SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

RCSUS INC. and RAMPAL CELLULAR STOCKMARKET LTD.,

Plaintiffs,

- v -

SGM SOCHER, INC. A/K/A SMG SOCHER, INC., YOSEF GREENWALD, and MENACHEM (MARTIN) STRAUSS[1],

Defendants.

----------X

**INDEX NO.** 650119/2015

**MOTION DATE** N/A

**MOTION SEQ. NO.** 006 007

**DECISION + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 273, 274, 275, 276, 281, 282, 284, 286, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 340

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 007) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 277, 278, 279, 280, 283, 285, 287, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 342

were read on this motion to/for DISCOVERY SANCTIONS/ PRECLUDE.

In motion sequence number 006, defendants SGM Socher, Inc. a/k/a SMG Socher, Inc. (SGM) and Yosef Greenwald move for summary judgment pursuant to CPLR 3212. In motion sequence number 007, plaintiffs RCSUS Inc. (RCSUS) and Rampal Cellular Stockmarket Ltd. (Rampal) move, pursuant to CPLR 3216 and 3212, to preclude defendants from contesting that the payments made during the times of the

[1] Menachem (Martin) Strauss is a former defendant in this action. On July 13, 2015, the court granted Strauss's motion to dismiss the complaint without prejudice as plaintiffs' claims against Strauss were subject to arbitration in Israel. (NYSCEF Doc. Nos. 101 and 102, Decision and Order and So-Ordered Transcript [motion seq. no. 002].)

deleted chats to Strauss were, in fact, commission payments made for diverted sales that would have gone to plaintiffs but for defendants' actions and for summary judgment.

**Background**

This dispute between competitors concerns the alleged improper relationship that defendants cultivated with Strauss, plaintiffs' former sales representative, in order to gain inside knowledge about plaintiffs' business transactions.

Plaintiffs and SGM[2] are distributors in the consumer electronics trading industry (Industry). Plaintiffs describe themselves as the "leading global distributor[s] of electronics and other open market goods." (NYSCEF Doc. No. [NYSCEF] 239, First Amended Complaint [FAC] ¶ 1.) As early as 2014, SGM "was a then-rising competitor in the [Industry]." (NYSCEF 197, Greenwald aff ¶ 3 [May 18, 2020].) Plaintiffs service buyers in need of consumer electronic goods items, such as cell phones, cameras, and tablets; since 2014, the nature of SGM's business is the same. (NYSCEF 201, Feller[3] depo tr at 25:7-12; NYSCEF 197, Greenwald aff ¶ 3 [May 18, 2020].)

Distributors in the Industry primarily utilize the internet to source information regarding suppliers and potential customers and to initiate transactions. (NYSCEF 198, Defendants' Expert Report of Avraham Liebermann [Liebermann Report] at 4[4].) In-person trade shows are a source of business as well. (*Id.* at 4-5.) Deals in the Industry

[2] Defendant Greenwald is the president and sole shareholder of SGM. (NYSCEF 197, Greenwald aff ¶ 1 [May 18, 2020].)
[3] Rami Feller is CEO and an owner of Rampal and President of RCSUS. (NYSCEF 201, Feller depo tr at 7:2-7; NYSCEF 292, Feller aff ¶ 1.)
[4] Pages cited refer to NYSCEF generated pagination.

are highly competitive and fast-paced, with offers that change in real time and turn on minor price differentials. (NYSCEF 239, FAC ¶ 5.)

Plaintiffs allege that, due to the nature of the Industry, their business model relies on their closely guarded trade secrets: "(1) the identity of its customers; (2) the identity of its suppliers; and (3) the terms under which it transacts individual deals with members of each group." (*Id.* ¶ 2; *see also* NYSCEF 292, Feller aff ¶¶ 4-8 [Feb. 2, 2015].) According to Feller, plaintiffs spent countless hours and millions of dollars developing lists of this information. (*Id.* ¶ 8.) For this reason, plaintiffs protect their confidential and proprietary information by limiting physical access to areas that store this information, using security software and network protections to prevent unauthorized access, and requiring their employees to sign confidentiality agreements to prevent the sharing of plaintiffs' information. (NYSCEF 239, FAC ¶ 3; NYSCEF 292, Feller aff ¶¶ 8-9 [Feb. 2, 2015].)

In 2011, Rampal hired Strauss as a sales agent; Strauss was "an employee of Rampal and agent of RCSUS." (*Id.* ¶ 21.) Strauss signed an employment agreement with Rampal, whereby Strauss agreed to "maintain in strict and absolute confidence, all information connected to Rampal, their customers, suppliers, trade secrets, trade and work methods" as a condition of employment (Confidentiality Agreement). (NYSCEF 241, Bill of Undertaking [English Translation] at 4.) This "obligation to secrecy" applied during Strauss's employment and thereafter so long as Rampal's information is not publicly available (provided that the information was not made publicly available as a result of any breach of the Confidentiality Agreement). (*See id.*) The Confidentiality Agreement contained an arbitration clause before the "'Bet Din' (Jewish Court)"

regarding all terms and conditions of Strauss's employment with Rampal. (*Id.* at 5.) SGM and RCSUS's relationship first began in 2011 when RCSUS began servicing SGM as an RCSUS customer and supplier; RCSUS assigned Strauss as the contact person for SGM's transactions with RCSUS. (NYSCEF 239, FAC ¶¶ 31-32; NYSCEF 197, Greenwald aff ¶¶ 23-25 [May 18, 2020].)

Plaintiffs allegedly learned, around October 2013, that Strauss was receiving monetary payments from Greenwald in exchange for stealing RCSUS's proprietary information. (NYSCEF 239, FAC ¶ 37.) An RCSUS sales agent reported Strauss's conduct and, following an investigation and the confiscation of Strauss's company-issued phone, plaintiffs terminated Strauss's employment. (*Id.* ¶¶ 38-39.)

Plaintiffs allege that much of Strauss's business was transacted on WhatsApp, a smartphone messaging application. (*Id.* ¶¶ 39-40.) Upon confiscating Strauss's phone, plaintiffs recovered approximately 2,400 messages exchanged between Strauss and Greenwald between October 29, 2014 and November 26, 2014. (NYSCEF 239, FAC ¶ 41.) Messages prior to October 29, 2014 were deleted by Strauss and irretrievable by plaintiffs as corroborated by the following messages:

> "29/10/14, 15:30:41: Menachem Strauss: My whole whatsapp just got erased.
> 29/10/14, 15:31:22: Yoisef Shloime Greenwald: How,
> 29/10/14, 15:31:22: Yoisef Shloime Greenwald: ?
> 29/10/14, 15:31:25: Menachem Strauss: I pushed by mistake and didn't realize.
> 29/10/14, 15:32:12: Meachem Strauss: Started from New."

(NYSCEF 256, Strauss-Greenwald WhatsApp Chat at 1.)

According to plaintiffs, these 2,400 messages demonstrate Greenwald and Strauss's scheme to steal and exploit plaintiffs' confidential and proprietary knowledge by (i) disclosing to Greenwald RCSUS's offers to and from buyers and sellers; (ii)

compensating Strauss for providing the confidential information, and (iii) detailing how Strauss improperly obtained information from other sales agents to steal additional information. (NYSCEF 239, FAC ¶ 42.) Plaintiffs provide a snapshot of those 2,400 messages:

> "03/11/14, 16:36:32: Yoisef Shloime Greenwald: What's w camera guy
> 03/11/14, 16:36:41: Menachem Strauss: Call him
> 03/11/14, 16:36:50: Menachem Strauss: Don't say RCS please
> 03/11/14, 16:36:49: Yoisef Shloime Greenwald: Good contact,
> 03/11/14, 16:36:51: Yoisef Shloime Greenwald: '?
> 03/11/14, 16:36:55: Menachem Strauss: Very
> 03/11/14, 16:36:55: Yoisef Shloime Greenwald: Offcourse
> 03/11/14, 16:37:01: Menachem Strauss: Heimishe guy
> 03/11/14, 16:37:06: Yoisef Shloime Greenwald: Aha
> 03/11/14, 16:37:13: Yoisef Shloime Greenwald: I never bought cameras
> 03/11/14, 16:37:20: Yoisef Shloime Greenwald: So need some help
> 03/11/14, 16:37:24: Menachem Strauss: U can also try to sell others
> 03/11/14, 16:37:32: Menachem Strauss: B and L
> 03/11/14, 16:37:44: Menachem Strauss: Will try
> 03/11/14, 16:37:54: Menachem Strauss: I don't either know enough
> 03/11/14, 16:38:05: Menachem Strauss: U don't have to know much
> 03/11/14, 16:38:35: Menachem Strauss: What he's looking for. If supplier has exact model u buy and sell
> 03/11/14, 16:38:39: Yoisef Shloime Greenwald: Ok
> 03/11/14, 16:38:42: Menachem Strauss: That what a does.
> 03/11/14, 16:38:52: Menachem Strauss: Knows nothing about cameras
> 03/11/14, 16:39:15: Yoisef Shloime Greenwald: Aha
> 03/11/14, 16:39:21: Yoisef Shloime Greenwald: Ok will call him
> 03/11/14, 16:39:25: Menachem Strauss: Yup
> 03/11/14, 16:39:49: Menachem Strauss: U got his name from Belgian freind
> 03/11/14, 16:39:58: Yoisef Shloime Greenwald: Offcourse
> 03/11/14, 16:40:04: Menachem Strauss: Good
> 03/11/14, 16:43:04: Yoisef Shloime Greenwald: Ok keep sending offers etc
> 03/11/14, 16:43:10: Yoisef Shloime Greenwald: Let's get back to work
> 03/11/14, 16:43:12: Yoisef Shloime Greenwald: Plz
> 03/11/14, 16:43:27: Menachem Strauss: Ok
> 03/11/14, 16:43:36: Menachem Strauss: I'm ready when u r."

(NYSCEF 256, Strauss-Greenwald WhatsApp Chats at 5-6.)

> "04/11/14, 21:00:29: Yoisef Shloime Greenwald: Spoke to Belgium
> 04/11/14, 21:00:35: Yoisef Shloime Greenwald: He kept asking where I got his name

04/11/14, 21:00:42: Yoisef Shloime Greenwald: I just dreyed
04/11/14, 21:00:44: Yoisef Shloime Greenwald: Lol
04/11/14, 21:00:51: Yoisef Shloime Greenwald: Didn't answer it
04/11/14, 21:00:55: Yoisef Shloime Greenwald: He asked 5 times
04/11/14, 21:01:00: Yoisef Shloime Greenwald: I said platforms
04/11/14, 21:01:01: Yoisef Shloime Greenwald: Lol
04/11/14, 21:01:08: Menachem Strauss: Good
04/11/14, 21:01:09: Yoisef Shloime Greenwald: He said he is not signed up to any platforms
04/11/14, 21:01:34: Yoisef Shloime Greenwald: 9300 u have?
04/11/14, 21:01:49: Menachem Strauss: Nope
04/11/14, 21:01:59: Yoisef Shloime Greenwald: What's the going rate
04/11/14, 21:02:17: Menachem Strauss: No idea
04/11/14, 21:02:44: Menachem Strauss: I told u to say Belgian freind
04/11/14, 21:03:44: Yoisef Shloime Greenwald: Don't worry
04/11/14, 21:03:48: Menachem Strauss: Ok
04/11/14, 21:06:10: Yoisef Shloime Greenwald: Can I write
04/11/14, 21:06:31: Yoisef Shloime Greenwald: I got ur contact from a friend in Belgium but he asked not to mention his name
04/11/14, 21:06:32: Yoisef Shloime Greenwald: ?
04/11/14, 21:06:39: Menachem Strauss: Yes."

(*Id.* at 11-12.)

"05/11/14 14:56:38: Menachem Strauss: N9005, blk, European, 400 pieces, $458
05/11/14 15:20:38 Menachem Strauss: i9195, blk/wht, with English manual, English on box, full Euro warranty, $224
05/11/14 15:20:48 Yoisef Shloime Greenwald: M[5] needs
05/11/14 15:20:59 Yoisef Shloime Greenwald: But if A[6] offers it's problem
05/11/14 15:21:35 Menachem Strauss: Only 500 white. Buy them. None will be left for A."

(*Id.* at 17.)

In January 2015, RCSUS commenced this action against SGM and Greenwald. (NYSCEF 1, Summons and Complaint.) RCSUS also moved for an immediate temporary restraining order and preliminary injunction against defendants. (NYSCEF 2, Order to Show Cause [motion seq. no. 001].)

[5] "M" is Matthew Harris, of one of the nonparty customers at issue here. (NYSCEF 246, Greenwald depo tr at 82:21-22.)
[6] "A" refers to one of plaintiffs' salesperson. (*Id.* at 82:23-83:4.)

On February 9, 2015, the court (Oing, J.) denied RCSUS's motion for a preliminary injunction. (NYSCEF 66, So-Ordered Transcript [motion seq. no. 001]; NYSCEF 60, Decision and Order [motion seq. no. 001].) On February 23, 2015, RCSUS amended its complaint to add Rampal as a co-plaintiff, Strauss as a defendant, and claims against Strauss, individually. (*Compare* NYSCEF 1, Summons and Complaint *with* NYSCEF 64, FAC.) Strauss moved to dismiss the action against him pursuant to an arbitration clause in his employment agreement, which was granted by the court on July 13, 2015. (NYSCEF 101, Decision and Order [motion seq. no. 002; NYSCEF 102, So Ordered Transcript [motion seq. no. 002].) In 2017, the Rabbinical Court of Justice in Israel determined that Strauss breached the Confidentiality Agreement. (*See* NYSCEF 271, Rabbinical Court of Justice Decision.)

Plaintiffs' remaining claims against SGM and Greenwald are: (i) tortious interference with business relationships (Count I); (ii) tortious interference with contract (Count IV); (iii) tortious interference with contract as third-party beneficiary (Count V); (iv) misappropriation of trade secrets and confidential information (Count VI); (v) unfair competition (Count VII); aiding and abetting breaches of fiduciary duty and duty of loyalty (Count IX); unjust enrichment (Count X); and permanent injunction (Count XI). (NYSCEF 239, FAC ¶¶ 50-56; 72-109; 115-132.)

Plaintiffs' Discovery Demands

Plaintiffs first requested documents on March 12, 2015. (NYSCEF 259, First Request for Documents.) Plaintiffs requested "[a]ll WhatsApp transcripts containing or concerning any conversation between [SGM] and Strauss." (*Id.* at 3.) On March 24, 2015, defendants contacted WhatsApp customer support for assistance in recovering

messages from a certain time period, explaining that Greenwald's iPhone was gifted to a co-worker who wiped all previous files. (NYSCEF 260, Correspondence with WhatsApp at 2.) WhatsApp responded that "WhatsApp does not maintain message logs or message content." (*Id*. at 3.)

With their initial production in May 2015, plaintiffs informed defendants that the production did not include WhatsApp communications from March 24, 2014 through May 28, 2014; May 30, 2014 through July 20, 2014; July 21, 2014 through July 30, 2014; August 1, 2014 through August 20, 2014; August 21, 2014 through September 22, 2014; and September 23, 2014 through November 19, 2014 (Message Gap Periods). (NYSCEF 261, Plaintiffs' Deficiency Letter at 1 [May 5, 2015].) Plaintiffs matched each of these missing periods with alleged loans from Greenwald to Strauss, explaining that:

> "Greenwald purport[ed] to have 'loaned' Strauss more than $89,000 during just these gap periods. It is difficult to believe that two individuals who so regularly conducted business on WhatsApp completely ceased using that medium at intervals that correspond directly to periods during which they were both negotiating transactions, Greenwald issued $89,000 of personal loans to Strauss, and, as Plaintiffs allege, misappropriating RCS's trade secrets and confidential information."

(*Id.*)

To explain the loss of messages during the Message Gap Periods, defense counsel stated that, sometime in late February or early March 2015, Greenwald upgraded his iPhone 5, for which he used for business matters and to contact Strauss, to an iPhone 6. (NYSCEF 324, Defendants' Deficiency Response Letter at 2 [May 12, 2015].) Counsel further explained that Greenwald gave the older model to his assistant who "naturally overwrote messages with her own." (*Id.*)

Therefore, with Strauss's deletion of his messages on his company phone, Greenwald giving his phone to his assistant for her own use, and WhatsApp's policy of not retaining messages, the messages sent during the Message Gap Period cannot be retrieved. This was confirmed by plaintiffs' forensic expert, Peter Kohler. (*See* NYSCEF 235, Kohler Report at 2.)

**Discussion**

Motion to Preclude

Plaintiffs ask the court to grant an adverse inference, precluding defendants from contesting that the payments made during the times of the deleted chats to Strauss were, in fact, commission payments made for diverted sales that would have gone to plaintiffs but for defendants' actions. According to plaintiffs, the spoliation of the WhatsApp chats during the Message Gap Period warrants their requested adverse inference. Plaintiffs also argue that, if the court grants this adverse inference, then plaintiffs are entitled to summary judgment on the amount of lost profits incurred from the business deals that Strauss steered to defendants instead of plaintiffs.

Spoliation is the intentional or negligent destruction of evidence. (*See Kirkland v New York City Housing Auth.*, 236 AD2d 170, 173 [1st Dept 1997] ["Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them."] [citation omitted].]

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind, which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the

> spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing."

(*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-452 [1st Dept 2014] [internal quotation marks and citations omitted].) Plaintiffs have sufficiently established that spoliation sanctions are appropriate for the loss of WhatsApp messages exchanged between Strauss and Greenwald during the Message Gap Period.

As to the first element, plaintiffs have the burden of showing that Greenwald had an obligation to preserve his WhatsApp messages at the time they were destroyed. The obligation to preserve evidence is triggered once a party reasonably anticipates litigation. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C*, 93 AD3d 33, 41 [1st Dept 2012] [holding that, at a minimum, the party anticipating litigation must institute an appropriate litigation hold].) Under *VOOM*, there can be no question that defendants "reasonably anticipated litigation," triggering their duty to preserve potential evidence as the litigation was well underway. (*Id.*) Here, Greenwald's iPhone was upgraded a month after this action was commenced, eliminating all doubt that he did not reasonably anticipate litigation. Moreover, Greenwald admits that, when this action commenced in January 2015, his counsel explained to him the "importance of maintaining a 'litigation hold' on all of my files and documents relating to this matter, and the importance of insuring that no documents, electronic files, and similar things were altered or deleted." (NYSCEF 320, Greenwald aff ¶ 9 [June 29, 2020].) Thus, the duty to preserve was in effect at the time of the destruction and Greenwald was well aware of his obligation at the time the evidence was destroyed.

As to the second element, plaintiffs have met their burden that Greenwald destroyed the WhatsApp messages with a culpable state of mind. "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence." (*VOOM HD Holdings LLC*, 93 AD3d at 45 [citations omitted].) "Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others. (N.Y. Pattern Jury Instr.--Civil 2:10A.) "Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail." (*VOOM HD Holdings LLC*, 93 AD3d at 45 [citation omitted].)

Although there was an oral litigation hold by Greenwald's counsel to Greenwald, there is no evidence that a written litigation hold was ever issued. While written litigation holds are not required in every case, (*see id.* at 41, n 2), a written litigation hold should have been issued here as SGM has two office locations in Delaware and New York and employs over thirty employees. (NYSCEF 246, Greenwald depo tr at 16:7-14.) A written litigation hold issued to defendants' employees would have given Greenwald's assistant notice not to delete apps and messages on Greenwald's iPhone 5.

Further, Greenwald relinquished possession and/or control over his iPhone 5 and did nothing to prevent deletion of the WhatsApp messages, despite the fact the

Greenwald admittedly used this iPhone 5 for business[7] and despite that fact that he was told to maintain a litigation hold. This utter failure to preserve the WhatsApp messages stored on the iPhone 5 while under a litigation hold constitutes gross negligence. (See *Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d 680 [1st Dept 2019] (After "separate incidents in May 2016 [when] their phones were damaged," defendants "replaced them with new phones. When they downloaded the application to the new phones, the chat histories were lost. Even assuming that [defendants] did not intentionally destroy the WeChat messages, defendants' failure to preserve the discussions for more than a year and to take timely actions to recover the damaged phones and data constitutes gross negligence;" *See also Safer v Hudson Hotel*, 70 Misc 3d 285 [Civ Ct, NY County 2020] [deletion of plaintiff's Facebook posts and failure to preserve third party posts constitutes gross negligence.) Defendants argue that Greenwald did not intentionally destroy the WhatsApp messages. Even if Greenwald believed that he "had transferred the data from the old phone to the new one" (NYSCEF 320, Greenwald aff ¶ 10 [June 29, 2020]), his belief does not erase his gross negligence in giving his iPhone away after litigation was filed and counsel advised defendant to preserve, nor do any tardy attempts by defendants to recover the WhatsApp messages. (NYSCEF 325, Emails with WhatsApp Support Team.)

Finally, where evidence is negligently destroyed, "the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense." (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-

[7] Greenwald testified he used two phones—one business and one personal—but that the phones were ultimately used interchangeably for both matters. (NYSCEF 246, Greenwald depo tr. at 90:13-20.)

548 [2015] [citation omitted].) However, where the spoliation is the result of gross negligence, the relevance of the evidence lost or destroyed is presumed. (*Arbor Realty Funding, LLC v Herrick, Feinstein LL*P, 140 AD3d 607, 609 [1st Dept 2016] [citations omitted].) The burden then shifts to the spoliating party to rebut this presumption. (*Id.*; *see also VOOM HD Holdings LLC*, 93 AD3d at 45 [citations omitted].) Here, defendants have failed to meet their burden. Instead of rebutting the presumption, defendants focus on plaintiffs' burden to show relevance, which is not the standard at issue here.

Thus, plaintiffs are entitled to an adverse inference precluding defendants from contesting that the payments made during the times of the deleted WhatsApp messages to Strauss were commission payments made for diverted sales that would have gone to plaintiffs but for defendants' actions.

Summary Judgment Motions

Both plaintiffs and defendants move for summary judgment.

*Plaintiffs' Motion for Summary Judgment*

Based on the adverse inference, plaintiffs are entitled to summary judgment on liability as to their claim for unfair competition. "To establish a cause of action for relief based on unfair competition, a plaintiff must demonstrate that the defendant wrongfully diverted the plaintiff's business to itself." (*Baldeo v Majeed*, 150 AD3d 942, 944 [2d Dept 2017] [citations omitted].) As defendants are precluded from contesting that they paid Strauss to divert plaintiffs' business to defendants, plaintiffs have established this cause of action, and defendants cannot raise any issue of fact. Defendants diverted business to themselves by wrongfully engaging plaintiffs' employee to supply defendants with confidential information such as plaintiffs' pricing.

However, judgment is limited to liability as an issue of fact exists as to damages, discussed in more detail below. Thus, the claim for unfair competition will be severed and referred to a referee for a hearing on damages.

As to plaintiffs' other causes of action, even with the adverse inference, plaintiffs still must make a prima facie case that summary judgment is warranted based on all elements of those claims, which they have failed to do. An adverse inference that defendants paid Strauss commissions to divert business to defendants does not alone prove the remaining claims as a matter of law. Therefore, plaintiffs have not met their initial burden and summary judgment is not warranted on these remaining claims. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case."].)

*Defendants' Summary Judgment Motion*

Defendants move for summary judgment on the grounds that plaintiffs' damages are speculative and there is no evidence thereof; the information at issue is not proprietary, arguing that the alleged contact information is publicly known in the Industry; and that plaintiffs failed to plead a necessary element of the claim.

Defendants argue that plaintiffs' damages theory is speculative because it assumes that each transaction SGM engaged in with the two customers identified by plaintiffs were ones that SGM would not have obtained but for Strauss. They argue that it is also based on other speculative assumptions, for example that plaintiffs had the merchandise available and at a price acceptable to those customers, had more

competitive pricing than SGM, offered the same favorable terms as SGM, and were in the market looking for customers for the specific products being offered.

In support of their argument, defendants submit the report of their expert, Abraham Liebermann, a former employee of plaintiffs. Liebermann opines that it does not makes sense, given the nature of the Industry, to contend that "all profits from transactions done between any customer or supplier and defendants after the customer or supplier was alleged first introduced by [Strauss] . . . should be considered as if that business could have been done by Rampal and it should therefore receive the profits from those transactions." (NYSCEF 198, Liebermann Report at 6-7.) While this may be true, it is not speculative that some of these transactions were the result of Strauss providing plaintiffs' confidential information such as pricing, enabling defendants to bid competitively lower and secure the transaction in their favor over plaintiffs. Thus, this Report does not conclusively show that plaintiffs' damages are speculative and should be denied altogether.

That being said, plaintiffs' submission to prove damages is woefully inadequate. Plaintiffs submit the affidavit and report of Daniel Feit, the Commercial Manager of plaintiffs' Accounting Department, to evidence their lost profits due to the diversion of business to defendants during this Message Gap Period. (NYSCEF 236, Feit aff and Report.) Feit also created spreadsheets as to two nonparty customers whose business was diverted to defendants by Strauss without much explanation. Instead of explaining the calculations and how they were arrived at, Feit informs the court that he is able to testify at trial. (*Id.*) As previously stated, the issue of damages must be determined at an immediate hearing as to the unfair competition claim as neither the Liebermann

Report nor the Feit Report conclusively answer whether plaintiffs suffered lost profits due to defendants' alleged conduct.

Defendants also assert that plaintiffs' claims (specifically Count VI) must fail because they are all based on the allegation that plaintiffs' client contact information is proprietary, which it is not. The court notes that the unfair competition does not require proprietary information as an element.

> "Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach . . . . Conversely, where the customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets. This is especially so where the customers' patronage had been secured by years of effort and advertising effected by the expenditure of substantial time and money."

(*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-393 [1972] [citations omitted].)

In support of their argument, defendants again rely on the Liebermann Report. Liebermann opines that there is nothing proprietary about vendor/customer information within the Industry, particularly in the last decade when there are open trade websites listing contacts in the Industry and many have their own websites. (NYSCEF 198, Liebermann Report at 6.)

Plaintiffs counter that, due to the nature of the Industry and the potential risk of unreputable customers or suppliers, they made painstaking efforts to build a list of qualified customers and suppliers. (NYSCEF 292, Feller aff ¶¶ 4-7 [Feb. 2, 2015].) They concede, however, that the general identity of suppliers and customers is publicly available. (NYSCEF 318, Plaintiffs' Opposition at 23.) Moreover, plaintiffs concede that trade exchange websites exist where customer and vendor information is readily shared; one of these exchanges has 40,000 members. (NYSCEF 243, Feller depo tr at

33-37:7.) Despite plaintiffs' conclusory allegation that they made painstaking efforts in compiling a list of reputable buyers and sellers, (NYSCEF 292, Feller aff ¶ 7 [Feb. 2, 2015]), they concede the identities of these potential customers or likely prospects are publicly known and available, and thus, they cannot be considered proprietary information.

Plaintiffs' allegation that they take serious measures to protect their curated list of sellers and buyers, such as enacting security measures and requiring employees to sign confidentiality agreements, does not establish that the information is proprietary, especially when the very nature of the Industry does not weigh in favor of finding the customers lists as trade secrets. (*1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503 [1st Dept 2011] [modeling agency "failed to establish that its customer lists and model contact information are confidential, since it has not shown that the information is not readily available in the modeling industry"] [citation omitted].)

Nevertheless, it is not only plaintiffs' contact list that is at issue. Plaintiffs also allege that Strauss provided defendants with "the terms under which it transacts individual deals with members of each group" including time-sensitive pricing. (NYSCEF 224, FAC ¶ 2.) Defendants fail to address this allegation. Thus, the claims will only be dismissed to the extent that they rely on the contact lists as trade secrets but will continue as to the pricing information.

Finally, defendants assert a whole host of reasons as to why plaintiffs' claims must be dismissed. In seeking a judgment dismissing the tortious interference with contract claims (Counts IV and V), defendants assert that plaintiffs have not established defendants' knowledge of the Confidentiality Agreement as the allegations in the FAC

are based upon information and belief. However, the burden is not borne by plaintiffs. Defendants have failed to point to any evidence showing that they did not know of the Confidentiality Agreement, such as an affidavit stating such, which would then shift the burden to plaintiffs. This is defendants' CPLR 3212 motion, in which defendants have the initial burden to make a "showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad*, 64 NY2d at 853.) Plaintiffs do not have the burden on this motion, and any argument otherwise is rejected.

Defendants argue that the aiding and abetting breach of fiduciary duty claim (Count IX) should be dismissed because they did not have any knowledge of a breach of fiduciary duty by Strauss. However, defendants fail to direct the court to any evidence supporting this argument, such as an affidavit. Further, even if the court accepted defendants' argument in their brief that they had no knowledge, there is an issue of fact as to whether they provided substantial assistance to Strauss. "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003].) Plaintiffs have presented several WhatsApp messages that raise an issue as to whether defendants helped conceal any breach of fiduciary duty. For example, the following message indicates Greenwald's willingness to keep his source of the information, Strauss, a secret:

> "04/11/14, 21:00:29: Yoisef Shloime Greenwald: Spoke to Belgium
> 04/11/14, 21:00:35: Yoisef Shloime Greenwald: He kept asking where I got his

> name
> 04/11/14, 21:00:42: Yoisef Shloime Greenwald: I just dreyed
> 04/11/14, 21:00:44: Yoisef Shloime Greenwald: Lol
> 04/11/14, 21:00:51: Yoisef Shloime Greenwald: Didn't answer it
> 04/11/14, 21:00:55: Yoisef Shloime Greenwald: He asked 5 times
> 04/11/14, 21:01:00: Yoisef Shloime Greenwald: I said platforms
> 04/11/14, 21:01:01: Yoisef Shloime Greenwald: Lol
> 04/11/14, 21:01:08: Menachem Strauss: Good
> 04/11/14, 21:01:09: Yoisef Shloime Greenwald: He said he is not signed up to any platforms."

(NYSCEF 256, Strauss-Greenwald WhatsApp Chats at 11.)

In regard to the tortious interference with business relationships claim (Count I), defendants assert that this claim fails because they did not use wrongful means to interfere with any of plaintiffs' business relations. Defendants assert that as competitors with an economic self-interest, this claim cannot stand.

To succeed on an interference with prospective business relations claim, the defendant's interference has to be "accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party. 'Wrongful means has been defined to include 'physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. '[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort.'" (*Stuart's v Edelman*, 196 AD3d 711, 713-714 [2d Dept 2021] [citations omitted].)

An issue of fact exists as to whether defendants employed wrongful means when they interfered with plaintiffs' customers. Since the aiding and abetting in breach of fiduciary duty claim is still alive, it cannot be determined on this motion whether any alleged participation in that breach amounts to interfering with business relations by wrongful means.

Defendants' argument for summary judgment of plaintiffs' unjust enrichment claim (Count X) is similarly denied. Unjust enrichment is a quasi-contract claim that "contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citations omitted].) A party claiming unjust enrichment must show that (1) another party was enriched (2) at the aggrieved party's expense, and (3) it is against equity and good conscience to permit the enriched party to retain what is sought to be recovered. (*See Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [citation omitted].) The court must examine whether a "benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1974], *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973].) The unjust enrichment claim cannot be determined on this motion as there is an issue of fact regarding whether defendants' conduct was tortious or fraudulent upon allegations that defendants participated in Strauss's breach of his fiduciary duty to plaintiffs.

All remaining arguments have been considered and are without merit.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED the portion of plaintiffs' motion for an adverse inference is granted in part, insofar as defendants are precluded from contesting that the payments made

during the times of the deleted chats to Strauss were commission payments paid to Strauss for diverted sales that would have gone to plaintiffs but for defendants' actions; and it is further

ORDERED that the portion of plaintiffs' motion for summary judgment is granted in part in so far as plaintiffs are awarded judgment on their unfair competition claims as to liability only, and otherwise denied; and it is further

ORDERED that the claim for unfair competition is severed and referred to a Special Referee for an immediate trial of the issues regarding damages; and it is further

ORDERED that a reference to determine is proper and appropriate pursuant to CPLR 4317 (b) in that an issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of what damages, if any, plaintiffs accrued as a result of defendants' unfair competition; and it is further

ORDERED that the powers of the Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link ), shall assign this matter at the

initial appearance to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

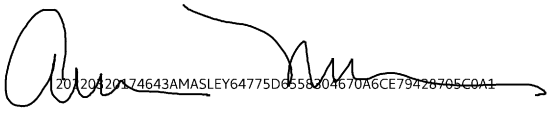
ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that as to the remaining causes of action before this court, the parties shall have 30 days from the date of this order to file motions in limine or they are deemed waived (no cross motions); and it is further

ORDERED that the parties shall update the court by email within 45 days from the date of this order as to whether they have filed motions in limine or to schedule a pre-trial conference; and it is further

ORDERED that the parties are directed to mediation and will return the mediation form they receive from the Part 48 Clerk forthwith.




3/20/2022
DATE

ANDREA MASLEY, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |