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SHORT FORM ORDER

INDEX NO. 03-30324

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-23-09
ADJ. DATE 1-27-10
Mot. Seq. # 019 - MD
020 - XMD

MICHAEL C. TRIMARCO, Plaintiff, - against - DATA TREASURY CORPORATION, Defendant.	ROBERT J. DEL COL, ESQ. Attorney for Plaintiff 1038 West Jericho Turnpike Smithtown, New York 11787
	McKENNA LONG & ALDRIDGE, LLP Attorneys for Defendant 230 Park Avenue, Suite 1700 New York, New York 10169

Upon the following papers numbered 1 to 103 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 43; Notice of Cross Motion and supporting papers 44 - 76; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 77 - 83; 84 - 103; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint against it is denied; and it is

ORDERED that the cross motion by plaintiff for, inter alia, an order granting summary judgment in his favor on the complaint and dismissing the counterclaims against him is denied.

On April 3, 2002, plaintiff Michael Trimarco (Trimarco) and defendant Data Treasury Corporation (DTC), a Delaware Corporation doing business in New York, entered into a written agreement whereby plaintiff agreed to provide consulting advice and services to DTC. The agreement gave Trimarco an option to convert the consulting arrangement into a full-time employment relationship with DTC, the exercise of which would entitle Trimarco to have 5.5% of DTC stock or warrants from existing DTC warrants issued to Keith DeLucia (DeLucia) transferred to him. Trimarco allegedly exercised this option by correspondence to the Chief Executive Officer of DTC, Keith DeLucia (DeLucia), dated November 20, 2002. Thereafter, on December 31, 2002, Trimarco, DeLucia and DTC entered into a written agreement entitled Amendment to Consulting Agreement. Under such agreement, Trimarco allegedly relinquished certain rights under the consulting agreement, namely, the right to receive DTC stock or warrants from DeLucia and the right to not have his equity position in DTC diluted by the issuance of additional stock as part of an initial

public offering. On that same date, the parties entered into a second written agreement, entitled Grant of Nonqualified Stock Option, granting Trimarco the option to purchase 1,500,000 shares of DTC common stock at a strike price of $0.80 per share.

Trimarco allegedly became a member of DTC's Board of Directors sometime after execution of the consulting agreement. According to DTC, in September 2002, Trimarco was assigned the task of developing a credit card processing business on behalf of a subsidiary owned by DTC named Infinity Payment Systems, Inc. In November 2002, after exercising the option to convert the consulting relationship into a full-time employment relationship, Trimarco allegedly became Chief Operating Officer of DTC. DTC alleges that, rather than devoting his energies to developing the business of Infinity Payment Systems, Trimarco embarked on a course of conduct designed to benefit a company named SkyLink Systems, LLC, which he and his family members hold equity interests, and a company named Veracity Systems, LLC, which he formed for the purpose of competing for in the credit card processing business. It alleges, among other things, that Trimarco attempted to recruit a "key" employee of DTC, Brian Blanchard (Blanchard), to leave his position and run the office of the new competing company.

On April 23, 2003, DeLucia allegedly confronted Trimarco about his alleged activities involving Blanchard and a competing credit card processing business. According to DTC, following the confrontation between Trimaco and DeLucia, Trimarco's employment with DTC was terminated. By correspondence dated May 5, 2003, Trimarco asked to meet with DeLucia as soon as possible "so I can continue my service with Data Treasury." DTC alleges that sometime in May 2002 it sent a letter, as well as a proposed Employment Termination Agreement, to Trimarco indicating his employment was terminated. Trimarco alleges he resigned as Chief Operating Officer and board member of DTC by letter dated May 10, 2002. Thereafter, by correspondence dated September 9, 2003, Trimarco advised DTC that he was exercising his option under the December 31, 2002 agreement to purchase shares of DTC stock, and attached a check in the sum of $80 for the purchase of 100 shares. The letter states, in part, that the purchase constituted a "partial exercise without prejudice to any future exercise or conversion," and that he was retaining the right to exercise additional option shares. DTC refused to issue shares of stock to Trimarco.

In December 2003, Trimarco commenced this action against DTC. The first cause of action in the complaint alleges DTC breached the December 2002 stock option agreement and seeks damages "equal to the value of the right to purchase 1,500,000 shares of DTC stock at $.80 per share exercisable anytime, in whole or in part, for a period of 10 years." The second cause of action seeks a judgment declaring that the December 2002 stock option agreement is legally valid and enforceable against DTC. DTC's answer asserts various affirmative defenses and interposes eight counterclaims. Briefly stated, DTC alleges Trimarco failed to carry out the "lawful instructions of management" to manage DTC and certain "business divisions" of DTC, including Infinity Payment Systems, and that such failure caused it "irreparable damages." It alleges Trimarco diverted corporate assets and used confidential information and business relationships for his own benefit in violation of the fiduciary duties owed as an employee, director and officer of the corporation. In addition to seeking damages, DTC seeks a declaration that its termination of Trimarco and its rescission of the equity interest previously granted to him were proper.

DTC now moves for an order granting summary judgment dismissing the complaint and declaring that the option agreement is void. DTC argues, among other things, that Trimarco breached the duty of loyalty owed as an officer and director by diverting corporate opportunities and, therefore, it should be granted equitable relief in the form of a judgment voiding the parties' option agreement. Alternatively, DTC argues that Trimarco breached the duty of loyalty owed as an employee and, under the faithless servant doctrine, forfeited his right to compensation. DTC's submissions in support of the motion include copies of the pleadings, the consulting agreement, the amendment to the consulting agreement, the option agreement, printouts of e-mails, and excerpts from the deposition testimony of Trimarco, DeLucia, and Blanchard.

Trimarco opposes the motion and cross-moves for, inter alia, an order granting summary judgment in his favor on the complaint and dismissing the counterclaims against him. Trimarco's submissions on the motions include copies of the parties' written agreements, his letter of September 9, 2003 seeking to exercise the option agreement, excerpts from the deposition transcripts of DeLucia and Claudio Ballard, and tax returns for DTC and Infinity Payments Systems. Trimarco also submits affidavits of Alfred Wanderlingh and Jeffrey Levine, and his own affidavit. Trimarco denies most of DTC's allegations in this litigation, including the claims that Infinity Payment Systems was a subsidiary of DTC and that Blanchard was a DTC employee, and asserts that he faithfully performed his obligations under the consulting agreement. Trimarco alleges that, due to his corporate expertise, he successfully organized a restructuring of DTC that resulted in a dramatic increase in its profitability and share price. He alleges that Infinity Payment Systems, in fact, was a joint business venture outside of DTC involving him and DeLucia that was capitalized with a $50,000 investment by a third party, Marc Holzwanger, and that Blanchard was an employee of Infinity. He asserts that under the terms of the parties' agreement, his interest in the stock warrants vested in November 2002, when the consulting arrangement ended and he became an employee of DTC, and that the December 2002 stock option agreement was simply a mechanism for transferring the shares to him. He further asserts that DTC, in fact, has no real business operations, other than enforcing its patents, and that its aim in this litigation is to prevent him from becoming a major shareholder in the company.

In its reply, DTC argues the consulting agreement "by its terms" was terminated when Trimarco exercised the option to convert the consulting arrangement into an employment relationship, and that the parties' contractual relationship is governed by the option agreement. It alleges that Trimarco's disloyalty began at least as early as September 2002 and, therefore, he is not entitled to any compensation or equity interest in the corporation. Trimarco, by his reply, argues that the warrants, though vested, were converted to a stock option to reflect DTC's new structure after the so-called cramdown. He asserts that while DTC was essentially worthless when the consulting agreement was executed in April 2002, the substantial increase in its value after the restructuring meant that the warrants previously granted would have entitled him to an unconscionable profit, namely a 50% ownership interest in the business. According to Trimarco, the warrants held by DeLucia, Ballard and Sheppard Lane, counsel for DTC, also changed to similar stock options to reflect the new corporate structure. It is noted that the sur reply papers filed by the parties were not considered by the Court in its determination of the motions (*see* CPLR 2214 [c]).

Section 1 of the consulting agreement states Trimarco, also referred to as Consultant, agrees to provide services "in connection with [DTC's] operations and development, including but not limited to acquisitions, mergers, financings, strategic development plans and marketing, business ventures, alliances, and investment activities, and to perform related services in [DTC's] business from time to time." Section 3 of the agreement states, except as set forth in Section 8, Trimarco's "sole compensation" for his consulting services "shall be the issuance of shares of DTC common stock ('Stock') or the grant of warrants to purchase DTC stock ('Warrants'), which warrants shall have a three (3) years [sic] term and an exercise price of $.00001cents . . . or any combination of DTC Stock and DTC Stock reserved for DTC Warrants that equals 1/2 of one percent of the issued and outstanding DTC Stock and DTC Stock reserved for DTC Warrants as of the date of this agreement (the 'Percentage of Equity'), which Percentage of Equity shall be non-dilutable until the initial public offering of DTC ('IPO'), or sooner if a majority of the holders ('Majority') decide to rescind the non-dilution treatment of their equity." It states, in part, that the shares of stock or warrants "shall vest in equal 1/12 portions" over the term of the agreement. Section 3 further states that in the event the consulting arrangement is terminated for cause by DTC, referred to as the Company, "all compensation earned to date will be cancelable at the sole discretion of [DTC], and no further compensation or benefits of any kind shall be payable to consultant hereunder; provided, however, that [Trimarco] shall continue to be bound by the terms and obligations of this agreement, other than Section 1."

Section 8 of the consulting agreement, titled "Option to Convert," states as follows:

> The Consultant at any time after six (6) months from the commencement date of this agreement shall have the option to convert his consultant's relationship to that of a full time employment relationship with the Company ("Option to Convert"). In the event Consultant elects to exercise this Option to Convert, then this agreement shall terminate, and the former consultant shall then become an employee of the Company ("Employee"), who shall be employed as a Senior executive with the Company. The Employee on exercise of this Option to Convert shall receive a one time transfer to him of an additional Five and One Half (5.5%) percent of DTC Warrants from existing DTC Warrants theretofore issued to Keith DeLucia . . . In addition, the consultant will receive a per annum salary of $125,000, all of which sum shall be deferred until the Company has revenue at an annual rate of Three (3) million dollars, or has raised Three Million dollars in its PPF, or has had a Ten (10) million dollars [sic] IPO, whichever is sooner.

The consulting agreement further states, at Section 4, that "Consultant's obligations under this agreement other than the provisions of Section 1 shall not be affected: (i) by any termination of Consultant's consulting arrangement, including termination upon the Company's initiative; nor (ii) by any change in Consultant's position, title or function with the Company; nor (iii) by an interruption in the consulting arrangement during which Consultant leaves and rejoins the

Company." Section 5 states "Consultant shall at all times, both during and after any termination of the consulting arrangement . . . maintain in confidence and shall not, without the prior written consent of the Company, use, except in the course of performance of Consultant's duties for the company, disclose or give to others any fact or information . . .not generally available to the public including but not limited to information and facts concerning business plans . . . inventions . . . or any other scientific, technical, trade or business secret or confidential or proprietary information of the Company." Property of DTC is defined in Section 6 as "all inventions, methods, processes and formulae . . . which may be used in the business of the Company, whether or not reduced to practice and whether patentable, copyrightable or not, which Consultant may conceive, reduce to practice or develop during the Term [of the agreement], alone or in conjunction with another or others . . . whether at the request or upon the suggestion of the Company, or otherwise."

Pursuant to Section 2, the "term" of the consulting agreement commenced the week of April 3, 2002 and continues through April 3, 2003, but could be extended "from time to time by mutual agreement." The agreement further states Consultant's term "shall be terminated upon the first to occur of the following : (i) immediately upon Consultant's death; or (ii) by the Company: (A) for Cause, as defined herein; or (B) subject to Section 3 hereof, without Cause." "Cause" is defined in the agreement as including "a material breach of any of Consultant's obligations under Sections 1, 5, 6 or 7 hereunder, the refusal of the Consultant to follow lawful directions of senior management or the Board . . . [and] willful or gross (not simple) negligence." It also states the right of DTC to terminate Trimarco's term "shall be effectuated by written notice sent to Consultant by the Company." In addition, the consulting agreement states that it may be modified and amended only by written agreement, and that the rights and obligations of the parties to such agreement shall be construed in accordance with New York law.

The Amendment to Consulting Agreement states, in relevant part, that "Consultant and the Company desire to amend the [Consulting] Agreement to eliminate the grant of Equity Securities and the Anti-Dilution Rights thereunder." It further states as follows:

> Whereas no Equity Securities were ever issued to [Trimarco] pursuant to the Agreement or transferred to [Trimarco] by DeLucia . . .Whereas [Trimarco] "has determined that it is in the best interests of the Company for [Trimarco] to forego and eliminate (i) his rights to receive any Equity Securities pursuant to the Agreement, and (ii) the Anti-Dilution rights . . . for good and valuable consideration . . . The Consultant hereby foregoes his rights to receive Equity Securities (or any other equity securities in lieu thereof, whether from the Company or from Delucia) and his Anti-Dilution Rights under the Agreement and, accordingly, the Consultant's rights to receive such Equity Securities and Anti-Dilution Rights under the Agreement are hereby eliminated. Accordingly, any agreement or covenant by the Company to issue Equity Securities to Consultant pursuant to the Agreement shall be void, *ab initio*, and have no force or effect.

As with the Consulting Agreement, the Amendment to Consulting Agreement provides that it shall be construed and enforced in accordance with New York law. Moreover, it states that if any term or provision of the Consulting Agreement is contradictory to or inconsistent with any term or provision therein, "then the terms and provisions of this Amendment shall in all events control and such contradictory or inconsistent term of provision of the [Consulting]Agreement shall be null and void. All Terms and provisions of the [Consulting] Agreement not expressly amended shall remain in full force and effect."

The non-qualified stock option agreement of December 2002 states, in relevant part, that "[t]he Company hereby grants you the right and option to purchase (the 'Option') an aggregate of One Million Five Hundred Thousand (1,500,000) shares of Common Stock of the Company (the 'Option Shares') at a price of $0.80 (eighty cents) per share (the 'Exercise Price'). The Option is not intended to be an incentive stock option within the meaning of section 422 of the Internal Revenue Code." This agreement states that the stock option can be exercised "at any time and from time to time, in whole or in part," and that the unexercised portion of the option automatically terminates 10 years from the date of such agreement. It further states that unless a registration statement under the Securities Act of 1933 is in effect, Trimarco, upon exercise of the option, will "(a) represent and warrant to the Company and agree . . . in writing that (i) the Option Shares then purchased by you pursuant to the Option are being acquired for your own account, for investment only and not with a view to the resale or distribution thereof, and (ii) that any subsequent offer for sale or sale of such Option Shares shall be made either pursuant to (x) a registration statement under an appropriate form under the Securities Act . . . or (y) a specific exemption from the registration requirements of the Securities Act." The agreement states that the stock option is not transferrable other than by will or the laws of descent and distribution, and that it may only be exercised by Trimarco during his lifetime. In addition, it states that the grant of the stock option is not a contract of employment, that "the terms of [Trimarco's] employment shall not be affected hereby or by any agreement referred to herein except to the extent specifically so provided herein or therein," and that nothing in such agreement "shall be construed to impose any obligation on the Company or on any subsidiary . . . to continue [Trimarco's] employment" or to impose on obligation on Trimarco to continue his employment. The non-qualified stock option agreement also contains a provision stating that it shall be construed and enforced in accordance with the laws of Delaware.

To establish a prima facie case of entitlement to judgment as a matter of law, a party moving for summary judgment must come forward with evidentiary proof in admissible form demonstrating the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

"[D]irectors and officers of a corporation, in the performance of their duties, stand in a fiduciary relationship to their corporation" (***Yu Han Young v Chiu***, 49 AD3d 535, 536, 853 NYS2d 575 [2d Dept 2008]; *see* ***Schachter v Kulik***, 96 AD2d 1038, 466 NYS2d 444 [2d Dept 1983], *appeal*

dismissed 61 NY2d 758 [1984]). As a fiduciary, a director or officer owes the corporation an undivided duty of loyalty and "may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of [his or her] corporation" (***Foley v D'Agostino***, 21 AD3d 60, 66, 248 NYS2d 121 [1st Dept 1964]). Thus, absent consent of the corporation, an officer or director thereof may not divert or exploit a business opportunity for his or her own benefit that would be deemed an asset of the corporation (*see* ***Yu Han Young v Chiu***, 49 AD3d 535, 853 NYS2d 575; ***Laro Maintenance Corp. v Culkin***, 267 AD2d 431, 700 NYS2d 490 [2d Dept 1999]; ***Alexander & Alexander of N.Y. v Fritzen***, 147 AD2d 241, 542 NYS2d 530 [1st Dept 1989]). Likewise, a person acting as an agent or employee of another "is prohibited from acting in any manner inconsistent with his [or her] agency or trust," and has an obligation to exercise at all times "the utmost good faith and loyalty" in the performance of his or her duties (*see* ***Lamdin v Broadway Surface Adv. Co.***, 272 NY 133, 138, 5 NE2d 66 [1936]; *see* ***Western Elec. Co. v Brenner***, 41 NY2d 291, 392 NYS2d 409 [1977]; ***30 FPS Prods., Inc. v Livolsi***, 68 AD3d 1101, 891 NYS2d 162 [2d Dept 2009]; ***Maritime Fish Prods. v World-Wide Fish Prods.***, 100 AD2d 81, 474 NYS2d 281 [2d Dept], *appeal dismissed* 63 NY2d 765 [1984]). Although an agent or employee may incorporate a competitive business prior to his or her departure from the agency relationship, he or she breaches the fiduciary duty owed to the principal if the principal's time, facilities or proprietary secrets are used to build the competing business (*see* ***Wallack Frgt. Lines v Next Day Express***, 273 AD2d 462, 711 NYS2d 891 [2d Dept 2000]; ***Laro Maintenance Corp. v Culkin***, 267 AD2d 431, 700 NYS2d 490; ***Royal Carbo Corp. v Flameguard, Inc.***, 229 AD2d 430, 645 NYS2d 18 [2d Dept 1996]; ***Maritime Fish Prods. v World-Wide Fish Prods.***, 100 AD2d 81, 474 NYS2d 281).

A person who owes a duty of fidelity to a principal and is faithless in the performance of his or her services is considered to have committed a fraud upon the principal and, under the faithless agent rule, generally forfeits any right to compensation for his or her services (*see* ***Feiger v Iral Jewelry, Ltd.***, 41 NY2d 928, 394 NYS2d 626 [1977]; ***Murray v Beard***, 102 NY 505, 7 NE 553 [1886]; ***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]). The duties of the agent, of course, are defined by the terms of the agreement that created the agency relationship (***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 101, 840 NYS2d 378). Under the faithless agent rule, where an agent or employee engages in repeated acts of disloyalty, he or she must account to the principal for any secret profits, and a complete forfeiture of compensation, deferred or otherwise, is warranted (*see* ***Lamdin v Broadway Surface Adv. Co.***, 272 NY 133, 138, 5 NE2d 66; ***William Floyd Union Free School Dist. v Wright***, 61 AD3d 856, 877 NYS2d 395 [2d Dept 2009]; ***American Map Corp. v Stone***, 264 AD2d 492, 694 NYS2d 704 [2d Dept 1999]).

The aim of a court interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (***Joseph v Creek & Pines, Ltd.***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see* ***Petracca v Petracca***, 302 AD2d 576, 756 NYS2d 587 [2d Dept 2003]; ***Fetner v Fetner***, 293 AD2d 645, 741 NYS2d 256 [2d Dept 2002]; ***Partrick v Guarniere***, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). It is a cardinal rule of construction that a court should not interpret a contract in such a way

as would leave one of its provisions substantially without force or effect (*see* ***Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.***, 63 NY2d 396, 482 NYS2d 465 [1984]; ***Corhill Corp. v S.D. Plants***, 9 NY2d 595, 217 NYS2d 1 [1961]; ***Petracca v Petracca***, *supra*; ***Malleolo v Malleolo***, *supra*; ***John E. Andrus Mem. Home v De Buono***, 260 AD2d 635, 688 NYS2d 687 [2d Dept], *lv denied* 93 NY2d 813, 697 NYS2d 561 [1999]). As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assocs. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see* ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *see* ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Furthermore, contracts generally remain separate "unless their history and subject matter show them to be unified" (***Nancy Neale Enters. v Eventful Enters.***, 260 AD2d 453, 453, 688 NYS2d 207 [2d Dept 1999]). Separate contracts relating to the same subject matter and executed simultaneously by the same parties, however, may be construed as one agreement (*see* ***Mayo v Royal Ins. Co. of Am.***, 242 AD2d 944, 662 NYS2d 654 [4th Dept 1997]; ***Williams v Mobil Oil Corp.***, 83 AD2d 434, 445 NYS2d 172 [2d Dept 1981]). Even if executed on separate dates, separate contracts designed to effectuate the same purpose and entered into by the parties as part of the same transaction should be read together (*see* ***Nau v Vulcan Rail & Constr. Co.***, 286 NY 188, 36 NE2d 106 [1941]; ***Doldan v Fenner***, 309 AD2d 1274, 765 NYS2d 401 [4th Dept 2003]). "In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances" (***Rudman v Cowles Communications***, 30 NY2d 1, 13, 330 NYS2d 33 [1972]).

DTC's motion for summary judgment dismissing the complaint and for a declaration that the non-qualified stock option is void is denied, as is Trimarco's motion for summary judgment in his favor on the complaint and counterclaims. Here, both DTC and Trimarco failed to show the deposition transcripts relied upon in their respective motions either were signed by the witnesses examined or, though forwarded to the witnesses for their review, were not signed and returned by such witnesses within 60 days (*see* CPLR 3116). Absent proof of compliance with CPLR 3116, such depositions are not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). Similarly, the printouts of e-mail messages allegedly exchanged by the parties, which were not authenticated, were not in admissible form. The affidavits of Alfred Wanderlingh and Jeffrey Levine, which were sworn to in Tennessee and Florida, also were not in admissible form, as they were not accompanied by certificates of conformity (*see* CPLR 2309 [c]).

Contrary to the conclusory assertions of counsel, it cannot be determined from the admissible evidence in the record whether the parties intended that the consulting agreement and the stock option agreement be treated as mutually independent contracts or that they be construed together

(*see* ***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 840 NYS2d 378; ***Williams v Mobil Oil Corp.***, 83 AD2d 434, 445 NYS2d 172). Although Trimarco asserts the non-qualified stock option was merely a mechanism for transferring an equitable interest in the corporation earned as a result of his consulting services, the inconsistent provisions in the consulting agreement and the amendment to the consulting agreement create an ambiguity as to the parties' intentions with respect to his compensation as a consultant and as an employee of DTC (*see* ***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 840 NYS2d 378). The parties' submissions also raise a triable issue as to whether the consulting agreement, in fact, was extinguished when Trimarco executed the option to become an employee (*see* ***Millenium Partners, LP v Lindebaum***, 73 AD3d 436, 899 NYS2d 599 [1st Dept 2010]). Furthermore, DTC failed to submit admissible evidence establishing prima facie that Trimarco breached the fiduciary duty owed as a director and officer by diverting and exploiting business opportunities that belonged to it (*see* ***Commodities Reasearch Unit [Holdings] v Chemical Week Assoc.***, 174 AD2d 476, 571 NYS2d 253 [1st Dept 1991]), or that he breached the duty of loyalty owed as an employee by failing to develop the business of Infinity Payment Systems and building a competing company using DTC's time or resources (*see* ***Wallack Frgt. Lines v Next Day Express***, 273 AD2d 462, 711 NYS2d 891; *cf.* ***30 FPS Prods.., Inc. v Livolsi***, 68 AD3d 1101, 891 NYS2d 162; ***Maritime Fish Prods. v World-Wide Fish Prods.***, 100 AD2d 81, 474 NYS2d 281). Significantly, DTC's submissions fail to demonstrate as a matter of law that Infinity Payment Systems was a subsidiary corporation. It is noted that a party seeking summary judgment may not rely on evidence submitted for the first time in its reply papers to cure a deficiency in its initial moving papers (*see*, ***GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.***, 35 AD3d 535, 828 NYS2d 409 [2d Dept 2006]; ***Rengifo v City of New York***, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]; ***Migdol v City of New York***, 291 AD2d 201, 737 NYS2d 78 [1st Dept 2001]). Questions regarding the nature of the parties' bargain, the duties owed under the agreement or agreements, and whether DTC or Trimarco breached such duties, therefore, must be resolved by the trier of fact (*see* ***Duane Reade, Inc. v Cardtronics, LP***, 54 AD3d 137, 863 NYS2d 14 [1st Dept 2008]).

Dated: 30 June 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION