

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY,

CRYOSURGERY, INC.,)
)
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 Plaintiff,)
)
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 vs.)
)
)
 ASHLEY RAINS AND COOL RENEWAL,)
 LLC,)
)
)
 Defendants.)

No. 15-871-BC

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**(REDACTED VERSION) MEMORANDUM AND ORDER: (1) GRANTING
MOTION FOR SUMMARY JUDGMENT ON COUNTS 1 AND 3 OF
COMPLAINT; (2) DENYING SUMMARY JUDGMENT ON DEFENDANTS'
CLAIM FOR ATTORNEYS' FEES UNDER T.C.A. § 47-25-1705; (3) DISMISSING
WITH PREJUDICE COUNTS 4 AND 5 OF THE COMPLAINT AS MOOT; AND
(4) PROVIDING 6/9/17 DEADLINE FOR COUNSEL TO FILE PROPOSED
ORDER ON PROCESS FOR RETURN OF PLAINTIFF'S DOCUMENTS ON
DEFENDANT RAINS' PERSONAL EMAIL ACCOUNT**

This lawsuit was filed by an industry leader in manufacturing, selling and distributing cryogenic surgical products and appliances used by doctors and veterinarians. The lawsuit is filed against a former employee conducting her newly founded business in the same industry as the Plaintiff. The Plaintiff, CryoSurgery, Inc. ("CryoSurgery"), produces and sells Verruca-Freeze, an aerosol-based device that is used to treat certain types of skin lesions. In 2014 and 2015, CryoSurgery made over eight million dollars in combined sales. The Defendants, Ashley Rains and her company Cool Renewal, LLC, sell a similar product as the Plaintiff and made approximately \$200,000 in annual sales in 2015 and 2016.

The Plaintiff seeks recovery from the Defendants for (1) breach of contract under a confidentiality agreement signed by Defendant Rains and (2) for misappropriation of trade secrets pursuant to the Tennessee Uniform Trade Secrets Act (“TUTSA”) against both Defendants.¹ The Plaintiff seeks recovery of compensatory damages, attorneys’ fees and permanent injunctive relief against the Defendants.

The case is set for trial on June 26, 2017.

The case is presently before the Court on the Defendants’ *Motion For Summary Judgment* to dismiss with prejudice the Plaintiff’s Counts 1 and 3 claims of breach of a confidentiality agreement against Defendant Rains and misappropriation of trade secrets under TUTSA against both Defendants. In addition, the Defendants seek a summary judgment on their claim to recover attorneys’ fees pursuant to Tennessee Code Annotated section 47-25-1705 of TUTSA which provides that “If: (1) A claim of misappropriation is made in bad faith, (2) A motion to terminate an injunction is made or resisted in bad faith, or (3) Willful and malicious misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.”

¹ The Plaintiff’s First Amended Complaint And Application For Temporary Injunction and Permanent Injunction also brought a claim for breach of contract for an alleged non-compete and non-solicitation agreement. On February 8, 2016, the Court granted the Defendants’ *Motion to Dismiss* this claim because “Plaintiff’s claims in Count 2 of violation by Defendants of a written or oral noncompete fail as a matter of law. On the face of the pleadings, the written agreements have expired, have been superseded, or have not been exhibited in conformity with Tennessee Civil Procedure Rule 10.03. Plaintiff’s claims of violation of an oral noncompete are barred as a matter of law by the Statute of Frauds.” *Memorandum And Order: (1) Granting Defendants’ Motion To Dismiss Count 2 Of The First Amended Complaint And (2) Entering Rule 54.02 Order*, p. 2 (Feb. 8, 2016).

After considering the summary judgment record, the law and argument of Counsel, it is ORDERED that the *Defendants' Motion For Summary Judgment* is granted in part and denied in part as follows:

- (1) Summary judgment is granted dismissing with prejudice Count 1: Breach of Contract – Confidentiality Provisions and Count 3: Misappropriation of Trade Secrets under TUTSA of the *Plaintiff's First Amended Complaint And Application For Temporary Injunction And Permanent Injunction*; and
- (2) Summary judgment is denied on Defendants' claim to recover attorney's fees pursuant to Tennessee Code Annotated section 47-25-1705.

It is additionally ORDERED that based on the above rulings, the claims for attorneys' fees and injunctive relief in Counts 4 and 5 of the *Plaintiff's First Amended Complaint And Application For Temporary Injunction And Permanent Injunction* are dismissed with prejudice as moot except for a permanent mandatory injunction for Defendant Rains to return certain CryoSurgery information/documents in her possession, contained on her personal email account, which she had preserved for the litigation. It is ORDERED that any such CryoSurgery information/documents shall be returned to the Plaintiff because this information/documents are company property of CryoSurgery. By June 9, 2017 Counsel for each party shall file a proposed order detailing the process and timing by which Defendant Ashley Rains shall turn over any of CryoSurgery's information/documents that are presently contained on Defendant Rains' personal email account.

With respect to attorney's fees incurred in connection with Defendants' various motions to compel discovery, it is ORDERED that those shall not be taxed to the Plaintiff.

As to this Memorandum and Order being placed under seal, the seal shall be removed on June 9, 2017, unless prior to that date an objection is filed specifying the content for redaction and the reason for the redaction. The reason for placing the Memorandum and Order under seal temporarily is that Counsel filed their briefing under seal. The Court's analysis is that there is no confidential information contained herein.

The undisputed facts, reasoning and authorities upon which the above rulings are based are as follows.

Summary Judgment Standard

In *Rye v. Women's Care Ctr. of Memphis, M PLLC*, the Tennessee Supreme Court provided the standard to apply when ruling on motions for summary judgment.

Our overruling of *Hannan* means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means

provided in Tennessee Rule 56, “set forth specific facts” *at the summary judgment stage* “showing that there is a genuine issue for trial.” Tenn. R. Civ. P. 56.06. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial. We turn our attention next to applying these standards in this appeal.

477 S.W.3d 235, 264–65 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452, 195 L. Ed. 2d 265 (2016). This is the standard the Court has applied to the record in this case.

Parties' Positions

Defendants' Position

In support of summary judgment, the Defendants assert that there are insufficient facts of record to demonstrate the Plaintiff's claims of: (1) confidential information and (2) that misappropriation occurred. Neither of these essential elements of the Plaintiff's claims of Count 1: Breach of Contract – Confidentiality Provisions and Count 3: Misappropriation of Trade Secrets under TUTSA have been established, the Defendant asserts.

Plaintiff claims that Defendants misappropriated ALL if [sic] its confidential information, but the only ‘proof’ Plaintiff can offer of such

misappropriation is: (1) that Defendant Rains ‘quickly’ opened her competing business; and (2) that Plaintiff received an anonymous letter whose author indicated that Defendant Rains ‘appeared’ to have Plaintiff’s ‘proprietary’ information. Such is inadequate to establish a genuine issue of material fact regarding the alleged misappropriation and contractual breach. Furthermore, the few similarities between Plaintiff’s business and that of Defendant Cool Renewal (i.e., selling the same product in the same canisters in the same markets) do not by themselves indicate that Defendants have taken Plaintiff’s confidential information. Indeed, much of what Plaintiff claims to be confidential, simply, is not.

Defendants’ Memorandum In Support Of Their Motion For Summary Judgment, p. 2
(Mar. 15, 2017).

With respect to summary judgment on Defendants’ claim to recover attorneys’ fees pursuant to Tennessee Code Annotated section 47-25-1705, the Defendants assert the summary judgment record establishes that the Plaintiff’s claim for misappropriation of trade secrets was made in bad faith.

As a matter of public policy, a plaintiff should not be permitted to use an unfounded claim under the TUTSA as a way to keep a former employee from competing with the plaintiff in the absence of an enforceable non-compete agreement, and yet, this is precisely what the Plaintiff has done in this case. Plaintiff brought an unfounded lawsuit against Defendants in order to conduct a “fishing expedition” to determine whether Defendants misappropriated information from CryoSurgery. Such expedition uncovered no unlawful conduct on the part of Defendants, and left Defendants with a tremendous amount of legal fees. Defendants should not be forced to cover the cost of defense of this lawsuit, where the record clearly shows that the lawsuit was unfounded and unsupported by evidence as of the date of its filing and as of the date of the filing of this Motion. As such, Defendants respectfully request that they be awarded their attorneys’ fees and related costs incurred in the defense of this lawsuit.

Defendants’ Memorandum In Support Of Their Motion For Summary Judgment, p. 21
(Mar. 15, 2017).

Plaintiff's Position

In opposition to summary judgment, the Plaintiff did not respond to the Defendants' Statements of Undisputed Material Fact. The Plaintiff did file a Memorandum in opposition to the Defendants' motion for summary judgment. In that Memorandum the Plaintiff argues that the summary judgment record "reveal[s] disputes of material fact about the misappropriation and misuse of confidential information in several areas listed by the Plaintiff in discovery" and lists the following alleged disputed material facts.

- **Anonymous letter.** CryoSurgery received a letter from a "senior manager" with obvious knowledge of both CryoSurgery and Cool Renewal who stated that Defendants "appeared to have proprietary information about operations. [CryoSurgery's] costs, product suppliers, vendors, quality control, and technical know-how that could only be known as an insider" and "copied your product line using most everything that you have developed over the years." [Letter (Exhibit 1-A).]
- **Quality Control Manual.** CryoSurgery went to the time and expense of hiring an expert to create its own Quality Control Manual. [McDow Declaration at ¶¶9-9.] Cool Renewal did not produce a copy of its control manual, which was created by Rains. [Moss Depo at 57 (Exhibit 4).] A copy of the Cool Renewal manual produced by a third-party shows it to be highly similar to CryoSurgery's manual. [*Compare* Moss Depo Ex. 1 *with* Moss Depo Ex. 11 (Exhibit 4).] CryoSurgery has not had an opportunity to discuss this manual with Rains on the record.
- **Rains' emails.** Email messages produced by Rains demonstrate that she maintained CryoSurgery's confidential information on her personal email, including but not limited to extensive lists of CryoSurgery's customers and contacts. [D00058-60 (attached as Exhibit 2-A). Moreover, Rains revealed CryoSurgery's confidential pricing strategy information to distributor Norm Jorgensen. [D00770-780 (attached as *Exhibit 2-A*).
- **Distributor information, including distributors that are compatible with CryoSurgery's business model.** Rains has an extensive list of distributor contacts that was taken from CryoSurgery. [D00058-60

(attached as Exhibit 2-A.)] Defendants claim to have only two customers, [MSJ Brief at 7], but a review of Cool Renewal's website indicates that Cool Renewal sells products to at least five (5) distributors that are or were purchasing competing CryoSurgery products. [See Cool Renewal's website (attached as Exhibit 2-C); Plf.'s 2nd Suppl. Resp. to Interrogatory Nos. 3, 5 (attached as Exhibit 3).]

- **Pricing and sales quantity information relating to particular customers.** Rains received proprietary product information, business plans, marketing plans, product information, supplier information, distributor information, pricing strategies, and pricing schedules. [See McDow Declaration at ¶ 13.] Moreover, her emails reveal CryoSurgery's pricing strategies and approaches. [See, e.g., D00770-780 (attached as *Exhibit 2-A*).

Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, pp. 9-10 (April 17, 2017).

In addition to the foregoing, on the Plaintiff's claim for breach of the confidentiality agreement, the Plaintiff argues that "the only remaining questions are whether Rains disclosed such information to a third party, as well as the damages arising therefrom" and relying on the above listed items of alleged disputed material facts states that:

[T]here is evidence that Rains disclosed, published, and/or transferred confidential information of CryoSurgery – including but not limited to the Quality Control Manual and the pricing strategy information shared with Norm Jorgensen – and the damages are apparent in the lost sales of CryoSurgery to the distributors that Defendants are now using. Accordingly, genuine issues of material fact exist, and summary judgment is not warranted.

Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, p. 11 (April 17, 2017).

As it relates to its TUTSA claim for misappropriation of trade secrets, the Plaintiff argues, citing to the case of *Cardinal Health 414, Inc. v. Adams*, 582 F. Supp. 2d 967

(M.D. Tenn. 2008), that “the types of allegations made in support of Defendants’ Motion on the TUTSA claims are not sufficient to merit summary judgment at this stage.”

Here, Defendants make the same allegations that customer/distributor lists were not trade secrets, pricing information is not a trade secret, and quality manuals are not trade secrets. But as shown above, the scope of the CryoSurgery confidential and trade secret information taken and/or used by Rains is not necessarily limited to customer lists and pricing information, as it includes confidential business strategy information and confidential Quality Control Manual. Accordingly, genuine issues of material fact exist, and summary judgment is not warranted.

Plaintiff’s Response In Opposition To Defendants’ Motion For Summary Judgment, pp. 11-12 (April 17, 2017).

Lastly, the Plaintiff asserts that it needs further discovery on recently produced documents pursuant to Rule 56.06 of the Tennessee Rules of Civil Procedure:

Plaintiff has not been able to examine a corporate representative of Defendant Cool Renewal regarding any of the documentary evidence or discovery responses in this case. Plaintiff has examined Defendant Ashley Rains, Cool Renewal’s proprietor, but important documents in this case were not yet available at the time of that deposition because (1) they were produced by Defendants after that deposition was completed, or (2) they were later produced by third parties, having not been produced by Defendants. Declaration of Plaintiff’s Counsel, Britton D. McClung (attached as Exhibit 2) at ¶¶3-5.

Because the bulk of Defendants’ document production was made after the deposition of Defendant Rains and Plaintiff has not been able to depose a Cool Renewal representative. Plaintiff has not yet had an opportunity to discuss such instances of apparent disclosure with either Defendant.

Plaintiff’s Response In Opposition To Defendants’ Motion For Summary Judgment, p. 14 (April 17, 2017).

Defendants' Reply

In reply, the Defendants deny that there are disputed issues of fact and address each of the foregoing matters as follows.

- **Anonymous letter:** “[T]he letter is not admissible evidence upon which the Plaintiff can rely to avoid summary judgment because Plaintiff lacks any foundation for the letter. *Byrd v. Hall*, 847 S.W.2d 208, 216 (Tenn. 1993) (stating that summary judgment cannot be denied based on inadmissible evidence).” *Defendants' Reply To Plaintiff's Response To Defendants' Motion For Summary Judgment*, p. 2 (April 19, 2017). “The letter does not state that Defendant Rains was in any way *using* any such alleged proprietary information. Thus, the only factual dispute that could potentially arise from the anonymous letter is *whether* Defendant Rains did, in fact, have proprietary information belonging to Plaintiff. Throughout the course of this litigation, Plaintiff has engaged in discovery with respect to the allegations set forth in the letter and Defendants have disclosed and produced any information belonging to Plaintiff in their possession.” *Id.* (emphasis in original).

- **Defendant Rains' Emails**
 1. **Customer Information** – The Defendants do not dispute that Defendant Rains maintained customer and contact information on her personal email address after she resigned, because “it is undisputed that Plaintiff’s employees, including Dr. Ronald McDow – owner of Cryosurgery – regularly used their personal email addresses to conduct company business” and “Cryosurgery did *not* ask her to return company property or documents, and Plaintiff customarily had *not* done so for other departing employees.” *Defendants' Reply To Plaintiff's Response To Defendants' Motion For Summary Judgment*, p. 3 (April 19, 2017). Additionally the Defendants argued that “[t]here is no evidence that Defendants have used these customer lists in any way” and that the Defendants only sell to two customers who then sell their product to an end user. The fact that one of the Defendants’ customers is also a customer of the Plaintiff does not prove misappropriation and is not confidential information because “Plaintiff’s posting on its website of the identity of some of its most significant customers not only renders such information to be public information but reveals that the protection of the identify of its customers is of no import to Plaintiff.” *Id.*

 2. **Audit Information** – In the alleged emails where the Plaintiff claims the Defendants shared confidential information regarding CryoSurgery’s audit

“Defendant Rains informs one of her customers, Norm Jorgensen, who is *not* a customer of Cryosurgery, that Ms. Rains heard a ‘rumor’ that Plaintiff was having issues passing its audit. This email is dated November 5, 2014 and pertains to *information/events occurring well after Defendant Rains’ resignation*. The information was not learned by Defendant Rains during her employment with Plaintiff, and therefore, is not covered by an confidentiality agreement, nor does such ‘rumor’ come close to qualifying as a protectable trade secret under TUTSA.” *Defendants’ Reply To Plaintiff’s Response To Defendants’ Motion For Summary Judgment*, pp. 3-4 (April 19, 2017) (emphasis in original).

3. Strategic Pricing Information – In disputing this, the Defendants quote from the relied upon emails by the Plaintiff that the Plaintiff contends “revealed Cryosurgery’s confidential pricing strategy information to distributor Norm Jorgensen. The Defendants argue that the context and statements in the emails in no way “provide sensitive or confidential pricing strategy.” *Defendants’ Reply To Plaintiff’s Response To Defendants’ Motion For Summary Judgment*, pp. 4-5 (April 19, 2017).
- **Pricing and Sales Quantity Information:** In response to the Plaintiff’s claims on this issue, the Defendants argue that “merely alleging that Defendant Rains received confidential information during her employment with Plaintiff without any evidence to create a factual dispute as to whether Defendants misused, misappropriated, disclosed or wrongfully took any such information” is insufficient to overcome summary judgment. With regard to the *Cardinal Health 414, Inc. v. Adams*, 582 F. Supp. 2d 967 (M.D. Tenn. 2008) case, the Defendants argue that it is factually distinguishable from this case because one of the defendants in that case where the court denied summary judgment had access to his former manager’s email for over eighteen months after he resigned and was observed passing on confidential information to a co-defendant. These facts, the Defendants argue, are completely different than the summary judgment record in this case.
 - **Quality Control Manual:** With regard to the claims relating to the Quality Control Manual, the Defendants argue that (1) any similarities between CryoSurgery’s Quality Control Manual and the Defendants is expected because these documents are highly regulated by government regulations and require certain information and (2) any similarities in the Quality Control Manual has not harmed the Plaintiff because the Manual does not provide a competitive advantage given that competitors are required to have the substantially the same document.

With regard to the Plaintiff's request for further discovery pursuant to Rule 56.06 of the Tennessee Rules of Civil Procedure, the Defendants assert that discovery is too late.

[T]he discovery deadline has passed. The parties had almost 18 months during which to complete discovery in this case. Plaintiff made the decision to take the deposition of Defendant Rains before written discovery was complete, and thus, some of Defendants' document production was served after Defendant Rains' deposition. Plaintiff has not asserted that Defendants surprised Plaintiff by unfairly supplementing some discovery response after Defendant Rains' deposition or that Defendants otherwise responded to written discovery on a schedule that was not anticipated by Plaintiff.² Defendants should not be denied the opportunity to dispose of a case wholly unsupported by factual evidence because Plaintiff wishes that it had taken Defendant Rains' deposition at a later date. Plaintiff's contention that it needs to take additional depositions in this case should not be considered by the Court in its ruling on Defendants' Motion For Summary Judgment.

FN2. Plaintiff appears to suggest that it is entitled to take additional depositions because Defendants did not produce the company's 2014 pre-audit manual that was produced by Angie Combs. Defendants were not requested to produce the company's quality manual and so such 'failure to produce' cannot justify avoiding summary judgment by demanding the opportunity for further discovery.

Defendants' Reply To Plaintiff's Response To Defendants' Motion For Summary Judgment, p. 7 (April 19, 2017).

Analysis

As a preliminary matter, the Court clarifies that even though the Plaintiff failed to respond to the Defendants' Statements of Undisputed Material Fact, the Court has

considered the Plaintiff's opposition to summary judgment contained in its April 17, 2017 *Response*. The Court has done this based upon the following case law:

Here, while Ms. Atkins did not expressly deny the facts as set forth in Farmers Mutual's Statement of Undisputed Facts, she did file a timely response "affirmatively opposing the motion" and "pointing to the evidence in the record which indicates disputed material facts" other than the facts alleged by Farmers Mutual. *See Holland*, 125 S.W.3d at 429. Specifically, Ms. Atkins did not deny that she did not submit to an Examination Under Oath prior to filing her Counterclaim, but offered other, seemingly undisputed evidence, surrounding her failure to participate that could either excuse or mitigate that failure. Thus, Ms. Atkins clearly responded in opposition to the motion and submitted evidence as to why summary judgment was inappropriate. We conclude that Ms. Atkins' response was consistent with the spirit and purpose of Rule 56.03. To hold that Ms. Atkins' response did not comply with Rule 56.03 would be to elevate form over substance, a construction that this Court avoids. *See Morgan Keegan & Co., Inc. v. Smythe*, 401 S.W.3d 595, 607, 608 (Tenn. 2013).

Farmers Mut. of Tennessee v. Atkins, No. E2014-00554-COA-R3CV, 2014 WL 7143292, at *6 (Tenn. Ct. App. Dec. 15, 2014).

As noted above, in its *Response*, the Plaintiff argues that the record demonstrated genuine issues of material fact with respect to the breach of the confidentiality agreement and misappropriation of trade secrets on these matters: (1) anonymous letter; (2) Quality Control Manual; (3) Rains' emails; (4) distributor information, including distributors that are compatible with CryoSurgery's business model; and (5) pricing and sales quantity information relating to particular customers.

After studying the record and arguments of Counsel, the Court adopts the analysis of the facts and law cited by the Defendants. The Court concludes that these matters do not "demonstrate the existence of specific facts in the record which could lead a rational

trier of fact to find in favor of the nonmoving party.” Instead, the Court concludes and finds that these matters (1) do not constitute admissible evidence, (2) are not confidential and/or (3) are not part of the summary judgment record for the Court to assess.

Anonymous letter

As argued by the Defendants, the anonymous letter can not be a basis for denying summary judgment as a matter of law because it is undisputedly hearsay. Under Tennessee law hearsay evidence can not be considered by a Court.

In applying the burden shifting analysis on a motion for summary judgment, it is well settled that a court may not consider hearsay evidence. Specifically, Tennessee Rule of Civil Procedure 56.06 provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Expert opinion affidavits shall be governed by Tennessee Rule of Evidence 703.

Todd v. Shelby Cty., 407 S.W.3d 212, 218–19 (Tenn. Ct. App. 2012) (emphasis added).

In none of the Plaintiff's briefing does it address the issue of inadmissibility of the anonymous letter or provide citation to authority that would allow the Court to consider

the letter on summary judgment. The anonymous letter, then, does not provide a basis for denying summary judgment because it is hearsay.

Quality Control Manual

As it relates to the Quality Control Manual, the Plaintiff argues that the Defendants have “disclosed, published, and/or transferred confidential information of CryoSurgery” because “[a] copy of the Cool Renewal [quality control manual] produced by a third-party shows it to be highly similar to CryoSurgery’s manual.” The initial reason this assertion fails is that the Court concludes that the Quality Control Manual is not “confidential” information within the meaning of TUTSA.

Trade secrets are defined in TUTSA as follows:

(4) “Trade secret” means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

TENN. CODE ANN. § 47-25-1702(4) (West 2017).

Tennessee courts have applied the foregoing in a manner that rejects the notion that every bit of information or every document in the possession of a company is a trade secret.

Information cannot constitute a trade secret and, thus, is not confidential if the subject matter is “of public knowledge or general knowledge in the industry” or if the matter consists of “ideas which are well known or easily ascertainable.”

B & L Corp. v. Thomas & Thorngren, Inc., 162 S.W.3d 189, 211 (Tenn. Ct. App. 2004)

(citation omitted).

Confidential information, like trade secrets, does not include information that is generally available in the trade or easily available from sources other than the employer, such as customer lists, knowledge of the buying habits and needs of particular clients, pricing information, and profit and loss statements.

Hinson v. O'Rourke, No. M201400361COAR3CV, 2015 WL 5033908, at *3 (Tenn. Ct.

App. Aug. 25, 2015) (citations omitted).

It is undisputed that the Quality Control Manual at issue in this case is required by Canadian governmental regulations and all Manuals must contain substantially the same information. *Defendants' Statement of Material Facts* (“DSOMF”), pp. 9-10, ¶¶ 40-43 (Mar. 15, 2017).

In order to sell a medical device into Canada, the seller of such product must have a quality system and manual that complies with very detailed Canadian regulations regarding its contents. (Rains at 38, 75). The quality system essentially sets forth certain processes that must be followed with respect to the sale of the product (i.e., production procedures, training procedures, safety procedures, shipping procedures, etc.) to ensure quality and safety. (Rains at 38-40). Each company doing business in Canada is audited by a government agency or government-authorized third party, which reviews the quality manual and corresponding quality processes to ensure compliance with the applicable regulations. (Rains at 39-40, 76). Normally a business will undergo a ‘pre-audit’ in which the auditor provides feedback on the quality manual and processes which will lead to modifications of the quality processes themselves, along with the quality manual and the manual’s underlying documentation, before the ‘official’ audit. (Rains at 75).

While the detailed process descriptions and manuals to which the quality manual will refer, such as the Device Master Record list, the Confidential Approved Supplier List, the Product Identification & Traceability Procedure, etc., will be unique in many respects to each business, the required contents of the quality manual itself will look much the same from business to business because the contents are dictated in detail by Canadian regulations. The Value Plastics Fluid management Product Line Quality Manual found online at: nordsonmedical.com/technical/material/vp_quality_manual.pdf is instructive because its outline is virtually identical to that of the outline of Defendant Cool Renewal's quality manual. (Rains Aff. at ¶ 11). Indeed, having a quality manual that is similar in form to that of another business is no more evidence of a misappropriation of confidential information than is a business having an Affirmative Action Plan, or an OSHA mandated safety plan, or any other such government-mandated document, that is similar in form to that of its competitor.

Defendants' Memorandum In Support Of Their Motion For Summary Judgment, pp. 17-18 (Mar. 15, 2017).

Under these facts, the Court concludes that the Quality Control Manual does not constitute confidential information or a trade secret because the subject matter of the Manual "is 'of public knowledge or general knowledge in the industry'" and "consists of 'ideas which are well known or easily ascertainable.'" *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn. Ct. App. 2004) (citation omitted).

As to any claim by the Plaintiff that the customized answers or content provided in response to the Quality Control Manual template is confidential, there is no evidence in the summary judgment record. It is undisputed that the Defendants never produced in discovery to the Plaintiff their Quality Control Manual because it was never requested. Counsel for both parties admitted during oral argument that neither side requested nor produced a Quality Control Manual. It was not until January 17, 2017 that any issue

regarding a Quality Control Manual arose after it was produced by non-party witness Angie Combs, an employee of a third-party auditor, BSi, who has audited both the Plaintiff and Defendant. There is no proof in the record that the Defendants ever had any customized or proprietary content that is alleged to be contained in the Quality Control Manual. This absence in the record is particularly significant in this case because of a discovery ruling.

On May 25, 2016, a *Memorandum And Order Using Delaware Procedure Of Requiring Plaintiff To Provide Preliminary Identification Of Trade Secrets In Issue Before Defendants Respond To Discovery* was entered. It ordered the Plaintiff to “first identify with reasonable particularity and pinpoint the trade secrets its asserts the Defendants have misappropriated before the Defendants are required to respond to Plaintiff’s discovery.” This procedure, which was adopted from Delaware, the Court stated would help “separate[] the identified trade secret ‘from matters of general knowledge in the trade or of special knowledge of those person who are skilled in the trade...’” *Id.* at p. 3 (*quoting Altavion, Inc. v. Konica Minolta Sys. Lab. Inc.*, 226 Cal. App. 4th 26, 43, 171 Cal. Rptr. 3d 714, 727 (2014), *review denied* (Aug. 20, 2014)). Furthermore, as stated by the Court in *Magnox v. Turner*, which is cited in this Court’s previous decision, “[t]he purpose of this requirement is to set the outer boundaries of discovery in order to avoid the needless exposure of a defendant's trade secrets. Only after a plaintiff has identified the trade secret that has allegedly been misappropriated can the relevance, and therefore the scope, of discovery be determined.” No. CIV. A. 11951, 1991 WL 182450, at *1-2 (Del. Ch. Sept. 10, 1991).

The Plaintiff's failure to identify the Quality Control Manual as a "trade secret" for which it would seek discovery is fatal to the Plaintiff's claim at this late stage of the litigation that it has somehow been harmed because of the similarities in the documents. The purpose of the preliminary identification procedure was to avoid situations like this, where, in an attempt to avoid summary judgment, the Plaintiff puts forth an additional "alleged trade secret" or "confidential" information that it asserts the Defendants misappropriated. Additionally, in the August 5, 2016 *Order Granting For The Most Part Defendants' Motion To Compel And Denying Motion For Sanctions*, the Court specifically ordered the following with regard to the Plaintiff's alleged trade secrets:

It is ORDERED that by August 12, 2016, Plaintiff shall verify under oath that:

- (1) The entirety of the trade secret it asserts the Defendants have misappropriated are identified and contained in the answers to Defendants' interrogatories 5, 6, 7, 8, 9, 10, 11, 13, 19.

It is further ORDERED that the Plaintiff's responses to Interrogatories 5, 6, 7, 8, 9, 10, 11, 13, 19, identify the universe of trade secrets for trial and no other alleged trade secrets shall be prosecuted.

At no time in any of the responses to the above interrogatories during the preliminary identification of trade secrets did the Plaintiff identify the "Quality Control Manual."

Rains' Emails

Next is the Plaintiff's claim that a set of 12 pages of email correspondence establishes a genuine issue of material fact. The Court finds that the emails cited in the Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment

between Defendant Rains and customer Jorgensen Labs do not constitute disclosure of confidential or trade secret information. Rather, the conversation is a back and forth negotiation process which at times includes what could be categorized as “industry gossip,” remembered information and general industry knowledge from Defendant Rains about her former employer, CryoSurgery.

Further, the Plaintiff provided no specificity or detail as to what portions of the emails contain confidential information or trade secrets, and there is no legal analysis for the Defendants or the Court to understand what the Plaintiff’s position is on any conclusions or inferences that could be drawn from the emails. It is not for the Court to “search the record in order to find proof to substantiate allegations of the parties or any other evidence to support a party’s contentions.” *Brummitte v. Lawson*, 182 S.W.3d 320, 323 (Tenn. Ct. App. 2005) (quoting *Pearman v. Pearman*, 781 S.W.2d 585, 588 (Tenn. Ct. App. 1989)). The Court has studied the 12 page emails found at bates number D00058-60 and D00770-780 and has excerpted the following examples of statements from the emails demonstrating the above conclusions.

- *Plaintiff’s Response In Opposition To Defendants’ Motion For Summary Judgment, Exhibit 2-A, Email from Ashley Rains to Norm Jorgensen dated Nov. 5, 2014 (D00707) (April 17, 2017):*

From: Ashley Rains
To: Norm Jorgensen
Subject: RE: Actively Seeking Medical and Veterinary Supply Distributors in Canada
Date: Wednesday, November 05, 2014 4:27:00 PM

Wow. That’s really funny because he is actively selling direct and marketing directly to veterinarians in the USA essentially competing with his veterinary distributors.

I think it is just a coincidence that you got that a few weeks ago, CryoSurgery's business is really hurting right now, so they are probably scrambling to get sales from anyone who will respond. The owner has destroyed his relationships with his medical distributors, and I have been informed that several of them will not be doing business with him in 2015.

Another note, he is about to lose his Canadian certification with the next few months. Their quality control manager quit several months ago, and they could not even participate in their scheduled Audit because the company was in such disarray. The follow up audit is scheduled in the next few weeks and rumor is that they still haven't addressed any compliance issues.

BUT these things are good to know! Our prices are still much lower and our kit will offer much more value.

Thanks for the information!

- *Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, Exhibit 2-A, Email from Ashley Rains to Norm Jorgensen dated Nov. 6, 2014 (D00771-773) (April 17, 2017):*

From: Ashley Rains
Sent: Thursday, November 6, 2014 4:29 PM
To: Norm Jorgensen
Subject: RE: proposed agreement for vet field on Cool Renewal products

Re: Pricing

[Norm Jorgensen] We just need to be aware that the pricing is seemingly all over the map and don not want to suggest prices only to find that Verucca was offering something different than we expected. You probably has this dialed in pretty well. A question of freeze count. Since each lesion is typically frozen twice is that reflected in the number of claimed freezes?

[Ashley Rains]The number of freezes per canister is based on treating a 5 mm (most common size treated) only once. Lesions that are much larger (10 mm+) or thick, calloused lesions MAY require multiple treatments. This is mainly common in podiatry, whereas the skin on the feet is much thicker, and lesions tend to need more treatments than a thin skinned area. The larger the lesion, the more cryogen will used, so we give an average range per canister based on treating 5mm lesions. Another note, the large foam tipped applicators stay cold for up to 2 minutes, so 2 treatments could be performed with this applicator without having to re-saturate the foam.

I will try to put together a pricing comparison between us and VF so you can get an idea of how we match up.

- *Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, Exhibit 2-A, Email from Ashley Rains to Norm Jorgensen dated Nov. 6, 2014 (D00774) (April 17, 2017):*

From: Ashley Rains
Sent: Thursday, November 6, 2014 12:38 PM
To: Norm Jorgensen
Cc: 'Lori Moss'
Subject: RE: proposed agreement for vet field on Cool Renewal products

Re: Verucca pricing

[Norm Jorgensen]For some reason, they sent us a unsolicited pricelist for Canada? I sent to you in a separate e-mail [sic]

[Ashley Rains] to be honest, the owner has destroyed the distributor relationships that I built when I was there. He has made terrible business decisions since I left, and the distributors are fed up. He is drastically losing sales and is probably panicking trying to acquire any new distributors to make up for his mistakes. More than likely they found Jorgensen on an internet search and reached out in hopes of acquiring new business.

Re: Pricing from MWI and Patterson

[Norm Jorgensen] I have attached two versions of the Verucca pricing from MWI and Patterson. Patterson has kit for \$399.00 list and MWI has it only for \$301.12. Replacement canisters are \$375.00 from Patterson and MWI for \$297.15. That is a big spread. Any thoughts on why that is happening?

[Ashley Rains] The owner has literally changed prices (increase and decreases) 10 or more times within the last 6 months. The pricing managers at either of these companies will verify this. He is oddly obsessed with changing prices (for no reason) and this will be the downfall of his company. The distributors they purchased their inventory. Another difference is their purchasing volume. I believe that Patterson was purchasing at the highest quantity and MWI was purchasing at a lower volume discounter.

- *Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, Exhibit 2-A, Email from Ashley Rains to Norm Jorgensen dated Nov. 6, 2014 (D00775-777) (April 17, 2017):*

From: Ashley Rains
Sent: Tuesday, November 4, 2014 3:11 PM
To: Norm Jorgensen
Cc: 'Lori Moss'
Subject: RE: proposed agreement for vet field on Cool Renewal products

Terms:

[Norm Jorgensen] We can set goals or targets, but do not want to make them mandatory for purchase. You mentioned a vet market sales figure of \$300k with the other company. This translates into about 750 kits that they sold in the vet market. We should not expect to eliminate their presence entirely. We certainly expect to take both market share and expand the market size, 1200 units in 18 months would be 800 a year. That is beyond what the other folks are doing so that goal seems on the high side. At the end of the day, both

parties need to be satisfied with each other's performance or the agreement will not work.

[Ashley Rains] I totally understand. I agree that it is unrealistic to think we can have complete market conversion within a year, but I do believe that demand for a less expensive system is there, and with a little education from sales reps, the customers will not be opposed to switching products. Would Jorgensen be comfortable committing to 500 units for the first year?

Pricing:

[Norm Jorgensen] Distributors are going to review the margin on the new range compared to the old range or present supplier. What was your former company offering in terms of margin? We are a "middle man" and do add cost to the product. We believe we bring the value needed for your new company to get this product successfully marketed in the vet field. The choice is to go it alone or partner with someone like ourselves. You need to make an informed decision. That is where someone like Mike Thomas comes in as a reference on what we have done for LW.


[Ashley Rains] Our former company offered discounts based on purchasing volume. The only distributor that purchased at the maximum discount (35% off SRP) was Schein. Other distributors purchased at lower volumes and only received 20-25% discount on SRP. I do believe that an exclusive agreement Jorgensen is worth the extra costs, we just need to determine a pricing structure that is beneficial for everyone if Jorgensen purchases at the highest discount level on the pricing guide provided this should allow a margin of approximately 30% for you and the distributors.

- *Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, Exhibit 2-A, Emails between Ashley Rains to Norm Jorgensen dated October 29, 2014 and October 24, 2014 (D00778-780) (April 17, 2017):*

From: Norm Jorgensen
Sent: Friday, October 24, 2014 2:49 PM
To: Ashley Rains
Subject: proposed agreement for vet field on Cool Renewal products

Re: Pricing

[Norm Jorgensen] We would again take in the inventory here in Colorado and do all of the shipping and billing. Our typically margin agreement is as follows;

 You mentioned that your pricing should be considerable less than your former company. Hopefully, we can still get there with this approach. The vast majority of our sales are via distribution, but we do have some direct business.

From: Ashley Rains
Sent: Wednesday, October 29, 2014 1:49 PM
To: Norm Jorgensen
Cc: 'Lori Moss'
Subject: RE: proposed agreement for vet field on Cool Renewal products

Pricing:

[Ashley Rains] I have attached a preliminary pricing guide for an exclusive distribution agreement. I understand that Jorgensen needs to profit, as well the distributors, but at some point, as a manufacturer, we must decide if it is in fact profitable for us to use a "middle man" such as Jorgensen. Please take a look at the attached pricing guide and see if desired margins are achievable. We would also entertain the option of a "buy in" if higher up front quantities are desired.

Everything is negotiable, so please contact me if you have any questions.

Please note that the Replacement Canisters listed on the price guide will not be available until Spring 2015. The Kit will what all new customers will need to start with and is the best value.

These statements, on their face are “industry gossip,” remembered information and general industry knowledge. As a matter of law, this type of information is neither confidential nor a trade secret.

Remembered information does not constitute a trade secret. *Hinson v. O'Rourke*, No. M201400361COAR3CV, 2015 WL 5033908 (Tenn. Ct. App. Aug. 25, 2015); *B&L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 215 (Tenn. Ct. App. 2004). Information that is well known or readily ascertainable does not constitute a trade secret. *Hickory Specialties, Inc. v. B&L Labs., Inc.*, 592 S.W.2d 583, 586 (Tenn. App. 1979). Remembered business information such as business prices, specific needs and business habits of certain customers, relationships established between an employee and certain customers, and customers lists where the identity of customers can be easily ascertained from other sources are not protectable under Tennessee law. *See B&L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn. Ct. App. 2004); *Venture Express v. Zilly*, 973 S.W.2d 602, 606 (Tenn. Ct. App. 1998); *Heyer-Jordan & Assoc. v. Jordan*, 801 S.W.2d 814, 820-21 (Tenn. Ct. App. 1990); *Selox, Inc. v. Ford*, 675 S.W.2d 474, 475 (Tenn. 1984). Similarly, “[c]onfidential information, like trade secrets, does not include information that is generally available in the trade or easily available from sources other than the employer, such as customer lists, knowledge of the buying habits and needs of particular clients, pricing information, and profit and loss statements. *Hinson v. O'Rourke*, No. M201400361COAR3CV, 2015 WL 5033908, at *3 (Tenn. Ct. App. Aug. 25, 2015) (citing *Amarr Co. v. Depew*, C/A No. 03A01-9511-CH-00412, 1996 WL 600330, *4-5 (Tenn.Ct.App. Oct. 16, 1996); *see also Vantage*, 17 S.W.3d at 645.)).

In addition to not being confidential or a trade secret, it is undisputed that CryoSurgery regularly allowed their employees, including Defendant Rains, to use their personal email addresses to conduct company business. Also, at the time Defendant Rains resigned from CryoSurgery there was not company policy and Defendant Rains was not asked to return any company property or documents, and Cryosurgery had not required other departing employees to return company property as well. These facts are significant because even if the documents listed above did constitute trade secrets or confidential information, the mere possession of them would not constitute wrongdoing.

Under TUTSA, misappropriation is defined as follows:

(2) "Misappropriation" means:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was:

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

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

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

(iii) Before a material change of the person's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;

Tenn. Code Ann. § 47-25-1702(2) (West 2017).

The above definition makes clear that a key component of “misappropriation” under TUTSA is the “[a]cquisition of a trade secret” or “disclosure or use of a trade secret” by “improper means” or under a duty to “maintain its secrecy” or with knowledge that it had “been acquired by accident or mistake.” None of these circumstances is present in this case. All of the documents and information contained on Defendant Rains emails, while undisputedly information gained from employment with the Plaintiff, was not taken by any improper means, but rather was maintained on her personal email because she had used her personal email during her employment with the Plaintiff and there was no established policy requiring its return. These undisputed facts do not constitute misappropriation under TUTSA.

For all these reasons, the Court concludes that Defendant Rains’ emails do not present a genuine issue of material fact precluding summary judgment in favor of the Defendants.

Distributor information, including distributors that are compatible with CryoSurgery's business model

The Plaintiff's attempt to preclude summary judgment by arguing that the Defendants have "an extensive list of distributor contacts" from CryoSurgery and "their website indicates that Cool Renewal sells products to at least five (5) distributors that are or were purchasing competing CryoSurgery products" is likewise insufficient under the summary judgment standard provided in *Rye v. Women's Care Ctr. of Memphis, M PLLC*.

The fact that the Defendants had access to the Plaintiff's distributor contacts, without more, is insufficient to create a genuine issue of material fact for trial. It is undisputed that the Defendants had a different business model than the Plaintiff with regards to selling their product. The undisputed facts are that the Plaintiff sells directly to only two customers – Medical Mart and Jorgensen Labs. These two customers, which are larger distributors, in turn sell the Defendants' product to end-user customers. In contrast, the Plaintiff, it is undisputed, has a business model where it sells its product on a "wholesale basis to hundreds of medical supply distributors which then sell the product to physicians or veterinarians in the U.S. and Canada." *Defendants Statement Of Material Facts* ("DSOMF"), p. 3, ¶ 10 (Mar. 15, 2017).

One of the Defendants customer's, Medical Mart, is also a distributor of the Plaintiff. However, this fact alone is insufficient on summary judgment to raise a genuine issue of fact that because they have one overlapping customer, the Defendants have in theory violated TUTSA or breached their confidentiality agreement. That leap is directly prohibited by the Court in *Rye*, "[t]he focus is on the evidence the nonmoving party

comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.” 477 S.W.3d 235, 265 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452, 195 L. Ed. 2d 265 (2016).

As it relates to what is on the Defendants’ website, it is further undisputed that the additional five (5) distributors that the Plaintiff alleges are listed on the Defendants website are really customers of Jorgensen Labs and are not direct customers of the Defendants. This fact, the Court concludes, would not “lead a rational trier of fact to find in favor of the nonmoving party” on either of its claims for misappropriation under TUTSA or violation of the confidentiality agreement. There is no proof in the record that the Defendants have any control, contractually or otherwise, with whom Jorgensen Labs determines to sell the Defendants’ products. The fact that Jorgensen Labs decides to sell the Defendants’ products to customers that were once the Plaintiff’s is irrelevant to the claims alleged against the Plaintiff.

For these reasons, the Court concludes there are no genuine issues of material fact as it relates to the distributor information, including distributors that are compatible with CryoSurgery’s business model.

Pricing and sales quantity information relating to particular customers

With regard to the final item that the Plaintiff argues creates a disputed issue of material fact for trial, the Court similarly determines that it is insufficient to preclude summary judgment in favor of the Defendants. As it relates to the pricing and sales

quantity information of particular customers, the Plaintiff summarily argues that “Rains received proprietary product information, business plans, marketing plans, product information, supplier information, distributor information, pricing strategies, and pricing schedules” and “her emails reveal CryoSurgery’s pricing strategies and approaches.” This blanket, non-specific conclusory response in opposition to summary judgment is insufficient under *Rye v. Women's Care Ctr. of Memphis, M PLLC*. The lack of specificity and link to some theory of wrongdoing fail to establish any sort of genuine issue for trial.

With regards to the Plaintiff’s claim that the Defendants revealed confidential pricing strategies and approaches through emails, as discussed above, the emails cited by the Plaintiff are nothing more than “industry gossip,” remembered information and general industry knowledge from Defendant Rains about her former employer.

Therefore, for the same reasons stated above regarding Defendant Rains’ Emails, the Court concludes as a matter of law that the Plaintiff’s arguments regarding the “pricing and sales quantity information relating to particular customers” do not constitute a genuine issue of material fact requiring a trial.

Additional Discovery Not Warranted Under Rule 56.06

In addition to the foregoing analysis, the Court also rejects the Plaintiff’s request to continue the summary judgment ruling to allow for additional discovery.

In *Exhibit 2 to Plaintiff’s Response In Opposition To Defendants’ Motion For Summary Judgment*, Counsel for the Plaintiff stated the following reasons for further discovery:

3. Attached hereto as Exhibit 2-C is a true and correct copy of Cool Renewal, LLC's Quality Manual. Bates labeled COMBS 0188-202 and produced by non-party witness Angie Combs on January 17, 2017. This document was not produced by Defendants.

4. Plaintiff took the oral deposition of Defendant Ashley Rains on September 21, 2016. At that time, Defendants had produced documents labeled D00001-D00534.

5. Subsequently on October 14, 2016, Defendants produced additional documents labeled D00535-D01111.

6. Given the timeline of this case to date, Plaintiff has not had an opportunity to examine Defendant Ashley Rains or a representative from Defendant Cool Renewal, LLC regarding the documents labeled D00535-D01111. Pursuant to Tenn. R. Civ. P. Rule 56.06, further discovery is needed regarding these documents.

Declaration Of Plaintiff's Counsel, Britton D. McClung, Exhibit 2, pp. 1-2, ¶¶3-6 (April 17, 2017).

The above reasons are insufficient because the relief has already been ruled on by the Court in a previous discovery related order.

On January 30, 2017, the Court entered a *Memorandum And Order Granting Defendants' Second Motion To Compel And Scheduling Depositions*. In that ruling the Court denied the Plaintiff's request to take the deposition of a corporate representative of Cool Renewal, LLC.

It is also ORDERED that Plaintiff's request to take the deposition of a corporate representative of Cool Renewal, LLC, is denied. The only person who fits the corporate representative designation in this case is Ashley Rains. She has already been deposed.

Case law from other jurisdictions and federal courts¹ is that continuing/reopening a deposition lies within the sound discretion of the court but is generally disfavored. "The propriety of a deponent's reopened deposition lies in the court's discretion. Without a showing of need or good

reason, courts generally will not require a deponent's reopened deposition. Reopened depositions are disfavored, except in certain circumstances, such as, long passage of time with new evidence or new theories added to the complaint." *Couch v. Wan*, No. CV F 08-1621 LJO DLB, 2012 WL 4433470, at *3 (E.D. Cal. Sept. 24, 2012) (citations omitted). "[T]he re-opening of depositions is disfavored as a general rule . . ." *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 389 (W.D. Tenn. 1999).

FN1. According to the Advisory Commission Comments to the 1979 Amendments to the Tennessee Rules of Civil Procedure:

Rules 26 through 37, inclusive, relating to depositions and discovery, have been amended [in 1979] to conform substantially but not identically to Rules 26 through 37, inclusive, of the Federal Rules of Civil Procedure. Each rule should be compared carefully with its Federal counterpart to determine the differences if any.

TENN R. CIV. P. 26.01 (West 2016).

Under the Federal Rules of Civil Procedure the standard for reopening a deposition is that leave of court must be obtained, and there must be a showing of "good cause," such as passage of time with new evidence or new legal theories. *Bookhamer v. Sunbeam Prod. Inc.*, No. C 09-6027 EMC DMR, 2012 WL 5188302, at *2-3 (N.D. Cal. Oct. 19, 2012). Reopening a deposition will be denied where the discovery is unreasonably cumulative or duplicative, whether the party has had ample opportunity to obtain the information in discovery, and whether the burden or expense of the proposed discovery outweighs its likely benefit—the factors found in Rule 26(b)(2) (i-iii). *Hibbert v. Bellmawr Park Mut. Hous. Corp.*, No. CIV. 10-5386 NLH/JS, 2013 WL 3949024, at *3 (D.N.J. Aug. 1, 2013).

Inconsistent, contradictory impeachment evidence is not enough by itself to justify reopening a deposition. *Barten v. State Farm Mut. Auto. Ins. Co.*, No. CIV12399 TUCCKJLAB, 2014 WL 11512606, at *2 (D. Ariz. July 8, 2014); *see also*, *Bookhamer v. Sunbeam Products Inc.*, No. C 09-6024 EMC (DMR), 2012 WL 5188302 (N.D. Cal. 2012); *E.E.O.C. v. Prod. Fabricators Inc.*, 285 F.R.D. 418, 422-23 (D. Minn. 2012); *Cunningham v. D.C. Sports and Ent. Commn.*, No. CIV 03-839 RWR/JMF, 2005 WL 4898867, *5 (D.D.C. 2005).

The Plaintiff has not filed evidence or argument demonstrating good cause to redepose Defendant Rains.

Memorandum And Order Granting Defendants' Second Motion To Compel And Scheduling Depositions, pp. 3-5 (Jan. 30, 2017).

This lawsuit was filed on July 21, 2015, over 21 months ago. Both parties have had ample time for discovery given that the initial discovery cutoff was December 15, 2016 and was extended by the Court to allow additional depositions to be completed by February 17, 2016. The bulk of the documents the Plaintiff alleges that it needs additional discovery on have been known to the Plaintiff since at least October 14, 2016 and the Quality Manual which, as stated above in the Court's decision, was neither requested nor produced by either party in discovery was available on January 17, 2017. The above ruling denying the Plaintiff's request to depose a corporate representative from Cool Renewal, LLC occurred *after* both of the above dates and *after* the Plaintiff had these documents in its possession.

For these reasons, the Court denies the Plaintiff's request to continue the summary judgment motion for additional discovery.

Attorneys' Fees Pursuant To Tennessee Code Annotated section 47-25-1705

In addition to seeking summary judgment on Counts 1 and 3, the Defendants have also requested an award of attorneys' fees under Tennessee Code Annotated section 47-25-1705 which grants the Court discretion to award attorneys' fees to the prevailing party if "a claim of misappropriation is made in bad faith."

After considering the entire summary judgment record, the Court concludes that the facts of this case do not rise to the level of “bad faith” prosecution by the Plaintiff of a trade secrets claim to warrant an award of attorneys’ fees under section 47-25-1705.

“Bad Faith” under the statute has been explained in Tennessee to include “‘dishonesty of belief or purpose,’ and that a claim brought under the Act that is ‘plausible’ is not considered to have been brought in bad faith for the purpose of awarding attorney’s fees under the statute.” *Hinson v. O’Rourke*, No. M201400361COAR3CV, 2015 WL 5033908, at *6 (Tenn. Ct. App. Aug. 25, 2015) (quoting *Dominion Enterprises v. Dataium, LLC*, No. M2012–02385–COA–R3–CV, 2013 WL 6858266, at *13–14 (Tenn.Ct.App. Dec. 27, 2013) (Trial court denied an award of attorney’s fees, finding that “though the claim was not strong, it was plausible.”)).

In this case, there is the anonymous letter Plaintiff received. While the letter is hearsay and, therefore, not admissible with respect to Defendants’ alleged liability, the letter is admissible for the non-hearsay reason to show Plaintiff’s state of mind and intent in bringing the lawsuit. The letter is evidence that the Plaintiff did not bring this lawsuit in “bad faith.”

Defendants here suggest that rather than pursuing litigation after receiving (and confirming in part) the Letter concerning misuse of confidential information, CryoSurgery should have simply called or written to Rains to clear up any problems. [MSJ Brief at 20.] On the contrary, it would have been naïve of CryoSurgery to expect Rains, or any other former employee who had been accused of misappropriating trade secrets under similar circumstances, to freely admit the kind of extensive wrongdoing set forth in the Letter on a mere phone call with CryoSurgery. In fact, faced with the very unusual situation of receiving information from an apparently knowledgeable source that described an ongoing illegal act threatening its

business, it was a necessary and prudent decision for CryoSurgery to pursue legal claims against the alleged wrongdoer in defense of that business.

Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, p. 12 (April 17, 2017).

Despite the Court ultimately concluding that the Plaintiff's claims do not prevail, the anonymous letter did provide the Plaintiff with a "plausible" reason to bring the lawsuit for alleged misappropriation and violation of a confidentiality agreement.

For these reasons, the Court denies the Plaintiff's request for an award of attorneys' fees under Tennessee Code Annotated section 47-25-1705.

Application For Injunctive Relief and Attorneys' Fees Denied; Provision To Return Company Property

Not addressed in the Defendants' *Motion For Summary Judgment* were the requests in Count 4 and Count 5 of the *Plaintiff's First Amended Complaint And Application For Temporary Injunction And Permanent Injunction* that (1) attorneys' fees be awarded against the Defendants and (2) a temporary and permanent injunction be issued against the Defendants "from using CryoSurgery's own trade secrets and Confidential Information against them."

Because the Court has concluded as a matter of law that summary judgment is appropriate in favor of the Defendants on Counts 1 and 3 of the *Plaintiff's First Amended Complaint And Application For Temporary Injunction And Permanent Injunction*, the Plaintiff's request for attorneys' fees and injunctive relief under Counts 4 and 5 are moot and therefore dismissed with prejudice, with one exception.

It is undisputed that Defendant Ashley Rains does have in her possession certain CryoSurgery information/documents on her personal email account which she preserved for purposes of the litigation. It is further undisputed that this information/documents is company property of CryoSurgery. Under these circumstances, it is appropriate that Defendant Rains to return any CryoSurgery information/documents to CryoSurgery. To accomplish this, as ordered above, Counsel for each party shall file by June 9, 2017 a proposed order detailing the process and timing by which Defendant Ashley Rains shall turn over any of CryoSurgery's information/documents that are presently contained on Defendant Rains' personal email account.

Lastly, there was the provision by the Court in previous hearings on discovery disputes that at the conclusion of the lawsuit, the Defendants could reassert their entitlement to recover attorney's fees in connection with motions to compel filed by the Defendants. Now, with the context of the conclusion of the lawsuit, the Court denies such recovery.

Recovery of fees is denied because in the area of misappropriation of trade secrets, Tennessee law is developing, so much so that this Court had to use a discovery protocol from other states because of the absence of Tennessee law. Much of the delay and confusion in discovery production, the Court concludes, was due to the absence of Tennessee law. Under these circumstances, it is not appropriate to award attorneys' fees.

Based on all of the above, the Court (1) grants the Defendants' *Motion For Summary Judgment* and dismisses with prejudice Plaintiff's claims in Counts 1 and 3;

(2) denies the Defendants' claim for attorneys' fees under Tennessee Code Annotated section 47-25-1705; (3) dismisses with prejudice Plaintiff's claims in Counts 4 and 5 of the Complaint as moot; and (4) provides for the return of any CryoSurgery information/documents contained on Defendant Rains' personal email account.

Upon the entry of a final judgment court costs shall be taxed to the Plaintiff.

Further, this ruling renders moot the trial set for June 26, 2017, and the deadlines for pretrial filings contained in the October 4, 2016 Order. The June 26, 2017 trial is removed from the docket.

[Judge's signature appears on original
Placed under seal]

ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:

Adam Dread
Joshua Hedrick
Jacob B. Kring
Britton D. McClung
Michael C. Wurtz
Robert W. Horton
Mary Leigh Pirtle
L. Lymari Cromwell