# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 102736/2007

DON'T THINK TWICE MEDIA

VS

CRACCHIOLA, IAN

Sequence Number : 001

DISMISS

INDEX NO.

MOTION DATE 7/2/07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |



**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that Ian Cracchiola's motion to dismiss the complaint is granted as to the sixth and seventh causes of action for defamation, and is otherwise denied; and it is further

ORDERED that Vincent Hernandez's motion to dismiss the complaint is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/4/07

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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DON'T THINK TWICE MEDIA, INC., and JOHN ECKSTEIN, JR.,

Plaintiffs,

Index No. 102736/07

-against-

**DECISION/ORDER**

IAN CRACCHIOLA and VINCENT HERNANDEZ,

Defendants.

----------x



CAROL R. EDMEAD, J:

**MEMORANDUM DECISION**

Motions sequence nos. 001 and 002 are consolidated for disposition. In motion sequence no. 001, defendant Ian Cracchiola (Cracchiola) moves, pursuant to CPLR 3211 (a) (7), for an order dismissing Counts 1 through 8 of the complaint.

In motion sequence no. 002, defendant Vincent Hernandez (Hernandez) moves, pursuant to CPLR 3211 (a)(7), for an order dismissing Counts 9 through 14 of the complaint.

This is an action for conversion, tortious interference with contract, misappropriation of trade secrets, tortious interference with prospective economic advantage, breach of fiduciary duty, defamation, *prima facie* tort, and injunctive relief.

The complaint alleges that, in or around 1996, John Eckstein, Jr. (Eckstein) and Glen Caplin (Caplin) formed a

company called Don't Think Twice Marketing & Promotions Corp. (Don't Think Twice). The company was engaged in the business of promotional and marketing activities, including music promotion. In 2000, Eckstein and Caplin dissolved Don't Think Twice, and Eckstein formed plaintiff Don't Think Twice Media, Inc. (DTTM), to engage solely in music promotion. Eckstein is DTTM's sole shareholder and president. Defendants Cracchiola and Hernandez were former employees to both Don't Think Twice, and DTTM.

The complaint states that DTTM enters into agreements with record companies (clients) to promote certain songs to mixshows (disc jockeys, or deejays) at "rhythmic" and "urban" music formatted radio stations. It describes DTTM's promotional activities as including, *inter alia*, obtaining airplay by deejays; convincing deejays and clubs to play songs; arranging promotion appearances and performances; traveling with artists; and distributing and posting promotional flyers. In consideration for its promotional activities, DTTM receives a flat fee.

The complaint states that DTTM's most valuable asset, and a trade secret, is its list of mixshow deejays (the contact list), which contains, *inter alia*, over 1,000 names, e-mail addresses, and specific personal information relating to the deejays which is not readily provided to the public. It is claimed that it took Eckstein several years to assemble the contact list, and

that only those individuals who know the password to DTTM's server or e-mail system have the opportunity to gain access to the confidential contact list. It is alleged that, over time, DTTM has been paid thousands of dollars by clients for its contact list.

The complaint further states that DTTM also maintains a confidential and proprietary "drop list," which is a list of radio stations and mixshow deejays, with a recorded statement that each deejay uses to support her or his show. It is claimed that the drop list information, which took Eckstein over 10 years to develop, can only be obtained by speaking directly to each DJ, and is not published or distributed.

Defendants Cracchiola and Hernandez initially were employed at Don't Think Twice, and then, in 2000, when Don't Think Twice was dissolved, began working for DTTM. Their duties consisted of calling deejays to promote songs, and questioning Deejays as to their song preferences. In 2004, Cracchiola was given more responsibilities which included client contact and managerial roles in DTTM's projects.

Epstein claims that, in or about June 2006, he had a discussion with Cracciola regarding Cracciola's poor work performance. On July 3, 2006, Cracchiola allegedly told Eckstein that he was quitting his job because he did not want to work for the music industry any more. Cracchiola is presently working for

Epiphany Media (Epiphany), a music promotion business. With regard to Hernandez, it is alleged that on October 20, 2006, Hernandez informed Eckstein that he was resigning.

MOTIONS TO DISMISS THE COMPLAINT

Cracchiola and Hernandez generally deny the allegations of the complaint, and argue that they are entitled to dismissal of the complaint as against them based upon documentary evidence, and/or plaintiff's failure to state a cause of action.[1] The first through eighth causes of action are asserted against Cracchiola, and the ninth through fourteenth causes of action are asserted against Hernandez.

The standards for evaluating a motion to dismiss pursuant to CPLR 3211 (a) (7) are well settled. The courts must liberally construe a pleading, accept all the facts alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory (Morales v Copy Right, Inc., 28 AD3d 440 [2d Dept 2006]; see also Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

However, when the moving party offers documentary evidence extrinsic to the pleading, the court need not assume the truthfulness of the pleaded allegation (Guggenheimer v Ginzburg,

[1]Eckstein concedes that he is a plaintiff in this matter only in connection with the defamation claims alleged against Cracchiola. Eckstein does not allege any personal claims against Hernandez.

43 NY2d 268 [1977]). In such a case, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (id. at 275). On a motion to dismiss a claim based upon documentary evidence, dismissal is appropriate if the documents definitively dispose of the plaintiff's claims by resolving all of the factual issues as a matter of law (Gephardt v Morgan Guar. Trust Co. of New York, 191 AD2d 229 [1st Dept 1993]; Standard Chartered Bank v D. Chabbott, Inc., 178 AD2d 112 [1st Dept 1991]).

CONVERSION

The first cause of action for conversion alleges that, when Cracchiola left his employ with DTTM, he destroyed the hard-drive on DTTM's laptop computer, failed to return various specified items which belong to DTTM, and made unauthorized personal charges on a DTTM corporate American Express credit card. In addition, plaintiff claims that while Cracchiola was in DTTM's employ, he worked on three projects for artists "Jibbs," "Field Mob" and "Daddy Yankee," for which he personally received three $5,000 checks, which monies should have been remitted to DTTM.

The ninth cause of action as against Hernandez also asserts conversion. Plaintiffs allege that, when Hernandez left his employ with DTTM, he failed to return to DTTM an external hard drive that contained DTTM's contact list, and a Subscriber Identity Module (SIM) card.

Cracchiola and Hernandez generally deny the allegations of the complaint. In response to the conversion claim, Hernandez maintains that he never received either a SIM card or a separate hard drive from DTTM. Cracchiola responds to the conversion cause of action by denying that he destroyed the hard drive on the laptop computer. He claims that the damage to the laptop was a result of prior documented problems with it. He attaches copies of repair invoices from 4G Data Systems, Inc., a computer repair shop, indicating that on January 1, 2006, the hard drive crashed and a new hard drive was installed, and that on April 7, 2006, and August 15, 2006, the subject laptop computer needed further repairs. Defendant also claims that he has either returned the items specified in the complaint, or never possessed them.

With regard to the DTTM credit card, defendant contends that all the charges on the card were made while he was employed by DTTM. Finally, he denies keeping payments belonging to DTTM for the promotion of songs for the artists referred to in the complaint. He attaches an affidavit by Kevin Black (Black), Chairman at Warner Bros. Records, formerly vice-president of Interscope Records,[2] who states that he never made any payments to Cracchiola for the promotional work performed, nor did Cracchiola

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[2]At the relevant time, Interscope Records retained DTTM to perform promotional work of the artists: Jibbs, Field Mob, and Daddy Yankee.

accept checks, on behalf of DTTM, or on behalf of himself, for the subject projects.

"The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (Republic of Haiti v Duvalier, 211 AD2d 379, 384 [1st Dept 1995]). Here, plaintiff has pled the elements of a conversion, to wit, defendant's wrongful taking of specific, identifiable, tangible, personal property (see e.g. Comprehensive Community Development Corp. v Lehach, 223 AD2d 399 [1st Dept 1996]; see also Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113 [1st Dept 1990]).

Plaintiffs have sufficiently pled claims for conversion against both Cracchiola and Hernandez. This court finds that, at this juncture, issues of fact exist regarding whether Cracchiola and/or Hernandez converted any of plaintiffs' property. Other than his disputing affidavit, Hernandez does not submit any other evidence regarding the conversion claim against him.

The evidence submitted by Cracchiola in support of his motion to dismiss does not definitively resolve all of the factual issues as a matter of law. Black's affidavit does not conclusively establish that Cracchiola did not receive payment for the specified artists, and the repair records for the lap top

do not conclusively establish that Cracchiola did not crash the hard drive in the computer.

Accordingly, Cracchiola's motion to dismiss the first cause of action, and Hernandez's motion to dismiss the ninth cause of action, are denied.

TORTIOUS INTERFERENCE WITH CONTRACT

The second cause of action as against Cracchiola asserts a claim for tortious interference with contract. Plaintiffs claim that, in April 2006, DTTM entered into a contract with a client to promote an artist known as "Big Tuck," and that, in turn, DTTM was to receive $30,000 for the project. It is further alleged that, in May 2006, DTTM was advised by the client that the project would be delayed, that during this time Cracchiola met with the client while he was still employed by DTTM, and attempted to get the Big Tuck project for himself.

Shortly after Cracchiola commenced working with Epiphany, Cracchiola/Epiphany submitted a lower bid for the project, and Epiphany received the job. Plaintiffs claim that Cracchiola tortiously interfered with DTTM's contract with its client by using proprietary and confidential information about the promotion and pricing schemes used by DTTM for the Big Tuck project.

In response, Eckstein claims in his affidavit, that in March or April 2006, Monte Lipman (Lipman), president of

Universal Republic Records (Republic), requested that DTTM listen to several projects, including a song from Big Tuck, and prepare a proposal. Shortly thereafter, Carolyn Young, an employee of DTTM, sent the proposal to Cracchiola for review, who then sent it to Republic. Eckstein attaches an e-mail sent to him by Lipman, dated April 25, 2006, which states "this is what we'd like to move forward on," and lists, among other songs, the song by Big Tuck, with specified budgets. Eckstein maintains that this constituted an offer of hire, and that, in response, DTTM sent Lipman an invoice for the project, consistent with the budget requested by Lipman. After Cracchiola went to work for Epiphany, DTTM was informed by Republic that it was giving the Big Tuck project to Epiphany.

The tort of tortious interference with contract contains the following elements: "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 [1996]; JHH Pictures v Rawkus Entertainment LLC, 291 AD2d 356 [1st Dept 2002]; Hoag v Chancellor Inc., 246 AD2d 224 [1st Dept 1998]).

Defendant argues that this claim should be dismissed since, *inter alia*, the complaint fails to demonstrate the existence of a

valid contract because it does not identify either the date of the contract, the parties that executed the contract, the relevant terms of the contract, nor how the contract was breached. It is further argued that the complaint fails to allege that Cracchiola intentionally and without justification caused the client to breach the alleged contract.

The complaint, together with Eckstein's affidavit in opposition to the motion, although inartfully drafted, is sufficient to withstand dismissal pursuant to CPLR 3211 (a) (7). "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; see also Leon v Martinez, 84 NY2d 83, 88 [1994]).

The allegations in the complaint, as well as the documentary evidence, and Eckstein's affidavit, provide: (1) the names of the parties, (2) enough facts that it is arguable that a valid contract existed between DTTM and Republic, (3) evidence of knowledge by Cracchiola of the agreement between DTTM and Republic, and (4) allegations that Cracchiola intentionally interfered with the contract, causing a breach of the contract and damages.

Giving the complaint and supporting papers submitted by the plaintiffs a liberal and favorable inference (CPLR 3026, 3211), this court finds that plaintiffs adequately pled a cause of

action to recover damages for tortious interference with contractual relations. Moreover, the affidavits submitted by the parties raise questions of fact with respect to, *inter alia*, whether there was a valid contract between DTTM and Republic, and whether, but for Cracchiola's actions, Republic would not have breached the contract with DTTM by terminating DTTM's services. Accordingly, defendants' motion to dismiss the second cause of action is denied.

MISAPPROPRIATION OF TRADE SECRETS

The third cause of action as against Cracchiola, and the tenth cause of action as against Hernandez, allege misappropriation of trade secrets. With regard to Cracchiola, plaintiffs claim that, through his employment with DTTM, Cracchiola obtained confidential and proprietary information about the promotion and pricing schemes DTTM was planning to use on the Big Tuck project. They claim that DTTM developed these promotion and pricing schemes for the Big Tuck project; that they constituted trade secrets; and that Cracchiola's actions in using these trade secrets to help procure the Big Tuck project for Epiphany constituted misappropriation of those trade secrets. It is also alleged that Cracchiola is improperly using the contact list and drop list to promote songs and obtain projects from record companies.

With regard to Hernandez, plaintiffs claim that, before leaving DTTM's employ, Hernandez e-mailed to his personal account, client and contact information and the drop list from DTTM's server. It is further alleged that Hernandez sent the contact list to a DTTM client, which resulted in the client thereafter paying DTTM less money to promote seven different projects, than it had paid prior to receiving the contact list. Plaintiffs also claim that Hernandez assisted Cracchiola in obtaining the contact list and drop list, by advising Cracchiola of the new password used to access the server and confidential contact lists, after Cracchiola left DTTM.

In order to establish a claim of misappropriation of trade secrets, plaintiffs must show that: (1) plaintiff possesses a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means (see Integrated Cash Management Services, Inc. v Digital Transactions, Inc., 920 F2d 171, 173 [2d Cir 1990]). The parties agree that New York courts have adopted the definition of trade secret set forth in the Restatement of Torts: "any formula, pattern, device, or compilation of information, which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it" (Restatement of Torts, §

757, comment b, quoted in Ashland Management v Janien, 82 NY2d 395, 407 [1993]).

The Restatement cites several factors which the court should consider in evaluating a claim of trade secrecy: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (Restatement of Torts § 757, comment b; see also Eastern Business Systems v Specialty Business Solutions, LLC., 292 AD2d 336, 337 [2d Dept 2002]).

Plaintiffs maintain that compiling the contact list and drop list is extremely labor intensive, took many years to compile, and requires personal relationships with radio stations and deejays. They also contend that this information is not readily available to the public. Both Cracchiola and Hernandez dispute plaintiffs' contention and argue that neither plaintiffs' contact list nor drop list is confidential or a trade secret; that they do not contain any information that is not readily available to

the public by either making telephone calls, using the internet, or listening to the radio.

"[A] trade secret must first of all be secret: whether it is is generally a question of fact" (Ashland Management v Janien, 82 NY2d at 407). Here, there are conflicting affidavits on the point, and the exhibits provided by the defendants do not definitively settle the issue of whether the contact list and/or the drop list can be considered trade secrets.

With regard to DTTM's promotion and pricing scheme for the Big Tuck project, Cracchiola argues that this does not rise to the level of a trade secret. However, cost and pricing details may rise to the level of a trade secret (CBS Corp. v Dumsday, 268 AD2d 350 [1st Dept 2000]; Laro Maintenance Corp. v Culkin, 267 AD2d 431 [2d Dept 1999]).

Plaintiffs' claim that Cracchiola improperly used DTTM's confidential pricing scheme and promotional information, which had limited access, to benefit a competing business, which business used this confidential information to undercut DTTM's bid for the Big Tuck project, permits an inference that Cracchiola improperly used trade secrets to replace DTTM (CBS Corp. v Dumsday, 268 AD2d at 353). Thus, Cracchiola's motion to dismiss the third cause of action, and Hernandez's motion to dismiss the tenth cause of action, are denied, as plaintiffs have

sufficiently stated a cause of action for misappropriation of trade secrets.

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The fourth cause of action asserted against Cracchiola, and the eleventh cause of action asserted against Hernandez, assert a claim for interference with prospective economic advantage. With regard to Cracchiola, plaintiffs allege that they had promoted a song for Blak Jack/"Ride N' Swerve" (Blak Jack) for a client, for which they received the sum of $30,000, and anticipated receiving a follow-up project for the next song which was being released by Blak Jack. The follow-up project for Blak Jack was subsequently awarded to Cracchiola and Ephiphany, for the sum of $25,000. Plaintiffs allege that Cracchiola, who was still employed by DTTM when DTTM promoted the first Blak Jack song, used proprietary and confidential information regarding DTTM's promotion and pricing schemes to undercut DTTM on the follow-up project.

Plaintiffs further allege that Cracchiola used the contact list to obtain promotion projects that otherwise would have been awarded to DTTM. Finally, plaintiffs contend that Cracchiola, while still an employee of DTTM, as a side project, helped promote the song "Dig Dug" by an artist known as "Whale." Plaintiffs maintain that this project should have been brought to DTTM; that DTTM's usual fee for this type of work would be

$5,000; and that Cracchiola's failure to bring this work to DTTM constitutes tortious interference with a prospective economic advantage.

With regard to Hernandez, plaintiffs claim that Hernandez worked on a side project while he was still an employee of DTTM, helping to promote the artist "Jadakiss" and his song "Blast Off." They maintain that DTTM usually performs this type of work for its clients, and that Hernandez should have brought this project to DTTM.

In his affidavit, Eckstein avers that one day before resigning from DTTM, Hernandez e-mailed the entire contact list to Dontay Thompson, who works for DTTM client J Records, and sent a copy to his personal account.[3] He contends that J Records regularly hired DTTM to promote songs and that Hernandez was aware of that fact. Eckstein claims that Hernandez acted out of pure malice, and that his actions resulted in J Records not requesting certain services from DTTM, and refusing to pay DTTM the same monies it had previously paid.[4]

Eckstein further claims that, in September 2006, Hernandez sent confidential information to Cracchiola in connection with the Big Tuck project (which plaintiffs allege was stolen from

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[3]Plaintiffs attach a copy of the e-mails exchanged between Hernandez and Dontay Thompson.

[4]Plaintiffs claim that J Records refused to pay more than $3,000-$6,000 to promote a song, since it had DTTM's contact list.

DTTM), and that Hernandez provided Cracchiola with the product key to download Microsoft, which gave Cracchiola access to all of DTTM's confidential information, which Cracchiola used to benefit DTTM's competitor. Finally, Eckstein attaches copies of various e-mails sent by Hernandez, while he was still employed by DTTM, in support of plaintiffs' claim that Hernandez was working on various specified side projects, which should have been brought to DTTM, while he was employed by DTTM.

In order to state a claim for tortious interference with prospective advantage, plaintiff must allege that "a contract would have been entered into had it not been for the conduct of the defendant ... [and that] the means employed to induce a termination of the relationship are dishonest, unfair, or in any other way improper" (Robbins v Ogden Corp., 490 F Supp 801, 811 [SD NY 1980]; Snyder v Sony Music Entertainment, Inc., 252 AD2d 294 [1st Dept 1999]). Wrongful means has been defined to include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (NBT Bancorp v Fleet/Norstar Financial Group, 87 NY2d 614, 624 [1996], quoting Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980]). Wrongful conduct may also include misappropriation of confidential and proprietary information (CBS Corp. v Dumsday, 268 AD2d at 353).

Here, even in the absence of a sole motivation to harm plaintiffs, there is an allegation of wrongful means in the nature of Cracchiola's alleged misappropriation of confidential and proprietary information to induce plaintiffs' client to award a contract to Cracchiola's present employer. There is also an allegation that Hernandez used wrongful means to misappropriate confidential information while he was employed by DTTM. These allegations suffice for pleading purposes.

Inasmuch as plaintiffs have adequately pled their claims for tortious interference with prospective economic advantage, defendants' motions to dismiss the fourth cause of action and the eleventh cause of action are denied.

BREACH OF FIDUCIARY DUTY

The fifth cause of action asserted against Cracchiola, and the twelfth cause of action asserted against Hernandez, claim breach of fiduciary duty. Plaintiffs allege that Cracchiola violated the duty of good faith and loyalty he owed to DTTM by, *inter alia*, misappropriating and using DTTM's confidential contact list, drop list, and promotion and pricing schemes, and misappropriating business opportunities.

As against Hernandez, plaintiffs claim that, as DTTM's employee, he owed a fiduciary duty to DTTM. It is alleged that Hernandez violated his duty of loyalty and good faith by: (1) providing Cracchiola with the new e-mail system password after

Cracchiola resigned from DTTM; (2) misappropriating business opportunities that belonged to DTTM; and (3) misappropriating DTTM's confidential contact list and drop list.

An employer is owed a fiduciary duty of loyalty and good faith by an employee as a matter of law, for the period that an employee is employed by the employer (Lamdin v Broadway Surface Adv. Corp., 272 NY 133, 138 [1936]; American Map Corp. v Stone, 264 AD2d 492 [2d Dept 1999]). An employee may not act in any manner inconsistent with his duties or trust (id. at 493). "An employee may create a competing business prior to leaving his employer without breaching any fiduciary duty unless he makes improper use of the employer's time, facilities or proprietary secrets in doing so" (Don Buchwald & Assocs., Inc. v Marber-Rich, 11 AD3d 277 [1st Dept 2004], quoting Schneider Leasing Plus v Stallone, 172 AD2d 739, 741 [2d Dept 1991]).

In the instant case, plaintiffs allege that Cracchiola kept payments for the Jibbs, Field Mob and Daddy Yankee projects, which monies belong to plaintiffs. Plaintiffs further claim that Cracchiola misappropriated the DTTM contact list and drop list while he was working for DTTM by making back-up copies of these lists, and e-mailing copies to his personal e-mail account. Since plaintiffs allege that Cracchiola improperly used plaintiffs' time, facilities, and trade secrets to solicit on behalf of a new employer who was competing with plaintiffs, and

to promote his own side project, to wit, Whale/"Dig Dug," while employed by plaintiffs, there is a sufficient basis for plaintiffs' claim of breach of fiduciary duty.

Similarly, plaintiffs' allegations that Hernandez, while in DTTM's employ, was competing with DTTM by promoting side projects and using DTTM's trade secrets, and that Hernandez used DTTM's time and facilities to divert plaintiffs' business, adequately states a claim for breach of fiduciary duty.

Since plaintiffs have sufficiently pled a cause of action for breach of fiduciary duty (see CBS Corp. v Dumsday, 268 AD2d at 353), against both Cracchiola and Hernandez, defendants' motions to dismiss this claim are denied.

DEFAMATION

The sixth and seventh causes of action, as against Cracchiola, purport to state causes of action for business defamation and defamation, respectively. They are based upon Cracchiola's alleged statements to DTTM clients that Eckstein is a designer drug addict and that he failed to pay his employees because of his drug addition. It is claimed that Cracchiola knowingly made these false statements to denigrate Eckstein's reputation in order to obtain promotional projects for himself and Epiphany, and that these statements have injured Eckstein's reputation. They also contend that plaintiffs have incurred

damages in order to repair business relationships as a result of defendant's actions.

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander) (Morrison v National Broadcasting Co., 19 NY2d 453 [1967]). A defamation claim arises from the making of a false statement which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society [citations omitted]" (Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 379, cert denied 434 US 969 [1977]).

The elements of a defamation cause of action are: "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (Restatement [Second] of Torts § 558)" (Dillon v City of New York, 261 AD2d 34 [1st Dept 1999]; Carecore National, LLC v New York State Assn. of Med. Imaging Providers, 24 AD3d 488 [2d Dept 2005]).

There are four categories of statements that are considered libelous per se. They are statements that: (1) charge plaintiff with a serious crime; (2) tend to injure plaintiff in its business, trade or profession; (3) plaintiff has some horrible

disease; or (4) impute unchastity to a woman (Liberman v Gelstein, 80 NY2d 429 [1992]; Harris v Hirsh, 228 AD2d 206 [1st Dept 1996]; Herlihy v Metropolitan Museum of Art, 214 AD2d 250, 261 [1st Dept 1995]).

CPLR 3016 (a) requires that in an action for libel or slander, "the particular words complained of shall be set forth in the complaint." Further, the time, place, manner and persons to whom the publication was made should be alleged (Dillon v City of New York, 261 AD2d at 38; Liffman v Brooke, 59 AD2d 687 [1977]).

The alleged defamatory statement that Eckstein is a "designer drug addict," can constitute a slanderous statement (see Torres v Prime Realty Services, 7 AD3d 343, 344 [1st Dept 2004]). "The words should be considered in the context in which they were used and whether they can be readily interpreted as imparting to plaintiff 'fraud, dishonesty, misconduct or unfitness in his business' [citations omitted]" (Herlihy v Metropolitan Museum of Art, 214 AD2d at 261). Here, neither the complaint nor Eckstein's affidavit adequately allege any specific facts describing the circumstances surrounding the slanderous statement at issue. There are no allegations regarding the time period, places, or manner of the false statement, nor to whom it was made, thus, this court finds that the sixth and seventh causes of action for defamation are not adequately pleaded.

Accordingly, Cracchiola's motion to dismiss the sixth and seventh causes of action for defamation is granted.

INJUNCTION

The eighth cause of action as against Cracchiola, and the fourteenth cause of action as against Hernandez, seek an injunction. Plaintiffs seek to restrain Cracchiola and Hernandez from using or disseminating any information contained on the contact list or drop list they obtained from DTTM.

Although a former employee cannot be restrained from using his or her own knowledge or experience, even if it involves a purported trade secret, "[a] former employee may be restrained from revealing a trade secret learned during his employment to his former employer's competitor, even in the absence of an agreement not to compete" (Advance Biofactures Corp. v Greenberg, 103 AD2d 834, 836 [2d Dept 1984]). Accepting the truth of the allegations contained in the pleading and Eckstein's affidavit, to wit, that the contact list and drop list are not publicly known or ascertainable from sources outside of DTTM, that Cracchiola and Hernandez acquired knowledge of these purported confidential lists while they were employed by DTTM, and that they misappropriated that information and used it to the benefit of a competitor, the pleading as to the eighth cause of action, and the fourteenth cause of action, for an injunction are sufficiently pled. Accordingly, Cracchiola's motion to dismiss

the eighth cause of action, and Hernandez's motion to dismiss the fourteenth cause of action, are denied.

PRIMA FACIE TORT (Tortious Destruction of Property)

The thirteenth cause of action as against Hernandez, labeled "tortious destruction of property", sounds in *prima facie* tort. Plaintiffs allege that, after resigning from DTTM, Hernandez deleted DTTM files from the computer system, and that it took DTTM several hours to restore the deleted information at a cost of approximately $900.00. Plaintiffs claim that Hernandez's actions were done intentionally and with malice. Hernandez does not respond to these allegations.

The requisite elements for a cause of action sounding in *prima facie* tort include: (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (see Curiano v Suozzi, 63 NY2d 113 [1984]; Drago v Buonagurio, 46 NY2d 778 [1978]; Golub v Esquire Publishing, 124 AD2d 528 [1st Dept 1986]). It is well settled law in New York that harm intentionally done is actionable if the conduct is unjustified. In the instant action, plaintiffs have alleged that Hernandez's actions have resulted in specific, identifiable, and measurable damages. Plaintiffs have pled the requisite elements, and Hernandez has failed to allege a justification which would allow him to escape liability (Aikens v Wisconsin, 195 US 194

[1904]). Accordingly, Hernandez's motion to dismiss the fourteenth cause of action is denied.

Accordingly, it is

ORDERED that Ian Cracchiola's motion to dismiss the complaint is granted as to the sixth and seventh causes of action for defamation, and is otherwise denied; and it is further

ORDERED that Vincent Hernandez's motion to dismiss the complaint is denied; and it is further

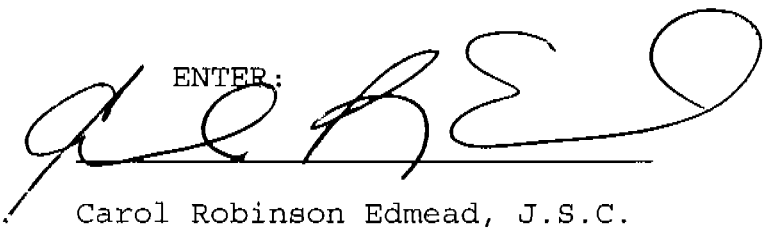
ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

DATED: October 4, 2007

ENTER:



Carol Robinson Edmead, J.S.C.