IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TANK CONNECTION, LLC,

Plaintiff,

v. Case No. 6:13-cv-01392-JTM

JOHN R. HAIGHT,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Tank Connection, LLC, brought this action against a former employee, John Haight, claiming that when Haight left its employment and went to work for a competitor he improperly took confidential information from Tank Connection's computer files. Plaintiff asserts claims for breach of contract, violation of the Kansas Uniform Trade Secrets Act, breach of a common law duty of loyalty, and violation of the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Haight denies the allegations. The matter is now before the court on Haight's motion for summary judgment, which argues there is no genuine issue as to any material fact and that Haight is entitled to judgment as a matter of law on all claims. (Dkt. 152).

I. Uncontroverted Facts

The court finds the following facts to be uncontroverted for purposes of the motion for summary judgment.

Tank Connection designs, manufactures, installs and services above-ground storage tanks. John Haight began working for Tank Connection in 2008. He had no prior experience in the industry. Haight signed a "Non-Disclosure Agreement" on July 28, 2008, pursuant to which he promised: "That I personally shall observe the strictest secrecy with respect to all proprietary information that I have been exposed to," and "[t]hat I personally will not disclose to third parties the materials mentioned above unless prior written consent is given by TANK Connection." He was also given an employee handbook. The parties did not have a non-compete agreement.

In the normal course of employment at Tank Connection, employees (including Haight) regularly accessed the company's servers both through on-site computers and remotely through secured connections. Employees' access normally and regularly included reading information in the public shared folders on the servers and copying documents to computer hard drives and portable flash drives (also referred to as thumb drives or USB devices). Tank Connection knew of such conduct and consented to it. Some of the flash drives used by Haight belonged to Tank Connection and some belonged to Haight. Haight's job involved frequent travel with a laptop computer and flash drives and he often took these items home at night.

Tank Connection had about 300 employees. Each employee's computer was password protected. Access to data on the server was controlled by user-account privileges (Microsoft Active Directory). The user accounts were set up with standard authentication practices including user name and password.

Haight's position with Tank Connection was International Sales Manager. Throughout his employment, Haight and other employees accessed Tank Connection's server on a regular basis and downloaded information on flash drives as was necessary in the performance of their duties.

Tank Connection shared some information with its customers without having them sign a non-disclosure agreement. Some of the information that Tank Connection now claims as confidential would have been known to its customers, such as pending jobs, pricing information, and customer purchasing history. The information shared with customers did not include Tank Connection's pricing margins, equity partner information, employee bonus information, corporate strategy, staff meeting notes, personnel files, and business plans with detailed financial information.

Haight testified that a "head hunter" contacted him about a month before he left Tank Connection and, as a result, he began discussions with a competitor, USA Tank Sales & Erection Company ("USA Tank"), about working for that company. On August 22, 2013, Haight received several emailed documents from USA Tank, including that company's vision statement, dental plan summary, employee benefits brochure, and non-disclosure and non-compete agreements. On August 23, 2013, Haight received an email from USA Tank setting forth its compensation package. On or about September 6, 2013, USA Tank emailed Haight a conditional offer for employment as Director of International Sales & Business Development. The offer was effective up until September 23, 2013.

By September 11, 2013, USA Tank had established a company email address and cell phone number for Haight. That information was emailed to Haight on September 12, 2013, at 7:55 a.m.

On the morning of September 12, 2013, Haight attempted to renegotiate his compensation and terms of employment with Tank Connection. After those negotiations failed, Haight submitted his resignation around 8:30 a.m. Haight testified that he had drafted his resignation letter on his home computer a day or two earlier. Haight left his Tank Connection laptop computer in his office along with several flash drives. (Dkt. 151 at 3).[1] These items have been in the possession of Tank Connection or its expert since Haight left Tank Connection's employment.

Tank Connection contacted Haight several days after his resignation and told him that all company property should be returned. In response, Haight deleted any and all remaining Tank Connection information from his personal flash drives, collected any items in his possession that could be considered property of Tank Connection, including promotional materials and three company flash drives, and placed those items in a paper bag. He gave the bag to a Tank Connection employee to return to the company. Haight had also previously returned another company flash drive, making a total of at least four that he returned within a few days of his resignation.

Tank Connection searched the laptop and the four flash drives returned by Haight prior to sending these items to a forensic expert. Tank Connection hired forensic expert Lanny Morrow, of BKD, LLP, to examine the laptop used by Haight during his

[1] Tank Connection attempts to controvert this fact although it stipulated to it in the pretrial order.

employment with Tank Connection to see if it contained "evidence of data harvesting." In the course of that examination Morrow also reviewed the four flash drives that Haight turned in after his resignation.

Haight brought four additional flash drives to his deposition on November 21, 2013. Two of these drives were Haight's personal property and two were given to Haight by his new employer, USA Tank. These four flash drives were subsequently examined by John Mallery, a computer forensic specialist agreed upon by the parties.[2] Mallery also examined the hard drive of the computer that Haight used in his new employment with USA Tank. The examination of the hard drive showed no evidence of any Tank Connection proprietary information.

Tank Connection generally attempted to keep the following information confidential: pending major projects ("Hot Lists");[3] pricing margins and goals; equity partner information; detailed customer lists with purchasing history and other information; employee bonus information; corporate strategy; staff meeting notes; and personnel files. This information helps Tank Connection to compete and could potentially be used by competitors to Tank Connection's detriment.

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[2] Early on in the case, the court granted a temporary restraining order and appointed a receiver for the purpose of preventing the loss or spoliation of data. Dkt. 8. Mallery was retained by the receiver as a forensic expert. In both that order and in a subsequent preliminary injunction, which was agreed to by the parties, the court ordered Haight and USA Tank to refrain from using and to turn over to the receiver any property of Tank Connection, to turn over an image of any USA Tank hard drives accessed by Haight, and for Haight to turn over any storage media in his possession. Dkt. 42.

[3] The "Hot List" contains a list of potential projects that are expected to close within thirty days. Information in the list may include customer names, projected cost of materials, installation and equipment, and the projected close date.

Tank Connection also used computer programs for design and pricing. The programs are not well explained in the briefs, but as their names suggest they were apparently used by Tank Connection to design and price tank systems. Tank Connection asserts that the programs are "uniquely detailed and complex," and that the design program was developed solely by Tank Connection and contains "unique design methods, techniques, and information." These amorphous descriptions do little to show the nature of these programs or whether they are truly unique in the industry, and the company's further assertion that these programs have a value of $1.2 million – which Tank Connection seeks as damages -- is not supported by any meaningful explanation. *See* Dkt. 154 at 9 ("This information is valued at $1.2 million because both the pricing and design programs were created, developed, and continuously updated by Tank Connection.").

Laptop examination. Forensic expert Lanny Morrow examined the laptop that Haight used at Tank Connection. The following is a summary of his findings, which the court accepts as true for purposes of the motion for summary judgment. A laptop user -- one may reasonably infer it was Haight -- accessed numerous directories and files on September 11, 2013. Some of these files were on the laptop and some were on the Tank Connection server. This activity occurred between the times of 1:07 p.m to 5:29 p.m., and 8:40 p.m. to 10:58 p.m.

A removable USB device with a serial number ending in 1050 was attached to the laptop at 5:29 p.m. and again at 10:06 p.m. After the connection of the USB at 10:06 p.m., Haight accessed various files and directories from the device after they were copied

from the laptop. The accessed files included a "Resignation.docx" file created on the USB at 10:06 p.m. A directory entitled "Business Plans, Budgets, Ect" was created on the USB at 10:41 p.m. A directory by that same name also exists on the laptop. The latter directory had been created on August 21, 2012. A file within the "Business Plans" directory entitled "2013 TC International Business Plan.docx" was also created on the USB at 10:44 p.m. A file by that same name exists on the laptop. The latter file had been created on March 28, 2013.

In addition to the foregoing files and directories accessed from the laptop, Haight also accessed various directories or files on the Tank Connection server. Among the latter was a directory titled "Sales Stuff" and a file titled "contacts.pst," which contained information on 276 contacts.

Morrow determined that the serial number of the USB used on the evening of September 11, 2013, does not match any of the four USB devices that Haight returned to the company after his resignation. The USB device used that evening remains unaccounted for. Tank Connection does not maintain an inventory of its flash drives, nor has it attempted to determine if the USB used on the evening of September 11, 2013, is among the other flash drives in its possession.

Morrow's opinion is that the connection of the USB device on Haight's final day of employment, in tandem with "mass accessing" of directories and files that are represented as proprietary by Tank Connection, "is indicative of the harvesting of data from Tank Connection by the user of the Haight hard drive."

Tank Connection's president, Vince Horton, had a personal "Home" folder set up on the company's file server. It contained directories or folders named "Business Plans, Budgets, Ect," "Sales Stuff," and "2013 TC International Business Plan.docx," all of which contained confidential information. Horton's folder was supposedly set up so that it was accessible only to Horton and a network administrator. But when the company changed servers on March 9, 2013, the security settings were incorrectly set, with the result that, unbeknownst to Horton, his Home folder could be accessed by other Tank Connection employees, including Haight.

Haight testified in his deposition that, a few days before his resignation, a coworker told him there was "some interesting stuff on the server." He was referring to the information in Horton's Home folder, which was in a directory or folder named "User Shared Documents." Haight admits that he looked at the files in the folder, which included information on possible "strategic partners" [i.e. other companies who might invest in, work with, or buy out Tank Connection] and details on employee salaries and bonuses.

Tank Connection paid BKD $33,386.25 for Lanny Morrow's forensic examination of the laptop. It paid Mallery Technical Training and Consulting $5,187.50 for John Mallery's forensic examination of the flash drives produced by Haight at his deposition.

II. Summary of Arguments

Haight's motion for summary judgment asserts a number of arguments. First, Haight contends that the opinions of Tank Connection's forensics expert (Morrow) are conclusory and based on nothing more than *ipse dixit*. Moreover, Haight claims that

Tank Connection refused in discovery to provide him with "the source data" underlying Morrow's conclusions. Haight argues that this "refusal to participate" in discovery, as he puts it, warrants the drawing of an adverse interest against Tank Connection and that, when considered with the lack of support for Morrow's opinions, warrants summary judgment in his favor. Dkt. 153 at 11.

Haight's second argument claims that Tank Connection has produced no evidence that he has or likely will disclose any confidential information. He argues judgment must be entered in his favor to the extent the claims are based on an allegation that he has disclosed or will disclose proprietary information. *Id.* at 12.

Haight next claims that Tank Connection has produced no evidence that its design and pricing programs have any economic value, or that Haight has disclosed or damaged the programs in any way. Haight argues that Tank Connection's claim for damages is based on pure speculation. *Id.* at 13.

Fourth, Haight argues that the breach of contract claim fails because Tank Connection cites no evidence that Haight violated the parties' non-disclosure agreement. He argues there is no evidence that he accessed any proprietary information beyond the needs of his employment and that, even if he did access or "harvest" such information, doing so did not violate the non-disclosure agreement and caused Tank Connection no damages. Additionally, Haight argues that the non-disclosure agreement terminated when his employment relationship ended.

Fifth, Haight argues that the claim under the Kansas Uniform Trade Secrets Act (KUTSA) fails, because the record contains no evidence that the information he

allegedly misappropriated had independent economic value; because there is no evidence that the information was not generally known by third parties; because Tank Connection failed to take reasonable steps to maintain the secrecy of the information; and because there is no evidence that Haight "misappropriated" any information within the meaning of the Act.

Sixth, Haight contends the claim under the Computer Fraud and Abuse Act (CFAA) fails because there is no evidence that he took information without permission from the server; there is no evidence that he exceeded his authorization to access the server; and no evidence that Tank Connection reasonably incurred any loss as a result of a violation by Haight. As for Tank Connection's argument that its payment to forensic expert Morrow constituted loss, Haight argues that Morrow was hired for purposes of litigation and not to determine how Haight obtained proprietary information or to mitigate damage or risk associated with a potential breach.

Finally, Haight's seventh argument challenges Tank Connection's claim for breach of a duty of loyalty. Haight argues any such claim is duplicative of and preempted by the Kansas Uniform Trade Secrets Act (KUTSA). He also argues the claim fails for reasons previously stated, i.e., due to an absence of evidence that he wrongfully accessed information or that Tank Connection was damaged as a result.

III. Summary Judgment Standards

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed.R.Civ.P. 56(a). Summary judgment is proper if "the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *LifeWise Master Funding v. Telebank,* 374 F.3d 917, 927 (10th Cir.2004). "The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Thom v. Bristol-Myers Squibb Co.,* 353 F.3d 848, 851 (10th Cir.2003) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The party resisting summary judgment may not rely upon mere allegations or denials contained in its pleadings or briefs. *Id.* at 256. Rather, it must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Id.* Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. *Id.* at 249-50. Once the moving party has carried its burden under Rule 56, the party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Id.* at 587 (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually

unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

IV. Analysis

1. Breach of contract. In the parties' non-disclosure agreement, Haight promised to "observe the strictest secrecy" with respect to all proprietary information he has been exposed to and that he will "not disclose [it] to third parties" without consent. The court finds that Tank Connection has failed to cite evidence from which a reasonable jury could conclude that Haight breached these promises. Insofar as Tank Connection's contract claim is based upon an allegation that Haight disclosed its proprietary information to USA Tank, there is no basis in this record other than speculation for a jury to make such a finding. There is clearly no direct evidence that Haight disclosed the information. Nor do the circumstances reasonably warrant such an inference. Tank Connection cites no evidence that USA Tank was able to poach Tank Connection's customers or employees after Haight began working there, that it was able to use inside knowledge to underbid Tank Connection on projects, that it began using methods formerly unique to Tank Connection, or that it otherwise did anything to suggest that it was in possession of Tank Connection's proprietary information. While it might be reasonable to infer that Haight likely copied some proprietary information just prior to his departure, and further that he did so with a possible view of improperly using this information in his work at USA Tank, the record is simply void of any evidence that he actually disclosed such information to USA Tank or that he (or USA Tank) used it to Tank Connection's disadvantage. The mere possibility that Haight might have done so

is not enough to permit a judgment against him for breaching a promise not to disclose the information. Tank Connection must cite some evidence reasonably tending to suggest that he disclosed the information.

Tank Connection argues that Haight breached the agreement by "accessing and harvesting" proprietary information. Dkt. 154 at 36 (*citing Atchison Casting Corp. v. Dofasco, Inc.*, 889 F.Supp. 1445 (D. Kan. 1995)). But the parties' agreement (entitled "NON-DISCLOSURE AGREEMENT") only prohibited Haight from *disclosing* proprietary information to third parties; it did not prohibit him from accessing it. And there is simply no evidence that he disclosed it. The *Atchison* case cited by Tank Connection only highlights the need for such evidence. In *Atchison*, evidence of improper disclosure arose from the fact that a purchaser of some of the defendant's assets was able to begin manufacturing a complex product in far less time than normal, suggesting it had been given access to defendant's trade secrets. The circumstances reasonably implied that the defendant had breached a promise to the plaintiff (a prospective purchaser of defendant's remaining assets) to preserve those trade secrets. *Atchison*, 889 F.Supp. at 1460. *Cf. Musket Corp. v. Star Fuel of Okla., LLC*, 606 Fed.Appx. 439, 452 (10th Cir. 2015) ("By bringing [plaintiff's] documents to [defendant], [employee] breached a non-disclosure agreement."). The absence of any such evidence in this case precludes Tank Connection's claim for breach of the non-disclosure agreement.

2. Misappropriation of Trade Secrets. Haight challenges the trade secret claim on a number of grounds, but the court concludes that only his argument concerning