

STATE OF NORTH CAROLINA
CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 3626

CALIBER PACKAGING AND
EQUIPMENT, LLC and CALIBER
PACKAGING GROUP, LLC,

Plaintiffs,

v.

CHERNELL SWARINGEN,

Defendant.

**ORDER AND OPINION ON
DEFENDANT'S MOTION TO DISMISS
PLAINTIFFS' CLAIMS OF THEFT BY
EMPLOYEE AND UNJUST
ENRICHMENT**

1. Plaintiffs allege that a (formerly) trusted Assistant Operations Manager who had broad access to its confidential and trade secret information violated that trust by misappropriating, and then leveraging, its trade secret information with competitors to entice employment offers and financial rewards. They assert eight causes of action, among them claims for civil liability for theft by employee, (violation of N.C.G.S. § 1-538.2), and unjust enrichment. The case is before the Court on Defendant's motion to dismiss these two claims.

Van Hoy, Reutlinger, Adams & Dunn, PLLC, by Bryan Adams, for Plaintiffs Caliber Packaging and Equipment, LLC and Caliber Packaging Group, LLC.

Bennett & Guthrie, PLLC, by Joshua H. Bennett and Mitchell Hendrix Blankenship, for Defendant Chernell Swaringen.

Earp, Judge.

I. BACKGROUND

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

3. Plaintiff Caliber Packaging and Equipment, LLC (“Caliber Packaging”) is a North Carolina LLC with its principal place of business in Cabarrus County, North Carolina. (Compl. ¶ 2, ECF No. 3.) Caliber Packaging “is a national distributor of industrial packaging materials and equipment . . . that provides packaging solutions for customers across the United States.” (Compl. ¶ 8.)

4. Plaintiff Caliber Packaging Group, LLC (“Caliber Group”) is also a North Carolina LLC with its principal place of business in Cabarrus County, North Carolina. (Compl. ¶ 3.) Caliber Group is owned by Caliber Packaging. (Compl. ¶ 10.)

5. Caliber Group was formed in 2017 as a holding company to organize Caliber Packaging’s North Carolina, Florida, Georgia, and California affiliates (collectively, the “Affiliates”). (Compl. ¶ 9.) Caliber Group provides business support services to the Affiliates. Each Affiliate pays a fee in return for these business support services. (Compl. ¶ 10.)

6. Prior to January 2022, Caliber Packaging had an affiliate in Chicago, Illinois. However, “the Chicago location was removed from Caliber Packaging” in January 2022. According to Plaintiffs, “[t]he removal of the Chicago location from the group was acrimonious.” (Compl. ¶ 9.)

7. Chernell Swaringen is a resident of Rowan County, North Carolina, and a former employee of Caliber Packaging. (Compl. ¶ 4.) Swaringen worked for the company from 2016 through 2022, beginning as a temporary employee before transitioning to a full-time role. (Compl. ¶ 22.)

8. When Swaringen became a full-time employee in September 2016, she signed a “New Employee Confidentiality, Non-Competition, and Non-Solicitation Agreement[.]” (Compl. ¶ 23.) After being promoted to Assistant Operations Manager in 2018,¹ Swaringen signed a second employment agreement. (Compl. ¶ 26.) Both employment agreements have provisions requiring Swaringen to maintain the confidentiality of Caliber Packaging’s confidential and trade secret information. (See Compl. Ex. 2 [“2016 Employment Agreement”], Ex. 3 [“2018 Employment Agreement”].)

9. Plaintiffs allege that their confidential and trade secret information includes:

[L]ists of Customers’ names, contacts, purchase and needs; lists of Potential Customers; prices and pricing strategies; Employer’s costs; Employer’s inventory information, promotional materials, marketing strategies, Product development strategies; Product specifications; Employer’s recommendations to Customers; research, development, systems, operations, and business activities of the Employer; and information received from any Customer regarding the Customer’s need for Products that Employer provides or has attempted to provide.

(Compl. ¶ 24.)

¹ While paragraph 22 of the Complaint states that Swaringen was promoted to Assistant Operations Manager in October 2021, both the attached employment agreement Swaringen signed and paragraph 26 of the Complaint state that she was promoted in October 2018. (Compare Compl. ¶ 22, with ¶ 26; Ex. 3 [“2018 Employment Agreement”].)

10. Plaintiffs store their confidential and trade secret information on a company computer system they call “Sage.” (Compl. ¶ 17.) Each Affiliate has access to its own information on Sage, but it cannot access the business information belonging to other Affiliates. Caliber Packaging has access to all the information in Sage. (Compl. ¶ 18.)

11. Swaringen also had access to all of Sage’s modules except for the banking module. (Compl. ¶ 19.) Additionally, Swaringen had access to the Employee Drive, which included “customer information, customer purchase orders, new customer forms, tool repair and service information, Customer consignment accounts . . . and some Private Label Vendor information.” (Compl. ¶ 20.) In Swaringen’s position as Assistant Operations Manager, she “routinely accessed Sage and the Employee Drive.” (Compl. ¶ 27.)

12. Caliber Packaging stores some of its confidential and trade secret information in a locked company file room. (Compl. ¶ 40.) This locked file room houses physical copies of customer and vendor invoices that are alleged to be “highly sensitive” trade secrets. (Compl. ¶ 40.) Swaringen had access to the file room. (Compl. ¶¶ 40–41.)

13. On 30 August 2022, Swaringen was laid off as part of a corporate restructuring. (Compl. ¶ 54.) In the weeks leading up to Swaringen’s departure, Plaintiffs allege that Swaringen engaged in “irregular and suspicious computer activity” that caused Plaintiffs to initiate an investigation into her actions. (Compl. ¶ 55.)

14. Based on their investigation, Plaintiffs claim that prior to being laid off, “Swaringen began making inquiries into employment opportunities with competitors of Plaintiffs,” including the Chicago Affiliate. (Compl. ¶ 43.) Plaintiffs believe that Swaringen had frequent phone conversations with the Chicago Affiliate during which she was given instructions to misappropriate specific confidential and trade secret information. (Compl. ¶ 44.) They further allege upon information and belief that the Chicago Affiliate promised to reward Swaringen financially if she misappropriated and transferred Caliber Packaging’s confidential and trade secret information to them. (Compl. ¶ 47.) Additionally, Plaintiffs allege that Swaringen used her access to Plaintiffs’ trade secret information to “entice potential prospective employers” into offering her a new job. (Compl. ¶ 47.)

15. In the weeks leading up to Swaringen’s departure date, Plaintiffs allege that Swaringen accessed confidential information more frequently than was necessary to complete her daily tasks. (Compl. ¶ 50.) Plaintiffs believe that Swaringen misappropriated “substantial amounts of customer information, including customer lists, invoicing and pricing, customer preferences, and numerous other sensitive items[.]” (Compl. ¶ 49.) They allege that Swaringen has refused their demand that she return this information and that she “continues to assume and exercise the right of ownership over property belonging to Plaintiff, which includes both hard paper copies of documents as well as electronic/digital copies of documents that Plaintiffs have been unable to recover.” (Compl. ¶¶ 56–57, 86.)

16. As a result, Caliber Packaging and Caliber Group filed their Complaint on 14 November 2022, asserting eight causes of action against Swaringen: (1) breach of contract, (2) civil liability for theft by employee (N.C.G.S. § 1-538.2), (3) violation of North Carolina’s Computer Trespass Act (N.C.G.S. § 14-458), (4) misappropriation of trade secrets in violation of the Trade Secrets Protection Act (N.C.G.S. § 66-152 *et seq.*), (5) conversion, (6) unfair and deceptive trade practices (N.C.G.S. § 75-1.1 *et seq.*), (7) unjust enrichment, and (8) civil conspiracy. (*See generally* Compl.)

17. On 13 January 2023, Swaringen moved to dismiss the claims for civil liability for theft by employee and unjust enrichment (the “Motion”), (ECF No. 16). On 6 April 2023, the Court held a hearing on the Motion during which all parties appeared and were heard through counsel. The Motion is now ripe for disposition.

II. STANDARD OF REVIEW

18. 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).

19. When deciding a motion to dismiss, the Court construes the complaint liberally and accepts all allegations as true. *See, e.g., Sykes v. Health Network Sols.*,

Inc., 372 N.C. 326, 332 (2019); *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. Dep’t of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

III. ANALYSIS

20. The Court evaluates the sufficiency of the Complaint with respect to Plaintiffs’ claim for civil liability for theft by employee under N.C.G.S. § 1-538.2 (Second Cause of Action), before moving to a review of Plaintiffs’ claim for unjust enrichment (Seventh Cause of Action).

A. Civil Liability for Theft by Employee (N.C.G.S. § 1-538.2)

21. Pursuant to Section 1-538.2 of the North Carolina General Statutes, an employer can pursue a civil claim for damages against an employee alleged to be responsible for theft of the employer’s property. The claim must be predicated on a violation of the criminal statutes for larceny, embezzlement, or a related criminal offense. *See* N.C.G.S. § 1-538.2(a).

22. The statute reads, in relevant part: “Any person . . . who commits an act that is punishable under G.S. 14-72, 14-72.1, 14-72.11, 14-74, 14-86.6, 14-86.7, 14-90, or 14-100 is liable for civil damages to the owner of the property.” N.C.G.S. § 1-538.2(a). An “action may be brought under this section regardless of whether a criminal action is brought or a criminal conviction is obtained for the act alleged in the civil action.” *Id.* § 1-538.2(c). If successful, a property owner is entitled

to the amount of any money lost by reason of the theft or embezzlement or fraud of an employee, as well as to any consequential damages, punitive damages, and reasonable attorneys' fees. *Id.* § 1-538.2(a).

23. Plaintiffs allege that Swaringen committed employee larceny and embezzlement—violating § 14-74 and § 14-90, respectively—when she took their confidential and trade secret information for her personal use. (Compl. ¶¶ 66–67.)

24. Section 14-74, prohibiting larceny by employee, lists the types of property protected as: “any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in G.S. 14-75[.]” N.C.G.S. § 14-74. Section 14-75 includes a list of financial instruments such as checks, stock certificates, bonds, and promissory notes, as well as other obligations, “either for the payment of money or for the delivery of specific articles[.]” Elements of the crime are: “(1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer.” *State v. Fink*, 252 N.C. App. 379, 384 (2017) (quoting *State v. Frazier*, 142 N.C. App. 207, 209 (2001)).

25. Section 14-90 prohibits embezzlement by employee. Like Section 14-74, it lists the property covered as: “any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable

security[.]” N.C.G.S. § 14-90(b)(2). To establish guilt in a criminal action, the State must prove: “(1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own.” *State v. McCaskill*, 47 N.C. App. 289, 292 (1980) (quoting *State v. Block*, 245 N.C. 661, 663 (1957)).

26. Swaringen argues that (1) because Section 1-538.2 requires violation of a criminal statute, its language must be strictly construed; and (2) because there is no reference to intellectual property such as confidential information or trade secrets in the underlying criminal statutes, Section 1-538.2 was not intended to cover the alleged theft of intellectual property. Summarily put, Swaringen argues that taking confidential and trade secret information does not violate either § 14-74 or § 14-90; consequently, she concludes, there can be no claim against her for civil damages under § 1-538.2. (Def.’s Br. Supp. Mot. Dismiss 3-6 [“Def.’s Br.”], ECF No. 17.)

27. Undeterred, Plaintiffs respond that the phrase “goods or other chattels” encompasses confidential and trade secret information when it is in tangible form, such as printed customer and vendor invoices containing cost and pricing information. Plaintiffs argue that the physical records they maintained in their locked file room constitute chattels covered by the relevant criminal statutes. (Pls.’ Resp. Def.’s Mot. Dismiss 3–5 [“Pls.’ Br.”], ECF No. 22.)

28. The Court determines that Plaintiffs have identified property that falls within the ambit of Section 1-538.2. Although confidential and trade secret

information itself is not referenced in the underlying criminal statutes, “hard” copies of business records are chattels belonging to the employer, and the predicate crimes cover theft of chattels. See Goods and Chattels, Black’s Law Dictionary (11th ed. 2019) (“Loosely, personal property of any kind; occasionally, tangible personal property only.”). Plaintiffs allege that some of the stolen information was in the form of paper invoices filed in a locked room. They allege that Swaringen took possession of the invoices for unauthorized purposes. These allegations satisfy the requirements of the underlying criminal statutes.²

29. The Court therefore **DENIES** the Motion as to Plaintiffs’ claim for Civil Liability for Theft by Employee (N.C.G.S. § 1-538.2).

B. Unjust Enrichment

30. “The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor.” *Atlantic C. L. R. Co. v. State Highway Com.*, 268 N.C. 92, 95–96 (1966). To state a claim for unjust enrichment, Plaintiffs must allege: (1) that it conferred a benefit on another party; (2) that the other party consciously accepted the benefit;

² The Court further determines that Plaintiffs have adequately alleged that Swaringen was entrusted with possession of the invoices for use in her work prior to allegedly stealing them. (Compl. ¶¶ 40, 86.) See *Artistic Southern Inc. v. Lund*, 2015 NCBC LEXIS 113, at **48 (N.C. Super. Ct. Dec. 9, 2015) (lawful possession established when defendant, who had authority to collect customer payments, collected payments and then misappropriated them). Plaintiffs’ claim is that Swaringen abused their trust and used her access to take possession of documents containing confidential and trade secret information for unauthorized purposes. (Compl. ¶¶ 48–53.) These allegations are sufficient to state a claim for civil liability for theft by employee.

and (3) that the benefit was not conferred gratuitously or by an interference in the affairs of the other party. *See Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002).

31. Plaintiffs' claim for unjust enrichment is based on Swaringen's alleged misappropriation of Caliber Packaging's confidential and trade secret information. Plaintiffs allege that Swaringen received a benefit when she was given access to their confidential information and trade secrets, that she willingly accepted this benefit, and that she was unjustly enriched when she exchanged the confidential information and trade secrets for employment opportunities and financial rewards. (Compl. ¶¶ 47, 53, 96–99.)

32. In response, Swaringen argues that Plaintiffs never conferred a benefit on her, personally. To the contrary, according to Swaringen, the Complaint establishes that she was provided access to Plaintiffs' confidential information and trade secrets so that she could do her job. Therefore, the access she was given was for Plaintiffs' benefit, not her own. (Def.'s Br. 6–8.)

33. Plaintiffs respond that they have alleged that Swaringen received two benefits as a result of taking the confidential information; namely, "promised financial rewards" and "leverage or a tool to secure other employment." (Pls.' Br. 6.)

34. But the benefits identified by Plaintiffs were not ones that they conferred on Swaringen; rather, the benefits they identify are the alleged ill-gotten gains of her misconduct. Indeed, the gravamen of the Complaint is not that Caliber transferred the confidential and trade secret information to Swaringen in exchange

for value and intending for her to use the information as she wished. Plaintiffs' complaint is that Swaringen misappropriated confidential and trade secret information that was to be used solely for Plaintiffs' business purposes and used it to her own advantage without Plaintiffs' consent.

35. Plaintiffs allege a taking in violation of their ownership rights, not a willing transfer of that ownership. *See, e.g., Albritton v. Albritton*, 2021 NCBC LEXIS 53, at **33–36 (N.C. Super. Ct. June 7, 2021) (“Neither the allegations nor the facts in evidence support a claim for unjust enrichment. Movants have not alleged that [Plaintiffs] *conferred* benefits upon Defendants, but, rather, that Defendants took assets belonging to [Plaintiff].” (emphasis in original)); *Klos Constr., Inc. v. Premier Homes & Props., LLC*, 2020 NCBC LEXIS 85, at *48–51 (N.C. Super. Ct. July 21, 2020) (dismissing a claim for unjust enrichment where “it is undisputed that the UE Defendants took any benefit of Plaintiff’s goodwill”); *KNC Techs., LLC v. Tutton*, 2019 NCBC LEXIS 72, at *36 (N.C. Super. Ct. Oct. 9, 2019) (“Alleging merely that the Defendants have taken for themselves some benefit to which Plaintiff believes it is rightfully entitled does not state a claim for unjust enrichment.”); *Chisum v. Campagna*, 2017 NCBC LEXIS 102, at *31–32 (N.C. Super. Ct. Nov. 7, 2017) (“Plaintiff fails to allege a claim for unjust enrichment. He does not allege that he conferred any benefit . . . but rather only that the [Defendants] ‘received’ or ‘wrongfully retained’ benefits from their alleged misconduct.”).

36. Accordingly, Defendant's Motion with respect to the claim for unjust enrichment shall be **GRANTED**, and the claim is **DISMISSED** with prejudice.³ However, the Court's determination does not foreclose Plaintiffs from seeking to recover damages for alleged misappropriation of their trade secrets.⁴

IV. CONCLUSION

37. WHEREFORE, the Court hereby ORDERS as follows:

- a. Defendant's Motion is **GRANTED in part** and **DENIED in part**.
 - i. Defendant's motion to dismiss the Second Cause of Action (Civil Liability for Theft by employee N.C.G.S. § 1-538.2) is **DENIED**.
 - ii. Defendant's motion to dismiss the Seventh Cause of Action (Unjust Enrichment) is **GRANTED** and the claim is **DISMISSED** with prejudice.

³ "The decision to dismiss an action with or without prejudice is in the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013).

⁴ The claim for unjust enrichment should not be confused with the damage theory of unjust enrichment resulting from the misappropriation of trade secrets. *Compare Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 661 (2009) (calculating damages for a claim of misappropriation of trade secrets as the "economic loss or the unjust enrichment" defendants gained); N.C.G.S. § 66-154(b) ("In addition to the relief authorized by subsection (a), actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater."), *with Booe v. Shadrick*, 322 N.C. 567, 570 (1988) ("In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable." (citing Restatement of Restitution § 1)).

IT IS SO ORDERED, this the 31st day of May, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases