IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GLOBAL PAYMENTS DIRECT f/k/a NATIONAL DATA PAYMENTS SYSTEMS, INC., and GLOBAL PAYMENTS, INC., Plaintiffs,	:	AUGUST TERM, 2002
	:	NO. 1373
v.	:	
EVS HOLDING COMPANY, INC., d/b/a GOEMERCHANT.COM Defendants.	:	(Commerce Program)
EVS HOLDING COMPANY, INC. d/b/a GOEMERCHANT.COM Plaintiff,	:	MAY TERM, 2002
	:	NO. 3449
v.	:	
GLOBAL PAYMENTS DIRECT, f/k/a NATIONAL DATA PAYMENTS SYSTEMS, INC., and GLOBAL PAYMENTS, INC., Defendants.	:	(Commerce Program)

ORDER

AND NOW, this 29th day of August 2005, upon consideration of the evidence presented at a bench trial, the respective proposed findings of fact and conclusions of law and responses of the parties, the respective briefs and memoranda, all matters of record, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that:

1. Judgment is entered in favor of EVS Holding Company, Inc., d/b/a GoEMerchant.com ("GoE"), and against Global Payments Direct, f/k/a National Data Payments Systems, Inc., and Global Payments, Inc. ("Global"), on GoE's claim for breach of the Merchant Services Agreement ("MSA").

2. The court awards GoE damages resulting from the breach of the MSA in the amount of $127,306.43 plus interest in the amount of $38,109.00.

3. Judgment is entered in favor of Global, and against GoE on Global's claim of tortious interference.

4. The court awards Global damages resulting from GoE's tortious interference in the amount of $158,000.00.

5. The court denies: (a) GoE's claim of business disparagement, (b) GoE's claim of tortious interference, (c) GoE's claim of negligent misrepresentation, (d) GoE's claim of unjust enrichment, (e) GoE's claim for an accounting with respect to monies allegedly owed GoE, and (f) GoE's claim for a violation of the New Jersey Consumer Fraud Protection Act.

6. The court denies: (a) Global's claim of breach of contract, (b) Global's claim of business disparagement, and (c) Global's claim for punitive damages.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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FINDINGS OF FACT, DISCUSSION
AND CONCLUSIONS OF LAW
SUR BENCH TRIAL

Albert W. Sheppard, Jr., J. ……. August 29, 2005

These cases involve a dispute between EVS Holding Company, Inc., d/b/a GoEMerchant.com ("GoE"), a company which provided an assortment of services to businesses that wished to sell their goods on the internet, and Global Payments Direct, f/k/a National Data Payments Systems, Inc. and Global Payments, Inc. ("Global"), a business that provides credit card processing services.

The court conducted a two-day non-jury trial. Based on the facts and conclusions of law set forth below, the court finds in favor of GoE on its breach of

contract claim against Global, in the amount of $165,415.43. The court finds in favor of Global on it claim for tortious interference, in the amount of $158,000.00.

FINDINGS OF FACT

I. The Parties

1. GoE is a Delaware corporation authorized to do business in Pennsylvania, with a business address in Havertown, Pennsylvania at the time of this action. N.T. 8/17/2004 at 199; GoE's Findings of Fact ("FF"), ¶ 1; Global's FF at pg. 1.

2. GoE hosts an Internet site where its customers can create websites to sell their products and GoE can provide services to these merchants. N.T. 8/17/2004 at 52; GoE's FF, ¶ 3.

3. The majority of GoE's merchants were small retail Internet businesses. N.T. 8/17/2004 at 74.; GoE's FF, ¶ 4.

4. GoE services include an Internet store, gateway services and E-Commerce operations to small and medium merchants throughout the country. N.T. 8/17/2004 at 73; GoE's FF, ¶ 3.

5. GoE merchants could begin processing credit card transactions in approximately two days after signing up. N.T. 8/17/2004 at 74; GoE's FF, ¶ 4.

6. GoE merchants used the credit card processing services offered by other companies such as Global. N.T. 8/17/2004 at 73; N.T. 8/18/2004 at 156; Global's FF at p. 1.

7. Global is a credit card processing company incorporated in the state of New York, with its principal office in Atlanta, Georgia. Global's FF at p. 1.

8. Global contracts with various banks that issue credit cards, such as Visa or Mastercard, to process those credit card transactions on behalf of those various banks. N.T. 8/18/2004 at 157; Global's FF at pg. 2.

9. James Battista was, at all material times, an owner and President of GoE. N.T. 8/17/2004 at 73; GoE's FF, ¶ 1.

10. Mark Wilson, at all times relevant, was the Director of Business Development for Global. N.T. 8/17/2004 at 56.

11. Vaden Landers, at all times relevant, was the President of Global's ISO[1] division. N.T. 8/17/2004 at 7.

12. Vincent Perrelli, Jr., was at all relevant times, the senior vice president of Global who handled all of the operations for Global. N.T. 8/18/2004 at 10.

13. James Kelly was, at all times relevant, the senior executive vice president and chief financial officer of Global. N.T. 8/18/2004 at 154-55.

II. The Contracts

The Contract Between Global and GoE

14. On April 1, 2001, Global and GoE entered into a Merchant Services Agreement ("MSA") requiring GoE to solicit merchants to use Global's credit card processing services. N.T. 8/17/2004 at 8-9. 75; N.T. 8/18/2004 at 156.

15. Pursuant to the MSA, Global agreed to provide credit card processing services to GoE merchants who were referred to Global by GoE. Exh. P-1 at ¶ A; GoE's FF, ¶ 11.

[1] An ISO is a reseller of credit card, or transaction processing services for either a bank or a processor such as Global. N.T. 8/17/2004 at 7.

16. In return for GoE's solicitation of merchants to use Global's services, Global was to pay GoE a specified percentage of the charges collected by Global for processing the merchants' credit card sales. These payments, otherwise known as "residuals", would continue to be paid by Global to GoE for (a) as long as the contract was in effect between Global and GoE and (b) Global continued to receive payments from the merchants for Global's credit card processing services. Exh. P-1, ¶ D; Global's FF at p. 4.

17. Under the MSA, GoE was to be paid on "the 25th day of the month immediately following the month in which [the charges] were *earned*." P-1, ¶ D. (Emphasis added.)

18. With regard to risk assessment, the MSA provided:

> [GoE] will market [Global's] merchant processing services to merchants. [Global] will provide [GoE] with [Global's] credit policies and [GoE] agrees to use commercially reasonable efforts not to submit any application to [Global] which does not meet [Global's] credit criteria. [GoE] will prescreen all potential merchants and submit to [Global] a complete application package containing the findings in the pre-screening process. *[Global] will use reasonable efforts to accept or decline any such merchant within two business days of receipt of a completed application by [Global's] credit department. [Global] may refuse to accept any such merchant and such decision shall be at the sole discretion of [Global]*.

Exh. P-1, § A. (Emphasis added.)

19. The MSA also provided that Global "will provide on-going credit review for all Merchants." Exh. P-1, ¶ B.1.

20. In addition, the MSA assigns losses, costs, or expenses, "including reasonable outside attorney's fees and expenses, that shall result from or arise out of Chargebacks and Credit Losses in respect of any Merchant Agreement, to the extent the losses are not due to the errors or negligence of [GoE]. A misrepresentation by a Merchant shall

not constitute an error or negligence of [GoE] as long as [GoE] is not aware of any such misrepresentation or a reasonable person would not have been aware of such misrepresentation." Exh. P-1, § B, ¶ 3.

The Contracts Between Global and the GoE Merchants

21. Separate contracts were entered into between Global and the merchants solicited for Global by GoE. N.T. 8/17/2004 at 148; N.T. 8/18/2004 at 156; Exh. D-2A; Global's FFCL at p. 3; GoE's FFCL, ¶¶ 29-30.

22. The term of the contract between Global and GoE merchants was 30 days or renewable month to month. Exh. P-2, ¶ 11; GoE's FF, ¶ 31.

23. GoE was not a party to any of the contracts between Global and the merchants solicited for Global by GoE. N.T. 8/17/2004 at 148; N.T. 8/18/2004 at 156; Exh. D-2A; Global's FF at p. 3.

23. Under its contracts with GoE merchants, Global could turn down any merchant application presented by GoE, in its (Global's) business judgment. N.T. 8/17/2004 at 82; Exh. 1, ¶ A. Global's FFCL at p. 3.

24. Additionally, Global had the right to terminate its relationships with GoE merchants in the event that Global "deems itself insecure in continuing [the] Agreement". Exh. D-2A, ¶ 11.

25. When consumers sought refunds from the Issuing Banks because they were dissatisfied with the service or merchandise purchased with the credit card, Global suffered losses due to these "chargebacks". N.T. 8/18/2004 at19-20; Global's FFCL at p. 5.

26. When a merchant was no longer in business or had insufficient funds or assets to offer a remedy to Global, Global had no redress and suffered the loss of the chargeback. N.T. 8/18/2004 at 18-19, 20-21; Global's FFCL at p. 5.

27. The chargebacks could take three or four months to appear on the Global system after the initial purchase. N.T. 8/18/2004 at 105; Global's FFCL at p. 5.

28. Under the Visa and Mastercard Association rules, Global could set up reserve accounts for each merchant that would allow Global to hold that merchant's monies for up to 180 days as against the possibility of chargeback losses. N.T. 8/18/2004 at 106-107, 159; Global's FFCL at p. 5.

III. Fast Track Applications

29. The Fast Track program was negotiated between GoE and Global in order for accounts that did small processing volumes and had low average tickets to get approved as quickly as possible. The program was "built in to win business." N.T. 8/17/2004 at 10.

30. Global treated accounts that were processed under the Fast Track program differently from accounts that were not processed through the Fast Track program. The accounts that did not meet the Fast Track parameters were subject to underwriting[2] by Global. N.T. 8/18/2004 at p. 24.

31. The parameters for the Fast Track program were agreed upon by GoE and Global. N.T. 8/18/2004 at 91; GoE's FF, ¶ 43.

[2] Underwriting is a process by which a party that is subject to risk, evaluates that risk. N.T. 8/18/2004 at 16.

32. Vaden Landers testified that "Auto Approval" under the Fast Track program meant a new account was automatically approved without any credit check or underwriting being required. N.T. 8/17/2004 at 44; Global's FF at p. 9.

33. However, an e-mail authored by an employee of Global, defined "Auto Approval":

> The term Fast Track or Auto Approval is not the approval of the application yet what is required with the deal to be considered before approval. Auto Approval says that we will not require the same items we normally would but not that we automatically approve the deal even though they have poor credit.
>
> Global Payments has 100% liability on all these deals therefore must make a credit decision based on what is presented which is minimal information under the auto approval guidelines. This is not a change in policy yet an enforcement of the same policy that our analysts have looked at minimally.

Exh. P-9.

34. In addition to the parameters built into the Fast Track program limiting merchants' average item prices or the average monthly sales volume, the program also had fraud profiling parameters which showed patterns of fraud. N.T. 8/17/2004 at p. 85; N.T. 8/18/2004 at p. 84; GoE's FF, ¶ 47.

IV. Global's Losses

35. Global incurred losses related to merchants in the Fast Track program. N.T. 8/17/2004 at 23.

36. James Kelly testified that these losses represented transactions that exceeded the average item price or the average monthly sales volume, or both. N.T. 8/18/2004 at 170; N.T. 8/18/2004 at 184.

37. Losses that Global attributes to failure of the Fast Track parameters equal $302,000.00. N.T. 8/18/2004 at 170; N.T. 8/18/2004 at 184.

38. In addition, Global claims to have suffered losses as a result of fraudulent merchant applications that were submitted by GoE. N.T. 8/18/2004 at 181; Global's FF at p. 10.

39. These eleven fraudulent merchant applications, each claiming to fall within the average item price and the average monthly volume parameters, were submitted to Global by GoE from August 31, 2001 to September 24, 2001. Exh. D-2; Global's FF at p. 10.

40. These applicants shared the same addresses, the same banks and bank accounts, the same corporate identity and the same president. N.T. 8/18/2004 at 181; Exh. D-2; Global's FF at p. 10.

41. In December 2001, James Battista told Vanden Landers that he (Mr. Battista) received a call from Bankcorp, wherein Bankcorp indicated that there was a problem with certain accounts. N.T. 8/17/2004 at 17, 29; GoE's FF, ¶ 39.

42. Bankcorp determined that these accounts were fraudulent, "stolen identity" accounts. Id.

43. Global incurred losses due to these eleven accounts in the amount of $103,000.00. N.T. 8/18/2004 at 50; Exh. D-2; Global's FFCL at p. 11.

V. Contract Termination and Residual Payments Entitlement

44. In February or March, 2002, Global began reunderwriting all GoE's merchant's accounts because of mounting losses. N.T. 8/18/2004 at 32.

45. The process of reunderwriting these accounts was complete in mid-June, 2002. N.T. 8/18/2004 at 33.

46. At that time Global had contracts with 2,280 GoE merchants. Id.

47. Approximately 900 were canceled due to their being inactive. Id.

48. Of the remaining accounts, 395 accounts were shut down as they were allegedly prohibited merchants. According to Vincent Perrilli, Jr., these sites included pornography sites, gambling sites and businesses that engaged in multilevel marketing. Id.

49. Global continued to process credit card transactions for 575 accounts. N.T. 8/18/2004 at 35.

50. Global delayed funding for the remaining accounts. N.T. 8/18/2004 at 34.

51. On May 17, 2002, Jim Battista wrote to Vanden Landers explaining that he (Mr. Battista) was told that Global was holding certain residuals related to GoE merchants. Exh. P-11.

52. In a May 25, 2002 e-mail, Mr. Battista wrote to Mr. Kelly regarding the residuals in question, asking for a report regarding the monies that were being held. Exh. P-12.

53. Mr. Landers confirmed that as of the time of these e-mails, certain residuals related to GoE merchants had not been paid. N.T. 8/17/2002 at 33.

54. In mid-June, certain GoE merchants contacted GoE stating that they had been shut off and had received termination notices from Global. Exh. P-15; GoE's FF, ¶ 72.

55. GoE repeatedly requested that Global surrender its contractual rights with GoE's merchants. N.T. 8/17/2004 at 31; Global's FFCL at p. 12.

56. Global refused to surrender these contractual rights because there were accounts that continued to generate revenue. N.T. 8/17/2004 at 31.

57. On June 26, 2002, GoE filed suit against Global alleging breach of contract, based upon a) Global's "intentionally and unlawfully" canceling, with "little" notice, GoE's customers from Global's processing system and informing those customers that they were terminated because of problems with GoE, and b) failing to pay GoE $125,505.00, an amount representing unpaid residuals, uncollected authorization fees and backbilling. GoE also asserted claims for negligent and intentional misrepresentation, tortious interference with contractual relations, business disparagement, and unjust enrichment. GoE also sought an accounting with respect to monies allegedly owed GoE by Global.

58. On July 26, 2002, GoE terminated the MSA. N.T. 8/17/2004 at p. 12; Exh. P-49; Global's FF at p. 12.

59. GoE announced its termination of the contract to third parties. N.T. 8/17/2004 at 167-168; Global's FF at p. 12.

60. After GoE terminated its contract with Global, GoE contacted it merchants that were under contract with Global, offering that their accounts be transferred to iPayments, Inc., GoE's new credit card processor. N.T. 8/17/2004 at 194-195.

61. These communications indicated that GoE would transfer the merchant's credit card processing accounts to iPayments, Inc., unless the merchants specifically instructed GoE not to do so. N.T. 8/17/2005 at 169, 181-182, 194-195; Global's FF at p. 12.

62. As a result of the cancellations, 300 accounts were moved from Global to iPayments. N.T. 8/18/2004 at 168.

63. On August 9, 2002, Global filed suit against GoE claiming: (1) tortious interference with contract, (2) business disparagement, (3) breach of contract (failure to pay Global for charges and costs "associated with the implementation and management of each of Global's agreements with the businesses solicited by [GoE], (4) breach of contract (failure to perform duties under the terms of the MSA), and (5) punitive damages.

DISCUSSION

I. Neither Party's Claim for Business Disparagement is Granted

GoE claims that Global "willfully, repeatedly and without justification made false comments regarding Plaintiff's business relationships and accounts". GoE's Complaint, ¶ 28. According to the Complaint, Global "fraudulently, intentionally, maliciously, and incorrectly" informed GoE merchants that they were cancelled because of GoE's actions, and that Global "fraudulently, intentionally, maliciously, and incorrectly" informed customers in the "Philadelphia area that [GoE] was responsible for the customer's termination." Id. at ¶ 28. GoE claims that these alleged actions endangered the "viability of [GoE's] business relationships" and caused GoE "immediate and irreparable harm". Id. at ¶ 30.

Global claims that "[t]hrough a campaign of falsehood, lies and misrepresentation, [GoE] has falsely and maliciously impugned and disparaged the conduct and business practices of Global". Global's Complaint, ¶ 25. Global complains that a blanket e-mail sent to merchants whose relationships were not

terminated by Global, or whose funds were not being withheld by Global, "damaged its contractual relationship" with these businesses. Id. See also Exh. P-6.

A claim of business disparagement is a tort and not an action for breach of contract.[3] Therefore, the court must decide which forum, Georgia or Pennsylvania, governs its disposition. This court held in Teledyne Technologies Incorporated v. Freedom Forge Corporation, that "under Pennsylvania law, if there is no material difference between the laws of competing jurisdictions, there is a 'false conflict' and the court need not decide the choice of law issue." 2002 Phila. Ct. Com. Pl. LEXIS 26, *16 citing In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3rd Cir. 1984).

Under Pennsylvania law, the tort of commercial disparagement requires the plaintiff to prove: "(1) that the statement was false; (2) that the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) that pecuniary loss does in fact result; and (4) that the publisher either knew that the statement is false or acts in reckless disregard of its truth or falsity." Hemispherx Biopharma, Inc. v. Manuel P. Asensio, Asensio & Company, Inc., 2002 Phila. Ct. Com. Pl. LEXIS 72, *20 citing Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 2000 Pa. Super 273, 761 A2d 553, 555-56 (2000) (citing Restatement (Second) of Torts § 623A (1977)).

While the common law of Georgia does recognize a specific claim for either "business disparagement" or "commercial disparagement", this claim falls under the ambit of a claim for libel or slander. Under O.C.G.A.§ 51-5-1 (2004), "[a] libel is a false and malicious defamation of another, expressed in print, writing, pictures, or

[3] New Jersey law must be applied to the parties' breach of contract claims. The contract provides that "[t]he Agreement shall be governed by and shall be construed in accordance with the laws of the State of New Jersey, without regard to its conflicts of law provisions." Exh. P-1, § N.

signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule . . . The publication of the libelous matter is essential to recovery." The pertinent statute also provides that "[a] libel is published as soon as it is communicated to any person other than the party libeled." O.C.G.A. § 51-5-3 (2004). Under Georgia law, slander consists of "making charges against another in reference to his trade, office or profession, calculated to injure him therein . . ." Furthermore, "[i]n all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In cases of privileged communication, such proof shall bar a recovery." O.C.G.A. § 51-5-5 (2004). "Privileged communication" is defined as statements made in good faith on the part of the speaker to protect his or her interest in a matter in which he or she is concerned. O.C.G.A. § 51-5-7 (2004).

This court finds that the elements to be proven under Pennsylvania law and Georgia law for a claim of business disparagement are essentially the same. Therefore, the court finds that there is no true conflict and Pennsylvania law will be applied to both parties' disparagement claims.

A. Global's Claim of Business Disparagement

Applying Pennsylvania law to this claim, Global is first required to show that that statements made in the e-mail at issue were false. Additionally, Global is required to prove that GoE either knew that the statements were false "or act[ed] in reckless disregard of [their] truth or falsity". Hemispherx Biopharma, Inc., 2002 Phila. Ct. Com. Pl. LEXIS at *20.

GoE's blanket e-mail sent to merchants that had contracted with Global and were continuing to process their credit card transactions with Global, stated that GoE found Global canceling numerous merchants without notice "unacceptable" and that based on these actions, GoE was severing its relationship with Global. N.T. 8/17/2004 at 166-69. The e-mail goes on to advise that GoE had contracted with another credit card processor and if merchants wanted to continue with Global they were required to notify GoE so as not to be automatically switched to iPayments.com, GoE's new credit card processor. Id. While GoE's *opinion* was, no doubt, offensive to Global, it was not a false statement. Therefore, the court finds that Global did not sufficiently prove the first and fourth requisite elements of a claim of business disparagement.[4] Therefore, Global's claim for business disparagement fails.

B. GoE's Claim of Business Disparagement

GoE's claim for business disparagement centers around a mass e-mail sent by Global (in response to GoE's blanket e-mail) which provided in pertinent part:

> We understand that you may have received an e-mail from GoEMerchant (GoE) regarding your processing relationship with Global Payments. Your merchant agreement with Global Payments does not include GoE as a party. It is perplexing and unfortunate that GoE considers it appropriate to disparage Global while encouraging you to take actions that may put you in breach of your contract with Global.
>
> You must understand Global has not terminated your merchant agreement and has no reason to do so. We look forward to continuing that relationship.
>
> Your contract with Global is most likely exclusive and may contain minimums that you will remain responsible for, even if you choose to breach the agreement by terminating your processing relationship with us.
>
> The correspondence that you may have received from GoE suggests that you will be moved unless you affirmatively contact GoE to tell them that

[4] Hemispherx Biopharma, Inc., 2002 Phila. Ct. Com. Pl. LEXIS at *20.

> you wish to remain with Global. Please do not allow GoE to put you into default under your agreement with Global by following their advice. We apologize for any inconvenience that this situation has caused you. Please contact GoE at jimj@goEmerchant.com <mail to jimj@goEmerchant.com> or via fax to Jim Juliano at 1-610-446-1855 and indicate that you will not breach your contract with Global and that you will remain with Global. . . .

Exh. P-6.

This court finds that Global did not make the requisite false statement in this e-mail. The contract between Global and the merchants, a contract that was posted on GoE's website, required Merchants to give thirty days written notice before terminating the agreement. Exh. D-2A. Consequently, Global's warning to merchants regarding the possibility of their breaching their contracts with Global, was based on the express terms of the contracts. Because GoE did not prove the first element of a claim for business disparagement, GoE's claim of business disparagement is denied.

II. GoE's Claim for Tortious Interference is Denied. Global's Claim for Tortious Interference is Granted.

Global's claim of tortious interference against GoE rests upon GoE's contacting the GoE merchants that had contracted with Global and "under improper and false representations that Global was about to terminate those merchants' credit card processing," moving those accounts to iPayments.com. Global's Response to GoE's FFCL at p. 5.

GoE asserts that Global's alleged tortious interference included "refusing to let GoE move the GoE Merchant customers that Global did not want to another processor instead of cutting them off"[5], and contacting GoE Merchant customers "to recruit them to leave GoE." GoE's FF, ¶ 85.

[5] GoE's FF, ¶ 76.

As noted above, the court must first determine which state law applies. "In Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary." Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000).

In order to make out a claim for tortious interference with contract under Georgia law, the party asserting the claim must establish that the defending party (1) acted improperly without privilege; (2) acted purposely and with malice and intent to injure; (3) induced a breach of contractual obligations; and (4) proximately caused damage to plaintiff. Disaster Services v. ERC Partnership, 228 Ga. App. 739, 740, 492 S.E.2d 526, 528 (1997).

Under Pennsylvania law, the four elements of a cause of tortious interference with contractual relations in Pennsylvania are: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with the contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct. See Triffin v. Janssen, 426 Pa. Super. 57, 63, 626 A.2d 571, 574 (1993).[6]

There are no appreciable differences between Pennsylvania law and Georgia law as to the tortious interference claim. Each has fundamentally the same elements to be proven by plaintiff to prevail. Therefore, this court will apply Pennsylvania law.[7]

[6] GoE has conceded that the result with respect to the tort claims would be the same under Georgia and Pennsylvania law. GoE's CL, ¶ 7.

[7] It may also be appropriate to apply Pennsylvania law in that both Global and GoE filed their respective complaints in Philadelphia County and GoE has a business address in Havertown, Pennsylvania.

A. Global's Claim of Tortious Interference

The e-mail at issue in Global's claim for tortious interference provided:

> During the past month, Global Payments (your current bank processor) has made it very difficult if not impossible for GoEMerchant.com to do business on the Global platform. Global Payments closed over 600 GoEMerchant.com customer merchant accounts in the past 30 days. Affected merchants have told us that Global did this with no advanced notice to the merchant and placed all funds processed on 100 percent reserve, telling those merchants that they will hold these funds for 180 days. GoEMerchant.com finds this behavior unacceptable, and at this time cannot assure you that Global will continue to process our sales . . .
>
> We value your business and our relationship. We also want to do everything we can to protect your business and prevent any possible interruption of your transaction processing capabilities. Therefore, GoEMerchant.com has decided to terminate its business relationship with Global Payments.
>
> This is to advise you that many of our customers have already chosen to move their business from Global Payments to another merchant processing partner of GoEMerchant. GoEMerchant has already established an alternative account at I-Payment, Inc. The financial terms and conditions are identical to the terms established by Global Payments. This change requires no programming on your part, and your store and admin server will continue to function exactly as it did today.
>
> If you do not wish us to transfer your processing relationship to I-Payment, Inc., please respond immediately to this e-mail and declare your intention to remain with Global Payments. If you do not declare your intention to stay with Global Payment, we will assume that you agree to switch your processing arrangement to I-Payment.

N.T. 8/17/2004 at 166-69.

In order to prove tortious interference, Global must prove that a contractual relationship existed. There is no doubt that Global and the merchants for whom Global was processing credit card transactions had contractual relationships. Exh. D-2A.

The court finds that the second element of tortious interference is also proven. The communication's intent is clear. GoE was attempting to persuade merchants processing with GoE to switch to a different processor. In fact, GoE made the transition from Global to iPayments.com effortless in that merchants that chose to switch did not have to take any action. N.T. 8/17/2004 at 166-69. Consequently, the court finds that Global has sufficiently proved the second element of the claim.

The third element requires that the defending party "acted improperly without privilege or justification for such interference"[8], "an actor is privileged to interfere with another's performance of a contract when: (1) the actor has a legally protected interest; (2) he acts or threatens to act to protect the interest; and (3) the threat is to protect it by proper means." Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 465, 600 A.2d 545, 548 (1992).

GoE claims that the communication was privileged because it was communicating with "GoE's *own* merchants". GoE's CL, ¶ 17. (Emphasis in the original). In addition, GoE argues that it acted in accordance with the "privilege to protect its own legitimate business interest." GoE's CL, ¶ 18. The court disagrees.

"The tort of interference with a contract is defined in terms of unprivileged interference with a contract with a third party. Essential to the right of recovery on this theory is the existence of a contractual relationship between the plaintiff and a party other than the defendant." Nix v. Temple University of Commw. System of Higher Educ., 408 Pa. Super. 369, 378-9, 596 A/2d 1132. 1137 (1991).

[8] Triffin, 426 Pa. Super at 63.

While it is true that GoE had contracts with the merchants that opted to use their service, GoE was **not** a party to the contracts between Global and these merchants. N.T. 8/17/2004 at 148; N.T. 8/18/2004 at 156; Exh. D-2A; Global's FF at p. 3. Moreover, GoE contracted away its right to object to Global's termination of the merchants. The MSA provides: "[Global] shall have right, in its sole discretion, to terminate, suspend or otherwise close any Merchant, provided such action is consistent with [Global's] risk policies applicable to its merchants generally." Exh. P-1 §F, ¶ 2. Conesquently, this court finds that GoE did not have a "legally protected interest" with regard to Global's contracts with the merchants solicited by GoE.

Furthermore, the contracts between Global and GoE merchants, a contract that was posted on GoE's website, provided that Global had the right to terminate these Agreements at any time without notice "in the event Global reasonably deems itself insecure in continuing this Agreement." Exh. D-2A. Because GoE posted this contract on its website, it may be inferred that GoE knew of the terms contained in the contract. Therefore, GoE knew that Global had the right to terminate its relationships with the GoE merchants in the event that Global decided it was "insecure" in maintaining those relationships. Accordingly, Global sufficiently proved the third element of its claim for tortious interference.

The fourth element requires that the defending party "proximately caused damage to plaintiff".[9] This element, too, was sufficiently proven at trial.

Global presented communications from GoE merchants that cancelled their contracts with Global, choosing instead to process with iPayments.com., as evidence that it suffered damages on account of GoE's tortious interference. The cancellation

[9] Triffin, 426 Pa. Super at 63.

notices were directly responsive to GoE's blanket e-mail to merchants. One such communication sent to GoE from a merchant that had not been terminated by Global, provided in pertinent part:

> Please reference the email messages you sent to jksasoc@mich.com regarding Global.
>
> As of this writing we have not experienced any trouble with either GoEmerchant or Global in the handling of our accounts.
>
> We will take your advice however and move to iPayment. Along with this letter is the last page of the iPayment signed as requested. Please cancel our arrangement with Global. . . .

Exh. D-3.

Another cancellation notice stated:

> To whom it may concern. I wish to terminate my business relationship with Global Payments. I am afraid I will be the next business (sic) ruined by being cancelled with no notice, without access to my funds. We, M. Catherine Freeman & Michael D. Freeman owners of Botony 101, request that you stop billing us, as of July 31 2002. We will be going to another company.

Exh. D-4.

James Kelly, senior executive vice president and chief financial officer of Global, testified that 300 merchants cancelled their accounts with Global and began processing with iPayments.com. N.T. 8/18/2004 at 168. This figure was undisputed. Mr. Kelly, whose education includes a degree in accounting, arrived at the amount of damages Global sustained as a result of GoE's tortious interference by taking the aggregate of those 300 merchants and assuming an industry attrition rate of approximately 25 percent. Id. Mr. Kelly explained that he arrived at the 25 percent attrition rate based on the attrition rate he had observed in Global's processing for over

50 ISOs[10]. N.T.8/18/2004 at 168-69. He further testified that this attrition rate was "calculable from his experience in the industry." N.T. 8/18/2004 at 169. Given the 25 percent attrition rate, Mr. Kelly concluded that Global's damages resulting from GoE's tortious interference amounted to $158,000.00.

GoE, in response to Mr. Kelly's direct testimony, attempted to establish that Mr. Kelly could not be sure that "every one of these customers would be there for four years. N.T. 8/18/2004 at 196. Mr. Kelly remained steadfast with regard to his calculation, testifying that based on his experience in the industry "it is reasonable to believe that [merchants were] going to attrit over 20, 25 percent a year." N.T. 8/18/2004 at 197.

This court found Mr. Kelly to be well qualified to testify as to industry standards specifically with regard to average attrition rates related to a business such as Global. Accordingly, the court finds that the fourth element of tortious interference was sufficiently proven. Moreover, this court adopts Mr. Kelly's conclusions related to the amount of damages Global suffered as a result of GoE's tortious interference. Therefore, this court awards Global $158,000.00.

B. <u>GoE's Claim of Tortious Interference</u>

GoE, in support of its claim of tortious interference, cites the "blanket" e-mail that was also at the center of GoE's claim for business disparagement claim[11]. This e-mail bears repeating. In pertinent part, the e-mail provides:

> We understand that you may have received an e-mail from GoEMerchant ("GoE") regarding your processing relationship with Global Payments. Your merchant agreement with Global Payments

[10] An ISO is reseller of credit card, or transaction processing, services for either a bank or processor such as Global. N.T. 8/17/2004 at 7.

[11] See Section I, pp. 14-15.

> does not include GoE as a party. It is perplexing and unfortunate that GoE considers it appropriate to disparage Global while encouraging you to take actions that may put you in breach of your contract with Global.

P-Exh. 6.[12]

As to the first element - - that there be a contractual relationship - - GoE claims that the contractual relationships that were interfered with were the contracts between GoE and the GoE merchants. Thus, the first element is satisfied. However, the second element for a claim of tortious interference, an intent on the part of the defendant to harm the plaintiff by interfering with the contractual relationship, was not sufficiently proven at trial.

While it is true that Global terminated certain merchants and held funds from others, Global, under its contract with the merchants, had a contractual right to take these actions. Exh. P- 2; N.T. 8/17/2004 at 42; N.T. 8/14/2004 at 82; N.T. 8/17/2004 at 101. Additionally, testimony was presented that Global took these actions in an effort to put a halt losses to Global was sustaining as a result of chargebacks. N.T. 8/17/2004 at 12-13, N.T. 8/18/2004 at 30, 32.

James Battista and Vaden Landers testified that GoE attempted to "work with Global and do what it could to make the Fast Track program work" and that GoE "continuously tried to work out its differences with Global and get the relationship back on track." N.T. 8/17/2004 at 13, 19, 31, 90, GoE's FF, ¶¶ 64, 65. Additionally, GoE asserted that it "wanted to move any accounts away from Global that Global was

[12] Another e-mail, which the writer admits to being composed of hearsay, states that Global told a GoE merchant that they were "shutting down all goEmerchant.com relationships b/c GoE had passed hundreds of thousands of dollars of fraudulent accounts to them." Exh. P-35. According to the "mutual customer of The Bancorp.com and goEmerchant.com" that relayed this information to GoE, "Global also stated to the customer that there was nothing wrong with her account, it was being shutdown due to the GoE relationship." Id. It is important to note that while this e-mail was included in GoE's exhibits, no one testified to its contents.

unsatisfied with". N.T. 8/17/2004 at 31. However Global refused to allow GoE to move accounts that were still processing because they were generating revenue. Id. Mr. Landers testified that "the logic was that the accounts that were still processing were generating revenue, and that that revenue would help to offset any losses we incurred up to that point in time." Id.

While this testimony shows that GoE offered Global an alternative to suspending merchants' accounts and/or terminating merchants, this testimony does not support the proposition that Global cancelled certain merchants' accounts with an intent to harm GoE. This court is persuaded that Global took these actions in an effort to ameliorate the losses it was sustaining and not for the purpose of harming GoE by interfering with the contracts between GoE and the merchants that were processing with Global.

With regard to the third element, that there existed the absence of a privilege or justification for such interference by the defending party, Global had a "legally protected interest" in its contract with the GoE merchants. Additionally, the court finds that Global was justified in its actions. Moreover, the court finds that Global's course of conduct with respect to the merchants for whom it was processing was not an interference with the contract between GoE and the merchants that had also contracted with GoE. That contract was separate and apart from the contract GoE's merchants had with Global.

The court acknowledges that Jim Battista, an owner and president of GoE, testified that GoE lost a "significant amount of accounts" due to Global's actions.[13]

[13] Mr. Battista testified that GoE lost "about 700 merchants" because of Global's conduct. N.T. 8/17/2004 at 103.

N.T. 8/17/2004 at 95. However, not one of the 28 e-mails cited to in support of GoE's claim for tortious interference sets out that Global's actions caused these merchants to terminate their contracts with GoE. Exhs. P- 18, 23-32, 34-40, 43-46, 48, 50, 53-57. The only "evidence" presented at trial that Global's course of conduct caused GoE to lose the merchants it had contracted with was the testimony of Mr. Battista. That testimony, in and of itself, was not sufficient to prove the third element of GoE's claim of tortious interference.

Finally, the fourth element of tortious interference, damages resulting from the defendant's conduct, was not sufficiently proven at trial. With the exception of Mr. Battista, GoE offered no evidence directly or indirectly identifying the amount of any claimed losses or how those losses were calculated. Plaintiff has the burden of proving its entire case, including its losses. They are not entitled to simply make allegations and require defendant to disprove them. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950); MacDonald v. Pennsylvania R. Co., 348 Pa. 558, 36 A.2d 492 (1944); Waldron v. Metropolitan Life Ins. Co., 347 Pa. 257, 31 A.2d 902 (1943). The court finds that GoE did not offer sufficient evidence to sustain an action for tortious or negligent interference with contract. Accordingly, GoE's claim for tortious interference fails.

III. GoE's Claim For Breach of Contract is Granted. Global's Claim For Breach of Contract is Denied.

The MSA is governed by New Jersey law. Exh. P-1, § N. Under New Jersey law, to support a claim for breach of contract, a plaintiff must demonstrate: (1) the existence of a contract between the plaintiff and defendant, including its essential

terms; (2) a breach of a duty imposed by the contract; and (3) damages resulting from a breach of that duty. *See e.g.* Ench Equipment Corporation v. Joseph Lorenzo and August Lorenzo, 23 N.J. Super. 63, 92 A.2d 480 (1952).

A. GoE's Breach of Contract Claim

GoE claims that Global breached the MSA by: (1) intentionally and unlawfully canceling GoE's merchants from Global's processing system with either no notice or short notice, (2) failing to remit $125,505.00 in residuals related to GoE merchants that were processing with Global, (3) "maliciously, unlawfully, and intentionally representing to others that [GoE] had problems", and (4) "intentionally refusing to timely pay [GoE] monies owed related to the [MSA]". GoE's Complaint, ¶¶ 7-12.

(1) Intentional and Unlawful Cancellation of GoE's Merchants

According to James Battista, GoE signed up approximately 1,600 merchants with Global. N.T. 8/17/2004 at 79, 92. These merchants had contracts with Global. N.T. 8/17/2004 at 148; N.T. 8/18/2004 at 156; Exh. D-2A; Global's FF at p. 3; GoE's FF, ¶¶ 29-30. These contracts were for 30 days or renewable month-to-month. Exh. P-2; GoE's FF, ¶ 31. GoE was not a party to the contracts between GoE's merchants and Global. N.T. 8/17/2004 at 148; N.T. 8/18/2004 at 156; Exh. D-2A; Global's FF at p. 3.

"[When] there has been no direct transaction between the plaintiff and the defendant, [it] is usually expressed by saying that they are not in 'privity' of contract." William L. Prosser, Law of Torts 622 (4th ed. 1971). Privity of contract exists when there is "a connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendant in respect of

the matter sued on". Black's Law Dictionary 1079 (rev. 5th ed. 1979). Furthermore, it is established that "a person not a party, nor in privity thereto, cannot sue in respect to a breach of a duty arising out of the contract." Bacak v. Joseph Hogya, 4 N.J. 417, 422, 73 A.2d 167, 170 (1950) citing Marvin Safe Co. v. Ward, 46 N.J.L 19 (Sup. Ct. 1884) and Styles v. Long Co., 70 N.J.L. 301 (E. & A. 1903).

In the absence of privity of contract between GoE and Global with respect to the contracts between GoE's merchants and Global, a breach of contract claim could be viable if GoE was a third party beneficiary of these contracts. N.J.S.A. 2A:15-2 provides that a person for whose benefit a contract is made may sue on the contract in any court. Rieder Communities, Inc. v. Township of North Brunswick, 227 N.J. Super. 214, 221, 546 A.2d 563, 566 (1988). This statute merely restates established New Jersey law that third-party beneficiaries may sue upon a contract made for their benefit without privity of contract. Id. citing Houdaille Constr. Materials, Inc. v. American Tel. & Tel. Co., 166 N.J. Super. 172, 184-185 (Law Div. 1979.)

The standard applied by courts in determining third-party beneficiary status is "whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts . . ." Borough of Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 77 (E. & A. 1940). In Gold Mills, Inc., v. Orbit Processing Corp., the court explained the difficult standard under which the courts will recognize third party contractual rights:

> The essence of contract liability to a third party is that the contract be made for the benefit of said third party within the intent and contemplation of contracting parties. Unless such a conclusion can be derived from the contract or surrounding facts, a third party has no right of action under that contract despite the fact that he may derive an incidental benefit from its performance.

121 N.J. Super 370, 373, 297 A.2d 203, 204 (Law Div. 1972).

No evidence was presented at trial to demonstrate that the GoE merchants who contracted with Global intended that GoE would benefit from those contracts. Thus, the court finds that GoE was not a third-party beneficiary of the contracts between the GoE merchants and Global. Accordingly, due to the lack of privity and the fact that GoE was not an intended third-party beneficiary under these agreements, the court holds that GoE's claim for breach of contract for Global's termination of certain GoE merchants fails.

(2) Global's Withholding $125,505.00 in Residuals [14]

GoE claims that Global breached the MSA, in part, by withholding residuals due GoE. GoE's Complaint at p. 4. Global counters that GoE, pursuant to the MSA, was required to bear certain charges and costs and that Global rightfully reduced the residuals by the amounts owed for these charges. Global's Complaint at p. 7. Global claims that the charges properly ascribed to GoE represented a greater amount than the residuals owed by Global. Thus, Global was not obligated to pay the residuals to GoE. Id.

The MSA provides for Global to pay GoE a specified percentage of the charges collected by Global for processing the merchants' credit card sales. Exh. P-1, ¶ D. The MSA also provides that "[Global] shall bear any loss, cost, or expense, including reasonable outside attorney's fees and expenses, that shall result from or arise out of Chargebacks and Credit Losses in respect of any Merchant Agreement, *to the extent the losses are not due to the errors or negligence of [GoE]*." (Emphasis added.) Exh. P-1,

[14] Although GoE's Complaint states that Global owes GoE $125,505.00, GoE claimed at trial that it is owed $249,356.69 in residuals. GoE's Complaint; Exh. P-7.

¶ B. The contract is silent with regard to whether Global had the right to deduct losses they attributed to GoE's "errors or negligence" from the amount of residuals owed to GoE.

"The function of the court is not to make contracts, but to enforce them and to give effect to the intention of the parties." Smith v. Metropolitan Life Insurance Company, 29 N.J. Super. 478, 482, 102 A.2d 797, 799 (1954) citing Corn Exchange National Bank & Trust Co. of Philadelphia v. Taubel, 113 N.J.L. 605, 608 (E. & A. 1934). Moreover, "where the language of a contract is clear courts must interpret it according to its plain meaning." Travelers Insurance Company v. Transport of New Jersey Corp., 204 N.J. Super. 63, 73, 497 A.2d 900, 904-5 (1985). The Superior Court of New Jersey wrote: "No occasion arises for the application of the canons of construction where the language employed to express the common intention is clear and unambiguous." Smith, 29 N.J. Super. at 483.

According to the Restatement (Second) of Contracts, § 204 (1981): "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is *essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court*."[15] (Emphasis added.)

The court submits that a set off provision in the contract between Global and GoE would not be an essential term. It is clear that under the contract GoE assumed the duty to bear losses that were incurred on account of GoE's errors or negligence. While a specific mechanism for the payment of these losses was not set out in the contract,

[15] This section of the Restatement has been adopted by the New Jersey courts. See e.g. Paul v. Timco, Inc., 356 N.J. Super. 180, 811 A.2d 948 (2002); In the Matter of the Estate of Alton Glenn Miller, 90 N.J. 210, 447 A.2d 549 (1982).

Global could have billed GoE for these losses instead of deducting them from the residuals. Moreover, common sense dictates that the question whether losses were attributable to GoE's "errors or negligence" would have to be decided before the amounts of those losses would be reimbursed to Global by GoE. The question whether the losses sustained by Global were due to GoE's "errors or negligence" presumably was viewed differently by the parties at the time that Global decided it would subtract the amount it believed was caused by GoE's error from the residuals. Indeed, the issue was a matter of much debate at trial. Therefore, Global's deducting these losses from the residuals was premature.

Since the court finds that a set off provision would not have been an essential term of the MSA, the court will not imply that term. Thus, the court holds that Global breached the MSA by not paying residuals on account of processing that occurred prior to the termination of the MSA.

As to damages for unpaid residuals, GoE claims that it is owed $249,356.69, an amount which represents certain fees (residuals) multiplied by an agreed percentage per annum.[16] Exh. D-7, subsection 2. These fees were calculated through March 2004. Id. Global's position is that GoE violated certain enumerated sections of the MSA, thereby forfeiting its right to residuals for that time period after GoE terminated the contract on July 26, 2000. N.T. 8/18/2004 at 176. Additionally, Global argues that it does not owe GoE $249,365.69 because GoE's Exhibit 7 is based on accrual

[16] These fees include "authorization fees, prior adjustment on authorization fees due, American Express sign up commission, merchant statement fee adjustment (MID fee) including corrections to credit Global, Cingular Wireless commissions including corrections to credit Global, monthly subscription fee (fee Global charged their merchants to use GoE software), interest at 10% per the Agreement." GoE's FF, ¶ 116.

accounting as opposed to an accounting based upon Global's receipt of payments from the merchants. N.T. 8/18/2004 at 174-75.

Under the MSA, Global was bound to pay GoE the fees set forth in Appendix A of the contract. The MSA provides that "[t]his Section shall survive the termination of this Agreement for as long as [Global] or its successors and assigns continually process for such Merchant and [GoE] continues to substantially comply with Sections B, C, E, F, G, H, and I of this Agreement." Exh. P-1, § D. (Emphasis added.) Global urges that GoE violated Section C , titled "Merchant Retention" and Section F of the MSA, titled "Merchant Agreements".

Under Section C of the MSA, GoE agreed that it would not use "confidential information . . . of the other party to solicit any merchant which is receiving processing services through a service agreement . . . with the other party." Exh. P- 1. Section F of the MSA states that: "[GoE] must provide [Global] with copies of notifications to Merchants affecting processing, pricing and issues thirty (30) days prior to receipt of such notification by Merchants if such notification relates to services provided by [Global] or its affiliates hereunder." Id.

Global argues that because GoE did not notify Global thirty days in advance of their soliciting the GoE merchants that had contracts with Global, and that GoE utilized confidential information in its solicitation of the merchants that had contracted with Global, GoE did not substantially comply with the MSA, thereby waiving their entitlement to the post-July 26, 2002 residuals.

The evidence presented at trial showed unequivocally that GoE did in fact solicit the merchants that had contracted with Global. N.T. 8/17/2004 at 194-95. As noted above, these communications stated that GoE would transfer the Merchants' credit card processing accounts to another processor, iPayments, Inc., unless GoE received specific instructions from the merchants not to do so. N.T. 8/17/2004 at 164-69, 181-82. Despite the express terms of Section C of the MSA, GoE did not provide Global with a copy of these communications and did not seek and obtain advance approval from Global for such communications. N.T. 8/18/2004 at 176.

Because GoE's right to compensation survives the termination of the contract unless GoE did not substantially comply with the notice provision of the MSA, the notice provision itself also survives the termination of the contract. Consequently, this court finds that GoE's claim for post-MSA residuals must fail.

As a result, the court holds that Global is not required to pay $90,827.61, an amount which represents the residuals GoE claims it is owed by Global for processing that took place after the contract was terminated.

With regard to the accrual versus cash-based accounting issue, the testimony elicted from both parties evidenced a course of conduct that was at odds with the language of the MSA. The MSA states that the residuals were due when they were "earned". Exh. P-1, ¶ D. However, Mr. Kelly testified that the fees to GoE were paid based on receipt of payments by the merchants. N.T. 8/18/2004 at 175. Likewise, Alfred Battista testified that he understood that GoE was not owed money until Global had received payments from the merchants:

> Q. All right. So this is a cash deal, not an accrual deal; am I correct?

A. I don't understand your interpretation, cash, accrual.

Q. Well, it says 100 percent of any amount received, so it has to actually be received before you're entitled to anything?

A. Absolutely.

N.T. 8/17/2004 at 175.

Mr. Kelly explained that the monthly summaries sent by Global to GoE upon which GoE's residuals-owed estimate was based, reflected the processing of the prior month and did not reflect the payments Global had received. N.T. 8/18/2004 at 175. Mr. Kelly testified that the practice of making payments to GoE upon accrual instead of receipt resulted in overpayments being made to GoE. N.T. 8/18/2004 at 218-19; Global's FF at p. 16. Global, according to Mr. Kelly, made accounting adjustments for the overpayments from subsequent residuals paid to GoE. N.T. 8/18/2004 at p. 215, 217. He further explained that it could take up to three months before the accounts were trued-up. Id. Mr. Kelly testified that this truing up process was "a reconciliation between the cash and accrual" that went on every month. N.T. 8/18/2004 at 176.

Because GoE's residuals-owed damage estimate was based on Global's reports which did not take into account the truing-up process described above, Mr. Kelly testified that, not only are GoE's numbers incorrect, but that GoE actually owes Global $59,000.00 as a result of Global's overpaying GoE. N.T. 8/18/2004 at 210.

Global did not present sufficient evidence to prove the amount it asserts must be subtracted from the residuals it owes for the period pre-dating termination. In addition, as noted, the language of the MSA directed that the residuals must be paid when "earned". Exh. P-1, ¶ D. GoE's evidence showed that the residuals owed by Global for

the period pre-dating the termination of the MSA amount to $127,306.43. The contract contemplates an additional 10% interest per annum. Exh. P-1, § H.

Accordingly, the court awards GoE $165,415.43, an amount which represents the amount owed on residuals that pre-date termination of the MSA plus 10% interest for a period of 3 years.[17]

(3) GoE's Damage Claim For Diminution of Company Value

GoE claims that it should be awarded $10,000,000.00 for an alleged diminution in value of its company as a result of Global's actions. The only evidence presented at trial in support of this item of damages was the testimony of Alfred Battista. Mr. Battista testified that prior to the "Global event" iPayments.com offered to buy GoE for approximately $14,000,000.00. N.T. 8/17/2004 at 130-32. According to Mr. Battista, GoE rejected this offer. N.T. 8/17/2004 at 131. Subsequent to the "Global event", GoE was sold to First American Payments for approximately $4,000,000.00. N.T. 8/17/2004 at 133.

The Restatement (Second) of Contracts cautions: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." Restatement (Second) of Contract, § 352 (1981). Furthermore, comment "a" of section 352 provides that "[c]ourts have traditionally required greater certainty in the proof of damages for breach of a contract than in proof of damages for a tort." However, comment "a" goes on to state that "[d]oubts are generally resolved against the party in breach." The question before this court is whether testimony given by an officer of the plaintiff corporation regarding an offer to purchase GoE prior to the defendant's breach of contract and what the corporation sold for after the breach is

[17] The three year period begins in August 2002 and extends to the date of the Order in this case.

"reasonably certain" evidence sufficient to prove the diminution in value as an element of damages.

No documentary evidence was offered to support Mr. Battista's testimony with regard to iPayments.com offer to purchase GoE for $14,000,000.00. The only evidence was Mr. Battista's testimony of the alleged offer to purchase GoE. Mr. Battista was an owner of GoE from the inception of the parties' relationship until GoE was sold. Because of Mr. Battista's obvious personal interests, his testimony, standing alone as it does, is not sufficient to prove the alleged diminution of value of GoE. Therefore, GoE's claim for this item of damages is denied.

(4) GoE's Claim For Attorneys' Fees

Finally, GoE claims that it is owed attorney's fees. The MSA provides for the indemnification of "reasonable" attorneys' fees for a breach of any obligation under the agreement. Exh. P-1, § L. According to GoE's Exhibit 7, subsection 8, GoE's attorneys' fees amounted to $90,438.18. This exhibit, the sole documentary evidence offered by GoE related to the legal fees, sets forth only the "period covered" and corresponding amounts of fees. Mr. Battista testified that this list of bills was the only accounting Mr. Battista "ever had for the fees due". N.T. 8/17/2004 at 119.

Because GoE did not present evidence to demonstrate the amount of work performed or the character of the services rendered, the court holds that GoE did not present sufficient evidence for a determination of whether the attorneys' fees were reasonable.

Therefore, the court is obliged to deny GoE's claim for attorneys' fees.

B. Global's Breach of Contract Claim

Global asserts a claim for breach of contract based on GoE's failure to "prescreen all businesses seeking credit card processing services." Global's Complaint at ¶'s 32-35. Global claims that as a result of this breach, it suffered damages in chargebacks. Global's Complaint at ¶ 36. Specifically, Global claims that the computerized Admin Server that was programmed to block transactions that exceeded the parameters of the Fast Track[18] program did not function properly, allowing numerous transaction batches to be accepted. Global's FF at pp. 6,9. In addition, Global claims that the Admin Server failed to block certain fraudulent transactions that "substantially exceeded the Fast Track parameters" causing those transactions to be improperly accepted, leading Global to suffer chargebacks. Global's FF at p. 9.

The Fast Track program, according to Vaden Landers, the president of the ISO[19] division of Global in late 2001 and 2002[20] , was a program set up for GoE to "board internet business accounts that did small processing volumes and had low average tickets . . . in a more expeditious fashion; meaning we got them on quicker, approved quicker, so that they were up and running quicker." N.T.8/17/2004 at 9-10. GoE had a Fast Track program with Nova, the company Mr. Landers worked for prior to his being employed by Global. N.T. 8/17/2004 at 37-38. According to Mr. Landers, Global had a meeting with underwriting and Global "put that Fast Track program on the table". N.T. 8/17/ 2004 at 38. Mr. Landers testified that Global set up the program to do business with GoE. N.T. 8/17/2004 at 10.

[18] *See* Finding Nos. 29-34, supra.
[19] According to Mr. Landers, an ISO is a "reseller of credit card processing services for either a bank or a processor similar to Global." N.T. 8/17/2004 at 7. (*See* Finding No. 11, supra.).
[20] N.T.8/17/2004 at 6-7.

Vincent Perrelli, Jr., the senior vice president of Global who handled all Global operations[21], testified that the Fast Track program was meant to facilitate GoE's business model, to get the merchants up and running in 48 hours. N.T. 8/18/2004 at 23-24.

According to Mr. Perrelli, the Fast Track program had parameters that were built in to the Admin Server by GoE. N.T. 8/18/2004 at 24. The parameters were agreed upon by GoE and Global. N.T. 8/18/2004 at 91; GoE's FF at p. 5. An e-mail authored by an employee of GoE, set out the Fast Track parameter guidelines:

> Fast Track 1- The Admin Server will not allow a batch with an average ticket over $100.00, and it will not allow the merchant to process over $10,000.00 in a month.
> Fast Track 2 – The Admin Server will not allow a batch with an average ticket over $200.00, and it will not allow the merchant to process over $6,000.00 in a month.

Exh. P-104[22].

Auto Approval was part of the Fast Track program. Mr. Landers testified that Auto Approval meant that any account that met the "guidelines" of the program was automatically approved without any underwriting or a credit check. N.T. 8/17/2004 at 44. This testimony was contradicted by an e-mail sent by an employee of Global to an employee of GoE:

> The term Fast Track or Auto Approval is not the approval of the application yet what is required with the deal to be considered before approval. Auto Approval says that we will not require the same items we normally would but not that we automatically approve the deal even though they have poor credit.

[21] N.T. 8/18/2004 at 10.
[22] The e-mail was written on January 29, 2002. However, according to the testimony of Mr. Perrelli, he was involved in a meeting regarding the Admin Server and the parameters at the beginning of the parties' relationship. He believed that the parameters laid out in the January, 2002 e-mail were the parameters originally agreed upon. N.T. 8/18/2004 at 132. Vincent Perrelli, Jr. testimony was slightly different regarding the parameters of the Admin Server in that he testified that there was a third category, one in which the merchant could process $300.00 average tickets. Id. at 26.

> Global Payments has 100% liability on all these deals therefore must make a credit decision based on what is presented which is minimal information under the auto approval guidelines. This is not a change in policy yet an enforcement of the same policy that our analysts have looked at minimally.

Exh. P-9.

Additionally, in an e-mail sent the next day, December 19, 2001, Jim Battista wrote to Vaden Landers:

> *We've been told from Day 1 that Global would pull a credit report on every fast track application, and to our knowledge that has happened*..(sic) Underwriting has declined about 4-5 fast tracks a month based on (horrid credit), and we agree wholeheartedly . . .

Exh. P-10. (Emphasis added.)

Mr. Landers responded:

> . . . I think the issue is related to our losses being way up this year and research has indicated that in many cases where there has been a loss, *had we reviewed the credit report on the principal(s) we most likely would not have approved the merchant.*

Id. (Emphasis added.)

Global claims that the admin server was set up to block transactions that exceeded the parameters the particular merchants were subject to. N.T. 8/18/2004 at 37, 45. According to Mr. Battista, GoE's duties with regard to the Fast Track program included GoE submitting applications to Global. N.T. 8/18/2004 at 245. Global was to underwrite the merchant. Id. Similarly, Mr. Landers testified that it was GoE's job to "create a visual . . . load accounts into a wheelbarrow, pull them up to [Global's] front step, and dump them on the front stop. It was [Global's] responsibility to go through those accounts and say we want these, we don't want these, and we could accept or

reject any accounts that we did or didn't want." N.T. 8/17/2004. This testimony is consistent with the terms of the MSA:

> [GoE] will market [Global's] merchant processing services to merchants. [Global] will provide [GoE] with [Global's] credit policies and [GoE] agrees to use commercially reasonable efforts not to submit any application to [Global] which does not meet [Global's] credit criteria. [GoE] will prescreen all potential merchants and submit to [Global] a complete application package containing the findings in the pre-screening process. [Global] will use reasonable efforts to accept or decline any such merchant within two business days of receipt of a completed application by [Global's] credit department. [Global] may refuse to accept any such merchant and such decision shall be at the sole discretion of [Global].

Exh. P-1, § A.

Section B of the MSA also speaks to the issue of which party assumed the duty to review the credit of merchants contracting with Global: "[Global] will provide on-going credit review for all Merchants." Exh. P-1, § B.1.

Despite the clear language of the MSA, Vincent Perrelli, Jr. testified that his employees were essentially "rubber-stamping" merchants that met the Fast Track parameters. N.T. 8/18/2004 at 44.

The court finds that the MSA controls with respect to Global's duty to review the credit of all of the merchants that contracted with Global. Likewise, the court finds that Global's practice of approving merchants automatically if they met the parameters of Fast Track constituted a failure to use "reasonable efforts to accept or decline" merchants who applied to Global. Additionally, the court finds that Global failed to produce sufficient evidence that GoE failed in its duties under the MSA with regard to providing Global with application packages for merchants who wished to process with Global.

Since this court finds that the losses sustained by Global were not the result of "errors or negligence of [GoE]", Global must "bear any loss, cost, or expense . . . that [arose] out of Chargebacks and Credit Losses in respect of any Merchant Agreement. Exh. P-1, § B, ¶ 3.

In addition to claiming that GoE's Admin Server failed to block transactions that exceeded the parameters of the Fast Track Program, Global claims to have suffered losses as a result of fraudulent merchant applications that were submitted by GoE. N.T.8/18/2004 at 181; Global's FF at p. 10.

The eleven fraudulent merchant applications, each claiming to fall within the average item price and the average monthly volume parameters, were submitted to Global by GoE from August 31, 2001 to September 24, 2001. Exh. D-2; Global's FF at p. 10. According to James Kelly, these applications shared the same addresses, the same banks and bank accounts, the same corporate identity and the same president. N.T. 8/18/2004 at 181; Exh. D-2; Global's FF at p. 10.

In December 2001, James Battista told Vanden Landers that he (Mr. Battista) received a call from Bankcorp in which Bankcorp indicated that there was a problem with certain accounts. N.T. 8/17/2004 at 17, 29; GoE's FF, ¶ 39. Bankcorp determined that these accounts were fraudulent, "stolen identity" accounts. Id. Global claims to have incurred losses due to these eleven accounts in the amount of $103,000.00. N.T. 8/18/2004 at 50; Exh. D-2; Global's FF at p. 11.

Vincent Perrelli, Jr. testified that Global did not spot these fraudulent accounts because "we weren't really watching them because the Admin Server was the gatekeeper. It wasn't even supposed to allow us to get a transaction over and above [the Fast Track parameters]." N.T. 8/18/2004 at 28.

While these specific merchant accounts were fraudulent, the issue still appears to be that these merchants were processing sales that exceeded the Fast Track parameters. Id. Therefore, the analysis applied to chargebacks that resulted from merchants simply exceeding the Fast Track parameters, equally applies to these fraudulent merchants that exceeded the Fast Track parameters. Accordingly, the court denies Global's claim for losses on account of these eleven merchants.

The court finds that GoE did not breach its contract with Global. The breach of contract claim against GoE is denied.

Global also asserts, that because GoE failed to perform under the contract, Global was excused from owing any monies under the MSA. Because GoE did not breach the contract, this claim is also denied.

IV. GoE's Claims of Intentional Misrepresentation and Negligent Misrepresentation Are Denied.

GoE asserted claims for negligent misrepresentation and intentional misrepresentation based on Gobal's alleged false assertions to GoE that the GoE merchants were not going to be suspended or terminated. GoE's CL at ¶ 49.

As with the tort claims discussed above, the court must decide whether Georgia or Pennsylvania law applies. This court must decide initially whether a conflict exists between the laws of the competing jurisdictions. Teledyne Technologies Incorporated, 2002 Phila. Ct. Com. Pl. LEXIS at *16.

In Pennsylvania, to establish a claim for intentional misrepresentation, a plaintiff must allege: (1) a representation, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citations omitted).

The laws of Georgia defines the tort of fraud as "the willful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his injury." McDaniel v. Elliot, 269 Ga. 262, 264, 497 S.E.2d 786, 788 (1998) citing O.C.G.A. § 51-6-2 (a).

In order for GoE to prove negligent misrepresentation under Pennsylvania law, GoE must prove:

> (1) a misrepresentation of a material fact, (2) made under circumstances in which the misrepresenter ought to have known its falsity, (3) with an intent to induce another to act on it, and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation . . . . Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another.

Bortz, 556 Pa. at 500, 729 A.2d at 561.

Georgia has adopted the Restatement (Second) of Torts § 522, titled "Information Negligently Supplied for the Guidance of Others" [23], which provides in pertinent part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary

[23] United States Fidelity & Guaranty Company, Inc. v. Paul Associates, Inc., 230 Ga. App. 243, 251, 496 S.E.2d 283, 291 (1998) citing Robert & Company Associates v. Rhodes-Haverty Partnership, 250 Ga. 680, 300 S.E.2d 503 (1983).

> interest, supplies false information for the guidance of others in their business transactions,
>
> (2) is subject to liability for pecuniary loss caused to them by their reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (3) . . . the liability stated in Subsection (1) is limited to the loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or know that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1977).

The laws of Georgia and Pennsylvania respecting claims for intentional misrepresentation differ in that Pennsylvania law requires that the injured party **justifiably** relied on the misrepresentation while Georgia law does not. For this reason, the laws of the two competing forums differ materially. Therefore, the court must decide which forum governs the disposition of this issue.

The law of the state with the most significant contacts to the parties and the alleged conduct applies to the substantive issues of the case. Troxel v.A.I. DuPont Institute, 19 Pa. D&C.4th 423, 426-7(1993), *aff'd*, 431 Pa. Super. 464, 636 A.2d 1179 (1994). "Vital contacts include the place of the injury, the place of the conduct, the domicile of the parties, and the place where the relationship between the parties is centered." Id. at 427 (citing Griffith v. United Airlines, Inc., 203 A.2d 796 (1964)).

The place of injury and domicile in the instant matter was Pennsylvania as GoE has a Pennsylvania business address. GoE conceded in their Conclusions of Law that that "Pennsylvania could be considered the place of the alleged tortious conduct as well

as the place of the alleged harm resulting from Global's conduct." GoE's CL, ¶ 7. Under the circumstances Pennsylvania law applies to GoE's claims for negligent and intentional misrepresentation.

According to Mr. Battista, Mr. Kelly assured him on three occasions that he would not terminate any accounts; that if they decided to terminate any GoE merchants, Mr. Battista would be the first person to know. N.T. 8/17/2004 at 93-94. Mr. Battista also testified that after he offered Mr. Kelly "any option that would work for Global Payments", Mr. Kelly "told [him] that in no way would he make any decision that would impact our business without discussing that first and giving us proper notice." N.T. 8/17/2004 at 96. Mr. Kelly testified that he had "no such conversation" with Mr. Battista. N.T. 8/18/2004 at 232.

The MSA contains an "entire agreement" clause which provides in pertinent part:

> (1) This Agreement contains the full understanding of the parties with respect to the subject matter hereof and *no waiver, alteration or modification of any of the provisions hereof shall be binding unless in writing and signed by both parties . . . .*

Exh. P-1, § O. (Emphasis added.)

Section F of the MSA provides in part:

> 2. Right to Terminate Merchant Agreements. [Global] shall have the right, in its sole discretion, to terminate, suspend or otherwise close any Merchant, provided such action is consistent with [Global's] risk policies applicable to its merchants generally. [Global] will use its best judgment to determine the method used to close a Merchant, with the understanding by both parties that continuing to process for an account (while suspending payment) may occasionally be more prudent than immediate termination of services. . . .

Exh. P-1, § F.

Because, under the MSA, Global had the right to terminate merchants in its sole discretion, Mr. Kelly's alleged promises that Global would not cancel merchants was in direct contradiction with the terms of the MSA. Additionally, Mr. Kelly's alleged statements that Global would not cancel GoE merchants were not reduced to a writing and signed by both parties, therefore, these communications, if they occurred, did not modify the MSA. Accordingly, Mr.Battista's reliance on these statements, if they were made, was not jusitified. Accordingly, GoE's claim for negligent misrepresentation fails.

As to GoE's claim for intentional misrepresentation, under Pennsylvania law fraud in the performance of a contract is barred by the Gist of the Action doctrine.

The gist of the action doctrine precludes plaintiffs from recasting ordinary breach of contract claims into tort claims." eToll, Inc. v. Elias/Savion Advertising Inc., 811 A.2d 10, 14 (Pa.Super. 2002). The gist of the action doctrine bars claims that: "(1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract." City of Philadelphia v. Human Services Consultants, II, Inc, 2004 Phila. Ct. Com. Pl. LEXIS 26, *7, citing eToll Inc, 811 A.2d at 19.

Here, GoE's intentional misrepresentation claim is based upon alleged misrepresentations made by James Kelly in performance of the contract. Moreover, Global's right to terminate contracts between itself and the GoE merchants was created

and grounded in the parties' contracts. Therefore, the fraud claim[24] is barred by the gist of the action. The Superior Court in eToll v. Elias/Savion Advertising, Inc., specifically held that claims of fraud in the performance of the contract are barred by the gist of the action doctrine. 811 A.2d at 14. Given this clear precedent, GoE's claim for intentional misrepresentation must fail.

V. GoE's Claim for Unjust Enrichment is Denied

GoE claims that "Global has kept fees and residuals withheld from GoE merchants belonging to GoE and has refused to turn the monies over." GoE's CL, ¶ 56.

In that this claim is duplicative of GoE's breach of contract claim, "[p]laintiff cannot ultimately recover on both theories of contract and unjust enrichment". Duane Morris, LLP v. Todi, 2002 Phila. Ct. Com. Pl. LEXIS 57, *13 (Sept. 3, 2002). Accordingly, GoE's claim for unjust enrichment is denied, as moot.

VI. GoE's Claim for an Accounting with Respect to Monies Allegedly Owed GoE by Global is Moot

GoE asks this court for an accounting pursuant to the MSA "[i]n view of Global's eleventh hour repudiation of its own documents used in good faith by the parties to prepare a joint damages exhibit for trial." GoE's CL, ¶¶ 62-64

The court *supra* denied Global's assertion that GoE was not owed any residuals because, in calculating damages GoE in reliance on Global's reports, did not take into account a truing up process that, according to Global, occurred monthly. The court ruled against Global on this point because Global did not produce documents that

[24] The Pennsylvania Supreme Court held in Office of Disciplinary Counsel v. Anonymous Attorney A that the elements that must be proven in a claim for intentional misrepresentation are identical to the elements of a claim for fraud. 552 Pa. 223, 233, 714 A.2d 402, 407 (1998).

evidenced this truing up process. As a result of this ruling, GoE's claim for an accounting is moot.

VII. GoE's Claim for a Violation of the New Jersey Consumer Fraud Act is Denied

GoE claims that Global by its actions has violated the New Jersey Consumer Fraud Act." GoE's CL, ¶ 77. GoE's only clarification with regard to what acts Global committed in violation of the Act is its assertion that these acts were "affirmative" in nature. GoE's CL, ¶ 74.

As GoE's claim for violation of the New Jersey Consumer Fraud Act is vague at best, the court will infer that the affirmative act complained of was Global's alleged promise not to terminate GoE's merchants.

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

N.J.S.A. 56:8-2

The governing law provision of the MSA states in part that "[t]his Agreement shall be governed by and shall be construed in accordance with the laws of the State of New Jersey, without regard to its conflicts of law provisions." Exh. P-1, § N. As GoE's Consumer Fraud Act claim is analogous to the tort of negligent misrepresentation, a claim in which the wrong ascribed to the defendant is the crux of the action, the contract being collateral, the court is not required to apply New Jersey law. Additionally, the competing jurisdictions that may govern

tort claims in this case are Pennsylvania and Georgia. As the claim is for a violation of a New Jersey statute and New Jersey law does not apply, the court finds that GoE's claim under the New Jersey Consumer Fraud Act is denied.

VIII. Global's Claim for Punitive Damages is Denied

Count V of Global's Complaint seeks punitive damages. See Global's Complaint. However, no such independent cause of action exists. Nix, 408 Pa. Super. at 380. (dismissing claim for punitive damages contained in a separate count. See also Hilbert v. Roth, 395 Pa. 270, 149 A.2d 648, 652 (1959) (stating that "[t]he right to punitive damages is a mere incident to a cause of action . . . and not the subject of an action in itself.").

Additionally, "[p]unitive damages may be awarded for conduct that is *outrageous*, because of the defendant's evil motive or his reckless indifference to the rights of others." Hutchinson v. Luddy, 870 A.2d 766, 770 (Pa. 2005) citing Feld v. Merriam, 506 Pa. 383, 395, 485 A.2d 742, 747 (1984) (quoting Restatement (Second) of Torts § 908(2)(1979). (Emphasis added.)

The court does not find that GoE's actions with regard to the claim for tortious interference, rose to the level of outrageousness. Global's claim for punitive damages is denied.

CONCLUSIONS OF LAW

1. The court holds that Pennsylvania law governs the parties' claims of business disparagement in that a conflict does not exist between the laws of the competing forums, Georgia and Pennsylvania, with regard to this claim. Teledyne Technologies

Incorporated v. Freedom Forge Corporation, 2002 Phila. Ct. Com. Pl. LEXIS 26, *16, citing In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3rd Cir. 1984).

2. GoE's claim of business disparagement is denied. The court finds that Global did not make any false statements in the blanket e-mail that was sent to GoE merchants.

3. Global's claim of business disparagement is denied. GoE did not make any false statements in its blanket e-mail sent to GoE merchants that were processing with Global.

4. The parties' claims of tortious interference is governed by Pennsylvania law because there are no appreciable differences between the laws of Pennsylvania and Georgia. Teledyne Technologies Incorporated, Phila. Ct. Com. Pl. LEXIS at *16.

5. GoE's claim of tortious interference is denied. GoE did not have a legally protected interest with regard to Global's contractual relationships with the merchants that were processing their credit card transactions with Global. In addition, GoE did not sufficiently prove that they suffered damages on account of Global's alleged tortious interference.

6. The court finds for Global on its claim of tortious interference because Global sufficiently proved all requisite elements of tortious interference. The court awards Global $158,000.00.

7. The parties' breach of contract claims are governed by New Jersey law. The Merchant Services Agreement, the contract at issue, contains a provision that provides that the Agreement shall be governed and construed in accordance with the laws of the State of New Jersey . . ." Exh. P-1, § N.

8. Global's claim of breach of contract is denied because the losses Global suffered were not on account of a failure of GoE to perform under the MSA, but rather the result of Global's failure to provide initial and on-going credit inquiries of certain merchants that applied to use Global credit card processing service.

9. The court finds for GoE on its claim of breach of contract. The court finds that Global breached the MSA by not paying the pre-termination residuals it owed to GoE. Accordingly, the court awards GoE $165,415.43, an amount which represents pre-termination residuals plus an agreed upon 10% interest per annum. The court has awarded interest for the three-year period beginning August, 2002, the approximate date of the termination[25], and ending August, 2005, the date of the Order to be entered contemporaneously with this Opinion.

10. The court denies GoE's claim for attorneys' fees on the ground that GoE did not present sufficient evidence with regard to this item of damages.

11. The court denies GoE's claim for an alleged $10,000,000.00 diminution of the value of GoE because GoE failed to present sufficient proof with regard to this item of damages.

12. The court finds that the laws of Georgia and Pennsylvania respecting GoE's claims for negligent misrepresentation and intentional misrepresentation differ materially. However, the court further finds that Pennsylvania law governs this claim because the place of both injury and domicile is Pennsylvania because GoE has a Pennsylvania business address. Additionally, GoE brought suit in Pennsylvania without objection.

[25] As was set out in the Finding of Fact, GoE terminated the contract with Global on July 26, 2002. See Findings of Fact, ¶ 58.

13. GoE's claim of negligent misrepresentation is denied in that any reliance on the part of GoE based on alleged promises made by representatives of Global regarding Global's not terminating their contracts with merchants who had contracted with Global, was not jusitifed.

14. GoE's claim of intentional misrepresentation is barred by the Gist of the Action Doctrine because this claim is based upon alleged misrepresentations made by James Kelly in the performance of the MSA and Global's right to terminate contracts between Global and the merchants that had contracts with Global, subject matter that was created and grounded in the parties' contract.

15. GoE's claim for unjust enrichment is denied because this claim is duplicative of GoE's breach of contract claim and GoE cannot recover on both theories of breach of contract and unjust enrichment. Duane Morris, LLP v. Todi, 2002 Phila. Ct. Com. Pl. LEXIS 57, *13.

16. GoE's claim for an accounting with respect to monies allegedly owed by Global is moot because this court ruled that Global did not produce sufficient evidence to demonstrate that GoE's pre-termination damage figures were incorrect.

17. GoE's Consumer Fraud Protection Act claim is analogous to the tort of negligent misrepresentation and that claim is not governed by the laws of New Jersey. GoE's claim for a violation of the New Jersey Consumer Fraud Protection Act is denied.

18. Global's claim for punitive damages is denied. Global made this claim in a separate count and no such independent cause of action exists. Nix v. Temple University of Comm. System of Higher Ed., 408 Pa. Super. 369, 380, 596 A.2d 1132,

38 (1991.) Further, the court does not find that GoE's tortious interference rose to the level of outrageousness.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.