redress past harm. Maxxim and Medline presented evidence as to the damages allegedly caused by PHS and McCauley. As to the substantive counts, the Court has affirmed the finding of the Bankruptcy Court that the damages sought were not caused by the acts of McCauley and PHS. In general, where damages can be calculated which adequately compensate for the harm complained of, the grant of injunctive relief, which is premised on the presence of irreparable harm, is not appropriate. Where a presumption of irreparable harm was applicable, PHS and McCauley rebutted the presumption.

2. Count VIII - Declaratory Judgment

In Count VIII, Maxxim and Medline allege that the goodwill of Debtors' business, including Maxxim's relationships with its employees and customers, constitutes property of the Debtors' estates, that Maxxim's employees and customers are key assets of its business, and wrongful attempts by PHS to solicit Maxxim's employees and customers constitute attempts to obtain possession of the goodwill of the Debtors' business. Maxxim and Medline further allege that PHS' and McCauley's conduct in using confidential information and soliciting Maxxim's customers for the purpose of inducing them to terminate their relationship with Maxxim and to work instead with PHS constitutes an act to obtain possession of property of the Debtors' estates, or of property from the Debtors' estates, or to exercise control over property of the Debtors' estates within the meaning of 362(a)(3) of the Bankruptcy Code.

Maxxim and Medline seek a declaratory judgment that:

> 1) its employees are the key assets of its business, and therefore constitute part of the business' goodwill, which is property of the Debtors' estates, and

> 2) PHS' conduct in targeting and contacting Maxxim's employees for the purpose of soliciting them to terminate their employment with Maxxim and to work instead for PHS constitutes an action to obtain possession of property of the Debtors' estates or of property from the Debtors' estates or to exercise control over property of the Debtors' estates within the meaning of 362(a)(3) of the Bankruptcy Code and is precluded by the automatic stay therein.

Maxxim and Medline requested a preliminary and permanent injunction as to:

1. McCauley: prohibiting her from: a) engaging in a competing business; b) working for a competing business; c) soliciting any employee or agency of Maxxim to discontinue the employment or agency relationship with Maxxim, prior to June 28, 2003;

2. McCauley: prohibiting her from ever disclosing Proprietary Information;

3. McCauley: requiring her to return all documents which may contain Proprietary Information;

4. PHS: a) employing McCauley in any capacity; b) taking any action to solicit employees of Maxxim; c) using or disclosing confidential or proprietary information;

5. PHS and McCauley to solicit customers of Maxxim in the Territory or whose identity was disclosed in information provided to PHS by McCauley

Maxxim and Medline further seek the award of damages, the award of costs, expenses and attorney's fees.

1. SRA

In this case, Maxxim and McCauley entered into a contract. As to a controversy based on a private contract, the purpose of a declaratory judgment action is to settle an actual controversy before it ripens into a breach of a contractual duty. Given the context, a declaratory judgment enforcing the SRA was intended to prevent any act

exercising possession of or control over property of the estate, in violation of the automatic stay.

Maxxim never sought a preliminary injunction to enforce the SRA, which included a non-compete period of one year. McCauley resigned effective 6/27/2003. Medline purchased the assets of Maxxim's business in October, 2003. The Adversary Proceeding commenced in October, 2003. The Bankruptcy Court found that Maxxim did not prove the existence of one or more legitimate business interests justifying the enforcement of its covenant not to compete, nor did Maxxim prove the elements of any of its claims for relief for damages. The Bankruptcy Court further noted that the trial of this case concluded three years after the acts occurred that form the basis of the request for injunctive relief. The trial took place after the confirmation of the Plan. Pursuant to its purchase, Medline owned Maxxim's CPT business at that time. The entry of an injunction, even if it had been appropriate at one time, would not have preserved the property of the estate, or prevented a violation of the automatic stay.

The Court recognizes that, under Florida law, an injunction may be equitably extended to run from the date of entry of the injunction order. Capelouto v. Orkin Exterminating Co. of Fla., Inc., 183 So.2d 532 (Fla. 1966). The Bankruptcy Court did not find the facts of this case appropriate to enter injunctive relief, or to equitably extend injunctive relief. Maxxim and Medline argue that they could not have feasibly sought a preliminary injunction, since McCauley contended that McCauley's version of the SRA was in effect. An evidentiary hearing on a motion for preliminary injunction could have resolved that issue, if Maxxim and Medline had sought a preliminary injunction to prevent further harm.

The harm that a declaratory judgment was intended to prevent is long past. The Court has affirmed the finding of the Bankruptcy Court as to the absence of a legitimate

business interest justifying the enforcement of the covenant not to compete in the SRA.

The Court concludes that the Bankruptcy Court did not abuse its discretion in finding the request for injunctive relief to be moot.

2. Ch. 688.003, Florida Statutes

Actual or threatened misappropriation of a trade secret may be enjoined.

The Bankruptcy Court found the information, products and documents that Maxxim and Medline considered to be trade secrets were not trade secrets. The Court has affirmed the Bankruptcy Court's findings and conclusions as to trade secrets. Therefore, Maxxim and Medline cannot establish the requirements necessary to grant injunctive relief as to trade secrets.

3. Ch. 501.211(2), Florida Statutes

Ch. 501.21(2) provides that any act or practice in trade or commerce that is violating, has violated or is otherwise likely to violate this section (the FDUTPA) may be enjoined.

The Bankruptcy Court concluded that no act of PHS or McCauley violated the FDUTPA, or caused Maxxim's and Medline's damages. The Court has affirmed the findings and conclusions of the Bankruptcy Court.

Therefore Maxxim and Medline cannot establish the requirements necessary to grant injunctive relief under FDUPTA.

The Court **affirms** the findings and conclusions of the Bankruptcy Court denying the request for injunctive relief.

J. Award of Costs
Bankruptcy Court Abused Its Discretion in Awarding Costs to PHS and McCauley

Maxxim and Medline argue that the Bankruptcy Court did not state any reason to award costs to PHS and McCauley, and did not explain its rationale for the purposes of review.

Maxxim and Medline argue that there is a substantial record of misconduct by PHS and McCauley in this case that weighs heavily against the award of costs to PHS and McCauley, including the duplicate original SRA, the redaction of an e-mail, deleting language to show McCauley worked for PHS while employed by Maxxim, false testimony about the redacted e-mail, and the disregard of the Court's instructions regarding sequestration and coaching of witnesses.

The allowance of costs under Bankruptcy Rule 7054(b) is within the discretion of the Bankruptcy Court. The Court notes that this multi-count case was heavily contested and required an extended trial. The Bankrupty Court has broad discretion to determine whether and to what extent to award costs to the prevailing parties. There is a strong presumption favoring the award of costs to the prevailing party....The losing party must satisfy a heavy burden when asserting that he should be excused from paying costs and affirmatively establish that the costs either fall outside the parameters of Sec. 1920, were not reasonably necessary to the litigator, or that the losing party is unable to pay. In re O'Callaghan, 304 B.R. 887 (M.D. Fla. 2003)(citing In re Franklin Arms Court, L.P., 2003 WL 1883472 at *14).

The Bankruptcy Court did not err in not including detailed findings as to costs; if the motion for costs had been denied, such findings would have been necessary to explain the Bankruptcy Court's conclusion. PHS and McCauley were the prevailing parties, and he Bankruptcy Court granted the award of costs to PHS and McCauley as prevailing parties.

The Court **affirms** the decision of the Bankruptcy Court as to the award of costs to PHS and McCauley.

K. Relief Requested

Maxxim and Medline request that the Court vacate the Bankruptcy Court's Final Judgment and enter a judgment for Maxxim and Medline on all Counts of the Complaint. The Court has affirmed the findings and conclusions of the Bankruptcy on all Counts and therefore **denies** the request to vacate the Bankruptcy Court's Final Judgment.

VIII. The Cross-Appeal

1) Denial of Motion to Amend to Assert Additional Defense

PHS and McCauley argue that this Adversary Proceeding is not identified as a "retained cause of action" in the Plan Supplement which identifies the causes of action which will be transferred to reorganized Maxxim upon emergence from bankruptcy. PHS and McCauley argue that a reorganized debtor may not pursue a cause of action if the cause of action has not been retained under a plan of reorganization. A cause of action that has not been retained is subject the defenses of res judicata or lack of standing. D & K Props. Crystal Lake v. Mutual Life Ins. Co., 112 F.3d 257, 261 (7th Cir.

2004); Browning v. Levy, 283 F.3d 761, 774-75 (6th Cir. 2002)

The Bankruptcy Court conducted a hearing on PHS' and McCauley's Motion to Amend. (17:172-206).

The Bankruptcy Court noted that PHS and McCauley could have and should have brought their Motion to Amend earlier. This case was pending when the Plan was confirmed, but no motion was brought until 17 months afterward, after discovery, dispositive motions and commencement of the trial. The Bankruptcy Court considered res judicata inapplicable, since the purpose of that equitable defense is to put an end to litigation, and this case was being prosecuted at the time of confirmation.

The Bankruptcy Court interpreted the Plan not to preclude a pre-existing adversary action, and found that Maxxim and Medline would be prejudiced if the Bankruptcy Court permitted the amendment. The Bankruptcy Court further found that the delay of PHS and McCauley constituted a waiver, and Maxxim and Medline retained constitutional and prudential standing after the Plan was confirmed.

For all of the reasons outlined at the hearing, the Court **affirms** the denial of the Motion to Amend Answer.

2) Denial of Motion to Amend to Assert Claim for Attorney's Fees

PHS and McCauley argue that the Bankruptcy Court erred in denying their motion to amend their Answer to assert a claim for attorney's fees. PHS and McCauley argue that the Bankruptcy Court had the discretion to award fees under Ch. 542.335(k), Florida Statutes (2005), and Ch. 688.005, Florida Statutes (2005). PHS and McCauley argue that many cases have held that attorney's fees may be recovered, even where

the pleadings have not contained a claim for damages. PHS and McCauley argue that lack of prejudice and fairness to the prevailing party support a fee award in this case.

The Bankruptcy Court conducted a hearing on the Motion to Amend (20:42-64).

At the hearing, PHS and McCauley conceded that Fed.R.Bank.P. 7008(b) requires attorney's fees to be specifically pled. The Bankruptcy Court noted that, in addition to Bankruptcy Rule 7008, Rule 26 requires all damages to be disclosed. The request for attorney's fees was not included in the initial pleadings or in any pretrial order. PHS and McCauley raised their request for the award of attorney's fees after PHS and McCauley had rested. The Bankruptcy Court noted that Maxxim and Medline asserted their request for the award of attorney's fees early, and through their Rule 26 disclosures. Maxxim and Medline included evidence establishing their attorney's fees during trial. The Bankruptcy Court applied Bankruptcy Rule 7008(b), and denied the Motion to Amend to assert a claim for attorney's fees.

The Bankruptcy Court did not err in denying the Motion to Amend due to the application of Bankruptcy Rule 7008 and prejudice to Maxxim and Medline from the late attempt to include attorney's fees as an element of damages. Nothing prevented PHS and McCauley from asserting the claim for attorney's fees from the outset.

The Court **affirms** the Bankruptcy Court's denial of the Motion to Amend as to the claim for attorney's fees.

IX. The Consolidated Appeal

A. Denial of Motion for Award of Attorney's Fees

PHS and McCauley argue that the Bankruptcy Court erred in denying their Motion for Award of Attorney's Fees. PHS and McCauley request that the Court reverse the judgment of the Bankruptcy Court and remand this case for the determination of attorney's fees.

The appeal of PHS and McCauley is based on the inherent power of the Bankruptcy Court to sanction "bad faith" and "willful misconduct" even in the absence of express statutory authority. The inherent power of the court to sanction is derived from the court's need to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. Chambers v. Nasco, 501 U.S. 32, 43 (1991).

PHS and McCauley argue that Maxxim and Medline pursued a broad "trade secret" misappropriation claim against PHS and McCauley in bad faith. Maxxim and Medline raised other claims, and the Motion of PHS and McCauley is limited to the claim that PHS and McCauley stole the trade secrets of Maxxim and Medline.

PHS and McCauley argue that the procedural history of this case demonstrates the bad faith of Maxxim and Medline. PHS and McCauley argue that Maxxim and Medline claimed all the information in their business was a trade secret, and that Maxxim and Medline labeled every trial exhibit "highly confidential" or "confidential." PHS and McCauley argue that Maxxim and Medline opposed the Motion to strike the some of the designations in bad faith, but at trial Maxxim and Medline did not seek "highly confidential" treatment.

PHS and McCauley argue that Maxxim and Medline persisted in their claim that pricing was confidential, but at a hearing of 9/20/2004 admitted that pricing was not confidential. PHS and McCauley argue that Maxxim and Medline never sought a protective order, and objected to the standard protective order sought by PHS and McCauley, and withheld documents sought in discovery but objected to the extension of the discovery deadline sought by PHS and McCauley. PHS and McCauley assert that they filed numerous motions to compel to obtain documents that were not produced until an order was entered on the motions to compel.

A finding of "bad faith" is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting litigation or hampering enforcement of a court order. Byrne v. Nezhat, 261 F.3d 1075, 1121 (11th Cir. 2001). In order to grant sanctions based on its inherent powers, the Court would first have to find that Maxxim and Medline proceeded in "bad faith." It troubles the Court that, according to the Letter Agreement of 9/2/2003 between McCauley and PHS, Maxxim conceded that a past employee had the right to use and disclose the information designated within the Letter Agreement, even if it might otherwise be considered by Maxxim to be a trade secret: a) generalized knowledge, skill and experience developed over the years and acquired while working for Maxxim; b) information that Maxxim might otherwise consider to be trade secrets but which has become a matter of public knowledge; c) Information that Maxxim might otherwise consider to be a trade secret but which is possessed by a third party; d) Information know to PHS about Maxxim. (PHS 0008).

At the hearing on the Motion for the Award of Attorney's Fees, the Bankruptcy Court noted that the designation of all documents as confidential was not appropriate, and that the tactic of constant objections during depositions was ineffective and

inappropriate, but Rule 11 and Rule 37 motions could have resolved those issues. PHS and McCauley did not file Rule 11 and Rule 37 motions. The Bankruptcy Court considered the tactics in this case to be far short of a Chambers v. Nasco scenario.

The Court may resort to its inherent powers to impose attorney's fees for bad faith conduct where other sanctioning mechanisms do not cover the conduct at issue. Where Rule 11, Rule 37 or some other mechanism would cover the conduct at issue, the Court ordinarily should not resort to its inherent powers, which are to exercised with caution and restraint. Chambers v. Nasco, 501 U.S. 32, 50 (1991); Peer v. Lewis, 606 F.3d 1306, 1315 (11th Cir. 2010).

The Court concludes that the Bankruptcy Court did not abuse its discretion in denying the Motion for the Award of Attorney's Fees of PHS and McCauley, and **affirms** the denial of the Motion. Accordingly, it is

ORDERED that the Findings of Fact and Conclusions of Law, Final Judgment, and Orders of the Bankruptcy Court are **affirmed** as to all issues raised in the Appeal, Cross-Appeal, and Consolidated Appeal.

DONE and ORDERED in Chambers, in Tampa, Florida on this 21st day of September, 2011.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record