ORIGINAL

SUPREME COURT-STATE OF NEW YORK

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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TRAVELSAVERS ENTERPRISES, INC. d/b/a TRAVELSAVERS PARTNER SERVICES,

Plaintiff,

-against-

ANALOG ANALYTICS, INC., KENNETH KALB, BARCLAYCARD UK, BARCLAYS BANK DELAWARE, and BARCLAYS PLC,

Defendants.

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TRIAL/IAS PART: 15
NASSAU COUNTY

Index No. 602696-13

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This matter is before the court on 1) the motion filed by Defendants Analog Analytics, Inc. ("AA"), Barclays Bank Delaware and Barclays PLC ("Company Defendants") on January 31, 2014 (motion sequence number 1), and 2) the motion filed by Defendant Kenneth Kalb ("Kalb") on January 31, 2014 (motion sequence number 2), both of which were submitted on February 25, 2014. For the reasons set forth below, the Court 1) grants the motions to dismiss the eighth cause of action in the Complaint, for punitive damages and attorney's fees; and

2) directs that, with respect to the remaining causes of action in the Complaint, the motions will be the subject of oral argument before the Court on **May 16, 2014 at 11:00 a.m.** at which time the Court anticipates counsel for the parties addressing the following issues: 1) whether Plaintiff's argument, in opposition to the motions, that the written agreement is not the entire agreement between Plaintiff and AA, can be reconciled with the allegation in the Complaint that "[t]he contract between Travelsavers... and AA...was set forth in a written agreement...executed by both parties in January 2012" (Compl. at ¶ 2) and applicable case law regarding the interpretation of contracts; 2) whether the second cause of action, alleging a breach of the implied covenant of good faith and fair dealing, is duplicative of other causes of action in the Complaint; 3) whether the third cause of action, alleging tortious interference with contract, provides the parties with adequate notice of the material elements of each cause of action alleged against it, adequately pleads the necessary elements and/or is precluded by the economic justification doctrine; 4) whether the fourth cause of action, alleging fraudulent inducement, fails because the disclaimer in the written agreement, set forth at Paragraph 8, precludes Plaintiff's justifiable reliance on the alleged oral representations; 5) whether Plaintiff alleges a sufficient relationship between Plaintiff and the Barclay Defendants to support the fifth cause of action alleging unjust enrichment; 6) whether, with respect to the sixth cause of action for misappropriation of trade secrets, Plaintiff has alleged the necessary element of secrecy of the information allegedly misappropriated and/or alleged facts demonstrating that any Defendant used the alleged trade secrets in breach of an agreement or duty, or as result of discovery by improper means; 7) whether the seventh cause of action, alleging unfair competition, alleges conduct to which this cause of action is applicable; and 8) assuming *arguendo* that Plaintiff has adequately stated a claim, whether the Court should limit Plaintiff's claim for damages in light of the written agreement's limitation of liability clause set forth at Paragraph 6 of the Agreement.

BACKGROUND

A. Relief Sought

The Company Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the complaint ("Complaint") with prejudice as against the Company Defendants.

Defendant Kalb moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint with prejudice as against Kalb.

Plaintiff Travelsavers Enterprises, Inc. d/b/a Travelsavers Partner Services

("Travelsavers" or "Plaintiff") opposes the motions.

B. The Parties' History

The Complaint (Ex. A to Gottridge Aff. in Supp.) alleges that in January 2012 Travelsavers entered into an exclusive ten-year contract with AA ("Agreement") , pursuant to which the parties agreed to work together to advertise and market brand-named travel deals, including luxury ocean cruises and vacation resorts, through electronic and other media directly to consumers. Plaintiff alleges that AA and Kalb, its founder and chief executive, breached the Agreement and, instead of performing, misappropriated Travelsavers' know-how and technology to launch a rival electronic travel offer service through Barclaycard UK which competes with, and undermines the value of, the Travelsavers contract and benefits Barclaycard UK, Barclays Bank Delaware and Barclays PLC (collectively "Barclays"). The Complaint alleges that Defendant Barclaycard UK is a wholly-owned subsidiary of Barclays PLC and is organized under the laws of England with its principal place of business in London, England.

Plaintiff alleges that AA advised Travelers that AA had the technological ability to analyze marketing efforts, and had a growing network of internet-based and traditional broadcasters, and other media outlets. AA advised Plaintiff that it had a program called the "Bigger Better Deal" (Compl. at ¶ 25) that enabled business partners, such as Travelsavers, to market coupons or other offers to consumers over AA's network of publishers, which AA called its "Syndication Network" (*id.*).

Plaintiff alleges that, during contract negotiations, AA and Kalb made the following material misrepresentations on which Plaintiff relied to its detriment: 1) at a dinner meeting in January of 2012, Kalb falsely represented that a) AA had over 850 publishers contractually bound to participate in the Syndication Network; b) the number of contractually bound publishers in the Syndication Network would surpass 1,000 in the coming months; and c) AA, each day, sends over 33,000,000 emails advertising daily deals directly to consumers, and would soon send more than 50,000,000 emails daily; 2) in meetings in 2012, Christina Laos ("Laos"), Director of Operations for AA, and Kalb falsely represented that the Syndication Network, based on its proprietary platform, "seamlessly delivered deal offers to all forms of media simultaneously" (Compl. at ¶ 34(d); and 3) in meetings in January 2012, Laos, Kalb and other representatives of

AA falsely represented to Travelsavers that AA had over 300 client publishers on the Syndication Network committed to running Travelsavers' travel offers, including CBS and Time Warner Cable.

Plaintiff alleges that, following the execution of the Agreement, it learned that AA had misrepresented the capability and quality of the Syndication Network. Plaintiff learned that AA did not have binding agreements with many of its purported publishers, and that some of the national media outlets that AA had claimed were participants in the Syndication Network were not in fact participating, or were doing so on a non-binding basis. AA also admitted that its prior representations regarding its customer reach were false, and that it had exaggerated the number of daily emails that it sent out. Travelsavers, however, continued to perform under the Agreement and continued to obtain commitments and interest from major travel providers to supply travel offers for the Agreement distribution.

Plaintiff alleges that Travelsavers and Kalb breached the Agreement by conduct including AA's failure to distribute travel offers provided by Travelsavers for distribution and Kalb's failure to appear at a travel conference hosted by Travelsavers' parent company, whose attendees included licensee agents and major travel providers. Plaintiff alleges that, following these breaches, Kalb informed Travelsavers that AA could not perform under the Agreement, in part due to the fact that AA was required to allocate most of its resources and personnel to Barclays, its new parent company, which had acquired AA in May 2012.

Plaintiff alleges that Barclays acquired 100% of AA's shares ("Acquisition") and entered into a license agreement to obtain AA's technology and proprietary information for use in building a competing platform and distribution system by Barclaycard called "Bespoke Offers" (Compl. at ¶ 53). In late May 2012, Kalb advised AA of the Acquisition, asked for forbearance from Travelsavers and told Travelsavers that, in return, Travelsavers would have the opportunity to expand the Agreement to include the rewards program for Barclays' credit card business. Kalb also advised Travelsavers that AA had disclosed the Agreement to Barclays, which was impressed by the business model reflected in the Agreement.

In late summer and fall of 2012, after AA had ceased its performance under the Agreement, Kalb arranged for discussions between executives of Travelsavers and Barclaycard.

During those meetings, Barclays advised Travelsavers that 1) Bespoke Offers was a platform that would directly compete with the Agreement, and Barclays had purchased AA for its technology to build and manage that platform; 2) Barclays was marketing the Bespoke Offers platform directly to travel providers, eliminating the role that Travelsavers had contracted to fulfill in the Agreement; and 3) AA's only priority was the success of Barclaycard, a direct competitor to the venture created by the Agreement.

The Complaint contains eight (8) causes of action: 1) against AA for breach of the Agreement by virtue, *inter alia*, of its failure to cooperate to develop direct reservation capability, delay in launching the Agreement and failure to promote and distribute travel offers submitted to the Syndication Network online portal by Travelsavers, 2) against AA for the breach of good faith and fair dealing by making false representations and entering into a long-term exclusive joint venture when it knew that it did not have the ability or intention to abide by the Agreement, 3) against Barclays for tortious interference with contract by causing AA to divert its resources and personnel away from implementation and execution of the Agreement to develop Bespoke Offers, a competing platform, 4) against AA and Kalb for fraudulent inducement by making material representations to Plaintiff during the negotiations leading to the execution of the Agreement, 5) against Barclays under the theory of unjust enrichment by virtue of Barclays diverting AA personnel and resources, and obtaining Plaintiffs' trade secret proprietary information that Plaintiff had shared with AA, 6) against all Defendants for misappropriation of Plaintiff's trade secrets, which AA improperly induced Plaintiff to share under the false pretense that AA was bound by the Agreement, 7) against AA for unfair competition, and 8) against all Defendants for punitive damages and attorney's fees.

In support of the motion, counsel for the Company Defendants provides a copy of the cover page and Exhibit 8.1 of the Form 20-F filed with the United States Securities and Exchange Commission ("SEC") by Barclays, PLC, dated March 13, 2013, which lists the subsidiaries of Barclays PLC, including AA and Barclays Bank Delaware (Ex. 4 to Gottridge Aff. in Supp.). The Company Defendants also advise the Court that the public record belies Plaintiff's allegation that Barclaycard PC is a wholly-owned subsidiary of Barclays PLC, as the official website of the United Kingdom's Companies House reflects that there is no company organized under English law called "Barclaycard UK" (Company Ds' Memo. of Law in Supp. at

n. 1).

The Company Defendants submit that Plaintiff's claims are barred by the language of the Agreement. The Company Defendants note that Plaintiff "curiously" (Company Defendants' Memo. of Law in Supp. at p. 1) failed to attach the Agreement to its Complaint, and provide a copy of the Agreement (Ex. 2 to Gottridge Aff. in Supp.). [1]

Paragraph 1 of the Agreement, titled "Analog Analytics Syndication Network," provides as follows at subdivisions (b), (d) and (f):

> (b) From time to time, at Travelsavers sole discretion, Travelsavers may offer specific deals ("Deal(s)") or Offer(s)") from travel companies ("Travel Partners") through the Syndication Network.
>
> (d) Travelsavers shall remit payment to Company once it receives point-of-sale commissions ("Commissions") from Travel Partners. Company shall remit appropriate payment to members of the Syndication Network ("Distributors") that sell Travelsavers Deal(s) or Offers(s) to Consumers, as defined below.
>
> (f) Once Travelsavers has published a Deal or Offer to Company, then Company shall provide to Travelsavers a mockup of the applicable Deal or Offer for Travelsavers' review and approval. Upon receipt of approval from Travelsavers (which will customarily be via email), then Company shall have no liability to Travelsavers for the content of such Deal or Offer including, without limitation, claims that the Deal or Offer was inaccurate or that the maximum number of deals published in the Deal did not match the Agreement. Notwithstanding the foregoing, Company has no obligation to accept or promote any Deal(s) or Offer(s).

Paragraph 3 of the Agreement, titled "Payment," provides as follows at subdivision a, titled "Revenue splits:

> Travelsavers, Company and Distributors will share the Commissions that result from Deal(s) or Offer(s) in the following manner:
>
> I. 50% to Company. Company shall then compensate Distributors in accordance with its own formula.
>
> II. 50% to Travelsavers.

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[1] The Agreement refers to AA as the "Company."

Paragraph 6, titled "Limitation of Liability," provides as follows:

> EXCEPT FOR ANY LIABILITY RELATED TO SECTION 5 ABOVE [addressing indemnification in suits by third parties], THE SOLE AND COMPLETE LIABILITY OF EACH PARTY TO THIS AGREEMENT TO THE OTHER PARTY UNDER OR IN CONNECTION WITH THE AGREEMENT AND ANY OFFER SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID OR INCURRED BY OR FOR COMPANY UNDER THIS AGREEMENT PRIOR TO THE DATE THE CLAIM AROSE. ALL CLAIMS BY A PARTY UNDER THIS AGREEMENT MUST BE MADE WITHIN ONE (1) YEAR OF FIRST PUBLICATION OF THE OFFER, AND ALL CLAIMS NOT SO MADE SHALL BE DEEMED WAIVED BY SUCH PARTY.

Paragraph 8 of the Agreement provides as follows:

> Except as expressly set forth in this Agreement: Neither Company nor Travelsavers makes any representations or warranties, express or implied, including without limitation any implied warranty of Travelsavers ability, fitness, for a particular purpose or non-infringement. Company does not warrant or guarantee that (A) any offer, voucher or coupon will be error free; (B) any errors, omissions or misplacements will be corrected, or (C) the offer will result in any revenue or profit for Company, Travelsavers or Travel Partners. Company makes no representations or warranties, expressed or implied, regarding the Company property or any other promotion, distribution or redemption method used or provided by Company or other Distributors of Syndication Network...and/or the accuracy, adequacy, reliability, availability, timeliness, completeness, suitability or other characteristics of the information and materials contained on or presented therein. The Syndication Network, other Company property and other promotion, distribution or redemption methods used or provided by Company, and all related information and materials, are provided "AS IS", without any warranty of any kind, and on an "AS AVAILABLE" basis.

In opposition, Ann Marie Moebes ("Moebes"), the Executive Vice President of Travelsavers, affirms that she was part of the Travelsavers team that negotiated the Agreement. Moebes submits that the Agreement is not the entire agreement between the parties, relying on Paragraph 7 of the Agreement which provides as follows:

> The parties acknowledge that communications between them (including the parties and parties' contractors) often use electronic means. For contractual purposes, the parties hereby (a) consent to receive communications from or on behalf of each other in an electronic form and (b) agree that all terms and conditions, agreements, notices, disclosures, and other communications that they provide to each other electronically satisfies any legal requirement that such communications would be in writing. The foregoing does not affect the parties[‘] statutory rights.

Moebes affirms that she engaged in numerous communications, often by email or supplemented by email, with AA to reach agreement on other terms and conditions of the Agreement as the parties moved forward to implement the Agreement. She affirms that the parties agreed and stipulated, *inter alia*, as follows: 1) the AA network had over 850 publishers; 2) AA obtained binding commitments from 300 of those publishers to carry Travelsavers' offers; 3) AA would promote Travelsavers offers through daily emails to over 40 million consumer email accounts; and 4) the Agreement would be "launched" (Moebes Aff. in Opp. at ¶ 5), meaning that the AA network would start carrying Travelsavers' offers, by the end of February 2012. Moebes submits that these agreements are reflected in emails between the parties, and are incorporated into the Agreement, pursuant to Paragraph 7. Moebes provides copies of emails (Exs. A-G to Moebes Aff. in Opp.) that, she submits, constitute additional terms and conditions of the Agreement, and of AA's contractual commitments "pursuant to the full scope of" the Agreement (Moebes Aff. in Opp. at ¶ 7). Moebes contends that the Agreement must be read and understood in the context of these communications.

C. The Parties' Positions

The Company Defendants submit that 1) the Court should dismiss the First Cause of Action, alleging breach of contract, on the grounds that a) Travelsavers fails to identify specific provisions of the Agreement that would have been breached, assuming *arguendo* that Travelsavers committed the conduct alleged; and b) the language of the Agreement contradicts the allegations supporting Plaintiff's cause of action for breach of contract; 2) the second cause of action, alleging a breach of the implied covenant of good faith and fair dealing, is not viable, because it seeks to impose on AA obligations for which Travelsavers failed to bargain, because it is duplicative of other causes of action in the Complaint, and because it seeks exemplary damages which are not authorized in ordinary breach of contract matters like the instant action; 3) the third cause of action, alleging tortious interference with contract, is defective because a) it fails to distinguish among Barclays Delaware, Barclays PLC and the "non-existent" Barclaycard UK (Company Defendants' Memorandum of Law in Opp. at p. 12) and, therefore, fails to provide each party with adequate notice of the material elements of each cause of action alleged against it; and b) it fails to allege the elements of that cause of action because it fails to allege that AA breached the Agreement, that any Barclay Defendant's conduct caused the breach, and that the Barclay Defendant(s) acted without justification; 4) the fourth cause of action, alleging

fraudulent inducement, fails because the disclaimer in the Agreement precludes Plaintiff's justifiable reliance on the alleged oral representations; 5) the fifth cause of action, alleging unjust enrichment, is not viable because a) Plaintiff groups together separate entities without specifying the conduct that each committed; b) Plaintiff fails to allege a relationship between Plaintiff and Barclays Delaware or Barclays PLC that could support this cause of action; and c) Plaintiff does not adequately allege that the enrichment was unjust; 6) the Court should dismiss the sixth cause of action, alleging misappropriation of trade secrets, because a) Plaintiff does not allege the necessary element of secrecy of the information allegedly misappropriated; b) Plaintiff did not bargain for any contractual restriction on AA's access to this information, as evidenced by the fact that the Agreement is silent regarding any trade secrets or proprietary information, even though it refers to AA's proprietary technology; and c) Plaintiff has not alleged facts demonstrating that any Defendant used the alleged trade secrets in breach of an agreement or duty, or as result of discovery by improper means; 7) the Court should dismiss the seventh cause of action, alleging unfair competition, in part because the conduct of which Plaintiff complains does not fall within any of the categories to which this cause of action is applicable; 8) the eighth cause of action seeking punitive damages and attorney's fees, is not viable because a) New York does not recognize punitive damages as a separate cause of action, and because Plaintiff has not alleged egregious conduct that would warrant such an award; and b) Plaintiff has not identified any contract or statute that would entitle it to attorney's fees; and 9) even assuming *arguendo* that Plaintiff has adequately stated a claim, the Court should limit Plaintiff's claim for damages because a) the Agreement's limitation of liability clause limits Plaintiff's damages to what AA was actually paid under the Agreement; and b) as to the first and second causes of action, Plaintiff fails to allege facts that would permit it to recover consequential damages.

Kalb presents many of the same arguments as the Company Defendants regarding the insufficiency of the causes of action in the Complaint. He submits, further, that even if Plaintiff had properly pled a viable cause of action for misappropriation of trade secrets, this cause of action fails as against Kalb because there is no allegation that Kalb personally used any trade secret belonging to Plaintiff, or that such use was in breach of an agreement or duty, or was a result of discovery by improper means.

In opposition, the Company Defendants submit that 1) the Agreement is not an integrated agreement, as evidenced by the fact that it does not have a merger clause and Paragraph 7's

reference to other terms and conditions, and agreements; 2) the Complaint adequately alleges that AA failed to perform its obligation under the Agreement to develop and operate its electronic distribution platform to carry travel offers exclusively from Travelsavers and to share its data analysis; 2) Paragraph 1(f) of the Agreement, limiting AA's liability, must be read in conjunction with the entire Agreement, and in consideration of its purpose and, therefore, the Court should reject Defendants' suggestion that Paragraph 1(f) gave AA the sole discretion to reject all travel offers, which would nullify the purpose the Agreement; 3) at a minimum, Paragraph 1(f) is ambiguous, and further discovery is necessary to determine the appropriate interpretation of Paragraph 1(f); 4) AA's breach of the duty of good faith and fair dealing is an independent ground for liability in light of AA's alleged failure to build its distribution network to carry Travelsavers' offers and diversion of its resources to building a competing system for Barclays' travel offers, which deprived Travelsavers of the benefit of the Agreement; 5) with respect to the fraudulent inducement claim, the Court should not construe the "as-is" disclaimer in Paragraph 8 of the Agreement as rebutting Plaintiff's claim of reasonable reliance on specific representations because that clause does not unmistakably refer to the same subject matter as AA's prior representations regarding, *e.g.*, the number of distributors that it had; 6) Plaintiff has adequately pleaded its tortious interference with contract claim by alleging that AA specifically informed Barclays of the Agreement and Barclays induced AA to breach the Agreement to facilitate the Acquisition and divert AA's resources to build Barclays' system for distributing travel offers, and the economic interest doctrine does not preclude this cause of action, in part because Plaintiff alleges that Barclays knew of, and interfered with, the Agreement before the Acquisition; 7) Plaintiff has adequately pleaded the causes of action for misappropriation of Plaintiff's trade secrets and unfair competition by alleging that Travelsavers disclosed certain information to AA with the understanding that this information would be used to further the parties' joint project, providing details regarding the steps that it takes to keep its proprietary information safe from disclosure to competitors (*see* Compl. at ¶ 89) and alleging that Defendants obtained the trade secrets by improper means; 8) Kalb, as the primary actor on behalf of AA with respect to the misappropriation, is liable because he was directly involved in controlling AA's conduct or otherwise aiding and abetting the tort; 9) Plaintiff has properly alleged unjust enrichment, in the alternative, based on its allegation that Barclays profited from Travelsavers' proprietary information to which it was not entitled and because there is a sufficient connection between

Barclays and Plaintiff in light of Barclay's alleged role in this action; 10) Plaintiff's request for punitive damages is proper in light of Plaintiff's allegation that Defendants engaged in conduct which exhibited "wanton dishonesty affecting the travel industry at large and millions of consumers" (Plaintiff's Memo. of Law in Opp. at p. 22); and 10) Paragraph 6 of the Agreement does not limit liability in the manner that Defendants suggest, and should be read to limit the liability of AA only with respect to damages caused by a particular "Offer" as that term is defined in the Agreement.

In reply, Defendants submit *inter alia* that 1) Plaintiff alleged in the Complaint that the contract between Plaintiff and AA was set forth in the Agreement, and is now trying to salvage the Complaint by arguing that the contract terms are not entirely contained in the Agreement; 2) Paragraph 7 of the Agreement does not reflect the parties' intention to be bound by agreements outside the four corners of the Agreement; rather, Paragraph 7 simply allows emails to satisfy any formal requirement that communications be in writing, which is a "far cry from turning every - or indeed, *any* - email into a binding contract" (Company Ds' Reply Memo of Law at p. 2; emphasis in original); 3) the absence of a merger clause in the Agreement does not mean that the Court must, or may, consider extrinsic evidence of additional terms; 4) Plaintiff provides no support for its assertions that the parties agreed to a launch date, that AA assumed an obligation to use email blasts to promote travel offers and/or that AA had an obligation to secure commitments from publishers to carry the travel offers provided by Travelsavers; 5) the Agreement, and the emails that Plaintiff contend comprise part of the parties' agreement, do not contain any obligation relating to confidential information or trade secrets; 6) the exclusivity provision set forth in Paragraph 1(g) is inapplicable to this action because Plaintiff does not allege that Travelsavers entered into its agreement with Barclays for the purpose set forth in that Paragraph, which is "sourcing a supply of travel-related Deal(s) or Offer(s) substantially similar to those provided by" Travelsavers; 7) the case law on which Plaintiff relies in support of its cause of action for breach of the implied covenant of good faith and fair dealing in fact undercuts Plaintiff's position because Plaintiff is seeking to impose implied conditions that are inconsistent with the terms in the Agreement; 8) with respect to the tortious interference claim, the economic justification doctrine does apply because where, as here, the allegedly breaching party is a wholly owned subsidiary of the Defendants accused of tortious interference, the parent-defendants have an economic interest in their subsidiary sufficient to support that defense; 9) Plaintiff has failed to

allege any relationship between Plaintiff and a Barclays Defendant that would support the unjust enrichment claim; 10) with respect to the misappropriation of trade secrets claim, Plaintiff has failed to plead facts demonstrating that any Defendant used the purported trade secrets in breach of an agreement, in breach of a confidential relationship or duty, or as a result of discovery by improper means; and 11) the Complaint contains no allegations on which Kalb, in his personal capacity, can be found liable for misappropriation of trade secrets.

RULING OF THE COURT

A. Dismissal Standards

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

A party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract. *Shlang v. Bear's Estates Dev.*, 194 A.D.2d 914, 915 (3d Dept. 1993). To sustains such a claim, however, the misrepresentations alleged in the

pleadings must be more than merely promissory statements about what is to be done in the future; they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them. *Id.*

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat & Apron v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group*, LLC, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003).

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Telecom International v. AT&T*, 280 F.3d 175, 197 (2d Cir. 2001), quoting *Katz Dochrermann & Epstein, Inc. v. Home Box Office*, 1999 U.S. Dist. LEXIS 3971 (S.D.N.Y. March 31, 1999). A cause of action based on unfair competition may be predicated on the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets. *Out of the Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 (2d Dept. 2008), citing *Beverage Mktg. USA, Inc. v. South Beach Beverage Co., Inc.*, 20 A.D.3d 439, 440 (2d Dept. 2005), quoting *Eagle Comtronics v. Pico Prods.*, 256 A.D.2d 1202, 1203 (4th Dept. 1998).

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v.*

Wildenstein, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). A plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. *Georgia Malone & Company, Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012), citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007). While a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not too attenuated. *Georgia Malone & Company, Inc. v. Rieder*, 19 N.Y.3d at 516, quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d at 215-216. Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

C. Relevant Contract Principles

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.* at 569, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992).

While a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a specific disclaimer defeats any allegation that the contract was executed in reliance on contrary oral representations. *Busch v. Mastropierro*, 258 A.D.2d 492, 493 (2d Dept. 1999).

It is settled that a contractual provision that limits damages will be enforced unless a special relationship exists between the parties, or a statute or public policy imposes liability despite the restrictions set forth in the contract. *Duane Reade v. 405 Lexington, L.L.C.*, 22 A.D.3d 108, 111 (1st Dept. 2005), citing, *inter alia*, *Peluso v. Tauscher Cronacher Professional Engrs.*, 270 A.D.2d 325 (2d Dept. 2000).

D. Attorney's Fees

It is well settled in New York that a prevailing party may not recover attorney's fees from the losing party except where authorized by statute, agreement or court rule. *Great Neck Terrace Owners Corp. v. McCabe*, 101 A.D.3d 944, 946 (2d Dept. 2012), quoting *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.2d 592, 597 (2004).

E. Punitive Damages

An award of punitive damages is warranted where a plaintiff establishes that the defendant's conduct evinced a high degree of moral turpitude and demonstrated behavior that equated to criminal indifference to civil obligations. *Stormes v. United Water New York, Inc.*, 84 A.D.3d 1351 (2d Dept. 2011), citing *Huang v. Sy*, 62 A.D.3d 660 (2d Dept. 2009). The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness, or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety rights. *Stormes v. United Water New York, Inc.*, 84 A.D.3d at 1351, quoting *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007) (internal quotation marks omitted).

F. Application of these Principles to the Instant Action

The Court grants Defendants' motions to dismiss the eighth causes of action based on the Court's conclusion that 1) there is no contractual or statutory authority for Plaintiff's application for attorney's fees; and 2) the conduct complained of is not sufficiently egregious to support an award of punitive damages. The Court directs that, with respect to the remaining causes of action, the motions will be the subject of oral argument before the Court on May 16, 2014 at 11:00 a.m.

ENTER

DATED: Mineola, NY
April 16, 2014

HON. TIMOTHY S. DRISCOLL
J.S.C.