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Case No. 3718-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GREAT AMERICAN OPPORTUNITIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3718-VCP
	)	
CHERRYDALE FUNDRAISING, LLC, n/k/a ELADYRREHC, L.L.C. and DREW MCMANIGLE, IN HIS SOLE AND LIMITED CAPACITY AS THE ASSIGNEE FOR THE BENEFIT OF ELADYRREHC, L.L.C.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: September 11, 2009
Decided: January 29, 2010

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Raymond J. DiCamillo, Esquire, Margot F. Alicks, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; *Attorneys for Defendant Drew McManigle as Assignee of Eladyrrehc, LLC f/k/a Cherrydale Fundraising, LLC*

PARSONS, Vice Chancellor.

This action focuses on events that occurred in the months before and after the acquisition of substantially all assets of Kathryn Beich, Inc. ("KB") by Great American Opportunities, Inc. ("Great American"). The case involves two claims made by Great American against a third company, Cherrydale Fundraising, LLC ("Cherrydale"): First, that Cherrydale tortiously interfered with Great American's contractual and prospective business relationships with certain of its employees and customers; and second, that Cherrydale willfully and maliciously misappropriated Great American's trade secrets.

On May 16, 2008, I entered a Preliminary Injunction prohibiting Cherrydale from engaging in much of the activity challenged in the Complaint. That Preliminary Injunction remains in effect.

The case has now been tried on the merits and is before me based on the parties' post-trial briefs and oral argument. For the reasons stated in this Opinion, I find that a number of poor decisions were made and wrongful actions were performed by people working as Cherrydale's agents and are attributable to Cherrydale. Thus, I hold that Cherrydale tortiously interfered with Great American's contractual relationships as to three former KB employees by enticing or encouraging them to breach several provisions in their employment contracts. Additionally, I hold that Cherrydale willfully and maliciously misappropriated certain of KB's trade secrets.

Despite Cherrydale's proven wrongdoing, however, Great American largely failed to meet its burden of proof as to damages. Although Great American sought compensation damages for its actual losses in excess of $1 million, it failed to prove that aspect of its claim. Rather, the only compensatory damages the record supports are based

on the degree of Cherrydale's unjust enrichment. Those damages total $61,538. In addition, because Cherrydale willfully and maliciously misappropriated Great American's trade secrets, I award Great American an additional $61,538 in exemplary damages and one half of its reasonable attorneys' fees incurred in connection with this litigation.

Finally, in regard to Great American's motion to hold Cherrydale in contempt of the Preliminary Injunction based on actions its agents took in May 2008, I find Cherrydale liable for contempt and, as a result, award Great American all of its attorneys' fees and expenses it incurred in prosecuting its motion for contempt.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Great American, is a Tennessee corporation with its principal place of business in Nashville, Tennessee. Defendant, Cherrydale, is a Delaware limited liability company with its principal place of business in Allentown, Pennsylvania. This case also relates to KB, a now defunct, nonparty Delaware corporation which had its principal place of business in Illinois.

At the time of the events giving rise to this case, Great American, Cherrydale, and KB competed with one another in the product and service-based fundraising industry. Generally, participants in the fundraising industry market and distribute products and services to nonprofit organizations including schools, student clubs, Parent Teacher Associations (PTAs), church groups, and civic organizations. These groups, in turn, resell the products to raise money for events and activities. Great American, Cherrydale,

and KB each participated in this industry, marketing similar products and services including chocolates, confections, gift wrap, and magazine subscriptions.

Fundraising companies typically sell these products and services through a team of sales representatives assigned to defined geographical "territories" across the country. Many of these sales reps are former teachers and educators, school coaches, or homemakers and may earn between $80,000 and $120,000 a year.[1] When starting out, sales reps may spend years in their assigned territories developing contacts with school principals, PTA presidents, community and organizational leaders and others before they begin to make a profit for their fundraising company.[2] Additionally, an experienced sales rep's annual sales may fluctuate because the leaders at these organizations are often students or their parents and, consequently, contacts change frequently and year-to-year turnover in customers is high.[3] Finally, because of the potential for conflict resulting from sales reps working in the same assigned territory, fundraising companies seeking to hire new sales reps often consider the potential for territorial overlap.[4]

B. Facts

On April 24, 2008, after weeks of negotiation, Great American closed on an Asset Purchase Agreement (the "APA") with KB whereby Great American purchased

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1 Trial Transcript ("T. Tr.") 251, 280 (Belli). Where the identity of the witness is not clear from the text, it is indicated parenthetically, as in this case.

2 *Id*. at 310 (Belli), 733-34 (Southern), 978-79 (Fisher).

3 *Id*. at 250 (Belli), 631 (Hoffrichter), 788, 812 (Southern).

4 *Id*. at 641-42 (Hoffrichter).

substantially all of KB's assets for $9.3 million.[5] Great American's claims in this case arise from actions taken by Cherrydale and its representatives during the months leading up to and following that acquisition.

Because this action involves so many players, I begin by identifying some of the key participants. Many of Great American's factual claims center on Steven Hoffrichter, who worked for Cherrydale as its National Sales Manager and participated heavily in Cherrydale's plan to recruit KB employees. This action also involves Darlene Williamson, a former KB sales representative and regional and national training manager who joined Cherrydale as an independent contractor in November 2007. In addition, Great American's claims focus on the actions of three former KB employees, Gregory Southern, Richard Fisher, and Michael Johnson, each of whom joined Cherrydale between March and June 2008. Finally, the record contains numerous references to communications with and actions taken by Alan Kraft, Cherrydale's President, Howard Lightstone, Cherrydale's Chief Financial Officer, and Larry Rosen, Cherrydale's Chairman.

1. Cherrydale's Recruiting Plan

Beginning in late 2007, Hoffrichter actively set out to expand Cherrydale's sales force with the assistance of Ross Cherry, a then-part owner of Cherrydale who had worked for the company since 1980.[6] In part, Cherrydale sought to facilitate broader

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[5] Joint Exhibit ("JX") 3 (the "APA").

[6] Def.'s Ans. Br. ("DAB") 1; T. Tr. 446 (Hoffrichter).

access to its products by expanding the territory covered by its sales reps into previously unserviced areas.[7] Cherry formulated a recruiting plan for Cherrydale in November 2007 and suggested that "[g]etting within the KB network, or the network of some of the other national companies, is how to get started."[8] In an email accompanying this plan, Cherry recognized that such recruitment efforts may be difficult because some of the sales reps who then worked for KB would "have non-competes" which Cherrydale would have to deal with.[9] After Cherrydale removed Cherry as a recruiter in December 2007,[10] Hoffrichter continued Cherrydale's efforts to recruit sales reps within the KB network.

In November 2007, Williamson, who had left KB in July 2006, joined Cherrydale. The next former KB employee to join Cherrydale was Southern. After working for KB in California for several years,[11] Southern contacted Hoffrichter in May 2007 to discuss possible opportunities with Cherrydale, but no serious negotiations took place at that time.[12] Southern again contacted Hoffrichter in early 2008 and, after some discussion,

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7 T. Tr. 459, 560, 587 (Hoffrichter), 1114 (Kraft).

8 JX 36.

9 *Id.*

10 T. Tr. 1073-74 (Kraft); Pl.'s Op. Br. ("POB") 5 n.1 ("For reasons unrelated to his recruiting efforts, Cherry was relieved of his daily responsibilities as a Cherrydale recruiter in December 2007 and was asked not to return to the company offices around March 2008.").

11 T. Tr. 732-33 (Southern).

12 *Id.* at 777-79. At approximately the same time, Southern communicated with four other fundraising companies about potential opportunities. *Id.*

accepted a proposal to become an independent contractor for Cherrydale on February 26, 2008 (the "February 26 Proposal").[13] Though Southern began actively working for Cherrydale on March 25,[14] he remained an employee of KB until April 18, 2008.[15] During this time, Southern accessed documents on the KB report portal, including the Ranking Report[16] and the Order Status Report,[17] maintained a copy of his customer information list,[18] contacted individuals on that list,[19] and assisted Cherrydale in its recruiting efforts.[20]

Soon after contacting Hoffrichter in early 2008, Southern began assisting Cherrydale with its recruiting efforts and talking with Hoffrichter about "his KB friends."[21] On February 8, Southern called Fisher, who worked for KB in Phoenix, Arizona, and repeated a rumor to him to the effect that KB had been sold to Great

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13 JX 51.

14 JX 114.

15 A March 24 email from Hoffrichter to Kraft and Lightstone noted that Southern had not "officially given word to KB yet – so he's still a bit under the radar." JX 64.

16 JX 119; T. Tr. 208-09 (Solima).

17 JX 312; T. Tr. 817 (Southern).

18 T. Tr. 769-70 (Southern).

19 *Id.*

20 JX 53.

21 *Id.* On February 26, the same day Southern accepted employment with Cherrydale, Hoffrichter told Rosen and Kraft that "[I] have a call into [Southern] to discuss his KB friends." *Id.*

American that day.[22] While this rumor turned out to be false, it prompted Fisher to begin thinking about his future in the fundraising industry.[23] A few days later, Fisher called Hoffrichter to discuss possible employment with Cherrydale.[24] After communicating with Hoffrichter and a competing fundraising company,[25] Fisher signed an agreement with Cherrydale on April 2, 2008.[26] Though he began working for Cherrydale on April 14, Fisher did not resign from KB until April 18.[27]

Shortly after Southern joined Cherrydale, Hoffrichter spoke with him and Williamson regarding KB sales reps they thought might be amenable to Cherrydale's recruitment efforts.[28] Based on these conversations and others with Herb Horn,[29] on March 4, 2008, Hoffrichter circulated his first "Target List of KB Reps," which included some of the top sales reps at KB.[30] Nine days later, on March 13, Hoffrichter circulated an updated "Target List of KB Reps" that, for the first time, indicated the sales volumes

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22 T. Tr. 1042-46 (Fisher).

23 *Id.*

24 *Id.* at 1045. Fisher received Hoffrichter's contact information from Southern. JX 118.

25 T. Tr. 1046 (Fisher).

26 *Id.* at 1009.

27 *Id.* at 1000, 1045-46, 1048.

28 *See supra* note 21; JX 54.

29 JX 54. Herb Horn was a former Vice President of Sales for KB. JX 136.

30 JX 54.

of the KB sales reps.[31] According to an email, this updated list represented "the best of the KB sales force."[32] Hoffrichter used these sales volume figures, which he claims he obtained from conversations with Williamson and Southern,[33] despite recognizing the figures as KB's confidential information.[34]

Initially, Hoffrichter employed passive tactics to recruit KB employees.[35] On March 10, however, Rosen pointedly told Hoffrichter that Cherrydale needed to bring "more salespeople to the sales force asap"[36] and that it was time to "get aggressive."[37] Though Hoffrichter sent at least two mailings to KB sales reps in March,[38] by mid-April, his recruiting efforts had become more active, including sending faxes and making follow-up telephone calls to multiple KB employees.[39] Specifically, Hoffrichter faxed a letter to seventeen KB employees on April 18, 2008 informing them of "an opportunity

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31 *Compare* JX 54 *with* JX 59.

32 JX 59.

33 T. Tr. 599-600.

34 *Id*. at 602-03.

35 Hoffrichter referred to this passive recruiting plan in a February 8, 2008 email, which noted that he would "not be calling anyone" but would instead be "putting out the word for them to call me." JX 47.

36 JX 58.

37 JX 60.

38 JX 55, 69.

39 JX 77.

with Cherrydale" for any sales reps looking for "other options."[40] According to an email he sent to Kraft and Rosen, Hoffrichter planned to send similar letters on April 19.[41] In addition, Hoffrichter's April 18 letter invited interested KB sales reps to attend a meeting on April 29 in Allentown to discuss employment opportunities.[42]

Before this meeting took place, however, Great American obtained a Temporary Restraining Order ("TRO") against Cherrydale and thereafter its recruiting efforts largely ceased.[43] Among other things, the TRO enjoined Cherrydale from soliciting, receiving, or using Great American or KB's confidential information or from moving forward with its April 29 meeting or otherwise soliciting or encouraging KB employees to use confidential KB information or breach their employment contracts.

This communication ban interrupted communications between Cherrydale and Johnson who, after approaching Cherrydale in the spring of 2008 about potential employment opportunities, became the last of the former KB employees to join Cherrydale.[44] Johnson, whose territory within the KB network included counties in Tennessee and Virginia, initially communicated directly with Hoffrichter.[45] Those

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40 T. Tr. at 671-72.

41 JX 80.

42 JX 77.

43 Temp. Restraining Order (Apr. 28, 2008).

44 T. Tr. 908-09 (Johnson).

45 *Id*. at 909.

communications ceased, however, after Hoffrichter was instructed to cut off contact with any former KB employees.[46] On May 2, 2008 despite having no promise of employment with Cherrydale or any other company, Johnson resigned from KB, after having rejected Great American's efforts to sign him.[47] The TRO communication ban was lifted in mid-May 2008[48] and, several days later, Cherrydale hired Johnson as part of its sales team.[49]

In total, Cherrydale's recruiting efforts resulted in only four sales representatives joining Cherrydale directly from KB—Southern, Fisher, Johnson, and Sharon Passantino.[50] When Great American executed the APA, ninety-five sales reps worked for KB.[51] Of these, eighty-two eventually joined Great American.[52] Johnson and Passantino were the only two of the remaining thirteen sales reps to join Cherrydale.

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46 *Id.*; *see also* Prelim. Inj. Order ("Prelim. Inj.") ¶ 2(d) (May 16, 2008).

47 T. Tr. 910-11.

48 *See supra* note 43.

49 T. Tr. 911-12. Johnson joined Cherrydale on June 5, 2008. *Id.*

50 None of Great American's claims implicate employment negotiations between Passantino and Cherrydale or any actions taken by Passantino after she left KB. Unlike other KB employees, Passantino's employment contract did not contain a provision preventing Passantino from selling to her former KB accounts through her new employer. *Id.* at 378 (Belli). Passantino left Cherrydale sometime before trial. *Id.* at 651 (Hoffrichter).

51 This number does not include Southern and Fisher, because by April 24, 2008, the day the APA was executed, they both had left KB. T. Tr. 369 (Belli).

52 *Id.* at 368-69.

As noted above, during Cherrydale's recruiting efforts, Hoffrichter obtained confidential KB information from Williamson and Southern and, to a lesser extent, Fisher and Johnson, which he used to aid his efforts. This information included KB's Consultant Schedule, which Hoffrichter used to target the "Best of the Best" within the KB sales force,[53] and the Ranking Report, which contained sales volume figures of KB employees.[54]

2. The Consultant Schedule

After Cherrydale hired Williamson, Hoffrichter talked with her about KB sales reps she thought might be looking to change companies.[55] Williamson responded to these conversations, in part, by giving Hoffrichter copies of KB's Employment Contract,[56] Consultant Schedule,[57] and Independent Contractor Contract.[58] The Consultant Schedule was a list of KB sales reps that Williamson printed from a KB computer system in late 2005 while she still was employed there.[59] In addition to the names of the sales reps, the Consultant Schedule contained names of their spouses, home

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53 JX 52.

54 *See infra* note 62.

55 JX 54, 80, 89; T. Tr. 599-600.

56 JX 31.

57 T. Tr. 1045-46 (Fisher).

58 JX 95.

59 T. Tr. 955-56.

addresses, telephone numbers, hire dates, email addresses, fax numbers, and the names of regional managers.[60] Hoffrichter admitted that the Consultant Schedule "accelerated" his recruiting efforts.[61]

3. The KB Ranking Report

Hoffrichter also received a copy of the KB Ranking Report. This real-time Report contained a list of KB representatives ranked by volume of sales paid.[62] In the days before Hoffrichter circulated his March 13 updated "Target List of KB Reps"—and while Southern was discussing Cherrydale employment with "his KB friends"[63]—Southern accessed KB's report portal five times to examine the Ranking Report.[64] Additionally, on April 23, Denise Morse, a KB sales representative who had inquired about employment with Cherrydale, sent Hoffrichter a copy of the Ranking Report,[65] which ranked KB's sales reps by volume of sales paid as of April 13, 2008.[66] Cherrydale

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60 JX 1.

61 T. Tr. 452-53, 522. The Consultant Schedule accelerated Hoffrichter's efforts to recruit from within KB because he did not have many of the names contained in the schedule before receiving it. *Id.* at 453.

62 JX 2; T. Tr. 203 (Solima), 1057-58 (Fisher).

63 JX 53.

64 According to the access report, Southern accessed the Ranking Report on March 3, 5, 7, 9, and 13. T. Tr. 208-09 (Solima); JX 119.

65 T. Tr. 678-79 (Hoffrichter).

66 JX 143. Hoffrichter received the report from Morse after responding "[s]ure" to her inquiry whether he wanted her to send it. T. Tr. 679. Hoffrichter denied ever

claimed to have disciplined Hoffrichter for receipt and use of both the confidential sales volume figures contained in Hoffrichter's updated Target List and the Ranking Report, but the nature and extent of the discipline is unclear and undocumented.[67]

4. KB's Customer Contact Information and the Order Status Report

Southern, Fisher, and Johnson each maintained customer contact lists at Cherrydale that they had compiled while working at KB.[68] Typically, following termination of employment with KB, sales reps received letters reminding them of their contractual obligations and asking that all confidential information, including "[a]ll territory contact lists," be returned to KB.[69] Southern, Fisher, and Johnson testified that they maintained these lists because they did not consider continued possession of the KB customer lists while employed with Cherrydale improper.[70]

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using the April 13 version of the Ranking Report received from Morse to recruit former KB employees or for any other reason. *Id.* at 680-81.

[67] *Id.* at 1128-29 (Kraft).

[68] *Id.* at 769-70 (Southern), 848-50 (Johnson), 1019-20 (Fisher).

[69] JX 85 (Southern termination letter from KB); *see also* JX 12 (Johnson termination letter from KB noting that Johnson must "immediately return any and all of [KB's] trade secrets, proprietary, and/or confidential information that is in your possession or control.").

[70] Southern said he maintained a customer list on his home computer because he considered it his information. T. Tr. 769-70. Johnson stated that he maintained a customer list on his computer because "I felt that the information that I had built and accrued was mine." *Id.* at 847-48.

After he left KB, Southern also downloaded a copy of an Order Status Report.[71] This Report contained a list of schools that Southern had worked with in that particular season, included phone numbers and addresses, and listed the status of various KB orders. Southern testified that he kept the Report because "it was an easy location for phone numbers and addresses, if I needed to enter those in a mailing or in a new agreement."[72] From the time Southern signed the February 26 Proposal until he resigned from KB, Southern accessed the Report on the KB system at least twelve times.[73] Southern accessed not only his own Order Status Report, but also that of Harold Zane, another KB sales rep.[74]

5. Cherrydale's Actions After the Court's Issuance of the Preliminary Injunction

On May 16, 2008, this Court issued a Preliminary Injunction enjoining Cherrydale (1) from further appropriating, using, or revealing any of Great American's confidential customer information or other trade secret or proprietary information that is not readily available through proper means and (2) from assigning Fisher to work in any part of the

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71 *Id.* at 817; JX 312.

72 *Id.*

73 JX 20.

74 JX 20 at pp. 41, 42, 49, 50. According to Great American's IT Director, Ed Solima, Southern routinely accessed other KB sales reps' sales and customer information after he agreed to join Cherrydale, including Zane's contact list and Order Status Report and Corinne Lillbridge's contact list. T. Tr. 231-32.

territory he worked in while employed at KB for a period of one year.[75] This Order also required Cherrydale to ensure that Hoffrichter, Williamson, Southern, and Fisher did not take part in soliciting, contacting, recruiting, or hiring any individuals who worked for KB on April 24, 2008 and to return or destroy any documents containing Great American's trade secrets and other confidential and proprietary information.[76]

Following entry of the Preliminary Injunction, Cherrydale and certain of its employees took actions that bear on Great American's claims.

First, Fisher sent a form letter drafted by Cherrydale's attorneys to between forty and fifty of his former KB customers.[77] This "Abe Lincoln" letter, so-called because the draft was addressed to Abe Lincoln, explained to Fisher's former KB customers that he would be unable to service their accounts because of the Preliminary Injunction and introduced them to one of Cherrydale's sales reps, Lisa Conati, who would be "the Cherrydale sales representative . . . contacting [Fisher's customers] and servicing [their] account."[78] In line with instructions Kraft gave to Fisher, Cherrydale also took other steps to transition Fisher's former accounts to Conati.[79] The two met together for two

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75 Prelim. Inj.

76 *Id.*

77 JX 101; T. Tr. 1061 (Fisher).

78 JX 101.

79 Kraft wrote to Fisher that "Cherrydale will make arrangements to service the accounts you signed" and informed him that "[Hoffrichter] and I will coordinate with you shortly to transition those accounts to another Cherrydale representative, Lisa Conati." JX 98.

hours and Fisher gave Conati information concerning his past and prospective KB customers.[80] In an August 29, 2008 email to Fisher, Hoffrichter indicated that Cherrydale employed similar tactics with regard to customers formerly serviced by Johnson.[81]

Second, from May 3, the day after he resigned, until June 22, Johnson continued to access his former KB email account and forward customer contact information to his personal email account.[82] The information Johnson forwarded to himself included a document entitled "Knoxville Area Contacts," which Johnson used to solicit customers on Cherrydale's behalf, [83] and an inquiry email sent to Johnson's KB account from an elementary school in the area assigned to him while at KB.[84] Johnson continued to access the email account despite a June 2 email from Kraft directing him not to use information gained from KB.[85]

Finally, as noted previously, Southern, Fisher, and Johnson have continued to maintain lists of customers whose accounts they serviced while employed with KB.[86]

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80 T. Tr. 1022 (Fisher).

81 JX 117 ("[m]uch like you [Fisher], he [Johnson] is getting calls from former customers that want to do business. He is telling them the same script you use. [Sentence redacted by Cherrydale] – Much like you are doing with Lisa Conati.").

82 JX 15.

83 T. Tr. 831-32.

84 *See* JX 22, 102.

85 JX 104.

86 *See supra* Part I.B.4.

Having recounted the events giving rise to this action, I now turn to certain documents that bear directly on Great American's claims, including the KB Employment Contract, the KB Employee Handbook, and the APA.

6. KB Employment Contract and Employee Handbook

Southern, Fisher, and Johnson and all but three of KB's sales reps signed a form KB employment contract (the "Employment Contract") when they joined KB.[87] The Employment Contract contains several clauses relevant to Great American's tortious interference claims, including the following: (1) a noncompete clause preventing sales reps from "engag[ing] in or in any way assist[ing] in any sales or similar related work or services for any third-party fund-raising company, or any fund raising products of any kind" in their assigned Territory during employment with KB and for a period of one year after termination of employment, (2) a clause requiring the return of "all [KB] materials" including "samples, manuals, customer files, invoices, address files, supplies and advertising/promotion material" as well as "any materials prepared by [the sales rep] utilizing any such [KB] materials, (3) a clause stating that sales reps "acknowledge and agree that customer-related information" received from KB is "confidential and proprietary to [KB]," (4) a clause prohibiting sales reps from "us[ing] any information designated in the Agreement as [KB] property or as confidential or proprietary to [KB] for any purpose other than in furtherance of [the sales rep's] responsibilities" in working for KB, and (5) a clause requiring KB sales reps to "follow all [KB] policies and

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[87] JX 4; T. Tr. 270.

procedures, and to direct [the sales rep's] full time and best efforts to sell and promote the products of [KB]."[88]

This last clause implicates the KB Employee Handbook (the "KB Handbook" or "Handbook"), which contains explicit provisions detailing KB policies and procedures, and requires employees to follow those provisions.[89] Among other things, the Handbook contains provisions: requiring employees to preserve the confidentiality of all KB trade secrets and confidential information, including compensation data, sales and customer lists, and financial information;[90] prohibiting employees from accessing personnel files without "a legitimate business reason";[91] prohibiting employees from "us[ing] a password, access[ing] a file, or retriev[ing] any stored communication without authorization or for any purpose other than [KB]'s business";[92] and requiring all employees to "return all [KB] property immediately upon request or upon termination of employment."[93]

Consistent with the confidentiality policies contained in the Handbook, KB took certain steps to maintain the secrecy of its proprietary information. For instance, sales

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[88] JX 8, 9, 10, 11, 31.

[89] JX 24.

[90] *Id.* § 105.

[91] *Id.* § 202.

[92] *Id.* § 701.

[93] *Id.* § 803.

reps could only access the KB report portal—which held the Consultant Schedule, Ranking Report, and Order Status Report—by inputing user names and passwords into two separate log-in screens.[94] Remote access to the KB computer network and KB email accounts also required KB sales reps to input their user name and password. Solima testified that the KB data protection system and protocols conformed to general practice in the IT field.[95] Additionally, when KB sales reps resigned, KB delivered to them a termination of employment letter requiring employees to conform their conduct to the terms of the Handbook and Employment Contract, including those terms requiring return of KB property and information.

Notably lacking in either the Employment Contract or the KB Handbook, however, is a clause or policy prohibiting KB sales reps from soliciting co-workers to work for another company. Though Great American contends that such nonsolicitation obligations exist and were breached by Southern, Fisher, and Johnson,[96] it has not

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94 JX 13-13B; T. Tr. 184.

95 T. Tr. 185-86.

96 Pl.'s Reply Br. ("PRB") 7 ("By hiring Southern, Fisher and Johnson, Cherrydale tortiously interfered with Great American's contractual right to preclude: (i) Southern from soliciting his former KB co-workers and (ii) Fisher and Johnson from competing for customers in their former KB territories and from soliciting their former KB co-workers.").

identified any such clause in the Employment Contract, and the Court has not found one.[97]

7. Relevant Terms of the APA

Seeking to increase its sales force through the addition of KB's sales force,[98] Great American entered into the APA with KB on April 24, 2008.[99] In an effort to acquire KB's ninety-five sales reps and their customer relationships, Great American paid $9.3 million in exchange for, among other things, the following KB assets: First, all of KB's information on past, present, and potential customers, including contact information, fundraising needs, cost and margins on products sold, account disputes and resolution, and the likelihood of customers conducting similar fundraisers in the future;[100] second, all assignable rights under nondisclosure, nonsolicitation, and noncompetition agreements;[101] third, all rights, claims, and causes of action for any past, present or future infringement of KB's confidential or proprietary information, including intellectual property rights;[102] fourth, KB's business records, marketing and pay plans, and personal

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[97] The only provision in the KB Handbook mentioning solicitation merely prohibits employees from selling merchandise or memberships to or soliciting funds or signatures from any co-worker while at work. JX 24 § 706.

[98] T. Tr. 60 (Bedford).

[99] *See supra* note 5.

[100] APA § 2.2(g).

[101] *Id.* § 2.2(f).

[102] *Id.* § 2.2(j).

and business information on the sales reps;[103] and fifth, all rights in and goodwill arising from KB's customer relationships.[104]

C. Procedural History

On April 28, 2008, Great American commenced this action in Delaware seeking injunctive relief and monetary damages for allegedly unlawful acts committed by Cherrydale and its agents. I granted Great American's motion for a TRO on April 30.[105] On May 16, I entered a Preliminary Injunction that superseded the TRO.[106] Beginning on January 9, 2009, I conducted a six-day trial on all of Great American's remaining claims against Cherrydale.

On March 3, 2009, Cherrydale assigned its assets for the benefit of creditors.[107] This assignment gave rise to a number of collateral issues and temporarily derailed the post-trial proceedings in this case. Nevertheless, after some delay, the parties completed their post-trial briefing, and I heard oral argument on September 11.

This Opinion reflects my post-trial findings of fact and conclusions of law in this matter.

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[103] *Id.* § 2.2(i).

[104] *Id.* §§ 2.1, 2.2(l).

[105] *See supra* notes 43-44 and accompanying text.

[106] *See supra* Part I.B.5.

[107] *See In re Eladyrrehc, LLC*, No. 4403-VCP (Del. Ch. Oct. 30, 2009) (Petition).

D. Parties' Contentions

Great American's Complaint sought damages against Cherrydale on several different theories, including tortious interference with contract and prospective business relations (Counts Two and Three), misappropriation of trade secrets (Count Six), aiding and abetting breach of contract (Count Four), and unfair competition (Count Five).[108] In its post-trial briefs, however, Great American focused almost exclusively on its tortious interference and misappropriation of trade secrets claims.[109] Further, at oral argument, Great American's counsel acknowledged that its additional claims for aiding and abetting, unfair competition, and conspiracy were duplicative and effectively abandoned those claims. Accordingly, I need not address further Great American's claims for aiding and abetting breach of contract, unfair competition, and conspiracy.

II. ANALYSIS

A. Choice of Law?

Before examining Great American's tortious interference and misappropriation of trade secrets claims, the Court first must determine which state's substantive law governs this dispute. As the preceding discussion illustrates, this action involves numerous entities, actors, and events spanning several states. Nevertheless, because the relevant laws in each of the various jurisdictions are substantially the same, I need address only briefly the choice of law question.

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108 Compl. ¶¶ 37-59.

109 POB 28 n.14.

When examining conflicts of law issues, Delaware courts adhere to the Restatement (Second) of Conflicts and generally apply the law of the state with the most significant relationship to the parties and the occurrence giving rise to the suit.[110] In this case, several states, to varying degrees, have a relationship with this dispute, including Arizona, California, Delaware, Illinois, and Tennessee. Both parties recognize, however, that the relevant laws of these states are "generally substantially the same as they relate to the issues in this case."[111] Each state recognizes the same basic elements for tortious interference with contractual relations and prospective contractual relations,[112] and each has enacted the Uniform Trade Secrets Act with no relevant deviations.[113] The only potential differences in laws relate to (1) the enforceability of noncompete clauses in employment contracts—they are void under California law subject to certain exceptions

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[110] *See Ubiquitel Inc. v. Sprint Corp.*, 2005 WL 3533697, at *3 (Del. Ch. Dec. 14, 2005); *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (citing *Travelers Indem. Co. v. Lake,* 594 A.2d 38, 46-47 (Del. 1991)); *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 343856, at *4 n.10 (Del. Ch. Feb. 7, 2008) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1) (1997) (noting the seven broad policy considerations that can inform choice of law decisions)).

[111] DAB 22; POB 28-29.

[112] *See, e.g.*, *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 985 P.2d 535, 547 (Ariz. Ct. App. 1998); *Farmers Ins. Exchange v. State of Cal.*, 175 Cal. App. 3d 494, 506 (Cal. Ct. App. 1985); *Estate of Carpenter v. Dinneen*, 2007 WL 2813784, at *5 (Del. Ch. Apr. 11, 2007); *Bolger v. Danley Lumber Co.*, 395 N.E.2d 1066, 1068 (Ill. App. Ct. 1979); *Campbell v. Matlock*, 749 S.W.2d 748, 751 (Tenn. Ct. App. 1987).

[113] *See Ariz. Rev. Stat. Ann.* §§ 44-401 to 44-407; *Cal. Civ. Code* §§ 3426.1-3426.11; 6 *Del. C.* §§ 2001-2009; 765 *Ill. Comp. Stat.* 1065/1-1065/9; *Tenn. Code Ann.* §§ 47-25-1701 to 47-25-1709.

but generally enforceable in the other interested states[114]—and (2) the assignability of noncompete agreements.[115] Accordingly, because the laws of the several interested states relevant to the issues in this case all would produce the same decision no matter which state's law is applied, there is no real conflict and a choice of law analysis would be superfluous.[116] Thus, I analyze Great American's claims under Delaware law.

B. Did Cherrydale Tortiously Interfere with KB's Employment Contract and Prospective Contractual Relations with Former KB Customers?

In this section, I discuss Great American's tortious interference claims and conclude that Cherrydale did tortiously interfere with KB's Employment Contracts with Southern, Fisher, and Johnson, causing injury to Great American. The amount of damages, if any, arising from Cherrydale's interference is addressed in Part II.D.2 below.

Delaware courts recognize a cause of action for tortious interference with contractual relations. The elements for this tort are well established and require a

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[114] *See* Cal. Bus. & Prof. Code § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); *see also Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008). Because Great American does not seek to enforce the noncompete agreement of Southern, who resides in California, this distinction is not relevant to the dispute before me.

[115] For the most part, this issue affects only the assignability of Johnson's noncompete agreement and is addressed *infra* Part II.B.2.

[116] *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 838 n.20 (1985); *Kronenberg v. Katz*, 2004 WL 5366649, at *16 (Del. Ch. 2004) ("Where the choice of law would not influence the outcome, the court may avoid making a choice."); *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.,* 1998 WL 437137, at *5 (Del. Super. June 10, 1998) ("When a choice of law analysis does not impact the outcome of the court's decision, no choice of law analysis need be made."), *aff'd,* 731 A.2d 811 (Del. 1999).

showing of "(1) a valid contract, (2) about which the defendants have knowledge, (3) an intentional act by defendants that is a significant factor in causing the breach of the [contract], (4) done without justification, and (5) which causes injury."[117] Thus, for each alleged act of interference by Cherrydale, Great American must show that a valid contractual relationship existed, that Cherrydale knew of and unjustifiably interfered with that contract, inducing its breach, and that Great American suffered damages as a result.

Delaware courts also recognize a cause of action for tortious interference with prospective contractual relations. Conceptually similar to tortious interference with contract, this tort requires (a) a reasonable probability of a business opportunity or prospective contractual relationship, (b) intentional interference by a defendant with that opportunity, (c) proximate cause, and (d) damages.[118] Furthermore, all of these requirements must be considered in light of a defendant's privilege to compete or protect his business interests in a lawful manner.[119]

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117 *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood,* 752 A.2d 1175, 1182 (Del. Ch. 1999); *see also All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *6 (Del. Ch. Aug. 9, 2004), *aff'd*, 880 A.2d 1047 (Del. 2005); *Estate of Carpenter*, 2007 WL 2813784, at *5 (citing *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.,* 871 A.2d 428, 437 (Del. 2005); *Irwin & Leighton, Inc. v. W.M. Anderson Co.,* 532 A.2d 983, 992 (Del. Ch. 1987) ("The critical question . . . [is whether the party acted] so as to bring about . . . [the] breach and, if so, was it justified by legitimate pursuit of its own interest in so acting.")).

118 *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).

119 *Id.*

Great American argues that Cherrydale tortiously interfered with KB's Employment Contracts by inducing Southern, Fisher, and Johnson to breach noncompete and nonsolicitation clauses as well as other contractual provisions. Great American further contends that Cherrydale's unlawful conduct precipitated the decisions of two other former KB sales reps, Doris Walker and Cindi Green, not to join Great American.[120] Finally, Great American cursorily avers that Cherrydale interfered with its

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[120] Unlike its claim for tortious interference with the Employment Contracts of Southern, Fisher, and Johnson, Great American's arguments with regard to Green and Walker more accurately reflect claims for tortious interference with prospective contractual relations.

Great American provided no evidence, however, of a reasonable probability or expectation that Green and Walker would have entered into employment contracts with Great American following execution of the APA; nor has it pointed to any provision in the KB Employment Contract or public policy consideration that would prevent KB employees from talking with a competitor regarding possible employment opportunities. Indeed, Great American provided no evidence that such conversations between Cherrydale and Green and Walker even took place. In total, Great American's argument for tortious interference with prospective contractual relations with Green and Walker relies on a portion of Johnson's testimony that does nothing more than note that he knew both Green and Walker and may have talked with them in early 2008 regarding rumors of KB's impending sale. T. Tr. 856-57.

Great American's half-hearted contentions in this regard do not meet the preponderance of the evidence standard. *See Triton Constr. Co. v. E. Shore Elec. Serv., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009) ("To succeed on its various claims against Defendants [including a claim of tortious interference with prospective contractual relations and tortious interference with contract], Triton must prove liability by a preponderance of the evidence."), *aff'd*, ___ A.2d ___ (Del. Jan. 14, 2010) (ORDER); *Shipman v. Div. of Soc. Servs.*, 454 A.2d 767, 768 (Del. Fam. Ct. 1982) (noting that preponderance of the evidence means "such relevant evidence as will enable the court to determine the identity of the litigant who should prevail, the weight of the evidence tipping in favor of that litigant.").

prospective contractual relations with former KB customers by allowing and encouraging Southern, Fisher, and Johnson to retain KB customer information and use it to foster Cherrydale's sales efforts.

Acknowledging that "certain Cherrydale representatives did not behave perfectly" and "made judgments that in hindsight may have been questionable or even wrong,"[121] Cherrydale responds to Great American's claims by arguing that Great American did not establish tortious interference with any contract because it did not show that the relevant Employment Contracts were assignable, that Cherrydale wrongfully interfered with any employment or customer contracts, or that any of those contracts were breached. Cherrydale also argues that Great American's tortious interference claims have no legal basis because Delaware "does not recognize an action for tortious interference with an at-will employment relationship."[122]

1. Tortious Interference with Contract in an "At Will" Employment Relationship

I address Cherrydale's last argument first. Cherrydale supports its contention that Delaware does not recognize an action for tortious interference with an at-will employment relationship by quoting *Triton Construction*.[123] That case involved an

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Consequently, any claim based on Cherrydale's supposed interference with Great American's potential contractual relations with Green and Walker fails.

121 DAB 2.

122 *Triton Constr. Co.*, 2009 WL 1387115, at *17.

123 *Id.*

electrical worker moonlighting for the defendant electrical company after hours.[124] The electrical worker in *Triton Construction* never had an employment contract with the plaintiff electrical contractor and, thus, remained an "at-will" employee who was under no contractual obligation to remain with or work solely for the benefit of the plaintiff electrical company.[125] Because the employee lacked a valid employment contract, the court in *Triton Construction* found that the plaintiff electrical contractor could not maintain a claim for tortious interference with contract.[126]

The fact that Delaware "does not recognize an action for tortious interference with an at-will employment relationship"[127] in such a situation, however, does not provide any support for Cherrydale's implied proposition that the "at-will" nature of an employment relationship automatically vitiates contractual obligations arising from a validly executed employment contract. To the contrary, claims for tortious interference with contract apply just as readily to an "at-will" employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time. Even though Southern, Fisher, Johnson, and other sales reps at KB had no expectation with regard to a specific "length of employment or [the

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124 *Id*. at *17-18.

125 *Id*. at *17-18, 26.

126 *Id*.

127 *Id*. at *17.

requirement of] grounds for termination,"[128] each of these sales reps did enter into a binding contractual relationship with KB with which Cherrydale could have tortiously interfered. Thus, I find Cherrydale's assertion in this regard without merit.

2. Assignability of Restrictive Covenants in an Employment Contract

Before turning to the validity of Great American's claims of tortious interference with KB's Employment Contracts with Southern, Johnson, and Fisher, I next address whether the restrictive covenants contained in those Employment Contracts were validly assigned to Great American following execution of the APA.

The import of that question as to Southern and Fisher's Employment Contracts is diminished because the bulk of Cherrydale's allegedly tortious conduct involving those individuals occurred before the execution of the APA.[129] Any claims based on that conduct thus accrued before Great American purchased KB's assets. This is relevant because under Section 2.1 of the APA, Great American purchased from KB:

> [A]ll of the right, title, and interest of [KB] in and to **all of the assets, properties, and rights of [KB]** that are used or usable in the operation of the Business of every kind, nature, type, and description, real, personal, and mixed, tangible and intangible, wherever located, . . . , whether known or unknown, fixed or unfixed, or otherwise, whether or not specifically referred to in this Agreement and whether or not reflected on the books and records of [KB].[130]

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[128] *Foley v. Interactive Data Corp.*, 765 P.2d 373, 385 (Cal. 1988); *see also Haney v. Laub*, 312 A.2d 330, 332 (Del. Super. 1973).

[129] *See supra* Part I.B.1.

[130] APA § 2.1 (emphasis added).

Through this clause, KB broadly assigned to Great American all of its rights, including the right to pursue causes of action for tortious interference with Southern and Fisher's contracts with KB that accrued before execution of the APA. Consequently, for actions that occurred before that time, Cherrydale's assignability argument has no merit.

But, the assignability of restrictive clauses contained in employment contracts does affect Great American's claims of tortious interference with Johnson's noncompete agreement. The Court must determine, therefore, whether restrictive covenants contained in an employment agreement lacking an assignability clause are enforceable by a successor company that has purchased substantially all of the original employer's assets.

In large measure, this is an issue of first impression. In support of its proposition that "employment contracts are non-assignable" in Delaware,[131] Cherrydale cites two cases: *Trinity Transportation* from the Court of Chancery[132] and *Hess* from the Pennsylvania Supreme Court.[133] Contrary to Cherrydale's contentions, however, *Trinity* does not reflect Delaware's stance on this issue. As Great American correctly notes, "while the *Trinity* case was heard in a Delaware court, it did not involve application of Delaware law"; instead, the court applied Maryland law.[134] Furthermore, *Hess* relied on the court's decision in *Trinity* when it listed Delaware among the jurisdictions denying

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131 DAB 23.

132 *Trinity Trans. Inc. v. Ryan*, 1986 WL 11111 (Del. Ch. Oct. 1, 1986).

133 *Hess v. Gebhard & Co.*, 808 A.2d 912 (Pa. 2002).

134 PRB 5 (citing *Trinity Trans. Inc.*, 1986 WL 11111, at *1).

the assignability of restrictive covenants absent an assignability clause.[135] As a result, *Hess* provides no additional insight as to the likely treatment of this issue in Delaware.[136]

One of the few cases in Delaware to address whether employment contracts containing restrictive covenants are assignable to the new owner in the event of a sale of the business is *People's Security Life Insurance Co. v. Fletcher*.[137] Yet, even in this case, the court did little more than note that whether such covenants are assignable depends, in part, "on the significance of any changes in the business after the assignment."[138] While the *People's Security* decision thus implicitly suggests that a business assignee may be able to enforce a restrictive covenant in an employment agreement absent an assignability provision, more analysis is necessary.

An effective assignment of a contract right requires that the owner of that right "manifest his intention to make a present transfer of the right without any further action by him or by the obligor."[139] Generally, contractual rights may be assigned unless that assignment is precluded by contract, is prohibited by public policy, or materially alters

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135 *See Hess*, 808 A.2d at 919 n.4.

136 *Hess* held that, under Pennsylvania law, a restrictive covenant not to compete, contained in an employment agreement, is not assignable to a purchasing business entity in the absence of a specific assignability provision in the covenant, if the covenant is included in a sale of assets. *Id.* at 917-20 (noting that restrictive covenants are not favored in Pennsylvania).

137 1988 WL 26791, at *3 (Del. Ch. Mar. 16, 1988).

138 *Id.* at *3.

139 *Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *5 n.16 (Del. Ch. Mar. 11, 1999) (citing RESTATEMENT (SECOND) OF CONTRACTS § 317(1)).

the duties of the obligor.[140] While personal service contracts usually may not be assigned,[141] noncompete agreements and other restrictive covenants exist *for the benefit of the business* and not the individual parties. Thus, the business, whether as assignee or assignor, should enjoy that benefit by having the power to enforce such restrictive covenants.[142]

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140 RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981); *see also Grynberg v. Burke*, 1981 WL 15118, at *1 (Del. Ch. May 20, 1981) ("The right of either party to the contract to its performance may be assigned, unless such assignment changes the obligor's position to his detriment or increases his burdens.").

141 *See Grynberg*, 1981 WL 15118, at *1 ("The general rule is that a contract not involving personal trust and confidence, and not being for personal services, is assignable in the absence of language to the contrary.").

142 Many jurisdictions have examined whether noncompete and other restrictive covenants can be assigned absent a specific assignment provision and have come down on both sides of the issue. The split of authority is such, in fact, that there is even a difference of opinion as to which position represents the majority view. *Compare* 6 WILLISTON ON CONTRACTS § 13:13 (4th ed. 1995) ("A majority of courts permit the successor to enforce the employee's restrictive covenant as an assignee of the original covenantee"), *with Hess,* 808 A.2d at 918 (noting that "the majority of [states that have considered the assignability of non-competition and nondisclosure covenants] have concluded that the restrictive covenants are not assignable").

Those that favor making noncompetition covenants unassignable absent the employee's express consent generally rely on the theory that such covenants are personal in nature and, consequently, cannot be assigned without the employee's permission. *See, e.g., Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054, 1057-58 (Nev. 2004) ("We agree with those jurisdictions holding that noncompetition covenants are personal in nature and, therefore, unassignable as a matter of law, absent the employee's express consent."); *Hess v. Gebhard & Co.*, 808 A.2d 912, 922 (Pa. 2002); *but see J.C. Ehrlich Co. v. Martin*, 979 A.2d 862, 866 (Pa. Super. Ct. 2009) (distinguishing *Hess* and allowing assignment of a noncompete agreement following execution of a stock purchase agreement that effectively consolidated the two companies).

Cherrydale has not shown any reason why reasonable restrictive covenants in employment contracts should not be generally assignable and enforceable by an assignee competing in the same industry as the assignor.[143] I hold, therefore, that absent specific language prohibiting assignment, noncompete covenants, even though part of a personal service contract, remain enforceable by an assignee when transferred to the assignee as part of a sale or transfer of business assets regardless of whether the employment contract contains a clause expressly authorizing such assignability, so long as the assignee engages in the same business as the assignor.[144]

Conversely, jurisdictions that favor assignability of noncompete agreements absent specific assignability provisions tend to place noncompetition covenants in the same category as other contractual rights. *Equifax Servs., Inc. v. Hitz,* 905 F.2d 1355, 1361 (10th Cir. 1990) (applying Kansas law) ("Although an employee's duty to perform under an employment contract generally is not delegable . . . the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business."); *Safelite Glass Corp. v. Fuller*, 807 P.2d 677, 683 (Kan. Ct. App. 1991); *Kegel v. Tillotson*, 2009 WL 3486739, at *2 (Ky. Ct. App. Oct. 30, 2009) (citing *Managed Health Care Assoc., Inc. v. Kethan,* 209 F.3d 923, 929 (6th Cir. 2000)); *J.H. Renarde, Inc. v. Sims,* 711 A.2d 410, 412-14 (N.J. Ch. 1998) (as a matter of law, noncompetition covenants may be freely assigned in an asset sale like any other contractual right in the absence of some express contractual prohibition); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981).

[143] *See Caldwell Flexible Staffing, Inc. v. Mays*, 1976 WL 1716, at *2-3 (Del. Ch. Nov. 29, 1976).

[144] Additionally, I note that to the extent Tennessee law may govern Johnson's Employment Contract, it appears that Tennessee law also recognizes that a restrictive covenant may be assigned and transferred pursuant to an asset purchase agreement. *Packers Supply Co. v. Weber*, 2008 WL 1726103, at *7 (Tenn. Ct. App. Apr. 14, 2008) (citing *Bradford & Carson v. Montgomery Furniture Co.*, 92 S.W. 1104 (Tenn. 1906) (holding that contracts containing covenants not to

The case for assignability of the noncompete agreement is particularly strong here because the terms of the APA directly address the assignability of the contractual covenants contained in the employment contracts of former KB sales reps. Specifically, the APA includes among the assets purchased by Great American "all assignable rights under nondisclosure agreements, nonsolicitation agreements, and noncompetition agreements entered into with any parties that relate to" KB's business.[145]

Having addressed Cherrydale's arguments with respect to the "at-will" nature of employment between KB and its former sales reps as well as the assignability of noncompete obligations, I now turn to the elements of Great American's tortious interference claim as to Southern, Fisher, and Johnson.

3. The Existence of a Valid Contract

Southern and Fisher signed Employment Contracts with KB on May 8, 2001.[146] Johnson signed his on December 14, 2001.[147] The relevant terms of these contracts are

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compete are assignable absent specific language in the covenants prohibiting assignment)).

145 APA § 2.2(f). Cherrydale contends that the phrase "all assignable rights" in § 2.2(f) indicates that certain of these agreements are somehow not assignable, because § 8.9 of the APA states that the APA does not "constitute an agreement to assign any Contract or any claim, right, or benefit arising thereunder or resulting therefrom, if a consent has not been obtained or if an attempted assignment thereof would be ineffective." *Id.* § 8.9. I read § 8.9, however, as precluding assignment of a claim, right, or benefit under a contract where consent has not been received *and* applicable state or federal law precludes assignment absent consent. As explained above, that is not the situation here.

146 JX 8-9. In Southern's case, this contract replaced a May 22, 1998 contract.

147 JX 10.

noted above in Part I.B.6. Cherrydale does not contend that any of these contracts or their respective clauses, with the exception of the noncompete clause as it applies to Southern, are invalid.[148] Thus, the first element of this tortious interference claim is satisfied.

4. Cherrydale's Knowledge of KB's Employment Contract

The next question is whether Cherrydale knew of the terms of Southern, Fisher, and Johnson's Employment Contracts. Before Cherrydale began its recruiting efforts, Cherry informed Kraft that a large number of KB's sales reps would "have noncompetes, which [Cherrydale] will have to deal with."[149] This information put Cherrydale on notice of the existence of KB's employment contracts and at least one of the restrictive covenants likely to be in those contracts.

Additionally, on November 20, 2007, Hoffrichter and Cherrydale received a faxed copy of KB's Employment Contract from Williamson.[150] This copy of the Employment Contract conforms to the one signed by Southern, Fisher, and Johnson in 2001. Moreover, according to an addendum to Southern's February 26 Proposal, Southern provided Cherrydale with a copy of his KB Employment Contract.[151] Similarly, Johnson

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148 Regarding Southern's noncompete clause, Great American tacitly acknowledges that it would be unenforceable under California law and does not assert that Southern breached any noncompetition arrangement. POB 38 n.21; *see also supra* note 114; T. Tr. 380 (Belli).

149 JX 36.

150 JX 31; T. Tr. 654 (Hoffrichter), 952 (Williamson).

151 JX 51, 113.

forwarded a copy of his KB termination letter to Cherrydale soon after he received it.[152] This letter reminded Johnson of his obligations under the Employment Contract and indicated several things Johnson was required to do to comply with that contract.[153] Cherrydale's receipt of these documents proves it knew of the existence and material terms of the KB Employment Contracts signed by Southern, Fisher, and Johnson.

5. Cherrydale's Intentional Actions Leading to Breach of the KB Employment Contracts

Turning to the third element of Great American's tortious interference claim, the Court must determine whether Cherrydale intentionally acted in a way that significantly contributed to causing Southern, Fisher, and Johnson to breach the terms of their Employment Contracts. Due to the fact-specific nature of this element, I address each of these individuals separately.

a. Southern

Southern accepted Cherrydale's proposal to become an independent contractor on February 26, 2008 and began actively working for Cherrydale on March 25. He remained an employee of KB, however, until April 18, 2008. Hoffrichter, Kraft, and Lightstone all knew that Southern remained a KB employee even after he began working for Cherrydale.[154] Indeed, under the February 26 Proposal, Cherrydale agreed to

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152 T. Tr. 844-45.

153 JX 12.

154 *See supra* note 15.

indemnify Southern if he was sued for breaches of the noncompete clause in his Employment Agreement.[155]

Between the time he signed the February 26 Proposal and the time he ended his employment at KB, Southern did several things that violated his Employment Contract. First, he began actively assisting Cherrydale's recruiting efforts and talking with Hoffrichter about "his KB friends."[156] Second, Southern accessed copies of the Ranking Report on KB's report portal five times.[157] Third, Southern maintained copies of information pertaining to KB customers he serviced while employed with KB and used that information in his work for Cherrydale.[158] Fourth, Southern began to sell Cherrydale products and services before he resigned from KB.[159] Finally, Southern accessed his Order Status Report and other reports on the KB report portal numerous times and used

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155 JX 51 at CD0000163.

156 JX 53.

157 JX 119. Shortly after Southern's final review of the Ranking Report on March 13, Hoffrichter circulated an updated "Target List of KB Reps" identifying, for the first time, the sales volumes of individual KB sales reps. JX 59.

158 JX 28. After he joined Cherrydale, Southern contacted many of the customers he serviced while employed at KB. JX 29.

159 In a March 24, 2008 email between Hoffrichter and Kraft, Hoffrichter reported that "[Southern] is doing a mailer this week in the Sacramento area with our stuff, and is presenting [Cherrydale] to one of his largest accounts first of next week." JX 64.

the information contained in the Order Status Report to send out Cherrydale mailings and facilitate contract signings.[160]

Through these actions, Southern breached numerous terms of his Employment Contract. What is relevant here, however, is that Cherrydale contributed significantly to causing these breaches when, through the acts of its agent Hoffrichter,[161] Cherrydale encouraged Southern to remain a KB employee for several weeks before ending his employment and encouraged him in his surreptitious activities during that time.[162] Cherrydale's encouragement of Southern's breach of his Employment Contract also can

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160 JX 20, 312; T. Tr. 817 (Southern).

161 *See TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 735 (Del. Ch. 2008) ("The seminal case in Delaware on vicarious liability is the 1962 decision of the Supreme Court in *Draper v. Olivere Paving & Construction Co*. There, the Court held that an employer is liable only when those torts are committed by the servant within the scope of his employment. The Court elaborated, explaining that it would impose liability upon the master for his servant's intended tortious harm if the act was not unexpectable in view of the duties of the servant.") (citing *Draper v. Olivere Paving & Constr. Co*., 181 A.2d 565 (Del. 1962) (internal quotation marks omitted)).

Kraft and Lightstone both knew of and encouraged Hoffrichter's recruiting activities, all of which took place in the scope of Hoffrichter's employment as Cherrydale's National Sales Manager. In fact, as indicated *supra* notes 35-37, Rosen actively fostered Hoffrichter's recruiting tactics by telling him to get more people into the sales force, "asap," and to get aggressive. Hoffrichter responded to Rosen's email stating that "Ill [sic] take that as a green light, with [Kraft]'s, [Lightstone]'s and your guidance and Ok on anything I do." JX 60. Neither Rosen, Kraft, nor Lightstone corrected Hoffrichter's understanding. Thus, Cherrydale is vicariously liable for Hoffrichter's actions.

162 JX 59, 64, 116, 311.

be seen in the fact that, upon signing the February 26 Proposal, Southern became eligible for a referral bonus for any sales rep that he enticed to join Cherrydale from KB.[163]

Cherrydale's intentional encouragement of Southern's "under the [KB] radar" actions and of his maintaining his KB customer list and contacting individuals on that list helped cause Southern to breach several clauses in his contract. Those clauses include the covenants he made "to follow all [KB] policies and procedures," "to direct [his] full time and best efforts to sell and promote the products of [KB] in [his assigned] Territory," to "return promptly upon termination any and all Company-owned materials such as . . . customer files, invoices and address files" as well as "any materials prepared by [the employee] utilizing any such Company-owned materials," and to not "use any information designated" as confidential or proprietary "for any purpose other than in furtherance" of his responsibilities to KB.[164] Therefore, Cherrydale's intentional acts contributed to Southern's breach of his KB Employment Contract.

b. Fisher

Like Southern, Fisher breached his Employment Contract in many ways. First, Fisher's employment with Cherrydale overlapped with his work at KB because he joined

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[163] T. Tr. 752.

[164] *See* JX 8. As noted *supra* Part I.B.6, employees, including Southern, acknowledged in the Employment Contract that "customer-related information" provided by the Company, including "names and address of customers, key contacts at customer, customer expressions of interest in purchasing Company or other fund-raising products, information regarding customer buying habits and preferences and customer contact reports," would be considered "confidential and proprietary to the Company." *Id.*

Cherrydale on April 14, 2008 but did not resign from KB until April 18, 2008.[165] Additionally, during his years at KB, Fisher created and maintained a personal copy of a customer information sheet listing all KB customers he serviced, which he took with him when he left KB.[166] Until the Court entered the Preliminary Injunction,[167] Fisher sold Cherrydale products to customers he serviced while at KB.[168] Fisher also accessed the KB report portal several times after he accepted employment with and began working for Cherrydale.[169] And, along with Southern, Fisher helped Hoffrichter correct old fax numbers Hoffrichter had pulled from the Consultant Schedule, so that Hoffrichter could send out his April 18 "Cherrydale Opportunity" letter.[170]

Fisher's Employment Contract also contained a noncompete clause whereby he agreed "not to engage in or in any way assist in any sales or similar related work or services for any third-party fund raising company . . . during [his] employment and for a period of one year thereafter" in his "territory as assigned at termination" of

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165 T. Tr. 1000, 1045-46, 1048.

166 JX 25; T. Tr. 1019-20.

167 After entry of the Preliminary Injunction, Fisher met with Conati to transfer his former KB customers to her. JX 98, 101. Through this transfer, Fisher effectively violated paragraphs 2(b) and (c) of the Preliminary Injunction. This violation is discussed further *infra* Part II.D.3.b.

168 JX 29.

169 JX 18.

170 JX 77, 81.

employment.[171] Despite knowing the terms of that noncompete agreement,[172] Cherrydale nevertheless caused Fisher to breach this provision by, among other things, encouraging him to continue selling Cherrydale products to at least some of the same customers he serviced while employed by KB.[173]

As with Southern, Cherrydale's intentional encouragement of Fisher's activities, especially his pursuit of former KB customers[174] and his overlapping employment with Cherrydale contributed to Fisher's breach of several clauses in his contract. In the affected covenants, Fisher had agreed "to follow all [KB] policies and procedures," "to direct [his] full time and best efforts to sell and promote the products of [KB] in [his assigned] Territory," to "return promptly upon termination any and all Company-owned materials such as . . . customer files, invoices and address files" as well as "any materials prepared by [Fisher] utilizing any such Company-owned materials," to not "use any information designated" as confidential or proprietary "for any purpose other than in furtherance" of his responsibilities to KB, and not to compete with KB for a specified

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171 JX 9.

172 JX 51.

173 JX 29.

174 JX 56. In this email, Fisher told Hoffrichter that "I met with the school in Flagstaff today [a school to which Fisher had sold KB products in the past] and they were quite impressed with my [Cherrydale] prize options. I sold my services and promotions. It was quite a generic presentation, but I think I have a great chance to get them back." *Id.*; *see also* JX 29.

period.[175] Consequently, Cherrydale's intentional acts also caused Fisher to breach his KB Employment Contract.

c. Johnson

Though he joined Cherrydale after the APA was executed, Johnson, like Southern and Fisher, breached his KB Employment Contract in several ways.[176] Johnson testified at deposition and again at trial that he maintains a list of customers he serviced when he was employed with KB on his home computer.[177] Shortly after he joined Cherrydale, Johnson began selling Cherrydale products to many of these former KB customers.[178] Additionally, Johnson accessed the KB report portal and reviewed reports after he left KB and after the Preliminary Injunction was entered.[179] As in the cases of Southern and Fisher, such actions breached Johnson's contractual obligations "to follow all [KB] policies and procedures," to "return promptly upon termination any and all Company-owned materials such as . . . customer files, invoices and address files" as well as "any materials prepared by [Johnson] utilizing any such Company-owned materials," and to not "use any information designated" as confidential or proprietary "for any purpose other than in furtherance" of his responsibilities to KB.

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175 *See* JX 8; *supra* note 164.

176 *See supra* notes 44-49 and accompanying text.

177 T. Tr. 848-50.

178 *Id*. at 838-41.

179 JX 16; T. Tr. 201-10 (Solima).

With regard to Johnson's noncompete agreement, however, Cherrydale denies that Johnson violated that agreement because his work for Cherrydale took place in counties in Tennessee and Virginia that were part of his coverage territory at KB, not his "assigned territory."[180] An assigned territory at KB is the territory assigned exclusively to one sales rep for which that sales rep is responsible.[181] Coverage territory, in contrast, was not assigned to any particular sales rep and could be worked by any sales rep that chose to do so.[182] Great American did not counter Cherrydale's argument on this point. Thus, I find that Great American has not satisfied its burden of proof as to any claim that Cherrydale caused Johnson to breach his noncompete agreement.

6. Cherrydale's Unjustified Actions

As to the fourth element of tortious interference with contract, Cherrydale has not provided any justification for its actions with regard to Southern, Fisher, and Johnson other than to suggest that such activity was common in the fundraising industry and that Great American has been guilty of similar tactics in the past.[183] But, this argument does not excuse or justify Cherrydale's actions here. Alleging that a competitor may have acted unlawfully or unethically does not excuse another company's use of similar tactics.

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[180] JX 295; T. Tr. 900-02, 913-14 (Johnson).

[181] T. Tr. 895 (Johnson).

[182] JX 102, 313 at 101-02, 133-34; T. Tr. 893-96 (Johnson).

[183] DAB 26.

Great American, therefore, has established the first four elements of Cherrydale's tortious interference with the KB Employment Contracts. Moreover, there is no serious dispute that Cherrydale's actions caused at least some injury to Great American, as it has shown a basis for liability for tortious interference with contract. The parties strenuously dispute the amount of any resulting damages, however, and that issue is addressed in Part II.D.2.

7. KB's Customer Contracts

Great American's claim for tortious interference with its prospective contractual relations with KB's former customers is duplicative of its claims based on Cherrydale's tortious interference with Southern, Fisher, and Johnson's KB Employment Contracts and misappropriation of the KB customer lists.

In substance, Great American claims that, because it purchased "all rights in and goodwill arising out of or relating to [KB's] relationships with [its] customers and suppliers,"[184] Great American had every right to "expect, with reasonable certainty," that the KB customers serviced by Southern, Fisher, and Johnson would remain Great American customers following execution of the APA. This is essentially the same theory Great American advances in support of its claim for monetary damages based on its tortious interference with contract and misappropriation of trade secret claims.

Because Great American does not seek any additional relief based on Cherrydale's tortious interference with Great American's prospective contractual relations with KB's

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184 APA § 2.2(l).

former customers and does not suggest any factual distinctions unique to this claim, it is subsumed in my discussion of Great American's tortious interference with contract and misappropriation claims and will not be discussed further.

C. Did Cherrydale Misappropriate Great American's Trade Secrets?

With respect to its claims for misappropriation of trade secrets, Great American contends that, as part of Cherrydale's efforts to recruit KB employees and increase its customer base, it willfully and maliciously misappropriated Great American's trade secrets, including the Consultant Schedule, the Ranking Report, the Order Status Report, and other confidential and proprietary reports as well as KB customer contact and purchasing information. Cherrydale counters by arguing that Great American did not establish that the information at issue constituted trade secrets or was misappropriated by Cherrydale because such information was used solely by independent contractors whose acts cannot be attributed to Cherrydale.

Under Delaware law, an employer's trade secrets are a protectable interest.[185] In pertinent part, the Delaware Uniform Trade Secrets Act ("DUTSA")[186] defines "trade secret" as follows:

> (4) "Trade secret" shall mean information, including a formula, pattern, compilation, program, device, method, technique or process, that:

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[185] *See Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006).

[186] 6 *Del. C.* §§ 2001-2009.

> a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other 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.[187]

Information must meet all requirements of Section 2001(4) to qualify for "trade secret" status.[188] Additionally, the DUTSA defines misappropriation, in relevant part, as the "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means."[189]

The plaintiff bears the burden of proving the existence and misappropriation of a trade secret.[190] Specifically, under the DUTSA, the plaintiff affirmatively must prove the following: First, that a trade secret exists, *i.e.*, the statutory elements—commercial utility arising from secrecy and reasonable steps to maintain secrecy—have been shown; second, that the plaintiff communicated the trade secret; third, that such communication was made pursuant to an express or implied understanding that the secrecy of the matter

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[187] *See id.* § 2001(4).

[188] *Dionisi v. DeCampli*, 1995 WL 398536, at *11 (Del. Ch. June 28, 1995), *amended by* 1996 WL 39680 (Del. Ch. Jan. 23, 1996).

[189] 6 *Del. C.* § 2001(2).

[190] *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *9 (Del. Ch. Nov. 15, 1994); *Marsico v. Cole,* 1995 WL 523586, at *4 (Del. Ch. Aug. 15, 1995).

would be respected; and fourth, that the trade secret has been used or disclosed improperly to the plaintiff's detriment.[191]

In many cases, including this one, the brunt of the DUTSA inquiry focuses on the first element, *i.e.*, whether a trade secret exists. To prove that a trade secret exists, Great American must demonstrate (1) that it possessed information sufficiently secret and valuable to give it a competitive advantage and (2) that it took reasonable efforts to maintain the secrecy of that information.[192] Once Great American establishes the existence of a trade secret, it then must prove misappropriation by showing that Cherrydale knowingly acquired such information by "improper means."[193]

Great American's misappropriation claim implicates Cherrydale's acquisition and use of the Consultant Schedule, the Ranking Report, the Order Status Report, and the KB customer contact and purchasing information. Great American proved at trial that these documents and information were not generally accessible and that reasonable efforts were made to maintain their secrecy by limiting access to authorized sales reps who, according to the terms of KB's Employment Contract,[194] were required to maintain the proprietary nature of any information, especially customer information, obtained from the

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191 *Dionisi*, 1995 WL 398536, at * 11 (citing *Wilm. Trust Co. v. Consistent Asset Mgt. Co.*, 1987 WL 8459, at *3 (Del. Ch. Mar. 25, 1987).

192 *See, e.g., Triton Const. Co. v. E. Shore Elec. Serv., Inc.*, 2009 WL 1387115, at *21 (Del. Ch. May 18, 2009), *aff'd*, ___ A.2d ___ (Del. Jan. 14, 2010) (ORDER).

193 *Id.*

194 *See, e.g.*, JX 8.

KB report portal or while working for KB.[195] Thus, my analysis in this section focuses on whether each claimed trade secret derived independent economic value by virtue of its secrecy.

Having considered the evidence adduced at trial under the applicable standard,[196] I find that Great American has demonstrated that the Ranking Report, the KB customer information lists, and Southern's Order Status Report were trade secrets under the DUTSA.[197] I further find, however, that Cherrydale cannot be held liable for misappropriation of Southern's Order Status Report because Great American failed to show Cherrydale is vicariously liable for Southern's actions in that regard.

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195 *See supra* notes 92-95 and accompanying text; *infra* notes 231-34 and accompanying text; T. Tr. 944 (Williamson).

196 *Del. P.J.I. Civ.* § 4.1 (2000) ("Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."); *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) ("It is important to remember that the burden to be met by the Plaintiff is one of a preponderance of the evidence.").

197 Under the terms of the APA, KB sold Great American "[a]ll Intellectual Property or rights therein owned or licensed by [KB] and all rights, claims, and causes of action otherwise inuring to [KB] in respect of any past, present, or future infringement of the foregoing." APA § 2.2(j). "Intellectual Property," as defined in the APA, includes "confidential or proprietary information, including trade secrets, technology, know how, formulae and customer and supplier lists." APA § 1.1(a). Consequently, there is no doubt that Great American purchased the right to bring a cause of action against Cherrydale for misappropriation of KB's trade secrets.

1. Consultant Schedule

On February 8, 2008, Williamson sent Hoffrichter the 2005 version of the Consultant Schedule.[198] Hoffrichter informed Kraft, Rosen, and Lightstone shortly after he received it.[199] The Consultant Schedule is an assemblage of largely public information about the KB sales force and represents a compilation of information under the DUTSA.[200] It contains the sales reps' home phone numbers, cell phone numbers, street addresses, hire dates, and the names of their spouses and regional managers.[201]

Cherrydale denies that the Consultant Schedule constitutes a trade secret, contending that the Schedule "was old, outdated, and contained largely public information."[202] Cherrydale supports this assertion by providing evidence that KB listed the names, phone numbers, fax numbers, and email addresses of its sales reps on its website,[203] that the home addresses and names of sales reps' spouses were available through public means, "such as the well-known free website, whitepages.com,"[204] and

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[198] JX 1; T. Tr. 955-56 (Williamson).

[199] JX 47, 48.

[200] *See Del. Express Shuttle, Inc.*, 2002 WL 31458243, at *18 (citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1055 (Del. Super. 2001); *Dionisi v. DeCampli*, 1995 WL 398536, at *11 (Del. Ch. June 28, 1995), *amended by* 1996 WL 39680 (Del. Ch. Jan. 23, 1996)).

[201] T. Tr. 187-88 (Solima).

[202] DAB 2.

[203] *Compare* JX 1 *with* JX 138.

[204] DAB 30.

that a 2007 change in the KB management structure rendered the regional manager information obsolete.[205] Cherrydale argues, therefore, that the sales reps' hire dates are the only nonpublic pieces of information contained in the Consultant Schedule.

To qualify as a protectable trade secret, the Schedule must "[derive] independent economic value by virtue of its not being generally known or readily ascertainable by proper means."[206] In this regard, Great American failed to show that the Consultant Schedule—and the hire dates it contained—had independent economic value by virtue of its secrecy. Thus, the Consultant Schedule is not a trade secret.

Great American places significant emphasis on Hoffrichter's admission at trial that he used the Consultant Schedule to "accelerate" his efforts to recruit KB employees.[207] Nevertheless, the information on KB's website, as well as the information available on free, public websites, suggests that Cherrydale readily could have obtained essentially all of the information contained in the Consultant Schedule, except for the hire dates, through proper means with relatively minimal expense or effort. In *Total Care Physicians*, the court held that a Rolodex, which contained "the names and addresses of numerous insurance companies, health maintenance organizations, and contacts" established by the plaintiff, was not a trade secret because, even though it "may have made [defendants'] job a little easier [in contacting these organizations] . . . it did not

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[205] JX 313 at 13-14.

[206] 6 *Del. C.* § 2001(4).

[207] T. Tr. 453.

provide her with information which was unavailable elsewhere."[208] Similarly here, even though Hoffrichter obtained the Schedule through improper means[209] and it may have made his recruiting efforts a little easier, the Schedule provided him with almost no information he could not have obtained by making a modest effort searching KB's website or similar public listings. Further, Great American has not shown any independent economic value derived from knowing the hire dates of KB's sales reps, the only nonpublic information contained in the Consultant Schedule. I hold, therefore, that the Consultant Schedule is not a trade secret as that term is defined in the DUTSA.

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[208] *See Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1055 (Del. Super. 2001).

[209] Under the Restatement (Third) of Unfair Competition, an actor may be liable for appropriation of another's trade secret if that actor acquires information she knew or had reason to know was a trade secret by improper means, including "theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful under the circumstances of the case." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 40, 43 (1995). The Restatement thus emphasizes the means of acquisition of information over the nature of the information.

In the definition of "trade secret" used in the DUTSA, however, the initial focus remains on the information itself—*i.e.*, whether it is readily ascertainable through proper means. *See* 6 *Del. C.* § 2001(4). The DUTSA only examines whether a person has improperly acquired information that does, in fact, constitute a trade secret. Absent the existence of a trade secret, it is immaterial whether Hoffrichter acted improperly in obtaining and using the Consultant Schedule to aid Cherrydale's recruiting efforts. Moreover, under 6 *Del. C.* § 2007(a), the DUTSA "displaces conflicting tort, restitutionary and other law of this State providing civil remedies for misappropriation of trade secrets."

2. Ranking Report

The Ranking Report contained a frequently updated list of KB's sales reps ranked by volume of sales paid.[210] KB maintained this sensitive financial information solely for internal use. On April 23, 2008, Denise Morse, a KB sales representative who had inquired about employment with Cherrydale, sent Hoffrichter a copy of the Ranking Report.[211] This version of the Report ranked KB's sales reps by volume of sales paid as of April 13, 2008.[212] Additionally, in the days before Hoffrichter's March 13 updated "Target List of KB Reps" was circulated—and while Hoffrichter was having conversations with Southern about "his KB friends"[213]—Southern accessed KB's report portal five times to examine the Ranking Report.[214] In light of this evidence, I infer that even though Hoffrichter did not receive an actual copy of the Ranking Report until April, he obtained the sales volume information contained in his March 13 "Target List of KB Reps" largely from Southern, based on what Southern learned by accessing the Ranking

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210 *See* JX 2; T. Tr. 203 (Solima), 1057-58 (Fisher).

211 T. Tr. 678-79 (Hoffrichter).

212 JX 143. Hoffrichter received the report from Morse after she inquired whether he wanted her to send it, to which Hoffrichter responded, "[s]ure." T. Tr. 679.

213 JX 53. On February 26, 2008, the same day he received Southern's signed proposal, Hoffrichter told Rosen and Kraft that "[I] have a call into [Southern] to discuss his KB friends." *Id.*

214 T. Tr. 208-09 (Solima); JX 119. Southern accessed the Ranking Report on March 3, 5, 7, 9, and 13. T. Tr. 208-209; JX 119.

Report on KB's report portal. Hoffrichter then used this information to target the "Best of the Best" of the KB sales force and facilitate his recruiting efforts.[215]

Like the Consultant Schedule, the Ranking Report was not generally accessible outside of KB and reasonable efforts were made to maintain its secrecy.[216] Unlike the Consultant Schedule, however, the Ranking Report also "derive[d] independent economic value" by virtue of the information "not being generally known" and "not being readily ascertainable by proper means."[217]

In large measure, a trade secret "derives actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money."[218] One of the clearest indications of the value of the Ranking Report as a trade secret, as well as KB's efforts to maintain its secrecy, is the zeal with which KB kept the names of its sales reps hidden from Great American during the negotiation of the APA.[219] Moreover, the Ranking Report contained nonpublic information and KB sales reps could only view and print it by accessing KB's report portal, located on a

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215 JX 52. Cherrydale also tacitly acknowledged the value of the Ranking Report by conceding that "[p]erhaps Mr. Hoffrichter should have returned the Ranking Report too." DAB 3.

216 *See supra* notes 92-95 and accompanying text.

217 *See Triton Const. Co. v. E. Shore Elec. Service, Inc.*, 2009 WL 1387115, at *21 (Del. Ch. May 18, 2009), *aff'd*, ___ A.2d ___ (Del. Jan. 14, 2010) (ORDER).

218 *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *18 (Del. Ch. Oct. 23, 2002).

219 JX 4, 5.

secure server.[220] While KB sales reps may have had access to all KB sales reps' revenue figures, the KB Handbook prohibited employees from disclosing such information to anyone outside of KB.[221]

I find that Hoffrichter accessed KB's trade secrets contained in the Ranking Report through improper means and that Kraft and other leaders at Cherrydale knew Hoffrichter was receiving that information from KB employees and reports.[222] Indeed, Hoffrichter knew the information contained in the Ranking Report was KB's confidential information.[223] Therefore, I hold that the Ranking Report constitutes a trade secret that was misappropriated by Cherrydale.

3. KB Customer Contact and Purchasing Information

Even after they began working with Cherrydale, Southern, Fisher, and Johnson retained customer lists they compiled while employed with KB.[224] These lists included names, contact numbers, and other information relevant to KB customers.[225] For instance, Johnson's customer list included, at a minimum, the names, telephone numbers,

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[220] JX 13, 13A, 13B; T. Tr. 184-85 (Solima).

[221] JX 24 § 105 ("Non-Disclosure").

[222] T. Tr. 1124 (Kraft).

[223] *Id*. at 602-03.

[224] *Id*. at 769-70 (Southern), 848-50 (Johnson), 1019-20 (Fisher).

[225] *See, e.g.*, JX 25, 28.

and addresses of contacts at organizations he worked with, which included schools, PTOs, and clubs.[226]

Cherrydale argues that this customer information was not confidential or proprietary because KB listed it on its public website[227] and it was available through other public sources, such as the Market Data Retrieval ("MDR") book.[228] But, an examination of the customer lists maintained by Southern and Fisher shows that these lists contained information that was not available on the KB website.[229] Additionally, a comparison of the MDR book with copies of Southern and Fisher's KB customer lists shows that Southern and Fisher's lists contain information not found in either the MDR book or the KB website. That nonpublic information included names of representatives

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226 T. Tr. 849-50.

227 JX 238.

228 JX 137. The MDR, published by Dun & Bradstreet, is a large directory of public and private schools organized by each state and region in the United States. T. Tr. 632-33. Similar information, including school websites, principal names, and identities of presidents of a PTA or PTO, was available through other public resources, such as http://www.schooltree.com and http://www.schooldigger.com. *Id*. at 891.

229 JX 25-28; T. Tr. 239-42 (Solima), 849-51 (Johnson). The KB website merely lists the names of schools and organizations, the type of group, and the city and state of each group. JX 238.

Additionally, despite Johnson's acknowledgment that he continued to maintain a list of customers serviced while he worked at KB, Cherrydale never produced that list. T. Tr. 848-50.

at specific organizations, their contact information, a description of the product type purchased by each group, and past sales amounts.[230]

KB took steps to protect the confidentiality of its customer lists by, among other things, including provisions in its Employment Contract,[231] its Handbook,[232] and letters it sent its employees following termination[233] that notified sales reps and other KB employees of the sensitive and proprietary nature of that information and prohibited them from disclosing such information while employed with and after leaving KB. KB also required its sales reps to input user names and passwords to access the customer information contained on the KB computer network.[234] Based on this evidence, I find that KB made reasonable efforts under the circumstances to maintain the secrecy of its customer information.

The remaining question, therefore, is whether this customer information derived independent economic value from not being generally known or readily ascertainable by companies like Cherrydale. When examining the economic value of a client list, one of the main factors is whether or not the customers "are easily identified."[235] If they are, "it

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230 *Compare* JX 25-28 *with* JX 137.

231 JX 8-11.

232 JX 24.

233 JX 12, 85.

234 JX 13B, T. Tr. 184 (Solima).

235 *Dionisi v. DeCampli*, 1995 WL 398536, at *11 (Del. Ch. June 28, 1995), *amended by* 1996 WL 39680 (Del. Ch. Jan. 23, 1996).

is unlikely that their identities will hold independent economic value even when the identities are considered confidential."[236] The focus of this inquiry is to determine whether Great American "would lose value and market share" if Cherrydale could thus "enter the market without substantial development expense."[237]

The customer lists maintained by Southern, Fisher, and Johnson, did contain important, nonpublic information, including the names, addresses, and phone numbers of contacts at each organization as well as the types and volume of product purchased by each customer. In the fundraising industry, such information could take months or years—and significant expense—to accumulate.[238] For instance, Southern testified that for a number of years after he started working with KB, he remained unprofitable because KB paid a set salary while Southern developed a customer base for KB in his assigned territory.[239] While Cherrydale may have been able to create such customer lists by "walking into a school" and asking for information or "looking on various public websites,"[240] compiling lists of similar value would have taken a significant amount of time, money, and effort.

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[236] *Id.*

[237] *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *18 (Del. Ch. Oct. 23, 2002).

[238] T. Tr. 733-34 (Southern).

[239] *Id.*; *see also* T. Tr. 978-79 (Fisher indicating that it took a number of years before he became profitable to KB).

[240] DAB 32.

Like the Ranking Report, the KB customer information lists used by Southern, Fisher, and Johnson held independent economic value. The fact that Southern, Fisher, and Johnson each maintained copies of these lists after leaving KB in contravention of clear KB policy buttresses this conclusion. Thus, I hold that the KB customer lists maintained by Southern, Fisher, and Johnson constitute trade secrets that were misappropriated by Cherrydale, whose top management both knew of and encouraged the retention and use of such information.

4. Order Status Report

Finally, I turn to the Order Status Report and other reports accessed by Southern, Fisher, and Johnson after they left KB. Great American adduced evidence that Southern and Fisher accessed several confidential and proprietary KB reports after they accepted employment offers from and started working for Cherrydale[241] and that Johnson accessed the KB computer system after he tendered his resignation to KB.[242] Yet, the evidence regarding misappropriation relates almost entirely to the Order Status Reports accessed by Southern.[243] Great American has not proven or made any arguments regarding the trade secret status of any other reports or information accessed by Southern, Fisher, or Johnson beyond what I previously have addressed. Instead, Great American seems to

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241 JX 18, 20 (KB report portal access exhibits for Fisher and Southern); T. Tr. 201-10.

242 JX 16.

243 T. Tr. 817 (Southern). In addition to his own Order Status Report, JX 312, Southern also accessed the Order Status Report for Harold Zane, another KB sales rep. JX 20 at 41, 42, 49, 50; T. Tr. 231-32 (Solima).

argue that the mere act of accessing information on the KB network, in itself, constituted a misappropriation of KB's trade secrets.[244] To find misappropriation of trade secrets under the DUTSA, however, a plaintiff must demonstrate that specific information constituted a trade secret and that such trade secret was, in fact, improperly acquired, used, or disclosed. A mere conclusory reference to "other reports"[245] or "numerous confidential and proprietary KB reports"[246] supposedly accessed by Southern, Fisher, and Johnson does not meet Great American's evidentiary burden in this regard. Accordingly, this subsection focuses on Great American's claim as to Southern's access and use of the Order Status Report.

Much like the information contained in the KB customer lists, the information in the Order Status Report appears to be sufficiently secret and valuable as to give Great American a competitive advantage in the fundraising industry. The Order Status Report listed a sales rep's customers for a particular season, including phone numbers, addresses, and the status of any orders the customers had placed.[247] Southern testified he kept a copy of this report because "it was an easy location for phone numbers and addresses, if I needed to enter those in a mailing or in a new agreement."[248] The Order Status Report

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[244] POB 19-20; DAB 33; PRB 10, 16-17.

[245] POB 35.

[246] *Id.* at 35-36.

[247] JX 312; T. Tr. 817 (Southern).

[248] T. Tr. 817 (Southern).

also was a compiled list of customer information that, though potentially available through legitimate means, would have taken significant effort and expense to create. Thus, I find that the Order Status Report constitutes a trade secret because it derived independent economic value from its nonpublic and confidential nature and Great American took reasonable efforts to maintain that secrecy.

Cherrydale nevertheless denies any liability for misappropriation of the Order Status Report, contending that Great American provided no evidence suggesting that Cherrydale knew Southern was accessing the KB report portal or that it encouraged such access.[249] Great American responds that even if Cherrydale was not aware of Southern's activities, Southern accessed the KB report portal in an effort to improve his sales on Cherrydale's behalf and that his acts, therefore, can be attributed to Cherrydale as those of one of its servants or agent-independent contractors.

a. Vicarious Liability of Servants and Agent-Independent Contractors

The Delaware Supreme Court in *Fisher v. Townsends, Inc.* established a two-part analysis for determining whether an employer is liable for the actions of an employed

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[249] Cherrydale admits that Southern "[u]nquestionably . . . should not have accessed KB's computer system when [he was] not authorized to do so." DAB 3. Cherrydale maintains, however, that Southern accessed the Order Status Report on the KB report portal and computer system to ensure he received commissions for prior sales. T. Tr. 752. Additionally, Cherrydale argues that it cannot be held responsible for Southern's access of the KB report portal because he was acting as an independent contractor and Cherrydale had no knowledge of his actions. In this regard, it appears Cherrydale did not know Southern had accessed the Order Status Report. *Id*. at 687, 689, 692 (Hoffrichter), 798-99 (Southern).

tortfeasor.[250] Under the first part of this analysis, the court engages in a fact-specific assessment to determine if the tortfeasor is a servant or an independent contractor.[251] If the court determines that the tortfeasor is a servant, the analysis ends because a master (principal) may be held liable for the actions of its servant (agent) committed within the scope of his employment.[252]

But if a tortfeasor appears to be an independent contractor and not a servant, then the court engages in the second part of the analysis articulated in *Fisher* to determine whether that independent contractor is an agent. In this regard, the central question is whether "the owner's or contractee's [Cherrydale's] control or direction dominates the

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[250] 695 A.2d 53, 58-61 (Del. 1997) ("All masters are principals and all servants are agents. There are some agents, however, who are not servants. All agents who are not servants are regarded as independent contractors. In addition, all nonagents who contract to do work for another are also termed 'independent contractors.' Consequently, there are agent-independent contractors and nonagent independent contractors.") (internal citations omitted).

[251] This part of the analysis examines numerous characteristics, including (1) the extent of control the employer may exercise over the details of the work, (2) whether the employed is engaged in a distinct business, (3) the kind of occupation, (4) the skill required, (5) whether the employer or the employed supplies the tools and information for doing the work, (6) the length of time of employment, (7) the method of employment payment, *i.e.*, whether by time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are creating the relation of master and servant, and (10) whether the employer is or is not in business. *Fisher*, 695 A.2d at 59.

[252] *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 735 (Del. Ch. 2008) (noting that an employer would be liable for his servant's intended harm if the act was foreseeable in view of the duties of the servant).

manner or means of the work performed."[253] If it does, "the nonagent status of the independent contractor can be destroyed and the independent contractor becomes an agent capable of rendering the principal vicariously liable for the acts of the independent contractor."[254] Despite Cherrydale's contentions to the contrary, the second part of the *Fisher* analysis would not focus on whether Cherrydale directed or controlled Southern's specific act of accessing the Order Status Report. Rather, the analysis centers on whether Cherrydale generally directed or controlled the manner and means of the work performed by Southern.

Unfortunately, there is little evidence from which to determine whether Southern worked as a servant for Cherrydale. Cherrydale contends that Southern was not a "W-2 employee" but was considered a "1099 independent contractor."[255] While "the label by which parties to a relationship designate themselves is not controlling,"[256] here, the independent contractor designation, when combined with tax and payment implications, does weigh in favor of a court finding that such a relationship existed. Yet, there also is countervailing evidence that arguably supports a finding that Southern is a servant of

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[253] *Fisher*, 695 A.2d at 61 (citing *E.I. du Pont de Nemours & Co., Inc. v. Griffith,* 130 A.2d 783, 785 (Del. 1957); *Seeney v. Dover Country Club Apartments, Inc.,* 318 A.2d 619, 621 (Del. Super. 1974)).

[254] *Id.*

[255] T. Tr. 688 (Hoffrichter), 877 (Johnson).

[256] *Singleton v. Int'l Dairy Queen, Inc.*, 332 A.2d 160, 163 (Del. Super. 1975).

Cherrydale.[257] This countervailing evidence, however, is not sufficient to prove that the latter proposition is more likely true than not.

The evidence for determining whether Southern worked as an agent-independent contractor for Cherrydale is likewise scant. While there is some support for the notion that Cherrydale maintained a level of control over its sales reps in terms of their service areas and the types of products they sold, Great American failed to prove that Cherrydale generally directed or controlled the manner and means of Southern's work to the extent necessary to make it vicariously liable for his use of the Order Status Report.

Therefore, I hold that even if Southern misappropriated the Order Status Report, Great American has not shown that Southern was either Cherrydale's servant or agent-independent contractor at the time such that Cherrydale can be held vicariously liable for his access and use of this report.

Having addressed the substantive elements of Great American's tortious interference and misappropriation of trade secrets claims, I turn to the amount of damages Great American may recover for Cherrydale's wrongful actions.

D. What Damages Resulted from Cherrydale's Misconduct?

For both of its claims, Great American must, by a preponderance of the evidence, prove the level of damages that resulted from Cherrydale's wrongful behavior.[258] Great

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[257] For instance, Southern worked as a full-time sales rep for Cherrydale. Such work was clearly "part of the regular business of" Cherrydale and carried on entirely for the benefit of Cherrydale. Additionally, Cherrydale provided its sales reps with brochures, samples, and other tools necessary to sell Cherrydale's products. T. Tr. 689.

American's damage calculations for injuries caused by Cherrydale's actions in this case are found in a report prepared by Charles Lunden, its valuation expert ("Damages Report").[259] Lunden based his measure of damages on Great American's annual lost sales revenue resulting from the lost business segment of KB customers formerly serviced by Southern, Fisher, and Johnson who did not buy from Great American after the APA.[260] Through his lost business segment model, Lunden sought to place Great American in the same financial position it would have enjoyed absent Cherrydale's wrongdoing.[261] That is, Great American claims it is entitled to such damages because it reasonably expected that the KB customer segments serviced by Southern, Fisher, and Johnson would remain with Great American following execution of the APA.[262]

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[258] *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005) ("A plaintiff alleging misappropriation of a trade secret must prove its case by a preponderance of the evidence."), *aff'd*, 913 A.2d 569 (Del. 2006); *Triton Constr. Co. v. E. Shore Elec. Serv., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009) ("To succeed on its various claims against Defendants [including a claim of tortious interference with contract], Triton must prove liability by a preponderance of the evidence."), *aff'd*, ___ A.2d ___ (Del. Jan. 14, 2010) (ORDER).

[259] JX 308.

[260] *Id.*

[261] T. Tr. 1276.

[262] According to documents provided by KB to Great American during due diligence leading up to execution of the APA, the average life of an ultimate KB customer was twelve years and Cherrydale recognized that a group of sales representatives represented a stream of revenue. JX 37, 60, 136; T. Tr. 1193, 1215, 1218-21 (Lunden), 1392-93 (Cherry). Thus, Great American's damage claim rests on the assumption that, but for Cherrydale's wrongdoing, Southern, Fisher, and Johnson would have accepted employment with Great American and continued to generate the same level of annual revenue as they had at KB.

In total, the Damages Report valued Great American's injury at $1,076,465.[263] According to Lunden, this number represents the "lost capital damages sustained by" Great American.[264] Lunden determined that number by first comparing the sales the three KB sales reps made in the year before the APA with the sales volume achieved by Great American from those customers in the year after the APA and calculating a "retention rate." Specifically, Lunden concluded that the retention rate for Southern, Fisher, and Johnson was approximately thirteen percent. Hence, Lunden's "analysis showed that [Great American] lost 87% of the annual sales volume that were generated by the KB sales representatives, despite [Great American's] active efforts to retain customers."[265] Lunden then calculated that lost sales volume and capitalized it using a 0.9 revenue multiplier to determine the value of the lost business segment associated with Southern, Fisher, and Johnson.[266]

To meet Great American's burden of proving the amount of damages, absolute precision is not required, but mere speculation is insufficient.[267] That is, Delaware does

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[263] JX 308.

[264] *Id*. at 5.

[265] *Id*. at 3.

[266] According to the Damages Report, a 1.1 revenue multiplier would apply for the value of an entire business for all companies "classified under SIC code 7389 (the SIC code applicable to companies engaged in sponsoring fundraising activities)." *Id*. Lunden selected the lower 0.9 revenue multiplier based on his belief "that the value of a segment of a business would be less than the value of the entire business." *Id*.

[267] *See supra* note 258.

not "require certainty in the award of damages where a wrong has been proven and injury established."[268] Indeed, "[t]he quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage,"[269] and public policy suggests that the wrongdoer should be required to "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven."[270]

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[268] *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) ("Responsible estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages.").

[269] *Total Care Physicians, P.A. v. O'Hara*, 2003 WL 21733023, at *3 (Del. Super. July 10, 2003).

[270] A number of jurisdictions, and the United States Supreme Court in at least one case, place the risk of uncertain damage calculations on the wrongdoer. *See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 565 (1931) ("[W]hatever uncertainty there may be in this mode of estimating damages is an uncertainty caused by the defendants' own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced."); *Boyce v. Soundview Tech. Gp., Inc.*, 464 F.3d 376, 391 (2d Cir. 2006) ("[W]here the existence of damage is certain, and the only uncertainty is as to its amount . . . the burden of uncertainty as to the amount of damage is upon the wrongdoer.") (internal quotations omitted) (quoting *Schonfeld v. Hilliard,* 218 F.3d 164, 182 (2d Cir. 2000)); *Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 210 Cal. Rptr. 387, 401 (Cal. Ct. App. 1985) ("The wrongdoer must bear the risk of uncertainty which his own wrong has created.").

While this "wrongdoer rule"—as it is called in some jurisdictions, notably New York—has not yet been adopted explicitly in Delaware, several cases strongly suggest that the wrongdoer does bear the burden of uncertainty in damages, especially where such uncertainty arises directly from the wrongdoer's actions. *See Duncan v. TheraTx, Inc.,* 775 A.2d 1019, 1023 (Del. 2001) (the defendant should "bear the risk of uncertainty in the share price because the 'defendant's acts prevent a court from determining with any degree of certainty what the plaintiff would have done with his securities had they been freely alienable.'") (quoting *Am. Gen. Corp. v. Cont'l Airlines Corp.,* 622 A.2d 1, 10 (Del. Ch. 1992)); *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958) ("The fact that there is some uncertainty

Nevertheless, this Court may not, as the fact finder, "supply a damages figure based on 'speculation or conjecture' where the plaintiff has failed to meet its burden of proof on damages."[271]

In this section, I first address Great American's claim for compensatory damages based on the theory that Cherrydale's wrongful conduct deprived Great American of the value of an identifiable segment of the KB business it contracted to acquire through the APA. Second, I consider whether the evidence supports an award of damages to Great American for unjust enrichment based on either its misappropriation of trade secrets claim or its claim for tortious interference with KB's employment contracts with Southern, Fisher, and Johnson. And finally, I examine the assertion that Cherrydale willfully and maliciously misappropriated Great American's trade secrets and, therefore, should be liable for exemplary damages and attorneys' fees under the relevant provisions of the DUTSA.

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as to plaintiff's damage or the fact that the damage is very difficult to measure will not preclude a jury from determining its value."); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1067 (Del. Ch. 2003) (placing the burden of uncertainty on the defendants); *Dionisi v. DeCampli*, 1995 WL 398536, at *18 (Del. Ch. June 28, 1995) ("[S]ome may argue public policy requires the wrongdoer bear the risk of uncertainty of damages where they cannot be proved with mathematical certainty . . . ."), *cited with approval in Total Care Physicians, P.A.*, 2003 WL 21733023, at *3.

[271] *Medek v. Medek*, 2009 WL 2005365, at *12 n.78 (Del. Ch. July 01, 2009) (citing *Henne v. Balick,* 146 A.2d 394, 396 (Del. 1950)).

1. Compensatory Damages Based on the Alleged Loss of a Segment of KB's Business

Under the DUTSA, "a complainant is entitled to recover damages for misappropriation."[272] Such damages may include "both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss."[273] Moreover, "the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret."[274] Similarly, a party who is liable for tortious interference may be required to compensate the wronged party for "the pecuniary loss of the benefits of the contract or the relation" or the "consequential losses for which the interference is a legal cause."[275]

In this case, though Great American may be entitled to recover damages based on its actual loss caused by Cherrydale's misappropriation of the Ranking Report and the KB customer contact lists as well as its tortious interference with Southern, Fisher, and Johnson's KB Employment Contracts, it has not proven the amount of such damages. Indeed, the only basis for awarding damages advanced by Great American's claim that it suffered an actual loss in excess of $1 million is the overly-expansive theory that, but for

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[272] 6 *Del. C.* § 2003(a).

[273] *Id.*

[274] *Nucar Consulting*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006).

[275] RESTATEMENT (2D) OF TORTS § 774A (1979).

Cherrydale's actions, all three of the former KB sales reps (Southern, Fisher, and Johnson) would have joined Great American and transitioned all of their customers to it.[276] The evidence, however, does not adequately support that claim.

Cherrydale contends that Lunden's damage calculation as to actual loss arising from Cherrydale's unlawful actions is flawed for two reasons: First, this court recently recognized in *Ivize* that in the context of an APA where the majority of consideration is offered by the purchaser in exchange for a "sales force," the purchaser obtains only the contractual right to a "*fair chance* to present the employees with an employment offer."[277] Thus, according to Cherrydale, Great American may receive no damages for actual loss arising from its tortious interference because it failed to present any evidence providing the Court with a basis for awarding "the difference in value between what limited opportunity it received and the clean shot at hiring [the KB sales reps] it negotiated for."[278] Second, even if Lunden's methodology is accepted, there is not enough evidence to support a finding that Southern, Fisher, or Johnson chose not to join Great American because of Cherrydale or that any of them necessarily would have joined Great American but for Cherrydale's alleged interference.

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276 JX 308.

277 *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *11 (Del. Ch. Apr. 27, 2009) (emphasis in original).

278 *Id.*

In response, Great American contends that Cherrydale misstates the decision in *Ivize* and that, in any event, this case is distinguishable on numerous grounds. Additionally, Great American argues that after it presented evidence providing a reasonable basis for damages, the burden shifted to Cherrydale to show Great American's injury was caused by something else.[279] Thus, according to Great American, Cherrydale should not be allowed to contest Great American's damage calculation because it offered no contrary expert testimony or other evidence suggesting that something other than Cherrydale's unlawful conduct caused Great American's lost profits.

Because the Court's holding in *Ivize* is instructive in assessing this portion of Great American's damages claim, I begin the discussion there. *Ivize* involved a dispute between a purchaser and seller following execution of an asset purchase agreement to purchase a litigation support company.[280] Among other things, the purchaser contended that employees working at the company, who made plans to start a competing entity after the asset purchase agreement was executed, violated noncompete and nonsolicitation clauses in their employment contracts, impermissibly re-routed the company's business, and stole company equipment and customer records.[281] While the court in *Ivize* found that the seller clearly breached the asset purchase agreement by misrepresenting the status

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[279] PRB 20 (citing *Dionisi v. DeCampli*, 1995 WL 398536, at *17 (Del. Ch. June 28, 1995)).

[280] *See Ivize*, 2009 WL 1111179, at *1.

[281] *Id.*

of the company as of the execution of the agreement, it held that the purchaser did not have a contractual right to the litigation support company's employees, clients, and goodwill, but only a "*fair chance* at retaining the employees of [the company]."[282] As a result, the court awarded only nominal damages because the purchaser based its damage calculations on the value of the goodwill lost when the employees left and not on "the difference in value between what limited opportunity it received and the clean shot at hiring it negotiated for."[283]

Great American attempts to distinguish *Ivize* on three grounds, namely, that (1) *Ivize* was a first party action between a purchaser and seller, (2) the only substantive claim brought by the purchaser was for breach of contract, and (3) the asset purchase agreement in *Ivize* did not include any sale of the employment agreements.[284] The first two grounds rest on a distinction without a difference. I see no reason why the Court should look at Great American's claims differently simply because it seeks damages from a nonparty to the APA or because its claims are for tortious interference with contract and misappropriation of trade secrets.[285] Likewise, Great American's third ground for

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282 *Id.* at *10 (emphasis in original).

283 *Id.* at *11.

284 PRB 21-22.

285 In its briefing, Great American never explains the relevance of the purported distinction that *Ivize* was a first party action. Additionally, as to its second distinction, Great American merely makes the conclusory assertion that *Ivize* is not controlling because it "adjudicated a breach of contract claim, not tortious interference or misappropriation of trade secrets claims." PRB 22-23.

distinguishing *Ivize*, *i.e.*, that it did not involve the sale of employment contracts, also lacks merit. The facts of this case are closely analogous to those in *Ivize* in terms of employment contracts. Moreover, Great American's assertion that the *Ivize* decision "does not identify that noncompetition agreements even existed" is incorrect.[286] *Ivize* references such noncompetition agreements on the first page of the opinion.[287]

In *Ivize*, the asset purchase agreement did not entitle the purchaser to execute employment contracts with the litigation support company's employees or to automatically receive the goodwill arising out of the customer relationships those employees represented.[288] Similarly, the APA here provides Great American with, at most, rights under then-existing KB nondisclosure, nonsolicitation, and noncompetition agreements[289] and the "rights in and goodwill arising out of or relating to relationships with customers and suppliers."[290] In *Ivize*, the court focused on what the purchaser bargained for when it entered the asset purchase agreement and concluded that the agreement only provided the purchaser with a fair chance to present the litigation support company's former employees with an employment offer.[291] Similarly, the APA was

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286 *Ivize*, 2009 WL 1111179, at *22.

287 *Id*. at *1.

288 *Id.* at *10.

289 APA § 2.2(f).

290 *Id*. § 2.2(l).

291 *Ivize*, 2009 WL 1111179, at *11.

structured in a way that it was possible that none of KB's employees would choose to join Great American. Those are the risks of that type of transaction. The APA simply provided Great American with a fair chance to present employment to KB's former employees—not the automatic right to assimilate them into its ranks.

While Great American undoubtedly suffered some damage from Cherrydale's interference and may have lost the value of the relatively unfettered opportunity to hire the KB employees it bargained for, Great American's Damage Report does not reflect that type of loss. Instead, the Report relies on the premise that all former KB sales reps would have joined Great American absent Cherrydale's tortious interference. In light of the Court's decision in *Ivize* and the evidence in this case, this premise is flawed. Rather, it remains Great American's burden to prove that, more likely than not, if it had been given a fair chance to present employment offers to KB's former employees free from Cherrydale's actions, Southern, Fisher, and Johnson would have accepted those offers.

It is, of course, possible that Southern, Fisher, and Johnson would have chosen to join Great American if Hoffrichter and Cherrydale had not tried to recruit them. But, the evidence does not show that is more likely true than not. Indeed, there are numerous reasons why a KB sales rep may have decided not to work for Great American, including (1) a distaste for Great American's allegedly aggressive tactics in dealing with its customers and others and its general approach to the industry,[292] (2) problems with overlapping territories and diminished sales opportunities at Great American for certain

[292] T. Tr. 905-08 (Johnson), 950 (Williamson).

sales reps,[293] (3) normal attrition,[294] and (4) decisions to leave the fundraising industry entirely.[295] That there are multiple reasons why certain former KB employees may have decided not to join Great American is also supported by the fact that of the ninety-five sales reps working for KB when the APA was executed, thirteen chose not to join Great American. Moreover, of those thirteen, only two, Johnson and Passantino, ultimately joined Cherrydale.

Cherrydale provided testimony and other evidence that each of the three former KB sales reps at issue in the Damages Report would not have joined Great American regardless of Cherrydale's actions. First, the record shows that Southern initiated discussions about employment opportunities with Cherrydale in May 2007, long before rumors of KB's takeover by Great American crystallized into fact.[296] Second, Johnson's desire to avoid affiliation with Great American apparently exceeded his desire to continue working in the fundraising industry. Indeed, Johnson testified that he "would rather change careers than work for Great American"—testimony borne out by the fact that he refused employment with Great American even though he had no other employment offers at the time and remained unemployed for almost a month before receiving an offer

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[293] *Id*. at 1043-45 (Fisher).

[294] *Id*. at 677-78 (Hoffrichter).

[295] *Id*. at 1224-25 (Lunden).

[296] *Id*. at 777-79.

from Cherrydale.[297] Finally, Fisher testified that he "didn't want to go work for Great American" because he was concerned about the potential for overlapping territories from joining a company that already had two other sales reps within a twenty mile radius.[298] Though it is possible that Fisher may have chosen to work for Great American if Southern had not called him on February 8, 2008 to spread the false rumor that KB was being purchased by Great American that day,[299] Great American did not provide evidence to contradict the reasons, unrelated to Cherrydale or Southern, Fisher gave for choosing not to join Great American.[300]

In reaching this conclusion, I am mindful that Southern, Fisher, and Johnson all work for Cherrydale and presumably are biased in its favor. Thus, I have considered their testimony and evidence closely and with significant skepticism. In that regard, I note that those witnesses, like many of the sales reps in this segment of the fundraising industry, function with a great deal of autonomy and independence under the umbrella of their employer's program as self-sufficient business people accustomed to making their own decisions. Ultimately, I found the testimony of Southern, Fisher, and Johnson on the

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297 *Id*. at 911.

298 *Id*. at 1043-45.

299 *Id*. at 1042-46.

300 Indeed, the fact that Fisher pursued employment with at least two fundraising companies at that time supports the proposition that he very well may not have joined Great American regardless of Cherrydale's actions. *Id*. at 1046.

reasons they chose not to join Great American to be credible, reliable, and consistent with the evidentiary record presented at trial.

Because the evidence shows that Southern, Fisher, and Johnson probably would have refused to join Great American regardless of Cherrydale's actions, Great American has not satisfied its burden of proof as to causation in connection with its claim for damages based on the value of the lost KB customer segment formerly serviced by these three sales reps. Thus, Great American's Damage Report, which relies heavily on that mistaken premise, provides virtually no assistance to the Court in determining the appropriate amount of damages.[301]

2. Compensatory Damages for Unjust Enrichment Arising from Cherrydale's Tortious Interference with Contract or Misappropriation of Trade Secrets

Even though Great American cannot recover damages based on its loss of business segment theory, however, the DUTSA also allows recovery for "the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss."[302] Additionally, damages for tortious interference with contract may be measured in terms

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[301] As to damages solely arising from Cherrydale's misappropriation of the Ranking Report or the information contained in the KB customer lists, Great American also has not provided any evidence or analysis to support holding Cherrydale liable for the actual loss caused specifically by the misappropriation or for a "reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." *See supra* notes 272-74. Without such evidence, I have no way of calculating the actual loss to Great American caused by Cherrydale's misappropriation. Thus, no compensatory damages based on Great American's actual loss may be awarded on the misappropriation of trade secrets claim.

[302] 6 *Del. C.* § 2003(a).

of the tortfeasor's unjust enrichment, *i.e.*, as the value of the profits earned by the tortfeasor arising from its tortious interference.[303]

In this case, Cherrydale's misappropriation of the Ranking Report and KB customer lists and its tortious interference with the Employment Contracts of Southern,

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[303] While Delaware courts have not explicitly addressed the issue of unjust enrichment in tortious interference cases, several jurisdictions have allowed this measure of damages largely on the theory that "an intending tortfeasor should not be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort." *Nat'l Merch. Corp. v. Leyden*, 348 N.E.2d 771, 775-76 (Mass. 1976); *see also Zippertubing Co. v. Teleflex Inc.*, 757 F.2d 1401, 1411-12 (3d Cir. 1985); *Second Nat'l Bank v. M. Samuel & Sons, Inc.*, 12 F.2d 963, 967-68 (2d Cir. 1926), *cert. denied*, 273 U.S. 720 (1926); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 661 F. Supp. 1448, 1478-79 (D. Wyo. 1987), *reversed on other grounds*, 885 F.2d 683, 697 (10th Cir. 1989); *Sandare Chem. Co. v. WAKO Intern., Inc.*, 820 S.W.2d 21, 23-24 (Tx. App. 1991) ("An unjust enrichment measure of damages is appropriate for willful interference with contractual relations, at least where the plaintiff's lost profits are not readily ascertainable."); *but see Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1133-35 (Ohio Ct. App. 1990) (concluding that damages in a tortious interference with contract action cannot be based on an unjust enrichment theory).

Because there are instances where actual loss may be difficult to ascertain, I hold that an unjust enrichment measure of damages is appropriate for tortious interference claims in some cases. *See Triton Constr. Co. v. E. Shore Elec. Serv., Inc.*, 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009) ("Triton has established that Defendants tortiously interfered with its prospective economic advantage in connection with the two jobs it won out of the thirteen overlapping projects. . . . The injury to Triton caused by that misconduct can be measured by the estimated gross profit earned by [Defendants] on those two jobs."), *aff'd*, ___ A.2d ___ (Del. Jan. 14, 2010) (ORDER). But, mindful of the need to prevent double recovery for a single harm, *Developers Three*, 582 N.E.2d at 1134-35, I hold only that such a measure of damages may be used to compensate a plaintiff in cases, such as this one, where actual loss is not readily ascertainable.

Fisher, and Johnson led to Cherrydale making sales to some former KB customers.[304] According to figures provided in its briefing, Cherrydale suggests that the value of the revenue generated by Southern, Fisher, Johnson, and Conati for Cherrydale in 2008 from former KB customers was $221,361.[305] Cherrydale also provides three profit margins that could be applied to this figure to arrive at an amount of damages suffered by Great American, 4.7%, 9.8%, and 27.8%. Applying the highest of these, the profit margin claimed by Great American, indicates that Cherrydale's unjust enrichment or Great American's loss was $61,538.[306]

While these figures are not exact, they do provide a reasonable basis for determining damages in the circumstances of this case. I, therefore, award Great American damages of $61,538 according to the highest damage calculation provided by

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[304] While Great American provided some evidence of specific, former KB customers who entered program agreements with Cherrydale through the actions of Southern, Fisher, and Johnson, it did not provide any evidence of the value of those customers or any alleged lost profits suffered by Great American as a result. *See* JX 29. Cherrydale, however, did provide figures reflecting the revenues generated from sales to former KB customers by Southern, Fisher, and Johnson after joining Cherrydale and the estimated profits from those sales.

[305] DRB 42-44 (citing JX 295; T. Tr. 1303 (Lightstone)).

[306] I apply the highest percentage in this case—a percentage that represents the profit margin claimed by Great American—for three reasons: First, it seems equitable that Cherrydale, as a proven wrongdoer, should bear the risk of an uncertain damage claim, see *supra* note 270; second, Cherrydale did not provide a sufficiently persuasive reason not to use the highest percentage; and third, it is reasonable to assume in this context that but for Cherrydale's actions, Great American would have made sales to those KB customers in 2008. Thus, I consider it appropriate to use Great American's profit margin.

Cherrydale for profits it made through sales by Southern, Fisher, Johnson, and Conati to former KB customers. Based on the scant evidence of calculable damages in the record, I conclude this represents a principled, nonspeculative estimate of damages due to Great American.[307]

3. Willful and Malicious Misappropriation of Trade Secrets

In addition to its claims for compensatory damages for lost profits and unjust enrichment, Great American argues that Cherrydale "willfully and maliciously" misappropriated trade secrets and that, as a result, it also should be liable for exemplary damages and attorneys' fees under the DUTSA. For the reasons previously stated, the record shows that Cherrydale willfully or intentionally misappropriated Great American's trade secrets. To succeed on this aspect of its claim, however, Great American must demonstrate that Cherrydale's misappropriation of the Ranking Report and KB's customer information was both willful *and* malicious.[308]

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[307] *See supra* note 263; *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *12 (Del. Ch. Apr. 27, 2009).

[308] *Marisco v. Cole*, 1995 WL 523586, at *8 (Del. Ch. Aug. 15, 1995) ("In the absence of a showing of malicious conduct, our law does not permit an award of exemplary damages and attorney fees."); *see also Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1120 (Fed. Cir. 1996) ("For an award of exemplary damages, that misappropriation must in addition be willful *and* malicious.") (interpreting the Illinois Trade Secrets Act).

Delaware case law generally describes willfulness as "an awareness, either actual or constructive, of one's conduct and a realization of its probable consequences,"[309] while malice requires a showing of "ill-will, hatred, or intent to cause injury."[310] Malice also may be found after a party has demonstrated a reckless disregard for another's trade secrets with the intent to cause injury.[311] The key requirement in finding malice in this context, therefore, is a showing that one party acted with *the intent to cause injury* to the other.

Here, Cherrydale knew that Southern, Johnson, Fisher, and other KB employees had signed Employment Contracts and knew the terms of those contracts.[312] Specifically, Cherrydale knew that former KB employees were contractually obligated to return customer information after leaving KB. Additionally, Cherrydale knew, or had reason to know, that the information contained in the Ranking Report—*i.e.*, the sales volume figures Hoffrichter used to facilitate his recruiting efforts—as well as the KB customer lists maintained by Southern, Johnson, and Fisher constituted KB trade secrets.[313] Nevertheless, despite this knowledge, Cherrydale chose to recklessly disregard the

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[309] *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005), (quoting *Jardel Co. v. Hughes,* 523 A.2d 518, 530 (Del. 1987)), *aff'd*, 913 A.2d 569 (Del. 2006).

[310] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

[311] *Nucar Consulting*, 2005 WL 820706, at *14.

[312] T. Tr. 1389

[313] *Id*. at 602-03, 612 (Hoffrichter), 1102-03 (Kraft); JX 47, 48, 52.

potential harm the disclosure and use of those trade secrets would cause Great American and, instead, used those trade secrets to pursue an aggressive course calculated to lure away members of the KB sales force and customer base.[314] These actions alone demonstrate that Cherrydale acted recklessly with intent to injure Great American. That conclusion is reinforced by an email between Hoffrichter and Rosen on March 18, 2008.[315] There, Rosen wrote "KB stole 1.5 mil in sales per year from us by hiring the nolan group and Ann teasdale [sic] as well. Let's get aggressive."[316] In response, Hoffrichter wrote, "Ill [sic] take that as a green light, with [Kraft]'s, [Lightstone]'s and your guidance and Ok on anything I do."[317] No one at Cherrydale ever corrected Hoffrichter.

I, therefore, find that Cherrydale acted maliciously with intent to harm KB and, indirectly, Great American through its questionable and illegal recruiting efforts, including Cherrydale's misappropriation of trade secrets.

a. Exemplary Damages

Great American seeks exemplary damages under 6 *Del. C.* § 2003(b), which provides that the Court "may award exemplary damages in an amount not exceeding twice any award [of compensatory damages]" where "willful and malicious

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314 JX 58, 60.

315 JX 60.

316 *Id.*

317 *Id.*

misappropriation exists." In the circumstances of this case, I consider it appropriate to grant Great American $61,538 in exemplary damages, bringing the total damage award to $123,076. While Section 2003(b) authorizes the Court to award exemplary damages up to twice the value of compensatory damages, I do not consider the maximum permissible amount appropriate here based on the way this litigation unfolded. Great American obtained a preliminary injunction at the very outset of this action and benefited greatly from it, hiring over 86 percent of KB's sales reps. Thereafter, a great deal of time and effort was devoted to Great American's grossly inflated claims for damages based on its lost business segment and other theories, which ultimately proved unsuccessful. These factors lead me to conclude that simply doubling the amount of compensatory damages amply serves the purposes of the DUTSA.[318]

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[318] The Court of Chancery typically may award exemplary damages only where it is explicitly authorized to do so by statute. *See Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1158-59 (Del. Ch. 1978) ("[I]n the absence of express statutory provisions, a court of equity is without authority to assess exemplary or punitive damages."). This Court is known "as a court of conscience" that "will permit only what is just and right with no element of vengeance and therefore will not enforce penalties or forfeitures." *Id.* at 1159. But, as "[t]he purpose of awarding punitive or exemplary damages is to impose a penalty or deterrent to prevent conduct which is deemed to be bad or harmful," the Delaware Legislature does have the constitutional power to "make the policy decision that a certain course of conduct, not previously cause for the imposition of punitive damages, should now be penalized beyond the awarding of compensatory damages" and to confer authority to award such damages in the Court of Chancery. *Id.* at 1160.

In granting exemplary damages based on 6 *Del. C.* § 2003(b), I am mindful that at least one case in Delaware questions whether the Legislature, through Section 2003(b), specifically and explicitly authorized the Court of Chancery to grant exemplary damages. *CVM Corp. v. O'Connor*, 1996 WL 255892, at *6 (Del. Ch.

b. Attorneys' Fees

In addition to exemplary damages, the DUTSA permits this Court to award reasonable attorneys' fees to the prevailing party when "willful and malicious misappropriation [of trade secrets] exists."[319] Implicit in this language is the understanding that the Court should award only reasonable attorneys' fees actually incurred in connection with litigation of a misappropriation of trade secrets claim. As discussed *supra* Part II.D.3, Cherrydale did willfully and maliciously misappropriate Great American's trade secrets; hence, an award of attorneys' fees arising from Great American's pursuit of that claim is justified.

Throughout this litigation, from the motions that resulted in the TRO and the Preliminary Injunction through the trial and post-trial proceedings, the primary

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Jan. 24, 1996) (Master's Report), *adopted by CVM v. O'Connor*, 1996 WL 255888 (Del. Ch. Apr. 18, 1996).

Since that decision, however, at least two Court of Chancery decisions have awarded exemplary damages under Section 2003(b). *See EDIX Media Gp., Inv. v. Mahani*, 2006 WL 3742595, at *6, 15 (Del. Ch. Dec. 12, 2006) (awarding exemplary damages equal to twice the compensatory damages); *W.L. Gore & Assoc., Inc. v. Wu*, 2006 WL 2692584, at *6 (Del. Ch. Sept. 15, 2006) (same). Additionally, two other cases implicitly recognized the Court's authority to do so. *See Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *14 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006); *Marsico v. Cole*, 1995 WL 523586, at *8 (Del. Ch. Aug. 15, 1995). In my opinion, these cases reflect the better view. When read as a whole, the DUTSA reflects a legislative intent to confer on the Court of Chancery jurisdiction to award exemplary damages in a case properly before it. Conversely, it is unlikely the Legislature intended to force a plaintiff claiming misappropriation of trade secrets and seeking injunctive relief therefor (as most plaintiffs do) to forego any claim for exemplary damages.

[319] 6 *Del. C.* § 2004.

components of Great American's case have been its claims for misappropriation of trade secrets and tortious interference. Moreover, although different in some respects, those claims have received essentially equal billing. In these circumstances, I award Great American one half of the attorneys' fees it incurred in this action, because Great American's misappropriation of trade secrets claim and its tortious interference claim played roughly equal roles in the litigation and in many respects were inextricably intertwined. Consequently, from a practical standpoint, accurately separating work done in pursuit of each claim would be difficult, if not impossible.[320]

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[320] As a prevailing party, Great American is also entitled to recover costs. *See* Ct. Ch. R. 54(d) ("Except when express provision therefore is made either in a statute or these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.").

Because the DUTSA only authorizes payment of reasonable attorneys' fees and does not mention either costs or expenses, I limit my ruling under 6 *Del. C.* § 2004 to attorneys' fees. I also note the recognized difference between "costs" and "expenses." Great American is entitled to recover only those "costs" traditionally recoverable under Rule 54(d). Such costs are limited to those "expenses necessarily incurred in the assertion of [a] right in court," such as court filing fees, fees associated with service of process, or costs covered by statute. *See FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *17-18 (Del. Ch. Jan. 22, 2007) (citing *Dewey Beach Lions Club v. Longacre,* 2006 WL 2987052, at *2-3, (Del. Ch. Oct. 11, 2006); *Comrie v. Enterasys Networks, Inc.,* 2004 WL 936505, at *16-17, (Del. Ch. Apr. 27, 2004)). Thus, items such as expert witness fees, computerized legal research, transcripts, travel, express mail and courier expenses, and photocopying are not recoverable. *See Gaffin v. Teledyne, Inc.*, 1993 WL 271443, at *2 (Del. Ch. July 13, 1993); *FGC Hldgs.*, 2007 WL 241384, at *17-18.

E. Attorneys' Fees Based on Cherrydale's Contempt of the Preliminary Injunction

In addition to its claims on the merits, Great American contends that Cherrydale acted in contempt of the Preliminary Injunction and should be sanctioned accordingly, including being required to reimburse Great American for its attorneys' fees and expenses in pursuing its motion for contempt. In this regard, I find that Cherrydale is liable for contempt and, on that basis, award Great American all of its attorneys' fees and expenses incurred in prosecuting that motion.

In Delaware, "[s]anctions for civil contempt may take the form of a fine to compensate the plaintiffs for such contempt, or of imprisonment. An award of counsel fees is also a proper consideration."[321] The Court's May 16, 2008 Preliminary Injunction enjoined Cherrydale (1) from further appropriating, using, or revealing any of Great American's confidential customer information or other trade secrets not readily available through proper means and (2) from assigning Fisher to work in any part of the territory he worked in while employed at KB for a period of one year.[322] The Preliminary Injunction also required Cherrydale to ensure that Hoffrichter, Williamson, Southern, and Fisher did

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321 *Miller v. Steller Enterp., Inc.*, 1980 WL 6432, at *3 (Del. Ch. Dec. 22, 1980) (citing *City of Wilm. v. Gen. Teamsters Local Union #326*, 321 A.2d 123 (Del. 1974)). The *Teamsters Local 326* case confirmed that the Court of Chancery possesses both common law and statutory powers to enforce its judgments. 321 A.2d at 125 (recognizing power of the Court to impose a fine or award damages for the harm sustained as a result of failure to obey injunctive order); *see also* Ct. Ch. R. 70(b) (authorizing the Court to provide relief "[f]or failure to obey a restraining or injunctive order, or to obey or to perform any order").

322 Prelim. Inj. ¶¶ 2(a)-(c).

not take part in soliciting, contacting, recruiting, or hiring any individuals who worked for KB on April 24, 2008 and to return or destroy any documents containing Great American's trade secrets and other confidential information.[323]

While it did not disregard the Preliminary Injunction altogether, Cherrydale failed to comply with several aspects of the order. First, Fisher sent the "Abe Lincoln" letter to his former KB customers explaining that he would be unable to service their accounts because of the Preliminary Injunction and introduced them to Conati, who would be "the Cherrydale sales representative . . . contacting [Fisher's customers] and servicing [their] account[s]."[324] Fisher and Conati then met so Fisher could give Conati information concerning his past and prospective KB customers.[325] Second, Cherrydale employed similar tactics with regard to customers formerly serviced by Johnson.[326] Third, from May 3 to June 22, 2008, Johnson continued to access his former KB email account and forward customer contact information to the personal email account he used as a Cherrydale sales rep.[327] Finally, Southern, Fisher, and Johnson continued to maintain a list of customers whose accounts they serviced while employed with KB.[328]

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323 *Id.*

324 JX 101; T. Tr. 1061.

325 T. Tr. 1022 (Fisher).

326 *See supra* note 81.

327 JX 15.

328 *See supra* Part I.B.4.

These actions violated both the spirit and the letter of paragraphs 2(b) and (c) of the Preliminary Injunction. Consequently, I find that Cherrydale must reimburse Great American for the reasonable attorneys' fees and expenses it incurred in prosecuting its motion for contempt of the Preliminary Injunction.

F. Pre- and Post-Judgment Interest

In its Complaint, Great American also seeks an award of pre- and post-judgment interest at the legal rate. Delaware courts routinely award such interest, using the "legal rate" as the default rate.[329] Seeing no reason to depart from this practice, I grant Great American pre-judgment interest on its compensatory damages beginning on January 1, 2009, compounded quarterly, at the legal rate. Additionally, I award post-judgment interest on the full amount of the judgment, including that part comprised of pre-judgment interest.[330]

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[329] *See* 6 *Del. C.* § 2301(a) ("Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due."); *see also In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *1 (Del. Ch. Jan. 05, 2010); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *18-19 (Del. Ch. May 30, 2008) (citing *Citadel Hldg. Corp. v. Roven,* 603 A.2d 818, 826 (Del. 1992) ("In Delaware, prejudgment interest is awarded as a matter of right. Such interest is to be computed from the date payment is due."); *Trans World Airlines, Inc. v. Summa Corp.,* 1987 WL 5778, at *3 (Del. Ch. Jan. 21, 1987) ("The purpose of prejudgment interest is to compensate plaintiffs for losses suffered from the inability to use the money awarded during the time it was not available.")).

[330] *See Brandin v. Gottlieb*, 2000 WL 1005954, at *30 (Del. Ch. July 13, 2000) (noting that without compound, post-judgment interest on the full amount, a judgment debtor could "chip away at the real value" of a judgment by delaying payment).

G. Permanent Injunctive Relief

Great American acknowledged that, after the trial in this action, Cherrydale assigned all of its assets to Cherry and that all of its former sales reps now work for Cherry Bros., LLC.[331] Based on this development and the absence of any persuasive argument as to the need for further injunctive relief in this matter, I deny Great American's request for a permanent injunction against Cherrydale as moot.

III. CONCLUSION

For the foregoing reasons, I hold that Cherrydale tortiously interfered with various provisions of KB's employment contracts and willfully and maliciously misappropriated certain of KB's trade secrets. Based on that misconduct, I award Great American $61,538 in compensatory damages, an additional $61,538 in exemplary damages, and one half of its attorneys' fees associated with litigating this action. I also hold Cherrydale in contempt of the May 16, 2008 Preliminary Injunction and award Great American all of the attorneys' fees and expenses it incurred in pursuing its motion for contempt. Great American is entitled to pre-judgment interest on the compensatory damages portion of this award from January 1, 2009 at the legal rate of interest, as well as post-judgment interest on the full amount due.

Plaintiff shall submit, on notice, a form of final judgment consistent with this opinion within ten days of the date of this Opinion. Plaintiff also shall submit evidence of its attorneys' fees and expenses within ten days of the date of this Opinion.

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[331] PRB 24.

Defendants shall file any objections to that claim within ten days after service of Plaintiff's evidence.