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# Wesco Autobody Supply, Inc. v. Ernest Appellant's Brief Dckt. 35732

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## I. STATEMENT OF THE CASE

### A. Nature of the Case.

On July 28, 2005, plaintiff/appellant Wesco Autobody Supply, Inc. (“Wesco”) purchased three autobody supply stores from Paint & Equipment Supply-Idaho, Inc. (“Paint & Equipment”) for approximately \$2.2 million. The stores were located in Idaho Falls, Pocatello, and Twin Falls, Idaho (the “Idaho Stores”). The purchase was of an ongoing business – locations, assets, customer files, goodwill, economic expectancy. About three weeks later, on August 19, 2005, substantially all of the Wesco employees who had worked at the Idaho Stores abruptly quit and reported for work at Wesco’s competitor – Paint & Spray Supply, Inc. (“P&S”) – at locations that did not exist the day before. P&S and Automotive Paint Warehouse (“APW”) are owned or controlled by individual defendants Holly Ernest (“Ernest”) and his partner, Tom Davis.

The mass defection was no coincidence. Ernest had long wanted to buy the Idaho Stores. Ernest had sold BASF paint products to the Idaho Stores through APW, but lost that business with Wesco’s purchase because Wesco would be supplied from its own warehouse. To avoid this loss, Ernest and Davis concocted a scheme with Brady Barkdull,<sup>1</sup> regional manager for the Idaho Stores (and by that time a Wesco employee), to open competing stores and to steal all of Wesco’s Idaho employees. Barkdull and Ernest then carried that scheme into action by successfully soliciting Wesco’s employees to abruptly leave for P&S – both directly and indirectly through other defecting Wesco Idaho managers.

Wesco brought this action against its former employees for breach of the duty of loyalty, tortious interference, and other theories, and named Ernest, Davis, P&S, and APW, alleging primarily claims for tortious interference.

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<sup>1</sup> Defendants Brady Barkdull and Hugh Barkdull are brothers. References to “Barkdull” relate to Brady Barkdull; where a reference to Hugh is intended, appellant will specifically name him as “Hugh Barkdull.”

This matter is before this Court following certification under Idaho Rule of Civil Procedure 54(b) of an order granting partial summary judgment in favor of defendants.

**B. Course of Proceedings.**

Wesco filed its Verified Complaint below on September 8, 2005. R. Vol. I, pp. 8-23. It named as defendants all of the Wesco employees who left to join P&S and asserted ten theories of liability against them, including breach of contractual and other duties arising by virtue of their employment with Wesco, including the duty of loyalty, tortious interference with Wesco's contracts or expectancy, and the like. *Id.* Wesco also named Ernest, Davis, and two of their companies – P&S and APW– claiming that they had tortiously interfered with Wesco's contracts with its employees. *Id.*

On March 29, 2006, defendants moved for summary judgment as to all claims. R. Vol. I, pp. 46-48 (motion), 89-114 (memorandum). The motion was supported by declarations of Stephen Dunn, Curtis Stairs, Tiffany Thomsen, David Cristobal, Chatil Dobbs, Travis Dayley, Jeffrey Peck, Joel Johnston, Kelly McClure, Shelby Thompson, Jenny Hancock, Holly Ernest, Brady Barkdull, Hugh Barkdull, Michael Cook, and Jodee Reid. *Id.*, pp. 59-61 (Dunn), 62-64 (Stairs), 65-67 (Thomsen), 68-70 (Cristobal), 71-73 (Dobbs), 74-76 (Dayley), 77-79 (Peck), 80-82 (Johnston), 83-85 (McClure), 86-88 (Thompson), 115-17 (Hancock), 118-20 (Ernest), 121-23 (Barkdull), 124-26 (Hugh Barkdull), 127-29 (Cook), 130-32 (Reid).

Wesco opposed the motion on June 28, 2006. R. Vol. I, pp. 149-81 (memorandum). Its opposition was supported by declarations of Shauntell Bell, Wes Goodwin, and Jeffrey Brunson. R. Vol. II, pp. 182-306 (Bell), 307-407 (Goodwin); R. Vol. III, pp. 408-576 (Brunson); R. Vol. IV, pp. 635-700 (Brunson).

Defendants filed a reply on July 5, 2006. R. Vol. III, pp. 580-98 (reply memorandum), R. Vol. IV, pp. 616-34 (amended reply memorandum). The reply was supported by declarations by Barkdull and Kent Hawkins. R. Vol. III, pp. 57-79 (Barkdull), 599-615 (Hawkins).

The district court heard argument on July 10, 2006. R. Vol. IV, pp. 701-04.

By a memorandum decision filed September 7, 2006, the district court dismissed all claims against Ernest, Davis, P&S, and APW. R. Vol. IV, pp. 705-34. The court also dismissed most of Wesco's claims against its former employees. Specifically:

*Breach of Contract/Fiduciary Duties.* The district court recognized that all of the departed Wesco employees were employees "at will"; consequently, it dismissed Wesco's claims that those employees had breached their employment contracts by departing, working for a competitor, and using non-confidential information gained from their employment by Wesco. R. Vol. IV, pp. 713-15. However, the court recognized that these employees nonetheless owed fiduciary duties to Wesco, including a duty of disclosure and a duty of loyalty. *Id.* pp. 715-18. The court therefore denied summary judgment as to certain of the employees, finding genuine issues of fact as to whether Dayley, Johnston, Barkdull, Cook, and Hancock breached fiduciary duties owed to Wesco. *Id.* It dismissed claims against the remaining employee defendants. *Id.*

*Tortious Interference with Business Expectancy/Customers.* The defendants challenged Wesco's tortious interference with business expectancy claim based upon an alleged failure of Wesco to prove that the interference "was wrongful by some measure beyond the fact of the interference itself." *Id.* pp. 719. The district court denied summary judgment as to those defendants it found might have breached fiduciary duties owed to Wesco, but dismissed the claim as to all other defendants. *Id.* p. 720.

*Tortious Interference by Ernest, Davis, Automotive Paint, and P&S.* Wesco alleged that Ernest, Davis, APW, and P&S had tortiously interfered with the employment contracts between Wesco and its employees. *Id.* The district court dismissed the claim based solely upon the “at will” nature of the relationship. *Id.* pp. 721-22.

*Tortious Interference with Customer Contracts.* Finding that the contracts between Wesco and its customers were terminable at will, the district court dismissed this claim as to all defendants solely on that basis. *Id.* pp. 722-23.

*Unfair Competition.* The district court concluded that there were genuine issues of material fact that precluded summary judgment on Wesco’s unfair competition claim, although it dismissed the claim as to Ernest and APW. *Id.* pp. 723-24.

*Violation of Idaho Competition Act.* Focusing solely upon Ernest’s statements of intent and ignoring the obvious consequences of Ernest’s and P&S’s theft of all of the significant employees of Wesco’s Idaho Stores, the district court granted summary judgment as to all defendants. *Id.* pp. 724-27.

*Computer Fraud and Abuse Act.* Finding that there were genuine issues of fact as to defendant Cook’s actions in copying and deleting files, the district court denied summary judgment as to Cook, but dismissed all other defendants. *Id.* pp. 727-29.

*Idaho Trade Secrets Act (“ITSA”).* Wesco alleged that the defendants had misappropriated trade secrets in violation of the ITSA. *Id.* p. 729. The district court found that customer lists, lists showing customer buying preferences, the history of customer purchases, and custom paint formulas were trade secrets, but found a genuine issue of fact only as to defendant Mike Cook. The court therefore dismissed ITSA claims against all other defendants. *Id.* pp. 729-32.

*Conspiracy.* Stating that it found no “agreement” to accomplish an unlawful purpose or to use unlawful means to accomplish a lawful purpose, the district court dismissed Wesco’s conspiracy claim. *Id.* pp. 732-33.

Wesco twice moved for reconsideration; both motions were denied. R. Vol. IV, pp. 735-45 (first motion and memorandum), 768-75 (order denying first motion); Vol. V, pp. 817-44 (second motion and memorandum), 913-21 (order denying second motion).

On April 16, 2007, the Hon. Don L. Harding replaced the Hon. N. Randy Smith in these proceedings. R. Vol. V, p. 809.

As the parties prepared for trial, Wesco voluntarily dismissed its claims with prejudice against Jeffrey Peck, Travis Dayley, Joel Johnston, Chantil Dobbs, David Cristobal, Ryan Nesmith, Jodee Reid, Curtis Stairs, Tiffany Thomsen, Shelby Thompson, Jenny Hancock, and Kelly R. McClure. R. Vol. V, pp. 910-11.

Defendants filed a renewed motion for summary judgment to dismiss all remaining claims. R. Vol. VII, pp. 1220-21 (motion), 1274-95 (memorandum). The district court denied the motion. R. Vol. VIII, pp. 1442-47.

On September 10, 2008, the district court certified the September 7, 2006, order on summary judgment as “final” pursuant to Rule 54(b). R. Vol. VIII, p. 1279.

Wesco filed a timely notice of appeal on October 1, 2008, *Id.* pp. 1483-90, and an amended notice of appeal on October 15, 2008, *Id.*, pp. 1493-500. Defendants cross-appealed based upon the district court’s denial of portions of their motion for summary judgment. *Id.*, pp. 1501-04.

**C. Statement of Facts.**

***I. Parties.***

Wesco is and was in 2005 in the paint supply industry, with stores in Washington, Oregon, and Idaho. R. Vol. I, pp. 9 & 23, ¶¶ 1, 23; Vol. III, pp. 414-15 (7:8-11:9). Paint & Equipment was an Idaho corporation in the paint supply industry and owned the Idaho Stores. R. Vol. I, pp. 9, ¶ 24. On July 28, 2005, for approximately \$2.2 million, Wesco purchased the Idaho Stores, including all assets, goodwill, customer files, and economic expectation. R. Vol. I, p. 11, ¶ 28. Of this purchase price, \$996,000 was specifically allocated to the goodwill of Paint & Equipment. R. Vol. III, p. 576.

Defendants Holly Ernest and Tom Davis were at all relevant times the owners of P&S and APW. R. Vol. I, p. 9, ¶ 2; p. 137 ¶¶ 2-3. Prior to Wesco's acquisition of the Idaho Stores, Ernest and Davis had unsuccessfully attempted to acquire them. *Id.*, p. 11, ¶ 25; R. Vol. III, pp. 416-17 (14:19-17:19). Before the acquisition closed on July 28, 2005, neither Wesco nor Ernest/Davis had stores in Eastern Idaho. *Id.* Ernest and Davis boasted to Wesco Vice President Roger Howe that if they could not work out a deal to purchase the Idaho Stores from Paint & Equipment, they would take Paint & Equipment's employees. R. Vol. III, pp. 416-17 (15:14-17:19); *see also* R. Vol. III, p. 456 (16:3-12); *Id.*, p. 453 (58:4-14).

Until Wesco's acquisition of the Idaho Stores, defendants Travis Dayley, Joel Johnston, Chantil Dobbs, David Cristobal, Ryan Nesmith, Jodee Reid, Curtis Stairs, Tiffany Thomsen, Hugh Barkdull, Brady Barkdull, Michael Cook, Shelby Thompson, Jenny Hancock, and Kelly R. McClure (together "Employee Defendants") were employed by Paint & Equipment in the Idaho Stores. R. Vol. I, pp. 9-10, ¶¶ 4-18. Following Wesco's acquisition and until the close of business on August 19, 2005, the Employee Defendants were employed by Wesco. *Id.*, R. Vol. I, p. 12, ¶ 31.

At the time of Wesco's purchase of the Idaho Stores, Barkdull was Paint & Equipment's regional manager of the Idaho Stores and continued in that capacity as a Wesco employee at least until August 19, 2005, when he tendered his resignation. R. Vol. III, p. 478. Barkdull thus had supervisory responsibility over the Idaho Stores with the managers of those stores reporting to him. R. Vol. III, p. 468 (31:14-21). Barkdull's brother, defendant Hugh Barkdull, headed outside sales for the Idaho Stores at the time Wesco purchased the Idaho Stores. His job duties included making shop and sales calls to all of the body shops in the area. R. Vol. III, pp. 481-82 (10:23-14:10). Defendant Mike Cook was the manager of the Pocatello store at the time of the Wesco acquisition. R. Vol. III, p. 485 (10:8-11:3) and 490. Defendant Jenny Hancock was the manager of the Idaho Falls store at that time. R. Vol. III, 492 (5:17-7:9) and 498. Defendant Travis Dayley was the manager of the Twin Falls store at that time, R. Vol. IV, p. 669, and defendant Jeff Peck headed outside sales in the Twin Falls area, *Id.*, p. 698.

**2. *Brady Barkdull, Ernest, and Davis Conspire to Steal Wesco's Idaho Employees and Jointly Engage in Steps to Further the Conspiracy. Barkdull Lies to Wesco.***

As noted above, Wesco's purchase of the Idaho Stores closed on July 28, 2005. At that time, Barkdull and Ernest had had a commercial or professional relationship for at least the previous thirty years. R. Vol. III, p. 452 (42:4-18). Barkdull contacted Ernest the same day when he found that the Idaho Stores had been sold to Wesco. R. Vol. III, p. 471 (73:22-74:1).

On August 8 and 9, 2005, Barkdull traveled to Seattle for a Wesco marketing and sales orientation meeting. R. Vol. I, p. 12, ¶ 29; R. Vol. III, p. 469-70 (68:1-72:7). At that meeting, Barkdull learned that Wesco would not be using APW as its supplier for the Idaho Stores. R. Vol. III, p. 470 (72:4-7); *Id.*, p. 418 (25:19-26:10). Barkdull subsequently told Ernest and Davis of Wesco's decision not to use APW as its supplier. R. Vol. III, pp. 430-36 (13:23-19:10); *Id.*, pp. 457-59 (17:4-19:24).

Upon returning from Seattle, on August 10 or 11, 2005, Barkdull met with Ernest and Davis in Tremonton, Utah. R. Vol. III, pp. 430-36 (13:23-19:10); *Id.*, pp. 474-75 (87:17-89:12); *Id.*, pp. 457-59 (17:4-19:24). Ernest and Davis, on behalf of APW/P&S, offered Barkdull a job at this meeting and announced their intent to open three stores in Eastern Idaho – one in each city in which Wesco operated – to compete with Wesco. *Id.* Over the next few days, Ernest and Davis, on behalf of APW/P&S, formulated a plan to steal as many of Wesco’s employees in the Eastern Idaho market as possible and recruited Barkdull as an ally. R. Vol. III, pp. 460-62 (20:18-22:7).

While Barkdull was still a Wesco employee, Barkdull, Ernest, and Davis worked together to carry out their plan. Indeed, it seems that Barkdull was exclusively focused on setting up the new business, usually during business hours. Between August 10 and 19, 2005, Barkdull and Ernest spoke at least 64 times by cellphone. R. Vol. II, pp. 182-95. By comparison, during the same timeframe, Barkdull placed only two calls to his boss at Wesco, Roger Howe. *Id.* On August 13, 2005, Barkdull met with Ernest to scout out potential store sites for P&S/APW. R. Vol. III, pp. 437-42 (20:3-25:22). While still a Wesco employee, Barkdull called realtors, title companies, and planning and zoning authorities to locate store sites. R. Vol. II, p. 191; R. Vol. III, pp. 546-48. Barkdull admits calling High Desert Realty on August 17 and 19, 2005, to assist APW d/b/a P&S in locating retail locations in Pocatello, Twin Falls, and Idaho Falls. R. Vol. III, pp. 546-48. He also contacted planning and building departments in those locations to obtain a business license. *Id.*

Barkdull made it clear to Ernest that if he solicited Wesco employees he would work for Ernest, Davis, and APW/P&S. R. Vol. III, pp. 437-42 (20:3-25:22). In fact, Barkdull and Ernest delivered a letter to a Wesco customer prior to August 19, 2005, that identified Barkdull as an

employee of P&S; the letter was dated *August 16, 2005*, three days prior to the effective date of Barkdull's subsequent resignation. R. Vol. III, pp. 473 (81:22-82:17), 483, 531 (15:11-19:8), 535-36.

Shortly after scouting locations, Barkdull, Ernest, and Davis then began recruiting Wesco's employees. They started with the managers. On August 17, 2005, Ernest met with Mike Cook and offered him a job working for P&S in the same managerial capacity as he had with Wesco. R. Vol. III, p. 489 (50:23-52:21). On the same day, Barkdull and Ernest met with Jenny Hancock to offer her a job working for P&S in the same managerial capacity as she had with Wesco. R. Vol. III, p. 494 (23:5-25).

On August 17, 2005, Howe and Wesco employee Mark Mortensen met in Pocatello to discuss rumors that employees would be leaving *en masse* and starting work for a competitor. R. Vol. I, p. 12, ¶ 30; R. Vol. III, p. 419 (42:17-44:8). Barkdull, Hugh Barkdull, and Cook attended the meeting. *Id.* All three lied to Wesco (Howe and Mortensen) and assured them that there was no substance to the rumors. *Id.* Hugh Barkdull stated specifically that since he was 58 years old and his wife had multiple sclerosis, he was not going to attempt a new business. *Id.* Barkdull laughed and said "you've got to be kidding me at my age." *Id.* Cook agreed, stated that there was no way, and that "you're crazy." *Id.*

Immediately following this coverup meeting with Wesco, Ernest and Barkdull, with the assistance of other managers, recruited the balance of Wesco's employees to defect to APW/P&S. On August 18, 2005, Ernest met with Wesco Twin Falls store employees Travis Dayley, David Cristobal, Jeff Peck, and Joel Johnston. R. Vol. III, pp. 445-46 (34:3-35:5); *Id.* pp. 472-73 (80:10-81:21). The Twin Falls employees accepted jobs with P&S. *Id.* Barkdull

discussed with Peck and Dayley their resignations. R. Vol. III, p. 472 (78:7-80:24). Dayley told Barkdull he would join P&S. *Id.*

On the same day, Jenny Hancock recruited Shelby Thompson and Kelly McClure from Wesco's Idaho Falls store to work for P&S. R. Vol. III, p. 494 (22:14-23:25) ("I told [Ms. Thompson] I had made this decision to take this other opportunity and, if she wanted to, she would have a position with me."); *Id.*, p. 500 (6:17-7:12) ("[Ms. Hancock] said that she was leaving and that she wanted us to go with her." (McClure)); *Id.*, p. 503 (6:21-7:4) (Thompson). Joel Johnston recruited Chantil Dobbs from the Wesco Twin Falls store to work for P&S. R. Vol. IV, p. 644 (31:1-32:3) (Johnston); R. Vol. IV, p. 652 (11:7-24) (Johnston extended Dobbs a job offer on August 18, 2005) (Dobbs). The following day, August 19, 2005, prior to 5:00pm, Cook recruited Jodee Reid, Curtis Stairs, and Shelby Thomsen from the Wesco Pocatello store to work for P&S. R. Vol. III, pp. 505-06 (6:19-9:22); *Id.*, p. 508 (6:16-7:18); *Id.*, pp. 51-11 (7:19-9:8).

Barkdull instructed all employees to walk out on Friday, August 19, 2005, at 5:00pm. R. Vol. III, p. 497 (39:15-40:7).

3. *All of Wesco's Idaho Managers and Virtually All of Its Employees Resign En Masse on August 19, 2005.*

On August 19, 2005, just after 5:00pm, all of the managers, sales force, and every Wesco employee in the Idaho Stores (except for two lower tier employees in Idaho Falls) faxed to Wesco resignation letters effective immediately (except McClure's, which was effective August 23, 2005). R. Vol. I, p. 12, ¶ 31; R. Vol. III, pp. 478, 498, 483, 490, 501.

The resignation letters contain similar and, in most cases, identical language. R. Vol. I, p. 12, ¶ 32; R. Vol. III, pp. 478, 498, 483, 490, 501. The resignations were coordinated and planned in advance, including the language to be used. R. Vol. I, p. 12, ¶ 32; R. Vol. III, pp. 493-94 (20:5-21:3), 497 (39:15-40:7), 486-89 (18:7-21:8), 480 (8:3-21); 471-72 (75:20-78:6).

Hancock prepared the letter for the Idaho Falls employees and Hugh and Brady Barkdull had Cook prepare their letters in the Pocatello office. *Id.* Travis Dayley called Cook, who told him where to find a template for the resignation letter on the Internet. R. Vol. IV, p. 661 (33:1-16). Dayley provided the resignation letter to all of the Twin Falls employees. *Id.* (35:22-36:22) Johnston testified that the Twin Falls resignation letter came in on the fax machine and that he thought Cook had prepared it. *Id.*, p. 645 (35:6-21)

Former Wesco employees and managers Barkdull, Hugh Barkdull, Cook, Jodee Reid, and Curtis Stairs have a listed hire date with P&S of 7:00pm on August 19, 2005. R. Vol. III, p. 450. Former Wesco employee Tiffany Thomsen has a listed hire date with P&S of August 20, 2005. *Id.* Former Wesco employees and managers Travis Dayley, Jeff Peck, David Cristobal, Joel Johnston, Chantil Dobbs, and Kelly McClure all have a listed hire date of August 22, 2005. *Id.* Former Wesco employee Shelby Thompson has a listed hire date of August 29, 2005. *Id.*

Defendants opened stores in Pocatello, Twin Falls, and Idaho Falls, all within blocks of Wesco's Idaho Stores. R. Vol. I, p. 12, ¶ 35.

#### 4. *Additional Wrongful Acts by Ernest and Wesco's Idaho Employees.*

With their departure from Wesco, the employees stole Wesco proprietary customer information, computers, paint chip books, files, and rolodexes. R. Vol. I, p. 12, ¶ 33; R. Vol. III, pp. 513-18 (92:23-111:3), 422 67:6-14), 424-25 (94:1-100:3). Johnston admitted taking Wesco paint books with him. R. Vol. IV, pp. 647-48 (42:24-45:19) (Johnston); Johnston also admitted that he took business cards he had received from Wesco walk-in customers during his employment with Wesco. R. Vol. IV, p. 648 (46:1-20). In addition, Cook's Pocatello computer had many customer files that had been copied then deleted. R. Vol. II, pp. 309-11, ¶¶ 13-14, 20. Cook admitted that he deleted customer information on his office computer. R. Vol. III, pp. 487-88 (21:9-28:14).

Prior to resigning, the defendant employees faxed from the Idaho Stores information about their new businesses and their locations. R. Vol. III, pp. 426, 574-75. This information was faxed to Wesco's existing customers being served by the Idaho Stores. *Id.* One of the letters states:

[T]his was not a decision we took lightly. We ultimately felt that this was the only decision that was right if we were to keep giving you, our valued customers the level of service that they had come to expect from us ... . [A]ny of us can be contacted by our cell phones for any of your needs.”

R. Vol. III, p. 475 (emphasis in original). Ernest and Barkdull solicited work for P&S from Wes Harris of Harris Collision while Barkdull was still employed by Wesco. R. Vol. III, pp. 531-32 (15:11-19:8).

After leaving employment at Wesco, the defendant employees continued to use their Wesco cell phones and cell numbers and as late as August 25, 2005, some of the defendant employees' cell phones still gave an introduction with the Paint & Equipment name. R. Vol. I, p. 13, ¶ 38. They also continued to wear shirts saying “Paint & Equipment” at their new employment. *Id.*, ¶ 39.

## II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in granting summary judgment.
2. Whether the District Court erred in holding as a matter of law that P&S, APW, Ernest, and Davis are not liable for tortious interference with Wesco's employment and customer contracts and prospective business advantage.
3. Whether the District Court erred in narrowing the acts as a matter of law for which Barkdull is potentially liable. Without limiting the generality of this issue, whether some or all of Mr. Barkdull's acts constituted mere “preparations” to move to new employment is a question of fact for the jury to decide.

4. Whether the District Court erred by finding as a matter of law that the Defendants are not liable for civil conspiracy. Without limiting the generality of this issue, whether some or all of the defendants entered into an agreement is a question of fact for the jury to decide.

### III. STANDARD OF REVIEW

When reviewing a ruling on a summary judgment motion, this Court employs the same standard used by the district court. *Sprinkler Irrig. Co. Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 695, 85 P.3d 667, 671 (2004) (citing *Baker v. Sullivan*, 132 Idaho 746, 748, 979 P.2d 619, 621 (1999)). Summary judgment is appropriate only “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). This Court liberally construes all disputed facts in favor of the non-moving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006) (citing *Infanger v. City of Salmon*, 137 Idaho 45, 47, 44 P.3d 1100, 1102 (2002)).

### IV. ARGUMENT

#### A. An Employer Has a Right of Non-Interference with an At-Will Employee.

Wesco does not dispute that the Employee Defendants were employed at-will. Had Wesco employees simply decided to quit of their own accord, Wesco would have no complaint. Had Ernest, Davis, and P&S directly recruited Wesco employees and persuaded them, through higher pay, promotions, or other inducements, to quit Wesco and become P&S employees, Wesco would have no complaint. But that is simply not the case here. The central fact is that Barkdull, at the behest of Ernest, Davis, and P&S, solicited all of Wesco’s Idaho managers and nearly its entire workforce to abruptly quit *en masse* and join P&S in direct competition with

Wesco. That act was unlawful. Barkdull, as an employee and agent of Wesco, breached fiduciary duties he owed to Wesco, as did any other Wesco employee who engaged in such solicitation. Ernest, Davis, and P&S employed wrongful means – an element in many of Wesco’s claims – and are therefore liable, among other things, for tortiously interfering with Wesco’s expectancy in the continuing employment and loyalty of its workforce because they aided and abetted Barkdull’s breach of his duty of loyalty.

The relationship of employer and employee is a contractual relationship, whether or not the contract is terminable at-will, and whether the contract is express or implied. 30 C.J.S. *Employer-Employee Relationship* § 6. Consequently, as discussed at greater length below, defendants may be liable for tortious interference with that contract.

As the district court properly observed, all of the Employee Defendants also owed to Wesco a duty of loyalty for as long as they remained employees – up to at least 5:00pm on August 19, 2005. The duty is described as follows:

Loyalty to his trust is the first duty which an agent owes to his principal. It follows as a necessary conclusion that the agent must not put himself in such a relationship that his interests become antagonistic to those of his principal. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal ... . The law guards the fiduciary relationship, which the relationship of principal and agent is, with jealous care. It seeks to prevent the possibility of a conflict between duty and personal interest. It demands that forbids him from acting adversely to his principal, either for himself or others ... .

*Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 353, 210 P. 1003, 1004 (1922).

Accordingly, the agent owes the principal a duty of disclosure and a duty of loyalty. *Id.*, 36 Idaho at 348, 210 P. at 1005.

Under the RESTATEMENT (SECOND) OF AGENCY § 393 (1958) (the “Restatement”), an agent has a duty (1) to further the principal’s interests even at the expense of his/her own interests in matters connected with the agency; (2) not to solicit the principal’s customers before the end of employment; (3) not to solicit (while working for the principal) the principal’s best employees to work for the agent after leaving the business; and (4) not to use confidential information peculiar to the principal’s business and acquired while working therein. R. Vol. IV, p. 717; *see* Restatement, cmts. a-d. The rule applies even though “the agent does not use his employer’s facilities or time.” Restatement, cmt. c.

Of particular importance in this case, an employee clearly breaches the duty of loyalty if he or she, while employed, solicits the principal’s best employees to leave and join a competing business. Restatement, cmt. e. The same would apply where, as here, the employee solicits not just the best, but virtually all of the employees. Indeed, *even absent “solicitation,”* “a court may find that it is a breach of the duty for a number of the key officers or employees to agree to leave their employment simultaneously and without giving the employer an opportunity to hire or train replacements.” *Id.* That is exactly what happened in *Alexander & Alexander Benefits Servs., Inc. v. Benefit Brokers and Consultants, Inc.*, 756 F. Supp. 1408, 1415 (D. Or. 1991):

Former employees are privileged to leave their employers and fairly compete against them. This privilege does not extend to employees who violate their duty of loyalty to their employer by plotting an en masse resignation, without warning, which has the effect of eviscerating the work force and operation of the employer’s office.

In accordance with these principles, Idaho courts have recognized that solicitation of employees to join a competing business is a breach of the duty of loyalty. *See R Homes Corp. v. Herr*, 142 Idaho 87, 123 P.3d 720 (Idaho App. 2005) (recognizing that solicitation of employees

under these circumstances would be unlawful);<sup>2</sup> *Twin Falls Farm & City Dist'g, Inc. v. D & B Supply Co., Inc.*, 96 Idaho 351, 528 P.2d 1286 (1974) (employee breached fiduciary duty when he negotiated with other employees to hire them away to competitor for which he had arranged or was arranging his own employment).

Courts in other jurisdictions are in accord. For example, in *Gresham & Assocs., Inc. v. Strianese*, 595 S.E.2d 82 (Ga. Ct. App. 2004), the plaintiff contended that, “while Strianese (the defendant) worked for Gresham, he violated his fiduciary duties by soliciting Gresham’s property department employees to leave Gresham and work for his planned new company.” *Id.* at 85. The court held that the following alleged facts created a fact issue on whether the defendant had breached his fiduciary duty to the plaintiff:

- While employed by plaintiff, defendant (a) revealed his plans to start a competing company to three of plaintiff’s property division employees; (b) arranged for Brown & Brown (co-owner of defendant’s new competing company) to loan money to one of these employees (so that she could repay a 401(k) loan); and (c) advised another of these employees on compensation negotiations with Brown & Brown.
- When defendant tendered his resignation to plaintiff, these three employees (comprising nearly the entire property department) simultaneously tendered their resignations and went to work for defendant’s company.

The court rejected the argument that this conduct – if true – constituted “fair competition.” Rather, it constituted competition by defendant with plaintiff – at a time when defendant was still employed by plaintiff. *Id.* at 85. *See also Phansalkar v. Andersen Weinroth*

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<sup>2</sup> The *R Homes* court nonetheless affirmed summary judgment dismissing the claim because the fact of solicitation was not established by admissible evidence. 142 Idaho at 94, 123 P.3d at 727.

*& Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003); *Purchasing Assocs. Inc. v. Weitz*, 196 N.E.2d 245 (N.Y. 1963); *Duane Jones Co. v. Burke*, 117 N.E.2d 237, 245 (N.Y. 1954).

An employer who hires an employee who has breached the duty of loyalty is liable for aiding and abetting the breach if the hiring employer participated in the breach. *See Mabrey v. Sandstream, Inc.*, 124 S.W.3d 302, 316 (Tex. App. 2003). Although *Mabrey* is a trade secrets case, there is no principled reason not to apply its reasoning to other breaches of fiduciary duty by the hired employee. A hiring employer may be liable for tortious interference even of at-will employment arrangements if the hiring employer engaged in conduct that was “independently wrongful – *i.e.*, ‘proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.’” *Reeves v. Hanlon*, 33 Cal.4th 1140, 1145, 95 P.3d 513, 514 (Cal. 2004).

The RESTATEMENT (SECOND) OF TORTS states the rules succinctly. Section 766 declares that one who intentionally and improperly interferes with the performance of a contract is subject to liability. “Until ... terminated ... , [a contract terminable at will] is valid and subsisting, and the defendant may not improperly interfere with it.” RESTATEMENT (SECOND) OF TORTS § 766, cmt. g (1979). “Competition” is not a defense to interference if the interferor employs wrongful means:

- (1) One who intentionally causes a third person ... not to continue an existing contract terminable at will does not interfere improperly with the other’s relation if
  - (a) the relation concerns a matter involved in the competition between the actor and the other and
  - (b) *the actor does not employ wrongful means* and
  - (c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

RESTATEMENT (SECOND) OF TORTS § 768(1) (1979).

In this case, the district court ignored the fact that Ernest and P&S actively participated in – aided and abetted – Barkdull’s (and other Wesco employees’) breach of the duty of loyalty to Wesco. Not only did they concoct a scheme by which P&S would hire away virtually all of Wesco’s employees, Ernest and P&S *used Wesco’s managerial employees – beginning with Barkdull – to solicit their departure.* Under any standard, the acts of Barkdull, Ernest, Davis, and P&S were “independently wrongful” and, therefore, actionable.

**B. The Employee Defendants Breached Their Duty of Loyalty.**

The district court properly found that there was sufficient evidence to allow claims against certain Wesco employees to proceed based upon a breach of their duty of loyalty to Wesco. R. Vol. IV, pp. 717-18. In particular, the court found that claims could proceed against Dayley for drafting resignation letters for other employees, against Johnston for speaking to other employees about quitting Wesco to join P&S, against Barkdull for soliciting Wesco’s employees while still employed by Wesco, against Cook for writing resignation letters for other employees, and against Hancock for speaking to Thompson and McClure about quitting Wesco. *Id.* The court dismissed claims against the remaining employees. *Id.* p. 720.

Given that Wesco voluntarily dismissed claims against most of the employee defendants, Wesco does not assign error to the district court’s granting of summary judgment as to certain defendants. However, claims against the remaining defendants should not be so circumscribed. Among other things, under the authority discussed in the preceding section, an abrupt resignation *en masse* is also actionable as a breach of loyalty, and when remanded for trial Wesco should be permitted to pursue that claim. *See, e.g.,* Restatement, cmt. e; *Alexander & Alexander Benefits*

*Servs., Inc. v. Benefit Brokers and Consultants, Inc.*, 756 F. Supp. 1408, 1415 (D. Or. 1991). It is a question for the jury whether the actions of departing employees were “mere preparations” excused under the Restatement.

**C. The District Court Improperly Dismissed Claims Against Ernest, Davis, and P&S for Interference with Prospective Economic Advantage.**

The Idaho Supreme Court first recognized the tort of interference with prospective economic advantage in *Idaho First Nat’l Bank v. Bliss Valley Foods*, 121 Idaho 266, 824 P.2d 841 (1991), although denominating it as tortious interference with contract. *Id.* at 283, 824 P.2d at 858. The elements of the tort are as follows:

- (1) The existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferor; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of interference itself (*i.e.* that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

*Highland Enters., Inc. v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). Of these, defendants challenged only the fourth element, arguing that there was no evidence that they had interfered for an improper purpose or using improper means. The district court dismissed claims against all defendants whom he had not identified as having breached their duty of loyalty. R. Vol. IV, p. 720. Wesco here challenges only the dismissal of claims against Ernest, Davis, and P&S.

To prove the fourth element of the tort, a plaintiff must prove that the interference was “wrongful” by proof that either “(1) the defendant had an improper objective or purpose to harm the plaintiff; or (2) the defendant used a wrongful means to cause injury to the prospective business relationship.” *Bliss*, 121 Idaho at 286, 824 P.2d at 861. The *Bliss* case relied upon *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1371 (1978), to supply

further instruction concerning the “wrongful means” part of the test. Among other things, a defendant is deemed to use wrongful means if he or she violated a statute, regulation, or an established standard of a trade or profession, rule of common law, such as violence, threats of other intimidation, deceit or misrepresentation, bribery, or disparaging falsehood. *Id.*

It is worthy of note that the *Top Serv.* case was also relied upon by the court in *Alexander & Alexander Benefits Servs., Inc. v. Benefit Brokers and Consultants, Inc.*, 756 F. Supp. 1408, 1415 (D. Or. 1991), discussed above. In *Alexander & Alexander*, the Court held that a claim for tortious interference with business relationships could be maintained where former employees had solicited their fellow employees to leave employment and work for a competitor. In *Alexander & Alexander*, four key employees, out of an office of five employees, none of whom had signed noncompete agreements, terminated their employment within four days of each other effective immediately. The Court held that the competitor could be liable for the conduct of its new employees if the competitor knowingly participated in, encouraged, and accepted the benefits of the acts of unfair competition. *Id.* at 1412.

Here, Ernest, Davis, and P&S participated in, encouraged, and accepted the benefits of the wrongful acts of the departing Wesco employees, particularly those of Barkdull and other managers, who clearly breached their duty of loyalty to Wesco by soliciting the defection of nearly all of Wesco’s Idaho employees.

It may readily be inferred from the facts presented that Ernest, Davis, and P&S as well as the other defendants had an improper purpose and used wrongful means to cause injury to Wesco’s prospective economic advantage. Just as the employees in *Alexander & Alexander* left their employment in a coordinated manner, leaving their former employer without staff in a particular office, the defendant employees, Ernest, Davis, and P&S left Wesco without managers

or trained sales staff in the Eastern Idaho market. And, like the competitor in *Alexander & Alexander*, Ernest, Davis, and P&S participated in, encouraged, and benefited from former Wesco employees' wrongful acts. Accordingly, the district court erred in dismissing the tortious interference claim against them.

That Ernest, Davis, and P&S had an improper purpose not just to compete with, but to destroy, Wesco's Eastern Idaho operations is readily inferred from the facts in evidence. Upon learning of Wesco's acquisition, those defendants formulated a plan to take as many of Wesco's employees in the market as possible. R. Vol. III, p. 460 (20:18-23). Ernest, Davis, and P&S told Wesco's Roger Howe months earlier that they knew the Paint & Equipment employees and had a better relationship with them than Paint & Equipment's owner had. R. Vol. III, pp. 416-17 (15:14-17:19). They also knew that Wesco had just purchased the Idaho Stores and that its presence in the Eastern Idaho market was brand new. R. Vol. III, p. 471 (73:19-74:20). It can easily be inferred that defendants knew Wesco would be particularly vulnerable in the early going, as Wesco would be entirely dependent on its newly-acquired management and sales staff to maintain continuity through the transition. They also knew it would be very difficult, if not impossible, for Wesco to continue to operate the Idaho Stores if all of their significant employees abruptly left *en masse*. R. Vol. III, pp. 447-49 (36:5-38:15). They did not seek to compete with Wesco; they sought to eliminate Wesco from the Eastern Idaho market. R. Vol. III, pp. 465 (25:6-16), 466 (34:7-15).

Ernest, Davis, and P&S also used wrongful means to cause injury to Wesco. By aiding and abetting Barkdull and other Wesco managers in breaching their duty of loyalty by soliciting Wesco employees while still employed by Wesco, Ernest, Davis, and P&S used wrongful means to achieve their wrongful ends.

Barkdull, while still employed by Wesco as a regional manager, along with Ernest recruited Jenny Hancock to work for P&S. R. Vol. III, pp. 494 (23:5-25), 443-44 (31:9-32:24). Barkdull and Ernest then used Hancock to recruit other Idaho Falls employees. R. Vol. III, pp. 494 (22:14-23:25); 500 (6:17-7:12); 503 (6:21-7:4). Similarly, Ernest, Davis, and P&S used Mike Cook to recruit Pocatello employees. *Id.*, pp. 505 (6:17-9:22); 508 (6:16-7:18); 510-11 (7:19-9:8). Ernest, Davis, and P&S used the management of the Idaho Stores, in breach of their duty of loyalty, to recruit an entire workforce in the Eastern Idaho market.

There is ample evidence of both wrongful means and wrongful purpose; therefore, the district court erred in granting summary judgment on this claim.

**D. The District Court Improperly Dismissed Claims Against Ernest, Davis, and P&S for Interference with Wesco's Employment Contracts.**

Ernest, Davis, and P&S moved to dismiss Wesco's claims for interference with Wesco's employment contracts with its at-will employees based upon the notion that "there is no evidence of any employment contract." But the entire employment relationship is based on contract, express or implied. 30 C.J.S. *Employer-Employee Relationship* § 6. At a minimum, the employees promised to work for Paint & Equipment, then Wesco, in exchange for a salary or other compensation. Paint & Equipment, then Wesco, promised to pay the employees for their service. Such an exchange of promises is the very heart of a contract.

The district court apparently believed that there were employment contracts because its dismissal of this count (as to all defendants) was based, first, on the finding that the Wesco employees had not breached their contracts; second, upon the fact that the contracts were terminable at will. R. Vol. IV, pp. 721-22.

The fact that the employment contracts were terminable at will does not defeat the claim. As noted previously, "[u]ntil ... terminated ... , [a contract terminable at will] is valid and

subsisting, and the defendant may not improperly interfere with it.” RESTATEMENT (SECOND) OF TORTS § 766, cmt. g (1979). Indeed, Section 768 specifically addresses the qualified privilege of a competitor to cause a third person “not to continue an existing contract terminable at will.” *Id.* § 768. There would be no need for a qualified privilege if interference with an at-will contract were not actionable at all.

It is also not necessary that the employees “breach” their employment contracts for the action to lie. All that is necessary is that Ernest, Davis, *et al.* caused the employees “not to continue an existing contract terminable at will.” Section 768(1) reads:

(1) *One who intentionally causes a third person ... not to continue an existing contract terminable at will* does not interfere improperly with the other’s relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

*Id.*, § 768(1) (emphasis added).

Here, there is no basis to dismiss Wesco’s tortious interference count, either for the reasons argued by defendants in their motion or the reasons identified by the district court.

**E. The District Court Improperly Dismissed Claims Against Ernest, Davis, P&S and the Employee Defendants for Interference with Wesco’s Customer Contracts.**

The abrupt exodus of nearly all of Wesco’s Idaho employees, orchestrated by Ernest, Davis, and P&S and in breach of Barkdull’s duty of loyalty, left Wesco without the experienced workforce to adequately serve its customer base. Those wrongful acts tortiously interfered with

Wesco's contracts with its customers. The district court recognized that Wesco used a "conditional use contract" with its customers, but nonetheless concluded that the contract was terminable at will and dismissed Wesco's claim for tortious interference with contract. R. Vol. IV, pp. 722-23. This conclusion was wrong for several reasons.

First, the fact that any contract is terminable at will simply does not defeat the claim. As noted previously, "[u]ntil ... terminated ... , [a contract terminable at will] is valid and subsisting, and the defendant may not improperly interfere with it." RESTATEMENT (SECOND) OF TORTS § 766, cmt. g (1979). There would be no need for the qualified privilege established by Section 768 if interference with a contract terminable at will were never actionable.

Second, an actor is not privileged to interfere with a contract terminable at will if the actor employs wrongful means. *Id.*, § 768(1)(b). As argued throughout this brief, Ernest, Davis, and P&S interfered with Wesco's contracts with its customers by aiding and abetting Barkdull's breach of his duty of loyalty, which led to the abrupt departure of all of Wesco's experienced employees in the Eastern Idaho market. Those means were wrongful; therefore, defendants cannot avail themselves of the privilege.

Finally, Wes Harris entered into a conditional use contract on behalf of Harris Collision with Paint & Equipment, which was assumed by Wesco on its acquisition. Pursuant to the contract, Harris was allowed to use certain equipment provided by Wesco at no charge as long as he bought paint product from Wesco. R. Vol. III, p. 543. Harris is still using the equipment, although he was no longer purchasing paint product from Wesco. *Id.*, pp. 532-33 (20:14-21:16). This is clear evidence of the employee defendants' interference with Wesco's customer contract. Accordingly, the district court's dismissal of these claims was improper.

**F. The District Court Erred in Dismissing Wesco's ITSA Claim.**

Wesco alleged that defendants misappropriated trade secrets such as customer lists, lists showing customer buying preferences, the history of customer purchases, and custom paint formulas. Defendants moved for summary judgment arguing that Wesco had failed to identify any "trade secret" that was misappropriated. While finding such information to constitute "trade secrets" under the ITSA, the district court dismissed all claims under the ITSA except as to defendant Mike Cook. That dismissal was error because Wesco introduced substantial evidence creating a genuine issue of material fact as to whether the other defendants also misappropriated trade secrets.

A trade secret is defined as:

[I]nformation, including a formula, pattern, compilation, program, computer program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy . . . .

Idaho Code § 48-801(5) (Michie 2003).

Misappropriation is defined as:

- (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
  - (A) Used improper means to acquire knowledge of the trade secret; or
  - (B) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) 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.

Idaho Code § 48-801(2) (Michie 2003).

“A trade secret is *any* information that can be used in the operation of a business or other enterprise and that is *sufficiently valuable* and *secret* to afford an *actual or potential economic advantage* over others.” *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 735 n.2, 992 P.2d 175, 184 n.2d (1999) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995)) (emphasis in original).

A former employee, even in the absence of an enforceable covenant not to compete, remains under a duty not to use or disclose, to the detriment of the former employer, trade secrets acquired in the course of previous employment. *Ed Nowogroski Ins., Inc. v. Rucker*, 132 Wash. 2d 427, 971 P.2d 936 (1999); see *Intermountain Eye and Laser Centers, PLLC v. Miller*, 142 Idaho 218, 127 P.3d 121 (2005) (employer has “protectable interest” in customer relationships its former employee established while employed). A customer list may be a protected trade secret if it meets the criteria specified under the Act. *Id.*, 132 Wash. 2d at 440. Under the weight of modern authority, there is no legal distinction between written and memorized information. *Id.*, 132 Wash. 2d at 450. An employee may not use or disclose trade secrets belonging to the former employer to actively solicit customers from a confidential list. *Id.*

Defendants in fact misappropriated Wesco's trade secrets, consisting of customer names, customer buying preferences, customer history, and custom paint formulas. Wesco was impeded in its identification of trade secret information by several factors, including the short time in which it owned the Idaho Stores and the fact that virtually all of its employees left (and subsequently became defendants in this lawsuit). However, the forensic analysis performed on Mike Cook's work computer demonstrates that the defendants, at a minimum, misappropriated Wesco's customer files. R. Vol. II, pp. 307-407 (analysis concludes that numerous files containing specific customer and competitor information were copied and then deleted).

The entire Wesco Work Folder was copied and deleted on August 18, 2005, one day prior to the *en masse* defection. R. Vol. II, pp. 307-407, ¶¶ 13, 20, Ex. B, Appendix D, Wesco Work Folder pp. 1-24. The Wesco Work Folder contained detailed competitor information including pricing information, customers the competition sells to, areas called on, and lines carried. *Id.* at pp. 7-11. The Wesco Work Folder also contained a delivery log for the Pocatello area consisting of an average list of weekly deliveries. *Id.* at pp. 12-13. Of the 21 customers listed, 17 are now P&S customers. R. Vol. III, pp. 551-68.

The Wesco Work Folder also contained "target shop" lists. *Id.* at pp. 15-24. The target shop lists consisted of a target customer, what was needed to get the account, and who the present suppliers were. *Id.* Some of the potential customer reports gave detailed and specific pricing information and provided strategy as to how to win the customer. *Id.* Of the 17 target customers contained in the Wesco Work Folder, 15 are now customers of P&S. R. Vol. III, pp. 551-68. Mike Cook admitted that he deleted the Wesco Work Folder prior to his departure from Wesco. R. Vol. III, pp. 487-88 (21:5-28:14). What he failed to mention was that he had copied all of these files immediately prior to deleting them. R. Vol. II, pp. 307-11.

This information is of economic value, as demonstrated by the fact that most of the identified targets are now P&S customers. Even a cursory review of the Wesco Work Folder demonstrates that it contained far more, and far more useful, information than simply names and phone numbers that is not readily ascertainable.

Wesco's former managers acquired detailed customer information during the course of their employment at Paint & Equipment then Wesco. Wesco spent nearly a million dollars on business goodwill to have access to this information for the purpose of competing in the Eastern Idaho market. The utility of the information is demonstrated by Barkdull's testimony, in which he identifies the many Wesco customers who are now customers of P&S. R. Vol. III, pp. 475-76 (92:10-94:12).

When they joined Wesco, the employee defendants signed handbooks establishing the importance of Wesco's customer and competitor information. R. Vol. III, pp. 519-29. The Wesco Rules of Conduct state that Wesco is "involved in a highly competitive business" and that certain actions were forbidden, including "[u]nauthorized release of the Company's information" and "[p]articipation in a business directly competing with the Company." *Id.* Wesco's computers were password protected. R. Vol. IV, p. 648 (48:1-15). The information misappropriated by defendants were compilations that Wesco guarded jealously and from which Wesco derived independent economic benefit. Accordingly, the information constitutes trade secrets as a matter of law, and dismissal of these claims was inappropriate.

**G. The District Court Erred in Dismissing Wesco's Conspiracy Claim.**

A civil conspiracy is actionable if there is an agreement between two or more persons to accomplish an unlawful objection or to accomplish a lawful objective in an unlawful manner. *McPherson v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). The district court found that, while there were certainly wrongful acts (the breaches of loyalty by Barkdull among them), there

was no evidence of an agreement. R. Vol. IV, pp. 732-33. But Wesco introduced substantial evidence of such an agreement. To take the primary example, there is ample evidence of Ernest's, Davis's, and P&S's aiding and abetting of Barkdull's and other managers' solicitation of Wesco employees while they were still employed by Wesco – a clear “civil wrong.”

Specifically, on August 10 or 11, 2005, Barkdull met with Ernest and Davis – the Tremonton meeting. R. Vol. III, pp. 430-36 (13:23-19:10); *Id.*, pp. 474-75 (87:17-89:12); *Id.*, pp. 457-59 (17:4-19:24). Ernest and Davis offered Barkdull a job at this meeting and announced their intent to open three stores in Eastern Idaho – one in each city – to compete with Wesco. *Id.* Over the next few days, Ernest and Davis, on behalf of APW/P&S, formulated a plan to steal as many of Wesco's employees in the Eastern Idaho market as possible and recruited Barkdull as an ally. R. Vol. III, pp. 460-62 (20:18-22:7). Ernest and Barkdull, with the assistance of other Wesco managers, successfully recruited the balance of Wesco's employees to defect to P&S. In doing so, Barkdull and the other Wesco employees breached their duty of loyalty, aided and abetted by Ernest. Even if Ernst's, P&S's, and Barkdull's aim of setting up competing stores was not of itself unlawful (a point Wesco does not concede), the means employed were, and a civil conspiracy is present. Thus, dismissal of these claims was improper.

**V. CONCLUSION**

For the foregoing reasons, the order granting partial summary judgment to defendants should be reversed and this case remanded for trial.

DATED this 23<sup>rd</sup> day of April, 2009.

  
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2009, I caused to be served two (2) true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Kent L. Hawkins  
Merrill & Merrill  
109 North Arthur, 5th Floor  
Pocatello, Idaho 83204

U.S. Mail    Fax    By hand    Overnight

  
\_\_\_\_\_  
Debora K. Kristensen