THE LAW OFFICE OF
JOHN A. FIALCOWITZ, LLC
89 Headquarters Plaza North, Suite 1216
Morristown, New Jersey 07960
973.532.7208
john@fialcowitzlaw.com
Attorney ID No.: 007122001
Attorney for Defendants
Phoenix Transcription, LLC
Teresa Ulrich, Melissa Ulrich,
John Ulrich, Mark Mazza and
Patricia Wtulich

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MORRIS COUNTY
DOCKET NO.: C-121-13

KING TRANSCRIPTION SERVICES, LLC, Plaintiff, vs. **PHOENIX TRANSCRIPTION, LLC, FRANK ULRICH, TERESA ULRICH, MELISSA ULRICH, JOHN ULRICH, MARK MAZZA and PAT WTULICH,** Defendants.	**CIVIL ACTION** **ORDER GRANTING MOTION FOR REIMBURSEMENT OF ATTORNEYS' FEES AND LITIGATION COSTS**

THIS MATTER, having been opened to the Court upon the motion of John Fialcowitz, Esq., counsel for Defendants Phoenix Transcription, LLC ("Phoenix"), Teresa Ulrich ("Teresa"), Melissa Ulrich ("Melissa"), John Ulrich ("John") and Mark Mazza ("Mark") (collectively, the "Phoenix Defendants") and Patricia Wtulich ("Patricia") for an Order, pursuant to N.J.S.A. §2A:15-59.1 and *Rule* 1:4-8: (a) directing Plaintiff King Transcription Services, LLC and its attorney to reimburse Phoenix for the attorney's fees and litigation costs it incurred defending John, Patricia and Mark from King's frivolous claims; and (b) granting them an award of the fees

and costs incurred in the preparation and presentation of this motion; and the Court having considered the parties' submissions and for good cause shown,

IT IS on this the 18th day of May, 2015,

ORDERED as follows:

1. The motion of the Phoenix Defendants and Patricia is GRANTED.

2. King and its attorney shall reimburse Phoenix for attorney's fees and litigation costs in the amount of $ 13,110.78 in connection with defending John, Patricia and Mark from King's frivolous claims.

(A) 3. Mr. Fialcowitz shall submit a Certification of Services to the Court within _ days for the attorney's fees and litigation costs that Phoenix, John, Patricia and Mark incurred in connection with preparing and presenting this motion.

4. Mr. Fialcowitz shall serve a copy of this Order on all parties within 10 days.

See attached Statement of reasons

Hon. Stephan Hansbury, P.J. Ch.

This motion was: [X] opposed.
[ ] unopposed.

IT IS YOUR RESPONSIBILITY TO SERVE YOUR ADVERSARY WITH THIS DOCUMENT

(B) Given the size of the award, the court declines to consider further fees.

KING TRANSCRIPTION SERVICES, LLC v. PHOENIX TRANSCRIPTION, LLC, et als.
DOCKET NO. MRS-C-121-13

STATEMENT OF REASONS

Defendants Phoenix Transcription, LLC, Teresa Ulrich, Melissa Ulrich, John Ulrich, Mark Mazza and Patricia Wtulich move for attorney fees pursuant to N.J.S.A. § 2A:15-59.1 and Rule 1:4:8. Defendants contend that Plaintiff "should have known from the outset" that their claims were not reasonable. Brief at 1. On January 23, 2015, this Court granted Defendants' motion for summary judgment and dismissed Plaintiff's Complaint as to John, Patricia, and Phoenix, Teresa and Melissa with prejudice.

I. Plaintiff's Action was Frivolous against Phoenix Transcription, LLC, Teresa Ulrich, Melissa Ulrich, John Ulrich, Mark Mazza and Patricia Wtulich

The moving Defendants assert that Plaintiff's Complaint was frivolous as to them under to N.J.S.A. § 2A:15-59.1 and Rule 1:4:8.

a. Frivolous Litigation Statute N.J.S.A. § 2A:15-59.1

> a. (1) A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous.
>
> . . .
>
> b. In order to find that a complaint, counterclaim, cross-claim or defense of the non-prevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:
>
> > (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in **bad faith, solely** for the purpose of **harassment, delay** or **malicious injury; or**

> (2) The non-prevailing party **knew**, or **should have known**, that the complaint, counterclaim, cross-claim or defense was **without** any **reasonable** basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> N.J.S.A. § 2A:15-59.1 (emphasis added).

b. Frivolous Litigation New Jersey Court Rule

> (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> . . .
>
> R. 1:4-8. Frivolous Litigation

I. Attorneys' Fees

Here, there is good cause to find that Plaintiff knew or should have known that the Complaint and causes of action were asserted against Defendants without any reasonable basis in fact or law and could not be supported by a good faith argument.

COUNT ONE: ENFORCEMENT OF RESTRICTIVE COVENANT

First, Teresa, Melissa, John and Patricia did not have a contract with Plaintiff. Therefore as a matter of law, this claim failed. The Court could enforce a restrictive covenant against a non-party. Plaintiff knew or should

have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT TWO: USURPATION OF CORPORATE OPPORTUNITY

Second, Teresa, Melissa, John and Patricia were not high ranking officers and it takes a high ranking officer of a corporation to usurp a corporate opportunity. To usurp a corporate opportunity, a person must be in a position to make decisions for the corporation. The corporation essentially misses out on an opportunity because of the manager or partner's infidelity to the corporation. Put otherwise:

> [I]f there is presented to a corporate officer of [sic] director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.
>
> [Valle v. North Jersey Auto. Club, 141 N.J.Super. 568, 573 (App.Div. 1976), modified, 74 N.J. 109 (1977) (quoting Guth v. Loft, 23 Del.Ch. 255 (Sup.Ct.1939))].

Here, Teresa, Melissa, John and Patricia were simply workers, independent contractors, since they were not the boss, partner, owner, manager of the business, they could not feasibly usurp a corporate opportunity. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT THREE: BREACH OF LOYALTY AND GOOD FAITH

Regarding the third, Teresa, Melissa, John and Patricia did not breach their duty of loyalty and good faith to Plaintiff because Plaintiff has not established these four individuals did anything to harm Plaintiff *while employed* with Plaintiff. Further, in the absence of an enforceable restrictive covenant, there is no common law duty of loyalty that prohibits an employee from working for a competitor.

"An employee owes a duty of loyalty to the employer and must not, while employed, act contrary to the employer's interest. Auxton Computer Enterprises, Inc. v. Parker, 174 N.J.Super. 418, 425 (App.Div.1980). "During the period of employment, the employee has a duty not to compete with the employer's business." Chernow v. Reyes, 239 N.J.Super. 201, 204 (App.Div.), certif. denied, 122 N.J. 184 (1990). See also Marchitto v. Central R.R., 9 N.J. 456, 466 (1952), overruled on other grounds, Donnelly v. United Fruit Co., 40 N.J. 61 (1963). "It is the nature and character of the act performed that will determine if there has been an actionable wrong and whether or not the act has caused some particular injury to the employer." Auxton Computer Enters., Inc. v. Parker, supra, 174 N.J.Super. at 424 "Obviously, each case must be decided upon its own facts; because of the competing interests the actionable wrong is a matter of degree." Id.

"The duty of loyalty may be breached by actions which do not rise to the level of actual direct competition. As noted, the standard is whether the employee acted contrary to the employer's interest." Cameco, Inc. v. Gedicke, 299 N.J. Super. 203, 214-215 (App.Div.1997) Chernow v. Reyes, supra, 239 N.J.Super. at 204. "The standard's test employs an analysis of the 'nature and the character' of the employee's act." Cameco, Inc. v. Gedicke, 299 N.J. Super. 203, 214-215 (App.Div.1997) quoting Auxton Computer Enters., Inc. v. Parker, supra, 174 N.J.Super. at 424. In this regard "[c]ourts have recognized the damage a former disloyal employee is able to inflict on his employer, even in the absence of a covenant, where he has launched or assisted a competing business while he is employed." Platinum Management, Inc. v. Dahms, 285 N.J.Super. 274, 303 (1995) citing United Board & Carton Corp. v. Britting, 63 N.J.Super. 517, 527 (Ch.Div.1959), aff'd, 61 N.J.Super. 340 (App.Div.), certif. denied, 33 N.J. 326 (1960).

There are simply no facts that these four individuals, while employed with Plaintiff, caused Plaintiff harm. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT FOUR: GOOD FAITH

Regarding the fourth, breach of covenant of good faith, Plaintiff has not established that it had a contract with these four individuals—to constitute a contractual breach of good faith.

"As a general rule, we have recognized that every contract in New Jersey contains an implied covenant of good faith and fair dealing." R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 276-277 (2001) citing

Wilson v. Amerada Hess Corp., 168 N.J. 236, 243 (2001),; Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); Pickett v. Lloyd's, 131 N.J. 457, 467 (1993); Onderdonk v. Presbyterian Homes, 85 N.J. 171, 182 (1981). "Our Court has determined that the implied duty of good faith and fair dealing means that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the full fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 276-277 (2001) quoting Association Group Life, Inc. v. Catholic War Veterans, 61 N.J. 150, 153 (1972); See 13 Williston on Contracts § 38:15 (4th ed.2000) (stating that an implied covenant of good faith and fair dealing means that "neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"). The Restatement explains further that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205, comment a (1981).

Since there was no contract, there is no breach of good faith. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT FIVE: MISAPPROPRIATION OF TRADE SECRETS

Regarding the fifth, misappropriation of trade secrets, Plaintiff has not established what—in the transcription service industry—constitutes a trade secret, **or** that it was misappropriated. New Jersey defines trade secrets narrowly:

> "Trade secret" means information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.J.S.A. § 56:15-2.

Here, Plaintiff simply did not plead or provide certifications designating what the trade secret was that these four individuals allegedly misappropriated. Further, Plaintiff's argument did not supplement what the trade secrets were or how they were secret. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT SIX: TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

Regarding the sixth, tortious interference with business relations, Plaintiff did not established interference amounting to damages.

An action for tortious interference with a prospective business relation protects the right to pursue one's business, calling, or occupation, free from undue influence or molestation. See Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 750 (1989). Not only does the law protect a party's interest in a contract already made, but it also protects a party's interest in reasonable expectations of economic advantage. See Id. To prove its claim, plaintiff must show [306] that it had a reasonable expectation of economic advantage that was lost as a direct result of defendants' malicious interference, and that it suffered losses thereby. See Baldasarre v. Butler, 132 N.J. 278, 293 (1993). Causation is demonstrated where there is "proof that if there had been no interference there was a reasonable probability that the victim of the interference would have received the [37] anticipated economic benefit." Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App.Div.), certif. denied, 141 N.J. 99 (1995) (quoting Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185-86 (App.Div.), certif. denied sub nom., Leslie Blau Co. v. Reitman, 77 N.J. 510 (1978)).

In this case, there was no tortious interference. There is no link showing that Defendants actions *caused* any lost profits. The causation and damages links were missing. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and fact and could not be supported by a good faith argument.

COUNT SEVEN: CONVERSION

Regarding the seventh, Plaintiff did not state what was converted to constitute conversion. The common law tort of conversion is defined as the "'intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" Chicago Title Ins. Co.

v. Ellis, 409 N.J. Super. 444, 454 (App.Div.) certif. denied, 200 N.J. 506 (2009). Here, bare allegations without more, did not rise to conversion. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

COUNT EIGHT: UNFAIR COMPETITION

Regarding the eighth, unfair competition N.J.S.A. § 56:4-1 and at common law fail because Plaintiff did not establish that Defendants were unfairly competing.

"The law will not permit the trespasser to take the crop away from the sower." American Shops, Inc. v. American Fashion Shops of Journal Square, Inc., 13 N.J. Super. 416, 420 (App. Div. 1951). "The law guards the good will of a business and protects against unlawful injury." Gold Fuel Service, Inc. v. Esso Standard Oil Co., 59 N.J. Super. 6, 13 (Ch.Div.1959) citing J. B. Liebman & Co., Inc. v. Leibman, 135 N.J. Eq. 288 (Ch. 1944); Sachs Furniture Radio Co. v. Sachs Quality Stores Corp., 39 N.J. Super. 70 (App. Div. 1956). "Except as certain conduct, which was lawful at common law, is defined as unfair competition by the federal statute, the plaintiff has no right to be protected against competition, but only to be free from malicious and wanton interference, disturbance or annoyance" Gold Fuel Service, Inc. v. Esso Standard Oil Co., 59 N.J. Super. 6, 13 (Ch.Div.1959) quoting Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 58 (E. & A. 1934); George F. Hewson Co. v. Hopper, 130 N.J.L. 525 (E. & A. 1943); Louis Schlesinger Co. v. Rice, 4 N.J. 169 (1950).

"No merchant, firm or corporation shall appropriate for his or their own use a name, brand, trade-mark, reputation or goodwill of any maker in whose product such merchant, firm or corporation deals." N.J.S.A. § 56:4-1.

Here, statutory and common law unfair competition claims fail as a matter of law because Plaintiff has not alleged facts sufficient to support these claims. Plaintiff did not establish malicious interference or a misappropriation of a trademark, name or something specifically belonging to Plaintiff. Furthermore, Plaintiff did not specifically establish what it is that these four individuals misappropriated. Plaintiff knew or should have known that this cause of action was asserted without a reasonable basis in law and could not be supported by a good faith argument.

For the foregoing reasons, this Court grants Defendants' motion for attorney fees.

II. Reasonableness of Fees

a. Attorney fees were necessary

In determining the reasonableness of an attorneys' fee award, the threshold issue "is whether the party seeking the fee prevailed in the litigation." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 386 (2009)(quoting N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 570 (1999). A "party must establish that the 'lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important factor in obtaining the relief.'" N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 570 (1999) (quoting *Singer v. State*, 95 N.J. 487, 494, *cert. denied*, 469 U.S. 832 (1984)).

In this case, the moving Defendants prevailed in the litigation, summary judgment was granted in their favor. To obtain the favorable result, counsel filed a summary judgment motion—swiftly evaluating the causes of actions without dragging the parties through trial. The lawsuit was related to securing the relief obtained. The attorneys' fees were necessary to draft a summary judgment brief on a multi-count Complaint.

b. Counsel's fees are reasonable

The next step in determining the amount of the award is to calculate the lodestar. The lodestar is the "number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004). The computation of the lodestar mandates that the trial court determine the reasonableness of the hourly rate of "the prevailing attorney in comparison to rates 'for similar services by lawyers of reasonably comparable skill, experience, and reputation' in the community." Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 387 (2009) (quoting Rendine v. Pantzer, 141 N.J. 292, 337 (1995)).

Rule of Professional Conduct 1.5(a) "commands that '[a] lawyer's fee shall be reasonable' in all cases, not just fee-shifting cases." Rules of Professional Conduct require courts to consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

[RPC 1.5(a).]

Here, regarding the first factor, the time and labor involved was standard. Counsel had five clients to defend. Next, in defending five clients, acceptance of the "Phoenix Defendants" precluded other employment-this was apparent to Defendants. Next, the Court is satisfied that Defendants' Counsel fee is reasonable. Counsel went to Fordham University School of Law, he charged Defendants $275.00 an hour, his associate (Kimberly Goldberg) charged $125.00 an hour; these fees are customary, standard and reasonable in our locality. Counsel received positive results for his clients as summary judgment was awarded in their favor. Next, Counsel and his clients had average an average nature and length of a professional relationship. The Court is satisfied that Counsel has excelled experience, reputation and ability. Finally, the fee was fixed.

Counsel's total legal fees accumulated $11,762.50. Counsel's total costs and fees accumulated $13,110.78. After review of the invoices, the hourly rate, the factors in RPC 1.5(a) and the arguments presented, the Court finds good cause to award fees and costs in the amount of $13,110.78 to Defendants' Counsel.

Plaintiff takes the position that Defendants allegedly delayed in filing the summary judgment until "most, if not all, of the discovery has been conducted," and this should be a basis for the Court to deny or reduce Defendants' motion for fees and costs. Opposition Brief at 6. The parties engaging in discovery showed the frivolity of the instant case against Defendants. In Plaintiff's motion for summary judgment brief, it states: "[i]t

is clear that the Defendants used King's trade secret and confidential information to compete against King." Summary Judgment Brief at 2. It was not clear that Defendants had secret information or used secret information. The facts, discovery and evidence showed there was no—even tenuous—claim against the Defendants.

Defendants assert that had the motion been filed earlier, the anticipated response would be - no, discovery is not over. Given the nature of this case, that is a reasonable position.

III. Plaintiff's Arguments

a. Patricia Wtulich Fees

Plaintiff also takes the position that certain fees should not be allowed for certain individuals because "no additional fees and costs were incurred in defending the claims as to John, Mazza and Wtulich." Opposition Brief at 3. If no additional fees and costs were incurred, then they were not charged on Counsel's invoice and will not be passed on to Plaintiff.

"Wtulich was originally named as she was believed to be instrumental in the formation of Phoenix and responsible for improperly inducing transcribers to go to Phoenix from King." Opposition Brief at 7 nt. 6. As discussed above, the claims against Ms. Wtulich were frivolous because Plaintiff did not establish causation, damages, a contract that Ms. Wtulich breached, or that employees left the Company because of Wtulich's actions.

b. Mark Mazza Fees

Plaintiff next argues that because Mark Mazza was dismissed in September 2014 he should not be awarded fees. The Court disagrees. Counsel fees should be awarded in Mr. Mazza favor because of Plaintiff dismissed Mr. Mazza over a year after Plaintiff filed the Complaint; Mr. Mazza defended against Plaintiff's claims, much like the other Defendants and was only dismissed four months prior to the other Defendants' grant of summary judgment. Therefore, Mr. Mazza is also awarded fees and costs.

c. Timeliness

The Court is satisfied that Defendants' application for fees was timely. There is no provision in the Statute or Rule that provides a time frame for bringing a fee application. Even if the Court were to apply a reasonableness standard, Summary Judgment was granted in February and this fee application was returnable in April.

d. Sanctions

The Court is satisfied that while counsel fees and costs are warranted, sanctions are not. There was no malice, intent to harass or gross conduct or malevolence in filing Plaintiff's claims. The Court does not issue sanctions against Plaintiff's counsel.

STEPHAN C. HANSBURY, P.J., Ch.