

STATE OF NORTH CAROLINA
IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 1096

STATES MORTGAGE COMPANY,
INC.,

Plaintiff,

v.

MARK BOND; LKN CAPITAL
MORTGAGE, INC; KEVIN CASPER;
and TRUSTEGIC CONSULTING,
INC.,

Defendants.

**ORDER AND OPINION ON
DEFENDANTS MARK BOND AND
LKN CAPITAL MORTGAGE, INC.'S
MOTION TO DISMISS AND
PLAINTIFF STATES MORTGAGE
COMPANY, INC'S MOTION FOR
LEAVE TO AMEND COMPLAINT**

1. Mark Bond and Kevin Casper worked for States Mortgage Company, Inc. (“States Mortgage”) for several years before leaving to start their own businesses in the mortgage brokerage and consulting industries. Shortly after they left, States Mortgage received an errant email from Bond’s new business, LKN Capital Mortgage, Inc. (“LKN”) forwarding a list of some of States Mortgage’s customers. The accompanying email suggested that two recipients with LKN email addresses solicit the listed customers, and it referenced the availability of additional information regarding those customers. This event triggered concern that Bond and Casper had absconded with States Mortgage’s proprietary customer information and were using it to jump-start their new venture. The lawsuit followed.

2. The case is before the Court on Defendants Mark Bond and LKN Capital Mortgage, Inc.’s Motion To Dismiss (the “Motion to Dismiss”), (ECF No. 12), and Plaintiff States Mortgage Company, Inc.’s (“States Mortgage’s”) Motion To Amend

Complaint, (the “Motion to Amend”), (ECF No. 24) (collectively, the “Motions”).¹ For the reasons stated below, Plaintiff’s Motion to Amend is **GRANTED in part and DENIED in part**, and Defendants’ Motion to Dismiss is **GRANTED in part and DENIED in part**.

Pope McMillan, P.A., by Clark D. Tew, for Plaintiff States Mortgage Company, Inc.

Sellers, Ayers, Dortch, & Lyons, P.A., by Brett Dressler and Michelle Dressler, for Defendants Mark Bond and LKN Capital Mortgage, Inc.

Thurman, Wilson, Boutwell, & Galvin, P.A. by James Galvin and Ryan Tiede, for Defendants Levin Casper and TrusTegic Consulting, Inc.

Earp, Judge.

I. FACTUAL BACKGROUND

3. The Court does not make findings of fact when ruling on either a motion to dismiss or a motion to amend. It recites below those factual allegations from the Complaint and the proposed amendment that are relevant and necessary to the Court’s determination of the motions before it. *See, e.g., Krawiec v. Manly*, 370 N.C. 602, 606 (2018).

4. States Mortgage is a North Carolina Corporation with its principal place of business in Huntersville, Mecklenburg County, North Carolina. (Prop. Am. Compl. ¶ 1, ECF No. 24.1.) Its revenue comes primarily from facilitating debt consolidation,

¹ States Mortgage includes with its Motion to Amend a Motion to File Documents Under Seal and a Motion for Protective Order (ECF No. 24). The Court has addressed the latter two motions by separate Order (ECF No. 45).

providing new mortgages, and refinancing existing mortgages. (Prop. Am. Compl. ¶ 10.)

5. Mark Bond is a resident of Lincoln County, North Carolina. (Prop. Am. Compl. ¶ 2.) States Mortgage employed Bond from 20 February 2015 to 20 September 2020 as a Mortgage Loan Originator. (Prop. Am. Compl. ¶¶ 16–17.)

6. LKN is a North Carolina Corporation with its principal place of business in Mooresville, North Carolina. Articles of Incorporation for LKN were filed with the North Carolina Secretary of State on 2 June 2020. Bond is President of LKN. (Prop. Am. Compl. ¶¶ 3, 28–29.)

7. States Mortgage alleges on information and belief that Kevin Casper is a resident of Iredell County, North Carolina. (Prop. Am. Compl. ¶ 4.) He was employed by States Mortgage from 1 October 2013 until November 2020 as a Loan Coordinator. (Prop Am. Compl. ¶¶ 26–27.)

8. TrusTegic Consulting, Inc. (“TrusTegic”) is a North Carolina Corporation with its principal place of business in Mecklenburg County, North Carolina. Articles of Incorporation for TrusTegic were filed with the North Carolina Secretary of State on 2 June 2020. Casper is President of TrusTegic. (Prop. Am. Compl. ¶¶ 6, 30–31.)

9. States Mortgage maintains a compilation of information regarding all of its past, present, and future customers dating back to 2013. The compilation is in the

form of an Excel spreadsheet (the “Spreadsheet”). (Prop. Am. Compl. ¶ 14, Ex. A.)² The Spreadsheet includes each customer’s current mortgage interest rate, the current outstanding amount owed on their existing mortgage, the current loan type, the customer’s credit score, the customer’s phone number and birthday, the loan status (including whether the application is in process, closed, withdrawn, or if it had an adverse result), the reason(s) for any loan denial, the initial annual percentage rate, the advertising campaign that resulted in the customer’s use of States Mortgage’s services, the fee earned or to be earned by States Mortgage, and “a variety of other pieces of non-public information accumulated by States Mortgage.” (Prop. Am. Compl. ¶¶ 11–12.)

10. The Spreadsheet is electronically maintained in a password protected, locked file that is accessible only by the administrator for States Mortgage, Donna Chain, its President, Brenna Olberding, and her spouse, Gus Olberding. (Prop. Am. Compl. ¶ 15.)

11. States Mortgage further protects the Spreadsheet by granting access to it on a limited basis to only those individuals who need it to fulfill their employment responsibilities. (Prop. Am. Compl. ¶ 19.) As a Mortgage Loan Originator for States Mortgage, Bond had access to information from the List to facilitate contracts between States Mortgage and its customers. (Prop. Am. Compl. ¶ 18.) Similarly,

² The Spreadsheet, which appears in the record as Exhibit A to the Proposed Amended Complaint, was submitted in redacted form to the Court for *in camera* review. The Court subsequently ordered Plaintiff to file Exhibit A under seal. (See Order, ECF No. 45.)

during his employment with States Mortgage, Casper had access to the Spreadsheet in his role as Loan Coordinator. (Prop. Am. Compl. ¶ 27.)

12. States Mortgage requires that its employees not share information from the Spreadsheet with anyone who is not doing work on a transaction for which the information was accessed. (Prop. Am. Compl. ¶ 20.)

13. When he left States Mortgage, Bond agreed in an exit letter that he would not use or sell States Mortgage's proprietary information. (Prop. Am. Compl. ¶¶ 21–22.)

14. Between 2 June 2020 and September 2020, Bond worked as a licensed loan officer for States Mortgage while also serving as President of LKN. He did not inform States Mortgage that he had started his own mortgage brokerage business. (Prop. Am. Compl. ¶ 32.)

15. Similarly, from 2 June 2020 until 20 November 2020, Kevin Casper acted as both an employee of States Mortgage and an officer of TrusTegic. (Prop. Am. Compl. ¶ 32.) He did so without informing States Mortgage that he was serving in both roles. (Prop. Am. Compl. ¶ 34.)

16. States Mortgage was not aware that Bond and Casper had started their own businesses while still working for it. (Prop. Am. Compl. ¶ 35.)

17. In November 2020, five States Mortgage employees quit their jobs and began working for LKN. (Prop. Am. Compl. ¶ 36.)

18. On 1 December 2020, an email that had originated on 24 November 2020 and that contained a list of some States Mortgage customers was inadvertently

forwarded from an administrative email address associated with LKN to an email address associated with States Mortgage. The email suggested that its LKN recipients contact the names listed and indicated that LKN had access to additional information about those individuals. (Prop. Am. Compl. ¶¶ 39–42.)

19. States Mortgage alleges upon information and belief that Bond and Casper “used Donna Chain’s computer and/or coerced Donna Chain” into downloading and transferring a form of the Spreadsheet for Defendants’ use to start LKN. States Mortgage further alleges that as of December 2020, Casper maintained a copy of this electronic file on his personal computer. (Prop. Am. Compl. ¶ 43.)

20. States Mortgage alleges that Defendants have used the Spreadsheet “to facilitate contracts and agreements” with its customers. In addition to the email forwarded on 1 December 2020, information that States Mortgage obtained from American Home Title, a title and escrow agent regularly used by Defendants, allegedly reveals that twenty-three (23) mortgages closed by LKN during its first few years of operation were for customers that are on the Spreadsheet. (Prop. Am. Compl. ¶ 46.)

21. States Mortgage alleges upon information and belief that Defendants contacted borrowers whose information they obtained from the Spreadsheet and pitched them by suggesting that States Mortgage was overcharging them. (Prop. Am. Compl. ¶ 49.)

22. States Mortgage also alleges that LKN has used information from the Spreadsheet in LKN’s advertising. (Prop. Am. Compl. ¶ 50.)

II. PROCEDURAL BACKGROUND

23. Plaintiff initiated this action on 9 May 2022. (Complaint, ECF No. 1.) Defendants Bond and LKN responded by filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)”) on 28 July 2022. (Defs.’ Mot. Dismiss, ECF No. 12.)³ On 24 August 2022, Plaintiff moved to amend its Complaint. (Pl.’s Mot. Amend, ECF No. 24.)

24. The Proposed Amended Complaint purports to assert five claims for relief: Misappropriation of Trade Secrets, Permanent Injunction, Unfair and Deceptive Trade Practices, Violation of Fiduciary Duty, and Piercing the Corporate Veil.⁴

25. Bond and LKN oppose Plaintiff’s Motion to Amend on futility grounds with arguments that echo many of the arguments they make to support their Motion to Dismiss. After full briefing and a hearing on the Motions during which all parties were present and participated, the Motions are ripe for disposition.

³ When TrusTegic failed to respond to the Complaint, States Mortgage moved for entry of default, and this Court granted the motion. (ECF No. 11.) Consequently, only Bond and LKN moved for dismissal and opposed the Motion to Amend. Casper and TrusTegic jointly filed a responsive pleading on 21 September 2022. (ECF No. 38.) The Court subsequently set aside the entry of default against TrusTegic and accepted its responsive pleading. (ECF No. 42.)

⁴ Plaintiff’s Fifth Cause of Action (Piercing the Corporate Veil) implicates Casper and is not at issue in either pending motion. *See Loray Master Tenant, LLC v. Foss N.C. Mill Credit 2014 Fund I, LLC*, 2021 NCBC LEXIS 15, at *26 (N.C. Super. Ct. Feb. 18, 2021) (“Piercing the corporate veil is an extraordinary remedy” not a claim).

III. LEGAL STANDARD

26. Dismissal of a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (“Rule(s)”) is proper if “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018). Otherwise, “a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

27. When deciding a Rule 12(b)(6) motion, the Court construes the complaint liberally and accepts all allegations as true. *See, e.g., Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019); *Laster v. Francis*, 199 N.C. App. 572, 577 (2009). However, the Court is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Good Hope Hosp., Inc. v. N.C. Dep’t of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

28. In its review, the Court may consider documents that are the subject of the Complaint and to which the Complaint specifically refers. *See, e.g., McDonald v. Bank of N.Y. Mellon Trust Co.*, 259 N.C. App. 582, 586 (2018) (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001)).

29. After a responsive pleading has been served, Rule 15 allows a party to amend his pleading only by leave of court or by written consent of the adverse party, but “leave shall be freely given when justice so requires.” N.C.G.S. § 1A-1, R. 15(a). Reasons justifying denial of a motion to amend are undue delay, bad faith, dilatory motive, repeated failure to cure defects by previous amendments, undue prejudice, and futility of the amendment. *See, e.g., JPMorgan Chase Bank, N.A. v. Browning*, 230 N.C. App. 537, 541 (2013). “Ultimately, whether to allow an amendment rests in the trial judge’s discretion.” *KRG New Hill Place, LLC v. Springs Invs., LLC*, 2015 NCBC LEXIS 20, at *8 (N.C. Super. Ct. Feb. 27, 2015) (citing *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991)).

IV. ANALYSIS

30. Because the test for futility used for a motion to amend mirrors the sufficiency test used for a motion to dismiss, the Court evaluates Plaintiff’s claims, original and proposed, using the same standard. *See Smith v. McRary*, 306 N.C. 664, 671 (1982) (an amendment was properly denied when “plaintiff’s proposed amendment could not withstand a motion to dismiss for failure to state a claim”); *Bourgeois v. Lapelusa*, 2022 NCBC LEXIS 111, at **11 (N.C. Super. Ct. Sept. 23, 2022) (“test for futility with respect to a proposed amendment mirrors the sufficiency test of Rule 12(b)(6)”); *Gateway Mgmt Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *8 (N.C. Super. Ct. May 8, 2021) (“Although an amended pleading would ordinarily moot a pending motion to dismiss, the Court will consider Defendants’ Motions to Dismiss as to the Amended Complaint because Defendants

and Plaintiff both addressed the sufficiency of the Amended Complaint in their respective briefs and at the hearing.”).

31. Defendants Bond and LKN contend that each of Plaintiff’s claims, asserted and proposed, are insufficient. The Court addresses the claims as stated in the Proposed Amended Complaint, which is their most fulsome form.

A. Misappropriation of Trade Secrets

32. In North Carolina a “trade secret” is defined as:

“[B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

a. Derives independent or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3).

33. Our Courts have employed six factors when determining the existence of a trade secret:

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

Combs & Assocs. v. Kennedy, 147 N.C. App. 362, 369–70 (2001); accord *Wilmington Star-News, Inc. v. New Hanover Reg’l Med. Ctr., Inc.*, 125 N.C. App. 174, 180–81

(1997). “These factors overlap, and courts do not always examine them separately and individually.” *Vitaform, Inc. v. Aeroflow, Inc.*, 2020 NCBC LEXIS 132, at **19 (N.C. Super. Ct. Nov. 4, 2020).

34. Misappropriation means the “acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent[.]” N.C.G.S. § 66-152(1). Misappropriation does not occur, however, when a trade secret is arrived at by “independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” *Id.*

35. To state a claim, States Mortgage must “identify a trade secret with sufficient particularity so as to enable [the defendants] to delineate that which [they are] accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.” *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 326 (2008) (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003) (citations omitted)). “[G]eneral allegations in sweeping, and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, [are] ‘insufficient to state a claim for misappropriation of trade secrets.’” *Krawiec*, 370 N.C. at 610 (quoting *Washburn*, 190 N.C. App. at 327). In addition, States Mortgage must affirmatively allege facts supporting a conclusion that it engaged in reasonable efforts to protect the secrecy of the identified trade secret. *BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24, at **20 (N.C. Super. Ct. Feb. 10, 2023) (citing N.C.G.S. § 66-152(3)(b)).

36. Likewise, when alleging misappropriation, States Mortgage must allege more than its belief that Defendants Bond and LKN had access to its trade secrets and now work for a competitor. *See Washburn*, 190 N.C. App. at 327 (citing *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 511 (2004)). Conclusory allegations of misappropriation are insufficient. *See, e.g., Bite Busters, LLC v. Burris*, 2021 NCBC LEXIS 26, at **22–23 (N.C. Super. Ct. Mar. 25, 2021); *Washburn*, 190 N.C. App. at 327; *Strata Solar, LLC*, 2020 NCBC LEXIS 129, at **11–12.

37. Defendants Bond and LKN contend that States Mortgage has failed on each of these fronts. They argue that States Mortgage has not identified the trade secret with particularity, not alleged facts to show that it protected the secrecy of any information, and not adequately specified the manner in which the alleged misappropriation occurred. (Defs.’ Opp. Mot. Amend 11–18.)

38. States Mortgage responds that its Proposed Amended Complaint adequately identifies the trade secret at issue as an Excel spreadsheet containing a “list of [all of its] past, present, and future, (sic) customers. . . who are generally individual residential mortgage borrowers seeking refinances or first loans, including their current mortgage interest rate, the current outstanding amount owed on their existing mortgage, the current loan type, the customer’s credit score, phone number and birthday, the loan status (including whether the application is in process, closed, withdrawn, or if it had an adverse result), the reason(s) for any loan denial, the initial annual percentage rate, the advertising campaign that resulted in the customer’s use of States’ Mortgages (sic) services, the fee earned or to be earned by States Mortgage,

amongst a variety of other pieces of non-public information accumulated by States Mortgage.” (Prop. Am. Compl. ¶¶ 11–12, 14.) The date range for the Spreadsheet is from 2013 until the date States Mortgage alleges the Spreadsheet was misappropriated. (Prop. Am. Compl. ¶ 12.)

39. States Mortgage alleges that it engaged in reasonable efforts to maintain the secrecy of the Spreadsheet, including but not limited to:

- (a) restricting access to the information to certain employees of States Mortgage;
- (b) maintaining reasonable safeguards, such as password-protected computers, for the storage of the [Spreadsheet];
- (c) preventing access to the [Spreadsheet] by States Mortgage competitors; and
- (d) protecting such information further by requiring non-disclosure of the [Spreadsheet] in exit interviews and agreements.

(Prop. Am. Compl. ¶ 56.)

40. Defendants Bond and LKN contend that a list of customer names and addresses that could be compiled through public sources is not a trade secret. (Defs.’ Opp. Mot. Amend 12.) They argue that financial and mortgage information is routinely shared with third parties during the process of obtaining a mortgage, which is then recorded on the public record. Given the public nature of the information, Defendants conclude that the Spreadsheet described by States Mortgage cannot be a trade secret. (Defs.’ Opp. Mot. Amend 14–15.)

41. Bond and LKN further argue that States Mortgage took insufficient steps to protect the confidentiality of the purported trade secret. They observe that States Mortgage does not allege that it used nondisclosure agreements or had

employment policies that prohibited disclosure of the Spreadsheet. (Defs.' Opp. Mot. Amend 18.) Defendants argue that the failure to use these tools is fatal to States Mortgage's claim. (Defs.' Opp. Mot. Amend 18.)

42. The Court concludes that the Proposed Amended Complaint sufficiently identifies the Spreadsheet as the trade secret allegedly misappropriated. While some of the information on the Spreadsheet might be shared with third parties or might otherwise be in the public domain, States Mortgage alleges that, over years of doing business, it has expended effort compiling the particular information regarding its customers and prospective customers that is necessary to "target [its customers] with a tailor-made pitch" for use of its mortgage services. (Prop. Am. Compl. ¶ 12.)

43. Although a party must ultimately meet a high burden of proof, in some instances even public information can constitute a trade secret if it has particular value as a compilation or manipulation of information. *See RoundPoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at ** 32 (N.C. Super. Ct. Feb. 18, 2016). Indeed, the NCTSPA uses the word "compilation" when defining the term "trade secret": "business or technical information, including but not limited to a . . . compilation of information[.]"

44. The Court finds no shortage of case law to support the assertion that a compilation of customer information could be a trade secret. *See, e.g., State ex rel. Utils. Comm'n v. MCI Telecomms., Corp.*, 132 N.C. App. 625, 634 (1999) ("compilation of information" involving customer data and business operations constituted trade secret); *Computer Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *27–

28 (N.C. Super. Ct. Jan. 27, 2017) (finding “financial information and contact lists” sufficient to allege trade secret); *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *10–12 (N.C. Super. Ct. Oct. 21, 2016) (denying 12(b)(6) motion where trade secret identified as “confidential and proprietary business information” that included “names and contacts of customers”); *Koch Measurement Devices, Inc. v. Armke*, 2015 NCBC LEXIS 45, at *13 (N.C. Super. Ct. May 1, 2015) (“[T]he Court of Appeals has held that where an individual maintains a compilation of detailed records over a significant period of time, those records could constitute a trade secret even if ‘similar information may have been ascertainable by anyone in the . . . business.’” (citing *Byrd’s Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376 (2001))). Accordingly, the Court concludes that Plaintiff’s allegations describing the Spreadsheet are sufficient to identify the alleged trade secret at issue.

45. Furthermore, while nondisclosure agreements and employment policies are certainly tools that are often used to safeguard business information, the law does not *require* that they be used in order to satisfy the “reasonable efforts” requirement in Section 66-152(3)(b) of the NCTSPA. At this early stage of the litigation, States Mortgage has satisfied its obligation to allege that it made reasonable efforts to maintain the secrecy of the Spreadsheet. *Bldg. Ctr., Inc.*, 2016 NCBC LEXIS 79, at *14 (“Generally, only where efforts to maintain secrecy of the allegedly misappropriated trade secrets were completely absent have North Carolina courts dismissed claims at the 12(b)(6) stage.” (citing *Thortex, Inc. v. Standard Dyes, Inc.*, 2006 N.C. App. LEXIS 1171 (2006) (unpublished))).

46. As for whether States Mortgage has adequately pled misappropriation, Defendants argue that new allegations in the Proposed Amended Complaint that, “upon information and belief,” Bond and Casper either used a co-worker’s computer or coerced the co-worker herself into providing the Spreadsheet and that they downloaded and transferred it by electronic file to Casper’s personal computer, (Prop. Am. Compl. ¶ 43), are “irreconcilable” with Plaintiff’s remaining allegations and should be disregarded. (Defs.’ Opp. Mot. Amend 9–10.)

47. The Court disagrees. The allegations are more than sufficient at this stage to meet the pleading requirements for misappropriation. In addition to the allegation in paragraph 43, Plaintiff also alleges that information it has received in discovery from American Home Title indicates that twenty-five (25) of the first thirty-two (32) mortgages closed by LKN involved customers whose information appears on the Spreadsheet. (Prop. Am. Compl. ¶ 46.) Moreover, States Mortgage points to the 1 December 2020 misdirected email containing a list of its customers, direction to the LKN recipient to contact them, and a statement indicating that additional information about those customers was available, as further support for its assertion that the Spreadsheet is being used by LKN. A determination of whether these allegations are inconsistent with other allegations, and whether they can be proven at all, requires a more developed record.

B. Violation of Fiduciary Duty

48. In addition to allegedly misappropriating trade secret information, States Mortgage alleges that Bond and Casper breached “certain fiduciary duties to Plaintiff as employees of Plaintiff.” (Prop. Am. Compl. ¶ 73.)

49. To state a claim for breach of fiduciary duty, Plaintiff must plead the existence of a fiduciary duty, a breach of that duty, and injury proximately caused by the breach. *See Green v. Freeman*, 367 N.C. 136, 141 (2013). In this case the claim fails at the first step.

50. A fiduciary relationship is one in which “there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52 (2016). “North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship.” *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019) (citing *Lockerman v. South River Electric Membership Corp.*, 250 N.C. App. 631, 635 (2016)). Neither a *de jure* nor a *de facto* fiduciary duty exists here.

51. States Mortgage alleges only that Bond and Casper owed it fiduciary duties by virtue of their status as its employees. (Prop. Am. Compl. ¶ 73.) However, a fiduciary relationship does not arise between an employee and his or her employer by operation of law, and only in rare circumstances does such a duty arise from the

particular facts of an employment relationship. *Dalton v. Camp*, 353 N.C. 647, 652 (2001) (virtually all employer-employee relationships are inadequate to establish obligations that are fiduciary in nature).

52. “The standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.” *Lockerman*, 250 N.C. App. at 636 (citation and internal quotation marks omitted).

53. In this case, Bond was employed by States Mortgage as a Mortgage Loan Originator, and Casper was employed as a Loan Coordinator. Neither man was in a position of such power that States Mortgage would have been subjugated to his improper influence or dominion. Therefore, Plaintiff’s allegations do not support the existence of a *de facto* fiduciary duty. *See Dalton*, 353 N.C. at 652.

54. “Without the existence of a fiduciary relationship there can be no claim for breach.” *Bourgeois*, 2022 NCBC LEXIS 111, at **15. Accordingly, Defendants’ Motion to Dismiss Plaintiff’s Fourth Claim for Relief (Violation of Fiduciary Duty) is **GRANTED**, and Plaintiff’s Fourth Claim for Relief is **DISMISSED** with prejudice.

C. Unfair and Deceptive Trade Practices

55. To state a claim under the North Carolina Unfair and Deceptive Trade Practices Act, (“UDTPA”), N.C.G.S. § 75-1.1 *et seq.*, a complainant must allege “(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to

his business.” *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 593 (2005) (quoting *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460–61 (1991)); *see also* N.C.G.S. § 75-1.1. Merely alleging breach of contract is insufficient. *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511 (1990). The allegations must include “egregious or aggravating circumstances.” *Dalton*, 353 N.C. at 657; *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62 (1992).

56. It is well-settled law in North Carolina that violation of the NCTSPA can be such an egregious circumstance. *See, e.g., NFH, Inc. v. Troutman*, 2019 NCBC LEXIS 66, at *64 (N.C. Super. Ct. Oct. 29, 2019) (“Under well-settled North Carolina law, a violation of North Carolina’s Trade Secret Protection Act may support liability under N.C.G.S. § 75-1.1.”).

57. Defendants’ motion to dismiss Plaintiff’s claim for Unfair and Deceptive Trade Practices is premised on their argument that Plaintiff’s claim for misappropriation of trade secrets fails. However, the Court has determined that the misappropriation of trade secrets claim, as it is stated in the Proposed Amended Complaint, survives. In addition, Plaintiff has adequately pled the remaining elements of a UDTPA claim. Defendants’ Motion to Dismiss the UDTPA claim is therefore **DENIED**.

D. Permanent Injunction

58. As its Second Claim for Relief, the Proposed Amended Complaint sets out a “claim” for a permanent injunction, alleging that Plaintiff has “no adequate remedy at law with respect to the immediate and short-term harm that may be done

to them by Defendants’ misappropriation of their trade secrets.” (Prop. Am. Compl. ¶ 63.) Defendants move to dismiss this “claim.” (Defs. Mot. Dismiss 20–26.)

59. As a matter of pleading form, the Court observes that injunctions are remedies, not independent causes of action. *See, e.g., Revelle v. Chamblee*, 168 N.C. App. 227, 230 (2005) (“A preliminary injunction is an ancillary remedy, not an independent cause of action”); *Brewster v. Powell Bail Bonding, Inc.*, 2018 NCBC LEXIS 76, at *18 (N.C. Super. Ct. July 26, 2018). On this basis, Defendants’ motion to dismiss the *claim* is **GRANTED**. However, this dismissal is without prejudice to Plaintiff’s ability to pursue injunctive *relief* should it be warranted by other viable causes of action. *See, e.g., Brewster*, 2018 NCBC LEXIS 76, at *19 (dismissing plaintiff’s claim for permanent injunction without prejudice and stating that the court would “assess any motion for a preliminary or permanent injunction, if filed, on its own merits”).

Motion to Amend

60. In addition to futility, Bond and LKN argue that the nine additional paragraphs added to the original complaint by the Proposed Amended Complaint “create insurmountable internal factual inconsistencies,” and that the doctrine of judicial estoppel prevents States Mortgage from attempting to amend its pleading in this way. (Defs.’ Opp. Mot. Amend 5–11.) Bond and LKN further argue that this is Plaintiff’s second lawsuit⁵ and his third attempt to state a claim for misappropriation of trade secrets. They contend that because Plaintiff’s failure to include in its original

⁵ The first action, 21 CVS 10759, was voluntarily dismissed on 3 May 2022. Defendants raise no argument pursuant to Rule 41(a).

filing the allegations it now seeks to add is not the result of mistake, inadvertence, or error, the amendment should not be permitted.

61. The Court recognizes that the facts pled by States Mortgage to support its misappropriation of trade secrets claim are more detailed in the Proposed Amended Complaint, undoubtedly in response to Defendants' Motion to Dismiss. However, a certain amount of evolution in the manner in which claims are pled is not uncommon, and the Court does not find the proposed amendment—particularly given how early it comes in the life of this case—to evidence an effort by Plaintiff to, as Defendants put it, play “fast and loose” with the Court. Nor can the Court rule out a set of circumstances under which the new allegations would be consistent with those previously pled, and the fact that some of the new allegations are pled on information and belief does not make them “irreconcilable” with the remaining allegations, as Defendants argue. *See, e.g., Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co.*, 258 N.C. 49, 51 (1962) (finding that in stating claims in a complaint, a plaintiff “may allege facts based on actual knowledge, or upon information and belief”).

62. Therefore, the Court, in its discretion, **GRANTS** Plaintiff's Motion to Amend its Complaint.

V. CONCLUSION

63. **WHEREFORE**, the Court hereby **ORDERS** as follows:

- a. Plaintiff's Motion for Leave to Amend Complaint is **GRANTED**.
- b. Defendants' Motion to Dismiss is **GRANTED in part and DENIED in part**. The Second Claim for Relief (Permanent Injunction) is dismissed

without prejudice to Plaintiff's ability to pursue injunctive *relief* should it be warranted by other viable causes of action. The Fourth Claim for Relief (Violation of Fiduciary Duty) is dismissed with prejudice.

- c. States Mortgage is directed to file its Amended Complaint, consistent with the Court's rulings herein, within seven (7) days.

IT IS SO ORDERED, this the 6th day of March, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases