NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 1900
GLOVER CONSTRUCTION COMPANY, INC., Plaintiff, v. SEQUOIA SERVICES, LLC, JOHN MICHAEL GLOVER, J. MARK GLOVER, and CHRISTOPHER JAMES COLANGELO, Defendants.	**ORDER ON DEFENDANTS' FIRST MOTIONS IN LIMINE RELATIVE TO CERTAIN DAMAGES ISSUES**

THIS MATTER comes before the Court on Defendants' First Motions in Limine Relative to Certain Damages Issues ("Motions in Limine," ECF No. 132). For the reasons set out below, the Motions in Limine are GRANTED IN PART and DENIED IN PART.

FACTUAL AND PROCEDURAL BACKGROUND

1. The factual and procedural background of this action is discussed in detail in this Court's Order and Opinion on the parties' cross-motions for summary judgment. *Glover Constr. Co. v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 76 (N.C. Super. Ct. June 18, 2020) (the "Summary Judgment Order"). Facts that are particularly pertinent to the Motions in Limine are referenced herein in the Court's analysis of Defendants' Motions in Limine.

2. Plaintiff Glover Construction Company, Inc. ("Plaintiff" or "GCC") and Defendants Sequoia Services, LLC ("Sequoia"), John Michael Glover ("John Glover"),

J. Mark Glover ("Mark Glover"), and Christopher James Colangelo filed cross-motions for summary judgment on 6 September 2019. (ECF Nos. 45, 47.)

3. On 18 June 2020, the Honorable Gregory P. McGuire entered the Summary Judgment Order in which the Court granted summary judgment in favor of Defendants on the following claims asserted by Plaintiff in its Complaint: aiding and abetting breach of fiduciary duty against Sequoia and Colangelo; aiding and abetting constructive fraud against Mark Glover, Sequoia, and Colangelo; breach of fiduciary duty against Mark Glover; tortious interference with contract against all Defendants; and tortious interference with prospective economic advantage against all Defendants. (ECF No. 98, at pp. 12–13, 45–46.) The Court denied summary judgment on the following claims: computer trespass against John Glover, Colangelo, and Sequoia; breach of fiduciary duty against John Glover; constructive fraud against John Glover; misappropriation of trade secrets against John Glover, Colangelo, and Sequoia; unfair methods of competition against all Defendants pursuant to Chapter 75 of the North Carolina General Statutes; conversion against John Glover; civil conspiracy against all Defendants; and punitive damages against all Defendants. (ECF No. 98, at pp. 12–13, 45–46.)

4. On 1 July 2021, this action was reassigned to the undersigned. (ECF No. 102.)

5. On 20 January 2022, Defendants filed their First Motions in Limine Relative to Certain Damages Issues in which they sought to exclude evidence or argument by Plaintiff at trial as to four damages-related subjects as is set out more fully below. (ECF No. 132.)

6. The Motions in Limine came before the Court for a hearing on 3 February 2022. The Motions in Limine are now ripe for decision.

ANALYSIS

7. "A Motion in limine seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial . . . ." *Hamilton v. Thomasville Med. Assocs*., 187 N.C. App. 789, 792 (2007) (cleaned up). The Court's ruling on motions in limine is interlocutory and "subject to modification during the course of the trial." *Id.* (cleaned up).

8. Defendants seek to exclude evidence and arguments regarding the subjects set out below under the North Carolina Rules of Evidence on the grounds that they are irrelevant under N.C. R. Evid. 401 and 402, or that their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under N.C. R. Evid. 403.

9. Rule 402 states that, unless barred by specific limitations, "[a]ll relevant evidence is admissible[.]" N.C. R. Evid. 402. Irrelevant evidence, on the other hand, is always inadmissible. *Id.* Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of [an] action more probable or less probable[.]" N.C. R. Evid. 401. Thus, trial judges are given "great freedom to admit evidence . . . if it has any logical tendency to prove any fact that is of consequence." *State v. Wallace*, 104 N.C. App. 498, 502 (1991) (cleaned up).

10. Under Rule 403, relevant evidence may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence." N.C.R. Evid. 403. "In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285 (1988) (cleaned up).

11. Several of the arguments underlying Defendants' Motions in Limine flow from the portion of Judge McGuire's Summary Judgment Order dismissing Plaintiff's claim for tortious interference with contract and concern the issue of whether that ruling forecloses Plaintiff's ability at trial to seek damages on the theory that Sequoia acted wrongfully in "poaching" 24 employees from GCC following John Glover's departure from GCC. The Court therefore deems it appropriate to address this issue first.

12. Plaintiff's tortious interference with contract claim was based on its assertion that Sequoia had engaged in tortious conduct by hiring multiple employees away from GCC. Plaintiff presented evidence that over an approximately one-and-a-half-year period, 150 of its employees left GCC—24 of whom were hired by Sequoia. (ECF No. 61.2, at p. 10; ECF No. 61.3, at p. 9.) In the Summary Judgment Order, Judge McGuire noted that with regard to its claim for tortious interference with contract, Plaintiff was required at the summary judgment stage to demonstrate a genuine issue of material fact as to whether Defendants acted without justification in hiring the former GCC employees. (ECF No. 98, at pp. 31–32.) In determining that Defendants were entitled to summary judgment on this claim, the Court stated, in pertinent part, the following:

> Defendants argue that GCC "fails to show that Sequoia had no 'legitimate business interest' in hiring former GCC employees—none of whom had non-competition

> agreements and nearly all of whom provided GCC with weeks of advance notice that they would be leaving." (ECF No. 48, at p. 14.)
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> GCC's only response to Defendants' argument is that "[q]uestions of material fact also remain whether Defendants also tortiously interfered with GCC's at-will employment contracts." (ECF No. 74, at p. 15.) GCC does not cite to any specific evidence supporting its claim. GCC does not argue that Sequoia had no legitimate business reason for hiring GCC's employees. To the contrary, GCC claims that Sequoia was a competitor. (ECF No. 3, at ¶ 3.)
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> Plaintiff has not created a genuine issue of fact that Defendants lacked justification and did not act for legitimate business purposes in hiring GCC's employees. Therefore, to the extent Defendants' Motion seeks summary judgment in their favor on Plaintiff's claim for tortious interference with contract for interfering with GCC's at-will employment contracts with its employees, Defendants' Motion should be GRANTED.

(ECF No. 98, at p. 32.)

13. As a preliminary matter, the Court notes that one Superior Court judge cannot overrule an order rendered by another unless the original order was "(1) interlocutory, (2) discretionary, and (3) there has been a substantial change in circumstances since the entry of the prior order." *Taidoc Tech. Corp. v. OK Biotech Co., Ltd.*, 2014 NCBC LEXIS 49, at **6 (N.C. Super. Ct. Oct. 9, 2014) (citing *Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189 (2010)). However, one Superior Court judge *is* permitted to "interpret, construe and enforce" the terms of an order entered by a different Superior Court judge. *Id.* at **7 (cleaned up).

14. A motion for summary judgment "involves an issue of law and is not discretionary." *County of Catawba v. Frye Reg'l Med. Ctr., Inc.*, 2015 NCBC LEXIS 18, at **9 (N.C. Super. Ct. Feb. 25, 2015) (cleaned up). Moreover, there have been no changed circumstances in this action since Judge McGuire issued his Summary

Judgment Order. Accordingly, the undersigned lacks the authority to overrule any aspect of Judge McGuire's ruling and is only able to "interpret, construe and enforce" the Summary Judgment Order. *See Taidoc Tech.*, 2014 NCBC LEXIS 49, at **7 (cleaned up).

15. Despite Judge McGuire's ruling on the tortious interference with contract claim at the summary judgment stage, Plaintiff contends that by wrongfully hiring away key employees of GCC, Sequoia (1) significantly depleted GCC's manpower and ability to perform profitable jobs, while simultaneously (2) enabling itself to rapidly grow from a small company to one capable of earning millions of dollars. Plaintiff seeks to rely on this narrative at trial, primarily in furtherance of its unfair competition claim under Chapter 75. Defendants, conversely, argue that the Court has already rejected this "poaching" theory in its Summary Judgment Order and that, as a result, Plaintiff should not be permitted to advance this argument at trial.

16. The Court agrees with Defendants. The lynchpin of Plaintiff's argument is the proposition that Sequoia was not legally entitled to hire away GCC's employees and that it therefore engaged in unlawful conduct by doing so. However, the above-quoted portions of the Court's Summary Judgment Order make clear that Judge McGuire expressly rejected this argument by virtue of his ruling on Plaintiff's claim for tortious interference with contract. He ruled that Plaintiff had failed to show the existence of a genuine issue of material fact on the issues of whether Sequoia was a competitor of GCC, whether Sequoia had a legitimate business purpose in hiring away employees of GCC, and on whether "justification" existed for Sequoia's actions. (ECF No. 98, at p. 32.)

17. Plaintiff strenuously attempts to escape the effect of the Court's prior ruling on this issue by contending that this portion of the Summary Judgment Order should be construed as applying *only* to Plaintiff's tortious interference with contract claim and not to its Chapter 75 claim. Plaintiff asserts that although Sequoia's conduct in hiring away GCC employees may not have constituted tortious interference with contract, the circumstances in which it did so constituted an unfair method of competition under Chapter 75.

18. In making this argument, however, Plaintiff is seeking to artificially isolate Judge McGuire's ultimate *ruling* on the tortious interference with contract claim from the *reasoning* that resulted in that ruling. If—as the Court has held—Sequoia had a proper business interest in hiring the employees at issue, was acting as a lawful competitor of GCC's in doing so, and acted at all relevant times with justification, then that conduct cannot form the basis for a Chapter 75 violation any more than it can support a tortious interference claim.[1]

19. Throughout their brief in opposition to Defendants' Motions in Limine, Plaintiff attempts to rely on this Court's decision in *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 2003 NCBC LEXIS 6 (N.C. Super Ct. May 2, 2003), *aff'd*, 174 N.C. App. 49 (2005), in an effort to support its argument that the "poaching" of employees by Sequoia was unlawful conduct for which it should be permitted to seek damages at trial.

20. In *Sunbelt*, the plaintiff company sued a defendant competitor in the industrial leasing field that had hired a significant number of the plaintiff's

[1] As noted herein, Plaintiff still possesses a viable Chapter 75 claim for trial—albeit on other grounds.

employees on a number of legal theories, including tortious interference and a violation of Chapter 75. *Sunbelt*, 2003 NCBC LEXIS 6, at **4, **150–66. The conduct at issue in *Sunbelt* was a concerted effort by some of the plaintiff's former employees to hire away the plaintiff's other employees in a targeted, coordinated effort, using branch-level managers to coax lower-level employees to leave the plaintiff company. *Id*. at **40, **141–42. The branch managers solicited these employees even while the managers were still employed by the plaintiff. *Id*. at **40. This effort by the branch managers, combined with the short amount of time and the "magnitude of the raid[,]" had a devastating effect on the plaintiff's business, as the defendant competitor seized on the resulting "immobilized" state of the plaintiff company and acquired existing customers of the plaintiff. *Id*. at **19–20, **40. This scheme was effectuated on a national scale, involving branches set up by the defendant entity in Charlotte, Orlando, Tampa, Fort Myers, Dallas, Houston, San Antonio, and Atlanta. *Id*. at **62, **79, **86, **103, **118, *122.

21. Following a bench trial, the Honorable Ben F. Tennille found "that Defendants (1) violated N.C.G.S. § 75–1.1, (2) misappropriated trade secrets, and (3) committed a civil conspiracy." *Id.* at **137. Because of the heavy reliance Plaintiff places on *Sunbelt* here, it is helpful to understand the facts of that case in greater detail.

22. In affirming Judge Tennille's order, the Court of Appeals noted that the "[defendant's] common pattern in opening new branches was to hire [the plaintiff's] branch managers, [and] direct them to recruit the top [plaintiff] personnel with little notice to [the plaintiff] of the employees' departures." *See Sunbelt*, 174 N.C. App. at 60. Indeed, this tendency to use the plaintiff branch managers to "accomplish the

raid on [the plaintiff's] employees[]" was noted by Judge Tennille as one of the strongest factors in favor of his determination that that the *Sunbelt* defendants had competed unfairly. *Sunbelt*, 2003 NCBC LEXIS 6, at **19–20. Judge Tennille specifically found that the *Sunbelt* defendants used the branch managers to "recruit employees to leave [the plaintiff's] branches in a concerted and orchestrated manner, which had the dual effect of temporarily immobilizing the [plaintiff's] branches and permitting [the defendant entity] to fill the void so created to appropriate [the plaintiff's] business to [the defendant entity], at least temporarily." *Id.* at **40.

23. The hiring scheme was highly coordinated and designed around the knowledge and experience of the former employees and resulted in an entity that was in many ways the spitting image of the plaintiff company. For example, the defendant entity opened an Atlanta branch that "was virtually identical to [the plaintiff's] former . . . branch with respect to its employees, customer base and structure" and "[o]n opening day, every employee of [the defendant entity's] Atlanta branch had been hired from [the plaintiff]." *Sunbelt*, 2003 NCBC LEXIS 6, at **127. The defendants also solicited the plaintiff's employees in a manner that prevented the plaintiff from attempting to retain them by means of counteroffers. *Id.* at **38, **146. In building up its company into a powerful entity at the expense of the plaintiff, the defendant competitor used plaintiff's confidential business information in a manner that was "coextensive" with the "*en masse* appropriation of the employee base." *Id.* at **151. The defendant's conduct "crippled" the plaintiff "to the point [plaintiff's] opportunity and ability to compete for key employees on a level playing field was completely eliminated." *Sunbelt*, 174 N.C. App. at 60.

24. In his conclusions of law, Judge Tennille determined that the plaintiff's tortious interference claims were "subsumed in the [plaintiff's Chapter 75] claim." *Sunbelt,* 2003 NCBC LEXIS 6, at **137. In concluding that the defendants' conduct was a violation of Chapter 75, Judge Tennille highlighted the "deceptive, secretive" nature of the manner in which the defendants created a scheme to hire the plaintiff's employees, using the plaintiff's branch managers to lure away employees in a deliberate, coordinated effort to keep the plaintiff in the dark regarding its employees, "prevent[ing] fair competition." *Id.* at **146–47. Notably, Judge Tennille expressly stated that *Sunbelt* was "a unique fact situation unlikely to be replicated." *Id.* at **162; *see also RoundPoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at **61 (N.C. Super Ct. Feb. 18, 2016) ("The invocation of *Sunbelt Rentals* has become a frequent event, although that case depended upon unusual facts that are not often repeated.").

25. It is clear that Plaintiff likewise sought to rely on *Sunbelt* at the summary judgment stage of this case (*see, e.g.*, ECF No. 74) and the Court interprets Judge McGuire's Summary Judgment Order as rejecting these arguments. This is evidenced not only by the above-quoted portions of his Summary Judgment Order dismissing the tortious interference with contract claim but also by virtue of his analysis of Plaintiff's Chapter 75 claim.

26. In the portion of the Summary Judgment Order allowing Plaintiff's Chapter 75 claim to survive summary judgment, Judge McGuire expressly stated that Plaintiff's evidence as to the Chapter 75 claim "mirrors the evidence it relies on in support of its misappropriation of trade secrets and breach of fiduciary duty against John [Glover] claims." (ECF No. 98, at p. 42.) Thus, not only is there a complete absence of support in the Summary Judgment Order for the proposition that

Judge McGuire intended for Plaintiff to be able to pursue its "poaching" theory at trial in connection with its Chapter 75 claim but rather—to the contrary— the language contained in the Summary Judgment Order reflects a determination by Judge McGuire that Plaintiff's Chapter 75 claim is linked solely to its claims for breach of fiduciary duty and misappropriation of trade secrets.

27. The Court notes that its ruling on this issue is consistent with prior caselaw from North Carolina courts.

28. Our Supreme Court addressed a similar issue in *Krawiec v. Manly*, 370 N.C. 602 (2018). In *Krawiec*, two dance instructors left the plaintiff dance company to join a competitor in violation of non-competition provisions contained in employment agreements previously entered into between the plaintiff and the instructors. *Krawiec*, 370 N.C. at 604–05. The plaintiff sued both the competitor and the instructors for "tortious interference with contract, misappropriation of trade secrets, unfair and deceptive trade practices, civil conspiracy, and unjust enrichment[.]" *Id*. The Supreme Court upheld the trial court's determination that the plaintiff had failed to state valid claims for tortious interference and misappropriation of trade secrets against the competitor. *Id*. at 607, 612.

29. In its analysis of the plaintiff's unfair and deceptive trade practices claim, the Court stated the following:

> Here the unfair or deceptive acts alleged in the amended complaint were that the [competitor] defendants had "maliciously, deliberately, secretly, wantonly, recklessly, and unlawfully solicit[ed] and subsequently hir[ed] Plaintiffs' employees, Bogosavac and Divljak, and misappropriat[ed] Plaintiffs' trade secrets for their own benefit." Plaintiffs made no further allegations of specific unfair or deceptive acts. Because we determined that plaintiffs failed to state a valid claim for tortious

> interference with contract or misappropriation of trade secrets, we necessarily must conclude that plaintiffs also failed to adequately allege that the [competitor] defendants "committed an unfair or deceptive act or practice." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. Consequently, plaintiffs have not stated a valid claim for [UDTP].

Id. at 613.

30. Similarly, in *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362 (2001), an employer sued a competitor that had been set up by an employee while he was still working with the plaintiff employer, asserting claims for tortious interference with contract, misappropriation of trade secrets, and civil conspiracy along with a claim under Chapter 75. 147 N.C. App. at 365–66. In analyzing the employer's Chapter 75 claim, the Court of Appeals stated the following:

> [P]laintiff's claim that defendants engaged in unfair and deceptive trade practices rests with its claims for misappropriation of trade secrets, tortious interference with contracts and civil conspiracy. Having determined that the trial court properly granted summary judgment on each of these claims, we likewise conclude that no claim for unfair and deceptive trade practices exists.

Id. at 374; *see also Bldg. Ctr., Inc. v. Carter Lumber of the North, Inc.*, 2017 NCBC LEXIS 85, at *32–33 (N.C. Super. Ct. Sept. 21, 2017) ("[T]he Court previously dismissed Plaintiff's claim for Defendants' interference with Plaintiff's customer relationships, and thus that conduct cannot be the basis for a claim for unfair trade practices.").

31. In sum, either it was legally permissible for Sequoia to hire employees of GCC or it was not. The Court expressly ruled in its Summary Judgment Order that it was. Allowing a jury to conclude that such acts constituted an unfair method

of competition under Chapter 75 would be inherently inconsistent with the Court's prior summary judgment ruling.

32. The Court therefore concludes that its prior ruling in the Summary Judgment Order dismissing Plaintiff's tortious interference with contract claim precludes Plaintiff from proceeding on its Chapter 75 claim against Sequoia on that identical theory—namely, that Sequoia unlawfully "poached" GCC's employees.[2]

33. It is important to note, however, that the Court's ruling does not preclude Plaintiff from supporting its claims for breach of fiduciary duty and constructive fraud against John Glover with evidence at trial showing that John Glover engaged in wrongful conduct by encouraging GCC employees to leave the company—for Sequoia or elsewhere—during the period of time in which he was a fiduciary of GCC. Such a theory of recovery was not foreclosed by the Court's Summary Judgment Order.

34. Having resolved this threshold issue, the Court next proceeds to address Defendants' specific arguments in connection with their Motions in Limine.

Defendants' First Motion in Limine

35. Defendants' First Motion in Limine reads as follows:

> **Motion in Limine No. 1:**
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> **GCC Should Be Prohibited from Arguing an Entitlement to or Presenting Evidence Regarding GCC's Alleged "Lost Profits" Damages in the Total Amount of $3,206,932 Relative to the Yorktown, Possum Point, Greensville, and Chesterfield Projects.**

[2] However, the Court's present ruling does not affect Plaintiff's ability to seek recovery on its *remaining* theories under Chapter 75—consistent with the Court's Summary Judgment Order.

(ECF No. 132, at p. 2.)

36. In this motion, Defendants argue that Plaintiff is not entitled to present any evidence or argument of "lost profits" relating to the Yorktown, Possum Point, Greensville, and Chesterfield projects. These were four projects put out for bid by Dominion Energy ("Dominion"), a large client of GCC, that were not awarded to GCC. In its response to Defendants' Motions in Limine, Plaintiff has represented to the Court that it is no longer seeking to recover lost profits damages stemming from the Yorktown, Possum Point, and Greensville projects. Therefore, the Court need only consider the parties' arguments regarding the Chesterfield project, which is now the sole project for which Plaintiff seeks lost profits damages from an unsuccessful bid.

37. In order for Plaintiff to recover its lost profits damages, they must be "the natural and probable result of the wrong[.]" *Champs Convenience Stores Inc. v. United Chemical Co.*, 329 N.C. 446, 462 (1991) (cleaned up); *see also Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 545 (1987) (cleaned up) ("Where the action is in tort rather than contract, the principle is . . . that the damages must be the natural and probable result of the tort-feasor's misconduct."). As explained more fully below, the Court concludes that Plaintiff is unable to establish this necessary causal connection. Plaintiff, therefore, shall not be permitted to seek recovery of its alleged lost profits for the Chesterfield project.

38. First, the portion of the Court's Summary Judgment Order dismissing Plaintiff's claim for tortious interference with prospective economic advantage makes clear the fatal defect in Plaintiff's evidence of causation regarding the Yorktown, Possum Point, and Greensville projects—a defect that applies even more strongly to the evidence related to Chesterfield.

39. In its tortious interference with prospective economic advantage claim, Plaintiff asserted that "after John [Glover] left GCC, Defendants wrongfully interfered with prospective contracts put out for bid by Dominion on the Yorktown, Green[s]ville, and Possum Point projects[]" and that "Sequoia underbid GCC on each of these projects and the projects were awarded to Sequoia." (ECF No. 98, at p. 33.) Although Plaintiff also claimed lost profits for Chesterfield, Judge McGuire noted that "[i]t is undisputed that GCC withdrew its bid on the Chesterfield project before the bids were considered, and the contract awarded. There is no evidence in the record that this contract was awarded to Sequoia." (ECF No. 98, at p. 11 n. 4.)

40. Judge McGuire also noted in the Summary Judgment Order that a tortious interference with prospective economic advantage claim requires a finding that "but for" the defendant's interference, the plaintiff would have entered into a contract with the third party. (ECF No. 98, at p. 33–34.) In holding that Defendants were entitled to summary judgment on this claim, the Court stated in relevant part as follows:

> Defendants argue that they are entitled to summary judgment because GCC has not produced any evidence that "but for" Sequoia's alleged interference, GCC would have been awarded the contracts for the Yorktown, Green[s]ville, and Possum Point projects. (ECF No. 48, at pp. 12–14; ECF No. 83, at pp. 4–6.) Additionally, Defendants assert that "Sequoia clearly had a legitimate business purpose in submitting bids for work . . . as this is the primary way business is obtained in the industry." (ECF No. 83, at p. 6.)
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> GCC argues that reasonable inferences can be drawn from the record, including John Michael's communications with Colangelo, that "Defendants maliciously induced Dominion not to contract with GCC, and that, but for this inducement, this customer would have remained with GCC for new or additional work." (ECF No. 74, at p. 15.)

> However, GCC offers no evidence that "but for" Sequoia's bids, GCC would have been awarded the Yorktown, Green[s]ville, and Possum Point projects. In fact, GCC has offered no evidence regarding whether entities other than GCC and Sequoia bid on the projects, and no evidence that GCC was the next lowest bidder to Sequoia. The lack of such "but for" evidence is fatal to GCC's claim for tortious interference with prospective economic advantage. . . .
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> In addition, GCC's claim fails because the undisputed evidence establishes that Sequoia was a "competitor" with GCC for the type of work involved in the Yorktown, Green[s]ville, and Possum Point projects. At the time of the bidding on the three projects, Sequoia was an established business entity performing dewatering and other work for Dominion, and had a legitimate business interest in acquiring additional work of that nature. GCC has not produced evidence that Sequoia lacked a justification for bidding on the Yorktown, Green[s]ville, and Possum Point projects.

(ECF No. 98, at pp. 34–35.)

41. As noted above with regard to Chesterfield, the Court specifically observed that

> [i]t is undisputed that GCC withdrew its bid on the Chesterfield project before the bids were considered and the contract awarded. There is no evidence in the record that this contract was awarded to Sequoia.

(ECF No. 98, at p. 11 n. 4.)

42. Given the Court's prior reasoning that Plaintiff's forecast of evidence was insufficient to establish "but for" causation on the three projects upon which GCC actually *did* submit a bid that was never withdrawn, this same logic even more forcefully bars Plaintiff's attempt to recover lost profits relating to Chesterfield since GCC withdrew its bid before the contract was awarded. (ECF No. 98, at p. 11 n. 4.) A contrary ruling would allow the jury to make a finding based on nothing more than

pure speculation that GCC would have been awarded the contract for Chesterfield had it not withdrawn its bid.[3]

43. Plaintiff nevertheless attempts to argue that it has, in actuality, a stronger claim to seek lost profits as to Chesterfield than as to Yorktown, Greensville, and Possum Point due to its contention that Sequoia's wrongful conduct *caused* GCC to withdraw its bid for the Chesterfield project. However, Plaintiff's basis for this argument is its assertion that the unlawful "poaching" of its employees by Sequoia left it insufficiently staffed to adequately perform the Chesterfield job, thereby necessitating the withdrawal of its bid. As discussed in detail above, the Court has already rejected the argument that Sequoia acted wrongfully in hiring away GCC employees. Therefore, this argument is without merit.

44. Accordingly, the Court GRANTS Defendants' First Motion in Limine, and Plaintiff shall not be permitted to seek its alleged lost profits on the Chesterfield project.

Defendants' Second and Third Motions in Limine: Plaintiff's Entitlement to Disgorgement as a Remedy

45. Defendants' Second and Third Motions in Limine read as follows:

> **Motion in Limine No. 2:**
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> **GCC Should be Prohibited from Arguing an Entitlement to or Presenting Evidence Regarding Disgorgement/Unjust Enrichment Damages from Any Defendant in the Total Amount of $9,135,963.**

[3] Plaintiff's argument that GCC had historically been awarded approximately 70% of the Dominion projects on which it bid is simply insufficient to create the inference that it would have been awarded the contract on this particular project had it not withdrawn its bid. Indeed, the Court's acceptance of that argument would run counter to Judge McGuire's determination in the Summary Judgment Order that the award of lost profits to GCC with regard to the Yorktown, Greensville, and Possum Point projects would be impermissibly speculative.

Motion in Limine No. 3:

GCC Should be Prohibited from Arguing an Entitlement to or Presenting Evidence Regarding Disgorgement of Salary GCC Paid to John.

(ECF No. 132, at pp. 5, 12.)

46. Defendants' next two Motions in Limine both challenge Plaintiff's ability to recover as a remedy at trial the disgorgement of certain amounts from Defendants on a theory of unjust enrichment. For this reason, the Court will analyze these two motions together.

47. "Disgorgement of profits is a relief in the nature of restitution." *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 63, at *19 (N.C. Super Ct. Oct. 10, 2019) (cleaned up). "Disgorgement is an equitable remedy designed to prevent the unjust enrichment of the wrongdoer[.]" *SEC v. Marker*, 427 F. Supp.2d 583, 591 (M.D.N.C. 2006) (cleaned up). Disgorgement may be sought as to "claims for which it is an appropriate remedy." *See Se. Anesthesiology*, 2019 NCBC LEXIS 63, at *20 (cleaned up). Therefore, in order for Plaintiff to be permitted to seek disgorgement at trial, it must demonstrate that disgorgement is a proper remedy for one or more of the claims that it is asserting in this action.

48. North Carolina law is clear that disgorgement is a permissible remedy for several of the claims asserted by Plaintiff against Defendants. As an initial matter, as Defendants concede, our General Statutes expressly authorize disgorgement as a remedy in misappropriation of trade secrets claims, allowing for the recovery of "unjust enrichment caused by misappropriation of a trade secret." N.C.G.S. § 66-154(b) (2021); *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 660 (2009).

49. Moreover, our appellate courts have also held that disgorgement is an appropriate remedy for breach of fiduciary duty. *See Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 472 (1998) (cleaned up), *rev'd on other grounds,* 351 N.C. 27 (1999) (noting that fiduciaries are "not entitled to compensation" when they breach their duty of loyalty to their employer; "therefore the trial court properly awarded damages to Sara Lee in the total amount of the compensation and benefits received by Defendant pursuant to his employment."); *Housing, Inc. v. Weaver*, 37 N.C. App. 284, 294 n. 1 (1978) (cleaned up) ("[O]ne who breaches his fiduciary duty can be forced to disgorge his ill-gotten gains.").

50. Plaintiff also asserts a claim for constructive fraud against John Glover. The elements of constructive fraud significantly overlap with the elements of breach of fiduciary duty. *See Chisum v. Campagna*, 376 N.C. 680, 706–07 (2021) (cleaned up). "A successful claim for breach of fiduciary duty requires proof that (1) the defendants owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Id.* at 706 (cleaned up). Similarly, "[a] successful claim for constructive fraud requires proof of facts and circumstances (1) which created the relation of trust and confidence between the parties, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Id.* at 706–07 (cleaned up). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294 (2004).

51. Given the substantial overlap between these two causes of action, the Court is of the view that our Supreme Court would similarly allow disgorgement as a remedy for a prevailing claimant on a constructive fraud claim for the same reasons that the remedy is available for a breach of fiduciary duty claim.

52. Moreover, our Court of Appeals and federal courts applying North Carolina law have also recognized disgorgement as a permissible remedy for a violation of Chapter 75. *See Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 850 (2012) ("[T]he fact finder in fraud and unfair and deceptive trade practices claims has broad discretion in awarding damages to insure that the plaintiff is made whole and the wrongdoer does not profit from its conduct."); *Sunbelt*, 174 N.C. App. at 62 (cleaned up) ("Under the UDTPA, plaintiff was awarded lost profits and the value of benefit defendants received, two different types of damages permitted under the UDTPA."); *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 165 (4th Cir. 2012) (cleaned up) ("[A]n award of profits disgorged from the defendants could be trebled pursuant to N.C. Gen. Stat. § 75-16."); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir. 1987) (permitting disgorgement of Defendants' profits under Chapter 75 "as a rough measure of the plaintiff's damages").

53. Having determined that disgorgement is a permissible remedy as a general proposition for at least some of the claims Plaintiff asserts in this action, the Court now turns to the specific arguments raised by Defendants in their Second and Third Motions in Limine.

1. Disgorgement of John Glover's GCC Salary

54. In their Motions in Limine, Defendants contend that Plaintiffs should not be entitled to seek at trial disgorgement of John Glover's salary paid to him by GCC. The Court disagrees.

55. Our Court of Appeals addressed a similar issue in *Sara Lee*. In that case, the defendant engaged in self-dealing by using companies in which he had a personal interest to sell computer parts to his employer without disclosing his interest in the companies. *Sara Lee*, 129 N.C. App. at 471. The Court of Appeals held that such acts constituted a breach of his fiduciary duty. *Id.*

56. In discussing the appropriate remedies available to the plaintiff, the Court of Appeals noted that one available remedy in such circumstances is the recovery of compensation paid by the plaintiff to the defendant during the periods "affected by the breach." *Id.* at 472 (cleaned up). The Court of Appeals determined that the *Sara Lee* employer was properly awarded all of the compensation it had paid to the defendant in light of his "continuous breach of fiduciary duty." *Id.*

57. It is undisputed that during the period of time when John Glover was an officer of GCC he owed a fiduciary duty to the company. *See Albritton v. Albritton*, 2021 NCBC LEXIS 53, at **21–22 (N.C. Super Ct. June 7, 2021) (cleaned up) ("Under North Carolina law, corporate officers owe fiduciary duties to the corporation[.]"). In the event that Plaintiff is able to prevail at trial on a theory that he did, in fact, breach that duty, *Sara Lee* makes clear that disgorgement of the portions of his salary he received from GCC during the time period in which the duty was breached is an available remedy. Defendant's Third Motion in Limine is therefore DENIED.

2. Disgorgement of Salaries Paid to Mark Glover, John Glover, and Colangelo By Sequoia

58. The Court reaches a different result with regard to whether Plaintiff is entitled to seek as a remedy at trial disgorgement of compensation paid *by Sequoia* to John Glover, Mark Glover, and Colangelo. Defendants argue that this form of disgorgement is not recognized under North Carolina law. In response, Plaintiff contends that such a remedy is appropriate in this case because (1) Sequoia's profits are potentially subject to disgorgement; and (2) the sums paid by Sequoia in the form of salaries to John Glover, Mark Glover, and Colangelo had the effect of reducing Sequoia's total profits—in other words, reducing the amount of profits from which Plaintiff is able to seek disgorgement.

59. The Court agrees with Defendants. Plaintiff has failed to direct the Court to any cases applying North Carolina law authorizing a plaintiff to recover all or part of a salary paid by a *defendant* to its employees in this context on a theory of disgorgement. The Court has also been unable to locate any case in which a North Carolina court has adopted such an argument.

60. Therefore, the Court concludes that Plaintiff shall not be permitted to seek disgorgement of salaries paid by Sequoia to John Glover, Mark Glover, or Colangelo and, accordingly, that portion of Defendants' Second Motion in Limine is GRANTED.

3. Disgorgement of Sequoia Profits from Performing Dewatering Work

61. Defendants also seek to exclude evidence or argument relating to Plaintiff's ability to disgorge Sequoia's profits stemming from "dewatering" work that Sequoia performed prior to the filing of this lawsuit as a subcontractor to GCC on various projects. Defendants argue that based on the evidence in this case,

disgorgement of the dewatering-related profits is not authorized. The Court agrees with Defendants.

62. Defendants assert—and Plaintiff does not dispute—that there is no allegation in this case that Sequoia misappropriated any of GCC's trade secrets specifically in connection with the dewatering work at issue. It is likewise undisputed that GCC was not equipped to perform dewatering work of this type, that Sequoia was hired to do the work as GCC's subcontractor, and that the work was properly performed by Sequoia under the contract. The Court has carefully considered Plaintiff's other arguments as to why it should nevertheless be entitled to disgorgement of Sequoia's profits on these dewatering projects under a theory of unjust enrichment but does not find those arguments to be persuasive.

63. The Court therefore GRANTS Defendants' Motion in Limine on this issue and excludes evidence regarding Sequoia's profits gained from projects in which it performed dewatering work as a subcontractor of GCC and prohibits argument seeking disgorgement of such profits.

4. Disgorgement of Sequoia's Profits from Projects as to Which It Bid Against GCC

64. Defendants also argue that Plaintiff should not be permitted to seek disgorgement of profits that Sequoia obtained from projects upon which it competed directly against GCC in the bidding process. Chapter 66, however, expressly permits GCC to recover disgorgement of such profits if a jury determines that Sequoia is liable for misappropriation of GCC's trade secrets in connection with those projects. *See* N.C.G.S. § 66-154(b). The Court therefore DENIES Defendants' Second Motion in Limine seeking to exclude such evidence and argument as to Sequoia's profits

obtained from projects in which it successfully competed against GCC for the awarding of a contract.

Defendants' Fourth Motion in Limine

65. Defendants' Fourth Motion in Limine states as follows:

> **Motion in Limine No. 4:**
>
> **GCC Should be Prohibited from Arguing an Entitlement to or Presenting Evidence Regarding GCC's Alleged "Out of Pocket Expenses" Totaling $2,162,429 Relative to Alleged Retention Incentives, Recruiting Expenses, Public Relations and Dominion Discounts**

(ECF No. 132, at p. 13.)

66. Finally, Defendants argue that Plaintiff should not be allowed to seek at trial the recovery of (1) various employment-related expenses and public relations expenses it incurred following the exodus of employees from GCC following John Glover's departure; or (2) monetary discounts that it gave to Dominion regarding a particular project performed for Dominion by GCC. Each of these categories of damages is discussed in turn below.

1. Employment-Related and Public Relations Expenses

67. Plaintiff seeks recovery for (1) funds spent by GCC as "retention incentives" to prevent additional employees from leaving GCC following John Glover's resignation from the company and the subsequent decisions by a number of other employees to also leave GCC; (2) "recruiting expenses" that GCC incurred in its efforts to replace those employees who left the company; and (3) "public relations" expenses that GCC claims to have incurred in order to improve its public image. Defendants argue that Plaintiff's ability to recover these expenses hinges on the legal

viability of its now-dismissed theory that Sequoia can be held liable for "poaching" GCC's employees.

68. The Court agrees with Defendants and concludes that these expenses are not recoverable on a theory that Sequoia engaged in unfair competition by hiring away GCC employees, and Plaintiff is precluded from making such an argument at trial. The Court's ruling, however, does not preclude Plaintiff from seeking to recover these expenses if it is able to present admissible evidence at trial that would allow jurors to reasonably find that the breach of John Glover's fiduciary duty to GCC proximately caused Plaintiff to incur these employment-related and public relations expenses. Moreover, it would be premature for the Court to make a ruling at the present time regarding the likelihood of Plaintiff's ability to actually produce such admissible evidence at trial.

69. Accordingly, Defendants' Motion in Limine on this issue is GRANTED IN PART and DENIED IN PART as set forth above.[4]

2. Dominion Discounts

70. Finally, Defendants seek to exclude evidence or argument related to discounts that Dominion sought and obtained from GCC regarding certain sums GCC received from Dominion on the Possum Point project after John Glover left GCC. Dominion disputed aspects of the work performed at a project site, and GCC granted Dominion's request to "credit" Dominion for certain sums relating to that work.

[4] The Court also notes that Defendants have pled the failure to mitigate damages as an affirmative defense in this case. In the event that Defendants elect to pursue this defense at trial with regard to the defection of GCC's employees, such an election may "open the door" to the admission of evidence as to some or all of these expenditures by GCC as a way of rebutting an argument by Defendants that GCC failed to take steps to mitigate its damages.

71. Plaintiff asserts that had John Glover not breached his fiduciary duty to GCC by failing to create, or retain, necessary documentation pertaining to this project, GCC would have had access to supporting documentation necessary to refute Dominion's claimed entitlement to credits and would not have been forced to ultimately give the credits to Dominion. Defendants argue in response that the credits in question related to billing that occurred *after* John Glover resigned from GCC. Defendants further contend that GCC voluntarily chose to issue the credits solely in order to preserve its relationship with Dominion rather than because it was forced to do so based on any wrongful conduct by Defendants.

72. Based on its thorough review of the record and consideration of the parties' briefing and arguments, the Court concludes that factual disputes currently exist that preclude granting Defendants' Motion in Limine on this issue. Therefore, the Court defers ruling on this issue at the present time.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Defendants' First Motion in Limine is GRANTED. Plaintiff shall not be permitted to seek its alleged lost profits on the Chesterfield project.
2. Defendants' Second Motion in Limine is GRANTED IN PART and DENIED IN PART. Plaintiff shall not be permitted to seek disgorgement of John Glover, Mark Glover, or Colangelo's Sequoia salaries. Plaintiff shall also not be allowed to seek Sequoia's profits from performing dewatering work as a subcontractor to GCC. Plaintiff shall, however, be permitted to seek disgorgement of Sequoia's profits obtained from projects in which it successfully competed against GCC for a contract to the extent that these

profits are established in relation to Plaintiff's misappropriation of trade secrets claim.

3. Defendants' Third Motion in Limine is DENIED. Plaintiff shall be permitted to seek John Glover's GCC salary during the period of time, if any, in which a jury finds that he breached his fiduciary duty to GCC.
4. Defendants' Fourth Motion in Limine is GRANTED IN PART and DENIED IN PART. Plaintiff is entitled to present evidence of its "employment-related expenses" and public relations expenses if it is able to offer admissible evidence at trial that would allow jurors to reasonably find that a breach of John Glover's fiduciary duty to GCC proximately caused Plaintiff to incur these employment-related and public relations expenses. The Court defers its ruling on the Motion in Limine relating to the Dominion discounts at the present time.

SO ORDERED, this the 15th day of March, 2022.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases