STATE OF IDAHO)
County of KOOTENAI)ss
FILED March 24, 2022
AT 12:45 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE HAGADONE CORPORATION,

Plaintiff,

vs.

ARROW DIGITAL, ET AL,

Defendant.

Case No. **CV28-21-1711**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment brought by defendants Arrow Digital, Black T. Marketing, Daniel G. Moering ("Mr. Moering"), and Toby G. Shell ("Mr. Shell") (collectively "defendants"), filed on February 2, 2022, against plaintiff Hagadone Corportation ("Hagadone"). Defendants request this Court grant their Motion for Summary Judgment because there is no legal basis for Hagadone's claims of breach of the duty of good faith and fair dealing, and violation of the Computer Fraud Abuse Act and because there were no actual damages. Mem. in Supp. of Defs.' Mot. for Summ. J. 2-10.

On March 12, 2021, Hagadone filed a Complaint and Demand for Jury Trial ("Complaint") against Hagadone. Hagadone is suing defendants for creating a competing start-up company and using contacts obtained through prior employment at Hagadone to compete with Hagadone. On April 13, 2021, defendants filed their

Defendants' Answer and Affirmative Defenses ("Answer"), and defendant's demanded a jury trial as well. Answer 4.

Hagadone is incorporated in Idaho and does business as both "Hagadone Media and Creative" and "Coeur d'Alene Press". Complaint ¶ 1. North Idaho Newspaper Group is a division of Hagadone. *Id.* Mr. Moering and Mr. Shell are former employees of the North Idaho Newspaper Group and are residents of Kootenai County. *Id.* ¶ 2. Mr. Moering and Mr. Shell operate Arrow Digital, an unincorporated association. *Id.* ¶ 4. Black T. Marketing is an inactive, administratively dissolved corporation with Mr. Shell as the registered agent. *Id.* ¶ 5. Mr. Moering was "employed full-time as a Lead Digital Media Strategist" at Hagadone, and Mr. Shell "was initially employed as a sales representative and was later promoted to a position as Director of Audience Development." *Id.* ¶ 11. "Mr. Moering's job responsibilities with Hagadone included selling advertisements to Hagadone customers which would be placed with Youtube and Google Ads." Pls.' Resp. to Defs.' Mot for Summ. J. 3. "Mr. Shell's job was to sell newspaper ads and digital marketing including websites, search engine optimization (SEO), and Google Ads." *Id.* Hagadone alleges that Mr. Shell and Mr. Moering were permitted to access "highly sensitive information belonging to Hagadone"; that they "both sold Hagadone's services and had intimate knowledge of Hagadone's processes of creating the products, including websites, which were marketed by Hagadone"; that they "were both intimately familiar with how Hagadone priced, marketed, and sold its products"; and that they "also had access to electronically stored information belonging to Hagadone". Complaint ¶ 12. Mr. Shell left his employment with Hagadone in February 2021, and Mr. Moering left in March 2021. *Id.* ¶ 16. Hagadone alleges that Mr. Moering and Mr. Shell "plotted conspired [sic] together against Hagadone by

forming a business, Arrow Digital, complete with a website and email addresses. Mr. Moering and Mr. Shell transmitted client lists, client lead lists, financial data, business plans, and other materials from Hagadone directly to themselves and Arrow Digital." *Id.* ¶ 18. Hagadone further alleges that Mr. Moering and Mr. Shell "used Hagadone devices and Hagadone equipment to steer Hagadone customers and potential customers to Arrow Digital" and that:

> The products and services marketed by Arrow Digital are substantially the same if not the same products which are marketed by Hagadone. Mr. Moering and Mr. Shell utilized information and contacts obtained at Hagadone to gain access to the products they sold to Hagadone customers under the name Arrow Digital. Such sales occurred while Mr. Moering and Mr. Shell were employees of Hagadone. . . . [S]uch sales continue to this day. Mr. Moering, Mr. Shell, and Arrow Digital continue to profit financially from information, contacts, and vendors Mr. Moering and Mr. Shell obtained through their employer, Hagadone.

Id. ¶¶ 19-21. Hagadone alleges that defendants breached Hagadone's Acceptable Use Policy and Employee Handbook, alleging the following causes of action: breach of the implied covenant of good faith and fair dealing; breach of fiduciary duty; intentional interference; tortious interference with a contract; unfair competition;[1] violation of the Computer Fraud Abuse Act; violation of the Idaho Trade Secret Act; and civil conspiracy. *Id.* ¶¶ 22-45.

On February 2, 2022, defendants filed their Defendant's Motion for Summary Judgment, Memorandum in Support of Defendant's Motion for Summary Judgment, and Statement of Undisputed Material Facts and Declarations of Regina M. McCrea, Toby Shell, and Danny Moering in support of their motion. On February 17, 2022, Hagadone filed its Plaintiff's Response to Defendant's Motion for Summary Judgment, and Plaintiff's Statement of Material Facts and Declarations of Clint Shroeder, Kari

[1] Hagadone voluntarily dismissed its claim for unfair competition in its Plaintiff's Response to Defendants' Motion for Summary Judgment (at 11).

Packer, and Markus W. Louvier in support of its memorandum. On February 23, 2022, defendants submitted their Reply Memorandum in Support of Defendants' Motion for Summary Judgment and Declaration of Regina M. McCrea in Support of Defendants' Reply Memorandum Re: Summary Judgment. The hearing on defendants' Motion for Summary Judgment was held on March 2, 2022, at the conclusion of which this Court took that motion under advisement.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to that Rule, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
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> (2) consider the fact undisputed for purposes of the motion;
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> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). "A material fact is one upon which the outcome of the case may be different." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed

> in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS

Defendants move for summary judgment asserting no legal basis exists for any of Hagadone's claims and because Hagadone has allegedly not proven damages. Initially, defendants only attack two of Hagadone's seven remaining claims—breach of the duty of good faith and fair dealing and violation of the Computer Fraud Abuse Act ("CFAA"). Then, defendants attack all of Hagadone's claims by alleging that there are no damages. Defendants then briefly attack the claims of civil conspiracy, tortious interference, and violation of the Idaho Trade Secret Act when discussing the absence of damages, two of which are entirely discussed in footnotes. The Court will address all seven claims, as well as the issue of damages, in turn.

A. The employee handbook is not a contract, but there are genuine issues of material fact pertaining to the implied covenant of good faith and fair dealing for both the handbook and the acceptable use policy.

Defendants allege that Hagadone does not allege "the existence of an express contract" anywhere in its complaint, but rather Hagadone "suggests that its handbook and acceptable use policy on information and technology resources constitute 'implied covenants" with employees". Mem. in Supp. of Mot. for Summ. J. 2-3. Defendants argue that these were not valid contracts because of the existence of a disclaimer in the handbook stating: "nothing contained herein is intended to be part of the employment relationship or constitute an express or implied employment contract. This handbook simply contains general statements of Company guidelines." *Id.* at 3. Both Mr. Moering

and Mr. Shell claim that they "did not have an employment contract and never signed a non-competition or non-solicitation agreement." Moering Decl. ¶ 3; Shell Decl. ¶ 3.

Hagadone responds:

> Defendants contend that no contract between the parties existed, and therefore, they were not required to act in good faith and deal fairly with Hagadone. They are factually and legally incorrect.
>
> . . . .
>
> In this case, it is undisputed that Moering and Shell were employees of the Hagadone corporation. It is undisputed that they signed and agreed to the terms of the AUP and Emplmoyee [sic] Handbook. Hagadone expected Moering and Shell to be loyal to Hagadone in marketing and selling digital advertising products. Defendants were paid salaries and bonuses for their work. Defendants, during work hours, while being paid by Hagadone, utilized the customers they came to know through Hagadone and marketed digital advertising products through their own business in order to enrich themselves. They did so surreptitiously and were successful. In doing so, they violated their covenant of good faith and fair dealing which they owed to their employer (Hagadone).

Pls.' Response to Defs.' Mot. for Summ. J. 10-11.

The Idaho Supreme Court has held, "The covenant of good faith and fair dealing is a judicially created exception to the employment at-will doctrine based on a contractual duty of good faith. This covenant implies obligations into every employment contract." *Crea v. FMC Corp.*, 135 Idaho 175, 179, 16 P.3d 272, 276 (2000). "A breach of the covenant is a breach of the employment contract, and is not a tort." *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 626, 778 P.2d 744, 748 (1989). Thus, "The potential recovery results in contract damages, not tort damages." *Id.* "[T]he covenant protects the parties' benefits in their employment contract or relationship, and . . . any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant." *Id.* at 627, 778 P.2d at 749. The covenant "does not create new duties that

are not inherent in the agreement itself[.]" *Bollinger v. Fall River Rural Elec. Co-op, Inc.*, 152 Idaho 632, 640, 272 P.3d 1263, 1271 (2012). It "is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). Whether a party breached the covenant is a question of fact for the jury. *Ferguson v. City of Orofino*, 131 Idaho 190, 195, 953 P.2d 630, 635 (Ct. App. 1998); *Metcalf*, 116 Idaho at 631, 778 P.2d at 753 (J. Huntley, dissenting).

Here, the parties clearly disagree about whether there was a contract. The Idaho Supreme Court held:

> A jury question is presented when the existence of a contract is in issue and the evidence is conflicting or admits of more than one inference. Hence, if the existence of the contract is not disputed or the evidence of the contract is not conflicting and admits of but one inference, the court may address the issue of the existence of a contract as a matter of law.

Watson v. Idaho Falls Consol. Hospitals, Inc., 111 Idaho 44, 47, 720 P.2d 632, 635 (1986). "An employee's handbook can constitute an element of the contract." *Harkness v. City of Burley*, 110 Idaho 353, 356, 715 P.2d 1283, 1286 (1986) (citing *Johnson v. Allied Stores Corp.,* 106 Idaho 363, 368, 679 P.2d 640, 645 (1984)); *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 625, 778 P.2d 744, 747 (1989). Whether "a contract existed between the parties by virtue of" an employment policy manual or employee handbook is a question of fact for the jury. *Johnson*, 106 Idaho at 368, 679 P.2d at 645; *Sorenson v. Comm Tek, Inc.*, 118 Idaho 664, 671, 799 P.2d 70, 77 (1990) (J. Bistline, dissenting) ("when the terms of an employment relationship are unclear, and the evidence is conflicting or uncertain, then it is for the jury to determine the parameters of the employment relationship, absent a waiver of jury trial.") (citing *Nilsson v. MAPCO,* 115 Idaho 18, 22 n.2, 764 P.2d 95, 99 (Ct. App.1988)). The Idaho

Supreme Court has held that, where there is a question of whether an employee handbook constitutes a contract, the Court must examine the employee handbook and policy statements separately "to determine first, whether they specifically negate any intention of contract formation, and if not, [to determine whether] there is a question of fact as to whether . . . the parties [intended it] to express a term of the employment contract." *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 713, 874 P.2d 520, 524 (1993).

In *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 799 P.2d 70 (1990), the Idaho Supreme Court found that the covenant of good faith and fair dealing applied where the employee handbook clearly indicated that the employment was at will and also included the following disclaimer:

> None of the benefits or policies in this handbook are intended by reason of their publication to confer any rights or privileges or entitled you to be or remain an employee of Commtek. The contents of this handbook are presented as a matter of information only. While Commtek believes wholeheartedly in the plans, policies,, [sic] and procedures described herein, they are not conditions of employment and are subject to unilateral change by Commtek. While we hope that your employment will be long lasting, employees are, of course, free to resign at any time just as Commtek is free to terminate your employment at any time.

118 Idaho at 667-68, 799 P.2d 70 at 73-74. In *Metcalf*, the Idaho Supreme Court found a genuine issue of material fact regarding whether "there was an implied-in-fact contractual agreement that Metcalf's employment would not be terminated or reduced because of her using the accumulated sick leave which both parties agree was part of the oral employment contract," even though the employer modified the handbook after dismissing Metcalf, adding language that clearly indicated that the employee handbook was not intended to be a contract and that the employment relationship was at will. *Id.* at 624-25, 778 P.2d at 746-47.

However, in *Mitchell*, which was decided four years after *Sorensen* and five years after *Metcalf*, the Idaho Supreme Court found there was not a contract where the handbook had the following disclaimers:

> This guide is not to be construed as a contract between Zilog and its employees and does not in any way imply or create any rights, contractual or otherwise, on behalf of Zilog's employees. Zilog may, at its sole discretion, alter or amend this guide or portions thereof at any time.
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> . . .
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> We're very glad you've chosen to become a member of our innovative team . . . . It is our hope that this guide will provide you with some general information on Zilog policies and benefits. Additional information will be given to you by your supervisor and peers. Hopefully, through this process we will be able to achieve a better understanding of your expectations and those of the company.
>
> Neither this guide nor the aforementioned information provided by your supervisor or peers are to be construed as a contract between Zilog and its employees. These communications do not in any way imply or create any rights, contractual or otherwise, on behalf of Zilog's employees. Zilog may at its sole discretion alter or amend this guide or portions thereof at any time.

Mitchell, 125 Idaho at 713, 874 P.2d at 524. The Idaho Supreme Court in *Mitchell* reaffirmed its holding in *Metcalf*, finding that an employee handbook is not a part of the employment contract where the handbook contains a provision that "specifically negates any intention on the part of the employer to create an employment contract". *Id.* Only if the handbook does not contain such language may a court "conclude from a review of the handbook that whether the handbook was intended by the parties to impliedly express a term of the employment agreement is a question of fact." *Id.*

Here, the language used in Hagadone's employee handbook is very similar to that used in *Mitchell*. The handbook here contained the following language: "nothing contained herein is intended to be part of the employment relationship or constitute an express or implied employment contract. This handbook simply contains general statements of Company guidelines." The reference to the employee handbook as

containing "general statements of Company guidelines" is similar to the handbook in *Mitchell* being referred to as a "guide" that informs employees of some "general information on Zilog policies and benefits". Additionally, both the handbooks in this case and in *Mitchell* clearly indicate that they are not a contract and are not part of the employment relationship. It is clear to this Court from the face of the handbook that Hagadone did not intend for the handbook to be a part of any employment contract or to constitute an employment contract on its own. Hagadone has not provided any evidence to show that the elements of a contract exist apart from stating that Mr. Moering and Mr. Shell agreed to the terms. Without more, this Court cannot determine as a matter of law that the handbook was a contract, nor can it determine that there is a jury question in light of the holding in *Mitchell*. Accordingly, the Court finds that the employee handbook is not a contract.

On the other hand, the language of the acceptable use policy is different from the language in *Mitchell*. The acceptable use policy states, "This Acceptable Use Policy is not intended to replace existing Policies and Procedures, but rather to complement [them]." There is no other language that "specifically negates any intention on the part of the employer to create an employment contract". *Mitchell*, 125 Idaho at 713, 874 P.2d at 524. Accordingly, the Court finds a jury question regarding whether the acceptable use policy was a contract.

The Court notes that Hagadone appears to misinterpret the case law that it cited to on page 11 of its response. Hagadone appears to believe that because Mr. Moering and Mr. Shell both signed and agreed to the terms of the employee handbook and the acceptable use policy that is enough to show that the parties intended both to be contracts. That is incorrect. The case law that Hagadone cites pertain solely to the

question of whether the implied covenant of good faith and fair dealing applies to employee handbooks and use policies in general, not to whether such documents are contracts.

Despite finding that the handbook was not a contract in *Mitchell*, the Idaho Supreme Court found that the implied covenant of good faith and fair dealing applied because it applies to all employment relationships. *Id.* at 715, 874 P.2d at 526; *Parker v. Boise Telco Federal Credit Union*, 129 Idaho 248, 256, 923 P.2d 493, 501 (Ct. App. 1996). A reasonable jury could find that, while not a part of the employment contract, the handbook and/or the acceptable use policy are part of the employment relationship such as to constitute benefits or rights a party may have in the course of employment. Accordingly, it is for the jury to decide whether defendants breached the implied covenant of good faith and fair dealing. Summary judgment is denied as to the issue of the acceptable use policy being a contract, but is summary judgment is granted as to the issue of the employee handbook not being a contract.

B. Breach of Fiduciary Duty and Intentional Interference claims.

Other than indirectly attacking these issues on the basis that damages cannot be proven (discussed below), defendants do not address the claims of breach of fiduciary duty or of intentional interference. Thus, the Court will not address these claims, and these claims remain as issues for trial.

C. There are genuine issues of material fact for the Tortious Interference with a Contract claim for Arrow Digital and Black T. Marketing.

Defendants confusingly discuss the issue of tortious interference under the heading, "Claims with no proof of actual damage":

> Defendants agree that Idaho has recognized an employer-employee fiduciary relationship and that a breach of the same *may* support a claim for interference with prospective economic advantage.

Mem. In Supp. of Mot. For Summ. J. 6 (citation omitted).

> The tortious interference with contract verbiage in plaintiff's Complaint should be disregarded. No viable claim for tortious interference with contract is implicated unless the tortious interference actually results in a breach of contract. *See, e.g., Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893 (1974) (outlining the following elements (1) knowledge of an existing contract; (2) intentionally interference [sic] with the contract **causing a breach**; and (3) damages sustained as a result of the breach). Just as in *Wesco*, Hagadone has no evidence that its customers owed a contractual duty to continue purchasing digital advertising services and products. [*Wesco Autobody Supply Inc. v. Ernest*,] 149 Idaho 881, 895-96, 243 P.3d 1069, 1083-84 [(2010)].

Id. at 6 n.3 (emphasis in original).

> The duty owed is essentially one of loyalty, and, to prevail, Plaintiff must establish that the Defendants "put themselves in such a position that their interests became antagonistic to those of their [employer] or that they may have been assisting the [employer's] competitors." (citation omitted). Employees may, however, take steps in anticipation of competition while still employed. (citation omitted). Public policy favors permitting employees an opportunity to change jobs or pursue self-employment without fear of reprisal from their current employer. *See, e.g., Rehabilitation Specialists, Inc. v. Koering,* 404 N.W.2d 301, 304 (Minn. Ct. App. 1987) ("Employees who wish to change jobs or start their own business should not be unduly hindered from doing so."); *Trumble v. Farm Bureau Mut. Ins. Co.,* 166 Idaho 132, 152, 456 P.3d 201, 221 (2019) ("The mere pursuit of one's own business purpose is not sufficient to support an inference of an improper motive to harm the plaintiff."). While there is no clear divide between preparation and impermissible competition, more evidence must be presented than simply showing that customers who once did business with Plaintiff subsequently took their business to the Defendant. (citation omitted). Moreover, employees may freely use information acquired over the course of performing their job after leaving it for whatever reason. Such usage does not constitute misappropriation. *Trumble,* 166 Idaho at 151, 456 P.3d at 220. As explained in *Northwest Bee-Corp v. Home Living Serv.,* 136 Idaho 835, 840, 41 P.3d 263, 268 (2002)—
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> > An employee will naturally take with her to a new company the skills, training,
> >
> > > and knowledge she has acquired from her time with her previous employer. This basic transfer of information cannot be stopped, unless an employee is not allowed to pursue her livelihood by changing employers. As Judge Shadur stated, "[a]ny other rule would force a departing employee to perform a prefrontal lobotomy on himself or herself." *Fleming Sales Co., Inc. v. Bailey,* 611 F. Supp. 507, 514 (N.D. Ill. 1985).
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> Decisions from other states reflect the same reasoning—

> An employee is not compelled to shut his eyes to what goes on in his place of employment nor is he required to wipe his memory clear of those matters which he learns during the course of that employment. So long as no contract express or implied prohibits him from divulging the information learned during his employment, the employee may use that information for his own benefit.
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> *Subcarrier Commc'ns, Inc. v. Day,* 691 A.2d 876, 880 (N.J. App. Div. 1997) (quoting *Nat'l Tile Board Corp. v. Panelboard Mfring Co.,* 99 A.2d 440 (N.J. 1953)).

Id. at 6-7.

Hagadone responds very briefly in a footnote that the footnote in defendants' motion does "not seek dismissal of Plaintiff's . . . tortious interference claim" and asserts the claim "should be 'disregarded.' As Defendants are not seeking dismissal of [this claim] and has not fully articulated the basis for dismissal at this stage, Plaintiff cannot further respond." Pls.' Resp. to Defs.' Mot. for Summ. J. 13 n.3.

"The elements of tortious interference with a contract by a third party are: '(a) the existence of a contract; (b) knowledge of the contract on the part of the defendant; (c) intentional interference causing a breach of contract; (d) injury to the plaintiff resulting from the breach.'" *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005) (quoting *Ostrander v. Farm Bureau Mut. Ins. Co.,* 123 Idaho 650, 654, 851 P.2d 946, 950 (1993)). The plaintiff must establish these elements before the burden switches to the defendant to explain the interference with the contracts. *Nw. Bec-Corp v. Home Living Serv.,* 136 Idaho 835, 841, 41 P.3d 263, 269 (2002).

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability." Restatement (Second) of Torts § 766 (1979). Liability may arise for tortious interference with a contract even where the contract is terminable at will because, until it has been terminated by one party, the contract is valid and subsisting and a defendant may not improperly interfere with it. Restatement (Second) of Torts § 766 cmt. g. (1979).

Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 895, 243 P.3d 1069, 1083 (2010). A "party cannot tortiously interfere with its own contract. . . . [I]t follows that an action for intentional interference with contract can only lie against a third party." *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 724, 184 P.3d 844, 849 (2008) (citing *Ostrander*, 123 Idaho at 654, 851 P.2d at 950); *Jenkins*, 141 Idaho at 243, 108 P.3d at 390 ("As there is no dispute between the parties that Gibbs and Irish were acting within the course and scope of their employment with Boise Cascade in these alleged activities, there is no "third party" to interfere with the contract. It is well established law in Idaho that a party cannot tortiously interfere with its own contract.").

Here, Hagadone is suing Mr. Moering, Mr. Shell, Black T. Marketing, and Arrow Digital. Mr. Moering and Mr. Shell, as Hagadone's former employees, were both party to an employment agreement and accordingly are not third parties. However, Arrow Digital is an unregistered general partnership, which is recognized as a distinct legal entity by the Idaho Code ("A partnership is an entity distinct from its partners." I.C. 30-23-201). Accordingly, summary judgment for the claim of tortious interference is granted in part as to Mr. Moering and Mr. Shell as individuals. As to Black T. Marketing and Arrow Digital, assuming the jury finds the acceptable use policy is a contract, the Court will address each element of tortious interference in turn.

1. Existence and knowledge of a contract

The Court has established above that the employee handbook is not a contract. Thus, summary judgment is granted as to that claim. However, the Court has indicated above that the jury must determine whether the acceptable use policy is a contract, and genuine issues of material fact exist for this element. Since Mr. Moering, Mr. Shell, and representatives of Hagadone have signed the acceptable use policy, they all had knowledge of the contract, if the jury determines that a contract existed. Arrow Digital

and Black T. Marketing also had knowledge of the acceptable use policy since Mr. Moering and Mr. Shell are the only partners of Arrow Digital and Mr. Shell is the authorized representative of Black T. Marketing.

2. Intentional interference causing a breach of contract

Whether interference with business was intentional is a question of fact for the jury to determine (*See Bybee v. Isaac,* 145 Idaho 251, 259, 178 P.3d 616, 624 (2008) (quoting *Highland Enters., Inc. v. Barker,* 133 Idaho 330, 340, 986 P.2d 996, 1006 (1999)) ("The 'intent' of the 'intentional interference' requirement can be inferred by the jury from evidence of 'conduct substantially certain to interfere with the [contract].'"). Similarly, whether a party breached a contract is a question of fact for the jury. *See, e.g., J.P. Stravens Planning Assocs., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996) (citing *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 700, 702, 874 P.2d 506, 511, 513 (1993)). Hagadone claims that defendants do not clearly seek dismissal of this claim. Pl.'s Resp. to Defs.' Mot. for Summ. J. 13 n.3. While it is true that it is difficult to decipher in defendants' memorandum, the Court finds that defendants are seeking dismissal of this claim. Defendants list (albeit indirectly) the following reasons for seeking dismissal of the tortious interference claim: (1) there was no breach of contract (see Mem. in Supp. of Defs.' Mot for Summ J. 6 n.3); (2) public policy favors permitting employees to change jobs or start their own business without fear of reprisal from their former employer (*Id.* at 6); (3) merely showing that defendants took Hagadone's former customers is not enough (*Id.* at 7); (4) employees may freely use any information, knowledge, skills, and training acquired on the job (*Id.*); and (5) as long as the employment contract does not prohibit divulging information obtained through the course of employment, the employee may do whatever he or she pleases

with such information. *Id.* Although Hagadone does not respond to these allegations in its brief, the Court finds that these reasons alone are not enough to support summary judgment on this issue. To the first point, the Court has already determined that a jury question remains for the breach of contract issue. To the second and fifth points, while it may be true that public policy favors the ability to freely change employers or to start ones' own business, Hagadone is not trying to prohibit Mr. Moering and Mr. Shell from earning a livelihood entirely; it is trying to obtain damages from alleged losses it attributes to them directly. Public policy does not favor permitting former employees to start up competing businesses and steal clients from their former employers, as Hagadone alleges defendants have done. To the third point, Hagadone has not merely shown that defendants have taken Hagadone's former customers. They have alleged that Mr. Moering and Mr. Shell used company computers to "form a coup" and that Mr. Moering emailed himself thousands of Hagadone's customers' information. This is enough for a jury to find in Hagadone's favor. To the fourth point, it is quite a stretch to claim that a list with thousands of customers' information, which Hagadone alleges to have compiled[2] (rather than a list that Mr. Moering compiled on his own over the course of his employment), consists of "information, knowledge, skills, and training acquired on the job". Mem. in Supp. of Defs.' Mot. for Summ. J. 7 (citing *Fleming Sales Co. Inc. v. Bailey,* 611 F.Supp 507, 514 (N.D. Ill. 1985)). Accordingly, the Court finds there is a genuine issue of material fact pertaining to whether Arrow Digital and Black T. Marketing intentionally interfered with the authorization use policy, if a jury determines it is a contract.

[2] "Just days before Moering submitted his resignation to Hagadone, he emailed a massive customer list with contact information from his Hagadone email account to his personal email account. The list contains thousands of names of businesses including addresses, email addresses, contact names and other information. This information had been assembled by

3. Injury to the plaintiff resulting from the breach

There is clearly some evidence of an injury to plaintiff here. Hagadone has provided proof of lost revenues as a result from Mr. Moering's and Mr. Shell's activities. Although the parties dispute the sufficiency of this evidence, the Court discusses below that a reasonable jury could find the evidence provided is enough to substantiate a claim for damages. Because the other elements of intentional interference remain for trial, the Court will not discuss this element at length and will leave this issue for trial.

On the claim of Tortious Interference with a Contract, summary judgment is granted in part as to defendants Mr. Moering and Mr. Shell as individuals and is denied in part as to defendants Black T. Marketing and Arrow Digital.

D. Summary judgment is granted as to the issue of the Computer Fraud and Abuse Act.

Defendants argue:

> Hagadone's complaint that the individual Defendants wrongfully used its computer system is not actionable under [the Computer Fraud and Abuse Act]. There are no facts (Plaintiff has produced nothing in discovery) which show either Defendant used Hagadone systems after they left their jobs. Accordingly, Hagadone is barred from pursuing a federal computer fraud and abuse claim. Said claim has no basis in law or fact, is wholly meritless, and should be summarily dismissed.

Mem. in Supp. of Mot. for Summ. J. 5.

Hagadone responds:

> Defendants agree that the CFAA creates a civil cause of action but assert without citation that it "will not apply in the employment context." Defendants go on to conclude that the CFAA requires computers to be accessed "without authorization." They cite a single case, *Mifflinberg Telegraph* wherein employees had the right to access computers "for any purpose." The law of *Mifflinberg* is not binding and is contradicted by Ninth Circuit precedent.
>
> . . . .

Hagadone over the course of years." Packer Decl. ¶ 12 (underlining added).

> Here, both Moering and Shell agreed to an Acceptable use policy ("AUP") which limited the scope of their computer access. . . .
>
> Mr. Moering admits to having used his Hagadone computer to further the business of Arrow Digital. Both Shell and Moering used Hagadone work computers - during work hours, while being paid by Hagadone - to conduct Arrow Digital business. Just days prior to his resignation, Moering transferred a customer list containing thousands of business names, contacts, and contact information to himself at his Arrow Digital email address. The Defendants [sic] actions were done without permission and exceeded the scope of their access to Hagadone's computers.

Pls.' Response to Defs.' Mot. for Summ. J. 11-12 (citations omitted).

A violation of the Computer Fraud and Abuse Act ("CFAA") occurs when one:

> (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

18 U.S.C.A. § 1030(a)(5). The second element may also be met when the scope of authorization is exceeded. *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1131-32 (9th Cir. 2009).

> the definition of "exceeds authorized access" in § 1030(e)(6) indicates that Congress did not intend to include such an implicit limitation in the word "authorization." Section 1030(e)(6) provides: "the term 'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). As this definition makes clear, an individual who is authorized to use a computer for certain purposes but goes beyond those limitations is considered by the CFAA as someone who has "exceed[ed] authorized access."

Id. at 1133. However, the U.S. Court of Appeals for the Ninth Circuit then held that, because this is a criminal statute, which should be interpreted

> to ensure that defendants are on notice as to which acts are criminal, . . . a person uses a computer "without authorization" under §§ 1030(a)(2) and (4) when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission), or when the employer has rescinded permission to access the computer and the defendant uses the computer anyway.

Id. at 1135.

> Basing criminal liability on violations of private computer use polices can transform whole categories of otherwise innocuous behavior into federal crimes simply because a computer is involved. Employees who call family members from their work phones will become criminals if they send an email instead. Employees can sneak in the sports section of the New York Times to read at work, but they'd better not visit ESPN.com. And sudoku enthusiasts should stick to the printed puzzles, because visiting www.dailysudoku.com from their work computers might give them more than enough time to hone their sudoku skills behind bars.
>
> . . . .
>
> We remain unpersuaded by the decisions of our sister circuits that interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty. *See United States v. Rodriguez,* 628 F.3d 1258 (11th Cir. 2010); *United States v. John,* 597 F.3d 263 (5th Cir. 2010); *Int'l Airport Ctrs., LLC v. Citrin,* 440 F.3d 418 (7th Cir. 2006). These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of "exceeds authorized access." They therefore failed to apply the long-standing principle that we must construe ambiguous criminal statutes narrowly so as to avoid "making criminal law in Congress's stead." *United States v. Santos,* 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008).
>
> We therefore respectfully decline to follow our sister circuits and urge them to reconsider instead. For our part, we continue to follow in the path blazed by *[LVRC Holdings LLC v. Brekka,* 581 F.3d 1127, and the growing number of courts that have reached the same conclusion. These courts recognize that the plain language of the CFAA "target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation." *Shamrock Foods Co. v. Gast,* 535 F.Supp.2d 962, 965 (D. Ariz.2008) (internal quotation marks omitted); *see also Orbit One Commc'ns, Inc. v. Numerex Corp.,* 692 F.Supp.2d 373, 385 (S.D.N.Y.2010) ("The plain language of the CFAA supports a narrow reading. The CFAA expressly prohibits improper 'access' of computer information. It does not prohibit misuse or misappropriation."); *Diamond Power Int'l, Inc. v. Davidson,* 540 F.Supp.2d 1322, 1343 (N.D. Ga. 2007) ("[A] violation for 'exceeding authorized access' occurs where initial access is permitted but the access of certain information is not permitted."); *Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda,* 390 F.Supp.2d 479, 499 (D.Md. 2005) ("[T]he CFAA, however, do[es] not prohibit the unauthorized disclosure or use of information, but rather unauthorized access.").

United States v. Nosal, 676 F.3d 854, 862-63 (9th Cir. 2012).

Here, Mr. Moering and Mr. Shell clearly had Hagadone's authorization to access the computers that they used to conduct their alleged wrongdoings in their capacity as employees. Whether they had Hagadone's authorization to perform the specific tasks is irrelevant, as the Ninth Circuit Court of Appeals in *Nosal* made abundantly clear. Although some federal circuits hold differently than the Ninth Circuit, this Court finds the Ninth Circuit's reasoning to be more persuasive than its sister circuits, and the Ninth Circuit is the district in which this Court is situated. Additionally, the Court finds the Ninth Circuit's public policy reasoning convincing. Accordingly, summary judgment is granted in part as it pertains to the claim of violation of the Computer Fraud Abuse Act.

E. Violation of Idaho Trade Secret Act

Defendants very briefly address the issue of violation of the Idaho Trade Secret Act ("ITSA") in a footnote: "A customer list containing contact information (such as names and addresses) generally will not be considered a trade secret." *See Trumble v. Farm Bureau Mut. Ins. Co.*, 166 Idaho 132, 150, 456 P.3d 201, 219 (2019). Although defendants are not directly seeking summary judgment for this particular issue, and Hagadone did not respond to this in its brief, the Court still finds it important to address this issue for the parties' knowledge heading to trial.

The ITSA prohibits misappropriation of trade secrets. I.C. 48-801.

> "To prevail in a claim brought under the ITSA, '[a] plaintiff must show that a trade secret actually existed.'" *La Bella Vita,* LLC v. Shuler, 158 Idaho 799, 353 P.3d 420, 428 (quoting *Basic Am., Inc. v. Shatila,* 133 Idaho 726, 734, 992 P.2d 175, 183 (1999)). Without this showing, there can be no misappropriation. *Id.* The ITSA defines a trade secret as:
>
> > [I]nformation, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
> >
> > (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. . . .

I.C. § 48-801(5). This Court has also taken direction from the Restatement of Torts section 757, which lists six additional factors that can be used to determine whether information is, or is not a trade secret. *Shatila,* 133 Idaho at 735, 992 P.2d at 184. These factors include

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

Id. (quoting RESTATEMENT OF TORTS § 757, cmt. b (1939)). These factors are not required, but "address the issue of whether the information in question is generally known or readily ascertainable." *Id.*

When a plaintiff successfully establishes the existence of a trade secret, the plaintiff must also show that the defendant misappropriated the trade secret. *See* I.C. § 48-801. Misappropriation is defined as:

> (a) Acquisition 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; or
>
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> A. Used improper means to acquire knowledge of the trade secret; or
>
> B. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
>
> i. Derived from or through a person who had utilized improper means to acquire it;
>
> ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

> C. Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it has been acquired by accident or mistake.
>
> I.C. § 48-801(2). Improper means include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy. . . ." I.C. § 48-801(1).

Trumble, 166 Idaho at 148-49, 456 P.3d at 217-18.

Defendants' statement of the law here is misleading. The Idaho Supreme Court did not state that customer lists are not generally considered a trade secret, as it would appear defendants would like the Court to believe. It held that names and addresses alone cannot constitute a trade secret. *Trumble*, 166 Idaho at 150, 456 P.3d at 219. Moreover, the Idaho Supreme Court has previously found client lists can be trade secrets. *See Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010); *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002). Therefore, a customer list with names and phone numbers may constitute a trade secret if accompanied by other confidential information. Here, Hagadone has indicated that the client list in question "contains thousands of names of businesses including addresses, email addresses, contact names and other information. This information had been assembled by Hagadone over the course of years." Packer Decl. ¶ 12. However, the Court is not sure of what "other information" was included. Nevertheless, the client list did not simply contain the names and addresses of clients, and the list could be determined to be a trade secret, depending on whether the "other information" was public or was intended to be kept confidential.

In *Trumble*, Trumble "created the Subject list after he was terminated, the list was created based on his own personal knowledge and experience." 166 Idaho at 148, 456 P.3d at 217. He created the list by compiling information retained in "his phone

contacts, commission statements, and calendars and [asserted] that none of these sources 'contained the kind of proprietary information that could only have been obtained from [Farm Bureau].'" *Id.* There was also no evidence that the company undertook reasonable efforts to maintain the secrecy of the contents of the list. *Id.* The Idaho Supreme Court in *Trumble* found that the client list in question did not constitute a trade secret because it "almost wholly generated from alternative and independent sources, it contained generally known information and Farm Bureau took few efforts to maintain its secrecy." *Id.* Specifically, the Idaho Supreme Court found:

> [T]he Subject List was mostly generated from Trumble's personal knowledge accumulated while working as an insurance agent as well as through the contacts in his phone. Although around twenty names on the Subject List were compiled from old commission statements and calendars accessed when Trumble was working for Farm Bureau, most of the names included on the list were from Trumble's own alternative and independent sources [after his employment ended].
>
> Second, the Subject List generally contains only contact information of individuals—their names and addresses. . . . Such public information cannot, on its own, constitute a trade secret.
>
> Third, . . . Mr. Swore, a Farm Bureau employee who maintained the operating systems and network infrastructure, provided testimony about Farm Bureau's protocol after an agent is terminated and explained how an agent's contacts are removed from Farm Bureau's server and any saved contacts, including addresses, are sent directly to the terminated individual. In his deposition, Mr. Swore testified that Trumble's contacts were sent directly to him. . . . It is hard to maintain an argument that contacts generated during employment are intended to remain a secret when Farm Bureau's practice is to provide terminated individuals with a copy of their contacts from the server.

166 Idaho at 150-51, 456 P.3d at 219-20.

> ...the commission statements lacked any language relaying the statements as confidential. There also was no business policy or practice in place informing agents that the information in the commission statements was confidential. And even if there were some aspect of confidentially implied by Farm Bureau about the commission statements, the statements did not have addresses of the customers. Thus, on these facts we conclude that the Subject List could not have divulged confidential information when the information Trumble used to mail solicitation letters was not included in the commission statements. Based on

these reasons, we agree with the district court that the Subject List is not a trade secret.

166 Idaho at 151, 456 P.3d at 220.

> Even if the list were a trade secret, Farm Bureau is also required to prove Trumble misappropriated its trade secrets in order to establish a successful ITSA claim. Merely using information obtained during his association with Farm Bureau in a new capacity does not rise to the level of misappropriation. *Northwest Bec-Corp v. Home Living Service,* 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) (explaining that the legislature did not intend the ITSA to be read so broadly that merely hiring a competitor's employee constitutes acquiring a trade secret because employees will naturally take with them the skills, training and knowledge acquired from previous employment). Nor is there any evidence in the record that the Subject List was acquired through improper means. Farm Bureau made no allegation of theft, bribery or misrepresentation. Its argument is founded on Trumble breaching a duty to maintain secrecy. As discussed directly above, Farm Bureau did not take reasonable efforts to maintain secrecy. Even so, the district court found that the Agent Contract provided a specific list of forbidden activities that a terminated agent could not participate in for a period of ninety days. Thus, the district court found that this provision signified that after the ninety days had passed, Trumble was free to engage in any of the listed activities without breaching the Agent Contract. Trumble adhered to the ninety-day term in the Agent Contract and thus there was no evidence of breach to maintain secrecy. Farm Bureau had the duty "to present evidence that demonstrated there was a genuine issue of material fact in order to survive summary judgment." *Id.* at 841, 41 P.3d at 269. It failed to do so. Summary judgment in Trumble's favor was proper on the misappropriation claim.

Id. Here, unlike in *Trumble*, Hagadone alleges to have compiled the list on its own and that Mr. Moering took this list on his own (presumably without authorization). Packer Decl. ¶12. Therefore, the present case is distinguishable from *Trumble*, and the customer list could be determined at trial to be a trade secret, leaving a question of whether defendants misappropriated it to the jury. This Court does not at the present time make a ruling on this issue, but finds it pertinent to point out the correct law to the parties going forward.

F. Civil Conspiracy

Defendants briefly address the issue of civil conspiracy in a footnote:

> Defendants have not specifically addressed Plaintiff's claim of civil conspiracy because "The essence of a cause of action for civil conspiracy is the **civil wrong**

> committed as the objective of the conspiracy, not the conspiracy itself." *Mannos v.* Moss, 143 Idaho 927, 155 P.3d 1166, 1173-74 (2007); *McPheters v. Mail,* 138 Idaho 391, 395, 64 P.3d 317, 321 (2003) (emphasis added [in original]). Plaintiff must define the underlying *unlawful* conduct, which, presumably, relates to its 7 other claims. This brief addresses those claims on the merits, and if said causes fail, Plaintiff's civil conspiracy tort must also be dismissed. Regardless, Plaintiff cannot show "the existence of an agreement" between the Defendants to bring about an unlawful act; insinuating some "understanding" is insufficient at the summary judgment stage. *R. Homes Corp. v. Herr,* 142 Idaho 87, 92-94, 123 P.3d 720, 725-27 (Ct. App. 2005).

Mem. In Supp. of Mot. For Summ. J. 6 n.2 (emphasis in original).

Hagadone responds briefly in a footnote:

> [Defendants] do not seek dismissal of Plaintiff's conspiracy . . . claim[ ], but assert[ ] that [it] fails if all of Plaintiff's other claims fail (Plaintiff agrees) . . . . As Defendants are not seeking dismissal of [this claim] and has not fully articulated the basis for dismissal at this stage, Plaintiff cannot further respond.

Pls.' Resp. to Defs.' Mot. for Summ. J. 13 n.3.

> "A civil conspiracy that gives rise to legal remedies exists only if there is an agreement between two or more to accomplish an unlawful objective or to accomplish a lawful objective in an unlawful manner." *McPheters v. Maile,* 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). Civil conspiracy is not an independent claim for relief because "[t]he essence of a cause of action for civil conspiracy is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself." *Id.* Furthermore, there must be specific evidence of a plan or agreement to demonstrate the existence of the conspiracy at the time the allegedly unlawful objective was accomplished. *Mannos v. Moss,* 143 Idaho 927, 935, 155 P.3d 1166, 1174 (2007).

Wesco, 149 Idaho at 898-99, 243 P.3d at 1086-87. The existence of a conspiracy is "only relevant insofar as it bears on the rules of evidence and the persons liable, including holding one conspirator liable for the conduct of the other. . . . [C]ivil conspiracy is not a claim upon which relief can be granted." *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 157 Idaho 106, 123 n.4, 334 P.3d 780, 797 n.4 (2014); *see also Tricore Investments, LLC v. Estate of Warren through Warren*, 168 Idaho 596, __, 485 P.3d 92, 121 (2021) (citations omitted) ("Conspiracy is only material

for the purpose of "making all of the defendants liable for each individual act of the other defendants, if the conspiracy is established.").

It is clear that civil conspiracy is not a cause of action under Idaho law. Nevertheless, Hagadone has provided evidence by way of exhibits attached to the declaration of Markus W. Louvier that Mr. Moering and Mr. Shell both participated in these actions. Should the jury find one defendant personally liable for one or more causes of actions but not the other, Hagadone may be able to rely on the concept of civil conspiracy to nevertheless hold the other defendant liable. Thus, the Court will not make any determination as to the issue of civil conspiracy at this summary judgment stage.

G. There are genuine issue of material facts pertaining to damages

First, defendants argue:

> In the event Plaintiff is entitled to recover against the Defendants, the appropriate measure of loss is lost profits, which are damages for the loss of net income to a business measured by reasonable certainty. *Todd v. Sullivan Constr., LLC,* 146 Idaho 118, 191 P .3d 196 (2008) (describing lost profits as a calculation of amounts received less the cost of labor and material to perform the job). Gross revenue does not directly correlate with net profit. Rather, the analysis is information-intensive, considering all objective facts, figures, and data from which a lost profit amount may be ascertained on a more likely than not basis. *Wiese v. Pro Am Serv., Inc.,* 317 S.W.3d 857, 863 (Tex. App. 2010). The inquiry involves more than merely estimating profit—"there must generally be supporting evidence of overhead expenses, or other costs of producing income from which a net figure can be derived." *Sunridge Dev. Corp. v. RB&G Eng'g, Inc.,* 305 P.3d 171, 177 (Utah App. 2013) [internal citation omitted] (upholding grant of summary judgment where company put forward a summary of gross revenue, but failed to provide any evidence concerning costs, which would leave the factfinder with no basis to determine amount of lost net profit claimed); *see also Saint Alphonsus Diversified Care, Inc. v. MRI Assocs. LLP,* 157 Idaho 106, 116, 334 P.3d 780, 790 (2014) (requiring sufficient evidence on which a jury could more probably infer a link between the defendant's conduct and the alleged lost profits as opposed to an inference that the loss is connected to other factors); *James Crystal Licenses, LLC v. Infinity Radio, Inc.,* 43 So.3d 68, 75 (Fla. App. 2010) (holding radio station failed to deduct general overhead expenses in calculating its lost profits and did not carry its burden "to provide

competent substantial evidence that the losses were directly linked to the defendants' alleged wrongdoing").

Here, even assuming Defendants breached a duty of loyalty when they started a sidehustle while still working as digital sales representatives at Hagadone or that they misappropriated a customer list (which allegations will not be disputed for purposes of this summary judgment) comprising a trade secret, all Plaintiff's remaining claims fail because it has not established any "lost profits." Plaintiff has produced nothing tending to show that since the Defendants left it has operated at a loss. Further, were this Court simply to take Plaintiff at its word (which is improper at the summary judgment stage), it has put forward no evidence (much less a preponderance) of a link between such loss and it being attributable to the Defendants, as opposed to their own management decisions, other lawful competition, market fluctuations, or a variety of countless other unrelated potential factors. Rather, its entire case is built on *ipse dixit,* something asserted, but not proved.

Mem. In Supp. of Mot. For Summ. J. 8-10.

Hagadone responds, first, that while "Defendants playfully characterize their conduct as a 'side hustle' [they] neglect to inform this Court that their secret side project sold the same products and services they were engaged in selling on their employer's behalf." Pls.' Resp. to Defs.' Mot. For Summ. J. 1-2. Hagadone also responds that (1) there are several ways to prove damages; (2) lost profits are not the appropriate or only measure of loss; (3) they are entitled to disgorgement damages for breach of fiduciary duty; (4) they are entitled to moneys improperly received by defendants from "utilizing Hagadone work computers on Hagadone time, through Hagadone clients"; and (5) they are entitled to losses caused by transitioning Hagadone clients over to Arrow Digital. Pls.' Resp. to Defs.' Mot. for Summ. J. 14-17.

"'Compensatory damages for lost profits and future earnings must be shown with a reasonable certainty. Damage awards based upon speculation and conjecture will not be allowed.'" *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 122, 191 P.3d 196, 200 (2008) (citing *Inland Group Cos., Inc. v. Providence Washington Ins. Co.,* 133 Idaho 249, 257, 985 P.2d 674, 682 (1999). "'Reasonable certainty requires neither

absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation.'" *Id.* (quoting *Griffith v. Clear Lakes Trout Co., Inc.,* 143 Idaho 733, 740, 152 P.3d 604, 611 (2007)). The amount of damages is a question of fact for the jury. *Conley v. Amalgamated Sugar Co.*, 74 Idaho 416, 423, 236 P.2d 705, 709 (1953) ("The mere fact that it is difficult to arrive at the exact amount of damages where it is shown damages resulted, does not mean that damages may not be awarded and it is for the trier of facts to fix the amount."); Idaho Trial Handbook § 25:1 ("The mere fact that it is difficult to arrive at the exact amount of damages does not prevent the award of damages; where damages are shown to have resulted, fixing the amount is for the trier of fact.").

The Court would first like to point out a misstatement of the law made by defendants regarding *Todd v. Sullivan Constr., LLC,* 146 Idaho 118, 191 P.3d 196 (2008) as standing for the proposition that "the appropriate measure of loss is lost profits, which are damages for the loss of net income to a business measured by reasonable certainty." Mem. in Supp. of Mot. for Summ. J. 8. The Court agrees with Hagadone that "The *Todd* court does not require that a plaintiff utilize lost profits to prove damages." Pls.' Resp. to Defs.' Mot. for Summ. J. 14. Rather, the Idaho Supreme Court in *Todd* focused on whether expert testimony was required to prove lost profits. Nowhere in that opinion did the Idaho Supreme Court state or even imply that lost profits is the *only* measure of loss in instances such as those found in the present case.

Defendants also cite to *Gem State Roofing, Inc. v. United Components, Inc.,* 168 Idaho 820, 837, 488 P.3d 488, 505 (2021) for the proposition that it is improper to use profit margins multiplied out over time to estimate the amount of damages because

such calculations are speculative and conclusory. Mem. in Supp. of Summ. J. 8. The Court does not find that this assertion is always correct, but rather that it depends on specific the facts of the case. In *Gem State Roofing, Inc.*, the Idaho Supreme Court found that the evidence presented at trial about lost profits was insufficient because it

> consisted entirely of its profits and profit margins over time as supported by Silvia's testimony. Its evidence about other damages, like that to its reputation, consisted entirely of hearsay statements that were ultimately not admitted at trial. Gem State-Blaine relied on the amounts that were paid to or bid by UCI for work in Blaine County as the benchmark for damages owed it, multiplying it by Gem State-Blaine's 19-year track record of profits to reach its requested damages of $220,000. Gem State-Blaine conceded loss of profit as a result of the recession in the years after 2008, but argued in its opening statement that UCI's breaching conduct caused Gem State-Blaine's losses to "[fall] further and stay [ ] down longer[.]" However, there is nothing in the record to support this assertion, much less enough to render the district court's conclusion clearly erroneous.

168 Idaho at 837, 488 P.3d at 505. This Court finds it telling that the company in *Gem State* multiplied its profits over nineteen years and that the profit margins was the only evidence that was admitted at trial. Here, Hagadone provides a comparison of 2020 to 2021 income from TDS Fiber Meridian. Packer Decl. Ex. A. The year-over-year loss between 2020 and 2021 was predicted to be $57,440, based on Hagadone's profits made from TDS Fiber Meridian in 2020. *See id.* Mr. Moering is listed as the representative for this amount. *Id.* Additionally, Arrow Digital provided invoices to Hagadone in discovery that evidence Arrow Digital billed TDS Fiber Meridian $105,000 between October 29, 2020 and April 1, 2021 and $87,250 between January 25, 2021 and April 1, 2021. Although gross revenue and net revenue are not directly comparable, the Court finds that there is enough from the available invoices to substantiate Hagadone's claim for lost revenue, even more so considering this amount only covers a single quarter. Since the amount of damages is a question for the jury, and a reasonable jury could find that Mr. Moering and Mr. Shell, through Arrow Digital,

caused damages in the amount of $57,440, there is no need for the Court to further address this issue. There is a genuine issue of material fact pertaining to damages, and summary judgment must be denied. The Idaho Supreme Court has held:

> ...any claim of damages for prospective loss contains an element of uncertainty, but that fact is not fatal to recovery. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. The party seeking to recover lost profits is not required to obtain the testimony of the customers allegedly lost as a result of the wrongdoer's conduct. There only need be sufficient evidence in the record to allow the jury to conclude that the inference linking the wrongdoer's conduct to the claimant's damages is more probable than the inference connecting such loss to other factors.

Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 157 Idaho 106, 116 (2014).

This Court finds that a reasonable jury could find a specific, non-speculative amount of damages based on the evidence provided. Hagadone is not required to prove damages to a mathematical certainty at this stage in the proceedings, as it is for the jury to weigh the credibility of the witnesses to determine the amount of damages to award to Hagadone, should they determine that defendants are liable for any causes of action. The Court need not belabor the point, and summary judgment is denied as it pertains to the amount of damages. While it is the Court's role to determine the proper *measure* of damages (not the *amount* of damages) ("The question of the proper measure of damages is a question of law which is reviewed *de novo*." *Asher v. McMillan*, ___ Idaho ___, ___, 503 P.3d 172, 176 (2021), citing *Gen. Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 854, 979 P.2d 1207, 1212 (1999)), this Court has not been asked to do so at this summary judgment stage.

Next, defendants attack the findings of Hagadone's expert witness, Mr. West:

> In answering written discovery, Plaintiff has never provided specifics regarding its claimed damages. . . . Plaintiff did not produce any report of Mr. West; instead, it supplied a supposed summary of year over year loss reports.

. . . . Plaintiff's disclosure of Mr. West's opinions are not only woefully insufficient to carry its burden of proof [under I.R.C.P. 26(b)(4)(A)(i)], but also are grossly inadequate to fairly permit the Defendants to prepare their case. There is very little substantive information in the disclosure, no information whatsoever on the basis and reasons underpinning Mr. West's ultimate opinion (i.e., the stated damages), and no information regarding causation.

. . . .

The disclosure of Mr. West's opinions contains no facts, no basis, no methodology, or explanation of any kind. The defense has absolutely no idea what Exhibit C means. It refers to businesses which have never been mentioned in discovery before, and the figures listed in the revenue columns lack significance. A cursory review of just a handful of Coeur d'Alene Press invoices reveals a litany of different types of products and services. There are limitless explanations as to why a customer in any given month bought advertising and in other months did not (e.g., Best Of campaigns). In addition, five of the accounts appearing on the list indicate they were sold by sales representatives who are not parties to this litigation. Furthermore, several of the names on Exhibit C have *never* conducted business with the Defendants. How then can the loss of such customers be attributable to their conduct? Defendants left Plaintiffs employ within the first 60 days of 2021. Assuming they competed fairly with Defendant thereafter, *none* of Plaintiff's decreases in revenue in the ensuing ten months have anything to do with an employer/employee duty of loyalty. Many other questions could be raised, but Defendants will end by reiterating simply that Plaintiff has not come forward with admissible evidence of tangible harms and losses that could fairly be traced back to any allegedly wrongful conduct.

Mem. in Supp. of Mot. for Summ. J. 10-13 (citations omitted).

Hagadone responds:

Defendants quibble with matters of expert disclosures, adequacy of foundation of expert testimony, and whether or not factually the Defendants are liable for specific, individual losses. However, the thrust of their motion and the basis for their requested relief is that the Plaintiff cannot prove ***any*** damages were sustained as a consequence of Defendants' conduct. That is simply untrue and not supported by the record.

Pls.' Resp. to Defs.' Mot. for Summ. J. 17 (emphasis in original).

The Idaho Rules of Civil Procedure require the following disclosures for retained expert witnesses:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;

- the data or other information considered by the witness in forming the opinions;

- any exhibits to be used as a summary of or support for the opinions;

- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

- the compensation to be paid for the testimony; and

- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(i). These are the requirements **for trial**. I.R.C.P. 26(b)(4). We are not currently at trial. What is before this Court is defendants' motion for summary judgment. For purposes of summary judgment, Hagadone has presented evidence of some damage. That is all that is required to survive summary judgment. This Court, at the present time anyway, has not been asked to strike some of or all of Hagadone's expert opinions due to any alleged failure or shortcomings found within Hagadone's expert witness disclosure.

IV. CONCLUSION AND ORDER.

For the foregoing reasons,

IT IS HEREBY ORDERED Defendant's Motion for Summary Judgment is **GRANTED IN PART** as to the issues of: breach of the implied covenant of good faith and fair dealing pertaining to the employee handbook; tortious interference pertaining to Mr. Moering and Mr. Shell as individuals; and the Computer Fraud and Abuse Act in its entirety.

IT IS FURTHER ORDERED Defendant's Motion for Summary Judgment is **DENIED IN PART** as to the issues of: breach of the implied covenant of good faith and fair dealing pertaining to the acceptable use policy and as to the implied covenant of

good faith and fair dealing in general; tortious interference pertaining to Black T. Marketing and Arrow Digital; and damages.

Entered this 24th day of March, 2022.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 24th day of March, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Markus William Louvier	mlouvier@ecl-law.com	Regina M. McCrea	rmccrea@omllaw.com

Jeanne Clausen, Deputy Clerk