THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill
Circuit Court Judge

App. Case No. 2015-000476
Lower Case No. 2012-CP-23-02887

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA CUSTOM CONVERTING, LLC, ... Plaintiff,

vs.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA CUSTOM CONVERTING, LLC, ... Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, ... Third-Party Plaintiffs,

vs.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

vs.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems, Inc., are the..... Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM CONVERTING, LLC, ... Appellants.

INITIAL REPLY BRIEF OF APPELLANT CAROLINA CUSTOM CONVERTING, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

When Wilson left, he created a brand new company using CCC's hard earned confidential information, and at that company, he began selling CCC's products to CCC's customers. Respondents' briefing seeks to portray that fact as much ado about nothing. They argue that the confidential information at issue in this case is nothing more than public data available to anyone. And, that Wilson and Neologic/FWS didn't need any of CCC's confidential information to start the new company. The argument begs the question: then why did Wilson take it with him when he left? Similarly, when he pursued FilmTech as his next employer, why did Wilson provide a detailed list of the industry segments for CCC's customers, the precise products those customers were buying, with pricing detail, and the related supplier information? Again, if this information had no value, then why didn't he just send his resume instead?

I. The Confidential Commercial Information is a Trade Secret

A. Supplier & Customer Detail Meet the Definition of a Trade Secret

The confidential information at issue in this case is comprised, in part, of a compilation of customer and supplier information that CCC uses to conduct its business. S.C. Code Ann. § 39-8-20(5)(a). Courts from across the country have held that this precise type of commercial information is a trade secret. *See, e.g., Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 781 (Neb. 2001); *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 909-910 (Miss. 1998); *Webcraft Technologies, Inc. v. McCaw*, 674 F. Supp. 1039, 1044-46 (S.D.N.Y. 1987); *see also Williams v. Riedman*, 339 S.C. 251, 284, 529 S.E.2d 28, 45 (Ct. App. 2000) (Goolsby, J. concurring) (concurring in the opinion and clarifying that "I do not construe it to hold that a customer list cannot be a trade secret"). Transcript cites from the lower court proceedings are provided below to give context to the legal issue before this Court.

1. Context from the Lower Court Proceedings

At the very beginning of this case, before CCC had even been named as a defendant, Gandis and Comeau-Shirley agreed with Wilson's pleadings, and sought to have CCC dissolved in an orderly fashion. The plan was that the parties could split up the proceeds and go their separate ways. At a December 6, 2012 hearing before the circuit court, however, Wilson abruptly opposed the dissolution.[1] In open court he noted that "[w]e don't want to gut the entity. We think the business has value. Remember, we were here not long ago because they didn't want to give us the customer list because that customer list has such value. Well, we agree it has value." (Dec. 6, 2012 Hearing Tr. 7, 9-13).[2]

When Wilson left CCC, eleven months before that hearing, he was the Vice President of Sales and Purchasing for the entire company and in that role charged with overseeing the company's sales force, its purchasing decisions, and its vendor (supply) sourcing and qualifying.

On direct examination by his counsel, Wilson testified on this point as follows:

> Q: And how were your sells [sic] to your customers going? Are you above or below projections [for 2011]?
>
> A: Well, as the VP of sales, I had transitioned a lot of my accounts to our reps. I viewed my role as more of supporting them. And, of course, I was still heavily involved in the ***vendor side, qualifying vendors and purchasing***.

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[1] Prior to abruptly opposing dissolution, Wilson had been working on a dissolution order. In a December 3, 2012 e-mail to Steve Norvell, Wilson wrote that "[w]e have a hearing this Thursday regarding dissolution of CCC and ZOi. We have drafted our own dissolution order . . . ." (Ex. 100; *see also*; Tr. 509, 1- 510, 1; Tr. 506, 19-22).

[2] Before this litigation began, Wilson understood the confidential nature of this information. During the buy-sell negotiations among the members in January 2012, in an e-mail Wilson was cautioned to protect the company's confidential information during discussions with third parties. (Ex. 69, p.3 (par. 3). In response Wilson assured the other members that "I certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor. That really should not be a concern of yours since I have a vested interest in protecting the company . . . ." (*Id.*, p.2 (second sentence)).

So I had been ***transitioning accounts over to them.*** So I couldn't really tell you which accounts I was personally managing at that time . . . .

(Tr. 415, 1-10) (emphasis added). During cross examination, Wilson testified that while at Neologic/FWS, he had all of CCC's data:

Q: You had company data. We've already talked about that; right?

A: I had company data, absolutely.

Q: The company data would have had ***all the e-mails of the customers.*** It would have had ***the prices.*** It would have had what CCC sold. . . . And you had all the information about ***what CCC was selling its customers, their pricing, their acquisitions, costs,*** and ***specifications of the products,*** all the products of CCC; right?

A: Yes. Royal Metal was not a customer of CCC.

Q: Well, you had it for everybody else; right?

A: Sure.

(Tr. 506, 1-18).[3]

CCC did not always undertake a qualifying process for every sale to a customer. But in the majority of CCC's regular sales to large volume accounts a qualification process was the norm. At trial, both sides discussed the concept of qualifying or finding the precise film that would work for a given customer's needs.

Mike Meyers (Respondents' Witness) verified this process when he testified as follows:

Q So that deal would have started in 2007. Why did that deal take so long to develop?

A Well, we were using a different type of film. It was polyester, but it had gone through a special kind of process. And we had to send it to the customer to test. They had to do all of their testing and make sure that it works for all their process, and everything like that. And then, after that,

[3] On cross examination Wilson also admitted that when he began working for Neologic/FWS, he began e-mailing (soliciting) CCC customers, (Tr. 505, 24-25), customers which as noted above, he had ceased servicing well before leaving CCC.

that's when we started getting some orders.

Q So, essentially, you've got this process where you've got to show them the film you're going to sell them; right?

A Yes.

Q And it's kind of got to go through a qualification process?

A Right.

Q And y'all had done that in 2007?

A The end of 2007 to 2008.

(Tr. 301, 3-20). Bruce Hotmer (Respondents' Witness) testified in a related manner as follows:

Q Well, what about the products they need?

A Well, you wouldn't find that in the Thomas Register, according to my memory. Now, if they've changed, I would be surprised. But the polyester business is a very specific detailed business. In ICI, we had over 20,000 product codes. So it's very, very -- and we probably had -- I don't know-- 250 customers. ***So it all boils down to a very specific requirement by customer.***

(Tr. 345, 2-9) (emphasis added).

Gandis testified as to the qualifications process as follows:

Q Okay. And let's talk about that spec in. What are we really talking about there? How does that work?

A I mean, I think even Bruce Hotmer mentioned, whenever it was, yesterday or the day before yesterday, some of these manufactures make up to 20,000 kinds of films. That doesn't mean all of them will work for every application. So there's got to be an evaluation to make sure that [a] manufacturer's film will, in fact, meet the [customer] specification. Each manufacturer has its own little thing that's a little different that meets different codes, FDA approvals, those sort of things.

So it's not -- it's never as simple as just walking in. It just doesn't happen, especially in food packaging.

Q But he could just walk straight in, couldn't he?

A He did.

(Tr. 872, 5-19).

Wilson also discussed this very concept. "[The customer was] looking for other sources of polyster, and [said] we'd love to have you quote us, if you can supply it. So I gave them a quote. ***I started to get products qualified.*** And, initially, I picked up their 142-guage business. (Tr. 374, 9-16) (emphasis added).

It is important to underscore the fact that nowhere in Respondents' briefing do they challenge the rigorous and time consuming process that CCC undertook to qualify various films. The qualification process was discussed by both parties at trial and corroborated by Wilson and his own witnesses. The circuit court did not even acknowledge this aspect of the confidential information in its Order.

2. The Circuit Court's Conclusion that the Supplier and Customer Information Was Not a Trade Secret Was Legal Error

The circuit court committed legal error when it concluded that the confidential information was not a trade secret because some of this information was procured from public sources. (Order, p. 13-14).[4] The South Carolina Trade Secret Act (the "Act") instructs that a "trade secret may consist of a simple fact, item . . . [and] [t]he collective effect of the items . . . must be considered in any analysis of whether a trade secret exists ***and not the general knowledge of each individual item.***" § 39-8-20(5)(b) (1997) (emphasis added). The circuit court's order did not even acknowledge the presence of subsection (b) of the statute. Indeed, ***nowhere*** in the order is this subsection of the statute even cited. The circuit court's legal

[4] As noted in CCC's opening brief, the facts of this case are fundamentally different and substantially more complex than the facts of *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 883 (2007). (Appellant's Opening Brief, pp. 18-19).

conclusion that the use of public information precluded the existence of a trade secret is irreconcilable with the language of the statute. This was legal error.

The circuit court's failure to acknowledge subsection (b) aside, the supplier and customer lists taken by Wilson to Neologic/FWS were developed by CCC with time and effort. CCC spent the time to find customers that needed specific film, and then spent the time and effort to find suppliers that could provide those needs.[5] "[W]here time and effort ha[s] been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market." *Home Pride*, 634 N.W.2d at 782; *see also Ecolaire Inc. v. Crissman*, 542 F. Supp. 196, 206 (E.D. Penn. 1982) (noting that customer lists which contain confidential customer data are of "considerably greater value than information contained in publicly available directories"). "Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers." *Home Pride*, 634 N.W.2d at 782; *see also id* (noting that courts are reluctant to protect the latter type of public customer list).

Moreover, confidential information is not precluded from trade secret protection merely because it is based upon information from the public domain. *See Servo Corp of Am. v. General Elec. Co.*, 393 F.2d 551, 555 (4th Cir. 1968) ("But if [the cited case] holds that the mere presence in the public domain of the information upon which a trade secret is based precludes recovery for breach of a confidential relationship, we decline to follow it."). "Such a burden would be insurmountable since trade secrets frequently contain elements that by themselves may be in the

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[5] Wilson's own brief acknowledges that in one given year where CCC had roughly $7 million in sales, that only half of those sales were from EFS customers. (Wilson Br., 15 (last paragraph)).

public domain but together qualify as trade secrets." *The Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 675 (Wash. 1987) (citing *Servo Corp.*, 393 F.2d at 555).

The circuit court committed legal error by failing to apply the plain language of § 39-8-20(5)(b), which follows well established law that the mere presence of public information does not defeat trade secret protection.

3. Respondents' Efforts to Gloss Over the Circuit Court's Legal Error Fail

First and foremost, Wilson contributed his industry know how and customer and supplier information in return for his equity in CCC. (Exs. 10, 31). Consequently, Wilson's discussion of previous contacts with the CCC customers that he brought to Neologic/FWS misses the point. Likewise, Wilson's effort to portray the confidential information in this case as independently gained from years of industry experience also misses the point. "Although the friends and acquaintances acquired in the course of a history of business dealings in an industry is not generally considered a trade secret, different considerations apply where a list of useful and influential contacts among customers and prospects is accumulated with considerable effort for the benefit of the employer." *Webcraft Tech's.*, 674 F. Supp. at 1046. "There is little doubt that information which [Wilson] learned while employed at [CCC] concerning customer preferences and . . . pricing is protectable."[6] *Id.* And, although Wilson said he didn't need any of the confidential information to compete, "the fact remains that []he took the list and no doubt it helped h[im] remember far more than []he could have remembered without it." *Id.*; *see also*

[6] CCC generated substantial amounts of new business while Wilson was working for the company. Again, he acknowledged in his responding brief that in one year CCC had $7 million in sales and of those sales only half were from former EFS customers. (Wilson Br., 15 (last paragraph)).

Home Pride, 634 N.W.2d at 782 (noting that if the information on the list were so readily available, then why go to the trouble of obtaining it (and in that case paying for it)).[7]

Second, Wilson's brief has oversimplified the typical one-off film-sales transaction. For example, Wilson notes testimony regarding a transaction as follows: "[I]f we had a customer—specific customer need, we'd go out. We'd look at three or four different vendors, find the film that we needed. If it was available, then, you know, the decision to purchase it was made." (Wilson Br., p. 11). Wilson then cursorily concludes no trade secrets were required to make that transaction. (Wilson Br., p. 11). Of course, what Wilson does not discuss is the previous efforts it took to have that customer look to CCC for supply in the first place. *Fred's Stores*, 725 So.2d at 909 (noting that "it is this very work effort or process of acquiring and retaining clientele, that constitutes a protectable trade secret" (citation omitted)). Wilson also does not discuss the previous efforts it took for CCC to locate the different vendors as a source of supply, and any efforts to ensure the supply was of a reliable quality. *Ecolaire Inc.*, 542 F. Supp. at 203 (noting that defendant "could not have realistically made certain bids for projects without this supplier information"). Likewise, Wilson does not discuss the fact that the ability to locate those vendors was made possible by use of the electronic vendor reference program created by CCC. (*See infra* at Part II.B).

Third, Respondents' description of the film supply market as a commodities market fares no better. (Wilson Br., p.15; Neologic/FWS Br., p. 6). The price that a company like CCC pays a supplier for its film stock is not the point. It is the suitability of the film from that supplier for a

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[7] Wilson claims that the identity of the customers he called on supports the claim that he did not use any of the confidential information, and that "[a]ppellants presented no evidence to the contrary." (Wilson Br., 8). But that statement has no support in the record. *See, e.g.*, Tr. 869, 6 – 871, 2 (discussing solicitation by Neologic/FWS of Patrick Industries); Tr. 871, 3 – 872, 4; see also Ex. 172 (customer noting that "Dave was in last week and he said that this is the same material that we get from Carolina [Custom Converting]")).

given customer that creates the value for CCC. *See Sigma Chemical Co. v. Harris*, 794 F.2d 371, 373 (8th Cir. 1986) (noting that "which suppliers supplied chemicals at the requisite quality and price was not in public domain" and protected as a trade secret).

Finally, Respondents argue that pricing is not a trade secret because customers freely provide sales persons with competing companies' current prices. While that statement is the subject of debate,[8] whether it is correct or not is irrelevant to this appeal. Wilson knew all of the customers that were buying from CCC, and he already had CCC's pricing information. *Webcraft Tech.'s*, 674 F. Supp. at 1046 (pricing information is a trade secret). Accordingly, Wilson was able to underbid CCC, (Tr. 870, 18 – 871, 2; 873, 2-20; 874, 6-11; Ex. 157 (stating "these prices are very attractive"; Ex. 168 (showing $400 profit on roughly $80,000 sale), which explains why Neologic/FWS's net sales numbers were not higher.

B. The Modified Excel Programs are Trade Secrets

The circuit court did not even acknowledge the presence of these programs in its Order. Discovery confirmed that Neologic/FWS had these programs in their possession.[9] Neologic/FWS argue that CCC was not damaged by the misappropriation of these efficiency programs. (Neologic/FWS Br. 12). This argument represents a misapprehension of the Act. When trade secrets like the subject efficiency programs are taken, the General Assembly recognized that it may be hard to quantify damages. For that reason, the Act authorizes a "reasonable royalty for a misappropriator's unauthorized . . . use of a trade secret." S.C. Code Ann. § 39-8-40(B). CCC incorporates by reference its discussion of this issue in its opening brief. (CCC Br., pp. 16-17).

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[8] For example, if the purchasing agent at potential Customer A tells Salesman X that he buys a roll of film from Competitor Company for $1.50, then Customer A is bidding against itself because now Salesman X knows he just needs to come in below $1.50 as opposed to $1.00.

[9] Respondents attempt to distract from this finding by noting that the document itself was dated. The only reason the document was "dated" is because Neologic/FWS produced the program in pdf form, as opposed to electronic format. The information was not dated.

II. Wilson & Neologic/FWS Misappropriated the Confidential Information

As detailed in CCC's opening brief, when Wilson began making plans to leave the company with intentions to join FilmTech, he harvested all of the company's confidential information. And, when FilmTech did not bite, Wilson used his family's resources to start a new film company. Discovery confirmed this fact; and, therefore, Wilson was forced to admit that he took the confidential information with him to Neologic/FWS. (Tr. 505, 18 – 506, 18).

Wilson and Neologic/FWS's attempt to narrow the amount of confidential information that they used down to the single inventory tracking program is belied by the record. (Wilson Br., p.13; Neologic/FWS Br., p.11). The record is replete with evidence that Respondents traded on CCC's confidential information. (E.g., Tr. 868, 10 – 887, 18; *see also* Order, p.17 ("Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim.")).

III. CCC Exercised Reasonable Efforts to Maintain the Secrecy of its Confidential Information

In a background section of its Order, the circuit court noted that "CCC made little if any effort to protect the information; neither Wilson, Gandis, Shirley, Bill Shaw, Mike Myers, nor any other CCC employee or contractor was required to sign a non-disclosure agreement prior to Wilson's ouster.[10]" (Order, p.8) (emphasis added). Respondents pushed the circuit court in this erroneous legal direction throughout the trial, (*E.g.*, Tr. 175, 16-25; 179, 1-17; 304, 18-20; 318, 21-23; 434, 3-12) in the exact same manner they are attempting to push this Court. (Wilson Br., p.11, 14, 25; Neologic/FWS Br., p.9). The circuit court took this factual observation and then

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[10] Whether Wilson was ousted from CCC, or not, had no bearing on the question whether he and Neologic/FWS misappropriated CCC's trade secrets. *See also* Order, p. 15 ("The evidence merely demonstrated that Wilson was able to conduct business with some of CCC's former customers after his ouster from CCC." (emphasis added))

applied it to a legally erroneously standard. The circuit court wrote that a "party claiming a trade secret violation must exercise '***eternal vigilance,' which 'calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it.***'" (Order, p. 14) (emphasis added). By misconstruing the applicable law, the circuit court rendered a legally erroneous decision.

Respondents' briefs argue that the Act's reasonable efforts standard is nothing more than a different phraseology of the above standard requiring ***eternal vigilance***, ***constant warnings***, and a ***required secrecy agreement***. (Wilson Br., pp. 21-22; Neologic/FWS Br., pp. 7-8). The plain language of the Act, however, does not include these heightened standards. Respondents' argument that these common law standards are the same standard embodied in the Act is legally incorrect.

As noted in CCC's opening brief, only three individuals had access to all of the confidential information relating to the suppliers (vendors) and the customers: Wilson, Gandis, and Comeau-Shirley. Furthermore, the testimony showed that this information was password protected on CCC's server. Password protecting confidential information and making it available to only a limited number of individuals constitutes reasonable efforts. *Fred's Stores*, 725 So.2d at 910-11 (holding reasonable efforts met where access to the "computer on which the list was stored was obtainable only though a password" and the "number of employees who had access to the list was limited"). As a matter of law, CCC employed reasonable efforts.

IV. CCC Was Damaged

The circuit court judged this trade secret case through an erroneous legal lens. Wilson and Neologic/FWS misappropriated CCC's trade secrets. Respondents were able to capture a

share of the market with this information. Respondents were also able to buy (through underbidding) a share of the market with this information. (See CCC Br., 20). CCC incorporates by reference its discussion of this issue in its opening brief. (CCC Br., pp. 22-24).

V. Response to Rhetoric

In the lower court Respondents defended this case by introducing a number of inflammatory claims about CCC and its members. These attacks were effective in the lower court as they distracted from plain legal defects in their defenses. The record before this Court, however, does not back up the rhetoric. CCC will provide a brief response.

A. Corporate E-mail

Wilson argues that CCC spied on him by monitoring, in real time, his personal email. (Wilson Br., p.6). That statement has no basis in fact or the record. The incoming e-mails for key staff members at CCC were compiled in an archive system. (E.g., Tr. 118, 19-23; 291, 9-11). When Wilson claims his e-mails were monitored, he is referring to this archive system. Consequently, the only Wilson e-mail that was ever reviewed came from his corporate e-mail account: dave@ccc-films.com. And, again, only the incoming e-mails could be seen. (Tr. 118, 19-23). Wilson's personal e-mail addresses, *e.g.*, davewilson@easternfilms.net or davewilsonsr@charter.net, were never reviewed—until discovery.

Despite claims to the contrary, Wilson understood that his corporate e-mail account was not private. When corresponding with FilmTech, Wilson primarily did so by sending e-mails from his charter e-mail account, (Ex. 70), and then from his easternfilms e-mail account. (Ex. 72). An exception is an e-mail exchange on January 13, 2012. On that date, FilmTech initiated the correspondence by sending Wilson, at his corporate e-mail account, some ideas about their potential business. (Ex. 73). Wilson immediately forwarded that e-mail to his easternfilms

account; he then promptly responded from the easternfilms account acknowledging the e-mail and asking that "all future emails pertaining to our working together [be sent] to my eastern films email address. I can't be 100% sure that the CCC email is secure." (Id.). Of course, he knew it wasn't secure as CCC had a handbook that said that very thing. (Tr. 119, 6-9; *see also* Ex. 176).

The claims of "real time" monitoring are likewise not well founded. There is an e-mail from Wilson's wife to Wilson where, one week after it was sent to Wilson, Gandis forwarded the e-mail to Comeau-Shirley. (Pl. 41, p. 2 (incoming e-mail dated September 12, 2011; e-mail forwarded on September 19, 2011)). There was an e-mail exchange regarding Comeau-Shirley's proposed tax reduction plan for Wilson's tax liability that included Wilson's accountant, but it is unclear whether Wilson forwarded that e-mail to Gandis. Gandis testified that his review of the archived e-mails was primarily after Wilson left the company. (Tr. 121, 21- 122, 7). Contrary to Wilson's claims, there is no evidence that anyone reviewed communications between Wilson and his lawyer.

B. ZOi Films, LLC

When Wilson started this litigation in April of 2012, he named only Gandis and Comeau-Shirley as defendants and sought dissolution of CCC, among other relief. (Complaint). Gandis and Comeau-Shirely agreed to dissolve CCC. For the entire first year of the below litigation it was believed that CCC would be dissolved.[11] When Respondents refer to Comeau-Shirley's e-mail where she says they would not have to "haggle" over the new stuff, she is referring to the new stuff after CCC's dissolution and the new stuff they were hoping to generate. (Pl. Ex. 106). An e-mail from July 20, 2012 outlined this very issue. As noted above, the parties were moving toward dissolution. In the e-mail, Comeau-Shirley noted that, "CCC will be aggressive in

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11 *See* n. 2, *supra.*

reducing its film stock between now and November 30th - with a goal to have all film sold by October 31st at the retail level and then spend November selling the residual in bulk sales to other brokers/scrap dealers. This would allow for collection of the receivables by December 31st." (Pl. Ex. 113). She further noted that:

> [a]s there likely won't be new film purchases (there are some open POs still to be fulfilled) -this cash should allow CCC to pay all its vendors and ... if we do this right, have cash left over- which would be divisible amongst the owners. The first portion of cash goes to John (and Me) to catch us up to the cash that Dave has already received (via loans) from CCC. Any excess would be divided appropriately-- the court &/or the attorneys will guide us as to how to properly settle. . . . And when that cash comes out of CCC in December – John and I will be placing ours into ZOi.

(Pl. Ex. 113). As it turned out, however, Wilson decided not to allow CCC to be dissolved at that time.

Respondents contend that far from protecting CCC's trade secrets, its members freely gave them away to a competing entity. That is simply not the case. First, the proceeds of all ZOi transactions went from the ZOi bank account into CCC. The Court's expert confirmed this very fact.[12] (Tr. 583, 25 – 584, 15). For that reason, all work done by CCC employees to further a ZOi transaction were for the benefit of CCC. Accordingly, Respondents claims that CCC employees worked to aid a competitor has no basis in fact or the record. Indeed, almost as soon as ZOi was

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[12] The Court's expert also did not cost $150,000; he cost $112,000. And the expert was requested by Wilson; this was not a *sua sponte* decision by the court. Indeed, the appointment was largely driven by an affidavit from Wilson's retained consultant that alleged indicia of fraud in the balance sheet. This claim hinged upon year-end adjustments to the inventory. Wilson plainly knew CCC's inventory was overstated by $300,000 - $400,000. (Tr. 483, 6-18; 488, 2-8; 507, 2-14; 541, 20 – 542, 4). Accordingly, Wilson knew the adjustments were necessary but apparently withheld that important information from his retained consultant. (Motion to Exclude C. Stoddard).

formed, in or around July 2012, it became public knowledge to all parties.[13] And, while it is a correct statement that ZOi was formed separate from CCC initially (for the reasons discussed above), it is also a correct statement that soon after its formation ZOi became a wholly owned subsidiary of CCC.

C. Destruction of Evidence

Respondents portray the spoliation of evidence in this case as harmless. Wilson argues that there were 40,000 e-mails loaded back onto the CCC computers after he erased the computers. (Wilson Br., 7; see also Wilson Br., p. 27 (noting "he returned his CCC computers with all the information contained in the 40,000 e-mails, which were on the computer"). To support this claim, Wilson cites to a forensic exam of the computers which noted the presence of his e-mails. (Ex. 79; Tr. 443, 9 – 444, 2). What Wilson does not mention, however, is that the forensic exam described his e-mails as "corrupt or encrypted." (Ex. 79, p.2, #11). Indeed, Gandis testified that when he attempted to review the recovered e-mails it was "like reading hieroglyphics." (Tr. 900, 24-25; see also Tr. 900, 1- 901, 2 (fuller discussion of same).

Nelogic/FWS makes the claim that "Wilson returned his computer to CCC with all information intact." (Neologic/FWS Br., 11 (citing transcript page 442, ln. 1-3). But that transcript cite is from the direct testimony of Wilson admitting that he erased the computers. (Tr. 442, 1-2). Indeed, in the lines immediately following that transcript cite Wilson also admitted that he "reformatted the Blackberry and made sure there was nothing on it." (Tr. 442, 9-10). There is no evidence in the record that supports the claim that Wilson "returned his computer to CCC with all information intact." Rather, the evidence shows that Wilson ran a hard drive

[13] When counsel for the parties learned of the existence of ZOi, they advised the individuals that notwithstanding their desire to make preparations for a dissolution of CCC and perhaps branch into a different segment of film sales, (Tr. 184, 12 – 185, 8), the related nature of the business counseled in favor of making ZOi a part of CCC.

erasure program and an e-mail shredder program on the computers before returning them to CCC. (Ex. 79, p. 4, ## 33-37, 43; Tr. 900, 16-20). Indeed, discovery showed that Wilson instructed others to delete e-mails about this litigation, during this litigation. (Tr. 523, 21- 524, 23; Ex. 115).

The destruction of evidence in this case was substantial. Respondents' efforts to minimize this fact are not supported by the record. The circuit court's decision not to address or acknowledge this issue is confounding.

D. So-Called Afterthought Filing

Respondents argue that Appellants trade secret claims were nothing but leverage tactics. That is simply not the case. First, as noted above, the parties believed CCC would be dissolved in an orderly fashion in 2012. When it became clear that Wilson did not seek that type of resolution, the management authorized CCC to assert all claims available in an effort to make the company whole. An independent trade secret lawsuit was filed in 2013. After it was served, Wilson amended his complaint to add CCC as a party. (Second Amended Complaint). In the interests of judicial economy and the resources of the litigants, CCC agreed to dismiss the independent trade secret action, and it was agreed that CCC would answer the amended complaint with all counterclaims.

Respondents fault CCC for not serving the counterclaims until later in the litigation. But the later service date was entirely driven by Respondents decision to pull the parties into a second round of settlement talks. Indeed, CCC was handicapped in its prosecution of the trade secret case by this fact because it did not start receiving receiving discovery from Nelogic/FWS

until a few months before trial. The trade secret claims have always been asserted to make CCC whole.[14]

VI. Breach of Fiduciary Duty

CCC hereby incorporates by reference the reply briefing set forth by Gandis and Comeau-Shirley regarding the claims against Wilson for breach of fiduciary duty associated with the usurpation of corporate opportunities.

VII. Conclusion

The circuit court failed to apply the plain language of the Act when it judged CCC's trade secret claim. CCC submits that the plain language of the Act demonstrates the confidential information at issue in this case is a trade secret. The record evidences that the trade secrets were misappropriated by Wilson and Neologic/FWS. Accordingly, CCC is entitled to an award of damages. CCC respectfully requests that this Court reverse that portion of the circuit court's Order that concluded CCC did not prove its trade secret claim, and remand for a new trial.

Respectfully submitted,

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[14] With all due respect to the circuit court, and although it failed to properly apply the Act, it ***did*** correctly note that the timing of the trade secret claims was due to the "convoluted history of this case and [that] the actions of Wilson and Norvell delayed CCC from pressing the claims it decided to bring." (Order, p.17).