NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 19339

HILB ROGAL & HOBBS COMPANY and MANAGING AGENCY GROUP, INC.,

Plaintiffs,

v.

DONALD SELLARS,

Defendant.

ORDER & JUDGMENT

The Court called this case for trial on 16 February 2010. The parties waived trial by jury. In their Complaint, Plaintiffs allege that Defendant Donald Sellars ("Sellars"): (1) breached restrictive covenants in an employment agreement (the "Employment Agreement"); (2) breached his fiduciary duties; and (3) violated the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") by soliciting and accepting business from Plaintiffs' "customers" and taking and using Plaintiffs' confidential information once he resigned and joined a competitor in May 2007.

On 20 April 2009, the Court granted Plaintiffs' motion for partial summary judgment on their claim that Sellars breached three stock option agreements by failing to repay $12,548.49 in realized gains after accepting employment with a competitor. Accordingly, the Court shall enter judgment on this claim as part of its final judgment in this case.

Sellars also filed a Counterclaim alleging that he and Plaintiffs agreed in writing on the salary he would be paid in 2002–2006 and that Plaintiffs breached that contract. On 20 April 2009, the Court granted Plaintiffs' motion for partial summary judgment on this Counterclaim, except with respect to the year 2001.

At trial, the Court deferred ruling on the admissibility of certain exhibits and deposition transcripts. After considering the same post-trial, the Court:

1. **SUSTAINS** the objections to Plaintiffs' Exs. 18, 26–28, 41, and 51;

2. **SUSTAINS** the objection to Defendant's Ex. 34;

3. **SUSTAINS** the objection to p. 31:3–6 of Bonnie Eaton's deposition;

4. **SUSTAINS** the objection to p. 52:12–21 of Kendra Kennedy's deposition;

5. **SUSTAINS** the objection to pp. 26:18–22; 114:16–115:4; and 116:4–117:9 of AnneMarie Latocha's deposition;

6. **SUSTAINS** the objection to pp. 139:24–140:2 and 176:5–177:25 of Angelo Ganguzza's deposition;

7. **SUSTAINS** the objection to pp. 40:19–41:8; 61:13–16; 65:4–12; 71:23–72:5; 96:10–15; and 100:22–23 of Richard Mason's deposition;

8. **SUSTAINS** the objection to pp. 40:7–20 and 49:9–51:14 of Roger Teese's deposition;

9. **SUSTAINS** the objection to pp. 16:14–18:4; 21:10–15; 25:2–20; and 27:4–28:21 of Robert Scott's deposition;

10. **SUSTAINS** the objection to pp. 131:8–132:20; 160:21–25; 200:14–201:1; 241:19–243:20; 246:12–255:10; 255:20–256:4; 260:11–261:17; 273:2–275:10; 275:23–276:16; 278:9–16; 279:1–10; 279:22–280:6; 280:25–281:11; 283:22–284:8; 284:17–25; 290:6–291:11; 297:11–299:10; 303:4–304:12; 306:7–307:4; 312:5–313:7; 403:13–404:3; 414:18–415:25; 443:10–444:8; and 537:22–539:10 of Peter Plumb's deposition; and

11. **SUSTAINS** the objection to p. 165:6–22 of Donald Sellars's deposition.

After considering the Court file, trial briefs of the parties, testimony of the witnesses, exhibits and deposition excerpts admitted as evidence, closing arguments of counsel, and the proposed findings of fact and conclusions of law submitted by the parties, the Court makes the following:

FINDINGS OF FACT

A.

THE PARTIES

1. Plaintiff HILB Rogal & Hobbs Company ("HRH") is a Virginia corporation.

2. HRH provides insurance and risk management services and products through its affiliated entities.

3. Plaintiff Managing Agency Group, Inc. ("MAG"), is a Connecticut corporation.

4. MAG is a wholly-owned subsidiary of HRH engaged in writing specialty insurance program business.

5. Defendant Sellars lives and works in Mecklenburg County, North Carolina.

6. Since May 2007, Sellars has served as President of American Lumber Underwriters, Inc. ("ALU").

7. ALU is a division of Member Insurance Agency, Inc. ("Member").

8. ALU is a direct competitor of MAG.

B.

THE DISPUTE

9. On or about 28 September 1999, HRH hired Sellars to serve as Assistant Vice President/Program Director of MAG's specialty insurance program targeted to meet the needs of

building material dealers and the businesses engaged in the manufacture of wood products (hereinafter the "Lumber Program").

10. As a condition of his employment, Sellers was required to execute an Employment Agreement.

11. Sellars signed the Employment Agreement in the Buffalo, New York, office of HRH, in the presence of two HRH employees.[1]

12. Among other things, the Employment Agreement provides:

> **[CONFIDENTIAL INFORMATION]**
>
> "Confidential Information" shall mean any and all information of a proprietary or confidential nature and trade secrets of Employer and the HRH Companies. Such confidential information shall include, but not be limited to, information about the HRH Customers such as customer identities and lists, revenues from customers' accounts, customer risk characteristics and requirements, key contact personnel, financial data and performance, payroll, policy expiration dates, policy terms, conditions and rates, information about prospective customers, and information about the HRH Companies such as methods of soliciting business, documents, financial data, marketing programs and specialized insurance market. Confidential information may be acquired from any source during Employee's term of employment, whether or not such information was expressly disclosed to Employee during the term of his/her employment;
>
> . . .
>
> Employee acknowledges that, in the course of his/her employment hereunder, he/she will become acquainted and entrusted with Confidential Information which is the exclusive property of the Employer. Employee further acknowledges that (I) [sic] Employer and the HRH Companies derive actual and potential economic value from the Confidential Information not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (ii) Employer and the HRH Companies have expended and currently expend substantial effort to acquire Confidential Information, and expend substantial effort, and expect their employees to expend substantial effort, to maintain the secrecy of the Confidential Information. Employee agrees and covenants that he/she will safeguard the Confidential Information from exposure to, or appropriation by, unauthorized persons, either within or outside the

[1] Sellars denies signing the Employment Agreement. After considering the competing evidence on this issue, including the handwriting expert proffered by Sellars, the Court finds Plaintiffs' evidence to be more credible.

employment of Employer or the HRH Companies, and that he/she will not, directly or indirectly, without the prior written consent of Employer and HRH during the term of this Agreement and any time in the three-year period following termination of this Agreement, divulge or make any use of the Confidential Information except as may be required in the course of his/her employment hereunder. **Upon termination of his/her employment, Employee covenants to deliver to Employer all information and materials, including personal notes and reproductions, relating to the Confidential Information, the HRH Companies, and the HRH Customers, which are in his/her possession or control.**

. . .

[NONPIRACY COVENANTS]

Employee recognizes that over a period of many years the Employer (specifically including for the purposes of this paragraph 5 any predecessors of Employer or entities from which it might have acquired insurance accounts) has developed, at considerable expense, relationships with, and knowledge about, Customers[2] and Prospective Customers[3] which constitute a major part of the value of the Employer. During the course of his/her employment by Employer, Employee will have substantial contact with these Customers and Prospective Customers. In order to protect the value of the Employer's business, Employee covenants and agrees that, in the event of the termination of his/her employment, whether voluntary or involuntary, whether with or without cause, he/she shall not, directly or indirectly, for his/her own account or for the account of any other person or entity, as an owner, stockholder, director, employee, partner, agent, broker, consultant or other participant during the Restricted Period:[4]

[2] Under the Employment Agreement, "Customers" are limited "to those customers of Employer for whom there is an insurance policy or bond in force or to or for whom Employer is rendering services as of the date of termination of Employees [sic] employment[.]" (Pls.' Ex. 1 ¶ 5.)

[3] The Employment Agreement limits "Prospective Customers" "to those parties known by Employee to have been solicited for business within any Prohibited Service within the twelve (12) months [sic] period preceding the date of termination of Employee's employment, by an employee (including Employee) or agent of Employer and with or from whom, within the twelve (12) month period preceding the date of termination of Employee's employment, an employee (including Employee) or agent of Employer either had met for the purpose of offering any Prohibited Service or had received a written response to an earlier solicitation to provide a Prohibited Service[.]" (Pls.' Ex. 1 ¶ 5.)

[4] The Employment Agreement defines "Restricted Period" as "three (3) years immediately following the date of termination of Employee's employment[.]" (Pls.' Ex. 1 ¶ 5.)

(a) Solicit a Customer or Prospective Customer, or accept an invitation from a Customer or Prospective Customer, for the purpose of providing Prohibited Services[5] to such Customer or Prospective Customer;

(b) solicit a Known Customer[6] or Prospective Customer, or accept an invitation from a Known Customer or Prospective Customer, for the purpose of providing Prohibited Services to such Known Customer or Prospective Customer;

(c) solicit a Customer or Prospective Customer located within the Restricted Area,[7] or accept an invitation from a Customer or Prospective Customer located within the Restricted Area, for the purpose of providing Prohibited Services to such Customer or Prospective Customer; and

(d) solicit a Known Customer located within the Restricted Area, or accept an invitation from a Known Customer or Prospective Customer located within the Restricted Area, for the purpose of providing Prohibited Services to such Known Customer or Prospective Customer.

(Employment Agreement, Pls.' Ex. 1 ¶¶ 4–5.) (emphasis added).

13. The Employment Agreement provides that it "shall be construed under and governed by the laws of the State of New York." (Pls.' Ex. 1 ¶ 16.)[8]

14. The Employment Agreement further allows Plaintiffs to "seek liquidated damages with respect to each Customer, Known Customer or Prospective Customer procured by or through Employee, directly or indirectly, in violation of paragraph 5 of this Agreement." (Pls.' Ex. 1 ¶ 8.)

15. Under the Employment Agreement, liquidated damages are calculated as follows:

[5] According to the Employment Agreement, "'Prohibited Services' shall mean (i) services in the fields of insurance or bonds or (ii) services performed by Employer, its agents or employees in any other business engaged in by Employer on the date of termination of Employee's employment, shall include but not [be] limited to Third Party Administration, Loss Control, Trust Administration and consulting. 'Field of insurance' does not include title insurance, but does include all other lines of insurance sold by Employer, including, without limitation, property and casualty, life, group, accident, health, disability, and annuities[.]" (Pls.' Ex. 1 ¶ 5.)

[6] "Known Customers" are limited under the Employment Agreement to "those 'Customers' with whom Employee had personal contact, or for whom Employee handled insurance or bonds, or whose names became known to Employee, in the course of the performance of his/her employment duties for Employer[.]" (Pls.' Ex. 1 ¶ 5.)

[7] "Restricted Area" is limited under the Employment Agreement to the city where Sellars was based. (Pls.' Ex. 1 ¶ 5.)

[8] Sellars maintained offices in New York during his employment with MAG.

> A Lost Customer shall be valued at 150% of the gross revenue to Employer in the most recent twelve (12) month period preceding the date of loss of such account. If such Lost Customer had not been a Customer or Known Customer of Employer for the entire twelve (12) month period, such liquidated damages shall be 150% of the gross revenue which would have been, in the absence of a breach by Employee, realized by Employer in the initial twelve (12) month period of such customer being served by Employer. A Lost Prospect shall be valued at 150% of the gross revenue realized in the initial twelve (12) month period of such Lost Prospect being served by any one or more persons or entities receiving such revenue as a result of Employee's breach.

(Pls.' Ex. 1 ¶ 8.)

16. Sellars's compensation during his employment with MAG was set annually in written salary and incentive plans.

17. Sellars's 2001 employment and incentive plan set his salary at $75,000, effective 1 March 2001, and set his incentive at 35% on profit earned over budget threshold. (Def.'s Ex. 3.)

18. The 2001 plan also provided that Sellars's "2002 salary will be based on net income (Gross Revenue less Broker Expense) as of 12/31/01 Producer Analysis Report. [sic] X 18%." (Def.'s Ex. 3.)

19. MAG's Gross Revenue for 2001 was $2,115,582.72.

20. MAG's Broker Expense for 2001 was $890,036.94.

21. In or around January 2002, Plaintiffs determined that Sellars should receive $115,563.00 as a 2001 bonus.

22. Plaintiffs also determined that Sellars's salary for 2002 would be $126,500.00.

23. Sellars expressed his displeasure with his bonus for 2001, as well as his salary for 2002, and demanded additional compensation.

24. On or about 14 March 2002, Plaintiffs paid Sellars an additional $50,000.00 in compensation.[9]

25. MAG eventually promoted Sellars to the position of "Vice President Managing Agency Group."

26. In that role, Sellars supervised the day-to-day operations of the MAG Lumber Program.

27. In or around March 2007, Member solicited Sellars to manage its wholesale lumber insurance operation.

28. On 20 April 2007, two days after formally interviewing for the Member job, Sellars copied the entire hard drive of his work computer, which contained, among other things, confidential and proprietary information about MAG's Lumber Program accounts and business strategies, including account files and lists, policy expiration dates, policy terms, conditions and rates, internal and external pricing and profit margins, information relating to accounts' risk characteristics, and carrier information.

29. Sellars accepted Member's offer of employment on 24 April 2007.

30. Sellars resigned from MAG on 8 May 2007.

31. Sellars's last day at work for MAG was 11 May 2007, but he was paid a salary through 22 May 2007.

32. After Sellars resigned, he took with him the contents of his MAG computer hard drive, as well as audit reports and other information related to MAG's Lumber Program.

33. Sellars retained this information until the Court ordered him to return it to Plaintiffs on 29 January 2008.

[9] Plaintiffs characterized this payment as an increase to Defendant's 2001 bonus.

C.

PLAINTIFFS' EVIDENCE ON DAMAGES

34. During discovery, Sellars served Plaintiffs with two separate Notices of Deposition pursuant to Rule 30(b)(6) of the North Carolina Rules of Civil Procedure.

35. Among other things, Defendant requested that Plaintiffs designate one or more individuals who could testify as to Plaintiffs' theory of damages for breach of the Employment Agreement, including the method used to calculate Plaintiffs' lost profits and/or liquidated damages.

36. Plaintiffs designated Peter Plumb ("Plumb") as their Rule 30(b)(6) designee, who at the time was a MAG senior vice president.

37. Defendant deposed Plumb on 24–25 June 2008, and again on 9 December 2008.

38. Plumb testified during his deposition that he "did not do a calculation of the lost profits specifically." (Plumb Dep. 457:11–14.)

39. When Defendant's counsel pressed Plumb further on the issue of lost profits, Plaintiffs' counsel responded, "I'm going to object to the extent that it relates to Plaintiffs' damages claim in this case. We're not – we're not asking for lost profits." (Plumb Dep. 458:3–6.)

40. Asked for his understanding of the damages sought by Plaintiffs, Plumb stated, "We're looking for lost revenue, compensatory damages, attorney's fees, costs, interest." (Plumb Dep. 458:13–17.)

41. Plumb was also asked questions about a set of exhibits that Plaintiffs sought to introduce at trial as Plaintiffs' Exhibits 28 and 51.

42. Plaintiffs' Exhibit 51 (denominated as the Lumber Lost Account List) is a table purporting to show the total gross revenue lost by MAG following Sellars's departure.

43. Plaintiffs' Exhibit 28, entitled "MAG Lumber Program Business Lost to Member Insurance," purports to set forth each account that purportedly transferred its business to Member following Sellars's departure, the broker for each account, the total premium earned by Plaintiffs during the last year they wrote the account, and the revenue lost to Plaintiffs, calculated as ten percent (10%) of the total premium.

44. At his deposition, Plumb expressed uncertainty as to the origin of the figures contained in Plaintiffs' Exhibits 28 and 51, testifying at one point that "I did not do this work." (Plumb Dep. 468:18–469:2.)

45. In fact, the figures used to create Plaintiffs' Exhibits 28 and 51 were prepared by others in Plaintiffs' employ (with the help of counsel), none of whom testified at trial.

46. There are a number of inconsistencies between the damages exhibits. For example:

Blue Ridge Lumber: the claimed lost premium does not match between Exhibit 28 and Exhibit 51;

Garmar Industries: the claimed lost premium does not match between Exhibit 28 and Exhibit 51;

Madwood Lumber: appears on Exhibit 28, but not on Exhibit 51;

Overseas Hardwoods: the claimed lost premium does not match between Exhibit 28 and Exhibit 51;

Roper Brothers Lumber: appears on Exhibit 28, but not on Exhibit 51;

Russell Forest Products: the claimed lost premium does not match between Exhibit 28 and Exhibit 51;

Tabor City Lumber: the claimed lost premium does not match between Exhibit 28 and Exhibit 51;

Twin River Hardwoods: appears on Exhibit 28, but not on Exhibit 51;

Western Timber Products: appears on Exhibit 28, but not on Exhibit 51;

Whipple Brothers: the claimed lost premium does not match between Exhibit 28 and Exhibit 51; and

Wood Flooring International: the claimed lost premium does not match between Exhibit 28 and Exhibit 51.

47. Additionally, Plumb could not rule out the possibility that the damages exhibits contained amounts for lost revenues for business that Plaintiffs could not underwrite, irrespective of Sellars's alleged breach of the Employment Agreement.[10]

48. On 21 January 2010, Plaintiffs sought to take Plumb's deposition for trial.

49. Defendant moved to quash the deposition on 22 January 2010.

50. In an order entered on 28 January 2010, the Court granted Defendant's motion, finding that (1) the trial had already been continued once so that Plaintiffs could take trial depositions, (2) Plaintiffs had not then given any indication that Plumb's trial deposition would be necessary, and (3) Plaintiffs failed to give sufficient notice to Defendant or the Court that they anticipated having to take Plumb's deposition for trial, as it appeared from the record that Plaintiffs were aware of Plumb's potential unavailability for trial as early as 11 December 2009, yet did not alert Defendant of the problem until they served him with a notice of deposition on 21 January 2010.

51. Plaintiffs designated extensive portions of Plumb's deposition for use at trial, but they did not call any other witness to testify about the damages exhibits.

[10] Plaintiffs agreed that their damages should not include accounts lost to Member during the time MAG could not write lumber insurance policies.

Based on the above findings of fact, the Court enters the following:

CONCLUSIONS OF LAW

A.

BREACH OF FIDUCIARY DUTY

1. In Count I of their Complaint, Plaintiffs claim that Sellars breached his fiduciary duty to them by taking and using Plaintiffs' Confidential Information and soliciting and accepting business from Plaintiffs' "Customers," "Known Customers," and "Prospective Customers" (as those terms are defined in the Employment Agreement) when Sellars went to work for Member.[11]

2. New York law governs this claim.

3. To make out a claim for breach of fiduciary duty, Plaintiffs were required to show: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages that were directly caused by the misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 868 N.Y.S.2d 212, 213 (N.Y. App. Div. 2008) (quoting *Kurtzman v. Bergstol*, 835 N.Y.S.2d 644 (N.Y. App. Div. 2007)).

4. Plaintiffs have at least shown that Sellars breached his fiduciary duty when, on 20 April 2007, two days after formally interviewing for the Member job (but while he remained in Plaintiffs' employ), Sellars copied and took with him the entire hard drive of his MAG computer, which contained, among other things, confidential and proprietary information about Lumber Program accounts and business strategies.

5. Moreover, Sellars kept these materials until the Court ordered him to return them to Plaintiffs.

[11] Plaintiffs presented evidence at trial purporting to show that Sellars also breached the Employment Agreement by soliciting some of his former colleagues to work for ALU. The Court, however, declines to consider that evidence because no such claim was alleged in the Complaint.

6. The Court need go no further with respect to this claim, and indeed, specifically declines to find whether Sellars breached his fiduciary duty by soliciting Plaintiffs' Customers.

7. Such a finding is immaterial here because Plaintiffs have failed to prove the third element of their claim: damages that were directly caused by the alleged breach of fiduciary duty.

8. Under New York law, the party claiming damages has the "burden of proof to present evidence of a measure of damages that are reasonably certain arising from the particular harm." *Sagnia-Blythe v. Gamblin*, 611 N.Y.S.2d 1002, 1005 (N.Y. Civ. Ct. 1994).

9. Moreover, Plaintiffs' "damages [for breach of fiduciary duty] are limited to profits lost from the actual diversion of customers." *Hair Say, Ltd. v. Salon Opus, Inc.*, No. 5106–01, 2005 NY Slip Op. 50382U, at *10, 800 N.Y.S.2d 347 (N.Y. Sup. Ct. 2005) (citing *Suburban Graphics Supply Corp. v. Nagle,* 774 N.Y.S.2d 160 (N.Y. App. Div. 2004); *Allan Dampf, P.C. v. Bloom*, 512 N.Y.S.2d 116 (N.Y. App. Div. 1987)).

10. In this case, Plaintiffs failed to present any competent evidence to support a claim for recovery of lost profits; indeed, Plaintiffs' counsel conceded during Plumb's deposition that Plaintiffs were not pursuing damages on that theory.

11. Accordingly, in the absence of any evidence of Plaintiffs' actual damages resulting from Sellars's breach of fiduciary duty, Plaintiffs may only recover nominal damages of $1.[12]

[12] *Contra Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289, 292 (N.Y. 1993) (holding that nominal damages are not available in New York for tort actions except where needed to protect an "important technical right"). As one federal district court has pointed out, however, New York courts routinely grant nominal damages for unfair competition claims. *24/7 Records, Inc., v. Sony Music Entm't, Inc.*, 566 F. Supp. 2d 305, 320 (S.D.N.Y. 2008) (citations omitted). Because Plaintiffs' claim alleging breach of fiduciary duty is sufficiently analogous to one alleging unfair competition, the Court is satisfied it may award nominal damages.

B.

BREACH OF CONTRACT CLAIM

12. Count III of Plaintiffs' Complaint alleges that Sellers breached the terms of the Employment Agreement.

13. New York law also governs this claim, which requires Plaintiffs to show (1) the existence of a contract, (2) breach by Sellars, and (3) damages suffered as a result of the breach. *Shred-It USA, Inc. v. Mobile Data Shred, Inc.*, 202 F. Supp. 2d 228, 235 (S.D.N.Y. 2002).

14. The Court holds that Sellars breached the Employment Agreement by taking Confidential Information with him when he left Plaintiffs' employ.

15. As was the case with Plaintiffs' claim alleging breach of fiduciary duty, Plaintiffs also contend that Sellars breached the Employment Agreement by soliciting and/or accepting business from Plaintiffs' Customers.

16. Here again, however, the Court need not reach this issue because, even if Sellars breached the Employment Agreement in any of the ways alleged by Plaintiffs, the evidence at trial was insufficient to show Plaintiffs' damages resulting from the breach.

17. First, Plaintiffs concede they have no evidence of lost profits flowing from Sellars's alleged breach.

18. Plaintiffs instead rely on the liquidated damages formula in the Employment Agreement, which generally sets damages at 150% of the gross revenue Plaintiffs earned during a specified 12-month period preceding the loss of a specific account, or 150% of the gross revenue Plaintiffs could have realized but for Sellars' alleged breach.

19. Plaintiffs, however, have failed to present competent evidence to support their calculation of liquidated damages.

20. The only evidence proffered by Plaintiffs on this issue is contained in Plaintiffs' Exhibits 28 and 51, which purport to set out a calculation of Plaintiffs' liquidated damages under the Employment Agreement.

21. In the face of a hearsay objection by Sellars, Plaintiffs insist the exhibits are admissible as business records.

22. The Court disagrees.

23. North Carolina Rule of Evidence Rule 803(6) provides that the following is not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C.R. EVID. 803(6).

24. The Court recognizes that: (1) information compiled from a computer database is admissible as a business record, *see United States v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002); (2) even reports prepared specifically for litigation may be admissible provided the underlying data satisfies the business records exception to the hearsay rule, *see* B. WEINSTEIN & M.A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 901.08[1] (2d. ed. 2006) ("[P]rintouts prepared specifically for litigation from databases that were compiled in the ordinary course of business are admissible as business records to the same extent as if the printouts were, themselves, prepared in the ordinary course of business. The important issue is whether the database, not the printout from the database, was compiled in the ordinary course of business."); and (3) an authenticating witness need not personally enter the relevant data, but instead "need only be familiar with the

company's recordkeeping practices." *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 777 (7th Cir. 2006) (citation omitted). *See also State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (authenticating witness familiar with recordkeeping practices need not have personal knowledge as to circumstances surrounding creation of business record if the record itself shows it was made around the time of the transaction at issue).

25. Nevertheless, the requirement that business records be authenticated necessarily imposes some burden on the proponent to show that the evidence is what it purports to be.

26. Moreover, "the simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial." *State v. Galloway*, 145 N.C. App. 555, 566, 551 S.E.2d 525, 533 (2001) (quoting *Donavant v. Hudspeth*, 318 N.C. 1, 7, 347 S.E.2d 797, 801 (1986)).

27. In this case, Plumb, the only witness who offered any testimony as to the substance of the damages exhibits, failed to lay an adequate foundation in his deposition for admitting them.[13]

28. Not only did Plumb not prepare the exhibits in question (which the Court recognizes is not fatal), but he could not vouch for the reliability of the figures contained therein, as he was unsure how they were derived.

29. After careful review, the Court concludes that Plaintiffs' Exhibits 28 and 51 are not trustworthy and reliable barometers of Plaintiffs' liquidated damages. Thus, even if the

[13] When Plumb was deposed, he was working for Plaintiffs and therefore was expected to testify at trial. Plumb, however, either resigned or was fired in December 2009. As a result, he declined to appear voluntarily for trial and he was beyond the Court's subpoena power. Plaintiffs sought to take Plumb's trial deposition, but the Court granted Defendant's motion to quash the deposition on 28 January 2010. In its Order, the Court suggested that it might reconsider its ruling if Plaintiffs needed additional testimony from Plumb to meet their burden. Upon further reflection, however, the Court declines to allow Plaintiffs leave to introduce additional evidence in this case. In particular, it is not clear how allowing Plumb's trial deposition would remedy his stated inability to lay a proper foundation for admitting Plaintiffs' Exhibits 28 and 51. Regardless, Plaintiffs have had ample opportunity to prepare this case for trial and the interests of justice would not be served by delaying the matter further.

exhibits were otherwise admissible as business records (and they are not), the Court would give them no weight.

30. Accordingly, Plaintiffs are entitled only to nominal damages of $1 for breach of contract. *See Kronos*, 612 N.E.2d at 292 ("[N]ominal damages are always available in breach of contract actions.").

C.

UDTPA CLAIM

31. Plaintiffs' claim in Count VI of the Complaint alleging a violation of the UDTPA fares no better.

32. "The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005) (citation omitted).

33. Plaintiffs' UDTPA claim fails for two reasons.

34. First, it does not appear a UDTPA claim is proper given that it is New York and not North Carolina that has the most significant relationship to the occurrences giving rise to this litigation. *See Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (holding that in actions involving unfair or deceptive trade practices, North Carolina applies the law of the state having the most significant relationship to the occurrence giving rise to the action).

35. Second, even assuming a UDTPA claim lies on the facts presented,[14] Plaintiffs failed to present competent evidence of their actual damages, which is a necessary element of a UDTPA claim. *See Castle McCulloch, Inc., v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416 (2005) (affirming directed verdict dismissal of UDTPA claim where plaintiff failed to establish actual injury).

36. Accordingly, the Court shall **DISMISS** Count VI of Plaintiffs' Complaint alleging a violation of the UDTPA.

D.

PUNITIVE DAMAGES

37. Plaintiffs also seek an award of punitive damages under North Carolina law.

38. The Court, however, finds no basis for applying North Carolina's punitive damages statute in this case.

39. Plaintiffs' claim for punitive damages flows from Sellars's alleged breach of fiduciary duty, as well as his alleged breach of the Employment Agreement.

40. The Employment Agreement provides that New York law applies to claims alleging a breach of that contract.

41. And as to Plaintiffs' tort claims, North Carolina courts apply the law of the state where the injury occurred, which in this case also is New York. *See Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988).

42. Accordingly, New York law applies to Plaintiffs' claim for punitive damages.

43. In New York, "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. . . .

[14] *See Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 21, 652 S.E.2d 284, 298 (2007) (holding that the alleged violation of a covenant not to compete, essentially a breach of contract within the employer-employee relationship, lies outside the scope of the UDTPA).

However, where the breach of contract also involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations', [sic] punitive damages are recoverable if the conduct was 'aimed at the public generally'. [sic]" *Rocanova v. Equitable Life Assurance Soc'y*, 634 N.E.2d 940, 943 (N.Y. 1994).

44. In this case, Plaintiffs' tort claim alleging breach of fiduciary duty arises from the terms of the Employment Agreement. Thus, absent evidence that Sellars's alleged misconduct was aimed at the public generally, Plaintiffs are not entitled to recover punitive damages.

45. After considering the evidence presented at trial, the Court declines to award punitive damages because (1) Plaintiffs failed to prove their actual damages, and (2) the alleged misconduct was a private matter that did not affect the public generally.

E.

RECOVERY OF ATTORNEY FEES AND COSTS

46. The Employment Agreement also allows Plaintiffs to recover attorney fees and costs incurred in enforcing its restrictive covenants, "but only to the extent such enforcement against [Sellars] is successful." (Pls.' Ex. 1 ¶ 11.)

47. In this case, Plaintiffs have recovered nominal damages of $1 on the two claims related to the Employment Agreement. Given this result, the Court declines to enter an award of attorney fees and costs.

F.

DEFENDANT'S COUNTERCLAIM

48. Finally, the Court addresses Sellars's First Amended Counterclaim alleging that Plaintiffs failed to pay his 2002 salary in full, based on a formula set out in Sellars's 2001 employment and incentive plan.[15]

49. New York law applies to this claim.

50. Sellars's 2001 employment and incentive plan set his salary at $75,000, effective 1 March 2001, and set his incentive at 35% on profit earned over budget threshold. (Def.'s Ex. 3.)

51. The 2001 employment and incentive plan also provided that Sellars's "2002 salary will be based on net income (Gross Revenue less Broker Expense) as of 12/31/01 Producer Analysis Report. [sic] X 18%." (Def.'s Ex. 3.)

52. In 2001, MAG's Gross Revenue was $2,115,582.72 and its Broker Expense was $890,036.94. (Def.'s Ex. 36.)

53. Thus, under the plain terms of the 2001 incentive plan, Sellars should have been paid a base salary of $220,598.24 in 2002.

54. Plaintiffs instead paid Sellars a base salary of $126,500.00 in 2002, a difference of $94,098.00.

55. Plaintiffs contend, however, that Sellars's acceptance of an additional $50,000.00 in compensation, which Sellars received in or around March 2002, operated as an accord and satisfaction of all disputes related to Sellars's pay.

56. The Court disagrees.

[15] The Court misread this portion of Sellars's First Amended Counterclaim when it considered the parties' competing motions for summary judgment. Accordingly, the Court **SETS ASIDE** that portion of the Court's 20 April 2009 summary judgment Order dismissing Sellars's counterclaim as it relates to his 2002 salary.

57. Under New York law, "acceptance of a check in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim." *Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 473 N.E.2d 229, 232 (1984). "Such agreements are enforceable, however, only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim." *Id.*

58. Plaintiffs did not meet their burden as to this affirmative defense.

59. Specifically, Plaintiffs failed to show that (1) the tender to Sellars of $50,000.00 in additional compensation was intended to settle all of Sellars's claims regarding his pay, and (2) Sellars was informed that acceptance of the $50,000.00 payment would have this result.

60. Plaintiffs presented no other evidence of a viable defense to the counterclaim.

61. The Court, however, disagrees that Sellars is entitled to recover the full $94,098.00 for breach of contract.

62. Instead, the Court has found that (1) Plaintiffs paid Sellars an additional $50,000.00 in compensation in March 2002, which was intended by Plaintiffs to address Sellars's dissatisfaction regarding his pay, and (2) Sellars did not present evidence to show the precise deficiency in his original 2001 bonus payment.

63. Accordingly, on the facts presented, and as a matter of equity, the Court will offset Plaintiffs' $50,000.00 payment against the $94,098.00 shortfall in Sellars's pay for 2002, meaning that Plaintiffs shall be liable for $44,098.00 for breach of contract.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that:

1. As to Plaintiffs' claims under Counts I and III of the Complaint alleging breach of fiduciary duty and breach of the Employment Agreement, Plaintiffs shall recover **$1.00** as nominal damages;

2. As to Plaintiffs' claim under Count III of the Complaint alleging breach of certain stock option agreements, Plaintiffs shall recover **$12,548.49**, said sum bearing interest at the legal rate from 22 May 2007, the last date on which Sellars was paid by Plaintiffs;

3. Count VI of Plaintiffs' Complaint is **DISMISSED**;

4. As to Defendant's First Amended Counterclaim alleging breach of contract with respect to his 2002 salary, Defendant shall recover **$44,098.00**, said sum bearing interest at the legal rate from 1 January 2003; and

5. The parties shall bear their own costs.

This the 10th day of May, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge