STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 039534-590
MASTER FILE

CRH EASTERN, LLC, formerly known as CTS METROLINA, LLC,

Plaintiff,

v.

DUSTIN BERASTAIN, TIMOTHY MOREAU, INKWELL EMERGENCY RESPONSE, LLC, S&P CAP PARTNERS, LLC, ZACHARY VANEK, CHAKYRA CHERRY, and VICTOR PENA,

Defendants.

ORDER AND OPINION ON DEFENDANTS INKWELL EMERGENCY RESPONSE, LLC, S&P CAP PARTNERS, LLC, CHAKYRA CHERRY, AND VICTOR PENA'S MOTION TO DISMISS

CABARRUS COUNTY

METROLINA RESTORATION, LLC, TIM MOREAU, and DUSTIN BERASTAIN,

Plaintiffs,

v.

CTS METROLINA, LLC, CONTINUUM RESTORATION HOLDINGS, LLC, CONTINUUM RESTORATION SERVICES, LLC, CONTINUUM TOTAL SOLUTIONS, LLC, and ROBCAP CTS OPERATING, LLC,

Defendants.

23 CVS 2124

1. **THIS MATTER** is before the Court on Defendants Inkwell Emergency Response, LLC, S&P Cap Partners, LLC, Chakyra Cherry, and Victor Pena's (the "Moving Defendants") Motion to Dismiss (the "Motion") pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), (ECF No. 102).

2. The Court, having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion held 10 December 2024, concludes for the reasons stated below that the Motion should be **GRANTED in part** and **DENIED in part**.

Williams Mullen, by Camden R. Webb, Alexander M. Gormley, and Killian Wyatt, for Plaintiff / Counterclaim-Defendants CRH Eastern, LLC formerly known as CTS Metrolina, LLC, Continuum Restoration Holdings, LLC, Continuum Restoration Services, LLC, Continuum Total Solutions, LLC, and RobCap CTS Operating, LLC.

TLG Law, by David G. Redding and Sean McLeod, for Defendants / Counterclaim-Plaintiffs Metrolina Restoration, LLC, Dustin Berastain, and Timothy Moreau.

Villmer Caudill, PLLC, by Bo Caudill and Tomi Suzuki, for Defendants Inkwell Emergency Response, LLC, S&P Cap Partners, LLC, Chakyra Cherry, and Victor Pena.

Copeland Richards, PLLC, by Drew A. Richards, for Defendant Zachary Vanek.

Earp, Judge.

I. FACTUAL BACKGROUND

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

4. Plaintiff CRH Eastern, LLC, formerly known as CTS Metrolina, LLC ("CTS Metrolina" or "Plaintiff") is a Louisiana limited liability company that provides emergency property restoration and repair services to owners of commercial and residential properties. (Am. Compl. ¶¶ 5, 20, ECF No. 87.) It is an indirect wholly owned subsidiary of Continuum Restoration Holdings, LLC ("CRH"), also a Louisiana company. (Am. Compl. ¶ 5.)

5. CTS Metrolina manages its jobs through a project management platform called iRestore. "When CTS Metrolina receives a job from a customer, it posts the project information on iRestore—including any specific notices or instructions for the subcontractor—designates a subcontractor to perform the work for that job, and has iRestore generate a job confirmation email and send it to the designated subcontractor." (Am. Compl. ¶ 21.)

6. In March 2022, CTS Metrolina purchased the assets of Metrolina Restoration, LLC ("Restoration"), a North Carolina limited liability company owned by Defendants Dustin Berastain ("Berastain") and Timothy Moreau ("Moreau"). (Am. Compl. ¶¶ 2, 22.) Berastain and Moreau retained the services of Greg Ponder ("Ponder") and Josh Stamey ("Stamey") of Viking Acquisitions, LLC ("Viking") to broker the deal. (Am. Compl. ¶¶ 28–29.)

7. In exchange for Restoration's assets, including its intellectual property and trade secrets, accounts, relationships, and employment contracts, Berastain and Moreau received $3.6 million and were granted minority, non-voting interests in CTS Metrolina. (Am. Compl. ¶¶ 23, 27.) In addition, Berastain and Moreau were offered

positions as co-presidents of CTS Metrolina. Both accepted the positions and signed employment agreements with CTS Metrolina. (Am. Compl. ¶¶ 2, 24.)

8. As a condition of the acquisition, both Berastain and Moreau were required to agree to the terms of a Confidentiality and Protective Covenant Agreement (the "Restrictive Covenant Agreement") that includes non-competition, non-solicitation, and confidentiality provisions. (Am. Compl. ¶ 25, Exs. 4 & 5, ECF Nos. 88.4, 88.5.) Both Berastain and Moreau also entered into a "Non-Competition, Non-Solicitation and Confidentiality Agreement" (the "Employment Covenant Agreement"; together with the Restrictive Covenant Agreement, "the Restrictive Covenants") that includes non-disclosure, non-solicitation, and non-competition provisions. (Am. Compl. ¶ 26, Exs. 7 & 8, ECF Nos. 88.7, 88.8.)

9. Berastain and Moreau managed and operated CTS Metrolina on a day-to-day basis, entered into agreements on behalf of CTS Metrolina, managed relationships with subcontractors and vendors, expanded CTS Metrolina's business, and awarded commissions to CTS Metrolina employees who brought in new accounts. (Am. Compl. ¶ 45.)

10. CTS Metrolina alleges that about a year after the acquisition, Berastain and Moreau developed "seller's remorse" and "disengaged from their work." (Am. Compl. ¶ 65.) The strained relationship between the parties culminated in CTS Metrolina terminating Berastain for cause on 10 October 2023. Following Berastain's termination, Moreau resigned. (Am. Compl. ¶¶ 73, 75.)

11. On 26 October 2023, sixteen days after leaving CTS Metrolina, Berastain and Moreau formed IER Holdings, LLC ("IER"), a Wyoming limited liability company. Berastain and Moreau are the sole members of IER, each owning a 50% interest. (Am. Compl. ¶¶ 9, 99.) The same day, another Wyoming LLC was formed—Inkwell Emergency Response, LLC ("Inkwell"). (Am. Compl. ¶ 10.) Inkwell is a wholly owned subsidiary of IER, (Am. Compl. ¶ 100), and, like CTS Metrolina, it provides emergency restoration and repair services for commercial and residential properties. (Am. Compl. ¶ 102.)

12. In the days after Berastain and Moreau's departure from CTS Metrolina, a number of CTS Metrolina's jobs were deleted from iRestore. On 11 October 2023, CTS Metrolina discovered that its Director of Operations, Chakyra Cherry ("Cherry"), had deleted at least twelve of those jobs. (Am. Compl. ¶¶ 13, 77–78.)

13. Cherry resigned from CTS Metrolina on 13 October 2023 to take a position as the Director of Operations for Inkwell. (Am. Compl. ¶¶ 13, 78.) Despite CTS Metrolina's request that Cherry return her company-issued laptop, Cherry refused to return it until 4 March 2024. (Am. Compl. ¶¶ 93–96.) When CTS Metrolina finally received the laptop in March 2024, it had been subjected to a factory reset, and all previously existing information on the laptop had been erased. (Am. Compl. ¶ 97.)

14. Similarly, on 12 October 2024, CTS Metrolina discovered that another employee, Victor Pena ("Pena") had deleted at least 60 jobs on iRestore. After this

discovery, CTS Metrolina summoned Pena to its office to explain why he had deleted the jobs and told him to bring his laptop with him. When Pena produced his CTS Metrolina-issued laptop, it "was covered with a cleaning fluid and was so thoroughly soaked that it was shooting out sparks and no longer worked." (Am. Compl. ¶ 79.) Ultimately, Pena was terminated for cause and is now working for Inkwell. (Am. Compl. ¶¶ 15, 79.)

15. Despite its condition, CTS Metrolina was able to take an image of the hard drive on the laptop assigned to Pena, but it was unable to access or view any information because Pena had encrypted the information before returning the laptop. (Am. Compl. ¶ 80.)

16. Plaintiff alleges that on 1 December 2023, CTS Metrolina confirmed that Berastain and Moreau were using Inkwell to compete against it. (Am. Compl. ¶ 103.) Rytech Restoration ("Rytech")—one of CTS Metrolina's subcontractors—forwarded a job confirmation email it received from iRestore to CTS Metrolina. The email indicated that the job was for American Homes 4 Rent ("AH4R")—one of CTS Metrolina's largest clients—and that it was created by Ryan Brandon, a former CTS Metrolina employee who resigned shortly after Berastain was terminated. (Am. Compl. ¶¶ 104–07.) Rytech forwarded the email to CTS Metrolina because it was unable to locate the job in CTS Metrolina's iRestore portal. (Am. Compl. ¶ 108.)

17. After contacting iRestore to investigate the incident, CTS Metrolina discovered that the job was generated by Mr. Brandon on behalf of Inkwell. (Am.

Compl. ¶¶ 108–10.) CTS Metrolina alleges that, thereafter, Inkwell continued to solicit business from AH4R. (Am. Compl. ¶¶ 120–22.)

18. CTS Metrolina contends that under the circumstances (e.g., working for a competitor), "it is inevitable that Mr. Berastain and Mr. Moreau have used or disclosed to unauthorized persons CTS Metrolina's trade secrets and other proprietary information on behalf of Inkwell." (Am. Compl. ¶ 112.) CTS Metrolina asserts that it owns the following trade secrets:

> a. Lists of customers, along with detailed information about each such as contact information, preferences and requirements for the work performed for them, terms of the contracts with these customers, pricing and discounts offered to these customers, and other information that enables CTS Metrolina to provide the right services at the right prices to these customers.
>
> b. Lists of subcontractors and vendors, along with detailed information about each such as contact information, preferences and requirements for them to perform services for CTS Metrolina's customers, terms of the contracts with the subcontractors and vendors, pricing and discounts, and other information that enables CTS Metrolina to engage its subcontractors and vendors under the right conditions in order to serve its customers.
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> c. Business operation information, which includes how CTS Metrolina sells and markets its services to customers, how it staffs jobs to serve customers effectively and efficiently, its operational structure, business opportunities it intends to pursue, and similar information.

(Am. Compl. ¶ 39.) CTS Metrolina further asserts that "a person with access to [its] trade secrets could approach existing or potential customers with full knowledge of exactly how CTS Metrolina would sell its services and serve the customers, allowing that person to undercut CTS Metrolina and obtain the work." (Am. Compl. ¶ 40.) Accordingly, CTS Metrolina alleges that "[g]aining Mr. Berastain's and Mr. Moreau's

intimate knowledge of CTS Metrolina's offerings, services, clients, subcontractors, vendors, and strategy by being involved with Mr. Berastain and Mr. Moreau gives Inkwell an invaluable and unfair advantage in the market where these businesses compete." (Am. Compl. ¶ 115.)

19. On 24 April 2024, Berastain and Moreau sold IER and Inkwell to S&P Cap Partners, LLC ("S&P Cap") for $300,000. (Am. Compl. ¶ 135.) S&P Cap intends for Inkwell to "continue operating just as it did prior to the sale." (Am. Compl. ¶ 136.)

20. S&P Cap was formed on 27 December 2023, and its purchase of Inkwell "was its first and only investment in another company." (Am. Compl. ¶ 144.) Stamey and Ponders, the brokers who facilitated the acquisition between Restoration and CTS Metrolina, are partners at S&P Cap. (Am. Compl. ¶¶ 143–44.) CTS Metrolina alleges that Berastain and Moreau's use of the same brokers was not merely coincidence but rather "was part of a coordinated scheme . . . to perpetuate the unlawful competition against CTS Metrolina." (Am. Compl. ¶ 145.)

II. PROCEDURAL BACKGROUND

21. On 23 June 2023, prior to Berastain's termination and Moreau's resignation, Berastain, Moreau, and Restoration filed suit in Cabarrus County Superior Court against CTS Metrolina and some of its affiliated companies (Continuum Restoration Holdings, LLC, Continuum Restoration Services, LLC, Continuum Total Solutions, LLC, and RobCap CTS Operating, LLC). (23-CVS-2124 ["Cabarrus County Action"].)

22. On 15 December 2023, CTS Metrolina returned fire by filing suit in Mecklenburg County Superior Court against Berastain, Moreau, and Inkwell. (23-CVS-39534 ["Mecklenburg County Action"].)[1]

23. By Order dated 23 May 2024, the Court consolidated the Cabarrus County and Mecklenburg County Actions and permitted the parties to amend their pleadings in the Mecklenburg County Action "to include any allegation, claim, and defense that relates to the disputes between the current parties[.]" (Consolidation Order ¶ 14, ECF No. 78.)

24. CTS Metrolina filed its Amended Complaint on 12 June 2024. (Am. Compl., ECF No. 87.) Among the claims it asserts are (a) tortious interference with both existing contract and prospective economic advantage and (b) misappropriation of trade secrets against Inkwell, Cherry, and S&P Cap; (c) violation of the Computer Trespass Statute (N.C.G.S. § 14-458) against Inkwell and Pena;[2] (d) violation of the

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[1] On 19 December 2023, Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction, requesting that the Court enjoin Berastain, Moreau, and Inkwell from competing against CTS Metrolina, (ECF No. 6). The Court entered a temporary restraining order on 24 December 2023, (ECF No. 11), followed by a preliminary injunction on 19 January 2024. The PI Order prohibited Berastain, Moreau, "and those persons in active concert or participation with them" from competing against CTS Metrolina in dozens of metropolitan areas. (PI Order, ECF No. 37.)

On 14 March 2024, Plaintiff filed a Motion for Order to Show Cause, (ECF No. 54), contending that Berastain, Moreau, and Inkwell were competing in violation of the PI Order. The Court entered an Order to Show Cause on 4 April 2024 and held a hearing on 7 May 2024. (Order to Show Cause and Not. Hr'g, ECF No. 67.) Following the hearing, the Court entered an order clarifying the terms of the injunction and cautioning Defendants that further violation of the PI Order may constitute criminal contempt. (Order Following Show Cause Hr'g, ECF No. 84.)

[2] While Plaintiff also asserts a claim for Violation of Computer Trespass Statute against Cherry, Cherry does not seek dismissal of that claim.

Unfair and Deceptive Trade Practices Act (N.C.G.S. § 75-1.1 *et seq*.) against Cherry, Inkwell, and Pena; and (e) civil conspiracy against Cherry, Pena, and S&P Cap. Plaintiff also seeks (f) an accounting and the imposition of a constructive trust on Inkwell for all the money it earned from customers in violation of the Restrictive Covenants; (g) an accounting and the imposition of a constructive trust on Berastain and Moreau for the money they received when they sold Inkwell's assets to S&P Cap; and (h) a declaratory judgment establishing that the sale of Inkwell to S&P Cap was invalid.

25. The Moving Defendants responded by filing the Motion on 3 September 2024. After full briefing, the Court held a hearing on the Motion on 10 December 2024. (Not. of Hr'g, ECF No. 127.) The Motion is now ripe for disposition.

III. LEGAL STANDARD

26. The Moving Defendants seek dismissal pursuant to both Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "Rule 12(b)(1) requires the dismissal of any action 'based upon a trial court's lack of jurisdiction over the subject matter of the claim.' " *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394 (2018) (quoting N.C. R. Civ. P. 12(b)(1)). Plaintiff bears the burden of establishing that jurisdiction exists. *Lau v. Constable*, 2022 NCBC LEXIS 75, at **10 (N.C. Super. Ct. July 11, 2022).

27. Pursuant to Rule 12(b)(6), dismissal of a claim is proper if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or

(3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018). Otherwise, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

28. When deciding a motion to dismiss under Rule 12(b)(6), the Court construes the complaint liberally and accepts all allegations as true. *See Laster v. Francis*, 199 N.C. App. 572, 577 (2009). Nevertheless, the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

IV. ANALYSIS

29. Rather than address the Motion by moving party, the Court addresses the Motion by claim, identifying the moving parties with respect to each.

A. Tortious Interference with Contract and with Prospective Economic Advantage (Inkwell, Cherry, S&P Cap)

30. To plead tortious interference with an existing contract, Plaintiff must include five elements:

> (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 the plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661 (1988). "In contrast, a claim for tortious interference with future contracts or prospective economic advantage requires the plaintiff to allege that 'defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.' " *E-Ntech Indep. Testing Servs. v. Air Masters., Inc.*, 2017 NCBC LEXIS 2, at **14 (N.C. Super. Ct. Jan. 5, 2017) (quoting *Walker v. Sloan*, 137 N.C. App. 387, 393 (2000)).

31. A claim for tortious interference with contract is not subject to a heightened pleading requirement.[3] *Miller v. Redgoose, L.L.C.*, 2024 NCBC LEXIS 148, at **15 (N.C. Super. Ct. Nov. 26, 2024); *see also Greentouch USA Inc. v. Lowe's Co., Inc.*, 2024 NCBC LEXIS 132, at **20 (N.C. Super. Ct. Oct. 2, 2024) ("[C]laims of tortious interference with existing contract are not held to a heightened pleading standard but rather must only satisfy the relatively low bar of notice pleading."). Therefore, Plaintiff's allegations "need only give sufficient notice of the events on which the claim is based to enable defendants to respond and prepare for trial[.]" *Miller*, 2024 NCBC LEXIS 148, at **15 (citing *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 501 (1992)); *see also* N.C. R. Civ. P. 8(a)(1) ("A pleading which sets forth a claim for relief shall contain a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions,

[3] Nevertheless, given the potential for restraint on legitimate competition, the pleading must include allegations that the defendant acted with legal malice. *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674 (2001) ("[T]he complaint must admit of no motive for interference other than malice.").

occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." (cleaned up)).

32. Still, to plead the tort, a plaintiff must identify a valid contract. *See, e.g., Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 700 (2016). Similarly, when pleading interference with prospective economic advantage, the plaintiff must identify a specific contractual opportunity that was lost as a result of the defendant's allegedly tortious conduct. *Truist Fin. Corp. v. Rocco*, 2024 NCBC LEXIS 62, at **51 (N.C. Super. Ct. Apr. 25, 2024).

1. <u>Inkwell</u>

33. Plaintiff first alleges that "Inkwell intentionally induced (and continues to induce) Mr. Berastain and Mr. Moreau to violate their obligations under the Restrictive Covenant Agreements." (Am. Compl. ¶ 161.) In response, Inkwell analogizes to the intracorporate immunity doctrine to argue that this claim should be dismissed: "[j]ust as a company cannot conspire with its controlling owners, officers, or directors, a company cannot induce its officers or directors to tortiously interfere with a contract—legally, this would be the company inducing itself." (Br. Supp. Defs.' Mot. Dismiss ["Defs.' Br. Supp."] 8, ECF No. 103.)

34. The intracorporate immunity doctrine "holds that 'there can be no conspiracy' between a corporation and its agents." *VanFleet v. City of Hickory*, 2020 NCBC LEXIS 40, at *15 (N.C. Super. Ct. Mar. 30, 2020) (quoting *Chrysler Credit Corp. v. Rebhan*, 66 N.C. App. 255, 259 (1984)). This is because, "[i]n legal contemplation, a corporation and its agents comprise but a single person, one less

than the requisite number for a conspiracy." *Chrysler Credit Corp.*, 66 N.C. App. at 259 (quoting *Schroder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1997), *modified on other grounds*, 456 F. Supp. 650 (E.D. Mich.1978)).

35. The intracorporate immunity doctrine, which applies to conspiracies, does not apply to this claim. Under North Carolina law, a limited liability company like Inkwell is "an entity distinct from its interest owners." N.C.G.S. § 57D-2-01. Inkwell is accountable for its own actions. If, in hiring Berastain and Moreau and providing them a haven to violate their contractual commitments, it acts maliciously, Inkwell's alleged interference with Berastain and Moreau's contractual obligations is actionable. *United Sewing Mach. Sales, LLC v. Digit. Cutting Servs., Inc.*, No. COA24-86, 2025 N.C. App. LEXIS 3, at *18–20 (Jan. 15, 2025).

36. Inkwell argues that even if the intracorporate immunity doctrine does not apply, "there is no allegation in the Amended Complaint that Inkwell ever gave or offered to give Berastain or Moreau anything in order to persuade them to breach the Restrictive Covenants." (Defs.' Br. Supp. 8.) The Court disagrees.

37. "This Court has interpreted 'induce' to mean 'purposeful conduct,' 'active persuasion, request, or petition.' " *Charah, LLC v. Sequoia Servs. LLC*, 2019 NCBC LEXIS 18, at *18 (N.C. Super. Ct. Mar. 11, 2019) (quoting *KRG New Hill Place, LLC v. Springs Inv'rs, LLC*, 2015 NCBC LEXIS 20, at *14–15 (N.C. Super. Ct. Feb. 27, 2015)); *Inland Am. Winston Hotels, Inc. v. Crockett*, 212 N.C. App. 349, 354 (2011). CTS Metrolina has alleged that it had Restrictive Covenant Agreements with Berastain and Moreau, (Am. Compl. ¶¶ 25–26, 50–64), that Inkwell knew of those

agreements, (Am. Compl. ¶ 160), and that Inkwell intentionally induced Berastain and Moreau to violate them by, upon information and belief, providing Berastain and Moreau the means and the motivation to perform the same duties that they had performed for CTS Metrolina in the field of emergency restoration and repair of commercial and residential properties, (Am. Compl. ¶¶ 101–02, 161). CTS further alleges that Inkwell acted without justification, (Am. Compl. ¶ 167), and that CTS Metrolina was damaged as a result, (Am. Compl. ¶ 168). These allegations are sufficient to state a claim against Inkwell for intentional interference with the Restrictive Covenant Agreements.

38. In addition, Plaintiff alleges that Inkwell intentionally induced (and continues to induce) "CTS Metrolina customers, subcontractors, and vendors not to perform on existing contracts and not to enter into contracts with CTS Metrolina that they would otherwise enter." (Am. Compl. ¶ 163.) Inkwell argues that this aspect of the claim is also subject to dismissal because the Amended Complaint does not explain how Inkwell induced such conduct and does not identify a customer, subcontractor, or vendor that was lost or a contract that was not performed as a result of Inkwell's actions. (Defs.' Br. Supp. 9.)

39. To the extent the alleged interference is with an existing relationship, the five elements identified in *United Labs.* apply again here. Thus, to plead a claim Plaintiff must first identify a valid contract about which Inkwell is aware. *United Labs.,* 322 N.C. at 661.

40. Similarly, to the extent the alleged interference is with a prospective relationship, a fundamental element of the claim is an allegation identifying the contract that would have resulted "but for defendant's malicious intervention." *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 701. A Plaintiff's failure to plead this "but for" causation is fatal to its claim. *Id.*; *see Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *29–30 (N.C. Super. Ct. Oct. 21, 2016) (dismissing claim for tortious interference with prospective economic advantage where Plaintiff alleged only that it "*reasonably expected* that, but for [Defendants'] conduct, its business relationships with its customers would have continued and grown." (emphasis added)).

41. Plaintiff alleges that one of its subcontractors, Rytech, was solicited by Inkwell in December 2023. On 1 December 2023, Rytech forwarded a job confirmation it received from iRestore to CTS Metrolina because Rytech "could not locate the job in CTS Metrolina's iRestore Portal." (Am. Compl. ¶¶ 106–08.) While it is alleged that Rytech believed the job was generated by CTS Metrolina, it is also alleged that the job was actually generated in iRestore by Inkwell. (Am. Compl. ¶ 109.) And, although Plaintiff argues in its brief that its contractual relationships were disrupted, there is no allegation in the Amended Complaint that CTS Metrolina would have received this particular job or that its relationship with Rytech suffered as a result of Inkwell hiring Rytech. Accordingly, the existing allegations are insufficient to support a claim for intentional interference with contract or with prospective economic advantage.

42. The same is true with respect to Inkwell's solicitation of AH4R. CTS Metrolina alleges that Inkwell solicited AH4R to perform jobs in Raleigh and Greensboro, North Carolina; Greenville, South Carolina; and Jacksonville, Florida, in February and March 2024. (Am. Compl. ¶¶ 120–22.) In briefing, CTS Metrolina alleges that but for the conduct of Inkwell, it would have received these jobs. (Pl.'s Resp. Opp. Defs.' Mot. Dismiss ["Pl.'s Br. Opp."] 11, ECF No. 121.) However, the Amended Complaint is silent on this point. Again, while it may be true that "CTS Metrolina has ongoing relationships with customers[,]" (Pl.'s Br. Opp. 10), the "mere expectation of a continuing business relationship is insufficient to establish" a claim for tortious interference with prospective economic advantage. *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 701.

43. Accordingly, Inkwell's motion to dismiss Plaintiff's claim for intentional interference with contract is **DENIED** as it pertains to allegations that Inkwell tortiously interfered with Berastain and Moreau's Restrictive Covenant Agreements. In other respects, Inkwell's Motion with respect to this claim is **GRANTED** and the claim[4] is **DISMISSED** without prejudice.[5]

2. Cherry

44. As it did with Inkwell, Plaintiff alleges that Cherry intentionally induced (and continues to induce) "CTS Metrolina customers, subcontractors, and

[4] Plaintiff brings both theories—intentional interference with contract and intentional interference with prospective economic advantage—as a single claim.

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

vendors not to perform on existing contracts and not to enter into contracts with CTS Metrolina that they would otherwise enter." (Am. Compl. ¶ 163.)

45. To establish its claim for tortious interference with existing contract, the Court again looks to the five *United Labs.* elements, discussed above. CTS Metrolina relies on its allegation that Cherry interfered by intentionally deleting at least a dozen jobs on iRestore. (Pl.'s Br. Opp. 10; Am. Compl. ¶¶ 77–78.) However, this allegation, standing alone, is insufficient to support the claim. While the pleading suggests malice on the part of Cherry, Plaintiff does not allege that Cherry's alleged conduct interfered in the performance of any identified, existing, valid contract or that CTS Metrolina was otherwise damaged.

46. As for interference with CTS Metrolina's current or future relationships with customers, subcontractors, and vendors, Plaintiff again identifies only Rytech and AH4R. The Court's rulings with respect to Inkwell apply equally to Cherry.

47. Accordingly, Cherry's Motion with respect to Plaintiff's claim for tortious interference is **GRANTED**, and the claim is **DISMISSED** without prejudice.

3. S&P Cap

48. CTS Metrolina alleges that "S&P Cap is admittedly continuing Inkwell's operations, thus perpetuating Mr. Berastain's and Mr. Moreau's unlawful interference with CTS Metrolina's customers, subcontractors, and vendors." (Am. Compl. ¶ 166.)

49. Without additional facts, this allegation is too conclusory to state a claim. Once again Plaintiff fails to name specific contracts with which S&P Cap has

interfered. Indeed, the alleged misconduct with Rytech and AH4R occurred on 1 December 2023, 22 February 2024, and 6 March 2024, prior to S&P Cap's purchase of IER and Inkwell on 24 April 2024. (Am. Compl. ¶¶ 104–09, 121–22, 135.) Failure to allege the existence of a valid contract is fatal to Plaintiff's claim. *See Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 699 (To state a claim for tortious interference "plaintiff must first establish the existence of a valid contract between plaintiff and its customers.").

50. Accordingly, as to Plaintiff's claim against S&P Cap for tortious interference, the Motion is **GRANTED**, and this claim is **DISMISSED** without prejudice.

B. <u>Misappropriation of Trade Secrets (Inkwell, Cherry, S&P Cap)</u>

51. To state a claim for misappropriation of trade secrets, CTS Metrolina must first "identify a trade secret with sufficient particularity . . . to enable [the Moving Defendants] to delineate that which [they are] accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Wasburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 326 (2008) (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003)). "[G]eneral allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, [are] 'insufficient to state a claim for misappropriation of trade secrets.'" *Krawiec v. Manly*, 370 N.C. 602, 610 (2018) (quoting *Wasburn*, 190 N.C. App. at 327)). Additionally, CTS Metrolina must allege facts supporting a conclusion that it engaged in reasonable efforts to protect the

secrecy of the identified trade secret. *BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24, at **20 (N.C. Super. Ct. Feb. 10, 2023) (citing N.C.G.S. § 66-152(3)(b)).

52. The North Carolina Trade Secrets Protection Act ("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 both:

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

N.C.G.S. § 66-152(3); *see also Sterling Title Co. v. Martin*, 266 N.C. App. 593, 601 (2019).

53. Our courts have employed six factors when determining the existence of a trade secret:

> (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 the 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.

Combs & Assocs. v. Kennedy, 147 N.C. App. 362, 369–70 (2001). "These factors overlap, and courts do not always examine them separately and individually." *Vitaform, Inc. v. Aeroflow, Inc.*, 2020 NCBC LEXIS 132, at **19 (N.C. Super. Ct. Nov. 4, 2020).

54. As for misappropriation, the term means the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent[.]" N.C.G.S. § 66-152(1). Misappropriation does not occur, however, when a trade secret is arrived at by "independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." *Id.* Conclusory allegations of misappropriation are insufficient. *See, e.g., Washburn*, 190 N.C. App. at 327; *Bite Busters, LLC v. Burris*, 2021 NCBC LEXIS 26, at **22–23 (N.C. Super. Ct. Mar. 25, 2021); *Strata Solar, LLC v. Naftel*, 2020 NCBC LEXIS 129, at **11–12 (N.C. Super. Ct. Oct. 29, 2020).

55. The Moving Defendants argue that CTS Metrolina has failed to allege both the existence of a trade secret and misappropriation. They contend that it does not identify its trade secrets with sufficient particularity and that it has failed to allege facts supporting its assertion that any of the Moving Defendants misappropriated any trade secrets. (Defs.' Br. Supp. 11–17.)

56. In the Amended Complaint, Plaintiff alleges three categories of trade secrets:

a. Lists of customers, along with detailed information about each such as contract information, preferences and requirements for the work performed for them, terms of the contracts with these customers, pricing and discounts offered to these customers, and other information that enables CTS Metrolina to provide the right services at the right prices to these customers.

b. Lists of subcontractors and vendors, along with detailed information about each such as contact information, preferences and requirements for them to perform services for CTS Metrolina's customers, terms of the contracts with the subcontractors and vendors, pricing and discounts, and other information that enables

CTS Metrolina to engage its subcontractors and vendors under the right conditions in order to serve its customers.

c. Business operation information, which includes how CTS Metrolina sells and markets its services to customers, how it staffs jobs to serve customers effectively and efficiently, its operational structure, business opportunities it intends to pursue, and similar information.

(Am. Compl. ¶ 39.)

57. The Moving Defendants argue that Plaintiff's allegations regarding its trade secrets are no better than those found lacking in both *Krawiec v. Manly*, 370 N.C. 602 (2018) and *Design Gaps, Inc. v. Hall*, 2024 NCBC LEXIS 64 (N.C. Super. Ct. May 1, 2024). In *Krawiec*, "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 contract information.' " 370 N.C. at 611. Our Supreme Court upheld the trial court's dismissal of the trade secret misappropriation claim, finding the allegation of a trade secret lacking because "[p]laintiffs provided no further detail about these ideas, concepts, strategies, and tactics sufficient to put defendants on notice as to the precise information allegedly misappropriated." *Id.*

58. Similarly, in *Design Gaps*, this Court, relying on *Krawiec*, held that plaintiff failed to identify its trade secrets with sufficient particularity where the allegation was that the trade secrets included "'customer lists, pricing formulas, and bidding formulas,' as well as 'product sources, products, price lists, advertising plans, designs and materials, technical drawings, services, pricing points, methods of sales and business contracts and training methods as well as . . . customers' pricing

programs, unit sales, dollar volume, models, financial information, product roadmaps, channelization and sales strategies[,]' " all alleged without specificity or further detail. 2024 NCBC LEXIS 64, at **9.

59. Plaintiff's third category of trade secrets—"Business operation information"—suffers from the lack of specificity that resulted in dismissal of the claim in *Krawiec* and *Design Gaps*. The Court concludes that the allegations in the Complaint with respect to that category are too vague to put the Moving Defendants on notice of the specific trade secrets they are accused of misappropriating.

60. The same is not true, however, with respect to Plaintiff's first two categories of trade secrets. Plaintiff identifies (1) "[l]ists of customers, along with detailed information about each such as contact information, preferences and requirements for the work performed for them, terms of the contracts with these customers, pricing and discounts offered to these customers, and other information that enables CTS Metrolina to provide the right services at the right prices to these customers," and (2) "[l]ists of subcontractors and vendors, along with detailed information about each such as contact information, preferences and requirements for them to perform services for CTS Metrolina's customers, terms of the contracts with the subcontractors and vendors, pricing and discounts, and other information that enables CTS Metrolina to engage its subcontractors and vendors under the right conditions in order to serve its customers." (Am. Compl. ¶ 39(a)–(b).) The language Plaintiff uses to describe these lists is sufficient to allege the existence of two categories of compilation-based trade secrets. (*See* Am. Compl. ¶¶ 39–40, 171.)

61. The NCTSPA uses the phrase "compilation of information" when defining the term "trade secret," and plenty of case law exists recognizing that such compilations can rise to the level of a trade secret. *See, e.g., State ex. rel Utils. Comm'n v. MCI Telecomms., Corp.*, 132 N.C. App. 625, 634 (1999); *Computer Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *27–28 (N.C. Super. Ct. Jan. 27, 2017); *Koch Measurement Devices, Inc. v. Armke*, 2015 NCBC LEXIS 45, at *13 (N.C. Super. Ct. May 1, 2015) ("[T]he Court of Appeals has held that where an individual maintains a compilation of detailed records over a significant period of time, those records could constitute a trade secret even if 'similar information may have been ascertainable by anyone in the . . . business.' " (quoting *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376 (2001)).

62. Unlike the allegations found lacking in *Krawiec* and *Design Gaps*, CTS Metrolina details the information included in these lists. It also alleges that the lists were compiled at great expense and refined over the years. (Am. Compl. ¶¶ 40, 171.) Accordingly, viewing the allegations in the light most favorable to CTS Metrolina, the Court concludes that Plaintiff's identification of its trade secrets, with the exception of subparagraph 39(c), is sufficient to survive dismissal under Rule 12(b)(6).

63. As for misappropriation, Plaintiff has alleged that Cherry used CTS Metrolina's trade secrets to benefit Inkwell in its dealings with CTS Metrolina's customers, subcontractors, or vendors. (Am. Compl. ¶ 176.) This allegation of use by Cherry while working for Inkwell satisfies the pleading requirements for misappropriation against both Cherry and Inkwell. *See* N.C.G.S. § 66-155

("Misappropriation of 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." (emphasis added)); *Wells Fargo Ins. Servs. USA v. Link*, 2018 NCBC LEXIS 42, at *40–41 (N.C. Super. Ct. May 8, 2018) (declining to dismiss plaintiff's misappropriation of trade secrets claim where plaintiff alleged that defendant had access to plaintiff's trade secret information during his employment and then used it to solicit customers for a competitor despite the "significant inferential leap" that was required).

64. Plaintiff further alleges that S&P Cap has continued Inkwell's unlawful use of CTS Metrolina's trade secrets. (Am. Compl. ¶ 177.) The allegation is sufficient to support a claim against S&P Cap.

65. Therefore, with respect to Plaintiff's claim for misappropriation of trade secrets, the Motion is **GRANTED** to the extent Plaintiff seeks to assert a claim for misappropriation of information identified generally in paragraph 39(c) of the Amended Complaint, and that claim is dismissed without prejudice. In other respects, the Motion is **DENIED**.

C. <u>Computer Trespass (Inkwell and Pena)</u>

66. Section 14-458(a) of the North Carolina General Statutes (the "Computer Trespass Statute") provides in pertinent part:

> [I]t 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.
>
> ****
>
> (4) Cause physical injury to the property of another.
>
> (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), (4)–(5). "'Computer' means an internally programmed, automatic device that performs data processing or telephone switching." N.C.G.S. § 14-453(2). "'Computer network' means the interconnection of communication systems with a computer through remote terminals, or a complex consisting of two or more interconnected computers or telephone switching equipment." N.C.G.S. § 14-453(3). "[A] person is 'without authority' when [ ] 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).

67. Plaintiff brings its claim for computer trespass against Pena and Inkwell.

1. <u>Pena</u>

68. Plaintiff alleges that Pena violated the Computer Trespass Statute by intentionally deleting "dozens of jobs on iRestore" during his employment with CTS Metrolina. (Am. Compl. ¶¶ 79, 194.) Pena first argues that this claim is subject to dismissal because "CTS Metrolina fails to allege that Pena used any computer or

computer network to injure CTS Metrolina's property." (Defs.' Br. Supp. 17.) Specifically, Pena argues that the Amended Complaint "does not allege facts that would show that iRestore is, itself, a 'computer or computer network,' that Pena deleted the jobs in iRestore through use of any separate 'computer or computer network,' or that the data contained in iRestore belongs to CTS Metrolina as opposed to iRestore." (Defs.' Br. Supp. 18.) The Court disagrees.

69. At various points, the Amended Complaint describes iRestore as a "project management platform," "operations software," and a "portal." (*See* Am. Compl. ¶¶ 21, 92(b), 109.) "Computer software" is defined in the statute as "a set of computer programs, procedures and associated documentation concerned with the operation of a *computer*, computer system, or *computer network*." N.C.G.S. § 14-453(5) (emphasis added). Likewise, the dictionary definitions of "software" and "portal" make clear that they relate to the operation of a computer or computer network. *See Software*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The sequence of instructions by which a *computer* accepts and translates input symbols, executes actions, and outputs symbols such as numbers, characters in an e-mail message, pictures in a text message, the music played on a mobile device, or GPS coordinates." (emphasis added)); *Portal*, MERRIAM-WEBSTER DICTIONARY ("[A]n *online* platform (such as a website) that provides access to services or information of a specific kind." (emphasis added)).

70. The Court is satisfied that Plaintiff has sufficiently alleged that iRestore is a system that operates on a "computer or computer network." As for the data

contained in iRestore, the Amended Complaint uses possessive language: "CTS Metrolina manages *its* jobs through a project management platform called iRestore." (Am. Compl. ¶ 21 (emphasis added).) Under North Carolina's liberal pleading standard, the allegations are sufficient to meet the statutory requirements.

71. Pena next argues that Plaintiff failed to allege that Pena acted without authority when he deleted the iRestore jobs. (Defs.' Br. Supp. 18–19.) But CTS Metrolina alleges that by deleting the jobs, Pena "acted in a manner exceeding the right or permission given by CTS Metrolina." (Am. Compl. ¶ 195.) This allegation is sufficient.

72. In short, Plaintiffs' allegations taken as a whole "put [Pena] on notice of his actions which are at issue, allow him to understand the nature of Plaintiffs' claim, and enable him to answer and prepare for trial." *Cnty. of Wayne Constr. Managers of Goldsboro v. Amory*, 2019 NCBC LEXIS 32, at *52 (N.C. Super. Ct. May 17, 2019) (addressing the sufficiency of allegations for violation of the Computer Trespass Statute) (citing *Wake Cnty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646 (2014)).

73. Accordingly, with respect to Plaintiff's claim against Pena for computer trespass, the Motion is **DENIED**.

2. <u>Inkwell</u>

74. As for Inkwell, Plaintiff alleges that "Inkwell violated the Computer Trespass Statute by, upon information and belief, intentionally (1) using and/or causing copies to be made of CTS Metrolina's data from Ms. Cherry's laptop; and (2) using and/or causing copies to be made of CTS Metrolina's data from Mr. Berastain's

laptop." Plaintiff further alleges that Inkwell is "responsible for the violations of the Computer Trespass Statute committed by its employees, including Mr. Berastain and Ms. Cherry, under the doctrine of respondeat superior." (Am. Compl. ¶ 193.)

75. Citing *MarketPlace 4 Ins., LLC v. Vaughn*, 2023 NCBC LEXIS 31 (N.C. Super. Ct. Feb. 24, 2023), Inkwell argues that Plaintiff's respondeat superior theory fails as a matter of law because this Court has previously declined to recognize a vicarious liability claim for computer trespass. (Defs.' Br. Supp. 20.) Plaintiff responds that the *Vaughn* case is distinguishable. (*See* Pl.'s Br. Opp. 20.) The Court agrees with Plaintiff.

76. In *Vaughn*, this Court explained that "the statutory text suggests a legislative intent to limit civil liability to a specific class of defendants—namely those persons who *intentionally* violate one or more of the enumerated statutory provisions." 2023 NCBC LEXIS 31, at **51 (emphasis added). Given this scienter requirement, this Court declined to recognize a claim for vicarious liability. However, the holding in *Vaughn* does not apply as broadly as Inkwell contends.

77. In *Vaughn*, this Court references the reasoning of the federal court in *Doe v. Dartmouth-Hitchcock Med. Ctr.*, 2001 U.S. Dist. LEXIS 10704 (D.N.H. July 19, 2001). There, the plaintiff sued a physician's employers under the federal Computer Fraud and Abuse Act ("CFAA")[6] on a theory of vicarious liability based on allegations

[6] The North Carolina Computer Trespass Statute and the CFAA contain similar scienter requirements. *Compare* N.C.G.S. § 14-458(a) ("[I]t 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[.]" (emphasis added)), *with* 18 USCS § 1030(2) ("Whoever . . . *intentionally* accesses a computer without authorization or exceeds authorized access . . . shall be punished[.]" (emphasis added)).

that the physician accessed plaintiff's medical records without authority. *Id.* at *5–10. In declining to impose vicarious liability on the physician's employers, the federal court observed that the employers themselves "were victimized by [the physician's] breach of the policies established to protect [plaintiff's] confidentiality." *Id.* at *11. Accordingly, "[t]o hold the [employers] vicariously liable for [the physician's] intentional violation of the CFAA, when that violation necessarily involved an intentional violation of [the employers'] own policies – and actually victimized the [employers], would hardly be consistent with, or further the purpose of, the CFAA, which, after all, is intended to protect computer systems . . . from unauthorized access and concomitant damage." *Id.* at *14.

78. The same is not true in the case before the Court. The allegations are not that Inkwell was victimized by the alleged computer trespasses, but rather that Inkwell profited from them. Further, as observed by Plaintiff, (*see* Pl.'s Br. Opp. 20–21), federal courts impose vicarious liability for violations of the CFAA in some circumstances. *See Binary Semantics, Ltd. v. Minitab, Inc.*, 2008 U.S. Dist. LEXIS 28602, at *14 (M.D. Pa. Mar. 20, 2008), *vacated on other grounds*, 2008 U.S. Dist. LEXIS 36575 (M.D. Pa. May 1, 2008) ("[T]he complaint sufficiently alleges that defendant Asha was acting at the direction of Minitab when she allegedly accessed plaintiff's protected computer and stole plaintiff's trade secrets. Therefore, we conclude that Minitab may be held liable for the CFAA violation."); *Se. Mech. Servs. v. Brody*, 2008 U.S. Dist. LEXIS 123211, at *41–42 (M.D. Fla. July 25, 2008) ("Where a new employer seeks a competitive edge through the wrongful use of information

from the former employer's computer system, plaintiff will likely win on the merits of a CFAA claim."); *NetApp, Inc. v. Nimble Storage*, 41 F. Supp. 3d 816, 835 (N.D. Cal. May 12, 2014) ("[A]n employer can be vicariously liable for an employee's violations of the CFAA if those transgressions occur in the scope of employment or the employer directs the employee's conduct."); *Charles Schwab & Co. v. Carter*, 2005 U.S. Dist. LEXIS 21348, at *20 (N.D. Ill. Sept. 27, 2005) ("[T]he Court assumes that Congress drafted the CFAA with an intent to permit vicarious liability.").

79. Therefore, the Court concludes that the Computer Trespass Statute does not foreclose the possibility of vicarious liability, as Inkwell argues. Accordingly, Plaintiff's claim against Inkwell for computer trespass may proceed, and the Motion is **DENIED**.

D. <u>Civil Conspiracy (Cherry, Pena, S&P Cap)</u>

80. Plaintiff's Eighth Cause of Action is styled as one for civil conspiracy. Plaintiff alleges that Berastain and Moreau, along with Cherry, Pena, and S&P Cap, entered into an agreement to unlawfully compete with CTS Metrolina, and that they carried out that agreement by violating both the Computer Trespass Statute and this Court's Orders. (Am. Compl. ¶¶ 207–14.)

81. "Civil conspiracy is not an independent cause of action in North Carolina. Rather, liability for civil conspiracy must be alleged in conjunction with an underlying claim for unlawful conduct." *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 104, at **18 (N.C. Super. Ct. Oct. 9, 2018) (citing *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002)). As observed by our Supreme Court:

> Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable.

Reid v. Holden, 242 N.C. 408, 414–15 (1955) (quoting 11 Am. Jur. 577, Conspiracy, § 45).

82. "To state a claim for civil conspiracy, a plaintiff must allege '(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.' " *Glob. Textile All.*, 2018 NCBC LEXIS 104, at **18–19 (quoting *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 350 (2011)). As stated above, however, proof of a civil conspiracy "does no more than associate the defendants together . . . . The gravamen of the action is the resultant injury, and not the conspiracy itself." *Henry v. Deen*, 310 N.C. 75, 87 (1984) (citation omitted). Therefore, to state a claim, in addition to an agreement, there must be an allegation of a wrongful act that causes damage in furtherance of that agreement. *Fox v. Wilson*, 85 N.C. App. 292, 301 (1987).

83. The Moving Defendants argue that Plaintiff's claim for civil conspiracy is subject to dismissal. Specifically, they argue that Plaintiff's allegations are conclusory and that the Amended Complaint fails to allege facts establishing "how the conspiracy came to be, or when, or where, or why." (Defs.' Br. Supp. 24). Plaintiff

responds that the Amended Complaint sufficiently identifies the steps the Moving Defendants took to conspire against CTS Metrolina. (Pl.'s Br. Opp. 24–26.) For purposes of this Motion, the Court agrees with Plaintiff.

84. The Amended Complaint alleges that the "agreement" was "to aid Mr. Berastain and Mr. Moreau in their unlawful competition with CTS Metrolina." (Am. Compl. ¶ 207.) Plaintiff alleges that Cherry agreed to become Inkwell's Director of Operations, a role that was identical to the one she held at CTS Metrolina, while having knowledge of Berastain's unlawful involvement with Inkwell. (Am. Compl. ¶¶ 13, 78, 128, 130.) Similarly, the Amended Complaint alleges that Pena was hired by Cherry, and that he agreed to become employed at Inkwell performing the same role he held with CTS Metrolina at a time when Berastain and Moreau were illegally engaged with Inkwell. (Am. Compl. ¶¶ 15, 79, 129.)

85. The Amended Complaint further alleges that the principals of S&P Cap had a "preexisting relationship" with Berastain and Moreau, had knowledge of the Court's prior Orders and Inkwell's allegedly unlawfully activity, and agreed to acquire Inkwell to continue "Inkwell's activities of unlawfully competing against CTS Metrolina[.]" (Am. Compl. ¶ 212; *see also* ¶¶ 136–38; 210–11.) These allegations satisfy the requirement that Plaintiff allege an agreement on the part of Cherry, Pena and S&P Cap to facilitate the allegedly unlawful acts of Berastain and Moreau.

86. As for the common scheme, Plaintiff alleges that Berastain, Moreau, and the Moving Defendants "us[ed] Inkwell as the instrument to unlawfully compete against CTS Metrolina," (Am. Compl. ¶ 213), and that they accomplished this wrong

by violating the Computer Trespass Statute, among other things. (Am. Compl. ¶¶ 208, 213.)

87. The Court concludes that Plaintiff has sufficiently pled the existence of a civil conspiracy that included Cherry, Pena, and S&P Cap. Accordingly, the Motion is **DENIED**.[7]

E. Unfair and Deceptive Trade Practices (Inkwell, Cherry, Pena)

88. To bring a claim for unfair or deceptive trade practices pursuant to Section 75-1.1 of the North Carolina General Statutes (the "UDTPA"), a party 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[.]" *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 593 (2005); *see also* N.C.G.S. § 75-1.1. "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton v. Camp*, 353 N.C. 647, 656 (2001) (citing *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987)). Whether a practice is unfair or deceptive within the meaning of the UDTPA is a question of law for the Court to decide. *Hardy v. Toler*, 288 N.C. 303, 309 (1975).

89. Plaintiff asserts its UDTPA claim against Inkwell, Cherry, and Pena, predicated on their involvement in an alleged conspiracy to assist Inkwell in

[7] Plaintiff also alleges that these Defendants acted unlawfully by tortiously interfering with CTS Metrolina's current and prospective contracts. (Am. Compl. ¶ 209.) Given the Court's dismissal of Plaintiff's tortious interference claim with respect to CTS Metrolina's customers, vendors and subcontractors and CTS Metrolina's claim for interference with prospective economic advantage, however, there cannot be a civil conspiracy with respect to these claims. (*supra* ¶¶ 38–50.) *See, e.g., Blusky Restoration Contrs., LLC v. Sasser Co.*, LLC, 2024 NCBC LEXIS 106, at **29–30 (N.C. Super. Ct. Aug. 9, 2024) (citing cases).

unlawfully competing with CTS Metrolina, by: (a) Inkwell allegedly inducing Berastain and Moreau to misappropriate CTS Metrolina's trade secrets, (Am. Compl. ¶ 174); (b) Cherry and Inkwell's use of those trade secrets, (Am. Compl. ¶ 176); and (c) all three Defendants' alleged violations of the Computer Trespass Statute, (Am. Compl. ¶ 201).

1. Unfair Act or Practice

90. In determining whether an act is unfair or deceptive, the Court considers "[t]he facts surrounding the transaction and the impact on the marketplace[.]" *Found. Bldg. Materials, LLC v. Conking & Calabrese, Co.*, 2024 NCBC LEXIS 40, at **13 (N.C. Super. Ct. Mar. 4, 2024) (quoting *Noble v. Hooters of Greenville, LLC*, 199 N.C. App. 163, 167 (2009)). However, "the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400 (1978).

91. The Court concludes that computer trespass in violation of state law constitutes conduct "which a court of equity would consider unfair." *See id.* (citing *Extract Co. v. Ray*, 221 N.C. 269, 273 (1942)). Simply put, violating the law by engaging in computer trespass is not legitimate competitive business activity. C*ontra S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 608 (2008)

(holding that conduct that appeared to be "nothing more than competitive business activities" was not "immoral, unethical, oppressive" behavior).

2. <u>In or Affecting Commerce</u>

92. For purposes of the UDTPA, "'commerce' includes all business activities, however denominated[.]" N.C.G.S. § 75-1.1(b). However, "[t]he UDTPA does not apply to unfair or deceptive conduct contained within a single business because the conduct has no impact on the marketplace and therefore is not 'in or affecting commerce.' " *Langley v. Autocraft, Inc.*, 2023 NCBC LEXIS 95, at **19 (N.C. Super. Ct. Aug. 7, 2023) (citing *Nobel v. Foxmoor Grp.*, 380 N.C. 116, 121 (2022) ("The internal operations of a business entity are not within the purview of the Act.")).

93. The alleged wrongful conduct here is not contained within CTS Metrolina. The claims against Inkwell and Cherry for computer trespass,[8] against Inkwell and Cherry for misappropriation of trade secrets, against Inkwell for tortious interference with contract, and against Cherry, Pena, and S&P Cap for their alleged participation in a conspiracy to unlawfully compete with CTS Metrolina, are all wrongful acts in or affecting commerce. *See, e.g., Power Home Solar, LLC v. Sigora*

[8] Specifically, Plaintiff claims that, *after* leaving its employ and becoming engaged with Inkwell, Cherry intentionally deleted all the data on her CTS Metrolina laptop prior to returning it. (Am. Compl. ¶¶ 93–97.) Thus, the allegation is not that this was an act that occurred internally, but rather that it was an act "between market participants."

On the other hand, both Pena and Cherry's alleged iRestore deletions occurred while they were still employed by CTS Metrolina. (Am. Compl. ¶¶ 78–79.) Without more, Pena and Cherry's alleged sabotage of their employer's operations while employed are insufficient to state a UDTPA claim. *Wheeler v. Wheeler*, 2018 NCBC LEXIS 38, at *12 (N.C. Super. Ct. Apr. 25, 2018) ("Section 75-1.1 does not apply to the internal conduct of individuals within a single market participant. Rather, the General Assembly intended section 75-1.1 to apply to interactions between market participants. As a result, any unfair or deceptive conduct contained solely within a single business is not covered by section 75-1.1" (cleaned up)).

Solar, LLC, 2021 NCBC LEXIS 55, at *51 (N.C. Super. Ct. June 18, 2021) ("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)).

94. Accordingly, with respect to Plaintiff's claim for violation of the UDTPA, the Motion is **DENIED**.

F. <u>Accounting and Constructive Trust (Inkwell and S&P Cap)</u>

95. Plaintiff demands an accounting and the imposition of a constructive trust against Inkwell for the money it has earned from CTS Metrolina's customers in violation of the Restrictive Covenants, (Am. Compl. ¶¶ 215–22), and against both Inkwell and S&P Cap for the money Berastain and Moreau received under the purchase agreement with S&P Cap for Inkwell. (Am. Compl. ¶¶ 223–28.)

96. In North Carolina, a request for a constructive trust is not a claim but is rather a request for relief. *See LLG-NRMH, LLC v. N. Riverfront Marina & Hotel, LLLP*, 2018 NCBC LEXIS 105, at *14 (N.C. Super. Ct. Oct. 9, 2018) ("[A] constructive trust is not a standalone claim for relief or cause of action." (citing *Weatherford v. Keenan*, 128 N.C. App. 178, 179 (1997))); *Flynn v. Pierce*, 2020 NCBC LEXIS 149, at *15 (N.C. Super. Ct. Dec. 22, 2020) (dismissing claim for constructive trust as a remedy rather than a claim). At this juncture, it remains to be seen whether a constructive trust is appropriate relief here.

97. Likewise, an accounting is available as a remedy when there is a viable underlying claim for relief, but it, too, is not a claim. *See Burgess v. Burgess*, 205 N.C.

App. 325, 333 (2010) ("An accounting is an equitable remedy[.]"); *Botanisol Holdings II, LLC v. Propheter*, 2021 NCBC LEXIS 94, at **29 (N.C. Super. Ct. Oct. 18, 2021) ("Like a constructive trust, while not a claim, an accounting is available as a remedy when there is a viable underlying claim for relief.").

98. Accordingly, to the extent Plaintiff styles these remedies as claims for relief, the Motion is **GRANTED**. However, the dismissal is without prejudice to Plaintiff's ability to seek the imposition of a constructive trust, or an accounting, or both, with respect to any surviving claims at the appropriate time.

G. Declaratory Judgment (Inkwell and S&P Cap)

99. Finally, with respect to the purported sale of Inkwell to S&P Cap, Plaintiff requests that the Court declare "Mr. Berastain's and Mr. Moreau's sale of IER and Inkwell to S&P Cap is void *ab initio* because it perpetuates Mr. Berastain's and Mr. Moreau's unlawful competition with CTS Metrolina." (Am. Compl. ¶ 232.)

100. The Declaratory Judgment Act (the "Act"), N.C.G.S. § 1-253 *et seq*., provides that "[a]ny person interested under a . . . written contract . . . or whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. Accordingly, a person seeking to have a written contract construed under the Act must first have an interest under the contract. *See Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 660 (1998) ("One who seeks

to have a written contract constructed by way of declaratory judgment must first have an interest thereunder.").

101. In addition, the Act is to be liberally construed. *See* N.C.G.S. § 1-264 ("This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.").

102. The Moving Defendants contend that CTS Metrolina lacks standing to request that the sale of Inkwell to S&P Cap be declared void *ab initio* because CTS Metrolina is not a party to the purchase agreement. (Defs.' Br. Supp. 27.) Regardless of that fact, CTS Metrolina responds that it has standing to bring this claim to the extent it is seeking an interpretation of the Restrictive Covenants to which it is a party and to which Berastain and Moreau agreed. (Pl.'s Br. Opp. 28.)

103. The Court agrees. The Amended Complaint alleges that Berastain and Moreau entered into agreements with CTS Metrolina that forbade them from "assist[ing] any other Person in engaging in [restoration work]" and from having an "active interest in any [business or person] that engages in" the property restoration business within certain geographical limits. (Am. Compl. ¶¶ 54(a), (c).) By creating IER and then Inkwell, Berastain and Moreau allegedly breached these agreements, giving CTS Metrolina an interest in determining whether Berastain and Moreau can profit from the sale of IER and Inkwell.[9]

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[9] Given the Court's determination that CTS Metrolina has standing with respect to its agreements with Berastain and Moreau, it is not necessary for the Court to reach CTS Metrolina's argument that it also has standing because CTS Metrolina's rights are affected by the purchase agreement between IER/Inkwell and S&P Cap.

104. In short, accepting the allegations in the Amended Complaint as true for purposes of this Motion, and giving consideration to the purpose of the Act, the Court concludes that CTS Metrolina has sufficiently stated a claim for declaratory judgment. *See BIOMILQ*, 2023 NCBC LEXIS 24, at **32 ("'[A] motion to dismiss a declaratory judgment claim is appropriate only when the complaint does not allege an actual, genuine existing controversy, which prevents a court from entering a purely advisory opinion.' The question is not whether the plaintiff will prevail on their claim, '[i]t is only whether they have identified an actual, genuine controversy.' " (quoting *Bennett v. Bennett*, 2019 NCBC LEXIS 19, at **30–32 (N.C. Super. Ct. Mar. 15, 2019))).

105. Accordingly, as to Plaintiff's claim for declaratory judgment, the Motion is **DENIED**.

V. CONCLUSION

106. **WHEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motion as follows:

a. With respect to the Third Cause of Action (Tortious Interference with Contract and with Prospective Economic Advantage):

   i. Inkwell's Motion as it pertains to allegations that Inkwell tortiously interfered with Berastain and Moreau's Restrictive Covenant Agreements is **DENIED**. In all other respects, Inkwell's Motion with respect to this claim is **GRANTED**, and the claim is **DISMISSED** without prejudice;

ii. Cherry's Motion is **GRANTED**, and the claim is **DISMISSED** without prejudice; and

iii. S&P Cap's Motion is **GRANTED**, and the claim is **DISMISSED** without prejudice.

b. With respect to the Fourth Cause of Action (Misappropriation of Trade Secrets):

i. Inkwell, Cherry, and S&P Cap's Motion is **GRANTED** to the extent Plaintiff seeks to recover for the alleged misappropriation of information identified generally in paragraph 39(c) of the Amended Complaint, and to that extent, the claim is **DISMISSED** without prejudice;

ii. In all other respects, the Motion is **DENIED**.

c. With respect to the Sixth Cause of Action (Violation of Computer Trespass Statute, N.C.G.S. § 14-458), the Motion of both Pena and Inkwell is **DENIED**.

d. With respect to the Seventh Cause of Action (Violation of the Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1 et seq.), Cherry, Inkwell, and Pena's Motion is **DENIED**.

e. With respect to the Eighth Cause of Action (Civil Conspiracy), Cherry, Pena, and S&P Cap's Motion is **DENIED.**

f. With respect to claims for the remedies of Accounting and Constructive Trust in the Ninth and Tenth Causes of Action, the Motion is

GRANTED, but the Court's ruling is without prejudice to Plaintiff's ability to seek the imposition of a constructive trust or an accounting, or both, at the appropriate time.

g. With respect to the Eleventh Cause of Action (Declaratory Relief), Inkwell and S&P Cap's Motion is **DENIED**.

IT IS SO ORDERED, this the 4th day of February, 2025.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases