

FILED Document

CO Larimer County District Court 8th JD

Filing Date: Jan 24 2012 1:35PM MST

Filing ID: 42100537

Review Clerk: Joyce M Mueller

District Court, Larimer County, Colorado
Larimer County Justice Center
201 Laporte Avenue, Suite 100
Fort Collins, CO 80521
(970) 498-6100

TERRI FASSI, individually, and FASSI FINANCIAL NETWORK, LLC,

Plaintiffs,

v.

MARSHALL, BOYD AND COMPANY, LLC, RON MARSHALL, individually, and DARRYL S. BOYD, individually,

Defendants and Third-party Plaintiffs,

v.

Michael Fassi, individually,

Third-party Defendant.

FILED WITH CLERK OF COURTS
LARIMER COUNTY, COLO.

JM

JAN 23 2012

SHERLYN K. SAMPSON
CLERK OF COURT



COURT USE ONLY

Case No. 2010CV602

Courtroom 4C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT finds as follows:

I. PRELIMINARY STATEMENT

1. Trial to the Court was held in this matter on November 22, December 15, and December 16, 2011.
2. Plaintiffs' remaining claim is that for payment on the Promissory Note executed by Marshall, Boyd and Company, LLC (LLC) for the benefit of the Plaintiffs.
3. Defendants and Third-Party Plaintiffs claims include:

- a. Breach of Contract – LLC against all Plaintiffs
 - b. Declaratory Relief - LLC against all Plaintiffs
 - c. Breach of Contract (Non-compete) - LLC against all Plaintiffs
 - d. Injunctive Relief - LLC against all Plaintiffs
 - e. Abuse of Process - all Defendants against all Plaintiffs
 - f. Intentional Interference With Contractual Relations – the LLC against Third Party Defendant
 - g. Intentional Interference With Prospective Business Advantage – the LLC against Third Party Defendant
4. Plaintiffs presented one witness, Terri Fassi, on its one remaining claim of payment under the promissory note and in rebuttal to Defendants and Third Party Plaintiffs' counterclaims.
5. Defendants and Third-Party Plaintiffs (collectively Defendants) presented witnesses James TenBrook, Ian Craig, Dori Healy, Michelle Parks, Dave Walling, Ian Craig, Don Daniel, Ron Marshall and Darryl Boyd.

II. FINDINGS OF FACT

A. Sale Documents.

On November 20, 2009, the LLC purchased Plaintiffs' accounting/tax practice (Practice.) Prior to the sale, Darryl Boyd was contacted by Plaintiffs to see if he and Ron Marshall were interested in purchasing the Practice. As a part of the pre-sale negotiations Plaintiff Terri Fassi (Fassi) provided hand written information regarding the amount of revenue generated by the Practice which was admitted as Exhibit 19. The undisputed evidence is that Fassi and Michael Fassi were both involved in the negotiations for the sale of the Practice on behalf of Plaintiffs. Defendants presented testimony from James TenBrook and Ron Marshall that the income figures on Exhibit 19 were significantly inflated. The Court finds the testimony presented by the Defendants regarding the inflated nature of the pre-sale income information provided by Fassi to be credible and persuasive.

Three documents evidence the terms of the sale of the Practice: the Agreement for the Purchase and Sale of Accounting Practice Assets (Sale Agreement,) Exhibit 1; Confidentiality and Non-Compete Agreement (Non-Compete,) Exhibit 2; and, Promissory Note (Note,) Exhibit 3. The last paragraph of the Sale Agreement provides that all schedules and exhibits to the Sales

Agreement are expressly incorporated into the Sales Agreement and expressly made a part of the Sales Agreement. The Court finds that the Non-Compete and the Note are a part of the Sale Agreement. Thus, the Court will construe the three sale documents together.

The assets sold by the Plaintiffs included: all software licenses used by the Practice; all of the Plaintiffs' right, title, and interest in the Practice's client and vendor files and records; contract rights pertaining to the Practice; and, the client list and goodwill of the Practice. Exhibit 1. The Plaintiffs were to provide on-site transition services and were to make referrals to the LLC of individuals and entities for accounting and tax work. Plaintiffs were also to forward all telephone accounting and tax inquiries to the LLC. The sale included the Plaintiffs' main telephone number. Defendants were required to provide Plaintiffs with access to the client files on an as needed basis. Exhibit 1.

The Non-Compete barred the Plaintiffs from: converting any business opportunity for professional benefit that the LLC is pursuing or may be interested in pursuing; becoming associated with any competitor of the LLC in the capacity of partner, manager, or other visible position; or, for Plaintiffs' own benefit or for the benefit of any of the LLC's competitors solicit or accept any business from any of LLC's existing or prospective clients. Exhibit 2. The Non-Compete required the Plaintiffs to refer to the LLC all leads generated through social or professional contacts by the Plaintiffs during the period of the Non-Compete. Exhibit 2. Paragraph 11 of Exhibit 2 provides that if of any litigation of any dispute between the parties the prevailing party will be awarded their reasonable attorney fees, expert fees, and costs.

In addition, the Plaintiffs and the LLC entered into a verbal agreement to sublease a portion of Plaintiffs' offices and to lease equipment and furniture. Exhibit 21. The lease included the use of the computer used by Michelle Stansbury (Michelle Computer.) The evidence was that the LLC was only going to sublease office space from the Plaintiffs for the "busy season" of the 2009 tax year, after that time the LLC would move offices, and that that information had been provided to the Plaintiffs at the time of the sale. Ron Marshall, Michelle Parks. It is undisputed that the Defendants vacated the Plaintiffs' offices on May 20, 2010.

B. Purchase Price.

Under the terms of the Sale Agreement Plaintiffs sold the LLC the Practice including all software licenses used by the Practice, all client and vendor files, and the client list. The purchase price was to be the collections from 1 year's worth of client billings from those clients which had been sold by Plaintiffs to the LLC. Based off the income figures presented by Fassi to the Defendants, the purchase price was estimated to be \$145,000. The LLC made a down payment towards the purchase price in the amount of \$21,750, Exhibit 4. The balance of the purchase price was to be paid over 48 months under the terms of the Note. Based off the estimate, the first year's payments under the Note were set at \$2,838.36 per month. After the first year, the monthly payments were to be adjusted to reflect the actual collected billings.

Under the Note, the monthly payments were due on the first day of each month beginning in January, 2010. However, the Non-Compete included a 30 day cure period before the Note would be considered in default. Construing the sales documents together, the Court finds that as long as the LLC made its payments within 30 days of the first day of each month it would not be in default under the terms of the Note.

The LLC made 11 monthly payments under the Note, Exhibit 33, covering the months of January through November, 2010, for a total of \$31,221.96. The 11 payments were all made within 30 days of the first day of the month in which they were due. Following the payment for the month of November, 2010, the LLC made no further payments under the Note. Based upon the terms of the sale documents as a whole, the Court finds that the LLC was in default under the Note on December 31, 2010, 31 days after the December, 2010, payment was due. The Court finds that the LLC has paid a total of \$52,971.96 towards the purchase price.

The LLC presented evidence as to the amounts it collected from the clients sold to it by the Plaintiffs in the first year following the closing of the sale. Mr. TenBrook testified that collected billings means those for which payment had been received and deposited. Mr. TenBrook testified that he had reviewed: the client list, Exhibit C; the LLC's bank account statements, Exhibit 28; and, the LLC's Transaction List By Customer November 20, 2009 through November 20, 2010, Exhibit 29. Based upon his review, Mr. TenBrook testified that the amount of the collected billing from the clients sold by Plaintiffs to the LLC was \$107,383, Exhibit 53.

Fassi testified that she believed that additional monies should be added to the amount. However, with the sole exception of the \$800 billed and collected from the Stavelys, the Plaintiffs did not provide any credible evidence that additional monies should be added to the amount of the collected billings reported by the Plaintiffs. Defendant Darryl Boyd admitted that the \$800 which was billed to the Stavelys, Exhibit 52, should be added to the amount of the collected billings. The Court finds that the amount of the collected billings in this matter, and thus the purchase price, is \$108,183.

Subtracting the amount paid from the collected billings, the Court finds that the balance due under the Note, without set offs, to be \$55,211.04.

C. Performance of Agreements.

Within a couple of weeks after the purchase, issues regarding the sale developed between the parties. Defendants presented a considerable amount of evidence both in the form of testimony and exhibits that the LLC and the Plaintiffs had agreed that the Plaintiffs would send letters to the clients of the Practice notifying them of the sale and introducing the LLC. The evidence was also that Plaintiffs refused to promptly notify the clients of the Practice of the sale

as agreed. Exhibits 21, 22, and 66; testimony of Ron Marshall, Dori Healy, Michelle Parks, and Fassi. The Court finds that the exhibits and the testimony offered by the Defendants are credible and persuasive on this issue. The Court finds that Plaintiffs did not timely notify the clients of the Practice as agreed. The Plaintiffs' failure to notify the clients of the Practice began in December, 2009, and was continuing. The Court further finds that said failure constitutes a material breach of the Plaintiffs' responsibilities to provide on-site transition services of the sales documents.

The evidence presented by the Defendants was clear that beginning in January, 2010, the Plaintiffs: barred the LLC from accessing the client information of the Practice; barred the LLC from accessing the client files on the computer system; refused to turn over the software licenses; and, refused to turn over exclusive possession of the client and vendor files. Exhibit 7; testimony of Ron Marshall, Dori Healy, Ian Craig, and Michelle Parks. Plaintiffs did not dispute that they had restricted the LLC's access to the Gorilla software, retained electronic copies of the client files, or had failed to turn over the software licenses. What the Plaintiffs did claim is that they were required to retain copies of the client files under the accountancy rules. The Court finds the Plaintiffs' argument unpersuasive on two grounds.

First, Mr. TenBrook testified that in situations such as this one the files are physically transferred to the purchaser with the seller having access to the files if necessary. Second, the terms of paragraph 13 of Exhibit 1 provide that the LLC must make any record available to the Plaintiffs in case of any malpractice claims or other needs. Based upon the foregoing, the Court finds that the exhibits and the testimony offered by the Defendants are credible and persuasive on this issue. The Court further finds that the Plaintiffs have materially breached the terms of the sale documents by: barring the LLC from accessing the client files on the computer system; refusing to turn over the software licenses; and, refusing to turn over exclusive possession of the client and vendor files.

The evidence was that the lack of the access to the Gorilla software required the LLC to expend additional time and resources to obtain the information necessary to contact the clients of the Practice. Mr. TenBrook testified that the LLC sustained \$750 in lost staff time spent in attempting to obtain client information in the Plaintiffs' possession but denied to the LLC. The Court finds that Mr. TenBrook's testimony regarding the damages to be credible and persuasive. The Court hereby finds that the LLC had sustained damage in the amount of \$750 as a result of Plaintiffs' denial of access to client information.

Mr. TenBrook also testified that the LLC had incurred damages as a result of Plaintiffs' failure to transfer the software licenses to the LLC. Mr. TenBrook testified the LLC's damages for the failure to transfer the software licenses were as follows: the Gorilla software license \$9,400; the QuickBooks software licenses \$2,500; and, the ProSeries software \$3,099. Plaintiffs offered no rebuttal testimony regarding the value of the software licenses. The Court finds that Mr. TenBrook's testimony regarding the damages to be credible and persuasive. The Court

hereby finds that the LLC sustained damages in the amount of \$5,599 as a result of Plaintiffs' failure to transfer the software licenses as required by the terms of the sale documents, excluding the Gorilla software which was not required by the terms of the sale documents.

The LLC presented uncontroverted evidence that the Plaintiffs did not transfer the main telephone number to the LLC following the purchase of the Practice as provided by the terms of the sale documents. As a potential defense, the Plaintiffs argued that the LLC simply obtained its own telephone number insinuating that the LLC did not need the number it had purchased. The Court finds the Plaintiffs' argument unpersuasive. The evidence was that the telephone number had real value and the failure to transfer the same caused damages to the LLC. The Court finds that the Plaintiffs' failure to transfer the main telephone number to the LLC constitutes a material breach of the sale documents.

Mr. TenBrook testified that he had conducted an analysis of the effects of the Plaintiffs' failure to transfer the main telephone number to the LLC. Mr. TenBrook's analysis resulted in a calculation of the lost first year of revenues in the amount of \$18,217 which he then multiplied by the LLC's net profit percentage of 40% to obtain lost revenue for the first year of \$7,187. Since the first year of net profits would have been paid to the Plaintiffs under the terms of the sale documents, Mr. TenBrook did not assign any damages to the first year. Mr. TenBrook did carry the analysis out for a period of six years based upon the assumed average retention of clients which would have been obtained through the availability of the main telephone number. Mr. TenBrook then reduced the lost profits by a present value factor and arrived at the present value of future net profits lost to the LLC as a result of the failure to transfer the main telephone number of \$19,047. Exhibit 53. While the Court finds Mr. TenBrook's testimony regarding the damages to be credible and persuasive, the Court finds that the LLC only sustained damages in the amount of \$5,000 as a result of Plaintiffs' failure to transfer the main telephone number as required by the terms of the sale documents.

The LLC presented evidence that it had only received a total of three referrals from the Plaintiffs following the purchase of the Practice. The Sale Agreement requires the Plaintiffs to continue to forward all phone calls received by the Plaintiffs related to accounting and tax services to the LLC for a period of four years following the date of closing. The Non-Compete requires the Plaintiffs to refer all leads generated through social or professional contacts by Plaintiffs during the non-compete period to be referred to the LLC. Plaintiffs did not dispute that they have not referred more than the three referrals to the LLC. In fact, the evidence was very clear that beginning in January, 2010, the Plaintiffs intended to refer clients and/or sell client referrals to other CPAs. Exhibit 21. Fassi and Don Daniel testified that Plaintiffs and Michael Fassi referred clients to Mr. Daniel during the term of the non-compete. The Court finds that the Plaintiffs' failure to refer clients and leads to the LLC constitutes a material breach of the sale documents.

Mr. TenBrook testified that he had conducted an analysis of the effects of the Plaintiffs'

failure to refer clients to the LLC. As with the analysis of the failure to transfer the telephone number, Mr. TenBrook conducted a six-year analysis of the effects of the failure to refer clients. Mr. TenBrook's analysis is contained in Exhibit 53. Mr. TenBrook opined that the LLC suffered damages in the amount of \$7,174 as a result of the Plaintiffs' failure to refer clients and leads to the LLC. The Court finds Mr. TenBrook's testimony regarding the damages to be credible and persuasive. The Court hereby finds that the LLC sustained damages in the amount of \$7,174 as a result of Plaintiffs' failure to refer clients and leads to the LLC as required by the terms of the sale documents.

Mr. TenBrook also testified as to his opinions regarding the effects of the inflated nature of the pre-sale income information provided by Fassi prior to the sale. The LLC presented testimony that based upon Fassi's representations of the expected income of the Practice it employed two full time employees to conduct the business of the practice. Ron Marshall, Darryl Boyd. The actual revenue of the Practice did not justify the employment of two full time employees. Mr. TenBrook testified that salaries and payroll taxes as a percentage of revenue as represented by the Plaintiffs was 42.5%. He further testified that salaries and payroll taxes of the Practice as a percentage of collected billings were 49.9%. Based upon the foregoing, Mr. TenBrook opined that the LLC incurred excess employee salaries and payroll costs in the amount of \$7,930 as result of the inflated nature of the pre-sale income information provided by Fassi. Plaintiffs did not offer any evidence in dispute of the foregoing testimony and analysis. The Court finds Mr. TenBrook's testimony regarding the damages to be credible and persuasive. The Court hereby finds that the LLC sustained damages in the amount of \$7,930 in excess employee salaries and payroll costs as a result of Fassi's inflation of the pre-sale income information.

The Court finds that the total amount of LLC's damages from Plaintiffs' breaches of the Sales Agreement is \$26,432.

D. Non-Compete.

The LLC presented evidence that the Plaintiffs continued to practice accounting and tax work in violation of the provisions of the sale document following the date of the closing of the purchase of the Practice. Exhibit 68 and 67, Fassi. The accounting and tax work included work done while the LLC occupied the Plaintiffs' offices and after the LLC had vacated the premises. While Fassi testified that many of the emails were actually related to investment file work and not accounting or tax work, the Court does not find such testimony credible. Darryl Boyd testified that the subject and the content of the e-mails were concerning accounting and tax work. The Court's review of the e-mails which comprise Exhibit 68 shows that the subjects and content of those e-mails involve accounting and tax matters. The Court finds that Plaintiffs violated the terms of the Non-Compete by performing accounting and tax work following the sale of the Practice beginning in December 2009 and continuing thereafter.

In addition to performing accounting and tax work on their own, the evidence was overwhelming that Plaintiffs engaged in a pattern of violating the terms of the Non-Compete by:

referring clients who have been sold to the LLC to the LLC's competitors; and, by referring new clients and leads to the LLC's Competitors. The testimony of Michelle Parks is highly enlightening and particularly credible in this matter. Ms. Parks testified that she was a former employee of the Plaintiffs having worked there both prior to the sale of the Practice and following the sale until late October, 2010. Ms. Parks testified that she became aware of the sale when Fassi and Michael Fassi called a meeting of all of the employees of the Plaintiffs following the sale in November, 2009. Following the sale, Ms. Parks shared office space with the Plaintiffs' computer technician and on occasion with Ron Marshall.

Ms. Parks testified that in May, 2010, following the LLC vacating the Plaintiffs' office she and the other employees of the Plaintiffs were called into a meeting by Fassi and Michael Fassi wherein Michael Fassi informed the employees that Plaintiffs intended to bring a libel/slander suit against the Defendants. Following the meeting, Fassi requested that Ms. Parks prepare an advertisement for a CPA based on information provided to her by Fassi. Ms. Parks testified that she personally typed the advertisement and that she saved the same onto the Plaintiffs' computer system on June 9, 2010. The advertisement was admitted into evidence as Exhibit 44. She further testified that in conjunction with posting the advertisement, Fassi asked her to open a new P.O. Box and that the new post office box number corresponded to the number contained on Exhibit 44.

Ms. Parks testified that she posted the advertisement on Craig's List on June 15, 2010. Exhibit 69. Exhibit 69 includes a number of responses to the advertisement through Craig's List. Exhibit 59 is a resume of a CPA, Pete Averson, which was saved onto Plaintiffs' computer system on June 23, 2010, following the date the advertisement was placed on Craig's List.

In August, 2010, Ms. Parks testified that she went to Fassi seeking additional bookkeeping work. Ms. Parks testified she requested that Fassi refer her clients for bookkeeping services because she knew that Fassi was barred from doing accounting and bookkeeping work herself due to the sale of the Practice. During the conversation, Fassi refused to refer bookkeeping services to Ms. Parks because "I just have to play my cards right and eventually I will get it all back again." Ms. Parks took Fassi's remarks to be indicative of a strategy. Also in August, 2010, Fassi asked Ms. Parks how Fassi could attract established and experienced CPAs.

Thereafter, in October, 2010, Fassi again asked Ms. Parks to place another advertisement on Craig's List for a CPA. Ms. Parks did so and placed the advertisement which is Exhibit 45 on Craig's List during the last week of her employment with the Plaintiffs.

Don Daniel testified that he responded to the advertisement on Craig's List and had a meeting with Fassi and Michael Fassi on November 5, 2010. At the meeting, Mr. Daniel, Fassi, and Michael Fassi discussed the proposal whereby Mr. Daniel would lease office space from the Plaintiffs and the Plaintiffs and Michael Fassi would refer clients to Mr. Daniel. The clients to be referred included those clients which Fassi and Michael Fassi represented as having been

clients sold to the LLC who were no longer interested in continuing with the LLC and needed tax and accounting work. Mr. Daniel testified that he was aware of the existence of a non-compete agreement between the Plaintiffs and the LLC based upon his conversation with Fassi and Michael Fassi at the meeting. Mr. Daniel testified that he was a competitor of the LLC and that he performed the same services as the LLC. Mr. Daniel testified that at the time of the meeting, tax season was coming up shortly and Fassi and Michael Fassi expressed to him that they wanted to know if he was going to be available so that he could do the clients' taxes. Confirmation of the meeting and its contents are contained in e-mails prepared by Mr. Daniel and sent to Fassi and Michael Fassi on November 8, 2010, which was introduced into evidence as Exhibit 70.

Following the meeting, Mr. Daniel reached an agreement with the Plaintiffs and Michael Fassi whereby he did lease office space from the Plaintiffs and Fassi and Michael Fassi referred clients to him for accounting and tax work. Mr. Daniel testified he moved into Plaintiffs' offices in December, 2010.

Ian Craig was a former employee of the Plaintiffs who was Plaintiffs' computer technician from mid-May, 2010, through mid-December, 2010. Mr. Craig testified that he was introduced to Mr. Daniel two weeks before he left Plaintiffs' employment in December, 2010. Mr. Craig testified that he was told to provide Mr. Daniel with complete access to the Plaintiffs' server which he did. Exhibit 72 consists of a series of screenshots of images from the Plaintiffs' computer system. Exhibit 72 includes a screenshot of a portion of Plaintiffs' computer system which includes a folder titled "don." Mr. Daniel testified that he assumed that was a folder referring to him. Included in Exhibit 72 are a series of Pro Series client files a significant number of which had been modified on December 1, 2010.

Mr. Daniel testified that he was introduced to several clients of the LLC by both Fassi and Michael Fassi for the purpose of doing accounting and tax work for those clients. Plaintiffs do not dispute that they have referred clients to Mr. Daniel. Mr. Daniel produced a series of QuickBooks reports from his records which detail those LLC clients he performed work for including the amount he collected for such work. Exhibit 74. Mr. Daniel testified that he keeps track of who refers him clients and that the record set forth on the first two pages of Exhibit 74 are those clients which have been referred to him by Fassi and Michael Fassi. Page 2 of Exhibit 74 states that Mr. Daniel collected a total of \$13,679.25 for the work he performed for the LLC' clients. Mr. Daniel testified that in addition to the monies set forth on Exhibit 74 which he collected he performed and collected an additional \$1,200 worth of services for clients of the LLC. Mr. Daniel further testified that Fassi had reviewed the first page of Exhibit 74 and that the handwriting on that page was Fassi's. Included on the first page of Exhibits 74 are 6 new non-LLC clients which have been referred to Mr. Daniel by Fassi and Michael Fassi.

The Court finds that beginning no later than June 9, 2010, the Plaintiffs engaged in a clear violation of the Non-Compete through a deliberate pattern of conduct to refer clients sold to the LLC and new referrals and leads to competitors of the LLC. The Court finds that the Plaintiffs'

actions constitute a material breach of the Non-Compete. The Court finds that Plaintiffs' violation of the Non-Compete has caused the LLC damages.

Mr. Boyd provided testimony as to the damages suffered by the LLC based upon the violations of the Non-Compete. Mr. Boyd testified that for those LLC clients for whom Mr. Daniel had performed services he calculated the LLC's damages to be between \$30,000-35,000. Mr. Boyd testified he utilized the same type of analysis that is used by Mr. TenBrook. Mr. Boyd used the figure of \$13,679 as a base figure and assumed that the clients would be clients of the LLC for a period of five years and applied a discount rate of 18% in order to arrive at his damages calculation. The Court finds that Mr. Boyd's methodology in calculating the damages are reasonable and persuasive. The Court finds that the LLC has suffered damages by Plaintiffs' breach of the terms of the Non-Compete by referring the LLC's clients and leads to Mr. Daniel in the amount of \$35,000.

Mr. Boyd further testified that the LLC had lost a total of 71 clients for tax year 2010. Mr. Boyd testified that such attrition is much higher than anticipated for the second year following the sale of the Practice. Mr. Boyd stated he believes the LLC is entitled to compensation for the loss of these clients as well. Mr. Boyd testified that the basis for his belief was that the Plaintiffs had violated the Non-Compete, and had not provided the items listed in Mr. TenBrook's report. Mr. Boyd testified that the amount of damages for the loss of these clients was \$58,000. The Court is not persuaded by Mr. Boyd's methodology, calculations and testimony regarding damages for loss of clients. The Court finds that Defendants have failed to meet the burden of proof on this issue and the Court will not award any damages for loss of clients as distinguished from clients referred to Mr. Daniel by Plaintiffs where the Court has awarded damages.

E. Interference with Contract.

The LLC presented evidence that Michael Fassi was involved in the original negotiations for the sale of the Practice to the LLC. Ron Marshall. The LLC presented evidence that Michael Fassi was directly involved in the search for a CPA to be involved in "client tax preparation services." Exhibit 45, Fassi. Don Daniel testified that Michael Fassi was directly involved in the negotiations with Don Daniel whereby the Plaintiffs reached an agreement with Mr. Daniel whereby he would lease office space from the Plaintiffs and the Plaintiffs and Michael Fassi would refer clients of the LLC to Mr. Daniel. Don Daniel also testified that Mr. Fassi introduced clients of the LLC to Mr. Daniel for purposes of Mr. Daniel doing accounting and tax work for the LLC's clients. Michael Fassi was aware of and involved in the referral of prospective clients and leads to the LLC's competitors.

The Court finds that Michael Fassi was aware of the sales documents between the Plaintiffs and the LLC including the Non-Compete. The Court finds that the LLC has been

damaged by Michael Fassi's referral of clients of the LLC to Don Daniels. The Court finds that the LLC has suffered damages by Michael Fassi's referring the LLC's clients and leads to Mr. Daniel in the amount previously awarded by the Court in the non-compete damages amount.

F. Police Report.

On May 20, 2010, following a series of e-mails between Defendants and Fassi, Plaintiffs terminated the LLC's lease. Prior to the termination Fassi instructed Ian Craig to reduce the LLC's access to the Plaintiffs' server including purchased information, which he did. Also on May 20, 2010, the Defendants removed their data from the Michelle computer and Mr. Boyd attempted to download a program called eraser onto the Michelle computer. Mr. Boyd testified that the erasure program was never installed onto the Michelle computer nor was it ever run on that computer or any other computers. Mr. Boyd testified that neither he nor anyone else associated with the LLC deleted or destroyed any data belonging to the Plaintiffs from any part of the Plaintiffs' computer system.

On July 14, 2010, Fassi requested Mr. Craig try to retrieve certain information from the Michelle computer. When Mr. Craig started up the Michelle computer, he noted that the eraser program had been downloaded onto the computer. Exhibit 14. Mr. Craig notified Fassi of the presence of the eraser program in the presence of Michelle Parks. Fassi ordered Mr. Craig to turn off the Michelle computer and take it into his workspace. Mr. Craig did as requested and the Michelle computer remained in Mr. Craig's workspace until August, 2010, when Fassi ordered him to remove the hard drive from the Michelle computer and give the hard drive to her.

Mr. Craig testified that he did not conduct any analysis on the Michelle computer nor did he try to run any of the programs on the Michelle computer. Fassi testified that she did not do, or have done, any analysis of the Michelle computer to determine what programs and files were removed from or remained on that computer. The Court takes judicial notice of the pleadings in this matter and notes that on July 27, 2010, the Plaintiffs filed the Motion to Amend Complaint to add a fifth claim for relief for computer crime. The Court denied Plaintiffs' motion on September 15, 2010. In October, 2010, Plaintiffs contacted the Fort Collins Police Department and made a criminal report alleging that Defendants had permanently destroyed information located on the Michelle computer and had stolen a printer from the Plaintiffs. Exhibits 46 and 47. Exhibit 46 includes the listings of the types of information which the Plaintiffs stated were deleted from the Michelle computer.

Dave Walling testified that he had tested the Michelle computer and opined that the eraser program had been downloaded on but not installed on the Michelle computer. Mr. Walling testified that the eraser program had not been run on the Michelle computer. Mr. Walling testified that he had been able to identify and restore all of the files which Mr. Boyd had deleted from the Michelle hard drive. Mr. Walling testified that the information which had been deleted was client related tax type files. Mr. Walling testified that he had searched the Michelle

computer, both deleted and non-deleted files, looking for the types of information contained on the list on page 2 of Exhibit 46. Mr. Walling stated he was unable to locate the types of files set forth on the list contained on Exhibit 46.

Michelle Parks testified that she was the person in charge of the marketing for the Plaintiffs and that she managed the software related to the same including the Gorilla software. Ms. Parks testified that all of the Plaintiffs' marketing materials, artwork, and logos were always on the server and remained there during the entire time she was employed until the end of October, 2010. Ms. Parks testified that the divorce client documentation and family law software was located on Fassi's computer and that she was aware of the same because Fassi requested that she scan put the same onto Fassi's computer.

Defendants introduced Exhibit 50 which the Court finds is the most damaging piece of evidence to the Plaintiffs' assertions that the information listed on Exhibit 46 had been permanently destroyed by the Defendants. The third paragraph of Exhibit 50 states that Plaintiff has a "backup of the files deleted by Marshall Boyd." Mr. Boyd testified that he discovered Exhibit 50 on the Plaintiffs' computer system and identified the location on a screen shot of Plaintiffs' computer on Exhibit 43. Clearly, Plaintiffs had maintained copies of all of the information they claimed in the police report had been destroyed by the Plaintiffs.

Ron Marshall and Darryl Boyd testified that Fassi had threatened to file the police report at a mediation held between the parties in October, 2010, if Defendants did not agree to settlement terms proposed by Plaintiffs. The evidence is that the Fort Collins Police Department decided not to pursue a criminal complaint based upon Plaintiffs' criminal report.

Mr. Marshall and Mr. Boyd testified they are both licensed professionals and that the filing of the criminal report placed their careers and livelihoods in jeopardy. Both Mr. Marshall and Mr. Boyd testified that they were very concerned and upset regarding the filing of the criminal report. Mr. Boyd testified that he holds certifications as a fraud examiner and evaluations analyst. Mr. Boyd testified that if a criminal complaint had been filed based upon the criminal report he would have to resign his position on the local school board, resign his teaching position, and report the filing to the state CPA licensing board.

The Court finds that there was no basis in fact for the filing of the Motion to Amend Complaint and the police report. The Court further finds that the filing of the Motion to Amend and police report were done for the purposes of harassing the Defendants and to gain unfair advantage in this matter.

Mr. Boyd testified that he incurred emotional type damages as a result of the filing of the criminal report. Mr. Boyd testified that he was asking for compensation equal to two months of his normal gross earnings of \$10,000 per month as damages. The Court finds that a portion of Mr. Boyd's request is reasonable in light of the Plaintiffs actions in this matter. The Court

hereby finds that Mr. Boyd has incurred emotional type damages in the amount of \$10,000.

III. CONCLUSIONS OF LAW AND ORDERS

A. Breach of Contract (Sales Agreement)

In this matter it is undisputed that valid contracts existed between the Plaintiffs and the LLC. Under contract law, a party to a contract cannot claim its benefit where he is the first to violate its terms. However, a breach must be material before a violation deprives a party of the right to demand performance by other. *Coors v. Security Life of Denver Ins. Co.*, 112 P.3d 59, 64 (Colo. 2005). Whether a breach is material is a question of fact. A material term goes to the root of the matter or essence of the contract. Materiality must be assessed in the context of the expectations of the parties at the time the contract was formed. The trier of fact should consider the importance or seriousness of the breach and the likelihood that the injured party will nonetheless receive substantial performance. *Id.*

In making its findings in this matter the Court reviewed the exhibits and heard the testimony of the witnesses. The Court also considered: the expectations of the parties as embodied in the agreements; the seriousness of the breaches; and, the likelihood that the LLC will receive substantial performance under both the Sales Agreement and the Non-Compete. Based on the foregoing, the Court has found that the Plaintiffs have committed several material breaches of both the Sales Agreement and the Non-Compete as detailed above.

Colorado cases recognize that partial failure of consideration is not a defense to a promissory note, unless the failure is apportionable, in which case the remedy lies in a set-off, or by an original action for damages. *Converse v. Zinke*, 635 P.2d 882, 887 (Colo. 1981). The Court finds that in this matter, apportionment is an available remedy regarding the Plaintiffs' breaches of the terms of the Sale Agreement. The amount remaining owing is \$55,211.04 and the Court has found that the total of the LLC's damages from the breaches is \$26,432. Applying the principles of the *Converse* case, the Court hereby offsets the amount of \$26,432 from the remaining balance owed under the Note. The result is the Court Orders that the remaining balance due under the Note shall be \$28,779.

B. Breach of Contract (Non-Compete)

The principles of law set forth in the section above apply to cases which involve violations of covenants not to compete. *Electrical Distributors, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1086 (C.A.10 (Utah) 1999).

The Court in *National Propane Corp. v. Miller*, 18 P.3d 782, 788 (Colo.App. 2000), stated the following regarding engaging in business for the benefit of others when one has

executed a non-compete agreement:

But, engaging in business under the guise of assistance to others is a breach of a noncompetition covenant, as is doing business through “dummy operators.” *Gold Messenger, Inc. v. McGuay*, supra (covenantors will not be allowed to do through others what they could not do directly).

Here, the Court has found that the Plaintiffs materially breached the terms of the Non-Compete by referring clients it sold to the LLC and providing additional leads and referrals to Don Daniel. In considering the amount of damages to award the LLC for the Plaintiffs’ breaches of the Non-Compete, the Court’s objective was to place the LLC in the position it would have been had there not been the breach. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo.App. 1999). The Court is aware that in cases such as these the prevailing party is therefore entitled to recover the amount of damages necessary to accomplish the foregoing result. *Id.* In so doing, the Court has found that the LLC’s damages for the breaches of the Non-Compete are \$35,000 regarding those clients referred to Don Daniel and an additional \$58,000 for loss of the 71 clients for the 2010 tax year. The Court Orders that the LLC’s damages for breaches of the Non-Compete total \$35,000.

C. Declaration of Valid Non-Compete.

Section 8-2-113(2)(a) C.R.S., specifically permits covenants not to compete in connection with contracts for the purchase and sale of a business or the assets of a business. Covenants not to compete, when ancillary to the sale of business, protect the buyer’s right to enjoy the business goodwill for which it paid. *Reed Mill & Lumber Co., Inc. v. Jensen*, 165 P.3d 733, 736 (Colo.App. 2006). Good will is considered to be an incident of a continuing business having a particular locality or name, and includes the expectation of continued and repeated public patronage. *Id.* The purpose of the covenant is not to control the seller’s future income, but to prevent the seller from soliciting the buyer’s new customers and to protect the good will inherent in the purchase. *DBA Enterprises, Inc. v. Findlay*, 923 P.2d 298, 302 (Colo.App. 1996).

The key element of a valid covenant not to compete is whether the covenant is reasonable. *Reed*, 165 P.3d at 736. The reasonableness of covenants ancillary to the sale of business depends on whether the restraint on competition provides fair protection to the buyer’s purchase of good will, while imposing restrictions no greater than necessary to protect the value of that good will. *Barrows v. McMurtry Mfg. Co.*, 54 Colo. 432, 131 P. 430 (1913).

Here, the terms of the Non-Compete are reasonable as to both term (10 years) and geographical scope (Larimer and Weld counties.) The Court concludes and orders as a matter of law that the Non-Compete is valid and remains binding upon the Plaintiffs and the LLC for the duration of its term.

D. Abuse of Process.

Abuse of process requires proof of an ulterior purpose in the use of judicial proceedings and willful actions by a party in the use of process which are not proper in the regular conduct of a proceeding. *Aztec Sound Corp. v. Western States Leasing Co.*, 510 P.2d 897, 899 (Colo. App. 1973). Classic examples of the requisite improper use include the abuse of process to accomplish a coercive goal which is not the intended legal purpose of the process. *James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994).

Here, the Court has found that there was no basis in fact for the Plaintiffs' filing of the Motion to Amend Complaint and the police report and that the filing of the Motion to Amend and the police report were done for the purposes of harassing the Defendants and to gain unfair advantage in this matter.

The Court Orders that the Mr. Boyd's damages for the Plaintiffs abuse of process in this matter are \$10,000.

E. Intentional Interference with Contractual Relations and Intentional Interference with Prospective Business Advantage.

The goal to be achieved by these forms of the tort is to protect the integrity of contracts. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1196 (Colo. App. 2009). The tort of interference with existing or prospective contractual relations is an intentional tort. *Id.* The *Harris* Court stated there are the following forms of these torts:

- a. The first form occurs when a defendant causes a third party not to perform the terms of an existing contract with a plaintiff. It is defined by Restatement section 766: One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.
- b. The second form occurs when a defendant interferes with a prospective business relation between a plaintiff and a third party. Its elements are listed in Restatement section 766B: One who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation. In order to prove this form of the tort, it is not necessary to show that an underlying contract exists, but, rather, the

plaintiff must show that intentional and improper interference prevented a contract from being formed. 290 P.3d at 1195.

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. *Harris*, 209 P.3d at 1196.

The Court has found that Michael Fassi was fully aware of the contractual relationships between the Plaintiffs and the LLC. The Court has found that Michael Fassi deliberately engaged in a pattern of conduct to interfere with the LLC's contractual rights with those clients sold to it by the Plaintiffs. The Court has found that Michael Fassi deliberately engaged in a pattern of conduct which interfered with the LLC's prospective business advantage with those referrals and leads that should have been referred to the LLC and instead were referred to Don Daniel.

The Court has found that the LLC's damages from Michael Fassi's interference with contractual rights and prospective business advantage are equal to the amount of the LLC's damages for breach of the Non-Compete, \$35,000. The Court hereby Orders that the LLC's damages for the interference with contractual rights and prospective business advantage are \$35,000.

F. Permanent Restraining Order.

The LLC seeks the issuance of a permanent restraining order barring the Plaintiffs from violating the Non-Compete by referring the clients sold to it to competitors and by referring prospective clients and leads to competitors. The Court in *Langlois v. Board of County Com'rs of County of El Paso*, 78 P.3d 1154, 1158 (Colo. App. 2003) established the standard for a party seeking permanent injunctive relief. In order to obtain a permanent injunction a party must show that: (1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. Here, the LLC has established all four elements set forth above enabling it to obtain a permanent injunction.

First, the LLC has achieved success on the merits. Second, as shown by the referral of the LLC's clients to Don Daniel, the LLC will continue to suffer irreparable harm unless the injunction is issued. Third, the threatened injury to the LLC outweighs any harm which may be caused to the Plaintiffs. This is particularly the case since the Plaintiffs are claiming that they receive no monetary benefit from the referral of clients to others. Fourth, the injunction in this

matter will not adversely impact the public interest.

The Court hereby Orders that a permanent restraining order be entered barring the Plaintiffs, and Michael Fassi, from referring the clients sold to the LLC by the Plaintiffs to the LLC's competitors and from referring prospective clients and leads to the LLC's competitors.

G. Attorneys Fees and Costs.

The Court Orders that pursuant to the terms of the sale documents, the LLC is the prevailing party in this matter. Because it is the prevailing party in this matter, the LLC is entitled to its attorneys fees and costs.

IV. JUDGMENT

Based upon the foregoing Findings, Conclusions of Law, and Orders, the Court issues the following Judgments:

A. On the LLC's claims for breach of the Sales Agreement and breach of the Non-Compete, the Court hereby enters judgment in the amount of \$32,653 against the Plaintiffs, jointly and severally, in favor of the LLC. The judgment amount represents the LLC's damages for the breaches of the Non-Compete offset by the remaining balance of the Note.

B. On the Defendants' claim for abuse of process, the Court hereby enters judgment in the amount of \$10,000 against the Plaintiffs, jointly and severally, in favor of Darrell Boyd.

C. On the LLC's claims for Intentional Interference with Contract, and Interference with Prospective Business Advantage, the Court hereby enters judgment in the amount of \$35,000 against Michael Fassi in favor of the LLC. This judgment shall be joint and several with the judgment against Plaintiffs on the LLC's claims for breach of Sales Agreement and Non-Compete.

D. On the LLC's claim for declaratory judgment on the validity of the Non-Compete the Court hereby enters declaratory judgment that the Non-Compete is valid and in full force and effect for its remaining term.

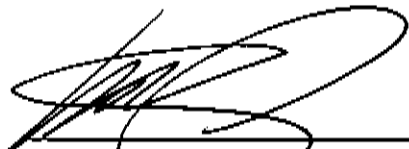
E. On the LLC's claim for issuance of a permanent restraining order, the Court enters a permanent restraining order barring the Plaintiffs, and Michael Fassi, from referring the clients sold to the LLC by the Plaintiffs to the LLC's competitors and from referring prospective clients and leads to the LLC's competitors.

F. Judgment is hereby entered against the Plaintiffs and in favor of the LLC for the LLC's

reasonable attorney fees and costs as the prevailing party under the sale documents. The LLC is to present a Bill of Fees and Costs pursuant to Rule 121 to the Court within 15 Days of the Date of This Order. The amount of the judgment will be determined by the Court after it considers the Bill of Fees and Costs.

Dated: January 23, 2012

BY THE COURT:



DANIEL J. KAUP
District Court Judge

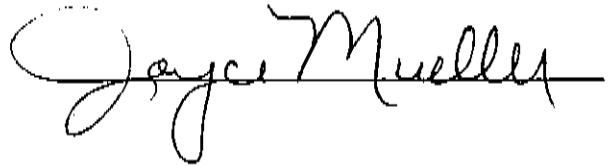
CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing ORDER was delivered to the attorney of record and parties appearing *pro se* in the following manner:

For counsel in Fort Collins who have agreed to such procedure, by placing said copy in the attorney pick up files located in the Larimer County Justice Center, 201 LaPorte Avenue, Suite 100, Fort Collins, Colorado.

For all other counsel and/or parties appearing *pro se*, by placing said copy in the United States Mail with the correct postage affixed thereon.

For all other counsel, by efileing said copy through LexisNexis File & Serve.

A handwritten signature in black ink that reads "Jayce Mueller". The signature is written in a cursive style and is positioned above a horizontal line.

cc:

Erik G. Fischer
Steward W. Olive