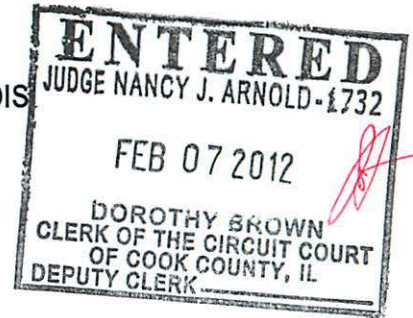


IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION



HERZUM SOFTWARE LLC., HERZUM SRL,
FOURTHCODEX, INC., FOURTHCODEX,
SPA., and HERZUM SOFTWARE LLC acting
derivatively on behalf of FOURTHCODEX,
INC. and HERZUM SLR acting derivatively on
behalf of FOURTHCODEX, SPA.,
Plaintiffs,

No. 08 CH 17194

Judge Nancy J. Arnold

Calendar No. 11

v.

LUIGI GUADAGNO, INDERBIR SIDHU,
CHRISTOPHER LEE, VANESSA FRANCENE
CECICH, HAROON CHAUDHRY, TINA
MOSCA, STEVE MOSCA, KENETICA, LLC, an
Illinois Limited Liability Company, and
EXEURA SOCIETA'A RESPONSABILITA'
LIMITATA – SPIN OFF DELL 'UNIVERSITA'
DELLA CALLABRIA (a/k/a Exeura Srl, a/k/a
Exeura Knowledge Management Systems,
Srl), an Italian corporation,

Defendants.

OPINION AND JUDGMENT ORDER

THIS CAUSE COMES ON FOR RULING AFTER TRIAL on all issues in Plaintiffs' Second
Amended Complaint.

THE PLEADINGS

The Plaintiffs in this case are two Herzum Software entities, one formed as an LLC here in the United States, and the other formed under Italian law as the Italian equivalent of a corporation. The Herzum entities also plead their case in part as a derivative action for Fourthcodex, Inc., and Fourthcodex, SPA, two entities created as a joint venture between the plaintiff Herzum entities and

an Italian and a U.S. entity each called Exeura. The joint venture comprising the Fourthcodex companies is the subject matter of this suit. The American Fourthcodex company is also a plaintiff.

There are several defendants. One is the Italian Exeura entity that had been Herzum's partner in the Fourthcodex joint venture. The other defendants still in the case at this point are three former employees of plaintiff Herzum (Mr. Guadagno, Mr. Sidhu and Mr. Lee), each of whom had worked on the Fourthcodex project, as well as an entity known as Kenetica, LLC, created and controlled by defendant Mr. Guadagno. Two other defendants (Ms. Mosca and Mr. Mosca) were dismissed before trial, and the court entered judgment in favor of two others (Ms. Cecich and Mr. Chaudhry) at the close of the Plaintiffs' case.

Plaintiffs' Second Amended Complaint is plead in eleven counts, on various theories. The factual allegations may be summarized as follows: the joint venture (Fourthcodex) was created to develop and market certain computer software. Fourthcodex itself had no employees. The two partners, Herzum and Exeura, each contributed their own personnel to the joint venture. The three Herzum employees remaining as defendants were all at a high level of experience and had significant responsibility in the Fourthcodex work.

The Fourthcodex joint venture was established in July 2006. The software it was formed to commercialize and market was comprised of four pieces, known as "Hilex," "Olex," "Onto DLV," and "Alex." The first three components were derivative works of programs owned by Exeura; the fourth component was written by Herzum employees working for Fourthcodex.

It is alleged that each of the three Herzum employee defendants had access to the confidential and proprietary information of both Fourthcodex and Herzum, including information as to customers and prospective customers. Each of these defendants had signed confidentiality agreements and restrictive covenants as part of their employment agreements.

It is alleged that in October, November, and December of 2007, the three Herzum employee defendants began telling Peter Herzum (who owned the controlling interest in the Herzum companies) that the software components that comprised the Fourthcodex projects were not succeeding commercially and that they had no commercial value. It is alleged that in fact these defendants planned to usurp Herzum's opportunities in the Fourthcodex products, as well as Fourthcodex's customers and prospective customers, and deceived Peter Herzum about the viability of the Fourthcodex project in order to induce him to agree to leaving the joint venture. It is alleged that in reliance on what his high-level employees advised him, Peter Herzum did in fact agree to withdrawing the Herzum companies from the Fourthcodex joint venture. It is alleged that the three Herzum employee defendants took actions to usurp the sales opportunities and customers developed by Herzum for the Fourthcodex project.

It is further alleged that defendant Mr. Guadagno, who had been the most senior person overseeing the Fourthcodex project, formed his own company, defendant Kenetica, with the intention of directing Herzum opportunities to that new company. It is alleged that within a period of two months, all three of the Herzum employee defendants resigned their positions at Herzum and began work with Kenetica in one fashion or another. It is alleged that Kenetica formed a business relationship with Exeura, Herzum's former joint venturer, with the intent of continuing to work on what had been the Fourthcodex project. It is further alleged that Exeura participated in the effort to oust the Herzum companies from the Fourthcodex project and agreed to work on that project with the new entity formed by the three Herzum defendants instead. It is alleged that Exeura conspired with the three Herzum employees for that purpose.

Several legal theories and prayers for relief are phrased in the various counts of the Second Amended Complaint. These include fraud, breach of fiduciary duty, trade secret

misappropriation, conspiracy, deceptive trade practices, tortious interference with business relationships, and breach of the Herzum employees' employment contracts.

FINDINGS OF FACT

The court will begin with a timeline it has prepared from the evidence, all of which the court has determined to be true, unless otherwise noted. The expectation is that the timeline will provide ease of reference for the various events that will be discussed later in this opinion.

2006

8/29/06 **Fourthcodex formed. Initial private agreement between the joint venturers signed.**

2007

1/07 By this time, Herzum's Lee says he had determined that the Fourthcodex components were fundamentally flawed. Lee also says he shared this opinion with Peter Herzum at this time. The court disbelieves this testimony.

3/23/07 **By-laws adopted at first Board of Directors meeting for Fourthcodex.**

First Quarter '07 By this time, Herzum's Guadagno says he had determined that the Fourthcodex components were fundamentally flawed. Guadagno also says he shared this opinion with Peter Herzum at this time. The court disbelieves this testimony.

5/07 Semantic Technology Convention- Fourthcodex product launched.

6/20/07 Herzum's Sidhu, writing to a friend, explains that his group is looking for venture capital because of its "differences" with Herzum.

7/5/07 Herzum's Lee meets with Fourthcodex personnel in Italy to discuss various aspects of the Fourthcodex work, including data mining.

Summer '07 Lee says there was a general feeling in the Herzum side of Fourthcodex that leads were not developing into customers.

8/2/07 Rullo (of Exeura) working with Sidhu and Guadagno on a data mining suite for a Fourthcodex customer called "Full Capture Solutions."

9/30/07 Sunday morning meeting of Herzum's Sidhu, Lee, and Guadagno, at Guadagno's home.

10/7/07 Informal meeting in Rome. Present: Herzum's Guadagno, De Julio and Rollo (both of Exeura), and Peter Herzum.

10/8/07 Mr. Guadagno and Exeura- not Fourthcodex- send proposed draft of an agreement for a transaction with a prospective customer being developed by Fourthcodex, called "Co-Decision."

10/23/07 Rullo (of Exeura) prepares marketing materials for Exeura. The materials claim as successful experimental results what had actually been Fourthcodex' work, specifically with Fourthcodex customer "Full Capture Solutions."

11/1/07 Sidhu, Lee and Guadagno send email to Exeura, proposing a business plan for a company to be called "Exeura Technologies." Among the items in the proposed plan is that Sidhu, Lee and Guadagno would contribute "existing contracts," identifying Full Capture Solutions, Co-Decision, and Topaz (customers and prospects of Fourthcodex).

11/1/07 De Julio (of Exeura), says that as of this date he no longer trusts Peter Herzum, but still believes in the Fourthcodex project.

Early 11/07 KM trade show. Herzum exhibits Fourthcodex there.

11/07 Exeura personnel stop working on the Fourthcodex project.

11/07 De Julio calls Peter Herzum and asks to talk about quality and scalability problems with the Fourthcodex product.

11/07 After De Julio's call, Peter Herzum consults with his employees Lee and Sidhu, who confirm that there were quality and scalability problems with the product.

11/5/07 Exeura's Rullo and Herzum's Sidhu working on a new version of Olex for Full Capture Solutions (a Fourthcodex customer).

11/9/07 Lee shopping for health insurance.

11/16/07 Guadagno directs a Herzum employee to look for new office space. Suitable space in the Merchandise Mart is located by 12/10/07.

11/20/07 Herzum's Mosca distributes leads from the KM show for others in Herzum to develop.

12/4 and 12/5/07 Herzum's Mosca again distributes leads from the KM show for others in Herzum to develop.

12/7/07 Meeting in Rome- without Peter Herzum. Present: Exeura's De Julio and Herzum's Guadagno and Sidhu.

12/9/07 De Julio expresses anger over discussion at that meeting.

12/9/07 Guadagno writes back, saying he is sorry if his presentation caused De Julio doubts, and that "we are all ready to give our best. Your trust in us will not be betrayed."

12/9/07 Guadagno sends De Julio a projected budget for the proposed new company. It includes projected salaries for identified employees, all of whom are current Herzum employees.

12/11/07 De Julio sends Guadagno Exeura brochures for use in leasing office space for the new company.

2nd week in 12/07 Lee, Sidhu, Guadagno meet with Peter Herzum and tell him that they cannot work with the Italians from Exeura, that the Italians were not responsive and do not work as a team.

12/14/07 Mr. Guadagno resigns from Herzum.

12/14/07 Guadagno reports to De Julio that he has just resigned.

12/17/07 Herzum's Mosca sending to Guadagno leads list from the KM trade show.

12/18/07 Guadagno sends the leads list back to Mosca with "interesting ones" deleted.

12/17/07 Herzum's Mosca sends Guadagno a current forecast projecting revenues from Fourthcodex.

12/18/07 Guadagno sends the forecast back, with reduced figures.

12/27/07 Lee resigns from Herzum.

12/27/07 Lee writes to Guadagno: "We're going to be very busy soon."

12/28/07 De Julio directs his people to stop communicating via Fourthcodex email.

12/29/07 De Julio and Guadagno agree that Exeura should take over a Fourthcodex "action item" immediately and assign it to Lee.

2008

1/2/08 Lee already has an Exeura email account.

1/08 Lee begins working for Guadagno, but on the Fourthcodex components.

1/3/08 De Julio asks Peter Herzum to freeze expenses.

1/4/08 Exeura sets up accounts in a software program for tracking sales leads.

12/5/07-1/7/08 Email series with Fourthcodex prospective customer called Diesel Point and Herzum employee. Subject matter is possible use of Fourthcodex' Helix and Olex for something new the customer is demanding. As of 1/4/08, the Herzum employee describes "our team" as being Guadagno, Sidhu, and Lee, and as of 1/7/08 the Herzum employee is setting up a meeting with Guadagno so that he can explain "the name change from Fourthcodex to Exeura."

1/8/08 Herzum's Sidhu assigns work on the Fourthcodex components to Guadagno and Lee (both recently resigned from Herzum).

1/8/08 Guadagno writes to Herzum's Mosca about Fourthcodex sales leads that have developed to the "opportunity stage."

1/9/08 Herzum's Mosca passes on to Guadagno a sales lead from the KM trade show.

1/11/08 Fourthcodex customer Full Capture writing to Peter Herzum after learning that Lee had resigned from Herzum, expressing the hope that Lee's knowledge about Full Capture's needs had been transferred to someone within Herzum.

1/14/08 Herzum's Sidhu putting Guadagno in touch with a Herzum customer called Alliance Boots.

1/20/08 Herzum's Sidhu writes to Exeura's Rullo and De Julio and to Guadagno, saying he is excited about this new venture and he is looking forward to a long and successful collaboration. Sidhu also writes that "Olex on data mining suite is great."

1/22/08 **Fourthcodex shareholder's meeting- shareholders agree to dissolve Fourthcodex. Liquidator appointed.**

1/28/08 Herzum's Sidhu working on a project with Guadagno and Lee.

- 1/28/08 Lee sends Fourthcodex sales leads to Guadagno from a Fourthcodex server that Lee still had access to.
- 1/30/08 Exeura's De Julio writes to Fourthcodex customer Full Capture Solutions to advise it that an "unfortunate business climate" has forced them to shut down Fourthcodex. He further advises that Exeura and Herzum are in the process of negotiating and that Hilex, Olex, and Onto DLV will return to Exeura when things are settled. He advises that Exeura fully intends to continue development of these products and is prepared to support Full Capture's existing contract.
- 1/31/08 Kenetica and Exeura execute a professional service letter setting services to begin 2/1/08. Total retainer fees to Kenetica for first six months to be €300,000, at €50,000 per month.
- 2/5/08 Herzum's Sidhu working with Lee and Guadagno on Hilex for customer Full Capture Solutions.
- 2/8/08 **Private agreement of dissolution of Fourthcodex, which includes distribution of assets between Herzum and Exeura.**
- 2/12/08 **Minutes of Exeura Board of Directors meeting- ratifying dissolution of Fourthcodex and contract with Kenetica.**
- 2/13/08 Exeura's De Julio writes to Sidhu to say "Welcome aboard."
- 2/15/08 or 2/22/08 **Sidhu resigns.**
- 2/27/08 Herzum's Mosca setting up conference calls for Guadagno with Fourthcodex leads from the KM trade show.
- 5/08 **Mosca terminated from Herzum.**
- 6/21/08 Lee and Sidhu communicating with Full Capture Solutions about the most recent versions of Hilex, Olex, and Onto DLV.
- 11/25/08 Exeura brochures for product called "Rialto" being distributed. Address for U.S. Office of Exeura shown at the Merchandise Mart space located by a Herzum employee at Guadagno's request on 12/10/07.

FINDINGS AS TO LIABILITY ON THE VARIOUS CLAIMS

BREACH OF FIDUCIARY DUTY- COUNT VI AND CONSPIRACY- COUNT VII

The timeline above should clearly illustrate the status of Exeura, Mr. Guadagno, Mr. Lee and Mr. Sidhu vis-à-vis the Herzum companies and Fourthcodex as each of the acts described above occurred. Exeura and Herzum were the two joint venturers that formed the entities known as "Fourthcodex s.p.a." and Fourthcodex LLC on Aug. 29, 2006. Exeura and Herzum each owned 50% of each of the Fourthcodex entities¹. The Exeura entities were owned by research and teaching professors in Italy who had individually developed certain software prototypes using grants from the Italian government. Professor De Julio was the Chairman of the Board of Exeura. He refers to Exeura as a software and professional services company with no experience in marketing or the ability to proceed from a research prototype to a product capable of being marketed. It was the parties' intent that the Italian Fourthcodex would focus on technical development and the American Fourthcodex would focus on marketing in the U.S.

Exeura and Herzum stood in the relationship of joint venturers from Aug. 29, 2006, when the initial private agreement establishing Fourthcodex was signed, until Jan. 22, 2008, when the shareholders voted to dissolve Fourthcodex and to appoint a liquidator. The private agreement as to the distribution of the software components and licensing agreements, etc. was signed on Feb. 8, 2008.

Applicable Law

It is well established that joint venturers, like partners, owe each other fiduciary duties of loyalty during the term of the joint venture. See, e.g., Dremco, Inc v. South Chapel Hill Gardens, Inc., 274 Ill. App. 3d 534 (1st Dist. 1995). The scope of the duty of loyalty is related to the scope of

¹ For convenience, throughout this opinion the Court will refer to "Herzum," "Exeura," and "Fourthcodex" in the singular, even though there are two business entities bearing each of those names.

the joint venture and the parties' expectations of each other. Here, the initial private agreement clearly states that the Exeura software prototypes Hilex, Olex and Onto DLV were assigned to Fourthcodex, as were certain software prototypes of Herzum. Although defendants attempted to make an issue in this regard over the translation of the pertinent part of the private agreement, in the end, there was no real issue. Prof. De Julio acknowledged that Exeura had transferred the ownership rights to the research prototype software to the joint venture. In the initial private agreement, the parties also expressly agreed not to engage in competition in Europe or the U.S. for the "respective area of expertise."

Findings

It is clear from the evidence, not only as documented in the many emails that were placed into evidence, but also as freely admitted by the participants, that as early as October 2007, Exeura was working separately, not under the auspices of Fourthcodex, to garner customers that were prospects developed by Fourthcodex and to market as its own successes what were actually the successes of Fourthcodex. This is demonstrated by Herzum's Mr. Guadagno and Exeura sending a proposed draft agreement to Fourthcodex' prospect "Co-Decision" on Oct. 8, 2007 and Exeura's Prof. Rullo independently preparing marketing materials for Olex on Oct. 23, 2007. By November, Exeura had also stopped working on Fourthcodex projects altogether. By Nov. 3, 2007, Exeura was reviewing a proposed business plan for a company that would be called "Exeura Technologies." The other members of the proposed business would be Herzum employees Mr. Sidhu, Mr. Lee and Mr. Guadagno. Exeura's Prof. Rullo admitted to planning this new venture at this time. By Nov. 5, 2007, Exeura's Prof. Rullo was working apart from Fourthcodex to develop a new version of one of the Fourthcodex components for Fourthcodex' licensee Full Capture Solutions.

On December 7, 2007, Exeura's Prof. De Julio and Prof. Rullo and Herzum's Mr. Guadagno and Mr. Sidhu met secretly in Rome. Prof. De Julio freely acknowledged that this meeting was deliberately kept secret from Peter Herzum. There they continued their discussions as to forming a new company and continuing work on the Fourthcodex components, without Peter Herzum or Fourthcodex. By Dec. 10, 2007, they were looking for office space in Chicago and Exeura was assisting Mr. Guadagno with information about Exeura to provide to the prospective landlord. As soon as Mr. Guadagno resigned from Herzum, on Dec. 14, 2007, Prof. De Julio and he discussed working to develop the leads that Fourthcodex had obtained from the KM trade show the preceding month. Prof. De Julio admitted he was well aware of the source of those leads. By Dec. 29, 2007, Prof. De Julio and Mr. Guadagno baldly agreed to take over a "hot" Fourthcodex lead immediately. On the witness stand, Prof. De Julio acknowledged it was a Fourthcodex lead, and acknowledged they were trying to take it. Exeura's breach of its fiduciary duties as a joint venturer has thus been well established.

The three Herzum employee defendants have also been charged with breach of the fiduciary duties they each owed to their employer, Herzum, and the court finds that these charges have been established as well. In addition, defendant Mr. Guadagno was an officer of Fourthcodex, and thus owed a fiduciary duty directly to the joint venture as well as to Herzum. The minutes from the first Board of Directors meeting show that he was elected Executive Vice President. Since the joint venture lasted until it was dissolved on Jan. 22, 2008, defendant Mr. Guadagno owed his fiduciary duty until that date. As an employee of Herzum, he owed a duty of loyalty until he resigned on Dec. 14, 2007.

Applicable Law

It is well settled that an employee owes a duty of fidelity and loyalty to his employer during the term of his employment and that an act inconsistent with that duty is a breach of fiduciary duty. ABC Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc. 62 Ill. App. 3d 671, 683 (1st Dist. 1978). For example, while in the employ of his employer one may not, consistent with his fiduciary duties, solicit his employer's customers for himself, and may not compete with his employer while still employed by him. Id. at 683. Nor may he solicit his co-employees for a new venture and suggest that they do a few things to harm the employer's business in the meantime. Id. at 676. It is a violation of an employee's fiduciary duty of loyalty to assume duties adverse to his employer. Vendo Co. v. Stoner, 58 Ill. 2d 289, 304 (1974). An employee's eventual resignation does not absolve him from liability for disloyal transactions completed thereafter but begun while still an employee. Veco Corp. v. Babcock, 243 Ill. App. 3d 153, 161 (1st Dist. 1993).

No doubt because officers in a company have more power and more responsibility than employees who are not officers, Illinois cases prescribe a somewhat higher duty of loyalty for officers, generally described in terms of things they may not do. They are held to a duty not to hinder the abilities of the company in its business or to exploit their positions within the company for their own personal benefit. Id. 243 Ill. App. 3d at 160. They breach their fiduciary duties if they do various things, many of which would be breaches of fiduciary duty by an ordinary employee as well. See Preferred Meal Systems, Inc. v. Guse, 199 Ill. App. 3d 710, 725 (1st Dist. 1990). If all defendant employees acted in concert for their mutual benefit, all are culpable. Id. at 727.

Findings

There seems to be some question as to whether defendants Mr. Guadagno and Mr. Sidhu were officers in the Herzum companies in the recognized sense of the word. Mr. Guadagno

referred to himself as the "world-wide director of research and development" for Herzum. Mr. Sidhu said Mr. Guadagno also called himself the CEO. Peter Herzum described Mr. Guadagno as being the most senior person for day-to-day management in the Herzum side of the Fourthcodex project. Mr. Sidhu was referred to as the chief technical officer in Herzum. But there was no evidence that either man was an officer of the Herzum corporation, as in secretary, treasurer, or vice president. It was definitely established that Mr. Guadagno was an executive vice president of Fourthcodex.

The distinction between being an actual corporate officer or being merely a person at a higher level of responsibility within Herzum does not make much difference in this case because the breaches of loyalty by Messrs. Guadagno and Sidhu that have occurred here are very basic, as well as those by Mr. Lee.

Mr. Guadagno had immigrated to the U.S. from Italy many years before the time in question. His Italian identity and fluency in the language no doubt made it easy for him to become friendly with the Italian professors from Exeura. He was in Italy on Fourthcodex business frequently and by May 2007, he was describing Professor Rullo as having become a "friend." Professor De Julio said he had met with Mr. Guadagno many times, so many times that he could not recall meeting with him alone the night before the Rome meeting of Oct. 7, 2007.

There was a meeting in Rome in Oct. 7, 2007. What occurred at that meeting is disputed by the parties. What is not disputed, however, is that after the meeting, Mr. Guadagno rode back on the train with Professor De Julio to someplace else in Italy. Mr. Guadagno testified that while on the train he told Prof. De Julio something he said Peter Herzum had said to him privately at the meeting. Mr. Guadagno also told him that Mr. Herzum had inflated certain figures related to the "human resources" contributed by Herzum to Fourthcodex and in a "pipeline" showing prospective sales for Fourthcodex. Mr. Guadagno told Mr. Sidhu about that supposed occurrence as well. By

the third week in October, Prof. De Julio was telling Mr. Guadagno, on the phone, that he was going to move forward to dismantle Fourthcodex.

As indicated, the events of the meeting in Rome on Oct. 7, 2007 are disputed. There are no minutes from this meeting, nor was any agenda introduced into evidence. The attendees were Prof. De Julio and Prof. Rullo of Exeura and Peter Herzum and Mr. Guadagno of Herzum. Peter Herzum described the meeting as a "review meeting." He said that Prof. De Julio had prepared an agenda. He also said that Mr. Guadagno had told him that he had spent the evening before the meeting with Prof. De Julio. Mr. Guadagno professed not to recall having done so. Mr. Guadagno said that Peter Herzum had told him a week or two before that Prof. De Julio had called the meeting and he thought it might be "tough."

Professor De Julio said the Oct. 7, 2007 Rome meeting was "at best" some kind of informal meeting of the Board of Fourthcodex, although Mr. Guadagno was not a member of the Board. Prof. De Julio said there are no minutes and there was no agenda. He said the purpose of the meeting was for him to tell Peter Herzum that he intended to seek dissolution of Fourthcodex pursuant to a certain provision in the by-laws. He acknowledged that no formal notice of dissolution was issued then. Peter Herzum testified that dissolution of Fourthcodex was never discussed at that meeting by anyone, and no decision about dissolution was made. He said that at the meeting they discussed the advisability of looking for venture capital for the business. Professor De Julio concurred that venture capital was discussed, and said that at this meeting it was agreed that Herzum should attempt to raise some and that the group would give Herzum three months to do so. Mr. Guadagno said that Prof. De Julio began the meeting by asking for dissolution, that Peter Herzum disagreed, that Peter Herzum suggested that the company seek venture capital, and that Mr. Guadagno then presented a PowerPoint instruction on venture capital, since the Italians were "ignorant" of it. The court believes Mr. Herzum's testimony about this

meeting, and also finds that while in Rome, Mr. Guadagno succeeded in turning Professor De Julio against Peter Herzum.

Of interest in conjunction with this Oct. 7, 2007 meeting in Rome is a Sunday morning meeting a week before (Sept. 30, 2007), at Mr. Guadagno's house. Email exchanges show Mr. Guadagno, Mr. Sidhu and Mr. Lee planning to meet there. An email from Mr. Sidhu sent at 3:00 a.m. the morning before the meeting, saying he's "still fixing up the papers" was not recalled by its author. Mr. Guadagno flatly denied that it was a meeting to plan a new venture. Mr. Lee likewise denied that the purpose of the meeting was to make plans for a new venture. He said they were all getting together on a Sunday morning at Mr. Guadagno's house to talk about "how to make Fourthcodex better."

Perhaps this is a good time for the court to record its observations as to the credibility of these witnesses. It must be said as to Mr. Lee that his various denials of things that were memorialized in various emails cast suspicion on his credibility at the outset. As his testimony continued, the likelihood of disparity between actuality and the witnesses' testimony grew. The court particularly disbelieved his denial of any knowledge of the very serious formal proposal sent by Mr. Guadagno on Nov. 1, 2007 to Exeura, bearing the names of Mr. Guadagno, Mr. Sidhu and Mr. Lee as signators. Indeed, Professor Rullo acknowledged that it had always been these three men who were going to form the new venture with Exeura.

Mr. Guadagno is in his own category, as far as credibility is concerned. He, too, repeatedly denied facts that were staring him in the face in various emails. He frequently pretended not to remember who a particular person was, even if that person and he had exchanged several emails about setting up a new venture. Mr. Guadagno showed a marked propensity to color everything. For example, he referred to a marketing brochure that he copied from Fourthcodex to use for the new business being formed by himself, Mr. Sidhu and Mr. Lee with

Exeura, as a "high level white paper." His testimony displayed a mastery of withholding information, and he exhibited a facility in speech unchallenged in any way by scruples as to the truth. Somewhere in the middle of his testimony, the court concluded that this witness' testimony was not to be trusted, and that conclusion was never disturbed.

The court finds that Mr. Guadagno, Mr. Sidhu and Mr. Lee each breached their duties of loyalty and fidelity to their employer, Herzum. Mr. Guadagno turned the President of Herzum's joint venturer (Prof. De Julio) against the President of Herzum at the Rome meeting on Oct. 7, 2007. This act clearly falls in the category of one meant to harm the Herzum business. The next day, Mr. Guadagno was working with Exeura, and not Herzum, to secure a transaction with a Fourthcodex prospective customer. This is competition with the employer. On Nov. 1, 2007, while all were still employed by Herzum, Mr. Guadagno, Mr. Lee and Mr. Sidhu prepared and forwarded a business plan to Exeura for a new business and promised to provide "existing contracts" belonging to Fourthcodex. This is solicitation of the employer's joint venture customers. This was also not just planning: these Herzum employees were already forming their own relationship with their employer's joint venturer, taking their employer's place.

In early November 2007, Herzum invested significant time, money and personnel to attend the "KM" show. "KM" is an acronym for "knowledge management," a recognized term in computer technology. Sales leads from the KM show were distributed within Herzum for development after the show. Three days after Mr. Guadagno resigned, he received a copy of the leads from that show and altered them, taking out the "interesting ones."

In mid-November, Mr. Guadagno was directing a Herzum employee to search for new office space, and using that Herzum employee's services, not telling her that the new office space was not going to be for Herzum, but for the new business Mr. Guadagno was planning to form. Mr.

Guadagno obtained brochures about itself from Herzum's joint venturer (Exeura) to help him secure the new office space.

In the second week of Dec. 2007, Mr. Lee, Mr. Sidhu and Mr. Guadagno met with Peter Herzum and told him they cannot work with the Italians from Exeura, and that the Italians refuse to work as a team. This, among other things, was an attempt to harm Herzum's business relationship with Exeura in the joint venture.

Two days after Mr. Lee resigned, he was assigned to take over a Fourthcodex "action item" and was working on the Fourthcodex components, not for Fourthcodex or Herzum, but for Mr. Guadagno's new company. The "team" of Mr. Guadagno, Mr. Sidhu and Mr. Lee began Dec. 5, 2007 soliciting a Fourthcodex customer, called Diesel Point, to use two of the Fourthcodex components and advised that there has been a "name change" from Fourthcodex to Exeura. This is direct competition with the employer, Herzum.

While still employed by Herzum, on Jan. 8, 2008, Mr. Sidhu assigned work on the Fourthcodex components to the recently resigned Mr. Lee and Mr. Guadagno, the latter still being an officer of Fourthcodex at that time. Mr. Guadagno took a lead from the KM trade show, passed on to him by a Herzum employee on Jan. 9, 2008, while Mr. Guadagno was still an officer of Fourthcodex. He also used a marketing brochure that had been developed by Fourthcodex, and simply changed it to use Exeura's name instead of Fourthcodex. All four of Fourthcodex' components were shown on that brochure.

He also took a customer of Fourthcodex called Co-Decision. Documentation of his dealings with that customer commenced on Nov. 13, 2007 and continued until Feb. 28, 2008. Greater description of Mr. Guadagno's dealing with this Fourthcodex customer appears later in this opinion, in the discussion of the Deceptive Trade Practices claim.

On Nov. 14, 2008, Mr. Sidhu, still a Herzum employee, solicited another Herzum customer for Mr. Guadagno. On Jan. 28, 2008 and on Feb. 5, 2008, Mr. Sidhu was actually working on a competing project with Mr. Guadagno and Mr. Lee, and Mr. Lee was sending Mr. Guadagno leads from the KM trade show from a Herzum computer server that he had not relinquished. In sum, the evidence of disloyalty and breach of fiduciary duty by Mr. Guadagno, Mr. Lee and Mr. Sidhu is overwhelming.

This same evidence also supports Plaintiff's theory of conspiracy set out in Count VII. There is no doubt from the evidence that Exeura, Mr. Guadagno, Mr. Sidhu and Mr. Lee were all conspiring with one another to break up Fourthcodex and to continue with the Fourthcodex work, by substituting the three Herzum employees for Herzum as Exeura's new partner in whatever business form the new relationship would take. The acts of individual conspirators in furtherance of a conspiracy bring liability to all of the conspirators. Adcock v. Brakegate, 164 Ill. 2d 54 (1994).

FRAUD- COUNT X

The evidence has clearly and convincingly established that a fraud was committed by defendants Mr. Guadagno, Mr. Lee and Mr. Sidhu against the plaintiff Herzum companies. Fraud is established when there has been clear and convincing evidence that defendants made a false statement of material fact, the defendants knew or believed the statement to be false while making it, the statement was made to induce the plaintiff to a certain action, and the plaintiff did so rely and was damaged thereby. Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 457 (1989); Cwikla v. Sheir, 345 Ill. App. 3d 23 (1st Dist. 2003). Fraud has been proven here by the defendants' own testimony and its inconsistency with their own actions.

These three defendants falsely told Peter Herzum in early November 2007 that there were serious problems with the quality of the Fourthcodex components. In the second week of

December 2007, Mr. Sidhu, Mr. Lee and Mr. Guadagno all falsely told Peter Herzum that they simply could not work with the Italians from Exeura. In fact, they had been formulating their plans with these same Italians to work on these same components for weeks, and a month later Mr. Sidhu writes that "Olex (one of the Fourthcodex components) on data mining is great!" On Oct. 18, Mr. Guadagno had been telling the Italians that there is strong market interest in Hilex. Mr. Guadagno actively altered a list of sales prospects and an analysis of sales projections that were to be given to Peter Herzum, making both documents project a darker picture. Four days after he resigned from Herzum, Mr. Guadagno sent an email to one of Herzum's sales people, advising him that if Peter Herzum called him he should say that the salespeople lost two of the sales prospects they were working on and also told him "do not mention the hot new ones." Lastly, he advised that he should tell Mr. Herzum, regarding the Fourthcodex product itself, that "good ideas, way too early market, technology too raw, issues in delivery, needs 5-10 million to really survive/compete." Peter Herzum was told these things in order to induce him to be receptive to the idea of dissolving Fourthcodex. The court finds that Mr. Herzum did rely on the information that these, his most senior trusted employees falsely gave him, when he agreed to the dissolution, and the Herzum companies were damaged thereby. They lost an ongoing business relationship and the customers of that joint venture. With regard to customer Full Capture Solutions, the loss was renewal of a license carrying a price of \$150,000.00.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS- COUNT V

The same evidence that support Plaintiff's claims of breach of fiduciary relationship and fraud also support the allegations in Count V, that by their described acts defendants Mr. Guadagno, Mr. Lee and Mr. Sidhu interfered with their employer's business relationship with its joint venturer, Exeura. That relationship was sabotaged.

DECEPTIVE TRADE PRACTICES- COUNT II

Applicable Law

One engages in a deceptive trade practice under 815 ILCS 510/1 et. seq. when one “causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services. 815 ILCS 510/2 (a)(3). This count was plead only against Kenetica, Mr. Guadagno, Mr. Sidhu and Mr. Lee.

There was strong evidence showing that defendant Mr. Guadagno deliberately mislead a new Fourthcodex customer, a company called “Co-Decision” into believing it was dealing with Fourthcodex when in reality Mr. Guadagno and Exeura had already usurped that lead. Herzum’s sales person testified that Fourthcodex had actually closed that deal by mid-December 2007. The confusion of the new customer is apparent from its communication of Nov. 13, 2007, introduced into evidence. This customer’s confusion persisted until Jan. 24, 2008, when Mr. Guadagno told its President that the new company that would “replace” Fourthcodex was planned to be called “Exeura Technologies,” and told her to use that name when talking to her investors. On Feb. 21, 2008, the customer was still in a quandary over the name, asking Mr. Guadagno “which logo I should use for Fourthcodex, our U.S. partner?” Mr. Guadagno told her to “just use the Exeura logo.” Ultimately, after discussion with Prof. De Julio, on Feb. 28, 2008, Mr. Guadagno told the customer that its U.S. partner would be Kenetica, which is “operating on behalf of Exeura” and will be absorbed by it.

Another prospective customer was handled similarly. On Feb. 28, 2008, Mr. Guadagno, Mr. Sidhu and Mr. Lee were communicating with Mr. Mosca of Herzum, who advised that a company called Mediregs was inquiring, and when asked to confirm that the name of the seller was “Fourthcodex,” was told “yes,” “to keep things simple at this point.”

REMEDIES

FORFEITURE OF COMPENSATION

To redress a breach of fiduciary duty, a court of equity may require that the compensation the fiduciary received from his principal during the time he was breaching his fiduciary duties be forfeited. As explained in ABC Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc. 90 Ill. App. 3d 817, 836 *et. seq.* (1st Dist. 1980) (an earlier decision in this case was cited supra, 62 Ill. App. 3d 671, 683 (1st Dist. 1978)), such a decree is not entered by way of penalty, but upon the theory that payment is not due for services not performed. In the second decision in ABC Nat'l Transport, Inc., the court held that it was proper to order forfeiture of the entire compensation paid during the entire period of breach. Id. at 838. See also, Vendo Co. v. Stoner, 58 Ill. 2d 289, 313 (1974).

In this case, the breach of loyalty and fidelity owed by Mr. Guadagno, Mr. Sidhu and Mr. Lee to Herzum began at least by Sept. 30, 2007. Mr. Guadagno continued to work for Herzum and be paid his salary until Dec. 14, 2007, Mr. Lee until Dec. 27, 2007, and Mr. Sidhu until Feb. 15, 2008. The evidence was that Mr. Guadagno's annual salary in 2007 was \$140,000, Mr. Lee's was \$100,000, and Mr. Sidhu's was \$115,000. The evidence shows that Herzum and Exeura had agreed to a 30% "loaded" percentage for each salary to reflect additional employee costs, such as health insurance, other benefits, and computers. This evidence came from testimony by Prof. De Julio. The respective amounts of compensation to be forfeited by these three people are: Mr. Guadagno, \$39,916.00; Mr. Lee, \$32,500.00; and Mr. Sidhu, \$56,062.00.

RESTITUTION

From Defendants Kenetica and Mr. Guadagno

The evidence established that as a result of the conspiracy of all the defendants, Kenetica, the company formed and owned by Mr. Guadagno, entered into a contract with Exeura in which Kenetica took the product development work for what had been the Fourthcodex components, taking the place –albeit through a different kind of relationship –of Herzum. Having the three Herzum employees take the place of Herzum was, of course, always the goal of this conspiracy. Mr. Lee and Mr. Sidhu each went to work for Kenetica as soon as they resigned from Herzum.

The evidence established that the business arrangement between Exeura and Kenetica, memorialized in a master subcontractor agreement, resulted in four payments of €50,000.00 each from Exeura to Kenetica. This total sum of €200,000.00 has been converted to U.S. dollars at the exchange rate published on the date of the entry of this judgment. The U.S. dollar equivalent today is \$262,200.00. The business arrangement between Exeura and Kenetica also resulted in a consulting contract with a company called Infogix using what had been the Fourthcodex components. Payment was made to Kenetica on the Infogix contract in the amount of \$49,929.00.

Prof. De Julio attempted to testify that the contracts between Exeura and Kenetica were limited to what is called “data mining,” and therefore not related to the work of Fourthcodex. He acknowledged, however, that there is nothing in the contracts that mentions “data mining.” Prof. De Julio opined that “data mining” was never within the scope of the Fourthcodex joint venture, which was formed to engage in “knowledge management.” This testimony, based on a restricted definition of the term “knowledge management,” was severely undermined in Prof. Rullo’s testimony, which included a reference to a page from Exeura’s own website, and was also contradicted by the testimony of Peter Herzum, which the court believed. There was also

testimony that within Fourthcodex, as early as July, 2007, the parties were working on data mining. Therefore the defense as to the lack of significance of the Exeura/Kenetica contracts is rejected.

The court determines that Kenetica and its owner, Mr. Guadagno, who created Kenetica specifically to acquire these other funds, have been unjustly enriched by the receipt of these sums, and that restitution is the appropriate remedy for this wrong. Specifically, the court determines that a constructive trust should be imposed upon these funds. A constructive trust is an equitable remedy that provides for specific restitution, *i.e.*, return or restoration of property which has been wrongfully acquired." James M. Fischer, Understanding Remedies § 57(d) (1999). Imposition of a constructive trust is an appropriate remedy when property has been acquired through a breach of fiduciary duty. Hofert v. Latorri, 22 Ill. 2d 126 (1961). A constructive trust is the remedial device "through which preference of self is made subordinate to loyalty to others." Meinhard v. Salmon, 249 N.Y. 458, 467 (1928), citing Beatty v. Guggenheim Exploration Co., 225 N.Y. 380 (1919). An "inveterate and uncompromising application of the construction trust remedy 'does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.'" Graham v. Mimms, 111 Ill. App. 3d 751, 762-63 (1st Dist. 1982), citing Guth v. Loft, Inc., (1939) 23 Del. ch. 255, 270, 5 A.2d 503, 510.

From Exeura

The evidence established, through the testimony of Professor De Julio himself, that Exeura, Herzum's joint venturer, stopped doing any work on the joint venture's project in November, 2007. During this same month, in contrast, its partner, Herzum, undertook the significant expense of exhibiting the Fourthcodex product at the KM trade show. Herzum also

continued otherwise to deploy its personnel on the Fourthcodex work as usual. Prof. De Julio did not contact Peter Herzum and ask him to freeze expenses until Jan. 3, 2008.

The court determines that Herzum is entitled to restitution from Exeura of the human resources it was obligated, but failed, to supply. The shareholder's private agreement of August 29, 2006 provided for each side to contribute its human resources, which were specified in that agreement and which presumably were of reasonable equivalence to each other. The court determines that Herzum is entitled to restitution of the human resources Exeura failed to contribute to the joint venture from Nov. 1, 2007 until Jan. 3, 2008, when Prof. De Julio gave notice. This is a period of eight weeks.

The value of the expected Exeura human resources for this eight-week period can be determined from a document admitted into evidence and showing a computation of the total human resources contributed by each side beginning in 2006 and ending in Nov. 2007. This document was prepared by the parties by listing the total number of hours of each identified employee per each year, and multiplying that figure by a certain rate (different rates were assigned to different identified employees). The total 2007 hours shown for each employee on this document is only for the eleven-month period ending in November. From this document, beginning with the "total 2007 hours" for each employee, one can calculate for each employee the total dollar equivalent of those hours for the eleven-month period. From there one can calculate the dollar equivalent for each week for that employee, and finally, one can calculate the dollar equivalent for eight weeks for each employee. Having made those calculations, the court finds that eight weeks' worth of non-contribution of human resources was the monetary equivalent of Exeura having withheld \$145,725.25 from the joint venture. It is this amount as to which the court will order restitution.

COMPENSATORY DAMAGES

It is to be expected in a case like this that proof of damages resulting from the breaches of fiduciary duty by Exeura, Mr. Guadagno, Mr. Lee and Mr. Sidhu, and the fraud by the latter three defendants, is difficult. Some specific damages have been identified, however. The Fourthcodex customer Full Capture Solutions was lost. Full Capture had paid \$150,000 for the license to use the Fourthcodex product. There is no question that the Private Agreement of dissolution assigned to Exeura the right to hold that license and gave Exeura the right to negotiate its renewal. The same agreement effectively acknowledged that Exeura had taken the customer called Co-Decision as well. Professor De Julio testified that Exeura did enter into a contract with that customer. The contract was introduced into evidence, but no price term was apparent. Mr. Mosca, however, in his sales projections, had estimated a total of \$83,750.00 in revenue on four phases of work on a consulting contract for Co-Decision.

From the evidence, then, Herzum is entitled to damages in the amount of one-half of \$150,000.00 (\$75,000.00) and one-half of \$83,750.00 (\$41,875.00) on the fraud, breach of fiduciary duty and conspiracy claims.

PUNITIVE DAMAGES

The court finds that punitive damages are warranted in this case for several reasons. The wrong here, committed by both Exeura and the three Herzum employee defendants, was unquestionably a breach of fiduciary duty and punitive damages are appropriate in such situations. Dowd & Dowd, Ltd. v. Gleason, 352 Ill. App. 3d 365, 387-388 (1st Dist. 2004); see also, Home Savings & Loan Ass'n v. Schneider, 108 Ill. 2d 277, 284 (1985). Punitive damages are also appropriate on proof of a claim of fraud. Home Savings & Loan Ass'n, at 284. There is no doubt that the defendants' actions were deliberate.

Punitive damages are designed to serve three distinct purposes: retribution against the wrongdoer, deterrence of similar conduct by the defendant in the future, and deterrence of others from similar conduct. N.C. Ill. Trust Co. v. First Illini Bancorp, Inc., 323 Ill. App. 3d 254, 267 (3rd Dist. 2001). The court finds that an award of punitive damages against Exeura, Mr. Guadagno, Mr. Lee and Mr. Sidhu would answer all three purposes. When awarding punitive damages, courts consider the nature and enormity of the wrong, as well as the defendants' financial ability to pay. Here, the wrong was substantial but the incomes of Mr. Guadagno, Mr. Lee and Mr. Sidhu were relatively modest, Mr. Guadagno's being less so. There was no evidence as to the assets or income of Exeura, but there was testimony that it is comprised of several professors at an Italian university some of whom, particularly professor Prof. De Julio, are of substantial status. In imposing punitive damages here, the court has considered these facts, as well as the perversity of each defendant's behavior relative to the wrong done to the plaintiff.

INJUNCTIVE RELIEF

In Count II, plaintiffs have invoked the Illinois Deceptive Trade Practices Act, 815 ILCS 510/3, to seek injunctive relief against Kenetica and Mr. Guadagno, barring them from passing Kenetica off as a restructured entity formerly known as Fourthcodex and indeed, there is evidence that these defendants have done precisely that, particularly with the Fourthcodex prospect Co-Decision, which they stole right from under the Fourthcodex nose. Although one might wonder how likely it is that, absent an injunctive order, defendants would persist in using the Fourthcodex attribution four years after that entity has been dissolved, there were acknowledgements on the witness stand that that activity ceased only because this suit was filed. Since the shareholder's private agreement of dissolution of Fourthcodex, dated Feb. 8, 2008, provided that Exeura assigned all its stock in Fourthcodex, Inc. to Herzum Software LLC, the Herzum entity still has an

interest in the Fourthcodex name. Therefore, the court determines that permanent injunctive relief under the Act is warranted. Because this relief is only a minor part of the overall remedies provided in this judgment, however, the court finds that attorneys' fees under the Act are not warranted.

ENTRY OF JUDGMENT

1. IT IS HEREBY ORDERED THAT JUDGMENT IS ENTERED in favor of plaintiffs Herzum Software LLC and Herzum SRL and against the various defendants as follows:
 - a. On Count VI (breach of fiduciary duty) and Count VII (conspiracy) against defendants Exeura Societa'a Responsabilita' Limitata- Spin Off Dell'Universita' Della Calabria (hereinafter "Exeura"), Luigi Guadagno, Christopher Lee, and Inderbir Sidhu for partial compensatory damages in the amount of \$129,373.00. Liability for these partial damages is joint and several among these defendants.
 - b. On Count VI and Count VII against Guadagno, Lee and Sidhu for compensation forfeited in the following amounts:

Guadagno:	\$39,916.00
Lee:	\$32,500.00
Sidhu:	\$56,062.00

This liability is several only.
 - c. On Count VI and Count VII against Exeura for restitution in the amount of \$145,725.25.
 - d. On Count VII against defendant Kinetica LLC for restitution in the amount of \$312,129.00, this figure being the sum of \$262,200.00 and \$49,929.00.
 - e. On Count VI and Count VII against Guadagno for restitution in the same amount of \$312,129.00.

The liability for restitution of \$312,129.00 in sub-paragraphs (d) and (e) is joint and several for these two defendants.

- f. On Count X (fraud) against Guadagno, Lee and Sidhu for partial compensatory damages in the amount of \$129,373.00. Liability for these partial damages is joint and several among these defendants, and is the same liability for partial damages imposed under Counts VI and VII. It is not the court's intention to award a double recovery of these damages.

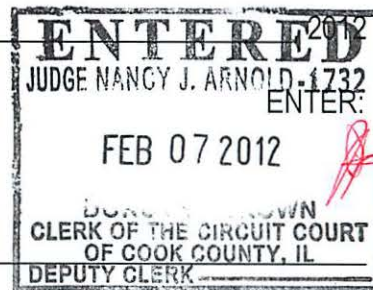
g. On Counts VI, VII, and X, punitive damages against the defendants as follows:

Exeura: \$150,000.00 (on Count VI and Count VII only)
Mr. Guadagno: \$150,000.00
Lee: \$30,000.00
Sidhu: \$50,000.00

This liability is several only.

h. On Count V (tortious interference with business relationship) against Guadagno, Lee and Sidhu for partial compensatory damages in the amount of \$129,373.00. Liability for these partial damages is joint and several among these defendants, and is the same liability for partial damages imposed under Count VI, VII, and X. It is not the court's intention to award double recovery of these damages.

2. Judgment is entered in favor of the plaintiffs and against defendants Kenetica LLC and Guadagno on Count II (Deceptive Trade Practices). IT IS HEREBY ORDERED THAT defendants Kenetica LLC and Luigi Guadagno are permanently enjoined from making any statements, verbal or in writing, implying or giving the impression that any product of Exeura or consulting service or product development work provided by Kenetica or Guadagno is related in any way to Fourthcodex.
3. Counts I, III, IV, VIII, and XI are dismissed as moot, given the recovery of damages and equitable relief awarded herein under the other counts.
4. Count IX (seeking rescission of the dissolution of Fourthcodex) is dismissed for the reason that it seeks a remedy that is not feasible.



Judge Nancy J. Arnold