

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
24 SEVEN, INC., and 24 SEVEN ONLINE, INC.,

Plaintiffs,

INDEX NO.,

600547/2004

- against -

SPECIAL REFEREE

INTERIM REPORT &

RECOMMENDATION

CHRISTIAN FIORELLO, THE GROMWELL GROUP

SAL FURIA¹ and DEMITRA PARETS,

Defendants.

-----X
THE SUPREME COURT : NEW YORK COUNTY - IAS 85R

A P P E A R A N C E S :

For Plaintiffs

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By orders of the Honorable Herman Cahn, dated March 12 and March 25, 2004, and September 30, 2005, the issues of: (1) whether the defendants violated the Court's two Temporary Restraining Orders ("TROs"); and (2) whether they failed to produce and/or turn over documents to the plaintiffs, claimed to be confidential business records, were referred to the Special Referee to hear and report (with recommendations). Furthermore, in the event the Special Referee reports that the defendants violated the TROs and/or the order to produce and turn over documents, than the Special Referee shall report and recommend on the issue of damages suffered by the plaintiffs in connection with said violation(s), "and the profits and revenues, if any, derived from the defendants' alleged taking and wrongfully using or taking by [defendant(s)] in violation of the orders."

This matter was assigned to the undersigned on November 15, 2005, at which time the attorneys appeared and the issues conferenced. On November 15, 2005, the Special Referee was on trial

¹ Also known as Salvatore Furia (T7, 127).

and this matter was adjourned for a hearing. Pending the same, the parties were directed to proceed with discovery and any issue in dispute to be determined by Justice Cahn and/or David Solomkin, Esq., appointed referee for discovery matters. Apparently, the parties were disputing both the scope of discovery as well as the prior discovery orders of the Court. Subsequent motion practice before Justice Cahn followed and his Honor granted plaintiffs' application to retain an expert as to the issue of damages. This hearing was adjourned to January 9, 2006.

On January 9, 2006, the hearing commenced, but before the commencement, I granted plaintiffs' application to bifurcate the issue of liability from the issue of damages. The hearing continued on January 9, 10, 17, 18, February 14, 15, 16, and April 5, 6, 10, 11 and concluded April 26, 2006, at which time the parties made closing arguments. All exhibits marked are noted in the report and because of the confidential nature of several exhibits, they will be returned to the respective party. The parties have ordered the transcript and designations from the same are noted herein as "T1 through T11" followed by page number. The transcript will be filed with the County Clerk file. This matter was marked for a report as to the issue of liability on April 26, 2006.

The litigation between the parties stems from plaintiffs and the individual defendants' prior business/employee relationships and the latter group's employment by the corporate defendant, Gromwell Group ("Gromwell"). The corporate plaintiff, 24-Seven, Inc., ("24-Seven"), and Gromwell are competitors in the staff placement industry, particularly, the permanent placement side and, arguably, now in the freelance placement side.

24-Seven has a long history in the placement of freelance or temporary candidates. The Gromwell Group entered the freelance placement industry approximately a year before the commencement of this action. Within a few weeks of the individual defendants' employment by Gromwell, this action was commenced. A TRO was issued as well as a second TRO, and a third subsequent order directing that the defendants both restrain from the use of claimed confidential business records and maintain certain documents for litigation. The plaintiffs moved on motion complaining that

defendants violated both TROs and destroyed documents relevant to this litigation. This reference ensued.

I have reviewed and weighed the testimony and evidence, keeping in mind the general premise that public policy favors robust and uninhabited competition, which should never give way merely because a particular employer wishes to insulate him or herself from competition (*American Broadcasting Companies, Inc. v Wolf*, 52 NY2d 394, 404). However, open competition does not sanction employee misconduct, breach of fiduciary duty, unfair competition and the misappropriation of trade secrets. Keeping the above in mind and based on the testimony and evidence as well as consideration of the parties' respective legal arguments, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Testimony by Sheila Hogan- Principal of 24-Seven

1. Sheila Hogan, one of three principals of 24-Seven, testified (“Hogan”). She is Senior Vice-President and responsible for the technology side of the business. The two other principles are Stewart Kagel (“Kagel”), Chief Operating Officer and Celeste Gudas (“Guda”), President (T1, 61).
2. Hogan has more than nine (9) years of placement experience before she formed 24-Seven (T1, 60). 24-Seven formed in 2000, specialized in staffing freelance and full time candidates with clients in the apparel industry, e.g., designers, patterns makers, fabric and manufacturing professionals. Candidates who are placed as free lancers are considered employees of 24-Seven, it acts as the employer and places the free lance candidate to work for a client of 24-Seven. Full time candidates are placed in a permanent position with a client and the candidate pays a fee (T1, 60-61).
3. As to its business protocol, 24-Seven identifies, screens and trains apparel industry professionals (candidates) for the apparel industry (clients), and in this process, cultivates strong personal and

business relationships with its client base (T1, 62). This process allows 24-Seven to maintain a client database that allows Account Managers the ability to identify the needs of a client who contacts 24-Seven for a candidate, search for the right candidate and places the candidate with the client. 24-Seven primary business is in the fashion industry, approximately eighty five percent (85%), the balance of business is home fashion, beauty industry and entertainment. 24-Seven has offices in New York and the west coast. Hogan estimates that in 2000, beginning operations, 24-Seven had 40 clients and 1,000 candidates, and about three employees (the principals). By 2004, business grew to offices in New York, and Los Angeles, San Francisco, and Orange County, California, with seventy-five (75) employees, 450 active clients and more than 35,000 candidates, approximately 13,000 in New York (T1, 63-65).

4. Hogan noted that the 450 active clients do not include the various divisions of a particular company, such as, design or marketing or manufacturing and that 24-Seven maintains a database that provides multiple contacts with a client consisting of departments, division and contacts (T1, 65).
5. 24-Seven invests time and expense in cultivating candidates and clients by screening them into levels for placement and understanding more than resumes and business profiles. Hogan explains that 24-Seven meets with clients and candidates to make the “right fit.” The quality control measures assure placements and allow 24-Seven to understand and improve its understanding of the clients’ buying habits as well as the level and skills of its candidates (T1, 66).
6. 24-Seven spends more than a \$1 million in print and on-line advertising and classifieds in reaching out to candidates and clients in the industry, particularly fashion and software companies that are apparel driven and/or school affiliations (T1, 66-70).
7. When securing candidates, 24-Seven starts with a resume and then screens them by interview, personal identification of skills, level of skill, training, area of expertise, potential and fit and sensitivity in a particular placement with a client. Clients are secured through relationships and

learning of the client buying habits, sensitivities, seasonal patterns, and candidate's placement tracking for quality and feed back (T1, 71).

8. Hogan describes 24-Seven's information on candidates and clients as superior and significantly different from any competitor's information of candidates and clients as 24-Seven does not base its relationship with clients solely on the director of human resources. Rather, it works and gathers information on different personnel of a client, it works "directly with the hiring managers . . . within the multiple divisions . . ." The information is considered by 24-Seven as highly confidential and all employees sign a confidentiality agreement and are given pass words for access to its "Bullhorn" database. 24-Seven also trains employees on the confidentiality of all of its candidate and client's information and maintains an employee hand book that set forth, among other things, the importance of confidentiality of business records and information (Px 3). 24-Seven's information on a candidate consists of years of experience, training, expertise, skill, familiarity with software or other training, work history and personal work schedules that Hogan describes as "very extensive" (T1, 72-73).
9. The 24-Seven's employee handbook (Px 3) sets out the policy against the dissemination of client and candidate information as well as business protocol in the operation, marketing, pricing and costs and the use of electronic mail. Pricing is sensitive to 24-Seven as clients and the plaintiff negotiate pricing and rates and 24-Seven does so to be competitive in the placement industry. Placement of a free lancer at one company with one rate can be and is at a different rate with another company, all dependent on the client's budget. However, information as to markups and profit margins are completely kept internal and not disclosed to clients or candidates. It is "absolutely confidential" as that measurement represents the difference between what the client pays 24-Seven and what 24-Seven pays the free lance candidate. Only management, account and sales managers have access and knowledge of the margin and markups. The Account Manager is responsible for working with both clients and candidates' relationships (T1, 79-81).

10. Hogan identified reports and lists generated by 24-Seven during the relevant time. One was an Aging Report that consists of candidate information and a weekly list of placements. These reports were used for collecting and managing business and billings. Kagel and Tare Fortana (“Fortana”) had access to these reports for invoicing and receivables. The Aging Reports were distributed between the freelance account managers and payroll for collection of pay checks. There were also Sale Reports, generated for sales calls by management. There were Client Lists which were not freely generated (T1, 82-83).
11. The Aging and Sale Reports were not circulated office-wide and 24-Seven’s Bullhorn database allowed employees restricted access to client information. This allowed 24-Seven to track the activity of employees using that database. But, because of the sensitivity of these reports it was uncommon that they would be generated in hard copy so “it was rarely done” (T1, 84). Hogan noted that there would be no reason for Kagel or Gudas to give out an Aging Report (T2, 33).
12. Hogan identified Px 2A as a copy of a 24-Seven Aging Report. The report provides client names, companies, their division or title, and telephone numbers or other contact information. This report had multiple contact persons and allowed for 24-Seven to pinpoint the contact person for candidate and client contacts (T1, 88). The Aging Report is confidential as it provides names, titles and numbers for persons in departments of a particular client other than one number for the department head of human resources. The Aging Report provides the names of contact persons who have “buying power” or “knowledge of the company’s buying patterns” or approval for “pricing.” Hence, the time and effort required to navigate large client companies is shortened and allow 24-Seven to find the right people to contact for taking placements from clients and filling the placements with candidates (T1, 89-90).
13. Px 2A consists of more than hundred pages and Hogan compared it to an original office copy, noting that the marked copy (Px 2A/Px 2B) had three names crossed out, one, Carmelina Pagano, a Vice President of freelance sales, a prior employee, Bob Brown and Hogan (T1, 90). The

original office copy was marked (Px 2B). Hogan noted this Aging Report was generated for use by the then on-line company, 24-Seven online. The Aging Report was used for “24-Seven Online” business venture. 24-Seven Online was a separate company created by the principals of 24-Seven and defendants Fiorello and Sal Furia. (“Furia”). The five were shareholders of 24-Seven Online. The separate company was to act as a fashion online job board developed for full time services to offer to clients, but it was not freelance service. The freelance services were being exclusively provided by 24-Seven (T1, 81-86).

14. The information contained in the Aging Report (Px 2A) can be accessed from the company’s Bullhorn database. Bullhorn is a vendor management software program that tracks information about clients and candidates and is hosted off site by the vendor company and accessible to employees of 24-Seven at different levels, where the data can be manipulated at different security levels depending on the security level assigned to employees of 24-Seven. Hogan as a principal has administration level access that allows her to create, programs and customize the software to meet 24-Seven particular needs. The lesser levels of security access are basic and basic plus delete, and are only available to management and principals of 24-Seven. Basic level allows for read only, but cannot delete. One can add notes at this level and review reports at a maximum of 500 records in a given category, such as, names, candidate contact or client contact. Thus, if there are 15 contacts at a given client that would constitute 15 records. User names and passwords are provided to a select group of employees for Bullhorn access (T1, 91-93).
15. Hogan noted that to secure against copying, Bullhorn only provided the ability to access the data and then convert it into a Bullhorn type report at a certain level that has to be printed screen by screen (individual screen printing) (T1, 95). Other than the Bullhorn database, 24-Seven had business records accessible from the main server and retained hard copies of documents in file cabinets. It was understood by employees that all information was deemed to be confidential business records (T1, 95-96).

16. At the relevant time in issue when Fiorello and Furia were employees of 24-Seven as well as defendant Demitra Parets (“Parets”), all had access to Bullhorn. Parets joined in 2003 and resigned from her position in 2004. Parets had basic level access to review and delete information while she was employed as an Account Manager and interacted with clients and candidates. Parets also signed a confidentiality agreement (Px 4) that provides for confidentiality of 24-Seven’s business records. The same agreement contains a covenant not to compete. She was given the employee handbook (T1, 96-101).
17. Initially, Fiorello met with 24-Seven to suggest the concept of building an online database for clients to apply for access to 24-Seven’s candidates’ resumes. The clients would pay 24-Seven a fee and then would be given a pass word to log onto a concentrated database of potential candidates for full time employment in the fashion industry. A Shareholders Agreement (Px 5) was executed establishing 24-Seven Online. Hogan, Kagel, Gudas, Fiorello and Furia were the shareholders of 24-Seven Online. 24-Seven provided the start up capital and administrative services (accounting, office space, etc.,), Fiorello provided his knowledge and experience. 24-Seven Online and 24-Seven did not share the same office space; they operated from two different locations a few blocks apart (T1, 102-105).
18. While conducting the business of 24-Seven Online, Fiorello and Furia had access to candidate resumes. All subscribers to the online service had access to the resumes. The subscriber would be required to abide by an agreement of confidentiality (T2, 91-96; Px 6).
19. All shareholders agreed to the confidentiality of information obtained and generated in the business of 24-Seven Online. 24-Seven operated for a few months, but the 24-Seven principals decided not to continue its operation and Fiorello and Furia negotiated terms to come on board with 24-Seven as employee (T1, 106-117).
20. Furia was employed in full time placement of candidates with clients. Fiorello accepted a sales position to develop the beauty section of 24-Seven as the company had concentrated in fashion

and saw the beauty industry fertile ground. Hogan saw no reason for an employee to send data from outside the office as the system was designed for in-office use so that it could be managed, tracked, and identified as to employees who were using the database. Fiorello had no need to have access to records for fashion in the company's Bullhorn database after 24-Seven Online closed down. Therefore, there would be no reason to transmit electronically information outside of the company to one's email address, although it was possible. Hogan concludes that transmitting data from Bullhorn to an email address outside of the company is the same as taking the documents out of the office. She views the conduct both suspicious and a concern to the company (T1, 118-120).

21. Hogan noted that remote access was available by way of password and user name for the Bullhorn database (that is one could have access at home) and that email was available by remote access as early as 2001-2002. Employees had access capability to both their emails and Bullhorn while they were out of the office (Px 35 [Id Only]) (T10, 274-276).
22. Furia and Fiorello were given access to the Bullhorn at the basic level with user names and passwords, allowing them the ability to review data, but not delete and included all areas of the company's business (fashion, beauty, entertainment) (T1, 120-121).
23. Fiorello remained employed in his new position for about six months and then resigned in 2003, after he informed the company that he was taking a leave, but he never returned after November 2003 (T, 121).
24. After Fiorello left, the company learned that the 24-Seven Online domain name was registered under his personal name and when ask to the release the domain name, Fiorello refused. 24-Seven commenced a federal action and was successful in securing the return of the domain name to 24-Seven (Px 32). Hogan was also informed that Fiorello contacted 24-Seven clients and was interviewing with competitors and 24-Seven viewed this as a breach of the no-compete clause of his employment agreement (Px 13 and 14). 24-Seven's attorneys contacted a potential employer

- of Fiorello to inform it of its claim that Fiorello had a non-compete agreement. 24-Seven commenced this law suit against Fiorello, learning he had become employed by Gromwell (T1, 122-125).
25. Concerned of Fiorello's post-24-Seven actions, Hogan conducts an investigation of electronic mail in the company's Bullhorn database relating to Fiorello's activity at 24-Seven Online from January 2003 to the end of his time at 24-Seven in November 2003. Hogan identified email activity between Furia and Fiorello in January 2003, that ultimately ended up in two of Fiorello's personal email accounts (Px 7).
 26. The first email trail consists of two pages and an attachment (a copy of the original attachment, voluminous, was also produced). This email originated on January 10, 2003, from Furia to Jennifer Ceman, an administration assistant at the company's office, requesting an electronic version of printouts from Bullhorn that Hogan claim Furia had no authority to have - that is, Furia did not have the access level to have an electronic version of Bullhorn data and that Ms. Ceman did not have permission to provide it to Furia. The only persons who had such authority were the principals of the company (T2, 52-54).
 27. Jennifer Ceman replies a few days later to Furia with the attachment and in turn, Furia directs the attachment to Fiorello on or about January 14, 2003 at the latter's 24-Seven Online email. The attachments generated by 24-Seven, list New York clients and California Clients in Excel spread sheet form. The attachments are the exact Px 2A/Px 2B, except the January 2003-attachments do not "black out" the first three names (T1, 125-133). Hogan received the "black out" version after this litigation commenced. It was obtained from Alicia Fazio ("Fazio") (T1, 84-85; T2, 86-90).
 28. During this email transaction Furia and Fiorello were working at 24-Seven Online's location. Hogan was not sure whether Fiorello worked from home time from time, but he was expected to work from 24-Seven Online offices Monday through Fridays. Nor was Hogan sure whether

- Fiorello had access to the 24-Seven Online email account from his home address. She confirmed that there was the possibility that Fiorello would have reason to work on the names listed on the attachment, but only as to New York clients and for marketing the 24-Seven Online (T2, 56-58).
29. Upon discovery of this email, Hogan became concern, concluding there was no reason for Fiorello's emailing the attachment to his outside email accounts as he had access to the same information by merely logging in at work. Hogan found no legitimate business reason for Fiorello sending the attachment of the Aging Report (Px 2A) to an outside email address (T1, 134-135).
 30. Hogan's investigation leads her to find a February 2003-email trail to an outside email account. This email contained an attachment to Fiorello's outside email account (Px 8). The trail originates from one, Pino Ficara, an outside consultant who worked as the IT person between Bullhorn and 24-Seven Online. Fiorello communicated with Mr. Ficara time to time with respect to 24-Seven Online business and to build and develop the back end of the online site (T2, 60-61).
 31. The attachment contained an extensive list of 24-Seven candidate information (not 24-Seven Online candidates) that consist of names, title, address, phone numbers, e-mail addresses, and current employment positions as opposed to the first attachment that consisted of clients (Px 7). Hogan noted that the names listed on this attachment were not "archived candidates" and there was no need to have this list sent from 24-Seven to 24-Seven Online and no reason for it to be sent to Fiorello's outside email account (Yahoo.com) (T1, 136-138).
 32. Hogan reviewed the hard copy of the attachment and claimed the list consisted of names that were not the 1,200 candidate names ("archived candidates" or those seeking full time employment) that 24-Seven agreed to share with 24-Seven Online nor the candidate names that were gathered directly from the 24-Seven Online database. She claims the attachment represented candidates from various States and, hence, was not authorized to be released to Fiorello for any business purpose regarding 24-Seven Online's business (T2, 63-70).

33. Hogan's investigation further discloses 24-Seven information being exported to outside email accounts (Px 9). She identifies an email from Rob Austin ("Austin") dated April 10, 2003, to Fiorello with an attachment of 24-Seven active clients names and email addresses that Hogan claims cannot be cultivated easily, but requires time and expense on the part of her company. Austin was an outside consultant who managed marketing on email campaigns. The information exported is considered by 24-Seven to be of great market and solicitation value. It was generated over time with much research and expense as well as business relationships with the client. Hogan noted that the attachment sent to Fiorello was accessible internally. She saw no business purpose or legitimate need of having that material sent to Fiorello's outside email address (T2, 72-73). Hogan claimed Austin had no authority to provide the attachment to Fiorello (Px 9; T1, 139-142).
34. Hogan discovers an August 11, 2003-email that attached lists from the Bullhorn database of the company's candidates that included professional categories identified and screened by the company (Px 10, 11 and 12). Hogan noted that the categories were inputted by 24-Seven staff, e.g., the candidate name and specialty, associate designer with other multiple categories of specialty. In addition, these lists consist of candidates with different skill levels in various areas of the apparel work with a multiple of skills for one candidate and a category identification that provided the staff member with contact information as well as qualifications of a candidate. These attachments provided information on 10,000 candidates of 24-Seven. Hogan claimed this information was gathered by 24-Seven over a long period of time and expense and after several levels of screening by staff; this information is not readily available from an industry source; the information is not reflected in resumes. The attachments represent more than 1,500 pages (T1, 141-153).
35. Hogan noted the date that Fiorello signed his employment agreement, dated September 8, 2003 (Px 14), is the same date he emailed 24-Seven documents (Px 10, 11 and 12) (T1, 158).

36. Noting to the email trail, Hogan discovered that Fiorello contacted Pino Ficara seeking his help in requesting that Bullhorn's offsite technical staff provide a report of all candidates. The email trail reveals that Bullhorn requested clarification between "archive" or "active" candidates. 24-Seven Online had authority only to "archive" candidates. However, Bullhorn was requested to provide an "active" candidate list. Bullhorn was not aware of the scope of access given to Fiorello, and provided Pino Ficara with an "active" candidate list. Ficara then sent the list and attachment to Fiorello's 24-Seven email account. Four months after April 11, 2003, in August 2003, Fiorello sends the attachment to his outside email account. Hogan noted that in August 2003, 24-Seven Online is no longer operating and Fiorello was at that time working to develop the beauty side of 24-Seven's business and client contacts only. Hogan found no business or legitimate need for Fiorello's email transactions in August 2003 and he had no business reason to have access to the "active" candidate list (T1, 144-149; T2, 74-75). The three documents (Px 10, 11 and 12) were provided to 24-Seven by Fazio (T2, 88-91).
37. After September 8, 2003, Hogan identifies another email communication to Fiorello's outside email account. She identified an email from staff member, Jodi Proietti, to Fiorello with an attachment of potential directors for placement with clients (Px 15). Ms. Proiette was hired to do the research in gathering up the names and generated a report for business use. Time and expense was incurred in generating this information (T2, 2-44).
38. 24-Seven considers all of the attachments noted in Hogan's testimony as confidential business records, that is, the practices, the pricing, all areas of information that contribute to the success of the company's freelance and full time business. The information therein is used for candidate and client placements and business that provides 24-Seven with leverage on both ends of its business, placing candidates and obtaining job orders from clients by way of departmentalizing its search and place efforts into various categories and specialties as well as experiences and budget/buying patterns (T1, 159-163).

39. The attachments represent six plus or more years of time and expense and according to Hogan gives any user of this data (or a competitor at worse)“immediate entry into the freelance as well as full-time” staffing industry (T1, 163).
40. Hogan explained that a competitor could use the data to by pass all standard measures of a database and use the data directly without the need to invest time or expense or advertise or spend time before a computer and could bring the product to market by direct telephone solicitation (T1, 165; T2, 44).
41. Identifying multiple printouts from the company’s Bullhorn database, as explained early on, the document represents a direct download of a screen view for one particular candidate and the screen print provides the user with 128 client contacts within the client company. Hogan noted that the particular printouts were generated from Bullhorn on August 28, 2003, about the time that Fiorello was employed at 24-Seven. They provide client names, contacts, numbers, titles, addresses and status both on the freelance and full time employment sides (Px 16 and 17; T1, 166-179). These Bullhorn printout were provided to 24-Seven by Fazio (T2, 88-89).
42. Noting to the Aging Trial Balance by Customer, which is an accounting document generated by 24-Seven’s funder, Thisco (Px 18), Hogan identified the dated document as August 7, 2003. Thisco is the company’s back office for accounting services. The Thisco document is sent weekly to the company and reviewed by Kagel. The document is used by the company’s accounting department to monitor placement of candidates with clients and for fee collection; the document reflects information as to the client and/or candidate and addresses and telephones numbers and rate ranges and identifies the person who is the contact to place candidates or obtain a client account. Hogan identified similar documents from Thisco, dated February 5, 2004 and a third document that provide job codes for billing a candidate. This document also provides similar information as the February 5-document. Hogan claims that these documents are sent directly to Kagel for review and for follow-up, but are circulated to the staff. Hogan claims that neither

Fiorello, Furia nor Parets had a business purpose for these documents nor authorized to receive information from Thisco (T1, 189-193; Px 19 and 20).

43. The Thisco documents were also provided to 24-Seven by Fazio (T2, 89) an ex-employee of Gromwell, who came to work for 24-Seven. She returned the Aging Reports to plaintiffs and informed them that she used the same documents at Gromwell when she worked there. Fazio provided the Aging Reports after this litigation commenced and three months into her employment with 24-Seven. Fazio initially told Gudas of her possession of the Aging Reports and that she kept them in her home. A few days later Fazio presents the Aging Reports to Gudas. Hogan and Gudas conclude the Aging Reports provided by Fazio were taken from 24-Seven's offices (T2, 36-42).

Testimony by Celeste Gudas- Principal of 24 Seven

44. Gudas is the second principal of 24-Seven with many years of experience in the staffing industry. She holds fifty percent (50%) of the stock in 24-Seven. She received a telephone call from Alicia Fazio, who told her she had documents that may be of interest to her and related to Fazio's employment at Gromwell. Three days later Fazio gives Gudas exhibits Px 2A (2B which is the top page original as copies in 2A), and Px 16 through Px 20. Gudas immediately turned over the documents to her attorney (T4, 213-218).
45. Gudas identified the documents given to her by Fazio at the hearing. When Fazio gave these documents to Gudas in her office, she asked Fazio where she got the documents and learned that Fazio had "found them at home" and "had used them at Gromwell" (T4, 223). At that time Gudas had suspicion that documents belonging to 24-Seven had been stolen. She recalled Fiorello had left 24-Seven in October 2003, Demitra Parets left in January 2004, and Sal Furia at the end of April 2004. Noting to Px 19, which she identified as an Aging Report, Gudas claims none of the individual defendants would have had a reason to have the copy and any access to them would have not been authorized (T4, 224-231).

46. Gudas also identified the employment agreement she signed on August 8, 2003 (Px 14) and then gave Fiorello for signature. She recalls he returned the agreement signed four weeks later (T4, 218-220).

Testimony by Alicia Fazio Ex Employee of Gromwell & Current Employee of 24-Seven

47. Alicia Fazio (“Fazio”) once a long time employee of Gromwell, left that employment and later joined the plaintiff. She is currently employed as an Account Executive responsible for developing new and existing business with clients. She has minimal contact with candidates at her present position. Her concentration is the fashion industry, beauty and home furnishings (T2, 105-106).
48. Fazio began at Gromwell in 1998 and left in April 2000. She returned in November 2001. She left her Sales Executive position at Gromwell in June 2005 and a few weeks later joined 24-Seven (June 2005) (T2, 107).
49. Fazio testified to events that took place at Gromwell upon the arrival of Richard Walsh (“Walsh”), followed by Fiorello, Furia and Parets and up to the time of her departure from Gromwell and arrival to 24-Seven (T2, 108-202; T3, 1-129).
50. While at Gromwell, Fazio contacted clients for full time placements. In early 2003 that changed at Gromwell, it was developing its free lance business and brought in Walsh to do the same. Up to January 2003, the bulk of Gromwell’s business was in the full time industry. Fazio recalls that Fiorello was hired by Gromwell in early January 2004 and by February 2004, Fiorello was supervising sales and concentrating on the freelance portion of Gromwell’s fashion apparel business. Fazio concluded that Walsh had not much success in building the free lance side of the business that she described was minimal at Gromwell in February 2004. Fiorello was hired to develop the freelance side of the business (T2, 109-112).
51. Fazio worked with the principals of Gromwell, Dennis O’Connor (“O’Connor”) and Thomas Foley (“Foley”) (T2, 113). During her tenure she shared her office space with Foley. Fazio

described the office set up during her time at Gromwell and drew an office diagram for the period of September-October of 2004, measuring the area at about 32 x 34 feet and depicted that office area to consist of numerous desks where people sat during that time. Fazio noted the seating chart for several employees, Claire Lewis, Melissa To, Jodi LaBow, Melissa Angel, Foley and herself as well as others. She described the space as open and not partitioned, with a conference room to one side and the entrance as well as storage facilities. Employees could see, hear and speak to each other from across the room. Foley worked in her vicinity, but O'Connor maintained his offices at an adjacent office where a separate business, Gromwell IT, operated. Both offices shared a common reception area, bathroom and waiting room (Px 21) (T2, 113-121).

52. A few months after Fiorello's arrival in January 2004, he became the Sales Director, while Walsh handled the operations side of the freelance business. Fiorello was Fazio's supervisor. At the time she learned that Fiorello had recently worked at 24-Seven. Before Walsh or Fiorello, Gromwell had no structure set up for freelance or full time. In fact, it was a full time staffing agency. Fazio and other employees had no structure regarding their job duties, they simply ran their own accounts, called clients and filled the accounts with candidates. They worked on commissions and had draws. Once, Fiorello came on board the pay structure changed, with the employees in both accounts and placements receiving higher salaries and smaller commissions. At that time, Gromwell had one database, Resource Tracking, that eventually changed over to Bullhorn in April 2004, after Fiorello joined Gromwell. Fazio worked on her accounts at that time based on her own contacts and the data provided in Resource Tracking. Fazio, up to that time, never used any non-third party documents to perform her job tasks (T2, 127-132).
53. Shortly after Fiorello joined Gromwell, Parets joins the staff and Furia follows. Fazio learned that Parets and Furia also worked at 24-Seven. After all three arrived the organization changed with a Sales Division (clients), to which Fazio worked and an Accounts Management (candidates) and Talent Acquisition (research) sections. Fazio did not work with candidates or do research after

the organization change. By September 2004, the Sales Division consisted of Fazio, LaBow, To, and Angel. The Accounts Management consisted of Parets, Furia, Peter Del Rio², Ann Jasney, Jessica Kerbel, and Alana Yavers. The Talent Acquisition consisted of Bridget Boyle, Kelly Milikan and Carissa Cates³. The sales section primarily focused on free lance while the other two did both full time and free lance placement (T2, 133-136).

54. By May 2004, Fazio claims her client based changed to securing free lance accounts. Fazio's standard procedure of using personal contacts and Resource Tracking changed and Fiorello gave her and other employees instruction as well as "documents, lists for sales and marketing" for free lance marketing. Fazio recalled Fiorello had given her "lists of names, contact people, companies, clients" in "computer generated lists." He also gave the staff verbal instructions and told them of his familiarity with some of the contacts (clients) as well as what type of candidate the client may be looking for, e.g., technical designers. Fazio claims that when she challenged Fiorello on whether there was free lance work from a client, Fiorello would "pull out a list and say 24-Seven had business from this company at this date, at this time is who they hired, this is what they billed this week. I know for a fact there is business coming out of there. Get on the phone" (T2, 137-140).

55. Fazio identified documents used and that Fiorello referred to as an Aging Report. She identified Px 18 as an example of the document she used to make client calls. She recalls seeing similar Aging Reports from Fiorello after May 2004 and she used them while at Gromwell. Fazio claims they facilitated her sales. She recognized the copy of the Aging Report as one that she used while at Gromwell and identified her handwriting and signature on that particular document. She

² Fazio testified about Del Rio and his deposition testimony was noted by the defendants during the hearing, that is, deposition testimony that he never saw any "24-Seven" documents used or documents shredded at Gromwell (T3, 48-50, 68-70). But, Del Rio never testified at the hearing.

³ This section reviewed and followed up on resumes given to Gromwell. Some people would be called in and interviewed, generally finding candidates (T4, 302).

recalls the hand written abbreviation “NLT” as one that she used at Gromwell, noting that “NLT” meant “no longer there” (Px 18). Fazio used similar Aging Report from Fiorello from June 2004 to the time they became “obsolete” (T2, 141-144).

56. Fazio claims LaBow, Lewis, To and Angel used the same reports, but she does not recall discussing their use with the other employees. She “shared them” with the other employees in her section. She does not recall sharing the document with Foley or O’Connor or Walsh. But, was “sure” that Foley and O’Connor saw the Aging Reports being used in the open and employees would refer to candidates on the lists in the open (T2, 144-145). Fazio observed Fiorello make use of the Aging Reports in the open and mentioned 24-Seven and it was her recollection that Foley and O’Connor would be in direct proximity of that conduct (T2, 147).
57. Identifying a similar stack of Aging Reports (Px 19 and 20) that was kept by Fiorello at Gromwell, Fazio recalled time to time Fiorello would pull pages from the stack and pass them to employees in the Sales Division to call potential clients for free lance work. Again, Fazio reiterated that she used the reports to secure accounts from clients as she “didn’t have any of those contacts prior to using these documents.” The success was noted by her and that she secured free lance work. Fazio claims that in February 2004, the size of her weekly average free lance billings was minimal; in May 2004 it was about \$20,000.00, but by October 2004 her weekly billing averaged more than a \$30,000.00 week. Fazio attributed her increase to the use of the Aging Reports. Here, too, Fazio identified her handwriting on the Aging Reports (Px 19) (T2, 148-153).
58. Fazio identified the Bullhorn client printout (Px 16) that she came in possession of while at Gromwell in or about March 2004. She claims once Fiorello gave her this document and instructed her to call the listing therein that was “circled.” At this time, Bullhorn was not being used at Gromwell (see also, Px 17 [08/28/03] (T2, 160). Fazio recognized her handwriting on this document, which she recalled was written during her time at Gromwell. She asked Fiorello

who were the persons listed on a certain column of the document and he told her not to worry about it. She learns that the persons listed were affiliated with 24-Seven. Fazio recalls taking with Foley about this document. Fazio claims she asked for an “authorization” to use the Bullhorn document, and he told her to use the document (“He said, Yeah, you know, it’s okay, like kind of not too many words . . .”) (T2, 154-159). Fazio never specifically told Foley she was using “24-Seven documents” (T3, 37).

59. But, Fazio recalls disputes between staff members with regard to obtaining accounts on clients from these documents and that Fazio would approach Foley, referencing the very documents to Foley, who on occasion reviewed the documents with Fazio. Fazio recalls she primarily referenced the Bullhorn documents with Foley (T2, 174-175; Px 16 and 17). Fazio claims that these documents were used and referenced at sale meetings attended by the Sales Division, Fiorello, Foley and sometimes Walsh. Fazio also claims that Foley was aware of her use of these documents, calling contact persons in different departments, because one client, Polo Ralph Lauren, called and complained to Foley about it (T2, 176). Fazio noted she sought authorization to use the claimed documents from Foley, but never memorialized her claimed discomfort in any writing, unlike incidents on the job with LaBow (Dx A) (T3, 32-37).
60. Fazio also testified that while at Gromwell she came into possession of another Bullhorn screen print document (Px 17), which was similar to the prior Bullhorn screen documents. She noted the client listed on that document “Academiks,” but could not recall whether she used the document to call clients or that the information on this document was inputted into Gromwell database. However, she claims once an employee used any document provided by Fiorello it was the practice to then input that information into Resource Tracking, which was then replaced by Bullhorn at a certain time. She claims the data from Resource Tracking was transferred

electronically to Bullhorn⁴, whereas information from the documents had to be transferred manually to Bullhorn. Once the information was used from the given document, the information was inputted and the document then became obsolete. Fazio received instructions for inputting the information from either Fiorello or Parets. Fazio recalled there was a time that the bulk of the information from these documents was inputted by Claire Lewis (T2, 162-165).

61. Fazio then identified the Aging Report marked Px 2A/2B. She recalled seeing a copy of the document while at Gromwell. She was given the copy by Fiorello while working at Gromwell. He brought it to her desk sometime around April 2004. Fazio recalls having Px 2B. She recalled the “black out” on the document. She does not know who made the “black out” markings (T2, 166-167).
62. Fazio claims she used Px 2B while at Gromwell in the same manner as she used the other document, noting that it provided client names, contact persons, titles, “it was who they were in relation to their organization . . .” Fazio claims to have observed other employees in the Sales Division use this document and the pages in this packet were “swap[ped]” between them (T2, 168).
63. Fazio used Px 2B and then inputted the information into Gromwell’s data system. As the process continued, Px 2B became obsolete. At the time of its use she claims not to have known its originator, but learned that it was a 24-Seven document after she became employed at the plaintiff company and saw a “similar almost identical document” at her new work place. Fazio does not recall ever discussing Px 2B with either Foley or O’Connor. And the only office gossip at 24-Seven was about the then pending lawsuit against Gromwell and their “joking about” the use of the documents Fiorello had given to staff to work off. However, Fazio “believes” O’Connor and Foley were aware that staff was using Px 2B or Px 2A, recalling that she would

⁴Fazio does not recall any problem with migrating data from Resource Tracking to Bullhorn. She claims that from March 2004 to the end of employment, she only used Bullhorn (T3, 66-69).

go to Foley for authorization, if it “was okay thing to do” (T2, 169-174).

64. Fazio attributed the new business she received to the use of these documents. She claims to have “actually got[ten] one of [her] largest and most profit-generating clients from these lists” (T2, 177), identifying a client, Judy Longo, that came “directly from a list” that she never had contacted before (T2, 177). Although she attributed the use of these documents as a primary reason for her success, she did consider Fiorello’s skills and management style added to the increase of the freelance business. But, the “tools” used to increase sales in the freelance business were the documents noted. Fazio claims that during Fiorello’s tenure she used these documents and the information that were then inputted the information into Gromwell’s database. She recalls no use of any “Gromwell” generated documents to place accounts or reach freelance clients (T3, 48-50); she noted the resumes were not useful to her as tools as she contacted clients and not candidates (T3, 23-28). Fazio also saw resumes in the beginning of Fiorello’s tenure at Gromwell. The resumes had the 24-Seven name on them (T2, 182). She ignored the resumes (T, 182).
65. Fazio also claims that while at Gromwell she learned the different bill rates charged by 24-Seven. She maintains the Sales Division staff learned of the bill rates charged by 24-Seven from Fiorello and Parets, that is, 24-Seven was billing at 85%. She made use of that knowledge by undercutting 24-Seven’s bill rate and offering on Gromwell’s behalf a bill rate of 60%. She recalls Fiorello instructing the Sales Division staff to tell potential clients that Gromwell would do it “cheaper than 24-Seven” and that Walsh was against this tactic and told the same staff not to mention 24-Seven. Fazio noted that she discussed her use of these documents with Parets (T2, 178-181).
66. After the litigation began Fazio claims that the issue of the documents was discussed with Parets. Fazio claims Parets stated she never took any documents from 24-Seven and the documents had been taken by Fiorello. She never told O’Connor or Foley of this discussion with Parets (T2,

182).

67. As to Furia, Fazio recalled he sat at the Sale Division meetings, and discussed the above documents at these meetings (T2, 184).
68. Fazio recalled the October 2004 incident when an announcement was made by Foley on the floor to remove all “non-Gromwell” documents from the desks. Fazio was at her desk and Foley was standing in the middle of the room (Px 21), and a few minutes later Parets repeated the announcement. Fazio recalled the statement “Guys, anybody with 24-Seven information . . . get it off your desks. Remove it” (T2, 188; T3, 58-61). She observed staff people removing paper from their desks, opening drawers, and started to pile the paperwork on one of the desk. A few days later Fazio asks Foley what was going on and he informed her that 24-Seven was visiting the offices and that the office “wanted to be prepared in case they were . . . going to look through our desks” (T2, 185-189).
69. Fazio claims the stack of documents was shredded and she observed some of the shredding. She claims the shredding machine was purchased by Gromwell and it “never had a shredding machine before” and believes it was purchased a few days before. She observed Walsh and Foley as well as “other people” shredding (T2, 192-193; Px 21 [designating the placement of the shredder] T2, 194), while Parets was “orchestrating and directing . . . She often liked to make herself feel important” (T, 195). Fazio had some documents, and claims she did not pile them on any desk, but kept them on her desk. A week later people from 24-Seven came to the office (T, 196).
70. Fazio leaves Gromwell in June 2004 as her “beliefs were no longer in accordance with management” (T2, 197). Fazio spoke with Melissa To, who had left Gromwell and ended up at 24-Seven. Fazio soon followed. When she leaves Gromwell, Fiorello, Furia and Parets are still employed by the defendant (T2, 197-199).
71. While at 24-Seven, Fazio brings the documents she had at her home to the plaintiffs’ attention, she “found them” in her home and “felt uncomfortable about it” (T2, 199), that is, while at 24-

Seven she realized she had found the “stolen documents” in her home. She noted that she had Px 2A/2B, and variations of Px 16 through 20 and brought those documents to 24-Seven (T2, 201-202; T3, 11-13, 19-22). She claims to have used them at home while she was working at Gromwell and at that time did not give a second thought whether the documents belonged to 24-Seven. They were used in her home for Gromwell business, but she does not know when she took them home, that is, before or after the announcement at Gromwell that staff turns in “24-Seven” documents (T3, 109-111).

72. Fazio “corrected” her testimony on cross examination and that now recalls she never used Px 20 regarding bills rates when she negotiated pricing with clients when she was at Gromwell (Px 20; T3, 90-92). Yet, she had Px 20 in her home along with the other documents she turned into 24-Seven after she began employment there. Fazio denies she turned in the documents or took them home solely to use them against Gromwell (T3, 111-112). Fazio also had three interviews with 24-Seven before she was hired and at that time knew: (1) of the litigation between the parties; (2) of the “24-Seven” announcement; (3) she had used documents at Gromwell that were circulated by Fiorello; and (4) that Fiorello had worked at 24-Seven, but did not reveal any of claimed conduct at the interviews (“that’s right, I did not tell them . . .” (T3, 114). Moreover, she found the documents in her apartment and held them for a few weeks before she turned them over to 24-Seven. Fazio had no explanation for the weeks that passed before she decided to turn over the documents to 24-Seven (T3, 117).
73. Fazio claims she was not offended that Fiorello became her supervisor as she was now working in a new area, freelance. She felt qualified to be a manager in the full time aspect of the business. She had been promised either from Foley or O’Connor a supervisor position in the full time aspect of the business, but that did not come to be and after Fiorello was asked to leave Gromwell and Walsh appointed her supervisor, Fazio concluded that Foley and O’Connor were dishonest (T3, 42-43).

74. She also viewed Walsh as “sexually offensive” and she could not work with him (T3, 123-124). She complained of Walsh to Foley, but nothing happened (T3, 125). In the end, after a short meeting with Walsh and O’Connor, Fazio concluded that her stay at Gromwell would end and leaves Gromwell in June 2005. She joins To, who left Gromwell and began work at 24-Seven in May 2005 (T3, 131).

Testimony by Richard O’Reilly, Fazio’s Husband & Ex-Partner of Gromwell IT

75. Richard O’Reilly (“O’Reilly”) was once a partner with Foley and O’Connor in Gromwell IT (“IT”). He was a shareholder and officer of IT. He left the corporation in 2006 and there is a dispute among the three over money O’Reilly claims is owed him (T, 201). O’Reilly concedes his money dispute with Foley and O’Connor, but maintains it has no impact on his testimony at this hearing (T3, 201).
76. O’Reilly knows Fiorello. In fact he sat in with O’Connor to interview Fiorello. He claims that O’Connor told him Fiorello was “going to bring a lot of things from the company” that he worked at. O’Reilly also knew that Fiorello had worked at 24-Seven. O’Reilly understood that Fiorello had contacts, processes, “everything that was to build a business” (T3, 194-198). O’Connor told O’Reilly that Fiorello was going to build the freelance business at Gromwell and made reference to him “bringing it on a silver platter” (T3, 199).
77. O’Reilly spoke with Walsh, Walsh complained that Fiorello was abrasive and possibly ruin the business, “too wild” and “breaking down walls” (T3, 200).
78. O’Reilly claimed there was a lot of talk about how the business was being done, “the way they were getting business, how they were getting business, where the business was coming from . . . [Walsh had referred that] all contacts from 24-Seven and that [Fiorello] was running with these” (T3, 201).

Testimony by Melissa To Ex Employee of Gromwell & Current Employee of 24-Seven

79. To testified that while at Gromwell she used documents identified by Fazio. As of May 2005, she

worked for 24-Seven in the client side of the free lance business. She worked at Gromwell from August 2004 to April 2005. To was hired by Fiorello. She worked in the Sales Division soliciting clients. During her period of employment she worked with Fiorello, Fazio, Furia, Parets and others. She was given lists to call clients. She claims these lists were given to her by Fiorello and were shared by the staff in the Sales Division. To identified Px 2A/Px 2B, Px 16 through Px 20 as documents she used. She recalled that Fiorello gave her instructions on the use of particular documents, such as, Px 17, that contained names and contact numbers that list specific categories of fashion work. She simply followed his instructions, cross referencing names with clients and their telephone numbers. She recalled cross referencing data on this particular document against Gromwell database; she identified the data base as Bullhorn. She called the listed contacts to solicit business (T3, 130- 138).

80. She identified Px 2A/Px 2B, testifying that she received instruction for using the material contained therein from Fiorello; she was informed by him that the names and positions listed on these documents were people he had been in contact within the past and she used the list to cross reference with Gromwell's database and make sales calls. Her testimony was the same as to the Aging Reports marked Px 18 and Px19, verifying whether the clients she had called from Px 2A, had in fact used freelancers. She recalled Fiorello telling her that he knew based on the information in those documents that the clients used freelancers when he worked at 24-seven. She claimed similar use of Px 16 and Px 17; she cross reference the information with Gromwell's Bullhorn database then call the "people who we had not connected with and then added them into our data base" (T3, 139-140).

81. To talked about their use with Fazio, LaBow, and Angel. She never discussed these documents with Foley or O'Connor. She infers that they knew she was using them as she worked in the office and they were in the open. The documents were passed from hand to hand between the Sales Division personnel (T3, 143). She testified that she and the staff used Px 2A/Px 2B, Px 16

through 20, interchangeably and recalled one instance that Fazio used Px 17 to contact the client, Academiks (T3, 172-173).

82. To claims that she secured business from the use of the documents; she recalled World Wide Dreams, and she recalled the documents gave her the names and contact numbers to secure World Wide Dreams as a client. To noted that there were discussions among the coworkers of the origin of these documents and it was “believed that these documents came from 24-Seven” (T3, 144-145).
83. To recalled that Fazio, LaBow, Angel and she passed around these documents and that there were “multiple copies” of these documents and used Px 2A for quite a while. She had them on her desk (“Yes, I had a 2-inch stack of papers with a binder clip in this format, yes, I did” [T3, 173]). To recalls multiple copies of Px 2A “float[ed] around” the office. She believed that the documents Fiorello was using had been duplicated for office use (T3, 183). To’s set was kept on her desk and she saw other sets on other desks (T3, 184).
84. To remained at Gromwell until April 6, 2005, and used the documents in issue for the first three months that she worked at Gromwell (August 2004-October 2004); she stopped using them after maximizing her efforts of what she got out of them (T3, 146-149).
85. To recalls that in October 2004, the staff at Gromwell was told to clean out their desks by Foley. She recalled that Foley stated “We need for you guys to clean out your desks and get rid of anything that does not say Gromwell on it” (T3, 151). Foley’s announcement was followed by Parets, who announced “No 24 Seven guys, get rid of anything that says 24 Seven” (T3, 152). The two were standing in the middle of the room. To marked an “x” and her initials “M.T.” in pencil on the diagram drawn by Fazio (Px 21), to depict where the two had been standing (T3, 152-153).
86. To recalled staff members opening their desk drawers and cleaning the tops of their tables; To opened her left desk drawer and “did find exhibit 2A” (T3, 154), raised it in the air and asked “is

this what you mean” to which Foley answered “yes” and took it from To (T3, 153). The document was placed on a pile of other documents she described as “to be shredded pile.” She could not recall who coined the phrase. To didn’t ask what was happening; she observed Parets walking around the office (“she sort of was all over the place”), nervous and excited. She heard Foley announce the possibility that 24 Seven’s people were going to be coming to the office to look around (T3, 154-155).

87. To claims the pile of documents was shredded by Walsh and Foley (T3, 179). She claims the shredding took place after the staff completed the cleaning of their desks and Foley’s second announcement of an office visit from 24-Seven’s people. The shredding “start[ed] then, which continued on for at least a couple of days” and put in “clear garbage bags . . . thrown out,” that is, “being removed through the back door” (T3, 156-159) (Px 21). She claims the shredder was located on the right of Walsh and then moved that day to the center of the room (the day of the announcement) (Px 21 [making an “x” in pencil]; T3, 157-158).
88. To claims seeing Walsh shred a copy of Px 2A (T3, 179), but it was noted, she did not recall that important event at her December-2005 deposition. At the hearing To simply surmised that the copy of Px 2A taken from her was one of the documents that Walsh shredded (T3, 179-180).
89. To maintain she never saw a shredder in the offices prior to the October 2004 incident (T3, 158). She recalls Foley “double checked” to see that the staff complied with his directive (T3, 159). Prior to the announcement, To was aware of litigation over Parets employment at Gromwell and her prior employer, 24-Seven (T3, 170).
90. At this hearing, To testified to specific placements of clients, but at her deposition she could not remember a single placement from information provided by Fiorello (T3, 161). Since her December 15, 2005-deposition, after much “thinking and recollecting,” and after she had spoken with plaintiffs’ counsel and with Fazio, she came to believe that the information Fiorello gave her while at Gromwell belonged to 24-Seven (T3, 161-162). To maintains she did not discuss her

testimony with Fazio nor did the two discuss To's testimony for this hearing. She met Fazio at a pizzeria three weeks before her testimony, but denies the two talked about this litigation (T3, 191).

91. To denies she is lying to hurt Fiorello, but accused him while at Gromwell of sexual harassment and denies any romantic relationship with Fiorello while at Gromwell (T3, 163).
92. To knew by the time she interviewed at 24-Seven and up to six months after her employment that she had used 24-Seven documents while employed at Gromwell, but only disclosed her knowledge when plaintiffs' attorneys interviewed her. She claims she "was so busy working with clients and filling job orders that [she] never even had a minute to breathe, let alone sit down and talk about something like this with them" (T3, 187-189).

Testimony by Claire Lewis, Gromwell Ex-Employee

93. Claire Lewis ("Lewis") worked at Gromwell for a year and a half, first as a receptionist, then in placement and ending her stay in the Sales Division. Her tenure ran from September 2002 to July 2004. She worked in the Sales Division from January 2004 through June 2004. Lewis worked under Fiorello. Her job duties were the same as Fazio and To, that is, to solicit clients for freelance business and permanent placement. Fiorello provided Lewis with the sales pitch (T4, 251-254).
94. Lewis identified documents she used were provided by Fiorello that she used. She noted to Px 17 and recognized her handwriting on that document, noting to the client Academiks at page 1067 as well as her handwriting on page 1073. Fiorello gave her this document and told her to call the clients and the contacts thereunder to solicit business. Lewis also identified Px 16. This document was handed to her from Fazio, who was also using it. She recognized the handwriting on the document as that of Fiorello, as she had worked with him and was familiar with his handwriting (T4, 255-259).
95. Lewis identified Px 2A and recalled receiving parts of what looked like Px 2A. It was her

recollection that Fiorello handed out parts of a document that looked like Px 2A. She saw parts of Px 2A on Furia's desk. She had no recollection of discussing the documents with others at Gromwell. Lewis used Px 16 and 17 while at Gromwell; recalling Fiorello telling her to call "technical designers" and that he would "scream" across the room that all companies "used technical designers" (T4, 261-263).

96. Lewis was also familiar with Bullhorn, describing it as the database used at Gromwell. She used Bullhorn to enter any data she obtained while soliciting business, such as, a client and message. She recalled that her last two weeks at Gromwell (she decided to leave to pursue a career in cosmetology) were spent inputting data into Bullhorn. She could not recall the documents she was using to input data, but the documents were given by Fiorello who told her what to do (T4, 263-268).

97. Lewis noted that she never had a conversation with Fiorello with regard to Px 16 and Px 17 or where he had acquired the exhibits (T3, 270).

98. She did recall certain pages of Px 2A. She remembered it was on Fiorello's desk and a pile of Furia's desk. Reviewing the office diagram (Px 21), Lewis pointed to the area where Fazio sat at the time that Lewis left Gromwell (June 2004). She was seated where the diagram lists "Claire Lewis," but recalls that when she was given Px 16, her desk was located at the area listed "Jodi LaBow." Lewis thought Px 17 was a Gromwell document when it was handed to her. While at Gromwell, Lewis did not know any document she used belonged to 24-Seven. She recalls Furia once mentioning that Px 2A was the "property of another company" (T4, 270-276). Lewis recalls no discussion with Fiorello or other workers regarding pricing (T4, 276-277).

Testimony by Melissa Angel Ex Employee of Gromwell

99. Melissa Angel ("Angel") was once employed at The Gromwell Group ("Gromwell"). She began in August 2004 and left in January 2005 (T1, 17).

100. Angel worked as a sales representative seeking clothing manufactures as clients for Gromwell

- (T1, 18). Angel worked with defendants Fiorello, Furia, and Parets. Angel reported to Fiorello (T1, 19).
101. Fiorello gave her sheets of papers that listed companies, contacts, names, positions and telephone numbers as well as a book that contained company names. She recalled that Fiorello told her that she not use the sheet “out in the open” (T1, 51).
102. Angel identified Px 2A as in the same format as that provided by Fiorello (Px 2A; T1, 21). She does not know whether the spread sheets were generated by Gromwell, but she never saw a client list generated by Gromwell other than what was generated from the computer program, Bullhorn (“Bullhorn”) (T1, 29). Several pages were given to her at a time and she would make telephone calls from them from which she attempted to get meetings (T1, 28). She claims prior spread sheets had been given to the person who she replaced and she followed up. The person she replaced was one, Clare Lewis (“Lewis”). The spread sheets listed companies that she had worked with before and knew of and also noted that “there was nothing that was tangible that was really useful for [her]” (T1, 22).
103. Reviewing Px 2A, Angel noted the company name, a contact person, and title, she only found it useful as a starting point, but did not provide her with anything other than a starting point to then make her way through the company. She noted that without the spreadsheet she would call, e.g., Bloomingdales, and ask around to reach the correct person. This was her practice and the “majority of . . . clients that [she] contacted were not on the spread sheets (T, 31-33).
104. As to the spread sheet, Angel claims it provided a starting point (T1, 51). She still would need history of the contact person listed on the spread sheet. She would look for history from somebody else who worked in the company or from Bullhorn or maybe from Fiorello as he had contacts in the industry (T1, 53). She recalled seeing Alicia Fazio (“Fazio”), Jodi Lebow (“Lebow”), Melissa To (“To”), use the spread sheets (T1, 23).
105. She recalled an October 2004 incident where Tom Foley (“Foley”) told the employees to discard

- the spread sheets that were not “Gromwell material” and recalled Parets “blurted out 24-Seven name, anything that has to do with 24 Seven get rid of” (T1, 24).
106. She recalled Foley was present. By October 2004, Fiorello had been fired. After Fiorello left, his desk was cleaned out by Lebow (T1, 26). Angel recalls Lebow moved to Fiorello’s desk after he had left. She cleaned out his desk and threw documents in the garbage. She had no recollection what were the documents (T, 39-42).
107. Angel only understood that something was going on involving 24-Seven as there was talk at the office that “material was in Gromwell’s possession that was” 24-Seven, but she never had any independent knowledge of the same (T1, 35-36). However, she understood that Gromwell did not want to have documents that came from outside of Gromwell (T1, 56).
108. Angel didn’t do anything because she believed she only had Gromwell materials and did not see any document noting 24-Seven; she did have the spread sheets, but she did not connect them to 24-Seven. But, other employees had documents and handed them to Foley or Walsh.
109. She does not know what happened to documents after she handed them over, only that there were boxes in a conference room adjacent to their work station. She did not enter the conference room at that relevant time. She never saw documents being brought to Walsh and then shredded (T1, 25-26, 38).
110. Angel leaves Gromwell in January 2005, she was not happy there. She communicates with Foley every couple of months. There were instances that Foley talked to her about this litigation and felt bad that Angel became involved in the litigation (T1, 26-28).
111. She also spoke with LaBow, To and Fazio after leaving Gromwell. Most of it was personal matters, but there were occasions that they spoke of the litigation, but not what they were testifying to or how they would testify. Foley asked Angel if she had seen any shredding and she told him no (T1, 42-45).

Testimony by Jodi LaBow Ex Employee of Gromwell & Current Employee of 24-Seven

112. Jodi LaBow (“LaBow”) joined Gromwell in May 1996 and left in March 2005. At the time of her testimony she was employed by plaintiffs. She began in June 2005. Her position is Senior Account Manager and she is responsible for bringing in new full time clients and candidates. She does ninety nine percent (99%) full time placements (T4, 289-293).
113. At Gromwell, LaBow worked as an Account Executive running a full desk on full time accounts and placements. When she started at Gromwell placements were made by advertisement and personal referrals. Starting January 2004, she began freelance sales, but there was more of an emphasis in April 2004. LaBow noted that from 1996 to April 2004, her protocol in seeking clients and candidates did not change, placing advertisements, tapping into referrals and placing advertisements in Womens’ Wear Daily or “DNR.” During that time, LaBow did not even use computers; her source book was the telephone directory. Her work schedule was typical, but after she had a child, she began working three days a week. Her work schedule went back to five days a week after March 2004 when Fiorello came to work at Gromwell (T4, 293-297).
114. After Fiorello is hired by 24-Seven and Parets and Furia are hired some time later and the organization changes. LaBow becomes part of the Sales Division along with Fazio, Lewis and others. LaBow interacted with that side of the office, that is, she would place an account and then confer with the other side of the office to secure the placement of candidates. She would walk over a new account to either Fiorello or Foley and then Parets followed up with candidate placement. Both sides of the office would follow up with both client and candidate for quality control, performance, etc., (T4, 298-301).
115. LaBow recalls Fiorello came to Gromwell one year after the company started to work on the freelance side of the staffing business. During that time, Walsh was working on developing the freelance business which at that time did not top more than seven freelancers on a given week. She claims that increased when Fiorello joined. When Fiorello started a board was set up in the office and information placed on the board to show the number of clients and freelance candidates

placed at a given period of time. The number of candidates placed would fluctuate. She saw the numbers ranged from 60-61, but the highest number of placements for one week reached 100 (October/November 2004) (T4, 305-309).

116. From March 2004 to November 2004, LaBow worked with Fiorello, Furia and Parets. Parets supervised the Account Managers, while Fiorello supervised the Sales Division. When Fiorello left in November 2004, LaBow was then supervised by Walsh (T4, 310).
117. Under Fiorello's supervision, LaBow worked off lists to call clients. She identified Px 2A as one of the documents she used at Gromwell to call clients and book accounts. She began using Px 2A after. Fiorello gave her the document, which was specific as to the accounts she was told to work on. She did not have the entirety of Px 2A. She had accounts assigned that consisted of companies and pages from Px 2A. She recalled assignments from Phillip Van Heusen, Victoria Secrets, Nesi and Federated Merchandising Group. Lollytog (French Toast), Limited, Kenneth Cole, Jones New York and Apparel Company, and others. She obtains some freelance accounts from Hampshire Brand, Nesi, Federated Merchandising Group, Phillip Van Heusen, Limited, Victoria Secret, Kenneth Cole, Jones Apparel Group, etc. Her biggest freelance accounts were from Federated Merchandising Group and Phillip Van Heusen. The latter client provided more than \$200,000.00 in freelance accounts and the former billed more than \$150,000.00 in freelance accounts. She used Px 2A's information by referencing the title, phone numbers as well as other documents that showed the amount of billing that was done to give her an idea who to go after "according to numbers that had been billed in the past" (T4, 311-318).
118. LaBow often talked to Foley about the Phillip Van Heusan account as the company itself was for "many years" his client for full time placements. "It was his very loyal account" (T4, 334) as to full time placements and while Walsh worked on the freelance initially, LaBow noted that company was already a long-term freelancer (T4, 335). LaBow recalled showing Foley the spreadsheet from Px 2A and inquiring whether she could call them on the free lance side as that was his

account before 2004 and she did not want to step “on his toes.” She recalled Foley telling her to “do what you got to do” (T4, 336).

119. She understood Px 2A came from 24-Seven, noting that Fiorello was vocal and it was known to her that he had worked at 24-Seven before Gromwell. She noted that she sat next to Fiorello from March to June 2004, and would hear him talk about his past employer, 24-Seven (T4, 318).
120. LaBow saw Fiorello show sheets of Px 2A to Fazio, Lewis, Angel and one Karen Ruiz (“Ruiz”), when he interacted with the Sales Division. LaBow identified the client contacts from which she obtain freelance accounts, naming D. Irwin, M. Evans, M. Flynn, Cates, S. Lloyd, P. Mahoney and P. Whipple (Px 2A, pp 1287), as an example of the accounts she opened (T4, 319-320).
121. LaBow also used Px 20 to get an idea as to the amount the company would charge a client for a specific placement and to “undercut” the competitors, most specifically 24-Seven.” She understood Px 20 to be a price list from 24-Seven. She would be shown that a particular document from Fiorello. Fiorello would point to the price list while LaBow was negotiating the price over the telephone with a client. For example, she negotiated the price with Phillip Van Heusen using Px 20 and undercutting the competition, including 24-Seven’s pricing. The price list assisted LaBow by giving her an idea of who to target more heavily from the larger Px 2A (T4, 321-323). She also saw Fiorello use Px 20 with other sales people (T4, 332-333).
122. LaBow also saw documents that looked like Px 17, Px 18 and Px 19 at Gromwell. These documents had billings that indicated months where billings were high and months where the billings were low for a given year and this information was relevant to LaBow as a sales person. LaBow had pieces of Px 17 through 19 as they related to specific company accounts. She recalled Fiorello provided her with those particular documents and would tell her which months were busiest for a client account regarding freelancers and directed LaBow to call the specific client. She recalled this occurred in April 2004 (T4, 324-326).
123. LaBow claims she showed Foley particular spread sheets from Px 2A (T4, 327). She recalled

Foley said things to Fiorello about Px 2A, such as, “put those things away” or “put those in a drawer” or “take those home.” But, LaBow saw the documents in the office. She also saw the staff in the Sales Division show Foley the particular spread sheets from Px 2A and the very same spread sheets were referred by the employees of the Sales Division at their staff meetings and while Foley was present. LaBow specifically recalls meetings where references were made and Foley was present. Sales meetings usually took place once a week and generally attended by the staff and Fiorello and on occasion. She recalled staff members referencing names and contacts made from the spread sheets at the meeting and that the very same sheets were used from March 2004 to November 2004 (T4, 329-332).

124. As a result of using the documents, LaBow claims she got accounts. She also discusses the use of these documents with the other sales persons as well as with Parets. Parets was helpful on the other side as LaBow recalled she was familiar with the candidates who were needed in certain departments, such as, designing, etc., (T4, 336-337).

125. LaBow also worked with resumes and on occasion Fiorello would show her some resumes. But, she did not know where he got them from, but she did see the 24-Seven name on some of the resumes and she suggested that they appeared to be off a website or page (T4, 339).

126. LaBow also recalled the October 2004 incident. Referring to Px 2A, Px 17 through Px 20, she recalled an announcement by Foley in the office that the staff was to go through their desks and remove all “non-Gromwell property.” She was told that “24-Seven attorneys were coming into our office.” She recalls most of the staff was present, and corrected her testimony with respect to “Karen Ruiz,” who she could not recall was or was not present at the time of the announcement (T4, 391-392). She claims Fiorello left Gromwell three weeks earlier. However, Furia and Parets were present and Parets stood up and said “anything that has 24-Seven or any sign of 24-Seven” had to be removed. She recalled Foley was present when Parets made the statement. LaBow went through her desk and took out what looked like Px 2A and Px 18 and put them in a pile located

to the left of Foley, on an empty desk. She claims to have seen shredding of the pile. She saw Walsh shredding documents. She testified that “Leon” did shred as well. She could not recall his last name⁵, but noted that he did accounting for the company. She saw other employees going through their desks, such as, To, Angel and Fazio (T4, 340-343).

127. She noted the location of the pile of paper and that she saw Parets place documents on that pile (Px 21). She also noted that the circled “x” depicted on the diagram, in the middle, was the location of the shredder. Shortly after Parets placed documents in the pile, the shredding began that day. The pile was located next to the shredder. She recalls the shredding took place over a three-day period, but not consecutively, one day before, two days later. She recalls that those present were Fazio, To, Walsh, Angel, Del Rio, Furia, Parets, Yavers, and “Leon was definitely there” (T4, 393-400).
128. After Fiorello left Gromwell, at the direction of Foley, LaBow went through his desk and cleaned it out; she was to clean out the desk, box personal items and “get rid of anything else.” She cleaned out the desk and claims to have found many copies of documents Px 2A, 18, 19 and 20 and started to shred these very copies with a shredder that was “wheeled” to Fiorello’s desk by either someone or herself. She claims Foley told her to shred the documents. She recalls this happening over a period of three days in October 2004. However, she did not shred all of the documents; instead, she places them in a bag and put in the garbage (T4, 343-346).
129. LaBow recalled that the information contained in the shredded or discarded documents had been inputted into the Gromwell database and that this process had been done in October 2004 (T4, 347). At the hearing, LaBow denied ever being told by O’Connor or Foley that they did not want 24-Seven documents on the premises, but at her December 2005-deposition she testified of a meeting of the staff where they were told, regardless whether they were or not on the premises, that

⁵ One Leon Persaud, who did accounting at Gromwell, testified at this hearing (discussed, *infra*).

any 24-Seven documents, if they existed, were not to be on the premises. She recalls the announcement, but the documents were used on the premises and in the open (T4, 378-381). She also recalled that after April 2004, the information obtained from the documents had been loaded onto the Bullhorn database, as instructed, and their work was done from the Bullhorn database and not the documents (T4, 283).

130. LaBow also recalled “*Magic*” which was a show in the fashion industry took place in Las Vegas twice a year, but she did not know if Fiorello attended that event, which took place at that time in February and LaBow recalls she was no longer in the office (T4, 386).
131. LaBow leaves Gromwell, after the company lowered her compensation and changed her hours (T4, 348). However, she claims that on the free lance side she was the company’s number two biller, and Fazio was number one. Presently, she does not consider Foley or O’Connor as friends (T4, 348).
132. LaBow was not friendly with Fiorello and at her deposition testified that she and other employees were aware of claims of sexual harassment and that they either wanted Fiorello to “step up to the plate and quite behaving like an animal, or for him to be fired” (T4, 274, 367-373).

Testimony by Karen Ruiz Ex Employee of Gromwell

133. Karen Ruiz (“Ruiz”) worked at Gromwell for about five months, from September 2004 to January 2005 and worked with Fiorello, Furia and Parets. She was beauty director. She left Gromwell because she was not in the right industry. She is now a teacher in Special Education. Her desk was the closet to the hallway that joined Gromwell IT and Gromwell. In the beginning, To, Fiorello, Angel, Labor and Fazio sat near her (T5, 4-6).
134. Ruiz noted that she was first contacted by plaintiff’s attorney with respect to this litigation. She spoke with one of the attorneys who sent her by email (Px 25 and 26) approximately three affidavits for review and signature regarding this litigation and Ruiz was not comfortable signing any of them. The last one provided to her was signed. But, she also noted that plaintiffs’ attorney

did not coerce her to sign the affidavit, dated September 22, 2005. Sometime after Ruiz signed an affidavit given by the attorney for the individual defendants (T5, 7-8; Dx C; Px 24; T5, 21-24).

135. Referring to her emails with the plaintiffs' attorneys (Px 25), Ruiz noted that in one of her affidavits she avers that she was told to "throw away certain documents" and that it was made at an office meeting (T5, 26). Ruiz recalled the office meeting, but not the person who stated to her that she throw away documents. She had no recollection who was at the meeting (T5, 27-29). She also remembers staff simply returning to their desks, and she did not see any activity (T5, 32).
136. Ruiz dealt with both clients and candidates in the beauty side of the business, not fashion or apparel companies. Moreover, Fiorello did not supervise Ruiz, she reported to Foley. The documents that the fashion people were working were not the documents she worked with (T5, 30-32).
137. Ruiz never observed anyone destroying documents at Gromwell. She never saw any documents that looked like Px 2A, Px 16 through 20 nor Px 11 at Gromwell. She didn't use any of these documents and she never saw them; as noted above Ruiz worked in the beauty section of the business and Fiorello did not supervise her. She never witnessed the shredding documents at Gromwell (T5, 9-13).

Testimony by Leon A. Persaud, Gromwell Employee

138. Leon A. Persaud ("Persaud") handles the accounting at Gromwell. He has an office separate from the rest of the office staff (Px 21), his office was located about five feet on the left from the entrance of the large open space. He has been at Gromwell for one year and three months since 2004. He was not employed at the time of Fiorello's hiring nor was Fiorello at Gromwell when Persaud began his employment. However Parets and Furia were there at the time Persaud started at the company (T5, 36-41).
139. Persaud testified that the office has a shredder and it was there before he began employment. He

never purchased a shredder for the company. He noted that he was not working for Gromwell in October 2004, recalling he started at the company a week after Thanksgiving 2004 (T5, 41-43).

Testimony by Dennis O'Connor Principal of Gromwell

140. Dennis O'Connor ("O'Connor") started in the placement industry in 1972. In 1980, O'Connor opens his own company and it ultimately evolves into Gromwell in 1990. Foley joined as a partner in 1990, but prior to that worked with O'Connor. From 1990 to 2003, Gromwell was basically full time placement and generally in fashion, but also did business outside of fashion. In 2002, O'Connor, Foley and O'Reilly form Gromwell IT an IT recruiting and consulting business separate and apart from Gromwell (T5, 49-65).
141. O'Connor noted that in 1997, Gromwell generated its data manually. Employees kept their own source of records on their desk or in file cabinets (notes, applications, directories) on accounts and applicants, which at the time was predominantly permanent placement. In 1997, Gromwell starts using Resource Tracking as its computer database and began inputting data. In May 2004, Gromwell changes to Bullhorn as its database for inputting data (T5, 67-69).
142. In 1997, Gromwell's pricing was 20% commission as most of its placements were for full time positions. The larger the company the lower the commission, but no lower than 15%. Sometimes the commission reached as high as 25%. O'Connor, with many years of experience, understood the competition and noted that pricing was determined by the clients, not the placement agencies (T5, 69-73).
143. When O'Connor and Foley joined forces to operate Gromwell, the former managed the office and the latter did the sales work. O'Connor worked on placing the accounts and Foley obtained them. The office grew to 15 employees doing administration, management, sales and accounts. The employees who worked on accounts both opened them and filled them; each employee had their own accounts. Employees would generate their own account or inherit them from employees who left Gromwell. They would generate their own lists, develop their own relationships and learn

from clients the seasonal patterns of the accounts (T5, 74-77).

144. Gromwell hired Walsh in 2003 to develop freelance business for the company. Foley knew Walsh for several years and the two principals of Gromwell interviewed Walsh and asks him if he could look into the feasibility of freelance business as Walsh was experienced in the freelance side of placements, but not much experience in the fashion industry. Gromwell hires Walsh as a consultant in May 2003 and Walsh began to assess the possibility. He met and spoke with employees, looked at clients and candidate records and issued reports. The reports were discussed with Foley and O'Connor. Walsh's conclusion was that freelance expansion was feasible (T5, 85-89).
145. O'Connor claims that Gromwell had accumulated in its database of clients and candidates over many years and from other agencies that his company shared either material with or received material from, for example, Project Solvers and Rapid Response. He concedes that when Fiorello came to the company the freelance business indeed increased, but he attributed the increase to advertising, market branding, office reorganization and Fiorello's management skills ("he brought a whole different mind set into the office, put a lot of energy into the office, and his ideas were to go out, get openings, use one person to lead you to another person . . . ") (T5, 172-174).
146. In 2003, O'Connor and Foley decide to go into the freelance side of the staffing/placement industry and make use of the database that Gromwell generated prior to 2003. Knowing that the freelance side was a specialized area, O'Connor sought one who could assist the company in getting into that side of the business. Walsh was hired to start off the freelance side. Walsh analyzed the prospect and acted as a consultant (T6, 40-45).
147. Gromwell then starts to work on freelance accounts and candidates in May or June 2003, sending out notices to their permanent clients of their expansion. Candidates that came would be asked either permanent and/or freelance placement. O'Connor noted that the startup did not go off well. At one point gross billings reached \$30,000.00 one week. O'Connor noted the problem was the

office culture in place was for so long and difficult to navigate; the staff was doing their own accounts and permanent placement that resulted in higher commissions. Pricing the freelance placement was either Foley or Walsh's responsibility (T5, 90).

148. By this time, Gromwell was using Resource Tracking that provided data on applicants, resumes, applications, notes to candidates and to clients, the company names, telephone numbers, references, and other information. Access was available to all employees. Employees were not required to sign any restrictive covenants or employment agreements. There was no restriction of the use of information and Gromwell and did not have in place any confidentiality agreement nor expected that from employees who left Gromwell (T5, 78-82).
149. Gromwell replaces Resource Tracking with Bullhorn in May 2004. After Gromwell began expanding in the freelance area he heard of Bullhorn from an advertisement and contacted the company. Bullhorn came to Gromwell and made a presentation of the software in the Fall 2003. Six months later, May 2004, Gromwell began using Bullhorn. The old system is kept for duplication purposes and for archived records (T5, 82-85).
150. O'Connor learned that Fiorello had contacted Foley while O'Connor was on vacation. O'Connor learns at that time that Fiorello worked at 24-Seven. O'Connor interviewed Fiorello and made notes (Px 22 and Px 23), and kept a copy of Fiorello's resume. On his notes, O'Connor wrote positives and negatives pertaining to Fiorello's employment with Gromwell. O'Connor had a number of interviews with Fiorello. Foley and he interviewed Fiorello three or four times (T4, 276-282).
151. In his notes, O'Connor indicated several positives as to Fiorello, "energy" as he found him energetic and O'Connor was looking for someone to "jazz up" their freelance operation after bringing in Richard Walsh ("Walsh") but, was not terrific. O'Connor found Fiorello "enthusiastic." He noted negatives as well and weighed both sides before deciding to hire Fiorello (T4, 283-287). Fiorello was hired after his series of interviews with Foley and O'Connor (Px 22

and 23; T5, 98-100).

152. O'Connor hired Fiorello to "jack up" the freelance business at Gromwell. He learned both from the resume and interview that Fiorello worked for 24-Seven, initially on the on-line service. He learned Fiorello and Furia worked at 24-Seven Online and then went over to 24-Seven into sales roles. He also learned from Fiorello of the no-compete clause in his 24-Seven employment agreement. O'Connor asked Fiorello if he signed the agreement and Fiorello told him yes. O'Connor then spoke to his attorney about the same. O'Connor ultimately offered Fiorello employment in January 2004 (T5, 101-104).
153. O'Connor concluded it was time "to grow the business" (T5, 105), and knew that there would be changes made once Fiorello came on board. Walsh was not able to move the freelance business forward, it "seemed to be a little stick-in-the-mud type of proposition" (*id.*). O'Connor felt Fiorello was good at marketing, branding, bringing technology on the fashion side. But, O'Connor never asks Fiorello if he could bring documents from 24-Seven to Gromwell. O'Connor weighed the pros and cons in hiring Fiorello ("what was the good side and the bad side on this") (T5, 106-110; T6, 24-25).
154. He weighed: "energy, enthusiasm, knowledge of fashion, expansion ideas, works with the opposition, can open doors, positive attitude, help with branding, knows IT/consulting, permanent placement" against: "fluff (not real), staying power, stolen material . . . [Walsh] rivalry, transition . . . jumpy background, reference bad, questionable remuneration . . ." (Px 22). O'Connor stated he wrote "stolen material" after he had interviewed Fiorello about the litigation Fiorello noted with 24-Seven and he simply inferred what he thought he understood the dispute between Fiorello and 24-Seven to be. O'Connor did not want stolen material in the office at all . . . anything that he would bring from another company that would jeopardize The Gromwell Group because we had what we needed in our office." He noted that Fiorello never said that he had "stolen material," it was simply something that was on O'Connor's mind (T6, 27). He denies having any inference

at the time of the interview with Fiorello that the latter had stolen and was offering stolen material to Gromwell (T6, 56-57). In the end, after talking with Foley, it was decided to hire Fiorello as a consultant for three months (T5, 110-117; T6, 26-29).

155. Once Fiorello came on board the structure of the office was changed with his micro-management over the staff, accustomed to being on their own, work increased and the compensation changed with an emphasis on increase salaries and fewer commissions. Along with this change, O'Connor noted friction between management (Parets and Fiorello), and the staff (Fazio, LaBow, To, Lewis, etc.), with some employees leaving Gromwell before Fiorello was terminated and some leaving after Walsh was appointed to manage the staff (e.g., Fazio) (T6, 2-24).
156. Fiorello was appointed as a Sales Manager and supervised Fazio, LaBow, To, Angel. O'Connor noted that Fiorello's appointment as manager resulted in a bittersweet relationship with the staff. But, he also added new things to the job site. He was on top of the staff and this caused some problems between staff and Fiorello (T5, 118-123).
157. Within two weeks of hiring Fiorello, the instant action commenced. O'Connor was aware of an injunction issued by Justice Cahn. He understood that the Court ordered the return, if any, of all 24-Seven documents. He recalls receiving a copy of the Court Order. O'Connor recalls either on that day or sometime thereafter he held an office meeting at Gromwell with the entire staff and stated that Gromwell didn't "want any information from 24-Seven on our premises or being used by anybody." If there was any such document O'Connor wanted the papers handed up to him (T5, 124-131).
158. O'Connor denies seeing any 24-Seven document on the premises, particularly Px 2A, 2B, Px 16 through 20, only in this litigation. He has reviewed these documents and claims that most of the information contained therein are not useful to Gromwell. He knows the majority of the companies. As to any pricing information contained in Px 18, O'Connor claims it was of no use as he could not understand it. He concedes that the subject exhibits, if indeed they were on

Gromwell's premises, weren't permitted to be on Gromwell's premises T5, 131-135).

159. During the regular course of business, O'Connor would spend time in the offices of both IT and Gromwell, but his office was located on the side of IT. O'Connor did not have a desk in the office space where Foley and the rest of the Gromwell staff worked (T5, 137-139).
160. He confirmed the presence of a shredder on the premises, one had been purchased in 2002 and a newer one in Fall of 2004. The first was used by the bookkeeper to shred financial documents. The second one was purchased after the appointment of, Henry Lehman, by the Court to assist in comparing the databases: Bullhorn and Resource Tracking as well as hard copies of records. O'Connor claims to have discovered a large amount of paperwork at this time and had Gromwell staff input that information into the offices' databases. The second shredder was used to "eliminate the excess stuff" and the other paperwork was placed in boxes for Lehman to take a look at. In short, the second shredder was used to shred documents that O'Connor claimed were not related to the instant litigation, but represented years of paperwork that could be discarded as long as the information in them had been inputted into the database. Foley was in charge in organizing and carrying out this effort. O'Connor recalls telling Foley that Henry Lehman would be coming to Gromwell and that the office had to have its files, boxes, documents and databases in order and there was going to be an inspection (T5, 139-146).
161. He recalls Lehman coming to the Gromwell office and that he spoke with him for a short while then walked Lehman over to Foley and left him there. He recalled a dispute followed when plaintiffs' attorneys appeared at the offices and O'Connor understood that Lehman was the only person expected to appear at the premises. Lehman arranged for the boxed materials to be sent to plaintiffs' attorneys' offices (T5, 146-151).
162. O'Connor received sexual harassment complaints from staff members about Fiorello and Gromwell's attorney conducted an investigation and recommended that Fiorello be terminated. In the end, Fiorello was suspended and then terminated from employment in November 2004.

O'Connor claimed that Fazio and LaBow had requested that Fiorello be terminated from his job. He recalled the Sales Division complained about Fiorello and he concluded that Fazio and LaBow "had it in for" Fiorello. He surmised that LaBow was upset that Fiorello required her to come to work five days a week and Fazio was seeking a management position and became upset when she wasn't offered one by Gromwell (T5, 153-156, 161-162).

163. After the termination, O'Connor asked Foley to clean out Fiorello's desk. But, O'Connor has no personal knowledge of what was on or in the desk at that time. He only recalls Fiorello picking up two boxes after the desk had been cleaned out (T5, 162-163).
164. Recalling the court order to turn over information pertaining to Fiorello while he was employed at Gromwell, O'Connor caused a search for documents, materials and email communications. He directed Gromwell's computer person, Mark Wilkinson ("Wilkinson") to search for electronic communications regarding Fiorello and that employee found some back up tapes containing electronic communications and turned them over to O'Connor. Sometime in the Spring 2005, O'Connor reviewed the material over a four-day period and on the last day opened an email with an attachment that contained approximately 6,000 names. He then turned over the back up tapes to his attorney (T5, 164-171).
165. O'Connor denies being told by any staff that they had been using 24-Seven documents during Fiorello's employment at the company. He claims to have spoken with Fiorello a number of times (as well as Furia and Parets [T5, 185-186]), and telling him that he did not want any 24-Seven documents on the premises. He also recalled having an office meeting or two to state the same to the office staff (T5, 180-181).
166. O'Connor claimed that O'Reilly (Fazio's husband) had a fallen out with Foley and O'Connor regarding the management and operation of IT, which was followed by a letter of resignation from O'Reilly in November 2005. O'Connor noted that there is a dispute over money among the three with respect to IT (T5, 157-160). Apparently, O'Reilly claims he is owed \$75,000.00 under their

partnership agreement (T6, 32).

167. O'Connor claims that Fazio and LaBow took information with them when they left Gromwell. But, he does not believe Gromwell's business records are confidential. Moreover, he concedes the employees are not bound by an agreement or restrictive covenant (T5, 175-180).

Testimony by Thomas Foley

168. Foley began working in the staffing placement industry in 1978. He began working with O'Connor in 1981. Foley later becomes a partner of the company which later becomes Gromwell. The company developed relationships with clients over the years. Initially by telephone calls and then direct relationships with Human Resource directors. Employees of Gromwell ran their own desks and accounts and kept their own records. There was no central filing system before Resource Tracking (T6, 91-97).
169. Foley is in charge of the fashion side of the business. He sits in the open office area supervising and managing the business. Foley spends more than seventy percent (70%) of his time in the office the rest outside the office with clients or with IT. Referring to the office diagram, Foley noted that he sat at different desks in August 2004 and October 2004, but he remained in the open office space (T6, 98-102).
170. At his deposition, Foley testified that in 2000, Gromwell had gross revenue of \$2 to 2.5 million in permanent placement and that after September 2001, the company "took a bit hit" in the field of permanent work. The gross revenue dropped to \$1.5 million. Foley also testified that after September 2001, clients wanted more freelance workers. Foley conceded that at that time Gromwell needed a business plan and took on Walsh and then Fiorello. Moreover, regardless of Foley's relationships with numerous contacts in the industry, Walsh was not successful in building up the freelance business (T7, 74-88).
171. Before Walsh's arrival, Foley and O'Connor managed the office staff. In 2003, they hired Walsh as a consultant for expanding business to freelance; Foley noted that at that time many companies

were hiring freelancers and Gromwell was losing business. It needed to tap into this streamline of cash. Walsh was hired to provide input as to how Gromwell could expand to freelance placement. Walsh reported to Foley directly and did not have any supervising responsibilities over the staff at that time. The expansion was slow as the staff had to be pushed to place freelancers and open accounts with clients. One staff member worked for freelance accounts, Anne Jasney (“Jasney”). The rest of the staff continued to work on permanent placements. Foley noted that by December 2003, the freelance placements were no more than \$30,000.00 per week and attributed the difficulty to securing clients and candidates and internal conflicts with the staff accustomed to permanent placements and high commissions and draws versus freelance placements, lower commission, but higher salaries (a change of the business model) as well as personal problems between staff members (T6, 103-107). \$30,000.00 was the highest weekly gross for freelance bookings while Walsh was in charge. In 2003, Gromwell had gross revenues of \$1,560,000.00 for freelance placements, approximately \$1.0 million less than the permanent gross revenue pre-September 2001 (\$2.5 million (T7, 79-80, 91-93). On redirect, Foley did not know how much Gromwell grossed in freelance revenue for 2004; he did not know if the amount exceeded \$500,000.00 (T7, 124).

172. Foley noted that on the average both before and after 2004, Gromwell received between 100 and 400 resumes per week (either hard copy or email transmission) and interviewed 50 to 100 applicants for placement. Foley indicated that the flow of candidates did not really change, but the emphasis after 2003 was on opening accounts and the “Account Management Team” (Parets, Furia, Del Rio, Jasney, Yavers) would interview candidates for placement in the new freelance accounts. In short, after the reorganization of the office, the staff concentrated more on opening accounts than filling them with candidates (T7, 51-64).
173. Walsh set up the parameters of the freelance operation, the freelance database and in a short period of time had “61 people in it.” Foley indicated Walsh “couldn’t do much . . . because the people

were pushing back on him. Walsh and Jasney were working the freelance side while the rest of the staff worked the permanent placement side (T6, 108-109).

174. The process changed once Fiorello was hired. Before his arrival, Gromwell had accumulated several hundred clients that included freelance, but the predominate clients were permanent. The principal producers of these clients were, Foley, Fazio and LaBow. While Fiorello was on the job, the principal producers were Fazio and LaBow as well as Foley. Foley had relationships already with Estee Lauder, The Gap, Warnarco, Nautica, among others (T6, 110-114).
175. Foley claims that prior to Fiorello coming to Gromwell, the company amassed more than 20,000 clients. During Fiorello's tenure and after the company had 30,000 candidates stored on its Bullhorn database. Before Fiorello and Walsh, Gromwell began inputting data into Resource Tracking in 1997. In 2004, the company began using Bullhorn. Foley claims the company changed to Bullhorn at the behest of Walsh because it was "user friendly" for the business of IT ("Richard wanted to get away from Resource Tracking because it wasn't effective for doing temps. It didn't have a bill rate and pay rate on it where you could go into the system, type in the information, put time sheets in, and actually send it over to payroll" [T6, 117]). Gromwell selected Bullhorn as the replacement (T6, 115-117).
176. As to pricing, Foley recalled Walsh was knowledgeable and that freelance rates generally were marked up from eighty to a hundred percent (80-100%). The markup was arrived by Walsh, but Foley claims pricing is determined always by the client and not the agency. There are contracts as to pricing with the clients for permanent placements, but freelance placements are generally negotiated. The markups are not disclosed to the clients and Gromwell instructs freelancers not to disclose their rates with clients. Before Fiorello came on board, Fazio would have an account for a freelancer and forward the same to Walsh who negotiated the fee with the client and then he would forward the same to Jasney, who filled the account (T6, 118-121).
177. Gromwell's business since the 1990s has been placements in the fashion industry and prior to

2002-2003, exclusively full time placements, but after IT was opened, Foley claims that Gromwell found freelance placement a good stream of cash.

178. Gromwell retained Fiorello's company as consultant for the company, Christian Fiorello Incorp. Checks were written to that company. Foley was first contacted by Fiorello in December 2003, looking for work. He had met Fiorello a year earlier. The two met after the December 2003 call. At the first meeting, Foley was informed that Fiorello had worked for 24-Seven and on the freelance side. He was also aware of Fiorello's contract and the no-compete clause (T6, 143-145). Foley understood at that time Fiorello had limited freelance experience and a lot of experience in fashion sales. The two discussed Fiorello's background and Fiorello's development of a database system and technology experience and Foley's interest and desire to expand the IT as a "fashion IT machine" (T6, 122-128).
179. Foley understood from Fiorello that while at 24-Seven Online he had created a database system that populated more than 40,000 applicants by using the internet and that he had collected resumes off the internet, job fairs, and workshops, which was not of any interest to Foley as he told Fiorello he was not interested in the "job board business" or "database business." Foley maintains he never saw 24-Seven's database system, but nevertheless was sure that it was similar to Gromwell's database (T6, 130-131).
180. Interviews continued with O'Connor. Foley could not recall if he saw Fiorello's resume (Px 22), and never saw O'Connor's notes (Px 23). He could not recall whether references were checked (T6, 134-136).
181. Fiorello was hired to develop the freelance business although he had only 15 months of experience in the fashion industry. At the time of his interview, Fiorello had no active accounts. O'Connor also raised concerns after the interview of bringing Fiorello on board. He was aware Fiorello had an agreement with 24-Seven regarding a no-compete clause. Foley denies Fiorello was hired because he had 24-Seven documents with him or that he was delivering 24-Seven to

Gromwell “on a silver platter” (T7, 94-98).

182. Foley supervised all of the staff, Fiorello, Walsh, Parets, Furia, Fazio, LaBow, etc. He observed Fiorello giving the staff verbal and written leads and knew in general candidates placed with freelance clients. Foley claims he never asked Fiorello where he was getting his leads from. But, Foley testified at the hearing and at a deposition that staff was told not to use “intellectual property from any other source” (T7, 106-111).
183. Once Furia, Parets and Fiorello came on board the freelance business began to grow from the low weekly average during Walsh’s tenure of \$30,000.00 to \$90,000.00 a week, and from a few candidates placed a week to almost 100 in one week (T7, 100-102).
184. Foley was aware of the subsequent injunction that was issued by Justice Cahn; he understood that plaintiffs’ were making the claim that defendants had documents that belonged to the plaintiffs and that Gromwell had to return them. Foley denies ever seeing any such documents on the premises (Px 2A/2B, Px 16-Px 20). Foley claims the documents would not have been of any use to Gromwell as there was the absence of a “relationship” between the contact persons and the person placing the call to that person. Foley claims those staffing placements are built on relationship between the staff member and the client and/or the candidate. Hence, the use of any document without the relationship would be of no value. Foley denies ever being told by a staff member that they were using 24-Seven documents in 2004 (T6, 145-149).
185. After Fiorello’s termination, his desk is cleaned out by LaBow. Foley recalled LaBow cleaned out the desk after he heard her testify at this hearing. As to the shredder, Foley does not recall when it was purchased. Foley claims never to have asked anyone to shred documents relating to this litigation, although documents are shredded in the regular course of business. He recalled gathering documents and boxing them, but that was in preparation for Lehman’s visit to the offices and that the materials were boxed and then placed in the offices’ conference room. Foley recalls this took place in October 2004. Before October 2004, the staff was requested to hand in

- all their paper work in August 2004 (T6, 150-155).
186. Foley concedes that on one occasion he requested that the staff discard all non-Gromwell documents. He does not recall Parets standing next to him at that time nor that she followed with her own statement (T7, 72-73).
187. Foley wanted all such documents discarded or thrown away, but he was referring to Bullhorn, Career Builder resumes, and other documents that “had no relevance to the business” (T6, 157). Foley at first did not recall the office shredder being used in October 2004 (T6, 159-160), but during his cross examination indicated that during the office cleanup he saw staff members placing documents on a desk and that some of the documents were shredded (“the documents that were — that were put together were resumes that people had on their desks; they were Career Builder; they were — some people had Bullhorn they had printed out on their desk. That’s the stuff that was gathered. So stuff that some of the — that was shredded, if it had been shredded, I’m not sure about . . .”) (T7, 68-69).
188. But, Foley did not go through every document that was placed in the pile nor did he review all documents that were “discarded.” He concedes that he does not have any personal knowledge whether any documents that appeared to be Px 2A/2B or Px 16 through 20 were not discarded (T7, 71-72). It is his recollection that the staff was directed to clean off their desk of documents and to throw out non-Gromwell documents by placing them in a pile; the pile was later placed in the garbage and discarded. Some applications and other materials were kept as part of Gromwell’s records on applicants and stored in the file cabinets (T7, 45-50). Foley noted Gromwell sought to place any and all necessary information from any discarded documents in its Bullhorn database (T7, 65-66).
189. Foley told Fiorello that Gromwell did not want any documents or database used on its premises after this litigation commenced. He recalls telling Fiorello that under no circumstance would Gromwell tolerate having such documents on the premises and that Fiorello acknowledged he had

no such documents (T6, 162-164).

190. Foley also interviewed Parets and hired her. She never mentioned stolen documents. She never told him that she could bring documents from 24-Seven. Foley also interviewed and hired Furia. Furia remains employed by Gromwell. Furia never told Foley he could or would bring 24-Seven documents with him to Gromwell (T7, 24-26).
191. Regarding clients and accounts that predate Fiorello's arrival and after his departure, Foley noted to the Banana Republic account that started in 2000 (permanent placement), Cache that started in 2002, The Gap that started in 1999 and a freelance relationship that began in 2003, Happy Kids that commenced years before 2003, J. Crew that commenced in the early 1990s, Kids International that started in 2002, Liz Claireborne that started in 1990, MB Kids that started in 1986, Nautica that started in the early 1990s and freelance that began in 2003, Old Navy that began in 2000, Perry Ellis that began in 2002, Polo that started in 1997, Regatta that started in 2003, Tommy Hilfiger that began in 1994, Warnarco that started years before 2003, among others. Foley noted that most of these accounts were handled by Fazio. By June 2004, Foley had assigned most of these accounts to Fazio and represented about eighty percent (80%) of Fazio's total billings for the year (T7, 3-18).
192. Foley noted to similar accounts that were opened and subsequently assigned to LaBow. Foley noted to Federated stores that was opened in 2000, French Toast opened in 1999, Kenneth Cole that was commenced in 2004, Plugg opened in the 1990s, Van Heusen and its divisions (Izod, LeCoste, Gants) (T7, 21-24).
193. When Gromwell first hired Fiorello he was a consultant and then a few months later brought on as a manager. As a manager over the employees with authority to determine their work week, salaries (Px 27A and 27B), vacation, assignments, accounts, and the protocol in calling and obtained clients (T7, 118-123), Foley claims that Fiorello continued to work as a "consultant" and was never an "employee" of Gromwell ("I mean he was always a consultant"). He recalled checks

were paid to Christian Fiorello Incorp. When Fiorello was terminated, Walsh was promoted to supervise the sales staff and Fazio indicated a desire to leave Gromwell after Walsh's promotion (T7, 28-35).

194. To left Gromwell after Walsh was promoted. To's sales had gone down during the time she was supervised by Walsh. For 2004, To's freelance sales were about \$100,000.00 as opposed to \$800,000.00 for Fazio and \$400,000.00 for LaBow. To's weekly freelance accounts fell to \$10,000.00 a week and Walsh found it unacceptable. A discussion with To followed and she left Gromwell (T7, 38-39).
195. In January 2005, LaBow was asked to take a salary reduction from \$60,000.00 to \$48,000.00 and to work four days a week. The staff complained to Foley of the same (preferential treatment), and LaBow left Gromwell as a result (T7, 40-41).
196. Foley claims he was never approached by LaBow regarding the use of any 24-Seven documents while she worked at Gromwell. He also claims neither Fazio or To ever approach him with any such documents (T7, 41-43).

Testimony by Richard Walsh

197. Walsh worked in the freelance field more than fifteen years before joining Gromwell. Walsh and Foley have had a professional relationship for years before he joined Gromwell. Foley knew of Walsh's experience in the freelance industry. In December 2002, he had lunch with Foley and O'Connor as the two wanted Walsh to evaluate the operation of Gromwell and the feasibility of adding a temporary service to the company (T8, 8-17). Walsh holds an ownership interest in Gromwell (T8, 115).
198. In February 2003, Walsh begins consulting work at Gromwell. He generated status reports during the initial consultation (Dx D; T8, 81), suggesting that structure change was necessary in order to add a freelance component to the business that included a change in the payment of more salary and less commission with no draw as well as tightening the work environment of the office staff.

Walsh claims that “relationship” is a very important component in the freelance business. Walsh reported to Gromwell that there would have to be a change in the company’s business model, office structure, staff payment, and recruitment if it sought to go into the freelance business (T8, 18-20, 83-90).

199. He followed with subsequent reports in April 2003, noting by this time LaBow and Fazio had expressed confidence in generating freelance accounts from their permanent accounts (Dx E) (T8, 91-96). In his April 2003-report, Walsh noted that it would not be productive to train the staff regarding the freelance portion of the business until Gromwell had “an adequate and fundamentally sound database of applicants.” He reported that the company was slowly building up a database that consisted of administrative staff and not skilled apparel staff. In short, Gromwell was not off the ground as far as creating a pool of creative, applicants that the company could supply to the apparel industry (T8, 135-136).
200. Walsh was hired as employee for the company in June 2003. By this time, Walsh conducted a survey of approximately 15 clients in the permanent placement area. The survey indicated an interest in freelance workers. By the end of Summer 2003, Gromwell began to bring the entire staff on board regarding freelance placements. Walsh, however, intended to have new staff come on board and start off on the permanent relationships the company had with clients. However, the company used existing staff, Fazio, LaBow, Del Rio and others. The business began at zero and grew to \$40,000.00 a week by the time Fiorello joined the company. He estimated about 20 to 25 clients were receiving freelancers. He had no recollection of the number of candidates placed with freelancing clients. The growth of clients came from Foley, Fazio, LeBow’s prior clients and their “relationships” with these clients as well as the use of Resource Tracking. That database listed all of the companies and contacts the company dealt within the past and on the candidate side, Walsh estimated that the company had gathered about 15,000 to 20,000 candidates from prior permanent placements. Walsh sought to have the candidates involved in fashion called regarding any interest

in freelance work. In February 2004, however, Fiorello comes to Gromwell and “everything changed” (T8, 21-30).

201. In August 2004, Walsh generated a status report (Dx G), as to the business after Fiorello on board and Gromwell “officially opened in June of 2003”. His review of the financials indicated that the freelance business was going up and the freelance hours doubled from 768 to 1,456 over a 30-week period with more than 75 companies serviced and 154 candidates employed and a peak week billing of more than \$78,000.00 ending July 2004. Gromwell’s permanent billing was more than \$873,000.00 and serviced more than 59 companies for permanent placement. Fiorello had no input in generating the report, Walsh never consulted with Fiorello regarding his numbers as Walsh was “critical of” Fiorello and viewed Fiorello have no “cohesive plan in place to work with the sales staff.” Walsh claims that when Fiorello got wind of this report, Fiorello “threw it at” him (T8, 98-103).
202. Walsh testified to his first report and his recommendation that the office change schedules and format. He was asked questions regarding time cards that were changed as to format while he was at Gromwell (Px 28), but Walsh never saw the time cards nor a freelance agreement marked “Px 28” and “Px 29” at Gromwell (T8, 130-131).
203. Walsh concedes that although he attempted to build up the freelance business for about a year, Fiorello was hired to work that side of the business and Walsh was assigned the fulfillment part of the freelance business (T8, 138-142).
204. Fiorello was instrumental in changing the configuration of the office toward the business model Walsh suggested (a business development staff and operations staff - fulfillment of the accounts by placing candidates). Positions and roles in the office changed, e.g., Fazio was a permanent counselor and became a salesperson or account executive; Del Rio became an account manager in fulfillment. Fiorello supervised the sales portion of the business (accounts) and Walsh supervised the fulfillment portion of the business (T8, 30-36).

205. Walsh described Fiorello's management style as "slash and burn," less focused on "building relationships" and more about "getting the job order" (T8, 37). Walsh noted that Fiorello's technique was not based on the "industry" standard of "relationship business . . . based on the relationships you have with the companies that you work with" (id.). Walsh noted that Fiorello managed the sales staff in that manner and his methods were different when dealing with the clients (T8, 38).
206. Walsh was responsible in filling job orders obtained by the Sales Division. He claims that some of the job orders were difficult to fill after he attempted to fill the job order. Reviewing the office diagram (Px 21), Walsh noted it was fairly accurate for the period of time it depicts (T8, 38-44).
207. Noting that the office staff worked in close quarters, Walsh observed employees doing their daily tasks as well as Foley and Fiorello. He observed Fiorello working with the Sales Division, "very close in proximity . . . physically leaning over . . . telling them what to say on the phone . . . almost even listened in on the calls very aggressive, very hands on." After a few weeks the office staff started to complain about Fiorello's management style. Overall, Walsh understood that the Sales Division did not like Fiorello. He also understood from Fazio that Fiorello had affairs with Melissa To and Claire Lewis (T8, 46-53). Walsh believed Fazio; he found her trustworthy (T8, 151-152). Subsequently, after numerous complaints, Fiorello was terminated from Gromwell (T8, 54).
208. Walsh claims that he never trusted Fiorello after he came on; he "watched him like a hawk" (T8, 56) and he never saw copies of Px 2A/2B, 11, 16, 17, 19 or 20 on the Gromwell premises. He noted that he recognized the Bullhorn format of one particular document (Px 17), but does not recall seeing the document. However, "had he," they were useless tools and of no value to him as they only provided names and phone numbers and did not create a relationship between Gromwell and the person on the other end (T8, 59-68).
209. It is Walsh's testimony that the Sales Division worked from Resource Tracking and the

information it developed over the twenty years in the permanent placement industry. He was sure Fiorello did not use 24-Seven documents because he “never saw them” before and Walsh was “very reluctant to give [Fiorello] free reign in the office.” Walsh claims he “would keep an eye on him all the time and think [he] would have noticed something as expansive as” the above documents (T8, 69).

210. Walsh recalled the October 2004-office announcement regarding a visit by Mr. Lehman and that he observed office staff assembling boxes consisting of documents in the conference room. He recalled the documents consisted of applications, and other documents. He observed office staff going through documents on their desks and he also observed some documents being discarded by the staff. But, he recalled those documents predated Gromwell’s move to the office location in issue. He claims not having any such documents on his desk, but observed staff members remove documents and place them on their desks, while an administrative staff member dated them and put them in boxes, some documents were returned to the desks and some documents were placed in file cabinets (T8, 70-73).

211. He also recalled shredders in the office, one was in the accounting office and a second one was in the office space (Px 21). Walsh used the shredder, but not in October 2004, and did not observe anyone else use the shredder at the time of the October 2004-announcement. On the occasions that he used the shredder or saw it being used, he claims the document shredding was done in the ordinary course of business. Walsh also recalled that Fiorello’s desk was cleaned out a few weeks after his termination. It was cleaned by LaBow. He observed her clean the desk. He recalled that LaBow placed the contents of what she took from Fiorello’s desk and placed them in a box and does not recall what happened to the box other than a day later it was gone (T8, 73-79).

Testimony by Salvatore Furia

212. Salvatore Furia (“Furia”) began work in the staffing industry while employed at DDI Leasing, a

business partner of IBM that began to do staffing as part of its computer leasing operations. Fiorello approached Furia to join him at 24-Seven Online. In 2002, Furia joins Fiorello at 24-Online. Furia became a shareholder of 24-Seven Online, holding 15% of the shares. The two were doing the day-to-day operations of the company, development, marketing, while the other three shareholders (Hogan, Gudas and Kagel) provided the resources. Furia dealt mainly with Kagel and little with Gudas or Hogan (T7, 127-135).

213. He recalled he had executed Shareholders' Agreement and after becoming an employee of 24-Seven, signing his employment agreement that contained, among other things, a covenant not to compete as well as a confidential business records provision (T7, 160-169; Px 13).

214. Furia's testimony as to the development of 24-Seven Online was similar to the testimony by Fiorello. However, Furia recalled that 24-Seven gave the new company roughly 5,000 candidates resumes to load onto the vendor management system. The information of the candidates consisted of email addresses, phone numbers, names. To solicit business, Furia recalls Kagel provided a lists of clients to solicit (T7, 135-138).⁶

215. In May 2003, the shareholders agreed to close down 24-Seven Online and Furia accepted the position of account manager at 24-Seven, while working on and off with relating to 24-Seven Online (attending to clients for another eight months [May 2003-January 2004]). Furia claims 24-Seven Online had more than 50,000⁷ candidates and an estimated 20 clients. From May 2003 and forward, Furia placed permanent candidates for 24-Seven. Fiorello contacted Furia after he began work at Gromwell. Furia followed with an interview with O'Connor and Foley in March 2004 and joins Gromwell for both permanent and freelance placements, dealing with both candidates

⁶ Hogan's designated deposition testimony reveals that 24-Seven shared candidate names with 24-Seven Online (Hogan 12/07/05 EBT, p 224).

⁷ Hogan's designated deposition testimony reveals that at its height, 24-Seven Online had approximately 70,000 applicants online (Hogan 12/07/05 EBT, p 90).

and clients that same month. Furia denies bringing any 24-Seven documents with him to Gromwell (T7, 139-145).

216. Reviewing email communications between Fiorello and himself (Px 7), in January 2003, Furia had no recollection of the events. But, recalled seeing the attachment to the email, identifying it as the client list for 24-Seven Online, which he used while at 24-Seven Online; Furia called clients from that list to solicit business for 24-Seven Online. The success was 20 clients off the list. Furia claims he never saw the list while at Gromwell. As to other documents, he recognized the format of Px 17 as that of a Bullhorn screen print, but claims never to have seen Px 17 while at Gromwell. He recognized Px 19 as an Aging Report that he specifically recalls being handed to him while at 24-Seven Online and from which Fiorello and he made telephone calls from. He recalled numerous Aging Reports were handed to him and used to call clients and that Kagel would give him the Aging Reports, referring to Px 20, Furia claims he never saw that document (T7, 147-153).
217. But, Furia concedes that while at Gromwell he would not have the need to use any of the above documents in carrying out his duties as an Account Manager for placing candidates; the documents would not be tools he would use to do his work at Gromwell (T7, 170-172).
218. As to the incident with respect to a request that staff check their desks for non-Gromwell documents, Furia recalled Foley announcing to the staff to gather up “old files” as the attorneys for the plaintiffs “needed to go through all of * * * old documents and compare data.” Furia went through his desk, found a “bunch of old files in there, from someone else that had worked there prior to” him and placed them either on a desk or in the conference room (T7, 154-156).

Testimony by Demitra Parets

219. Since 2001, Parets has been involved in various areas of fashion, from retail merchandising, to management and operation and finally to staffing in the fashion apparel industry. In June 2002, she was hired by 24-Seven as a Junior Accountant as the candidate side of the business and then

- worked on her own accounts in fulfillment. Parets had no involvement with 24-Seven Online (T9, 3-9).
220. She used the Bullhorn database and had her own user name and password. She could use Bullhorn out of the office and had access from her home. But, she could not take information off Bullhorn in an electronic form and copy it to something else, but could print out the screen she was viewing. She worked at 24-Seven for about nine months. She left on February 11, 2004, quitting that very day. She denies taking any records or materials with her. She had no employment plans and left for Florida to visit her grandmother. She receives a call from Fiorello about joining Gromwell while in Florida and when she returns to New York, she calls him (T9, 10-12).
221. Parets understood she had a no-compete clause in the employment agreement with 24-Seven, but informed and believed the clause was not enforceable and she interviewed with Gromwell and accepted the offer to work there as an account manager in March 2004 (T9, 13-15).
222. Initially Walsh was her supervisor, and she focused on freelance fulfillment and not client accounts. She was filling job orders with candidates. She did not solicit clients and did not work under Fiorello's supervision. Her responsibilities grew and she became a team leader in the fulfillment section of the office. She was in the office most of the time and remains employed at Gromwell (T9, 15-16).
223. Parets interacted with the Sales Division to fill the job orders and did so on a daily basis. She was setting up interviews with the candidates and the Sales Division was bringing in the client account (T9, 17-18).
224. In fulfilling the jobs, Parets found it easy, noting the transaction was easy because the company had their own database in place, Research Tracking. She found her candidates from the database as well as from her own research methods and hard documents. "It was not hard to find people" (T9, 18-19).
225. Parets noted that she was one of the staff members that were involved in the transitioning of

Resource Tracking to Bullhorn database. She consulted with Bullhorn technology assistance, e.g., Ms. Lisa Novak, while at Gromwell regarding the use of the Bullhorn system. She denies taking any information from 24-Seven with regard to a list of job classifications; she denied printing out such a lists or documents from 24-Seven and bringing them with her to Gromwell. She identified a printed lists of fashion skills from Resource Tracking (Px 31)⁸, but denies it is identical to 24-Seven's fashion skills (T9, 62-67).

226. Parets sat in the same vicinity as the Sales Division. She noted to the office diagram (Px 21), and confirmed she sat at one time where her name is listed. She denied ever using Aging Reports, she did not need them (Px 19), and never saw them at Gromwell. Her testimony was the same as to another document (Px 16) other than the format was from a Bullhorn database. Her testimony was the same as to other documents (Px 2A/2B, 17, 19) (T9, 23-28).

227. But, Parets noted that she was doing her own job and did not observe everything that was going on in the Sales Division; she was often involved in her own telephone conversations and filling job orders. If Fiorello was using certain documents or certain tools with his staff at any given time she may not have seen it or known about it (T9, 41-43).

228. Parets noted to her relationship with Fazio and Labow. She described more of a working relationship, one side getting accounts and she fulfilling them. But, conceded Fazio and she often argued (T9, 29-31).

229. Parets also recalled the October 2004 incident, where staff was requested to remove documents from their desks. She recalled being told that some investigators were to come to the office and she was told to pull "all Gromwell documents that were specific to Gromwell" (T9, 32-33). She

⁸ On rebuttal, Hogan testified that he job skills listed by Gromwell (Px 31) were in fact the very unique job skills that were "termed" and "identified" by 24-Seven years earlier and under the Bullhorn database. Hogan claims this list was an exact duplicate of the company's unique business protocol. Aside from some generic titles, Hogan noted that specifications and terminology as to certain categories were in fact, first, "termed" (e.g., Sizzle) by 24-Seven and implanted by Bullhorn into that company's database at 24-Seven's request (T10, 277-287).

pulled out Gromwell documents, such as reports, letters, marketing materials, resumes, etc., that she gave them “to her bosses” (T9, 33). She did not state anything to the staff during this incident (T9, 34). She noted that there was “stuff . . . sitting there for ten years . . .” and that there had to be some cleaning up (T9, 60). She did not see what other people were taking off or placing in a pile; Parets did not see and did not know what the Sales Division staff had on their desks when they were ordered to clean their desks by Foley (T9, 61-62).

230. She recalled documents were shredded, but she did not focus on what was being shredded or who was doing the shredding (T9, 34).

Testimony by Christian Fiorello

231. Fiorello began in the staffing business shortly after leaving college. He began at Metro Personnel, a staff company in New Jersey. The company did general staffing placement. He left that company and joined Leafstone. With Leafstone, Fiorello started Higher Planet, described as the “first online like staffing agency.” Fiorello was a part owner of Higher Planet. Fiorello stayed for a year and a half. Fiorello left to start a vendor management system in or about 2001. He developed the system and sells it to a company called Starpoint Solutions. He joined Starpoint Solutions and was paid a salary. He left Starpoint a year later (2002). At or about the same time, Fiorello meets Kagel and calls him about the vendor management system and pitched the “24-Seven Online” concept to him that results in the venture, 24-Seven Online (T10, 6-17).

232. Fiorello’s first “fashion industry job” was with Macy’s before he started with 24-Seven Online. His job at Metro was placement in various fields of employment. At Leafstone he did temporary and full time placement, but he concentrated in vendor management. Fiorello has no formal computer training. He leaves Leafstone and spends a year and a half at Higher Planet. Here, too, he was not involved in any fashion-based industry work. He leaves that job and sells his “concept” of a vendor management system to Starpoint, where he becomes employed for about one year. Starpoint was not involved in the fashion industry. He then reaches out to 24-Seven -

after his two and a half year of employment experience - selling his concept of a fashion industry vendor management system (T10, 120-140).

233. When Fiorello first joined plaintiffs, 24-Seven Online did not exist. From the Summer 2002 until the date he signed the Shareholder Agreement (Px 5) in February 2003, Fiorello was paid by 24-Seven (T10, 140-143).
234. The offices for 24-Seven Online were located at 120 Wooster Street a block from 24-Seven offices. He called his offices the "Club House." Furia and Fiorello occupied the offices and Kagel, Gudas and Hogan continued their business activities in the 24-Seven offices (T10, 18-19).
235. 24-Seven Online began building the applicant pool of resumes from 24-Seven own database. Fiorello claims that 24-Seven emailed their database to 24-Seven Online as well as referred candidates to the new venture, asking them to send in their resumes. But, the database sent was either "full time" and/or "inactive applicants" that totaled about 6,000 to 7,000 applicants. When 24-Seven Online ceased doing business, Fiorello claims the entity had accumulated at least 40,000 applicant names (candidates). The additional candidates came in by way of online services or job fairs that Fiorello attended; he estimated about 2,500 came from job fairs (T10, 19-22).
236. Fiorello identified his email (Px 8) of March 2003 with attachments. Fiorello claimed that Pino Ficara was a developer-consultant for the 24-Seven Online database. Fiorello recalled that the email was sent at the time that 24-Seven Online was starting up and Ficara had the resume database component, but claimed there were typos that required cleanup and rather than have the company pay Ficara, Fiorello asks for the attachment so that he would clean ("monitor") the list and he would then enter the profiles onto the online database. The two would send the attachment back and forth several times. He was using his Yahoo.com email address to communicate with Ficara, but at the same time he also had a 24-Seven Online email address. He claimed that Ficara would send the material at the Yahoo.com address because Fiorello would receive it different times during the course of the day including at night and could access it from any where, but

claimed he could not access his 24-Seven Online email from home; he claims Kagel was aware of this process (T10, 22-29).

237. His testimony was similar as to another email trail introduced in evidence (Px 9), and that as to that email trail, Fiorello was asked to clean a second list of candidates after one of 24-Seven Online's consultants, Rob Austin, asked that it be done (T10, 30).

238. A third email trial introduced by plaintiffs (Px 7) was identified by Fiorello. That too contained an attachment that dates back to January 2003. At the time, Fiorello was building up the online site and was starting to meet with clients for the service. This email originated from Furia to an administrative assistant at 24-Seven, one Ms. Jennifer Siemen, wherein she was requested to send him by email the list of New York and California clients that he on hard copy, but misplaced. Furia forwarded the list to Fiorello. He claims he used the list to make sales calls or inputted the information into 24-Seven Online profiles. The attachment contains both clients and candidates. He compared Px 7 to Px 2A and found them similar except for the "blacked out" three names that appear on Px 2A. After receiving Px 7, Fiorello printed it out to make calls to clients and market the 24-Seven Online database. He also forward the email from his 24-Seven Online email to his home email address ("NYC.RR") (T10, 31-36).

239. Fiorello claims he could not access his 24-Seven Online email via the internet from his home. And was not aware of the ability to do so via 24-Seven's exchange servers. He claims that the list of clients and candidates he had sent to himself had to be cleaned until it was sufficient to be loaded onto the online project. When asked if he sent the list to his home to work on, Fiorello responded "maybe" and he either worked on it over the week end or printed it out, but denies he was sending the list home to steal it, claiming as a business owner of 24-Seven Online he had no reason to steal it, he "owned it" as a fifteen percent (15%) shareholder (T10, 145-148). It is noted that in January 2003, Fiorello had no lawsuit or counterclaims against the plaintiffs and I note he was not a shareholder of 24-Seven Online until he signed the 24-Seven Online Shareholder

Agreement in February 2003 (Px 5). It is also noted that the shareholder agreement contains a covenant not to compete as well as a confidentiality agreement for business records (T10, 149-151).

240. After he signs his shareholder agreement, Fiorello sends the Ficara-February 2003 email to his home (Px 8), claiming he did not have enough time at work to do his work and there was an urgency to get the online up and running. However, it is noted that Ficara's February 2003-email is not emailed by Fiorello to his home until March 2003. Again, at this time, there were no complaint and no counterclaim between the parties (T10, 152-155).

241. Fiorello's May 2003-email (Px 9), was sent at a time where there were no complaint and no counterclaims and Fiorello noted "everything was optimistic." The data was sent by Mr. Austin in April 2003 and Fiorello sends the same (a list of candidates) to his home email address a month later. Fiorello denies any knowledge of talk among the shareholders of closing down the online business in late May 2003. He claims no awareness of any meetings on or after May 21, 2003. It is noted that 24-Seven Online closed down operations on or about May 30, 2003 and Fiorello's last email was May 21, 2003 (Px 9). Fiorello sends himself 4,800 names of 24-Seven clients and their email addresses. He concedes that on May 21, 2003, the online business was in jeopardy. The shareholder agreement for 24-Seven Online ended on May 30, 2003 (T10, 155-159).

242. When the online company closed, Fiorello did not contemplate any lawsuit against the plaintiffs. His lawsuit and/or claims were not interposed until after March 2004 (T10, 160). Fiorello only interposed claims against plaintiffs in this litigation stemming after commencement. His counterclaim is premised on an interest in the 40,000 applicants that were allegedly added to the 24-Seven Online database (T10, 3-5).

243. Fiorello reviewed Px 10 (Fiorello April -August 2003-emails and Attachment "Active" Candidate Names), and claims that portion of the profiles were being entered into 24-Seven Online database, they were used to fill up the database at the initial stage of launching the website and Fiorello

claims he was the point person involved with the list and worked with the developer. He recalls that the information on Px 10 was to be imported into 24-Seven Online. Reviewing Px 20 (24-Seven Employee Code/Aging Report Trial Balance by Thisco), Fiorello confirmed that his handwriting appears on the back page of this exhibit and recalled it was made at the time Furia and he was in the Wooster Street office. Fiorello believes that Px 20 was brought to the office by Kagel, as it appeared to be one of the documents that he on occasion brought to the offices, but Fiorello had to use it while he was doing 24-Seven Online work (T10, 37-39).

244. Fiorello noted to Px 19 (24-Seven Aging Report Trial Balance by Customer from Thisco), he recognized his handwriting appeared on the document⁹. He recalls receiving documents like this while at 24-Seven Online. He was resolute that this type of document would have been provided by Kagel to him. He recalled this document was used by him as a call list to sell the 24-Seven Online database to clients. He confirmed that his handwriting appeared on Px 19 (24-Seven Aging Report Trial Balance by Customer from Thisco) and that he also used the form of documents while at 24-Seven Online (T10, 40-42).
245. The online venture did not attract clients and it closed down. Fiorello became employed by 24-Seven in the beauty business sales section, although he still did some work servicing the 24-Seven Online database in a limited way. Fiorello had a salary of \$125,000.00, and commissions on placements. While working on the beauty side, Fiorello sends himself the August 2003-email (Px 10) with an attachment containing 10,000 active 24-Seven candidates (Px 14) and in August he also receives his employment agreement (T10, 165-168).

⁹ In defendants' closing argument a notation was made that Px 19 was in evidence to the extent that only the typed portion was moved in evidence by the plaintiff and that any testimony by Fiorello regarding his handwriting was of no material moment (T11, 29-30). But, Fiorello's testimony is surely in evidence and he identified his handwriting. His acknowledgment, coupled with his identification of his handwriting, is surely evidentiary and I have given it the weight I find to be deserving (discussed, *infra* **[CONCLUSIONS OF LAW]**). Moreover, Fazio testified that her handwriting also appeared on Px 19 **[FINDINGS OF FACT, ¶ 58]**).

246. Although 24-Seven Online ceased operations in May 2003, and Fiorello is assigned to the beauty product side of 24-Seven, his reasoning for sending the 10,000 active candidate list to his home was that he “believed he could get [24-Seven Online] running.” His December 9, 2005-deposition testimony indicated that had no such thought (T10, 169-170).
247. Noting to the September 2003-email (Px 1), with attachments, Fiorello claims he does not know what that email was. He sent this email from 24-Seven to his home email address. This email and the attachment were subsequently emailed by Fiorello from his home email to his Gromwell email address (T10, 171-173).
248. Reviewing Px 15, consisting of more emails (September 29, 2003), Fiorello disputes any conflict with his bosses at that time. Although he leaves 24-Seven in October 2003. He denies that before October 2003 he was told by various managers that his sales were disappointing; he claims that he had accounts but the company did not have the applicant base to fulfill accounts. He had no recollection of the revenue he generated nor the commissions earned during the time he worked on the beauty side of the business for 24-Seven. He concedes he sends home the last September 29, 2003-email and doesn’t know why he sent it and concludes it was “worthless.” He claims he never sent it to his Gromwell email address, but the very attachment was printed up and delivered from Gromwell to the plaintiffs (Px 1), and represented to have been down loaded from that company’s computer system. Fiorello found that “shocking!” (T10, 174-178).
249. After some time, Fiorello began to think about leaving the company, noting that he felt he was being treated differently. He conveyed his feeling to Ricardo Alvar, who told him to take the weekend to think about what he wanted to do. Fiorello informed Alvar a few days later that he was not coming back to he company and that he was going on his own. He never returned to the office and left all of his personal belongings and any other material on his desk (T10, 42-45).
250. Fiorello sought to work at Project Solvers. Fiorello claims that this potential employer was contacted by 24-Seven and he never got the job (T10, 186-190).

251. After leaving plaintiffs' employment, Fiorello was informed by 24-Seven that it was commencing a federal suit to have him turn over the domain name of 24-Seven online on the ground he had improperly registered the name under his name. Subsequently, a federal court ordered Fiorello to relinquish the domain name to the plaintiffs (Px 32) (T10, 190).
252. Fiorello approached Gromwell and after several interviews where expanding Gromwell's freelance business was discussed, he was hired by O'Connor as a consultant for the "first year" under his own corporation, "Salvatore Fiorello, Inc." (T10, 46-50).
253. He concedes that he worked exclusively from Gromwell's offices, had his own desk, supervised staff and determined their hours and changed their salaries and commissions and took direction from O'Connor (T10, 191-193).
254. When he interviewed with O'Connor, he informed Gromwell of his employment agreement with 24-Seven. He informed O'Connor he was in a law suit with 24-Seven; he denied he had any 24-Seven documents when he interviewed with O'Connor. He told them he could market and brand the company and set up the infrastructure and develop and train the front line sales based on his three years of experience. His starting salary was \$100,000.00, and commissions. From February 2004 to October 2004, he could not recall how much money he earned, but believed it was about \$150,000.00 (T10, 210-212).
255. Fiorello set up the three divisions of the new infrastructure, Sale Division, Talent Acquisition and Fulfillment, one to do the sale with clients and to fulfill; and although Gromwell had 30,000 candidates the talent section was needed to fulfill the accounts that were placed for freelancers. He told Parets and Furia about Gromwell and they joined him in February and March 2004. On March 7, 2004, Fiorello sends an email from his home address containing 24-Seven Bullhorn documents (Px 1) to his Gromwell email address. Fiorello claims the attachments consist of the list of candidates and clients he claimed belonged to 24-Seven Online, which he was a prior partner. In March 2004, Fiorello had not interposed any claim or counterclaim against the

plaintiffs (T10, 212-218).

256. Fiorello claims that he had “a large staffing background” before he joined 24-Seven, (T10, 49), and his first assignment was a multitude of tasks to bring Gromwell into the freelance area of the business, he “started to fix it from, * * * the inside out or the outside in, depending on what needed to be done.” He started to diversify the office operations and restructured the staff into separate divisions; he did not see any freelance activity that could be termed separate and viable part fo the office business (T10, 52). Regardless of what Walsh testified too, Fiorello claims he “set up the whole infrastructure for the whole organization and then [he] gave the sales people the rules.” He “polished” the sales staff and gives them sales pitch, a market approach, a way to sell Gromwell to clients (T10, 51-55). In fact, he described the freelance portion of Gromwell business as “negligible” at the time he began his employment (T10, 194).
257. The staff was informed by O’Connor that Fiorello was their “new sales manager” and he had a desk in the office from where he made calls to clients and accounts. Fiorello met with Foley and O’Connor to discuss the tasks of marketing Gromwell for freelance placement through Foley, who had contacts in the fashion business. He sought to capitalize on these contacts and claims that he took these “existing relationships” and put marketing lists together. He attended a convention, commonly known as “Magic,” and claims to have picked up a book that listed names and companies of the garment industry (a directory) and he sent the hard copy to a company that copied the information and imported it into an Excel spread sheet (Dx K) and placed on a disk that was returned to Fiorello. The information on the disk was never inputted it into Gromwell’s Bullhorn database. He used the hard copy to contact vice presidents of particular companies (Dx K). Fiorello would have the staff also make calls from the list to get meetings with the vice presidents to pitch Gromwell’s freelance services (T10, 56-67).
258. He claims to have relied on both Foley and Gromwell’s contacts as well as his own or the use of sources such as the Magic guide. Noting to a copy of a Magic Guide (Px 33 [id., only]), Fiorello

- concedes there was no listing of Human Resource Directors, but a listing of executive directors and presidents of sales. It was his practice to contact them to solicit business (T10, 201-209).
259. Fiorello claims he used his newly acquired list while at Gromwell. He conceded that he started at Gromwell in March 2004 and that the Magic show only takes place twice a year, February and September. Fiorello had been suspended by Gromwell sometime in the month of September 2004, but Fiorello's recollection is that during his brief tenure at Gromwell he attended the Magic show (Dx K) (T10, 68-69).
260. Fiorello claimed he also used Cosmetic Executive Women, a directory, as another source of information for marketing Gromwell's freelance service. He recalled this directory contained 2,500 contacts by email, phone number, etc., of professionals in the business and contained multiple contacts. He also formulated the directory into an Excel spreadsheet that he claims he imported to Gromwell's Bullhorn database. He also used Womens' Wear Daily, where he obtained executive contacts within companies. He would also go to different industry organizations and use their directories. He would compile the data and then generate an Excel spreadsheet (T10, 70-73).
261. He claims that at the time he started at Gromwell he had the use of that company's 30,000 and more candidates for placement, but he did know how much of them were interested in freelance or how many were looking for jobs. Moreover, by the time he arrived, Fiorello concedes the temporary placement side was "negligible." Furthermore, the 30,000 names noted by Fiorello were collected over "26 years." Lastly, most of those names were generated for the full-time side of the company's business (T10, 195-200).
262. Fiorello noted to a January 13, 2006-printout (Dx L [id., only]) from the internet web site for Women's Wear Daily.com, but the document was objected to and not admitted as evidence (T10, 73-74). Nevertheless, Fiorello maintains that all of the above were his sources of information while at Gromwell.

263. He noted to the diagram of the office space (Px 21), and recalled the time period that it depicts, but there was also movement of staff from desk to desk. He recalls that the depiction noted on the diagram (Px 21) was accurate upon his arrival and thereafter. His desk was at the same location from start to finish. The Sales Division, as noted on the diagram, was seated in close proximity to his desk. He denies ever seeing Px 2A being used by the Sales Division. His testimony is that he never gave to the Sales Division nor used Px 17, 18, 19, and 20 (T10, 75-81).
264. As to Walsh, Fiorello had an adverse relationship. Fiorello claimed he was brought into Gromwell to finish what Walsh could not do. He claims that Walsh was initially employed to set up the freelance division and Gromwell wasn't happy with the result. Fiorello's task was to grow the business, whereas Walsh was more of the operational stand point of managing the business; he viewed himself more sales oriented and Walsh as "process oriented" (T10, 82-83).
265. When he first started at the company, Resource Tracking was the company's database. He simply informed the staff to use the same database to make contacts with clients and that any and all information thereafter would have to be recorded on that database. Resource Tracking was used up to April 2004 (T10, 100). He also followed with updates to that database after subsequent contacts with the clients (T10, 90-94).
266. After the lawsuit was commenced, Fiorello was asked if he had any 24-Seven documents at the Gromwell offices. Fiorello became annoyed and claims he went through his office and found no such documents. Limiting his search solely as to Gromwell's offices, Fiorello claims he found no documents that were similar to Px 2A/2B, Px 16 through 20. Fiorello claims that he never used the documents at Gromwell. He also recalls searching for 24-Seven documents shortly after he started at Gromwell (February 2004). He recalls he searched for such documents in March 2004 (T10, 86-89).
267. While Fiorello worked at Gromwell there was growth in the freelance section of the business. He attributed success to advertisements and branding and marketing the business with personalized

invitations and sidewalk graphics at the clients' offices. He also noted sales and recruiting, and meetings with clients, and the combination of the above grew the business. In the office, he attributed restructure of the staff, uses of Bullhorn and knowing the market (T10, 94-96).

268. Noting to Px 2A, Fiorello testified - although he claimed he never saw the document - that had he used it, it would have been a receipt for disaster as it did not fit in his general direction of sales and marketing (T10, 98), noting the list consisted of relationships that developed by 24-Seven; he concedes this document was used by him at 24-Seven, but that at that time there was a relationship between 24-Seven and the clients listed on Px 2A. Fiorello claims that to have used Px 2A while at Gromwell would not have helped as there was no relationship between Gromwell and the contacts listed on Px 2A (T10, 98-99)
269. But, Fiorello was asked to compare Px 2A to Dx J, and the testimony reveals the names of clients that appear on Px2A also appear on Dx J and that some of those very client names were entered into Gromwell's Resource Tracking by both Fazio and Lewis after February 2004. In short, Px 2A and Dx J contain similar client contacts and if the latter were useful to Gromwell how was it not that Px 2A could not be useful (T10, 225-233).
270. During his tenure at Gromwell, staff was required to enter all contacts and activity on that database. Noting to the client, Nautica, it was noted that Fazio had that account and entered information as to that client in the company's database. He noted that no contacts listed in Resource Tracking from February 2004 to April 2004 appear in Px 2A, which he reviewed the night before at the direction of his attorney. His testimony was th same as to clients: Banana Republic, Cache, the Gap, Happy Kids, J. Crew, MMB Kids, Old Navy, Perry Ellis, Polo, Warnarco, also Fazio clients (T10, 100-104).
271. Fiorello identified his March 2004 and September 2004-emails (Dx M), the March email was from an email address Fiorello could not recall, but recognized that the email was sent to himself at his Gromwell email address. This March 2004 email had three attachments. He recognized one

attachment to be of the Bullhorn database for 24-Seven Online (the candidates entered on the online system while he was working on 24-Seven Online). The second attachment was a similar profile from the 24-Seven Online database. Fiorello's claims he kept these attachments to serve as a basis of his lawsuit ("that's my proof"). He claims the attachments contain the candidates that were entered into the 24-Seven Online database and then dumped back into 24-Seven's database. He claims the database is an asset of 24-Seven Online (T10, 144). Fiorello claims he never used any of the attachments while at Gromwell. But, he could not explain why he sent the very attachments to Gromwell in September 2004. Nevertheless, he claims the information in the attachments were not useful to him at Gromwell ("some might have . . . they were full time, but they were older") (T10,105-111).

272. Fiorello's testimony was the same as to Px 19, that is, not useful except the telephone numbers; Px 18 and Px 20 were not useful because "you need to know who these people are" (T10, 112). Fiorello's testimony was similar as to Px 17 (T10, 112-113).
273. He recalls never having Px 19 with him while at Gromwell. Viewing Px 19, Fiorello concedes his handwriting appears on this very document, a document generated off 24-Seven's Bullhorn database. However, the document was generated long after Fiorello left 24-Seven. He could not explain how his handwriting appears on this document and wondered since he was no longer at plaintiffs' business. He denies he obtained Px 1 while he was at Gromwell and denies it was provided to him from either Furia or Parets before they left 24-Seven (T10, 219-220).
274. Fiorello was aware of Justice Cahn's TRO and that he was directed to turn over any and all 24-Seven documents. He claims when he went through his desk in March 2004, and he did not find any such documents. He claims he did not have Px 19 in his possession at the time or after; if he did he would "gladly have given it back to" the plaintiffs (T10, 221-222).
275. In September 2004, a month before he leaves Gromwell after complaints by staff of sexual harassment, Fiorello's pattern of sending emails containing attachments from his work place to

his home continued. On or about September 6, 2004 he sends an email from Gromwell to his personal email address (Px 1). He concedes this attachment consisted of 24-Seven or arguably 24-Seven Online, but he was aware of Justice Cahn's TRO directing any and all such documents to be turned over to the plaintiffs. He knew he had 24-Seven documents in September 2004. He doesn't know if he told his lawyer of these documents, whether defined by him as 24-Seven Online or 24-Seven documents. In fact, comparing, Px 1 with Px 10 through 12, Fiorello concedes the very email and attachments he sent himself in September 2004, he had already sent to himself in August 2003 (T10, 234-244).

276. As to employees taking material home, Fiorello never observed Fazio taking documents home to work with (T10, 116-118). Fiorello claims he had sexual relationships with Claire Lewis and Melissa To before he left Gromwell (T10, 104).

Testimony by Stuart Kagel-Principal of 24-Seven

277. Kagel testified on rebuttal that he never received a request from Fiorello to have Bullhorn release information to Fiorello and he never instructed Bullhorn personnel to release such information to Fiorello while he was employed or worked at 24-Seven Online or 24-Seven. He does recall that he provided Fiorello with 24-Seven Aging Reports to pursue business contacts and subscription to the online service. Noting to the Aging Report of February 6, 2004 (Px 19), Kagel claims he never provided a copy of this Aging Report to any of the defendants; he would have no need to provide an Aging Report to the defendants after 2003 (T10, 263-264). He noted the document was generated in February 2004 as it references an invoice dated February 2004. Moreover, the document, like all other similar documents, was generated for Kagel's weekly review and furnished to him by one of the company's funders, Thisco Inc. (T10, 266-268). Kagel concludes that Px 19 was wrongfully removed from plaintiffs' premises after February 6, 2004 (T10, 270). As noted earlier, Kagel also claims the information contained on Px 19, includes the names of hiring managers and their telephone numbers regarding freelance placements by 24-Seven (T10,

272-273).

278. He identified the Job Master list, but claims he never provided any such copy to the defendants (Px 20 [Seven Employee Code/Aging Report Trial Balance]), and does not recognize the handwriting on that document (T10, 265-266).

Testimony by Ricardo Alvar

279. Ricardo Alvar (“Alvar”) an employee of 24-Seven as early as September 2003, supervised Fiorello. Fiorello’s performance for that quarter of September 2003 fell short of the goals and he was issued a warning (Px 36). Another document that set out the minimal expectations of sales was provided to Fiorello (Px 37). However, Fiorello did not make the minimal goal (Px 37), performing less than fifty percent (50%). Alvar had more than one discussion with Fiorello regarding his performance and in the end Fiorello informed Alvar that the position “wasn’t for him.” Subsequently, Fiorello leaves 24-Seven (T10, 290-298).

Testimony by Mark Wilkinson, IT Employee of Gromwell

280. Mark Wilkinson (“Wilkinson”) an employee of Gromwell testified to the company’s database and tapes stored in the computer systems. Wilkinson maintains and operates the company’s computer system and databases. He handles the net work’s administration and services the system. He began employment in December 2004, he runs the system by himself (T8, 162-165).
281. Wilkinson noted that any files on the system would be found on the company’s server. He claims he is the only person that has access to anyone’s email at the company by way of an administrator password. Wilkinson was asked by O’Connor to review the computer’s email system to locate any communications by or from Fiorello, Furia and Parets. He found no emails on the system’s server. He was then requested to search further and Wilkinson reviewed the backup tapes and found an email file belong to Fiorello while employed at Gromwell. Wilkinson had to open the file (PST File) to determine that the emails were addressed by or to Fiorello. He also recalled attachments, but did not open the attachments. Wilkinson copied the files onto a CD and turned over the CD

to O'Connor (T8, 166-171).

282. Wilkinson identified a one inch ream of documents titled "Smorgasbord Company Contacts" (Dx H) that he prepared from the company's data system consisting of 15 clients that were serviced by Fazio while at Gromwell. Wilkinson testified this document listed all of Fazio's contacts at every one of the companies that existed on the Bullhorn database serviced by Fazio. Wilkinson separated the contacts into categories of contacts at a particular client company, but those contacts are detailed by the person who inputted the contact onto the Bullhorn database. Wilkinson testified that the names printed out on Dx H were compiled from the company's Bullhorn and Resource Tracking databases. He logged onto the company's databases and searched the companies listed from Px 2A and printed out the company's entire list of contacts from the Bullhorn and Resource Tracking databases that referenced the client companies listed on Px 2A. Resource Tracking is only kept for archived records a "legacy system," that is, it continues to be used because Gromwell has not replaced it other than moving data input to Bullhorn. He then compared contact names from the 15 clients with the names listed on Px 2A (T8, 172-175).
283. Wilkinson did not edit any of the information, he simply printed the Bullhorn screen as it appeared on the system left by the past or present employees. He did the same with respect to Resource Tracking. He printed out the screen format. Wilkinson noted that the date listed on the documents "entered and updated" are not editable and permanently stamped with the initial date and any other date when the last person updates the data. There is no way to edit the information from Resource Tracking. Bullhorn's print screen protocol, however, does not provide the initial date of input and the only way to ascertain an initial input is to "detail each person individually and it would come up on the screen" (T8, 177-184).
284. Wilkinson noted that the information listed on the Bullhorn and Resource Tracking could have simply been inputted from hard documentation or the contact could have actually been made by the staff member inputting the information. He had no personal knowledge how the information

was ascertained that is reflected in the documents or who actually inputted the information. He knows that the contacts in the Resource Tracking were “dumped into Bullhorn” (T8, 187-188; Dx I).

285. Wilkinson was called back to the stand to amplify his testimony regarding the data retained on Resource Tracking. He identified a printout from Resource Tracking (Dx J) and his testimony centered on the issue of whether the information inputted into Resource Tracking can be edited or revised in any form compared to Bullhorn inputted data. Wilkinson did a print screen of all of the contacts for the same 15 companies in the Resource Tracking database and contains no documents from the Bullhorn database. He then compared the Resource Tracking information to the 15 companies and compared them to the companies listed on Px 2A. Wilkinson found 145 contact names in Gromwell’s Resource Tracking database for the 15 companies and of the 145 contact names he matches 50 of the same names found in Px 2A. Wilkinson noted that the entry dates for the 145 names on Resource Tracking, some date years before Fiorello’s arrival at Gromwell, cannot be altered or changed in Resource Tracking (T9, 69-73).
286. Wilkinson was asked to search the 15 companies in the Resource Tracking database. He was never asked to compare Gromwell’s Bullhorn database to 24-Seven Px 2-A. He has no idea how many contacts in Px 2A may appear in Gromwell’s Bullhorn database nor the contacts in Px 2A that may appear in Gromwell’s Resource Tracking. Moreover, he did not know when the information in Gromwell’s Bullhorn database was first entered (Dx I) nor the source of the information or the person who got the information (T9, 87-92).
287. Wilkinson returns a day later to offer testimony on Fazio’s data entries into the Resource Tracking system after February 1, 2004. He limited his search of entries to five companies (known to him as the “Smorgasbord companies”) and had to bring up the company name and manually click through Fazio’s contacts string (Dx N). He then printed out the screen view. He matched names on this exhibit from names listed in Px 2A. But, he also noted that there were names on Dx N that

did not match any name listed for companies from Px 2A. Wilkinson noted that he only produce contacts entered by Fazio after February 2004 and not before. Comparing Dx N with Dx I and J, Wilkinson noted that he limited his most recent search to five companies and not all of the companies listed in exhibits Dx I, J and N. He also researched only Resource Tracking; he did no such search in Gromwell's Bullhorn database (T10, 246-253).

Testimony by Rachel Ancliffe-Candidate

288. As proof that candidates of 24-Seven have been contacted by Gromwell after Fiorello joined the defendant, one Rachel Ancliffe ("Ancliffe") currently of Portland, Oregon testified that while in New York she had been placed in both freelance and permanent positions in the fashion industry by 24-Seven since 2000. She is a fashion designer and technical designer. When she was first introduced to the company she provided them with a resume (T2, 3-6). She too works freelance and full time.
289. The first time she heard of Gromwell was in February 2004, when it contacted her by way of her cellular telephone. She never contacted, provided a resume nor met with anyone at Gromwell. She recalled a male named "Peter" spoke with her. At the time she received the telephone call on her cellular telephone she was then living in Philadelphia, Pennsylvania and had updated her resume in January 2004, and he submitted her updated resume to 24-Seven and no one else. She understood that Gromwell thought she still resided in New York, but she moved from New York in January 2003 (T2, 7-10). Prior to 2000, Ancliffe had placed her resumes with another staff agency, Project Solvers (T2, 20-23).

Testimony by Sarah Levine-Candidate

290. Sarah Levine ("Levine") is a New York based Fashion Designer and currently employed by Delta Gallil as technical designer of clothing. She began working with 24-Seven in 2000. She has worked in both freelance and full time positions. She first learned of Gromwell in 2004, when she received a call from it to see "if she wanted work" (T4, 207).

291. Levine never provided a resume to Gromwell nor register with the company. She informed Gromwell she was not interested in work as she was currently employed by Delta Gallil. She identified the caller as a female named "Anne." Levine testified that after the initial call she received several more telephone calls from Gromwell. Levine did not know how her contact information was provided. She recalled three telephone calls and two e-mails on one day. She sent Gromwell a resume a couple of months ago, that is, after 2004 and before January 2006. Before 2005, she had sent her resumes to Project Solvers and 24-Seven and to employers (T4, 208-212).

Testimony by Charlene Johnson - Candidate

292. Charlene Johnson, currently employed as a designer at Regatta's Pacific Lines also testified she has worked with 24-Seven since 1999-2000, and provides it with her work information and contacts. She is a freelancer and has obtained employment from 24-Seven. Gromwell called her in the Summer of 2004 and was seeking her because of her experience. Prior to that time she never provided Gromwell with her resume nor register with the company. She inquired of the companies seeking work, but Gromwell asks her to come into the office. She noted that she was contacted several times by Gromwell on her cellular telephone and her home telephone. She never gave out her home telephone number. She recalled she spoke with two females. She also recalled submitting her resume only to 24-Seven and several direct or potential employers (T4, 238-249).

Deposition Designations of the Parties

293. Finally, the plaintiffs designated deposition testimony of certain parties and provided copies of the same to the Court and defendants. The defendants have waived cross-designations of their deposition testimony. Plaintiffs' direct designations were submitted on April 21, 2006 (T10, 257-259; see also, Individual Defendants' Deposition Designations, 04/13/06; Gromwell Deposition

Designations, 04/14/06; Plaintiffs Cross Designations of Deposition Testimony of Art Papas¹⁰ and Sheilah Hogan¹¹, 04/18/06).

CONCLUSIONS OF LAW

1. My query is limited by the scope of this reference (*Marshall v Pappas*, 143 AD2d 979). The scope of a referee's duties is defined by the order of reference (see CPLR 4311; *Rihal v Kirchoff*, 274 AD2d 567; *Al Moynee Holdings v Deutsch*, 254 AD2d 443; *Lloyds Bank v Kahn Lbr. & Millwork Co.*, 220 AD2d 645).
2. Courts may take judicial notice of a record in the same court of either the pending matter or some other action (*Sam and Mary Housing Corp. v Jo/Sal Market Corp.*, 100 AD2d 901, 903, *affd.* 64 NY2d 1107; *Rosbach v Rosenblum*, 260 App Div 206, *affd.* 284 NY 745; *Matter of Ordway*, 196 NY 95).
3. I take judicial notice of Hon., Herman Cahn's prior orders. On March 12, 2004, Justice Cahn issued the first TRO enjoining Gromwell and Parets from using confidential information or documents that Parets "learned, obtained, created or assisted in creating while" employed by 24-Seven and were directed to "deliver forthwith to 24 Seven, Inc., all originals and copies or computerized records now possessed by Defendants, or which are otherwise subject to the Defendants' custody or control, of all documents reflecting or containing confidential information

¹⁰ Art Papas is an out-of-state witness. He was deposed in Boston, Massachusetts (CPLR § 3117 [3] [ii]; *Roeck v Columbia-Greene Med. Ctr.*, 248 AD2d 921; *Dailey v Keith*, 1 NY3d 586). Mr. Papa's deposition testimony is relevant to the extent that it supports Hogan's testimony as to the uniqueness of Bullhorn configuration of job categories and classification, e.g., sizzle, for a client and that it is Bullhorn's business protocol not to share these configurations with other clients (Plf., Designation of Pappas 04/16/04 EBT). Defendant Gromwell has also made designations from Pappa's deposition, wherein Papas testified to the inability to verify the initial source of information that was migrated from Gromwell's old database to Bullhorn.

¹¹ Individual Defendants objected to designation of Sheilah Hogan at page 156, In 24 through page 157, lines 12, based upon lack of personal knowledge by declarant and hearsay (see, Basil 04/18/06 Email Communication to Parties and Court). I have reviewed the designation and sustain defendants' objection (see, Hogan 12/07/05 EBT Designation, pp 156-157).

of 24 Seven, Inc.” (see, County Clerk file, Ord., Show Cause, 03/12/04 at p 3).

4. On or about March 25, 2004, Justice Cahn issued the second TRO enjoining defendants Fiorello, Furia and Gromwell and “any person or entity acting in concert with them or on their behalf . . . from disclosing to any person or entity [or using] any confidential information, documents or computer programs that Furia learned, obtained, created or assisted in creating while in the employ” of either plaintiffs and “directed to deliver forthwith to plaintiffs all originals or copies or computerized records now possessed by defendants or otherwise subject to the defendants’ custody or control, of all documents reflecting or containing confidential information . . . ” (id., County Clerk file, Ord., Show Cause, 03/25/04 at p 2).
5. In or about August 2005, plaintiffs moved by Order to Show Cause (Mot., Seq., 005) for an order holding the defendants in contempt of court for violated the TROs. On or about September 30, 2005, Justice Cahn referred the issues noted above to the Special Referee (see, County Clerk file, Dec., & Ord., 09/30/05).
6. Defendant Fiorello takes issue with the interpretation of the TROs, suggesting that he is not individually named in the specific decretal paragraphs of the TROs and, thus, he cannot be found to have violated the orders. A myopic reading would support his reasoning. But, a strict construction of the language supports plaintiffs’ interpretation (*Dwyer v Town of Oyster Bay*, 28 Misc2d 952) (discussed, infra [**CONCLUSIONS OF LAW**, ¶ 16]).
7. In order to determine and report on the issues referred I, as the trier of fact, have weighed the character, demeanor, and interest of each witness. I have determined that the testimony by a party-witness was colored by his or her interest in the result that each seeks (*Lauria v Lauria*, 187 AD2d 888; 65 NYJur., Witnesses, §71, pp 233-234).
8. There can be no dispute that Hogan, Gudas, Kagel, O’Connor, Walsh, Fiorello, Furia, Parets and Foley each have an interest in the outcome of this hearing, and that is material to the assessment of their credibility (*Coleman v New York City Tr. Auth.*, 41 AD2d 812, *affirmed* 37 NY2d 137;

65 NYJur., Witnesses, §71, pp 233-234; *Coleman v New York City Tr. Auth.*, 41 AD2d 812, *affirmed* 37 NY2d 137). With regard to the witnesses - other than Ruiz and Angel and the non-party witnesses Ancliffé, Levine and Johnson, there can be no dispute that at the relevant period they are either agents or employees of the 24-Seven or Gromwell. Based on the same, their credibility and demeanor were weighed.

9. Whether a witness has an interest in the outcome of the litigation is a factor that must be weighed in order for the Court to adequately perform the unique duty of weighing the evidence and assessing credibility (*Calandra v Norwood*, 81 AD2d 650; *Dobro v Village of Sloan*, 48 AD2d 243, 247-248, *appeal dismissed* 37 NY2d 804).
10. The fact that a witness may have an interest does not mean that he/she did not tell the truth. But, as the trier of fact, I am at liberty to believe the testimony of one witness over the other even though that testimony is not otherwise impeached or contradicted (*Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 46 NY2d 528).
11. The witnesses' characters, demeanor, and interests, are important. It is the trier of fact that determines whether or not the testimony is colored intentionally or unintentionally by those factors (*Lauria v Lauria*, 187 AD2d 888, 889). The weight to be accorded to such testimony is for the trier of fact (*Fassett v Fassett*, 101 AD2d 604; *Gilmore v Tindel*, 210 AD2d 1).
12. In short, there are instances where I find one witness more credible than the other, either based on the weight I give to their demeanor or character, coupled with credible documentation. In the end, I conclude that my findings are consistent with the credible testimony and/or documentation or the lack thereof (*Nager v Panadis*, 238 AD2d 135 [Special Referee's finding that credibility was affected by a lack of documentary support]).
13. As to the burden of proof, a party holding the affirmative duty is bound to present all the evidence on his side of the case before he closes his proof (CPLR § 4011). 24-Seven and 24-Seven Online have the initial burden to demonstrate their claims (*Matter of Schnare*, 191 AD2d 859, 860, *lv.*

denied 82 NY2d 653; *Manshul Constr., Corp., v Dormitory Authority of New York*, 79 AD2d 383, 388). Once they have demonstrated their proof then the defendants have the burden to rebut the evidence presented on direct.

14. I note that at the close of plaintiffs' case the defendants' moved to have the undersign report and recommend that the plaintiffs failed to prove their *prima facie* case and, hence, no need to continue the hearing (Basil 02/09/06 Memo of Law, pp 1-14).
15. I also note defendants' contention that the plaintiffs failed to prove by clear and convincing evidence that the two TROs "clearly expressed an unequivocal mandate to the individual defendants" (Basil 02/09/06 Memo of Law, pp 2-7 [citing, *Ottomanelli v Ottomanelli*, 17 AD2d 647]). The plaintiffs submitted their opposition. The motion was denied. After the parties rested, the defendants renewed their application and the plaintiffs noted their prior opposition and in lieu of post-trial legal memos the parties made closing arguments.
16. Although, I believe the scope of this reference does not require that I make such a finding and that Justice Cahn has indicated otherwise, *assuming arguendo*, that the issue is before me, I find the contention to be without moment. The two TROs are unequivocally clear and enjoin defendants from using confidential business records belonging to plaintiffs and that any such documents, actual or copies, be returned forthwith. The language of the two TROs are unequivocally clear: (1) enjoining defendants in the, *inter alia*, use of confidential records; and (2) to turn over documents in defendants' possession (*Rienzi v Rienzi*, 23 AD3d 447 [to prevail on a motion to hold another in civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court order, thereby prejudicing a right of another party to the litigation]). What constitutes as "confidential information" in this case is discussed further on (*infra*).
17. "[An employee] is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the employee or agent account to his principal for secret profits but he also forfeits

his right to compensation for services rendered by him if he proves disloyal” (*Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138; *Western Elec. Co. v Brenner*, 41 NY2d 291).

18. The plaintiffs are the movants on the motion to hold defendants in contempt. Thus, they have the initial burden of proof of demonstrating a violation of the two TROs, i.e., the Court orders (*Yalkowsky v Yalkowsky*, 93 AD2d 834).
19. Civil contempt requires proof to a reasonable certainty (*Matter of Hynes v Hartman*, 63 AD2d 1, *appeal dismissed* 45 NY2d 838) and criminal contempt requires proof beyond a reasonable doubt (*N.A. Dev. Co. v Jones*, 99 AD2d 238). Civil contempt occurs when there is a disobedience of a court order, regardless of motive, which must have defeated, impaired, impeded or prejudiced the rights of the other party (Judiciary Law § 753). In order to prevail on civil contempt, “the movant must demonstrate that the party charged violated a clear and unequivocal court order, thereby prejudicing a right of another party to the litigation” (*Rupp-Elmasri v Elmasri*, 305 AD2d 394, 395; *Matter of County of Orange v Rodriguez*, 283 AD2d 494, 495; Judiciary Law § 753[A][3]; *Goldsmith v Goldsmith*, 261 AD2d 576, 577). The contempt must be proven by clear and convincing evidence (*Vujovic v Vujovic*, 16 AD3d 490; *Green v Green*, 288 AD2d 436, 437)¹².
20. Civil contempt requires only disobedience, it is sufficient that the defendant have intended to do the act which violated the order, even though he may not have intended to violate the order. Such a finding need not be made for a finding of criminal contempt (*In re Ganz*, 38 Misc 666, 668, affd sub nom *Granz v Ronginsky*, 78 App Div 399, 400).
21. A court can punish for criminal contempt only upon a finding that the alleged contemnor willfully violated the order; that is, that he took the action knowing that he was violating a court order and

¹² Defendant Furia, Fiorello and Parets’ attorney noted to the same in his closing argument (T11, 29-30; citing, *Morales v State*, 183 Misc2d 839 [clear and convincing evidence is evidence which satisfies the trier of fact that it is highly probable that what the party with such burden contends happened is what actually occurred]).

intending to do so (*People ex rel. Stearns v Marr*, 181 NY 463, 471; *Torah v Kesher Int'l Trading Corp.*, 246 AD2d 538; *Gordon v Janover*, 121 AD2d 599, 600; *Yalkowsky v Yalkowsky*, 93 AD2d 834). A party is guilty of criminal contempt if the court order has been willfully disobeyed (Judiciary Law § 750[A][3]).

22. A finding of criminal contempt must be based on “wilful disobedience to [the court's] lawful mandate,” whereas a finding of willfulness is not necessary for a civil contempt, which as noted above need only be based on a finding of “disobedience to a lawful mandate of the court” (compare, Judiciary Law § 750(A)(3) and Judiciary Law § 753(A) [3]).
23. Lastly, as a consequence of the different goals served by civil and criminal contempt, any fine ordered to be paid as a result of a civil contempt is paid to the injured individual in an amount sufficient to compensate for the actual loss suffered, while a criminal fine is paid to the clerk of the county in an amount intended to punish the contemnor for the wrongful conduct. (*Goodman v State*, 31 NY2d 381, 385; *Beth-El Hospital v Davis*, 231 NYS2d 635, *aff'd* 18 AD2d 1138). The fine on a civil contempt may be in the amount of the complainant's costs and expenses plus two hundred fifty dollars (Judiciary Law § 773).
24. A party is not entitled to a “jury trial” on the issue whether he or she has violated a court order (see, *In re Hirschfeld*, 184 Misc2d 119 [charged criminal contempt offenses, each of which carried a maximum sentence of imprisonment of no more than 30 days and a fine of \$1000, were petty offenses, and did not trigger Sixth Amendment right to jury trial, even though defendant faced potential aggregate sentence of greater than six months, see also, McKinney's Judiciary Law § 751 [1]; *Department of Housing Preservation and Development of City of New York v Deka Realty Corp.*, 208 AD2d 37 [right to jury trial in serious criminal contempt cases does not apply to criminal contempt classified as petty offenses]).
25. Plaintiffs must demonstrate that defendants violated the TROs as they used “confidential information or documents that Parets . . . obtained . . . while employed by” 24-Seven and that the

defendants further violated the TRO by failing to “deliver forthwith to 24 Seven, Inc., all originals and copies or computerized records now possessed by” the defendants or “otherwise subject to the[ir] . . . custody or control . . . reflecting or containing confidential information of 24 Seven, Inc.” (see, County Clerk file, Ord., Show Cause, 03/12/04 at p 3).

26. Plaintiff must also demonstrate that the defendants (particularly Fiorello, Furia, Parets and Gromwell) and “any person or entity acting in concert with them or on their behalf . . . us[ed] any confidential information, documents or computer programs that [were] obtained, created or assisted in creating while in the employ” of either plaintiffs.
27. Plaintiffs must also demonstrate that the defendants violated the TROs when they failed to “deliver forthwith to plaintiffs all originals or copies or computerized records now possessed by defendants or otherwise subject to the defendants’ custody or control, of all documents reflecting or containing confidential information . . . ” (id., County Clerk file, Ord., Show Cause, 03/25/04 at p 2).
28. At the hearing the plaintiffs pressed the claim that defendants purposed discarded and/or destroyed documents material, necessary and relevant to this litigation. The testimony indicates that documents were indeed shredded at Gromwell (discussed, infra).
29. The first issue to determine is whether the documents introduced by the plaintiffs constitute “confidential” business records that fall within the subject matter of the TROs. In fact, the scope of this reference requires the undersign to weigh and determine whether documents constitute evidence of business records that are of a “confidential” nature and hence within the purview of the TROs. In short, whether certain documents contain information that is substantive and relevant to the nature of plaintiffs’ business.
30. The plaintiffs must demonstrate that the defendants understood at the relevant time in issue that certain documents were of such a “confidential” nature as to constitute the equivalent of a trade secret.

31. Thus, the plaintiffs' proof must show: (1) that 24-Seven and/or 24-Seven Online possess trade secret[s], and (2) that defendants used the trade secret[s] in breach of an agreement, confidence, or duty, or as a result of discovery by improper means.
32. Justice Cahn has noted that our "courts have adopted the trade secret definition set forth in the Restatement of Torts § 757, Comment B, as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, 5 Misc3d 285, 297; citing, *Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407; *U.S. Reinsurance Corp. v Humphreys*, 205 AD2d 187, 191).
33. The factors considered in evaluating claims of trade secrecy include: (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (Restatement of Torts § 757, Comment B; *Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, *supra*, 5 Misc3d at 298).
34. The testimony by Hogan and the supporting documentary evidence¹³ as well as the actions and conduct by Fiorello (discussed, *infra*), unequivocally reveal that Px 2A/2B as well as Px 16, 17, 18, 19 and 20 constitute "confidential" business records that are also trade secrets that belonged exclusively to 24-Seven. Moreover, the fact that 24 Seven shared some of these trade secrets with 24-Seven Online did not make turn them into public documents readily available to third parties.
35. It is unequivocally clear that the specific names and contacts contained in these documents as well

¹³ Gudas' designated deposition testimony reveals that 24-Seven treated almost all of its business records as confidential information and trade secret (Gudas 03/29/04 EBT, p 193).

as sales cycles, pricing, freelance categories, placement history, and employee codes, etc., is unique information not readily available from public sources or directories and not incapable of being memorialized.

36. As related by Hogan, client and candidate contacts had been screened by 24-Seven at considerable effort and expense “without which their receptivity and willingness to do business with this kind of a service organization could not be known” (*Town & Country House & Home Services v Newbery*, 3 NY2d 554, 560). The above information in whole and in part is not the sort of information that is known outside of plaintiffs’ business (**FINDINGS OF FACT, ¶¶ 7-9, 226 [fn 7]**).
37. The testimony by Hogan, Gudas and Kagel also support the finding (I find them credible although they are clearly interested witnesses) plaintiffs made it known to employees that the information contained in these documents was confidential and not for public use.¹⁴
38. Plaintiffs made it a routine business practice to provide all employees with an employee handbook and the individual defendants unequivocally signed employment agreements that contained confidentiality agreements. Moreover, plaintiffs expended money and effort to secure the company’s Bullhorn database, limited access by levels and deletion and editing to the principals of the company.
39. In short, plaintiffs have demonstrated credible proof that the documents in issue were known by the employees to be confidential. They also demonstrated the extent of measures taken by them to guard the secrecy of the information, especially from competitors (**FINDINGS OF FACT, ¶¶ 4, 7, 14, 16, 22**).
40. Hogan’s credible testimony also demonstrates that the plaintiffs have expended a large amount

¹⁴ Although Hogan testified that she deemed all information confidential - a point noted by defendants in support of their contention that plaintiffs cannot demonstrate an “unequivocal mandate” as to confidential records and defendants’ understanding as to what constitutes “confidential records” - that does not, without more, end my query.

of effort or money on its business and in developing the information. A review of the documents (Px 2A/2B, Px 16 through Px 20), unequivocally demonstrate there is no ease in duplicating this information.

41. Much time and effort was expended in generating this unique information and duplicating it - short of downloading the same and/or emailing it to an outside email address - is difficult. The names of both clients and candidates - regardless if they were secured for accounts or placement - could not be ascertained by the defendants without extraordinary effort (*Stanley Tulchin Assoc., Inc., v Vignola*, 186 AD2d 183).
42. The testimony reveals that plaintiffs not only had contact information for the Directors of Human Resources, but through much time and effort departmentalized contacts so as to reach the person who was the first “domino” in a line of dominos. This particular contact would initiate the decision to hire candidates. These contacts were by name, title, department, telephone number, address and email. To duplicate this effort, short of copying it, would be an extraordinary task.
43. Therefore, the proof is clear and convincing that the above documents are indeed trade secrets and clearly confidential. It is beyond cavil that Fiorello, Furia and Parets understood the confidentiality of these documents and any such document while at 24-Seven Online or 24-Seven. The defendants are not novices when it comes to understanding the unique placement industry and the importance of keeping documents and records used at 24-Seven confidential. They acknowledged this importance when they signed their respective employment agreements. It is noted that Fiorello and Furia’s Shareholder Agreement was understood to contain similar covenant of confidentiality.
44. Their testimony reveals familiarity with the industry and the importance of having information that provides a chart in securing clients and/or placing candidates. To the extent they testified to unfamiliarity or a lack of recollection or inability to access documents **FINDINGS OF FACT**,

¶ 222, 246¹⁵), I find it of no credible moment. The individual defendants understood what confidential documents meant and reasonably understood that such documents similar to Px 2A/2B and Px 16 through 20 were indeed confidential and trade secrets.

45. The defendants produced no evidence to substantiate their claim that plaintiffs' list of client and candidate contacts, categorized by department and skill, was not confidential, but known or readily available in the market.
46. Defendants evidence documents to support their claim that many of client contacts were available to Gromwell before Fiorello or that there were limited matches from their sampling of clients. But, upon review of the same and consideration of the testimony by Wilkinson, Hogan, Fiorello as well as Px 2A/2B, Px 16 through 20 and Dx K, I conclude otherwise.
47. The record also provides evidentiary support to the plaintiff's claim that its cost and pricing information was confidential. The testimony by plaintiffs' witnesses demonstrate that defendants used the knowledge of the plaintiff's pricing to obtain an unfair competitive advantage. I reject the opposing testimony that the "customer sets the price" ends the query.
48. The proof (Px 16 through 20), supports the finding that the individual defendants misappropriated pricing information to solicit the plaintiff's clients (but cf., *Amana Exp. Intern., Inc. v Pier-Air Intern., Ltd.*, 211 AD2d 606; see also, *Leo Silfen, Inc., v Maurice C. Cream*, 29 NY2d 387 [former employee was not shown to have appropriated by copying, studied memory or other means detailed information in employers' customer files. Employers' customers were likely users of employers' merchandise, engaged in business at advertised locations, names of the customers alone involved no trade secret and no wrongful conduct by employee was shown by circumstance that he had solicited 47 of 1,100 customers appearing on list prepared by employers from their

¹⁵ Fiorello's testimony that he had no access to his work email at home was not credible. In fact, Parets testified otherwise and Hogan's testimony clearly reveals accessibility to email from home was available at the relevant time.

confidential files. If there has been a physical taking or studied copying of customer lists by employee, court may in proper case enjoin solicitation, not necessarily as violation of a trade secret, but a breach of trust and confidence and if wrongful or fraudulent tactics employed by former employee in soliciting of customers, an award damages and injunction of further similar conduct constituting unfair competition. In absence of express agreement to that effect between the parties, or demonstration that a customer list has the attributes of a trade secret, courts should not enjoin exemployee from engaging in fair and open competition with his former employer]).

49. Plaintiffs must next demonstrate the defendants, particularly Furia and Parets, obtained, created or assisted in creating the confidential information while employed by 24-Seven and used or facilitated its use at Gromwell after March 12, 2004.
50. I agree that the plain language of the TROs enjoined the individual defendants from disclosing confidential information, documents and computer information learned, obtained, or created while at 24-Seven to any person or entity, including Gromwell and its employees.
51. The clear and convincing proof consisting of testimony by Hogan, Fazio, LaBow, To, Lewis, Angel as well as Fiorello (who was “shocked!” to learn that Px 1 was produced by Gromwell from an attachment in one of Fiorello’s Gromwell emails), and documentation, is that Fiorello obtained the confidential information and trade secrets (Px 2A/2B, Px 7-12 and 16-20) at a time that: (1) their use was to be for a limited purpose, e.g., archive candidates and NOT active candidates; (2) at a time that he had no legitimate business purpose, e.g., when 24-Seven Online was closed down and Fiorello moved to beauty accounts; (3) the very same information and attachments could be accessed from his work email address directly from his home; and (4) conveniently at or about the time - and not by coincidence - he knew 24-Seven Online was closing down (May 2003) and/or knew after several discussions with Alvar that he would be leaving 24-Seven (September 2004) (**FINDINGS OF FACT**, ¶¶ 28, 31, 34, 36, 54-65, 80-81, 84-85, 97-98, 108-109, 112, 118-124, 242-245, 249-254, 269, 272, 279, 280).

52. Fiorello testified that at a certain time he was simply “protecting his asset” in 24-Seven Online, but at the time in issue no such litigation was contemplated and in one instance, Fiorello was optimistic (**FINDINGS OF FACT, ¶¶ 240-242, 248**). Moreover, it was not his “own” asset, but the asset of a corporate entity and his “unilateral act” is suspect.
53. Furthermore, there is clear and convincing evidence that Fiorello had in his possession the February 6, 2004- 24-Seven document (Px 19), while employed by Gromwell. This document is clearly a trade secret and was used by Fiorello as it contains his handwriting and the most reasonable inference is that he had that document on his person on or after March 2004 and used it for business at Gromwell (**FINDINGS OF FACT, ¶ 274**).
54. Fiorello’s testimony unequivocally confirms that he indeed had possession and control either physical or constructive (email attachments), of 24-Seven and 24-Seven Online documents (*Viviano v Jewelers Mut. Ins. Co.*, 115 Misc2d 518; *People v Torres*, 68 NY2d 677; *People v Sierra*, 45 NY2d 56; *People v Manini*, 79 NY2d 561, 573). At one time he had the very attachment that was produced and downloaded by Gromwell and then provided to plaintiffs (Px 1).
55. Moreover, the credible testimony and proof reveals that Furia provided Fiorello with Px 7 while he was at 24-Seven Online and that very document made its way to Gromwell in the form of Px 2A/2B. The testimony by Lewis supports the finding that Furia acknowledged Px 2A/2B while at Gromwell when he told Lewis that document was the property of another company (**FINDINGS OF FACT, ¶ 58**). It is also a reasonable inference - based on the documentation and testimony - that Furia knew the “other company” was 24-Seven.
56. Furia’s testimony reveals his familiarity with the format of documents Px 7, Px 17, 19 and 20. However, his testimony that he could not recollect any familiarity with them while at Gromwell was not credible. Furia’s familiarity with these exhibits was his exposure to them while at 24-Seven and their circulation among other office staff at Gromwell. In fact, both Lewis and Fazio

credibly testified to recognizing their handwriting on Px 16, 17 and 18, while at Gromwell at the relevant time in issue (**FINDINGS OF FACT**, ¶¶ 55, 58, 94).

57. Furia was aware of the use of Px 2A/Px 2B at Gromwell and his denial is not credible. The credible testimony by Lewis is that she saw portions of that document on Furia's desk. I found her testimony credible.
58. The testimony by Lewis is that "[Px 2A/Px 2B] was split up between Christian Fiorello and Sal Furia" but she did not see who actually "split" up that document (T4, 261).
59. It is of no moment who actually divided up Px 2A, as the evidence clearly demonstrates that Px 2A was initially Px 7 and Px 7 was transferred by Furia to Fiorello. Later on Px 7 is printed up as Px 2A/2B. Once Furia joins Gromwell - as revealed by Lewis' testimony - he again "obtains" Px 7 by way of Px 2A/2B and both he and Fiorello have portions of it on their desks.
60. The reasonable inference is that Furia provided Px 7 to Fiorello and Px 2A/2B is its progeny. Thus, Furia facilitated Fiorello in obtaining and using the above confidential document and trade secret both before and during Fiorello's tenure at Gromwell.
61. I also find it reasonable to infer that as Furia provided Fiorello with Px 7 (ultimately becoming Px 2A/2B), he likely provided Fiorello with - and facilitated the use of - Px 19. That document, dated February 6, 2004, did not make its way to Gromwell by itself. Clearly, Fiorello was not on 24-Seven premises in February 2004, but Furia surely was. Furia leaves 24-Seven in March 2004 and begins employment at Gromwell. Moreover, Furia specifically recalls handling Px 19 while at 24-Seven (**FINDINGS OF FACT**, ¶¶ 221-222). Lastly, Parets could not have provided Px 19 to Fiorello as she left Gromwell in January 2004 and Px 17 was not generated until February 6, 2004.
62. Simple deductive reasoning supported by the testimony and documentary proof clearly supports the finding that Furia provided Fiorello with Px 7 and he also provided Fiorello with Px 19. Furia's testimony is noted, but I do not find him credible and therefore I reject it.

63. As to Parets, Fazio's testimony reveals the disclosure of pricing and that Parets facilitated Fazio's efforts in negotiating pricing with clients. Fazio's testimony reveals how that information was used to market Gromwell's "competitive" prices; she learned the different bill rates charged by 24-Seven from both Fiorello and Parets and made use of that information by undercutting 24-Seven's bill rate and offering on Gromwell's behalf a bill rate of 60% (**FINDINGS OF FACT, ¶¶ 65-66**).
64. I also credit Fazio's testimony that she discussed documents used and provided to her with Parets (*id.*), and that information Fazio gleaned from the trade secrets-documents was inputted by her into Gromwell's new Bullhorn system with the assistance, guidance, and instructions from Parets. Parets instructed Gromwell personnel on how to enter 24 Seven confidential information into Gromwell's database. Once the inputting was complete the hard copies were deemed by Fazio to be "obsolete" (**FINDINGS OF FACT, ¶ 60**).
65. LaBow convincingly testified that Parets assisted and interacted with the Sales Division by facilitating the placement of candidates with clients she obtained by way of her use of 24-Seven documents. The testimony reveals that LaBow interacted with Parets to secure the placement of candidates. She walked over a new account to, among others, Parets, who in turn followed up with candidate placement. Both sides of the office would follow up with both client and candidate for quality control, performance, etc., (**FINDINGS OF FACT, ¶114¹⁶**).
66. I have weighed the above testimony and note that there was more consistency and little contradiction among plaintiffs' witnesses. Other than Leon Persaud's presence in October 2004 (limited to the issue of the "shredding" incident) and the limited testimony of Ruiz (who only worked on beauty accounts), I find the testimony by plaintiffs' witnesses - although ex-employees

¹⁶ As a result of using the documents, LaBow claims she got accounts and discussed the use of these documents with the other sales persons as well as with Parets. LaBow testified that Parets was helpful as she was familiar with the candidates who were needed in certain departments, such as, designing, etc., (**FINDINGS OF FACT, ¶ 124**).

of Gromwell, with some holding grudges (Fazio, LaBow) against Gromwell and almost all expressing an intense dislike of Fiorello, when weighed separately and then cross referenced, very credible. I see no web of conspiracy, no ignoble action or motive, no planned or coached testimony.

67. Here, I find clear and convincing evidence that plaintiffs have established violations of the TROs by Parets, Furia and Fiorello. Their testimony demonstrates that defendants engaged in the solicitation of clients and customers by way of former employees (Fiorello, Furia and Parets) and with the use of confidential records and trade secrets. Moreover, the former employees engaged in wrongful conduct; such as physically taking or copying files and records and using the confidential information (*Cosmos Forms v American Computer Forms*, 193 AD2d 577; *Levine v Bochner*, 132 AD2d 532).
68. The testimony by Ancliffe, Levine and Johnson, all whom are 24-Seven freelance candidates, demonstrate a pattern of freelance solicitation by Gromwell. Their respective testimonies reveal their unique expertise in fashion apparel and that they had no material connection with Gromwell until after Fiorello joined the defendant. Yet, all three testified that for the last few years before March 2003, they worked freelance. As revealed by Fiorello's testimony, Gromwell's freelance business was negligible in March 2003 (**FINDINGS OF FACT**, ¶¶ 257, 289-294). The credible testimony, coupled with the documentary evidence, demonstrates that the solicitation of plaintiffs' clients and candidates was not the product of casual memory, or, as defendants would have the court believe, coincidence.
69. The plaintiffs have maintained throughout this litigation – and the very reason why it sought and obtained the TROs – that the individual defendants committed an egregious breach of trust and confidence (*Scott & Co. v Scott*, 186 App Div 518-; *cf.*, *Duane Jones Co. v Burke*, 306 NY 172; *Bruno Co. v Friedberg*, 21 AD2d 336).
70. I have weighed and considered the defendants' contentions, but they are rejected and not supported

by the record. The defendants have not rebutted the evidence presented on direct and there legal contentions (see also, Basil 02/09/06 Memo re: Directed Verdict, pp 6-14) are noted and found to be without moment.

71. I find no credible proof that Fiorello generated his own resource book after attending the “Magic Show.” The testimony reveals that the “Magic Show” took place two times a year (February and September) and there is no credible proof that Fiorello attended either event in 2004, the first show took place too early in Fiorello’s employment with Gromwell and the second show took place at a time that Fiorello was either suspended or discharged from Gromwell (**FINDINGS OF FACT**, ¶¶ 258-260).
72. Moreover, the defendants’ proof indicates that when Gromwell sought to expand into the freelance business: (1) the initial start was difficult; (2) Walsh’s attempt to expand the freelance business was not successful; (3) the staff continued to place permanent placements rather than freelance and kept “pushing back” Walsh; (4) before Fiorello came on board, Gromwell had few freelance clients and its freelance candidate pool was slowly being developed; (5) when Fiorello came board he described the Gromwell’s freelance section “negligible”; and (6) a comparison of Px2A/2B with Dx J suggested duplication (**FINDINGS OF FACT**, ¶¶ 146-147, 156, 171-172, 174, 201, 257, 270). These noted view findings support the inference that Fiorello did not materially rely on existing office documents and turned to the use of the plaintiffs’ confidential records and trade secrets when he managed the office staff at Gromwell.
73. Plaintiffs’ proof demonstrate that the defendants (Parets, Fiorello, Furia and Gromwell) and other employees “. . . acting in concert with them or on their behalf . . . us[ed] . . . confidential information, documents or computer programs that [were] obtained, created or [created] . . . while [the three individual defendants were] in the employ” of the plaintiffs.
74. I reject the defendants’ contention that there is no clear and convincing proof that Fiorello disclosed or used any document or information brought to Gromwell by Furia. I also note that Parets learned

of trade secret information while at 24-Seven and facilitated the use of such secrets (pricing), coupled with the presence of the confidential and trade secret documents, with both Fiorello and Gromwell staff.

75. I find credible proof that Px 2A/Px 2B as well as Px 16 through Px 20 were on Gromwell's premises from the time Fiorello began his employment and after. I credit the plaintiffs' witnesses' testimony that through out the employments of Fazio, Lewis, LaBow, To, and Angel, these employees used these documents individually or shared them.
76. It is of no real moment whether there were multiple copies of certain documents or portions of the same document, the testimony reveals that these documents are confidential records and trade secrets, that they originated from 24-Seven, that they were obtained and used in concert by Fiorello, Furia and Parets and other employees of Gromwell and while acting on behalf of Gromwell, and that their use was enjoined by the TROs (**FINDINGS OF FACT**, ¶¶ 56-67, 79-84, 94-96, 103-104, 117-124).
77. I also take issue with the testimony by defendants that Fiorello acted as an independent contractor or "consultant" as the testimony clearly reveals he supervised staff, determined salary, hours and vacation and directed and managed the office (**FINDINGS OF FACT**, ¶ 194). Fiorello was a "consultant" in name only. The evidence clearly reveals that Fiorello supervised, controlled, and/or directed performance of the employees in the Sales Division. With intent and purpose, Fiorello acted as a "psuedo" employee. Regardless of his "position" during his tenure, the TROs clearly enjoined "all persons acting in concert with" the defendants.
78. The plaintiff's proof demonstrates the reasonable certainty that the above documents are confidential records, the property of 24-Seven, and that the information was generated, learned and/or obtained by the individual defendants and used by all of the defendants in violation of the TROs.
79. Gromwell, by way of its own employees' actions - as testified by plaintiffs' witnesses - had both

actual and/or constructive knowledge of the use of the above documents. The testimony by Fazio, Labow, and Lewis support the finding that Foley was aware of these documents, regardless of his testimony to the contrary. The credible testimony demonstrates that these documents were circulated in the open and in an office where desks were adjacent to each other and both administrators and staff worked closely together. The documents were also discussed at staff meetings (**FINDINGS OF FACT**, ¶¶ 56, 63, 79, 81, 123, 170).

80. Hence, the above conduct and acts by the defendants and their employees who acted on their behalf at the relevant time in issue constituted disobedience of the TROs, regardless of motive (Judiciary Law § 753; *Great Neck Pennysaver, Inc. v Central Nassau Publications, Inc.*, 65 AD2d 616).
81. Plaintiffs' proof also demonstrates that defendants' conduct impaired, impeded and/or prejudiced the 24-Seven's rights (Judiciary Law § 753). Here, obtaining, using and duplicating plaintiffs' confidential documents records and trade secrets is tantamount to an impairment of plaintiffs' proprietary interests in these documents and trade secrets and surely placed defendants in an unfair competitive edge. This conduct clearly impeded and prejudiced plaintiffs' rights in the confidential documents and trade secrets (*Campanella v Campanella*, 152 AD2d 190 [bank's failure to restrain the defendant's funds in his bank accounts impaired and impeded the plaintiff's ability to obtain her court-ordered award of maintenance and counsel fees pendente lite]).
82. The evidence supports the finding that the Fiorello, Furia and Parets willfully violated the TROs. The record reveals both testimony and documentation of their awareness of the TROs issued on or after March 12, 2004 (**FINDINGS OF FACT**, ¶¶ 157, 184, 274), yet they continued to use the confidential documents and trade secrets with Gromwell and its employees. The evidence supports this finding as against these individual defendants.
83. However, I do not find that the same evidence supports a wilful violation of the TROs by Gromwell (*Gordon v Janover*, 121 AD2d 599 [criminal contempt is demonstrated by the wilful disobedience of a court order]), but that is of no consequence in view of the finding that Gromwell

violated the TROs when its employees supervised by Fiorello disobeyed the TROs, “regardless of motive,” that unequivocally defeated, impaired, impeded and prejudiced the rights of the plaintiff (*Rupp-Elmasri v Elmasri*, 305 AD2d 394 [civil contempt is demonstrated by disobedience of a court order regardless of motive]). It is sufficient that the defendants have intended to do the act which violated the order, even though they may not have intended to violate the order.

84. Plaintiffs must also demonstrate their burden of proof that the defendants further violated the TROs by failing to “deliver forthwith to 24 Seven, Inc., all originals and copies or computerized records now possessed by” the defendants or “otherwise subject to the[ir] . . . custody or control . . . reflecting or containing confidential information of 24 Seven, Inc.” (see, County Clerk file, Ord., Show Cause, 03/12/04 at p 3).
85. At the hearing the plaintiffs pressed the claim that although defendants were obligated to deliver documents containing confidential information of 24-Seven, instead the defendants purposely discarded and shredded documents that were material, necessary and relevant to this litigation. The testimony indicates that documents were indeed shredded at Gromwell.
86. Here too, the plaintiffs have demonstrated that there were indeed documents that belonged to 24-Seven and in defendants’ possession on and after March 12, 2004. As noted above, the evidence demonstrates that Px 2A/2B and Px 16-20 were being used by defendants after March 2004 and up to October 2004 and not one of these documents was produced and/or delivered to 24-Seven by any of the defendants under the TROs. Fazio turned over these documents after she left Gromwell and worked at 24-Seven for several months (**FINDINGS OF FACT**, ¶¶ 41-42, 44, 58, 60). Hence, Fazio’s possession of these very documents is clear and convincing evidence (in fact, beyond a reasonable doubt), that they were on Gromwell’s premises.
87. As discussed above, it is unequivocal that these documents and computer records were in defendants’ possession both individually and jointly. Gromwell’s production of Px 1 and Wilkinson’s testimony clearly reveal that Fiorello had sent certain computerized records from his

home address to Gromwell and then before his suspension redirected the same confidential and computerized records to his personal email address - his pattern of conduct continued.

88. But, the testimony by Fazio, To, LaBow reveal that the documents were either discarded or shredded in a haphazard “clean up” of office documents (**FINDINGS OF FACT, ¶¶ 69, 87, 126-129**). LaBow’s testimony that she saw Persaud shred documents may indeed be true. But, she did not witness that event in October 2004, and likely after Thanksgiving 2004, when he commenced employment. However, without more, I am convinced that LaBow witnessed the shredding of documents and that she too shredded documents as well as discarded documents removed from Fiorello’s desk with an “on and off” supervision of her actions by management (**FINDINGS OF FACT, ¶ 128**).
89. The defendants failed to produce and/or turn over the documents to the plaintiffs. Instead, the clear and convincing testimony supports the finding that some or all of the documents were discarded and/or shredded. This finding is premised on the wise inference that as the documents were in the defendants’ care and custody, they should have been produced. In fact, the testimony by both Parets and Foley confirm that shredding of documents took place, but neither of them claim to know what was exactly shredded, both claimed no knowledge or recollection of the documents that were shredded in October 2004 other than the claim that they were not related to the documents in issue (**FINDINGS OF FACT, ¶¶ 188-189, 230-231**).
90. The above finding is further supported by the credible testimony of an office announcement by Foley with respect to the collection of non-Gromwell materials from staff. Foley’s announcement was second by Parets (**FINDINGS OF FACT, ¶¶ 68 [Fazio], 85, 89 [To], 105-106 [Angel], 126 [LaBow]**). It was after this announcement that plaintiffs’ witnesses recall the shredding and/or the discarding of documents.
91. Thus, the clear and convincing evidence demonstrates the following: (1) 24-Seven documents made

their way to Gromwell; (2) they were on the business premises from March 2004 and after; (3) they were used by defendants and staff; (4) they were available after March 2004 and should have been delivered to plaintiffs as directed in the TROs; (5) in October 2004, six months after the Court's directive, an office announcement was made for the collecting of non-Gromwell documents; (6) the staff collected some, but not all documents; and (7) the non-Gromwell documents were both discarded and shredded.

92. Furthermore, Fazio produced the very same documents to the plaintiff and testified that she had them in her home and used them while working at Gromwell. Fazio knew what she was doing at the time she used these documents while at Gromwell. She also likely took them home for some other reason rather than work on them in the comfort of her home. I credit that aspect of Fiorello's testimony that he never saw Fazio take work home. In fact, in one instance, Fazio claims she took the documents home and worked from them. In a second instance, she concedes she never used Px 20, yet took it home (**FINDINGS OF FACT**, ¶ 72). The evidence is clear that she never worked from these documents at home.
93. But, the fact that she took them and for whatever motive does not change the plain and undisputed fact that defendants had them and used them to plaintiffs' detriment. The testimony by plaintiffs' witnesses demonstrate that the same confidential records and trade secrets were in defendants' possession as early as March 2004 and forward. I found Fazio's testimony credible or as noted by Walsh, Fazio was "trustworthy" (**FINDINGS OF FACT**, ¶207).
94. Therefore, plaintiffs have demonstrated their burden of proof that the defendants failed to deliver confidential records and trade secrets as directed by the Court. Defendants have not demonstrated otherwise.

CONCLUSION

Noting to the closing arguments and adopting defendants' counsel "food for thought," (T11, 2-3, 27), I have indeed found a pie with a thick crust and savoring it, I dug in and found a lot of

filling, but not to my liking. In fact, the after taste was most unpleasant.

For all of the above findings of fact and conclusions, I find that the plaintiffs have sustained their burden of proof and that the issue of damages shall be scheduled forthwith with the Special Referee. The parties are directed to schedule the date(s) with the undersigned no later than June 9, 2006.

Dated: June 5, 2006

LOUIS CRESPO
SPECIAL REFEREE

EXHIBITS

Ct Ex	Comparison Chart re: Px 2A vs Px 20
Px 1	Fiorello September 6, 2004-Email (Box)
Px 2A / 2B	24-Seven Aging Report (names, title, phone number and company) (2A Copy -2B Orig., Provided by Fazio to 24-Seven)
Px 3	24-Seven Employee Handbook
Px 4	Parets Confidentiality Agreement
Px 5	24-Seven Online Shareholder Agreement
Px 6	24 Seven Online - Terms and Conditions of Use
Px 7	Furia & Fiorello January 2003-emails and Attachment Correspondence-Clients (cf., Px 2A and Px 2B)
Px 8	Fiorello March 2003-email and Attachment Correspondence-Candidates Info.,
Px 9	Fiorello May 2003-email and Attachment Client Names & Emails -Country Wide
Px 10	Fiorello April - August 2003 emails and Attachment "Active" Candidate Info.,
Px 11	Fiorello April - August 2003 emails and Attachment "Active" Candidate Info.,
Px 12	Fiorello April 0 August 2003 emails and Attachment "Active" Candidate Names
Px 13	Furia Employment Contract August/September 2003
Px 14	Fiorello Employment Contract August 2003
Px 15	Sept., 2003-Email from Jodi Proietti to Fiorello with Attachment Potential Directors for Clients
Px 16	Bullhorn generated Screen Print-Liz Clairborne Clients-Candidates Placement - Undated
Px 17	Bullhorn generated Screen Print of Clients-Candidates Placement per Company-Aug., 2003
Px 18	24-Seven Aging Report Trial Balance by Customer from Thisco -August 2003
Px 19	24-Seven Aging Report Trial Balance by Customer from Thisco - Feb., 16, 2004
Px 20	24-Seven Employee Code - Job Master List - August 2003
Px 21	Fazio Office Diagram at Gromwell (August 2004)
Px 22	Fiorello Resume
Px 23	O'Connor Note re: Fiorello Hiring
Px 24	Ruiz Aff., Sept., 2003 on Behalf of Plaintiff
Px 25	Ruiz and Rothman Sept., 2005- Email Correspondence
Px 26	Ruiz and Rothman Sept., 2005- Email Correspondence
Px 27A-B	Labow and Fazio Salary Letters
Px 28	Gromwell and 24-Seven Time Cards (Id., Only)
Px 29	Gromwell Freelance Agreement (Id., Only)

Px 30 Walsh Feb., 2005-Email to Staff Member
Px 31 List of Resource Tracking Job Categories
Px 32 Federal TRO [J. Batts] re: Domain Name
Px 33 Magic Guide/Directory (**Id., Only**)
Px 34A Gromwell Staffing Inc., Jan., 2003-Dec., 2003 Gross Billings -Freelancing
Px 34B (\$299,318.34).
Px 35 Bullhorn Corresp., to Hogan (**Id., Only**)
Px 36 24-Seven Oct., 2003 -Fiorello Warning Letter
Px 37 24-Seven Sales Expectations Oct., 2003 to Fiorello

Dx A Fazio April 2004-Email of Apology to Gromwell Staff
Dx B Hogan Dec., 2005 Deposition (**Id., Only**)

Dx C Ruiz Aff., Sept., 2005 Behalf of Defendant
Dx D Walsh March 2003-Report
Dx E Walsh April 2003-Report
Dx F Walsh November 2003-Report re: hiring of two new staff
Dx G Walsh August 2004-Report
Dx H Smorgasbord Company Contacts-Samples of Bullhorn and Resource Tracking
Dx I Bullhorn Screen Print from Gromwell
Dx J Resource Tracking Screen Print from Gromwell
Dx K Fiorello Excel Spreadsheet re: contacts (Magic Show)
Dx L Women's Wear Daily.Com Website Printout 2006 (**Id., Only**).
Dx M Fiorello Emails & Attachments from Gromwell to Fiorello (March 2004 and September 2004).
Dx N Wilkinson Data Review Resource Tracking of Fazio Contacts: Smorgasbord Companies