

MISSOURI SUPREME COURT

NO. SC91831

MYRNA ROBERTS and MEL ROBERTS,
Appellants

v.

WESTERN BLUE PRINT COMPANY, LLC,
Respondent

RESPONDENT'S SUBSTITUTE BRIEF

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RESPONSE TO APPELLANTS' SUBSTITUTE BRIEF

This is the brief of respondent Western Blue Print Company, LLC (“Western Blue”) in response to the Substitute Brief of appellants Mel Roberts and Myrna Roberts (“Appellants”).

I. JURISDICTIONAL STATEMENT

This action constitutes an appeal from a final judgment entered by the circuit court of Boone County, Missouri, in favor of the Plaintiff for breach of fiduciary duty, tortious interference with contract and computer tampering. After a ruling by the Court of Appeals, Western District, this Court granted transfer.

II. RESPONSE TO APPELLANTS' STATEMENT OF FACTS

Respondents take issue with the appellants' “statement of facts.” Rule 84.04(c) requires that the statement of facts in a brief set forth “a fair and concise statement of the facts relevant to the questions presented for determination without argument.” *Rice v. State, Dept. of Social Services*, 971 S.W.2d 840, 841-42 (Mo. App. E.D. 1998). “The primary purpose of the statement of facts is to set forth an immediate, accurate, complete and unbiased understanding of the facts of the case.” *Id.* at 842. Most of Appellants' arguments question the existence of probative evidence to support the elements of the various claims. Appellants omit various critical facts that are important to disposition of those questions. Therefore, Respondent includes those facts as allowed by Rule 84.04(f).

Mrs. Roberts came to Western Blue in 1999 and was charged with getting the Columbia operation started. Tr. Transc. vol. 1, 5:7-10. Her title at that time was “branch manager” Id. at 5:11-12. This position was considered “senior management.” Id. at 6:5-

8. As a branch manager she was vested with discretion to run her operation, to hire and to fire. Id. at 6:16-22. Her duties included managing Western Blue's location in Columbia, including overseeing production, customer relationships, some sales and customer service and being in charge of everything related to that particular office. Id. at 5:15-20.

Around August of 2004, Mrs. Roberts was made a Division Vice President of Western Blue; this was the title she kept until the time she left. Id. at 5:23-6:4. As Division Vice President, Mrs. Roberts was expected to attend and was included in various executive meetings where strategy and planning were decided. Id. at 7:22-25. Mrs. Roberts' responsibilities included assisting and attending those meetings and providing her input on planning and strategy. Id. at 7:25-8:3. Mrs. Roberts was exposed to the company's financial information including profit and loss statements. Id. at 8:4-8. She saw on a monthly basis how the company was doing division by division in terms of revenues, costs, and profits. Id. at 8:8-10. She was exposed to cost information including employee salaries. Id. at 8:11-12. She was involved in decisions regarding acquiring and servicing equipment and knew the costs associated with that. Id. at 8:14-18. She saw material costs and a variety of information that Western Blue considered proprietary. Id. at 8:17-18. Much of this Western Blue considered its "secret recipe." Id. at 8:18-19. Mrs. Roberts received sensitive competitive information. Id. at 316:24-25, 317:19-22. Western Blue's executives understood that such information was confidential, without the need for a confidential stamp or marking. Id. at 361:12-362:3. Western Blue's policy

was that its employees were to keep Western Blue's confidential information confidential. Id. at 360:11-15, Ex. 48.

Micki Marrero began working as a mortgage specialist with Mr. Roberts and his real estate investment company, Graystone Properties, around 2001 or 2002. Tr. Transc. vol. 1, 584:20-585:11. Mr. Roberts first broached the idea to Mrs. Marrero of a new business that would later become DocuCopy. Id. at 586:1-9. This led to an initial meeting between Mrs. Marrero and Mrs. Roberts where Mrs. Roberts presented the idea that she and Mr. Roberts wanted Mrs. Marrero to run what became DocuCopy. Id. at 588:9-22. By the end of the meeting Mrs. Marrero understood that Mrs. Roberts was looking for a business to be majority owned by a woman and/or a minority, and that Mrs. Marrero would be that person. Id. at 587:18-588:3.

At the time Mrs. Marrero had no experience in the reprographics business. Id. at 588:4-6. The plan was that Mrs. Roberts would train Mrs. Marrero. Id. at 588:8-16. Mrs. Marrero dealt with Mr. Roberts more than Mrs. Roberts between the time of the meeting with Mrs. Roberts and the time in September or October of 2003 when she decided to accept the Roberts' proposal. Id. at 588:21-589:5. Mrs. Marrero had discussions with Mr. Roberts concerning how she would be compensated and about what her responsibilities would be. Id. at 589:7-22. The way Mrs. Marrero was compensated was that she was paid a commission on whatever reprographic sales she made for DocuCopy and would get paid at an hourly rate for things like doing bookkeeping for DocuCopy. Id. at 589:24-590:4; 590:11-15.

Mrs. Marrero became the 51% owner of DocuCopy. Id. at 590:25-591:2. Prior to January 1, 2004, Mr. Roberts was “calling the shots” with regard to DocuCopy. Id. at 591:24-592:4. After January 1, 2004, Mr. Roberts continued to “call the shots” but Mrs. Marrero also had to speak with Mrs. Roberts. Id. at 592:5-10. Mrs. Roberts set up the financial bookkeeping for DocuCopy. Id. at 609:9-14. Mrs. Roberts trained Mrs. Marrero by telling her what rate to charge per print page and how to bill Western Blue. Id. at 610:4-25. After January 1, 2004, Mr. Roberts was not actively running DocuCopy, rather he was relaying messages from Mrs. Roberts about how DocuCopy should be run. Id. at 592:12-18. These messages included who Mrs. Marrero was to call on to try to sell to. Id. at 592:19-593:3. The reason that the messages came from Mrs. Roberts was that like Mrs. Marrero, Mr. Roberts had no experience in the field either. Id. at 593:10-13. On other occasions, Mr. Roberts instructed Mrs. Marrero through Mrs. Roberts, as he did, for example, with suggestions about how to do presentations to lawyers to get their business. Id. at 594:1-5. Mrs. Marrero also communicated directly with Mr. Roberts because they did not want Mrs. Roberts to be “so involved with DocuCopy” because of a worry about conflict of interest. Id. at 594:15-21.

DocuCopy began operating in the building next to Western Blue’s, where Mr. Roberts maintained offices for various other businesses of his. Id. at 437:17-22. During the years before Mrs. Roberts left Western Blue, Mr. Giboney observed Mr. and Mrs. Roberts discuss the business of DocuCopy on too many occasions to number. Id. at 440:6-22. Mr. Giboney saw Mr. Roberts come down to Western Blue’s office almost every day and discuss with Mrs. Roberts a variety of their businesses including

DocuCopy. Id. at 440:22-25. This was a nearly daily occurrence between early 2004 until the first quarter of 2006. Id. at 441:4-20.

During the time Mrs. Marrero worked at DocuCopy, Mrs. Roberts had a great deal of involvement with DocuCopy. Id. at 438:2-4. For example, Mrs. Marrero reported to Mrs. Roberts about DocuCopy's operations and billing. Id. at 438:9-12. Mr. Giboney's office was right across from Mrs. Roberts's. Id. at 438:14-15. Mr. Giboney saw Mrs. Marrero go in Mrs. Roberts's office and meet with her and he overheard some of their conversations. Id. at 438:18-20. Their conversations included the management of DocuCopy. Id. at 438:22-439:1. During those conversations, Mrs. Roberts gave instructions regarding how DocuCopy would be run. Id. at 439:2-8. Mrs. Roberts sometimes sent technicians from DocuCopy to Western Blue in order to provide DocuCopy with free services. Id. at 461:2-462:1; 572:13-574:21.

During the process of trying to get DocuCopy's MBE/WBE certification, Mrs. Marrero spoke with Mrs. Nancy Heyer of the Office of Administration several times. Id. at 612:9-13. Mrs. Marrero reported one of the calls to Mr. Roberts. Id. at 612:14-25. Mrs. Marrero told Mr. Roberts that Nancy Heyer asked who owned the companies listed in DocuCopy's MBE/WBE application, and that Mrs. Marrero identified Mr. Roberts as the owner. Id. at 613:1-5. In response Mr. Roberts told Mrs. Marrero that she should have said she did not know. Id. at 613:6-7. According to Mrs. Marrero, Mr. Roberts asked her to lie. Id. at 613:8-9.

The application was denied due to how the other 49% was held by Mr. Roberts through multiple LLCs. Id. at 598:20-599:15; 501:4-7. When DocuCopy's MBE/WBE

application was denied, steps were taken to change around its ownership structure. Id. at 614:1-7.

Mrs. Marrero refused when Mr. Roberts instructed Mrs. Marrero to do something deceptive with regard to re-applying for MBE/WBE certification. Id. at 614:24-615:25. As a result, Mr. Roberts asked her to leave. Id. at 614:18-23. Mrs. Marrero's last day with DocuCopy was September 1, 2004. Id. at 606:14-17.

Cheryl Ann "Cherie" Rutter first heard of DocuCopy in the fall of 2003 when she was working for Graystone Properties. Tr. Transc. vol. 2, 681:4-15. Mr. Roberts told her that Mrs. Roberts was opening a printing business that would be owned 49% by Graystone Properties and 51% by Micki Marrero. Id. at 681:9-12; 683:14-18. After Mrs. Marrero's departure from DocuCopy, Mr. Roberts approached Mrs. Rutter and asked her to take over Mrs. Marrero's position. Id. at 686:14-20. This was in September of 2004. Id. at 686:23-24. Mrs. Rutter knew nothing about the printing business. Id. at 688:16-17. When Mrs. Rutter said she did not want the job, Mr. Roberts told her he would fire her if she did not accept it. Id. at 686:20-687:5. Mrs. Rutter reluctantly accepted. Id. at 687:8-9. Mrs. Rutter met with Mr. and Mrs. Roberts to find out her duties. Id. at 687:6-22. At this meeting Mrs. Roberts explained the position and told Mrs. Rutter who she was and was not allowed to contact on behalf of DocuCopy. Id. at 687:23-685:8.

Mr. Roberts instructed Mrs. Rutter to "run everything through [Mrs. Roberts.]" Id. at 688:9-12. There was never a time when Mrs. Rutter was able to run DocuCopy as the majority owner because she had to run everything she did through Mr. and Mrs. Roberts, pursuant to the instruction of both of them. Id. at 689:19-690:7.

Mrs. Rutter was told her number one priority for DocuCopy was obtaining MBE/WBE certification. Id. at 690:12-22. Mrs. Roberts told Mrs. Rutter how to fill out the application and required Mrs. Rutter to give it to Mrs. Roberts for review before sending it in. Id. at 690:23-691:2. Mrs. Rutter did as instructed. Id. at 691:20-22. It took several months for the application to be approved but once the approval was obtained in March of 2005, Mr. and Mrs. Roberts immediately began voicing complaints about Mrs. Rutter's job performance and in May of 2005 they fired her. Id. at 691:23-692:3; 693:6-10. Mr. Roberts told Mrs. Rutter that in the event of any inquiries after he fired her that she was not to tell anyone that she was no longer employed by DocuCopy and was to say that she worked for Mr. Roberts from home. Id. at 697:16-22. Mr. Roberts testified that he fired Mrs. Rutter by first offering to sell his shares to her, for \$30,000 to \$35,000. Id. at 1174:5-14. He testified that when she could not pay him that price, he bought her 51% of the company for \$51. Id. at 1175:20-22. Mr. Roberts says that in March/April, 2006, Mrs. Roberts paid him \$100 for 100% of DocuCopy. Id. at 1176:4-7. Mrs. Rutter's last day working for DocuCopy was May 5, 2005. Id. at 695:17-24.

Prior to her leaving DocuCopy, Mrs. Rutter was told to file DocuCopy's tax returns for 2004 showing her as 100% owner because Mr. Roberts did not want his company, Graystone, to be reflected as an owner on the tax returns. Id. at 696:3-12. DocuCopy's 2005 tax returns were also filed showing Mrs. Rutter as the 100% owner. Id. at 696:14-17.

Western Blue's understanding was that DocuCopy was primarily a subcontractor with regard to the University of Missouri contract. Tr. Transc. vol. 1, 19:2-7, 19-22. The subcontractor relationship was to assist Western Blue to fulfill a portion of its contract with the University of Missouri which provided for Western Blue to subcontract out part of its work for the University of Missouri to a business that was disadvantaged. Id. at 19:23-20:11. Mrs. Roberts was the person who set up Western Blue's arrangement with DocuCopy. Id. at 28:7-8. Mrs. Roberts was the person at Western Blue who was responsible for Western Blue's contract with DocuCopy. Id. at 28:19-21.

Shortly after Mr. Vince Pingel became managing director of Western Blue, questions began to surface about who owned and managed DocuCopy. Id. at 20:18-24. This was in late 2004 or early 2005. Id. at 20:25-21:1. Mr. Pingel began asking questions when he heard that Western Blue's employees were performing work for DocuCopy while on Western Blue's payroll. Id. at 21:11-19.

Mr. Galen Hansen was Western Blue's Chief Financial Officer whose regular duties included looking at possible financial irregularities. Id. at 22:18-25. Mr. Hansen undertook to investigate any relationship between Mrs. Roberts, her husband, DocuCopy and Graystone. Id. at 41:6-8; 34:12-17; 34:22-24. Mr. Hansen called Mr. Giboney with questions about Western Blue's relationship with DocuCopy. Id. at 445:4-9, 18-21. When Mr. Giboney reported the call to Mrs. Roberts she seemed bothered by Mr. Hansen's interest and made sure Mr. Giboney did not say anything substantive to Mr. Hansen. Id. at 455:20-456:3.

Mr. Hansen sent Mrs. Roberts an email dated Friday, July 8, 2005, in which he began, “I need some additional information and history related to Graystone Properties and DocuCopy transactions.” Ex. 7; Tr. Transc. vol. 1, 33:10-14; 34:18-21. Mr. Hansen’s email asked three questions. Ex. 7.

Mr. Hansen's first question was, “What are the histories of these two companies with us?” Tr. Transc. vol. 1, 35:11-14. Mrs. Roberts replied by typing into the body of Mr. Hansen's email, “Attached is report showing invoice/profit history on sheet 2.” Id. at 35:20-23. Mr. Hansen’s second question was, “How was the pricing for the 9600 FM with Graystone and the outsource printing to DocuCopy established.” Id. at 35:25-36:2. Mrs. Roberts’s answer was, “The sale order for the FM is attached.” Id. at 36:3-4; Ex. 8. The sales order form (Ex. 8) was dated March 11, 2004, and was executed by one Kirsten Craver for Graystone Properties. Tr. Transc. vol. 1, 40:1-14. It documented a lease of an OCE 9600 by Graystone Properties from Western Blue, represented by Mrs. Roberts. Id. The date of the lease, March 11, 2004, was during the time Mrs. Marrero was the 51% owner of DocuCopy. Id. at 606:14-17. At the time of trial, Mrs. Marrero testified she had never heard the name Kirsten Craver. Id. at 609:3-8. Mr. Hansen’s third question was “Who is the owner for each entity and what related party transactions are occurring?” Id. at 43:7-9. Mrs. Roberts answered, “Graystone Properties/Michael Potter (Kristin Craver)” and then “DocuCopy/Cherie Rutter (Amber Soper)” Id. at 43:10-20. Michael Potter never owned any of Graystone. Tr. Transc. vol. 2, 817:2-11. The answer to Mr. Hansen’s third question came from Mr. Roberts. Tr. Transc. vol. 2, 819:21-25, 820:17-25; 821:15-24; 822:20-823:1.

Mr. Hansen's research into DocuCopy brought to Mr. Pingel's attention a piece of equipment that Western Blue was leasing to Graystone Properties. Tr. Transc. vol. 1, 32:6-14; 39:8-12. The equipment was known as an "OCE 9600." Id. at 36:6-7; 4:2. Also, Mr. Pingel felt that the rate that DocuCopy was being paid as a subcontractor was "suspiciously high." Id. at 203:24-204:2.

In July of 2005, to investigate DocuCopy, Mr. Pingel asked Mrs. Roberts to meet off-site, away from the other employees, at Everett's Restaurant, to ask her a few questions. Tr. Transc. vol. 1, 24:1-12; Tr. Transc. vol. 2, 853:2-5. Mrs. Roberts agreed but asked if her husband, Mr. Mel Roberts could attend. Tr. Transc. vol. 1, 24:1-12.

Mr. Pingel asked Mrs. Roberts, "I need to know, do you have any equity or do you have any ownership position in DocuCopy?" Mrs. Roberts's answer was, "No." Id. at 24:13-16.

Mr. Pingel then asked Mrs. Roberts "Do you get any financial benefit or any monetary benefit through DocuCopy." Mrs. Roberts's answer was, "No." Id. at 24:17-18. Mrs. Roberts recalls telling Mr. Pingel she had "absolutely none." Tr. Transc. vol. 2, 851:20-852:5.

In mid-February, 2006, a few hours after having left work for the evening, and after having had dinner, Mr. Giboney returned to Western Blue's office to pick up an item he had left behind. Tr. Transc. vol. 1, 485:11-25. He found Mrs. Roberts inside, alone, about to leave Western Blue's office with six or seven documents boxes. Id. at 486:1-12; 576:19-21. Mr. Giboney had never seen Mrs. Roberts take home that volume of files before. Id. at 487:7-9. Mr. Giboney did not look inside the boxes because it was

not his job to do so, but the weight of the boxes indicated they were full of paper. Id. at 576:22 -577:3.

Later, after Mrs. Roberts quit Western Blue, Mr. Pingel searched Western Blue's Columbia office and found no hard copies of things like customer contracts and business cards. Id. at 75:1-8. Mr. Pingel needed such information in order to be able to contact customers as quickly as possible. Id. at 75:14-22. Not having such information put Mr. Pingel in a situation where he was left with no sales information that would allow him to continue the business where it had been left off. Id. at 76:12-18; 77:7-11.

While still a Vice President for Western Blue, Mrs. Roberts personally recruited Western Blue employees to leave Western Blue and begin working for DocuCopy. Id. at 488:6-13. These included Kyla Young, Bill McGlothlin, Brandon Roberts and Mr. Giboney. Id. at 488:6-14. This took place at a meeting at Mr. and Mrs. Roberts's home, in March 2006, prior to DocuCopy's move. Id. at 488:20-22; 489:24-490:7. Mrs. Roberts told Western Blue's employees that they would need to leave without giving notice because she wanted to stagger their departures. Id. at 490:17-491:2.

At this meeting Mr. and Mrs. Roberts communicated that the ability to continue to pay Western Blue's former employees depended on DocuCopy's taking the University of Missouri with them. Id. at 492:1-10. Mr. and Mrs. Roberts indicated that they expected to get the renewal of the University of Missouri contract. Id. at 492:18-20. Mr. Giboney felt confident that DocuCopy would get the University of Missouri contract because of the work that Western Blue had done to develop a security process with the University, the fact that no one else knew how to do the process, and the fact that Western Blue was

helping the University to write the specification for the bid. Id. at 494:16-496:8. The work on developing the security process was done while Mrs. Roberts and Mr. Giboney were Western Blue employees, and made use Western Blue resources, including Western Blue's IT person, Mr. Ed Enquist. Id. at 496:14-18. Mr. and Mrs. Roberts both participated substantively in recruiting Western Blue's employees at this meeting. Id. at 491:9-16.

Mr. Grant Taylor, of Riverview Technologies, first met Mrs. Roberts around early to mid March, 2006. Tr. Transc. vol. 2, 1113:13-16; 999:1-3. The location was a potential new office for DocuCopy. Id. at 1113:6-10. The purpose of the meeting to conduct a site survey for computer and telephone cable for a potential new site for DocuCopy's operations. Id. The meeting was attended by Mr. Taylor and others from Riverview, Brandon Roberts, and Mrs. Roberts. Id. at 1114:1-10. Others were there, possibly including Kyla Young and Mr. Roberts. Id. at 1114:11-18. The meeting lasted one to two hours and occurred in the afternoon. Id. at 1114:23-1115:5. Mr. Taylor understood Kyla Young to already be employed by DocuCopy at that time. Id. at 1115:15-25.

Thursday, March 30, 2006, was the last time anyone accessed 9256 computer files that had already been deleted from Mrs. Roberts' company laptop by the time Mr. Pingel took possession of the laptop on March 31, 2006. Tr. Transc. vol. 1, 67:22-25; 242:21-23; 244:7-13; Ex. 16. Around that same day, Mr. Pingel began to hear from some Western Blue employees that Western Blue's employees in Columbia were nonresponsive. Id. at 53:2-7. The next day, Friday, March 31, 2006, Mrs. Roberts spoke

to Mr. Pingel by phone and said she would not be signing an employment agreement. Id. at 53:9-25; 59:3-5. She did not say she was resigning. Id. at 59:16-19. In response to this and to hearing more reports about Western Blue's Columbia employees being nonresponsive, Mr. Pingel decided to drive to Columbia. Id. at 60:22-61:4. When Mr. Pingel arrived he was shocked to be met by an employee who handed Mr. Pingel the keys and told him that everyone was gone and that he (the employee) was also gone. Id. at 61:22-25. Mrs. Roberts quit Western Blue with no notice on Friday, March 31, 2006. Id. at 20:4-15; 48:24-49:3.

Analysis showed that a database of customer names, contacts and sales history had been deleted from Mrs. Roberts's company laptop. Id. at 73:8-11; 74:2-14. Deleted files that were recovered from Mrs. Roberts's laptop included Western Blue's business records containing financial information, strategic, high level competitive thinking, database information, strategic planning, profit analysis, and cost analysis. Id. at 122:6-123:4. These files included sensitive competitive information that would have given a competitor an advantage. Id. at 123:11-14.

Among the deleted and recovered documents was a document titled "Competitive Edge for MU Contract Renewal 2006" which consisted of strategic discussion of how to pursue renewing Western Blue's contract with the University of Missouri in the summer of 2006. Id. at 123:19-125:23; Ex. 29. The document contained information regarding the number one and number two largest contracts of Western Blue's Columbia office. Tr. Transc. vol. 1, 126:14-24. Mr. Pingel never saw the document prior to its being recovered from Mrs. Roberts's laptop. Id. at 127:3-5. The document contained

information Western Blue wanted and needed. Id. at 128:1-9. Other computer files that were deleted and subsequently recovered from Mrs. Roberts's laptop included data files associated with Western Blue's provision of services to the University of Missouri. Id. at 130:7-131:4; Exs. 17, 18, 19, 47. These included computer files with revision dates in March 2006, and as recent as March 28, 2006. Tr. Transc. vol. 1, 133:17-29; 132:5-8; Exs. 19, 47.

Western Blue's document distribution database, which was used to track documents under Western Blue's contract with the University of Missouri was incomplete at the time Mr. Pingel took over Western Blue's Columbia operation. Tr. Transc. vol. 1, 287:4-288:4; Ex. 47. Additional problems left for Mr. Pingel included that production was left half complete. Tr. Transc. vol. 1, 77:14-17. There were work orders that were not completed. Id. at 77:17-18. There was work that was completed but not delivered. Id. at 77:19. There were customer documents that did not have identifying information attached to them making it difficult to identify who documents belonged to. Id. at 77:19-22.

During the two months until the bid opened on the renewal of Western Blue's contract with the University of Missouri, Western Blue experienced problems operating its Columbia office due to jobs that were left incomplete, others completed but not delivered, projects with no identification on them, incomplete data in the data base, work was unbilled or not invoiced. Id. at 300:5-22.

III. RESPONSE TO APPELLANTS' POINTS RELIED ON

A. Response to Point I: The trial court properly denied Appellants' motion for directed verdict and motion for judgment notwithstanding the verdict as to breach of fiduciary duty.

1. Standard of Review.

An appellate court's standard of review for denial of a motion for directed verdict is the same as for denial of a motion for judgment notwithstanding the verdict. *Hardcore Concrete v. Fortner Ins. Services*, 220 S.W.3d 350, 354 (Mo. App. S.D. 2007). A JNOV for defendants is only appropriate if the plaintiff fails to make a submissible case. *Altenhofer v. Fabricor, Inc.*, 81 S.W.3d 578, 584 (Mo. App. W.D. 2002). Each element required to establish defendants' liability must be supported by substantial evidence, which is "competent evidence from which a trier of fact can reasonably decide the case." *Hardcore Concrete*, 220 S.W.3d at 354.

The Court reviews the denials of such motions as questions of law, viewed in the evidentiary light most favorable to the non-moving party. *Id.* "In reviewing for a submissible case, th[e] court must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence." *Altenhofer*, 81 S.W.3d at 584. "Missing evidence will not be supplied, and the plaintiff will not be given the benefit of unreasonable, speculative, or forced inferences." *Id.*

Judgment notwithstanding the verdict is a drastic action. *Echard v. Barnes-Jewish Hospital*, 98 S.W.3d 558, 565 (Mo. App. E.D. 2002). "A motion for JNOV should be granted only when reasonable minds cannot differ as to the ultimate disposition of the

case.” *Altenhofer*, 81 S.W.3d at 584. “The reviewing court will reverse the jury’s verdict for insufficient evidence only where there is a ‘complete absence of probative fact’ to support the jury’s conclusion.” *Id.* (citation omitted). “The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony.” *Id.*

2. Mrs. Roberts was a Division Vice President with broad powers of control and responsibility for Western Blue’s Central Missouri Operations.

Appellants contend that Mrs. Roberts did not owe Western Blue a fiduciary duty because (Appellants say) Mrs. Roberts was not an officer or director of Western Blue. App. Substitute Brief at p. 18.¹ However, the record clearly shows that Mrs. Roberts was vested with control over and responsibility for Western Blue’s Central Missouri Operations.

Mrs. Roberts came to Western Blue in 1999 and was charged with getting the Columbia operation started. Tr. Transc. vol. 1, 5:7-10. She was vested with discretion to run her operation, to hire and to fire. Id. at 6:16-22. Her duties included managing Western Blue’s location in Columbia, including overseeing production, customer

¹ While Appellants cite cases for the proposition that a corporate officer, director or controlling shareholder may be a fiduciary, App. Brief at pp. 27-28, they cite no case for the proposition that *none but* an officer, director, or controlling shareholder may be a fiduciary.

relationships, sales and customer service and being in charge of everything related to that office. Id. at 5:15-20.

Around August of 2004, Mrs. Roberts was made a Division Vice President of Western Blue; this was the title she kept until the time she left. Id. at 5:23-6:4. As Division Vice President, Mrs. Roberts was exposed to WB's strategy and planning, Id. at 7:22-25, to its sensitive financial information including profit and loss statements, Id. at 8:4-8, and to monthly information that showed how the company was doing division by division in terms of revenues, costs, and profits. Id. at 8:8-10. She was exposed to cost information such as employee salaries and the costs of acquiring and maintaining equipment. Id. at 8:11-18. She saw material costs and a variety of information that Western Blue considered proprietary, its "secret recipe." Id. at 8:17-19. Mrs. Roberts received sensitive competitive information such as contained in Exhibits 21, 22, and 24. Id. at 316:24-25, 317:19-22.

Mrs. Roberts had responsibility for Western Blue's contracts and was responsible for engaging customers, exploring customers' needs, determining how Western Blue's services would match those customers needs, making proposals to customers, establishing pricing, and obligating the company on contracts. Id. at 13:3-13. Her responsibilities included negotiating and strategizing and working face-to-face with Western Blue's customers to try to sense where Western Blue might be successful in winning a project or customer. Id. at 14:12-24. Mrs. Roberts was authorized to offer a price on the spot if necessary in order to land an account. Id. at 14:22-24. She had discretion to decide who would sign a contract that would bind Western Blue. Id. at

16:3-6. She had discretion to travel as needed, spend money as needed, and to entertain clients. Id. at 16:13-22. Mrs. Roberts was vested with the discretion to assist in establishing salaries for her employees. Id. at 16:23-17:2.

The Court of Appeals correctly states that in the context of an employer-employee relationship, the concepts of "fiduciary duty" and a "duty of loyalty" are distinct, but they may also overlap. This is clear from *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. banc 2005). An employee has some degree of latitude to plan and prepare to compete with her employer *after* the employment relationship has ended, but that latitude is not unlimited. If the employee, while the employment relationship still exists, goes beyond mere planning and preparation and directly competes with her employer, or solicits her employer's customers, she has breached her duty of loyalty to the employer. *Scanwell* at 479-480.

Scanwell left open the issue of whether and to what extent an employee owes her employer a fiduciary duty. The Court of Appeals noted thirteen significant factors which led to the conclusion that Mrs. Roberts breached her fiduciary duty to Western Blue. The factors cited by the Court of Appeals, which Western Blue adopts, include the following: (1) Mrs. Roberts had been entrusted with confidence and control over a significant portion of Western Blue's business affairs; see e.g. Tr. Transc. Vol. 1, 5:23-6:8; (2) Western Blue entrusted Ms. Roberts with control over its entire Columbia branch; see e.g. Tr. Transc. Vol. 1, 5:7-12; Id. at 6:5-8; (3) Ms. Roberts had the authority to hire, fire and manage employees; see e.g. Tr. Transc. Vol. 1, 6:16-22; (4) Ms. Roberts had the authority to oversee production; see e.g. Tr. Transc. Vol. 1, 5:15-20; (5) Ms. Roberts had

the authority to make sales; see e.g. Tr. Transc. Vol. 1, 5:15-20; (6) Ms. Roberts had the authority to provide customer service; see e.g. Tr. Transc. Vol. 1, 5:15-20; (7) Ms. Roberts had the authority to develop customer relations; see e.g. Tr. Transc. Vol. 1, 5:15-20; (8) Western Blue manifested its consent for Ms. Roberts to act on its account and Ms. Roberts agreed to so act; see e.g. Tr. Transc. Vol. 1, 13:3-13; (9) Ms. Roberts had the power to bind the legal relations of Western Blue, within the Columbia branch; see e.g. Tr. Transc. Vol. 1, 13:3-13 Id. at 14:22-24; Id. At 16:3-6; (10) Mr. and Mrs. Roberts themselves refer to Ms. Roberts as a "key employee" of the Columbia branch; see e.g. Tr. Transc. Vol. 1, 6:5-8; Id. at 5:23-6:4; (11) this relationship implies an entrustment of confidence; see e.g. Tr. Transc. Vol. 1, 6:5-8; Id. at 5:23-6:4; (12) Ms. Roberts was the de facto manager because she was the division vice-president of Western Blue; see e.g. Tr. Transc. Vol. 1, 5:23-6:4; and (13) Ms. Roberts was the branch manager of the entire Columbia office; see e.g. Tr. Transc. Vol. 1, 5:11-12. Therefore, Western Blue submits that under these circumstances, given the thirteen factors above, that a fiduciary relationship existed between Western Blue and Ms. Roberts, which Ms. Roberts breached. See *Twin Chimneys Homeowners Assoc. v. J.E. Jones Const. Co.*, 168 S.W. 3d 488 (Mo. 2005) (assuming that a person has been entrusted with control over and responsibility for another's business, the former owes the latter a fiduciary duty as a matter of law).

3. Mrs. Roberts secretly operated and managed DocuCopy thereby putting her own interests above those of Western Blue and failing to act in its best interests.

The following are but a sample of the many different activities Mrs. Roberts undertook to secretly operate and manage DocuCopy, while still employed by Western Blue:

- (i) she and Mr. Roberts instructed Western Blue employees to conceal her involvement with DocuCopy from Western Blue's management, Tr. Transc. vol. 1, 608:7-13; Tr. Transc. vol. 2, 697:16-22; Tr. Transc. vol. 1, 441:24-442:5; 443:14-23,
- (ii) she held meetings with DocuCopy employees and required those employees to report financial data to her, Tr. Transc. vol. 1, 464:19-21,
- (iii) she had Western Blue service technicians do free repair work for DocuCopy, Id. at 461:2-462.1; 572:13-574:21,
- (iv) she recruited employees of Western Blue on behalf of DocuCopy, including Brandon Roberts, Kyla Young, Bill McGlothin, and Ken Giboney, Id. at 488:6-13,
- (v) she interfaced with Mr. Roberts concerning DocuCopy's personnel issues, Id. at 464:11-12.
- (vi) she participated in telephone conversations with Barbara Hayes of the University of Missouri in order to influence the writing of and gain advance

- insight into the specification for the bid on the 2006 contract, Id. at 475:2-7; 476:1-19; 477:1-7, 17-478:7; 479:21-480:12; 481:13-482.1; 482.8-16,
- (vii) she purchased equipment for DocuCopy, Id. at 498:25-499.24; Tr. Transc. vol. 2, 1094:3-1095:3,
 - (viii) she set up the financial bookkeeping for DocuCopy, Tr. Transc. vol. 1, 609:9-14,
 - (ix) she instructed Mrs. Marrero by telling her what rate to charge per print page and how to bill Western Blue, Id. at 610:4-25,
 - (x) she told Mrs. Marrero whom to call on, Id. at 592:19-593:3,
 - (xi) she required Mrs. Marrero to report to her regarding DocuCopy's operations and billing, Id. at 438:9-12,
 - (xii) she discussed DocuCopy's financials with Mr. Roberts, Id. at 596:17-24,
 - (xiii) she made the business decisions for DocuCopy, Id. at 611.23-612.7,
 - (xiv) she and Mr. Roberts made the decision to obtain an OCE 9600 large format reprographic machine for DocuCopy, Id. at 604:8-605:24,
 - (xv) she instructed Mrs. Mrs. Rutter on how to fill out the WBE application and required Mrs. Rutter to give it to her for review before submitting it, Id. at 690:23-691:2.

Each of the foregoing examples was done in secret as to Western Blue and, as such, constituted Mrs. Roberts's putting her interests ahead of those of Western Blue, rather than acting in Western Blue's best interest. Indeed, Mrs. Roberts sought to advance her own interest, openly, early on when she asked her superiors whether she

could open her own reprographics business while remaining employed by Western Blue. Tr. Transc. vol 1, 436:21-437:2. That permission was denied due to the conflict of interest. Id. at 437:4-6. The fact that shortly thereafter Mrs. Roberts proceeded with the DocuCopy scheme makes the breach of her fiduciary duty all the more compelling. See id. at 437:7-13.

4. Mrs. Roberts was not merely making plans to compete after leaving.

Appellants attempt to argue away Mrs. Robert's fiduciary duty by pressing cases (*National Rejectors* and *Zemitzsch*) that address planning and preparing to compete with an employer *in the future, after leaving that employment.* See, e.g., *National Rejectors, Inc., v. Trieman*, 409 S.W.2d 1, 26-27 (Mo. banc 1996) (addressing the right to compete with the employer *upon termination of the employee's employment*); *Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421, (Mo. App. E.D. 1986) (discussing knowledge that sales manager is permitted to use *upon leaving the employer.*)² Those are not the facts of this case. Mrs. Roberts did not wait to leave Western Blue to begin operating a

² Appellants erroneously contend that Mrs. Roberts "did not take any documents or other items with her that she used in competition in the new business." App. Substitute Brief at p. 20. In fact, the evidence is Mrs. Roberts was caught red-handed with relevant computer files (that belonged to Western Blue) that she had deleted from her Western Blue laptop, saved to CDs, and retained until after being compelled by court order to produce. Tr. Transc. vol 1, 101:20-24; Ex. 15; Tr. Transc. vol 1,

competitor and use her knowledge to take Western Blue's clients. She operated DocuCopy while remaining on Western Blue's payroll. ³ Appellants cite no cases that

248:3-14, 20-249:1; 301:14-6; 302:9-18. Exs. 13, 14, 16, 25, A, B, C. Additional evidence is that she left no relevant paper files at the office, after having been caught carting off seven file boxes late one evening not long before she left Western Blue. Tr. Transc. vol 1, 486:1-12; 576.19-577:3. Since everything about Appellants' gamble hung on Appellants' winning the University contract, see Tr. Transc. vol 1, 492:1-10, a fair inference from the foregoing facts is that Mrs. Roberts took the computer data and file boxes in order gain an advantage with regard to winning the University contract.

³ And generally speaking, the jury was also certainly entitled to disbelieve Mrs. Roberts's testimony. For instance, at trial, Mrs. Roberts first testified that she was "not real sure" who came up with the idea for DocuCopy. Tr. Transc. vol. 2, 867:20-22. She then read to the jury from her deposition of December 14, 2006, in which, when asked "Who came up with the idea of forming DocuCopy?" Mrs. Roberts answered: "I don't know anything about DocuCopy." Id. at 868:2-11. Returning to the trial, she then testified that it was her idea to set up DocuCopy because she needed an MBE/WBE subcontractor. Id. at 869:9-12. She then read to the jury from her deposition in which, when asked, "You don't know anything about DocuCopy being created in order to provide a woman or minority-owned business for Western Blue's contracting purposes?" Mrs. Roberts answered, "No, I don't know anything about it

would approve of Mrs. Roberts' actual conduct. The cases they do cite, simply do not apply. The trial court properly denied Appellants' motions as to fiduciary duty.

B. Response to Point II: The trial court properly denied Appellants' motion for directed verdict and for judgment notwithstanding the verdict as to tortious interference with contract.

1. Standard of Review.

The appropriate standard of review is set out *supra* at section III.A.1 of Respondent's brief.

2. There was substantial evidence to support the claim of tortious interference.

The record is full of evidence that shows Western Blue had a valid expectancy that it would continue with the University Contract and that Appellants' wrongful, intentional conduct is what caused the University to select Appellants' bid. Appellants could not have "won" the contract, were it not for their wrongful conduct. The elements of a claim for tortious interference with business expectancy are:

- (1) A contract, valid business relationship or expectancy;
- (2) Defendant's knowledge of the contract, relationship or expectancy;

being created for those purposes." Id. at 869:13-870:16. Returning to trial, Mrs. Roberts said that was no longer her answer. Id. at 870:17-18. She was unable to explain the variance in her testimony. Id. at 871:1-3; 872:19-20.

- (3) Breach or loss of expectancy induced or caused by defendant's intentional interference;
- (4) Lack of justification; and
- (5) Damages.

Sloan v. Bankers Life & Casualty Co., 1 S.W.3d 555, 564-65 (Mo. App. W.D. 1999). Appellants challenge the business expectancy and lack of justification elements. App. Substitute Brief, p. 28.

(a) Western Blue had a valid business expectancy.

Appellants erroneously claim that Western Blue did not make a submissible case on the element of a valid business expectancy. App. Substitute Brief at p. 28-29. This challenge is readily refuted by the evidence in the record. When asked about that expectancy, Western Blue's President, Mr. Mark Newton, testified:

Well, there would have been really – if you think – if we really look back at it, we had had this contract for a while. We had been performing well. I saw nothing in any of the documents that would indicate that Western Blue or any -- you know, any of the folks there had had any problems with regard to execution of the contract. We had won a rebid. So I would have said that I felt it was a pretty high expectation that we would win it again.

You know, we had been challenged before, and we won before. So I would have expected fully that we could have won it again.

Tr. Transc. vol. 2, 718:21-719:9. Moreover, Western Blue believed it had in place a trusted, Tr. Transc. vol. 1, 17:16-18, Division Vice President, id. at 5:23-6:4, whose job it

was to secure the renewal of the contract, Id. at 498:7-10, and who had a demonstrated ability to do so. Tr. Transc. vol. 2, 849:12-24. Moreover, before she left Western Blue, Mrs. Roberts made use of Western Blue's resources to build a document security system for the University contract, Tr. Transc. vol. 1, 496:9-18, and had helped the University to write the specification for the new contract that would require that security software. Id. at 496:2-8.

According to Mr. Thomas Hilton, CPA, when Western Blue was purchased in March of 2006, Id. at 380:25-381:4, the purchase price was based on an expectation that the company, including the Central Missouri Division, would continue to earn what it had earned.

Western Blue Print, when this was acquired, was buying the entire operation, including the Columbia branch and its future profitability. So at the moment it bought it, it was buying the future profitability. It was investing today in the *expectation* that it would receive the profits of the company, *including the Columbia branch*, into the future. *That was its expectation. . . .* It's a very simple formula. It is used in the purchase of every closely held company. It's also used in the public marketplace. The multiple is known as the price to earnings ratio, a fancy finance term. All it means is it is a multiple of what is the future cash *that the buyer expects to receive*.

Id. at 383:1-7, 13-18 (emphasis added). Thus,

[t]he payment of the purchase price reflects that expectation, that they expected to receive that cash and that the people who were in that branch were going to continue to work for them. That was their expectation and that's not unlike any buyer who buys a business. You are buying the customers, you are buying the people in the branch, and you are buying the future cash. That's what they expected they would get.

Id. at 414:24-415:7.

Moreover, as went the University of Missouri contract, so went a contract with the State of Missouri. Tr. Transc. vol. 2, 718:7-8. The state contract was about half the value of the University contract. Tr. Transc. vol. 1, 126:9-13. Together they were the significant part of the business done by Western Blue's Central Missouri Division. Tr. Transc. vol. 2, 718:17-19. Thus, Western Blue's expectation of the University contract included the contract with the State. Id. at 718:7-8.

(b) Appellants' interference was intentional, improper, and illegitimate.

Appellants claim there is no evidence sufficient to show that Appellants obtained the University contract by improper means and without justification. App. Substitute Brief at p. 31. Appellants' claim is contradicted by the record.

Appellants go as far as to claim that DocuCopy's bid was selected because it was the "best" bid and not because of any wrongdoing on the part of Appellants. *Id.* This is a completely specious argument. Even if DocuCopy's bid was in fact the winning bid, that does not mean that Appellants' actions were legal.

Appellants implicitly claim, via tremendously warped logic, that Mrs. Roberts's knowledge of Western Blue's pricing could not have affected the outcome of the University of Missouri bid because DocuCopy would have won the bid even if DocuCopy and Western Blue's bid had been superior. App. Br. at p. 61. The obvious flaw in Appellants' reasoning is that it flies in the face of Appellants' repeated reliance on the claim that the bid process was completely anonymous. App. Substitute Brief at pp. 30.

Of course, Mrs. Roberts did have contacts with the University of Missouri that gave her the opportunity to shape DocuCopy's bid to meet the University of Missouri's needs and did this while still an employee of Western Blue. Tr. Transc. vol. 1, 475:2-7; 476:1-19; 477:1-7. During this time, Mrs. Roberts had a number of conversations with Barbara Hayes of the University of Missouri. Id. Barbara Hayes relied on Mrs. Roberts for descriptions of a new security program that Western Blue had been developing for the University. Id. at 477:17-478:7. During those calls, Mrs. Roberts provided specifics about the criteria for the new bid. Id. at 479:21-480:12. Mrs. Roberts's input on the writing of the bid proposal for the University of Missouri gave DocuCopy an advantage in the bidding process. Id. at 481:13-482:1, 8-16. Essentially, DocuCopy knew the answers prior to taking the test. This would explain why, while still employed by Western Blue, Mrs. Roberts was so confident that DocuCopy would get the contract. Id. at 481:13-482:1, 8-16. But the answers that DocuCopy had, were obtained on Western Blue's time, using Western Blue's resources and personnel, Id. at 496:14-18, and so rightfully belonged to Western Blue. If Appellants had been telling the truth when they

said they had nothing to do with DocuCopy, Western Blue would have received the benefit of those answers—and retained the University contract. If, on the other hand, Appellants’ deceit had been uncovered, Mrs. Roberts would have been fired for disobeying a direct prohibition and for secretly competing with her employer. Tr. Transc. vol. 2, 726:23-727:8. Either way, Western Blue, as the incumbent and highest bidder after DocuCopy, would have obtained the renewal of the University contract.

Appellants’ wrongdoing caused Western Blue harm in that it caused Western Blue to unknowingly feed business to a competitor (DocuCopy) that was secretly operated by Mrs. Roberts—the person whose duty it was to win the contract for Western Blue. Tr. Transc. vol. 2, 714:5-15. Appellants’ wrongdoing also caused Western Blue to unknowingly give away services to DocuCopy. Id. at 714:16-20. Likewise, Appellants and their employees harmed Western Blue by failing to properly log or update a document database, Id. at 715:21-716:3, by failing to log jobs properly, Id. at 772:3-5, and by not leaving behind any notes such as would indicate the status of the work in progress, what needed to be done, what had been billed, etc. Id. at 773:11-16. Western Blue was harmed by Mrs. Roberts’s taking with her the contents of approximately seven file boxes, and not leaving behind hard copies of things like customer contracts and business cards, Tr. Transc. vol. 1, 75:1-8. Similarly, Western Blue was harmed by Appellants’ deleting and withholding computer files that Western Blue needed in order to successfully win its renewal of the University contract and the state contract that went along with the University contract, Tr. Transc. vol. 2, 716:5-717:13; 717:14-718:12; 740:16-22; 741:12-20; 742:13-20; 742:18-11; Ex. 29; 744:5-8, 14-19. Western Blue was

harmful by the loss of the renewal of the University contract, Id. at 719:15-24, and by the resulting loss of Western Blue's Columbia office. Id. at 714:20-22; 718:15-20.

All of the foregoing share a common thread: Appellants' deceit and consequent secret ownership and operation of DocuCopy. Id. at 716:5-19. If the deception had been discovered, Mrs. Roberts' employment would have been terminated. Id. at 726:23-727:8.

Based on the circumstances, Mr. Newton, the president of Western Blue, believes that Mrs. Roberts took with her a price list that she used against Western Blue to bid on the Western Blue contract. Id. at 747:24-748:5. Certainly, Mrs. Roberts had Western Blue's cost information in the form of profit and loss statements. Id. at 748:7-14. Mrs. Roberts knew what Western Blue's costs were but Western Blue did not know what Mrs. Roberts' costs were. Id. at 749:12-22. Mrs. Roberts knew Western Blue's costs, pricing strategies and information about DocuCopy that she did not provide to Western Blue. Id. at 752:9-11. This negatively affected Western Blue's ability to win renewal of the University contract. Id. at 752:11-13. The criteria of "price" was 50% of the University's criteria for the bids. Id. at 720:11-20. Of the four bidders, only DocuCopy had a better price than Western Blue. Id. at 720:17-22; 722:8-15. As a result of Appellants' deception, DocuCopy had Western Blue's current pricing strategies. Id. at 720:17-722:2.

Appellants' deceit also affected Western Blue's bid on the criteria known as "submittals," which implicated experience, the quality of output, and staffing. Id. at 723:16-21. On this criteria the University noted that Western Blue's Columbia office

was all new. Id. at 723:19-25. Appellants intentionally caused this and similar difficulties for Western Blue by maintain their deceit until the last possible moment during the critical weeks leading up to the bid process. Appellants refused to allow the Western Blue employees who were leaving Western Blue to give notice. Tr. Transc. vol. 1, 490:17-491:2. Mrs. Roberts gave no notice. Id. at 20:4-15; 49:3. Appellants staggered the employees' departure during the last week of March 2006, so as to keep Western Blue in the dark as long as possible. Id. at 490:17-491:2. Kyla Young, who was the subject of Mrs. Roberts's email to Mr. Pingel on Monday, March 27, 2006, ("Kyla sprung this one on me this morning. Her plans have changed long-term. I'll have to get an ad run this Wednesday." Id. at 50:5-13; Ex. 4) was already working for DocuCopy by mid-March, 2006, according to Appellants' own witness, Mr. Grant Taylor. Tr. Transc. vol. 2, 1113:13-16; 999:1-3; 1115:15-25.

The bid criteria of "quality control," "experience/qualification," distribution/delivery, and staffing were similarly affected. Id. at 724:13-22; 728:7-10, 17-729:7; 729:11-21. The university noted that Western Blue's quality control has been poor over the last three months; this corresponded to and was caused by the actions of Mr. and Mrs. Roberts. Id. at 725:3-20.

Clearly, then, there is substantial evidence that Appellants' interference was intentional, improper, and illegitimate.

C. Response to Point III: The trial court properly denied Appellants' motion for directed verdict and motion for judgment notwithstanding the verdict as to computer tampering.

1. Standard of Review.

The appropriate standard of review is set out *supra* at section III.A.1 of Respondent's brief.

2. There was substantial evidence that Mrs. Roberts committed computer tampering.

According to section 569.095 RSMo, "a person commits the crime of tampering with computer data if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

- (1) Modifies or destroys data or programs residing or existing internal to a computer, computer system, or computer network; or
- (2) Modifies or destroys data or programs or supporting documentation residing or existing external to a computer, computer system, or computer network; or
- (3) Discloses or takes data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network; or
- (4) Discloses or takes a password, identifying code, personal identification number, or other confidential information about a

computer system or network that is intended to or does control access to the computer system or network;

- (5) Accesses a computer, a computer system, or a computer network, and intentionally examines information about another person;
- (6) Receives, retains, uses, or discloses any data he knows or believes was obtained in violation of this subsection.”

Appellants argue that there is no evidence that Mrs. Roberts took Western Blue’s data by deleting files from Western Blue’s laptop computer or copying Western Blue’s electronic information on to compact disks. App. Substitute Br. at p. 34-35. However, it is undisputed that Mrs. Roberts was caught red-handed with relevant computer files (that belonged to Western Blue) that had been deleted from her Western Blue laptop, transferred to CDs, and retained until their return was compelled by court order. Tr. Transc. vol. 1, 101:20-24; Ex. 15; 248:3-14, 20-249:1; 301:14-6; 302:9-18; Exs. 13, 14, 15, 16, 25, A, B, C. Moreover, the circumstances surrounding the making of the CDs and the deletions from the laptop lead Mr. Swailes, a forensic computer expert, to conclude that putting the files on the CDs and deleting them from the laptop was not accidental. Tr. Transc. vol. 1, 249:19-250:12; 252:7-21. Mrs. Roberts was the one who attempted to explain away the CDs as merely “old backups of old records.” Id. at 106:8-11. In this case, however, many of the files on the CDs corresponded with files that were *deleted* from the laptop. All that Mr. Swailes said was that files on the CDs correspond to files that were deleted from the laptop. Id. at 248:3-14. Contrary to Mrs. Roberts’s story, the purpose of the CDs appears to have been something other than to back up files.

Thus, there is more than sufficient evidence for the jury to conclude that Mrs. Roberts was the one who made the deletions from her lap top and that, under the totality of the circumstance and the evidence, the deletions and copying were neither authorized nor reasonably believed to be authorized.

Appellants attempt to attack the “without authorization” element by claiming that because certain computer files that Mrs. Roberts copied to the CDs were made in the normal course of business, that the copying of those files onto the CDs was also done in the normal course of business. App. Substitute Brief at p. 35. This, of course, does not follow. It conflates the creation of an underlying computer file, see, e.g., Exs. 17, 18, 20, 21, 22, 24, 25, A, B, C, 29, with a secret competitor’s making of an unauthorized copy/compilation of those underlying files in order to take them to another location. To be sure, it was not a normal part of Mrs. Roberts's job to create such CDs as correspond to Exhibits 13 and 14. Tr. Transc. vol. 1, 118:7-11.

Finally, Appellants erroneously contend without citing to the record that “it is undisputed that Mrs. Roberts last touched the computer at 11:00 a.m. on March 30, 2006.” To the contrary, Mr. Pingel testified that the laptop came into his custody at about 3 p.m. on March 31, 2006. Id. at 67:4-8. Mr. Pingel’s testimony is corroborated by that of Mr. Giboney who testified that Mrs. Roberts delivered her Western Blue laptop to Western Blue’s Columbia office in the afternoon of March 31, 2006. Id at 500:11-15; 506:5-9.

There was substantial evidence, probative facts and reasonable inferences to support each and every element of the computer tampering claim against Mrs. Roberts.

That is, there was evidence that Mrs. Roberts knowingly and without authorization, destroyed, modified, took or disclosed data from a Western Blue computer, thus supporting the jury's finding of computer tampering. Thus the trial court properly denied Appellants' motion as to liability for computer tampering.

D. Response to Point IV: The trial court properly denied Appellants' motion for new trial on the award of attorneys' fees for computer tampering.

1. Standard of Review.

The Court's standard of review of the denial of a motion for new trial is for an abuse of discretion. *Arrington v. Goodrich Quality Theaters*, 266 S.W.3d 856, 860 (Mo. App. S.D. 2008). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the court, then it cannot be said that the trial court abused its discretion." *Id.* "New trial is available only upon showing that trial court error or misconduct of the prevailing party incited prejudice in the jury." *Id.* The Court must review the evidence from a "standpoint favorable to the trial court's ruling." *Id.*

2. The Court carefully segregated the fees, which were intertwined among the various claims.

Appellants contend that the trial court mishandled the award of attorney's fees for computer tampering by not properly segregating those fees from other attorney's fees and

awarding attorney's fees expended solely on the computer tampering claim. App. Substitute Br. at p. 36. According to Appellants, Western Blue's "claims for breach of fiduciary duty, conspiracy and tortious interference with business expectancy were unrelated factually and legally to [the] claim of computer tampering." App. Substitute Br. at p. 37. Appellants fail to mention, however, that the trial court expressly considered both sides of the argument and actually performed a segregation that the court felt was right for this case:

[F]irst of all, I think that Mr. Vannoy correctly stated that I could -- you could come in and file a motion for attorney's fees and that the Court is deemed to be an expert on attorney's fees and I could enter an order probably with nothing less than that. I want more than that, and it appears that I'm getting the bills to look at.

I do think there is an issue of are the issues so intertwined with one another that you can't segregate, and that on the one hand I think there is intertwining going on, and on the other hand I think I'm going to be looking at that issue to see what I can do to unintertwine it in some fashion.

And though I hear your argument, Mr. Moen, that No.1, Count I, our first submission doesn't have anything to do with the tampering submission, I do think it is all intertwined. . . .

Tr. Transc. vol. 2, 1281:11-2. The Court continued:

I do think—I'm confident to allay your concerns that the Court looks at this and says, it is on the one hand – as Mr. Vannoy argues, it is intertwined. On the other hand, there are probably some things that are not in there. And I think that the Court is going to be forced at some point to make a gross decision as to what that intertwining is because I think that there is hardly going to be an entry that's going to say, this particular item, this phone call was had with regard to the breach of fiduciary duty, because I believe that the tampering -- every count colored every other count in this matter, and I think that until this case was finally submitted to the panel for their decision that it would have been -- it would be hard. Even as we went through the trial and every time a word was spoken, someone stood up and said, that has to do with Count I and that has to do with Count II. I think that's sort of the nature of litigation where you have multi counts and you have multiple defendants.

Id. at 1282:20-1283:12.

Moreover, the trial court asked counsel, as experts on attorney's fees, their opinion as to what percentage of their fees did NOT have to do with computer tampering. Id. at 1293:11-13; 1309:15-18. Appellants neither cite any authority that would critique the court's methodology, nor do they provide a methodology of their own.

The trial court is an expert on the costs of attorneys' fees and has wide latitude in determining them. *Burden v. Burden*, 811 S.W.2d 818, 822 (Mo. App. S.D. 1991). "As an expert the court that tries a case may fix attorneys fees without the aid of evidence."

Id. “The setting of attorney fees should not be reversed, unless the amount awarded is arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration.” *Id.*

Nothing about the trial court’s methodology can be said to shock one’s sense of justice. On the contrary, the court made a careful and reasonable determination of the issue. The trial court properly ruled on Appellants’ motion regarding attorneys’ fees.

E. Response to Point V: The trial court properly denied Appellants’ motion for directed verdict and motion for judgment notwithstanding the verdict as to civil conspiracy.

1. Standard of Review.

The appropriate standard of review is set out *supra* at section III.A.1 of Respondent’s brief.

2. The proper elements of conspiracy were supported by substantial evidence.

Based the evidence in this case, it indisputable that Mr. Roberts conspired with Mrs. Roberts to breach her fiduciary duties and tortiously interfere with Western Blue’s business expectancy. Conspiracy requires a showing that (1) Two or more persons (2) with an unlawful objective (3) after a meeting of the minds (4) committed at least one act in furtherance of the conspiracy, and (5) plaintiff was thereby damaged. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996). Appellants do not challenge the first, second or third elements. To be sure, however, the first element is met: the Roberts were two persons. The second and third elements, unlawful objective after a meeting of the

minds, finds support in the Roberts's plan to have Mrs. Roberts secretly compete with Western Blue while still employed by Western Blue, by means of operating DocuCopy so as to take over the operation of Western Blue's Central Missouri Division. Further, if such be necessary, Western Blue incorporates herein the briefing under Sections III.A and III.B, *supra*, in support of conspiracy elements one, two, and three.

As for the fourth element, an act in furtherance of the conspiracy, the act consisted of concealing the true ownership of Graystone Properties and DocuCopy in response to Western Blue's request for information regarding the ownership of those two entities. *See* Applnt.'s Appx. A5 (Jury Inst. No. 20). The third question posed by Western Blue's CFO, Mr. Galen Hansen was "Who is the owner for each entity and what related party transactions are occurring?" Tr. Transc. vol. 1, 43:7-9. Mrs. Roberts answered, "Graystone Properties/Michael Potter (Kristin Craver)" and then "DocuCopy/Cherie Rutter (Amber Soper)" Id. at 43:10-20, Ex. 7. Mr. Roberts admits he was the source of these answers. Tr. Transc. vol. 2, 819:21-25, 820:17-25; 821:15-24; 822:20-823:1. He also admits that Michael Potter never owned any of Graystone, Tr. Transc. vol. 1, 43:10-20, and that the answer to the question "certainly needed more explanation than that." Tr. Transc. vol. 1, 613:8-9; Tr. Transc. vol. 2, 822.8-16.

Faced with such clear-cut liability in light of the elements and the language of Instruction 20, Applnt.'s Appx. A5 (Jury Inst. No. 20), Appellants attempt to posit a new element: a duty to disclose. App. Substitute Brief at p. 39-40. In support of this additional element, Appellants cite no case concerning (1) conspiracy, (2) fiduciary duty, nor (3) tortious interference. Instead they cite a single case concerning direct liability for

fraud by non-disclosure. App. Substitute Brief at p. 40 (citing *Cambridge Engineering, Inc. v. Robertshaw Controls*, 966 F. Supp. 1509 (E.D. Mo. 1997)). Because a duty to disclose is not an element of conspiracy, the trial court properly denied Appellants' motion. Even assuming, however, purely for the sake of argument, that a duty to disclose were an element of conspiracy, Mr. Roberts undertook such a duty when he chose to assert his false answer in response to Mr. Hansen's inquiry. Alternatively, Mr. Roberts's duty to disclose would be imparted from the duty that his conspirator, Mrs. Roberts, undoubtedly had. Either way, the trial court properly denied Appellants' motion.

IV. CONCLUSION

Importantly, Appellants do not challenge the admissibility of any evidence in this case. They instead challenge the application of that evidence to the elements of the claims. Clearly, there was substantial evidence to support each and every element of each and every claim. Considering the standards by which the evidence is to be viewed by this Court, it is plainly apparent that a bevy of facts and inferences support the jury's verdicts and the trial court's fee analysis. The verdict and judgment must be affirmed.

WHEREFORE Respondent requests this Court affirm the judgment of the Boone County Circuit Court; and for such other relief as the Court deems just.

Respectfully submitted,

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CERTIFICATIONS OF COUNSEL

The undersigned hereby certifies that:

1. This filing complies with the requirements of Missouri Supreme Court Rule 55.03.
2. This brief complies with the limitations of Rule 84.06(b). Excluding the cover, certificate of service, signature block, and certifications of counsel, this brief contains 10,959 words. I have relied upon my word processor, Microsoft Word 2007, to obtain the word count.

/s/ Scott T. Jansen
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by electronic notification through the electronic filing system on this 3rd day of November, 2011, to:

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