STATE OF NORTH CAROLINA WAKE COUNTY MERZ PHARMACEUTICALS, LLC, Plaintiff, v. ANDREW THOMAS, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 32848 **ORDER AND OPINION ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER is before the Court on Plaintiff Merz Pharmaceuticals, LLC's Motion for Preliminary Injunction ("PI Motion," ECF No. 58).

THE COURT, having considered the PI Motion, the briefs, affidavits, exhibits, arguments of counsel, and all appropriate matters of record, **CONCLUDES**, in its discretion, that the PI Motion should be **GRANTED in part**, and **DENIED in part**, for the reasons set out below.

McGuireWoods LLP, by Heidi E. Siegmund, Dana L. Rust, and Zachary L. McCamey, for Plaintiff Merz Pharmaceuticals, LLC.

Spengler & Agans, PLLC, by Eric Spengler, for Defendant Andrew Thomas.

Davis, Judge.

FINDINGS OF FACT

1. The Court makes the following findings of fact solely for the purpose of resolving the present PI Motion. They are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction

proceeding are not binding upon a court at trial on the merits."), *disc. rev. denied*, 360 N.C. 364 (2006).

2. Plaintiff Merz Pharmaceuticals, LLC ("Merz Pharmaceuticals") filed its Verified Complaint on 16 November 2023 ("V.C.," ECF No. 3), asserting claims against Defendant Andrew Thomas arising out of Thomas' alleged wrongful conduct in connection with the termination of his employment at Merz Pharmaceuticals and the commencement of his new employment at Revance Therapeutics, Inc. ("Revance").

3. Merz Pharmaceuticals is a privately-owned North Carolina limited liability company registered to do business in North Carolina. (V.C. ¶ 3.) At all relevant times, a separate entity, Merz, Inc., was the sole member of Merz Pharmaceuticals. (Cleef Aff. ¶ 4, ECF No. 74.2.) In the Verified Complaint, Merz Pharmaceuticals is described as "a leading pharmaceutical company," which "markets and sells its products to healthcare providers for therapeutic purposes." (V.C. ¶ 8.)

4. Thomas, a resident of South Carolina, is a former Merz Pharmaceuticals employee. (V.C. ¶¶ 1, 4.) In October 2018, Thomas began working at Merz North America, Inc. ("Merz NA") as its Director of Government and Federal Accounts. (Thomas Aff. I ¶ 18, ECF No. 19.1.)

5. Merz NA is a related entity of Merz Pharmaceuticals. As with Merz Pharmaceuticals, Merz NA's sole shareholder at all relevant times was Merz, Inc. (Cleef Aff. ¶ 4.) Moreover, Merz Pharmaceuticals, Merz NA, and Merz, Inc., are "all

indirect wholly-owned subsidiaries of Merz Pharmaceuticals GmbH, a German corporation." (Cleef Aff. ¶ 4.)

6. As a condition of his employment with Merz NA, Thomas was required to sign a Confidentiality, Nonsolicitation, and Proprietary Rights Agreement (the "Agreement"), which contained certain restrictive covenants with respect to Merz NA's confidential information and trade secrets, as well as a nonsolicitation provision regarding the customers of Merz NA. (V.C., at Ex. A, ECF No. 3.)

7. In an affidavit submitted by Thomas in opposition to the PI Motion, Thomas stated that he does not recall signing (electronically or otherwise) the Agreement. (Thomas Aff. I ¶ 6.) In response, Merz Pharmaceuticals submitted a printout of a document showing that Thomas did, in fact, electronically sign the Agreement. (V.C. ¶ 54.) Moreover, at the 6 May 2024 hearing on the PI Motion, Thomas' counsel conceded that for purposes of the PI Motion, Defendant was not contesting this fact. Therefore, the Court finds that Thomas signed the Agreement.

8. Merz Pharmaceuticals contends that "[i]n this leadership role, Thomas was responsible for spearheading Merz [Pharmaceuticals'] overall strategy for its federal accounts program across the United States." (V.C. ¶ 23.) Specifically, Thomas' duties included working to increase the market share in the governmental sector of "[o]ne of Merz [Pharmaceuticals'] flagship products[,]" Xeomin. (V.C. ¶ 9.) Thomas "managed a team of three directors who called on physicians and other prescribers of Xeomin® within the Department of Defense ('DoD') and Department of Veterans Affairs ('VA')[.]" (Thomas Aff. I ¶ 18.) Thomas' "team of directors at Merz

[Pharmaceuticals] was responsible for achieving Merz [Pharmaceuticals'] sales targets for Xeomin® within the Governmental Sector, by marketing Xeomin® to prescribing healthcare professionals." (Thomas Aff. I ¶ 20.)

9. Xeomin is "a federally regulated botulinum toxin injection[,]" which can be used for both therapeutic and aesthetic purposes. (V.C. ¶¶ 9–10.) Therapeutically, Xeomin is "used to treat upper limb spasticity, cervical dystonia, blepharospasm (overactive eye blinking), and chronic sialorrhea (excessive salivation)." (V.C. ¶ 9.) Xeomin is also sold for aesthetic purposes such as for smoothing frown lines. (V.C. ¶ 10.) However, the federal government purchases Xeomin only for *therapeutic* uses. (Cleef Aff. ¶ 3.)

10. Merz NA first obtained Food and Drug Administration ("FDA") approval for certain therapeutic uses of Xeomin in 2010 and for aesthetic uses in 2011. (Cleef Aff. ¶ 3.) However, Merz Pharmaceuticals did not become the entity responsible for the sale of Xeomin for therapeutic purposes until 1 January 2021. (Cleef Aff. ¶ 3.)

11. This change occurred because "[i]n 2020, Merz [Pharmaceuticals] and [Merz NA] decided to separate [Merz NA]'s therapeutics business division from its aesthetics business division." (Cleef Aff. ¶ 5.) After this separation of business divisions was effectuated, Merz NA continued to handle the sale of Xeomin for aesthetic uses while Merz Pharmaceuticals was responsible for the sale of Xeomin for therapeutic purposes. (Cleef Aff. ¶¶ 3–5.)

12. On 30 November 2020, Thomas received a letter stating that "Merz Therapeutics . . . is transferring operations from Merz North America, Inc. to Merz

Pharmaceuticals, LLC, another Merz US affiliate, on January 1, 2021" and that his "employment will similarly transfer and . . . you will become an employee with Merz Pharmaceuticals, LLC." (Thomas Aff. II, at Ex. C, ECF No. 64.7.)

13. On 1 January 2021, Merz NA and Merz Pharmaceuticals entered into an Asset Transfer Agreement ("ATA"), in which Merz NA "transferred substantially all of its assets and liabilities related to its therapeutics division to Merz [Pharmaceuticals]. This transfer included all employees working in [Merz NA]'s therapeutics division, including Thomas[.]" (Cleef Aff. ¶ 5.) Additionally, with respect to the transferred employees, "the ATA transferred all restrictive covenant, non-solicitation, and confidentiality agreements pertaining to the therapeutics business from [Merz NA] to Merz [Pharmaceuticals]." (Cleef Aff. ¶ 6.)

14. Thomas accepted the transfer of his employment. (*See* Thomas Aff. II, at Ex. C, ECF No. 64.7.) Accordingly, from 1 January 2021 onward, Thomas was no longer an employee of Merz NA and instead became an employee of Merz Pharmaceuticals. (Thomas Aff. III ¶ 11, ECF No. 70.1.) However, his "job duties and title remained unchanged." (Cleef Aff. ¶ 10.)

15. The Agreement was assigned from Merz NA to Merz Pharmaceuticals per the terms of the ATA.[1] Accordingly, the Agreement is a valid and binding contract between Merz Pharmaceuticals and Thomas.

16. For reasons unrelated to the present PI Motion, Merz Pharmaceuticals terminated Thomas' employment on 31 July 2023. (V.C. ¶ 35; Thomas Aff. I ¶ 25.)

[1] Although Thomas initially disputed that a valid assignment of the Agreement actually occurred, he has now conceded this fact.

On the day of his termination, Thomas attached a personal thumb drive to his "Merz [Pharmaceuticals]-owned computer and downloaded the contents of the desktop to the [t]humb [d]rive." (Thomas Aff. I ¶ 26; V.C. ¶ 36.) Subsequent forensic analysis revealed that the same thumb drive was once again attached to Thomas' Merz Pharmaceuticals-owned computer on 7 August 2023. (Brown Aff. ¶ 6, ECF No. 75.8.)

17. Overall, "over 500 files were sequentially accessed, indicating a mass transfer of files from the Merz [Pharmaceuticals] laptop to the personal USB thumb-drive." (Brown Aff. ¶ 7.) Merz Pharmaceuticals contends that the files and documents downloaded by Thomas contained its confidential information and trade secrets. (V.C. ¶¶ 36–39; O'Brien Aff. ¶ 11, ECF No. 59.2.) Among the hundreds of downloaded documents, Merz Pharmaceuticals provides the following list of examples in its Verified Complaint:

- Internal update presentations on behalf of Merz's Federal Accounts team showing federal channel trends, pricing information, product volumes over time, targets, Xeomin® utilization by sales channel, market insights, current strategies and opportunities, and updates on the competitive landscape;

- Spreadsheets compiling Xeomin® market share data;

- Customer contact lists, including Xeomin® vials purchased by customer;

- Performance reports showing Xeomin® quarterly utilization over time;

- Internal presentations containing detailed performance data, analytics, and strategies for Merz's Therapeutics division as a whole, including lists of top performing Xeomin® accounts nationwide;

- Spreadsheets reflecting Xeomin® revenues by prescription indications;
- Spreadsheets reflecting Merz's overall Federal Accounts performance over time and by region; and
- Spreadsheets identifying key customers and Xeomin® purchasing data and trends for those customers.

(V.C. ¶ 39.)

18. On 10 August 2023, Thomas "returned all [his] Merz [Pharmaceuticals]-owned computing devices to [the company], including the laptop computer, iPad, and cell phone [he] used on behalf of Merz [Pharmaceuticals]." (Thomas Aff. I ¶ 30.) However, Thomas did not provide the thumb drive at this time, and Merz Pharmaceuticals was not yet aware of its existence. (V.C. ¶ 46.)

19. Thomas has testified that on 12 August 2023 he "permanently deleted all the contents of the [t]humb [d]rive, including the Merz [Pharmaceuticals] documents [he] had downloaded to the [t]humb [d]rive[.]" (Thomas Aff. I ¶ 31.) Thomas further stated that "[s]oon thereafter, [he] reformatted the [t]humb [d]rive to re-use it for storing [his] family's archival home videos, which [he] was in the process of converting to digital format." (Thomas Aff. I ¶ 31.)

20. On 3 August 2023, just a few days after his termination from Merz Pharmaceuticals, Thomas began communicating with a Revance representative about the possibility of him obtaining a job at Revance. (V.C. ¶ 42.)

21. Thomas applied for his current position with Revance on 17 August 2023, and was interviewed three times over the course of the next few days. (Thomas Aff. I ¶ 37–38.) Following his interviews, Revance offered Thomas a job as its

"National Account Director, Market Access," on 21 August 2023, which he accepted shortly thereafter. (Thomas Aff. I ¶¶ 38–40; *see also* Thomas Aff. I, at Ex. 4.)

22. On 8 September 2023, Merz Pharmaceuticals learned that Thomas had begun working for Revance and proceeded to send both Thomas and Revance cease-and-desist letters "raising concerns about his misappropriation of Merz [Pharmaceuticals'] trade secrets and potential communications with Merz [Pharmaceuticals'] customers." (V.C. ¶¶ 51, 55.)

23. The Verified Complaint asserts that "Revance, like Merz, markets and sells injectables to healthcare professionals for aesthetic and therapeutic purposes[,]" and is a "direct competitor of Merz in the pharmaceutical industry." (V.C. ¶¶ 17–18.)

24. Most notably, Revance recently "developed a botulinum toxin that competes directly with Xeomin® in both the aesthetics and therapeutics spaces." (V.C. ¶ 20.) Revance's botulinum toxin (or "neurotoxin") is called Daxxify. (V.C. ¶ 20.)

25. The FDA first approved Daxxify exclusively for an aesthetic purpose (the treatment of frown lines) in September of 2022. (V.C. ¶ 20.) On 14 August 2023, the FDA approved Daxxify for the therapeutic treatment of cervical dystonia—a condition that Xeomin is also used, and approved, to therapeutically treat. (V.C. ¶ 21.)

26. Merz Pharmaceuticals initiated this lawsuit by filing its Verified Complaint in Wake County Superior Court on 16 November 2023 in which it asserted claims against Thomas for (1) breach of contract; (2) misappropriation of trade secrets

under the North Carolina Trade Secrets Protection Act ("NCTSPA"); (3) conversion; (4) breach of fiduciary duty; and (5) violation of the North Carolina Unfair and Deceptive Trade Practices Act. (V.C. ¶¶ 64–101.)

27. This case was designated as a complex business case and assigned to the undersigned on 17 November 2023. (ECF Nos. 1, 2.)

28. On 1 December 2023, Merz Pharmaceuticals filed a Motion for Expedited Discovery in which it asked the Court for "permission to conduct limited, expedited discovery to facilitate its preparation of a forthcoming motion for preliminary injunction." (Mot. Exp. Disc., at 4, ECF No. 6.) The Court granted the Motion for Expedited Discovery, in part, and directed the parties to "to meet and confer for the purpose of seeking to reach agreement regarding the scope and timing of the expedited discovery[.]" (Order on Pl.'s Mot. Exp. Disc., ECF No. 37.) As directed, the parties filed a Joint Status Report (ECF No. 33), setting out the agreed-upon scope and timetable for completion of the expedited discovery requested by Merz Pharmaceuticals, which the Court adopted and incorporated by reference in its 23 January 2024 Order on Plaintiff's Motion for Expedited Discovery. (Order on Pl.'s Mot. Exp. Disc., at 3.) The parties proceeded to engage in limited discovery as directed by the Court.[2]

29. On 22 March 2024, Plaintiff filed the present PI Motion, in which Merz Pharmaceuticals requested that the Court order that Thomas:

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[2] Although Thomas contends that Merz Pharmaceuticals' delay in filing the PI Motion warrants its denial, the Court is satisfied that any such delay was reasonable based on the circumstances set out above.

> (1) refrain from accessing, using, or disclosing any confidential information or trade secrets belonging to Merz [Pharmaceuticals]; and (2) comply with Paragraph 2(b) of his Confidentiality, Nonsolicitation and Proprietary Rights Agreement [the "Agreement"], including by refraining from soliciting any Merz [Pharmaceuticals] Customers (including, without limitation, the Department of Veterans Affairs, the Department of Defense, the Indian Health Service, the Defense Health Agency, the Defense Logistics Agency, and the National Institute of Health) and by refraining from interfering with Merz [Pharmaceuticals'] relationships with such Customers.

(PI Mot., at 1.)

30. The PI Motion has been fully briefed, and the Court held a hearing on 6 May 2024 at which all parties were represented by counsel.

31. The PI Motion is now ripe for resolution.

CONCLUSIONS OF LAW

32. **BASED UPON** the foregoing **FINDINGS OF FACT**, the Court makes the following **CONCLUSIONS OF LAW**:

33. Any Finding of Fact that is more appropriately deemed a Conclusion of Law, and any Conclusion of Law that is more appropriately deemed a Finding of Fact, shall be so deemed and incorporated by reference as a Finding of Fact or Conclusion of Law, as appropriate.

34. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701 (1977). Accordingly, a Court will only issue a preliminary injunction:

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is

> necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 401 (1983) (cleaned up).

35. "The burden is on the moving party to establish its right to a preliminary injunction, and the remedy 'should not be lightly granted.' " *Comp. Design & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *19 (N.C. Super. Ct. Jan. 27, 2017) (quoting *GoRhinoGo, LLC v. Lewis*, 2011 NCBC LEXIS 39, at *17 (N.C. Super. Ct. Sept. 29, 2011)).

36. With respect to the second prong of the preliminary injunction test, this Court has explained as follows:

> North Carolina courts have held that in assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).
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> Irreparable injury under Rule 65 is established upon a showing that "the injury is beyond the possibility of repair or possible compensation in damages" or "that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P.*, 308 N.C. at 407, 302 S.E.2d at 763 (citing *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949)) (emphasis omitted).
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> If there is a "full, complete and adequate remedy at law," the moving party is not entitled to the equitable remedy of injunction. *Bd. of Light and Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980). "[O]ne factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant's breach." *A.E.P.*, 308 N.C. at 406–07, 302 S.E.2d at 762.

Comp. Design & Integration, LLC, 2017 NCBC LEXIS 8, at *19–20.

37. Ultimately, "[t]he issuance of a preliminary injunction is a decision committed to a trial court's discretion." *State ex rel. Stein v. MV Realty PBC, LLC*, 2023 NCBC LEXIS 102, at **37–38 (N.C. Super. Ct. Aug. 30, 2023) (citing *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980)).

38. Merz Pharmaceuticals asserts that it has shown a likelihood of success on its claims for misappropriation of trade secrets and its claim for breach of contract. Its breach of contract claim is premised on its assertion that Thomas has breached both the confidentiality provision of the Agreement as well as the nonsolicitation provision contained therein.

I. Breach of Confidentiality Provision of the Agreement and Misappropriation of Trade Secrets Claim

39. For purposes of the PI Motion, Merz Pharmaceuticals' claim for misappropriation of trade secrets factually overlaps with the portion of its breach of contract claim concerning Thomas' alleged violations of the confidentiality provision of the Agreement. Accordingly, the Court will analyze these two claims in tandem.

A. Likelihood of Success

40. To prevail on a breach of contract claim, a party must show: "(1) existence of a valid contract; and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000) (cleaned up).

41. The confidentiality provision of the Agreement required Thomas to agree:

(i) to treat all Information as strictly confidential;

(ii) not to any time, whether during or after the termination of your employment, directly or indirectly use, divulge, disclose, furnish, reveal, or otherwise make accessible to any person or entity not affiliated with Merz any Information unless such Information is in the public domain through no fault of your own, except as may be required in the ordinary course of performing your duties as an employee of Merz or as otherwise required by law, and you shall keep secret all Information, and you shall use Information only as required in the ordinary course of performing your duties as an employee of Merz and in accordance with corporate practices, conduct, customs and understandings as currently in existence or as may be modified by Merz in its sole discretion from time to time throughout your term of employment, and which are incorporated herein by reference;

(iii) to refrain, upon termination with Merz, from, intentionally or unintentionally, *taking; removing; electronically transferring, downloading, uploading or copying; appropriating; borrowing; or, in any manner, going off with, carrying away, making off with or converting any Information, or copies thereof*, whether in tangible or intangible form, unless you obtain written authorization from Merz in advance as based on Merz's policies, practices and corporate operations which may be subject to modification from time to time in the sole discretion of Merz;

(iv) During your employment, you will not take, download, upload, copy, transfer, use or permit to be used any notes, memoranda, reports, lists, records, drawings, sketches, specifications, software programs, data, documentation or other materials belonging to Merz or an Affiliate, except for the sole benefit of Merz as part of your job duties. *You further agree that you will not, after the termination of your employment, use or permit to be used any such notes, memoranda, reports, lists, records, drawings, sketches, specifications, software programs, data, documentation or other materials, it being agreed that all of the foregoing shall be and remain the sole and exclusive property of Merz. You agree that you will immediately upon the termination of your employment (or at any other time upon Merz's request), deliver all property of Merz or any Affiliate, including, but not limited to, the materials referenced above, and all copies thereof*, as well as all company-issued cell phones, computers, or similar devices (including all passwords and passcodes necessary to access such devices) to Merz at its Raleigh, North Carolina headquarters office or as otherwise directed by Merz management.

(Agrmt. § 1(b)(i)–(iv) (emphasis added).) The Agreement further provided that the confidentiality provision would continue to be enforceable after Thomas' employment

with Merz ended "until such time as such Information has become public knowledge other than as a result of [Thomas'] breach of this Agreement or breach by those acting in concert with [Thomas] or on [his] behalf." (Agrmt. § 1(c).)

42. Moreover, the Agreement contains the following detailed definition of the term "Information":

> For purposes of this Agreement, "Information" shall mean and include any information, data and know-how relating to the business, market and technology of Merz and/or the Merz Group that is disclosed to you by Merz or the Merz Group or known to you or developed by you as a result of your relationship with Merz. Information shall include trade secrets (as that term is defined under the North Carolina Trade Secrets Protection Act and the Defend Trade Secrets Act, 18 U.S.C. § 1833 (as amended on May 11, 2016)) and confidential and/or proprietary information relating to Merz and/or the Merz Group, including, without limitation:
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> (i) past, present and prospective supplier and customer lists and related information and data (including any of the foregoing which may be subject to applicable state, federal and international privacy laws), past, present and prospective supplier, subcontractor, vendor and customer-specific information, user lists, vendor lists, content provider lists, sales techniques and reports; proprietary and confidential agreements with past, current and prospective vendors, contractors, negotiations and transactions or the terms of past, existing or proposed business arrangements;
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> (ii) planning data, selling and marketing strategies, branding information, business plans and strategies; product, program and service commercialization strategies, strategic alliances and objectives, product, program and service strategies; evaluations related to past, current or potential products, services, programs or activities of Merz or any Affiliate (as defined below);
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> (iii) system, product and process designs and specifications, formulas, processes, plans, drawings, concepts, techniques, systems, strategies, software programs (source, object, binary, html), code listings, data bases, works of authorship, print outs; general analytical and statistical data, general notes, documents, papers, notebooks, manuals, and reports;

(iv) manufacturing and operating methods, specifications and procedures including standard operating procedures;

(v) discoveries, research and development studies, tests and results and related data and findings, inventions, trade secrets, concepts, processes, methods, techniques, know-how, apparatus, devices, prototypes, technology, systems, configurations, modifications, improvements, enhancements, research and development data and materials, including those related to the research and development of products, materials or manufacturing and other processes;

(vi) financial and accounting information, financial and accounting records, pricing information, profit margins; projects, budgets, projections, forecasts, financial spreadsheets, financial data, financial status and position, financial projections, investor information and proposals, current and prospective employment and consultant listing and related information and data (including any of the foregoing which may be subject to applicable state, federal and international privacy laws);

(vii) all industrial and intellectual property rights, including without limitation, patents, patent applications, patent rights, trademarks, trademark applications, trade names, service marks, service mark applications, copyrights, copyright applications, databases, algorithms, computer programs and other software, know-how, trade secrets, proprietary processes and formulae, inventions, trade dress, logos, design and all documentation and media constituting, describing or relating to the above;

(viii) past, current or future personnel or employee information or data (including any of the foregoing which may be subject to applicable, state, federal and international privacy laws); personnel or employee records and data and information (including any of the foregoing which may be subject to applicable, state, federal and international privacy laws); compensation systems, performance evaluation and employee manuals;

(ix) other information with respect to Merz, which, if divulged to Merz's competitors, would impair Merz's ability to compete in the marketplace;

(x) information received by Merz from a third party under an obligation or an affirmative duty to handle such information in a confidential or restricted use manner; and

> (xi) any and all Intellectual Property (as defined herein) and Work Product (as defined herein).
>
> You understand that the above list is not exhaustive, and that Information also includes other information that is marked or otherwise identified as confidential or proprietary, or that would otherwise appear to a reasonable person to be confidential or proprietary in the context and circumstances in which the information is known or used.

(Agrmt. § 1(a).)

43. The North Carolina Trade Secrets Protection Act ("NCTSPA") provides that "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation[.]" N.C.G.S. § 66-154(a).

44. With respect to showing either actual or threatened misappropriation of a trade secret, this Court has explained as follows:

> Actual or threatened misappropriation may be established by the introduction of "substantial evidence" that a person against whom relief is sought "[k]nows or should have known of the trade secret; and [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent of the owner [of the trade secret]." N.C. Gen. Stat. § 66-155. A defendant may rebut an owner's claim of misappropriation by proving that the defendant acquired the owner's trade secret information through independent development or reverse engineering, or by proving that the owner's "trade secret" information was received from another person with a right to disclose the information or is generally known in the industry. N.C. Gen. Stat. §§ 66-155, 66-152.

Comp. Design & Integration, LLC, 2017 NCBC LEXIS 8, at *22 (alterations in original).

45. For purposes of the NCTSPA, a trade secret is defined as

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3).

46. Generally, North Carolina courts consider the following six factors when determining whether processes or information qualify as trade secrets under the NCTSPA:

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

Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., 125 N.C. App. 174, 180–81 (1997) (citations omitted). "The factors overlap, and courts considering these factors do not always examine them separately and individually." *Comp. Design & Integration, LLC*, 2017 NCBC LEXIS 8, at *23.

47. Moreover, "in a trade secret misappropriation case, 'an applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur.' " *Id.*, at *23–24 (quoting *N.C. Farm P'Ship v. Pig Improvement Co.*, 163 N.C. App. 318, 323 (2004)).

48. Merz Pharmaceuticals contends that its alleged trade secrets consist of the following:

> (1) presentations showing federal channel trends, pricing information, product volumes over time, targets, Xeomin utilization by sales channel, market insights, current strategies and opportunities, and competitive updates; (2) customer contact lists, including lists showing purchase volumes by customer; (3) market share data; (4) Xeomin performance data and analytics, including a list of top-performing Xeomin accounts nationwide; (5) spreadsheets reflecting Merz's overall Federal Accounts performance over time and by region; and (6) spreadsheets identifying key customers, along with Xeomin purchasing data and trends for those customers.

(Pl.'s Br. Supp. PI Mot., at 18–19, ECF No. 59; V.C. ¶ 27.)

49. The Court notes that all of the above-quoted information is protected by the explicit terms of the confidentiality provision of the Agreement.

50. Moreover, based on its review of the evidence of record at this stage of the litigation, the Court is convinced that Merz Pharmaceuticals has met its burden in connection with the PI Motion to show that at least some of the information listed above constitutes protectable trade secrets under the NCTSPA.

51. North Carolina courts have concluded that similar information can constitute trade secrets. *See e.g., Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 174 N.C. App. 49, 53–56 (2005); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 174 (1992); *Comp. Design & Integration, LLC*, 2017 NCBC LEXIS 8, at *28.

52. Furthermore, for purposes of the present PI Motion, Merz Pharmaceuticals has offered evidence "that the information is valuable, both to [itself] and [its] competitors, not generally known outside [Merz Pharmaceuticals],

difficult to duplicate or acquire, developed at significant cost to [Merz Pharmaceuticals], and subject to adequate measures to guard its secrecy[.]" *Id.* (*See* V.C. ¶¶ 11–13.)

53. Merz Pharmaceuticals asserts that it "has invested substantial amounts of time and money in developing its trade secrets and confidential information[.]" (V.C. ¶ 11.) Additionally, Merz Pharmaceuticals explains that such information is valuable to both itself and its competitors because it includes marketing strategies to grow accounts, which "would be invaluable to a new market entrant like Revance, which is in desperate need of establishing accounts to compete with other long-established neurotoxin products on the market[.]" (V.C. ¶ 26.) Merz Pharmaceuticals contends that "[p]ossession of such information would provide a competitor such as Revance an enormous unfair advantage by giving Revance all the information it needs to effectively target Merz's customers, anticipate Merz's customer messaging, and undercut Merz's strategies and pricing in the therapeutic marketplace." (V.C. ¶ 28.) Moreover, Merz Pharmaceuticals argues that acquisition of "this information gives Revance an enormous head start in entering the therapeutics market with Daxxify®, and will permit Revance to avoid substantial costs that Merz incurred in developing its trade secrets." (V.C. ¶ 40.)

54. With respect to its reasonable efforts to safeguard the confidential information, the record discloses that Merz Pharmaceuticals requires its employees to sign employment agreements (like the Agreement), which contain confidentiality clauses. (V.C. ¶ 13.) Additionally, Merz Pharmaceuticals has a number of policies in

place with respect to protecting the secrecy of its confidential information and trade secrets, such as the following:

- storing Merz's confidential information on secured and password-protected electronic systems, and restricting access only to Merz personnel;
- password-protecting any computers, laptops, or other electronic devices provided to Merz employees and ensuring compliance with applicable security measures;
- maintaining written policies and procedures governing its information technology (IT) and security of its confidential information;
- restricting remote access only to connections approved and encrypted by Merz's IT Department;
- prohibiting the connection of non-Merz issued electronic storage media without verification and approval by Merz's IT Department;
- prohibiting the use of private electronic devices for storing Merz data;
- storing confidential hard copy documents and storage media in a place that is locked and inaccessible to third parties;
- encrypting sensitive data such that only authorized users can read it;
- prohibiting the use of external free applications or external cloud services for storage and requiring the use of Global-IT approved storage solutions;
- securing and restricting access to physical facilities containing its confidential and trade secret information through the use of key cards and badge access;
- requiring non-disclosure and/or confidentiality agreements in any business dealings with third parties before any Merz confidential information is disclosed to such third parties; and

- restricting access to its most confidential information to only select individuals on a need-to-know basis.

(V.C. ¶ 12.)

55. Notably, Thomas does not dispute the fact that he downloaded the confidential information listed earlier in this Opinion onto his personal thumb drive on 31 July 2023—the day his employment with Merz Pharmaceuticals was terminated.

56. His only serious argument on this issue is that his actions were permissible pursuant to a "safe harbor" provision of the Agreement, which stated as follows:

> **Notice of Immunity under the Economic Espionage Act of 1996, as amended by the Defend Trade Secrets Act of 2016.**
>
> Notwithstanding any other provision of this Agreement:
>
> (A) You will not be held criminally or civilly liable under any federal or state trade secret law for any disclosure of a trade secret that is made: (1) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney and solely for the purpose of reporting or investigating a suspected violation of law; or (2) in a complaint or other document that is filed under seal in a lawsuit or other proceeding.
>
> (B) If you file a lawsuit for retaliation by Merz for reporting a suspected violation of law, you may disclose Merz's trade secrets to your attorney and use the trade secret information in the court proceeding if you (1) file any document containing the trade secret under seal; and (2) do not disclose the trade secret, except pursuant to court order.
>
> (C) Nothing precludes any Merz employee from cooperating with any governmental investigation, making a truthful statement or complaint to law enforcement or a government agency or testifying under oath to law enforcement or a government agency.

> This Notice of Immunity is specifically included to provide notice of Employee's rights sufficient to comply with the provisions of the Defend Trade Secrets Act of 2016.

(Agrmt. § 1(b)(vi).)

57. Thomas argues that this safe harbor provision immunizes him from liability for downloading Merz Pharmaceuticals' documents to his personal thumb drive following his termination because he claims that he "reasonably believed they constituted evidence of unlawful conduct by Merz that could form the basis for a whistleblower lawsuit to be discussed with an attorney—and for no other purpose." (Thomas Aff. I ¶ 27.) Moreover, Thomas argues that he "has, in fact, filed a counterclaim that details the basis for this reasonable belief." (Def.'s Br. Opp. PI Mot., at 16, ECF No. 70.)

58. However, the Court rejects Thomas' argument. First, there is nothing in the record suggesting that Thomas actually took the information he had downloaded to an attorney prior to deleting it from the thumb drive.[3] Second, he has offered no explanation for the fact that a great number of the Merz documents he downloaded onto his thumb drive bore no relation to the alleged conduct by Merz Pharmaceuticals that ultimately formed the basis for his counterclaim. Finally, the Court does not find it credible that he downloaded the documents to preserve evidence of wrongful conduct by Merz Pharmaceuticals and then simply proceeded to delete them.

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[3] The Court notes that in this lawsuit Thomas' initial Answer did not contain any counterclaim. (*See* Answer, ECF No. 32.) It was not until Thomas filed an Amended Answer on 23 January 2024 that he actually asserted a counterclaim. (*See* Am. Answer & Countercl., ECF No. 36.)

59. For all of these reasons, the Court is persuaded that Merz Pharmaceuticals has met its burden of showing a likelihood of success on its claims that Thomas misappropriated its trade secrets and breached the confidentiality provision of the Agreement.

B. Irreparable Harm

60. Additionally, the Court concludes that Merz Pharmaceuticals has adequately shown the likelihood of irreparable harm absent the entry of injunctive relief as a result of Thomas' improper actions in downloading its confidential information and trade secrets.

61. In its submissions to the Court, Merz Pharmaceuticals has sufficiently demonstrated that Thomas' unauthorized acquisition of its protected information will cause it to suffer competitive harm unless the PI Motion is granted. Indeed, North Carolina courts have repeatedly recognized the existence of irreparable harm in similar contexts. *See*, *e.g.*, *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 597 (1993) (holding that a preliminary injunction was proper because "[t]he very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. The party wronged may forever lose its competitive business advantage or, at the least, a significant portion of its market share."); *Barker Indus. v. Gould*, 146 N.C. App. 561, (2001) (565–66) (concluding that injunctive relief was properly awarded to prevent further misappropriation and improper use of plaintiff's trade secrets and confidential information); *Armacell LLC v. Bostic*, 2010 N.C. App. LEXIS 1278, at *41 (N.C. Ct. App. July 20, 2010) (finding that "considering the very

nature of the misappropriation of trade secrets, the law of this State authorizes the issuance of a preliminary injunction.").

62. The Court has engaged in a balancing of the equities in which it has weighed the potential harm to Merz Pharmaceuticals if an injunction is not issued against the potential harm to Thomas if injunctive relief is granted. Having done so, it is clear that the equities favor the entry of injunctive relief given that Thomas is unable to show any legitimate harm he would suffer from being enjoined from using Merz Pharmaceuticals' confidential information.

63. Therefore, the Court concludes, in the exercise of its discretion, that Merz Pharmaceuticals is entitled to a preliminary injunction with respect to Thomas' use of Merz Pharmaceuticals' confidential information and trade secrets.

II. Breach of Nonsolicitation Provision of the Agreement

64. However, the Court reaches a different conclusion with regard to the portion of Merz Pharmaceuticals' PI Motion regarding the nonsolicitation provision in the Agreement.

65. The Court need not address whether Merz Pharmaceuticals has met its burden of showing a likelihood of success on this component of its breach of contract claim because even assuming *arguendo* that such a showing has been made, Merz Pharmaceuticals has failed to demonstrate that it would suffer irreparable harm

absent the entry of a preliminary injunction as to Thomas' alleged violation of the nonsolicitation provision.[4]

66. Merz Pharmaceuticals contends that Thomas' solicitations of "key federal agency contacts whom he met through his work at Merz[,]" has or will cause it to suffer irreparable harm because "Thomas' intimate familiarity with Merz' confidential information and business development strategies . . . makes him uniquely well-situated" to convince "Merz's federal customers [to] replace Xeomin with Daxxify[,]" thus taking away market share from Merz. (PI Mot., at 3–6.)

67. Although Merz Pharmaceuticals seeks to enjoin Thomas from engaging in solicitation of a handful of federal agencies with whom he had involvement during his work for his Merz employers, Merz Pharmaceuticals' irreparable harm argument focuses on Thomas' solicitation of individuals at the Veterans Administration ("VA"), asserting that it will be irreparably harmed unless Thomas is enjoined from soliciting personnel from this agency on behalf of Revance (and its Daxxify drug).

68. Merz Pharmaceuticals' argument regarding irreparable harm can essentially be summarized as follows: (1) in order to be prescribed to patients by VA physicians, Daxxify must first receive "formulary approval" by the agency, and the granting of such approval to Daxxify would be adverse to Merz Pharmaceuticals' interests as a competitor; (2) absent an injunction, Thomas is likely to use his contacts and relationships within the VA to make Daxxify's receipt of formulary approval more

[4] Thomas has filed a Motion for Partial Summary Judgment (ECF No. 63) on the issue of whether Merz Pharmaceuticals' deadline for seeking to enforce the nonsolicitation provision has expired. The Court will address that motion by means of a separate order.

likely; and (3) assuming Daxxify does, in fact, receive such formulary approval, not only will Daxxify be on the same footing as Xeomin (which received such formulary approval years ago), but also Thomas will seek to persuade the VA to grant Daxxify "preferred" (or "enhanced") status over Xeomin.

69. In their arguments on this issue, the parties are referring to the VA National Formulary ("VANF"), which "is a list of therapeutic agents (e.g., drugs and drug-related supplies) that must be available for prescription at all VA medical facilities and cannot be made non-formulary by a VISN[5] or [an] individual VA medical facility."[6] *Veterans Health Admin.*, VHA Formulary Mgmt. Process, Directive 1108.08 (July 29, 2022). The Veterans Health Administration ("VHA") is responsible for the management of VANF. *Id.* "It is VHA policy that VANF is the only drug formulary authorized for use in the VHA; the use of VISN formularies or local drug formularies at individual VA medical facilities is prohibited." *Id.*

70. With regard to Merz Pharmaceuticals' concern about the effect of Thomas' solicitation efforts on Daxxify receiving formulary coverage, that ship has sailed. During the briefing period in connection with the present PI Motion, Daxxify obtained formulary coverage in April 2024.[7] Therefore, the Court must only address

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[5] "VISN" is the acronym for "Veterans Integrated Services Network." 38 C.F.R. § 1.220(b).

[6] Pursuant to Rule 201 of the North Carolina Rules of Evidence, the Court takes judicial notice of this fact. *See BIOMILQ, Inc. v. Guiliano*, 2024 NCBC LEXIS 8, at *12 (N.C. Super. Ct. Jan. 9, 2024) ("North Carolina courts and federal courts routinely take judicial notice of public filings by federal agencies.").

[7] *See* VA National Formulary April 2024, https://www.pbm.va.gov/NationalFormulary.asp (accessed May 13, 2024).

Merz Pharmaceuticals' remaining argument regarding the possibility of Thomas' solicitation efforts on behalf of Revance resulting in preferred coverage for Daxxify at the expense of Xeomin.

71. In support of its PI Motion, Merz Pharmaceuticals submitted the affidavit of Kevin O'Brien, who is the Chief Executive Officer of Merz. (O'Brien Aff. ¶ 1, ECF No. 59.2.) O'Brien describes his knowledge as being "[b]ased on [his] familiarity with the formulary approval process *generally*[.]" (O'Brien Aff. ¶ 7.) (emphasis added).

72. Thomas has filed multiple affidavits throughout the course of this litigation, including an affidavit filed contemporaneously with his response brief in opposition to the PI Motion. (*See* Thomas Aff. III, ECF No. 70.1.) Since 1999, Thomas has "built a career working with botulinum toxins in the governmental sector[.]" (Thomas Aff. III ¶ 12.) Thomas has "a deep familiarity and knowledge with the formulary process in the governmental sector, including based on [his] dedicated, full-time work in this area for 25 years." (Thomas Aff. III ¶ 27.)

73. The affidavits of both O'Brien and Thomas each discuss the formulary coverage process within the VHA. To the extent that their respective testimony is in conflict, the Court, in its discretion, finds the testimony of Thomas to be more credible than O'Brien's testimony based on Thomas' superior—and far more detailed—knowledge of the manner in which formulary approval and purchasing issues are handled by the VHA. Therefore, as set out below, the Court gives greater weight to Thomas' testimony on this subject.

74. In his affidavit, O'Brien testified that "[o]ne of the keys to success in the federal sector (and in the pharmaceutical industry generally) is enhancing formulary coverage." (O'Brien Aff. ¶ 4.) O'Brien describes how he believes the formulary process works as follows:

> Every payor maintains a "formulary," or a list of approved prescription drugs for which it will provide reimbursement. Enhancing formulary coverage involves convincing payors (including federal pharmacy benefits managers) that they should favor a particular drug at the expense of others. For example, a payor may limit the number of drugs in a certain class that are available on formulary, provide improved coverage for a particular drug, or remove preapproval requirements for prescribers for a particular drug.

(O'Brien Aff. ¶ 4.)

75. Furthermore, O'Brien stated that while employed at Merz, one of Thomas' "important responsibilities was enhancing formulary coverage[,]" which meant Thomas "worked closely with pharmacy benefits managers and other federal contacts to improve formulary coverage for Xeomin® and to demonstrate why Xeomin® should receive more favorable formulary coverage than other competitive products." (O'Brien Aff. ¶ 5.) Additionally, O'Brien testified that while at Merz, "Thomas' key federal contacts were agency employees, including individuals who are involved in formulary coverage and purchasing decisions, which could significantly impact prescription choices downstream for patients." (O'Brien Aff. ¶ 6.)

76. O'Brien then stated his belief "that Thomas is doing the same type of formulary work on behalf of Revance as he did for Merz[,]" and that he is "confident that Thomas' campaign to enhance formulary approval for Revance requires him to explain to customers why Daxxify is safer and better than Xeomin, and why the

agencies should permit prescribers to switch from Xeomin to Daxxify." (O'Brien Aff. ¶ 7.)

77. As an initial matter, Thomas testified that his "job duties at Revance are different from [his] job duties at Merz." (Thomas Aff. I ¶ 46.) Moreover, "[a]s an employee of Revance, [Thomas] do[es] not manage any directors or other employees who call on physicians or any other prescribers of Daxxify®." (Thomas Aff. I ¶ 50.)

78. In addition, Thomas' affidavit testimony contains extensive information about how the formulary process actually works at the VA. He testified that "Mr. O'Brien's affidavit reflects a fundamental misunderstanding of formulary coverage in the governmental sector[,]" and that he does "not believe Mr. O'Brien has knowledge or familiarity about the formulary approval process in the governmental sector, specifically (as opposed to the commercial sector)." (Thomas Aff. III ¶ 26.)

79. Thomas' affidavit explains that prior to 2020 the VHA attempted to regulate this class of botulinum toxins by providing enhanced levels of formulary approval but has since abandoned that practice. (Thomas Aff. III ¶ 31.)

> *If* this attempt had been successful, it could have resulted in a permanent system of "enhanced" or differing levels of formulary approval. However, the VHA abandoned the effort in around [sic] 2020. Upon information and belief, the VHA reversed course due to significant pushback from physicians and other prescribers in the governmental sector. *Simply put, the VHA does not recognize preferred classes or distinctions between or among botulinum toxins—which are either approved for formulary coverage, or disapproved for formulary coverage. It is a binary distinction. All the approved botulinum toxins also have the same coverage within the FSS.*[8]

[8] "FSS" is the acronym for "Federal Supply Schedule." 48 C.F.R. § 808.402 ("GSA has delegated authority to the VA to procure medical equipment, supplies, services and pharmaceuticals under the VA Federal Supply Schedule (FSS) program.").

(Thomas Aff. III ¶ 31 (emphasis added in part).)

80. With respect to O'Brien's discussion of "enhance[d] formulary coverage," Thomas has testified that although O'Brien's description "might be accurate for *commercial* insurance plans, it is false, inaccurate, and misleading as it relates to formulary coverage in the *governmental* sector." (Thomas Aff. III ¶ 30 (emphasis added in part).)

81. The Court finds Thomas' testimony to be credible that—despite O'Brien's assertions to the contrary—"there is no enhanced formulary coverage within the VHA for botulinum toxins (like Xeomin® or Daxxify®), and there has not been enhanced formulary coverage within the governmental sector since around 2020." (Thomas Aff. III ¶ 30.) Accordingly, the Court accepts Thomas' testimony that the VHA will not confer preferred status on either Xeomin or Daxxify at the expense of the other.

82. Therefore, the Court finds that Merz Pharmaceuticals has failed to show irreparable harm absent the issuance of a preliminary injunction in connection with its claim for breach of contract based on the nonsolicitation provision of the Agreement.

CONCLUSION

1. For the reasons set out above, the Court, in the exercise of its discretion, **CONCLUDES** that the PI Motion should be **GRANTED in part** and **DENIED in part.** The PI Motion is **GRANTED** as to Merz Pharmaceuticals' misappropriation of trade secrets claim and its claim for breach of the confidentiality provision of the

Agreement. However, the PI Motion is **DENIED** as to Merz Pharmaceuticals' claim for breach of the nonsolicitation provision of the Agreement.

2. Before setting out the specific terms of the injunctive relief to which Merz Pharmaceuticals is entitled, the Court deems it appropriate to allow the parties an opportunity to submit a proposed preliminary injunction order that takes into account the Court's rulings contained herein. The parties are **DIRECTED** to confer on this issue and submit either jointly or separately **on or before 20 May 2024** a proposed order.[9] The Court will determine at that time whether a hearing is necessary with regard to the parties' submissions.

SO ORDERED, this the 15th day of May, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

[9] The proposed order(s) should be submitted in Microsoft Word format.