IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRIX HR, LLC	:	CIVIL ACTION
	:	
v.	:	
	:	
ON-SITE STAFF MANAGEMENT, INC., et al.	:	NO. 04-5660
	:	

MEMORANDUM OF DECISION

THOMAS J. RUETER
Chief Magistrate Judge

March 25, 2008

The court conducted a bench trial in the above-captioned case from October 22 to October 24, 2007. This Memorandum of Decision constitutes the court's Findings of Fact and Conclusions of Law on the issues raised at trial.

I. FINDINGS OF FACT

A. The Parties

1. Plaintiff, Centrix HR, LLC ("HR"), is a Delaware Limited Liability Corporation, with a registered address of 275 Commerce Drive, Suite 330, Fort Washington, Pennsylvania 19034. (Complaint ¶ 1.) HR was owned, at all times relevant hereto, by Blaise Mazzoni, and was engaged in the temporary staffing services business.

2. Defendant, On-Site Staff Management, Inc. ("On-Site"), d/b/a/ Centrix Staffing, is a corporation organized under the laws of the Commonwealth of Pennsylvania with a principal place of business at 511 North Broad Street, Philadelphia, Pennsylvania 19123. (Complaint ¶ 2.) On-Site was owned, at all times relevant hereto, by defendant William Black, and is engaged in the temporary staffing services business.

3. Defendant, Centrix HR Logistics, Inc. ("Logistics"), is a corporation organized under the laws of the Commonwealth of Pennsylvania with a principal place of business at 961 Pottstown Pike, Exton, Pennsylvania 19304. (Complaint ¶ 4.) Logistics was owned, at all times relevant hereto, by defendant William Black, and was engaged in the temporary staffing services business.

4. Defendant, William Black, is an individual, residing in Pennsylvania. (Complaint ¶ 5.) He is the President and sole stockholder of both On-Site and Logistics.

B. <u>The Licensing Agreement</u>

5. The case concerns the alleged breach of a Licensing Agreement, dated March 15, 2002, between plaintiff, HR, the Licensor, and defendant, Logistics, the Licensee. (Ex. P-2.) The Licensing Agreement was drafted by plaintiff's attorney. (N.T., 10/22/07 at 160.)

6. Defendants Logistics and William Black entered into a Guaranty Agreement the same day, guaranteeing the performance and payment of all HR's obligations "pursuant to and/or arising out of and pursuant to the Licensing Agreement." (Ex. P-3 at 1.) The agreement further provided that the Guarantors "shall not be responsible for any loss incurred by . . . [HR] . . . arising out of [HR's] own gross negligence or intentional misconduct or intentional material breach in its performance of the Licensing Agreement." (Ex. P-3 ¶ 9; N.T., 10/22/07 at 71-72.)

7. Under the Licensing Agreement, HR granted to Logistics the right to use the name Centrix HR in connection with the operation of a business by which Logistics provided marketing and recruitment services in the staffing and temporary help industry as well as

employment related services. (Ex. P-2 ¶ 1.)

8. HR's obligations under the Licensing Agreement included delivering invoices to customers of Logistics for payment for services rendered by employees of Logistics to its clients. (Ex. P-2 ¶ 3(A).)

9. Logistics was to instruct all clients to make full payment for services to HR at an address specified by HR. (Ex. P-2 ¶ 5; N.T., 10/22/07 at 119-20.)

10. The Licensing Agreement further provided that HR would be responsible for processing payroll for all temporary workers, which included collecting, reporting, and paying all applicable federal, state and local payroll taxes and unemployment insurance. (Ex. P-2 ¶ 3(B); N.T., 10/22/07 at 163.) HR used a funding source, such as a bank, which would advance monies to HR to fund payroll while it awaited payments from customers. (N.T., 10/22/07 at 120-21.)

11. The Licensing Agreement further required HR to deposit all amounts received from its clients into a General Operating Account ("GOA"). All funds necessary to timely pay HR's payroll tax, withholdings, and statutory additions were required to be transferred to an escrow account from the GOA. (Ex. P-2 ¶ 2; N.T., 10/22/07 at 174.)

12. The Licensing Agreement also provided that any funds received from clients, or from a funding source in excess of the funds necessary to timely pay: (1) HR's payroll tax, withholdings, and statutory additions; (2) any funding fee charged to HR by the funding source; and (3) service fees due and owing to Logistics, were to be deposited into a Reconciliation Account, an escrow account, and dispersed to Logistics on a daily basis. (Ex. P-2 ¶ 6.)

13. The Licensing Agreement also required HR to produce and deliver to Logistics reports related to HR's invoicing, payroll collection and benefits administration services on a weekly basis. (Ex. P-2 ¶ 6; N.T., 10/22/07 at 164.)

14. The Licensing Agreement prohibited HR from using any funds collected from clients except as expressly provided in the Licensing Agreement. (Ex. P-2 ¶ 6.) The Licensing Agreement did not authorize HR, or its agents, to use funds to make loans or to pay expenses of any other company not a party to the Licensing Agreement. Id.

15. The Licensing Agreement also prohibited HR and Logistics from engaging in any deceptive, misleading, or unethical practice, which might be detrimental to either party. (Ex. P-2 ¶ 11(A).)

16. The Licensing Agreement further required HR to provide Logistics with monthly, quarterly, and annual financial statements, including balance sheets and income statements. (N.T., 10/22/07 at 172.) The monthly and quarterly statements were to be provided within thirty (30) days after the end of each month and quarter respectively, and the annual financial statements were to be provided within sixty (60) days of the end of each fiscal year. HR further agreed to provide copies of its state and federal income tax returns to Logistics within ten (10) days of their filing. (Ex. P-2 ¶ 15.)

17. At the expiration or upon termination of the Licensing Agreement, HR agreed to sell, assign and transfer its name to Logistics in consideration for One Dollar ($1.00). (Ex. P-2 ¶ 18.)

18. Pursuant to the Licensing Agreement, Logistics could terminate the Agreement without prior notice to HR, in the event HR, as a result of its own material

negligence, had committed a violation of the Licensing Agreement for which HR received written notice from Logistics. (Ex. P-2 ¶ 20.)

C. <u>William Black, Robert Brown and Blaise Mazzoni</u>

19. In 1998, William Black and Robert Brown owned the following three businesses:

1. Pratt Temporaries, Inc., d/b/a/ London Personnel Services, Inc. ("PTI"), a staffing company which provided temporary employees to clients;

2. Transit Aide, Inc. ("Transit Aide"), a transportation company which provided transportation services for the temporary employees; and

3. Employers Management Group Inc. ("EMG"), a company that provided back office functions for PTI and Transit Aide, such as processing cash receipts and preparing payroll. As explained by Mr. Mazzoni, EMG was a professional employer organization, which provided human resources services, such as payroll and benefits, to several clients, one of which was Transit Aide. (N.T., 10/22/07 at 51-54; N.T., 10/23/07 at 118-19, 244-47.) EMG had numerous clients throughout the eastern United States. (N.T., 10/23/07 at 276.)

20. Messrs. Black and Brown considered selling the above businesses and hired Blaise Mazzoni, a Certified Public Accountant, to complete an audit of the businesses. (N.T., 10/23/07 at 45-50; N.T., 10/23/07 at 244.) In 1999, Mr. Mazzoni became an employee of EMG as its Chief Financial Officer. (N.T., 10/22/07 at 52; N.T., 10/23/07 at 245-46, 255.)

21. In late 2000, Messrs. Black and Brown ended their professional affiliation due to different business philosophies. (N.T., 10/22/07 at 55; N.T., 10/23/07 at 248.)

22. Mr. Black ended his ownership interest in EMG, effective April 1, 2001, by executing a Stock Transfer Agreement with Mr. Brown. (Exs. D-1, D-2; N.T., 10/22/07 at 152; N.T., 10/23/07 at 249-50.) Centrix HR-PEO ("HR-PEO"), a company owned by Mr. Mazzoni, managed EMG after Black relinquished ownership to Brown. (N.T., 10/22/07 at 154.)

23. Messrs. Black and Brown divided their respective interests in PTI, whereby Mr. Black retained sixty percent of the staffing offices, and Mr. Brown retained the remaining offices. (N.T., 10/22/07 at 151; N.T., 10/23/07 at 251-53.)

24. Mr. Black retained ownership of Transit Aide. (N.T., 10/22/07 at 55; N.T., 10/23/07 at 251; N.T., 10/24/07 at 41.)

25. At about the same time, Mr. Mazzoni formed his own corporations: HR, First Staff, LLC ("First Staff"), HR-PEO, Centrix Source and Centrix Source IT. (N.T., 10/22/07 at 57.) HR-PEO was formed to manage EMG, and to prepare and conduct all of the administrative functions for HR. (N.T., 10/22/07 at 58.)

26. At the time Mr. Black negotiated the Licensing Agreement between his company, Logistics, and Mr. Mazzoni's company, HR, Mr. Mazzoni negotiated a similar licensing agreement between his company, First Staff, and Mr. Brown's company, Hirevision, Inc. ("Hirevision"). (N.T., 10/23/07 at 266.) Mr. Black was not an owner, officer, or employee of First Staff or Hirevision. Id. at 266-67.

27. Neither Mr. Black nor Mr. Brown intended to stay connected in business. Thus, their respective companies, Logistics and Hirevision, entered into separate licensing agreements with HR. (N.T., 10/24/07 at 37-38.)

28. Logistics was not a party to any contracts, other than the Licensing Agreement, with HR. (N.T., 10/23/07 at 10-11, 266-67.)

D. Conduct of the Parties

29. In early 2002, Mr. Black moved his office from Fort Washington, Pennsylvania to Norristown, Pennsylvania. (N.T., 10/24/07 at 49.) Once he left the Fort Washington location, Mr. Black did not have direct access to the financial records of HR. (N.T., 10/24/07 at 49-50.)

30. To operate the temporary staffing business, HR required a funding source. (N.T., 10/22/07 at 164-65; N.T., 10/23/07 at 268-69.) Starting in May, 2002, Oxford Commercial Funding ("Oxford") provided funding to HR. (N.T., 10/23/07 at 270-71.) However, in mid-2002, Oxford went out of business, which further reduced revenues to HR. (N.T., 10/22/07 at 217-18.)

31. EMG was losing money at the time Oxford stopped funding. (N.T., 10/23/07 at 15-16; N.T., 10/22/07 at 217.) At this time, Mr. Mazzoni began to allocate funds to cover expenses for the entire group of companies, including those owned by Mr. Black and Mr. Brown. (N.T., 10/23/07 at 16-20.) At this same time, EMG owed money to the IRS. (N.T., 10/22/07 at 221-23.)

32. Mr. Mazzoni secured another funding source, CIB Marine Commercial Finance, LLC ("CIB Marine"), for HR. (N.T., 10/22/07 at 164.)

33. Mr. Mazzoni testified that HR-PEO performed administrative services for HR, First Staff and EMG, and that HR-PEO took all of the expenses from these three companies and allocated them to HR, First Staff and EMG, and in some instances to Logistics,

Hirevision, and Transit Aide. Mr. Mazzoni used funds that were received from his funding source to achieve this. (N.T., 10/23/07 at 16-20.)

34. Logistics seldom received funds directly from the clients. Typically, the funding source advanced funds to HR. The clients sent monies they owed for services received to an account controlled by the funding source. (N.T., 10/22/07 at 120.) HR was obligated under the Licensing Agreement to account for those funds and to pay all salaries, payroll taxes, insurance and operating expenses, from monies received from the funding source. The remaining funds were to be distributed to Logistics for operating expenses or commissions. HR would retain funds for its administrative fee. (N.T., 10/22/07 at 65-67, 120-22, 162-63, 172.)

35. Mr. Mazzoni acknowledged that the Licensing Agreement prohibited the use of funds collected from clients that was inconsistent with the terms of the contract. However, he admitted that he neither followed this provision of the contract nor credited the accounts as required by the Licensing Agreement. (N.T., 10/22/07 at 175-76, 184.)

36. Mr. Mazzoni admits that HR failed to comply with federal law by failing to pay federal payroll taxes. (N.T., 10/22/07 at 194.) He explained that he chose not to pay payroll taxes because he instead disbursed funds to pay the operating expenses of all of the companies, whether controlled by himself, Mr. Brown or Mr. Black. (N.T., 10/22/07 at 202; Ex. D-4.)

37. During the course of the contractual relationship between HR and Logistics, Mr. Black did not receive weekly financial reports and periodic financial statements from Mr. Mazzoni, which were required pursuant to the Licensing Agreement. (N.T., 10/24/07 at 26-27.)

38. Mr. Black became concerned about Mr. Mazzoni's failure to provide financial reports as required by the Licensing Agreement. Mr. Black met Messrs. Brown and Mazzoni at his office in November, 2002. At this time, Mr. Mazzoni presented Mr. Black and Mr. Brown with spreadsheets which indicated allocations of expenses among the various companies. (N.T., 10/24/07 at 29-32.)

39. Mr. Mazzoni believed that it was his obligation to keep "all the accounts" among the group of companies positive; specifically, Mr. Mazzoni believed that he was responsible for maintaining positive accounts for HR, Logistics, Transit Aide, EMG and HR-PEO. (N.T., 10/22/07 at 81.)

40. Mr. Black was concerned that Mr. Mazzoni had included expenses incurred by HR-PEO and EMG in his calculation of the expenses attributed to Logistics. (N.T., 10/24/07 at 32.)

41. Mr. Mazzoni decided, without the consent of Mr. Black, to allocate expenses to the various Brown and Black companies based upon the sales value of those companies. (N.T., 10/24/07 at 32-33.) Mr. Mazzoni acknowledged that the general ledger for HR establishes that funds were transferred back and forth between HR and First Staff, between HR and Hirevision, and between HR and Centrix Source, IT. (N.T., 10/23/07 at 70-76.) Mr. Mazzoni also transferred HR's funds to PTI. (Ex. P-31.)

42. At the request of Messrs. Black and Brown, Mr. Mazzoni revised numbers on the spreadsheets representing the allocation of expenses during the November, 2002 meeting. However, Mr. Brown and Mr. Black remained concerned with the calculations since the allocations of expenses were not in conformity with their respective Licensing Agreements.

(N.T., 10/24/07 at 34-41.)

43. Mr. Mazzoni failed to provide supporting documentation for the information contained in the spreadsheets, which would have identified sales numbers. (N.T., 10/24/07 at 35-36.)

44. With the exceptions of Transit Aide and Logistics, Mr. Black never authorized or intended Mr. Mazzoni to use funds belonging to Logistics for the benefit of any other company. (N.T., 10/24/07 at 37-38.) Mr. Mazzoni admitted that he used funds from HR accounts to fund expenses incurred by companies other than Logistics. (N.T., 10/22/07 at 202-03.) Mr. Mazzoni did not know how much money in the HR account was transferred to entities other than Logistics. (N.T., 10/22/07 at 262.)

45. In February, 2003, Mr. Mazzoni met with Mr. Black. Again, Mr. Mazzoni presented Mr. Black with spreadsheets similar to those presented in November, 2002, which contained allocations of costs among the various companies. The costs increased from the time the spreadsheets originally were provided. (N.T., 10/24/07 at 39-41.) During this meeting, Mr. Mazzoni remained unable to provide balance sheets and income statements to Mr. Black. (N.T., 10/22/07 at 235.)

46. At the above meeting, Mr. Mazzoni also presented a spreadsheet relating to Transit Aide, whose books and records were maintained by Mr. Mazzoni. Mr. Black demanded return of Transit Aide's books and records, because he questioned the accuracy of Mr. Mazzoni's assessment of Transit Aide's financial status. Mr. Mazzoni initially refused to turn over the records, but later relented, transferring the records to Mr. Black in March, 2003. (N.T., 10/22/07 at 238-39; N.T., 10/24/07 at 42-46.)

47. Following the dispute over Transit Aide's books and records, Mr. Mazzoni installed a security system at the Fort Washington office. (N.T., 10/24/07 at 44.)

48. By letter dated February 26, 2003, Mr. Mazzoni requested Mr. Black to modify the Licensing Agreement to obligate Mr. Black to repay loans extended to Transit Aide. (Ex. P-5; D-14.)

49. Mr. Black refused to sign a Licensing Agreement Modification prepared by Mr. Mazzoni's attorney, Joseph Vaughan, Esquire. (N.T., 10/22/07 at 241.)

50. During the summer of 2003, Mr. Mazzoni issued checks to temporary workers with insufficient funds. (N.T., 10/24/07 at 53.) Soon thereafter, Mr. Black received complaints about the returned checks from the workers. Mr. Black was concerned that he would lose the services of his employees if they could not be paid. (N.T., 10/24/07 at 53-54, 73-74, 83-84.)

51. Mr. Mazzoni hired consultants to analyze the financial operations of his companies and the companies belonging to Messrs. Brown and Black. At no time did Mr. Black authorize the hiring of consultants on behalf of Logistics. (N.T., 10/24/07 at 52.)

52. In September, 2003, Mr. Black was asked to attend a meeting with Mr. Mazzoni's consultants. (N.T., 10/24/07 at 54.)

53. Mr. Black was presented with a business proposal which he had not seen prior to the meeting. (N.T., 10/24/07 at 55.)

54. During the September, 2003 meeting, Mr. Mazzoni remained unable to provide accurate financial information relating to HR and Logistics. (N.T., 10/24/07 at 58.)

55. After this meeting, the relationship between Messrs. Mazzoni and Black deteriorated. (N.T., 10/24/07 at 60.)

56. On October 9, 2003, HR (through its owner, Mr. Mazzoni) and Logistics (through its owner, Mr. Black) signed the LOU, which was drafted by Mr. Mazzoni's attorney. Mr. Mazzoni insisted that Mr. Black sign the LOU before HR paid an American Express bill in the amount of $23,500 incurred by Transit Aide. (N.T., 10/22/07 at 98-107.)

57. The LOU provided that the parties would enter into a "licensing agreement" or a "fee for service agreement" based upon one of two potential fee schedules commencing January 1, 2004. (Ex. P-10 ¶ 1.)

58. The LOU provided that the parties would, within thirty days, negotiate the "responsibility and amounts" of loans and tax obligations of Logistics. (Ex. P-10 ¶ 1(f).)

59. The LOU does not require Logistics to pay any tax obligations incurred by HR or by Mr. Mazzoni, but does acknowledge that the "loans accumulated by Centrix Logistics" were used "to pay any operating losses incurred by Centrix Logistics in lieu of tax obligations." (Ex. P-10 ¶ 2(h).) The LOU does not reference any loans made by HR to Transit Aide or EMG. Mr. Black made handwritten changes in the LOU, where he clarified that Logistics was only obligated to repay loans from HR to Logistics which were used to pay for its operating losses. Id. (N.T., 10/22/07 at 108.)

60. Mr. Mazzoni contemplated forming new companies during the summer of 2003. (N.T., 10/24/07 at 62-63.)

61. Logistics had no contracts or other relationships with any of Mr. Mazzoni's new companies. (N.T., 10/24/07 at 63-64.)

62. As stated earlier, CIB Marine replaced Oxford as the funding source for HR so that HR could pursue its financial obligations under the Licensing Agreement. HR required a third-party funder in order to operate the staffing business. (N.T., 10/22/07 at 164.)

63. In November, 2003, CIB Marine had cut off all funding and Mr. Mazzoni directed his staff to lock the office doors and withhold paychecks. (N.T., 10/24/07 at 72.)

64. Upon learning this information, Mr. Black traveled to the Fort Washington office and questioned Mr. Mazzoni about the withdrawal of funding by CIB Marine. (N.T., 10/24/07 at 72.) Mr. Mazzoni informed Mr. Black that a tax lien had been filed against First Staff in October, 2003. (N.T., 10/24/07 at 73.) First Staff owed over $400,000 in unpaid taxes at that time. (N.T., 10/22/07 at 226-29, 269.) CIB Marine became aware of the lien, stopped funding First Staff, and refused to fund HR until the matter was resolved. (N.T., 10/23/07 at 50-51.) First Staff went out of business at the end of 2003. (N.T., 10/22/07 at 270.)

65. At the end of November or the beginning of December, 2003, Mr. Mazzoni forwarded a letter to Mr. Black indicating that CIB Marine no longer funded HR. (N.T., 10/24/07 at 85.)

66. Mr. Black interpreted this to mean that HR was out of business since it no longer had a funding source. (N.T., 10/24/07 at 73.)

67. Neither Mr. Black nor Logistics received notice of a tax lien in connection with the relationship between HR and Logistics. Prior to the termination of the Licensing Agreement, Mr. Mazzoni never asked Mr. Black to pay HR's payroll tax liabilities. (N.T., 10/22/07 at 232.)

68. By letter dated December 1, 2003, Mr. Black placed Mr. Mazzoni and HR

on formal notice of defaults under the Licensing Agreement and further notified them of Logistics' intent to terminate the Licensing Agreement pursuant to its terms. (N.T., 10/24/07 at 87; Ex. P-16.) Soon thereafter, Mr. Black formed a new company, defendant On-Site. This company engaged in the temporary staffing services business similar to that engaged in by HR. On-Site did business as Centrix Staffing and remains in operation.

E. <u>Testimony on Damages</u>

69. According to Mr. Mazzoni, as of December 31, 2003, HR had unpaid receivables of approximately $1,000,000. (N.T., 10/23/07 at 77-78.)

70. Mr. Mazzoni testified that he would have collected the unpaid receivables, but did not. He acknowledged that Mr. Black did not receive this money. Mr. Mazzoni believes CIB Marine retained these funds. (N.T., 10/23/07 at 84.)

71. Plaintiff's expert, Christopher Nawn, CPA, testified that the general ledger of HR for a thirty-two month period ending August 31, 2003, showed that over $2.5 million was transferred by HR to EMG's bank accounts. As a result, HR was unable to pay payroll taxes in the amount of $947,098. (N.T., 10/23/07 at 204; Ex. D-69.)

72. Mr. Nawn opined that Logistics owed HR the total sum of $1,799,019, which is based upon the alleged transfer of $2,455,822 to EMG, plus outstanding payroll tax liabilities of $947,098, minus the sum of $1,603,673 (the amount due to Logistics from HR as calculated by defendant's expert, which is undisputed by Mr. Nawn). (N.T., 10/23/07 at 175-76.)

73. Defendants' expert, Charles Lunden, CPA, reviewed the books and records of HR and Logistics. (N.T., 10/24/07 at 185.) Based on that review, he concluded that Logistics did not proximately cause the inability of HR to pay payroll taxes. (N.T., 10/24/07 at

185-192.) This court agrees with Mr. Lunden's conclusion on this issue.

74. Mr. Lunden disputes the opinion of Christopher Nawn that the transfer of $2.4 million to EMG should serve as an offset since Mr. Black did not own or control EMG at the time of the contractual arrangement between HR and Logistics. (N.T., 10/24/07 at 197.)

II. CONCLUSIONS OF LAW

A. The Complaint

On December 7, 2004, plaintiff, HR, commenced this action against defendants by filing a Complaint with the following counts: (1) Intentional Interference With Contractual Relations; (2) Accounting; (3) Civil Conspiracy; (4) Conversion; (5) Unfair Competition; (6) Assumpsit; and (7) RICO.

In the Complaint, plaintiff alleges the following:

1. ... Defendant, On-Site does business as Centrix Staffing, and is the successor to and alter ego of its predecessor, Logistics... (Complaint ¶ 2.)

2. Defendant, On-Site, was formed and operated for the purpose of facilitating and enabling its predecessor [Logistics] to fraudulently evade its contractual obligations to the Plaintiff, and to remove and to divert assets to itself which had been both assigned and pledged by the predecessor to the Plaintiff, which assets Plaintiff was to use to discharge the IRS, state, and local taxes and other liabilities ... of the Plaintiff, and the predecessor in the approximate amount of ... $1,700,000. (Complaint ¶ 3.)

3. Defendant On-Site wrongfully converted the assets and operations of Logistics, and is engaged in the identical business [of Logistics.] (Complaint ¶ 11.)

4. ... In order to interrupt the Plaintiff's business cycle, On-Site and Logistics, falsely advised past customers not to honor their obligations to the Plaintiff, and as to future customers, either directed them away from the Plaintiff and/or funded the transaction by itself, all of which were in violation of the Licensing Agreement... (Complaint ¶ 32.)

5. ... Defendants On-Site and Logistics continued to use Plaintiff's name and goodwill for the purpose of benefitting themselves and in doing so violated the Licensing Agreement... (Complaint ¶ 33.)

6. At the time Black and Logistics caused the Defendant On-Site to be created, Logistics was insolvent and indebted to the Plaintiff (see Exhibit B, Letter of Understanding), the IRS, state and local taxing authorities and for other operating liabilities including, but not limited to, worker's compensation in the approximate amount of... $1,700,000. (Complaint ¶ 34.)

7. As a result of the conduct of Logistics, On-Site and Black, Plaintiff has been deprived of the assets assigned to it which were earmarked to discharge IRS and other state and local tax liabilities. Consequently, Plaintiff has been unable to do so, and the IRS as a result thereof, has identified Plaintiff and its principal as an entity responsible for payment thereof, thus leaving Plaintiff "holding the bag" for the tax liabilities. (Complaint ¶ 36.)

B. Defendants' Motion In Limine

Shortly before the trial of this matter, defendants filed a Motion in Limine. By way of the motion, defendants sought to preclude plaintiff from presenting any evidence that the Licensing and Guaranty Agreements were modified whereby Logistics and Black agreed to pay for loans that HR made to entities other than Logistics. These entities were Transit Aide, a company owned by Mr. Black, and EMG, a company owned by Mr. Brown. Defendants claim these allegations are outside the allegations of the Complaint and should have been precluded at trial. Defendants claim they first learned of these allegations when they took the deposition of Mr. Mazzoni on October 1 and 15, 2007, approximately two weeks before the trial. When the Motion in Limine was presented to the court on the eve of trial, the court reserved ruling on the motion until after the conclusion of trial. In the meantime, the court permitted plaintiff to introduce the disputed evidence.

In Count VI of the Complaint, plaintiff alleges that the conduct of the defendants described in the above quoted paragraphs of the Complaint constitutes a breach of the Licensing and Guaranty Agreements (Complaint ¶ 58). At trial, plaintiff produced evidence that Mr. Mazzoni believed that he and Mr. Black caused HR and Logistics to modify the Licensing and Guaranty Agreements to obligate Logistics and Black to repay any loans made by HR to Transit Aide and EMG. Plaintiff contends that this modification was memorialized in the LOU dated October 9, 2003, Ex. P-10. In paragraph 34, the Complaint avers that Logistics was indebted to HR in the amount of $1,700,000 which represents obligations to the IRS, state and local taxing authorities, and other operating expenses. The LOU reflects an acknowledgment that HR made loans to Logistics, that the loans were used "to pay any operating losses incurred by Centrix Logistics in lieu of tax obligations," and Logistics agreed to the repayment of any loans made to Logistics, the amount to be determined after good faith negotiation.

Federal Rule of Civil Procedure 8(a)(2) only requires a "short and plain" statement of a party's claim for relief. The notice provision of Rule 8(a) only "requires a plaintiff to provide the opponent with fair notice of a claim and the grounds on which that claim is based." Kanter v. Barella, 489 F.3d 170, 175 (3d Cir. 2007). Under federal practice, the goal of narrowing and defining the issues for trial is not primarily fulfilled by the pleadings but rather by the parties engaging in the discovery process, by the filing of a summary judgment motion and by pretrial conferences. 5 Charles Wright & Arthur R. Miller, Federal Practice and Procedure Civil 3 § 1182, at 18 (3d ed. 2004).

Here, the Complaint filed by plaintiff gave defendants fair notice that it claimed that defendants were indebted to HR for loans allegedly made to Logistics as reflected in the

LOU. The LOU was explicitly referenced in the Complaint. Plaintiff argues that loans made to Transit Aide and EMG benefitted Logistics and therefore Logistics is obligated to repay all of them. Defendants claim they first learned of this contention when they took Mr. Mazzoni's deposition shortly before trial. (N.T., 10/24/07 at 141-42.) It is unfortunate that defendants chose not to take Mr. Mazzoni's deposition until two weeks before trial and allegedly did not learn the full details of plaintiff's claim until that time. Any delay in understanding the details of the claim, however, is due to defendants' lack of diligence, not the fault of plaintiff. Moreover, from a review of the correspondence between Mr. Black and Mr. Mazzoni made during the years they were in business, it is clear Mr. Black knew that Mr. Mazzoni claimed that Logistics was responsible for loans made by HR to Transit Aide. (N.T., 10/24/07 at 156-57.) Therefore, this court must deny the Motion in Limine. Plaintiff's cross-motion to amend the Complaint is denied as moot.[1]

C. The Assumpsit Claim (Count VI)

The evidence presented by plaintiff at trial focused primarily on plaintiff's claim that defendants breached the Licensing Agreement and Guaranty Agreement by not repaying loans between plaintiff and Logistics, Transit Aide and EMG, by terminating the Licensing Agreement, and by establishing On-Site. Since this claim was the focus of the trial, the court

---

[1] Even if the court had not construed plaintiff's Complaint to include the allegations that defendants owe plaintiff monies for loans HR made to EMG and Transit-Aide, the court would allow plaintiff to amend its Complaint to assert such a claim. See Fed. R. Civ. P. 15(a) (amendment to complaint "shall be freely given when justice so requires"). Courts in this circuit deny requests to amend "only where there has been undue delay, bad faith or where it would be prejudicial to the nonmoving party." Phoenix Techs., Inc. v. TRW, Inc., 154 F.R.D. 122, 123 (E.D. Pa.), aff'd, 43 F.3d 1462 (3d Cir. 1994) (Table). This court does not find that plaintiff acted in bad faith or exercised undue delay. Furthermore, granting leave to amend would not be prejudicial to defendants.

will address Count VI of the Complaint first.

To prevail on its breach of contract claim, plaintiff must prove three elements: (1) the existence of a contract; (2) a breach of a duty imposed by the contract; and (3) resultant damages. J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002). The court first starts with the Licensing Agreement, dated March 15, 2002. The Licensing Agreement contains an integration clause, which provides the following:

> This Agreement contains the entire understanding between the parties and all prior oral understandings are deemed to be merged herein. This Agreement may not be modified or changed in any way, in whole or in part, unless such agreement to modify, change or discharge the said Agreement shall be in writing and signed by both parties.

(Ex. P-2 ¶ 27.)

The parties agree that the Licensing Agreement prohibited HR from making loans to any entities other than Logistics. (N.T., 10/22/07 at 184.) The Licensing Agreement provides the following: "Licensor shall not be authorized to use any monies collected from clients except as expressly provided herein." (Ex. P-2 ¶ 6.) The Agreement does not authorize HR to make loans to another entity. The plaintiff knew that the Licensing Agreement did not permit it to make loans to Transit Aide or EMG without a written modification of the Licensing Agreement. Plaintiff tried unsuccessfully on several occasions to obtain the consent of Black and Logistics to a written modification of the Licensing Agreement to permit plaintiff to make the loans. See Exs. P-5, P-7.

Because plaintiff was unable to obtain a written modification of the Licensing Agreement, it relies upon alleged oral agreements between Black and Mazzoni in support of its claim that defendants owe plaintiff for reimbursement for monies "loaned" or transferred to

EMG, Transit Aide and Logistics.

Under Pennsylvania law, parties to a written contract are permitted to orally modify a written contract despite a clause in the contract which specifically prohibits oral modification. First Nat'l Bank of Pa. v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 280 (3d Cir. 1987); 2101 Allegheny Assoc. v. Cox Home Video, Inc., 1991 WL 225008, at *5 (E.D. Pa. Oct. 29, 1991), aff'd, 975 F.2d 1552 (3d Cir. 1992) (Table); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968). An oral modification of a contract may be accomplished by either words or conduct. First Nat'l Bank of Pa., 824 F.2d at 280 (citing cases). Pennsylvania law requires either additional consideration or reliance to support a contractual modification. Barnhart v. Dollar Rent-A-Car Sys., Inc., 595 F.2d 914, 919 (3d Cir. 1979); Nicolella, 248 A.2d at 23-24. Furthermore, a party seeking to demonstrate that a contract was orally modified must prove modification by clear, precise and convincing evidence. First Nat'l Bank of Pa., 824 F.2d at 280; Admark, Inc. v. RPS, Inc., 1998 WL 19481, at *4 (E.D. Pa. Jan. 20, 1998); United States v. 29.16 Acres More or Less, 496 F. Supp. 924, 928 (E.D. Pa. 1980); Nicolella, 248 A.2d at 23. As the Third Circuit has emphasized:

> An oral waiver or modification of a written contract must be proved by clear, precise and convincing evidence, including conduct by the parties that "clearly shows the intent to waive the requirement that the amendments be made in writing." Somerset Community Hospital v. Allan Mitchell & Assocs., 454 Pa. Super. 188, 685 A.2d 141, 146 (1996). As the Pennsylvania Supreme Court forcefully stated:
>
> > An oral contract changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they had previously solemnized by a formal document. The oral evidence must be of such a persuasive character that it moves like an ink eradicator across the written paper, leaving it blank so that the parties in effect start afresh in their negotiations and mutual commitments.

MDNET, Inc. v. Pharmacia Corp., 2005 WL 1385906, at *4 (3d Cir. June 13, 2005) (non-precedential) (quoting Gloeckner v. School Dist. of Baldwin Tp., 175 A.2d 73, 75 (Pa. 1961)).

After a careful consideration of all the evidence, the court concludes that Mr. Black, on behalf of Logistics, orally modified the Licensing Agreement insofar as he agreed that Logistics would repay any loans made from HR to Transit Aide. Furthermore, Mr. Black, on behalf of Logistics, agreed in writing to repay any loans HR made to Logistics. However, plaintiff has failed to show that Black and Logistics agreed to pay for loans made by HR to EMG, a company wholly owned by Robert Brown, in which neither Mr. Black nor Logistics had any ownership interest.

1. Loans To Logistics

It is clear that Mr. Black and Logistics agreed in writing to repay any loans made between HR and Logistics. In a Notice of Termination dated December 1, 2003, terminating the Licensing Agreement, Logistics agreed to the following:

> In connection with the termination of the License Agreement, and in accordance with its obligations thereunder, Centrix HR Logistics, Inc., will pay all monies loaned by Centrix HR, LLC. to Centrix HR Logistics, Inc. in equal monthly installments over a period of twenty-four (24) months, subject to a final accounting of such monies due and confirmation of the same by all parties.

(Ex. P-16; N.T., 10/24/07 at 130.) Furthermore, in the LOU, executed by the parties in October, 2003, Logistics, through Mr. Black, agreed to repayment of outstanding loans from HR "to pay any operating losses incurred by Centrix Logistics in lieu of tax obligations." (Ex. P-10.) Thus, this court concludes that defendants Logistics and Black, individually pursuant to the Guaranty Agreement (Ex. P-3), are liable to plaintiff for loans made to Logistics pursuant to the Licensing Agreement.

2. Loans To Transit Aide

Transit Aide is a company that is owned by William Black. At the time of the cash transfers by HR to Transit Aide, Mr. Black was the sole owner. The court finds Mr. Mazzoni's testimony credible that numerous loans were made from HR directly to Transit Aide and that Mr. Black, on behalf of Logistics, agreed to repay the loans. By clear, precise and convincing evidence, plaintiff has shown that Logistics agreed to repay these loans because it needed Transit Aide in operation because it transported the employees of Logistics to clients during work hours. (N.T., 10/22/07 at 97-98, 210.) Without HR's loans to Transit Aide, Logistics would have been unable to operate during the term of the Licensing Agreement.

On several occasions, Mr. Mazzoni sent letters to Black and his counsel, Stephen Siana, Esquire, memorializing Black's agreement to repay HR for the loans to Transit Aide. On December 23, 2002, Mr. Mazzoni wrote to Messrs. Black and Brown and confirmed their discussions during a meeting on November 22, 2002 between the parties and their counsel. (Ex. P-6.) In this letter, a copy of which was provided to Mr. Siana, Mr. Mazzoni confirmed an agreement that HR funds were being used to support the operations of Transit Aide. Neither Mr. Black nor Mr. Siana responded to this letter to dispute the confirmation of an agreement to fund Transit Aide. Again, on February 26, 2003, Mr. Mazzoni wrote to Mr. Black and stated: "Based on, and consistent with, our verbal agreement, I have continued to subsidize Transit Aide from funds which should be utilized elsewhere." (Ex. P-7.) Mr. Black again failed to respond to this letter and dispute this oral agreement. In his letter, Mr. Mazzoni also enclosed a Licensing Modification Agreement which recited that Logistics "has requested loans and subsidies from . . . [HR] from time to time on behalf of . . . Transit Aide, Inc." (Ex. P-7.) Although Logistics never

signed the Licensing Modification Agreement, Mr. Black never disputed the recitation therein that Logistics agreed to repay loans made to Transit Aide.

Finally, on September 19, 2003, Mr. Black forwarded an American Express bill in the amount of $23,500 incurred by Transit Aide to Mr. Mazzoni for payment from funds generated by the Licensing Agreement between HR and Logistics. (N.T., 10/22/07 at 98; 10/24/07 at 243). In this letter, Mr. Mazzoni again confirmed that during previous meetings, Black and Mazzoni "mutually agreed to use available funds from sales to loan to your entities for operating expenses rather than to keep current on tax obligations." (Ex. P-8 (emphasis added).) In addition, Mr. Mazzoni questioned Logistics' plan to repay the loans to Logistics and Transit Aide. He said the following:

> How do you propose repaying Centrix HR Logistics, Inc. [sic] outstanding loan balance obligation of $971,332.11 - monies which have been diverted from tax obligations to fund your operations? Transit Aide, Inc., also has a substantial loan balance which should be compiled and defined in the very near future.

(Ex. P-8 (footnote omitted).) In the same letter, Mr. Mazzoni recounted that at a meeting on September 19, 2003, Mr. Black proposed "[p]ayment of all loans outstanding to Transit Aide, Inc., at a rate of approximately $20,000 per month beginning within the next 60 days." Id. As with the previous letters sent by Mazzoni, Mr. Black did not respond to this letter and disputes the agreement to repay loans made to Transit Aide. (N.T., 10/22/07 at 100; 10/24/07 at 122, 124.)

This court recognizes that under Pennsylvania law, Mr. Black's silence in response to Mr. Mazzoni's numerous letters confirming loans to Transit Aide cannot constitute an acceptance of the terms set forth in those letters absent a duty on the part of Mr. Black to

speak. See Brown v. Aponte, 2006 WL 2869524, at *3 (E.D. Pa. Oct. 3, 2006) ("Silence will not constitute acceptance of an offer in the absence of a duty to speak."). However, Mr. Black did have a duty to answer Mr. Mazzoni's letters. The letters were numerous and Black should have known that Mr. Mazzoni was construing his silence as Logistics' acceptance of the obligation to repay the loans to Transit Aide. See N.T., 10/22/07 at 84, 93-97.

Even if there were not an enforceable contract between HR and Logistics to repay the loans, under the doctrine of promissory estoppel, Logistics, and Black as the guarantor of Logistic's obligations, have the obligation to repay the loans. Where there is no enforceable agreement between the parties, "the doctrine of promissory estoppel is invoked to avoid injustice by making enforceable a promise made by one party to the other when the promisee relies on the promise and therefore changes his position to his own detriment." Crouse v. Cyclops Inds., 745 A.2d 606, 610 (Pa. Super. Ct. 2000). For all the above reasons, this court concludes that Logistics, through Mr. Black, and Mr. Black, as guarantor, promised to repay loans made by HR to Transit Aide and that HR relied upon this promise to its detriment.

3. Loans to EMG

Plaintiff also seeks reimbursement from defendants for loans it made to EMG, a company owned exclusively by Mr. Brown after April, 2001, when Mr. Black relinquished his stock in the company.

After careful consideration of the evidence, this court concludes that neither Mr. Black nor Logistics are liable for the loans made by HR to EMG. Plaintiff has failed to prove by a preponderance of the evidence, let alone by clear, precise and convincing evidence, that Mr. Black ever knew of these loans to EMG at the time they were made or subsequently agreed to

repay the loans.

The letters sent by Mr. Mazzoni to Mr. Black discussed above did not reference any loans to EMG. While Mr. Mazzoni did reference loans made to Transit Aide and Logistics, he was silent as to any agreement by Mr. Black to pay loans to EMG. While the LOU executed by Mr. Black in October, 2003, mentioned loans to Logistics, it does not reference any loans to EMG. Mr. Black made handwritten notations on the LOU making it clear that he only agreed to repay loans "incurred by Logistics." (N.T., 10/22/07 at 108.) This court finds it incredible that Mr. Black would agree orally to repay loans incurred by EMG, a company owned exclusively by Mr. Brown at the time of the alleged loans. As noted earlier, Mr. Brown and Black had split their joint venture and Black relinquished his ownership in EMG. (Exs. D-1, D-2.)

In his testimony, Mr. Mazzoni explained that HR made loans to EMG as part of its effort to assist Transit Aide, because EMG was responsible for funding the payroll of Transit Aide employees. (N.T., 10/22/07 at 75, 85.) EMG would pay Transit Aide's payroll each week, and EMG would bill Transit Aide for the amounts of the payroll. Transit Aide was to pay the invoice to EMG. (N.T., 10/23/07 at 120-21.) Under this scenario, there should be fifty-two weeks of EMG invoices per year sent to Transit Aide. (N.T., 10/24/07 at 235.) Mr. Black credibly testified that Transit Aide paid most, if not all, of these invoices. (N.T., 10/24/07 at 158-62.) Plaintiff did not introduce any billing records of EMG, or unpaid invoices and dunning letters EMG sent to Transit Aide, to support Mr. Mazzoni's assertion that the monies transferred from HR to EMG went directly to pay Transit Aide's payroll, and that Transit Aide did not repay

the monies. See N.T., 10/23/07 at 207-09.[2] HR's accounting records show transfers to EMG, but do not describe the reasons for the transfer. (Exs. P-31, P-32.) Plaintiff has not eliminated the possibility that the loans from HR to EMG were used for other purposes, for example, to pay another client's payroll. EMG had many clients, only one of whom was Transit-Aide. (N.T., 10/23/07 at 118-19, 276.) Even if the loans from HR to EMG were used to pay Transit Aide's payroll, this court cannot impose on Logistics or Mr. Black the obligation to repay HR for these loans absent credible evidence proving that they agreed or promised to repay HR for loans to EMG. Plaintiff has failed to produce such evidence. Accordingly, the court will not find defendants liable for any loans made by HR to EMG.[3]

4. Termination of the Licensing Agreement

The court concludes that defendant Logistics properly terminated the Licensing

---

[2] In its rebuttal case, plaintiff introduced Exhibit P-61, which Mr. Mazzoni identified as an "excerpt" or "extraction" of Transit Aide's general ledger account for the year 2002. This document lists monies totaling $1,975,766.75 transferred to Transit Aide from EMG for "contract services." See N.T., 10/24/07 at 222-32. However, this summary was created by Mr. Mazzoni on October 24, 2007, during the trial. Id. at 231. It was not a record generated by Transit Aide at the time of the alleged money transfers. Mr. Mazzoni testified that there was "a detailed listing of invoices" which supports this summary, but neither this document nor the invoices were introduced into evidence. Id. Mr. Mazzoni also insists that all monies Transit Aide owes to EMG, as listed on Ex. P-61, were not repaid by Transit Aide. Id. at 227. After careful consideration of all the evidence, this court cannot accept Mr. Mazzoni's testimony regarding Ex. P-61 and finds the exhibit to be untrustworthy.

[3] Plaintiff further requests that the court order defendants to repay loans made to EMG under the equitable theory of unjust enrichment. To show unjust enrichment, plaintiff must show that benefits were conferred on defendants by plaintiff, appreciation of such benefits by defendants, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendants to retain the benefit without repayment to plaintiff. Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc., 933 A.2d 664, 669 (Pa. Super. Ct. 2007). The court cannot apply the doctrine of unjust enrichment here because plaintiff has not shown that defendants knew that plaintiff was making loans to EMG, or that the monies given to EMG were for the direct benefit of Transit Aide.

Agreement because plaintiff breached the Licensing Agreement by: (1) failing to provide a proper accounting of Logistics' client invoices and collections; (2) failing to pay payroll-related taxes on a timely basis; (3) failing to remit payments when due to Logistics; (4) failing to provide timely accounting records; and (5) disbursing monies collected pursuant to the Licensing Agreement to unauthorized entities, such as EMG. The court also finds that defendant Logistics gave proper notice to plaintiff of the termination under the terms of the Licensing Agreement. Defendant Logistics gave plaintiff a right to cure the defaults in accordance with the terms of the Agreement. See Ex. P-2 ¶ 20.

5. Breach of the Non-Compete Agreement

Plaintiff alleges that by starting On-Site after the termination of the Licensing Agreement, defendants violated paragraph 23 of the Licensing Agreement which states:

> **Licensee Non-Competition and Confidentiality**. Neither the licensee nor any persons controlling, controlled by or under common control with licensee may, without the licensor's prior written consent:
>
> A. Have any interest, direct or indirect, in the ownership or operation of any business similar to that of licensor's business, within the licensed area or within 100 miles thereof, for a period of three years after expiration or termination of this Agreement, and may not operate such a business anywhere within the territory or within 100 miles thereof during the term of this Agreement.

(Ex. P-2.) Plaintiff seeks an award of damages for the alleged breach of this non-compete provision.

After careful review of the evidence and the terms of paragraph 23 of the Licensing Agreement, the court concludes that defendant William Black does have an interest in the ownership or operation of a business "similar to that of licensor's business." The business

On-Site, operated within the licensed area or within 100 miles thereof, within three years after the termination of the Agreement. Defendants argue that On-Site's business was not similar to plaintiff's business, in that, plaintiff conducted the back office operation of the temporary staffing business, see Findings of Fact Nos. 8-16, while On-Site performed the front end of the business, see Findings of Fact No. 7. This court concludes that both plaintiff's business and On-Site's business were similar enough to fall within the broad non-compete provision set forth in the Agreement. Both were operating a temporary staffing services business. See N.T., 10/23/07 at 160-61, 166. Therefore, the court finds that defendants were not in compliance with the non-compete provision of the Licensing Agreement.

The question remains, however, in what manner the non-compete provision should be enforced by this court. The parties agreed in the Licensing Agreement that Pennsylvania law applies to the enforcement of any provision in the agreement. (Ex. P-2 ¶ 29.) Pennsylvania law permits equitable enforcement of an agreement not to compete only so far as reasonably necessary for the protection of the employer's protectable business interests. Hess v. Gebhard & Co., Inc., 808 A.2d 912, 920 (Pa. 2002). However, plaintiff has not requested the court to enter an injunction against defendants. Instead, the Complaint requests only an award of damages.

Under Pennsylvania law, the plaintiff bears the burden of proof as to damages. Omicron Sys., Inc. v. Weiner, 860 A.2d 554, 564 (Pa. Super. Ct. 2004). "The measure of damages for breach of contract is compensation for the loss sustained." William B. Tanner Co., Inc. v. WIOO, Inc., 528 F.2d 262, 271 (3d Cir. 1975). A plaintiff, therefore, is entitled to its lost profits resulting from a defendant's breach of a covenant not to compete. Scobell Inc. v. Schade,

688 A.2d 715, 719 (Pa. Super. Ct. 1997); Ebright v. Shutter, 386 A.2d 66, 69 (Pa. Super. Ct. 1978). See also TelAmerica Media Inc. v. AMN Television, 2002 WL 32373712, at *17 (E.D. Pa. Sept. 26, 2002) (damages for breach of non-competition agreement are profits plaintiff would have made on sales it could reasonably expect to have secured had defendants not breached the agreement). "Because damages in the nature of lost profits are difficult to establish with mathematical certainty, only reasonable certainty will be required . . .. Often the reasonable certainty required may be fulfilled by looking to a restitutionary measure of damages." Scobell, 688 A.2d at 719 (citations and quotation omitted). Because computations of lost profits are difficult to calculate, parties to a contract often stipulate to a liquidated damages clause in the event of a breach of a non-compete provision. See, e.g., Omicron Sys., Inc., 860 A.2d at 565. Plaintiff, who drafted the Licensing Agreement, did not include a liquidated damage provision.

In the case at bar, plaintiff failed to present any evidence to establish its lost profits as a result of the breach of the non-compete provision by defendants. Indeed, at the time the Licensing Agreement was terminated, plaintiff was out of business since it lost its funding source, which was necessary to operate its business. (N.T., 10/23/07 at 273-74.) Furthermore, although plaintiff was able to show that On-Site had gross annual revenues approximating six to eight million dollars in 2006 (N.T., 10/24/07 at 98), plaintiff failed to show whether defendants obtained any profit from this gross revenue. A fact finder may not render a damages award based on sheer conjecture or guess work. Rochez Bros. Inc. v. Rhoades, 527 F.2d 891, 895 (3d Cir. 1975), cert. denied, 425 U.S. 993 (1970). As the Pennsylvania Superior Court has stated:

> Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might

> have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made.

Scobell, 688 A.2d at 719.

Because plaintiff has provided no credible evidence upon which this court can make a just and reasonable calculation of plaintiff's damages, the court will enter judgment in favor of plaintiff and against defendants for the breach of the non-compete provision in the nominal amount of one dollar ($1.00). See Rolland v. SmithKline Beckman Corp., 1990 WL 90492, at *1 (E.D. Pa. June 27, 1990) (nominal damages will be awarded under Pennsylvania law where breach of contract, but no actual damages, is shown; maximum award for nominal damages recoverable in Pennsylvania is one dollar).

D. Intentional Interference With Contractual Relations (Count I)

In Count I of the Complaint, plaintiff alleges that defendants interfered with its contractual relations. To establish a cause of action for intentional interference with a contractual relation, plaintiff must prove the following elements:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as the result of the defendant's conduct.

Blackwell v. Eskin, 916 A.2d 1123, 1127-28 (Pa. Super. Ct. 2007).

At trial, plaintiff failed to present any evidence of customers of HR that were interfered with by defendants. The record contained no evidence to show that defendants induced customers to violate their contractual obligations to plaintiff.

More importantly, plaintiff did not provide testimony to establish its damages for

intentional interference with contractual relations. Plaintiff was out of business because of the lack of a funding source when On-Site began its operations. While plaintiff did present expert testimony on damages, the expert, Christopher Nawn, only supported plaintiff's claim for damages for amounts "transferred to and paid on behalf of EMG, Inc." and payroll taxes owed by Logistics to the IRS. (Ex. D-69.) The expert never opined as to the lost profits of HR caused by the creation of On-Site. Accordingly, judgment must be entered in favor of defendants on plaintiff's claim for interference with contractual relations.

E. Accounting (Count II)

In Count II of the Complaint, plaintiff requests an accounting for all sums received by defendants as a result of their tortious interference with plaintiff's contractual relations. (Complaint ¶ 46.) Since plaintiff has failed to prove that defendants tortiously interfered with plaintiff's contractual relations, this court will not order an accounting. Furthermore, "[a]n accounting request is not a substitute for plaintiffs' obligation to establish their damages through discovery." Arrowroot Natural Pharmacy v. Stand. Homeopathic Co., 1998 WL 57512 (E.D. Pa. Feb. 10, 1998). "An accounting should not be used to aide [sic] a party who has otherwise failed to satisfy his burden of proof on the damages issue." Genica, Inc. v. Holophane Div. of Manville Corp., 652 F. Supp. 616, 619-20 (E.D. Pa. 1987). See also United States v. Kithcart, 134 F.3d 529, 536 (3d Cir. 1998) (McKee, J., dissenting in part and concurring in part) ("I do not think it is asking too much to expect attorneys to attempt to meet their burdens of proof when issues are first litigated."). Plaintiff had the opportunity through discovery to establish any damages caused by defendants' alleged interference with contractual relations. Plaintiff evidently failed to conduct discovery to establish its damages resulting from

defendants' interference with contractual relations, and offered no such evidence at trial. Accordingly, an accounting will not be ordered by this court.

F. Civil Conspiracy (Count III)

Count III of the Complaint alleges a civil conspiracy. Plaintiff alleges that defendants conspired with one another "to siphon off the One Million Seven Hundred Thousand Dollars ($1,700,000) tax fund, by creating a new entity, in this case, On-Site, to funnel these and other assets into it which belonged to the Plaintiff." (Complaint ¶ 49.)

In order to establish a claim for civil conspiracy, a plaintiff must prove: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. Ct. 2004). "Proof of malice is an essential part of a cause of action for conspiracy." Id.

As explained more fully herein, plaintiff has failed to prove any unlawful or criminal act that can support a civil conspiracy claim. The Licensing Agreement was properly terminated and defendants violated no law when they created On-Site thereafter. Thus, this court cannot find defendants liable for a civil conspiracy claim. While the court does find that defendants, Black and Logistics, are liable for loans made by HR to Logistics and Transit-Aide, their liability is predicated upon a breach of contract and promissory estoppel, not upon any unlawful or criminal act that would support a claim of civil conspiracy. Judgment will be entered in favor of defendants and against plaintiff on Count III of the Complaint.

G. Conversion (Count IV)

In Count IV of the Complaint, plaintiff alleges that as a result of breaching the Licensing Agreement and creating On-Site, defendants converted assets of the plaintiff in the amount of $1,700,000. (Complaint ¶ 53.)

In order to prove the tort of conversion under Pennsylvania law, plaintiff must show that defendants deprived it of its right of property, or use or possession of a chattel, or other interference therewith, without plaintiff's consent and without legal justification. Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995). The Third Circuit explained the requirements for conversion as follows:

> Conversion is an act of willful interference with the dominion or control over a chattel, done without lawful justification, by which any person entitled to the chattel is deprived of its use and possession. The tort is predicated on interference with dominion or control over the chattel incident to some general or special ownership rather than on damage to the physical condition of the chattel. A person not in lawful possession of a chattel may commit conversion by intentionally dispossessing the lawful possessor of the chattel, by intentionally using a chattel in his possession without authority so to use it, by receiving a chattel pursuant to an unauthorized sale with intent to acquire for himself or for another a proprietary interest in it, by disposing of a chattel by an unauthorized sale with intent to transfer a proprietary interest in it, or by refusing to surrender a chattel on demand to a person entitled to lawful possession.

Baram v. Farugia, 606 F.2d 42, 43-44 (3d Cir. 1979) (footnotes omitted).

During the term of the Licensing Agreement, defendants neither controlled the monies held by HR nor diverted plaintiff's funds to themselves. (N.T., 10/22/07 at 118; N.T., 10/23/07 at 43.) Defendants properly terminated the Licensing Agreement and thus were permitted to use the HR name and logo. See Ex. P-2 ¶ 18. Aside from the HR name and logo, there was no evidence at trial that defendants took any other assets of plaintiff after termination

of the Licensing Agreement. Judgment will be entered in favor of defendants and against plaintiff on the conversion claim.

H. Unfair Competition (Count V)

In Count V of the Complaint, plaintiff alleges that "the conduct of the defendants jointly and severally constitutes unfair competition with the plaintiff." (Complaint ¶ 55.) Plaintiff alleged that defendants engaged in unfair competition because they "deliberately and intentionally simulated Plaintiff's products by using Plaintiff's name and brand, without permission, in order to deceive the customers." (Pl.'s Proposed Findings of Fact No. 252.)

The common-law tort of unfair competition was developed to protect "against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection." Granite State Ins. Co. v. Aamco Transmissions, Inc., 57 F.3d 316, 319 (3d Cir. 1995). Thus, "[t]he gist of the action lies in the deception practiced in 'passing off' the goods of one for that of another." Pennsylvania State Univ. v. Univ. Orthopedics, Ltd., 706 A.2d 863, 870 (Pa. Super. Ct. 1998); Granite State, 57 F.3d at 319.

The Licensing Agreement provided that upon the termination of the agreement, the name "Centrix HR" and logo would transfer to Logistics for consideration of one dollar. (Ex. P-2 ¶ 18.) This court has held that Logistics properly terminated the Licensing Agreement. See supra at 27. Thus, upon the termination, Logistics had the right to use the name HR and logo. Therefore, defendants did not engage in unfair competition. Judgment will be entered in favor of defendants and against plaintiff on Count V of the Complaint.

I. RICO (Count VII)

The final count of the Complaint alleges a violation of the Racketeer Influenced

and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d). "Section 1962(c) prohibits any person employed by or associated with an enterprise from conducting or participating in the conduct of that enterprise's affairs through a pattern of racketeering activity." Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 520 (3d Cir. 1998). The statute defines "racketeering activity" "as an act or threat chargeable as one of a variety of state felonies or any act which is 'indictable' under specifically listed federal criminal statutes, see 18 U.S.C. § 1961(1)(A)-(B)." Brokerage Concepts, 140 F.3d at 520. Section 1962(d) outlaws any conspiracy to violate the other subsections of § 1962.

The predicate acts that plaintiff asserts constitute the pattern of racketeering activity in this case are: mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and bank fraud, 18 U.S.C. § 1344. To show a violation of the wire and mail fraud statutes, plaintiff must show defendants "use[d] the mails or interstate wires for the purpose of carrying out any scheme or artifice to defraud." Brokerage Concepts, 140 F.3d at 528. Likewise, to prove a violation of the bank fraud statute, plaintiff must show that funds under the control of a financial institution were the subject of a scheme to defraud by defendants. United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987). A "scheme or artifice to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another of something of value. See United States v. Strum, 671 F.2d 749, 751 (3d Cir.) (must show defendant participated in scheme "with knowledge of its fraudulent nature"), cert. denied, 459 U.S. 842 (1982). Here, the court finds that defendants did not engage in a scheme to defraud, and, therefore, plaintiff has not proven defendants violated the above three criminal statutes. Therefore, plaintiff has not shown a pattern of racketeering activity, which is necessary to prove a

violation of the RICO statute. Brokerage Concepts, 140 F.3d at 520. Judgment will be entered in favor of all defendants and against plaintiff on the RICO claim.

J. Plaintiff's Damages

Plaintiff's Exhibits 31 and 32 outline the amount of monies transferred from HR to Logistics and Transit Aide. (N.T., 10/22/07 at 137.)[4] According to these two Exhibits, a total of $723,101.55 was loaned by HR to Logistics during the years 2002-03. The same exhibits demonstrate a total of $142,897.81 was transferred from HR to Transit Aide during 2002-03.[5] As noted earlier, Logistics, through Mr. Black, agreed in writing to repay HR's loans to itself and orally agreed to repay the loans to Transit Aide. Accordingly, the court finds that defendants, Logistics and On-Site as the successor corporation, are liable to plaintiff for the loans in the amount of $865,999.36.[6]

---

[4] Defendants' expert, Mr. Lunden, and plaintiff's expert, Mr. Nawn, agreed that HR's financial statements differentiate between direct transfers of funds to Transit Aide and direct transfers to EMG. (N.T., 10/24/07 at 200; Ex. P-58.)

[5] These amounts are consistent with those advanced by plaintiff in its proposed Findings of Fact, see Pl.'s Findings of Fact No. 190 at 40 n.16, with the exception of the amount of transfers to Logistics in 2003. Plaintiff claims the amount is $707,933.46, but Ex. P-31 lists the amount of transfers to Logistics in 2003 as $426,095.00.

[6] On-Site is merely a continuation of Logistics and is therefore liable for its debts. See Cont'l Ins. Co. v. Schneider, Inc., 810 A.2d 127, 134-35 (Pa. Super. Ct. 2002) (successor company is responsible for seller's liabilities when the purchasing company was merely a continuation of the selling corporation). Here, defendant Black is both the sole owner and operator of On-Site and Logistics. On-Site took over Logistics' business and Logistics is no longer in business. All of Logistics' liabilities necessary to operate a staffing business, such as office leases, phone numbers, employees, etc., were all assumed by On-Site. The trade name and logo, phone numbers, locations, and employees of the two businesses are identical. (N.T., 10/22/07 at 134-36; N.T., 10/23/07 at 152-57.)

K. Counterclaim

Defendant, Logistics, has asserted a Counterclaim against plaintiff for fees owed to it pursuant to the Licensing Agreement. See Answer with Counterclaims ¶¶ 8-25.

Plaintiff's books of original entry record a net due to Logistics for fees of $1,603,673, as of August 31, 2003, the last date for which financial statements were prepared. (Ex. D-50 (Report of C. Lunden) at 4 and Ex. B; N.T., 10/24/07 at 193.) Plaintiff has introduced no evidence to refute that it owes Logistics this sum of money. See N.T., 10/23/07 at 176; Ex. D-69. Thus, in the absence of any off-set, judgment should be entered in favor of defendant, Logistics, and against, plaintiff, HR, in the amount of $1,603,673 which plaintiff's own records show is owed to Logistics.

In addition to the above claim, Logistics argues that it also is entitled to repayment by HR of approximately $1,400,000 in accounts receivable that were transferred to HR at the inception of the Licensing Agreement from the run-off operations of the PTI branches owned by defendant Black. Plaintiff argues that this claim was never pled in the Counterclaim and it is too late to amend the Counterclaim.

The court agrees with plaintiff that this claim was not alleged in the Counterclaim and, therefore, denies it on this basis. However, even if the court would permit an amendment of the Counterclaim at this late stage, the court finds the claim to be without merit. Nowhere in the Licensing Agreement does it provide that defendants Logistics or Black would be entitled to a repayment of the accounts receivable used as seed funds to get the licensing arrangement between Logistics and HR started. These funds were necessary for the operation of the Licensing Agreement, in that they were used to fund the payroll for the temporary workers who were

providing services to the clients. (N.T., 10/24/07 at 111.) Both HR and Logistics benefitted from the funding arrangement because it enabled the parties to earn profits. Id. at 112-13. The court finds no basis, in law or equity, to order the repayment of these accounts receivable. Furthermore, this court cannot discern whether any of the $1,603,673 owed by HR to Logistics, as reflected in plaintiff's books of entry, includes monies or fees derived, either directly or indirectly, from these accounts receivable. Accordingly, Logistics cannot recover on this part of the Counterclaim.

III. CONCLUSION

In accordance with the above, the court will enter the following judgment orders:

First, on Count 6 of the Complaint, the court will enter an order granting judgment in favor of plaintiff and against defendants, On-Site Staff Management, Inc., Centrix HR Logistics, Inc. and William Black, as guarantor, jointly and severally, in the amount of $865,999.36, to be offset by the amounts HR owes Logistics on its Counterclaim – $1,603,673.[7] Consequently, a judgment order will be entered on the breach of contract claim (Count 6), in favor of plaintiff in the amount of one dollar ($1.00) for the breach of the non-compete clause of the Licensing Agreement. On the remaining counts of the Complaint, judgment will be entered in favor of defendants and against plaintiff.

Second, the court will enter an order granting judgment in favor of defendant,

---

[7] See Lewis v. Benedict Coal Corp., 361 U.S. 459, 467 (1960) ("Under modern practice, when the promises are to pay money, or are reducible to a money amount, the promisor, when sued by the promisee, offsets the damages which he has sustained against the amount he owes, and usually obtains a judgment for any excess."). See also Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 149 (3d Cir.) (same), cert. denied, 528 U.S. 878 (1999).

Logistics, and against, plaintiff, HR, on Counts 1 and 2 of the Counterclaim (Breach of Contract and Conversion), in the amount of $1,603,673, to be offset by the amount of $865,999.36, for a balance of $737,673.70, plus pre-judgment interest. See Peterson v. Crown Fin. Corp., 661 F.2d 287, 293-94 (3d Cir. 1981) (pre-judgment interest awarded when damages are capable of exact computation). Judgment is entered in favor of plaintiff, HR, and against defendant, Logistics, on Count 3 of the Counterclaim (Accounting), for the same reasons the court denied plaintiff's claim for an Accounting. See supra at pp. 31-32.

BY THE COURT:

_____

THOMAS J. RUETER
CHIEF MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRIX HR, LLC	:	CIVIL ACTION
	:	
v.	:	
	:	
ON-SITE STAFF MANAGEMENT, INC., et al.	:	NO. 04-5660
	:	

JUDGMENT ORDER

AND NOW, this 25th day of March, 2008, in accordance with the Memorandum of Decision filed this day, it is hereby **ORDERED** that:

1. Judgment is hereby entered in favor of plaintiff, Centrix HR, LLC, and against, defendants, On-Site Staff Management, Inc., Centrix HR Logistics, Inc. and William Black on Count 6 of the Complaint (Assumpsit) in the amount of one dollar ($1.00);

2. Judgment is hereby entered in favor of defendants, On-Site Management, Inc., Centrix HR Logistics, Inc. and William Black, and against, plaintiff, Centrix HR, LLC, on Counts 1, 2, 3, 4, 5 and 7 of the Complaint.

3. Judgment is hereby entered in favor of defendant, Centrix HR Logistics, Inc., and against, plaintiff, Centrix HR, LLC, on Counts 1 and 2 of the Counterclaim in the amount of $737,673.70, plus pre-judgment interest.

4. Judgment is hereby entered in favor of plaintiff, Centrix HR, LLC, and against, defendant, Centrix HR Logistics, Inc., on Count 3 of the Counterclaim requesting an Accounting.

BY THE COURT:

_____

THOMAS J. RUETER
CHIEF MAGISTRATE JUDGE