

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**IN RE:  
SIMONS BROADCASTING, LP,  
Debtor,**

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**ROBERT MILBANK, JR., in his  
capacity as Plan Implementation  
Agent,  
Plaintiff & Counter-Defendant,**

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**v.**

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**MICHAEL SIMONS, and  
PROMISELAND TELEVISION  
NETWORK, INC.,  
Defendants &  
Counter-Plaintiffs,**

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§

**Civil No. W-11-CA-172**

**and**

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**PROMISELAND TELEVISION  
NETWORK, INC.,  
Cross-Plaintiff,**

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**v.**

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**EVERETT G. STRONG, BRIAN  
BYRNES, PARAMOUNT MEDIA  
ADVISORS, INC., KTAQ OF  
DALLAS, and PLATINUM EQUITY,  
LLC,  
Cross-Defendants.**

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**MEMORANDUM OPINION AND ORDER**

Before the Court is a civil lawsuit that was tried before a jury. At the close of evidence, various parties moved under Rule 50 of the Federal Rules of Civil

Procedure for judgment as a matter of law as to all the claims presented to the jury. After due consideration of the evidence and applicable legal authority, the Court determined that each motion should be granted. Pursuant to Rule 50, the Court now issues this Memorandum Opinion and Order in accordance with that prior ruling.

## **I. BACKGROUND**

This case arises out of the enforcement of a Chapter 11 Plan. Prior to the bankruptcy, the Debtor, Simons Broadcasting, was a Texas limited partnership. All equity interests in Simons Broadcasting were owned or controlled by Michael Simons individually as limited partner, and as president of its general partner, Simons Asset Management. Simons is also the president and board member of PromiseLand Television Network ("Promiseland"), a non-profit organization; however, as a Section 501(c)(3) non-profit, Promiseland was incorporated as a distinct entity apart of Simons Broadcasting. Pursuant to its incorporation, Promiseland's main purpose involved promoting and selling airtime to religious organizations and commercial advertisers as well as distributing programming via satellite and internet channels. In 2005, Promiseland entered into an airtime agreement with Simons Broadcasting, which gave Promiseland the exclusive right to purchase all the airtime of KTAQ, a television station in the Dallas-Fort Worth area that was owned and operated by Simons Broadcasting. Though

Promiseland provided its programming on the Internet as well as for satellite television, its primary broadcasting was on KTAQ.

In 2008, Simons Broadcasting filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the Western District of Texas, Waco Division. The Bankruptcy Court confirmed the First Amended Plan ("Plan"). The Bankruptcy Court named Robert Milbank, Jr. ("Plan Agent") as the Plan Implementation Agent, and his responsibilities included managing the Debtor's assets and operations as well as conducting an orderly liquidation. As part of the Plan, Milbank held the exclusive right to run KTAQ. By the terms of the Plan, the exclusive airtime agreement between Simons Broadcasting and Promiseland was terminated. However, throughout the course of the bankruptcy and after confirmation of the Plan, Promiseland continued to purchase airtime and provided programming to KTAQ. During the administration of the Plan, Milbank hired Brian Byrnes and his company, Paramount Media Advisors, to assist in the operations of KTAQ during the bankruptcy process. The Creditors, Platinum Debt Group and Platinum Equity, eventually purchased KTAQ at an auction in June 2010, through the newly formed entity, KTAQ of Dallas.

Shortly after the confirmation of the Plan, Milbank met with Simons to discuss the implementation process and Simons' participation as president of the Debtor. The Plan and the Order Confirming Chapter 11 Plan ("Order") required the Debtor to give the Plan Agent all income generated from the KTAQ asset, as

well as an accounting of its estate. Since the religious organizations were already paying Promiseland to broadcast its programming on KTAQ, Milbank and Simons agreed that Promiseland would continue accepting payments on behalf of the Debtor's estate, remit the payments to Milbank, and transmit the client's programs via Promiseland's programming on KTAQ.

During this period, a disagreement between Simons and Milbank developed regarding a 10% withholding amount for expenses. Simons claimed that both parties agreed to the 10% fee to cover expenses Promiseland incurred in connection with the collections and broadcasting on behalf of the Debtor. Milbank maintains that no agreement was finalized as he needed a detailed expense report from Simons, and would need the approval of the Creditors before agreeing to such terms. No written agreement was ever entered into by the parties. Even though Milbank corresponded with Simons on several occasions about this issue, Simons continued to deduct 10% from each payment before sending the income checks to Milbank each month.

On October 26, 2010, Milbank and Everett Strong, an employee of Platinum Debt Group and former employee of Promiseland, went to Promiseland's headquarters, which shared the same office suites with Simons Broadcasting. While visiting, Strong accessed the traffic computer for Promiseland and downloaded a software program called AdEze. The AdEze download included the traffic and billing information of the clients that purchased airtime through

Promiseland. Simons maintains that the "Client Information"<sup>1</sup> was not only proprietary and confidential, but it exclusively belonged to Promiseland as a separate and distinct entity from Simons Broadcasting. Milbank claims that as Plan Agent, he had the right to possess the Client Information under the Order and that there is no evidence that the data taken was confidential or proprietary.

On March 9, 2011, Milbank filed an adversarial proceeding in the Bankruptcy Court styled *Robert Milbank Jr., in his capacity as Plan Implementation Agent, Plaintiff v. Michael Simons, and Promiseland Television Network, Defendants*, which bears Adversary Proceeding No. 11-06005. In the adversary proceeding, Milbank sought compliance with the Order, an accounting, and turnover. Simons and Promiseland filed their Answer, Affirmative Defenses, and Compulsory Counterclaims to Complaint and Promiseland's Original Cross-Complaint against Milbank and Strong. Pursuant to 28 U.S.C. § 157(d), this Court withdrew the case, allowing Counter and Cross Plaintiffs to exercise their right to a jury trial.<sup>2</sup> Milbank and Simons filed a Motion for Summary Judgment, which was partially granted and partially denied.<sup>3</sup> The Court allowed

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<sup>1</sup> Simons contends that the downloaded data was a trade secret as it contained information regarding Promiseland's clients, contacts, all billing information, contact information, pricing, schedule run times, and invoicing.

<sup>2</sup> *In re Clay*, 35 F.3d 190, 198 (5th Cir. 1994)(Court erred by not withdrawing case when defendant did not consent to trial in the bankruptcy court); *Rodriguez v. Countrywide Home Loans, Inc.*, 421 B.R. 341, 352 (S.D. Tex. 2009)("[W]hen one party requests a jury trial but does not consent to conducting the trial in the bankruptcy court, this may justify withdrawal of the reference.").

<sup>3</sup> See Doc. 96 (the Court granted summary judgment with respect to the claims of tortious interference with contract and prospective business relations against Milbank and Strong).

Simons and Promiseland to amend their counterclaims<sup>4</sup> and add their claims against Byrnes, Paramount Marketing Media, the Platinum Debt Group, Platinum Equity, and KTAQ of Dallas ("PDG").<sup>5</sup>

On October 7, 2013, a five-day trial was presented to a seven-member jury. As Plan Agent of the Estate, Milbank presented his claims against Simons for the operational income Simons was withholding from the bankruptcy estate. Simons and Promiseland, as Counter and Cross Plaintiffs, followed by presenting their claims against Milbank, Strong, and PDG before the jury as well. They argued that Milbank, Strong, and PDG stole trade secret information from Promiseland and should be found liable for conversion, trespass to personalty, theft under the Texas Theft Liability Act, misappropriation of a trade secret, harmful access of a computer in violation of Chapter 33 of the Texas Penal Code, violation of the Computer Fraud and Abuse Act, and civil conspiracy. Simons and Promiseland also submitted claims against PDG for tortious interference with contract and business relations, and a breach of contract claim against Milbank for money he claims was owed to him under the Plan.

At the close of all the evidence, Milbank, Strong, and PDG moved for a directed verdict under Rule 50 on all claims asserted against them. Milbank also moved for a directed verdict on the Estate's original compliance claim against

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<sup>4</sup> See Doc. 118 (any new claims asserted in the Amended Complaint were separated to a new case number and immediately removed to the bankruptcy court).

<sup>5</sup> Since all the claims and facts are the same with respect to the alleged conduct of each party, they are grouped together and referred to as "PDG."

Simons and Promiseland. Simons and Promiseland responded to each motion and voluntarily dismissed their claims for tortious interference of current and prospective business contracts against PDG. After hearing the arguments and considering the evidence presented at trial, the Court agreed that there were no fact issues to be decided on any of the claims. Accordingly, the Court granted the motions for judgment as a matter of law asserted by Milbank, Strong, and PDG, ruled against Simons and Promiseland on all claims, and dismissed the jury.

## II. STANDARD OF REVIEW

A court may grant judgment as a matter of law when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue.” FED. R. CIV. P. 50(a)(1). In order to survive a Rule 50 motion, “the party opposing the motion must at least establish a conflict in substantial evidence.” *Anthony v. Chevron USA, Inc.*, 284 F.3d 578, 583 (5th Cir. 2002). When weighing whether there exists a “conflict in substantial evidence” a court must consider all the evidence presented at trial in the light most favorable to the non-moving party, and must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000); *Ellis v. Weasler Engineering Inc.*, 258 F.3d 326, 337 (5th Cir. 2001) (“[C]ourt must give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that

that evidence comes from disinterested witnesses.” (quoting *Reeves*, 530 U.S. at 151)).

Substantial evidence must be "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions" regarding the case's outcome. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* Thus, arguments premised only on conclusory allegations, speculation, and unsubstantiated assertions are inadequate to defeat a Rule 50 motion. *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir.2002) (citing *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir.1996)).

### III. ANALYSIS

#### **A. Order Granting Milbank's Rule 50 Motion for Compliance of Bankruptcy Court Order Against Simons and Promiseland**

Pursuant to the Confirmation Order, Simons was ordered to "promptly turn over to the [Plan Agent] any payments received by him or PromiseLand Television Network from third parties for use of airtime on KTAQ."<sup>6</sup> Simons was also ordered to "provide copies of records reasonably requested by the Plan Implementation Agent that relate to the Debtor's business and operations."<sup>7</sup> As Plan Agent, Milbank was appointed to manage the Debtor's assets and operations, and to

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<sup>6</sup> Order at p. 7, ¶ 31.

<sup>7</sup> *Id.* at p. 7-8 ¶ 33.



conduct an orderly liquidation of the Debtor's assets. The KTAQ television station was the primary asset of the Debtor that Milbank was charged with operating, until its auction sale at a later date. As part of the operations, Milbank was given the authority to enter into a local marketing agreement with a third-party, who would assist in managing and generating income for KTAQ through the closing of the sale of the Station. The income received by Milbank would be held as the cash collateral of PDG, and subject to the approval of PDG, the cash collateral could be used by Milbank in the operations of the Station Assets.<sup>8</sup>

At trial, Milbank testified that he could not agree to allow Simons to retain 10% of the payments received for use of airtime on KTAQ because the Order required Milbank to obtain 100% of the payments. Additionally, Milbank contends that the Plan did not authorize him to make such an agreement with Simons without the prior approval of PDG. Since the payments being received by Simons were cash collateral for PDG, the 10% deduction would constitute an operating expense, which required the approval of PDG.

While the details were never clarified to this Court, there was an agreement between Simons, Milbank, and Byrnes regarding the continued programming of Promiseland on KTAQ, and the collections of operational income of KTAQ by Simons. Simons and Milbank met on April 21, 2010, to discuss the implementation of the bankruptcy plan including the operational income for KTAQ

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<sup>8</sup> Plan at p. 14, § 5.03.

starting on February 1, 2010. At that meeting, Simons informed Milbank that he was withholding 10% of the payment he was collecting for airtime use based on the advice of his attorney. Simons told Milbank that the 10% withholding amount would cover Promiseland's expenses associated with the operational income he was receiving on behalf of KTAQ. Milbank informed Simons that he could not agree to the 10% withholding fee until Milbank provided information justifying the expense amount. Still, Simons submitted checks to Milbank for each month's operational income, minus the 10% expense fee he was claiming.

Even though Simons deposited each check, he continued sending correspondence to Simons explaining that he did not agree to the 10% withholding amount and would require a detailed report of expenses to be submitted to PDG for approval. Milbank continued receiving these "partial payments" for the operational income for each month; however, Simons did not submit any proceeds for the months of September 2010, October 2010, and November 2010. Milbank contends that Simons wrongfully withheld operational income totaling \$139,995.60.

Simons claims that Milbank agreed to the 10% withholding expense, which was affirmed by Milbank's cashing of each check that included the 10% deduction. Simons also notes that with each check, Milbank was provided with an invoice reflecting the amount of the sales for each month as well as the 10% expense deduction. During his testimony at trial, Simons conceded that he received

letters, either to him or his attorneys, from Milbank that there was no agreement for the 10% deduction. Simons also acknowledged that there were requests for information to justify the expense amount; however, Simons did not send any additional information to Milbank on the expenses he was claiming.

At the conclusion of Simons' testimony, the Court granted Milbank's Rule 50 Motion for two reasons. First, this Court finds that there was no contract formed between Milbank and Simons on the 10% withholding amount. Courts in Texas require the following for an enforceable contract: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the agreed terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Hubbard v. Shankle*, 138 S.W.3d 474, 481 (Tex.App.-Fort Worth 2004, pet. denied). A contract that is executed by an agent without proper authority is unenforceable against the principal. *Angroson, Inc. v. Independent Comms.*, 711 S.W.2d 268, 271 (Tex. App-Dallas 1986, writ ref'd n.r.e.). Pursuant to the Confirmation Order and Plan, which Simons was a party of,<sup>9</sup> Milbank did not have the express authority to enter into an operational expense agreement without the permission of PDG. Since Milbank did not have the authority to enter into the expense fee arrangement without the express consent of PDG, and Simons was constructively aware of PDG's requisite

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<sup>9</sup> Simons argues that Promiseland and him, as an individual, were not separately served and made party to the Plan; however, Simons was involved as president of the Debtor entity, Simons Broadcasting.

approval to such an agreement, the Court finds that there are no fact issues to present to the jury on the existence of such a contract.

Secondly, even if an agreement existed between Simons and Milbank, it would have been terminated due to a material breach by Simons. Whether an individual's conduct constitutes a breach of contract is a question of law for the court to decide. See *E.P. Towne Center Partners, L.P. v. Chopsticks, Inc.*, 242 S.W.3d 117, 123 (Tex.App.-El Paso 2007, no pet.). Breach of a contract occurs when a party fails to perform an act that it has expressly or impliedly promised to perform. See *Stewart v. Sanmina Tex., L.P.*, 156 S.W.3d 198, 214 (Tex.App.-Dallas 2005, no pet.)(citing *Methodist Hosp. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 882 (Tex.App.-Dallas 1991, writ denied)). Therefore, a party seeking an action for a breach of contract must establish that he performed, tendered performance of, or was excused from performing his contractual obligations. *Krayem v. USRP (PAC), LP*, 194 S.W.3d 91, 94 (Tex.App.-Dallas 2006, pet. denied).

Assuming that an agreement can be implied from the depositing of each check by Milbank, Simons failed to comply with the terms of this purported agreement, as Simons acknowledged the fact that he did not produce the detailed expense reports required by Milbank. Several emails and letters sent to Simons regarding the 10% fee and expense information were admitted as evidence at trial. Simons did not dispute Milbank's claim that any expense fee would be contingent

upon a detailed expense report and approval from PDG. Because Simons failed to perform a contractual obligation pursuant to his alleged agreement with Milbank, Simons is not entitled to the 10% fee under that agreement. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)(“A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform.”); see also *Restatement (Second) of Contracts* § 235(2)(1981)(“When performance of a duty under a contract is due any non-performance is a breach”). Thus, to the extent that an implied agreement existed between Milbank and Simons, the Court also finds that Simons materially breached the agreement by violating a condition precedent, which terminates the entitlement to any expense fee claimed by Simons.

Finding no fact issue warranting jury determination on any contractual dispute between Simons and Milbank, this Court granted Milbank’s Rule 50 Motion and ordered Simons to comply with the Order by turning over all operational income owed to the Estate.

**B. Order Granting Rule 50 Motions Dismissing Claims Against Milbank, Strong and PDG**

In their respective requests for judgment as a matter of law, Milbank, Strong, and PDG claimed that there were no facts supporting the merits of each claim asserted, and they were entitled to the protection from liability under the Plan and

Order. In granting their Rule 50 Motions, the Court agrees that Milbank, Strong, and PDG are shielded from liability as there were no genuine fact issues to defeat their immunity. The Court also finds no evidence to support submitting the merits of each claim for jury determination. Accordingly, the Court ruled in favor of each directed verdict request for the following reasons:

**(1) Immunity Protection**

Whether it is expressly stated in the bankruptcy plan itself or derived from the common law, the parties involved in the administration of a bankruptcy plan can be protected from liability for certain actions. In the instant case, the Bankruptcy Plan explicitly provides that:

Neither the Plan Implementation Agent nor PDG, nor any of their respective employees, officers, directors, direct or indirect equity interest holders, agents, advisors, attorneys, affiliates, or financial advisors, shall have or incur any liability to any holder of a Claim or Interest or any other party in interest, for any act or omission in connection with, relating to, or arising out of the Chapter 11 Case, the negotiation, formulation, and preparation of this Plan, the pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of the Estate and the distribution of property under this Plan, *except for their gross negligence or willful misconduct*, and in all respects they shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under this Plan.<sup>10</sup>

The law also recognizes a bankruptcy trustees'<sup>11</sup> general immunity from personal liability for actions grounded in his conduct as trustee. *In re Thurman*,

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<sup>10</sup> Plan at p. 22, § 13 (emphasis added).

<sup>11</sup> Though Milbank is designated as the Plan Implementation Agent, he has the same rights, duties and powers of a trustee.

163 B.R. 95, 100 n. 6 (Bankr.W.D.Tex. 1994)(citing *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74 (4th Cir. 1987)); see also *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981)(per curiam)(recognizing that “as an arm of the [c]ourt,” because bankruptcy trustees are immune from liability for acting subject to the orders of the bankruptcy court). Such “derived judicial immunity” provides broad protection to the trustee and other individuals acting on behalf of the court. See *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992) (court-appointed bankruptcy trustees acting within scope of authority entitled to derived judicial immunity). “Once an individual is cloaked with derived judicial immunity because of a particular function being performed for a court, every action taken with regard to that function-whether good or bad, honest or dishonest, well-intentioned or not-is immune from suit.” *Ramirez v. Burnside & Rishebarger, L.L.C.*, No. 04-04-00160-CV, 2005 WL 1812595, \*5 (Tex.App.-San Antonio Aug. 3, 2005, no pet.)(mem.op.)(citing *B.K. v. Cox*, 116 S.W.3d 351, 357 (Tex.App.-Houston [14th Dist.] 2003, no pet.)).

On the other hand, a trustee will relinquish his derived immunity where the trustee acts in “the clear absence of all jurisdiction.” *Clements*, 834 S.W.2d at 46 (citing *Mullis v. United States Bankr.Ct.*, 828 F.2d 1385, 1390 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988)). In other words, trustees will be held personally liable for acts taken outside the scope of their authority, or if they are found to have acted with gross negligence. *United States v. Sapp*, 641 F.2d 182, 184 (4th Cir.

1981). Still, the immunity a bankruptcy trustee is entitled to will extend to professionals acting on his behalf. *Harris v. Wittman*, 2009 WL 4893658 (9th Cir. Dec. 21, 2009).

Texas law defines gross negligence as “that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.” *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1980) (citing *Missouri Pacific Ry. v. Shuford*, 72 Tex. 165, 10 S.W. 408, 411 (1888)).<sup>12</sup> An individual acts with gross negligence if his actions objectively involved an extreme degree of risk concerning the magnitude of potential harm and, being subjectively aware of that risk, he still went forward with “conscious indifference to the rights, safety or welfare of others”. TEX. CIV. PRAC. & REMS. CODE §§ 41.001. In light of that standard, a finding of gross negligence will require proof of both the objective and subjective components. *Wal-Mart v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993). Thus, there must be some facts that (1) the individual had actual awareness of the extreme risk created by his or her conduct, and (2) the individual’s conduct involved an extreme degree of risk, a threshold significantly higher than the objective “reasonable person” standard for negligence. *Id.*

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<sup>12</sup> Since “willful misconduct” is generally equated with gross negligence, any discussion of gross negligence includes willful misconduct. *IP Petroleum Co., Inc. v. Wevanco Energy, LLC*, 116 S.W.3d 888, 898 (Tex.App.-Houston [1st Dist.] 2003, pet. denied).



**a. Plan Agent Immunity for Milbank and Strong**

As to the claims asserted against Milbank by Simons and Promiseland, Milbank's motion for judgment as a matter of law is premised upon his claim that Promiseland failed to offer any facts of gross negligence or willful misconduct at the hands of Milbank.<sup>13</sup> Without such a showing, which is expressly enumerated under the Bankruptcy Plan, Milbank cannot be found personally liable for his actions related to his conduct as the Plan Agent. The Court agrees and finds no fact issues from Simons that will defeat the immunity from liability extended to Milbank under the Plan and by the law.

Milbank was acting pursuant to and consistent with the Order when he obtained the Client Information and used the information in the administration of the bankruptcy. On multiple occasions, Milbank attempted to obtain the Client Information directly from Simons, the president of the Debtor. Testimony and evidence at trial revealed that Simons partially complied with these requests. However, given the deadlines Milbank was under, he could not act in accordance with his duties as Plan Agent without the complete information.<sup>14</sup>

After consulting with attorneys and other relevant individuals, Milbank and Strong went to the shared offices of Promiseland and Simons Broadcasting, and

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<sup>13</sup> Since Strong was assisting Milbank in his role as Plan Agent, the same legal arguments and defenses apply to Strong as well. See *Harris*, 2009 WL 4893658.

<sup>14</sup> In addition to the Bankruptcy Court's deadlines, Milbank was also subject to deadlines imposed by the Federal Communications Commission (FCC) and their requirements for KTAQ and its transfer of ownership.

downloaded the Client Information from the traffic computer. The Client Information obtained by Milbank was necessary for a Plan Agent to account for all assets owned by the bankruptcy estate, and to maximize the value of those assets throughout the administration of the bankruptcy. Additionally, there was no provision in the Order expressly limiting Milbank to obtain necessary information from only Simons. In light of the circumstances, it may have been more practical for Milbank to obtain a court order before acquiring the Client Information;<sup>15</sup> however, "it is not for the court in such instances to substitute its own judgment in hindsight as to what should or should not have been done by the trustee." *In re Engman*, 395 B.R. 610, 624 (Bankr. W.D. Mich. 2008). The court should only be concerned with whether the trustee "had comported himself consistent with the duties required of him as a fiduciary of the bankruptcy estate." *Id.*

Since Milbank was reasonably acting in his official capacity, and there are no facts supporting claims of gross negligence or willful misconduct, Milbank is entitled to qualified immunity. *TTT Hope, Inc. v. Hill*, CIV.A. H-07-3373, 2008 WL 4155465 (S.D. Tex. Sept. 2, 2008). Furthermore, to the extent Strong was acting under the direction of Milbank, he is also entitled to the same protections of qualified immunity. *Id.* Accordingly, judgment as a matter of law is proper as

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<sup>15</sup> Milbank testified that obtaining a court order from the Bankruptcy Court was considered. However, given his prior trustee experiences, Milbank knew that courts required trustees to exhaust all of their options before seeking compliance from the courts. Milbank also noted that involving the court would cause timely delay, which would have been detrimental to the television station and the Estate as a whole.

there is no showing that Milbank or Strong acted with gross negligence or willful misconduct.

**b. Immunity Under the Plan for PDG as the Creditor**

PDG is also entitled to the immunity provision under the Plan itself. It is undisputed that PDG was also involved in the acquisition and use of the Client Information physically obtained by Milbank and Strong. As Creditors of the bankruptcy estate, PDG is also protected from liability if their conduct, under the Plan and Order, did not amount to gross negligence or willful misconduct.<sup>16</sup> As this Court will explain *infra*, the Estate was entitled to the Client Information as it was necessarily part of the Debtor's principal asset, KTAQ. Since PDG was authorized to use the Client Information under the Plan and Order, no showing of gross negligence or willful misconduct was supported by the record. As such, judgment as a matter of law for PDG is also appropriate, as they are protected from liability under the Plan.

**(2) Client Information Belongs to the Bankruptcy Estate**

Although immunity protections entitled Milbank, Strong, and PDG to judgment as a matter of law on all claims asserted against them by Promiseland, they are also entitled to judgment as a matter of law on the merits of each claim as well. All of the causes of action Promiseland is asserting against Milbank, Strong, and PDG are premised on its claim that the entire Client Information downloaded

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<sup>16</sup> See Plan at p. 22, § 13.

belonged exclusively to Promiseland. As the dispositive factor, the ownership interest of the Client Information will determine the resolution of the merits of each claim asserted by Promiseland. After reviewing the evidence and relevant testimony at trial, this Court finds that the Client Information also belonged to Simons Broadcasting.

Prior to filing for bankruptcy in November 2008, Simons Broadcasting was a for-profit entity controlled by Simons Asset Management as its general partner, and Simons as its limited partner. Simons was also listed as president of Simons Asset Management. On August 12, 2005, Promiseland Television Network, Inc. was incorporated as a non-profit corporation under Article 32 of the Texas Non-Profit Corporation Act, and recognized as a Section 501(c)(3) entity under the Internal Revenue Code of 1986. Under its Articles of Incorporation, Simons, his wife, and sister were listed as Promiseland's board of directors. Simons was also listed as Promiseland's president.

On September 1, 2005, Promiseland and Simons Broadcasting entered into an Air Time Agreement giving Promiseland the exclusive right to lease all of the airtime on KTAQ. Pursuant to the agreement, Promiseland was required to pay for the lease according to a monthly payment schedule. The agreement expressly provided that the relationship between the parties is that of a lessor-lessee, and no agency relationship was intended. Simons signed the agreement on behalf of both parties to the contract: as president of Promiseland,

and as president of Simons Asset Management, the general partner for Simons Broadcasting.

At trial, it was revealed that in 2008, Simons amended the Air Time Agreement and reduced the payment amounts Promiseland would pay to Simons Broadcasting. Simons explained that the reduction was necessary because of the downturn in the economy and it was not feasible for Promiseland to continue paying the increased payment amounts. Simons claimed that he was acting in his respective capacities for Promiseland and Simons Broadcasting; the agreement continued being an arm's-length transaction; and that the amendment was for the best interest of both Promiseland and Simons Broadcasting. In the end, however, the amendment was never reduced to writing.

**a. Air Time Agreement Did Not Grant Promiseland Exclusive Control of the Client Information**

Basic contract law requires at least two distinct parties to enter into a contract. "A person cannot legally enter into a contract with oneself, that is to say, it is not legally possible for one mind to make a contract." 14 TEX. JUR. 3d § 14. While an individual may attempt to act in more than one capacity, an agreement with oneself, even in another capacity, is a legal fiction that should not "rise to the dignity of a contract." *People's Bank of Butler v. Allen*, 344 Mo. 207, 212, 125 S.W.2d 829, 831-32 (1939); see also 1 *Williston on Contracts* § 3:2 at 265 (4th ed.) ("Even where an individual is acting in more than one capacity, as for example as

trustee, executor, or partner, it is generally not permissible for him to deal with himself in another capacity.”) Therefore, when an individual signs an agreement in two different capacities, the court can look at the legal relations of that person and rule accordingly. *Bobbitt v. Alamo Cas. Co.*, 241 S.W.2d 464, 467 (Tex. Civ. App. 1951) (refusing to give legal effect to a contract a one-man corporation entered into himself as an employee).

The Air Time Agreement between Promiseland and Simons Broadcasting, which resulted in the development of the Client Information, was entered into between Simons and himself. Though purportedly acting in different capacities, the Agreement was not an arm’s-length transaction. Furthermore, it is uncontested that Simons unilaterally modified the Agreement on behalf of both entities. Therefore, to the extent that the Air Time Agreement may be used to grant exclusive control of the Client Information to only Promiseland, it is without legal effect.

**b. Simons Broadcasting is the Alter Ego of Promiseland and is Entitled to the Client Information**

Even beyond the contractual issues discussed above, the alter ego theory, as recognized under Texas law, provides equitable reasons to discount any distinction between the two entities. “[A]n alter ego remedy applies when there is such an identity or unity between a corporation and an individual or another entity such that all separateness between the parties has ceased and a failure to

disregard the corporate form would be unfair or unjust.” *In re Southmark Corp.*, 95 F.3d 53 (5th Cir. 1996) (citing *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1152 (5th Cir. 1987)). Accordingly, a “corporate veil” may be pierced “where a corporation is organized and operated as a mere tool or business conduit of another.” *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). Thus, courts should “disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.” *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 454 (Tex. 2008) (citing *Castleberry*, 721 S.W.2d at 271-72).

The factors relevant to the court's alter ego inquiry include: “the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.” *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372, 374 (Tex. 1984); *Gentry v. Credit Plan Corp.*, 528 S.W.2d 571, 573-75 (Tex. 1975). While the alter ego theory is typically utilized in cases where an entity attempts to shield itself from liability, Texas courts have extended its application to other types of cases. See *In re Faith Missionary Baptist Church*, 174 B.R. 454, 466-69

(Bankr. E.D. Tex. 1994)(extending the alter ego theory in an IRS levy claim against a church and its pastor); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 952 (Tex.App.-Fort Worth 1985, writ dismiss'd) (applying alter ego theory in an action for divorce "to properly characterize corporate assets as part of the community estate."); *Dillingham v. Dillingham*, 434 S.W.2d 459, 462 (Tex. Civ. App.—Fort Worth 1968, writ dismiss'd)(court affirmed trial court's division of property, which awarded portion of increased value of husband's wholly owned corporation, based on finding that corporation was alter ego of husband).

In an alter ego case involving a church, the court noted that "the legal fiction between an individual and an entity may be pierced if the entity 'has been used as part of a basically unfair devise to achieve an inequitable result.' " *In re Faith Missionary Baptist Church*, 174 B.R. at 466-69 (Bankr. E.D. Tex. 1994)(quoting *Castleberry*, 721 S.W.2d at 271). In that case, the bankruptcy court focused on the fact that assets from the pastor were being transferred to a church that was controlled by the pastor and his family. Though there was evidence that the church was being operated as a church, the unity of interest between the pastor and the church was undeniable. *Id.* The court held that the pastor was the alter ego of the church and the assets of the church could be subjected to the IRS lien against the pastor. *Id.*; see also *See Loving Saviour Church v. United States*, 728 F.2d 1085 (8th Cir. 1984)(church established as an unincorporated association was the alter ego of the individual who was both a pastor and trustee of the church,



thus IRS levy not wrongful); *United States v. Kitsos*, 770 F.Supp. 1230 (N.D.Ill. 1991)(individual's continued exercise of dominion over assets purportedly transferred to the church was grounds to disregard the church's independent existence), *aff'd*, 968 F.2d 1219 (7th Cir. 1992); *Church of Hakeem v. United States*, No. C-79-0741 SW, 1979 WL 1475, 79-2 USTC ¶ 9651 (N.D.Cal. 1979)(levy not wrongful because of unity of interest between the individual and the church).

Upon reviewing the evidence in light of the relationships Simons had with Simons Broadcasting and Promiseland, the Court finds the Client Information is property of the bankruptcy estate because Promiseland is the alter ego of Simons Broadcasting. Promiseland is controlled by Simons and his family members. Simons was the sole individual in control of Simons Broadcasting prior to its bankruptcy, irrespective of what capacity Simons acted under. Both Simons Broadcasting and Promiseland shared the same offices at the Hillcrest Church in Dallas, Texas. Clients would mail their tapes to Promiseland, which would have been "walked across the hall" to Simons Broadcasting for broadcasting.

Given the evidence, it is clear that Simons Broadcasting and Promiseland were alter egos of each other. Though some corporate formalities between the entities were observed prior to the bankruptcy, a necessary requirement given Promiseland's existence as a non-profit organization, the Client Information was freely accessible to both entities by means of Simons. *See Castleberry*, 721

S.W.2d at 272 (focusing on the relationship between the corporation and the entity or individual that allegedly abused corporate formalities as the basis for using the alter ego theory to disregard the corporate form). Therefore, this Court is convinced that Simons Broadcasting was entitled to the Client Information as the alter ego of Promiseland.

**c. The Bankruptcy Code and Bankruptcy Plan and Order  
Authorized Access and Use of the Client Information**

The Bankruptcy Code recognizes the trustee's right to possess and use books, documents, records, and papers related to the Debtor's property or financial affairs. *In re Spence*, 05-12968CAG, 2009 WL 3756621 (Bankr. W.D. Tex. Nov. 3, 2009). The obligation of full disclosure must be enforced to preserve the integrity of the bankruptcy process. See *In re Wincek*, 202 B.R. 161, 166 (Bankr.M.D.Fla. 1996). Pursuant to 11 U.S.C. § 541, recorded information, including the books, files, and records of the Debtor, are property of the bankruptcy estate. *In re Blinder, Robinson & Co., Inc.*, 140 B.R. 790, 793 (D. Colo. 1992) (citations omitted)(noting that "[d]ocuments or books belonging to the debtor and of value or benefit to the estate must be turned over as property of the estate under section 542(a)"). "The duty to turn over [or deliver] the property is not contingent upon any predicate violation of the stay, any order of the bankruptcy court, or any demand by the creditor." *In re Calvin*, 329 B.R. 589 (Bankr.S.D. Tex 2005)(quoting *In re Knaus*, 889 F.2d 773, 775 (8th Cir.1989)). In fact, "[t]here is

no requirement in the Code that the trustee make a demand, obtain a court order, or take any further action in order to obtain a turnover [delivery] of the estate's property." *Id.* (citations omitted); *In re Bidlofsky*, 57 B.R. 883, 900 (Bankr.E.D.Mich. 1985). Since the obligation "is self-operative and mandatory," the trustee would instantly be entitled to the Debtor's recorded information once the bankruptcy plan is confirmed. *In re U.S.A. Diversified Products, Inc.*, 193 B.R. 868, 872 (Bankr. N.D. Ind. 1995)(citations omitted).

The Order expressly provided that Simons and counsel for Debtor "shall provide copies of records reasonably requested by the Plan Implementation Agent that relate to the Debtor's business and operations."<sup>17</sup> Additionally, the Plan defined "Station Assets" as "assets of the Debtor which are used in the operation of the digital television station known as KTAQ, including *without limitation*, all licenses, [and] leases."<sup>18</sup> Since the Order is not ambiguous, assessing the scope of Milbank's authority under the Order is not a question of fact for the jury. *In re Davis Offshore, L.P.*, 644 F.3d 259, 265 (5th Cir. 2011) cert. denied, 132 S. Ct. 782 (2011)(interpretation of the unambiguous terms of a bankruptcy court's order are left to the court's discretion).

Pursuant to his rights and duties as Plan Agent, Milbank was required to collect the operational income from the Debtor's assets, which included any outstanding accounts receivables owed by users of the Debtor's airtime. Since

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<sup>17</sup> See Order at p. 7-8, ¶ 33.

<sup>18</sup> See Plan at p. 6-7 (emphasis added).

the airtime agreement between Promiseland and the Debtor was terminated under the Bankruptcy Order, Milbank had the duty to collect and account for all the funds being transferred to Promiseland. To comply with his duties as Plan Agent, Milbank was authorized and obligated to collect all operational income owed to the Debtor, and to determine any amount still outstanding.<sup>19</sup>

Simons and Promiseland note that the information downloaded on October 26, 2010, included the identities and contact information of clients, the financial and contractual terms involving each client, and Promiseland's programming and scheduling information. They argue that the Client Information belonged to the sole and exclusive possession of Promiseland. As such, any unauthorized possession or use of the Client Information by Milbank, Strong, and PDG would amount to tortious misconduct.

In light of the bankruptcy, this Court cannot fathom how a Plan Agent can fulfill his fiduciary duties if he does not have access to the Client Information that is part and parcel to the financial records of the Debtor. For example, as Plan Agent, Milbank is required to confirm the Debtor's assets, which would include the programming contracts that are generating the operational income for KTAQ. It is without question that pricing and duration are contractual terms that a plan agent must review to determine what amounts have been paid and what are still owed. Furthermore, the rest of the terms of the contract must also be reviewed, as that

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<sup>19</sup> See Plan at p. 14.

information is necessary for the continued operation and management of KTAQ by the Plan Agent. Therefore, this Court finds that under the Bankruptcy Code, Milbank, Strong, and PDG were entitled to obtain the Client Information that was downloaded on October 26, 2010. Additionally, as the Client Information related to the continued and future operations of KTAQ, Milbank, Strong, and PDG were also entitled to its use, as it was expressly authorized pursuant to the Order and Plan.

### **(3) Claims Asserted by Promiseland and Simons**

#### **a. Conversion**

In Texas, conversion is defined as the wrongful exercise of dominion and control over another's property, which physically deprives the true owner of its use, or conflicts with the true owner's rights. *Bandy v. First State Bank*, 835 S.W.2d 609, 622 (Tex. 1992). To prevail on a claim for conversion, a plaintiff must prove the following elements: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion or control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded the return of the property; and (4) the defendant refused to return the property. *Apple Imports, Inc. v. Koole*, 945 S.W.2d 895, 899 (Tex. App.—Austin 1997, writ denied).

Since the conversion claim relates to the Client Information that was included in the electronic download of computer software, the Court must first determine if conversion law applies to this fact pattern. “Texas law has never recognized a cause of action for conversion of intangible property except in cases where an underlying intangible right has been merged into a document and that document has been converted.” *Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895, 901 (Tex.App.-Dallas 2001, no pet.); see also *Neles—Jamesbury, Inc. v. Bill's Valves*, 974 F.Supp. 979, 982 (S.D.Tex. 1997); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 456 (5th Cir. 2003)(explaining that Texas conversion law “concerns only physical property”); *Prewitt v. Branham*, 643 S.W.2d 122, 123 (Tex. 1983) (allowing claim for conversion of rights conferred by a lease because the rights had been merged into a physical document). Only “where the underlying intangible right has been merged into a document,” like a customer list, and “there has been conversion of that document,” will courts extend a conversion claim to the copying of intangible information. *Neles—Jamesbury, Inc.*, 974 F.Supp. at 981–82; *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F.Supp. 1513, 1569 (S.D.Tex.1996). The fact that computer software or data was downloaded to a physical storage medium will not satisfy the merger requirement. *Quantlab Technologies Ltd. (BVI) v. Godlevsky*, 719 F.Supp.2d 766, 779 (S.D.Tex. 2010); *Xpel Technologies Corp. v. Am. Filter Film Distributors*, CIV.A SA-08-CA175-XR, 2008 WL 3540345 (W.D. Tex. Aug. 11, 2008)(finding no trade secret exception to the physical property

requirement under Texas conversion law). Based on the forgoing, the Court declines to depart from the interpretation of Texas law shared by the majority of Texas courts and the Fifth Circuit, and holds that conversion applies only to physical property under Texas law. *Quantlab Technologies Ltd. (BVI)*, 719 F.Supp.2d at 779 (citations omitted).

There is no dispute that Strong, along with Milbank, went to the traffic computer, copied the AdEze software into a compressed file on a thumb-drive, and eventually accessed the software data on another computer. Simons and Promiseland did not present any evidence that Strong and Milbank took a paper document with the “trade secret” information on October 26, 2010. While the information downloaded is capable of being transferred or printed onto a document in the future, such a factor is beyond the scope of current trade secret conversion law in the state of Texas. Since the facts surrounding the conversion allegation do not satisfy the merger doctrine, Plaintiff’s conversion claim must fail. See *Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 627 (S.D. Tex. 2011) (declining to extend conversion claims to information that was emailed by a defendant to himself).

Notwithstanding the physicality of the property at issue, unauthorized copying of another party’s confidential client list and trade secrets can support a claim for conversion in Texas. See *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 469 (Tex.App.-Fort Worth 1987, writ denied). “Where the property at

issue in a conversion claim, is essentially information, and not a tangible item, the plaintiff has to show that the defendant intended to deprive the plaintiff of the information, or that the defendant intended to use the information in a manner that excluded or was inconsistent with the plaintiff's rights." *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Services, LLC*, 404 S.W.3d 737, 749 (Tex. App.—El Paso 2013, no pet.)(citing *Westlake Surgical, L.P. v. Turner*, No. 03–08–00122–CV, 2009 WL 2410276, at \*3 (Tex.App.-Austin 2009, no pet.)(memo op.)). Thus, if there is no showing that the defendant actually used or intended to use the copied information in a manner inconsistent with the true owner's rights, the conversion claim must fail as a matter of law. *Id.*

Simons and Promiseland failed to offer any evidence of "use" of its trade secret that would be inconsistent with their rights as true owner. Though it is clear that Milbank, Strong, and PDG eventually accessed the customer data and information contained in the downloaded AdEze software, there is no evidence that there was *commercial use* of the information deemed proprietary, or that the confidentiality of the trade secret was compromised by exposure to a third-party. The evidence is clear that Byrnes contacted Promiseland's clients prior to October 26, 2010. Furthermore, the identity of Promiseland's clients and their contact information was already known to PDG, as well as to anyone with access to a television and phonebook. Though Simons and Promiseland argue that pricing and client preference information was included in the AdEze download, they



offered no evidence that PDG used that information to the detriment of Promiseland or to benefit of PDG. Simons never demonstrated that Milbank, Strong, or PDG actually *used* any truly confidential information contained in the AdEze software. *Alliantgroup*, 803 F.Supp.2d at 627 (finding no conversion claim when there was no proof that the defendant actually used the customer list).

Finally, this Court also finds that the Order and Plan authorized Milbank and Strong to collect data that related to the Debtor's bankruptcy. While Milbank and Strong "did not have the authority under the Order to take the law into their own hands," the undisputed facts at trial convince the Court that the actions of Milbank and Strong were not unlawful.<sup>20</sup> It is clear to this Court that the Plan Agent had the authority to enter the offices of Promiseland, as the control room of Simons Broadcasting was in the same suite of offices with Promiseland. While Simons claims that Milbank did not obtain his express permission to visit the Promiseland office on the day in question, the Court wonders how a Plan Agent can manage and operate a television station, without the implied authority to physically visit its control room. It is even more perplexing to the Court that an employee of the Debtor, Simons' son, can work and access the office area, but his "boss" cannot.<sup>21</sup> Since a trade secret cannot be converted when a party is entitled to the information as a matter of law or by court order, Milbank, Strong, and PDG's acquisition of the

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<sup>20</sup> See Doc. 96 at p. 9.

<sup>21</sup> Plan at p. 13. The Plan expressly granted the Plan Agent with the power operate the television station, which included the power to hire and fire employees of the Station Assets.

Client Information, by way of bankruptcy administration, cannot support a meritorious conversion claim.

The Court is persuaded that the actions of obtaining the records by Strong and Milbank were reasonable under the Order. Additionally, this Court finds that a claim for conversion of trade secrets is inapplicable given the unsatisfied merger requirement and no showing of “use” by the claimants. More importantly, the Court finds that Milbank, Strong, and PDG were entitled to the Client Information by way of the traffic computer, as Promiseland is the alter ego of Simons Broadcasting, and any information or trade secret developed by Promiseland through its relationship with Simons Broadcasting and its assets, would also belong to Simons Broadcasting.<sup>22</sup>

**b. Texas Theft Liability Act - §§ 31.03 and 31.05**

Simons and Promiseland assert that Milbank, Strong, and PDG violated two sections of the Texas Theft Liability Act—Texas Penal Code §§ 31.03 and 31.05 (“TTLA”). Section 134.005(a) of the TTLA provides that “a person who has sustained damages resulting from theft may recover” the amount of actual damages and, “in addition to actual damages, damages awarded by the trier of fact in a sum not to exceed \$1,000.” TEX. CIV. PRAC. & REM. CODE ANN. § 134.005

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<sup>22</sup> The testimony of Promiseland’s witnesses, including Promiseland’s employees, Simons, and Simons’ wife and son, revealed several facts demonstrating the interrelationship of Promiseland and Simons Broadcasting. Information, including the video tapes sent by Promiseland’s clients, would be “walked across the hall” from Promiseland to Simons Broadcasting. Additionally, cameras and studio equipment belonging to Simons Broadcasting were housed at offices belonging to Promiseland.

(Vernon 2012). A plain reading of this provision clearly reveals that an award of \$1,000 statutory damages is contingent upon an award of actual damages. See *Rodgers v. RAB Investments, Ltd.*, 816 S.W.2d 543, 551 (Tex.App.-Dallas 1991, no writ)(citing *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 256 (Tex.App.-Dallas, no writ))(interpreting similar statutory language and stating “there must be a recovery of money or something of value; otherwise, the attorneys’ fee award cannot be described as an ‘addition’ to the claimant’s relief.”).

Section 31.03 states that a person commits an offense of theft if he unlawfully appropriates property with intent to deprive the owner of its use. TEX. PEN. CODE ANN. § 31.03. To “deprive” is “to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.” *Id.* § 31.01(2)(A). As Promiseland continued possessing its trade secrets, there can be no showing that Promiseland was deprived of its use or access. Absent exclusive possession or deprivation, Milbank, Strong, and PDG cannot be held liable for theft under the § 31.03 of the TTLA. *Falcone v. State*, 682 S.W.2d 418, 420 (Tex.App.-Houston [1st Dist.] 1984, no writ).

With respect to a claim under § 31.05, a person is liable if, without the owner’s consent, he or she: (1) steals a trade secret, (2) copies an article representing a trade secret, or (3) communicates or transmits a trade secret. TEX. PEN. CODE ANN. § 31.05(b). There is no theft if a defendant has the authority

to copy or transmit the trade secret, or has a legitimate ownership interest in the trade secret. Still, proof of a mistake or accident negates the element of intent necessary for theft. *Id.* § 8.02(a)(mistake of fact is a defense if it negates culpable intent); *Gardner v. State*, 780 S.W.2d 259, 262-63 (Tex.Crim.App. 1983). Since proof of intent is part of the plaintiff's TTLA claim, the defendant does not need to plead mistake or accident. *Id.* Furthermore, there is legally insufficient evidence to support a theft claim if there is a *bona fide* dispute about the ownership and right of access to the property. *Bokor v. State*, 114 S.W.3d 558, 560 (Tex. App. – Fort Worth 2002, no pet.).

This Court determined that the Bankruptcy Plan and Order delegated Milbank with the right and authority to access and copy the “trade secret” information claimed by Promiseland. Even if the Plan can be considered ambiguous, Milbank had a reasonable belief that he could access the Client Information without additional permission from another party. Since Promiseland failed to establish the requisite *mens rea* element for theft, their TTLA claims must fail.

### **c. Misappropriation of a Trade Secret**

Under Texas law, a claim for the misappropriation of a trade secret requires (1) the existence of a trade secret; (2) breach of a confidential relationship or improper discovery of a trade secret; (3) use of the trade secret; and (4) damages. *Moncrief Oil Intern., Inc. v. OAO Gazprom*, 332 S.W.3d 1, 14–15 (Tex.App.-Fort

Worth 2010, no pet). Texas law defines a “trade secret” as a “formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it.” *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007)(quoting *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991)). Courts in Texas have recognized data including pricing information, customer lists, client information, customer preferences, buyer contacts, and market strategies as trade secret. See, e.g. *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 776 (Tex. 1958)(identifying customer lists as a trade secret due in part to the competitive advantage it gives its owner); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex.App.1998, pet. dismiss'd) (“Items such as customer lists, pricing information, client information, customer preferences, buyer contacts...have been shown to be trade secrets.”).

The “use” of a trade secret refers to “commercial use” and occurs when “a person seeks to profit from the use of the secret.” *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 450 (5th Cir. 2007) (quoting *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 464 (Tex.App.-Austin 2004, no pet.)). In fact, “any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant” can be considered “use” of a trade secret. *Id.* at 451 (quoting *Restatement (Third) of Unfair Competition* § 40). However, simply exercising dominion and control over the trade secret will not

establish “use.” *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 476 (Tex. App. 2001). If there is no proof the defendant actually used the trade secret, the misappropriation claim must fail. *Plains Cotton Co-op. Ass’n of Lubbock, Texas v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1262 (5th Cir. 1987); see also *Propulsion Technologies, Inc. v. Attwood Corp.*, 369 F.3d 896, 905 (5th Cir. 2004)(explaining that proof of a defendant’s profits, without more, is not evidence establishing that the defendant used the trade secret to generate those profits).

Since it is clear that the Debtors and the Plan Agent were entitled to the downloaded data pursuant to the Order and Plan, Promiseland cannot show an improper acquisition of the Client Information. Though Promiseland may disagree, the unambiguous terms of the Order authorized the Plan Agent to visit the shared offices of Promiseland and Simons Broadcasting, and obtain any information necessary for the implementation of the Bankruptcy Plan. When the terms of a bankruptcy plan and order are not ambiguous, the Court is charged with assessing whether the parties complied with its terms. See *In re Nat’l Gypsum Co.*, 219 F.3d 478, 483 (5th Cir. 2000)(noting that interpretation of an unambiguous bankruptcy order is not for the jury to decide as fact-finder).

The Court finds that PDG was entitled to the Client Information and the information was reasonably acquired by the Plan Agent. Furthermore, Promiseland failed to present any proof of unauthorized “use” of the information. The uncontroverted facts at trial establish that data from the AdEze software was

eventually accessed by Strong. However, without more, Promiseland did not present the jury with a fact-issue on the “use” element. Other than conclusory allegations, Promiseland did not offer any evidence that Milbank, Strong, and PDG utilized the “trade secret” information for commercial enrichment, or sold the information to a third-party. See *Propulsion Technologies, Inc.*, 369 F.3d at 905 (refusing to find “use” based only on the defendant’s possession of the trade secret and the plaintiff’s testimony that it “kind of gave [the defendant] the ability to learn how to make [the propellers]”).

It is undisputed that, prior to October 26, 2010, Byrnes contacted the ministries that had programming aired on KTAQ, and Simons previously allowed Milbank to review Promiseland’s contracts with these ministries. Byrnes testified that he contacted these ministries to advise them of the bankruptcy situation and their future programming on KTAQ. According to Byrnes, the contact information for each ministry was obtained from the combination of the Client Information Simons gave Milbank, as well as from viewing the programs aired on KTAQ, and corroborating their contact information with a phonebook.

Additionally, though Simons did not give his express authorization to its access, there was no proof that that Milbank, Strong, or PDG commercially used the trade secret information beyond their authority pursuant to the Bankruptcy Plan and Order. See *e.g. IBP, Inc.*, 101 S.W.3d at 476 (finding no cause of action for misappropriation when the disclosure or use of a trade secret involves court

proceedings, which renders its use or disclosure by an attorney during discovery as absolutely privileged). Milbank, Strong, and PDG were entitled to access and use records that related to the Debtor's business and operations.<sup>23</sup>

As the Plan Agent was charged with operating and transferring KTAQ, the Debtor's principal asset, he was authorized to obtain and use Client Information as part of the implementation of the plan. Additionally, the information on the AdEze software was incorporated with the income stream of the Estate's asset. As liquidation of the Debtor's business was contemplated by the Plan, KTAQ, in its intact and complete form, was part of the bankruptcy estate. Since the Client Information that was downloaded on October 26, 2010, is necessarily intertwined with KTAQ, as an asset of the Debtor, this Court finds that Milbank, Strong, and PDG had the right and authority to use that information.<sup>24</sup> Therefore, no misappropriation of trade secret claim can be sustained by Promiseland, mandating the judgment as a matter of law on that claim.

#### **d. Breach of Computer Security**

Promiseland additionally assert that Milbank, Strong, and PDG should be found liable for accessing their computer system without proper consent. A plaintiff can assert a civil claim for an injury sustained by "an intentional or knowing

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<sup>23</sup> Order at ¶ 33.

<sup>24</sup> See Plan at p. 6-7 (" 'Station Asset' shall mean those assets of Debtor which are used in the operation of the digital television station known as KTAQ, including without limitation, all licenses, leases (including the Tower Lease (defined below)), transmitter and studio equipment and transmission lines.").



violation of chapter 33 of the Texas Penal Code.” *Institutional Sec. Corp. v. Hood*, 390 S.W.3d 680, 684 (Tex. App. 2012) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 143.001 (West 2011)). In order to be held liable for such a violation, Promiseland must prove that (1) an individual knowingly and intentionally accessed their computer, computer network, or computer system; (2) the individual did not have the effective consent of the owner to do so; and, (3) the owner suffered damages as a result. See TEX. PENAL CODE ANN. § 33.02(a) (West Supp.2012). There is no effective consent if the individual’s access is outside the scope of the consent actually granted. *Id.* § 33.01(12)(E).

Promiseland contends that there are legitimate fact issues with respect to any express or implicit consent Promiseland employees might have conveyed to Milbank and Strong to access its traffic computer and download the AdEze program. However, pursuant to the Plan, Milbank was authorized to access the data contained in the AdEze software. Any separation between Promiseland and Simons Broadcasting prior to the bankruptcy was blurred and comprised of a single business entity. As such, it was reasonable for a plan agent, or an individual under his direction, to access a computer to obtain information required for the proper implementation of a bankruptcy plan.

Furthermore, to the extent that the utilization of the computer by Strong or Milbank was not authorized by the Plan, reasonable mistake is a defense to liability, as it negates the kind of culpability required for a violation of a breach of

computer security. See TEX. PEN. CODE ANN. § 8.02. Moreover, Promiseland failed to allege, much less prove, that it sustained any damages when Strong accessed the traffic computer. See *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3-06-CV-0891-B, 2007 WL 4823761, \*16 (N.D.Tex. Sept. 12, 2007)(citing TEX. CIV. PRAC. & REM. CODE ANN. § 143.001(a)(Texas statute prohibiting harmful access to computer requires proof of an “injury” to person or property)). Promiseland claims its existence as a Christian programming network was destroyed as a result of Milbank and Strong’s conduct; however, since the Plan authorized the use of the Client Information for the implementation of the Plan and operation of KTAQ, any damage or injury alleged from the use of a trade secret directly resulted from the effects of bankruptcy, and independent of any nefarious conduct of Milbank, Strong, or PDG.

#### **e. Trespass to Personality**

Promiseland additionally claims that Milbank, Strong, and PDG’s download and access of the Client Information constituted a trespass to personality. Trespass to personality is an unlawful injury to, or interference with, possession of the property with or without the exercise of physical force. *Russell v. American Real Estate Corp.*, 89 S.W.3d 204, 210 (Tex. App.-Corpus Christi 2002, no pet.). “Liability does not attach, unless the wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time.” *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981)(citing

*Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770 (1945). This Court is not aware of any Texas court expanding trespass to personalty claims to trade secrets or other intangible property, and declines to do so today. Regardless, Promiseland offers no proof that Milbank, Strong, and PDG interfered with Promiseland's possession of the Client Information, or that the Client Information was physically damaged. Furthermore, as this Court previously found, the Plan Agent and the Debtor were permitted access to the Client Information according to the Order and Plan. As there is no merit to Promiseland's trespass claim with respect to the Client Information, the Court granted the Rule 50 Motions on this claim.

**f. Computer Fraud and Abuse Act**

Promiseland also contends that Milbank, Strong, and PDG are liable for violating the Federal Computer Fraud and Abuse Act ("CFAA"). The CFAA prohibits unauthorized access to a "protected computer" for purposes of obtaining information, causing damage, or perpetrating fraud. *Quantlab Techs. Ltd. (BVI) v. Godlevsky*, 719 F.Supp.2d 766, 774 (S.D.Tex. 2010)(citing 18 U.S.C. § 1030(a)(2), (a)(4), (a)(5)). Promiseland maintains that Strong's use of the traffic computer and download violated subsection (a)(4) of the CFAA, which provides that anyone who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value" commits a federal crime. 18 U.S.C. § 1030(a)(4).

As this Court already established, Strong, by and through Milbank, had the authority to access and obtain the information from the traffic computer. Therefore, there can be no proof of intent to defraud, as there was authorization pursuant to the Bankruptcy Plan and Order. Even if the authority under the Plan was ambiguous, § 1030(g) only provides civil remedies to a person that suffered “damage or loss by reason of a violation” of the CFAA, and the offense resulted in “loss to 1 or more persons during any 1–year period ... aggregating at least \$5,000 in value.” *Id.* § 1030(c)(4)(A)(i)(I), (g); *Fiber Sys. Int’l, Inc. v. Roehrs*, 470 F.3d 1150, 1156–57 (5th Cir. 2006). Thus, a cognizable civil claim under the CFAA demands proof of “damages” or “loss.”

It is without question that the deletion of computer data or files would constitute damage; however, this Court is not convinced that a party can be damaged by the simple download of computer software. The CFAA defines the term “damage” as meaning “any impairment to the integrity or availability of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8). In the instant case, there is no claim that Promiseland was ever denied access to the traffic computer or data. While Promiseland may argue that the integrity of its trade secret was damaged by Milbank, Strong, and PDG’s conduct, the plain language of the statute requires “some alteration of or diminution to the integrity, stability, or accessibility of the computer data itself” to be “damage” under the CFAA. *Cont’l Group, Inc. v. KW Prop. Mgmt., LLC*, 622 F. Supp. 2d 1357, 1371 (S.D. Fla. 2009)

order clarified, 09-60202-CV-COHN, 2009 WL 3644475 (S.D. Fla. Oct. 30, 2009). Therefore, even if a computer was improperly used to misappropriate a trade secret, such facts alone will be insufficient to allege impairment to the integrity or availability of data, a system, or information. *Garelli Wong & Assocs., Inc. v. Nichols*, 551 F.Supp.2d 704, 709-710 (N.D.Ill. 2008); see also *Lockheed Martin Corp. v. Speed*, 6:05-CV-1580-ORL-31, 2006 WL 2683058, \*3, 8 (M.D. Fla. Aug. 1, 2006)(concluding that “[t]he copying of information from a computer onto a CD or PDA is a relatively common function that typically does not, by itself, cause permanent deletion of the original computer files,” and will not establish “damage” under the CFAA); see also *Worldspan, L.P. v. Orbitz, LLC*, No. 05 C 5386, 2006 WL 1069128, \*5 (N.D.Ill. Apr.19, 2006) (accepting the ordinary meaning of “damage” and “integrity” to reject the argument that “the mere ‘taking of information’ constitutes ‘damage’ under the CFAA”).

The CFAA defines “loss” as “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.” 18 U.S.C. § 1030(e)(11). However, any lost revenue damages claimed as “loss” under the CFAA is insufficient, unless it was “incurred because of interruption of service.” *Id.*; see *Nexans Wires S.A. v. Sark-USA, Inc.*, 166 F. App’x 559, 562 (2d Cir. 2006)(“[T]he plain language of the statute treats lost

revenue as a different concept from incurred costs, and permits recovery of the former only where connected to an ‘interruption in service.’ ”); see also *AtPac, Inc. v. Aptitude Solutions, Inc.*, No. Civ. 2:10–294, 730 F.Supp.2d 1174, 1185, 2010 WL 3069255, \*10 (E.D.Cali. Aug. 4, 2010)(explaining that “the definition of ‘loss’ itself makes clear Congress’s intent to restrict civil actions under subsection (l) to the traditional computer “hacker” scenario-where the hacker deletes information, infects computers, or crashes networks.”). Though Strong used the traffic computer, Promiseland never claimed that it was ever denied access to the traffic computer or its files as a result of Strong’s conduct.

Promiseland does not allege or present any evidence that it suffered from a loss or was damaged as a result of a CFAA violation. Data on a computer was not altered or deleted and no service interruption was alleged. Given the absence of loss or damage, Promiseland’s CFAA claim fails, thus warranting judgment as a matter of law.

#### **g. Civil Conspiracy**

Texas does not recognize an independent cause of action for conspiracy. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)(Civil conspiracy is “generally defined as a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means, might be called a derivative tort.”). For that reason, any finding of conspiracy must be based on some underlying tort. *Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 n. 5

(Tex.App.—Dallas 1989, writ denied). To sustain a claim of conspiracy, the allegations must involve wrongs that would have been actionable against the conspirators individually. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (1963). In other words, if an act by one person cannot give rise to a cause of action, then the same act cannot give rise to a cause of action if done pursuant to an agreement between several persons. *Schoellkopf*, 778 S.W.2d at 900; *Gulf & Atlantic Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 102 (Tex.App.—Dallas 1985), *rev'd on other grounds*, 749 S.W.2d 762 (Tex.1987); *Closs v. Goose Creek Consolidated ISD*, 874 S.W.2d 859, 871–72 (Tex.App.—Texarkana 1994, no writ)(noting that a defendant's liability for conspiracy is contingent upon successful showing of an underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable).

Since none of Promiseland's derivative claims against Milbank, Strong, or PDG survived its respective Rule 50 Motions, the civil conspiracy claims automatically fails as a matter of law.

### **C. Order Granting Rule 50 Motion and Dismissing Breach of Contract Claim by Promiseland and Simons**

The final claim asserted by Simons and Promiseland involves the enforcement of a provision under the Plan and Order. Under the Plan, as soon as practicable after its effective date, "the Plan Implementation Agent shall convey to

Dr. Michael Simons...cash in the amount of \$50,000.”<sup>25</sup> Simons argues that he is entitled to \$50,000, as that conveyance was explicitly ordered by the Bankruptcy Court. As this claim relates to an unambiguous provision of the Bankruptcy Plan, the Court must determine whether the provision was properly enforced. See *In re Nat'l Gypsum Co.*, 219 F.3d at 483 (interpreting a bankruptcy order is purely a question of law).

While it is true that the Plan contemplates the transfer of \$50,000 to Simons, that claim is listed as a Class 6 Equity Interest. Class 6 claims are impaired and subject to the liens of PDG, and cannot be paid from cash collateral.<sup>26</sup> Simons points out that after the Effective Date, Milbank had access to over \$450,000 in cash collateral. According to Simons, since the Plan limited the cash collateral reserve to \$250,000, any additional cash held beyond that amount should not be cash collateral. Simons argues that the extra \$200,000 should have been used to pay the \$50,000 owed to Simons, and non-compliance by Milbank was a breach of contract.

The Plan defined “cash collateral reserve” as “\$250,000 in cash...subject to the liens of PDG which will be used to pay Administrative Claims and Allowed Claims in Classes 1-3 and 5.” The \$250,000 represents the minimum amount that must be held as cash collateral reserve and no express provision limits the maximum amount that may be held as cash collateral. To hold otherwise would

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<sup>25</sup> See Plan at p. 11.

<sup>26</sup> See *id.* at pp. 3, 11.



force the plan agent to play a constant balancing game with the cash collateral throughout the administration of bankruptcy.

Furthermore, Simons only offered his conclusory belief that it was “practicable” for Milbank to pay him \$50,000 the instant Milbank had access to cash above the \$250,000 cash collateral reserve. KTAQ was auctioned off and sold for less than the \$11 million the Debtor owed to PDG. Consequently, no outstanding funds were available in the bankruptcy estate for Class 6 claims. As Simons is suing Milbank individually for a breach of contract, he can only be held liable under the Plan for gross negligence and willful misconduct.<sup>27</sup> Simons failed to allege any facts demonstrating gross negligent conduct at the hands of Milbank in the administration of the bankruptcy estate. Accordingly, the motion for judgment as a matter of law is properly granted and Simons’ claims against Milbank is dismissed.

#### **IV .CONCLUSION**

It is the opinion of this Court that after assessing all evidence and factual claims asserted at trial, considering the elements of each cause of action, and applying the appropriate legal precedent, Milbank, Strong, and PDG conclusively proved that judgment as a matter of law in their favor is appropriate as to each claim asserted in this case. Accordingly, it is

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<sup>27</sup> See Plan, § 13, p. 22; see *generally* Court’s discussion of gross negligence discussed *supra* in section B of this opinion.

**ORDERED** that all of the Motions under Rule 50 as requested by Milbank, Strong, and PDG is **GRANTED** and Judgment shall be entered accordingly. It is further

**ORDERED** that any and all motions filed before October 11, 2013 and not previously ruled upon by the Court are **DENIED** as moot. It is finally

**ORDERED** that any claim for court costs and attorney's fees shall be filed, with appropriate documentation, within fourteen days (14) from the date of this Opinion.<sup>28</sup>

**SIGNED** on this 19<sup>th</sup> day of November, 2013.

  
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**WALTER S. SMITH, JR.**  
**UNITED STATES DISTRICT JUDGE**

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<sup>28</sup> PDG, Strong, and Milbank also requested court costs and reasonable and necessary attorney's fees as authorized under the TTLA. See TEX. CIV. PRAC. & REM. CODE ANN. § 134.005.