U.S. BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

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| **In re**<br>**RED MOUNTAIN MACHINERY COMPANY et al,**<br>**Debtors.** | In Chapter 11 proceedings<br>Case No.: 09-19166-RJH<br>Adversary No. 09-941-CGC |
| **RED MOUNTAIN MACHINERY COMPANY et al**,<br>Plaintiffs,<br>v.<br>**COMERICA BANK et al**,<br>Defendants. | **PHASE II MEMORANDUM DECISION (Findings Of Fact And Conclusions Of Law Under Fed. R. Bankr. Proc. 7052)** |

## I. Introduction

Phase II is now complete. The Court concludes that: 1) M&C aided and abetted Dierich's breach of fiduciary duty from April 2009 to mid-June 2009; 2) M&C is not entitled to indemnification; and 3) there is no contractual cap on the aiding and abetting damages. However, the damages awardable to Plaintiffs are limited as more fully described here. For the reasons more fully explained below, the Court will not award attorney's fees to any party. As to all other causes of action against the remaining defendants, the Court concludes that plaintiffs have not shown that the relief requested is warranted and the Court finds in favor of the defendants.

## II. Background & Facts

The Court recited, at length, the complex and intertwined facts in this matter in its September 21, 2012 Phase I Memorandum Decision (Dkt # 738) (Phase I Decision) which it incorporates into this decision.[1] The Court will refer to specific facts as needed.

What is Phase II? Phase I dealt primarily with whether Dierich breached his fiduciary duties, but also addressed claims of fraudulent concealment and non-disclosure. In Phase I the Court found that Dierich did breach his fiduciary duties, but did not commit the torts of fraudulent concealment or non-disclosure. Phase II was meant to deal with the remaining issues. All parties have agreed that the proper way to resolve the remaining issues is to rule on the outstanding MSJs rather than conduct a plenary trial. The plaintiffs initially identified the following issues to be addressed:

> 1) Did Comerica or [M&C] aid and abet Dierich's breach of fiduciary duty;
> 2) Are there damages not addressed in Phase I;
> 3) Should any portion of Comerica's claim against RMMC be subordinated or disallowed;
> 4) Did M&C breach the covenant of good faith and fair dealing and misuse confidential RMMC information; and
> 5) Is M&C protected by the indemnification provision or the contractual cap contained in the Engagement Agreement with RMMC. [2]

While Phase II was under advisement, RMMC, Cowing, Valinda Cowing, Linda Cowing, Kain, Joyce Kain, and Comerica reached a global settlement resolving not only this adversary proceeding, but also all matters in the administrative case, including pending appeals. Therefore the Comerica issues that remained have now been resolved and will not be addressed in this memorandum decision.[3]

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[1] The Court also adopts the Glossary from the Phase I Decision.

[2] The third amended complaint (Dkt # 360) (Complaint) also brings fraudulent concealment (Counts V; VI) and non-disclosure (Counts III; IV) claims against M&C. However, these issues are not addressed in the closing briefs by RMMC and are deemed abandoned. Had they been pursued, they would have suffered the same fate as the non-disclosure and fraudulent concealment claims in Phase I -- namely, the alleged actions did not cause the alleged harm to RMMC.

[3] Stated in terms of undecided summary judgment motions involving M&C (as opposed to outstanding issues), the following remain: RMMC's summary judgment motions at docket numbers 481 (aiding and abetting breach of fiduciary duty by M&C beginning April 2009), 480 (M&C cannot claim indemnification via the Engagement Agreement) (RMMC MSJ #4), 479 (M&C cannot claim a contract cap on damages in the Engagement Agreement), and 483 (punitive damages); and M&C's omnibus motion for summary judgment at docket number 477.

Thus, the only claims alleged in the Complaint remaining to be decided in Phase II are:

- Count II. RMMC v. M&C for aiding and abetting breach of fiduciary duty;
- Count VIII. RMMC v. M&C for breach of the implied covenant of good faith and fair dealing;
- Whether Dierich should be liable for punitive damages for his breaches.[4]

As noted in the Court's order setting agenda (Dkt # 587) on the motions for summary judgment in this case:

> "Summary judgment should not be granted when a case involves complicated questions of law and fact, and a proper resolution of these issues would be advanced by further development of the record in the particular case. As the Supreme Court has noted, summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding extremely complex cases. A decision based on an insufficiently developed record may well be found later to be lacking in the thoroughness that should precede judgment." *In re Rigden*, 795 F.2d 727, 731, (9th Cir. 1986) (citations and quotations omitted).

After the trial in Phase I and supplemental briefings by the parties, the record is now sufficiently developed that the Court can rule on the outstanding motions for summary judgment. Moreover, RMMC claims that the Court did not rule on the extent to which Dierich's misconduct caused RMMC to detrimentally change its position and did not consider punitive damages. The Court will clarify the former, and rule on the latter.[5]

## III. Analysis

### A. Change in Position

Plaintiffs claim that the Court did not address change in position damages in Phase I. However, in the Phase I Decision, the Court concluded "While the filing of the

[4] Three other counts alleged in the Complaint were subsumed within the Phase I decision. These are: Count VII.RMMC v. M&C for reformation of the Engagement Agreement; Count IX. RMMC v. Dierich for intentional interference with business expectancies; and Count X. RMMC v. Dierich for intentional interference with contract.

RMMC and M&C have agreed that RMMC, not Red Mountain Operating Company, and M&C entered into the Engagement Agreement. Therefore, relief under Count VII is moot. To the extent that RMMC asks for other relief under this count, it is denied.

To the extent not so subsumed, the Court finds they have been abandoned because they have been repeatedly ignored by the Plaintiffs in this case. They are not mentioned in the RMMC's motions for summary judgments, pretrial memorandum (Dkt #670), Phase I closing brief (Dkt #732), and supplemental brief (Dkt #740).

[5] As to any issue raised by any party not specifically addressed in this decision, the Court either sustains or overrules that position, consistent with the overall outcome stated herein.

bankruptcy (issues 2 and 5) may be a specie of damage, Dierich's actions must be shown to be in natural and continuous sequence, unbroken by any efficient intervening cause all the way to the filing of the bankruptcy." (109:21-23). The Court took "issue 5" directly from the Plaintiffs' fact Issue #7 of the JPS which reads, in part:

> Did Dierich and Fickett cause RMMC and/or the Cowings to suffer harm?
>
> Yes. ... Dierich and Fickett also caused harm to RMMC's goodwill and caused RMMC to change its position and file for Chapter 11 bankruptcy to stop the sale of RMMC and/or its assets to EPIC.

The Plaintiffs did not show Dierich's actions caused the filing of the bankruptcy. As a result, the Plaintiff's change in position claim also necessarily fell.

The Plaintiffs now claim that the change in position argument was actually tied to the retention of Caliber Advisors, not the filing of the bankruptcy. Aside from being inconsistent with their earlier position, this argument is flimsy. RMMC's dire financial straits required the retention of a financial expert if Cowing wanted to do anything other than shut it down. Therefore, relief on this basis is denied.

B. Punitive Damages

All parties agree that *Security Title Agency, Inc. v. Pope*, 200 P. 3d 977 (Ariz. App. Div. 1, 2008) controls. "In Arizona, punitive damages are awarded only in the most egregious of cases, where it is proved by clear and convincing evidence that the defendant engaged in reprehensible conduct and acted with an evil mind. . . . A defendant acts with the requisite evil mind when he intends to injure or defraud, or deliberately interferes with the rights of others, consciously disregarding the unjustifiable substantial risk of significant harm to them." *Id.* at 995.

Plaintiffs claim that the following findings are evidence of Dierich's evil mind:

> (1) stalling the Armand Group in order to wait for M&C to bring in offers, prior to M&C's even circulating a pitch book; (2) suggesting to RMMC's lender that it foreclose on RMMC's assets and put the Cowings into bankruptcy; (3) purposefully misleading Cowing about a concrete marketing effort designed to sell RMMC with the primary goal of achieving a result for Dierich's own benefit whether it was the best deal for RMMC; (4) undermining efforts by the Cowings to settle the debt with Comerica by sharing attorney-client privileged information and failing to

> relay a counteroffer; and (6) [sic] "surreptitiously" pursuing the EPIC Transaction.

(RMMC's supplemental brief, Dkt # 740, 8:19-9:1).

The Court is not clearly convinced that Dierich's breach of fiduciary duty justifies punitive damages. The Court has been unflinching in its characterization of Darren Dierich describing him as:

> deceitful, two-faced, and [having] only a fleeting acquaintance with the truth. He was gullible, superficial and not particularly sophisticated, neither delving into nor understanding the HIG deal sufficiently to understand that it was a mirage. He was clearly contemptuous of Cowing and his abilities as CEO.

(Phase I Decision 113:18-22). As bad as this conduct was, the evidence does not support a finding by clear and convincing evidence that Dierich acted with evil intent or an evil mind. Thus, the Court will not add "evil" to the list set forth above. Although the Court did conclude that "in the many ways, the facts are so egregious that ever recurring questions are -- can't something be done about this? Isn't there some remedy for what he did? How can it be right for him to 'get a pass?'" (Phase I Decision 116:15-17), the balancing reality is that the EPIC offer was economically the best option on the table. Thus, even though Dierich was acting in his own interests, his efforts to move the company toward the EPIC deal do not fit the standard of acting "with the requisite evil mind" with the intent "to injure or defraud, or deliberately interfere[] with the rights of others, consciously disregarding the unjustifiable substantial risk of significant harm to them." Therefore, the Court finds and concludes that punitive damages are not warranted.

C. Aiding and Abetting

"A claim for aiding and abetting a tort requires proof that (1) the primary tortfeasor has committed a tort causing injury to the plaintiff; (2) the defendant knew the primary tortfeasor breached a duty; (3) the defendant substantially assisted or encouraged the primary tortfeasor in the breach; and (4) a causal relationship exists between the assistance or encouragement and [the tortfeasor's] breach." *Security Title Agency* at 988.[6]

[6] The Court's analysis would not differ under Massachusetts law. "[T]he elements of the tort of aiding and abetting a fiduciary breach are: (1) there must be a breach of fiduciary duty, (2) the defendant must know of the breach, and (3) the defendant must actively participate or substantially assist in or encourage the breach

Aiding and abetting must be shown by a preponderance of the evidence. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 28 (Ariz. 2002). After Phase I and the subsequent settlement with Comerica, the Court must only determine if M&C aided and abetted Dierich's breach of fiduciary duty.

Prong one has been met. Dierich breached his fiduciary duty with the resulting damage of causing RMMC to pay him his salary. The key inquiry for the Court is whether M&C knew that Dierich breached his fiduciary duty and whether the defendant substantially assisted or encouraged the breach. Once the Court makes these determinations, it will then turn to causation. Much like it did in Phase I, the Court will break down M&C's actions into two time frames: January through the end of March 2009 and April 1 through June 15, 2009. It is no accident that these time frames correspond to the expiration of the Engagement Agreement.

*1. January 2009 to March 2009*

The Court has determined that Dierich breached his fiduciary duty during this time frame by preparing and distributing different pitch books for Cowing, potential investors, and Comerica. Undoubtedly, M&C was heavily involved with the preparation and distribution of the pitch books. The first question presented is whether M&C knew that it was assisting Dierich in his breach during this time frame. M&C's knowledge will be judged via its agents -- primarily Cowan, and to a lesser extent, Whipple.

Undoubtedly, Cowan and Whipple knew that they were part of a delicate marketing effort of RMMC to three competing audiences: Cowing, potential investors, and Comerica. As the Court detailed in the Phase I Decision, marketing RMMC in this manner was a breach of Dierich's fiduciary duty. Without doubt, M&C not only assisted and encouraged Dierich in the breach, but was a key participant in the breach. Thus, prong three of the *Security Title* test is met.

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to the degree that he or she could not reasonably be held to have acted in good faith." *Arcidi v. NAGE, Inc.*, 856 N.E.2d 167, 174 (Mass. 2006).

The key question, however, is whether M&C *knew* that Dierich was breaching his duty to RMMC. On this key point, the evidence does not prove M&C's knowledge of Dierich's breach *in this time frame*. M&C's interactions with RMMC must be viewed in the context of the relationship that RMMC established via not only Dierich, but Cowing as well. At trial, RMMC made much of the fact that between October 2008 and March 2009 Cowan met with Cowing only for a total of about three hours. (Trial Transcript, Ross Cowan, July 23, 2012, 299:13-300:10). This, urges RMMC, is evidence of Dierich's and Cowan's grand plan to take over RMMC.

However, this evidence cuts the other way as well. As the Court noted in the Phase I Decision, Cowan was oddly disengaged during the spring of 2009 with the responsibility of dealing with M&C put squarely on Dierich's shoulders. (Phase I Decision, 98:4-11). The Court finds it unsurprising that M&C told potential investors that the "deal is structured as a management lead buyout with the absentee owner exciting the business." (Ex. 174). As far as M&C knew, this picture was consistent with its own interactions -- or, more fairly, lack thereof -- with Cowing. Cowan credibly testified that entrepreneurs, such as Cowing, routinely left restructuring transactions to subordinates and would not engage until later in the process. (Trial Transcript, Ross Cowan, July 24, 2012, 85:17-87:21). Further, Cowan knew that he couldn't do a deal without Cowing signing off because "they obviously own all the equity of the company. You can't do anything with that entity without it." (Trial Transcript, Ross Cowan, July 23, 2012, 268:14-269:9).

During this time frame the evidence does not support a finding that M&C was working on behalf of itself or Dierich instead of RMMC. Much of the Court's conclusion that Dierich breached his duty during this time frame was tied to Dierich's motives as evidenced by his make "s*** smell like roses" email to Kain. (ex. 160, Phase I Decision, 98:14-18). The Court does not find sufficient similar evidence to make the same findings about M&C's knowledge during this time. Therefore, because of the failure to prove the

second element, the Court finds that, from January to March 2009, M&C did not aid and abet Dierich's breach of his fiduciary duty to RMMC.

*2. April 2009 to June 2009*

The Engagement Agreement expired on March 31, 2009. (JPS Stipulated Fact #8). By April 9, 2009, Comerica rejected the Signature offer. (Ex. 215). This did not stop M&C from working on a deal to sell RMMC. Cowan testified that he thought that M&C should stop working on the RMMC deal at this point, but M&C kept pursuing it because they didn't want to abandon the potential fee. (Trial Transcript, Ross Cowan, July 24, 2012, 63:8-21). Do M&C's actions during this time frame show that they aided and abetted Dierich's breach of fiduciary duty?

Again, prong one of the *Security Title* test has been met because the Court has already found that Dierich breached his fiduciary duty during this time.

However, unlike the previous time frame, the Court finds that from April through June 2009 M&C *knew* that Dierich was breaching his fiduciary duty to RMMC. The evidence shows that M&C was aware that Cowing was unhappy with the Signature proposal and unlikely to accept it. It also knew by mid-April that Signature was at least contemplating whether to bypass RMMC and negotiate directly with Comerica on acquiring the company's assets via foreclosure. (Ex. 221). By April 21, 2009, Cowan knew that the CEO and CFO of RMMC were working at cross purposes: Cowing had presented the April Settlement Offer to Comerica; and Dierich was trying to structure a more attractive deal to Comerica via Signature. (Ex. 5169). Cowan's response to this knowledge? "We just need a chance to respond and put the real math on the table for Robin. We'll win." *Id.* (emphasis added). By the end of April, M&C was referencing RMMC Partners in an email to Dierich. (ex. 230). The evidence shows that beginning in April 2009, M&C knew that Dierich was surreptitiously undermining the plans of Cowing. Thus, during this time frame, M&C knew that Dierich was breaching his fiduciary duty to RMMC.

M&C's assistance to Dierich in his breach was substantial and intentional. Beginning in April, M&C actively worked on Dierich's and EPICs behalf:

- April 30, 2009 – Dierich and Cowan discussed methods to increase Signature offer (ex. 5183);
- May 1, 2009 – Dierich sent Whipple Fickett's six-month business plan (Ex. 236);
- May 8, 2009 – Whipple requested titles of the management team from Dierich (Ex. 239);
- May 12, 2009 – Whipple requested pro formas from Dierich (Ex. 5191);
- May 19, 2009 – M&C, Dierich and Boatwright scheduled a teleconference (Ex. 255);
- May 26, 2009 – Dierich sent a draft LOI to M&C and Boatwright Ex. 265);
- May 27, 2009 – Boatwright sent revisions of the LOI to M&C and Dierich Ex. 5204);
- May 29, 2009 – EPIC executed an engagement letter for M&C to raise capital (Ex. 272);
- June 3, 2009 – M&C returned a fully executed Engagement Agreement to EPIC (Ex. 278); and
- June 4, 2009 – EPIC sent M&C projections, business models and ideas (Exs. 281, 282);

M&C did this work with the full knowledge that it was no longer engaged by RMMC and that RMMC's CFO was working on a plan directly contrary to that of RMMC's CEO. To conclude otherwise would ignore the facts. Thus, prong three of *Security Title* is met.

This assistance caused damage to RMMC. Once RMMC learned of Dierich's disloyalty, it fired him. Had RMMC known of Dierich disloyalty when M&C did, it would have fired him in April. Thus, Dierich could not have continued his disloyal actions without M&C's assistance.

At bottom, the Court finds and concludes that M&C aided and abetted Dierich in his breaches of fiduciary duty from April through June 2009. The remedies for these actions will be discussed below.

D. Breach of Contract

RMMC asks the Court to amend the complaint to include a breach of contract claim against M&C because "M&C has been put on notice that misuse of confidential information was an issue in the case as early as the first complaint naming M&C as a defendant." (RMMC Supplemental Brief (Dkt #740) 12:15-17). The Court denies RMMC's request.

Courts balance five factors to determine if denying an amendment is proper: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment…." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Courts balance the factors, but "each is not given equal weight." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Undue delay alone is insufficient to deny an amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citing *United States v. Webb*, 655 F.2d 977, 980 (9th Cir.1981); *Hurn v. Retirement Fund Trust of Plumbing*, 648 F.2d 1252, 1254 (9th Cir.1981)). Undue prejudice to the opposing party is "the most important factor." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). In this matter, where RMMC has had ample opportunity to amend, allowing amendment at this late date to assert a breach of contract claim is an undue delay and would cause significant undue prejudice to the opposing parties.

To determine undue delay, courts examine "'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'" *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006)(quoting *Jackson*, 902 F.2d at 1388). The Court has reviewed the record, and RMMC was aware of the facts underlying a breach of contract claim. RMMC MSJ #4 makes repeated reference to M&C's alleged misuse of RMMC's confidential information. Here, RMMC clearly knew it had a potential breach of contract claim, but chose not to pursue it. The undue delay factor weighs strongly in favor of denying leave to amend.

Amending would impose a significant undue hardship on M&C. There have been days of trial, reams of paper, and hours upon hours of attorney time spent on this matter. To allow a major change to the pleadings allowing an entirely new claim would be patently unfair to M&C.

Thus, the undue delay and undue hardship factors tip the balance in favor of denying the motion to amend.[7]

E. Good Faith and Fair Dealing

"Generally, the implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Kuchera v. Parexel Intern. Corp.*, 719 F.Supp.2d 121, 125 (D. Mass. 2010) (citing *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 583 N.E.2d 806, 820 (1991)). RMMC must prove that M&C undertook the act with "dishonest purpose, conscious doing of wrong, or breach of duty through motive of self interest or ill will." *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of Dep't of Mental Retardation*, 677 N.E.2d 127, 144 (Mass. 1997). A contract must be in existence between the parties when the alleged breach occurred. *Rezendes v. Barrows*, 1998 WL 470505 (Mass.Super. Aug. 11, 1998). "[T]he purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed

[7] The Court does question RMMC's motives in making the motion to amend. The statement "M&C has been put on notice that misuse of confidential information was an issue in the case as early as the first complaint naming M&C as a defendant" rings hollow. It must therefore be equally true that RMMC was on notice that that misuse of confidential information was an issue throughout the case as well. It is apparent in the pleadings that RMMC carefully crafted the misuse of confidential information argument to *avoid* treating it as a breach of contract.

M&C has its own theory on why RMMC proceeded as it did:

> By the same token, Plaintiffs' have not sued M&C for any breach of contract either. *See* Plaintiffs' Third Amended Complaint, Docket No. 360. In point of fact, Plaintiffs have artfully avoided bringing such a claim by bringing their breach of implied covenant of good faith and fair dealing claim against M&C and trying to shoehorn every possible tort duty and contractual obligation they can imagine under the auspices of that claim. The reason for this artful pleading is clear – the Engagement Agreement provides that M&C would be the "exclusive advisor and agent with respect to the proposed Transaction(s)." Deposition Exhibit 846 at p.1. Furthermore, Mr. Cowing agreed on his own behalf that he would "not during the term of this Agreement engage in contact with or solicitation of investment banks, brokerage firms, commercial banks, financial providers, placement agents, or advisors for this transaction, without the involvement and consent of [M&C]." Deposition Exhibit 846 at § 16.

(M&C's reply in support of its motion for summary judgment (Dkt. # 564, 15:23-16:7).

In the end, asking to amend the Complaint at this time to allow a breach of contract count is disingenuous. But, at this juncture, the Court will not make a finding of bad faith where the opposing parties do not allege it and the other factors weigh heavily in favor of denying the Motion regardless of RMMC's good faith, or lack of it.

expectations of the parties in their performance." *Uno Rests., Inc. v. Boston Kenmore Realty Corp.*, 805 N.E.2d 957, 964 (Mass. 2004).

RMMC's claim rests on M&C's use of confidential information gained via its representation of RMMC. Section 17 of the Engagement Agreement bars the use of confidential information. M&C does not contest that it used the information, but claims it was allowed to represent M&C because the Engagement Agreement expired. As stated by M&C:

> Breach of implied covenant of good faith and fair dealings clauses can only be brought against a defendant for actions it undertook during the pendency of a contract with the plaintiff. *Rezendes v. Barrows*, 8 Mass. L. Rep. 699 (Mass. Super. Ct. 1998). Plaintiffs are barred from claiming that any activities M&C might have engaged in on behalf of EPIC after the Engagement Agreement expired constituted a breach of implied covenant of good faith and fair dealing.

M&C's response to RMMC's motion for summary judgment (Dkt # 531, 22:17-23). This argument is unavailing because Section 17 was still in effect, notwithstanding the expiration of the agreement, pursuant to Section 6. (Ex. 105).[8]

Addressing the merits, the first question is whether the use of confidential information had the effect of destroying or injuring RMMC's right to receive the fruits of the Engagement Agreement. The answer is yes. M&C's argument that the only benefit of the Engagement Agreement was the sale of the company is too limited. Surely, another negotiated benefit of the contract was that RMMC's confidential information would remain confidential and not be used without its consent.

Contacting Boatwright to find out if M&C could represent EPIC is not evidence M&C's of good faith or lack of intent. Instead, it is evidence of the opposite. Remember, Boatwright represented EPIC, not M&C in this deal. An investment banker contacting the potential buyer's attorney to answer this all-important question shows a serious lack of business judgment at best.[9] Jeff Whipple testified that Boatwright said that "it is not a

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[8] "expiration . . . of this Agreement shall not affect the indemnification provisions set in paragraph 9 or the provisions of paragraph[] . . . 17 . . . which shall survive any expiration . . . of this Agreement."

[9] It is possible that Boatwright represented M&C too. Cowan testified that he "met Darren through Steve Boatright, who's our securities attorney here in Phoenix." (Trial Transcript, Ross Cowan, July 23, 2012, 264:14-22); *See also* RMMC's Reply in Support of Summary Judgment, p. 10, n. 8 (Dkt # 575).

conflict of interest to represent both a buyer and seller." (Deposition of Jeff Whipple, December 15, 2011, 92:14-16). However, as Whipple made clear later in his deposition, M&C believed at this time it no longer represented RMMC because the Engagement Agreement had expired. (Deposition of Jeff Whipple, December 15, 2011, 95:7-19). The Court finds that it is no accident that M&C did not ask the right question. It knew that it was in a precarious position, but was driven to represent EPIC as a last ditch effort to garner a fee in this deteriorating sale effort.

But, as has often been observed in this case -- so what? Did M&C's breach of the covenant of good faith and fair dealing cause harm to RMMC? Here, like the breaches of Dierich, M&C's breach caused no harm beyond the continued payment of Dierich's salary. M&C's use of confidential information resulted, paradoxically, in the highest monetary offer for the company; an offer than RMMC requested. The other types of harm RMMC claims in this case -- lost profits, the filing of bankruptcy, etc. -- were the result of forces well beyond M&C's influence or control.

Attorney's fees may be awardable, but only if the facts fit the dimensions of the contractual language. The salient portion of Section 17 reads:

> . . . that upon any such breach or any threat thereof, the disclosing Party shall be entitled to appropriate equitable relief in addition to whatever harm, including, without limitation, attorney's fees, in connection with any breach or enforcement of the receiving Party's obligations hereunder or the unauthorized use or release or other breach of which it is aware.

(Ex. 105) (emphasis added). Under this section, RMMC claims that the attorney's fees incurred in this adversary proceeding are awardable.[10] However, this interpretation of the Section 17 oversteps the bounds of the language of the Engagement Agreement; Section 17 does not contemplate a general right to attorney's fees but only those fees incurred "in connection with any breach or enforcement" of M&C's obligations.

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[10] The Court notes that RMMC has incurred over $275,000 in fees in connection with the adversary proceeding. The court approved the following payments

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| May 24, 2010 (Admin. Dkt #314): | $103,507 |
| September 23, 2010 (Admin. Dkt #371) | $ 72,449 |
| March 22, 2011 (Admin. Dkt #548) | $100,098 |

RMMC is currently on a contingency fee (Admin. Dkt #413). RMMC has not filed a fee application pending a ruling on Phase II.

Here, any request for equitable relief -- such as an injunction or restraining order -- is moot. Once RMMC requested a proposal from EPIC, the factual basis for such a remedy evaporated.

As noted above, the only damages potentially connected to M&C's use of confidential information arise from Dierich's breach of fiduciary duty, an action that ended by June 2009. The connection between this harm and the attorney's fees sought is too tenuous to satisfy the limited language in Section 17. The thrust of the adversary proceeding was not to prove that Dierich's actions, and M&C's aiding and abetting thereof, caused RMMC to pay him a salary. Rather, RMMC brought suit to show that Dierich, Comerica, and M&C conspired to take over RMMC which resulted in the filing of bankruptcy and millions of dollars in resulting damages. As noted, M&C did not cause this harm. As such, an award of attorney's fees in an adversary proceeding commenced well after the breach ceased is unwarranted.

G. Indemnification

Both parties agree that the indemnification clause does not apply to intentional conduct. Here, the Court has concluded that M&C's aiding and abetting a breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing were intentional. Section 9 or the Engagement Agreement excludes losses related to intentional wrongdoing. As such the indemnification clause does not apply.

H. Contractual Cap

The Court is asked to interpret the interplay between the cap of Section 9[11] and the unlimited scope of Section 17 of the Engagement Agreement to determine if RMMC's claims against M&C are capped at $25,000.[12]

The Court concludes that the aiding and abetting breach of fiduciary duty claims are not capped by Section 9. In Massachusetts, a limitation of liability clause is

[11] "The aggregate liability of Advisor and its shareholders, officers, directors, employees or agents to the Company and its owners for any claim arising under or related to this Agreement, the Transactions(s), or the service provided hereunder, shall be limited to no more than an amount corresponding to the aggregate fee paid under this Agreement by the Company or its owners to Advisor."

[12] Parties have agreed that RMMC paid M&C $25,000.

unenforceable for intentional torts. *Brush v. Jiminy Peak Mountain Resort, Inc.*, 626 F. Supp. 2d 139, 151 (D. Mass. 2009); *Restatement (Second) of Contracts* § 195(1) (1996) ("a term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable."). Because the Court has concluded that M&C's aiding and abetting liability was intentional, it is not subject to the cap.

## IV. Conclusion

Based on the forgoing,

**IT IS ORDERED GRANTING** judgment to the defendants on the plaintiffs' change in position claim;

**IT IS FURTHER ORDERED GRANTING** judgment to the defendants on the plaintiffs' request for punitive damages;

**IT IS FURTHER ORDERED GRANTING** judgment to the plaintiffs on their aiding and abetting claim against M&C from April through June 2009 in the same amount as previously awarded against Dierich;

**IT IS FURTHER ORDERED GRANTING** judgment to the defendants on the plaintiffs' aiding and abetting claim during all other time periods.

**IT IS FURTHER ORDERED DENYING** the plaintiffs' request to amend the Complaint to include a claim for breach of contract;

**IT IS FURTHER ORDERED GRANTING** judgment to the defendants on the plaintiffs' claim of a breach of good faith and fair dealing;

**IT IS FURTHER ORDERED THAT** the indemnification clause does not apply to the aiding and abetting claim; and

**IT IS FURTHER ORDERED THAT** the contractual cap does not apply to the aiding and abetting claim.

Counsel for RMMC is to upload a form of judgment.

**So ordered.**

Dated: January 17, 2013.

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to interested parties.