IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRITON CONSTRUCTION COMPANY, INC., Plaintiff, v. EASTERN SHORE ELECTRICAL SERVICES, INC., EASTERN SHORE SERVICES, LLC, GEORGE ELLIOTT, TERESA ELLIOTT, TOM KIRK and KIRK'S ELECTRICAL SERVICES, Defendants.	)	Civil Action No. 3290-VCP

MEMORANDUM OPINION

Submitted: November 25, 2008
Decided: May 18, 2009

Robert K. Beste, Jr., Esquire, COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C., Wilmington, Delaware; Roy S. Cohen, Esquire, Jonathan Landesman, Esquire, COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C., Philadelphia, PA; *Attorneys for Plaintiff Triton Construction Company, Inc.*

James S. Green, Esquire, Kevin A. Guerke, Esquire, SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware; *Attorneys for Defendants Eastern Shore Electrical Services, Inc., Eastern Shore Services, LLC, George Elliott and Teresa Elliott*

William M. Kelleher, Esquire, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware; *Attorneys for Defendants Tom Kirk and Kirk's Electrical Services*

PARSONS, Vice Chancellor.

This is an action by an electrical contracting company against a former employee and his current employer and its principals. The case presents questions of law and fact with respect to agency, fiduciary duty, tortious interference, fraud, and trade secrets, but essentially asks whether a former employee and the company for which he moonlighted can be held liable for that employee's acts of disloyalty. The plaintiff alleges that the former employee breached his fiduciary duties by working simultaneously for the plaintiff and a direct competitor, diverting corporate opportunities, and engaging in fraud by failing to reveal his extracurricular arrangement. The plaintiff also alleges that the current employer aided and abetted the employee's breaches of duty and misappropriated trade secrets belonging to the plaintiff.

The plaintiff filed its complaint on October 10, 2007. Shortly thereafter, the Court granted the plaintiff's application for a temporary restraining order. The parties then agreed to a stipulated preliminary injunction, entered on November 8, 2007, curtailing the extent to which the defendants could compete with the plaintiff. The Court conducted a trial on the plaintiff's claims for damages and other relief from March 10 to March 13, 2008. At the post-trial argument on November 25, 2008, the Court lifted the aspects of the preliminary injunction that prohibited the defendants from soliciting business from certain customers and projects. Thus, the primary focus of this opinion is on the plaintiff's claims for monetary relief.

For the reasons stated in this opinion, I hold that the defendants are liable to the plaintiff for breach of certain fiduciary duties, tortious interference with prospective economic advantage as to two projects, and aiding and abetting such wrongful conduct.

On that basis, I also conclude that all but one of the defendants are jointly and severally liable to the plaintiff for monetary damages in the amount of $167,644 – a small fraction of the damages the plaintiff sought. In addition, the current employer and certain related parties violated the preliminary injunction in at least one instance. Consequently, those defendants must reimburse the plaintiff for the reasonable attorneys' fees and expenses it incurred in prosecuting its motion for contempt of the Preliminary Injunction. In all other respects, the plaintiff's claims are dismissed with prejudice. In that regard, I further find that no trade secrets existed and, therefore, no misappropriation occurred.

I. FACTUAL BACKGROUND

A. The Parties

Triton Construction Company, Inc. ("Triton," "Plaintiff," or "the Company") is a Delaware corporation with its principal place of business in Newark, Delaware. Triton is an electrical contractor specializing in commercial work, particularly for public schools and assisted living communities.

Defendant Eastern Shore Electrical Services, Inc. ("ESES") is a Delaware corporation and Defendant Eastern Shore Services, LLC ("ESS") is a Delaware limited liability company. Both companies have their principal places of business in Wilmington, Delaware. Unless otherwise indicated, references in this opinion to "Eastern" denote both of those entities.

Defendants George Elliott ("Elliott") and Teresa Elliott ("Mrs. Elliott") are married and reside in Wilmington, Delaware. Elliott serves as President of both ESES and ESS; Mrs. Elliott is the majority owner of both companies.

Defendant Tom Kirk is an individual residing in Dover, Delaware. Kirk was an employee of Triton from February 5, 2004 until August 31, 2007. He operates Defendant Kirk's Electrical Services ("KES") as an unregistered business with its principal place of business in Dover, Delaware.[1] Since September 2007, Kirk has worked for Eastern as General Manager.

B. The History

Triton is a nonunion commercial electrical contractor established in 1999 that serves customers primarily in New Castle and Kent Counties in Delaware. Triton performs electrical subcontracting work for commercial businesses through a general contractor. It bids publicly-announced projects or is invited to bid on private commercial projects by the general contractor or business or property owner. If its bid is accepted, Triton provides electrical subcontracting services at the bid price. In the field of electrical subcontracting, local newspapers print invitations to bid on public projects, such as schools and government buildings.[2] For private projects, there may not be newspaper notices soliciting bids. Instead, electrical subcontractors typically are invited to bid by general contractors because of previous working relationships or contacts.[3]

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1 KES is an alter-ego created by Kirk for the purpose of submitting invoices to Eastern for his work. Because KES does not exist as a valid business entity distinct from Kirk, I will refer to Kirk singularly throughout this opinion, and any action on the part of Kirk or KES will be imputed to the other.

2 Trial Transcript ("T. Tr.") at 966.

3 *Id.* at 962-63, 994-95.

In 2004, Triton decided to expand the management team to run its business.[4] As part of that expansion, Triton hired Kirk in February 2004 as an Estimator and Project Manager, a full-time, salaried position. At the time, Kirk lived and worked in North Carolina, and previously had not worked in Delaware or with anyone in Delaware. Kirk's job responsibilities included estimating and preparing bids and managing projects. When Triton hired Kirk, it only employed two people in management positions: President, Kathleen Thomas, who performed banking, accounting, bonding, and human resources work, and General Manager and Chief Estimator, Mark Bauguess, who performed estimating and project management work.

In August 2004, Triton hired Julie Yearian as Director of Administration. In November 2004, Triton replaced Bauguess as General Manager with Joseph Zang. Bauguess, however, remained Chief Estimator at Triton, and focused on his estimating, bidding, and project management functions. After hiring Yearian and Zang, Thomas met each Thursday morning with Kirk, Bauguess, Yearian and Zang to discuss Triton's business. No other employees attended the Thursday morning meetings. At these meetings, confidential information about Triton's overhead, labor rates, material costs, equipment costs, profit, salaries, and general financial position was discussed. For their workspace, Kirk and Bauguess shared a trailer outside the building that housed Triton's

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[4] *Id.* at 972.

offices.[5] The fax machine on which Triton received invitations to bid from general contractors and customers was located next to Zang's desk inside the building.[6]

Kirk and Bauguess performed similar responsibilities. They managed Triton's projects and prepared and submitted bids for new projects. Bauguess did not use the same estimating software that Kirk used. When he joined Triton, Kirk asked for and was granted permission to use his copy of Vision EBM estimating software. Kirk's estimating software required frequent updates and worked in much the same way as Bauguess's software. Eventually, Kirk began preparing estimates and submitting bids primarily, while Bauguess began focusing on project management.[7] Zang had the responsibility to identify public bid invitations for which Triton would prepare bids.[8] When an electrical subcontractor, like Triton, does not receive an invitation to bid on a private project from a general contractor, it implies that contractor does not want to work with that subcontractor.[9]

Elliott established Eastern in late 2004 with Mrs. Elliott as the majority owner of Eastern. Eastern is a nonunion commercial electrical contractor that competes directly with Triton for some of the jobs it bids, both public and private. Elliott performed nearly

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5 *Id.* at 949-50.

6 *Id.* at 996.

7 *Id.* at 26.

8 *Id.* at 976-77.

9 *Id.* at 966.

all estimating services for Eastern after its inception. Eastern learned of opportunities to bid in the same way that Triton learned of them, *i.e.*, Elliott scanned the papers for public bid invitations and generally received private bid invitations directly from general contractors.[10]

Eventually, Elliott decided to grow Eastern by bidding more projects. Consequently, in November 2005, Elliott met with Kirk and offered him a full-time position at Eastern. Kirk rejected Elliott's offer, but contacted Elliott approximately two weeks later to offer his estimating services on a part-time basis.[11] Elliott and Kirk agreed that Kirk would work for Eastern part-time and send invoices to Eastern through an entity

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[10] *Id.* at 1158-59.

[11] According to Elliott and Kirk, Kirk did not prepare completed bids or estimates for Eastern. Instead, Kirk provided "takeoffs." Triton's expert, Dennis C. Link, explained the difference between estimates and takeoffs:

> In order to prepare an estimate, there is a number of things you have to do. And it starts out with a general review of the bidding documents that come in with the request for proposal and then actually taking the plans and specs and reviewing those and then getting into the process, which that's the first part of the estimating process.
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> And then you might say the second part is the actual takeoff itself. And the takeoff, the words themselves speak to what it is. And what you are doing in a takeoff is you are counting items or you are measuring lengths of wire or pipe or something like that. So the takeoff is actually going to the drawings and actually counting and taking off lengths and measurements.

Id. at 694. According to Link, takeoffs involve counting and measuring materials, whereas estimates require calculating labor rates and other costs associated with project management, as well as material prices. *Id.* at 695-98, 705.

to be established by Kirk, namely, KES. There is no indication, however, that Kirk ever formally established or registered KES as an entity in Delaware or elsewhere. Elliott and Kirk testified that they agreed Kirk would not perform estimating services for Eastern on any projects for which he prepared bids for Triton.[12] Although Elliott, himself, would not have permitted Eastern's employees to work for a competitor, he did not contact Triton before hiring Kirk.[13] Likewise, Kirk never informed Triton of his part-time job at Eastern.

From November 2005 until August 31, 2007, Kirk worked full-time for Triton and part-time for Eastern. Elliott and Kirk met two to three times per month, at their homes and in parking lots and restaurants, but never at Triton's or Eastern's offices. In addition, they spoke to each other frequently by telephone, sometimes as often as ten times per day. Elliott often made telephone calls to Kirk's cellular phone, which Triton issued to Kirk, but never to Kirk's telephone at Triton's office. Elliott and Kirk, who had become and remain friends, testified unconvincingly that these conversations mostly were of a personal nature.[14] Based on all the evidence, I find that many of those telephone calls related to Kirk's work for Eastern.

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12 *Id.* at 430, 1008, 1164.

13 *Id.* at 540.

14 *Id.* at 292-94, 505.

Elliott would identify projects on which he wanted Kirk's assistance in preparing an estimate for Eastern and would bring that project to Kirk's attention.[15] Kirk then would prepare a partial estimate or takeoff and transmit it to Elliott, who then would prepare a formal estimate and submit it.[16]

At some point while Kirk worked for both Triton and Eastern, Elliott and Kirk encountered each other at the bid opening for a project known as the Del Tech job. Elliott testified that he immediately confronted Kirk and inquired why he was at the opening. Kirk informed Elliott that Triton had entered a bid for the Del Tech job that Bauguess had prepared.[17] According to Elliott, Kirk then promised not to perform work for Eastern and Triton on the same bids or projects.[18]

During the relevant period, Kirk worked on 195 bids for Eastern, for which the total amount bid was $35,849,352, and of which 131 bids related to projects located in Dover or northward.[19] Out of those bids, Triton contends Eastern was awarded 59 jobs, which generated approximately $13,699,797 in revenue and $2,979,435 in gross profits.

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15 *Id.* at 226, 1171.

16 *Id.* at 333-34, 518-20.

17 *Id.* at 1164-65.

18 *Id.* at 1165, 1184.

19 Some of the 131 bids, however, were for projects located outside Delaware. At least one was in northern Chester County, Pennsylvania, approximately forty-nine miles from Triton's offices at the time.

For 13 of the 195 projects, Kirk both prepared bids for Triton and worked on bids for Eastern. Eastern won two of those projects, while Triton was awarded one.

In 2007, Kirk received a base salary of $68,000 plus various benefits from Triton. During the period Kirk worked for Triton and performed services for Eastern, from November 2005 until August 2007, Triton paid Kirk salary and benefits in the amount of $181,399. During the same period, Eastern paid Kirk, through KES, approximately $21,000 for his hourly services.[20] Kirk billed Eastern at the rate of approximately $25 per hour.[21] Following Kirk's resignation from Triton, Elliott hired him on behalf of Eastern at an annual salary of $92,500, which is $24,500 more than his salary was at Triton.[22]

C. Procedural History

On October 10, 2007, Triton filed a Verified Complaint requesting injunctive and other relief and a Motion for a Temporary Restraining Order against ESES, Elliott, and Kirk. This Court conducted a hearing on the TRO motion on October 16, during which it granted the motion and ordered the parties to confer about an appropriate form of order for the TRO. On October 24, Triton filed an Amended Verified Complaint that named ESS, Mrs. Elliott, and KES as additional Defendants in the action. On November 8, 2007, this Court granted the parties' stipulated Temporary Restraining Order and

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20 *Id.* at 260.

21 *See id.* at 1045.

22 *Id.* at 262-63.

Preliminary Injunction (the "Preliminary Injunction"). On March 5, 2008, in connection with the Pretrial Conference, Triton filed a Motion for Leave to File a Second Verified Amended Complaint, adding counts for civil conspiracy and aiding and abetting a breach of fiduciary duty. The Court granted that motion on March 12, and Triton filed its Second Verified Amended Complaint (the "Complaint") on March 21. A four-day trial was held from March 10 to March 13, 2008. Extensive post-trial briefing and argument followed.

D. Parties' Contentions

Triton asserts a plethora of claims against its former employee, Kirk, his alter-ego, KES, his current employer, Eastern, and that company's owners and managers, Elliott and Mrs. Elliott. Triton's claims ultimately arise from the intersection of the employment relationships between Triton and Kirk and between Eastern and Kirk. Triton alleges Kirk breached his duties of due care, loyalty, and disclosure to Triton by performing estimating services for its direct competitor Eastern, over a period of approximately twenty-two months. According to Triton, Eastern and Elliott aided and abetted Kirk's breaches of fiduciary duty, and all Defendants participated in a civil conspiracy to harm Triton's business interests. Triton also contends that Kirk usurped its business opportunities by diverting opportunities and invitations to bid on various electrical contracting projects. Next, Triton alleges that Defendants tortiously interfered with its prospective economic advantage, contractual relations, and employment relations by facilitating Kirk's work for Eastern on bids for local projects, including thirteen bids on which Kirk performed work for both companies. Triton contends that Defendants

committed fraud by concealing Kirk's work for Eastern and engaged in unfair competition by disrupting Triton's efforts to secure invitations to bid, and by submitting bids for Eastern through the use of Triton's confidential information. Triton also asserts that its confidential information constituted trade secrets that Defendants misappropriated in violation of Delaware's Uniform Trade Secret Act. Finally, Triton claims that Defendants are liable for unjust enrichment in connection with Eastern's increased revenue and profits and Kirk's collection of salary and benefits from Triton while he worked for Eastern. Triton seeks relief in the form of attorneys' fees, monetary damages, imposition of a constructive trust, and disgorgement of profits and Kirk's salary and benefits. Triton also asks this Court to make permanent the Preliminary Injunction to which the parties stipulated.

Defendants deny liability as to all Triton's claims. According to Defendants, Kirk owed no fiduciary duties to Triton because he neither acquired Triton's confidential information nor held the position of a director, officer, or key managerial employee at Triton. Even assuming Kirk did owe fiduciary duties to Triton, Defendants deny that Kirk breached any such duty. In addition, Defendants argue that Triton's information does not constitute trade secrets because it does not derive independent economic value from not being readily ascertainable by others and Triton failed to take reasonable measures to preserve its secrecy. Fraud did not occur, per Defendants, because no overt misrepresentations were made and no Defendant had a positive duty to speak. Defendants further contend that they did not usurp corporate opportunities or tortiously interfere with Triton's prospective economic advantage or contractual relations because

Triton had no valid business expectancies or contracts with the customers or general contractors at issue.

II. ANALYSIS

A. Standard of Review

To succeed on its various claims against Defendants, Triton must prove liability by a preponderance of the evidence. "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[23] Under this standard, Triton is not required to prove its claims by clear and convincing evidence or to exacting certainty. Rather, Triton must prove only that it is more likely than not that it is entitled to relief.

B. Did Elliott and Eastern Act in Contempt of the Preliminary Injunction?

In March 2008, Triton filed a motion for contempt against Elliott and Eastern for acting in contravention of this Court's November 8, 2007 Preliminary Injunction, which was stipulated to by the parties. Triton alleges Elliott solicited Ernest W. Skaggs, Jr. to form a joint venture with Eastern and submit a bid for a project identified in the Preliminary Injunction. Defendants argue that, because Triton was awarded that particular job, the Preliminary Injunction was not violated and neither Elliott nor Eastern should be found in contempt. The Preliminary Injunction enjoins Defendants "from soliciting, estimating, bidding, consulting, performing services for, or otherwise

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[23] *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) (quoting Del. Super. P.J.I. § 4.1 (2000)).

conducting business in connection with" a list of 30 customers and 17 projects.[24] One of the identified projects involves the Methodist Country House.[25] The relevant portion of the Preliminary Injunction remained in force until at least November 25, 2008.

At trial, Skaggs testified that Elliott approached him in late November 2007 and asked him to undertake a joint venture to bid on the Methodist Country House project.[26] Skaggs ultimately bid on that project, but was not awarded the job.[27] Although Eastern previously provided labor for a different joint venture between it and Skaggs, Skaggs averred that he would have supplied the labor for the Methodist Country House project.[28] Elliott never revealed to Skaggs the existence of the Preliminary Injunction or even that he and Eastern were enjoined from bidding on the Methodist Country House job. According to Skaggs, if he had known about the terms of the Preliminary Injunction, it would have made a difference to him because it was an attempt to skirt the law.[29]

Elliott and Eastern do not deny that Elliott solicited Skaggs to bid on the Methodist Country House project without telling him about the Preliminary Injunction. In fact, Defendants' counsel's sole defense for these actions is essentially, "No harm, no

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24 Prelim. Inj. ¶ 2.

25 *Id.*

26 T. Tr. at 939-40.

27 *Id.* at 940.

28 *Id.*

29 *Id.*

foul" in that he contended at oral argument that the motion for contempt is a "red herring" because the job ultimately was awarded to Triton.[30] In fact, Defendants never filed a brief in opposition to Triton's motion for contempt; they simply brand the motion a "comedy of unfortunate circumstances."[31]

I consider the matter much more serious. The Preliminary Injunction prohibited Elliott and Eastern from soliciting or bidding the identified customers and projects, including the Methodist Country House project. Whether Triton was awarded the Methodist Country House job is irrelevant to whether Elliott and Eastern are in contempt of the Preliminary Injunction. What is relevant is that Elliott caused Eastern to enter into a joint venture with Skaggs to bid on the Methodist Country House project in direct contravention of paragraph 2 of the Preliminary Injunction. Therefore, I grant Triton's motion for contempt against Elliott and Eastern and award Triton its reasonable attorneys' fees and costs associated with that motion. In addition, I find that Elliott's attempt to circumvent the Preliminary Injunction undermines his credibility as a witness and manifests a willingness to engage in conduct designed to hide the involvement of Elliott and Eastern.

C. Whether Kirk Intentionally Destroyed Evidence?

Triton accuses Kirk of intentionally destroying evidence, and requests that this Court draw an adverse inference against Kirk as a result. On July 26, 2007, apparently

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30 Post-Trial Argument Tr. at 68-69.

31 *Id.*

"[g]uided by women's intuition," Triton employees Thomas and Yearian directed William Worrell, an employee of Triton's outside accounting firm who sometimes provided technical support, to produce a ghost copy of the hard drive of Kirk's desktop computer located in Triton's office ("Kirk's Work Computer").[32] Thomas also testified that the ghost copy was necessary because Kirk recently had been implicated in an incident where wire went missing from a job site, and he had been talking about headhunters and looking for different employment.[33] Worrell retained the ghost copy until after Kirk ceased working for Triton on August 31, 2007. After Kirk left Triton, Yearian received a call from the general contractor on the Wilmington Music School project, which Kirk bid on for Triton before he resigned, who informed her that Triton and Eastern submitted identical bids. Yearian attempted to review documents related to the project on Kirk's Work Computer, but found that it contained almost no files related to Triton projects.

On September 7, 2007, Yearian asked Worrell to restore the ghost copy he made of Kirk's Work Computer's hard drive on July 26. The ghost copy contained bid information related to projects that Kirk worked on for both Triton and Eastern. Triton next retained a computer forensics expert to conduct an investigation on Kirk's Work Computer. The expert found that Kirk installed a wiping program on the computer that targeted specific files for overwriting, making the files irretrievable. Kirk deleted

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[32] Pl.'s Opening Br. ("POB") at 20.

[33] T. Tr. at 55, 549.

thousands of files and folders from his computer, as well as e-mail and contacts.[34] Triton's computer forensics expert concluded that the majority of the deleted files also had been rendered irretrievable in a way that is consistent with the use of a wiping program such as the one Kirk installed.[35] Kirk asserts, however, that he never used the wiping program to destroy the data in the deleted files and e-mail.[36] In the circumstances, Kirk's testimony is not credible.

Kirk also maintained copies of all work performed for Eastern on his home computer and backed up files related to Eastern on a thumb drive every night.[37] Kirk never produced his home computer or thumb drive during discovery and claims that he no longer owns either of them.[38]

Delaware courts may draw adverse inferences against a party or impose other sanctions for intentional or reckless destruction of evidence. An affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected.[39] Thus, a

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34 *Id.* at 218, 631-33. Triton's computer forensics expert, Matthew St. Jean, testified that most of the deleted folders "appeared to relate to specific businesses or specific projects" and each folder contained multiple files and documents. *Id.* at 631.

35 *Id.* at 634-35, 637-38.

36 *Id.* at 227-28.

37 *Id.* at 1034-35.

38 *Id.* at 227.

39 *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006).

party's duty to preserve evidence may arise before any litigation has been commenced. For an adverse inference to be drawn, Delaware law requires a determination that the party acted intentionally or recklessly in failing to preserve the evidence.[40] Here, I find that Kirk intentionally or, at a minimum, recklessly destroyed or failed to preserve evidence relating to this litigation, at a time when he knew such litigation was imminent or otherwise to be expected. To the extent warranted by the circumstances, therefore, this Court is free to draw an adverse inference against Kirk.

On August 16, 2007, at the Thursday morning meeting, Kirk and Zang argued about the missing wire and had to be restrained.[41] Three days later, on August 19, Kirk tendered his resignation from Triton, although he denied the confrontation with Zang precipitated his resignation.[42] Kirk's last day of work for Triton was August 31. Triton commenced this litigation on October 10. Between July 26, 2007, when Worrell created a ghost copy of Kirk's Work Computer, and August 31, Kirk deleted most of the files on that computer. Arguably, Kirk's duty to preserve the files on his Work Computer arose when the argument about the missing wire occurred on August 16. Regardless, Kirk knew that litigation should be expected or might be imminent when he resigned so that he could accept employment with a direct competitor of Triton for whom he had been clandestinely moonlighting. The extent of the destruction, comprising thousands of files,

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40 *Id.* at 548.

41 T. Tr. at 73-74.

42 PX 81.

and the fact that many files relevant to this litigation disappeared further militate in favor of drawing an adverse inference.

Additionally, at some point before trial, Kirk intentionally destroyed or otherwise lost his thumb drive and home computer. I infer from the evidence that Kirk either destroyed or discarded those devices and the information on them or he recklessly failed to fulfill his duty to preserve that potential evidence. Kirk presented no evidence that he took any steps to preserve the thumb drive or home computer. Rather, he effectively threw up his hands in bewilderment as to what happened to them. I am convinced, therefore, that Kirk did not lose those devices innocently; instead, he intentionally or recklessly failed to preserve them. Thus, an adverse inference is appropriate here.

In the case of Kirk's Work Computer, the availability of the ghost copy presumably supplies most of the missing information. To the extent there are any significant gaps, however, it is appropriate to infer that the missing information would have supported Triton's position on any issue to which that information was relevant. Similarly, as to the information on Kirk's missing home computer and thumb drive, I infer that it, too, would not have been favorable to Kirk. These circumstances lead me to conclude that, while Kirk's work for Eastern may have been in the nature of performing takeoffs as opposed to preparing a complete bid, it was significant enough that it involved the use and disclosure of at least some of Triton's confidential information. As explained *infra* Section II.H, however, such an inference, without more, is not sufficient to prove that Kirk misappropriated information of Triton that constituted protected trade secrets under the Delaware Uniform Trade Secrets Act.

D. Did Kirk Breach Fiduciary Duties Owed to Triton (Counts I-III and XV)?

Triton argues that Kirk owed it fiduciary duties of loyalty, confidentiality, and disclosure. Kirk breached those duties, according to Triton, by usurping bidding opportunities, failing to inform Triton of his part-time work at Eastern, and using Triton's confidential information to undercut its bids on projects that Eastern also bid. I examine first the extent of Kirk's fiduciary duties, if any.

1. Did Kirk owe fiduciary duties to Triton?

A preliminary question in determining whether Kirk breached any fiduciary duty concerns whether Kirk actually owed a fiduciary duty to Triton. Under fundamental principles of agency law, an agent owes his principal a duty of good faith, loyalty, and fair dealing.[43] These duties encompass the corollary duties of an agent to disclose information that is relevant to the affairs of the agency entrusted to him and to refrain from placing himself in a position antagonistic to his principal concerning the subject matter of his agency.[44] Nevertheless, an agent has no duty to disclose to his principal information obtained in confidence, the disclosure of which would be a breach of duty to

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[43] *Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980) (citing 3 C.J.S. *Agency* § 271; Restatement (Second) of Agency § 387 (1957)). *See also* Restatement (Third) of Agency § 1.01 cmt. e (2006) (noting that the Delaware Supreme Court has defined an agent's obligations as duties of good faith, fair dealing, and loyalty).

[44] *Sci. Accessories Corp.*, 425 A.2d at 962 (citing Restatement (Second) of Agency §§ 381, 393).

a third person.[45] Nor does agency law prohibit an agent from acting in good faith outside his employment even though it may adversely affect his principal's business.[46] Further, an agent can make arrangements or preparations to compete with his principal before terminating his agency, provided he does not act unfairly or injure his principal.[47]

These hallmark principles of agency law apply to traditional corporate fiduciaries, such as officers and directors, and to key managerial personnel.[48] The inclusion of key managerial personnel as corporate fiduciaries with corresponding duties reflects the divergent policies of demanding undivided and unselfish loyalty to the corporation from its crucial employees and of fostering and protecting free competition in the marketplace.[49] Hence, a privilege favoring employees developed, allowing them to prepare to compete with their employers before leaving their employ without fear of incurring liability for breach of their fiduciary duty of loyalty.[50]

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45 *Id.* (citing Restatement (Second) of Agency § 381 cmt. e, § 393 cmt. c).

46 *Id.* (citing Restatement (Second) of Agency § 387 cmt. b).

47 *Id.* (citing Restatement (Second) of Agency § 393 cmt. e).

48 *Id.* (citing *Cahall v. Lofland*, 114 A. 224 (Del. Ch. 1921); 3 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 846 (perm. ed. 1975)).

49 *Maryland Metals, Inc. v. Metzner*, 382 A.2d 564, 568-69 (Md. 1978) (citing *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939)).

50 *Id.* at 569.

Triton relies on *Science Accessories Corp. v. Summagraphics Corp.*[51] for the proposition that key managerial employees may be liable for breaches of fiduciary duty in their position with a corporation. Plaintiff argues that Kirk was a key managerial employee of Triton, and as such, he owed the same fiduciary duties that a director or officer would owe to the Company. In *Science Accessories Corp.*, the Delaware Supreme Court affirmed the decision of the Court of Chancery holding that three employees in charge of major divisions of a technology company did not breach fiduciary duties arising out of the principles of agency law and the corporate opportunity doctrine. In the decision, however, the Supreme Court implicitly held that the three employees were key managerial personnel. The defendant employees were the physicist in charge of the research, development, and engineering departments, the chief engineer, and the supervisor of manufacturing. None of these individuals served as officers or directors of the defendant corporation.

Before examining further what fiduciary duties Kirk may have owed to Triton, I find that Kirk was not a key managerial employee, and, therefore, owed no fiduciary duties to the Company solely by virtue of his position. Unlike the defendants in *Science Accessories Corp.*, Kirk did not run a division of the Company or supervise tiers of employees. Rather, Kirk performed estimating and project management functions for a small corporation with approximately thirty full-time employees. Furthermore, Kirk did not participate in any accounting or other financial decisions of Triton, had no input into

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[51] 425 A.2d 957 (Del. 1980).

or knowledge of the financial welfare of the Company beyond the basic communication of overall company health during the weekly meetings, did not shape the policy of the Company, or advise its CEO.

As for Triton's contention that Kirk's participation in the weekly meetings reflects his status as a key employee akin to a director or officer, I find that argument unpersuasive. Kirk participated in the meetings because Triton is a relatively small company. More frequent contact with the principals of the organization, such as Thomas and Zang, resulted from Triton's size, not because of the importance of Kirk's responsibilities. He reported on his specific tasks, preparing and submitting bids and project management. Kirk shared an office with Bauguess in a forty-foot trailer outside Triton's headquarters.[52] He was not even in the same building as Zang, who sat near the fax machine on which Triton received bid invitations and who was tasked with sifting through the sources for public bid invitations and collecting and logging private bid invitations.[53] Simply put, Kirk did not exhibit any of the hallmarks of being a key managerial employee such that a person in his position would owe general corporate fiduciary duties to Triton.

Although Kirk did not owe fiduciary duties to Triton as a key managerial employee, he did undertake certain duties and obligations as an agent of Triton. These duties arise from the scope of Kirk's employment as a project manager and estimator.

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52 T. Tr. at 949-50.

53 *Id.* at 976-77, 996-97.

Under Delaware law, the distinguishing feature of an agent is that he represents his principal contractually to the extent that the agent normally binds, not himself, but his principal by the contracts he makes.[54] The ability to so bind his principal results from the agent having been authorized, or appearing to an unsuspecting third party to have been authorized, to do so.[55] Here, Kirk routinely prepared and submitted bids to contractors on behalf of Triton. If the bids were accepted, Triton was obligated to perform at the price and on the terms specified in the bid. Both Kirk and Triton understood this facet of his employment relationship, and third parties receiving bids from Kirk understood this, as well. Because Triton trusted Kirk to prepare the bids and empowered him to submit them, an agency relationship existed regardless of whether Kirk was a key managerial employee of the Company. Thus, while I do not find that Kirk, by virtue of his position at Triton, owed the same general duties as a corporate officer or director, I do find that Kirk was an agent of Triton, and that, in that capacity, he may have owed duties to Triton under the principles of agency law.

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54 *Heller v. Kiernan*, 2002 WL 385545, at *4 (Del. Ch. Feb. 27, 2002) (citation omitted).

55 *Id.*

2. Did Kirk breach his fiduciary duty of loyalty (Counts II and XIV)?

Under Delaware law, the relationship of agent to principal does not of itself give rise to fiduciary duties.[56] A fiduciary relationship generally requires "confidence reposed by one side and domination and influence exercised by the other."[57] Nevertheless, where an agent represents a principal in a matter where the agent is provided with confidential information to be used for the purposes of the principal, a fiduciary relationship may arise.[58] For example, if an employee in the course of his employment acquires secret information relating to his employer's business, he occupies a position of trust and confidence toward it, and must govern his actions accordingly.[59] The resulting relationship is analogous in most respects to that of a fiduciary relationship.[60]

Here, Triton gave access to its confidential information to Kirk, including during its Thursday morning meetings. Such information included its labor rates, volume, profit

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56 *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *6 (Del. Ch. May 27, 2005). Fiduciary duties will arise, however, in the context of an agent/principal relationship when "there is an element of confidentiality or a joint undertaking between the principal and agent. The hallmark of this form of special principal/agent relationship is when matters are peculiarly within the knowledge of the agent." *Metro Ambulance, Inc. v. E. Med. Billing, Inc.*, 1995 WL 409015, at *3 (Del. Ch. July 5, 1995) (citations omitted).

57 *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004) (quoting *Gross v. Univ. of Chi.*, 302 N.E.2d 444, 453-54 (Ill. App. Ct. 1973)).

58 *Ramsey v. Toelle*, 2008 WL 4570580, at *6 (Del. Ch. Sept. 30, 2008).

59 *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949).

60 *Id.*

margins, equipment costs, material costs, leasing costs, existing contracts, and customer information. This information was not publicly available to other contractors, and was considered confidential by Triton. Defendants contend that the disclosure of this information does not give rise to fiduciary duties as contemplated in *Brophy v. Cities Service Co.* because the information does not constitute trade secret information. This argument misses the mark, because *Brophy* does not hold that the purloined information must be a trade secret. Fiduciary duties may arise, according to *Brophy*, when an employee acquires secret information relating to his employer's business. Whether or not the information rises to the level of a trade secret, an employee has a fiduciary duty to safeguard that information, or at least, not disclose it to a competitor, if the information is secret and the employee has acquired it in the course of his employment.[61]

I infer from the evidence in this case, including the information Kirk failed to preserve, that Kirk used Triton's confidential information for his own and Eastern's benefit without Triton's consent. In most cases, the bids Kirk worked on for both Triton and Eastern in connection with the thirteen overlapping projects were similar, with Eastern's bid being slightly below Triton's.[62] Kirk also performed takeoffs for Triton and

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61 *See id.* at 7-8 ("A fiduciary is subject to a duty to the beneficiary not to use on his own account information confidentially given him by the [principal] or acquired by him during the course of or on account of the fiduciary relation or in violation of his duties as fiduciary, in competition with or to the injury of the beneficiary . . . ."). *See also EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *5 (Del. Ch. Dec. 12, 2006) ("Not all confidential information is a trade secret.").

62 T. Tr. at 253-56, 270, 282.

used them in his work for Eastern on the same projects.[63] As discussed in more detail *infra* Section II.D.5, because I find Kirk used Triton's confidential information in his work preparing bids for Eastern, a competitor, he breached his fiduciary duty to Triton.

Although employees do enjoy a privilege allowing them to make preparations to compete with their employer before their employment relationship ends, that privilege is not without limitations. Under some circumstances, the purported exercise of the privilege may breach the employee's fiduciary duty of loyalty.[64] For example, an employee may be denied the protection of the privilege when they have misappropriated trade secrets, misused confidential information, solicited the employer's customers before cessation of employment, conspired to effectuate mass resignation of key employees, or usurped a business opportunity of the employer.[65] Ultimately, the determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise "must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case."[66]

Even if Kirk did not misappropriate trade secrets or attempt to engineer the exodus of Triton employees, I conclude that he breached his fiduciary duty of loyalty by performing similar work for Eastern in direct competition, at times, with Triton over a

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63 *Id.* at 392.

64 *Sci. Accessories Corp.*, 425 A.2d at 964-65.

65 *Id.* at 965 (citing cases).

66 *Id.* (citation omitted).

prolonged period of time. Kirk began working on a part-time basis for Eastern in November 2005, performing tasks related to estimating electrical contracting services similar to those he performed for Triton. Kirk continued working full-time for Triton and part-time for Eastern until August 31, 2007. Under Delaware law, an agent has a duty to refrain from placing himself in a position antagonistic to his principal.[67] Triton and Eastern compete in the electrical contracting field in the same geographic area for many of the same customers and projects. During the twenty-two-month period that Kirk simultaneously worked in some capacity for both companies, he worked on at least thirteen projects for which both Triton and Eastern submitted bids. Direct competition by an agent without disclosure to the principal exemplifies an antagonistic relationship.[68] By working on bids for both companies for the same thirteen projects, Kirk placed himself in an antagonistic position to Triton, and thereby breached his fiduciary duty.

Furthermore, Kirk's actions are not immunized by the privilege of agents to make preparations to compete with their employer before the end of their employment relationship. First, the evidence does not support a finding that Kirk was making *reasonable* arrangements to compete after the termination of his employment relationship with Triton. The fact that he worked for both Triton and Eastern, sometimes on bids for the same projects, for more than twenty-two months belies the notion that he was making

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67 *Sci. Accessories Corp.*, 425 A.2d at 962 (citing Restatement (Second) of Agency § 303 cmt. e).

68 *See* Restatement (Third) of Agency § 8.04.

preparations to compete. Rather, Kirk wished to earn additional money by moonlighting, regardless of whether it placed him in direct competition with his primary employer, Triton. Second, even if Kirk only was preparing to leave Triton and compete through Eastern in the local electrical services contracting industry, he did not act in good faith. Kirk never informed Triton that he worked for a direct competitor; instead, he and Elliott actively concealed their relationship from Triton.[69] Additionally, Kirk performed work for Eastern using Triton's resources at Triton's offices. Third, Kirk's attempts to equate his work for Eastern to other Triton employees, who moonlighted by performing electrical work for their own customers, ring hollow. There is no evidence that any of those employees collected a paycheck from a direct competitor for performing work on projects in which Triton may have been interested.

In sum, Kirk acted in bad faith and placed himself in a position antagonistic to Triton by working for Eastern for twenty-two months without informing Triton. Based on the evidence presented at trial, I find that Triton has established by a preponderance of the evidence that Kirk breached his fiduciary duty of loyalty to refrain from placing himself in a position antagonistic to and directly competitive with his employer.

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[69] Examples of this include Kirk's never speaking to Elliott on Kirk's office phone, and using his cell phone, instead; meeting with Elliott at one of their homes, rather than at Triton; and destroying the files pertaining to projects Kirk worked on for Eastern, as well as projects he did for Triton, shortly before Kirk left Triton.

3. Did Kirk usurp corporate opportunities from Triton (Counts II, XII, and XIV)?

Triton also contends that Kirk breached his fiduciary duties by usurping corporate opportunities from the Company on each of the 195 projects he worked on for Eastern. According to Triton, Kirk should have presented those projects to Triton and submitted bids on its behalf. Triton argues that each of the jobs represented a corporate opportunity because Triton routinely worked in the same geographic area as Eastern and on similar projects for similar customers. In response, Kirk denies that Triton had any interest or expectancy in the 195 projects. He also asserts that those projects represented independent opportunities of Eastern that Elliott shared with him under the scope of his employment with Eastern.

The corporate opportunity doctrine represents an application of agency fiduciary law in a particular corporate fact setting.[70] To prove misappropriation of a corporate opportunity, a plaintiff must show: (1) the opportunity is within the corporation's line of business; (2) the corporation has an interest or expectancy in the opportunity; (3) the corporation is financially able to exploit the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary is placed in a position inimical to his duties to the corporation.[71] If a business opportunity comes to a fiduciary in his individual capacity, and if the opportunity is neither essential to his corporation nor of

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[70] *Sci. Accessories Corp.*, 425 A.2d at 964.

[71] *McGowan v. Ferro*, 859 A.2d 1012, 1038 (Del. Ch. 2004).

interest to it, and if the corporate resources have not been wrongfully used on the opportunity, the fiduciary is free to treat the opportunity as his own.[72]

There is no dispute that the 195 projects were electrical contracting jobs within Triton's line of business as a local electrical contractor. Still, Kirk disputes that the 195 projects constituted business expectancies of Triton. Preliminarily, I conclude that Kirk could not have usurped Triton's corporate opportunities for the thirteen projects bid by both Eastern and Triton, because Triton actually submitted a bid.[73] The remaining 182 projects, including as many as 59 awarded to Eastern, present a more difficult question.

Although those 182 jobs are in Triton's line of business and Kirk worked on those jobs for Eastern, Triton has not demonstrated by a preponderance of the evidence that it had an interest or expectancy in those projects or that Kirk breached a duty in failing to disclose them to the Company. The 182 projects are highly contingent in that they are invitations to submit a bid, or offer, to perform electrical contracting services for a customer or general contractor. Many of these invitations are general and public invitations to submit a bid, which appear in newspapers or other public sources. For such projects, Zang had the responsibility at Triton to scan the public sources and determine

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72 *Sci. Accessories Corp.*, 425 A.2d at 964.

73 Although Triton's submission of bids for those thirteen overlapping projects preclude it from claiming that Kirk usurped or diverted those projects under the corporate opportunity doctrine, Triton still may be able to recover damages from Defendants under some other theory, such as its tortious interference with prospective economic advantage claim, discussed *infra* Section II.F.

the opportunities on which Triton would bid.[74] Zang also sat nearest the fax machine on which invitations to bid were transmitted to Triton, and had the responsibility to collect and log the invitations.[75] Although, during one period lasting three to six months, Kirk had sole responsibility for handling incoming bid invitations, there is no evidence that Kirk intercepted and diverted or destroyed any of them.[76] In addition, many general contractors and customers build relationships with specific electrical contractors and only selectively invite bids from those companies.[77] Thus, the evidence suggests that many of the 182 bids on which Kirk worked solely for Eastern were independent opportunities derived from Elliott's relationships and research. Elliott culled the invitations and shared them with Kirk so that Kirk could perform estimating services for Eastern. In contrast, Triton failed to demonstrate that it had an interest or expectancy in any of the 182 specific projects, or that it even would have been invited to bid on the nonpublic ones.[78]

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74 T. Tr. at 976-77.

75 *Id.* at 996-97.

76 *See id.* at 32, 246-47.

77 *See id.* at 987-88.

78 Defendants also presented evidence that Triton likely declined to submit bids for at least some of the projects at issue because of the comparatively smaller geographic reach of the Company. For example, both Thomas and Bauguess admitted that Triton, as a general matter, did not bid on projects located more than an hour's drive from its offices in New Castle County, Delaware. Bauguess Dep. at 44; T. Tr. at 128. In addition, Triton's records indicated that it considered a job in Trooper, Pennsylvania, approximately forty-nine miles from its offices, too far away to submit a bid. T. Tr. at 129.

Further, Triton had every opportunity to bid the public projects within the 182 projects in question.

For similar reasons, Kirk did not breach any fiduciary duty by failing to disclose to Triton the bid invitations he received from Eastern. There was no showing that Kirk had the responsibility to generate and present bid invitations to Triton or that the Company expected him to do so. Kirk was not from Delaware and did not have contacts with local customers and general contractors before he joined Triton, and, as stated earlier, Zang was tasked with generating bid invitations. Moreover, an agent does not have a duty to disclose to his principal information obtained in confidence, the disclosure of which would be a breach of a duty to a third person.[79] Elliott presented the nonpublic bid invitations to Kirk in confidence, and as an employee of Eastern, Kirk arguably had a duty to safeguard the confidentiality of that information. Thus, Kirk did not breach his fiduciary duty to Triton under the corporate opportunity doctrine.

4. Did Kirk breach his duty of disclosure to Triton (Count XV)?

Triton argues that Kirk breached his duty of disclosure to Triton by failing to reveal and actively concealing his part-time position at Eastern. Kirk counters that he never owed any fiduciary duties to Triton. Kirk further contends that Triton routinely permitted employees to perform electrical contracting services outside their daily responsibilities at Triton.

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[79] *Sci. Accessories Corp.*, 425 A.2d at 962.

Agents owe a duty to disclose relevant information if they have notice of facts which they should know may affect the decisions of their principals as to their conduct.[80] The duty to disclose arises in situations where an agent has, or represents another who has, interests adverse to the principal concerning matters within the scope of the agency.[81] An agent also has a duty to disclose to his principal the fact that he is competing with the principal and using information acquired during his agency.[82] The agent is only liable to his principal for failure to disclose material information if that failure causes damage to the principal.[83]

As an agent of Triton who also was working for a direct competitor, Kirk had a duty to disclose his employment with Eastern to Triton. Kirk's estimating services for Eastern fall within the scope of his agency relationship with Triton, where he prepared bids and provided estimating services that could bind the Company. Kirk directly competed with Triton in his work for Eastern, including the thirteen bids on which Kirk performed work for both Eastern and Triton. This is the type of information that employee-agents are required to reveal to their employer-principals. The evidence

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80 Restatement (Third) of Agency §§ 8.06, 8.11 (2006).

81 *Id.*; *see also id.* § 8.04 cmt. b ("[W]hen an employee or other agent plans to embark upon a side business, contemporaneously with the agency relationship, that might conflict with the principal's interests, the agent should inform the principal of this fact so that the principal may assess the substantiality of the risks posed to its interests.").

82 *Id.* § 8.04 cmt. b.

83 *Lang v. Koziarz*, 1989 WL 44029, at *2 (Del. Ch. May 2, 1989) (citing 3 Am. Jur. 2d *Agency* § 337).

indicates that if Triton had known about Kirk's employment with Eastern, it would not have allowed his dual employment to continue. At a minimum, Triton would have prevented Kirk from submitting binding bids to customers and general contractors. Therefore, Kirk's failure to inform Triton of his employment with Eastern contributed to the damages suffered by Triton in connection with the overlapping bids.

Although the record contains evidence that some Triton employees moonlighted in the electrical contracting field, there was no evidence that an employee with the power to contractually bind the Company performed closely related services for another company or for himself. In fact, the other employees were performing small tasks such as installing dryers or ceiling fans, and one employee simply provided services for the church to which he belonged.[84] Unlike Kirk's activities, such work did not pose any competitive threat to Triton. Accordingly, I find that Triton has sufficiently demonstrated that Kirk owed a duty to disclose his twenty-two-month employment assisting Eastern in the preparation of bids, and that he breached that duty by failing to inform Triton about it.

5. Did Kirk breach his duty of confidentiality to Triton (Count III)?

Triton contends that Kirk breached his duty to refrain from using or communicating the Company's confidential information by performing estimating work for Eastern. Kirk allegedly used Triton's bid rates, material costs, equipment costs, labor rates, and other confidential information to prepare competitive bids for Eastern. In

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[84] T. Tr. at 983-84.

connection with the thirteen overlapping bids, Triton asserts that Kirk used its confidential information to help Eastern submit a lower bid than Triton.

An agent has a duty not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.[85] This duty includes a prohibition on the use of the principal's confidential information in competition with the principal.[86] To constitute a breach of the duty of confidentiality, there is no requirement that an agent's use of the principal's confidential information reveal that information.[87]

As stated earlier, Triton has failed to demonstrate that it is more likely than not that Kirk usurped corporate opportunities from Triton or that knowledge of the 195 bidding opportunities in issue constituted confidential information that belonged to Triton or should have been disclosed to them. I find, however, that Triton has met its burden of proving that Kirk probably did use confidential information of Triton in the preparation of the thirteen overlapping bids, which is proscribed under Delaware law. Kirk performed estimating work for both companies on the thirteen jobs, and in several instances, the Eastern bid was only slightly lower than the Triton bid.[88] Kirk also used

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85 Restatement (Third) of Agency § 8.05.

86 *See Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949) (citation omitted).

87 Restatement (Third) of Agency § 8.05 cmt. c (For example, "it is a breach of an agent's duty to use confidential information of the principal for the purpose of effecting trades in securities although the agent does not reveal the information in the course of trading").

88 T. Tr. at 253-56, 270, 282.

the same takeoffs for Triton and Eastern on the overlapping projects.[89] Because Kirk claims he worked many more hours for Triton than Eastern, it is reasonable to infer that Kirk used the information from the Triton takeoffs in his work for Eastern as a shortcut. The fact that Eastern's bids often were slightly lower than Triton's bids also supports an inference that Kirk used Triton's confidential bid information to improve Eastern's chances of winning a bid, ultimately benefiting a direct competitor in the bids that Eastern won. Thus, even if Kirk never explicitly revealed Triton's confidential information to Eastern or Elliott, it is more likely than not that he used that information for the disloyal purpose of assisting a direct competitor to outbid Triton for a project. Therefore, I find that Triton has demonstrated by a preponderance of the evidence that Kirk breached his duty of confidentiality to Triton by using its confidential information in performing estimating work for Eastern.

E. Did Defendants Aid and Abet Kirk's Breach of Fiduciary Duty (Counts XVII and XVIII)?

Triton asserts that Elliott and Eastern aided and abetted Kirk's breach of fiduciary duty to the Company by soliciting Kirk to work part-time preparing bids for electrical contracting projects that Triton could have performed.[90] Triton further contends that

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89 *Id.* at 392.

90 Although the Complaint names Mrs. Elliott as a Defendant in its claim of aiding and abetting Kirk's breach of fiduciary duty, Triton has failed to present evidence or argument that Mrs. Elliott has any connection to the challenged behavior beyond her status as majority stockholder of Eastern. Neither has Triton provided evidence that Mrs. Elliott acted wrongfully in connection with any other count in the Complaint or that she personally received any ill-gotten gain, other than

Elliott and Eastern knew that Kirk used Triton's confidential information in his services for Eastern, and failed to stop him from working on bids for projects for which Triton also prepared bids. To succeed on a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must establish (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a nonfiduciary defendant knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and nonfiduciary.[91] Knowing participation in a fiduciary breach requires that the nonfiduciary act with the knowledge that the conduct advocated or assisted constitutes such a breach.[92] Nevertheless, in some circumstances, the nonfiduciary's actions may be so suspect as to permit, if proven, an inference of knowledge of an intended breach of trust.[93] Additionally, it is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation.[94] Here, Triton must prove that Kirk owed and breached at least one fiduciary duty to the Company, that Defendants knowingly participated in that breach, and that Triton suffered damages as a result.

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indirectly as an owner of Eastern. Based on this failure of proof, I dismiss Counts XVII and XVIII and all other counts, as to Mrs. Elliott.

91 *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

92 *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

93 *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007) (citing *Malpiede*, 780 A.2d at 1097 n.79).

94 *See, e.g.*, *Carlson v. Hallinan*, 2006 WL 771722, at *21 (Del. Ch. Mar. 21, 2006); *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1108 n.22 (Del. Ch. 2003); 18A Am. Jur. 2d *Corporations* § 1444 (2005).

As discussed above, Triton has established the first two elements of a claim for aiding and abetting, namely, the existence of a fiduciary relationship between Kirk and Triton and a breach of that duty by Kirk.

Based on the record, I find that Triton also has proven by a preponderance of the evidence that Defendants Elliott and Eastern knew about Kirk's actions and participated in them. Elliott knew that Triton and Eastern perform similar electrical contracting services, sometimes for the same customers and in the same geographic area, and that the companies sometimes competed for the same projects. Despite knowing this and having admitted that he would not allow one of his own employees to work for a competitor, Elliott hired Kirk to work on a part-time basis for Eastern while Kirk was employed at Triton. Elliott knew that Kirk still worked for Triton when he hired him part-time. Yet, rather than advising Triton that Kirk would be working for Eastern, Elliott and Kirk actively concealed that fact. Both men testified that they met to discuss Eastern business in parking lots, at their homes, and at restaurants. Elliott never called Kirk at his work phone number. Elliott and Eastern also never provided instructions or safeguards to prevent Kirk from working on bids for Eastern and Triton for the same projects. Indeed, Elliott still failed to implement any changes in his or Eastern's business relationship with Kirk even after he discovered that Kirk had worked on a bid for the same project for both Triton and Eastern. Based on these facts, I find that Elliott knowingly participated in Kirk's breach of his fiduciary duties to Triton. Eastern also is liable for aiding and

abetting because the knowledge and conduct of Elliott, its controlling officer, are imputed to it.[95]

Count XVII of the Complaint makes a related claim that Defendants engaged in a civil conspiracy. In support of this allegation, Triton proffers the same evidence that it used to demonstrate Defendants aided and abetted Kirk's breach of fiduciary duty. The elements for civil conspiracy under Delaware law are: (1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) damages resulting from the action of the parties to the conspiracy.[96] Also, "[t]he combination must be undertaken in furtherance of some unlawful purpose."[97] Claims for civil conspiracy are sometimes called aiding and abetting.[98] The basis of such a claim, however, regardless of how it is captioned, is the idea that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship.[99]

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95 *See, e.g.*, *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 (Del. Ch. 2006) (denying motion to dismiss aiding and abetting claim against corporation because knowledge and conduct of controlling persons were imputed to the corporation).

96 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 437 n.8 (Del. 2005); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

97 *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 n.143 (Del. Ch. Apr. 15, 2004).

98 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005).

99 *Id.*

In this case, the underlying conduct that might give rise to a civil conspiracy is identical to that which forms the basis for the claims against Elliott and Eastern for aiding and abetting a breach of Kirk's fiduciary duty. Kirk is liable for the underlying breach of fiduciary duty, and Elliott and Eastern are liable for aiding and abetting that breach.[100] Because any relief granted for the civil conspiracy claims here, however, would be redundant of the relief for aiding and abetting, I need not consider Triton's civil conspiracy claim further.[101]

F. Did Defendants Tortiously Interfere with Triton's Employment Relations, Contractual Relations, and Prospective Economic Advantage (Counts IV-VII)?

Count IV of the Complaint claims that Eastern and Elliott tortiously interfered with Triton's employment relationship with Kirk. The record is clear, however, that Kirk did not have an employment contract with Triton; he was an at-will employee. Delaware does not recognize an action for tortious interference with an at-will employment

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100 *Cf. In re Am. Int'l Group, Inc.*, 965 A.2d 763, 805 n.149 (Del. Ch. 2009) (noting that Delaware recognizes an independent cause of action for breach of fiduciary duty, but that "the utility of the conspiracy concept is that a person who did not commit all the required elements of a tort can still be held liable if her co-conspirators' joint actions completed the tort").

101 *See Malpiede v. Townson*, 780 A.2d 1075, 1098 n.82 (Del. 2001) (stating, in a breach of fiduciary duty case, that "[a]lthough there is a distinction between civil conspiracy and aiding and abetting, we do not find that distinction meaningful here").

relationship.[102] Triton, therefore, cannot prove tortious interference by Eastern and Elliott with an employment or other type of relationship between Triton and Kirk.

The Complaint also contains counts against Defendants for tortiously interfering with Triton's prospective economic advantage and with its contractual relations in connection with the 195 bids that Kirk worked on for Eastern, while he was employed by Triton. The torts of interference with contract and interference with prospective business relations are similar but not identical causes of action. To establish a claim for tortious interference with contract, "[t]here must be (1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[103] On the other hand, interference with prospective business relations requires (1) a reasonable probability of a business opportunity, (2) intentional interference by a defendant with that opportunity, (3) proximate causation, and (4) damages.[104] The main difference between the two, other than the existence of a contract, is that the tort of interference with prospective business

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102 *See, e.g.*, *Leblanc v. Redrow*, 2001 WL 428686, at *2 (Del. Super. Apr. 19, 2001) (granting summary judgment on claim of tortious interference with contractual relations because employee was at-will employee); *Rizzo v. E.I. du Pont de Nemours & Co.*, 1989 WL 135651, at *1-2 (Del. Super. Oct. 31, 1989) (same regarding claim of tortious interference with employment).

103 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 n.7 (Del. 2005) (quoting *Aspen Advisors LLC v. UA Theater Co.*, 861 A.2d 1251, 1265-66 (Del. 2004)).

104 *Empire Fin. Servs., Inc. v. Bank of N.Y.*, 900 A.2d 92, 98 n.19 (Del. 2006) (quoting *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Super. 1980)).

relations "must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner."[105]

As to the claim of tortious interference with contractual relations, Triton has not satisfied its evidentiary burden. The record is devoid of any evidence of contracts between Triton and current or former employees or customers, or in connection with any projects, with which Defendants allegedly interfered, tortiously or otherwise.[106]

The only remaining tortious interference claim relates to Triton's prospective economic advantage or business relations. According to Triton, it could have been awarded any of the 195 jobs if Defendants had not interfered by using the information acquired by Kirk through his employment at Triton. Although Eastern won less than a third of the 195 bids Kirk worked on, Triton seeks damages for all of those bids. Triton contends it had a reasonable probability of winning as to each of the 195 bids at issue because Triton and Eastern are both nonunion electrical contractors in the same geographic area with the same capacity for work, and they have competed directly for customers in the past. Defendants aver that most of Triton's work is north of Dover or its vicinity, with only three or four jobs located in Sussex County since 2004.[107] Defendants also presented evidence that Triton rarely does work south of Dover and generally bids

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105 *DeBonaventura*, 419 A. 2d at 947.

106 Triton implicitly concedes this point by omitting the allegation of tortious interference with contractual relations from its post-trial briefing. *See* POB; Pl.'s Reply Br.

107 *See* Bauguess Dep. at 43.

on projects within an hour of its New Castle County office.[108] Triton disputed that allegation, but its owner admitted that, although Triton occasionally bids on work below Dover, jobs at such a distance were harder for Triton and its employees to manage.[109] Furthermore, Triton showed that 131 of the 195 jobs at issue were located in and north of Dover. At least as to those jobs, Triton contends Kirk diverted work to Eastern, thus interfering with reasonable business opportunities of Triton.

The evidence Triton adduced at trial, however, falls well short of the mark. Triton has not demonstrated that it had a reasonable business expectancy as to the vast majority of the 195 bids at issue. In fact, from the evidence it is arguable whether any one contractor would have had a reasonable expectancy that its bid would be accepted on any one job. Bids are awarded based on many factors, including price, prior relationships, completion date, and manpower.[110] There is no evidence that Triton is the most used or most efficient electrical contractor, or that it has the best reputation. There is nothing besides Triton's declaration that it had a reasonable business expectancy to support the conclusion that it did, in fact, have such an expectancy in the jobs for which it did not bid. Even if this Court assumes, as Triton argues, that it had no opportunity to bid on 131 of the 195 jobs because Kirk diverted them, Triton has not proved that it had a reasonable

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108 *Id.* at 44; T. Tr. at 127-28.

109 T. Tr. at 127-28.

110 *Id.* at 125.

probability of obtaining any of those jobs.[111] Nor has Triton proved that it likely would have submitted a bid, but for Kirk's conduct. Most bids were publicly disseminated and, therefore, presumptively available to Triton. Many other jobs were by request only of the general contractor, and Triton did not prove that it would have known of the bid opportunity but for Kirk's actions. Finally, even if Triton could prove that it had a reasonable probability of submitting a bid, the foundation for damages would be tenuous, at best.

Triton failed to prove that it had a reasonable probability of a business opportunity, and, therefore, has not shown the first element of a claim for tortious interference with business relations in connection with the majority of the 195 bids Kirk worked on for Eastern. The evidence shows, however, that Kirk worked on bids for both Triton and Eastern for 13 of the 195 projects. Triton won one and Eastern won two of those jobs, with the other ten jobs presumably being awarded to third party electrical contractors. For the single job that Triton was awarded, there was no showing that Eastern's bid decreased the price of Triton's bid or that Eastern otherwise caused any damages to Triton. As to the two jobs that Eastern won, on the other hand, Triton has satisfied the elements for a claim of tortious interference with prospective economic advantage. Triton actually bid on those jobs at a price only slightly higher than Eastern,

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[111] Triton's evidence on this point is not convincing. It failed to show which jobs were public or, for those that were with private owners or contractors, whether Triton had a prior relationship with that person or any other reason to believe its bid would prevail over other competitors.

so it did have a reasonable probability of a business opportunity as to both jobs.[112] As previously discussed, Defendants intentionally interfered with that opportunity and caused Eastern to obtain it instead, to Triton's detriment.[113]

Triton also alleges that Defendants engaged in unfair competition against Triton through their concerted actions in using Triton's confidential information and bidding the 195 projects. That is, Triton lodges a claim for unfair competition based on the same conduct underlying its tortious interference with economic advantage claim. Delaware courts have struggled to define the boundaries of a claim for unfair competition under the common law.[114] The Delaware Superior Court has held that to succeed on a claim for unfair competition, a plaintiff must show (1) a reasonable expectancy of entering into a valid business relationship, (2) interference with that relationship by the defendant, and (3) consequent defeat of the plaintiff's legitimate expectancy.[115] The essential element separating unfair competition from legitimate market participation is unfair action by the

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112 PX 20 Ex. B at 2. For the Stanton Middle School job located in Newark, Delaware, Triton bid $400,000 and Eastern bid $392,000. For the Baylor Prison job in New Castle, Delaware, Triton submitted a bid for $300,400 and Eastern submitted a bid for $296,400.

113 Even assuming Triton had a reasonable probability of a business opportunity as to the other ten overlapping jobs that neither it nor Eastern won, Triton has not shown proximate causation or any damages related to those jobs. Thus, Triton has failed to prove tortious interference as to those projects.

114 *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *11 (Del. Ch. Dec. 12, 2006).

115 *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001).

defendant that results in preventing the plaintiff from legitimately earning revenue.[116] Because Triton has not alleged any facts or provided any evidence that Defendants acted in some way that would entitle it to different relief on its unfair competition claim than that which it seeks on its tortious interference claim, I have not considered the unfair competition claim in determining damages or the propriety of any other form of relief.[117]

G. Did Defendants Fraudulently Conceal that Kirk Worked for Eastern (Count VIII)?

Triton alleges that Defendants fraudulently concealed the fact that Kirk worked part-time for Eastern from November 2005 until August 2007. The object of this scheme, according to Triton, was the continued employment of Kirk and his acquisition of salary and benefits from Triton, as well as the retention of an unfair competitive advantage by Eastern. The unfair competitive advantage allegedly flowed from the use of Triton's confidential information and the diversion or usurpation of and tortious interference with invitations to bid. In response, Defendants argue that Triton has failed to demonstrate essential elements of fraud, including a duty to disclose Kirk's employment and an intent on Defendants' part to induce Triton to take or not take action.

Triton styles Count VIII of the Complaint as a claim for fraudulent concealment. Such a characterization of a party's conduct, however, normally arises in the context of

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116 *EDIX Media Group*, 2006 WL 3742595, at *11.

117 *See id.* (removing tortious interference and unfair competition claims from damages calculation because they were completely redundant in light of plaintiff's other claims alleging breach of contract in connection with the same underlying behavior by defendant).

an attempt to toll a statute of limitations.[118] What Triton's claim ostensibly comprises is an allegation of fraud against Kirk and the other Defendants.

Common law fraud in Delaware requires that: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance.[119] In the context of a fiduciary relationship, fraud can occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.[120] Triton argues that Kirk's failure to reveal his employment with Eastern resulted in a breach of an affirmative duty to disclose such information, thereby exposing him to liability for fraud. In the case of the other Defendants, Triton's argument apparently amounts to a claim that fraud occurred because, with their assistance, Triton was induced to continue employing Kirk, while he worked for Eastern.

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118 Under the doctrine of fraudulent concealment, the statute of limitations will be tolled, if there was an affirmative act of concealment or some misrepresentation that was intended to put a plaintiff off the trail of inquiry, until such time as the plaintiff is put on inquiry notice. *Krahmer v. Christie's, Inc.*, 911 A.2d 399, 407 (Del. Ch. 2006).

119 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *7 (Del. Ch. Aug. 26, 2005) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

120 *Id.* at *7.

Because Kirk, through Eastern, competed directly with Triton and in a number of cases did work for both Eastern and Triton on the same bids, he had a positive duty to disclose that conflict under elemental principles of agency law. This is the same duty as that underlying Triton's claim that Kirk breached his duty of disclosure. As discussed *supra* Section II.D.4, Kirk, by remaining silent, breached his duty of disclosure. But, liability on a claim for fraud arising out of the same facts will not entitle Kirk to any new relief. Additional damages for fraud would be punitive, and the Court of Chancery does not award punitive damages.[121] Therefore, Triton's claim against Kirk for fraudulent concealment is redundant, and need not be considered further.

As to the other Defendants, Triton's claim of fraud must fail. Defendants never made any overt misrepresentations to Triton concerning Kirk's position with Eastern. Furthermore, no fiduciary relationship existed between Triton and any of the other Defendants; therefore, no positive duty to speak ever arose. Accordingly, Triton has failed to demonstrate that Defendants committed fraud in connection with Kirk's employment relationship with Eastern.

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[121] *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) ("To say that Chancery may award compensatory damages in certain instances is not to say that Chancery may also award punitive damages.").

H. Did Defendants Misappropriate Triton's Trade Secrets (Counts XII and XVI)?

Under the Delaware Uniform Trade Secrets Act ("DUTSA"),[122] the liability issue in an action for misappropriation of a trade secret may be divided into four sub-issues: (1) Does a trade secret exist; *i.e.*, have the statutory elements -- commercial utility arising from secrecy and reasonable steps to maintain secrecy -- been shown; (2) Has the secret been communicated by the plaintiff to the defendant; (3) Was such communication pursuant to an express or implied understanding that the secrecy of the matter would be respected; and (4) Has the secret information been improperly (e.g., in breach of that understanding) used or disclosed by the defendant to the injury of the plaintiff.[123] There is no requirement, under DUTSA, that a plaintiff demonstrate that a former employee had a written employment contract or noncompete agreement to prove liability for misappropriation of a trade secret.[124] The plaintiff must show only "an express or implied understanding that the secrecy of the matter would be respected."[125] With this in mind, as well as the applicable preponderance of the evidence standard, I next address

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122 6 *Del. C.* §§ 2001-2009.

123 *Wilm. Trust Co. v. Consistent Asset Mgmt. Co.*, 1987 WL 8459, at *3-4 (Del. Ch. Mar. 25, 1987) (citation omitted).

124 *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005) (citing *Wilm. Trust Co.*, 1987 WL 8459, at *3 ("Despite [the fact that none of the former employees had written contracts of employment or covenants not to compete], they remain subject to certain obligations imposed by law upon employees to whom, during the course of their employment, confidential or secret information is disclosed.")).

125 *Nucar Consulting*, 2005 WL 820706, at *5.

whether Triton has satisfied the elements of DUTSA for proving misappropriation of a trade secret.

Triton claims that Kirk had access to its bidding information, labor rates, overhead, profit, volume, material costs, equipment costs, and salary information on key employees. A plaintiff alleging misappropriation of a trade secret bears the burden of proving that a trade secret exists.[126] The DUTSA defines a trade secret as:

> [I]nformation, including a formula, pattern, compilation, 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.[127]

Thus, to prove that a trade secret existed, Triton must demonstrate that information Kirk used for Eastern's benefit or communicated to Elliott or Eastern derived independent economic value from being secret and not "readily ascertainable by proper means." In addition, Triton must demonstrate that it took reasonable steps to keep the information secret. Having considered the evidence produced at trial under the applicable preponderance of the evidence standard, I find Triton has not met its burden of demonstrating that any of the information Kirk allegedly misappropriated constituted a trade secret.

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126 *Marsico v. Cole*, 1995 WL 523586, at *4 (Del. Ch. Aug. 15, 1995) (citation omitted).

127 6 *Del. C.* § 2001(4).

In that regard, Triton has failed to show that any of the alleged trade secrets derived independent economic value from not being generally known or readily ascertainable by Eastern. Although they may vary slightly based upon volume, costs for labor, material, and equipment do not necessarily constitute trade secrets.[128] A company such as Eastern can determine material and equipment costs by contacting the provider. Further, public projects have a uniform minimum labor rate.[129] Triton could choose to pay more than that rate, as Thomas testified, but it failed to show that, in fact, occurred for any of the bids in issue. Similarly, Triton did not show that knowing the higher rate at which Triton paid employees would have benefited Eastern because the objective in crafting a bid is to undercut the competition, not increase costs, and other companies also were bidding for the same jobs. Moreover, Eastern presented credible evidence that it readily could have ascertained the information at issue through reverse engineering.[130] In particular, Eastern presented evidence that the information could be determined by using estimating software. Further, Triton failed to adduce evidence or argument that any of

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128 *See Delmarva Drilling Co. v. Am. Water Well Sys., Inc.*, 1988 WL 7396, at *6 (Del. Ch. Jan. 26, 1988) (finding that costs and net profits, while confidential, do not rise to the level of a trade secret).

129 T. Tr. at 48-49.

130 *Id.* at 1002-03, 1021-23. Reverse engineering time is a factor in determining whether a process is readily ascertainable, as is the complexity and detail of the data involved. *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *11 (Del. Ch. Nov. 15, 1994) (citing *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 900-01 (Minn. 1983)).

the claimed trade secrets were novel in any way.[131] In fact, Triton made very little effort to identify precisely what it contends constitutes its valuable trade secrets. As a result, it is difficult to determine from the record to what extent Triton's information had "independent economic value, actual or potential, . . . and [was] not readily ascertainable by proper means . . . ."[132] Because Triton has the burden on these issues, its claim must fail.

Triton also has failed to show that it made reasonable efforts under the circumstances to maintain the secrecy of its alleged trade secrets. Triton did not mark any documents handled by Kirk or Bauguess as secret or confidential,[133] and never conducted any training or provided any instructions to its employees on information that the Company considered secret or confidential.[134] The only protections Triton identified are a single phrase in its employee handbook and the fact that Triton "used passwords on documents."[135] As to the handbook, under the heading "Prohibited Conduct," it lists as one example among several: "Improper disclosure of trade secrets or confidential

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131 While novelty is not a requirement for trade secrets to the same extent as for patentability, some novelty may be required. *See Miles Inc.*, 1994 WL 676761, at *11 (citations omitted).

132 6 *Del. C.* § 2001(4).

133 T. Tr. at 120-21, 958.

134 *Id.* at 124.

135 *Id.* at 52.

information."[136] This phrase forbids a Triton employee from doing what the law already proscribes, *i.e.*, disclosing a trade secret. It does not identify, however, what a trade secret is and what Triton considers to be its trade secrets and confidential information. Such a vague prohibition, without more, does not constitute a reasonable effort to maintain the secrecy of Triton's alleged trade secrets.

Under the circumstances, considering the small size of the Company and the even smaller fraction of employees to whom the information allegedly was communicated, Triton easily could have defined, at least generally, the information it considered secret or confidential. This is especially true in an industry where, according to Triton's own expert, employees routinely took information like labor rates and estimating techniques from a former employer to a new employer. Furthermore, in response to a direct inquiry about the steps Triton took to protect what it considered secret or confidential information, Triton's President, Thomas, replied:

> Firstly, not everybody in the company had access to that information. I would not share the profits of the company with other people, other than top management. I wouldn't share volume with them. There would be situations where even some of those people would not have all of the information. We used passwords on documents to try to safeguard that. We also, in our computer system, had separate drives for separate applications. Payroll was on a drive of its own with a password and a security level.[137]

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136 *Id.* at 25.

137 *Id.* at 52.

Triton's payroll may be on a separate password-protected drive to safeguard the personal information, including home addresses and Social Security numbers, of its employees. That fact, however, does not demonstrate that Triton took measures to maintain the secrecy of information such as its labor rates, supervisory staff availability, equipment costs, and supply costs. Moreover, the mere fact that information is secret or confidential does not bestow upon it the mantle of a trade secret.[138] Without a stronger showing as to the steps Triton took to safeguard as trade secrets the information it accuses Kirk of misappropriating, I cannot find that it has met its burden in proving the trade secret nature of that information.

I. Is Kirk Liable for Negligence Regarding his Work for Triton (Count IX)?

Triton also argues that Kirk acted negligently in the performance of his project management work for the Company, and he should be liable to Triton for any lost profits they suffered. According to Triton, Kirk mismanaged several Triton projects to which he was assigned because he devoted too much time to his work with Eastern. Triton contends that Kirk owed a duty of care to use his best efforts and reasonable diligence for Triton arising from their fiduciary relationship, that Kirk breached that duty by underperforming, and that Triton suffered a decrease in revenue and profits as a result.

To succeed on a claim for negligence, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff; the defendant breached that duty; and the

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[138] *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *5 (Del. Ch. Dec. 12, 2006).

breach proximately caused injury to the plaintiff.[139] An agent owes a fiduciary duty to his employer or principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.[140]

Assuming that Kirk owed a duty of care to Triton regarding his project management responsibilities, Triton nevertheless has failed to demonstrate that Kirk breached that duty. Triton complains that Kirk did not spend enough time working for Triton, because he was performing Eastern work instead. If Kirk owed Triton a duty of care in his project management work, the applicable standard is the same care, competence and diligence exercised by agents in similar circumstances.[141] Triton argues that, in Kirk's case, such a similarly-situated agent is Bauguess.[142] Yet, comparing the performance of Kirk to that of Bauguess does not support Triton's argument. Bauguess's

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139 *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

140 Restatement (Third) of Agency § 8.08 (2006).

141 *See id.* cmt. c ("If an agent undertakes to perform services as a practitioner of a trade or profession, the agent is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities . . . .") (internal quotation marks and citation omitted). In some circumstances, the duty of care, competence, and diligence may be expanded. *See id.* (An agent's duty is measured by other agents in similar circumstances "unless the agent represents that the agent possesses greater or lesser skill.").

142 Triton makes no assertion that Kirk owed any greater duty than that of similar agents in the project management field or of Bauguess. In fact, because Kirk was a more experienced estimator than project manager, Triton assigned him to focus on estimating, while Bauguess took the lead on project management. T. Tr. at 26.

projects had a profit margin of 17.52%, while Kirk's projects had a profit of 17.41%.[143] Thomas "felt that [Kirk] was doing a good job" until his part-time work for Eastern was revealed.[144] In addition, there is no evidence that Kirk's responsibilities at Triton were impacted by his part-time work for Eastern.[145] To the contrary, Kirk's profit margin on managed projects increased from 5.45% to 17.41% after he began working for Eastern.[146] Based on these facts, Triton has not proved that it is more likely than not that Kirk breached a duty of care. Therefore, Kirk is not liable for negligence in the performance of his project management duties at Triton.

J. Is Kirk Liable for Conversion of the Salary and Benefits He Received from Triton (Count X)?

Triton alleges that Kirk wrongfully converted its property because he accepted salary, benefits, and other compensation totaling $181,399 during the almost two years he worked part-time for Eastern. Because Kirk performed Eastern work during Triton "work hours," Triton seeks to recover all compensation it paid to Kirk during the twenty-two months in question. Triton contends that Kirk, as a full-time employee, should have devoted the bulk of his time to Triton work and his failure to do so resulted in wrongful

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143 T. Tr. at 1104-05.

144 *Id.* at 44.

145 Although Kirk worked on bids for 195 projects for Eastern during the relevant twenty-two-month period, the scope of his work on each project appears to have been limited. Kirk billed at an hourly rate of approximately $25 and received a total of $21,000 from Eastern. On average, therefore, Kirk worked about ten hours per week for Eastern.

146 *Id.* at 1105, 1140-41.

conversion of Triton's property in the form of his compensation. In addition, Triton avers Kirk's mismanagement of projects necessitated the reassignment of his work to other employees.

Conversion is the "act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it."[147] Before bringing an action for conversion, a plaintiff must demonstrate that it made a demand that the property be returned and the defendant refused the demand.[148] This requirement is excused, however, when the alleged wrongful act amounts to a denial of the rights of the real owner.[149]

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147 *McGowan v. Ferro*, 859 A.2d 1012, 1040 (Del. Ch. 2004) (quoting *Arnold v. Soc'y for Savings Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (quoting *Drug, Inc. v. Hunt*, 168 A. 87, 93 (Del. 1933))).

148 *CIT Commc'ns Fin. Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *2 (Del. Super. June 6, 2008) (quoting *Drug, Inc.*, 168 A. at 94).

149 *Id.* There is no evidence that Triton made a demand on Kirk to return the compensation he collected during the relevant period. Nevertheless, I need not reach the question of whether the failure to make a demand is fatal to Triton's claim or whether such failure is excused, because, as explained in the text, Triton has not demonstrated that Kirk is otherwise liable for conversion.

Kirk did not take the disputed compensation by force.[150] Triton freely paid Kirk in exchange for his estimating and project management services on a full-time basis. Kirk never denied any right of Triton to the compensation because Triton's property rights terminated when it freely paid Kirk. As discussed *supra* Section II.I in the context of whether Kirk acted negligently, there is no evidence that Kirk failed to perform his duties diligently, competently, or with due care. In other words, Triton got what it paid for. A superior right to the compensation does not arise simply because Triton, with the benefit of hindsight, challenges Kirk's disloyal acts. The fact remains that Triton voluntarily paid Kirk for services, which he rendered. Any relief for his disloyalty must derive from different causes of action. Thus, I find Triton has not demonstrated that Kirk is liable for conversion by a preponderance of the evidence or any other standard.

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[150] Triton asserts that, to succeed on a claim for conversion, a plaintiff is not required to show that the defendant manually wrested possession from her, citing *Drug, Inc. v. Hunt*, 168 A. 87 (Del. 1933). The *Drug, Inc.* case, however, is distinguishable. There, the Delaware Supreme Court noted that shares of stock were once considered an improper subject for conversion claims because their intangible nature made it impossible to manually possess them. *Id.* at 93. Still, the court held that an action for conversion lies whenever an individual or entity interferes with a stockholder's right to shares of stock, which represent a property interest in the company. *See id.* Triton provided no support, however, for the proposition that compensation voluntarily conveyed to an employee or agent in exchange for services is the proper subject for a conversion action. Without a demonstration that the employee or agent wrongfully exercised dominion over the compensation and that the employer or principal retains a superior right to it, this Court will not make such a finding.

K. Were Defendants Unjustly Enriched (Count XI)?

Triton contends that Defendants were unjustly enriched at the expense of Triton through the employment of Kirk by Eastern while he was a full-time employee of Triton. Triton claims Kirk was unjustly enriched by collecting full-time salary and benefits from Triton while working for Eastern, and that Kirk's work product suffered as a result of his moonlighting. According to Triton, the combination of Kirk's allegedly diminishing productivity and efficiency with a spike in Eastern's revenue and profits is attributable to the diversion of business opportunities to Eastern, resulting in unjust enrichment of Defendants.

Unjust enrichment involves "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[151] In determining whether to award a remedy based on unjust enrichment, courts look for proof of the following elements: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[152] Further, in evaluating a party's claim for an equitable remedy based

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151 *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

152 *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998).

on unjust enrichment, courts engage in a threshold inquiry to determine whether a contract already governs the parties' relationship.[153]

According to Triton, Kirk received an enrichment in the form of his Triton salary and benefits during his concurrent employment with Triton and Eastern from November 2005 until August 2007, which totaled $181,399. The impoverishment stems from Triton's having paid that amount to Kirk while he was employed with their direct competitor Eastern. Triton perceives a direct relation between Kirk's acquisition of salary and Triton's loss of equivalent value. Triton's theory, however, fails for the same reasons that its claim against Kirk for negligence did: Triton has not met its burden of demonstrating that it suffered an impoverishment by compensating Kirk because there is no evidence that he failed to perform his work with due care. Kirk's projects increased in profitability while he worked at Triton, and the difference in profitability between his projects and those managed by the more experienced project manager, Bauguess, was not that significant. Hence, Triton has not shown that it was impoverished by a deterioration in Kirk's work performance. In addition, as discussed *supra* Section II.D.3, there is no evidence that Kirk diverted or usurped Triton's business opportunities beyond the two jobs on which he worked for both Triton and Eastern and the job went to Eastern. Because Kirk's salary and benefits constituted fair compensation earned by Kirk for his

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153 *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *19 (Del. Ch. May 16, 2007).

efforts at Triton, Triton has not proved that it is entitled to relief based on a claim of unjust enrichment against Kirk.

Triton's related claim that the other Defendants were unjustly enriched because Eastern enjoyed increased revenue and profits is equally unavailing. With the possible exception of the two overlapping bid situations that Eastern won, Eastern did not retain increased revenue and profits to the loss of Triton. Stated another way, except as described below, there is no relation between Eastern's increased revenue and profits and Triton's alleged losses of business opportunities. In fact, with only two exceptions, Triton failed to demonstrate that Kirk usurped any business opportunities of Triton or that it failed to receive the benefit of Kirk's services in exchange for his compensation. To the extent that Triton's theory can be construed to tie Defendants' tortious interference with the thirteen overlapping bids to its loss of business opportunities, money damages provide an adequate remedy at law for that claim. The amount of those damages for tortious interference is discussed *infra* Section II.L.3. Therefore, I find Triton has not demonstrated by a preponderance of the evidence that it is entitled to equitable relief on a claim of unjust enrichment.

L. What is the Relief to Which Triton is Entitled?

Triton has demonstrated that Kirk breached his fiduciary duties arising from the principles of agency law, including his duty of loyalty, his duty to give information or to disclose, his duty of confidentiality, and his duty not to place himself in a position antagonistic to his principal, Triton. In addition, Eastern and Elliott are liable to Triton for aiding and abetting those fiduciary breaches. Triton also has shown that Defendants

tortiously interfered with Triton's prospective economic advantage by their actions in connection with certain of the overlapping bids. Triton argues that the appropriate remedy for those wrongs is disgorgement of profits on the two jobs awarded to Eastern and an award of estimated net profits on the ten other jobs.[154] Triton further requests attorneys' fees and costs in connection with its motion for contempt against Elliott and Eastern, as well as all of its other attorneys' fees and costs under the bad faith exception to the general rule that parties pay their own attorneys' fees. Finally, Triton requests that I make permanent the provisions of the November 28, 2007 Preliminary Injunction against Defendants. I address first the request to extend the injunction.

1. Permanent injunctive relief

The Preliminary Injunction enjoins Defendants from employing former or current Triton employees or inducing or soliciting them to leave Triton's employ. It also restrains all parties from making disparaging, negative, or defamatory comments about each other or this litigation. Lastly, the Preliminary Injunction orders Defendants to return any Triton property, including specific project job folders.[155]

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[154] The remaining job from the thirteen overlapping projects was awarded to Triton, which has not demonstrated that it decreased its bid or suffered any other damage from Eastern's actions in connection with that project.

[155] At the conclusion of the post-trial oral argument on November 25, 2008, I lifted the portion of the Preliminary Injunction enjoining Defendants from bidding or soliciting specified customers and projects. See Order entered Jan. 9, 2009, ¶ 1; Post-Trial Argument Tr. at 98-101. As explained at the argument, I made that modification to the Preliminary Injunction largely because the injunction had been in place for over a year and the evidence indicated that, as of November 25, 2008, any confidential information or trade secrets Kirk might have possessed when he

To merit a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits, (2) irreparable harm, and (3) that the balance of the equities weighs in favor of issuing the injunction.[156] As to the project job folders and other Triton property, Defendants assert that all Triton property and project job folders have been returned to Triton or never left Triton's control. Triton presented no evidence to the contrary.[157] Further, because any bid rates, employment rates, or other confidential information embedded in Kirk's estimating software could have been ascertained by legitimate means by now or, at least, would be materially less valuable due to the passage of time, there is no need to keep in place the portion of the Preliminary Injunction regarding Triton's property.

I also decline to make permanent the other provisions of the Preliminary Injunction, as well. Most of Triton's employees are at-will employees with no employment contracts. They are free to leave to work for another electrical contractor at any time provided they do not breach any fiduciary duties to Triton, as Kirk did here. More than eighteen months have passed since the parties entered into the stipulated

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left Triton in August 2007 could have been discovered by legitimate means or rendered stale by then. My modification of the Preliminary Injunction, as memorialized in the January 9, 2009 Order does not affect, however, my finding that Defendants Elliott and Eastern previously acted in contempt of the Preliminary Injunction.

156 *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007).

157 For this reason, I consider moot and need not address further Count XIII of the Complaint, captioned "Misappropriation of Project Job Folders."

Preliminary Injunction, and it has been even longer since Kirk left Triton. There has not been any showing that Triton would suffer irreparable harm by the lifting of the portion of the Preliminary Injunction proscribing soliciting or employing Triton employees, because under ordinary circumstances, competitors would be allowed to approach those employees about employment opportunities. If any Defendant later acts wrongfully in that regard, Triton has remedies available to it to protect its interests. The same reasoning applies to the provision restraining the parties from making negative, disparaging, or defamatory remarks about each other or this litigation. If any party acts wrongfully, the other party has recourse by challenging that action, for example, in the Delaware courts through allegations of defamation or some other claim. Thus, I find that the Preliminary Injunction should be lifted in all respects, and deny Triton's request that it be made permanent.

2. Attorneys' fees and costs

Having found Elliott and Eastern in contempt for purposely attempting to circumvent the Preliminary Injunction by soliciting Skaggs to submit a bid on the Methodist Country House project, I order Eastern and Elliott to pay the actual attorneys' fees and costs Triton reasonably incurred in prosecuting their motion for contempt. Although this Court is vested with the authority to impose penalties for civil contempt of a restraining order in certain circumstances,[158] such penalties would not be equitable or

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[158] *City of Wilm. v. Gen. Teamsters Local Union 326*, 321 A.2d 123, 125 (Del. 1974). The Court of Chancery possesses both common law and statutory powers that may be used to enforce its judgments. *See id.* (recognizing power of the Court to

appropriate in this case. Triton has not suffered any damages, beyond its expenditure of attorneys' fees and costs, from Eastern's and Elliott's actions contravening the Preliminary Injunction. Nor have Elliott or Eastern unfairly benefited in that they did not receive the job they bid on with Skaggs. Moreover, the primary purpose of sanctions for civil contempt is "to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled."[159] No penalty is needed to compel compliance with the Preliminary Injunction in the future, because I recently negated the relevant portion. Thus, Eastern's compliance is no longer necessary and further damages to cure the infraction would serve no purpose.

Triton also seeks an award of its attorneys' fees in litigating this entire matter against Defendants. In support of its request, Triton suggests that Defendants acted in bad faith by violating the Preliminary Injunction, destroying evidence, concealing the twenty-two-month employment of Kirk, and "chang[ing] their story on the eve of trial and even on the last day of trial."[160]

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impose a fine or award damages for the harm sustained as a result of failure to obey injunctive order); 10 *Del. C.* § 370 (authorizing the Court to enforce judgments by imprisonment or sequestration of lands); 10 *Del. C.* § 371 (authorizing the Court to sell real estate to give effect to a judgment); Ct. Ch. R. 70(b) (authorizing the Court to provide relief "[f]or failure to obey a restraining or injunctive order, or to obey or to perform any order").

159 *City of Wilm.*, 321 A.2d at 125 (citation and internal quotation marks omitted).

160 POB at 63.

Delaware follows the American Rule, under which each party normally bears its own litigation expenses regardless of the outcome.[161] Still, attorneys' fees may be awarded where the party against whom the fees are assessed has acted in bad faith or vexatiously.[162] A determination of bad faith necessarily involves a fact-intensive inquiry.[163] "Courts will not find bad faith lightly: to constitute bad faith the conduct at issue must rise to a high level of egregiousness."[164]

Defendants' conduct, although at times worthy of reprobation, does not rise to the level of bad faith or vexatiousness in the context of the litigation as a whole, so as to warrant an award of attorneys' fees. Eastern and Elliott violated the Preliminary Injunction, for which I granted Triton's motion for contempt. As to Kirk's failure to preserve evidence, I have drawn an adverse inference against him where appropriate. Beyond that, however, Defendants generally did not act in a way that would cause unreasonable delay or advance meritless arguments.[165] In fact, Defendants prevailed on the trade secrets claim, among others. Although various other arguments made in

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161 *Fox v. Paine*, 2009 WL 147813, at *6 (Del. Ch. Jan. 22, 2009) (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989)).

162 *Id.* (citation omitted).

163 *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, at *20 (Del. Ch. Dec. 20, 1994).

164 *Fox*, 2009 WL 147813, at *6 (citation and internal quotation marks omitted).

165 *See, e.g.*, *Abex Inc.*, 1994 WL 728827, at *20 (finding bad faith where defendant contested liability of a valid debt with factually and legally meritless arguments in order to delay payment).

defense against Triton's claims proved unsuccessful, they were not frivolous or otherwise vexatious. Therefore, with the exception of the fees and expenses related to Triton's Motion for Contempt, I deny its request for attorneys' fees and costs.

3. Damages

Damages are warranted to remedy Kirk's, KES's, Eastern's, and Elliott's liability for Counts I-III, VI, XV, and XVIII.[166] Of the 195 projects on which Kirk worked for Eastern, there is some dispute as to whether Eastern won 59 or 48.[167] There is no question, however, that Kirk worked on thirteen bids for both Triton and Eastern, and that Eastern won two of those projects and Triton won one. Triton seeks the imposition of a

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166 The Complaint named Mrs. Elliott as a defendant in Counts V-VIII, XI-XII, and XVI-XIX. Triton did not demonstrate her liability, however, as to any of those claims, and I, therefore, dismiss all claims as to Mrs. Elliott. Triton failed to point to any actions or omissions by Mrs. Elliott that would even hint at liability. In fact, Triton's sole basis for including Mrs. Elliott as a defendant is that she is married to Elliott and is the majority stockholder of Eastern. In those capacities, Triton suggests Mrs. Elliott may have benefited improperly from some of Defendants' wrongful conduct. Triton cites *Schock v. Nash*, 732 A.2d 217 (Del. 1999), for the proposition that innocent parties with no knowledge of the wrongdoing may be held jointly and severally liable and forced to disgorge profits to a beneficiary for a breach of duty committed by a fiduciary. Disgorgement by an innocent party is appropriate, however, only upon a showing that the ill-gotten gains were transferred to the innocent party or the corporate veil should be pierced. Triton has not demonstrated nor seriously argued that corporate veil-piercing is warranted here. Further, it has not shown or even alleged that there were transfers to Mrs. Elliott from Elliott, Eastern, or Kirk of any relevant profits or assets. Therefore, Mrs. Elliott is not liable for any actions in connection with this case or for any damages awarded to Triton.

167 Triton alleges that Eastern won fifty-nine projects, while Eastern concedes only that it won forty-eight. For purposes of this opinion, the discrepancy is irrelevant because Triton failed to prove that Eastern is liable for any damages except in relation to the two overlapping projects Eastern won.

constructive trust on and disgorgement of the estimated net profits from all 195 projects on which Kirk worked for Eastern. Triton further seeks disgorgement of the wages Kirk received from Eastern and the wages and benefits he received from Triton from November 2005 until August 2007, when he moonlighted for Eastern while still a full-time employee of Triton. Triton also requested damages in the form of its own lost profits stemming from Kirk's alleged mismanagement of Triton projects.

Some aspects of Triton's claim for compensatory relief have merit, but most of the relief it seeks is not warranted. First, as discussed *supra* Sections II.I, II.J, and II.K, Triton has not proved Defendants' liability for or its entitlement to disgorgement of the salary and benefits paid to Kirk by Triton or for any losses due to Kirk's alleged mismanagement of the Triton projects assigned to him.

Defendants Kirk, KES, Eastern, and Elliott are jointly and severally liable for Counts I-III, VI, XV, and XVIII. Kirk breached his fiduciary duty of loyalty to Triton by working for its direct competitor Eastern. By working on bids for both companies on thirteen separate projects, Kirk placed himself in a position antagonistic to Triton. Kirk also breached his duty of disclosure to Triton by failing to reveal the relevant information that he was employed by Eastern for twenty-two months to assist it in preparing bid estimates. Finally, Kirk breached his duty of confidentiality by using takeoffs he prepared for Triton or other confidential information of Triton in his work for Eastern. Eastern and Elliott aided and abetted Kirk's breaches of fiduciary duty by helping him conceal his employment, and allowing Kirk to work on bids for the thirteen overlapping projects. Defendants are also liable for tortious interference with Triton's prospective

economic advantage in connection with the two of the concurrently bid jobs awarded to Eastern because Defendants jointly acquired and used Triton's confidential information to create similar and successful bids.

Delaware law does not require certainty in the award of damages in cases where the plaintiff has proved that a defendant committed a wrong and established that an injury occurred.[168] Further, a plaintiff is required to demonstrate that the defendant caused the injury.[169] In its claims for compensatory relief, Triton relies heavily on the mechanism of constructive trust. "A constructive trust is one imposed by a court of equity as a remedy to correct the unlawful vesting, or assertion of, legal title."[170]

Here, Triton has established that Defendants tortiously interfered with its prospective economic advantage in connection with the two jobs it won out of the thirteen overlapping projects. Those jobs are the Stanton Middle School and Baylor

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168 *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *13 (Del. Ch. Dec. 12, 2006) (citation omitted).

169 *Id.*

170 *E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula-Del. Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798, 809 n.4 (Del. 1999) (citing *Hogg v. Walker*, 622 A.2d 648, 651-52 (Del. 1993)). In this case, it is not necessary to proceed by way of imposing a constructive trust to remedy Defendants' infractions. First, there is no identifiable asset or fund to which equitable title can be traced. More importantly, Triton failed to show that the various breaches of fiduciary duty or tortious interference caused Triton to suffer losses or Eastern to acquire ill-gotten gains with the exception of the Stanton Middle School and Baylor Prison projects. As to those specific jobs, the appropriate damages can be determined without any need to impose a constructive trust.

Prison projects. The injury to Triton caused by that misconduct can be measured by the estimated gross profit earned by Eastern on those two jobs.[171] Eastern earned estimated

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[171] The parties disagree as to whether net profits or gross profits provide the appropriate measure of damages. Eastern argues that Delaware law dictates that only net profits should be disgorged, citing *Topps Chewing Gum, Inc. v. Fleer Corp.*, 1985 WL 24928, at *2 (Del. Ch. Nov. 25, 1985). The *Topps* case, however, involved restitution for a claim of unjust enrichment where the defendant infringed on an exclusive license of the plaintiff. As the court held, "[b]ecause under a claim of restitution for unjust enrichment a plaintiff is entitled only to recover the amount of the windfall, the award, if any, must be limited to the net profit which defendant actually received as a result of the infringement." *Id.* The case before me is distinguishable in that the *Topps* plaintiff sought restitution, rather than lost profits by an action at law. *Id.* The court recognized that the plaintiff could have brought such a claim, but chose to proceed in equity. *Id.* Here, Triton originally sought equitable relief in the form of a preliminary injunction, which I granted, thereby establishing jurisdiction in this Court and enabling it to grant additional relief in the form of lost profits to remedy tortious interference, breaches of fiduciary duty, and aiding and abetting those breaches by Defendants. Once the Court of Chancery determines that equitable relief is warranted, it retains the power to decide the legal features of the claim pursuant to the cleanup doctrine. *Nicastro v. Rudegeair*, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007) (citation omitted).

While neither party specified what net profits or gross profits specifically entail in this context, Defendants' expert, William C. Santora, did enumerate some differences between the accounting methods used by Triton and Eastern in determining profits. Specifically, Santora pointed out that Triton includes auto and truck, insurance, and small tools costs in its gross profits calculations, while Eastern does not. PX 23 at 2; T. Tr. at 1100. Triton's gross profits calculations omit other variables, like whether the customer paid for its work. PX 23 at 2. For example, Eastern was not paid and filed a mechanic's lien to procure payment on at least one project. *Id.* Eastern would deduct that cost in determining lost profits. The difference in how Eastern calculates damages, however, does not affect the actual loss to Triton, which is what damages are intended to remedy. Furthermore, Triton's expert, John A. Wheeler opined:

> Net profit is an incorrect measure to determine the loss endured by Triton. The administrative and indirect costs for a contractor do not change proportionate to

gross profits of $95,704 on the Stanton Middle School project and $50,940 on the Baylor Prison project.[172] Therefore, I award Triton $146,644 in damages against Defendants on its tortious interference claim.

Triton also requests disgorgement of all compensation Kirk collected from Eastern while he worked for Triton and committed various breaches of fiduciary duty, including his duty of loyalty, and all profits Eastern earned on projects where Kirk helped prepare the bids. "[T]he absence of specific damage to a beneficiary is not the sole test for determining disloyalty by one occupying a fiduciary position."[173] That is to say, damages

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> the change in revenue. If a company manages their administrative and indirect costs efficiently, an increase in volume would not substantially increase the company's administrative and indirect costs.

PX 21 at 2. See T. Tr. at 813.

Under Delaware law, fixed costs generally are not deducted from lost profits. *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *11 (Del. Ch. Aug. 9, 2004); *see also Vitex Mfr. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (holding that overhead should not be deducted from lost profits because overhead remained constant). Because Triton and Eastern would have expended the fixed costs notwithstanding Defendants' tortious interference with the two jobs, *i.e.*, whether Eastern gained the jobs or Triton lost them, I find it is inappropriate here to deduct fixed costs to arrive at a net profits number. *See All Pro Maids, Inc.*, 2004 WL 1878784, at *11 (awarding equivalent of gross profits because the plaintiff would have had "to pay the fixed costs for its existing clients notwithstanding the loss of eleven clients to [the defendant]. The amount of these costs, therefore, was not affected by the . . . tortious interference."). Thus, I conclude that gross profits are the proper measure of the harm to Triton for the tortious interference claim.

172 PX 20 Ex. D.

173 *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 334 (Del. 1993).

for a breach of the fiduciary duty of loyalty are not to be determined narrowly.[174] Delaware law prohibits fiduciaries from profiting personally from disloyal acts that constitute fiduciary breaches.[175] Such damages are designed to discourage disloyalty by fiduciaries.[176] Thus, once disloyalty has been established, the standards evolved in the Delaware courts require that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct.[177]

Kirk, by and through KES, collected $21,000 of compensation from Eastern for work he performed while employed by Triton. Unlike the compensation he received from Triton, which Kirk earned as an estimator and project manager, this amount derived from Kirk's breach of his fiduciary duties of loyalty, confidentiality, and disclosure owed to Triton. Because all profits obtained from a breach of the duty of loyalty should be disgorged, I award Triton additional damages in the amount of $21,000. Delaware law requires that improper gains, such as Kirk's compensation from Eastern, be recoverable

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174 *Boyer v. Wilm. Materials, Inc.*, 754 A.2d 881, 906 (Del. Ch. 1999).

175 *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) ("It is an act of disloyalty for a fiduciary to profit personally from the use of information secured in a confidential relationship, even if such profit or advantage is not gained at the expense of the fiduciary. The result is nonetheless one of unjust enrichment which will not be countenanced by a Court of Equity.").

176 *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relationship.").

177 *Boyer*, 754 A.2d at 906.

by Triton even though no specific injury to Triton can be measured. Such a penalty against Kirk and KES serves to discourage disloyalty and prevents an unjust windfall by stripping the profits gained from their disloyal acts.

As discussed *supra* Section II.E, Defendants Eastern and Elliott aided and abetted Kirk's breaches of fiduciary duty. Therefore, they are jointly and severally liable for the damages imposed to remedy those breaches.[178]

As to the remainder of the 195 jobs Kirk worked on, excluding the Stanton Middle School and Baylor Prison projects, Triton failed to prove that it suffered any damages based on any of those jobs or that Defendants profited from their collective wrongdoing beyond the $21,000 Eastern paid to Kirk. In that sense, this case is distinguishable from the cases upon which Triton relies.[179] The monetary equitable relief granted in those cases arose from the principle that "[a] fiduciary must account for, and yield to the

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[178] *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002) (holding defendants jointly and severally liable for breach of fiduciary duty they aided and abetted).

[179] *See, e.g.*, *Thorpe v. CERBO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (denying transactional damages because breach of fiduciary duty was not proximate cause of the nonconsummation of the deal, but ordering disgorgement of profit in the form of money received from third party that was incidental to the breach). As Vice Chancellor Lamb observed about the *Thorpe* case, "[t]he cause-and-effect relationship between the breach of duty and the personal profit was obvious." *Boyer*, 754 A.2d at 907. In *Boyer*, the court declined to grant relief in the form of disgorgement of all profits because they were "neither a product of a breach of fiduciary duty nor representative of a profit earned at [the defendant]'s expense." *Id.* Similarly here, the profits on the jobs awarded to Eastern, with the exception of the Stanton Middle School and Baylor Prison projects, did not flow from Kirk's breaches of fiduciary duty. *See also Guth*, 5 A.2d at 510 (espousing the policy that profits "flowing from" a breach of fiduciary duty must be disgorged).

beneficiary, any profit he makes as a result of his breach of fiduciary duty."[180] In this case, I find that Triton has not shown that any of the profits Eastern made, apart from those on the Stanton Middle School and Baylor Prison projects, resulted from Kirk's breach of fiduciary duty or any of the other wrongdoing alleged by Triton against Kirk and the other Defendants.

No further award is warranted in connection with the gross or net profits earned from the 195 jobs on which Kirk worked for Eastern. Although Triton set forth numerous claims against Defendants, it was only successful in demonstrating Defendants' liability on a few. Triton did not prove that it would have won any jobs beyond the Stanton Middle School and Baylor Prison projects but for Kirk's and the other Defendants' illicit acts. For instance, Triton failed to prove that Kirk diverted any of Triton's bid opportunities to Eastern or even that he brought any projects to Eastern's or Elliott's attention. As to the jobs awarded to Eastern, the record lacks any proof that Kirk's input to the bids ultimately submitted by Eastern constituted a material factor in Eastern's obtaining that job. In fact, with the exception of the two jobs mentioned, Triton has not demonstrated a causal relationship between Kirk's work for Eastern and the projects it won or the profits it earned on those projects. Triton has not shown, for example, that Elliott would have received less revenue or profits if he had hired a different person to perform Kirk's work. That work, while not limited to the strict

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[180] *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App. 2005) (citation omitted).

definition of "takeoff," more closely approximated that type of work than it resembled preparation of an estimate or complete job bid. The evidence suggests that any profits earned by Eastern in connection with the jobs it won, apart from the Stanton Middle School and Baylor Prison projects, originated from the performance of a complicated job involving multiple actors, including Elliott, the project manager, and the contractors. Triton has not proved that Kirk's involvement contributed significantly to Eastern's acquisition of those profits.

Moreover, while the total damages for which Defendants are liable may be relatively small compared to Triton's total requested relief of $3,845,336,[181] I note that Triton already has received the considerable benefit of the Preliminary Injunction. That order remained in place for over a year and prohibited Eastern from bidding on, soliciting work from, or performing work for a list of thirty customers and seventeen projects. The lengthy imposition of this prohibition represented a significant restraint on Defendants' freedom of action and provided a competitive advantage to Triton.

III. CONCLUSION

For the reasons stated in this opinion, I hold that Defendants Kirk and KES are liable to Triton for breach of the fiduciary duties of loyalty, disclosure, and confidentiality, and tortious interference with prospective economic advantage in connection with the Stanton Middle School and Baylor Prison projects. Defendants Elliott, ESS, and ESES are liable to Triton for aiding and abetting those breaches of

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[181] Joint Pretrial Order at 4.

fiduciary duty and tortious interference with prospective economic advantage related to the two specific jobs. Based on those claims, I find Defendants Kirk, KES, Elliott, ESS, and ESES jointly and severally liable to Triton for monetary damages in the amount of $167,644 plus postjudgment interest at the legal rate prescribed in 6 *Del. C.* § 2301(a).[182] I also find that Defendants Elliott, ESS, and ESES acted in contempt of the Preliminary Injunction and are liable to Triton for its attorneys' fees and costs reasonably incurred in prosecuting its Motion for Contempt.[183] In all other respects, Triton's claims are dismissed with prejudice.

Triton's counsel shall confer with Defendants' counsel and submit within twenty days a proposed form of final judgment to implement the rulings in this opinion.

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[182] In Delaware, prejudgment interest is awarded as a matter of right from the date payment is due. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (citing *Moskowitz v. Mayor & Council of Wilm.*, 591 A.2d 209 (Del. 1978) (internal citation omitted)). Triton, however, did not request such interest in the Joint Pretrial Order, its post-trial briefing, or argument. I further note that the figures for the bulk of the damages sought were for projects without specified time periods that would enable the accurate calculation of prejudgment interest. Therefore, any claim for prejudgment interest effectively has been waived. *See All Pro Maids, Inc. v. Layton*, 2005 WL 82689, at *1 (Del. Ch. Jan. 11, 2005).

[183] Triton shall submit within ten days of the date of this opinion an application detailing the basis for and amount of the reasonable attorneys' fees and costs it expended in prosecuting its Motion for Contempt. To the extent Defendants Elliott, ESS, or ESES object to the amount of attorneys' fees and costs requested, they shall file an opposition within ten days of the filing of Triton's application.