STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24 CVS 619
A DISTRIBUTION COMPANY LLC and GREEN FAMILY FARM INT., LLC, Plaintiffs, v. MOOD PRODUCT GROUP LLC, Defendant.	**ORDER ON MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

1. **THIS MATTER** is before the Court following the 9 February 2024 filing of Plaintiffs' *Motion for Temporary Restraining Order and Preliminary Injunction* (the "Motion"). (ECF No. 5 ["Mot."].) Pursuant to Rule 65 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Plaintiffs seek to prevent Defendant from (1) soliciting its suppliers through use of Plaintiffs' trade secret(s), and (2) utilizing false post-harvest Certificates of Analysis ("COAs") to sell products acquired from unknown third parties. (Mot. 2.)

2. Having considered the Motion and related briefing from the parties, the Verified Complaint and exhibits thereto, evidence of record filed by the parties, and the arguments of the parties' counsel at the hearing on the Motion held 2 April 2024

(the "Hearing"),[1] (*see* ECF No. 16), the Court hereby **FINDS** and **CONCLUDES**, solely for the narrow purpose of ruling on the Motion,[2] as follows:

I. FINDINGS OF FACT[3]

3. Plaintiff A Distribution Company LLC ("ADC") is a North Carolina limited liability company located in Asheville, North Carolina. (Verified Compl. ¶ 1, ECF No. 3 ["Compl."].)[4] ADC is a distribution company "specializing in cannabis products derived from various source farms." (Compl. ¶ 10.)

4. Plaintiff Green Family Farm Int., LLC ("GFF"; with ADC, "Plaintiffs") is a North Carolina limited liability company located in Browns Summit, North Carolina. (Compl. ¶ 2.) GFF is "the premier cultivator of high-quality hemp flower" throughout

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[1] At the Hearing, Plaintiffs' counsel attempted to put into the record numerous statements about evidence that is not a matter of record regarding what may or may not have happened between Plaintiffs and Defendant. The Court will not consider such statements as they are not appropriately before the Court. Further, the Court does not consider new arguments made at the Hearing that were not made by counsel in the briefing. *See* BCR 7.2 ("A party should [ ] brief each issue and argument that the party desires the Court to rule upon and that the party intends to raise at a hearing.").

[2] Neither findings of fact nor conclusions of law made during a preliminary injunction proceeding are binding upon the Court at a later stage of the proceedings, including at a trial on the merits. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (citing *Huggins v. Wake Cty. Bd. of Educ.*, 272 N.C. 33, 40–41 (1967)).

[3] To the extent one or more findings of fact are more properly considered conclusions of law, and vice versa, they are intended by the Court to be and should be properly categorized and considered as such.

[4] For purposes of resolving the Motion, the Court treats the Verified Complaint as an affidavit. *See Page v. Sloan*, 281 N.C. 697, 705 (1972); *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 69 (2010). Notwithstanding this determination by the Court, the Verified Complaint, as any affidavit, may only be properly considered if it demonstrates by its allegations and representations that the affiant has firsthand knowledge of the facts or circumstances alleged and that the representations therein are properly considered by the Court as admissible evidence. *See Page*, 281 N.C. at 705.

the country and has cultivated over thirty strains of USDA-approved THCA flower. (Compl. ¶¶ 106, 117.) GFF's founder is Rocco Luciano Mocciola ("Mr. Mocciola"). (Compl. ¶ 106; Aff. Rocco Luciano Mocciola ¶ 4, ECF No. 12 ["Mocciola Aff."].)

5. Defendant Mood Product Group LLC ("Mood") is a Wyoming limited liability company that is registered to do business as a foreign entity in the State of Oklahoma. (Compl. ¶¶ 3–4.)

6. Michael Rich ("Mr. Rich") is ADC's principal. (Compl. ¶ 11.) Mr. Rich formed his first hemp distribution company in 2019. (Compl. ¶¶ 9, 14.) He managed production, packaging, fulfillment, and inventory, and among other things, managed the same for an unrelated e-commerce platform. (Compl. ¶¶ 14–15.) Mr. Rich focused on "procuring consumer end-products including hemp flower (outdoor, greenhouse, and indoor - 50+ strains), full spectrum gummies (CBN & CBG), tinctures, concentrates (hash, shatter, dab wax, crystalline, crumble, and kiet), and Delta-8 products." (Compl. ¶ 15.)

7. In April 2021, Rich formed ADC, which primarily supplied retail stores with "hemp flower, gummies, [and] vapes." (Compl. ¶ 16.)

8. Mr. Rich formed "strong relationships with hemp farmers across the country to establish a nationwide distribution network[,]" that "became the cornerstone for the development of innovative products and brands." (Compl. ¶¶ 17, 19.)

9. On around 16 May 2022, Mr. Rich met David Charles ("Mr. Charles") and Jake Antifaev, the eventual co-founders of Mood. (Compl. ¶ 20.) During their initial

conversations between 16 May and 19 May 2022, Mr. Charles sought Mr. Rich's assistance with procuring hemp flower for Mood. (Compl. ¶ 21; *see* ECF No. 30.1 (providing the May 2022 email communications).) Mr. Rich was engaged as a "cannabis consultant" to help procure the hemp flower. (Compl. ¶ 22.)

10. Mood was formed on 25 May 2022. (Compl. ¶ 23; *see* Decl. David Charles ¶ 2, ECF No. 22.1 ["Charles Aff."].)

11. On 1 June 2022, Mood and Mr. Rich executed a six-month consulting agreement and a six-month distributorship agreement for the acquisition of hemp flower and vapes. (Compl. ¶ 24; Charles Aff. ¶ 12.) Mr. Rich performed "cannabis consulting, the curation of products in line with the developing brands, and exclusively supplying flower and other related products to Mood." (Compl. ¶ 24; *see* Charles Aff. ¶ 11.) ADC, through Mr. Rich, procured hemp flower from growers that ADC had a relationship, without ADC disclosing the identity or location of those growers to Mood or its agents, to protect ADC's "trade secrets developed over many years." (Compl. ¶ 25.)

12. Mood's e-commerce marketplace, Hellomood.co, launched on 27 June 2022. (Compl. ¶ 26.) Plaintiffs liken the website to "the Amazon of hemp." (Compl. ¶ 29.) Mood focuses its business on the sale of lawful THC-based hemp products, meaning "cannabis with no more than 0.3% delta-9 tetrahydrocannabinol on a dry weight basis[ ], including flowers, pre-rolls, edibles, vaporizes, concentrates, and other lawful hemp related products and accessories." (Charles Aff. ¶ 3.) Mood's hemp products

"are generally sold as 'white label' products, which means that they contain the Mood brand but are sourced from third parties." (Charles Aff. ¶ 9.)

13. Between its formation and May 2023, Mood's business grew rapidly. (*See* Compl. ¶ 35.) In August 2022, ADC supplied Mood with two pounds of each of its twenty strains, and by May 2023 was supplying Mood twenty to twenty-five pounds of each strain per month. (Compl. ¶¶ 30–31, 35.)

14. On 19 May 2023, ADC and Mood entered into the Distribution and Sale of Goods Agreement (the "Agreement"). (Compl. ¶ 38; *see* Compl. Ex. A.)[5] Pursuant to the Agreement, ADC agreed to supply Mood with hemp products to be sold on Hellomood.co. (Compl. ¶ 5.)

15. The Agreement worked as follows: Mood would place an order for one or more specified products with ADC; once the order and payment was received, ADC had thirty days to deliver the products to Mood's Oklahoma City warehouse; upon receipt of the products, Mood had ten days to inspect them, during which time it could reject any nonconforming products and provide ADC a ten to fourteen day period for ADC to cure any deficiencies in the order; and, if ADC did not cure within a "commercially reasonable time," Mood could seek product replacement from another vendor. (Compl. ¶¶ 44.a.–d.; *see* Charles Aff. ¶ 14.) Under the Agreement, ADC was Mood's exclusive supplier of "1) All Delta-8 THC Concentrates; 2) All Hemp Flower; and 3) All Caviar Pre-rolls." (Compl. ¶ 44.h.)

[5] All exhibits to the Verified Complaint were filed as one combined document. (*See* Compl.) Therefore, for ease of reference, the Court does not re-cite the same ECF No. when referencing an exhibit for the first time and instead cites to each exhibit as follows: (Compl. Ex. [ ] at [ ].)

16. The Agreement provides, in relevant part, as follows:

> 14. Compliance with Law. The Parties and the Goods shall comply with all applicable laws, regulations, and ordinances . . . In addition to the foregoing, any Goods subject to this Agreement shall be accompanied by validly issued certificates of analysis (COAs) that demonstrate the Goods' compliance with applicable local, state, and federal law.
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> 16. Term. The initial term of this Agreement commences on the Effective Date and continues until May 8, 2026[.]
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> 17. Termination. . . . MOOD may terminate this Agreement upon written notice to ADC: (a) if ADC is in breach of, or threatens to breach, any representation, warranty or covenant of ADC under this Agreement, any Invoice, or Purchase Order, and either the breach cannot be cured, or if the breach can be cured, it is not cured by ADC within a commercially reasonable period of time under the circumstances, in no case exceeding fourteen (14) days following ADC's receipt of written notice of such breach;
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> 18. Confidential Information. All non-public, confidential, or proprietary information of the Parties, including, but not limited to, . . . documents, data, business operations, customer lists, vendor lists, supplier lists, pricing, . . . whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and whether or not marked, designated, or otherwise identified as 'confidential,' in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by the other Party in writing.
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> 19. Non-Circumvention. . . . ADC may (1) provide MOOD with access to the ADC's Confidential Information (as defined in Section 18) . . . for the sole purpose of marketing the Goods. MOOD is prohibited from doing any of the following . . . without ADC's prior written consent (which consent shall be at ADC's sole discretion) in each instance: (a) enter into any deal or other transaction with an Disclosing Party Contact that (i) is

> the same as, substantially similar to, or in competition with the potential transaction(s) contemplated by this Agreement . . . ; (b) solicit or otherwise encourage any Disclosing Party Contact to enter into any Prohibited Transaction; or (c) solicit, procure, induce, or otherwise encourage any of its affiliates, subsidiaries, partners, shareholders, officers, directors, employees, third-party agents, representatives, members, other individuals, or otherwise, to enter into any Prohibited Transaction or to respond to any solicitation to enter into any Prohibited Transaction.

(Compl. Ex. A at 4–6.)

17. Section 19 of the Agreement specifically provides that ADC will compile a "complete and accurate list of" the "names, addresses, and contact information for ADC's Disclosing Party Contacts." (Compl. Ex. A at 6.) The Disclosing Party Contact List (the "List") would be "amended on a monthly basis by ADC" and "kept confidential by ADC's attorney of record." (Compl. Ex. A at 6.)

18. Section 31 of the Agreement provides that it is to be governed by and construed in accordance with North Carolina law, and Section 32 provides that the parties to the Agreement choose North Carolina as the appropriate forum. (Compl. Ex. A at 9–10.) While the Agreement provides that ADC and Mood agree to arbitrate disputes between them, they each may initiate litigation "for claims for equitable relief." (Compl. Ex. A at 11.)

19. The List, provided to Mood on 10 July 2023 in reliance on the protections the Agreement, contained "source locations (i.e. the individual farms in multiple states) of specific hemp strains, information that was neither public nor easily acquired[.]" (Compl. ¶ 49.) Mood received the List in the form of an excel spreadsheet and contacted some of the growers on the List "for the sole purpose of determining if

they wished to participate in creating video marketing content for the Mood website that focused on the grower." (Charles Aff. ¶ 18.) Mood understood this to be in accordance with the terms of the Agreement. (Charles Aff. ¶ 18.)

20. Mood's first order under the Agreement was placed on 13 September 2023 for thirty pounds each of eight strains of THCA flower. (Compl. ¶ 52.) The THCA flower for this order was grown and harvested by GFF. (Compl. ¶ 54.)

21. Plaintiffs allege that Mood "understood" that this order would be delivered in two separate shipments and that sale of the products would need to be delayed in order for Plaintiffs to perform testing required by the United States Department of Agriculture ("USDA") at licensed laboratories. (Compl. ¶ 56.)

22. The 13 September 2023 order was delivered to Mood in two shipments between 19 September and 14 October 2023, and the required post-harvest testing for all eight strains took place relative to the dates of actual harvest. (Compl. ¶ 57.)

23. On 17 October 2023, Mood placed a second order for the same eight strains. (Compl. ¶ 59.) Plaintiffs allege that Mood's tone in communications thereafter "changed, leading ADC to suspect something sinister was afoot." (Compl. ¶ 60.)

24. According to Mr. Charles, "[a]lmost immediately after the initial orders were placed," there were errors or failures by ADC related to: "(i) quality control, including spoiled or moldy product; (ii) untimely delivery of product; (iii) inaccurate quantity of product ordered; and (iv) providing COA's with product or providing COA for pre-harvest testing that were dated after COA's for the same flower for the post-harvest testing." (Charles Aff. ¶ 20.)

25. Between 31 July 2023 and 30 October 2023, "Mood documented 66 issues with orders it placed with, or received from, ADC." (Decl. Katy Futrell ¶ 8, ECF No. 22.2 ["Futrell Aff."].) The evidence before the Court is that ADC failed to cure thirty-nine of the sixty-six issues. (Futrell Aff. ¶ 9.)

26. In October 2023, Mood emailed notices to ADC regarding issues with COAs, which were required by Section 14 of the Agreement to accompany shipments. (Compl. ¶ 62.)

27. A COA is a test report prepared by a licensed laboratory that shows the content of THC, THCA, cannabinoid, and other chemicals from a post-harvest laboratory-tested plant, in compliance with federal and state regulations. (Compl. ¶ 64.) This is done to ensure that the product crossing state lines contains less than 0.3% THC in the dry weight of the product. (Compl. ¶ 64.) COAs may also be issued for pre-harvest testing when law requires, such as in North Carolina where the product is regulated directly by the USDA. (Compl. ¶¶ 67–68.)

28. Thus, "[i]n North Carolina, before the hemp crop is harvested, USDA-licensed samplers must visit the farm, clip a sample from the plant, and submit the sample to the USDA for pre-harvest testing. Then, the grower is required to harvest the crop within or around 30 days from sampling." (Compl. ¶ 70.) Once the crop is harvested, the grower "can submit their crops directly to a DEA-licensed lab for post-harvest testing and pay the required testing fees." (Compl. ¶ 72.)

29. Plaintiffs allege that post-harvest testing was an established part of their practices to ensure their products complied with federal law. (Compl. ¶ 73.) Post-

harvest COAs were required for "merchant verification purposes" for businesses like Mood, meaning that it could not process payments from its customers unless a post-harvest COA was displayed on the website for the products being sold to the public. (Compl. ¶ 74.)

30. In Mood's October 2023 communications to ADC, it complained of shipments containing THCA flower products that were missing their respective COAs. (Compl. ¶ 75.) Specifically, on 18 October 2023, "Mood notified ADC by email that there were eight products missing the COA upon receipt of a shipment received under Invoice Number 1259T." (Futrell Aff. ¶ 11.) Prior to alerting ADC by email, Mood previously requested COAs for other orders on 13 September, 16 September, 11 October, and 12 October 2023. (Futrell Aff. ¶ 11.) Mood alerted ADC by email again that "there were eight products missing documentation upon receipt by Mood under Invoice Number 1271T." (Futrell Aff. ¶ 12.)

31. Plaintiffs allege that the Agreement did not require any COAs to accompany a shipment. (Compl. ¶ 76.) Mood, however, notes that the Agreement "required ADC to include COAs in each shipment. Mood emphasized to [Mr.] Rich early in the contractual relationship that it was ADC's responsibility to provide COAs to Mood." (Futrell Aff. ¶ 23.)

32. Following Mood's various complaints, on 27 October 2023 ADC sent all pre- and post-harvest COAs for the eight strains of THCA flower for some previous orders by email to Mood. (Compl. ¶¶ 81, 121 ("On October 27, 2023, in response to a request from Mood communicated via email, ADC transmitted PDF-formatted copies of GFF's

pre-harvest test results and post-harvest COAs to Mood.").) To be clear, Plaintiffs allege that GFF fulfills its pre-harvest obligations and submits its crops for post-harvest testing at DEA-licensed labs on a weekly basis.[6] (Compl. ¶¶ 118–19.)

33. On 17 November 2023, Mood communicated its decision to terminate the Agreement pursuant to Section 17. (Compl. ¶ 89; Futrell Aff. ¶ 15; *see* ECF No. 30.3 (providing the termination email and subsequent communications between counsel for the parties, Mr. Rich, and Mr. Charles).)

34. Plaintiffs allege that Mood refused to place any orders with ADC until a new agreement was signed, and that Mood, as early as July 2023, was sourcing products from third parties in violation of the exclusivity and right of first refusal provisions of the Agreement. (Compl. ¶¶ 97–98.) Mood disputes this allegation, noting that it purchased certain products after the termination of the Agreement and subsequently sold pre-rolls as a finished good, assembled in house. (Charles Aff. ¶ 34.)

35. Plaintiffs also allege that Mood violated its obligations under the Agreement by using the List to "directly and indirectly solicit, procure, induce, or otherwise encourage" at least three growers into entering into prohibited transactions under Section 19 of the Agreement. (Compl. ¶ 99.) Mr. Charles states, however, that "Mood has not knowingly purchased any flower from any party

[6] This is consistent with the representations by counsel at the hearing: GFF, as the grower, submitted its crop through the USDA labs for pre-harvest testing, within thirty days of sample submission harvested the applicable crop, and thereafter submitted post-harvest samples to DEA-labs for testing by choice, although COAs from that testing were required pursuant to the Agreement.

identified as a Disclosing Party Contact." (Charles Aff. ¶ 22.) Rather, Mood was "contacted by Grower No. 20" on the List in October 2023, and Mr. Charles called that individual to inform them that Mood could not buy from them and that "everything between him and Mood needs to go through ADC." (Charles Aff. ¶ 23.) Mood also notes that the information contained in the List can be identified through browsing social media, Mood's marketing efforts spotlighting farmers on its website, online COAs, and online searches of publicly available records, including the USDA hemp public search tool. (Charles Aff. ¶ 26.)

36. Plaintiffs also allege that Mood engaged in misconduct related to the COAs supplied to it by ADC. Plaintiffs allege that GFF has not filled a single order of THCA flower destined for Mood through ADC since 17 November 2023. (Compl. ¶ 125.) Despite that, Plaintiffs allege that Mood "continues to sell the same strains of THCA flower (such as Gushers, Pink Lemonade, Gary Payton, Rainbow Runtz, Purple Punch, and Pluto) previously grown and supplied by GFF, despite, upon information and belief, no longer having the ADC procured products grown by GFF in inventory." (Compl. ¶ 126.)

37. Following the termination of the Agreement, Mood still had GFF product in its possession, sourced by ADC, so that product continued to be sold throughout the remainder of 2023 and the COAs therefore remained on Mood's website. (Futrell Aff. ¶ 25.) Prior to filing the lawsuit, ADC did not indicate that it was improper for Mood to have the COAs on its website. (*See, e.g.*, Charles Aff. Exs. A–B.) Once Mood received and reviewed the Verified Complaint in this action and became aware of the

issue, it removed the COAs at issue from its website. (Futrell Aff. ¶ 27; Charles Aff. ¶¶ 25, 37.)

38. Since 12 January 2024, Mood has added ten new strains of THCA flower from third parties to its product offerings at Hellomood.co. (Compl. ¶ 127.) Plaintiffs allege that Mood is using "altered official versions of GFF's post-harvest COAs" to facilitate its sales from these unknown third parties. (Compl. ¶¶ 129, 132–33; *see* Exs. B–G.) In doing so, Mood allegedly altered GFF's post-harvest COAs by replacing GFF's name and address with Mood's name and address. (Compl. ¶ 136.) Plaintiffs contend that, by altering COAs posted on Mood's website, Mood is falsely identifying itself as the grower of the THCA flower. (Compl. ¶ 140.)

39. According to Mood, this allegation is false. (Charles Aff. ¶ 37.) Mood does not represent on its website, or generally hold itself out, to be a grower or cultivator of hemp product. (Charles Aff. ¶ 37.) Further, a review of the exhibits to the Verified Complaint demonstrates the same: on some COAs Mood appears as the "client" but not the grower. (*See, e.g.,* Exs. B, E (showing that Mood has replaced GFF's name and address on the client line but has not replaced the grower license number on either COA); Futrell Aff. ¶ 28.) Further, where "the COAs contained a license number of the grower (which is searchable on-line), that information still appears on those COAs that were posted to the Mood website (see Exhibits B and F to the complaint)." (Futrell Aff. ¶ 28.) Mood represents that "all COA's relating to products sourced by ADC from GFF have been removed from Mood's website." (Charles Aff. ¶ 37; *see also* Futrell Aff. ¶ 27.) Finally, communications between the parties leading up to the

execution of the Agreement support Mood's contention that ADC was aware and approved of Mood listing itself as the client on the COAs. (Charles Aff. ¶¶ 15–16, Exs. A–B.)

40. Thus, primarily at issue in the Motion is Mood's alleged (1) use of the List, which ADC contends is a trade secret, in violation of Section 19 of the Agreement; and (2) misrepresentations on COAs regarding post-harvest testing with DEA-licensed labs which use GFF's USDA-hemp license as its own, despite GFF having filled no orders for Mood since 17 October 2023.

II. CONCLUSIONS OF LAW

41. As an initial matter, the Agreement contains an arbitration provision at Section 33.d. (Compl. Ex. A at 11.) The provision provides that,

> [u]nless otherwise provided elsewhere in this Agreement, no Party may institute any court proceedings concerning any dispute. . . . Notwithstanding the foregoing, the Parties may initiate court proceedings in a court of competent jurisdiction: (a) to enforce any arbitration award between the Parties; or (b) for claims for equitable relief.

(Compl. Ex. A at 11.) Mood contends that the Court should not entertain the Motion, and rather should compel the parties to arbitrate the matter, including any requests by Plaintiffs for equitable relief. (Def.'s Br. Opp. Mot. 7–8, ECF No. 21 ["Br. Opp."].) The Court determines that, even if the parties should be compelled to engage in arbitration,[7] Section 33 does not prevent ADC from seeking to obtain from this Court an order awarding injunctive relief, a form of equitable relief. *See, e.g., Local Soc.,*

[7] Mood has filed its Motion to Compel Arbitration. (ECF No. 23.) The Court's determination herein is not intended to, nor should it be interpreted as, ruling on the Motion to Compel Arbitration. The Court will decide that motion following full briefing and oral argument.

Inc. v. Stallings, 2017 NCBC LEXIS 94, at *22 (N.C. Super. Ct. Oct. 9, 2017); *Bayer CropScience LP v. Chemtura Corp.*, 2012 NCBC LEXIS 43, at **11 n.40 (N.C. Super. Ct. July 13, 2012) ("It is proper for a court to enter an injunction pending arbitration if doing so would prevent one party from eviscerating the effectiveness of the arbitration.").

42. Under Rule 65, the Court has discretion to issue a preliminary injunction in appropriate circumstances. *See* N.C.G.S. § 1A-1, Rule 65(a)–(b); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)).

43. 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). Plaintiffs bear the burden of showing: (1) a likelihood of success on the merits, and (2) that they are 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. Indus., Inc.*, 308 N.C. at 401 (cleaned up); *see also Pruitt v. Williams*, 288 N.C. 368, 372 (1975) ("The burden is on the plaintiffs to establish their right to a preliminary injunction.").

44. Likelihood of success means a "reasonable likelihood[.]" *A.E.P. Indus., Inc.*, 308 N.C. at 404. Irreparable injury is not necessarily injury that is "beyond the possibility of repair or possible compensation in damages, but 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[.]" *Id.* at 407 (emphasis omitted). The Court must also weigh the potential harm Plaintiffs will suffer if no injunction is entered against the potential harm to Mood if the injunction is entered. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

45. Ultimately, the decision to grant or deny a preliminary injunction rests in the discretion of the trial court. *Lambe v. Smith*, 11 N.C. App. 580, 583 (1971); *A.E.P. Indus., Inc.*, 308 N.C. at 400.

46. Thus, Plaintiffs must demonstrate a "reasonable likelihood" of success on the merits of their claims to satisfy the first requirement. *A.E.P. Indus., Inc.*, 308 N.C. at 401–02. As to the second requirement, a movant "is entitled to injunctive relief when there is no adequate remedy at law and irreparable harm will result if the injunction is not granted." *Vest v. Easley*, 145 N.C. App. 70, 76 (2001). A party may show that it will suffer an irreparable injury for which it has no adequate remedy at law where damages are difficult to calculate and cannot be ascertained with certainty. *A.E.P. Indus., Inc.*, 308 N.C. at 406–07.

47. The Court analyzes each of the pertinent claims for relief herein.

A. <u>Likelihood of Success on the Merits</u>

48. For a preliminary injunction to issue, the standard requires "more than conclusory allegations[.]" *Barbarino v. Cappuccine, Inc.*, 2012 N.C. App. LEXIS 305, at *9 (2020) (unpublished). Only two of Plaintiffs' stated claims allege a request for injunctive relief. (*See* Compl. ¶¶ 147–48, 182.) The Court takes each in turn.

1. Breach of Contract

49. Plaintiffs contend, in relevant part, that Mood breached the Agreement by (1) soliciting growers on the Disclosing Party Contact List; and (2) contracting with third parties in violation of the right of first refusal provision in Section 20. (Br. Supp. Mot. 10, 14, ECF No. 6 ["Br. Supp."].) ADC seeks to enforce the non-solicitation and confidentiality clauses in the Agreement. (Br. Supp. 10.)

50. Plaintiffs must demonstrate "a probability of success on the two essential elements of any breach of contract claim, which are (1) existence of a valid contract and (2) breach of terms of that contract." *Aeroflow Inc. v. Arias*, 2011 NCBC LEXIS 21, at **15 (N.C. Super. Ct. July 5, 2011) (citing *Poor v. Hill*, 138 N.C. App. 19, 25 (2000)).

51. Here, there is no dispute regarding the existence of a valid contract. (Br. Supp. 12; Br. Opp. 8.) Rather, Mood disputes Plaintiffs' allegations of breach. (Br. Opp. 8.) Mood contends that its termination of the Agreement was proper and the natural consequence of ADC's numerous instances of poor and non-conforming performance. (Br. Opp. 8.) Mood also argues that, even if it breached the Agreement, ADC breached first, thereby relieving Mood of the obligation of complying with the contract provisions in question. (Br. Opp. 8; *see* Futrell Aff. ¶¶ 4–14.)

52. Mood further contends that it "has no record of doing business with [any third] parties, and has not knowingly purchased goods from any growers from ADC's customer list since the termination." (Br. Opp. 10.) Further, during the Hearing Mood's counsel represented to the Court that Mood secured other growers to satisfy

its product needs and therefore had no reason to seek business from the growers included on the List.

53. The Court first addresses Plaintiffs' allegations that Mood violated the non-solicitation provision of the Agreement through use of the List. The evidence of record demonstrates that Plaintiffs have failed to meet their burden on this issue.

54. The Verified Complaint provides that Mood used the list to "directly and indirectly solicit" three growers into entering prohibited transactions under the Agreement. (Compl. ¶ 100.) Mr. Charles, however, states that "Mood has not knowingly purchased any flower from any party identified as a Disclosing Party Contact." (Charles Aff. ¶ 22.) He states that ADC's allegation is incorrect, affirming that "Mood has no record of doing business with these parties. In October 2023, Mood was contacted by Grower No. 20. [Mr. Charles] called him out of courtesy and told him that we cannot buy from him and everything between him and Mood needs to go through ADC." (Charles Aff. ¶ 23.) ADC fails to address this statement in its reply.

55. Plaintiffs have similarly failed to come forward with convincing evidence supporting the alleged facts constituting Mood's purported breach of the non-solicitation provision of the Agreement. *See VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510 (2004) (emphasis removed) (quoting *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675 (1977)). Plaintiffs' conclusory statements regarding Mood's purported solicitation, without more, are insufficient to demonstrate likelihood of success on the merits for breach of the non-solicitation provision.

56. The Court next turns to Plaintiffs' contention that Mood breached the Agreement by terminating it in November 2023 pursuant to Section 17. (*See* Br. Supp. 14.)

57. Plaintiffs argue, without citation to the Verified Complaint or other evidence of record, that "Mood's invocation of general termination provisions lacks any basis in law or fact." (Br. Supp. 14.) The evidence of record demonstrates otherwise.

58. The evidence before the Court demonstrates that (1) Mood had significant problems with ADC due to ADC's "failures to properly fulfill product orders from Mood, and ADC's repeated failures to timely rectify errors after being notified of them by Mood," (Charles Aff. ¶ 19); (2) Mood notified Mr. Rich and ADC of these issues on numerous occasions, (Charles Aff. ¶ 21; Futrell Aff. ¶¶ 4–17; Futrell Aff. Exs. 1–4); (3) a majority of these issues were not cured, (Futrell Aff. ¶¶ 9, 15); and (4) Mood, as a result of at least thirty-nine failures to cure, timely or otherwise, terminated the Agreement, (Futrell Aff. ¶¶ 9, 15–17). This evidence is effectively unrebutted.

59. Plaintiffs' conclusory statements regarding Mood's purported breach by terminating the Agreement, without more, are insufficient to demonstrate likelihood of success on the merits for breach of Section 17 of the Agreement.

60. Plaintiffs have failed to meet their burden of demonstrating likelihood of success on the merits for their breach of contract claim, and therefore, this claim cannot serve as a basis for the Court to order any preliminary injunctive relief.

2. Misappropriation of Trade Secrets

61. ADC's only other claim allegedly justifying preliminary injunctive relief is contained in its claim for trade secret misappropriation.

62. "It is generally accepted that a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468 (2003). Plaintiffs have identified ADC's Disclosing Party Contact List as the purported trade secret at issue. (Br. Supp. 16–17.)

63. However, ADC has not demonstrated that the List was "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C.G.S. § 66-152(3)(b). That Plaintiffs shared the information at issue with Mood "with nothing more than an expectation of confidentiality is insufficient to establish that the information was the subject of efforts that were reasonable under the circumstances to maintain its secrecy." *Krawiec v. Manly*, 370 N.C. 602, 612 (2018) (cleaned up) (concluding that at the Rule 12(b)(6) stage, where the burden on Plaintiffs is lower because they do not have to show likelihood of success on the merits, that such allegations are insufficient). Here, Plaintiffs argue, without citation, that "ADC engaged in reasonable efforts to maintain the secrecy of this information by entering into an Agreement expressly protecting this information prior to disclosure." (Br. Supp. 17.)

64. While far from clear in the record, it appears that Plaintiffs contend that the List included product-specific information by grower—information that was unnecessary for Mood to have access to. Providing Mood with more fulsome information than was necessary for it to complete the marketing project contemplated in the Agreement is inconsistent with reasonable measures to protect the confidentiality of the information.

65. Assuming, *arguendo*, that Plaintiffs met their burden regarding the measures taken to maintain the secrecy of the List, Plaintiffs have similarly failed to come forward with convincing evidence that misappropriation has occurred, is threatened to occur, or is going to occur. *See Analog Devices, Inc.*, 157 N.C. App. at 472.

66. Under the North Carolina Trade Secret Protection Act ("TSPA"), "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). "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 or authority of the owner [of the trade secret].' " *Red Valve, Inc. v. Titan Valve, Inc.*, 2018 NCBC LEXIS 41, at **24 (N.C. Super. Ct. Apr. 17, 2018) (quoting N.C.G.S. § 66-155).

67. Plaintiffs argue, again without citation to applicable law or evidence of record, that ADC's information was misappropriated when Mood "attempted to solicit sales directly from growers on the list without ADC's consent[.]" (Br. Supp. 17.) The evidence presently before the Court of misappropriation is neither compelling nor convincing, as Plaintiffs rely only on the sweeping contention in the Verified Complaint that Mood solicited three growers included on the List. (*See* Compl. ¶ 100.)

68. The record evidence discloses that (1) ADC gave Mood the List for purposes of marketing efforts, and Mood did in fact use the List for the permitted marketing purpose, (Charles Aff. ¶¶ 18 ("Mood contacted growers from the Disclosing Party Contact List for the sole purpose of determining if they wished to participate in creating video marketing content for the Mood website that focused on the grower."), 35 ("Mood contacted multiple disclosed contacts in an effort to coordinate video marketing efforts [and] Mood produced four marketing films that featured growers[.]")); (2) when one grower on the List reached out to Mood, Mr. Charles directed that grower to communicate with ADC instead, (Charles Aff. ¶ 23); and (3) "ADC has never requested that Mood return to it any alleged confidential information in Mood's possession[,]" (Charles Aff. ¶ 33).

69. Plaintiffs did not provide any convincing evidence to the Court to rebut Mood's evidence. Plaintiffs have failed to demonstrate likelihood of success on the merits for either the breach of contract or trade secret misappropriation claims. Therefore, the Court need not address whether irreparable harm will result, given

that Plaintiffs have failed to meet their burden of demonstrating likelihood of success on the merits.

70. The Court briefly notes that Plaintiffs seek injunctive relief in the form of an order that requires Mood to cease utilizing modified post-harvest COAs. While Plaintiffs addressed all of their alleged claims in their briefing on the Motion, only the breach of contract and misappropriation of trade secrets claims contained a specific request for injunctive relief. Those claims, therefore, were the focus of the Court's analysis, and neither claim concerns Mood's use of COAs. Further, the record demonstrates that (1) ADC, through Mr. Rich, consented to GFF's COAs being modified by Mood, and (2) Mood has removed all of GFF's post-harvest COAs from its website. Thus, even if there was a claim with some likelihood to succeed on the merits to serve as the basis for this request, Plaintiffs have not demonstrated irreparable harm.

III. CONCLUSION

71. **THEREFORE**, for the foregoing reasons, the Court hereby **DENIES** the Motion.

SO ORDERED, this the 4th day of April, 2024.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases