PREPARED BY THE COURT

KEITH SEQUEIRA,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:MONMOUTH COUNTY
Plaintiff,	:	DOCKET NO.: MON-L-3747-17
vs.	:	
		CIVIL ACTION
CHRISTOPHER RUSSO and RITA ROBBINS,	:	
	:	**ORDER FOR JUDGMENT**
Defendants.	:	
	:	

THIS MATTER having been opened to the court by way of a trial held on diverse dates between December 2, 2019 and January 23, 2020, and the court having considered the evidence, including documents and testimony, and the written and oral argument presented by the parties, it is for the reasons set forth in the attached written decision rendered by the court,

ORDERED on this 18th day of March, 2020 that judgment is hereby entered against plaintiff Keith Sequeira, and in favor of defendants Christopher Russo and Rita Robbins, in the above-captioned matter.

/s/ Linda Grasso Jones, J.S.C.
HON. LINDA GRASSO JONES, J.S.C.

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KEITH SEQUEIRA,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:MONMOUTH COUNTY
Plaintiff,	:	DOCKET NO.: MON-L-3747-17
vs.	:	CIVIL ACTION
CHRISTOPHER RUSSO and RITA ROBBINS,	:	**TRIAL DECISION**
Defendants.	:	

I. BACKGROUND:

This matter involves claims by plaintiff Keith Sequeira against defendants Christopher Russo and Rita Robbins. Sequeira and Russo were investment advisors with Freedom Capital Management, an investment advisory company located in Colts Neck, New Jersey. Sequeira and Russo entered into a contract in August 2016 pursuant to which Russo bought Sequeira's then-existing investment advisory "book of business," which essentially was Sequeira's client accounts. The evidence presented at trial indicated that at the time of the negotiations between Sequeira and Russo, and the entry into the August 25, 2016 contract for the sale of Sequeira's book of business, Sequeira had an action pending against him by FINRA, the government-authorized agency that oversees and licenses securities broker-dealers in the United States. The pending action would potentially result in the revocation of Sequeira's license to participate in

the securities industry. It is clear to the court based upon the evidence presented that Sequeira's motivation for the sale of his book of business to Russo was the pending FINRA suspension.[1]

Sequeira and Russo entered into an agreement dated August 25, 2016, titled Asset Purchase Agreement (hereinafter "APA"), which provided for the sale of "certain assets, including certain brokerage insurance, and investment advisory accounts" on which Sequeira was the representative of record. The Asset Purchase Agreement provided for the sale of 25% of Sequeira's book of business to Russo, and the transfer of the remaining 75% upon a "trigger event." The APA had attached a list of Sequeira's accounts that were the subject of the agreement. Under the APA, as of August 25, 2016 Sequeira's clients were transferred to Russo, who was at that point listed as the representative of record on those accounts.

Under the APA, if a "trigger event" should take place, which was defined as Sequeira's death or the suspension of Sequeira's license to sell securities by FINRA, Russo would purchase the remaining 75% of Sequeira's book of business, and would receive the entirety of the commissions due on those clients.

The APA provided that Sequeira could repurchase the book of business from Russo at any time prior to the final transfer. Thus, the APA provided that Russo initially purchased 25% of Sequeira's book of business; if Sequeira was suspended by FINRA, Russo would purchase the remaining 75%. If Sequeira was not suspended, he could repurchase from Russo the 25% of his

[1] The court advised Sequeira at trial that the reasons for the proposed suspension were not important to the court; any prior alleged bad act would not be evidential if utilized or argued for the purpose of implying that the prior action proved that Sequeira did something wrong with reference to the contract and actions between Sequeira and Russo. The history is important, however, as background for what led to the interactions between Sequeira and Russo. Prior to the entry of the contract between Sequeira and Russo, Sequeira knew that his license was potentially going to be suspended due to the entry of an arbitration award against him that he had not paid, and thus he planned to sell his book of business before the potential loss of license took place.

book of business that Russo had purchased, and retain the remaining 75% that had not yet been purchased by Russo.

The APA provided the mechanism pursuant to which the parties had calculated the purchase price of the sale of 25% of Sequeira's book of business, as follows:

> (d) Price and Terms. The aggregate purchase price to be paid by Buyer to Seller, in cash as evidenced by a promissory note at Closing for the Purchased Assets (the "Purchase Price") shall equal the sum of fifty-seven thousand, five hundred dollars ($57,500), which Purchase Price is based upon the agree-upon valuation of Seller's Business calculated as follows:
>
> (i) The Current Rolling GDC for the 12-month period "GDC") to the date of APR Rep Profile ("Rep Profile") dated August 10, 2016, which GDC amounts in aggregate to $122,690.66 ("GDC"); and
>
> (ii) The "Recurring Revenues" contained in GDC, which Recurring Revenues amount in aggregate to $118,042.02; and
>
> (iii) Multiplying Recurring Revenues by two (2), which equals a valuation of Seller's Business amounting in aggregate to $236,084.04, which valuation has been rounded down by agreement of the Parties to a total sum of $230,000 ("Valuation"); and
>
> (iv) Applying to the Valuation the percentage of Business Assets sold by Seller and purchased by Buyer, which amounts to a Purchase Price of $57,500.

Also on August 25, 2016, Sequeira and Russo entered into an Adjustable Promissory Note (hereinafter "APN"), pursuant to which Russo would pay to Sequeira the total amount of $47,500 for Sequeira's book of business, with payments made in the amount of $1,319.44 per month over the 36 month period from September 1, 2016 through August 1, 2019. The APN stated that the APA and APN "constitute two parts of one indivisible agreement between the Parties. . . ."

The Adjustable Promissory Note contained an adjustment mechanism, providing for the amount to be paid by Russo to Sequeira to increase or decrease if the Gross Dealer Concession (hereinafter "GDC") during the 12 month period after the August 25, 2016 closing (the "adjustment period") to increase or decrease by more than 10%. In the APN Sequeira and Russo agreed that the GDC of Sequeira's book of business was $122,690.66 as of the August 24, 2016 closing date. Thus, if the GDC in the 12 months after closing was less than 90% of $122,690.66, the parties would adjust the price to be paid by Russo downward. If the GDC in the 12 months after closing was more than 100% of $122,690.66, the parties would adjust the price upward.

On or around August 10, 2016, Russo had paid to Sequeira a $10,000 down payment in the form of a loan, which as noted in the APA was treated as repaid by Sequeira in full at the time of closing. Under the APA and APN, Russo was also required to begin making monthly payments to Sequeira in the amount of $1,319.44 beginning on September 1, 2016. The first three monthly payments, due September 1, 2016, October 1, 2016 and November 1, 2016 are the basis for part of Sequeira's claim in this matter; Sequeira claims that these payments were made late, contrary to the terms of the APA and APN, and Russo contends they were made properly and in conformance with the agreement.

Sequeira's license was revoked by FINRA on November 18, 2016. Sequeira immediately tendered his resignation, and under the parties' agreement Russo purchased the remaining 75% of Sequeira's book of business. Beginning December 1, 2016, Russo's payments to Sequeira were for 100% of the book of business, and were thus to be $5,277.76.

The proofs presented at trial indicate that Sequeira and Russo communicated on several occasions during the winter and spring following Sequeira's suspension concerning Sequeira's former accounts. Russo on occasion advised Sequeira when one of Sequeira's former clients had

ended a financial advisory relationship with the firm, and asked for contact and other information concerning other clients.

In July 2017, Russo advised Sequeira that a particular client with a large account had left the firm, and indicated that they would need to do a downward adjustment on the amounts being paid by Russo to Sequeira. Sequeira disagreed, and by letter dated August 11, 2017 set forth his disagreements with Russo on Russo's claim that a downward adjustment was appropriate. Sequeira also set forth in his August 11, 2017 letter certain claims against Russo, which included a claim that several of the payments made to him by Russo had been late, and Sequeira demanded, based upon this alleged breach of the APN, that Russo immediately pay all principal owed by Russo to Sequeira under the acceleration clause contained in the APN.

By letter dated September 27, 2017, Russo advised that he was reducing the monthly payments to Sequeira due to Russo's claim that the GDC had reduced during the adjustment period by more than 10%. Russo indicated that the GDC was reduced during the transition period to 66% of the August 10, 2016 GDC, and advised Sequeira that this reduction in GDC would result in a reduction in the monthly payment to Sequeira to $4,284.00. Russo indicated, however, that he was going to voluntarily provide a higher payment than was required.

Sequeira filed a 17 count complaint with the court on October 6, 2017, alleging against defendant Russo multiple counts of breach of contract; anticipatory breach of contract; breach of the implied covenant of good faith and fair dealing; and common law fraud. Plaintiff alleged tortious interference by Robbins with the contract entered into between plaintiff and Russo, aiding and abetting by Robbins in Russo's breach of contract, and violation of the New Jersey Consumer Fraud Act. Count 17 of the complaint, the Consumer Fraud Act count against defendant Robbins, was dismissed by the court on a motion for summary judgment. Count 6 and

7, which alleged that defendant Russo had devalued investment accounts held by clients as pretrial motion pretrial, were dismissed by the court at the conclusion of the plaintiff's evidence at trial.

The terms of the contract entered into by plaintiff Sequeira and defendant Russo provided that the parties waived their right to a trial by jury if either party claimed that the agreement had been breached. On a motion in limine filed by defendants requesting that the trial waiver provision be enforced by the court and that the matter proceed as a bench trial, the court granted defendants' motion. The court held a bench trial on certain days in December 2019 and January 2020.[2] Written summations were provided to the court by the parties on February 13, 2020.

The court has had the opportunity to consider the testimony provided in the above matter, all documents entered into evidence and the demonstrative exhibits provided by the parties, as well as the written summations/final submissions from the parties, and is rendering the within determination based upon the testimony and other evidence and oral and written argument presented by the parties. As a jury is instructed to do in Model Civil Jury Charge 1.12K, in weighing and considering the testimony presented at trial, the court has considered the witness' interest, if any in the outcome of the case; the accuracy of the witness' recollection; the witness' ability to know what he/she is talking about; the reasonableness of the testimony; the witness' demeanor on the stand; the witness' candor or evasion; the witness' willingness or reluctance to answer; the inherent believability of the testimony; and the presence of any inconsistent or contradictory statements.

[2] Robbins was not a party to the contract and thus had not agreed through the contract to a non-jury trial, but her counsel joined in the motion by Russo, and indicated that she was waiving her right to a jury trial as well.

Overall, the court found Russo to be a credible witness. He spoke directly, and clearly indicated in his testimony when he did not know the answer to a question, without prevarication or dissembling. He did not appear at any time to be "making up" answers to questions, on direct or cross, to help his case. Russo's testimony was supported by the documentary evidence presented in evidence at trial.

While it is clear to the court that Sequeira believes that the testimony he presented at trial was accurate, his claims in this matter and the conclusions that he draws from what he contends is the relevant evidence are not supported by the evidence presented. For example, Sequeira took great exception to the involvement of Robbins in the disagreement between Sequeira and Russo beginning in August 2017. As noted below, it is difficult to understand how Sequeira could argue that Robbins had no business being involved; she was an owner of the company that employed Russo (and had formerly employed Sequeira), and Sequeira had sent Robbins a copy of the lengthy August 2017 demand letter to Russo. Sequeira seemed unable to squarely address the evidence presented at trial, but rather stuck to his version of events, which was not supported by the text messages, emails and other documents presented. For example, Sequeira remained steadfast in his claim that six or more clients had been lost during the adjustment period due to Russo's failure to properly handle the accounts, despite the introduction of his own testimony on cross examination that he (Sequeira) knew before the parties entered into the agreement that the clients planned to leave the firm. Sequeira's testimony, viewed in light of the entire record presented in this matter, and also considered standing alone, was not generally supportive of his claims against Russo and Robbins.

II. EVALUATION:

Russo joined Royal Alliance in July 2015. He had previously worked with another investment advisory firm, and brought with him his own book of business. Russo was made

aware that Sequeira was potentially going to lose his securities license and was asked by Paul Largo, the President of Freedom Capital Management, a company associated with Royal Alliance Associates, Inc. if he was interested in buying Sequeira's book of business.

The evidence presented clearly indicates that Sequeira was aware that his license was very likely going to be revoked by FINRA as a result of the prior arbitration decision. The arbitration decision in that matter was rendered in August 2014, and Sequeira had 30 days to pay the arbitration award. Sequeira was quite clear at trial that he did not and was not going to pay the arbitration award.

In March 2016 Sequeira had discussed with Paul Largo the potential for Sequeira to sell his book of business to another financial advisor. He returned to discuss the matter with Largo in the summer of 2016. As noted above, the prospect of buying Sequeira's book of business had been discussed with Russo, and on or about August 8, 2016 Sequeira and Russo discussed the proposed transaction. Sequeira and Russo agreed that Russo would pay to Sequeira an initial $10,000 advance, a loan on the amount to be paid for the purchase, which Sequeira indicated at trial was being used to refinance his mortgage. An agreement was signed by Sequeira and Russo on August 10, 2016 providing for the $10,000 loan. Under the agreement, Sequeira would sell 25% of the book of business, with the remaining 75% of the business transferring to Russo when, or if, Sequeira's license was suspended by FINRA. Suspension of Sequeira's license was called a "trigger event" under the parties' agreement.

Russo prepared a one paragraph agreement, marked into evidence as P-6, that Sequeira indicated was not acceptable. Robbins provided to Sequeira a lengthy form of agreement that she had available to her from another sale of a book of business from one advisor to another, and emailed it to Russo and Sequeira on August 19, 2016. Sequeira made changes to the form of

agreement provided by Robbins. Russo had the opportunity to review and make changes to the agreement; no evidence was presented that Russo in fact requested any changes. The parties agreed on the terms as set forth in the APA and APN, and signed both documents, marked into evidence as D-1 and D-2 at trial, on August 25, 2016.

Notice of an expedited hearing was issued by FINRA in August 2016, and the hearing was held in September. A decision was issued by FINRA on November 18, 2016 suspending Sequeira's license. On that date, Sequeira issued a letter of resignation from his position as a financial advisor. The parties agree that after November 18, 2016 Sequeira was not able to work as a financial advisor unless and until he had paid the arbitration award and had been reinstated by FINRA.

Under the agreement Sequeira's client accounts would initially be transferred to a joint "rep" (representative) number ("D2E"), with both Sequeira and Russo having the ability to review the information generated, and with Sequeira receiving 75%, and Russo receiving 25%, of the GDP generated by the account. When Sequeira's license was terminated, all of the clients would be transferred to a different rep number ("D2F"), in which only Russo, and not Sequeira, would have access. According to the document marked into evidence as P-12 in evidence, the new rep codes D2E and D2F were created on or about August 15, 2016. Email communications introduced by Sequeira in discovery indicate that on November 9, 2016, Robbins advised Russo that she was having the D2F rep code shut off, and that the former Sequeira clients would be held under rep code of A3G. In a follow-up email dated November 19, 2016, however, Robbins confirmed to Russo that post-suspension the Sequeira accounts would be transferred to the D2F code. November 23, 2016 emails among various individuals with Royal Alliance Group and what appears to be its parent organization, Advisor Group, Inc., confirmed that the former

Sequeira clients would be transferred to D2F. A November 23, 2016 entry by Timothy Maurer in ServiceNet, a computer program used by Affiliated Advisors, indicated:

> Rep Keith Sequeira was terminated. He had a joint code with Rep Chris Russo which is D2E. We need all D2E accounts moved to rep code D2F (a single code created for Russo).
>
> Also, we need any remaining accounts in any/all Keith Sequeira's individual rep codes moved to D2F as well.
>
> Attached is a list of just variable annuities that appear to still be in Keith's individual rep code that need to be moved to D2F. Chris Russo has all proper appointments.

Email communications dated December 15, 2016 indicate that there was an error in the conversion of the commission payments from the former Sequeira clients, as full commissions for those clients had not been paid to Russo, but rather he was paid only 75% per the pre-suspension agreement terms. Once Sequeira was suspended, Sequeira was no longer licensed and thus could not be paid a commission on the accounts, and the entirety of the commissions were to have been paid to Russo.

Using the D2E and D2F system set up at the time of the entry of the agreement would have kept the record of Sequeira's former clients separate from that of Russo's clients. It appears from the evidence presented at trial that Sequeira's former clients were merged with Russo's clients into the A3G account number, rather than being kept segregated in the D2F rep code.

Thus, upon the "trigger event," Sequeira's suspension, the contents of the joint account were transferred, but not to an account numbered "D2F", a separate account containing no other clients, but rather the accounts were transferred to an account that also contained Russo's existing accounts. Russo's existing accounts were thus joined in with the accounts transferred by

Sequeira to Russo. Upon termination of Sequeira's license, Russo was to, and ultimately did received 100% of the GDP generated by Russo's former clients.

No evidence was presented at trial that failure to use the D2F rep code caused the accounting for commissions earned through Sequeira's former clients to decrease. It did require Russo to segregate out from his commission statement the former Sequeira clients from his other client. No evidence was presented at trial that Russo failed to properly account for the former Sequeira clients in performing this task. Russo credibly testified that there was no confusion in determining which of the clients on the list used were Sequeira's former clients, and the use of the other rep code did not cause a problem in his provision of information from which the adjustment period GDC was determined. Additionally, no evidence has been presented that the failure to use the D2F code was the result of actions of Robbins or Russo, or that it was done by any person with the intention of negatively affecting the manner in which the commissions earned through Sequeira's former clients were accounted for. The court cannot find, as urged by Sequeira, that the failure to use the D2F code to track Sequeira's former clients was part of a concerted effort to underpay monies owed to him.

After the APP and APN were signed on August 25, 2016, a letter was generated, signed by Sequeira, advising clients

> I am delighted to inform you that I have today entered into an agreement with Christopher Russo to better serve your investment needs under a new joint number. I will be your primary point of contact and there will be no change to the manner in which your account is operated and managed.
>
> Chris is an experienced Financial Advisor with complementary and new skills. Please take a moment to review his attached bio. I look forward to introducing him to you personally in due course.

Sincerely,

Keith P. Sequeira

The letter was submitted to the Advertising compliance Department on August 16, 2016, and received conditional approval on that same date.

A second proposed email was submitted for approval to the Advertising Compliance Department on November 1, 2016 and approved the following day. The document was admitted into evidence at trial as P14. This communication bore a signature line for Russo, and stated as follows:

> I hope this email finds you and your family in good health.
>
> As you may recall from our previous communications, I am working in partnership with Keith Sequeira. If we have not had the pleasure of speaking yet, I hope that you have received my letter and my bio.
>
> First, I wanted to make sure that you have all of my contact information. Please note that my direct dial phone number at Freedom Capital Management is 732-749-XXXX. Additionally, my cell is 732-829-XXXX, and I welcome your call at either number at any time. You can also reach me via email at XXXXXXXX.com.[3]
>
> Secondly, during the next several weeks I will be conducting in depth reviews of your accounts to better understand your current portfolios and asset allocations. I will be reaching out to each and every one to discuss your goals, review any changes in your future plans and to answer any questions you may have.
>
> Please feel free to call me at any time with your questions or concerns about the strategies we are employing or just to say hello and chat. Along with Keith, I look forward to helping you in any way possible.
>
> Thank you for your trust and confidence, which is an honor I hope to continue to earn.

[3] The court has not provided the full telephone numbers and email address in this decision, but they were provided in the email.

The proposed email had a place at the bottom for the signature of Christopher A. Russo, Senior Vice President and Russo's contact information via phone, email and regular mail was provided under his signature.

A separate letter was submitted to the Advertising Compliance Department also on November 1, 2016, and approved on that same day. This letter, also prepared for the signature of Chris Russo, stated as follows:

> Hello this is Chris Russo from Freedom Capital Management/Royal Alliance. I have entered into a partnership with your advisor, Keith Sequeira. By now you should have received a letter with my bio or an email about the partnership. I have also introduced myself to some of you over the phone. I wanted to make sure everyone has my contact information. My direct line at work is 732-749-XXXX, my cell is 732-829-XXXX, and my email address is XXXXX@fcmadvisor.com. I will be making myself familiar with your accounts in the coming weeks so I better understand your portfolios. Feel free to contact me about the market, the account/s, or just to say hello and chat. I, along with Keith look forward to helping you meet your financial goals in any way I can.
>
> Thank you
>
> Chris
>
> Thanks
>
> Christopher A. Russo
> Senior Vice President

It appears that the above communications were all approved for issuance to Sequeira's former clients as a means of introducing them to Russo. The court finds nothing in these communications that conflicts with or is in violation of the agreement entered into between Sequeira and Russo.

A. Sequeira's claim that late/improper payments were made by Russo in September, October and November, 2016, thus permitted Sequeira to accelerate payment of unpaid principal

Sequeira contends, and provided in evidence, bank account statements reflecting that he did not receive the September 2016 payment from Russo until September 12, 2016, and that the payment was thus 12 days late. Sequeira provided bank statements showing that the October payment was received on October 4, 2016, and the November payment was received on November 2, 2016.[4]

Russo testified that he tried to wire the first payment to Sequeira in late August 2016, but the wiring instructions that he had received from Sequeira were incorrect and the payment did not go through. He testified that once he received corrected wiring instructions, he was able to provide the payment to Sequeira via wire transfer.

The bank records provided by Russo as Exhibit D-8 in evidence showed that a wire transfer was made by Russo to Sequeira on September 8, 2016 in the amount of $1,319.44; a transfer was made to Sequeira on September 30, 2016 in the amount of $1,319.44; and a transfer was made to Sequeira on October 31, 2016 in the amount of $1,319.44.

In a lengthy letter dated August 11, 2017, Sequeira demanded that Russo immediately pay an unpaid principal amount of $157,122.80, which Sequeira had calculated was the unpaid principal then outstanding on the entire three years of payments, plus interest. Sequeira

[4] Sequeira also contends that the December 1, 2016 payment, which was the first payment made after Sequeira's license was suspended, and thus after Russo assumed ownership of 100% of Sequeira's former accounts, was improper because it was made in multiple parts. Sequeira's bank statement reflects that two separate wired payments were received on November 29, and one on November 30, 2016, all prior to December 1, 2016. No claim has been made that the amount paid was less than what was due. There is no provision in the parties' agreements that payment could not be made in this manner, and the court rejects Sequeira's claim that the December 1, 2016 payment was in breach of the agreement because it was made in several parts.

contended that these amounts were then due and owing due to breaches of the agreement by Russo, which included Russo's alleged failure to make the September, October and November 2016 payments when due.

Plaintiff Sequeira has the burden of proving by a preponderance of the evidence that the payments due to him by Russo were paid late, in violation of the terms of the agreement entered into between Russo and Sequeira.

Paragraph 5 of the APN provides:

> Any unpaid Principal under the Note from the date of the Note shall be immediately due and payable upon written demand of the Seller upon the first to occur of the following during the term of the Note:
>
> * * * * *
>
> (c) Buyer breaches any obligations under the Note including, without limitation, the payment when due of any amounts payable under the
> Note. . . .

Paragraph 8 of the APN, titled "Non-Waiver," states,

> [b]uyer agrees that no forbearance or delay by the Seller in exercising its rights hereunder, or in seeking any of its remedies hereunder, shall constitute a waiver of any right or remedy set forth in the Note. Buyer agrees that no partial exercise of any right or remedy under the Note shall preclude any other or further exercise of any right or remedy granted under the Note, any related document or by law.

The emails moved into evidence do not contain any communications between Russo and Sequeira concerning the alleged late payments. The text messages moved into evidence show the following exchange with reference to the September 1, 2016 payment:

> <u>September 8, 2016</u>:
>
> Russo: Hey I sent the $ so u should be getting email I spoke of. U need to give them the bank info just this one time! Let me know if it works.
>
> Sequeira: Done. Will let you know when the funds hit.

Russo: Ok

September 12, 2016:

Russo: Did u get the $

Sequeira: Yes. Today.

Beginning on September 27, 2016, the following exchange took place:

Sequeira: Can you talk?

Russo: Not till Friday

Sequeira: Could you do the monthly transfer tomorrow? I have set up my mortgage for payment on Saturday.

Russo: No I'm away for my 20 year anniversary! Sorry could prob do Friday or Saturday. Did you hear anything yet?

Sequeira: Latest Friday. No.

Russo: It's suppose to be the 1st of every month. It's only the 27th? Did u hear anything?

Sequeira: No.

Russo: Ok but it's the first right? I'll try for Friday but I'm in Turks and Caicos until tomorrow

Sequeira: Yes but last month the transfer on Thursday hit on Monday. Have fun.

Date unknown:

Russo: Transfer done should be there by Monday.

Sequeira: K. Thx. Did u have a good time?

On October 31, 2016, the following exchange took place via text message:

Sequeira: Did you transfer the funds? Your bank takes two business days to complete the transaction.

Russo: Doing today sorry got caught up over weekend.

Ok

Sequeira: K. Thx. Will be in tomorrow. We can wrap up the remaining few accounts.

Russo: $ sent should be there by 11/2 the latest.

On November 1, 2016, Sequeira responded: "have to get something out today. Will have to make the calls tomorrow." Russo responded, "ok."

With reference to the September 1, 2016 payment, Russo credibly testified that he had received incorrect wiring instruction from Sequeira, and could not make the payment until the wiring instructions were corrected. As the first text message exchange on the issue was September 8, 2016, it appears that prior communications between Sequeira and Russo, if any, were made verbally. The court finds Russo's testimony on the issue to be credible. It appears to the court that Russo's bank would not remove the money from his account if it did not have correct wiring instructions, and thus the money was not removed from his account until September 8, 2016. The money was not placed into Sequeira's account until September 12, 2016, however, four days later.

The amounts due for the October 1 and November 1, 2016 payments were paid by Russo's bank to Sequeira's bank prior to the due date. The amounts did not show up on Sequeira's bank statement until after the payment due date.

The court has been presented with no information as to why the amounts did not show up in Sequeira's bank account at the time of transfer. No evidence has been presented as to when his bank received the payment. No evidence has been presented as to why it took several days for the money to show up in Sequeira's account. It may be that his bank has a required wait period to assure clearance of funds, as banks do with checks received. (When a check is deposited, the funds are generally not available for withdrawal until a certain waiting period has passed.)

As reflected in the above communications, neither Sequeira nor Russo indicated that the payments should be made by Russo in some other manner. Paragraph 15(l) of the APA provides:

> Buyer agrees that, upon the occurrence of a Trigger Event, payments under the Agreement (Payments") will be made to Helen D. Sequeira or such other person as Seller may designate ("Beneficiary"). Buyer agrees that Payments will be made to Beneficiary by delivering a certified check to the address for Buyer in section 14 or to such other address as may be communicated in writing to Buyer by Beneficiary.

A "trigger event" did not occur, however, until November 18, 2016, when Sequeira's license was suspended. Neither the APA or the APN contain any provision for the manner in which the payments from Russo to Sequeira should be made prior to the trigger event.

Given the evidence presented, the court cannot find that defendant Russo was delinquent in the September, October or November 2016 payments to plaintiff Sequeira. As noted above, the court finds that Russo could not have paid the funds for the September payment from his account in a timely manner due to the incorrect wire transfer information provided to him, and with reference to the October and November 2016 payments, the monies were paid out by Russo on time. Sequeira has not proven that Russo did not make the payments on time. The court finds that Sequeira is not entitled to an acceleration of the payments, and interest on those payments, due to late payments, as he claims, and on the late payments claim, the court finds that plaintiff has not proven his claim as set forth in Count 1 and Count 9 of the complaint.

A. Sequeira's claim against Russo that he was not paid the entire amount owed to him under the APA and APN, that is, that a downward adjustment should not have been made by Russo, and that Russo did not properly service the accounts of his former clients

1. Claim that Russo did not properly manage the accounts of Sequeira's former clients.

As noted above, as plaintiff in this matter, Sequeira bears the burden of proving the claims he has made against defendant Russo.

In Count 4 and Count 5, Sequeira claims that Russo was not diligent in servicing the accounts of his former clients, and that this caused clients to leave the firm. Sequeira claims that he told Russo to service the accounts exactly as he had done, which involved calling the client at least every two to three weeks, and "have something specific to tell them," that is, take some action in the account within that same time frame. Sequeira indicates that Russo failed to do this, which Sequeira contends caused clients to leave. Russo denies that he had agreed to manage the accounts in this manner.

There is no provision in the APA or the APN providing for Russo to manage the former Sequeira clients' accounts in the manner described by Sequeira. Paragraph 15(a) of the APA provides:

> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter thereof. This Agreement supersedes all prior agreements, understandings, negotiations and representations with respect to the subject matter hereof. No amendment or modification of the terms or conditions of this Agreement shall be valid unless in writing and signed by all Parties hereto.

Sequeira's claim that Russo agreed to manage the accounts the way that Sequeira had managed them is not set forth in the agreement, and is not otherwise set forth in writing between the parties. Sequeira's claim is thus rejected by the court.

Additionally, Sequeira claims that Russo generally mismanaged the accounts of his former clients, and that this mismanagement caused former clients to leave. Russo testified at trial that he began active management of the accounts held by Sequeira's former clients in January 2017, because he did not want to "step on Sequeira's toes," as they were still Sequeira's

clients unless and until Sequeira lost his license. Russo thus began active management of the accounts shortly after Sequeira's license was suspended and Sequeira resigned. It is unclear whether Sequeira was actively managing his client's accounts after entering into the August 25, 2016 agreement up through the date of his suspension. It is noted, however, that the APA provided in paragraph 3 that Sequeira would during the transition period (from the date of the August 25, 2016 contract through the trigger event) provide transition consulting, which did not include "providing advisory or investment related services to clients but rather" would introduce and transition Sequeira's clients to Russo. Account management after the parties signed the August 25, 2016 agreements was Russo's responsibility, and given Russo's testimony it does not appear that the accounts were being actively managed from August 24, 2016 until January 2017. Without expert testimony, however, the court cannot find that this four (4) month period without active management constitutes "mismanagement," as no evidence was presented as to what happened with reference to the contents of those accounts during that time period. Additionally, as noted herein, no competent evidence has been presented that any client left due to "mismanagement" by Russo.

The court heard testimony over a period of many days concerning clients who had left after August 10, 2016 to the end of the one year "adjustment period." Sequeira's claim that clients left because of mismanagement by Russo must be rejected, for several reasons.

Sequeira cannot prove based upon the evidence presented that the accounts were "mismanaged." As indicated by Russo in the written submission provided to the court after the close of evidence, the court would have to have received expert testimony as to what constitutes proper management of an investment account in order to find that Russo had "mismanaged" the accounts of Sequeira's former clients. The court cannot find that the fact that Russo did not

contact the clients in the same manner, with the same information, and as often as Sequeira had done constitutes mismanagement.

With reference to specific clients whom Sequeira claimed had left due to "mis-management" by Russo, none of those clients were produced as witnesses by Sequeira to provide testimony and to be cross examined. It became clear at trial that former clients whom Sequeira claimed had left due to mismanagement had in fact left for other reasons personal to that client. With reference to some of the clients, Sequeira had known, prior to August 10, 2016, that they intended to leave the firm.

Nothing was presented to the court that would permit the court to conclude pursuant to the theory of Res Ipsa Loquitor ("the thing speaks for itself") that the manner in which the accounts were managed by Russo constituted mismanagement of an account, or that clients had left due to something that Russo did or did not do. Rather, the evidence presented would lead to the opposition conclusion. Specific information was presented as to the reasons that certain clients had left, and those reasons had nothing to do with management of the account by Russo. Additionally, the evidence presented showed that ten of Sequeira's clients had left his management in the year prior to August 10, 2016, while Sequeira was managing the accounts, as compared to six during the following "adjustment period" year. Likewise, the court cannot determine by applying the concept of circumstantial evidence that clients had left due to mismanagement by Russo – there are many reasons that a client might choose to leave his/her investment advisory firm, and the proofs presented indicate that in fact clients were motivated by other reasons. [5]

[5] Defendant Russo suggested at trial that clients may have had concerns about staying with the firm after information about Sequeira's suspension had become publicly available through an internet search. The court has no information as to why clients chose to leave, and just as the court cannot reach the conclusion suggested by Sequeira, it also cannot reach the conclusion urged by Russo.

Sequeira relies upon a text message exchange that he had with former client MOS indicating that Russo had not contacted him. Russo testified that in fact he had contacted MOS several times beginning in January 2017, and that he had several nice conversations with him, but ultimately MOS did not respond to messages sent by Russo. The content of the text message from MOS to Sequeira is hearsay; MOS was not called as a witness to testify at trial and thus the court cannot rely upon his alleged statement to Sequeira that he was not contacted by Russo. More fundamentally, there is no evidence presented that an alleged failure by Russo to contact clients caused former Sequeira clients to leave. How could this evidence have been presented at trial by plaintiff? By calling the former clients to testify. Even if they were out of the area, they could have testified via videoconference – the courtroom has technology that would allow testimony to be presented in that manner. The court has no competent evidence presented at trial that former Sequeira clients left due to Russo failing to contact them.

No factual or legal basis was provided at trial for Sequeira's claims, set forth in Count Four and Five of the complaint, that Russo was not diligent in servicing the accounts of Sequeira's former clients, and particularly client MOS.[6] The court finds that plaintiff Sequeira did not prove these claims by a preponderance of the evidence, and thus finds in favor of defendant on these counts of the complaint.

[6] As the documents and testimony relied upon by the parties at trial included personal identifying information concerning individuals who had been clients of Sequeira/Russo and are clients of Russo, the court required the parties to refer to clients in the testimony by the first three letters of the clients' last name (i.e., "MOS") and to redact the documents relied upon at trial in that manner. Both Sequeira and Russo had access to all documents with all identifying information shown in full.

2. Claim by Sequeira that Russo did not pay him the entire amount owed to him under the parties' agreement(s), and thus breached the agreement(s), anticipatorily breached the agreement(s), and breached the implied covenant of good faith and fair dealing in the agreement(s)

The APN contains at paragraph 13 an adjustment mechanism as to the amount that should be paid by Russo to Sequeira. Specifically, the APN provides as follows:

> 13. Adjustment Mechanism. The Buyer and Seller have entered into an Asset Purchase Agreement of even date herewith for the sale of twenty-five percent (25%) of the Business. Buyer and Seller agree that the GDC of the Business is $122,690.66 as of the Closing Date. Although the seller cannot guarantee that twenty-five percent (25%) all of the revenue shall transfer to the Buyer, the Seller agrees to the following adjustment mechanism to the Note: (a) if 90% or more of the GDC attributable to the Purchased Assets at the Closing Date transfers to the Buyer as of 12 months after the Closing Date ("the Adjustment Date"), then this Note shall continue as originally amortized; (b) If less than 90% of the GDC attributable to the Purchased Assets has transferred to Buyer as of the Adjustable Date, then the face value of the Note shall, upon the mutual consent of the Parties, be adjusted downwards from 100%, any payments of Principal shall further reduce the Note, and the balance of the adjusted Note shall be re-amortized over the length of the Note; and (iii) if more than 100% of the GDC attributable to the Purchased Assets at the Closing Date has transferred to Buyer as of the Adjustment Date, then the face value of the Note shall, upon the mutual consent of the Parties, be adjusted upwards from 100%, any payments of Principal shall reduce the Note, and the balance of the adjusted Note shall be re-amortized over the length of the Note.

Sequeira contends that Russo's reduction of the amount to be paid to him constituted an arbitrary reduction in the payments, in violation of the agreement(s) entered into between the parties (Count Three); and a breach of the implied covenant of good faith and fair dealing (Count Ten). Sequeira also claims that Russo anticipatorily breached the contract, in two text messages sent by Russo by Sequeira, on November 22, 2016 and July 25, 2017.

a. Anticipatory breach

An anticipatory breach is a definite and unconditional declaration by a party to an executory contract – through word or conduct – that he will not or cannot render the agreed upon performance. Ross Systems v. Linden Dari-Delite, Inc., 35 N.J. 329, 340-41 (1961).

The November 22, 2016 text message from Russo reads as follows:

> Can't talk now but need to adjust the payment to the $1300 this one and start the $6700 end of December so u get first days of January as it doesn't make sense as I don't get first 100% until mid January. As it is I am fronting cause I'll wire for first if [sic] month and I don't get till mid month and if annuity papers aren't signed and processed I won't get the trails [sic] right away.

Russo and Sequeira then exchanged a series of text messages concerning individual clients, and thereafter had the following exchange:

November 28, 2016:

Russo: The $ goes to the JP Morgan account right?

Sequeira: Yes

Russo: K

November 29, 2016:

Sequeira: Monthly payment is $6,546.72. Total of two pending transfers is $6,246.52. Shortall is $300.20. Pls adjust.

Russo: Oh Shit my 2 looked like a 5 sorry will put in tomorrow.

November 30, 2016:

Sequeira: Money was sent.

On July 25, 2017, Russo and Sequeira had an extended text message exchange in which Russo proposed an adjustment based upon his contention that the GDC had been reduced by more than 10%, and Sequeira's response, indicating that any adjustment would need to be calculated based upon the contractual adjustment mechanism.

As discussed above, Sequeira was paid the entire December 1, 2016 payment prior to December 1, 2016. Sequeira's instruction that payment of the amount due and owing in several part constitutes a violation of the agreement is without basis in the agreement. Sequeira was paid the full amount owed.

The July 25, 2017 communication is not an anticipatory breach. Russo indicated that an adjustment in the amount owed was appropriate under the parties' agreement, and as set forth in this decision, Sequeira has not proved that this was incorrect. Sequeira's claim of anticipatory breach is rejected.

b. Implied covenant of good faith and fair dealing

The implied covenant of good faith and fair dealing applicable to all contracts mandates that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 253 (App. Div. 2002), (quoting Sons of Thunder v. Borden, Inc. 148 N.J. 396, 420 (1997)).

A claim of breach of the covenant of good faith and fair dealing focuses on how a party's unequal bargaining power will give rise to a claim, even if the opposing party has acted in conformance with the express terms of the contract. Seidenberg v. Summit Bank, 348 N.J. Super. at 254-55.

> The implied covenant of good faith and fair dealing has been applied in three general ways, each largely unaffected by the parol evidence rule. First, the covenant permits the inclusion of terms and conditions which have not been expressly set forth in the written contract. The earlier cases, such as Bak-A-Lum, 69 N.J. at 129-30, 351 A.2d 349, and Onderdonk, 85 N.J. 171, 425 A.2d 1057, provide examples of the imposition of absent terms and conditions. The covenant acts in such instances to include terms "the parties must have intended. . .because they are necessary to give business efficacy" to the contract. New Jersey Bank v. Palladino, 77 N.J. 33, 46, 389 A.2d 454 (1978)' see also M.J. Paquet, Inc. v. N.J. Dept. of

> Transp., 335 N.J. Super 130, 141-42, 761 A.2d 122 (App. Div. 2000), certif granted, 167 N.J. 635, 772A.2d 937 (2001). Second, the covenant has been utilized to allow redress for the bad faith performance of an agreement even when the defendant has not breached any express term, as in Sons of Thunder. And third, the covenant has been held, in more recent cases to permit inquiry into a party's exercise of discretion expressly granted by a contract's terms. See Wilson v. Amerada Hess Corporation, 168 N.J. 236, 250, 773 A.2d 1121 (2001); R.J. Gaydos Ins. Agency, Inc. v. National Consumer Ins. Co., 168 N.J. 255, 281, 773 A.2d 1132 (2001); Emerson Radio, 253 F.3d at 170-72.
>
> [Id. at 257.]

No evidence was presented in this matter that the parties had unequal bargaining power. The parties received a draft form of agreement from Robbins, and Sequeira drafted the agreement between the parties, using that form agreement as a template. While the implied covenant of good faith and fair dealing cannot override an express term in a contract, it can require that a part to the contract act in good faith when exercising discretion in performing contractual obligations. Seidenberg, 348 N.J. super. at 254. No evidence was presented at trial that Russo acted in bad faith. It is undisputed that clients left during the adjustment period, and the proofs presented indicate that the job of calculating the reduction in GDC if any, was performed at the request of Robbins by Tim Maurer, Compliance Director at Affiliated Advisors. Plaintiff Sequeira has not proved that Maurer's calculations were incorrect.

No factual or legal basis has been provided that would permit this court to order defendant Russo to pay to plaintiff Sequeira more than Sequeira is entitled to receive, based upon the APA and APN, under the adjustment mechanism agreed to by the parties. No evidence has been presented in this matter that would permit the court to conclude that if Russo did not actually breach the agreement by reducing payments in accordance with the adjustment mechanism, that he should still be required to make full payments to Sequeira under a theory of

breach of the covenant of good faith and fair dealing. Very simply, no equitable basis exists that would require Russo to pay more than is required under the APA and APN.

c. Breach of contract – arbitrary reduction in payment

Sequeira contends that the GDC during the adjustment period, if it was reduced at all, was reduced by less than 10%, and thus no downward adjustment by Russo in the amount to be paid to Sequeira was permitted under the APA and APN. Sequeira indicates that only six clients (FRO, LAP, SCH, GRI, HAS, MOS) left during the adjustment period,[7] and the loss of those accounts does not support a conclusion that a decrease in GDC of more than 10% occurred.[8]

Russo contends that several of Sequeira's former clients, some with large accounts, had left during the adjustment period, which led him to realize that an adjustment in the amount he was paying to Sequeira would have to addressed. Russo offered an adjusted amount, and Sequeira indicated that the parties needed to do the calculation as envisioned in the adjustment clause. Russo tried to work out the calculation himself, as reflected in P-26E, but indicated at trial he was not confidently able to do so and thus Robbins asked Tim Maurer to do the necessary calculation. Russo's calculation of the GDC for the adjustment period was $75,753.38; Maurer's calculation was $78,099.99, a larger amount that was better for Sequeira, as reflected in D-6 in

[7] It was initially claimed that client MIL left during the adjustment period, but evidence presented at trial revealed that MIL left immediately before the August 10, 2016 GDC calculation date, which was based upon the commissions from the one year period leading up to August 10, 2016. (Defendants note that ten clients left during Sequeira's management in the one year period prior to August 10, 2016, thus undermining Sequeira's argument of client loss due to mismanagement by Russo.) With reference to the GDC calculations, it is noted that the income from MIL's accounts would have been included in the August 10, 2016 GDC calculation, but MIL would not have contributed to the GDC during the adjustment period, thus resulting in a decrease in the commissions paid to Russo from the accounts of Sequeira's former clients.

[8] Sequeira testified that he knew after the August 10, 2016 GDC calculation that Mr. and Mrs. GRO, LAP and SCH would be leaving , and that he had mentioned this to Russo. As noted by defendants, this further discounts Sequeira's argument that clients left during the adjustment period due to mismanagement by Russo. Sequeira contends that the expected income from clients during the adjustment period was reduced from $236,000 to $230,000 to cover the loss of income from Mr. and Mrs. GRO and LAP.

evidence. Russo contends that the reduction in GDC was based upon factors other than the loss of individual clients during the adjustment period; Russo presented at trial evidence that ten or more clients left during the year preceding August 10, 2016, and that the commissions generated by those clients during that prior year, due to the clients' departure, would thus not have been generated during the adjustment period.

The parties agreed that Sequeira was paid based upon an adjustment period GDC of $85,414, a larger amount than was calculated by Russo or by Maurer. By letter dated September 27, 2017, marked as D-7 at trial, Russo advised Sequeira that he was reducing the monthly payments. Russo indicated that the GDC at the end of the one year adjustment period was 66% of what had been agreed to in the August 25, 2016 agreement, (which would have resulted in 34% reduction in the monthly payment to Sequeira), but that he was voluntarily reducing the payment by only 21%, and was thus paying to Sequeira 79% of the payment previously calculated.

Sequeira thus contends that he should have been paid for the remainder of the contract payout period based upon a GDC of $122,690, the number contained in the contract. Russo contends that Sequeira was entitled to have been paid based upon the adjustment period GDC of $78,099, but that Russo actually paid him through the conclusion of the payout period based upon a GDC of $85,414.

Sequeira was focused solely upon the six or so clients who left during the one-year adjustment period from August 11, 2016 through August 10, 2017. As proved at trial, however, ten or more clients left during the one year period leading up to August 10, 2016, while Sequeira was managing the accounts. The loss of those clients during the year meant that those clients – unless they left on August 11, 2015, the day that measurement of the GDC began - had generated

commissions during part or all of the one year period that led up to the August 10, 2016 measurement date. For example, if a client left on or around February 10, 2016, that client would have generated approximately six (6) months of commissions that were included in the August 10, 2016 GDC number. Because the client left in February 2016, that client would not have contributed to the GDC during the August 2016 through August 2017 adjustment period. If a client left in July 2016, that client would have contributed to the GDC leading up to August 10, 2016 for almost the entire measurement period – but would have contributed nothing to the GDC from August 11, 2016 through August 10, 2017. Clients who left during the August 11, 2016 through August 10, 2017 period did contribute to the GDC during the adjustment period; the amount that the client contributed was dependent, in part, on when the client left during the adjustment period. The court cannot conclude, based upon the evidence presented, that the GDC loss from the clients who left during the adjustment period is the entire source of loss of GDC.

The APR Rep Profile for Sequeira upon which the agreement was based, marked as P-9 in evidence, reflects a downward trend. The GDC for the current 12 month period ending August 10, 2016 was $122,690.66. The GDC for the 12 month period before that was $134,652.16. The APR Rep Profile thus indicates that Sequeira had suffered a loss in GDC of 8.88%, or $11,961.50, in the year leading up to August 10, 2016.

The document relied upon by Russo in concluding that the GDC had been reduced during the adjustment period by more than 10% was marked as a part of P-20 in evidence at trial, and had also been included in the grouping of email exchanges marked into evidence as P-1a. The calculations cover statement entries from August 11, 2016 through August 10, 2017. Sequeira has failed to provide proof that the information provided by Russo, with the calculations by Maurer, were incorrect.

Even the "Analysis of Understated GDC" marked for identification only (as a demonstrative exhibit), which was prepared by Sequeira to show that the Russo had understated the GDC for the adjustment period, does not support Sequeira's claim. In P-57, Sequeira calculates the first quarter GDC to be $18,597.21, relying upon the document marked as P-27 as a source. Assuming that the commissions from each quarter were approximately the same (a conclusion that the court would not be able to reach, given the lack of evidence on this issue), four quarters of $18,597.21 each in commissions yields a total of $74,388.84 ($18,597.21 x 4) in GDC during the adjustment period – a number that is $3,711 less than the $78,099 GDC calculated by Tim Maurer.

d. Breach of Contract – failure to pay transition consulting services

Sequeira argues in his written summation to the court that Russo failed to pay him for transition consulting services. Sequeira indicates as follows:

> "Russo did not pay TCS. Sequeira's second head [sic] of claim [sic] is for TCS based upon the Monthly Payments for the period from August 2016 through October 2017 (77,291.68) plus Default Interest at 5% for 28 months ($9,017) equals $86,308.68.
>
> [emphasis in original.]

The September, October, and November 2016 payments by Russo to Sequeira were in the amount specified in the APN; at this point Russo owned 25% of Sequeira's book of business. Beginning in December 2016, through September 2017, Russo paid the increased amount, as he had at that point purchased 100% of Sequira's book of business. In September 2017, Russo advised Sequeira that he was reducing the amount to be paid in accordance with the adjustment mechanism; Sequeira disputed that a reduction was warranted.

Paragraph 3 of the APA, titled "Transition Consulting," provides as follows:

> (a) The Seller shall provide the following transition services to introduce the Seller's clients to the Buyer, which transition services shall commence at Closing:
>
> > (i) Seller will introduce Buyer to the clients, referral sources, and affiliates of the Business as Seller's "partner," as reasonably requested by Buyer; and
> >
> > (ii) Seller will use commercially reasonable efforts to assist in the retention of clients of the Business.
>
> (b) Buyer shall, at the expense of Buyer of Business, plan, host, coordinate, and pay for all reasonable costs relating to events at which Buyer is personally introduced by Seller to the clients, business affiliates, and referral sources of the Business.
>
> (c) Buyer and Seller agree that transition consulting is integral for a successful transition between the Buyer and the Seller but that the sum paid for such transition consulting is in addition to the Purchase Price paid of the Purchased Assets and shall be paid separately from the payment of the Purchase Price. The Buyer and Seller agree that the Buyer shall provide the Seller with a 1099 for such transition consulting for any tax year that such moneys are paid to the Seller by the Buyer.
>
> (d) Buyer and Seller agree that the services performed as transition consulting does not include providing advisory or investment related services to clients but rather that it is specifically for introducing and transitioning the Seller's clients to the Buyer.

No evidence was presented at trial as to any particular transition services provided by Sequeira to Russo. The parties exchanged emails/texts for almost one year after they entered into the August 25, 2016 agreements, but no information was presented as to any agreement reached by the parties as to whether the parties had reached an agreement on compensation, if any, Sequeira should receive for transition services, or whether responding to Russo's text/emails constituted transition services. It is unclear how Sequeira concluded that he was entitled to

$86,308.68 for transition services provided as requested in his summation – this claim is not supported by the evidence presented at trial.

Plaintiff Sequeira has not proved by a preponderance of the evidence his claim against defendant Russo, that Russo paid Sequeira less than he was entitled to receive under the agreement. As provided above, the court finds that defendant Russo did not breach the contract with Sequeira as he did not reduce the payments to Sequeira arbitrarily, or in contravention of the terms of the agreement between the parties, and did not anticipatorily breach the contract with Sequeira or breach the implied covenant of good faith and fair dealing. The court thus finds in favor of defendant Russo on Counts Three, Eight and Ten of the complaint.

3. Claims by Sequeira against Robbins for tortious interference with contract (advising Russo not to pay the full amount due and owing, and aiding and abetting Russo to default on contract)

Plaintiff Sequeira claims that defendant Robbins tortiously interfered with his contract with Russo when Robbins advised Russo not to pay the full amount which Sequeira claims was owed to him, and that she aided and abetted Russo's actions in failing to pay the full amount owed. At trial, Sequeira indicated that Robbins tortiously interfered with the contract by instructing Sequeira to conduct conference calls with Russo to Sequeira's clients, and by assisting Russo in the drafting of a letter, marked as P-16 at trial, which was sent out in the Spring of 2017 by Russo to Sequeira's former clients. The letter enclosed a risk questionnaire to be filled out by the client, and advised that Russo intended to reduce the client fee to 1%. Sequeira contended that this devalued the client accounts. The court dismissed the claim that client accounts were devalued at trial on a motion by defendants; in any event, no evidence was presented as to the effect that reducing client fees would have on the account valuation, GDC, or

any other issue in the case, and the court cannot find that this letter constituted tortious interference.[9]

As the agreement between Russo and Sequeira provided for Sequeira to engage in "transition consulting" during the transition period, which included introducing and transitioning Sequeira's clients to Russo, the court cannot find that any instruction by Robbins to Sequeira to do just that to be tortious interference with the contract.

When Sequeira sent his August 11, 2017 letter to Russo contending that Russo would be in breach of the APA and APN if he reduced his payments to Sequeira, Sequeira sent a copy of that letter to "Rita Robbins, President, Freedom Capital Management, LLC.." Robbins was not a party to the APA or APN. Nonetheless, after involving her in the dispute between Sequeira and Russo by sending her a copy of his August 11, 2017 letter, Sequeira contends that Robbins interfered with his contract(s) with Russo by getting involved in the issue of the payment amount that should be paid to him.

Robbins did respond to Sequeira's letter, in an email marked as P-19 in evidence. The court allowed only portions of the document into evidence, for reasons set forth on the record, but the portions introduced show Robbins stating "payments being made a few days late is totally and perfectly acceptable." As noted above, the court has found that the September payment was late, for reasons associated with Sequeira, not Russo, and the October and November payments were not late, and that Russo thus had not breached the parties' agreement. Robbins' opinion on this subject is thus irrelevant to this case.[10]

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[9] It is difficult to imagine how a claim could be made that asking clients to fill out a risk questionnaire constitutes an interference with Sequeira's contract with Russo.

[10] Robbins' opinion also could not have caused the September, October or November 2016 payments to be late; her email was sent in August 2017.

Robbins also indicated, "[y]our agreement with Chris contain an accelerated payment clause for four reasons none of which have occurred." As indicated above, the court has concluded that plaintiff's claim for accelerated payment is without basis, and again, Robbins' opinion on this subject is not relevant to this matter.

Robbins was instrumental in arranging for the calculation under the adjustment mechanism of the agreement. She asked Tim Maurer, Compliance Director of Affiliated Advisors Inc. to run the calculations. He indicated in a September 25, 2017 email that he ran the calculations five times, and found that a reduction in the GDC had occurred during the adjustment period which warranted a reduction of approximately $1,700 per month in the payment made by Russo to Sequeira. Specifically, Maurer stated as follows:

> On Sep 25, 2017, at 6:48 PM, Timothy Maurer timothy@affiliatedadvisors.com wrote:
>
> Hi All,
>
> I did everything the same exact way that I did last time, but, the figure I received was a smidge lower. I ran everything 5 times to see if anything was missing, etc. New total GDC # is about $1700 in Chris' favor.
>
> 1. D2F rep code was created to track Sequeira book purchase calculations. The spreadsheet attached "D2F 8102016 to 8102017" details GDC received to D2F between 8/10/2016 and 8/10/2017. $21,509.47
>
> 2. The spread sheet attached "D2F 8102016 to 8102017 Number 2" shows GDC received by D2F from 8/10/2016 and 8/10/2017 - $1644.29.
>
> 3. Chris combed through his A3G primary rep code (mostly 1A GDC) from 8/10/2016 to 8/10/2016 and selected all Sequeira clients. The first spreadsheet he reviewed was "Russo 8102016 to 8102017 Number 1. Total GDC of Sequeira purchased clients - $54,527.03
>
> 4. "Russo 8102016 to 8102017 Number 2" was the second report for A3G primary rep code commissions (mostly Mutal fund) from 8/10/2016 to 8/10/2017. Total GDC received - $419.20.

Total GDC from 8102016 to 8102017 for #1-4 above = $78,099.99

Timothy Maurer
Compliance Director

Robbins then assisted Russo in the preparation of correspondence to Sequeira, which she advised should be printed out on company letterhead.

"The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice – that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages." Dimaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001), cert denied 205, 205 N.J. 519 (2011). It is difficult to understand Sequeira's argument that Robbins acted with malice – that she interfered in his contractual relationship with Russo without justification. Sequeira obviously believed that Robbins had the right, and perhaps the obligation, to be involved – he sent her a copy of his August 11, 2017 letter as a "cc" recipient. Sequeira has not proved that Russo improperly reduced his payments under the adjustment mechanism, and he thus has not proved that Robbins' "interference" caused the loss of prospective gain, or caused him damages.[11] The court thus finds against plaintiff Sequeira on the claims against Robbins, as set forth in counts 15 and 16 of the complaint.

[11] It is noted that "[s]ince Printing Mart [Morristown v. Sharp Elec. Corp., 116 N.J. 739-751 (1989)], a clear-cut consensus has emerged that if an employee or agent is acting on behalf of his or her employer or principal, then no action for tortious interference will lie." Dimaria Const., Inc. v. Interarch, 351 N.J. Super. at 568. Even if a cause of action by Sequeira against Robbins otherwise existed, it is clear from the evidence presented at trial in this matter than Robbins was acting on behalf of Royal Alliance. Even if Sequeira had successfully proven the elements of the tort of interference with a business relationship, which he has not, he could not be successful on his claim against Robbins in this matter. The correspondence sent by Sequeira, the email communications transmitted to and from Robbins on the issue, and the testimony presented all indicate that Robbins was acting on behalf of Royal Alliance.

4. Request by Sequeira for award of sanctions against Russo for dismissal of counterclaim

Russo had filed a counterclaim against Sequeira, contending that Sequeira had breached the APA by failing to provide transition consulting services as required under the APA, and by failing to use commercially reasonable efforts to assist in the retention of clients. The counterclaim was withdrawn by defendant Russo at the completion of trial. Sequeira requested that sanctions be imposed against Russo for making the breach of contract claim, and then withdrawing that claim, under N.J.S.A. 2A:15-59.1, which provides that all litigation costs and reasonable attorney fees may be awarded to a prevailing party upon a finding by the court that a filing, in this case a counterclaim, was frivolous.

In order to find that a complaint, counterclaim, cross-claim or defense of the non-revailing party was frivolous, under N.J.S.A. 20:15-59.1 the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The proofs presented at trial, specifically communications between Russo and Sequeira, indicate that on at least one occasion, after the transition period but during the adjustment period, Russo had asked Sequeira to reach out and speak to a client in an attempt to keep that client from leaving. During the adjustment period, Russo and Sequeira were in contact with each other concerning the lack of retention of certain clients. The court is not determining that defendant would or would not have been successful on the counterclaim on the proofs presented; that issue

is not before the court because the counterclaim was withdrawn. The court cannot find that the counterclaim was frivolous, the evidence presented reflects that the parties had communications concerning the contractual transition consulting services, including a specific request by Russo to Sequeira on same, and Sequeira's request for an award of sanctions is denied.[12]

III. Conclusion:

For the abovementioned reasons, and as set forth above, the court finds in favor of defendants Russo and Robbins, and against plaintiff Sequeira, on all counts of the complaint.

/s/ Linda Grasso Jones, J.S.C.
HON. LINDA GRASSO JONES, J.S.C.

Dated: March 18, 2020

[12]Sequeira was self-represented in this matter and thus did not incur counsel fees. He presumably did incur litigation costs, which would be compensable under N.J.S.A. 2A:15-59.1 if the court found that the counterclaim was frivolous.