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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ALABAMA**

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| **DOUG KILLOUGH and TECHNICAL CONSULTING SOLUTIONS, INC.;** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Case No.: 5:17-cv-00247-AKK** |
| **ALL POINTS LOGISTICS, LLC;** | ) | |
| **Defendant.** | ) | |

**PRETRIAL ORDER**

A pretrial conference was held in the above case via videoconference on **July 23, 2021**, wherein, or as a result of which, the following proceedings were held and actions were taken:

1. Appearances. Appearing at the conference were:

   For **Doug Killough and Technical Consulting Solutions, Inc.**: Sam David Knight and Christopher Driver

   For **All Points Logistics, LLC[1]:** Wesley C. Redmond, Lori R. Benton, and Susan W. Bullock

**ONLY COUNSEL APPEARING AT THE PRETRIAL CONFERENCE MAY REPRESENT A PARTY AT TRIAL.**

[1] Defendant Phil Monkress was dismissed from this action pursuant to the March 30, 2021, Memorandum Opinion. (Doc. 115).

2. Jurisdiction and Venue.

(a) The court has subject matter jurisdiction of this action under the following statutes, rules or cases:

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and the dispute is between citizens of different states.

(b) All jurisdictional and procedural requirements prerequisite to maintaining this action have been met.

(c) Personal jurisdiction and/or venue are not contested.

3. Parties and Trial Counsel. Any remaining fictitious parties are hereby **STRICKEN.** The parties and designated trial counsel are correctly named as set out below:

| | Parties: | Trial Counsel: |
|---|---|---|
| Plaintiff(s): | **Doug Killough** | **Sam David Knight and Christopher Driver** |
| | **Technical Consulting Solutions, Inc.** | Same Counsel |
| Defendant: | All Points Logistics, LLC | Wesley C. Redmond, Lori R. Benton, and Susan W. Bullock |

4. Pleadings. The following pleadings have been allowed:

- Plaintiff's Third Amended Complaint (Doc. 41);
- Defendants Phil Monkress And All Points Logistics, LLC's Amended

Answer, Defenses, And Affirmative Defenses To Plaintiffs' Third Amended Complaint And All Points Logistics, LLC's Counterclaims Against Doug Killough And Technical Consulting Solutions, Inc. (Doc. 54); and

- Plaintiffs/Counterclaim Defendants' Answer To Defendant/Counter Plaintiff All Points Logistics, LLC's Counterclaim (Doc. 74).

5. Statement of the Case.

(a) Narrative Statement of the Case.

This action arises from an agreement between Doug Killough, the owner of Technical Consulting Solutions, Inc. ("TCS"), and All Points Logistics, LLC ("APL"). Doug Killough worked at APL as an engineer and program manager. Mr. Killough claims that APL breached a contract that between APL and Killough to pay Killough half of the profits that APL made on certain government subcontracts and eventually to give those contracts to TCS. Mr. Killough also asserts a quantum merit claim against APL for failure to pay him profits for 2015Killough's business, Technical Consulting Solutions, Inc, or TCS.

APL denies these claims and also has counterclaims against Mr. Killough and TCS APL asserts counterclaims against Killough and TCS for alleged misappropriation and use of its trade secrets in violation of Defense of Trade Secrets Act ("DTSA") and the Alabama Trade Secrets Act ("ATSA"). APL also claims that Mr. Killough violated fiduciary duties, including his duty of loyalty, that he

owed to APL by trying to usurp APL's business with Northrop Grumman for TCS and breached his contract with APL by purloining APL's confidential and proprietary documents. Killough and TCS deny these claims.

(b) Undisputed Facts.

1. Prior to his employment with APL, Killough worked for Booz Allen Hamilton, a government contractor.

2. Subsequently, Killough and a fellow employee decided to start a new company, TCS.

3. In March 2010, Killough and his partner met with Phil Monkress, the President of APL, to discuss a potential joint venture between APL and Killough's business.

4. APL employed Killough from July 1, 2010, to November 10. 2014, and then rehired Killough several days later, until September 30, 2015.

5. APL never included what are called "unallowable costs" in the calculation of the profits that it paid to Killough for the years 2011–2014.

6. In November 2014, Killough contacted Boeing, Northrop Grumman, and Teledyne Brown in an attempt to have APL's contracts with these customers transferred to TCS.

7. Killough then told Monkress on November 7, 2014, that he wanted APL

to transfer APL's contracts with prime contractors to TCS, and that the prime contractors had agreed to the transfer.

8. On November 10, 2014, APL terminated Mr. Killough's employment

9. Killough's discharge caused Northrop to express concerns. As a result, APL rehired Killough.

10. Killough was employed by APL until September 30, 2015.

11. In the year before Killough's employment at APL ended, Killough applied for a facility security clearance for TCS.

12. Killough also applied for TCS to become an approved supplier of Northrop Grumman.

(c) Plaintiffs/Counter Defendants' Claims and Defenses.

**Plaintiffs' Claims**

**Killough—Breach of Contract (Profit Payments):** Killough and APL had a contract that required APL to pay Killough 50% of the profits on certain contracts that he helped bring in and worked on—including contracts that APL had with Northrop Grumman, Boeing, and Teledyne Brown. APL paid Killough in quarterly installments and provided him with statements showing the income, expenses, and profit for each of the relevant contracts. Killough alleges that APL did not pay him the correct amount over the course of his employment, both by underpaying him for

much of his employment and by failing to pay Killough's profit-sharing payments at all for 2015. A comparison of the profit statements provided to Killough during his employment and a reconciliation produced during discovery reveals a discrepancy of $163,996. By failing to pay Killough the proper amount, APL breached its contract with Killough, and Killough is entitled to damages to compensate for this underpayment.

**Killough—Quantum Meruit (Profit Payments):** Alternatively, Killough alleges that he is entitled to the profit payments that APL failed to pay in 2015 under a quantum meruit theory. "Quantum meruit arises when a contract is implied." *Mantiply v. Mantiply*, 951 So. 2d 638, 656 (Ala. 2006). "[W]here one knowingly accepts services rendered by another, and the benefit and the result thereof, the law implies a promise on the part of the one accepting with knowledge the services rendered by another to pay the reasonable value of such services rendered." *Id.* APL had previously compensated Killough by paying him 50% of the profits of the relevant contracts. By failing to pay Killough his portion of the profits, APL knowingly accepted services without rendering to Killough the reasonable value of those services.

**TCS—Breach of Contract (Novation):** APL and Killough agreed, both prior to APL's first termination of Killough and upon Killough's rehire at APL, that APL

would novate the contracts that Killough was working on at Northrop Grumman, Boeing, and Teledyne Brown to Killough's company Technical Consulting Solutions, Inc. ("TCS"). TCS was therefore a third-party beneficiary of APL and Killough's contract. *See Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc.*, 512 So. 2d 99, 101–102 (Ala. 1987) ("To recover under a third-party beneficiary theory, the complainant must show: 1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; 2) that the complainant was the intended beneficiary of the contract; and 3) that the contract was breached."). APL never novated and has refused to novate these contracts to TCS. In fact, when Killough attempted to begin the novation process, APL fired Killough and thwarted his attempts. As a result, APL breached the contract that it had with Killough that benefited TCS. TCS is therefore entitled to damages, including lost profits that TCS would have earned on the contracts had they been novated.

**Defenses to Counterclaims**

**DTSA/ATSA:** Damage is an essential element of both a DTSA claim and an ATSA claim. *See InteliClear, LLC v. ETC Global Holdings, Inc.*, 978 F.3d 653, 658 (9th Cir. 2020); *Ultimate Fitness Group, LLC v. Anderson*, 2019 WL 8810367, at *3–4 (S.D. Fla. Mar. 13, 2019); APJI § 44.21 ("You should award compensatory

damages if (name of plaintiff) reasonably satisfied you from the evidence that: . . . 2. The misappropriation caused (him/her/it) harm.").

APL cannot demonstrate damages for its alleged misappropriation, nor can it show that Killough and TCS were unjustly enriched. The only action that could possibly constitute misappropriation is Killough's alleged use of APL's outdated labor rates in a submission to Northrop Grumman.[2] Northrop Grumman rejected these rates and did not award any contract to TCS on the basis of those rates. Thus, the use of those rates did not cause APL to lose any business, and it did not lead to any business for TCS.[3]

Misappropriation does not include the use of a trade secret with the express or implied consent of the owner of the trade secret. *See* 18 U.S.C. 1839(5)(B); Eleventh Cir. Pattern Jury Instructions 11.1. Here, APL and Killough had an

[2] In their motion for summary judgment, Killough and TCS said, "The only instance of any alleged use or misappropriation of a trade secret is the submission of rates to Northrop Grumman for budget planning purposes." Doc. 81 at 16–17. APL did not contest this point in its response. *See* Doc. 99 at 15–17.

[3] Absent actual damage, Killough questions whether APL has standing to sue. Standing requires that a party asserting a claim to have suffered "'an invasion of a legally protected interest' that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Trichell v. Midland Credit Management, Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). If APL cannot demonstrate that it suffered any concrete loss or that Killough and TCS experienced an unjust gain, then APL cannot demonstrate that it suffered a concrete and particularized injury. At best, APL could only show a the invasion of a statutory right, without any actual concrete harm or injury.

agreement that APL would novate certain contracts to TCS, including the contract related to the relevant labor rates. Thus, APL impliedly consented to Killough and TCS taking control of the APL-Northrop Grumman contract, which included the labor rates built into that contract.

APL's alleged trade secrets were outdated and obsolete. *See Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.3d 329, 336 (8th Cir. 2003) ("[O]bsolete information cannot form the basis for a trade secret claim because the information has no economic value."). The labor rates that APL alleges that Killough used in a proposal to Northrop Grumman were APL's rates for fiscal year 2014. APL's labor rates for the same positions changed each fiscal year. As a result, the 2014 labor rates were obsolete in 2015. Killough's Northrop Grumman proposal that APL alleges contained APL's 2014 rates was submitted in September 2015 when APL's 2014 rates were already obsolete.

**Breach of fiduciary duty (NGC):** An employee may take certain actions in preparation to compete with his employer without violating any fiduciary duty. *See Allied Supply Co. v. Brown*, 585 So. 2d 33, 35 (Ala. 1991). Further, an employee may seek other employment while he is still employed by his current employer. *See Perfection Mattress & Spring Co. v. Dupree*, 113 So. 74, 78 (Ala. 1927).

Killough's contacts with Northrop Grumman were preparatory in nature—specifically his application for TCS to become an approved supplier and pursuit of a facility security clearance. Moreover, Killough's requests for information about work with Northrop Grumman were focused on work that Killough himself would perform, and in fact, when TCS first received a contract with Northrop Grumman, Killough was the only TCS employee working on a Northrop Grumman contract. Thus, Killough's efforts to seek out a contract with Northrop Grumman were merely efforts to obtain employment for himself.

APL did not have any expectancy is any contract performed solely by Killough because it did not have the practical advantages to secure the contract. *See Mitchell v. K&B Fabricators, Inc.*, 274 So. 3d at 251, 262 (Ala. 2018) (requiring a company to have an expectancy in and the practical advantage to secure a contract for a breach of fiduciary duty claim). The contract was specifically entered to secure Killough's services at Northrop Grumman. APL chose to fire Killough. Thus, APL did not have the practical advantage—i.e., the services of Killough—to secure a contract that was specifically designed to secure the services of Killough. Even if it had not fired Killough, Killough was an at-will employee who had no obligation to continue working at APL, and APL had no right to Killough's continued service at APL. *See James A. Head & Co. v. Rolling*, 90 So. 2d 828, 840 (Ala. 1956). To find

that APL had an expectancy in the TCS-Northrop Grumman contract would be to find that APL had a right to Killough's continued employment because the contract could not be performed without Killough.

APL consented to and ratified Killough taking steps to establish TCS as an operable business focused on providing engineering services to government contractors. APL knew and agreed that Killough could establish his own business while he was working at APL. Even the contract that APL claims that Killough breached contains provisions relating to Killough starting a business, obtaining a facility clearance, and obtaining work similar to what APL was doing. *See Morad v. Coupounas*, 361 So. 2d 6, 9 (Ala. 1978) (identifying "the degree of disclosure made to the corporation" and "the action taken by the corporation with reference thereto" as factors in determining a breach of fiduciary duty).

Killough had no duty to present the opportunity for him to work at Northrop Grumman because at the time of the opportunity, Killough was not an officer, director, or managerial employee. *See Mitchell v. K&B Fabricators, Inc.*, 274 So. 3d 251, 264–65 (Ala. 2018) (defining the corporate opportunity doctrine as applying to "a director or officer."). Further, after August 17, 2015, APL limited Killough's responsibilities to solely working on a contract. Thus, he had no responsibility for obtaining business for APL, and as a result, Killough had no corresponding duty to

present the opportunity for him, and only him, to continue working at Northrop Grumman to APL. *See Benchmark Med. Holdings, Inc. v. Rehab Solutions, LLC*, 307 F. Supp. 2d 1249, 1266 (M.D. Ala. 2004) (applying Delaware law).

**Breach of Contract:** APL cannot demonstrate that Killough manifested his assent to the written contract that it claims is binding. While Killough did sign a version of the written document, he did not return the document to APL. Mutual assent—an essential element of contract formation—requires "an objective rather than a subjective manifestation of intent . . ." *Lilley v. Gonzales*, 417 So. 2d 161, (Ala. 1982). In other words, it requires, "mutual expressions" not "harmonious intentions or states of minds." *Id.* (quoting A. Corbin, *Corbin on Contracts* § 9 (1952)).

APL only received the document signed by Killough during discovery. Prior to its production in this case, APL had never received the signed version. In fact, APL filed a motion to dismiss in this case—prior to any discovery—and asserted that an unsigned contract was the parties' binding contract. *See* Doc. 10 at 18 ("The only written agreement of which APL is aware that reflected any agreements between APL and Killough is 'All Points Logistics, LLC Employment and Non-Disclosure Agreement,' which is attached to this Motion as Exhibit A."). In fact, the unsigned contract differed in material ways from the signed, but unreturned, version

that APL *now* claims is the parties' binding contract. APL's shifting positions indicates that the parties never had a meeting of the minds on any specific written document—though they did have a meeting of the minds on other material terms.

Moreover, APL terminated and rehired Killough, and upon his rehire, Killough and APL never signed a written contract. Thus, for the relevant timeframe (i.e., after Killough was rehired), the parties undisputedly did not have a written contract with a confidentiality clause.

APL cannot demonstrate damages for its breach of contract claim, nor can it show that Killough and TCS were unjustly enriched. "Proof of the damages resulting from a defendant's alleged breach of contract is a required element in a breach-of-contract claim." *Brooks v. Franklin Primary Health Center, Inc.*, 53 So. 3d 932, 935 (Ala. Civ. App. 2010). The only action that could possibly constitute misappropriation is Killough's alleged use of APL's outdated labor rates in a submission to Northrop Grumman. Northrop Grumman rejected these rates and did not award any contract to TCS on the basis of those rates. Thus, the use of those rates did not cause APL to lose any business, and it did not lead to any business for TCS.

APL cannot meet the element of a breach of contract claim requiring that it do "the things that the contract required it to do." APJI § 10.13 Action Breach—

Elements. APL breached the agreement that it had with Killough to novate certain contracts to TCS and to pay 50% of the profits to Killough.

Under Alabama law, a claim for attorney's fees pursuant to a contractual prevailing party provision must be presented to the jury as an element of damages. *See* Fed. R. Civ. P. 54(d)(2)(A); *Hill v. Premier Builders*, 56 So. 3d 669, 675–76 (Ala. Civ. App. 2010); *McCord v. Bridges*, 211 Ala. 295, 298 (Ala. 1924); *RBC Bank (USA) v. Glass*, 773 F. Supp. 2d 1245, 1247 (N.D. Ala. 2011). However, APL never produced discovery related to its claim for attorney's fees—either in response to discovery requests from Killough and TCS or pursuant to its initial disclosures. Thus, under Rule 37(c), APL "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c). APL's failure to produce these documents is unfairly prejudicial, as the parties are on the eve of trial and TCS and Killough have no discovery related to what is surely a substantial request for damages.

(d) Defendant's Defenses.

**PLAINTIFF KILLOUGH'S COUNT ONE: BREACH OF CONTRACT CLAIMS-(**addressing separately three discrete claims: (a) failure to pay net profits in 2011-2014; (b) failure to pay net profits in 2015; and (c) failure to novate contracts):

**Count I Breach of Contract (a) Alleged Failure to Pay Net Profits 2011-2014**

1. The June 2010 written employment agreement is a valid binding and enforceable contract between Killough and APL from June 2010 until November 2014 that bars this claim. To prove his breach of contract claim, Killough must establish: (1) a valid contract binding Killough and APL, (2) Killough's performance under the contract, (3) APL's alleged nonperformance, and (4) damages suffered by Killough as a result of the nonperformance. *Shaffer v. Regions Fin. Corp*., 29 So. 3d 872, 880 (Ala. 2009) (quotation omitted). To establish a valid contract, Killough must prove "an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of a contract." *Id*. (quotation omitted).

    a. There was an offer by APL and acceptance by Killough. APL submitted to Killough a proposed written employment agreement. Killough revised, reviewed, signed, and accepted the June 14, 2010, written employment agreement and the February 11, 2011, Addendum. By his actions and words, Killough operated under the written employment agreement, and APL believed Killough accepted the written agreement. Several times Killough referred to his written employment agreement, and he never expressed to APL that he did not accept the employment agreement.

    b. The written contract was supported by consideration, which is not disputed

    c. The parties mutually assented to all terms essential to the formation of the contract. Killough revised, reviewed, signed, and accepted the June 14, 2010, written employment agreement and February 11, 2011, Addendum. Both APL and Killough were operating under the written employment agreement. On several occasions, Killough referred to his written employment agreement, and he never expressed a disagreement with any term of the employment agreement he signed in June 2010 or the February 2010 Addendum A. Alabama law is clear that "[t]he purpose of a signature on a contract is to show mutual assent . . . " *Ex parte Rush*, 730 So. 2d 1175, 1177-78 (Ala. 1999) (citations omitted). Thus, Killough's signature on the contract is evidence of his

assent to the terms of the written contract even if he did not deliver the contract to APL.

d. APL performed under the contract, which included, among other things, APL compensating Killough fully his salary, benefits, and net profits due to him.

2. APL and Killough did not have a valid binding and enforceable oral contract.

a. APL made no offer to Killough outside the terms of the written employment agreement.

b. Killough's allegations of oral modifications to the agreement are void for lack of consideration.

c. There was no mutual assent to the terms essential to the formation of an alleged oral contract- no meeting of the minds.

3. According to the February 2011 Addendum to the written employment agreement between APL and Killough, APL agreed to pay Killough a "[b]onus amount equal to 50% of net profit of project excluding self-payable on a quarterly basis through payroll." The profits Killough was to be paid under the written agreement with APL was to be based on, and was based on, a calculation of the net profits that included overhead and general and administrative costs. APL calculated Killough's net profits in accordance with Generally Accepted Accounting Principles (GAAP), which means bottom line net income after all costs are accounted. In other words, "net profits" equals revenue minus all costs, including specifically costs such as overhead and administrative costs. APL has always calculated net profits using the methodology of allocation of division overhead based on the percentage of direct costs of the particular project/contract in the management services division, which includes all contracts upon which Killough received a profit (the contracts he managed only and not the contracts where he performed work as an engineer), and not using only the overhead and general and administrative expenses associated with the specific contracts Killough managed. Accordingly, each project has its direct cost and the sum total of overhead was allocated based on the percentage of the direct costs; and

Killough accepted and ratified this methodology. It would have been impossible for APL to have allocated additional overhead to the contracts where Killough was paid a profit as alleged because the allocation is based on the percentage of direct costs of each contract. *See Sweet v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 2;16-cv-225, 2019 U.S. Dist. LEXUS 52927 * 5 — 6 (D. Utah March 27, 2019) ("'Net profits are determined by computing the difference between the gross profits and the expenses that would be incurred in acquiring such profits. . . . In addition to proof of gross profits, there must generally be supporting evidence of overhead expenses, or other costs of producing income from which a net figure can be derived.") (quotations omitted); *Bright Harvest Sweet Potato Co. v. H.J. Heinz Co., L.P.*, Case No. 1;13-cv-00296-BLW, 2016 U.S. Dist. LEXIS 17721 *13 (D. Idaho Feb. 10, 2016) (Net profits, unlike gross profits, are adjusted for additional expenses, such as reasonable overhead."); *Digital Ally v. Z3 Tech., LLC*, Case No. 09-2292-KGS, 2012 U.S. Dist. 87728 *13 (D. Kan. June 26, 2012) ("Where a plaintiff presents evidence of only gross profits and fails to provide evidence of expenses and overhead costs from which net profits can be calculated, the plaintiff has failed to present sufficient evidence of lost profits.") (quotation omitted). Further, to determine net profits, all costs included unallowable costs, which are actual costs incurred by APL, although not charged to the government. Thus, unallowable costs should be considered in determining the amount of net profits owed even if APL did not consider them; to not consider actual, although unallowable cost, would result in a windfall to Killough.

4. APL does not owe Killough net profits. Instead, Killough owes APL the amount APL overpaid him, which at a minimum is $6,642.00.

5. In the employment agreement, APL agrees to subcontract certain contracts to Killough's new company only after several conditions were satisfied, including that APL and Killough's company enter into a SBA sponsored mentor/protégé agreement and that APL sponsor Killough's new company in a DSS Top Secret Facility Clearance. Although not alleged, APL did not breach this provision of the written employment agreement. Killough rejected APL's efforts to initiate the mentor/protégé agreement, and Killough and TCS never provided APL with the opportunity to sponsor the DSS Top Secret Facility Clearance.

6. Plaintiff Killough's breach of contract claim is barred. APL owes Killough nothing due to Killough's prior material breach of his employment contract's confidentiality provision. APL owes Killough nothing because he breached his duty of good faith and loyalty by engaging in self-dealing with APL's clients to the detriment of APL and to the benefit of Plaintiffs. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1343 (Ala. 1987) ("a substantial breach by one party [to a contract] excuses further performance by the other"); RESTATEMENT (SECOND) OF CONTRACTS, CH. 10, INTRO. n. (1981) (the injured party is justified in not performing his own obligations if the other party materially fails to perform). *See Denver-Albuquerque Motor Transport, Inc. v. Green*, 331 So. 2d 719, 722 (Ala. Civ. App. 1976) (holding that since the contract had been breached, the non-breaching party was excused from further performance). *Smith v. Clark*, 341 So. 2d 720, 721 (Ala. 1977) (court did not enforce boundary-line agreement against the plaintiff where the defendant failed to honor his part of that agreement to move a structure off the disputed area); *Gray v. Reynolds*, 553 So. 2d 79, 82 (Ala. 1989) (a court should not enforce a contract when the party seeking enforcement failed to perform his part of the agreement).

7. To the extent that an oral contract between APL and Plaintiffs existed, which APL specifically denied, Plaintiffs' breach of contract claim is unenforceable because the employment agreement between APL and Killough prohibits amendments or modification to employment agreement that are not in writing and executed by all Parties to the agreement. (APL's Seventh Defense)

8. APL is entitled to recover any fees or costs incurred in any successful dispute under the employment agreement. Specifically, if APL prevails on Killough's breach of contract claim relating to the calculation of his net profits under the employment agreement, APL is entitled to recover any attorneys' fees incurred in successfully defending that claim.

**Count I: Breach of Contract (b) Alleged Failure to Pay Net Profits in 2015**

1. APL and Killough did not have a valid written or oral contract that obligated APL to pay Killough profits in 2015.

a. There was no offer by APL to pay Killough profits in 2015, precluding Killough from acceptance.

b. The alleged oral representations are void due to lack of consideration.

c. There was no mutual assent to the terms essential to the formation of an alleged oral contract- no meeting of the minds.

2. Plaintiff Killough's breach of contract claim is barred and APL owes Killough nothing due to Killough's prior material breach of the confidentiality provision of his employment contract with APL and by breaching his duty of good faith and loyalty by engaging in self-dealing with APL's clients to the detrimental of APL and to the benefit of Plaintiffs. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1343 (Ala. 1987); RESTATEMENT (SECOND) OF CONTRACTS, CH. 10, INTRO. n. (1981); *Denver-Albuquerque Motor Transport, Inc. v. Green*, 331 So. 2d 719, 722 (Ala. Civ. App. 1976); *Smith v. Clark*, 341 So. 2d 720, 721 (Ala. 1977); *Gray v. Reynolds*, 553 So. 2d 79, 82 (Ala. 1989) (a court should not enforce a contract when the party seeking enforcement failed to perform his part of the agreement).

3. Killough was an at-will employee so that APL could change the conditions of his employment. *Stutts* v. *Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1584 (N.D. Ala. 1994). After Killough was rehired by APL in November 2014, APL specifically told Killough several times in November and December 2014 that he needed to sign and to return a revised employment agreement, thus notifying Killough before 2015 that he would not continue to be paid any net profits unless he signed and returned the signed employment agreement to APL. After rehiring Killough, APL wanted an executed employment agreement from Killough before moving forward to avoid any misconceptions. APL offered Killough the same employment agreement but with a revised Addendum A, which included a percentage of profit on hardware sales as incentive for Killough to sell. The revised Addendum A did not include the subcontract terms and preconditions, including the mentor protégé arrangement, but APL told Killough when he was rehired that APL was still open to a mentor protégé arrangement. Killough ignored APL's requests and did not sign and return the agreement. Consequently, APL changed the terms

of Killough's compensation and, starting 2015, no longer paid him for the net profits when he refused to agree to the new written agreement.

4. Plaintiffs' calculations as to amount of profits owed are incorrect.

5. In addition to not being owed profits for 2015, Killough is also not entitled to profits after his employment with APL ended, which is no longer an issue after the court's ruling on APL's summary judgment motion. *Stutts* v. *Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1584 (N.D. Ala. 1994).

6. Even if there were an agreement, which APL denies, Killough did not perform under the agreement.

7. APL is entitled to recover any fees or costs incurred in any successful dispute under the employment agreement. To the extent this claim is based on the written employment agreement, if APL prevails on Killough's breach of contract claim relating to the calculation of his net profits under the employment agreement, APL is entitled to recover any attorneys' fees incurred in successfully defending that claim.

**Breach of Contract (c) Alleged Failure to Novate Contracts**:

1. APL and Killough did not have a valid written or oral contract that obligated APL to novate contracts to TCS.

   a. There was never an offer by APL to novate contracts and, thus, no acceptance by Killough or TCS. It was always APL's understanding that APL could subcontract to TCS subject to the prime contractor's approval and that Boeing indicated it would approve, especially if APL and TCS entered into the Mentor Protégé Agreement. In Alabama, "no contract is formed without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract." *Stieger v. Huntsville City Bd. Of Educ.*, 653 So. 2d 975, 978 (Ala. 1995).

   b. The alleged oral representations are void due to lack of consideration. Killough offered nothing in exchange for the alleged promise to novate the contracts other than services he was required to provide as an APL's

employee. Had APL entered into a subcontract with TCS, APL would have remained the owner of the contract, or contract holder with the prime contractor, and would have continued to receive revenue and gross profit for any work APL performed on the contract. TCS would not be a party to the contract with the prime contractor. Further, APL could reference the subcontract as its past performance when bidding on future government contracts. Additionally, had APL and TCS entered into a subcontract agreement, APL would have another small business supplier with whom it could partner in the future. In other words, novation means the transfer of the ownership of the contracts. In contrast to a subcontract, by transferring ownership and novating the contracts, APL would be giving up future revenue and gross profits that could have been earned on the contracts. Further, APL could not reference the novated contracts when describing its past performance in future government proposals. Lastly, although APL never entered into an agreement with Killough or TCS to novate APL's contracts to TCS, had APL entered into an agreement to novate its contracts to TCS, APL would have negotiated an amount to be paid in consideration for giving up ownership of its contracts, along with all the benefits associated with the ownership including profits and reliance on the contracts as part of its past performance. Accordingly, APL received nothing of value in addition to what APL was already receiving when it allegedly agreed to change from subcontracting contracts (where APL would remain the owner of the contract and receive revenue) to novating contracts (where APL would give up ownership and receive no revenue). "'To constitute consideration, a performance or a return promise must be bargained for,' and '[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.'" *Smith v. Wachovia Bank, N.A.*, 33 So. 3d 1191, 1197 (Ala. 2009) (quoting Restatement (Second) of Contracts § 71(1) and (2)) (emphasis in original omitted).Valid consideration exists only when there is "some act, forbearance, detriment, or a destruction of a legal promise, or a return promise, bargained for and given in exchange for the promise." *Kelsoe v. Int'l Wood Prods., Inc.*, 588 So. 2d 877, 878 (Ala. 1991). Killough cannot rely on his past performance as an APL employee as the consideration for the novation. Killough was already paid for these

services. “A past consideration is not sufficient to support a contract . . . .” *Phillips Brokerage v. Professional Personnel Consultants*, 517 So. 2d 1, 2 (Ala. Civ. App. 1987).

c. There was no mutual assent to the terms essential to the formation of an alleged oral contract- no meeting of the minds. *Stieger v. Huntsville City Bd. Of Educ.*, 653 So. 2d at 978.

d. Assuming there was an agreement to novate contracts, which APL denies, such an agreement would not be enforceable, precluding APL from liability for failure to perform under such an agreement; APL could not unilaterally perform under such an agreement, and performance was therefore impossible. TCS was not an approved supplier for Teledyne Brown or Boeing, and the agreement would have required acts by third parties (the various government contractors) who did not perform such acts or agree to perform such acts. *See* subsection (e) below.

e. Assuming there was an agreement to novate contracts, which APL denies, neither Teledyne Brown, Boeing, Northrop nor the Government approved the novation of the contracts, which is a condition precedent to the novation of the contract APL laid off Killough solely because the contract upon which he was working had ended and there was no more work to assign to Killough; APL did not lay off Killough to allegedly frustrate Killough’s attempts to obtain the prime contractors’ and Government’s approval. A contract that requires the consent of a third party is not enforceable if the third party has not consented. *Mercury Dev., LLC v. Motel Sleepers, Inc.*, Civil No. 11-147-GFVT, 2013 U.S. Dist. LEXIS 137370 *13 (E.D. Ky. September 25, 2013); *Gentry v. Hanover Ins. Co.*, 284 F. Supp. 626, 631 (W.D. Ark. 1968); *Welch Transfer & Storage, Inc. v, Oldham*, 663 P.2d 73, 76 (Utah 1983) ("Where fulfillment of a contract is made to depend upon the act or consent of a third person over whom neither party has any control, the contract cannot be enforced unless the act if performed or the consent given.").

f. The alleged agreement to novate, which is alleged to occur when Killough felt "ready "was indefinite and, thus, enforceable. *Pearson's Pharm., Inc. v. Express Scripts, Inc.*, 3:06-CV-73-WKW [WO], 2009 U.S. Dist. LEXIS 100915, at *40-41 (M.D. Ala. Oct. 29, 2009), *aff'd*, 378 Fed. App'x 934 (11th Cir. 2010) (an "illusory promise" means "words in promissory form that promise nothing," and such a promise is "not a promise at all and cannot act as consideration."); "A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance, renders his obligation to perform too indefinite for legal enforcement." *Smith v. Chickamauga Cedar Co.*, 263 Ala, 245, 248-249, 82 So. 2d 200, 202 (1955); *see also White Sands Group v. PRS II*, 998 So. 2d 1042, 1051 (Ala. 2008) ("'In particular, a reservation in either party of a future unbridled *right to determine the nature of the performance* . . . has often caused a promise to be too indefinite for enforcement.") (quoting Williston on Contracts §4.21. at 644 (4th ed. 2007)) (emphasis in original); *ANZ Advanced Techs v. Bush Hog*,, 09-00228-KD-N, 2009 U.S. Dist. LEXIS 97246 *21(S.D. Ala. September 29, 2009), *magistrate recommendation affirmed*, 09-00228-KD-N, 2009 U.S. Dist. LEXIS 97517 (S.D. Ala. October 20, 2009) ("The *White Sands* court also reiterated the well-established principal that `[a] reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement.") (quoting *White Sands* at 1051) (quoting *Smith v. Chickamauga Cedar Co.*, at 202)).

g. Any agreement to novate the contracts in the future is an unenforceable agreement where the terms of the future agreement are not definite and certain. *Drummond Co. v. Walter Indus.*, 962 So. 2d 753, 779 (Ala. 2006) ("[A] contract to enter into a future contract must be definite and certain in all of its terms and conditions so that the court can ascertain what the parties have agreed upon.").

2. At the time APL terminated Killough's employment, TCS did not have the required security clearance approvals and business structure in place to service the contracts APL was allegedly obligated to novate to TCS.

3. TCS needed to be an approved supplier of the prime contractor before a contract could be novated to TCS. At the time APL terminated Killough's employment, TCS was not an approved supplier for Boeing and for Teledyne Brown and has not, to date, become an approved supplier for either. Further, at the time APL terminated Killough's employment, APL did not know that TCS had recently become an approved supplier of Northrop Grumman on August 10, 2015.

4. To the extent that an oral contract between APL and Plaintiffs existed concerning the giving of contracts, which APL specifically denies, Plaintiffs' breach of oral contract claim is barred by the Statute of Frauds, and the contract is unenforceable because there was no reasonable possibility the agreement could be performed within one year from the making of the alleged agreement.

5 Assuming there was an agreement to novate the contracts, which APL denies, Killough did not perform under the agreement.

6. Plaintiff Killough's breach of contract claim is barred, and APL owes Killough nothing due to Killough's prior material breach of the confidentiality provision in his employment contract with APL by breaching his duty of good faith and loyalty by engaging in self-dealing with APL's clients to the detrimental of APL and to the benefit of Plaintiffs. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1343 (Ala. 1987); RESTATEMENT (SECOND) OF CONTRACTS, CH. 10, INTRO. n. (1981); *Denver-Albuquerque Motor Transport, Inc. v. Green*, 331 So. 2d 719, 722 (Ala. Civ. App. 1976); *Smith v. Clark*, 341 So. 2d 720, 721 (Ala. 1977); *Gray v. Reynolds*, 553 So. 2d 79, 82 (Ala. 1989) (a court should not enforce a contract when the party seeking enforcement failed to perform his part of the agreement).

7. To the extent that an oral contract to novate contracts exists, which APL specifically denies, a breach of such contract fails. An oral contract is unenforceable because the employment agreement between APL and Killough from 2010-2014 prohibits amendments or modification to employment agreement that are not in writing and executed by all Parties to the agreement.

8. To the extent that an oral contract between APL and Killough existed concerning the novation or transferring of the contracts, which APL specifically denies, TCS has no standing to enforce the contract because APL and Killough did not intend TCS to receive a direct benefit enforceable in court. TCS is not a beneficiary to the alleged contract, TCS is not a party to the alleged contract between APL and Killough, and TCS is not a party or beneficiary to the contract between APL and the prime contractors.

**COUNT V: QUANTUM MERUIT CLAIM RELATED TO NET PROFITS IN 2015.**

1. Plaintiff had no expectation of net profits in 2015. His employment had been terminated and upon rehire he had refused to enter into another agreement to pay him profits. "In order to succeed on a claim based on a theory of quantum meruit, the plaintiff must show that it had a reasonable expectation of compensation for its services." *Mantiply v. Mantiply*, 951 So. 2d 638, 656 (Ala. 2006).

2. Plaintiff Killough is barred from asserting a quantum meruit claim because he approaches this Court with unclean hands, namely the breach of his duty of loyalty; misappropriation of trade secrets and proprietary information; and breach of the confidentiality provision of his employment agreement.

3. The alleged services performed by Killough for which APL allegedly failed to fairly, reasonably, or fully compensate him had no value to APL and did not benefit APL.

4. Killough's claim of the existence of a contract between Killough and APL to support his claim for profits in 2015, which APL denies, precludes Killough's quantum meruit claim. The existence of an express contract for the services at issue generally precludes a plaintiff from recovering under a theory of quantum meruit. *See Carroll v. LFC Def. Contracting, Inc.*, 24 So. 3d 448, 458 (Ala. Civ. App. 2009) (citation omitted).

5. Killough cannot rely on equitable claims of quantum meruit to renegotiate the terms of his salary or the agreement he alleges existed, which APL denies.

6. APL compensated Killough at a salary it offered him and he accepted, and the agreed salary was to compensate Killough fully for all services he provided to APL as an employee of APL. APL is unaware of services Killough provided to APL for which his agreed salary did not fully compensate him. In fact, Killough's compensation was similar to other APL employees with the same or similar job responsibilities and duties. No other APL employee with the same or similar job responsibilities and duties was paid profits on the projects they managed.

7. Killough did not have a reasonable expectation that he would receive additional compensation above his agreed upon salary for his services provided to APL as an APL employee. *See CIT Group/Equipment Fin., Inc. v. Roberts*, 885 So. 2d. 185, 190 (Ala. Civ. App. 2003) (subjective expectation of compensation must be reasonable).

**ALL POINTS LOGISTICS, LLC'S CLAIMS**

**COUNT I FEDERAL DEFENSE OF TRADE SECRETS ACT ("DTSA") 18 U.S.C. § 1836(B)(1)**

**COUNT II ALABAMA TRADE SECRETS ACT ("ATSA") ALA. CODE § 8-27-3.**

1. APL possessed and lawfully owned trade secrets, which include, but are not limited to, APL's labor rates, overhead rates, pricing, and other competitive information, all of which represent valuable confidential and proprietary financial and business information possessed by APL that were used and are used by APL in connection with bidding for federal contracts that impacts interstate commerce. *See* 18 U.S.C. § 1839(3).

2. Each of APL's trade secrets derive independent economic value from not being generally known to or readily accessible by other persons who could obtain significant economic value from its disclosure or use. *See* 18 U.S.C. § 1839(3).

3. APL took reasonable steps to keep its trade secrets secret and confidential. Such steps include, but are not limited to, APL's implementation of its employee handbook, execution of Killough's employment agreement, training its employees on confidentiality, limiting access of trade secrets to certain employees, and designating trade secrets as confidential and proprietary.

4. Killough had access to APL's trade secrets. During his employment with APL and after his employment ended, Killough had a duty to maintain the secrecy of APL's trade secret information.

5. Killough transferred intentionally to his TCS laptop, without APL's implied or expressed consent or knowledge, APL's documents that included many marked confidential and/or proprietary containing trade secrets and APL's proprietary and confidential information. Killough failed to return APL's information upon his separation from APL's employment. (ATSA)

6. Killough's transfer of APL's trade secret information to his TCS laptop was unauthorized and made by improper means. (ATSA).

7. APL exercised reasonable diligence to protect its trade secrets by requiring Killough to return all of its property upon termination of his employment. APL had no reason to know Killough misappropriated its trade secrets and did not learn of Killough's misappropriation of its trade secrets until January 2019 during discovery in this lawsuit.

8. Killough and TCS used and disclosed APL's trade secrets to assist in obtaining the Northrop Grumman contract to APL's competitive detriment. For instance, in Killough's last month with APL, Northrop and Killough reached an agreement that TCS could perform for Northrop the same work Killough performed for Northrop as an APL employee. Killough then submitted proposed labor rates to Northrop on behalf of TCS that were identical to APL's rates. Northrop used the rates to estimate a ceiling value for the contract it ultimately awarded to TCS. Then, the labor rates in TCS's January 2016 contract with Northrop were exactly 35% less than APL's 2016 labor rate for principal engineer, which is not likely a coincidence.

9. Killough's appropriation, use, and disclosure of APL's trade secrets constitutes a breach of confidence reposed in Killough by APL.

10. Killough and TCS knew or should have known that APL's information that Killough transferred to his laptop and later used was comprised of APL's trade secrets, the use and disclosure of which was unauthorized by APL. Killough's use and disclosure of APL's trade secrets constitutes a breach of confidence APL reposed in him, and Killough's appropriation of the trade secrets was unauthorized and made by improper means. (ATSA)

11. APL was financial harmed by Killough's misappropriation and Killough's and TCS's use of APL's trade secrets, and proprietary and confidential information; and Killough and TCS benefited from their misappropriation. Damages available under the DTSA and ATSA are for actual loss caused by the misappropriation of the trade secret or for any unjust enrichment (including profits and other benefits conferred on either of them including the benefit of the resources APL expended to develop the labor rates and other information Killough and TCS used) caused by the misappropriation of the trade secret or, in lieu of those damages, the imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret. 18 USCS § 1836 and Ala. Code. § 8-27-4(a).

12. Killough's and TCS' actions were taken intentionally, maliciously, and with intent to injure APL, thereby entitling APL to exemplary damages.

13. APL has been required to retain the services of counsel to pursue this action, thereby entitling APL to recover its reasonable costs and attorneys' fees.

**APL'S COUNT V BREACH OF FIDUCIARY DUTY** AND DUTY OF LOYALTY (*based on Killough's alleged attempts to usurp APL's business for TCS while still employed by APL*.)

1. Killough had a fiduciary duty and a duty of loyalty to APL while employed by APL. While an employee, Killough was APL's agent for actions that fell within the scope of his employment. *See Potts v. BE & K Const. Co*., 604 So. 2d 398, 400 (Ala. 1992). As an agent, Killough had a "duty to act, in all circumstances, with due regard for the interests of his principal and to act with

the utmost good faith and loyalty,'" *Systrends, Inc. v. Group 8760, LLC*, 959 So. 2d 1052, 1078 (Ala. 2006) (quoting *Allied Supply Co. v. Brown*, 585 So. 2d 33, 37 (Ala. 1991)). Under Alabama law, an employee "while engaged in the service of his [employer], has no right to do any act which may injure his trade, or undermine his business . . . ." *Perfection Mattress & Spring Co. v. Dupree*, 113 So. 74, 78 (Ala. 1927) (citation omitted). Further, the duty of loyalty is part of the fiduciary duty. *See M5Mgmt. Servs., Inc. v. Yanac*, 428 F. Supp. 3d 1282, 1293-94 (N.D. Ala. 2019) (noting that that the plaintiffs assert a breach of fiduciary duty claim and addressing the duty of loyalty as part of that claim). Lastly, "Implicit in [an agent's fiduciary duty] is an obligation not to subvert the principal's business by luring away customers or employees of the principal, or to otherwise act in any manner adverse to the principal's interest." *Allied Supply Co.*, 585 So. 2d at 37 (citation omitted).

2. Killough breached his fiduciary duty and duty of loyalty trying to, and successfully luring, Northrop's business away from APL. By way of example only, while employed by APL and while APL was compensating Killough, Killough: (1) contacted Northrop about TCS obtaining a facility security clearance and becoming an approved supplier; (2) applied for a facility security clearance for TCS; (3) applied for TCS to become an approved supplier of Northrop Grumman; (4) emailed a Northrop employee from his TCS email account asking for job descriptions for openings at Northrop; (5) sent Northrop an email from his personal email address asking NG to stop using his APL email address and to send him job descriptions for NG vacancies on the APL's purchase order with Northrop; (6) sent Northrop a draft statement of work using his TCS email address; and (7) entered into an agreement with Northrop regarding the scope of work, which mirrored the work Killough did for Northrop as an APL employee.

3. Killough also breached his fiduciary duty and duty of loyalty trying to lure Teledyne Brown's business away from APL.[4] For instance, while employed by APL and while APL was compensating Killough, began soliciting APL's customer, Teledyne Brown Engineering (TBE), on behalf of TCS to discuss a

[4] The Court has already dismissed any claims APL has relating to any breach of fiduciary duty with respect to the Boeing or TBE contracts, so based on that ruling, APL is not asserting any independent claims against Killough and TCS for breach of fiduciary duty with respect to the Boeing or TBE contracts.

new opportunity and APL's contract with TBE. On June 23, 2015, Killough and another APL employee, wearing APL bandages and while being compensated by APL, met with TBE to discuss a business opportunity for TCS that was similar to the work APL was performing for TBE. During the meeting, Killough provided TBE with a PowerPoint presentation representing APL employees as TCS employees, which APL considers proprietary. TBE had ethical concerns because Killough represented APL's work as TCS's work. Killough was APL's point of contact and wore an APL badge, but was representing his own company and acting on behalf of his own company for personal gain at the expense of APL.

4. Similarly, Killough breached his fiduciary duty and duty of loyalty trying to lure Boeing's business away from APL. Specifically, while employed by APL and while APL was compensating Killough, Killough began soliciting Boeing on behalf of TCS and not on behalf of APL. As early as January 2015 and up through May 2015, Killough requested meetings with Boeing to discuss open positions and the possibility of TCS, not APL, providing engineers to fill the open positions; Killough sent Boeing resumes for candidates as an unsolicited attempt to obtain on behalf of TCS work that was within the scope of APL's contract with Boeing. One of Boeing's representatives found Killough's actions unsettling because he was soliciting business for his own company as an APL employee.

5. Killough's actions were to lure Northrop's, TBE and Boeing's business away from APL, and not simply to secure employment or prepare to compete with APL after his employment ended.

6. APL had no reason to know Killough breached his fiduciary duty and duty of loyalty, and did not learn of Killough's breach of his fiduciary duty and duty of loyalty until on or after April 2019, during discovery in this lawsuit. APL never agreed to allow Killough while an APL employee to form TCS to compete against APL and to obtain government contracts from APL's customers that APL was performing or could have performed.

7. APL suffered damages as a result of Killough's breach of his fiduciary duty and duty of loyalty. APL's damages are based on Killough's actions soliciting business from APL's customer Northrop and on Killough and TCS

obtaining business APL could have performed. APL's damages also include the compensation APL paid to Killough and any as an APL employee while Killough was attempting to divert and/or diverted business from APL's customers Northrop, TBE, and Boeing to TCS, while Killough used other APL resources to attempt to divert and/or diverted business from APL to TCS, including the use of other employees to accompany Killough to the TBE meeting or those who otherwise assisted Killough. These damages are sufficiently alleged in APL's counterclaim to provide adequate notice to Killough.

8. Killough's actions were in bad faith and were taken intentionally, maliciously, and with intent to injure and/or oppress APL, thereby entitling APL to punitive damages.

**APL'S COUNT VI BREACH OF CONTRACT** (*Killough breached confidentiality provisions of his employment agreement*.)

1. APL and Killough negotiated an employment agreement that Phil Monkress and Killough both signed in June 2010, and Killough accepted and assented to the terms of the agreement.

2. The employment agreement included specific confidentiality provisions that, among other things, (a) define APL's confidential, sensitive, and proprietary information, including trade secrets, (b) prohibited Killough from removing such information from APL's premises, (c) required that Killough return of all such information prior to or at the termination of his employment, and (d) set out remedies should Killough breach those provisions. Per the terms of the employment agreement, even after the employment agreement ended Killough was still obligated, as all other employees, to protect APL's confidential and proprietary information, and return such information to APL upon the termination of his employment with APL.

3. Killough breached the employment agreement by (a) removing from APL's laptop and transferring to a TCS laptop, without APL's authorization, APL's proprietary, sensitive, and confidential information as defined in the employment agreement, (b) by not returning this information upon the termination of his employment with APL, (c) by not returning the information

after the termination of his employment, (d) disclosing APL's information to his attorney in this litigation and by attempt to use it against APL's interests in this lawsuit, (e) using APL's proprietary and confidential labor rates to bid on the contract with Northrop , and (f) using APL's proprietary, confidential information in a presentation to TBE, on behalf of TCS, when attempting to usurp APL's business with its customer Teledyne Brown.

4. Killough did not cure his breach of the employment agreement by returning all of APL's proprietary, sensitive, and confidential information that he took and failed to return upon his termination of employment despite many demands by APL for its return. Killough only returned all the information after APL filed its counterclaim.

5. APL performed under the employment agreement.

6. As a result of Killough's breach of the employment agreement, APL has suffered damages including damages based on Killough's use of APL's proprietary, sensitive, and confidential information to TCS's competitive advantage with Northrop, and against APL in this litigation. APL also incurred damages through the expenditure of resources, including attorneys' fees and expenses, before having to prepare and filing its counterclaim and after APL filed its counterclaims, seeking the return of its proprietary, sensitive, and confidential information. APL is also entitled to its fees and costs as the prevailing party as provided by the employment agreement.

7. APL referenced attorneys' fees in its amended Rule 26 disclosures, its counterclaim, and its motion for summary judgment. APL properly objected to Killough's discovery requests to which Killough did not challenge. Killough is on notice of APL's damages including its fees and costs, and will not be prejudiced. APL further asserts this is a matter of law for the Court to decide after the prevailing party is determined.

**APL'S CLAIM FOR ATTORNEYS' FEES AND COSTS**

**1.** APL is entitled to recover any fees or costs incurred in any successful dispute under the Employment Agreement. Specifically, if APL prevails on Killough's breach of contract claim relating to the calculation of his net profits under the

Employment Agreement, APL is entitled to recover any attorneys' fees incurred in successfully defending that claim.

6. Discovery and Other Pretrial Procedures.

(a) Pretrial Discovery.

Unless otherwise ordered, the parties are given leave to proceed with the deposition of APL's expert, David Garcia, prior to trial.

(b) Pending Motions.

There are no pending motions.

(c) Motions In Limine. Motions in limine must be filed at least one week in advance of the scheduled trial date and shall be accompanied by supporting memoranda. As to each matter counsel seeks to exclude, counsel shall indicate whether the exclusion is "opposed" or "unopposed" by counsel for the other side. Parties are encouraged to resolve evidentiary issues by stipulation whenever possible.

7. Trial Date.

(a) This case is set for Jury trial on August 30, 2021.

(b) The trial of this matter is expected to last 7 days.

8. Exhibit A. Except for the provisions in Paragraph 5 related to the essential elements of claims and defenses, special evidentiary issues, and trial briefs,

the parties are to comply fully with each provision contained in Exhibit A – Standard Pretrial Procedures which is incorporated into this Order by reference as if fully set forth verbatim herein.

It is **ORDERED** that the above provisions be binding on all parties unless modified by further order for good cause shown.

**DONE** the 27th day of July, 2021.

**ABDUL K. KALLON**
UNITED STATES DISTRICT JUDGE

# EXHIBIT A -- STANDARD PRETRIAL PROCEDURES

**1.** **Damages**. No later than thirty (30) calendar days prior to the date set for trial, the parties shall file and serve a list itemizing all damages and equitable relief being claimed or sought; such list shall show the amount requested and, where applicable, the method and basis of computation.

**2.** **Witnesses – Exchange of Lists**.

(a) **Expert Witnesses**. No later than thirty (30) calendar days prior to the date set for trial, the parties shall file and serve a list stating the names and addresses of all expert witnesses who have previously been identified in accordance with Fed. R. Civ. P. 26(a)(2) and whose testimony may be offered at trial.

(b) **Other Witnesses**. No later than thirty (30) calendar days prior to the date set for trial, the parties shall file and serve a list stating the names and addresses of all witnesses (other than expert witnesses) whose testimony they may offer at trial.

(c) **Contents of Lists**. The parties shall appropriately indicate on their witness lists: (1) the "primary" witnesses – those witnesses whose testimony the party expects to offer; (2) the "optional" witnesses – those witnesses whose testimony the party expects will not be needed, but the party has listed to preserve its right to offer such testimony should the need arise in light of developments at trial, and (3) those witnesses the party expects to present by means of depositions with a listing of the specific pages from the depositions to be used.

Unless specifically agreed by the parties in writing or allowed by the court for good cause shown, the parties shall be precluded from offering substantive evidence through any witness not included on the party's witness list. The listing of a witness does not commit the party to have such witness available at trial or to call such witness to testify, but it does preclude the party from objecting to the presentation of such witness's testimony by another party.

As to any witnesses shown on such list to be presented by deposition, within ten (10) business days after the filing of such list, an opposing party may serve a list of additional pages of the deposition to be used, and may serve and file a list disclosing any objections to the use of such deposition testimony under Rule 32 or

Rule 26(a)(3)(B). Any objections to deposition testimony should be accompanied by excerpts from the depositions including the testimony to which the objection relates. Objections not made within such time, other than objections under Fed. R. Evid. 402 and 403, shall be deemed waived, unless such failure to timely object is excused by the court for good cause shown.

**3. Exhibits**.

(a) **Exchange of lists**. No later than thirty (30) calendar days prior to the date set for trial, the parties shall file and serve a list providing an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those exhibits that the party expects to offer and those exhibits that the party may offer if the need arises. Unless specifically agreed by the parties in writing or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified.

Courtesy copies of Exhibit Lists should be submitted to the Clerk's office (for delivery to the judge's chambers), as well as emailed to the chamber's email address at *kallon_chambers@alnd.uscourts.gov*, in Word or WordPerfect format.

(b) **Objections and Stipulations.** Upon receipt of Exhibit Lists, the parties shall immediately meet and confer regarding any objections to the listed exhibits. Most objections should be cured by discussion, and the parties should stipulate as to the admissibility of as many exhibits as possible.

As to any document or other exhibit on which agreement cannot be reached, including summaries of other evidence shown on such list, no later than ten (10) business days before trial, an opposing party shall serve and file a list disclosing any objection, together with the grounds therefor, that may be made as to the admissibility of exhibits identified on such list. Objections not so disclosed, other than objections under Fed. R. Evid. 402 and 403, are waived unless such failure to timely object is excused by the court for good cause shown. The court generally rules on objections to exhibits outside the presence of the jury and will do so prior to opening statements, to the extent possible.

(c) **Counsel requiring authentication** of an opponent's exhibit must notify offering counsel in writing within ten (10) business days after the

exhibit is identified and made available for examination. Failure to do so is an admission of authenticity.

(d) **Marking**. Each party that anticipates offering more than five (5) exhibits as substantive evidence shall premark such exhibits in advance of trial, using exhibit labels and lists available from the Clerk of Court. The court will provide up to 100 labels; if any party needs more labels, that party must use labels of the same type as those supplied by the court. Counsel must contact the courtroom deputy for the appropriate exhibit list form for use at trial. The court urges counsel to be judicious in determining which documents actually are relevant to necessary elements of the case.

(e) **Examination by Opposing Party**. Except where beyond the party's control or otherwise impractical (*e.g.*, records from an independent third-party being obtained by subpoena), each party shall make such exhibits available for inspection and copying. The presentation of evidence at trial shall not ordinarily be interrupted for opposing counsel to examine a document that has been identified and was made available for inspection.

(f) **Court's Copies**. In addition to the premarked trial exhibits mentioned above, the court requests for the bench an exhibit notebook of anticipated trial exhibits (to the extent possible and practical). The notebook should include a copy of the Exhibit List referenced in "(d)" above.

(g) **Special and Visual Exhibits**. Should either side desire to present exhibits via projection onto a screen or monitor or by enlargement, or other special means to present the exhibit to the jury, such exhibits will be limited to the twenty (20) most critical documents to that side's case. Counsel shall advise opposing counsel at the same time as submission of the Exhibit List which documents it plans to so present. Hard copies of such exhibits must first be identified before projection. Counsel are responsible for providing whatever technology may be necessary for such projection.

**THE PARTIES ARE REMINDED THAT THEY WILL NOT BE ALLOWED TO USE AT TRIAL ANY WITNESS OR EXHIBIT NOT DISCLOSED IN ACCORDANCE WITH FED. R. CIV. P. 26(a) OR 26(e), UNLESS EXTREMELY GOOD CAUSE IS SHOWN AND THE OFFERING PARTY**

**CAN SHOW THAT ITS FAILURE TO DISCLOSE WAS HARMLESS.** ***See*** **Fed. R. Civ. P. 37(c)(1).**

**4. Use of Depositions at Trial**.

(a) The court will accept the parties' written agreement to use a deposition at trial even though the witness is available. In the absence of such an agreement, parties must comply with Fed R. Civ. P. 32.

(b) Before trial, counsel must provide the courtroom deputy with a copy of all depositions to be used as exhibits at trial.

(c) To the extent possible, counsel will designate the portion of any deposition that counsel anticipates reading by citing pages and lines in the final witness list. Objections, if any, to those portions (citing pages and lines) with supporting authority must be filed at least five (5) business days before trial.

(d) Use of videotape depositions is permitted and the parties must make good faith efforts to agree on admissibility or edit the videotape to resolve objections.

(e) In a non-jury trial, for any deposition offered as a trial exhibit, counsel shall attach to the front of the exhibit a summary of what each party intends to prove by the deposition testimony, with line and page citations, and include an appropriate concordance of the deposition pages offered.

**5. Trial Submissions to Court**.

No later than ten (10) business days prior to the scheduled trial date, each party may submit the following to the Clerk's office (for delivery to the judge's chambers):

(a) A listing of what each party understands to be the essential elements of each of Plaintiff's claim(s) (separate listing for each claim).

(b) A listing of what each party understands to be the essential elements of each Defendant's defense(s) (separate listing for each defense).

(c) A listing of what each party understands to be the essential elements of

each Defendant's counterclaim(s), if any (separate listing for each counterclaim).

(d) A listing of what each party understands to be the essential elements of each defense to any Defendant's counterclaim, if any (separate listing for each defense).

(e) A listing of any special evidentiary or other anticipated legal problems with citation to legal authority that supports the party's position.

Parties may, if they desire, file trial briefs. Any such briefs must be filed at least ten (10) business days prior to trial. Opposing parties may respond to such trial briefs at least five (5) business days prior to trial. The briefs, if any, should not exceed ten (10) typed pages. Additionally, three-hole punched and bound courtesy copies of all briefs must be submitted to the Clerk's office for delivery to the judge's chambers, as well as emailed to the chamber's email address at *kallon_chambers@alnd.uscourts.gov*, in Word or WordPerfect format.

No later than the Friday before the scheduled trial date, each party will submit the following to the Clerk's office (for delivery to the judge's chambers):

(a) Any special questions or topics for voir dire examination of the jury venire.

**6a. *Jury Charges**.

No later than five (5) business days prior to the scheduled trial date, the parties shall file a **single, joint proposed jury charge**, including all necessary instructions, or definitions applicable to the specific issues of the case. The parties need not submit standard generic instructions regarding routine matters, *e.g.*, burden of proof, credibility of witnesses, duty of jurors, etc.

(a) **Each** requested **instruction** must be numbered and presented on a separate sheet of paper with authority cited.

(b) In their joint, proposed jury materials, counsel are to include all necessary instructions or definitions, specifically including: (1) the *prima facie* elements of each cause of action and defense asserted; (2) legal definitions required by the jury; (3) items of damages; and (4) methods of calculation of damages. Counsel are to use the Eleventh Circuit Pattern Jury Instructions, or appropriate state pattern jury

instructions, as modified by case law or statutory amendments, wherever possible. Any deviations must be identified, and accompanied with legal authorities for the proposed deviation.

(c) Even if the parties, in good faith, cannot agree on all instructions, definitions or questions, the parties should nonetheless submit a single, **unified** charge. Each disputed instruction, definition, or question should be set out in bold type, underlined or italics and identified as disputed. Each disputed item should be labeled to show which party is requesting the disputed language. Accompanying each instruction shall be all authority or related materials upon which each party relies. **The parties shall also email the unified charge, in Word or WordPerfect format, to the chamber's email address at *kallon_chambers@alnd.uscourts.gov*.**

**6b. *<u>Trial[Non-Jury]</u>.**

(a) <u>Proposed Facts</u>.

(1) No later than twenty-five (25) calendar days prior to trial, Plaintiff's counsel shall submit to Defendant's counsel a statement setting forth the principle facts proposed to be proved by Plaintiff in support of their claims as to liability and damages. These facts should be set out in short, separately numbered paragraphs.

(2) No later than fifteen (15) calendar days prior to trial, Defendant's counsel shall return the statement of principle facts to Plaintiff's counsel, indicating thereon those factual contentions of the Plaintiff with which they disagree and including any additional facts Defendant proposes to prove.

(3) No later than seven (7) calendar days prior to trial, Plaintiff's counsel shall indicate on the statement of principle facts those additional factual contentions of Defendant with which Plaintiff disagrees and shall file with the court the modified statement of principle facts, serving a copy thereof on opposing counsel. The final product should have all agreed facts, regardless of by whom proposed, collected under one heading and have the respective additional disputed facts proposed by the parties

collected under separate headings. The final product should be submitted to the Clerk's office (for delivery to the judge's chambers), and then emailed to the chamber's email address at *kallon_chambers@alnd.uscourts.gov*, in WordPerfect format.

(4) In stating facts proposed to be proved, counsel shall do so in simple, declarative, consecutively numbered sentences, avoiding "color words," labels, and legal conclusions. In indicating disagreement with a proposed fact, counsel shall do so by deletion or interlineation of particular words and phrases so that the nature of the disagreement will be clear. Objections to the admissibility of a proposed fact (whether as irrelevant or on other grounds) may be made at trial and, without court order, may not be used to avoid indicating agreement or disagreement with the truth of the proposed fact.

(b) Proposed Conclusions of Law.

(1) No later than twenty-five (25) calendar days prior to trial, Plaintiff's counsel shall submit to Defendant's counsel a statement setting forth the principles of law, with citation to authority, that Plaintiff contends are applicable to the case. These principles should be set out in short, separately numbered paragraphs.

(2) No later than fifteen (15) calendar days prior to trial, Defendant's counsel shall return the statement of principles of law, indicating thereon those principles of law of the Plaintiff with which they disagree, and including any additional principles of law on which Defendant relies.

(3) No later than seven (7) calendar days prior to trial, Plaintiff's counsel shall indicate on the statement of principles of law those additional principles of law of Defendant with which Plaintiff disagrees and shall file with the court the modified statement of principles of law, serving a copy thereof on opposing counsel. The final product should have all agreed principles of law, regardless of by whom proposed, collected under one heading and have the respective additional disputed principles proposed by the parties collected under separate headings. The final product should be submitted to the Clerk's office (for delivery to

the judge's chambers), and then emailed to the chamber's email address at *kallon_chambers@alnd.uscourts.gov*, in WordPerfect format.

**7. Court's Expectations**.

(a) The court will expect all parties to be ready for trial as of the trial date set in the Pretrial Order unless a continuance is requested within ten (10) business days after the date on which the court enters the Pretrial Order. Continuances based on inadequate preparation will not be considered favorably.

(b) The court calls to the attention of all parties the various time requirements in the Pretrial Order and Exhibits. The court strictly adheres to these time requirements to avoid last minute requests for rulings.

(c) Any case announced settled after the Pretrial Conference but before the scheduled trial date will be dismissed with prejudice and with costs taxed as paid on the scheduled trial date unless a different stipulated judgment form is submitted on or before the scheduled trial date.