SUNBELT RENTALS, INC. v. HEAD & ENGQUIST EQUIPMENT. L.L.C.
2002 NCBC 4

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MECKLENBURG COUNTY

00-CVS-10358

SUNBELT RENTALS, INC., a North Carolina corporation,

Plaintiff,

v.

HEAD & ENGQUIST EQUIPMENT, L.L.C., d/b/a H&E HI-LIFT, ROBERT HEPLER, DOUGLAS KLINE, MICHAEL QUINN, GREGG L. CHRISTENSEN, PATRICK C. MULDOON, MICHELE U. DOUGHERTY and BRIAN W. PEARSALL,

Defendants.

ORDER and OPINION

{1} This case arises out of an employer's allegations of unfair competitive activity by former officers and managers who have joined the employ of a competing business. The employer, Plaintiff Sunbelt Rentals, Inc. ("Sunbelt"), has brought this action against defendants and the company for which they now work, claiming that they have breached their fiduciary duties, aided and abetted the breach of fiduciary duties, tortiously interfered with prospective relations, violated the North Carolina Trade Secrets Act, violated the North Carolina Unfair Trade Practices Act, and committed wrongful acts pursuant to a conspiracy. This matter is currently before the court on defendants' motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. For the reasons set forth below, this court will grant defendants' motion in part and deny defendants' motion in part.

Parker, Poe, Adams & Bernstein, L.L.P., by William L. Rikard, Jr. and Eric D. Welsh for plaintiff.

Helms Mulliss & Wicker, P.L.L.C., by Irving M. Brenner for defendants.

I

{2} The allegations in this dispute require the court to consider closely two primary factual components of the case: first, the nature of the individual defendants' employment—both with Plaintiff Sunbelt (including its predecessor in interest) and subsequently with defendant company Head & Engquist Equipment ("H&E")—and, second, the circumstances surrounding the defendants' leaving their old jobs for their new ones. The essential facts relevant to this examination, considered in the light most favorable to plaintiff, are set forth below. Additional facts will be raised and considered in succeeding sections of this opinion, as they are relevant to the court's examination of the particular claims at issue in this motion.

{3} Sunbelt is a North Carolina corporation that rents construction and industrial equipment. It does business throughout the United States, including Mecklenburg County, North Carolina, where it has a place of business. In April 2000, Sunbelt announced its plans to purchase BET Plant Services, Inc. ("Plant Services"), a Georgia corporation.[1] Included in the purchase was BPS Equipment Rental and Sales, a division of Plant Services that had been in the business of renting, selling and installing construction and industrial equipment since 1939. Prior to the sale of Plant Services, BPS was headquartered in Jacksonville, Florida, and operated 24 branches, located throughout the Southeast and south-central United States. Less than two months later, on June 1, 2000, the purchase of Plant Services was consummated.

{4} Defendant H&E is a Louisiana corporation doing business in various states throughout the United States, including North Carolina, where one of its divisions has a branch office located in Mecklenburg County. Defendant H&E Hi-Lift ("Hi-Lift"),[2] a division of H&E, is also

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[1] Plant Services in turn was owned by its British parent company, Rentokil Initial, plc ("Rentokil"). A Rentokil official named James Wilde served as Plant Services' chairman and president.

[2] References to "Head & Engquist Equipment, L.L.C." or "H&E" in this opinion will include H&E's "Hi-Lift" division unless otherwise noted.

a Louisiana corporation that conducts business in North Carolina and other states in the Southeast.

{5} Plaintiff has also named a number of individuals in this suit who had previously worked for Plant Services or Sunbelt before entering the employ of H&E. Defendant Robert Hepler, a citizen and resident of Florida, served as president of BPS and as director of Plant Services from 1992 until his employment ended on December 14, 1999. After leaving his position at BPS, Mr. Hepler became employed as an officer of Hi-Lift. Plaintiff also contends that Mr. Hepler has served H&E and Hi-Lift as a director. Defendants deny this assertion.

{6} Defendant Douglas Kline is also a citizen and resident of Florida. From 1992 until the end of his employment on December 14, 1999, Mr. Kline served as vice president of finance at BPS and as director and assistant secretary of Plant Services. When his employment with BPS ended, Mr. Kline joined Hi-Lift as an officer. As with Mr. Hepler, plaintiff contends that Mr. Kline served H&E and Hi-Lift as a director—an assertion defendants also deny.

{7} Defendant Michael Quinn is a citizen and resident of Georgia. From 1979 until January 5, 2000, Mr. Quinn was product manager of BPS and its predecessor companies. After leaving his employment with BPS, Mr. Quinn became employed as vice president of Hi-Lift's Eastern Region.

{8} Defendant Gregg L. Christensen is a citizen and resident of Texas. Mr. Christensen was director of operations, Western Division at BPS from 1992 until he left that position on January 14, 2000. After leaving BPS, Mr. Christensen became employed at H&E as vice president of Hi-Lift's Western Division.

{9} Defendant Michele U. Dougherty is a citizen and resident of North Carolina. From 1989 until June 6, 2000, Ms. Dougherty was employed at BPS's Charlotte, North Carolina office. Plaintiff asserts that Ms. Dougherty served as branch administrator while working for BPS in Charlotte. After leaving BPS, Ms. Dougherty became the branch administrator of Hi-Lift's Charlotte operations.

{10} Defendant Brian W. Pearsall, also a citizen and resident of North Carolina, was the branch manager for BPS's Charlotte, North Carolina office from 1987 until his resignation on June 5, 2000. Upon leaving BPS, Mr. Pearsall became the branch manager of Hi-Lift's Charlotte operations.

{11} Defendant Patrick C. Muldoon, a citizen and resident of North Carolina, served as BPS's service manager at its Charlotte branch from 1989 until his resignation in late May 2000. After leaving his employment at BPS, Mr. Muldoon became employed as service manager of H&E's Charlotte office.

{12} Immediately following Sunbelt's purchase of BPS, several management level BPS employees, including the named defendants, and many more lower level employees left their jobs with the company and took positions in H&E's newly created Hi-Lift division. The basis of each of plaintiff's claims are that this substantial shift of employees from BPS to H&E was part of an "unlawful plan" undertaken by defendants to raid BPS of its employees, customers and trade secrets.

{13} As alleged by plaintiff, the defendants implemented this plan during their employment with BPS by misappropriating BPS trade secrets and confidential information and using their relationships with BPS customers and other BPS employees to the competitive disadvantage of BPS. According to plaintiff, this plan was born out of a desire by Hepler and Kline to create an aerial work platform ("AWP") business to be owned by them. In August 1999, they developed a business plan for the new enterprise that described, among other things, the locations where the company would do business, details as to the levels of employee compensation required, and details about the type and amount of equipment that should be maintained at each location.

{14} Plaintiff claims that Hepler and Kline began implementing their plan when, in late 1999, they met on at least two occasions with owners and managers of H&E. The substance and purpose of those meetings, however, is disputed by the parties: plaintiff speculates, but offers no proof, that these meetings included discussions as to how H&E would "raid" BPS/Sunbelt of its customers, employees, and other confidential and proprietary information as H&E expanded its

Hi-Lift division into BPS/Sunbelt markets; defendants testified these meetings were concerned solely with the prospective employment of Hepler and Kline at H&E and that no such comprehensive plan or "raid" was discussed.

{15} Following Hepler and Kline's departure from H&E on December 14, 1999, plaintiff claims the raid of BPS/Sunbelt employees began in earnest. As characterized by plaintiff, the alleged plan took the form of a "pyramid pattern." Hepler and Kline recruited Defendants Quinn and Christensen from the BPS/Sunbelt Dallas, Texas office. Plaintiff claims that Quinn and Christensen then began recruiting other BPS/Sunbelt employees to join H&E—doing so in some cases before resigning themselves from BPS/Sunbelt. Subsequently, in each location, the individual branch managers were recruited to H&E, who, in turn, also began recruiting BPS/Sunbelt employees for H&E while still employed themselves for BPS/Sunbelt. Defendants admit that at least 69 former employees of BPS/Sunbelt have joined H&E since December 1999. Defendants deny, however, that they were recruited as part of an unlawful plan to raid plaintiff of its key human resources, suggesting instead that employees left their jobs with plaintiff because of problems internal to BPS/Sunbelt's business.

{16} According to plaintiff, Defendant H&E used BPS/Sunbelt employees to immediately convert BPS/Sunbelt customers to H&E. Plaintiff emphasizes that BPS/Sunbelt sales representatives who had been recruited by H&E began calling on BPS/Sunbelt customers on behalf of H&E before they had officially left their jobs with plaintiff. Other solicitations of BPS/Sunbelt customers by former BPS/Sunbelt employees occurred within days or hours of those employees' departure to H&E. According to plaintiff, these solicitations of BPS/Sunbelt customers could only have been accomplished by the use of its confidential and proprietary information. Plaintiff alleges that its former employees took customer records with them to H&E and the BPS/Sunbelt pricing and customer information was used to solicit customers to H&E.

{17} Defendants admit that plaintiff's customers were actively solicited after H&E established and expanded its hi-lift division into BPS/Sunbelt markets. Defendants deny, however, that any

information about BPS/Sunbelt's customers or other business operations was used that could be construed as trade secrets or otherwise protected information. Defendants produced evidence that customer and price information were readily available to the public. Defendants urge the court to protect their right to compete, especially in view of the fact that not one of the individual defendants was bound by a restrictive covenant or non-compete agreement.

II

{18} Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *See* N.C. R. Civ. P. 56(c); *see also Beam v. Kerlee*, 120 N.C. App. 203, 209, 461 S.E.2d 911, 916 (1995) (recognizing that summary judgment is appropriate only when "there is no dispute as to any material fact"). As moving parties, defendants have "the burden of showing there is no triable issue of material fact." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 543, 459 S.E.2d 23, 25-26; *see also Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993). In determining whether that burden has been met, the court "must view all the evidence in the light most favorable to the non-moving party, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999); *see also Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358, 362 (1996).

{19} To grant summary judgment, the court must conclude that no reasonable jury could find in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. When considering a motion for summary judgment, the judge must determine whether a fair-minded

jury could return a verdict for the non-movant on the evidence presented. *See Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 U.S. App. LEXIS 21487, at *10 (4th Cir. Sept. 7, 1999) (quoting *Anderson*, 477 U.S. at 252). This is a nonjury case and the court may be in a better position to render judgment on some issues after the trial is complete. The court may not resolve disputed facts at this stage even though no jury has been demanded.

III

{20} The first issue the court will address is plaintiff's claim that the individual defendants breached a fiduciary duty they owed to BPS/Sunbelt. For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between plaintiff and defendants. *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). A fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83 (1979) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896, 906 (1931)). The North Carolina courts have historically declined to adopt a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. *Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991). Therefore, "the relationship can arise in a variety of circumstances . . . and may stem from varied and unpredictable factors." *Id.* (citation omitted).

{21} Defendants contend they did not owe any fiduciary duty to plaintiff. They assert that, as mere employees of BPS/Sunbelt, they lacked the requisite domination and influence on the affairs of the corporation that would give rise to this duty. In support of their argument, they primarily rely on *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001), and *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001), and assert that even among individual defendants with significant managerial duties, those duties "can hardly be construed

as uniquely positioning [them] to exercise dominion" over plaintiff. *Dalton*, 353 N.C. at 652, 548 S.E.2d at 708. Because Hepler, Kline, and all of the employees at BPS were constrained by the dictates of the parent corporation, Plant Services, defendants contend they cannot be found to owe plaintiff a fiduciary duty.

{22} Though the appellate court rulings in *Dalton* and *Reichhold* are recent additions to the body of case law on this subject, they did not effect any fundamental change in the longstanding North Carolina law governing fiduciary relationships.

{23} In *Dalton*, the plaintiff, a publishing company operated under the aegis of a sole proprietor, alleged its employee had breached his fiduciary duty and duty of loyalty when the employee established a competing publishing company while still employed for the plaintiff. When the Court took up the question of whether a fiduciary was owed, it grounded its analysis on the same broad definition of the fiduciary relationship it articulated in the *Abbitt* Case in 1931 (quoted above in this section).

{24} As the *Dalton* court notes, however, a special gloss is required when examining the employer-employee relationship: "the broad parameters accorded the term [fiduciary duty] are limited in the context of employment situations. Under the general rule, 'the relation of employer and employee is not one of those regarded as confidential.'" 353 N.C. at 652, 548 S.E.2d at 708 (quoting *King v. Atlantic Coast Line R.R. Co*., 157 N.C. 44, 72 S.E. 801 (1911)). This limitation necessarily follows from the basic fundament that a "fiduciary" obligation entails the presence of a degree of trust and confidence beyond that of ordinary commercial dealings.

{25} The Court acknowledged that the defendant employee was granted responsibility over certain affairs of the company that indicated he was more than a mere functionary, noting that "(1) the managerial duties of Camp were such that a certain level of confidence was reposed in [the defendant]; and (2) as a confidant of his employer, [the defendant] was therefore bound to act in good faith and with due regard to the interests of [the plaintiff]." *Id.* The Court, however, examined more closely the specific facts and circumstances of the employment relationship. The defendant had been "hired as an at-will employee to manage the production of a publication. His

duties were those delegated to him by his employer, such as overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines." *Id.* The Court concluded that "[i]n our view, such circumstances, as shown here, merely serve to define the nature of virtually all employer-employee relationships; without more, they are inadequate to establish [defendant's] obligations as fiduciary in nature." *Id.*

{26} A similar result was reached by the Court of Appeals in *Reichhold Chemicals*. That case, unfortunately, is not instructive for the purposes of the present inquiry. Despite our Supreme Court's long history of recognizing the need for a case-by-case, fact intensive analysis of claims for breach of fiduciary, the Court of Appeals in *Reichhold Chemicals* only addressed the issue conclusorily by citing the *Dalton* case for the general rule that "[a] managerial position alone does not demonstrate the requisite 'domination and influence on the other' required to create a fiduciary obligation." 146 N.C. App. at 155, 555 S.E.2d at 292. In finding that no fiduciary relationship existed, the Court of Appeals presented no factual analysis and did not otherwise opine on the circumstances of that case.

{27} This court will, therefore, follow the approach set forth in *Abbitt* and affirmed in *Dalton* and base its determination on a fact-specific inquiry that accounts for the *Dalton* court's admonition that more must be shown than the ordinary characteristics of the employer-employee relationship.

{28} With respect to Defendants Hepler, Kline, Quinn, and Christensen, the court finds there is a genuine issue of material fact as to the extent of their duties and responsibilities at BPS/Sunbelt and their consequent ability to dominate and influence the company at the fiduciary level. There is the basic fact of their positions in the BPS management. By virtue of their titles alone—Chief Executive Officer, Chief Financial Officer, Western Regional Manager, and Product Manager respectively—one may initially assume that these four defendants held jobs of significant responsibility at BPS. That plaintiff may prove these four "upper-level" managers did in fact enjoy positions of real, pervasive influence at BPS is borne out by facts in the record.

{29} According to testimony submitted by James Wilde, the regional managing director at Rentokil to whom Hepler and Kline reported, Hepler and Kline were granted extensive responsibilities with respect to the operation of BPS: "I completely put my trust in Hepler and Kline and in the BPS Senior Management to run BPS as a profitable, viable business. I looked to their experience and ability to operate BPS as, in essence, an independent, successful company on a day to day basis." (Wilde Aff. ¶¶ 5-12.) When considered in the light most favorable to plaintiff, Hepler's and Kline's own deposition testimony and the testimony of other BPS/Sunbelt officers support Mr. Wilde's description. Hepler has testified he played an instrumental role in developing the BPS division following its consolidation and restructure into a single entity in the early 1990s—ultimately a $40 million business. (Hepler Depo. at 23; Kline Depo. at 146.) Indeed, he appears willing to accept a large share of the credit for the success of BPS through this period of reorganization and beyond. (Hepler Depo. at 162.) To be sure, by his own account, Hepler was responsible for major business decisions, including negotiating contracts with BPS's major vendors and other decisions relating to corporate marketing and fiscal policy. (Hepler Depo. at 23, 32, 162-64.)

{30} Mr. Kline began his career at Plant Services as corporate controller, overseeing the financial operations of 11 operating companies and reporting directly to Plant Services in England. (Kline Depo. at 16.) Like Hepler, Kline played a key role in guiding Plant Services' North American operations through its consolidation and reorganization (Hepler Depo. at 167.), ultimately taking on the position of chief financial officer of the BPS division in 1992. (Kline Depo. at 17.) As CFO, Kline appears to have exercised extensive authority over all financial matters in the division, including decision-making powers with respect to the financing of new AWP equipment and other capital expenditures. (Kline Depo. at 88.)

{31} Defendants Quinn and Christensen, though possessing authority subordinate to Hepler and Kline, appear to have nevertheless exerted substantial influence over the operation of BPS. Mr. Quinn was BPS's product manager. According to Mr. Quinn, his job was to manage the assets of the entire company, making decisions with respect to the company's equipment needs

based on the direct report of each of the branch managers. (Quinn Depo. at 14; Guy Depo. at 123.) As a member of BPS's "senior management" team, Quinn would meet regularly with Hepler and Kline (Quinn Depo. at 14-15), participating thereby in company-wide decisions related to capital expenditures and negotiations with vendors and suppliers. (Quinn Depo. at 30-33; Stachowiak Aff. ¶ 6.)

{32} As BPS's Western Regional Manager, Mr. Christensen oversaw the operations of several branches and was the direct report of the branch managers. (Christensen Depo. at 13.) He would also participate in the formulation of the company's fiscal policy with Mr. Kline. (Christensen Depo. at 13; Guy Depo. at 123.) By virtue of his position, Christensen gained extensive BPS market knowledge—including details of many of BPS's key customer relationships. (Guy Depo. at 136.) He also exercised authority over personnel matters in the branches he oversaw, including the ability to hire and fire employees. (Stachowiak Aff. ¶ 6.)

{33} These facts as to the respective roles of Hepler, Kline, Quinn, and Christensen are such as to warrant the question of their fiduciary standing proceeding to trial. One cannot conclude from the present state of the record that these four defendants served as mere instruments to the will of Rentokil and Plant Services. A reasonable fact-finder could find that the degree of trust and responsibility reposed in each of these defendants was sufficient to rise to the level contemplated by our Supreme Court in *Abbitt*, *Dalton* and the many other cases that have defined the contours of fiduciary obligation in North Carolina.

{34} The opposite is true, however, of Defendants Muldoon, Dougherty, and Pearsall. The record reflects insufficient facts to muster a reasonable argument that these defendants exercised any brand of control rising to the level of the domination and influence required for fiduciary standing. As branch manager of BPS/Sunbelt's Charlotte location, Mr. Pearsall's actions did not extend beyond basic management responsibilities. To be sure, this court notes plaintiff's quotation of two statements by Mark Alexander, the branch manager of BPS's Atlanta operation (and not a party to this suit) in its brief opposing this motion. In its attempt to depict Mr. Pearsall's position as one of dominance and control at BPS/Sunbelt, plaintiff quotes Mr.

Alexander as having stated that, as branch manager, he was "responsible for all aspects of managing a $17 million annual business." (Pl.'s Br. Opp'n Summ. J. at 5.) Plaintiff also quotes Alexander's testimony that, as branch manager, he was "captain of the ship." (Pl.'s Br. Opp'n Summ. J. at 5.) These quotations, when considered in context, merely paint a thin veneer of support for plaintiff's position that is without foundation in fact. The first statement about managing a $17 million business is extracted from Alexander's application for employment with H&E. (Pl.'s Ex. 146.) The "captain of the ship" metaphor was plaintiff's counsel's attempt to rephrase Alexander's preceding testimony regarding his efforts to improve sales at the Atlanta branch. (Alexander Depo. at 18.) Typical résumé puffery and skillful phraseology alone will not dissuade this court from the unavoidable conclusion that there are no facts which indicate Pearsall or any of the other branch managers had the authority to effect change in corporate operations or policy either unilaterally or by way of influence upon the decision-making process of the senior management team. This is not to say that branch managers did not exercise substantial discretion with respect to the day-to-day, "nuts and bolts" operation of the branches. It does not follow, however, that from this limited sphere of authority, a branch manager could dominate and influence the larger company. To put it squarely in the *Dalton* court's terms: the facts do not indicate that Pearsall's duties place him beyond the bounds of the traditional employer-employee relationship. Without more, it is untenable to argue that Pearsall is anything other than an employee.

{35} Patrick Muldoon, as service manager of BPS's Charlotte branch, stands even further apart from the core of decision-making authority than did Mr. Pearsall. According to Muldoon, his primary responsibility was to maintain the Charlotte rental fleet, managing a repair shop with a staff of five mechanics and four more "road mechanics." (Muldoon Depo. at 7.) This court can find no evidence in the record that Muldoon's influence over the affairs of BPS extended any further.

{36} Finally, Ms. Dougherty, as branch administrator of the Charlotte branch, perhaps exerted the least influence of all the named defendants on the conduct of BPS operations. The record

reflects her job at BPS was purely a support position. Her duties included reviewing customer accounts, retrieving credit reports, filling out work orders, answering phones and other intra-office administrative duties. Undoubtedly, Ms. Dougherty's work was indispensable to the Charlotte branch's staff. It strains credulity, however, to argue that Ms. Dougherty bore the mantle of fiduciary at BPS.

{37} For these reasons, the court concludes that judgment should be granted in favor of defendants Pearsall, Muldoon and Dougherty because the facts, even when considered in the light most favorable to plaintiff, do not support a finding that they owed BPS/Sunbelt a fiduciary duty. A triable issue of fact remains, however, with respect to whether Hepler, Kline, Quinn, and Christensen were fiduciaries.

{38} Of course, beyond establishing that these four defendants owed BPS/Sunbelt a fiduciary duty, plaintiff must also show the duty was breached.

{39} Plaintiff's allegations of breach of fiduciary duty center around an alleged "plan" implemented by defendants that was intended to create a specialty hi-lift business to compete against BPS. This plan also allegedly called for supplying the new business with former BPS employees and customers that had been systematically lured away by the defendants. Plaintiff asserts this plan was devised and effected while the defendants were still employed at BPS—actions they claim contravened defendants' fiduciary obligation to BPS/Sunbelt.

{40} Before considering the merits of plaintiff's claim, a distinction bears note. Our courts have made clear that merely planning to work for another company or planning to start a new company is not unlawful behavior. *See Dalton,* 353 N.C. at 651, 658, 548 S.E.2d at 707-08, 711 (finding that employee's plan to start a new business and his failure to inform employer of plan while still employed was not unlawful); *Fletcher, Barnhardt & White, Inc. v. Matthews*, 100 N.C. App. 436, 441-42, 397 S.E.2d 81, 84 (1996) (holding that employee did not breach his fiduciary duty to employer by making plans to compete with employer before he left the company because there was no showing that the employee misappropriated trade secrets or that he was bound by any covenants not to compete). The court must focus its attention on *actions*

taken in furtherance of such a plan to compete while defendants were employed at BPS/Sunbelt—as alleged fiduciaries—rather than preparations to compete.

{41} In arguing that such a plan was executed, plaintiff cites the court to a number of facts. Plaintiff points to testimony regarding meetings defendants conducted among themselves and with other employees and customers of BPS. These discussions are characterized by plaintiff as ones in which the details of the new hi-lift business were given form or solicitations to join the new business offered. Plaintiff also argues that the fact that Defendants Hepler and Kline were in "constant consultation" with their attorneys in the weeks prior to their departure from BPS is indicative of actions in breach of fiduciary duty. (Pl.'s Br. Opp'n Summ. J. at 9.) Plaintiff contends that Christensen's providing advice, while still employed at BPS, to Kline about potential H&E properties was violative of fiduciary duties.

{42} These facts, even if accepted as true, do not amount to anything beyond the planning of competitive activity. Plaintiff cites the court to no act or omission that would rise to the level of actual breach of fiduciary duty when considered in the light most favorable to plaintiff. Failing to disclose these plans to compete is not sufficient to constitute breach when there are no facts that indicate these plans had any impact on the performance of their duties while employed for BPS.

{43} For these reasons, it appears to the court that even if a genuine issue of fact exists concerning whether Defendants Hepler, Kline, Quinn, and Christensen owed a fiduciary duty to BPS/Sunbelt, plaintiff cannot sustain its claim that any such duty was actually breached prior to their departure. The court will, therefore, grant defendants' motion for summary judgment on plaintiff's claim for breach of fiduciary duty prior to the termination of their employment with respect to Defendants Hepler, Kline, Quinn, and Christensen. To the extent plaintiff asserts that the individual defendants violated their fiduciary duties after their employment terminated, those claims would be duplicative and encompassed by the other causes of action discussed below.

IV

{44} The court now turns to plaintiff's claim that defendant H&E aided and abetted the individual defendants' breach of fiduciary duty. Any theory of liability for aiding and abetting is necessarily a form of "secondary" or "third party" liability. Consequently, plaintiff must first prove a primary breach of fiduciary duty before a cause of action for aiding and abetting that breach is viable. Plaintiff, having failed to sustain its claims for breach of fiduciary duty by any of the defendants prior to termination of their employment, is therefore unable to sustain its claim for aiding and abetting such breach. Accordingly, the court will grant defendants' motion for summary judgment on plaintiff's claim for aiding and abetting breach of fiduciary duty. Again, to the extent plaintiff asserts that the individual defendants violated their fiduciary duties after termination of their employment, those claims would be duplicative of and encompassed by the other causes of action, and the corporate defendant's liability, if any, would arise under those claims.

V

{45} The court now turns to plaintiff's claim that defendants tortiously interfered with the prospective relations of BPS/Sunbelt.

{46} The first question raised in defendants' challenge to this claim is whether a cause of action for tortious interference with prospective "relations" exists in North Carolina. Defendants admit that actions for tortious interference may take the form of "tortious interference with contract" or "prospective contract" but deny that any claim for interference with "relations" has been recognized by the North Carolina courts.

{47} This confusion seems to be due in large part to our courts' varying degree of precision in framing tortious interference issues. The nomenclature of broad categories and specific causes of action have sometimes been used interchangeably. A careful reading of our Supreme Court's

opinion in *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 412 S.E.2d 636 (1992), however, helps to clarify the proper distinctions. In that case, the owner of a convenience store sued Pepsi for, among other things, Pepsi's interference with his contracts with customers. The Court of Appeals granted summary judgment in favor of Pepsi, finding that plaintiff had failed to present sufficient evidence to show the disruption of any existing contracts. The Supreme Court reversed this decision, finding that "the court overlooked the principle that an action for tortious interference with prospective economic advantage may be based on conduct which prevents the making of contracts." *Id.* at 680, 412 S.E.2d at 644. The Court then used the broader category of "business relationships" to encompass the twin components of tortious interference: interference with contract and interference with prospective contract or prospective economic advantage. Therefore, it is sufficient for a party to state a claim for interference with "relations" or "business relations" when referring to interference with existing contracts or the prospective likelihood of future contracts.

{48} Despite this confusion of terms, the elements of the cause of action have been clearly defined. It appears to the court from the complaint filed in this case and the arguments presented on this motion, that plaintiff does not assert a cause of action for interference with specific, existing contracts. Rather, BPS/Sunbelt's claim for interference focuses upon ongoing relationships it has with its customers with whom it expects to contract for their equipment rental needs in the future. Simply put, plaintiff claims that H&E has wrongfully converted to its own advantage BPS/Sunbelt's repeat business and loyal customer base. Therefore, the claim is properly evaluated under the standard for tortious interference with "prospective contract" or "prospective economic advantage."

{49} In a recent opinion, our Court of Appeals summarized from contemporary North Carolina case law the necessary elements of this action:

> An action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiffs from entering into a contract with a third party. *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 680,

412 S.E.2d 636, 644 (1992). In *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945), our Supreme Court stated the following:

> We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant[s'] own rights, but with design to injure the plaintiffs, or gaining some advantage at [their] expense. . . . In *Kamm v. Flink*, 113 N.J.L. 582, 99 A.L.R., 1, 175 A. 62, it was said: "Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results." The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at [their] expense.
>
> 225 N.C. at 506, 35 S.E.2d at 656. Thus, to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in "inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference." *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917, *disc. review denied and appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982).

Walker v. Sloan, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241-42 (2000).

{50} With respect to claims of interference with business relations by competing business entities, our Supreme Court further refined the standard in *Peoples Sec. Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1988). In *Hooks*, the Court affirmed the dismissal under Rule 12(b)(6) of a plaintiff employer's claim that its former employee had unlawfully interfered with the employment contracts of other employees. The *Hooks* court focused on whether the defendants' actions constituting the alleged interference were justified. According to the Court, interference is justified, and therefore privileged, if it can be established that the defendant was acting for a "legitimate business purpose" and not merely motivated by a "malicious wish to injure plaintiff." *Id.* at 221, 367 S.E.2d at 650. The Court also noted that "[n]umerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful." *Id.*

{51} Defendants argue plaintiff has presented insufficient facts to show that defendants maliciously induced BPS/Sunbelt customers not to contract with BPS/Sunbelt, and have failed to

show that, but for this inducement, these customers would have remained with BPS/Sunbelt. Defendants acknowledge that they sought to attract customers of BPS/Sunbelt as well as the customers of other competitors to do business with H&E's Hi-Lift division. They assert, however, that their solicitation of BPS/Sunbelt customers did not exceed the bounds of normal competitive behavior.

{52} As evidence that defendants maliciously induced BPS/Sunbelt' customers to forgo contracts they would have otherwise entered into with BPS/Sunbelt, plaintiff relies primarily on the fact that, coincident with the entry of H&E into the market, customer revenue declined sharply at certain BPS/Sunbelt locations. The fact of this substantial disparity in plaintiff's revenue from one year to the next is circumstantial evidence that more may have been involved than normal competitive behavior. Other evidence in the record that plaintiff argues supports its claim for interference includes: the fact that BPS customer files were missing, customer telephone numbers normally stored in the memory of cell phones issued to former BPS salespersons had been deleted; AWP equipment was not properly tracked and returned to the BPS branch from certain jobsites; that because so many BPS/Sunbelt employees had left their jobs for positions at H&E, plaintiff was unable to properly bill customers, thereby damaging customer relations; and that defendants "engaged in other unethical conduct, spreading rumors about BPS and its acquisition by Sunbelt, all in an effort to create disquiet and insecurity and encourage employees to go to H&E." (Pl.'s Br. Opp'n Summ. J. at 33.)

{53} Taken together, these facts give rise to a genuine issue of material fact as to whether defendants prevented plaintiff from making contracts by means other than legitimate methods of competition.

{54} Plaintiff has also alleged that defendants tortiously interfered with terminable at will contracts between plaintiff and certain of its former employees who departed BPS/Sunbelt for H&E. Our Supreme Court opined in *Hooks* that businesses should be given wide latitude to go about the normal competitive activity of recruiting the most qualified employees:

> [W]e find the well-reasoned opinion of Judge Learned Hand in *Triangle Film Corp. v. Artcraft Pictures Corp.*, 250 F. 981 (2d Cir. 1918) to be persuasive. Judge Hand, writing for the majority in that case, stated that public policy demands that absent some monopolistic purpose everyone has the right to offer better terms to another's employee, so long as the latter is free to leave. *Id.* A contrary result would be intolerable, both to the new employer who could use the employee more effectively and to the employee who might receive added pay. *Id.* To hold otherwise would unduly limit lawful competition. *Id.*
>
> . . . .
>
> The free enterprise system demands that competing employers be allowed to vie for the services of the "best and brightest" employees without fear of subsequent litigation for tortious interference. To restrict an employer's right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work once they accept new employment savors strongly of oppression.

Id. at 222-23, 367 S.E.2d at 651 (citations omitted).

{55} To be sure, the Supreme Court does not overstate the importance of the public policy question implicated under this cause of action. Stifling competition within the pool of the gainfully employed is not contemplated by our laws. Only when competition is itself threatened—by actions taken to further "some monopolistic purpose"—do legal protections obtain. That is the question presented in this case. Plaintiff argues defendants did more than entice away a cadre of its best employees through legitimate recruiting techniques. Instead, plaintiff has forecast evidence which could suggest that defendants were motivated by a desire to eliminate BPS/Sunbelt's ability to compete in certain markets by leaving it without the human resources necessary to carry on basic operations and adequately maintain customer relationships. Defendants admit that at least 69 BPS/Sunbelt employees departed for jobs with H&E within the space of a few months. Included in that figure are a number of employees who, according to plaintiff, played key management roles in the company's operations. The record further reflects that many of these employees took the same or similar positions at H&E's operations in the same markets. This significant transfer of employees and the circumstances surrounding the change may or may not take this case out of the realm of typical marketplace employment activity. When considered in the light most favorable to plaintiff, this gives rise to a genuine issue of material fact that warrants this claim proceeding to trial.

{56} For these reasons, this court will deny defendants' motion for summary judgment on plaintiff's claim for tortious interference with business relations with its customers and employees.

VI

{57} The court will now turn to the issue of whether defendants misappropriated confidential information of BPS/Sunbelt in violation of the North Carolina Trade Secrets Protection Act ("Trade Secrets Act"), N.C.G.S. § 66-152 to -157 (2001). The court will deny defendants' motion for summary judgment on this claim for the reasons set forth below.

{58} Plaintiff claims that defendants used confidential and proprietary information of BPS/Sunbelt when effecting the plan to raid BPS/Sunbelt of its employees and customers. There are several categories of information that plaintiff claims were protected as trade secrets and subsequently misappropriated by defendants, including: information regarding BPS/Sunbelt's personnel, salary information, pricing, organizational structure, financial projections and forecasts, cost information, capital budgets, branch budgets and customer information (including the identity, contacts and requirements of its rental customers).

{59} As set out in section 66-152 of the Trade Secrets Act:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by 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.

{60} When determining whether information is a trade secret, our courts have set out the following factors for consideration:

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

State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 634, 514 S.E.2d 276, 283 (1999) (citing *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 182, 480 S.E.2d 53, 57, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997).

{61} The overwhelming majority of cases in which trade secrets have been found to exist under the Trade Secrets Act and the factors set out in *Wilmington Star News* are easily distinguishable from the present case because those earlier cases almost exclusively involved highly technical information, most often in the areas of consumer and commercial products research and development. *See, e.g., State ex rel. Utilities Comm'n v. 132 N.C. App. 625, MCI Telecomms., Corp.*, 132 N.C. App. 625, 514 S.E.2d 276 (1999); *Bar-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 424 S.E.2d 226 (1993); *Merck & Co. v. Lyon*, 941 F. Supp. 1443 (M.D.N.C. 1996); *Glaxo, Inc. v. Novapharm Ltd.*, 931 F. Supp. 1280 (E.D.N.C. 1996), *aff'd*, 110 F.3d 1562 (Fed. Cir. 1997).

{62} In *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 542 S.E.2d 689 (2001), however, our Court of Appeals applied the Trade Secrets Act to factual circumstances more closely analogous to the present case. In that case, the owner of a small business had kept detailed cost records as to the materials, labor and equipment required for each of its service contracts over a period of seventeen years. The owner used this information to prepare bids for future contracts. While employed for the plaintiff, as the general manager of the business, the defendant used this business information to solicit the plaintiff's customers for a competing business the defendant later opened. The Court of Appeals found that even though this

information may have been ascertainable by anyone in the same type of business, the records qualified as a trade secret. In so finding, the court emphasized the language in the statutory definition that provides "compilation of information, method, technique, or process" as examples of information the Act is intended to protect. *Id.* at 376, 542 S.E.2d at 692. The Court of Appeals also noted that the cost records information would have had potential value to competitors who had not performed similar services for the customers mentioned in the records.

{63} In the present case, plaintiff has forecast sufficient evidence to find that a genuine issue of material fact exists as to whether the business information its employees possessed upon their departure to H&E qualifies as trade secrets under Section 66-152. Business plans, marketing strategies, and customer information represent the type of information that, when accumulated over time, can be extremely valuable to competitors—especially so, when, as reflected in the record in this case, Defendant H&E was new to many of BPS/Sunbelt's markets and would not have been able to readily ascertain this information on its own. Notwithstanding the fact that much of this information was freely available to most employees at BPS/Sunbelt, plaintiff's evidence, when considered in the light most favorable to it, is sufficient to sustain a finding that the confidential information was adequately protected by plaintiff. The BPS/Sunbelt employee handbook mandated that certain business information be kept confidential. Also, access to BPS/Sunbelt customer information stored in computer databases was restricted to authorized personnel with access codes.

{64} Plaintiff has also forecast evidence sufficient to support a finding that, if trade secrets did exist, defendants misappropriated them. Under the Trade Secrets Act, "misappropriation" is defined as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." § 66-152(1). A *prima facie* case of misappropriation is established by introducing substantial evidence that the defendant: "(1) knows or should have known of the trade secret; and (2) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it

without the express or implied consent or authority of the owner." § 66-155. There is no specific requirement that plaintiff show that defendants have disclosed or used the trade secrets, only that they had a specific opportunity to acquire the trade secrets for use or disclosure. Once plaintiff establishes a *prima facie* case, the burden shifts to defendants to show that the trade secret was not acquired improperly.

{65} There are facts in the record that tend to show that plaintiff has made out its *prima facie* case. H&E's significant increase in its customers and its immediate profitability in markets where it had previously not engaged in substantial AWP rental business, along with the concurrent, substantial decrease in BPS/Sunbelt business, is sufficient circumstantial evidence to conclude that a genuine issue of material fact exists as to whether the individual defendants knew BPS/Sunbelt's trade secrets and had access to them as well as the opportunity to acquire them for disclosure and use.

{66} For these reasons, defendants' motion for summary judgment on plaintiff's claim alleging violation of the Trade Secrets Act will be denied.

VII

{67} The court next reviews plaintiff's claim that defendants violated North Carolina's Unfair Trade Practices Act, N.C.G.S. § 75-1.1 to -89 (2001). The Act declares unlawful all "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . ." § 75-1.1. In order to establish a violation of this section, plaintiff must meet a three-pronged test: (1) there must be a showing of an unfair or deceptive act or practice, or an unfair method of competition; (2) in or affecting commerce; (3) which proximately caused actual injury to the plaintiff. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998); *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 503 S.E.2d 401 (1998), *cert. denied*, 351 N.C. 41, 519 S.E.2d 314 (1999). With respect to the first prong, there are two distinct components: The language in the statute referring to "unfair or deceptive acts or

practices" concerns only consumers and businesses not in a competitive relationship. When, as in the present case, the activity of two competing businesses is at issue, the appropriate inquiry is whether there has been a showing of "unfair methods of competition."

{68} The statute itself does not define what conduct constitutes unfair methods of competition. Nor have the North Carolina courts articulated a precise definition, employing a case-by-case approach instead:

> Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair . . . ." Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended actual effects upon others.

McDonald v. Scarboro, 91 N.C. App. 13, 18, 370 S.E.2d 680, 684, quoting, *Harrington Manufacturing Co. v. Powell Manufacturing Co*., 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469, *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

{69} The statute was created to provide an additional remedy apart from those less adequate remedies afforded under common law and statutory causes of action. *See Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E.2d 582, *cert. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). As a result, our courts have had the opportunity to find that if a party is able to maintain a claim for certain causes of action, a claim may also be had under Section 75-1.1. At least two of the claims plaintiff has brought in this case fall into this category.

{70} The regulatory acts contained in Chapter 66 of the North Carolina General Statutes explicitly provide that a violation of its provisions constitutes a violation of Section 75-1.1 as well. Violations of those acts are charged in this case. The North Carolina Trade Secrets Protection Act, though among the regulatory laws of Chapter 66, does not so provide. Our courts, however, have found that a violation of the Trade Secrets Act may also be a violation of Section 75-1.1. In *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 423 S.E.2d 324 (1992), the Court of Appeals, after noting the requirements for a finding of liability

under Section 75-1.1, found that "[i]f the violation of the Trade Secrets Protection Act satisfies this three prong test, it would be a violation of N.C. Gen. Stat. § 75-1.1." *Id*. at 172, 423 S.E.2d at 326.

{71} Our courts have also found that claims for tortious interference with business relations violate Section 75-1.1. In *Roane-Barker v. Southeastern Hospital Supply Corp*., 99 N.C. App. 30, 392 S.E.2d 663 (1990), the plaintiff brought a suit against a competitor alleging interference with contract and unfair and deceptive trade practices under Section 75-1.1. The Court of Appeals concluded that by recruiting and hiring plaintiff's employees, soliciting plaintiff's customers and further inducing the salesmen to interfere with plaintiff's existing accounts, defendants had tortiously interfered with contracts or prospective contracts. *Id.* at 39, 392 S.E.2d at 669. The court then found that this tortious interference with contract was also violative of Section 75-1.1.

{72} In other cases as well, our courts have found that various types of claims for tortious interference with business relations also state claims under Section 75-1.1. *See, e.g., McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680, *rev. denied*, 323 N.C. 476 (1988).

{73} Plaintiff has asserted claims for violation of the Trade Secrets Act and for tortious interference with business relations. As explained in the two preceding sections of this opinion, this court has found that plaintiff has forecast sufficient evidence to warrant those issues proceeding to trial. Therefore, in light of our appellate courts' rulings that both of these causes of action may also implicate violations of the Unfair Trade Practices Act, this court is not in a position to undertake the factual inquiry necessary to resolve plaintiff's Section 75-1.1 claim on this summary judgment motion. This court's findings on this claim will depend upon its findings with respect to the trade secrets and tortious interference claims.

{74} For these reasons, this court will deny defendants' motion for summary judgment on plaintiff's claim alleging violation of Section 75-1.1 of the Unfair Trade Practices Act.

VIII

{75} The court now turns to plaintiff's claim alleging defendants committed wrongful acts pursuant to a conspiracy. A claim for civil conspiracy "requires the showing of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way that results in damages to the claimant." *Dalton v. Camp*, 138 N.C. App. 201, 213, 531 S.E.2d 258, 266 (2000), *rev'd on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001); *see also Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 373, 555 S.E.2d 634, 642 (2001). Plaintiff must also present evidence of an "overt act" committed by at least one conspirator committed in furtherance of the conspiracy. *Dalton*, 138 N.C. App. at 212, 531 S.E.2d at 267. If a party makes this showing, all of the conspirators are jointly and severally liable for the act of any one of them done in furtherance of the conspiracy. *Id.; see also Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981).

{76} Circumstantial evidence may suffice to prove an action for civil conspiracy. *Dalton*, 138 N.C. App. at 214, 531 S.E.2d at 267. Sufficient evidence must exist, however, "to create more than a mere suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. Plaintiff's claim for conspiracy relies on the essential facts upon which its other claims are based—that is, the overarching allegations of an "unlawful plan." In light of this court's previous discussion of these issues and the key material facts that remain disputed, summary judgment on this claim is not warranted. Plaintiff has forecast sufficient evidence to overcome the requirement of an "overt act" by one of the defendants in furtherance of the conspiracy—the individual defendants' departure from BPS/Sunbelt and the solicitation and departure of many more BPS/Sunbelt employees is clearly a matter of record in this case. Plaintiff has also met the requirement that the allegations be grounded upon more than mere suspicion or conjecture—the substantial shift of employees from BPS/Sunbelt to H&E is sufficient circumstantial evidence to suggest that the actions alleged

were part of a larger overall plan to cripple or eliminate BPS/Sunbelt as a competitor in the AWP business.

{77} For these reasons, this court will deny defendants' motion for summary judgment on plaintiff's claim alleging the commission of wrongful acts pursuant to a conspiracy.

IX

{78} As an affirmative defense, defendants argue that the doctrine of laches bars all of plaintiff's equitable and legal claims. According to our Supreme Court,

> In equity, where lapse of time has resulted in some change in the condition of the property or the relations of the party which would make it unjust to permit prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Taylor v. Raleigh, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976).

{79} The mere passage or lapse of time is not sufficient to support a finding of laches. Claims will be barred by laches only when the delay is shown to have been unreasonable and worked to the disadvantage, injury, or prejudice of the person seeking to invoke it. *Id*. at 622-23, 227 S.E.2d at 584-85. Defendant bears the burden of proof in pleading this defense. *Scott Poultry Co. v. Bryan Oil Co*., 272 N.C. 16, 22, 157 S.E.2d 693, 698 (1967). As with other claims, summary judgment may be granted in favor of a defendant raising laches only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that party is entitled to summary judgment as a matter of law." *Thompson v. Three Guys Furniture Co*., 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996).

{80} As a general rule in North Carolina, laches is an equitable defense and therefore may not be asserted with respect to actions at law. *Coppersmith v. Upton*, 228 N.C. 545, 548 S.E.2d 565, 566 (1948) (citing *U.S. v. Mack*, 295 U.S. 480 (1935)). Defendants have cited some general authority outside this jurisdiction that indicates some courts have been willing to apply the doctrine of laches to legal as well as equitable claims.

{81} Regardless of whether laches is expanding beyond equity into the realm of legal questions, the court finds that defendants have failed to meet their burden of proof to sustain barring plaintiff's claims on the grounds of laches. Plaintiff filed this action on July 13, 2000. The unlawful plan alleged by plaintiff began to unfold eight months prior when Mr. Hepler and Mr. Kline left their positions at BPS/Sunbelt. Many more BPS/Sunbelt employees followed suit in early 2000. This wave of employee departures coincided with the purchase of BPS by Sunbelt.

{82} These facts, when considered in the light most favorable to plaintiff, do not reflect that there was an unreasonable delay in the initiation of this action. The complaint sets forth claims that concern allegations of unlawful acts that were planned and executed over an extended period of weeks. If a plan of that magnitude did exist, it is only natural to expect that its victims would not be able to discern its full form and extent without the hindsight gained by the passage of time. Additionally, the fact that plaintiff was undergoing a fundamental corporate change because of the BPS acquisition during this same time period mitigates against a finding of unreasonable delay. Defendants have offered no proof that they have been disadvantaged or prejudiced by the delay in the commencement of this action other than that they "expended untold hours in an effort to sustain and build their business" in the interval in question, and that "if BPS/Sunbelt would have filed suit when Defendants began the lawful competition . . . the scale of its lawsuit would have required only a fraction of the time and expense the Defendants have had to expend defending this lawsuit." (Def.'s Mem. Supp. Mot. Summ. J. 32-33.) As noted above, the nature of the claims brought by plaintiff are such that it would have been difficult to fully comprehend the type and extent of possible damage until some period of time

had elapsed. Defendants' claim of disadvantage and prejudice are therefore insufficient to sustain its assertion of laches.

{83} For these reasons, the court will deny defendants' motion for summary judgment on the affirmative defense that plaintiff's claims are barred by laches.

X

{84} The court has not made any finding of fact in ruling on this motion. It has only determined that genuine issues of material fact exist which are more appropriately determined at trial. Nor has the court concluded that there is any liability arising from defendants' actions. It has only determined that such determinations are best made at trial than at summary judgment.

{85} For the reasons set forth above, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Defendants' motion for summary judgment on plaintiff's claim for breach of fiduciary duty is granted.
2. Defendants' motion for summary judgment on plaintiff's claim for aiding and abetting breach of fiduciary duty is granted.
3. Defendants' motion for summary judgment on plaintiff's claim for tortious interference with business relations is denied.
4. Defendants' motion for summary judgment on plaintiff's claim for violations of the North Carolina Trade Secrets Protection Act is denied.
5. Defendants' motion for summary judgment on plaintiff's claims for violation of the North Carolina Unfair Trade Practices Act is denied.
6. Defendants' motion for summary judgment on plaintiff's claim that defendants committed wrongful acts pursuant to a conspiracy is denied.

7. Defendants' motion for summary judgment on all of plaintiff's claims pursuant to the doctrine of laches is denied.

This the 10th day of July 2002.

Ben F. Tennille
Special Superior Court Judge
for Complex Business Cases