SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LINSPIRE, INC., a Delaware Corporation, Plaintiff, v. WILLIAM LONG, et al., Defendants.	Case No. 2008-00092383 **STATEMENT OF DECISION AS TO 6TH COUNT** February 18, 2010, 1:30 p.m. Dept. 72

1. Overview. This is a boardroom dispute over the alleged misappropriation of corporate monies as "severance payments" to former employees of the corporation. In December, 2009, the court denied the defendants' summary judgment motions, finding abundant triable issues of fact. The case went to trial between August 30 and September 13, 2010; the court heard testimony from 8 witnesses and received 86 exhibits into evidence. After about 5 days of deliberation, the jury found in favor of defendants Beshers, Brennan, Linnell and Long on Linspire's affirmative claims. The jury awarded Long $72,500.00 on his cross-claims against Linspire, and the court subsequently granted his contract-based attorneys' fee request in the amount of $212,360.00. Defendants

Carmony and Olson were absolved of liability on several of Linspire's allegations of wrongdoing; on others, the jury found liability but awarded Linspire $81,333 (a little more than 30% of the $263,000 it asked for in closing argument). Nevertheless, Linspire asks the court to find judgment in its favor on the sixth cause of action for indemnity, as against Carmony and Olson, in the amount of nearly $740,000.00 in alleged damages (including the judgment payable to Long and an additional $425,875.00 in attorneys' fees). The parties agreed to present the sixth cause of action to the court on paper, without the need for additional testimony. The court has received extensive briefing from both sides, as well as excerpts of the transcripts of trial testimony and copies of trial exhibits. The court has carefully reviewed all of those submissions. The court heard thoughtful and well-prepared oral argument on February 18, and took the matter under submission. The February 18 argument was preceded by service upon the parties of an earlier version of the court's Tentative Decision.

The court filed and served its Tentative Decision pursuant to CCP section 632 and CRC 3.1590 on February 22. The Tentative Decision stated it would become the decision of the court unless either party took the steps set forth in CRC 3.1590(c) within the timeframe set forth therein. On March 4, Carmony and Olson filed an "Objection" that is not in conformance with CRC 3.1590. On March 9, plaintiff filed a response to the "Objection."

CCP Section 632 provides:

> "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . ."

"[I]t is settled that the trial court need not, in a statement [of] decision, 'address all the legal and factual issues raised by the parties.' [Citation.] It 'is required only to set out ultimate findings rather than evidentiary ones.' [Citation.] ' "[U]ltimate fact[]" ' is a slippery term, but in general it refers to a core fact, such as an element of a claim or defense, without which the claim or defense must fail. [Citation.] It is distinguished conceptually from 'evidentiary facts' and 'conclusions of law.' [Citation.]" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559.) "The trial court is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case." (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118.) A specific finding on a disputed factual issue is not required when that finding may necessarily be implied from a general finding. (*St. Julian v. Financial Indemnity Co.* (1969) 273 Cal.App.2d 185, 194.)

2. Basis for Linspire's Claims. Linspire argues its claims are founded upon general principles of indemnity law [*Herrero v. Atkinson*, 227 Cal. App. 2d 69, 74 (1964)], application of the specific principles enunciated in *Fireman's Fund Ins. Co. v. Haslam*, 29 Cal. App. 4th 1347, 1354-55 (1994), and Labor Code section 2865. In addition to seeking indemnity for the amounts awarded to Long, Linspire claims attorneys' fees. This latter claim is founded upon the so-called "tort of another" doctrine of *Prentice v. North American Title Guar. Corp.*, 59 Cal. 2d 618, 620 (1963), and upon the attorneys' fee provision of the employment agreements between Linspire and the defendants found liable at trial.

3. Linspire's RFJN. Linspire's requests for judicial notice of certain court records is granted. In *People v. Harbolt,* 61 Cal.App.4th 123, 126 -127 (1997), the court discussed the purposes for which a court may take judicial notice of a court record:

> "Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.' [Citations.] Thus, in *People v. Padilla* (1995) 11 Cal.4th 891, 961, footnote 6, our Supreme Court took judicial notice of an unpublished opinion of this very court, *People v. Prado* (Feb. 1, 1994) F016385, to show that a codefendant had been convicted of murder, conspiracy to commit murder and solicitation to commit murder."

Evidence Code section 453 provides that a trial court must take judicial notice of any matter specified in Evidence Code section 452, upon a party's proper request. Linspire's RFJN is unopposed, and is otherwise proper, so it is granted.

4. Linspire's Evidentiary Objections. In another procedural context, the Supreme Court wrote just last summer:

> "We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711-712.) Indeed, the *Biljac* procedure itself was designed to ease the extreme burden on trial courts when all too often litigants file blunderbuss objections to virtually every item of evidence submitted. (*Demps, supra,* 149 Cal.App.4th at pp. 578-579, fn. 6; *Biljac, supra,* 218 Cal.App.3d at p. 1419, fn. 3) ... To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion."

Reid v. Google, Inc., 50 Cal. 4th 512, 532 (2010).

In line with the Supreme Court's view, the court encourages counsel to raise only meritorious and important objections in the future. The court's rulings are as follows:

1. Overruled; 2. Sustained; 3. Overruled; 4. Sustained; 5. Overruled; 6. Overruled; 7. Sustained; 8 – 12. Overruled.

5. Decision Regarding Indemnity Claim. The court denies recovery on Linspire's claims for indemnity. The right of indemnity is either express or implied (equitable). *Bay Dev. Ltd. v. Superior Court*, 50 Cal. 3d 1012, 1030 (1990). Linspire does not argue there was an express indemnity agreement. The court agrees with Carmony and Olson that traditional principles of equitable indemnity do not apply here, because Carmony and Olson are in no way joint tortfeasors with Linspire. See Rest. 3d, Torts, Apportionment of Liability section 22; *Molko v. Holy Spirit Assn.*, 6 Cal. 3d 1092, 1127 (1972). Linspire became liable to Long not because of anything Carmony or Olsen did, but rather (as the jury correctly found) because Linspire decided - after a period of repose during which it had time to consider its options - to breach its agreement with Long. It would not be equitable to impose the financial burden of Linspire's decision to breach its contract with Long upon Carmony or Olson.

Moreover, inasmuch as indemnity claims at issue here are purely equitable in nature, the court (having heard and read the same evidence as the jury) must observe that it believes an inequitable result would follow if the court were to adopt Linspire's argument. Many cases hold that it is appropriate for a court to consider "the equities of a particular case" in determining the right to indemnity. *E.L. White v. City of Huntington Beach*, 21 Cal. 3d 497, 506 (1978); s*ee Miller v. Ellis*, 103 Cal. App. 4th 373, 382 (2002)(indemnity must not result in unjust enrichment); *Fireman's Fund Ins. Co. v.*

Haslam, 29 Cal. App. 4th 1347, 1353 (1994)(indemnity allowed only where "equity and good conscience" require the lifting of the burden of a judgment from one and placement of same on another). Here, the jury found there was no merit to Linspire's decision to pursue Beshers, Brennan, Linnell and Long. The court agrees with the jury's determination in this regard, and finds that it would be unjust to impose upon Carmony or Olson the expenses associated with pursuit of claims that lacked legal or factual merit. Along the same lines is the request that Carmony and Olson pay for Linspire's pursuit of Comerica Bank, an action which Judge Meyer ruled had no merit. There is more than a little indicia of overreaching here, and an award in Linspire's favor would unjustly enrich Linspire.

The case relied upon by Linspire, *Fireman's Fund*, does not require a different result. The court agrees with the argument on page 8 of the opposition papers, which distinguishes *Fireman's Fund* and notes the care taken by the Court of Appeal (29 Cal. App. 4th at 1354) to make clear that the verdict challenged was based on claims of negligence and negligent misrepresentation (not indemnity).

Nor does the law of contribution apply to give Linspire a right to recover some of the money for which Linspire is now indebted to Long. Contribution is the right to recover from a co-obligor. 13 Witkin, *Summary of Calif. Law* (10th Ed.), Equity section 179 at 507. Long's employment contract, which Linspire breached, was with Linspire; in no way were Carmony or Olson "co-obligors" with Linspire on that agreement.

Defendants correctly note that on October 1, 2010 (Transcript pp. 4, 9) and November 12, 2010, Linspire withdrew any reliance on Labor Code 2865, and rested its remaining claims purely in equity. Defendants were entitled to rely on this *retraxit*, as otherwise they would have been entitled to demand a jury trial on this count. The court therefore has not considered part IIIA2 on page 10 of Linspire's brief.

6. Decision Regarding Attorneys' Fee Request. As mentioned above, Linspire's attorneys' fee request is based upon the tort of another doctrine and upon the employment agreements of Carmony and Olson. Taking the latter first: the court agrees with Carmony and Olson's argument on pp. 15-16 of the opposition brief that the claims that went to trial in this case did not arise out of the employment agreements between Linspire on the one hand, and Carmony and Olson on the other. Said another way, this was not, as to Carmony and Olson, an "action on a contract" within the meaning of Civil Code section 1717. The claims which went to trial as against Carmony and Olson were money had & received, conversion, fraud, conspiracy and breach of fiduciary duty. Thus, the contracts do not form a basis for the award of attorneys' fees in Linspire's favor.

Even if the court were to consider that Linspire "prevailed" on a contract claim, it is clear Linspire did not obtain a "'simple, unqualified win'" ... thereby "eliminating the trial court's discretion to deny fees under section 1717." *Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876 (*Hsu*). Linspire did not prevail on its claims against four of the six defendants, and lost on Long's claims against it. To the extent it prevailed as against Carmony and Olson, it did so in an amount far less than it sought. Thus, the court would

have the discretion to consider whether "on balance, neither party prevailed sufficiently to justify an award of attorney fees." *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.

When determining the prevailing party under section 1717, the trial court "is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." *Hsu, supra*, 9 Cal.4th at p. 876. Additionally, "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.'" The inquiry is whether "the party has ... achieved its main litigation objective. [Citations.]" *Id.* at p. 877, italics omitted. The trial court has broad discretion "to determine who, if anyone, is the party prevailing on the contract." *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 806.

The tort of another doctrine, as set forth by our Supreme Court in *Prentice v. North Amer. Title Guar. Corp.,* 59 Cal.2d 618 (1963)(*Prentice*), holds that "a person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." *Id.* at 620. The doctrine is an exception to the general rule, codified in section 1021, "that each party is to bear his own attorney fees unless a statute or the agreement of the parties provides otherwise." *Gray v. Don Miller & Associates, Inc.,* 35

Cal.3d 498, 504 (1984) (*Gray*). The tort of another doctrine, which is also referred to as the " 'third party tort' exception" is "embodied in the Restatement of Torts and is generally followed in the United States." *Gray*, 35 Cal. 3d at 505, citing Rest.2d Torts, § 914, subd. (2), and appendix.

Significantly, "the so-called 'third party tort exception' to the rule that parties bear their own attorney fees is not really an 'exception' at all but an application of the usual measure of tort damages. . . . Indeed, this point was made clear in *Prentice* itself when the court stated it was 'not dealing with "the measure and mode of compensation of attorneys" but with damages wrongfully caused by the defendant's improper actions.'" *Sooy v. Peter,* 220 Cal.App.3d 1305, 1310 (1990), citation omitted.) Thus, because the tort of another doctrine is "in fact an element of tort damages, nearly all of the cases which have applied the doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees." (*Ibid.*, collecting cases.) "[W]hen a defendant's tortious conduct requires the plaintiff to sue a third party, or defend a suit brought by a third party, attorney fees the plaintiff incurs in this third party action 'are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.' " *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC,* 127 Cal.App.4th 1311, 1325 (2005).

Carmony and Olson argued on February 18 (and again in their March 4 "Objection") that the claim should be denied because Linspire never asked the jury for its

fees. The court rejects this argument because the court finds that all parties agreed that all issues embraced by Linspire's 6th cause of action (including this "tort of another" theory) were to be tried to the court. A review of the shifting procedural posture of the case is necessary to fully understand why this is so.

The court held the first Trial Readiness Conference (TRC) in this case on April 16, 2010, As shown by the pleadings and the Joint Trial Readiness Report ("JTRR") filed by the parties on that day, there was no "indemnity" claim by Linspire at that time. The only parties seeking "indemnity" were defendants Beshers, Brennan, Carmony, Linnell and Olson. JTRR at 2:18; Barnette Trial Brief filed 4/30/10. Thus, when the matter was announced ready for trial, Linspire could not have asked the jury for fees under the tort of another doctrine, as no claim for same was pled. This undercuts a major premise of defendants' March 4 argument.

At the 4/16/10 TRC, the court confirmed the matter for trial for May 7. Scheduling and vacation problems arose, and the case was delayed during the summer. The case did not actually start trial until August 30, and on that day, the court granted defendants' motion *in limine* no. 1 to bifurcate the defendants' indemnity claims. These, the court ruled, would be determined in a bench trial ("phase 2") after the jury's verdict.

The trial continued through closing arguments on September 13. Following the verdict on Sept. 17, the court set a further trial call on what was to be "phase 2" of the trial, the indemnity claims of the prevailing defendants Beshers, Brennan and Linnell.

This was set for October 1. See Minutes for Sept. 17, 2010, last page. A few days before the October 1 hearing, Linspire filed its *ex parte* application for leave to file a third amended complaint. Here, for the first time, Linspire sought to add its "indemnity" theory against Carmony and Olson. The court continued the *ex parte* application from Sept. 30 to October 1, so it could be heard on slightly more notice and so it could be heard at the same time as the continued trial call on phase 2 of the trial. Minutes of 9/30/10.

At the October 1 hearing, the court scheduled phase 2 (the indemnity claims of Beshers, Brennan and Linnell) for November 12. [They ultimately elected not to pursue these claims, and the November 12 merits hearing never went forward. This was the result of a Notice of Settlement filed October 15.]

Also at the October 1 hearing, the court granted Linspire's motion for leave to file its third amended complaint (TAC), deemed the TAC filed, and engaged the parties in discussion about resolution of the claims embraced in it. The parties agreed to a "phase 3," in which the new claim (the sixth cause of action was the only new claim) would be tried to the court on paper after phase 2 was concluded. The court set a CMC for November 12, coincident with the then-expected phase 2 (and Long's attorneys' fee motion), so that a briefing schedule could be agreed upon.

At the November 12 hearing, the court, in addition to ruling on Long's motion, set a briefing schedule as to the trial on paper of phase 3 (which became phase 2 because of the October 15 settlement). 11/12/10 Minutes, page 5.

Thus, the question raised by defendants' March 4 Objection is whether they were fairly placed on notice of the "tort of another" claim by the TAC. The court finds that they were. This was a major purpose of Linspire's motion for leave to amend in the first place, and the court finds that paragraph 46 of the TAC unambiguously placed them on notice of the nature of Linspire's attorneys' fee claims.

The transcript colloquies highlighted by defendants in their March 4 Objection do not require a different result; they just show that when defendants intended to exclude something from their agreement to a trial on paper (the Labor Code theory), they did so explicitly.

A trial court has broad discretion in determining a reasonable amount of attorney fees. (*PLCM Group, Inc. v. Drexler,* 22 Cal.4th 1084, 1095 (2000). "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." *Id.*

The court concludes that the only portion of Linspire's claim that has any merit is the contention that Linspire was required to pursue Carmony on a tort claim because of Olson's failure to disclose to Robertson that Olson had been terminated, and was required to pursue Olson on a tort claim because of Carmony's failure to disclose the same fact to Robertson. The court concludes (again, having seen and heard the same evidence as the jury) this is the only reasonable explanation of the jury's verdicts as to these two defendants. This explanation is consistent with Linspire's arguments at trial, and remains consistent with its theory today (see Opening Brief filed 12/14/10, section IID4b at pp.5-6). Carmony and Olsen both had a fiduciary duty to disclose to Robertson the fact that Olson had been terminated by Carmony even as he was exchanging emails with Robertson giving no inkling of this fact. The amount awarded, $81,333.00, is about one third of the $240,000 in gross severance the testimony established Olson agreed to take (even though under paragraphs 2a and 3c of Trial Exhibit 28 he was entitled to twice that). In other words, the jury wanted about a third of Olson's severance pay refunded as a consequence of Carmony and Olson's lack of forthrightness with Linspire's Chairman and majority shareholder. The court cannot say that the measure of damages awarded by the jury ($81,333, jointly and severally as to Carmony and Olson) was erroneous.

Linspire argued on February 18 that the series of identical figures written by the jury on the special verdicts should be added together. If this were done, the judgment against Carmony and Olson would be $81,333 x 5, or $406,665. This is a figure with no relationship to the amount Linspire requested in closing argument (9/9/10 Transcript at

47:23). Moreover, the "accretion" argument offered by Linspire is inconsistent with its own closing argument (9/9/10 Transcript at 51:19-20), and with the court's response to Jury Note No. 5 (to which all parties agreed – see Minutes of 9/17/10, pages 1-2). Finally, adding the amounts together would award damages multiple times for the same conduct (breach of fiduciary duty and conspiracy to breach fiduciary duty). This is impermissible. The special verdict form appropriately asked "What are Linspire's damages?" The jury answered with the same answer ten times: $81,333.00. Linspire is entitled to judgment in that amount.

Having concluded that Linspire has properly invoked the "tort of another" doctrine (and that defendants agreed to a trial on paper of same), the question becomes: what would a rational company expend, in attorneys' fees and costs, to establish a claim for a total of $81,333.00 in damages? Was it "reasonably necessary" for Linspire to spend $739,915.99 to pursue a claim worth roughly 11% of that amount? Merely to pose the question is to provide the answer.

Linspire argued on February 18 that, accepting that it was awarded a little less than a third of the damages it sought ($263,000 – 9/9/10 Transcript at 47:23), it should receive a third of its attorneys' fees (about $243,000). This would have the effect of giving Linspire what the jury did not feel it was entitled to (both in terms of the amount requested in closing argument and in terms of a full "refund" of Olson's severance pay).

The success enjoyed by Linspire was modest at best. It is plain to the court that Linspire was not "required to act in the protection of its interests" as it did. Rather, Linspire approached this case as a vehicle for a test of wills as between Robertson and Carmony. For all the foregoing reasons, the court awards Linspire $40,666 in attorneys' fees under the "tort of another" doctrine, jointly and severally as against Carmony and Olson. In all other respects, relief is denied on Linspire's Sixth Cause of Action.

Counsel for Linspire shall forthwith submit a form of Judgment consistent with the jury's verdict and the views expressed above.

IT IS SO ORDERED.

March 11, 2011

Timothy B. Taylor
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Linspire Inc vs. Long

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2008-00092383-CU-FR-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the Statement of Decision dated March 11, 2011 was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 03/15/2011.

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