IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2521**
Plaintiff	:	**(Judge Conner)**
v.	:	
ERIC ADAIR,	:	
Defendant	:	
GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2522**
Plaintiff	:	**(Judge Conner)**
v.	:	
DOUG JOHNSON,	:	
Defendant	:	
GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2523**
Plaintiff	:	**(Judge Conner)**
v.	:	
WILLIAM KRAMER,	:	
Defendant	:	

GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2524**
Plaintiff	:	**(Judge Conner)**
v.	:	
JEFF LAWTON,	:	
Defendant	:	

GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2525**
Plaintiff	:	**(Judge Conner)**
v.	:	
MICHAEL PERRI,	:	
Defendant	:	

GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2526**
Plaintiff	:	**(Judge Conner)**
v.	:	
DANIEL SCHILKE,	:	
Defendant	:	

GRAHAM ENGINEERING CORP.,	:	**CIVIL ACTION NO. 1:16-CV-2527**
Plaintiff	:	**(Judge Conner)**
v.	:	
KEVIN SLUSARZ,	:	
Defendant	:	

MEMORANDUM[1]

Defendants are seven former employees of Graham Engineering Corporation ("Graham or GEC"), a producer of extruders and extrusion equipment. Defendants left their employment with Graham between December 2015 and April 2016 as the company relocated from Rhode Island to Pennsylvania. Defendants subsequently started US Extruders, a competing company in the extrusion business. As is often the case, the separation has been a bitter one, culminating in this litigation. Before the court are the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). The court will grant in part and deny in part each motion.

[1] This memorandum addresses motions filed across several dockets, with all lawsuits filed by the same plaintiff (Graham), but against different individual defendants: 1:16-CV-2521 (Adair), 1:16-CV-2522 (Johnson), 1:16-CV-2523 (Kramer), 1:16-CV-2524 (Lawton), 1:16-CV-2525 (Perri), 1:16-CV-2526 (Schilke), and 1:16-CV-2527 (Slusarz). The court prepared a single omnibus memorandum and order in the interest of judicial economy. Unless otherwise stated, all docket citations refer to the first action, 1:16-CV-2521 (Adair).

I. Factual Background & Procedural History[2]

Graham is a Pennsylvania corporation that offers design and development expertise for extruders. (Doc. 186 ¶ 1; Doc. 199 ¶ 1). Extruders are "large pieces of manufacturing equipment that shape solid plastic, often for the production of commercial plastic goods." (See Doc. 186 ¶ 1; Doc. 199 ¶ 1). After acquiring a majority stake in 2012, Graham acquired American Kuhne, Inc. ("American Kuhne"), through a stock transfer on January 1, 2016. (See Doc. 186 ¶¶ 20-21; Doc. 199 ¶¶ 20-21; Doc. 191-12 at 2; Doc. 214-1 at 2-34). American Kuhne had been cofounded by one of the defendants, William Kramer, and employed all defendants. (See Doc. 184 ¶¶ 2, 9-10; Doc. 186 ¶¶ 10-16; Doc. 196 ¶ 2). The pending civil actions arise from defendants' abrupt departure upon Graham's acquisition of American Kuhne, and defendants' formation of a competing entity, US Extruders.

A. The Employment Agreements

In preparation for the 2016 stock transfer, Graham offered employment to American Kuhne employees, including to defendants Eric Adair, Doug Johnson, William Kramer, Jeff Lawton, Michael Perri, Daniel Schilke, and Kevin Slusarz.

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[2] Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." M.D. PA. L.R. 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. Id. Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts and the opposing party's answer thereto. (See Docs. 184, 186, 196, 199). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

(See Doc. 184 ¶¶ 8-9; Doc. 186 ¶ 21). Several of the defendants—Adair, Kramer, Perri, and Schilke—accepted short-term employment with Graham. (See Doc. 184 ¶¶ 11-14; Doc. 186 ¶¶ 31, 51, 77, 87). These defendants signed new employment agreements with Graham. (See Doc. 186 ¶¶ 28, 51, 78, 89). Although Johnson, Lawton, and Slusarz did not contract with Graham, they were subject to the terms of employment agreements previously signed with American Kuhne. (See id. ¶¶ 41, 66, 98).

Every employment agreement contains an "assignment of rights" provision allowing Graham to assign its rights to any successor, assign, or purchaser without the employee's consent. (See Doc. 45-1 at 8, 17, 24, 33, 39, 47, 73). All but one of the agreements contain a Pennsylvania choice-of-law provision. (See id. at 8, 17, 24, 33, 40, 47). The outlier is Slusarz, whose agreement is governed by Rhode Island law. (See id. at 73). All employment agreements contain varying dates of expiration.

1. *Nonsolicitation and Noncompetition Provisions*

The employment agreements for Adair, Johnson, and Lawton contain identical nonsolicitation and noncompetition clauses. (See id. at 5-6, 14-15, 30-31). They prohibit defendants from seeking to do business with any Graham "client, customer, distributor[,] or reseller"; from working with any entity engaged by Graham to "manufacture, assemble, supply[,] or deliver products, goods, materials[,] or services" to Graham; and from inducing Graham's "clients, customers, distributors, resellers, suppliers, associates, consultants, employees[,] or agents" to act in any way that might disadvantage Graham. (See id.) These restrictions are limited to those entities with whom the contracting defendant "had substantial business dealings in the last 12 months" of their employment. (See id. at 6, 15, 31). The agreements also bar defendants from soliciting any employee who they supervised or about whom they received confidential information in their last 12 months with Graham. (See id.) All of these restrictive covenants expire one year after defendants' termination of employment with Graham. (See id. at 5, 14, 30).

The agreements for Kramer, Perri, and Schilke contain slightly different language and expiration dates. (See id. at 22, 38, 45). Their agreements expand the prohibitions to third parties with whom defendants "had contact" during their last 24 months of employment. (See id.) Kramer, Perri, and Schilke may not "contact, solicit, divert, or attempt to contact, solicit, or divert, any client of GEC or any potential client of GEC"—Kramer and Schilke for 12 months, and Perri for six. (See id.) All three agreements also include employee nonsolicitation clauses effective for a period of 24 months. (See id.) Finally, the agreements bar defendants from accepting employment with a competitor anywhere in North America—again, Kramer and Schilke for 12 months, Perri for six. (See id.) Kramer's agreement includes an extra restriction barring him from acting on behalf of several named competitors to contact any client or potential client to divert business from Graham. (See id. at 22). This restriction lasts 24 months. (See id.)

Slusarz signed a similar iteration of the employment agreement in 2012, and also joined the Equity Appreciation Rights Plan ("EARP"). The employment agreement states Slusarz cannot work in any competing business or in a business "related to Davis-Standard, LLC." (See id. at 71-72). The length of Slusarz's noncompetition period depends on whether he receives severance. The noncompetition clause sets a default period of 24 months, but if Slusarz's employment ends under circumstances in which he is eligible for severance, the period is shortened to just six months. (See id. at 71, 72). Slusarz's nonsolicitation provision prohibits actions to "induce or attempt to induce" or "hire" any employee, as well as any action to "induce any customer, supplier, licensee, or other business relationship . . . to cease doing business with" or "interfere with the relationship" with Graham. (See id. at 72). The length of Slusarz's nonsolicitation period also depends on whether he receives severance: six months if he receives one, and two years if he does not. (See id.) Slusarz's EARP also notes his noncompete obligations, but defers to the period established in Slusarz's "employment or service agreement." (See id. at 61).

2. ***Confidentiality Provisions***

The employment agreements for Adair, Johnson, and Lawton contain identical confidentiality provisions. (See id. at 5, 14, 30). Section (a) acknowledges the employee's "duty of confidentiality" and notes defendants' agreement not to do any of the following either during employment or within two years of termination of such employment:

> directly or indirectly, use, divulge, furnish or make accessible to any person or entity, without the express written consent of the Company, any trade secret or private, proprietary or confidential information or knowledge (including, without limitation, any pricing, pricing methodology and costed bills of materials, any trade secret, information or knowledge respecting inventions, products, designs, methods, know-how, techniques, systems, processes, software programs, works of authorship, customer lists, projects, plans and proposals) of the Company . . . .

(See id.) Section (b) states that the employee will not "duplicate, remove from the Company's possession or premises or make use of" any of the information listed, and promises to return any such information that was in the employee's possession upon termination from Graham. (Id.)

Kramer's, Schilke's, and Perri's agreements include slightly different confidentiality clauses. (See id. at 20-21, 36-37, 43-44). These clauses prohibit Kramer, Schilke, and Perri from disclosing "any GEC Confidential Information" to anyone without Graham's permission and from using any such confidential information "for [their] own purpose or for the benefit of any person, firm, corporation, association, or other entity other than for GEC." (See id. at 21, 37, 44). The clause also includes a longer list of information that Graham considers "confidential information" or "trade secrets" compared to the other defendants' contracts. (See id.)

Slusarz's employment agreement references a "Confidentiality Policy (HR 402)" that Slusarz should have signed as part of his employment agreement, (see id. at 70), but this document was not included in either party's submissions. Slusarz's EARP agreement, however, also contains a "nondisclosure" provision. (See id. at 61-62). This provision bars Slusarz from disclosing any "knowledge, information or materials" about the company's proprietary information. (See id. at 62).

3. *Slusarz's Severance Provision*

Slusarz's employment agreement entitles him to severance "equal to six months base salary and then-existing health benefits for the same six month period." (See id. at 69).[3] The agreement entitles him to severance only if he terminates his at-will employment for "good reason." (See id.) The agreement defines "good reason" to include, *inter alia*, "relocation of the Corporation to a place that is more than fifty miles from Ashaway, Rhode Island and increases the Employee's commute by more than fifty miles." (See id. at 70).

When Graham announced the York relocation, Slusarz was one of the employees offered a new position. (See Doc. 203-12 at 5-9). Slusarz received an initial offer in November 2015 that was revised in early December 2015. (See Doc. 191-14 at 30). The revised offer's "location" section states that Slusarz would perform duties "as required from the current AK facility in Ashaway followed by the newly established satellite office." (See id.) Slusarz acknowledges that the satellite office means an office in Stonington, Connecticut. (See Doc. 203-12 at 8). A follow-up email from Graham confirms the satellite office would be located less than five miles from the Ashaway location. (See Doc. 191-15 at 15). The offer also provides that Graham would pay relocation expenses if Slusarz decides to relocate to York, Pennsylvania. (See Doc. 191-14 at 31). Finally, the offer notes that Slusarz's position would require travel and includes certain reimbursements for

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[3] Slusarz is also entitled, through his enrollment in the EARP, to the "appreciation amount" of his vested rights following termination, unless his termination is "with cause," (see id. at 53-65); if he is terminated with cause, his rights under the EARP are automatically forfeited, (see id. at 58). "Cause" is defined to include criminal activity and other actions that may be considered "deliberate violations of Company policy." (See id. at 53-54). The EARP also incorporates the terms of Slusarz's employment agreement, stating cause could be "any other activity or event described in the employment agreement . . . if such agreement specifically defines cause." (See id. at 54). Defendants do not contend Slusarz is owed payment for his equity rights. (See Doc. 205-13 at 56).

that travel, but it does not specify a particular percentage or amount of travel hours that would be required. (See id.)

Slusarz declined Graham's offer. (See Doc. 203-12 at 12). When Slusarz spoke with Graham president and chief executive officer, David Schroeder, Slusarz explained he could not move to York or "spend excessive time on the road." (See id. at 10; Doc. 186 ¶ 3). Slusarz believed that even though his offer contemplated office work in Connecticut, he would "have to relocate to York" in the long term. (See Doc. 203-12 at 9). A December 15, 2015 letter from Graham informs Slusarz that he would not be entitled to severance if he did not take the position, due to the offer of a position in nearby Stonington. (See Doc. 191-15 at 15-16). A follow-up letter from Graham in February 2016 repeats its position that because Slusarz voluntarily terminated his employment, he forfeited his severance. (See id. at 19-20).

B. Defendants' Activities Between Leaving Graham and Forming US Extruders

By April 2016, none of the defendants were employed by Graham. Adair began his own graphic design business. (See Doc. 186 ¶ 33; Doc. 199 ¶ 33). Johnson worked for Rolf Koerner and Kuhne GmbH. (See Doc. 186 ¶ 47; Doc. 199 ¶ 47). Kramer received various sums from his minority ownership in American Kuhne as well as sign-on and severance pay from Graham and did not seek traditional employment. (See Doc. 186 ¶ 58; Doc. 199 ¶ 58). Lawton worked for Radiation Protection Services. (See Doc. 186 ¶ 72; Doc. 199 ¶ 72). Slusarz worked for Cable Components Group. (Doc. 186 ¶ 102; Doc. 199 ¶ 102). Perri worked for ProSystems, then a vendor to Graham. (See Doc. 184 ¶¶ 3, 36-37; Doc. 186 ¶ 84; Doc. 199 ¶ 84). The parties offer no information about Schilke's subsequent employment.

Before leaving, certain defendants took steps that Graham contends are evidence of their liability in this action. Adair reset his work devices to factory settings before returning them. (Doc. 186 ¶ 36; Doc. 199 ¶¶ 36-37). Kramer also reset his work computer. (Doc. 186 ¶ 62; Doc. 199 ¶ 62). Perri shared a copy of an "Item Master" file with Lawton, stating he was creating a new one and needed input. (Doc. 184 ¶¶ 27, 31). Perri also took photos of shop supply cards, an invoice, and a price list. (Id. ¶ 32). Lawton retained a flash drive that contained proprietary information. (Id. ¶ 113).

After leaving Graham, defendants began to communicate and meet with each other to discuss formation of a new business. (See id. ¶¶ 50-99; Doc. 196 ¶¶ 50-99).[4] The discussions began in mid-2016 and culminated in defendants' incorporation of US Extruders in July 2017, followed by an opening in August 2017. (See Doc. 184

[4] To the extent defendants claim that much of plaintiff's submitted evidence for these meetings is "inadmissible hearsay," we are unpersuaded. "[H]earsay statements can be considered on a motion for summary judgment if they are *capable of being admissible at trial.*" Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 238 (3d Cir. 2016) (citing Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1275 n.17 (3d Cir. 1995)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Much of this evidence originates from emails and other documents defendants produced during discovery. Defendants' argument that "admissions by a party opponent cannot be used against a co-party" rests primarily on the consolidation of these actions, which has not occurred. (See Doc. 196 at 7-8 n.3). Defendants do not provide a sound basis for why any of the defendants as witnesses would be unable to authenticate these documents or speak to their own firsthand knowledge about the meetings at trial. Despite numerous depositions on the matter, no defendant has testified that the meetings did not occur.

¶¶ 11-12; Doc. 186 ¶ 19). John Brunelle, owner of ProSystems, attended several of these meetings. (See Doc. 184 ¶¶ 53, 58, 73, 82, 106; Doc. 186 ¶¶ 191, 197). The parties forcefully dispute the nature of the meetings leading up to US Extruders' official launch. Graham argues that defendants met and took meeting minutes, (see Doc. 184 ¶ 50); created and distributed email addresses for the new company and created a SharePoint site, (see id. ¶ 58); and discussed, *inter alia*, office configurations, trademarks, design elements and drawings, a business plan, and marketing concepts, (see id. ¶¶ 67, 73 74, 82, 89). Defendants rejoin that these conversations were "informal discussions" and describe them as "casual," "vague," "wicked loose," and mere "pipe dreams" prior to late 2017. (See Doc. 196 ¶ 51).

ProSystems terminated its relationship with Graham in October 2017. (See Doc. 186 ¶ 108; Doc. 199 ¶ 108). In the three years prior, business between ProSystems and American Kuhne comprised over $3 million annually. (See Doc. 189-16 at 7). The parties vigorously dispute the reason for this termination. (See Doc. 186 ¶¶ 105, 106, 108, 111; Doc. 199 ¶¶ 105, 106, 108, 111). Graham maintains that defendants triggered the end of the relationship by violating their noncompete agreements and by working with Brunelle during the formation of US Extruders. (See Doc. 184 ¶¶ 58, 73, 76-78, 83). Defendants argue that ProSystems ended the relationship due to longstanding issues with Graham, especially issues concerning ownership of intellectual property and late payment of invoices. (See Doc. 186 ¶¶ 105-111).

C. Graham's Access to Defendants' SharePoint Site

At some point prior to July 15, 2016, Schilke purchased Microsoft 365 under the name US Extruders, and Adair set up a SharePoint site under this name to facilitate defendants' discussions. (See Doc. 186 ¶¶ 160-161; Doc. 199 ¶¶ 160-161; Doc. 189-47). On July 15, 2016, Adair sent a group email to inform the defendants that their new email addresses were operative. (See Doc. 184 ¶ 61; Doc. 196 ¶ 61). His email to Perri inadvertently went to Perri's former email address with Graham. (See Doc. 186 ¶ 162; Doc. 199 ¶ 162). After receiving an automatic reply from Perri's Graham address, Adair unsuccessfully attempted to recall the email. (See Doc. 184 ¶¶ 61-62; Doc. 186 ¶¶ 162, 165). The email was received by Perri's successor and eventually forwarded to Graham's board chairman, William Kerlin. (See Doc. 186 ¶¶ 4, 163, 166-168; Doc. 199 ¶¶ 166-168).

Following a discussion of the email with Schroeder and in-house counsel, Kerlin used his Graham work computer to log into the SharePoint site using Johnson's credentials, which were contained in Adair's inadvertently forwarded email chain. (See Doc. 186 ¶¶ 169-171, 176; Doc. 199 ¶¶ 169-171, 176). Kerlin, acting on behalf of Graham, accessed and printed files from the SharePoint site and distributed them to Graham's senior management. (See Doc. 186 ¶¶ 181, 188; Doc. 199 ¶¶ 181, 188). Kerlin accessed the SharePoint site roughly once per business day until the password expired 90 days later. (See Doc. 186 ¶¶ 193-194, Doc. 199 ¶¶ 193-194). Graham did not communicate with defendants informally regarding Kerlin's findings on the SharePoint site. (See Doc. 186 ¶ 190; Doc. 199 ¶ 190). Graham did use SharePoint information to support some of its allegations in the instant litigation. (See Doc. 186 ¶ 195; Doc. 199 ¶ 195).

D. Procedural History

Graham commenced the instant action on December 21, 2016. In its operative pleading, the second amended complaint, Graham contends that defendants' actions form the basis for several state-law claims: breach of contract, unfair competition, misappropriation of trade secrets, tortious interference with business and prospective business relations, civil conspiracy, and unjust enrichment. Graham also includes a claim under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Defendants counterclaim that, by improperly accessing the SharePoint site set up to discuss formation of US Extruders, Graham violated the Computer Fraud and Abuse Act, the Stored Communications Act, 18 U.S.C. § 2701, the Pennsylvania Uniform Trade Secrets Act, 12 PA. CONS. STAT. §§ 5301-5308, and the Defend Trade Secrets Act, 18 U.S.C. § 1832. Defendants' counterclaims also include state-law claims against Graham based on this same SharePoint access. Following discovery, both parties filed motions for partial summary judgment. (See Docs. 182, 185). The motions are fully briefed and ripe for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. City of

Lebanon, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The court is to view the evidence "in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor." Thomas v. Cumberland County, 749 F.3d 217, 222 (3d Cir. 2014). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89 (1986). Only if this threshold is met may the cause of action proceed. See Pappas, 331 F. Supp. 2d at 315.

Courts may resolve cross-motions for summary judgment concurrently. See Lawrence v. City of Philadelphia, 527 F.3d 299, 310 (3d Cir. 2008); see also Johnson v. FedEx, 996 F. Supp. 2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

Graham moves for summary judgment on two claims: against defendants Lawton and Perri on misappropriation of trade secrets under Pennsylvania law, and against all defendants on tortious interference with business relations. (See Doc. 182-1; Doc. 183 at 33-42). Graham also moves for summary judgment on all eight of defendants' counterclaims. (See Doc. 182-1; Doc. 183 at 42-70). Defendants move for summary judgment on their Computer Fraud and Abuse Act and Stored

Communications Act counterclaims as well as on all 14 counts of Graham's second amended complaint. (See Doc. 185 at 1-2).

Prior to addressing these claims, we note that, of the 22 claims initially submitted for and against summary judgment, four have been abandoned. Graham no longer contests defendants' motion for summary judgment on two counts.[5] (See Doc. 198 at 2 n.1). Therefore, we will grant summary judgment to defendants on Graham's unjust enrichment and Computer Fraud and Abuse Act claims. For their part, defendants no longer oppose Graham's motion for summary judgment on defendants' counterclaims under the Pennsylvania Uniform Trade Secrets Act and Defend Trade Secrets Act. (See Doc. 64 at 71-73 ¶¶ 94-109; Doc. 197 at 57). We will grant summary judgment to Graham on defendants' trade secrets counterclaims.

A. Contract Claims

The bulk of this litigation—and the parties' summary judgment arguments—centers on the contract claims. The gravamen of Graham's breach-of-contract claims rests on actions defendants took during their noncompete and nonsolicitation periods to form US Extruders. Graham contends that defendants breached both the noncompetition and confidentiality clauses of their contracts by meeting with each other and by unofficially forming US Extruders. The only

[5] Graham states it no longer contests defendants' motion on "Counts XII and XIV of its Second Amended Complaint." (See Doc. 198 at 2 n.1). Count XII refers to Graham's claim for civil conspiracy. (See Doc. 45 ¶¶ 321-330). However, Graham argues in *support* of its civil conspiracy claim in its briefing. (See Doc. 198 at 50-53). Conversely, Graham provides no argument in support of Count XIII, its claim for unjust enrichment. (See Doc. 45 ¶¶ 331-333). Defendants also point out this inconsistency. (See Doc. 210 at 26). We infer from the parties' briefing that Graham intended to drop its opposition to summary judgment on Count XIII, not Count XII.

defendant to assert reciprocal contract-based claims is Slusarz, who contends that Graham breached its contractual and statutory obligations to him by failing to pay a severance. We address Graham's breach-of-contract claims first.

1. ***Graham's Breach-of-Contract Claims Against Adair, Kramer, Perri, and Schilke***

Adair, Kramer, Perri, and Schilke move for summary judgment on Graham's breach-of-contract claims against them. These defendants accepted short-term employment with Graham and, unlike their codefendants, see *infra* at 21-26, do not dispute the enforceability of their noncompete and nonsolicitation restrictions, (see Doc. 186 ¶¶ 10, 12, 14, 15; Doc. 199 ¶¶ 10-16). They do, however, dispute whether their actions, meetings, and preparations to form US Extruders constitute a breach of those restrictions, and whether Graham suffered damages from that purported breach. (See Doc. 187 at 28-30, 32).

To prevail on a claim for breach of contract under Pennsylvania law,[6] a plaintiff must prove the following: (1) the existence of a contract, including its essential terms; (2) defendant's breach of duty imposed by the terms; and (3) actual loss or injury as a direct result of the breach. See Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003) (quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). When the court interprets a written contract, "the written intent of the parties . . . is contained in the writing itself." Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 92 (3d Cir. 2001) (citing Krizovensky

[6] These four defendants' agreements include a Pennsylvania choice-of-law clause, and the parties do not dispute that Pennsylvania law applies to these claims. (See Doc. 45-1 at 8, 24, 40, 47).

v. Krizovensky, 624 A.2d 638, 642 (Pa. Super Ct. 1993)). Undefined terms are to be given their ordinary meaning. Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004). If the terms are unambiguous, the court ascertains their meaning as a matter of law, but ambiguous terms are interpreted by the factfinder. Id. (citing Cmty. Coll. of Beaver Cnty. v. Cmty. Coll. of Beaver Cnty., Soc'y of the Faculty, 375 A.2d 1267, 1275 (Pa. 1977)).

The noncompete provisions prevent Adair from engaging in any act "that could be reasonably expected to induce any of the clients, customers, distributors, resellers, suppliers, associates, consultants, employees or agents of the Company . . . to take any action that might be disadvantageous to the Company." (See Doc. 198 at 14). This is restricted to individuals with whom Adair "had substantial business dealings in the last 12 months" of his employment with Graham. (See id.) Similarly, Kramer, Perri, and Schilke cannot "contact, solicit, divert, or attempt to contact, solicit, or divert, any client of GEC or any potential client of GEC . . . for the purpose of soliciting or diverting business away from GEC." (See id. at 18). This is restricted to those with whom Kramer, Perri and Schilke "had contact during the final 2 years" of their employment. (See id.)

The parties dispute the characterization of the relationship between ProSystems and Graham. Defendants argue ProSystems was merely a "vendor" to Graham, and the lack of any reference to "vendor" in their agreements means Graham's claims fail as a matter of law. (See Doc. 187 at 8, 30). Graham insists that ProSystems is both a vendor and a "supplier" or "client." (See Doc. 198 at 19). Unfortunately, neither "client" nor "supplier" is defined in any of the agreements.

(Cf. Doc. 45-1 at 3-4). "Suppliers" as used in Adair's agreement as well as "clients" as used in the agreements of Kramer, Perri, and Schilke could mean "vendor" to a reasonable factfinder. See Kripp, 849 A.2d at 1163. Suffice it to say that these terms are inherently ambiguous, and the factual disputes raised by the parties cannot be resolved at the summary judgment stage.[7]

On the merits, Graham's opposition to defendants' motion relies in part on Schroeder's deposition. In his deposition, Schroeder testified, and referenced documents in support of his claim, that each defendant breached multiple subsections of their noncompete and confidentiality provisions. (See Doc. 191-2 at 15-23). Schroeder claimed Adair's setup and organization of the SharePoint site, which included Brunelle, violated his noncompete provision. (See id. at 15). According to Schroeder, Kramer was "constantly" in contact with ProSystems before he left in 2016, so the meetings with Brunelle would have constituted a breach. (See id. at 22). Schroeder also testified that: (1) Kramer disclosed confidential information in violation of his employment agreement via a flash drive produced in discovery, (2) Perri violated his agreement because he used Graham's "Item Master" file in forming US Extruders, and (3) Schilke's contacts with ProSystems violated several segments of his agreement. (See id. at 20, 26-27, 30-31).

[7] We note that defendants' present arguments on this subject contradict record evidence of their contemporaneous beliefs regarding their employment agreements. For example, July 2016 meeting minutes produced in discovery reflect that defendants were aware Graham was "calling vendors to see if any of us have been contacting them." (See Doc. 191-19 at 31-33). These notes speculate that Graham was "making sure we are staying within the boundaries of the non-competes" and noted under the heading "Vendors" that Schilke "can't contact existing ones until non-compete is up." (See id. at 31, 32).

Unsurprisingly, defendants' deposition testimony is diametrically opposed to Schroeder's testimony. Adair stated that he did not take any action to violate any provision of his employment agreement. (See Doc. 189-7 at 12). Kramer denied taking any trade secret information via the flash drives he produced in discovery. (See Doc. 189-10 at 14). Perri described speaking only "occasionally" to Brunelle and reported that they were not friends. (See Doc. 189-12 at 10-11). Schilke explained that he paid for the US Extruders building by himself, and the company did not open until August 2017 because he knew the noncompete prevented him from opening earlier. (See Doc. 189-13 at 32-33). Graham's summary judgment record is further contradicted by testimony from John Brunelle, who testified that the relationship between American Kuhne and ProSystems went "downhill" soon after Graham purchased a majority stake in 2012. (See Doc. 191-10 at 10). Brunelle also testified that Graham's operations vice president informed him that Graham would be bringing its "controls and panels in-house" rather than continuing to use ProSystems. (See id. at 14-15). He related that Graham had issues paying ProSystems on time, and that ending the Graham relationship had nothing to do with US Extruders. (See Doc. 189-31 at 5; Doc. 191-10 at 17).

As our discussion clearly highlights, conflicts in witness testimony raise numerous genuine disputes of material fact for trial. Thus, a decision regarding whether defendants breached their employment agreements relies on credibility determinations. In light of the above analysis, we will deny defendants' motion for summary judgment on these breach-of-contract claims.

2. *Graham's Breach-of-Contract Claims Against Johnson and Lawton*

Defendants Johnson and Lawton also move for summary judgment on Graham's breach-of-contract claims against them. Neither Johnson nor Lawton accepted employment with Graham, and both now argue that a lack of consideration in their employment agreements makes them unenforceable. (See Doc. 187 at 26). We analyze their contracts and the validity of their noncompete provisions together.

Noncompete clauses in employment contracts are "generally disfavored" in Pennsylvania.[8] Socko v. Mid-Atl. Sys. of CPA, Inc., 126 A.3d 1266, 1274 (Pa. 2015). Noncompete clauses "have been historically viewed as a trade restraint that prevents a former employee from earning a living." Hess v. Gebhard & Co., 808 A.2d 912, 917 (Pa. 2002). A noncompete agreement may be valid and enforceable, however, if it is "incident to an employment relationship between the parties" and supported by consideration. Rullex Co. v. Tel-Stream, Inc., 232 A.3d 620, 624-25 (Pa. 2020). The restrictions it imposes "must be reasonably necessary for the protection of the employer's legitimate interests and reasonably limited in duration and geographic extent." Id.; Socko, 126 A.3d at 1275-76; Hess, 808 A.2d at 917.

Consideration is crucial to this analysis. If the parties execute a noncompete at the beginning of employment, it may be enforceable if the other requirements for validity and reasonableness are met. See Rullex Co., 232 A.3d at 627. But when

[8] These two defendants' agreements also include a Pennsylvania choice-of-law provision, and the parties do not dispute that Pennsylvania law applies to these claims. (See Doc. 45-1 at 17, 33).

execution occurs well into the employment relationship without "fresh consideration," a noncompete is not enforceable. Id. Continued employment alone does not suffice as adequate consideration. Id.; Socko, 126 A.3d at 1278. On the other hand, new consideration includes "a corresponding benefit . . . or beneficial change" in an employee's status, such as a bonus or promotion. L.B. Foster Co. v. Barnhart, 615 F. App'x 63, 65 (3d Cir. 2015) (nonprecedential) (citing Modern Laundry & Dry Cleaning Co. v. Farrer, 536 A.2d 409, 411 (Pa. Super. Ct. 1988)).

Johnson and Lawton contend that the noncompete provisions are unenforceable for lack of consideration, and Graham does not dispute this point. (See Doc. 187 at 26; Doc. 198 at 8).[9] We agree. It is undisputed that Johnson and Lawton received only "continued employment" rather than "fresh consideration" for signing their employment agreements. (See Doc. 186 ¶¶ 43, 67; Doc. 199 ¶¶ 43, 67). The noncompete provisions are not enforceable under Pennsylvania law. See Rullex Co., 232 A.3d at 627.

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[9] Johnson, Lawton, and Slusarz collaterally attack the enforceability of the agreements by claiming that Graham cannot enforce restrictive covenants in contracts signed between defendants and American Kuhne because the latter failed to assign rights to Graham. (See Doc. 186 ¶ 23; Doc. 187 at 8). Defendants premise this attack on Pennsylvania Supreme Court precedent holding that "a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets." Hess v. Gebhard & Co., 808 A.2d 912, 922 (Pa. 2002). Defendants' reliance on this case is misplaced for two reasons. First, in stark contrast to Hess, all seven contracts in this matter *did* contain an express assignability provision. (See Doc. 45-1 at 8, 17, 24, 33, 40, 47, 73). Second, subsequent Pennsylvania and federal court decisions have made clear that the decision in Hess is limited to an asset sale, rather than a stock transfer. See Zambelli Fireworks Mfg. Co. v. Woods, 592 F.3d 412, 414, 423 (3d Cir. 2010); Missett v. Hub Int'l Pa., LLC, 6 A.3d 530, 537 (Pa. Super. Ct. 2010); Amerex Env't Techs. Inc. v. Foster, No. CIV.A. 11-349, 2012 WL 6552828, at *3 n.3 (W.D. Pa. Dec. 14, 2012).

The unenforceability of their noncompete provisions, however, does not invalidate all aspects of their respective agreements. The requirement of fresh consideration does not apply to other provisions of an employment contract in Pennsylvania; continued employment is sufficient consideration. See, e.g., Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 458 (Pa. Super. Ct. 1988) (differentiating between noncompete and confidentiality provisions of employment agreement). Moreover, contractual provisions may be severable under Pennsylvania law. See Jacobs v. CNG Transmission Corp., 772 A.2d 445, 452 (Pa. 2001). When an otherwise valid contract contains invalid provisions, "a court may nevertheless enforce the rest of the agreement." Huber v. Huber, 470 A.2d 1385, 1389 (Pa. Super. Ct. 1984) (citing RESTATEMENT (SECOND) CONTRACTS § 184 (AM. LAW INST. 1979)).

With due regard for the principles of contract severability, we conclude the other provisions of defendants' contracts—*viz.*, the confidentiality clauses—are enforceable. See id. For this reason, we will grant summary judgment to Johnson to the extent that Graham's breach-of-contract claim relies on his noncompete provision, and to Lawton to the same extent. Our analysis *supra* as to Adair, Kramer, Perri, and Schilke otherwise applies, and factual disputes preclude wholesale summary judgment on Graham's claims concerning defendants' alleged breach of the surviving confidentiality provisions of their agreements. See *supra* at 17-20. Therefore, in all other respects, defendants' motion on these claims will be denied.

3. *Contract-Based Claims Involving Slusarz*

The parties' contract-based claims as to Slusarz implicate a threshold choice-of-law dispute. When a federal court sits in diversity, it generally applies the substantive law of the state in which it sits. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see also Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."). However, when contracts incorporate a choice-of-law provision, a federal court may apply the substantive law of a state other than the forum. See, e.g., Gay v. CreditInform, 511 F.3d 369, 390 (3d Cir. 2007).

Slusarz's employment agreement contains a provision adopting the law of Rhode Island, where American Kuhne was headquartered until 2015. (See Doc. 186 ¶ 18; Doc. 199 ¶ 18). The EARP contains a provision for application of Delaware law, American Kuhne's state of incorporation. (See Doc. 199 ¶ 18). Thus, there are competing considerations for choice of law. A federal court sitting in diversity confronted with this issue must apply the choice-of-law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 498 (1941). Accordingly, we apply Pennsylvania choice-of-law rules.

Pennsylvania courts generally enforce choice-of-law provisions unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice" or "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." CreditInform, 511 F.3d at 389 (citing RESTATEMENT (SECOND) OF

CONFLICT OF LAWS § 187). Here, applicable choice-of-law provisions *themselves* conflict. We therefore compare Pennsylvania, Rhode Island, and Delaware law.

To succeed on a breach-of-contract claim in Pennsylvania, Rhode Island, or Delaware, a plaintiff must prove (1) existence of a contract, (2) breach of that contract, and (3) damages from the breach. See Ware, 322 F.3d at 225 (quoting CoreStates, 723 A.2d at 1058); Fogarty v. Palumbo, 163 A.3d 526, 541 (R.I. 2017); VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). Similarly, plaintiffs seeking to enforce noncompete provisions of an employment agreement in any of these three states must prove that (1) the provision is ancillary to an otherwise valid transaction, such as an employment contract, (2) the provision is reasonably limited, and (3) there is adequate consideration to support it. See Modern Laundry, 536 A.2d at 411; Hough Assocs., Inc. v. Hill, No. CIV.A. 2385-N, 2007 WL 148751, at *14 (Del. Ch. Jan. 17, 2007), judgment entered (Del. Ch. 2007); Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989).

The states part ways on the definition of adequate consideration. In Pennsylvania, valid consideration for a noncompete agreement must be something more than continued employment. See Socko, 126 A.3d at 1278. Rhode Island's Supreme Court has not considered whether continued employment constitutes sufficient consideration for a noncompete agreement. See Nestle Food Co. v. Miller, 836 F. Supp. 69, 77 n.3 (D.R.I. 1993). Delaware, in contrast, does allow "continued employment" to serve as valid consideration for a noncompete provision. All Pro Maids, Inc. v. Layton, No. CIV.A. 058-N, 2004 WL 1878784, at *3 (Del. Ch. Aug. 9, 2004), aff'd, 880 A.2d 1047 (Del. 2005).

After review of the contractual provisions and applicable law, we conclude that Slusarz's enrollment in the EARP is determinative under any of the three applicable state-law provisions. Unlike Lawton and Johnson, Slusarz received a tangible benefit in addition to continued employment. That tangible benefit came in the form of an award of "75 Equity Appreciation Rights" through the EARP, with a fair market value of nearly $500 per "right." (See Doc. 45-1 at 64). Both the employment agreement and the EARP took effect on September 28, 2012. (See id. at 51, 67). Slusarz's equity rights are specifically referenced in his employment agreement as part of his compensation package. (See id. at 68). We therefore conclude his enrollment in the EARP constitutes sufficient consideration for a noncompete provision under all three states' laws. See L.B. Foster Co., 615 F. App'x at 65; CVS Pharmacy, Inc. v. Lavin, 384 F. Supp. 3d 227, 230, 237 (D.R.I. 2019), aff'd on other grounds, 951 F.3d 50 (1st Cir. 2020); All Pro Maids, 2004 WL 1878784, at *3. Therefore, the noncompete provisions of Slusarz's contracts are enforceable.

a. Graham's Claim: Breach of Contract

Slusarz moves for summary judgment on Graham's breach-of-contract claim. In light of our determination that Slusarz's noncompete agreement is enforceable, we will deny his motion as to that provision. With respect to the remaining aspects of his employment contract, we incorporate our analysis from the other defendants here. Slusarz's employment agreements mandate that he refrain from any action to "induce or attempt to induce any customer, supplier, licensee, or other business relationship to cease doing business" with Graham. (See Doc. 45-1 at 71-72). The confidentiality provisions prohibit Slusarz from disclosing "knowledge, information, or materials" for his own benefit or for an entity other than Graham. (See id. at 61-62). Slusarz was present at the US Extruder meetings, including some that included Brunelle. (See Doc. 191-16 at 10, 12, 31; Doc. 191-19 at 31-32; Doc. 205-10 at 30-31, 40-43, 80-81; Doc. 191-18 at 37-38). As detailed *supra*, there are genuine credibility-based disputes regarding defendants' discussions as well as Brunelle's and ProSystems' termination of the latter's relationship with Graham. See *supra* at 17-20. Those disputes preclude summary judgment. Accordingly, we will deny Slusarz's motion for summary judgment in its entirety.

b. Slusarz's Counterclaim: Breach of Contract

Graham moves for summary judgment on Slusarz's claim that Graham breached his employment contract by refusing to pay him a severance. Under the terms of his agreement, Slusarz was entitled to severance if he left the company for "good reason," which included a relocation of the company to more than 50 miles from American Kuhne's facility in Ashaway, Rhode Island. (See Doc. 45-1 at 69-70). Slusarz did not accept Graham's employment offer, and his final day with the company was December 31, 2015. (See Doc. 186 ¶ 16; Doc. 199 ¶ 16). Graham argues that, because Slusarz chose not to join Graham for "personal reasons," he was never entitled to severance pay. (See Doc. 183 at 66-68). Slusarz rejoins that there is a genuine dispute of fact about whether he would have been required to travel extensively or even relocate to York in his new role. (See Doc. 197 at 60).

In Rhode Island, a contract's ambiguity is a question of law.[10] Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009). If a contract is "clear and unambiguous," the court determines the contract's meaning, Cassidy v. Springfield Life Ins. Co., 262 A.2d 378, 380 (R.I. 1970), according contractual provisions "their plain, ordinary, and usual meaning," Breen v. Green, No. CV 18-315JJM, 2019 WL 5855978, at *5 (D.R.I. Sept. 13, 2019) (quoting Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995)). The court is constrained from "stretching the imagination to read ambiguity . . . where none is present." Mallane, 658 A.2d at 20. Just because parties disagree about an agreement's meaning "does not necessarily mean that the agreement is in fact ambiguous." Young, 973 A.2d at 560. The meaning of contractual provisions "should be determined without reference to extrinsic facts or aids." Nuzzo v. Nuzzo Campion Stone Enters., Inc., 137 A.3d 711, 716 (R.I. 2016) (quoting JPL Livery Servs., Inc. v. R.I. Dep't of Admin., 88 A.3d 1134, 1142 (R.I. 2014)). The court may conclude the contract contains ambiguity "if it is reasonably susceptible of different constructions." Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 238 (R.I. 2004) (internal quotation marks omitted). If a term is ambiguous, "construction of that provision is a question of fact." Haviland v. Simmons, 45 A.3d 1246, 1258-59 (R.I. 2012) (quoting Fryzel v. Domestic Credit Corp., 385 A.2d 663, 666 (R.I. 1978)).

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[10] Slusarz's breach-of-contract claim encompasses only the severance portion of his employment agreement. The EARP does not include severance provisions, and competing choice-of-law questions do not exist here. Slusarz's 2012 employment agreement includes a provision for Rhode Island choice of law, which we will apply in our review of this issue. (See Doc. 45-1 at 73).

Upon review of the two documents—Slusarz's 2012 agreement and the 2015 offer—we discern no ambiguity that would require a trier of fact to determine its meaning. The 2012 employment agreement conditions severance on an employee leaving for "good reason." (See Doc. 45-1 at 69-70). Good reason includes corporate relocation over 50 miles *and*—not or—an increase in commute by more than 50 miles. (See id. at 70). Graham's 2015 offer to Slusarz did not require relocation to York. Instead, Graham offered Slusarz work in the nearby satellite office, with travel to York, and promised relocation expense reimbursement if Slusarz decided to relocate to York. (See Doc. 191-14 at 30-33). The parties do not dispute that Slusarz's offer contemplated work at the Stonington, Connecticut, satellite location. Nor does Slusarz contend that the words "travel" (to York) and "commute" (to the satellite office) denote anything other than their plain and ordinary meanings.[11] Rather, Slusarz speculates that in the "long-term" he *might* have had to move to York. (See Doc. 203-12 at 9, 12-13). Slusarz's contention is not enough to create a genuine issue of material fact. See Betts v. New Castle Youth Dev. Ctr., 621 F.3d

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[11] According to the IRS, a commuting expense is based on a taxpayer's "transportation and commuting between an employee's place of residence and place of employment." See *News Release: Treasury and IRS issue final regulations on the deduction for qualified transportation fringe and commuting expenses*, INTERNAL REVENUE SERVICE (Dec. 9, 2020), https://www.irs.gov/newsroom/treasury-and-irs-issue-final-regulations-on-the-deduction-for-qualified-transportation-fringe-and-commuting-expenses. In contrast, "business travel" includes "traveling away from home for your business, profession, or job." See *Tax Topics: Topic No. 511 Business Travel Expenses, Internal Revenue Service*, INTERNAL REVENUE SERVICE, https://www.irs.gov/taxtopics/tc511 (last updated on Jan. 4, 2021); see also Jean Murray, *Business Travel Expenses vs. Commuting Expenses – What's Deductible?* THE BALANCE SMALL BUSINESS (Sept. 24, 2020), https://www.thebalancesmb.com/communicating-expense-versus-travel-expense-398676.

249, 252 (3d Cir. 2010). We will therefore grant summary judgment in favor of Graham on Slusarz's breach-of-contract counterclaims.[12]

B. Misappropriation of Trade Secrets Under PUTSA

Graham asserts that all defendants misappropriated its trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act ("PUTSA"), 12 PA. CONS. STAT. §§ 5301-5308. (See Doc. 45 ¶¶ 294-303). Graham moves for summary judgment on this count as to Lawton and Perri. (See Doc. 183 at 38-42). All defendants move for summary judgment on this count. (See Doc. 187 at 32-45). To prevail on this claim, Graham must prove both that the material at issue is a trade secret, and that defendants misappropriated it. See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109-10 (3d Cir. 2010) (citing 12 PA. CONS. STAT. § 5302).

1. Trade Secret Classification

PUTSA defines a trade secret as "information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process" that:

> (1) [d]erives 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.

[12] Slusarz also asserts a cause of action under the Rhode Island Payment of Wages Act, 28 R.I. GEN. LAWS § 28-14-1. This statute mandates that when employment ends, "unpaid wages or compensation of the employee shall become due on the next regular payday." Id. § 28-14-4(a). It also provides a private right of action to any employee "aggrieved by the failure to pay wages." Id. § 28-14-19.2(a). Slusarz premises his wage claim solely on the allegation that Graham failed to pay a severance contractually owed to him. As set forth herein, he was not contractually entitled to severance, and we will therefore grant summary judgment to Graham on this claim.

(2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 PA. CONS. STAT. § 5302.

To constitute a "trade secret" under PUTSA, the information "must be an actual secret of peculiar importance to the business and constitute competitive value to the owner." Youtie v. Macy's Retail Holding, Inc., 653 F. Supp. 2d 612, 620 (E.D. Pa. 2009) (citing Parsons v. PHEAA, 910 A.2d 177, 185 (Pa. Commw. Ct. 2006)). Pennsylvania courts look to six factors to determine whether information is a protectable trade secret: (1) the extent to which the alleged secret is known outside the business possessing it; (2) the extent to which the alleged secret is known by employees within that business; (3) the extent to which the business took measures to maintain secrecy; (4) the competitive value of the information; (5) the effort or cost of developing or procuring the information; and (6) the relative difficulty of replicating or reverse engineering the information. Bimbo Bakeries, 613 F.3d at 109 (citing Crum v. Bridgestone/Firestone N. Am. Tire, LLC, 907 A.2d 578, 585 (Pa. Super. Ct. 2006)). As these factors reveal, the focal considerations are the existence and preservation of secrecy. See Nova Chems., Inc. v. Sekisui Plastics Co., 579 F.3d 319, 327 & n.12 (3d Cir. 2009) (quoting JAMES POOLEY, TRADE SECRETS § 2.04 (2009)).

Courts have found "trade secrets" to include "certain business and marketing information including the costing and pricing information of an employer's product or services, an employer's business plans, marketing strategies, and financial projections and the terms of specific customer accounts including contract expiration dates and revenues generated." BIEC Int'l, Inc. v. Global Steel

Servs., Ltd., 791 F. Supp. 489, 545 (E.D. Pa. 1992); see also Youtie, 653 F. Supp. 2d at 621 (collecting examples). A data compilation with independent value "can be protected as a trade secret." Youtie, 653 F. Supp. 2d at 621.

While thousands of files have been exchanged during this litigation, the parties focus on three sets of data: the "Item Master" file, the shop supply cards, and the proprietary drawings on Lawton's flash drive. The Item Master refers to a spreadsheet that contains "a materials list used in an assembly." (See Doc. 186 ¶ 132). It contains "a list of parts and their corresponding vendor parts numbers." (See id. ¶ 133). An email exchange from Perri to Lawton in January 2016 indicates Perri began to assemble his own version of an item master while still employed at Graham. (See Doc. 191-19 at 37). The parties use the phrase "shop supply cards" to refer to a series of photographs taken by Perri that depicted dozens of notecards. (See Doc. 191-14 at 11-13). The notecards contain mostly handwritten information relating to vendors, quantities, prices, part numbers, and purchase dates for items that range from the mundane (*e.g.*, AA batteries) to the more technical (*e.g.*, motor shims, micrometers, flat wheels, and sanding discs of various sizes). (See Doc. 189-37 at 2-29). Finally, proprietary drawings are drawings recovered from a flash drive that Lawton possessed after he left Graham. (See Doc. 191-6 at 7-18; Doc. 205-2 at 8-100; Doc. 205-3 at 1-39). Although many of the files appear to be personal to Lawton (*e.g.*, tax documents and health savings account spreadsheets (see Doc. 205-2 at 8-9, 12-93; Doc. 205-3 at 22-39)), hundreds of these files are categorized as ".dwg," with titles that contain technical terms including, *inter alia*, "extruder reclaim layout," "barrel," "breaker plate," "flange," "vacuum tank," "melt pump," and "swing bolt," (see Doc. 205-2 at 10-12, 94-100; Doc. 205-3 at 1-21, 35).

Graham contends that these items constitute trade secrets, but fails to squarely address the factors used by Pennsylvania courts. Instead, Graham insists that because its information *could* meet the definition of trade secrets under existing precedent, its information therefore *is* a trade secret.[13] Hence, we will conduct an independent analysis from the facts and evidence in the record.

a. "Item Master" File

Graham's Item Master is a data compilation of machine parts. According to Graham, it is "the entirety of every part that [Graham] provide[s] on machines." (See Doc. 191-2 at 49). Defendants characterize an item master as simply "a catalog of all types of nuts, bolts, and other materials that extruders use." (See Doc. 187 at 11).

[13] Defendants wage a series of threshold attacks on Graham's trade secrets claim, arguing that Graham did not own the materials discussed, (see Doc. 187 at 42); that the materials belonged to American Kuhne and not to Graham, (see id. at 43); and that Graham lacks standing to bring the claim, (see id. at 44). We have previously adopted the reasoning of the Fourth Circuit Court of Appeals and several other district courts by concluding that "ownership, in the traditional sense, is not prerequisite to a trade secret misappropriation claim." See Advanced Fluid Sys., Inc. v. Huber, 28 F. Supp. 3d 306, 323 (M.D. Pa. 2014) (Conner, C.J.), aff'd, 958 F.3d 168 (3d Cir. 2020). Rather, a plaintiff need only demonstrate "lawful possession of a trade secret." Id. Defendants fail to apprise us of any intervening Third Circuit or Pennsylvania Supreme Court cases demonstrating a need to revisit this issue. Thus, to the extent Graham's materials qualify as trade secrets, "its lawful possession of those secrets is sufficient to advance a misappropriation claim." See Advanced Fluid Sys., No. 1:13-CV-3087, 2017 WL 2445303, at *9 (M.D. Pa. June 6, 2017) (Conner, C.J.), aff'd, 958 F.3d 168.

We first consider whether Graham employees knew about the Item Master, and whether it was known outside Graham. See Bimbo Bakeries, 613 F.3d at 109. Several defendants confirmed their familiarity with Graham's Item Master. For example, Lawton confirmed he "worked with [Graham's Item Master] regularly" before leaving Graham. (See Doc. 189-11 at 28). Slusarz explained the mission critical purpose of the Item Master in deposition, noting it would be the mainstay to "get a list of parts . . . to rebuild or build something." (See Doc. 189-14 at 17). Neither party alleges that Graham's Item Master would be known outside of Graham. Consequently, we have no difficulty finding that the Item Master was reasonably known inside Graham's business, but not outside of Graham. We conclude these factors are in equipoise for trade secret status.

Although the parties agree on very little about the subjective value of the Item Master, deposition testimony confirms that it warranted secrecy measures and had competitive value. See Bimbo Bakeries, 613 F.3d at 109. Schroeder noted that all of Graham's sensitive information is stored on a secure network. (See Doc. 207 at 21; Doc. 191-2 at 32, 42). Schilke stated that US Extruders also maintained an item master file, aspects of which it considered to be a "trade secret or confidential." (See Doc. 189-9 at 15).

Last but not least, we consider the effort or cost of developing or procuring the information. See Bimbo Bakeries, 613 F.3d at 109. Again, we look to the parties' own characterizations. Perri stated in a January 2016 email that he had "begun the arduous process" of creating an item master. (See Doc. 191-19 at 37). Lawton's reply and comments on the document noted Perri had "a good memory" and asked if his email should "self destruct." (See Doc. 205-3 at 41). This email reference to a Mission: Impossible[14] assignment plainly supports Graham's claims regarding the confidential nature of the Item Master file. During Schroeder's deposition, he stated that the Item Master contained "every part, every vendor, every price for that part and every price for that vendor-purchased item." (See Doc. 191-2 at 49). We readily conclude from the parties' statements and from other references in the summary judgment record, (see Doc. 205-5 at 85; Doc. 205-3 at 41; Doc. 191-19 at 37; Doc. 189-6 at 13, 15), that compiling a file of this size and nature would be no easy feat. In light of the above analysis, we hold that there are no genuine disputes of material fact as to the Item Master's status as a confidential file and a trade secret.

b. Shop Supply Cards

The parties supply conflicting information regarding the importance of the shop supply cards that Perri photographed. In his deposition, Perri stated that the cards were stored in the "card file" of Graham's production manager. (See Doc. 191-14 at 12). To the extent these cards were secured in a physical space on Graham's property, we conclude they would not be known outside of Graham. Schroeder did not testify regarding the supply cards, and Graham has not addressed how it protected the shop supply cards in its brief. Based upon the present record, we find that the first two factors are a wash in the trade secret analysis. Cf. Bimbo Bakeries, 613 F.3d at 109.

[14] See MISSION: IMPOSSIBLE (Paramount Pictures 1996).

There is also conflicting record evidence as to the competitive value of the shop supply cards. See id. Perri provided contradictory testimony. He admitted that he took the photos to "lash out" after learning of his termination, "thinking that at some point . . . they might be useful to have." (See Doc. 189-12 at 16-17). He then claimed the photos contained "very insignificant information that had no use." (See id.) Graham counters that its shop supply cards were "specifically chosen and compiled." (See Doc. 183 at 42).

Finally, Graham provides scant information on its effort or cost to develop the information on these cards. Cf. Bimbo Bakeries, 613 F.3d at 109. A nonparty Graham employee testified the cards looked like "someone's manual notes" for the shop. (See Doc. 189-6 at 16). Graham argues that because it purchased the items on Perri's note cards, the cards are a trade secret. (See Doc. 198 at 34 n.11). This conclusory statement, standing alone, is not enough to demonstrate the cards' importance or competitive value as required under Pennsylvania law. Taking all of these factors into consideration, and viewed in a light most favorable to Graham on defendants' motion, the evidence regarding the shop supply cards contains factual disputes to be resolved by the factfinder. Likewise, to the extent Graham moves for summary judgment as to Perri and Lawton alone, this dispute of fact precludes summary judgment in its favor as well. Accordingly, we will deny both parties' summary judgment motions as to the trade-secret status of the shop supply cards.

c. Proprietary Drawings on Lawton Flash Drive

We last turn to the engineering drawings recovered from Lawton's flash drive.[15] Under the first and second factors, we consider the extent to which these drawings were known inside and outside Graham's business. See Bimbo Bakeries, 613 F.3d at 109. Schroeder testified that it was company policy to "work[] with everything on the network" rather than to use flash drives. (See Doc. 191-2 at 41). When presented files from the drive, Lawton identified several drawings as authored by previous employees. (See Doc. 191-6 at 8-18). We conclude that Graham employees could access--via Graham's network--drawings like those on the flash drive. The parties acknowledge it was common practice to share some engineering drawings with business partners, (see Doc. 189-6 at 11-12; Doc. 191-6 at 11), but there is otherwise no indication in the record that these materials were widely available outside of Graham.

It is quite clear that the engineering drawings on Lawton's flash drive are proprietary and have significant competitive value. See Bimbo Bakeries, 613 F.3d at 109. When Lawton was confronted with a number of these drawing during deposition, he: (1) confirmed the proprietary markings on them; (2) affirmed that he

[15] Defendants take issue with plaintiff's attribution of the files on this flash drive to Lawton, asserting that Graham "does not present evidence that these files were in fact on the USB drive produced by Lawton." (See Doc. 197 at 37 n.16). Defendants assertion is plainly incorrect. It is cogently refuted by Lawton, who confirmed a sampling of drawings shown to him, confirmed they originated from his "personal USB," and stated that he furnished this device to his attorney. (See Doc. 205-13 at 23). The spreadsheet containing the files on the flash drive names the "item path" of the files as either "C:/LAWTON 2GB," or "C:/Recovered Folders" for deleted files, followed by the file name. (See Doc. 205-2 at 8-100; Doc. 205-3 at 1-39).

considered several of them to be confidential; (3) stated that he might use the drawings "as reference" while working on a project from home; and (4) conceded that several of these drawings were not created by him, but by previous employees of American Kuhne. (See Doc. 191-6 at 7-18).[16] Schroeder testified that Graham's drawings were valuable and costly to develop, (see Doc. 191-2 at 12); without them, a competitor in the marketplace would be required to "start from scratch" and "sit[] down and draw[] them," (see Doc. 191-2 at 12). Notes from defendants' early meetings to form US Extruders also confirm that engineering drawings are a key component in the extrusion business. For example, November 2016 meeting minutes consider whether outside companies could "assist with drawings," note that "Jeff will begin work on a barrel drawing," and questioned if the group "could get flange drawings." (See Doc. 191-18 at 37-38).

The proprietary drawings recovered from Lawton's flash drive epitomize trade secret materials with competitive value to Graham. We therefore conclude that there is no genuine dispute of material fact regarding their status as trade secrets.

d. **Other Alleged Trade Secret Materials**

Although Graham moved for summary judgment only against Perri and Lawton, all defendants moved for summary judgment on Graham's trade secrets

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[16] Lawton identified drawings for "a bolt flange for an extruder," "the hoods for a machine," dimensions for a "base extruder," a "panel drawing," an "extruder barrel," a "base assembly," a "manufacturing drawing for a clamp," a "modification to a purchased universal joint shaft," a "belt guard for an extruder," and a "fabrication drawing for a guard for an air spacer on a ram extruder." (See id.)

claim. Graham's opposition brief to defendants' motion mentions several other sets of documents that Graham claims as trade secrets. Specifically, Graham lists the following items as trade secrets in its briefing: (1) "two extruder drawings," (see Doc. 198 at 30); (2) information on two flash drives that Kramer produced during discovery, (see id. at 31); (3) an April 2016 email chain between Kramer, Schilke, and Perri whereby an American Kuhne growth chart was shared, (see id. at 31-32; Doc. 205-15 at 72-75, 82); and (4) generalized trade secrets Perri and Slusarz purportedly took "via USB," (see Doc. 198 at 32).

Graham fails to provide any evidence or analysis tending to establish that these items are trade secrets. Graham includes the extruder drawings as an exhibit, (see Doc. 205-15 at 69-70), but provides no argument or record evidence tending to establish the status of these drawings as trade secrets or to attribute the drawings to any defendant, (see Doc. 198 at 30). Similarly, Graham's generalized contentions surrounding the Kramer flash drives do not offer any analysis or record support for its characterization of these files as trade secrets. Indeed, Graham does not specify *which* files it believes Kramer misappropriated. Upon review, the vast majority of these files appear to be mp3 music files. (See Doc. 205-14 at 159-69, Column B; Doc. 205-15 at 1-4, Column B). The non-music files lack descriptive titles or other indicia that the information they contain could be considered a trade secret, and Kramer, unlike Lawton, was not confronted with numerous drawings or photos from any flash drive. (Cf. Doc. 191-11 at 2-17; Doc. 189-10 at 13-16). Other than Graham's conclusory statement that it considered the growth chart on the April 2016 email to be a trade secret, Graham provides no other information about this chart, its availability inside or outside the business, its competitive value, the ability to recreate it, or any other evidence tending to suggest its trade secret status. (See Doc. 198 at 32). Nor has Graham adduced any evidence that whatever files Perri or Slusarz purportedly took from their workstations "via USB" in fact constitute trade secrets. (Cf. id.)[17]

Graham's conclusory statements, devoid of any meaningful statutory analysis or application, fail at the summary judgment stage. After defendants moved for summary judgment on Graham's PUTSA claim, it became "'put up or shut up' time for [Graham,] the non-moving party." See Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006). Graham has failed to "rebut the motion with facts in the record" and instead rested "on assertions made in the pleadings . . . [and] legal memoranda." See id. To the extent Graham premises its PUTSA claims on these materials, we find that Graham has not carried its burden to demonstrate their trade secret status.

2. *Trade Secret Misappropriation*

At the Rule 56 stage, Graham must establish that the defendants took action that qualifies as "misappropriation" under the PUTSA, which is defined as

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[17] Graham points to an expert report prepared by Catzen Forensic ("Catzen") which conducted an analysis of Slusarz's and Perri's workstations. (See Doc. 205-14 at 20-69). The Catzen report concludes that Slusarz and Perri inserted USBs into their workstations and accessed files shortly thereafter. (See id. at 28-41). Even if we accept this report's conclusions as true, it speaks only to file access, and Catzen's pure speculation that the files "were confidential in the industry." (See id. at 35). Thus, this report does not help Graham carry its Rule 56 burden of establishing that the accessed documents qualify as trade secrets.

> (1) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (2) disclosure or use of a trade secret of another without express or implied consent by a person who:
> (i) used improper means to acquire knowledge of the trade secret;
> (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
> (A) derived from or through a person who had utilized improper means to acquire it;
> (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

12 PA. CONS. STAT. § 5302.[18] The parties have submitted cross-motions—Graham as against Lawton and Perri, and all defendants against Graham—and we therefore view the evidence on misappropriation in the light most favorable to the nonmoving party as to each motion. See FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains, 402 F.2d at 245).

Viewed in the light most favorable to Perri, there is no genuine dispute that he improperly acquired the Item Master from Graham, disclosed it to Lawton, and

[18] As a threshold matter, defendants' assertion that Graham's claim fails because it cannot prove that any defendant "ever *used* [Graham's] trade secrets" misreads the plain language of the statute. (See Doc. 187 at 41 (emphasis added)). Misappropriation, as defined by PUTSA, means "acquisition . . . *or* . . . disclosure or use," not acquisition *and* disclosure or use. See 12 PA. CONS. STAT. § 5302 (emphasis added); see also Advanced Fluid Sys., 958 F.3d at 178 n.6 (noting "the gravamen of [a Uniform Trade Secrets Act] misappropriation action is wrongful acquisition or improper use of information" (citation omitted) (alteration in original)).

had "reason to know" his acquisition was improper. See 12 PA. CONS. STAT. § 5302. In fact, Perri's declaration admits his acquisition and disclosure, stating: "I shared with Jeff Lawton a copy of an item master spreadsheet that [Graham] alleges is its or AK's item master spreadsheet." (See Doc. 189-56 ¶ 5). Defendants do not dispute this immutable fact. Instead, defendants argue that Perri "went no further than possession." (See Doc. 187 at 39). Defendants attempt to sidestep the inevitable conclusion that, to have possessed the Item Master, Perri must have acquired it.

As to the second element of misappropriation, it is undeniable that the Item Master file was acquired by improper means. Reference to Perri's early 2016 email from Lawton—while Perri was still employed by Graham—inexorably leads to the conclusion that Perri had "reason to know" his acquisition was improper. While asking for Lawton's input, Perri noted that he needed to assemble the file "in a way that we can prove (if we have to) that we created it from existing knowledge." (See Doc. 191-19 at 37). There are no genuine disputes of material fact as to whether Perri misappropriated Graham's trade secret by acquiring the Item Master file. We will grant summary judgment to Graham on its PUTSA claim against Perri to the extent it is premised on the Item Master, and deny Perri's motion for summary judgment on the same claim.

As to Graham's motion concerning Lawton, we draw all reasonable inferences in his favor as the nonmovant. There is no clear-cut evidence in the extensive summary judgment record that Lawton understood the proprietary nature of the Item Master file. Without a copy of this massive file, we are unaware of any immediately telling signs that would indicate Graham's ownership (such as a proprietary stamp) and would give Lawton "reason to know" he had acquired trade secret information. Graham's argument regarding Lawton's possession of proprietary drawings fares no better. Graham fails to acknowledge that many files list a creation date to the early 2000s and even the 1990s. (See, e.g., Doc. 205-2 at 7-100, Column E). Lawton testified that he often referred to drawings when he worked from home. (See Doc. 189-11 at 18). Drawing inferences in favor of Lawton, a reasonable factfinder could conclude that Lawton acquired the Item Master from Perri and the proprietary drawings from his employment without the requisite "reason to know" this acquisition was improper. Cf. 12 PA. CONS. STAT. § 5302. We will deny Graham's motion to this extent.

All defendants move for summary judgment on this claim, so we must draw reasonable inferences in favor of Graham as the claim relates to Adair, Johnson, Kramer, Lawton, Schilke, and Slusarz. Viewed through this lens, a factfinder could reasonably conclude that each defendant acquired the Item Master in 2016. The record evinces that, in November 2016, Perri emailed an item master to the other defendants and also loaded it into software the defendants had purchased. (See Doc. 205-5 at 85). Lawton and Schilke provided firsthand confirmation of Perri's possession of the Item Master. (See Doc. 189-13 at 9; Doc. 189-11 at 20-21). However, defendants now declare they lacked contemporaneous knowledge regarding acquisition or use of such information. (See Docs. 189-52, 189-53, 189-54, 189-55, 189-56, 189-57, 189-58). In actuality, the record confirms defendants' receipt of some iteration of an item master from Perri in late 2016. (See Doc. 205-5 at 85). Moreover, defendants received an email from Perri six months into this litigation, stating: "[T]o avoid even the appearance that we've copied 'their' item master (I didn't!), we should blow out what I did last year and start from scratch." (See Doc. 191-16 at 56; Doc. 189-12 at 21). Based upon this evidence, a reasonable factfinder could conclude that defendants had "reason to know" that the initial item master actually came from Graham. This extant factual dispute precludes summary judgment. We will thus deny defendants' motion on Graham's PUTSA claim for Adair, Johnson, Kramer, Lawton, Schilke, and Slusarz.

C. Graham's State-Law Tort Claims

Graham asserts several state-law tort claims, alleging that defendants committed tortious interference with Graham's business and prospective business relationships and engaged in unfair competition and a civil conspiracy. (See Doc. 45 ¶¶ 288-293, 304-330). Graham now moves for summary judgment on its tortious interference with business relations claim. (See Doc. 183 at 33-37). Defendants move for summary judgment on all of Graham's tort claims, premising their motion on the gist of the action doctrine. (See Doc. 187 at 48-52).

When a tort claim and breach-of-contract claim are pled together, the tort claim may be barred by the "gist of the action doctrine." See Bruno v. Erie Ins. Co., 106 A.3d 48, 68 (Pa. 2014). For breach of a contract to constitute an actionable common law tort, the allegedly tortious conduct at issue "must be the gist of the action, the contract being collateral." eToll Inc. v. Elias/Savion Advert., Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002) (citation omitted). Thus, a contracting party cannot assert a tort claim against another party to the contract when the gravamen of such a claim is, in actuality, breach of contract. The doctrine bars a tort claim when (1) the claim arises from a contract between the parties; (2) the duties breached were created by the contract; (3) liability derives from the contract; or (4) the success of the tort claim is wholly dependent upon the contract's terms. eToll, 811 A.2d at 19. In other words, the court must inquire as to the source of the duties allegedly breached: if the duties are "imposed by mutual consensus" or "deeply intertwined with the obligations imposed by the contract," the claim sounds in contract, but if the duties are "imposed by law as a matter of social policy," the claim sounds in tort. Id. at 14, 19. The doctrine's applicability is a question of law for the court to decide. Reginella Constr. Co. v. Travelers Cas. & Sur. Co. of Am., 949 F. Supp. 2d 599, 614-15 (W.D. Pa. 2013).

We have little difficulty concluding that Graham's tortious interference claims are barred by the gist of the action doctrine. Graham's theory underlying its tortious interference claims is identical to the noncompete portions of its breach-of-contract claims: that defendants met with Brunelle during formation of US Extruders and that these meetings caused Brunelle to terminate ProSystems' relationship with Graham soon after US Extruders opened to the public. (See Doc. 198 at 13-26). These alleged wrongs fall squarely within defendants' employment agreements, which prohibit disclosure of confidential information and "direct or indirect" solicitation of Graham's business contacts and existing relationships. (See Doc. 45-1 at 5-6, 14-15, 20-22, 30-31, 36-38, 43-46, 61-62, 70-72). Simply put, Graham ignores that "a claim [in contract] cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done." See Bruno, 106 A.3d at 66 (citing Bash v. Bell Tel. Co. of Pa., 601 A.2d 825, 829 (Pa. Super. Ct. 1992)).

Graham's tortious interference claims are plainly barred by the gist of the action doctrine. Accordingly, we will deny summary judgment to Graham on its tortious interference claims and grant summary judgment to defendants.

We reach the same result for Graham's unfair competition claim. The tort of unfair competition includes "unlawful use of confidential information." Synthes v. Globus Med., Inc., No. Civ.A 04-CV-1235, 2005 WL 2233441, *8 (E.D. Pa. Sept. 14, 2005).[19] The core of Graham's unfair competition claim against defendants is the alleged violations of their employment agreements. Graham's reply brief in further support of its breach-of-contract claims appears to concede that the instant action is contractual at heart, noting "the public has a substantial interest in discouraging unfair competition . . . *achieved through the enforcement of restrictive covenants*." (See Doc. 207 at 13 (emphasis added)). Indeed, the conduct underlying Graham's unfair competition claim is quite plainly and specifically addressed by the confidentiality provisions of each defendant's employment agreement. Graham's unfair competition claim is barred by the gist of the action doctrine. Thus, we will grant summary judgment to defendants on this claim.

Our application of the gist of the action doctrine to Graham's tortious interference and unfair competition claims is also dispositive of its civil conspiracy claim. A civil conspiracy claim under Pennsylvania law "depends on performance

[19] Graham does not directly address defendants' argument that the gist of the action doctrine bars its unfair competition claim. (See Doc. 198 at 49). Graham merely responds that its claim "rests, in part, on [d]efendants' unlawful use of its confidential information." (See id.) Graham does not provide any other record evidence to support its claim. We therefore confine our unfair competition analysis to the information that Graham asserts is confidential.

of some underlying tortious act." Boyanowski v. Cap. Area Intermediate Unit, 215 F.3d 396, 407 (3d Cir. 2000); see also Phillips v. Selig, 959 A.2d 420, 437 (Pa. Super. Ct. 2008) (affirming grant of summary judgment on civil conspiracy claim after "predicate cause of action" for interference with contract was dismissed). Because we will grant summary judgment to defendants on all of Graham's tort claims, there is no "predicate cause of action" upon which Graham can base a conspiracy claim. See Phillips, 959 A.2d at 437. Therefore, we will grant summary judgment to defendants on Graham's civil conspiracy claim.

D. Computer Fraud and Abuse Act

Defendants assert a counterclaim under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, based on Graham's access to their SharePoint site during 2016. (See Doc. 64 at 69 ¶¶ 79-87). Both parties move for summary judgment on defendants' claim. (See Doc. 183 at 42; Doc. 187 at 57).

The CFAA prohibits seven types of computer crimes involving unauthorized access to "protected computers" (or access in excess of authorization) which results in obtaining information from or damaging the computer. See 18 U.S.C. § 1030(a)(1)-(7). CFAA violations can expose defendants to both criminal and civil liability. Id. § 1030(c), (g). The statutory provisions relevant to the instant litigation impose liability against anyone who, *inter alia*, "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer" or "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access." Id. § 1030(a)(2)(C), (a)(4).

The facts underlying defendants' counterclaim are not disputed: in July 2016, Adair sent the group an email that contained usernames and passwords for a SharePoint site. (See Doc. 184 ¶ 61; Doc. 196 ¶ 61). Adair included Perri's previous Graham email address from his employment at Graham. (See Doc. 186 ¶ 162; Doc. 199 ¶ 162). After Adair unsuccessfully attempted to recall the email, a Graham employee forwarded the email to Graham management. (See Doc. 186 ¶¶ 162-169; Doc. 199 ¶¶ 162-169). William Kerlin, Graham's board chairman, then logged onto the SharePoint using Johnson's credentials and continued to log onto the site for roughly 90 days. (See Doc. 186 ¶¶ 171, 193-194; Doc. 199 ¶¶ 171, 193-194). Defendants were unaware that Kerlin had done this until Graham filed its first amended complaint. (See Doc. 186 ¶ 198).

The parties vigorously debate the meaning of multiple provisions in the CFAA, but our analysis rises and falls on just one: the term "protected computer." The CFAA defines a computer as

> an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

18 U.S.C. §1030(e)(1). A "protected computer" includes a computer that is "used in or affecting interstate or foreign commerce or communication." Id. § 1030(e)(2)(B).

The evidence of record provides limited information regarding the CFAA's application to SharePoint. Defendants submit information from Microsoft's website, which defines SharePoint as "a secure place to store, organize, share, and access information from any device." (See Doc. 189-51 at 2). The parties agree that SharePoint is a "'web-based collaborative platform' that is a part of Microsoft Office" and requires payment to use. (See Doc. 64 at 59 ¶ 17; Doc. 184 ¶ 59; Doc. 196 ¶ 59; see also Doc. 189-13 at 28-30; Doc. 189-47 at 2).

Relevant caselaw provides only marginal assistance. Our court of appeals has acknowledged that "employers . . . are increasingly taking advantage of the CFAA's civil remedies to sue former employees who seek a competitive edge through wrongful use of information from the former employer's computer system." P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC., 428 F.3d 504, 510 (3d Cir. 2005) (quoting Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1188, 1196 (E.D. Wash. 2003)). Consequently, most cases focus on employees sued for obtaining trade secret or other confidential information stored on company-issued equipment and address only the extent of the employee's "authorization" to use the computer at issue. See, e.g., Stephanie Green and Christine N. O'Brien, *Exceeding Authorized Access in the Workplace: Prosecuting Disloyal Conduct Under the Computer Fraud and Abuse Act*, 50 AM. BUS. L.J. 281, 284-85 (2013). The instant litigation presents the opposite scenario: a group of former employees suing their former employer because they set up a "web-based collaborative platform" accessed by their former employer. (See Doc. 64 at 59 ¶ 17; Doc. 184 ¶ 59; Doc. 196 ¶ 59).

Cases addressing whether online platforms similar to SharePoint can be "protected computers" present two divergent views. Some cases hold that "online data storage facilities" meet the CFAA definition of computer. See Hill v. Lynn, No. 17 C 06318, 2018 WL 2933636, at *3 (N.D. Ill. June 12, 2018) (collecting cases and finding that GitHub, a software development platform, is a protected computer). Others hold that CFAA protects against "unauthorized access to computers, not unauthorized access to web-based accounts." Christie v. Nat'l Inst. for Newman Studies, No. CV 16-6572, 2019 WL 1916204, at *6 (D.N.J. Apr. 30, 2019) (quoting Owen v. Cigna, 188 F. Supp. 3d 790, 793 (N.D. Ill. 2016)), appeal dismissed *sub nom.* Christie v. Nat'l Insitute for Newman, No. 19-2251, 2019 WL 6358762 (3d Cir. 2019) (nonprecedential); Psychas v. Dist. Dep't of Transp., No. CV 18-0081, 2019 WL 4644503, at *7 (D.D.C. Sept. 24, 2019) (holding CFAA does not apply to "software or an application over the internet"), appeal dismissed *sub nom.* Psychas v. Marcou, No. 19-7159, 2020 WL 6600057 (D.C. Cir. Oct. 14, 2020); see also Eagle v. Morgan, No. CIV.A. 11-4303, 2011 WL 6739448, at *6 (E.D. Pa. Dec. 22, 2011) ("A review of the CFAA's purpose reveals that . . . the statute was meant to require actual handling of a computer.").

After a review of the statutory language and case law, we find the narrower reading to be appropriate and conclude that the SharePoint site does not fall within the meaning of "computer" as contemplated by the CFAA. The words used in the statutory definition indicate physical characteristics of a "computer" that SharePoint's "web-based platform" decidedly lacks.[20] Defendants acknowledge that Graham's access did not occur "via the individuals' hard drives." (See Doc. 197

[20] While not relevant to the instant claim, we presume that SharePoint information may be stored in servers owned by Microsoft.

at 54); cf. Brown Jordan Int'l Inc. v. Carmicle, No. 014CV60629, 2015 WL 6123520, at *9 (S.D. Fla. Oct. 19, 2015) (holding that CFAA claim failed because counter-plaintiff could not prove counter-defendant accessed his personal laptop), aff'd, 846 F.3d 1167 (11th Cir. 2017). They further admit that SharePoint itself is not a computer, stating in another section of their brief that SharePoint "is a cloud-based system that exists outside a home computer." (See Doc. 187 at 54). We conclude that the title, heading, and statutory language of the CFAA all indicate that it "is aimed at unauthorized access to *computers*, not unauthorized access to *web-based accounts*." See Christie, 2019 WL 1916204, at *6 (emphasis added). We will grant Graham's motion for summary judgment on defendants' CFAA counterclaim and deny summary judgment to defendants on the same.

E. Stored Communications Act

Defendants' counterclaim under the Stored Communications Act ("SCA"), 18 U.S.C. § 2701, is also based on Graham's access to the SharePoint site. (See Doc. 64 at 70-71 ¶¶ 88-93). Both parties move for summary judgment on this claim. (See Doc. 183 at 51-56; Doc. 187 at 53-57).

The SCA provides a civil cause of action to "any . . . person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind." 18 U.S.C. § 2707(a).[21] A person may be liable under the SCA if he "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." Id. § 2701(a); *In re* Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 145-46 (3d Cir. 2015). The SCA is also known as "Title II" of the Electronic Communications Privacy Act ("ECPA"), and it draws many definitions from the ECPA. See 18 U.S.C. § 2711(1).

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[21] Graham also alleges that defendants do not have standing because they have not shown injury in fact through "actual damages." (See Doc. 183 at 55 (citing Frank v. Gaos, 586 U.S. ___, 139 S. Ct. 1041 (2019))). A technical SCA violation "is not enough to satisfy the requirement for Article III standing; a plaintiff must allege the SCA violations caused a 'sufficiently concrete and particularized' injury-in-fact in order to have standing to sue." Walker v. Coffey, 956 F.3d 163, 167 (3d Cir. 2020) (citing Frank, 139 S. Ct. at 1046). However, injury in fact is not a high bar; a plaintiff need only allege "some specific, identifiable trifle of injury." *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 633 (3d Cir. 2017). Our court of appeals recently emphasized that "[h]istory and tradition reinforce that a concrete injury for Article III standing purposes occurs when . . . any third party . . . tracks a person's internet browser activity without authorization." *In re* Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316, 325 (3d Cir. 2019). Here, defendants have not only alleged but provided competent evidence that after Adair accidentally sent email passwords to Graham, Kerlin regularly monitored their use of the site for roughly three months. (See Doc. 203-29 at 13-14, 30). Kerlin accessed the SharePoint using Johnson's US Extruders email address and password, not his own. (See id. at 16-17). Kerlin was fully aware that his actions were risky and considered it "generally likely" he was violating a law. (See id. at 20). Defendants have also alleged both "actual damages" as well as costs incurred "in investigating and responding to" Kerlin's access. (See Doc. 64 ¶¶ 85, 92). We have no hesitation in concluding that Kerlin falls into the category of a "third party" who surreptitiously tracked defendants' SharePoint activity. Cf. *In re* Google, 934 F.3d at 325. Hence, we find Graham's standing argument meritless.

Under the ECPA, "electronic communication service" means "any service which provides to users thereof the ability to send or receive wire or electronic communications." Id. § 2510(15). In tandem, "electronic storage" means both "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof," id. § 2510(17)(A), as well as "any storage of such communication by an electronic communication service for purposes of backup protection of such communication," id. § 2510(17)(B).

"Facility" is not defined by the SCA, but our court of appeals has noted that the term may "apply to providers of a communication service such as telephone companies, [i]nternet or e-mail service providers, and bulletin board services." *In re* Google, 806 F.3d at 146. Microsoft touts SharePoint as "a secure place to store, organize, share, and access information from any device." (See Doc. 189-51 at 2). By virtue of an obviously mistaken communication, Defendants received US Extruders email addresses to access the site. (See Doc. 189-48 at 4-6). We find that this definition of SharePoint, uncontroverted by Graham, means that SharePoint acted akin to an "email service provider" as well as an online "bulletin board" where defendants could post information for one another to read. See *In re* Google, 806 F.3d at 146. SharePoint comfortably fits into the meaning of a "facility" that provides "electronic communication service" under the SCA. See 18 U.S.C. § 2510(15).

Turning to electronic storage, neither party contends that Kerlin accessed any files while they were in "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." See id.

§ 2510(17)(A). We therefore focus our analysis on whether the documents and emails loaded onto the SharePoint site could constitute "storage of such communication by an electronic communication service for purposes of backup protection of such communication." Id. § 2510(17)(B).

The Third Circuit Court of Appeals has not explicitly addressed this prong of the SCA other than acknowledging that courts are divided on the issue. See Walker, 956 F.3d at 168 n. 1. But it has suggested that an email could very well be in backup storage after transmission. See Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 114 (3d Cir. 2003), as amended (Jan. 20, 2004). In Fraser, the district court held that, after communications have been transmitted, they cannot be covered by subsection (B) of the SCA's definition of storage. Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 636 (E.D. Pa. 2001), aff'd in part, vacated in part, remanded, 352 F.3d 107. Our court of appeals, however, characterized that conclusion as "questionable" before affirming the decision on other grounds. Fraser, 352 F.3d at 114. The Ninth Circuit directly addressed and rejected the district court's opinion in Fraser the very next year, see Theofel v. Farey-Jones, 359 F.3d 1066, 1075 (9th Cir. 2004), and our court of appeals recently cited Theofel's analysis approvingly in discussing the SCA's definition of "facility," *In re* Google, 806 F.3d at 147 n.1 (citing Theofel, 359 F.3d at 1075).

Other courts of appeals are split. The Fourth Circuit explicitly followed Theofel's rationale, concluding "that previously delivered and opened emails fall within the meaning of Subsection (B)" of the SCA's definition of electronic storage. Hately v. Watts, 917 F.3d 770, 797 (4th Cir. 2019). The Eleventh Circuit affirmed a district court decision finding that an SCA violation occurred when an employee accessed another employee's email account using a generic password. Brown Jordan Int'l, 2016 WL 815827, at *43, aff'd, 846 F.3d 1167. The Eighth Circuit disagreed, holding that a plaintiff's draft email and previously sent email were not in "electronic storage" under the statute. Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 793 F.3d 822, 838 (8th Cir. 2015).

After a review of Theofel and the cases that incorporate its rationale, we agree that removing previously uploaded or opened information from the protection of the SCA would "drain[] subsection (B) of independent content because virtually any backup of a subsection (A) message will itself qualify as a message in temporary, intermediate storage." See Theofel, 359 F.3d at 1076. We conclude that the storage of emails, documents, and other information on the password-protected SharePoint site is included in the SCA's definition of "electronic storage." 18 U.S.C. § 2510(17)(B).

Having concluded that the SCA embraces defendants' SharePoint documents, we consider whether Kerlin's access to the SharePoint site violated the SCA. Without qualification, it did. After Adair sent the email to Perri's old Graham address, Kerlin became aware of the email and its contents—namely, login credentials for the SharePoint site. (See Doc. 203-29 at 12). He then intentionally chose to use Johnson's credentials to log in, because Johnson was "least likely" to quickly change his password from the one provided. (See id. at 16). Kerlin printed out multiple files from the SharePoint site. (See id. at 18, 23). He characterized himself as "on full alert" to monitor the site for new information and indicated that

Graham's majority shareholder, Don Graham, told Kerlin to "keep [him] posted" on the site's contents. (See id. at 33, 26-27). Kerlin testified that he understood the "risk . . . associated with accessing without authorization," and that he likely violated a law by doing so. (See id. at 20).[22]

Viewed in the light most favorable to Graham, there is no genuine dispute that Kerlin's actions on its behalf violated the SCA. We also conclude that his actions were "knowing or intentional" as defined by the statute. See 18 U.S.C. § 2707(a). We make no decision regarding damages at this time, other than noting the statutory authorization of at least $1,000. See id. § 2707(c). We will grant summary judgment in favor of defendants on their SCA counterclaim and deny Graham's motion for summary judgment on the same.

F. Defendants' State-Law Counterclaims

Defendants assert two state-law counterclaims based on Kerlin's access to the SharePoint site. (See Doc. 64 at 73-75 ¶¶ 110-123). Graham moves for summary judgment on each of them. (See Doc. 183 at 63, 65). As stated above, the facts involving Kerlin's access are not in dispute.

1. Unjust Enrichment

Unjust enrichment is an equitable doctrine, whereby a plaintiff must prove that (1) he or she conferred a benefit upon the defendant; (2) that the defendant achieved a benefit; and (3) that the defendant accepted and retained the benefit

[22] Graham admits that Kerlin understood his access was "without authorization," (see Doc. 186 ¶ 178; Doc. 199 ¶ 178); that his access likely violated the law, (see Doc. 186 ¶ 179; Doc. 199 ¶ 179); and that he "acted on behalf of" Graham when he accessed the site, (see Doc. 186 ¶ 188; Doc. 199 ¶ 188).

under such circumstances that retention would be inequitable without payment of value. EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 273 (3d Cir. 2010); Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. Ct. 1993). The crux of an unjust enrichment claim is whether the benefit to the defendant is unjust; "the doctrine does not apply simply because the defendant may have benefitted" from the plaintiff's actions. Styer, 619 A.2d at 350. Instead, it must "be unconscionable for [the defendant] to retain" the benefit. Davis v. Pennzoil Co., 264 A.2d 597, 607 (Pa. 1970).

Defendants initially premised their unjust enrichment claim on Graham's alleged misappropriation of their trade secrets through its access to the SharePoint site. (See Doc. 64 at 73 ¶ 111). After abandoning their trade secrets claims, (see Doc. 197 at 57), defendants rely solely on Graham's monitoring of the SharePoint site and subsequent printing of SharePoint documents to make a case for unjust enrichment, (see Doc. 197 at 58).

Defendants allege that Graham's unauthorized access to SharePoint enabled it to skirt "the costs associated with a lawful investigation," but this allegation finds no support in the record. (See id.) Defendants' failure to offer any evidence beyond their own *ipse dixit* assertions that Graham *may* have saved on litigation costs is fatal to their unjust enrichment claim. See Jutrowski v. Township of Riverdale, 904 F.3d 280, 289 (3d Cir. 2018) (plaintiffs cannot rely on "[b]are assertions, conclusory allegations or suspicions" to show the existence of a genuine issue to survive summary judgment) (citing D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 268-69 (3d Cir. 2014)). Absent proof that Graham unconscionably benefitted and failed to compensate defendants in return, the court will enter summary judgment in Graham's favor as to defendants' unfair competition counterclaim.

2. *Conversion*

Conversion is "an act of willful interference with the dominion or control over a chattel done without lawful justification, by which any person entitled to the chattel is deprived of its use and possession." Baram v. Farugia, 606 F.2d 42, 43 (3d Cir. 1979); see Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 581 (Pa. Super. Ct. 2003). Under Pennsylvania law, conversion claims lie only for "tangible property," or "intangible property rights that are typically merged in or identified with a particular document." WhiteSand Rsch., LLC v. Sehn, No. 1123 WDA 2017, 2018 WL 2728847, at *9, 10 (Pa. Super. Ct. June 7, 2018) (nonprecedential) (collecting cases). Liability for conversion occurs when a person "unreasonably withhold[s] possession from one who has the right to it." PTSI, Inc. v. Haley, 71 A.3d 304, 314 (Pa. Super. Ct. 2013) (citing Martin v. Nat'l Sur. Corp., 262 A.2d 672, 675 (Pa. 1970)). Conversion only applies when a defendant's actions resulted in "serious, major, and important interferences with the right to control the chattel." Baram, 606 F.2d at 44 (citing RESTATEMENT (SECOND) TORTS § 222A (AM. LAW INST. 1965)).

We assume without deciding that defendants were entitled to use of the SharePoint site and that the contents of the SharePoint were chattels. But see Eagle, 2013 WL 943350, at *10 (holding that a LinkedIn account is not a tangible chattel, defeating a conversion claim). Defendants' claim still fails, because they produce no evidence demonstrating deprivation of use and possession of the

SharePoint site.[23] The Pennsylvania Superior Court's opinion in Haley is instructive. See Haley, 71 A.3d at 312. There, plaintiff claimed that defendants had removed physical copies of spreadsheets containing client information from plaintiff's possession and kept them for three weeks. Id. at 312-13. Although defendants took "the only existing copy" of these spreadsheets, their return three weeks later led the court to conclude on summary judgment that the conversion claim failed because defendants' actions did not "seriously interfere[]" with plaintiff's right to control the spreadsheets. Id. at 312, 315.

In the instant case, it is clear that defendants were not deprived of the materials on the SharePoint site. Indeed, as defendants' own statement of facts points out, they were not even aware of the unauthorized access until Graham filed its first amended complaint. (See Doc. 186 ¶ 198). Defendants do not allege any interruption in service, any mysterious deletion of files, or any other factual scenario that begins to approach the "interference" or "deprivation" required for a conversion claim. To the extent their conversion claim is coextensive with their unjust enrichment claim, "the law does not support a conversion claim for use of [a defendant's] time." See WhiteSand Rsch., 2018 WL 2728847, at *9. We will grant summary judgment to Graham on defendants' conversion counterclaims.

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[23] Defendants initially premised their conversion claim on Graham's alleged misappropriation of trade secrets through its access to the SharePoint site. (See Doc. 64 ¶ 120). But, as defendants point out in opposition to Graham's PUTSA claim, "any tort claim predicated on the same conduct [misappropriation of trade secrets] is preempted" by PUTSA, 12 PA. CONS. STAT. § 5308. (See Doc. 187 at 53).

IV. <u>Conclusion</u>

The court will grant in part and deny in part Graham's motion (Docs. 182, 165, 165, 165, 165, 166, 164) for summary judgment. The court will also grant in part and deny in part defendants' motion (Docs. 185, 168, 168, 168, 168, 169, 167) for summary judgment. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: February 10, 2021