[* 1]

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON MARCH 19 2012
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF WESTCHESTER**
**COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,**
**Justice.**

----------X

UMS SOLUTIONS, INC., d/b/a UNIVERSAL ULTRASOUND and UNIVERSAL MEDICAL SYSTEMS, INC.,

Plaintiffs,

-against–

BIOSOUND ESAOTE, INC., JEFF FISHEL, MICHAEL COLLINS, KEVIN GOUVIN, DR. PAUL BRAZZELL, VETEL DIAGNOSTICS, INC., and BOOTHROYD IMAGING SOLUTIONS, INC., d/b/a CANADA BOOTHROYD IMAGING SOLUTIONS (BIS), ESAOTE CANADA, BOOTHROYD IMAGING SOLUTIONS, CANADIAN VETERINARY IMAGING INC., and BIS, INC.,

Defendants,

----------X

Index No. 11590/10
Motion Date: 2/10/12
SEQ # 008

**DECISION & ORDER**

FILED
MAR 19 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Scheinkman, J:

Defendant Vetel Diagnostics, Inc. ("Defendant" or "Vetel") renews its prior motion to dismiss the Supplemental Verified Complaint based on the lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Plaintiffs UMS Solutions, Inc. d/b/a Universal Ultrasound and Universal Medical Systems, Inc. ("Plaintiffs" or "UMS")) oppose the motion.

## FACTUAL AND PROCEDURAL HISTORY

This action arises out of (1) the termination of Plaintiffs as the exclusive United States distributor of veterinary ultrasound diagnostic and radiography equipment made by Defendant Biosound Esaote, Inc. ("Biosound");[1] (2) the breach of certain restrictive covenants

[1]The Court understands that this aspect of the action has been settled as against Biosound and a stipulation of discontinuance dated December 2, 2011 was so-ordered by this Court and filed on February 17, 2012.

contained in the sales representative agreements Plaintiffs entered into with various defendant sales representatives including, Jeff Fishel, Michael Collins and Kevin Gouvin; and (3) Defendant Vetel's tortious interference with those restrictive covenants and unfair competition based on its wrongful use of Plaintiffs' proprietary information and wrongful solicitation of Plaintiffs' customers, distributors and employees in contravention of those restrictive covenants.

In a Decision & Order dated December 13, 2010 (the "December Decision"; the substance of which is incorporated herein by reference), this Court denied, with leave to renew, Vetel's motion to dismiss for lack of personal jurisdiction following the jurisidictional discovery ordered by this Court in its December Decision. With jurisdictional discovery now complete, Vetel renews its motion to dismiss for lack of jurisdiction.

## VETEL'S CONTENTIONS IN SUPPORT OF MOTION

In support of its motion, Vetel submits two affidavits from its President, James K. Waldsmith, DVM: (1) the affidavit he submitted in connection with Vetel's first motion to dismiss for lack of personal jurisdiction; and (2) the affidavit he prepared for the purpose of this renewed motion. Vetel also submits an affidavit from Steve Garner, an affirmation from its counsel, Jessica J. Kastner, Esq., and a Memorandum of Law. Although this Court already recited the factual assertions made by Waldsmith in his original affidavit, they will be summarily repeated here for completeness. In his affidavit, Waldsmith avers that Vetel was incorporated in California in 1999 and is engaged in the business of manufacturing digital radiography systems and distributing veterinary ultrasound systems, thermal imaging systems, and diagnostic imaging software, primarily in the equine area (Affidavit of James K. Waldsmith, DVM, sworn to August 5, 2010 ["Waldsmith Aff."]).

Waldsmith avers that Vetel is not authorized to conduct business in New York, maintains no offices, employees, or bank accounts in New York, has no employees, property or telephone listing in the State of New York, does not regularly conduct or solicit business in New York, and does not derive substantial revenue from goods used or consumed or services rendered in New York (Waldsmith Aff. at ¶¶ 8-16). He further asserts that

> [t]he sum and total of Vetel's business and contact within the State of New York for the last ten (10) years are as follows:
> a. In the past ten (10) years, Vetel has sold equipment to only three (3) end users in New York[2] and
> b. In 2008, Vetel entered into a 90-day contract with Plaintiff Universal Medial Systems, Inc. As evidence of Vetel's intention not

---

[2]According to Waldsmith, none of the sales were the result of sales activities physically located in New York and, instead, were consummated at trade shows or similar events occurring outside of New York (Waldsmith Aff. at ¶ 6).

> to submit itself to the jurisdiction of the State of New York, the contract provides that any dispute be submitted to arbitration in the State of Texas. This contract resulted in zero business being conducted in New York (*id.* at ¶ 5).

According to Waldsmith, neither Vetel's website nor its Facebook page allows customers to purchase goods or services over the Internet.

With regard to co-defendants, Michael Collins ("Collins"), Steve Fishel ("Fishel") and Kevin Gouvin ("Gouvin"), Vetel asserts that any communications with the co-defendants occurred outside New York and none of the sales people mentioned sells equipment in New York. While Waldsmith concedes that Vetel uses the services of one independent sales representative in New York (Steve Garner) (Waldsmith Aff. at ¶ 22), Waldsmith asserts that (1) Garner's territory encompasses New England, New York, New Jersey, Pennsylvania, Delaware, Maryland and Washington, D.C., (2) Garner is not a Vetel employee, (3) Garner has no authority to bind Vetel to any agreements, and (4) Garner has brought in only one transaction to Vetel since 2005 up to the filing of the action in May 2010, which involved a shipment of equipment from California to New York (Waldsmith Aff. at ¶¶ 23-27).

In his renewed affidavit, Waldsmith avers that "Vetel does not purposefully advertise within the State of New York" (Affidavit of James K. Waldsmith, DVM, sworn to October 31, 2011 ["Waldsmith Renewed Aff."] at ¶ 3). He asserts that Steve Garner "is an independent sales representative for Vetel and is compensated by commission only" (*id.* at ¶ 4). He confirms his prior representations concerning the sum total of three sales made by Vetel to customers in New York in the 10 years prior to the filing of this action (although one of the sales occurring in 2009 involved the product being shipped to Puerto Rico and, therefore, Vetel disputes that the sale should be counted as a New York sale). These sales accounted for the following percentages of Vetel revenue – 2005: 0%; 2006: 1.07%; 2007: 3.9%; 2008: 0%; 2009: 0% (excluding the Puerto Rico sale, 1.8% if the sale is included); January - April 2010: 0% (*id.* at ¶ 4). He identifies the customers of these sales as Rick Lesser, Center for Veterinary Care P.C., and American Veterinary Supply (though the sale was ultimately made to an end user/customer in Puerto Rico). He avers that the only sale involving digital radiography equipment was the one made in 2007 to the Center for Veterinary Care P.C. He contends that Vetel "learned of any New York customer leads, including the Center for Veterinary Care, Dr. Amy Todd, and Dr. George Kramer, through proper and lawful means, such as trade shows, referrals from prior customers and membership lists from professional veterinary associations" (*id.* at ¶14), although "Vetel does not obtain membership lists from the New York State Veterinary Medical Association" (*id.* at ¶ 15).

Waldsmith contends that the customers in Vetel's industry are

> readily ascertainable based on knowledge of the industry and public information. In particular, any person can go to a number of public websites and obtain the names and contact information for

> any registered veterinarian. Specifically, the website for the American Veterinary Medical Association (AVMA) provides a list of all registered veterinarians in North America, the website of the American Association of Equine Practitioners (AAEP) provides a list for all equine practitioners in North American, and the website for the American College of Veterinary Radiologists (ACVR) provides a list of all board certified veterinary radiologists in the world. Those websites are accessible to the public, and Vetel often obtains leads for customers from these websites (*id.* at ¶ 16).

Waldsmith asserts that a firm named "Equipment Outreach is an entity that is separate and distinct from Vetel. At no time, has Equipment Outreach and Vetel ever had an agent/principal relationship, subsidiary/parent relationship or any other corporate affiliation" (*id.* at ¶ 17).

With regard to the relationship between Vetel and UMS, Waldsmith attests that during 2008 and early 2009, the companies offered bundled products (a product from Vetel and a product from UMS were offered together) to customers, but all of these sales occurred outside of New York. He avers that he only made one trip to New York in 2004 on unrelated business and since the time this action was commenced, Vetel has had not active partnership agreements with any entities in New York (*i.e.*, its relationship with UMS ended in 2009 and its relationship with AFP ended in 2008).

In the affidavit Garner submitted on the first motion, Garner confirms that as Vetel's independent, non-exclusive[3] sales representative covering the territories of New England, New York, New Jersey, Pennsylvania, Delaware, Maryland and Washington, D.C., he is not a Vetel employee and has no authority to bind Vetel to any agreement on Vetel's behalf and actually represents other businesses that are in direct competition with Vetel (*id.* Affidavit of Steve Garner, sworn to September 9, 2010 at ¶¶ 1-5). He avers that as of the date this lawsuit was filed, April 29, 2010, he had brought only one sale to Vetel in 2005 involving a sale of equipment to California (*id.* at ¶ 7). And based on an excerpt from Garner's deposition transcript, between 2005 and the date this lawsuit was filed, Garner had only demonstrated Vetel's digital radiography products to one customer, Dr. Ron Vin, in Millbrook, New York (Affirmation of Jessica Kastner, Esq. dated October 31, 2011, Ex. F, Garner Tr. at 90).

Vetel's counsel submits an affirmation the purpose of which is to attach the Verified Complaint, the December 2010 Decision, the affidavits of Waldsmith and Garner, excerpts from the deposition transcripts of Garner and Peter Brunelli and emails between Brunelli and Waldsmith in February 2007 and December 2008.

In its memorandum of law, Vetel reiterates all the facts set forth in the Garner and Waldsmith Affidavits to show that Vetel neither committed a tortious act outside New York

---

[3]In this regard, Garner was free, and actually did, sell veterinary products on behalf of other companies.

causing injury in New York or that it is doing business here. Vetel also rebuts the facts relied on by Plaintiffs in their prior opposition to show jurisdiction. For example, Plaintiffs' contention that Fishel or Collins, in violation of their restrictive covenants, may have transmitted information to Vetel regarding Plaintiffs' customers, Dr. George Kramer, Dr. Amy Todd and Dr. Ron Vin – has been rebutted by the following jurisdictional discovery: (1) Brunelli's admission at his deposition that no documents or emails have been produced showing that Fishel or Collins transmitted any lead for any of Plaintiff's New York customers, including Dr. Ron Vin, Dr. George Kramer or Dr. Amy Todd (Def's Mem. of Law at 5, *citing* Kastner Aff., Ex. H, Brunelli Tr. at 106-108); (2) an email produced showing that it was Brunelli in 2007 that discussed with Waldsmith the prospect of Dr. Ron Vin as a customer lead (*id.* at 6; *citing* Kastner Aff., Ex. I); and (3) "Plaintiff has offered no evidence ... that Vetel learned ... [of] any of Plaintiff's ... New York customers, through any means that was improper or in violation of any law, duty or obligation. Rather, Vetel learned of its New York customer leads through proper means, such as trade shows, referrals from prior customers and membership lists from professional veterinary associations" (*id.* at 6-7, *citing* Waldsmith Renewed Aff. at ¶ 14).[4]

Vetel also refutes the assertion by Plaintiffs in their prior opposition that Vetel committed a tortious act by communicating with Plaintiffs' sales representatives through Plaintiffs' email server based on email communications between Fishel and Fred Petzold, an Equipment Outreach sales representative concerning a demonstration to Dr. Karly Delano by pointing out (1) these emails do not relate to New York customers so they are irrelevant to the demonstration of jurisdiction in New York since any damage would have been sustained to Fishel's and Collins' customer base outside New York; (2) based on the deposition testimony of Brunelli and the emails produced "the sale to Dr. Delano was intended as part of a 'bundle deal' offered by Vetel and Plaintiff, together, with the express approval of Mr. Brunelli" (Def's Mem. of Law at 10-11, *citing* Brunelli Tr. at 15-16 [Brunelli admits that during the 2008-2009 time frame, Vetel and Plaintiffs were selling bundled products together that were meant to work together and were not in competition with each other] and Kastner Aff., Ex. J).

As its legal argument, Vetel reasserts many of the same points made in its first motion, which will not be reiterated herein. With regard to doing business CPLR 301 jurisdiction, Vetel argues that there can be no finding of jurisdiction against Vetel under the solicitation plus test since it has no office, employees, bank account, property or phone listing in New York, it transacts virtually no business here given the paltry revenues associated with New York sales, and because its website does not allow customers to purchase goods or services on it, it falls under the "passive category" insufficient to confer jurisdiction under a doing business analysis. Further, because jurisdiction is determined as of the time the action was commenced, and because "at the time this action was commenced, Vetel had no active

---

[4]Vetel also points out that these customers are not secret and they can be found through public sources such as the websites for the American Veterinary Medical Association, the American Association of Equine Practitioners and the American College of Veterinary Radiologists (Def's Mem. of Law at 7, *citing* Waldsmith Renewed Aff. at ¶16).

partnership agreements with entities in New York,"[5] those prior partnerships are irrelevant to the determination of Vetel's doing business in New York.

With regard to Vetel's relationship with Garner, Vetel asserts that courts have not found a basis for jurisdiction under similar facts – *i.e.,* where the sales representative, whose work address is located outside of New York (in New Jersey), works on a commission, is not an employee and has no authority to bind the company, and his agreement is non-exclusive and includes territories beyond New York (Def's Mem. of Law at 16–17, *citing Baldwin Hardware Corp. v Harden Indus., Inc.*, 663 F Supp 82 [SD NY 1987]; *Vincent v Davis Grabowski, Inc.*, 638 F Supp 1171 [SD NY 1986]; *Ring Sales Co. v Wakefield Eng'g, Inc.*, 90 AD2d 496 [2d Dept 1982]; *Crouch v Atlas Van Lines, Inc.*, 834 F Supp 596 [ND NY 1993]; *William Sys., Ltd. v Total Freight Sys., Inc.*, 27 F Supp 2d 386 [ED NY 1998]). Vetel further asserts that the federal courts in the Second Circuit have determined that where a foreign corporation derives less than five (5%) percent of its overal revenue from sales in New York, such sales are not substantial enough to force a foreign defendant to litigate in New York (*id.* at 18, *citing Copterline Oy v Sikorsky Aircraft Corp.*, 649 F Supp 2d 5 [ED NY 2007]; *Indemnity Ins. Co. of N. Am. v K-Line Am., Inc.*, 2007 WL 1732435 [SD NY 2007]; *Gross v Bare Escentuals, Inc.*, 2005 WL 185122 [SD NY 2005]; *Hennigan v Taser Intl., Inc.*, 2001 WL 185122 [SD NY 2001]; *C.E. Jamieson & Co., Ltd. v Willow Labs, Inc.*, 585 F Supp 1410 [SD NY 1984]; *Crouch v Atlas Van Lines, Inc.*, 834 F Supp 596 [ND NY 1993]).

With regard to jurisdiction under CPLR 302(a)(3)(ii), Vetel points out that to satisfy the requirement that an injury occur in New York, courts "uniformly hold that the situs of a non-physical commercial injury is where the critical events associated with the dispute took place rather than where the Plaintiff experienced financial loss" and therefore, simply because Plaintiffs are located in New York and sustained financial losses in New York are insufficient for a finding of an injury occurring in the state. According to Vetel, Plaintiffs have failed to show that they lost any customers in New York as the result of tortious conduct since the discussion with Dr. Vin and Dr. Delano were with the express approval of Brunelli (*id.* at 21-22, *citing* Kastner Aff., Exs. I and J) and Plaintiffs have failed to provide any evidence that Vetel learned of any New York customer through tortious conduct. Vetel further points out that the tortious conduct "must have occurred, and must have been asserted against the defendant, *at the time of service* (*id.* at 21 [emphasis in original], *citing United Computer Capital Corp.v Secure Prods., L.P.*, 218 F Supp 2d 273 [ND NY 2002]; *Lebensfeld v Tuch*, 43 Misc 2d 919 [Sup Ct NY County 1964]).

## PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition to Vetel's motion, Plaintiffs submit an affirmation from counsel, an

---

[5]Vetel points out that its relationship with AFP terminated in 2008 and its relationship with Plaintiff terminated in 2009 (Def's Mem. of Law at 16, *citing* Waldsmith Renewed Aff. at ¶ 21).

affidavit from Plaintiffs' President, Peter Brunelli, and an affidavit from R. Scott Jones, Chief Executive Officer of AFP Imaging Corporation d/b/a ImageWorks ("AFP"), which was previously submitted in opposition to Vetel's first motion to dismiss.

The purpose of the affirmation of Plaintiffs' counsel, Michael P. Regan, Esq. is to submit excerpts from the deposition transcripts of Garner and Waldsmith referenced in Plaintiffs' Memorandum in Opposition and Brunelli's Affidavit, a stipulation of between counsel for Plaintiffs and Vetel in which Vetel admits that it derives substantial revenue from interstate commerce (Affirmation in Opposition of Michael P. Regan, Esq. ["Regan Opp. Aff."], Ex. E), a copy of a motion by Vetel to amend its answer, and a copy of the proposed Vetel Third Amended Answer, Plaintiffs' warning letters to Vetel in August 2009 and April 2010 concerning the restrictive covenants under which Fishel and Collins were bound, and the sales representative agreement between Vetel and Collins.

In his affidavit, Jones avers that AFP is a corporation located in Elmsford, New York and that Vetel, during the period February 2006 to July 2009, "transacted business with AFP by purchasing products and services from AFP in the aggregate sum of $1,448,662.00" (Affidavit of R. Scott Jones, sworn to September 1, 2010 at ¶ 4). He submits a spreadsheet alleged to have been prepared in the ordinary course of AFP's business showing that the sales involved products that were shipped from AFP's New York location to Vetel's customers across the country and in many cases directly to Vetel in California. He claims that "[t]he orders for services (such as product repair) were placed with AFP in New York and the services were provided by AFP in its facility in New York" (*id.* at ¶ 5).

In his affidavit, Brunelli explains why Plaintiffs and Vetel are direct competitors in the sale of ultrasound systems, including Biosound systems. He also assembles much of the evidentiary proof Plaintiffs garnered from the jurisdictional discovery.

Brunelli avers that it was Vetel's poaching of Plaintiffs' sales representatives (Fishel,[6] Collins,[7] Kevin Gouvin, Mike Mumaw, Dr. Paul Brazzel and Richard Boothroyd) in

---

[6]Plaintiffs contend in violation of his agreement with Plaintiffs, Fishel entered into an agreement with Vetel on January 29, 2010, over a month before Biosound terminated Plaintiffs (Brunelli Opp. Aff., Ex. 8) and months before he was terminated by Plaintiffs in April 2010 (Brunelli Opp. Aff. at ¶ 17 and Ex. 8 thereto). Brunelli states that this agreement was originally dated January 29, 2010 (based on the date Waldsmith signed it) and Brunelli later avers that the agreement was entered into on March 15, 2010 (*id.* at ¶ 27). The Court notes that Ex. 8 reflects in its first paragraph that the agreement was entered into on March 15, 2010, but the actual date it was signed by Fishel appears to be stated as April 8, 2010.

[7]Brunelli contends that Collins entered into an agreement with Vetel in 2008 when he was still under contract with Plaintiffs and when Brunelli learned of his agreement with Vetel and objected, Collins gave Vetel 30 days' notice in May 2009, but Collins was thereafter terminated in August 2009 "because he was still engaged in the marketing,

violation of their restrictive covenants and Vetel's exploitation of their knowledge of Plaintiffs' trade secrets that has allowed Vetel to usurp Plaintiffs' exclusive distributorship with Biosound and "put UMS at a severe competitive disadvantage, particularly in New York State, where Vetel has a sales representative competing with UMS for sales" (Affidavit of Peter Brunelli in Opposition to Renewed Motion to Dismiss, sworn to December 5, 2011 ["Brunelli Opp. Aff."] at ¶¶ 8-9).

Attaching emails obtained during discovery, Brunell points put that in October 2009, Fishel was communicating with Biosound's President, Claudio Bertolini and disparaging Plaintiffs and encouraging Biosound to "go direct or let [Fishel] help [Biosound] select a reputable distributor" (*id.* at ¶ 13, *quoting* Ex. 2). Without providing any evidentiary support, Brunelli avers that it is clear that Fishel informed Bertolini in January 2010 that Vetel was recruiting him given Fishel's "open dialogue" with Bertolini as shown by this October 2009 email. Brunelli offers his explanation for the reason that Biosound terminated Plaintiffs, which is that Biosound wanted to continue with UMS's best sales people who had left UMS for Vetel and that the fact that Waldsmith took Collins with him to meet Bertolini for the initial interview on March 17, 2010 is "quite telling" (*id.* at ¶ 26). As evidentiary support for this, Brunelli attaches an email dated March 10, 2010 from Waldsmith to Bertolini confirming that Collins would be accompanying him on their meeting scheduled for March 17, 2010 (*id.*, Ex. 9). Brunelli attaches another email dated March 18, 2010 from Tom Feick, Biosound's Vice President and CFO, confirming that based on their meeting, Vetel would be given a non-exclusive distributorship for the Biosound ultrasound product line for a 90-day period beginning March 22, 2010 (Brunelli Aff., Ex. 10).

According to Brunelli, Plaintiffs' sales of ultrasound products in New York declined significantly during this 2009-2010 time period; specifically, Plaintiffs' sales declined 33% from 2009-2010, and for the period April 2010 to December 2010, the sales declined 55% (*id.* at ¶ 31, and Ex. 12 thereto). Brunelli attaches various emails from Fishel and Collins during April-June 2010 and November -December 2010 showing that Fishel and Collins "have been actively sharing with Steve Garner confidential UMS information, such as: (i) UMS pricing (*see* Vetel000667, Vetel000941); (ii) UMS sales techniques (*see* Vetel000932, Vetel000664, Vetel000941, Vetel000872); (iii) UMS marketing strategy (*see* Vetel000932); and (iv) UMS product information (*see* Vetel000841, Vetel000664, Vetel000667, Vetel000744, Vetel000866, Vetel000921)" (*id.* at ¶ 35, and Ex. 13 thereto). Brunelli points out that in an email dated April 29, 2010 from Bert Bossardet, former Vetel Vice President to Vetel's sales team, Bossardet advised the Vetel sales team that they should use the intimate knowledge from within their own sales team (*e.g.,* Collins and Fishel) to help them compete against UMS (*id.* at ¶ 40 and Ex. 14 thereto).

---

promotion and sale of digital radiography products for Vetel, a clear violation of his agreement with UMS" (Brunelli Opp. Aff. at ¶ 14). Brunelli then states that Vetel and Collins entered into an Independent Ultrasound Product Sales Manager Agreement with Vetel dated March 1, 2010 and signed on March 14, 2010 (Brunelli Opp. Aff. at ¶ 26).

Brunelli asserts that from Vetel's records, it is evident that Garner has sold to UMS customers such as Dr. George Kramer of Atlantic Coast Veterinary Specialists and Cornell University since Fishel and Collins joined Vetel (*id.* at ¶ 42 and Ex. 15 thereto). Brunelli avers that armed with UMS's proprietary information from Collins and Fishel, Garner has been successful in selling to New York customers since he has been actively soliciting and selling to (1) Cornell University (*id.* at ¶ 48, and Ex. 17 thereto); and (2) Dr. George Kramer (*id.* at ¶ 50). With regard to Dr. Kramer, Brunelli avers that UMS had a contract with Dr. Kramer in March 2010 to sell $114,000 of ultrasound equipment and that beginning in May 2010, right after the lawsuit was initiated, "Garner and Collins attempted to reach out to Dr. Kramer in an effort to steal this sale from UMS ... [and] Collins was actively involved in negotiating the sales terms to assist Garner in convincing Dr. Kramer to purchase from Vetel as opposed to UMS" (*id.* at ¶¶ 54-55 and Exs. 19-20). He further attaches a revealing email dated January 6, 2011 in which "Garner confided in Dr. Waldsmith that 'we stole [the sale to Dr. Kramer] from [Brunelli] and he was pissed'" (*id.* at ¶ 57, and Ex. 22 thereto).

Brunelli avers that with UMS's proprietary information being fed to Garner, Vetel has been actively competing for New York sales and has been soliciting (1) Elmhurst Animal Emergency Hospital (*id.* at ¶ 60 and Ex. 23 thereto); (2) Dr. Michael McCarthy of the Village Animal Clinic in Vooreheesville, New York (*id.* at ¶ 60 and Ex. 24 thereto); and (3) Dr. Diane Levitan of Peace Love Pets Veterinary Care, PLLC in Commack, New York (*id.* at ¶ 61 and Ex. 25 thereto).

Brunelli states that Garner testified at his deposition that "months prior to the start of the lawsuit, Vetel solicited Dr. Linda Homco located in Ithaca, New York, culminating in a sale in June 2010" (*id.* at ¶ 62) and after the lawsuit commenced, Vetel sold a MyLab5 ultrasound system to Dr. Amy Todd of Canandaigua Veterinary Hospital in New York and this sale is not listed on Vetel's spreadsheet produced in this case (*id.* at ¶ 63).

According to Brunelli, in addition to the solicitation and sales to UMS's customers, Vetel has also used improperly obtained information from Gouvin, Fishel and Collins to improperly usurp UMS's sales leads such as: (1) Gouvin's passing of information in February 2010 to Garner concerning a New York sales lead to Dr. Jayne Motler (a prospective customer UMS had quoted); and (2) Dr. Kramer. In addition, in March 2010, Gouvin emailed Waldsmith to go after UMS distributors such as DVM Resources of Westlake, TX ("DVMR") (*id.*, Ex. 28). He avers that DVMR had provided Plaintiffs with New York sales leads and that when Collins was with Plaintiffs, he was the liason with DVMR and after he left to go to Vetel, he convinced DVMR to stop doing business with UMS and start doing business with Vetel and DVMR now shares customer leads with Vetel and not UMS (*id.* at ¶ 70). As proof, Brunelli attaches an email chain between Brunelli and Collins in July 2009 evidencing a disagreement between Brunelli and Collins concerning Collins' alleged failure to provide DVMR leads to UMS (*id.*, Ex. 28) and an email dated January 8, 2010 in which Bossardet circulated a "DVMR Sales Rep Roster" to Vetel's sales representatives, including Garner, and suggested they reach out to DVMR. Again, without any evidentiary proof, Brunelli speculates that based on this email, Garner reached out to DVMR, the implication being that Garner then received the New York leads from DVMR (*id.* at ¶ 71, Ex. 29).

In support of its contention that jurisdiction exists under CPLR 301 (doing business), Brunelli offers the following evidence:

> (1) Garner testified that from May 2005 to May 2010, Garner solicited sales in New York on behalf of Vetel and that an important part of his territory is Cornell University and he regularly conducted workshops and demonstrations[8] at Cornell. Further, that Garner received a bonus in 2010 based on his New York sales. While Vetel's sales records show that its sold $16,500 worth of equipment to Dr. Lesser (a UMS customer) in 2006, $84,950 to the Center for Veterinary Care in 2007 (a UMS customer), $18,000 to AFP Imaging in 2006-2007, and a sale to American Veterinary Supply in 2009, these do not reflect all of the efforts Garner made to make sales during this time period nor do they reflect sales of Vetel products made by Vetel's distributors such as Equipment Outreach[9] and Dr. Waldsmith admitted at his deposition that Equipment Outreach made two or three such sales during the time period (*id.* at ¶¶ 71-88).
>
> (2) "Vetel's Facebook page has a 'Wall' feature, which allows Vetel to interact with potential customers from all over the United States concerning its products and services ... [and] has a link to its commercial website, allowing visitors to email Vetel for more information" (Brunelli Opp. Aff. at ¶¶ 91-92). Brunelli asserts that it is common knowledge that in this modern digital age, companies use social media websites to advertise their business to a broader geographical customer base.
>
> (3) Vetel and AFP in 2006 entered into two separate agreements: (1) for the sale of AFP's Digi-Vet Equine Radiography system to Vetel; and (2) a collaboration agreement between the parties concerning product design, software support and sales whereby Vetel acted as a non-exclusive independent dealer when purchasing and reselling AFP's Digi-Vet DR Systems. Based on the affidavit of

---

[8]Brunelli avers that since 2005, Garner has used Dr. Victor Rendano, Dr. Linda Homco, Dr. Alaine Girouz and Dr. Bruce Kornreich (all located in New York) to conduct training sessions for potential customers and Vetel has sold product to Drs. Rendano and Homco (Brunelli Opp. Aff. at ¶ 87 and Ex. 35). Further, that Garner testified at his deposition that in January 2010, he started to solicit the sale of Zonare ultrasound products to Dr. Meg Thompson of Cornell University and Linda Homco and during that time, he performed 6 product demonstrations for Dr. Thompson, one of which occurred two weeks prior to the start of this action (Pltfs' Opp. Mem. at 2, *citing* Garner Tr. at 80-85; 88-90, Regan Opp. Aff., Ex. C). In this regard, Vetel's contention that during this time period it only performed one product demonstration of digital radiography (omitting ultrasound) is misleading and dubious (Pltfs' Opp. Mem. at 2-3).

[9]Plaintiffs contend the other distributors are Asteris, Inc. and American Veterinary Supply, both of which are located in New York (Brunelli Opp. Aff. at ¶ 87).

AFP's CEO R. Scott Jones,[10] during the period February 2006 to July 2009, Vetel purchased goods from AFP totaling $3.5 million and arranged for AFP's products to be shipped to Vetel's customers and end users around the country from AFP's New York facility. Brunelli concludes that Vetel used AFP as "its supplier, service depot and de facto warehouse in New York for at least three years" (Brunelli Opp. Aff. at ¶¶ 96-106).

(4) Brunelli describes the business dealings between Vetel and UMS, which included a Distribution Agreement in December 2008 whereby UMS would sell Vetel products and collect a finder's fee, and the parties' joint sale of bundled products. Also a mutual non-disclosure agreement and letter of intent for Vetel to sell its assets to UMS in November 2008. Brunelli asserts that Bert Bossardet visited UMS's offices on January 7, 2009 to negotiate a merger between the companies (*id.* at ¶¶ 107-115).

(5) Brunelli avers that "All Pro Imaging located in Melville, New York lists Vetel as a 'dealer' on its website" and Brunelli attaches a copy of a printout from that website from February 3, 2011 (*id.* at ¶¶ 116 and Ex. 43).

(6) Referencing a document produced by Vetel entitled Transaction List by Vendor, Brunelli asserts that Vetel has purchased components from the following New York suppliers to create and sell its product (1) AFP Imaging - approximately $1.5 million from 2006-2009; (2) All Pro Imaging - approximately $16,000 in product from 2008-2010; (3) JPI America, Inc. – approximately $70,000 in product from 2008-2010; (4) Quantum Medical Imaging – $50,000 in product from 2008-2010; (5) UMS – $500,000 in product from the mid-1990's (Brunelli avers that Vetel's records grossly understate the amount of product purchased); (6) V.J. Technologies – $52,000 in product (*id.* at ¶ 119).

In their memorandum of law, Plaintiffs largely repeat the arguments made in opposition to Vetel's original motion and they will not be repeated herein. The main case relied upon by Plaintiffs to support jurisdiction under CPLR 302(a)(3) is *Sybron Corp. v Wetzel* (46 NY2d 197 [1978]) and Plaintiffs contend that Vetel's use of UMS's proprietary information (*i.e.*, UMS pricing information and marketing strategy) obtained from Fishel, Collins and Gouvin in violation of their restrictive covenants which was then used to assist Garner in soliciting UMS's New York customers puts this case squarely within the holding of *Sybron*. Plaintiffs use as their example, the emails showing Collins' assistance of Garner in stealing UMS's sale to Dr. George Kramer in Bohemia, New York (Ptfs' Opp. Mem. at 6). In addition, Plaintiffs rely on Vetel's sales to Cornell University, Dr. Linda Homco and Dr. Michael McCarthy (*id.* at 7). Plaintiffs further contend that Gouvin, Collins and Fishel "acted in concert to persuade Biosound into terminating its distributorship with UMS. Vetel's tortious conduct[ ] resulted in a sharp loss of UMS sales in New York. Accordingly, UMS has sustained several injuries in New

---

[10]Plaintiffs resubmit the affidavit of R. Scott Jones sworn to September 1, 2010, originally submitted in opposition to Vetel's first motion.

York as a result of Vetel's bad acts" (Pltfs' Opp. Mem. at 2). Given the foregoing, Plaintiffs argue that they "have provided this Court with far more than a 'probable inference' of a conscious plan by Vetel, Fishel and Collins to engage in unfair competition and misappropriation of Universal's proprietary information" (Pltfs' Opp. Mem. at 10 [emphasis in original]). And Plaintiffs have demonstrated a tortious act committed by Vetel (*id.* at 10, n. 3). With regard to the other elements for CPLR 302(a)(3) jurisdiction, Plaintiffs argue that (1) Vetel has stipulated that it derives substantial revenue from interstate commerce and "cannot reasonably argue that it did not reasonably expect its conduct of poaching Fishel, Collins and Gouvin ...and encouraging them to share UMS's trade secrets with Steve Garner, to have negative financial consequences for UMS in New York State, where it competes with Steve Garner for sales" (*id.* at 11) and therefore, CPLR 302(a)(3)(ii) is satisfied; or alternatively (2) CPLR 302(a)(3)(i) is satisfied since it is clear that since 2005 Vetel has regularly solicited business in New York (*id.*).

With regard to jurisdiction under CPLR 301, Plaintiffs reiterate the above-referenced facts and argue that Vetel is soliciting sales in New York both through Garner and its interactive website (*citing Chestnut Ridge Air, Ltd. v 1260269 Ontario Inc.*,13 Misc 3d 807 [Sup Ct NY County 2006])[11] and that there are more than sufficient "plus facts" to sustain jurisdiction (*i.e.,* its business relationships with AFP, UMS, and its purchases from All Pro Imaging, JPI America, Quantum Medical Imaging and VJ Technologies).

Plaintiffs argue that Vetel's motion to amend its counterclaims,[12] which would assert counterclaims "totally unrelated to the pre-existing claims in this case" "constitutes a waiver of its defense of lack of personal jurisdiction" based on the New York Court of Appeals' decision of *Textile Tech. Exchange, Inc. v Davis* (81 NY2d 56 [1993]).

## VETEL'S REPLY

In further support of its motion, Vetel submits another affirmation from its counsel (the sole purpose of which is to attach additional documentary and testimonial evidence), and a reply memorandum of law.

The Court notes that Vetel's Reply Memorandum of Law violates Commercial Division Rule 17, which requires that all Reply Memoranda not exceed 15 pages. At 27 pages, Vetel's Reply Memorandum greatly exceeds this requirement and Vetel made no application

---

[11]Relying on *Chestnut Ridge,* Plaintiffs dispute that the amount of Vetel's sales revenue is insufficient to support CPLR 301 jurisdiction and argue that there is no minimum percentage of annual revenue that must be attributed to New York sales to support jurisdiction (Pltfs' Opp. Mem. at 18).

[12]Because this motion had the chance of rendering certain other motions moot that had been filed by Vetel, this Court stayed the Vetel amendment motion, together with Defendants' spoiliation motion, on the record of the conference held on October 18, 2011.

for permission to file a reply memorandum exceeding the maximum page limit by 12 pages. However, given the delay in reaching this motion due to the stay imposed as a result of the Dorf Firm's motion to withdraw as counsel to Fishel and Collins, and given that much of the reply memorandum of law is comprised of either (1) arguments previously made in its opening papers, and (2) copied text from the deposition testimony cited and attached as an exhibit presumably for ease of reference, the Court shall exercise its discretion and overlook this breach of Rule 17. Counsel, however, is hereby put on notice that failure to comply with the Commercial Division Rules in future submissions to the Court may result in the rejection of the papers submitted.

Vetel argues that Plaintiffs have "failed to put forth any evidence showing that Vetel obtained a single New York customer from UMS through improper means" (Def's Reply Mem. at 6). Vetel proceeds to explain how it learned of these customers through proper means (*i.e.*, Garner ran into Dr. George Kramer at an internal medicine meeting in Anaheim, California which is what led to the sale to him in May 2010) or that these relationships pre-existed prior to the tortious conduct alleged (*i.e.*, Garner testified that he had a 22-year old relationship with Cornell and that this relationship revolved around his sale and demonstration of products from another company, unrelated to Vetel, namely, Aloka Ultrasound) (Def's Reply Mem. at 6-7, *citing* Garner Tr. at 51, 62-63, Kastner Reply Aff., Ex. E). Vetel also points out that with regard to Dr. Kramer, Brunelli admitted at his deposition that UMS was unable to consummate that sale because its relationship with Biosound had been terminated (*id.*, *citing* Brunelli Tr. at 25, Kastner Reply Aff., Ex. F).

With regard to Plaintiffs' assertions concerning the improper transfer of Plaintiffs' confidential information by Collins and Fishel to Garner, Vetel argues that these also fail because (1) Collins and Fishel are not Vetel employees and therefore, their actions cannot be imputed to Vetel; (2) Plaintiffs have failed to show that any of the information[13] constitutes a trade secret or is otherwise protected; and (3) even if the acts of Collins and Fishel can be imputed to Vetel and even if the information rises to the level of a trade secret, Plaintiffs have failed to show any injury resulted from the passing of this information since Plaintiffs' loss of profits in New York is not enough (*id.* at 9). Thus, Vetel argues that *Sybron* is inapposite since it involved the loss of important customers in New York (*id.* at 10)[14] and Brunelli testified that he had no proof showing that Collins or Fishel transmitted a lead of any New York customer to

---

[13]Vetel argues that "sales knowledge and market analysis are clear categories of information that belongs to the sales representatives, not to Plaintiff. It is well established that 'mere knowledge of the intricacies of a business is simply not enough' and that 'pricing and market strategies' generally are not recognized as trade secrets" (Def's Reply Mem. at 9, *quoting Ikon Office Solutions, Inc. v Usherwood Office Tech., Inc.*, 21 Misc 3d 1144[A] [Sup Ct Albany County 2008]).

[14] In addition to *Sybron*, Vetel cites to the following cases to support that there must be a loss of New York customers and not just to profits based on the company's New York location (*Citigroup Inc. v City Holding Co.*, 97 F Supp 2d 549 [SD NY 2000]; *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317 [1980]; *Polansky v Gelrod*, 20 AD3d 663 [2005]).

Vetel (*id.* at 11). Vetel asserts that the losses of the Biosound distributorship and Fishel and Collins as sales representatives are irrelevant since they were not located in New York (*i.e.*, Biosound is not located in New York and Fishel's territory was on the West Coast and Collins' territory was in the south and in Texas and neither had any New York customers).

Vetel refutes Plaintiffs' assertions of Vetel's tortious poaching conduct by relying on: (1) Biosound's President's affidavit submitted in opposition to Plaintiffs' preliminary injunction motion wherein he averred that Biosound terminated Plaintiffs because of Plaintiffs' own actions (Def's Reply Mem. at 11-12); (2) Fishel's prior affidavits submitted in opposition to Plaintiffs' motion for injunctive relief in which he averred that he resigned because Plaintiffs refused to pay him $94,000 in commissions, Plaintiffs subjected him to unilateral changes in his geographic region, he was repeatedly requested to engage in unethical behavior regarding the software licenses, and Brunelli harassed and abused him (Def's Reply Mem. at 12-13, *citing* Fishel Affidavits attached as Kastner Aff. Exs. I and J); (3) Collins' prior affidavits submitted in opposition to Plaintiffs' motion for injunctive relief in which Collins averred that his relationship with Plaintiffs terminated over Plaintiffs' refusal to pay him his commissions owed, Plaintiffs' unilateral changing of Collins' sales territory and requirement that he engage in unethical practices with regard to the offering of software licenses (Def's Reply Mem. at 13, *citing* Collins Affidavits attached as Kastner Aff. Exs. K and L). Vetel further contends that the evidence upon which Plaintiffs relies is flawed. For example, at his deposition, Brunelli admitted that Vetel and Plaintiffs worked together to offer bundled products and, therefore, during this time period, the parties discussed customers and pricing in furtherance of that effort. Vetel points out that "Brunelli himself discussed the leads for Dr. Ron Vin and Dr. Karly Delano with Vetel as a part of this relationship" (Kastner Reply Aff., Ex. B) yet Plaintiffs have used these "prior communications to support allegations of wrongdoing levied against Vetel" (Def's Reply Mem. at 13-14, *citing* May 7, 2009 emails between Rebecca Owens, Vetel and Michael Collins, UMS attached as Kastner Reply Aff., Ex. N ).

In further support of its lack of doing business in New York, Vetel argues that it meets none of the traditional factors for doing business in New York since it has no office, owns no property, had no phone listing and this Court already determined its website falls within the passive (not interactive category). Further, there is no evidence that Vetel conducted substantial and continuous solicitation within New York given the *de minimus* amount of sales in New York and the demonstration of a total of three pieces of Vetel equipment in New York over the five years preceding this action – "one to Atlantic Coast Veterinary (Dr. Ron Vin) in 2007; one to Dr. Homco in 2010; and one to Dr. Thompson in 2010" (Def's Reply Mem. at 16-17, 18 *citing* Garner Tr. 86-90, 93). Further, it is undisputed that Garner's demonstrations to Cornell were on behalf of Aloka Ultrasound, not Vetel (Def's Reply Mem. at 17) and the first demonstration to Cornell on behalf of Vetel occurred subsequent to the lawsuit's initiation (*id.* at 19).

Vetel further refutes Brunelli's assertion that it made a sale to Dr. Rendano since it was denied by Garner at his deposition (*id.* at 19, *citing* Garner Tr..at 49).

It is Vetel's position that the lion's share of the sales cited were either sales to Equipment Outreach (a California company)[15] or else they occurred after this action was commenced and are, therefore, irrelevant for purposes of determining jurisdiction (*id.* at 19-20). Likewise, Vetel argues that its business relationships with AFP and UMS are irrelevant to jurisdiction because these arrangements were terminated by the time the lawsuit was commenced – *i.e.,* AFP ended in 2008 and UMS ended in 2009 (*id.* at 20). Finally, although Plaintiffs contend otherwise, Vetel argues that its purchase of component parts is irrelevant for purposes of doing business jurisdiction (*id.* at 21).

Vetel counters Plaintiffs' argument that its motion for leave to amend its counterclaims means that it has waived its jurisdictional defense by arguing: (1) Plaintiffs' position is misguided as this Court has not granted Vetel's motion to amend; and (2) a party is permitted to assert counterclaims related to the action without waiving the defense of personal jurisdiction. Vetel argues that claims are related when "they stem from the same occurrences or transactions and could be barred by principles of collateral estoppel in a subsequent action" and here,

> if the claims of the parties had proceeded, this Court would have undoubtedly determined whether Plaintiff's action with regard to the sale and offer of Biosound software licenses and other Biosound products without proper authorization from Biosound, constituted a cognizable cause of action and what damages resulted from such action. Had Vetel proceeded in this action and failed to raise such claims, Vetel could have been precluded from raising similar claims in a subsequent action, since these claims would have already been litigated and determined herein. Thus, Vetel's proposed counterclaims clearly fall within those permitted without waiving the jurisdictional defense (*id.* at 24).

Vetel requests that the Court disregard, *in toto*, Brunelli's affidavit since he:

> (1) fails to address the contradictions between his affidavit and the evidence produced as a result of the spoiliation hearing and the hire of TM Protection Resources – *i.e.*, the sales leads to Dr. Ron Vin and Dr. Karly Delano;
>
> (2) it is "rife with unsupported speculation, inadmissible hearsay and unreliable conjecture" such as (i) that Biosound terminated UMS because of Vetel's poaching activities and Collins and Fishel's efforts to convince Bertolino to drop UMS; (ii) Plaintiffs' steep decline in New York sales was the result of Garner's efforts and UMS lost New York sales because Fishel, Collins, Garner and Gouvin dissuaded potential New York customers from dealing with

---

[15]According to Vetel, where Equipment Outreach later sells its products is irrelevant to this analysis.

UMS; (iii) Fishel approached Brunelli's son two weeks ago to ask for his job back and to apologize; and (iv) when Collins was terminated in August 2009 he convinced DVMR to stop doing business with UMS and DVMR now gives its New York customer leads to Vetel (*id.* at 25-26).

## LEGAL ANALYSIS

It is Plaintiffs' burden to establish jurisdiction exists as against Vetel (*Brandt v Toraby*, 273 AD2d 429 [2d Dept 2000; *see also Hoffritz for Cutlery, Inc. v Amajac, Ltd.*, 763 F2d 55, 57 [2d Cir 1985]).[16]

As discussed *infra*, Plaintiffs rely on Defendants' activities over the course of approximately five years prior to the action being filed to show that jurisdiction exists over Vetel based on Vetel's doing business in New York, CPLR 301. By contrast, Vetel argues that much of the evidence relied upon by Plaintiffs for establishing jurisdiction is largely irrelevant because it is the period in which the lawsuit was filed – here 2010 – which is the only period relevant to whether Vetel was doing business in New York. The Court agrees with Vetel's position because it is well settled that the "'solicitation plus test' cannot be premised on activity occurring over a multi-year period preceding the commencement of the action (*see Zipper v Nichtern*, 2007 WL 1041667 at * 5 [ED NY 2007], *citing Jacobs v Felix Bloch Erben Verlag fur Buhne Film and Funk KG*, 160 F Supp 2d 722, 726 [SD NY 2001] ["[f]or the purposes of the jurisdictional analysis under New York State law, the Court focuses specifically on the Defendants' amenability to suit at the time the lawsuit was filed, not when the claim arose (and not based on subsequent changes in their status)"]; *see also Gross v Bare Escentuals, Inc.*, 2005 WL 823889 at *3 [SD NY 2005] [future plans to open retain store insufficient to confer jurisdiction]; *Yurman Designs, Inc. v A.R. Morris Jewelers, L.L.C.*, 41 F Supp 2d 457 [SD NY 1999]; *William Sys., Ltd. v Total Freight Sys., Inc.*, 27 F Supp 2d 386, 388 [SD NY 1998] [Albany operation that closed several months prior to the filing of the lawsuit could not be used to find jurisdiction over defendant]).

---

[16]Plaintiffs contend that their burden is only to make a *prima facie* showing of jurisdiction (Pltfs' Opp. Mem. at 5). Vetel merely asserts that the burden of proving jurisdiction on this motion is Plaintiffs without setting forth what that burden of proof is (Def's Mem. of Law at 12; Def's Reply Mem. at 4). The Court finds that in the context of this renewed motion, where extensive discovery concerning Vetel's contacts with the New York has occurred, but no evidentiary hearing has taken place, Plaintiffs' "*prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant'" (*Metropolitan Life Ins. Co. v Robertson-Ceco Corp.*, 84 F3d 560, 567 [2d Cir 1996], *quoting Ball v Metallurgie Hoboken-Oerpelt, S.A.*, 902 F3d 502 [2d Cir 1990), *cert denied* 498 US 854] [1990]). Thus, the fact that Vetel has asserted contradictory facts does not negate whether Plaintiffs have sustained their required burden (*Metropolitan Life Ins. Co.*, 84 F3d at 567).

***A. Plaintiffs Have Not Established that Vetel Does Business in New York For Purposes of Jurisdiction Under CPLR 301***

CPLR 301, the "doing business" statute, provides that New York courts may exercise jurisdiction over a foreign corporation where it solicits business in New York and is engaged in some other continuous activity here (*Laufer v Ostrow*, 55 NY2d 305, 309-310 [1982]). A defendant is doing business in New York, for purposes of the personal jurisdiction statute, if it has engaged in such a continuous and systematic course of activities in New York that it can be deemed present in the state. *(Id.).*

The "doing business test" is simple and pragmatic, and depends on the specific facts of each case (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28 [1990]). The "salient issue in determining jurisdiction" is whether "the aggregate of the corporation's activities in the State" are enough to amount to defendant's presence in the State "not occasionally or casually, but with a fair measure of permanence and continuity" (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 2006 NY Slip Op 50527[U] at *5 [Sup Ct Kings County 2006]).

"The 'doing business' standard is 'stringent, because a defendant who is found to be doing business in New York in a permanent and continuous manner may be sued in New York on causes of action wholly unrelated to acts done in New York" (*Holey Soles Holdings, Ltd. v Foam Creations, Inc.*, 2006 WL 1147963 at * 3 [SD NY 2006], *quoting Overseas Media, Inc. v Skvortsov*, 407 F Supp 2d 563, 568 [SD NY 2006]).

Factors that New York courts have found especially relevant to establish jurisdiction under CPLR 301 include whether the corporation has employees, offices or property within the state, whether the corporation is authorized to conduct business within the state, and the volume of business that the corporation conducts with New York residents (*Laufer, supra*; *Atlantic Veal & Lamb, Inc., supra)*. The sale of products or solicitation of business in the state by itself is not enough to confer jurisdiction, absent conduct specifically directed at New York (*id.*). New York courts have held that soliciting New York business through an interactive website, together with other factors, constitute a basis for jurisdiction under CPLR 301, even where defendant is not physically present in the state (*Chestnut Ridge Air, Ltd. v 1260269 Ontario Inc.,* 13 Misc 3d 807 [Sup Ct NY County 2006]; *Thomas Publ. Co. v Industrial Quick Search, Inc.*, 237 F Supp 2d 489, 492 [SD NY 2002]; *Citigroup Inc. v City Holding Co.,* 97 F Supp 2d 549, 566 [SD NY 2002]; *see Deutsche Bank Sec., Inc. v Montana. Bd. of Invs.*, 7 NY3d 65 [2006]; *cf. Atlantic Veal & Lamb, supra*).

The crux of Plaintiffs' opposition is their position that Vetel is doing business in New York based on the "solicitation plus" standard. "[U]nder the 'solicitation plus' test, if the solicitation 'is substantial and continuous, and defendant engages in other activities of substance in the state, then personal jurisdiction may properly be found to exist'" (*Citigroup Inc., supra.*, 97 F Supp 2d at 569, *quoting Landoil Resources, Corp., supra*, 918 F2d at 1043-44). Under this solicitation plus analysis, "New York courts have held that soliciting New York business through an interactive website, together with other factors, constitutes a basis for jurisdiction under CPLR 301, even where defendant is not physically present in the state" (*Bankrate, Inc. v Mainline Tavistock, Inc.*, 2008 NY Slip Op 50213[U], 18 Misc 3d 1127[A] at *

4 [Sup Ct NY County 2008], *citing Chestnut Ridge Air, Ltd. , supra*; *Thomas Publ. Co. v Industrial Quick Search, Inc.*, 237 F Supp 2d 489, 492 [SD NY 2002]; *Citigroup Inc., supra*; *see also Deutsche Bank Sec. Inc. v Montana Bd. of Invs.*, 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]; *Atlantic Veal & Lamb, Inc., supra*).

The Court concludes that Plaintiffs' reliance on business relationships with AFP and UMS to establish jurisdiction is misplaced. First, those relationships terminated long before the filing of the action, and, accordingly, cannot be used as a basis for doing business jurisdiction. Second, even if these relationships were ongoing at the time this lawsuit was filed, the relationship with AFP is irrelevant because it involved Vetel's purchase of equipment from AFP (save for one purchase of Vetel equipment from AFP in 2006) and

> [t]he law is clear that purchases in New York by a foreign corporation of a large part of merchandise to be sold at its place of business outside the state, even if systematic ... do not warrant a holding that the corporation was present within the jurisdiction of this state (*Grossman v Wal-Mart Stores, Inc.*, 682 F Supp 752, 754 [SD NY 1988], *quoting Greenberg v Lamson Bros. Co.*, 273 App Div 57 [1st Dept 1947]; *see also Agency Rent A Car Sys., Inc. v Grand Rent A Car Corp.*, 916 F Supp 224, 229 [ED NY 1996]; *Rolls-Royce Motors, Inc. v Charles Schmitt & Co.*, 657 F Supp 1040, 1046 [SD NY 1987]).

While the UMS agreement involved the companies agreeing to bundle their products and then sell them together, it is undisputed that there no New York sales resulted from this arrangement. Furthermore, that agreement terminated a year before this action was filed, and therefore, it is entirely irrelevant to this analysis.

The Court further agrees that Vetel's use of Garner, a non-exclusive, independent sales representative, is insufficient to establish Vetel's doing business since it is well settled that "[g]eneral jurisdiction will not lie when the foreign defendant merely uses outside sales representatives residing in the forum state ... when such representatives are not employed by the defendant and have no authority to bind the defendant to contracts" (*Holey Soles Holdings, Ltd., supra*, 2006 WL 1147963 at *6). Courts find that because "[t]he Independent Sales Representatives are not agents of the defendants, ... their solicitation of business in New York is not enough to confer general jurisdiction over the defendants" (*id.*; *see also Ring Sales Co. v Wakefield Eng'g, Inc.*, 90 AD2d 496, 497 [2d Dept 1982]).

It is true that the presence of sales representatives plus additional purposeful activity directed at New York may be sufficient to confer jurisdiction. For example, in *Laufer v Ostrow* (55 NY2d 305 [1982]), jurisdiction was found even though the defendant had no office, telephone or bank account in New York and the only contacts were (1) that defendant employed three sales representatives whose territory included New York to solicit and service defendant's New York accounts, and (2) the sales representatives were visited by defendant's president 8-10 times a year to call on the accounts. Further, *de minimus* sales in the state may still be sufficient to confer jurisdiction so long as there is evidence of an intent to carry on business within the state with continuity from a permanent locale (*see, e.g., Vincent v Davis-*

*Grabowski, Inc.*, 638 F Supp 1171 [SD NY 1986] [presence of independent sales representative with no authority to bind defendant coupled with defendant's lease of a 1,000 square foot showroom used to solicit orders during the 10 days when the annual Toy Fair was conducted that resulted in a very small number of sales (*i.e.*, $20,000 to $30,000) was sufficient to confer jurisdiction]). Here, Vetel's use of Garner, who is a non-exclusive independent sales representative with no authority to bind Vetel and who simply solicited business on behalf of Vetel in New York, as well as the other states in his territory, cannot, in and of itself, be sufficient for a finding that Vetel conducts business in New York. Thus, the Court must analyze the "plus factors" offered by Plaintiffs to establish jurisdiction.

To determine whether soliciting business over a website confers jurisdiction in New York, Courts have looked to additional factors such as the extent of the website's "interactive nature," whether the company has "substantially solicited" New York business through its website, and whether defendant's servicing of New York customers has been "systematic and continuous" (*See Chestnut Ridge Air, Ltd., supra*, 13 Misc 3d at 810 [holding that because company's website amounted to a "virtual community," with a forum for customers to post questions and items for sale or rent, and a private website' to monitor their own projects' completion, and because company obtained 4% of its yearly revenue from customers with a New York mailing address and spent 14 weeks per year servicing projects for these customers, company was subject to CPLR 301 jurisdiction.]; *cf. Atlantic Veal & Lamb, Inc., supra*, 2006 NY Slip Op 50527[U] at * 5 (holding that although defendant maintained a website which indicated its "ability and willingness... to conduct audits in a variety of markets around the world," the aggregate of its business activities in the state were not "sufficiently systematic or continuous to support jurisdiction pursuant to CPLR 301"]).

If the foreign company maintains an informational Web site accessible to the general public but which cannot be used for purchasing services or goods, then most courts find it unreasonable to assert personal jurisdiction over that company (*Grimaldi v Guinn,* 72 AD3d 37, 48 [2d Dept 2010]; *see also A.W.L.I. Group, Inc. v Amber Freight Shipping Lines*, 2011 WL 6130149 [ED NY 2011], *Zibiz Corp. v FCN Tech. Solutions*, 777 F Supp 2d 408, 423 [ED NY 2011]; *Arouh v Budget Leasing, Inc.*, 63 AD3d 506 [1st Dept 2009]).

Here, the telltale signs of doing business such as the maintenance of a New York office, a New York bank account, or having New York employees, do not exist. Further, the evidence does not show that Vetel's website is sufficiently interactive enough to support a finding of doing business in New York. The fact that Vetel's website is "linked" to the company's Facebook interactive page, which contains a "Wall" allowing potential customers to post questions and comments on Vetel products to be responded to by Vetel employees, does not constitute the type of an interactive website that has been found to "'demonstrate that the website operator has purposefully availed itself of the privilege of conducting activities within New York'" (*A.W.L.I. Group, Inc., supra*, 2011 WL 6130149 *at * 8*; *quoting Zibiz Corp., supra,* 777 F Supp 2d at 423).

In *Grimaldi, supra*, the Appellate Division, Second Department, reviewed the case law concerning passive versus interactive websites and explained an interactive website as one that

> provides information, permits access to e-mail communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact made ... then the assertion of personal jurisdiction may be reasonable (*Grimaldi,* 72 AD3d at 50).

In *Grimaldi,* the Second Department found the website to be completely passive so that the website, in and of itself, was insufficient to confer jurisdiction. However, the Court further noted that "passive Web sites, when combined with other business activities, may provide a reasonable basis for the assertion of personal jurisdiction" (*id.* at 49). The Court ultimately found jurisdiction to exist pursuant to CPLR 302(a) (1) because defendant's passive website combined with it purposeful contacts with the automobile owner in New York through telephone, faxes, e-mails and other communications, were sufficient to confer jurisdiction given the substantial relationship between these contacts and the cause of action.

The other "plus factors" relied upon by Plaintiffs include a multi-year relationship between Vetel and AFP, a New York company that served as Vetel's supplier, and the business relationship between Vetel and UMS. Plaintiff also claims that Vetel had other substantial business dealings in New York based on the transaction list showing that from 2005-2010, Vetel engaged in continuous and substantial transactions with New York suppliers, specifically with All Pro Imaging, totaling approximately $16,000 from 2008-2010, JPI America Incorporated totaling approximately $70,000 from 2008-2010, Quantum Medical Imaging totaling approximately $50,000 from 2008-2010, V.J. Technologies totaling approximately $52,000 in products, and finally with UMS totaling approximately $500,000 in products from the mid-1990s until just prior to the commencement of this lawsuit. (Brunelli Aff., Ex 44).

With regard to the annual revenues, Plaintiffs rely on *Chestnut Ridge (supra)* and argue that even modest sales figures[17] can confer jurisdiction over Vetel given Vetel's other substantial activities in New York. However, there are numerous cases holding that revenues under 5% cannot be considered substantial as a matter of law – *i.e.*, district courts in the Second Circuit "have observed that a foreign corporation is usually not subject to general personal jurisdiction in New York if it derives less than 5% of its overall revenue from sales to customers in New York" finding that they "did not engage in 'substantial and continuous solicitation'" (*Zipper v Nictern*, 2007 WL 1041667 at * 5 [ED NY 2007], *citing, inter alia, Yanouskiy v Eldorado Logistices Sys., Inc.*, 2006 WL 3050871 at * 6 [ED NY 2006]; *Hutton v Priddy's Auction Galleries, Inc.*, 275 F Supp 2d 428 [SD NY 2003]; *Stemcor USA, Inc. v Sharon Tube Co.*, 2001 WL 492427 [SD NY 2001]).

---

[17]Those modest sales figures were: $16,500 in 2006 to Dr. Lesser, $85,000 in 2007 to Center for Veterinary Care, P.C., $18,000 in sales from 2006-2007 to AFP imaging, and $80,000 in 2009 for a sale to the New York based American Veterinary Supply. (Brunelli Aff., Ex. 32). Plaintiffs' contention that Waldsmith admitted at his deposition that Equipment Outreach made approximately two or three sales in New York during the relevant time period is not supported by the deposition testimony cited.

Here, the only evidence of revenues from sales of New York products that has been submitted are those outlined by Vetel showing substantially less than 5% of annual revenues. While UMS makes assertions concerning sales by other Vetel distributors such as Equipment Outreach, Asteris, Inc. and American Veterinary Supply, UMS fails to provide any actual New York sales by these alleged New York distributors.[18] Given the *de minimus* sales of products by Vetel in New York prior to the filing of this action, and given that the "plus factors" (*e.g.,* the website, the purchases of products from New York companies, and the expired joint venture arrangements with New York companies involving no sales of products in New York) do not meet the standard necessary to find Vetel's doing business in New York, the Court finds that Plaintiffs have not established that Vetel is subject to jurisdiction under the general jurisdiction provision, CPLR 301, based on the solicitation plus test.

The Court next turns to whether Plaintiffs have established jurisdiction over Vetel pursuant to CPLR 302(a)(3)(ii).

***B. Vetel is Subject to Jurisdiction Pursuant to CPLR 301(a)(3)(ii)***

CLR 302 (a)(3)(i) & (ii) provides that a court may exercise personal jurisdiction over a non-domiciliary who

> commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce (CPLR 302[a][3][i]&[ii]).

The predicate for Plaintiffs' assertion of jurisdiction under CPLR 302(a)(3)(ii) is that Vetel tortiously interfered with Plaintiffs' contracts with Plaintiffs' sales representatives (*i.e.,* Fishel, Collins, Gouvin) by inducing them to breach their restrictive covenants with Plaintiffs by having them, *inter alia*, provide Vetel with UMS's proprietary information (such as pricing, marketing strategies and customer specific needs) and solicit UMS's customers to move over to Vetel causing a loss of UMS's New York customers.

The New York Court of Appeals has held that a court may obtain personal jurisdiction under CPLR 302(a)(3)(ii) if five conditions are met: (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to person or property in New York; (4) the defendant expected or should

---

[18]In one email attached to the Brunelli Affidavit, Asteis is listed as a seller with $132,349.21 in sales, but there is no indication that those involved New York sales (Vetel 000191, Brunelli Ex. 33).

reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce (*Penguin Group (USA) Inc. v American Buddha,* 16 NY3d 295, 302 [2011]; *see also LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]; *Yash Raj Films (USA) Inc. v Dishant.Com LLC*, 2009 WL 4891764 at * 8 [ED NY 2009]). It is undisputed for the purposes of this motion, based on the Stipulation between counsel to Plaintiffs and Vetel, that the fifth element is satisfied – *i.e.*, that Vetel derives substantial revenue from interstate commerce.

Vetel opposes the assertion of jurisdiction under CPLR 302(a)(3)(ii) primarily on the grounds that: (1) Plaintiffs have not established that it committed a tort outside of New York; and (2) even if Plaintiffs established that Vetel committed a tort outside of New York, they have not established an injury in New York since the only basis for injury is that the situs of Plaintiffs' business in New York (and thus the loss of profits are here), which is not enough, and Plaintiffs have not shown the loss of any New York customers as a result of Vetel's allegedly tortious activities.

To begin with, contrary to Vetel's position, "[t]o satisfy the first element, the plaintiff 'need not actually prove that defendant committed a tort but rather need only state a colorable cause of action'" (*Sole Resort, S.A. de C.V. v Allure Resorts Mgt., LLC*, 450 F3d 100, 106 [2d Cir 2006], *quoting Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 305 F3d 120, 125 [2d Cir 2002]).

The crux of Plaintiffs' opposition to this aspect of Vetel's motion is that based on several emails exchanged between Garner and UMS's former sales representatives Fishel, Collins, and Gouvin, it is clear that Fishel, Collins and Gouvin in collaboration with Vetel, breached their restrictive covenants with UMS by providing Garner with UMS's proprietary information concerning pricing, marketing and customers in order to assist Vetel in its solicitation of UMS's customers.

As this Court noted in its prior Decision and Order dated July 15, 2010 (the "July 2010 Decision") resolving Plaintiffs' motion for a preliminary injunction, the restrictive covenants provide that Collins and Fisher cannot:

- disclose directly or indirectly any confidential information of the company which is defined as the identity of any customer or prospective customer of UMS, the specific types of services and equipment provided to such customer or prospective customer, the specific prices or methods of payment for UMS's products and services, the specific programs or other information developed by or for customers or prospective customers, operations manuals and guidelines, business plans/strategies, financial information and pricing policies, and any inventions or computer hardware or software (Agreements at § 3);

- throughout the period of the relationship and for one year following the termination of the relationship with the

Company or its successor in interest, directly or indirectly engage in the Territory in any business competitive with the Company, including without limitation, any business that markets, promotes, sells or distributes medical or veterinary ultrasound or digital radiography equipment or holds seminars relating to the sales and training on medical or veterinary ultrasound equipment, or any business that markets, promotes, distributes, sells or installs products that the Company is now or in the future contemplating marketing, promoting, distributing, selling or installing (such as monitoring equipment) (Sales Representative Agreement § 14.3 [the "Non-Compete"]);

- directly or indirectly induce any present, former or prospective customer, supplier or independent contractor of the Company to patronize any person/entity that competes with UMS or request present, former or prospective suppliers, customers or independent contractors to cancel their business with UMS throughout the Sales Representative's tenure with UMS and for a period of one year after the termination of such relationship with the Company or its successor in interest (Sales Representative Agreement at § 14.1 [the "non-solicitation"]); or

- directly or indirectly, solicit, hire or retain the services of the Company's past or present employees or past or present independent contractors, or otherwise induce any such employee or independent contract to leave employment or engagement, or to breach an employment or independent contractor agreement with the Company throughout the Sales Representative's tenure with the Company and for a period of one year after the termination of such relationship with the Company or its successor in interest (Sales Representative Agreement § 14.2. [the "non-hire"]) (July 2010 Decision at 34).

In the context of Plaintiffs' preliminary injunction motion, the Court blue-lined the restrictive covenants and granted Plaintiffs' motion to the extent Fishel and Collins were enjoined from soliciting their prior UMS customers. However, because it was not raised by Plaintiffs (most likely because the Court had already ordered that Fishel and Collins turn over their laptops to prevent any disclosure of UMS's proprietary information), the Court did not address an injunction against the use and disclosure of UMS's confidential information. Here, the torts asserted against Vetel arise out of its alleged tortious interference with these restrictive covenants as well as its unfair use of misappropriated proprietary information that Vetel has allegedly used to unfairly compete with Plaintiffs.

Based on the emails annexed to Brunelli's Affidavit showing Collins' and Fishel's divulging UMS's confidential pricing and marketing information to assist Vetel in its competition against UMS, the Court is satisfied that Plaintiffs have established colorable claims of unfair competition, misappropriation of trade secrets and tortious interference with contract by inducing the breach by Fishel's and Collins' of the restrictive covenants found in their agreements with UMS.

Vetel's assertion that it has not engaged in any tortious conduct is based on its contention that the information at issue is not protectable since "mere 'knowledge of the intricacies of a business operation does not qualify'" (*Silipos, Inc. v Bickel,* 2006 WL 2265055 at *3-4 [SD NY 2006]) and courts have held that marketing or other financial information, market strategies, technical know-how, and pricing arrangements and price margins are not trade secrets for purposes of determining an employer's legitimate interest in protecting data (*see, e.g. Silipos, supra*; *Marietta Corp. v Fairhurst,* 301 AD2d 734, 739 [3d Dept 2003]). It is also Vetel's position that with regard to customer information, all of the leads it obtained were through lawful means. It is well settled that customer identities that are readily ascertainable from nonconfidential sources are not trade secrets as long as there is no evidence that the employee copied or memorized customer information from confidential sources (*Apa Sec., Inc. v Apa*, 37 AD3d 502, 502 [2d Dept 2007]; *Starlight Limousine Serv., Inc. v Cucinella*, 275 AD2d 704 [2d Dept 2000]). However, if Plaintiffs can show that Fishel and Collins misappropriated Plaintiffs' confidential information and fed the information to Vetel to unfairly compete against Plaintiffs, Plaintiffs may be able to establish their claims since the cases make a distinction between knowledge that is simply retained in the employee's brain upon his/her departure and information that has been misappropriated. As to this latter category of information, the information does not necessarily have to rise to the level of a trade secret to find that the misappropriation and use of such information in a competing business resulted in unfair competition (*see, e.g.*, *7th Sense, Inc. v Liu,* 220 AD2d 215 [1st Dept 1995]; *Repair Tech Inc. v Zarakin,* 2005 NY Slip Op 51233[U], 8 Misc 3d 1022[A] [Sup Ct Kings County 2005]); *Marcone APW, LLC v Servall Co.,* 85 AD3d 1693 [4th Dept 2011];*Eastern Bus. Sys., Inc. v Specialty Bus. Solutions, LLC*, 292 AD2d 336 [2d Dept 2002]).

For example, in an email dated May 3, 2010 from Collins to Garner, Collins advises Garner of UMS's final price of $137,700 without tax and shipping (Vetel 000667, Brunelli Ex. 13), and in an email dated May 7, 2010, Collins advises, among others, Garner, that

> UMS has been quoting the MyLab 5 at $22,500 with licenses for a year. We can match this with our demo systems. We have all the licenses turned on for 500 hrs just as they do. Call me if you need more on how to strategize with this feature yet be a consultative salesperson (Vetel 000941, Brunelli Aff., Ex. 13; *see also* Vetel 000932 [explaining that UMS sells systems like Vetel's demos with all licenses turned on and UMS calls customers on a daily basis]).

Vetel's encouragement of the disclosure of this confidential information by former UMS sales representatives is evidenced by an email from Bert Bossardet (Vetel VP) dated April 29, 2010 to all Vetel sales representatives wherein he states

> There have been some frustrating competitive scenarios that we have been caught up in during the early going with the Esaote Ultrasound line. We knew going in that UMS and their "tactics" where [sic] something we had to overcome in order to be successful with the MyLab line. *We do have intimate experience from within our own sales team in how to overcome these situations. It is our responsibility to each other to leverage our resources to gain insight into how to combat UMS*. The following was put together by Jeff Fishel to help combat what UMS is doing and saying (Brunelli Aff., Ex. 14 [emphasis added]).

Bossardet then forwards an email from Fishel in which Fishel explains the alleged misrepresentations made by UMS in its sales tactics (*id.*).

Garner followed Bossardet's direction and, on November 19, 2010, he wrote to Collins about a quote he had heard that had been made by UMS to some customer whose name is redacted for $27k for the advanced machine, which he found hard to believe. Collins writes back "This is not an advanced machine. Call me" (Vetel 000866, Brunelli Ex. 13).

Moreover, Plaintiffs have provided evidence that since Fishel and Collins moved over to Vetel, (1) Garner has become the top sales representative (Brunelli Ex. 33), (2) Vetel sold to two of UMS's customers, Cornell University and Dr. George Kramer of Atlantic Coast Veterinary Specialists (Brunelli, Ex. 15), (3) Vetel has been soliciting other clients of Plaintiffs such as Elmhurst Animal Hospital, Dr. Michael McCarthy and Dr. Diane Levitan, and (4) that Collins was actively involved in the sale to Kramer including his apparent assistance in locating Kramer in the first place (Brunelli Ex. 19). While Vetel contends that the sale to Kramer was only because UMS had been terminated and could not complete the purchase order that was then given to Vetel, these are obviously questions of fact that need not be determined for the purpose of this motion to dismiss.

Turning to the second basis relied upon by Vetel, the Court finds that Plaintiffs have established injury in New York that was reasonably foreseeable by Vetel. Thus, whether or not Plaintiffs actually lost a New York customer (although there is evidence suggesting that they did) is not the only inquiry since here, there is evidence that Vetel actively solicited its independent sales representatives to share the confidential information to assist Vetel in unfairly competing with UMS in the quotes made to New York veterinarians.

It is well settled that "'the situs of the injury is the location of the original event which caused the injury, not where the resultant damages are subsequently felt by the plaintiff'" (*Mareno v Rowe*, 910 F2d 1043, 1046 [2d Cir 1990], *cert denied* 498 US 1028 [1991], *quoting Carte v Parkoff*, 152 AD2d 615 [2d Dept 1989]; *United Bank of Kuwait, PLC v James M. Bridges, Ltd.*, 766 F Supp 113, 116 [SD NY 1991] [citation omitted] ["New York courts uniformly hold that the situs of a non-physical commercial injury is 'where the critical

events associated with the dispute took place'"]).[3] Thus, the occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York'" (*Katiroll Co., Inc. v Kati Roll and Platters, Inc.* 2010 WL 2911621 at * 3 [SD NY 2010]). However, injury within the state includes harm to business in the New York market in the form of lost sales or customers (*Citigroup Inc.*, 97 F Supp 2d at 568).

Here, Plaintiffs claim that they have made a *prima facie* showing that there is a basis to sustain jurisdiction in New York over the defendant, pursuant to CPLR 302(a)(3)(ii). In support, Plaintiffs rely on the New York Court of Appeals' decision in *Sybron Corp. v Wetzel* (46 NY2d 197 [1978]). In *Sybron,* the Court found that jurisdiction existed over the foreign defendant pursuant to CPLR 302(a)(3) because plaintiff had been injured in New York as the result of defendant's act of inducing a tortious breach of Wetzel's obligations to his former employer, whereby Wetzel provided defendant with plaintiff's trade secrets purloined through Wetzel, allowing defendant to make valuable competitive sales to plaintiff's New York customers (*Sybron Corp., supra,* 46 NY2d at 201). The Court reasoned that Wetzel could have foreseen the financial injury to Sybron, through its tortious acts that threatened the loss of the plaintiff's important New York customers (*id.* at 205).

Plaintiffs assert that the facts of *Sybron* are virtually indistinguishable from the facts of this case. Here, Fishel and Collins were passing plaintiff's proprietary information such as pricing and marketing strategies to Vetel's New York sales representative, Garner, who then solicited UMS's New York customers. Plaintiff claims that Garner's sale to Dr. Kramer, and Garner's conversation with Collins inquiring on how to effectively compete with UMS are two examples of the type of financial injury to UMS that the *Sybron* court feared, namely the threatened loss of "important New York customers" (*id.*). The Court held that a tortious act committed out of state that was likely to cause injury through the loss of business in state was sufficient to satisfy personal jurisdiction regardless of whether damages were ascertainable or likely recoverable *(id.).*

According to *Sybron*, when there are admitted and uncontroverted facts giving rise to the probable inference that there is a conscious plan to engage in unfair competition and misappropriation of trade secrets, there is enough to satisfy the requirements of CPLR 302(a)(3) (*id.* at 204). Plaintiffs claim that they have met and exceeded the requirements of this test by establishing actual injury in New York as a result of Vetel's tortious conduct. Plaintiffs claim that Garner, on behalf of Vetel, admitted to stealing the sale to Dr. Kramer from UMS with the help of Collins, and continues to service, solicit and sell to Dr. Kramer (Plaintiff's Opp. at 10; Regan Aff., Ex. C, 62:12-63:24). UMS further avers that by using the inside information he obtained from Collins and Fishel, as well as the sales lead he got from Gouvin, Garner continues to compete with UMS in New York. Plaintiffs also argue that the emails produced during discovery strongly suggest that Vetel, Fishel and Collins acted in concert to

---

[3]As noted by one court, "[t]his limitation on the applicability of § 302[a][3] anticipates and incorporates due process concerns: if the impact in New York is too removed from defendant's conduct, it is unlikely that the defendant will have purposefully availed itself of the benefits and protections of the forum state law" (*National Tel. Directory Consultants, Inc. v Bellsouth Adv. & Publ. Corp.*, 25 F Supp 2d 192, 198 [SD NY 1998]).

persuade Biosound to elect to terminate its relationship with UMS, resulting in an injury to UMS in New York (Brunelli Aff. ¶ 10-31, Ex. 2-12).

Indeed, courts in other cases under similar facts have found that jurisdiction exists over not only the employees who breached their fiduciary duties/restrictive covenants by providing their new employer with their prior employers' confidential trade secret information, but over the employers as well.

For example, in *Blissworld, LLC v Kovack* (2001 WL 940210 [Sup Ct NY County 2001]), plaintiff Blissworld, LLC, an owner and operator of a spa and seller of spa and beauty products through catalogs sued its former employee Kelly Kovack for her unlawful misappropriation of its proprietary customer list (containing the customers' contact information, their birthdays and their past purchases) which was kept on a password protected database. Blissworld also sued the company that purchased the list from Kovack, Glo Skincare, LLC ("Glo"), and its CEO, Mark Hayden. According to plaintiff, Glo used plaintiff's list to mail its own beauty products catalogs to plaintiff's customers, including residents of New York State. In denying Glo's and Hayden's motion to dismiss, the court held that the single mailing using plaintiff's purloined list was sufficient to establish jurisdiction under CPLR 302(a)(2)(ii). Further, the court held that it also had jurisdiction over Hayden as he participated in the mailing – a tortious act – without the state causing not unexpected injury to Blissworld in the state since for purposes of jurisdiction, the acts of a co-conspirator may be attributed to Hayden (*Blissworld,* 2001 WL 940210 at * 4, *citing Reeves v Phillips*, 54 AD2d 854 [1st Dept 1976]). In this regard, the Court disagrees with Vetel's argument that UMS cannot use the acts of Fishel and Collins to establish jurisdiction against Vetel. The documents submitted show Vetel's use and encouragement of its other sales representative's use of Collins' and Fishel's inside information to compete against UMS.

Similarly, in *Harrison Conference Serv., Inc. v Dolce Conference Serv., Inc.* (768 F Supp 405 [ED NY 1991]), plaintiff operated several corporate conference centers and until November 1990, it ran the center in Heritage Village, CT owned by Triangulum Associates. In September 1991, Triangulum notified plaintiff that it was in breach of the management agreement and that it would be terminating the agreement. Thereafter, on December 9, 1990, Triangulum telecopied a notice of termination to plaintiff and at the same time, armed security guards physically ousted plaintiff's personnel from the conference center. According to the complaint, prior to the ouster, Triangulum had hired defendants Andrew Dolce and John Marenzana and their respective companies to be the replacement for plaintiff under the management agreement. Plaintiff claimed that at the time of the takeover, defendants took plaintiff's documents, including its pricing and occupancy information, customer files, and customer and employee evaluations and plaintiff contended that this information could be used by defendants to their competitive advantage. Plaintiff sued defendants for misappropriation of trade secrets, unfair competition and conversion.

The court denied defendants' motion to dismiss for lack of personal jurisdiction holding:

> Plaintiff claims that the trade secret documents contain information regarding customers located in New York. If defendants improperly

> use the trade secrets to take New York customers from plaintiff, defendants will cause an injury within New York ... It is fair to infer defendants could have foreseen that injury ... Defendants do not dispute that each of them derives substantial revenue from interstate commerce. The court has personal jurisdiction over each of the defendants (*Harrison Conference Serv., Inc., supra*, 768 F Supp at 407).

Because this Court finds that there exists personal jurisdiction against Vetel, it need not address Plaintiffs' last argument that even if there is no basis for finding jurisdiction against Vetel, the Court may find that by moving to amend its answer to assert counterclaims that do not relate to Plaintiffs' claims, Vetel has waived its jurisdictional objection.

Based on the foregoing, Vetel's renewed motion to dismiss shall be denied.

## CONCLUSION

The Court has considered the following papers in connection with the motion to dismiss:

1) Notice of Motion to Dismiss dated October 31, 2011; Affirmation of Jessica J. Kastner, Esq. dated October 31, 2011, together with the exhibits annexed thereto; Affidavit of James K. Waldsmith, DVM, sworn to August 5, 2010; Affidavit of James K. Waldsmith, DVM, sworn to October 31, 2011; Affidavit of Steve Garner, sworn to September 9, 2010 Affidavit of Michael Collins, sworn to May 11, 2010;

2) Defendant's Memorandum of Law in Support of Defendant Vetel Diagnostics, Inc.'s Renewed Motion to Dismiss dated October 31, 2011;

3) Affidavit of Peter Brunelli, sworn to December 5, 2011, together with the exhibits annexed thereto; Affirmation of Michael P. Regan, Esq. dated December 5, 2011, together with the exhibits annexed thereto; Affidavit of R. Scott Jones, sworn to September 1, 2010, together with the exhibit annexed thereto;

4) Plaintiffs' Memorandum of Law in Opposition dated December 5, 2011;

5) Affirmation in Reply of Jessica J. Kastner, Esq. dated December 15, 2011, together with the exhibits annexed thereto; and

6) Defendant's Reply Memorandum of Law in Further Support of Defendant Vetel Diagnositcs, Inc.'s Renewed Motion to Dismiss dated December 16, 2011.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendant Vetel Diagnostics, Inc. to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that counsel appear before this Court on March 30, 2012 at 9:30 a.m. for a conference to discuss the scheduling of the motions that were stayed on the record of the October 18, 2011 conference as well as any other outstanding issues in the case; and it is further

ORDERED that the conference hereinabove ordered may not be adjourned without the prior written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March , 2012

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

APPEARANCES:

HARTMAN & CRAVEN LLP
By: Peter G. Goodman, Esq.
Attorneys for Plaintiffs
488 Madison Avenue
New York, New York 10022

THE DORF LAW FIRM, LLP
By: Jonathan B. Nelson, Esq.
Attorneys for Defendant Vetel Diagnostics, Inc.740 West Boston Post Road, Suite 304
Mamaroneck, New York 10543

YANKWITT & McGUIRE, LLP
By: Russell M. Yankwitt, Esq.
Attorneys for Defendants Jeff Fishel and Michael Collins
140 Grand Street, Suite 501
White Plains, New York 10601

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendant Vetel Diagnostics, Inc. to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that counsel appear before this Court on March 30, 2012 at 9:30 a.m. for a conference to discuss the scheduling of the motions that were stayed on the record of the October 18, 2011 conference as well as any other outstanding issues in the case; and it is further

ORDERED that the conference hereinabove ordered may not be adjourned without the prior written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 19, 2012

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court