First Manhattan Consulting Group, LLC v Novantas, Inc.
2015 NY Slip Op 31089(U)
June 23, 2015
Supreme Court, New York County
Docket Number: 652492/2014
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45 ANIL C. SINGH

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FIRST MANHATTAN CONSULTING GROUP, LLC,

Index No. 652492/2014

Plaintiff,

Motion Sequence No. 001

- against -

NOVANTAS, INC., ANDREW FRISBIE, PETER GILCHRIST and JONATHAN WEST,

Defendants.

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SINGH, J:

Plaintiff First Manhattan Consulting Group, LLC (FMCG) brings this action against defendants Novantas, Inc. (Novantas), Andrew Frisbie (Frisbie), Peter Gilchrist (Gilchrist) and Jonathan West (West, together with Frisbie and Gilchrist, Individual Defendants). The four-count complaint asserts causes of action for: (1) breach of contract against the Individual Defendants; (2) tortious interference with contract against Novantas; (3) unfair competition against Novantas; and (4) misappropriation of confidential information/trade secrets against all defendants.

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Should the court grant any portion of the motion, FMCG seeks leave to replead.

I. Factual Allegations

FMCG provides "strategy, risk management, deposit analytics and marketing services to . . . firms engaged in all aspects of financial services as well as private equity groups and vendors." Complaint, ¶ 12. Its practice areas include risk, deposit analytics and strategy. According to FMCG, "Novantas was founded in 1999 by former FMCG executives and . . . directly compete[s] with FMCG in the financial services industry." Complaint, ¶ 3.

The Individual Defendants are FMCG's former employees, who resigned to join Novantas in June 2014. Frisbie was a vice president in FMCG's deposit analytics and strategy practices. Gilchrist was also a vice president and the only officer in FMCG's risk practice. West was a senior engagement manager in FMCG's deposit analytics and strategy practices. West had returned to FMCG a few months earlier, on March 31, 2014, after leaving it in 2011. FMCG states that it was Frisbie and Gilchrist who convinced West to return to FMCG.

Upon commencing their employment with FMCG, Frisbie, Gilchrist and West each executed a "Confidentiality And Non-Solicitation Agreement for FMCG Employees" (Agreement), which provided, in pertinent part:

> "1. Confidential Information
>
> > "a. Existence of Confidential Information. FMCG owns and has developed and compiled, and will develop and compile, certain proprietary techniques, software, databases (including, but not limited to the items which are listed on Exhibit A annexed hereto and by reference, incorporated herein) and information which have great value to its business (collectively, the 'Confidential Information'). Confidential Information includes not only information disclosed or furnished by FMCG to Employee, but also information developed, created, learned or prepared by Employee . . . during the course or as a result of employment with FMCG or any engagement or project with FMCG's clients . . . . Confidential Information includes . . . identities and characteristics of FMCG clients . . . .
>
> > "c. Use and Protection of Confidential Information. (i) At all times during the term of Employee's employment and thereafter, Employee shall hold in strictest confidence the Confidential Information and will not, directly or indirectly, disclose, publish, use or otherwise communicate the Confidential Information to any person or entity except as such disclosure, publication or use may be required for the benefit of FMCG or during the course of Employee's assigned duties in

> connection with any Engagement in which Employee is participating . . . .
>
> "3. Non-solicitation. During Employee's employment by FMCG and for a period of two years thereafter, Employee will not directly, or indirectly, solicit or counsel any person who was an FMCG employee at any time during Employee's employment by FMCG to terminate that employment or to become affiliated as employee, consultant, or otherwise with any other employer or organization, nor assist others in doing so, nor in any way facilitate the employment or affiliation of such an employee or former employee with any other organization or employers."

Complaint, exhibits A-C. "Gilchrist purported to cross out certain language throughout his 2010 [A]greement with FMCG . . . ." *Id.*, ¶ 71. Specifically, the following language appeared crossed out from paragraph 3 of Gilchrist's Agreement: "or to become affiliated as employee, consultant, or otherwise with any other employer or organization," and "nor in any way facilitate the employment or affiliation of such an employee or former employee with any other organization or employers." *Id.*, exhibit B, ¶ 3.

In January 2013, FMCG asked its employees to reaffirm their Agreements. On February 7, 2013, Frisbie signed a new Agreement, containing identical provisions.

FMCG states that the Individual Defendants had access to its "confidential, proprietary and trade secret information . . . including the names and contact information for clients, identification and development of clients' needs, results of proprietary analysis, methods of presenting complex analysis and findings, models, as well as information regarding FMCG's expertise and compensation." *Id.*, ¶ 14. Before their resignations, Gilchrist and Frisbie allegedly worked closely together on a number of projects for FMCG and its clients, including the development of "proprietary and confidential stress testing for deposits to comply with Comprehensive Capital Analysis and Review ('CCAR') government regulations for financial institutions." *Id.*, ¶ 16. FMCG states that, "in or around the end of 2013, Citibank had informed

[Gilchrist] that it had a need for a certain deposit analytics strategy," that Frisbie and Gilchrist "were understood to be working on this proposal[, on behalf of FMCG,] when they resigned. . . . [and that] FMCG was forced to inform Citibank that it could not complete the proposal and [that it] was unable to bid for the Citibank opportunity." *Id.*, ¶ 55. In addition, before their resignations, Frisbie and Gilchrist were working on a proposals for Regions Bank and "for a prospective deposit analytics client, TD Bank." *Id.*, ¶ 54. FMCG states that, "[o]n or about May 13, 2014, Gilchrist informed FMCG that Frisbie and Gilchrist had lost the TD Bank opportunity and [that] TD Bank had decided to use Novantas for the project instead." *Id.*

On May 23, 2014, Novantas allegedly offered Frisbie and Gilchrist managing director positions. On June 4, 2014, Frisbie and Gilchrist announced that they were leaving FMCG. According to FMCG, "when asked whether Kendra Boohlie, their executive assistant, would be going with them, Gilchrist responded that 'he would like her to and would like all of the team to join him.'" *Id.*, ¶ 40. In addition, "Gilchrist [allegedly] asked FMCG about the process for transferring employees' H1B visas." *Id.*, ¶ 42. FMCG states that Gilchrist did not have an H1B visa, but that a senior analyst in the risk practice, Emmanouil Davris Sampatakakis (Davris), who later joined Novantas, did.

On June 6, 2014, FMCG sent a letter to Richard Spitler, co-chief executive officer and managing director of Novantas, informing him that Frisbie and Gilchrist were bound by the Agreements.

On June 6, 2014, Sherief Meleis, a Novantas employee, sent Frisbie an email regarding "TD pricing," telling Frisbie that Meleis wished to involve him more prominently in that project and stating: "But let me know your availability for this, I know you have some other stuff

cooking, and obviously new business development takes priority." *Id.*, exhibit G. Frisbie responded, copying Gilchrist, as follows:

> "Super excited to dig into TD as you mentioned . . . swing factor will be how big the pending CITI (hopefully $1mm+) and RGN (a little smaller but still large) proposals settle . . . we hope to have clarity here in a few days.
>
> "Regardless I'm keen to have a mind meld and share some of the ideas we have previously employed on TDs and mortgages."

Id. According to FMCG, "TDs" refers to "time deposits" (*id.*, ¶ 59), "'TD' refers to 'TD Bank,' 'CITI' refers to 'Citibank' and 'RGN' refers to 'Regions Bank.'" *Id.*, ¶ 57.

Also on June 6, 2014, Robert Vokes (Vokes), a former FMCG officer who left in 2008 to join Novantas, emailed Gilchrist and Frisbie, stating: "I've been reaching out into my MIT network and have surfaced a candidate. Would like your input. Can you call me?" *Id.*, exhibit F.

Following the announcement of Frisbie and Gilchrist's resignation, West was promoted to head of analytics and pricing. FMCG alleges that on June 6, 2014, a Friday, West was "inquiring about his new role and title and appeared enthusiastic about it." *Id.*, ¶ 43. The following Monday, June 9, 2014, West informed FMCG of his resignation. FMCG states that West is an MIT alumnus.

Upon the resignations of the Individual Defendants, each was asked to sign a statement entitled "FMCG-Proprietary Materials," stating that he returned all confidential materials, did not remove any non-personal items from FMCG's premises and acknowledged his responsibility to keep all proprietary information confidential. *Id.*, ¶ 27 and exhibit E. Only West signed the statement, with Frisbie and Gilchrist allegedly refusing to do so.

FMCG states that following the departure of the Individual Defendants, three more employees left for Novantas. On June 11, 2014, Ryan Schulz, a consultant in FMCG's risk practice, resigned and allegedly stated that he was joining Gilchrist. According to FMCG, "[i]n or around 2010, Gilchrist had recruited Schulz to FMCG and, upon information and belief, was and remains personal friends with him." *Id.*, ¶ 47. On July 23, 2014, Gregory Muenzen, another a consultant in FMCG's risk practice, resigned and allegedly lied about joining Novantas. On August 11, 2014, Davris resigned to join Novantas.

According to FMCG, prior to Frisbie and Gilchrist's resignations, FMCG's risk practice had six employees and has now been reduced to two low-level employees.

II. Analysis

A. Defendants' Motion to Dismiss

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dept 2004); *see also Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009) ("[t]he court must . . . accord the plaintiff[] the benefit of every possible favorable inference"). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (internal citation omitted). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Id.* (internal citation omitted). Where the defendant seeks to dismiss the complaint based upon documentary

evidence, "the documentary evidence [must] utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (internal citation omitted).

1. Breach of Contract against the Individual Defendants (First Cause of Action)

The parties dispute whether: (1) the complaint sufficiently alleges that the Individual Defendants solicited FMCG employees or disclosed confidential information in violation of their Agreements; and (2) the allegedly confidential information was in fact confidential.

To state a cause of action for breach of contract, plaintiff must allege "the existence of a contract, the plaintiff's' performance thereunder, the defendant[s'] breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where an agreement contains restrictive covenants, such as the non-solicitation and the confidentiality provisions at issue here, "courts . . . recognize the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy." *Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 (1st Dept 2008) (internal quotation marks and citation omitted), *mod* 14 NY3d 774 (2010). Generally, "an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential." *Walter Karl, Inc. v Wood*, 137 AD2d 22, 27 (2d Dept1988) (internal citations omitted); *see also Anchor Alloys v Non-Ferrous Processing Corp.*, 39 AD2d 504, 507 (2d Dept 1972). However, "if the parties entered into a confidentiality agreement and the proprietary information at issue constitutes a trade secret, whether defendants' use of that information was a result of casual memory is irrelevant." *Ashland Management Inc.*, 59 AD3d at 102-103 (internal citations omitted). In addition, "[w]hether a plaintiff's customer list and/or other proprietary information constitutes a trade

secret or is readily ascertainable from public sources is ordinarily a triable issue of fact." *Id.* at 102 (internal citations omitted).

Here, FMCG states that the Agreements prohibited the Individual Defendants from "directly, or indirectly, solicit[ing] or counsel[ing] . . . an FMCG employee . . . to terminate that employment or to become affiliated . . . with any other employer or organization." Complaint, ¶ 70 and exhibits A-C, ¶ 3.[1] FMCG alleges that Frisbie and Gilchrist breached the non-solicitation provision in that they either directly or indirectly solicited FMCG employees in the risk, deposit analytics and strategy practices. *Id.*, ¶ 75. In support of this claim, FMCG alleges that Frisbie and Gilchrist had convinced West to join FMCG only a few months before the Individual Defendants resigned (*id*, ¶¶ 22, 23), and that, a few days after Vokes sought Frisbie and Gilchrist's input on a potential candidate from his "MIT network" (*id.*, ¶ 45 and exhibit F), West, an MIT graduate (*id.*, ¶ 45), resigned to join Novantas, despite having been promoted and "appearing enthusiastic" about his new role a few days prior. *Id.*, ¶ 43. In addition, FMCG states Gilchrist inquired about transferring an H1B visa, even though he did not have one, and that Davris, a senior analyst on Gilchrist's team, who did possess such a visa (*id.*, ¶ 42), joined Novantas on August 11, 2014. *Id.*, ¶ 49. Assuming, as the court must, the truth of these allegations and allowing for reasonable inferences, the complaint sufficiently alleges a claim for breach of the Agreements' non-solicitation provision against Gilchrist and Frisbie. *See Amaro*, 60 AD3d at 492; *see also Gorey v Allion Healthcare Inc.*, 18 Misc 3d 1118(A), 2008 NY Slip Op

[1] Defendants argue that Gilchrist is not bound by the crossed out portions of the non-solicitation provision. Defendants' opening brief at 7 n 6. Although Gilchrist allegedly purported to cross out portions of the non-solicitation provision in his Agreement, FMCG alleges that the non-solicitation provision was nevertheless part of his Agreement. Complaint, ¶ 71. Because defendants do not offer any evidence or legal authority disputing this allegation, the court accepts it as true for purposes of the instant motion. *See Allianz Underwriters Ins. Co.*, 13 AD3d at 174.

50125(U), *10 (Sup Ct, Suffolk County 2008) (finding allegation that plaintiff threw a party at which he made disparaging remarks about former employer's financial health to lure its employees to competitor, if true, gave rise to a counterclaim for breach of plaintiff's non-solicitation agreement, "in view of the subsequent departure of several of [d]efendant's employees who attended [the party]").

FMCG also states that the Agreements prohibited the Individual Defendants from "directly or indirectly, disclos[ing], publish[ing], us[ing] or otherwise communicat[ing] the Confidential Information to any person or entity." Complaint, ¶ 73 and exhibits A-C, ¶ 1 (c). "Confidential Information" included "information developed, created, learned or prepared by [the Individual Defendants] . . . during the course or as a result of employment with FMCG . . . [and] identities and characteristics of FMCG clients." *Id.*, ¶ 73 and exhibits A-C, ¶ 1 (a). FMCG alleges that the Individual Defendants breached this provision by disclosing and using confidential information, "including information related to stress testing deposits and CCAR regulations for purposes of luring clients away from FMCG and to Novantas" (*id.*, ¶ 75), and by "contacting FMCG clients Union Bank and Regions Bank" *Id.*, ¶ 76.

The complaint states that, before their resignations, Frisbie and Gilchrist were working on proposals for Citibank (*id.*, ¶ 55) and Regions Bank (*id.*, ¶ 57), and had worked on a failed proposal for TD Bank (*id.*, ¶ 54), and that Frisbie emailed a Novantas employee shortly after resigning from FMCG, stating that he was working on proposals for Citibank and Regions Bank, was excited "to dig into" TD Bank (*id.*, ¶ 56 and exhibit G) and wished to "share . . . ideas we previously employed on [time deposits] and mortgages." *Id.*, ¶ 59, exhibit G. The alleged close working relationship between Frisbie and Gilchrist, and Frisbie's use of "we" in the email, on which he copied Gilchrist, allow the inference that Gilchrist also worked on these projects. *Id.*

Taken together, these allegations allow a reasonable inference that Frisbie and Gilchrist used information developed while working for FMCG in violation of their Agreements. *See CBS Corp. v Dumsday*, 268 AD2d 350, 352 (1st Dept 2000) (finding that plaintiff sufficiently stated breach of non-disclosure agreement by alleging that former employees "disclos[ed] confidential information to [competitor], which used such information to divert work from plaintiff to itself . . . especially so in light of the rapid-fire resignations by defendants"); *see also Marsh USA Inc. v Hamby*, 28 Misc 3d 1214(A), 2010 NY Slip Op 51320(U), *5 (Sup Ct, NY County 2010) (denying motions to dismiss claims for breach of contract, misappropriation of trade secrets, tortious interference, and unfair competition, because allegation that "that defendants defected to [competitor], after which numerous . . . employees and clients quickly followed . . . raise[d] a strong inference of misappropriation of trade secrets").

FMCG also alleges the Frisbie and Gilchrist materially breached their Agreements by "contacting FMCG clients Union Bank and Regions Bank." Complaint, ¶ 76. While these are well-known financial institutions, whether the information concerning the "identities and characteristics of [these] clients" (complaint, ¶ 72 and exhibits A-C, ¶ 1 [a]), as well as other allegedly confidential information, is "readily ascertainable from public sources" is an issue of fact not determinable on the instant motion. *Ashland Management Inc.*, 59 AD3d at 102; *see also CBS Corp.*, 268 AD2d at 352 ("[w]hile defendants dispute that they used any confidential information . . . it cannot be concluded as a matter of law that defendants negated any possibility of a breach"); *Marsh USA Inc.*, 28 Misc 3d 1214(A), 2010 NY Slip Op 51320(U) at *6 (stating that, on a CPLR 3211 [a] [7] motion to dismiss, "[i]t [was] premature to determine what constitute[d] trade secrets"). Likewise, because "the parties entered into a confidentiality agreement . . . whether defendants' use of that information was a result of casual memory is

irrelevant." *Ashland Management Inc.*, 59 AD3d at 102-103 (internal citations omitted).

For the foregoing reasons, to the extent defendants seek dismissal of the first cause of action against Frisbie and Gilchrist, the motion is denied.

However, with respect to West, the complaint is devoid of factual allegation of his wrongdoing. Therefore, to the extent the complaint is directed against West, the motion to dismiss is granted. *See Skillgames, LLC*, 1 AD3d at 250.

2. Tortious Interference with Contract against Novantas (Second Cause of Action)

Defendants contend that the complaint fails to state a claim for tortious interference with contract against Novantas, because it fails to: (1) state a claim for breach of contract against the Individual Defendants; and (2) allege that Novantas knew of the Agreements or intentionally caused the Individual Defendants to breach them. In addition, they argue that the claim is contradicted by documentary evidence.

To establish a cause of action for tortious interference with contractual relations, plaintiff must allege: "(1) the existence of a valid contract between [plaintiff] and [a third-party]; (2) defendant['s] knowledge of that contract; (3) defendant['s] intentional procuring of the breach of that contract; and (4) damages." *Burrowes v Combs*, 25 AD3d 370, 373 (1st Dept 2006) (internal citations omitted). Plaintiff "must support his claim with more than mere speculation." *Id.*

As explained above, FMCG sufficiently alleges that Frisbie and Gilchrist breached their Agreements. By the same token, the complaint's allegations also allow the inference that Novantas intentionally procured these breaches. *See Admarketplace Inc. v Salzman*, 2014 WL 1278504, *4, 2014 NY Misc LEXIS 1458, *10 (Sup Ct, NY County, Mar. 28, 2014, Index No. 651390/2013) (denying motion to dismiss tortious interference with contract claim where "[t]he

gravamen of [plaintiff's] allegations [was] that [competitor] ha[d] been poaching employees from [plaintiff], inducing them to switch companies for greater compensation hoping that [they would] bring proprietary information with them"). Defendants contend that, because both emails underlying the procurement allegations were sent on June 6, 2014, the same day as the letter informing Novantas of Gilchrist and Frisbie's Agreements, the complaint fails to state that Novantas knew of the Agreements at the time it procured the breaches. However, it is not clear whether Novantas received the letter before or after the emails were sent. Nor is it clear whether Novantas knew of the Agreements prior to June 6, 2014, independent of the letter. Because this is a motion to dismiss on the pleadings, the court must "accord [FMCG] the benefit of every possible favorable inference." *Amaro*, 60 AD3d at 492. Therefore, for purposes of the instant motion, the complaint sufficiently alleges Novantas's knowledge of the Agreements. At a minimum, the allegations are sufficient to allow the inference that Novantas knew of the Agreements at the time it enlisted Gilchrist and Frisbie's assistance in recruiting their former team members, all of whom resigned after June 6, 2014. *See* complaint, ¶¶ 39, 42-44, 47, 49 and 65-66. Therefore, FMCG's allegations of Novantas's tortious interference with Gilchrist and Frisbie's Agreements are sufficient to survive defendants' motion to dismiss. *See Novus Partners, Inc. v Vainchenker*, 32 Misc 3d 1241(A), 2011 NY Slip Op 51666(U), *7 (Sup Ct, NY County 2011) (denying motion to dismiss tortious interference with contract claim, where breach of contract claim survived the motion to dismiss and plaintiff "sufficiently alleged that [defendant] employed [plaintiff's former employee] with knowledge of [nondisclosure agreement]").

Novantas also submits its employment agreements with the Individual Defendants, requiring them, "as a condition of employment, [to] continue to honor the confidentiality of

[their] prior employers' information." Friedman affirmation, exhibits B-D. While this provision may serve as evidence of Novantas's corporate policy, it does not establish that the policy was followed and, therefore, fails to "utterly refute[] plaintiff's factual allegations . . . ." *Goshen*, 98 NY2d at 326.

Accordingly, the motion to dismiss the second cause of action is denied.

3. Unfair Competition against Novantas (Third Cause of Action)

To the extent the unfair competition claim is based on a theory of employee raiding, the parties dispute whether the complaint alleges that Novantas used dishonest means to recruit FMCG employees or hired them solely to harm FMCG. To the extent the unfair competition claim is based on the use of FMCG's proprietary information, the parties dispute whether the complaint alleges disclosure of protectable trade secrets or Novantas's use of such trade secrets.

"[A]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." *ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 (2007) (internal quotation marks omitted). "To state such a claim, a plaintiff must demonstrate that it had compiled information used in its business that provided an opportunity to obtain a competitive advantage and that a competitor misappropriated it." *Edelman v Starwood Capital Group, LLC*, 2008 WL 2713489, 2008 NY Misc LEXIS 9980, *5 (Sup Ct, NY County, June 27, 2008, Index No. 0601077/2007), *affd* 70 AD3d 246 (1st Dept 2009). "[T]he mere inducement of an at-will employee to join a competitor [is not] actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage." *Headquarters Buick-Nissan v Michael Oldsmobile*, 149 AD2d 302, 304 (1st Dept 1989).

Here, FMCG's unfair competition claim is primarily based Novantas's recruitment of FMCG employees. It alleges that "Novantas has raided these employees as part of its scheme to gain access to . . . proprietary trade secret information, including . . . information related to stress testing deposits, CCAR regulations client identities, including Union Bank and Regions Bank, and client opportunities, including . . . Citibank and Regions Bank." Complaint, ¶ 91.

FMCG fails to allege that Novantas recruited FMCG's employees "solely to produce damage." *Headquarters Buick-Nissan*, 149 AD2d at 304. To the contrary, the complaint states that "Novantas boasted that by joining the company as managing directors, Frisbie and Gilchrist were 'expanding and strengthening Novantas's capabilities in deposit analytics, banking strategy, risk management, and stress testing." Complaint, ¶ 64. Therefore, by FMCG's own theory of the case, Novantas did not act "solely to produce damage," but to benefit itself. *Headquarters Buick-Nissan*, 149 AD2d at 304.

Nonetheless, the complaint's allegations allow the inference that Novantas employed dishonest means in soliciting FMCG's employees. The complaint states that "Frisbie and Gilchrist deliberately deferred the Citibank and Regions Bank proposals, which they had been working on before their resignations, and thereby wrongfully usurped FMCG's opportunities with these prospective clients for their own and Novantas' benefit." Complaint, ¶ 57. This, along with the allegations that Frisbie and Gilchrist received their offers a mere 10 days after losing the TD Bank opportunity to Novantas (*id.*, ¶ 54), and that Novantas induced them to breach the non-solicitation and confidentiality provisions of their Agreements, allows a reasonable inference that Novantas used unfair or dishonest means when it recruited Frisbie and Gilchrist. *Headquarters Buick-Nissan*, 149 AD2d at 304; *see also Men Women NY Model Mgt., Inc. v Ford Models, Inc.*, 32 Misc 3d 1236(A), 2011 NY Slip Op 51595(U), *4 (Sup Ct, NY

County 2011) (plaintiff stated a claim for unfair competition by alleging, among other things, that the defendant competitor was "poaching plaintiff's top executives and inducing them to breach their fiduciary duties to [plaintiff] by encouraging other employees to leave [plaintiff]").

The complaint also states an unfair competition claim based on Novantas's misappropriation of FMCG's trade secrets. *See CBS Corp.*, 268 AD2d at 353 (complaint stated claims for misappropriation and unfair competition, where "the scenario set forth by plaintiff," that the defendants resigned, started a competing business and replaced defendant on a pending project with one of plaintiff's clients, "permit[ed] an inference that defendants improperly used trade secrets in an effort to supplant plaintiff"); *see also Marsh USA Inc.*, 28 Misc 3d 1214(A), 2010 NY Slip Op 51320(U) at *5 (denying motion to dismiss unfair competition claim, among others, based on "a strong inference of misappropriation of trade secrets").

For the foregoing reasons, defendants' motion to dismiss the third cause of action is denied.

4. Misappropriation of Confidential Information/Trade Secrets against All Defendants (Fourth Cause of Action)

Defendants contend that the misappropriation claim must be dismissed because: (1) FMCG's purported confidential information, specifically its client list, is readily ascertainable; (2) the complaint fails to plead any measures taken to preserve confidentiality; (3) the complaint's allegations with respect to which trade secret were allegedly misappropriated are too broad and amorphous to qualify for trade secret protection; and (4) the complaint fails to allege that Novantas gained a competitive advantage.

A trade secret is "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 Mgt. v Janien,* 82 NY2d 395, 407 (1993) (internal quotation marks and citation omitted). To state a claim for misappropriation, the plaintiff must allege "'that it possesses a trade secret, and that defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means." *Novus Partners, Inc.*, 32 Misc 3d 1241(A), 2011 NY Slip Op 51666(U) at *7 (internal quotation marks and citation omitted). "Whether a plaintiff's customer list and/or other proprietary information constitutes a trade secret or is readily ascertainable from public sources is ordinarily a triable issue of fact." *Ashland Mgt. Inc.*, 59 AD3d at 102. However, a plaintiff must allege "that it employed precautionary measures to preserve its allegedly exclusive knowledge . . . so as to actually render it a trade secret." *Precision Concepts v Bonsanti*, 172 AD2d 737, 738 (2d Dept 1991); *see also Ashland Mgt.*, 82 NY2d at 407 ("a trade secret must first of all be secret"); *Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 2012 WL 10028550, *10 (Sup Ct, NY County, Feb. 27, 2012, Index No. 651832/2011) (dismissing misappropriation claim where plaintiff failed to allege "any precautionary measures taken to guard the secrecy of the information," including the existence of a "confidentiality agreement, covenant or prohibition against the defendants' use or disclosure of [the information]").

Here, FMCG sufficiently alleges that it possessed protectable trade secrets. The complaint states that FMCG's trade secrets included, among other things, "client names and contact information, identification and development of clients' needs, results of proprietary analysis" (complaint, ¶ 96), and information developed by "Frisbie and Gilchrist . . . during and pursuant to their employment by FMCG related to stress testing deposits, CCAR regulations . . . ." *Id.*, ¶ 97. Defendants contend that FMCG's clients consist of large financial institutions, whose identities are public information, as is the "information detailing the methodology,

techniques, results, and analysis associated with stress testing and the CCAR regulations." Defendants' brief at 8 n 8. However, FMCG alleges that its trade secrets are not limited to the names of such clients, but include their "contact information" and the "identification and development of clients' needs." Complaint, ¶ 96. Likewise, FMCG alleges that Frisbie and Gilchrist developed information related to stress testing and CCAR regulations and that such information (*id.*, ¶ 97) was proprietary and "not generally know." *Id.*, ¶ 96. Whether this information is readily ascertainable or not raises an issue of fact not determinable on the instant motion. *See Skillgames, LLC*, 1 AD3d at 250; *Ashland Mgt. Inc.*, 59 AD3d at 102; *Marsh USA Inc.*, 28 Misc 3d 1214(A), 2010 NY Slip Op 51320(U) at *5.

Defendants argue that FMCG's alleged trade secrets are not pleaded with sufficient specificity to survive a motion to dismiss. In support of this contention, they cite to *Julie Research Lab., Inc. v Select Photographic Eng'g, Inc.* (810 F Supp 513 [SD NY 1992], *affd in part, vacated in part on other grounds* 998 F2d 65 [2d Cir 1993]) and *Sit-Up Ltd. v IAC/InterActiveCorp.* (2008 WL 463884, 2008 US Dist LEXIS 12017 [SD NY 2008]). Neither case is binding, and both cases are distinguishable on their facts and procedural posture. *See Julie Research Laboratories, Inc.*, 810 F Supp at 519 (finding that, in a trial on the merits of plaintiff's claim for a permanent injunction after grant of a preliminary injunction, plaintiff failed to meet its burden to "define or identify in detail the trade secret or proprietary information it allege[d] ha[d] been misappropriated by defendants"); *Sit-Up Ltd.*, 2008 WL 463884 at *8, 2008 US Dist LEXIS 12017 at *23 (dismissing misappropriation claim on motion for summary judgment, where "plaintiff's inability to identify its trade secrets with specificity ha[d] been an issue in [that] action for more than half of its pendency"). Nor could this court locate any

authority that would warrant dismissing FMCG's claims for failure to plead with sufficient specificity.

Here, the complaint alleges that FMCG had a confidentiality agreement with the Individual Defendants, which identified what constituted confidential information, and that defendants misappropriated such information in order to secure FMCG's potential clients for themselves. "Such [allegations] provide[] notice of the event[s] out of which the grievance arises and the material elements making up the cause[] of action." *Marsh USA Inc.*, 28 Misc 3d 1214(A), 2010 NY Slip Op 51320(U) at *6 (denying motion to dismiss misappropriation claim based on plaintiff's failure to "identify[] what trade secrets were misappropriated").

In addition, the complaint sufficiently alleges that FMCG took precautions to protect its proprietary trade secrets. Upon commencing their employment, each Individual Defendant executed the Agreement, which contained a confidentiality provision. Complaint, exhibits A-C. In January 2013, FMCG asked its employees to reaffirm their commitments to their Agreements, which Frisbie did. *Id.*, ¶¶ 24-25. Also, upon the Individual Defendants' departure, FMCG asked each of them to sign a "FMCG-Proprietary Materials" statement. *Id.*, ¶ 27. Therefore, FMCG sufficiently alleges the protective measures it took to maintain secrecy. *Cf Edelman*, 70 AD3d at 249 (affirming dismissal of misappropriation claim, where there was no "written confidentiality agreement with [defendant], as would ordinarily be expected to insure continued secrecy"); *see also Daly v Metropolitan Life Ins. Co.*, 4 Misc 3d 887, 893 (Sup Ct, NY County 2004) ("[c]onfidentiality agreements are routinely signed by incoming employees as a condition of employment where companies seek to protect client bases and trade secrets").

The complaint also sufficiently pleads "that defendants used those trade secrets to gain an advantage over plaintiff[]." *Twin Sec., Inc. v Advocate & Lichtenstein,* LLP, 113 AD3d 565, 565

(1st Dept 2014). As explained above, the allegations allow the inference that Frisbie and Gilchrist breached their Agreements, and that Novantas induced such breaches, in order to "wrongfully usurp[] FMCG's opportunities." Complaint, ¶ 57. Therefore, the motion to dismiss the fourth cause of action is denied with respect to defendants Frisbie, Gilchrist and Novantas.

However, to the extent the claim is based on West's execution of the "FMCG-Proprietary Materials" statement, acknowledging that "'information regarding FMCG's personnel's expertise [and] compensation' [was] also confidential" (complaint, ¶ 98), the complaint is devoid of factual allegations of West's wrongdoing and is dismissed as against him.

B. Plaintiff's Request for Leave to Replead

In its opposition papers, FMCG asks that it be given the opportunity to replead any dismissed claims. Defendants oppose, arguing that FMCG cannot plead the necessary facts.

A court will reject a plaintiff's request to replead where it is "unsupported by facts that would correct deficiencies in the pleadings and thereby render [its] claims actionable." *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 503 (1st Dept 2011).

Here, FMCG neither moves for leave to amend nor submits a proposed amended pleading. Moreover, FMCG fails to offer facts that would correct the deficiencies in its claims against West. Therefore, leave to replead is denied.

Accordingly, it is hereby

ORDERED that the motion of defendants Novantas, Inc., Andrew Frisbie, Peter Gilchrist and Jonathan West to dismiss the complaint herein is granted to the extent of dismissing the complaint in its entirety as against Jonathan West, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street on August 3, 2015, at 10:00 a.m.

Dated: June 23, 2015

ENTER:

J.S.C.

ANIL C. SINGH