Actions for Preliminary Injunctive Relief To Enforce Restrictive Covenants and Trade Secrets

Chief Judge John C. Martin,
North Carolina Court of Appeals

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I. Introduction

This paper examines claims based on covenants not to compete, non-solicitation agreements, confidentiality agreements, and trade secrets as they typically arise in the trial courts via a motion for preliminary injunctive relief. It seeks to summarize the North Carolina appellate precedent, which is more extensive in the context of restrictive contracts than in the context of trade secret misappropriation, where a trial court may often further look to decisions in other

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jurisdictions decided pursuant to the Uniform Trade Secrets Protection Act, but with caution to be sensitive to differences between the Uniform Act and North Carolina's statute.

In addition to summarizing the controlling North Carolina appellate precedents, the paper also notes various cases which have been addressed in reported dispositions of cases before the North Carolina Business Court. While these decisions are not precedential, *Estate of Browne v. Thompson*, 727 S.E.2d 573, 576 (N.C. Ct. App. 2012), they may be illustrative of how different factual scenarios arising in trial courts require application of the binding appellate precedent discussed in this paper. Likewise, the discussion includes federal court decisions applying North Carolina law, which may be persuasive but not binding. *Dep't of Transp. v.* Rowe, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001).

The paper will first address substantive law related to the various claims. It will then address issues pertinent to the particular injunctive relief being sought.

II. Covenants Not to Compete

Covenants against competition are found in employment agreements, franchise agreements, or agreements to sell a business. At least in the employment context, covenants not to compete are generally disfavored in modern law, *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 282, 530 S.E.2d 878, 881 (2000), but the courts will enforce them when drafted in accordance with recognized guidelines, *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). Those guidelines may be less restrictive outside the employment context. *See, e.g., Outdoor Lighting Perspectives Franchising v. Harders,* ___ N.C. App. ___, 747 S.E.2d 256, 262–63 (N.C. Ct. App. 2013).

In the employment context, a covenant not to compete is valid if it is: (1) in writing; (2) entered into as part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) not against public policy. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649–50, 370 S.E.2d 375, 380 (1988). In a contract for the sale of a business, a restrictive covenant is valid if it (1) is reasonably necessary to protect the legitimate interest of the purchaser; (2) is reasonable with respect to both time and territory; and (3) does not interfere with the interest of the public. *Outdoor Lighting*, ___ N.C. App. at ___, 747 S.E.2d at 262 (quoting *Jewelry Box Stores Corp. v. Morrow*, 272 N.C. 659, 662–63, 158 S.E.2d 840, 843 (1968)). These requirements can be synthesized into the following requirements for a valid covenant: It must be: (1) in writing; (2) supported by consideration; (3) reasonable as to time and territory; (4) necessary to protect the covenantor's legitimate business interests; and (5) not otherwise against public policy. *See, e.g.*, *Kuykendall*, 322 N.C. at 648, 649–50, 370 S.E.2d at 379–80; *Outdoor Lighting*, ___ N.C. App. at ___, 747 S.E.2d at 262–63. This section will discuss each element of the synthesized rule below.

A. In Writing

A statute governs the requirement that a covenant not to compete be in writing. A contract "limiting the right of any person to do business in the state of North Carolina" must be (1) in writing and (2) "duly signed by the party who agrees not to do any such business within such territory." N.C. Gen. Stat. § 75-4 (2013). This statute, like other statute of frauds provisions, requires only that the party against whom enforcement is sought sign the writing. *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 519–20, 257 S.E.2d 109, 113 (1979). Thus, to satisfy the writing requirement, a covenant not to compete must be signed by the employee but need not be signed by a corporate officer. *Id.* at 520, 257 S.E.2d at 114.

A court may consider extrinsic evidence to clarify whether the agreement was signed. *New Hanover Rent-A-Car, Inc. v. Martinez*, 136 N.C. App. 642, 645-46, 525 S.E.2d 487, 490 (2000). For example, *New Hanover Rent-A-Car* considered extrinsic evidence when the employee had printed her name in the text of the non-compete agreement but failed to sign the agreement on the signature line. *Id.* at 646, 525 S.E.2d at 490. Because the court concluded that the employee likely did not sign the agreement because she signed everywhere else she was supposed to in the agreement, but not the non-compete provision, it refused to grant a preliminary injunction. *Id.* at 647, 525 S.E.2d at 491.

B. Supported by Consideration

A covenant not to compete is supported by consideration if it is entered into as part of an employment agreement. *See James C. Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964). Likewise, the promise of new employment can also serve as valuable consideration to an otherwise valid covenant. *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 123, 392 S.E.2d 446, 448 (1990) (citing *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E.2d 427 (1974), *cert. denied*, 286 N.C. 421, 211 S.E.2d 802 (1975)).

Timing, however, is important. Although consideration exists when a covenant is entered into as part of the initial employment agreement, mere continued employment cannot satisfy the requirement of consideration. When the employer-employee relationship already exists, any subsequent noncompete agreement must be supported by new consideration. *James C. Greene Co.*, 261 N.C. at 168, 134 S.E.2d at 167. Such new consideration, for example, may take the form of an increase in pay or a new job assignment. *Reynolds & Reynolds Co. v. Tart*, 955 F. Supp. 547, 553 (W.D.N.C. 1997). Changes to the employment agreement must be significant to provide consideration because eligibility for discretionary raises, without more, is insufficient consideration. *Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E.2d 528 (1973). As long as the covenant is part of the initial terms of employment it does not have to be signed contemporaneously with the employment contract. This is because consideration may support a covenant not to compete signed after the employee has started work if the covenant was part of the original verbal employment contract. *Young*, 99 N.C. App. at 123, 392 S.E.2d at 448 (1990) (citing *Robins & Weill v. Mason*, 70 N.C. App. 537, 542, 320 S.E.2d 693, 697 *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984)). The employee must agree to the terms of the restrictive covenant, not simply agree generally to a restrictive covenant, to provide adequate consideration for the verbally-agreed-upon covenant. *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 293 (1989).

When a corporate successor inherits a covenant, issues may arise regarding the assignability of the restrictive covenant. As a general rule, a covenant not to compete is assignable under North Carolina law as long as it protects (1) an employer's capital investment in its employee, and (2) against the risk of that investment being "pawned off" to a competitor. *Keith v. Day*, 81 N.C. App. 185, 195, 343 S.E.2d 562, 568 (1986).

Whether the business acquisition is structured as a purchase of assets or an acquisition of equity may impact the assignability of covenants. Under North Carolina law, an asset purchase will terminate all existing employment relationships, but the acquiring company and employees may enter into new employment contracts, which will provide adequate consideration for a new covenant not to compete. *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 597, 632 S.E.2d 563, 571 (2006). The Business Court, in reliance on *Calhoun*, has allowed a "new" employer in an asset purchase to elect whether to (1) seek to enter into a new covenant, or (2) enforce the original restrictive covenant, which will start running at the time of the asset sale.

Covenant Equip. Corp. v. Forklift Pro, Inc., 2008 NCBC LEXIS 12, at *25–*26 (N.C. Super. Ct. May 1, 2008); *Better Bus. Forms & Prods., Inc. v. Craver*, 2007 NCBC LEXIS 34, at *4 (N.C. Super. Ct. Nov. 1, 2007). When a company is acquired through an acquisition of equity, the Business Court has indicated that the rule is different but the appellate courts have not addressed this issue. *See Amerigas Propane, L.P. v. Coffey*, 2014 NCBC LEXIS 4, at *10 (N.C. Super. Ct. Feb. 11, 2014); *Better Bus. Forms & Prods., Inc.*, 2007 NCBC LEXIS 34, at *21.[2]

C. Reasonable as to time and territory

A covenant's time and territory restrictions must be reasonable, but there is no bright-line rule to determine reasonableness. North Carolina courts consider the combined effect of the time and territory restrictions, so a longer period of time paired with a small geographic restriction may be acceptable, and *vice versa*. *Farr Assocs., Inc.*, 138 N.C. App. at 280, 530 S.E.2d at 881. A court decides the reasonableness of a covenant not to compete as a matter of law. *Outdoor Lighting*, ___ N.C. App. at ___, 747 S.E.2d at 264 (citing *Beasley v. Banks*, 90 N.C. App. 458, 460, 368 S.E.2d 885, 886 (1988)).

Courts scrutinize the reasonableness of time and territory restrictions differently depending on the context of the covenant not to compete. In the employment scenario, courts consider the following relevant factors:

> (1) the area or scope of the restriction; (2) the area assigned to the employee; (3) the area in which the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

[2] For convenience, a reader might consult *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 41 (N.C. Super. Ct. Nov. 3, 2011), where the Business Court sought to summarize both North Carolina and Delaware precedents to evaluate different covenants arising out of an asset sale and a new company formed by several former employees.

Outdoor Lighting, ___ N.C. App. at ___, 747 S.E.2d at 263 (quoting *Clyde Rudd & Assocs., Inc.*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (1976)). In the employment context, our courts have created a soft rule that a five-year restriction is the "outer boundary" of reasonableness that may be supported by special circumstances. *Farr Assocs., Inc.*, 381 N.C. App. at 280, 530 S.E.2d at 881; *but see Eng'g Assocs., Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966) ("in some instances and under extreme conditions five years would not be held to be unreasonable."). Thus, most of the time a five-year or longer time restriction will be unreasonable.

In contracts for the sale of a business, North Carolina courts consider issues of goodwill in addition to geographic area and duration when determining a restrictive covenant's reasonableness. *See, e.g.*, *Jewelry Box Stores Corp.*, 272 N.C. at 662–65, 158 S.E.2d at 843–44. Goodwill is a "business's reputation, patronage, and other intangible assets that are considered when appraising the [value of a] business." *Black's Law Dictionary* 715 (8th Ed. 2004). Courts recognize that a business owner acquires a property interest in its goodwill, and that this property interest is unmarketable unless the owner is free to sell his interest by placing restrictions on his ability to diminish the value of these intangible assets by entering into a restrictive convent. *Jewelry Box Stores Corp.*, 272 N.C. at 663, 158 S.E.2d at 843 ("the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time.") (quoting *Kramer v. Old*, 119 N.C. 1, 8, 25 S.E. 813, 813 (1896)). North Carolina courts have upheld non-compete agreements accompanying the sale of a business, for ten, fifteen, and twenty years, as well as for the lifetime of the seller. *Id.* at 663–64, 158 S.E.2d at 843–44 (collecting cases).

Covenants not to compete may not fit neatly into either the employment or business sale scenario; the most common such example is a restrictive covenant contained in a franchise agreement. *See, e.g.*, *Outdoor Lighting*, ___ N.C. App. at ___, 747 S.E.2d at 262–63 (collecting examples of restrictive covenants involving partnerships, venture capital purchases, and independent contractors). The franchisor-franchisee relationship is a hybrid situation, because it is both an employer-employee relationship, where the employee is less dependent on the employer, and a business to business agreement, where the franchisee contributes to the accumulation of goodwill by the franchisor. *Id.* at ___, 747 S.E.2d at 263. Recognizing this unique relationship, a court should determine the reasonableness of the covenant by considering:

> the extent to which the non-competition provision contained in the franchise agreement is no more restrictive than necessary to protect the legitimate interests of the franchisor, with the relevant factors to be considered in the making of this determination to include the reasonableness of the duration of the restriction, the reasonableness of the geographic scope of the restriction, and the extent to which the restriction is otherwise necessary to protect the legitimate interests of the franchisor.

Id. at ___, 747 S.E.2d at 264.

When a court reviews the scope of any restrictive covenant it applies a balancing test. Restrictions "must be no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford Cnty., Inc.*, 42 N.C. App. at 521, 257 S.E.2d at 114. For example, a covenant that prevents a former employee from working in any field, even those unrelated to his former employment, within a geographic area would be unreasonable. *See, e.g.*, *CopyPro, Inc. v. Musgrove*, ___ N.C. App. ___, 754 S.E.2d 188, 192 (N.C. Ct. App. 2014) (collecting cases). Also, a nationwide limitation on a former employee's ability to work in a field is generally unreasonable unless the "company is actually engaged in nation-wide activities[.]" *Harwell Enters., Inc. v. Heim*, 276 N.C. 475, 481, 173 S.E.2d 316, 320 (1970).

1. "Look back" Provisions

A restrictive covenant may be said to "look back" when its terms refer to activities in the period preceding termination of employment. In certain instances, the "look-back" period must be added to the duration of the covenant after termination of employment to determine the covenant's true duration. *Farr Assocs., Inc.*, 138 N.C. App. at 277–78, 280, 530 S.E.2d at 880–81 (prohibiting the employee from rendering service to anyone who was a client or customer of the employer during the two-year period preceding termination). The Business Court addressed these precedents in different factual scenarios in *Akzo Nobel Coatings, Inc.*, 2011 NCBC LEXIS 42, at *36, and *Wachovia Ins. Servs., Inc. v. McGuirt*, 2006 NCBC LEXIS 25, at *28–*29 (N.C. Super. Ct. Dec. 19, 2006).

2. Prohibition on "Blue Penciling" and Use of the "Cascading Approach"

When a covenant not to compete is overly broad and therefore unenforceable, North Carolina has a strict policy against "blue penciling," which is revising or rewriting the covenant to make it reasonable. *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920. In order to mitigate the severity of the prohibition against blue penciling, modern non-compete agreements take a "cascading approach" to geographical restrictions, which consists of separately stated geographical restrictions intended to invite a court to choose the acceptable restriction and enforce only that restriction. To support this approach, parties rely on the rule that, "a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in divisions deemed unreasonable." *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (Bobbit, J., dissenting) (holding that a geographic restriction to the town of Fayetteville was reasonable, but refusing to enforce the restriction in "any city or town in the

United States in which the plaintiff is doing, or intends to do business"); *but see Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45, 50–51, 345 S.E.2d 692, 696 (1986) (declining to limit the geographical restriction in a covenant nearly identical to the one in *Pender* because of insufficient testimony).

An example of this approach is found in *Akzo Nobel Coatings, Inc.*, 2011 NCBC LEXIS 42, at *15, where the non-compete clause contained the following geographical provisions:

> 1. All portions of the North American continent.
> 2. All portions of the United States of America.
> 3. All states in which the employee conducted business or contacted current or potential customers during the year preceding the termination of Employee's Employment with the Company.
> 4. Within two hundred miles of all home offices to which the Employee was assigned for a period of at least one week during the year preceding the termination of Employee's employment with the Company.

Another way parties can avoid the prohibition on "blue penciling" is to agree that another jurisdiction's law govern the contract. The law of the place where the contract was made ordinarily governs interpretation of a contract, but the parties may agree that the laws of a different jurisdiction apply. *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). A choice-of-law provision will not be honored if (1) the chosen jurisdiction has no substantial relationship to the parties or the transaction or (2) the chosen jurisdiction's law is contrary to a fundamental public policy of North Carolina. *Cable Tel Servs. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 642–43, 574 S.E.2d 31, 33–34 (2002). In North Carolina, foreign law conflicts with public policy when it violates only a "prevalent conception of good morals[,]" a "fundamental principal of natural justice[,]" or "would involve [an] injustice to the people" of North Carolina. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 857–58 (1988). Importantly, such public policy conflicts typically exist in cases only concerning "prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor." *Id.* at 342, 368

S.E.2d at 858. When choice-of-law rules mandate the application of foreign law, courts may not disregard that decision on public policy grounds merely because the law of North Carolina differs from that of another jurisdiction. *Id.* at 342, 368 S.E.2d at 857.

Courts will honor choice-of-law provisions in covenants not to compete. *See Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999). The Court of Appeals has applied the law of Texas, as chosen in a choice-of-law clause, which allows for the blue-penciling of restrictive covenants. *Redlee/SCS, Inc. v. Pieper,* 153 N.C. App. 421, 426, 571 S.E.2d 8, 13 (2002) (affirming as enforceable a restrictive covenant, governed by Texas law, which the trial court blue-penciled according to Texas law). *Redlee/SCS, Inc.*, however, did not address whether honoring the choice of law provision would violate a fundamental public policy of North Carolina by circumventing the prohibition on blue penciling.

D. No broader than necessary to protect the employer's interest

As stated above, a covenant not to compete is valid when its restrictions are "no wider in scope than is necessary to protect the business of the employer." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004) (quoting *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979)).[3] A court's determination of whether the scope of the restriction is reasonable is a fact-specific inquiry. To make this determination, the court considers two separate and distinct business concerns which give an employee an unfair advantage when engaged in a competing business: (1) whether the employee will acquire valuable information "as to the nature and character of the business and the names and requirements of the patrons or customers," or (2) whether the employee will be creating

[3] Because the covenantor's legitimate business interests are weighed against the scope of the restrictions, some of the discussion *supra* in Section I.B. is relevant here.

customer relationships that need to be protected. *Kuykendall*, 322 N.C. at 650, 370 S.E.2d at 380.

In rare circumstances, an employer may have a legitimate business interest in prohibiting employment of *any* kind by a former employee with a competitor. *See, e.g.*, *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 639, 568 S.E.2d 267, 273 (2002). *Precision Walls, Inc.* reasoned that the defendant would feel the same pressure to disclose competitive information if he worked for one of the plaintiff's competitors no matter what capacity he worked in. *Id.* However, the Court of Appeals has declined to extend this rule in factually distinguishable cases. *See CopyPro, Inc.*, ___ N.C. App. at ___, 754 S.E.2d at 194–95 (N.C. Ct. App. 2014); *VisionAIR, Inc.*, 167 N.C. App. at 509 n.1, 606 S.E.2d at 362 n.1 (2004).

Courts should carefully review non-compete agreements with the language "directly or indirectly" in their restrictions because these terms may make the covenant broader than necessary to protect the employer. For example, a clause stating that an employee could not "own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer's" is broader than necessary because it prevents the employee from doing even wholly unrelated work for a competitor. *VisionAIR, Inc.*, 167 N.C. App. at 508–09, 606 S.E.2d at 362 (noting additionally that the language would prevent the employee from even holding an interest in a mutual fund that invested in a business doing similar work); *Horner Int'l Co. v. McKoy*, ___ N.C. App. ___, 754 S.E.2d 852, 857 (N.C. Ct. App. 2014) (holding that a non-compete which prohibited the employee from having an indirect financial interest in a competing business was overbroad).

E. Not otherwise against public policy

In the past, courts heavily relied on the not otherwise against public policy element to invalidate covenants not to compete because, as restraint on trade, they offended public policy. *Kuykendall*, 322 N.C. at 648, 370 S.E.2d at 379. Over time, however, courts began classifying restrictive covenants as only partial restraints on trade that could be enforceable. *Id.* at 648–49, 370 S.E.2d at 379–80. Courts now use the public policy element to consider policies that both encourage and discourage the enforcement of a covenant not to compere. For example, a court may now enforce a covenant based on the public policy of ensuring the enforcement of valid contracts. *Beam v. Rutledge*, 217 N.C. 670, 673, 9 S.E.2d 476, 478 (1940).

Public policy concerns are particularly relevant in medical contracts. For example, a covenant not to compete will violate public policy if its enforcement could create potential harm to the public health. *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 27, 373 S.E.2d 449, 453 (1988). In making this determination, a court will consider factors relevant to medical care like the supply of specialists in the field, the potential for a monopoly and increased fees, the availability of physicians in case of emergencies, and patients' interest in being able to choose a physician. *Statesville Med. Grp., P.A. v. Dickey*, 106 N.C. App. 669, 673, 418 S.E.2d 256, 259 (1992).

There are two noteworthy examples of North Carolina courts invalidating non-compete agreements as against public policy. First, noncompetition agreements will not be enforced when they are merely intended to inhibit normal competition. *Starkings Court Reporting Servs., Inc. v. Collins*, 67 N.C. App. 540, 542, 313 S.E.2d 614, 616 (1984) (holding that a restrictive covenant prohibited normal competition when the defendant was purely an independent contractor and had no access to trade secrets or unique information); *see also Kadis v. Britt*, 224

N.C. 154, 29 S.E.2d 543 (1944). Second, public policy may militate against enforcing a noncompetition agreement assigned to a third party through a bankruptcy sale. *E.g.*, *Better Bus. Forms & Prods.*, 2007 NCBC LEXIS 34, *10–*18.

The Business Court addressed these public policy considerations in the unusual context of covenants that had been assigned multiple times. There, the employee's noncompetition agreement was sold to another company in a sale of assets and was later sold to the plaintiff company at a bankruptcy auction. *Id.* at *3–*5. As this issue has not yet been addressed directly by the appellate courts, the court carefully considered *Keith*, 81 N.C. App. 185, 343 S.E.2d 562 (1986) and *Reynolds & Reynolds Co.*, 955 F. Supp. 547 (W.D.N.C. 1997), and then found that under those particular facts, allowing assignability of restrictive covenants in bankruptcy sales would extend the policy allowing assignment beyond reasonable bounds.

II. Covenants Not to Solicit

The elements for a covenant not to solicit are the same as the elements for a covenant not to compete. *See, e.g.*, *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 468–69, 556 S.E.2d 331, 335–36 (2001) (applying the non-compete test to a non-solicitation clause); *Akzo Nobel Coatings, Inc.*, 2011 NCBC LEXIS 42, at *30–*31. Covenants not to solicit tend, however, to be more easily enforced because their restraints on employees are more tailored and less onerous. *See*, *e.g.*, *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 673 (M.D.N.C. 2009) (citing generally *Kuykendall* for the proposition that non-solicits are deemed *per se* reasonable).

Non-solicit agreements generally come in two types, agreements not to solicit customers and agreements not to solicit employees. *See, e.g., Wade S. Dunbar Ins. Agency, Inc.*, 147 N.C. App. at 465, 556 S.E.2d at 333 ("[Employee] will not solicit any customers of [Employer] who have an active account with [Employer] at the time of termination or any prospective client whom [Employee] has solicited within six months preceding the date of termination"); *Precision Walls, Inc.*, 152 N.C. App. at 632, 568 S.E.2d at 269 ("[During the restricted period,] Employee will not…[s]olicit for employment or employ any Company Employee or otherwise induce any Company Employee to terminate his employment with the Company.").

The most critical inquiries when a court evaluates the reasonableness of a covenant not to solicit are the provisions related to time, geography, and scope of the covenant. Because the requirements for non-competition and non-solicitation agreements are the same, this section will only briefly highlight a few considerations unique to non-solicitation agreements.

The five-year outer boundary for covenants not to compete applies equally to covenants not to solicit. *See Farr Assocs., Inc*, 138 N.C. App. at 280, 530 S.E.2d at 881 (2000). Because covenants not to solicit are often client-focused, look-back provisions will typically lengthen the effective duration of the restriction. *See, e.g., Farr Assocs., Inc.*, 138 N.C. App. at 281, 530 S.E.2d at 882 (adding the two-year look-back period to the three year post-termination restriction).

North Carolina's Supreme Court has recognized the validity of geographic restrictions that are limited not by area but by client base. *Kuykendall*, 322 N.C. 643, 370 S.E.2d 375. When the territorial reach of a restrictive covenant is client-based, the employer "must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships." *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. A court may hold that a client-based restriction that fails to define the terms “client” or “customer” is unenforceable. *Farr Assocs., Inc.*, 138 N.C. App. at 282, 530 S.E.2d at 882 (holding as unenforceable a non-solicitation agreement that failed to define the term “client” or “customer” when the employer had approximately 461 offices in 41 states and four foreign countries); *see also MJM Investigations, Inc. v. Sjostedt*, No. COA09-596, 2010 N.C. App. LEXIS 1280, at *10–*11 (N.C. Ct. App. July 20, 2010) (holding as unenforceable a non-solicit covenant when the employer submitted after issuance of a preliminary injunction a list of 800 businesses it considered “current or prospective clients”).

Courts consider the same six factors listed in Section I.C. above when assessing the reasonableness of the geographic restriction, with perhaps more emphasis on the company’s need to protect its client base. For example, the company in *Hartman* failed to justify the broad geographic scope of the non-solicitation covenant because at trial the company presented evidence of only “two or three” clients in some states and failed to prove the number of its clients in other states. 117 N.C. App. at 313–14, 450 S.E.2d at 917–18.

Also, non-solicitation agreements must be no greater in scope than necessary to protect the legitimate business interests of the employer. Generally, a covenant which prohibits a former employee from soliciting future or prospective customers with whom the employee has had no personal contact during employment fails as unnecessary to protect the legitimate business interests of the employer. *Farr Assocs., Inc.*, 138 N.C. App. at 281–82, 530 S.E.2d at 882. However, a restrictive covenant may successfully prohibit solicitation of prospective customers when the covenant includes only those prospective customers whom the employee had contacted. *Wade S. Dunbar Ins. Agency, Inc.*, 147 N.C. App. at 469, 556 S.E.2d at 335 (upholding a covenant prohibiting employee from soliciting all active customers and prospective customers whom employee had solicited within the six months prior to his departure).

III. Confidentiality Agreements

A confidentiality agreement is an agreement that prevent the parties to the agreement from disclosing specified information. Confidentiality agreements may be for an unlimited time and area if a legitimate business interest is protected. *Chemimetals Processing, Inc. v. McEneny*, 124 N.C. App. 194, 197, 476 S.E.2d 374, 376–77 (1996). Because confidentiality agreements do not "prevent a party from engaging in a similar business in competition with" another party, courts more readily enforce them. *See id.*; *see also Static Control Components, Inc. v. Darkprint Imaging, Inc.*, 135 F. Supp. 2d 722, 730 (M.D.N.C. 2001). Nonetheless, courts are less likely to enforce confidentiality agreements that use expansive definitions of "confidential information." *See Chemimetals Processing, Inc.*, 124 N.C. App. at 196, 476 S.E.2d at 376 (noting restrictions limited right to manufacture or attempt to recreate products or processes within specific product line and right to disclose information or trade secrets regarding the product line); *McElmurry v. Alex Fergusson, Inc.*, 1:04CV389, 2006 U.S. Dist. LEXIS 10760, at *41–46 (M.D.N.C. Mar. 8, 2006) (upholding confidentiality agreement limiting use or disclosure of formulas or proprietary knowledge concerning the same or similar products).

IV. Trade Secrets

The North Carolina Trade Secret Protection Act ("TSPA") prohibits the "acquisition, disclosure, or use of a trade secret" without the express or implied consent of the owner. N.C. Gen. Stat. § 66-152(1) (2013). This statute is based on but varies in some respects from the Uniform Trade Secrets Protection Act. The term "owner" is not defined in the statute. North Carolina's statute varies from the Uniform Trade Secrets Protection Act ("UTSA"), which affords the right to bring actions to a "complainant." UTSA § 3(a). The Business Court is presently asked in a pending case to determine that an "owner" does not include a "licensee." There is no North Carolina appellate opinion addressing the issue, but the North Carolina Pattern Jury Instructions for Civil Cases note that it presumably "owner" would be interpreted broadly enough to include a bona fide licensee. N.C.P.I. Civil. 813.92 n. 2.

A. Existence of Trade Secret

"Trade secret" is defined broadly to include eight general categories of information. N.C. Gen. Stat. § 66-152. The TSPA defines a "trade secret" as:

> 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.

§ 66-152(3). To determine if something satisfies the definition of a trade secret, courts consider six factors:

> (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 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.

Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc., 125 N.C. App. 174, 180–81, 480 S.E.2d 53, 56 (1997); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (citations and internal quotation marks omitted) ("To determine what information should be treated as a trade secret, a court should consider [these six] factors[.]"); *see also Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC,* 174 N.C. App. 49, 53, 620 S.E.2d 222, 226 (2005) (factors are to be considered when determining whether an item is a trade secret); *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 369, 555 S.E.2d 634, 640 (2001); *State ex rel. Utils. Comm'n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 634, 514 S.E.2d 276, 281 (1999) ("When determining whether information is a trade secret, the following factors are proper to consider[.]"). Courts do not always address each factor individually because the factors overlap. *See, e.g.*, *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 216, 646 S.E.2d 550, 558 (2007) (affirming trial court's summary judgment ruling for defendant on trade secret misappropriation claim without reference to the six factor test when evidence revealed that the secret could be obtained through reverse engineering); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 779, 501 S.E.2d 353, 356–57 (1998) (affirming the Rule 12(b)(6) dismissal of a trade secrets claim ascertainable through independent development); *S.E.T.A., Univ. of N.C.–Chapel Hill, Inc. v. Huffines*, 101 N.C. App. 292, 296–97, 399 S.E.2d 340, 343 (1991) (no reference to the factors when determining trade secrets did not exist); *Mech. Sys. & Servs. v. Carolina Air Solutions, LLC*, 2003 NCBC LEXIS 8, at *4–*6, *22–*24 (N.C. Super. Ct. Dec. 3, 2003) (determining that a trade secret did not exist without reference to the six factor test when information claimed as a trade secret had been made public).

Courts may find that a trade secret exists even if some of the protected information includes public information. North Carolina courts have determined that compilations of business information may receive trade secret protection, even if the individual aspects of the compilation are not, themselves, trade secrets. *See, e.g.*, *Sunbelt Rentals, Inc.*, 174 N.C. App. at 55, 620 S.E.2d at 227–28 (affirming that a business's compilation of "pricing information, customer information (identity, contacts and requirements of its rental customers), personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, fleet mix by market, capital and branch budget information, and cost information" constituted a protectable trade secret); *Bridgetree, Inc. v. Red F Mktg., LLC*, No. 3:20-CV-00228-FDW-DSC, 2013 U.S. Dist. LEXIS 15372, at *21–*22 (W.D.N.C. Feb. 5, 2013) ("The fact that the jury found 'compilation' source code to be a trade secret but did not find the individual source codes to be a trade secret is of no moment."). The Business Court discussed *Servo Corp. of America v. General Elec. Co.,* 393 F.2d. 551, 554 (4th Cir. 1968), and decisions from other jurisdictions in *SCR-Tech, LLC v. Evonik Energy Servs., LLC*, 2011 NCBC LEXIS 27 (N.C. Super. Ct. July 22, 2011), in the context of comparing descriptions of a trade process in published patents to other portions of the process claimed as trade secrets. *Id.* at *37–*39.

1. Reasonable Efforts to Maintain Secrecy

Section 66-152(3)(b) requires trade secret owners "to take reasonable measures to maintain the information's secrecy[.]" *Glaxo, Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1300 (E.D.N.C. 1996), *aff'd* 110 F.3d 1562 (Fed. Cir. 1997). Absolute secrecy is not required to maintain trade secret protection. *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 596, 424

S.E. 2d 226, 229 (citing *Q-CO Indus., Inc. v. Hoffman*, 625 F. Supp. 608, 617 (S.D.N.Y 1985)). However, when an individual discloses his trade secret to the public or to individuals that are under no obligation to protect the confidentiality of the information, the information may lose trade secret protection. *See Glaxo, Inc.*, 931 F.Supp. at 1301; *Combs & Assocs.*, 147 N.C. App. at 370, 555 S.E.2d at 640 (noting that prior disclosure of alleged trade secret to competitor prevented plaintiff from claiming trade secret protection for disclosed information). The law is unclear whether the existence of reasonable and adequate security measures is an issue of fact or law. *See* N.C.P.I. Civil 813.90 (instructing jury to consider *Wilmington Star-News* factors in determining whether a something is a protectable trade secret).

Some courts have held information published in a patent or patent application cannot be a trade secret under North Carolina law. *Glaxo, Inc.*, 931 F. Supp. at 1298 (applying North Carolina law) ("the owner of a valid patent will have disclosed the best method for practicing the invention, and thus no longer possess a valuable trade secret relating to the practice of the invention") *cited in SCR-Tech, LLC*, 2011 NCBC LEXIS 27, at *38 n. 108. However, a company may maintain a trade secret in a process that involves the use of public information. *See id.* at *64 (denying the defendants' summary judgment motion as to several trade secrets that defendants claim were publically disclosed through internet or patent publications). For example, in considering different aspects of an acid-based regeneration process, the court dismissed a trade secret claim as to composition of an acid-based soak, which was disclosed in a patent, but allowed the claimed trade secret in duration of the soak step, not disclosed in the patent, to survive. *Id.* at *65–*66.

Courts commonly consider whether the claimant restricted access to information and whether those privy to the information were required to sign a confidentiality agreement when evaluating the measures taken to maintain the information's secrecy. *See, e.g.*, *Combs & Assocs.*, 147 N.C. App. at 370, 555 S.E.2d at 640 (noting that the territorial review plaintiffs claimed as a trade secret was distributed to each sales representative and terms of an exclusive representation agreement required disclosure to a third party); *Area Landscaping, LLC*, 160 N.C. App. at 525–26, 586 S.E.2d at 511–12 (2003) (dismissing a trade secret claim because the plaintiff did not require customers privy to the subject information to sign a nondisclosure agreement); *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000) (denying preliminary injunction where the claimant failed to provide any evidence that it attempted to restrict access to its purported trade secrets). An example of how factual issues might arise in the context of a company's financial records is demonstrated in *McKee v. James*, 2013 NCBC LEXIS 33, at *12 (N.C. Super. Ct. July 24, 2013).

B. The pleading requirement to identify sufficiently the trade secret

The plaintiff "must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 469–70, 579 S.E.2d 449, 454 (2003); *VisionAIR*, 167 N.C. App. at 510–11, 606 S.E.2d at 364 (affirming denial of a preliminary injunction). Thus, a complaint that makes generally sweeping and conclusory allegations without clearly identifying the trade secrets allegedly misappropriated is insufficient to state a claim. *Id.*

Where, for example, a plaintiff merely alleges a former employee "acquired knowledge of [the employer's] business methods; clients, their specific requirements and needs; and other confidential information pertaining to [the employer's] business[,]" the allegations are too "broad and vague" to state a claim. *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 327, 660 S.E.2d 577, 586 (2008). A complaint describing with detail and specificity "various raw materials and raw material treatments; extraction, filtration, separation, and distillation techniques; and methods for compounding of flavors, packaging, and plant utility" taken by former employee sufficiently identifies the trade secret. *Horner Int'l Co.*, ___ N.C. App. at ___, 754 S.E.2d at 859 (N.C. Ct. App. 2014). Both a federal district court and the Business Court have applied these general precedents to particular factual scenarios. *Patch Rubber Co. v. Teolke*, No. 5:13-CV-379-BO, 2013 U.S. Dist. LEXIS 84104, at *11 (E.D.N.C. June 14, 2013) (holding that "plans, pricing methods, processes, techniques, present and prospective customer lists, manufacturing processes, product formulations, recipes and customers' purchasing requirements, service requirements, product preferences, and purchasing volumes" was not a specific enough description to warrant a preliminary injunction); *AECOM Tech. Corp. v. Keating*, 2012 NCBC LEXIS 9, at *6–*8 (N.C. Super. Ct. Feb. 6, 2012) (listing of "customer lists, customer contact information, pricing, information and product information" too broad); *Koch Measurement Devices, Inc. v. Armke*, 2013 NCBC LEXIS 48, at *19 (N.C. Super Ct. Oct. 14, 2013) (holding the claimant sufficiently identified the trade secrets it alleged were misappropriated where it described "(a) customer lists including names, contact persons, addresses and phone number of [claimant's] customers; (b) the ordering habits, history and needs of [claimant's] customers and (c) [claimant's] pricing and inventory management strategies."). A federal district court accepted the claimant's particularization of "customer lists, vendor lists, and technical information" when accompanied by the production of the actual documents at issue. *Static Control Components, Inc. v. Darkprint Imaging, Inc.*, 200 F. Supp. 2d 541, 545 (M.D.N.C. 2002).

C. Actual or Threatened Misappropriation

Under the TSPA, "misappropriation" is defined as the:

> 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) (2013).

Establishing a *prima facie* case of trade secret misappropriation requires introducing substantial evidence that the opposing party knew or should have known of the confidential or secret nature of the information, and that the defendant had an opportunity to acquire or did acquire, disclose, or use the information without the owner's consent. N.C. Gen. Stat. § 66-155 (2013). Direct evidence is not required to show misappropriationm, and claimants often prove misappropriation through circumstantial evidence. *See, e.g.*, *Sunbelt Rentals, Inc.,* 174 N.C. App at 57–58, 620 S.E.2d at 229 (holding that the circumstantial evidence of access to trade secrets, along with a substantial increase in defendant's business and simultaneous decrease in plaintiff's business located in same area and during the same time period, met the burden of proving misappropriation); *Byrd's Lawn & Landscaping, Inc. v. Smith,* 142 N.C. App. 371, 376–77, 542 S.E.2d 689, 693 (2001).

D. Defense to Misappropriation – Independent Development, Reverse Engineering, or Acquisition from Another with a Right to Disclose

Defendants may rebut the presumption that they misappropriated trade secrets by introducing "substantial evidence that [they] acquired the information comprising the trade secret by independent development, reverse engineering,[4] or . . . from another person with a right to

[4]Reverse engineering is "starting with the known product and working backward to divine the process which aided in its development or manufacture." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 480, 476 (1974); *see also Decision Insights, Inc. v. Sentia Grp., Inc.*, 311 F. App'x 586, 590 n.15 (4th Cir. 2009) (unpublished).

disclose the trade secret." N.C. Gen. Stat. § 66-155 (2013). While the "reverse engineering" and "independent development" defenses are similar to the sixth factor a court considers when determining whether information *is* a trade secret, they are different. The defenses require showing that the alleged misappropriators actually acquired the trade secrets without misappropriating them, whereas the sixth *Wilmington Star-News* factor scrutinizes whether, as a general matter, the claimed trade secret is so difficult to duplicate that it warrants trade secret protection.

Whether competing products, processes, or information have been developed through independent development or reverse engineering without using another's trade secret is a factually intensive inquiry. Cursory testimony declaring that an alleged misappropriator did not use another's trade secret, however, is typically not "substantial evidence" required to establish the defense. *See Armacell, LLC v. Bostic*, No. COA09-1160, 2010 N.C. App. LEXIS 1278, at *34–37 (N.C. Ct. App. July 20, 2010) (affirming trial court's finding that likelihood of success on independent development and reverse engineering defense not established where affidavit declared that competing product was "not based on any formula or information from" trade secret owner but did not provide specific facts showing independent development).

E. Statutory Remedies

When a plaintiff establishes a *prima facie* case for trade secret misappropriation, there is a presumption of protection and a court may impose preliminary or permanent injunctive relief. N.C. Gen. Stat. § 66-154 (2013). An example of a successful prima facie case is found in *Barr-Mullin, Inc.*, where the plaintiff showed that defendants helped to develop the software, had access to copies of the source code, had knowledge of the trade secret, and had the opportunity to acquire it. 108 N.C. App. at 596–97, 424 S.E.2d at 230. Furthermore, the court in *Barr-Mullin*, *Inc.* went on to observe that the misappropriation of trade secrets is the type of injury that warrants injunctive relief because "[t]he very nature of a trade secret mandates that misappropriation will have significant and continuous long term effects." *Id.* at 597, 424 S.E.2d at 230 (citation and quotation omitted).

F. The "Inevitable Disclosure" or "Inevitable Discovery" Doctrine

The TSPA authorizes courts to enjoin the *threatened* misappropriation of trade secrets during the pendency of legal action. N.C. Gen. Stat. § 66-154(a) (2013). This requires consideration of a doctrine referred to as the "inevitable disclosure" or "inevitable discovery" doctrine. This issue usually arises when an employee who knows trade secrets goes to work for a new employer where he will "inevitably" disclose the trade secret due to the similarity of the employee's new work. *Analog Devices, Inc.*, 157 N.C. App. at 470 n.3, 579 S.E.2d at 454–55 n.3. Even though statutory language seems to presume an injunction in this situation, it is unclear whether the North Carolina appellate courts will fully embrace the "inevitable disclosure" doctrine. The Business Court has noted and discussed this uncertainty. *Allegis Grp., Inc. v. Zachary Piper, LLC*, 2013 NCBC 13, ¶¶ 52–56, 2013 NCBC LEXIS 12, at *27–30 (N.C. Super. Ct. Feb. 25, 2013) (discussing *Analog Devices, Inc.* and *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 693–94, 228 S.E.2d 478, 484–85 (1976)).

If a court does apply the inevitable discovery doctrine, then the court should evaluate the likelihood of inevitable disclosure by examining "the degree of competition between the former and new employer, . . . the new employer's efforts to safeguard the former employer's trade secrets, . . . the former employee's lack of forthrightness . . . in his activities before accepting his [new] job . . . and in his testimony, [and] the degree of similarity between the employee's former and current position[s]." *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1459–60 (M.D.N.C. 1996) (describing doctrine and collecting cases) (quotations and citations omitted). If the court does issue an injunction, the injunction should only limit the scope of the employee's new employment duties. An injunction should be narrowly drawn so as to not prevent any employment with a competitor. *See Analog Devices, Inc.*, 157 N.C. App. at 470–71, 579 S.E.2d at 455.

V. General Rules Regarding Preliminary Injunctive Relief

A preliminary injunction is an "extraordinary measure" that seeks to preserve the parties' *status quo* during the pendency of the litigation. *A.E.P. Indus., Inc.*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). A preliminary injunction will issue only upon the movant's showing that (1) there is a likelihood of success on the merits of the case, and (2) the movant will likely suffer "irreparable loss unless the injunction is issued." *VisionAIR*, 167 N.C. App. at 508, 606 S.E.2d at 362 (2004). A court, when considering whether to issue a preliminary injunction, should consider whether to enforce the agreement or whether the plaintiff can be adequately compensated with monetary damages. *A.E.P. Indus., Inc.*, 308 N.C. at 404, 302 S.E.2d at 761. When the court weighs these two competing remedies, the timing of when the plaintiff will receive the benefit of the remedy is also an important consideration that might make one remedy better than the other. *A.E.P. Indus., Inc.*, 308 N.C. at 410, 302 S.E.2d at 764.

A. Appellate Considerations

Generally, preliminary-injunctive-relief orders are immediately appealable. For example, the following orders are immediately appealable: orders granting or denying preliminary injunctive relief for alleged breaches of noncompetition or confidentiality agreements, *see, e.g.*, *A.E.P. Indus., Inc.*, 308 N.C. at 400, 302 S.E.2d at 759; *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002); *Cox*, 129 N.C. App. at 777–78, 501 S.E.2d at 355–56, orders affecting the "right to earn a living," *Precision Walls, Inc.*, 152 N.C. App. at 635, 568 S.E.2d at 271 (2002); *Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45, 47, 345 S.E.2d 692, 694 (1986), and orders denying injunctive relief to prevent trade secret misappropriation, *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 361 (2004).

When appellate courts review a trial court's ruling on a preliminary injunction they presume the trial court's issuance of an injunction is proper and uphold the trial court's decision "if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Precision Walls, Inc.*, 152 N.C. App. at 635–36, 568 S.E.2d at 271 (quoting *Wrightsville Winds Homeowners Ass'n. v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990)). The appellate court, however, is not bound by the trial court's factual findings or legal conclusions. *Precision Walls, Inc.*, 152 N.C. App. at 635–36, 568 S.E.2d at 271; *see also A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760.

B. Bond Considerations

Rule 65(c) directs a judge to require the party seeking a temporary restraining order or preliminary injunction to post a bond, in the amount determined by the judge, to cover costs or damages incurred by a party later found to be wrongfully enjoined. N.C. Gen. Stat. 1A-1, Rule 65(c) (2013). The judge, however, may dispense with the bond requirement if the injunction will not materially damage the defendant. *See Keith v. Day*, 60 N.C. App. 559, 560–62, 299 S.E.2d 296, 297–98 (1983). Whether or not the judge requires a bond, the judge should make fact findings and conclusions of law to support the decision. *See Iverson v. TM One, Inc.*, 92 N.C.

App. 161, 167, 374 S.E.2d 160, 164 (1988) (remanding case to trial court where no findings of fact or conclusions of law made regarding $20,000 bond).

VI. Other Considerations

Some cases may present similar issues to those discussed in the paper but that arise in a different context. For example, a departing employee who is also a corporate director or manager may owe duties to his employer to refrain from competitive conduct regardless of the existence of an employment contract, such as by taking actions inconsistent with his or her fiduciary duty *before* resigning from the corporation. Furthermore, a departing employee that is not a director or manager may have a fiduciary duty to the company he is leaving because he held a position that gave him effective domination and control. *See Dalton v. Camp*, 353 N.C. 647, 652, 548 S.E.2d 704, 708 (2001); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 2002 NCBC LEXIS 2, at *12–*27 (N.C. Super. Ct. July 10, 2002) (applying principles from *Dalton* to specific corporate officers in an "employee raiding" case), *aff'd on other grounds*, 179 N.C. App. 49, 620 S.E.2d 222 (2005) (appellate opinion did not address issue).

These cases might also include claims for conversion or computer trespass because employees might take computers, mobile devices, or other property with them when they leave their job. Generally, "only goods and personal property" may be converted, not "intangible interests such as business opportunities and expectancy interests . . . ." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414, 537 S.E.2d 248, 264 (2000) (citing *McNeill v. Minter*, 12 N.C. App. 144, 146, 182 S.E.2d 647, 648 (1971) and *In re Silverman*, 155 B.R. 362 (Bankr. E.D.N.C. 1993)). Section 14-458 defines the misdemeanor crime of "computer trespass" and provides an express right of action for damages, including lost profits, for those injured by a violation of the statute. N.C. Gen. Stat. § 14-458(c); § 1-539.2A. Significantly, this statute has not been reviewed by the North Carolina appellate courts.

Parties also frequently request expedited discovery in these types of cases because of the time sensitive nature of the remedies they are seeking. Providing for limited expedited discovery before hearing a motion for preliminary injunction can enable the court and the parties to more effectively address the merits of the case early. Generally, discovery timelines and scope are within the trial court's discretion. Although there is no definitive standard under North Carolina law for when courts should allow expedited discovery, federal courts and other state courts apply different approaches. While on the Business Court, Judge Diaz summarized various approaches to expedited discovery motions. *Ehrenhaus v. Baker*, 2008 NCBC LEXIS 20, at *11–13 (N.C. Super. Ct. Nov. 3, 2008) (collecting cases). Also, the trial court can issue a blanket protective order governing to production of discover to facilitate smoother pretrial litigation due to the sensitive nature of information that will typically be discoverable in these cases. The court must be vigilant, however, when there are efforts to preclude public access to material submitted to the court for its consideration.

Motions for preliminary injunctions may require the trial court to decide whether to allow live testimony or decide the issues based on the filed affidavits and other evidence. While it may be easier to decide issues based on short notice at a hearing, the decision will likely be appealed and a decision based on a concrete record may lower the risk of an appellate court misunderstanding the evidence.