IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CORPORATE EXPRESS
OFFICE PRODUCTS, INC.,
a Delaware corporation,

Plaintiff,

OPINION AND ORDER

00-C-608-C

v.

STUART BROWN,

Defendant.

- -

STUART P. BROWN,

Plaintiff,

00-C-666-C

v.

BT OFFICE PRODUCTS INTERNATIONAL,
INC., n/k/a CORPORATE EXPRESS OFFICE
PRODUCTS, INC., CORPORATE EXPRESS
OFFICE PRODUCTS, INC.,

Defendants.

- -

This civil action for monetary relief involves two consolidated cases that arise out of

commercial disputes between Corporate Express Office Products, Inc. and its former employee, Stuart P. Brown. Case no. 00-C-608-C was brought in this court by plaintiff Corporate Express Office Products against Stuart P. Brown, Todd Brown and Indoff, Inc. Plaintiff alleged that defendant Stuart Brown had breached non-compete and non-solicit agreements, misappropriated trade secrets, breached his fiduciary duty, tortiously interfered with business relations and engaged in a conspiracy for the purpose of injuring Corporate Express's business. Plaintiff Corporate Express settled its claims against Todd Brown and Indoff, Inc. Case no. 00-C-666-C was filed in Eau Claire County, Wisconsin, on September 26, 2000, and removed to this court by defendants. Brown alleged that defendants BT Office Products International, Inc. and Corporate Express Office Products, Inc. had breached a "separation agreement and general release" and a commercial lease.

Presently before the court is Stuart Brown's motion for summary judgment in which he seeks the dismissal of the claims brought by Corporate Express and judgment in his favor on his claims against BT Office Products and Corporate Express. (It appears that these two defendants are actually one. I will refer to Corporate Express from here on.) Because I find that Corporate Express has failed to adduce evidence sufficient to establish its claims or to refute Brown's, I will grant Brown's motion for summary judgment on all of Corporate Express's claims and grant Brown's motion for summary judgment on his claims.

Also before the court are two additional motions. Brown has filed motions to strike the affidavits of Rick Toppin and Maria VanHees on the ground that they do not meet the requirements of Fed. R. Civ. P. 56(e). Brown's motions will be denied. Rather than striking the filings, I will consider Brown's objections to the documents in determining whether Corporate Express's specific proposed factual assertions are supported properly by admissible evidence.

For the purpose of deciding this motion, I find the following facts material and undisputed.

UNDISPUTED FACTS

A. Parties

Stuart Brown, a resident of Wisconsin, was a sales manager for BT Office Products International, Inc. and later, Corporate Express Office Products, Inc. at BT's facility in Eau Claire, Wisconsin, until his resignation on July 3, 2000. Corporate Express is an office supply business incorporated under the laws of the State of Delaware with its principal place of business in Broomfield, Colorado. Corporate Express merged with BT in December 1999 and has since assumed its obligations.

In approximately 1975, Brown purchased a small office supply store in Eau Claire, Wisconsin. Brown operated the business for 22 years. In December 1996, Brown sold his

company to BT. Brown was employed as a sales manager at BT from December 6, 1996 until sometime in December 1999.

In late fall or early winter 1999, BT merged with Corporate Express, the largest commercial office products company in the world. As a result of the merger, Corporate Express assumed all of BT's obligations and contracts.

B. Brown's Position with BT

Pursuant to BT's purchase of his business, Brown signed an employment agreement with BT. Under the terms of that agreement, BT agreed to pay Brown a salary of $58,000 each year beginning on January 1, 1997. Brown was paid $56,288.49 in 1997. In March 1998, Brown's salary was increased to $60,320, effective April 1, 1998. Brown received $66,015.39 in gross pay from BT in 1998.

C. Brown's Position with Corporate Express

Brown was employed as a branch and sales manager at Corporate Express in Eau Claire, Wisconsin, at one of Corporate Express's smallest distribution depots. In his capacity as sales manager, Brown was responsible for supervising and assisting the local sales representatives, overseeing sales strategies and company policies, assigning accounts and signing off on new account implementation, setting up sales meetings, training sales

representatives on products and on difficulties they might have in the field and explaining the Eau Claire business plan to the sales representatives. Brown was responsible for sales generated from the Eau Claire facility, overseeing the solicitation of business, maintaining confidential customer information and assigning sales representatives to customer accounts. In his capacity as branch manager, Brown was responsible for many of the day-to-day operations of the Eau Claire facility. Brown had no responsibility for shipping and receiving, paying personnel or bills, hiring and firing, purchasing or writing checks and he had no authority to bind Corporate Express to any contracts except sales contracts with customers. Brown was not an officer or director of BT or Corporate Express. He was not involved in administration or operations of the companies outside his supervisory role over sales representatives.

At Corporate Express, Brown had little or no customer contact. On a daily basis, his responsibilities included overseeing the solicitation of business, maintaining confidential customer information and assigning sales representatives to customer accounts. BT's and Corporate Express's sales representatives had the primary contact with customers but both the sales representative and the sales manager were responsible for customer sales and satisfaction. At present, the Eau Claire facility is a service center; the employees handle various aspects of sales and marketing, including answering customer telephone calls and placing customer orders. The facility was not able to place customer orders until shortly

before Brown terminated his employment in July 2000.

Brown's managerial territory encompassed a radius of approximately 50 miles from Eau Claire when he was employed by BT and approximately 120 miles when he was employed by Corporate Express. It was rare for Brown to make contacts outside his managerial territory. During his employment with BT and Corporate Express, Brown was not provided with any valuable sales training, any customer accounts, customer referrals or customer leads.

Since his voluntary termination of employment with Corporate Express on July 3, 2000, Brown has been employed on a full-time basis by RMED International, Inc., a diaper manufacturer, as Vice President and Chief Operating Officer. In addition, Brown is the owner of two Quizno's sandwich stores in Eau Claire, Wisconsin.

D. Non-competition, Non-solicitation and Confidentiality Agreements

Pursuant to BT's purchase of Brown's store, Brown entered into a non-competition agreement with BT on December 6, 1996. The agreement was to continue for five years from the date of signing or two years from the date of Brown's termination, whichever was longer. It contained a geographic restriction that included the counties within a 150 mile radius of Eau Claire. Under the 1996 non-compete agreement, Brown was prohibited from

> Hir[ing] or attempt[ing] to hire (or assist any one else in hiring or attempting to hire)

> for employment any person who is, or during the immediately preceding six (6) month period was, an employee of the Buyer or any of its affiliates or induce or assist anyone in inducing in any way any employee of the Buyer or to resign or sever employment or breach an employment contract with the Buyer.

The agreement provides that the party who prevails in an action to enforce the agreement is entitled to recover its reasonable attorney fees and other expenses.

On December 6, 1996, Brown signed a second covenant not to compete as part of an employment agreement with BT and received $20,000 in consideration. The second covenant not to compete included a "Restricted Period" that prohibited competition for a period of two years from the date of termination of employment or five years from the date of signing, whichever was longer. The agreement provided that, during the same period of time, Brown would not "directly, or indirectly through any other person or entity, solicit sales to or [sic] other business of any person or entity which . . . was a customer or an active prospect of BT." The agreement provided that Brown would not

> Hire or attempt to hire (or assist any one else in hiring or attempting to hire) for employment, in any business enterprise or activity, any person who is, or during the immediately preceding six (6) month period was, an employee of BT or any of its affiliates, or induce (or assist anyone in inducing) in any way any employee of BT to resign, sever employment, or breach an employment contract with BT. . . .

The agreement also included a territorial restriction within a 150 mile radius from Eau Claire.

On December 14, 1999, Brown signed a third covenant not to compete as a condition

of his continued employment with Corporate Express after it merged with BT. Brown received $1,800 in consideration. That covenant included a one-year restriction on competition and a two-year "non-solicitation/interference" restriction. Instead of a mileage restriction, the third covenant applied to any territory in which "the employee worked or [that he] managed during [his] employment with the Company." The agreement provided further that "If a court should determine that any provision of the Agreement is unenforceable, that provision shall be enforced to the fullest extent by law, and the remainder of this Agreement shall remain in effect." None of the three agreements contained language superseding prior agreements.

Corporate Express requires its employees such as Brown, who have access to confidential information, to execute non-competition agreements. Corporate Express considers its customer information proprietary; it has dedicated substantial time to develop its customer information. Brown had access to Corporate Express's confidential customer information.

E. Indoff, Inc.

In May and June 2000, Stuart Brown became interested in working for Indoff, Inc., one of Corporate Express's competitors. Brown called Indoff's vice president, Jay Temple, to discuss employment. On May 11, 2000, Brown sent Indoff a "Partner Profile," a

document summarizing his employment and sales experience.

At the same time, Brown's son, Todd Brown, also became interested in working for Indoff. Todd Brown had begun working for BT on or about December 6, 1996. On a few occasions shortly after the merger between BT and Corporate Express, Brown had assisted his son in soliciting accounts for Corporate Express. Temple, a salesperson recruiter for Indoff, believed that Brown would advise his son on his decision regarding employment with Indoff.

When Temple learned that Todd Brown and not Stuart Brown was available for employment, he inserted Todd's name in place of Stuart Brown's on the partner profile. As a result, the document stated that Todd Brown had 30 years of employment history and that 80% of Todd's sales would be retained if he left Corporate Express, resulting in an estimated first year sales volume of one million dollars. The Partner Profile also stated that Todd Brown was subject to a "breakable" non-compete agreement. In late May, Temple drafted a "New Partner Visiting/Checklist Form" in which he noted that Todd Brown was part of a "Father and Son team - They will be strong," hoping that Stuart Brown would join Indoff after his covenant not to compete had expired.

On June 1, 2000, Todd Brown and Jeanine Brown (Stuart Brown's wife) both received "letters of understanding," stating that the letter was "not intended to be an employment contract but merely a listing of the responsibilities and obligations of both

parties to avoid any misunderstandings." Todd signed his letter on June 7, 2000; Jeanine signed hers on June 9, 2000.

On June 8 and 9, 2000, Stuart Brown, Todd Brown and Jeanine Brown traveled to St. Louis so that Todd could visit Indoff's offices. Indoff paid for Stuart and Todd Brown's travel expenses. Stuart Brown and Temple had spoken on the phone several times before the visit. In St. Louis, Stuart Brown met with at least one Indoff representative. Stuart Brown told Indoff that he had a covenant not to compete and that he had no interest in working for Indoff.

On July 14, 2000, Todd Brown terminated his employment with Corporate Express voluntarily. The same month, Todd began working for Indoff. Jeanine Brown was also hired to be a commissioned salesperson; she assisted Todd Brown in his work by making sales calls and placing and receiving orders on behalf of Indoff. Before working for Indoff, Jeanine Brown's sales experience had been limited to department store retail sales and occasional phone answering for Stuart Brown's business.

Todd Brown used Stuart Brown's credit card to purchase a computer for use in his work for Indoff; he repaid Stuart Brown at a later date. Jeanine and Todd Brown use the basement of Stuart and Jeanine Brown's home as an office for their work for Indoff; Todd has not lived in his father's home since at least the spring or summer of 2000. Jeanine deposited $12,800 into the checking account that she shares with Stuart Brown,

representing the proceeds she received from assisting Todd Brown with his work for Indoff. This money was not segregated from the couple's other money. Stuart Brown has never assisted, consulted or advised Todd or Jeanine Brown in soliciting, contacting or selling products to Corporate Express customers following his termination of employment.

Stuart Brown has never worked for Indoff and has never received a pay check from Indoff. Brown has never introduced Todd or Jeanine Brown to any of Corporate Express's customers or prospective customers since his termination of his employment with Corporate Express.

F. Commercial Lease

On December 6, 1996, Stuart Brown began leasing BT approximately 3,000 square feet of commercial space located at 1305 Woodland Avenue in Eau Claire, Wisconsin. The lease was signed by BT's vice president of logistics and Brown. The lease was for a period of twelve months, from December 6, 1996 to December 6, 1997. The lease agreement provides that the lease continues from "year to year thereafter until written notice of termination [is] given by either party to the other at least ninety (90) days before expiration of [the] lease or any renewal." The lease provides for payments of $1600 each month, payable on the sixth day of each month, beginning on December 6, 1996, and continuing "until the expiration of the lease or any extension thereof." As a result of annual rent

adjustments, the rent for the period from December 6, 1999 to December 6, 2000 was $1712 each month. The lease agreement provides further that if any monthly installment of rent remains unpaid for ninety days after Corporate Express's receipt of written notice that rent is past due, all the rent for the entire unexpired term of the lease becomes due and payable immediately.

Corporate Express hired a property management company to represent the leasing interest of BT and Corporate Express on a national basis. Corporate Express waited until December 1, 2000, to provide written notice to Brown that it intended to terminate the lease as of September 7, 2000. Its delay triggered renewal of the lease for an additional twelve months, until December 1, 2001. Corporate Express vacated the premises on April 18, 2000, and has not made any rent payments since October 2000. Brown has placed advertisements in the newspaper in an effort to find a tenant but the efforts have been unsuccessful. The commercial lease provides that if any suit or action is instituted in connection with any controversy arising out of the lease, the prevailing party is entitled to recover reasonable costs and attorney fees.

Brown was aware that Corporate Express was moving. On April 13, 2000, he sent a letter to Corporate Express's customers notifying them of the relocation of the Eau Claire facility and on or before April 19, 2000, Brown distributed a memorandum to the management team discussing the impending move.

G. Separation Agreement and General Release

On June 26, 2000, before Brown's resignation, Brown and Corporate Express entered into a separation agreement and general release. The separation agreement included a severance provision under which Corporate Express agreed to pay Brown 32 weeks of his base salary ($1,349.06 each week) in regular bi-weekly payments. According to the agreement, in order to receive the severance payments, Brown had to: (i) return the agreement; (ii) fulfill his obligation to continue working until July 3, 2000; (iii) cooperate with Corporate Express on any matter relating to events that occurred during his employment; and (iv) abide by all other terms of the agreement. Corporate Express has not paid Brown any severance payments under the terms of the policy.

In addition to the severance provision, the separation agreement included a vacation and sick pay provision under which Corporate Express agreed to pay Brown for any hours of unused vacation pay accrued as of his last day of employment. On July 3, 2000, Brown had accrued 688 hours of unused vacation and sick pay. Corporate Express's policy in calculating the hourly rate of vacation and sick pay is to divide the employee's salary by the total number of hours worked. For Brown, this total amounts to $33.73 for each hour of accrued vacation pay. Under the separation agreement, Brown was to receive $23,206.24 for 688 hours in accrued vacation pay on July 3, 2000. On July 21, 2000, Corporate Express paid Brown $8,095.20 for 240 hours of vacation pay at the rate of $33.73 each day. Brown

has not received any additional payments.

BT's vacation policy allows employees to accrue a maximum of one year's vacation time only. The policy advises employees that payment of vacation pay is subject to the policy in effect at the time of termination. At the time of Brown's termination, he was subject to Corporate Express's vacation policy, which provides that employees may accrue only one year's vacation pay plus 40 hours. Brown was paid 240 hours of vacation pay, which is one year (200 hours) plus 40 hours.

H. Interference with Contract Claim

Brown has never encouraged any Corporate Express customers to do business with Indoff or anyone who has a relationship with Indoff. Brown has never interfered with any relationship between Corporate Express or BT and their customers or suppliers. Brown has contacted and solicited business from friends and acquaintances, who may also happen to be Corporate Express customers, with regard to the sale of lunch catering services from Quizno's Subs. Brown has never made any disparaging remarks about Corporate Express to its customers or prospective customers.

I. Misappropriation of Trade Secrets and Confidential Information Claim

Brown did not take any property from Corporate Express other than the list of

customer accounts that he may have memorized. Brown has never used, disclosed or disseminated directly or indirectly to any other person, organization or entity any confidential information, customer list, costs or pricing information, financial information, supplier information, marketing materials, strategic plans, prospective customer information, customer contacts, customer proposals or customer agreements.

J. Conspiracy Claim

Brown has never entered into an agreement with any individual, organization or entity for the purpose of injuring BT or Corporate Express's business.

OPINION

On a motion for summary judgment, if the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

Brown contends that Wisconsin law applies to all claims in this case. Corporate Express does not object to Brown's analysis of the choice-of-law decision. For the purpose

of deciding this motion, I will assume that Brown is correct and will apply Wisconsin law to all claims.

II. CORPORATE EXRESS'S CLAIMS

A. Non-Competition and Non-Solicitation Agreements

Corporate Express contends that Brown violated three separate covenants not to compete: a 1996 non-compete agreement; a 1996 non-compete provision in an employment agreement; and a 1999 non-compete agreement. Corporate Express argues that each of the agreements contains substantially identical non-competition, non-solicitation and confidentiality provisions and, therefore, the 1999 agreement does not supersede the others and all three are in effect. Brown does not dispute this assessment.

Generally, covenants not to compete are disfavored and suspect on their face because they restrain trade. See Wausau Medical Center v. Asplund, 182 Wis. 2d 274, 281, 515 N.W.2d 34, 38 (Ct. App. 1994). Restrictive covenants are enforceable only if they are reasonably necessary for the protection of the employer and reasonable as to time, geography and types of conduct covered. See Wis. Stat. § 103.465. If any provision of a covenant not to compete is unreasonable, the entire covenant is void even if the remaining provisions would otherwise be enforceable. See id. The question whether a restrictive covenant is reasonable is a question of law for the court. See Farm Credit Services of North Central

Wisconsin, ACA v. Wysocki, 237 Wis. 2d 522, 529, 614 N.W.2d 1, 4 (Ct. App. 2000).

Before assessing the reasonableness of the covenants not to compete, a word is warranted concerning the level of scrutiny of the three covenants. Corporate Express asserts that both of the 1996 agreements were signed pursuant to Brown's sale of his business to BT and not pursuant to an employment contract and, therefore, that they are not subject to the exacting scrutiny to which the 1999 employment agreement is subject. See Reiman Assoc., Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 309-10, 306 N.W.2d 292, 295 (Ct. App. 1981) (covenants not to compete incident to sale not subject to exacting scrutiny, especially when they contain no restriction on right of restrained party to enter employment). Corporate Express also argues that because the 1996 agreements are covenants incidental to the sale of a business and not incident to employment, unreasonable provisions can be struck from the covenant without invalidating the entire agreement. See id. at 310, 306 N.W.2d at 295-96.

I find that one of the 1996 agreements was incident to the sale of Brown's business to BT and that the other 1996 agreement was incident to an employment agreement. The agreement incident to sale is contained within the sale documents; the consideration for that agreement was included in the purchase price of Brown's business. The other agreement was an employment agreement separate from the sale price; Brown received $20,000 in consideration for signing it.

1. Reasonableness

Five inquiries are made in determining the reasonableness of a covenant not to compete. Under this analysis, the non-compete agreement must (1) be necessary for the employer's protection; (2) provide a reasonable time period; (3) cover a reasonable territory; (4) be reasonable to the employee; and (5) be reasonable to the general public. See Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 162, 98 N.W.2d 415, 418-19 (1959). Brown argues that the agreements fail under each of these inquiries.

The principal reason for enforcing a restrictive covenant is to protect trade secrets and unfair competition. "An employer is not entitled to be protected against legitimate and ordinary competition of the type a stranger could give. There must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer's business." Id. at 163, 98 N.W.2d at 419.

The two 1996 agreements contain essentially the same language and restrictions. Both agreements prohibit Brown from (1) hiring, trying to hire or assisting anyone else in hiring or in trying to hire anyone who had been an employee of Corporate Express in the immediately preceding six months and (2) assisting anyone in encouraging an employee of Corporate Express to sever employment with Corporate Express. These two provisions were not necessary to protect the interests of Corporate Express. Although BT had an interest in retaining experienced employees when it purchased Brown's business in 1996, the provisions

were not necessary to advance this interest. First, BT and Corporate Express cannot keep their employees from seeking other work; Wisconsin law protects and encourages the mobility of workers. See Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 214, 267 N.W.2d 242, 248 (1978) (employer has no recourse against former employee who takes only experience and intellectual development and no trade secrets). Prohibiting Brown from encouraging others to hire Corporate Express employees does not serve Corporate Express's goal of retaining its employees. Second, the non-hiring provisions are overreaching; they prohibit Brown from taking action outside the scope of his employment. Taken to their logical end, these provisions would prohibit Brown from serving as a reference for former Corporate Express employees. Finally, the provisions are an attempt to restrict the activities of not only Brown but also other recent employees of Corporate Express, creating an unreasonable restriction on the freedom of contract of persons who are not parties to the contract. For these reasons, the non-hiring provisions are not enforceable.

The finding of unenforceability has different ramifications for the two 1996 restrictive covenants. As to the 1996 agreement incident to employment, the entire covenant is unenforceable because one clause has been found invalid. See Lakeside Oil, 8 Wis. 2d at 162, 98 N.W.2d at 419. As to the 1996 agreement incident to sale of a business, the agreement will be enforced partially, meaning that the non-hiring provision is invalid but the rest of the 1996 agreement incident to sale stands. See Reiman Assoc., 102 Wis. 2d at 310,

306 N.W.2d at 295-96.

Although Brown argues that agreements do not contain reasonable time and territory restrictions and that they violate public policy, for the purpose of this opinion, I will assume that the remainder of the 1996 agreement incident to sale and the 1999 agreement are enforceable.

2. Breach

Even assuming that the 1996 agreement incident to sale (less the non-hiring provision) and the 1999 agreement are enforceable, Corporate Express has failed to adduce evidence sufficient to establish that Brown violated the agreements. Corporate Express contends that Brown violated the non-compete agreements both directly and indirectly. However, the evidence does not show that Brown has engaged in any activity that violates the agreements. Brown has never had any direct affiliation with Indoff or any other competitor of Corporate Express. He has never received a pay check from Indoff or any other competitor. Since his termination, Brown has not introduced Todd or Jeanine Brown to any Corporate Express customers.

Corporate Express contends that Brown violated the restrictive covenant indirectly by encouraging Indoff to hire his son and by assisting his son and wife in their employment with Indoff. Wisconsin courts have not decided whether a former employee violates his

covenant not to compete when his family members engage in competition with the employee's former employer. A few jurisdictions have held that an employee cannot evade his or her non-compete agreement indirectly through a family member. See e.g., Dad's Properties, Inc. v. Lucas, 545 So. 2d 926 (Fla. Ct. App. 1989) (wife operated adult nightclub in violation of husband's covenant not to compete when he "exerted considerable control over [its] design and operation"); Weickgenant v. Eccles, 173 N.W. 695 (Mich. 1913) (husband violated covenant not to compete when wife used husband's money and family name to launch competing business and husband managed and controlled business); Ingredient Technology Corp. v. Nay, 532 F. Supp. 627 (E.D. N.Y. 1982) (husband violated restrictive covenant when his wife incorporated a competing business, he became employee, salesperson and consultant and he encouraged former employer's customers to do business with wife and son). In those jurisdictions, indirect competition is evidence that a covenant has been violated under circumstances in which the former employee has a large degree of control over the family member's competing business.

Even assuming the unlikely proposition that Wisconsin courts would adopt the indirect violation of a covenant not to compete, Corporate Express's claim fails. Corporate Express has not adduced evidence sufficient to establish that Brown was so involved in his wife and son's employment with Indoff that he was competing with Corporate Express. Taking the evidence in the light most favorable to Corporate Express, the evidence shows

that Stuart Brown was interested in working for Indoff and helped Todd Brown set up his office used in employment with Indoff. At the same time, Brown told Indoff that he had a covenant not to compete and that he was not interested in working for Indoff. It may be the case that Brown encouraged Indoff to hire Todd Brown and counseled Todd to accept employment at Indoff. Nevertheless, I have found the non-hiring provisions of the covenants not to compete to be unenforceable. Therefore, even if Brown encouraged the relationship between Todd and Indoff, he did not violate the terms of his agreement with Corporate Express.

Corporate Express also alleges that Brown assisted Todd and Jeanine Brown in their employment with Indoff and profited from it in violation of his covenant not to compete. Todd Brown used Brown's credit card to purchase a computer for use in his employment with Indoff and continues to use the Brown family basement as an office. To the extent that Todd Brown himself may have violated his covenant not to compete with Corporate Express, Corporate Express has settled its claims with him and cannot pursue Stuart Brown for those same acts. Even though Jeanine Brown deposited her earnings from Indoff into her joint bank account, this benefit to Stuart Brown does not rise to the level of involvement required under the cases that recognize indirect competition. Moreover, Brown never assisted, consulted or advised Todd or Jeanine Brown in soliciting, contacting or selling products to Corporate Express customers after his termination. These facts do not add up to

competition with Corporate Express, either directly or indirectly. Because I find that Corporate Express failed to adduce evidence sufficient to establish that Brown violated the covenants not to compete and not to solicit, I need not address Brown's argument that the 1996 covenants are unenforceable because Corporate Express materially breached the employment agreement by paying Brown only $56,288.49 in 1997 instead of the agreed to $58,000. Brown's motion for summary judgment as to Corporate Express's claim that he violated the covenants not to compete and not to solicit will be granted.

B. Trade Secrets

Corporate Express contends that Brown violated the Wisconsin Uniform Trade Secret Act, Wis. Stat. § 134.90, by disclosing or using trade secrets, namely its customer lists. Brown argues that Corporate Express has adduced no evidence establishing that Corporate Express's customer lists constitute trade secrets.

Wisconsin law defines a trade secret as

> information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
>
> 1. The information 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.
>
> 2. The information is the subject of efforts to maintain its secrecy that are

reasonable under the circumstances.

Wis. Stat. § 134.90(1)(c).

Six factors assist in determining whether an item qualifies as a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors: (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Minuteman, Inc. v. Alexander, 147 Wis. 2d 842, 851, 434 N.W.2d 773, 777 (1989).

Generally, an employee cannot be restricted from transplanting the skills and knowledge he acquired from a former employer, unless the information that the employee acquired constitutes a trade secret or confidential information acquired during employment. See Gary Van Zeeland Talent, Inc., 84 Wis. 2d at 214, 267 N.W.2d at 248. Absent some unique circumstance, customer information is not protected as a trade secret unless the employer shows that the information is not reproducible easily or is kept confidential. See id. at 216, 267 N.W.2d at 246; Chuck Wagon Catering, Inc. v. Raduege, 88 Wis. 2d 740, 749, 277 N.W.2d 787, 791 (1979) ("list of customers per se does not constitute a trade secret").

Corporate Express has failed to adduce evidence sufficient to establish that the customer list that Brown allegedly misappropriated constitutes a trade secret. In its

complaint, Corporate Express alleges that Brown had access to "pricing information, marketing strategies, product information, supplier information, and other confidential information." Corp. Express's Compl., dkt. #2, at 5. Although Corporate Express has gone to great time and expense to develop its customer list, the other factors of the six-part inquiry point to the conclusion that the customer list is not a trade secret. Corporate Express does not allege that Brown took anything other than customer lists or that he took a hard copy of the lists. Corporate Express has not established the value of the memorized information to either itself or to competitors. The parties dispute the extent to which Corporate Express took measures to guard the secrecy of the information. Corporate Express states that its customer lists are maintained on a restricted computer hard drive; Brown alleges that the information was kept in an unsecured notebook at the Eau Claire facility. The undisputed facts do not demonstrate that the group of purchasers of Corporate Express's office supplies is either so "fixed or small" that its contents constitute a trade secret. See Nalco Chemical Co. v. Hydro Technologies, Inc., 984 F.2d 801, 804 (7th Cir. 1993). Corporate Express sells office supplies; its potential customers could be surmised by perusing the phone book of each community it services. Significant portions of the list could be duplicated by others relatively easily. In Carroon & Black-Rutters & Roberts, Inc. v. Hosch, 109 Wis. 2d 290, 325 N.W.2d 883 (1982), the Supreme Court of Wisconsin found that an insurance customer list comprising customer names and addresses as well as detailed

information such as the names of contact people, coverage amounts and renewal dates did not meet the definition of a trade secret under the six-part test. The information to which Brown had access is similar to that of the former employees in Carroon & Black-Rutters.

I conclude that Corporate Express has failed to adduce facts sufficient to establish that Brown has misappropriated a trade secret. Brown will be granted summary judgment on this claim.

C. Preemption of Duty of Loyalty, Tortious Interference and Conspiracy Claims

Corporate Express's tort claims for duty of loyalty, tortious interference with business relations and conspiracy must be dismissed to the extent that they are based on trade secret misappropriation because they are preempted by the Wisconsin Uniform Trade Secrets Act. The Wisconsin Uniform Trade Secrets Act "displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret." Wis. Stat. § 134.90(6)(a). Expressly excluded from this displacement is "[a]ny civil remedy not based upon misappropriation of a trade secret." Wis. Stat. § 134.90(6)(b)(2). Read together, subsections (a) and (b)(2) lead to the conclusion that claims based on misappropriation of a trade secret are preempted by the Wisconsin Uniform Trade Secrets Act. Although no Wisconsin court has interpreted this provision, courts of other jurisdictions interpreting similar provisions are authoritative in applying and construing the

Wisconsin Uniform Trade Secrets Act. See Wis. Stat. § 134.90(7) ("This section shall be applied and construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially similar identical laws."). Other courts have held that these provisions displace state common law claims to the extent that they rely on factual allegations that would constitute trade secret misappropriation. See e.g., Thomas & Betts Corp. v. Panduit Corp., 108 F. Supp. 2d 968, 971-72 (N.D. Ill. 2000) (interpreting Illinois version of Uniform Trade Secrets Act); Coulter Corp. v. Leinert, 869 F. Supp. 732, 734-35 (E.D. Mo. 1994) (interpreting Florida version of Uniform Trade Secrets Act). In determining whether a cause of action is preempted in a given case, the issue is whether the allegations of trade secret misappropriation alone make up the underlying wrong. If so, the action is barred. See e.g., Coulter Corp., 869 F. Supp. at 734-35. Corporate Express's claims will proceed only to the extent that they have as their factual basis something other than trade secret misappropriation.

In its claim for breach of fiduciary duty, Corporate Express alleges that Brown: (1) conspired to take away business from Corporate Express and give it to Indoff; (2) misappropriated trade secrets and other confidential information; and (3) failed to have Todd Brown execute a non-compete agreement as requested by Corporate Express. See Corp. Express's Compl., dkt. #2, at 10. Because Corporate Express's contention that Brown breached his duty of loyalty by misappropriating trade secrets is based on the same facts as

its claim under the Wisconsin Uniform Trade Secrets Act, that portion of the fiduciary duty claim will be dismissed.

In its claim for tortious interference with present and prospective business relations, Corporate Express alleges that Brown (1) contacted or met with Corporate Express customers and employees to solicit business for Indoff and (2) used confidential information to solicit future customers for Indoff. See Corp. Express's Compl., dkt. #2, at 11. Because the second allegation comprises the trade secret misappropriation alone, that portion of Corporate Express's tortious interference with business relations will be dismissed.

In its conspiracy claim, Corporate Express contends that Stuart Brown violated Wis. Stat. § 134.01 when he conspired with Todd Brown and Indoff to injure Corporate Express's business by breaching his contract, misappropriating trade secrets, interfering with business relations and breaching his duty of loyalty. See Corp. Express's Compl., dkt. #2, at 12. This claim is not barred by the Wisconsin Uniform Trade Secrets Act because the allegations of trade secret misappropriation alone do not constitute the underlying wrong. Rather than resting on the misappropriation of trade secrets, the conspiracy claim is a conglomeration of all of the other claims. The conspiracy claim is not preempted by the Wisconsin Uniform Trade Secrets Act.

D. Fiduciary Duty

After the dismissal of the portions of the fiduciary duty claim that are preempted by the Wisconsin Uniform Trade Secrets Act, Corporate Express's claim consists of two factual allegations: Brown (1) conspired to take away business from Corporate Express and give it to Indoff; and (2) failed to have Todd Brown execute a non-compete agreement as requested by Corporate Express. Corporate Express argues that Brown "breached his fiduciary duty by applying to work for a competitor and traveling to St. Louis with his family to meet with a competitor while still employed by [Corporate Express]." Corp. Express's Br. in Opp. to Brown's M. for S. J., dkt. #49, at 20-21. Corporate Express has not supported its allegation that Stuart Brown failed to have Todd Brown execute a covenant not to compete. See id. at 20-21. Accordingly, I consider this portion of the claim dropped. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

The elements of the tort of breach of fiduciary duty are 1) a duty of care owed to the principal by the agent; 2) a breach of duty by the agent; and 3) an injury to the principal resulting proximately from the breach. See Olfe v. Gordon, 93 Wis. 2d 173, 186, 286 N.W.2d 573, 579 (1980). The parties dispute whether Brown can be considered a fiduciary when he was a sales manager for the Eau Claire office, not an officer or director. Brown argues that only high level, policy-making employees have a fiduciary duty to their employer. Brown is wrong. All employees are agents of their employers with respect to matters within the scope of their employment. See Arsand v. City of Franklin, 83 Wis. 2d. 40, 50, 264 N.W.2d 579, 584 (1978) ("a servant is necessarily an agent, but an agent is not invariably a servant"). See also Restatement (Second) of Agency § 2(1) (definition of master, servant and independent contractor: "A master is a principal who employs an agent to perform service in his affairs . . ."). While Brown was employed by Corporate Express, he was its agent in supervising its sales personnel. As an agent, he owed his employer a fiduciary duty as to those matters within the scope of his agency. See Wisconsin Jury Instructions - Civil 4000, 4020 (agent occupies position of trust and confidence with respect to principal and is under obligation to discharge duties with absolute fidelity and loyalty to interests of principal and keep principal informed of all material facts that affect subject of agency).

In support of his position that he cannot be held to be a fiduciary in relation to Corporate Express, Brown cites Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.,

206 Wis. 2d 435, 557 N.W.2d 835 (Ct. App. 1995). In Modern Materials, the narrow question of fiduciary duty was whether a particular employee had held a position as an officer or director of the company or had been otherwise vested with policy making authority within the company, so as to be precluded from competing with his former employer. See id. at 444, 557 N.W. 2d at 838. In deciding that the employee had not held such a position, the court of appeals held that the former employer had not established that the employee was an officer who would owe a fiduciary duty to the company. See id. at 445, 557 N.W. 2d at 839. The Wisconsin Court of Appeals was not concerned with any duty the employee might have had while employed; its focus was on whether he had occupied such a high level in the former company as to be precluded from competing with his former employee after his termination.

The holding in Modern Materials does not help Brown because the only remaining issue under the fiduciary duty claim is whether Brown engaged in a competing business while employed by Corporate Express. Corporate Express alleges that Brown applied to work for Indoff and traveled to St. Louis with his family to meet with Indoff while still employed by Corporate Express. The undisputed facts show that Brown filled out a form expressing interest in working for Indoff. However, even if Brown did apply at Indoff and meet with Indoff employees, these acts do not fall within the scope of Brown's employment as a sales manager. Investigating employment opportunities at one company while still employed at

another does not rise to the level of a breach of fiduciary duty. Brown did not divert any profit from Corporate Express to his own pocket as a result of his contact with Indoff. See General Automotive, 19 Wis. 2d 528, 120 N.W.2d 659 (1963) (general manager solicited machine shop work for his employer and at same time solicited work for competing shop without employer's knowledge and pocketed profits). Corporate Express has failed to adduce evidence sufficient to establish that Brown breached his fiduciary duty. I will grant Brown's motion for summary judgment on this claim.

E. Interference with Contract

In order to establish the tort of intentional interference with contracts, Corporate Express must show: (1) an actual or prospective contractual relationship; (2) knowledge by Brown of the existence of the relationship; (3) intentional acts on the part of Brown to disrupt the relationship; and (4) damages to Corporate Express caused by those acts. See Cudd v. Crownhart, 122 Wis. 2d 656, 639-40, 364 N.W.2d 158, 160 (Ct. App. 1985).

In the portion of its claim of interference with contract that remains, Corporate Express alleges that Stuart Brown contacted or met with Corporate Express customers and employees to solicit business for Indoff. Brown contends that there is no evidence that he acted intentionally to interfere with Corporate Express's relationship with its customers. Although Corporate Express argues that the conduct need not be egregious to satisfy the

intent element set out in Cudd, Corporate Express cannot escape the fact that there is no evidence that Brown contacted Corporate Express's customers in order to sell office supplies, assisted Todd Brown in soliciting Corporate Express customers or tried to convince Corporate Express's customers not to do business with Corporate Express. Taking the evidence in the light most favorable to Corporate Express, no reasonable jury could find that Brown acted intentionally to disrupt the relationship between Corporate Express and its customers. Therefore, Brown will be granted summary judgment on this claim.

F. Conspiracy

Civil conspiracy is "a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." Modern Materials, 206 Wis. 2d at 447, 557 N.W.2d at 840 (citation omitted); see also Wis. Stat. § 134.01 (two or more persons who join together "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever . . ."). "To state a cause of action for civil conspiracy, the complaint must allege: 1) the formation and operation of the conspiracy; 2) the wrongful act or acts done pursuant thereto; and 3) the damage resulting from such act or acts." Onderdonk v. Lamb, 79 Wis. 2d 241, 247, 255 N.W.2d 507, 510 (1977).

Corporate Express contends that Brown conspired with Todd and Jeanine Brown and

Indoff to injure Corporate Express's business by breaching his contract, misappropriating trade secrets, interfering with business relations and breaching his duty of loyalty. I have already found that Corporate Express has failed to adduce evidence sufficient to establish that Brown engaged in any of these alleged acts. Moreover, Corporate Express has failed to present evidence that suggests that Brown made plans with anyone to injure Corporate Express's business. Brown will be granted summary judgment on the claim of civil conspiracy.

III. BROWN'S CLAIMS

A. Commercial Lease

Brown contends that Corporate Express breached its commercial lease when it failed to pay him rent for fourteen months. Because the commercial lease provides that it continues from year to year until written notice of termination is given by either party at least 90 days before the expiration of the lease or any renewal of the lease, the lease was renewed automatically for the period from December 6, 1999 to December 6, 2000. The terms of the lease dictate that Corporate Express needed to give Brown written notice 90 days before the renewal (September 7, 2000) in order to cancel the automatic renewal that was to take place on December 6, 2000. Corporate Express did not notify Brown in writing that it did not wish to renew the lease and it did not pay rent for the months the lease was

extended. Although Brown acted in his capacity as a landlord when he signed the lease, Brown was the branch manager of the Eau Claire office that rented his property. The parties dispute whether by virtue of his managerial position with Corporate Express, Brown had a duty to notify himself that Corporate Express did not wish to renew the lease.

According to Corporate Express, the fact that Brown was sales manager leads to the inevitable conclusion that he had a duty to provide written notice that the lease would not be renewed. As Corporate Express points out, Brown was aware of Corporate Express's impending relocation well before the September 7 deadline. As early as April 2000, Brown had distributed a memorandum to the management team discussing the move and had sent Corporate Express's customers a letter notifying them of it. Despite the fact that Brown had actual knowledge that Corporate Express did not intend to renew its lease, Brown did not have the authority to enter into real estate contracts on behalf of Corporate Express. Corporate Express had retained a property management company to represent its leasing interests on a nationwide basis. Corporate Express has failed to adduce evidence sufficient to demonstrate that Brown was responsible for Corporate Express's failure to provide written notice that it did not want to renew its lease with Brown. Accordingly, summary judgment will be granted to Brown on this claim. Brown is entitled to fourteen months' rent (October 2000 through December 2001) at $1712 per month, totaling $23,968 plus interest and attorney fees.

B. Separation Agreement and General Release

Brown contends that Corporate Express breached its separation agreement and general release by failing to pay him the appropriate severance payments and by paying only a portion of the compensation for unused sick and vacation days. Under the terms of the agreement, Corporate Express agreed to pay Brown 32 weeks of his base salary and 688 hours of unused sick and vacation time. At the same time, Corporate Express's obligations under the separation agreement are conditioned upon Brown's abiding by all the terms of the agreement, including honoring all previous agreements and not disclosing trade secrets. Corporate Express asserts that it does not owe Brown the severance pay or the unused vacation and sick pay because Brown violated the 1996 and 1999 covenants not to compete and misappropriated trade secrets. However, I have found that no reasonable jury could find that Brown breached the non-compete agreements or misappropriated trade secrets. Therefore, no reasonable jury could find that Brown failed to abide by the terms of the separation agreement and general release. Accordingly, Corporate Express cannot escape its obligations under the agreement; it owes Brown the full amount of the severance pay and the remainder of the unused vacation and sick pay, as stated in the agreement. Brown's motion for summary judgment will be granted on this claim.

As to the severance pay, Brown is entitled to 32 weeks of his weekly base salary, or $43,169.92. As to the unused vacation and sick time pay, the parties dispute how many

hours Brown is due. Corporate Express paid Brown for 240 hours, relying on its vacation policy which allows an employee to accrue only one year's vacation pay (200 hours) plus 40 hours. However, the severance agreement itself includes a notation that the amount of vacation and sick time that Brown had accrued as of July 3, 2000 was 688 hours. Under Wisconsin law, when the terms of a contract are plain and unambiguous, a court should enforce the plain meaning of the contract as it stands. See Borchardt v. Wilk, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App.1990). Thus, under the terms of the agreement, Corporate Express is obligated to pay Brown for 688 hours of unused vacation and sick pay. Because Corporate Express has paid Brown for only 240 hours, it still owes Brown for 448 hours of vacation and sick time at $33.73 each hour, or $15,111.04.

ORDER

IT IS ORDERED that

1. Stuart Brown's motion for summary judgment is GRANTED as to all of Corporate Express Office Products, Inc.'s claims; Brown's motion for summary judgment is GRANTED against BT Office Products International, Inc. n/k/a Corporate Express Office Products, Inc. as to all of his claims.

2. Brown's motions to strike the affidavits of Rick Toppin and Maria VanHees are DENIED.

3. Brown is awarded $23,968 in damages plus interest and reasonable attorney fees for his claim for breach of the commercial lease.

4. Brown is awarded $58,280.96 in damages plus interest for his claim for breach of the separation agreement and general release.

5. Brown may have until August 3, 2001, in which to submit an itemized accounting of the total interest due on both claims and the time expended on the claim for breach of the commercial lease, with identification of the tasks performed, together with an itemization of the costs Brown reasonably incurred in prosecuting this claim; Corporate Express may have until August 10, 2001, in which to respond to Brown's submission. There will be no reply brief.

Entered this 18th day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge