MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 16

CREDITRISKMONITOR.COM, INC.,

Plaintiff,

INDEX NO.: 006211/2001

- against -

SAMUEL FENSTERSTOCK and GLOBAL CREDIT SERVICES, INC.,

Defendants.

DECISION AFTER HEARING

In April 2001, plaintiff initiated this action by show cause order contending, generally, that the defendant Samuel Fensterstock had left plaintiff's employ taking customer names and information to his new employer, Global Credit Services, Inc., thus violating a non-compete clause in his employment contract. An Order to Show cause with a Temporary Restraining Order was signed on April 23, 2001 (Trial Exhibit 2 , T. 2). In June 2001, the parties entered into a Stipulation of Settlement (Exhibit 20) which settled all issues initiated in the April action. The said Stipulation of Settlement was So Ordered by the court on July 11, 2001. (Trial Exhibit 19, T. 19).

In late November, 2001, the plaintiff brought on a contempt proceeding arguing the defendants had violated the So Ordered Stipulation of Settlement of July 11, 2001 and should be found in contempt, that, due to the actions of the defendants, the plaintiff had suffered actual damages and, further, the plaintiff should be awarded punitive damages due to the intentional acts of defendants. Further, plaintiff argues that the "lies and fraud" of defendants caused plaintiff to incur additional legal fees and expenses.

Plaintiff alleges that the So Ordered agreement was violated because:

(1) Defendant, Fensterstock, took Creditriskmonitor's customer list and gave it to Global prior to the order to show cause being signed, yet Fensterstock and Global, in the agreement of June 2001, affirmatively stated that Fensterstock did not possess any of Creditriskmonitor's confidential information including a customer list, and Global agreed that if they had such information they would not use it;

(2) that Samuel Fensterstock allegedly worked for Global prior to December 4, 2001, notwithstanding that the order prevented Global from utilizing Mr. Fensterstock until after December 4, 2001; and, finally

(3) prior to April 30, 2002, Samuel Fensterstock solicited Creditriskmonitor's customers for Global in violation of the order which allegedly precluded such acts.

These are the three major categories of the contempt action which are expanded upon in plaintiff's written summation.

After the contempt motion was filed, there followed a lengthy period of pre-trial discovery which included pre-trial depositions, electronic discovery ordered by the court, confidentiality agreements and an eventual hearing. The "hearing" lasted ten weeks.

During the course of the hearing, the court heard from twelve witnesses, admitted 250 plaintiff exhibits and 10 defense exhibits. The exhibits filled seven plus banker boxes - each exhibit usually was multi paged. After the "hearing" (a term which is quite deceptive considering the length and complexity of the proceeding), both sides submitted written summations and memoranda of law, as well as Reply Affirmations. The Reply memos were primarily dedicated to the damage issue.

The parties and the court agreed that there were three issues before the court:

(1) Were the defendants in contempt, did they violate the agreement, and did they do so intentionally?

(2) If so, what damages, if any, were caused by the acts of the defendants? And, finally,

(3) Are punitive damages appropriate?

(a) Along with attorney fees?

Punitive damages are based on the alleged fraud committed by defendants by inducing plaintiff to sign the agreement (June, 2001) knowing that a customer list had already been in their hands a month or more before the order to show cause, and that they were systematically stealing trade secrets from Creditriskmonitor.

The agreement entered into by the parties and So Ordered by Justice O'Connell (hereinafter known as "July 11th Order") has been described in various ways throughout this proceeding. The language ranged from "clear on its face" to "clear as mud". These may not be exact quotes, but the message is clear. The defense basically arguing that if the defendants violated the agreement, it was due to the internal ambiguity of the agreement, not due to any purposeful intentional acts.

BACKGROUND

Samuel Fensterstock, founded the CreditRiskMonitor division of Market Guide, Inc. with his father, Albert Fensterstock. In 1999 New Generation Foods purchased the CreditRiskMonitor division from Market Guide, Inc. and renamed it CreditRiskMonitor.com, Inc.

On April 1, 2001 Samuel Fensterstock terminated his employment with CRM and entered into an agreement to work for Global (April 5th) in apparent violation of his written agreement with CRM. Global hired Samuel Fensterstock because he was the "face" of CRM. (See, Tr. Polakoff Testimony, p. 4641) On top of agreeing to pay Samuel Fensterstock Global's highest salary and, to use Gerry Polakoff's words, "the best deal in the credit industry," Global also agreed to pay Samuel Fensterstock an "incentive bonus" equal to ten percent (10%) of Global's "new business" revenues. (Ex. 1, April 5, 2001 employment agreement between Samuel Fensterstock and Global, p. 2, ¶ 2.2) Global paid Samuel Fensterstock more than Gerry Delisle (Global's President, Chief Executive Officer, Chairman of the Board, Co-Founder and significant shareholder) and Gerry Polakoff (Global's Vice President of Sales, Board Member, Co-Founder and significant shareholder). Obviously Mr. Fensterstock had great value to Global.

On April 24, 2001 CRM moved by order to show cause to restrain Defendants' conduct. That same day, the Court issued a temporary restraining order.

In June 2001 the parties entered the Stipulation of Settlement settling the claims raised in CRM's April 24, 2001 order to show cause. (Ex. 20, June 2001 Stipulation of Settlement).

On July 11, 2001 the Court "so-ordered" the June 2001 Stipulation of Settlement. (Ex. 19, July 11, 2001 Order).

On the eve of Thanksgiving weekend 2001, CRM brought on an Order to Show Cause claiming Global was in contempt of the July 11th Order.

THE APRIL 24, 2001 TEMPORARY RESTRAINING ORDER

Pursuant to the April 24, 2001 temporary restraining order, Defendants were restrained from: (I) disclosing or utilizing "CRM's customer lists, confidential information concerning customers and [prospective] customers;" (ii) soliciting CRM's customers; (iii) violating Samuel Fensterstock's written agreement with CRM; and (iv) employing or utilizing Samuel Fensterstock. See, Ex. 2, April 24, 2001 temporary restraining order, pp. 4-5, ¶¶'s 1-5. And it also stated that " this directive shall not apply to persons or entities with whom [GLOBAL] was doing business within the past five years or potential customers whom GLOBAL has previously contacted"

It is argued by the defendant that the entire language of the April 24, 2001 order became part of the July 11th Order and must be incorporated within the Order of July 11th in determining if the Order has been violated by the defendants. The Court finds otherwise. The first reference to the April Order in the July Order is via the "Whereas" clause which is merely prefecatory to the July 11th Order. It does not incorporate it into the July 11th Order. The court will interpret the July 11th Order within its four corners unless required to reach beyond those corners by ambiguity. It will resort to parole evidence as needed. The second reference is in para. 3 of said Order and it also does not incorporate the April Order but as noted below refers to compliance with the prior Order up to the date of signing the stipulation on June 11, 2001.

THE JULY 11TH ORDER

The parties agreed to and were ordered to abide by the following terms and conditions which the plaintiff argues have been violated by the defendants:

A. The July 11th Order Required Defendants To Represent That They Complied With The April 24, 2001 Temporary Restraining Order

Paragraph three (3) of the July 11th Order required Defendants to represent they complied with the Court's April 24, 2001 temporary restraining order which, among other things: (I) prohibited Samuel Fensterstock from disclosing CRM's customer list to Global; and (ii) prohibited Samuel Fensterstock and Global from utilizing CRM's customer list. See, Ex. 20, July 11th Order, p. 2, ¶ 3.

The July 11th Order provides:

> Fensterstock and Global agree that they have, to the date of this Stipulation, fully and completely complied with the Court's April 24 temporary restraining order.

See, Ex. 20, July 11th Order, p. 2, ¶ 3.

The relevant portions of the April 24, 2001 temporary restraining order restrained Defendants from:

> Disclosing or utilizing confidential information of or about CreditRiskMonitor, . . . obtained from Samuel Fensterstock, including but not limited to customer lists, confidential information concerning customers and perspective [sic] customers .

See, Ex. 2, April 24 temporary restraining order, p. 4, ¶ 4.

B. The July 11th Order Prohibited Defendants From Possessing Or Utilizing CRM's Customer List, Confidential Memoranda And Other Confidential Information

Paragraphs five (5), six (6), twelve (12) and thirteen (13) of the July 11th Order prohibited Defendants from: (I) possessing; or (ii) utilizing CRM's confidential information, including CRM's customer lists and confidential memoranda. Most important, pursuant to paragraph thirteen (13) of the July 11th Order, Global was ordered "to refuse to accept [CRM's customer lists and confidential information] or use it in ***any*** way" (emphasis added). See, Ex. 20, July 11th Order, p. 8, ¶13.

The July 11th Order provides:

> Fensterstock and Global agree that they shall not . . . use, any of CRM's . . . *confidential information* . . . which Fensterstock obtained during the course of or in connection with Fensterstock's employment with CRM .

See, Ex. 20, July 11th Order, p. 3, ¶ 5.

> Fensterstock and Global agree that they shall not . . . use . . . any of CRM's agreements pertaining to current and prospective customers, customer lists, costs, prices .

See, Ex. 20, July 11th Order, p. 3-4, ¶ 6.

> Fensterstock represents and warrants that he is not in possession of any documents, computer records or copies thereof containing customer lists, names or contact information of CRM customers . . . trade secrets, memos, confidential information or property belonging to CRM and that he has not disclosed any such materials to Global . . .. Furthermore, in accordance with the affidavit of Fensterstock, attached hereto as Exhibit "A," Fensterstock has conducted a search of his home computer, Palm Pilot and personal files (paper and electronic) and confirms that he has returned, deleted or otherwise destroyed any documents, computer records or copies containing customer lists, names or contact information of CRM customers, trade secrets or confidential information belonging to CRM or any internal memos, sales memos, training memos or other materials that he obtained from or prepared for CRM during his employment with CRM .

See, Ex. 20, July 11th Order, p. 7-8, ¶ 12.

> Global represents and warrants that it has not received from Fensterstock . . . any customer lists, names or contact information of CRM customers . . . trade secrets or confidential information, sales memos, internal memos, training materials or materials obtained from or belonging to CRM. Furthermore, in accordance with the affidavit of Serge Poskotin, attached as Exhibit "B," Global has conducted a search of the computer assigned to Fensterstock and a search Global's network, computers and paper files and confirms and represents and warrants that it has located no files containing any information received from Fensterstock concerning CRM. Global covenants that if presented with such information it will refuse to accept it or use it in any way

See, Ex. 20, July 11th Order, p. 8, ¶ 13.

C. The July 11th Order Prohibited Samuel Fensterstock From Providing Services To Global And Prevented Global From Accepting Services From Samuel Fensterstock From April 24, 2001 Until December 4, 2001

Paragraphs two (2) and four (4) of the July 11th Order prohibited: I) Samuel Fensterstock from providing any services to Global "in any way" and ii) Global from accepting any services "whatsoever" from Samuel Fensterstock until December 4, 2001. See, Ex. 20, July 11th Order, p. 2-3, ¶¶'s 2 and 4.

The July 11th Order provides:

> Global agrees that it has not and will not directly or indirectly employ, engage, hire or utilize the services of Fensterstock in any way, whether as an employee, consultant, joint venturer, agent, or independent contractor from April 24, 2001 until December 4, 2001 .

See, Ex. 20, July 11th Order, p. 2, ¶ 2.

> Fensterstock agrees that he has not and will not directly or indirectly work for or provide any services whatsoever to Global or for the benefit of Global, whether as an employee, consultant, joint venturer, agent or independent contractor for the period from April 24, 2001 to December 4, 2001 .

See, Ex. 20, July 11th Order, p. 2-3, ¶ 4.

D. The July 11th Order Prohibited Samuel Fensterstock From Soliciting CRM's Customers On Behalf Of Global Or Participating As A Manager Of Global From April 24, 2001 Until April 30, 2002

Paragraphs four (4) and nine (9) of the July 11th Order prohibited Samuel Fensterstock from: I) directly or indirectly soliciting CRM's customers on behalf of Global; or ii) participating in the management of Global until April 30, 2002. See, Ex. 20, July 11th Order, p. 4-5, ¶¶'s 8 and 9.

The July 11th Order provides:

> [F]or the period from April 24, 2001 until April 30, 2002, Fensterstock ***shall not participate or be employed either directly or indirectly in the ownership, management***, operation or control of any business (I) whose activities conflict with or are competitive with CRM; (ii) which engages in a business of the type conducted by CRM with, or solicits business of the type conducted by CRM from, any person, firm or entity which was a customer of CRM at any time or induce or attempt to induce any such customer to reduce its business with CRM; . . . (emphasis added).

See, Ex. 20, July 11th Order, p. 4, ¶8.

> [D]uring the period from December 4, 2001 through April 30, 2002, Fensterstock agrees that he will not directly or indirectly solicit or accept any business from persons or entities who were previously CRM's customers or prospective customers at any time during the twelve month period prior to April 5, 2001 . . .

See, Ex. 20, July 11th Order, p. 4-5, ¶ 9.

The specific numbered paragraphs of the agreement that concern the court run from paragraphs 2 to 18 (see above). At times, a statement is made in one paragraph subject to any exception that might be "set forth herein". It is this style of writing that causes the reader to jump from one area to another and to possibly lose track of what each party was bound to do pursuant to the agreement. However it must be remembered that each side was represented by counsel during the entire period of the litigation and the Agreement was not drawn by laymen. What the defendants may not do prior to December 4, 2001 compared to what they may not do after that date is allegedly not so clear and, thus, whether the parties complied with the order also becomes arguable, at least that is what the defendant claims.

FINDINGS OF FACT

The List

It is undisputed that Samuel Fensterstock took CRM's customer list that contained the expiration dates of customer's contracts, prior to his leaving the employ of CRM. It is also undisputed that he gave this list to Gerry Polakoff, VP of sales at Global, in late March or early April, 2001. Apparently he did this at Polakoff's urging. Polakoff gave the list to his Technology department to "match"it to Global's own customer data base. Copies were also given to key Global sales employees, Joe Pilla and Joe Myers, at a minimum. Samuel Fensterstock denies ever using the list for his own or Global's purpose. This may or may not be exactly true, but it becomes irrelevant because the information from the list was already , so finds the court, within the Global system.

It also undisputed that Polakoff showed the list to Gerry Delisle. Delisle purportedly told Polakoff to get rid of the list, that he didn't want to see it. Allegedly the list was given back to Samuel Fensterstock who destroyed it. In the Stipulation of June 11, Samuel Fensterstock represented and warranted that he was not in possession of such a document (which may have been true by the time the Stipulation was signed) and, further, that he had not disclosed such material to Global. The Court finds that Sam Fensterstock lied when he signed the June 11, 2001 Stipulation (T.2). The Court further finds that Gerry Delisle knew of the customer list when he signed the Stipulation of June 11 and the court must also find that he too lied when he signed the document.

Though it is argued that the names on the list were also on the CRM web site and thus the list had no value, the value in the list as supported by testimony, is in what the customer was paying for services and, most importantly when the customer's contract would expire. This enabled Global's sales team to target parties whom they knew used credit services when their contracts were about to expire with CRM and knowingly undercut CRM in various ways.

The Court further finds that Gerry Delisle and Samuel Fensterstock consistently lied or at minimum misstated the truth in affidavits they submitted to the court that related to Global's knowledge and /or use of a CRM customer list and other related materials as referred to above.

(See affidavits of May 1, May 2, June 22, December 5, 2001). It is quite clear that if the court is to believe Delisle as to his alleged statement about the list "I don't want to see it" (paraphrase) then he did nothing to prevent the use of the list by Global beyond trusting Polakoff to do the right thing. The court strongly believes from the evidence submitted and the testimony adduced that from an ethical view, the combination of Polakoff and "do the right thing" is an oxymoron.

Other Documents or Memorandum of CRM

While at CRM Fensterstock prepared a variety of documents/memoranda related to sales technique. These became the property of CRM. Pursuant to paragraph 12 of the July 11th Order "Fensterstock represents and warrants that he is not in possession of any documents... trade secrets, memos, confidential information or property belonging to CRM."

Defendants do not dispute that Samuel Fensterstock took CRM's memoranda that he prepared while employed by CRM, including the "Common Objections" and "Call Script" memoranda. Defendants also do not dispute that Samuel Fensterstock utilized these and other memoranda by distributing them to "his" sales team at Global.

Defendants argue that these memoranda are not trade secrets. The "Common Objections" and "Call Script" memoranda contain sale methodologies that Samuel Fensterstock prepared for CRM – the "Common Objections" memorandum contains CRM's methodologies for how to convince a prospect to purchase credit services. The court concludes "Common Objections" and "Call Script" memoranda are trade secrets because they contain methodologies for how to convince a prospect to purchase credit services over the prospect's objections and the "Call Script" memorandum contains CRM's methodology about how to initiate contact with a prospect. See, Ex. 73. CRM's confidential sales methodologies. See Support Systems Associates, Inc. v. Tavolacci, 135 A.D.2d 704, 522 N.Y.S. 2d 604, 606 (2d Dep't 1987)(holding that bid packages that include "plaintiff's management's approach" are trade secret); AIN Leasing Corporation v. Peat, Marwick, Mitchell & Co., 166 Misc.2d 902, 903-904, 636 N.Y.S.2d 584, 585-586 (N.Y. Sup. Ct., Nassau County 1995) (denying motion to compel production of internal document, manual, or handbook regarding defendant's standards of practice, methods of practice and approaches in handling a client's work because such internal document, manual or

handbook are trade secrets).

Services Provided by Samuel Fensterstock from April 24, 2001 to December 4, 2001

Most of the ten weeks of hearing testimony was devoted to whether Samuel Fensterstock provided services of any kind to Global during the above stated period or the period that immediately followed ending on April 30, 2002.

Paragraphs 2 and 4 of the Order of July 11th prohibited: (i) Samuel Fensterstock from providing services to Global "in any way" and (ii) Global from accepting any services "whatsoever" from April 24, 2001 through December 4, 2001. See, Ex. 20, July 11th Order, below:

> 2. Global agrees that it has not and will not directly or indirectly employ, engage, hire or utilize the services of Fensterstock in any way, whether as an employee, consultant, joint venturer, agent, or independent contractor from April 24, 2001 until December 4, 2001, but thereafter shall not be so restricted, except as set forth herein.
>
> * * *
>
> 4. Fensterstock agrees that he has not and will not directly or indirectly work for or provide any services whatsoever to Global or for the benefit of Global, whether as an employee, consultant, joint venturer, agent or independent contractor for the period from April 24, 2001 to December 4, 2001, but thereafter shall not be so restricted, except as set forth herein. .....

Defendants contend that Fensterstock did not provide services to Global during this period nor did Global accept such services.

This court sat through innumerable hours of testimony and sifted through hundreds of e-mails that were related to this period of time. These e-mails would not have been discovered without the services of an outside contractor who cloned the defendants computers and then searched them for material related to CRM and Samuel Fensterstock. This was information that allegedly did not exist. E-mails were found from and to Samuel Fensterstock as well as every other employee related to sales in any way. There were even e-mails to Polakoff who disliked e-mails and who never answered them though at times he actually opened them. What was not found and was conspicuous by its absence was anything from Gerry Delisle. Numerous e-mails

to Mr. Delisle were found from Sam Fensterstock's mail box but nothing that would have come from Delisle. We know they were sent by examining responses from Sam Fensterstock. The only conclusion the court can draw is that while everyone else merely deleted their mail, Gerry Delisle intentionally wiped out the mail on his own computer sometime before the search began. Considering that Delisle stalled the search of the computers by the court appointed analyst, it is not an unlikely scenario. (Court was in phone contact with the parties when analyst was prevented from starting at pre arranged time so that Mr. Delisle could speak to his IT department head to see if it was convenient.)

As set forth seriatim in plaintiff's Reply Brief the Court finds Sam Fensterstock rendered the following services to Global:

- ☐ Samuel Fensterstock transmitted e-mails on October 11 and November 5, 2001 to every member of Global's sales team identifying CRM customers to solicit. See, Ex. 73, October 11, 2001 4:17 p.m. e-mail, CRM 2156, October 11, 2001 4:18 p.m. e-mail, CRM 2157, and November 5, 2001 e-mails, CRM 2707 to CRM 2720;

- ☐ Samuel Fensterstock corrected Global's database to identify CRM's customers; See, Ex. 73, September 20, 2001, 12:06 p.m. e-mail, CRM 1546;

- ☐ Samuel Fensterstock attended group sales meetings and scheduled one-on-one training sessions. See, Ex. 73, July 24, 2001 5:30 p.m. e-mail, CRM 709, August 23, 2001 2:32 p.m. e-mail, CRM 1138, September 24, 2001 7:56 a.m. e-mail, CRM 1607, November 5, 2001 10:04 a.m. e-mail, CRM 2677, and November 5, 2001 12:42 p.m. e-mail, CRM 2721; Tr. Polakoff Testimony, p. 2649, ln. 9 to ln. 17;

- ☐ Samuel Fensterstock transmitted e-mails to Joe Pilla telling Joe Pilla to instruct Global's sales team to sign up for instant messaging and every member of Global's sales team thereafter signed up for an instant messenger account. See, Ex. 73, July 26, 2001 9:51 a.m. e-mail, CRM 732 and October 12, 2001 11:15 a.m. e-mail, CRM 2198; (no IM material was discovered in the computer search)

- ☐ Samuel Fensterstock transmitted e-mails to every member of

Global's sales team requiring them to increase their call volume. See, Ex. 73, October 11, 2001 12:01 p.m. e-mail, CRM 2123;

- ☐ Joe Pilla re-transmitted copies of e-mails that he received from Samuel Fensterstock to Global's sales teams instructing Global's sales team how notes should be entered into Global's database. See, Ex. 73, July 25, 2001 12:53 p.m. e-mail from Samuel Fensterstock to Joe Pilla, CRM 716 and July 25, 2001 2:38 p.m. e-mail from Joe Pilla, CRM 722;

- ☐ Joe Pilla transmitted an e-mail to every member of Global's sales team memorializing group sales meetings where Samuel Fensterstock and Gerry Delisle ***jointly*** issued managerial instructions. See, Ex. 73, July 24, 2001 5:30 p.m. e-mail, CRM 709;

- ☐ Samuel Fensterstock reviewed and taped sales calls. See, Tr. Polakoff Testimony, p. 2662, ln. 6 to ln. 20; Tr. Mitchell Testimony, p. 2348, ln. 5 to p. 2350, ln. 2; Tr. S. Fensterstock Testimony, p. 189, ln. 7 to ln. 15 and p. 191, ln. 14 to p. 191, ln. 20; Ex. 73, September 4, 2001, 9:49 a.m. e-mail from Samuel Fensterstock, CRM 1344 and October 3, 2001, 12:30 p.m. e-mail, "subject: taping a walkthrough," CRM 1873;

- ☐ Samuel Fensterstock attended sales meetings where he discussed the differences between CRM and Global and even presented these differences on a blackboard. See, Tr. Polakoff Testimony, p. 2649, ln. 9 to ln. 17 and p. 2651, ln. 19 to p. 2653, ln. 19;

- ☐ Samuel Fensterstock distributed training memoranda that he prepared while he was employed by CRM to "his" Global sales team including, but not limited to, the "Common Objections" and "Call Script" memoranda, See, Tr. S. Fensterstock Testimony, p. 203, ln. 9 to ln. 20 and Ex. 73, October 1, 2001 3:26 p.m. e-mail, CRM 1764 to CRM 1770 and p. 220, ln. 19 to p. 223, ln. 17 and Ex. 73, October 11, 2001 5:40 p.m. e-mail, CRM 2163 to CRM 2171;

- ☐ Joe Pilla scheduled a sales meeting after Samuel Fensterstock sent Joe Pilla an e-mail instructing him to schedule a sales meeting to review this month's projections. See, Ex. 73, October 1, 2001 9:37 a.m. e-mail, CRM 1746 and October 1, 2001, ll:20 a.m. e-mail from Joe Pilla, CRM 1758;

- ☐ Samuel Fensterstock recommended that Global hire Jay Bossert. See, Tr. Polakoff Testimony, p. 4672, ln. 6 to ln. 21; Tr. Bossert Testimony, p. 3004, ln. 10 to ln. 14; Tr. S. Fensterstock Testimony, p. 319, ln. 4 to ln. 7;

- ☐ After Global hired Jay Bossert, Joe Pilla re-transmitted an e-mail that he ***received from Samuel Fensterstock stating Global hired Jay Bossert to go after CRM customers***. See, Ex. 73, September 25, 2001 11:01 a.m. e-mail, CRM 1626;

- ☐ Samuel Fensterstock transmitted an e-mail to Jay Bossert ***as Jay Bossert's "manager"*** criticizing Jay Bossert's tardiness. See, Ex. 73, November 21, 2001 10:42 a.m. e-mail, CRM 3611;

- ☐ Samuel Fensterstock interviewed Evelyn Holly for a sales administrator position at Global. See, Tr. Delisle Testimony, p. 1596, ln. 20 to ln. 23;

- ☐ Samuel Fensterstock offered Evelyn Holly a job with Global. See, Ex. 44, September 28, 2001 3:49 p.m. e-mail, and Ex. 73, October 2, 2001 4:13 p.m. e-mail, CRM 1820 to CRM 1821;

- ☐ Samuel Fensterstock introduced Evelyn Holly to Global's staff as "our new Sales Administrator." See, Ex. 73, October 10, 2001 2:14 p.m. e-mail, CRM 2035;

- ☐ Samuel Fensterstock ordered Global's controller to add Evelyn Holly to Global's payroll. See, Ex. 73, October 11, 2001 10:16 a.m. e-mail, CRM 2108;

- ☐ Samuel Fensterstock interviewed Julie Siegel for a sales position at Global. See, Ex. 73, September 26, 2001 12:16 p.m. e-mail, CRM 1726;

- ☐ Samuel Fensterstock ordered Global's controller to add Julie Siegel to Global's payroll. See, Ex. 73, October 11, 2001 10:16 a.m. e-mail, CRM 2108;

- ☐ Samuel Fensterstock set up an e-mail address and password on behalf of Global at Hotjobs.com and, **at Gerry Delisle's instruction**, conducted a search for controller and screened resumes. See, Tr. Delisle Testimony, p. 1986 ln. 15 to ln. 23; Ex.

73, August 2, 2001 5:15 p.m. e-mail, CRM 819, August 3, 2001 1:12 p.m. e-mail, CRM 832, and August 6, 2001 11:36 a.m. e-mail, CRM 849 to CRM 852; and

- Gerry Delisle ordered Samuel Fensterstock to be involved in creating Summit, a means by which Global could sell additional credit reports (and increase sales). See, Ex. 73, October 10, 2001 1:24 p.m. e-mail, CRM 2026 to CRM 2030.

As further evidence that Samuel Fensterstock believed he was working for Global during that April 24-December 4, 2001 period, in a March 31, 2002 e-mail, Fensterstock requested that Gerry Delisle pay him a performance bonus in accordance with his employment agreement. According to the e-mail, Global owed Samuel Fensterstock ten percent (10%) of the Four Hundred and Eight Thousand Eight Hundred and Ninety Dollars ($408,890) in payments that Global received from companies that first became Global's clients between July 2001 and November 2001 because Samuel Fensterstock began working for Global as a ***"member of the Management Team"*** in July 2001. See, Ex. 53, March 31, 2002 e-mail, CRM 437.

Defendants argue that Fensterstock was not paid this incentive bonus and thus it is of no consequence. That is correct but it is irrelevant to our issue. Gerry Delisle **never** told Samuel Fensterstock that Global would not pay him the incentive bonus before Samuel Fensterstock transmitted the March 31, 2002 e-mail. Since Gerry Delisle previously complied with Samuel Fensterstock's employment agreement, including paying Samuel Fensterstock a One Hundred Thousand Dollar ($100,000) forgivable loan, there was no reason for Fensterstock not to believe he would not be paid the bonus, especially since he had worked for it. Gerry Delisle further reinforced this belief by, as demonstrated by the over three thousand (3,000) pages of e-mails beginning on July 16, 2001 and ending on December 4, 2001, permitting Samuel Fensterstock to provide services to Global while working from Global's offices.

During this period was Fensterstock a Sales Manager? Could his activities be akin to those of a sales manager? The functions of a sales manager are to, among other things, enhance sales by motivating and driving the sales staff to make sales calls. See e.g. Eutectic Corporation v. Astralloy Vulcan Corporation, 1974 U.S. Dist. LEXIS 9126, *2 (N.D. Al. 1974)(interpreting New York law and describing sales manager responsibilities to include: participating and

supervising the review, promotion, and assignments of the sales staff; receiving extensive reports regarding customer identification and buying patterns; and reviewing the performance records of the sales staff); Shelby v. Bank One, N.A., 2003 U.S. App. LEXIS 3983, *3 (6th Cir. 2003)(noting that a sales manager is responsible for "setting sales and referral goals, motivating the staff to achieve these goals, and for being personally involved in monitoring the day-to-day sales process"); Burch v. WDAS AM/FM, 2002 U.S. Dist. LEXIS 12290, *10 (E.D. Pa. 2002)(finding that plaintiff's responsibilities as a local Sales Manager included "achieving sales goals, reviewing and approving local sales orders, assigning sales leads, providing a monthly lead report to the General Sales Manager, managing the sales staff by conducting individual focus meetings and performance reviews . . . ").

Defendants assert two (2) claims to support their defense that Samuel Fensterstock did not provide services to and Global did not accept services from Samuel Fensterstock in "knowing" violation of the July 11th Order. First, Defendants claim Samuel Fensterstock did not provide services to Global because Samuel Fensterstock was merely preparing for his employment with Global or made suggestions to the Global staff. They argue that the fact that he communicated with Delisle or in fact any Global employee does not violate para. 2 of the July 11th Order. In fact, so argues the defense, "to the extent that he communicated with Global's sales staff, he was either attempting to obtain or share information". From the Court's observations that would be a minority view.

Defendants' assertions that Samuel Fensterstock's above-described pre-December 4, 2001 activity, was in preparation for his employment with Global and not in violation of the July 11th Order is absolutely without foundation in the record. Global undisputedly hired Samuel Fensterstock to enhance sales. See, Defendants' Post-Hearing Brief, p. 11. The thousands of pages of e-mails that Samuel Fensterstock transmitted to Global's staff and CRM's customers prove Samuel Fensterstock: (i) told "his" sales team which CRM subscribers to solicit and when; (ii) led sales meetings; (iii) trained "his" sales team; (iv) monitored the progress of "his" sales team; (v) instructed "his" sales team regarding sales techniques; and (vi) hired and disciplined staff. Global's argument that no one paid attention to Fensterstock, that his actions were unsolicited and that Global employees knew everything he was telling them doesn't hold

water. Whether the Global sales staff cared about what their future boss said is not relevant, nor is whether his suggestions were followed or not. He definitely made suggestions, reviewed the progress of different sales personnel and was involved in the hiring of personnel.

Global's contention that it was unaware Samuel Fensterstock was providing services to Global or that these acts of Fensterstock were merely to prepare him for his job as of December 4, 2001 defies logic. The undisputed facts that Gerry Polakoff, Global's Vice-President of Sales, and Gerry Delisle, Global's Chief Executive Officer, directed Samuel Fensterstock and exchanged e-mails with Samuel Fensterstock before December 4, 2001 rebut Global's claims that both Global and its Board members were unaware of Samuel Fensterstock's conduct before December 4, 2001.

Gerry Polakoff knew Samuel Fensterstock provided services to Global before December 4, 2001. Fensterstock testified that Polakoff told him to "go into [Global's Production] system" and make lists of CRM's customers for Global's sales staff. See, Tr. S. Fensterstock Testimony, p. 335, ln. 2 to p. 337, ln. 8.

The Court finds that during the period of April 24-December 4, 2001, Samuel Fensterstock worked for Global providing services in the form of sales advice and indirectly soliciting of CRM's customers through the Global sales staff. He did this as an employee of Global. He rendered theses services either from the Global offices or from his home, all in violation of the agreement of June, 2001 and the Order of July 11, 2001.

The Court further finds that the defendants Samuel Fensterstock and Global Credit Services Inc., knowingly violated the July 11th Order that refers to the period between April 24-December 4, 2001.

Services provided to Global in the period December 5, 2001 - April 30, 2002

Selected paragraphs of the Stipulation read as follows:

> 8. Except as otherwise set forth in this Stipulation, for the period from April 24, 2001 until April 30, 2002, Fensterstock shall not participate or be employed either directly or indirectly in the ownership, management, operation or control of any business (I) whose activities conflict with or are competitive with CRM; (ii) which engages in a business of the type conducted by CRM with, or solicits business of the type conducted by CRM from, any

> person, firm or entity which was a customer of CRM at any time or induce or attempt to induce any such customer to reduce its business with CRM; or (iii) which solicited or offered employment to any employee of CRM within the last twelve months, but thereafter shall not be so restricted, except as otherwise set forth herein.
>
> 9. Except as otherwise set forth in paragraph 11 below, during the period from December 4, 2001 through April 30, 2002, Fensterstock agrees that he will not directly or indirectly solicit or accept any business from persons or entities who were previously CRM's customers or prospective customers at any time during the twelve month period prior to April 5, 2001. In the event any such customers or prospective customers initiate contact with Fensterstock prior to April 30, 2002 and requests to do business with him or Global, Fensterstock shall inform such customer or prospective customer that they must contact Global and ask for its sales department and decline to speak further with them.

Pursuant to paragraph 8 of the Agreement, Samuel Fensterstock could not "participate or be employed either directly or indirectly in the ownership, management, operation or control of" Global from April 24, 2001 to April 30, 2002. Paragraph 8 does not say he could not solicit business for Global.

Paragraph 9, however, says during the period December 4, 2001 to April 30, 2002 "Fensterstock agrees that he will not directly or indirectly solicit or accept any business from persons or entities who were previously CRM's customers or prospective customers at any time during the twelve month period prior to April 5, 2001."

The defense further argues paragraphs 8 and 9 are unenforceable. How could Global know whether a particular corporation was a CRM customer or prospect since Global was never provided with a list of customers by CRM when they entered into the Agreement?

The defense argues that the April 24, 2001 order allowed solicitation of CRM customers who were already in the Global database and those entities would be excluded from the prohibition set forth in paragraph 9 and elsewhere.

On its face, this argument appears to have merit. Under the facts of this case, the Court finds otherwise.

The Court found earlier in this decision that the April 24th Order was not incorporated into the July 11th Order. Therefore, the exception that existed in the April 24th Order was not carried into the body of the July Order.

The Agreement did not call for a list. If the parties were to be bound by a list, the Agreement would say so. In any event, Global had a list which was apparently interfaced with their database in late March or early April 2001. Further, Samuel Fensterstock was a walking directory of customer names and contact persons. The evidence also reflected that Global's database had a field or area that reflected CRM customers.

Thus the Court must now determine what Samuel Fensterstock did after December 4th and whether it violated the prohibitions of paragraphs 8 and 9 of the Agreement. More specifically, was he a manager at Global (paragraph 8) and/or did he directly or indirectly solicit CRM customers (paragraph 9)?

Based on all of the evidence, the Court finds Samuel Fensterstock acted as a manager at Global both before and after December 4, 2001. He both directly and indirectly solicited one or more CRM customers both before and after December 4, 2001 and up until April 30, 2002. He did this knowingly and in complete disregard of the Agreement and with the knowledge of Global Credit Services, Inc.

The Court further finds that Global Credit Services, Inc. through the acts of its employees knowingly accepted the services of Samuel Fensterstock both prior to and after December 4, 2001 and up and through April 30, 2002. Said services were both as a sales person (indirectly pre December 4, 2001 and directly and indirectly thereafter), and as a manager of the sales team - whether the sales team chose to accept his advice or not. Said actions violated paragraphs 8 and 9 of the July 11th Order.

May the Court draw an inference of contempt?

The plaintiff argues that the Court should draw an inference that the defendants contemptuously violated the July 11th Order. To support such an argument it points to various affidavits from Samuel Fensterstock, Gerry Delisle and Serge Poskotin.

It is clear to the Court that Delisle misstated the truth when stating that Samuel Fensterstock did not provide Global with a list of CRM customers (May 1, 2001, April 10, 2002)

and that Samuel Fensterstock had not performed any services for Global as of the December 5, 2001 affidavit (considering Delisle's contact with Samuel Fensterstock during this period such a statement borders on the ludicrous).

It is also clear that Samuel Fensterstock broadly misstated the truth in claiming that he "improperly removed something from CRM's offices is a lie." (May 2, 2001 affidavit).

In his December 5, 2001 affidavit, Samuel Fensterstock states he had not "provided any service for Global." It is amazing that Fensterstock thought so little of himself that he considered the massive amount of activity he did for Global from July 11 to December 4 to be nothing. Perhaps this was due to the fact that the Court ordered electronic discovery had not yet taken place and the huge amount of e-mails sent by him had not yet been revealed to the plaintiff. There are other examples cited by plaintiff, however, the statement given therein could be considered equivocal.

The plaintiff cites trial testimony within which he contends Samuel Fensterstock lied to the Court. This testimony referred to Samuel Fensterstock stating that whatever he did pre December 4, 2001, it was for his own benefit, i.e. providing "services to himself." Further, that he was not giving order to his sales team, but rather "making suggestions" (pre December 4, 2001). The Court finds this testimony incredulous, but solely from those statements will not draw an inference of contemptuous conduct, rather it will consider all of the above in determining whether the defendants knowingly violated the July 11th Order and acted contemptuously in doing so. The court will draw a negative inference against Global where the facts will allow in that e-mail from everyone involved in the sales end of Global was eventually discovered, except for that of Gerry Delisle, and that Delisle held back the cloning of the computers that had been ordered by the Court.

FINDING OF CONTEMPT

In civil contempt the initial burden on plaintiff is to prove by "clear and convincing evidence" that a "clear and unequivocal" order has been violated or disobeyed. Judiciary Law § 753. The Court must also be persuaded that the defendant's actions were calculated to, or did actually defeat, impair or prejudice the rights of plaintiff. Seril v Belnard Tenants, 139 A.D.2d 401 (1st Dept. 1988). Once this has been accomplished the burden shifts to defendant.

In this case, the Court finds the plaintiff has proven by "clear and convincing evidence" that a "clear and unequivocal" order of the Court, the July 11th Order, has been violated by the defendants, Samuel Fensterstock and Global. It further finds that such violation by Samuel Fensterstock was willful and that Global, through Gerry Polakoff and/or Gerry Delisle, knowingly and willfully accepted the services of Samuel Fensterstock. The argument that the acts of Samuel Fensterstock with the sales staff and the computer database prior to December 4, 2001 were merely to prepare him for the job he was to assume as of December 4th is absolutely ludicrous and is rejected by the Court.

What damages, if any, compensatory and/or punitive, may be awarded to plaintiffs?

Plaintiff argues that it has lost 102 customers due to the willful acts of defendants which violated the July 11th Order. They, therefore, should be awarded compensatory damages for the loss of those customers. They further argue that the defendants have failed to show that their violation of the July 11th Order did not cause CRM to lose these customers, that the frivolous arguments raised by defendants and, more importantly, their misleading if not completely false statements found in the affidavits of May and December 2001, along with April 2002, and the alleged destruction of evidence (e-mails of Gerry Delisle and possibly IM's (instant messages) entitle CRM to punitive damages, attorney fees and other legal expenses and the return of commission payments made to Samuel Fensterstock.

A finding of contempt entitles CRM to lost profits from defendants' willful violation of the July 11th Order and to punitive damages as well. Pencom Systems, Inc. v Shapiro, 193 A.D.2d 561 (1st Dept. 1993). The plaintiff argues, and the Court agrees, that lost profits may include opportunities for profits from accounts diverted from CRM due to the wrongful conduct of a former employee who diverted accounts from the employer. Duanne Jones Co., Inc. v Burke, 306 N.Y. 172 (1953); see also, Hyde Park Products Corp. v Maximillian Lerner Corp., 65 N.Y.2d 316 (1985); E.W. Bruno Co., Inc. v Friedbury, 21 A.D.2d 336 (1st Dept. 1964).

Plaintiff proffers that the facts adduced at trial combined with three factors reflecting perjury and fraud within the pre-trial affidavits establish that the defendants contributed in a "substantial measure" to CRM's loss of at least 102 customers, specifically: (1) Samuel Fensterstock swearing that he did not give a customer list to Global; (2) Global's false swearing

that Samuel Fensterstock did not provide services to Global, but rather was "making suggestions" to Global in service to himself; and (3) Global destruction of electronic evidence (Delisle's e-mail) or, at a minimum, failure to preserve or produce it.

The plaintiff argues the burden to prove some alternative reason or intervening cause for the loss of CRM's customers to Global now shifts to Global. Special Products Manufacturing, Inc. v Douglass, 169 A.D.2d 891, 893 (3d Dept. 1991). The court agrees.

It is for all these reasons, so argues plaintiff, that the Court should not only award compensatory damages (for lost customers) to CRM, but punitive damages as well. The Court finds that punitive damages are appropriate in this matter. The basis for this conclusion is not only the acts of Fensterstock at Global after July 11th, but also the deception that was foisted upon CRM by the out right lies and misstatement of facts surrounding the customer list that was purloined from CRM. We know now that Global had the list in April of 2001, that the defendants were aware of it when they signed the stipulation which became the July 11th Order as well as when they signed the multiple affidavits that both preceded and followed the Order. The court has no doubt that with the information eventually gathered about the activities that surrounded the list that the Stipulation would never have occurred in this form and the actions that followed would never have occurred, at least not in the form that they have. Most importantly the court would not have spent ten weeks on a contempt hearing and the parties would not have had to endure the time and cost of electronic discovery, value approximately $150,000.00. Punitive damages will be addressed after the Court has determined an appropriate amount of compensatory damages.

The finding of contempt, as serious a matter as it is, does not sua sponte result in a damage verdict for plaintiff. As the Court pointed out during trial, CRM must prove a causal relationship between the defendants' conduct, its lost customers. If an inference could equally be drawn from the evidence that the customers, though lost to Global, were not lost due to the wrongful conduct of Global, then there could be no damage award for that lost customer. It should be noted that such evidence need not have been produced by Global rather the inference would be drawn from all evidence produced by whomever.

As of December 4, 2001, Fensterstock was allowed to send a letter to prospective

customers as reflected in Exhibit 28, pursuant to paragraph 4 of the July 11th Order.

However, that communication is limited to non CRM customers pursuant to paragraph 9 of the July 11th Order: "During the period from December 4, 2001 through April 30, 2002, Fensterstock agrees that he will not directly or indirectly solicit or accept any business from persons or entities who were previously CRM's customers or prospective customers at any time during the twelve month period prior to April 5, 2001." Thus, any CRM customer that received this letter was "solicited." If the letter merely announced that Fensterstock was now working at CRM then that was not prohibited, however, the letter crossed the line and became a solicitation, that was prohibited.

Damages - Summary

The court's findings on damages are lengthy and detailed. They are found in Appendix A. In Appendix A the court evaluated each alleged lost customer from the available evidence as well as negative inferences drawn due to deleted or missing material. From these materials the court concluded that CRM lost 62 customers due to the actions of Sam Fensterstock in working for Global pre December 4, 2001 in either directly or indirectly soliciting CRM customers in violation of the July 11th Order, the management of the Global sales team, and the use of the purloined customer list.

CALCULATION OF COMPENSATORY DAMAGES

In the plaintiff's post-trial reply brief in Exhibit 2, there is a detailed calculation of total damages, broken down by year, that the plaintiff has or will incur from 2001 to 2020. Through the various calculations shown in this exhibit the plaintiff has calculated damages due to lost customers to be $1,126,586.

The first calculation done (in this exhibit) is a calculation of the "gross profit before cancellations," which is really a calculation of the total gross profit lost per year. The first line of this calculation shows the "cumulative number of customers lost by year," which is calculated in Schedule 1 of the same exhibit. This schedule breaks down the cancellations from 2001 to 2003 according to the year the cancellation occurred, and the year of the original contract date. The total number of clients lost per year is then calculated by adding up the number of clients lost in a given year. Then a "calculation of the cumulative customers lost" is done by adding together the

current year's lost customers and the prior year(s) lost customers.

The court finds no mathematical errors in the plaintiff's calculation of the cumulative number of customers lost; however, a strong assumption is made which may inflate the total amount of damages incurred. By using the cumulative data, the plaintiff is assuming that their company will lose the same customer each year. The only way the plaintiff could lose the same customer each year is if that the customer would have renewed their contract with the plaintiff indefinitely. This is a very strong assumption to make in light of the highly competitive nature of the plaintiff's business.

Another potential problem with the calculation of the cumulative number of customers lost is that the figures were not adjusted for the companies that later re-signed with the plaintiff. Even though the plaintiff's expert, Mr. Warshavsky, claims that re-signs are taken into account by the cancellation rate, this court does not find that to be the most effective way to handle the situation of re-signs. If a company re-signs, the total number of customers lost would decrease which would change all the future figures. This court acknowledges that the change may not be significant, but there still would be a change. Therefore, based on the information provided to this court, if a company was to have re-signed with the plaintiff, the company was taken out of the cumulative number of lost customers once that company re-signed. The court has found that only one customer did in fact re-sign after one year, therefore, that customer is only counted as a lost customer for one year.

The court has previously determined that not all customers used in the plaintiff's calculation of damages were in fact lost due to the actions of the defendants in this case. In the Court's Schedule B, there is a listing of all 102 alleged lost customers, along with the date of contract cancellation, and a summary of this court's findings on each customer. In this schedule, there is also a summary of the total number of customers lost by the plaintiff each year based on the court's prior findings, as well as a calculation of the cumulative number of customers lost by year. The court has determined that fifteen (15) customers were lost in 2001, forty-three (43) were lost in 2002, and three (3) were lost in 2003. The cumulative number of customers lost per year would then be fifteen (15) in 2001, fifty-eight (58) in 2002, and sixty-two (62) in 2003. However, since this court has found that one customer, Sunshine Industries, re-signed with the

plaintiff after one year, the cumulative number of customers lost per year in 2003 must be adjusted. Taking the re-sign into consideration, the cumulative number of customers lost per year in 2003 becomes sixty-one (61)

The plaintiff's next calculation shows the "average gross profit per customer," taken from Schedule 2 of Exhibit 2 in plaintiff's post-trial reply brief. There are several steps taken by the plaintiff to calculate the average gross profit per customer. The first step is to take lost revenue minus total costs (both direct and variable) to get the total gross profit. Gross profit is then divided by the cumulative number of customers lost to get average gross profit per customer. The numbers used in this schedule for lost revenue as well as direct and variable costs are calculated in other sub-schedules in the exhibit. The court does not find any problem with the methods used to calculate "average gross profit per customer;" therefore, the plaintiff's number for the average gross profit is used by this court in its own calculation of damages.

The next step is to calculate the "gross profit before cancellations." This is calculated by taking the cumulative number of customers lost by year multiplied by the average gross profit per customer. This calculation is really a calculation of the total amount of gross profit loss before cancellations. The court agrees with the methodology used by the plaintiff in the calculation of "gross profit before cancellations" and therefore employs the same method in its own final calculation of damages.

The next calculation performed in Exhibit 2 of the plaintiff's post-trial brief, is the "cancellations based on historical cancellation rates." The first line in this calculation shows the "cumulative projected number of customers cancelled by year," taken from the information in Schedule 3 of Exhibit 2 of the plaintiff's post-trial reply brief. This number reveals the expected number of customers who cancel in any given year. In this schedule, the following formula is used to calculate the "cumulative projected number of customers cancelled by year": cumulative number of customers lost by year less the prior year's cumulative projected number of customers cancelled by year multiplied by the cancellation rate plus the prior year's cumulative projected number of customers cancelled per year. Important in this calculation is the cancellation rate, calculated in Schedule 3A of the plaintiff's same exhibit. To get the cancellation rate, the average cancellation rate from the years 1998 to 2000 is calculated. Although the plaintiff

company began operations in 1997, the first year's cancellation rate is not used in the average. When this calculation is done, the average cancellation rate comes out to twenty percent (20%).

The court finds that the calculation used to get the "cumulative projected number of customers cancelled by year" is extremely well done. It is the most accurate way to ascertain the number of customers lost per year based on the historical cancellation rate, because the cumulative number of customers lost in the prior year(s) is subtracted out before the calculation is done for the current year's number of customers that have cancelled. In the court's calculation of damages, the calculation used by the plaintiff to get the "cumulative projected number of customers cancelled by year" will also be employed.

The concern the court has is with the cancellation rate used by the plaintiff. Although it is mathematically the correct average, the court questions whether an average is truly reflective given the nature of the business. When looking at plaintiff's Exhibit 2, Schedule 3A, one sees that the actual cancellation rate in 1999 and 2000 is considerably higher than the cancellation rate in 1998. This suggests that the cancellation rate is increasing; however, this would not be reflected in the average. Based on these numbers it appears that the 1998 cancellation figure is a statistical "outlier," and normally would be disregarded in statistical analysis. However, since the company has only been in business a short period of time, it may be improper to disregard this figure as an outlier in the court's calculation of damages. In addition, if a new average cancellation rate is used, such as the average cancellation rate in 1999 and 2000, the effect on the total calculation of damages would not be great. Therefore, given that the twenty percent (20%) cancellation rate is the true average, and a change in the cancellation rate would not have a great effect, this court will use the historical average in its calculation of damages, even though there is concern over its validity as an accurate estimate of future cancellation rates.

The Court's Schedule C should be consulted for the court's calculation of customers cancelled per year. Since the total number of customers lost per year is less, the number of cancelled customers will be less as well. When using the total number of customers cancelled per year in the subsequent calculations, this court has employed basic rounding principles of mathematics because it is impossible to lose a third (.33) of a customer. The court's rounding policy is as follows: any number which is .49 and below is rounded down, while any number .50

and above is rounded up.

The next step in the calculation of damages is to calculate the "gross profit on cancellations," which is really the gross profit that would be naturally lost through cancellations. In order to get the "gross profit on cancellations," the plaintiff multiplies the "cumulative projected number of customers cancelled by year" by the "average gross profit per year." Then the "net gross profit after cancellations" is calculated by taking the "total gross profit" less the "gross profit on cancellations." The court agrees with the methodology used to calculate the gross profit on cancellations, and employs the same method in its calculation of damages.

The final step to calculate the total amount of damages that the plaintiff has or will incur involves getting the present value of the amount lost each year. The amount of "net gross profit after cancellations" is converted to 2003 dollars by using the corresponding year's present or future value factor. The plaintiff uses a six percent (6%) factor based on the return for a 20 year T-bill. Each year the net gross profit is multiplied by the present or future value factor to get how much that year's loss is in 2003 dollars. The plaintiff continues to do this calculation each year up until the year 2020. Then each year's amount is added together to get total damages.

Although the court agrees that each year's lost profits must be converted to 2003 dollars, the court has some concerns over the interest rate used to calculate the present or future value factor, as well as the number of years into the future in which the plaintiff seeks to recover damages. Given the economic conditions in the U.S. for the past several years, six percent, (6%) appears to be an extremely high interest rate to be using in calculations. The interest rate used in the present and future value factor is supposed to be the rate at which investments can be made. From 2001 until the present day, most investments are not paying six percent (6%). According to economic projections, it will be several years before most investments will be paying as high as six percent (6%) again. Therefore, to use a six percent (6%) rate is much too high given the past, current, and projected economic conditions.

The court will acknowledge however, the 20 year T-bill rate, as reported by the Federal Reserve, is near six percent (6%). The court takes judicial notice of the Federal Reserve rates as found on their website, http://www.federalreserve.gov . The court finds that given the ever changing nature of the economy to assume that a company can tie up its cash for 20 years is a bit

of a reach. Therefore, in order to be more realistic this court has decided to use a 10 year T-bill rate.

The actual reported rates from the Federal Reserve *available at* http://www.federalreserve.gov are as follows:

Year	Actual Reported Rate
2001	5.02
2003	4.61
2003	4.01
2004 (through May)	4.226

It would be difficult to calculate the factor using the exact figures; therefore this court has decided to round the T-bill interest rate for use in its calculation of damages. The court has employed basic rounding rules described earlier. The following is a breakdown of the rate used by the court in its calculation of damages (as reported by the Federal Reserve *available at* http://www.federalreserve.gov).

Year	Actual Reported Rate	Rounded Rate Used by the Court
2001	5.02	5
2003	4.61	5
2003	4.01	4
2004 (through May)	4.226	4

Since economic projections suggest that it will be several years for most investments to have a return as high as six percent (6%) again, the court has decided to use a lower interest rate when calculating future damages as well. Since the court has no crystal ball, it has decided to be modest in its prediction for the future and to use a four percent (4%) interest rate for the remainder of 2004, as well as 2005. Then the court uses a five percent (5%) interest rate for the years 2006 and 2007, and then the court uses a six percent (6%) rate for the remainder of the years in which damages are calculated.

Another problem the court finds with the plaintiff's calculation of damages is the speculative nature of determining damages through the year 2020. The plaintiff is correct that using the calculations in Exhibit 2 of the plaintiff's post-trial reply brief, it would take the plaintiff company until 2020 to naturally lose 102 customers. However, making projections

seventeen (17) years into the future is purely speculative given the unstable nature of the US economy. Since the court has determined that the actual number of customers lost is only sixty-one (61), it would not take as many years to naturally lose this smaller amount of customers. Using the cut off determination established by the plaintiff's expert at trial, damages could be calculated until the cumulative number of customers cancelled is within two (2) of the cumulative number of lost customers. This would mean that damages would need to be calculated through the year 2015 based on the cumulative number of cancelled customers shown in Court's Schedule C.

Although the time frame is reduced by five years because of the decrease in total customers lost, projections, even that far into the future, are speculative due to the highly competitive nature of the industry. There are several indicators that this is a highly competitive industry including the increasing raw number of cancellation shown in plaintiff's Schedule 3B, the increasing cancellation rate as seen in plaintiff's Schedule 3A, and the changes seen in the net number of contracts outstanding per month in plaintiff's Schedule 2B1. In addition, at trial it was well established that this is a competitive industry where customers jump back and forth between companies on a regular basis.

Taking into consideration the inability to project damages many years into the future, this court has decided to limit the number of years it allows the plaintiff to recover damages. If the court was to continue it's calculation of damages until the point where the cumulative number of cancelled customers per year is negligible, this court would need to calculate damages until the year 2015 as shown in Court's Schedule. That would mean the court is speculating about damages for twelve (12) years into the future given the base year as 2003. This court has determined that calculations so far into the future would be purely speculative, and has decided to limit the recovery range through the year 2010.

The court has determined the plaintiff's damages from year 2001 to 2010, using the identical formula used in the plaintiff's post-trial reply brief, Exhibit 2. A full calculation of the damages per year can be seen in Court's Schedule D. Based on the foregoing calculations, the court has determined that the plaintiff is entitled to compensation in the amount of $621,044 for the damages it has or will incur due to the actions of the defendants in this case.

PUNITIVE DAMAGES

It has been clearly demonstrated to the satisfaction of the court that CRM is entitled to Compensatory damages. Now it must be determined if they should also receive punitive damages.

Paragraph 17 of the July 11th Order provides that:

"Should any party be found by a Court of competent jurisdiction to have breached this Stipulation of Settlement, the prevailing party shall be entitled to seek immediate injunctive relief, as well as, compensatory damages, punitive damages, and their reasonable costs and attorneys' fees incurred in any future actions."

The mere fact that punitive damages may be sought of course does not mean that they should be awarded. Punitive damages are available or perhaps appropriate when a wrong has been aggravated by "willfulness...whether or not directed against the public" see Childress v. Taylor, 798 F.Supp. 981, 997, 1992 U.S. Dist. LEXIS 10991, *48 (S.D.N.Y. 1992); see also, Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, 494-495, 402 N.Y.S.2d 815, 817 (1st Dept. 1978); (exemplary [punitive] damages allowed when wrong "aggravated by evil or a wrongful motive or that there was willful and intentional misdoing, or a reckless indifference equivalent thereto.") Punitive damages are also available where "a defendant's conduct is wanton, willful, or constitutes morally culpable conduct to an extreme degree." See, H&R Industries, Inc. v. Kirschner, 899 F.Supp. 995, 1011, 1995 U.S. Dist. LEXIS 13029, *51-54 (E.D.N.Y. 1995).

Plaintiff argues that the conduct of the defendants was willful "because Samuel Fensterstock stole CRM's customer list and gave it to Gerry Polakoff, notwithstanding Samuel Fensterstock admittedly knew he should not have possession of the Stolen List and admittedly should not have given the Stolen List to Gerry Polakoff. Further, Global willfully used the Stolen List to match and identify "good potential customers" in its prospect database. Additionally, Samuel Fensterstock willfully provided services to Global and Global willfully accepted services from Samuel Fensterstock knowing that Samuel Fensterstock could not provide

services to Global and Global could not accept services from Samuel Fensterstock. He further argues "Samuel Fensterstock also willfully solicited CRM's customers between April 24, 2001 and April 30, 2002 in violation of the July 11th Order."

Defense counsel continually drew from his key witnesses statements that they did not "willfully" use the customer list (Gerry Delisle) nor "willfully" use the services of Sam Fensterstock (Gerry Delisle). Fensterstock and Delisle continuously denied that Fensterstock was actually working for Global from April to December 2001, but rather was learning about Global so that when he came on board on December 4, 2001 he could "hit the ground running". Further that when he did work for them, post December 4, he did nothing wrong, intentionally or willfully, vis-a-vis the Order.

Punitive damages are also available when the defendant has demostrated a malicious intent to injure the plaintiff. Laurie Marie M. v. Jeffrey T.M., 159 A.D.2d 52, 57-59, 559 N.Y.S.2d 336, 340-341 (2d Dep't 1990). Plaintiff cites a variety of acts by Sam Fensterstock to support this position, including: "in May/June 2001, Samuel Fensterstock told Thomas Corbett he was "going to put [CRM] out of business." See, Tr. Corbett Testimony, p. 4064, ln. 19 to p. 4065, ln. 2. Furthermore, in August 2001, Samuel Fensterstock also told Thomas Corbett that he was going to "take [CRM's] customers and move them to Global." See, Tr. Corbett Testimony, p. 4062, ln. 12 to p. 4062, ln. 23."

Plaintiff contends that further support for " malicious intent" is found in the on going series of "lies" found in the affidavits submitted during the course of this case and the e-mails that were not found until the court ordered the cloning of the computers and the e-mails that were not found of Gerry Delisle, which were obviously destroyed. There were Data Notes and contracts only grudgingly produced and in some cases not produced at all, making the courts job that much more difficult in determining lost customers.

The court finds that Sam Fensterstock and Global acted willfully and in some cases maliciously in violating the Order of July 11th 2001. However, perhaps the best description of the acts of Fensterstock and Global, including its board of directors, would be "reckless indifference" which has been found to be equivalent to willfulness. See, Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, at 495. To put it bluntly they just didn't care

about the Order. They acted in the best interests of Global to beat out and crush CRM. There is no issue in the court's mind that the actions of Polakoff and Fensterstock were driven by a malicious dislike or perhaps even hatred of their chief competitor. To put it nicely, Delisle put his head in the sand despite being frequently copied on the efforts of Fensterstock which involved him in practically managing the sales staff. It was up to him to make sure the Order wasn't violated and no claim that the Order was unclear will save him at this point. The Board of Global spent "less than two minutes" on the issue of Fensterstock or Global's compliance with the July 11th Order. Both Fensterstock and Global will be held liable for punitive damages.

There would never have been a contempt proceeding if there had been no Order of July 11th. There would never had been an Order of July 11th if the defendants had not done a tightrope act around the truth of the customer list in the Stipulation. The proceeding would never have stretched out the way it had at immense cost to the parties if the e-mails had not been shielded from discovery and in some cases destroyed. All these factors are considered by the court in setting an amount for punitive damages. Said damage amount is to prevent this party as well as third parties from acting in such a similar fashion in the future. America's capitalistic system has prospered by strong competition but the manner in which Global acted in this case was not ethical, even in the cutthroat world of business, and in turn they willfully and with reckless indifference violated the Order of the Court.

There is no precise formula to use in determining the amount of punitive damages; therefore, the trier of fact has discretion when awarding such damages. This discretion is not unlimited, however. Most courts have found that the punitive damages should bear some reasonable relation to the actual injury caused and the outrageousness of the conduct which caused the injury. I.H.P. Corp. v. 210 Central Park South Corp., 16 AD2d 461, 463 (1st Dept 1962). This means that the award of punitive damages can not be shockingly excessive. Faulk v. Aware Inc., 19 AD2d 464, 466 (1st Dept 1963).

How to determine if an amount is excessive is unclear, because in general, punitive damages do not need to bear a specific ratio to compensatory damages. Hartford Accident & Indemnity Comp. v. Village of Hempstead, 48 NY2d 218, 227 (1979). In some cases, the amount of punitive damages is more than compensatory damages, while in others it is less. In

I.H.P. Corp. the court determined that it was proper for punitive damages to be greater than compensatory damages. I.H.P., 16 AD2d at 467. In this case, the court determined that an award of punitive damages which was twice the amount of compensatory damages was proper. The I.H.P. court, however, made no determination as to the greatest ratio of punitive to compensatory damages allowed. This court is offered some guidance by another case, Kern v. News Syndicate Co., which found that a punitive damages award fifty (50) times greater than the compensatory damages was excessive. Kern v. News Syndicate Co., 20 AD2d 528 (1st Dept 1963). In Faulk, punitive damages much less than compensatory damages were considered proper. Faulk, 19 AD2d at 472. In Faulk, the court determined that punitive damages of $50,000 for one defendant and $100,000 for another was proper, when compensatory damages were determined to be $400,000. Id.

It is important to remember that punitive damages are not meant to compensate for the injury, rather they are meant to punish reprehensible conduct and deter repeated conduct. Hartford, 48 NY2d at 224. Because punitive damages are meant to punish, some courts have found that the wealth of the defendant should be considered when awarding punitive damages. Rupert v. Sellers, 48 AD2d 265, 269-70 (4th Dept 1975). The Rupert court found that a defendant's wealth is relevant in order to determine what amount would be useful as a deterrent. Id. Courts in many other states have held in similar manners. *See e.g.* Coy v. Superior Court of Contra Costa County, 58 Cal 2d 210, 222-23 (Supreme Court 1962); Schmitt v. Kurrus, 234 Ill 578, 582 (Supreme Court 1908); Judson v. Tracey, 25 PA D&C 2d 97, 99 (Common Pleas Ct of Chester County 1961). For example, New Jersey considers a defendant's wealth material because an amount which may be punishment to one person may only be trivial to another, due to their differences in wealth. Gierman v. Toman, 77 NJ Super 18, 24 (Superior Ct Law Division 1962).

Some New York courts however, have found that the financial situation of a defendant is irrelevant in determining punitive damages. Stewart v. Mutual Clothing Co., 195 Misc. 244, 245 (Monroe Co. 1949); Wilson v. Onondaga Radio Broadcasting Corp., 175 Misc. 389, 391-92 (Supreme Ct Onondaga Co. 1940). These courts have so found because they believe to measure punitive damages according to wealth is unfair and because such a determination is contrary to

how compensatory damages are determined as well as how criminals are punished. Stewart, 195 Misc. at 245; Wilson, 175 Misc. at 391-92. More recently the "rational fact finder" standard of Jackson v Virginia, 443 US 307 (1979) has risen in favor for appellate review as discussed in Cooper Industries v. Leatherman Tool Group, 532 US 424 (2001). In Cooper the Supreme Court concluded that when reviewing a punitive damage award the court should "de novo" review the case on the basis of the degree of reprehensibility or culpability of defendant and the relationship between penalty and harm to victim caused by defendant's actions. The bottom line being whether the punitive damage award is grossly disproportionate to the gravity of the offense.

In recent times anything under a multiple of three or less has been considered appropriate as a ratio of punitive to compensatory damages. However when the compensatory amount is of a substantial nature a multiple of that amount is not necessarily appropriate. Considering all of the above and the culpability of the individual defendants the court awards punitive damages against Samuel Fensterstock of $75,000.00 and $125,000.00 against Global Credit Services , Inc.

Attorneys Fees and Legal Expenses

The court finds that the violation of the Court Order allows for awarding attorney's fees to plaintiff. The claim for attorneys fees by defendant is denied. The court is aware that certain acts of plaintiff or their employees may have inhibited discovery in this case in some small way but they pale in comparison to the acts of defendants. The court will set the matter down for a hearing before the court or referee on legal fees and other related costs unless both sides agree to submit on this issue. The court requests a reply to said question no later than fifteen (15) days from the date of this decision.

Return of Commission Payments Made to Sam Fensterstock

Plaintiff requests that the court order the return of commissions paid to Fensterstock after the signing of the June stipulation (July 11th Order) which were earned based on sales made while he was an employee of CRM. Plaintiff argues that since the Stipulation was violated then any agreement to pay those commissions should be rescinded. They argue that no commissions were due because "an employee who engages in disloyal acts in competition with his or her employer is not entitled to compensation. See, e.g. Duane Jones, 306 N.Y. at 188-189".

The court finds that the acts performed by Fensterstock were performed after he left CRM and not while he was earning the commissions. This application is denied.

SUMMARY

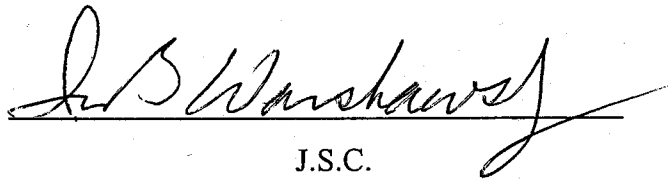
The court finds the defendants breached the agreement entered into June 2001 and So Ordered on July 11, 2001. Further, the court finds the defendants in contempt of court for their willful breach of said Order.

The court awards compensatory damages of $621,044.00 against the defendants and punitive damages of $75,000.00 against defendant, Samuel Fensterstock, and $125,000.00 against the defendant, Global Credit Services, Inc.

The court will award attorney's fees to plaintiff to be determined at a hearing before this court or a court attorney referee, or by written submission if consented to by the parties.

Submit judgment on notice.

Dated: August 6 , 2004



J.S.C.