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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 32

Zeno Group

-v-

Charlotte Wray

INDEX NO. 602132/04

MOTION DATE 4/28/06

MOTION SEQ. NO. 002

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/26/08

HON. RICHARD B. LOWE, III J.S.C.

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

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 56

----------X

ZENO GROUP, INC.,

Plaintiff,

-against-

Index No.
602632/06

CHARLOTTE WRAY, OMNICOM GROUP, INC., DIVERSIFIED AGENCY SERVICES d/b/a DAS, BRODEUR WORLDWIDE, and MELYSSA WEIBLE,

Defendants.

----------X



**RICHARD B. LOWE, III, J.:**

This action arises in connection with the employment of defendants Charlotte Wray (Wray) and Melyssa Weible (Weible) with plaintiff Zeno Group, Inc. (Zeno), which employment terminated on June 30, 2006.

From September 2001 until her resignation in June 2006, Wray was a senior executive of Zeno, a subsidiary of an independent public relations firm. Wray departed Zeno to become the president of non-party Rx Mosaic Health (Mosaic), a division of defendant Brodeur Worldwide (Brodeur), and an alleged direct competitor of Zeno in the health care public relations field. Brodeur is, in turn, wholly-owned by defendant Omnicom Group, Inc. (Omnicom), and managed by defendant Diversified Agency Services (DAS), the largest division within Omnicom. Omnicom,

DAS, and Brodeur will sometimes hereinafter be referred to collectively as the "Corporate Defendants."

According to the complaint, in the weeks prior to and after her resignation, Wray breached her fiduciary duties to Zeno by soliciting Zeno's most valuable health care clients and the employees who serviced these clients. Zeno maintains that Wray's actions took place with the full knowledge, support and endorsement of senior executives of the Corporate Defendants.

Zeno seeks to permanently enjoin the Corporate Defendants from the use or disclosure of Zeno's confidential information for any purpose, and from the solicitation of certain Zeno clients and employees. The complaint seeks damages for Wray's alleged breaches of fiduciary duty, which were purportedly endorsed and supported by the Corporate Defendants, and a targeted effort to misappropriate Zeno's health care practice. In addition, Zeno seeks recovery for Wray's tortious interference with Zeno's employment and client contracts and advantageous business relations. Finally, the complaint asserts causes of action under the theories of unfair competition, unjust enrichment, misappropriation of confidential information, conversion, violation of the Computer Fraud and Abuse Act, breach of contract and fiduciary duty (against Weible), and for the Corporate Defendants' involvement with these activities.

By Order to Show Cause dated July 27, 2006, Zeno obtained a

temporary restraining order requiring the return of documents and computerized materials obtained by Wray prior to her departure from Zeno, and prohibiting the use of that information to solicit clients or employees of Zeno. Subsequently, on September 25, 2006, the parties stipulated to a so-ordered preliminary injunction essentially maintaining the facets of the TRO for the duration of this action.

**BACKGROUND**

Wray, a specialist in health care public relations, began working at Zeno in September 2001 as a Senior Vice President. Two years after Wray was hired, she was promoted to Managing Director and named head of Zeno's health care practice group, reporting directly to the President and CEO of Zeno, Jerry Epstein (Epstein).

In June of 2006, Wray left Zeno to join Mosaic, a new health division of Brodeur that would allegedly compete directly with Zeno for public relations services in the health care field.

According to the complaint, prior to her departure, Wray: (i) secretly solicited clients and employees to leave Zeno and join Brodeur; (ii) ensured that Zeno would not be selected to perform a significant project for a major potential client by failing to submit a proposal for the project or notify others of deadlines associated with the potential business opportunity; (iii) deleted computer files and e-mails contained on the laptop

computer provided to her by Zeno for business use; (iv) removed and/or destroyed confidential client files; and (v) surreptitiously communicated with both the Chief Executive Officer and Chief Financial Officer of Brodeur, to notify them of, and enlist their help with, her improper interference with Zeno's contracts and employment relationships.

According to plaintiffs, although they cannot produce such a document, Wray, like all Zeno employees, was presented with an offer letter that included as an attachment a Non-Competition Agreement (the "NCA"). See Epstein Affidavit, Exhibit HH. Wray claims that she never signed the NCA. Plaintiffs retort, however, that Wray signed her offer letter on September 10, 2001, and the letter clearly indicates that the NCA was to be signed and returned to Zeno on Wray's first day of employment.

Zeno also complains that in an e-mail recovered from Wray's hard drive, dated June 29, 2006, the Marketing Director of ColBar LifeScience (ColBar), thanked Wray and Weible "for taking the time to meet with us last week," and suggested that another meeting be scheduled in mid-July. At this time, both Wray and Weible were still employed by Zeno. The ColBar business involved providing public relations services in connection with a product called Evolence. The account, according to the complaint, was diverted by Wray and Weible to Mosaic.

According to Zeno, on about July 12, 2006, a procurement

officer at Organon, one of the largest women's health companies in the world, and another potential client of Zeno, contacted Paul Oestreicher, the new Managing Director of Zeno's New York office, asking for Zeno's overdue proposal for their women's health business. The procurement officer allegedly told Mr. Oestreicher that Wray had committed to submit a proposal on behalf of Zeno, but that she had not done so.

Zeno argues that this evidence indicates that either Wray: (i) failed to assign any Zeno employees to work on the proposal thereby squandering the opportunity; or (ii) Wray intentionally and deliberately diverted the potential client to harm Zeno and benefit herself, and her new employer.

The complaint brings causes of action for: (i) a permanent injunction preventing defendants from utilizing Zeno's confidential and proprietary business information; (ii) breach of fiduciary duty and the duty of loyalty against Wray and Weible; (iii) aiding and abetting breach of fiduciary duty; (iv) tortious interference with Zeno's client, confidentiality, and non-competition contracts against Wray, Omnicom, DAS, and Brodeur; (v) tortious interference with advantageous business relations; (vi) unfair competition; (vii) unjust enrichment; (viii) misappropriation of confidential information; (ix) conversion; (x) violation of the Computer Fraud and Abuse Act (18 USC § 1030); and (xi) breach of the NCA by Weible.

Defendants move, pursuant to CPLR 3212, to dismiss all causes of action.

**DISCUSSION**

Summary judgment is a drastic remedy which may be granted only if defendants establish that there are no triable issues of fact. (*Andre v Pomeroy*, 35 NY2d 361 (1974); *Mosheyev v Pilevsky*, 283 AD2d 469 [2nd Dept 2001]). Thus, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Only after defendants have made such a showing, is Zeno then required to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or an acceptable excuse for its failure to do so. (*Zuckerman*, 49 NY2d at 557; *Davenport v County of Nassau*, 279 AD2d 497 [2nd Dept 2001]).

Finally, Zeno, as the nonmovant on this motion is entitled to the benefit of every favorable inference, and the evidence shall be viewed in a light most favorable to Zeno. *Negri v Stop & Shop*, 65 NY2d 625 [1985]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2nd Dept 2001]).

**Claims against Omnicon**

As a preliminary matter, defendants claim that there are no allegations in the complaint against Omnicom, and, consequently,

that the complaint as against Omnicom should be dismissed. Meanwhile, the complaint states that Omnicom is aiding and abetting Wray and former employees of Zeno in material breaches of their fiduciary duty (Complaint, ¶¶ 6, 67). The cause of action, on its face, is not, as defendants assert, based upon Omnicom's controlling interest in Brodeur. Defendants' argument is rejected.

**Permanent Injunction (1st Cause of Action)**

Zeno seeks to permanently enjoin defendants from utilizing confidential and proprietary business information of Zeno. Defendants argue that this cause of action fails because Zeno cannot prove that the alleged confidential information was not known outside of Zeno, that it was maintained as confidential, that it is valuable to Zeno competitors, or ascertainable from other sources. (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993]).

This argument is not appropriate on a motion for summary judgment. First, *Ashland Mgt. Inc.* goes on to state unequivocally that whether information constitutes a trade secret "is generally a question of fact." (*Id.*; *see also Kaumagraph Co. v Stampagraph Co.*, 235 NY 1, 8-9 [1923]). As such, whether the information alleged to be used is confidential it is not a determination that may be made on a motion for summary judgment.

Moreover, a movant cannot establish entitlement to summary

judgment merely by pointing to gaps in the opponent's proof. (*Torres v Industrial Container*, 305 AD2d 136 [1st Dept 2003]; *Picart v Brookhaven Country Day School*, 37 AD3d 798 [2nd Dept 2007]; *Dow v Schenectady County Dept. of Social Servs.*, 46 AD3d 1084 [3rd Dept 2007]; *Giangrosso v Kummer Dev. Corp.*, 8 AD3d 1037 [4th Dept 2004]). Instead, as movants, even if defendants credibly maintain that Zeno cannot establish an essential element of a claim (*see Restrepo v Rockland Corp.*, 38 AD3d 742, 743 [2nd Dept 2007]), defendants are still required to affirmatively demonstrate the merit of their claim or defense. (*Pappalardo v Long Is. R.R. Co.*, 36 AD3d 878, 880 [2nd Dept 2007]). Defendant-movants have made no such showing and therefore the motion for summary judgment dismissing the cause of action for a permanent injunction is denied.

**Breach of Fiduciary Duty Claims (2nd Cause of Action)**

According to the complaint, Wray breached her fiduciary duties to Zeno by (i) diverting business opportunities to her new company and failing to pursue lucrative opportunities for Zeno; (ii) interfering with Zeno's client relationships to ensure that those relationships would leave Zeno and follow her to Mosaic; (iii) soliciting clients and employees to leave Zeno and join her at Mosaic; (iv) choreographing the lift-out of Zeno employees to disable her prior employer from retaining its client relationships; (v) misappropriating critical confidential

information regarding Zeno and its clients (based upon the 8th cause of action for misappropriation); and (vi) destroying files and records belonging to Zeno (based upon the 9th cause of action for conversion).

"[T]o establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2nd Dept 2007]). Here, neither party argues that there was no fiduciary relationship between Wray and Zeno.

*Diversion of Business Opportunities*

With regard to Wray's alleged diversion of business opportunities, Zeno argues that Wray originally removed 10,000 pages of highly sensitive, confidential, and proprietary documents, which were only returned during this litigation, and that Wray diverted business with ColBar/Evolence, and squandered (deliberately or not) a business opportunity with Organon.

The nature and value of the documents, as noted above, is not generally subject to summary determination. (*Ashland Mgt. Inc.*, 82 NY2d at 407; *Kaumagraph Co.*, 235 NY at 8-9). However, with regard to the diversion of the ColBar/Evolence business, according to Mikael Svensson, a principal of Evolence, there was never an intention to hire Wray or Zeno for public relations until after Wray had already left Zeno. Zeno argues that this

affidavit is in conflict with both Wray's and Weible's admissions that they viewed Evolence as a business opportunity for Zeno. This argument is specious. Neither Wray nor Weible are in a position to supersede Svensson's affirmation of his own intentions when he contacted Zeno.

Moreover, Svensson's affidavit strongly implies that Evolence was interested in doing business with Wray, and not necessarily with Zeno. (*See* Svensson Affidavit, ¶ 5 ("as a result of Ms. Wray's ideas, energy and expertise, we chose to work with Mosaic"); *see also Moser v Devine Real Estate*, 42 AD3d 731, 735-736 [3rd Dept 2007] ("evidence that the third party would not have done business with the corporation, but only the employee or officer individually would have, is sufficient to preclude the finding that a corporate opportunity existed" [citation omitted]). Thus, there was no tangible expectancy that Zeno would have acquired the ColBar/Evolence business. (*See Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 248 [1st Dept 1989]).

Similarly, the complaint alleges that Wray diverted an account with CV Technologies (CVT) to Brodeur while she was still working at Zeno. Meanwhile, the affidavit of John Rea, Communications Director of CVT, states that no such diversion took place. (*See* Rea Affidavit, ¶ 8 (Wray "never made any effort to solicit CVT to terminate its relationship with Zeno")).

Moreover, Rea makes clear that CVT was only ever interested in doing business with Wray. (*See id.*, ¶¶ 5, 9, 11, 13; *see also Moser*, 42 AD3d at 735-7360.

With regard to the allegation that Wray failed to submit an RFP to Organon, for which she claimed to be the point person, the cause of action remains. Although uncommon, New York has recognized a cause of action for breach of fiduciary duty based on negligence. (*See e.g. Matter of Kaszirer v Kaszirer*, 286 AD2d 598 [1st Dept 2001]) (discussing the statutes of limitations for such a cause of action). Wray has not even attempted to offer any proof that Zeno's claims are without merit. (CPLR 3212) (it is the obligation of the movant to demonstrate entitlement to judgment as a matter of law).

Further, the conclusory allegations of Wray's memoranda as to whether Zeno may be able to prove the allegations of its witness, Paul Oestreicher, are insufficient to support a motion for summary judgment. (*See Torres*, 305 AD2d at 136)(merely by pointing to gaps in the opponent's proof is insufficient for summary judgment).

*Interference with Client Relationships*

Zeno also argues that Wray breached her fiduciary duties by sabotaging its relationships with Sepracor Inc. (Sepracor) and Teva Neuroscience, Inc. (Teva). Specifically, Zeno asserts that in "transitioning the business," Wray made arrangements to have

Jerry Epstein, CEO of Zeno, meet with principals of Sepracor. When Epstein could not attend due to a medical emergency, Wray did not reschedule the meeting, but went to the meeting anyway, thereby casting Epstein in an unreliable light. Weeks later, Sepracor had taken on Mosaic, Wray's new firm, as its public relations agency.

First, these facts, given the benefit of every favorable inference (*Negri*, 65 NY2d at 625), still do not amount to a breach of fiduciary duty. It is uncontested that Wray set up the meeting with Sepracor for the week before her departure. If Epstein was unable to attend the meeting, Wray was not obligated, as Zeno implies, to reschedule the meeting at a time more convenient to Epstein.

Second, Robert Ciappenelli, Executive Director of Marketing Operation at Sepracor, affirms that he made a decision to leave Zeno because of his dissatisfaction with Wray's replacement, Oestreicher (Ciappenelli Affidavit, ¶ 14), and that Wray never solicited Sepracor while she was employed with Zeno (*id.*, ¶ 16).

With regard to Teva, the complaint offers the hearsay claim that on or about July 12, 2006, an Account Supervisor at Zeno spoke with a contact at Teva who disclosed that Wray had been working "for some time" to bring the Teva business with her to Mosaic. On July 13, 2006, Teva notified Zeno that it intended to terminate its relationship with Zeno effective the following day.

On July 20,2006, Teva confirmed to Zeno that it had transferred its business to Wray at Mosaic.

John Shaw, Senior Product Manager for Teva, has only affirmed that Wray called him on June 19, 2006, but she did not solicit Teva's business, or ask him to terminate Teva's contract with Zeno. *(See* Shaw Affidavit, ¶¶ 6, 7, 9, 10). This affidavit is, nonetheless, insufficient to carry the burden of demonstrating entitlement to judgment as a matter of law. The affidavit addresses two specific conversations, but does not speak to any other conversations that may, or may not have, taken place. *(Compare* Ciappenelli Affidavit, ¶ 16) ("[n]ot once during any of my conversations with Ms. Wray while she was employed at Zeno did Ms. Wray solicit, ask or encourage me to cancel Sepracor's contract with Zeno or to follow her to a new public relations agency"); (Rea Affidavit, ¶ 8_ ("Ms. Wray never made any effort to solicit CVT to terminate its relationship with Zeno, or to retain her or her future employer as its public relations agency").

Moreover, there are unaddressed indications that Wray sought to take clients with her when she left Zeno. Specifically, in an e-mail to Andrea Colville, of Brodeur, she states that "[t]wo clients want to come immediately," and "[w]ill send that lead to you when I can get it off other email." The burden of demonstrating entitlement to judgment as a matter of law remains

unsatisfied while such evidence and questions of fact are extant and unrebutted.

*Soliciting Employees To Leave Zeno*

According to the complaint, Wray, in the aftermath of her departure from Zeno, solicited three key employees to leave Zeno and join Mosaic. Specifically, Wray allegedly solicited non-parties Stacey Gandler (Senior Vice President), and Nicole D'Angelo (Account Supervisor), as well as defendant Weible (Vice President). However, Zeno has failed to point out any such attempt before Wray left Zeno. Nor has Zeno identified any executed agreement or law indicating that Wray had an obligation not to solicit employees of Zeno. Having no restrictive covenant, Wray was free to compete with Zeno, as long as her actions were not legally wrongful. (*See NCN Co. v Cavanagh*, 215 AD2d 737 [2nd Dept 1995]).

*Misappropriating and Destroying Confidential Information*

Zeno seeks actual and exemplary damages for Wray's misappropriation and destruction of confidential information. Indeed, Zeno states, citing *Advanced Magnification Instruments of Oneonta, N.Y., Ltd. v Minuteman Opt. Corp.* 135 AD2d 889, 891 [3rd Dept 1987], that the taking of its files may constitute unfair competition. *See also Leo Silfen Inc. v Cream*, 29 NY2d 387, 391-392 (1972). Unfair competition is, nonetheless, a different cause of action than misappropriation of confidential

information.

A cause of action for misappropriation of confidential information generally applies to cases where former employees actually utilize the confidential information, which information is in the form of trade secrets. (*CBS Corp. v Dumsday*, 268 AD2d 350 [1st Dept 2000]).

First, nowhere in the cause of action for misappropriation does Zeno identify the information, as required, as a trade secret. *(Id.0* Second, nowhere in the cause of action does Zeno say that Wray actually used the information. Indeed, the complaint carefully offers, "[g]iven Ms. Wray's daily immersion in Zeno's highly confidential and proprietary information, she will inevitably put such information to unfair use for Brodeur. It would be virtually impossible for Ms. Wray to successfully act as President of a competing public relations firm without relying on the confidential and proprietary information she gained while employed by Zeno." (Complaint, ¶¶ 122, 1230. Thus, the complaint attempts to presume use of the information rather than assert it. Therefore the pleading is insufficient as a matter of law.

Therefore, based on the foregoing, summary judgment dismissing the second cause of action, for breach of fiduciary duty, is granted, except with regard to Organon, which was not addressed by the movant. In addition, the eighth cause of

action, for misappropriation of confidential information, is dismissed.

**Aiding and Abetting Breach of Fiduciary Duty (3rd Cause of Action)**

Zeno argues that the Corporate Defendants designed Wray's compensation package in a manner intended to reward her for stealing Zeno's existing business by paying her a percentage of Mosaic's operation profit. A claim for aiding and abetting a breach of fiduciary duty requires "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *(Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). However, in addition, New York courts require that the alleged aider or abettor "substantially assist" the party in breach. *(Id.* at 126; *see also Louis Capital Mkts., L.P. v REFCO Group Ltd., LLC*, 9 Misc 3d 283 [Sup Ct, NY County 2005]).

Paying Wray, as a prospective president, a percentage of the operating profit could not substantially assist the other defendants in their breach of fiduciary duty. First, the only allegation of this nature in the complaint is that Brodeur "encourag[ed] the removal and/or deletion of confidential client information, diversion of business opportunities, and theft of client relationships." (Complaint, ¶ 86). But this behavior, once again giving Zeno the benefit of every favorable inference

(*Negri*, 65 NY2d at 625), does not amount to "substantial assistance" to Wray or Weible. *See Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461 (1st Dept 2007); *see also Kaufman*, 307 AD2d at 126.

Second, actual knowledge, and not mere constructive knowledge, of the agreement giving rise to the fiduciary duty and the ensuing misconduct is necessary to sustain a cause of action for aiding and abetting a breach of fiduciary duty. *(Liberman v Worden*, 268 AD2d 337, 338 [1st Dept 2000]). Here, Zeno does not reference any direct contact between Weible and the other Corporate Defendants, but rather relies on its "conclusory and sparse allegations that the [defendants] knew or should have known about the primary breach of fiduciary duty." *(Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006]; *see also Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]).

Nonetheless the contact between Wray and Weible is uncontrovered. Wray apparently, knowing of Weible's NCA, caused her to begin work at Mosiac. As such, the third cause of action, for aiding and abetting breach of fiduciary duty of Weible, cannot be dismissed, as against Wray, upon summary judgment.

**Tortious Interference with Contract (4th Cause of Action)**

The complaint states that defendants: (i) knew of valid client services agreements between Zeno and Teva and Sepracor (hereinafter, the Client Services Agreements); (ii) knew of valid

NCAs between Zeno and employees Nicole D'Angelo, Stacey Gandler, and Weible; (iii) improperly procured the breach of said agreements; and (iv) damaged Zeno as a result.

A cause of action for tortious interference with contract requires a showing that there is 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*, 88 NY2d 413, 424 [1996]; *accord Havana Cent. NY2 LLC v Lunney's Pub*, 49 AD3d 70 [1st Dept 2007]). It is important to note that it is only where the plaintiff could recover from the plaintiff's contractual counter-party that recovery for tortious interference with contract is viable. *(Havana Central NY2 LLC*, 49 AD3d at 70).

In moving for summary judgment, defendants argue that the NCAs are unenforceable as a matter of law because they are over-broad and of "unlimited geographic scope," cannot be shown to protect a legitimate interest of Zeno, and are related to employees that did not provide unique, extraordinary, or irreplaceable services. In addition, defendants argue that the Client Services Agreements were terminable at will, and, thus, a showing of wrongful conduct is required to maintain an action for tortious interference with them.

It is true that where there is no binding contract, there is no viable claim for tortious interference with contract absent extraordinary circumstances, such as fraud. (*Herman & Beinin v Greenhaus*, 258 AD2d 260 [1st Dept 1999]; *see also Lama Holding Co.*, 88 NY2d at 4130. However, the NCAs may be deemed reasonable and, therefore, binding contracts if they are: (i) limited in the time and geographical scope of their restrictions; (ii) not unduly burdensome to the employee; (iii) not harmful to the general public; and (iv) necessary for the employer's protection. (*Mallory Factor Inc. v Schwartz*, 146 AD2d 465 [1st Dept 1989]).

Here, Zeno does not note any language in the NCAs delimiting the geographic scope. The absence of a geographic limitation does not, as Zeno suggests, summarily indicate a restrictive covenant of "unlimited geographic scope." (*See American Rentals v Pomponio*, 18 Misc 3d 1137(A), 2008 NY Slip Op 50336 (U) [Sup Ct, Monroe County 2008]) (a client-based limitation may extend to any contracts made during the period of the employee's employment).

In any event, geographic limitation of unlimited scope is not automatically invalid as a matter of law. (*See e.g. Deborah Hope Doelker Inc. v Kestly*, 87 AD2d 763 [1st Dept 1982] ("[w]here an otherwise valid restrictive covenant does not contain a geographic limitation, the court may ... interpret the clause in conformity with the intent of the parties"); (*Business*

*Intelligence Servs. v Hudson*, 580 F Supp 1068, 1073 [SD NY 1984]) (for a worldwide business, a covenant with no geographical limitation may be enforceable).

Moreover, the NCAs are severable, setting out, in paragraph 13, that "[i]n the event that any of the provisions of this Agreement are found or held to be invalid or unenforceable, the remaining provisions of the Agreement shall nevertheless continue to be valid and enforceable ...." Thus, to the extent that an "unlimited geographic scope" provision is deemed to exist, by their own terms, the NCAs need not be entirely invalidated. *(See also Karpinski v Ingrasci*, 28 NY2d 45 [1971]) (court has power to sever the impermissible aspects, and uphold the permissible aspects of a restrictive covenant); Restatement [Second] of Contracts § 184, at 32 (Reporter's Note) (covenant can be partially enforced); *accord BDO Seidman v Hirshberg*, 93 NY2d 382 (1999); *Trans-Continental Credit & Collection Corp. v Foti*, 270 AD2d 250 [2nd Dept 2000]).

Defendants' remaining conclusory allegations that Zeno cannot show that they have a legitimate interest to protect, and that Zeno must show that the services of Weible, Gandler, and D'Angelo were special, unique, or extraordinary, are without gravitas. First, defendants cannot satisfy the requirements for summary judgment by pointing to gaps in the opponent's proof. (*Torres*, 305 AD2d at 136). Second, the case upon which

defendants rely involves covenants that "d[o] not involve the possession of trade secrets or confidential customer lists." (*See Purchasing Assoc. v Weitz*, 13 NY2d 267, 274 [1963]). Here, customers, alleged trade secrets, and confidentiality are at the heart of the complaint.

Consequently, as the allegations in the complaint established prima facie that the restrictive covenants in the NCAs were necessary to protect confidential client information, and any unenforceable provisions are severable, the remaining confidentiality provisions, for example, are properly subject to a tortious interference with contract claim. The motion to dismiss the cause of action for tortious interference with contract is denied, except as to defendant Weible, against whom a duplicative cause of action for breach of the NCA is extant. (*Mallory Factor Inc.*, 146 AD2d at 465).

Defendants also argue that the Client Services Agreements with Teva and Sepracor, were terminable at will, and, thus, a showing of wrongful conduct is required to maintain an action for tortious interference with those Agreements. (*See American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998], citing Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, 191-92 [1980]) ("[a]greements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with

existing contracts").

Zeno simply offers that the contracts were not terminable at will. This conclusory allegation is insufficient to withstand a motion for summary judgment. In the absence of express provisions to the contrary, contracts are presumptively terminable at will. [*Compare Liberty Imports v Bourguet*, 146 AD2d 535 [1st Dept 1989](in the absence of an express provision of duration agency and distributorship contracts are terminable at will); *Sabetay v Sterling Drug*, 69 NY2d 329 [1987] (employment relationship is presumed to be terminable at will); *Noah v L. Daitch & Co.*, 22 Misc 2d 649 [Sup Ct, NY County 1959]) (if there is no demonstrated termination clause in an agreement, a party is allowed to terminate after giving reasonable notice).

Thus, Zeno, as the plaintiff, and the party in possession of the alleged Client Services Agreements, was required to lay their proofs bare (*Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396 [1st Dept 2007]), by at least citing to the provisions that were violated when Teva and Sepracor terminated the Agreements.

Zeno also argues that even if the contracts were terminable at will, questions of fact remain as to whether Wray and Weible engaged in "wrongful means" by lying to clients, failing to provide information on the accounts, and promising Teva that employees from Zeno would follow them to Mosaic. These actions are generally insufficient to establish "wrongful means" as a

matter of law. (*See NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]).

As stated above, Robert Ciappenelli, Executive Director of Marketing Operation at Sepracor, affirms that he made a decision to leave Zeno because of his dissatisfaction with Wray's replacement, Oestreicher (Ciappenelli Affidavit, ¶ 14), and that Wray never solicited Sepracor while she was employed with Zeno (*id.*, ¶ 16). As such, the allegation of "wrongful means" with regard to Sepracor has been rebutted.

However, with regard to Teva, John Shaw, Senior Product Manager, has only affirmed that Wray did not solicit Teva's business, or ask him to terminate Teva's contract with Zeno, on June 19, 2006. (*See* Shaw Affidavit, ¶¶ 6, 7, 9, 10). This evidence is insufficient to carry the burden of demonstrating that such conversations never took place at another time, and is consequently insufficient to support a motion for summary judgment. The motion for summary judgment on the fourth cause of action, for tortious interference with Zeno's contract with Teva, is denied.

**Tortious Interference With Advantageous Business Relations (5th Cause of Action)**

A cause of action for intentional interference with prospective business advantage requires a showing that: (i) defendants knew of the proposed contracts between the plaintiff and a third party; (ii) defendant intentionally interfered with

the proposed contracts; (iii) the proposed contract would have been entered into but for defendants' interference; (iv) defendants' interference was done in a wrongful manner; and (v) plaintiff sustained damages. (*NBT Bancorp*, 87 NY2d at 614; *Guard-Life Corp.*, 50 NY2d at 183).

Zeno alleges in the complaint that defendants "interfered with Zeno's relationship with Zeno's clients and senior personnel by, among other things, [their] effort to induce such clients and employees to sever their relationships with Zeno and induce them to do business with or become employed by Defendants, for the benefit of Defendants." (Complaint, ¶ 104). This allegation defeats the claim because it states that there was a motivation other than malicious harm for defendants' actions. (*See John R. Loftus Inc. v White*, 150 AD2d 857, 860 [3rd Dept 1989]).

Conclusory allegations, such as those in the complaint, that defendants "intentionally, maliciously, and improperly" interfered with the consummation of contracts are patently insufficient. (*Susskind v Ipco Hosp. Supply Corp.*, 49 AD2d 915 [2nd Dept 1975]). What is more, the complaint lacks any specificity as to which contracts would have been consummated, as required, but, rather, relies upon "surmise or speculation." *Williams & Co. v Collins Tuttle & Co.*, 6 AD2d 302, 306 (1st Dept 1958); *see* also *Pacheco v United Med. Assoc.*, 305 AD2d 711, 713 [3rd Dept 2003] (plaintiff must demonstrate that client would have

entered into contract "but for" actions of defendants). The fifth cause of action, for tortious interference with advantageous business relations, is dismissed.

**Unfair Competition (6th Cause of Action)**

"[T]he gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another ... by exploitation of proprietary information." *(Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998]; *see also Advanced Magnification Instruments*, 135 AD2d at 891 ("[i]n short, an employee's illegal physical taking or copying of an employer's files or confidential information constitutes actionable unfair competition"), citing *Leo Silfen Inc.*, 29 NY2d at 391-392).

Defendants offer the conclusory allegation that "none of Zeno's purported 'confidential and proprietary information' is protectable under New York law." This allegation is insufficient to support a motion for summary judgment. Instead, defendants were required to show that the information taken by Wray was neither confidential, nor improperly used by defendants. They have not done so. The motion for summary judgment dismissing the sixth cause of action, for unfair competition, is denied.

**Unjust Enrichment (7th Cause of Action)**

A claim for unjust enrichment poses the question of whether it is against equity and good conscience to permit a defendant to

retain what is sought to be recovered. (*Grombach Prods. v Waring*, 293 NY 609, 615 [1944]; Restatement, Restitution, § 1; 50 N.Y. Jur, Restitution, §§ 1, 3; *see also Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 [1972], *cert denied* 414 US 829 [1973]). The inquiry centers on whether a benefit has been conferred under mistake of fact or law, and whether the defendants' conduct was tortious or fraudulent. (*Paramount Film Distrib. Corp.*, 30 NY2d at 421).

The complaint states that defendants have been unjustly enriched in receiving the benefits of employment and client relationships, "including that of a special and extraordinary employee who had access to the highly confidential and proprietary information of Zeno" (Complaint, ¶ 116), to wit, Wray. However, this argument is ineffective. Defendants presumably paid Wray for her services, and did work in exchange for payment from clients. Nothing was "bestowed" upon them.

With regard to Weible, the complaint, after this motion, continues to contain a cause of action for breach of her NCA, and Wray's aiding and abetting breach of the fiduciary duties arising therefrom. The cause of action for unjust enrichment due to her employ with Mosaic is redundant.

Moreover, a claim for unjust enrichment will not relieve a party of the consequences of his own failure to exercise caution with respect to a business transaction. (*Charles Hyman Inc. v*

*Olsen Indus.*, 227 AD2d 270, 277 [1st Dept 1996]). Here, Zeno claims that defendants were enriched by the opportunity to employ Wray, but it was Zeno that apparently failed to secure an NCA with her. The seventh cause of action, for unjust enrichment, is dismissed.

**Conversion (9th Cause of Action)**

The complaint alleges that Wray deleted confidential and proprietary information belonging to Zeno prior to her departure, and absconded with several boxes of printed documents.

Relying upon *Independence Discount Corp. v Bressner* 47 AD2d 756, 757 [2nd Dept 1975], defendants argue that Zeno cannot recover for conversion because the "confidential and proprietary information" that it alleges Wray took or deleted from computer files is neither "tangible personal property" nor "specific money." As a preliminary matter, the documents that were taken from Zeno offices were certainly "tangible." *(See Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 289-290 [2007]) (paper may represent convertible value).

What is more, however, the Court of Appeals has now made clear, especially with regard to electronic data, that tangibility is no longer a strict requirement for a claim of conversion. (Id. at 291-292_. Data stored on a computer is indistinguishable, for purposes of conversion, from printed documents, and both are subject to a claim of conversion in New

York. (*Id*). The motion to dismiss the ninth cause of action, for conversion, is denied.

**Violation of Computer Fraud and Abuse Act (CFAA), 18 USC § 1030 (10th Cause of Action)**

A claim under CFAA § 1030 (a) (4) requires a showing that: (i) defendant has accessed a "protected computer" (ii) without authorization or by exceeding such authorization as was granted, (iii) "knowingly" and with "intent to defraud," and has thereby (iv) furthered the intended fraud, and obtained something of value. (*See P.C. Yonkers v Celebrations the Party and Seasonal Superstore*, 428 F3d 504 [3rd Cir 2005]).

Here, Wray has not accessed a protected computer without authorization. The complaint offers that Wray: (i) "deleted computer files and e-mails contained on the laptop computer *provided to her by Zeno for business use*" (Complaint, ¶ 2); and "appears to have attempted to delete computer files and e-mails contained on *her* laptop computer *that had been provided to her by Zeno for her employment*" (id. at ¶ 13). Emphases added. Thus, especially given the remaining cause of action for conversion, a claim under the CFAA would be redundant at best.

Moreover, even though the complaint notes that "files contained on Zeno's New York server relating to CV Technologies ... were also deleted, as were activity reports and new business files" (*id.*, ¶ 13), there is no allegation that the server she accessed was beyond her authorization. Indeed, it strains reason

that someone could delete files on a server beyond their authorization level.

Finally, Zeno's reliance upon *ViChip Corp. v Lee* 438 F Supp 2d 1087 (ND Cal 2006) for the proposition that deleting files upon departure constitutes a violation of the CFAA is unpersuasive. In that matter, the court asserted that the when the defendant "decided-the night before his termination and after knowing that he was being asked to step down and give up his duties at ViChip-to delete all information from ViChip's server and his ViChip-issued computer, he ... breached his duty of loyalty and terminated his agency relationship to the company." 438 F Supp 2d at 1100.

However, in drawing that conclusion, the California district court explicitly relied upon *International Airport Ctrs. v Citrin* 440 F3d 418 (7th Cir 2006), in which the defendant not only deleted files, but transmitted a "secure-erasure program to the computer." It was the action of uploading programming to secure the deletion of the files, after loss of authorization by deleting of files in the first place, that constituted a violation of the CFAA. Here, Wray has not allegedly engaged in any post-termination deletion of files.

The motion to dismiss the tenth cause of action, for violation of the Computer Fraud and Abuse Act, 18 USC § 1030, is granted.

**Breach of Contract (11th Cause of Action)**

Defendants move to dismiss the cause of action for breach of the NCA by Weible. The crux of their argument is simply that the NCA is unenforceable as a matter of law. As noted above, defendants have failed to demonstrate that the NCA is unenforceable.

Furthermore, defendants offer cases and rules on the matter that are inapposite. *Milan Music v Emmel Communications Booking* (37 AD3d 206 (1st Dept 2007) is about the issue of oral cancellation of a written contract, *Matter of Argersinger* 168 AD2d 757 (3rd Dept 1990) is about contracts implied in law, and *Gomez v Bicknell* 302 AD2d 107 (2nd Dept 2002) is about whether it was necessary to prove damages at trial in order for the jury to be instructed on a charge. None of those cases have any application here. As a result, defendants have failed to demonstrate entitlement to judgment as a matter of law. (CPLR 3212).

Here, Zeno has alleged the existence of the NCA, Zeno's performance, Weible's breach by soliciting the specific accounts and employees allegedly covered by the Agreement, and damages. The motion for summary judgment dismissing the eleventh cause of action, for breach of contract, is denied.

Accordingly, it is hereby

**ORDERED** that the motion of defendants for summary judgment

is granted to the extent that the second (except as regards Organon), fifth, seventh, eighth, and tenth causes of action are dismissed, and it is otherwise denied.

Dated: September 26, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III