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NORTH JERSEY MEDIA GROUP, INC., Plaintiff, vs. IC SYSTEMS SOLUTIONS, INC., COMPUTER NETWORK SOLUTIONS, LLC, PHILIP NOLAN, NANCY NOLAN, THE ESTATE OF PETER VAN LENTEN, JOHN DOES 1-10 (fictitious designations), and ABC COMPANIES 1-10 (fictitious designations), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-2791-13 CIVIL ACTION OPINION

Argued: **January 9, 2014**
Decided: **February 18, 2014**

Honorable Robert C. Wilson, J.S.C.

THIS MATTER comes before the Court pursuant to three motions for summary judgment filed by Defendants in the instant matter: Stephen R. Bosin, Esq., on behalf of the Estate of Peter Van Lenten; John R. Dineen, Esq. (Netchert, Dineen & Hillman, Esqs.), on behalf of Philip Nolan, Nancy Nolan, and IC System Solutions, Inc.; and Giuseppe Franzella, Esq. (Lazer Aptheker Rosella & Yedid, P.C.; Christina M. Rosas, Esq. on the brief.) on behalf of Computer Network Solutions, LLC. Samuel J. Samaro, Esq., (Pashman Stein, P.C.) filed opposition on behalf of the Plaintiff, North Jersey Media Group, Inc. Oral argument was heard on January 9, 2015.

FACTUAL BACKGROUND

Plaintiff in this matter is North Jersey Media Group, Inc. [hereinafter "NJMG"], a well-known media company that publishes two daily newspapers, including its flagship newspaper

The Record, two websites, and nearly forty weekly newspapers. NJMG contends that "[o]ver an eight-year period of time, … [NJMG] was the victim of a technology equipment and services scam orchestrated by a former company executive in collusion with two outside vendors." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, page 1. Particularly, Plaintiff's Complaint alleges that the Defendants engaged in fraud, conversion, unjust enrichment, consumer fraud, civil conspiracy, and pleads the need for a constructive trust in this matter. The essence of Plaintiff's allegations is that Defendants IC System Solutions, Inc. ("ICSS"), Computer Network Solutions, LLC ("CNS"), Philip Nolan, and Nancy Nolan conspired with Peter Van Lenten, Jr. [1] ("Van Lenten"), then the head of NJMG's Information Technology ("IT") Department to defraud NJMG, by, *inter alia*, charging unreasonable rates for equipment and services, providing services that were unnecessary, and otherwise scamming NJMG out of funds for the procurement of IT equipment and services.

On August 23, 2013, this Court heard Defendant CNS' motion to dismiss the Complaint with prejudice. In denying CNS' application, the Court noted on the record that "it would be premature for this Court to dismiss the cause of action where the serious allegations… have been laid out by Plaintiff, that other, additional torts could arise even though there may have been a contract action *ab initio*, and as such the Court will see if the proof materializes during the discovery process.[2]" Following that ruling, approximately eighteen thousand pages of discovery have been exchanged, over the course of five hundred and seventy days. Discovery concluded on

[1] Unfortunately, Mr. Van Lenten passed away in April of 2010, prior to the filing of this lawsuit. His estate is a named defendant in this action.

[2] The Court notes that the Defendants had been insistent that the Complaint in this matter constituted nothing more than spurious litigation at the outset, insofar as it attempted to characterize tortious causes of action out of purported breaches of contract. While that finding is now clearly evident, the Court stands by its ruling on Defendants' previous motion for dismissal.

December 12, 2014. Despite all of this discovery, and the statements of material facts submitted in connection with this motion, with approximately two hundred separate numbered statements of fact, the Court finds that the material facts in this matter are undisputed. To the extent these facts are pertinent to Defendants' motions, they are encapsulated herein.

Defendants ICSS and CNS were IT vendors who did business with NJMG for the relevant time periods, from approximately 2001-2009. As represented by the Plaintiff, ICSS is a corporation that is in the business of assisting its clients in managing their computer and networking equipment procurement, design, and installation. CNS is a full-service technology company that represented that it could provide all equipment and services necessary to maintain and safeguard its clients' business-critical IT operations. Defendant Nancy Nolan is the CEO of ICSS. Defendant Philip Nolan is the Vice President of ICSS, and owned a 50% stake in CNS until 2013, which he apparently received in exchange for a loan he made to CNS early in the company's history. Alan Cook, a principal and managing member of CNS, owned the other 50% interest in CNS.[3] CNS and ICSS shared office space in Hillsdale, New Jersey throughout their relationship with NJMG. They submitted certain work proposals to NJMG jointly, and often referred business to one another. Despite the close relationship of the companies, however, it is undisputed that they were legally distinct entities.[4] As regards CNS, and as background to each

[3] Plaintiff has filed a motion seeking leave of Court to amend its Complaint and to add Alan Cook as a defendant. This motion was made returnable on the day of trial, February 23, 2015. In light of the Court's opinion of this date, said motion is denied as moot, as no liability can be established on the part of Mr. Cook where it was not established as to any other party.

[4] Plaintiff denied Defendant CNS' undisputed statement of material fact, ¶ 7, which stated that "CNS and ICSS are not related entities," citing its Answer. For purposes of summary judgment, the Court accepts as true the premise that CNS and ICSS clearly had some relationship. However, the Court notes the simple fact that they are, and remain, distinct legal entities. There is no pending application to pierce the corporate veil, or for other equitable remedies, before the Court or mentioned in the Complaint.

of the transactions to be discussed, CNS promised NJMG that it could provide equipment and services needed by NJMG at a lower cost than manufacturers.[5]

Peter Van Lenten, Jr., ("Van Lenten") was employed by NJMG for over 20 years, most recently as the Vice President of Information Technology ("IT"). In that capacity, he was responsible for a multi-million dollar technology budget, and is claimed to have been a trusted member of Plaintiff's management team. His recommendations "were largely accepted without meaningful oversight." Certification of Jennifer Borg, ¶ 4. Van Lenten was introduced to Defendant Philip Nolan through Jon Markey, a non-party to this action and former President of NJMG. Jon Markey and Philip Nolan became acquainted, and, after learning of Mr. Nolan's business, Mr. Markey "suggested that Nolan contact Peter Van Lenten to see if Nolan could obtain IT business from NJMG." NJMG's Counter Statement of Material Facts, ¶ 16. Thereafter, Van Lenten and Philip Nolan met, and Van Lenten called Mr. Nolan some months later regarding a problem with a particular computer system, wherein Mr. Nolan arranged for a CNS engineer to fix the problem. Van Lenten and Mr. Nolan became friends, having lunch together three times a month and drinks, paid for by Nolan, on many Friday afternoons. Mr. Nolan and Van Lenten went on two fishing trips together – one to Long Island, and another to Maryland – that were paid for by CNS and ICSS. Van Lenten was terminated by NJMG in April of 2009, "for reasons having nothing to do with his relationship with Nolan, CNS or ICSS.[6]" Id. at ¶ 22.

I. Transactions At Issue

[5] Plaintiff acknowledges that the only payments it tendered to CNS were for services, and not for equipment. CNS' Statement of Material Facts in Support of Summary Judgment, ¶ 32; NJMG Counter-Statement of Material Facts, As to CNS' Statement of Material Undisputed Facts, ¶ 32.

[6] During oral argument, John Dineen, Esq., counsel for Defendant ICSS, suggested upon information and belief that Van Lenten was ultimately terminated for problems relating to alcohol addiction. Upon objection by Plaintiff it was revealed that this fact was not established in the record due to no deposition having been taken on the subject.

Between 2001 and 2009, CNS and ICSS conducted numerous transactions with NJMG. Plaintiff identifies several transactions as problematic, contending that they provide a speculative inference of tortious conduct.

A. Security Camera Project

This particular transaction occurred in 2005 and 2006. ICSS entered into a contract with NJMG whereby it agreed to upgrade NJMG's security camera system at its printing plant in Rockaway, New Jersey. Mr. Frank Devetori, the facilities manager for NJMG's Rockaway facility, advised his superiors "that the security camera system in Rockaway -- where NJMG has a large printing facility -- was outdated." Certification of Frank Devetori, ¶ 3. Devetori researched some options for upgrading the system, and received a quote from a vendor that NJMG had previously hired for similar work. "Shortly thereafter, Van Lenten came in and took over the project. … I had no idea why Van Lenten, who was my boss at the time, suddenly decided to spearhead the project." Id. at ¶ 4. Mr. Nolan testified that he received a call from Joseph Cuervo, an NJMG employee who was Van Lenten's "right-hand man," who asked if ICSS was capable of installing a security camera system for NJMG. NJMG's Counter Statement of Material Facts at ¶ 39; Borg. Cert. at ¶ 6. Nolan, having no experience installing security cameras, called Mr. Cook at CNS, who advised Nolan that although the security cameras involved new technology, "he felt comfortable" providing it. NJMG's Counter Statement of Material Facts at ¶ 40, 41. Cook required significant research to understand the camera technology, and this was a larger job than any security camera installation CNS had done previously.

The security camera project was proposed and completed in two stages. The first stage involved the installation of approximately 30 cameras and related equipment for a total price of

$109,865. The second stage involved the installation of 18 Pelco Brand cameras and related equipment, for a total price of $172,000. There is no evidence in the record that Van Lenten negotiated these prices with ICSS/CNS or sought competitive proposals from any other vendor. There is similarly no evidence that Van Lenten was required to do so as Vice President of IT. "The evidence suggests that Mr. Van Lenten, Mr. Cuervo, Mr. Cook and Mr. Nolan all helped install the cameras over the weekends, with the assistance of a consultant Mr. Cook hired to help with the first phase and two outside contractors to help install cameras in the second phase." Devetori Cert., ¶ 8. Plaintiff hypothesizes that this was so Mr. Devetori, the facilities manager, would not be around during the installation.[7]

Plaintiff next assumes that certain pieces of the equipment described in the proposals, and paid for by NJMG, were apparently never installed. The October 11, 2005 proposal required installation of 18 Pelco Brand cameras. Frank Devetori now belatedly certifies that "NJMG did not receive all of the hardware it paid for. For instance, the October 11, 2005 proposal from CNS/ICSS required installation of eighteen Pelco Cameras. I can only account for nine of them." Devetori Cert. at ¶ 11. Plaintiff further avers that documents provided in discovery "reveal that CNS cannot now account for the purchase of more than 10 Pelco cameras." NJMG's Counter Statement of Material Facts, ¶ 49. Plaintiff's proposed camera expert, Jeffrey Zwirn, reviewed the proposals, the supporting documents, and only now personally inspected the Rockaway facility and drew certain conclusions many years later, namely that:

- The CCTV Video Surveillance Cameras and equipment which was purported to be installed by the Defendants was supposed to be

[7] Plaintiff cites to the Certification of Frank Devetori, ¶ 8, in support of this proposition. That section of the Devetori Certification reads, in full: "In fact, the installation work was done at night and on the weekend *so that I was not around and did not know what was happening*. It was highly unusual to do this type of planned upgrade work only on nights and weekends." (emphasis added). No justification is provided in the Devetori Certification regarding how Mr. Devetori knew the purpose for the chosen hours of installation work, but rather his suspicion or feeling is certified to as fact. The Court finds this statement to be a net suspicion, not within the personal knowledge of the affiant.

> new. However, in many circumstances used and/or existing equipment was installed and/or utilized instead, all without the knowledge, consent, or authority of the Plaintiff.
>
> - Defendants represented certain manufacturer's brands of CCTV Surveillance System Cameras and equipment, but instead of installing what they represented would be provided; lower cost and/or substandard equipment was provided and installed, including equipment that was not listed by a Nationally Recognized Testing Laboratory (NRTL) such as Underwriters Laboratories, Inc., which is also a violation of the National Electrical Code;
> - The Defendants charged and collected money from North Jersey Media Group for the installation of certain CCTV Surveillance System cameras; but egregiously and deceptively never installed the wiring or the cameras at the premises for the services that they charged the Plaintiff for.
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> NJMG's Counter Statement of Material Facts, ¶ 50.

Further, the Plaintiff goes on to claim that CNS and ICSS "charged outrageously high prices for the items they did install. For example, the October 11, 2005 proposal noted that NJMG was being charged $28,000 for a 16-Channel DVR. Records obtained by NJMG in discovery disclose that CNS bought the DVR for $7,815.40, a markup of 259%." Id. at ¶ 51, 52. Other examples of high prices that led Plaintiff's self-proclaimed expert to claim that these prices "grossly exceeded normal and customary pricing in the industry." Id. at ¶ 53.

On February 6, 2006, CNS proposed to Van Lenten that NJMG be supplied with spare cameras and accessories, as well as a Pelco Constant Scan Camera. NJMG only now claims that it cannot account for the spare cameras and accessories, but has been able to locate the Constant Scan Camera. Mr. Zwirn, Plaintiff's purported expert, further describes the idea of spare camera parts as "ludicrous," because the new cameras would have come with a manufacturer's warranty. The sale of spares in this circumstance is then claimed to be "grossly inconsistent with any known best practice and/or industry standard of the CCTV Video Surveillance System industry." Id. at ¶ 56. Finally, CNS and ICSS sold annual maintenance contracts to NJMG on the camera

system at $33,000 per year. Frank Devetori had no recollection of CNS or ICSS ever performing maintenance on the cameras. Mr. Devetori does not claim to have ever raised any of these purported shortcomings or suspicions until well after Van Lenten was terminated. Philip Nolan did have a recollection of a small number of maintenance visits, "at least three." Id. at ¶ 57, 58. Mr. Zwirn's notes that to charge for a maintenance program without maintenance records or a document describing the terms and conditions of that program provides him the basis to speculate that it was a vehicle for fraud.[8] Further, Mr. Zwirn opines that the CNS/ICSS installers were not licensed to install surveillance cameras and therefore their conduct "carries the germ of fraud," is "bad faith," and "smacks of intentional wrongdoing." Id.

The Court notes that Plaintiff has never pled a claim for breach of contract in this matter, either with regard to the failure to purchase the contracted-for security cameras, or with regard to any other claims. The record is devoid of any claim of breach or of a failure to provide goods sold, or failure or complaints in any regard concerning any of the transactions or vendors until the instant litigation began. The instant lawsuit is then based on an inference upon another unrelated inference.

B. LibertyNet

Another IT product or service purchased by Plaintiff during Van Lenten's tenure was LibertyNet, a document management software. ICSS was an authorized reseller of LibertyNet products. Philip Nolan testified that at some point in 2005, Van Lenten contacted him about the possibility of using LibertyNet at NJMG. In 2006, NJMG purchased the software and Van

[8] The Court finds, for purposes of the present motions, that Mr. Zwirn's proposed expert opinion, as cited in Plaintiff's Opposition, is simply a net opinion, and not competent evidence. Therefore, Mr. Zwirn's baseless conclusions are irrelevant to the Court in its consideration of the instant motions. See Polzo v. County of Essex, 209 N.J. 51 (2012) (affirming a trial court's granting of summary judgment after disqualifying an expert whose testimony constituted a net opinion, insofar as it did not set forth a recognized or established standard for determining the ultimate issue).

Lenten placed a verbal order for the purchase of LibertyNet, at a price of $84,800. By way of e-mail dated March 6, 2006, Joseph Cuervo memorialized NJMG's decision not to implement LibertyNet in the Human Resources Department, due to complaints and issues implementing it in that environment. That same e-mail reflected the decision that the product would be deployed elsewhere at NJMG, "where we will realize more value out of the application." Exhibit 19 attached to the Certification of Samuel J. Samaro, Esq. in Opposition to Defendants' Motions for Summary Judgment. On March 13, 2006, ICSS submitted its first invoice to NJMG for the product. Plaintiff's forensic accounting expert nakedly declares that "the fact that Van Lenten overrode normal procedures and authorized payments on his own, is evidence of his participation in a fraudulent scheme."[9] Report of Yigal Rechtman, page 23. It is from such baseless speculation that the Plaintiff then infers that the contractor had to be also involved in the purported violation of managerial authority.

Philip Nolan's testimony is that at the time of purchase, Van Lenten informed him that there was not sufficient funds in the IT budget to purchase LibertyNet, but that if invoices were spread out across several months, he would be able to pay for LibertyNet out of discretionary funds. Plaintiff alleges that Van Lenten circumvented NJMG's purchasing practices in order to authorize payment for a product he knew the company did not want. Moreover, NJMG's policy that all contracts over $10,000 be reviewed and approved by the company's legal department was apparently not followed by Van Lenten. The Court notes that all payments were made by NJMG through a Finance Department that did not report to Van Lenten. There is no fact claimed by NJMG indicating that anyone employed by NJMG other than Van Lenten was involved in this construed fraud claim, and no fact suggesting that, besides Van Lenten's personal approval

[9] The Court finds that this opinion is merely a net opinion and does not consider the opinions submitted by Mr. Rechtman in this regard.

of the purchases, he did anything to coerce NJMG to actually issue payment for the Defendants' products.

ICSS paid $12,000 for the LibertyNet software, and, as noted, sold it to Plaintiff for $84,800, providing ICSS a profit margin of approximately 600%. Profit margins in the computer equipment and software industry is now claimed to average around 35%.[10] After Human Resources declined to use the software, Van Lenten attempted to have other departments at NJMG use it. However, it was never implemented anywhere else in the company, as Van Lenten "found no takers." NJMG's Counter Statement of Material Facts, ¶ 78. Philip Nolan also had no idea if anyone at the company actually used LibertyNet. ICSS, however, submitted three invoices for maintenance on LibertyNet, each totaling in excess of $11,000. Nolan and Cuervo could not recount whether any maintenance was ever requested.

C. Monitoring Services

The next product at issue was the Payment Card Industry scans. The Payment Card Industry ("PCI") has established standards designed to ensure that all companies that process, store or transmit credit card information maintain a secure IT environment. Id. at ¶ 82. A PCI scan, then, examines a company's network to determine whether there are weaknesses that could constitute or cause a security breach. Id. at 83. Van Lenten had called Nolan because credit card companies were beginning to require NJMG to conduct PCI scans, and he was interested in knowing what Nolan knew or could find out about them. Nolan, in turn, asked Cook, and Cook, in turn, looked into the question. Cook later informed Nolan that "yeah, we could do it."

Plaintiff provides the certification of its own employee, Bryan Shaughnessy, stating that

[10] The Court observes that Yigal Rechtman's expert report defines this market as "computer and computer peripheral equipment and software merchant wholesalers," and notes the breadth of the category. The legitimate inferences regarding appropriate pricing to be drawn from this testimony are, again, speculative.

CNS had never done PCI scans before. NJMG, like other companies, had an inside IT Department that may have done the scans. At the time, a company called Qualys sold a software package for approximately $2,145 that allowed a company to run the scans itself. CNS passed the cost of this software on to NJMG, and charged NJMG to run the scans in 2007. In 2008, the parties dispute whether scans were done by CNS, or by Shaughnessy at NJMG – but NJMG paid $8,000 to ICSS for the scans that year. ICSS and CNS split the fees for the PCI project.

Plaintiff also alleges that Defendants unnecessarily billed NJMG for certain monitoring services which were not used. One of these monitoring services was called "NOC," further described in attached invoices as "Remote System Network and Secure Monitoring." ICSS billed NJMG over $70,000 per year from 2005 through 2008 for NOC. Although the bills were sent by ICSS, the service was actually provided by CNS and the two companies split the profits. NOC services were intended to detect security intrusions into NJMG's network. CNS installed two IDS machines, at $15,000-$20,000 each, to monitor the system. "NJMG [now claims that it] simply did not need or use the NOC service." NJMG's Counter Statement of Material Facts, ¶ 97. Bryan Shaughnessy, who is now employed by NJMG in their IT Department, claims to be shocked by the 2008 invoice for NOC, because NJMG had removed the IDS equipment years before and was therefore not using the service. Id.

ICSS also charged NJMG $5,000 per month for "SANM," or "System Administration and Remote Monitoring." The purpose of the service was to provide monitoring of NJMG's internal systems for errors. Plaintiff now claims no knowledge of any such services being performed and states that these invoices were paid with no benefit to NJMG.

The ENS service was billed by ICSS at $44,000 per year. This service was intended to get NJMG's website on line as quickly as possible, if it experienced any problems. ICSS claims

to have had spare parts and 24-hour on call engineers for any eventuality. Nolan admitted that this service was unique to NJMG and it was not something they offered to anyone else. Nolan was unaware if the spares were ever used and had no idea if any maintenance or repairs were performed under the ENS. Bryan Shaughnessy, who was in charge of the network, had no idea that Van Lenten had authorized the service. Shaughnessy postulates that the system could not have been in existence without his knowing of it.

Combined, these monitoring and maintenance services cost NJMG over $170,000 per year, and now NJMG claims that they were never needed or used, in spite of the fact that NJMG was freely paying for them. Alan Cook further testified that he never checked to see if NJMG was using these services, or if CNS was providing any benefit under these services.

D. Increased Labor Rates

Van Lenten also arranged for the employment of certain former employees terminated by NJMG as independent contractors through ICSS. Nolan testified that the arrangement came about because of a mandatory head count reduction at NJMG, that forced Van Lenten to offer early retirement to people who were still working on important projects. Van Lenten asked Nolan if ICSS would be willing to hire some of those employees and assign some of them back to NJMG on a temporary basis. Van Lenten also advised that the people would not return to work for less than what they were previously making at NJMG, to which Nolan claims to have responded "that's not a problem but I'm going to mark up whatever rate they get so it's somewhat profitable for myself." Deposition Transcript of Philip Nolan, at 47:18-25. ICSS thereafter supplied several temporary workers to NJMG from 2001 through 2007. Plaintiff now belatedly avers that several of these rehired employees could simply not be described as information technology specialists or engineers of any kind, but were billed as such. Specifically,

Plaintiff states that Mary Linley was a secretary and brought back through ICSS; that Justin and Joshua Pethos, the sons of long-time employee Les Pethos, and who had worked at NJMG on their Christmas breaks, were brought back. The rates charged for these employees were higher than what they had been making at NJMG. Many of the invoices used initials to identify the temporary workers, which NJMG now nakedly conjectures was to obscure their identities.

E. Microsoft Exchange Upgrade

Furthermore, during his tenure as Vice President of IT, Van Lenten sought to upgrade NJMG's email system. In 2007, the decision was made to bring the email system up to date. This would first require updating the system to a platform known as Microsoft 2003. After that, the system would then be updated to a platform known as Microsoft 2007. The contract for this transition was awarded to NJMG's regular information technology partner CNS without competitive bidding, price negotiation, or comparison shopping. The total price of this sale was $477,900. The benefits of the bargain, however, appear not to have materialized, as "the system never got past Microsoft 2003." NJMG's Counter Statement of Material Facts, ¶ 130. CNS through Cook explained that NJMG's desktop computers could not handle Microsoft 2007. Plaintiff cites the parties' contract, which states:

> CNS Project Management Office will assign a project manager to coordinate all functions required to identify the project requirements and develop all project documentation required to effectively manage the relocation project.

NJMG in retrospect now postulates that "the entire exchange project could have been completed by Dell, the manufacturer of the servers that were purchased by CNS for use in the project, almost certainly at less cost." Further, CNS paid Nolan and ICSS over $90,000 on the project, despite the fact that no appreciable work was accomplished. Cook admitted this fact, and

testified that CNS had made half as much profit on the deal as ICSS had. This was a commissioned finder's fee.

F. Proposed Additional Work

In September of 2008, CNS emailed three large proposals to Van Lenten that, together, would constitute a complete overhaul of NJMG's computer equipment and network. The total contract price for the three proposals exceeded $2 million. From the email traffic, it appears that Van Lenten did not review the proposals until October 30, 2008. On that day, he sent three emails to Mr. Nolan and to Mr. Cook that Plaintiff claims "are extremely revealing." NJMG's Counter Statement of Material Facts, ¶ 138. The first of them, sent at 7:42 pm, notes that he has just finished reviewing one of the proposals and has concerns that he would like to address over the phone. Twenty two minutes later, Van Lenten sent a second email, this one only to Nolan:

> Need to clean up the typo's [sic] and misspellings as as [sic] well as adjust the numbers. This can't be sloppy. This is not a criticism, the Finance guys don't know what they're doing so it's the only thing they can focus on to bust balls.
>
> NJMG's Counter Statement of Material Facts, ¶ 139.

Nineteen minutes thereafter, Van Lenten sent a third email to Nolan:

> Probably 100K in more room. Please strip my comments about money from the documents before sharing with Tom. Also need to talk about transfer of knowledge, licensing and maintenance.
>
> Id. at ¶ 140.

Finally, on December 3, 2008, Mr. Cook sent to Van Lenten by email attachment a PowerPoint presentation entitled the "Business Impact of Infrastructure," with a note in the e-mail "Just did this for another client. Would something like this be helpful to you?" Id. at ¶ 142, 143. Van Lenten responded "Good stuff, if they had the attention span of more than 5 seconds, it would

work but I'll try. Hoping for the best, meeting with the family on Tuesday to pitch it. Hopefully, great holiday for all." Id. at ¶ 143.

II. Plaintiff's Investigation into Defendants

NJMG never had any suspicions concerning long-term IT director Van Lenten until sometime after his termination. Following Van Lenten's termination, an NJMG employee "checked Van Lenten's office computer and … discovered that the hard drive had been removed. … It was apparent that no one other than Van Lenten would have had the skill, motive and opportunity to remove the hard drive.[11]" Borg Cert., at ¶ 8. This missing hard drive apparently caused Plaintiff to begin a purported investigation into Van Lenten's activities, "which first focused on people closest to him.[12]" Id. NJMG's internal investigation began with an administrative assistant named Tracey McCain, who was apparently in possession of a company laptop not yet configured for official use. "[I]t was determined[13] that her answers to questions about Mr. Van Lenten were evasive," and afterwards NJMG conducted further inquiry concerning Ms. McCain's possession of a company laptop. NJMG also believed that there were approximately twelve missing company laptops, but "[t]hat investigation was ultimately inconclusive." Id. at ¶¶ 11, 12.

[11] No basis or explanation for the opinion, that "[i]t was apparent that no one other than Van Lenten would have had the skill, motive and opportunity to remove the hard drive" is provided. Moreover, no authority is cited for the proposition that "[t]he hard drive is a permanent storage device contained within the computer that can only be removed by someone with knowledge of computer hardware," said quote being redacted from the above citation. Bare speculation as to Van Lenten's motives does not suffice as a fact from which a legitimate inference of fraud may be derived.

[12] It is noted that no law enforcement or criminal prosecution authority was ever contacted, nor is it represented that such acts were contemplated by NJMG, with regard to the alleged conduct at issue herein.

[13] The basis of said determination is, once again, purely speculative and without basis in the facts provided to this Court. A single person's unsupported net opinion does not suffice to create a genuine dispute of material fact.

For reasons unknown to the Court, "[i]n the fall of 2009, Bryan Shaughnessy, a Network Analyst employed by [NJMG], attempted to ascertain the purpose of three large payments made by NJMG to ICSS in November of 2008: one in the amount of $77,195.49, one for $11,468.45 and one for $44,298." NJMG's Counter Statement of Material Facts, ¶ 27. Mr. Shaughnessy inquired of Nancy Nolan what the charges were for, and Ms. Nolan forwarded his inquiry to Phil Nolan, who shared an email exchange with Mr. Shaughnessy explaining the charges.[14] In rebuttal to that e-mail, Mr. Shaughnessy responded with his own e-mail, itemizing perceived deficiencies in the explanations proffered, and asking for further information.[15] No response was provided by

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[14] The first e-mail from Mr. Nolan read:

Bryan,

The three payments are as follows:

$77,195.49 Network and Security Monitoring which includes two CNS IDS units on-site at NJMG. This was a two year contract that is that needs to be renewed expiration date is 12-31-2009.

$11,468.45 LibertyNet Document Management annual Software support and Warranty

$44,298.00 On-demand hardware support, immediate spares replacement and Cisco CCIE remote and on-site support as required, Contract renewed annually.

Please feel free to call me if you need additional questions,
201-666-1122 x 111

Thank you,

Phil Nolan

IC System Solutions

[15] Mr. Shaughnessy's email read:

Phil,

Please provide feedback on my comments below:

<u>$77,195.49 Network and Security Monitoring</u> - Your VPN & IDS equipment was taken off line long ago. We have not corresponded with CNS's technical people in possibly several years in regards to the Network and Security Monitoring. I am surprised to see that NJMG is paying for a service when it clearly is not in use.

email to Mr. Shaughnessy. "Over the ensuing months and in fact years, the company embarked on" an intensive and after-the-fact audit "of all of the transactions that it could find regarding ICSS, Nolan and CNS," which now NJMG guesses were in fact "numerous instances where Mr. Van Lenten misused his position of trust to allow ICSS and CNS to steal large sums of money from NJMG." NJMG's Counter Statement of Material Facts, ¶ 35. NJMG found no proof whatsoever that Van Lenten received any personal remuneration from CNS or ICSS during his time at NJMG, and concedes this point that there is no evidence of any direct benefit to Van Lenten. NJMG has further been unable to demonstrate facts demonstrating any indirect benefit to Van Lenten. Instead, Plaintiff merely conjectures years after the fact that since it freely contracted, and voluntarily paid, too much for items it now cannot find or use, that it had be the result of a fraudulent conspiracy. This cannot sustain a cause of action.

The undisputed evidence, viewed in the light most favorable to Plaintiff, only demonstrates that the Defendant vendors were comfortable and friendly with Van Lenten; that NJMG paid large sums of money for services that, in retrospect, it wishes it had not, and which may not have been needed; that the Defendants obtained very high profits from NJMG in their business transactions; and that, in hindsight, Van Lenten's purchasing decisions were impecunious.

$44,298.00 On demand hardware support, etc. – I was not aware that we were paying for this support. I am responsible for networking at NJMG so I am shocked to see this. Can you tell me if NJMG has ever utilized this support (any dates/examples)?

Thanks,

Bryan Shaughnessy

North Jersey Media Group

201-646-4705

SUMMARY JUDGMENT STANDARD

The New Jersey Rules of Court state that a judgment or order sought by way of a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id.

In interpreting the standard set forth by the Rules of Court for entering summary judgment, this Court's lodestar is Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). The thrust of the Brill decision was "to *encourage* trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541 (emphasis added). Pertinent to the within matter, "the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party *in consideration of the applicable evidentiary standard*, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523 (emphasis added). "Rule 4:46-2 dictates that a court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Id. at 529 (emphasis original). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute." Id. Indeed, "if the opposing party [in a summary judgment motion] offers … only facts which are immaterial or of an insubstantial

nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Id. (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

If, therefore, a party opposing summary judgment highlights only "issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Judson, supra, 17 N.J. at 75. Further, "[s]ubstantial means '[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or "having real existence, not imaginary[;] firmly based, a substantial argument." Brill, supra, 142 N.J. at 530-31 (internal citations omitted); see also Manalapan Realty, L.P. v. Township Committee Tp. of Manalapan, 140 N.J. 366, 384 (1995).

The procedural availability of summary judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial. Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641-42 (1995) (quoting Judson, supra, 17 N.J. at 74). "[P]rotection is to be afforded against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Brill, supra, 142 N.J. at 542 (citing Robbins v. Jersey City, 23 N.J. 229, 240 (1957)).

Trial courts are obligated to engage in the same type of evaluation, analysis or sifting of evidential materials as required by *Rule* 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial. 142 N.J. 520, 540 (1995).

> "The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue

> of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.
>
> Id. (citing Liberty Lobby v. Anderson, 477 U.S. at 249-52.).

"[I]t is … important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Brill, supra, 142 N.J. at 540, 541 (internal citations omitted). "[T]hese general rules … without unjustly depriving a party of a trial, can effectively eliminate from crowded court calendars cases in which a trial would serve no useful purpose and cases in which the threat of trial is used to coerce a settlement. To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed "worthless" and will "serve no useful purpose."" Id. (internal citations omitted).

RULES OF LAW

I. Common Law Fraud

Plaintiff alleges that "Philip and Nancy Nolan, through ICSS and CNS, … conspired with Peter Van Lenten to devise and implement a plan to make money by submitting false and inflated invoices from ICSS and CNS to NJMG." Complaint, First Count (Fraud), ¶ 55. In order to recover under this claim of fraud, Plaintiff is obligated to prove the following elements:

> (1) a material misrepresentation of a presently existing or past fact;
> (2) knowledge or belief by the defendant of its falsity;
> (3) an intention that the other person rely on it;
> (4) reasonable reliance thereon by the other person; and
> (5) resulting damages.
>
> Banco Popular N. Am. v. Gandi, 184 N.J. 161, 173 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

Each of these elements must be demonstrated by clear and convincing evidence. Baldasarre v. Butler, 254 N.J. Super. 502, 521 (App. Div. 1992), rev'd in part on other grounds, 132 N.J. 278

(1993). As regards the individual elements, the non-performance of a promise is not proof of a misrepresentation, unless a party can demonstrate that the promiser knew that he either could not or would not fulfil such a promise at the time he made the promise. Barry By Ross v. N.J. Highway Authority, 245 N.J. Super. 302 (Ch. Div. 1990). Moreover, proof of intention "not to perform an agreement cannot be established solely by proof of its non performance …." Restatement (Second) of Torts cmt. d § 530 (1977).

II. Conversion

The common law tort of conversion is defined as the "intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div.) (quoting Restatement (Second) of Torts § 222A(1) (1965)), certif. denied, 200 N.J. 506 (2009). "This tort has evolved to apply to 'money, bonds, promissory notes, and other types of securities, as long as the plaintiff has an actual interest in the security and it is capable of misuse in a way that would deprive the plaintiff of its benefit.'" Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 431-32 (App. Div. 2011) (citing Cargill Global Trading v. Applied Dev. Co., 706 F. Supp. 2d 563, 578 (D.N.J. 2010). "[T]he injured party must establish that the tortfeasor exercised dominion over its money and repudiated the superior rights of the owner." Bondi, supra, 423 N.J. Super. 432 (citing Mueller v. Technical Devices Corp., 8 N.J. 201, 207 (1951)). This repudiation of the true owner's superior rights "must be manifested in the injured party's demand for funds and the tortfeasor's refusal to return the money sought." Id. (citing Farrow v. Ocean Cnty. Trust Co., 121 N.J.L. 344 (Sup. Ct. 1938)). "Moreover, the demand must be at a time and place and under circumstances such that the defendant is able to comply and any refusal to comply must be wrongful." Id.

III. Unjust Enrichment

"The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966). "A cause of action for unjust enrichment requires proof that 'defendant[s] received a benefit and that retention of that benefit without payment would be unjust.'" County of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 549-50 (App. Div. 2004) (quoting VRG Corp. v. GKN Realty Corp., 134 N.J. 530, 554 (1994)), aff'd, remanded by 186 N.J. 46 (2006). "Unjust enrichment is not an independent theory of liability, but is the basis for a claim of quasi-contractual liability." Nat'l Amusements, Inc. v. New Jersey Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd 275 N.J. Super. 134 (App. Div.), certif. denied, 138 N.J. 269 (1994). "Unjust enrichment is a quasi-contractual remedy, and therefore, a plaintiff may only claim unjust enrichment in the absence of an express contractual relationship between the parties." Winslow v. Corporate Exp., Inc., 364 N.J. Super. 128, 143 (App. Div. 2003).

IV. Consumer Fraud

Pursuant to New Jersey's Consumer Fraud Act, it is a violation to:

> use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
>
> N.J.S.A. § 56:8-2.

V. Civil Conspiracy

Civil conspiracy is an agreement between two or more persons to inflict an injury upon another by committing an unlawful act, or by committing a lawful act by unlawful means, and an

overt act in furtherance of the agreement, which results in damages. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005); see also Morgan v. Union County Board of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993). "To establish a conspiracy, the plaintiff must demonstrate that there was one plan and that its essential scope and nature was known to each person who is charged with responsibility for its consequences." Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App. Div. 2003).

DECISION

At its core, this case is Plaintiff's retrospective analysis of its business relationship with the Defendants. NJMG now "feels" that it engaged in some poor business transactions. NJMG belatedly seeks reimbursement from the Defendants. The lawsuit is clearly a classic example of "buyer's remorse." The relationship between Van Lenten and the other Defendants is the core of Plaintiff's allegations. However, NJMG, and not ICSS or CNS, was responsible for Van Lenten's actions, decisions, and behaviors while their employee. There is no provision in the laws of New Jersey that allows for an argument that Defendants ICSS/CNS took advantage of NJMG, by getting *too good of a deal* when they negotiated at arms' length with the Plaintiff. The law also does not provide a right to institute legal proceedings against your deceased, incompetent employee by simply claiming fraud without any actual proof. Plaintiff had the opportunity at *all* relevant times to review its contracts, its vendor relationships, and the decisions of its senior management, and to change course if that was considered desirable. NJMG had a duty to have internal financial and management controls to avoid such a claimed calamity. That simply did not happen during Van Lenten's tenure, and his decisions are now the subject of this litigation. The fact that Plaintiff may have paid too much, or bought unnecessary services, is not per se actionable under the facts and circumstances presented herein. Plaintiff has only provided second guessing. NJMG has

demonstrated no case for fraud, or any other tort. Mere regret does not beget recovery in New Jersey, and Plaintiff's causes of action must fail.

I. There Are No Facts Demonstrating Fraud By Any of the Defendants.

In an apparent effort to demonstrate the existence of genuine disputes as to material facts in this case, Plaintiff has provided the Court with an abundance of records, testimony, certifications, and other exhibits relevant to their claims. Notwithstanding the voluminous submissions to this Court, nowhere therein could be found a material fact in dispute. Plaintiff presented numerous suppositions and conspiracy theories, but not a single legitimate inference drawn from any actual fact.

To prove fraud, NJMG is obligated to demonstrate five factors:

(1) a material misrepresentation of a presently existing or past fact;
(2) knowledge or belief by the defendant of its falsity;
(3) an intention that the other person rely on it;
(4) reasonable reliance thereon by the other person; and
(5) resulting damages.

Banco Popular, supra, 184 N.J. 161, 173 (2005).

The Court finds that the undisputed facts present no competent evidence of a knowing and material misrepresentation made to NJMG by any of the named Defendants. Plaintiff contends that CNS and ICSS represented that they possessed certain competencies that they did not, and that they submitted inflated invoices for services and equipment not received by NJMG. Plaintiff states that the Defendants' contentions that they could perform PCI screening services and security camera installations was "demonstrably false." However, Defendants did in fact perform, or provide for the performance of, PCI screening services in 2007. Defendants also installed security cameras at NJMG's Rockaway facility. There is no evidence on record of any complaint as to the adequacy of the services provided with regard to either the security systems or the PCI scanning

prior to the instant lawsuit. There is still no evidence that the security system does not function, or was not installed properly. Therefore, any representations as to competence were apparently not misleading.

More importantly, however, is the fact that the failure of one party to live up to its contractual obligation is not actionable as a fraud, "unless a party can demonstrate that the promiser knew that he either could not or would not fulfil such a promise at the time he made the promise." Barry By Ross, supra. There is not a single fact in evidence here demonstrating such a misrepresentation as to either the PCI systems or the security camera installations. The mere fact that Plaintiff was billed, and then remitted payment, for the 2008 PCI scan which, according to Plaintiff was performed by Plaintiff alone, does not present competence evidence of a fraud. Rather, absent some corroboration as to intent, it demonstrates that Plaintiff purchased a service it did not use.

The next apparent misrepresentation is Defendants' purportedly inflated invoices submitted to NJMG, which were paid by NJMG. Plaintiff states that Defendants "misrepresented the need for the equipment and services, the reasonableness of the price being charged for the equipment and services and the fact that NJMG would indeed receive the equipment and services described in the invoice." Brief in Opposition, p. 59. To state it otherwise, Plaintiff bought monitoring services that were not used by Plaintiff, bought goods that were not perfectly tendered, and paid more than, in retrospect, they should have. At worst, these might amount to breaches of express (verbal or written) contractual agreements with Plaintiff. The fact that NJMG, a sophisticated commercial enterprise, bought IT services it ended up not needing or using, is not evidence of fraud. In fact, the evidence is that NJMG, through Peter Van Lente, freely and voluntarily purchased these services and paid for them.

The facts described above at best represent business transactions gone awry, in which Plaintiff did not receive what it had hoped for the sums it expended. Plaintiff's assertion of the close friendship of some of the parties, the stale claims of uselessness of some of the services, and the contractual breaches committed by Defendants, are plainly insufficient as a matter of law to permit a rational factfinder to find for Plaintiff.

II. Plaintiff's Cause of Action for Conversion Fails As A Matter of Law.

This Court must grant summary judgment to the Defendants on Plaintiff's allegation of conversion of funds. The claim for conversion is plainly deficient on the record before this Court. Plaintiff alleges that "[b]y conspiring with Peter Van Lenten to charge NJMG for equipment and services that were not provided and exorbitant amounts for equipment and services that were provided, Defendants have converted funds belonging to NJMG." Complaint, ¶ 60. No actual proof of such a conspiracy exists except in the conjecture of the Plaintiff.

First, no demand for repayment is claimed to have been made prior to the filing of the instant lawsuit. This failure to make demand prior to the filing of the instant lawsuit defeats the element of conversion which requires a showing that Defendant exercised dominion over Plaintiff's funds by repudiating the true owner's superior right to those funds. There is no fact on the record which demonstrates that Plaintiff has a superior right to any of the funds it paid over to the Defendants. Pursuant to validly executed contracts, which were both verbal and written, a person with authority to bind NJMG paid for goods and services received, in whole or in part, by NJMG.

III. Plaintiff's Claim for Unjust Enrichment Must Be Dismissed.

Plaintiff's voluminous discovery submitted in this matter demonstrate amply that the parties shared numerous express contractual agreements, both verbal and written. "A party who

confers a benefit upon another party outside the framework of an express contractual relationship may seek recovery for unjust enrichment on the basis of a quasi-contractual obligation. … there is no basis or need for plaintiff to pursue a quasi-contractual claim for unjust enrichment" in light of an express contract. Winslow v. Corporate Exp., Inc., 364 N.J. Super. 128, 143 (App. Div. 2003). Although Plaintiff tries to deny that there were express contracts, due to the fact that it appears that only certain of those contracts were reduced to writing, the undisputed facts demonstrate that the parties engaged in valid and binding contracts, that NJMG had given actual or apparent authority to Van Lenten to enter those contracts, and any default by Defendants on those contracts would need to be compensable under the terms of the contract and remedies provided in the law of contracts. However, the Complaint did not state a claim for relief under said law, and none can therefore be afforded Plaintiff.

Once again, it is abundantly clear to this Court that, in retrospect, Plaintiff only now regrets entering into contracts with Defendants. That being said, there is no dispute as to the validity of those contracts, or as to the authority of Van Lenten to bind NJMG to those contracts. The fact that Defendants profited by the terms of those contracts does not in and of itself create a cause of action for unjust enrichment, and it must be dismissed.

IV. Consumer Fraud Has Not Been Demonstrated By Plaintiff.

Plaintiff pleaded generally that Defendants violated of the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. § 56:8-1 to -20. The NJCFA was enacted to address "rampant consumer complaints about fraudulent practices in the marketplace and to deter such conduct by merchants." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005). The NJCFA is remedial legislation and should be liberally construed to accomplish its dual objectives of deterrence and protection. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999). This law provides

three bases for potential recovery. The first of the three alternatives relates to that part of N.J.S.A. 56:8-2 which declares that "any unconscionable commercial practice, deception, fraud, false pretense, false promise [or] misrepresentation" is an unlawful practice. The second alternative relates to a "knowing concealment, suppression or omission of any material fact" under the same statute. Pursuant to New Jersey's Consumer Fraud Act, it is a violation to:

> use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

"Thus, a plaintiff need not even show reliance on the violation of the NJCFA as long as an ascertainable loss resulting from defendant's conduct is demonstrated." Leon v. Rite Aid Corp., 340 N.J. Super. 462, 468 (App. Div. 2001). In order to prevail, a plaintiff need only demonstrate a causal connection between the unlawful practice and the ascertainable loss. Thiedemann, 183 N.J. at 246.

Preliminarily, the Court notes that there is no precedent or binding authority which could possibly allow this cause of action to proceed against defendant, Van Lenten. Plaintiff cites a case, Vibra-Tech Engineer v. Kavalek, 849 F. Supp. 2d 462, 496 (D.N.J. 2012), wherein the area manager of a plaintiff company was successfully sued under the CFA, under allegations similar to those in the instant matter. However, in Vibra-Tech, there were facts indicating that defendant Kavalek, the area manager, actually *owned* the company he was directing sales to, and there was proof of a fraudulent kickback scheme. The instant presents nothing like Vibra-Tech, in that there has been absolutely no evidence of any benefit accruing to Van Lenten from ICSS and CNS' engagement as vendors.

Business entities can be considered as "consumers" for purposes of the NJCFA in some instances. See Hundred East Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 355 (App. Div.), certif. denied, 107 N.J. 60 (1986) (noting that nothing in the CFA suggests it is inapplicable to the sale of merchandise for the use in business operations and that a business entity can be a consumer and can be victimized by unlawful practices). However, "[t]he [Consumer Fraud] Act directs its focus at products and services sold to consumers in the ordinary sense and the legislative language evinces an intent to protect a person who is a "consumer" in the ordinary meaning of that term as understood in the marketplace." Del Tufo v. Senatorial Committee, 248 N.J. Super. 684, 688 (App. Div. 1991). Certain business technology products and services are "merchandise," under the CFA. Plaintiff, in arguing that the CFA is applicable, cites Dreier v. Unitronox, 218 N.J. Super. 260, 263-5 (App. Div. 1996), which held that the sale of a computer system consisting of hardware and customized software was within the scope of the CFA.

Plaintiff argues that several undisputed facts entitle it to relief under the NJCFA. To quote Plaintiff, in italics below:

> *NJMG, through Van Lenten, retained CNS and ICSS to supply IT goods and services without seeking alternative suppliers, competitive bids or even negotiating the prices proposed by CNS and ICSS.*

NJMG's conduct in seeking out IT goods and services does not now entitle it to relief against merchants who sold it goods. In other words, Plaintiff cannot recover from Defendants wherein the "unlawful" practice cited is Plaintiff's own improvident conduct.

> *Based upon the representations of CNS and ICSS, Van Lenten retained CNS and ICSS to provide services they were not competent or licensed to provide, such as temporary labor (in violation of N.J.S.A. 56:8-1.1), security cameras (N.J.A.C. 13:31A-1.1 et. seq.) and PCI scans.*

There is no fact pled or argued that CNS or ICSS represented that it had pertinent licenses to hire temporary labor[16] or to install security cameras[17]. The mere assisting in the installation of security cameras by or at the direction of NJMG's IT director did not require a license and is not an unlawful practice under the NJCFA. Regarding Defendants' provision of "temporary" workers, the NJCFA only applies to their failure to have a license if they are a temporary help service firm under the law.

> "Temporary help service firm" means any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries worker's compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers.
>
> N.J.S.A. § 34:8-43.

By the plain language of the statute, it is clear that none of the undisputed facts in the present matter render the Defendant ICSS (or CNS) a temporary help service firm. ICSS hired various individuals at the insistence of NJMG, through Van Lenten, after NJMG had decided to reduce its workforce. According to the expert report of Yigal Rechtman, submitted as an attachment to the Certification of Plaintiff's counsel, Defendants did not incur any of the expenses normally retained by temporary help service firms, including "training, insurance, human resources services, benefits, scheduling, and other general administration." ICSS was performing services for NJMG

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[16] N.J.S.A. § 56:8-1.1, cited by Plaintiff, provides that:

> Services provided by a temporary help service firm shall constitute services within the term "merchandise" [of the NJCFA], and the provisions of [same] shall apply to the operation of a temporary help service firm.
>
> N.J.S.A. § 56:8-1.1

[17] The installation in this matter was performed under the direct control and supervision of NJMG's IT director who merely used co-defendants to assist in the project.

like any other service sector contractor. Indeed, the Report states that ICSS' "sole function – was to record the hours worked, to pay the employees for these hours at the agreed-upon rate, and to bill NJMG for same, in addition to a mark-up that ICSS selected and applied to these costs." It is clear that ICSS was not in the business of a temporary help service firm in any common understanding of the phrase, nor as contemplated explicitly by statute. ICSS brought on specific workers for a specific client at the request and direction of a member of that client's management team. This conduct does not fall within the scope of the regulated activities, and therefore does not fall within the scope of the CFA. Failure by ICSS to obtain the "requisite" license is thus not actionable under the CFA by the instant Plaintiff.

Moreover, the mere fact that ICSS charged NJMG a profitable rate for accomplishing the payroll-related task that it was asked to do is not an unconscionable or deceptive practice. Identifying employees by their initials is similarly not deceptive.

In essence, Plaintiff asks the Court to find that the practice of hiring NJMG employees who had been fired, at the request of NJMG, and sending them to work at NJMG upon request, is unconscionable insofar as ICSS reaped a reward from doing as asked. Although reliance is not an element of the CFA, it is worth noting that the very idea that NJMG was in any way surprised by subsequently finding invoices which it had freely paid for these employees is patently absurd. To suggest that there was some conspiracy, whereby these employees performed work and were paid for that work, but were not seen by employees of NJMG other than Van Lenten, and that NJMG was fooled by the use of initials on invoices, defies common sense.

CNS and ICSS billed NJMG for expensive new cameras when it ultimately supplied cheaper, used cameras.

Plaintiff states this as fact, but once again there are no facts in the record for this assertion. The Court notes that the undisputed facts establish that in 2005 NJMG decided to install new security cameras at its Rockaway facility, and contracted Defendants ICSS and CNS to assist with the installation. Proposals dated July 20, 2005 and October 11, 2005 indicated the scope of the work to be done. Nolan, principal of ICSS, testified he had no experience with this type of work. Cook stated that, although the cameras were new technology, he "felt comfortable" providing the work. No one at CNS was familiar with the technology that NJMG wanted in particular and Cook, principal of CNS, needed to do significant research to understand it. CNS had done some camera work in the past, but this was a larger job than anything it had done. Plaintiff does not cite the precise date upon which the cameras were installed, but it is undisputed that the work was rendered and payment tendered in 2006. Now, in 2015, Frank Devetori, an NJMG employee certifies, that he is not able to find all of the cameras which were purchased back then. Reading the facts most favorably to the Plaintiff, it is possible that in 2009 Frank Devetori first noticed "missing" parts and cameras, pursuant to his certified statement which was "after Van Lenten was fired in April 2009, I was asked to review the invoices for the security camera projects. … I know that NJMG did not receive all the hardware it paid for [because] I can only account for nine [cameras]." Devetori Cert. ¶ 7, 8, 9. The Court finds that there is no competent evidence here to persuade a reasonable juror by a preponderance of the evidence that the Defendants engaged in deceptive or otherwise unconscionable commercial practices in the sale and installation of security cameras for NJMG. The mere assertion by a witness that he now cannot find something sold years earlier is insufficient as a basis for an assertion that it was not tendered.

> *CNS and ICSS billed NJMG for "maintenance" on the new cameras, when it knew the cameras were under manufacturer warranty and there would be little or no maintenance to perform.*

There is no evidence whatsoever that representations as to the necessity of maintenance were made in the record.

> *CNS and ICSS billed NJMG for spare cameras when it never provided, delivered or even intended to deliver those spare cameras to NJMG.*

The Court notes that this fact is substantially similar to the above fact, regarding purportedly missing cameras. If cameras, or spare parts, were missing some years after the completed transaction, this is not a basis for a Plaintiff to state that an unconscionable commercial practice occurred by the other parties' failure to precisely live up to its side of the bargain. There is no competent evidence to convince a reasonable juror otherwise.

> *CNS and ICSS billed NJMG for various monitoring and security services, when it knew those services were not needed and in some instances not being supplied.*

CNS and ICSS billed NJMG, and NJMG approved, invoices for services for a substantial period of time. NJMG possessed the business wherewithal to know whether or not it needed a particular service. Given that there is absolutely no evidence of a fraud involving Van Lenten, Plaintiff cannot hang its hat on this imagined conspiracy to explain its lack of evidence.

> *CNS and ICSS billed NJMG for LibertyNet software that it knew was not being used by anyone at NJMG.*

It is not an unconscionable commercial practice to bill a consumer for a product they ultimately choose not to use.

> *CNS and ICSS billed NJMG for maintenance on LibertyNet software when it knew that maintenance was not needed because no one at NJMG was using the software.*

It is not an unconscionable commercial practice to bill a consumer for a product they ultimately choose not to use.

CNS failed to understand NJMG's capabilities before recommending the Microsoft Exchange Upgrade and should have known that it could not be completed.

A business vendor's incompetence is not an unconscionable commercial practice under the NJCFA.

CNS billed and received payment on the full cost of the Microsoft Exchange proposal even though it knew the project was not complete.

Failure of CNS to live up to its contractual obligations with regard to a sophisticated business consumer is not an unconscionable commercial practice, insofar as the consumer has all the remedies available pursuant to the contractual agreement. As has been stated by this Court throughout, the mere failure by Plaintiff to plead a breach of contract does not give rise to a fraud, or consumer fraud, cause of action. Mere failure to live up to the terms of a contract does not give rise to consumer fraud absent further evidence, and said evidence is simply lacking here.

CNS and ICSS billed NJMG exorbitant amounts for unnecessary PCI scans when NJMG employees were fully capable of performing said scans.

Providing a consumer with a service that the consumer is capable of providing for itself is not an unconscionable commercial practice. For instance, if a corporation had its own maintenance staff, with machinery, equipment, and the wherewithal to provide landscaping, but still hired an outside contractor, the mere acceptance of payment and provision of services by the outside contractor, even knowing the capabilities and perhaps even frivolities of its own employment is not an unconscionable commercial practice. Similarly, the instant situation provides no basis for finding the same.

ICSS marked up the hourly rates of the temporary workers by 30-40% when it knew it was supplying no benefits or services other than issuing paychecks to those workers.

This suggests that Plaintiff's position is that ICSS should have charged less for its services, and since it did not charge what other companies charged, is subject to recovery. This is insufficient on its face. Moreover, Plaintiff's purported fraud expert opined that "This marked up rate would have been normal for employment agencies, and it would normally cover expenses related to the employment…." Report of Yigal Rechtman, p. 31. Once again, Plaintiff's claim is boiled down to essentially a claim that Defendants profited *too much* in doing business with NJMG, and therefore fraud of some kind can be inferred. This is simply not a legitimate inference to be drawn from the mere existence of a large profit. NJMG's failure to negotiate prices is not the fault of its vendors, and is not tortious in any way.

V. Civil Conspiracy Claims Cannot Be Sustained in The Instant Matter.

Civil conspiracy is an agreement between two or more persons to inflict an injury upon another by committing an unlawful act, or by committing a lawful act by unlawful means. Banco Popular, supra. "It is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." Id.

Here, the undisputed facts only demonstrate that ICSS and CNS shared a relationship with one another, wherein they worked jointly on projects for NJMG, collaborated on submitting work proposals to NJMG, and sought to make as much profit as possible in the process. Moreover, it is clear that Van Lenten was friends or friendly with defendant Nolan, and made suggestions to Nolan on at least one occasion as to how to improve his chances of landing work with NJMG, via a work proposal. There are facts which are claimed to demonstrate that the parties did not live up to their contractual promises, with regard to the provision of certain goods (cameras and camera spares and accessories). There are claims which tend to demonstrate that the parties received payment on a contract for PCI scans which was not necessary – but there is no fact which demonstrates that

the conduct was unlawful, fraudulent, deceptive, misleading, or otherwise performed in a manner so as to render it recoverable. Defendant vendors provided monitoring services and software to NJMG that was either not used or not monitored, but nevertheless paid for.

All the facts, viewed in a light most favorable to Plaintiff, and every legitimate inference drawn therefrom, do not demonstrate a civil conspiracy. As the Court has dismissed the substantive claims underlying this cause of action, the cause of action cannot be sustained. A conspiracy to do unlawful acts, or to do lawful acts by unlawful means, cannot exist where the acts, or the means chosen, are found lawful.

Indeed, even if this Court were to find that there were facts suggesting certain tortious conduct which would warrant submission of this case to a jury, the count of civil conspiracy would still be insufficient. There is truly no fact, or set of facts, demonstrated herein which demonstrate that the parties were engaged in an agreement to inflict harm upon NJMG. Plaintiff has cited e-mails which demonstrate that both Defendant vendors were keenly aware of the business opportunities with NJMG, and that they sought to extract as much worth from the situation as possible. However, two contractors working in concert to sell work to a company is not evidence of an unlawful agreement, even if both of those contractors independently acted deceptively toward the company. As such, the claim must be dismissed.

CONCLUSION

The New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995) observed as follows:

> To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed "worthless" and will "serve no useful purpose."
>
> The thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves. Some have suggested that trial courts out of fear of reversal, or out of an overly

> restrictive reading of *Judson*, *supra*, 17 N.J. at 67, 110 A. 2d 24, or a combination thereof, allow cases to survive summary judgment so long as there is *any* disputed issue of fact. As to fear of reversal, we believe our judges are made of sterner stuff and have sought conscientiously over the years to follow the law. We may have permitted an encrustation of the Judson standard that obscured its essential import. A summary judgment motion has in the past required and will in the future continue to require a searching review. *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 167, 501 A.2d 505 (1985) (noting that Judson requires a "discriminating search" of the record to determine whether there exists a "genuine issue of material fact requiring disposition at trial"); *see Ziemba v. Riverview Medical Center*, 275 N.J. Super. 293, 298-303, 645 A.2d 1276 (1994).
>
> Trial courts must keep in mind that the summary judgment rule should be applied so as to serve two competing jurisprudential philosophies. *Robbins v. Jersey City*, 23 N.J. 229, 240, 128 A.2d 673 (1957). As this Court observed over a quarter of a century ago:
>
>> On the one hand is the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case… On the other hand, protection is to be afforded against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention [Id. at 240-41, 128 A.2d 673 (citations omitted).]

Moreover:

> A party cannot defeat a motion for summary judgment merely by submitting an expert's report in his or her favor. *See Ziemba*, *supra*, 275 N.J. Super. at 302, 645 A.2d 1276. In order for such a report to have any bearing on the appropriateness of summary judgment, it must create a genuine issue of material fact. *Id.* at 301-03, 645 A.2d 1276.

The instant matter represents a situation where there are truly no undisputed facts, and in which the proper application of judicial resources is the granting of summary judgment. The disputes between the parties, with minor factual exceptions which have been fully ascribed to the Plaintiff's submissions. The only matter in dispute was the unfounded conjecture that Defendants engaged in a fraudulent scheme. In attempting to prove the case and to manufacture a genuine dispute of material fact, Plaintiff has submitted two expert reports to the Court, each of which

recounts the facts of this matter and nakedly prophesizes that fraud is at hand. Following the well-established law of this state regarding the admissibility of expert opinions, including, the Supreme Court decision in *Polzo v. County of Essex*, 209 N.J. 51 (2012), the Court finds that each of these opinions is a net opinion as regards the issue of fraud, and does not provide competent evidence which would be admissible in front of a factfinder. Moreover, even if this Court did not so find, the proposed expert opinions would not truly create a genuine dispute of material fact, insofar as they do not dispute facts but merely characterize the facts as bearing on the ultimate issue of fraud in this matter.

The mere self-proclaimed nomenclature designating a witness as an expert does not make all proffered testimony admissible. "[A]n expert's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere 'net opinion.'" State v. Townsend, 186 N.J. 473, 494-95 (2006). In *Polzo*, the Supreme Court affirmed a trial court's grant of summary judgment where the Court found that "Plaintiff's expert did not set forth any recognized standard for determining when a" roadway defect presents a dangerous condition. 209 N.J. 51, 74.

In regard to the instant matter, both of Plaintiff's expert recount the facts set forth in the Complaint and as adduced through discovery in this matter, and both conclude or suggest that a fraud was committed. As an example, Plaintiff's security camera expert, Mr. Zwirn, opined that:

> The Defendants' conduct in these transactions is bad faith and carries the germ of fraud. [and]
> The Defendants' actions in this matter smack of intentional wrongdoing.

Both experts, including Mr. Zwirn, claim to rely upon certain authorities. Mr. Zwirn's report does not present any standard employed for determining that a fraud was perpetrated in this matter with regard to the installation and maintenance of NJMG's security camera system. Moreover, Mr. Zwirn's report fails to articulate a standard that would necessarily assist the trier of

fact, by relying, for instance, on an objectively reasonable understanding of fraud in the CCTV or surveillance industry. Moreover, it is not clear that Mr. Zwirn is qualified to opine on the characteristics of fraud, bad faith, or intentional wrongdoing, but instead is merely qualified to opine on the characteristics of security systems, and the appropriateness of Defendants' actions in regard thereto.

Mr. Rechtman, on the other hand, is arguably qualified to offer an opinion as to fraud and fraudulent billing. The opinion provided, however, does not provide this Court with any basis to conclude that the findings of Mr. Rechtman are anything other than conjecture. That is to say, although Mr. Rechtman's report notes authorities which indicate that "[f]raud can be committed by management overriding controls using" certain techniques, that a purchasing scheme is considered by fraud examiners as a type of fraud, and defining when a conflict of interest occurs, it does not demonstrate the application of those principles to the facts in this case. Mr. Rechtman merely goes off to opine about what Defendants knew or should have known, and that therefore fraud must have occurred. The Court is left with insufficient information as to how that conclusion was reached, or could be reached by a factfinder.

The Court, having examined the expert reports in order to make the determination of admissibility, notes that even were this Court to accept the expert opinions, said opinions could not create a genuine dispute of material fact. Where the underlying facts do not support the legal conclusion that fraud, or any of the other tortious causes of action, has occurred, an expert opining that fraud has occurred does not change that result. As many times, and in as many ways, as Plaintiff has attempted to demonstrate that a fraud occurred herein, the simple and undisputed facts of this matter do not support that assertion.

The Court holds that the evidence in the record creates "no genuine" issue of material fact precluding the grant of summary judgment under Rule 4:46-2. As such, and for the aforementioned reasons detailed herein, each of the Defendants' motions seeking summary judgment is **GRANTED**, and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE.**

It is so ordered.