STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 9285
FOUNDATION BUILDING MATERIALS, LLC, Plaintiff, v. CONKING & CALABRESE, CO., INC.; CONKING & CALABRESE SE, INC.; JEREMY CHAVIS; and DOUGLAS CALABRESE, Defendants.	**ORDER AND OPINION ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [PUBLIC VERSION]**

1. **THIS MATTER** is before the Court on Plaintiff's Motion for Preliminary Injunction (the "Motion"), (ECF No. 3), pursuant to Rule 65 of the North Carolina Rules of Civil Procedure (the "Rule(s)").

2. Having considered the Motion, the Verified Complaint, the affidavits, briefs and exhibits supporting and opposing the Motion, and the parties' arguments at a hearing held on 29 June 2022, the Court **GRANTS in part and DENIES in part** the Motion as provided herein.[1]

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by J. Allen Thomas, Savannah Trimmer, and Haseeb Fatmi, for Plaintiff Foundation Building Materials, LLC.

Robertson & Associates, P.A., by Ryan T. Vince and R. Lee Robertson, Jr., and McDermott IP Law, by Richard M. McDermott, for Defendants

[1] Recognizing that this Order and Opinion discusses documents that are confidential and that are alleged to contain trade secrets, the Court elects to file this Order and Opinion under seal. A public version will be filed after consultation with the parties regarding proposed redactions.

Conking & Calabrese, Co., Inc., Conking & Calabrese SE, Inc., Jeremy Chavis, and Douglas Calabrese.

Earp, Judge.

I. INTRODUCTION AND PROCEDURAL HISTORY

3. Plaintiff Foundation Building Materials, LLC ("FBM") filed its Verified Complaint on 26 May 2023, complaining that its former branch manager, Jeremy Chavis ("Chavis"), along with a group of branch employees, resigned days earlier to start the North Carolina office of a competing company. FBM alleges that Chavis and others took and are using FBM's trade secrets to jump start the competitor's launch in North Carolina. (*See generally* Ver. Compl. ["Compl."], ECF No. 3.)

4. At the same time FBM filed its Verified Complaint, it also filed motions for a temporary restraining order ("TRO"), a preliminary injunction ("PI"), and expedited discovery. The TRO and PI motions seek relief based solely on FBM's claim against Defendants for alleged misappropriation of its trade secrets.[2]

5. After designation, on 8 June 2023, the Court held a hearing on the motion for TRO. Counsel for both parties were present. The Court entered a TRO the same day, which became effective immediately. (ECF No. 13.) FBM did not move to extend the TRO, and it expired on 18 June 2023 at 3:00 PM.

6. On 12 June 2023, the Court granted FBM's Motion for Expedited Discovery and afforded the parties limited discovery to prepare for a hearing on Plaintiff's PI motion. (ECF No. 18.)

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[2] Plaintiff also asserts claims for tortious interference with prospective business relations, unjust enrichment, breach of fiduciary duty, constructive fraud, fraud, violations of the Unfair and Deceptive Trade Practices Act, and common law unfair competition.

7. On 22 June 2023, the parties filed a joint stipulation agreeing to reinstate the provisions of the TRO until the Court ruled on the PI motion. A hearing was set for 29 June 2023. (ECF No. 25.)

8. After completion of the expedited discovery period[3] and full briefing, the Court held a hearing on the PI motion during which all parties were represented and participated. The Motion is now ripe for disposition.

II. FINDINGS OF FACT[4]

9. The Court makes the following findings of fact solely for the purpose of deciding this Motion. These findings are not binding at a trial on the merits. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well-settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits.").

10. FBM is a California limited liability company, registered to do business in North Carolina, with over three hundred locations across North America. It is a leading supplier and distributor of building materials. (Compl. ¶¶ 1, 12.) FBM's customers are contractors and subcontractors in the residential and commercial construction industry. (Aff. of Robert Henshaw ["Henshaw Aff."] ¶ 34, ECF No. 24.1.)

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[3] While the record reflects that interrogatories and document requests were directed to each Defendant, FBM complains that Defendants' discovery responses to date have been deficient in some respects.

[4] Any determination later stated as a Conclusion of Law that should have been stated as a finding of fact is incorporated in these Findings of Fact and vice versa. Citations to the record herein are not exhaustive and do not necessarily reflect all evidence upon which corresponding findings of fact are based.

11. Most customers in the industry form relationships with their distributors that result in repeat business. (Henshaw Aff. ¶ 35.) A distributor's historical knowledge of its customers' preferences and needs is valuable information used in the bidding process. (Henshaw Aff. ¶¶ 35-36; Aff. of Christopher Cirocco ["Cirocco Aff."] ¶ 32, ECF No. 28.) In addition, it is not uncommon for customers to follow a salesperson from one employer to another because of relationships that form as a result of repeat business. (Cirocco Aff. ¶ 22.)

12. Although a quote usually locks FBM into pricing for an entire project (which can be multi-year), the customer is not locked in and can stop delivery and/or change distributors at any time. (Henshaw Aff. ¶¶ 37-38.) Even so, it is rare for a customer to switch distributors once a project has begun. In the past, less than 5% of FBM's customers have changed distributors once their jobs have begun. (Henshaw Aff. ¶ 39.)

13. In February 2021, FBM acquired the interior products division of Beacon Supply, Inc. ("Beacon"), including its branch located in Charlotte, North Carolina. (Compl. ¶ 18.) Beacon's former employees transitioned to FBM as a result of the acquisition. Among them was Defendant Jeremy Chavis, who became the branch manager for FBM's new "Branch 314" office in Charlotte. (Compl. ¶¶ 20-22.) In that role, Chavis oversaw the work of a team of approximately twenty employees. (Compl. ¶ 23.)

14. FBM did not utilize either noncompetition or non-solicitation agreements with Chavis or other employees who worked in the Charlotte office that

Chavis managed. (Cirocco Aff. ¶ 10; Aff. of Ron Greene ¶ 12 ["Greene Aff."], ECF No. 28; Aff. of Jeremy Chavis ¶ 12 ["Chavis Aff."], ECF No. 28.)

15. Defendant Conking & Calabrese, Co., Inc. ("Conking NY") is a New York corporation with its principal place of business in New York. Conking NY has been in operation since 1975 as a regional distributor of building materials. (Compl. ¶¶ 2, 37-38.) Until early 2023 when Conking & Calabrese SE, Inc. ("Conking SE") was formed, the company had no affiliate in North Carolina or anywhere else in the southeastern United States. (Henshaw Aff. ¶ 48.)

16. Conking SE was incorporated in North Carolina on 9 March 2023. It is located in Charlotte and directly competes in the building materials market with FBM. (Compl. ¶¶ 3, 38-39.)

17. Defendant Douglas Calabrese ("Calabrese"), a resident of New York, is the President of both Conking NY and Conking SE (collectively, "Conking"). (Compl. ¶ 6.)

Chavis Leaves FBM to Join Conking SE

18. In January 2023, Calabrese began discussions with Chavis about leaving FBM and taking a leadership role in Conking SE's new Charlotte office. (Chavis Aff. ¶ 15.) Those discussions progressed, and on 18 January 2023, Chavis used an FBM scanner to send himself a copy of the lease for what would later become the new Conking SE office. (Henshaw Aff. ¶ 53, Ex. 7.) On 20 January 2023, Chavis emailed the lease to himself a second time, this time with his annotations. (Henshaw Aff. ¶ 53, Ex. 8.)

19. On 4 May 2023, Conking SE filed an amendment to its articles of incorporation naming Chavis as its Corporate Secretary. (Compl. ¶¶ 41-42; Henshaw Aff. ¶ 57, Ex. 12.) Chavis officially resigned from FBM to join Conking SE as Vice President of the Southeast Region on 19 May 2023. (Compl. ¶ 47, Henshaw Aff. ¶ 75(a).)

20. When Chavis submitted his resignation, he did so with the accompanying resignations of fourteen (14) of his subordinates from Branch 314. Three additional employees from another FBM branch followed a short time later. The seventeen (17) FBM employees who resigned now work for Conking. (Compl. ¶¶ 52-53; Henshaw Aff. ¶ 66.)

21. The former FBM employees working for Conking include Calabrese's nephew, Chris Cirocco ("Cirocco"), who was formerly an outside salesperson for FBM and reported to Chavis. Cirocco made the transition on 3 May 2023. (Henshaw Aff. ¶¶ 20, 50, 59.)

22. Ron Greene ("Greene"), formerly inside sales manager/assistant branch manager for FBM, resigned to join Conking at or about the time Chavis resigned on 19 May 2023. (Henshaw Aff. ¶¶ 21, 66; Greene Aff. ¶¶ 13-15.)

FBM's Confidential and Trade Secret Information

23. FBM has developed and maintains confidential and trade secret information related to, among other things, its operations, pricing margins, and customer needs. (Compl. ¶ 24.) Much of the information is stored in software systems, including "Rainmakers," its Customer Relationship Management ("CRM")

software, "Power BI," its business intelligence tool, its human resources management systems, and its computer operating system. (Compl ¶ 25.)

24. FBM limits access to its computer systems to only those individuals who must have access to perform essential functions of their work. (Compl. ¶ 26.) The computer systems are protected by multi-factor authentication, complex passwords, prohibitions against access by employees outside the branch, print controls, prohibitions on the use of USB drives, and company policies. (Compl. ¶ 32; Henshaw Aff. ¶ 31)

25. FBM has a Code of Conduct that includes prohibitions on the unauthorized disclosure of its confidential information. In addition, FBM employees are prohibited by company policy from working for, or taking a financial interest in, a competitor. (Henshaw Aff. ¶ 31, Ex. 5.) Chavis, Greene, and Cirocco each electronically acknowledged the Code of Conduct. (Henshaw Aff. ¶ 31, Ex. 6.)

26. FBM identifies seven categories of confidential information that it contends Chavis, Cirocco, or Greene provided to Conking. The categories are:

a. Compilations of customer, vendor, and referral source information including identity and pertinent contacts;

b. Customer credit information, current and historical pricing data;

c. Vendor rebates and discounts;

d. Customer [redacted];

e. Market product utilization rates and buying strategies;

f. Customer and job selection and quotation process;

g. Personnel files, salaries, incentives, and other compensation information.

(Henshaw Aff. ¶ 29(a)-(g).) With respect to some categories, Henshaw attaches examples as exhibits to his affidavit. (*See* Henshaw Aff. ¶ 29(a)-(b), (g), Exs. 1, 2, 3, 4.) With respect to other categories, however, no examples are provided, and the Court is left with only general descriptions in the Verified Complaint and Henshaw's affidavit, as well as argument in FBM's brief and from the hearing to determine what information is alleged to be a trade secret. (*See* Henshaw Aff. ¶ 29(e), (f).)

27. As for evidence of misappropriation, for some of the categories Plaintiff attaches to its brief exhibits (mostly emails produced by Defendants in expedited discovery) evidencing transfers of information to Calabrese. (*See, e.g.,* Henshaw Aff. Exs. 1, 4; Br. Supp. Pl.'s Mot. PI ["Pl.'s Br."], Exs. 12, 14, 17, 18, ECF No. 24.1.)

28. For the balance of the categories of purported trade secrets, however, Plaintiff provides only Henshaw's affidavit stating that he "reasonably believes" the information was misappropriated. In support of his belief, Henshaw avers only that Chavis, Cirocco, and Greene had access to, created, and regularly used the information in their daily work for FBM. (Henshaw Aff. ¶ 29.) Plaintiff concludes that the fact that some FBM customers have moved portions of their business to Conking necessarily means that Conking is using FBM's trade secrets. (Pl.'s Br. 10-12; Henshaw Aff. ¶¶ 69-73.)

29. In response, Defendants contend that, in some instances, they cannot identify what FBM alleges to be a trade secret. (Defs.' Br. Opp. Pl.'s Mot. PI 4 ["Defs.' Br."], ECF No. 27.) In other cases, where examples are provided, Defendants argue

that the information is publicly available "street knowledge" and does not constitute even confidential information, much less trade secret information. (Defs.' Br. 6-8.)

30. Moreover, Defendants contend that Plaintiff has not presented evidence that any of the information at issue has been misappropriated. They argue that the decision made by some former FBM customers to move their business to Conking results from the relationships Chavis and others have formed with those customers over the years. (Defs.' Br. 3, 6-8.)

a. Compilations of Customer, Vendor, and Referral Source Contacts

31. In this category, Plaintiff refers broadly to its computer operating system ("ERP"), its CRM software, "other internal systems," and vendor and customer "contact information." (Henshaw Aff. ¶ 29(a).) Specifically, however, it references only an Outlook contact list compiled by Greene. The list consists of 2,930 names, email addresses and, in some instances, telephone numbers and business addresses. (Henshaw Aff. Ex. 1.) Based on the domain names for the email addresses, the majority of the contacts on the list are FBM customers or vendors. (Henshaw Aff. ¶ 29(a)(iv).)

32. During the hearing on the Motion, Plaintiff's counsel argued that Greene compiled the contacts over the course of his employment with FBM, but the record itself provides no support for his statement. There is no evidence regarding his source(s) of the information or the effort expended or expense incurred to compile the contacts. Similarly, the record is silent regarding whether others were able to access Greene's contacts, except that Greene states that neither he nor Beacon, his

former employer, considered the contacts to be a trade secret. (Greene Aff. ¶ 41(i).) Before he left FBM, Greene emailed a copy of the Outlook contacts to his personal Gmail account.[5]

b. Customer Credit Information, Current and Historical Pricing Data

33. FBM's credit department maintains a customer profile for each of its customers that includes the customer's credit history, payment collection history, and historical job information. Although access to this information is restricted, Chavis, Greene, and Cirocco had access to it. (Henshaw Aff. ¶ 29(b)(i).)

34. In addition, FBM uses a business information aggregation tool called Power BI to rank its top 55 customers by profitability. The report generated includes each customer's year-to-date gross sales and profit margins for the past two years. A sample is attached to Henshaw's affidavit. (Henshaw Aff. ¶ 29(b)(ii), Ex. 2.)

35. The information gathered in Power BI for FBM reflects that its top five customers are [redacted] (Henshaw Aff. ¶ 70, Ex. 2.)

36. Rainmakers is FBM's CRM software used to prepare quotes and manage ongoing jobs. (Henshaw Aff. ¶ 29(b)(iv).) It tracks current and potential customers by opportunity (e.g., construction project), product categories, start and end dates (by quarter), estimated revenue, committed revenue, actual revenue, and "backlog

[5] On 15 June 2023, following a conference with the parties arising from FBM's concerns regarding Defendants' compliance with the TRO, the Court entered an order requiring Greene to return the Outlook contact file to FBM. Counsel for the parties were directed to review the material and return to Greene information that was solely of a personal nature. (Order, ECF No. 20.)

value," which appears to be the difference between committed revenue and actual revenue. An example of output from the software is attached to Henshaw's affidavit. (Henshaw Aff. Ex. 3.)

37. FBM has collected the information it maintains in Power BI and Rainmakers over the course of many years. (Henshaw Aff. ¶¶ 27, 29(b).)

38. Access to this information is restricted, but Chavis, Greene, and Cirocco each had varying degrees of access to it, used the information they were permitted to access on a daily basis, and discussed the profitability of the branch's customers on a quarterly basis with Henshaw. (Henshaw Aff. ¶ 29(b)(ii).)

39. There is no evidence in this record that information in either the Power BI or the Rainmakers CRM software was transferred electronically or in hard copy. However, there is evidence that Conking SE—through Chavis and Greene—has made overtures to Pulte Home Corp., (Henshaw Aff. ¶ 73(a), Ex. 13), and that Cirocco was in contact with NC Interiors Contracting, LLC after leaving FBM but before Conking SE was officially open. (Pl.'s Br. Ex. 20.)[6] Henshaw also testified that since Chavis' departure, FBM's expected deliveries have stopped on two projects that it had previously bid and won, one for NC Interiors and another for Incentive Contracting. (Henshaw Aff. ¶¶ 73(b), 73(d).)

[6] Although Henshaw's affidavit contains hearsay that, if supported by competent evidence, would suggest that Conking has been successful in its efforts to move sales from FBM to Conking with respect to other FBM customers, the Court does not consider inadmissible hearsay evidence. (*See* Henshaw Aff. ¶ 73.)

c. Vendor Rebates and Discounts

40. Given its national presence, FBM has the buying power to negotiate favorable discounts and rebates with some of its vendors. Because a competitor with access to this information would have additional bargaining power to negotiate better pricing with the same vendors, FBM limits access to its vendor rebates and discounts to a select few employees. Vendor rebates, in particular, are some of the most closely guarded secrets in the industry. Chavis had access to regional rebate information in profit and loss reports for his branch. (Henshaw Aff. ¶ 29(c)(i)-(iv).)

41. There is evidence in this record that Conking, through Chavis, placed purchase orders with various vendors during March and April 2023. (Pl.'s Br. Exs. 9, 10, 11.) There is no evidence, however, that Conking utilized knowledge of FBM's vendor rebates and discounts to do so. On the other hand, on 28 March 2023, Cirocco emailed Calabrese a price sheet from FBM vendor [redacted] specifically reflecting the terms of that vendor's discount for FBM. (Pl.'s Br. Ex. 12.)

d. Customer [redacted]

42. For a select few customers, FBM [redacted] (Henshaw Aff. ¶ 29(d)(i)-(iii).)

43. A competitor with knowledge of FBM's [redacted] has an advantage in the bidding process. Consequently, FBM safeguards [redacted] by keeping them in its legal department. It limits access to this information to only those employees who need it to do their jobs. Chavis, Greene, and Cirocco all had access to [redacted] for the customers at Branch 314. (Henshaw Aff. ¶ 29(d)(iv)-(v).)

44. Cirocco negotiated the [redacted] for two of the branch's top customers, [redacted], in April 2023. (Henshaw Aff. ¶ 29(d)(vi).)

45. On 8 May 2023, Cirocco emailed FBM's negotiated [redacted] for each of FBM's top three customers to Calabrese at Conking. (Pl.'s Br. Ex. 18.)

e. Market Product Utilization Rates and Buying Strategies

46. FBM has compiled historical data to assist it when determining which products to stock and in what quantities. For the Charlotte branch, it acquired data from Beacon and has collected additional data during the three years it has operated the branch. FBM has gained this information through an expensive trial and error process. (Henshaw Aff. ¶ 29(e)(i).)

47. A competitor with knowledge of the market's utilization rates has an advantage when formulating its buying strategies and is able to maximize profitability by avoiding unnecessary inventory storage, labor, and vehicle costs. (Henshaw Aff. ¶ 29(e)(i)-(ii).)

48. On this record, it is unclear whether FBM maintains this information in its computer. Even if it does, aside from the protections FBM has implemented for its computer operating system generally, FBM provides no evidence of specific limits on access to this information.

49. After FBM acquired Beacon in February 2021, Henshaw spent three months at Branch 314. During that time, Henshaw spoke with Chavis, Greene, and Cirocco about, among other things, the use of this data to maximize profitability for Branch 314. Profitability improved in 2021 and 2022. (Henshaw Aff. ¶¶ 24, 29(e)(iii).)

50. There is no evidence that information regarding market utilization rates or buying strategies was transferred electronically or in hard copy to Conking.

f. Customer and Job Selection and Quotation Process

51. Post-acquisition when Henshaw was at Branch 314, he, Cirocco, and Greene discussed factors to evaluate for successful job selection and pricing (e.g., customer payment history, labor requirements, delivery coordination). (Henshaw Aff. ¶¶ 24, 29(f)(i)-(iii).)

52. Aside from a general description of factors that can affect the profitability of a project, FBM does not include specific detail about the communications Henshaw had with Chavis, Greene, and Cirocco. (*See* Henshaw Aff. ¶¶ 24, 29(f)(ii).)

53. There is no evidence in this record that information that Henshaw communicated about job pricing or selection was transferred to Conking electronically or in hard copy.

g. Personnel Productivity and Compensation Information

54. In the materials distribution industry, qualified drivers are in short supply, and competition for them is intense. FBM's drivers are often paid on a piece rate basis based on the volume of their deliveries. Their production-based compensation information is kept in FBM's secured computer system and in each driver's personnel file. (Henshaw Aff. ¶ 29(g)(i)-(ii), (vi).)

55. Following Chavis' resignation, Conking came into possession of the personnel files for 13 FBM employees. It is unclear how many of the files were for former FBM drivers who moved to Conking. The files have since been returned to FBM. (Chavis Aff. ¶ 52(e); Greene Aff. ¶ 46(d); Cirocco Aff. ¶ 43(d).)

56. Chavis forwarded spreadsheets containing incentive rate calculations for FBM employees to his personal Gmail address in December 2022 and again in February 2023. (Henshaw Aff. ¶ 29(g)(v), Ex. 4.) On 24 April, Chavis sent Calabrese via email unspecified personnel file(s). (Pl.'s Br. Ex 14.) In addition, on 4 May 2023, Chavis emailed Conking employee Heidi Supinski offering to send "payroll records[.]" (Pl.'s Br. Ex. 17.)

III. CONCLUSIONS OF LAW

57. The Court has jurisdiction over the parties and over the subject matter of this action.

58. A preliminary injunction is an "extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701 (1977). The Plaintiff bears the burden to show: (1) a likelihood of success on the merits, and (2) that it is likely to sustain irreparable loss unless the injunction is issued or, "if, in the opinion of the Court, issuance is necessary for the protection of plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (1983); *see also Pruitt v. Williams*, 288 N.C. 368, 372 (1975) ("The burden is on the plaintiffs to establish their right to a preliminary injunction."); *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508 (2004) (a preliminary injunction will issue only upon the movant's showing of these two factors); N.C.G.S. § 1-485.

59. Likelihood of success means a "reasonable likelihood[.]" *A.E.P. Indus., Inc.*, 308 N.C. at 404. Irreparable injury is not necessarily injury that is "beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P. Indus., Inc.*, 308 N.C. at 407 (emphasis omitted).

60. Irreparable injury must be "real and immediate." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586 (2002). Merely alleging that irreparable injury is occurring is not enough. *See United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236 (1975). Plaintiff must "set out with particularity

facts supporting such statements so the court can decide for itself if irreparable injury will occur." *Id.*

61. Furthermore, when deciding whether to afford preliminary injunctive relief, the Court must balance the potential harm the plaintiff will suffer if no injunction is entered against the potential harm to the defendants if an injunction is entered. *See Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 694 (1976) ("A court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction."); *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 23, at **12-13 (N.C. Super. Ct. Mar. 15, 2017) ("[T]he trial court must weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is entered." (citing *Williams v. Greene*, 36 N.C. App. 80, 86 (1978))).

62. Ultimately, the decision to grant or deny a preliminary injunction rests in the discretion of the court. *Lambe v. Smith*, 11 N.C. App. 580, 583 (1971).

A. Likelihood of Success on the Merits

63. To succeed on the merits of a misappropriation of trade secrets claim, FBM must identify the information at issue with specificity and then prove both that (a) the identified information is, in fact, a trade secret and (b) it has been misappropriated. *See VisionAIR, Inc.*, 167 N.C. App. at 510-11.

64. A plaintiff must first identify its trade secrets "with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is

threatened to occur." *Krawiec v. Manly*, 370 N.C. 602, 609-10 (2018) (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003)).

65. Not all confidential business information is a trade secret. 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:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3).

66. Six factors assist the Court to determine whether particular information is 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); *accord Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc.*, 125 N.C. App. 174, 180-81 (1997). "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).

67. Misappropriation is defined by statute 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). A court may preliminarily enjoin "actual or threatened misappropriation of a trade secret[.]" N.C.G.S. § 66-154(a).

68. To be reasonably likely to succeed on a claim for misappropriation of trade secrets, a plaintiff must present "substantial evidence" that the person against whom relief is sought both: "[k]nows or should have known of the trade secret; and [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C.G.S. § 66-155.

69. A defendant may rebut a claim of misappropriation by proving that the trade secret was independently developed or determined through reverse engineering, or by proving that the trade secret was relayed by a person with a right to disclose it. *Id.*

70. While the Court recognizes that much of the information presented by FBM appears to be confidential and is undoubtedly important to its operations, the Court is not persuaded, based on this limited record, that all of the information at issue constitutes trade secrets. Likewise, the Court determines that in some

instances FBM has failed to present substantial evidence that particular information was misappropriated.[7]

a. Compilations of Customer, Vendor, and Referral Source Contacts

71. In this category, Plaintiff specifically identifies only a compilation of Greene's Outlook contacts, which consists of 2,930 publicly available names, email addresses and, in some instances, telephone numbers and business addresses. Although compilations of data that include names and addresses as well as other customer specific information can, in some instances, constitute a trade secret, Greene's Outlook contact file has none of this additional information. The individual contacts are not annotated to include information specific to each customer, such as customer preferences, buying habits, or pricing. *Compare Mech. Sys. & Servs. v. Howard*, 2021 NCBC LEXIS 69, at *6-7 (N.C. Super. Ct. Aug. 11, 2021) (on Rule 12(b)(6), a customer list that included contract terms, customer needs, pricing information, recruiting strategies, sales proposals and quotes, and correspondence with potential customers which took "many years of effort" to develop satisfied the particularity requirement to plead a trade secret), *Red Valve, Inc. v. Titan Valve, Inc.*, 2018 NCBC LEXIS 41, at **27-28 (N.C. Super. Ct. Apr. 17, 2018) (compilation of purchasing preferences and order histories as well as customer requests and complaints received over many years had great competitive value and is information generally recognized to be a trade secret), *and Koch Measurement Devices, Inc. v. Armke*, 2013 NCBC LEXIS 45, at **8 (N.C. Super. Ct. Oct. 14, 2013) ("customer lists

[7] The Court is mindful that the record before it is not fully developed and, accordingly, its conclusions are preliminary.

including names, contact persons, addresses and phone number[s] . . . [customer] ordering habits, history . . . [and company] pricing and inventory management strategies" may constitute trade secrets), *with Kadis v. Britt,* 224 N.C. 154, 162 (1944) ("the knowledge of a deliveryman, or other personal solicitor, of the names and addresses of his employer's customers, gained during the performance of his duties, is not a trade secret, partly because the information would be readily discoverable, and partly because of the Court's reluctance to deprive the employee of his subjective knowledge acquired in the course of employment" (quoting 5 Williston on Contracts § 1646)), *Combs & Assocs.*, 147 N.C. at 370 (no trade secret found where defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists), *Bldg. Ctr., Inc. v. Carter Lumber of the North, Inc.*, 2017 NCBC LEXIS 85, at *19-20 (N.C. Super. Ct. Sept. 21, 2017) ("Although customer lists, when compiled with pricing and bidding formulas, can sometimes qualify as a trade secret under the [North Carolina Trade Secrets Protection Act], the Court does not consider a customer list containing only information that is easily accessible through a telephone book or other readily available sources to be a trade secret."), *and Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *26 (N.C. Super. Ct. Apr. 23, 2015) (public information such as client names, customer contact information, or published prices for products is usually not considered a trade secret).

72. Plaintiff does not dispute the fact that the information in Greene's Outlook contacts is available in the public domain. Further, the record contains no

evidence that compiling the contacts took great effort or was done at great expense. *See Wilmington Star-News*, 125 N.C. App. at 181 (including as one of six factors an evaluation of "the ease or difficulty with which the information could properly be acquired or duplicated by others"); *cf. Addison Whitney, LLC,* 2017 NCBC LEXIS 23, at **15 (drug database is not "simply a tool of convenience" but rather was a "voluminous compilation of both private and publicly available information, which required approximately 1,000 hours of work over a 7-year period to create"). And, while Greene maintained and had access to the list, the record is silent as to whether other individuals could also access it. Aside from the fact that employees could not access the computer system without a password, there is no evidence that FBM treated Greene's particular Outlook contacts (or any other employee's Outlook contacts) as trade secret information by taking steps to ensure that his contacts were kept secret.

73. Consequently, on this limited record, the Court concludes that FBM has not shown that it is reasonably likely to prevail on its claim that Greene's Outlook contact list is a trade secret.

b. Customer Credit Information, Current and Historical Pricing Data

74. FBM provides two examples of reports containing information in this category. One exhibit was generated using FBM's business information aggregation tool, Power BI. (Henshaw Aff. Ex. 2.) The exhibit compiles and ranks revenue and profitability for Branch 314's top 55 customers. (Henshaw Aff. ¶ 29(b)(ii).) The

sample provided to the Court includes year-to-date gross sales and profit margins for the past two years for each top customer.

75. The second example is a report generated by FBM's customer relations management software, Rainmakers. The report compiles information for all the jobs on which Branch 314 has bid and includes key financial information related to each job. (Henshaw Aff. ¶ 29(b)(iv).)

76. The business information reflected in the two reports described above required significant effort to accumulate. The compilations provide, in summary form, key insights into FBM's business at Branch 314. A competitor would benefit economically from knowing the information. Because they are so valuable, FBM has employed reasonable measures to secure these compilations. Access to the information is restricted to only those few employees whose duties require that they know it. (*See* Henshaw Aff. ¶ 29(b)(iv)-(v).)

77. However, there is no evidence that either of the compilations FBM references has been sent digitally or in hard copy to Conking. Nevertheless, FBM argues that Chavis is aware of the information contained in these reports and that the threat of disclosure to Conking is real. As this Court has previously observed, North Carolina courts "are reluctant to grant injunctive relief solely on the basis of threatened misappropriation without proof of actual misappropriation." *Allegis Grp., Inc. v. Zachary Piper LLC*, 2013 NCBC LEXIS 12, at **27 (N.C. Super. Ct. Feb. 25, 2013) (citing *Analog Devices, Inc.*, 157 N.C. at 470-71).

78. Although it is possible for Plaintiff to use circumstantial evidence to support its claim, "a wrongdoer's access to and opportunity to acquire a trade secret—without more—is insufficient. Rather, there must be *substantial evidence* (1) that the wrongdoer accessed the trade secret without consent, or (2) of misappropriation resulting in an inference of actual acquisition or use of the trade secret." *Addison Whitney, LLC*, 2017 NCBC LEXIS 23, at **18 (citing *TSG Fishing, LLC v. Bollinger*, 238 N.C. App. 586, 595 (2014)). *See also Bldg Ctr., Inc. v. Carter Lumber of the North, Inc.*, 2017 NCBC LEXIS 85, *23-24 (N.C. Super. Ct. Sept. 21, 2017) ("Plaintiff produced no evidence that [Defendant] disclosed or used any information . . . that he learned through his authorized access to Plaintiff's sales reporting systems").

79. In this case, Chavis had the ability to access the information in Power BI and Rainmakers through the date of his departure from FBM. But FBM's contention that Chavis has used or will use information from the Power BI and Rainmakers software to benefit Conking SE is speculation rather than evidence. To the extent Chavis has approached customers that also do business with FBM, there is no evidence in this record that he relied on information in FBM's Power BI or Rainmakers software, as opposed to relying on his general knowledge of the industry, publicly available information, or the relationships he has developed with customers over the years. *See Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478 (2000) (affirming trial court's denial of preliminary injunction where evidence suggested that defendant had developed a personal relationship with clients

as a result of serving them, and one could expect these clients to follow him to a competing business).

80. Accordingly, as to this category, and on this record, the Court concludes, in its discretion, that FBM has not provided sufficient evidence of misappropriation to support a determination that it is reasonably likely to prevail on its claim and to warrant the extraordinary relief of a preliminary injunction.[8]

c. Vendor Rebates and Discounts

81. Because the information has competitive value, vendor rebates and discounts are closely guarded secrets. Neither FBM nor its vendors share this information with others. Internally, FBM takes steps to secure the information and permits only a few employees to access it.

82. On 28 March 2023, Cirocco emailed Calabrese a price sheet from FBM vendor [redacted]. The price sheet reflected the terms of

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[8] To the extent FBM invites the Court to recognize the doctrine of inevitable disclosure because Chavis has taken a position for a competitor, Conking SE, in which he will perform duties substantially similar to those he performed for FBM, the Court declines to do so. The appellate courts of this State have not adopted the inevitable disclosure doctrine. *See, e.g., Southeast Anesthesiology Consultants v. Charlotte-Mecklenburg Hosp. Auth.*, 2018 NCBC LEXIS 137, at *57-59 (N.C. Super. Ct. June 22, 2018) (observing that a federal district court's prediction that North Carolina would adopt and apply the inevitable disclosure doctrine "ha[d] still not come to fruition" nearly twenty-two years later (citing *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1459 (M.D.N.C. 1996))).

In other jurisdictions where the doctrine has been recognized, it "is generally used to enjoin a former employee from working with a competitor to prevent inevitable future misappropriation . . . . It is not generally thought of as a basis for proof of actual misappropriation after the fact." *Velocity Solutions, Inc. v. BSG, LLC*, 2015 NCBC LEXIS 54, at **25 (N.C. Super. Ct. May 26, 2015). *See Travenol Labs.*, 30 N.C. App. at 693 (declining injunctive relief on the basis of inevitable disclosure and observing that "North Carolina courts have never enjoined an employee from working for a competitor merely to prevent disclosure of confidential information.").

that vendor's discount for FBM. As to this category, therefore, the Court concludes that it is reasonably likely that FBM will prevail on its claim that Conking, through Cirocco, has misappropriated trade secret information specific to its discount with [redacted].

d. Customer [redacted]

83. [redacted] has great competitive value with respect to the bidding process. FBM specifically negotiates [redacted], and both FBM and these customers recognize the importance of [redacted]. FBM safeguards this information in its legal department and limits access to it. The Court concludes that it is reasonably likely that FBM will succeed in proving that its [redacted] is a trade secret. *See, e.g., Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 174 (1992) (pricing and bidding formulas constituted trade secrets); *cf. Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376 (2001) (compilation of historical cost information used to underbid competitor was a trade secret); *Biesse Am., Inc. v. Dominici*, 2019 NCBC LEXIS 50, at *16 (N.C. Super. Ct. Aug. 19, 2019) (nonpublic price lists are among the types of "valuable confidential information that North Carolina courts regularly protect as trade secrets").

84. On 8 May 2023, Cirocco, while working for Conking, emailed Calabrese FBM's [redacted] for three FBM customers: [redacted]

[9] FBM has presented evidence that it won a significant job for [redacted] but that its deliveries for this job stopped on 30 May 2023. Similarly, Henshaw testified that FBM was awarded a job for Incentive Contracting and was making deliveries on the job until soon after Chavis' resignation. (Henshaw Aff. ¶ 73(b), (d).)

[redacted]. Therefore, as to this category, the Court concludes that it is reasonably likely that FBM will prevail on its claim that Conking, through Cirocco, has misappropriated trade secret information specific to FBM's [redacted] with these three customers.

e. Market Product Utilization Rates and Buying Strategies

85. FBM claims to have calculated market utilization rates for its products using data it acquired from Beacon, as well as data it has collected from its own experience. This information allows it to buy and stock, in a cost-effective way, the materials it anticipates will be necessary to serve Branch 314's customers. Henshaw claims to have taught Chavis, Greene, and Cirocco how to use this data to maximize the Branch's buying power.

86. FBM does not describe the process it underwent or the expense it incurred to determine market utilization rates, and it provides no documents that contain this information for any of its products. Furthermore, Chavis, Greene, and Cirocco deny that Henshaw trained them and claim that they have relied on nothing more than their general knowledge and experience in the industry to determine how to buy and stock materials for Conking SE.

87. When an employee has knowledge of an industry and skills resulting from having worked in it for years, and when the employee's skills are not specific to the techniques used by his or her former employer, the employee is free to market those skills to competitors. *See Analog Devices, Inc.*, 157 N.C. App. at 471; *see also Engineering Assocs. v. Pankow*, 268 N.C. 137, 140 (1966) ("[A]n employee may take

with him, at the termination of his employment, general skills and knowledge acquired during his tenure with the former employer."). "The mere fact that [an employee] acquired some of these skills while working for [the former employer] does not mean that [the employee] must work for [the former employer] or not work at all." *Analog Devices, Inc.*, 157 N.C. App. at 471. Absent an enforceable noncompetition covenant, Defendants may "exercise[ ] the privilege every citizen has of accepting employment in the field for which he is trained." *Id.*

88. There is no evidence that market utilization rates were transferred electronically or in hard copy to Conking. Therefore, under the circumstances presented in this record, the Court is unable to conclude that it is reasonably likely that a trade secret with respect to market product utilization rates and buying strategies has been misappropriated.

f. Customer and Job Selection and Quotation Process

89. Similarly, FBM claims that the factors that go into selecting and pricing jobs are a trade secret requiring years of market experience to learn. It contends that Henshaw taught Chavis, Greene, and Cirocco these basic tools of their trade, an allegation they deny. Defendants once again argue that this type of general knowledge about the industry comes from experience and does not constitute a trade secret.

90. FBM provides no training materials or other documents that it contends contain trade secrets. General descriptions of information that are not unique to FBM are insufficient to identify a trade secret. *See, e.g., FMC Corp. v. Cyprus Foote*

Mineral Co., 899 F. Supp. 1477, 1481 (W.D.N.C. 1995) (denying preliminary injunction for violation of [NCTSPA] where plaintiff failed to "come forward with evidence establishing the precise nature of its trade secrets").

91. Furthermore, there is no evidence that any such information was transferred electronically or in hard copy to Conking. To the extent Chavis, Greene, and Cirocco have learned this information through experience in the industry, "equity has no power to compel a man who changes employers to wipe clean the slate of his memory." *Kadis*, 224 N.C. at 162. Therefore, on this record, the Court is unable to conclude that it is reasonably likely that a trade secret exists or, if so, that it has been misappropriated.

g. Personnel Productivity and Compensation Information

92. Compilations by pay period of FBM's piece rate incentive compensation for all the drivers employed at Branch 314, which reflect not only the rate paid but also each driver's production, have competitive value and were securely kept by FBM. On two occasions relatively close in time to his initial communications with Conking, Chavis sent this information to his personal Gmail account. While he argues that he did not use the information inappropriately, the Court concludes that this evidence, particularly when combined with evidence following Chavis' departure of thirteen (13) missing personnel files and an email from Chavis to a Conking employee on 4 May 2023 offering "payroll information," is sufficient at this stage to make it reasonably likely that trade secret information was misappropriated.

B. Irreparable Injury

93. Preliminary injunctive relief is often appropriate when a company's trade secrets are at stake:

> [M]isappropriation of a trade secret is an injury of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. The very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. The party wronged may forever lose its competitive business advantage or, at the least, a significant portion of its market share.

Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 597 (1993) (internal quotation marks omitted). However, if the harm has been done and there is no substantial evidence that additional harm is threatened, damages are the appropriate recourse. *Lewis v. Goodman*, 14 N.C. App. 582, 583 (1972) ("It is well-settled law that where there is an adequate remedy at law, an injunction will not lie.").

94. In this case, FBM is still susceptible to irreparable harm from the improper use of its vendor discount with [redacted], as well as its [redacted]. However, any harm to FBM that might have come from the alleged theft of driver piece rate and productivity information appears to have occurred during the exodus of employees that happened when Chavis resigned in May 2023. FBM has not identified any driver still in its employ whose compensation information was allegedly shared with Conking. For this reason, the Court concludes that preliminary injunctive relief is not appropriate with respect to the alleged misappropriation of personnel productivity and compensation information.

C. Balancing the Equities

95. In this case, Conking, which is historically a northeast regional market participant, has made a foray into the southeastern market with a single office in Charlotte. It is competing against FBM, a national juggernaut with 300 offices across the country.

96. Despite its size, there is no evidence that FBM utilized restrictive covenants to protect the legitimate business interests it may have in its goodwill with customers, investment in employees, and development of confidential business information. Courts have found that an employer's failure to protect itself through these commonly used means weighs against affording it preliminary injunctive relief. *See, e.g., Analog Devices*, 157 N.C. App. at 471 ("While [plaintiff] might have prevented [defendants] from working in the field of HSHR ADC design and development in the event they ceased working for [plaintiff] by making a non-compete clause part of their employment contract, no such clause has been presented."); *FMC Corp.*, 899 F. Supp. at 1479 ("[Plaintiff] never asked defendant to sign a covenant not to compete, and [defendant] never did so.").

97. However, "[a] preliminary injunction is especially warranted where misappropriation threatens to deprive a business of its competitive advantage." *Red Valve, Inc.*, 2018 NCBC LEXIS 41, at **37 (citing *Barr-Mullin*, 108 N.C. App. at 597). Such is the case with respect to information regarding FBM's vendor rebate from [redacted]. and the [redacted]

98. Defendants have testified that they are achieving their goals without using Plaintiff's information. (Cirocco Aff. ¶¶ 20, 27; Greene Aff. ¶¶ 23, 30, 39, 41; Chavis Aff. ¶¶ 28, 35, 44, 46.) It follows, then, that they will suffer little or no harm if the injunction is issued.

99. On this record, the Court concludes that FBM would be irreparably harmed in the absence of an order enjoining Defendants from using and disclosing this information. The harm is immediate and ongoing, and FBM has no adequate remedy at law. The Court therefore concludes that a preliminary injunction is appropriate to prevent Conking's use of FBM's vendor discount with [redacted], and FBM's [redacted] during the pendency of this lawsuit. Defendants remain free, however, to use their own skills, experience, and personal relationships with customers.

IV. CONCLUSION

100. WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, in the exercise of the Court's discretion, that pending final resolution of this civil action, and unless and until otherwise ordered by this Court, Defendants, and any persons or entities in active concert or participation with any of them, are hereby RESTRAINED and ENJOINED from using or disclosing (a) FBM's vendor rebate arrangement with [redacted]; and (b) FBM's [redacted]

[redacted]. Defendants may use their own skills, experience, and personal relationships with customers.

101. The Court concludes, in the exercise of its discretion, that the security bond in the amount of one thousand dollars ($1,000.00) previously posted by Plaintiff is reasonable and appropriate as a condition of granting this preliminary injunction. Accordingly, the Court will not require the posting of additional security at this time. The Court's order concerning the posting of security is without prejudice to any party's right to move the Court to adjust the amount of the security for good cause shown.

IT IS SO ORDERED, this 7th day of July, 2023.

/s/ Julianna Theall Earp
Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases