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| KRISTINE DEER, INC., dba K-DEER, INC.,<br><br>Plaintiff,<br>v.<br>KATE CORNISH BOOTH,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>CHANCERY DIVISION: BERGEN COUNTY<br>DOCKET No. C-29-16<br><br>OPINION |

Argued: July 7, 2017
Decided: July 28, 2017
Appearances: Randy T. Pearce for plaintiff
Alison Greenberg for defendant

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**HON. EDWARD A. JEREJIAN, J.S.C.**

Presently before the court is a motion for summary judgment filed by plaintiff Kristine Deer, Inc., dba K-DEER, Inc. ("plaintiff" or "K-DEER") on June 6, 2017. Plaintiff seeks summary judgment on count one of the complaint (New Jersey Trade Secret Act), count two of the complaint (Computer Related Offenses Act), count three of the complaint (misappropriation of confidential information), count five of the complaint (breach of duty of loyalty), count six of the complaint (trade libel), count three of the counterclaim (breach of contract), count four of the counterclaim (fraud), count five of the counterclaim (equitable fraud), and count six of the counterclaim (unjust enrichment and quantum meruit).

Also before the court is defendant Kate Cornish Booth's ("defendant" or "Booth") motion

for summary judgment filed on June 6, 2017. Defendant seeks summary judgment on count one of the complaint (New Jersey Trade Secret Act), count two of the complaint (Computer Related Offenses Act), count three of the complaint (misappropriation of confidential information), count five of the complaint (breach of duty of loyalty), and count six of the complaint (trade libel).

## I. Factual Background and Procedural History

This matter arises out of Booth's resignation from K-DEER. K-DEER is a corporation specializing in the manufacture of high-performance luxury active wear, and its sole shareholder is Kristine Deer ("Deer"). Booth was initially hired by K-DEER as an independent financial consultant at a rate of $5,000 a month, but she later became an employee and was compensated at the same rate. As an employee, Booth headed the finance department. Booth's yearly income was increased to $100,000 in 2015, and she received a bonus of $20,000 at the end of 2015.

As part of her duties, Booth maintained log-in information and passwords for financial software and applications from wholesalers and used the information to access various accounts during her employment. Booth also accessed company documents on her personal laptop, which she used to work from her home. Booth used the information to provide financial services to K-DEER, including developing projections and analytics necessary to improve the business. In August 2015, Booth received a company laptop, but she continued to use her personal laptop.

Deer and Booth had multiple conversations, in which Booth inquired about receiving an equity interest in the company. The first occurred in March of 2015 in Florida. Booth was not given an equity interest at that time, nor did Deer state that she would give Booth equity in the future. Booth again inquired about equity in August of 2015. During that conversation, Booth stressed to Deer the importance of having an equity stake in the business. Booth advised Deer to seek counsel from someone else on that matter. Booth was not given an equity interest pursuant to that

conversation; however, Booth did receive an increase in salary in September 2015. In January 2016, Booth and Deer discussed equity again, and, on January 4, 2016, Deer told Booth that Deer needed the month to "think about equity." On January 17, 2016, Booth sent Deer an email to "follow up on our dialog from earlier this month." The next day, Deer responded, "I agree there is follow up to do but I'm not ready to have the conversation about ownership yet."

Booth resigned by e-mail on January 19, 2016, stating "If you are not willing to pursue an active dialog about ownership I am not interested in working at K-DEER". At the time Booth resigned, Booth had corporate documents and information on her laptop, and Booth knew the log-in information for various accounts. Following Booth's resignation, Deer sent Booth an e-mail on January 21, 2016, asking Booth for her availability to meet and transition all K-DEER proprietary information and files from her personal computer. Deer told Booth that she could bring her own information technology professional to oversee K-DEER's information technology professional in the recovery of K-DEER's property. Deer also informed Booth that she would compensate her for the time it takes to complete this task. On January 26, 2016, Booth responded to that e-mail, "Let's have a discussion about a separation agreement first. I'd prefer to have a draft document in hand before the meeting—then we can sit down in person to review." On January 28, 2016, Deer replied, "A separation agreement? You resigned and have K-DEER property on your computer that belongs to me. There is nothing to discuss here."

Booth also maintained a personal LinkedIn account. Under the "Experience" section of her account, Booth stated:

> In my role at K-DEER I was in charge of herding the cats. That meant developing budgets, setting projections and paying partners, working with legal and accounting consultants, creating financial statements, creating marketing, promotions and production timelines, making the website work, selling to wholesale parts and generally getting product out the door.

Also in her LinkedIn profile, under a heading entitled "Financial success included," Booth stated that she "[m]anaged business from a loss in 2014 to over $300,000 in earnings before taxes."

On February 5, 2016, seventeen days after Booth's resignation, K-DEER commenced this action by filing a verified complaint and order to show cause seeking temporary restraints on February 5, 2016. On February 10, 2016, Booth was restrained from disclosing, copying, deleting, altering, or taking K-DEER's confidential business information, company history, contract and financial information, historical information.[1] Booth was also ordered to provide a thumb drive on February 19, 2016, containing a copy of all K-DEER records within Booth's possession, custody, or control. Pursuant to that mandate, Booth released some electronic information to plaintiff on February 18, 2016. The court did not order Booth to remove any information from her LinkedIn account.

On March 10, 2016, all existing restraints were dissolved. The court also ordered that Booth provide to an escrow agent a thumb drive identical to what was provided to defense counsel and that Booth delete that data from her computer. Pursuant to that order, Booth released any remaining electronic and documentary evidence to John Walsh, Esq., the court-appointed escrow agent, on May 11, 2016. These documents were not provided to plaintiff until July 2016.

On August 8, 2016, Booth was ordered to make a production of electronic discovery from her personal laptop, iPhone, and external hard-drive of emails and text messages sent in her work capacity for K-DEER, any e-mail or text conversations with K-DEER vendors or customers before Booth resigned, and any email or text conversations Booth had with third-parties about K-DEER after leaving K-DEER other than where Booth was looking for a new job or pursuing a business opportunity.

[1] All proceedings prior to the motions for summary judgment were heard before the Honorable Robert P. Contillo, P.J.Ch.

On May 27, 2016, count one (Uniform Declaratory Judgment Act), count two (Minority Shareholder Act), count seven (slander per se and libel), count eight (piercing the corporate veil), count nine (accounting), and count ten (constructive trust) of defendant's counterclaim were dismissed with prejudice. On February 17, 2017, count four of the complaint (tortious interference with prospective business relations) and any claims in this case regarding the alleged disparagement by defendant were dismissed with prejudice.

On April 17, 2017, the following theories were precluded: "K-DEER blaming Ms. Booth for not following-up on wholesaler "leads" (from on-line applications) prior to resigning"; "K-DEER blaming Ms. Booth for how her department negatively impacted K-DEER, ranging from people not being able to find passwords to substantive business matters (even though they did not seek Ms. Booth's assistance)"; "K-DEER accusing Ms. Booth of being responsible for K-DEER not taking on new wholesale customers because she had paper copies of wholesaler application forms at home, even though K-DEER could access the information and was getting the information"; and "K-DEER accusing Ms. Booth of interfering with 19 wholesalers without providing any facts about how she did this as to each of the wholesalers."

## II. Standard of Review for Summary Judgment

Summary judgment is designed to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Thus, the court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must

show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

Here, both parties seek to prevail on summary judgment on the causes of action in the complaint, arguing that the facts established in the matter entitle them to judgment as a matter of law. Plaintiff additionally seeks summary judgment on the causes of action in the counterclaim.

**III. Analysis**

The causes of action in the counterclaim are predicated upon conversations between Deer and Booth during Booth's employment, and the causes of action in the complaint are predicated upon Booth's actions following her resignation. As the events predicating the counterclaim occur before the events predicating the complaint, the court will first address the counterclaim.

### A. Count Three of the Counterclaim: Breach of Contract

Plaintiff seeks summary judgment on count three of defendant's counterclaim, which seeks relief under a claim for breach of contract. Defendant alleges that a contract existed whereby Deer led Booth to believe she was a partner and had a right to equity in K-DEER. Booth contends that Deer did not explicitly deny her requests for equity and Deer referred to Booth as a "partner."

To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and that the breach caused the claimant to sustain damages. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). A contract arises from offer and acceptance and must be sufficiently definite "that the performance to be rendered by each party can be ascertained with reasonable certainty." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24–25 (1958)). Thus, an enforceable contract can only exist if the parties agree on the essential terms and manifest an intention to be bound by those terms. Weichert Co. Realtors, supra, 128 N.J. at 435 (citing West Caldwell, supra, 26 N.J. at 24–25). However, if the parties do not agree to one or more essential terms, the agreement is unenforceable. Weichert Co. Realtors, supra, 128 N.J. at 435 (citing Heim v. Shore, 56 N.J. Super. 62, 72–73 (App. Div. 1959); see also Morgan v. Sanford Brown Institute, 225 N.J. 289 (2016) ("An enforceable agreement requires mutual assent, a meeting of the minds based on a common understanding of the contract terms.").

The record reflects that there was never any agreement between Deer and Booth to offer Booth equity. In fact, Booth repeatedly admits in her deposition that Deer never offered Booth equity:

Q: Did Kristine ever promise you an interest in the company?

A: Not overtly, no.

Q: And did she overtly offer you an interest in the company?

A: She did not overtly offer me an interest in the company.

. . .

Q: Did she offer you any equity?

A: No

. . .

Q: But did she say that she would give you equity in the future?

A: She did not sit and specifically say, Kate Booth, I will give you equity in the future, no.

. . .

Q: Okay. And you resigned because Kristine didn't offer you equity, is that correct?

A: Yeah. She wasn't even willing to talk about it anymore.

(Booth Dep. 138:24–25, 148:20–23, 157:7–10.) Thus, no reasonable fact-finder could determine that any offer was made to Booth. Defendant also cannot state when the contract was formed or how much equity was promised. Thus, absent any offer from plaintiff for equity or any agreement on essential contractual terms, a "meeting of the minds" could not have occurred, and a contract between the parties for equity cannot exist. With no contract in existence, a breach of contract could not have possibly occurred. Thus, this claim fails.

**B. Count Four of the Counterclaim: Fraud**

Plaintiff seeks summary judgment on count four of defendant's counterclaim, which seeks relief under a claim for common law fraud. Booth's claim for fraud revolves around Deer purportedly leading Booth to believe equity would be granted in the future and Deer purportedly referring to Booth as a "partner." Booth alleges that Deer, in response to Booth's request for equity in March 2015, never stated that she would never grant equity. Instead, Booth contends that Deer

stated that she was hesitant to change the structure of the company and that, as the business grew and capital needs changed, she would have to address these issues in the future. Further, Booth claims that Deer stated that she saw herself, her sister, and Booth as "partners" and "the team." Based on these statements, Booth states she believed Deer would continue to treat her as a "partner" and provide her with equity in K-Deer.

To establish common law fraud, a party must demonstrate: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Marino v. Marino, 200 N.J. 315, 341 (2009) (citing Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624–25 (1981)); see also Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). "Misrepresentation and reliance are the hallmarks of any fraud claim, and a fraud cause of action fails without them." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 174 (2005) (citing Gennari, supra, 148 N.J. at 610).

Here, even accepting Booth's claims, Booth has failed to recite a material misrepresentation. Never in the conversation recited by Booth did Deer state that she would ever make any changes to the structure of the company, only that she would address those issues. Although Booth admits that Deer never explicitly offered her equity in the company (Booth Dep. 138:4–10, 138:24–25; 148:20–23; 157:7–10), Booth claims that she interpreted the conversation as one where Deer would grant Booth equity in the future:

> I took from that conversation that she wasn't ready to do it right now. She's an entrepreneur with a small business. I wasn't going to pressure her to make that change right then. But as a partner, in the exercise of growing the business, I understood that she understood the value of equity to her partners who were investing in growing her business. So I took, yes, her conversation with me as a -- as an indication that in the future she would make me an equity owner in her company.

(Booth Dep. 146:6–14). Deer made no indication that she would grant equity or that she would

grant equity to Booth. Even though Deer referred to Booth as a "partner" and part of "the team," Deer does not even suggest that Booth would become an equity partner. Thus, Deer's statements do not constitute a material misrepresentation. Cf. Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599 (1989) (material misrepresentation when the defendant misrepresented that the signed agreement conformed with earlier agreement); Jewish Center, supra, 86 N.J. 619 (material misrepresentation when the defendant failed to disclose his prior conviction for fraud).

Further, Booth's reliance on these statements was unreasonable. Booth's claim that she believed she would be given equity simply because Deer referred to her as a "partner" and part of "the team" is absurd. Booth acknowledged in her deposition that "partner" was commonly used vernacular at K-DEER and was used to refer to people who did not have an equity stake in K-DEER. (Booth Dep. 72:10–73:22.) Also, as Deer did not indicate that she would award equity to any employee, no reasonable person could assume as Booth did that she would be awarded equity.

As neither material misrepresentation nor reasonable reliance occurred, defendant's claim for fraud must fail. Gandi, supra, 184 N.J. at 174.

**C. Count Five of the Counterclaim: Equitable Fraud**

Plaintiff seeks summary judgment on count five of defendant's counterclaim, which seeks relief under a claim for equitable fraud. In contrast with a claim for common law fraud, an action for equitable fraud does not require proof of the second element, that a defendant know of the falsity of the statement. Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 148 (2015) (citing Jewish Ctr. of Sussex County, supra, 86 N.J. at 625). Hence, the other four elements are essential. Foont-Freedenfeld Corp. v. Electro Protective Corp., 126 N.J. Super. 254, 257 (App. Div. 1973) (citing Dover Shopping Center, Inc. v. Cushman's Sons, Inc., 63 N.J. Super. 384, 391 (App. Div. 1960)). "However, in an action in which plaintiff relies upon equitable fraud, the only relief that may be

sought is equitable relief." Foont-Freedenfeld Corp. v. Electro Protective Corp., 126 N.J. Super. 254, 257 (App. Div. 1973).

Defendant's claim for equitable fraud similarly fails. As stated previously, no material misrepresentation was made and Booth's reliance upon any statement made by Deer was unreasonable.

**D. Count Six of the Counterclaim: Unjust Enrichment and Quantum Meruit**

Plaintiff seeks summary judgment on count six of defendant's counterclaim, which seeks relief under a claim for unjust enrichment and quantum meruit. Booth alleges that Deer misled Booth into believing that Deer would give Booth equity, that Deer never told Booth that she never planned to give Booth equity, and that plaintiff benefitted without having to compensate Booth accordingly. Booth believed that her "sweat equity" should have been recognized. (Booth Dep. 149:4–6.)

Quantum meruit is a form of quasi-contractual recovery and "rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Starkey v. Estate of Nicolaysen, 172 N.J. 60, 68 (2002) (internal citations omitted). "Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." Ibid. (quoting Weichert Co. Realtors, 128 N.J. at 437). To recover under a theory of quantum meruit, a party must establish: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Ibid. (quoting Longo v. Shore & Reich, Ltd., 25 F.3d 94, 98 (2d Cir. 1994)); accord Weichert Co. Realtors, supra, 128 N.J. at 437–38.

However, during the entirety of Booth's employee relationship with plaintiff, Booth was

compensated for her work. Booth did not testify that, at any point, Booth was not compensated nor did she specify that she performed tasks outside her work duties. Instead, Booth stated that she "made material change happen in this business that I considered investment" and suggested that she would have left K-DEER if she had known she would never be given equity. (Booth Dep. 147:12–25.) Thus, Booth did not perform any services without compensation for K-DEER, and plaintiff was not unjustly enriched.

During oral argument, defendant's counsel pointed to Weichert, claiming that Weichert entitles defendant to quantum meruit. Weichert Co. Realtors v. Ryan, 128 N.J. 427 (1992). In Weichert, a real estate agent telephoned a local developer and informed him that he knew of a property that the developer and his partner may be interested in purchasing. Id. at 430. The real estate agent also informed the developer that the purchaser of the property would have to pay the real estate company a ten percent commission. Id. at 430–31. The developer indicated that he was interested in knowing more about the property, and the real estate agent disclosed the property's identity and the seller's proposed price. Id. at 431. The developer eventually purchased the property; however, prior to closing, the developer repeatedly told the real estate agent that he believed a ten percent commission was excessive. Id. at 432. Regardless, the real estate agent aided in the sale of the property. Id. at 432–33. The Court found that quantum meruit was applicable even though the developer never assented to the terms of the realtor estate agent's offer and even though the developer consistently rejected the ten percent commission. Id. 438–39.

However, in contrast with Weichert, here, Booth was already compensated for her work and Booth's compensation was not dependent on commission. Also, in Weichert, the real estate agent and developer had agreed that a commission was due to the agent but had not decided upon a specific percent. Id. at 432. Thus, Weichert does not entitle Booth to quantum meruit.

Instead, this court looks to Thayer v. Dial Indus. Sales, Inc., 189 F. Supp. 2d 81 (S.D.N.Y. 2002) for guidance. In Thayer, quantum meruit was awarded for the period where an employee was completely uncompensated by his employer. Id. at 92. During the periods that the employee was compensated for his employment, however, Thayer did not award quantum meruit. Ibid. Similarly, here, Booth was never uncompensated.

Thus, quantum meruit is unjustified.

**E. Count One of the Complaint: New Jersey Trade Secret Act**

Both plaintiff and defendant seek summary judgment on count one of plaintiff's complaint, which seeks relief under the New Jersey Trade Secrets Act, N.J.S.A. 56:15-1 to -9. Plaintiff argues that the items retained by Booth—including various patterns on leggings and pants to be produced in future months, a current inventory list, financial and production projections, and a proposal and strategy to work with a competitor in the industry—qualify as trade secrets under the statute. Plaintiff maintains that these documents derive independent economic value, whether actual or potential, and were intended to remain confidential. Plaintiff argues that Booth threatened misappropriation of trade secrets by leveraging her possession of the documents to obtain a separation agreement and that Booth misappropriated trade secrets by posting financial information to her LinkedIn profile.

The New Jersey Trade Secrets Act ("TSA"), enacted in 2012, is based on the Uniform Trade Secrets Act prepared by the National Conference of Commissioners on Uniform State Laws. The New Jersey Law Revision Commission reviewed and modified the Uniform Trade Secrets Act to reflect New Jersey's common law trade secret jurisprudence.

The New Jersey Trade Secrets Act prohibits actual or threatened misappropriation of trade secrets. N.J.S.A. 56:15-3. TSA defines a trade secret as:

> information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:
>
> > (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> >
> > (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.J.S.A. 56:15-2.

> The statute defines misappropriation as:
>
> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (2) Disclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who:
>
> > (a) used improper means to acquire knowledge of the trade secret; or
> >
> > (b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or
> >
> > (c) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through improper means.

N.J.S.A. 56:15-2.

Plaintiff has not provided anything, other than its self-serving statements, to support that the information retained by Booth constitute trade secrets. During oral argument, plaintiff's counsel also claimed that Booth's statement that she "[m]anaged business from a loss in 2014 to over $300,000 in earnings before taxes" was a trade secret. However, such a statement cannot be a trade secret. Although plaintiff may not want its earnings to be publicly known, plaintiff has failed to demonstrate that such information "[d]erives independent economic value, actual or potential, from not being generally known." N.J.S.A. 56:15-2. Thus, this court cannot find that either the information retained by Booth or the information posted on LinkedIn is a trade secret.

The statute also requires that the trade secret be acquired by "improper means." TSA defines "improper means" as "the theft, bribery, misrepresentation, breach or inducement of a breach of an express or implied duty to maintain the secrecy of, or to limit the use or disclosure of, a trade secret, or espionage through electronic or other means, access that is unauthorized or exceeds the scope of authorization, or other means that violate a person's rights under the laws of this State." N.J.S.A. 56:15-2. Here, it is clear that Booth rightfully acquired and possessed the data during her employment. Plaintiff claims that Booth's continued possession of the documents following her resignation exceeds the scope of authorization. Even so, Booth did not acquire the documents by "improper means."

Also, there is no evidence that Booth accessed the documents after her resignation, and, after much discovery on the matter, there is no evidence that a trade secret was disclosed to any third parties in violation of N.J.S.A. 56:15-2.

As the information retained by Booth is not a trade secret and as Booth did not misappropriate the information, Booth did not violate TSA.

**F. Count Three of the Complaint: Misappropriation of Confidential Information**

Both plaintiff and defendant seek summary judgment on count three of plaintiff's complaint, which seeks relief under a claim for the misappropriation of confidential information. Plaintiff alleges that documents retained by Booth constitute confidential information, including financial charts, fiscal projections, revenue streams, and production strategies. Plaintiff suggests that Booth misappropriated confidential information by leveraging her possession of the information to obtain a separation agreement and by posting financial information to her LinkedIn profile.

The law protects confidential information even in the absence of an employment or other agreement prohibiting its use. Lamorte Burns & Co. v. Walters, 167 N.J. 285, 298 (2001).

Information need not rise to the level of a trade secret to be protected. Id. at 299. "However, matters of general knowledge within the industry may not be classified as . . . confidential information entitled to protection." Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 33–34 (1971). The key to determining if confidential information was misappropriated is the relationship of the parties at the time of disclosure and the intended use of the information. Lamorte, supra, 167 N.J. at 299 (citing Zippertubing Co. v. Teleflex, Inc., 757 F.2d 1401, 1407–10 (3rd Cir. 1985) (citing Kamm v. Flink, 113 N.J.L. 582 (E. & A. 1934))).

Here, plaintiff does not sufficiently state why this information is confidential and has never offered any proofs regarding why this information is entitled to protection. Instead, plaintiff asks the court to accept its conclusory statements that this information is confidential necessitating judicial protection.

Also, most cases finding misappropriation of confidential information involve the accused sharing the confidential information or otherwise using the confidential information to compete with the plaintiff. See, e.g., Lamorte, supra, 167 N.J. at 299 (misappropriation of confidential information found when former employees collected confidential information regarding clients to solicit those clients in new business in competition with former employer). Here, however, after much discovery on the matter, there is no evidence that the information was disclosed to any third parties, that Booth utilized the information, or that Booth used the information to compete with K-DEER.

Here, Booth simply was in possession of the documents following her resignation, and there is no evidence that Booth even accessed the documents following her resignation. Without evidence that Booth used the documents, no reasonable finder of fact could conclude that Booth engaged in misappropriation of confidential information.

### G. Count Two of the Complaint: New Jersey Computer Related Offenses Act

Both plaintiff and defendant seek summary judgment on count two of plaintiff's complaint, which seeks relief under the New Jersey Computer Related Offenses Act, N.J.S.A. 2A:38A-1 to -6. Plaintiff alleges that Booth knowingly took data from K-DEER and was not authorized to retain the data. Plaintiff thus argues that Booth purposefully withheld confidential and proprietary information from K-DEER after her termination. Plaintiff further alleges that Booth knew she was not authorized to continue to access any of K-DEER's financial instruments but that Booth maintained K-DEER's passwords and log-in information. Finally, plaintiff states that Booth purposefully retained the data and accessed it to use various portions of the information in her LinkedIn profile to benefit herself.

The Computer Related Offenses Act ("CROA") "makes an individual civilly liable for damages resulting from unauthorized taking or destruction of computer information or programs." News Release, Office of the Governor (Nov. 14, 1984) (available at https://repo.njstatelib.org/bitstream/handle/10929.1/23403/L1984c182.pdf?sequence=1&isAllowed=y). CROA, in relevant part, states:

> A person or enterprise damaged in business or property as a result of any of the following actions may sue the actor therefor in the Superior Court and may recover compensatory and punitive damages and the cost of the suit including a reasonable attorney's fee, costs of investigation and litigation:
>
> > a. The purposeful or knowing, and unauthorized altering, damaging, taking or destruction of any data, data base, computer program, computer software or computer equipment existing internally or externally to a computer, computer system or computer network;
> >
> > . . .
> >
> > c. The purposeful or knowing, and unauthorized accessing or attempt to access any computer, computer system or computer network; [or]
> >
> > d. The purposeful or knowing accessing and reckless altering, damaging, destroying or obtaining of any data, data base, computer, computer program, computer software, computer equipment, computer system or computer network[.]

N.J.S.A. 2A:38A-3.

Booth argues that Booth neither purposefully nor knowingly violated the statute nor did she cause damage to K-DEER in connection with having documents on her laptop after resigning. Booth stated that she remembered the log-in information following her resignation, and Booth maintains that plaintiff has never accused Booth of using the information in an improper way.

Here, both parties do not contest that Booth rightfully possessed the information prior to her resignation. The continued possession of that information, however, is not actionable conduct under CROA. The statute clearly prohibits the "taking" or "obtaining" of information but is silent as to the retention of information. See N.J.S.A. 2A:38A-3(a) and (d). Further, plaintiff has failed to cite and the court cannot find any support for the claim that the retention of data constitutes the "taking" of information under CROA. In support of their claims, both parties refer to Fairway Dodge, L.L.C. v Decker Dodge, Inc., 191 N.J. 460 (2007). However, in Fairway, former employees entered the premises of their former employer after business hours and copied data from their former employers. Id. at 464. As the CROA "require[s] proof of some activity vis-à-vis the information other than simply gaining access to it," plaintiff has not established that Booth took any information pursuant to CROA. See In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 277 (3d Cir. 2016). Thus, Booth did not violate CROA in violation of subsection (a).

Plaintiff has also failed to show that Booth "accessed" the documents in violation of subsection (d) and (e) of CROA. There is no evidence that Booth ever shared or disclosed any documents with third parties or even that Booth opened any of the retained documents after she resigned.

Further, plaintiff failed to establish that plaintiff was "damaged in business or property" as a result of Booth's actions. Without any proof that plaintiff was "damaged in business or property,"

plaintiff's claim must fail. See Marcus v. Rogers, 2012 N.J. Super. Unpub. LEXIS 1523, *9 (App. Div. 2012).

As plaintiff failed to demonstrate that Booth took or accessed any data in violation of CROA and that K-DEER was somehow damaged in business or property, plaintiff's claim must fail.

**H. Count Five of the Complaint: Breach of Duty of Loyalty**

Both plaintiff and defendant seek summary judgment on count five of plaintiff's complaint, which seeks relief under a breach of the duty of loyalty claim. Plaintiff argues that Booth failed to uphold that obligation in contravention of her duty of loyalty to K-DEER. Plaintiff contends that Booth attempted to use documents which plaintiff alleges were important, valuable, and confidential to force plaintiff to give her a separation agreement. Plaintiff further alleges that defendant's retention of these documents caused substantial harm and hardship for plaintiff.

An employee must not act contrary to the employer's interest while employed. Lamorte, supra, 167 N.J. 285 at 302 (citing Chernow v. Reyes, 239 N.J. Super. 201, 204 (App. Div.), certif. denied, 122 N.J. 184 (1990) (citing Auxton Computer Enters., Inc. v. Parker, 174 N.J. Super. 418, 425 (App. Div. 1980)). "This obligation to protect the employer's interests 'lasts until the last hour of . . . service.'" Fairway Dodge, L.L.C. v. Decker Dodge, Inc., 2006 N.J. Super. Unpub. LEXIS 1360, *43 (App. Div. 2006), aff'd, Fairway Dodge, L.L.C. v Decker Dodge, Inc., 191 N.J. 460 (2007) (quoting United Board & Carton Corp. v. Britting, 63 N.J. Super. 517, 523 (Ch. Div. 1959). "Loyalty from an employee to an employer consists of certain very basic and common sense obligations." Lamorte, supra, 167 N.J. 285 at 302. Among those obligations from employee to employer is a "common law duty to safeguard confidential information they have learned through their employment relationship." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 260 (2010).

A breach of loyalty claim requires a fact-specific analysis. Kaye v. Rosenfielde, 223 N.J.

218, 230 (2015) (citing Cameco, Inc. v. Gedicke, 157 N.J. 504, 516 (1999)). "The contexts giving rise to claims of employee disloyalty are so varied that they preclude the mechanical application of abstract rules of law":

> The scope of the duty of loyalty that an employee owes to an employer may vary with the nature of their relationship. Employees occupying a position of trust and confidence, for example, owe a higher duty than those performing low-level tasks.

Ibid. Thus, Cameco identified four factors relevant to the determination of whether an employee-agent breached his or her duty of loyalty: (1) the "existence of contractual provisions" relevant to the employee's actions; (2) the employer's knowledge of, or agreement to, the employee's actions; (3) the "status of the employee and his or her relationship to the employer," and (4) the "nature of the employee's [conduct] and its effect on the employer." Kaye, supra, 223 N.J. at 230 (citing Cameco, supra, 157 N.J. at 516); see also Lamorte, supra, 167 N.J. at 303.

The duty of loyalty prohibits the employee from taking affirmative steps, while still employed, to injure the employer's business. Lamorte, supra, 167 N.J. at 305. Thus, a breach of the employee's duty of loyalty has been found where an employee has solicited the employer's customers or taken action to compete with the employer before the employment ends. E.g., Platinum Management, Inc. v. Dahms, 285 N.J. Super. 274, 303–05 (Law Div. 1995) (the defendants had a meeting with employer's competitor and contacted employer's customers on behalf of competitor before resigning); United Board & Carton Corp., supra, 63 N.J. Super. at 519–20 (the defendants secretly incorporated a company six months before leaving employment, secretly diverted to the new company a large part of employer's customers, surreptitiously removed customers' products, and resigned on a prearranged date).

In contrast, here, Booth was simply in possession of documents that she properly acquired during the term of her employment. When Booth asked for a separation agreement, the dialogue

between Booth and Deer about the return of the data abruptly ended, and Booth and Deer did not come to an agreement on how to remove the documents from Booth's personal laptop in the seventeen days between Booth's resignation and the filing of the verified complaint. Once the litigation ensued, the return of the information on Booth's personal laptop was under the court's purview. Also, there is no evidence that Booth shared the information with any competitor or took any action to harm or to compete with K-DEER. Thus, Booth's actions do "not reach that level of impropriety which has heretofore been required when violating the duty of loyalty owed to an employer." Auxton Computer Enterprises, Inc., supra, 174 N.J. Super. at 425. Plaintiff's claim consequently fails.

**I. Count Six of the Complaint: Trade Libel**

Both plaintiff and defendant seek summary judgment on count six of plaintiff's complaint, which seeks relief under a claim of trade libel. Plaintiff alleges that Booth's statement on her LinkedIn profile that she was in charge of "herding cats" was derogatory to K-DEER's business and was designed to reflect the alleged chaos in the company.

Trade libel is the "publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with plaintiff's relations with others." Patel v. Soriano, 369 N.J. Super. 192, 246–47 (App. Div.), certif. denied, 182 N.J. 141 (2004). To sustain a cause of action for trade libel, a plaintiff must demonstrate (1) "publication of material derogatory to the quality of a plaintiff's business, or to his business in general," (2) which was "of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others." Id. at 248 (citing Prosser & Keeton on Torts §128 at 967 (5th ed. 1984)). The falsehood conveyed to a third person must be made "knowingly or recklessly" and must play "a material and substantial part in leading others not to deal with

plaintiff." Ibid. Finally, proof of damages is essential in an action for trade libel, and plaintiff must prove special damages in the form of pecuniary loss. Id. at 247–48. The necessary showing is specific: plaintiff must establish pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers. Id. at 248–49.

Defendant explains that the "herding cats" statement was to refer to her multiple responsibilities. Further, defendant contends that there is no evidence that the statement was read by anyone outside of the company and that no one has informed plaintiff that they have a negative impression of K-DEER because of that comment.

At the February 10, 2016 hearing for temporary restraints, Booth was not ordered to remove the information from her LinkedIn profile as the statement was deemed sarcastic and not libelous. Salek v. Passaic Collegiate School, 255 N.J. Super. 355, 359 (App. Div. 1992) ("There is no libel where, as here, the material is susceptible of only non-defamatory meaning and is clearly understood as being parody, satire, humor, or fantasy."). Booth's comment was, at best, a poor attempt at comedy or, at worst, unamusing sarcasm, and it clearly referred to her widely varied duties. Where a statement cannot be reasonably susceptible of defamatory interpretation, it is not libelous as a matter of law. Scelfo v. Rutgers University, 116 N.J. Super. 403, 408 (Law Div. 1971).

Also, even though the statement was published on LinkedIn, there is no evidence that anyone other than K-DEER employees were aware of the statement. Likewise, there is no evidence of any special damages. K-DEER does not even allege that it experienced any loss as a result of Booth's statements.

Booth's statement was not libelous, and, even if it were, plaintiff failed to demonstrate, or even allege, that the statement caused any damage to K-DEER. Hence, plaintiff's claim for trade libel fails.

## IV. Conclusion

The catalyst for this case was Booth's resignation from K-DEER and the arising need to remove K-DEER's data from Booth's personal laptop. Deer asked Booth for her availability to transition K-DEER information and files from her computer, but Booth responded not by giving her availability but by asking for a separation agreement. Ten days after Booth's request for a separation agreement, K -DEER reacted by filing a verified complaint raising numerous causes of action based upon Booth's continued possession of K-DEER's data. In response, Booth filed a counterclaim demanding equity. Thus arose this highly contentious situation between K-DEER, Deer, and Booth. Nonetheless, all the causes of action in contention were ripe for determination by way of summary judgment as no further discovery is required and as there are no disputed issues of material fact.

Here, a review of the proofs demonstrated that although Booth was persistent throughout her employment in pursuing an equity interest in K-DEER, Deer neither offered Booth any equity nor did she make any representation that equity would be given. Also, it is undisputed that Booth was compensated for her work throughout her employment and Booth resigned because Booth did not receive any equity. Moreover, after extensive discovery, no evidence was ever presented that Booth accessed or shared any of the information that was rightfully on her laptop following her resignation, that the information published in her LinkedIn profile was viewed by anyone outside of K-DEER or that it damaged K-DEER, or that Booth used any K-DEER information to compete with K-DEER. Booth was only found to be in possession of documents that she properly acquired during her employment, which does not subject Booth to liability under K-DEER's causes of action. As a result, both the complaint and counterclaim proved to be without merit, and the remaining causes of action in the counterclaim and complaint fail as a matter of law.

Summary judgment is granted in favor of defendant on count one of the complaint (New

Jersey Trade Secret Act), count two of the complaint (Computer Related Offenses Act), count three of the complaint (misappropriation of confidential information), count five of the complaint (breach of duty of loyalty), and count six of the complaint (trade libel).

Summary judgment is granted in favor of plaintiff on count three of the counterclaim (breach of contract), count four of the counterclaim (fraud), count five of the counterclaim (equitable fraud), and count six of the counterclaim (unjust enrichment and quantum meruit).

An order accompanies this decision.