IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COMMERCE COURT

USI INSURANCE SERVICES NATIONAL, INC., f/k/a and f/d/b/a WELLS FARGO INSURANCE SERVICES USA, INC. *Plaintiff,* v. ERIC M. FRIEMAN and RCM&D SELF-INSURED SERVICES COMPANY, INC., *Defendants*	Superior Court Docket Nos. 2211 EDA 2020 2163 EDA 2020 Commerce Court Docket No. January Term, 2018 No. 00954

OPINION

USI Insurance Services National Inc. (hereinafter "USI"), Eric Frieman (hereinafter "Frieman"), and RCM&D Self-Insured Services Company, Inc. (hereinafter "RCM&D") have filed cross-appeals from the decision of this Court, whereby following a two (2) day bench trial, this Court entered judgment against Frieman and in favor of USI for Breach of Contract, and awarded USI damages in the amount of $1,073,560.21. After consideration and denial of all post-trial motions, the instant cross-appeals followed.

PROCEDURAL HISTORY

On January 5, 2018, USI commenced the underlying action by filing a Complaint against Frieman and RCM&D (collectively, "Defendants") (See Docket). The complaint included a Count I. claim for Breach of Contract, against Frieman only, and a Count II. Claim for Intentional Interference with Contract, against RCM&D only. On February 1, 2018, Frieman and RCM&D filed an Answer with New Matter. On February 21, 2018, USI filed their Reply to the New Matter. On June 28, 2019, USI: filed a Motion in Limine to preclude Defendants from eliciting certain testimony from Defendants' expert Khody R. Detwiler (Control Number 19068292); and, filed a

Motion in Limine to preclude Defendants from introducing evidence and eliciting testimony about alleged discriminatory statements and unrelated legal proceedings (Control Number 19068293). Answers in Opposition to the Motions in Limine were filed on behalf of Frieman and RCM&D on July 10, 2019, and July 11, 2019, respectively. On the first day of the bench trial, July 15, 2019, this Court denied both Motions in Limine.[1] *See* July 15, 2019 Notes of Testimony (hereinafter "N.T. 7/15/19") at p. 4:15-20). The two (2) day bench trial ended the next day, July 16, 2019.

On October 18, 2019, USI filed Proposed Findings of Fact and Conclusions of Law. On October 28, 2019, Frieman and RCM&D filed Proposed Findings of Fact and Conclusions of Law. On November 7, 2019, USI filed final Proposed Findings of Fact and Conclusions of Law.

On June 23, 2020, Judgment was entered against Frieman and in favor of USI for Breach of Contract, whereupon damages were awarded in the amount of $1,073,560.21 (hereinafter "6/23/20 Order & Judgment"). This Court further determined that Frieman and USI entered into a valid, enforceable contract thereby restraining Frieman from soliciting customers he serviced while employed with USI's predecessor, Wells Fargo Insurance Services USA, Inc. (hereinafter "Wells Fargo"), and that Frieman breached this contract by soliciting customers in his subsequent employment with RCM&D.

On July 2, 2020, USI filed a Motion to Mold the Verdict to Reflect an Award of Interest (Control Number 20070246) (hereinafter "Motion to Mold Verdict"). On July 2, 2020, Frieman and RCM&D filed Post-Trial Motions (Control Number 20070250) (hereinafter "Frieman and RCM&D's Post-Trial Motion"). On July 7, 2020, Frieman and RCM&D filed a Praecipe to Supplement Post-Trial Motions. On July 13, 2020, USI filed an Answer in Opposition to Frieman and RCM&D's Post-Trial Motion (Control Number 20070990) (hereinafter "USI's Post-Trial

[1] Although both Motions in Limine were denied on July 15, 2019 immediately preceding trial, said Orders were not docketed until September 9, 2019.

Motion"). Orders docketed July 14, 2020, and July 17, 2020, scheduled a hearing and oral argument on the two (2) Post-Trial Motions for August 14, 2020. On July 21, 2020, USI filed an Answer in Opposition of the Motion to Mold Verdict, and Frieman and RCM&D filed an Answer in Opposition to USI's Post-Trial Motion. On August 14, 2020, oral argument was held on the Motion to Mold Verdict and the Post-Trial Motions.

On October 17, 2020, three (3) separate orders were docketed: (1) an order denying the Motion to Mold Verdict; (2) an order denying USI's Post-Trial Motion; and, (3) an order denying Frieman and RCM&D's Post-Trial Motion (hereinafter "10/17/20 Orders Denying Post-Trial Motions").

On October 23, 2020, Judgment was docketed upon Praecipes for Entry of Judgment filed on behalf of USI, and judgment was entered in favor of USI and against Frieman in the amount of $1,073,560.21. Judgment was entered in favor of RCM&D and against USI on USI's claim for Intentional Interference with Contract pursuant to the Court Order and Opinion dated June 20, 2020, and docketed June 23, 2020 (hereinafter "10/23/20 Order & Final Judgment").

On November 3, 2020, Frieman and RCM&D filed a Notice of Appeal of this Court's Order of October 17, 2020, which denied Frieman and RCM&D's Post-Trial Motion with the Superior Court of Pennsylvania (hereinafter "Superior Court"). Said appeal to Superior Court was docketed at 2163 EDA 2020. On November 16, 2020, USI filed a Notice of Appeal from the final judgment entered by the 10/23/20 Order and Final Judgment to Superior Court, which appeal Superior Court docketed at 2211 EDA 2020.

On December 3, 2020, Frieman and RCM&D filed a Notice of Discontinuance as to RCM&D only at 2163 EDA 2020. On December 23, 2020, both appeals were *sua sponte* consolidated as cross-appeals from the judgment entered on October 23, 2020,[2] with Superior Court designating the lead docket as 2211 EDA 2020. On January 4, 2021, Superior Court granted the praecipe to discontinue as to RCM&D only, whereupon Superior Court ordered that the Appeal docketed at 2163 EDA 2020 will continue as to Frieman.

FACTUAL HISTORY

Effective December 1, 2017, USI purchased all of the equity interests of Wells Fargo and therefore acquired Wells Fargo. (N.T. 7/15/19 at pp. 25:16–26:13). Subsequent to the stock purchase, Wells Fargo changed its name to and began doing business as "USI Insurance Services International, Inc.," which entity is the instant Plaintiff.[3] N.T. 7/15/19 at p. 25:16-18; p. 28:1-10. Wells Fargo was mainly in the business of arranging insurance contracts and providing ongoing servicing for commercial clients. (N.T. 7/15/19 at p. 28:11-23). Frieman was employed by Wells Fargo since 2008 as a sales executive for employer benefits, also referred to as a "producer" in the insurance industry. (N.T. 7/15/19 at p. 29:5-13; p. 84:5-8; p. 175:13-17). Producers are responsible for initiating new client relationships on behalf of the insurance firm; once the client relationship

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[2] The Superior Court's December 23, 2020, order instructs:

The above-captioned appeals are hereby CONSOLIDATED as crossappeals from the judgment entered on October 23, 2020, and USI Insurance Services National, Inc. f/k/a and f/d/b/a Wells Fargo Insurance Services USA, Inc. is hereby deemed the Appellant/Cross-Appellee. See Pa.R.A.P. 2136(a); see also Fanning v. Davne, 795 A.2d 388 (Pa. Super. 2002), appeal denied, 825 A.2d 1261 (Pa. 2003) (appeal properly lies from judgment entered following trial court's disposition of post-trial motions).

The Prothonotary of this Court is further directed to amend this Court's docket at No. 2163 EDA 2020 to reflect that the appeal lies from the judgment entered on October 23, 2020.

[3] For purposes of this opinion, USI and Wells Fargo are considered the same entity because USI purchased all of Wells Fargo's equity interests, and therefore USI is the successor thereto.

is established, the producer becomes the face of the organization. (N.T. 7/15/19 at p. 29:14-23; p. 32:2-11).

In 2010, seven (7) years prior to the aforementioned stock purchase, Wells Fargo required all of its producers, including Frieman, to execute a contract which included non-solicitation and non-compete provisions. Said provisions were entitled, the "Wells Fargo Agreement Regarding Trade Secrets, Confidential Information, Non-Solicitation, And Assignment of Inventions" (hereinafter "Agreement"). (Plaintiff Exhibit P-1, Wells Fargo Non-Solicitation Agreement (hereinafter "Agreement, Exh. P-1"); N.T. 7/15/19 at pp. 40:20-41:3; p. 43:17-20; pp. 176:17–177:15; pp. 178:6–179:18; p. 180:11-21; p. 181:10-24; p. 183:22–184:21; pp. 185:18–186:2). Because USI was involved in acquisitions that produced "a lot of different kinds of agreements," for the purpose of uniformity, USI required all producers to sign the Agreement in 2010, to standardize one type of non-solicitation agreement. (N.T. 7/15/19 at pp. 40:20-41:3; pp. 178:6–179:18).

According to the Agreement, during the course of Frieman's employment, he would acquire knowledge of the "Company's Trade Secrets and other proprietary information relating to its business, business methods, personnel, and customers." (collectively referenced as "Confidential Information") (Agreement, Exh. P-1, § II. Trade Secrets and Confidential Information). The Agreement further provides, in pertinent part:

> The Company's Trade Secrets include, but are not limited to, the following: the names, addresses, and contact information of the Company's customers and prospective customers, as well as other personal or financial information relating to any customer or prospect, including, without limitation, account numbers, balances, portfolios, maturity and/or expiration or renewal dates, loans, policies, investment activities, purchasing practices, insurance, annual policies and objectives. . . . [] I agree that any Confidential Information of the Company is to be used by me solely and exclusively for the purpose of conducting business on behalf of the

> Company. I am expected to keep such Confidential Information confidential and not to divulge, use or disclose this information except for that purpose. If I resign or am terminated from my employment for any reason, I agree to immediately return to the Company all Records and Confidential Information, including information maintained by me in my office, personal electronic devices, and/or at home.

Agreement, Exh. P-1, § II. Trade Secrets and Confidential Information.

The Agreement prohibits Frieman from soliciting and accepting business from clients he serviced while employed by USI, for a period of two (2) years in subsequent employment. (Agreement, Exh. P-1, § III. Non-Solicitation of the Company's Customers and Employees).

The non-solicitation provision provides:

> I agree that for a period of two (2) years immediately following termination of my employment for any reason, I will not do any of the following, directly or indirectly or through associates, agents, or employees: [] solicit, participate in or promote the solicitation of any of the Company's clients, customers, or prospective customers with whom I had Material Contact and/or regarding whom I received Confidential Information, for the purpose of providing products or services that are in competition with the Company's products or services ("Competitive Products/Services"). "Material Contact" means interaction between me and the customer, client or prospective customer within one (1) year prior to my last day as a team member which takes place to manage, service or further the business of the relationship; or Accept insurance business from or provide Competitive Products/Services to customers or clients of the Company: i. with whom I had Material Contact, and/or ii. were clients or customers of the Company within six (6) months prior to my termination of employment.

Agreement, Exh. P-1, § III. Non-Solicitation of the Company's Customers and Employees.

The Agreement also required Frieman to "communicate the contents of . . .the non-solicitation and non-disclosure sections of this Agreement to any prospective employer." (Agreement, Exh. P-1, § VII. Injunctive Relief & Damages).

The new compensation plan applicable to producers effective as of January 1, 2010 (hereinafter the "Producer Plan"), provides that a producer like Frieman was "eligible to participate in the Plan once the Participant has executed an appropriate Trade Secret Agreement." (Plaintiff Exhibit P-3, Wells Fargo Producer Plan; N.T. 7/15/19 at p. 176:13-23; pp. 177:12–178:5). The Producer Plan references an Appendix that sets compensation rates and the 2010 payment period for Frieman. (Plaintiff Exhibit P-3, Wells Fargo Producer Plan; Plaintiff Exhibit P-2, WFIS Producer Plan Appendix A (hereinafter "Exh. P-2 Appendix")); *see also* N.T. 7/15/19 at p. 176:13-23; pp. 180:22–181:13; p. 200:18-22). The Appendix set the new consideration amount to be paid to Frieman in exchange for him signing the Agreement under the section entitled "TSA Consideration" as follows:

> For the 2010 Plan year only (January 1, 2010 through December 31, 2019), ***Participant will receive the following consideration for signing the new TSA*** for Wells Fargo Insurance Services USA: Additional 1% on New Revenue and Additional 1% on Net New Revenue. Net New Revenue is defined as new revenue recorded in 2010 less lost business (revenue booked in 2009, not retained in 2010). Producer must have positive net new to earn the additional 1.0% opportunity. This is a one-time payment that will be made after the end of the plan year. All terms and conditions of the Plan apply to the calculation and payout of this consideration.

Exh. P-2 Appendix (emphasis supplied).

The signature of Frieman appears on the line entitled "Participant Signature," and the date of July 22, 2010, appears next to this signature. (Exh. P-2 Appendix).

Frieman left the employment of Wells Fargo in November of 2016, and was hired by RCM&D as a producer that same month; the record establishes that in November of 2016, RCM&D was a competitor of USI and Wells Fargo. (N.T. 7/15/19 at p. 83:19-21; pp. 102:17–103:8; pp. 188:24–189:9). David Haney, the Managing Director of RCM&D, testified as the

corporate designee of RCM&D. (Plaintiff Exh. P-67, Deposition of David Haney (hereinafter "Exh. P-67, Haney Deposition"), at p. 8:2-5). Prior to hiring Frieman, RCM&D knew about the non-solicitation Agreement between Frieman and USI's predecessor, Wells Fargo; RCM&D believed the non-solicitation Agreement was invalid because Frieman indicated that his signature had been forged. (*See* N.T. 7/15/19 at pp. 102:17–104:25; *see also* Exh. P-67, Haney Deposition, at p. 20:12-16; p. 22:21-23; p. 28:2-5; pp. 28:20–29:18; p. 30:12-22; pp. 44:13–45:3; p. 45:15-22; p. 49:6-10; p. 52:10-13; pp. 71:12–72:3, p. 74:17-22; pp. 85:6–87:11; pp. 97:19–98:7; p. 113:5-22; p. 119:7-22).

RCM&D knew that Frieman would solicit the clients whom he serviced while employed by Wells Fargo, in an effort to move their business over to RCM&D and away from Wells Fargo. (Exh. P-67, Haney Deposition, at pp. 22:17–23:18; p. 49:6-23; p. 64:1-9; pp. 65:4–66:15; p. 67:4-23; pp. 71:12–72:3, pp. 71:5–72:3, pp. 72:10–73:23; p. 74:17-22; p. 77:12-23; pp. 85:6–87:21; p. 94:15-22; p. 102:7-14; pp. 108:23–109:20; p. 113:5-22; p. 119:7-22). RCM&D and Frieman had several conversations about Frieman soliciting clients whom he serviced while employed by Wells Fargo, and also about bringing their business over to his new employer, RCM&D. (Exh. P-67, Haney Deposition, at p. 22:21-23; p. 49:6-23; p. 64:1-9; p. 66:2-15; p. 67:4-23; pp. 71:12–72:3, pp. 72:10–74:22; pp. 85:6–87:21).

Frieman created and submitted to RCM&D an agenda or plan of his business goals, early in his employment with RCM&D. (Exh. P-67, Haney Deposition, at p. 19:4-24; p. 21:1-22). One of Frieman's goals was "to bring RCM&D Employee Benefits to the Philadelphia office" because RCM&D did not, prior to hiring Frieman, have an employee benefits team in that office. (Exh. P-67, Haney Deposition, at pp. 21:9–22:4; p. 22:17-23; p. 55:6-16; pp. 57:24–58:15). RCM&D admitted that it desired to develop an employee benefits team in that office. (Exh. P-67, Haney

Deposition, at p. 21:9–22:4). The agenda created by Frieman also listed a "business objective," to "migrate Frieman current book," indicating that Frieman would solicit the clients whom he serviced while employed by Wells Fargo in an effort to bring their business over to RCM&D. (Exh. P-67, Haney Deposition, at pp. 22:17–23:18; p. 49:6-23; p. 64:1-9; p. 67:4-23; pp. 71:12–72:3, pp. 72:10–74:22; pp. 85:6–87:21).

Frieman then solicited eighteen (18) clients with whom he worked and serviced while employed by Wells Fargo, and the clients subsequently moved their business from Wells Fargo over to RCM&D. (N.T. 7/15/19 at pp. 43:17–44:2; p. 104:16-25; pp. 106:15–107:8; p. 121:21-24; p. 189:10-24) (Notes of Testimony from Trial, July 16, 2019, ("N.T. 7/16/19") at p. 12:10-15; p. 51:1-7; pp. 60:7–61:8). Wells Fargo's loss of the business of the eighteen (18) clients equaled approximately $1.1 million per year in lost revenue. (N.T. 7/15/19 at p. 44:4-20; p. 189:10-24) (N.T. 7/16/19 at pp. 60:7–61:8) (*see also* Plaintiff Exhibit 23, RCM&D Gross Commission for Subject Clients; Plaintiff Exhibit 61, Francis Brulenski Report for Damages Calculation, at page 5, Exhibit D).

DISCUSSION

I. BREACH OF CONTRACT

This Court finds that USI has demonstrated that the Agreement is a valid, enforceable contract, and that Frieman breached the Agreement by soliciting the former clients he serviced at Wells Fargo.

In Pennsylvania, restrictive covenants are assignable to successors where "an explicit assignability provision" is included in the terms of the contract, and a non-compete clause will not be imputed to successors "absent an applicable, explicit assignment clause." *WMI Group, Inc., et.*

al. v. Fox, et. al., 109 A.3d 740, 749-50 (Pa. Super. 2015) (quoting *Hess v. Gebhard & Co.*, 808 A.2d 912, 921 (Pa. 2002)).

Instantly, the Agreement has at least one (1) explicit assignability clause that permits this Court to enforce the Agreement against Frieman on behalf of USI, the successor of Wells Fargo. The Agreement provides that its terms "shall survive my employment by the Company, Inure to the benefit of successors and assigns of the Company[.]" (Agreement, Exh. P-1, § IX. Choice of Law/Integration/Survival). The Agreement states that its terms apply to and the employee agrees to contract with "the Company," which is defined as "a Wells Fargo company and/or any of its past, present, and future parent companies, subsidiaries, predecessors, successors, affiliates, and acquisitions (collectively 'the Company')." (Agreement, Exh. P-1, § I. Introduction). Therefore, USI is legally permitted to enforce the Agreement between Frieman and Wells Fargo.

The legal requirements related to breach of contract claims and to the formation of contracts have been long settled in Pennsylvania:

> [T]hree elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of the contract; and, (3) resultant damages. *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016) (citing *J.F. Walker Co., Inc. v. Excalibur Oil Grp., Inc.*, 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002)). [T]o form a contract, there must be an offer, acceptance, and consideration."*Reed v. Pittsburgh Bd. of Pub. Educ.*, 862 A.2d 131, 134 (Pa. Commw. Ct. 2004) (citing *Koken v. Steinberg*, 825 A.2d 723 (Pa. Commw. Ct. 2003)). A contract is formed when the parties to it (1) reach a mutual understanding, (2) exchange consideration, and (3) delineate the terms of their bargain with sufficient clarity. . . Consideration consists of a benefit to the promisor or a detriment to the promisee. Consideration must actually be bargained for as the exchange for the promise.

Pennsy Supply Inc. v. American Ash Recycling Corp. of Pennsylvania, 895 A.2d 595, 600 (Pa. Super. Ct. 2006) (quoting *Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 128 (Pa. 1940); *Weavertown Transport Leasing, Inc. v. Moran*, 834 A.2d 1169, 1172 (Pa. Super. Ct. 2003)).

All essential elements must be present and courts determining whether an agreement is enforceable consider: "(1) whether both parties have manifested an intent to be bound by the terms of the agreement, (2) whether the terms are sufficiently definite, and (3) whether consideration existed." *Cardinale v. R.E. Gas Dev. LLC*, 74 A.3d 136, 140 (Pa. Super. Ct. 2013) (quoting *Johnston the Florist, Inc. v. TEDCO Const. Corp.*, 657 A.2d 511, 516 (Pa. Super. Ct. 1995)).

A. Forgery of the Signature of Frieman on the Agreement

Whether the Agreement between USI's predecessor, Wells Fargo, and Frieman is an enforceable contract depends upon whether Frieman signed the Agreement.

The standard for establishing forgery:

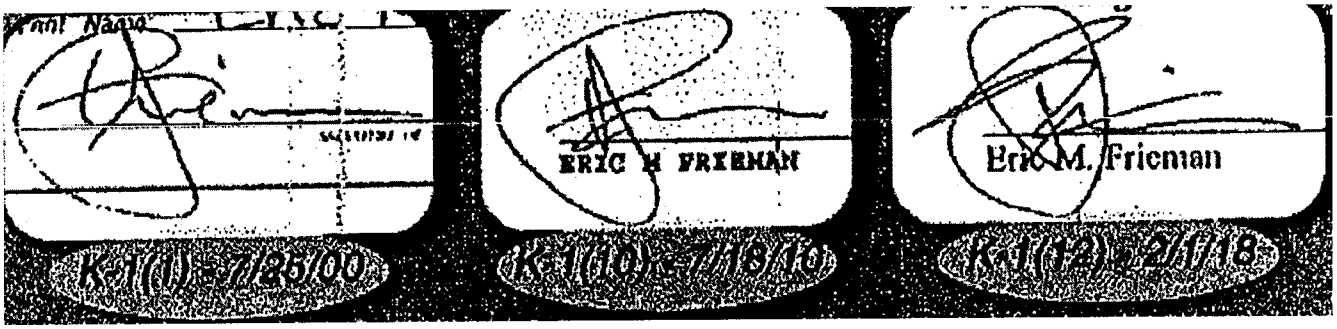
> Generally, 'when the issue of a forgery is raised, the [party claiming forgery] has the burden of proving the existence of a forgery by clear and convincing evidence. Also, we note that because forgery presents an issue of fact, the resolution of the issue necessarily turns on the court's assessment of the witnesses' credibility.'

De Lage Landen Servs., Inc. v. Urban P'ship, LLC, 903 A.2d 586, 590 (Pa. Super. Ct. 2006) (quoting *In re Estate of Presutti*, 783 A.2d 803, 805 (Pa. Super. Ct. 2001)) (citations omitted) (alterations in original).

USI entered into evidence a report authored by J. Wright Leonard, a forensics document examiner, that analyzes the signatures described above. (Exh. P-62 Leonard Handwriting Report). At trial, Ms. Leonard was qualified as an expert in document and handwriting examination and analysis, and provided testimony regarding her observations included in the report. (N.T. 7/15/19 at p. 134:15-22). Ms. Leonard described the similarities between the signature on the Agreement

and the signatures on the September 1, 2005, Deed and the October 4, 2010, Mortgage, which she referred to as the "additional signatures." (N.T. 7/15/19 at pp. 145:8–154:3). Ms. Leonard concluded that there are indications the same person who signed the Agreement also signed the Deed and Mortgage described above. (Exh. P-62 Leonard Handwriting Report, Page 9; N.T. 7/15/19 at pp. 154:25–156:12). Ms. Leonard explained that she used the term "indications" as a qualified opinion due to the limited number of comparison signature samples available and not having the original, signed documents at her dispose. (N.T. 7/15/19 at pp. 155:6—56:12; p. 163:6-25). The testimony and report of Ms. Leonard evinces that Frieman has two (2) styles of signatures.

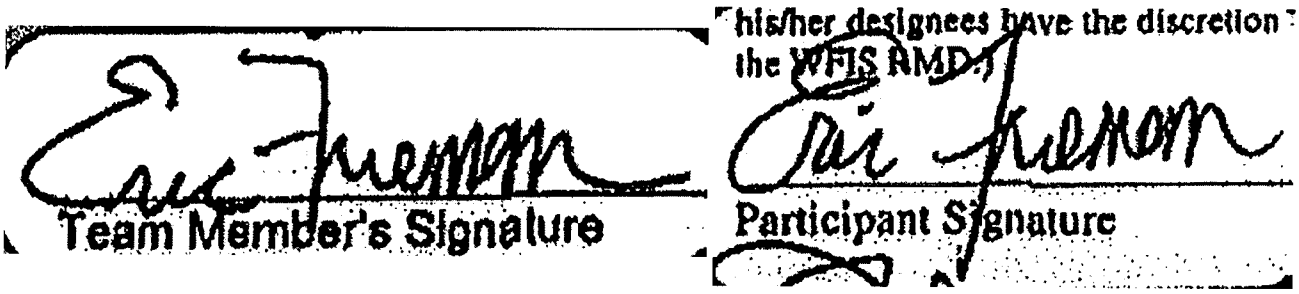
Instantly, Frieman denies signing the Agreement and told prospective employers that his signature was forged. N.T. 7/15/19 at p. 87:1-4; p. 96:18-22; pp. 103:9–104:25; p. 114:15-19) ("I did not sign this document. That's not my signature nor my handwriting"). Frieman claims that he only signs his name one way and that the signature on the Agreement is not the style of his signature. (N.T. 7/15/19 at p. 87:5-13, ("That style is the only way I've signed."), p. 88:18-23; pp. 89:14–90:4; p. 91:2-8; pp. 91:24–92:1; pp. 92:22–93:5; p. 95:9-17; pp. 96:23–97:12). The signature that Frieman admits belongs to him is in a graphic style and is illegible (hereinafter "the Admitted Signature"). (N.T. 7/15/19 at p. 87:5-13; p. 88:18-23; p. 91:15-17; p. 95:9-21; p. 96:4-13; p. 97:5-12)



(Plaintiff Exhibit P-62, J. Wright Leonard Handwriting Report, Page 2 (hereinafter "Exh. P-62

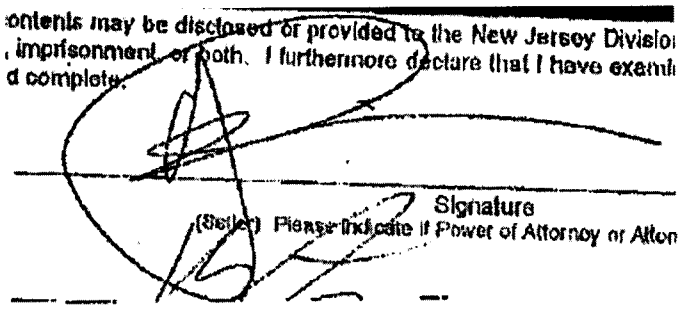
Leonard Handwriting Report")).

The signatures on the Agreement and the appendix to the Agreement that Frieman denies signing are a cursive style signature and the letters are fairly legible (hereinafter "the Denied Signature"). (*See* Agreement, Exh. P-1; Plaintiff Exhibit P-2, WFIS Producer Plan Appendix A (hereinafter "Exh. P-2 Appendix")); *see also* N.T. 7/15/19 at p. 87:5-13; p. 88:18-23; pp. 89:14-90:4; p. 91:2-8; pp. 91:24-92:1; pp. 92:22-93:5; p. 95:9-17; pp. 96:23-97:12).



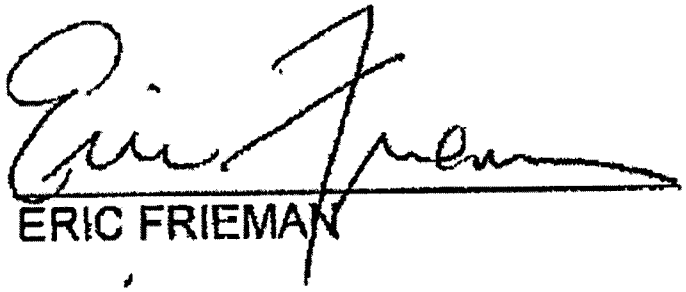
(Exh. P-62 Leonard Handwriting Report, Page 2).

However, both the Denied Signature and the Admitted Signature appear on a September 1, 2005, deed that transfers ownership of Frieman's previous residence and was recorded in the Camden County, New Jersey Public Records (hereinafter "the Deed"). (*See* Plaintiff Exhibit P-6, Deed for 3 Golf View Drive, Voorhees, NJ ("Exh. P-6 Frieman Deed"); *see also* N.T. 7/15/19 at pp. 88:2–92:1). The Deed is evidence that Frieman indeed has two (2) different styles of signature because the Deed contains both of the two (2) styles of signature. The second page of the Deed entitled "State of New Jersey Seller's Residency Certification/Exemption" contains the Admitted Style of Frieman's graphic signature. (*See* Exh. P-6 Frieman Deed; *see also* N.T. 7/15/19 at pp. 91:11–92:1).



(Exh. P-6 Frieman Deed).

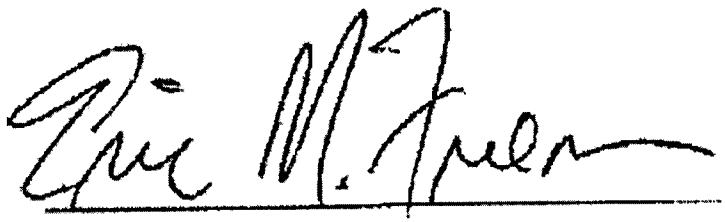
The last page of the Deed, notarized by Connie Carlson, contains Frieman's Denied Style of signature that appears very similar to the signature on the Agreement. (*See* Exh. P-6 Frieman Deed). *see also* N.T. 7/15/19 at pp. 88:24-92:1).



(Exh. P-6 Frieman Deed).

Frieman admitted: that he previously owned the property described in the Deed; that he sold the property to the grantees listed on the Deed, Mr. and Mrs. Gatti; and, that he sold the property listed in the Deed for the amount listed in the Deed. (N.T. 7/15/19 at pp. 88:24–89:17) ("Question: Prior to 2005, did you own a home with your wife on Golf View Drive in Voorhees? Answer: I did. Question: Did you make an agreement to sell that property to Mr. and Mrs. Gatti for $428,000? Answer: Sounds right.") (*see also* Exh. P-6 Frieman Deed). However, Frieman flatly denied signing the Deed on either page. (N.T. 7/15/19 at pp. 89:23–90:4; pp. 91:2–92:1) ("It's not my handwriting. It's my name, but I did not write that.") ("Question: Yet you denied that you placed your signature on this document? Answer: I deny it.").

Further, the Denied Style of signature also appears on an October 4, 2010, mortgage document, dated five (5) years subsequent to the September 1, 2005, Deed, whereby Frieman and his wife borrowed $417,000 from Wells Fargo Bank (hereinafter "Mortgage"). (Plaintiff Exhibit P-7, Camden County Document: Mortgage from Wells Fargo Bank, N.A. ("Exh. P-7 Frieman Mortgage"); *see also* N.T. 7/15/19 at pp. 92:10–96:13).



(Exh. P-7 Frieman Mortgage)

Frieman admitted that he received the $417,000 from Wells Fargo for the Mortgage, and that he has been paying back that Mortgage. (N.T. 7/15/19 at pp. 92:13–93:13). However, Frieman also denies that he signed the Mortgage. (N.T. 7/15/19 at pp. 92:22–93:5; p. 94:14-25; p. 95:5-17; pp. 96:4–97:4).

The testimony of Frieman denying that he signed both the recorded September 1, 2005, Deed, and October 4, 2010, Mortgage lacks credibility, especially in light of the fact that Frieman admitted that he did, in fact, deed the house to the named grantees, and that he obtained the Mortgage and that he has followed through with paying back that Mortgage. (N.T. 7/15/19 at pp. 88:24-–89:17; p. 93:9-13). The signatures on the Deed and Mortgage evince that Frieman indeed has two (2) styles of signatures.

Therefore, the record reveals that USI established the Agreement was signed and agreed upon by Frieman, and that Frieman failed to demonstrate by clear and convincing evidence that his signature on the Agreement was forged. Consequently, the Agreement represents a valid contract.

B. Enforceability of the Agreement as a Restrictive Covenant in Employment

In Pennsylvania, the enforceability of contracts in the context of restrictive covenants in employment is as follows:

> [I]n Pennsylvania, restrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer.

Socko v. Mid-Atl. Sys. of CPA, Inc., 126 A.3d 1266, 1274 (Pa. 2015) (citing *Hess v. Gebhard & Co.*, 808 A.2d 912, 917 (Pa. 2002); *Piercing Pagoda, Inc. v. Hoffner,* 351 A.2d 207, 210 (Pa. 1976); *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838, 844–46 (Pa. 1957)).

Here, Frieman admits to being employed by Wells Fargo, which is the successor to USI, and therefore the Agreement was "ancillary to [the] employment relationship between" Frieman as the employee, and Wells Fargo, now USI, as the employer. (N.T. 7/15/19 at p. 84:5-81).

1. Frieman Received New and Adequate Consideration for Signing the Agreement

"As with other contracts, for an employment agreement containing a restrictive covenant to be enforced, consideration is crucial, whether the covenant is entered into prior to, during, or after employment ends. Thus, to be valid, a covenant not to compete must be consummated with the exchange of consideration." *Socko* at 1274-75. "When a non-competition clause is required after an employee has commenced his or her employment, it is enforceable only if the employee

receives 'new' and valuable consideration—that is, some corresponding benefit or a favorable change in employment status." *Socko* at 1275.

Sufficient "new and valuable consideration" includes: "a promotion, a change from part-time to full-time employment, or even a change to a compensation package of bonuses, insurance benefits, and severance benefits. Without new and valuable consideration, a restrictive covenant is unenforceable." *Socko* at 1275 (citing *Maintenance Specialties Inc. v. Gottus*, 314 A.2d 279, 281 (Pa. 1974)) (footnotes omitted).

Pennsylvania courts consistently uphold as sufficient consideration when employees receive the opportunity to make more money, such as increased commissions, in exchange for signing a restrictive covenant:

> The adequacy of consideration to support a restrictive covenant is an issue of law. With respect thereto, the courts have stated, "as long as the restrictive covenant is an auxiliary part of the taking of employment and not a later attempt to impose additional restrictions on an unsuspecting employee, a contract of employment containing such a covenant is supported by valid consideration and is therefore enforceable." *Davis & Warde, Inc. v. Tripodi*, 616 A.2d 1384, 1387-88 (Pa. Super. Ct. 1992) (holding that an employee received sufficient consideration for post-employment non-compete to be valid where employee received a cash payment, a favorable change in the employer's automobile reimbursement policy, and a severance benefit) (quoting *Modern Laundry & Dry Cleaning v. Farrer*, 536 A.2d 409, 411 (Pa. Super. Ct. 1988)) (citing *Beneficial Finance Co. v. Becker*, 222 A.2d 873 (Pa. 1966)); see also *M.S. Jacobs & Associates, Inc. v. Duffley*, 303 A.2d 921, 923 (Pa. 1973) (holding that a post-employment non-compete was supported by sufficient valuable consideration when an employer agreed to pay travel expenses and commission on sales in exchange for the employee signing the non-compete); *Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 733 (Pa. Super. Ct. 1995) (finding that a post-employment non-compete was supported by sufficient consideration with a raise of $2,000 and a change from at-will employment to year-to-year upon signing the agreement); *Modern Laundry & Dry Cleaning Co. v. Farrer*, 536 A.2d 409, 411-412 (Pa. Super. Ct. 1988) (holding that a change in employment status from provisional to full-time and increased earnings on commission, giving the employee an

> opportunity to increase his earnings, was sufficient consideration to bind employee to post-employment restrictive covenant); *Wainwright's Travel Serv., Inc. v. Schmolk*, 500 A.2d 476, 478 (Pa. Super. Ct. 1985) (finding that an employee receiving shares of the employer's stock in exchange for signing a post-employment non-compete agreement was supported by adequate consideration because, even though "immediate monetary gains were not recognized . . . , the "potential to realize gains existed").

Pennsylvania courts have found consideration for a new restrictive covenant obligation to be insufficient only in the clearest circumstances where the consideration was truly illusory or *de minimis*. See, e.g., *George W. Kistler, Inc. v. O'Brien*, 347 A.2d 311, 314 (Pa. 1975) (payment of $1.00 and continued employment was insufficient); *Markson Bros. v. Redic*k, 66 A.2d 218, 221 (Pa. Super. Ct. 1949) (reducing terms of oral employment agreement to writing without any change to terms was not adequate consideration to support restrictive covenants).

Instantly, it is undisputed that Frieman entered into the Agreement after his employment began with Wells Fargo, the successor of USI. (N.T. 7/15/19 at pp. 40:20–41:3; p. 84:5-8; p. 193:3-5; p. 202:3-11). The "new and valuable consideration" or "corresponding benefit or favorable change in employment status" that Frieman received as consideration for signing the Agreement is an additional one per cent (1%) to his commission rate for new revenue, and an additional one per cent (1%) of the net new revenue, which given his performance, he received approximately $1,769 on March 18, 2011. (N.T. 7/15/19 at pp. 181:10–183:21; pp. 185:23–186:17; p. 194:2-11; See Exh. P-2 Appendix) ("Participant will receive the following consideration for signing the new Agreement for Wells Fargo Insurance Services USA: Additional 1% on New Revenue and Additional 1% on Net New Revenue").

Frieman received new and valuable consideration in the form of added compensation in exchange for signing the Agreement, as reflected by an increase in his commission rate for the 2010 plan year, which included an added one per cent (1%) of any new revenue, plus an extra one

per cent (1%) of the net new revenue. (Exh. P-2 Appendix; N.T. 7/15/19 at p. 183:8-11). "New revenue" is the "revenue that has been derived from truly new sales that have been brought in by the participant." (N.T. 7/15/19 at p. 182:21-25). "Net new revenue is defined as new revenue recorded in 2010 less lost business (revenue booked in 2009, not retained in 2010)." (Exh. P-2 Appendix; see also N.T. 7/15/19 at p. 183:1-10). Frieman, like all other producers employed by Wells Fargo at the time, received the additional compensation, as reflected by the increased commission rates outlined in the Appendix, only if the Agreement was signed. (N.T. 7/15/19 at pp. 177:12–178:5; p. 179:8-15; p. 180:15-21; p. 181:10-14; pp. 181:24–182:12; p. 184: 3-7; pp. 185:18–186:10; p. 190:17-21; p. 191:9-23; p. 200:1-22; p. 201:13-17; pp. 202:3–203:5; *see also* Agreement, Exh. P-1, § 1. Introduction ("In consideration for my continued employment by a Wells Fargo company . . .the ability to participate in a new compensation plan containing new and additional benefits which include, but are not limited to, a guaranteed draw and an increased commission percentage for new revenue and net new revenue generated in 2010, I agree as follows: . . .")). The increased commission rates on new revenue and also on net new revenue is a favorable change in Frieman's employment terms, and is unlike the "clearest circumstances" where Pennsylvania courts found the consideration "truly illusory or *de minimis*." Therefore, the increase in commission and total compensation paid to Frieman is sufficient "new and valuable" consideration to support the Agreement.

Both the Agreement and the Appendix to the Agreement bear the signature of Frieman. (*See* Agreement, Exh. P-1, Acknowledgment; Exh. P-2 Appendix). However, testimony given at trial and the plain language of the Producer Plan make clear that the Agreement is enforceable, and Frieman would receive the additional compensation as listed in the Appendix, as long as Frieman signed the Agreement, even if Frieman did not also sign the Appendix. The Agreement

itself, not the Appendix, had to be signed for Frieman to receive the additional compensation. (See N.T. 7/15/19 at pp. 190:17–191:23) ("[I]t's your understanding the agreement had to be singed to get the $1,769; is that your understanding? Answer: That's my understanding." Obtaining the signatures of the producers on the Appendix "would have been a nice to have, but getting the TSA signed is what drove payment of consideration.") ("For the 2010 Plan year only . . . Participant will receive the following consideration for signing the TSA for Wells Fargo Insurance Services. That being the case, this would have been a nice to have, but getting the TSA signed is what drove payment of consideration.") *(see also* N.T. 7/15/19 at p. 176:13-23; pp. 177:12–178:5; p. 181:10-14; pp. 181:24–182:12; p. 184: 3-7; pp. 185:18–186:10; p. 200:1-22; p. 201:13-17; pp. 202:3–203:5; Exh. P-2 Appendix; Plaintiff Exhibit P-3, Wells Fargo Producer Plan).

The Producer Plan states that a producer like Frieman was "eligible to participate in the Plan once the Participant has executed an appropriate Trade Secret Agreement." (Plaintiff Exhibit P-3, Wells Fargo Producer Plan; N.T. 7/15/19 at p. 176:13-23; pp. 177:12–178:5). The Producer Plan references the Appendix, which sets compensation rates and the payment period for Frieman. (Plaintiff Exhibit P-3, Wells Fargo Producer Plan; Exh. P-2 Appendix); see also N.T. 7/15/19 at p. 176:13-23; pp. 180:22–181:13; p. 200:18-22).

The plain language of the Appendix indicates that the participant's signature on the Agreement, not the Appendix, is required to receive the additional compensation. Directly under the signatures of Frieman and representatives of Wells Fargo is the following statement: "The Participant's signature above acknowledges that the Plan and Appendix A have been reviewed by the Participant. The provisions of the WFIS Producer Plan will be applied and the Participant will be paid in accordance with its terms even if the Participant does not sign Appendix A." (Exh. P-2 Appendix). Both documents are enforceable as long as the employee signs the Agreement itself,

regardless if the employee also signs the Appendix page. Consequently, the record reveals that Frieman was awarded with new and adequate consideration in exchange for signing the Agreement when Wells Fargo increased his commission rate and added more compensation to his overall earnings.

2. The Agreement is Reasonable and the Restrictions are Designed to Protect the Legitimate Interests of USI for its Customer and Client Goodwill

The record further reveals that the third element for the enforceability of the Agreement is present, as the restrictions of the Agreement are reasonably limited to only two (2) years after Frieman separates from Wells Fargo.

Lastly, the restrictions in the Agreement are "designed to protect the legitimate interests of the employer," here USI's customer and client goodwill. "Pennsylvania cases have recognized that trade secrets of an employer, customer goodwill and specialized training and skills acquired from the employer are all legitimate interests protectable through a general restrictive covenant." *WMI Group, Inc., et. al. v. Fox, et. al.*, 109 A.3d 740, 749 (Pa. Super. Ct. 2015). Additional protectable business interests of the employer are those that "relate to an employee's special skills; the safeguarding of customer goodwill; proprietary business information, including processes, trade secrets, and inventions; as well as the time and resources the employer has invested in the training of its employees." *Socko* at 1273.

Instantly, the Agreement is designed to protect legitimate business interests of USI: the customer and client goodwill of USI in the clients whom Frieman serviced while employed with Wells Fargo, the predecessor of USI, and the time and resources invested in training Frieman and maintaining its clients. (N.T. 7/15/19 at p. 33:3-21 ("The goals [of enforcing the Agreement] are really in recognition of this major investment that [USI has] made over a protracted period of time, until the sales person or producer really gets traction and becomes successful, it's to protect the

assets of our firm which is those revenue streams from those clients."); N.T. 7/15/19 at pp. 35:19–36:11 ("[T]hese are complex clients, they require, even mid-sized clients require typically a lot more resources beyond the producer. There's a team of people every day, day in and day out are interacting with those clients. And those assets are delivered at a considerable expense and investment of the firm."); *see also* Agreement, Exh. P-1, § II. Trade Secrets and Confidential Information)).

Further, the Agreement itself also explicitly states that the names, addresses, and contact information of USI's customers are confidential, proprietary information, under Section II. Trade Secrets and Confidential Information:

> During the course of my employment I will acquire knowledge of the Company's Trade Secrets and other proprietary information relating to its business, business methods, personnel, and customers (collectively referenced as "Confidential Information"). . . . The Company's Trade Secrets include, but are not limited to, the following: the names, addresses, and contact information of the Company's customers and prospective customers, as well as other personal or financial information relating to any customer or prospect[.] (Agreement, Exh. P-1, § II. Trade Secrets and Confidential Information).

The evidence establishes that the Agreement is designed to protect the legitimate business interests of USI, especially the proprietary and confidential information relating to its customers, such as names, addresses, and contact information.

Therefore, the record reveals that the Agreement is a valid, enforceable restrictive covenant that Frieman breached when he solicited the eighteen (18) clients from Wells Fargo, in an effort to transfer their business over to his new employer, RCM&D.

II. INTENTIONAL INTERFERENCE WITH CONTRACT AGAINST RCM&D

The record reveals that USI failed to meet its burden to establish that RCM&D intentionally interfered with the contractual Agreement between Frieman and Wells Fargo, the predecessor of USI. Therefore, this Court did not err in finding in favor for RCM&D and against USI under Count II of the Complaint, Intentional Interference with Contract.

The legal standard for intentional interference with contract is as follows:

> (1) the existence of a contractual . . . relation between the complainant and a third party; (2) the purposeful action on the part of the defendant, specifically intended to harm the existing relation,[]; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. *Maverick Steel Co. v. Dick Corp./Barton Malow*, 54 A.3d 352, 354–55 (Pa. Super. Ct. 2012) (citing *Steffy & Son, Inc. v. Citizens Bank of Pennsylvania*, 7 A.3d 278, 288 (Pa. Super. Ct. 2010)).

The third element of tortious interference with a contract requires showing by a preponderance of the evidence that the defendant's actions were not privileged, which requires showing those actions were "improper." *Salsgiver Commc'ns, Inc. v. Consol. Commc'ns Holdings, Inc.*, 150 A.3d 957, 966 (Pa. Super. Ct. 2016) (citing *Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923,934 (Pa. Super. Ct. 2013)). The factors to consider in determining whether an actor's interference is "improper" include:

> (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties. *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 475–76 (Pa. 2011) (quoting *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1184 (Pa. 1978)).

Instantly, the record reveals that USI has failed to establish sufficient evidence that RCM&D intentionally interfered with the Agreement between Wells Fargo and Frieman. The crux of the issue regarding the Count II of the Complaint for Intentional Interference with Contract against RCM&D is whether RCM&D intentionally interfered with the Agreement between Frieman and USI's predecessor, Wells Fargo.

RCM&D is required to have known about, and have intentionally interfered with, the contract between USI's predecessor Wells Fargo and Frieman. However, USI offered no evidence of purposeful action on the part of RCM&D that was specifically intended to harm the contractual relationship between USI and Frieman.

At most, the record reveals that USI demonstrated only that RCM&D had mere knowledge that Frieman was violating a potentially valid non-solicit agreement by soliciting clients whom he serviced at USI to do business with RCM&D.[4] (Exh. P-67, Haney Deposition, at p. 20:12-16; p. 22:21-23; p. 28:2-5; pp. 28:20–29:18; p. 30:12-22; pp. 44:13–45.3; p. 45:15-22; p. 49:6-23; p. 52:10-20; pp. 65:4–66:15; p. 67:4-22; pp. 71:5–72:3, pp. 72:10–74:22; p. 77:12-23; pp. 86:17–87:21; p. 102:7-14; pp. 108:23–109:20). RCM&D knew, prior to hiring Frieman, about the non-solicitation Agreement between Frieman and USI's predecessor, Wells Fargo, but RCM&D believed that it was invalid because Frieman told RCM&D that his signature was forged. (Exh. P-67, Haney Deposition, at p. 20:12-16; p. 22:21-23; p. 28:2-5; pp. 28:20–29:18; p. 30:12-22; pp. 44:13–45:3; p. 45:15-22; p. 49:6-10; p. 52:10-20; pp. 71:12–72:3, p. 74:17-22; pp. 85:6–87:11; pp. 97:19–98:7; p. 113:5-22; p. 119:7-22).

The record reveals that USI merely established that RCM&D had knowledge of Frieman's breach, but that USI failed to further present evidence that RCM&D took any purposeful action to

[4] David Haney, the Managing Director of RCM&D, testified as the corporate designee of RCM&D. (Plaintiff Exh. P-67, Deposition of David Haney (hereinafter "Exh. P-67, Haney Deposition"), at p. 8:2-5).

interfere with Frieman's contractual obligations under the Agreement. RCM&D knew that Frieman would solicit the clients whom he serviced while employed by Wells Fargo, in an effort to move their business over to RCM&D and away from Wells Fargo. (Exh. P-67, Haney Deposition, at pp. 22:17–23:18; p. 49:6-23; p. 64:1-9; pp. 65:4–66:15; p. 67:4-23; pp. 71:12–72:3, pp. 71:5–72:3, pp. 72:10–73:23; p. 74:17-22; p. 77:12-23; pp. 85:6–87:21; p. 94:15-22; p. 102:7-14; pp. 108:23–109:20; p. 113:5-22; p. 119:7-22). RCM&D and Frieman had several conversations about Frieman soliciting clients whom he serviced while employed by Wells Fargo to bring their business to his new employer, RCM&D, in direct violation of the Agreement. (Exh. P-67, Haney Deposition, at p. 22:21-23; p. 49:6-23; p. 64:1-9; p. 66:2-15; p. 67:4-23; pp. 71:12–72:3, pp. 72:10–74:22; pp. 85:6–87:21).

Further, Frieman created and submitted to RCM&D a plan of his business goals, which listed a "business objective," to "migrate Frieman current book," indicating that Frieman would solicit the clients whom he serviced while employed by Wells Fargo in an effort to bring their business over to RCM&D. (Exh. P-67, Haney Deposition, at p. 19:4-24; p. 21:1-22; pp. 22:17–23:18; p. 49:6-23; p. 64:1-9; p. 67:4-23; pp. 71:12–72:3, pp. 72:10–74:22; pp. 85:6– 87:21). However, even though RCM&D benefited from Frieman's breach by receiving the solicited clients' business, and had knowledge of the potential violation, USI failed to establish any action taken by RCM&D to interfere with the Agreement.

Therefore, the record reveals that USI failed to present evidence of the third element required pursuant to *Maverick Steel*, that RCM&D purposefully interfered with the Agreement with the intent to harm the existing relation. Consequently, this Court did not err as a matter of law and did not abuse its discretion in finding for RCM&D on Count II go the Complaint.

III. DAMAGES

The 6/23/30 Order & Judgment properly awarded damages against Frieman and in favor of USI in the amount of one $1,073,560.21. The 10/23/20 Orders & Final Judgment entered judgment against Frieman and in favor of USI in the same amount of $1,073,560.21, to reflect the losses sustained by USI from Frieman's breach of the Agreement. This Court properly awarded damages to USI based on the weight of evidence presented at trial and therefore the judgment should be affirmed.

Under Pennsylvania law, a "party seeking damages for breach of contract must be able to prove such damages with reasonable certainty." *Printed Image of York, Inc. v. Mifflin Press, Ltd.*, 133 A.3d 55, 59 (Pa. Super. Ct. 2016) (quoting *Logan v. Mirror Printing Co. of Altoona*, 600 A.2d 225, 227 (Pa. Super. Ct. 1991)). Trial courts are "afforded considerable deference to calculate damages," and damages "need not be proved with mathematical certainty." *Dibish v. Ameriprise Fin., Inc.*, 134 A.3d 1079, 1089 (Pa. Super. Ct. 2016).

The general rule regarding damages is as follows:

> [T]he plaintiff bears the burden of proof as to damages. The determination of damages is a factual question to be decided by the fact-finder. The fact-finder must assess the testimony, by weighing the evidence and determining its credibility, and by accepting or rejecting the estimates of the damages given by the witnesses. Although the fact-finder may not render a verdict based on sheer conjecture or guesswork, it may use a measure of speculation in estimating damages. The fact-finder may make a just and reasonable estimate of the damage based on relevant data, and in such circumstances may act on probable, inferential, as well as direct and positive proof.

Omicron Sys., Inc. v. Weiner, 860 A.2d 554, 564–65 (Pa. Super. Ct. 2004) (quoting *Judge Technical Services, Inc. v. Clancy*, 813 A.2d 879, 885 (Pa. Super. Ct. 2002)).

Instantly, USI met its burden in establishing its damages caused by Frieman soliciting the eighteen (18) clients in violation of the Agreement. The damages award is a just and reasonable estimate of the injury sustained by USI, and the award is supported by the evidence.

> Damages for a breach of contract should place the aggrieved party in "as nearly as possible in the same position [it] would have occupied had there been no breach." To that end, the aggrieved party may recover all damages, provided "(1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty.

Ely v. Susquehanna Aquacultures, Inc., 130 A.3d 6, 10 (Pa. Super. Ct. 2015) (quoting *Helpin v. Trustees of University of Pennsylvania*, 10 A.3d 267, 270 (Pa. 2010)).

USI demonstrated monetary losses in profit and losses in clientele associated with Frieman's violation of the two (2) year Agreement. At trial, USI presented testimony from two (2) expert witnesses: Robert Bryan Tilden, Jr., was qualified as an expert in retail insurance brokerage industry and agency evaluation (Notes of Testimony from Trial, July 16, 2019, ("N.T. 7/16/19") at pp. 9:10–11:11); and, Francis Brulenski was qualified as an expert in the evaluation and calculation of economic damages (N.T. 7/16/19 at p. 55:15-24). Further, written expert reports prepared by Mr. Tilden and Mr. Brulenski were admitted into evidence at trial. (Plaintiff Exhibit 60, Damage Expert Report by R. Bryan Tilden ("Exh. P-60, Tilden Report"); Plaintiff Exhibit 61, Francis Brulenski Report for Damages Calculation ("Exh. P-61, Brulenski Report"); Plaintiff Exhibit 61-A, Francis Bruleski Report Supplement ("Exh. 61-A, Brulenski Supp.")).

Mr. Tilden provided an expert opinion on Wells Fargo's "retention rate" on the "book of business," or clients serviced by Wells Fargo, as an average of eighty-nine per cent (89%). (N.T. 7/16/19 at pp. 13:21–15:9; see also Exh. P-60, Tilden Report). Based on the average retention rate of eighty-nine per cent (89%), Mr. Brulenski prepared a written report and provided testimony at

trial regarding his calculation of USI's financial losses in terms of lost profits from the decreased commission revenue caused by Frieman soliciting the eighteen (18) clients in violation of the Agreement. (N.T. 7/16/19 at p. 56:1-23; p. 57:11-24; pp. 59:20–60:6; pp. 61:9–62:12; see also Exh. P-61, Brulenski Report; Exh. 61-A, Brulenski Supp.). Mr. Brulenski calculated the net profits lost by USI from the eighteen (18) clients solicited by Frieman as $3,985,215, and $3,787,389 in present value, for the period of 2017 to 2026. (N.T. 7/16/19 at p. 56:10-23; p. 57:11-24; pp. 59:20–60:9; pp. 63:20–65:3; pp. 66:2–67:8; p. 69:1-20; *see also* Exh. P-61, Brulenski Report; Exh. 61-A, Brulenski Supp). The ten (10) year loss period was used to reflect the eighty-nine per cent (89%) retention rate, or eleven per cent (11%) loss of business yearly, that would diminish and eventually the eighteen (18) solicited clients would be lost by USI within ten (10) years. (N.T. 7/16/19 at p. 57:11-24; pp. 59:20–60:9; *see also* Exh. P-61, Brulenski Report; Exh. 61-A, Brulenski Supp).

Evidence of gross commissions received by RCM&D in the amount of $1,073,560.21 for the eighteen (18) clients solicited by Frieman in violation of the Agreement was submitted by USI for the period December 1, 2016 to July 1, 2018. (N.T. 7/16/19 at pp. 60:7–61:8; pp. 68:25–69:9); (*See* Plaintiff Exhibit 23, RCM&D Gross Commission for Subject Clients ("Exh. P-23, RCM&D Commission"); Exh. P-61, Brulenski Report, at Table Exhibit D). The loss period of December 1, 2016 to July 1, 2018, is an accurate and fair benchmark for damages incurred by USI because the Agreement restricted Frieman from soliciting clients serviced at Wells Fargo for two (2) years after leaving in November of 2016, which would extend to November of 2018. Using the loss period through only July 2018, is reasonable because it excludes from the damages award at least five months of losses suffered by USI when Frieman was still restricted from soliciting USI's clients.

The award of damages is within a reasonable range of USI's financial harm, is supported by competent evidence, and therefore, judgment should be affirmed in favor of USI and against Frieman on the breach of contract claim for a total amount $1,073,560.21. (Exh. P-23, RCM&D Commission; Exh. P-61, Brulenski Report at Table Exhibit D; N.T. 7/16/19 at p. 60:7-25).

CONCLUSION

For the foregoing reasons, this Court's decision should be affirmed.

BY THE COURT:

DATE: 4/15/21

NINA W. PADILLA, J.