

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

NUCAR CONSULTING, INC.,)
a Delaware corporation,)
)
Plaintiff,)
)
v.) Civil Action No. 19756-NC
)
TIMOTHY DOYLE,)
DEALER REWARDS, INC.,)
a Delaware corporation,)
)
Defendants.)

MEMORANDUM OPINION

Submitted: December 16, 2004
Decided: April 5, 2005

Robert A. Penza, Esquire, Peter M. Sweeney, Esquire, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware, *Attorneys for Plaintiff*

Eric C. Howard, Esquire, David C. Hutt, Esquire, WILSON, HALBROOK & BAYARD, P.A., Georgetown, Delaware, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

Plaintiff, NuCar Consulting, Inc. (“NuCar”), claims that Defendants, former employee Timothy Doyle (“Doyle”) and Doyle’s newly created company, Dealer Rewards, Inc. (“Dealer Rewards”), misappropriated certain of NuCar’s trade secrets. NuCar requests that this Court determine whether Defendants misappropriated NuCar’s trade secrets under the Delaware Uniform Trade Secrets Act (the “Delaware Trade Secrets Act” or “Act”),¹ and the extent to which NuCar should receive monetary damages or injunctive relief for the alleged misappropriation. NuCar also seeks an award of attorney’s fees pursuant to 6 *Del. C.* § 2004 for Defendants’ allegedly wilful and malicious misappropriation.

This Memorandum Opinion reflects the Court’s post-trial findings of fact and conclusions of law. For the reasons set forth below, the Court finds that NuCar failed to prove that its customer loyalty program, in the general terms it was described, qualifies as a trade secret under the Act. The Court also concludes that Defendants misappropriated NuCar trade secrets in the form of its customer contract (the “Form Contract”) and potential client list (the “Potential Client List” or “List”). In terms of relief, the Court grants NuCar’s unopposed request for a permanent injunction prohibiting Defendants’ further use of the Form Contract and finds Defendants liable for \$69,750 in unjust enrichment damages for their misappropriation of the Potential Client List. Finally, the Court finds that Defendants’ misappropriation was wilful and malicious and awards

¹ 6 *Del. C.* §§ 2001 – 2009.

NuCar its reasonable attorney's fees expended on its misappropriation of trade secrets claims.²

I. FACTUAL BACKGROUND

NuCar develops, implements, maintains and enhances customer retention for the automotive market through its customer loyalty program (the "Rewards Program"). NuCar originally was affiliated with the NuCar Connection dealerships, but by early 1995 was spun off as an independent Delaware corporation. NuCar operates at the retail and manufacturing level and serves all of North America. At trial, Christopher Blum ("Blum"), vice president and part owner of NuCar, described the components of the Rewards Program as follows:

Step 1) a delivery manager fills out the application-for-a-membership kit and forwards it to a central accounting office at the dealership;

Step 2) the customer receives a bar-coded key tag;

Step 3) the dealership's accounting office enters the membership information on software NuCar has provided and scans in, with a scanner provided by NuCar, the keyed membership sticker, which causes the membership information to be transmitted to NuCar;

Step 4) each time the customer uses the token³ at terminals provided by NuCar at every cash-receiving location at the dealership, information is captured and sent to NuCar's database and the customer's reward account receives some sort of credit;

² The award of attorney's fees does not include fees expended in pursuit of any of the non-trade secret claims NuCar dropped before trial.

³ A token can be anything that would identify a member, such as a key tag, flash card, magnetic-striped card, thermal crystalline card, etc.

Step 5) the customer and dealer both receive periodic reports.⁴

Chandler Greene (“Greene”), vice president of sales and marketing and part owner of NuCar, described the Rewards Program as having three components. The first is an earnings component where the customer earns either points towards a new car or a gift certificate. The second component includes some type of partnership marketing with local merchants. The third component deals with the manner of communicating data between NuCar and the dealership.⁵ The evidence showed, however, that other companies in the auto industry, as well as other industries, utilize similar customer loyalty programs.⁶

NuCar developed its Potential Client List through various means ranging from brainstorming to promotional mailers. NuCar used more concentrated marketing efforts, however, to identify potential clients in the auto industry. NuCar generally compiled that portion of the List from responses to its National Automobile Dealers Association (“NADA”) Convention exhibit and responses to promotional mailers sent to automotive dealerships. Over the last eight years, NuCar invested approximately \$25,000 to \$50,000 annually in its exhibit at the NADA Convention. Similarly, NuCar spends approximately

⁴ See Trial Transcript (“Tr.”) at 11-18.

⁵ NuCar does not allege that Defendants misappropriated any of NuCar’s software.

⁶ See Defendants’ Non-Confidential Exhibit (“DTX”) 7A-E.

\$20,000 to \$30,000 a year on promotional mailers. NuCar generated the List internally and did not make it public.⁷

In May of 1995, NuCar hired Doyle as an account executive. In 1997, in connection with his employment at NuCar, Doyle executed a Works for Hire Agreement that states, in pertinent part:

1. Employee . . . acknowledge[s] all ideas, inventions and other developments or improvements conceived or reduced to practice by Employee . . . that are within the scope of NuCar's business operations or that relate to any of NuCar's work or projects, shall be the exclusive property of NuCar. . . .

2. Employee . . . acknowledge[s] all right[s], title and interest of every kind and nature, whether known or unknown, in and to any intellectual property, including, but not limited to, any inventions, patents, trademarks, service marks, copyrights, films, scripts, ideas, creations, and properties invented created, written, developed, furnished, produced, or disclosed by employee, in the course of rendering services to NuCar under and pursuant to this Agreement shall, as between NuCar and Employee, be and shall remain the sole and exclusive property of NuCar for any and all purposes and uses, and Employee shall have no right, title or interest of any kind or nature in or to such property, or in or to any results and/or proceeds from such property.⁸

Doyle did not understand the Works for Hire Agreement to be a noncompete agreement, and verified that understanding with an attorney before signing it.

During his tenure at NuCar, Doyle's responsibilities included assisting current clients in the development and implementation of NuCar products, maintaining a client

⁷ Doyle concedes this fact.

⁸ Plaintiff's Non-Confidential Exhibit ("PTX") 1.

contact program to monitor and report client satisfaction, promoting NuCar's product offerings and soliciting prospective clients. Each year, Doyle was assigned approximately sixty to seventy companies from the Potential Client List to solicit. These companies were considered "active prospects" by NuCar.⁹

By mid-2001, dissatisfaction between Doyle and NuCar had developed. On or about June 20, 2001, NuCar had Doyle sign a job description for his position and placed him on a ninety day probation. On September 18, 2001, at the end of the probationary period, NuCar informed Doyle that he was being terminated. NuCar offered Doyle a termination agreement (the "Termination Agreement"), which stated:

1. Employee agrees to return all business related equipment and supplies purchased by NuCar Consulting in proper working order within 24 hours of termination. . . .
2. Employee agrees that all client information including electronic and hard copy files be returned to NuCar Consulting in their entirety within 24 hours of termination.
3. Employee agrees that no further contact with existing clients, prospective clients and/or vendors be made effective date of termination. Employee also understands and agrees to the terms as outlined in the Works for Hire agreement signed as a condition of employment.¹⁰

* * * *

⁹ Tr. at 26 (Blum).

¹⁰ Doyle claims that when he signed the Termination Agreement, or shortly thereafter, he believed the third paragraph seeking to prohibit him from contacting former clients was unenforceable. In any event, by the time of trial, NuCar had abandoned any claims for relief based on an alleged breach of the Termination Agreement. Therefore, the Court does not comment on the validity of this clause.

5. NuCar Consulting agrees to provide employee the following severance package provide[d] that all of the above outlined terms are fulfilled by the employee in their entirety, within agreed time frames.

- Five weeks of your current salary (\$4,000) payable in one payment on September 28, 2001. Provided:
1. Turn over all NuCar Consulting supplies, equipment, files and client information. 2. Signed termination agreement is in effect.

- Payment of September commissions based on collections payable on October 10, 2001.¹¹

Doyle executed the Termination Agreement on September 18, 2001. He returned equipment and files to NuCar, and NuCar remitted to Doyle his commissions for his last month of employment and a severance payment of \$4,000. Discovery revealed, however, that Doyle had a copy of NuCar's Potential Client List in his possession that he failed (perhaps inadvertently) to return in September 2001.

On October 3, 2001, Doyle incorporated Dealer Rewards to provide customer loyalty programs to retail automotive dealers – the same business as NuCar. Doyle is the sole shareholder and president of Dealer Rewards. In an effort to develop Dealer Rewards, Doyle researched and located a vendor to make tokens for it¹² and a software developer to create a database system to support its loyalty program. Doyle also purchased a mailing list of approximately three thousand automobile dealers and sent out a promotional mailer to generate interest and business.

¹¹ PTX 9.

¹² Dealer Rewards uses a bar-coded key tag as a token for its program.

On or about October 10, 2001, just after Doyle received his severance payment from NuCar, Doyle contacted on behalf of Dealer Rewards various clients of NuCar he knew of through his employment at NuCar. Upon learning of such contacts, NuCar notified Doyle in a letter, dated December 14, 2001, that they believed the contacts breached the Termination Agreement. In a responsive letter dated January 24, 2002, attorneys for Doyle expressed their belief that the Termination Agreement was unenforceable.

Shortly after he created Dealer Rewards, Doyle also contacted several companies on the Potential Client List. One of these potential clients was McCafferty.¹³ McCafferty was one of the sixty to seventy “active prospects” NuCar had assigned to Doyle. On behalf of NuCar, Doyle had contacted McCafferty to follow up on interest that McCafferty had shown in NuCar’s products at the NADA Convention. Although Doyle exchanged phone calls with McCafferty, he had not yet succeeded in setting up a meeting with them when he left NuCar. A notation in the Potential Client List confirms that McCafferty was assigned to Doyle and suggests that he had telephone contact with McCafferty on September 17, 2001, the day before he was terminated.¹⁴

¹³ The original complaint included among the named defendants McCafferty Beans Holding Company, Inc., McCafferty Chevrolet Sales, Inc., McCafferty Hyundai Sales, Inc., McCafferty Ford Sales, Inc., McCafferty Motors of Mechanicsburg, Inc., and McCafferty Ford of Mechanicsburg, Inc. (together referred to as the “McCafferty Defendants”). The McCafferty Defendants were dismissed by Stipulation and Order dated April 10, 2003.

¹⁴ See PTX 12.

Doyle explained that it was generally difficult to set up meetings with dealerships and that McCafferty presented an added challenge because NuCar needed to obtain a waiver from another client, Team Toyota, in order to contract with McCafferty. Team Toyota's contract with NuCar contains an exclusivity clause that prohibits NuCar from entering into agreements with other dealerships within a certain geographic radius. McCafferty falls within that geographic area. Doyle asked Team Toyota to waive their exclusivity clause but they declined sometime during the summer of 2001. While Doyle was at NuCar, he conveyed this refusal to Greene, but McCafferty remained on the Potential Client List.

Doyle's later contacts with McCafferty on behalf of Dealer Rewards were successful. Dealer Rewards entered into a contract with McCafferty to provide them with a customer loyalty program on December 11, 2001, less than three months after Doyle left NuCar. Doyle admits using a NuCar contract, the Form Contract, as a template for creating Dealer Rewards' contract with McCafferty.¹⁵

In June or July of 2001, Dealer Rewards also entered into a contract to provide a customer loyalty program to Brian's Harley-Davidson. Though Brian's Harley-Davidson was an "active prospect" on NuCar's Potential Client List, it had not been specifically assigned to Doyle. He testified that he was generally aware that NuCar was soliciting Harley-Davidson dealers, but not Brian's Harley-Davidson in particular. Based on that evidence and the fact that Doyle had the List in his possession for some time after he left

¹⁵ Doyle knew that NuCar's contracts were private documents between NuCar and their clients.

NuCar, the Court infers that Defendants used the List to identify Brian's Harley-Davidson as a prospective client. Defendants presented no evidence regarding the impetus for, or nature of, their initial contacts with Brian's Harley-Davidson that would support a contrary conclusion.

II. PROCEDURAL HISTORY

On July 18, 2002, NuCar filed suit against Defendants, Doyle and Dealer Rewards, for breach of contract, misappropriation of trade secrets under the Delaware Trade Secrets Act, and violation of the Delaware Uniform Deceptive Trade Practices Act. NuCar concurrently moved for a temporary restraining order. Former Vice Chancellor, now Justice, Jacobs heard and denied NuCar's motion for a TRO on July 31, 2002.

The Court held a trial on the merits on June 8, 2004. The parties submitted extensive post-trial briefs, as well as oral argument. In the course of those proceedings, they significantly narrowed the scope of the pending claims and related issues. The only issues that remain are: (1) whether Defendants breached the Delaware Trade Secrets Act by misappropriating NuCar's Rewards Program, Potential Client List, and Form Contract; (2) to what extent, if any, NuCar should receive monetary damages or injunctive relief for the alleged misappropriation; and (3) whether Defendants' alleged misappropriation of NuCar's trade secrets was wilful and malicious such that this Court may award NuCar reasonable attorney's fees pursuant to 6 *Del. C.* § 2004.

III. ANALYSIS

NuCar alleges that Defendants violated the Delaware Trade Secrets Act by misappropriating NuCar's trade secrets. Specifically, NuCar alleges that Defendants misappropriated NuCar's Rewards Program, Potential Client List and Form Contract.

A plaintiff alleging misappropriation of a trade secret must prove its case by a preponderance of the evidence.¹⁶ Liability for misappropriation of a trade secret is a "creature of statute"¹⁷ that may be established by demonstrating:

- (1) The existence of a trade secret as defined in the statute;
- (2) Communication of the secret by plaintiff to the defendant;
- (3) Such communication was pursuant to an express or implied understanding that the secrecy of the matter would be respected; and
- (4) The secret information has been improperly (e.g., in breach of that understanding) used or disclosed by the defendant to the injury of the plaintiff.¹⁸

To prove misappropriation of a trade secret by a former employee under the Act, there is no requirement that the employee be shown to have had a written employment contract or

¹⁶ See *Miles Inc. v. Cookson Am., Inc.*, 1994 WL 676761, at *9 (Del. Ch. Nov. 15, 1994); *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002).

¹⁷ *Total Care Physicians, P.A. v. O'Hare*, 2002 WL 31667901, at *4 (Del. Super. Oct. 29, 2002). See 6 Del. C. §§ 2001-2009.

¹⁸ See *Wilmington Trust Co. v. Consistent Asset Mgmt., Inc.*, 1987 WL 8459, at *3 (Del. Ch. Mar. 25, 1987); *Total Care Physicians*, 2002 WL 31667901, at *4.

noncompete agreement with the former employer.¹⁹ The Court will address whether NuCar has demonstrated the required elements for misappropriation with regard to the Rewards Program, Potential Client List and Form Contract in turn.

A. Are NuCar’s Rewards Program, Potential Client List and Form Contract Trade Secrets?

The Act defines a trade secret as:

[I]nformation, 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.²⁰

Trade secrets have actual or potential independent economic value if a competitor cannot produce a comparable product without a similar expenditure of time and money.²¹ This requirement of 6 *Del. C.* § 2001(4)(a) highlights the notion of competitive advantage and focuses on whether a plaintiff would lose value and market share if a competitor could enter the market without substantial development expense.²² The same rationale applies

¹⁹ See *Wilmington Trust*, 1987 WL 8459, at *3 (“Despite [the fact that none of the former employees had written contracts of employment or covenants not to compete], they remain subject to certain obligations imposed by law upon employees to whom, during the course of their employment, confidential or secret information is disclosed.”).

²⁰ 6 *Del. C.* § 2001(4).

²¹ *Miles*, 1994 WL 676761, at *10.

²² See *id.*

to information that qualifies as a trade secret, such as a customer list that meets the statutory requirements.

1. Rewards Program

While “[a] commercial production process consisting of a ‘combination of the principles and details used to make a product’ can be a trade secret,”²³ it is “well-established that if a method, technique or process in question can be found in the public domain or public literature, it is considered to be generally known and readily ascertainable and thus, cannot qualify as a trade secret.”²⁴ “Processes alleged to be generally known or readily ascertainable must be known or ascertainable by proper means.”²⁵ Such proper means include: “(1) discovery by independent invention; (2) discovery by reverse engineering; (3) discovery pursuant to a license from the owner of the trade secret; (4) observation of the item in public use or on public display; and (5) obtaining the alleged trade secret from the published literature.”²⁶ Therefore, as a

²³ *Merck & Co. v. Smithkline Beecham Pharmaceuticals, Co.*, 1999 WL 669354, at *15 (Del. Ch. Aug. 5, 1999), *aff’d*, 766 A.2d 442 (Del. 2000) (quoting *Miles*, 1994 WL 676761, at *11). When a plaintiff claims a “compilation” trade secret, however, courts have required that the trade secret be identified with greater specificity. *See Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *6 (Del. Super. Aug. 16, 2004).

²⁴ *Miles*, 1994 WL 676761, at *11 (internal citations omitted). *See also Merck*, 1999 WL 669354, at *16 (“Under the Uniform Trade Secrets Act, information is not a trade secret if it is generally known to, or readily ascertainable by proper means by, others.”).

²⁵ *Miles*, 1994 WL 676761, at *12.

²⁶ *Id.* (citing Uniform Trade Secrets Act, § 1, Comments (1979)).

threshold matter, NuCar must show that its Reward Program is not generally known or readily ascertainable by proper means.

A common starting point for a party attempting to prove the existence of a trade secret in a compilation, program, method, technique or process is to identify the components of the compilation or process that individually or collectively are not generally known or readily ascertainable by proper means. NuCar presented very little evidence on this issue. They rely primarily on the testimony of two of their officers and part owners, Greene and Blum.

Greene described the Rewards Program as made up of three different components. The first two, however, are publicly available and the third is largely irrelevant in the circumstances of this case. The first component Greene identified allows the customer to earn either points towards a new car or special discounts and gift certificates. The second component includes some type of partnership marketing with local merchants. Yet, NuCar publishes these two components in brochures and handbooks that are given to customers who purchase cars at dealerships utilizing the NuCar Rewards Program. These documents even disclose details such as how many points customers will receive for certain purchases, how to earn extra bonuses and which local merchants participate in the Rewards Program.²⁷ At trial, Greene conceded that these documents were in the public domain:

If we do a program that has a handbook in it, these [program description, rules and conditions] will go into a handbook

²⁷ See, e.g., DTX 1A-H.

which, yes, the customer will get. If we do a program [and] they don't do a handbook, but a brochure, they would go into the brochure. So yes, the customers [those who purchase a car at a dealership that utilizes the NuCar Rewards Program] get a copy of the rules and conditions.²⁸

Moreover, NuCar made no effort to maintain the secrecy of any alleged trade secret outlined in the handbooks and brochures.

Q: Is there anything that tells [customers] they can't show these rules to somebody else?

A: No.²⁹

The third and final component Greene mentioned deals with the manner of communicating data between NuCar and the dealership. NuCar, however, is not alleging that Doyle misappropriated NuCar's software or database management systems. In fact, Dealer Rewards presented evidence that it uses a different type of token and that Dealer Rewards hired a software writer to create its own database management system. NuCar did not controvert that testimony or offer any details from which the Court could evaluate the similarities or dissimilarities of the parties' software or database management systems.

Blum's description of the NuCar Rewards Program's components goes into more detail than Greene's regarding the placement of their token reading hardware and their application process. All of this information, however, is readily observable by anyone who purchases a car at a dealership utilizing the Rewards Program.

²⁸ Tr. at 116.

²⁹ *Id.* (Greene).

NuCar also relied on certain indirect evidence in an effort to shore up its claim for trade secret protection of its Rewards Program. In particular, NuCar argues that Doyle’s testimony that technical processes of Dealer Rewards’ customer loyalty program were not readily available in the public domain “also proves that NuCar’s Program is not generally known to the public.”³⁰ This argument is not persuasive. Doyle’s untested opinion that undisclosed technical aspects of Dealer Rewards’ program are not readily ascertainable provides no basis for drawing any reasonable inference as to whether NuCar’s Rewards Program, which was described only in general terms, qualifies as a trade secret. The record, however, contains no detailed evidence regarding the technical processes of either NuCar or Dealer Rewards. The law is clear that a comparison of *published* components of two customer loyalty programs “cannot, without more, give rise to a reasonable inference of misappropriation.”³¹ Thus, even assuming *aguedo* that the technical processes of NuCar’s program warrant trade secret protection, the Court would have no basis upon which to determine whether Defendants misappropriated those trade secrets.

NuCar’s reliance on *Miles Inc. v. Crookson America, Inc.*³² is also misplaced. The facts in this case differ markedly from those in *Miles*. There, the court found that “the literature introduced as evidence does not disclose the combination of specific detailed

³⁰ Plaintiff’s Opening Post-Trial Brief (“POB”) at 18-19.

³¹ *Savor*, 2004 WL 1965869, at *10.

³² 1994 WL 676761.

methods, techniques or processes” claimed as a trade secret and therefore held that the combination of methods was not generally known or readily ascertainable from the literature cited.³³ In contrast, the evidence adduced at trial by NuCar regarding the nature and scope of its alleged trade secrets in its Rewards Program is so general that it is readily ascertainable by interested persons through, for example, publicly available promotional material. Thus, the Court concludes that NuCar has failed to meet its burden of proof on its claim that its Rewards Program qualifies as a trade secret under the Act.³⁴

³³ *Id.* at *12.

³⁴ NuCar also argues that the alleged inability of another dealership to create a successful customer loyalty program proves that the Rewards Program was not generally known or readily ascertainable. This argument fails for two reasons. First, NuCar bases the argument on an affidavit of J. Todd Buch, an employee of McCafferty, submitted in connection with the TRO hearing. Defendants strenuously objected before, during, and after trial to the admissibility of the affidavit as hearsay. Having carefully considered the arguments of the parties, the Court sustains that objection. Notwithstanding NuCar’s protestations to the contrary, it does seek to rely on the Buch Affidavit for the truth of the matters asserted in it. NuCar provided no explanation for its failure to depose Buch or call him as a witness at trial. In these circumstances, the Court concludes that the affidavit is hearsay, that it does not come within any recognized hearsay exception, and that Defendants’ passing reference to the affidavit in the TRO hearing does not render it otherwise admissible.

Second, even if the Buch Affidavit were admitted, the Court is not persuaded by NuCar’s argument. Failure of one dealership to develop a successful customer loyalty program does not necessarily mean that the Rewards Program is not readily ascertainable from literature in the public domain. In any event, the very general nature of the proffered Buch evidence renders it insufficient to cure the problems discussed above regarding the lack of detailed evidence about the nature and scope of either NuCar’s Rewards Program or Dealer Rewards’ program.

2. Potential Client List

As discussed above, the parties agree that the Potential Client List was an internal NuCar document not in the public domain. Therefore, the question that remains is whether the List “derives independent economic value” from its secrecy. Customer lists are “precisely the type of business information which is regularly accorded trade secret status.”³⁵ In the past, however, this court has found that “[w]here buyers in a particular market are easily identified, it is less likely that independent economic value can be attributed to their identity even when information relating to their identity is treated as confidential.”³⁶

Defendants argue that the Potential Client List represented mere “brainstorming of potential businesses and markets NuCar could enter down the road” and, as such, had no independent economic value.³⁷ The evidence shows, however, that at least the portion of the list pertaining to automotive dealers represented more. “An alleged 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.”³⁸ In a market spanning North America and containing thousands of automotive dealers, independent economic value may be attributed to a List that contains only dealers that have expressed

³⁵ *Liveware Publ’g, Inc. v. Best Software, Inc.*, 252 F. Supp.2d 74, 85 (D. Del. 2003) (internal citations omitted).

³⁶ *Wilmington Trust*, 1987 WL 8457, at *7. *See also Delaware Express Shuttle*, 2002 WL 31458243, at *18.

³⁷ Defendants’ Post-Trial Answering Brief (“DAB”) at 18.

³⁸ *Miles*, 1994 WL 676761, at *10.

some sort of interest in a customer loyalty program. NuCar representatives testified, and Doyle agreed, that the portion of the List consisting of automotive or motorcycle dealerships, approximately fifty to seventy-five dealerships, was developed through interest expressed by dealers at NuCar's NADA Convention exhibit³⁹ as well as responses received from annual mailers. NuCar expended approximately \$45,000 to \$80,000 a year in its efforts to develop that portion of the Potential Client List. Thus, while Dealer Rewards may have been able to extract contact information for dealerships across the nation from public sources, it would not have been able to determine which of the tens of thousands of automotive and motorcycle dealerships had an interest in purchasing a customer loyalty program without a comparable expenditure of time and money.

Defendants also argue that, though the Potential Client List may have been a private document, NuCar's failure to designate the List as "Confidential" or "Attorneys' Eyes Only" during this litigation demonstrates it did not take reasonable steps to maintain the secrecy of the List. NuCar responds that they considered it unnecessary to designate the List confidential because Defendants already had it in their possession. Unless designated confidential, court proceedings and transcripts thereof are open to the public. Chancery Court Rule 5(g) specifies procedures for maintaining the secrecy of confidential information during litigation. In the circumstances of this case, however, NuCar's failure to designate its Potential Client List as confidential during discovery does

³⁹ Approximately 10,000 to 20,000 automotive dealers attend the NADA Convention each year.

not significantly undermine its trade secret claim. Because NuCar seeks damages, as opposed to injunctive relief, for Defendants' alleged misappropriation of the List, the most relevant time period for examining NuCar's efforts to maintain the secrecy of its Potential Client List spans the time that Doyle worked for NuCar through the first couple of years after his termination in September 2001.⁴⁰ There is no evidence that NuCar's not designating the List as confidential during the litigation resulted in its disclosure to, or use by, anyone other than Defendants during that or any other time frame.

Thus, the Court finds that the automotive dealer portion of the Potential Client List both derives independent economic value from not being generally known or readily ascertainable and has been the subject of reasonable efforts to maintain its secrecy. The List, therefore, qualifies as a trade secret under the Act.

3. Form Contract

NuCar hired an attorney to prepare the Form Contract that it used for its agreements with automotive dealers. The Court infers from that fact that Dealer Rewards could not have produced a comparable contract for its customers without a similar expenditure of time and money. Therefore, the Form Contract has independent economic value as required by 6 *Del. C.* § 2001(4)(a), albeit limited to the relatively modest expenditures that would be required to produce a comparable document by proper means. Additionally, the parties agree that the Form Contract is a private document between

⁴⁰ The main instances of alleged misappropriation, namely Defendants' contracting with McCafferty and Brian's Harley-Davidson, occurred less than a year after Doyle's termination and before NuCar filed this action on July 18, 2002.

NuCar and its clients not generally known to the public. Thus, the Form Contract qualifies as a trade secret under the Act.

Because there is little dispute between the parties regarding any other issues involving the Form Contract, I digress briefly to summarize those matters. First, it is undisputed that Doyle obtained the Form Contract from NuCar in the course of his employment and understood that it was confidential. Second, Doyle admittedly used the NuCar Form Contract as a template to develop Dealer Rewards' contract with McCafferty. "Misappropriation occurs even where the trade secret is used only as a starting point or guide in developing a process."⁴¹ Therefore, the Court finds that Doyle's use of the Form Contract constitutes misappropriation of a NuCar trade secret. Lastly, in terms of relief, all parties have agreed to the Court entering an order permanently enjoining Defendants' further use of the Form Contract.⁴²

B. Was the Potential Client List Communicated by NuCar to Doyle Pursuant to an Express or Implied Understanding that its Secrecy Would be Respected?

Doyle had reason to know that the circumstances under which he acquired the List gave rise to a duty to maintain its secrecy. Doyle understood that the Potential Client List was an internal NuCar document not in the public domain. He obtained the List and knew about potential customers, such as McCafferty, through his work at NuCar.

⁴¹ *Merck*, 1999 WL 669354, at *20.

⁴² NuCar has not sought monetary damages for misappropriation of the Form Contract.

Regardless of the efficacy of the Works for Hire Agreement⁴³ and the Termination Agreement in prohibiting Doyle from contacting his former clients and competing with NuCar, those agreements make clear that NuCar desired to protect private customer information and expected “all client information including electronic and hard copy files [to] be returned to NuCar Consulting in their entirety within 24 hours of termination.”⁴⁴ For example, the Works for Hire Agreement states that employees acknowledge that “all ideas, inventions and other developments or improvements conceived or reduced to practice by Employee . . . that are within the scope of NuCar’s business operations or that relate to any of NuCar’s work or projects, shall be the exclusive property of NuCar” and that rights to “any intellectual property . . . shall, as between NuCar and Employee, be and shall remain the sole and exclusive property of NuCar.”⁴⁵ This language demonstrates that NuCar considered it important to establish ownership over its proprietary information. Although the Works for Hire Agreement does not specifically mention trade secrets, its reference to ideas, developments and improvements conceived of or reduced to practice reflects an intent to protect its trade secrets.⁴⁶ Thus, NuCar communicated the Potential Client List to Doyle pursuant to at least an implied

⁴³ NuCar required employees to sign this document as a condition of employment.

⁴⁴ PTX 9. *See also* PTX 1.

⁴⁵ *Id.*

⁴⁶ Even without the Works for Hire Agreement or any other form of written agreement, the Act operates to protect against misappropriation of trade secrets. *See Wilmington Trust*, 1987 WL 8457, at *3 (stating that defendants remained “subject to certain obligations imposed by law upon employees to whom, during the course of their employment, confidential or secret information is disclosed”).

understanding that the secrecy of the documents and the information contained in them would be respected. The remaining issue, therefore, is whether Doyle used the Potential Client List.

C. Defendants Improperly Used or Disclosed Information From the Potential Client List

The Delaware Trade Secrets Act 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 use⁴⁷

“Misappropriation of trade secrets may be proven by circumstantial[l] evidence,’ and more often than not, ‘plaintiffs must construct a web of perhaps ambiguous

⁴⁷ 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.”⁴⁸

NuCar argues that because Doyle kept the List after being required to return it by the Termination Agreement, he acquired the List 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.”⁴⁹ Doyle acquired the List through proper means: it was communicated to him by NuCar in the course of his employment there.⁵⁰ NuCar presented no evidence that when Doyle acquired the List, he intended to deprive NuCar of it or appropriate it. Therefore, one must look to his retention and later alleged use of the List or information contained in it for evidence of misappropriation.

“Disclosure or use of a trade secret of another without express or implied consent by a person who . . . knew or had reason to know that his or her knowledge of the trade was . . . [a]cquired under circumstances giving rise to a duty to maintain its secrecy or

⁴⁸ *Merck*, 1999 WL 669354, at *20 (quoting *Miles*, 1994 WL 676761, at *13, and *Greenberg v. Croydon Plastics Co.*, 378 F. Supp. 806, 814 (E.D. Pa.1974)).

⁴⁹ 6 *Del. C.* § 2001(1).

⁵⁰ Dealer Rewards obtained access to NuCar’s trade secrets through Doyle. Based on the evidence, the Court concludes that if Doyle is liable for misappropriation of trade secrets under § 2001(2)(b), Dealer Rewards would have misappropriated them as well under one or more of § 2001(2)(b)(1), (2)(B) and (C).

limit its use” constitutes misappropriation.⁵¹ In this case, Doyle did not have express or implied consent to use the List after his termination. The Termination Agreement requires that Doyle have no further contact with prospective clients and conditions his severance payment on the return of all client information.⁵² Regardless of the enforceability of any noncompete provision in the Termination Agreement, the Court finds that Doyle knew that NuCar had not consented to his making any further use of the List after he left.

1. McCafferty

Before his termination, Doyle clearly utilized the Potential Client List to contact McCafferty on behalf of NuCar. The entry for McCafferty on the List indicates that it was assigned to Doyle, that the contact at McCafferty was Todd Buch at a specified telephone number, and the last telephone contact was on September 17, 2001 (the day before Doyle was terminated). The List also contains a notation that “decision is not w/Beans [McCafferty] . . . Territory issues with Team [Toyota].”⁵³ Because of McCafferty’s presence on the List and conversations Doyle had with McCafferty while at NuCar, he knew McCafferty had an interest in purchasing a customer loyalty program. Although “[a]n employee who achieves technical expertise or general knowledge while in the employ of another may thereafter use that knowledge in competition with his former employer,” he may do so only if “he does not use or disclose protected trade

⁵¹ 6 *Del. C.* § 2001(2)(b)(2)(B).

⁵² *See* PTX 9.

⁵³ PTX 12. *See also* Tr. at 94.

secrets in the process.”⁵⁴ In his capacity as owner of Dealer Rewards, Doyle sent a fax to Todd Buch at McCafferty shortly after his termination from NuCar. In the fax, Doyle states that he and Buch had conversations on “numerous occasions about creating a customer earnings program for McCafferty Ford” and that Buch “had mentioned that [he] would need to set the meeting up with [him]self and some other key managers.”⁵⁵ The evidence supports the inference that some, if not all, of those conversations took place while Doyle was working for NuCar. This demonstrates that Doyle used more than just generalized knowledge of the industry or technical expertise to obtain Dealer Rewards’ McCafferty contract. Accordingly, the Court finds that NuCar has proven by a preponderance of the evidence that Doyle misappropriated trade secret information reflected in the Potential Client List when he contacted and negotiated with McCafferty on Dealer Rewards’ behalf.

2. Brian’s Harley-Davidson

The record shows that Doyle found and retained a copy of the Potential Client List after he signed the Termination Agreement that required him to return it to NuCar. The record also evinces that Brian’s Harley-Davidson was on the List retained by Doyle. Though Doyle testified that he was unaware of that fact until this litigation, the Court finds it more likely than not that Doyle knew about Brian’s Harley-Davidson’s interest in a customer loyalty program from either his employment at NuCar generally or the List

⁵⁴ *Wilmington Trust*, 1987 WL 8457, at *5.

⁵⁵ Plaintiff’s Confidential Exhibit (“Confidential PTX”) 39.

itself or both.⁵⁶ As previously noted, misappropriation of trade secrets often is proven by circumstantial evidence.⁵⁷ Brian's Harley-Davidson's presence on the List, Doyle's possession of the List and knowledge of NuCar's pursuit of Harley-Davidson dealers, and Dealer Rewards' entry into a contract with Brian's Harley-Davidson within nine months of its creation, while circumstantial, present sufficient evidence to constitute a prima facie case against Defendants. Moreover, Defendants offered no exculpatory evidence regarding how they initially came into contact with Brian's Harley-Davidson and therefore failed to rebut NuCar's showing. Thus, the Court finds that NuCar has proven by a preponderance of the evidence that Defendants misappropriated information reflected in the Potential Client List with regard to Brian's Harley-Davidson.

D. NuCar's Claim for Damages

The Act authorizes an award of monetary damages for misappropriation of trade secrets:

(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable

⁵⁶ While employed at NuCar, Doyle was generally aware that NuCar was soliciting Harley-Davidson dealers. Doyle admitted knowing of at least two Harley-Davidson dealers that NuCar pursued while he was employed there.

⁵⁷ See *Merck*, 1999 WL 669354, at *20.

royalty for a misappropriator's unauthorized disclosure or use of a trade secret.⁵⁸

Thus, the Act provides that the actual loss or unjust enrichment claimed by a plaintiff must be “caused by [the] misappropriation.” “Although the causation element is not defined further in the [Delaware Trade Secrets Act], and case law on the subject is sparse, statutory construction and deductive reasoning lead to the clear conclusion that the causation referred to in the Act is proximate causation.”⁵⁹

Delaware recognizes the traditional “but for” definition of proximate causation.⁶⁰ “Our time-honored definition of proximate cause . . . is that direct cause without which [an injury] would not have occurred.”⁶¹ “When assessing the adequacy of a plaintiff's causation and damages case, the analysis involves two steps. The court must determine first whether the plaintiff has proven that an injury or damage occurred and then whether the plaintiff has adequately proven the amount of his damages.”⁶²

Defendants argue that any injury to NuCar is too speculative to support an award of damages. “Our law does not permit a recovery of damages which are merely

⁵⁸ 6 *Del. C.* § 2003(a).

⁵⁹ *Total Care Physicians, P.A. v. O'Hara*, 2003 WL 21733023, at *2 (Del. Super. July 10, 2003) (hereinafter *Total Care II*).

⁶⁰ *Id.* See also *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 828 (Del. 1995).

⁶¹ *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

⁶² *Total Care II*, 2003 WL 21733023, at *3.

speculative or conjectural.”⁶³ It is undisputed that the exclusivity clause in Team Toyota’s contract with NuCar prohibited NuCar from contracting with McCafferty absent a waiver. While still employed by NuCar, Doyle approached Team Toyota about waiving its exclusivity clause as to McCafferty, and its owner declined. According to NuCar’s Greene, however, “no” was just “the beginning of a conversation we ha[d] to have.”⁶⁴ Furthermore, in the past Team Toyota had waived its exclusivity clause without even requiring a monetary concession.

The Court finds that NuCar’s injury is not merely conjectural or speculative. Injury to NuCar occurred because Defendants misappropriated their trade secret, the Potential Client List and more specifically the information reflected therein that McCafferty and Brian’s Harley-Davidson had expressed an interest in the Rewards Program. In this case, such misappropriation allowed Dealer Rewards quickly to identify McCafferty and Brian’s Harley-Davidson as potential clients and enter into contracts with them. Dealer Rewards entered into a contract with McCafferty on December 11, 2001, only two months after its creation, and with Brian’s Harley-Davidson in June or July 2001, approximately nine months after its creation. Without misappropriating the Potential Client List, it would have taken Dealer Rewards much longer to develop a similar list and learn of McCafferty’s and Brian’s Harley-Davidson’s interest in a

⁶³ *Lasher v. Inter-Continental Biologics, Inc.*, 1984 WL 137716, at *15 (Del. Ch. June 14, 1984). See also *Laskowski v. Wallis*, 205 A.2d 825 (Del. 1964); *Henne v. Balick*, 146 A.2d 394 (Del. 1958)).

⁶⁴ Tr. at 94.

customer loyalty program. By misappropriating NuCar's trade secrets, Defendants gave themselves an unfair advantage at NuCar's expense. NuCar expended time and money to create the Potential Client List and keep it secret. Defendants' use of the List injured NuCar because it destroyed the secrecy of certain information on the List and diminished the concomitant value of that information to NuCar.

Defendants' argument that any injury to NuCar from Dealer Rewards' contract with McCafferty is too speculative to support an award of damages relates to the quantum of damage rather than the fact of injury to NuCar. The entry for McCafferty on the Potential Client List indicated that NuCar still considered it a prospective client, notwithstanding Team Toyota's refusal of its initial request for a waiver. Defendants misappropriated the information regarding McCafferty for their own benefit. Furthermore, the Act expressly provides that: "Damages can include *both* the actual loss caused by misappropriation *and* the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss."⁶⁵ NuCar has presented ample evidence of Dealer Rewards' profits from its contracts with McCafferty and Brian's Harley-Davidson. Thus, in a case such as this, where it is difficult to compute the actual loss to the trade secret owner, the Court may award damages based on Defendants' unjust enrichment.

Defendants also argue that NuCar is prohibited from seeking damages based on Dealer Rewards' contract with Brian's Harley-Davidson because Defendants materially

⁶⁵ 6 *Del. C.* § 2003(a) (emphasis added).

and prejudicially changed their position by contracting with Brian's Harley-Davidson after NuCar had notice of Defendants relationship with McCafferty.⁶⁶ This argument misinterprets the first sentence of 6 *Del. C.* § 2003(a), which states, “[e]xcept to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation.” Under this provision, recovery of damages may be limited where a defendant has changed its position before acquiring knowledge, or reason to know, that its actions constitute misappropriation of trade secrets. In this case, before Defendants made any contact with Brian's Harley-Davidson they knew, or at least had reason to know, that the Potential Client List and the information contained in it was a trade secret. Therefore, § 2003(a) provides no basis for limiting NuCar's recovery of damages for Dealer Rewards' contract with Brian's Harley-Davidson.⁶⁷

In determining the unjust enrichment to Doyle and Dealer Rewards caused by their misappropriation of trade secret information from NuCar's Potential Client List, the Court recognizes that Defendants could have developed a comparable list through proper means. As the evidence showed, however, that would have taken a significant investment of time and money. NuCar contends that it is entitled to all of the profits

⁶⁶ NuCar became aware of Defendants' contract with McCafferty around March 2002, when it printed out a McCafferty website advertising its customer loyalty program. *See* PTX 17.

⁶⁷ Defendants' laches argument has, by their own admission, been rendered moot by NuCar's abandonment of its breach of contract claims. *See* DAB at 43.

realized by Dealer Rewards from both the McCafferty and Brian's Harley-Davidson contracts. NuCar presented evidence that the total amount of those profits through 2004 was \$109,680. The Court finds, however, that by using proper means, Dealer Rewards would have been able to develop a comparable potential client list of its own by September 30, 2003 – *i.e.*, within approximately two years after it was formed. Dealer Rewards had purchased contact information for automotive dealers generally and sent out promotional mailers to those entities. In addition, Dealer Rewards could have engaged in other activities, as NuCar did, such as determining potential customers' interest in a loyalty program through attending NADA Conventions and organizing appropriate follow up efforts. Legitimate activities of this nature would have enabled Dealer Rewards to generate its own list of good prospects and probably to have identified McCafferty and Brian's Harley-Davidson as prospective customers. Therefore, the Court concludes that only the resulting profits from Dealer Rewards' contracts with McCafferty and Brian's Harley-Davidson through September 30, 2003 represent unjust enrichment.

The evidence NuCar submitted for the relevant damages period consists of Dealer Rewards' contract with McCafferty and testimony regarding its annual profits from the McCafferty and Brian's Harley-Davidson contracts. The McCafferty contract was signed in December of 2001 and the Brian's Harley-Davidson contract was signed in June or July of 2002. Therefore, profits from the first seven quarters of the McCafferty contract and the first five quarters of the Brian's Harley-Davidson contract constitute unjust enrichment and are awarded to NuCar as damages under 6 *Del. C.* § 2003(a). Based on Doyle's testimony regarding Dealer Rewards' profits on these two contracts and

assuming the profits for 2003 were realized on a constant, average quarterly basis, the Court finds this figure amounts to \$69,750.⁶⁸

E. Wilful and Malicious Misappropriation

The Act provides that “if wilful and malicious misappropriation exists, the court may award reasonable attorney’s fees.”⁶⁹ Delaware case law generally characterizes wilfulness as “an awareness, either actual or constructive, of one’s conduct and a realization of its probable consequences,”⁷⁰ and malice as “ill-will, hatred or intent to cause injury.”⁷¹

NuCar argues that Doyle’s testimony that “it was [his] intention that as soon as [he] got paid in full [under the Termination Agreement], that [he] would then aggressively go after [his] current customers”⁷² and his immediate solicitation of NuCar

⁶⁸ Plaintiffs did not request pre-judgment interest and presented no evidence at trial in support of any claim for pre-judgment interest. In these circumstances and based on the length of time this action has been pending and largely inactive, the judgment to be entered based on this Memorandum Opinion shall not include pre-judgment interest. *See All Pro Maids, Inc. v. Layton*, 2005 WL 82689 (Del. Ch. Jan. 11, 2005).

⁶⁹ 6 *Del. C.* § 2004. The Act also allows for exemplary damages in an amount not exceeding twice any award made under § 2003(a) if wilful and malicious misappropriation exists. At trial and in their post-trial briefing, NuCar did not seek exemplary damages. Based on the facts of this case and the level of actual damages involved, the Court does not believe that exemplary damages in addition to or in lieu of reasonable attorney’s fees would be appropriate. Thus, the Court will limit its analysis to whether Defendants’ conduct was (1) wilful and malicious and (2) justifies an award of attorney’s fees.

⁷⁰ *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

⁷¹ *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

⁷² Tr. at 164.

clients and McCafferty demonstrate wilful and malicious misappropriation. In this action, however, NuCar is not claiming that it had a valid noncompete agreement with Doyle. Absent such a claim, Doyle was free to use his technical expertise or general knowledge to compete against his former employer NuCar so long as he did not misappropriate any of its trade secrets.⁷³ Therefore, Doyle could have pursued his “current customers” aggressively, provided he was careful not to misappropriate trade secrets in the process. The Court finds that Doyle not only failed to exercise the appropriate degree of care in this regard, but also demonstrated a reckless disregard of NuCar’s trade secrets.⁷⁴ The Potential Client List was a NuCar trade secret and Doyle aggressively solicited McCafferty (an identified “active prospect” of NuCar with whom Doyle recently had dealt) and others with the intent to cause injury to NuCar. Therefore, Doyle maliciously misappropriated the Potential Client List.

⁷³ See *Wilmington Trust*, 1987 WL 8457, at *5.

⁷⁴ The manner in which Doyle pursued NuCar’s second largest customer and largest automotive customer, Burt Automotive (“Burt”), also supports the inference that Doyle was haphazardly indifferent to protecting NuCar’s trade secrets. Doyle’s pitch to Burt centered around his familiarity with Burt’s then existing NuCar loyalty program. See PTX 20 (“having worked for NuCar for over six years, I am very familiar with Burt’s Platinum Plus program”). In his presentation, Doyle used his knowledge of the Reward Program’s specific costs to Burt and perceived problems in staff training to promote Dealer Rewards’ loyalty program. Although Doyle did not succeed in luring Burt away from NuCar, the record suggests that he made no effort to confine his communications with Burt to information that was generally known or readily ascertainable by proper means. Such tactics, as well as Doyle’s unauthorized use of NuCar’s Form Contract, demonstrate a reckless disregard for existing trade secrets and proprietary information.

Additionally, Doyle's actions were wilful. Doyle testified that he believed that he had returned everything that belonged to NuCar the day after he was terminated. He understood that the Termination Agreement required him to do so. Yet, Doyle did not promptly return documents including the Potential Client List to NuCar when he later discovered them in his possession. This conduct, together with Doyle's deliberate decision to contact an identified potential client of NuCar, such as McCafferty, is wilful. The Court, therefore, concludes that Doyle's misappropriation of trade secrets relating to the Potential Client List was wilful and malicious under 6 *Del. C.* § 2004.

Having reached that conclusion and finding no persuasive mitigating evidence,⁷⁵ the Court holds that NuCar is entitled to be reimbursed for its reasonable attorney's fees in prosecuting its misappropriation of trade secrets claim.⁷⁶

IV. CONCLUSION

For the reasons stated above, the Court finds that NuCar's Form Contract and Potential Client List were trade secrets under the Act. Defendants misappropriated NuCar's Form Contract. The Court hereby grants NuCar's request (unopposed) for a

⁷⁵ Doyle's argument that he was free to contact McCafferty because Team Toyota had refused to provide a waiver provides no justification for his disregard of NuCar's trade secrets. Defendants did not show that NuCar had given up on McCafferty as a prospective client. Indeed, the Potential Client List supports a contrary inference.

⁷⁶ Additionally, the Court rejects Defendants' argument that Plaintiff's request for attorney's fees under 6 *Del. C.* § 2004 is barred by 10 *Del. C.* § 5102. Section 5102 applies to traditional court costs rather than attorney's fees. *See, e.g., Heite v. Camden-Wyoming Sewer & Water Auth.*, 1993 WL 181299 (Del. Ch. May 21, 1993).

permanent injunction prohibiting Defendants' further use of the Form Contract. The Court further finds that Defendants misappropriated NuCar's Potential Client List in connection with its contacts with McCafferty and Brian's Harley-Davidson. Defendants are jointly and severally liable to NuCar for unjust enrichment damages caused by that misappropriation in the amount of \$69,750.

Additionally, the Court finds that the misappropriation was wilful and malicious and awards attorney's fees to NuCar in connection with its misappropriation of trade secrets claims. NuCar shall supplement the record to demonstrate the amount and reasonableness of their requested attorney's fees.

Counsel shall promptly confer and submit a stipulated or proposed form of judgment in accordance with this opinion.

IT IS SO ORDERED.