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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
ESSEX COUNTY
DOCKET NO. C-246-12
APP. DIV. NO. _____

LKLJ CORP.,)
)
Plaintiff,)
)
vs.)
)
BRIAN MC CRACKEN, ET.)
AL.,)
)
Defendants.)
)

TRANSCRIPT
of
DECISION

Place: Essex Co. Courthouse
212 Washington Street
Newark, NJ 07101

Date: January 27, 2014

BEFORE:

HONORABLE DAVID B. KATZ, J.S.C.

TRANSCRIPT ORDERED BY:

JOHN A. FIALCOWITZ, ESQ. (J. Fialcowitz, LLC)

APPEARANCES:

JOHN A. FIALCOWITZ, ESQ. (J. Fialcowitz, LLC)
Attorney for the Plaintiff

MICHAEL V. DOWGIN, ESQ. (M.V. Dowgin, Esq.)
Attorney for the Defendants

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THE COURT

Decision

3

1 THE COURT: Back on the record, please, in C-
2 246-12. Just for the record, can I kindly have
3 counsel's appearances again?

4 MR. FIALCOWITZ: Good afternoon, Your Honor.
5 John Fialcowitz for the plaintiffs, LKLJ Corporation
6 and LED Mechanical, Inc. doing business as Accurate
7 Air.

8 THE COURT: Thank you.

9 MR. DOWGIN: Yes, Judge. Michael Dowgin on
10 behalf of the defendants.

11 THE COURT: All right. Thank you very much
12 and thank you for being punctual.

13 Obviously, I had an opportunity to review
14 everything that was submitted both before Judge Levy
15 and now in connection with the request for a
16 preliminary injunction.

17 Based on the certifications I -- I don't
18 think there's much dispute with respect to certain
19 events that took place in the August, early September
20 time frame. I think the issue is what -- what is --
21 what should flow from those events. But for any event
22 -- in any event, I do make the following findings.

23 Mr. McCracken was an employee of Accurate
24 Air, more particularly LKLJ Corporation, and at some
25 point became an employee of LED Mechanical, all doing

1 business as Accurate Air. And he left his employment,
2 I believe, the Friday of the week encompassing
3 September 17th. I don't have a calendar in front of
4 me, but I think someone had indicated that was
5 probably the 21st of September. And then he went on
6 to work for defendant Carrano.

7 So using 9/21/2012 on a time line I find the
8 following. On September 4th, 2012 there was an e-mail
9 to Mr. Carrano regarding apartments locked in,
10 speaking of met with Two Rivers Maintenance to discuss
11 projects in Harlem and the facts brought up at a
12 deposition is that eventually Mr. Carrano's
13 organization landed two separate projects from Two
14 Rivers. This is referred to as the Harlem work.

15 On 8/17/2012 at that point in time the
16 plaintiff sends to an entity called Balfour an
17 acknowledgment of intent to bid and Mr. McCracken
18 sends an e-mail to Mr. Carrano containing the proposal
19 for this job, and at some point in time thereafter Mr.
20 Carrano's company gets work on two homes in connection
21 with Balfour.

22 On August 22nd, 2012 Mr. McCracken, again
23 while employed by plaintiff, meets with a Mr.
24 Callandra (phonetic) for installation work at Cargill
25 Laboratories, and rather than providing the requested

1 quote to Mr. Callandra he refers this work to Mr.
2 Carrano and two proposals are submitted and the work
3 eventually is obtained by Mr. Carrano or his company.

4 I found also significant that on September
5 6th, 2012 Mr. Carrano sends an e-mail to Mr. McCracken
6 and he directs Mr. McCracken or asks Mr. McCracken to
7 have Andy, who is Andy Polkowski (phonetic) -- pardon
8 me if I mispronounced the name -- to fill out
9 documents, non-compete and that the other can follow
10 as well. And it was concluded that the others was Mr.
11 Loches (phonetic) who had left on 9/10/12 and Mr.
12 Surry (phonetic), who left on 9/9/12. So that's an e-
13 mail where Mr. Carrano, while employed -- pardon me,
14 Mr. McCracken, while employed by plaintiff, is
15 facilitating employment documents for people who
16 haven't yet -- not yet left plaintiff and he's doing
17 that for the defendant.

18 The Court is also troubled by the apparent
19 violations of the 11/14/12 consent order. Therein,
20 the parties are bound as if the Court entered an order
21 itself that the defendant Carrano -- or the
22 defendants, including Carrano would not compete with
23 respect to Clearview Cinemas, Tilcon, Concentra, CVS,
24 and Heritage Home, and that there to be no
25 disparagement or I believe negative comments about the

1 plaintiff.

2 On 1/23/13 there's an e-mail where Mr.
3 McCracken and Carrano are coaching Mel Rodriguez
4 (phonetic) of Tilcon how to terminate it's contract
5 with Accurate and go with Carrano.

6 The law of New Jersey has been set forth in
7 numerous cases. In LAMORT BURNS AND COMPANY VS.
8 WALTERS (phonetic) 167 New Jersey 285, a 2001 opinion
9 the Supreme Court of New Jersey states that -- quotes
10 the re-statement second of agency, Section 393, 1958
11 in Comment E, which indicates that an employee is not
12 entitled to solicit customers for such rival business
13 before the end of his employment, nor could he
14 properly do other similar acts in direct competition
15 with the employer's business.

16 In CAMICO, 157 New Jersey at Page 517 our
17 Supreme Court again held that an employer may prove a
18 prima facie case of an employee's breach of the duty
19 of loyalty not only -- not only by showing that the
20 employee directly competed with the employer while
21 employed, but also by showing that the employee, while
22 employed, assisted the employee's competitor.

23 Significantly, in evaluating an employee's
24 conduct under the breach of the duty of loyalty --
25 this comes from LAMORT again, the employee's level of

1 trust and confidence and the egregiousness of the
2 conduct are important factors to consider in the
3 analysis.

4 Here Mr. McCracken was of the highest level
5 of trust. He basically ran the company and I believe
6 at some point there was even an app-- a power of
7 attorney trusted to him by Mr. D'Amico. The court
8 goes on in LAMORT to say that we recognize the right
9 of an employee to plan and prepare for future
10 employment. But the defendant's conduct in that case
11 was outside the Rubric of that right. The duty of
12 loyalty prohibits an employee from taking affirmative
13 steps to injure the employer's business.

14 CAMMARO (phonetic) again, New Jersey at Page
15 516 talks about employees occupying a position of
16 trust and confidence owe a higher duty than those
17 performing low level tasks.

18 Again, as was noted in oral argument in
19 UNITED BOARD AND CARTON CORP., 63 NJ Super 517 the
20 Court held, which is affirmed by the Appellate
21 Division at 61 NJ Super 340, that an employee's breach
22 of the duty of loyalty can give rise to either
23 equitable or legal relief. As noted in their -- in
24 that case there as no restrictive covenant.
25 Defendants were restrained for two years based on a

1 violation of duty of loyalty.

2 There the Judge, it was noted, did not keep
3 the defendants out of their business forever as that
4 destroys free enterprise and competition, but noted
5 the need -- the defendant's need to earn a livelihood
6 is no excuse for stealing work that came into the
7 employer while employed there.

8 AUXTON VS. PARKER (phonetic) at 174 NJ Super
9 418, the Appellate Division in an often cited opinion.
10 Actually, it's really a case you can -- when you
11 shepardize you get the rest of these cases.

12 The Court there held that an employee who is
13 not bound by a covenant, and assume for a moment there
14 is no restrictive covenant, after the termination of
15 employment in the absence of any breach of trust may
16 anticipate future termination of his employment and
17 while still employed you may make arrangements for
18 some new employment by a competitor or the
19 establishment of his own business in competition with
20 the employer. It's not against New Jersey public
21 policy or the common law for people to change jobs and
22 make preparations therewith. The only restriction is
23 that the employee, quoting directly from the opinion,
24 "may not solicit his employer's customers for his own
25 benefit before he has terminated his employment, nor

1 may he do other similar acts in direct competition
2 with the employer's business. This would constitute a
3 breach of the undivided loyalty which the employee
4 owes to the employer while still employed."

5 I do find as a matter of fact that the acts
6 of Mr. McCracken, while employed by the plaintiff in
7 diverting opportunities to his eventual employer is
8 wrongful, egregious, and is -- and will be -- will be
9 significantly dealt with here in the court.

10 The idea that somehow these are Mr.
11 McCracken's clients, I feel, is a misguided attempt to
12 skirt the duty of loyalty for several reasons. First,
13 there's nothing indicating that these clients were
14 segregated from the client while employed by the
15 plaintiff.

16 Second, if these clients were near and dear
17 to Mr. McCracken there's no explanation as to why they
18 weren't similarly excluded when he took employment
19 shortly thereafter on the 24th of September with Mr.
20 Carrano's entity.

21 And lastly, even if I were to assume for the
22 moment that these clients came in with Mr. McCracken
23 and would leave with Mr. McCracken, Mr. McCracken
24 didn't leave until the 24th of September, so for him
25 to think cavalierly that even if these clients were

1 his and were going to leave with him that
2 opportunities that came in with respect to those
3 clients before he left and while he was on the payroll
4 of the plaintiff does not permit him to divert
5 those -- the work efforts and does not permit him to
6 work and be -- and take actions contrary to his
7 employer at that point in time.

8 Clearly, these are acts in direct
9 competition with his employer's business because some
10 of this work went to Mr. Carrano's company.

11 When I balance the equities here I find a
12 constructive trust should be imposed upon the gross
13 profits associated with the work in connection with
14 the Two Rivers, Balfour, and Heritage Homes. And to
15 balance the equities I find that everything equities
16 don't run in favor of the defendants. The defendants
17 caused this conduct.

18 There was no reason in the world for the
19 defendants to -- for Mr. McCracken to be in a position
20 of lining up employees while still employed and while
21 those employees were still employed by the plaintiff
22 to sign restrictive covenants with the -- with the
23 defendant company.

24 There's no reason in the world to assume
25 that -- that Mr. D'Amico and his entities could not do

1 this work. That's not for Mr. McCracken to make that
2 unilateral decision. And the facts are clear he
3 didn't even present the opportunity to Mr. D'Amico or
4 his entities. So there needs to be an accounting, a
5 full accounting of all that work.

6 And -- and I'm contemplating putting my own
7 accountant in there, quite frankly, at the defendant's
8 expense. But in the first instance I'll let Mr.
9 Fialcowitz do the work and see if he's satisfied with
10 the accounting. And at this point in time I think
11 what's appropriate is that it's not only those initial
12 jobs that I want a constructive trust imposed upon or
13 that I will impose a constructive trust upon, I don't
14 know what other work flowed in connection with Two
15 Rivers, Balfour, and Heritage Homes.

16 And what's also significant to me, this case
17 presents as a little bit of an interesting twist
18 because a lot of times when employees violate the duty
19 of loyalty and they go to an employer they start the
20 company. And this is not the situation where this is
21 Mr. McCracken's profits. This is Carrano's profits.

22 And so in shaping the -- my remedy I looked
23 closely and I see that all along the way Mr. Carrano
24 is involved and knows -- regardless of whether he
25 knows there's a restrictive covenant or not he knows

1 that Mr. McCracken is employed during this time period
2 with the plaintiff. And Mr. Carrano, during that time
3 period is e-mailing him, him being McCracken, Mr.
4 McCracken, and is directing him to get the paperwork
5 executed for his eventual employees that are coming
6 from plaintiff. And Mr. McCracken is acting on those
7 proposals. I'm sorry, Mr. Carrano is acting on his
8 proposals.

9 It would be a little bit different if Mr.
10 Carrano said well, well, wait a second. You know, you
11 don't work for me yet. But it seems that because all
12 the things I just indicated Mr. Carrano is involved
13 directly it's appropriate that even though his company
14 is the one that got the profits, he's part and parcel
15 of the -- and assisted with the violations of the duty
16 of loyalty. And moreover, it certainly at this point,
17 is shown to me with a reasonable probability of
18 success with respect to interference with prospective
19 economic advantage, which is another count in the
20 complaint.

21 And so therefore I don't think this remedy
22 is inappropriate for a constructive trust. Again, the
23 equities, in my estimation, preliminarily balance in
24 favor of the plaintiff. The defendant solely
25 misguidedly caused all of this to occur and they're

1 going to be answerable in damages when the time comes
2 potentially at final hearing. This is just a
3 preliminary injunction at this point. There will be a
4 final hearing shortly.

5 In addition, the fact that the other two
6 individuals I mentioned, Mr. Laches and Mr. Surry were
7 still being -- were still on the plaintiff's payroll
8 at a point in time when Mr. Carrano was soliciting or
9 elici-- or containing Mr. McCracken to have those
10 individuals fill out the documents clearly, in my
11 estimation, shows that this remedy is important as to
12 the profits realized from the -- from the work.

13 In addition, there's that 9/17 e-mail
14 relative to Balfour regarding keeping the people going
15 with the two houses that Mr. McCracken is involved in.
16 And clearly he's operating adverse to his employer at
17 that point in time. That being the plaintiff. And
18 the Court finds if I review the Crowe factors, that
19 there is a probability of success on this duty of
20 loyalty claim for the reasons that Mr. Dowgin's been
21 in a tough position. The Court has respect for his
22 position and he's been forthright with the Court and
23 acknowledges that this was done. That is, that these
24 e-mails were sent and work was diverted. And
25 attempted to argue that these were Mr. -- perhaps Mr.

1 McCracken's clients, which I reject and the record
2 doesn't support and even if they were still find that
3 that doesn't warrant until Mr. McCracken leaves with
4 those clients, diverting opportunities that came in
5 with respect to those clients while he was still on
6 the plaintiff's payroll.

7 And as I was saying, notwithstanding all
8 that, a fair reading of the defendant's papers
9 acknowledges, as it must, that they -- that those
10 activities occurred and therefore there's no doubt
11 it's a -- a probability of success on the merits at
12 this point.

13 Secondly, the harm is irreparable. And
14 that's why a constructive trust is appropriate on all
15 the work that they got from these projects. The
16 language cited by Mr. Fialcowitz in the UNITED BRAND
17 case I incorporate herein -- UNITED BOARD case, pardon
18 me. And it talks about the difficulty of measuring
19 profits and who knows what could have happened if Mr.
20 D'Amico or the plaintiff entities obtained this work
21 and what that could have led to, et cetera.

22 It's -- it's really a textbook definition of
23 harm that's appropriately addressed by equitable
24 relief.

25 Balance of the equities, as I noted, because

1 his conduct was direct, and albeit misguided was 100
2 percent brought upon by the defendants upon
3 themselves. They may have had some difficulties with
4 Mr. D'Amico. I guess those things will wait for final
5 hearing, but the remedy is to leave.

6 This is -- you know, I don't want to sound
7 flippant. It's a free marketplace. If you want to
8 go, go. But you can't have it both ways. You can't
9 stay there and divert opportunities, which clearly was
10 done.

11 And so consequently I just want to note also
12 that in UNITED BOARD the Appellate Division held that
13 the breach of an employee's breach of -- duty of
14 loyalty can give rise to equitable relief. So an
15 accounting and a constructive trust will be imposed.

16 Now as to their covenants I think with
17 reluctance perhaps Mr. Fialcowitz agrees but it's
18 certainly my ruling that there needs to be a hearing
19 on -- on the validity of these covenants and I need to
20 hold that quickly. And I'll meet with counsel in a
21 few moments and we can perhaps talk about some dates
22 and then come back on the record and indicate what
23 needs to occur, how much time you need to get ready
24 for that. But at this point in time the conduct that
25 I've outlined by the defendants is relatively finite,

1 at least at this point. Of course, discovery is not
2 complete.

3 And -- and will be addressed and whether
4 it's through damages or other remedies, which could
5 occur at the final hearing, the Court is uncomfortable
6 precluding the defendants from competing in any sense
7 or entirely against the plaintiffs. That's going to
8 have to wait until I can get my arms around the
9 validity of the restrictive covenants and I'll balance
10 the Crowe factors at that point.

11 And the -- in my estimation there's no point
12 in precluding the defendants from doing further work
13 with Two Rivers, Heritage Homes, and Balfour because
14 that money is all going to be held in trust at this
15 point for the plaintiff. So -- through my ruling of
16 the constructive trust and that will all be examined
17 at the final hearing.

18 This is just a preliminary order to do as
19 much as I can under these circumstances. I think when
20 the whole record is considered and the -- and just for
21 the record, with respect to the restrictive covenants,
22 as I indicated in oral argument, I tried to be up
23 front with counsel that my preliminary thoughts were
24 that there were just too many issues for me to find
25 that those covenants are binding at this point in time

1 because of all the -- a myriad of reasons, some of
2 which I put on the record before and consequently I
3 feel it would be inappropriate for me to -- at this
4 stage to enforce those covenants and restrict the
5 defendants when there's so many factual issues.

6 The defendants deny under oath that they
7 signed them. I'm well aware that the defendants also
8 denied under oath that they ever signed any
9 restrictive covenants. And that will be something
10 we'll deal with at the final hearing what effect I
11 give that.

12 But at this point in time what -- what the
13 defendants have indicated is that notwithstanding a --
14 a falsity in their affidavits to this Court and to
15 Judge Levy, the balance is emphatically their
16 position. They did not sign these restrictive
17 covenants. And frankly, that's an issue that I'm
18 going to have to put people on the witness stand and
19 listen very carefully to the surrounding circumstances
20 and make a ruling when I have more of a full record
21 with cross-examination as opposed to making that
22 ruling on the -- on the papers.

23 Now there is concern I have with the
24 violation of the consent order with Tilcon. That's
25 going to be dealt with in some other fashion, but not

1 equitable relief, which is all today is concerned
2 with. There obviously has been other work that the
3 defendants are doing. But at this point all the other
4 work seemed to -- at least at this point, seemed to
5 have arisen subsequent to Mr. McCracken's departure.
6 And consequently those issues will also have to await
7 final hearing. So once again when I -- I try to
8 balance this out considering all the issues as best as
9 one can under -- on a very convoluted record, I submit
10 that this is an appropriate decision considering all
11 the factors and one that I will enforce and I'd ask
12 Mr. Fialcowitz to please draft the appropriate order.

13 All right. Counsel, any other issues?

14 MR. FIALCOWITZ: Yes, Your Honor. I'm
15 questioning who pays for the accounting that Your
16 Honor is ordering?

17 THE COURT: Well, in the first instance I'm
18 going to have defendant produce an accounting.

19 MR. FIALCOWITZ: Okay.

20 THE COURT: And if you challenge it and
21 question it and you make an application and I'm
22 satisfied I'll put a court accountant in there. I'm
23 trusting with Mr. Dowgin you'll get a -- you'll get
24 the accounting. It is what it is. We're dealing with
25 numbers.

1 But if I find that, for instance, you show
2 me a deposition or a certification from somebody else
3 who said no, the job was not 55,000 it was 155,000 and
4 you show me that they told you it was 55 I'll deal
5 with that.

6 But I think there may be fees shifted in
7 this case. I'm just not at that point yet. But in
8 the first instance Mr. Dowgin and his clients will
9 generate the accounting and you can test the bona
10 fides of it and see where you're at.

11 MR. FIALCOWITZ: Okay. Thank you, Your
12 Honor.

13 THE COURT: Any further clarification, Mr.
14 Fialcowitz?

15 MR. FIALCOWITZ: Just in terms of timing on
16 that.

17 THE COURT: Well, we'll -- we can talk about
18 that in chambers if that's acceptable to each of you.

19 MR. FIALCOWITZ: Okay.

20 THE COURT: Mr. Dowgin, any questions?

21 MR. DOWGIN: It was along the lines of Mr.
22 Fialcowitz, Judge, and we can discuss it.

23 THE COURT: Okay. While we're on the record
24 I want to complete or star-- or finish where I started
25 and that's to commend both attorneys and I'm well

1 aware you worked over the holiday period. I think we
2 had conference calls and one of you was on vacation.
3 You both did what you had to do.

4 It's an unfortunate case. Maybe -- I have
5 some thoughts that we can talk about in a few moments.
6 But I just think the record should reflect the
7 tremendous work that was done in, now that we got the
8 merits, a short period of time.

9 So if you could come around the back, the
10 Officer will show you in the back and I'll see you in
11 chambers in a few moments. And then we'll get going
12 with our other trial.

13 MR. FIALCOWITZ: Thanks, Your Honor.

14 THE COURT: Thank you.

15 (Off the record. Back on the record.)

16 THE COURT: C-246-12. Are we on the record,
17 Gwen?

18 THE CLERK: Yes, Judge.

19 THE COURT: LKLJ VS. MC CRACKEN, ET. AL.

20 The record should reflect I had a conference in
21 chambers with counsel to discuss several things.
22 First, we set a date for the -- or we set an
23 approximate date for the hearing on the validity of
24 the restrictive covenants and we talked about the
25 first week of April and now that I have the calendar

1 in front of me does 1:30 on April 2nd sound -- are you
2 in court then, sir?

3 MR. DOWGIN: What day of the week is that,
4 Judge?

5 THE COURT: Wednesday.

6 MR. DOWGIN: That's fine. That should be
7 fine, Judge. April 2nd, 1:30?

8 THE COURT: Yes. Okay. And that's going to
9 be limited to the restrictive covenants, the validity
10 of it.

11 Now I expect -- I don't know how many
12 witnesses you're all going to have, but if we finish
13 that day I expect to be able to make a decision that
14 day based on what I hear. It's really a factual
15 issue. But that doesn't end the inquiry because
16 there's a claim that these restrictive covenants are
17 too broad. So if I find that these restrictive
18 covenants were, in fact, signed I will then entertain
19 argument. So please be prepared as to any arguments
20 with respect to enforceability of them.

21 Obviously, if I find that they have not been
22 -- that they're not valid there needs to be no
23 argument in that regard.

24 We talked in chambers about counsel having
25 at least a month to complete whatever discovery they

1 need in connection with that hearing and it's
2 envisioned that you can take the month of March. I
3 would -- as we discussed in chambers, it seems to be
4 an opportunity to use the month of February to -- for
5 the parties to engage in mediation. And this schedule
6 has built that in that you'd have a month in February
7 for mediation and a month in March to get yourself
8 ready, and then April 2nd we'd have a hearing.

9 I asked counsel to talk to their clients
10 about mediation and I would just like to say a few
11 words about it. I have a concern, which is why I
12 brought counsel to chambers. This case is already a
13 year and maybe six months old. And I'm sure each side
14 has spent significant on attorneys' fees. But I think
15 we're -- you all are about to turn a corner where the
16 fees could become a multiple of whatever they have
17 been to date.

18 And what's going to happen potentially in
19 this case, and I just want to make everybody aware of
20 that, the fees may start driving the case. You have
21 so much invested in legal fees that the case can't
22 settle because the lawyers have done so much work and
23 the fees get so high.

24 So before we -- you get to a position like
25 that potentially it's in everyone's interest to have a

1 mediation session. Secondly, you don't know what I'm
2 going to do. I don't know what I'm going to do
3 because I haven't heard the testimony. Your counsel
4 will tell you that very rarely, if at ever does
5 anybody get a home run. Because if they get a home
6 run they probably don't need to be in court. If it's
7 that clear it probably would have been resolved by
8 motion long before we got to the point where we're
9 getting to -- where we got -- before we get to the
10 point where there needs to be a trial.

11 So it's good that you all have confidence in
12 your respective cases. I would expect nothing less.
13 But keep in mind that while the law in New Jersey is
14 clear on a lot of these issues the facts are not
15 clear.

16 And I'm only one person. I make my
17 decisions based on credibility of witnesses and I
18 don't know who's credible, who isn't credible, but
19 that's all I have to go on. One thing is clear. I
20 wasn't there when these agreements were allegedly
21 signed or not signed. So I have to listen carefully
22 to the witnesses and try to figure out what happened,
23 if anything, a while ago. And there is always some
24 uncertainty there.

25 I will assure you whatever decision I make

1 will be based on -- on established facts that I find
2 credible, but it just behooves everyone if you could
3 avoid having me make that determination which has a
4 lot of uncertainty to it, that you control your own
5 outcome by engaging in some sort of mediation and I'll
6 give you the month of February to do that.

7 Again, regardless of how far you may be
8 apart your counsel will tell you there's lots of cases
9 where you go in, and that's the job of a mediator. I
10 can't sit down with either side and get you to move
11 because I'm going to be trying the facts. I don't
12 want to be the person to talk about weaknesses,
13 strengths, or what have you. That's a mediator's job.

14 Everything in mediation is confidential. So
15 I won't know, nor do I want to know, what took place
16 in mediation. But the mediator's job is to get the
17 parties to a -- to try to get the parties to a common
18 ground. And we are somewhat fortunate in New Jersey
19 in that we have a vast array of very experienced
20 mediators, both retired Judges and counsel in firms.

21 So we left it with counsel that you will
22 call me Tuesday at 8:30 if you can agree, first of
23 all, to have your clients engage in mediation.
24 Second, if you can agree on a mediator it's always
25 best if you agree. If you can't agree and you still

1 want mediation my understanding is you'd ask me then
2 to appoint a mediator.

3 The only wrinkle there is I probably have to
4 think long and hard if I can go to a retired Judge,
5 even though you asked me to do it because I think
6 we're only supposed to use retired Judges if we have
7 consent of the parties. Otherwise, it's -- creates an
8 error of -- I don't want to use the wrong words, where
9 you're protecting your own where a Judge refers cases
10 to retired Judges.

11 So but there -- but that -- Your Honor,
12 there are plenty of practitioners. So if you want a
13 Judge it's best if the two of you agree or at least
14 come up with two or three names and have me agree or
15 select for you. Otherwise, I will probably have a
16 senior practitioner who is known to the Court and has
17 a reputation for settling cases.

18 First of all, counsel, does that accurately
19 recap what we discussed in chambers?

20 MR. DOWGIN: Absolutely. Yes, Judge.

21 MR. FIALCOWITZ: Yes.

22 THE COURT: Okay. Anything else you'd like
23 to add for the record or any other comments?

24 MR. FIALCOWITZ: No, Your Honor.

25 MR. DOWGIN: Judge, the Tues-- I just

1 thought Mr. Fialcowitz and I aren't going to have the
2 time to talk about the mediator if we talk 8:30 on
3 Tuesday because I think I fly back in like eight
4 o'clock Monday night. And so if we don't talk
5 tomorrow is it possible we could do it like Wednesday
6 morning at eight, instead of Tuesday just to give us
7 one --

8 THE COURT: Is that the 5th of February?

9 MR. DOWGIN: Well, 5th instead of the 4th.
10 Yes, Judge.

11 MR. FIALCOWITZ: Yes.

12 THE COURT: You know, unfortunately, I'll be
13 out of the state that afternoon. I guess I can take a
14 conference call, but my only concern is I want to get
15 you going. In other words if you tell me either
16 select a mediator or you selected a mediator
17 presumably whoever you select or I select is not going
18 to be able to take you the next day or thereafter. So
19 I don't want to waste -- I don't want to lose time,
20 pardon me. I don't want to lose time in that process.

21 Today is only Monday. I know you're aware
22 the rest of the week.

23 MR. DOWGIN: I'm going to be in court --
24 we'll try to do it tomorrow morning, Judge. I'm in
25 court and I leave first thing Wednesday morning.

1 We'll try to work -- we'll try to talk in the morning.

2 THE COURT: Do you want to try calling him
3 tomorrow afternoon?

4 MR. FIALCOWITZ: Sure.

5 MR. DOWGIN: I'm in court all -- from one
6 o'clock on until -- until the night.

7 THE COURT: Okay.

8 MR. DOWGIN: But we'll try to speak in the
9 morning, Judge.

10 THE COURT: Okay. So --

11 MR. DOWGIN: We'll leave it just the way --
12 we'll leave it the way it is.

13 THE COURT: All right. And lastly, we also
14 discussed that the accounting should be done within 21
15 days.

16 MR. DOWGIN: Yes, Judge.

17 THE COURT: All right. And as I said, I
18 thought that discussion -- since there was a lot of
19 back and forth we didn't need to clutter the record.
20 We would just do it in chambers. So again, thank you
21 for your time and I'll look forward to speaking to you
22 tomorrow.

23 MR. DOWGIN: thank you very much, Judge.

24 THE COURT: All right.

25 MR. FIALCOWITZ: Thank you very much.

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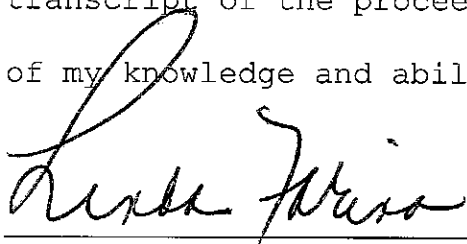
THE COURT: Have a good afternoon.

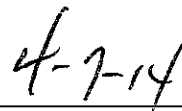
(Proceedings concluded)

CERTIFICATION

1
2 I, Linda Farina, the assigned transcriber, do hereby
3 certify the foregoing transcript of proceedings of the
4 Essex County Superior court on January 27, 2014,
5 Digitally recorded, Time Index from 1:43:40 to
6 2:15:56, and from 2:44:12 to 2:53:04, is prepared in
7 full compliance with the current Transcript Format for
8 Judicial Proceedings and is a true and accurate
9 transcript of the proceedings as recorded to the best
10 of my knowledge and ability.

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