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Case No. 2017-0439-TMR

THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LASER TONE BUSINESS SYSTEMS, LLC, Plaintiff, v. DELAWARE MICRO-COMPUTER LLC, PRINTIT SOLUTIONS, LLC, ALEX J. FARLING, and JUSTIN MCGINNIS, Defendants, and JUSTIN MCGINNIS, Cross Claim Defendant/ Third-Party Plaintiff, v. STEVE MARTIN, Third-Party Defendant	)	C.A. No. 2017-0439-TMR

MEMORANDUM OPINION

Date Submitted: August 15, 2019
Date Decided: November 27, 2019

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MONTGOMERY-REEVES, Vice Chancellor.

In this action, plaintiff, a photocopier company, sues a former employee and his new business partner for alleged violations of the Delaware Misuse of Computer System Information Act. The company alleges that the former employee made and retained unauthorized copies of the company's data to use in a new competing business venture. The company also alleges that the former employee deleted significant company data without authorization in violation of the statute and the company's employee handbook.

The company's founder was, understandably, upset by the former employee's alleged behavior. In frustration, he shared his belief that the former employee was a thief and a drug user with an untold number of people in their small community. The former employee alleges that as a result of these actions, he suffered signification reputational harm. He sues the company and the founder for libel and slander. The former employee also seeks unpaid wages and commissions.

Upon learning of the allegations against the former employee, the new business partner demanded, and the former employee provided, an indemnification agreement related to these claims. The new business partner eventually settled the claims against him and his businesses in this action. He seeks indemnification for the settlement and attorneys' fees and costs incurred in this action.

For the reasons outlined in this opinion, I hold that the former employee violated the Misuse of Computer System Information Act by deleting certain

company data; the founder, personally and on behalf of the company, committed libel and slander; the company owes and must pay unpaid wages and commissions to the former employee; and the former employee must indemnify the new business partner for the settlement, attorneys' fees, and costs incurred in this action.

I. BACKGROUND

Below are my findings of fact based on the parties' stipulations, over 209 trial exhibits, and the testimony of six live witnesses during a two-day trial.[1]

A. McGinnis's Employment at Laser Tone

Laser Tone Business Systems, LLC ("Laser Tone") is a Delaware limited liability company founded by Steve Martin.[2] Laser Tone's business consists of photocopier and office equipment sales and leasing throughout Delaware and the eastern shore of Maryland.[3] In 2007, Laser Tone hired Justin McGinnis as a member of its sales team.[4] McGinnis learned quickly and became a "very good" salesperson.[5]

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1 Citations to the trial transcript are in the form "Tr. # (X)" with "X" representing the surname of the speaker. Joint trial exhibits are cited as "JX #." Facts drawn from the Amended Joint Pre-trial Stipulation and Order are cited as "PTO ¶ #." Unless otherwise indicated, citations to the parties' briefs are to post-trial briefs. After initially identifying individuals, I reference surnames without honorifics or regard to formal titles such as "Doctor." I intend no disrespect.

2 PTO ¶ II.2.

3 *Id.* ¶ II.1.

4 Tr. 147:23-148:2, 149:16-17 (Martin); *see* JX 181 Ex. B, at 2.

5 Tr. 149:18-150:3 (Martin).

By 2016, McGinnis had become Laser Tone's highest paid employee.[6] Incidental to his employment, Laser Tone provided McGinnis with a company car, laptop, and cell phone.[7]

Despite the stellar start, the relationship between Martin and McGinnis deteriorated by approximately November 2016. McGinnis expressed interest in becoming a partner at Laser Tone.[8] Martin, on the other hand, had misgivings about McGinnis's dedication and recent sales performance because McGinnis had not met his monthly sales quotas.[9] Martin and McGinnis never reached agreement about McGinnis's future at Laser Tone.

The situation came to a head in February 2017. Laser Tone issued a new employee handbook and required that all employees, including McGinnis, sign to acknowledge receipt of the handbook and to agree to the conditions of employment stated in the handbook.[10] These conditions included a non-compete provision, which prohibited Laser Tone employee's from "solicit[ing], sell[ing], and offer[ing] to sell supplies, equipment, and services to any Laser Tone accounts" for a period of five

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6 PTO ¶ II.3.

7 Tr. 150:17-24, 173:17-19 (Martin).

8 JX 181 Ex. B, at 3.

9 Tr. 150:8-14 (Martin); JX 28; JX 196.

10 JX 97.

years after leaving Laser Tone.[11] McGinnis refused to agree to the non-compete condition and did not sign the handbook.[12] As a result of his refusal to sign the employee handbook, Laser Tone terminated McGinnis's employment benefits on February 17, 2017, and notified McGinnis by letter dated February 21, 2017.[13]

B. McGinnis Creates a Competing Business

In January and February 2017, McGinnis began planning his exit from Laser Tone. In January 2017, McGinnis and Alex Farling discussed starting a new business together.[14] Farling owns Delaware Micro-Computer LLC ("Del Micro"), a Delaware limited liability company.[15] Del Micro and Laser Tone had done business together since 2008;[16] Del Micro provided IT services to Laser Tone, and Laser Tone provided some of Del Micro's copiers and printers.[17] McGinnis was Farling's main point of contact at Laser Tone.[18]

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11 JX 184, at LT 0090.

12 Tr. 426:13-24, 431:12-14 (McGinnis).

13 JX 160.

14 Tr. 466:2-6 (McGinnis); *see* Tr. 8:6-12, 20:7-21:2 (Farling).

15 Tr. 4:19-20 (Farling).

16 Tr. 5:20-23 (Farling).

17 Tr. 5:24-6:24 (Farling).

18 Tr. 7:1-3 (Farling).

McGinnis and Farling decided to create a hybrid company that would provide both IT services and printer and copier sales and leases.[19] While still working at Laser Tone, McGinnis contacted Farling because he (McGinnis) "need[ed] a business name ASAP."[20] They decided to call their new venture PrintIT Solutions. On February 14, 2017, Del Micro created an email address for McGinnis.[21]

February 23, 2017, was McGinnis's last day at Laser Tone.[22] In the morning, he and Ed Dorr, a Laser Tone employee, called on a customer. McGinnis returned to the Laser Tone office, performed a factory reset on his company cell phone, and turned in the cell phone to Laser Tone.[23] He also returned the keys to his company car and left the car in Laser Tone's parking lot.[24]

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19 Tr. 7:10-8:1 (Farling).

20 JX 136, at PST000670.

21 JX 138.

22 PTO ¶ II.4. Although the parties initially disputed the date McGinnis quit working at Laser Tone, Plaintiff concedes that February 23, 2017, was the day McGinnis left Laser Tone. Post-Trial Hr'g Tr. 16:11-17; *see also id.* at 43:9-20 ("Now, [McGinnis] was continuing to do work. He did some work from home. And on the last day [February 23], he took a trip with one of his new supervisors and serviced a customer . . . .").

23 Tr. 476:14-477:6 (McGinnis).

24 *Id.*

In March 2017, McGinnis and Del Micro officially formed their business, PrintIT Solutions, LLC ("PrintIT"), a Delaware limited liability company.[25] As a printer and copier business, PrintIT would compete directly with Laser Tone.[26]

C. Martin and Laser Tone React to McGinnis's Competing Business

When Laser Tone learned that McGinnis had created a competing business, it took a variety of actions against McGinnis. Through its counsel, Laser Tone sent a cease and desist letter to McGinnis.[27] The March 3, 2017 letter stated that McGinnis "stole company property in the form of files, both written and electronic, customer list [sic] and a cell phone, among other things."[28] The letter also claimed that McGinnis had signed a non-compete and non-solicitation agreement that barred McGinnis's solicitation of Laser Tone customers.[29]

Farling received a copy of this letter and discussed the contents of the letter with McGinnis immediately.[30] McGinnis denied Laser Tone's accusations, and

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25 PTO ¶ II.5.

26 *Id.* ¶ II.6.

27 *See* JX 163.

28 *Id.* at 1.

29 *Id.*

30 *Id.* at 2; Tr. 30:7-14 (Farling).

Farling believed him.[31] As a precautionary measure, Farling and McGinnis met with Farling's attorney on April 10, 2017.[32] At that meeting, McGinnis signed an Indemnity and Hold Harmless Agreement (the "Indemnification Agreement").[33] McGinnis agreed to indemnify Farling, Del Micro, and PrintIT (collectively, the "Farling Defendants") for any claims arising from McGinnis's "employment relationship with [Laser Tone]" and McGinnis's "subsequent employment . . . with [PrintIT]."[34]

About two months after sending the cease and desist letter, on May 10, 2017, Martin sent a letter on Laser Tone letterhead to Phillis Mitchell at Mitchell and Hastings, a former Laser Tone customer.[35] This letter informed Mitchell that "McGinnis has stolen company confidential information included [sic] leasing portfolios, customer records and customer cell phone numbers."[36]

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31 Tr. 30:15-31:2 (Farling).

32 Tr. 31:11-14 (Farling); PTO ¶ II.10.

33 Tr. 434:12-435:3 (McGinnis); PTO ¶ II.10; *see* JX 166.

34 JX 166.

35 JX 168.

36 *Id.*

Martin also told his friends that McGinnis was a thief. Steven Obringer testified at trial that he and Martin have been friends for about twenty-five years.[37] Obringer also testified that after McGinnis's departure from Laser Tone, Martin told Obringer that McGinnis had "stolen records or information" and that McGinnis was "a thief."[38] Martin was also friends with Shane McGinnis, Justin McGinnis's brother. Shane[39] has known Martin for fifteen years.[40] Shane testified that he and Martin discussed the situation between Martin and McGinnis; during those conversations, "[Martin] said that [McGinnis] was a thief" and a "drug addict."[41]

D. Laser Tone's Expert Report

Some months after McGinnis left Laser Tone, Martin discovered on McGinnis's TeamViewer[42] profile three spreadsheets named "Export1," "Export2," and "Export23."[43] The last modified date for each of these three files was February

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37 Tr. 489:3-7 (Obringer).

38 Tr. 489:20-490:19 (Obringer).

39 To avoid confusion, I refer to Shane McGinnis by his first name. I intend no disrespect.

40 Tr. 495:16-19 (S. McGinnis).

41 Tr. 496:24-497:1 (S. McGinnis).

42 TeamViewer is remote access software that enables Laser Tone employees to access their desktop computers remotely. Tr. 310:6-311:18 (Bunting).

43 Tr. 182:23-183:6 (Martin).

15, 2017, 12:29 am, February 15, 2017, 12:47 am, and February 16, 2017, 1:33 am, respectively.[44] Martin opened the spreadsheets and ascertained that they contained detailed information about Laser Tone's service contracts with dozens of its customers.[45]

Martin's discovery prompted Laser Tone to hire a computer forensics expert. Laser Tone hired Stephen Bunting to determine whether any of the deleted data on the laptop or cell phone could be recovered and also to create a preliminary triage report.[46] Bunting determined that the deleted data was unrecoverable.[47] The majority of Bunting's report analyzes the contents of and any logged activity on the desktop that McGinnis used when he worked for Laser Tone. This report forms the basis of Laser Tone's claims in this litigation.

Bunting's analysis of activity on the desktop includes remote login times and actions the computer user took during those remote login times. For example, the

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44 JX 193.

45 Tr. 184:20-185:1 (Martin); *see* JX 172 at Export1, Export2, Export23.

46 Tr. 282:12-13, 285:13-21 (Bunting).

47 Tr. 298:22-24, 302:14-303:1 (Bunting). Bunting concludes that McGinnis did not factory reset the cell phone because there was one recoverable message on the cell phone, but Bunting confirms that the "more significant data" on the cell phone was "removed or deleted." JX 172, at 9. Regardless of whether McGinnis performed a factory reset, as he testified, or simply deleted all data, the resulting loss of data on the cell phone is the same.

report explains that someone using McGinnis's computer login (presumably McGinnis) logged in remotely to the desktop via TeamViewer, Laser Tone's remote access software, at the following times:

- 02/13/2017, 9:23 p.m. – 02/13/2017, 9:24 p.m.
- 02/15/2017, 12:19 a.m. – 02/15/2017, 12:53 a.m.
- 02/15/2017, 7:33 p.m. – 02/15/2017, 7:41 p.m.
- 02/15/2017, 9:02 p.m. – 02/15/2017, 9:13 p.m.
- 02/15/2017, 9:12 p.m. – 02/15/2017 9:40 p.m.
- 02/16/2017, 1:48 a.m. – 02/16/2017, 2:34 a.m.
- 02/20/2017, 11:39 a.m. – 02/20/2017, 11:47 a.m.
- 02/22/2017 9:15 p.m. – 02/22/2017 9:18 p.m.[48]

Bunting also provides detailed information about the actions the computer user took. The following items are particularly of interest in this litigation:

02/14/2017, 1:09 a.m.	The user accesses a Del Micro Outlook email account.[49]
02/14/2017, 9:30 p.m.	The user again accesses a Del Micro Outlook email account.[50]
02/15/2017, 12:29 a.m.	The user creates a spreadsheet file named Export1 in a OneDrive folder.[51]
02/15/2017, 12:47 a.m.	The user creates a spreadsheet file named Export 2 in a OneDrive folder.[52]

48 JX 172.1 Ex. E, at 13-14.

49 JX 172.1 Ex. F, at 48, Record 1; Tr. 338:14-22 (Bunting).

50 *Id.* at 181-82, Record 44.

51 *Id.* at 81, Record 1; *see* Tr. 332:8-333:9 (Bunting).

52 JX 172.1 Ex. F, at 81, Record 2; *see* Tr. 332:8-333:9 (Bunting).

02/15/2017, 8:15 p.m.	The user visits the Del Micro website.[53]
02/15/2017, 9:26 p.m.	The user creates Backup.pst.[54]
02/15/2017, 10:21 p.m.	The user saves Backup.pst.[55]
02/16/2017, 1:33 a.m.	The user creates a spreadsheet file named Export 23 in a OneDrive folder.[56]

The report also describes when the computer user launched "e-automate" software to extract report spreadsheets from Laser Tone's customer database. The report concludes that the computer user created three spreadsheets, Export1.xlsx, Export 2.xlsx, and Export 23.xlsx (collectively, the "Export Spreadsheets"), using e-automate during a remote login period.[57] The expert report erroneously states that the user created these spreadsheets on February 16, 2017, between 12:49 a.m. and 1:22 a.m.[58] Bunting later corrected the error in date and time, stating that the user created these spreadsheets between February 15, 2017, at 12:29 a.m. and February 16, 2017, at 1:33 a.m.[59] He testified that this error was a result of (1) incorrect conversion from the computer's UTC time zone to Eastern Time, (2) a typographical

53 JX 172.1 Ex. F, at 229, Record 249.

54 *Id.* at 2, Record 4; Tr. 325:1-4 (Bunting).

55 JX 172, at 11-12.

56 JX 172.1 Ex. F, at 81-82, Record 3; *see* Tr. 333:2-335:21 (Bunting).

57 JX 172, at 13.

58 *Id.*

59 JX 172.1 Ex. F, at 81-82, Record 1-3; Tr. 389:23-390:4 (Bunting).

error, and (3) simply human error.[60] The report also notes that the Export Spreadsheets were located in a OneDrive folder.[61]

Bunting also analyzed the contents of "Backup.pst," a backup file of McGinnis's Laser Tone email account that was created on February 15, 2017. He compared the size of this file, 13.4 GB, with the size of McGinnis's email account, 8.8 GB.[62] In noting that the email account is smaller than the backup file, Bunting concludes in his report that McGinnis deleted emails from his Laser Tone email account after creating the Backup.pst file on February 15.[63]

Bunting relies on data obtained from his examination of the desktop to draw conclusions about the user's behavior or intent. For example, Bunting concludes that the computer user exported detailed customer information from Laser Tone's database on February 15, 2017.[64] Bunting takes these conclusions one step further and "presume[s] that a user would not go through the trouble of logging in remotely to create such a backup copy [of email] and yet not retain it after doing so."[65]

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60 Tr. 386:13-390:4 (Bunting).

61 JX 172, at 20.

62 *Id.* at 11-12.

63 *Id.* at 12-13; Tr. 322:20-323:15 (Bunting).

64 JX 172, at 13.

65 *Id.* at 11.

Additionally, Bunting identifies linked Dropbox and OneDrive accounts on the desktop and presumes that these accounts are McGinnis's personal cloud accounts.[66]

Laser Tone provided a copy of the expert report to the Defendants.[67] Farling testified that after reading the report, he found McGinnis's denials of any wrongdoing less credible.[68] On the afternoon of November 17, 2017, Farling asked McGinnis for his login credentials.[69] McGinnis gave Farling his password without any hesitation and soon thereafter left the office for the day. Farling logged in on McGinnis's account and inspected McGinnis's email.[70] Farling claimed that he found Laser Tone emails in McGinnis's account that pre-dated February 14, 2017, when Del Micro created McGinnis's Del Micro email account.[71] After discovering these emails in McGinnis's account, Farling sent McGinnis an email terminating McGinnis's employment with PrintIT and indicating that Farling would take steps to dissolve the PrintIT partnership.[72]

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66 *Id.* at 10.

67 PTO ¶ II.11.

68 Tr. 45:18-46:9 (Farling).

69 Tr. 43:7-10 (Farling).

70 PTO ¶ II.12; Tr. 46:11-18 (Farling).

71 Tr. 46:15-47:1, 48:6-7 (Farling).

72 JX 204.

E. Laser Tone Files Its Complaint

Laser Tone filed its Complaint against McGinnis and the Farling Defendants on June 8, 2017.[73] In the Complaint, Laser Tone alleges that McGinnis violated Delaware's Misuse of Computer System Information Act.[74]

In response to Laser Tone's Complaint, McGinnis filed a claim against Laser Tone for unpaid wages and commissions and a claim against Laser Tone and Martin for defamation.[75] The Farling Defendants filed a claim against McGinnis for indemnification under the Indemnification Agreement.[76]

F. The Farling Defendants Settle

In January 2018, the Farling Defendants entered into a settlement agreement with Laser Tone.[77] Under the terms of this settlement agreement, Laser Tone released the Farling Defendants from its claims in this litigation. The Farling Defendants agreed to pay Laser Tone $30,000, transfer any gross profits PrintIT realized from previous Laser Tone customers, and assign PrintIT customer contracts

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73 PTO ¶ II.7.

74 *Id.* ¶ II.7; *see* 11 *Del. C.* § 935.

75 PTO ¶ II.8.

76 *Id.* ¶ II.9.

77 *Id.* ¶ II.13.

to Laser Tone.[78] Additionally, the Farling Defendants agreed to assist Laser Tone in prosecuting its claims against McGinnis.[79]

G. McGinnis's Employment After PrintIT

After leaving PrintIT, McGinnis worked at Automated Copy Systems Incorporated ("ACS").[80] Through counsel, Laser Tone sent a letter to Joseph Szabo at ACS informing Szabo of Laser Tone's pursuit of legal claims against McGinnis.[81] ACS terminated McGinnis's employment the same day Szabo received that letter.[82]

In February 2018, McGinnis started a copier lease and sales company, Maryland Copier, LLC, which he owns and operates.[83]

H. Trial

This Court held a two-day trial in this matter on December 6 and 7, 2018, and a post-trial hearing on August 9, 2019.

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78 JX 176 ¶ 1(a), (c), (f).

79 *Id.* ¶ 1(e).

80 Tr. 431:17-19 (McGinnis).

81 Tr. 270:8-17 (Martin); JX 174.

82 Tr. 431:17-19 (McGinnis).

83 Tr. 454:19-455:4 (McGinnis).

II. ANALYSIS

"To succeed at trial, 'Plaintiff[] . . . ha[s] the burden of proving each element . . . of each of [his] causes of action against [the] Defendant . . . by a preponderance of the evidence.'"[84] "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[85]

The claims at issue in this case fall into four broad categories: (1) Laser Tone's claims that McGinnis violated the Delaware Misuse of Computer System Information Act; (2) McGinnis's claims for libel and slander against Martin and Laser Tone; (3) McGinnis's claims for unpaid wages and commissions; and (4) the Farling Defendants' claim for indemnification from McGinnis.

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84 *S'holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at *15 (Del. Ch. Mar. 15, 2017) (quoting *inTEAM Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 5660282, at *13 (Del. Ch. Sept. 30, 2016)), *aff'd*, 177 A.3d 610 (Del. 2017).

85 *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

A. Laser Tone Claims That McGinnis Violated the Delaware Misuse of Computer System Information Act

Laser Tone alleges that McGinnis violated the Delaware Misuse of Computer System Information Act.[86] The alleged violations fall into four categories: (1) McGinnis's alleged creation and retention of reports from Laser Tone's database; (2) McGinnis's alleged copying and retaining access to his Laser Tone email account; (3) McGinnis's deletion of data from the company laptop; and (4) McGinnis's deletion of data from the company cell phone.[87] Laser Tone seeks an order permanently enjoining McGinnis from using the data in any business venture, restitution from McGinnis, and an award of its reasonable attorneys' fees and costs.

Delaware's Misuse of Computer System Information Act, Section 935, states:

> A person is [liable for] misuse of computer system information when:
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> (1) As a result of accessing or causing to be accessed a computer system, the person intentionally makes or causes to be made an unauthorized display, use, disclosure or copy, in any form, of data residing in, communicated by or produced by a computer system;
>
> (2) That person intentionally or recklessly and without authorization:

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86 PTO ¶ II.7; *see* 11 *Del. C.* § 935.

87 Pl.'s Opening Br. 22-28.

> a. Alters, deletes, tampers with, damages, destroys or takes data intended for use by a computer system, whether residing within or external to a computer system; or
>
> b. Interrupts or adds data to data residing within a computer system;
>
> (3) That person knowingly receives or retains data obtained in violation of paragraph (1) or (2) of this section; or
>
> (4) That person uses or discloses any data which that person knows or believes was obtained in violation of paragraph (1) or (2) of this section.[88]

Section 931 of the statute provides definitions for terms appearing in Section 935. "Computer system" is defined as "a computer, its software, related equipment and communications facilities, if any, and includes computer networks."[89] "Data" means "information of any kind in any form."[90]

Although Section 935 is a criminal statute, aggrieved parties may bring a civil action under Section 941:

> (a) Any aggrieved person who has reason to believe that any other person has been engaged, is engaged or is about to engage in an alleged violation of any provision of §§ 932-938 . . . of this title may bring an action against such person and may apply to the Court of Chancery for:

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88 11 *Del. C.* § 935.

89 *Id.* § 931(8).

90 *Id.* § 931(9).

> (1) An order temporarily or permanently restraining and enjoining the commencement or continuance of such act or acts;
>
> (2) An order directing restitution; or
>
> (3) An order directing the appointment of a receiver.[91]

"The filing of a criminal action against a person is not a prerequisite to the bringing of a civil action under this section against such person."[92]

1. The Export Spreadsheets

Laser Tone alleges that McGinnis acted without Laser Tone's authorization when he created three Export Spreadsheets, as described in the expert report. Additionally, Laser Tone believes that McGinnis retains access to these spreadsheets because McGinnis saved them in a linked OneDrive folder. Relying on the expert report, Laser Tone also alleges that McGinnis printed one of the spreadsheets and retains that printed document. Laser Tone argues that these actions violate Section 935, which prohibits a person from making, using, retaining, or disclosing an unauthorized copy of data residing in or produced by a computer system. Thus, Laser Tone must show (1) that McGinnis created, used, retained, or disclosed the Export Spreadsheets and (2) that these acts were unauthorized.

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91 *Id.* § 941(a).

92 *Id.* § 941(f).

After McGinnis's departure, Martin discovered "Export1," "Export2," and "Export23," the Export Spreadsheets, under McGinnis's TeamViewer profile.[93] The last modified date for each of these three files was February 15, 2017, 12:29 am; February 15, 2017, 12:47 am; and February 16, 2017, 1:33 am, respectively.[94] Martin opened the spreadsheets and confirmed that they contained detailed information about Laser Tone's service contracts with dozens of its customers.[95]

The expert report concludes that a person (presumably McGinnis) logged in remotely under McGinnis's TeamViewer profile and accessed McGinnis's desktop at Laser Tone on February 15 and 16. The report goes into detail regarding when the person logged in and logged out of TeamViewer. The login periods are as follows:

- 02/13/2017, 9:23 p.m. – 02/13/2017, 9:24 p.m.
- 02/15/2017, 12:19 a.m. – 02/15/2017, 12:53 a.m.
- 02/15/2017, 7:33 p.m. – 02/15/2017, 7:41 p.m.
- 02/15/2017, 9:02 p.m. – 02/15/2017, 9:13 p.m.
- 02/15/2017, 9:12 p.m. – 02/15/2017 9:40 p.m.
- 02/16/2017, 1:48 a.m. – 02/16/2017, 2:34 a.m.
- 02/20/2017, 11:39 a.m. – 02/20/2017, 11:45 a.m.

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93 Tr. 182:23-183:6 (Martin).

94 JX 193.

95 Tr. 184:20-185:1 (Martin); *see* JX 172 at Export1, Export2, Export23.

- 02/22/2017 9:15 p.m. – 02/22/2017 9:18 p.m.[96]

The report claims that Export1.xlsx was created on 02/15/2017 12:29 a.m., and the last modified date for Export1.xlsx is also 02/15/2017 12:29 a.m. The report provides a creation time of 02/15/2017 12:47 a.m. for Export2.xlsx, and this time matches the last modified date for Export2.xlsx. These times for Export1.xlsx and Export2.xlsx fall within the second TeamView login period. For Export23.xlsx, the last modified date is 02/16/2017 1:33 a.m., and the expert report provides this same time for the time the file was created. This time, however, falls outside of the TeamViewer login times. Laser Tone provides no explanation for this inconsistency.

The report also explains that the computer user saved the Export Spreadsheets to a OneDrive folder, which leads the expert to conclude that McGinnis, the presumed computer user, retains access to these spreadsheets from a personal OneDrive cloud storage account.[97] No evidence, however, actually indicates whether the OneDrive account is McGinnis's personal account or an account owned

96 JX 172.1 Ex. E, at 13-14.

97 JX 172.1, at 14.

by Laser Tone.[98] In fact, Bunting testified that he did not verify who owned the OneDrive account and that Laser Tone could actually own the OneDrive account.[99]

Further, McGinnis testified that he exported this type of data regularly as part of his work at Laser Tone.[100] For example, McGinnis created similar reports for use by Laser Tone's salespeople.[101] Laser Tone points to no evidence that contradicts this assertion. McGinnis allegedly created the Export Spreadsheets on February 15 and 16, when he was still working for Laser Tone. The fact that McGinnis had in the recent past created and distributed similar reports in his role at Laser Tone suggests that his creation of the Export Spreadsheets while still employed at Laser Tone was not unauthorized or unusual.

Laser Tone also alleges that McGinnis printed Export23.xlsx. Laser Tone bases this allegation on Bunting's testimony and his report. He testified that Export23.xlsx was printed on 2/15/2017 7:09 p.m., and the printing most likely did not occur at Laser Tone's offices.[102] His forensic analysis also shows a "last printed

98 Tr. 405:8-17 (Bunting).

99 *Id.*

100 Tr. 427:5-428:9 (McGinnis).

101 *E.g.*, JX 15.

102 Tr. 335:4-10 (Bunting).

date" of 2/15/2017 7:09 p.m.[103] Again, this time does not coincide with any of the TeamViewer login periods, with the closest login period being 2/15/2017 7:33 p.m. and 7:41 p.m. Moreover, other than speculation and inference, Laser Tone offers no evidence to show that McGinnis has retained, used, or disclosed any printed copy of Export23.xlsx.

Laser Tone has failed to show that McGinnis created, used, retained, or disclosed any unauthorized copy of its data. McGinnis denies taking or having access to any exported or printed Laser Tone data after he left Laser Tone on February 23, 2017.[104] As such, neither the creation nor the printing of the Export Spreadsheets constitute a violation of Section 935.

2. The copied emails

Laser Tone alleges that McGinnis improperly copied over 70,000 Laser Tone emails in a backup .pst file on February 15, 2017, one day after McGinnis confirmed to Farling that he would soon leave Laser Tone, and deleted certain emails from his Laser Tone email account. Laser Tone also alleges that McGinnis uploaded Laser Tone emails from the Backup.pst file to McGinnis's Del Micro email account. Laser Tone argues that McGinnis's alleged deletion of emails from his Laser Tone

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103 *Id.*

104 Tr. 428:10-19, 429:6-8 (McGinnis).

email account constitutes a violation of Section 935(2)(a) and Laser Tone's employee handbook. Laser Tone also argues that McGinnis violated Section 935(1) and (3), which prohibits a person from making and retaining an unauthorized copy of data residing in or produced by a computer system.

The expert report explains that a person using McGinnis's user profile created a .pst file named "Backup.pst" on February 15, 2017, at 9:26 pm.[105] This file was saved to McGinnis's Documents folder on the Laser Tone system.[106] The .pst file contains 70,716 emails to or from McGinnis during his tenure at Laser Tone.[107] McGinnis's testimony does not address whether he created the Backup.pst file.

Laser Tone claims that the creation of the Backup.pst file is unauthorized. In support of this claim, it cites its employee handbook.[108] The relevant section regarding use of email states as follows:

> The Laser Tone, LLC electronic mail system is reserved solely for the conduct of company business and may not be used for personal reasons. The confidentiality of any message shall not be assumed. The electronic mail system may not be used to create, down-load, or disseminate any material or information that may be offensive to any group

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105 JX 172.1, at 11.

106 \User\Justin\Documents\Outlook. JX 172, at 11. The expert report also states that this folder location is the default location Outlook uses to save a backup .pst file. *Id.*

107 JX 172.1, at 13.

108 Pl.'s Opening Br. 23.

> on the basis of sex, race, color, creed, religion or disability. Laser Tone, LLC reserves the right to review, audit, intercept, access and disclose all messages created received or sent over the electronic mail system for any purpose.[109]

This provision prohibits the creation, downloading, or dissemination of Laser Tone emails for personal or offensive ends. This provision does not prohibit the mere creation of the Backup.pst. Laser Tone points to no other provision that the creation of the Backup.pst might violate.

Laser Tone next asserts that McGinnis violated Section 935 and the Laser Tone employee handbook when he deleted emails from his Laser Tone email account. Laser Tone relies on the expert report in support of this claim. Because the size of the Laser Tone email account is less than the size of the Backup.pst file, Laser Tone presumes that McGinnis deleted emails from his Laser Tone email account.[110] The handbook provision at issue prohibits "[r]emoving or using, without authority, property, records or other materials of Laser Tone, LLC or of other persons."[111] The Backup.pst file, however, resided on the Laser Tone desktop. Thus, McGinnis did not remove emails; at most, he moved them from the email account to the Backup.pst file. Laser Tone points to nothing that prohibits such action.

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109 JX 184, at LT 0088.

110 Tr. 320:16-323:15 (Bunting).

111 JX 184, at LT 0087.

Laser Tone also asserts that the presence of McGinnis's Laser Tone emails in McGinnis's Del Micro email account shows the unauthorized retention of the Laser Tone emails. The factual basis for this argument derives solely from Farling, who testified that he discovered Laser Tone emails in McGinnis's Del Micro email account. Laser Tone infers from Farling's testimony that McGinnis transferred the Laser Tone emails to his Del Micro email account. This inference is logical on its face and potentially damaging for McGinnis; however, additional details undermine that inference, and Laser Tone does nothing to rebut those details.

The Backup.pst file was created on February 15, 2017. Bunting testified that a .pst file created on February 15, 2017, could not contain any emails dated after February 15, 2017.[112] The expert report does not indicate the existence of any other backup files or copies of McGinnis's emails,[113] and Bunting testified that his forensic analysis found no .pst files created after February 15.[114] Bunting also testified that a digital footprint of would exist if any .pst file had been created.[115]

When Farling discovered McGinnis's Laser Tone emails in McGinnis's Del Micro email account, Farling copied these emails to a .pst file (the "Del Micro .pst

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112 Tr. 360:18-361:12 (Bunting).

113 *See* Tr. 351:24-357:23 (Bunting).

114 Tr. 357:16-23 (Bunting).

115 Tr. 354:13-17 (Bunting).

file") and produced it to Laser Tone. The Del Micro .pst file contains numerous emails to and from McGinnis's Laser Tone email dated after McGinnis created a backup of his Laser Tone e-mails on February 15, 2017.[116] In fact, the Del Micro .pst file even contains emails dated after McGinnis's last day at Laser Tone, February 23, 2017.[117] Bunting testified that he found no evidence that anyone accessed McGinnis's TeamViewer login after February 22, 2017.[118] Thus, the presence of emails post-dating the date that McGinnis last accessed his Laser Tone email account contradicts the inference that McGinnis uploaded the Backup.pst file to his Del Micro email account. Laser Tone offers no explanation for this.

McGinnis also identifies another inconsistency. The Backup.pst file is approximately 13.4 gigabytes and contains approximately 70,000 emails; while the Del Micro .pst file is only 5.7 gigabytes and contains approximately 27,000 emails. One might be able to imagine an explanation for these alleged inconsistencies, but Laser Tone offers none.

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116 *See* JX 142-159.

117 Tr. 365:11-16, 366:24-369:19 (Bunting); *see, e.g.*, JX 142-159.

118 Tr. 365:22-366:5 (Bunting).

McGinnis vehemently denies taking the Laser Tone emails or putting them his Del Micro email account.[119] Further, he offers an alternative explanation for how the Laser Tone emails might have arrived at Del Micro. Del Micro provided IT services to Laser Tone as late as March 1, 2017.[120] Farling notified Martin on March 23, 2017, that Del Micro still had access to Laser Tone email accounts. As such, McGinnis observes that a Del Micro representative could have accessed McGinnis's Laser Tone email account and copied emails to McGinnis's Del Micro account.[121] Farling testified that he did not do this[122] and that such action would have left a digital trail of evidence.[123] He also testified, however, that no one inspected Del Micro's servers to search for such a digital trial.[124]

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119 Tr. 427:1-4, 430:3-5, 430:11-17, 432:3-4, 432:7-9, 432:23-433:1, 434:4-8, 447:13-448:5 (McGinnis).

120 JX 208.

121 Another possibility is that before Del Micro deleted all data from McGinnis's company laptop, the Del Micro representative created and retained a copy of McGinnis's email. *See* Tr. 478:8-11 (McGinnis). McGinnis suggests that a Del Micro representative would do this in order to settle out of this litigation on McGinnis's dime. Def.'s Opening Br. 10, 69-70.

122 Tr. 57:21-23 (Farling).

123 Tr. 35:24-36:3, 83:13-84:8 (Farling).

124 Tr. 38:9-15 (Farling); *see* JX 172.1, at 5 (excluding Del Micro sources of data in list of submitted devices or data).

Given the unexplained inconsistencies in Laser Tone's factual narrative, and the equally plausible exculpatory scenarios explaining the presence of the Laser Tone emails in McGinnis's Del Micro email account, I find that Laser Tone failed to meet its burden of proving its case by a preponderance of the evidence.

Finally, Laser Tone also argues that McGinnis retained access to his Laser Tone email account after he left Laser Tone. Specifically, "McGinnis' last action [at Laser Tone] using his Laser Tone affiliated Microsoft Outlook cloud account—which used shared access by justin@laser-tone.net and [McGinnis's personal email address]—was to add access for jmcginnis@delawaremicro.com."[125]

This argument lacks factual support. Laser Tone mischaracterizes joint trial exhibit 162, which Laser Tone uses as its sole documentary evidence to support this argument. Exhibit 162 is an automated email from the "Microsoft account team" notifying McGinnis that he added his Del Micro email address as a secondary email to his personal email account, which happens to be a Microsoft Outlook account. Email accounts and other digital accounts, like a Microsoft Outlook email account, commonly use a secondary email address as a security measure. The user receives a notification such as this whenever he or she makes changes to a digital account. Further, this particular automated email provides no evidence that McGinnis

[125] Pl.'s Reply Br. 7 (citing JX 162; Tr. 474:4-475:18 (McGinnis)).

retained access to his Laser Tone email. Nor does it indicate that his Microsoft Outlook email account "used shared access by justin@laser-tone.net and [McGinnis's personal email address]." Instead, it indicates that McGinnis previously used his Laser Tone email address as the secondary email for his personal email account.

Laser Tone also mischaracterizes McGinnis's testimony by arguing that McGinnis confirmed that he would have received this email in the hours after he quit Laser Tone on February 23, 2017. McGinnis testified that he did not receive this automated email. The email is time-stamped February 23, 2017 5:25 p.m.[126] McGinnis credibly testified that he had already left Laser Tone by that time and he did not receive the automated email.[127]

None of Laser Tone's theories for this claim succeed. Neither the creation of the Backup.pst file; nor the deletion of Laser Tone emails, when otherwise preserved in the Backup.pst file; nor the presence of a different .pst file on Del Micro's server; nor the retention of access to the Laser Tone email account is sufficient to support Laser Tone's claim that McGinnis's actions with respect to his Laser Tone emails constitute a violation of Section 935.

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126 JX 162.

127 Tr. 475:3-8 (McGinnis) ("Did you receive this email from the Microsoft account team? . . . A. No, I would have been out of Laser Tone by then.").

3. Data deleted from the cell phone and the laptop

Laser Tone alleges that the deletion of data from the cell phone and the laptop constitutes a violation of Section 935(2)(a), which provides that "[a] person is [liable for] misuse of computer system information when" he "intentionally or recklessly and without authorization . . . deletes . . . data intended for use by a computer system, whether residing within or external to a computer system."

Before McGinnis returned the company cell phone to Laser Tone, he performed a factory reset on the phone.[128] McGinnis credibly testified that performing a factory reset on company phones is standard practice when an employee leaves Laser Tone.[129] Laser Tone did not rebut this testimony. Because performing a factory reset is standard practice for employees leaving Laser Tone, I conclude that Laser Tone authorizes this practice in general. Laser Tone provides no explanation why this particular factory reset of McGinnis's phone is an exception to this practice. Therefore, McGinnis's act of performing a factory reset on his company phone shortly before he left Laser Tone was authorized and, thus, is not a violation of Section 935.[130]

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128 Tr. 476:21-24, 477:9-22 (McGinnis).

129 Tr. 476:21-24 (McGinnis).

130 Laser Tone also argues that before factory resetting and returning his company phone, McGinnis first "transferred the data via his existing iCloud account when he set up his new 'personal' iPhone." Pl.'s Opening Br. 14. Laser Tone points to an automated email showing that a new iPhone logged into McGinnis's iCloud account

McGinnis similarly caused all data to be deleted from the company laptop before he returned it to Laser Tone.[131] McGinnis explained that he had used the laptop for personal and professional purposes, and he wished to remove any personal information from the laptop.[132] While the deletion of personal data from the laptop is likely permissible, the deletion of Laser Tone data from the laptop without authority is not.[133] McGinnis does not identify any such authority. Thus, the deletion of Laser Tone data from the laptop constitutes a violation of Section 935(2)(a).

4. Remedy

Laser Tone seeks a permanent injunction, restitution from McGinnis, nominal damages and an award of its reasonable attorneys' fees and costs.[134] Section 941

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on February 16, 2017. JX 151. But aside from the automated email, Laser Tone produced no evidence that McGinnis transferred any Laser Tone information via the new phone's iCloud access. Instead, McGinnis testified that he only "removed . . . all of [his] personal info" from the company phone before factory resetting it. Tr. 476:2-24 (McGinnis). As it is entirely possible that McGinnis used the iCloud to transfer exclusively personal information, Laser Tone has not substantiated its claim that McGinnis "replicated all data from his Laser Tone iPhone—apps, email, texts, call history, contacts, calendar, etc.," in violation of Section 935. Pl.'s Opening Br. 14.

131 Tr. 478:8-11 (McGinnis).

132 Tr. 478:5-7 (McGinnis).

133 JX 184, at LT 0087.

134 Pl.'s Opening Br. 3.

outlines available remedies for violations of the Misuse of Computer System Information Act.[135]

First, Laser Tone seeks a permanent injunction against McGinnis under Section 941(a)(1) enjoining McGinnis from using Laser Tone's data in any business venture.[136] "To warrant permanent injunctive relief, the plaintiff must succeed on the merits of [its] case after a full hearing, demonstrate that irreparable harm will result in the absence of an injunction, and prove that, on balance, the equities weigh in favor of issuing the injunction."[137] Laser Tone has succeeded in its case in chief only as to the deletion of Laser Tone data from the laptop. This limited success does not imply that McGinnis has improperly retained any Laser Tone data. As such, Laser Tone cannot show that irreparable harm will result in the absence of the injunction Laser Tone seeks. This factor weighs against issuing any injunction.

Second, Laser Tone seeks an order requiring McGinnis to return all Laser Tone data, including digital, cloud-based and physical data, to Laser Tone. If Laser Tone had proven its claim that McGinnis retained Laser Tone data, I would not hesitate to order McGinnis to return the data to Laser Tone or, where return is

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135 11 *Del. C.* § 941.

136 *Id.* § 941(a)(1).

137 *Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC*, 2014 WL 897223, at *27 (Del. Ch. Mar. 5, 2014).

impractical, to certify the destruction of the data, as McGinnis was not entitled to retain any of the Laser Tone data. Granting such relief, however, is inappropriate here because Laser Tone fails to prove by a preponderance of the evidence that McGinnis retained any Laser Tone data.

Third, Laser Tone requests an award of $27,451.00 in nominal damages for the 27,451 emails that Farling discovered in McGinnis's Del Micro email account. Because I conclude above that Laser Tone has not shown by a preponderance of the evidence that McGinnis uploaded the Laser Tone emails into his Del Micro email account, I deny this request.

Notably, Laser Tone specifies no damages related to the deletion of the laptop data. Section 941(b) states that for Misuse of Computer System Information violations "[t]he Court may award the relief applied for or such other relief as it may deem appropriate in equity."[138] The Court's award, however, must be based on more than "speculation" or "conjecture."[139] This Court "cannot create what does not exist in the evidentiary record, and cannot reach beyond that record when it finds the evidence lacking. Equity is not a license to make stuff up."[140] This is a very different

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138 11 *Del. C.* § 941(b).

139 *Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005).

140 *Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 21, 2018), as revised (Mar. 22, 2018).

situation than one where the Court has a basis to calculate damages. As Laser Tone points to no evidence of damages stemming from the deleted laptop data, "[a]ny attempt by the Court to determine the harm caused by these actions would be entirely speculative conjecture."[141] Thus, I award Laser Tone nominal damages of $1.

Fourth, and finally, Laser Tone requests an award of its attorneys' fees and costs in this action. Under Section 941(e), "the Court shall award to any aggrieved person who prevails reasonable costs and reasonable attorneys' fees."[142] When assessing the reasonableness of attorneys' fees in this context, this Court has rejected an attorneys' fees request as excessive when a party succeeded on only a fraction of its claims.[143] Thus, this Court may grant fees under Section 941(e) in proportion to the success achieved.[144] Laser Tone's success on the merits in this case is minimal. Laser Tone originally asserted two counts of breach of contract, four Misuse of Computer System Information violations, and one count of civil conspiracy.[145] Laser

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141 *Id.*

142 11 *Del. C.* 941(e).

143 *Wayman*, 2014 WL 897223, at *30-31 (awarding 35% of attorneys' fees where the Court found "excessive [Plaintiff's] request for an award of 80% of its attorneys' fees and expenses for this entire case based on its successful prosecution of its computer misuse claim").

144 *Id.* at *30-31.

145 Compl. ¶¶ 32-56. Only one count, related to claims concerning the Misuse of Computer System Information Act, remained at trial. *See* PTO ¶ II.7.

Tone only succeeded on a single violation of Section 935. McGinnis set forth the factual basis for this violation in his Verified Answer; he admitted to factory resetting his company-issued laptop.[146] This admission occurred well before extensive discovery and trial. Moreover, Laser Tone did not identify a single remedy unique to the Section 935 violation on which Laser Tone succeeded. Thus, any time spent on this aspect of the claim appears to have been limited. Any award of fees also should be limited to the proportion of Laser Tone's narrow success. Accordingly, I award Laser Tone its reasonable attorneys' fees and costs incurred in prosecuting the claim that McGinnis improperly deleted Laser Tone data from his Laser Tone laptop, which shall not exceed $20,000.

B. McGinnis's Claims for Libel and Slander

McGinnis asserts counterclaims against Laser Tone and third-party claims against Martin for libel and slander. Specifically, McGinnis alleges that Laser Tone and Martin told others that McGinnis committed theft and uses drugs.[147]

"[D]efamation consists of the 'twin torts' of libel and slander."[148] To succeed in a claim for defamation, the "plaintiff must plead (i) the defendant made a defamatory statement, (ii) concerning the plaintiff, (iii) the statement was published,

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146 Answer ¶ 20.

147 Def.'s Opening Br. 67.

148 *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).

and (iv) a third party would understand the character of the communication as defamatory."[149] "[L]ibel is written defamation and slander is oral defamation."[150] "A communication is defamatory 'if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"[151] "Under [Delaware] law, any libel (that is, written publication which defames plaintiff) is actionable without special damages, whether the defamatory nature is apparent on the face of the statement or only by reference to extrinsic facts."[152] For slander, "the general rule is that oral defamation is not actionable without special damages."[153]

> But there are four categories of defamation, commonly called slander Per se, which are actionable without proof of special damages. In broad terms, these are statements which: (1) malign one in a trade, business or profession, (2) impute a crime, (3) imply that one has a loathsome disease, or (4) impute unchastity to a woman.[154]

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149 *Agar v. Judy*, 151 A.3d 456, 470 (Del. Ch. 2017) (citing *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005)).

150 *Spence*, 396 A.2d at 970.

151 *Agar*, 151 A.3d at 470 (quoting *Spence*, 396 A.2d at 969).

152 *Spence*, 396 A.2d at 971.

153 *Id.* at 970.

154 *Id.*

At trial, McGinnis presented written and testimonial evidence of Laser Tone's and Martin's statements concerning McGinnis. On May 10, 2017, Martin, acting as Laser Tone's President, sent a letter on Laser Tone letterhead to Phillis Mitchell at Mitchell and Hastings, a former Laser Tone and then-current PrintIT customer.[155] This letter informed Mitchell that "McGinnis ha[d] stolen company confidential information included [sic] leasing portfolios, customer records and customer cell phone numbers."[156]

Martin also told several people that McGinnis was a drug user and a thief. Martin admitted that he told "[o]ne or two friends" that McGinnis was a drug user.[157] Martin "had no idea" the number of people he told that McGinnis was a thief.[158] Farling testified that Martin accused McGinnis of drug use.[159] Obringer testified that after McGinnis left Laser Tone, Martin was upset about McGinnis's departure and told Obringer that McGinnis had "stolen records or information" and that McGinnis is "a thief."[160] Additionally, Shane testified that he and Martin discussed the

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155 JX 168.

156 *Id.*

157 Tr. 268:17-21 (Martin).

158 Tr. 267:6-268:8 (Martin).

159 Tr. 31:3-4 (Farling).

160 Tr. 489:20-490:19 (Obringer).

situation between Martin and McGinnis, and during those conversations "[Martin] said that [McGinnis] was a thief" and a "drug addict."[161]

The written statements in the letter to Phillis Mitchell clearly concerned McGinnis, and the letter itself constitutes a publication. The statements concern McGinnis's alleged theft of Laser Tone's confidential information and likely deterred Mitchell and her business, Mitchell and Hastings, from continuing business with McGinnis. These statements are defamatory, and a third party understood the character of the communication as defamatory.

Likewise, Martin's oral statements that McGinnis was a thief constitute slander per se because the statements connect the alleged theft with McGinnis's employment and Laser Tone and, therefore, malign McGinnis in his trade, business, or profession. Similarly, Martin's oral statements that McGinnis was a drug user constitute slander per se because they impute the crime of drug use[162] to McGinnis. McGinnis need not show special damages connected to these statements. The written statements in the letter to Mitchell and the oral statements made to Farling, Obringer, and Shane are sufficient to support a claim of defamation against both Martin and Laser Tone.

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161 Tr. 496:6-497:1 (S. McGinnis).

162 *See* 16 *Del. C.* § 4763.

In response, Laser Tone and Martin do not deny McGinnis's allegations. Instead, they claim that the statements regarding McGinnis's theft or referring to McGinnis as a thief are true.[163] "At common law, truth is an affirmative defense to a defamation action. In Delaware, it is sufficient that the statement is 'substantially true.'"[164] "[N]o libel has occurred where the statement is no more damaging to plaintiff's reputation in the mind of the average reader than a truthful statement would have been. Immaterial errors do not render a statement defamatory so long as the 'gist' or 'sting' of the statement is true."[165] Because Laser Tone has not succeeded in its claim that McGinnis retained Laser Tone data, it cannot use this claim to support its defense of truth.

McGinnis requests as the remedy for his claim an injunction prohibiting Laser Tone from selling or leasing in a certain geographic area.[166] McGinnis cites no authority to support the application of injunctive relief to his defamation claim. "The ability of a court to issue injunctive relief is even more constrained in a defamation

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163 Pl.'s Reply Br. 25-26.

164 *Agar*, 151 A.3d at 485 (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1035 (Del. 1998)) (citing *Barker v. Huang*, 610 A.2d 1341, 1350 (Del. 1992)).

165 *Ramunno*, 705 A.2d at 1035.

166 Def.'s Reply Br. 29-32.

case than in a garden-variety tort case or breach of contract case."[167] "Moreover, '[d]amages are [the] standard remedy for defamation.'"[168] "Although [McGinnis] tr[ies] to dress [his] allegations of lost business opportunities . . . as irreparable harm, those losses, if proven are readily and historically compensable by damages."[169]

McGinnis also seeks damages as a remedy for the defamation claim. As previously mentioned, McGinnis need not show special damages resulting from the defamatory statements.[170] Because damages for these defamatory statements "involve circumstances [in] which it would be difficult to trace specific financial loss," the Court will presume general compensatory damages.[171] "The objective of compensatory damages is to place the injured party in as good a position as existed before the injury."[172] "This Court has discretion to employ a flexible approach to damages in order to achieve a just and reasonable result."[173] Fact finders may award

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167 *Organovo Hldgs., Inc. v. Dimitrov*, 162 A.3d 102, 115 (Del. Ch. 2017).

168 *Perlman v. Vox Media, Inc.*, 2019 WL 2647520, at *6 (Del. Ch. June 27, 2019) (quoting *Organovo*, 162 A.3d at 114).

169 *Perlman*, 2019 WL 2647520, at *6.

170 *Spence*, 396 A.2d at 970.

171 *Id.*; *see also Stidham v. Wachtel*, 21 A.2d 282, 282-83 (Del. Super. 1941).

172 *Brown v. Lakhsman*, 2010 WL 1006622, at *2 (Del. Com. Pl. Feb. 23, 2010).

173 *Id.* (quoting *Ausejo v. Delmarva Power and Light Co.*, 1999 WL 1847437, at *5 (Del. Com. Pl. Feb. 17, 1999)).

"such general compensatory damages as would reasonably compensate the plaintiff for the harm which normally would result from such defamation and wrong done to his reputation, good name and fame, and for any mental suffering caused thereby."[174] The Restatement (Second) of Torts explains, "[t]here is no direct correspondence between money . . . and feelings or reputation."[175] "The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation."[176]

Defamation cases are most often decided by our sister court, the Delaware Superior Court.[177] The Superior Court instructs its fact finders to consider the

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174 *See Stidham*, 21 A.2d at 283.

175 RESTATEMENT (SECOND) OF TORTS § 912 cmt. b (1979).

176 *Id.* ("The most that can be done is to note such factors as the intensity of the pain or humiliation, its actual or probable duration and the expectable consequences. Since these factors are all indefinite . . . it is impossible to require anything approximating certainty of amount even as to past harm.").

177 *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 4 (Del. Ch. 2019) ("[B]ecause of the implications on speech of the application of remedies, legal or equitable, to tortious speech, slander and libel are seen as denizens of the Superior Court, and are subject to the findings made there by juries regarding the speech of their peers."); *Perlman*, 2019 WL 2647520, at *1 (granting a motion to dismiss for lack of subject matter jurisdiction over a defamation claim); *Organovo*, 162 A.3d at 125 ("The Superior Court has been the primary forum for adjudicating defamation claims. That court's ample experience provides an additional reason for this court to decline jurisdiction.") (citing *Gelof v. Prickett, Jones & Elliott, P.A.*, 2010 WL 759663, at *3 (Del. Ch. Feb. 19, 2010)). The defamation claims in this case made their way to this Court as a compulsory counterclaim. Under the clean-up doctrine, the Court of Chancery may obtain jurisdiction to resolve "causes of action that are before it as part of the same controversy over which the Court originally had subject

following factors when determining reputational injury: (1) the reputation plaintiff enjoyed before the defamatory publication as compared to the reputation he enjoyed after the publication; (2) whether plaintiff's reputation has actually been diminished since publication; (3) the manner in which the defamatory statement was distributed; (4) the extent of the defamatory statement's circulation in the plaintiff's community; and (5) whether those who read or heard the defamation understood it to refer to the plaintiff.[178]

The evidence presented at trial reflects substantial reputational damage and mental suffering.[179] Before the defamatory publication, McGinnis had a reputation as the best salesman and highest paid employee at Laser Tone.[180] He went from a man at his "absolute lowest," to a rise-through-the-ranks employee excelling at his career for 9 years.[181] Colleagues trusted his word.[182] After the defamatory

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matter jurisdiction in order to avoid piecemeal litigation." *Kraft v. Wisdom Trees Invs., Inc.*, 145 A.3d 969, 974 (Del. Ch. 2016).

178 *See* Del. Super. P.J.I. Civ. § 11.11 (2000); *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1183-90 (Del. 2000).

179 Tr. 431:15-24 (McGinnis); Tr. 31:3-6 (Farling); Tr. 489:22-491:19 (Obringer); Tr. 496:24-497:8 (S. McGinnis).

180 Tr. 149:24-150:7 (Martin); PTO ¶ II.3.

181 Tr. 149:24-150:7 (Martin); Pl.'s Opening Br. 5; *see* JX 181 Ex. B, at 2.

182 *See, e.g.*, Tr. 34:15-22, 37:17-24 (Farling); Tr. 149:1-150:7 (Martin).

publication, the reputation McGinnis worked so hard to build was destroyed. He was maligned as a thief and a drug user. As a result of the defamatory statements, McGinnis has already lost two jobs, customers, and friends; and, he fears his business is in jeopardy.[183] Martin distributed his comments throughout McGinnis's professional and social circle (including familial circle), through targeted letters and conversations.[184] Martin cannot even recall the number of individuals to whom he publicized these remarks.[185] Finally, the defamatory statements explicitly named McGinnis, his former employer, and then-current employer, so those who read or heard the defamation knew McGinnis was the subject of the defamation.[186] Therefore, I will award compensatory damages. Using my discretion, I award compensatory damages in the amount of $100,000 to be paid to McGinnis from Martin and Laser Tone jointly and severally.[187]

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183 Tr. 431:15-24 (McGinnis).

184 Tr. 268:17-21 (Martin); *see, e.g.*, JX 168.

185 Tr. 267:6-268:8 (Martin).

186 *See, e.g.*, JX 168; Tr. 496:22-24 (S. McGinnis).

187 In post-trial briefing, McGinnis asserted that he "testified that this cost him a job, a house, a boat, and friends. It has also left him racking up attorney's fees predicated on claims that Mr. Martin knows are false. The same is worth at least $200,000.00." Def.'s Opening Br. 68-69. It is unclear whether McGinnis is alleging general or special compensatory damages. His inclusion of a dollar figure suggests special damages. Although McGinnis testified credibly to these losses, nothing in the record justifies his specific calculation of $200,000 in losses.

C. McGinnis's Claim for Unpaid Wages and Commissions

Although the parties initially disputed the date of McGinnis's departure, Laser Tone now concedes that McGinnis's last date of employment with Laser Tone was February 23, 2017.[188]

McGinnis claims that Laser Tone (1) underpaid him in his last paycheck in the amount of $143.85, (2) did not pay his regular wages for February 22 and 23, 2017, an amount equal to $315.38, and (3) did not pay commissions totaling $2,456.83 owed to McGinnis.[189] McGinnis referenced customers related to specific commissions in his trial testimony.[190]

Laser Tone has provided no evidence to challenge these claims other than to argue there is no contract between Laser Tone and McGinnis.[191] Indeed, McGinnis has not produced any written employment contract.

To succeed in his breach of contract claim, McGinnis must show by a preponderance of the evidence "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third,

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188 Post-Trial Hr'g Tr. 16:11-17, 43:9-20.

189 JX 181 ¶¶ 17-18.

190 *See* Tr. 436:1-24 (McGinnis).

191 *See* Pl.'s Reply Br. 25-26.

the resultant damage to the plaintiff."[192] "A valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration."[193]

Here, McGinnis has failed to show the existence of an express contract. "'[A]n implied contract is one inferred from the conduct of the parties, though not expressed in words.' 'The parties' intent and mutual assent to an implied-in-fact contract is proved through conduct rather than words.'"[194] "That behavior 'is evaluated from the perspective of a reasonable person, considering all of the attendant circumstances.'"[195]

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192 *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 883 (Del. Ch. 2009) (quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

193 *CSH Theatres, L.L.C. v. Nederlander of San Fransisco Assocs.*, 2018 WL 3646817, at *15 (Del. Ch. July, 31, 2018) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

194 *Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1098 (Del. 2002) (alteration in original) (quoting 17A Am. Jur. 2d § 12 (1991); *Chase Manhattan Bank v. Iridium Africa Corp.*, 239 F. Supp. 2d 402, 408 (D. Del. 2002); *accord Trincia v. Testardi*, 57 A.2d 638, 642 (Del. Ch. 1948) ("An express contract is one where the terms of the agreement are stated in so many words, and an implied contract is where one party receives benefits from another party, under such circumstances, that the law presumes a promise on the part of the party benefited to pay a reasonable price for the same." (quoting *Jones v. Tucker*, 84 A. 1012, 1012 (Del. Super. 1912))); *id.* ("[A]n express agreement is arrived at by words, while an implied agreement is arrived at by acts. Consequently, the difference seems to be only in the evidence by which the agreement is proved.").

195 *Alfred v. Walt Disney Co.*, 2015 WL 177434, at *4 (Del. Ch. Jan. 14, 2015) (quoting *Levey v. Brownstone Asset Mgmt., LP*, 2014 WL 3811237, at *10 (Del. Ch. Aug. 1, 2014)).

Laser Tone and McGinnis had a long-lasting relationship of approximately nine years, and their course of conduct over these nine years supports McGinnis's claims for unpaid wages and commissions. Additionally, Laser Tone has repeatedly acknowledged its employer–employee relationship with McGinnis. Laser Tone even alleges in its Complaint that McGinnis "was employed by Laser Tone since 2007" and was "Laser Tone's highest paid employee."[196] This long-term course of conduct and Laser Tone's admission of the parties' agreement supports this Court's inference of an implied-in-fact contract. Therefore, McGinnis has proven the existence of an employment contract and its sufficiently definite terms by a preponderance of the evidence. Laser Tone's failure to pay McGinnis's wages and commissions is a breach of that contract, and McGinnis provided information about his specific damages.

This Court awards McGinnis $2,916.06 for his unpaid wages and commissions.

D. The Farling Defendants' Claim for Indemnification and Contribution from McGinnis

The Farling Defendants assert a claim for indemnification against McGinnis. They argue that under the Indemnification Agreement McGinnis is responsible for (1) the settlement amounts paid (or to be paid) by the Farling Defendants to Laser

196 Compl. ¶¶ 9,14.

Tone and (2) attorneys' fees incurred to enforce the Indemnification Agreement.[197] McGinnis interprets the Indemnification Agreement to require Laser Tone to prevail on its claims against him before the Indemnification Agreement will apply.[198]

Resolution of this claim requires the Court to interpret the Indemnification Agreement and determine whether the amounts the Farling Defendants claim are covered by the Indemnification Agreement. "'Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party.' 'We will read a

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197 Pl.'s Reply Br. 27-31. The Farling Defendants previously claimed that McGinnis is responsible for the Farling Defendants' monetary losses in the form of start-up money, equipment, and operating costs for PrintIT. *Id.* at 30. The Farling Defendants subsequently waived this claim. Post-Trial Hr'g Tr. 60:18-61:6.

198 Def.'s Opening Br. 70. McGinnis now contends that the Farling Defendants settled Laser Tone's claims against them under false pretenses, breaching the implied covenant of good faith and fair dealing. McGinnis also now contends that the Indemnification Agreement is not a valid contract because he received no consideration. McGinnis raises these arguments for the first time in his post-trial opening brief. In doing so, he failed to provide fair notice of these arguments before trial, which deprived the Farling Defendants of the opportunity to introduce evidence in response to these allegations. Allowing these arguments at this stage would cause sufficient prejudice to justify precluding McGinnis from pursuing the arguments. *See In re Genelux Corp.*, 126 A.3d 644 (Del. Ch. 2015) ("Although Plaintiffs did raise this argument for the first time in their post-trial opening brief, I conclude that Plaintiffs' failure to provide fair notice of this argument before trial caused Defendants sufficient prejudice to justify precluding Plaintiffs from pursuing the argument . . . ."), *vacated in part, Genelux Corp. v. Roeder*, 143 A.3d 20 (Del. July 6, 2016) (TABLE). Thus, I do not consider these newly raised argument.

contract as a whole and we will give each provision and term effect . . . .'"[199] The relevant provisions of the agreements reads as follows:

> [McGinnis], jointly and severally, agrees to indemnify and save harmless [the Farling Defendants] . . . from any claim action, liability, loss, damage or suit arising from the following:
>
> [McGinnis]'s employment relationship with [Laser Tone], including, but not limited to, those certain allegations and issues raised within the March 3, 2017, letter of Sean E. Regan, Esq., of the law firm Giordano, Halleran & Ciesla, P.C., AND/OR, [McGinnis]'s subsequent employment, service, and/or relationship with [PrintIT].
>
> . . .
>
> Should [McGinnis] fail to so defend and/or indemnify and save harmless, then, in such case, [the Farling Defendants] shall have full rights to defend, pay or settle said claim on [their] own behalf without notice to [McGinnis] for all fees, costs, and payments made or agreed to be paid to discharge said claim.
>
> . . .
>
> [McGinnis] hereby, expressly and without reservation or exception, agrees to pay all reasonable attorneys' fees necessary to enforce said indemnification.[200]

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199 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxson Commc'ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005); *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010)).

200 JX 166.

Nothing in the Indemnification Agreement indicates that the indemnification obligation is contingent upon the outcome of Laser Tone's claims against McGinnis. Indeed, the Indemnification Agreement does not indicate that McGinnis's success in defending in the claims against Laser Tone affect his indemnification obligations. Further, the Supreme Court has considered whether indemnification under a similar indemnity agreement is dependent on the outcome of the indemnitor's liability, and concluded it does not.[201] Instead, "when a claim is made against an indemnitee for which he is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held not liable."[202] Therefore, McGinnis's argument fails; he is bound to indemnify the Farling Defendants under the agreement regardless of his actual liability.

The language of the Indemnification Agreement explicitly obligates McGinnis to indemnify the Farling Defendants for both (1) attorneys' fees incurred to enforce the Indemnification Agreement and (2) if he fails to defend the Farling

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201 *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 421 (Del. 1994) ("[Indemnitor] contends that even if [Indemnitee] is entitled to indemnification under the Indemnification Clause, there is still a requirement that the litigation proceed through trial with a finding . . . against [Indemnitor] on the allegations of negligence as to him. Such a requirement has no foundation in reason or policy.").

202 *Eastern Mem'l Consultants, Inc. v. Gracelawn Mem'l Park, Inc.*, 364 A.2d 821, 825 (Del. Super. 1976) (quoting *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.*, 475 P.2d 69, 71 (Or. 1970)).

Defendants, the amounts the Farling Defendants incurred (and will incur) to settle Laser Tone's claims against them. McGinnis does not point to any language in the Indemnification Agreement that would allow a contradictory conclusion.[203]

I conclude that the Indemnification Agreement requires McGinnis to indemnify the Farling Defendants for the settlement amounts, meaning the $30,000 owed to Laser Tone and the actual costs incurred from transferring prepaid customer accounts to Laser Tone less any credits allowed by the settlement agreement.[204] Further, McGinnis must reimburse the Farling Defendants' attorneys' fees incurred in enforcing the Indemnification Agreement.

III. CONCLUSION

For the foregoing reasons, I award Laser Tone $1 in nominal damages to be paid by McGinnis for his single violation of the Misuse of Computer Systems Information Act; I also award Laser Tone its reasonable attorneys' fees and costs incurred in prosecuting the claim that McGinnis improperly deleted Laser Tone data from his Laser Tone laptop, which shall not exceed $20,000. I award McGinnis $100,000 in compensatory damages for defamation to be paid by Laser Tone and Martin, jointly and severally. I award McGinnis $2,916.06 in compensatory

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[203] McGinnis also does not challenge that he failed to defend the Farling Defendants.

[204] *See* JX 176 ¶¶ 1(a), f.

damages to be paid by Laser Tone for its breach of their employment contract. Finally, I award the Farling Defendants a declaratory judgment that they are entitled to indemnification from McGinnis for their settlement amount and attorneys' fees and costs incurred in this action. All other relief is DENIED. The parties shall confer regarding the reasonable attorneys' fees awarded in this action. The parties shall inform the Court within twenty days whether they have reached agreement regarding the attorneys' fees. If the parties reach agreement regarding fees, they shall submit a joint implementing form of order and final judgment on the same day. If parties do not reach an agreement regarding fees, they shall inform the Court by the above specified date and submit a proposed briefing schedule to resolve any attorneys' fees dispute.

IT IS SO ORDERED.