Water Quality Ins. Syndicate v Safe Harbor Pollution Ins., LLC
2014 NY Slip Op 32397(U)
September 10, 2014
Sup Ct, New York County
Docket Number: 653001/13
Judge: Shirley Werner Kornreich
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

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WATER QUALITY INSUR. SYNDICATE & RICHARD H. HOBBIE III, Pres. & CEO,

Plaintiffs,

-against-

Index No. 653001/13
Decision & Order

SAFE HARBOR POLLUTION INSUR., LLC, FALVEY INSUR. GRP., LTD., RUSSELL BROWN, ANTHONY GERONE, SEAN QUINN, JOSEPH LEOTTA, J. MICHAEL FALVEY & JOHN DOES 1-10,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

In this action for misappropriation of trade secrets, unfair competition, breach of fiduciary duty and loyalty, tortious interference with contract, conversion and fraud, defendants Safe Harbor Pollution Insurance, LLC (Safe Harbor), Falvey Insurance Group, Ltd. (Falvey), Russell Brown, Anthony Gerone and Sean Quinn (collectively, Defendants) move to dismiss the verified amended complaint (AC) for failure to state a cause of action. CPLR 3211(a)(7). Plaintiffs Water Quality Insurance Syndicate (WQIS) and Richard H. Hobbie III oppose.

As this is a motion to dismiss, the recitation of facts that follows is drawn from the AC, as well as inferences in favor of Plaintiffs that can be drawn from their affidavits and the documentary evidence submitted by the parties. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005); *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998).

I. Background

WQIS is a syndicate of insurers which issues and administers marine pollution liability insurance. It is the largest pollution insurer in the United States and has been in business for

over 40 years. Until March 3, 2013 (Termination Date), the individual defendants, Brown, Gerone and Quinn (collectively, Individual Defendants) were employed by WQIS for approximately 16, 14 and 8 years, respectively. On the Termination Date, Brown was Executive Vice President and Chief Underwriting Officer, Gerone was Assistant Vice President of Underwriting, and Quinn was an "at will" employee, whose title was Claims Manager.

Each of the Individual Defendants executed an acknowledgement confirming that they had received a copy of the WQIS Employee Handbook (Handbook), "wherein each agreed that . during their employment with WQIS each would maintain in the strictest confidence and would not disclose, directly or indirectly, WQIS's confidential information ... and would not use any Confidential Information in any manner or for any purpose." AC, ¶26. The information "was acknowledged by [the Individual Defendants] to include [WQIS's] database of current or potential clients or insureds, including the names, addresses, telephone numbers and identity of contact persons." AC, ¶27. The confidential information also included: 1) the names, addresses, telephone numbers and identity of contact persons for clients and potential clients; 2) client and potential client information as to insurance coverages, policy limits and renewal dates; 3) policy language; 4) client data concerning loss records, rates, premiums, limits, deductibles, exclusions, and conditions, limitations, and business methods; and 5) marketing plans or efforts, know-how, financial or other performance data, policies and/or personnel information. AC, ¶¶ 28-30. It is not clear whether the fifth category of information refers to WQIS's marketing, etc., or that of its clients. The complaint further alleges that Brown and Gerone took confidential, proprietary information from WQIS "before resigning, but after establishing Defendant Safe Harbor." AC, ¶53.

The affidavit of WQIS's Senior Vice President, John Ryszetnyk, states that the subject information is stored in a confidential OMNI database that was compiled over decades, using hundreds of thousands of man-hours, and contains 141 categories of information about thousands of customers. 4/22/14 Affidavit of John Ryszetnyk (Ryszetnyk Aff), Doc 112.[1] According to the Ryszetnyk, such information is not just a customer list but is recognized in the industry as an extremely valuable asset that permits WQIS to maintain a competitive advantage in the marketplace. *Id.* He alleges that OMNI is a secure database, is not shared with anyone outside of WQIS, and can only be accessed by WQIS employees with "proper network credentials" and "specialized software". *Id.* The parties' memoranda of law agree that WQIS's employees need passwords to access OMNI, although the word "password" does not appear in the AC or in any affidavit. See, Doc 120, p 7 and Doc 115, p 4. Employees can log into the database from any location. Affidavit of John Imor, Doc 109 (Imor Aff), ¶6. Defendants' agree that the information is available to "most" WQIS employees and "generally available" to the underwriting, claims and accounting departments. Defendants' Moving Brief, Doc 94, p 11 and fn 7 on p 11.

Among other things, the database includes the name of the broker servicing each client, the expiration/renewal dates of clients' policies, and the premiums and deductibles for each policy. *Supra,* Doc 112. WQIS does business with hundreds of brokers. *Id.* Ryszetnyk contends that someone with experience in the market might know the names of some assureds and some brokers, but would not be able to identify the broker servicing each of WQIS's many assureds. *Id.* Nor would they know the premium charged, the expiration and renewal dates, the coverage

[1] References to "Doc" followed by a number refer to documents in this action filed in the New York State Electronic Filing System .

limits, the commissions and other valuable information contained in the OMNI database, which is too large to memorize. *Id.*

The Individual Defendants acknowledged that they could not remove or cause to be removed from WQIS's premises any file relating to WQIS's business except in furtherance of their duties as employees. AC, ¶31. They executed a "Conflict of Interest Policy, Acknowledgement and Disclosure Form ", which prohibited them from engaging in activities or relationships that constituted a conflict of interest, including "any activity, transaction, relationship, service, or an ownership interest which is, or appears to be, contrary to the best interests of WQIS, or in which the interests of an individual or another organization has the potential to be placed above those of WQIS." AC, ¶¶ 25 & 33.

WQIS submitted the affidavit of its Technology Manager, John Imor, who averred that in early September of 2012, Brown asked him to perform a data dump of the entire OMNI database and to place the resulting spreadsheet on a portable media storage device (Flash Drive). Imor Aff, Doc 109, ¶¶ 10-14. Imor did so, and gave Brown a Flash Drive containing the spreadsheet, a 50+ megabyte file. *Id.* Imor put the spreadsheet on an unencrypted, red, Kensington model 8 gigabyte Flash Drive that he pulled from his desk (Red Flash Drive). AC, ¶38. According to Imor, a data dump is rarely done and he did it on this occasion at Brown's request. Imor Aff, ¶13.

By contrast, Brown swore in an affidavit that he instructed Imor to do a complete data dump of the OMNI database in or around September 2012; that Imor did it; that the information was then culled and organized; that Brown then asked Imor to copy to a Flash Drive only the culled information for WQIS's reinsurer, Towers Watson; that Imor gave him a Flash Drive provided by Tower Watson with the culled information on it; that this was the only time in 2012

that Brown asked Imor to do a data dump; and that Imor never gave him a complete data dump on a Flash Drive in 2012. 11/12/13 Affidavit of Russell Brown, Doc 110, ¶¶10-12.

The Flash Drive given to Tower Watson in 2012 was blue (Blue Flash Drive). AC, ¶42. According to Thomas Dean, Senior Vice President for Tower Watson, on September 10, 2012, Tower Watson gave the Blue Flash Drive, which was encrypted and had the 2011 data dump on it, to Brown and Gerone. 10/25/13 Affidavit of Thomas Dean, Doc 111, ¶6. WQIS returned it to Tower Watson, with the 2012 data dump added to it, during a meeting on September 27, 2012. *Id*. WQIS's computer network metadata shows that the reinsurance data provided to Towers Watson was downloaded on September 27, 2012 from Brown's computer and that both Brown and Gerone accessed that data on that date. Ryszetnyk Aff, ¶¶26-27. On that date, Imor was on vacation in Virginia. *Id.*

Plaintiffs allege that on or about December 20, 2012, Brown and Gerone unsuccessfully solicited United States Fire Insurance Company to provide the pollution insurance backup indemnity insurance for their startup business, Safe Harbor. AC, ¶¶ 47-48. On January 20, 2013, while still employed by WQIS, the Individual Defendants created a Rhode Island entity – defendant Safe Harbor, a division of defendant Falvey. AC, ¶¶ 50 & 51. Brown and Gerone are principals of Safe Harbor. *Id*, ¶¶ 9 & 13. Quinn is its Vice President. *Id*, ¶17. Plaintiffs contend that since March 9, 2013, Defendants have been methodically going through the stolen data, cold calling insurance brokers using contact information found on this data and attempting to undercut WQIS 's renewal quotes by undercutting the expiring premium rates. AC, ¶56. The AC alleges that on April 30, 2013, a broker at Wortham Insurance said that Gerone was soliciting business using WQIS confidential information for a WQIS policy issued to Enco that was due to expire on May 30, 2013. AC, ¶60. Mr. Ryszetnyk adds that Wortham's brokers

informed him that "Brown, Gerone and Quinn collectively through Safe Harbor" were using the confidential information to quote a policy due to expire on May 30, 2013. Ryszetnyk Aff, Doc 112, ¶14.

With respect to fraud, the AC alleges that sometime during the fiscal year of 2012, Brown and Gerone posted at least $400,000 in false premiums upon which they received bonuses.[2] AC, ¶¶ 107 & 108. The premiums were never collected and the policies were never issued. *Id*, ¶110. Mr. Ryszetnyk's affidavit states that Brown and Gerone represented to WQIS that they had been binding insurance policies when in fact no orders for coverage had been placed. Ryszetnyk Aff, Doc 112, ¶17-20. When WQIS's accounting department contacted the brokers on these policies regarding unpaid premiums, it was informed that no policy had been requested, whereupon Brown and Gerone would cancel the policy back to its inception date. *Id.* Mr. Ryszetnyk reviewed WQIS's computer records for 2012 and found that Brown and Gerone did this every month and WQIS relied on the entries in determining Brown and Gerone's bonuses for 2012. Gerone entered the data that was forwarded to the underwriting team for binding the policies, although no orders were actually received. *Id.* The fictitiously bound policies were cancelled within 30 to 90 days, tracking WQIS's practice of demanding payment of unpaid premiums within 90 days. *Id.* The canceled policy premiums for 2012 were in the amount of $259,000. *Id.* Terence Moynihan, a WQIS underwriter, avers that in 2012, no premium was booked on WQIS's computer network other than at the instruction of Brown and Gerone. 4/23/14 Affidavit of Terence Moynihan, Doc 114, ¶7.

II. Misappropriation of Trade Secrets - 1st Cause of Action

[2] Although the AC said that Quinn also received a bonus based upon the false premiums, the fraud claim against him was abandoned by WQIS on this motion

"[E]mployees are bound by express or implied contract not to disclose trade secrets and that courts of equity will restrain a party from making a disclosure of secrets communicated to him through and by means of his having been in a confidential employment. *Kaumagraph Co. v Stampagraph Co.*, 235 NY 1, 7 (1923). A trade secret is defined as:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Ashland Management v Janien, 82 NY2d 395, 407 (1993), citing *Restatement of Torts* §757, comment b. The following factors should be considered to determine whether something is a trade secret:

> (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.

Id.

Where 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. *Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-393 (1972). For a customer list to qualify as a trade secret, the plaintiff must show that he employed precautionary measures to preserve the secrecy of the list. *Precision Concepts, Inc. v Bonsanti,* 172 AD2d 737 (2d Dept 1991). Moreover, there must be a showing that the trade secret was improperly used by the offending party. *Falconwood Corp. v In-Touch Techs.,* 227 AD2d 215, 216 (1st Dept 1996). Whether or not something is a trade secret generally is a question of fact. *Ashland, supra.*

Defendants dispute that the OMNI database contains confidential information, but disputed facts are not a basis on which to grant a motion to dismiss. The court must accept as true that WQIS created the database, which contains confidential information, over decades and at great expense. Furthermore, the affidavits of the Individual Defendants allege that "***much***" of the Omni Database information is publicly available. This is a concession that some of it is not. Defendants also allege that in the pollution insurance industry, ***brokers seeking coverage approach the insurers*** and provide the policy expiration dates and premiums charged when seeking to place a new policy. They present numerous e-mails from brokers to Safe Harbor containing policy expiration dates and asking for quotes from Safe Harbor, some of which attach premium information and/or a WQIS quote or expiring policy. There is no way of knowing whether the e-mails attached to the Individual Defendants' affidavits were sent after the brokers already had been contacted by Safe Harbor using the database for their contact information. Moreover, Defendants' affidavits do not allege that the particular broker servicing an assured is publicly available information, while WQIS alleges that someone with experience in the pollution insurance industry would not be able to identify the broker servicing each of WQIS's many assureds. Ryszetnyk Aff, Doc 112, ¶12.[3] Thus, defendant's argument that Safe Harbor

[3] Notably, Brown avoids denying that he and/or Safe Harbor are using WQIS's contact information for brokers that is not publicly available. Brown avers that "[t]he marine pollution insurance business is a small industry comprised of a select few ***clients and potential clients***, the identities of which are generally known in the industry and ***whose contact information can be found from publicly available sources***"; that neither he nor Safe Harbor are using WQIS's "(1) … contact information ***of current and potential … clients***, (2) … clients' insurance coverages, policy limits or renewal dates and (3) … rates, premiums, limits, deductibles, exclusions, conditions and limitations, business methods, marketing plans or efforts, know-how, financial or other performance data, policies and or personnel information"; and ***"[t]o the extent that I communicate with WQIS's clients or potential clients*** in my role as principal for Safe Harbor, ***I am using contact information publicly available or that has been provided to me by a broker or the client or potential client***…." 9/25/13 Brown Affidavit, Doc 13, ¶¶ 6, 8 and 9. [emphasis supplied] Thus, the statement in Defendants' Moving Brief that the marine pollution insurance business is "comprised of a select group of brokers whose identities are widely known in the industry" is not supported by the Brown's affidavit, which is cited as proof. Moving Memo, 94, p 4. Similarly, the statement in the Moving Brief that Brown has previously sworn that he "… is not using

were provided with the expiration date of the old policy by the broker [Defendants' Moving Brief, Doc 94, p 10], begs the question as to whether Safe Harbor used the database to obtain the expiration dates of policies placed by WQIS.

WQIS alleges, and the court on this motion to dismiss accepts as true, that Brown downloaded the entire database in September 2012 and that WQIS has been told by several brokers that they were not renewing policies previously placed with WQIS because "Safe Harbor (via the individual defendants) contacted them and offered a lower premium prior to the policy renewal dates." Ryszetnyk Aff, Doc 112, ¶14 & 15. The court also, on this motion, accepts as true that Gerone was using the confidential information when it contacted the Wortham broker about a WQIS policy for Enco. Finally, for purposes of this motion, the court must accept WQIS's assertion that Safe Harbor was contacting brokers using confidential broker contact information as well as expiration dates compiled by WQIS, rather than waiting for brokers to call Safe Harbor.

Whether or not WQIS took sufficient steps to safeguard confidentiality cannot be decided as a matter of law based on the record presented. Defendants attempt to undermine WQIS's assertion that it sought to safeguard the database by pointing to the fact that "most" WQIS employees in the underwriting, claims and accounting departments had access to OMNI using a password and could print from it. Whether those employees needed access to do their jobs, whether access was sufficiently restricted, and whether the password was a reasonable method of preserving confidentiality are questions of fact. *Cf, Downtown Women's Ctr. v Carron*, 237 AD2d 209 (1st Dept 1997) (patient list, left ***unprotected*** on centralized computer accessible to

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any documents taken from WQIS in order to conduct business at Safe Harbor" is not supported by the affidavit, which does not eliminate the possibility that Safe Harbor is using the allegedly confidential contact information for brokers. *Id*, p 5, fn 5.

all persons in the medical suite sharing or using computer not trade secret). The fact that WQIS allowed credentialed employees in three departments to log in using a password or take information home does not, standing alone, destroy confidentiality. Defendants also urge that WQIS did not designate as confidential the data dumps that it has produced during discovery, pursuant to the confidentiality stipulation regarding disclosure in this action. However, this argument was raised for the first time in reply and will not be considered. *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 (1st Dept 2008).

In sum, WQIS has sufficiently alleged that the OMNI database is a trade secret, that Brown misappropriated it while still employed by WQIS and that Safe Harbor and Gerone used it to quote policies to WQIS's confidential broker contacts. There are sufficient allegations that the database was compiled over a long period of time with great effort and expense; that it is a valuable business asset; that the information it contains is not generally known outside of the business; that it is protected because only certain employees with passwords can access it; and that it could not be acquired or duplicated without difficulty. With respect to Brown and Gerone, the allegations sufficiently allege that they committed independent tortious acts that could subject them to individual liability for actions taken as principals and for the benefit of Safe Harbor. *Retropolis, Inc. v 14th St. Dev LLC*, 17 AD3d 209, 211 (1st Dept 2005)(" a corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit"); *Konrad v 136 East 64th St. Corp.*, 246 AD2d 324 (1st Dept 1998). Accordingly, the first cause of action is not dismissed as to Brown, Gerone and Safe Harbor.

However, with respect to Quinn and Falvey, there are no allegations that they took or used a trade secret. Falvey is accused in conclusory fashion of conspiring with the other

Defendants. However, a conspiracy claim must present facts from which the defendant's scienter can be inferred, i.e., that the defendant knowingly agreed "to cooperate in a fraudulent scheme, or shared a perfidious purpose." *Snyder v Puente De Brooklyn Realty Corp.*, 297 AD2d 432, 435 (3d Dept 2002). With respect to Quinn, there is no allegation that he individually misappropriated or used anything. Hence, the first cause of action must be dismissed as to Quinn and Falvey because there are no facts alleged regarding their knowing participation or scienter, and Quinn individually is not alleged to have been involved in the tort of misappropriation.

III. Unfair Competition – 2d Cause of Action

A cause of action for unfair competition requires allegations of obtaining business by means of wrongful conduct, trick or device, such as fraud or false representations. *S. W. Scott & Co. v Scott*, 186 AD 518, 527-528 (1st Dept 1919). It can consist of wrongful tactics in connection with solicitation of a competitor's customers. *Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 (1972); *Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 570 (1959).

Here, the AC alleges that the Individual Defendants willfully and in bad faith misappropriated documents and data, and used the latter "to cold call brokers days before policies expire and to undercut WQIS by unfairly knowing WQIS's expiring policy premiums." AC, ¶77. In conclusory fashion, Falvey is accused of wilfully inducing the Individual Defendants to breach their duties of loyalty, misappropriate confidential business information and interfere with WQIS's business relationships and customers.

The second cause of action is dismissed because it duplicates the claim for misappropriation of trade secrets. Other than denominating the claim as unfair competition, it is indistinguishable from the first cause of action. There is no other wrongful action or business chicanery alleged that would give rise to a separate claim for unfair competition. *Fada Intl.*

Corp. v Cheung, 57 AD3d 406 (1st Dept 2008). In addition, the allegations against Falvey do not allege any facts that would give rise to such a claim against it.

IV. Breach of Fiduciary Duty& Duty of Loyalty – 3d Cause of Action

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss. *People v Grasso*, 50 AD3d 535 (1st Dept 2008), *aff'd* 11 NY3d 64 (2008). CPLR 3016(b) provides that in a pleading for breach of fiduciary duty, "the circumstances constituting the wrong shall be stated in detail." The purpose of the rule "is to inform a defendant with respect to the incidents complained of." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). The provision requires only that the misconduct be stated in sufficient detail to clearly inform the defendant of the conduct complained of, and should not be interpreted to prevent the assertion of a claim where it would be impossible to state in detail the circumstances, such as where the information is peculiarly in the defendant's knowledge. *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320-321 (1st Dept 1997), citing *Jered Contr. Corp. v NYC Tr. Auth.*, 22 NY2d 187, 194 (1968).

"An employee may create a competing business prior to leaving his employer unless he makes improper use of the employer's time, facilities or proprietary secrets in doing so." *Don Buchwald & Assocs. v Marber-Rich*, 11 AD3d 277, 278 (1st Dept 2004), citing *Schneider Leasing Plus, Inc. v Stallone*, 172 AD2d 739 (2d Dept 1991). After the employment terminates, solicitation of the employer's customers is actionable only if the employee engages in wrongful conduct, such as taking files or using confidential information. *Island Sports Physical Therapy v Kane*, 84 AD3d 879, 880 (2d Dept 2011). *Computer Task Group, Inc. v Professional Support, Inc.*, 88 AD2d 768, 769 (4th Dept 1982)(employee has duty not to use confidential knowledge

acquired in his employment in competition with his principal that survives termination of employment).

Applying these principles to this case, WQIS has stated a cause of action against Brown, Gerone, Quinn for breach of fiduciary duty. The court has already ruled that WQIS have sufficiently alleged that the data base is a trade secret. Brown is alleged to have taken files in electronic form; Brown and Greene are alleged to have approached a syndicate subscriber to support their new company before leaving WQIS; all three are accused of forming Safe Harbor during business hours; and Gerone is alleged to have used confidential information to solicit the Wortham Broker. AC, ¶¶ 60, 90 & 91.

While Defendants contend that WQIS has not sufficiently alleged damages, "damages have never been considered to be an essential requirement for a cause of action based on a breach of fiduciary duty." *Amfesco Industries, Inc. v Greenblatt*, 172 AD2d 261, 265 (1st Dept 1991). The reason for the rule is that in an action for breach of fiduciary duty:

> unlike in an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but ... "to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates."

Diamond v Oreamuno, 24 NY2d 494, 498 (1969), *quoting Dutton v Willner*, 52 NY 312, 319 (1873). A party liable for breaching a fiduciary duty may have to disgorge any gains realized therefrom, even where the injured party has sustained no direct economic loss. *Excelsior 57th Corp. v Lerner,* 160 AD2d 407, 408-409 (1st Dept 1990).

However, there are insufficient allegations that Falvey had a fiduciary duty to WQIS, or even that it did anything to conspire with or aid or abet breach of fiduciary. Clearly, Falvey had no fiduciary duty to WQIS. The AC only alleges in conclusory fashion that Falvey, conspired,

was complicit or benefited from the Defendants wrongful conduct. This is insufficient because no facts relating to its participation are alleged. *Snyder v Puente De Brooklyn Realty Corp., supra* (conspiracy claim must plead facts that show knowing participation or sharing of perfidious purpose); *Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003) (must plead that aider and abettor of breach of fiduciary duty affirmatively assisted, helped conceal or failed to act when required thereby allowing breach to occur). Here, no facts regarding Falvey are pleaded and the court dismisses the breach of fiduciary duty claim against it.

V. Tortious Interference with Business Relationship – 4th Cause of Action

The 4th cause of action for tortious interference with business relationships is dismissed. WQIS pleads both interference with existing contracts and interference with prospective economic relationships. Where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference .... *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004). Where a suit is based on interference with a non-binding economic relationship, the plaintiff must show that the defendants knew of the proposed contract, intentionally interfered with it and that it would have been entered into but for the interference. *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 49 (1st Dept 2009); *Zetes v Stephens,* 108 AD3d 1014, 1020 (4th Dept 2013); 2 *Pattern Jury Instructions, Civil*, 2nd Ed. © 2009, 3:57. WQIS points to no contract that was breached or any contract it would have obtained absent Defendants' interference. Thus, WQIS failed to state a claim for interference with contract or interference with prospective business relationships.

VI. Fraud – 5th Cause of Action

The fraud claim is pleaded against the Individual Defendants and is sufficiently stated as to Brown and Gerone. The elements of a fraud claim are a misrepresentation or a material

omission of fact; which was false and known to be false by defendant; made for the purpose of inducing the other party to rely upon it; justifiable reliance of the other party on the misrepresentation or material omission; and injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). The court agrees with WQIS that placing a false entry in a computer system, or instructing an employee to do it, is a misrepresentation. WQIS alleges that during Brown and Gerone's employment, no policy was bound without instructions from one of them. 4/23/14 Affidavit of Terence Moynihan, Doc 114. Scienter can be inferred from the fact that Brown and Gerone systematically booked the policies and cancelled them within 90 days, before the time to demand payment for unpaid premiums according to WQIS's accounting procedures. Whether WQIS justifiably relied on the entries is a question of fact. The court cannot hold as a matter of law that the scheme should have been discovered because there was data reflecting the cancellations in the computer system. Prior to their departure to a competing business, WQIS had a right to trust Brown and Gerone not to game the bonus process by making false entries. An employee has a fiduciary duty toward his employer. *Front, Inc. v Khalil*, 103 AD3d 481 (1st Dept 2013); *N.K. Intl., Inc. v Dae Hyun Kim*, 68 AD3d 608 (1st Dept 2009). Further, as employees, Brown and Gerone could be held liable for fraudulent concealment that they were making false entries upon which their bonuses would be calculated. *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 459 (1st Dept 2009)(duty to disclose where there is confidential or fiduciary relationship between parties). In sum, WQIS has stated a claim for fraud against Brown and Gerone, but the claim is dismissed as to Quinn. Accordingly, it is

ORDERED that the motion by defendants Safe Harbor Pollution Insurance, LLC (Safe Harbor), Falvey Insurance Group, Ltd. (Falvey), Russell Brown, Anthony Gerone and Sean

Quinn to dismiss the amended complaint is granted solely to the extent of dismissing: 1) the 1st cause of action for misappropriation of trade secrets against Falvey and Quinn; 2) the 2d cause of action for unfair competition; 3) the 3d cause of action for breach of fiduciary duty against Falvey; 4) the fourth cause of action for interference with contract and prospective business relationships; 5) the 5th cause of action for fraud against Quinn; and in all other respects the motion is denied; and it is further

ORDERED that the Clerk shall enter judgment dismissing the amended complaint against Falvey and sever the remainder of the action, which shall continue; and it is further

ORDERED that the caption shall be amended as follows:

WATER QUALITY INSUR. SYNDICATE & RICHARD H. HOBBIE III, Pres. & CEO,

Plaintiffs,

-against-

SAFE HARBOR POLLUTION INSUR., LLC, RUSSELL BROWN, ANTHONY GERONE, SEAN QUINN, JOSEPH LEOTTA, J. MICHAEL FALVEY & JOHN DOES 1-10,

Defendants.

and it is further

ORDERED that upon service upon them of a copy of this order with notice of entry, the Clerks of the Court and the Trial Support Office shall note the amended caption in their respective records and henceforth all papers filed in this action shall bear the amended caption.

Dated: September 10, 2014

ENTER:

J.S.C.