(Evans Deposition, pp. 45-46). GPO members select from among GPO vendors. Since the hospitals provide their specifications to prospective vendors in the RFP process, a restrictive covenant designed to protect Maxxim's investment of resources in customer relationships, customer preferences and tray design does not serve its purpose.

Once Novation did not award a new contract to Maxxim, Maxxim's then-customers testified that they would not continue their CPT business with Maxxim. The identity of Maxxim customers, their preferences, and cost/pricing information were of no use to PHS once the Maxxim contracts expired. The evidence at trial establishes that Maxxim's Novation customers selected PHS through the RFP process. In the RFP process, the hospitals communicated their product preferences to the GPO vendors, who competed against each other. As to customers in the Yankee Alliance, the evidence at trial establishes that Yankee Alliance used a comparable process.

The restrictive covenants of the SRA did not protect trade secrets, other confidential business information, customer relationships, or customer goodwill. If the Bankruptcy Court erred in not including any conclusion as to legitimate business interests beyond trade secrets, given the Bankruptcy Court's conclusion as to causation, that error had no impact on the Bankruptcy Court's ultimate conclusion to enter a final judgment in favor of PHS and McCauley.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count II.

D. Count III - Breach of Fiduciary Duty
Fiduciary Duty to Maxxim

Maxxim argues that the relationship between Maxxim and McCauley was more

than a "mere independent contractor relationship." Maxxim relies on the Maxxim's entrustment of "Proprietary Information" to McCauley, the acceptance of which established a fiduciary relationship implied in law. Maxxim contends McCauley breached her alleged fiduciary duty to Maxxim by disclosing confidential information. Maxxim further argues that McCauley breached the common law duty not to engage in disloyal acts in anticipation of future competition.

Maxxim argues that McCauley gave Maxxim BOMs and product specifications to PHS, and gave PHS a list of Maxxim customers that McCauley felt she could take with her to PHS. Maxxim further argues that McCauley appeared at customer meetings and promoted PHS products as an alternative to Maxxim products, such as the guided tour of PHS's production facilities. Maxxim argues that even if the information disclosed was "common knowledge," steering Maxxim's customers to PHS breached McCauley's duty of loyalty.

The Bankruptcy Court found that the relationship between Maxxim and McCauley was, at most, an independent contractor relationship. The Bankruptcy Court noted that, within a relationship characterized as confidential, the purpose of the disclosure, the past practice of the parties, the customs of the industry, and other circumstances of the disclosure remain relevant in determining the recipient's obligations.

The elements of an action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) breach of that duty; and 3) damage proximately caused by that breach. Gracey v. Eaker, 837 So.2d 348 (Fla. 2002). In the absence of an express fiduciary relationship, courts have found the presence of a fiduciary relationship implied in law. A fiduciary relationship must be established by competent evidence, and the burden of proving such a relationship is on the party asserting it. Kislak v.

Kreedian, 95 So.2d 510, 514-15 (Fla.1957). To establish a general fiduciary relationship, "a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." Watkins v. NCNB Nat'l Bank of Fla., N.A., 622 So.2d 1063, 1065 (Fla. 3d DCA 1993). Fiduciary relationships implied in law are premised upon the specific factual situation surrounding the transaction and the relationship of the parties. Courts have found a fiduciary relationship implied in law "when confidence is reposed by one party and a trust accepted by the other." Capital Bank v. MVB, Inc., 644 So.2d 515, 518 (Fla. 3d DCA 1994) (citations omitted).

What distinguishes an "independent contractor" from an "agent" is the degree of control retained or exercised over the manner in which work is performed; an employee who is subject to the control or direction of the owner only as to the result is an independent contractor. In determining the status of a party as an independent contractor, the Court would look first at the agreement between the parties, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. Where other provisions of the agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control. Keith v. News and Sun Sentinel Company, 667 So.2d 167 (Fla. 1995).

The SRA shows that the parties were in an arm's length, independent contractor relationship. The SRA expressly provides that McCauley had limited authority and was not Maxxim's agent. In order for Maxxim and Medline to establish the presence of a fiduciary relationship, Maxxim and Medline would have to prove additional facts independent of the SRA. "Fiduciary relationship" is a broad umbrella that includes both formal and informal relationships. The designation of business information entrusted to a sales representative as "confidential" does not necessarily create a fiduciary

relationship. The evidence did not show that confidence was reposed as a result of the position of superiority and influence held by McCauley.

The Court has affirmed the finding that the business information that Maxxim and Medline designated as a trade secret, i.e. tray contents and design, bills of materials, is not a trade secret. To the extent that McCauley had access to other business information that Maxxim considered confidential, the trial record establishes that PHS was selected as a vendor through the RFP process, in which hospital customers disclosed their product preferences and specifications directly to PHS. Therefore, if McCauley did disclose Proprietary Information, the disclosure did not cause Maxxim's damages.

The Bankruptcy Court found that McCauley did not disclose confidential business information or trade secrets, and Bankruptcy Court identified independent causes of Maxxim's and Medline's damages. The Court has concluded that the Bankruptcy Court did not err in its finding.

The Court affirms the decision of the Bankruptcy Court finding only an independent contractor relationship, not a fiduciary relationship. If the Bankruptcy Court erred in finding the absence of a fiduciary relationship, that error has no impact on the Bankruptcy Court's finding as to causation.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count III.

E. Count IV - Aiding and Abetting Breach of Fiduciary Duty
Knowledge of McCauley's SRA

Maxxim argues that the Bankruptcy Court erred in concluding that PHS had no

liability for aiding and abetting McCauley's breach of fiduciary duty on the ground of lack of knowledge.

Maxxim argues that PHS knew that McCauley was still Maxxim's sales representative at the beginning of its contacts with McCauley. Maxxim further argues that PHS management had actual knowledge that it was Maxxim's standard practice to have their sales representatives sign non-compete agreements. Maxxim argues that John Abele's knowledge of Maxxim's contractual requirements is imputed to PHS.

Maxxim further argues that, in light of the common law duty not to engage in disloyal acts in anticipation of future competition, PHS' claims of ignorance are false. Maxxim argues that the precise state of PHS' knowledge is irrelevant, since PHS knew that McCauley was under contract to Maxxim, and that McCauley's disclosure of proprietary Information to PHS, and McCauley's direction of Maxxim's customers to PHS was inconsistent with the terms of McCauley's relationship with Maxxim.

Maxxim further argues that once McCauley joined PHS in July, 2003, McCauley's knowledge of the terms of the SRA and business relations with Maxxim, and of Maxxim's contracts and business relations with Maxxim's customers, were imputed to PHS, regardless of the time, place or manner in which McCauley acquired that knowledge. Maxxim argues that, as of that date, PHS was aware of McCauley's covenant not to compete with Maxxim.

There is trial testimony that not every Maxxim sales representative executed an employment agreement which included a covenant not to compete; John Abele, PHS employee and former Maxxim employee, testified that he did not execute such an agreement (17: 74). PHS denied knowledge of the terms of the SRA. McCauley testified that McCauley did not convey the terms of the SRA to PHS. McCauley

testified that McCauley sought out PHS, and would have left Maxxim whether or not PHS hired her. In any event, once Novation did not award Maxxim a contract, Maxxim's CPT customers intended to and did select a new vendor. Maxxim's Novation customers continued to purchase from Maxxim until the CPTs in the supply pipeline were gone, and they had selected a new vendor through the RFP process. PHS was a Novation vendor and a Premier vendor, and was selected through the RFP process.

The Bankruptcy Court concluded that McCauley had no fiduciary duty to Maxxim, and the Court has affirmed as to Count III.

The Bankruptcy Court found that Maxxim did not establish that PHS knew the terms of McCauley's contract, and rendered substantial assistance to McCauley in connection with McCauley's alleged breach of duty. The Bankruptcy Court further found that PHS did not cause Maxxim's damages.

It is the role of the trial court to resolve conflicts in the evidence. There is substantial evidence supporting the Bankruptcy Court's finding that PHS did not know the terms of McCauley's contract with Maxxim. There is substantial evidence that the status of PHS as a Novation vendor and a Premier vendor is what led Maxxim's CPT customers to select PHS to replace Maxxim.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count IV.

F. Count V - Tortious Interference with Contract and Advantageous Business Relations
Knowledge of McCauley's SRA
Maxxim's "Actual or Identifiable" Business Relationship With Maine Hospitals

1) Knowledge of McCauley's SRA

Maxxim argues that PHS had actual knowledge of McCauley's contract in February, 2003, and, by using McCauley during that time, PHS interfered with McCauley's contractual and common law duty not to compete with Maxxim. Maxxim argues that PHS influenced or induced McCauley's breach of her obligation not to compete with Maxxim and not to disclose their Proprietary Information. Maxxim further argues that PHS influenced or induced McCauley's breach of her post-separation non-compete covenant.

The Court has affirmed the finding of the Bankruptcy Court as to PHS' lack of knowledge of the terms of McCauley's contract. The Bankruptcy Court further found that Maxxim did not prove that PHS induced any breach of McCauley's SRA. In any event, the actions of PHS did not cause Maxxim's damages.

2) "Actual or Identifiable" Business Relationship with Maine Hospitals

Maxxim argues that: 1) the Bankruptcy Court's finding that Maxxim and Medline presented no evidence of a business relationship with Maine hospitals is clearly erroneous; 2) the Bankruptcy Court's finding that PHS did not intentionally interfere and PHS acted in good faith by promoting its business misapplied the undisputed facts to the law and/or was clearly erroneous.

The elements of a tortious or intentional interference with a business relationship are: 1) the existence of a business relationship; 2) the defendant's knowledge of that relationship; 3) an intentional and unjustified interference with the relationship by the defendant; and 4) damage to the plaintiff as a result of the breach of the relationship. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1994).

In Adversary Complaint, Maxxim alleged:

> 68. Plaintiff's employment and customer contracts constitute contracts.
>
> ....
>
> 71. Defendants PHS and McCauley have maliciously, intentionally and improperly interfered with Maxxim's customer contracts by inducing Maxxim's customers to enter into contracts with PHS and to terminate contracts with Maxxim, and by diverting business under Maxxim's existing customer contracts to itself.
>
> ....
>
> 77. Defendants have no justification, privilege or excuse for their conduct.

The Bankruptcy Court found that Maxxim presented no evidence of any actual identifiable understanding or agreement which in all probability would have been completed absent the actions of PHS and McCauley. The Bankruptcy Court states that, although Maxxim once had a business relationship with certain hospitals in Maine for the supply of CPTs, the hospitals ceased to do business with Maxxim for reasons independent of any actions attributable to PHS and McCauley.

The Bankruptcy Court further found that PHS did not enter the market with the intent to sabotage Maxxim's CPT business. PHS began soliciting business from hospitals in Maine once PHS was awarded the Novation contract. The Bankruptcy Court further found that Maxxim did not prove causation of its damages.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count V.

G. Count VI - Violation of Uniform Trade Secrets Act

Maxxim argues that the Bankruptcy Court misapplied the law in its conclusion that Maxxim's CPTs, BOMs and other materials Maxxim gave to McCauley were not trade secrets. Maxxim further argues that the Bankruptcy Court made no findings or conclusions regarding the "misappropriation" or "improper means of acquisition." Maxxim contends that: 1) the trial court erred when it ruled that customers' knowledge of customer specific information defeats any claim under the trade secret statute; 2) possession of information is sufficient to acquire the protection of the UTSA and there is no requirement of "ownership"; 3) Defendants acquired the information by improper means.

In the Adversary Complaint, Maxxim alleged that:

> 81. Defendants had access to confidential and proprietary Maxxim product and design specifications and contractual information. This information constituted trade secrets belonging to Maxxim under the Uniform Trade Secrets Act in that Maxxim made reasonable efforts under the circumstances to maintain its secrecy; furthermore, the information had independent economic value, and could not have been generated and developed absent substantial effort and expense on the part of Maxxim.
>
> 82. Defendants misappropriated Maxxim's trade secrets, thereby gleaning the economic value from the information. They did so without Maxxim's consent, despite a duty to maintain the secrecy of the information.

This focus of this case is Maxxim's CPT business. The Complaint's reference to "confidential and proprietary Maxxim product and design specifications" means CPT contents and design. The CPT is a custom product that hospitals purchase by entering into contract with a vendor; the Court assumes that the "contractual information" alleged

in the Complaint refers to a hospital's contract to purchase CPTs from Maxxim. This would include the customer's identity and the customer's specifications as to the contents of a CPT, which results in a "bill of materials." McCauley testified at trial that, at the request of customers, she sent BOMs to PHS.

The Court notes that Maxxim did not enter into confidentiality agreements with the hospitals which purchased its products, and did not label its products or documents "confidential." There is trial testimony that it is industry practice for hospitals to use the BOM to solicit RFPs, and the hospitals may provide tray samples to prospective vendors. There is no evidence that Maxxim identified what Maxxim considered a trade secret to McCauley or the hospitals.

There is trial testimony that the CPT business is a "small world." There are a limited number of hospitals in Maine. GPOs publicize the award of their contracts to their members, and material managers attend the same meetings and vendor fairs. PHS was awarded a Novation contract and was a Premier vendor. It would not have been difficult for PHS to determine which hospitals were Maxxim's customers. Knowing that PHS was a Novation vendor, the hospitals would have communicated their product preferences and specifications, seeking a response to an RFP. There is trial testimony that PHS was selected through the RFP process.

The Bankruptcy Court credited McCauley's testimony that McCauley sent BOMs to PHS at the request of customers. Maxxim may have considered the BOMs, and tray contents and design, to be trade secrets and/or confidential business information, but did not take reasonable steps to protect that information. The Bankruptcy Court further found that, even if Maxxim established that tray contents and design were trade secrets, Maxxim cannot show that its loss of the CPT business for Maine hospitals was caused any act of PHS or McCauley, but was caused by other factors.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count VI.

H. Count VII - Unfair Competition
Florida Deceptive and Unfair Trade Practices Act, Ch. 501.204, Fla. Stat.

In Count VII of the Adversary Complaint, Maxxim alleges that the actions of McCauley and PHS in intentionally harming Maxxim by soliciting its customers and employees, and by using Maxxim's confidential and proprietary information, constitute unfair competition. Maxxim further alleges that Defendants misled Maxxim's customers and defrauded Maxxim by Defendant McCauley meeting with customers under the guise of being a Maxxim employee when she had in fact begun working for PHS, causing pecuniary losses to Maxxim.

Maxxim and Medline argue that the Bankruptcy Court erroneously concluded that they lack standing to bring a claim under FDUTPA because they are not "consumers." Maxxim and Medline argue that the right to seek injunctive relief was never limited only to "consumers," and the 2001 amendment extended the cause of action for damages to all "persons," not just to "consumers."

There are cases which support the conclusion of the Bankruptcy Court as to standing, but the Court does not agree with the Bankruptcy Court's conclusion. See Furmanite America, Inc. v. T.D. Williamson, 506 F.Supp.2d 1134 (M.D. Fla. 2007); PNR, Inc. v. Beacon Prop. Mgt. Inc., 842 So.2d 773, 777 (Fla. 2003).

Even if the Bankruptcy Court erred in its conclusion as to standing, the Bankruptcy Court further found that the actions of PHS and McCauley did not violate the FDUTPA, and did not cause Maxxim's and Medline's damages. The Bankruptcy

Court found there was nothing confidential or proprietary about the information regarding Maxxim's business in Maine, specifically referring to tray contents and design, and bills of materials, nor was there anything inappropriate as to the way in which PHS came to employ McCauley.

The Court has affirmed the Bankruptcy Court's findings as to confidential or proprietary information, and as to PHS' lack of knowledge of the terms of the SRA. Upon the conclusion of Maxxim's contracts with its Novation customers, those customers sought a new vendor through the RFP process. PHS did not compete with Maxxim, and Medline participated in the RFP process unless and until excluded by the customer's selection.

The Court notes that Appellee argues that the FDUTPA claim in Count VII is preempted by the UTSA claim in Count VI. In the Adversary Complaint, Maxxim incorporates by reference all preceding paragraphs of the Complaint in each subsequent count of the Complaint, a practice which does not comply with the Federal Rules of Civil Procedure. To determine whether Count VII is preempted, the Court would have to determine whether Maxxim's allegations of unfair competition are distinguishable from the allegations of trade secret misappropriation. Allegiance Healthcare Corp. v. Coleman, 232 F.Supp.2d 1329, 1335 (S.D. Fla. 2002).

In Count VI, Maxxim alleges that PHS and McCauley harmed Maxxim by soliciting Maxxim's customers and employees, and by using confidential and propriety information. Because the allegations of the Complaint allege more than the use of confidential and proprietary information, the Court concludes that Count VII is not preempted.

The Court **affirms** the findings and conclusions of the Bankruptcy Court as to Count VII.

I. Count VIII - Declaratory Judgment that PHS Violated Section 362(a)(3) of the Bankruptcy Code
Denial of Injunction

Maxxim and Medline argue that the Bankruptcy Court erred in denying their request for injunctive relief as moot. Maxxim and Medline argue that the Bankruptcy Court did not consider the claims for injunction under the UTSA, Ch. 688, Florida Statutes, and FDUTPA, Ch. 501.211(2), Florida Statutes, but only under the SRA. Maxxim and Medline argue that the Bankruptcy Court erred in relying on Insurance Field Services v. White and White Audit and Inspection Service, Inc., 384 So.2d 303 (Fla. 5th DCA 1980) in finding that the request for an injunction pursuant to the SRA was moot. Maxxim and Medline argue that the Bankruptcy Court did not consider or apply the opinion in Proudfoot Consulting, Inc. v. Gordon, 576 F.3d 1223, 1240 (11th Cir. 2009). Maxxim and Medline further argue that it would be inequitable to deny them equitable relief due to the passage of time. Maxxim and Medline further argue that the Bankruptcy Court did not make specific findings that would justify the denial of injunctive relief.

1. Substantive Counts

Maxxim and Medline sought an injunction to restrain McCauley as to Count I, Count II, Count III, Count V, Count VI, Count VII, and Count VIII. Maxxim and Medline sought an injunction to restrain PHS as to Count IV, Count V, Count VI, Count VII and Count VIII.

The purpose of injunctive relief is prevent future harm; an injunction does not