ATTORNEYS FOR APPELLANT:

HAROLD ABRAHAMSON
JONATHAN E. HALM
Hammond, Indiana

MICHELE L. ODORIZZI
THOMAS M. DURKIN
DAVID D. POPE
Chicago, Illinois

ATTORNEYS FOR APPELLEES:

F. JOSEPH JASKOWIAK
KEVIN G. KERR
Valparaiso, Indiana

IN THE
COURT OF APPEALS OF INDIANA

THINK TANK SOFTWARE DEVELOPMENT CORPORATION, d/b/a THINK TANK NETWORKING TECHNOLOGIES GROUP AND THINK TANK INFORMATION SYSTEMS,

Plaintiff-Appellant,

vs. No. 64A03-1003-PL-172

CHESTER, INC., MIKE HEINHOLD, JOHN M. MARIO, JOEL E. PARKER, THOMAS GUELINAS, JON MEYER, DANIEL B. CURRY, ERIC M. WOJCIECHOWSKI, MICHAEL GEE, PHILIP RYAN TURNER, and CARL ZUHL,

Defendants-Appellees.

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D05-0205-PL-3861

APRIL 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Think Tank Software Development Corporation, d/b/a Think Tank Networking Technologies Group and Think Tank Information Systems (Think Tank) appeals the grant of summary judgment in favor of Defendants-Appellees Chester, Inc. (Chester); Mike Heinhold (Heinhold); John M. Mario (Mario); Joel E. Parker (Parker); Thomas Guelinas (Guelinas); Jon Meyer (Meyer); Daniel B. Curry (Curry); Eric M. Wojciechowski (Wojciechowski); Michael Gee (Gee); Philip Ryan Turner (Turner); and Carl Zuhl (Zuhl) (collectively, the defendants). We affirm in part, reverse in part, and remand with instructions.

ISSUES

The following issues are relevant to this appeal:

I. Whether the trial court erred in granting summary judgment on Think Tank's claim for breach of contract as to covenants not to compete.

II. Whether the trial court erred in granting summary judgment on Think Tank's claim for breach of contract as to a confidentiality clause.

III. Whether the grant of summary judgment was proper because Think Tank failed to show specific damages resulting from contact between the defendants and Think Tank customers.

IV. Whether the trial court erred in granting summary judgment on Think Tank's tort claims.

FACTS AND PROCEDURAL HISTORY

Think Tank is engaged in computer-related business activities, including systems and network engineering, problem solving, systems design, implementation, sales, client training, and computer maintenance. As of April 19, 2001, Think Tank employed defendants Mario, Parker, Guelinas, Meyer, Curry, Wojciechowski, Gee, Turner, and Zuhl (collectively, the former employees).

Think Tank required most, if not all, employees to sign employment agreements containing a covenant not to compete. The covenant reads in part:

> (b) During the employment of Employee by Employer and for a period of two (2) years following the date of termination of Employee's employment with Employer for any reason, Employee shall not personally, or in concert with any other person or company, either as an employee, partner, director, officer, shareholder or independent contractor, for purposes other than specifically for the business of the Employer, solicit, canvas [sic], or otherwise contact any of Employer's customers or former customers who have been customers of Employer within a period of two (2) years prior to the termination of Employee's employment with Employer. Employee agrees that he will not contact any such person, customer, account, or prospect for any business purpose which is similar to or relates to any business activities generally engaged in by Employee during the term of his employment with Employer. Further, Employee shall not contact any present customer or former customer or any individual or company that has been a customer with Employer within two (2) years preceding the date of Employee's termination of employment, for purposes of requesting said customer or former customer to withdraw from any further business with employer, or to curtail or cancel its business with Employer.
>
> (c) During the employment of Employee by Employer, and for a period of two (2) years following the date of termination of Employee's employment with Employer for any reason, Employee shall not, in connection with engaging in the business of selling, soliciting, servicing, consulting and providing computer hardware and software and related equipment, as well as design and development of computer software and systems analysis design, accept referrals of clients from, or negotiate any contract or agreement with, any customer or client that has been a customer or client of

> Employer with[in] two (2) years preceding the date of Employee's termination of employment under this Agreement.

Appellant's App. pp. 98-99.

During a period ranging from April 20, 2001, to April 19, 2002, all of the former employees left Think Tank for various reasons, shrinking Think Tank's staff from sixteen to nine employees. With the exception of Parker, all of the former employees went directly from Think Tank to Chester.[1] Chester was informed of the covenant not to compete by Curry, Gee, Guelinas, Wojciechowski, and Zuhl. However, Mario, Parker, Meyer, and Turner did not believe they had signed the covenant when they were hired by Think Tank, and Think Tank could not produce the signed agreements. Think Tank's president asserts that each of these four signed the covenant in his presence.

On April 26, 2002, Think Tank filed its "Verified Complaint For Injunctive And Other Relief" against Chester; Chester's manager, Heinhold; and the former employees. Appellant's App. p. 39. Among other things, Think Tank alleged in its complaint that its former employees were violating the covenant not to compete by contacting Think Tank personnel and customers. Think Tank further alleged that Chester, Heinhold, and the former employees were interfering with Think Tank's business by divulging confidential information and trade secrets. Three days later, after an ex parte emergency hearing, a Lake Superior Court granted a temporary restraining order finding that Think Tank had "a protectable interest in its goodwill (which includes all its customer information and relationships as well as its employees) and reputation . . . ." Appellant's App. p. 61. The

[1] Parker worked for another employer for approximately five months before moving to Chester.

court further found that "the provisions of [the covenant] provide reasonable and appropriate restrictions on post-employment conduct of [Think Tank's] employees; and that all defendants in concert with one another have either breached the [covenant] or induced or aided the breach . . . ." Appellant's App. pp. 61-62.

On May 1, 2002, the defendants filed for a change of venue, and the Lake Superior Court transferred the case to the Porter Superior Court on May 6, 2002. After a hearing on the defendants' motion to dissolve the temporary restraining order, the trial court ruled on May 10, 2002, that the temporary restraining order was not properly issued because Think Tank failed to give proper notice pursuant to Indiana Rule of Trial Procedure 65(B)(2) and failed to post bond pursuant to Indiana Rule of Trial Procedure 65(C).

On June 7, 2002, Think Tank filed its "First Amended Verified Complaint For Injunctive And Other Relief." Appellant's App. p. 67. In this amended complaint, Think Tank asserted breach of contract and tort claims against various defendants.

Think Tank did not pursue injunctive relief, and on August 24, 2004, the defendants moved to dismiss the case due to Think Tank's lack of prosecution. The motion was denied and discovery continued until November 30, 2009. On December 31, 2009, the defendants filed a motion for summary judgment challenging Think Tank's claims. On March 9, 2010, after holding a hearing and reviewing the designated evidence of all parties, the trial court granted the motion for summary judgment for the defendants on all of the claims raised by Think Tank in its first amended complaint. In doing so, the trial court concluded that the covenant not to compete in the various employment agreements "is overbroad and is therefore unenforceable . . . and cannot be reformed." Appellant's App. p. 36. The court also concluded that "the information alleged to have been misappropriated by [the defendants] does not constitute a 'trade secret' under the Indiana Trade Secret Act and therefore [Think Tank's] claim for misappropriation fails as a matter of law." *Id*. The court further concluded as a matter of law that Think Tank's claims for interference with a business relationship, unfair competition, and unjust enrichment "do not apply to the fact situation of this case." *Id.* at 37.[2] Think Tank now appeals.

DISCUSSION AND DECISION

STANDARD OF REVIEW

When reviewing a grant of summary judgment, our standard of review is the same as the trial court. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.,* 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that the parties designated to the trial court, we must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Id*. at 1269-70; Indiana Rule of Trial Procedure 56(C). Once the moving party has sustained its burden of showing that there is no genuine issue of material fact on a determinative issue, the nonmovant must respond by setting forth specific facts showing that a genuine issue exists, and it may not simply rest on the allegations or denials in the pleadings. *See Brady v. Brown Twp. Life Star Ambulance Serv.*, 802 N.E.2d 983, 987 (Ind. Ct. App. 2004). If the nonmovant fails to meet its responsive burden, the court shall render summary judgment for the moving

[2] The trial court also granted summary judgment for the defendants on a defamation claim. Think Tank does not appeal the grant of summary judgment on that issue.

party. *Krueger v. Hogan*, 780 N.E.2d 1199, 1201 (Ind. Ct. App. 2003). We may affirm the trial court's order on any legal basis supported by the record. *Clary v. Dibble*, 903 N.E.2d 1032, 1038 (Ind. Ct. App. 2009), *trans. denied*.

I. BREACH OF CONTRACT: COVENANT NOT TO COMPETE

Noncompetition agreements are in restraint of trade and are not favored by the law. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 172 (Ind. Ct. App. 2008). They are strictly construed against the employer and are enforced only if reasonable. *Id*. Covenants not to compete must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. *Id*. The ultimate determination of whether a covenant not to compete is reasonable is a question of law for the court to decide. *MacGill v. Reid*, 850 N.E.2d 926, 929 (Ind. Ct. App. 2006). However, whether a particular clause is reasonable depends on the facts and circumstances of the particular case. *Hahn v. Drees, Perugini, & Co.*, 581 N.E.2d 457, 459 (Ind. Ct. App. 1991).

In determining the reasonableness of the covenant not to compete, we examine whether the employer has asserted a legitimate interest that may be protected by a covenant. *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003). If the employer has asserted a legitimate, protectable interest, then we determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. *Id*. It must be established that the former employee has gained a unique competitive advantage or ability to harm the employer before the employer is entitled to the protection of a noncompetition covenant. *Id*.

Think Tank and the defendants agree that the issue of a legitimate protectable interest is based on Think Tank's good will with its customers. However, the defendants argue that the covenant not to compete is overbroad and unenforceable because it restricts the former employees from contacting customers with whom they had no direct contact while they were working for Think Tank. "Personal contact, however, is not an essential element of good will, and our courts have upheld covenants that restricted a former employee from contacting those customers with whom his former employer did business during his tenure, considering such clients to be present not past ones." *Cohoon v. Fin. Plans & Strategies, Inc.*, 760 N.E.2d 190, 195 n. 3 (Ind. Ct. App. 2001) (citing *Hahn*, 581 N.E.2d 457, 461-62 (Ind. Ct. App. 2004); *Seach v. Richards, Dieterle & Co*, 439 N.E.2d 208, 214-15 (Ind. Ct. App. 1982)).

A covenant may not be enforced to preclude a former employee from soliciting a customer that was not a customer <u>during</u> the employee's employment. Such a customer is considered a "past" customer if it was a customer prior to the employee's employment or a "prospective" customer if it became a customer after the employee left employment. *See Cohoon*, 760 N.E.2d at 195 (defining "past clients" as those persons or entities that had no contact with the employer during the employee's tenure with the employer); *Hahn*, 581 N.E.2d at 461 (same); *Seach*, 439 N.E.2d at 214 (same).

The covenant approved in *Hahn* as blue pencilled was specific that the customer had to have been a customer at some time <u>after</u> the employment of the employee and before the termination: "A client shall be any individual, firm, or credit union from whom the employer has received a fee for services performed from the date of the employee's employment thru and including the date of the employee's termination." *Hahn,* 581 N.E.2d at 462.

In *Cohoon* we approved a covenant that precluded association for two years with "any [c]lient or any dealer, supplier or any other person, which had a previous business relationship with the [c]ompany or the [b]usiness at any time during the twelve (12) months prior to the date of the termination of this agreement." *Cohoon,* 760 N.E.2d at 195. At the same time we recognized that a client must have been one who was a client during the employee's employment. Although the covenant language was not specific on that point, it was the fact that Cohoon had been employed for a two year period and, thus, any customer who was a customer during the twelve month period preceding Cohoon's termination was necessarily a customer during Cohoon's employment. *Id.*

Here, too, although the covenant is not specific that the customers or former customers had to have been customers during the employee's employment, there is evidence that the customers as to which Think Tank complains had been customers during the employment of the defendants.

An issue of fact that will need to be resolved as to each defendant with respect to each customer for whom Think Tank claims damage by reason of a defendant violating the covenant not to compete is whether that customer was a customer during the time of that employee's employment and within two years of that employee's termination. There is evidence that such is the case, but it remains for trial to sort it out as to each employee and each customer.

The defendants also contend that the covenant not to compete is overbroad as a matter of law because it does not contain a geographical restriction. A covenant not to compete must be sufficiently specific in scope to coincide with only the legitimate interests of the employer and to allow the employee a clear understanding of what conduct is prohibited. *Cohoon*, 760 N.E.2d at 195. One method of limiting a covenant's scope is to impose territorial boundaries; however, "as the specificity of limitation regarding the class of person with whom contact is prohibited increases, the need for limitation in territorial terms decreases." *Id*. at 195-96. Indeed, "a covenant not to compete may even be enforced absent a territorial limitation where the covenant sufficiently restricts the class of prohibited contacts." *Id*. at 196. Where, as here, the covenant not to compete restrained the former employees from contacting customers who had been such within two years of the former employees' termination, the class of prohibited contacts is well defined and specific, thereby eliminating the need for any geographical limitation.

Although we have concluded generally that the covenant is not too broad to be enforceable, we do find two respects in which the covenant as written is too broad. The first is found in the first sentence of section (b) of the covenant which reads:

> During the employment of Employee by Employer and for a period of two (2) years following the date of termination of Employee's employment with Employer for any reason, Employee shall not personally, or in concert with any other person or company, either as an employee, partner, director, officer, shareholder or independent contractor, for purposes other than specifically for the business of the Employer, solicit, canvas [sic], or otherwise contact any of Employer's customers or former customers who have been customers of Employer within a period of two (2) years prior to the termination of Employee's employment with Employer.

Appellant's App. p. 98. While "solicit" and "canvas" (sic) are sufficiently restrictive, we find that "or otherwise contact" is too broad. It would restrict contacts beyond those impinging on protection of the employer's good will, such as discussion of possible employment of the employee by a customer.

Although we must reject as unenforceable the portion of a covenant not to compete that contains the aforementioned broad language, we need not reject the entire covenant. *See Seach*, 439 N.E.2d at 214. Indiana follows the rule that when objectionable and nonobjectionable terms appear in a contract, the contract may be divisible and the reasonable limits may be enforced. *Id.* at 214-15. Indeed, our Supreme Court ratified this court's use of the "blue pencil doctrine" to allow for removal of invalid covenant provisions and to leave a valid covenant, so long as the covenant is divisible. *See Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005). We apply the blue pencil here to strike the overly broad "or otherwise contact" language and to insert the word "or" between "solicit" and "canvas" (sic).[3]

The second respect in which the covenant as written is too broad is found in section (c) of the covenant, which reads:

> During the employment of Employee by Employer, and for a period of two (2) years following the date of termination of Employee's employment with Employer for any reason, Employee shall not, in connection with engaging in the business of selling, soliciting, servicing, consulting and providing computer hardware and software and related equipment, as well as design and development of computer software and systems analysis design, accept referrals of clients from, or negotiate any contract or agreement with, any

[3] A word may be added to the covenant "for the simple purpose of making the clause grammatically correct." *See Hahn*, 581 N.E.2d at 462.

> customer or client that has been a customer or client of Employer with[in] two (2) years preceding the date of Employee's termination of employment under this Agreement.

Appellant's App. p. 98. The provision that the Employee shall not "accept referrals of clients from" is too broad. It would prohibit acceptance of referrals of clients who had never been clients of Employer if the referral came from the clients who were "off limits" to the Employees. That goes beyond the limits permissible to protect Employer's good will. We apply the blue pencil to remove the "accept referrals of clients from, or" and section (c) of the covenant will now be read as:

> During the employment of Employee by Employer, and for a period of two (2) years following the date of termination of Employee's employment with Employer for any reason, Employee shall not, in connection with engaging in the business of selling, soliciting, servicing, consulting and providing computer hardware and software and related equipment, as well as design and development of computer software and systems analysis design, ~~accept referrals of clients from, or~~ negotiate any contract or agreement with, any customer or client that has been a customer or client of Employer with[in] two (2) years preceding the date of Employee's termination of employment under this Agreement.

Because of its conclusion regarding the wording of the covenants, the trial court did not address the defendants' contention that Mario, Parker, Turner, and Meyer are entitled to summary judgment because Think Tank cannot produce the covenants they allegedly signed. The defendants first argue that enforcement of the provisions as to these former employees is prevented by the statute of frauds. We note, however, that the statute of frauds pertains to the enforcement of oral contracts. *See Wright v. Sampson*, 830 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) (holding that the purpose of the statute is to bar certain actions on contracts that are not placed in writing). Here, Think Tank is not attempting to enforce oral contracts; it is attempting to enforce a written covenant that has allegedly been misplaced.

The defendants also argue that the covenants signed by the other former employees cannot be used to prove the terms of the covenants with Mario, Parker, Turner, and Meyer. However, we have held that Indiana Evidence Rule 1004 provides that where an original writing is lost or destroyed, other evidence of the contents of the writing is admissible, unless the proponent lost or destroyed the writing in bad faith. *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 717 (Ind. Ct. App. 2004), *trans. denied*. Where the missing document is a contract, such evidence can include "standard forms" of the contract. *See id*. at 720-21. In the instant case, the signed covenants of the other former employees, coupled with evidence of Think Tank's practices, provide evidence from which a reasonable finder of fact could determine that Mario, Parker, Turner, and Meyer also signed covenants with the same terms as the other former employees. Thus, Mario, Parker, Turner, and Meyer are not entitled to summary judgment on Think Tank's breach of contract claim merely because the covenants are missing.

II. BREACH OF CONTRACT: CONFIDENTIALITY CLAUSE[4]

The employment contracts signed by most, if not all of the former employees, also include a covenant not to compete that is referred to by Think Tank as a "confidentiality clause." This clause states:

[4] The defendants equate the confidentiality clause issue with the misappropriation of trade secrets issue as raised in the court below and as framed by the parties in their appellate briefs. We agree that the misappropriation of trade secrets issue is subsumed by the confidentiality clause issue. We will examine the validity of the confidentiality clause under the summary judgment standard of review, and our decision on this issue stands as a decision on the claim for misappropriation of trade secrets.

> (a) At any time following execution of this Agreement, Employee shall not use or disclose, directly or indirectly, for any reason whatsoever or in any way, other than at the specific direction of Employer during the course of Employee's employment or after receipt of the prior written consent of the Employer, *any Confidential Information or other trade secrets of Employer*, as well as property of Employer including, but not limited to, the following: customers or clients of Employer and any of their financial statements, reports, financial information, or customer needs; contract proposals and bidding information and quote systems; rate and fee structures; policies and procedures developed as part of a confidential business plan; marketing data including data processing bluebook; computer intelligence reports; computer software developed by Employer or by Employee during the course of employment for Employer or any of the Employer's customers or clients; management systems and procedures and software relating thereto, including manuals and supplements; information concerning the manner in which the software programs have been developed (i.e., source code) or any copies of existing software programs owned by Employer and not specifically authorized in writing by Employer; any one or all of the foregoing are hereby deemed to be "Confidential Information" under the terms of the Agreement. The obligation not to use or disclose Confidential Information shall not apply to any information which becomes public knowledge in the industry through no fault of Employee or through any disclosure of information compelled through a valid order of court or any governmental agency.

Appellant's App. p. 98. (Emphasis added).

The defendants maintain that the trial court did not err in granting summary judgment on the enforcement of this clause because Think Tank did not possess any confidential information or other trade secrets that could be used against it by its former employees. In support of their summary judgment motion, the defendants designated as evidence the affidavit of Gerald Gott, a former Think Tank director of technology. In the affidavit, Gott asserts, among other things, that (1) Think Tank's business was "similar to the hundreds of other computer technology companies, including Chester, in the Chicago Metropolitan Area"; (2) Think Tank sold industry standard hardware and software; (3)

Think Tank "bought the software and hardware components from the same companies (i.e. IBM, Compaq, Hewlett Packard, Microsoft, and Novell) and distributors as its competitors"; (4) the training received by Think Tank employees was "industry standard training conducted primarily by the manufacturers"; (5) the certifications held by Think Tank employees "were common certifications in the computer technology industry . . . [which] . . . by their very nature require standardization of the practices and procedures used by those receiving the certifications"; (6) the customers of a computer technology company, such as Think Tank, were "well known to its competitors"; (7) identification of potential customers was not difficult, and Think Tank was aware of the identity of its competitor's customers; (8) Think Tank customers or general customers were not precluded from sharing quotes or pricing information received from Think Tank, and "it was common to disclose pricing information of competing companies in an effort to obtain the best price"; (9) "an average computer technician could determine a customer's hardware, software, and server configurations by examining the customer's computer system"; and (10) he (Gott) was not "request[ed] to protect any alleged trade secrets when [he] ended his employment with [Think Tank]." Appellees' App. pp. 401-02. The defendants also designated similar statements by Mario. Appellees' App. p. 413.

Think Tank points to evidence designated to show that customer identities and Think Tank's tailored solutions to the customers' information technology needs combine to form confidential information as that term is defined in the confidentiality clause. Think Tank also points to its extensive security provisions in protecting the types of information referred to in the confidentiality clause as evidence that the information is confidential information or other trade secrets. Think Tank further points to the former employees' access to such information as an indication of the advantage that can be acquired if the former employees used the information. Finally, Think Tank points to certain scenarios in which the defendants gained an advantage by using such information to harm Think Tank's business.

In general, "good will" includes such things as "names and addresses and requirements of customers and the advantage acquired through representative contact." *Hahn*, 581 N.E.2d at 460 (quoting *Donahue v. Permacel Tape Corp.*, 234 Ind. 398, 410, 127 N.E.2d 235, 240 (1955)). These are property rights that an employer is entitled to protect. *Cohoon*, 760 N.E.2d at 195. The defendants place much weight on *Fleming Sales Co., Inc. v. Bailey*, 611 F.Supp. 507 (N.D. Ill. 1985), and like cases for the proposition that the types of information covered by Think Tank's confidentiality clause are so ephemeral that they cannot be trade secrets. However, we note that *Fleming* is specifically limited to a situation where, unlike the present case, no confidentiality clause exists. *See id*. at 511 (holding that whether names, addresses, and other customer information constitute trade secrets is relevant because Fleming "did not elect to bind [the former employee] by a restrictive covenant of any kind").

In short, Think Tank has designated evidence that shows there is a genuine issue of material fact that prevents the grant of summary judgment on this issue. The fact finder must determine whether the items contained in the confidentiality clause are trade secrets that may be protected. If they are not, then Think Tank has not asserted that the covenant not to compete asserts a legitimate interest that may be protected and/or that the former employees have gained a unique competitive advantage or ability to harm Think Tank.

III. DAMAGES

The defendants maintain that after nearly eight years of discovery, Think Tank has failed to produce any evidence of damages resulting from any particular defendant's contacts with or activity involving Think Tank's customers. The defendants further maintain that over the long period of discovery, Chester repeatedly requested—by interrogatories, depositions, and requests for production—that Think Tank identify what each defendant did wrong and how Think Tank was damaged. The defendants point to depositions and affidavits submitted in support of their summary judgment motion that include denials by the former employees, Heinhold, and Chester that any breach of covenant had resulted in lost net profits to Think Tank. The defendants emphasize that only nine customers have been identified that Think Tank claims were Think Tank clients and whose business Think Tank allegedly lost because of the defendants' actions.

The proper measure of damages for breach of a covenant is the plaintiff's lost net profits. *See Turbines, Inc. v. Thompson*, 684 N.E.2d 254, 257 (Ind. Ct. App. 1997). The plaintiff must show that "but for" the defendant's breach of the covenant, the plaintiff would have received the business earned by the defendant. *See id*. at 257-58. A damage award "does not require any specific degree of certainty, so long as the amount awarded is supported by the evidence and is not based on speculation or conjecture." *Id*. at 258. Even where the amount is uncertain, lost profits as an element of damages still may be awarded if the evidence is sufficient for the fact-finder to make a fair and reasonable determination. *Id*. A party must demonstrate the loss attributable to prohibited competition as opposed to the loss attributable to the cyclical nature of business or other factors. *See id.*

Turbines is not a summary judgment case but an appeal from a trial court's judgment where the company had the burden of proof to show that its former employee caused the company's lost profits. At the summary judgment stage, the "burden imposed at trial upon the party with the burden of proof on an issue is significantly different from that required by a nonmovant in an Indiana summary judgment proceeding." *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994). Under Indiana's standard, the party seeking summary judgment "must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the nonmovant required to come forward with contrary evidence." *Id*. "Merely alleging that the plaintiff has failed to produce evidence on each element of [a cause of action] is insufficient to entitle the defendant to summary judgment under Indiana law." *Id*.

The effect of *Jarboe* is examined in *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079 (Ind. Ct. App. 1998), *trans. denied*, where Lumpe, who was injured in an explosion at a plant that manufactured brass bars through a process that involved the pouring of molten metal into a mold, brought a products liability action against Lenhardt, the producer of some of the molds used in the plant. Lenhardt filed a motion for summary judgment alleging that Lumpe could not prove that the molds being used at the time of the accident were the ones manufactured by Lenhardt. After the trial court denied summary judgment, we characterized the issue on appeal as "whether the evidence designated by Lenhardt sufficiently demonstrates the lack of a material issue of fact that Lenhardt manufactured the mold." *Id*. at 1081. We then stated, "Simply put, may a defendant succeed in a motion for summary judgment by showing the plaintiff lacks sufficient proof to establish an essential element of the plaintiff's claim on which the plaintiff bears the burden of proof." *Id*.

We held that under the *Jarboe* analysis, Lenhardt "would have had to designate some evidence that the mold was not manufactured by Lenhardt in order to require Lumpe to come forward with evidence that the mold was manufactured by Lenhardt." *Id*. at 1083. We stressed that "[s]imply demonstrating that Lumpe does not have sufficient evidence to prove the mold was manufactured by Lenhardt is not enough." *Id*. We then concluded:

> The practical consequences of this analysis could be that in some cases summary judgment would be denied to a defendant where at the conclusion of the plaintiff's evidence, if it is no better at trial than shown to be by the defendant at summary judgment, the defendant would be granted a motion for judgment on the evidence under T.R. 50 by reason of the plaintiff's failure to prove an essential element of his case. However, the dictate of *Jarboe* is consistent with the recognition that summary judgment terminates the right to trial and that summary judgment will be denied even though it appears that the plaintiff may not succeed at trial.
>
> Because Lenhardt did not designate sufficient materials in support of its motion for summary judgment to require Lumpe to designate materials to demonstrate the existence of a genuine issue of material fact as to whether Lenhardt machined the mold in question, the trial court did not err when it denied Lenhardt's motion for summary judgment on the negligence claim.

Id. at 1083-84. (citation omitted).

In *Lenhardt*, we contrasted Lenhardt's mere allegation that Lumpe could not produce evidence on an element of his case with the claims of the defendant in *Hinkle v.*

Niehaus Lumber Co., 525 N.E.2d 1243 (Ind. 1988). We noted that in *Hinkle*, the plaintiff was injured when there was a failure of sheet metal roofing installed over a shed where corrosive salt compounds were stored. *Lenhardt*, 703 N.E.2d at 1083 (citing *Hinkle*, 525 N.E.2d at 1244). We further noted that Niehaus presented a deposition of a roofing contractor as evidence that Niehaus "had no idea how or where its roofing material was to be used." *Id*. (citing *Hinkle*, 525 N.E.2d at 1245). We held that the designation by Niehaus of the deposition in support of its summary judgment motion was sufficient to place the burden on Hinkle "to come forward and identify or present evidence showing that Niehaus either knew or should have had some reasonable expectation that the metal roofing sheets were to be used in an unusually corrosive environment." *Id*. (citing *Hinkle*, 525 N.E.2d at 1245-46).

In the present case, the defendants, like Niehaus, have presented sufficient evidence to place the burden on the plaintiff to designate evidence showing the existence of a genuine issue of material fact. Specifically, the defendants have presented depositions and affidavits of Think Tank customers showing that no damages were incurred. Accordingly, Think Tank is obligated to come forward and identify how the defendants broke the covenants in a manner that resulted in the loss of net profits by Think Tank.

Before the trial court, Think Tank referenced twelve customers by name; however, on appeal Think Tank now references nine customers where there is an alleged genuine issue of material fact on the loss of net profits—Braun Corporation; Diocese of Gary;

East Porter County Schools; Weil-McClain; Methodist Hospital; Lowell Public Library; Eye Care for You; Lake Station Community Schools; and School District 149.

The defendants designated a deposition of Steven Sommers, Braun Corporation's IT manager. Sommers stated that Braun hired Think Tank in late 1998 or 1999 to become "a consultant to help with network projects." Appellees' App. p. 344. Sommers also stated that Braun ended its association with Think Tank in 2002 because Sommers "saw a lot of people leaving, which scared me that I would not get the support I needed." Appellees' App. p. 345. Sommers further stated that he first heard of Think Tank employees leaving when Gee told him that he was leaving for health reasons and when Zuhl told him he was leaving for unspecified reasons. Appellees' App. p. 347. Sommers further said that he heard about other employees leaving Think Tank through the "grapevine" of other customers. Appellees' App. p. 347. Sommers stated that neither Chester nor the former employees solicited Braun's business, though he did ask for quotes when Braun was going through the process of hiring a firm to do system upgrades. Sommers emphasized that Braun did not hire Chester to replace Think Tank. Appellees' App. pp. 348-51. In response, Think Tank designated sales figures which showed that Chester received some income from Braun in 2002 through 2005; however, these sales amounted to a total of only $15,560 over this four year period. Appellant's App. p. 1702. However, the sales came after a period of three years where Chester did not earn any income from doing work for Braun, and Think Tank's evidence is sufficient to raise a genuine issue of material fact pertaining to damages that may have occurred because of Chester's relationship to Braun.

The parties agree that a former employee made contact with a representative of the Diocese of Gary. However, Think Tank admits that the Diocese remained a Think Tank customer and that no loss of net profits occurred. Accordingly, there is no genuine issue of material fact pertaining to this customer.

The defendants designated the deposition of Denise Schiller, East Porter County School Corporation's systems administrator. Schiller acknowledged that East Porter has continued "to do business with Think Tank over the years." Appellees' App. p. 312. Schiller also acknowledged that "the amount of work . . . obtained from Think Tank [has not] been affected, in any way, by any contact there has been between Chester, Inc. and the school corporation." Appellees' App. p. 313. In response, Think Tank has not referred this court to any designated evidence that creates a genuine issue of material fact regarding East Porter.

The defendants designated evidence to show that Lowell Public Library became dissatisfied with Think Tank's lack of expertise. Appellant's App. p. 1069. However, there is designated evidence to show that former employees solicited Lowell's business. Furthermore, Chester's sales went from zero in 1999 through 2002 to $107,126.00 in 2003 through 2004. There is a genuine issue of material fact regarding damages arising from Think Tank's loss of this customer.

In the same fashion, the designated evidence shows solicitation of Weil-McClain by former Think Tank employees and a substantial increase in sales after that solicitation. Again, there is a genuine issue of material fact regarding damages.

Think Tank also designated evidence, in the form of an affidavit from the systems coordinator at the Diocese of Gary, that former employee Turner had contacted her and stated that Methodist Hospital had left Think Tank for Chester. Appellant's App. p. 462. This is sufficient evidence to create a genuine issue of material fact regarding damages occurring because of the defendants' involvement with Methodist Hospital.

Think Tank designated evidence that certain former employees "had contact" but "didn't contact" School District 149, Eye Care For You, and Lake Station Community Schools. Appellant's App. pp. 723-24; 735; 767; and 796-98. As explained by our interpretation of the covenants in Issue IV below, this evidence is insufficient to create a genuine issue of material fact.

In an apparent attempt to create a genuine issue of material fact pertaining to customers in addition to the nine referred to above, Think Tank points to a report prepared by a third party that lists the customers it lost in the years following the former employees' transfer to Chester, and it proposes that some of these losses could be attributable to breach of covenants. The supposed losses that "could be attributable to breach" compose the entire result of seven years of discovery. In an industry where even Think Tank's third party expert documents that Think Tank normally retains customers for an average of only 2.3 years, we cannot view the report as anything but speculative. In short, the report says little more than that even though Think Tank lost almost all of its key employees and it normally loses a percentage of its customers each year, Think Tank guesses that some of the lost customers must be attributable to the defendants' actions. Mere speculation cannot create genuine issues of material fact to defeat summary judgment. *See Beatty v. LaFountaine*, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008), *trans. denied*. (holding that mere speculation, guesses, supposition, and conjecture "are not sufficient to create a genuine issue of material fact to defeat summary judgment").

Think Tank also points to what it terms "spoliation of evidence" as creating a genuine issue of material fact pertaining to customers in addition to the nine referred to above. However, our review of the designated evidence shows that Think Tank issued a records request in 2009 in connection with a deposition held in November of 2009, seven years after the lawsuit was filed and five years after Chester upgraded from an inferior database system of tracking customer services to a customer relationship manager (CRM) system. In the course of the upgrade, some information was lost. However, Think Tank has not designated evidence that it deposed the people, named by a Chester employee, who could identify why the upgrade was made and what was lost. Furthermore, there is no indication that the lost information was intentionally destroyed, that it was relevant, or that Chester later failed, in the reams of sales data given to Think Tank, to supply the information that was lost. There is no genuine issue of material fact here—there is only speculation. *See Porter v. Irvin's Interstate Brick & Block Co.*, 691 N.E.2d 1363, 1365 (Ind. Ct. App. 1998) (holding that an inference against a party applies only when a party "actively endeavors to prevent disclosure of facts" and when it "fails to produce available evidence"). We affirm the grant of summary judgment on the question of damages as it applies to all customers except Braun Corporation, Lowell Public Library, Weil-McClain, and Methodist Hospital.

IV. OTHER CAUSES OF ACTION

A. Tortious Interference with a Contract

Think Tank contends that the trial court erred in granting summary judgment on its claim that Chester tortiously interfered with the covenants between Think Tank and the former employees.[5] The elements necessary for tortious interference with a contract are: (1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of a breach of contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach. *Stoffel v. Daniels*, 908 N.E.2d 1260, 1270 (Ind. Ct. App. 2009).

Our review of the designated evidence discloses that there are genuine issues of material fact that prevent the grant of summary judgment on this issue. However, the designated evidence also discloses that the same limitations expressed in Issue III apply here. In other words, Think Tank has failed to show a genuine issue of material fact pertaining to any former customers other than the four listed in our discussion above.

Furthermore, in light of our responsibility to strictly construe covenants not to compete against the employer, we conclude as a matter of law that the covenants are narrower than Think Tank appears to believe. The covenant as expressed in the third sentence of section (a), when stripped of its nonessential language, is narrower than it first appears. In the sentence, the former employee agrees not to contact any customer

[5] Think Tank does not claim, and our examination of the designated evidence does not reveal, that summary judgment pertaining to the tort claims should be denied on the basis of *Jarboe*. Plainly stated, Chester presented sufficient evidence in support of its summary judgment motion to shift the burden to Think Tank.

for any business purpose which is similar to or relates to "any business activities generally engaged in by Employee during the term of his employment with Employer . . . *for purposes of requesting said customer or former customer to withdraw from any further business with Employer, or to curtail or cancel its business with Employer*." Appellant's App. p. 98. (Emphasis added). Simply stated, the employee is allowed to engage in servicing a computer or some other activity (not prohibited by other sentences) as long as he is not requesting the customer to abandon or decrease its business with Think Tank. Accordingly, Chester did not tortiously interfere with a covenant by sending a former employee simply to engage in a service activity for one of Think Tank's customers.[6]

Finally, section (c), as blue penciled, supra, when stripped of its nonessential verbiage, states that a former employee . . . shall not, in connection with engaging in the business of . . . servicing . . . ~~accept referrals of clients from, or~~ negotiate any contract or agreement with, any [Think Tank] customer or client . . . ." Appellant's App. at 98. Again, the employee is allowed to engage in servicing a computer or some other activity (not prohibited by other sentences) as long as he is not negotiating contracts with a Think Tank customer. Accordingly, Chester did not tortiously interfere with a covenant by sending a former employee simply to engage in a service activity for one of Think Tank's customers.[7]

[6] We make no assumption regarding the application of the confidentiality clause to this fact situation. As we discussed in Issue II, there are genuine issues of material fact that apply in determining the scope of the confidentiality clause.
[7] *See supra* footnote 6.

Think Tank has designated evidence showing a genuine issue of material fact regarding tortious interference with the covenants included in the former employees' contracts as these covenants have been interpreted in our discussion and have been limited to the four customers designated in our discussion of Issue III. We hold that the grant of summary judgment was improper as to those four customers. We affirm the grant of summary judgment regarding tortious interference as to any other customers.

B. Tortious Interference with a Business Relationship

Think Tank contends that the trial court erred in granting summary judgment on its claim that Chester tortiously interfered with business relationships between Think Tank and its customers. The elements necessary for tortious interference with a business relationship are: (1) the existence of a valid business relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; (5) damages resulting from the defendant's wrongful interference with that relationship; and (6) evidence that the defendant acted illegally in achieving its end. *Columbus Med. Servs. Org., LLC v. Liberty Health Corp.*, 911 N.E.2d 85, 94 (Ind. Ct. App. 2009); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003).

Think Tank points to alleged acts of conversion and spoliation as evidence that Chester acted illegally in interfering with Think Tank's business relationships. In support of its conversion claims, Think Tank points to the following designated evidence: (1) Meyer copied Think Tank's entire customer list onto a disk and he was about to leave before being stopped and the disk reclaimed; (2) Mario took a laptop computer belonging to Think Tank when he left Think Tank's employment; and (3) before Wojciechowski left Think Tank he reformatted his hard drive, thereby preventing Think Tank from investigating his activities prior to his departure. In support of its spoliation claims, Think Tank points to designated evidence that Chester changed the name of an account with the intent to hide the customer's identity and to the information lost when Chester upgraded its customer services database as discussed in our resolution of Issue III.

Our examination of the designated evidence discloses that there is no genuine issue of material fact pertaining to the legality of Chester's actions. Think Tank speculates that its departing employees' acts were done at Chester's behest. However, there is no designated evidence from which such a conclusion can be inferred. Accordingly, there is no evidence that Chester acted illegally. Furthermore, the only evidence of "spoliation" by the changing of an account name shows that Chester provided the information of the change to Think Tank. The remaining "spoliation" claim is discussed and rejected as speculation in our examination of damages under Issue III. There is no genuine issue of fact on the issue of tortious interference with a business relationship. Therefore, the trial court did not err in granting summary judgment.

C. Unfair Competition

Think Tank contends that Chester engaged in unfair competition in a similar manner as the defendant in *Bartholomew Cnty. Beverage Co. v. Barco Beverage Corp., Inc.*, 524 N.E.2d 353, 358 (Ind. Ct. App. 1988). In *Bartholomew*, the defendant engaged in predatory pricing—pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run—by cutting prices below marginal cost with the intent to put the plaintiff out of business.[8]

In the present case, the designated evidence shows that Chester was advised to enter the technology service side of the computer business, and it did so, even though it operated at a loss for a period of nine years as it tried to develop its technological expertise and customer base. There is no genuine issue of material fact on the issue of whether Chester engaged in predatory pricing as that practice is illustrated in *Bartholomew*. In developing its service business, Chester hired the former employees named in this case; an action that Think Tank admits is appropriate. The trial court did not err in granting summary judgment on this issue.

D. Unjust Enrichment

Think Tank contends that the trial court erred in granting summary judgment on its claim for unjust enrichment. To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. *Bayh v. Sonnenberg*, 573 N.E.2d 398, 408 (Ind. 1991). Think Tank argues that there is a genuine issue of material fact as to whether Chester received such a measurable benefit. Think Tank maintains that the measurable benefit is the use of Think Tank's good will and confidential information to develop its technology service business while taking Think Tank customers.

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[8] The tort of "unfair competition" does not describe a single course of conduct or a tort with a specific number of elements; instead, it describes "a general category into which a number of new torts may be placed when recognized by the courts." *See Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 (Ind. 2001).

Think Tank designated as evidence a letter from Lowell Public Library's Computer Resource Manager that recommends that the library hire Chester. The letter states in pertinent part:

> After talking to the representatives of (three companies, including Think Tank), I would highly recommend Chester Technologies from Valparaiso to be our new computer system service provider. I believe this would save us time and money. Our current service, Think Tank, has experienced a huge turnover in staff in the last year with many of the people who were familiar with our system joining the Chester Technologies staff. These personnel had always given excellent service to our library. Since the turnover, our recent experience with Think Tank has not been satisfactory. My phone calls are not always returned and I have received too many "I don't know" answers instead of solutions.

Appellant's App. p. 1069.

The evidence designated by Think Tank allows a reasonable trier of fact to conclude that Think Tank's competence decreased when it lost the former employees. It also allows a reasonable trier of fact to conclude that the former employees could provide service to the customer as Chester employees, as we have already determined is permitted by the covenants signed by the former employees. What the evidence does not allow is the conclusion by a reasonable fact finder that Chester engaged in any wrongdoing that resulted in unjust enrichment.

CONCLUSION

The trial court erred in granting summary judgment on the basis that the covenant not to compete was overbroad. The trial court also erred in granting summary judgment on the propriety of the confidentiality clause, as there are genuine issues of material fact that must be determined. Further, the trial court erred in granting summary judgment on the tortious interference with a contract issue. The trial court did not err in granting summary judgment on any of the remaining issues.

We affirm in part, reverse in part and remand for further proceedings consistent with this opinion. In doing so, we instruct the trial court to be mindful of the restrictions expressed in our discussion of Issues I, III and IV.

Affirmed in part, reversed in part and remanded with instructions.

DARDEN, J., and BAILEY, J., concur.