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.	)	
RANDALL BOWMAN	)	
Third Party Defendant/Counterclaim Plaintiff	)	

THE KANSAS CITY BARBEQUE SOCIETY'S OPPOSITION TO RANDALL BOWMAN AND FIRST CLUB MARKETING LLC's MOTION FOR SUMMARY JUDGMENT

After the Kansas City Barbeque Society ("KCBS") terminated its marketing agency, MMA Creative, in 2017, it retained a company called Big Kahuna to perform its marketing services in 2018. From February 2018 through February 2019, Randall Bowman was the President of KCBS, and throughout much of his tenure, he assisted Big Kahuna with its marketing efforts, claiming the entire time that he was doing this out of the goodness of his heart, referring to it in one email as a "favor" to KCBS. The payoff came when Bowman procured, just one month before his term as President expired and he would lose control of the Board, an excessive marketing contract (the "Marketing Agreement") for his own company, First Club Marketing LLC ("FCM"), to replace Big Kahuna. Under the Marketing Agreement, Bowman would be paid for work he did in 2018; apparently, even a "favor" is not free.

It is Bowman's dishonesty, deceit, and self-dealing in the procurement of the Marketing Agreement that lies at the heart of this case. As explained further below, Bowman was the only person involved in the search for a new marketing agency to replace Big Kahuna, and thus he controlled all the information that flowed to the 2018 Board. Bowman created a PowerPoint presentation for the 2018 Board explaining the marketing options, and in that PowerPoint Bowman claimed that only three marketing firms in the entire country—other than his own—could handle the needs of KCBS, a non-profit with approximately $2 million in annual revenue at the time. According to Bowman, these three agencies would need between $30,000 and $42,000 in monthly retainers alone; and according to the 2018 Board, these numbers were "crazy" and never seriously entertained. So then that left FCM, the only marketing agency in existence able to handle KCBS's needs according to Bowman. And Bowman said he would only need a $13,000 per month retainer, which does indeed look cheap in comparison to $30,000 to $42,000.

Bowman's own marketing expert testified in her deposition that, in her 40 years in the industry, she had never seen anything like this, where the President of a non-profit directed and controlled the entire search process for a new marketing agency, and then, afterwards, submitted a bid on behalf of his own marketing company to do the same work. Bowman's self-dealing was a breach of his fiduciary duties, and this Court should not allow him to evade the consequences of his actions by granting his and FCM's Motion for Summary Judgment.

The Marketing Agreement has had dire consequences for KCBS. In addition to the excessive retainer that Bowman secured, the way FCM was to be paid put all the risk on KCBS and all the upside on FCM. Unlike KCBS's previous marketing partners, FCM was to be paid based on the *gross amounts* generated through the procurement of sponsorships rather than on the *profits* generated through the procurement of sponsorships. FCM had no incentive to minimize

any costs associated with the sponsorships, because FCM would be paid whether KCBS received a net benefit from the sponsorships or received no benefit at all. Bowman's procurement of the Marketing Agreement was not merely a technical breach of his fiduciary duties: It had real, devastating results for a small non-profit.

Serious factual disputes remain in this case. The Court should deny Bowman and FCM's Motion for Summary Judgment.

DISCUSSION

Summary judgment is appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Mo. R. Civ. P. 74.04. Where a party will not bear the burden of proof at trial, that party need not controvert each element of the opposing party's claim at summary judgment. *Almat Builders and Remodeling, Inc. v. Midwest Lodging, LLC*, 615 S.W.3d 70, 77 (Mo. Ct. App. 2020).

Once a movant has made a *prima facie* showing of lack of genuine issue of material fact, the burden shifts to the non-movant to show that one or more of the material facts shown by the movant is, in fact, genuinely disputed. *Id.* at 78. "The non-movant never needs to establish a right to judgment as a matter of law; the non-movant need only show that there is a genuine dispute as to the facts underlying the movant's right to judgment." *Id.* (citation omitted). "For purposes of Rule 74.04, a 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *Id.* (citation omitted).

I. FCM Is Not Entitled to Summary Judgment on its Breach of Contract Claim.

a. KCBS Approved the Agreement Under False and Misleading Pretenses That are Directly Attributable to Bowman.

FCM's papers ignore KCBS's principal contention in this case: That the Marketing Agreement was fraudulently induced in breach of Bowman's fiduciary duties to KCBS, and that

therefore KCBS owes FCM nothing and any money previously paid to FCM should be returned. As explained below, the "search" for a new marketing agency that ultimately resulted in the Marketing Agreement, controlled entirely by Bowman, was deceitful and violated Bowman's fiduciary duties to KCBS and also to his fellow 2018 Board members. FCM is not entitled to summary judgment on its breach of contract claim. *See Nicolazzi v. Bone*, 564 S.W.3d 364, 371 (Mo. Ct. App. 2018) ("[P]arties are bound by the terms of the contracts they sign and courts will enforce contracts according to their plain meaning, *unless induced by fraud, duress, or undue influence*." (citation omitted, emphasis added)).

It is critical to understand how the search process actually worked. Bowman was the only point of contact with the potential marketing agencies and he was the only person who communicated with the 2018 Board about those potential marketing agencies. No one on the 2018 Board had any marketing expertise other than Bowman, and the 2018 Board members were wholly reliant on Bowman's word. Peters Depo. at 76:6-9 (agreeing that "nobody on that Board of Directors had any marketing expertise other than Mr. Bowman"); Bragg Depo. at 31:7-23 (testifying that the Board was reliant on Bowman to provide complete and accurate information); *id.* at 35:12-14 (testifying that he "couldn't really evaluate the meaning of any" of the bids Bowman sent the Board). Stated differently, the only marketing expert on the 2018 Board was Bowman himself, and the only way the 2018 Board could proceed was by trusting Bowman's judgment about the best path forward for KCBS. Peters Depo. at 76:6-9; Bragg Depo. at 31:7-23; Richter Depo. at 37:24-38:3 (testifying that he assumed the bids Bowman sent the 2018 Board "gave [the Board] a reasonable approximation of the going market rate for marketing services . . . . because I trusted Randall").

This trust is what allowed Bowman to consummate his ruse. Bowman first sent the 2018 Board a PowerPoint presentation with overpriced bids from only *three* other marketing agencies, which Bowman claimed were the *only* marketing firms in the entire country that were capable of handling KCBS's needs—the needs of a non-profit with approximately $2 million in annual revenue at the time. *See* Ex. 23 to Bowman/FCM's Statement of Undisputed Facts ("SUF"). The cost of hiring any one of these agencies, based on the information that Bowman fed to the 2018 Board, made them, clearly and obviously, cost-prohibitive and were never seriously considered by the 2018 Board. *See, e.g.*, Peters Depo. at 40:20-23 (agreeing the proposals were so expensive they "would not even really be entertained"); Richter Depo. at 35:24-36:5 (referring to the price of the proposals as "crazy"); *see also* Bragg Depo. at 31:15-20 (testifying that he could not evaluate the bids in the PowerPoint presentation but "I've never known Mr. Bowman to be distrustful [sic]").

After telling the 2018 Board that these were the only three options other than his own company, Bowman sent a bid to the Board for FCM that, shockingly, was significantly less expensive than the other, inflated bids that he had previously sent the Board. And then also unsurprisingly, the 2018 Board immediately accepted Bowman's bid because it looked reasonable in comparison to the "crazy" bids they had seen previously. Indeed, one 2018 Board member testified in his deposition that even though he could not accurately evaluate the bids in the PowerPoint, Bragg Depo. at 31:15-20, he was the first to vote "yes" and tell his fellow Board members "I feel [Bowman's] proposal is more than fair and we should accept it,"[1] *id.* at 39:12-24.

[1] It is notable that, when Bowman submitted his "proposal" for FCM, FCM had been administratively dissolved "for failure to file its annual registration, failure to maintain a registered agent or registered office in this state, and/or failure to submit payment for a dishonored fee payment or for fees, taxes, or penalties owed."

To merely state all these facts is to demonstrate Bowman's self-dealing and the 2018 Board's Bowman-indulgence. But there is more. Conspicuously absent from Bowman's papers is any reference to the testimony of his own marketing expert, Susan McClure. That is doubtless because her testimony shows that the 2018 Board was misled by Bowman's actions. Ms. McClure has over 40 years of marketing experience, including both on the agency side where she submitted bids to companies for marketing work, as well as "in-house" experience where she evaluated bids for marketing work and hired marketing agencies for her employers, such as Sprint and UMB Bank. *See generally* McClure Depo. at 24:19-25:14.

Ms. McClure testified to the following when asked about Bowman's "process" for finding a new marketing agency for KCBS:

- Unlike Bowman's process, where he led the search before submitting a bid for his own company, in a real search for a new marketing agency, the potential agencies would not be informed of how or what the other agencies were bidding so that the process would be fair. McClure Depo. at 63:21-64:5; *see also id.* at 37:10-12 (noting she would not want any agency to have an unfair advantage in bidding because "I try to keep it on a somewhat level playing field for all firms competing").

- In her 40 years of experience, Ms. McClure had never seen someone direct and control the search for a new marketing agency and then submit a bid for his own marketing company after the search. McClure Depo. at 64:6-15.

- In her 40 years of experience, Ms. McClure had never seen the president of a non-profit direct and control the search for a new marketing agency and then submit a bid for his own marketing company after the search. McClure Depo. at 65:1-11.

- Despite his being the only person on the 2018 Board with any marketing expertise, none of Bowman's actions would constitute "best practices" from a marketing perspective. McClure Depo. at 65:12-18.

Thus, it is clear that Bowman, whom the 2018 Board trusted to advise them and provide the best possible outcome for KCBS, hoodwinked people who, by their own admission, could not have known better given their inexperience.

As its President, Bowman owed fiduciary duties to KCBS. In particular, a corporate board member

> "is a fiduciary of the highest order and is required to exercise a high standard of conduct and loyalty. Although [he] has many duties emanating from the fiduciary relationship, the most fundamental is the duty of loyalty. Part of this duty precludes self dealing, which under most circumstances is a breach of fiduciary duty."

Nixon v. Lichtenstein, 959 S.W.2d 854, 859 (Mo. Ct. App. 1997) (citations and alterations omitted). Based on the testimony of his own expert witness, as well as the confirmatory testimony from several 2018 Board members, Bowman did not live up to his fiduciary duties: As the lone 2018 Board member with any marketing expertise, he created a sham search for a new marketing agency, well-aware that his fellow 2018 Board members would not know the difference. *Cf. Frame v. Boatmen's Bank of Concord Village*, 824 S.W.2d 491, 495 (Mo. Ct. App. 1992) ("[B]usinessmen who justifiably rely on the advice and expertise of other businessmen, holding themselves out in the community as possessing unique skills, are entitled to expect that one possessing skill will exercise it with due care."). And it was only after the 2018 Board was presented with Bowman's false reality that it approved the Marketing Agreement.

Bowman's procurement of the Marketing Agreement severely damaged KCBS. Unlike its previous marketing partners, FCM was to be paid based on the *gross amounts* generated through the procurement of sponsorships rather than on the *profits* generated through the procurement of sponsorships. That is, FCM had no incentive to minimize any costs associated with the partnerships, because it would be paid whether KCBS received a net benefit from the sponsorships or received *no benefit at all*. As explained in detail by former Treasurer and current President of KCBS, Richard Wagner, this has torn KCBS apart financially. *See generally* Wagner Report. Bowman's sham-search was not just a technical breach of his fiduciary duties: It had real, devastating results for a small non-profit.

Factual disputes remain regarding the formation of the Agreement. The Court should deny FCM's motion for summary judgment on its breach of contract claim. *Nicolazzi*, 564 S.W.3d at 371.

b. <u>That the Parties Seemingly Performed Under the Agreement for a Period of Time Does Not Imply that FCM is Entitled to Summary Judgment on its Breach of Contract Claims.</u>

FCM argues that because Bowman obtained certain sponsorships during 2019 and KCBS paid FCM for that work, KCBS cannot challenge the Marketing Agreement and FCM is entitled to summary judgment on its breach of contact claim. Mem. at 6 (citing Restatement (Second) of Contracts § 34). However, this argument ignores pertinent facts that are contained in Bowman and FCM's own Statement of Undisputed Facts. Those facts demonstrate that KCBS never believed the Marketing Agreement was proper and that KCBS paid FCM for work Bowman was doing *all the while* seeking an amicable resolution of the parties' dispute about the Marketing Agreement. Stated differently, KCBS paid FCM for Bowman's work not because the Marketing Agreement was valid, but because that was the way to keep a relative peace between the parties until they could, hopefully, find a way to resolve the dispute out of court.

From the day the 2019 Board was seated, Bowman and the Board were discussing the fact that the 2019 Board was unhappy with the Marketing Agreement and that the parties needed to find a solution to this problem. This was so clear to everyone that, at the conclusion of the 2019 Board's first meeting, Bowman handed Candy Weaver, the 2019 Board's President, his attorney's business card and then, just weeks later, sent a threatening email to the 2019 Board copying his attorney. *See* SUF at ¶¶ 50, 61-2; Ex. 9 of SUF.

While discussions were on-going, KCBS paid FCM for work that Bowman did, but it was always understood that the 2019 Board did not believe the Marketing Agreement was fair,

reasonable, or proper. FCM is not entitled to summary judgment merely because KCBS paid for Bowman's work while simultaneously trying to find a path forward without litigation; at the least, there is a factual dispute regarding the meaning of Bowman's work and KCBS's payment for the same, and this factual dispute precludes summary judgment. *Cf. Firestone v. VanHolt*, 186 S.W.3d 319, 323 (Mo. Ct. App. 2005) (holding summary judgment is inappropriate where the record supports varying factual interpretations).

II. FCM is Not Entitled to Summary Judgment on KCBS's Breach of Contract Claim Against It.

KCBS's ultimate position is that the Marketing Agreement was fraudulently induced and, consequently, that the contract was void from the start and FCM should take nothing further from KCBS, and that all money previously paid by KCBS to FCM should be returned. However, if the Court disagrees, KCBS alternatively contends that Marketing Agreement was properly terminated "for cause" due to Bowman's dishonest conduct. The Marketing Agreement provides several bases for termination "for cause," and one those is "Agency's dishonesty in the course and scope of his duties." (emphasis added)). Bowman drafted the Marketing Agreement, and thus the "his" can only refer to Bowman.

Based on the facts detailed above, KCBS decided to terminate the Marketing Agreement for cause once it had uncovered most—not all, because discovery in this case has revealed more—of Bowman's deceit involved in the procurement of the Marketing Agreement, including the inflated pricing and the acceptance of the payments flowing from those inflated prices. Particularly when Bowman's fraudulent search process is viewed in light of the financial impact the Marketing Agreement has had on KCBS, Bowman's dishonesty provided sufficient warrant to terminate the Marketing Agreement for cause. FCM is not entitled to summary judgment on KCBS's breach of contract claim.

III. Bowman is Not Entitled to Summary Judgment on KCBS's Breach of Contract Claim.

a. Bowman Violated the Terms of his Confidentiality Agreements.

Bowman is correct that KCBS's breach of contract claim against him is not based on the Marketing Agreement, which was signed by FCM and KCBS. Instead, KCBS's breach of contract claim against Bowman is based on the Confidentiality Agreements he signed in connection with his service on the KCBS Board.

Bowman is not entitled to summary judgment on KCBS's claim. Bowman has admitted in his pleadings that he signed the Confidentiality Agreements. Bowman Answer at ¶ 14. Bowman has also admitted that the Confidentiality Agreements contain the following operative language:

> "all information and know how, whether tangible or intangible, and whether or not in writing, of a private, secret, or confidential nature concerning [KCBS's] business or affairs provided or made available to [Bowman] by or on behalf of [KCBS] . . . is and shall be the exclusive property of [KCBS] . . . .
>
> "[Bowman] acknowledges and agrees that the Confidential Information is of great value to [KCBS] and that the restrictions and agreements contained in this Agreement are necessary to protect the interests of [KCBS]. . . . .
>
> "[Bowman] agrees that all files, letters, memoranda, reports, records, data, disks, electronic storage media, or other written, photographic, electronic or tangible material containing Confidential Information (collectively, 'Records'), whether created by the [Bowman] or others, shall be the exclusive property of [KCBS] to be used by [Bowman] only in the performance of [Bowman's] duties for [KCBS]. All such Records or copies thereof in [Bowman's] custody or possession shall be promptly delivered to [KCBS] (a) upon any request by [KCBS], and (b) in any event, upon the expiration of [Bowman's] service on the Board. After any such delivery, [Bowman] shall not retain any such Records or copies thereof or any other tangible property of [KCBS] and, upon reasonable request from [KCBS], shall certify in writing to [KCBS] as to the same."

Bowman Answer at ¶ 16. Bowman has also admitted that he transferred, or caused to be transferred, *every single email* tied to his KCBS email address over to his own, personal files. SUF

at ¶ 52. Bowman claims that an IT vendor helped him to transfer this data, but he does not claim—nor could he—that he had permission from KCBS to do this.

The essential elements of a breach of contract action include: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff. *Martha's Hands, LLC v. Rothman*, 328 S.W.3d 474, 479 (Mo. Ct. App. 2010); *see also Shirley's Realty, Inc. v. Hunt*, 160 S.W.3d 804, 808 (Mo. Ct. App. 2005) ("In Missouri, nominal damages are available where a contract and its breach are established."). Bowman's admissions establish that KCBS has a submissible case on its breach of contract claim against him: The existence of the Confidentiality Agreements is undisputed; KCBS honored its obligations under the Confidentiality Agreements; and Bowman retained KCBS's confidential records. Accordingly, there is no basis for the Court to grant Bowman summary judgment on KCBS's breach of contract claim against him.

b. <u>Bowman's Duty to Preserve Does Not Justify the Original Taking of KCBS's Confidential and Proprietary Information.</u>

Bowman contends that his taking and retention of KCBS's confidential and proprietary information was justified because people who are in litigation, or who anticipate litigation, "have an affirmative duty to preserve evidence." *See generally* Mem. at 18-19. While this is true as a general proposition, Bowman omits the key, missing premise of his argument: His duty was to preserve potential evidence *within his own possession or control*, not to preserve evidence within KCBS's possession and control. *Am. Builders & Contractors Supply Co., Inc. v. Roofers Mart, Inc.*, 2012 WL 2992627, at *3 (E.D. Mo. July 20, 2012).

The Confidentiality Agreements make clear that KCBS's confidential and proprietary information was to always remain within its possession and control. It is true that once Bowman had taken KCBS's confidential and proprietary information, he had a duty to preserve it; but that

does not retroactively justify his taking of KCBS's confidential and proprietary information in the first place. KCBS had a duty to preserve potential evidence within its own possession or control, but Bowman was under no obligation to preserve potential evidence within KCBS's possession or control. Bowman had no right to take all electronic communications using his KCBS email address. The Court should reject Bowman's duty-to-preserve argument.

IV. Bowman is Not Entitled to Summary Judgment on KCBS's Breach of Fiduciary Duty Claim.

"[I]t is certain that[] neither the executive officers nor the directors of an incorporated company have a right to convert its assets to their own use, or give them away, or make any self-serving disposition of them against the interest of the company." *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 383 (Mo. Ct. App. 2000) (citation marks omitted)). A breach of this fiduciary duty may give rise to an action for damages for breach of contract or tort. *Id.* An action for damages for breach of fiduciary duty does not depend on whether the officer or director realized a monetary profit. *Id.*

As explained in detail above, the testimony of Bowman's own expert witness, confirmed by the testimony of 2018 Board members, demonstrates that Bowman put his own interests ahead of KCBS's in procuring the Marketing Agreement and summary judgment is inappropriate due to outstanding factual disputes. The rest of the 2018 Board had no marketing expertise and thus were relying on Bowman to tell them the truth. Indeed, one 2018 Board member actually testified that *he could not even evaluate the information that Bowman sent him*—but, nonetheless, he was the very first Board member to vote to approve FCM as KCBS's new marketing agency. Bragg Depo. at 35:12-14; *see also id.* at 39:18-40:3 (testifying that Bowman's proposal was "more than fair" because it was less expensive than the other bids and confirming that he did not use any information to reach that conclusion other than what Bowman told him).

In short, for the reasons that summary judgment on FCM's breach of contract claim would be improper, summary judgment on KCBS's breach of fiduciary duty claim against Bowman would be improper as well. There are serious factual questions surrounding the formation of the Marketing Agreement and whether it was fraudulently induced through a breach of Bowman's fiduciary duties to KCBS. *Nicolazzi*, 564 S.W.3d at 371 ("[P]arties are bound by the terms of the contracts they sign and courts will enforce contracts according to their plain meaning, *unless induced by fraud, duress, or undue influence*." (citation omitted, emphasis added)).

V. Bowman and FCM are Not Entitled to Summary Judgment on KCBS's Computer Tampering Claims.

Section 569.095.1(3) of the Missouri Revised Statutes makes it a crime to, *inter alia*, for someone to "[d]isclose[] or take[] data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network" if he does so "knowingly and without authorization or without reasonable grounds to believe he has such authorization." Missouri Revised Statute § 537.525.1 grants a private right of action to "the owner or lessee of the computer system, computer network, computer program, computer service or data" that has been compromised under § 569.095.

Bowman and FCM violated Missouri's computer tampering statute. They are not entitled to summary judgment on KCBS's claim against them.

a. Bowman and FCM's Case Law is Not On Point.

KCBS's computer tampering allegations are that (1) Bowman and FCM improperly took and retained KCBS's confidential electronic communications in violation of Confidentiality Agreements, and Marketing Agreement, that Bowman signed, and (2) that Bowman and FCM improperly accessed KCBS's Google Drive after KCBS formally terminated the Marketing Agreement. The Confidentiality Agreements make clear that Bowman was not to retain or use *any*

of KCBS's confidential or proprietary information after his term of service on the Board expired, and the Marketing Agreement makes clear that FCM was not to retain or use *any* of KCBS's confidential or proprietary information after the Marketing Agreement expired or was terminated.

Based on the established facts, in the words of the computer tampering statute, Bowman and FCM "knowingly and without authorization or without reasonable grounds to believe [they] ha[d] such authorization" took KCBS's "data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network." Nonetheless, they argue they are entitled to summary judgment based on *Anzaldua v. Northeast Ambulance & Fire Protection District*, 978 F. Supp.2d 1016 (E.D. Mo. 2013).

Anzaldua is dissimilar to the facts here. In *Anzaldua*, the plaintiff filed a complaint alleging that his employment was terminated as a result of a conspiracy between his former employer, the Fire Protection District, and Kate Welge, his ex-girlfriend. The computer tampering claim was based on the allegation that Welge "hacked" his email account and accessed his private electronic communications. The Court found the plaintiff's allegations were implausible given the prior romantic relationship: "Plaintiff was aware of Welge's access, and gave actual consent, whether expressly or constructively, to her access." *Anzaldua*, 978 F. Supp.2d at 1030.

Here, by contrast, Bowman and FCM signed Agreements that specifically and unequivocally prohibited them from taking and retaining KCBS's confidential and proprietary information or from using that information for any non-KCBS purpose. Bowman and FCM violated the terms of these Agreements, *cf. Crede v. City of Oak Grove*, 979 S.W.2d 529, 531 (Mo. Ct. App. 1998) (noting that on summary judgment the entire record is viewed in the non-movant's favor and that the non-movant is entitled to "all reasonable inferences that may be drawn from the evidence"), and thus, unlike in *Anzaldua*, there is no "reasonable inference" that KCBS gave its

"actual consent" to Bowman or FCM's taking of KCBS's confidential emails or using KCBS's Google Drive for their own purposes.

While KCBS, Bowman, and FCM did, at one time, share *access* to the information at issue, they certainly did not share *ownership* of this information. The problem is that Bowman and FCM stole KCBS's confidential and proprietary information to use for their own purposes; the Agreements prohibited that, and neither Bowman nor FCM is entitled to summary judgment on KCBS's computer tampering claims.

b. KCBS Can Establish that Bowman and FCM Had the Requisite State of Mind to Succeed on its Computer Tampering Claim.

Similarly unpersuasive is the argument that KCBS cannot establish that Bowman or FCM had the requisite state of mind to succeed on the computer tampering claims, contending "the record is devoid of any evidence of anyone's culpable state of mind." Mem. at 33. But as noted above, the computer tampering statute requires that the confidential information be taken "knowingly and without authorization or without reasonable grounds to believe [there is] such authorization," and here, Bowman and FCM signed Agreements that specifically prohibited precisely the conduct that Bowman and FCM engaged in. Bowman and FCM cannot have thought they had authorization to do exactly what the Confidentiality Agreements and the Marketing Agreement prohibited.

c. Bowman and FCM Did Not Have a Duty to Preserve KCBS's Information.

Bowman and FCM again contend that they were legally obligated to keep and retain KCBS's confidential and proprietary information based on a litigant's, or a potential litigant's, duty to preserve potential evidence. However, as explained above, their duty was only to preserve potential evidence within their own possession or control. *Am. Builders & Contractors Supply Co., Inc.*, 2012 WL 2992627, at *3. The duty to preserve potential evidence does not retroactively

justify the taking or use of KCBS's confidential and proprietary information. Bowman and FCM were not obliged to preserve information in KCBS's possession or control; if the duty to preserve really extended to any and all potential evidence on the planet, there would be way to ensure compliance.

d. KCBS's Computer Tampering Claim Against FCM Should Not be Dismissed Because FCM is a "Person" Within the Meaning of the Statute.

FCM argues, lastly, that it cannot be held *civilly* liable for computer tampering because there might be issues with *criminally prosecuting* FCM for committing the felony of computer tampering. Mem. at 33. The civil statute at issue provides that "the owner or lessee of the computer system, computer network, computer program, computer service or data may bring a civil action against *any person* who violates sections 569.095 to 569.099 for compensatory damages." Mo. Rev. Stat. 537.525.1 (emphasis added). There is no reason to think this statute does not mean what it says: That a natural person *or* a corporate entity may be held civilly liable for computer tampering. *See, e.g.*, *In re Duval*, 178 S.W.3d 617, 625 (Mo. Ct. App. 2005) ("The phrase 'any person' . . . means exactly that—*every natural person or corporation, without limitation or restriction*." (emphasis added)).

CONCLUSION

Serious factual disputes remain in this case, which can only properly be resolved by a jury at trial. The Court should deny Bowman and FCM's Motion for Summary Judgment.

Respectfully submitted March 8, 2021.

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CERTIFICATE OF SERVICE

On March 8, 2021, I electronically filed the foregoing with the clerk of the court using the electronic filing system, which will send notice of filing to all counsel of record.

/s/ *Logan M. Rutherford*
Attorney for The Kansas City Barbeque Society