IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DAMAGE RECOVERY SYSTEMS, INC., Plaintiff,	)	
v.	)	Civ. No. 02-1647-SLR
MICHAEL R. TUCKER, Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 2d of February, 2005, having reviewed defendant Michael R. Tucker's motion for re-argument (D.I. 49), and the memoranda submitted therewith;

IT IS ORDERED that defendant's motion (D.I. 49) is denied for the reasons that follow:

1. Plaintiff brought suit against defendant alleging breach of contract and aiding and abetting breach of fiduciary duties owed to plaintiff. (D.I. 36, ex. 1) On November 19, 2003 defendant moved for an order granting him summary judgment on plaintiff's claims. (D.I. 34) Plaintiff also filed a motion for summary judgment on November 19, 2003. (D.I. 37) This court issued an order on September 28, 2004 granting plaintiff's motion for summary judgment. Defendant filed a motion for re-argument

on October 13, 2004.[1]

2. "As a general rule, motions for reconsideration should be granted 'sparingly.'" Stafford v. Noramco of Delaware, Inc., 2001 WL 65738, *1 (D. Del. 2001) (quoting Karr v. Castle, 768 F.S upp. 1087, 1090 (D. Del. 1991)). The purpose of granting a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicky, 176 F.3d 669, 677 (3d Cir. 1999) (citing Keene Corp. v. Int'l Fid. Ins. Co., 561 F. Supp. 656, 665 (N.D. Ill. 1983)). Parties, therefore, should remain mindful that a motion for reconsideration is not merely an opportunity to "accomplish repetition of arguments that were or should have been presented to the court previously." Karr v. Castle, 768 F. Supp. 1087, 1093 (D. Del. 1991) (citing Brambles U.S.A., Inc. v. Blocker, 735 F. Supp. 1239, 1240-41 (D. Del. 1990)). A court should reconsider a prior decision if it overlooked facts or precedent that reasonably would have altered the result. Id. (citing Weissman v. Fruchtman, 124 F.R.D. 559, 560 (S.D.N.Y.1989)).

3. **Breach of contract claim**. In the consulting agreement

[1] The court notes that Local Rule 7.1.5 provides, "[a] motion for re-argument shall be served and filed within [ten] days after the filing of the court's opinion or decision." D. Del. L. R. 7.1.5. Defendant did not file his motion for re-argument until fifteen days after the court's order granting plaintiff's summary judgment motion. This alone should allow the court to deny defendant's motion. However, because the court finds that defendant's motion lacks substantive merit, it will not deny the motion on this basis.

between defendant and plaintiff ("Consulting Agreement"), defendant agreed not to compete with plaintiff's "Business" as that term is defined in the Asset Purchase Agreement ("APA"). (D.I. 42, ex. B) Plaintiff's "Business" is to service, report, handle, and control the sale, destruction, or other disposition of damaged or unsaleable goods on behalf of manufacturers, vendors and other entities in the grocery and consumer packaged goods industry. (D.I. 42, ex. A) Defendant argues that, unlike plaintiff, "Sacks[2] [Processing] reported to no one, and there is no evidence that it did." (D.I. 50 at 8) (footnote added) On the contrary, the record indicates that the businesses defendant invested in did generate reports for its customers.[3] Defendant

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[2] Sacks Processing is one of seven corporations owned and operated by Charles Soost ("the Soost Entities"): (1) Sacks Processing; (2) Sacks Resaleables of Eustis; (3) Sacks Wholesale; (4) J.J. of Central Florida; (5) Sacks Salvage; (6) Sacks of Jax; and (7) Gulley's Surplus. (D.I. 38 at 6) Defendant invested in Sacks Processing and Sacks Resaleables of Eustis. (D.I. 35 at 10) Subsequent to defendant's investment Soost created two additional corporations: Resaleables Northeast and American Shelf Ready. (D.I. 36, ex. 6; D.I. 41 at 15)

[3] Darryl Moll testified at his deposition that the "Sacks companies", including Sacks Processing, would purchase product, clean it up, scan it, put a retail price sticker on it, and "[a] pallet is accumulated and a report is created to say, this is the items on the pallet, this is the retail value at a secondary market level of this pallet. We will sell it to you at X percent of . . . shelf retail." (D.I. 42, ex. 3 at 175-77) Furthermore, Chuck Soost testified in his deposition that:

> Q: Okay. So, all the product would go to Sacks Processing, Inc.?
> A: Right.
> Q: Would it all be scanned?

also argues that because Sacks Processing and the remaining Soost Entities were separate corporations participating in arms-length transactions, Sacks Processing did not act "on behalf of" any of the other Soost Entities.[4] It is true that Sacks Processing and

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A: Except for stuff that was not sellable, depending upon the source. Explanation?
Q: Okay.
A: If we had somebody, such as Southeast Frozen Food, okay? If they wanted to bill the manufacturer for everything that was damaged, we'd scan their trash, and it was separated out as trash. So, we only paid them for the goods. Scanned it out as trash, combined the database. They gave us their database of manufacturers, okay, at one point. At one point, we just gave them the UPCs, and they ran their own invoices, depending on how the contract ran. And then they billed back the manufacturers.

(D.I. 43, ex. 5 at 62-63) Sacks Processing collected product on behalf of Southeast Frozen Food, a "vendor or other entity" in the grocery industry; serviced and handled damaged or unsaleable goods for Southeast Frozen Food; and reported back to Southeast Frozen Food informing them which products were "trash." Thus, Sacks Processing engaged in plaintiff's "Business" and defendant's investment in Sacks Processing breached his Consulting Agreement.

[4] Defendant attempts to bolster his argument that the court misconstrued "on behalf of" by stating:

> The flaw of the Court's logic that Sacks acted "on behalf of Eustis and the six grocery stores is best demonstrated by inserting Sacks and one of the six stores in the definition of the "Business" contained in the APA, as follows:
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> "Sacks processes, on behalf of Eustis, the requirements of servicing, reporting, handling and controlling the sale, destruction or other disposition of Eustis' damaged or unsaleable goods."

(D.I. 50 at 11) The flaw of defendant's argument rests in its addition of a second "Eustis" to the APA's definition of "Business". The APA defines "Business" as:

the six remaining Soost Entities were separate corporations. However, all seven corporations were part of Soost's "hub and spoke" business model. Sacks Processing served as the hub of this model, obtaining product, working it, and then selling it to the spoke grocery stores.[5] The main purpose of Sacks Processing's very existence was to provide product for the remaining Soost Entities. Consequently, Sacks Processing's activities were on behalf of the six grocery stores which purchased worked product from Sacks Processing. The court concludes that the Soost Entities in which defendant invested serviced, reported, handled, and controlled the sale, destruction, or other disposition of damaged or unsaleable goods on behalf of manufacturers, vendors and other entities in the

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> Seller processes, on behalf of manufacturers, vendors and other entities in or related to the grocery and consumer packaged goods industry, the requirements (commonly known as reverse logistics) of servicing, reporting, handling and controlling the sale, destruction or other disposition of such industry's damaged or unsaleable goods (the "Business").

(D.I. 42 ex. A) Defendant substitutes "Sacks" for "Seller" and "Eustis" for "manufacturers, vendors and other entities in or related to the grocery and consumer packaged goods industry". (D.I. 50 at 11) However, defendant then substitutes "Eustis" for "such industry's". (Id.) Individual manufacturers, vendors and entities in the grocery and consumer packaged goods industry are not equivalent to the entire industry.

[5] This holding should not be misconstrued as a finding that the Soost Entities were all part of some grand scheme together with Resealeables Northeast and American Shelf Ready. Rather, it is the finding of this court that Sacks Processing engaged in its activities on behalf of the remaining Soost Entities.

grocery and consumer packaged goods industry. Thus, defendant breached his Consulting Agreement, and the court denies defendant's motion to reargue plaintiff's breach of contract claim.[6]

4. **Aiding and abetting breach of fiduciary duty claim.** Darryl Moll was the Chief Financial Officer ("CFO") of plaintiff. (D.I. 42 at 108-14) Consequently, Moll owed plaintiff a fiduciary duty. Defendant insisted, as a condition of his loans to Soost, that Moll be named an officer and director of the Soost Entities. (D.I. 36, ex. 1 at 7; D.I. 38, ex. B at 69-70) Defendant argues that none of the Soost Entities did work for customers of plaintiff until after plaintiff fired Moll on July 31, 2000 and, therefore, Moll would not have been working for a competitor or breaching his fiduciary duty. (D.I. 50 at 13-15) Even if the Soost Entities did not perform work for plaintiff's customers until after Moll was fired, the record shows that Moll still breached his fiduciary duty. Regardless of whether the Soost Entities took plaintiff's customers, the Soost Entities were competitors of plaintiff simply because they engaged in the same business. Thus, serving as an officer of both plaintiff and

[6] Since the court finds that the Soost Entities engaged in plaintiff's "Business" it does not take the opportunity to comment on whether any of the Soost Entities that defendant invested in performed work for former customers of plaintiff. The mere fact that Sacks Processing performed the "Business" of plaintiff is sufficient to find that defendant's investment in Sacks Processing violated his Consulting Agreement.

the Soost Entities breached Moll's fiduciary duties to plaintiff. Furthermore, the Soost Entities purchased product from plaintiff and owed a significant amount of money to plaintiff. As a result, Moll's dual role as CFO of the seller (i.e., plaintiff), and an officer and director of the purchaser of plaintiff's products (i.e., the Soost Entities) breached his fiduciary duty to plaintiff. At the time Moll was appointed an officer of the Soost Entities, defendant knew that Moll was still CFO of plaintiff and that the Soost Entities purchased product from plaintiff. (D.I. 38, ex. B at 69-70) Thus, defendant knowingly participated in Moll's breach of fiduciary duty. Finally, Moll's breach of fiduciary duty proximately caused plaintiff some amount of damages. The Soost Entities owed plaintiff somewhere around $225,000. (D.I. 36, ex. 1 at 10) Moll's job was to determine credit policy, and Moll knew of the Soost Entities' outstanding debt prior to his leaving plaintiff. (D.I. 42 at 63; D.I. 42 at 189) Outstanding debt "of brokers or end users [had] always been monitored initially by the regional directors . . . ." (D.I. 42 at 63) However, if these "[regional directors] had a problem "they would call [Moll]." (Id.) Moll was in charge of resolving problems involving outstanding debt. Simply because there were several other people that played roles in establishing and enforcing plaintiff's credit policy, or that there were ways for the owners of plaintiff to find out the extent of Soost's debt

does not show that Moll did not breach his duty to plaintiff. Moll had a duty to inform his superiors at plaintiff of the Soost Entities' outstanding debt. The evidence of record shows that Thomas Conoscenti, Executive Vice President of plaintiff, was unaware of the extent of the Soost Entities' debt. When Conoscenti became aware of the debt, plaintiff fired Moll and ended the Soost Entities' credit. As a result, some amount of the outstanding debt that the Soost Entities were allowed to incur is attributable to Moll. The record clearly establishes all the elements of a claim that defendant aided and abetted Moll's breach of fiduciary duty. The court denies defendant's motion to reargue this claim.

Sue L. Robinson
United States District Judge