IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

FRANCHISE RISK SOLUTIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. 16-176-BC
	)	
CONIFER HOLDINGS, INC., WILLIAM O. FLOYD, BORIS MATTHEW PETCOFF, and SYCAMORE INSURANCE AGENCY, INC. d/b/a BLUE SPRUCE UNDERWRITERS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This lawsuit asserts that, while employed by the Plaintiff, Defendant Petcoff, in conspiracy with, and aided and abetted by Defendants Confier Holdings, Inc. and Blue Spruce Underwriters, breached his fiduciary duties, and caused Plaintiff's trade secrets and confidential and proprietary information to be taken and used by Defendants in Petcoff's new employment with the Defendants. The Plaintiff asserts six causes of action and seeks at trial recovery of lost direct and future profits of $6 million, punitive damages, attorneys fees, and a permanent injunction for the alleged unfair and illegal advantage the Plaintiff claims the Defendants had in starting up and now competing against the Plaintiff. Discovery has been substantially completed. The case is set to be tried to a jury in less than a month, beginning March 6, 2017.

The Plaintiff's pending six causes of action, quoted as they are entitled in the *Fourth Amended Complaint,* are as follows:

— Count 1 – Actual and Threatened Misappropriation under the Tennessee Uniform Trade Secrets Act (Tenn. Code. Ann. § 47-25-1701 *et. seq.*) (against all Defendants individually and as co-conspirators);

— Count 2 – Breach of Fiduciary Duty (against Petcoff individually and all Defendants as co-conspirators);

— Count 3 – Aiding and Abetting Breach of Fiduciary Duty (against Conifer);

— Count 6[1] – Fraud/Misrepresentation/Failure to Disclose (against Petcoff individually and all Defendants as co-conspirators);

— Count 7 – Violation of Tennessee Personal and Commercial Computer Act (Tenn. Code. Ann. §§ 39-14-602(b)(5) & 39-14-604(a)) (against all Defendants as co-conspirators); and

— Count 8 – Civil Conspiracy (against all Defendants).

The case is presently before the Court on the Defendants' Motions for Summary Judgment. With respect to each of Plaintiff's six causes of action, the Defendants assert insufficient evidence. The Defendants assert that the summary judgment record establishes that there are missing elements of each cause and that the summary judgment record establishes that the Plaintiff does not have the evidence to prove its claims. The Defendants therefore assert that the Court must not present the case to a jury and must dismiss the lawsuit on summary judgment.

[1] The Plaintiff has withdrawn Counts 4 and 5.

After carefully studying the record, the law, and argument of Counsel, the Court finds that the summary judgment record does contain concrete facts, which, in combination, constitute circumstantial evidence and/or provide bases from which competing inferences can be drawn on the essential elements of Plaintiff's six causes of action, and which raise genuine doubts as to credibility of Defendants and their witnesses. Accordingly, there are genuine issues of material fact on all six of Plaintiff's causes of action, and summary judgment is precluded.

The law, undisputed facts established in the summary judgment record, and the analysis on which the above ruling is based are stated below.

In General

One of the factors in this Court's denial of summary judgment is that the claims in this case, of alleged breaches of fiduciary duty and misappropriation of trade secrets and proprietary information in concert with others which harmed the Plaintiff, are similar to the cases of *Ram Tool & Supply Co., Inc. v. HD Supply Constr. Supply Ltd.*, No. M201302264COAR3CV, 2016 WL 4008718 (Tenn. Ct. App. July 21, 2016), *appeal denied* (Dec. 14, 2016); *Eagle Vision, Inc. v. Odyssey Med., Inc.*, No. W2001-01772-COA-R3CV, 2002 WL 1925615 (Tenn. Ct. App. Aug. 14, 2002); *B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674 (Tenn. Ct. App. 1995). Significant to this Court in evaluating the Defendants' Summary Judgment Motions in this case is that in each of the

foregoing cases, the Court of Appeals reversed the trial court in granting summary judgment: *Ram Tool & Supply Co., Inc.* (reversing trial court's grant of summary judgment on breach of fiduciary duty, aiding and abetting breach of fiduciary duty and civil conspiracy for lack of TUTSA preemption and genuine issues of material fact); *Eagle Vision, Inc.* (reversing trial court's grant of defendant's motion for summary judgment on claims of misappropriation of trade secrets, breach of contract, breach of fiduciary duty, and conversion because of disputed issues of fact); *B & L Corp.* (reversing trial court's grant of defendant's motion for summary judgment because of genuine issues of material fact as to whether former employees breached their fiduciary duty).

In addition to the foregoing reversals of summary judgment on claims like the ones in this case, other general legal principles the Court has taken into account in denying the Defendants' Summary Judgment Motions are that the appellate courts have stated that the claims asserted by the Plaintiff in this case involve questions of fact.

> "Breach of fiduciary duty to a company has been defined by this Court as 'assum [ing] positions of conflict with the interests of the corporation.' *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 205 (Tenn.Ct.App.2004) (quoting *Hayes v. Schweikart's Upholstering Co.*, 55 Tenn.App. 442, 402 S.W.2d 472, 483 (1966)). The question of whether a fiduciary duty has been breached is a question of fact. *B & L Corp.*, 162 S.W.3d at 205." *Dominion Enterprises v. Dataium, LLC*, No. M2012-02385-COA-R3CV, 2013 WL 6858266, at *4 (Tenn. Ct. App. Dec. 27, 2013).
>
> * * *
>
> "Also, whether or not a departing employee accused of soliciting employees merely presented his colleagues with an opportunity for

> employment elsewhere, or crossed the line into 'solicitation' in violation of a fiduciary duty, is a fact question that is generally for the jury to decide. *See GAB Business Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.*, 83 Cal.App.4th 409, 424, 99 Cal.Rptr.2d 665, 675 (2000); *accord B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 679 (Tenn. Ct. App. 1995)." *Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005, 1044 (N.D. Iowa 2003).

In conjunction with the foregoing legal principles the Court has evaluated Defendants' Motions for Summary Judgment in the context of the following representative sampling and inexhaustive lists of undisputed, basic facts of the case.

- This lawsuit was filed by a specialty insurance corporation whose business is serving as a broker for insurance for Quick Service Restaurant ("QSR"—e.g. Taco Bell) and Casual Dining (e.g. Applebee's) franchises nationwide and performing some of the operational functions of an insurance company such as underwriting and billing.

- The lawsuit was filed against Plaintiff's former president and CEO, Defendant Petcoff, and a new company he founded, Defendant Blue Spruce Underwriters, who, as of January 5, 2016, competes with the Plaintiff in this specialized insured sector. Defendant Blue Spruce Underwriters is a wholly owned subsidiary of the third Defendant, Conifer Holdings, Inc.

- Defendant Petcoff's brother and two nephews are officers and directors of Conifer, and Defendant Petcoff is a shareholder.

Timeline of Undisputed Events and Facts

- **May 2014** – Defendant Matt Petcoff told Farzin Ferdowsi, Franchise Risk's Chairman, that Petcoff for personal/family issues needed to move back to

Michigan temporarily. From this date until his resignation from Franchise Risk in September 2015, Defendant Petcoff worked remotely.

- **August 2014** - Defendant Matt Petcoff has idea for Franchise Risk to be acquired by Defendant Conifer, which is located 10 to 15 minutes from Defendant Petcoff's home in Michigan, is operated by members of Petcoff's family, and at the time Defendant Petcoff conceived of the Conifer acquisition, he was also a shareholder.

- **December 2014** – Defendant Matt Petcoff's brother James G. Petcoff – CEO and Chairman of Conifer and his nephew Andrew Petcoff – Vice President of Marketing of Conifer, flew to Nashville to meet Franchise Risk's board of directors and to show their interest in acquiring Franchise Risk.

- **April 2015** – Defendant Petcoff met Plaintiff's employees: William Floyd, Darlene Crafton, Kyler Carr, and Joe Meyers at the Corner Pub. Matt Petcoff was responsible for hiring and training Floyd, Crafton, Meyers, and Carr. At the meeting at the Corner Pub Defendant Petcoff asked Plaintiff's employees if Matt Petcoff left Franchise Risk to start an MGA would they be interested in following him. Darlene Crafton offered to bring underwriting tools, she was then using at Franchise Risk, with her to the new MGA on a thumb drive.

- **April 17, 2015** – Matt Petcoff used his AOL email account to write Nick Petcoff (at Conifer) about prepping "for FRS or my business as an independent."

- **April 30, 2015** – Nick set up a meeting at Conifer's offices and planned for a number of Conifer personnel to attend.

- **May 20, 2015** – Jim Petcoff (CEO of Conifer) texted Matt Petcoff that "Farzin [Franchise Risk Board Member] called me yesterday and it was kind of weird."

- **May 27, 2015** – Defendant Petcoff sends an email to Franchise Risk's chairman, copying Franchise Risk's CFO and vice president saying "I'm not involved in the Conifer negotiations at all."

- **June 8, 2015** – Matt Petcoff sent Jim and Nick Petcoff a pro-forma of "FRS's budget assuming Conifer purchases us."

- **June 8, 2015** – Matt, Jim and Nick Petcoff corresponded regarding budget numbers and Matt told Jim that he had not shared the budget with Farzin Ferdowsi, a Franchise Risk board member.

- June 8, 2015 – Matt Petcoff told his brother, Jim, at the end of an email chain that he would be meeting with Uzi and a Franchise Risk board member, Farzin, later that evening, and Jim said he was looking forward to hearing about their meeting.

- June 8, 2015 – Matt Petcoff emailed Jim Petcoff regarding the meeting with Uzi and Farzin by text message stating that Uzi and Farzin "intend to sell, I think. Uzi was concerned about stipulating to growth to you," and "[a] fair offer, tying up Farzin for his connections and we can grow significantly. They want me to sign a non-compete. I told them I would think about it. No, I'm not signing one."

- April 30, 2015, August 26, 2015, September 20, 2015, September 21, 2015 - Defendant Petcoff has side-conversations with Conifer discussing the possibility and logistics of working together independently from Franchise Risk, even though Franchise Risk and Conifer were at that same time engaged in business negotiations.

- July 17, 2015 – Defendant Petcoff sends an email from his personal email account to William Floyd, Darlene Crafton, Kyler Carr, and Joe Meyers with the subject line "Conifer" stating: "Offer going out today per Jim. Now delete this email."

- July 15, 2015 – Conifer sends a proposed term sheet to Franchise Risk.

- August 2015 – Defendant Petcoff texts William Floyd "We are moving onto out [sic] own gig. Get us an office. Final decision will be 9/1, but its [sic] 95% we are starting our own MGA. Keep it quite [sic]. Set up with our gang an after work meet this coming week Mon Tue or Wed." Floyd knew what Petcoff meant by "our gang," as referenced in the August 12, 2015 text, based upon the April 2015 meeting at the Corner Pub, and Floyd reached out to Crafton, Carr, and Meyers after receiving this message.

- August 12, 2015 – Matt Petcoff texted Jim Petcoff and said "I have lots of news on FRS."

- August 12, 2015 – Matt Petcoff and Jim Petcoff planned to meet at a bar.

- August 12, 2015 – Matt Petcoff texted William Floyd the following: "No. Was not invited. It's BS by Farzin. We are moving onto out own gig. Get us an office. Final decision will be 9/1, but it's 95% we are starting our own MGA. Keep it quite. Set up with our gang an after work meeting this coming week Mon Tue or Wed." Floyd set up an after work meeting with his and Petcoff's "gang" for the

following week as directed in Petcoff's August 12, 2015 text. Petcoff ended up cancelling the meeting he directed Floyd to set up in his August 12, 2015 text.

- **August 15, 2015** – Jim Petcoff texted Matt Petcoff the following: "After reflecting on our conversations I would like to wait until we get answers from Risk, Uzi etc so we know the direction we will take. I understand your basic thoughts on what is important and I will try to figure out what works from Conifers perspective and we can generate a game plan from there. There are too many variables to make a definite game plan or be committed to a direction right now. It seems all will be cleared up this week."

- **August 15, 2015** – Matt Petcoff responded to Jim Petcoff's previous message by text with the following: "I gave Uzi until the end of the month. My target exit date is 9/4. So I agree with your timing."

- **September 2, 2015** – Franchise Risk's board formally rejects Conifer's buyout offer.

- **September 21, 2015** – Petcoff told Floyd "tomorrow will be your last day," and Floyd was not being fired.

- **September 22, 2015** –Floyd received an offer from Conifer which is one day after he resigned from Franchise Risk, without ever having applied or been interviewed by Conifer.

- **September 23, 2015** – Defendant Petcoff and Franchise Risk's Vice-President of Operations, William Floyd, resigned from Franchise Risk without notice with Defendant Petcoff turning in both of the resignations.

- **October 5, 2015** – Knightbrook, the carrier with whom Plaintiff did business, terminated its contract with Franchise Risk. This was preceded and in contrast to facts that Knightbrook had previously expressed enthusiasm for Franchise Risk's program before Petcoff communicated his plans to leave. The expressions included permitting Franchise Risk to quote and write policies where the total insured value exceeded $3 million and writing "Hopefully this will give you some additional opportunities to quote more business," and "let's go after the large accounts as you all see where it makes sense for the benefit of the program"; and permitting Franchise Risk to begin operating in a new state (Maine) on the day before Petcoff reached out to Pyfrom about his plans to start a new MGA. Thereafter Defendant Petcoff sent an email to Joel Napgezek on August 11, 2015, in which he set forth plans to leave Franchise Risk. Petcoff emailed Pyfrom on

August 19, 2015, that Franchise Risk would not be acquired and that therefore "we are moving forward with our newco project." Pyfrom emailed Petcoff on August 19, 2015, about setting up a meeting to discuss the "Newco Project." Matt Petcoff told Mr. Napgczek that "[w]hat will remain will not be enough to handle the in force."

- **October 7, 2015** – Darlene Crafton resigned from Franchise Risk without notice. Sometime prior to resigning, Darlene Crafton copied numerous Franchise Risk files to a thumb drive.

- **October 8, 2015** – Conifer's MGA, Sycamore Insurance Agency, filed for and received a Certificate of Assumed Name in Michigan permitting it to transact business under the name "Blue Spruce Underwriters."

- **October 15, 2015** – Kyler Carr (Franchise Risk's bookkeeper and agent) and Joe Meyers (Franchise Risk's claims representative) resigned from Franchise Risk. Meyer's last day was October 31, 2015 and Carr's last day was November 2, 2015.

- **January 5, 2016** – Blue Spruce's QSR/Casual Dining program went live, with Blue Spruce/Sycamore as the MGA, Conifer Insurance as the insurance company, and IAT as the fronting company.

- **October 1, 2015** – Since October 1, 2015 Plaintiff has experienced declining revenues.

In addition to the timeline, the following facts are undisputed in the record.

Underwriting Guidelines

1. Underwriting guidelines contain an insurance program's policies for underwriting risks.

2. An "admitted" carrier (a carrier licensed by the state) may file underwriting guidelines with state insurance agencies.

3. It is the intention of Blue Spruce to introduce an admitted business.

4. Just after joining Conifer, Matt Petcoff dictated a task list to William Floyd. At this time, Darlene Crafton was still a Franchise Risk employee. The task list included tasks for Darlene Crafton. The task list for Crafton items titled "UW Guidelines – hard copy" and "UW Rules – hard copy." The task list for Floyd listed him as being responsible for "Retype UW Guide."

5. Darlene Crafton saved certain Franchise Risk guidelines to a thumb drive while employed at Franchise Risk, and she brought the thumb drive with her to Blue Spruce.

6. Franchise Risk's guidelines were then used by Defendants.

7. Defendants' program was (initially) non-admitted.

8. A section in Franchise Risk's 2015 non-admitted guidelines (the ones Conifer used) entitled "Risk Appetite," listing permissible risk criteria, is not present in the 2013 California admitted guidelines.

9. A section in Franchise Risk's 2015 non-admitted guidelines listing minimum premiums is different from its 2013 CorePointe guidelines filed in California.

10. "Underwriting guidelines" may be used as part of a submission to insurance partners.

11. Franchise Risk did not share its underwriting guidelines with others.

12. Blue Spruce's guidelines match Franchise Risk's guidelines.

Rates

13. Franchise Risk's rates for its non-admitted program could not have been publicly filed because non-admitted programs have no public filings.

14. Franchise Risk's rates changed between 2013, when Franchise Risk had an admitted program (with CorePointe), and 2015, when it had a non-admitted program (with Knightbrook).

15. Darlene Crafton has testified that the underwriting base rate was filed with State National Insurance Company.

16. Matt Petcoff listed BOP Rater as a to-do item on his "task list" when he first came to Conifer.

17. Confier obtained Franchise Risk's BOP Rater from one or two sources (either Darlene Crafton's thumb drive or a third party that was under a confidentiality agreement with Franchise Risk that Petcoff had signed and was aware of).

18. Blue Spruce's rates were 35% lower across the board from Franchise Risk's BOP Rater.

19. A BOP Rater has been loaded and implemented onto Finys Software for Blue Spruce to come up with initial prices for policies, which Petcoff may then modify.

Agent List

20. Darlene Crafton created an agent list by referencing a Franchise Risk agent list.

21. There are two versions of Conifer's Agent Prospect List: one includes only agents who once were appointed as agents for Franchise Risk, the second also includes agent who were prospective agents for Franchise Risk.

22. Darlene Crafton testified that the purpose of the lists was for Blue Spruce to choose which agents to reach out to, and that that was how the list was used, though not every agent was contacted.

23. While Franchise Risk no longer has access to the list of agents on its website since it was taken down, a screenshot from its website indicates that 32 appointed agents were listed there (Exhibit Q (screenshot of franrisk.com/agents as of July 18, 2015)), but there are 151 agents on Conifer's prospect list, a number of whom were prospects not yet appointed to work with Franchise Risk, along with specific detail as to who should be contacted at each agency.

24. Darlene Crafton brought a copy of the agent lists with her on a thumb drive.

25. Conifer's Agent Prospect List, which is based on a list that Crafton took from Franchise Risk using her thumb drive, contains specific notes about contacts with agents Franchise Risk from mid- to late-2015, showing that the list was copied after the Corner Pub meeting in early 2015.

26. Agents are obligated to consider, in obtaining insurance for their insureds, whom offers them the best products at the lowest price.

Other Undisputed Facts

27. Darlene Crafton's taking the Franchise Risk documents was in violation of Franchise Risk policy as expressed through its Handbook that Crafton signed. Franchise Risk's employee Handbook states "Computer data files are not to be removed from company premises except as specifically authorized."

28. Darlene Crafton lost her thumb drive.

29. Darlene Crafton was Blue Spruce's senior underwriter when she copied Franchise Risk's files onto Conifer's computer system.

30. Matt Petcoff knew at least that Blue Spruce's underwriting guidelines and rules were derived from Franchise Risk documents.

31. Matt Petcoff "assumed I would be sued" if his co-workers did follow him after he left FRS.

In Particular

In addition to the foregoing general legal principles and undisputed facts of record, the Court makes the following particular conclusions of law with respect to Defendants' Motions for Summary Judgment.

Defendants' Challenges To Causation on All Counts

Defendants Conifer and Sycamore assert summary judgment dismissing all the Counts of Plaintiffs' Complaint is required because the Plaintiff can not prove an essential element of all of its causes of action: causation. The Defendants argue that there

is insufficient evidence in the record that the damages, calculated by the Defendants' expert based upon decline in Plaintiff's revenues and/or the enrichment of the Defendants, are caused by and the result of Defendants' misconduct. Similarly, Defendant Petcoff asserts lack of causation as to Count 2 (breach of fiduciary duty) and Count 6 (fraud).

In support of this argument the Defendants cite to evidence in the record that:

— Agents who did business with the Plaintiff have testified they left the Plaintiff because they preferred doing business with Defendant Petcoff.

— Plaintiff's insurance carrier, Knightbrook Insurance Company, testified that it terminated its contract, as contractually permitted, because Defendant Petcoff was no longer working for the Plaintiff and it quit writing that kind of insurance because of its financial rating.

The Defendants cite the case of *Morrison v. Allen*, 338 S.W.3d 417, 438 (Tenn. 2011) for the proposition that "[p]roof of damages is an essential element of" a fiduciary duty claim, *Union Planters Bank of Middle Tenn. v. Choate,* No. M1999-01268-COA-R3-CV, 2000 WL 1231383, at *3 (Tenn. Ct. App. Aug. 31, 2000), as is causation of damages." Based upon this case law, the Defendants argue the Plaintiff has failed to present evidence that the alleged misconduct, in particular the allegations relating to breach of fiduciary duty, are the cause of Plaintiff's alleged damages.

In analyzing this argument, the Court has researched the issue of causation and damages particularly as it relates to a claim for breach of fiduciary duty. In conducting this research, the Court located case law that indicates causation and damages for breach of fiduciary duty represent a special breed of cases that loosen normally stringent

requirements of causation and damages. *See, e.g., LNC Investments, Inc. v. First Fid. Bank, N.A. New Jersey*, 173 F.3d 454, 465 (2d Cir. 1999) (citations omitted) ("We have stated, however, that breach of fiduciary duty cases 'comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.' This is because '[a]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach—not simply to compensate for damages in the event of a breach.'"); *Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera*, 2010-Ohio-1677, ¶ 47, 157 Ohio Misc. 2d 1, 15, 926 N.E.2d 375, 386 ("Moreover, to the extent that the Columbus lawyers offer only a factual argument that Buckingham was not harmed, it has been observed that 'breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.'").

Consistent with the foregoing from other jurisdictions, Delaware has these loosened requirements of causation and damages in breach of fiduciary duty cases.

> In *Oberly v. Kirby,* the Delaware Supreme Court broadly condemned acts by fiduciaries to profit personally from their fiduciary relationship, stating:
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> > 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.
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> Del. Supr., 592 A.2d at 463.

The Supreme Court said the following in *Thorpe* concerning the proper scope of damages for breach of the duty of loyalty:

> Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly. Although this Court in *In re Tri–Star Pictures, Inc. Litig.*, Del. Supr., 634 A.2d 319 (1993) was addressing disclosure violations, we reasoned from a more general standard concerning the duty of loyalty:
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> > "[T]he absence of specific damage to a beneficiary is not the sole test for determining disloyalty by one occupying a fiduciary position.... The distinction we noted in *Oberly* [between personal profit and injury to the corporation] explains why no Delaware court has extended the damage rule to actions for breach of fiduciary duty...."
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> *In re Tri–Star Pictures,* 634 A.2d at 334 (footnote omitted); *accord Milbank, [Tweed, Hadley & McCloy v. Boon]* 2d. *Cir.,* 13 F.3d 537, 543 (1994) ("breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages"). The strict imposition of penalties under Delaware law are designed to discourage disloyalty.
>
> > 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.
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> *Guth v. Loft, Inc.*, Del. Supr., 5 A.2d 503, 510 (1939). Once disloyalty has been established, the standards evolved in *Oberly v. Kirby* and *Tri–Star* require that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct.

Del. Supr., 676 A.2d at 445.

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

Delaware law of damages and causation in the context of breach of fiduciary duty claims is significant because "in matters of corporate law, Tennessee courts look to Delaware law due in part because Delaware has become the most popular state in which to incorporate businesses, and, as a result, its judiciary have become specialists in the field." *Rock Ivy Holding, LLC v. RC Properties, LLC*, 464 S.W.3d 623, 635 (Tenn. Ct. App. 2014).

In Tennessee, while not stating this principle explicitly, the Court of Appeals has stated that it is not necessary that an employer suffer a loss in order to recoup profits and compensation for a breach of the fiduciary duty of loyalty.

> An employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received as a result of his disloyal activities. *See ITT Cmty. Dev. Corp. v. Barton,* 457 F. Supp. 224, 230 (M.D. Fla. 1978); *Clyde Rudd & Assocs., Inc. v. Taylor,* 29 N.C. App. 679, 225 S.E.2d 602, 604 (1976); Restatement (Second) of Agency § 469. In addition, an employee who breaches the duty of loyalty may be required to surrender any compensation paid by the employer during the period of breach. *Baker v. Battershell,* 1986 WL 7602, at *6 (Tenn. Ct. App. July 9, 1986) (citing *Red Boiling Water Co. v. McEwen,* 3 Tenn. C.C.A. (Higgins) 687 (Tenn. Ct. App. 1913)). It is not necessary that the employer suffer a loss in order to recoup such illicit profits or compensation from the employee. *Phansalkar v. Anderson Weinroth & Co.,* 344 F.3d 184, 200 (2d. Cir.2003); *Ross v. Calamia,* 153 Fla. 151, 13 So.2d 916, 917 (1943); *Faultersack v. Clintonville Sales Corp.*, 253 Wis. 432, 34 N.W.2d 682, 684 (1948); Restatement (Second) of Agency § 469. *221 Therefore, the trial court must determine damages due the Clinic under the circumstances of this case.

Efird v. Clinic of Plastic & Reconstructive Surgery, P.A., 147 S.W.3d 208, 220–21 (Tenn. Ct. App. 2003); *see also Ram Tool & Supply Co., Inc. v. HD Supply Constr. Supply Ltd.*, No. M201302264COAR3CV, 2016 WL 4008718, at *5 (Tenn. Ct. App. July 21, 2016), *appeal denied* (Dec. 14, 2016) (citations omitted) ("According to the *Efird* Court, the employer need not prove it suffered a loss to recover 'such illicit profits or compensation from the employee.'").

In addition to the loosening of stringent causation with breach of fiduciary duty, there is other latitude. There is not just one measure of damages. There are many alternatives.

> A principal whose agent has violated or threatens to violate his duties has an appropriate remedy for such violation. Such remedy may be:
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> (a) an action on the contract of service;
> (b) an action for losses and for the misuse of property;
> (c) an action in equity to enforce the provisions of an express trust undertaken by the agent;
> (d) an action for restitution, either at law or in equity;
> (e) an action for an accounting;
> (f) an action for an injunction;
> (g) set-off or counterclaim;
> (h) causing the agent to be made party to an action brought by a third person against the principal;
> (i) self-help;
> (j) discharge; or
> (k) refusal to pay compensation or rescission of the contract of employment.

RESTATEMENT (SECOND) OF AGENCY § 399 (1958).

On causation the record contains evidence of Defendants' misconduct and the timing of that with falling revenues and enrichment of the Defendants: the facts of

decline in revenue are coincident with the time of Defendant Petcoff's misconduct and the alleged aiding, abetting, and conspiracy of Defendants Conifer and Sycamore; and the ongoing declines in revenue are coincident with the continuing unfair competition. There is also evidence of Defendants' motivation which can be inferred from many of the texts, such as those with Knightbrook.

Lastly, many of the facts on which the breach of fiduciary duty claim and damages are based are the same for all other Counts. These same facts and competing inferences permeate all the causes of action. It is therefore not possible or appropriate on summary judgment to parse causation as to the different counts.

In sum, then, based upon the foregoing authorities, the Court concludes that the facts of Defendant Petcoff's breach of fiduciary duty and misconduct of being disloyal and inferences as to Defendants' motivations at a time when Defendant Petcoff was still employed by the Plaintiff, in combination with Plaintiff's decline in revenues when that misconduct commenced, along with an ongoing decline in Plaintiff's revenues and enrichment of the Defendants at the time the Plaintiff's alleged trade secrets were provided to and being used by Defendants—all constitute sufficient facts and evidence to present genuine issues of material fact on causation as to all the Counts of the *Fourth Amended Complaint*.

Count 1—Genuine Issue of Material Fact Whether Information Constitutes a Trade Secret

In addition to asserting lack of causation, the summary judgment challenges of Defendants Conifer and Sycamore to Count 1 are that the information asserted therein either is or was publicly available, easily ascertainable, easily re-creatable and/or was known to Defendant Petcoff. The summary judgment challenge made by Defendant Petcoff is that the information at issue does not provide a competitive advantage in the relevant market.

As to these arguments, the Court finds that the summary judgment record presents genuine issues of material fact.

In so finding, the Court has applied *Hamilton-Ryker Grp., LLC v. Keymon*, No. W200800936COAR3CV, 2010 WL 323057, at *10 (Tenn. Ct. App. Jan. 28, 2010) and these authorities cited by Defendants. The Tennessee Uniform Trade Secrets Act, Tennessee Code Annotated Section 47-25-1702(4), defines "trade secret" as follows:

> (4) "Trade secret" means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan 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.

Tennessee Courts have applied the foregoing in a manner that rejects the notion that every bit of information or every document in the possession of a company is a trade secret:

> Information cannot constitute a trade secret and, thus, is not confidential if the subject matter is "of public knowledge or general knowledge in the industry" or if the matter consists of "ideas which are well known or easily ascertainable."

B & L Corp. v. Thomas & Thorngren, Inc., 162 S.W.3d 189, 211 (Tenn. Ct. App. 2004) (citation omitted).

> Confidential information, like trade secrets, does not include information that is generally available in the trade or easily available from sources other than the employer, such as customer lists, knowledge of the buying habits and needs of particular clients, pricing information, and profit and loss statements.

Hinson v. O'Rourke, No. M201400361COAR3CV, 2015 WL 5033908, at *3 (Tenn. Ct. App. Aug. 25, 2015) (citations omitted).

Nevertheless, Tennessee law states that whether information constitutes a trade secret is a question of fact.

> Determination of whether information constitutes a "trade secret" is a question of fact. *See Venture Express v. Zilly,* 973 S.W.2d 602, 606 (Tenn.Ct.App.1998); *Arkansas Dailies, Inc. v. Dan,* 36 Tenn. App. 663, 260 S.W.2d 200, 204 (Tenn.Ct.App.1953). In determining this factual question, Tennessee Courts have invoked the Restatement of Torts § 757, comment b (1939), which provides:
>
> > Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the

> information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.
>
> *See, e.g., Venture Express,* 973 S.W.2d at 602.
>
> ****
>
> As we have noted above, one of the factual considerations in the determination of what constitutes a trade secret is "the ease or difficultly with which the information could be properly acquired or duplicated by others." Restatement of Torts § 757, comment b. This Court, in *Hickory Specialties,* noted that, if a matter is "disclosed by a marketed product [it] cannot be a secret." 592 S.W.2d at 587. However, whether something that can only be disclosed by using sophisticated equipment and a complex process is, nonetheless, "easily ascertainable," is not a determination properly made on a motion for summary judgment.
>
> In the case at bar, we hold that the question of whether Eagle Vision's punctum plug design constitutes a "trade secret" is an issue of material fact which precludes summary judgment. The parties themselves dispute at least one fact we hold is material to the resolution of this case: whether Odyssey misappropriated tolerance data it gathered for use with CAD software.

Eagle Vision, Inc. v. Odyssey Med., Inc., No. W2001-01772-COA-R3CV, 2002 WL 1925615, at *4, 4-5 (Tenn. Ct. App. Aug. 14, 2002) (footnote omitted).

Applying all of the above law to the record, the Court maintains its analysis in broadening the temporary injunction in this case. As argued by Plaintiff, in this case it is the compilation, and integration and aggregation of the information in issue which precludes summary judgment. The facts of record which the Court cited to in its October 25, 2016 *Memorandum and Order* that the Plaintiff took means to preserve confidentiality by keeping the information on a protected server, maintaining

confidentiality agreements with employees and limiting electronic access to documents are still unrefuted in the record. As to independent economic value of the information in issue and that it provides a competitive advantage, the undisputed facts that Darlene Crafton testified in her deposition that the documents she took from the Plaintiff she used only days after beginning employment with Defendants create genuine issues of material fact that the information has economic value and provides a competitive advantage. These facts are not a metaphysical doubt; they are facts of use by an employee upon starting employment with a competing business.

With respect to the specific documents challenged by Defendants as not constituting trade secrets: the Underwriting Guidelines, the Underwriting Rules, the Underwriting Rating and Base Rate, the BOP Rater, and the Agent Prospect List, the Court adopts the undisputed facts of record, competing inferences, and reasoning and authorities provided at pages 10-19 of *Franchise Risk's Omnibus Response In Opposition To Defendants' Motions For Summary Judgment,* and finds that the record presents genuine issues of material fact on whether the specific documents challenged constitute trade secrets, including genuine issues of material fact on their economic value and competitive advantage.

Defendants' Challenge To Counts 2, 3, 6, 8: Plaintiff Has Insufficient Evidence To Refute Denials Of Defendants And Their Witnesses

The Defendants cite to evidence in the record where they and their witnesses assert the following:

— Resignations of Defendant Petcoff and employees of Plaintiff, which occurred serially and not at one time, were not coordinated.

— Defendant Petcoff did not cause Darlene Crafton to copy files from the Plaintiff and bring them to Blue Spruce.

— The employees left the Plaintiff of their own volition and voluntarily accepted employment with the Defendants, and they were not improperly solicited by Defendant Petcoff.

The Defendants assert that their testimony is unrefuted in the record and, therefore, summary judgment is appropriate. The Court's assessment of the record differs.

From the undisputed facts in the record, the Court concludes that the Plaintiff has raised genuine doubts and thereby created genuine issues of material fact for trial on Counts 2, 3, 6 and 8 of the *Fourth Amended Complaint*. The following undisputed facts are an inexhaustive, representative sampling. They demonstrate sufficient concrete evidence in the record, and demonstrate, on the issue of aiding and abetting and conspiracy, circumstances that ordinary persons of sound mind might deduce that there was concerted misconduct by the Defendants. In so concluding, the Court has applied the principles of assessing a summary judgment record from the cases cited in the footnote.[2]

[2] "The opponent to the motion for summary judgment must raise a *genuine doubt* as to witness credibility." *Hill Boren, P.C. v. Paty, Rymer & Ulin, P.C.*, No. W2012-00925-COA-R3-CV, 2013 WL 1136540, at *15 (Tenn. Ct. App. Mar. 19, 2013) (quoting *Bailey Tool & Mfg. Co. v. Butler*, No. M2009-00685-COA-R3-CV, 2010 WL 2073854, at *7 (Tenn. Ct. App. May 21, 2010)). Raising a genuine doubt as to the credibility of material witnesses will create a genuine issue of material fact sufficient to render granting summary judgment improper, especially

The representative sampling of undisputed concrete facts are that while still employed with the Plaintiff, Defendant Petcoff gathered at a Pub in April 2015 with certain employees of Plaintiff and discussed starting a new business and whether these employees would follow him to his new employment. It is further undisputed that in subsequent emails, Defendant Petcoff referred to the "gang." Additionally, it is a fact that these employees left the Plaintiff's employment during the Fall of 2015 and all came to work for Defendants Blue Spruce and Defendant Petcoff. It is undisputed that one of the employees – Darlene Crafton – announced at the Pub gathering her ability to download some of Plaintiff's information to take with her in new employment and Defendant Petcoff, while still Crafton's boss at Franchise Risk, did not instruct her not to do so. The proof is further that Darlene Crafton used the information taken from the Plaintiff when she went to work for Blue Spruce. These facts constitute concrete, probative evidence which raise a genuine doubt as to the credibility of the Defendants' and their witnesses' denials of wrongdoing and conspiracy, and aiding and abetting by the Defendants and their witnesses.

"when the basic facts are under the control of one of the parties." *Knapp v. Holiday Inns, Inc.*, 682 S.W.2d 936, 942–43 (Tenn. Ct. App. 1984). "[W]hen the credibility of the evidence has been called into question using one of the legal modes available to test the credibility of witnesses," uncontradicted evidence will not entitle a party to summary judgment." *Id.*

* * *

"Plaintiff's argument seems to be that even though Phillips denies by affidavit that he was involved in any conspiracy and even though plaintiff had not come forward with any contrary evidence, the case should go forward because the jury might choose not to believe Phillips.

Plaintiff's reliance on what he calls circumstantial evidence to prove the conspiracy is misplaced. Circumstances must do more than create the mere suspicion of involvement in a conspiracy. Circumstances must be such that ordinary men of sound mind may reasonably deduce that there was a conspiracy. Where the circumstantial evidence is as consistent with a lawful purpose as with an unlawful one, such evidence is insufficient and cannot establish a genuine issue as to a material fact. *Fink v. Sheridan Bank of Lawton*, 259 F. Supp. 899, 903 (W.D. Okla.1966)." *Cupido v. Phillips*, No. 88-22-II, 1988 WL 53346, at *6, 7, 8, 9, 10 (Tenn. Ct. App. May 27, 1988).

Circumstantial evidence may be the basis for a verdict. *Webb v. State*, 140 Tenn. 205, 203 S.W. 955 (1918).

Count 2 Not Preempted Under TUTSA

In challenging Count 2, Defendant Petcoff argues that that Count is preempted under the Tennessee Uniform Trade Secrets Act to the extent the Plaintiff's claims are based on allegations about Darlene Crafton taking files from the Plaintiff. In support of this argument, Defendant Petcoff cites to Tennessee Code Annotated section 47-25-1708 and *PartyLite Gifts, Inc. v. Swiss Colony Occasions*, No. 3:06-CV-170, 2006 WL 2370338 (E.D. Tenn. Aug. 15, 2006), *aff'd*, 246 F. App'x 969 (6th Cir. 2007) for the proposition that TUTSA preempts fiduciary duty claims rooted in alleged misappropriation of trade secrets.

In analyzing the preemption argument, the Court has considered the recent case of *Ram Tool & Supply Co., Inc. v. HD Supply Constr. Supply Ltd.*, where the Court of Appeals reversed a trial court's grant of summary judgment on TUTSA preemption grounds in a lawsuit alleging causes of action similar to this case. No. M201302264 COA R3CV, 2016 WL 4008718, at *1 (Tenn. Ct. App. July 21, 2016), *appeal denied* (Dec. 14, 2016).

In *Ram Tool & Supply Co., Inc.*, the plaintiff company sued one of its former employees for unlawfully recruiting some of the plaintiff company's other employees to work for a competitor alleging claims for breach of fiduciary duty/duty of loyalty. *Id.* In addition, the plaintiff company also named as defendants the competing company and one of the competitor's employees asserting claims that these defendants aided and

abetted its employee's breach of fiduciary duty/duty of loyalty and that all the defendants were liable for engaging in a civil conspiracy. *Id.*

The defendants moved for summary judgment alleging that the plaintiff company's claims were all preempted by the Tennessee Uniform Trade Secrets Act. *Id.* The trial court agreed and granted the motions for summary judgment based upon preemption by TUTSA. *Id.* at *2.

In reversing the trial court, the Court of Appeals held that "factual issues abound" and that the plaintiff company's claims against the individual defendant "are not preempted by TUTSA so long as [the plaintiff company] does not rely on proof at trial that implicates [the plaintiff company's] trade secrets and/or confidential information." *Id.* at *8.

Applying the *Ram Tool & Supply Co.* analysis to this case, the undisputed facts are that the Plaintiff's Employee Handbook, quoted as follows, prohibits the Crafton downloads and Defendants' use of those downloads. Under the heading "COMPUTER USE," the Handbook states, in relevant part, "Computer data files are not to be removed from company premises except as specifically authorized." Under the heading "CONFIDENTIAL INFORMATION," the Handbook states in relevant part:

> Like all businesses, FRS has confidential internal information about what it does and how it does things. It is extremely valuable and must be kept confidential at all times. Examples of confidential information are:
>
> - Company operating procedures and methods
> - Trade secrets, formulas and designs
> - Information on the Company's financial or profit position
> - Prices and pricing strategy

- The Company's plans for the future
- Any information about fellow employees
- Any other sensitive internal information

> Confidential information expressly may not be given to, among others, competitors . . .

There is also a "CONFLICT OF INTEREST" section in the Handbook which states that, "Use by an employee for personal gain any information about the company or its customers or suppliers not only places the employee in a conflict of interest situation but also violates company rules regarding confidentiality."

Finally, under the heading "GOING INTO BUSINESS," the Handbook provides that:

> The company does not wish to block the personal progress of any employee, even if it means losing a valuable staff member. The company wishes the best of luck to any employee who goes into his or her own business, on the understanding that he or she will act responsibly. However, conflicts of interest could obviously arise. The use of company facilities and resources to start or maintain a part-time or start-up business is not allowed.

In opposition to the preemption claim, the Plaintiff argues (1) that this defense was waived because it was not asserted in Defendant Petcoff's Answer and (2) even if it is not waived, the Plaintiff's breach of fiduciary claim is not preempted by TUTSA because it does not involve the same proof as Plaintiff's trade secrets claim. In particular, the Plaintiff argues the breach of fiduciary duty claim involving Darlene Crafton's taking of documents is a violation of Plaintiff's Handbook, an independent basis for breach of fiduciary duty.

> Here, the claim that Matt Petcoff breached his fiduciary duties by permitting Darlene Crafton to take a thumb drive of files from Franchise Risk (see Fourth Am. Compl. ¶ 127) will not involve the same proof as Franchise Risk's TUTSA allegations, because it does not require that Crafton's stolen documents were trade secrets. Petcoff's breach was in permitting Crafton to steal Franchise Risk documents in violation of Franchise Risk Policy, as expressed through its handbook that Crafton signed, whether or not the stolen files were trade secrets (though some of them were). The purloined materials contained both trade secrets and compilations of Franchise Risk documents that were proprietary, violating the employee policy in the handbook which Crafton signed.
>
> That handbook is the basis for Franchise Risk's legal interest in the stolen documents as it relates to the breach of a fiduciary duty claim. And the Court has already recognized the handbook as "prohibit[ing] the Crafton downloads and Defendants' use of those downloads," even if some of the stolen content "is in the public domain and can be accessed, reused and revised by businesses." Order 7 ¶ 4 (Oct. 25, 2015). The handbook states, for instance, "Computer data files are not to be removed from company premises except as specifically authorized." Thus, Franchise Risk can prove that Crafton violated Franchise Risk's legal interest in its documents without those documents being trade secrets. Under the "same proof" test, there is therefore no preemption.

Franchise Risk's Omnibus Response In Opposition To Defendants' Motions For Summary Judgment, pp. 34-35 (Feb. 6, 2017).

Like *Ram Tool & Supply Co., Inc. v. HD Supply Constr. Supply Ltd.*, the Plaintiff's independent theory of breach of fiduciary duty based on the violation of the Plaintiff's Handbook creates a sufficient alternative theory with factual disputes that do not depend on the existence of any trade secrets. Given this alternative theory of breach of fiduciary duty under the Handbook, summary judgment is denied on the Plaintiff's claim of breach of fiduciary duty to the extent it is not based on the misappropriation of trade secrets.

Genuine Issue of Material Fact As To Count 7 – Violation of Tennessee Personal and Commercial Computer Act

As to Count 7, the Defendants argue summary judgment is appropriate because "Matt Petcoff did not make or cause Darlene Crafton to copy files from FRS's computer system." *Memorandum In Support Of Matthew Petcoff's Motion For Summary Judgment*, p. 8 (Jan. 3, 2017). In addition, the Defendants argue that even though the Defendants eventually benefited from the actions of Darlene Crafton, this fact alone does not constitute a violation of the Tennessee Personal and Commercial Computer Act.

The Defendants' arguments in this case on summary judgment are similar to arguments raised by the defendants in the case of *Cardinal Health 414, Inc. v. Adams*, 582 F. Supp. 2d 967, 972 (M.D. Tenn. 2008), where Judge Aleta A. Trauger of the Middle District of Tennessee denied the defendants' motion for summary judgment on a claim by the plaintiffs that they had violated the Tennessee Personal and Commercial Computer Act.

In that case, the two defendants were former employees of the plaintiff nuclear pharmacy company who decided to leave the company to take on different jobs. *Id.* at 970. One of the defendants, Townsend, started his own nuclear pharmacy that provided direct competition to the plaintiff nuclear pharmacy company. *Id.* The other defendant, Adams, left to join another company that did not engage in direct competition with the plaintiff nuclear pharmacy company. *Id.* Without authorization, the second defendant

continued to log on to the plaintiff's employee e-mail system to access, read and copy emails from the plaintiff's computer system. *Id.* at 971. The second defendant then sent certain e-mails he had pulled from the plaintiff's e-mail system to the first defendant working at the new nuclear pharmacy that provided direct competition to the plaintiff nuclear pharmacy company. *Id.*

In arguing that the plaintiff had failed to prove a claim for violation of the Tennessee Personal and Commercial Computer Act, defendant Townsend presented a similar argument to that of the Defendants in this case, namely that he did not "make or cause" defendant Adams to copy the material, but rather he was just an "unwitting recipient":

> Townsend claims that he did not solicit the e-mails, and he was rather an "unwitting recipient" who never encouraged what Adams was doing or benefitted from it. At his deposition, Townsend testified that he received "three to five" e-mails from Adams via e-mail, "five to six" via fax, and a "few hard copies." Townsend testified that, in total, he received "ten or so" e-mails from Adams, but it is clear that he and Adams had additional conversations regarding Cardinal on the phone. Townsend confirmed that Kirkland, on occasion, delivered Cardinal e-mails to him from Adams, but Townsend testified that "[t]here weren't a great deal .... probably three to five times in total, in a couple of years." Townsend also testified that he discussed the ramifications of e-mail snooping with an IT professional in November 2005, and, concerned by that conversation, Townsend told Adams to stop sending him Cardinal materials via e-mail. Townsend testified that, in June 2006, he told Adams to stop sending him Cardinal materials altogether. Townsend admitted that he read the e-mails Adams sent him, that he knew where the e-mails were coming from, and that he shared the correspondence with others at Music City.

Id. at 972.

In rejecting the defendants' motion for summary judgment, Judge Trauger found that the record plainly raised genuine issues of material fact as to whether the defendants had violated the Tennessee Personal and Commercial Computer Act.

> While there is very little case law interpreting these provisions, the plain text of *982 the provisions themselves, combined with the facts of this case, raise at least a fact issue as to whether the defendants violated the TPCCA. For example, Adams appears to have violated section 602(b)(1), as he intentionally accessed a computer network without authorization. Also, a reasonable jury could find that Townsend/Music City violated section 602(b)(5) by causing to be made unauthorized copies of computer data from a computer network. It is not necessary to come to a precise conclusion as to each potential ground for relief Cardinal might have under section 602, as it is clear that the defendants are not entitled to summary judgment after considering only a couple of subsections.
>
> ****
>
> In short, based on the clear language of the Act, there is no question that there is at least a genuine issue of material fact as to whether the defendants violated the TPCCA.

Id. at 981–82.

Guided by the analysis in *Cardinal Health 414, Inc.*, this Court finds that there are genuine issues of material fact in this case on whether the Defendants conduct violated the Tennessee Personal and Commercial Computer Act.

This concludes the analysis, conclusions of law, and identification of undisputed material facts upon which the Defendants' Motions for Summary Judgment are denied.

ELLEN HOBBS LYLE
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