**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

| | | |
|---|---|---|
| FIRST CLUB MARKETING LLC; | ) | |
| Plaintiff/Counterclaim Defendant; | ) | |
| v. | ) | Case No. 1916-CV32558 |
| KANSAS CITY BARBEQUE SOCIETY | ) | Division: 11 |
| Defendant/Counterclaim Plaintiff/ Third Party Plaintiff/Counterclaim Defendant; | ) | |
| v. | ) | **ORAL ARGUMENT REQUESTED** |
| RANDALL BOWMAN | ) | |
| Third Party Defendant/Counterclaim Plaintiff | ) | |

**MEMORANDUM IN SUPPORT OF FIRST CLUB MARKETING LLC AND RANDALL BOWMAN'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Randall Bowman is a longtime member of the Kansas City Barbecue Society ("KCBS"). In 2017 Bowman was elected to the KCBS Board of Directors, and he served as the KCBS Board President in 2018. In 2017, KCBS terminated its contract with its marketing vendor, MMA Creative. In 2018, Bowman's marketing company, First Club Marketing LLC ("FCM"), performed numerous marketing services for KCBS at no charge. In 2018, Bowman informed the board that FCM could not continue to perform this work for free. Ultimately, FCM and KCBS entered into a marketing agreement dated January 2, 2019 (the "Agreement"). The Agreement was unanimously approved at a January 2, 2019 board meeting. The board reaffirmed the contract, with KCBS's counsel present, at the January 15th, 2019 board meeting and again at the February 15-16, 2019 board meeting. Bowman did not vote on the Agreement.

KCBS terminated the Agreement on November 1, 2019 - eleven months into the Agreement's three-year term. KCBS has refused to pay amounts due and owing under the plain terms of the Agreement.

KCBS argues that it should not be required to abide by the Agreement because Bowman was on the KCBS board and was FCM's owner; according to KCBS, this is a conflict of interest that voids the Agreement. KCBS's argument avoids three critical facts: (1) KCBS Bylaws specifically permit a board member to receive a contract for compensation; (2) the KCBS board voted three times over the course of two months to approve the Agreement; and (3) Bowman disclosed any potential conflict to the board (indeed, it was well known that Bowman was an owner of FCM) and did not vote on the Agreement. Moreover, every witness who was on the KCBS board when the Agreement was created testified that the Agreement was reasonable and favorable to KCBS for a multitude of reasons.

When KCBS appointed new board members in 2019, Bowman resigned from the KCBS board. Nearly immediately thereafter, the KCBS board began discussing whether to terminate FCM's contract. As one director put it in his resignation letter to the board, "Please share with the membership the cost of the legal fishing expedition and the cost of settlement once the board voids the contract for whatever reasons are concocted and subsequent litigation or settlements are completed."

At the completion of the 2019 barbecue season, KCBS terminated the Agreement; it stated that the termination was for cause.[1] Bowman attempted to informally resolve the dispute but to no avail. Left without any other options, FCM filed this case against KCBS alleging claims for breach of contract and declaratory relief. In February 2020, KCBS answered FCM's Petition, and also filed a new suit against Randall Bowman in his individual capacity alleging breach of fiduciary duty and tampering.

The Court consolidated the two cases with the lead case being *First Club Marketing LLC and Randall Bowman v. Kansas City Barbeque Society*, Case No. 1916-CV32558 (Division 11, Judge Adam Caine). After the consolidation, the case presents the following claims:

- First Club Marketing LLC (Plaintiff) brings:
    - Breach of Contract against KCBS
    - Declaratory Relief against KCBS
- KCBS (Defendant/Counterclaim and Crossclaim Plaintiff) brings:
    - Breach of Contract against FCM and Bowman
    - Breach of Fiduciary Duty against Bowman
    - Tampering with Computer Data against Bowman and FCM

[1] KCBS also parted ways with its CEO and its other primary vendor, Heading South, LLC, in 2019.

Because there is no genuine dispute that the Agreement was entered into by both parties and because there is no genuine dispute as to the meaning of the terms of the contract, FCM is entitled to summary judgment on its claim for breach of contract pursuant to Mo. R. Civ. P. 74.04.

FCM is also entitled to summary judgment on KCBS' counterclaims for breach of contract, breach of fiduciary duty and tampering. As discussed more fully below, the evidence in the record – or lack thereof – creates no genuine dispute of material fact and no reasonable jury could find in favor of KCBS on its theories of counterclaim liability. Thus, summary judgment in FCM and Bowman's favor is appropriate.

## LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute about material facts and, under the undisputed facts, the moving party is entitled to judgment as a matter of law." *Parr v. Breeden*, 489 S.W.3d 774, 778 (Mo. 2016). A genuine dispute is one that is "real, not merely argumentative, imaginary, or frivolous." *Pub. Sch. Ret. Sys. Dist. of Kan. City v. Mo. Comm'n on Human Rights*, 188 S.W.3d 35, 40 (Mo. App. W.D. 2006). Further, a dispute as to a non-controlling fact or facts does not preclude the moving party from summary judgment. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1052 (8th Cir. 2011).

A motion for summary judgment is helpful "to isolate and dispose of factually unsupported claims." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). "[W]hen a motion for summary judgment is supported by affidavits … an adverse party cannot rely solely upon his pleadings or argue that he has evidence for trial that will disclose issues of fact, rather the adverse party must come forward with affidavits, depositions, or other evidence showing that a genuine issue of material fact exists. *McLeese v. J.C. Nichols Co.*, 842 S.W.2d 115, 118 (Mo. Ct. App. 1992) (citation omitted). Summary judgment should be granted against a party where that party "fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. A moving party is not required to disprove matters that his opponent has the burden of proof on at trial. *Id.* at 323. A party that opposes summary judgment, "[M]ay not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial." Mo. S. Ct. R. 74.04(c)(2).

## ARGUMENT

### I. FCM IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM.

To create a "genuine issue" of fact sufficient to survive summary judgment, KCBS must point to evidence in the record that demonstrates there are "two plausible, but contradictory, accounts of the essential facts." *Pub. Sch. Ret. Sys.*, 188 S.W.3d at 40. There can be no such showing here because there is no dispute the contract was entered into and performed by both parties. Even the 2019 Board that ultimately terminated the Agreement previously voted in favor of it after having a lengthy discussion about the Agreement in the presence of KCBS' own lawyer. *See* (Ex. 18 at 7:30). First Club Marketing LLC and Randall Bowman's Statement of Undisputed Facts ("FCM SOF") ¶¶ 36-38, 43. Yet KCBS did not pay and has not paid FCM the amounts due to FCM under the contract. FCM SOF ¶ 77.

While KCBS's current leadership may now regret or disagree with the 2018 and 2019 Boards' decision, remorse or second-guessing after entering into a contract is insufficient to invalidate an otherwise lawful contract. *See Levy v. Young Adult Institute, Inc.*, Case No. 13-cv-2861, 2015 WL 13745763, at *1 (S.D.N.Y. Oct. 9, 2015) (where a not-for-profit corporation sought to void an otherwise valid contract with an executive because the corporation determined,

after the execution of the contract, that the compensation was excessive, the court refused to allow the corporation to unwind the contract, reasoning "hindsight regret about the reasonableness of its compensation agreement does not justify reneging on a contract") *report and recommendation adopted*, 2015 WL 782497 (S.D.N.Y. Dec. 2, 2015), *aff'd* 744 F. App'x 12 (2nd Cir. 2018). Indeed, the KCBS Bylaws specifically permitted KCBS to contract with its board members for services. FCM SOF ¶ 5. ("…nothing herein contained shall be construed to preclude any Directors from serving the corporation in any other capacity and receiving reasonable compensation for services actually rendered … no officer shall be prevented from serving the corporation in any other capacity and receiving reasonable compensation for personal services actually rendered") (quoting Ex. 16, at FCM_017497, Section 4.09; FCM_017501, Section 6.10).

**A. The Agreement was a Valid and Enforceable Contract.**

The undisputed material facts demonstrate that the Agreement was a valid and enforceable contract. "The elements required to form a valid contract in Missouri are 'offer, acceptance, and bargained for consideration.'" *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 737 (Mo. App. W.D. 2011) (quoting *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1988)). The undisputed material facts demonstrate that each of these elements is satisfied.[2]

[2] First, there was an offer to enter into a contract between FCM and KCBS. FCM and KCBS representatives discussed the possibility of FCM providing marketing services for KCBS. FCM SOF ¶ 18.

Second, there was acceptance of the contract. The Agreement was accepted when representatives from both parties signed the Agreement. Bowman signed as the representative for FCM, and Carolyn Wells, the executive director of KCBS, signed on behalf of KCBS. FCM SOF ¶ 30. *See Baier v. Darden Restaurants*, 420 S.W.3d 733, 738 (Mo. App. W.D. 2014) ("A party's signature on a contract remains the 'common, though not exclusive, method of demonstrating agreement.'") (citation omitted). The board also voted in favor of the contract on three separate occasions. FCM SOF ¶ 27.

Third, there was bargained for consideration. In exchange for providing marketing services, social media services, sponsorship sales, and brand and partnership management services for KCBS, the Agreement provided that FCM would receive monetary compensation for such services. FCM SOF ¶¶ 58, 59. *See Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438 (Mo. App. W.D. 2010) ("Generally speaking, [], if a contract contains mutual promises, such as a legal duty or liability is imposed on each party as a promisor to the other party as a promise, the contract is a bilateral contract supported by sufficient consideration") (citation omitted).

Indeed, KCBS admits in its pleadings that the Agreement was a valid agreement. *See* (Ex. 17, KCBS Amended Answer, Claims, and Counterclaims of KCBS ("KCBS Amended Answer"), p. 10 at ¶ 32) ("The Agreement is a valid and binding contract.").

Both KCBS and FCM performed under the contract for the 2019 barbecue season, supporting that both parties believed the Agreement was a valid and enforceable contract. FCM SOF ¶ 31. Specifically, FCM procured sponsorships, responded to and created posts on social media on KCBS' behalf and provided the day-to-day marketing services to KCBS during the life of the Agreement. FCM SOF ¶ 58. FCM submitted invoices to KCBS, and KCBS paid invoices submitted (except for those due and owing), thus demonstrating KCBS' understanding and belief that the Agreement was a valid contract. FCM SOF ¶¶ 31, 58-60. Such performance under a contract is sufficient to establish that a valid and enforceable contract exists. *See* Restatement (Second) of Contracts § 34 (1981).

### B. Under the Agreement, KCBS was Required to Pay FCM but KCBS Withheld Pay.

Because FCM performed under the Agreement, FCM is owed payment for its services provided. To date, FCM has not been paid for all of the services it provided. Specifically, the following payments are due and owing:

- Cabo Wabo Commission in the amount of $13,000.00 due on October 7, 2019, invoice number 10237.
- National Turkey Federation Commission in the amount of $5,250 due on October 7, 2019, invoice number 10237.
- October Monthly Retainer for Services in the amount of $13,000 due on November 19, 2019, invoice number 10384.
- October Expenses in the amount of $425.39 due on November 19, 2019, invoice number 10385.

- Renewals for twenty-four months after termination per the Agreement. (The Agreement provided that upon its termination, FCM is entitled to receive payment in the amount of 20% of all renewals for two years after the termination).

- 2019 Bonus per the Agreement. (The Agreement provided that FCM is entitled to a performance bonus based on the amount of revenue secured for an entire year).

- Finally, in the event the termination was without cause, three months' retainer per the Agreement.

FCM SOF ¶ 78(a)-(g).

KCBS' Corporate Representative testified that KCBS does not have a position on the amount of money owed to FCM, FCM SOF ¶ 77; accordingly, KCBS cannot provide evidence to dispute the amounts due and owing to FCM. Nonetheless, the record demonstrates what is owed to FCM. FCM SOF ¶ 78(a)-(g). Therefore, there is no genuine issue of material fact that FCM is owed payment.

**C. KCBS had No Basis to Terminate the Agreement for Cause.**

FCM is entitled to summary judgment under the "without cause" provisions of the Agreement because KCBS falsely and improperly designated FCM's termination as "for cause" when there was no cause for termination. *See Scribner v. Worldcom, Inc.*, 249 F.3d 902, 911-12 (9th Cir. 2001) (granting summary judgment where the court determined the company breached its duty of good faith and fair dealing when it wrongfully and intentionally classified termination with cause when no such cause existed to avoid paying under the contract terms). To be clear, whether the contract was terminated "for cause" or "without cause," KCBS was required to pay amounts which it is undisputed it did not pay. The *amount* of damages differs, however, depending on whether the contract is terminated with or without cause. Specifically, if KCBS did not have cause to terminate pursuant to the "for cause" provision, KCBS also owes three months' retainer to FCM. *See* (Ex. 1).

The Agreement provided that cause existed to terminate the Agreement if one or more of the following occurred:

> (i) dishonesty in the course and scope of FCM's duties;
>
> (ii) active participation in criminal conduct;
>
> (iii) material failure to perform any of his duties, if that failure occurs for a period of thirty (30) days from the date of KCBS' written notice of warning to Consultant [KCBS], which notice shall specify the acts or omission deemed to amount to that failure; or
>
> (iv) gross negligence in the performance of his duties under the Agreement, if that negligence continues for a period of thirty (30) days from the date of KCBS' written notice of warning to Agency [FCM], which notice shall specify the acts or omissions deemed to amount to the negligence.
>
> (Ex. 1, KCBS_0000396-000397, at ¶ 3).

As discussed below, none of the enumerated reasons for cause exist.

**1. There is no Evidence of Dishonest Conduct in the Scope of the Duties.**

Here, KCBS makes no allegation nor provides any evidence of any dishonest conduct during the pendency of the contract.[3] Therefore, any such allegations are outside of the "for cause" reasons listed in the Agreement. To terminate for cause under the Agreement, the dishonest conduct must occur during the "course and scope of his duties." (Ex. 1, KCBS_0000396 at ¶ (3)(i)). KCBS does not allege, nor is there any evidence in the record, that Bowman or FCM acted dishonestly in the performance of the Agreement. *See* (Ex. 5, Corporate Representative Deposition, at 215:7-9).

[3] KCBS claims, without credible support, that Bowman was dishonest in securing the contract, but even assuming any alleged dishonest conduct (which FCM and Bowman deny) the Agreement required the dishonest conduct to be within the course and scope of carrying out duties under the Agreement. KCBS's allegation does not fit the limitations of this clause.

**2. There is No Evidence of Criminal Conduct.**

Likewise, there is no record evidence that FCM or Bowman actively participated in criminal conduct to justify the for cause termination under Paragraph 3(ii). (Ex. 1, at KCBS_000396 at ¶ (3)(i)).

**3. There is No Evidence that FCM failed to Perform Duties under the Agreement or Acted in any way that would Constitute Gross Negligence.**

Finally, both subsections (iii) and (iv) require that KCBS provide written notice of warning to FCM thirty days prior to termination for breach of these subsections. No such writing has ever been presented to FCM or Bowman, and there is no such writing in the record evidence. FCM SOF ¶ 67. Had KCBS actually believed there was cause for termination under sections (iii) or (iv), KCBS would have been contractually required to send a written cure letter - which it did not do.

None of the Agreement's "for cause" clauses can be applied here, and KCBS' designation of the termination of FCM as "with cause" was improper.

In sum, there is no dispute the Agreement was entered into and that amounts due under the Agreement have not been paid. Further, there is no evidence in the record that satisfies the Agreement's "for cause" termination provisions. As such, FCM is entitled to summary judgment on its breach of contract claim.

## II. FCM IS ENTITLED TO SUMMARY JUDGMENT ON KCBS' BREACH OF CONTRACT CLAIM AGAINST FCM.

KCBS brings a counterclaim for breach of contract against FCM. KCBS alleges the following three theories as to how FCM breached the Agreement: FCM engaged in dishonest conduct under the Agreement; FCM violated the Non-Compete provision in the Agreement; and FCM improperly accessed a Google drive. All of these theories fail as a matter of law and the Court should grant summary judgment in FCM's favor.

### A. KCBS' Claim for Breach of Contract Cannot Withstand Summary Judgment because KCBS was the First to Breach.

KCBS cannot prevail on its breach of contract claims against FCM because KCBS breached the Agreement first. Missouri applies the "first to breach rule, under which a party to a contract cannot claim its benefit where he is the first to violate it." *Randy Kinder Excavating, Inc. v. J.A. Manning Construction Company, Inc.*, 899 F.3d 511, 517 (8th Cir. 2018) (internal quotation marks and citation omitted). *See also Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602, 612 (Mo. App. E.D. 2009) (same). *See also Washington County Memorial Hospital v. Sidebottom*, 7 S.W.3d 542, 546 (Mo. App. E.D. 1999) ("An employer that has materially breached an employment agreement before an employee has violated a covenant not to compete may not enforce the covenant."); *Ozark Appraisal Serv. Inc., v. Neale*, 67 S.W.3d 759, 764 (Mo. App. S.D. 2002) ("This is because a party to a contract cannot seek to enforce its benefits where he is the first to violate its terms."); *Supermarket Merchandising & Supply, Inc., v. Marschuetz*, 196 S.W.3d 581, 585 (Mo. App. E.D. 2006) (same).

There is no dispute that KCBS stopped paying FCM under the Agreement. *See* FCM SOF ¶ 77 and Section I(B) above discussing payments due and owing. Failure to pay under an agreement is a material breach of a contract. *See e.g., R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 19 (Mo. App. W.D. 2003). *See also JumboSack Corp. v. Buyck*, 407 S.W.3d 51, 57 (Mo. App. E.D. 2013) ("An employer's unilateral change to an employment agreement may constitute a material breach of the agreement if it substantially alters the manner and/or amount that the employer pays the employee."); *Supermarket Merchandising & Supply, Inc.*, 196 S.W.3d at 586 (granting summary judgment and refusing to enforce a non-compete clause where the employer breached the agreement first by substantially altering the way and amount the plaintiff was paid).

KCBS also breached the Agreement by terminating it "for cause" when in fact no "for cause" justification existed. This is itself a breach of contract because the contract permits only a limited number of bases for terminating for cause. It also constitutes a breach of the doctrine of good faith and fair dealing. *See e.g., City of St. Joseph v. Lake Contrary Sewer District*, 251 SW.3d 362 (Mo. App. W.D. 2008) (each party to the agreement had an implied duty of good faith and fair dealing); *Scribner*, 249 F.3d at 911-12 (granting summary judgment where the court determined the company breached its duty of good faith and fair dealing when it wrongful and intentionally classified termination with cause to avoid paying under the contract terms when no such cause existed).

Because KCBS was the first to breach the Agreement, the terms of the Agreement, including the above Non-Compete provision, are no longer applicable as of November 1, 2019.

**B. FCM is entitled to Summary Judgment on the Non-Compete Provision.**

The Agreement contains a Non-Compete provision with the following language:

> Except as otherwise provided herein, Agency [FCM] agrees it will not directly compete against KCBS, this included but is not limited to sanctioning of events. KCBS acknowledges that Agency has operated events as an official organizer with said event being sanctioned through KCBS, KCBS excludes any event run by Agency and sanctioned by KCBS from any non-compete restrictions. KCBS and Agency have the right to change this clause at any time with mutual agreement in writing.

(Ex. 1, KCBS_000398 at ¶ 7).

**1. The Non-Compete Provision is Not Enforceable because the Non-Compete Provision Concluded when KCBS terminated the Agreement on November 1, 2019.**

The Non-Compete provision ended at the same time KCBS terminated the Agreement on November 1, 2019. There is no language in the Non-Compete provision that it survives termination of the Agreement, and it does not state an additional term that extends beyond the effectiveness of the Agreement. *See* (Ex. 1, p. 8 at ¶ 7). As such, the Agreement may not be enforced after the

termination of the Agreement. *See Fulton v. Honkamp Krueger Financial Services, Inc.*, Case No. 20-cv-1063, 2020 WL 7041766, at *5 (D. Minn. Dec. 1, 2020) (without specific language to the contrary, a non-compete does not survive the termination of the agreement with which it is contained); *In re Bennett Paper Corp.*, 68 B.R. 515, 518 (Bankr. E.D. Mo. 1986) ("upon the expiration of McGraw's employment agreement, McGraw's covenant not to compete was of no further effect"); *Financial Guardian, Inc. v. Kutter*, 630 S.W.2d 197, 198 (Mo. App. E.D. 1982) (the court found the non-compete was inapplicable because the contract was no longer in effect when the time limitation on the noncompete specifically indicated it would apply only if the individual left the employer during the term of the contract).

Accordingly, without language indicating that it survives the termination of the Agreement, the Non-Compete provision ended on November 1, 2019. Any action by FCM after that date was not bound by the Non-Compete provision.

**2. The Non-Compete Provision is Unenforceable as read by KCBS.**

**a. The Non-Compete as Interpreted by KCBS is Unenforceable as a Matter of Law.**

KCBS argues that the noncompete agreement survives the termination of the Agreement - presumably for perpetuity and that it prohibits FCM from conducting any sort of business unrelated to the sanctioning of barbecue events. KCBS's unreasonably broad reading of the noncompete cannot be enforced.

"Generally, because covenants not to compete are considered to be restraints on trade, they are presumptively void and are enforceable only to the extent that they are demonstratively reasonable." *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 434 (Mo. App. S.D. 2008) (citation omitted). *See also Healthcare Service of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 609-10 (Mo. banc 2006) ("[n]oncompetition agreements are not favored in the law, and the party

attempting to enforce a noncompetition agreement has the burden of demonstrating both the necessity to protect the claimant's legitimate interests and that the agreement is reasonable as to time and space"). "Non competition covenants may be said to be the least favored – they are presumptively void and are enforceable only to the extent they are demonstratively reasonable; and thus to be upheld they must be reasonably necessary to protect the employer's legitimate interests, and reasonable as to time and geographic scope." 7 Mo. Prac. Series § 30:181 Noncompetition, Nonsolicitation, and Nondisclosure Covenants – In General. *See also Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 841 (Mo. 2012) ("[a] non-compete agreement must be narrowly tailored temporally and geographically and must seek to protect legitimate employer interests beyond mere competition by a former employee"); *Renal Treatment Centers-Missouri, Inc. v. Braxton*, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997) (must be limited in time and geographic scope).

Accordingly, Missouri courts will only enforce a non-compete if it is demonstrably reasonable. § 11:2 Elements of the action, 35 Mo. Prac., cont., Eq. & Stat. Actions Handbook. "A non-compete agreement is reasonable if:

- it is no more restrictive than necessary to protect the legitimate interests of the employer;
- it is narrowly tailored temporally and geographically; and
- it seeks only to protect legitimate employer interests beyond mere competition by a former employee."

*Id.* (citation omitted).

Here, the Non-Compete provision – as interpreted by KCBS – is unenforceable as a matter of law because it is not limited in time or scope. *See* (Agreement, p. 8, ¶ 7) (stating the terms of the Non-Compete Agreement).

A similar, but less egregious, question came up in *Payroll Advance, Inc. v. Yates*. 270 S.W.3d 428, 436 (Mo. App. S.D. 2008). In *Yates*, the non-compete had a geographic restriction of fifty miles and prevented the individual from working at "any business that is in competition with [Payroll Advance.]" *Id.* The *Yates* court determined that the non-compete was demonstrably unreasonable, and therefore, unenforceable because the non-compete did not define what a competing business would be and without such definition, a competing business prohibition would be extremely overbroad. *Id.* The court stated that such a vague definition could be extended to working with payroll lending institutions, banks, credit unions, title loan companies, pawn shops, and more. *Id.* Therefore, without any reasonable restrictions, the *Yates* court determined that the non-compete was overboard, unduly burdensome, unreasonable, and unenforceable. *Id.* Likewise, KCBS's broad reading of the provision is unenforceable.

**3. Even if the Non-Compete were Enforceable, there is No Evidence that FCM Breached the Non-Compete Provision.**

Further, there is no evidence in the record to show that FCM breached the Non-Compete provision or that KCBS was damaged as a result of the breach. Indeed, every witness who testified about the meaning of the Non-Compete provision agreed that its meaning and purpose was to preclude FCM from sanctioning a food competition. FCM SOF ¶ 55. There is no allegation whatsoever that Bowman did anything of the sort.

The only allegation is that Bowman worked with Ace Hardware after the termination of the Agreement to assist Ace Hardware in providing talent (barbeque cooks or "pitmasters") for in-store promotions. Importantly, the Ace Hardware event occurred *after* the Agreement was terminated; therefore, the Non-Compete provision was not in force at the time of the Ace Hardware event. FCM SOF ¶ 83. And just as important, the Ace Hardware event does not fall within the scope of the Non-Compete provision's terms because the placement of pitmaster talent at hardware

stores is not competing with KCBS since KCBS' purpose is to sanction barbeque competitions. FCM SOF ¶¶ 3, 81, 82. There is no allegation or evidence whatsoever that FCM has sanctioned any food competitions at any time since the Agreement was terminated on November 1, 2019. FCM SOF ¶ 84. As such, FCM was not directly competing with KCBS, but rather was doing what marketing agencies routinely do – providing talent to clients. Indeed, FCM had worked with Ace Hardware before the Agreement was in place. FCM SOF ¶ 80. And there is nothing in the noncompete that prohibits FCM from continuing to work with its then existing clients. Thus, even if the Non-Compete provision were valid and enforceable, the complained of conduct is outside the scope of the Non-Compete provision.

**C. There was No Dishonest Conduct.**

KCBS also argues that FCM breached the contract by engaging in dishonest conduct under the Agreement. *See* (Ex. 17, KCBS Amended Answer, p. 10 at ¶ 34). To terminate for cause under the Agreement, the dishonest conduct must occur during the "**course and scope of his duties**." (Ex. 1, Agreement, p. 6 at ¶ 3(i)) (emphasis added). KCBS does not allege, nor is there any evidence in the record, that Bowman or FCM acted dishonestly during the *performance* of the Agreement. *See* (Ex. 5 Corporate Representative Deposition, at 215:7-9). For this reason, KCBS may not rely upon the dishonesty provision of the contract to support a for cause termination.

**D. Accessing a Shared Google Drive does not Constitute a Breach.**

KCBS alleges that FCM breached the Agreement because an FCM employee accessed a shared Google Drive. However, there is no evidence that the Google Drive contained confidential information as defined by the Agreement. Nor is there record evidence that FCM disclosed any information accessed through the shared Google Drive in violation of the Agreement. As such, KCBS cannot state a claim for breach of the Agreement even assuming FCM accessed the shared

Google Drive. To the contrary, the only record evidence is that FCM did not use any KCBS list on the shared Google Drive for any purpose of FCM. FCM SOF ¶ 76. Additionally, the record lacks any evidence that KCBS was thereby damaged in any way. KCBS cannot present evidence to support a claim for breach of contract as it relates to access of a Google drive, and summary judgment is appropriate.

## III. BOWMAN IS ENTITLED TO SUMMARY JUDGMENT ON KCBS'S BREACH OF CONTRACT CLAIMS.

As an initial matter, Bowman is not a party to the FCM / KCBS Agreement and therefore cannot be held responsible for breach of the Agreement. Rather, KCBS appears to assert a claim for breach of Bowman's nondisclosure agreement that he signed in conjunction with serving as a board member. To be clear, KCBS's complaint is that Bowman was in possession of KCBS emails that he previously received as a KCBS board member. KCBS takes Bowman to task for failing to delete these emails. But KCBS was aware that he had access to these emails because KCBS's own vendor was responsible for helping Bowman to migrate his board related emails over to his FCM email. And importantly, Bowman was under a duty to preserve these communications because he anticipated litigation prior to resigning from the KCBS board. Finally, KCBS cannot demonstrate damages of any sort.

### A. Bowman did not Breach the Non-Disclosure Agreement; therefore, KCBS' Remaining Claims for Breach of Contract Cannot Survive Summary Judgment.

It is undisputed that Bowman was in possession of his KCBS emails because he had a KCBS email account. But there is no evidence in the record to show that Bowman "took" or acted improperly in retaining communications, nor is there evidence to show that Bowman kept or used those communications for personal use or to use at the detriment of KCBS. Bowman served as a board member for KCBS and received emails relating to board business through his resignation

from the board on or around February 16, 2019. FCM SOF ¶¶ 4, 52, 53. In addition, Randall Bowman served as a marketing vendor for KCBS and received emails related to his work for KCBS. FCM SOF ¶ 53. Around the time of his resignation from the board, KCBS's own IT vendor assisted in migrating all of Bowman's board emails to his FCM email account. FCM SOF ¶ 52. Thus, KCBS had actual or constructive knowledge that Randall Bowman was in possession of KCBS emails sent to and received by him.

While there is no evidence that Bowman used any of the email communications in his possession, there *is* evidence to the contrary. During his deposition, Bowman testified that he only had such communications on his servers because KCBS's IT team assisted in migrating all emails Bowman had on his KCBS email account onto the FCM Google account. FCM SOF ¶¶ 52-53. This migration included communications with current and potential sponsors and board activity. FCM SOF ¶¶ 52-53. There is no evidence that Bowman did anything with the communications other than KCBS business. FCM SOF ¶ 54. As a result, there is no evidence in the record that KCBS was damaged in any way from Bowman's possession of such communications. *See Rice's Lucky Clover Honey, LLC v. Hawley*, 700 F. App'x 852, 856-57 (10th Cir. 2017) (finding that where the testimony could not identify damages from the ex-consultant's behavior, judgment as a matter of law was appropriate); *C-H Bldg. Assocs., LLC v. Duffey*, 309 S.W.3d 897, 899 (Mo. Ct. App. 2010) ("to prevail on a motion for summary judgment for a breach of contract claim, C–H was required to make a prima facie showing that there was no genuine dispute as to the material facts establishing: (1) the existence of a valid contract; (2) the defendants' obligation under the contract; (3) a breach by the defendants of that obligation; and (4) resulting damages.").

**B. Bowman was Under a Duty to Preserve his KCBS emails.**

Bowman reasonably anticipated litigation such that it would have been improper to delete any KCBS emails. There was growing unrest with the 2019 KCBS Board of Directors concerning the Agreement after its execution, and this became apparent to Bowman and others in the weeks following the Agreement's execution. FCM SOF ¶ 56. As a result, Bowman hired his own attorney to protect his interests. FCM SOF ¶¶ 56, 57. Bowman told Candy Weaver (the new KCBS Board President) at the February 15-16, 2019 Board Meeting that he had hired legal counsel and provided the attorney's business card. FCM SOF ¶ 50. Bowman also emailed the Board of Directors on April 24, 2019 stating he was concerned about FCM being taken advantage of by the KCBS Board and had retained legal counsel just in case. FCM SOF ¶ 61. His attorney was carbon copied on that email. FCM SOF ¶ 61.

The Board also likely anticipated litigation because it discussed whether to terminate the Agreement and whether to send related communications to KCBS' legal counsel. FCM SOF ¶¶ 63 (discussing whether to "terminate the contract either without cause and pay the termination fee or with cause and prepare for litigation").

Accordingly, Bowman anticipated litigation concerning the Agreement during the time leading up to, during, and after Bowman's resignation from the Board, and as such, he had a duty to preserve evidence in anticipation of litigation.

Parties in litigation have an affirmative duty to preserve evidence, *Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W.3d 705, 718 (Mo. App. W.D. 2015), and this duty begins when litigation is anticipated. *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 284 (E.D. Va. 2001). Therefore,

if Bowman had deleted emails and documents that KCBS now complains he has possession of, Bowman could have faced sanctions and other punishment for spoliation of evidence.[4]

Because he (as well as KCBS) anticipated litigation, Bowman had a duty to preserve all documents and communications, and it would have been improper and illegal for Bowman to delete or destroy any documents or communications concerning the Agreement or KCBS.

Summary judgment is appropriate. Indeed, the Court is in the best position to understand the duty to preserve. Rather than to send this potentially confusing issue to a jury which is legal in nature, the Court should make this determination on summary judgment.

## IV. KCBS' BREACH OF FIDUCIARY DUTY CLAIM CANNOT SURVIVE SUMMARY JUDGMENT.

KCBS asserts a breach of fiduciary duty claim against Bowman in his individual capacity. To survive summary judgment on a breach of fiduciary duty claim, KCBS must present evidence to support each of the following elements: (1) the existence of a fiduciary duty; (2) a breach of that fiduciary duty; (3) causation; and (4) harm. *Robert T. McLean Irrevocable Tr. u/a/d Mar. 31, 1999 ex rel. McLean v. Ponder*, 418 S.W.3d 482, 490 (Mo. Ct. App. 2013) (*citing Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. App. W.D. 2000)).

KCBS alleges the following theories of how Bowman breached his fiduciary duty to KCBS: Bowman falsely and fraudulently represented that the Agreement's rates did not exceed

[4] If a party fails to properly preserve digital evidence, a party can face sanctions including but not limited to: fines, exclusion of evidence, adverse jury instruction(s), and an entry of an adverse judgment. Schroeder, 22 Missouri Practice: Missouri Evidence § 401.3(l) (3d ed.). *See, e.g., Marmaduke v. CBL & Assocs. Mgmt., Inc.*, 521 S.W.3d 257, 273 (Mo. Ct. App. 2017) (duty to preserve evidence after injury); *Stiriling v. St. Louis Cty. Police Dep't*, No. 4:11-cv-01932, 2013 WL 2244638, at *1 (E.D. Mo. May 21, 2013) ("A party that anticipates litigation is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request. Consequently, upon anticipation of litigation, parties must suspend their routine document retention/destruction policies and put in place a 'litigation hold' to ensure the preservation of relevant documents."); *McCargo v. Texas Roadhouse, Inc.*, No. 09-cv-02889, 2011 WL 1638992, at *3 (D. Colo. May 2, 2011) ("It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.").

industry standards, (Ex. 17 KCBS Amended Answer, p. 11 at ¶ 42); falsely and fraudulently represented that KCBS' legal counsel had seen the Agreement, (*id.*); worked on FCM's behalf before the Agreement was approved, *id.*; the Agreement was an excess benefit transaction, (*id.*, p. 12 at ¶ 43); possession of communications with KCBS' attorneys in his email server for the purpose of using these communications in the future for personal use and to the detriment of KCBS, (*id.* at ¶ 45).

KCBS cannot satisfy the elements of its breach of fiduciary duty claim.

**A. Each of KCBS's Fiduciary Duty Theories Fails a Necessary Element.**

**1. There was no Deceptive Statement about Industry Standards.**

KCBS alleges that Bowman made a false statement or statements to the KCBS Board of Directors that the Agreement's monthly retainer and commission rates for sponsorships did not significantly exceed industry standards. KCBS Amended Answer, at p. 11 at ¶ 42. However, KCBS cannot produce any evidence in the record that such a statement was ever made.[5]

Prior to the Agreement's execution, Bowman emailed two PowerPoint presentations to the KCBS Board of Directors during the discussions concerning the Agreement. FCM SOF ¶ 19. The first presentation included information about other marketing companies. FCM SOF ¶ 19. Nowhere did it state it was a formal a request for proposal ("RFP") response or other formal quote for services. FCM SOF ¶¶ 20-21. The second PowerPoint provided an estimate of what Bowman would charge to perform the work. FCM SOF ¶ 19. Again, nowhere does it state it was a formal RFP. FCM SOF ¶¶ 20-21. Further, KCBS Board of Directors testified that they understood these PowerPoint presentations as conversation starters, not formal RFPs. FCM SOF ¶¶ 20-21. Nowhere in either presentation does Bowman state that the Agreement is at or below industry standards.

[5] Of course, Bowman denies any allegation that the Agreement is unreasonable or is excessive.

The Board of Directors testified that if they had wanted more information about other marketing companies, they could have sought out such information or asked questions of Bowman. FCM SOF ¶ 24. The Board Members testified there was nothing that would have stopped them from seeking such information or procuring such information on their own. FCM SOF ¶ 24. Bowman also invited any questions anyone had about FCM in communications with the Board of Directors. FCM SOF ¶ 22. The formation and discussion of the Agreement was open and fair. The KCBS Board of Directors had the option and full ability to seek information from other marketing companies, ask Bowman more questions, or otherwise gather information. FCM SOF ¶ 24.

There is no evidence that Bowman or FCM made a false statement. Accordingly, summary judgment is appropriate.

**2. There was No Deceptive Statement about Legal Counsel's Review of the Agreement.**

KCBS argues that Bowman falsely and fraudulently represented that KCBS' legal counsel had reviewed the Agreement. (Ex. 17, KCBS Amended Answer, p. 11 at ¶ 42). However, again KCBS cannot produce any evidence of such statement in the record because such statement was never made.

In fact, Bowman sent an email to the KCBS Board of Directors concerning the review of the Agreement by KCBS legal counsel. FCM SOF ¶¶ 45, 61. In that email, Bowman indicated he did not feel it was appropriate for him to bring the Agreement to KCBS' legal counsel because he wanted to remain distanced from and free of inserting any influence on the Board of Directors' review and consideration of the contract. FCM SOF ¶ 45.

Accordingly, the only evidence in the record indicates that Bowman: (a) did not make such affirmative statement, and (b) in fact encouraged the review of the Agreement by KCBS' legal

counsel before the Agreement was executed. Moreover, there is no evidence that any board member materially relied on any such statement. Summary judgment is appropriate.

**3. KCBS Does Not Have Standing to Argue the Agreement was an Excess Benefit Transaction to Invalidate the Contract.**

KCBS alleges that Bowman breached his fiduciary duty to KCBS because the Agreement was an excess benefit transaction under the tax code. (Ex. 17, KCBS Amended Answer, p. 12 at ¶ 43). However, KCBS does not have standing to assert an excess benefit transaction because only the Internal Revenue Service ("IRS") can bring such a claim. *See Levy*, 2015 WL 13745763, at *4 (stating the IRS does not allow a non-profit corporation to determine that an excess benefit transaction has occurred, rather, that is the job for the IRS). An excess benefit transaction refers to a transaction where a non-profit corporation pays an economic benefit to an individual who has the ability "to exercise substantial influence over the affairs of the organization" and the benefit "exceeds the value of the consideration (including the performance of services) received for providing that benefit." 26 U.S.C. § 4958-1. The IRS is charged with determining whether an excess benefit transaction occurred. *See Levy*, 2015 WL 13745763, at *6; *see also* 26 U.S.C. § 4958(b), (a)(1). "If the IRS determines that there has been an excess benefit transaction, the disqualified person must correct the excess benefit and the IRS may impose a 25% tax on the value of the excess benefit on the recipient." *Id.* at *6.

Here, KCBS's complaint about Bowman centers on the allegation that the Agreement was excessive. Indeed, KCBS notified the IRS of its concern about a potential excess benefit transaction with respect to the Agreement in their 2019 Form 990 tax returns. *See e.g.*, FCM SOF ¶ 68. While KCBS made the IRS aware of its concerns of an excess benefit transaction in its 2019 Form 990, there is no evidence that the IRS has taken any action as a result of that designation.

As the court in *Levy* observed:

> YAI argues that now, after Levy has performed his obligations under the contract, the corporation may nonetheless invoke the anti-inurement provision of the IRC § 501(c)(3) to deny him his promised benefits. YAI seeks to imply a right to determine, retrospectively, what is reasonable (and to withhold anything that exceeds that amount) because YAI faces the risk of the IRS revoking its tax-exempt status if it overpays. YAI may indeed face such a risk, but there has been no evidence of that to date: the IRS has been aware of Levy's compensation since at least 2013, when YAI reported the alleged excess benefit transaction, but has not taken action.
>
> ***
>
> Having approved the compensation and allowed Levy to perform, YAI may not now reduce Levy's benefits by invoking the IRC. The IRS may evaluate whether Levy's executive compensation was an excess benefit transaction, but YAI's chance to make that evaluation ended when it signed Levy's contract and approved his benefits.

*Levy*, 2015 WL 13745763, at *6.

So too KCBS has no standing to substitute itself in for the IRS. Summary judgment is appropriate.

**4. Nothing in the Bylaws Prohibited FCM and Bowman from Providing Marketing Services to KCBS in 2018.**

Finally, KCBS alleges in its Amended Answer that Bowman, in breach of KCBS' Bylaws, worked on FCM's behalf before the Agreement between KCBS and FCM was approved. (Ex. 17, KCBS Amended Answer, p. 11 at ¶ 42). It is undisputed that Bowman and FCM provided marketing services to KCBS in 2018. Bowman and FCM managed many aspects of KCBS's marketing efforts and worked to build relationships with current and future sponsors. But KCBS's argument is flawed because FCM and Bowman were not paid for these tasks in 2018. The Bylaws only require that if an officer or director receives compensation, it must be reasonable. (Ex. 16, Amended and Restated Bylaws at Section 4.09; Section 6.10). The Bylaws do not prohibit providing volunteer services or ever being compensated for work.

To the extent that KCBS's complaint is that efforts in working with sponsors in 2018 resulted in sponsorship contracts in 2019, and therefore, FCM was paid commissions on such

sponsorship contracts, there is nothing in the Bylaws or the Agreement that prohibit this. The Agreement is clear as to what is compensable, and under the terms of the Agreement 2019 sponsorship contracts are compensable even if they resulted from Bowman's 2018 marketing efforts. There is nothing in the Agreement that prohibits this pay structure. KCBS can point to no authority suggesting anything nefarious about this arrangement.

**5. Retention of Communications with Legal Counsel**

As discussed in Section III(B) above, there was nothing improper about Bowman retaining emails sent to and received by him. Indeed, as discussed above, he was under a legal obligation to do so. And the record is devoid of any evidence that Bowman did anything improper with these communications.

**6. Bowman is Immune from Suit with respect to Heath Hall and Mike Peters' contracts.**

KCBS' damages expert's report included alleged damages for the amounts that KCBS paid to Heath Hall as KCBS CEO, and Heading South LLC, a third party vendor that ran the Great American Cookout Tour on behalf of KCBS. It is unclear whether KCBS intends to actually bring a fiduciary duty claim for these alleged damages, but because the damages report includes over $300,000 in alleged damages for these contracts, and because the claim is baseless, Bowman raises the issue here. For several independent reasons, this claim fails as a matter of law.

**a. The Business Judgment Rule Provides Immunity from Suit.**

First, a claim for breach of fiduciary duty concerning the Heath Hall and Heading South contracts is barred by the business judgment rule. *See* 26 Mo. Prac., Business Organizations § 35.8 (2nd ed.) (discussing directors of not-for-profit corporations protection under the business judgment rule).

The business judgment rule protects the directors and officers of a corporation from liability for decisions within their authority and made in good faith, uninfluenced by any consideration other than an honest belief that the action promotes the corporation's best interest." *Virgil Kirchoff Revocable Tr. Dated 06/19/2009 v. Moto, Inc.*, 482 S.W.3d 834, 841–42 (Mo. App. E.D. 2016) (citation omitted). "'The [ ] rule vests the directors and shareholders with wide latitude in making judgments that affect the running of the corporation.'" *Id.* (quoting *Ironite Products Co., Inc. v. Samuels*, 17 S.W.3d 566, 573 (Mo. App. E.D. 2000)). "As a general proposition, Missouri courts have held that where the matter under consideration is one that calls for the business judgment or discretion of a corporation's board of directors the courts will not interfere so long as that judgment is exercised fairly and honestly." *Wolgin v. Simon*, 722 F.2d 389, 393 (8th Cir. 1983).

The hiring of employees and executives for the corporation falls squarely into the duties and within the authority of a corporation's board of directors. *See* Mo. Rev. Stat. § 351.310 ("The property and business of a corporation shall be controlled and managed by a board of directors"); 25 Mo. Prac., Business Organizations § 15.3 (2d ed.) (board of directors may elect, appoint, or remove agents of the corporation). *See also* (Ex. 16 Amended and Restated Bylaws) (providing the Board of Directors can hire agents to help run KCBS, including the hiring of the Executive Director). There is no evidence in the record that Bowman acted in bad faith or exceeded the scope of his duties as a board member concerning the discussion and voting of these contracts. There is no evidence in the record that Bowman acted unreasonably or fraudulently in the discussion and negotiations of the employment contracts. In fact, these decisions were made in good faith and in the best interest of KCBS. FCM SOF ¶ 85. There is no evidence Bowman acted in an *ultra vires*

manner; he did not vote on the contracts[6] and any discussions that were had were within his authority and duties as President to discuss, evaluate, and negotiate contracts. *See McLeese v. J.C. Nichols Co.*, 842 S.W.2d 115, 119 (Mo. App. W.D. 1992) (in denying summary judgment, the court found that because the articles of incorporation provided for the duties that were performed, none of the acts complained of were ultra vires, fraudulent, or illegal).

Without evidence that Bowman acted in bad faith or outside of the scope of his duties, which there is no basis for this claim, summary judgment should be granted in Bowman's favor.[7]

**b. Mo. Rev. Stat. § 537.117 Provides Immunity from Suit.**

Mo. Rev. Stat. § 537.117 expressly prohibits suit against directors or officers, stating that board members are immune from actions performed in their capacity as officers or directors. *See e.g.*, 26 Mo. Prac., Business Organizations § 35.8 (2nd ed.) ("by statute[,] voluntary directors serving without compensation of many not-for-profit corporations are immune from civil liability arising from the negligent performance of their duties in setting the policies or managing the affairs of the corporation"). Specifically, the statute provides:

> Any officer of member of an entity which operates under the standards of section 501(c) of the Internal Revenue Code of 1986, who is not compensated for his services on a salary or prorated equivalent basis, shall be immune from personal liability for any civil damages arising from acts performed in his official capacity. The immunity shall extend only to such actions for which the person would not otherwise be liable, but for his affiliation with such an entity. This immunity shall

[6] With the exception of the event of a tie, the president of the KCBS Board does not vote on decisions, including employment decisions. *See* (Ex. 8, at ¶ 39).

[7] *See Nixon v. Lichtenstein*, 959 S.W.2d 854, 858 (Mo. App. E.D. 1997) ("when a corporate director or officer's decision falls within the business judgment rule, the court will not interfere with that decision"). *See also Virgil Kirchoff Revocable Tr.*, 482 S.W.3d at 841–42 (the court determined that the board of directors' valuation of stock was protected by the business judgment rule, and there was no finding of fraud, illegal conduct, an ultra virus act or an irrational business judgment); *McLeese v. J.C. Nichols Co.*, 842 S.W.2d 115, 118 (Mo. Ct. App. 1992) (finding that "Appellant's allegation that defendants McCarthy and Roeder engaged in illegal activity is unsubstantiated [and] [n]othing in the record indicates that they committed any illegal act or violated public policy"); *Wolgin v. Simon*, 722 F.2d 389, 393 (8th Cir. 1983) (party was protected by the business judgment rule where party failed to specify which acts complained of are illegal nor does he indicate which statues, if any, were violated).

> not apply to intentional conduct, wanton or willful conduct, or gross negligence. Nothing herein shall be construed to create or abolish an immunity in favor of the entity itself.

Mo. Rev. Stat. § 537.117.

Here, the elements under Section 537.117 are present. First, KCBS is a 501(c) corporation. FCM SOF ¶ 2. It is undisputed that Bowman was not paid a salary for his services as a member of the board or the President of the board. FCM SOF ¶ 9. The hiring of employees and contractors for KCBS falls under the job duties of members of the board; thus, Bowman was acting in his official capacity. *See* (Ex. 16 Amended and Restated Bylaws).

KCBS has no evidence that Bowman acted in bad faith intentionally, willfully, or with gross negligence in the negotiation of these contracts. During the discussion of such contracts, Bowman communicated extensively with the board of directors and KCBS' legal counsel to ensure the contracts were in the best interest of KCBS, and KCBS received the most qualified individuals for the position at a rate of pay affordable to KCBS. (Ex. 22) (emails with Bowman and 2018 Board of Directors discussing hiring Heath Hall as CEO). Because there is no evidence in the record that Bowman acted intentionally, with willful or wanton conduct, or with gross negligence sufficient to enact the exception to Section 537.117, Bowman is entitled to the protections of this statute. Accordingly, there is no genuine dispute of material fact as to the application of Section 537.117 to bar claims against Bowman for these contracts. Summary judgment in favor of Bowman is appropriate on this claim.

## V. THE UNCONTROVERTED MATERIAL FACTS DO NOT SUPPORT THE KANSAS CITY BARBEQUE SOCIETY'S TAMPERING WITH COMPUTER DATA CLAIMS AGAINST FCM AND BOWMAN.

KCBS brings a Missouri Computer Tampering Act ("MCTA") claim against FCM and Bowman under Mo. Rev. Stat. § 569.095. Section 569.095 provides:

> 1. A person commits the offense of tampering with computer data if he or she knowingly and without authorization or without reasonable grounds to believe that he has such authorization:
>
> (1) Modifies or destroys data or programs residing or existing internal to a computer, computer system, or computer network; or
>
> (2) Modifies or destroys data or programs or supporting documentation residing or existing external to a computer, computer system, or computer network; or
>
> (3) Discloses or takes data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network; or
>
> (4) Discloses or takes a password, identifying code, personal identification number, or other confidential information about a computer system or network that is intended to or does control access to the computer system or network;
>
> (5) Accesses a computer, a computer system, or a computer network, and intentionally examines information about another person;
>
> (6) Receives, retains, uses, or discloses any data he knows or believes was obtained in violation of this subsection.

Mo. Rev. Stat. § 569.095.

Mo. Rev. Stat. § 569.010 further defines "to tamper" as: "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing."

KCBS alleges that FCM accessed KCBS's shared Google Drive and "intentionally examined information about KCBS' contacts." (Ex. 17, KCBS Amended Answer, p. 13 at ¶ 55). KCBS also alleges that Bowman "took and retained attorney-client privileged communications

between KCBS and its attorneys, as well as his communications – while he was purporting to be acting solely on behalf of KCBS – with current or potential sponsors of KCBS." *Id.* at ¶ 56.

What KCBS ignores is that KCBS provided FCM and Bowman with access to these materials and KCBS was aware of FCM and Bowman's access. Put simply, KCBS's tampering claim is an overbroad reading of the MCTA that does not fit the facts of this case and the Court should grant summary judgment in favor of FCM and Bowman.

### A. KCBS Cannot Provide Evidence to Satisfy the Elements of a Tampering with Computer Data Claim.

#### 1. The Missouri Computer Tampering Act does not Support a Claim of Tampering against Bowman simply because Bowman was in Possession of Emails Previously Sent to and Received by him.

KCBS's claim is Bowman's possession of emails previously sent to and received by him constitutes the crime of tampering. Yet there is no allegation or evidence in the record that he did anything wrong. Instead, KCBS is complaining that Mr. Bowman retained emails sent to or received by him that he was legally obligated to preserve. To be clear, KCBS is arguing that the mere act (or non-act) of preserving emails at his own email address is a crime. There is no authority or credible argument that sending or receiving emails – or keeping emails – is a violation of the MCTA. Indeed, a Missouri federal court has already rejected such a broad reading of the MCTA. In *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 978 F. Supp. 2d 1016, 1030–31 (E.D. Mo. 2013), on reconsideration in part, No. 4:13-cv-01257, 2014 WL 466234 (E.D. Mo. Feb. 5, 2014), *aff'd in part, rev'd in part and remanded*, 793 F.3d 822 (8th Cir. 2015), and *aff'd in part*, 793 F.3d 822 (8th Cir. 2015), the court addressed a similar issue in which the plaintiff provided his email password to a defendant while in a romantic relationship. The defendant then accessed the plaintiff's email after the relationship ended. The court specifically held that because access had been previously provided, this could not state a claim under the MCTA. *Id*. Bowman's case is even

stronger than the defendant in *Anzaldua* because the emails at issue here are emails sent to and received at Bowman's own email addresses. In fact, KCBS was aware that Bowman had a KCBS email and its own IT vendor was responsible for helping to migrate all of Bowman's KCBS emails over to his FCM email account. FCM SOF ¶ 52.

Moreover, there is no evidence that Bowman did anything improper with the emails. FCM SOF ¶ 54. They just resided on his system. As such, this does not fall under the definition of "tampering" which means to "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing." Mo. Rev. Stat. § 569.010.

Indeed, had Bowman deleted these emails – which is apparently what KCBS is arguing he should have done – Bowman presumably would have been accused of spoliation. *See* above, section III(B). But he was under a duty to preserve his emails when he reasonably anticipated litigation and hired a lawyer in early February 2019 prior to resigning from the Board. He then produced the emails in discovery. Which is precisely what he should have done. As such, KCBS's tampering claim relating to emails that he sent, received or preserved must fail.

The plain language of the MCTA does not support a claim for tampering due to receiving and retaining emails. Indeed, under such an expansive and careless reading of the MCTA, any time someone receives, sends or preserves emails, he or she could be accused of computer tampering. Summary judgment is appropriate.

**2. Missouri Law Prevents KCBS's Tampering Claim against FCM based on Access to a Shared Google Drive.**

KCBS also seeks to unreasonably expand the MCTA by arguing that by an FCM employee accessing a *shared* Google Drive – a drive that FCM had permission and access to use – constitutes tampering. FCM and KCBS operated several shared Google folders. FCM SOF ¶ 69. The folders

included documents created by both FCM and KCBS. FCM SOF ¶ 70. FCM was the owner of some of the Google folders and KCBS was the owner of others. FCM SOF ¶ 71. Sometimes, KCBS would copy a document or spreadsheet created by FCM and place it into a Google Drive which KCBS owned. FCM SOF ¶ 72. KCBS had access to FCM's shared drives and FCM had access to KCBS's shared drives. FCM SOF ¶ 73.

Google makes it simple to provide access and to turn off access to shared drives. The Google Drive Terms of Service specifically state:

> Sharing settings in Google Drive allow you to control what others can do with your content in Google Drive. The privacy settings of your files depends on the folder or drive they are in. Files in your individual drive are private, until you decide to share them. You can share your content and can transfer control of your content to other users. Files you create or place in folders or drives shared by others will inherit the sharing settings and may inherit the ownership settings of the folder or drive they are in.

Google Drive, *Terms of Service*, https://www.google.com/drive/terms-of-service/ (last visited January 22, 2021) Google drive users may also turn off sharing or access. *See also* Google Drive Help, *Share files from Google Drive*, https://support.google.com/drive/answer/2494822 (last visited January 22, 2021) (discussing ability to share files, limit access, limit credentials, choose people who can view files); Google Drive Help, *Stop, limit, or change sharing*, https://support.google.com/drive/answer/2494893 (last visited January 22, 2021) (how to stop access to your files, stop sharing a file).

Thus, KCBS could turn off access to its shared folders any time it wanted to. In fact, KCBS knew that Bowman had access and prior to terminating the contract had discussed whether to limit Bowman's access. *See* (Ex. 20) (KCBS internally discussing removing Bowman's access to certain KCBS online accounts in August 2019). But it did not turn off access to the shared Google Drives

until November 5, 2019. *See* (Ex. 21) (discussing the need to check Google settings and stop "sharing" Google Drive files with Bowman, among others).

KCBS's position that despite having given access to the shared Google Drive to FCM, FCM violated the MCTA by continuing to use it after the termination of the Agreement is an overbroad reading of the Missouri statute. *See Anzaldua*, 978 F. Supp. 2d at 1030–31 (when the plaintiff had previously provided access to email password while in a romantic relationship with the defendant, the defendant's post-relationship accessing of the email did not constitute an MCTA violation as a matter of law).

The court's ruling in *Anzaldua* is consistent with the requirement that Missouri criminal statutes must be construed narrowly. *See State v. McCord*, No. SD 35696, 2020 WL 1873237, at *3 (Mo. Ct. App. Apr. 15, 2020) ("The rule of lenity requires that an ambiguity in a penal statute (i.e., criminal statutes and also civil statutes with penal consequences) be construed against the government and in favor of the person on whom a penalty is sought to be imposed."). The complained of conduct simply does not fall under Missouri's definition of "tampering" which means to "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing." Mo. Rev. Stat. § 569.010.

There is no evidence of actual hacking or tampering within the meaning of the MCTA. While KCBS may regret not turning off access to the shared Google Drive, that does not meet the standard for accusing FCM and Bowman of a crime.

**3. KCBS Cannot Establish the Required State of Mind to Succeed under the MCTA.**

The MCTA also requires a showing of the requisite state of mind that "he or she knowingly and without authorization or without reasonable grounds to believe that he has such authorization."

Again, the record is devoid of any evidence of anyone's culpable state of mind. Instead, when asked if he had the ability to look at and access the Google Drive, Mr. Bowman testified that FCM and KCBS shared Google documents back and forth with each other on the drive. FCM SOF ¶ 70.

**B. FCM is Not "a person" and Cannot be Liable for Tampering.**

The MCTA states that a claim can be made against "a person." FCM is not "a person" under Missouri criminal law. Moreover, KCBS has no evidence to prove that this case falls within any exception to the rule that criminal statutes only apply to *people*.

Indeed, KCBS pleaded in its Counterclaim that the actions at issue constitute a felony. *See* Counterclaim at ¶ 52. But a company can only be liable for the criminal acts of its employees if the "offense is a *misdemeanor* or an infraction, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation." Mo. Stat. § 562.056.1(2) (emphasis added). Because KCBS pleaded its tampering claim as a felony, KCBS cannot meet the exception outlined in § 562.056.1(2). As such, the tampering claim must be dismissed as to FCM.

**CONCLUSION**

For the reasons stated herein, First Club Marketing LLC and Randall Bowman respectfully request an order from the Court granting First Club Marketing LLC and Randall Bowman's Motion for Summary Judgment and granting such other relief as the Court deems just and equitable under the circumstances. Specifically, FCM and Bowman request a ruling granting summary judgment:

- in favor of FCM on FCM's breach of contract claim and that KCBS be required to pay amounts due under the without cause termination provision, including unpaid bonuses, commissions, retainers and expenses;

- in favor of FCM and Bowman on KCBS's breach of contract counterclaim;
- in favor of FCM and Bowman on KCBS's tampering claim; and
- In favor of Bowman on KCBS's breach of fiduciary duty claim.

DATED: January 22, 2021

Respectfully Submitted,

**WILLIAMS DIRKS DAMERON, LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of January 2021, a true and correct copy of the foregoing filed with the Clerk of the Court using the electronic filing system, which will send notice of electronic filing to all counsel of record for this case.

/s/ *Eric L. Dirks*
Eric L. Dirks