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SUPERIOR COURT OF NEW JERSEY
UNION COUNTY
CHANCERY DIVISION, GENERAL EQUITY PART
DOCKET NO. C- 28-16

MAGNOLIA BEEF COMPANY,

Plaintiff,

Vs.

GEORGE HRISSIKOS, AKA GEORGE CHRISSIKOS; MAGNOLIA BEEF HOLDING, LLC, KRISKOS FOOD CORP., PETER CHRISSIKOS; GENNADY GRISHPUN,

GEORGE HRISSIKOS, AKA GEORGE CHRISSIKOS; MAGNOLIA BEEF HOLDING, LLC, KRISKOS FOOD CORP., PETER CHRISSIKOS,

Counterclaimants,

Vs.

MAGNOLIA BEEF COMPANY, INC.,

Counterclaim Defendant.

GEORGE HRISSIKOS, AKA GEORGE CHRISSIKOS; MAGNOLIA BEEF HOLDING, LLC, KRISKOS FOOD CORP., PETER CHRISSIKOS,

Third-Party Plaintiffs,

Vs.

ALAN SIMBERLOFFF, ADAM PRESTON, ELLEN SIMERLOFF-FITCH AND MARIAN HUNT

Third-Party

Decided: June 7, 2018

Martin K. Indik, Esq, attorney for plaintiff and Third Party Defendants
Indick and McNamara, P.C.

Michael Profita, Esq., attorney for defendants, Counterclaimant's and Third Party Plaintiffs
DeCotis, Fitzpatrick, Cole & Giblin, LLP

KATHERINE R. DUPUIS, P.J.Ch.

Plaintiff Magnolia Beef Company, Inc. (MBC) has been in the wholesale food distribution business in Elizabeth for more than sixty years. Alan Simberloff (Simberloff) has been the chairman, president and principal operator of MBC since 1957. George Hrissikos (George) was hired by MBC in October 2013 and took over as the president of MBC shortly thereafter. George's son, Peter Hrissikos (Peter) was hired at the same time. The company was in the business of wholesale meat distribution to diners, schools, jails, nursing homes, and the like. In 2014, George formed Magnolia Beef Holding, LLC (MBH) with the purpose of purchasing assets of MBC pursuant to the Asset Purchase Agreement (APA) entered into by MBH and MBC in October 2014. It has been a successful business. The company has almost four million dollars invested in the stock market.

Simberloff and George, through their respective companies, entered into an Asset Purchase Agreement (APA) on October 30, 2014, which would come into effect upon the disability, death or voluntary withdrawal from the business of MBC by Simberloff. (Ex. D-28). The purchase price was eight million dollars subject to credits for accounts receivable not over 120 days from the sale of products and all inventory as of the closing date. George could also finance the purchase himself without any of these events taking place.

The plaintiff alleges that George stole from him and diverted customers and payments that were due to MBC. Plaintiff alleges signatures were forged or that the name of MBH was filled in on checks rightfully payable to MBC. In sum, it is alleged that George took over one million dollars belonging to plaintiff.

George alleges Simberloff violated the "no shop" provision of the APA as well as a number of oral agreements to pay the salary of defendant and his son and to pay Kriskos a fee equal to 10% of payments made by it and 20% of any delinquent accounts collected.

Defendant denies that he took money or customers of the plaintiff and that the allegations are a subterfuge to disguise the sale of the company in violation of the APA. He also alleges Simberloff was motivated to cancel the agreement when he learned his and his daughters' massive tax fraud was going to be exposed.

Gennady Grinshpun (Grinshpun) is alleged to have cooperated with George by removing customer names from the accounts receivables and by depositing checks to MBH bank accounts.

Alan Simberloff

The first witness called by plaintiff was Alan Simberloff. He testified that MBC had been owned by his father and he took over in 1957. He knew Gary Kepniss (Kepniss), the prior manager, was going to leave the company in 2013. Once Kepniss and his assistant James Montefusco (Montefusco) left the company in October 2013, sales went down $300,000 a week or $15,000,000 a year. The company had, in the past, been a $50,000,000 per-year company and was selling $40,000,000 a year at the time Kepniss and Montefusco left.

Simberloff was aware that George was a good salesman and that he had a good reputation in the industry and reached out to him. Simberloff testified regarding his connections with George. He said George did not want to be an employee but was interested in purchasing the business. Simberloff made an offer which would have George running the company with an eye towards acquiring the business. George's salary was $2,500 a week and thereafter George became President and Simberloff became Chairman. There was no written employment agreement. George's son, Peter Hrissikos (Peter), was also employed.

Simberloff and George signed an asset purchase agreement on October 30, 2014. Simberloff believed that George would be able to take over the company, pursuant to the APA, upon his death, disability, or voluntarily leaving the company. George could also purchase the company if he had sufficient financing for the purchase price.

Section 10.7 of the APA provided:

> No Disposition of Assets Sold.
> Seller shall not sell or otherwise dispose of any of its assets being sold to Buyer (other than inventory in the ordinary course of business or except with Buyer's consent and approval) or encumber any of the assets being sold to Buyer, except that any encumbrance shall be permitted so long as the assets and inventory are otherwise delivered free of all liens and encumbrances on the Closing Date.

Section 17.3 of the APA provided that:

> No Shop.
> Seller hereby agrees not to offer to sell, encumber or otherwise assign its rights to the Purchased Assets to any other person or entity and not to negotiate or accept any offer for such sale or assignment during the term of this Agreement. Seller's failure to comply with the terms of this Section shall result in damages paid by Seller, to Buyer, for the resulting costs and damages incurred by Buyer.

Section 13.13 (a) of the APA provided that:

> Seller represents and warrants that Seller has filed all federal, state and local tax returns required to be filed, that the tax returns correctly and completely reflect liability for taxes and other information required to be reported, and has timely paid all taxes shown on those returns.

There was an agreement reached that Kriskos Food Corp., owned by George, would be used as a “pass through” company to lease and insure the trucks. This was done at the suggestion of the insurance agent in order to save money on insurance rates because MBC had high rates due to prior claims. In time, the payroll of MBC began to be paid through Kriskos also. Kriskos was repaid by MBC promptly. Gennady Grinshpun, an MBC employee, did all the accounting.

Over the course of the next two years, relations between the parties soured. Simberloff believed George had started stealing from him but he was uncertain at first as to how this was being accomplished. In early November 2015, he confronted George about the loss of revenue of $50,000 a week and was told by him that they had a few bad months. Simberloff lent the company $500,000 dollars four times in 2014 and once in 2015 for a total of $2,500,000. He also testified he did not cash checks for loans and rent due to him or family members because the MBC had no money. He informed George that he would not be providing additional operating capital and said this was not required by the APA.

Magnolia Beef Holdings, LLC (MBH) formed by George in 2014, began to sell its own products on January 11, 2016.

Simberloff testified that after he realized George did not have sufficient capital for operating expenses, he wished to reach an agreement with George on other terms. He said George agreed that without adequate working capital he would not be able to run the business. He devised one plan where they would need less operating capital. George would keep his own clients and Shelley’s Foodservice, Inc. would handle the overall operation for a sales percentage. Simberloff said there were a number of meetings at his house with himself, George and Scott Geller of Shelley’s Foodservice. He stated George never objected, never said he had sufficient capital, nor said that the APA was still in effect. Simberloff also said that this agreement was not a sale of assets as contemplated in the APA. Simberloff did not believe this violated the “no shop” provision because the APA involved an asset sale and this did not. The agreement between Magnolia Beef and Shelley’s was eventually signed and lasted less than two weeks because Shelley’s was also not properly capitalized. MBC was eventually sold for $1,800,000 to Solomon’s Food Service, Inc.

George left the company on January of 2016.

Simberloff admits he did not intend to go through with the APA because George did not have enough capital and had demonstrated he could not be trusted and was not going to sell him assets with a 30 year payout. In addition, Simberloff points out that no triggering event had taken place.

Upon cross examination it was noted that the profit for MBC in 2015 was $1,000,000. This is despite the alleged stealing.

Simberloff admits two sets of books were kept, one of which reflected cash received. Salaries for the approximately 20-40 employees were paid one half by check and one half in cash. Cash is also saved on hand for a large purchase.

Simberloff admitted his accountant created unaudited financial statements. He testified the statements are made at the request of customers for their use.

Simberloff did admit that between $100,000 and $200,000 may have been used for renovations on the MBC property and testified to a large number of defalcations by George. Simberloff testified that:

1) He subpoenaed documents from JPMorgan Chase which showed unexplained cash deposits into Kriskos accounts before MBH was in business. (Ex. P-30). He identified deposits of $205,596. He believed these were all deposits of money rightfully due to MBC.
2) George did not give him a $15,000 cash payment from Old Towne Diner in October 2015.
3) Approximately $1,000,000 was lost due to George's actions. He contends wholesale suppliers continued to provide the same amount of supplies yet gross profits were reduced to 6% from the usual 10-12%. He believes George had been selling the meat and not depositing the money into MBC.
4) Simberloff claims $30,000-$40,000 of product was taken by George when he left MBC and was never paid for.
5) Simberloff also testified as to improper payments deposited with 1st Constitution Bank. He believes a total of $693,711.32 was paid by check from MBC customers which was deposited into MBH and Kriskos' bank accounts.
6) Simberloff testified that the EZ Pass transponder continued to be paid by MBC without his permission and George owes $6,500 for his use of EZ Pass.
7) There are also $251,109.59 in checks due to MBC diverted to MBH in a TD account. (Ex. P-8). Some of those checks were duplicative of diversions to 1st Constitution accounts. The duplicative diversions were bank checks issued by 1st Constitution to customers of MBC after George confessed to the diversions, but were then deposited by George into the TD Bank account instead of being returned to MBC customers. The checks that were not duplicative diversions totaled $74,208.19.
8) Simberloff contends he should not have to pay the $4,500 it cost to obtain copies of documents that had been taken from the MBC office.
9) George never repaid a $75,000 loan made on October 14, 2000 for his daughter's wedding. Payments were to be made monthly. If they were not, interests would accrue.
10) Did not repay $100,000 that had been loaned to Kriskos
11) George "rang up" another $1,500,000 in receivables as accounts that were not being paid.
12) Simberloff contends George used trucks leased by MBC in the MBH business.
13) Simberloff contends MBC paid for the truck insurance while George was using the trucks in his own business.
14) Simberloff saw a check from The Charcoal Pit made payable to MBH. Simberloff believed that the check belonged to MBC. He confronted George and George signed the checks over to him.
15) George extended credit of $402,478.76 to customers without authorization. This reduced the amount of cash available to MBC.
16) Simberloff alleges computers, hand trucks and desks were taken by George.
17) George traded on MBC's good will and reputation. For example, the MBC name as used when a warehouse was rented.

18) George gave a $29,500 credit for MBC product to Carla's Diner and received a Hummer.
19) When George left all the signed receipts were taken. He said this was significant since George had told customers not to pay MBC and that MBC could not prove the debt.
20) Simberloff also contends that had George not been stealing he would not have needed to lend $2,500,000 to the company.

Simberloff noted that his two daughters had to sign the lease for the building before the APA could go into effect. He said that George rejected a term sheet for a new venture showing a $25,000 a month rental and a ten year lease with a five-year option.

There was a time when he talked to Scott Geller about how the APA was not going to work because George could not get funding for operating expenses. The parties discussed alternate arrangements and proposed a plan where less capital was needed.

He tried to develop an agreement with Shelley's Foodservice where George could keep his own clients and Shelley's would pay a percentage to MBC. Geller and Simberloff reached an agreement which only lasted two weeks because Shelley's Foodservice did not have the financing either.

Simberloff testified that the APA never went into effect by its own terms.

George left in January 2016.

Simberloff said he first learned of a verbal agreement to pay George $2,500 a week above his salary after the litigation started. He denied such an agreement. He denied ever agreeing to pay a percentage on accounts forwarded to the collection agency.

1st Constitution Bank

Simberloff contends Grinshpun cooperated with George by personally depositing checks made payable to MBC into an MBH account at 1st Constitution Bank. Had the checks been deposited by MBC there was no need to personally deposit the checks; it would have been done by scanner.

He contends $205,596 in cash deposits were wrongfully deposited to the Kriskos Food Corp. bank account at JPMorgan Chase Bank. Simberloff said Kriskos was not involved in sales at this time and only acted as a pass through company.

Overdue Accounts

Simberloff testified that the practice of MBC was to take a portion of a receivable and turn it into a loan and then provide for payments over time. He said at no time was there an agreement to pay George a portion of any past due accounts receivable. He did acknowledge

that George hired a new collection agency. Sometime later when he inquired as to whether the money was being received, George told him that "these things take time."

Simberloff testified he never paid an employee a commission before on receivables. He said he never authorized the payment from RHK collection agency to Kriskos or George. He said he first learned of this arrangement when litigation began. He contends the overdue accounts were deleted from the computer by Grinshpun when they were referred to RHK Recoveries. Thus there was no way to trace the accounts.

Trucks

Simberloff said it was agreed that Kriskos would be set up as a pass-through company to insure and lease trucks because MBC had a history of claims. Kriskos eventually paid payroll and insurance as well as leasing for the trucks. The lease was guaranteed by MBC. (Ex. P-15).

Kriskos would initially pay the bills and be reimbursed by MBC. One bill contained a 10% surcharge for "interest" and Simberloff refused to pay.

When George left the company there were eleven trucks. George took the trucks with him and refused to pay the trucking company and told Simberloff he was stuck with the leases. Simberloff continued to pay the bills because MBC had guaranteed the payments. He continued to pay until a resolution was reached. He contends plaintiff owes him $147,420 for trucks used by MBH.

$75,000 loan

Simberloff testified that he lent George $75,000 on October 14, 2014 for his daughter's wedding. Payments were to be made monthly and so long as they were paid timely there would be no interest. No payments were ever received. (Ex. P-13).

Altered Checks (1st Constitution Bank)

Simberloff testified that George took checks due to MBC and altered them to make them payable to MBH. After he was confronted, George notified 1st Constitution Bank and authorized the bank to take the funds from his account.

They are as follows:

Maker of Check	Check Number	Amount of Check
Hagana Corp	1292	$2,776.25
P&G Lexington Corp.	3103	$1,441.00
V&T Restaurant Inc.	15622	$1,464.83
The Forge Inn, Inc.	4992	$11,369.51
Smithfield Farmland	0200502496	$2,810.00
Syros Pizzeria Restaurant	2182	$204.85
		$20,066.44

(Ex. P-6)

Additional checks were altered for the following customers of MBC. George signed a written authorization to permit 1st Constitution Bank to charge his account and make the checks payable to the following companies:

Maker of Check	Check Number	Amount of Check
RHK, Recovery Group Inc.	10789	$6,673.92
RHK, Recovery Group Inc.	10533	$30,742.44
Einhorn Forlenza Agency, Inc	36682	$3,455.12
RHK, Recovery Group Inc.	10455	$8,877.13
RHK, Recovery Group Inc.	10977	$4,137.50
		$53,886.11

(Ex. P-5)

George also gave written permission to 1st Constitution Bank to make checks payable to the following companies, representing checks that were previously altered and made payable to MBH during the last six months of 2014.

Maker of Check	Check Number	Amount of Check
Giakoumatos Business Associates, Inc.	1800	$6,682.88
Omonia Café Inc.	5568	$7,135.63
BK Waterview LLC	1105	$98.70
Community Restaurant Inc.	18457	$814.70
Giakoumatos Business Associates, Inc.	1891	$1,658.11
Brownstone Pancake Factory, Inc.	3391	$1,500.00
		$17,890.02

(Ex. P-4)

He also gave written permission to make checks payable to the following companies. George had altered the checks to make them payable to MBH.

Maker of Check	Check Number	Amount of Check
CMH BBQ Holdings, LLC dba Mighty Quinn's Barbeque	2817	$54,222.25
GSFA Restaurant Corp.	1753	$5,378.00
2800 Restaurant Corp.	2922	$4,589.03
Omega Diner, LLC	2381	$3,038.00
Omega Diner, LLC	2402	$2,177.42
Omega Diner, LLC	2442	$3,696.00
		$73,100.70

(Ex. P-3)

Substitute checks were written by 1st Constitution Bank and given to George who did not return the checks to the maker but deposited them into an MBH account at TD Bank. Simberloff testified the following altered checks deposited into TD Bank.

TD Bank

12/19/15	To MBH from Myriel Restaurant d/b/a Clinton Station Diner Check written before MBH started business	$5,731.83
1/16/15	From Dafnia Inc. to MBH Check written on 1/10/15 before invoices were sent	$6,926.69
2/2/16	From Stamna Associates to "Magnolia Beef" No MBH invoices presented and check not made out to MBH	$3,380.71
1/25/16	From Echo Park LLC for $2,246.66 stipulated $944.27 was for MBC invoice and the balance was for MBH delivery	$944.27
1/29/16	Daphnee AGD Corp. Matched no MBH invoice	$1,774.71
1/30/16	Community Restaurants Its Greek to Me Check to the order of "Magnolia Beef Company" and did not match MBH invoices	$794.67
2/6/16	Red Oak Diner and Lounge Payment on account does not match MBH invoices	$5,000.00
2/12/16	Red Oak Diner and Lounge Check to the order of "Magnolia Beef Company, Inc."	$7,555.31
9/20/16	Red Oak Diner and Lounge Payment on account does not match MBH invoice	$1,500.00
11/23/16	Silver Cup Plaza 46 Diner Payment on account does not match MBH invoice	$500.00
11/30/16	Silver Cup Plaza 46 Diner Payment on account does not match MBH invoice	$500.00
12/3/16	Cash from Don's Diner Payment on account does not match MBH invoice	$20,000.00
12/11/16	Ambella, Inc (Randolph Diner) Payment on account does not match MBH invoice	$10,000.00
12/20/16	Cash from Don's Diner Payment on account does not match MBH invoice	$9,100.00
12/22/16	Silver Cup Plaza 46 Diner Payment on account does not match MBH invoice	$500.00
	Total additional funds alleged to have been diverted from MBC to TD Bank account of MBH	$74,208.19

Adam Preston

Plaintiff called Adam Preston (Preston), who had worked at MBC for ten years under Kepniss and Montefusco. Preston said George started as a salesman in September of 2013.

Preston handled the payroll for a time before George became familiar with the payroll. George took it over in February or March 2014. He said George told him he had been making $3,000 per week at his previous employer and believed he would make the same at MBC but it did not work out. He believed George was attempting to show that no one got what they wanted.

Preston testified his own salary was $1,200 per week when George got there. He was paid $500 in cash and the rest by check.

Preston noted that a customer, Link and Ziegler, owed $47,000 and the customer asked that the debt be held open as they recovered from a flood. Simberloff agreed but George turned the collections over to RHK. Preston inquired and learned RHK had been paid in full and it was not reflected on MBC books.

Preston said Simberloff told him to tell George he could not handle cash transactions about three months before George left. When he handled cash after being told not to, Preston had to tell him a second time before he finally stopped handling cash.

Preston tried to collect the $30,000 debt due from Carla's Diner. The witness learned it had been taken off the books as bad credit. A receipt was provided to him for $24,500 credit in exchange for a Hummer.

Preston said a computer history for every vendor is kept and that there is an invoice for every transaction in the computer and a hard copy is kept in the files. He said that after George left there were no records as to Kriskos.

He testified that he saw Peter and helpers carry boxes out of the building on January 8, 2015 at 5:00 p.m. by reviewing a video. He testified that not all files disappeared, just the ones he believed were Kriskos customers.

He saw George take $38,000-$40,000 worth of product when he left without paying for it. This sum had still not been collected.

He stated that the MBC operating account was with 1st Constitution.

He received a check at MBC from Steward of Seaside for a third and final payment to MBC. MBC had not received the first two payments. The first two payments were made to RHK. There was no record of these payments in MBC records.

At a later point, George told him he was making $5,000 per week. He testified that MBC had provided a $6,500 initial payment for Fuel One on Kriskos' behalf.

He alleges MBC is owed money from Kristos for a $100,000 deposit on June 12, 2014, $13,500 for a Fuel One deposit, and for three payments of $6,000, $20,000, and $20,000 respectively.

Scott Geller

Scott Geller (Geller) was employed by Shelley's Foodservice, Inc. He testified as to two meetings in Simberloff's kitchen in 2015 with George and Simberloff. The discussion included separating George's accounts from the MBC accounts. The parties were working from a document that showed a breakdown of MBC sales by salesperson. He testified George was fed up and wanted his customers and to be on his way. George said he was tired of being accused of things and tired of the acrimonious relationship. He wanted to leave with the accounts he came in with. He said he wanted to make an amicable break. George did not discuss any aspect of the APA at these meetings.

There was a term sheet that was used by the parties in the negotiations. The sheet was discussed by Geller and Simberloff but not George. (Ex. D-68, D-69).

Upon cross examination, Geller disclosed that he had been friends with George since 2002. In 2013 he was asked by George if he wanted to join a joint venture between his company and MBC. This also involved Shelley's Foodservice. No venture was ever begun. In early November 2016 he discussed a commission-based agreement with Simberloff but there were no discussions of taking over the company. He said there was an agreement with Shelley's Foodservice but eventually Solomon's Foodservice, Inc. became the owner. This was after George left.

Geller continued to maintain contact with George after he left but they never discussed Simberloff.

Gennady Grinshpun

Grinshpun was the comptroller for MBC. He began his career in the Ukraine. When he was hired at MBC he found a system in disarray with missing money and unclear records. He established computerized accounts. No one at MBC wanted a book/order system or a purchase order system and as a result, there was no system to establish a balance sheet. The book inventory was kept in the computer. Computers were not used for accounts receivable when he got there but he remedied that. Grinshpun said a lot of "stuff" went missing until he established a new system. He noted that an earlier bookkeeper stole $300,000.

Simberloff opened the mail daily, if he was there. Grinshpun did bank reconciliation reports and said he would know what was owed on a daily basis. Every week he would get a check register from the second floor.

Grinshpun did not do the tax returns although he would give information to the accountant.

He testified that when cash was received, the driver would bring in the money and two sets of slips were prepared. One went to the banking unit on the second floor and a second copy was sent to Simberloff's house. The driver would be given a receipt for the cash amount. A separate slip was given to Grinshpun. For example, the week ending April 4, 2014 showed $90,244.67 received as cash. (Ex. D-2).

From 2007 to 2012 cash payments were made to the approximately 20-40 employees for payroll. No payroll taxes were paid by the company on these amounts.

He testified collections were difficult. Simberloff determined who could be extended credit. Accounts receivables would be transferred into loans and then the customer would have 3-5 years to pay the money back.

He prepared bad debt reports once a year. He said Simberloff would examine the books and decide what was a bad debt. Between 2007 and 2013 he said 99% of the bad debt accounts were never collected.

The Wells Fargo account had been used for operations but was never used for cash deposits.

He said there were two kinds of accounts. One, for regular deposits received and two, a "hold" account containing cash deposits. He said the customers did not want to show accounts being paid in cash and, hence, their transactions were kept separate.

He testified that informal statements were given to suppliers.

Rent was paid to the Simberloff Children's Trust of $240,000 per year.

He did not discuss the sale of MBC to George with Simberloff.

He believed George was paid $130,000 ($2,500 a week) when he arrived in September of 2013. George complained to Grinshpun regularly that he was told he would be paid more when Kepniss left but that never happened.

Checks were deposited into 1st Constitution by MBC daily by scanner. Grinshpun said Kriskos also had an account at Wells Fargo. The witness recalls depositing checks into 1st Constitution for Kriskos because they had no scanner. All cash was deposited in Wells Fargo. Occasionally, Grinshpun would deposit checks for MBC at the branch in Perth Amboy. He knows the checks he was depositing were not for MBC or the scanner would have been used. The witness said he did not look at the deposits.

Grinshpun said he was never paid by George, MBH or Kriskos. He said he never conspired to take any money.

He stated that Kriskos paid for the trucks at a rate of about $20,000 to $25,000 per month. Twenty to forty people were paid from Kriskos.

A payment of 10%, intended as a commission, was shown on one bill for Kriskos (Ex. D-21). Alan refused to pay it. The 10% was never again included. George told him that he had a deal with Simberloff to put the 10% towards the purchase price of MBC.

He said $100,000 was given to Kriskos to open and run the account. Simberloff saw the check register so he knew of the payment.

MBH paid $6,000 to Fuel One to set up an account for Kriskos.

When Simberloff became angry at George he told Grinshpun to stop making payments to Kriskos.

In 2014-2015 Simberloff approved a number of payments for improvements to the property due to problems and to prevent collapse of the buildings.

He testified that Kriskos paid $50,000 for landscaping at Simberloff's house.

He said Kepniss was very successful and weekly sales dropped when he left.

Grinshpun's employment ended January 18, 2016.

Grinshpun gave a list of George's accounts to employees so that George could remove boxes with files. The files were returned after the lawsuit began.

He testified to a number of customers who wrongly paid MBH invoices which were due to MBC.

Echo Type	$1,300
Six Brothers Diner	$949.84
Malibu Clinic	$6,450.05
Red Oak	$1,500
Silver Cup	$500
Ramen Diner	$10,000
Dan's Diner	$9,100

He noted both Simberloff daughters were on the payroll although neither worked.

George Hrissikos

George testified that he graduated from high school in Greece and he had a varied career working as a plumber, bus boy, waiter, manager of a diner, and later was the manager of three diners. He opened Europa Meat which he sold to Sysco Foods, opened a café, and had a job at Sunshine Foods for three years where he made $2,500 a week plus expenses. George believed Kepniss was the owner of MBC until the January 2013 meeting with Simberloff. Simberloff invited him to use MBC as a supplier. George bought for Sunshine from MBC. After he learned Kepniss was leaving MBC in August 2013, Simberloff requested a meeting and said he had a deal too good to refuse. At this meeting Simberloff said that MBC had lost business when Kepniss left. He said he told George he had a good reputation and was known for bringing in customers. George told Simberloff he was unhappy where he was and was not intending to move to work but that he wanted to open his own company. Simberloff asked him to consider working for him. Two days later there was a second meeting where George said he wanted to make the same money. Simberloff said profit margins were 30%, a higher margin that George had ever seen. Simberloff agreed to hire George and his son, Peter. He said it was a good offer with $5,000 per week plus expenses. MBC would finance the accounts that he brought in.

George said this was a better opportunity for him than where he was working because there was more financing in a bigger company. He alleges his son Peter was hired at first for $750 and then $1,500 as Vice President.

Shortly after George and Peter were hired Simberloff told them that they would receive half of their salary, while the other half would accrue towards the eventual purchase price.

George began work in September 2013. He described the first floor of the building as being used to house walk in freezers, cutting rooms and other boxes. The second floor had the main office with Simberloff. There was also a third floor.

George said that when he started at MBC he obtained a new customer with $7,000 in sales and lost him the first week because the meat was old. MBC sent expired cheese products and cold cuts to schools. Everything in the refrigerator was more than two months old. These items were scheduled for existing customers such as jails and nursing homes. George

threatened to leave and Simberloff said he would give him a “blank check,” promising to purchase newer meat. Kepniss came into the meeting and was angry with George for “messing” with the inventory.

The business was making $500,000 per week when Kepniss left and there were concerns that if he left about half of the business would go. Kepniss and Montefusco left and Preston was also bitter and left.

George felt his responsibilities had been tripled. He had to fight not to let Kepniss talk badly of MBC to customers, he had to repair the warehouse, and he had to do his sales job.

Simberloff told him that after Kepniss left he would not increase his pay until business improved to $800,000. He believed that to be a fair deal.

Schools would buy up to $100,000 a week but he said it went against his “code” to sell expired cheese. By the end of 2014 business never went below $850,000. George alone was bringing in $300,000 a week.

There were a number of drafts of a letter of intent. (Ex. D-66, D-67). All debts would have to be paid before George bought the business. There was an undated term sheet between George and Simberloff. (Ex. D-68). Eventually the APA was signed. The terms were as testified to by Simberloff. As of October 30, 2014 the purchase price was $8,000,000.

George signed the promissory note the next day. George told Simberloff he had never seen someone make so much money.

George described the “no shop” clause in the APA as preventing Simberloff from selling to someone else with a better deal. The lease provision provided the premises would be rented for $25,000 a month for five years with an option to renew for three consecutive terms at $25,000 or as based on an increase in the Consumer Price Index. The property was owned by the Trust for the Benefit of the Simberloff Children.

George spent $40,000 on cameras; $50,000 to $60,000 for a roof leak; $125,000 for a new hamburger maker; and had to fix the refrigerator. All was done with Simberloff’s approval.

George testified that one Sunday they had a fire in the building and the fire department took off the second floor ceiling and third floor. The Fire Department shut them down. The cost of repairs was $300,000. In another building the insurance company would not renew the policy because the chimney was starting to fall down. Mice and rats were starting to come into the building. The cost of repairs was $100,000 for the second building. Repairs had to be made to both buildings. He and Simberloff were in agreement.

He testified that when he came to MBC he reviewed the situation with the trucks. The mechanic they used in Newark went out of business. They were spending $450,000 to $500,000 a year on the truck repairs. It was decided that leasing the trucks would save $400,000 a year. Their insurance agent said the $9,000 cost per year for truck insurance was high because of prior claims. He suggested the truck insurance run through another company. The lease for the new trucks was signed in 2014. (Ex. P-15). Eleven trucks were rented. From the first day Kriskos paid for truck leases and was promptly reimbursed from MBC until November 2015. Kriskos also took over all the operating expenses such as parking tickets and gas.

Simberloff suggested Kriskos take over payroll because he was tired of worrying and George would be taking it over eventually. Simberloff said he could take the 10% commission which would be added to the bill. Simberloff refused to pay the initial 10% commission but said in the future commissions would be credited against the purchase price.

In September 2014, Simberloff told George that he was going to write off substantial accounts receivable. George requested an opportunity to collect the accounts and signed an agreement with RHK Recovery Group. (Ex. D-22). He claimed MBC had many dead accounts and he wanted to clear them out. He said RHK met with Simberloff then came to the office and went through the boxes of dead accounts. He said he told RHK that the collection agency would get 25% for out of court settlements and 35% for in court settlements, and MBC would get 20% and George would get 20%. Every month an accounts status report came in and Simberloff usually saw them. (Ex. D-23).

George denied that he wrote off a debt to Carla's Diner in exchange for a Hummer. He admitted that Carla's debt was placed in collection. He said the Hummer was a separate personal purchase for which he paid $7,000 cash in December 2013 shortly after he became president. He could not explain the receipt for $29,500. (Ex. P-19A).

He said the APA warranted that MBC was in full compliance with laws and that the federal, state, and local taxes were currently filed and correctly reflected all income.

He claimed he was owed $250,000 from Simberloff as part of the commission due to Kriskos, the accrued salary and for delivery costs.

He admitted depositing the sum of $250,000 into MBH owned accounts from MBC. Ten days later Simberloff requested the money back and received $249,000.

In mid-2015 George had a discussion with Simberloff about financing to purchase the company. Simberloff agreed to try to help him get his financing through 1st Constitution. Simberloff also noted it was hard to get financing from banks and suggested George try other routes. Simberloff provided two years' worth of tax returns and financials for 2012 and 2013. George is convinced he did not get financing due to the discrepancies between the tax records and the financial statements. The financial statements showed much more favorable information for sales and profits than did the tax returns.

George denies that he had to pay back the $75,000 loan. He claims there was to be an accounting when the APA came into effect.

On January 1, 2016 MBC entered into an "Exclusive Sales Agency Agreement" with Solomon Food Services, Inc. and appointed Solomon Foods as the sales representative and sales agent for MBC customers. (Ex. D-25). This had evidently been under negotiation since November 2015. MBC also agreed not to compete against Solomon Food Services, Inc. George believed this violated the APA.

George claims Simberloff wanted to make a new deal as early as December 2015. Simberloff said to him that since George was unable to get financing he had to figure out something else. At first, Simberloff proposed a new agreement wherein George and Scott Geller would each keep half the accounts. George told Simberloff that MBC owed him $600,000 to $700,000 and that needed to be paid as part of any new deal.

George testified he never said he didn't have the money to buy the company or that he had insufficient money for operating capital. George said he had $500,000, his son had $200,000 and he had friends who could lend him additional money. He said he never gave up his rights under the APA.

The proposed new agreement provided the new lease would be for $25,000 a month rent for six months, then $30,000 for the next six months. This was an increase from the original $25,000. The term sheet also provided for an immediate cash payment for inventory. The present agreement had a 30 year term to pay for inventory. The new agreement also provided that $1,525,000 would be repaid to Simberloff. This had not been covered in the old agreement. In fact the old agreement said all debts would be paid by MBC.

The company had a vastly increased debt from $70,000 in 2013 to $700,000 by 2018.

The corporate expenses for MBC came in the end of December. He was told to separate house accounts from George's accounts. The only exception was Dan's Diner.

P-9 provides written material that the accounts would be deleted. It was initialed AS.

George admits to a meeting at Simberloff's house when Simberloff said he was losing $300,000 and then said the losses were $1,500,000 but refused to provide proof.

George never agreed to the revised APA. George told Simberloff he would not accept the losses. Simberloff said he must leave by the end of the month. In fact he left by January 6, 2016.

Michael Beck

Michael Beck, a public accountant with Neidich and Company, testified. He does not recall ever talking to Peter or Grinshpun. He did speak to Simberloff. He has done the MBC tax returns for twenty five years. He maintains a general ledger for MBC but does not know if they have another ledger. He does not make the general ledger; he just adjusts entries.

He had never heard of Alpha Data Systems, Inc. until the day Todd Conrad testified.

He files tax returns for MBC showing Ellen and Marian, Alan Simberloff's daughters, as stockholders. He prepares a K-1 and each sister gets 50% of the profit each year.

He has prepared trial balance work sheets from 2010 to 2015. This is done after the general ledger is prepared and is just the starting point before adjustments, depreciation, and accounts receivable. Simberloff signs the tax return.

He prepared a compilation as an accommodation for a major client. He said there is an enormous difference between the money on a tax return and a compilation. The net income as reflected in the compilation were only intended to go to vendors. The compilations contain a disclaimer. (Ex. D-51).

He was asked if all cash was put in the bank. He said he never confirmed it was and did not know about the cash payroll being paid since the 1960s.

He was unaware that loans from MBC were being paid to Simberloff directly.

He agreed that the tax returns do not reflect $2,000 a week in cash being paid to Simberloff's daughter Marian Hunt.

The witness never saw an RHK statement before the trial and only spoke to RHK after the law suit started.

He said there was a decline in the revenue in 2015 when George left.

He notes that the APA does not contain a non-solicit or non-compete clause.

Ilan Hirschfeld

Ilan Hirschfeld is a managing partner at Marcum, LLC. He testified that the Marcum report did not show fair market value as it reflects one buyer and not all willing buyers and sellers.

Bruce Golden

Bruce Golden, an attorney for MBC testified. He said the shareholders are Ellen and Marian and Simberloff is the director of MBC.

Todd Conrad

Todd Conrad testified that he works for Alpha Data Systems, Inc. He said he was hired to purge all of George's customers out of the system. He believed George was going to take all of his customers that he had brought with him. As a result, anything to do with those customers would be removed. It was the only time he had purged accounts receivable and invoice history. He spoke to both parties to ensure that they knew the documents in the system could not be recreated and had Simberloff initial each page of the list of accounts to acknowledge the customer records to be retained and those to be transferred to George and purged. (Ex. P-9). Page two of the list was inadvertently not initialed. The invoice from Alpha Data Systems, Inc. dated January 5, 2016 also detailed that he was assigned the task of purging customers from the system. (Ex. D-95). Conrad noted that if computer records were purged hard copies were even more important.

George printed out an accounts receivable list for MBC. Simberloff outlined the accounts which were going to stay with MBC. The remainder were to be assigned to MBH. (Ex. P-9).

Peter Hrissikos

Since graduating from high school, Peter has attended one semester of Bergen County Community College and worked as a waiter at a restaurant managed by his father, working the night shift at the counter. He then worked as a driver for Sunshine Foods. He went with his father to MBC in October 2013. At first he worked in a warehouse and then as a driver. His only discussions with regards to salary were with his father. His father told him his salary would double to $1,500 when he went into the office to assist his father. Before he started in the office, he worked 12-15 hour days for MBC. He stopped working the first week in January 2016. He said his computer, as well as his father's, were taken by them from MBC. He had not downloaded any files.

He knew there was a surveillance system and he did not disable it. He believed it was not working when he left.

He knew eleven trucks had been leased by Kriskos and were used by his father. He estimates costs for those trucks were $1,800 month and $6,500 in EZPass charges. Eventually MBC got five trucks.

Opinion

Of course, underlying the issue of the tax returns and financial statements is the fact that MBC and Simberloff were conducting a massive tax fraud by underreporting income and by paying employees cash since at least 1960. This was known to George. Indeed he testified that he had never seen anyone make so much money.

Simberloff was approached by Geller in the fall of 2015. Simberloff was aware of Geller and George's financial troubles and suggested a plan that would assist both. George, Geller, and Simberloff met to discuss the proposal.

In December 2015, Simberloff wanted to redo the terms of the APA. George rejected the term sheet because the terms were much less favorable to him.

By this time, Simberloff was concerned George was stealing from him. He noted there were losses of $50,000 a week from June to October.

An agreement was reached with Shelley's Foodservice where MBC would still make sales but Shelley's Foodservice was going to process the orders. They would be paid a commission. Alan Simberloff insists MBC had not breached the APA as this was an asset sale.

At this point it was obvious to Simberloff that George was stealing from him. Further it was apparent George did not have sufficient funding. At first George claimed he had $500,000, his son had $300,000, and other people would give him additional money. The court is not persuaded by the paucity of this testimony on this critical part that he had financing.

George was fired and Simberloff sold the business.

George claims Simberloff breached the contract. The court does not agree. There was no triggering event which activated the contract. George never came forward with sufficient funding from anyone other than Simberloff. George wants the court to find he did not get bank

financing due to the discrepancy between the tax returns and the financial statements or compilations. The financial statement clearly states that it has not been prepared in accordance with generally accepted accounting practices. George Hrissikos, as a buyer, was on notice that they were not reliable.

In any civil case, the plaintiff's burden of proof is generally a preponderance of the evidence. Liberty Mutual Ins. Co. v. Land, 186 N.J. 163 (2006); N.J.R.E. 101(b)(1). Pursuant to this standard, the plaintiff has the obligation to prove that the "desired inference is more probable than not." Liberty Mutual Ins. Co., 186 N.J. at 169.

There has been no proof that Simberloff was acting in any capacity but that of Chairman of MBC. As such, he cannot be held personally liable for any of the acts complained of by the defendants.

Second Amended Complaint

In the First Count of the Second Amended Complaint, MBC claims that George and MBH breached the covenant of good faith and fair dealing which was implied in the APA by (a) diverting the proceeds of MBC's accounts receivable including but not limited to eleven checks collected through RHK Recovery totaling $90,475.55; (b) taking evidence supporting MBC's pending accounts receivable by removing signed receipts from customers and other documentary evidence from Plaintiff's premises; (c) interfering with Plaintiff's computer records supporting its accounts receivable by interfering with Plaintiff's relationship with Alpha Data Systems, Inc.; (d) interfering with Plaintiff's customer relationships by urging customers not to pay MBC; (e) converting proceeds of accounts receivable due from Plaintiff's customers by passing themselves off as Plaintiff; (f) converting Plaintiff's inventory to their own use without compensation and selling MBC's products as their own; (g) converting other tangible assets; (h) converting Plaintiff's trade secrets including confidential information regarding plaintiffs customers, accounts receivable, modes of operation, pricing, and other; and (i) otherwise unfairly competing with Plaintiff and causing Plaintiff irreparable harm.

Every contract contains an implied covenant of good faith and fair dealing. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). The parties to a contract are bound by this duty in both the performance and enforcement of the contract. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005). This duty "calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Id. at 224-25 (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)).

When claiming a breach of the covenant of good faith and fair dealing, the party must show proof of bad motive or intention "sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Id. at 225 (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001).).

This court finds that George and MBH breached the covenant of good faith and fair dealing by:

(a) diverting accounts receivable owned by MBC and by representing that MBH was MBC. Losses are detailed on pages six through nine.

(b)The court also finds that documents were removed by George's son, Peter, at his behest, including the removal of signed receipts and other documentary evidence such as invoices.

(c) The court does not find George and MBH interfered with computer records. Todd Conrad testified that he told Simberloff that the records would be purged and not recoverable after he completed his work. In fact, Todd Conrad testified Simberloff signed a document acknowledging that fact. Conrad had no real connection with any of the litigants. The court found him to be a credible witness.

(d) There was no testimony from any customer stating that George directed the customer not to pay MBC. The only testimony regarding this issue was Simberloff's testimony that it happened. Although there was no objection, the court finds this hearsay statement to be insufficient proof of George's statement.

(e) The court finds that George took checks belonging to MBC, endorsed them and caused them to be deposited in MBH and Kriskos accounts.

(f) The court finds that George took $48,500 in products from MBC and failed to pay when he left. MBH also sold products of MBC while representing they were MBH products.

(g) The court finds MBH converted tangible assets, namely computers, desks, and hand trucks. Peter testified that Preston gave his father the authority to take the computers. He does not deny that the other items were taken. This is a hearsay statement to which defendant did not object but the court is not inclined to give it any weight. There was no testimony as to the value of any of these items.

(h) Plaintiff alleges trade secrets have been converted including highly confidential information such as accounts receivable, modes of operation and pricing, which have been used to compete unfairly. There was no testimony relevant to anything unique regarding the mode of operation or pricing. There was no testimony regarding "highly confidential" information as to customers. There was no non-compete clause. Defendant was free to solicit anyone in the industry. See Auxton Computer Enters., Inc. v. Parker, 174 N.J. Super. 418, 423 (App. Div. 1980) (finding that an employee who is not bound by a covenant not to compete may, "while still employed, make arrangements for some new employment by a competitor or the establishment of his own business in competition with his employer.").

The court finds a violation of the duty of good faith and fair dealing in taking accounts receivable, removing records, and taking approximately $48,500 in product and failing to pay for it. The court finds all of these breaches were material breaches.

The Second Count of the Second Amended Complaint alleges Peter and Grinshpun conspired with co-defendant George before and after leaving Plaintiff's employment to violate their duties of good faith and loyalty and to convert Plaintiff's assets. Plaintiff contends that Grinshpun and Peter removed financial records and other assets belonging to Plaintiff without

authorization to do so. Plaintiff also contends that they have otherwise conspired to interfere with Plaintiff's contractual relations and collections, and otherwise unfairly compete with Plaintiff.

The court understands the complaint to allege that Peter and Grinshpun conspired with George to (1) breach their duty of good faith, (2) breach their duty of loyalty (3) convert tangible assets and (4) use Plaintiff's confidential information.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005) (citing Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993)).

> 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. Most importantly, the gist of the claim is not the unlawful agreement, but the underlying wrong which, absent the conspiracy, would give a right of action. [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177-78 (2005). See also Morgan v. Union Cnty. Bd. Chosen Freeholders, 268 N.J. Super. 337, 364-65 (App. Div. 1993).]

Parties to a civil conspiracy are jointly liable for the underlying unlawful conduct as well as the resulting damages. Id. at 178 (citing Bd. Educ. v. Hoek, 38 N.J. 213, 238 (1962)). There need not be direct evidence of an unlawful agreement, but rather circumstantial evidence may suffice. Morgan, 268 N.J. Super. at 365.

Plaintiff must show Peter and Grinshpun joined with George to commit these various bad acts.

The court has already discussed the law with regard to the duty of good faith.

Peter, Grinshpun, and George also have a duty of loyalty to their employer, MBC. An employee owes an undivided duty of loyalty to his employer. See Auxton Computer. Enters., Inc. v. Parker, 174 N.J. Super. 418, 425 (App. Div. 1980). Engaging in competitive activity during the term of one's employment is a breach of the duty of loyalty. Chernow v. Reyes, 239 N.J. Super. 201, 205 (App. Div. 1990). Mere preparation for new employment is not considered competitive activity, while soliciting an employer's clients is considered competitive and a breach of the duty of loyalty. Ibid.

"In evaluating an employee's conduct under the breach of loyalty standard, the employee's level of trust and confidence, the existence of an anti-competition contractual provision, and the egregiousness of the conduct are important factors to consider in the analysis." Lamorte Burns & Co. v. Walters, 167 N.J. 285, 303 (2001) (citing Cameco, Inc. v. Gedicke, 157 N.J. 504, 516-18 (1997)). The court must also consider the employer's knowledge of or agreement to the employee's competitive actions. Kaye v. Rosefielde, 223 N.J. 218, 230 (2015). The level of trust and confidence between an employee and employer inevitably

depends on the employee's role within the company. In Cameco, Inc., the court specifically explained that "[e]mployees occupying a position of trust and confidence . . . owe a higher duty than those performing low-level tasks." Cameco, Inc., 157 N.J. at 516. In determining the appropriate remedy, a fact-sensitive inquiry similar to that used to determine liability is appropriate. Kaye, 223 N.J. at 231.

Plaintiff seeks to have the court find that Grinshpun acted hand-in-hand with George in defrauding MBC. Both of them had Simberloff's confidence and he trusted them. Among the actions complained of are the suspicious deposit of checks into 1st Constitution Bank, including checks from the collection company, and the fact that overdue accounts "disappeared" from the computers to the accounts once they were paid. Checks were also taken by MBH or Kriskos. Defendant Grinshpun testified he never noticed what checks he was depositing, a fact the court does not find credible. The court also finds that Grinshpun removed accounts from the computer records and converted that information. Conversion is the wrongful exercise of dominion or control over the property of another in a manner inconsistent with the other person's rights in the property. Huffmaster v. Robinson, J.A., 221 N.J. Super. 315, 323 (1986). See also LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div. 2009) (quoting Barco Auto Leasing Corp. v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988)). A cause of action for conversion arises when a plaintiff has the right to immediate possession of the property at issue and the defendant willfully engaged in an act that deprived the plaintiff of that right. Royal Store Fixture Co. v. N.J. Butter Co., 114 N.J. Super. 263, 268-9 (App. Div. 1971).

The court finds the same acts constitute a conspiracy to violate their duties of good faith and loyalty. George and Grinshpun conspired to act in violation of their duty good faith and committed a breach of loyalty against their employer. There was insufficient proof to find Peter liable. The court does not find Grinshpun conspired to convert tangible assets such as checks. It does not find Grinshpun conspired to convert personal property. It also cannot find a conspiracy to convert confidential information.

Plaintiff wishes to involve Peter in this tangled web. There is no proof he deposited any checks, collected any money or did anything disloyal to his employer with two exceptions. One, his actions in removing boxes, initially those of Kriskos accounts, at the direction of his father. Peter testified the documents belonged to Kriskos, which was owned by his father. Testimony of Preston supports the fact that more documents were taken. The court cannot conclude Peter knew he was taking other documents. The court does not find his action to be wrongful and does not find he converted items of MBC.

Two, the court finds George and Peter conspired to convert tangible assets such as the computer and hand trucks.

In the Third Count, Plaintiff alleges that George, while an employee and officer of MBC, interfered with Plaintiff's collection of $344,240.86 from Central BBQ, LLC d/b/a Mighty Quinn's BBQ and $581,237.90 from Mighty Quinn BBQ 2nd Avenue (collectively, Mighty Quinn Customers). These sums were due before November 2015 and January 2016. Plaintiff contends that George extended Plaintiff's credit to the Mighty Quinn Customers and the Mighty Quinn

Customers refused to pay Plaintiff, claiming that George had extended further credit and the amounts demanded by Plaintiff were not due. Plaintiff also contends that the Mighty Quinn Customers claimed the amounts were owed not to Plaintiff, but to George and his companies. Plaintiff further claims that George admitted he had collected other amounts due to Plaintiff and deposited the funds into the defendants' accounts, but would not account for or return the amounts to Plaintiff. The collection action was eventually settled by MBH and Mighty Quinn.

To prove tortious interference of either a business relationship or contractual relationship, a party must allege (1) that it has some protectable right to an economic advantage; (2) such right was intentionally and maliciously interfered with; and (3) the interference caused the party an economic loss. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989). An action for tortious interference with a business relationship protects the right to pursue one's business or calling free from undue influence or molestation. Id. (citing Louis Kamm v. Flink, 113 N.J.L. 582, 586 (E. & A. 1934)). "What is actionable is '[t]he luring away, by devious, improper and unrighteous means, of the customer of another." Printing Mart-Morristown, 116 N.J. at 750.

The court finds MBC had a protectable right as to the provider of sales to the Mighty Quinn Customers. The court finds Simberloff's testimony credible and finds George acted maliciously and intentionally interfered with the right of MBC by extending credit without authorization, by not disclosing that payments had been made to him, and by misleading customers as to the fact that MBH and Kriskos were not entitled to the proceeds. Finally, MBC suffered the economic loss of use of an account receivable.

The ad dannum clause is the same as for the second count, except that Count Two also seeks disgorgement of amounts paid to George, Peter, and Grinshpun while they were employed by Plaintiff and acting in contravention of Plaintiff's interests.

Among other remedies, an employee who disregards his covenant of loyalty to his employer is subject to disgorgement of his salary. The New Jersey Supreme Court has found such a remedy to be consonant with the purpose of a breach of loyalty claim, that is, to secure the loyalty that the employer is entitled to expect when it hires and compensates an employee. Kaye v. Rosefielde, 223 N.J. 218, 236 (2015). "[T]he remedy of equitable disgorgement is available to a trial court even absent a finding that the employer sustained economic loss by virtue of the employee's disloyal conduct." Kaye v. Rosefielde, 223 N.J. 218, 221-222 (2015).

When the court determines that disgorgement is an appropriate remedy, it should compel disgorgement of only the compensation that the employee received during pay periods in which he was violating the duty of loyalty. Id. at 222.

The court has found that George breached the duty of loyalty by committing various bad acts, including the conversion of Plaintiff's property and assets. Thus, the disgorgement of George's salary for the time period when he was violating the duty of loyalty is an appropriate remedy in this matter.

The Fourth Count claims that software installed by Alpha Data Systems, Inc. was removed by Alpha Data at the direction of George, and Plaintiff's computer records that were paid for by Plaintiff and created specifically for its business have been denied to Plaintiff by Defendants. Plaintiff contends that the refusal of Defendants to allow Plaintiff access to its own computer records threatens irreparable harm to Plaintiff's business.

A claim of unfair competition is a business tort, consisting of misappropriation of property with some commercial or pecuniary value. N.J. Optometric Ass'n v. Hillman-Kohan Eyeglasses, Inc., 144 N.J. Super. 411, 427 (Ch. Div. 1976). "The misappropriation usually takes the form of 'palming off' or 'passing off' another's goods as your own, although this *modus operandi* is not essential." Id. at 428 (citing CBS v. Melody Recordings, Inc., 134 N.J. Super. 368, 377-78 (App. Div. 1975)). "The essence of unfair competition is fair play." CBS, 134 N.J. Super. at 376; see also Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92 (App. Div. 2001). Unfair competition has been found to exist where employees began competing with their employer while they were being paid by the employer in the course of their duties, even when no covenant not to compete existed. United Bd. & Carton Corp. v. Britting, 63 N.J. Super. 517, 530 (Ch. Div. 1959). If an employee usurped a corporate opportunity or secretly profited from a competitive activity, the employer may recover the value of the lost opportunity or the secret profit. Cameco, Inc. v. Gedicke, 157 N.J. 504, 518 (1999). An agent is not permitted to take advantage of their principals by engaging in secret, self-serving activities, which include usurping corporate activities. Id.

The court's findings are exactly the opposite of what was plead. Simberloff had complete knowledge of what was being done to the computer system as testified to by Conrad. He even initialed a document provided by the expert confirming that the information would be lost. Plaintiff has not proven his case and the court questions his good faith in even bringing the claim.

The Fifth Count alleges that Plaintiff has been damaged by the willful, wanton and malicious acts of Defendants and Plaintiff is entitled to punitive damages. There are no acts specified in this count and Plaintiff has incorporated the allegations of the prior counts.

The New Jersey Punitive Damages Act, codified in N.J.S.A. 2A:15-5.9, *et seq.*, states, in relevant part that:

> (a) Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.
> (b) In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following: (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) The defendant's awareness of reckless disregard of the

likelihood that the serious harm at issue would arise from the defendant's conduct; (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) The duration of the conduct or any concealment of it by the defendant.
[N.J.S.A. 2A:15-5.12(a)-(b).]

The Punitive Damages Act has codified the common law, "which limited punitive damages to only 'exceptional cases . . . as a punishment of [a party] and as a deterrent to others from following his example.'" Pavlova v. Mint Mgmt. Corp., 375 N.J. Super. 397, 404 (App. Div. 2005). Therefore, a party's conduct must have been wantonly reckless or malicious, and there must be an intentional wrongdoing in the sense of an "evil-minded act, or an act accompanied by a wanton and willful disregard of the rights of another . . . The key to the right to punitive damages is the wrongfulness of the intentional act." Ibid. (citing Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984)).

"'Actual malice' is an intentional wrongdoing in the sense of an evil-minded act. 'Wanton and willful disregard' is defined as 'a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.'" Pavlova, 375 N.J. Super. at 404. In order to demonstrate "willful or wanton misconduct," a party must prove that the guilty party is one "with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrong or act or omits to discharge some duty which product the injurious result." Savino v. Paterson Hous. Auth., 260 N.J. Super. 316, 321 (App. Div. 1992) (citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970)).

Punitive damages are awarded with the purpose of punishing the wrongdoer and deterring similar conduct in the future. Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 564 (App. Div. 2007). The plaintiff must provide sufficient evidence to prove that the defendant acted intentionally to harm the plaintiff, in "wanton and willful disregard" of the plaintiff's rights. See Hottenstein v. City of Sea Isle City, 977 F.Supp. 2d 353, 370 (D.N.J. 2013).

The court finds by clear and convincing evidence that George acted with actual malice in his actions in endorsing and depositing checks belonging to MBC to MBH and Kriskos accounts. Grinshpun acted maliciously by depositing checks into the wrong accounts and by erasing the names of delinquent accounts. The court cannot find Peter acted wrongfully. George and Grinshpun are liable for punitive damages. They were fully aware of the harm to a business which would be caused by stealing a considerable portion of its accounts receivable. At the time computer records were erased, only George knew this was part of a plan to convert more money from Plaintiff. This was a long term "crime spree" where George continually stole money from MBC.

This court finds that this was much more than a business dispute. Once George realized that Simberloff might not go through with the APA and Simberloff was on to his ways he began grabbing "with both hands." The court finds he has concocted various incredible explanations for his behaviors (i.e. collections, 10% Kriskos commission) and punitive damages are warranted.

The Sixth Count alleges George signed a promissory note and $89,684.15 is now owed. A contract arises from offer and acceptance, and must be sufficiently definite "that the performance to be rendered by each party can be ascertained with reasonable certainty." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract. Ibid.

For reasons the court cannot fathom, time was spent at trial on whether George needed the money for his daughter's wedding or not. That is immaterial. He admits getting the money and signing the note. He admitted not paying the note but contends this was another area where the parties were to "even up credits and debits at the close of the APA". The court does not find George credible with regard to the fact that the loan did not need to be repaid until the time the conditions of the APA were fulfilled. The promissory note made no reference to this condition. (Ex. P-13). Further, it may well have been that the APA was never consummated. The logical conclusion would be that George would get $75,000 without needing to repay it if he chose not to go through with the deal. The court does not find this is credible. The court finds $89,684.15 is owed.

In the Seventh Count, Plaintiff claims that MBH purchased Plaintiff's products with a promise to pay $39,684.15 on an account certain and Defendant breached its agreement to make payment. Plaintiff contends that payment has been demanded but has not been made.

Testimony was elicited by Preston as to the fact that George was to pay C.O.D. for the products when he left and did not. The court finds Preston to be a more credible witness than George. George and MBH owe MBC $39,500, the amount which was testified to at trial. To the extent George denies the debt, the court does not find him to be a credible witness.

The Eighth Count claims that George and Peter conspired to provide $29,500 credit to the customer account of MBC customer J & R Coffee Shop (Carla's Diner, Inc.) in consideration for a 2005 Hummer. Plaintiff contends that George and Peter had no authority to provide a MBC credit as consideration for the vehicle and they willfully and maliciously entered into the transaction to deprive MBC of the value of its products and convert said value to their own use.

George denies same and contends he bought the Hummer for $7,000 cash for his daughter. A receipt for $29,500 was produced by Preston. (Ex. P-19A). Defendant correctly points out that the receipt has not been authenticated. A debt of J & R Coffee Shop (Carla's Diner, Inc.) in the amount of $28,170.76 was placed with RHK on September 3, 2014. The receipt is dated December 23, 2013. (Ex. P-19A). Defendant argues that had the $29,500 been credited to Carla's Diner the company would have produced the receipt as a defense in the collection matter.

The court, while suspicious, cannot find Plaintiff has proven its case by a preponderance of the evidence.

The Ninth Count alleges George accepted $15,000 in cash from Adolfo Menendez, one of the principals of the Old Towne Diner, as part of a settlement of an MBC debt, and that the $15,000 was willfully and maliciously converted from MBC by George individually without depositing the money into any account of MBC.

Conversion, as previously defined, is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div. 2009) (citing Barco Auto Leasing Corp. v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988)).

George testified he accepted $15,000 cash from Menendez towards a larger debt. George says he gave Menendez a receipt and turned the money over to Simberloff. Both Simberloff and George have lied frequently to the court, to each other, and to the taxing authority. The court cannot find by a preponderance of the evidence that George stole $15,000.

The Tenth Count alleges that defendants have willfully and maliciously conspired to use the vehicles leased by Kriskos without paying for them, thus forcing MBC to pay for the vehicles. Plaintiff further contends that Defendants have failed to reimburse MBC for the cost of the vehicles used by Defendants and that the vehicles have been used to unfairly compete with Plaintiff.

The court finds for the Plaintiff on Count Ten. Both parties agree the lease was taken out for vehicles that would be used to deliver MBC products. George offered no explanation as to why he would be permitted to take the vehicles. Admittedly, they were leased by Kriskos but they were paid for by MBC and guaranteed by MBC. Defendants then kept some of the vehicles in their competing business. Plaintiff should be permitted to recoup the $146,000 lease payment.

In the Eleventh Count, Plaintiff claims that Defendants have willfully violated the terms of the Order entered on April 1, 2016 by: (a) withholding receipts and invoices relating to restaurants opened by Jimmy Manetas who owed $550,000 and reporting to Manetas that MBC did not have the backup documentation to prove debts; (b) continuing to use the name MBC and otherwise passing themselves off as Plaintiff; (c) continued to disparage and misrepresent the status of Plaintiff's business; and (d) otherwise violating the terms of the order.

George used MBC's name when renting space for MBH.

No witness has testified that they heard defendants disparage or misrepresent the status of plaintiff's business.

In the Twelfth Count of the Second Amended Complaint, Plaintiff claims that Defendants diverted checks and accounts receivable of Plaintiff. Specifically, Plaintiff contends that (1) a subpoena of MBH's account at 1st Constitution Bank produced records in the period January 2015-January 2016 of deposited checks of unauthorized diverted accounts receivable of at least $693,711.32; (2) a subpoena of Kriskos' account at JPMorgan Chase from January 2015-January 2016 evidenced sums of unauthorized diverted accounts receivable of MBC and at

least $205,596 of cash deposits diverted from MBC accounts receivable; and (3) a subpoena of JPMorgan Chase account records produced records of a previously undisclosed bank account of Kriskos at Wells Fargo, which is expected to include further evidence of Plaintiff's assets diverted by Defendants. These checks included payments from the collection agency.

George would have the court determine the collection of debts as not part of his job as president but a line of business he could operate "on the side" for his own benefit. Defendants deny such agreements. The court does not believe Simberloff permitted George to make additional money by way of a commission on accounts receivable. George explained that he was to receive 20%. Since no records were kept with regard to how the money was to be paid to George, he alleges George just periodically decided he should take a check made payable to MBC for his benefit. The fact that no records were kept defies credulity.

George has signed correspondence to 1st Constitution bank which proves he had been taking MBC checks and depositing them into MBH accounts. (Ex. P-3, P-4, P-5, P-6).

This court agrees that $693,711.32 has been diverted. These checks include items paid to the collection agency. While cash was deposited into the JPMorgan Chase account there was no proof presented that the origin of the cash was from MBC customers.

Counterclaim

In the First Count of the Counterclaim, George and MBH claim that MBC breached the Asset Purchase Agreement by (1) entering into an agreement where MBC transferred business accounts to a third party in December 2015 and (2) George contends he could not get financing because the financial statements and the tax returns differed substantially. There is no doubt that the financial statements and tax returns differed, but the financials or "compilations" were designed for another purpose. The APA makes no reference to them. No witness from a lender was called to confirm the statement that the discrepancy was the reason George could not get financing. Nor was there any testimony that these statements were kept from him at the time the APA was entered into.

The court finds that the proposed revision to the APA did not violate the APA.

In section 13.13 of the APA the Seller warranted all tax returns had been filed and all taxes were paid. No mention is made of the financial statements.

George contends Plaintiff subjected MBH to economic duress by attempting to unilaterally change the terms of the APA with regard to rent; requiring a substantial portion of the purchase price be paid in cash; requiring MBH to repay $300,000 in loans of MBC; requiring MBH to pay $1,525,000 for funds advanced by Simberloff; and requiring MBH to pay an additional $30,000 to Simberloff. Admittedly, Simberloff was proposing a new agreement that was unsatisfactory to George on many levels. The question presented is whether Simberloff breached the APA. He did not do so by proposing new terms. Simberloff did not die, become disabled or resign. The only way George could buy the company would be to finance the $8,000,000 purchase price himself. In addition, George would have to have a substantial amount of money to be used for operating capital. Contrary to his testimony at trial, the court finds George did not have sufficient cash to operate the company. The fact that he would get accounts receivable of approximately $3,600,000 is not enough to persuade the court he had

sufficient money. The business always operated with large accounts receivables and needed considerable operating capital to operate while waiting for accounts to be paid. George was present at meetings between Simberloff and Geller regarding purchasing the assets and never raised the issue of his ability to get financing. The court found Geller's testimony that George just wanted to get out of the relationship with the accounts he had to be credible.

The court does not find Simberloff violated the APA. It does appear that Simberloff offered a "new deal" when George could not raise the necessary cash. No doubt this was on much less favorable terms than the old APA, but that does not constitute a breach. George was free to and did not reject the new terms.

George wants the court to find Simberloff violated the "no shop" portion of the APA. At this point, Simberloff believed George was stealing from him and he was no longer willing to provide cash infusions into MBC. George contends that Simberloff changed his mind when he was told that George would no longer keep a second set of books to disguise cash from taxing authorities. He also was not going to keep another set of books, the "hold" accounts. This account was kept so that the taxing authorities would not be able to accurately determine the amount of inventory purchased by a customer. George believed Simberloff became concerned large amounts of additional sales would be noticed by the taxing authorities and they might investigate. He thought Simberloff was concerned that he and his daughters would face considerable problems with the taxing authorities and implied criminal penalties.

In the Second Count of the Counterclaim, Defendants claim that the aforementioned actions of MBC and Simberloff constituted an anticipatory breach and/or repudiation of the APA and a breach of the implied covenant of good faith and fair dealing.

An anticipatory breach is a definite and unconditional declaration by a party to an executory contract, through word or conduct, that he will not or cannot render the agreed upon performance. Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 340-341 (1961). "If the breach is material, *i.e.*, goes to the essence of the contract, the non-breaching party may treat the contract as terminated and refuse to render continued performance." Id. at 341. An anticipatory breach may also "give[] rise to a claim for specific performance or for damages for total breach; i.e., for damages based on the injured party's remaining rights to performance under the contract." Cipala v. Lincoln Technical Inst., 354 N.J. Super. 247, 251 (App. Div. 2002). (citing Stopford v. Boonton Molding Co., 56 N.J. 169, 188 (1970)).

When faced with a total anticipatory breach, the non-breaching party has the right to deem itself discharged from further performance and to sue the defendant for damages under the contract. Frank Stamato & Co. v. Lodi, 4 N.J. 14, 21 (1950). The injured party would be required to continue performance on the contract only if the breaching party did not indicate any intention to renounce or repudiate the remainder of the contract and the injured party is offered "a genuine election . . . of continuing performance or of ceasing to perform." Ibid.

Admittedly, there was no notice to George that the APA would be terminated. Again, this is of no matter to the court. George was stealing from MBC. This showing of bad faith precludes George from arguing the APA should have been complied with.

The court does not find that Simberloff has to continue to lend the company $500,000 a quarter, which he had done five times. George would have the court rule that Simberloff should continue to lend large sums of money at the same time George was stealing large sums of money derived from delinquent accounts.

The court does not find an anticipatory breach by Simberloff. The court finds as credible the fact that George could not get financing and did not have sufficient operating capital. George strongly contends he had the operating capital to run the business. He fails to realize that assuming, arguendo, he had sufficient operating capital, he did not have the financing to purchase the business. Simberloff was exploring other alternatives. It was not a breach of the duty of good faith and fair dealing.

In the Third Count of the Counterclaim, Defendants claim a breach of contract. Defendants contend that in December 2013, MBC promoted George to be President of MBC and promised to pay him $5,000 per week salary, in addition to reimbursement of expenses and six weeks of vacation each calendar year. Defendants further claim that MBC and Simberloff represented to George that $2,500 of the $5,000 per week salary would be deferred and credited against the purchase price due from MBH under the APA. Defendants claim that MBC breached the APA, no credit to MBH was provided for George's accrued salary, and therefore MBC is obligated to pay the deferred salary and $5,000 per week vacation pay for a period of six weeks.

The court does find George credible on this issue. Why would George have left his prior employer for the same pay? Adam Preston testified to this same course of action by Simberloff when it came to his salary. He promised one thing but delivered another.

The court believes Peter is entitled to the $750 per week which was deferred from December 1, 2013 to January 6, 2016 (109 weeks). The total due to Peter is $81,750. Judgment is to enter against MBC. But for his unclean hands, George would be entitled to $1,500 per week for the same time period.

In the Fourth Count of the Counterclaim, Defendants claim that MBC and Simberloff fraudulently induced George to agree to a deferral of $2,500 of his salary per week by misrepresenting that MBC would credit MBH with the amount of salary deferred when they had no intention of doing so.

The elements of fraud are (1) a material representation of present or past fact; (2) made knowing it was false and with the intent that it be relied upon; and (3) detrimental reliance incurred upon the representation. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989). In order to form the basis for fraud, the alleged fraudulent representation must relate to some past or present fact and cannot ordinarily be predicated upon matters *in futuro*. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960).

When a claim of fraud is based upon a promise to act in the future, rather than a representation of present or past fact, the claimant must demonstrate a lack of intent by the promisor to perform at the time of the promise. See Stochastic Decisions, Inc., 236 N.J. Super.

at 395. A false promise to do some act in the future is a promise which the promisee did not intend to perform at the time it was made. Maple Hill Farms, Inc. v. Div. of N.J. Real Estate Comm'n, 67 N.J. Super. 223, 230 (App. Div. 1961). "In equity it has been held that an assurance with a subsequent change of mind is a mere moral wrong, while an assurance with a present intention never to follow through with it is a fraud." Ibid. For example, a promise to pay in the future is fraudulent if there is no present intent ever to do so. Stochastic Decisions, Inc., 236 N.J. Super. at 395. However, mere proof of nonperformance does not prove a lack of intent to perform. Id. at 396.

To be successful, George would have to prove that Simberloff and MBC had no intention of crediting George with the deferred salary in the future. The court cannot find this fact by a preponderance of the evidence. The court believes that when the relationship soured, Simberloff decided not to pay the deferred salary, but the court cannot say it was his intent at the time the agreement was made.

In the Fifth Count of the Counterclaim, Defendants claim that in October 2014, MBC requested that Kriskos assume responsibility for operating the delivery service of food products to MBC's customers and, in return, MBC promised to pay Kriskos all costs of operating the delivery service plus a profit equal to 10% of total costs incurred by Kriskos in operating the delivery service. The first bill contained this 10% premium. Simberloff refused to pay and requested that Kriskos agree to a deferred payment of the 10% profit and represented that the deferred amounts would be credited against the purchase price due from MBH upon closing of the APA.

Defendants contend that MBC breached the terms of the APA, MBH never received any credit against the purchase price under the APA, and therefore MBC owes the 10% premium. Defendants also claim that, at the request of MBC, Kriskos carried all of the MBC employees except Simberloff on the Kriskos payroll; MBC promised to pay Kriskos all of the costs of wages, payroll taxes, workers compensation insurance premiums and other expenses relating to the MBC employees and operation of the delivery services; and MBC has not paid all of such costs.

George testified the amount owed is $144,808. (Ex. D-76A). The court does not find as credible that Simberloff agreed to pay a 10% commission. The work involved from an accounting point of view was done by Grinshpun. There was no testimony that George had not spent more time at this business than would have been involved if MBC had been paying the distributions directly.

Furthermore, Defendants claim that based upon the representation by Simberloff that George would be able to complete the purchase of MBC pursuant to the APA, Kriskos leased eleven trucks in order to perform the delivery service for MBC and remains obligated to pay the lease payments and insurance on the trucks as a result of the breach of the APA by MBC. Defendants further claim that Kriskos gave possession of six of the trucks to MBC in March 2016 and despite demand, MBC has failed and refused to hand over possession or to pay for the insurance charges for the trucks. The parties have evidently settled the issue of the lease of the trucks with each company leasing the trucks separately.

In the Sixth Count of the Counterclaim, Defendants claim that MBC and Simberloff fraudulently induced Kriskos to agree to a deferral of the 10% profit component of the delivery service charges by misrepresenting that they would credit such amounts against the purchase price due under the APA, when in fact they had no intention of paying Kriskos for the deferred amounts or crediting the amounts against the purchase price.

The elements of a cause of action for fraudulent inducement and fraudulent misrepresentation are essentially the same as those for common law fraud. A fraudulent misrepresentation "consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." Jewish Ctr. Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981). To recover on a fraudulent misrepresentation, the reliance must be actual and justifiable. Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 181 (App. Div. 2012).

As stated previously, the court cannot find that MBC and Simberloff intended that the Defendants would not be paid at the time they entered into the agreement.

In the Seventh Count of the Counterclaim, Defendants claim that in or about December 2014, MBC and Simberloff agreed that George would be given an opportunity to collect the delinquent accounts receivable and Simberloff promised to pay George a fee equal to 20% of the net amount of any delinquent accounts receivable which were collected on behalf of MBC. Defendants further claim that George expended substantial time and effort in collecting a large portion of the delinquent accounts receivable in reliance on that promise and MBC has failed to pay the full amount of the 20% fee due for collection of the delinquent accounts receivable.

The court does not find George's testimony with regard to this arrangement to be credible. George was president of MBC. As president his duties would include collecting accounts in order to keep the business running. He need not collect them personally, just make sure there was a method in place to collect them. The court cannot see any business reason why he would be given a "commission" on accounts receivable and finds Simberloff's denial of the agreement to be credible.

The court also finds as significant the fact that no records were kept. There was no way to determine the 20% allegedly due.

Third Party Complaint

The First Count of the Third-Party Complaint claims that MBC and Simberloff fraudulently induced George to expend substantial time and effort in collecting the delinquent accounts receivable by promising to pay George 20% of the net amount of delinquent accounts receivable collected, when in fact MBC and Simberloff had no intention of paying the fee to Kriskos. Third Party Plaintiffs MBH, Kriskos, George and Peter claim that Kriskos relied upon these fraudulent misrepresentations and have sustained damages as a result of such reliance.

The law as to fraudulent inducement is discussed on page thirty one.

The court does not find as credible that George was fraudulently induced to collect the accounts receivable. In fact, the court finds George devised this whole scheme without the knowledge of Simberloff.

In the Second Count of the Third Party Complaint, Third-Party Plaintiffs claim that prior to December 2013 and continuing through December 2015, Ellen Simberloff-Fitch and Marian Hunt, the daughters of Simberloff and owners of all the outstanding stock of MBC, conspired with MBC and Simberloff to defraud MBH, Kriskos and George in order to enrich themselves at their expense. They further claim that Ellen Simberloff-Fitch and Marian Hunt systematically withdrew substantial funds from MBC and Simberloff, and used the alleged precarious financial condition of MBC to fraudulently induce George and Kriskos to defer payments due from MBC and prevent MBH from being able to complete the purchase of MBC under the APA.

No doubt the Simberloff daughters were making incomes, at least a part in cash, from MBC. Their trusts received rental income and they were paid for no-show jobs. But there is nothing in the record to support the allegations they were in any way involved in the relationship between MBC or their father to defraud the Defendants and Third Party Plaintiffs.

The Third Count of the Third Party Complaint claims that MBC, Preston, and Simberloff tortiously interfered with the contractual relationships of MBH with its customers by representing to MBH customers that MBH was going out of business and would not be able to continue to supply food products to its customers and suggesting that their customers cease conducting business with MBH and buy their food products from MBC instead.

A claim for tortious interference with contract arises when a party "intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." Nostrame v. Santiago, 420 N.J. Super. 427, 433 (App. Div. 2011) (quoting Restatement (Second) of Torts § 766 (1979)). An essential element for tortious interference with contract is malice, which requires a showing that the interference was done intentionally and "without justification or excuse." E. Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 180 (App. Div. 1996). Thus, "a party may not be held liable for tortious interference for merely providing truthful information to one of the contracting parties." Ibid. Furthermore, the claim must be directed at a third party. Id. at 169. If a person interferes with the performance of his or her own contract, the claim will not be one of tortious interference with contract and liability will be governed by the principles of contract law. Ibid.

There was no testimony elicited from any customer or member of the industry that Preston and Simberloff made any such statements.

The Fourth Count of the Third Party Complaint claims that Simberloff and Preston have continued to make false, disparaging and defamatory statements concerning MBH and George to customers of MBH since the company opened on January 11, 2016. Third Party Plaintiffs further claim that Simberloff and Preston intended to cause financial loss by publishing these statements, or they knew or should have known that the statements would result in damage to

the reputation and finances of MBH and George. They further claim that MBH and George have suffered financial losses and the loss of their reputation as a result of Preston and Simberloff publishing the false, disparaging and defamatory statements.

To prevail on a defamation claim, a plaintiff must establish that (1) defendant made a defamatory statement; (2) concerning plaintiff; (3) which was false; (4) which was communicated to persons other than plaintiffs; and (5) defendants were at fault for publishing the defamatory statement of fact. Feggans v. Billington, 291 N.J. Super. 382, 391 (App. Div. 1996). "A defamatory statement is one that is false and harms the reputation of another such that it lowers the defamed person in the estimation of the community or deters third parties from dealing with that person." Salzano v. N. Jersey Media Grp. Inc., 201 N.J. 500, 512 (2010).

There was no proof elicited that any such statements were made. All Third-Party complainants are relying on hearsay information that defendants made such statements. Yet at trial no one came forward to testify they had heard such statements.

In the Fifth Count of the Third Party Complaint, Peter claims that MBC and Simberloff represented to him that he would receive a $750 per week increase in salary, which would be deferred and credited against the purchase price due from MBH under the APA. MBC was never purchased by George and Peter believes MBC is obligated to pay his deferred salary. The court agrees.

The court finds as credible that Simberloff said the $750 salary would be credited at the time of purchase of MBC. There was never any such purchase. The parties did not make any agreement dealing with this contingency. Parties are free to contract terms of their own choosing and a contract must be enforced in accordance with the express written terms of the contract itself, which evidences the parties' intention and agreement. See Marchak v. Claridge Commons Inc., 134 N.J. 275, 281 (1993); Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 582 (1986). Presented with a contract whose terms are clear and unambiguous, the court must enforce the terms as written. See Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div. 1991). The court has no right to rewrite the contract merely because one might conclude that it might have been functionally desirable to draft it differently, nor may the court remake a contract or alter it for the benefit of one party and to the detriment of the other. Karl's Sales & Serv., Inc., 249 N.J. Super. at 493. The court cannot "fill in" a missing contract term.

In the Sixth Count of the Third Party Complaint, Peter claims that MBC and Simberloff fraudulently induced Peter to agree to the deferral of $750 of his salary per week by misrepresenting that MBC would credit MBH with the amount of salary deferred when in fact they had no intention of crediting MBH with the amount of salary deferred or paying Peter the deferred salary amount.

To find for Peter, the court must be convinced Simberloff and MBC intended to deprive him of the $750 at the time the agreement was made. The court cannot reach this conclusion.

Conclusion

This case presents the most widespread tax fraud this court has seen. Plaintiff had to know when he brought the suit that evidence of his tax fraud would be disclosed. Simberloff and MBC have paid the employees half in cash and half in check for an excess of thirty years. They have evaded paying New Jersey unemployment taxes, social security, etc. They have assisted their employees in defrauding the government in not paying social security or income taxes. Simberloff and MBC have kept not just two sets of books but three sets of books. Reportable income was recorded in one set of books, unreported cash income paid to the company from its customers in the second set. They even kept a third set of books so that their customers, diners, restaurants and the like could pay them in cash that would not be reported on the customer's books. The purpose of this "hold" account was to ensure the IRS could not obtain accurate information as to the total goods purchased.

Simberloff even placed his daughter, Marian, in jeopardy by paying her $2,000 per week in cash. Simberloff committed insurance fraud by claiming to Great Western Casualty Company in October of 2015 that product was destroyed, obtaining payment for the ruined product, and then reselling $150,000 of product for cash. This required that he ignore the direction of the health inspector to destroy the product.

The court finds that Simberloff committed insurance fraud by taking money for a damaged products from the insurance company and, rather than destroy the stock, he sold it.

Simberloff, at the time of this action, testified MBC had accumulated almost $5,000,000 in stock holdings, undoubtedly assisted by the large cash payments made by customers.

The court has found George has stolen almost $1,000,000 from MBC yet seeks the court's assistance. Where a suitor is guilty of bad faith, fraud or unconscionable acts the court can deny relief. See Untermann v. Untermann 19 N.J. 507 (1955). George, as detailed above, has stolen large amounts of money from MBC in various ways. Included are stealing checks made payable to MBC, cash taken from accounts receivables, and taking products without paying for them.

In the face of such hubris, the Chancery court remains closed to MBC and Simberloff.

The court has found for the various parties on the above counts. Despite this fact, the court will not enter judgment in favor of plaintiff, defendant/counter-claimant, or the third-party plaintiffs.

Neither Simberloff nor George have clean hands.

The clean hands doctrine states that one who comes into equity must come with clean hands. A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949). A general guiding principle in the administration of equity is the maxim "[h]e who seeks equity must do equity." Hudson Bldg. & Loan Ass'n v. Black, 139 N.J. Eq. 88, 96 (E. & A. 1946). It is axiomatic that one who seeks relief from court of equity must do so with clean hands. The court of equity will refuse relief to a party who has acted contrary to the purpose of equity. See Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416, 420 (App. Div. 2000). The doctrine is based upon public policy and may be relaxed in the interest of fairness. Rasmussen v. Nielsen, 142 N.J. Eq. 657, 661 (E. & A. 1948). In general, its requirement is not that suitors seeking relief in equity 'shall have led blameless lives' but rather that they shall not have acted fraudulently or

unconscionably with respect to the particular controversy in issue. Med. Fabrics Co. v. D.C. McLintock Co., 12 N.J. Super. 177, 180 (App. Div. 1951).

The Chancery court has been known as the “conscience” of the legal system. Any party desiring the assets of equity must come before the court with “clean hands”. One cannot come into equity without a careful examination of one’s own conduct. The court of equity will refuse relief to a party who has acted contrary to the purpose of equity. Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416 (App. Div. 2000).

The doctrine does not need to be raised by a party to the case and may be recognized by the trial court on its own initiative in the interests of justice and public policy. Trautwein v. Bozzo, 39 N.J. Super. 267, 268 (App. Div. 1956).

The doctrine of unclean hands embraces the principle that a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit. Faustin v. Lewis, 85 N.J. 507, 511 (1981). It calls for the exercise of careful and just discretion in denying remedies where a suitor is guilty of bad faith, fraud or unconscionable acts in the underlying transaction. Untermann, 19 N.J. at 517-18. If circumstances calling for its application are disclosed, then a court of equity, as a court of conscience, is justified in refusing to listen, even if the complaint is well founded. Goodwin Motor Corp. v. Mercedes-Benz of N. Am., Inc., 172 N.J. Super. 263, 271 (App. Div. 1980). However, the doctrine "does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct" of a complainant. Ibid. (quoting Neubeck v. Neubeck, 94 N.J. Eq. 167, 170 (E. & A. 1922)). The effect of the inequitable conduct on the total transaction determines whether the maxim of unclean hands shall apply. Untermann, 19 N.J. at 518. The doctrine of unclean hands should not be used as punishment but to further the advancement of right and justice. Heritage Bank, N.A. v. Ruh, 191 N.J. Super. 53, 71-72 (Ch. Div. 1983). In Pollino v. Pollino, the court held that “[w]hile it is true that the clean hands philosophy is not to be applied where it will disserve the interest of justice or restrain the just exercise of the court’s discretion, not to apply the doctrine in the instant case would result in violence to equity, justice and good conscience.” Pollino v. Pollino, 39 N.J. Super. 294, 205 (Ch. Div. 1956).

The principles on which the doctrine of unclean hands rests are equitable and, if properly administered with consideration of the total situation, are instrumental in the preservation of justice and the integrity of the courts. Untermann, 19 N.J. 507, 517 (1955). “Relief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter’s wrongdoing in the course of a transaction between him and a third person.” United Bd. & Carton Corp. v. Britting, 61 N.J. Super. 340, 344 (App. Div. 1960).

“While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.” Gluck v. Rynda Dev. Co., 99 N.J. Eq. 788, 798 (1926). Any unconscientious conduct connected with the controversy to which one is a party “will repel him from the forum whose very foundation is good conscience.” Id.

> The court acts for its own protection rather than for the protection of the defendant. When fraud or illegality is disclosed in a case public policy requires a court to refuse its aid irrespective of the

> state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief.
> [Id. at 799.]

> The maxim . . . is [sometimes] applied where both plaintiff and defendant have knowingly made a contract tainted with illegality; sometimes it is applied where only the party seeking to enforce is in fault; but it proceeds always on the theory that the dignity of the court is touched to the quick, and that courts of equity will not countenance inequity.
> [Ibid.]

"Indeed, it is true that the plaintiffs in error were the first wrong-doers, but the doctrine that a prior wrong on the part of one will justify a subsequent wrong on the part of the other certainly can have no countenance in a court of equity where the principles that 'he who seeks equity must do equity' and 'he who seeks equity must come with clean hands' guide and direct the chancellor." Id. at 801.

Peter Hrissiko's third party complaint has been dismissed due to failure of proof.

The complaint against Grinsphun is dismissed based on Simberloff's unclean hands.

As a result, all remaining counts of the Complaint, Counterclaim and Third Party Complaint are dismissed.

Based on the court's decision, there is no need to address the experts.