

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

WAYMAN FIRE PROTECTION, INC.,	§	
	§	
Plaintiff.	§	
	§	C.A. No. 7866-VCP
v.	§	
	§	
PREMIUM FIRE & SECURITY, LLC,	§	
ROBERT WEITZEL, and ROBERT	§	
WHITE, and PREMIUM POWER	§	
SERVICES, LLC,	§	
	§	
Defendants.	§	
	§	

**MEMORANDUM OPINION**

Submitted: October 17, 2013  
Decided: March 5, 2014

William D. Johnston, Esq., Curtis J. Crowther, Esq., Margaret M. DiBianca, Esq., YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; *Attorneys for Plaintiff.*

A. Richard Winchester, Esq., Christopher A. Selzer, Esq., McCARTER & ENGLISH, LLP, Wilmington, Delaware; Peggy L. Ableman, Esq., Of Counsel, McCARTER & ENGLISH, LLP, Wilmington, Delaware; *Attorneys for Defendants.*

**PARSONS, Vice Chancellor.**

This action arises from the alleged possession and misuse of a fire alarm and fire protection system company's proprietary information by certain of its former employees. When the plaintiff company terminated one of its longtime employees, that former employee, a defendant in this action, began working for a local entrepreneur and an entity in the power generation business owned by the entrepreneur. Shortly thereafter, the entrepreneur created a new entity for the purpose of starting a fire alarm and fire protection system business that would be run by the former employee. In getting the new business off the ground, the former employee hired several individuals he had worked with while he was employed by the plaintiff.

The plaintiff alleges that the individuals hired by the former employee, also defendants in this case, without authorization, deleted files from the plaintiff company's computers, and copied the company's proprietary information and trade secrets for the purpose of bringing that information to the new fire alarm and fire protection system business. The plaintiff also alleges that the defendants have, in fact, used that information to compete with it. According to the plaintiff, both the new fire alarm and fire protection system business and the power generation entity were aware of and sanctioned the alleged misappropriation of its information. As a result of this alleged wrongdoing, the plaintiff company has sued the former employee, the individuals he hired, the new fire alarm and fire protection system business, and the power generation entity, asserting various claims for both monetary and equitable relief.

This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law on the plaintiff's claims. For the reasons that follow, I conclude that

the plaintiff has failed to prove its claims for tortious interference and for misappropriation of trade secrets and has not established any basis for liability on the part of the defendant power company. I also find, however, that the plaintiff has proved its statutory computer misuse claim, as well as its claims for conversion, conspiracy, and breach of the duty of loyalty against certain defendants. Therefore, the plaintiff is entitled to the monetary and equitable remedies set out in Section III *infra*.

In addition, the plaintiff has proven that certain defendants repeatedly violated this Court's order granting the plaintiff a preliminary injunction. Therefore, I hold certain defendants in contempt, order them to pay the plaintiff's reasonable attorneys' fees and expenses it incurred in proving the defendants' failure to comply with the injunction, and impose a fine of \$10,000 payable to the State of Delaware.

## **I. BACKGROUND<sup>1</sup>**

### **A. The Parties**

Plaintiff, Wayman Fire Protection, Inc. ("Wayman"), is a corporation engaged in the business of providing sales, service, design, installation, and maintenance of fire alarm and fire protection systems.

Defendant Premium Fire & Security LLC ("Premium Fire") is an entity engaged in the same line of business as Wayman. Jeff Donnelly is the owner and CEO of Premium Fire.

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<sup>1</sup> Unless otherwise noted, this background is drawn from the stipulated facts section of the parties' Joint Pre-Trial Stipulation and Order (June 5, 2013). Docket Item ("D.I.") 298.

Defendant Robert Weitzel was employed by Wayman from 2001 until he was terminated on August 18, 2011. At the time of his termination, Weitzel held the position of Vice President of Operations and Business Development at Wayman. Weitzel became President of Premium Fire on December 5, 2011, and has held that position continuously since that time.

Defendant Robert White was employed as a technician by Wayman from 2001 until his resignation in November 2011. White began work as a technician for Premium Fire on December 1, 2011, and has held that position continuously since that time.

Defendant Premium Power Services, LLC (“Premium Power” and, together with Premium Fire, Weitzel, and White, “Defendants”) is an entity engaged in the business of providing power generation services. Donnelly also is the owner and founder of Premium Power.

Former defendant Craig Fox was employed as a salesman by Wayman until his employment was terminated on January 26, 2012. Fox worked in a sales capacity at Premium Fire from February 6, 2012 through February 15, 2013. Before trial, Wayman and Fox settled all of Wayman’s claims against Fox.

Former defendant Ryan Williams was employed as a salesman by Wayman from 2010 until he resigned on December 9, 2011. Williams worked as a salesman for Premium Fire from December 12, 2011 until February 18, 2013, when he was terminated. As with Fox, Wayman and Williams reached a settlement before trial as to all of Wayman’s claims against Williams.

## B. Facts

### 1. Wayman terminates Weitzel

On August 18, 2011, Wayman abruptly terminated Weitzel’s employment. In connection with his termination, Weitzel and Wayman negotiated a severance agreement. Pursuant to that agreement, Weitzel received \$30,000 in exchange for releasing Wayman from any claims he may have had against it for, among other things, wrongful termination or age discrimination.<sup>2</sup> The severance agreement did not contain either a noncompetition or a nonsolicitation provision.<sup>3</sup>

After a brief period of networking, Weitzel was introduced to Donnelly, who hired him to work in a business development role across Donnelly’s various businesses.<sup>4</sup> When an anticipated opportunity in the security camera market failed to materialize, Donnelly and Weitzel decided instead to develop a fire and security business.<sup>5</sup> Although the record is unclear as to the exact timing, at some point Donnelly established Premium

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<sup>2</sup> JX 35.

<sup>3</sup> *Id.* See also JX 53 (email from Wayman Vice President Alisha Bryson to Weitzel stating that “[t]he struck section [of the severance agreement] pertains only to disparagement. This does not preclude your ability to continue working in the industry.”).

<sup>4</sup> Donnelly Dep. 48.

<sup>5</sup> Tr. 781–82 (Weitzel). References in this form are to the trial transcript. Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the page citation. See also Donnelly Dep. 47–48.

Fire as a standalone legal entity.<sup>6</sup> He installed Weitzel as its President on December 5, 2011.<sup>7</sup>

## **2. White agrees to join Premium Fire**

Shortly after Weitzel left Wayman, White reached out to Weitzel and asked to be kept in mind if Weitzel became aware of any new job opportunities.<sup>8</sup> After some discussions with Weitzel, on October 8, 2011, White accepted a job with Premium Fire.<sup>9</sup> White, however, continued to work at Wayman and did not give notice of his intent to leave the company until November 16, 2011.<sup>10</sup> White left Wayman's employ two weeks later on November 30. The following day, December 1, White started working for Premium Fire.

Upon his departure from Wayman, White turned in all four company-issued laptops that he had in his possession.<sup>11</sup> White maintained possession, however, of at least one flash drive that he had used to back up the files on his Wayman-issued computers.<sup>12</sup> Although White was in possession of the laptops, he was not the only Wayman employee

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<sup>6</sup> It appears that Premium Fire was established no later than the time that White agreed to join Premium Fire on October 8, 2011. JX 75.

<sup>7</sup> Tr. 665–66 (Weitzel).

<sup>8</sup> Tr. 858 (White).

<sup>9</sup> Tr. 668 (Weitzel); 858 (White).

<sup>10</sup> Tr. 858 (White).

<sup>11</sup> Tr. 860–61 (White).

<sup>12</sup> Tr. 849–50. White's flash drives also may have contained files from Honeywell, the company he worked for before joining Wayman. Tr. 850.

with access to them.<sup>13</sup> The evidence shows that on November 27 and 28, 2011, one of White’s Wayman-issued laptops was used to access a Dropbox account.<sup>14</sup> The user who accessed the Dropbox account downloaded multiple files from the account onto a flash drive. In addition, two days later, on White’s last day of employment at Wayman, 390 SDU files<sup>15</sup> were deleted from that same Wayman-issued laptop. For reasons discussed in greater detail *infra*, I find that Defendant White was responsible for copying and deleting the files from the Wayman laptop on those dates.

When White began working for Premium Fire, he uploaded all of the files he had stored on a flash drive, which included files from Wayman, onto his Premium Fire laptop.<sup>16</sup> He did so for the purpose of having the files on any of his flash drives available to him during the course of his job.<sup>17</sup>

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<sup>13</sup> Tr. 859–60 (White).

<sup>14</sup> See JX 667 (“Dropbox is an Internet-based storage service, which allows files to be stored online and remotely shared, copied, and synchronized with other devices.”).

<sup>15</sup> For purposes of this Memorandum Opinion, SDU refers to a certain type of electronic computer file used to program fire control systems. Although the parties also referred to these as XDU files during the course of the litigation, for purposes of simplicity, I refer to all such files as SDU files.

<sup>16</sup> Tr. 838–39 (White).

<sup>17</sup> *Id.* White viewed the flash drive as his “tool kit,” because it contained items he needed to do his job, including SDU files, manuals, technical bulletins, switch card templates, and other needed computer programs.

### **3. Premium Fire becomes a strategic partner with Edwards System Technology**

In an attempt to bolster its business opportunities, on January 4, 2012, Premium Fire became a strategic partner with Edwards System Technology (“EST”),<sup>18</sup> a manufacturer of fire alarm equipment.<sup>19</sup> As an EST strategic partner, Premium Fire is a non-exclusive representative for EST products in a specified geographic area.<sup>20</sup> Although Premium Fire had applied to become a strategic partner in EST areas PA4 and PA5, EST granted Premium Fire strategic partner status only in PA5.<sup>21</sup> Notably, Wayman is an EST strategic partner in PA4.<sup>22</sup>

The strategic partnership between Premium Fire and EST is governed by contract.<sup>23</sup> Premium Fire’s main point of contact with EST regarding its strategic partner status and its obligations under its agreement is Brian Boyle, an EST Regional Manager. Pursuant to its contract, Premium Fire agreed not to “solicit orders for or sell, install or service [EST] Products” outside of PA5 without prior written authorization (“OOT authorization”) from EST.<sup>24</sup> The only parties to the contract are Premium Fire and EST.

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<sup>18</sup> JX 106; Tr. 798–99 (Weitzel).

<sup>19</sup> Tr. 359 (Celino).

<sup>20</sup> *Id.*

<sup>21</sup> Tr. 798–99 (Weitzel).

<sup>22</sup> Tr. 304 (Duane Wayman); 362 (Celino). At all times relevant to this case, Wayman has been one of at least six EST strategic partners in PA4. Tr. 380 (Celino).

<sup>23</sup> JX 136.

<sup>24</sup> *Id.*

EST's other strategic partners in PA5 and elsewhere, including Wayman, are not parties to Premium Fire's agreement with EST, and that contract contains no language indicating that a non-party may enforce the agreement or exercise any rights specified therein.<sup>25</sup>

#### **4. The Doylestown Hospital upgrade project**

##### **a. Wayman's relationship with Doylestown Hospital**

Wayman's first contact with Doylestown Hospital ("Doylestown") came through Weitzel sometime in 2008. Weitzel was introduced to Thomas Smith, Doylestown's Manager of Environmental Care,<sup>26</sup> through John Geffre, a longtime friend of Weitzel's.<sup>27</sup> The development of Smith's relationship with Weitzel led to Doylestown hiring Wayman to install a fire control system in the hospital's new addition and to manage the hospital's existing fire control system.<sup>28</sup>

At the time the fire control system was being installed in Doylestown's new addition, the "old building" at Doylestown used IRC3 fire control technology. The IRC3

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<sup>25</sup> *Id.* See also Boyle Dep. 217–19 (“Q: Are the rights in this agreement between [EST] and Premium Fire rights between [EST] and Premium Fire? A: I would say yes. Q: Is it EST’s position that any other [strategic] partner can intervene into the contract between [EST] and Premium Fire? A: I would say no. Q: Is it EST’s position that Premium Fire can interject in between any contract between [EST] and another channel partner? A: I would say no.”)

<sup>26</sup> Smith Dep. 6.

<sup>27</sup> Tr. 790–91 (Weitzel). Geffre’s company, a former EST strategic partner, had managed Doylestown’s fire alarm system until the company was acquired by Siemens, a direct competitor of EST. Because Geffre’s company no longer could honor its contractual commitments to service EST customers after it was acquired by Siemens, Geffre attempted to facilitate the transfer of several of his company’s EST relationships, including Doylestown, to his friend Weitzel. *Id.*

<sup>28</sup> Smith Dep. 7.

system in the old building was approximately 30 years old, and Smith wanted to ensure that whatever system was installed in the new addition could be expanded to include upgrading the old building.<sup>29</sup> Thus, when Wayman installed EST3 technology in the new addition in 2010, it appears to have been understood that soon thereafter Doylestown would be looking to upgrade the old building's fire control system from IRC3 to something compatible with EST3 technology.

While he was employed at Wayman, Weitzel believed that the company would be awarded at least the first "phase" of the Doylestown upgrade if Wayman pursued it.<sup>30</sup> Even after he was terminated, on at least two separate occasions, Weitzel reached out to Trippe Wayman, a Wayman Vice President, to encourage him to follow through with Smith to ensure that Wayman secured any upgrade work at Doylestown.<sup>31</sup> The record is unclear as to what, if any, steps Wayman took to capitalize on the opportunity that

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<sup>29</sup> Smith Dep. 10 ("We knew it was a 30-year-old system in the old building, and the plans were that, again, addition sometime in the future for when the E.R. opened in 2010, that we would want to expand it over and replace the existing system.")

<sup>30</sup> JX 23; JX 33; JX 34.

<sup>31</sup> See JX 43 ("Trippe, [r]egardless of what you might think, Tom Smith is expecting to sit down with Perry any day to go over the first phase of the upgrade. At that time he will be releasing Wayman on a P.O. to spend his 2012 budget money, either \$200k or \$300k. . . . Please put Perry on it if you want to make the most of this opportunity. . . . P.S. Next to me Chris Goodwin has the best relationship with Tom Smith, keep him involved."); JX 422 ("Trippe, I have two things I wanted to mention to you as follows: 1. Godwin told me in a meeting with you he and Carmen Doylestown Hospital was mentioned and you laughed and said do you really believe Weitzel sold that upgrade for \$300K. I want you to know it is very real and you need to put someone on it. I have been nurturing this customer for two years. . . . I have Wayman in a position to be sole sourced all of the work. . . . They are ready to go!").

Weitzel claimed existed. As discussed *infra*, however, by the time Doylestown officially requested bids for the upgrade project in March 2012, the scope of the project that Doylestown was bidding out appears to have changed from what Weitzel had told Wayman in July and August 2011.

**b. Weitzel's solicitation of Doylestown on behalf of Premium Fire**

Within a few days of his termination on August 18, 2011, Wietzel emailed Smith to inform him that he no longer was employed by Wayman.<sup>32</sup> Weitzel spoke with Smith again on October 5, 2011<sup>33</sup> and met with Smith in person on December 13, 2011.<sup>34</sup> Although Weitzel “didn’t have any products” to sell at the time, Weitzel used the December 2011 meeting to inform Smith that he would be heading up a new fire and alarm venture named Premium Fire.<sup>35</sup>

On January 26, 2012, Weitzel emailed Smith and Werner on behalf of Premium Power to express an interest in applying to become a bidder for Doylestown’s power

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<sup>32</sup> Tr. 725 (Weitzel); Smith Dep. 11.

<sup>33</sup> JX 74.

<sup>34</sup> JX 115. Also in attendance were Geffre, White, and Ernie Werner, another Doylestown representative. JX 119.

<sup>35</sup> Tr. 725–29 (Weitzel). *See also* JX 117 (“We appreciate having the opportunity to tell you a little about our new company and will follow up with a product/service line card, describing all of our products and services. I just wanted to reiterate, we are in no way trying to interfere in any contractual relationships you have in place with your current vendors/suppliers. However, we did want you to be aware that we have started a new fire and security integration company and we would like you to consider us should anything change with any of your vendors/suppliers.”).

needs.<sup>36</sup> In response, Smith wrote to Weitzel “I assume you [also] would be interested in discussing the fire system upgrade of old building?? Just need to know right now.”<sup>37</sup> Weitzel immediately confirmed Premium Fire’s interest in the Doylestown upgrade project.<sup>38</sup> On February 3, 2012, Weitzel, White, Smith, and Werner met in person to discuss the upgrade project.<sup>39</sup> Approximately three weeks later, on February 24, Premium Fire received OOT authorization from Boyle to pursue the upgrade at Doylestown,<sup>40</sup> which is located in EST territory PA4.<sup>41</sup> Premium Fire and Doylestown met and discussed the upgrade project actively until Premium Fire submitted its bid for the project approximately one month later.

**c. Wayman’s interactions with Doylestown after Weitzel’s termination**

When Smith learned that Weitzel was no longer employed at Wayman, he was “concerned” both because he had “an excellent relationship” with Weitzel and because he was “uncomfortable” dealing with “unknown” people at Wayman who he had never seen before, and in whose performance he did not have confidence.<sup>42</sup> Fairly soon after Weitzel’s termination from Wayman, Smith became dissatisfied with Wayman’s

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<sup>36</sup> JX 170.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> JX 254.

<sup>40</sup> JX 268.

<sup>41</sup> Tr. 813–14 (Weitzel).

<sup>42</sup> Smith Dep. 11–12.

service,<sup>43</sup> but by October 2011 Smith had decided to give Wayman a “second chance.”<sup>44</sup>

From Smith’s perspective, however, serious issues arose from Wayman’s performance in December 2011 in conjunction with Doylestown’s annual fire system inspection.<sup>45</sup>

Smith continued to have problems with Wayman after the annual inspection was completed. For example, Smith did not receive Wayman’s annual inspection report until mid-March 2012, even though he expected to receive it within four to five weeks of Wayman completing the inspection in late December 2011, and inquired persistently when the report was not delivered in that time frame.<sup>46</sup> When Smith actually received the report, he noticed that it contained deficiencies that needed to be addressed.<sup>47</sup> Smith advised Wayman, but was not satisfied with its response.<sup>48</sup>

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<sup>43</sup> Tr. 282 (Trippe Wayman).

<sup>44</sup> JX 82 (“Carmen has won over Tom Smith and he has committed to giving us a second chance!”).

<sup>45</sup> Smith Dep. 12–14 (“Well, again, I think that the biggest factor stands out in me was the performance during that annual in December. Number one, as I said, [Wayman showed up without any prior notice and] we had to escort them around [over a three week period], which cost me labor time. Number two, they were unprepared with equipment.”).

<sup>46</sup> *Id.* at 14–15.

<sup>47</sup> *Id.* at 27–28.

<sup>48</sup> *Id.* at 28 (“I then informed [Wayman] that you must follow up with a point-by-point repair solution to the deficiency. What [Wayman] provided me at the very end was they e-mailed me a blanket letter stating that all deficiencies were repaired. It’s not acceptable under the standard practices of what the inspectors look at. They want to see a point-for-point repair, not a blanket letter. I was not happy with that.”).

**d. Premium Fire is awarded the Doylestown upgrade project**

In the end, only two vendors, Wayman and Premium Fire, bid for the Doylestown upgrade project. Before submitting their respective bids, both companies sent employees to walk through the building to get an understanding of its layout and where various relevant devices were located. Whereas Wayman did two walkthroughs at Doylestown, Premium Fire was onsite “more often taking a look around,” and conducted five or six walkthroughs.<sup>49</sup> In addition, during these walkthroughs, Smith and Premium Fire had “several discussions on concepts of panel layouts and so forth,” discussions that Smith and Doylestown “didn’t get from Wayman.”<sup>50</sup>

The bids that Premium Fire and Wayman eventually submitted to Doylestown differed significantly in scope and cost. Premium Fire’s bid “included the new IRC system, the crossover, the main panel, the remote panels, complete rewiring, and complete component change,” while Wayman’s bid consisted only of the “main panel, satellite panels, using existing wiring and existing components.”<sup>51</sup> According to Smith, Premium Fire’s bid was consistent with Doylestown’s request for proposal for the upgrade project;<sup>52</sup> Wayman’s bid was not.<sup>53</sup> Premium’s bid, at approximately

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<sup>49</sup> *Id.* at 21–22.

<sup>50</sup> *Id.* at 22.

<sup>51</sup> *Id.* at 24–25.

<sup>52</sup> *Id.* at 24.

<sup>53</sup> *Id.* at 25 (Q: And in what way [was Wayman’s bid nonconforming]? A: We already knew that, number one, the existing components were not supported and they did not communicate properly with the new system.”). Celino confirmed that

\$619,000,<sup>54</sup> also was materially higher than Wayman's bid of approximately \$227,000.<sup>55</sup>

In addition, as part of its bid, Premium Fire sent Smith a document known as "Annex E." Annex E, which every EST vendor is required to provide to potential new clients regardless of whether that client is in the vendor's designated EST area, provides a customer notice that if they begin working with an EST strategic partner that did not install the original system (such as Premium Fire), they may incur additional costs if the new strategic partner has to reprogram the system because it cannot obtain access to the

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the Wayman and Premium Fire bids were fundamentally different. *See* Tr. 470 ("So you can't -- in my opinion, you can't compare the two bids because they are materially different. Q: And Tom Smith compared them and he selected Premium's; is that right? A: I don't believe -- there is no way to compare it. I mean, this is the proverbial apples-to-oranges situation."). According to Celino, Wayman believed that the upgrade project consisted of several phases and that Wayman's bid was supposed to represent only the "first phase pricing." Tr. 470. Although Celino claims that such belief was based on conversations with Smith, it appears that Celino and Wayman misunderstood what Smith was looking for in the bids. *See* Smith Dep, 26–27 ("Q: Did you envision the upgrade being a two-phase project? A: I don't understand the question. Q: Well, did you envision that the Doylestown Hospital upgrade as put out for bid would be completed over a number of steps? A: No, I envisioned that to be an ongoing seamless process, not in steps."); *see also* Smith Dep. 20–21 ("We laid the ground rules for all the vendors in reference to bringing the new system over and incorporating it again into the old system, make one seamless. We were well-aware that the fact that a lot of the older components, number one, as I said, not supported, number two, the fact that they did not communicate with the new products, and we knew that, number one, it had to be a replacement of some of the detection devices so it would communicate with the new IRC system, and at the same time too, a lot of the wiring in the old building was now approaching 30 years old, and we knew several of those areas needed replacement wiring. So the concept was laid to both Wayman and Premium what our expectations were with any bids, the scope of the project.") (emphasis added).

<sup>54</sup> JX 296.

<sup>55</sup> JX 276.

original program file.<sup>56</sup> On March 14, 2012, slightly more than a week before Premium Fire submitted its bid to Doylestown, Weitzel told Smith he was sending Annex E as a formality, and that there would be no additional charges for reprogramming the Doylestown system.<sup>57</sup>

After considering the bids, Smith awarded the upgrade project to Premium Fire. Smith said he chose Premium Fire because he was not comfortable with Wayman after its performance on the December 2011 annual fire inspection or with the logistics of the bid that Wayman had presented.<sup>58</sup>

##### **5. Fox uploads files from Wayman onto his Premium Fire laptop**

In early February 2012, Fox, another former Wayman employee, began working for Premium Fire.<sup>59</sup> While he was employed at Wayman, Fox used an external hard drive to back up the files on his Wayman laptop.<sup>60</sup> Although Fox was instructed by Donnelly not to bring any information from Wayman with him to Premium Fire,<sup>61</sup> within a week of starting at Premium Fire, Fox uploaded the contents of the external hard drive onto his

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<sup>56</sup> Tr. 365-66 (Celino).

<sup>57</sup> JX 664 at 97.

<sup>58</sup> Smith Dep. 25.

<sup>59</sup> Tr. 534 (Fox).

<sup>60</sup> Tr. 533 (Fox). In that regard, the record shows that it was common practice among Wayman salespeople and technicians to backup files on their computers onto external devices, such as hard drives and thumb drives. *See, e.g.,* Tr. 512–13 (Williams).

<sup>61</sup> Tr. 588 (Fox). Donnelly gave similar instructions to Williams. Tr. 524 (Williams).

Premium Fire laptop.<sup>62</sup> Williams actually witnessed the upload,<sup>63</sup> but he was unaware of what Fox was uploading.<sup>64</sup> Shortly after the upload was complete, Weitzel entered Fox’s cubicle. Fox had placed the uploaded information in a folder labeled “Wayman” on his computer’s desktop.<sup>65</sup> While it is unclear if Weitzel noticed the folder on Fox’s computer screen, Fox also claims that he told Weitzel what he had just done, and that in response, Weitzel asked him if he had any documents related to Pitcairn,<sup>66</sup> a Wayman client for which Premium Fire was preparing an inspection bid. Although neither Williams<sup>67</sup> nor Weitzel<sup>68</sup> had any recollection of that exchange, I found this aspect of Fox’s testimony credible.

Of the approximately 17,000 documents that Fox copied while at Wayman and uploaded onto his Premium Fire laptop, two are of particular importance to this case: (1) a contacts report and (2) a sales opportunity report, both of which were generated by Salesforce.com (“Salesforce”). Salesforce is a “customer relations management tool” that Wayman uses to store data such as contact information, sales information, and

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<sup>62</sup> Tr. 534 (Fox). Although Fox denied that he uploaded the Wayman documents onto Premium Fire’s server (Tr. 579), I did not find his testimony on this point to be reliable.

<sup>63</sup> Tr. 565 (Fox).

<sup>64</sup> Tr. 529–31 (Williams).

<sup>65</sup> Tr. 565–66 (Fox).

<sup>66</sup> Tr. 566.

<sup>67</sup> Tr. 528–29.

<sup>68</sup> Tr. 830.

proposal information for each of its customers.<sup>69</sup> Wayman pays approximately \$15,000 per year to use Salesforce and, in addition, has spent thousands of dollars customizing the database to meet its specific needs.<sup>70</sup> Trippe Wayman determines how the company's seventeen Salesforce licenses are allocated.<sup>71</sup> Although the record is not entirely clear, I infer from the facts available that the number of Salesforce licenses corresponds roughly to what Wayman is entitled to as part of its \$15,000 annual fee for the software.

Access to Salesforce is password protected, and Wayman Salesforce users are required to change their password every 30–60 days.<sup>72</sup> These security measures are a part of the Salesforce service itself and were not implemented specifically by Wayman.<sup>73</sup> It does not appear that Wayman takes any additional steps to protect the information it inputs into Salesforce beyond the security that is built into the software. Moreover, there is no evidence that Wayman monitors its authorized employees' use of Salesforce or restricts those employees' abilities to download, export, or otherwise transmit Wayman's Salesforce data.

It is undisputed that Fox, who was authorized to access Salesforce, uploaded Salesforce reports onto his Premium Fire laptop. According to Fox's unrefuted

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<sup>69</sup> Tr. 189–90 (Trippe Wayman); Tr. 260–61 (Trippe Wayman).

<sup>70</sup> Tr. 189–90.

<sup>71</sup> At the time of trial, the licenses were allocated to all of Wayman's salespeople and to select Wayman managers, including Trippe Wayman. Tr. 190.

<sup>72</sup> Tr. 190–91 (Trippe Wayman).

<sup>73</sup> *Id.*

testimony, however, no one at Premium Fire ever asked him for the information contained in the reports or was aware that he possessed them.<sup>74</sup> There is no evidence in the record that Fox or anyone else at Premium Fire ever used the opportunities report. While Fox did admit to using some of the Wayman files he uploaded onto his Premium Laptop to get in touch with old clients,<sup>75</sup> he expressly denied ever using either of the Salesforce reports during the course of his employment at Premium Fire.<sup>76</sup>

### C. Procedural History

After Premium Fire was awarded the Doylestown upgrade project, Wayman began to suspect that Premium Fire was in possession of, and using, Wayman's SDU program files. As a result, Wayman retained a forensic computer expert to determine if its former employees had copied files from Wayman's computers that they could have brought with them to Premium Fire. Based on the results of the investigation, on September 14, 2012, Wayman commenced this action by filing a complaint against Premium Fire and other defendants accusing them of tortious interference, misuse of computer system information, civil conspiracy, and conversion, among other things. Concurrent with filing its original complaint, Wayman moved, unopposed, to have this case expedited. On October 9, 2012, I granted Wayman's motion to expedite.

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<sup>74</sup> Tr. 573–74.

<sup>75</sup> Tr. 536 (“Q: And tell me under what circumstances did you use the files? A: Well, it was ten years' worth of my industry contacts.”).

<sup>76</sup> Tr. 572–73.

The next day, on October 10, Wayman moved for a preliminary injunction against Defendants. After conducting limited discovery, the parties agreed to a consensual preliminary injunction order (the “Preliminary Injunction”), which I granted on November 19, 2012.

In January 2013, Defendants sought leave to file a counterclaim in this action. After obtaining such leave, Defendants filed their counterclaim on January 25, 2013. Wayman then moved both to dismiss the counterclaim and for summary judgment on it. On May 6, 2013, I dismissed Defendants’ counterclaim pursuant to a joint stipulation of the parties.

Between January and May 2013, Wayman filed both an amended complaint and a second amended complaint, the latter of which constitutes the operative complaint in this action. From June 18 through June 21, 2013, I presided over a three-and-a-half-day trial. Based on the facts developed at trial and certain assurances made by Defendants, on August 2, 2013, I vacated the Preliminary Injunction. After extensive post-trial briefing, counsel presented their final arguments on October 17, 2013. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law in this matter.

#### **D. Parties’ Contentions**

In post-trial briefing, Wayman narrowed to six the number of claims it is pursuing against various combinations of Defendants. Wayman’s first claim accuses all Defendants of tortious interference with Wayman’s prospective business relationship regarding the Doylestown upgrade project. Second, Wayman argues that Premium Fire and Premium Power misappropriated the Salesforce reports that Fox uploaded onto his

computer in violation of Delaware's Uniform Trade Secrets Act. In its third claim, Wayman contends that all Defendants are liable for computer misuse under the Delaware Misuse of Computer System Information Act based on, at a minimum, White's and Fox's uploads of Wayman computer files onto their Premium Fire laptops. In its next claim, Wayman alleges that White breached his duty of loyalty to the company by misappropriating Wayman's computer files for the purpose of using them, as an employee of Premium Fire, to compete with Wayman. Fifth, Wayman avers that all Defendants are liable for White's conversion of its computer files. Wayman also alleges that Premium Fire and Premium Power are liable for conversion of the files Fox uploaded to his Premium Fire laptop because they maintained possession of that laptop and did not return the files to Wayman. Finally, Wayman asserts that all Defendants conspired with White to steal computer files from Wayman and to retain and use improperly those files for the purpose of engaging in unfair competition with Wayman. In addition, although it is not a separate claim *per se*, Wayman renewed its efforts to have Defendants held in contempt based on their repeated violations of the Preliminary Injunction.

In response, Defendants argue that Wayman has failed to prove its tortious interference claim because Wayman had no reasonable expectancy of being awarded the upgrade project based on its poor performance at Doylestown, and that regardless, Premium Fire had not used any improper means to compete with Wayman in securing that contract. As to the second claim, according to Defendants, the information in the Salesforce reports does not meet the statutory definition of a "trade secret," and even if it did, Wayman has not proved any use or disclosure of Wayman's purported trade secret

information. Next, Defendants acknowledge that they were in possession of Wayman's information in violation of the Delaware Misuse of Computer System Information Act. Nevertheless, they assert that Wayman has not proved that Defendants used that information or that Wayman has been harmed by Premium Fire's possession of its files, and, therefore, any damages for this claim should be minimal. Fourth, Defendants assert that White was not a Wayman corporate fiduciary, and, thus, he did not owe the company any fiduciary duties. Moreover, Defendants contend that even if he had such a duty, the computer files White is alleged to have copied were neither confidential nor Wayman's property. Defendants also deny any liability for conversion because Wayman never demanded that its property be returned and, in any event, Wayman retained its own copy of the electronic files that White and Fox copied. Finally, regarding Wayman's claim for civil conspiracy, Defendants argue that there is no evidence of an agreement among Defendants to steal or use Wayman's computer files.

Separate from their arguments with respect to Wayman's claims, Defendants also devoted a significant portion of their post-trial briefing to their view that Wayman should be required to reimburse Defendants for the attorneys' fees and expenses they have incurred in this action. In that regard, Defendants base their contention on Wayman's failure to comply with the verification requirement of Court of Chancery Rule 3(aa) and on Wayman's alleged bad faith conduct in relation to this litigation.

With that framework in mind, I turn to my analysis of the issues presented in this case.

## II. ANALYSIS

Before discussing the substance of Wayman’s claims, I address first the liability of Defendant Premium Power for the various causes of action that Wayman has asserted against it in this case. As stated previously, although Premium Power and Premium Fire share a common owner, they are distinct legal entities. It is undisputed that the different companies share an office and some administrative personnel. The evidence also shows that Premium Fire employees at times attempt to “cross-sell” Premium Power’s services to potential customers,<sup>77</sup> and that one Premium Power employee, Jeff Lucas, occasionally performed work for Premium Fire.<sup>78</sup> None of this, however, warrants holding Premium Power liable for the claims Wayman is asserting in this case. To the extent Wayman argues that the distinct corporate forms of Premium Power and Premium Fire should be disregarded, it has not offered any evidence whatsoever that would support a veil-piercing or alter-ego type theory. Nor has Wayman presented evidence that any of the individual Defendants were acting as employees of Premium Power when they committed their alleged wrongdoing. Moreover, Wayman has not pointed to anything in the record that indicates that anyone actually employed by Premium Power ever possessed Wayman’s computer files, let alone used them.<sup>79</sup> In sum, based on the record

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<sup>77</sup> JX 190; JX 193; JX 202.

<sup>78</sup> Tr. 500–01, 519 (White).

<sup>79</sup> Wayman also has offered no persuasive explanation as to how Premium Power, which operates in a completely different industry from Premium Fire and Wayman, could make use of Wayman’s proprietary computer files or purported trade secrets.

in this case, Wayman has failed to satisfy its burden of proving its claims against Premium Power by a preponderance of the evidence. Therefore, I find in favor of Premium Power on each of the claims that Wayman has asserted against it in this action, and will dismiss those claims with prejudice.<sup>80</sup>

## A. Tortious Interference<sup>81</sup>

### 1. Legal standard

Wayman's tortious interference claim is predicated on an expectancy, rather than the existence, of a contractual relationship with Doylestown regarding the upgrade project. Under Delaware law, an action for tortious interference with prospective contractual relations requires: (1) a reasonable probability of a business opportunity or prospective contractual relationship; (2) intentional interference by a defendant with that opportunity; (3) proximate cause; and (4) damages.<sup>82</sup> Furthermore, all of these requirements must be considered in light of a defendant's privilege to compete or protect

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<sup>80</sup> Because Premium Power faces no liability in this case, all subsequent references to "Defendants" in this Memorandum Opinion refer only to White, Weitzel, and Premium Fire, collectively.

<sup>81</sup> In Count I of Wayman's Second Amended Complaint, Wayman alleged that Premium Fire tortiously interfered with both Wayman's service contract with Doylestown and with Wayman's expectancy of being awarded the Doylestown upgrade project. Plaintiff, however, only provided post-trial briefing with respect to its interference with an expectancy claim. Therefore, to the extent Wayman has not done so already voluntarily, I find that Wayman has waived its claim for tortious interference with its contractual relationship with Doylestown, as well as any other claim that appears in the Second Amended Complaint that Wayman also has not briefed.

<sup>82</sup> *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).

his business interests in a lawful manner.<sup>83</sup> I reject Wayman's claim for tortious interference, because I find that Wayman has failed to prove either: (1) that it had a reasonable probability of a business opportunity or prospective contractual relationship; or (2) the existence of proximate cause.

## **2. Reasonable probability of a business opportunity or prospective contractual relationship**

Wayman avers that it had a reasonable expectancy of being awarded the Doylestown upgrade based on Weitzel's representations to Wayman that they would be engaged for the project and Smith's deposition testimony that he allowed Wayman to bid for the project. Neither of these arguments is sufficient to meet Wayman's burden of proof regarding a reasonable expectancy.

Before his termination by Wayman, Weitzel emailed his colleagues at Wayman on more than one occasion to express his confidence that Wayman would be hired to conduct the first phase of Doylestown's upgrade.<sup>84</sup> In the month following his firing, Weitzel continued to communicate to Trippe Wayman that Wayman had an excellent opportunity to secure the \$200,000–\$300,000 first phase of the Doylestown upgrade project if he followed through with Smith.<sup>85</sup> All of Weitzel's emails on this subject were sent between June and September 2011. Until March 2012, however, Smith apparently had to focus his efforts on addressing Wayman's failure to provide him with an annual

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<sup>83</sup> *Id.*

<sup>84</sup> JX 23; JX 33; JX 34.

<sup>85</sup> JX 43; JX 422.

report for the hospital's fire system, and, therefore, he was unable to get into "the real nitty-gritties of the upgrade" until that time.<sup>86</sup> Thus, Weitzel's representations from June to September of 2011 do not provide a reliable indication of Wayman's probability of procuring the Doylestown upgrade nearly six months later in March 2012.

Weitzel's representations also fail to persuade me that Wayman had a reasonable expectation of being awarded the Doylestown upgrade for the separate reason that the project he was claiming Wayman was likely to win was not the upgrade project that Doylestown actually bid out and awarded. Each of Weitzel's emails contemplates Wayman being given a contract to complete an initial or preliminary phase of upgrading Doylestown for between \$200,000 and \$300,000. That, however, was not consistent with the scope of the bids that Smith instructed both Wayman and Premium Fire to submit in March 2012. Regardless of whether Weitzel misunderstood the nature of the Doylestown upgrade while he was at Wayman or Smith elected to change the scope of the project at some point after he had talked with Weitzel in the summer of 2011, the contract that Weitzel's 2011 emails expressed confidence that Wayman would be awarded never actually came to fruition.<sup>87</sup> Therefore, Weitzel's emails and beliefs<sup>88</sup> in mid-2011 are not

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<sup>86</sup> Smith Dep. 39–40.

<sup>87</sup> It is puzzling that the bid Wayman submitted to Doylestown in March 2012 was consistent with how Weitzel explained the scope of the Doylestown upgrade in his 2011 emails, rather than the broader scope Smith actually invited. One reasonable inference from this is that Wayman may have relied, to its detriment, on Weitzel's months-old representations that the company would win the Doylestown project if it bid between \$200,000 and \$300,000 for the "first phase" of a hospital-wide upgrade.

persuasive evidence that Wayman had a reasonable expectancy of winning the Doylestown upgrade project in March 2012.

Smith's deposition testimony about Wayman being permitted to bid on the upgrade project is not sufficient to show the existence of such an expectancy either. Despite its missteps with Doylestown's 2011 annual inspection, Smith had not eliminated Wayman entirely from consideration for the upgrade project.<sup>89</sup> The facts that Wayman was permitted to bid and that its bid was considered, however, did not, in and of themselves, give Wayman a reasonable expectancy of securing the upgrade contract. Based on my review of the evidence submitted at trial, including Smith's deposition testimony, I find that Wayman's chances of procuring the Doylestown upgrade were significantly below 50%, even though it was only one of two bidders for the project. The record shows that Smith, consistent with several other former Wayman customers, had become disenchanted with Wayman as a result of its poor performance.<sup>90</sup> Although Smith did not foreclose the possibility of continuing to work with Wayman, I find that by the time Wayman and Premium Fire submitted their bids in March 2012, Wayman's odds

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<sup>88</sup> See generally Tr. 719–23 (Weitzel).

<sup>89</sup> Smith Dep. 43 (“Q: Okay. And did you voice your opinion about having both of those entities [Wayman and Premium Fire] be able to bid? A: Yes. Yes, it was allowed for both of them to bid, correct. . . . Q: And Wayman’s bid was considered; is that right? A: Both were considered, correct.”)

<sup>90</sup> See, e.g., Boyle Dep. 202–03 (“Through my conversations with Tom, Tom Smith at Doylestown, it was clear to him that he was not happy with Wayman’s performance, that they weren’t getting the maintenance and testing done on time. He felt as if things were deteriorating over there and he was hesitant to want to move forward on any projects on the upgrade project.”).

of being awarded the upgrade project were diminished materially by its poor performance in the aftermath of Weitzel’s departure from the company. Thus, while Wayman has shown that its chances of securing the upgrade contract were something greater than zero, it has not met its burden of demonstrating that those chances were high enough such that it reasonably could expect that Doylestown would select its bid.

Finally, Wayman has offered no persuasive explanation as to how it could have expected reasonably to be awarded the Doylestown upgrade when its bid failed to conform to the requirements that Smith had specified. Wayman has not produced any evidence that Smith or anyone else at Doylestown has ever given a contract of the scope of the upgrade project to a bidder who submitted a nonconforming bid. In the absence of any such evidence, I find that Wayman’s inability to meet the project’s most basic requirement (*i.e.*, demonstrating an adequate understanding of the scope of work being sought) is fatal to its assertion that its expectation of procuring the upgrade project was reasonable. Because Wayman has not established the first element of its tortious interference claim, that claim must fail.

### **3. Proximate Causation**

I also am convinced that Wayman’s tortious interference claim would fail for a separate and independent reason even if I assumed that Wayman had a reasonable expectancy in the Doylestown upgrade project and that Premium Fire used “improper means” in competing with Wayman. The reason is that Wayman has not shown that Premium Fire’s use of improper means was the proximate cause of Wayman’s failure to secure the Doylestown contract.

Wayman avers that Premium Fire competed improperly with it for the Doylestown upgrade in two ways. First, Wayman alleges that Premium Fire's communications with EST to obtain OOT authorization for Doylestown contained material misrepresentations and omissions. Wayman asserts that had Premium Fire not solicited Doylestown in violation of Premium Fire's agreement with EST and been truthful about its solicitation of Doylestown in its communications with EST, Premium Fire never would have received OOT authorization for Doylestown. Moreover, in that case, Wayman would have remained Doylestown's sole fire control vendor. Second, Wayman accuses Premium Fire of impermissibly using for Doylestown the program file that Wayman had created through its previous work at the hospital. This, according to Wayman, allowed Premium Fire to submit a substantially lower bid than it otherwise would have been able to if it had incurred the costs of reprogramming Doylestown's fire control system from scratch.

Initially, I note that Smith specified two reasons for not accepting Wayman's bid: its poor performance during the 2011 annual inspection, and its failure to deliver a bid that conformed to the requirements he had conveyed to them. Both of these factors were completely within Wayman's control. Thus, regardless of any improper actions Premium Fire may have taken, the record shows that Wayman itself bears the ultimate responsibility for Wayman's inability to win the upgrade contract.

In that regard, I emphasize that neither of Smith's reasons for rejecting Wayman's bid had anything to do with Premium Fire's purported use of improper means to compete. First, Wayman failed to prove, for example, that Premium Fire was awarded the upgrade

project because it was the cheaper or more cost-effective option. To the contrary, Premium Fire's bid was approximately \$400,000 higher than Wayman's bid. Second, even assuming that without Wayman's Doylestown program file Premium Fire would have had to reprogram the entire Doylestown system, and Premium Fire would have passed the entirety of that cost onto Doylestown,<sup>91</sup> there is no evidence to support Wayman's suggestion that this would have made Premium Fire's bid prohibitively expensive.

At trial, Steve Bender, a technical service manager at Wayman, testified that if Wayman was in Premium Fire's position and did not have the necessary program file for Doylestown, Wayman would have had to submit a higher priced bid to account for an increase of approximately 15% in certain of its costs relating to the purchase and installation of equipment associated with reprogramming Doylestown's fire control system.<sup>92</sup> Nothing in the record suggests that Premium Fire's additional costs would be significantly more than this 15% figure. There also is no evidence as to what Doylestown's budget for the upgrade project was, nor is there any evidence that Smith had any concerns about the cost of Premium Fire's bid or would have been unwilling to accept it if it was 15% higher. Thus, even assuming Premium Fire impermissibly used Wayman's program file and that its bid would have been 15% higher had it not had

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<sup>91</sup> Based on Weitzel's testimony that Premium Fire would not pass on any such cost and Premium Fire's interest in "getting its foot in the door" at Doylestown, I consider this unlikely.

<sup>92</sup> Tr. 927–29.

access to that file, Wayman has not met its burden of showing that Smith's decision to award the upgrade project to Premium Fire would have been different if its bid had been that much higher.

Moreover, that is not the only respect in which the evidence does not support Wayman's assertions regarding proximate cause. According to Wayman, but for Premium Fire having solicited Doylestown improperly and received OOT authorization from EST through unfair means, Wayman would have secured the Doylestown project. As discussed previously, Smith was unhappy with Wayman's performance during the 2011 annual inspection and he took Wayman's poor performance seriously. Wayman has not offered any evidence that Smith, notwithstanding his concerns about Wayman's performance, was going to permit Wayman to be the only bidder for the upgrade, a sizeable endeavor, if Premium Fire had not expressed an interest in the project.

Nor does the record show that Doylestown had no choice but to use Wayman for the upgrade if Premium Fire did not emerge as a bidder. In February or March 2012, Smith spoke with representatives at SimplexGrinell, an EST competitor, about using their products to upgrade the hospital.<sup>93</sup> I find, therefore, that Doylestown would have pursued these discussions if no other EST vendor besides Wayman expressed an interest in bidding on the project.<sup>94</sup> Moreover, Smith told EST's Boyle explicitly that he was not

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<sup>93</sup> Smith Dep. 39–40.

<sup>94</sup> See JX 267 (email from Smith to Boyle stating: "DH will choose the vendor and product without restraints to territorial boundaries set by some other company or corporation. If you want to work with us, fine. If not, I will move to another manufacturer. There is a major, long term project which is well behind schedule.

going to allow EST to dictate which EST strategic partners he could and could not use.<sup>95</sup>

Based on these facts, I find that Wayman has not shown either that it would have been the only bidder for the Doylestown upgrade but for Premium Fire's contravention of its agreement with EST or that Wayman would have been awarded the upgrade project had Premium Fire not bid on it. Therefore, because Wayman has not met its burden on either the reasonable expectancy or proximate cause elements of its tortious interference claim, I find in favor of Defendants on Count I of the Second Amended Complaint.

#### **B. Delaware Uniform Trade Secrets Act**

As previously noted, Wayman accuses Defendants of misappropriating the Salesforce reports that Fox uploaded to his Premium Fire computer. I turn now to that claim.

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I am moving forward with or without EST. After you explained your company's restrictions Wednesday, I have started contacts with other manufacturers. As I stated above we are moving on, I have time issues and your territories are not my problem.”)

<sup>95</sup> Smith Dep. 22–23 (“The contents of that meeting is, Mr. Boyle came out, and I was here with Ernie Werner, and we were discussing vendors. My content on that meeting was not based on I want a particular vendor to bid. My content with Mr. Boyle, if he is going to dictate to me what vendors I can and cannot use, then I either had to make a decision to go with EST or I made it clear to him that if we weren't satisfied with his restrictions, we would look into a totally different company.”); JX 224 (email from Smith to Weitzel stating “I will choose who I want in here and don't care about [Boyle's] company's territories.”).

## **1. Legal standard**

Under Delaware law, an employer’s trade secrets are a protectable interest.<sup>96</sup> In pertinent part, the Delaware Uniform Trade Secrets Act (“DUTSA”)<sup>97</sup> defines a “trade secret” as follows:

- (4) “Trade secret” shall mean information, including a formula, pattern, compilation, program, device, method, technique or process, that:
  - a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>98</sup>

Information must meet all the requirements of Section 2001(4) to qualify for “trade secret” status.<sup>99</sup> Additionally, DUTSA defines misappropriation, in relevant part, as the “[a]cquisition 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.”<sup>100</sup>

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<sup>96</sup> See *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at \*5 (Del. Ch. Apr. 5, 2005), *aff’d*, 913 A.2d 569 (Del. 2006).

<sup>97</sup> 6 Del. C. §§ 2001–2009.

<sup>98</sup> See *id.* § 2001(4).

<sup>99</sup> *Dionisi v. DeCampli*, 1995 WL 398536, at \*11 (Del. Ch. June 28, 1995), *amended by* 1996 WL 39680 (Del. Ch. Jan. 23, 1996).

<sup>100</sup> 6 Del. C. § 2001(2).

The plaintiff bears the burden of proving the existence and misappropriation of a trade secret.<sup>101</sup> Specifically, under DUTSA, the plaintiff affirmatively must prove the following: first, that a trade secret exists, *i.e.*, that the statutory elements—commercial utility or value arising from secrecy and reasonable steps to maintain secrecy—have been shown; second, that the plaintiff communicated the trade secret; third, that such communication was made pursuant to an express or implied understanding that the secrecy of the matter would be respected; and fourth, that the trade secret has been used or disclosed improperly to the plaintiff’s detriment.<sup>102</sup>

## **2. Are the Salesforce documents trade secrets?**

At trial, Wayman adduced evidence that Fox was in possession of two Salesforce documents, and that he uploaded those documents onto his Premium Fire-issued laptop. Wayman contends those two documents, which consist of a “contacts report” and an “opportunities report,” are its trade secrets. The “contacts report” contains the names, addresses, and phone numbers for Wayman’s “point person” at each of its clients.<sup>103</sup> For some of those individuals, the contacts report also lists their position with the client and their email address.<sup>104</sup> The “opportunities report” contains, as its name suggests,

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<sup>101</sup> *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at \*9 (Del. Ch. Nov. 15, 1994); *Marsico v. Cole*, 1995 WL 523586, at \*4 (Del. Ch. Aug. 15, 1995).

<sup>102</sup> *Dionisi*, 1995 WL 398536, at \*11 (citing *Wilm. Trust Co. v. Consistent Asset Mgmt. Co.*, 1987 WL 8459, at \*3 (Del. Ch. Mar. 25, 1987)).

<sup>103</sup> JX 102.

<sup>104</sup> *Id.*

information regarding Wayman’s potential business prospects, including the location and nature of the job and Wayman’s assessment of how likely it is to secure the project.<sup>105</sup>

The first question is whether either of these reports “derive[d] independent economic value” by virtue of the information “not being generally known to” and “not being readily ascertainable by proper means by” others. In large measure, a trade secret “derives actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money.”<sup>106</sup> Having considered the evidence presented, I find that Wayman has established that the “opportunities report” satisfies this criterion, but the “contact list” does not.

In the “opportunities report,” Wayman identifies both the company’s prospective business opportunities as well as projects that the company has secured. The report includes valuable information beyond just the names of the opportunities, such as how much Wayman has bid on certain projects and how Wayman became aware of the opportunity. The vast majority of the opportunities appear to have been brought to Wayman’s attention by some combination of cold calling, customer referrals, and repeat business from existing customers. Therefore, it does not appear that these opportunities are “generally known.” It also is unlikely that a potential competitor to Wayman could produce the same list of opportunities without spending significant time and money to develop an existing customer base and solicit new business. Consequently, Wayman has

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<sup>105</sup> JX 101.

<sup>106</sup> *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at \*18 (Del. Ch. Oct. 23, 2002).

shown that the “opportunities report” satisfies the first criterion of a trade secret under DUTSA.

The same cannot be said, however, for the “contacts report.” With respect to determining whether a client or contact list is a trade secret, this Court has held that:

The market of the product or service involved is the main factor in determining whether a client list constitutes a compilation deriving independent economic value from not being generally known by other persons who can obtain economic value from its disclosure or use. If the buyers are easily identified, it is unlikely that their identities will hold independent economic value even when the identities are considered confidential.<sup>107</sup>

The focus of this inquiry is on whether Wayman “would lose value and market share” if Premium Fire could thus “enter the market without substantial development expense.”<sup>108</sup> Wayman has not carried its burden of proving that the identities of its customers cannot be easily determined. Wayman is in the commercial fire control industry. The majority of Wayman’s clients, such as hospitals, commercial buildings, hotels, and multi-family residential structures, are obvious potential clients to a competitor in that same industry.<sup>109</sup> Many, if not all, of Wayman’s clients probably are required by law to have

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<sup>107</sup> *Dionisi v. DeCampli*, 1995 WL 398536, at \*11 (Del. Ch. June 28, 1995), amended by 1996 WL 39680 (Del. Ch. Jan. 23, 1996) (citations omitted).

<sup>108</sup> *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at \*16 (Del. Ch. Jan. 29, 2010) (quoting *Del. Express Shuttle, Inc.*, 2002 WL 31458243, at \*18).

<sup>109</sup> See *Dionisi*, 1995 WL 398536, at \*11 (finding Rolodex from a graphic design business with clients’ names and addresses did not constitute a trade secret because the clients were “well known in the community,” and “the majority of the

commercial fire control systems, which further underscores that Wayman's client base can be identified easily, even if Wayman does not identify all of its clients publicly.<sup>110</sup> Furthermore, in this particular case, the record supports the conclusion that Weitzel, White, and other former Wayman employees who joined Premium Fire had a good understanding of the commercial fire control industry, both from their work with Wayman and earlier employers. Yet, none of those persons were subject to a noncompetition, nonsolicitation, or confidentiality agreement with Wayman. Although Weitzel and Premium Fire's other employees may not have known each and every Wayman customer, Wayman cites no authority for the proposition that such absolute knowledge is necessary. Furthermore, based on the knowledge that Weitzel and the others had, they could have replicated Wayman's contact list in all material respects through proper means, with a minimal expenditure of time and money.

Wayman's argument that the contact list qualifies as a trade secret because it also contains the names of some of the "decision makers" at its various clients is similarly unavailing. Wayman has offered no evidence that its clients' phone numbers are not publicly available or that learning the identity of the "decision makers" would require anything more than using that publicly available information to contact the client.<sup>111</sup> I

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names on the Rolodex were generally known throughout the graphic arts services market as purchasers or suppliers of graphic arts services.").

<sup>110</sup> Tr. 315 (Duane Wayman).

<sup>111</sup> See *Del. Express Shuttle, Inc.*, 2002 WL 31458243, at \*19 ("The Plaintiff contends that the identities of certain internal contact people were not available publicly and, thus, constitute proprietary information. Yet, the Plaintiff failed to

find, therefore, that the “contacts report” does not meet the first criterion of 6 Del. C. §2001(4), and that it is not a protectable trade secret under DUTSA.

Even if, however, the contacts report does have independent economic value, neither the contacts report nor the opportunities report constitutes a protectable trade secret under DUTSA because Wayman has not shown that the reports were the “subject of efforts that are reasonable under the circumstances to maintain [their] secrecy.” As evidence that it took reasonable steps to preserve the secrecy of the Salesforce documents, Wayman points to the facts that access to the Salesforce documents was password protected, only a limited number of employees were given Salesforce passwords, and those with passwords were required to change their passwords every 30–60 days.

In prior trade secrets cases, this Court has recognized confidentiality provisions in employment contracts, employee handbooks, and letters sent to employees following their termination as evidence of reasonable efforts to maintain the confidentiality of trade

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prove that this information was not available publicly; for example, could not one simply call the number of the company and discover the names of these contact people without significant burden or expense? Because the data on the list can be duplicated from publicly available sources, the list does not carry independent economic value, and as such fails to qualify as a protectable trade secret.”); *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1054 (Del. Super. 2001) (noting that a Rolodex that contained “only the names of insurance companies, HMO’s and contacts within these organizations” was not a trade secret because the plaintiff “ha[d] not indicated how this information is not available elsewhere, e.g., a telephone call (from a number obtained in the phone book or directory assistance) to the carriers or HMO’s themselves”).

secret information.<sup>112</sup> This Court also has found that reasonable efforts were taken to preserve confidentiality when a company had implemented specific policies to prevent disclosure of information to outsiders<sup>113</sup> or the company was in an industry where custom dictated that certain information be kept confidential.<sup>114</sup> Wayman has not shown that, in terms of the Salesforce documents, it has used *any* of the measures that this Court has recognized as reasonable to protect the confidentiality of such documents in a meaningful way, except for password protecting the Salesforce portal.<sup>115</sup>

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<sup>112</sup> See *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at \*19 (Del. Ch. Jan. 29, 2010) (“KB took steps to protect the confidentiality of its customer lists by, among other things, including provisions in its Employment Contract, its Handbook, and letters it sent its employees following termination that notified sales reps and other KB employees of the sensitive and proprietary nature of that information and prohibited them from disclosing such information while employed with and after leaving KB.”) (citations omitted).

<sup>113</sup> See *Miles, Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at \*12 (Del. Ch. 1994) (finding a process subject to reasonable efforts to maintain secrecy where access to the company plant was restricted, and employees signed confidentiality agreements and were not permitted to remove documents from the plant).

<sup>114</sup> See *Beard Research, Inc. v. Kates*, 8 A.3d 573, 596 (Del. Ch. 2010) (finding that reasonable efforts were made to preserve confidentiality when, among other things, the evidence showed that “throughout the industry it was generally considered inappropriate to use experimentals anywhere outside of the lab in which they were created.”).

<sup>115</sup> Although not referred to in Wayman’s briefing or at trial, a copy of a 2008 Wayman employee handbook is in the record. JX 2. Wayman cites to no evidence that Weitzel, White, or Fox, who began working at Wayman well before 2008, had ever seen a copy of this or any other Wayman employee handbook. In addition, the confidentiality language in the 2008 handbook is geared more towards protecting Wayman’s client’s confidential information than it is towards protecting Wayman’s confidential information. I am not convinced that the language in the handbook would lead a Wayman employee to believe that either the contacts report or the opportunities report was confidential information.

I am not persuaded that merely password protecting the Salesforce information at issue here constitutes reasonable efforts to protect the confidentiality of that information. Wayman has not presented evidence that it conveyed to those to whom it gave passwords to access Salesforce that the Salesforce information was highly confidential or secret. As previously discussed, it is not inherently obvious that the names and phone numbers of Wayman's clients was confidential proprietary information. If Wayman believed that information was proprietary, I find that they should have done something more to impress that fact upon those with access to Salesforce. That is not to say that a company always must do more than password protect information to comply with DUTSA's "reasonable efforts" requirement. In this case, however, based on the nature of the information at issue, I find that in simply relying on the security features that came with Salesforce, primarily a password requirement, Wayman failed to make efforts that were reasonable under the circumstance to maintain secrecy of either of the Salesforce documents.<sup>116</sup> Thus, Wayman has not met its burden of establishing that either report is a protectable trade secret under DUTSA.

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Therefore, the employee handbook in this case is not persuasive evidence that Wayman took reasonable steps to protect the confidentiality of the Salesforce reports.

<sup>116</sup> At the end of both Salesforce reports, in small print, it says "Confidential information – Do Not Distribute." JX 101; JX 102. There is no evidence that Fox or any other Wayman Salesforce user was cognizant of that easy-to-overlook language, or that Wayman ever brought that concept to its employees' attention.

**3. Wayman also has failed to prove misappropriation or disclosure of the Salesforce documents**

Another disputed issue on Wayman's misappropriation of trade secrets claim is whether Premium Fire actually misappropriated the information in question. I focus my analysis of that issue on Premium Fire and the actions of Fox.

DUTSA defines "misappropriation," in relevant part, as:

- a. 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
- b. Disclosure or use of a trade secret of another without express or implied consent by a person who:
  - 1. Used improper means to acquire knowledge of the trade secret;
  - 2. At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade [secret] was:
    - A. Derived from or through a person who had utilized improper means to acquire it;
    - B. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - C. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use

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"Misappropriation of trade secrets may be proven by circumstantial evidence,' and more often than not, 'plaintiffs must construct a web of perhaps ambiguous

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<sup>117</sup> 6 Del. C. § 2001(2).

circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place.”<sup>118</sup>

Wayman argues that because Fox kept the Salesforce documents after his employment with Wayman ended, he acquired them by improper means. The evidence does not support this theory. “Improper means” is defined by the statute as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”<sup>119</sup> Fox acquired the Salesforce documents through proper means: he downloaded them, as he was permitted to do, in the course of his employment at Wayman. Moreover, there is no evidence that Fox downloaded the Salesforce documents for the purpose of taking them with him to Premium Fire. The contacts report contains a date stamp which appears to indicate that Fox downloaded it on November 18, 2011.<sup>120</sup> Fox also testified that he downloaded the contacts report and the opportunities report on the same day.<sup>121</sup> Fox did not start working for Premium Fire until February 2012, and there is no evidence that Fox was talking to

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<sup>118</sup> *Merck & Co. v. Smithkline Beecham Pharm. Co.*, 1999 WL 669354, at \*20 (Del. Ch. Aug. 5, 1999) (quoting *Miles*, 1994 WL 676761, at \*13, and *Greenberg v. Croydon Plastics Co.*, 378 F. Supp. 806, 814 (E.D. Pa. 1974)).

<sup>119</sup> 6 Del. C. § 2001(1).

<sup>120</sup> JX 102.

<sup>121</sup> Tr. 539–40.

Premium Fire about a job there in November 2011.<sup>122</sup> Based on the evidence, therefore, I am not persuaded that Fox downloaded the Salesforce documents for the purpose of bringing them to Premium Fire. Rather, I find that Fox downloaded the reports in the normal course of his employment at Wayman and backed them up on his external hard drive as part of his usual practice, and not for the purpose of appropriating them.

It is still possible, however, that Fox and, through him, Premium Fire, misappropriated the Salesforce documents within the meaning of 6 Del. C. § 2001(2). Assuming for purposes of argument, and contrary to my finding in Section II.B.2. *supra*, that Wayman had shown that the Salesforce documents are trade secrets, there could be misappropriation under Section 2001(2)(b)(2)(B). That is, Fox, in his capacity as an employee of Premium Fire, may have “[d]isclos[ed] or use[d] a trade secret of another [i.e., Wayman] without [Wayman’s] express or implied consent” and “[a]t the time of disclosure or use, [Fox may have known] or had reason to know that his . . . knowledge of the trade [secret] was: . . . . [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use . . . .” The record on several of the factual predicates for this argument is less than clear and the subject of dispute between the parties. Because I have found that Wayman failed to prove that either of the Salesforce

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<sup>122</sup> In fact, Fox did not resign from Wayman for the purpose of accepting a job at Premium Fire. Wayman fired Fox. Tr. 571–72 (Fox). *See also* Tr. 807–08 (Weitzel) (“Q: And behind that page is a letter dated February 14<sup>th</sup> to Mr. Fox. How did Mr. Fox come to work for Premium? A: He was terminated and got in touch with me and asked me if I had any openings. And I said, ‘Yeah. We’re starting up. It’s probably pretty good timing for you. Come on over.’”).

documents are trade secrets, however, I need not resolve the issue of whether those documents were misappropriated, even indirectly, by Premium Fire.

Even if Wayman had succeeded in proving a misappropriation of one of its trade secrets, however, I am convinced that any such misappropriation would not have been willful and malicious within the meaning of 6 *Del. C.* § 2003. There is no evidence that Fox deliberately brought the Salesforce documents to Premium Fire, that anyone at Premium Fire asked Fox to bring the Salesforce documents with him, or that anyone at Premium Fire actually knew that Fox's laptop contained the Salesforce documents. Therefore, I find no basis in the record to hold that Premium Fire acted willfully or maliciously with regard to the Salesforce reports. Consequently, even if a misappropriation of trade secrets by Premium Fire had been shown, Wayman has failed to prove a basis for any award of enhanced damages or attorneys' fees to Wayman under Section 2003 or 2004 of DUTSA.

In addition, there is no evidence that Fox or anyone else at Premium Fire used any information from the opportunities report for Premium Fire's benefit. Thus, I conclude that Wayman has not demonstrated use by Fox or Premium Fire of the opportunity report. Moreover, even if Wayman had been able to establish use of the contacts report, that use would not have been material, because the contact report is not a protectable trade secret for the reasons discussed previously.

### **C. Delaware Misuse of Computer System Information Act**

Under 11 *Del. C.* § 935, a person is liable for misuse of computer system information when:

- (1) As a result of accessing or causing to be accessed a computer system, the person intentionally makes or causes to be made an unauthorized display, use, disclosure or copy, in any form, of data residing in, communicated by or produced by a computer system;
- (2) That person intentionally or recklessly and without authorization:
  - a. Alters, deletes, tampers with, damages, destroys, or takes data intended for use by a computer system; or
  - b. Interrupts or adds data to data residing within a computer system;
- (3) That person knowingly receives or retains data obtained in violation of paragraph (1) or (2) of this section; or
- (4) That person uses or discloses any data which that person knows or believes was obtained in violation of paragraph (1) or (2) of this section.

Defendants concede their liability under this statute, and instead focus their argument on the damages that Wayman should be awarded.<sup>123</sup> For purposes of determining the appropriate remedy, however, it is useful to review briefly the grounds on which each Defendant is liable.

### **1. Defendant White**

Based on the evidence presented at trial, White is liable for computer misuse under Section 935(1), (2)(a), and (4). With respect to Section 935(1), it is undisputed that White was in possession of unauthorized copies of certain of Wayman's files when he

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<sup>123</sup> Defs.' Post-Trial Reply Br. 38–39.

resigned from the company.<sup>124</sup> White intentionally copied files from Wayman's computer system, and uploaded those files onto his Premium Fire laptop. Wayman never authorized White to make copies of its files for such use. Thus, White is liable for computer misuse under Section 935(1).

Although White expressly denied doing so at trial, I find from the evidence that it was White who deleted the 390 files from the Wayman laptop he used on his last day of employment on November 30, 2011. Even after trial, the factual record is unclear as to exactly what was contained in these files, whether someone other than White used the laptop on November 30, and what, if any, steps Wayman took to preserve the integrity of the laptop between the time White surrendered the laptop to his supervisor and when Wayman's expert analyzed it. Wayman's computer expert Louis Cinquanto, however, credibly testified that many of the files that were deleted from the Wayman laptop also were found on White's Premium Fire laptop and White's flash drives. Based on Cinquanto's testimony that White was in possession of many of the files that were deleted, I find it is more likely than not that White deleted those files from the Wayman laptop, without authorization, in contravention of Section 935(2)(a).

Finally, White is liable under Section 935(4) for his use of the Doylestown program file that Tom Darling, a Wayman technician and former colleague of White's, sent to him in June 2012. As discussed *infra*, and contrary to Defendants' position, I find

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<sup>124</sup> Because White regularly backed up Wayman's files onto his personal flash drive, the statement in the text is true regardless of whether White also was the individual who copied files from Wayman's Dropbox account on November 27 and 28, 2011.

it is an oversimplification to say that technicians from different fire system vendors exchange program files freely and regularly. Moreover, whether any such exchange can be considered “authorized” depends on the circumstances. There is no evidence, for example, that Smith asked or directed Wayman to share its program files with Premium Fire in connection with the Doylestown upgrade project or that Wayman authorized Darling to provide such files to White. Therefore, I find it is more likely than not that White had no reasonable basis to believe that Wayman had authorized Darling to copy the Doylestown program file and send it to him.

I also find, based on a preponderance of the evidence, that White made use of the Doylestown file that Darling sent to him. Before Premium Fire even submitted their bid, Weitzel assured Smith that Doylestown would not incur any reprogramming charges if Premium Fire was awarded the upgrade project. If Premium Fire did not use Wayman’s program file, it would have incurred additional costs to reprogram the system for the Doylestown upgrade. Because White specifically requested and received the most updated copy of the Doylestown file from Darling, I infer that he used it on Premium Fire’s behalf on the Doylestown job.<sup>125</sup> In that regard, I also note that Cinquanto testified that White was in possession of Doylestown files that had been modified, which further supports inference of use.<sup>126</sup>

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<sup>125</sup> See *W.L. Gore & Assocs., Inc. v. Long*, 2011 WL 6935278, at \*7 (Del. Ch. Dec. 28, 2011) (“[O]ne’s possession of a competitor’s confidential data naturally raises the question of why that person possesses that data if not to use it.”).

<sup>126</sup> Tr. 89–90. Relatedly, because I find the fact that White requested and received updated Doylestown files from Darling, I consider it unlikely that White used the

### **a. Was White's misuse wilful and malicious?**

Whether an individual's computer misuse was wilful and malicious directly affects the amount of damages to which a plaintiff is entitled under Section 935; if both are shown, a plaintiff may recover treble damages.<sup>127</sup> The misuse statute does not define "wilful" and "malicious," but this Court, in the analogous misappropriation of trade secrets context, has defined those words, respectively, to mean "an awareness, either actual or constructive, of ones conduct and a realization of its probable consequences," and "ill-will, hatred or intent to cause injury."<sup>128</sup> Even assuming White's misuse was wilful, I am not persuaded that any of his conduct in this case was malicious. As to copying Wayman's files, White, like several other current or former Wayman employees, copied files and backed up his computers as a matter of habit. Furthermore, White brought the Wayman files he had assembled over the course of his career there to Premium Fire because he believed it would help him in his new job, not because he harbored any ill-will or hatred towards Wayman or intended to harm Wayman.

Regarding the deletion of files, Wayman has failed to adduce any probative evidence regarding the nature or substance of those files. Without a better understanding

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Doylestown files he had copied while he was at Wayman and brought with him to Premium Fire.

<sup>127</sup> See 11 Del. C. §941(c) ("The aggrieved person shall recover actual damages and damages for unjust enrichment not taken into account in computing damages for actual loss and treble damages where there has been a showing of wilful and malicious conduct.").

<sup>128</sup> *Beard Research, Inc. v. Kates*, 8 A.3d 573, 600 (Del. Ch. 2010) *aff'd sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010).

of what was deleted, I cannot conclude that White deleted those files with an intent to injure Wayman, or was motivated by ill-will or hatred towards a company he had worked for for nearly a decade and was leaving on his own terms.

Finally, I find that White did not act maliciously in using the Doylestown file that Darling sent him. White asked for and received that file after Premium Fire already had been awarded the contract over Wayman. Thus, some of the alleged harm to Wayman already had occurred before White used the file. Furthermore, it appears more likely that White simply was trying to do his job and did not focus much, if at all, on whether Darling was authorized to send him the Doylestown file. Because the record does not support the conclusion that White's conduct was motivated by ill-will, hatred, or an intent to harm Wayman, Wayman has not established that White's actions were malicious. Therefore, Wayman is not entitled to treble damages under the misuse statute for White's actions.<sup>129</sup>

## **2. Defendants Premium Fire and Weitzel**

Premium Fire is liable for computer misuse under Section 935(3) and 935(4). Both White and Fox uploaded Wayman's files onto their Premium Fire laptops. The record shows that Weitzel, Premium Fire's President, became aware that Fox uploaded Wayman documents onto his computer shortly after Fox began working for Premium Fire in February 2012, and became aware that White was in possession of Wayman's files

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<sup>129</sup> For similar reasons, I also conclude that Wayman has failed to show that either Defendants' use of Wayman's program file to perform work at Pitcairn or Defendants' provision of a copy of a Wayman program file to Geffre constituted malicious conduct .

shortly after this lawsuit was commenced in September 2012. Weitzel did not ask either Fox or White to destroy, delete, or return the Wayman files they had brought with them. Therefore, Premium Fire has knowingly “retained” Wayman’s files in contravention of Section 935(3).

Premium Fire also is liable for computer misuse under Section 935(4) because, at a minimum, its employee and agent White improperly used Wayman’s computer information.<sup>130</sup>

In addition, Weitzel is individually liable under the misuse statute. Wayman argues that Weitzel is liable because he knew about Fox and White’s possession of Wayman’s property and failed to ensure it was returned to Wayman and not used. Defendants concede that at some point Weitzel possessed, retained, or received impermissibly, through Fox or White, some of Wayman’s computer system information. On the basis of that concession, I find Weitzel liable for computer misuse.

**a. Was Premium Fire and Weitzel’s misuse wilful and malicious?**

Wayman claims Weitzel and Premium Fire acted with malicious intent because Weitzel failed to take any action once he became aware that Fox and White possessed Wayman computer files. Although Weitzel’s actions were exceptionally careless, I do not find that they were malicious. Nothing in the record suggests that Weitzel had much, if any, understanding of what was contained in the files that Fox uploaded onto his

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<sup>130</sup> See *Fisher v. Townsends, Inc.*, 695 A.2d 53, 58 (Del. 1997) (“Two general rules establish the framework for determining vicarious liability. The first general rule is that if the principal is the master of an agent who is a servant, the fault of the agent, if acting within the scope of employment, will be imputed to the principal by the doctrine of *respondeat superior*. ”).

Premium Fire laptop. Without having demonstrated that Weitzel knew what Fox had brought to Premium Fire, I find that Wayman has not shown that Weitzel acted with ill-will or an intent to harm Wayman when he failed to ensure the property was returned to it. For similar reasons, I conclude that Weitzel did not act maliciously by failing to take any curative actions once he learned that White also was in possession of Wayman property. White assured Weitzel that he had not used any of Wayman's property, and that he would not do so going forward. Moreover, Weitzel did not learn of White's possession of Wayman's computer files until after Wayman filed this lawsuit. Shortly thereafter, Premium Fire engaged counsel to address Wayman's allegations<sup>131</sup> and, presumably, to instruct Defendants what to do with the files.<sup>132</sup> Under these circumstances, I am not persuaded that Weitzel's failure to act more aggressively to ameliorate the situation was motivated by ill-will or an intent to harm Wayman. Consequently, Wayman has not established that any of the Defendants acted wilfully and maliciously in misusing Wayman's computer files.<sup>133</sup>

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<sup>131</sup> Tr. 671 (Weitzel).

<sup>132</sup> See Tr. 679–80 (Weitzel) (“I -- once we got our counsel involved, I’m sure there were further instructions, but I asked [White] not to use [Wayman’s files]. We didn’t need [Wayman’s files] for anything.”).

<sup>133</sup> In post-trial briefing, Wayman argued that Weitzel “sought to destroy Wayman” after his termination. Wayman’s Post-Trial Opening Br. 2–5. The evidence that Wayman points to in support of its assertion, considered individually or together (including Weitzel’s emails in JX 74 and JX 315), does not show that Weitzel ever acted maliciously towards Wayman. As Wayman itself recognizes, Weitzel was free to compete once he was terminated. The fact that he chose to do so vigorously by, for example, attempting to “stir things up” at Wayman by making sure Wayman knew that Premium Fire had secured contracts from Wayman

## **D. White’s Duty of Loyalty**

Turning to the claim that White breached his duty of loyalty to Wayman, it is undisputed that White was not a “key managerial employee” of Wayman such that he would have owed general corporate fiduciary duties to the company. Nevertheless, the record convinces me that White was Wayman’s agent.<sup>134</sup> Thus, as an agent, White may have owed duties to Wayman under principles of agency law. I address that question next.

### **1. Legal standard**

Under Delaware law, the relationship of agent to principal does not itself give rise to fiduciary duties.<sup>135</sup> A fiduciary relationship generally requires “confidence reposed by

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customers, or soliciting potential clients in EST area PA4, where he previously had conducted business for several years, does not amount to malicious conduct or indicate that Weitzel had a vendetta against Wayman. Rather, his actions are consistent with aggressive competition, which he was permitted to engage in, and which Wayman could have avoided through a noncompetition agreement or some other contractual arrangement.

<sup>134</sup> See *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at \*10 (Del. Ch. May 18, 2009) (“Under Delaware law, the distinguishing feature of an agent is that he represents his principal contractually to the extent that the agent normally binds, not himself, but his principal by the contracts he makes. The ability to so bind his principal results from the agent having been authorized, or appearing to an unsuspecting third party to have been authorized, to do so.”) (citations omitted).

<sup>135</sup> *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at \*6 (Del. Ch. May 27, 2005). Fiduciary duties will arise, however, in the context of an agent/principal relationship when “there is an element of confidentiality or a joint undertaking between the principal and agent. The hallmark of this form of special principal/agent relationship is when matters are peculiarly within the knowledge of the agent.” *Metro Ambulance, Inc. v. E. Med. Billing, Inc.*, 1995 WL 409015, at \*3 (Del. Ch. July 5, 1995) (citations omitted).

one side and domination and influence exercised by the other.”<sup>136</sup> Nevertheless, where an agent represents a principal in a matter where the agent is provided with confidential information to be used for the purposes of the principal, a fiduciary relationship may arise.<sup>137</sup> For example, if an employee in the course of his employment acquires secret information relating to his employer’s business, he occupies a position of trust and confidence toward it and must govern his actions accordingly.<sup>138</sup> The resulting relationship is analogous in most respects to that of a fiduciary relationship.<sup>139</sup> This is true even if the confidential information disclosed to the employee does not rise to the level of a trade secret.<sup>140</sup>

Although employees do enjoy a privilege allowing them to make preparations to compete with their employer before their employment relationship ends, that privilege is not without limitations. Under some circumstances, the purported exercise of the

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<sup>136</sup> *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at \*8 (Del. Ch. Aug. 3, 2004) (quoting *Gross v. Univ. of Chi.*, 302 N.E.2d 444, 453–54 (Ill. App. Ct. 1973)).

<sup>137</sup> *Ramsey v. Toelle*, 2008 WL 4570580, at \*6 (Del. Ch. Sept. 30, 2008).

<sup>138</sup> *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949).

<sup>139</sup> *Id.*

<sup>140</sup> See *id.* at 7–8 (“A fiduciary is subject to a duty to the beneficiary not to use on his own account information confidentially given him by the [principal] or acquired by him during the course of or on account of the fiduciary relation or in violation of his duties as fiduciary, in competition with or to the injury of the beneficiary . . .”). See also *EDIX Media Gp., Inc. v. Mahani*, 2006 WL 3742595, at \*5 (Del. Ch. Dec. 12, 2006) (“Not all confidential information is a trade secret.”).

privilege may breach the employee’s fiduciary duty of loyalty.<sup>141</sup> For example, an employee may be denied the protection of the privilege when they have misappropriated trade secrets, misused confidential information, solicited the employer’s customers before cessation of employment, conspired to effectuate mass resignation of key employees, or usurped a business opportunity of the employer.<sup>142</sup> Ultimately, the determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise “must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case.”<sup>143</sup>

## **2. Who owns the program files?**

A key point of disagreement between the parties in this case is who “owns” the SDU files that White is alleged to have copied from Wayman and used during the course of his job at Premium Fire. Wayman argues that it owns the SDU program files that it develops for its customers to make their fire control systems operational. This assertion is predicated on the fact that Wayman, as the entity that expends the time and resources to create the file, has an ownership interest in the product it creates. In response, Defendants aver that the SDU files are owned by the customer for which they are designed. According to Defendants, this is evidenced by, among other things, fire code regulations that require a copy of the program file to remain on site with the customer and

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<sup>141</sup> *Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 964–65 (Del. 1980).

<sup>142</sup> *Id.* at 965 (citing cases).

<sup>143</sup> *Id.* (citation omitted).

the fact that technicians, even among competing firms, “routinely” exchange program files with one another. Having reviewed the relevant portions of the record, I conclude that Wayman has established, by a preponderance of the evidence, that it has an ownership interest in the SDU program files at issue.

There is a credible basis for Defendants’ assertion that customers have an ownership interest in the program files created for them. Marc Heil, the Director of Building Services and Project Management at one of Wayman’s former clients, testified that he believed his employer, and not Wayman, owned the program file that ran the fire control system.<sup>144</sup> Smith of Doylestown believes that Doylestown owned the program files that had been installed before Wayman started servicing the hospital.<sup>145</sup> I also note that EST, which supplies fire control system equipment, apparently does not take a position as to whether its vendors or their customers own site-specific SDU program files.<sup>146</sup> Finally, there is some evidence that certain fire codes require vendors to leave copies of program files on site with customers so that the customers can use them in the event of a failure with the system.<sup>147</sup>

The fact that clients may have an ownership interest in the customized SDU program files installed on their system, however, does not, without more, divest Wayman

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<sup>144</sup> Heil Dep. 54.

<sup>145</sup> Smith Dep. 10–11. *See also* Geffre Dep. 26 (stating that it is becoming an increasingly common requirement on projects that the “provider has to provide the end user with the data file upon completion.”).

<sup>146</sup> Boyle Dep. 225.

<sup>147</sup> Tr. 841–42 (White); Boyle Dep. 224–25.

of its ownership rights in such files. This is perhaps best exemplified by “Annex E” to Premium Fire (and Wayman’s) agreement with EST. The purpose of Annex E is to inform potential customers that if the customer cannot provide a new vendor with a copy of its SDU program files, then the new vendor may have to reprogram the customer’s system which could result in additional fees and expenses that should be agreed upon before the new vendor is hired.<sup>148</sup> Although Annex E addresses situations in which the customer has access to the program files and can convey them to the new vendor, there would be no reason for Annex E to exist, if, as Defendants argue, the customer generally has exclusive ownership of the program files or the customer generally has an absolute right to give a third party access to the program files.

Defendants also argue that the program files belong to customers because technicians at different vendors “routinely” transfer and share program files. In support of their contention, Defendants cite to thirteen joint exhibits that purport to show email exchanges between Wayman and non-Wayman technicians. Two of these emails are between different Wayman technicians; therefore, they are largely irrelevant.<sup>149</sup> Four of the emails pertain to a customer that Wayman and Premium Fire were servicing simultaneously, and the customer had instructed Wayman and Premium Fire to share the program files.<sup>150</sup> Three more of the emails involve White sending a Wayman technician

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<sup>148</sup> JX 136 at 16.

<sup>149</sup> JX 348; JX 556.

<sup>150</sup> JX 347; JX 352; JX 358; JX 411.

files that White had copied from his time at Wayman.<sup>151</sup> In the final three emails,<sup>152</sup> a Wayman technician is providing White with a copy of a program file he requested, including Doylestown on two occasions.<sup>153</sup>

These emails fail to show that the customers have exclusive ownership interests in the customized program files installed on their fire control systems. Because several of the emails involve special circumstances and others are merely episodic, they do not provide an adequate basis for a reasonable inference that there is an “industry custom” among vendors of freely exchanging program files.<sup>154</sup> Even if these emails did demonstrate the existence of such a custom, however, it is unclear how that shows that the program files belong to the clients. If the files were the exclusive property of the clients, one could reasonably infer that vendors would be reluctant to share them without express permission from the file’s owner. With one possible exception, there does not appear to be any evidence in the record that the clients associated with the files that were

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<sup>151</sup> JX 343; JX 344; JX 391. The fact that White was in possession of Wayman files that the company’s technicians were unable to locate on their Wayman computers further supports the inference that White was responsible for the deletion of 390 files from a Wayman laptop on his last day of employment there.

<sup>152</sup> Of the thirteen emails cited by Defendants, two are duplicates.

<sup>153</sup> JX 342; JX 353; JX 413.

<sup>154</sup> Testimony of John Geffre, who has installed and maintained EST and other fire control systems, undermined the notion that technicians at competing vendors were free to exchange program files and did so regularly. According to Geffre, based on the liability a vendor could face if there was a problem with the fire control system it installed, he would not share a file with another vendor, who might make changes to the system, without having that vendor agree in writing to indemnify him in the event something went wrong after the file exchange. Geffre Dep. 34–35.

exchanged between Wayman and Premium Fire gave either vendor permission to do so. Thus, rather than find that Wayman and Premium Fire wilfully sent their client's property to one another without authorization, I find that the evidence as a whole indicates that vendors such as Wayman and Premium Fire do have an ownership interest in the program files that they create for their respective clients. The customers also may have an ownership interest in those files and, in consultation with the vendor, may direct that they be made available to other vendors. As stated previously, however, that does not undermine the conclusion that Wayman has an ownership interest in the program files at issue in this case.

I also infer from the evidence that the SDU program files are both confidential and valuable. Although Wayman has not argued that such property constitutes a protectable trade secret, it has demonstrated nevertheless that the SDU program files are confidential in nature by virtue of the fact that they are proprietary and not shared unless it is necessary to do so, and that they derive at least some value from the fact that other vendors do not know their contents.<sup>155</sup> Therefore, I find that the SDU program files at issue were the confidential property of Wayman, the vendor that created them for its clients.

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<sup>155</sup> This is true even assuming that clients also have an ownership interest in the program files. That fact, without more, does not destroy the confidentiality of the files from the vendor's perspective.

### **3. White owed Wayman a duty of loyalty**

Wayman has demonstrated that it has a property interest in the SDU files at issue in this case and that it generally kept them confidential. It is undisputed that over the course of his tenure at Wayman, White was exposed to, helped create, and was often responsible for, a number of such program files. Based on these facts, White owed Wayman a duty of loyalty with respect to the confidential information that Wayman entrusted to him.

### **4. White breached his duty of loyalty**

From the time White accepted a job with Premium Fire in October 2011, he enjoyed a limited privilege to make preparations to join a competing enterprise. This limited privilege did not include, however, the right to misuse Wayman's confidential information. Although I find it is more likely than not that White copied files from Wayman's Dropbox account on November 27 and 28, 2011, less than a week before he left the company, even had he not, White continued to back up his Wayman files on his flash drive after he accepted a position with Premium Fire and after he gave Wayman notice that he would be resigning. Not only did White continue to back up the files on his flash drive, but his purpose in doing so was to have those files available to him when he began working for Premium Fire. Therefore, White misused Wayman's confidential information, in breach of his duty of loyalty, when he, at a minimum, backed up Wayman

files on his flash drive for the purpose of having them at his disposal when he began to work for Premium Fire, a direct competitor of Wayman.<sup>156</sup>

In addition, I find that White actually used the confidential information he copied near the end of his employment at Wayman while he was working for Premium Fire. Although White may have retained any number of files in his “tool kit” that were not Wayman’s property, I am not persuaded that White would copy Wayman’s files so they would be available to him, yet never use them. As discussed *supra*, White had sufficient familiarity with the files he had copied from Wayman to email Wayman technicians certain files that they asked him for because they were unable to locate them on Wayman’s computers.<sup>157</sup> Thus, I am not persuaded that White simply possessed Wayman’s files or that he had forgotten that he had them. White may not have used Wayman’s files often, and Wayman may not have incurred any direct harm as a consequence of White’s use of its files, but the fact that White more likely than not used Wayman’s files in the course of his employment at Premium Fire leads me to conclude that he thereby breached his duty of loyalty to Wayman.

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<sup>156</sup> See *Beard Research, Inc. v. Kates*, 8 A.3d 573, 603 (Del. Ch. 2010), *aff’d sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010) (finding breach of fiduciary duty based on, among other things, the fact that fiduciary brought “a large amount of confidential information with him” to his new employer.”)

<sup>157</sup> See JX 343; JX 344; JX 391.

## **E. Conversion**

### **1. Legal standard**

Conversion is the “act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it.”<sup>158</sup> Before bringing an action for conversion, a plaintiff must demonstrate that it made a demand that the property be returned and the defendant refused the demand.<sup>159</sup> This requirement is excused, however, when the alleged wrongful act amounts to a denial of the rights of the real owner.<sup>160</sup>

### **2. Defendants are liable for conversion of Wayman’s program files**

Wayman asserts that White converted its program files by copying and deleting files from his Wayman laptop in the last few days of his employment. In addition, Wayman avers that White, on Premium Fire’s behalf, accessed, modified, and used an unknown number of Wayman’s program files while working for Premium Fire in denial of Wayman’s rights in those files. In response, Defendants contend that the tort of conversion is inapplicable to electronically stored data, and that even if it was possible to convert Wayman’s files, they are not liable for conversion here because Wayman never asked that the files be returned. Defendants’ arguments in this regard are without merit.

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<sup>158</sup> *McGowan v. Ferro*, 859 A.2d 1012, 1040 (Del. Ch. 2004) (quoting *Arnold v. Soc’y for Savings Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (quoting *Drug, Inc. v. Hunt*, 168 A. 87, 93 (Del. 1933))).

<sup>159</sup> *CIT Commc’ns Fin. Corp. v. Level 3 Commc’ns, LLC*, 2008 WL 2586694, at \*2 (Del. Super. June 6, 2008) (quoting *Drug, Inc.*, 168 A. at 94).

<sup>160</sup> *Id.*

First, Defendants cite no legal authority for the proposition that the tort of conversion is inapplicable to electronically stored information. In contrast, this Court has held on at least one occasion that such information is susceptible to conversion.<sup>161</sup> Therefore, I reject Defendants' argument that Wayman's electronic computer files could not have been converted as devoid of legal or logical support.

I also conclude that, in this case, Wayman was excused from demanding that Premium Fire return the files that White had copied and taken with him. According to Cinquanto, at least several of the program files White had in his possession that appeared to match the files deleted from Wayman's computer on November 30, 2011, were modified after White left Wayman.<sup>162</sup> In addition, I find that White used at least some of the program files he had copied from Wayman and taken with him to Premium Fire during his tenure there. White's modification and use of some of the program files at issue constitutes a denial of Wayman's rights to utilize its files for similar purposes. This is particularly true with respect to the modified files because they could have rendered Wayman's version of the file obsolete.<sup>163</sup> Because White's actions amount to a denial of Wayman's ownership rights in the files, Wayman was excused from demanding their

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<sup>161</sup> See *Seibold v. Camulos P'srs LP*, 2012 WL 4076182, at \*22 (Del. Ch. Sept. 17, 2012) (finding new employer liable for conversion of the former employer's electronic documents and information.)

<sup>162</sup> Tr. 31.

<sup>163</sup> Moreover, to the extent White deleted Wayman's copy of the file before he left Wayman and maintained only the modified copy of the file when he was with Premium Fire, Wayman's file no longer exists and, therefore, cannot be recovered.

return before initiating this action. Furthermore, because White and his employer Premium Fire wrongly “exercise[d] dominion” over Wayman’s property in a manner that was inconsistent with Wayman’s rights over the property, they are liable for conversion.<sup>164</sup>

### **3. Premium Fire is liable for conversion of the Wayman documents Fox uploaded on his Premium Fire laptop**

Defendants did not respond to Wayman’s arguments with respect to Premium Fire’s alleged conversion of the information Fox uploaded on his laptop. Although Wayman settled its claims against Fox before trial, Premium Fire is nevertheless vicariously liable for the actions Fox took while he was a Premium Fire employee. In copying Wayman’s information, putting that information on his Premium Fire laptop, and using some of the information during the course of his employment at Premium Fire, Fox exercised dominion over Wayman’s property in a manner that was inconsistent with Wayman’s rights over that property. Because Fox took those actions in the course of his employment with Premium Fire, and because Weitzel likely was aware that Fox was in possession of some of Wayman’s property, Premium Fire is liable for the tortious actions of its employee.

### **F. Civil Conspiracy**

Wayman also asserts that Premium Fire and Weitzel conspired with White and Fox to steal computer files from Wayman and to retain and use those files improperly for

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<sup>164</sup> As discussed in Section II.F. *infra*, I find Weitzel liable for Fox’s conversion of Wayman’s property on a conspiracy theory. Thus, I need not address whether Weitzel also is liable for conversion on an individual basis.

the purpose of competing unfairly with Wayman. Defendants deny the existence of any agreement among themselves to engage in impermissible conduct. I next address the merits of these respective arguments.

### **1. Legal standard**

The elements for civil conspiracy under Delaware law are: (1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) damages resulting from the action of the parties to the conspiracy.<sup>165</sup> Wayman argues that all Defendants are liable for civil conspiracy with respect to: (1) White's alleged theft of Wayman's program files and corresponding breach of his duty of loyalty to Wayman; (2) White's retention and use of Wayman's files; and (3) Fox's possession and use of Wayman's files. I conclude that Wayman has not met its burden of proving the existence of a civil conspiracy claim based on White's alleged wrongdoing, but that it has established a conspiracy claim with respect to Fox's actions.

### **2. Confederation or combination of two or more persons**

A plaintiff pursuing a claim for civil conspiracy may not rely solely on the fact that more than one person is involved in committing an alleged wrong. A "confederation or combination" of people for purposes of a civil conspiracy claim means that there is a "meeting of the minds between or among such persons," and that "meeting of the minds"

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<sup>165</sup> *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 437 n.8 (Del. 2005); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987).

relates to the allegedly improper object or course of conduct to be accomplished.<sup>166</sup> Thus, to prevail on its civil conspiracy claim, Wayman must demonstrate that Defendants reached an agreement amongst themselves to wrongfully possess or use Wayman's property.

**a. White's alleged theft of the program files and breach of duty of loyalty to Wayman**

There is no evidence to support Wayman's assertion that another Defendant had knowledge of White's alleged theft and deletion of Wayman's files in the days leading up to his leaving Wayman. Furthermore, the record is devoid of any indication that White engaged in his alleged theft and breach of fiduciary duty pursuant to an agreement with another Defendant or anyone else. Thus, even though I have concluded that White converted Wayman's property and breached his duty of loyalty to Wayman in doing so, the absence of any indicia of an agreement among two or more of the Defendants for White to engage in such conduct makes Wayman's civil conspiracy claim on this basis untenable.<sup>167</sup>

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<sup>166</sup> *Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at \*15 (Del. Ch. Oct. 31, 2013). See also *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at \*15 (Del. Ch. Aug. 28, 2012) (stating that a civil conspiracy claim "focuses on the agreement.").

<sup>167</sup> Wayman's reliance on *Seibold v. Camulos P'rs LP*, 2012 WL 4076182 (Del. Ch. Sept. 17, 2012) for the proposition that Premium Fire should be deemed to have had knowledge of White's actions, because White acted for the purpose of benefitting Premium Fire and Premium Fire benefitted from White's actions, is misplaced. In *Seibold*, which involved an aiding and abetting claim, the tortfeasor's knowledge was imputed to the defendant entity because the tortfeasor created that entity. *Id.* at \*22. In contrast, there is no basis in this case to impute White's knowledge to Premium Fire or any other Defendant.

**b. White's retention and use of Wayman's files**

The evidence presented at trial suggests that the first time any of Defendants became aware of White's possession of Wayman's property was after the original complaint was filed in this action. Upon learning of the allegations that White had stolen Wayman's property, Weitzel discussed the matter with White.<sup>168</sup> White admitted to having Wayman files in his possession, but he denied that those files were stolen. Rather, White explained that, during his eleven-year career as a technician, he regularly backed up files onto a flash drive and kept them as his "tool kit," and that he believed he was entitled to do that and keep the files after changing jobs. Although Weitzel did not ask White to return the files to Wayman, he did instruct White not to use any of Wayman's property. In response, White advised Weitzel that he had not used any of Wayman's files since he had begun working for Premium Fire, and that he would not use those files going forward.

In these circumstances, I find no evidence of any agreement among two or more Defendants to facilitate or encourage White's use of Wayman's files. Even assuming that White actually used Wayman's files impermissibly, the evidence does not show that he acted pursuant to an arrangement with any other Defendant. Nor is there evidence sufficient to establish that White's use of Wayman's files was encouraged or sanctioned, either explicitly or tacitly, by any other Defendant. Thus, I find that there was no

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<sup>168</sup> Tr. 670–76 (Weitzel).

“meeting of the minds” amongst Defendants with respect to White’s alleged use of Wayman’s files.

I reach the same conclusion as to White’s retention of Wayman’s files during his employment at Premium Fire. Defendants, and in particular Weitzel, may have been careless in how they handled the arrival of former Wayman employees at Premium Fire. Civil conspiracy, however, is a “scienter-based” doctrine.<sup>169</sup> Wayman has not shown that Defendants’ carelessness rose to such a level that their conduct amounted to a knowing participation in White’s wrongdoing. It was not until shortly after they received notice that Wayman had sued them that any Defendant other than White even became aware that he possessed files from Wayman.<sup>170</sup> In the same timeframe, Defendants retained counsel to address the situation. Although Defendants conceivably might have begun to conspire with one another after this lawsuit was filed and they retained counsel, that seems highly unlikely. Thus, because Wayman has not carried its burden of demonstrating that there was a “meeting of the minds” among Defendants with respect to

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<sup>169</sup> *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1043 n.59 (Del. Ch. 2006).

<sup>170</sup> Although Weitzel told Smith that there would be no additional charge for reprogramming Doylestown’s system before Premium Fire submitted its bid, I do not infer from that that Weitzel’s knowledge of White’s possession of Wayman information before Wayman filed its complaint. Instead, I find it more likely that Weitzel informed Smith that there would be no reprogramming costs because either: (1) Premium Fire was willing to absorb any additional costs to win new business; or (2) Weitzel believed he would be able to get the file from Wayman, through permissible means, if Premium Fire obtained the bid based on his own experience or White’s assurances to that effect.

White improperly retaining Wayman's files, that allegedly unlawful conduct cannot provide a predicate for its claim for civil conspiracy.

**c. Fox's possession and use of Wayman's files**

As with White, there is no evidence that any Defendant knew that Fox was bringing Wayman files to Premium Fire or asked him to do so. I do find, however, that it is more likely than not that Weitzel became aware of Fox's possession of Wayman property on the day that Fox uploaded the files onto his Premium Fire computer, when Weitzel asked Fox if he had any Pitcairn documents. I also find that in asking about the Pitcairn documents, Weitzel at least implicitly expressed an interest in using the Wayman files that Fox possessed and recognized that Fox intended to use at least some of that information. Because Weitzel had the authority and the opportunity to prevent Fox from maintaining or using Wayman's information, and because Weitzel knew that Fox possessed Wayman documents and likely understood he intended to use some of them, I find that there was a "meeting of the minds" between Fox and Weitzel with respect to the Wayman files Fox uploaded onto his Premium Fire laptop.

**3. Unlawful act in furtherance of the conspiracy and damages**

Fox acted in furtherance of the conspiracy with Weitzel by using at least some of the Wayman files he had uploaded onto his laptop. I also find that Wayman was harmed by Premium Fire's conversion, through Fox, of its property, even if it has not been able to

quantify the extent of that harm. Therefore, Premium Fire and Weitzel are liable for civil conspiracy with respect to Fox’s conversion of Wayman’s computer files.<sup>171</sup>

#### **G. Defendants’ Violation of the Preliminary Injunction**

On November 19, 2012, I granted the Preliminary Injunction.<sup>172</sup> Pursuant to that order, Defendants were enjoined from soliciting Wayman’s customers and “further misappropriating, using, or disclosing” any of Wayman’s proprietary or confidential information. To ensure that Defendants did not solicit Wayman’s clients, the parties agreed to “confer and identify a mutually acceptable third party to hold Plaintiff’s customer list for purposes of providing a mechanism for Defendants to ascertain whether a specific person or entity is on [Wayman’s] customer list in order to fully comply with this Order.” Defendants were to use the mechanism each time they wished to engage a new client by providing the potential client’s name to the third-party neutral. The third-party neutral would check the name given to them by Defendants against Wayman’s list of clients. Defendants would be permitted to solicit the potential client only if the third-party neutral informed them that the client did not appear on Wayman’s list.

In post-trial briefing, Defendants concede that they violated the terms of the Preliminary Injunction.<sup>173</sup> This admission is unsurprising in light of the evidence presented at trial. The testimony of Williams, Fox, and Weitzel, together with the evidentiary exhibits reviewed with those witnesses, demonstrated that Defendants

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<sup>171</sup> As Premium Fire’s President, Weitzel’s actions are attributable to Premium Fire.

<sup>172</sup> D.I. 61.

<sup>173</sup> Defs.’ Post-Trial Reply Br. 11–13.

repeatedly solicited potential clients without first checking with the third-party neutral to ensure that those potential clients were not Wayman customers.

Defendants aver that, although they violated the terms of the Preliminary Injunction, there are mitigating factors that should lessen the severity of any fine or sanction the Court might impose for their failure to comply with that order. None of Defendants' arguments, however, are persuasive.

First, Defendants contend that their violations of the Preliminary Injunction were inadvertent and not wilful or malicious. Even if Defendants did not intend to contravene this Court's authority, I consider their actions to have been reckless, at best. Had Defendants' violation of the Preliminary Injunction been an isolated and discrete occurrence, I might give more weight to their plea that they did not intend deliberately to disobey this Court's instructions. In fact, however, Defendants repeatedly violated the Preliminary Injunction. Defendants assert that they did not understand the scope of the Preliminary Injunction to which they consented. Yet, Defendants made no discernable effort to have their obligations clarified by Wayman or this Court. Instead, they chose to act in a manner consistent with their own self-serving interpretation of the Preliminary Injunction, regardless of whether that interpretation was accurate.<sup>174</sup> But, it was not Defendants' role to decide unilaterally what they could and could not do under the terms of the Preliminary Injunction. Only this Court has the authority to make such a

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<sup>174</sup> Indeed, the testimony of Fox and Williams makes clear that, in some instances, Defendants did not even attempt to comply with the order and simply ignored it. The cumulative effect of Defendants' actions in relation to the Preliminary Injunction was, for all intents and purposes, to render it largely ineffectual.

determination. To the extent clarifications might have been necessary, Defendants could have communicated with the “mutually acceptable third party,” Wayman, or this Court about their questions. By failing to pursue any of those more reasonable avenues, Defendants were at least negligent, and probably grossly so, in their attempts to adhere to the Preliminary Injunction. Therefore, I do not find Defendants’ professed “lack of intent” to be a mitigating factor.

Defendants also criticize the list of customers that Wayman apparently submitted to the third-party neutral as overbroad and including names of companies that were not actually Wayman’s clients. According to Defendants, Wayman thereby abused the Preliminary Injunction process, and that should militate against imposing a harsh punishment on Defendants for failing to comply with an overly broad order. I disagree. Based on the unnecessary contentiousness with which both sides have litigated this case, I would not be surprised if Wayman, in fact, overreached with the customer list it provided to the third-party neutral. Even assuming that to be true, however, if Defendants believed that Wayman was abusing the third-party neutral process, it was incumbent upon them to advise the Court of such and seek appropriate relief. Defendants had no right to engage in self-help and disregard the plain language of the Court’s order, irrespective of how Wayman might have conducted itself. Because, for the most part, Defendants simply ignored the third-party notification process and did not seek relief from this Court, Defendants’ current attempt to rely on Wayman’s actions to excuse their violations of the Preliminary Injunction rings hollow.

Finally, Defendants aver that Wayman has not produced any evidence that their failure to comply with the Preliminary Injunction has caused harm to Wayman. To the extent Defendants argue that they should not be required to pay damages, when Wayman has not shown that their contumacious conduct caused it any consequential damages, I agree. Wayman is entitled, however, to recover the attorneys' fees and expert expenses it incurred in connection with obtaining and trying to enforce the Preliminary Injunction. Whether or not Wayman has suffered consequential damages related to its business, however, is a separate issue. The absence of consequential, competitive damages incurred by Wayman does not preclude this Court from using its powers to enforce the orders that it issues or from imposing meaningful sanctions by way of fine, for example, on Defendants for violating the Preliminary Injunction.

For these reasons, I find Defendants in contempt for their repeated violations of the Preliminary Injunction. The remedy for Defendants' contempt is discussed in more detail in Section III.D. below.

### **III. DAMAGES**

Because Wayman has prevailed to at least some extent on its computer misuse, conversion, duty of loyalty, and conspiracy claims, I next address the remedies to which Wayman is entitled for each of the claims on which it has succeeded. I also address the remedy for Defendants' violations of the Preliminary Injunction.

#### **A. Computer Misuse and Conversion**

Regarding its computer misuse and conspiracy claims, Wayman seeks equitable and monetary relief, as well as an award of attorneys' fees. Remedies available under the

computer misuse statute are set forth in 11 *Del. C.* § 941. Wayman contends it is entitled to relief under Section 941(a), (b), (c), and (e). I address these provisions in turn.

### **1. Section 941(a)**

Under Section 941(a), an aggrieved party under the computer misuse statute may seek a permanent injunction to vindicate its rights. Wayman asserts that Defendants should be permanently enjoined from using its electronic information. To warrant permanent injunctive relief, the plaintiff must succeed on the merits of their case after a full hearing, demonstrate that irreparable harm will result in the absence of an injunction, and prove that, on balance, the equities weigh in favor of issuing the injunction.<sup>175</sup> Wayman has succeeded on the merits of its case, and has shown that it is exposed to a risk of irreparable harm in that Premium Fire might use Wayman's confidential computer information to compete unfairly with Wayman. Finally, the equities weigh in Wayman's favor as Defendants have no right to remain in possession of property that rightfully belongs to Wayman.

Although some form of permanent injunctive relief is appropriate here, most, if not all, of the electronic property in question will not remain valuable indefinitely. For example, once an SDU program file is modified, the value of previous versions is greatly diminished, if not eliminated entirely. Based on the passage of time to date since White and Fox brought Wayman property to Premium Fire, I find that an injunction prohibiting Defendants from using Wayman's electronic files and the confidential information

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<sup>175</sup> *Harden v. Christina Sch. Dist.*, 924 A.2d 247, 269 (Del. Ch. 2007).

contained in them for one year is appropriate. Because the parties already have agreed voluntarily to a process by which Wayman's electronic information was to be removed from Premium Fire's computers and Defendants have returned any Wayman property they had in their possession,<sup>176</sup> this injunction will serve primarily as a backstop to that process in the event, for example, Defendants later discover computer files that should have been deleted or returned to Wayman.

## **2. Section 941(b)**

Section 941(b) states that a court may award "such other relief as it may deem appropriate" on finding a violation of the computer misuse statute. Wayman urges this Court to use its equitable discretion and award it \$17,390 in nominal damages for the 17,390 files it asserts were stolen and received by Defendants. While it is unclear that each of the 17,390 files at issue were Wayman's property, I find that Defendants should bear the burden of that uncertainty. Had White or Fox made an effort to go through the files that they had obtained during the course of their employment at Wayman and taken with them only their personal files or items that clearly were not proprietary confidential information of Wayman, this lawsuit may well have been avoided. In choosing to copy indiscriminately Wayman's property and bring everything they copied with them to their new employer, Defendants assumed the risk that Wayman or a court would take the position that everything they took belonged to Wayman. Because Defendants have not proven that the files at issue in this case belonged to them or were not Wayman's

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<sup>176</sup> See D.I. 368.

property, I will award Wayman \$1 in nominal damages for each of the 17,390 files that Wayman proved were taken by Defendants.

### **3.       Section 941(c)**

Section 941(c) states in relevant part that the “aggrieved person shall recover actual damages and damages for unjust enrichment not taken into account in computing damages for actual loss and treble damages where there has been a showing of wilful and malicious conduct.” As discussed *supra*, Wayman has not proven that any Defendant acted wilfully and maliciously in violating the computer misuse statute. Consequently, Wayman is not entitled to treble damages for this claim.

Regarding actual damages, Wayman asserts that it is entitled to the costs it incurred in connection with two forensics experts it retained to investigate the theft of its computer files by Defendants. Defendants argue that awarding Wayman the costs of its experts in this case is unreasonable because the first expert was working (undisclosed) for both Wayman and Premium Fire simultaneously, and Wayman’s second expert did not testify conclusively that White was responsible for copying and deleting files from a Wayman laptop between November 27 and November 30, 2011.

With respect to Digital Legal, the computer expert that Premium Fire later learned had been retained by both Wayman and Premium Fire and apparently worked on matters as to which their interests clearly were adverse, I will award Wayman one half of its expenses in retaining and utilizing this expert. It is entirely unacceptable that Digital Legal was working for both sides during the discovery process without having obtained the parties informed consent in advance. Although it is unclear when Wayman became

aware of this fact, the situation is highly problematic and raises serious concerns about the integrity of the discovery process in this case while Digital Legal was working for both sides at the same time without, at least, Premium Fire's knowledge. I do not consider it either fair or reasonable, therefore, to require Defendants to incur the entire cost of Wayman's Digital Legal-related fees and expenses. Therefore, Wayman is entitled to an award of only 50% of any expenses it incurred related to its interactions with Digital Legal. As for Wayman's second expert, Cinquanto, I find that Wayman is entitled to recover fully the reasonable expenses it incurred in connection with this witness. Cinquanto's testimony was both credible and helpful to the Court in terms of deciding certain of Wayman's claims, including, in particular, the computer system information misuse claim.<sup>177</sup> Thus, I award Wayman its reasonable expenses related to its engagement of Cinquanto.

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<sup>177</sup> I find unpersuasive Defendants' argument that I should infer that Cinquanto's testimony would have been proven wrong had Wayman produced the late-discovered Wayman Dropbox account in a more timely and complete fashion. Defendants have not shown that Wayman's failure to produce the Dropbox account amounted to bad faith or reckless conduct. Therefore, I decline to draw any adverse inference against Wayman based on Cinquanto's testimony in that regard. I reach the same conclusion in terms of Wayman's similar assertion from the opposite perspective that I should draw adverse inferences against Defendants regarding the contents of White's flash drives because Defendants' electronic discovery expert inadvertently corrupted the information on those drives. While both of these examples are emblematic of the technical problems and miscommunications that plagued both sides and their counsel during this litigation, neither example reflects bad faith or the type of reckless conduct that would warrant an adverse inference in either direction. *See, e.g., Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006) ("An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item. Before giving such an

In addition to the expenses associated with its computer experts, Wayman seeks an award of unjust enrichment with respect to the Doylestown upgrade project. As discussed in Section II.A *supra*, I have concluded that Premium Fire did not tortiously interfere with Wayman’s expectancy in the upgrade project. In addition, I found that Wayman failed to prove that it would have been awarded the Doylestown contract but for Premium Fire’s use of improper means, including the use of Wayman’s SDU program files, in relation to that project. Thus, Wayman is not entitled to actual damages in the form of lost profits from the Doylestown upgrade project.

Relief under the misuse statute, however, is not limited to compensatory damages. Section 941(c) explicitly authorizes the imposition of “damages for unjust enrichment not taken into account in computing damages for actual loss.” Unjust enrichment considers “the unjust retention of a benefit to the loss of another, or retention of money or property of another against the fundamental principles of justice or equity and good conscience,”<sup>178</sup> and is proven based on the following elements: (1) an enrichment; (2) an impoverishment; (3) a relationship between the enrichment and the impoverishment; (4) lack of a justification; and (5) the absence of a remedy at law.<sup>179</sup>

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instruction, a trial judge must, therefore, make a preliminary finding that the evidence shows such intentional or reckless conduct. Absent such a finding, an adverse inference instruction is not justified.”)

<sup>178</sup> *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

<sup>179</sup> *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at \*30 (Del. Ch. Feb. 18, 2010).

Wayman has proven all five elements of unjust enrichment regarding the Doylestown upgrade project. Premium Fire used Wayman's SDU program file for Doylestown, and thereby saved at least some time and reprogramming costs that it otherwise would have had to incur to secure the Doylestown contract. As a result, Premium Fire was able to: (1) submit a lower cost bid to Doylestown that increased the probability it would secure that large and significant piece of business; and (2) devote the time and resources it would otherwise have had to spend reprogramming the Doylestown fire control system on other business opportunities. Therefore, I conclude that Premium Fire was enriched by misusing Wayman's SDU program files.

Wayman, on the other hand, was "impoverished" by Premium Fire's use of its proprietary and confidential files. The value of Wayman's SDU files depends in large part on them not being known to, used, or modified by other vendors. Thus, Premium Fire's use and modification of Wayman's Doylestown program impoverished Wayman in that it diminished materially the value of its property.

There also is a clear relationship between the enrichment and the impoverishment in this case. Premium Fire was enriched by using impermissibly Wayman's program files. That same action (*i.e.*, Premium Fire's use of Wayman's program files) was the source of Wayman's impoverishment. Nor was Premium Fire justified in using Wayman's program file. While Defendants may not have acted maliciously in procuring or using Wayman's files, those files nevertheless were Wayman's property, and Defendants were not authorized to use them.

Finally, there is no adequate remedy at law available for Defendants' use of the Doylestown files. Because the use of the program files was not the proximate cause of Wayman losing, or Premium Fire winning, the bid on the Doylestown upgrade project, Wayman has not shown any nonspeculative damages that it incurred because of Premium Fire's misuse of its property. Therefore, Wayman has satisfied each of the requisite elements of unjust enrichment as to Premium Fire's use of its Doylestown program files.

The amount of that unjust enrichment, however, is difficult to quantify. The only evidence in the record addressing this subject is Annex E, discussed previously, and the testimony of Bender, a Technical Services Manager at Wayman, who was neither familiar with Premium Fire's business model nor qualified as a damages expert. Bender testified that if Wayman was in Premium Fire's position for the Doylestown bid and did not have the relevant SDU program files, Wayman would have had to increase certain costs associated with its bid by approximately 15%. He also testified that, in general, having the necessary SDU program file would reduce certain costs factored into a bid by 10–15%.<sup>180</sup>

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<sup>180</sup> Tr. 916–17. At trial, Defendants objected to Bender's testimony on the grounds that he is not an expert and he was not designated during discovery as a witness who would be providing damages-related testimony. It is undisputed that Bender is not a “damages expert.” He is, however, an experienced fire system technician with an adequate basis for testifying about the effect of having a program file on a vendor's reprogramming costs. Thus, I find that Bender was qualified to provide the fact testimony that he did. Second, although Bender was not designated as a witness who would discuss damages during discovery, for the reasons I explain below, his testimony largely corroborates the inferences supported by Annex E. Because Annex E has been known to Defendants throughout this litigation, and that document has clear implications in terms of the potential damages or harm in this case, I do not believe Defendants have been prejudiced unfairly by

Although imperfect, I find that Bender’s testimony offers a reasonable guide as to the extent to which Premium Fire was unjustly enriched through its use of Wayman’s Doylestown SDU file. As stated previously, EST vendors are required to give Annex E to potential clients for whom they did not install the existing fire control system. EST’s insistence that its strategic partners use Annex E in connection with situations that would require OOT authorization suggests that reprogramming costs can increase materially the expense of a project, and, therefore, it is important for potential clients to be aware of that fact and come to an understanding with a potential vendor on expenses before committing to using its services. Bender’s testimony that having the program file can reduce costs 10–15% is in line with what reasonably can be inferred from Annex E, *i.e.*, that reprogramming costs can alter materially the expense of a project. Indeed, if reprogramming costs were generally below the range that Bender provided, it is unlikely that Annex E would be necessary or relevant.

Applied to this case, Premium Fire’s Doylestown bid included \$464,775<sup>181</sup> for the kinds of costs Bender indicated would be relevant, such as replacing panels, devices, and wires.<sup>182</sup> Therefore, assuming Premium Fire would have to increase its costs in those

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Bender’s testimony on this particular issue. Thus, I overrule Defendants’ objection, and find that I can consider Bender’s testimony in fashioning an appropriate remedy for unjust enrichment.

<sup>181</sup> JX 296.

<sup>182</sup> This figure includes both Premium Fire’s actual costs, and its profit “mark-up.” I conclude it is appropriate to use this number as a basis for calculating unjust enrichment because one of the ways in which Premium Fire was unjustly enriched was that it had a higher probability of winning the Doylestown project because of

areas by 15% if it did not have Wayman's proprietary SDU file, it saved \$69,716.25 by using Wayman's property. This represents approximately 11% of Premium Fire's total bid for the Doylestown upgrade (\$619,775), which I consider to be a reasonable figure in light of Bender's testimony and Annex E. Stated differently, I find that Premium Fire received a benefit equal to approximately 11% of its bid price by having Wayman's Doylestown SDU program available for its use. Therefore, I award Wayman \$69,716.25 in damages for unjust enrichment based on Defendants' misuse of Wayman's computer information.

#### **4. Section 941(e)**

Finally, under Section 941(e), "the Court shall award to any aggrieved person who prevails reasonable costs and reasonable attorneys' fees." Wayman argues that the computer misuse claims were the basis for the initiation of this lawsuit, and that all of its claims, with the exception of its DUTSA claim, were related to the theft of Wayman's computer files. Under these circumstances, Wayman avers that it deserves an award of not less than 80% of the fees and costs it incurred in prosecuting this action. Defendants assert that because they admitted and accepted responsibility for accessing and possessing some of Wayman's materials well before trial, Wayman's expenses in proving its computer misuse claims were minimal.

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the lower bid it was able to present to Smith. Consequently, Premium Fire had an increased probability of actually realizing its expected profit margin and that should be accounted for in determining the extent to which Premium Fire was unjustly enriched through Defendants' conduct.

I find excessive Wayman's request for an award of 80% of its attorneys' fees and expenses for this entire case based on its successful prosecution of its computer misuse claim. Even though Defendants' misuse of Wayman's computer files may underlie many of Wayman's claims, several of those claims involved other issues unrelated to the elements of the computer misuse claim. Wayman itself acknowledged that the misappropriation of trade secrets claim falls in that category. The same also can be said, however, about Wayman's claims for tortious interference with prospective business opportunities and civil conspiracy. The tortious interference claim required, for example, proof of the existence of business opportunities as to a number of different companies that Wayman identified before trial. The parties engaged in substantial discovery regarding those companies and, over the course of the litigation, Wayman eventually dropped its tortious interference claim as to all of them, except Doylestown. Moreover, to the extent there might have been some overlap between a request for damages for tortious interference and for a violation of the computer misuse statute, Wayman did not prevail on any such damages claim, except with respect to the unjust enrichment enjoyed by Premium Fire as a result of the Doylestown job. Similarly, Wayman's claim for civil conspiracy required, among other things, proof of the existence of an agreement between a Defendant and, at least, one other person. The computer misuse claim does not involve any analogous element.

Moreover, extensive discovery on the broad range of issues raised in Wayman's pleadings revealed that Wayman would be unable to prevail at trial on several of the causes of action it originally asserted. As a result, Wayman substantially narrowed the

scope of the claims that it presented at trial. After trial, Wayman narrowed its claims even further. Based on the rather “shot-gun” approach that Wayman took in this litigation, and the large number of claims that needed to be investigated as a result, I conclude that much less than 80% of its overall attorneys’ fees and expenses properly can be attributed to its success in proving its computer misuse claims. Having considered the claims that were raised, investigated, and actually tried in this matter, I find that, under 6 Del. C. § 941(e), Wayman is entitled to an award of 35% of the attorneys’ fees and expenses it reasonably incurred in this litigation, net of the attorneys’ fees and expenses I award to Wayman in Section III.D. *infra* for Defendants’ contempt as to the Preliminary Injunction order.

### **B. Duty of Loyalty**

Wayman has not requested specific relief for White’s breach of his duty of loyalty; rather, it asks this Court to use its discretion in fashioning an appropriate remedy. In this case, although White owed Wayman a duty of loyalty, that duty was narrow in scope and related only to the disclosure and use of Wayman’s confidential information. Consequently, Wayman’s reliance on case law from the corporate context, in which broad damages are appropriate for a breach of the duty of loyalty by those who owe the entities they manage or direct general fiduciary duties, is questionable. Because White is jointly and severally liable for the relief I awarded Wayman for its computer misuse claim, and because the relief I awarded Wayman on that claim addresses the same wrongdoing that serves as the basis for Wayman’s breach of loyalty claim (*i.e.*, the unauthorized copying, use, and disclosure of Wayman’s confidential information), I hold

that Wayman is not entitled to an award of additional damages for White's breach of his duty of loyalty.

### **C. Civil Conspiracy**

Wayman acknowledges the duplicative nature of the relief being sought on this claim and does not seek any damages beyond what is awarded for its computer misuse and duty of loyalty claims. I agree with Wayman's assessment and do not award it any separate damages for its civil conspiracy claim. The primary, if not only, effect of Defendants' liability for civil conspiracy is that it confirms that Premium Fire and Weitzel are jointly and severally liable for any and all relief awarded based on Wayman's claims of computer misuse and conversion.

### **D. Violation of the Preliminary Injunction**

As relief for Defendants' violation of the Preliminary Injunction, Wayman seeks an order finding all Defendants: (1) in contempt; and (2) jointly and severally liable to Plaintiff for all attorneys' fees and expenses associated with (a) the negotiation, preparation, and implementation of the Preliminary Injunction, (b) the selection, engagement, and services of the third-party neutral, and (c) opposing Defendants' Motion to Strike.<sup>183</sup>

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<sup>183</sup> D.I. 180. Defendants' motion was predicated on striking allegations in the amended complaint that they claimed had not been verified adequately under Court of Chancery Rule 3(aa). Because the Preliminary Injunction was predicated on these allegedly faulty allegations, Defendants also moved, in essence, to have the Preliminary Injunction vacated. I denied Defendants' motion to the extent they sought relief from the Preliminary Injunction, but permitted them to raise the issue of Wayman's alleged failure to verify their complaints properly in

For the reasons stated *supra*, I find Defendants are in contempt for their repeated violations of the Preliminary Injunction.<sup>184</sup> In Delaware, “[s]anctions for civil contempt may take the form of a fine to compensate the plaintiffs for such contempt, or of imprisonment. An award of counsel fees is also a proper consideration.”<sup>185</sup> Because Defendants repeatedly violated the letter and spirit of this Court’s Preliminary Injunction order, I grant Wayman most of the relief it seeks on this issue. Defendants are jointly and severally liable to reimburse Wayman for the reasonable attorneys’ fees and expenses it incurred for: (1) the negotiation, preparation, and implementation of the Preliminary Injunction; and (2) the selection, engagement, and services of the third-party neutral. In addition, Defendants are jointly and severally liable for 50% of the reasonable attorneys’ fees and expenses Wayman incurred opposing Defendants’ Motion to Strike until June 4, 2013. This reflects the fact that Defendants’ Motion to Strike was not related entirely to

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conjunction with post-trial briefing. See notes 188 and 189 *infra* and accompanying text.

<sup>184</sup> White also is in contempt for violating the Preliminary Injunction because the evidence, such as Cinquanto’s testimony and his June 12, 2013 report, supports the inference that White continued to use Wayman’s property after the order was put in place.

<sup>185</sup> *Miller v. Steller Enter., Inc.*, 1980 WL 6432, at \*3 (Del. Ch. Dec. 22, 1980) (citing *City of Wilm. v. Gen. Teamsters Local Union 326*, 321 A.2d 123 (Del. 1974)). The *Teamsters Local 326* case confirmed that the Court of Chancery possesses both common law and statutory powers to enforce its judgments. 321 A.2d at 125 (recognizing power of the Court to impose a fine or award damages for the harm sustained as a result of failure to obey injunctive order); *see also* Ct. Ch. R. 70(b) (authorizing the Court to provide relief “[f]or failure to obey a restraining or injunctive order, or to obey or to perform any order”).

vacating the Preliminary Injunction and that the portion of the motion that was related to the Preliminary Injunction was decided in my June 4, 2013 order.

In addition, Defendants' disregard for the Preliminary Injunction demonstrated an egregious lack of respect for the Court's order and appreciation of the resultant imposition on the resources of the Court. In circumventing the process set forth in the Preliminary Injunction through their conduct, Defendants effectively nullified the efforts and resources expended by the Court and Wayman to establish and maintain the third-party neutral process. Therefore, because Defendants have abused the good offices of the Court and wasted valuable time and judicial resources in the process, I also order Defendants to pay a fine of \$10,000 for their contempt, payable to the State of Delaware, to the Register in Chancery.<sup>186</sup>

#### **E. Other Fee-Shifting Arguments**

Defendants dedicate a substantial portion of their opening post-trial brief to arguing that Wayman violated the verification requirement of Court of Chancery Rule 3(aa).<sup>187</sup> According to Defendants, Wayman's failure to make a good faith effort to

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<sup>186</sup> See *In re Metviner*, 1989 WL 226135 (Del. Aug. 22, 1989) (holding that the Court may order a party that is liable for civil contempt to pay a fine to the State of Delaware).

<sup>187</sup> The rule states: "All complaints, counterclaims, cross-claims and third-party complaints, and any amendments thereto, shall be verified by each of the parties filing such pleading. Every pleading, except that filed by a corporation, which is required to be verified by statute or by these Rules shall be under oath or affirmation by the party filing such pleading that the matter contained therein insofar as it concerns the party's act and deed is true, and so far as relates to the act and deed of any other person, is believed by the party to be true. Every pleading by a corporation which must be verified shall be verified under oath or

verify the allegations in its original and amended complaints led to the prosecution of several baseless claims, resulting in litigation that was unnecessarily broad in scope and unreasonably expensive. Defendants pressed a similar argument in a pre-trial Motion to Strike,<sup>188</sup> which I addressed in a June 4, 2013 order.<sup>189</sup> In that order, I indicated my belief that the serious flaws Defendants had pointed out in Wayman's (and specifically Trippe Wayman's) verifications were more likely the result of carelessness than of bad faith, but I also undertook to reconsider Defendants' argument in conjunction with post-trial briefing. Having carefully reviewed the parties' post-trial briefing and the evidence presented at trial, I remain convinced that Wayman's conduct regarding the verification of its complaints and prosecution of this action did not amount to bad faith conduct that would warrant an award of attorneys' fees to Defendants.

I do not condone, however, Wayman's half-hearted efforts to meet the requirements of Rule 3(aa). Trippe Wayman was careless in his efforts to verify the allegations in Wayman's complaints, and, as a result, Wayman only barely met its obligations under the Rule. Wayman and its counsel should have done better. Nevertheless, based on the record before me, I cannot say that Wayman acted in bad faith in bringing the claims that it did or it failed to provide the requisite verification.

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affirmation by the chairperson or vice-chairperson of the board of directors, by the president, by a vice-president, by a secretary, by an assistant secretary, by the treasurer, or by an authorized agent and shall be under the seal of the corporation.” Ct. Ch. R. 3(aa).

<sup>188</sup> D.I. 180.

<sup>189</sup> D.I. 292.

Therefore, Defendants are not entitled to any award of attorneys' fees or other form of fee shifting under either the American Rule<sup>190</sup> or Rule 3(aa).<sup>191</sup>

#### F. Pre-and Post-Judgment Interest

In its complaint, Wayman also seeks an award of pre- and post-judgment interest at the legal rate. Delaware courts routinely award such interest, using the "legal rate" as the default rate.<sup>192</sup> Seeing no reason to depart from this practice, I grant Wayman pre-judgment interest on its compensatory damages from the date they accrued, compounded quarterly, at the legal rate. Additionally, I award post-judgment interest on the full amount of the judgment, once a judgment is entered, including that part comprised of pre-judgment interest.<sup>193</sup>

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<sup>190</sup> See *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) ("the American Rule requires that 'a litigant must, himself, defray the cost of being represented by counsel.'") (quoting *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

<sup>191</sup> In its post-trial briefing, Wayman seeks an award of attorneys' fees pertaining to its defense of Defendants' voluntarily withdrawn counterclaim on the grounds that the counterclaim was brought in bad faith. Here, too, I am unconvinced that there has been an adequate showing of bad faith. Thus, I deny Wayman's request for fee shifting in this regard.

<sup>192</sup> See 6 Del. C. § 2301(a) ("Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due."); see also *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at \*1 (Del. Ch. Jan. 5, 2010); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at \*18–19 (Del. Ch. May 30, 2008) (citing *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) ("In Delaware, prejudgment interest is awarded as a matter of right. Such interest is to be computed from the date payment is due.").

<sup>193</sup> See *Brandin v. Gottlieb*, 2000 WL 1005954, at \*30 (Del. Ch. July 13, 2000) (noting that without compound, post-judgment interest on the full amount, a

## G. Costs

Under Court of Chancery Rule 54(d), costs “shall be allowed as of course to the prevailing party unless the court otherwise directs.”<sup>194</sup> Under Rule 54(d), the “prevailing” party is a party who successfully prevails on the merits of the main issue or the party who prevailed on *most* of her claims.<sup>195</sup> Courts interpret the term “prevailing” to mean that a party need not be successful on all claims, but rather must succeed on a general majority of claims.<sup>196</sup> Because Wayman prevailed on most of its claims, I award Wayman its costs under Rule 54(d).

## IV. CONCLUSION

For the reasons stated above, the Court finds that Wayman has failed to prove that Defendant Premium Power is liable as to any of its claims. In addition, Wayman has not met its burden to prove its tortious interference and trade secret claims by a preponderance of the evidence. Wayman has established, however, that Defendants Weitzel, White, and Premium Fire are liable for violating Delaware’s Misuse of Computer System Information Act and for conversion. Wayman also has established that

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judgment debtor could “chip away at the real value” of a judgment by delaying payment).

<sup>194</sup> For the purposes of Rule 54(d), costs include “expenses necessarily incurred in the assertion of a right in court, such as court filing fees, fees associated with service of process or costs covered by statute. . . . [I]tems such as computerized legal research, transcripts, or photocopying are not recoverable.” See *FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at \*17 (Del. Ch. Jan. 22, 2007).

<sup>195</sup> See *id*; *Brandin v. Gottlieb*, 2000 WL 1005954, at \*27.

<sup>196</sup> See *FGC Hldgs.*, 2007 WL 241384, at \*17.

Defendants Weitzel and Premium Fire are liable for civil conspiracy and Defendant White is liable for breaching his duty of loyalty to Wayman. Based on these findings, Defendants Weitzel, White, and Premium Fire are jointly and severally liable for, in addition to the expert and attorneys' fees and expenses specified in Section III.A.4 *supra*, the \$17,390 in nominal damages and \$69,716.25 in unjust enrichment damages that I awarded Wayman on its computer misuse claim. Finally, I find Defendants Weitzel, White, and Premium Fire in contempt of this Court's Preliminary Injunction order and hold them jointly and severally liable for the reimbursement of the previously discussed fees and expenses Wayman incurred related to the Preliminary Injunction and for payment of the \$10,000 fine to the State of Delaware.

Wayman shall submit, on notice, a form of final judgment and order consistent with the rulings herein within ten days of the date of this Memorandum Opinion. Wayman also shall submit evidence of its reasonable attorneys' fees and expenses within ten days of the date of this Memorandum Opinion. Defendants shall file any objections to the requested fees and expenses within ten days after service of Plaintiff's evidence.