[Cite as *MNM & MAK Ents., L.L.C. v. HIIT FIT Club, L.L.C.*, 2019-Ohio-4017.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

MNM & MAK Enterprises, LLC, d.b.a. Westerville Title Boxing Club, et al.,	:	
Plaintiffs-Appellees,	:	No. 18AP-980 (C.P.C. No. 17CV-7854)
v.	:	(REGULAR CALENDAR)
HIIT FIT Club, LLC, et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 30, 2019

On brief: *Graff and McGovern, LPA*, and *Luther L. Liggett, Jr.*, for appellees. **Argued:** *Luther L. Liggett, Jr.*

On brief: *Barkan Meizlish DeRose Wentz McInerney Peifer, LLP*, and *Jessica R. Doogan*, for appellants. **Argued:** *Jessica R. Doogan.*

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Defendants-appellants, HIIT Fit Club, LLC ("HIIT Fit") and Robert Richardson, appeal the November 26, 2018 decision from the Franklin County Court of Common Pleas granting judgment to plaintiffs-appellees, MNM & MAK Enterprises LLC, d.b.a. Westerville Title Boxing Club and Knockout New Albany, LLC, on many of their claims and awarding damages to appellees in the amount of $81,776.77. We affirm in part and reverse in part the trial court's decision, and we remand the matter to the trial court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellee Knockout New Albany, LLC ("Knockout") operated as a Title Boxing franchise in New Albany, Ohio until it closed in October 2016. Steve Alleman owned Knockout and several other Title Boxing franchises around central Ohio.

{¶ 3} Appellant Richardson worked as a trainer and sales manager at Knockout and at other Title Boxing franchises Alleman owned. Richardson was originally hired by Alleman in 2011 as a trainer at his Hilliard, Ohio Title Boxing location. In that capacity, Richardson was an independent contractor, and he signed an independent contractor agreement. That agreement included a confidentiality clause, which provided:

> Confidentiality. The Contractor acknowledges that during the engagement [he or she] will have access to and become acquainted with various trade secrets, processes, information, records and specifications owned or licensed by the Company and/or used by the Company in connection with the operation of its business including, without limitation, the Company's business and product processes, methods, customer lists, accounts and procedures. The Contractor agrees that [he or she] will not disclose any of the aforesaid, directly or indirectly, or use any of them in any manner, either during the term of this Agreement or at any time thereafter * * *.

(Emphasis omitted.) (Pls.' Ex. G, Section No. 6, at 1.) Shortly after signing the agreement, Richardson was hired as a full-time employee and began working in membership sales. He did not sign a new employment agreement in that role. Richardson later worked at Alleman's other locations and was eventually hired as the head trainer at Knockout.

{¶ 4} Richardson's roles at Alleman's facilities required that he have access to and use the Title Boxing franchise software, known as the CLR system. The CLR system is used to manage membership accounts, which includes maintaining personal contact information for the members. Although the software is the same at each Title Boxing location, each facility's system is separate and password protected. There are three passwords for each location's system: staff, manager, and franchisee. The passwords allow different levels of access to the CLR system and the information stored in it. The staff password allows sales staff to enter membership information and payment information. Thereafter, the sales staff can no longer access or see the member's credit card information. Staff can, however, even with only the sales staff password, see the member's name, email address, home address, and other contact information. Access increases with the manager password and then the franchisee password. The franchisee password provides access to all of a franchisee's Title Boxing CLR accounts. At some point, Alleman gave Richardson the franchisee password so he could "access anything that needed to be done" for any of Alleman's franchises.

{¶ 5} Appellee MNM & MAK Enterprises, LLC, d.b.a. Westerville Title Boxing Club ("MNM"), operates as a Title Boxing franchise in Westerville, Ohio. Maria Manzo owns MNM. After Knockout closed, Alleman agreed to sell Knockout's membership accounts to Manzo. The parties entered into a contract on October 28, 2016 whereby MNM agreed to purchase "all Membership Accounts" listed in an attached exhibit. (Pls.' Ex. E.) The contract specified that MNM would service all of the membership accounts it purchased. The exhibit attached to the contract included a list of all of the members from Knockout who were currently active, although some of the members were in the process of canceling their membership, along with their contact information. Upon completion of the sale, the franchisor, Title Boxing International, transferred the Knockout membership accounts to MNM through the CLR system. MNM paid Knockout $20,000 for those accounts.

{¶ 6} Richardson was working at Knockout when it closed, and he continued to work at Alleman's other facilities until approximately August 2017. In August 2017, in partnership with his wife and two others, Richardson opened his own gym, appellant HIIT Fit, near New Albany, Ohio. On August 21, 2017, Richardson sent an email to 395 email addresses announcing the grand opening of HIIT Fit. (Pls.' Ex. C.) Richardson obtained many of the email addresses he used for this email from Knockout's CLR system. Some of Knockout's previous members became members at HIIT Fit after it opened. Manzo did not know Richardson had taken contact information from Knockout's CLR system when she purchased the membership accounts from Knockout, and Richardson did not know Alleman sold or was planning to sell the membership accounts when he accessed the customer contact information on Knockout's CLR system.

{¶ 7} On August 30, 2017, MNM filed an action against HIIT Fit, asserting a claim for misappropriation of trade secrets.[1] MNM also filed a motion for a temporary restraining

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[1] MNM also filed claims against one of its former employees, Jamie Walker, at that time. MNM alleged that Jamie Walker misappropriated trade secrets in conjunction with HIIT Fit and breached a duty of loyalty he owed to MNM. MNM dismissed its claims against Walker without prejudice on September 1, 2017.

order and preliminary injunction to stop HIIT Fit from using or disclosing MNM membership and contact information. The parties agreed to and the court issued a temporary restraining order enjoining HIIT Fit from having "any contact with or solicitation of [MNM's] membership and customers, including signing up any new member who [HIIT Fit] contacted" through the August 21 email. (Sept. 1 2017 Temporary Restraining Order at 1.) HIIT Fit was, however, allowed to offer complementary use of its facilities to individuals included on the email.

{¶ 8} Following a preliminary injunction hearing, the magistrate denied MNM's motion for a preliminary injunction because MNM failed to establish a substantial likelihood of success on the merits. The magistrate found that the evidence conflicted regarding what exactly MNM purchased in its October 28, 2016 agreement with Knockout. The magistrate also found insufficient evidence to support MNM's contention that the contact information Richardson used was a protected customer list and that Knockout took steps to secure the list and protect its secrecy.

{¶ 9} On September 26, 2017, MNM filed an amended complaint. It added Knockout as a plaintiff, and it also added Richardson as a defendant. Plaintiffs-appellees asserted claims against both HIIT Fit and Richardson for misappropriation of trade secrets and unjust enrichment. Knockout asserted a claim against Richardson for breach of a duty of loyalty. Appellees requested an injunction, attorney fees, monetary damages, and prejudgment statutory interest.

{¶ 10} The trial court held a bench trial on October 3, 2018. The trial court issued its decision on November 26, 2018. In its decision, the trial court found that Richardson had access to Knockout's CLR system during his employment, which included access to membership information. The trial court found the membership information contained on the CLR system was a trade secret because the "information was password protected, and treated by Alleman as a trade secret." (Decision at 2; *see also* Decision at 4.) The trial court found further that Richardson misappropriated the trade secrets when he accessed and took the information for his own use without appellees' knowledge or consent. The trial court enjoined appellants from any further use of the information Richardson misappropriated. As to monetary damages, the trial court awarded appellees the full amount of monetary damages they sought, $81,776.77. According to the trial court, this was a "reasonable amount of damages" based on the evidence of appellants' revenues. (Decision at 5.) The court also awarded appellees their requested prejudgment statutory interest, beginning on the "date the cause of action arose, which is the date of the instigating email, or August 21, 2017." (Decision at 5.) But the trial court declined to award appellees any punitive damages or attorney fees. "While Richardson's misappropriation and use was certainly willful (not to mention selfish and lazy)," the trial court found that "the evidence [did] not support a finding that he acted maliciously." (Decision at 5.)

{¶ 11} Richardson and HIIT Fit appeal the trial court's decision.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellants assert the following assignments of error:

> [1.] The trial court erred by simultaneously holding Defendant-Appellant, Robert Richardson, to the incompatible legal standards of both a W-2 Employee and an Independent Contractor.
>
> [2.] The trial court erred by improperly applying the Ohio Trade Secrets Act, Ohio Revised Code Section 1333.61.
>
> [3.] The trial court erred by improperly calculating damages.

III. LAW AND ANALYSIS

{¶ 13} We review civil appeals from bench trials applying a manifest weight of the evidence standard. *See* App.R. 12(C); *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77 (1984). We, thus, presume the trial court's findings are correct if they are " 'supported by some competent, credible evidence going to all the essential elements of the case.' " *Seasons Coal Co.* at 80, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 14} We review a trial court's determination on damages for an abuse of discretion. *Roberts v. United States Fid. & Guar. Co.,* 75 Ohio St.3d 630, 634 (1996). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). We also review a decision awarding prejudgment interest for an abuse of discretion. *See Wagner v.*

Midwestern Indem. Co., 83 Ohio St.3d 287, 293 (1998), citing *Kalain v. Smith*, 25 Ohio St.3d 157, 159 (1986); *Hanes v. Jones*, 9th Dist. No. 08CA009469, 2009-Ohio-2944, ¶ 5.

A. First Assignment of Error – Richardson's Employment Classification

{¶ 15} In their first assignment of error, appellants argue that the trial court erred because it found Richardson subject to the employment agreement he signed when he started working for Alleman as an independent contractor at the Hilliard Title Boxing facility. According to appellants, this error affected the trial court's overall decision on liability.

{¶ 16} The trial court's entire discussion about that employment agreement is as follows:

> Richardson signed an employment agreement with Alleman. (Plaintiff's Exhibit G) In paragraph 6 titled "Confidentiality" Richardson acknowledged that he had access to various trade secrets owned by Alleman and that he, Richardson, would not disclose any trade secrets directly or indirectly, or use any of them in any manner, either during the term of the Agreement or at any time thereafter.

(Decision at 1-2.) The trial court never referred to the agreement again and never suggested that Richardson was still bound by the agreement. The trial court never suggested that any part of its decision on liability was predicated on a breach of that agreement. This makes sense because appellees never brought a cause of action for breach of that agreement. Neither their allegations nor the trial court's decision could be based on breach of that agreement; it contains a mandatory arbitration provision and specifies that Kansas law applies. Similarly, the trial court never made a finding of fact or conclusion of law about Richardson's status as either an independent contractor or an employee.

{¶ 17} The trial court found Richardson misappropriated trade secrets based upon Ohio law, not on the parties' contract. The confidentiality provision contains in the employment agreement Richardson signed as an independent contractor is relevant to the consideration of whether Alleman considered his customer lists confidential trade secrets and whether Richardson knew that such lists were confidential and he did not have consent to use them. The trial court did not err when it referenced Richardson's previous employment contract.

{¶ 18} Appellants' first assignment of error fails because it mischaracterizes the basis for the trial court's decision. Thus, we overrule appellants' first assignment of error.

B. Second Assignment of Error – Application of Ohio's Trade Secrets Act

{¶ 19} In their second assignment of error, appellants contend that the trial court did not apply Ohio's Trade Secrets Act, R.C. 1333.61, properly.

{¶ 20} Under R.C. 1333.61(D):

> "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

{¶ 21} R.C. 1333.61(B) defines "misappropriation" to mean any of the following:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;
>
> (2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:
>
> (a) Used improper means to acquire knowledge of the trade secret;
>
> (b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed

> a duty to the person seeking relief to maintain its secrecy or limit its use;
>
> (c) Before a material change of their 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.

{¶ 22} First, appellants argue that the trial court erred because it failed to apply the six-factor test in *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513 (1997) to its trade secret analysis.

{¶ 23} In *Plain Dealer*, the Supreme Court of Ohio set forth a six-factor test to assist in determining if something is a trade secret under R.C. 1333.61(D):

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131, 134-135, 7 Ohio B. Rep. 165, 169, 454 N.E.2d 588, 592; *see Water Management, Inc. v. Stayanchi* (1984), 15 Ohio St. 3d 83, 86, 15 Ohio B. Rep. 186, 188, 472 N.E.2d 715, 718.

Plain Dealer at 524-25. "A business or possessor of a potential trade secret must take some active steps to maintain its secrecy in order to enjoy presumptive trade secret status." *Id.* at 525. Appellants contend that application of this test is mandatory and that the trial court must affirmatively analyze the facts in the case under the test in order to render a decision that withstands appellate scrutiny. But appellants fail to cite to any law requiring the trial court to do as they request.

{¶ 24} In *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171 (1999), decided two years after *Plain Dealer*, the Supreme Court considered whether the appellants were properly granted summary judgment on the appellee's misappropriation of a trade secret claim related to the former employee's use of a client list. In the course of that analysis, the Supreme Court stated:

> "Where information is alleged to be a trade secret, a factfinder *may* consider, e.g., the amount of effort or money expended in obtaining and developing the information, as well as the amount of time and expense it would take for others to acquire and duplicate the information. *Plain Dealer*, 80 Ohio St. 3d at 524-525.

(Emphasis added.) *Fred Siegel, Co.* at 182. That case did not recite any of the other factors from *Plain Dealer* or otherwise mandate that trial courts analyze trade secret cases under the factors. Instead, the Supreme Court's language suggests that the *Plain Dealer* factors are advisory, to be used to the extent they are applicable, to assist the trial court and factfinder.

{¶ 25} Likewise, in *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396 (2000), the Supreme Court listed the *Plain Dealer* factors, but then immediately reaffirmed that it is ultimately the statute that controls the analysis, not the factors. The *Besser* Court stated: "[a]n entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information *under the statute* * * * ." (Emphasis added.) *Id*. at 400. We have also held previously that " 'no single factor of the *Plain Dealer* test is dispositive.' " *Columbus Bookkeeping & Business Servs., Inc. v. Ohio State Bookkeeping, LLC*, 10th Dist. Franklin No. 11AP-227, 2011 Ohio App. LEXIS 5655, *10-11 (Dec. 30, 2011), quoting *Thermodyn Corp. v. 3M Co.*, 593 F. Supp.2d 972, 986 (N.D. Ohio 2008). The *Plain Dealer* factors are meant to assist courts and factfinders in their analysis of whether something is a "trade secret." Failure to utilize the factors as part of the analysis, particularly when many of the factors are not applicable in the context of the alleged trade secrets at issue, is not reversible error.

{¶ 26} The relevant inquiry is whether the trial court's determination that the Knockout's list constitutes a trade secret under R.C. 1333.61(D) is supported by competent, credible evidence. Under the statute and analyzing the *Plain Dealer* factors, competent, credible evidence exists to support the trial court's determination.

{¶ 27} All parties agree that Knockout's CLR system, and access to the client list, was protected by a password. Each Title Boxing franchise can only access that facility's own CLR system and client list, unless the same franchisee owns multiple franchises and utilizes the franchise password to access his other franchises' CLR systems. Alleman testified that Knockout's membership base is its largest asset. He spent years compiling the list, and the

CLR system contains contact information for every person who ever signed up to take a class or join Knockout. The list is unique to Knockout, the result of years and funds expended to market Knockout and attract business. Alleman testified that he spent a minimum of $5,000 per month across his franchises on marketing and advertising to build his customer base. These marketing efforts included radio advertisements and attending public events to promote the franchise. Alleman testified that the cost to generate the membership base was $120,000 to $150,000 over the years. The result of these efforts was a membership base that generated $8,000 to $10,000 worth of revenue for Knockout every month. Alleman testified that employees had to receive authorization from Alleman to get the CLR system password. Alleman considers the list a trade secret. He testified that there is no public record of the list, and he never used the list in a public way or provided the list to any mailing company. Because of its value, Alleman was able to sell Knockout's customer base to MNM for $20,000. Under R.C. 1333.61(D), and the *Plain Dealer* factors, there is competent, credible evidence to support the trial court's determination that the list is a trade secret.

{¶ 28} Appellants also argue that Richardson's "acts do not, under the law, constitute misappropriation." (Appellants' Brief at 28.) As to this point, appellants contend that Richardson had Alleman's express consent to access Knockout's CLR system and he was not bound by any employment agreement preventing him from using the information.

{¶ 29} Contrary to appellants' contentions, express consent to access trade secret information in the course of employment does not also confer express or implied consent to use the information for non-work, personal purposes. Even Richardson himself admitted that he did not have the right to access the CLR system except in his capacity as an employee, and he took client information without Alleman's permission.

{¶ 30} Employees owe a duty of good faith and loyalty regardless of whether they signed an employment agreement with their employer. *See Goal Systems, Internatl., Inc. v. Klouda*, 10th Dist. Franklin No. 84AP-168, 1985 Ohio App. LEXIS 8799, *7 (Oct. 10, 1985) ("An employee owes a duty of good faith and loyalty to his employer's interests."); *Cartwright v. Falls Heating & Cooling*, 9th Dist.Summit No. 16079, 1994 Ohio App. LEXIS 2936 (June 29, 1994) (employee continues to owe a duty of loyalty even original employment agreement terminated). The presence of an explicit, binding confidentiality or employment agreement is not required to find misappropriation of a trade secret. *See Al Minor & Assocs. v. Martin*, 117 Ohio St.3d 58 2008-Ohio-292 (employee liable for misappropriation despite the lack of an employment agreement where he did not take anything but had memorized customer lists); *see also Dill-Elam, Inc. v. Smallwood Bros. Transp. Servs., LLC*, 12th Dist. CA2005-01-001, 2005-Ohio-6554, ¶ 9 ("The fact that there were no written agreements, however, does not eliminate the common law duty of good faith and loyalty. *Busch v. Premier Integrated Med. Assoc., Ltd.*, 2d Dist. No. 19364, 2003-Ohio-4709, ¶ 72.")

{¶ 31} Appellants' arguments that Richardson did not misappropriate trade secrets because he had consent to access the CLR system and because he was not bound by an employment agreement are without merit. Based on Richardson's own admissions that he knew he did not have the right to access the CLR system for his own purposes, knew he did not have Alleman's consent to take the information, took individual contact information from the CLR system, and used contact information he obtained, at least in part from the CLR system to send his August 21 email, there was competent, credible evidence to support the trial court's determination that Richardson and HIIT Fit misappropriated trade secrets. We overrule appellants' second assignment of error.

C. Third Assignment of Error: Damages and Prejudgment Interest

{¶ 32} In their final assignment of error, appellants argue that the trial court improperly calculated damages, both in its compensatory damage award for the misappropriation and in its decision to award prejudgment interest.

1. Compensatory Damages

{¶ 33} Damages for misappropriation of trade secrets are governed by R.C. 1333.63. It states:

> (A) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant in a civil action is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may

> be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both, for a misappropriator's unauthorized disclosure or use of a trade secret.
>
> (B) If willful and malicious misappropriation exists, the court may award punitive or exemplary damages in an amount not exceeding three times any award made under division (A) of this section.

Thus, R.C. 1333.63(A) allows a party to recover as damages its actual loss or the unjust enrichment gained by the wrongful party. *See Miller Med. Sales, Inc. v. Worstell*, 10th Dist. Franklin No. 93AP-23, 1993 Ohio App. LEXIS 6251, *3-4 (Dec. 21, 1993) ("plaintiff would be entitled to the higher amount of either plaintiff's lost profits or defendant's gain."); *see also Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d 246, 251 (10th Dist. 1985) ("[T]he proper measures of damages for misappropriation of trade secrets * * * are either the award to plaintiff of profits lost * * * or an accounting by defendant of profits gained by the misappropriation.").

{¶ 34} Regardless of whether the damages calculation is based on a plaintiff's loss or a defendant's gain, the damages figure " 'cannot be based upon a gross revenue amount.' " *Berardi's Fresh Roast, Inc. v. PMD Enters., Inc.*, 8th Dist. No. 93920, 2010-Ohio-5124, ¶ 24, quoting *Try Hours, Inc. v. Swartz*, 6th Dist. No. L-06-1077, 2007-Ohio-1328, ¶ 23. Rather, "Ohio law 'requires that evidence of lost profits be based upon an analysis of lost 'net' profits after the deduction of all expenses impacting on the profitability of the business in question.' " *Worstell* at *4, quoting *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 48 (1989) (Wright, J. concurring in part and dissenting in part); *see also Berardi's Fresh Roast, Inc.* at ¶ 27 (defendant's gross billings must be reduced by costs and expenses defendant incurred to determine defendant's net gain); *Swartz* at ¶ 23.

{¶ 35} We have also recognized that damages " 'must be demonstrated with reasonable certainty.' " *Worstell* at *3, quoting *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65 (1988), paragraph one of the syllabus. The burden is on the plaintiff to present evidence not only of profits earned "but also regarding the issue of expenses." *Worstell* at *5.

{¶ 36} In *Worstell*, we reversed a trial court's damages award in a breach of a non-compete action because it awarded the defendant's gross revenue as damages instead of net profits, "represented by the total gross billings from proscribed accounts which defendant had serviced." *Id.* at *5. We found that it was error for the trial court to fail to "take into consideration any costs and expenses defendant would have incurred in producing income on the accounts." *Id.* We also specifically recognized in that case that "the burden is upon plaintiff to present evidence not only of the commissions earned but also regarding the issue of expenses." *Id.* The trial court in *Worstell* acted improperly when it placed the burden on the defendant to present evidence of his expenses and the plaintiff's expenses.

{¶ 37} Here, appellees requested damages in the amount of $81,776.77 based on their calculation of the membership fees and other revenue HIIT Fit allegedly received from individuals who were previously Knockout members — i.e. appellants' profits, rather than appellees' losses. Appellees admittedly based their calculation on appellants' gross revenue. The trial court found appellees' proposed amount reasonable and "supported by the evidence for revenues" appellants received from Richardson's misappropriation. (Decision at 5.) The trial court never considered or discussed whether and how to reduce this proposed gross revenue figure by appellants' expenses to try to reach an amount representing appellants' net profits. The trial court's failure to consider appellants' expenses and net profit was an abuse of discretion.

{¶ 38} Even without subtracting appellants' expenses, the trial court used a net revenue amount that was arbitrary. Appellees did not retain a damages expert to opine about appellees' losses or appellants' profits. Rather, appellees themselves testified about damages based on their own review of HIIT Fit's financial records. Appellees admit that they calculated damages by looking at the members HIIT Fit gained in the five-month window directly following Richardson's August 21 email. Appellees then extrapolated this new membership rate figure out over the course of one year, thereby assuming that HIIT Fit would gain new members as a result of Richardson's misappropriation and the August 21 email at the same rate it did immediately following dissemination of the email. But appellants' membership records and financial data show that HIIT Fit gained the most new members from Knockout's customer list in August — the month in which Richardson sent the email. The number of new members then continued to decline every month thereafter.

Appellees admitted at trial that there was a fall in HIIT Fit's revenue and a drop in its new memberships over the course of the five months following the August 21 email. Appellees admitted that by October 2017, HIIT Fit's new membership sign ups began to "be more in line with a start-up business that did not have access" to the misappropriated customer list. There is no allegation that appellants used the misappropriated trade secrets beyond the August 21 email. Appellees did not submit any evidence to suggest that HIIT Fit would continue to gain members due to Richardson's misappropriation at the same rate it had right after the email was sent. In fact, the evidence shows exactly the opposite. The evidence plainly does not support appellees' gross revenue calculation based on membership enrollment.

{¶ 39} It is also worth noting that the parties testified that some year-long memberships are paid in full when a member joins a gym. Yet Appellees did not account for the impact a member's up-front payment of a year-long membership might have on appellants' monthly revenue for the remainder of the year.

{¶ 40} Appellees then continued with their speculative calculation of damages when they apportioned appellants' other revenue to the misappropriation. In addition to paid memberships, appellants received and deposited other revenue based on personal training fees, sales of merchandise and nutritional supplements, loans, and capital contributions from its owners. Rather than consider the source of this income, appellees simply assumed that the revenue was attributable to the misappropriation at the same percentage that they found membership fees were. Appellees made this unfounded assumption despite admitting at trial that they had no idea what the other revenue could possibly represent. Appellees alleged that 55 percent of HIIT Fit's membership dues for the first 5 months it was open were attributable to members it acquired from Richardson's misappropriation of the customer list. It then, without any evidence, alleged that 55 percent of HIIT Fit's other revenue, for the entire year, must also be attributable to the misappropriation. There is no evidence that appellees considered the source of that revenue.

{¶ 41} Without analysis, the trial court accepted appellees' proffered damages figure, based on the above noted faulty assumptions. In so doing, because of the many faulty and arbitrary assumptions appellees used in calculating their damages, the trial court abused its discretion in its contemporary damages award.

{¶ 42} We sustain appellants' third assignment of error as it relates to the trial court's compensatory damages award. We vacate the damages award, and we remand the matter back to the trial court on the issue of compensatory damages.

2. Prejudgment Interest

{¶ 43} Appellants also argue that the trial court erred when it awarded prejudgment interest beginning on August 21, 2017, the date Richardson sent the email using the misappropriated trade secrets. We agree.

{¶ 44} Appellees requested that the trial court award them prejudgment interest. The trial court awarded appellees prejudgment interest citing R.C. 2743.18. That statute, however, applies only to actions against the state. The prejudgment interest statute that applies to appellees' action is R.C. 1343.03. That statute distinguishes between cases in which there has been a prior settlement between the parties, R.C. 1343.03(B), which is not applicable here, and cases in which there has not been a settlement, R.C. 1343.03(C). In the latter case, the statute provides:

> (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, *** the court determines *at a hearing held subsequent to the verdict or decision* in the action that the party required to pay the money *failed to make a good faith effort to settle* the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:
>
> (a) In an action in which the party required to pay the money has *admitted liability* in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;
>
> (b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the *deliberate purpose of causing harm* to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;
>
> (c) In all other actions, for the longer of the following periods:
>
> (i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree

> was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.
>
> (ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(Emphasis added.) R.C. 1343.03(C). This statute cannot apply to support a prejudgment interest award here because the trial court never held a hearing on the issue after reaching its decision on liability, and no party has ever argued that appellants failed to settle the action in good faith. Furthermore, even if we could move past R.C. 1343.03(C)(1), appellants here have never admitted liability, R.C. 1343.03(C)(1)(a), and the trial court explicitly found that appellants did not act with malice, R.C. 1343.03(C)(1)(b). Even 1343.03(C)(1)(c)'s application to "all other actions" still would not allow prejudgment interest to attach from the date of the August 21 email.

{¶ 45} Because the trial court erred when it awarded appellees prejudgment interest, we sustain appellants' third assignment of error as to that issue. We vacate the trial court's prejudgment interest award.

IV. CONCLUSION

{¶ 46} Because the trial court did not establish liability based on the independent contractor agreement Richardson signed, we overrule appellants' first assignment of error. Because the trial court's determination that appellants misappropriated trade secrets was supported by competent, credible evidence, we overrule appellants' second assignment of error. We affirm the trial court's decision finding HIIT Fit liable for misappropriation of trade secrets. Because the trial court abused its discretion in its compensatory damages award and in its prejudgment interest award, we sustain appellants' third assignment of error. We vacate the trial court's damages and prejudgment interest award, and we remand the matter to the trial court to determine the damages to which appellees are entitled.

Judgment affirmed in part and reversed in part;
remanded with instructions.

BRUNNER, J., concurs.

NELSON, J., concurs in parts and concurs in judgment.

NELSON, J., concurring in the opinion in part and concurring in judgment.

{¶ 47} I join the opinion of this court in upholding the conclusion of the trial court that "Defendants jointly and intentionally misappropriated and used the Trade Secret Assets of Plaintiffs," *see* trial court Decision at ¶ 18, and in vacating the trial court's prejudgment interest award. I write separately, however, because while I agree that the trial court must reassess the amount of its "compensatory damages" award, I do not believe that the reappraisal needs to be as sweeping as some of the language in the majority opinion might be read to suggest.

{¶ 48} I think that the trial court's damages calculation went against the manifest weight of the evidence only insofar as its equitable royalty formula resulted in awarding MNM a percentage of what MNM concedes were owner "capital investments" in HIIT Fit. *See* Plaintiff's Post-Trial Proposed Findings of Fact and Conclusions of Law at ¶ 55 (including in calendar year 2017 HIIT Fit revenues as then annualized for the formula certain "capital investments of Jesse Cervantez, identified as $11,900.00"); *see also* Plaintiffs' trial Ex. K (Cervantez investments). To the extent that demonstrated contributions to capital went into the HIIT Fit aggregate revenue amount as then extrapolated to a full year and divided by 55% (the percent of HIIT Fit clients fairly attributable to the trade secrets misappropriations) to obtain the $81,776.77 damages amount, what the trial court found to be "the portion of Defendants' revenues attributable to enrolling Plaintiffs' membership" was overstated. *See* Decision at ¶ 22-23 and Plaintiffs' trial Ex. I.

{¶ 49} Correcting revenue amounts so as to remove what the trial court determines to have been owner contributions to capital will have some significant effect on the final damages figure, but that is the only alteration that I myself would see as necessary under the law. And that change would not mandate limiting the ultimate aggregate revenue sum simply to monies attributable to membership dues: trial testimony established, for example, that beyond those fees, HIIT Fit also collected thousands of dollars for "personal training and retail," *see* Tr. at 220 (Richardson testimony), and there is no reason the trial court would have to conclude that those additional sums would be allocable to members from the purloined lists in percentages different from the proportion of former MNM members to the new HIIT Fit membership.

{¶ 50} Nor would the change that I see as necessary require a different basic formula. The 55% figure, for example, seems to me appropriately grounded in the evidence. HIIT Fit part owner Mr. Cervantez conceded at trial that "the overwhelming percentage" of HIIT Fit members from the first five months had been listed on the trade secret rosters. Tr. at 207-08. And as the majority decision acknowledges, *see* ¶ 38 *supra*, HIIT Fit's acquisition of new members tailed off significantly after those lists had been plumbed. Moreover, the benefit to HIIT Fit of having (mis)used the lists was not a one-time gain limited to August 2017; memberships continue on into the future, *see id.* ¶ 39, and members also pay for services not covered by the membership fees, *see* Tr. at 220.

{¶ 51} The trial court turned to the governing statute in reciting that: "In lieu of damages measured by any other methods [and the statute also permits damages to 'include both the actual loss caused by misappropriation and the unjust enrichment' not subsumed in that amount], the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both * * *." Decision at ¶ 21, quoting R.C. 1333.63(A).

{¶ 52} Here, those circumstances included HIIT Fit's illicit acquisition of customer lists that the majority opinion correctly notes had cost between $120,000 and $150,000 to build up over time, *see supra* at ¶ 27, Tr. at 237 (Alleman testimony). Armed with that misappropriated data, HIIT Fit launched its new business without incurring any substantial advertising costs—that is, without paying anything to speak of for customer acquisition. *See* Tr. at 163 (Richardson testimony: advertising budget of $2,000 "for the entire year"; "we may have spent $1,000"). Indeed, on this record, there is no particular reason for the trial court to have to conclude that gaining or servicing those customers cost HIIT Fit anything significantly beyond the fixed costs that the business would have required in any event.

{¶ 53} In the context of this case, I do not believe that the statutory references to "unjust enrichment" or to "a reasonable royalty that is equitable under the circumstances" when relevant loss and benefit are considered restricts a compensatory damages calculation to "profits earned." *Compare* ¶ 35, *supra*. HIIT Fit benefited unjustly whether or not it made any profit at all, and the trial court was within its authority to find that HIIT reaped significant revenues that it would not have accrued but for the misappropriation. And any lack of documentation regarding HIIT Fit's money coming in and money going out does not seem properly chargeable to MNM: HIIT Fit declined to produce tax returns, its balance sheet, its income statements, and the like because "[w]e didn't have the information available to provide it * * * * in [organized] form." Tr. at 209-10, 222 (Cervantez testimony); *see also id.* at 168-69, 176, 181-82 (Richardson testimony: tax returns and bank statements not produced; doesn't know whether he has made capital contributions of $10,000 or $100,000; "no" idea to explain variance between membership dues received and deposits; etc.).

{¶ 54} So the record here reflects that "the issue of expenses" that might be especially salient in certain contexts, *compare* Majority Decision at ¶ 35, quoting *Miller Medical Sales, Inc. v. Worstell*, 10th Dist. No. 93AP-23, 1993 Ohio App. Lexis 6251, *3, is rather different here because (1) the (client acquisition) expenses that might ordinarily be deducted from revenues were, by virtue of the misappropriation itself, not incurred; (2) the trial court might reasonably find the nature of the revenues generated by customer list misappropriation not likely to relate to other significant costs beyond the already fixed costs of the business at any (low, initial) customer volume; and (3) the trial court could reasonably ascribe any lack of evidence on further costs or benefits to HIIT Fit.

{¶ 55} *Worstell* does not seem to me to provide much of a guide here beyond the general proposition that consideration of revenues should be net of related costs. First, that was a contract case involving breach of a non-compete clause, and commissions earned there necessarily would have gone hand-in-hand with expenses (of which there was evidence in the record). 1993 Ohio App. Lexis 6251, * 5-6. Second, *Worstell* did not involve application of the damages statute that obtains here—not only because misappropriation of trade secrets entered into the analysis only through the plaintiff's analogy, but also because that 1993 case pre-dated the July 20, 1994 effective date of the misappropriation damages statute, R.C. 1333.63.

{¶ 56} In sum, I concur in the judgment of this court and in those parts of the majority decision itself that do not relate to the "compensatory damages" calculation. I do think that the trial court's calculation went against the manifest weight of the evidence in penalizing HIIT Fit (and commensurately rewarding MNM) for contributions to capital by HIIT Fit's owners, but I otherwise would defer to the assessments of the trial court that heard the witnesses first hand; I respectfully diverge from the analysis of my colleagues in that regard.

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