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IN THE SUPREME COURT OF MISSOURI

CENTRAL TRUST AND INVESTMENT COMPANY,	)	
Plaintiff/Appellant,	)	
VS.	)	**Cause No. SC93182**
TROY KENNEDY AND ITI FINANCIAL MANAGEMENT, LLC,	)	
Defendants,	)	
AND	)	
SIGNALPOINT ASSET MANAGEMENT, LLC,	)	
Defendant/Respondent.	)	

Appeal from the Circuit Court of Greene County, Thirty-First Judicial Circuit
Greene County Circuit Court Case No. 1031CV00117
The Honorable Michael J. Cordonnier, Circuit Judge

APPELLANT CENTRAL TRUST & INVESTMENT COMPANY'S SUBSTITUTE BRIEF

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Appellant Central Trust & Investment Company ("Central Trust") appeals an order and judgment from the Circuit Court of Greene County, Missouri entering summary judgment in favor of Respondent SignalPoint Asset Management, LLC ("SignalPoint") finding that, on Central Trust's claims against SignalPoint for misappropriation of trade secrets, tortious interference with contract or business expectancy and civil conspiracy, there "is no genuine issue as to any material fact and that Defendant SignalPoint Asset Management, LLC is entitled to a judgment as a matter of law as to all counts" of Central Trust's First Amended Petition. (LF 1089-91, 1092-94).[1] Central Trust also appeals the trial court's denial of its Motion for Reconsideration of Summary Judgment and for New Trial based upon newly discovered evidence and purposeful misconduct regarding discovery. (LF 14, 1108-38). The Amended Summary Judgment which is a subject of this appeal was entered on July 26, 2011, by the Circuit Court of Greene County, Missouri, the Honorable Michael J. Cordonnier. (LF 1092-1094). The Honorable Michael J. Cordonnier overruled Central Trust's Motion for Reconsideration on October 5, 2011. (LF 14).

[1] In referencing the Record on Appeal, the Legal File is referred to as "LF," the Supplemental Legal File as "SLF" and the Appendix accompanying this Substitute Brief as "Appendix."

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Greene County lies within the geographic boundaries of the Missouri Court of Appeals, Southern District. Mo. Rev. Stat. § 477.060 (2012). Following opinion by the Missouri Court of Appeals, Southern District, on January 24, 2013, affirming the trial court's judgment, Central Trust filed its Motion for Rehearing and an Application for Transfer to the Supreme Court with the Court of Appeals on February 8, 2013, which was denied February 19, 2013. Central Trust filed its Application for Transfer to the Missouri Supreme Court with this Court on March 6, 2013. This Court granted transfer on May 28, 2013. This Court has jurisdiction pursuant to Missouri Constitution, Art. V, Section 10.

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STATEMENT OF FACTS

Respondent SignalPoint is a competitor of Central Trust. (LF 1012). SignalPoint is a registered investment advisor (LF 1013) that has affiliated with Troy Kennedy ("Kennedy") and ITI Financial Management, LLC ("ITI") for the purpose of managing assets of numerous clients Kennedy took from his former employer and Central Trust's predecessor, Springfield Trustshares ("ST") and from ST's holding company, Springfield Trust and Investment Company ("STIC") (collectively, "STC") (LF 331-36; 778-79).[2] Kennedy ended his STC employment when Central Trust purchased the assets of STC—including STC's client lists and information—on November 20, 2009, for $19,750,000. (LF 987; 989, 1014). Through their affiliation, SignalPoint, Kennedy and ITI have deprived Central Trust of about $50 million in assets under management. (LF 582).

A. Factual Background.

In 1991, the creator of STC formed the company to provide financial management services to clientele. (LF 987). In 2007, at its peak, STC had approximately $714 million in client assets under management, which due to the economic downturn, was reduced to $560 million in November 2009. (LF 988). Building this book of business was a team effort: no one employee was solely responsible for STC's relationships with its clients. (LF 988).

Central Trust acquired STC on November 20, 2009. (LF 989, 1008). Central Trust paid $19,750,000 to purchase STC's assets, the primary asset being STC's clients.

[2] Kennedy founded ITI the day after he resigned from STC. (LF 1009).

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(LF 989). Central Trust now provides investment and management services to former STC clients in exchange for an agreed upon fee. (LF 990). On average, a client account remains with Central Trust for 20 years. (LF 990). As long as a client maintains an account with Central Trust, fees are earned by Central Trust for continued management of the account. (LF 901, 990).

1. Kennedy's employment with STC prior to affiliating with SignalPoint.

STC employed Kennedy from 1992 through November 20, 2009. (LF 990-91). During that time, Kennedy was an executive vice president, shareholder and officer of ST and a director of STIC. (LF 990-91). When Kennedy began his STC employment, he had no prior experience in the investment or asset management business. (LF 991). Kennedy's primary job as an STC employee was to develop new business. (LF 991). Kennedy's leads were, initially, provided to him by existing STC executives and board members. (LF 992).

Kennedy ultimately became a part of STC's core management team. (LF 993). Kennedy was a member of three of the four formal director committees, including the management team, trust acceptance committee and investment committee. (LF 993). As an STC officer and director, Kennedy was exposed to STC's confidential and proprietary information, including client information, client accounts and client business plans and strategies. (LF 993). During board meetings, other directors provided Kennedy new business referrals. (LF 992). According to Kennedy, "[t]he only reason the board was assembled was for referrals for new business." (LF 992). During board meetings, Kennedy and other directors discussed clients, client prospects and individual client

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assets under management. (LF 993). Kennedy considered client information, client accounts and client business plans and strategies valuable STC assets. (LF 994).

Indeed, STC spent 19 years and an incalculable amount of money (including paying employees like Kennedy) to develop its client database containing confidential information, including its client lists. (LF 988-89). STC treated the information, including the identify of its clients, as confidential and took steps to protect the confidentiality of the information, including using passwords, restricting access to the information, adopting a confidentiality policy and keeping physical client files in a locked vault. (LF 998). No publically available document listed STC clients, and no publically available document lists Central Trust's clients. (LF 998). Even for those authorized individuals who could access STC's client database remotely, like Kennedy, the database remained subject to password protection. (LF 998).

According to Kennedy, STC's (now Central Trust's) client information, including business plans and strategies, are valuable. (LF 994). The most important piece of information, according to Kennedy, is the client's identity. (LF 994). The client list, according to Kennedy, is also very important in the asset management business, the name of a client being the "gateway" to the client's other information. (LF 995).

In fact, Kennedy admitted in his deposition it would be "much simpler" to develop business using a list of Central Trust's clients, than using a phone book because knowledge that a person is a client of Central Trust is knowledge that the person has assets to invest. (LF 995). Without access to or other knowledge of Central Trust's client information, identifying a person as a Central Trust client would require calling

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everyone in the phonebook or sitting outside Central Trust's office building, taking photos of individuals entering and exiting the building, following those individuals and figuring out who was a Central Trust client (as opposed to a mere employee or tenant of the building), which, Kennedy admitted, would take "quite a while." (LF 995). Thus, knowledge of Central Trust's client information provides a competitive advantage to anyone in the asset management industry. (LF 996).

The lengths which STC took to protect its client lists are exemplified by Kennedy's written employment agreement entered with STC, dated January 1, 2008 ("Kennedy Employment Contract"). (LF 998). Among other obligations undertaken, Kennedy agreed as follows:

> In consideration for the Employment Agreement, the Employee hereby covenants for a period of three (3) years and within one hundred (100) mile radius of Springfield, MO: **a**. Not to solicit Springfield Trust Company clients; **b**. Not to solicit Springfield Trust Company employees and clients to terminate their relationship with Springfield Trust Company; **c**. Not to accept employment with or in any other manner engage in a business which, directly or indirectly, competes with Springfield Trust Company within a one hundred (100) mile radius of Springfield, MO and; **d**. provided STC's revenue do not fall below four million dollars ($4,000,000) in any twelve (12) month period not to refer STC clients or prospects to any individual or business which directly or indirectly competes with STC. . . .

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(LF 999). By its terms, the Kennedy Employment Contract remained in effect through the date of Central Trust's purchase of STC. (LF 999). Kennedy was not, however, free to solicit STC clients, even after the Kennedy Employment Contract expired. [3](LF 999).

In addition, on July 22, 2009, Kennedy executed an Oath of Director with STC ("2009 Oath of Director"). (LF 1000). Kennedy agreed as follows:

> *I agree not to use for any purpose, or disclose to any person or entity, any confidential information acquired during the course of my term of service as a Director of Springfield Trust & Investment Company. I shall not directly or indirectly, copy, take, or permanently remove any of the Company's books, records, customer lists, or any other documents, materials, or confidential information.* The term "*Confidential Information*" as used in this Agreement includes, but is not limited to: (a) information of a business nature such as, but not limited to, records, lists, and *knowledge of the Company's clients,* suppliers, methods of operations, information about costs, purchasing, profits, markets, sales, methods of determination of prices, financial condition, net income, and indebtedness, etc.; (b) information of a scientific or technical nature such as, but not limited to, know-how, processes, procedures, designs, research and

[3] Central Trust asserts that the provisions of the nonsolicitation survived the sale of STC to Central Trust due to Kennedy's prior material breach of the Kennedy Employment Contract. (LF 31-32)

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> development results, whether successful or unsuccessful, engineering drawings, computer software, trade secrets, investment strategies, etc.; (c) new business or product development information, business or marketing strategies, future development plans or ideas, projections, or estimates, etc.; and (d) *information regarding clients' personal information including but not limited to, contact information, net worth, account balances with Springfield Trust & Investment Company or any other places of investment.*

(LF 1000) (emphasis added). Kennedy read and understood the 2009 Oath of Director. (LF 1001). Kennedy even consulted with his attorney, who reviewed the 2009 Oath of Director before Kennedy signed it. (LF 1001). There is neither a time limit on the confidentiality agreement contained in the 2009 Oath of Director nor language limiting the confidentiality agreement to matters expressly related to Kennedy's capacity as a director. (LF 1002). If Kennedy would not have signed the 2009 Oath of Director, STC would have asked him to resign as director. (LF 1002).

Kennedy first learned of a possible sale of STC in March 2009. (LF 620). By August 28, 2009, Kennedy had begun preparing for life after STC, investigating potential office leases, phone expenses, computer expenses and other infrastructure expenses. (LF 1002). Although Kennedy knew he was not going to continue his employment with Central Trust, in October 2009 he had breakfast with Central Trust management to discuss affiliation with Central Trust. (LF 1005). By letter dated October 20, 2009, Kennedy informed Central Trust he was open to negotiating his affiliation with Central Trust until October 23, 2009, when he intended to end further negotiations. (LF 1005).

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Yet, before the STC sale to Central Trust occurred, and while still an officer and director of STC, Kennedy began soliciting clients and employees of STC, as well as competitors of STC and Central Trust. (LF 1003). Prior to November 20, 2009, Kennedy told at least three STC clients he would not continue employment with STC's buyer (LF 1003), the reasonable inference being that Kennedy wanted to continue doing business with them. Kennedy also spoke with Midwest Trust, a competitor of STC, about opening a Midwest Trust branch in Springfield. (LF 1003). Indeed, Kennedy was so brazen that, prior to November 20, 2009, he told Jami Peebles of Central Trust that he was going to solicit STC's customers. (LF 1003).

Moreover, in October 2009, John Courtney, Owner and President of STC, learned Kennedy had told Midwest Trust he was going to take STC's clients. (LF 1004). When Courtney approached Kennedy about his conduct, Kennedy promised he would not solicit STC's customers, and, in return for this promise, Courtney agreed not to terminate Kennedy for breaching the Kennedy Employment Contract and the 2009 Oath of Director. [4] (LF 1004).

Nevertheless, in August 2009, knowing of the impending sale of STC, Kennedy had already taken a cell phone containing names and contact information of approximately 200 STC clients and placed it in a safe deposit box. (LF 1006). At that same time, Kennedy also took from STC, 39 pages of its client lists containing

[4] By the terms of the Kennedy Employment Contract, had Courtney terminated Kennedy, the nonsolicitation provision would have been effective immediately. (LF 42)

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confidential customer banking and other information and placed them into a safe deposit box. (LF 1006). Kennedy also retained in a safe deposit box a copy of an STC client list that had been attached as an exhibit to the Kennedy Employment Contract. (LF 1007).

Oddly, prior to filing the present action, Central Trust received a letter from Kennedy's lawyers claiming that Kennedy had not retained any STC client information. (LF 1007). Kennedy's counsel stated,

> On another matter, in your October 22, 2009 letter, you claim that Mr. Kennedy has been exposed to Springfield Trustshare's confidential and proprietary information. Please be assured that Mr. Kennedy has not and will not take or retain any documentation or data belonging to the company either at or before his termination.

(LF 1007-08). Additionally, after filing the present action, Central Trust served discovery requests requiring Kennedy to produce customer lists in his possession or control. (LF 1007, 1157-71). Kennedy, through his counsel, answered "None." (LF 1007, 1168).

Then, on May 10, 2011, Kennedy for the first time admitted during his deposition that in August 2009, before he left STC, he had in fact placed a cell phone containing 200 STC client names and telephone numbers, along with a "client list" in his lawyer's safe deposit box. (LF 1007, 1108-38, 1157-71) He claimed he did so at his lawyer's direction. (LF 1007). The "client list" turned out to be 39 pages of detailed, hand-written and printed documents (the "Client Lists") containing STC/Central Trust's client contact information, including names, addresses, phone numbers, e-mail addresses, personal and

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family information, and confidential banking information (collectively, Central Trust's "Client Information"). (LF 1108-38). Kennedy failed to produce the cell phone or Client Lists until after the hearing on the Motions for Summary Judgment which occurred on July 6, 2011. (LF 1108-38).

2. SignalPoint's affiliation and collusion with Kennedy.

Kennedy is not a registered investment advisor and, therefore, could not offer or provide investment services unless affiliated with a company like STC or SignalPoint. (LF 1013).[5] SignalPoint first met with Kennedy in January 2010. (LF 1015). At that time, and before reaching an agreement to affiliate with Kennedy, SignalPoint understood that Kennedy would bring STC/Central Trust clients to SignalPoint *if* SignalPoint agreed to affiliate with Kennedy. (LF 1015). SignalPoint did affiliate with Kennedy and is now Kennedy's registered investment advisor. (LF 1013).

The day after Kennedy resigned from STC, he founded ITI Financial Management, LLC ("ITI"). (LF 1009). Kennedy is the sole member of ITI. (LF 1009). ITI is a direct competitor of Central Trust because it provides financial advice and investment management services to investors. (LF 1009). Additionally, on the evening of November 20, the date the STC sale to Central Trust closed, and after Kennedy was no longer employed by STC, Kennedy logged into STC/Central Trust's computer system

[5] Kennedy has a Series 65 License but not a Series 7 license and is an independent advisor representative: he must either be affiliated with a registered investment advisor such as SignalPoint or become a registered investment advisor. (LF 1013-14).

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from his home. (LF 1008). Kennedy began, that same day, calling STC's customers to solicit their business. (LF 1008).

In May 2010, ITI had approximately 90 clients, 148 accounts and $50 million in client assets under management. (LF 1009). Of ITI's 90 clients, 85 were former STC/Central Trust clients. (LF 1009). Of ITI's $50 million in assets under management, 90-95% were from former STC/Central Trust clients. (LF 1009). Kennedy and ITI now offer their investment services through SignalPoint. (LF 1014). Indeed, Kennedy and ITI advise customers that they are affiliated with SignalPoint, invest in mutual funds for clients through SignalPoint and offer their investment services through SignalPoint; moreover, all of Kennedy's ITI-related emails go through SignalPoint. (LF 1014-15).

Like Central Trust, SignalPoint maintains a client list that SignalPoint considers valuable, that SignalPoint maintains as confidential, and that SignalPoint would not provide to competitors. (LF 996). Also like Central Trust, SignalPoint keeps its customer information confidential and takes the issue of confidentiality "very seriously." (LF 997). SignalPoint also, and again like Central Trust, maintains no public listing of its clients, and it would be very difficult to discover the identity of SignalPoint's clients. (LF 997).

As of February 11, 2010, upon receipt of Central Trust's cease-and-desist letter, SignalPoint possessed actual knowledge and notice that Central Trust believed Kennedy and ITI were engaged in misappropriating Central Trust's trade secrets. (LF 1015-16). Accompanying the cease-and-desist letter was a copy of Central Trust's petition in the underlying case. (LF 1015-16). Central Trust advised SignalPoint that it was tortiously

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interfering with Central Trust's customer contacts and business expectancies. (LF 1015). Nonetheless, SignalPoint continued to do business with Kennedy and ITI and accepted accounts that had been taken from STC/Central Trust. (LF 1016). SignalPoint failed to instruct Kennedy to curtail his solicitation of Central Trust's clients in any way after receiving the letter. (LF 1016).

B. Procedural Background.

Central Trust filed its Motion for Temporary Restraining Order and Application for Preliminary Injunction and its Memorandum of Law in Support of its Motion on January 5, 2010. (LF 2). The trial court held a hearing on Central Trust's Motion for TRO on January 8, 2010, ultimately denying the motion. (LF 2).

After engaging in written discovery, depositions and third-party discovery, the trial court granted Central Trust leave to amend and file its First Amended Petition on September 7, 2010. (LF 3-5). Central Trust asserted causes of action against all defendants for misappropriation of trade secrets in violation of the Missouri Uniform Trade Secrets Act, Mo. Rev. Stat. §§ 417.450-.467; for compensatory and exemplary damages; an award of damages against Kennedy for his breach of fiduciary duty and breach of contract; and, for compensatory and exemplary damages and an award of costs against all defendants for their tortious interference with business relations and civil conspiracy. (LF 17-50).

Central Trust's First Amended Petition contains causes of action against Kennedy and ITI for misappropriation of trade secrets (Count I), and for tortious interference with business relations (Count III); against Kennedy for breach of fiduciary duty (Count II),

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breach of contract (Count IV), and breach of contract (Count V); against SignalPoint for tortious interference with business relations (Count VI), and misappropriation of trade secrets (Count VII); and, against Kennedy, ITI, and SignalPoint for civil conspiracy (Count VIII). (LF 17-50).

1. Defendants' Summary Judgment Motions.

On May 20, 2011, Kennedy and ITI filed their joint Motion for Summary Judgment and related pleadings. (LF 9, 99-143, SLF 1-154). On May 27, 2011, SignalPoint filed its Motion for Summary Judgment and related pleadings. (LF 9, 144-66, SLF 155-460).

On June 15, 2011, Central Trust filed its Statement of Additional Material Facts, its Response to SignalPoint's Statement of Facts (and accompanying Exhibits) and its Memorandum in Opposition to SignalPoint's Motion for Summary Judgment. (LF 10, 556-929). Also on June 15, 2011, Central Trust filed its Responses to Kennedy and ITI's Statement of Material Uncontroverted Facts and its Memorandum in Opposition to Kennedy and ITI's Motion for Summary Judgment. (LF 10, 504-55, 930-86).

On June 22, 2011, SignalPoint filed a joint response to Central Trust's Statement of Additional Material Facts with Kennedy and ITI and a Reply to Central Trust's Opposition to their Motion for Summary Judgment. (LF 10, 987-1018). Kennedy and ITI also filed their Suggestions in Reply to Central Trust's Opposition to their Motion. (LF 10, 1019-29). On June 27, 2011, SignalPoint filed its Reply in Support of its Motion. (LF 10, 1030-39). A hearing was held on defendants' Motions on July 6, 2011, and the matter was taken under advisement. (LF 10).

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On July 13, 2011, the trial court granted summary judgment in favor of SignalPoint on all counts of Central Trust's First Amended Petition. (LF 11). On July 14, 2011, the trial court, however, denied Kennedy's and ITI's Motion for Summary Judgment finding that "there remains one or more genuine issue [sic] of material fact" ("Kennedy Order"). (LF 11). On that same day, the trial court entered an Order finding that "the identities of Plaintiff's customers/clients is [sic] not, as a matter of law, a Trade Secret as that term is used in the Uniform Trade Secrets Act" ("Trade Secret Order"). (LF 11, 1089-91).

On July 26, 2011, the trial court entered its Amended Summary Judgment Order in Favor of Defendant SignalPoint Asset Management, LLC which sustained SignalPoint's Motion for Summary Judgment and entered summary judgment in favor of SignalPoint on Counts VI, VII and VIII of Central Trust's First Amended Petition, effectively resolving all claims pending by Central Trust against SignalPoint in their entirety. ("Amended Summary Judgment Order"). (LF 11, 1092-94).

2. Newly discovered evidence and motions for reconsideration.

Because the trial court denied Kennedy's and ITI's Motion for Summary Judgment, discovery continued between the remaining parties. (LF 11-14). After the trial court denied Kennedy's and ITI's Motion for Summary Judgment, they filed their Motion to Dismiss or, in the Alternative, Motion for Reconsideration of Defendants' Motion for Summary Judgment and Suggestions in Support based upon the trial court's entry of the Trade Secret Order regarding trade secrets and the denial of summary

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judgment. (LF 12, 1095-1107). The trial court took Kennedy's and ITI's Motion for Reconsideration under advisement and later denied the Motion. (LF 12-16, 1095-1107).

On August 25, 2011, Central Trust filed its Motion for Reconsideration of Summary Judgment Entered in Favor of Defendant SignalPoint Asset Management, LLC on its Motion for Summary Judgment and for New Trial on the Merits, along with its memorandum in support. (LF 12, 1108-38). In its Motion for Reconsideration, Central Trust argued new evidence discovered in Kennedy and Kennedy's counsel's safe deposit box—namely, Central Trust's Client Lists consisting of 39 pages of handwritten and printed documents containing STC/Central Trust's customer contact information (names, addresses, home and cell phone numbers and e-mail addresses) and confidential banking information, along with a cell phone containing over 200 contacts of STC/Central Trust's clients—materially affected each and every one of its claims against SignalPoint. (LF 1108-25, 1127). Central Trust argued that Kennedy's and ITI's misconduct in failing to produce the Client Lists and cell phone required (1) the setting aside of the Amended Summary Judgment Order entered in favor of SignalPoint, and (2) that summary judgment be denied and that a new trial to be granted. (LF 1108-25). Notwithstanding Central Trust's arguments and offers of proof presented at the hearing on the Motion, the trial court denied Central Trust's Motion on October 5, 2011. (LF 14).

Central Trust timely filed its Notice of Appeal on October 14, 2011. (LF 14, 1172-1207). On January 24, 2013 the court of appeals issued its opinion affirming the summary judgment entered in favor of SignalPoint (the "Opinion"), and on February 19,

2013, the court of appeals denied post-opinion relief. Central Trust then timely filed an Application for Transfer to this Court, which was granted on May 28, 2013.

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POINTS RELIED ON

POINT RELIED ON I

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VII OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND, (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS AGAINST SIGNALPOINT, IN THAT (a) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND (b) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACTS CONCERNING (1) CENTRAL TRUST'S CLIENT INFORMATION AND LISTS BEING TRADE SECRETS, (2) SIGNALPOINT'S MISAPPROPRIATION OF CENTRAL TRUST'S TRADE SECRETS AND (3) CENTRAL TRUST'S DAMAGES FROM THE MISAPPROPRIATION.

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Missouri Cases

State ex rel. Coffman Group, L.L.C. v. Sweeney, 219 S.W.3d 763 (Mo. App. S.D. 2005)

Kessler-Heasley Artificial Limb Co., Inc. v. Kenney, 90 S.W.3d 181 (Mo. App. S.D. 2002)

Lyn-Flex West, Inc. v. Dieckhaus, 24 S.W.3d 693 (Mo. App. E.D. 1999)

Federal Cases

Cerner Corp. v. Visicu, Inc., 667 F.Supp. 2d 1062 (W.D. Mo. 2009)

Secure Energy, Inc. v. Coal Synthetics, LLC, 708 F.Supp. 2d 923 (E.D. Mo. 2010)

Statute

Mo. Rev. Stat. § 417.453 (2001)

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POINT RELIED ON II

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VI OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND, (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS AGAINST SIGNALPOINT, IN THAT (A) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS, OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND, (B) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACTS CONCERNING (1) CENTRAL TRUST'S VALID BUSINESS EXPECTANCIES, (2) SIGNALPOINT'S KNOWLEDGE OF THOSE EXPECTANCIES, (3) SIGNALPOINT'S INTENTIONAL INTERFERENCE WITH THE EXPECTANCIES, RESULTING IN THE EXPECTANCIES NOT BEING REALIZED, (4) SIGNALPOINT'S LACK OF JUSTIFICATION AND (5) CENTRAL TRUST'S DAMAGES PROXIMATELY CAUSED BY SIGNALPOINT'S CONDUCT.

Missouri Cases

Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7 (Mo. banc 2012)

Stehno v. Sprint Spectrum, L.P., 186 S.W.3d 247 (Mo. banc 2006)

Howard v. Youngman, 81 S.W.3d 101 (Mo. App. E.D. 2002)

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POINT RELIED ON III

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VIII OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR CONSPIRACY AGAINST SIGNALPOINT, IN THAT (A) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND (B) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER (1) TWO OR MORE PERSONS, (2) WITH AN UNLAWFUL OBJECTIVE, (3) AFTER A MEETING OF THE MINDS, (4) COMMITED AT LEAST ONE ACT IN FURTHERANCE OF THEIR CONSPIRACY, AND (5) CAUSED CENTRAL TRUST DAMAGES AS A RESULT.

Missouri Cases

Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7 (Mo. banc 2012)

Lyn-Flex West, Inc. v. Dieckhaus, 24 S.W.3d 693 (Mo. App. E.D. 1999)

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POINT RELIED ON IV

THE TRIAL COURT ERRED IN OVERRULING CENTRAL TRUST'S MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT AND FOR NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION, IN THAT CENTRAL TRUST DISCOVERED NEW EVIDENCE CONSISTING OF 39 PAGES OF VALUABLE COMPILATIONS OF CONFIDENTIAL CLIENT INFORMATION, INCLUDING NAMES, ADDRESSES, TELEPHONE AND CELL PHONE NUMBERS AND E-MAIL ADDRESSES AND BANKING INFORMATION OF CENTRAL TRUST CLIENTS, AND A CELL PHONE CONTAINING MORE THAN 200 NAMES AND NUMBERS OF CENTRAL TRUST'S CLIENTS IN POSSESSION OF DEFENDANTS KENNEDY AND ITI, WHICH WERE WRONGFULLY WITHHELD FROM CENTRAL TRUST DESPITE POINTED AND TIMELY DISCOVERY SEEKING SUCH EVIDENCE AFTER THE AMENDED SUMMARY JUDGMENT ORDER WAS ENTERED IN SIGNALPOINT'S FAVOR, AND (1) CENTRAL TRUST EXERCISED DUE DILIGENCE BY TIMELY SEEKING THE NEWLY DISCOVERED EVIDENCE THROUGH DISCOVERY, (2) THE NEW EVIDENCE WAS MATERIAL TO THE QUESTION OF WHETHER SIGNALPOINT, IN COOPERATION WITH OTHER DEFENDANTS, HAD OBTAINED AND USED CENTRAL TRUST'S TRADE SECRETS, (3) THE EVIDENCE CONSISTING OF CONFIDENTIAL CLIENT INFORMATION AND CLIENT LISTS WAS NOT CUMULATIVE OF OTHER EVIDENCE, (4) AFFIDAVITS WERE PRESENTED IN SUPPORT OF

THE MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT AND (5) THE OBJECT OF THE NEW EVIDENCE WAS NOT TO IMPEACH OR DISCREDIT A WITNESS.

Missouri Cases

Butts v. Express Personnel Services, 73 S.W.3d 825 (Mo. App. S.D. 2002)

McCullough v. Commerce Bank, 349 S.W.3d 389 (Mo. App. W.D. 2011)

State ex rel. Missouri-Nebraska Exp., Inc. v. Jackson, 876 S.W.2d 730 (Mo. App. W.D. 1994)

Rule

Rule 74.06, *Missouri Rules of Civil Procedure*

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ARGUMENT

POINT RELIED ON I

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VII OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND, (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS AGAINST SIGNALPOINT, IN THAT (a) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND (b) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACTS CONCERNING (1) CENTRAL TRUST'S CLIENT INFORMATION AND LISTS BEING TRADE SECRETS, (2) SIGNALPOINT'S MISAPPROPRIATION OF CENTRAL TRUST'S TRADE SECRETS AND (3) CENTRAL TRUST'S DAMAGES FROM THE MISAPPROPRIATION.

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A. Standard Of Review On Appeal.

1. Appellate review of a grant of summary judgment.

Appellate review of a grant of summary judgment is de novo. *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 764 (Mo. banc 2009). Summary judgment will be upheld on appeal if (1) there is no genuine issue of material fact and (2) movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). Summary judgment is an extreme and drastic remedy and courts exercise great caution in affirming it because the procedure cuts off the opposing party's day in court. *Id.* at 377. "The propriety of summary judgment is purely an issue of law." *Id.* at 376.

An appellate court reviews the record in the light most favorable to the party against whom summary judgment was entered. *Kinnaman-Carson*, 283 S.W.3d at 764. The non-moving party is entitled to receive the benefit of all inferences which may reasonably be drawn from the record. *In re Estate of Lambur*, 317 S.W.3d 616, 619 (Mo. App. S.D. 2010) (quoting *ITT Commercial*, 854 S.W.2d at 378). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Kinnaman–Carson*, 283 S.W.3d at 764 (internal quotation omitted). When the trial court grants summary judgment without specifying the basis upon which it was granted—as in the instant case—a reviewing appellate court will uphold the decision only if it was appropriate under a basis appearing in the record. *English ex rel. Davis v. Hershewe*, 312 S.W.3d 402, 404 (Mo. App. S.D. 2010).

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2. Standard of review for summary judgment.

Summary judgment may only be granted when the moving party demonstrates it is entitled to judgment as a matter of law on the material facts that are not in dispute. Mo. R. Civ. P. 74.04 (2013); *ITT Commercial*, 854 S.W.2d at 376; *see also Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 731 (Mo. App. W.D. 2005) ("The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." (internal quotation omitted)). As noted above, summary judgment is an extreme and drastic remedy and courts exercise great caution in affirming summary judgment. *ITT Commercial*, 854 S.W.2d at 377. The caution is warranted because summary judgment "borders on a denial of due process and effectively denies the party against whom it is entered a day in court." *Guidry v. Charter Communications, Inc.*, 269 S.W.3d 520, 535 (Mo. App. E.D. 2008). Only strict compliance with the rules governing summary judgment prevents the procedure from "crossing over the border." *Jones v. Housing Auth. of Kansas City, Missouri*, 118 S.W.3d 669, 674 (Mo. App. W.D. 2003).

The demonstration required of a party moving for summary judgment necessarily differs depending on whether the moving party is a "claimant" or a "defending party". *ITT Commercial*, 854 S.W.2d at 381. When a defending party moves for summary judgment, such as SignalPoint, the defending party must establish an undisputed right to summary judgment by showing one of the following:

> (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the

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> trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense.

ITT Commercial, 854 S.W.2d at 381. Thus, when the defending party fails to make any such showing, summary judgment may not be granted.

The burden to demonstrate why summary judgment should not be granted shifts to the non-moving party if, but only if, the moving party demonstrates a right to summary judgment as a matter of law. *Corbet v. McKinney*, 980 S.W.2d 166, 168 (Mo. App. E.D. 1998); *Allison v. Agribank, FCB*, 949 S.W.2d 182, 187 (Mo. App. S.D. 1997). When reviewing summary judgment, the record is viewed in the light most favorable to the non-moving party. *ITT Commercial Finance Corp.*, 854 S.W.2d at 382. This adage places the burden squarely on the movant to "establish[] a right to judgment as a matter of law on the record as submitted." *Cardinal Partners, LLC v. Desco Investment Co., LLC*, 301 S.W.3d 104, 109 (Mo. App. E.D. 2010). As *Cardinal Partners* emphasizes,

> Any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's *prima facie* showing. Similarly, the rule that we give the non-movant the benefit of all reasonable inferences means that if the movant requires an inference to establish the right to judgment as a matter of law, and the evidence reasonably supports any inference other than, or in addition to, the movant's inference, a genuine dispute exists, and the movant's *prima facie* showing fails.

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Id. (citing *ITT Commercial,* 854 S.W.2d at 382) (internal quotations omitted). "[A] 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *ITT Commercial*, 854 S.W.2d at 382.

If the moving party does demonstrate a right to judgment, only then must the non-moving party counter with a showing that a material fact is subject to genuine dispute, and may do so by affidavit, depositions, answers to interrogatories or admissions. *ITT Commercial,* 854 S.W.2d at 381; *Corbet,* 980 S.W.2d at 168. Courts, however, test "simply for the existence, not the extent, of genuine disputes." *Trumbo v. Metropolitan St. Louis Sewer Dist.*, 877 S.W.2d 198, 201 (Mo. App. E.D. 1994). When the non-moving party demonstrates the existence of a genuine dispute, summary judgment must be denied. *ITT Commercial Finance Corp.,* 854 S.W.2d at 382.

B. Signalpoint Is Not Entitled To Summary Judgment On Central Trust's Claim Under The Missouri Uniform Trade Secrets Act For The Reason That Signalpoint Did Not Make The Required *Prima Facie* Showing That Would Entitle Signalpoint To Summary Judgment, And Central Trust Has Demonstrated That There Are Material Facts Genuinely In Dispute.

SignalPoint is not entitled to summary judgment on Central Trust's claim under the Missouri Uniform Trade Secrets Act ("MUTSA") against SignalPoint for misappropriation of Central Trust's trade secrets. SignalPoint failed to make the required *prima facie* showing that there are no genuine issues of material fact and failed to show that SignalPoint is entitled to judgment as a matter of law. SignalPoint did not negate

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any one of the elements of Central Trust's misappropriation claim and did not demonstrate that Central Trust will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of those elements.[6] Even if the required *prima facie* showing had been made by SignalPoint, Central Trust demonstrated that numerous material facts are actually and genuinely in dispute. Summary judgment should not have been granted.[7]

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[6] The trial court did not denote its specific reasons for granting summary judgment in favor of SignalPoint on July 13, 2011. SignalPoint did not, however, seek summary judgment on the basis that there is no genuine dispute as to the existence of each of the facts necessary to support any of SignalPoint's pleaded affirmative defenses, the third "means" available to a defending party to obtain summary judgment. *See ITT Commercial*, 854 S.W.2d at 381. Nor does the record support summary judgment on that basis.

[7] While the trial court did not denote its specific reasons for granting summary judgment in favor of SignalPoint, on July 14, 2011, one day after granting SignalPoint's motion, the trial court entered its interlocutory Trade Secret Order finding "that the identities of Central Trust's customers/clients is [sic] not, as a matter of law, a Trade Secret as that term is used in The Uniform Trade Secrets Act." (LF 1091). Inexplicably, the trial court then denied the summary judgment motion filed by Kennedy on parallel issues because it found that genuine issues of material fact remained. (LF 11).

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To establish a claim for misappropriation of a trade secret, a claimant must demonstrate (1) the existence of a protectable trade secret, (2) misappropriation of the trade secret and (3) damages. *Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F. Supp. 2d 923, 926 (E.D. Mo. 2010) (citing Mo. Rev. Stat. § 417.453(2) (2001)). First, Central Trust has demonstrated in this case that its Client Information and Client Lists are protectable trade secrets. Second, Central Trust has shown there is a genuine dispute over whether SignalPoint misappropriated Central Trust's Client Information and Client Lists. Finally, Central Trust has presented evidence that SignalPoint's misappropriation

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Moreover, at the time the trial court entered the Trade Secret Order, Central Trust's Client Lists were not yet part of the trial court's record, and the determination made by the Trade Secret Order was therefore based solely on Kennedy's false representation that he had memorized the client information and hand wrote his own list after leaving STC/Central Trust. As discussed under Point Relied On IV, *infra*, Central Trust and the trial court were both wrongfully deprived by Kennedy of the benefit of the actual client list and cell phone containing contact information. Central Trust was deprived when responding to and arguing against SignalPoint's summary judgment motion, and the trial court was deprived when evaluating and ruling upon that motion.

In any event, because the determination of whether Central Trust's client list constitutes a protectable trade secret should have been decided by the jury, the trial court erred when entering the Trade Secret Order purporting to determine, as a matter of law, that Central Trust's client list is not protectable as a trade secret.

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has caused Central Trust damage. Accordingly, the trial court erred in granting summary judgment in favor of SignalPoint on Central Trust's claim for misappropriation of trade secrets.

1. Central Trust's confidential Client Information and Client Lists are protectable trade secrets.

Central Trust's Client Information and Client Lists, are protectable trade secrets under MUTSA, the Missouri codification of the Uniform Trade Secrets Act ("UTSA"). *See* Mo. Rev. Stat. §§ 417.450, *et seq*. (2012). MUTSA defines "trade secret" as:

> Information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally know to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Mo. Rev. Stat. § 417.453(4) (2001). Central Trust's Client Information, and the Client Lists containing that information, qualify and are therefore eligible for protection as trade secrets under this definition.

When interpreting the MUTSA, the courts of Missouri, and of other states that have adopted the UTSA, are entitled to rely upon common law existing prior to adoption

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of the UTSA that is not in conflict. *See* Mo. Rev. Stat. § 417.463 (2012) (providing that the MUTSA only displaces "conflicting tort, restitutionary, and other laws of [Missouri] providing civil remedies for misappropriation of a trade secret."). Whether a trade secret exists is a mixed question of law and fact. *See State ex rel. Coffman Group, L.L.C. v. Sweeney*, 219 S.W.3d 763, 769 (Mo. App. S.D. 2005) ("The existence of a trade secret is a conclusion of law based on the applicable facts.").

In *Titan Intern. Inc. v. Bridgestone Firestone North America Tire, LLC*, 752 F.Supp. 2d 1032 (S.D. Iowa), the federal district court, considering a substantively identical definition of a trade secret from Iowa's version of the UTSA, explained the impact of the mixed question concerning the existence of a trade secret:

> The legal part of the question is whether the information in question could constitute a trade secret under the first part of the definition of trade secret in [UTSA]. … With regard to the factual question, the Court must determine whether Plaintiff has proffered sufficient evidence to demonstrate the [the information in question] both derives independent economic value from not being generally known or readily ascertainable, and whether [Plaintiff] took reasonable measures under the circumstances to maintain the secrecy of the method.

752 F. Supp. 2d at 1038 (S.D. Iowa 2010). The court's task, then, is to first determine whether, under applicable law, the type of information in question falls within the first part of the definition of a trade secret, and, if so, determine whether the claimant has presented evidence sufficient to make out a *prima facie* case under the second part of the

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definition for submission of the issue to the jury. Thus, in *Cerner Corp. v. Visicu, Inc.*, 667 F.Supp. 2d 1062 (W.D. Mo. 2009), Missouri's federal district court for the Eastern District, applying Missouri law, explained that when issues of fact are disputed concerning the existence of a trade secret, these issues must be resolved by the jury. 667 F.Supp. 2d at 1077 (citing *Lyn-Flex*, 24 S.W.3d at 698). *Accord American Builders & Contractors Supply Co., Inc. v. Roofers Mart, Inc.*, 2012 WL 3027848 at *3 (E.D. Mo., July 24, 2012); *see also Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F.Supp. 2d 923, 928 (E.D. Mo. 2010) (finding issues of fact for the jury to decide regarding whether plaintiffs' engineering plans and drawings were trade secrets).

Accordingly, while the determination of whether certain information could constitute a trade secret is a legal question, once a claimant has offered evidence demonstrating that the information in question is of a type that may constitute a trade secret, and sufficient evidence to make out a *prima facie* case under the second part of MUTSA's definition of a trade secret, the jury must decide the factual question of whether the information is a protectable trade secret. *See Lyn-Flex West, Inc. v. Dieckhaus*, 24 S.W.3d 693, 698 (Mo. App. E.D. 1999) (reversing directed verdict because the claimant proffered sufficient evidence for a jury to find that customer information was a trade secret under MUTSA).

a. Central Trust's Client Information and Client Lists are protectable as trade secrets under the MUTSA.

A trade secret can be any "compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors

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who do not know or use it." *Kessler-Heasley Artificial Limb Co., Inc.*, 90 S.W.3d at 188 (internal quotation marks and citation omitted). In Missouri, client information and lists, such as Central Trust's Client Information and Client Lists, have long qualified as information that can constitute a trade secret under the first part of the MUTSA's definition of trade secret. *See Kessler-Heasley Artificial Limb Co., Inc. v. Kenney*, 90 S.W.3d 181, 188 (Mo. App. S.D. 2002) (finding that orthotic/prosthetic company's list of existing patients qualified as a trade secret); *Lyn-Flex West*, 24 S.W.3d at 698 (Mo. App. E.D. 1999) (holding that price book containing customer contact information qualified as a trade secret); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18-19 (Mo. banc 1966) (stating that a trade secret may consist of "a list of specialized customers"); *see also Charles Reilly Optical Co. v. Burke*, 41 S.W.2d 909, 911 (Mo. App. St.L. 1931) (noting "it is a well-settled principle" that "where an employee attempts to use…in connection with his services…to a new employer, lists of customers, knowledge of which was acquired by reason of his former employment, and was regarded as confidential, the right to relief by injunction exists"); *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811, 819-20 (8th Cir. 2004) (holding that, under Missouri law, potential customer lead sheets and information contained in existing customer files qualified as trade secrets).

Of course, as recognized by the Missouri Court of Appeals, Eastern District, "to be protected, a customer list must be more than a listing of firms or individuals which could be compiled from directories or other generally available sources." *Brown v. Rollet Bros. Trucking Co., Inc.*, 291 S.W.3d 766 (Mo. App. E.D. 2009) (internal quotation omitted).

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But when the customer or client list represents "a selective accumulation of information based on past selling experience, *or when considerable time and effort have gone into compiling it*," the list is protectable as a trade secret under Missouri law. *Id.* (emphasis added, internal quotation omitted).

Courts throughout the country echo Missouri's treatment of customer and client information as trade secrets, particularly in the financial services industry. *See Morgan Stanley DW Inc. v. Rothe*, 150 F.Supp. 2d 67, 76 (D.D.C. 2001) (holding that "the customer lists of a financial-services firm deserve trade-secret status" under D.C.'s Uniform Trade Secrets Act); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Davis*, 1998 WL 920328 at *1 (N.D. Tex., Dec. 30, 1998) ("This court has routinely held that Merrill Lynch's [a financial services firm] customer lists qualify as trade secrets."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cross*, 1998 WL 122780 at *2 (N.D. Ill., Mar. 13, 1998 ("Customer lists are entitled to trade secret protection under Illinois law."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hegarty*, 808 F.Supp. 1555, 1558 (S.D. Fla. 1992), *aff'd*, 2 F.3d 405 (11th Cir. 1993) (holding that customer list of financial services firm was a trade secret in which claimant held a legitimate business interest); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kramer*, 816 F.Supp. 1242, 1246 (N.D. Ohio 1992) ("Merrill Lynch's customer list is entitled to trade secret protection under Ohio law."); *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 173 (N.Y.A.D. 1986) (finding that customer lists are deserving of protection when compiled through the effort and expense of the claimant, and containing information that a former employee would not have obtained but for employment with claimant).

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In *JPMorgan Chase Bank, N.A. v. Kohler*, the court highlighted precisely why, under Kentucky's version of the UTSA, the client list of a financial services company is deserving of trade secret protection:

> [T]he list of JPMorgan customers at issue in this case consists of wealthy investors whose business JPMorgan had cultivated over a period time. No simple phone or Internet search would reveal their identities. Though defense counsel urges that … [former] JPMorgan employees merely wrote down the names of clients and later got their contact information from the Internet, the Court does not find that argument compelling. Furthermore, it appears the weight of the authority on the issue of whether client lists are trade secrets weighs in favor of Plaintiffs, with many jurisdictions protecting lists similar to the ones in this case.

2009 WL 2913897 at *1 (W.D. Ky., Sept. 8, 2009). After finding that client lists are protectable trade secrets, the court in *JPMorgan Chase Bank, N.A.*, entered a preliminary injunction prohibiting former JPMorgan employees hired by Morgan Stanley Smith Barney, LLC from further soliciting JPMorgan's clients. *Id.*

Indeed, as a general rule, jurisdictions across the country regularly find that client information and customer lists are protectable as trade secrets. *Language Line Services, Inc. v. Language Services Associates* 2013 WL 1891369, *8 (N.D. Cal., May 6, 2013) (finding that customer lists of language interpretation and translation company were protectable trade secrets); *Freeman v. Brown Hiller, Inc.*, 281 S.W.3d 749, 757 (Ark. Ct. App. 2008) (recognizing that customer lists are protectable as trade secrets); *NaturaLawn*

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of America, Inc. v. West Group, LLC, 484 F.Supp. 2d 392 (D. Md. 2007) (applying Maryland law and finding that customer lists of lawn services franchisor were protectable as trade secrets); *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.* 147 F.Supp. 2d 1057, 1066 (D. Kan. 2001) (applying Kansas law and finding that customer lists of fireworks seller were protectable trade secrets); *Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 781 (Neb. 2001) (holding "that a customer list can be included in the definition of a trade secret"); *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 943 (Wash. Banc 1999) (collecting cases and stating that "[a] customer list is one of the types of information which can be a protected trade secret"); *Public Systems, Inc. v. Towry*, 587 So. 2d 969, 973 (Ala. 1991) ("It is undisputed, as a general proposition of law, that customer lists may, in proper circumstances, be afforded the protection of a trade secret."); *Abba Rubber Co. v. Seaquist*, 286 Cal. Rptr. 518, 526 (Cal. Ct. App. 1991) ("A customer list is one of the types of information which can qualify as a trade secret.").

Indeed, pursuant to Mo. Rev. Stat. § 417.465 (2012), the MUTSA must "be applied and construed to effectuate the general purpose of making uniform the law with respect to the subject of trade secrets among states enacting them." Not only does the MUTSA require a "uniform" interpretation of the Act, case law also requires that, when Missouri courts engage in the construction of a uniform act, special value should be given "to the precedents of other states on the same issue." *State ex rel. Tri-City Const. Co. v. Marsh*, 668 S.W.2d 148, (Mo. App. W.D. 1984) (holding that the Missouri Uniform Arbitration Act "should be construed as other states have construed it in their decisional law"). *See also Paul v. Paul*, 439 S.W.2d 746, 750 (Mo. banc 1969) (relying on

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decisions from other jurisdictions construing the Uniform Reciprocal Enforcement of Support Laws as persuasive authority).

Accordingly, the legal side of the mixed question of law and fact at issue concerning whether Client Information, such as Central Trust's, qualify as protectable trade secrets must be answered in the affirmative. Client and customer lists are, as a matter of law, widely recognized by the courts of Missouri and other states as protectable trade secrets of a business. Missouri courts cannot ignore their own precedent, nor the persuasive authority from other states applying the UTSA when determining whether client and customer lists are protectable as trade secrets. Thus, Central Trust's Client Information constitutes protectable trade secrets under the first part of MUTSA's definition of a trade secret.

The factual side of the mixed question does remain, requiring a determination of whether Central Trust's Client Information derives independent economic value from not being generally known or readily ascertainable and whether Central Trust took reasonable measures under the circumstances to maintain the secrecy of the Client Lists. Of course, at the summary judgment stage, the burden is first on SignalPoint to prove undisputed facts that negate the trade secret element of Central Trust's claim or by establishing that there is no evidence to support the elements of the claim. SignalPoint failed to meet its burden, and Central Trust has, in any event, demonstrated there are material facts in dispute concerning whether Central Trust's Client Information constitutes trade secrets.

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b. Central Trust's Client Information and Client Lists are trade secrets for the reason that Central Trust derives economic value from the fact that the Client Information is not generally known, and is not readily ascertainable by competitors, and Central Trust has undertaken reasonable efforts to maintain its secrecy.

Courts rely on the following factors to determine whether information in fact constitutes a trade secret under the MUTSA:

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

Cerner Corp. 667 F.Supp. 2d at 1076–77 (citing *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins.*, 169 S.W.3d 905, 909–10 (Mo. App. W.D. 2005)). SignalPoint failed to demonstrate that no genuine dispute exists over the facts relevant to these factors. For that reason alone, summary judgment was not proper. Even so, these factors weighed together upon the record evidence, support a finding that Central Trust's Client Information and Client Lists are, in fact, trade secrets under the MUTSA.

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(1) Central Trust undertook substantial measures to guard the secrecy of the Client Information and Lists, both inside and outside of the business.

Central Trust presented undisputed evidence STC/Central Trust treated its Client Information and Lists as trade secrets and took steps to protect the confidentiality of the information. Central Trust presented undisputed testimony from Kennedy himself regarding the significant, comprehensive and meticulous measures taken by Central Trust to ensure that its Client Information remained confidential and not subject to disclosure to unauthorized third parties. Kennedy's testimony presented to the trial court included: (1) STC kept its client files in a locked vault; (2) only two or three STC employees had keys to the locked vault; (3) STC's policies prohibited employees from taking client information out of the STC building; (4) STC used passwords to protect its digital files; (5) employees who discussed clients in public were subject to termination and (6) STC's client information was not accessible to the public. (LF 641-43, 661-62, 998). These facts are not in dispute and favor Central Trust's trade secret claims.

Moreover, contrary to the Southern District's ruling in this case, in the employer/employee context, an employer need not demonstrate the existence of a non-compete agreement to establish a claim under the MUTSA. *See Wilson Manufacturing Co. v. Fusco*, 258 S.W.3d 841, 847 (Mo. App. E.D. 2008). The record evidence supports a finding that STC/Central Trust's efforts to protect the secrecy of its Client Information was reasonable under the circumstances and sufficient to support a finding that Central

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Trust's Client Information and Lists are trade secrets. Any dispute over such evidence merely presents an issue of fact to be decided by the jury.

(2) Central Trust's Client Information is valuable.

Central Trust's Client Information is valuable. According to Kennedy himself, STC's customer information, customer accounts, business plans and strategies were valuable. (LF 994). Kennedy also agreed the most important piece of information about a client is the client's name. (LF 994). According to Kennedy, a customer list is very important in the asset management business; the name of a client is the "gateway" to the client's other information. (LF 995). In fact, Kennedy testified in his deposition it would be "much simpler" for him to develop business at ITI by using a listing of Central Trust's clients than by using a phone book because he would know that the Central Trust clients have assets to invest. (LF 995). Central Trust's Client Information, and the Client Lists containing the information, provide a huge advantage because the individuals are known to have money to invest. (LF 996).

Moreover, SignalPoint itself regards its customer list in a manner similar to Central Trust, a manner SignalPoint disingenuously argues should be disregarded when considering Central Trust's Client Information. Central Trust presented evidence to the trial court that SignalPoint's owner, Michael Orzel, admitted (1) SignalPoint's own customer list is valuable and (2) he would not provide it to competitors because it is confidential and valuable to its competitors. (LF 996). SignalPoint keeps its customer information confidential and takes the issue of confidentiality "very seriously." (LF 997).

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SignalPoint's confidential information, as defined by its confidentiality agreement, includes lists of clients and prospective clients of SignalPoint. (LF 997).

In its motion for summary judgment, SignalPoint and, ultimately the trial court and appellate court, used flawed reasoning when arguing and finding that "all anyone has to do to obtain the information is talk to the client." (LF 420). To reach that analysis, one has to know the client's name. Without knowing who Central Trust's clients are, a competitor such as SignalPoint cannot "talk to the client."

(3) STC/Central Trust's Client Lists and Client Information were created and compiled through the expenditure of great time and expense.

Central Trust's Client Lists and Client Information were created and compiled through the expenditure of great time and expense. Since its inception, STC spent 19 years and an incalculable amount of money (including paying employees like Kennedy) to develop a client database that contained confidential information, including STC's client list and client identities. (LF 988).

(4) Central Trust's Client Information and Client Lists are not easily duplicated.

Central Trust's Client Information and Lists are not easily duplicated, required considerable time and effort to compile, are not generally known and are not readily ascertainable from information available to the public. Indeed, it is not merely the names and contact information that Central Trust here seeks to protect, but rather the competitive advantage that derives from the association of a person as a client of Central

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Trust. From such an association, a competitor such as SignalPoint learns that the person has both the resources and the desire to invest those resources through a company such as Central Trust or SignalPoint. Allowing SignalPoint to obtain and use that information, and pinpoint such individuals out of the millions of others not interested in the services provided by companies such as Central Trust, without having to commit the considerable time and effort that STC and Central Trust committed, permits SignalPoint an unfair competitive advantage. *See Home Pride Foods, Inc.*, 634 N.W.2d at 782 ("[W]here time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market."); *American Credit Indemnity Co. v. Sacks*, 262 Cal. Rptr. 92 (Cal. Ct. App. 1989) (finding that customer list of credit insurer was a trade secret because it would allow "a competitor to direct sales efforts to the elite 6.5 percent of those potential customers which already have evinced a predisposition to purchase credit insurance").

The competitive advantage obtained in circumstances such as are present in this case was well-explained by the California Court of Appeals in *Abba Rubber Co. v. Seaquist*, 286 Cal. Rptr. at 527:

> By itself, knowledge of the identities of the businesses which buy from a particular provider of goods or services is of no particular value to that provider's competitors. However, that information is valuable to those competitors if it indicates to them a fact which they previously did not know: that those businesses use the goods or services which the competitors sell.

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By way of illustration, consider a hypothetical market for widgets, supplied by five widget sellers. There are 100,000 businesses engaged in industries which have been known to use widgets in their operations; however, there is no way for the widget sellers to know for sure which of those individual businesses use widgets and which do not. Seller A has a list of 500 businesses to which he has sold widgets in the recent past. That list proves a fact which is unknown to his competitors: that those 500 businesses are consumers of widgets, the product they are trying to sell. Therefore, it has independent value to those competitors, because it would allow them to distinguish those proven consumers, who are definitely part of the widget market, from the balance of the 100,000 potential consumers, who may or may not be part of the market. With that list, they would know to target their sales efforts on those 500 businesses, rather than on 500 other businesses who might never use widgets.

Now imagine the same facts, but assume that each of the other four sellers of widgets knows that the businesses on Seller A's customer list are proven widget consumers (although they do not know that those businesses buy their widgets from Seller A). Under those circumstances, Seller A's customer list has no independent economic value, because the identities of those consumers are already known to his competitors.

In both situations, the identities of the businesses which bought widgets from Seller A are unknown. The distinguishing factor is whether it

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> is also unknown that those businesses bought widgets at all. Thus, the customer list in the first hypothetical would be a protectable trade secret, while the list in the second hypothetical would not be.

Compare Fireworks Spectacular, Inc., 147 F.Supp. 2d at 1066 (finding that customer list containing information "ultimately ascertainable from public sources," was a trade secret because the information was "not readily ascertainable from public sources" and could not be duplicated "without investing a significant amount of time, effort, and expense"), *with Titan Intern, Inc.* 752 F.Supp. 2d at 1044 (finding that customer information did not qualify as a trade secret where the "information *was* readily ascertainable in the marketplace." (emphasis added)).

In this case, the record evidence establishes that STC spent 19 years and an incalculable amount of money to develop a client database containing its confidential Client Information, including the Client Lists. (LF 988). This required identifying potential clients with particular needs and characteristics, including the desire to use the type of services provided by STC, and now Central Trust, and then developing client relationships. The Client Information and Client Lists effectively reduce the universe of potential clients from millions to a small, preselect group of high and ultra high net worth individuals already using investment and asset management services. Accordingly, STC devoted, and now Central Trust devotes significant time and resources to updating and protecting its clients' identities and related information from public dissemination. The identify of Central Trust's clients, and the information that derives from that

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identification, is not publicly available. On this point, there simply can be no genuine dispute.

Kennedy himself admits that to determine who is a Central Trust client without access to or other knowledge of Central Trust's customer information would require someone calling everyone in the phonebook or sitting outside the office building of Central Trust, taking photographs of individuals entering and exiting the building, following those individuals, then figuring out who was a client of Central Trust (versus someone who was a mere employee or tenant of the building), which would take "quite a while." (LF 995). SignalPoint even admits that it, like Central Trust, (1) maintains no public listing of its clients, and (2) that it would be very difficult for third-parties to determine SignalPoint's clients. (LF 997).

The identity of Central Trust's clients, and the fact the clients have financial resources to invest and are predisposed to use asset management services—the type of service that Central Trust, and Kennedy and SignalPoint provide—is information not readily available to the public, and from which independent economic value is derived from not being generally known, or readily ascertainable by competitors. Knowledge that a given person is a client of Central Trust, which Kennedy gained solely through his employment by STC, grants competitors such as Kennedy and SignalPoint the unfair advantage of being able to focus solicitation efforts on those individuals who have already shown a predisposition to use asset management services. In this case, because Central Trust has demonstrated, through record evidence, that the Client Information and

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Client Lists are not easily duplicated, and the information and Client Lists containing the information are entitled to trade secret protection,.

(5) Kennedy acquired knowledge of STC/Central Trust's Client Information and accessed its Client Lists solely through his employment and directorship at STIC.

Kennedy learned the identity of STC's clients exclusively through his employment and directorship at STC. (LF 991-992). When Kennedy began his STC employment, he had no prior experience in the investment management or asset management business. (LF 991). Kennedy's primary job as an STC employee was to develop new business. (LF 991). Kennedy was paid to bring in new accounts as both a director and an employee. (LF 991). During his first years, Kennedy's leads were provided to him by existing STC executives and board members, including Courtney and Peebles (who was an STC employee for a time during Kennedy's STC employment). (LF 992).

c. Summary judgment should not have been granted in favor of SignalPoint because evidence has been presented demonstrating that Central Trust's Client Information constitutes trade secrets.

As demonstrated by the evidence, Central Trust's Client Information and Client Lists are trade secrets and, in fact, are protectable under MUTSA. On this point, *Lyn-Flex West, Inc.* 24 S.W.3d 693 is instructive. In *Lyn-Flex West, Inc.*, the court held that customer information was a trade secret, even in the absence of a non-compete or confidentiality agreement. *Id.* at 699. In so holding, the court relied upon evidence that the company's customer information was not known outside plaintiff's business, not

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independently known by employees outside of their employment, treated as confidential, valuable to competitors, resulted from great time and effort and could not easily be duplicated or otherwise properly acquired by others. *Id.* at 698-99. Accordingly, the court held the plaintiff produced sufficient evidence to show its customers' identities and specifications were trade secrets such that the plaintiff's misappropriation of trade secrets claim should be decided by a jury. *Id.* at 699.

Likewise, in this case, Central Trust's misappropriation of trade secrets claim must be decided by a jury. First, SignalPoint did not negate the element of Central Trust's misappropriation claim requiring that Central Trust demonstrate that its Client Information and Lists are protectable trade secrets, nor did SignalPoint demonstrate that Central Trust will not be able to produce evidence sufficient to allow the trier of fact to find the existence of the element. Second, notwithstanding SignalPoint's failure to demonstrate it was entitled to summary judgment, Central Trust has demonstrated that numerous facts material to the issue are actually and genuinely in dispute. Central Trust presented evidence that its Client Information is not known outside Central Trust's business, is not independently known by employees outside of their employment, is treated as confidential, is valuable to competitors, resulted from great time and effort, and could not easily be duplicated or otherwise properly acquired by others. Accordingly, this Court should find that the trial court erred in determining that Central Trust's Client Information and Lists are not trade secrets under the MUTSA, and reverse the summary judgment granted in favor of SignalPoint.

2. SignalPoint misappropriated Central Trust's trade secrets.

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Central Trust has presented evidence demonstrating that a genuine dispute exists over whether SignalPoint misappropriated Central Trust's trade secrets. As defined in MUTSA, a person misappropriates a trade secret through:

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

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

a. Used improper means to acquire knowledge of the trade secret; or

b. Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or

c. At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

i. Derived from or through a person who had utilized improper means to acquire it;

ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

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See also Cerner Corp., 667 F.Supp. 2d at 1077 (citing Mo. Rev. Stat. § 417.453(2)(b) (2001)). Further, "'improper means' includes theft…misrepresentation, breach or inducement of a breach of a duty to maintain secrecy." Mo. Rev. Stat § 417.453(1) (2012). Accordingly, to establish a *prima facie* case of misappropriation against SignalPoint, Central Trust "is not required to show that [SignalPoint] personally accepted, used and/or disclosed [Central Trust's] trade secrets. Rather, [Central Trust] must simply provide sufficient evidence from which a jury could reasonably infer that [SignalPoint] aided and abetted [Kennedy's] acts of misappropriation." *Insituform Technologies, Inc. v. Reynolds, Inc.*, 398 F. Supp. 2d 1058, 1063-64 (E.D. Mo. 2005).

SignalPoint misappropriated Central Trust's trade secrets because SignalPoint knew or had reason to know that SignalPoint, as Kennedy and ITI's registered investment advisor through which all of Kennedy's and ITI's services flowed, was acquiring information from Central Trust's Client Lists that had been obtained by improper means, *and* was also using information from Central Trust's Client Information that (1) was derived from or through Kennedy, who had utilized improper means to acquire it; (2) was acquired by Kennedy under circumstances giving rise to his duty to maintain its secrecy or limit its use; or (3) was derived from or through Kennedy who, as an employee, officer and director of STC owed a duty to STC/Central Trust to maintain its secrecy or limit its use. *See* Mo. Rev. Stat. § 417.453(2)(a)-(b) (2012).

SignalPoint met with Kennedy in January 2010. (LF 1015). Without question, at that time, SignalPoint understood Kennedy would bring STC/Central Trust clients to SignalPoint if it agreed to affiliate with him. (LF 1015). SignalPoint's similar protection

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of its own client information should have served notice to SignalPoint that Central Trust's Client Information was also protected. Moreover, shortly after meeting with Kennedy and affiliating with him and ITI, SignalPoint had actual knowledge Central Trust believed Kennedy and ITI were misappropriating Central Trust's trade secrets because Central Trust notified SignalPoint through a cease-and-desist letter dated February 11, 2010, which included a copy of Central Trust's petition in the underlying case. (LF 1015). Central Trust also stated in its letter that SignalPoint was tortiously interfering with Central Trust's customer contacts and business expectancies. (LF 1015). SignalPoint even knew of the lawsuit prior to receiving the letter from Central Trust. (LF 1016). SignalPoint also admitted knowing Kennedy had obtained STC/Central Trust's Client Information while under a duty to protect its secrecy and limit its use. (LF 899, 1015).

Despite receiving the-cease-and-desist letter from Central Trust, SignalPoint admitted it continued to do business with Kennedy and ITI and accepted accounts that had been transferred from STC/Central Trust. (LF 1016). SignalPoint did not ask Kennedy to curtail his solicitation of Central Trust's clients in any way after receiving Central Trust's cease-and-desist letter. (LF 1016). There is no evidence SignalPoint asked Kennedy which clients were transferred from Central Trust after being notified. (LF 899, 1016). Instead, SignalPoint chose to bury its proverbial head in the sand, and feign innocence with regard to Kennedy's misappropriation of Central Trust's trade secrets, which was knowingly induced, aided, and/or abetted, by SignalPoint's agreement

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to associate with Kennedy and ITI, and permit all Kennedy's and ITI's services to flow through SignalPoint.

Missouri law does not, however, permit SignalPoint to avoid liability for misappropriation by turning a blind eye to conduct such as Kennedy's. The record evidence demonstrates that SignalPoint had, at the very least, reason to know that, by associating with Kennedy and allowing Kennedy's services to flow through SignalPoint, it was using and benefiting from the confidential Client Information contained in Central Trust's Client Lists, which was either improperly obtained, or being improperly used by Kennedy. In Missouri, such conduct constitutes misappropriation, and, contrary to the Southern District's ruling below, there is no requirement that Central Trust demonstrate any agency relationship between SignalPoint and Kennedy or ITI. *See* Mo. Rev. Stat. § 417.453(2)(a)-(b).

Moreover, the fact "that Kennedy could probably remember the names and personal information of each of his clients such that any type of written client list would be unnecessary for him to re-create his relationships", as highlighted by the Southern District below, (Opinion at p. 10), is not relevant. It is well recognized among states adopting the UTSA that memorized information can be the basis for a trade secret violation:

> [M]ore than 40 [now 47 and the District of Columbia] other states have adopted the Uniform Trade Secrets Act in substantially similar form, and the majority position is that memorized information can be the basis for a trade secret violation. *See, e.g.*, *Ed Nowogroski Ins., Inc. v. Rucker* (1999),

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> 137 Wash.2d 427, 971 P.2d 936; *Morlife, Inc. v. Perry* (1997), 56 Cal.App.4th 1514, 66 Cal.Rptr.2d 731; *Allen v. Johar, Inc.* (1992), 308 Ark. 45, 823 S.W.2d 824; *Jet Spray Cooler, Inc. v. Crampton* (1972), 361 Mass. 835, 282 N.E.2d 921; *Van Prods. Co. v. Gen. Welding & Fabricating Co.* (1965), 419 Pa. 248, 213 A.2d 769; *M.N. Dannenbaum, Inc. v. Brummerhop* (Tex.App.1992), 840 S.W.2d 624; *Schulenburg v. Signatrol, Inc.* (1965), 33 Ill.2d 379, 212 N.E.2d 865; *Morgan's Home Equip. Corp. v. Martucci* (1957), 390 Pa. 618, 136 A.2d 838; *Cent. Plastics Co. v. Goodson* (1975), 1975 Ok 71, 537 P.2d 330; *Rego Displays, Inc. v. Fournier* (1977), 119 R.I. 469, 379 A.2d 1098.

Al Minor & Assoc., Inc. v. Martin, 881 N.E.2d 850, 854 (Ohio 2008). In adopting the majority position in Ohio, the *Al Minor* court noted that "[t]he majority position among our sister states is relevant with respect to the legislature's intent, because as we [previously] recognized, [t]he purpose of the enactment of the Uniform Trade Secrets Act was…to make uniform the law with respect to their subject among states enacting them." *Id*. (internal citation and quotation omitted). Continuing, the *Al Minor* court went on to "recognize that the protection of trade secrets involves a balancing of public policies" stating:

> Among the substantial and conflicting policies at play … are the protection of employers' rights in their trade secrets … versus the right of the individual to exploit his talents. However, by adopting the Uniform Trade Secrets Act, with the express purpose to make uniform the law with respect

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> to their subject among states, the General Assembly has determined that public policy in Ohio, as in the majority of other jurisdictions, favors the protection of trade secrets, whether memorized or reduced to some tangible form.

Id. at 854-55 (internal citation and quotation omitted). Thus, the *Al Minor* court held that information constituting a trade secret "does not lose its character as a trade secret if it has been memorized. It is the information that is protected by the UTSA, regardless of the manner, mode, or form in which it is stored—whether on paper, in a computer, in one's memory, or in any other medium." *Id.* at 855.

MUTSA is substantively identical to Ohio's Uniform Trade Secrets Act. *See* Mo Rev. Stat. §§ 417.450-.467 (2012); Ohio Rev. Code Ann. §§ 1333.61-.69 (Banks-Baldwin 2012). Like Ohio's version of UTSA, Missouri's version specifically provides that the MUTSA "shall be applied and construed to effectuate the[] general purpose of making uniform the law with respect to the subject of trade secrets among states enacting them." Mo. Rev. Stat. § 417.465 (2012). Accordingly, whether Kennedy may have been able to memorize all or even part of Central Trust's Client Information or Client Lists is not relevant to the determination of whether the information constitutes a trade secret, nor is it relevant to the determination of whether the information was misappropriated.

The evidence presented by Central Trust, construed as it must be in the light most favorable to Central Trust, establishes that SignalPoint acquired knowledge of STC/Central Trust's clients through Kennedy's misappropriation of Central Trust's Client Lists, and did so with the knowledge that Kennedy acquired the information while

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under a duty to maintain its secrecy and limit its use. SignalPoint is therefore subject to liability for misappropriation under MUTSA. Central Trust should be allowed to present its evidence to the jury for a trial on the merits. Accordingly, the Amended Summary Judgment Order in SignalPoint's favor must be reversed.

3. Central Trust has been damaged.

Due to SignalPoint's affiliation with Kennedy and ITI, and in turn, its misappropriation of Central Trust's trade secrets, Central Trust clearly established its damages to the trial court regarding SignalPoint's wrongdoing. It is undisputed Kennedy took almost $50 million in client assets under management from Central Trust by taking STC/Central Trust clients, including some STC/Central Trust clients with whom Kennedy had no relationship while he was a STC employee and director. (LF 1009-10). After 18 months of operation, ITI had only five clients with no prior relationship with STC. (LF 1010). Central Trust, at a bare minimum, has lost the fees generated from providing financial services to those clients. (LF 1017).

In summary, Central Trust provided ample evidence to the trial court supporting its claim against SignalPoint for misappropriation of Central Trust's trade secrets. Central Trust is entitled to a jury's determination of factual issues regarding whether its Client Lists and Client Information constitute trade secrets, and ultimately, whether SignalPoint misappropriated those trade secrets. The Amended Summary Judgment Order in favor of SignalPoint must be reversed and the matter remanded for Central Trust to present its claims to a jury.

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POINT RELIED ON II

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VI OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND, (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS AGAINST SIGNALPOINT, IN THAT (A) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND, (B) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACTS CONCERNING (1) CENTRAL TRUST'S VALID BUSINESS EXPECTANCIES, (2) SIGNALPOINT'S KNOWLEDGE OF THOSE EXPECTANCIES, (3) SIGNALPOINT'S INTENTIONAL INTERFERENCE WITH THE EXPECTANCIES, RESULTING IN THE EXPECTANCIES NOT BEING REALIZED, (4) SIGNALPOINT'S LACK OF JUSTIFICATION AND (5) CENTRAL TRUST'S DAMAGES PROXIMATELY CAUSED BY SIGNALPOINT'S CONDUCT.

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A. Standard Of Review On Appeal.

The standard of review applicable to Point Relied on I, as discussed *supra*, also applies to Point Relied on II, and is hereby incorporated by reference.

B. Signalpoint Is Not Entitled To Summary Judgment On Central Trust's Claim For Tortious Interference With Business Relations For The Reason That Signalpoint Did Not Make The Required *Prima Facie* Showing That Would Entitle Signalpoint To Summary Judgment, And Central Trust Has Demonstrated That There Are Material Facts Genuinely In Dispute.

SignalPoint is also not entitled to summary judgment on Central Trust's claim for tortious interference with business relations against SignalPoint. SignalPoint again failed to make the required *prima facie* showing that there are no genuine issues of material fact and failed to show that SignalPoint is entitled to judgment as a matter of law. SignalPoint failed to negate any element of Central Trust's tortious interference claim, and did not demonstrate that Central Trust will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of those elements. Even if a *prima facie* showing had been made by SignalPoint, Central Trust demonstrated that numerous material facts are actually and genuinely in dispute related to this claim. The trial court erred in granting summary judgment in SignalPoint's favor.

Central Trust had a valid business expectancy that STC/Central Trust clients would continue to do business with Central Trust. To make a submissible claim for tortious interference with business relations, Central Trust must adduce evidence of: (1) a

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contract or other valid business expectancy; (2) SignalPoint's knowledge of the expectancy; (3) intentional interference with the expectancy, resulting in the expectancy not being realized; (4) lack of justification; and (5) damages proximately caused by SignalPoint's conduct. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 250 (Mo. banc 2006) (citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. banc 1993)).

First, Central Trust demonstrated it had reasonable and valid business expectancies with its clients, both before and after its purchase of STC, to maintain and provide financial management services for its clients. Second, Central Trust has shown there is a genuine dispute over whether SignalPoint had knowledge of the expectancy and whether SignalPiont intentionally interfered with the expectancy. It is undisputed that the business expectancy was not realized, and Central Trust provided evidence showing this fact. Finally, Central Trust presented voluminous evidence that SignalPoint's tortious interference has caused Central Trust damage. When looking at all of the evidence in the light most favorable to Central Trust, and giving Central Trust the benefit of all reasonable inferences that may be drawn from the record, Central Trust presented substantial evidence supporting each element of its claim, and it is abundantly clear that summary judgment was improper. As such, it was error for the trial court to grant summary judgment in SignalPoint's favor on Central Trust's claim for tortious interference with business relations.

Additionally, and converse to the trial court's actions in the underlying case, the Missouri Appellate Court for the Eastern District has held that whether a defendant has played a material and substantial part in causing a plaintiff's loss of contract or business

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expectancy is a question of fact for the jury to decide, which would preclude summary judgment. *See Howard v. Youngman*, 81 S.W.3d 101, 114 (Mo. App. E.D. 2002). Because Central Trust presented ample evidence in support of its claim, and because material factual issues remain, summary judgment was improper and should be reversed.

1. Central Trust had both a contract and a valid business expectancy to continue business with its clients.

There can be little dispute that Central Trust had contracts and/or business expectancies with its clients, and Central Trust presented sufficient evidence to support this element of its claim. The undisputed evidence before the trial court was that Central Trust provides investment and financial management services for its clients in exchange for an agreed-upon fee. (LF 990). Under Missouri law, these reciprocal obligations qualify, as a matter of law, as a contract under any definition of "contract". *See Kosher Zion Sausage Company of Chicago v. Roodman's, Inc.*, 442 S.W.2d 543, 546-47 (Mo. App. St.L. 1969) (holding a contract exists when a parties' actions support a reasonable inference of mutual understanding and agreement that one party perform and the other party compensate for such performance).

Even assuming *arguendo* that Central Trust did not have contracts with its clients, Central Trust had a valid expectancy of doing business with its clients. Pursuant to Missouri law, a business expectancy need not be based on an existing contract. *BMK Corp. v. The Clayton Corp.*, 226 S.W.3d 179, 190 (Mo. App. E.D. 2007). "A probable future business relationship that gives rise to a reasonable expectancy of financial benefit is enough." *Stehno*, 186 S.W.3d at 251. Missouri courts have recognized that a regular

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course of prior dealings suggests a valid business expectancy. *Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555, 565 (Mo. App. W.D. 1999); *see also Conoco Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 907 (8th Cir. 1985) (applying Missouri law and finding that a 20-year customer relationship was a protected business expectancy even though every year the customer offered its business to all bidders).

Central Trust demonstrated overwhelming evidence to the trial court that it had a valid business expectancy to continue doing business with its clients. Central Trust paid $19,750,000 to purchase STC, the primary asset purchased being STC's client base, including the relationships developed by STC with its clients. (LF 989). It can be inferred that Central Trust would not have paid this much if it expected STC's clients would walk out of the door following the purchase. Central Trust had a valid business expectancy in continuing to conduct business with STC's clients post-purchase.

Additionally, the record established that Central Trust maintained a regular course of prior dealings with its clients in that the average client account remains with Central Trust for 20 years. (LF 990). Despite SignalPoint's erroneous arguments, the fact Central Trust's clients can terminate their relationships at any time does not free third-parties, such as SignalPoint, from liability if they tortiously interfere in the relationship. *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117, 125 (Mo. App. W.D. 2010). SignalPoint's interference with those relationships is actionable because Central Trust and its clients are in a subsisting relation that will continue and is of value to Central Trust. *See id.*

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Once Central Trust established it had a valid business expectancy to continue doing business with its clients, it was necessary to determine whether Central Trust's expectancy "was reasonable and valid under the circumstances presented." *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 19 (Mo. banc 2012). This Court recently determined in *Western Blue* that the plaintiff had a reasonable business expectancy in a potential client on the renewal of a university construction document printing contract even though (1) the bidding was anonymous, and (2) three other competing companies had also submitted bids for the potential client's business. *Id*. at 14. In reaching this determination, this Court relied upon the past dealings between the plaintiff and the entity to which it submitted the bid for the business, as well as the key employee who worked for it. *See id.* at 19. This Court reaffirmed that, in Missouri "a regular course of prior dealings suggests a valid business expectancy." *Id.*

In light of this Court's *Western Blue Print Co., LLC* holding, it was reasonable and valid under the facts of this case for Central Trust to expect to continue doing business with STC/Central Trust's existing clients. Central Trust provided overwhelming supportive evidence to the trial court that it held a much stronger business expectancy in its clients than the plaintiff in *Western Blue Print Co., LLC.* SignalPoint, along with Kennedy and ITI, interfered with current, actual clients of Central Trust, not potential clients. It was reasonable for Central Trust to expect the current clients to continue doing business with Central Trust after purchasing STC for $19,750,00 with the expectation it would continue doing business with STC's clients, as the primary asset purchased by

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Central Trust was the Client Lists containing the Client Information, and as argued above, the average client account remains with Central Trust for 20 years (LF 989-90).

These facts, together with the law, clearly demonstrate Central Trust provided substantial supporting evidence to the trial court that it had valid contracts and business expectancies with its clients. At a minimum, Central Trust demonstrated expectancies in its clients which were not facially unreasonable and showed a genuine dispute over a material fact, and the jury should be allowed to decide whether Central Trust's business expectancies were reasonable. *See Londoff v. Walnut Street Sec. Inc.*, 209 S.W.3d 3, 10 (Mo. App. E.D. 2006).

2. SignalPoint knew of Central Trust's valid business expectancies.

Central Trust presented sufficient evidence to show the trial court that SignalPoint knew of Central Trust's business expectancies with its clients. "It is enough to show that a defendant had knowledge of facts, which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties." *Howard*, 81 S.W.3d at 113. It is not necessary for a defendant to appreciate the legal significance of the facts giving rise to the relationship between the parties. *See id.* "If [the defendant] knows those facts, [the defendant] is subject to liability even though [the defendant] is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have." *Id.* SignalPoint's arguments that it had no knowledge of where Kennedy's clients were coming from and did not know these clients were Central Trust clients do not pass muster, and, furthermore, do not relieve it of its duty under the law to inquire.

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The evidence before the trial court indicated that, before affiliating with Kennedy, SignalPoint knew Kennedy would bring STC/Central Trust's clients to SignalPoint. (LF 1015). SignalPoint also knew of Central Trust's pending lawsuit against Kennedy and ITI for misappropriation of trade secrets. (LF 1016). Finally, Central Trust expressly directed SignalPoint to cease tortiously interfering with its business expectancies in its cease-and-desist letter. (LF 1015). These facts create fact issues, which if viewed in a light most favorable to Central Trust, show that SignalPoint knew of Central Trust's valid business expectancies. SignalPoint's knowledge or—as it argues—lack thereof, is a matter in genuine dispute precluding summary judgment.

3. SignalPoint induced Central Trust's clients to terminate their contracts and relationships with Central Trust.

Central Trust presented substantial evidence to the trial court supporting its contention that SignalPoint induced Central Trust's clients to terminate their contracts and relationships with Central Trust. First, it is beyond dispute that SignalPoint knew at the time Michael Orzel met with Kennedy in January 2010 that the clients Kennedy would bring with him to SignalPoint were STC/Central Trust clients. (LF 1015). Orzel himself testified to this fact. (LF 1015, 778-79). Presumably, SignalPoint received transfer paperwork authorizing Central Trust to transfer the accounts to SignalPoint. (LF 899). SignalPoint also received a cease-and-desist letter from Central Trust, yet it admittedly continued to do business with Kennedy and ITI and to accept accounts that had been transferred from STC/Central Trust. (LF 1016). SignalPoint did not ask Kennedy to curtail his solicitation of Central Trust's clients in any way after receiving the

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letter. (LF 1016). There is no evidence SignalPoint asked Kennedy which clients were transferred from Central Trust. (LF 1016).

Central Trust also presented to the trial court substantial evidence that, without SignalPoint's affiliation with Kennedy and ITI, Kennedy and ITI could not, by themselves, have taken Central Trust's clients. (LF 1013-15). Therefore, SignalPoint, by affiliating with Kennedy and ITI, was a necessary tool Kennedy used to induce or cause Central Trust's clients to discontinue business with Central Trust and, instead, conduct the exact same type of financial business with SignalPoint. Central Trust presented indisputable evidence that Kennedy and ITI, without SignalPoint, could not have provided their financial services to Central Trust's clients. (LF 1013-15). Further, the evidence clearly showed SignalPoint is a competitor of Central Trust. (LF 1012).

Indeed, Kennedy has a Series 65 License but not a Series 7 license and is an independent advisor representative, and he therefore must either affiliate with a registered investment advisor such as SignalPoint or become a registered investment advisor himself in order to provide the same financial services to clients as he did when employed by STC. (LF 1013-14). Kennedy has an Independent Advisor Representative Agreement with SignalPoint. (LF 1013). Because of this, Kennedy expressly advises clients and prospective clients of his affiliation with SignalPoint and ability to do their investment work. (LF 1014-15). The evidence before the trial court demonstrated that Kennedy invests in mutual funds for clients through SignalPoint, Kennedy's ITI-related emails go through SignalPoint and Kennedy and ITI offer their investment services through SignalPoint. (LF 1014). Thus, but for his business affiliation with SignalPoint,

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Kennedy could not have improperly taken Central Trust's clients. Consequently, without SignalPoint, there would have been no misappropriation.

Accordingly, SignalPoint, as Kennedy's registered investment advisor, directly caused Central Trust's clients to end their contracts and relationships with Central Trust. By allowing Kennedy to serve as its independent advisory representative, SignalPoint facilitated the termination, accomplished by Kennedy and ITI, of Central Trust's relationships with its clients. Central Trust presented ample evidence in support of this element of its claim against SignalPoint for tortious interference and, at the very least, showed material facts in dispute preventing summary judgment. Critically, whether a defendant has played a material and substantial part in causing plaintiff's loss is a question of fact for the jury, alone, to determine. *See Howard*, 81 S.W.3d at 114; *see also Tri-Continental Leasing Co. v. Neidhardt*, 540 S.W.2d 210, 219 (Mo. App. 1976).

4. SignalPoint has no justification for its conduct.

Central Trust also demonstrated substantial evidence on the element of absence of justification. As the plaintiff, Central Trust carried the burden of affirmatively showing SignalPoint's lack of justification. *See Nazeri*, 860 S.W.2d at 316–17. "Absence of justification refers to the absence of a legal right to justify actions taken." *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 590 (Mo. App. E.D. 2008) (quoting *Downey v. McKee*, 218 S.W.3d 492, 497 (Mo. App. W.D. 2007)). If the defendant has a legitimate interest, economic or otherwise, in the expectancy the plaintiff seeks to protect, then the plaintiff must show that the defendant employed improper means in seeking to further only his own interests. *Id*. at 317. Even if there is an economic justification for interfering with a

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business expectancy, the interfering party must not employ improper means. *Id.*

"Improper means" are those that are independently wrongful, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law. *Id.* "[C]ompeting by improper means, including use of a misappropriated trade secret obtained in violation of a fiduciary duty" demonstrates lack of justification. *Lyn-Flex West, Inc.*, 24 S.W.3d at 700.

Central Trust provided evidence to the trial court supporting that SignalPoint's actions were improper and without justification. SignalPoint employed improper means in seeking to further its own financial interests in facilitating the intentional interference with Central Trust's client relationships. As discussed fully in Point Relied On I, *supra*, and incorporated herein by reference, Central Trust had evidence to support SignalPoint misappropriated Central Trust's trade secrets and acquired Central Trust's Confidential Information. The evidence also showed SignalPoint had knowledge of potential violations by Kennedy of the Kennedy Employment Contract, the 2009 Oath of Director and Kennedy's fiduciary duties.

Notwithstanding this direct and inescapable knowledge, SignalPoint did not ask Kennedy to curtail his solicitation of Central Trust's clients in any way after receiving Central Trust's cease-and-desist letter on February 11, 2010. (LF 1016). Instead, SignalPoint chose to ignore Central Trust's notification of its rights by continuing to affiliate with Kennedy and ITI to provide financial services to Central Trust's clients. In essence, SignalPoint chose to force Central Trust to sue for damages rather than simply informing Kennedy to stay away from Central Trust's clients. Consequently, SignalPoint

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has no justification for its conduct and is, therefore, not entitled to summary judgment against Central Trust

5. Central Trust has been damaged by SignalPoint's conduct.

SignalPoint did not dispute in its Motion for Summary Judgment and related suggestions that (1) Central Trust has been damaged by SignalPoint's conduct or (2) Central Trust could not establish this element of its tortious interference claim against SignalPoint. Presumably, SignalPoint agrees Central Trust has been damaged, and the overwhelming evidence provided to the trial court substantiates this fact.

SignalPoint and Kennedy, working together, took almost $50 million in client assets under management from Central Trust by taking STC/Central Trust clients, including STC/Central Trust clients with whom Kennedy had no relationship while he was an STC employee and director. (LF 1009-10). After 18 months of operation, ITI had only five clients with no prior relationship with STC. (LF 1010). SignalPoint, as Kennedy's registered investment advisor, receives a direct benefit from these clients in the form of business revenue—revenue SignalPoint knew was that of Central Trust and that it improperly took from Central Trust. As such, it is an undisputed fact that SignalPoint damaged Central Trust.

Accordingly, SignalPoint failed to meet its burden entitling it to summary judgment on Central Trust's claim for tortious interference with its business expectancies against SignalPoint, and Central Trust has, in any event, demonstrated there are material facts in dispute. Therefore, in light of the foregoing reasons, and the substantial evidence presented to the trial court in support of Central Trust's claim against SignalPoint for

tortious interference with its business expectancies, the trial court erred in granting summary judgment in favor of SignalPoint. The Amended Summary Judgment Order must be reversed.

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POINT RELIED ON III

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF SIGNALPOINT ON COUNT VIII OF CENTRAL TRUST'S FIRST AMENDED PETITION BECAUSE (I) SIGNALPOINT FAILED TO MAKE A *PRIMA FACIE* SHOWING IT WAS ENTITLED TO SUMMARY JUDGMENT, AND (II) REGARDLESS, CENTRAL TRUST DEMONSTRATED THERE ARE MATERIAL FACTS IN DISPUTE ON EACH ELEMENT OF ITS CLAIM FOR CONSPIRACY AGAINST SIGNALPOINT, IN THAT (A) SIGNALPOINT FAILED TO SHOW (1) FACTS NEGATING ANY ONE OF CENTRAL TRUST'S *PRIMA FACIE* ELEMENTS OR (2) THAT CENTRAL TRUST, AFTER AN ADEQUATE PERIOD OF DISCOVERY, HAD NOT BEEN ABLE TO PRODUCE, AND WILL NOT BE ABLE TO PRODUCE, EVIDENCE SUFFICIENT TO ALLOW THE TRIER OF FACT TO FIND THE EXISTENCE OF ANY ONE OF CENTRAL TRUST'S ELEMENTS, AND (B) IN ANY EVENT, CENTRAL TRUST DEMONSTRATED GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER (1) TWO OR MORE PERSONS, (2) WITH AN UNLAWFUL OBJECTIVE, (3) AFTER A MEETING OF THE MINDS, (4) COMMITED AT LEAST ONE ACT IN FURTHERANCE OF THEIR CONSPIRACY AND (5) CAUSED CENTRAL TRUST'S DAMAGES AS A RESULT.

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A. Standard Of Review On Appeal.

The standard of review applicable to Point Relied on I, as discussed *supra*, also applies to Point Relied on II, and is hereby incorporated by reference.

B. Signalpoint Is Not Entitled To Summary Judgment On Central Trust's Claim For Conspiracy For The Reason That Signalpoint Did Not Make The Required *Prima Facie* Showing That Would Entitle Signalpoint To Summary Judgment, And Central Trust Has Demonstrated That There Are Material Facts Genuinely In Dispute.

SignalPoint is also not entitled to summary judgment on Central Trust's claim for conspiracy against SignalPoint. As similarly argued *supra* in relation to Counts VI and VII of Central Trust's First Amended Petition, SignalPoint also failed to make the required *prima facie* showing that there are no genuine issues of material fact and failed to show that SignalPoint is entitled to judgment as a matter of law on Count VIII of Central Trust's First Amended Petition. SignalPoint failed to negate any one of the elements of Central Trust's conspiracy claim and did not demonstrate that Central Trust will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of those elements. Even if a *prima facie* showing had been made by SignalPoint, Central Trust demonstrated that numerous material facts are actually and genuinely in dispute related to this claim. The trial court erred in granting summary judgment in SignalPoint's favor on Central Trust's claim for conspiracy.

To establish a claim for civil conspiracy, Central Trust must make a showing of facts supporting the following elements: (1) two or more persons; (2) with an unlawful

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objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and, (5) Central Trust was thereby damaged. *Western Blue Print Co., LLC,* 367 S.W.3d at 22; *see also Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 781 (Mo. banc 1999). Although the civil conspiracy cause of action requires its own elements be proven, it is not a separate and distinct action. *Breeden v. Hueser*, 273 S.W.3d 1, 13 (Mo. App. W.D. 2008). "[R]ather, it acts to hold the conspirators jointly and severally liable for the underlying act." *8000 Maryland, LLC v. Huntleigh Fin. Services Inc.*, 292 S.W.3d 439, 451 (Mo. App. E.D. 2009). "The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage to plaintiff." *Id.* (quoting *Royster v. Baker*, 365 S.W.2d 496, 499 (Mo. 1963)). "The term unlawful, as it relates to civil conspiracy, is not limited to conduct that is criminally liable, but rather may include individuals associating for the purpose of causing or inducing a breach of contract or business expectancy." *Lyn–Flex West, Inc.*, 24 S.W.3d at 700–01. In addition, if there is an intentional interference with a person's right to pursue a lawful business, calling, trade, or occupation by unlawful means, an action will lie for damages. When the interference is done conspiratorially, a civil conspiracy action will lie for the damages. *Cowan v. Gibson*, 392 S.W.2d 307, 310 (Mo. 1965), *receded from on other grounds by Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169 (Mo. 2008). A civil conspiracy may be established by circumstantial evidence. *National Rejectors, Inc.*, 409 S.W.2d at 50.

SignalPoint failed to establish Central Trust could not meet an element of its claim for conspiracy. Central Trust, on the other hand, presented ample evidence to the trial

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court sufficient to survive summary judgment in support of its conspiracy claim. The overwhelming evidence presented in support of Central Trust's misappropriation of trade secrets and tortious interference with Central Trust's business relations claims, discussed in Points Relied On I and II, *supra*, also supports Central Trust's conspiracy claims against all defendant tortfeasors, including SignalPoint. While an action for a conspiracy to commit a tort will not lie unless that tort was actually committed, Central Trust provided sufficient evidence to the trial court to survive summary judgment on its claims for the underlying torts of misappropriation of trade secrets and intentional interference with Central Trust's business relations, and incorporates here its arguments made in Points Relied On I and II, *supra*. *See Stegeman v. First Missouri Bank of Gasconade County*, 722 S.W.2d 349 (Mo. App. E.D. 1987). Not only did the evidence show Central Trust's evidence supported its *prima facie* elements of its conspiracy claim, the evidence clearly established that SignalPoint, along with Kennedy and ITI, associated together for the dual purposes of misappropriating Central Trust's trade secrets and interfering with Central Trust's valid business expectancies with its clients, all to Central Trust's detriment, resulting in the intentional and wrongful loss to Central Trust of almost $50 million in client assets under management.

Central Trust presented uncontroverted evidence to the trial court that SignalPoint met with Kennedy in January 2010 for the purpose of associating with Kennedy and ITI. (LF 1015). At the time of the January 2010 meeting, SignalPoint understood Kennedy would bring STC/Central Trust's clients to SignalPoint if it agreed to affiliate with him. (LF 1015). In fact, the evidence infers that, without Kennedy, SignalPoint would have no

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knowledge of or relationship with STC/Central Trust's clients. Further, Kennedy and ITI, without SignalPoint, could not have invested Central Trust's client's assets without affiliating with SignalPoint because Kennedy lacked the appropriate investment licenses: he must either be affiliated with a registered investment advisor such as SignalPoint or become a registered investment advisor himself. (LF 1013-14). The evidence presented clearly showed that Kennedy, ITI and SignalPoint affiliated with each other to allow Kennedy, as SignalPoint's Independent Advisor Representative, to invest in mutual funds for clients, most all of which were Central Trust's clients, and to offer investment services through SignalPoint. (LF 1013-15).

By affiliating with Kennedy and ITI, SignalPoint enabled, facilitated and participated in the tortious conduct. Moreover, SignalPoint continued its affiliation and after receiving the cease-and-desist letter from Central Trust's counsel. (LF 1015). Together, Kennedy, ITI and SignalPoint—by associating to improperly use STC/Central Trust's Client Information, including the stolen Client Lists misappropriated by the three tortfeasors, and to interfere with Central Trust's valid business expectancies—conspired and caused significant damages to Central Trust.

The fact finder in the underlying case, the jury, should have determined the genuine issues of fact in dispute—whether SignalPoint aided Kennedy in tortiously interfering with Central Trust's business relations with its clients and misappropriating Central Trust's trade secrets. *See Western Blue Print Co., LLC*, 367 S.W.3d at 23 (holding, in a civil conspiracy case, that whether plaintiff's former employee aided a

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competitor in tortiously interfering with plaintiff's business expectancy was a question for the jury).

Furthermore and inescapable for SignalPoint, the trial court overruled Kennedy's and ITI's motion for summary judgment on all claims pending against them, including Central Trust's civil conspiracy claim pled against all three defendants. It is inconceivable how the trial court could find disputed facts existed to preclude summary judgment in favor of Kennedy and ITI but blindly grant summary judgment in favor SignalPoint on the same claims. Central Trust's conspiracy claim against SignalPoint (along with all of Central Trust's other claims against SignalPoint) should have survived summary judgment because material facts remained in dispute, and SignalPoint did not meet its hefty burden required to obtain summary judgment. Clearly, because there are genuine issues of material fact in dispute, whether SignalPoint aided Kennedy and ITI in misappropriating Central Trust's trade secrets and in tortiously interfering with Central Trust's business relations with its clients is a question for the jury, not the trial court. In accordance with this Court's ruling in *Western Blue Print Co., LLC,* and the factual support of Central Trust's claim of conspiracy against SignalPoint, the summary judgment in SignalPoint's favor must be reversed, and Central Trust must be allowed to present its claim of conspiracy to a jury.

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POINT RELIED ON IV

THE TRIAL COURT ERRED IN OVERRULING CENTRAL TRUST'S MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT AND FOR NEW TRIAL BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION, IN THAT CENTRAL TRUST DISCOVERED NEW EVIDENCE CONSISTING OF 39 PAGES OF VALUABLE COMPILATIONS OF CONFIDENTIAL CLIENT INFORMATION, INCLUDING NAMES, ADDRESSES, TELEPHONE AND CELL PHONE NUMBERS AND E-MAIL ADDRESSES AND BANKING INFORMATION OF CENTRAL TRUST CLIENTS, AND A CELL PHONE CONTAINING MORE THAN 200 NAMES AND NUMBERS OF CENTRAL TRUST'S CLIENTS IN POSSESSION OF DEFENDANTS KENNEDY AND ITI, WHICH WERE WRONGFULLY WITHHELD FROM CENTRAL TRUST DESPITE POINTED AND TIMELY DISCOVERY SEEKING SUCH EVIDENCE AFTER THE AMENDED SUMMARY JUDGMENT ORDER WAS ENTERED IN SIGNALPOINT'S FAVOR AND (1) CENTRAL TRUST HAD EXERCISED DUE DILIGENCE BY TIMELY SEEKING THE NEWLY DISCOVERED EVIDENCE THROUGH DISCOVERY, (2) THE NEW EVIDENCE WAS MATERIAL TO THE QUESTION OF WHETHER SIGNALPOINT, IN COOPERATION WITH OTHER DEFENDANTS, HAD OBTAINED AND USED CENTRAL TRUST'S TRADE SECRETS, (3) THE EVIDENCE CONSISTING OF CONFIDENTIAL CLIENT INFORMATION AND CLIENT LISTS WAS NOT CUMULATIVE OF OTHER EVIDENCE, (4) AFFIDAVITS WERE PRESENTED IN SUPPORT OF

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THE MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT AND (5) THE OBJECT OF THE NEW EVIDENCE WAS NOT TO IMPEACH OR DISCREDIT A WITNESS.

A. Standard Of Review On Appeal.

Under the abuse of discretion standard of review which applied here, the trial court's decision overruling Central Trust's Motion for Reconsideration of Summary Judgment Entered in Favor of Defendant SignalPoint Asset Management, LLC on its Motion for Summary Judgment and for New Trial on the Merits was an abuse of discretion and must be reversed and the matter remanded to the trial court for a new trial on the merits. A trial court's decision to deny (or grant) a new trial is reviewed by the court of appeals and this Court for abuse of discretion. *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 162 (Mo. App. E.D. 2007); *see also Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. banc 1993). Where an appellate court finds a substantial or glaring injustice, it may reverse the trial court's decision. *Kehr v. Knapp*, 136 S.W.3d 118, 122 (Mo. App. E.D. 2004).

In this case, Central Trust first seeks a new trial on the basis of newly discovered evidence. An appellate court may overturn the trial court's ruling where it finds a clear abuse of discretion. *Zimmer v. Fisher*, 171 S.W.3d 76, 79 (Mo. App. E.D. 2005). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court at the time and is so unreasonable and arbitrary it shocks one's sense of justice and indicates a lack of careful consideration. *Id.*

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Alternatively, Central Trust seeks reversal of the trial court's Order overruling Central Trust's Motion requesting the trial court to set aside the Judgment in favor of SignalPoint for misconduct related to discovery pursuant to Missouri Rule of Civil Procedure 74.06(b)(2). In its Motion for Reconsideration and for New Trial, Central Trust requested the trial court set aside the Amended Summary Judgment Order in SignalPoint's favor due to misconduct of Kennedy and ITI related to discovery pursuant to Rule 74.06(b)(2). An appellate court reviews a trial court's rulings on motions for relief from judgment for abuse of discretion. *Rosemann v. Rosemann*, 349 S.W.3d 468, 471 (Mo. App. E.D. 2011).

B. The Client Lists And Cell Phone Discovered In Kennedy's And ITI's Counsel's Safe Deposit Box Constituted Newly Discovered Evidence, Central Trust's Discovery Of The New Evidence Materially Affected Each And Every One Of Central Trust's Claims Against Signalpoint, And, Therefore, The Trial Court Erred In Overruling Central Trust's Motion For Reconsideration And For New Trial.

SignalPoint should not be rewarded because the trial court awarded summary judgment in its favor before having additional, clear evidence supporting the claims asserted against it. SignalPoint's "it was not me" position related to the issues raised by Central Trust in its Motion for Reconsideration and for New Trial should not convince this Court to turn a blind eye to the circumstances in this case that prevented Central Trust from having the substantial supporting evidence.

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A party, such as Central Trust, seeking a new trial on the ground of newly discovered evidence must show the following six factors: (1) the evidence has only recently came into movant's knowledge since judgment was entered; (2) due diligence would not have uncovered the evidence sooner; (3) the new evidence is so material it would probably produce a different result; (4) the new evidence is not cumulative; (5) the affidavit of the witness must be produced or its absence accounted for and (6) the object of the evidence is not to impeach the character or creditability of a witness. *Butts v. Express Personnel Services*, 73 S.W.3d 825, 842 (Mo. App. S.D. 2002); *see also M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo. App. E.D. 1998); *Executive Jet Management & Pilot Service, Inc. v. Scott*, 629 S.W.2d 598, 610 (Mo. App. W.D. 1981); *Gehner v. McPherson*, 430 S.W.2d 312 (Mo. App. 1968); *Young v. St. Louis Public Service Co.*, 326 S.W.2d 107, 111 (Mo. 1959). The grant of a new trial on the basis of newly discovered evidence requires more than a showing of inadvertent failure to produce information within the scope of propounded discovery without regard to the impact that information may have had on the outcome at trial. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 395-96 (Mo. App. W.D. 2011). It requires proof of fraud or purposeful misconduct by the party withholding the evidence. *Id*.

Based upon this standard of proof, the trial court erred in overruling Central Trust's Motion for Reconsideration and for New Trial because Central Trust provided clear and unequivocal evidence supporting Kennedy and ITI's fraud and purposeful misconduct in failing to produce the 39 pages of Client Lists and cell phone despite

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pointed and formal written discovery requesting such documents served upon them 15 months before the hidden evidence was discovered. The Client Lists and cell phone constitute newly discovered evidence so material they would produce a different result in this case. At the point the newly discovered evidence was found, the case became no longer about Kennedy's self-proclaimed—and falsely stated—memorization of Central Trust's customers' names with whom he did business during his tenure as an employee of STC. The Client Lists and cell phone became supporting evidence of Central Trust's claims against all parties and direct evidence of the parties' tortious conduct and breaches of duties to Central Trust.

First, in its Motion and Suggestions in Support thereof filed with the trial court, Central Trust demonstrated that, because of Kennedy and ITI's fraudulent and purposeful misconduct regarding the production of requested documents at the time the parties argued SignalPoint's Motion for Summary Judgment on July 6, 2011, neither Central Trust nor the trial court had the benefit of using and examining the physical evidence at the heart of Central Trust's case despite Central Trust requesting such information numerous times in formal written discovery. (LF 1157-71). To meet the first two elements of its *prima facie* case, Central Trust provided supporting evidence to the trial court that (1) the existence and true nature of the information contained in the Client Lists and cell phone only recently came into Central Trust's knowledge since the Amended Summary Judgment Order was entered in SignalPoint's favor and (2) due diligence would not have uncovered the evidence sooner. (LF 1108-38, 1157-71).

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Central Trust presented to the trial court that, to Central Trust's surprise, Kennedy disclosed in his May 2011, deposition he and his attorneys were in possession of a customer list and cell phone located in his personal safe deposit box and his counsel's safe deposit box. (LF 1113). May 2011, was the first time Central Trust became aware this evidence existed, despite Central Trust receiving a letter from Kennedy and ITI's counsel representing that Kennedy "has not and will not take or retain any documentation or data belonging to [Central Trust] either at or before his termination" and despite requesting Kennedy and ITI to produce such documents and items in written discovery throughout the pendency of the case, more than 15 months. (LF 1007-08). When specifically asked in written discovery to produce "all documents or communications concerning customers of Central Trust, including customer lists," Kennedy's response was "None." (LF 1007). This false, evasive response was signed off by Kennedy's counsel despite said counsel knowing both he and Kennedy possessed the Client Lists and cell phone, all the while storing them in their respective safe deposit boxes. (LF 1006-07, 1171).

Central Trust also provided evidence of Kennedy and ITI's continued deliberate refusal to produce the Client Lists and cell phone after Kennedy's deposition. Although Kennedy disclosed the existence of the Client Lists and cell phone for the first time in May despite previously denying the existence of any such list or physical object in written discovery, neither he nor ITI voluntarily supplemented any discovery by producing the Client Lists and cell phone despite their undisputed duty to do so under Missouri Rules of Civil Procedure. (LF 1-16). By the time Central Trust received the

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transcript of Kennedy's deposition, the parties were engaging in summary judgment drafting and the ensuing arguments concerning those motions being filed by Kennedy, ITI and SignalPoint. (LF 1131). At defendants' request, Central Trust agreed to expedite its preparation of memoranda in opposition to their respective summary judgment motions so the motions could be heard as soon as possible before the trial then scheduled to commence in August 2011. (LF 1131). It can be inferred that Kennedy and ITI pushed forward in hopes Central Trust would not uncover the Client Lists and cell phone before they could receive a favorable ruling from the trial court on their summary judgment motions, further evidencing their intentional misconduct and fraud. Understandably, and based on the prior representations of Kennedy and his counsel that no such information had been retained, counsel for Central Trust focused their efforts on opposing the pending summary judgment motions. Thus, at the time the Central Trust responded to SignalPoint's Motion for Summary Judgment and argued against the same at a hearing on the Motion before the trial court, Central Trust did not possess a physical list or any other physical evidence showing Kennedy had, in fact, taken STC/Central Trust's actual Client Lists, and the information contained in the Client Lists, not to mention the client contact information stored on the cell phone. (LF 569, 1131).

Presumably, SignalPoint will try to deflect Kennedy and ITI's fraudulent and purposeful misconduct in secreting the Client Lists and cell phone to place blame on Central Trust for not timely inspecting the safe deposit boxes and acquiring the Client Lists and cell phone after the deposition, as SignalPoint argued to the trial court in response to Central Trust's Motion for Reconsideration. (LF 1151-56). This blame is

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notably misplaced. Upon becoming aware Kennedy, ITI and its counsel had no intention of voluntarily producing the Client Lists and cell phone, and after acceding to the expedited pleading deadlines related to Kennedy, ITI and SignalPoint's motions for summary judgment, Central Trust coordinated a timely inspection of the safe deposit boxes on July 27 and 28, 2011. (LF 1126-38). At the inspection and after the Amended Summary Judgment Order was entered in SignalPoint's favor on July 26, 2011, Central Trust's counsel discovered documents vital to its case—39 pages of confidential client information, of which some was handwritten and some printed from Central Trust's system, including client name, addresses, telephone and cell phone numbers, e-mail addresses and investment information. (LF 1108-38).

As evidence supporting its third element of its *prima facie* case, Central Trust provided convincing evidence to the trial court the Client Lists and cell phone are, without a doubt, so material they would have produced a different result in this case. (LF 1108-38). As discussed above, the newly discovered evidence consisted of 39 pages of handwritten and printed documents containing STC/Central Trust's customer contact information (names, addresses, telephone and cell phone numbers, e-mail addresses) and confidential banking information along with a cell phone containing more than 200 contacts of STC/Central Trust's customers. (LF 124, 1108-38). As further evidence of Kennedy and ITI's purposeful misconduct and fraud in secreting the Client Lists and cell phone, Central Trust provided evidence to the trial court that Kennedy and ITI's consistently false position throughout the underlying case had been that Kennedy created a list from memory. (LF 1131, 1160). The discovery and inspection of the Client Lists

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and cell phone directly disproves defendants' contentions. The information contained on the Client Lists and in the cell phone contacts were not simply the product of regurgitating the information from Kennedy's memory, but were the product of a conscious decision to steal trade secrets and other confidential information from Central Trust and use that information to compete against Central Trust. (LF 1131-32).

A direct and important example, and one presented to the trial court by Central Trust, of one way the discovery of the Client Lists would produce a different result in the underlying case is with regard to the claims against Kennedy and ITI for misappropriation of trade secrets, and, ultimately, SignalPoint for misappropriation of trade secret. The trial court's July 14, 2011 Trade Secret Order finding "the identities of Plaintiff's customers/clients is [sic] not, as a matter of law, a Trade Secret as that term is used in the Uniform Trade Secrets Act" was determined by the trial court under the guise that the issue was whether the identities of Central Trust's customers memorized and recorded by Kennedy after resigning from STC constituted a trade secret. (LF 11, 1089-91). When the Court made this determination and entered its Amended Summary Judgment Order in favor of SignalPoint, the only evidence within Central Trust and the trial court's knowledge were the patently false assertions by Kennedy that he had memorized Central Trust's customer information and created his own list from his memory. Even a cursory examination of the Client Lists disproves these assertions. Central Trust urges the newly discovered evidence should be treated as trade secrets under Missouri law. And, though not contained in the record, Kennedy and ITI's counsel's position—from the inception of the underlying lawsuit—was that the parties

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and the trial court would be dealing with a different situation if there actually was a physical client list (albeit knowing such a list existed the whole time).

Finally, as shown by Central Trust in its Motion and argued at the hearing, the newly discovered evidence is not cumulative. The picture of the cell phone and the Client Lists were attached to Central Trust's Motion for Reconsideration and New Trial, and the object of the evidence is not to impeach the creditability or character of any witness.

Irrefutably, Central Trust met its burden to establish the Client Lists and cell phone constituted newly discovered evidence entitling Central Trust to a new trial. At the very least, the existence of the Client Lists and cell phone, which constitute newly discovered evidence, create issues of fact regarding the creation and possession of the Client Lists, precluding summary judgment in favor of SignalPoint. As argued in Point Relied On I, *supra*, while SignalPoint seeks to convince this Court as it did the trial court it is an innocent bystander in Kennedy and ITI's misappropriation of trade secrets, breach of fiduciary duties/confidential relationship and duty of loyalty, such is not the case, nor is it supported by the law. A third party, such as SignalPoint, which acquires information and has actual or constructive knowledge (which SignalPoint did) that the information is considered to be a trade secret—and whose access to such information is a direct result of a breach of duty owed to the trade secret owner STC/Central Trust arising from the confidential relationship between STC/Central Trust and Kennedy—is liable for misappropriation of trade secret to the same degree as Kennedy. *See Cerner Corp.*, 667 F.Supp. 2d at 1077 (citing Mo. Rev. Stat. § 417.453(2)(b) (2001)). Moreover, Central

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Trust proved that Kennedy's and ITI's withholding of the newly discovered evidence was not an inadvertent failure to produce information within the scope of propounded discovery: it was fraud and purposeful misconduct. The trial court's denial of Central Trust's Motion for Reconsideration and for New Trial must be reversed.

C. The Amended Summary Judgment Order In Signalpoint's Favor Must Be Set Aside Pursuant To Rule 74.06(B)(2) Because Kennedy And ITI Engaged In Purposeful Misconduct Regarding Discovery, And Central Trust Presented And Proved This Misconduct Prevented Central Trust From Fully And Fairly Presenting Its Case Against All Defendants By Clear And Convincing Evidence.

Rule 74.06(b)(2) provides a court may relieve a party from a final judgment or order for, among other reasons: "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Mo. R. Civ. P.. 74.06(b)(2)(b)(2) (2012); *see also McCullough*, 349 S.W.3d at 395. Central Trust is entitled to have the Amended Summary Judgment Order in SignalPoint's favor set aside and be granted a new trial if an adverse party or its counsel's misconduct prevented Central Trust from fully exhibiting and trying its case. *State ex rel. Missouri-Nebraska Exp., Inc. v. Jackson*, 876 S.W.2d 730, 734 (Mo. App. W.D. 1994). Hence is the situation in the underlying lawsuit.

Missouri courts require proof of fraud or purposeful misconduct by clear and convincing evidence to support vacating a judgment in reliance on Rule 74.06(b)(2). *McCullough*, 349 S.W.3d at 395; *see also State ex rel. Willey Enterprises., Inc. v. City of*

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Kansas City, 848 S.W.2d 14, 16–17 (Mo. App. W.D. 1992) (citations omitted in original). Central Trust undeniably proved to the trial court, by clear and convincing evidence in its Motion and Suggestions in Support thereof and at the hearing before the trial court, Kennedy and ITI engaged in fraudulent and purposeful misconduct regarding discovery which prevented Central Trust from fully and fairly presenting its case. As more fully argued in Section B, *supra*, and incorporated herein by this reference, Central Trust argued Kennedy, ITI and their counsel's conduct regarding the Client Lists and cell phone constituted purposeful misconduct in that despite numerous requests in written discovery spanning 15 months prior to the discovery of the evidence for Kennedy and ITI to produce STC/Central Trust Client Lists, property and confidential information, Kennedy only verbally disclosed the existence of such Client Lists and cell phone during his May 2011, deposition and such late disclosure constituted purposeful misconduct. (LF 1158-59). Moreover, the fact that Kennedy's and ITI's counsel directed Kennedy to place the Client Lists and cell phone in their firm's own safe deposit boxes months before Central Trust filed the underlying lawsuit,[8] where it was ultimately located upon inspection by Central Trust's counsel, is further evidence of their purposeful misconduct. Kennedy's and ITI's counsel knew that the Client Lists would make a difference in the underlying case from its inception. (LF 1160). Central Trust presented evidence to the

[8] Kennedy and his counsel later in correspondence to Central Trust assured Central Trust that Kennedy retained no information or data of STC or Central Trust. Such a representation has been proved as false.

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trial court of Kennedy and ITI's counsel's position from the beginning of the case that the case would be different if there was a physical customer list, all the while knowing that the Client Lists and cell phone existed, hidden away in the safe deposit boxes. (LF 1160).

Additionally, and as more fully briefed in Point A, *supra*, the newly discovered evidence would have had a probable impact on the outcome of the trial court's ruling on summary judgment, and ultimately on Central Trust's meaningful ability to present its case both at the summary judgment stage and at trial. The evidence presented to the trial court pointedly supports a finding of fraud and purposeful misconduct which was prejudicial to Central Trust and demands vacation of the judgment. Evidence of Kennedy's and ITI's fraudulent and purposeful misconduct in stealing the Client Lists and secreting the Client Lists and cell phone in safe deposit boxes of Kennedy and ITI at the direction of and with their counsel's knowledge, by responding "None" to pointed written discovery requests demanding these very documents, by their subsequent disclosure by Kennedy of the documents in his May 2011, deposition and followed by defendants' expedited briefing request in an effort to take Central Trust's focus off the box, all supports a finding of fraud entitling Central Trust to a new trial.

Presumably in light of this overwhelming evidence of fraud and purposeful misconduct, SignalPoint will argue as it did to the trial court that even if the Client Lists and cell phone constitute newly discovered evidence and even if Kennedy and ITI committed misconduct regarding their production of the Client Lists and cell phone pursuant to Rule 74.04(b)(2), neither is relevant to the judgment in SignalPoint's favor.

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To the contrary, SignalPoint, as Kennedy's and ITI's Registered Investment Advisor, received a direct benefit from Kennedy's and ITI's tortious acts and misconduct. And, because SignalPoint had actual knowledge Central Trust considered the Client Lists, at a minimum, to be trade secrets, and SignalPoint's access to the information was a direct result of a breach of duty owed to STC/Central Trust as the trade secret owner arising from the confidential relationship between STC/Central Trust and Kennedy, SignalPoint is liable for misappropriation of trade secrest to the same degree as Kennedy. *See Cerner Corp.*, 667 F. Supp. 2d at 1077 (citing Mo. Rev. Stat. § 417.453(2)(b) (2001)).

Furthermore, the trial court only granted summary judgment in favor of SignalPoint. (LF 11). The trial court denied Kennedy and ITI's summary judgment motion. Central Trust pled misappropriation of trade secrets against Kennedy, ITI and SignalPoint. (LF 17-50). If the trial court found issues of material fact preventing the award of summary judgment in favor of Kennedy and ITI on Central Trust's claims for misappropriation of trade secrets, yet the uncontroverted material facts show SignalPoint benefited from STC/Central Trust's trade secrets and Confidential Information obtained by Kennedy and ITI by a potential breach of duty owed to STC/Central Trust by Kennedy, the trier of fact, in this case the jury, should determine whether SignalPoint is liable to Central Trust to the same degree as Kennedy and ITI.

The trial court abused its discretion in overruling Central Trust's Motion for Reconsideration and for New Trial. For the reasons set forth above, this Court should order a new trial based upon the newly discovered evidence discussed in Central Trust's Motion and Suggestions in Support thereof filed with and argued to the trial court.

Alternatively, the trial court's Amended Summary Judgment Order should be reversed, with this matter remanded to the trial court with instructions to set aside and vacate its entry of the Amended Summary Judgment Order in favor of SignalPoint and allow Central Trust a new trial on the merits of its claims.

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CONCLUSION

For the reasons set forth above, Appellant Central Trust & Investment Company respectfully requests this Court reverse, or set aside and vacate, the Amended Summary Judgment Order entered in Respondent SignalPoint Asset Management, LLC's favor and remand the matter to the trial court so Central Trust may present its claims to a jury. Alternatively, Central Trust respectfully requests this Court order a new trial based upon the newly discovered evidence—the Client Lists and cell phone—and allow Central Trust a new trial on the merits of its claims against SignalPoint.

Respectfully submitted,

POLSINELLI PC

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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing Appellant Central Trust and Investment Company's Substitute Brief includes the information required by Rule 55.03, *Missouri Rules of Civil Procedure,* and complies with Rule 84.06(b), *Missouri Rules of Civil Procedure.* According to the word count function of Microsoft Word by which it was prepared, the foregoing brief contains 22,891 words, exclusive of cover, certificate of service, this certification, signature block and appendix.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant Central Trust & Investment Company's Substitute Brief and accompanying Appendix were served on the following individuals, to-wit:

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