STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BEST TEAM EVER, INC., et al,

Plaintiffs,

v **NO. 12-127444-PD**
Hon. Michael Warren

MATTHEW K. PRENTICE,

Defendant.[1]
____/

At a session of said Court, held in the
County of Oakland, State of Michigan
October 21, 2013.
PRESENT: HON. MICHAEL WARREN
____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT

INTRODUCTION
(OR THE FOOD CRITIC'S SUMMARY)

At stake in this case is whether a sophisticated business owner can negotiate and sign a clear and unambiguous agreement (in which he agrees its terms are reasonable) and purposefully breach it without consequence? Because the answer is "no," the Court renders judgment in favor of the Plaintiffs.

[1] This caption is consistent with the addition of Plaintiffs in the Amended Complaint filed July 2012, and reflects the remaining Defendant at the time of trial. It also is consistent with the caption of the trial briefs/theory of case submitted by the parties.

THE CAUSE OF ACTION
(OR THE INGREDIENTS)

The Plaintiffs allege that Defendant Matthew Prentice (an owner and operator of various restaurants and catering operations ["Prentice"]) is (1) operating various business operations in violation of an Employment Agreement with Plaintiff Trowbridge Restaurants, Inc. ("Trowbridge") dated as of October 26, 2009 (and amended), which includes various non-competition terms, and (2) illegally took and uses Plaintiffs' assets for the improper operations.

The original Complaint filed on June 11, 2012 alleged claims for (1) Claim and Delivery, (2) Conversion, and (3) Unjust Enrichment. The First Amended Complaint filed July 11, 2012, greatly expanded the parties and added allegations to include claims for (1) Breach of Contract, (2) Breach of Duty of Loyalty, (3) Tortious Interference with an Existing Contractual Relationship and Future Business Expectations, (5) Civil Conspiracy, (6) Unfair Competition, (7) Claim and Delivery, and (8) Statutory and Common Law Conversion.[2] Although the First Amended Complaint included various businesses and individuals[3] who worked with Prentice in purported violation of the Employment Agreement, all of those Defendants have been dismissed (via a settlement) pursuant to a June 14, 2013 order. Accordingly, the case is narrowed to claims against Prentice for (i) Breach of Contract, (ii) Breach of Duty of Loyalty, (iii) Claim and Delivery, and (iv) Statutory and Common Law Conversion.

This Court presided over an *exhaustive* bench trial.

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[2] In a bit of less than precise drafting, the Plaintiffs omitted any fourth claim, and the Court has maintained their numbering.

[3] Jimmy Asmar, Michigan Bistro, LLC, Asmar Companies, Inc., International Restaurant Group, LLC, NWH Holdings, LLC, Asmar Capital, LLC, and Mykonos Taverna, LLC (collectively referred to as the "Asmar Defendants"

FINDINGS OF FACT
(OR THE COOKBOOK)

Based on the Court's assessment of the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses, exhibits, and reasonable inferences of the same, the Court makes the following Findings of Fact:

THE MAIN PARTIES
(OR THE CO-STARS)

- Stanley Dickson is a jack of many trades: lawyer, accountant, and businessman. A University of Michigan undergraduate, he holds a Master's Degree in tax and a Juris Doctorate from the University of Detroit. He is the 50% owner of the accounting firm Dickson & Associates, and the managing member of the Trowbridge Law Firm PC. His business ventures include such diverse fields as genetics, hotels, and banking.

- Matt Prentice is a premiere chef. He started cooking when only 12 years old, and obtained his first chef position at 16. He opened his first restaurant when he was 20 years old – approximately 34 years ago. As of late 2009, he had opened and managed approximately 20 restaurants. Since the 1980s, his businesses have collectively employed thousands. Although more recently Prentice has tended to leave the corporate formalities and minutia to his administrative staff, he is very familiar with creating and managing business entities – including company formation; leases; company filings; taxes; and employment documents and procedures. He is deeply experienced in business negotiations. He has required some of his employees to execute noncompetition agreements, and he has established deferred compensation agreements.

THE BRAND & PRENTICE ENTITIES
(OR THE SECRET SAUCE)

- Prior to the transactions at issue, Prentice created, owned and managed a set of restaurants and catering businesses. "Matt Prentice" was a well-recognized brand in the Oakland and Wayne Counties. That brand included a world class, top tier dining experience in all of its facets - preparation, presentation, quality, creativity, and deliciousness – at various price points. Matt Prentice the person was synonymous with and indistinguishable from Matt Prentice the brand. A darling of the press, Matt Prentice relished publicity and marketing, and received favorable coverage and notoriety. Matt Prentice was the public face for his businesses, bringing unique goodwill and value to the restaurants and catering operations. They had a very loyal following, including through a frequent diner program, repeat business through families, and similar relationships.

- Prior to the transactions at issue, Prentice had several premises agreements to operate his businesses; Prentice developed menus, trained and managed culinary, wait, and other staff; and Prentice otherwise had a robust business organization. Many of his higher end employees required extensive training and were irreplaceable.

- Prior to the transactions at issue, Prentice's proprietary and confidential information included customer lists and recipes, and literally the "special sauce" of culinary success.

- Prior to the transactions at issue, over the last 30 years Prentice had 10 minor shareholders and more than 20 employees who received deferred compensation based on performance.

THE PRELUDE

(OR SOCIAL HOUR)

- As young, rising stars, Dickson and Prentice met through the Young Presidents' Organization, which is a networking organization for business presidents under the age of 40. They were professional associates and friends, but did not socialize outside of business related events.

- Beginning in approximately 2004, Dickson & Associates performed accounting work for Prentice's business entities, including annual accounting, tax returns, and some quarterly financial statements. Dickson & Associates last performed accounting work for Prentice's business entities in 2009 to address some lingering issues from prior years' accounting work. Dickson formally ended the accounting relationship pursuant to a letter sent to Prentice well prior to August, 2009. Dickson terminated the relationship because Prentice owed Dickson & Associates tens of thousands of dollars of unpaid accounting bills.

- Prior to the transactions at issue, Dickson did not personally perform any legal work for Prentice or his entities, as the law firm Lipson Neilson[4] was their primary counsel. Lipson Neilson engaged in general corporate representation, and also represented Prentice and/or his entities in several lawsuits, including a broad range of matters, over many years involving thousands of billable hours. Other than noted in these Findings of Fact, until the transactions at issue, Lipson Neilson was the exclusive law firm for Prentice and his affiliated businesses. Eventually Prentice told Lipson Neilson to stop working because he could no longer afford to pay the firm.[5]

- The Trowbridge Law Firm is solely owned by Dickson, and its associates report to him. In early 2009, the Trowbridge Law Firm was engaged by Prentice's business entities regarding a 2004 tax issue – they appeared in tax court and billed 8.5 hours. This limited representation concluded on March 25, 2009.

- With the collapse of the national and Michigan economies, by March 2009, Prentice and his entities were near insolvency. Prentice had been involved in some novel work with local hospitals, which had kept his businesses afloat, but they were unable to consummate a long-term binding deal. With that, he believed he would have to shutter the businesses.

ACT ONE: CRISIS & FALSE STARTS
<u>(OR THE APPETIZER)</u>

- In early August, 2009, in a phone call to Dickson, Prentice disclosed the dire financial situation of himself and his then existing business entities (the "Prentice Entities"). On or about August 7, 2009, Dickson and Prentice met in person about the crisis. At the meeting, they discussed the possibility of Prentice going into bankruptcy, and they had questions

[4] Technically, the law firm today is called Lipson, Neilson, Cole, Seltzer & Garin P.C.
[5] On October 26, 2009, a prior employee filed a lawsuit against Prentice. Prentice was represented by Lipson Neilson.

about the viability of such a course of action. Prentice was anxiously looking for a savior, and was hoping Dickson could help. Dickson did not provide legal advice in this discussion. Nor was Dickson about to provide Prentice a bailout. To the contrary, Dickson disclaimed being able to give any advice and instead told Prentice that "You need advice, and I've got a good guy for that." Dickson struck upon the idea of referring Prentice to his friend Robert Diehl, an attorney at Bodman PLC, who Dickson knew had an excellent reputation as a "work-out" expert, and believed would do a good job for Prentice and any potential buyers. Dickson picked up the phone and called Diehl, and Diehl agreed to meet Prentice to discuss options. Diehl happened to have the ability to meet with the two that afternoon, and Dickson and Prentice drove to Diehl's office and had a short meeting about Prentice and the Prentice Entities' predicaments. Diehl expressed his doubts about the viability of bankruptcy (ironically, Prentice did not have enough money to go bankrupt), and advised Prentice and Dickson of the benefits and viability of the Prentice Entities engaging in a friendly foreclosure with their largest creditor, AMRESCO. Diehl explained that in such a transaction, if Prentice could find a friendly buyer, Prentice could still work and remain in control of his businesses. Diehl further counseled that in this friendly foreclosure, the friendly buyer would purchase the assets to be foreclosed by AMRESCO (the "Acquired Assets"), and Prentice would be able to use the Acquired Assets in the operation of his businesses to maintain his livelihood. In this transaction, technically Prentice would not be involved until after the fact. The Acquired Assets would first be foreclosed on by AMRESCO, which in turn would sell the Acquired Assets to the friendly buyer, who in turn would hire Prentice to use the Acquired Assets on behalf of the friendly buyer. This idea was new to Prentice.

- Armed with Diehl's advice to him, as soon as the meeting was over, Prentice went to work to explore the viability of the friendly foreclosure plan, including calling AMRESCO and searching for a friendly buyer. Soon Prentice had identified a potential friendly buyer, Frank Farrugia, who also happened to be his best friend. Although Farrugia had a number of questions about the transaction, he expressed serious interest. Farrugia and Prentice agreed they should meet with Dickson, Diehl, and accountants to review the viability and structure of the friendly foreclosure idea.

- On August 19, 2009, Prentice, Dickson, Farrugia, and a handful of other business advisors/accountants met at Diehl's conference room to further discuss the friendly foreclosure. At the time, Farrugia was the proposed buyer of the Acquired Assets in any proposed friendly foreclosure. Although Prentice was unsure who Diehl would have represented before this meeting, it was evident at this meeting that Diehl would be representing Farrugia if the deal proceeded as discussed. Diehl had no further involvement in the proposed transaction. Everything that was previously discussed at the initial meeting among Dickson, Diehl, and Prentice was also discussed at the August 19, 2009 meeting. During the course of these discussions, Prentice revealed that he had overextended his dining empire, all of the restaurants were losing money, the catering operations alone were profitable, large amounts of State of Michigan and federal taxes were outstanding and being pursued, and the 2009 economy was savaging the ability of Prentice and the Prentice Entities to stay solvent. No employment agreement was discussed.

- Within a few days after the August 19, 2009 meeting, Farrugia withdrew from considering the friendly foreclosure. Dickson was stunned when he heard the news.

ACT TWO: SALVATION
<u>(OR SOUP)</u>

- With the collapse of the Farrugia deal, at Prentice's request, Dickson and Prentice met. Prentice told Dickson he had no other buyer; his businesses were about to close; 500 people would lose their jobs; Prentice's brand would be worthless; and Prentice's reputation would be ruined. Prentice implored Dickson to replace Farrugia, and he promised Dickson that he would with his "last dying breath" repay Dickson any money put into the deal. Dickson was surprised and uninterested in becoming the friendly buyer.

- Motivated to save his business empire and reputation, over the next several days Prentice continued to approach Dickson about doing a deal. In light of his re-evaluation of the proposed deal, growing interest in helping Prentice, and his improved financial situation, Dickson decided that he was then prepared to move forward with such a deal, but only under tightly controlled circumstances, including Prentice's unwavering commitment to make the deal work. The two agreed that if Dickson became Prentice's savior, Prentice must be 100% committed to saving the businesses. Prentice stated he could personally live on $4,000 a month to make the deal work. Dickson agreed to become the proposed purchaser.

ACT THREE: THE KABUKI DANCE
(OR MAKING OF THE CEASAR SALAD)

- In the prelude leading to the acquisition of the Acquired Assets, Dickson desired to formalize the business arrangement with Prentice. Although Prentice desired to include a commitment by which he could reacquire the Acquired Assets, Dickson flatly refused. Both parties hoped that at some point Prentice would reacquire the Acquired Assets, but they agreed that was something quite far in the future - if ever. The parties never agreed to any terms regarding such a buy-back.

- Dickson determined that if he were to go forward as Prentice's savior, he would likely invest at least a $1,000,000 in the businesses after the closing. He understood that he might be subject to tax liabilities, employer liabilities, and other risks. He believed that the deal was a long-term investment, requiring an enormous amount of his time and attention. Dickson believed that several years – perhaps 5 or more – would pass before the businesses would turn a material profit. He also believed that the only way to make the deal work was if Prentice was 100% committed and would not dilute his talent, attention, or brand by setting up operations outside of the control and supervision of Dickson. In other words, Dickson would not tolerate Prentice competing against him. Because Dickson was investing a substantial sum of money to acquire the Acquired Assets and salvage the businesses, a key condition of the deal was that Prentice would report directly to Dickson. Dickson decided that Prentice would run the daily operations, and that most other employees would report to Prentice. Dickson explained his terms to Prentice, and Prentice agreed.

- In light of Dickson's and Prentice's agreement, Dickson had the Trowbridge Law Firm prepare an Employment Agreement for Prentice. Dickson provided Prentice the draft of the Employment Agreement in September, 2009. Prentice set it aside and did not bother to review it for weeks. On one occasion, Dickson told Prentice that he needed to sign it to "pass the sniff test" for the friendly foreclosure. This assertion was never explained or questioned. On several occasions, Dickson pestered Prentice about the Employment Agreement, even encouraging him to have a lawyer review it. Because the Employment Agreement was an indispensable component of the broader transaction, Dickson ensured that it possessed several specific provisions, including a liquidated damages clause of $500,000 and a 5 year noncompetition term, with a tolling provision. Dickson believed that these provisions were reasonable and necessary (1) to protect his investment and the brand, (2) because damages would not be reasonably calculable, and (3) to deter Prentice from breaching the Employment Agreement.

- Prentice eventually reviewed the document, and told Dickson, "It is one of the most oppressive agreements I've ever seen." Dickson flatly responded, "You're right. It gives me the right to cut your balls off. I need you on board. Talk to your lawyer, and if you don't sign it, I won't do the deal." Prentice understood that he had a simple choice: (1) he could proceed with Dickson and sign the Employment Agreement or (2) he could abandon the transaction.

- Prentice was well aware of all of his options. He could walk away from the deal with Dickson and try to find another buyer. He could let all of his businesses collapse (likely through bankruptcy). He could have let the restaurants collapse and simply live off of the catering businesses. He did not bother to consult with a lawyer as suggested by Dickson. He did not rely on Dickson's comment about the sniff test to sign the Employment Agreement. He was not fooled into thinking that it was unenforceable. Without the Dickson deal, Prentice's businesses were almost certainly doomed. His reputation and businesses would be lost in the impending foreclosure to AMRESCO.

- Prentice decided to move forward with the Dickson deal, and signed the Employment Agreement. Prentice understood the terms of the Employment Agreement, and made a decision of his own free will to accept what he considered to be onerous terms to obtain a fighting chance to salvage his reputation and businesses, along with his standard of living. Prentice and Dickson both hoped that Prentice would be able to buy back the restaurants from Dickson at some point in the future, but there was no agreement or even discussion on any material terms (such as timing, price, or form of the transaction). At the time he decided to sign the Employment Agreement, Prentice was a sophisticated businessman desiring to entice Dickson to become his savior. He was no simpleton.

- With Prentice's agreement to move forward with the Employment Agreement, Dickson negotiated the purchase of the Acquired Assets for $600,000 with a $50,000 down payment and $550,000 promissory note. Through some amazing negotiations, Dickson reduced the final pay off to a single $100,000 payment. Entities owned entirely by Dickson, including all successors involved with the transactions in this matter (hereinafter, the "Trowbridge Entities," as applicable), purchased the Acquired Assets and took over the operations of the Prentice Entities. Accordingly, AMRESCO foreclosed on the Acquired Assets, and the Trowbridge Entities acquired the Acquired Assets from AMRESCO on October 26, 2009 (the "Closing"). Prentice then promptly executed the Employment Agreement.

- Some of the major provisions of the Employment Agreement are:[6]

> 1. Position of Employment and Responsibilities. Employee will serve in the capacity of Chief Executive Officer; and will assume and perform such responsibilities and duties as are customary for such position together with such additional responsibilities and duties as may be assigned by the directors or senior officers of Employer from time to time. Employee will serve Employer fully, diligently, competently, and to the best of his ability during the Employment Term (as defined herein). Employee will devote his full working time, attention and energies to, and use his best efforts, ability and fidelity in the performance of, the duties and obligations set forth in this Agreement.
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> * * *
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> 5. Non-Competition During Employment. Employee agrees that for as long as he remains employed by Employer, he will devote substantially all of his time, skill, diligence and attention to the Business. Employee further agrees that during such period of employment he will not, directly or indirectly:
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> a. make any statement or perform any act intended to advance any interest of an existing or prospective competitor of Employer in its relationship with any existing or potential customer, supplier, employee or creditor of Employer;
>
> b. do any act, or solicit or encourage any other employee of Employer to do any acts, that is disloyal to Employer or inconsistent with Employer's interest or in violation of Employer's policies;
>
> c. participate in or assist with the formation or operations of, or solicit any other employee to participate in or assist with the formation or operation of, any business that competes with Employer or facilitate any discussions with respect to the

[6] "Employee" is defined as Prentice. "Employer" is defined as Trowbridge Restaurants, Inc. and its successors. Prentice does not challenge the Plaintiffs' standing to enforce the Employment Agreement and the Employment Agreement Amendment.

possible future employment of such other employee by any such business;

d. discuss with any customer of the Business or any existing or potential supplier or creditor of Employee that Employee intends to resign, or make any statement or do any act intended to cause any customer or an existing or potential supplier or creditor of Employer to learn of Employee's intention to resign; and

e. discuss with any customer or any existing or potential supplier or creditor of Employer the present or future availability of services or products provided by a business that competes with Employer or, where such services or products are competitive, with services or products that Employer provides.

6. Non-Competition During and After Employment. Employee agrees that during the Employment Term and until the expiration of five (5) years following the date that Employee ceases to be employed by Employer for any reason, he will not, directly or indirectly, either:

a. have any interest in (whether as founder, proprietor, officer, director or otherwise), enter the employment of, act as agent, broker, licensor or distributor for or adviser or consultant to, or in any way assist (whether by solicitation of customers or employees or otherwise) any individual, partnership, joint venture, corporation or other business entity directly or indirectly engaged in any business or enterprise which directly or indirectly competes with Employer in the business of the restaurants, catering, and all related goods and services or other activities engaged in by Employer at the time Employee ceases to be employed by Employer, to the extent competitive with Employer in the markets in which Employer operates;

b. solicit, divert or take away, or attempt to solicit, divert or take away any customer or the business of any customer with respect to the products or services of Employer sold (or offered for sale) to such customer;

c. attempt to cause any customer to refrain, in any respect, from maintaining or acquiring any product or service provided or offered by Employer to such customer;

d. render services to or share in the earnings of or invest in the stock, bonds or other securities of any other entity directly or indirectly engaged in any business or enterprise in competition with the Employer's business; provided, however, that Employee may own passive investments of not more than one percent (1%) of the outstanding stock, bonds, or other securities of any similar business (but without otherwise participating in such similar business) if such stock, bonds or other

securities are listed on any national stock exchange or are traded and quoted on or the Nasdaq National Market System.
The running of the period during which the restrictions set forth in this Section 6 apply will be tolled during the continuance of any breach or violation by Employee of his covenants and agreement contained in this Section, and the period will be extended by the length of time during which any such breach or violations continues.

7. Non Solicitation, etc.

a. Employee agrees that during the Employment Term and until the expiration of five (5) years following the date that Employee cases to be employed by Employer for any reason, Employee will not (i) recruit or solicit any employee or sales agent of Employer to discontinue such employment or engagement; seek to employ or retain any such employee or agent; or cause any business, person, firm or corporation which competes directly or indirectly with Employer to seek or solicit the employment or retention of any such employee or agent; or (ii) solicit or encourage any person or any business firm, corporation or other entity which has a business or commercial relationship with Employer to seek to discontinue such relationship or reduce the volume or scope of such relationship.

* * *

10. Reasonable Restrictions. Employee agrees that the duration, activities restricted and geographic scope of the provision set forth in Sections 5 through 9 are reasonable, and are reasonably necessary to protect the business and good will of Employer. If any court determines that the duration, activities restricted or geographic scope, or any combination thereof, are unreasonable and that such provision is to that extent unenforceable, Employee agrees that the provision will remain in full force and effect for the greatest time period, with respect to the broadest type of activities described, and in the greatest geographic area that would not render it unenforceable. Employee expressly acknowledges that the obligations of Employer provided herein are full and adequate consideration for the restrictions in Sections 5 through 9.

11. Enforcement. The parties hereto recognize that the services to be rendered by Employee under this Agreement are special, unique and of extraordinary character. Employee acknowledges that breach by Employee of the terms and conditions of any provisions of Sections 5 through 9 of this Agreement will result in irreparable harm to the Employer and Employer's Affiliates for which compensatory damages are

an inadequate remedy. Employee therefore agrees that in the event of such breach, Employer will be entitled, if it so elects and in addition to all other remedies available to Employer both at equity and at law, to institute and prosecute proceedings in any court of competent jurisdiction, either in law or equity, without the posting of any bond or security, to enjoin such breach and/or to specifically enforce the performance of Sections 5 through 9 of this Agreement. Employee further agrees to a liquidated damage clause in the amount of $500,000.00. The waiver by the Employer of a breach of any provision of this Agreement by the Employee shall not operate or be construed as a waiver of any subsequent breach by the Employee. No waiver shall be valid unless in writing and signed by an authorized officer of the Employer. Employee will reimburse Employer for all attorneys' fees and expenses incurred by Employer and Affiliates of Employer in successfully enforcing such provisions. This remedy is in addition to any other remedy available to Employer, by judicial proceedings or otherwise, for breach of any provision of this Agreement, including Sections 5 through 9. Notwithstanding any breach by Employer of this Agreement, except if Employer refuses without cause to pay Employee amounts to which Employee is entitled hereunder, the provisions of Section 5 through 9 will remain in effect.

- Dickson gave no legal advice to Prentice about the AMRESCO transaction; Dickson dealt directly with AMERESCO to obtain the assets of the Prentice Entities.

- At the time the Employment Agreement was signed, the markets in which Prentice and the Prentice Entities operated were Oakland County and Wayne County, and the parties understood that the covenants in Paragraphs 5 and 6 of the Employment Agreement pertained solely to those markets.

- The Acquired Assets did not include all of the Prentice Entities' operations. For example, Prentice continued catering operations at

Temple Israel, and maintained ownership and operations at Coach Insignia, a restaurant at the top of the Renaissance Center in Detroit.

ACT FOUR: THE DEAL GROWS
(OR WOULD YOU A LIKE A SECOND ENTRÉE?)

Following the Closing:

- Prentice continued to be the face of the businesses and to manage most of the daily affairs of the Trowbridge Entities.

- Prentice asked, and Dickson agreed, to reimburse Prentice through the Trowbridge Entities for ordinary business expenses. Prentice was given a corporate credit card for business expenses, and on occasion Prentice would also run what apparently – and in fact were – personal expenses through the card. Prentice's car expenses were run through the credit card and paid by the Trowbridge Entities. Prentice even paid his daughter's rent via the credit card. On occasion these expenses were questioned by Dickson and discussed with Prentice, but in the end none were rescinded. Dickson ensured that the applicable Trowbridge Entities issued Prentice 1099 Tax Forms for the expenses.

- Prentice's wife was employed for a period of time at the Trowbridge Entities, and Prentice and his children (and their friends) often ate at the restaurants.

- Dickson invested well over $1,000,000 in the Trowbridge Entities. Over time, all the Acquired Assets involving the business entities were reorganized into Trowbridge Entitles in which each restaurant was compartmentalized into a separate legal entity.

- Dickson never personally provided Prentice legal advice.

- When Prentice was facing jail time in his divorce case pending before Judge Alexander, the Trowbridge Law Firm, via Chip Baker (who had worked on tax matters for the Prentice Entities), represented Prentice. That special appearance began and ended on that discrete matter, and only encompassed the time period of November 2, 2010-November 10, 2010. Prentice asked the Trowbridge Law Firm to represent him because he was desperate.

- Prentice remained the technical owner of 1/3 of the ownership interest of the Coach Insignia restaurant in the Renaissance Center; 2/3 of the ownership interest was held by General Motors. General Motors was also the sole owner of the leasing company (i.e., Riverfront Holdings, Inc.) and was owed over $300,000 in back rent. Prentice had signed a personal guaranty for the rent. Sensing an impending disaster that would spill-over to his new business, Dickson negotiated with General Motors and Prentice for a Trowbridge Entity to acquire 100% of the ownership interest in Coach Insignia (i.e., Coach Insignia LLC) in exchange for repayment of the rent, over time, to Riverfront Holdings, Inc. If this transaction did not occur and Coach Insignia failed, Prentice was personally liable for over $300,000.

- Prentice remained the technical owner of the catering business located at Temple Israel. However, the Temple Israel business expenses, including employee expenses, payroll, supplies, inventory, and others, were all paid for by the Trowbridge Entities, and all Temple Israel revenues were collected by the Trowbridge Entities. The Temple Israel business operations earned the Trowbridge Entities $200,000 in net profits annually, meaning that $1,000,000 would be made over five years.

- The Trowbridge Entities obtained additional catering business at Adat Shalom.

- On New Year's Day of 2011, Prentice and Dickson closed the Shiraz restaurant to stop impending huge losses in the New Year.

- In light of the reorganization of the Acquired Assets into the Trowbridge Entities, in a document dated January 25, 2011, the parties executed an Employment Agreement Amendment that expanded the definition of "Employer" to include all the Trowbridge Entities, some of which had not been included in the AMRESCO transaction (such as Coach Insignia, LLC, and Milk & Honey, Detroit, Inc. [located at the Jewish Community Center]). Prentice had no qualms signing the Employment Agreement Amendment, understanding that it was vital to his continued livelihood and was appropriate in light of the current business posture of the parties. Prentice understood that the Employment Agreement Amendment was indispensable to maintaining his wages, health insurance, continued employment, reimbursable expenses, and related compensation and job security. In fact, his overall compensation increased.

- The next day, January 26, 2011, Prentice filed personal bankruptcy.

ACT FIVE: THE DEAL UNRAVELS
(OR A RUINED DESSERT)

- Unknown to Dickson, after Prentice "got his head back on straight" (including finding a new significant other), in early 2012, Prentice had decided he should leave the Trowbridge Entities. Prentice, however, realized he needed financial security to do so. He began to search for partners and found Jimmy Asmar, who agreed to cover Prentice's legal expenses. Prentice did not consider him an ideal partner, but was hopeful that the relationship would work.

- Without prior approval of Dickson, Prentice gave $5,000 bonuses to two Trowbridge Entity employees and hired his former executive assistant (Kelly Jo Clarke) as a Trowbridge Entity employee.

- Prentice talked to the press about the restaurants in a way that concerned Dickson, and without Dickson's knowledge or approval, Prentice began exploring acquiring a business. When Dickson learned of the press coverage and the acquisition exploration, Dickson demanded, and Prentice agreed, that Prentice execute an acknowledgment of Prentice's limitations in a Corporate Policies memo dated January 25, 2012 (the "Corporate Memo"). Via the Corporate Memo, Prentice acknowledged that various material decisions of the Trowbridge Entities needed the approval of Dickson and that the breach of the expectations in the Corporate Memo would be a breach of the Employment Agreement.

- Prentice continued to operate the catering business at Temple Israel. Much of the equipment used or stored at Temple Israel were Acquired Assets or assets purchased by the Trowbridge Entities (china, glass, silver, kitchen equipment, service ware, chaffing dishes, table decor, unused food items). In March 2011, a fair inventory of such equipment was taken, reflected on Plaintiffs' Exhibit 36. The value of these items is at least $30,000. After March 2011, additional catering and related assets were purchased with a value of $44,166.28, as reflected on Plaintiffs' Exhibit 33 ("PCI Shiraz Purchases") and detailed in Plaintiffs' Exhibit 34.

- Prentice had many creative ideas about how to expand the business. He pursued a culinary wellness program which had begun with Henry Ford West Bloomfield medical facility, and a Pittsburgh hospital chain was also interested.

- Prentice also pursued the opening of a dining operation dubbed "Flat Iron." He prepared a pro forma financial statement with an annual net income of $450,047.61. This pro forma was speculative and conjecture at best. No one knew if the pro forma had any reasonable likelihood of short or long-term accuracy.

- Prentice also pursued a business opportunity called Gastronomy.

- Prentice also pursued the re-opening of the signature restaurant Morels. Morels had been a restaurant of the year in the 1990s with a very successful, high visibility operating history. Prentice identified a location and began readying it for occupation. A draft lease was circulated. The re-opening of the restaurant garnered high profile media attention, and a Trowbridge Entity even put a deposit down for its carpeting.

- Prentice convinced Dickson that Morels would open and that the deal to acquire the location would close on March 19, 2012. On March 14, 2012, the Trowbridge Law Firm incorporated Morels, Inc. On the Ides of March (March 15), 2012, companies affiliated with Jimmy Asmar (the "Asmar Companies") circulated what was proposed to be a Final Lease Agreement for review and approval by Prentice, Dickson and the Trowbridge Law Firm. Prentice also developed a pro forma financial statement showing an annual net income of $772,625.58. This pro forma was speculative and conjecture at best. No one knew if the pro forma had any reasonable likelihood of short or long-term accuracy.

- During these developments, Prentice began to secretly negotiate with the Asmar Companies to open Morels without Dickson. In tandem, at Prentice's direction, Ms. Clarke visited the Milk & Honey Detroit and Temple Israel locations and copied the password protected computer files at the sites and placed them on a thumbdrive and her laptop. These files included financial statements, financial forecasts, banquet event orders (past and future), bills, invoices, and customer lists. On March 26, 2012, Ms. Clarke was told that Prentice had left the Trowbridge Entities; the next day she turned over the laptop and thumbdrive to the Trowbridge Entities' management.

- Pending the Morels closing, Dickson went on vacation to the Caribbean. Prentice called Dickson and left a voicemail stating that he was leaving the Trowbridge Entities and was going forward with Morels and Flat Iron without Dickson. Stunned, Dickson called back and tried to convince Prentice that many customers, employees, and Dickson were dependent upon him and that Prentice would be breaching the Employment Agreement. Prentice was unmoved. They exchanged emails, in which accusations flew and meager attempts to negotiate were made. Meanwhile, Prentice had already begun and continued negotiations with the Asmar Companies to open Morels and perhaps engage in other businesses. On March 23, 2012, the Trowbridge Law Firm sent a demand letter to the Asmar Companies warning them that Prentice was violating the Employment Agreement. The next day, through an email, Prentice officially resigned from the Trowbridge Entities (effective on March 29, 2012).

- On March 28, 2012, Prentice wrote an email to Riverfront Holdings, Inc., asserting that he had been fired by Dickson on March 26, and that his termination meant that the license for the name of Coach Insignia had been violated as had the lease agreement between the Trowbridge Entities and Riverfront Holdings, Inc. However, over time Dickson was able to salvage that relationship and business because of his personal connections. Nevertheless, as recently as July 9, 2013, Riverfront Holdings, Inc. sent Dickson a notice that Coach Insignia LLC was in material default for losing and failing to re-engage Prentice.

- On March 28, 2012, Prentice sent an email to the real estate owner of the potential new business project, Gastronomy, in which he requested that the project be halted. However, Dickson was able to salvage that relationship because of his personal connections.

- On or about March 28, 2013, Prentice personally talked to an Asmar Company involved with another restaurant and the Trowbridge Entities lost that business opportunity.

- On March 28, 2013, Prentice wrote an email claiming that several key staff of the Trowbridge Entities had agreed to work with him. He lied in the email as some of those employees had made no such commitment.

- Prentice quickly enticed several key employees of the Trowbridge Entities to leave, including, but not limited to, the manager of catering, an executive chef, a catering manager for Temple Israel, the original chef of Morels, a chef with expertise in Kosher food, a sous chef, and a catering chef. Prentice personally announced to lower wage employees that they no longer worked for the Trowbridge Entities. Prentice also enticed his executive assistant to follow him. Prentice made job offers to several other key personnel, including the director of Kosher sales. Prentice interfered with all the fine dining establishments and attempted to take over the catering businesses.

- With help of his executive assistant Ms. Clarke and her husband, Prentice created a database of hundreds of customers that were originally derived from comment cards, frequent diner program lists, and business cards – almost all such information which had been acquired by the Trowbridge Entities (the "Trowbridge Database"). The Trowbridge Database was used to send emails and entice customers to Prentice managed businesses.

- When Prentice abandoned the Trowbridge Entities, he seized control of $150,015.45 of assets (including $15,349.13 for coolers; $75,000 in china, glass, silverware, dishes, and trucks; $15,500 in ending inventory; $44,166.28 in purchases for PCI Shiraz; and $8,000 of carpet at Morels) (collectively, the "Seized Assets"). In addition, because of the seizure, the Trowbridge Entities suffered $52,334.27 in lost profits from catering events for which they paid the out of pocket expenses, but were unable to collect payment because of Prentice's interference with receipt of payment.[7]

- When he left, Prentice demanded that the Trowbridge Entities stop using his name, and Prentice announced to the press, customers, employees, and general members of the public that he had left the Trowbridge Entities. In light of the brand being all but destroyed for the Trowbridge Entities by these actions, the Trowbridge Entities rebranded their operations to the Epicurean Group. Dickson attempted to take the payments for a few catering jobs executed by the Trowbridge Entities, and also attempted to entice repeat catering customers to leave the Trowbridge Entities for him. Prentice was able to entice cars.com and a few other off premises catering customers to leave the Trowbridge Entities for his operations.

- Prentice approached landlords of some of the Trowbridge Entities' restaurants in an effort to convince the landlords to terminate the Trowbridge Entities' monthly leases in favor of new Prentice businesses. In fact, this interference had some success. A Trowbridge Entity at the Northern Lakes location was forced to move because Prentice raised sufficient doubts in the landlord's confidence in the Trowbridge Entity that it was unable to negotiate a more favorable, longer term leasehold.

[7] See Plaintiffs' Exhibit 33 and Exhibit 34.

- On May 7, 2012, Prentice opened (with the Asmar Companies) the new Morels, but it soon went bust and closed. Prentice began sending emails to customers using the Trowbridge Database in June, 2012.

- Prentice opened Flat Iron, but it soon went bust and closed.

- Although Prentice negotiated extensively with the Asmar Companies an on-going business relationship, it was never consummated in writing and eventually unwound.

- As of the time of trial, Prentice had established a new company, Matt Prentice Events Inc. Prentice is the sole owner and officer, and it is the only entity that provides any culinary related services in which Prentice is involved; these services are only for catering – as of the date of trial, he has no remaining operating restaurant interests. Matt Prentice Events Inc. has no business dealings with the Asmar Companies.

- Prentice has conducted consulting work for a potential new restaurant, and has even met with West Bloomfield Township officials regarding various issues. He has mainly consulted regarding the kitchen, layout, and menu; he (through Matt Prentice Events Inc.) will be paid $25,000 upon opening the restaurant, with a percentage of the gross revenues thereafter.

- Through Matt Prentice Events Inc., Prentice has seized the Temple Israel catering business, including some off-premises events. He continues to use a cooler paid for by the Trowbridge Entities. The assets used for Temple Israel are the same assets used when he worked for the Trowbridge Entities. Prentice continues to earn $200,000 in net profits annually (approximately $16,666.66 a month) from the Temple Israel business. But for his breach of the Employment Agreement, those net profits would have been earned by the Trowbridge Entities. As of the end of trial, the Trowbridge Entities already suffered lost profits of $266,666.67 (i.e., the approximately 16 months from the end of March, 2012 – end of July, 2012). In addition, the Trowbridge Entities will lose at least another $733,333.33 in lost profits over the course of the next 44 months. Moreover, concurrently a business valuation multiplier of times five (x 5) the annual lost profits applies to the Temple Israel business. The Trowbridge Entities will not be able to reclaim the lost business at Temple Israel even if the noncompetition provisions are enforced against Prentice.

- As of the time of the trial, the Trowbridge Entities were involved in litigation for unemployment taxes and Single Business Taxes for debts that Prentice had incurred through the Prentice Entities prior to the consummation of the acquisition, as well as by others for acts or omissions by the Prentice Entities prior to the consummation of the acquisition.

- The Plaintiffs did not establish by credible evidence the value of the loss of goodwill.

- Unless enjoined by this Court, Prentice will continue to operate catering operations and pursue new restaurant opportunities in Oakland and Wayne Counties.

- Prentice serially and repeatedly violated Paragraphs 1, 5, 6 and 7 of the Employment Agreement by his actions detailed *supra,* including, but not limited to (including preparing to work with the Asmar Defendants prior to his official departure), competing against the Trowbridge Entities, taking their assets, disparaging the Trowbridge Entities to their landlords, interfering with their leases, seizing receipts for their executed catering events, and poaching their employees.

CONCLUSIONS OF LAW

(OR THE HANGOVER)

I

Purported Breach of Fiduciary Duties by Dickson

A

Prentice's Argument

Prentice argues that the Employment Agreement is unenforceable because Dickson violated his fiduciary duties to Prentice in entering the Employment Agreement. In particular, Prentice argues:

> Mr. Dickson, the owner of all of Plaintiffs' entities, is not only an attorney, but an accountant; a counselor and a financial advisor to Prentice. All three professions are without a doubt held to high standards of professionalism and ethics. Mr. Dickson unmistakably knew and has no excuse to deny that he owed Prentice the duty to act in good faith, fair dealing, and loyalty as required by the Michigan Supreme Court and to act in accordance with the Michigan Rules of Professional Conduct. It would be intolerable and inexcusable to fathom otherwise. Unfortunately Mr. Dickson, Prentice's counselor, accountant, financial advisor, and friend used his position to defraud him. . . . As Prentice's counselor, accountant, and financial advisor, Prentice undoubtedly entrusted Mr. Dickson with the utmost confidence and signed the Employment Agreement. As a result Mr. Dickson gained superiority and influence over Prentice . . . . Mr. Dickson failed to adhere to his fiduciary duties and engaged in fraudulent and unlawful conduct by failing to disclose his adverse interests to Prentice, knowingly entering into a business transaction with Prentice whereby he acquired an adverse ownership, possessor, and security interest in Prentice's assets, breaching his duty of loyalty, good faith, and fair dealing he owed to Prentice. Mr. Dickson knew he had a duty to disclose and an ethical responsibility to inform

Prentice of the inherent conflicts of interest present, but failed to do so. [Defendants' Trial Brief 5-8.[8]]

B

The Plaintiffs did not violate any fiduciary duties to Prentice because (1) any fiduciary relationships had ceased at the time of the transactions at issue, (2) Prentice was fully informed that Dickson would be taking an adverse position, (3) Dickson advised Prentice to obtain independent legal advice, and (4) the negotiations were at arms' length with no use or abuse of any confidential information or fiduciary relationship

Prentice's broad brushed and sweeping assertions are simply unsupported by the specific facts in this case. By the time Prentice approached Dickson, the Trowbridge Law Firm had concluded its completely unrelated representation on a single tax issue months before, and Dickson & Associates had ended its accounting relationship. Prentice approached Dickson, who then referred him to another lawyer. After Farrugia bowed out, Prentice again approached Dickson to become his savior. By that time, Prentice had disclosed anything and everything about his financial affairs to third parties, including Farrugia and Diehl (after it was clear that Diehl would be representing Farrugia if the friendly foreclosure was consummated). Dickson had no confidential information to use against his former client. In addition, Dickson advised Prentice to obtain his own legal counsel, even referring him initially to Diehl. Dickson explicitly told Prentice that he needed to have an onerous Employment Agreement, and it was obvious that they were adverse in connection with Employment Agreement. There was no slight of hand, trickery, or clever abuse of fiduciary relationships. The parties engaged in arms' length negotiations as sophisticated businessmen.

[8] Much of this argument is a mixing of fiduciary duties and the Michigan Rules of Professional Conduct ("MRPC"), and is repeated in a different argument that specifically addresses violations of the MRPC. As such, this Opinion addresses the fiduciary duties argument in this section and the MRPC issues separately.

Prentice argues (citations omitted) "The failure on the part of the one occupying a fiduciary relation to disclose fully and fairly all the facts to those to whom such duty of disclosure is owed may be regarded as evidence of fraud." Such is not the case here. Dickson was no longer in a fiduciary relationship, and he fully and fairly disclosed all the facts to Prentice about the deal and their relationship. Prentice was not a simpleton who blindly followed Dickson to the slaughter – he was a fully informed participant who initiated the business deal and was thankful to his "dying breath" that the deal would be consummated.

II

<u>Dickson's Purported Breach of the Michigan Rules of Professional Conduct</u>

A
Prentice's Argument

Echoing the breach of fiduciary argument, Prentice asserts that because Dickson violated the Michigan Rules of Professional Conduct ("MRPC"), the Employment Agreement should be rendered unenforceable. In particular, Prentice argues that "Mr. Dickson is prohibited from representing Prentice in the 'friendly foreclosure' or in counseling him to sign the Employment Agreement, because Mr. Dickson's own interests adversely affected his ability to competently and ethically represent Prentice." Mixed in this argument is the assertion that no consideration was given for the noncompetition clause, and that Dickson fraudulently induced Prentice to sign the Employment Agreement. Prentice also asserts that Dickson violated the MRPC by engaging in fraudulent behavior.

B

Dickson did not violate the MRPC because (1) Dickson did not provide Prentice legal advice in the transaction, (2) Prentice was a former client at the time of the Employment Agreement for matters wholly unrelated to the Employment Agreement, (3) Dickson did not commit fraud, (4) Dickson advised Prentice to obtain independent counsel, and (5) Dickson did not use any confidential information as Prentice had revealed his financial distress to many third parties

Prentice's arguments are again unsupported by the record. Prior to the execution of the Employment Agreement, and with the sole exception of engaging the Trowbridge Law Firm for a single tax matter which ended months prior to Prentice approaching Dickson about his dire financial straits, Prentice's legal counsel was Lipson Neilson.[9] Moreover, neither Dickson nor the Trowbridge Law Firm provided legal advice to Prentice in connection with the friendly foreclosure. Thus, MRCP 1.7(b)[10] and MRPC 1.8(a),[11] which are the authorities relied upon by Prentice, are inapplicable.

Although not cited or argued by Prentice, MRPC 1.9 is also inapplicable. The Trowbridge Law Firm did not previously represent Prentice in any substantially related

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[9] As noted in the Findings of Fact, Lipson Neilson was engaged by Prentice and the Prentice Entities until Prentice instructed the firm to stop working because he could no longer afford to pay it.

[10] Rule 1.7(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[11] Rule 1.8(a) Conflict of Interest: Prohibited Transactions
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.

matter to the transaction at hand. Accordingly, Dickson and the Trowbridge Law Firm need not follow the procedures set forth in the Rule.[12]

Similarly, Dickson did not commit fraud. He engaged in arms' length negotiations with Prentice, explaining exactly the deal that they entered. He did not unduly coerce Prentice to enter the transaction. To the contrary, Prentice wanted to proceed with the transaction and did so of his own free will. Thus, contrary to Prentice's argument, MRPC 8.4 has no applicability.[13]

Although unnecessary, Dickson even told Prentice to obtain his own legal counsel.

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[12]Conflict of Interest: Former Client.
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
(b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client
(1) whose interests are materially adverse to that person, and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
[13] Rule 8.4 Misconduct, particularly subrule (b):

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
(c) engage in conduct that is prejudicial to the administration of justice;
(d) state or imply an ability to influence improperly a government agency or official; or
(e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law

Moreover, Dickson did not use any confidences gained by his prior representation of the Prentice. In fact, Prentice had fully revealed his financial situation and the need to enter into some kind of transformative business transaction to third parties, including Farrugia and Diehl (once it was it clear that Diehl would be representing Farrugia if he proceeded with the friendly foreclosure).

III
Dickson's Purported Fraud in the Inducement

A
Prentice's Argument

Prentice argues that the Employment Agreement is unenforceable because he was duped into signing it by Dickson's lies and deception.

B

Prentice was not fraudulently induced to enter the Employment Agreement because (1) Dickson did not lie or deceive Prentice, and (2) Prentice was a sophisticated businessman who entered the Employment Agreement (and the preceding transactions) of his own free will

To establish a fraud in the inducement, a party must show:

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*Custom Data Solutions, Inc v Preferred Capital,* 274 Mich App 239, 242-243 (2007), quoting *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 477 (2003), *M&D, Inc v McConkey,* 226 Mich App 801, 806 (1997).]

These elements are not met here. Dickson made no false representation. In addition, to the extent Prentice believes that any statements were false, Dickson did not make such statements knowing that they were false or in reckless disregard of the truth, or with the intention that Prentice would act in reliance upon them. Moreover, to the extent Prentice acted, he was not damaged because he wanted the transaction to be consummated – he obtained what he bargained for.

IV

Enforceability of the terms of the Employment Agreement (other than Liquidated Damages)

A

Prentice's Argument

Prentice claims that the Employment Agreement is unenforceable as a matter of law because it fails to protect a reasonable business interest as required by MCL 445.774a. In particular, Prentice claims that because he built the business, the Plaintiffs are "attempting to steal what is not rightfully theirs." Prentice also asserts that there was no consideration given, the "geographical limitation is outrageous and unreasonable," and "Plaintiffs have not identified and cannot identify any unfair advantage other than mere competition itself. . . ."

B

Because the Employment Agreement provides in its plain and unambiguous text that it is reasonable, it is enforceable under MCL 445.774a

MCL 445.774a(1) provides:

> An employer may obtain from any employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or

> covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Paragraph 10 of the Employment Agreement specifically provides that "Employee agrees that the duration, activities restricted and geographic scope of the provisions set forth in Sections 5 through 9 are reasonable, and are reasonably necessary to protect the business and good will of Employer."[14] By definition it is a free will contract that protects a reasonable business interest. The Court will not create a new contract for the parties, and its terms are enforceable. *Rory v Continental Ins Co,* 473 Mich 457, 461 (2005) ("unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions").

Of course, the language of MCL 445.774a(1) requires that the terms of the Employment Agreement be "reasonable." Despite Prentice's express, plain, and unambiguous agreement and affirmation in the language of the Employment Agreement that its terms are reasonable, Prentice now asserts that very Employment Agreement is void because it is unreasonable. In particular, Prentice relies heavily on a

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[14] More fully, this provision provides:

> The parties hereto recognize that the services to be rendered by Employee under this Agreement are special, unique and of extraordinary character. Employee acknowledges that breach by Employee of the terms and conditions of any provisions of Sections 5 through 9 of this Agreement will result in irreparable harm to the Employer and Employer's Affiliates for which compensatory damages are an inadequate remedy. Employee therefore agrees that in the event of such breach, Employer will be entitled, if it so elects and in addition to all other remedies available to Employer both at equity and at law, to institute and prosecute proceedings in any court of competent jurisdiction, either

non-binding 1991 Eastern District of Michigan federal case, *Kelsy-Hayes Co v Maleki*, 765 F Supp 402, 404-407 (ED Mich, 1991), for the proposition that the Court should evaluate several factors to determine the Employment Agreement's reasonability. However, *Rory* precludes this Court from second guessing the reasonability of the Employment Agreement and finds *Kelsy-Hayes* to be unpersuasive in this context. Simply put, the plain and unambiguous text agreed to by the parties binds them. Again, the Court will not create a new contract for the parties, and its terms are enforceable. *Rory, supra* at 468 ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that ""'[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts"'" [emphasis in original; citations and footnotes omitted]).

C

Even ignoring the Employment Agreement's admission of reasonability, because the Employment Agreement (1) provided significant consideration to Prentice, (2) established a reasonable geographical limitation, (3) protects the Plaintiffs from unfair competition, and (4) clearly and unambiguously establishes the reasonable business interest, it is enforceable under MCL 445.774a(1)

Even if the Court were to ignore Prentice's own words and were to impose its own view of reasonability onto the Employment Agreement, this long-term strategic deal, including the Employment Agreement, was reasonable.

Referring to MCL 445.774a(1), Prentice expounds part of his argument:

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in law or equity, without the posting of any bond or security, to enjoin such breach and/or to specifically enforce the performance of Sections 5 through 9 of this Agreement.

> Applied to our facts, Plaintiffs have failed to show what protectable business interest Plaintiffs' Employment Agreement protects. Plaintiffs' quibble claims of goodwill and reputation are superfluous to these facts because Prentice acquired the goodwill and reputation he had long before his employment began with Plaintiffs. Furthermore his general knowledge and skills are personal to him, learned by him, not these new business entities or Plaintiffs. Plaintiffs have failed to identify any trade secrets or special knowledge that Prentice did not already know or that is not already known to the public or customers who chose to hire him. Prentice has spent much of his entire adult life (over thirty years) dedicated to the restaurant business and up until Plaintiffs purchased Prentice's assets through the Article 9 Sale, they had no experience in the restaurant business. Plaintiffs are attempting to steal what is not rightfully theirs.

This argument is specious. The Plaintiffs stole nothing. At the vigorous request of Prentice, the Plaintiffs purchased Prentice's former business assets from AMRESCO for hard, cold cash. Without the Dickson deal, Prentice's businesses were almost certainly doomed. His reputation and businesses would be lost in the impending foreclosure to AMRESCO. At his urging, the Trowbridge Entities purchased the Acquired Assets, which enabled the Trowbridge Entities to operate with the goodwill and business reputation that the Plaintiffs salvaged. In addition, Prentice was made the CEO of a culinary empire. Prentice was provided a salary and business expense allowances, even his daughter's rent. His wife was employed and his children fed. This was no mere employment agreement, it was a long-term strategic business relationship, of which the Employment Agreement was the indispensable cornerstone. If there was no reasonable business interest to protect, the deal would never have been consummated by either side. In addition, the parties contemplated that Dickson would pour huge sums of money into the new businesses, which he did. The parties believed that the Trowbridge Entities would only have a fighting chance if Matt Prentice, the brand, was employed as the CEO. The parties understood that Dickson would not move forward with the deal without a 5 year noncompetition agreement. Prentice signed it. He made the bargain.

Indeed, all of the factors cited by Prentice favor a finding of reasonability. There was significant consideration to support the Employment Agreement.

The economic hardship on Prentice was reasonable in light of the long-term deal, and Prentice knew of its long-term consequences and agreed to them.

The public interest favors the enforceability of contracts and the ability of individuals to negotiate in a free market their own business deals, including noncompetition agreements. *Rory, supra;* MCL 445.774a(1).

Prentice also claims that "the economic hardship imposed on Prentice itself is unconscionable because Plaintiffs (who have not offered any reasonable competitive interests to protect) attempt to restrict Prentice, a man who is known as being inseparable from the kitchen, from being able to seek employment in any a restaurant for five (5) years in Oakland or Wayne County. Metropolitan Detroit primarily consists of two counties, [sic] (Wayne and Oakland); the geographical limitation is outrageous and unreasonable." This argument is fallacious. First, the 700,000 or so residents of Macomb County might be somewhat dismayed that they are not counted as Metropolitan Detroit, not to mention the other nearby counties of Washtenaw, Ingham and Livingston for that matter. Second, by its terms, Prentice can open a restaurant or culinary business in any of the other 81 counties in Michigan, the other 49 states (plus D.C. and territories) of the United States of America, or any other country in the world (e.g., Canada, which includes Windsor across the river from Detroit and which actively caters to Metropolitan Detroiters). Prentice can earn a living in the restaurant and catering business, he just must do it outside of the competitive area in which he agreed to in his Employment Agreement. He also can earn a living doing anything else within Oakland and Wayne Counties. The geographic limitation is more than reasonable.

With regard to the duration of the noncompetition covenant, the parties understood that Dickson would not move forward with the deal without a 5 year noncompetition agreement as set forth in Paragraph 6 (including the tolling provision). This was so because it was part of the long-term strategic business deal. The 5 year duration was reasonable in light of the circumstances, including the acquisition from AMRESCO, the investment of at least a $1,000,000, the acquisition of the goodwill and brand, and Prentice's indispensable role. Likewise, contrary to the arguments of Prentice, the tolling provision in Paragraph 6 is enforceable to ensure that the Trowbridge Entities would actually benefit from the 5 year duration. Again, the Court will not redraft the Employment Agreement for the parties. *Rory, supra.* For the reasons articulated *supra,* the Court independently finds that the duration and tolling provision are reasonable.

With regard to the line of business or type of employment, these terms on their face are reasonable. Requiring a premier chef not to compete against restaurants and catering businesses is eminently reasonable. This is especially so in light of all of the circumstance surrounding the Employment Agreement.

Simply put, Prentice signed the Employment Agreement of his own free will. He made the bargain. The contract is plain and unambiguous. He was not coerced to sign it. By definition it is a free will contract that protects a reasonable business interest and includes a duration, reasonable geographical and type of employment or line of business. The Court independently affirms its reasonability under MCL 445.774(a).

V

Breach of Duty of Loyalty

A

Prentice's Argument

Prentice argues that Count II of the Complaint, alleging that Prentice breached his duty of loyalty to the Plaintiffs, should be dismissed because the Employment Agreement is unenforceable and Prentice owed no such duty of loyalty.

B

The Employment Agreement is enforceable, and as Chief Executive Officer, Prentice owed and breached his duty of loyalty to the Trowbridge Entities

For the reasons articulated *supra,* the Employment Agreement was enforceable and breached by Prentice. Prentice owed the Trowbridge Entities a fiduciary duty of loyalty as their Chief Executive Officer, which he blatantly breached by violating the Employment Agreement (including preparing to work with the Asmar Defendants prior to his official departure), competing against the Trowbridge Entities, taking their assets, disparaging the Trowbridge Entities to their landlords, interfering with their leases, seizing receipts for their executed catering events, and poaching their employees.

VI

Because Prentice wrongfully took dominion and control over assets of the Trowbridge Entities, the Plaintiffs have proven their claims for Common Law and Statutory Conversion

As noted in the Findings of Fact, Prentice asserted dominion and control over the Seized Assets, and they have never been returned. In closing argument, the Plaintiffs relinquished their action for Claim and Delivery and desired to pursue solely monetary damages for conversion. Prentice did not object.

Common law conversion "is defined as any distinct act of domain wrongfully exercised over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 391 (1992). MCL 600.2919a(1)(b) provides that "A person damaged as a result of . . . . Another person's stealing or embezzling property or converting property to the other person's own use" is entitled to treble damages.

When Prentice breached his Employment Agreement and seized control of the Seized Assets, he "wrongfully exercised" control over the assets of the Trowbridge Entities. Accordingly, he is liable for both common law and statutory conversion.

VII

Damages

Although their numbers kept growing during the trial, the Plaintiffs most cogently and precisely express their prayer for damages in their Exhibit 29, which lists (1) injunctive relief, (2) liquidated damages of $500,000, (3) lost profits from the restaurant businesses of $6,113,366, (4) lost profits from Temple Israel of $1,000,000, (5) $52,346 in lost profits for payment of executed catering jobs, (6) $43,200 in lost profits from other catering jobs, (7) converted assets valued at $158,015, trebled to $474,045, (8) loss of goodwill of $1,000,000, and (9) unspecified attorney fees and costs, plus interest.

A

Injunctive Relief

Paragraph 10 of the Employment Agreement specifically provides that the parties agreed that injunctive relief was appropriate:

> The parties hereto recognize that the services to be rendered by Employee under this Agreement are special, unique and of extraordinary character. Employee acknowledges that breach by Employee of the terms and conditions of any provisions of Sections 5 through 9 of this Agreement will result in irreparable harm to the Employer and Employer's Affiliates for which compensatory damages are an inadequate remedy. Employee therefore agrees that in the event of such breach, Employer will be entitled, if it so elects and in addition to all other remedies available to Employer both at equity and at law, to institute and prosecute proceedings in any court of competent jurisdiction, either in law or equity, without the posting of any bond or security, to enjoin such breach and/or to specifically enforce the performance of Sections 5 through 9 of this Agreement.

This language is plain and unambiguous and governs the parties. *Rory, supra.*

Even if this Court were to independently determine whether such injunctive relief is warranted (which is not the role of the Court), the Court independently finds that for the reasons articulated *supra* regarding the application of MCL 445.774a(1), the injunctive relief set forth in the Employment Agreement is warranted. As previously determined, the geographic scope of the Non-Competition provision and corresponding injunctive relief is limited to Oakland and Wayne Counties. The tolling provision of Paragraph 6 applies. Because no such tolling provision exists elsewhere, only the covenants in Paragraph 6 will be tolled.

B

Liquidated Damages

Paragraph 11 of the Employment Agreement in relevant part provides that "Employee further agrees to a liquidated damages clause in the amount of $500,000.00." Nothing could be more clear and unambiguous. As such, its dictates are enforceable without any second guessing by this Court. *Rory, supra.*

To the extent a higher court determines that this Court should look behind the plain language of a contract entered freely by sophisticated businessmen, see, e.g., *Moore v St Clair County,* 120 Mich App 335, 339-340 (1982),[15] the liquidated damages "amount is 'reasonable with relation to the possible injury suffered' and [is] not 'unconscionable or excessive.'" *UAW-GM Human Resource Ctr v KSL Recreation Corp,* 228 Mich App 486, 508 (1998). As argued by the Plaintiffs, liquidated damages are "particularly applicable where actual damages are uncertain and difficult to ascertain." *Papo v Aglo Restaurants,* 149 Mich App 285, 294 (1986). "The distinction between a valid liquidated damages clause and an illegal penalty depends on the relationship between the amount stipulated to in the liquidated damages clause and the subject matter of the cause of action." *Id.* The $500,000 liquidated damages clause was more than reasonable in light of the AMRESCO acquisition, the known costs to be invested into the Trowbridge Entities, the risky nature of business success, the need for Dickson to deter Prentice from abandoning the business, on-going liabilities and liability risks, and the speculative nature of any lost profits. Accordingly, the parties shall be bound by the agreement for a $500,000 liquidated damages award.

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[15] Of course, *Moore* was decided prior to *Rory.*

C

Lost Profits

Prentice cursorily argues that if liquidated damages are awarded, that the Plaintiffs are entitled to nothing more. However, Paragraph 11 of the Employment Agreement (emphasis added) specifically provides that the injunctive relief and the liquidated damages clauses are not the exclusive remedy:

> Employee therefore agrees that in the event of such breach, Employer will be entitled, if it so elects and *in addition to all other remedies available to Employer both at equity and at law*, to institute and prosecute proceedings in any court of competent jurisdiction, either in law or equity, without the posting of any bond or security, to enjoin such breach and/or to specifically enforce the performance of Sections 5 through 9 of this Agreement. Employee further agrees to a liquidated damage clause in the amount of $500,000.00. The waiver by the Employer of a breach of any provision of this Agreement by the Employee shall not operate or be construed as a waiver of any subsequent breach by the Employee. No waiver shall be valid unless in writing and signed by an authorized officer of the Employer. Employee will reimburse Employer for all attorneys' fees and expenses incurred by Employer and Affiliates of Employer in successfully enforcing such provisions. *This remedy is in addition to any other remedy available to Employer, by judicial proceedings or otherwise, for breach of any provision of this Agreement, including Sections 5 through 9.*

1

Morels and Flat Iron

The Plaintiffs request lost profits from Morels and Flat Iron. However, as established in the Findings of Fact, the claimed lost profits involving Morels and Flat Iron are based on Prentice's pro forma calculations, which were nothing more than conjecture and speculation. As such, the Plaintiffs have failed to present credible evidence by which lost profits should be awarded. Indeed, the evidence revealed that these entities were all but stillborn, and likely for reasons unrelated to Prentice's breach of the Employment Agreement. That the parties contemplated that any lost profits would be speculative is affirmed by the $500,000 in liquidated damages established in the Employment Agreement, which is exactly what the Plaintiffs argued when defending the liquidated damages clause. The lack of credible evidence and the speculative nature of the lost profits bars their recovery. *Isbell v Anderson Carriage Co,* 170 Mich 304, 317-318 (1912) ("There is no proof or presumption that Isbell & Grant would have been able to do all these things [business plans], or could have as successfully managed the business and worked up a market for the car. This is not a case of infringing on an old established business. It was building up a new business where none existed. Prospective profits on an established business can often be estimated in the light of the past with a reasonable degree of certainty; but a new business is in the realm of uncertainty and conjecture. It has sometimes been stated as a rule of law that prospective profits are so speculative and uncertain that they cannot be recognized in the measure of damages. This is not because they are profits, but because they are so often not susceptible of proof to a reasonable degree of certainty. Where the proof is available, prospective profits may be recovered, when proven, as other damages. But the jury cannot be asked to guess. They are to try the case upon evidence, not upon conjecture").

2

Temple Israel

The Plaintiffs also seek recovery for lost profits from Temple Israel. "The object of awarding damages in cases of breach of contract is to award a sum 'which is the equivalent of performance of the bargain * * * to place the plaintiff in the position he would be in if the contract been fulfilled.'" *Gongola v Yaksich,* 3 Mich App 676, 680-681 (1966), quoting McCormick, Damages, § 137, p 561. Michigan jurisprudence "do[es] not, however, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable." *Stimac v Wissman,* 342 Mich 20, 28 (1955). See also *Gongola, supra* at 680, quoting *Stimac, supra* at 28. Instead, the law merely "require[s] that the amount of profit lost be shown with such a reasonable degree of certainty as the situation permits." *Stimac, supra* at 28. See also *Isbell, supra* at 318 (finding that "proof to a reasonable degree of certainty" was necessary to award lost profits, and "Where the proof is available, prospective profits may be recovered, when proven, as other damages").

As articulated in the Findings of Fact, the Plaintiffs proved that Prentice earns $200,000 in net profits from the Temple Israel business annually (approximately $16,666.66 a month). But for his breach of the Employment Agreement, those net profits would have been earned by the Trowbridge Entities. As of the end of trial, the Trowbridge Entities already suffered lost profits of $266,666.67 (i.e., for the approximately 16 months from the end of March, 2012 – end of July, 2012). In addition, the Trowbridge Entities will lose at least another $733,333.33 in lost profits over the course of the next 44 months. The Trowbridge Entities will not be able to reclaim the lost business at Temple Israel even if the noncompetition provisions are enforced against Prentice. Unlike the lost unsupported allegations of lost profits for Morels and Flat Iron, the lost profits for Temple Israel are readily ascertainable. See, e.g., *Rich v Daily Creamery Co,* 303 Mich 344, 353-354 (1942), quoting the circuit court ("'much has been said by defendants on the point that this business had been operating such a short time that the jury could not properly decide what the profit could be in the following years . . . In our case, the ice-cream business, of course, was not a new business. It is an established type of business, and even though this particular concern had been in business only a short time, nevertheless it seems to me that it was a reasonable time upon which a jury could base its verdict. The business was not an experimental one. It was an established type of business . . ."); *Gongola, supra* at 680 ("the defendant set the weekly earnings of the bar at $250. The trial court multiplied this figure by the number of weeks (9) the plaintiff was without a bar because of this breach. The resulting figure of $2,250 was based solely upon the defendant's testimony and this Court feels that there was no error in raising this figure to a more realistic $3,000 in view of plaintiff's testimony. . . . The trial court in its award has attempted to confer upon the parties the benefits contemplated by both parties when the contract was made, which have been denied the plaintiff as a consequence of defendant's breach. The method utilized by the trial court in assessing damages was proper and reasonable"); *Nat'l Pharmaceutical Services, Inc v Harrison Community Hospital,* 67 Mich App 286, 293 (1976) ("The real gist of defendants' argument, however, seems to be that plaintiff should not have been able to prove loss of future profits over a five-year period by pointing to profits made in the first eight months. We think Michigan law allows such a procedure, and that it was proper to do so in this instance" (citations omitted)).

In addition, as the Findings of Fact noted, a business valuation multiplier of times five (x 5) for the annual lost profits applies to the Temple Israel business. Thus, an award of $1,000,000 is warranted under two independent analyses – an actual accounting of lost profits (for 16 months in the past and 44 months in the future) and a business valuation (times 5) multiplier of the lost profits.

3

Trowbridge Entities' executed catering jobs

The Plaintiffs are also entitled to the $52,346 in lost profits from catering jobs they assert were executed by the Trowbridge Entities but for which they were never paid. *Gongola, supra* at 680-681. These damages are not duplicative of the lost profits from Temple Israel in general for the next five years (and through the business multiplier) because these losses involve transactions in which the Trowbridge Entities already paid out of pocket expenses.

4
Catering jobs lost to Prentice

The Plaintiffs also assert they are entitled to over $40,000 in catering jobs that they did not execute but were taken by Prentice. However, these damages are duplicative of the $1,000,000 of Temple Israel lost profits damages awarded *supra.* That there are specific, identifiable losses that occurred immediately upon Prentice's breach of the Employment Agreement strongly affirms the total award of $1,000,000, but do not entitle the Plaintiffs to a windfall.

D
Conversion

Abandoning their count of Claim and Delivery, the Plaintiffs seek treble damages for converted assets valued at $158,015 (i.e., for a total of $474,045). As noted in the Findings of Fact and Section VII, conversion of those assets have been proven, and treble damages should be awarded in the amount $474,045.

E
Goodwill

The Plaintiffs also seek $1,000,000 in damages stemming from the loss of goodwill. In closing, the Plaintiffs suggested that this amount could be offset by the liquidated damages award. However, as noted in the Findings of Fact, the Plaintiffs did not establish by credible evidence the value of the loss of goodwill. This is no great surprise in light of the liquidated damages provision and the Plaintiffs' argument that liquidated damages are appropriate in light of the difficulty of fixing damages based on loss of good will and reputation.

F

Unspecified attorney fees and costs

Paragraph 11 of the Employment Agreement provides "Employee will reimburse Employer for all attorneys' fees and expenses incurred by Employer and Affiliates of Employer in successfully enforcing such provisions." The Plaintiff suggested in opening statement that such fees and expenses should be considered as a post-judgment matter and there is a very cursory reference to attorney fees in the Plaintiff's trial brief. The Defendant neither challenged nor accepted the suggestion that attorney fees and expenses should be handled after the trial. This Court was not asked to definitely address them.

At this point, the proofs have closed, and the Court has absolutely no evidence to support an award of any attorney fees or expenses. As such, they are not awarded here.

Since the parties made no effort to address whether they have been properly preserved as a post-judgment issue, neither will the Court.

In light of the foregoing Findings of Fact and Conclusions of law, the following Judgment is entered:

JUDGMENT

1. Non-Competition During and After Employment.

For the five (5) years following the date of this Judgment, Prentice will not, directly or indirectly, either:

a. have any interest in (whether as founder, proprietor, officer, director or otherwise), enter the employment of, act as agent, broker, licensor or distributor for or adviser or consultant to, or in any way assist (whether by solicitation of customers or employees or otherwise) any individual, partnership, joint venture, corporation or other business entity directly or indirectly engaged in any business or enterprise which directly or indirectly competes with the Trowbridge Entities in the business of the restaurants, catering, and all the time Prentice ceases to be employed by the Trowbridge Entities, to the extent competitive with the Trowbridge Entities in Oakland County and Wayne County, Michigan;

b. solicit, divert or take away, or attempt to solicit, divert or take away any customer or the business of any customer with respect to the products or services of the Trowbridge Entities sold (or offered for sale) to such customer;

c. attempt to cause any customer to refrain, in any respect, from maintaining or acquiring any product or service provided or offered by the Trowbridge Entities to such customer;

d. render services to or share in the earnings of or invest in the stock, bonds or other securities of any other entity directly or indirectly engaged in any business or enterprise in competition with the Trowbridge Entities' business; provided, however, that Prentice may own passive investments of not more than one percent (1%) of the outstanding stock, bonds, or other securities of any similar business (but without otherwise participating in such similar business) if such stock, bonds or other securities are listed on any national stock exchange or are traded and quoted on or the Nasdaq National Market System.

The running of the period during which the restrictions set forth in this Section 1 apply will be tolled during the continuance of any breach or violation by Prentice of the terms of this Judgment contained in this Section 1, and the period will be extended by the length of time during which any such breach or violations continues.

2. Non Solicitation, etc.

Until the expiration of five (5) years following March 28, 2012, Prentice will not (i) recruit or solicit any employee or sales agent of the Trowbridge Entities to discontinue such employment or engagement; seek to employ or retain any such employee or agent; or cause any business, person, firm or corporation which competes directly or indirectly with the Trowbridge Entities to seek or solicit the employment or retention of any such employee or agent; or (ii) solicit or encourage any person or any business firm, corporation or other entity which has a business or commercial relationship with the Trowbridge Entities to seek to discontinue such relationship or reduce the volume or scope of such relationship.

3. Liquidated Damages.

$500,000 in liquidated damages are awarded against Prentice in favor of the Trowbridge Entities.

4. Temple Israel Lost Profits.

$1,000,000 in lost past and future profits from Temple Israel are awarded against Prentice in favor of the Trowbridge Entities.

5. Lost Profits for payment of executed catering jobs

$52,346 in lost profits from catering jobs executed by the Trowbridge Entities but for which they were never paid.

6. Conversion.

$474,045 in treble damages for converted assets valued at $158,015.

THIS JUDGMENT RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/Michael Warren

______________________________/

HON. MICHAEL WARREN,
Circuit Court Judge