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

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YOUNG ADULT INSTITUTE, INC. and INTERNATIONAL INSTITUTE FOR PEOPLE WITH DISABILITIES OF PUERTO RICO,

Index No.: 654923/2016

DECISION & ORDER

Plaintiffs,

-against-

THE CORPORATE SOURCE, INC., JEROME D. BLAINE, MICHAEL KRAMER, MARGARET BROWN, VIVEK SAWHNEY, KELLY QUINN, SCOTT LAPOFF, CURTIS BAER, and JOE GARCIA CARDONA,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants, The Corporate Source, Inc. (TCS), Jerome D. Blaine, Michael Kramer, Margaret Brown, Vivek Sawhney, Kelly Quinn, Scott Lapoff, Curtis Baer, and Joe Garcia Cardona (Garcia), move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). Plaintiffs, Young Adult Institute, Inc. (YAI) and International Institute for People With Disabilities of Puerto Rico (IIPD-PR), oppose the motion. For the reasons that follow, defendants' motion is granted in part and denied in part.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 57)[1] and the documentary evidence submitted by the parties.[2]

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The court, however, will not consider factual averments in defendants' affidavits (e.g., Dkt. 65) because they are inadmissible on a motion to dismiss. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 (1st Dept 2014), *accord Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *see also Amsterdam Hospitality Group, LLC v Marshall-*

"YAI is a [New York] not-for-profit organization that provides individuals with intellectual and developmental disabilities with access to housing, medical care, education, employment opportunities, and day services, as well as respite care to those individuals' family members, through a network of agencies." AC ¶ 2. "Until September 2016, TCS was one of those network agencies." *Id.* IIPD-PR, an affiliate of YAI, is a not-for-profit organization incorporated and based in Puerto Rico. YAI alleges it is the sole "member" of IIPD-PR. ¶ 8.[3]

The defendants in this action are TCS and some of its employees and independent contractors, many of whom formerly were employed by YAI. Blaine is the chairman of TCS's board. Kramer is the executive director of TCS. Brown is the Vice President of TCS. Quinn, a former Vice President of Finance of YAI, is currently employed by TCS. Sawhney, the former Chief Information Officer of YAI, "currently or recently [was] engaged to work for TCS." ¶ 14. Lapoff, the former Manager of Budgets for YAI, is currently employed by TCS. Baer is a former information technology manager of YAI. Garcia, the former Director of IIPD-PR, is the current Director, Caribbean Region of TCS. Garcia currently lives and works in Puerto Rico.

Pursuant to a contract dated March 1, 2010, TCS provided management services to YAI. *See* Dkt. 68 (the Management Agreement). The Management Agreement had a five-year term which, unless terminated by the parties under section 7, would automatically renew for another five years. *See id.* at 2. Section 7 provides that the Management Agreement "may be terminated by the mutual written agreement of TCS and YAI on two years' notice." *Id.* at 3-4. TCS,

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Alan Assocs., Inc., 120 AD3d 431, 432 (1st Dept 2014)("We have held that affidavits that 'do no more than assert the inaccuracy of plaintiffs' allegations [ ] may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law."), quoting *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007).

[3] The court will not address the parties' disputes regarding YAI's exact relationship with IIPD-PR because they are not germane to the court's decision on the instant motion.

however, had "no right to terminate the Management Agreement so long as YAI, or any successor entity of YAI, is a guarantor of any debts and obligations of TCS under any loan, line of credit or any evidence of indebtedness or if TCS owes any money to YAI." *Id.* at 2. YAI paid management fees to TCS for its services. *See id.* at 3. That said, section 5 provides that "services to be rendered by YAI hereunder shall be non-exclusive and shall not limit the ability of YAI from rendering services to any other person or entity during the term hereof or during the term of the Management Agreement." *Id.* It is undisputed that neither the Management Agreement, nor any other applicable agreement, contains restrictive covenants. Hence, neither YAI's employees nor TCS are bound by a non-compete or non-solicit.

"In 2014, TCS sought to change aspects of its management services agreement with YAI." AC ¶ 22. "Specifically, TCS demanded the ability to select and hire executive employees without input from YAI and to unilaterally terminate the management relationship with YAI." *Id.* "YAI was willing to consider TCS's requests and work with TCS to find an arrangement that worked best for both organizations", and "[t]hroughout 2014, 2015, and 2016, YAI engaged TCS in discussions about the terms of the relationship going forward." *Id.* "During all negotiations and through August 2016, YAI continued to provide all management services to TCS and TCS continued to pay for the services accordingly." *Id.* "Unbeknownst to YAI, however, TCS—through its senior management Defendants Blaine, Kramer, and Brown (TCS's Vice President)—had been working covertly for months with YAI employees to terminate its relationship with YAI and transfer the business to a newly formed operation." ¶ 23.

Plaintiffs explain:

> In order to successfully carry out its scheme to separate itself from the YAI network, TCS needed to immediately resume operations after it broke from YAI at the end of summer 2016. To do so, TCS required, among other things, systems provided by third-party vendors to provide various back-office functions

> previously overseen by YAI, including payroll management and employee timekeeping. TCS had to both negotiate contracts with those vendors and provide them with enough time to get the systems in place. Thus, in order to effect its exit without disrupting its operations, TCS needed to act well in advance of its intended break with YAI.
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> Because YAI had handled such vendor relationships for TCS, TCS had to establish new vendor relationships of its own. **TCS could have done so by hiring new employees with the relevant information technology, operations, and other back-office experience, who would then have had to learn TCS's business, contact the appropriate vendors, negotiate service agreements, and direct the vendors in establishing the required systems. TCS did not go this route**.
>
> Instead, TCS took a short cut: no later than in February 2016, TCS secretly sought help from then-current YAI employees. These YAI employees already understood the relevant technological and operational issues, already knew TCS's business from having helped manage TCS as a member of the YAI network, and already had contacts at and goodwill with the relevant vendors through those vendors' preexisting relationships with YAI

AC ¶¶ 24-26 (emphasis added).

Plaintiffs allege that, while on the clock as YAI employees and using YAI's resources, certain of the individual defendants, in concert with certain TCS employees, organized their breakaway:

> TCS contacted and recruited the YAI employees [] Quinn, Sawhney, and Baer to help TCS carry out its scheme. [Sawhney] held an executive position of confidence and was responsible for overseeing YAI's information technology department and maintaining the highest level of security, confidentiality, and compliance in connection with the data stored in YAI's computer systems and network servers. Sawhney also consulted with executive personnel on technology-related needs, opportunities for innovation, and purchasing decisions. Furthermore, Sawhney directly supervised Defendant Baer, who was responsible for IT project management. Similar to Sawhney, [Quinn] also held an executive position of confidence as YAI's Vice President of Finance. In that role Quinn managed YAI's various financial operating processes, including overseeing accounts payable and insurance, managing the YAI's network's fleet of vehicles, and coordinating purchasing. Quinn was responsible for assisting YAI's chief financial officer in providing YAI and its network agencies with financial protection, organizational stability, and regulatory compliance, as well as supporting YAI's and the network's future growth. ... Quinn, Sawhney, and Baer spent dozens if not hundreds of hours, all on YAI's dime, secretly facilitating

> TCS's efforts to establish independent vendor relationships and back-office systems in aid of its break from YAI. In addition, [they] minimized their use of their YAI email accounts to communicate regarding their plans, and they took other efforts to hide their actions from others at YAI,

AC ¶¶ 27-28 (paragraph break omitted).

In the AC, plaintiffs detail the covert efforts of these former employees. For example, in February 2016, Baer corresponded with Kronos and ADP, which, respectively, provided timekeeping and payroll services to YAI and its agencies, to coordinate segregating TCS's records. *See* AC ¶¶ 29-36. This was not the only instance of the employees, while on the clock working for YAI, coordinating their departure to TCS. "For instance, on or about April 22, 2016, while Quinn was still employed by YAI, Quinn had a call with ADP during which she negotiated a 50% discount for TCS off of the implementation costs for TCS's new account." ¶ 40. Moreover:

> in or around May 2016, Quinn began training [Lapoff] on the ADP software so that when TCS announced its departure from YAI, TCS could hire Lapoff and effect a seamless transition. To accomplish this, Quinn made a staffing change and assigned Lapoff responsibility over the TCS account. From that time until Lapoff left YAI to join TCS, approximately two months later, Lapoff spent his time learning the ADP system that TCS would use in its operations, all at YAI's cost. Lapoff then took this knowledge and left YAI to join TCS. Quinn's staffing change and the resulting time Lapoff spent learning the TCS account all eventually benefited TCS, and did not benefit YAI at all, despite YAI's paying Lapoff's compensation during this period.

¶ 42.

Plaintiffs also alleged, based on upon these former employees' YAI corporate emails, that they knew what they were doing was wrong and kept their actions secret. "For instance, on February 10, 2016 at 4:14 PM, Baer, copying Sawhney, sent an email to an ADP representative with the subject 'Supporting Information Leading to ADP Quote for TCS Instance,' which contained a variety of information about the services TCS needed from ADP. Near the top of

that email, in bold, Baer wrote: 'Just a reminder that all communication regarding this matter should be shared only with me and [Sawhney].'" ¶ 49. "Similarly, on February 12 at 1:12 PM, Baer wrote in an email to a Kronos representative, following up on his February 4 request to establish a separate account for TCS, described above: 'Please keep any discussions regarding this request solely with me and/or [Sawhney].'" ¶ 50. "Baer reiterated the point with a message to Kronos sent on March 1 at 3:02 PM: "Once again, no discussion regarding this matter to anyone but me and [Sawhney]." *Id.*

Plaintiffs allege that:

> Baer and Sawhney had no legitimate business purpose for keeping their communications with YAI's own vendor a secret from YAI. Baer and Sawhney used their YAI email addresses to communicate with ADP and Kronos because, upon information and belief, they wanted to mislead those vendors into thinking that they were assisting their current client YAI, rather than helping TCS to break away from YAI, to YAI's detriment. In so doing, Baer and Sawhney leveraged YAI's existing relationship with these vendors for TCS's benefit and against YAI's own interests. However, because Quinn, Sawhney, and Baer were afraid of being caught, they for the most part avoided using their YAI email accounts to communicate about their scheme to help TCS, apart from communications with ADP and Kronos. Upon information and belief, the Defendants communicated regarding the scheme mostly by using their personal email accounts, by phone, and/or in person.

AC ¶¶ 51-52. Plaintiffs further allege that "[t]his concern about being found out is evidenced by a March 25, 2016 email Baer sent to Sawhney at 2:40 PM, in the middle of the workday, in which Baer complained about the difficulties he was having arranging a teleconference among Quinn, ADP, and Defendants Kramer and Brown of TCS." ¶ 53. "Baer wrote that he was 'spending too much of [his] morning just trying to schedule a meeting that is for TCS's benefit' and that he 'thought this stuff is highly important for TCS and time is of the essence.'" *Id.* He

then wrote: "I'm trying to keep emails to a minimum on this stuff so as to minimize risk to us that I don't need to explain to you." *Id.*[4]

The employee exodus began in the summer of 2016. "In late July 2016, [Quinn] gave notice that she would be leaving YAI for a job 'closer to her home.' YAI later learned that Quinn told some of her coworkers that she was going to a start-up company, and Quinn told others that she would be working at an established company in the construction industry, hiding the fact that she was leaving to work for TCS." ¶ 57. "On her way out, **[Quinn] deleted most of her emails and files from YAI's computer system.** Quinn deleted these emails and files for the obvious purpose of covering her tracks and making it more difficult for YAI to uncover her

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[4] The AC sets forth other examples:

> A few days later, on March 30, when a call with ADP did take place, Baer wrote in an email to Defendant Brown of TCS that Brown had "an option to call in and use the video link from [her] desk or go to Conf. Room L" in space that YAI and TCS shared. Brown responded that she and [Quinn] would "go to the lobby" to listen in on the call, apparently so as not to be overheard by YAI staff who were not in on the scheme. For his part, Baer wrote to [] Brown, Kramer, Quinn, and Sawhney regarding the same call: "I'll be in [conference room] L if anyone wants me. With my shared office space in IT, I cannot participate verbally without many being privy to the conversation."
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> The same day, in a chat-message exchange with Sawhney, Baer asked, "How do you suggest we get TCS Kronos rules without spilling the beans?" Later, on April 1, after Sawhney had obtained the Kronos rules (configuration guidelines for using the Kronos timekeeping software) from the YAI employee Marcia Rodriguez, Baer asked whether Rodriguez was "aware of TCS's intentions or has she simply provided the rules without question?"
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> On May 3, 2016, Defendant Kramer sent to Defendants Brown and Quinn an email laying out in detail a "time line" for separating TCS from YAI. Kramer began that email by writing: "First of all, I know that I am sending this to your YAI email." Kramer's statement implies that he, Brown, and Quinn had been avoiding using their YAI email accounts to discuss the scheme because they were afraid of the scheme's being uncovered.

AC ¶¶ 54-56 (emphasis and paragraph numbering omitted).

and the other disloyal YAI employees' wrongdoing. These emails and files that Quinn deleted were not personal to Quinn but were instead the property of YAI, and Quinn did not have the authority to delete them." ¶ 58 (emphasis added). "Quinn immediately became a TCS employee upon leaving YAI's employment." ¶ 59.

Lapoff resigned from YAI effective August 5, 2016. The day before, on August 4 at approximately 8:00 a.m., Lapoff "created a new sub-folder within the 'TCS' folder on the 'finance' drive, and soon afterword the board financial materials for YAI and each and every one of the network member agencies were copied into this new folder that [he] created." ¶ 62.[5] Plaintiffs allege, "[u]pon information and belief, [that] Lapoff copied these board financial materials into the folder that he had just created." *Id.* "Lapoff made the copies without YAI's permission or knowledge." ¶ 63. "Lapoff's purpose in copying the board financial materials for

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[5] Plaintiffs explain that, as YAI's Manager of Budgets, Lapoff:

> managed various budget processes for YAI, including the preparation of financial reports for distribution to the member agencies of the YAI network. Lapoff was also responsible for managing and coordinating the formulation, monitoring and presentations of detailed operating budgets and financial reports. In order to perform his duties as YIA's Manager of Budgets, Lapoff had access to electronic files on the "finance" drive of YAI's computer system, which contained the financial materials provided to the boards of directors of YAI as well as each of the member agencies in the YAI network, including TCS. YAI's and each of the network member agencies' board financial materials are highly confidential and proprietary to each agency. No employees of the network member agencies had access to these files: the network member agencies each separately maintained their own board financial information, but they did not have access to each other's financial information. YAI maintained the board financial materials for all of its network member agencies as those agencies' manager, and YAI had a duty to maintain the confidentiality of that information on behalf of the agencies. (YAI, of course, maintained its own board financial materials in the course of its own business, and likewise treated those materials as highly confidential and proprietary.) Due to these electronic files' highly confidential and proprietary nature, YAI restricted access to a limited group of YAI employees with finance responsibilities.

AC ¶¶ 60-61 (paragraph break omitted).

YAI and the network member agencies into a 'TCS' sub-folder was to allow Lapoff to take those files with him when he left YAI for TCS, either by copying them again onto portable media or through some other means." ¶ 64.

Plaintiffs allege that Sawhney did something similar. That said, unlike the other employees who either left on their own or were fired once the scheme was discovered (such as Baer, who was terminated in September 2016), "[i]n May 2016, YAI terminated [Sawhney's] employment for cause, **unrelated to this case**." *See* AC ¶ 57 n.1 (emphasis added). "TCS thereafter engaged Sawhney as an independent contractor, and he provided services to TCS throughout the summer of 2016, helping it to establish independent information technology systems." *Id.* Prior to his termination, Sawhney copied and transmitted to TCS information on what is known by YAI as its "H: drive"; Sawhney allegedly admitted doing so. *See* ¶ 86. "The H: drive is password protected, and only authorized persons can access it." ¶ 68. It "contains tens of thousands of electronic files, consisting of records and documents broadly related to both YAI's and TCS's employment projects and initiatives." *Id.* Plaintiffs explain:

> YAI operates employment training, placement, and coaching programs, and TCS is one of the employers YAI used to place its trainees. As such, certain employees of both TCS and YAI had access to the H: drive, but no one (whether YAI or TCS employees) was authorized to copy, remove, or re-transmit the H: drive's contents without prior authorization. This important restriction was in place to prevent the disclosure of not only YAI's and TCS's respective business-confidential information, **but also the confidential personal and health information of many of the individuals YAI served**.

AC ¶ 69 (emphasis added).

Plaintiffs allege that "[i]n order to effect its separation from YAI smoothly, TCS needed to take with it many of the files from the H: drive." ¶ 70. "However, unbeknownst to YAI at the time TCS left the YAI network at the end of July 2016, TCS had already obtained a copy of the

full H: drive, without YAI's knowledge." That is because "[i]n or around March 2016, Defendant Sawhney asked one of his subordinates in YAI's IT department to copy the H: drive to a USB flash drive. Sawhney had to ask this unwitting employee to copy the H: drive for him because even though he was YAI's Chief Information Officer, Sawhney was not one of the few employees authorized to access the H: drive." ¶ 71. "Sawhney removed the copy of the H: drive from YAI's premises and has not returned it." ¶ 72. This proved problematic for YAI due to the nature of the information on the drive. Plaintiffs clarify:

> YAI did not discover that Sawhney had surreptitiously taken a copy of the H: drive until late summer 2016. YAI then investigated the theft and learned that, in addition to data and information that was confidential and proprietary to YAI, **the H: drive contained Personally Identifiable Information (e.g., names and associates Social Security numbers) and Personal Health Information (e.g., demographic information, medical history, and insurance information) of more than 1,200 individuals. Such Personally Identifiable Information and Personal Health Information is protected under state and federal law**.

AC ¶ 73 (emphasis added). "Because YAI lost control of this protected information through Sawhney's unauthorized copying of the H: drive, **YAI had to comply with remediation and notification requirements under state and federal law, at great expense**." ¶ 74 (emphasis added). "In particular, the data breach caused by Sawhney's unauthorized copying forced YAI to engage external legal counsel, hire temporary staff, and engage specialized vendors in order to comply with various state and federal laws concerning Personally Identifiable Information and Personal Health Information." ¶ 75.[6]

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[6] Specifically:

> First, YAI had to conduct an initial review of the H: drive's tens of thousands of files. Using software YAI purchased from a vendor, YAI identified Personally Identifiable Information and Personal Health Information in almost 50,000 electronic files. YAI then had to train some of its current staff and hire additional temporary staff to manually review each of those nearly 50,000 files to identify the almost 1,000 individuals whose personal information was affected by the

Plaintiffs allege that the former YAI employees (Quinn, Sawhney, Lapoff, and Baer) acted at the direction of TCS's senior management (Blaine, Kramer, and Brown). The AC details TCS's coordination of these efforts. *See* AC ¶¶ 81-90. For example, Kramer sent "Brown and Quinn (while she was still a YAI employee) detailed timelines for TCS's separation from the YAI network, and asking for both Brown and Quinn's input." ¶ 85. Further, TCS management allegedly was involved with Sawhney's theft of the H: drive. Likewise, "TCS aided and abetted Lapoff in his copying of the board financial materials for YAI and the YAI network member agencies on August 4, 2016", and "TCS received a copy of these financial materials, either directly or indirectly, from Lapoff." Allegedly, "Blaine, Kramer, and Brown induced Lapoff to copy those materials." ¶ 87.

Finally, plaintiffs allege that "TCS [] induced an employee of [IIPD-PR] to breach his duty of loyalty and divert government funding from IIPD-PR to TCS." ¶ 91. "IIPD-PR is a Puerto Rico not-for-profit corporation and until the fall of 2016 was primarily an employment training and placement organization." ¶ 92. "IIPD-PR referred most of the individuals with

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> breach. YAI then worked with attorneys to prepare notification letters, substitute notification, and a press release to alert those affected. In addition, YAI also had to notify the U.S. Department of Health and Human Services Office for Civil Rights of the breach, and prepare (with the assistance of counsel) an extensive report to the Office, detailing the circumstances of the breach, the investigation process, the reporting YAI did, and YAI's response. Moreover, since Social Security Numbers were among the personal data affected by Sawhney's data breach, YAI also secured credit monitoring and identity theft prevention services for each of the affected individuals and set up a call center where the affected individuals could obtain more information about the breach and identify theft prevention. **In all, YAI employees spent hundreds of hours responding to and mitigating the Sawhney's data breach, time they would otherwise have spent managing YAI's operations and the operations of YAI's network members to help them serve their communities. YAI also had to pay vendors, including legal counsel, for their assistance.**

AC ¶¶ 76-78 (paragraph breaks omitted; emphasis added).

intellectual and developmental disabilities that it supported to TCS's Puerto Rico division. Under IIPD-PR's organizational by-laws, YAI is IIPD-PR's sole member. YAI also had a management agreement with IIPD-PR, by which IIPD-PR agreed to pay YAI a monthly management fee in exchange for YAI's providing IIPD-PR with management services. IIPD-PR was funded in part by an annual contract from the Commonwealth of Puerto Rico." *Id.*

Until September 2016, Garcia, who lives and works in Puerto Rico, was IIPD-PR's Director. "To secure funding for IIPD-PR, Garcia was required to file a proposal with the Commonwealth of Puerto Rico in or around October of each year. IIPD-PR had submitted such a proposal to the Commonwealth of Puerto Rico on an annual basis since October 2000, and had been awarded and IIPD-PR had received government funds pursuant to this contract every year." ¶ 94. "These funds, however, were insufficient to support the organization and allow it to pay all of its obligations, so YAI loaned IIPD-PR significant funds. By the fall of 2016 the amount outstanding on these loans exceeded $500,000. IIPD-PR has failed to repay these loans and this amount remains outstanding." ¶ 95.

Plaintiffs claim that during the summer of 2016, Garcia surreptitiously failed to seek government funding for IIPD-PR, and instead did so for TCS. "Instead of submitting the proposal for IIPD-PR, Garcia submitted a proposal on behalf of TCS, effectively defunding IIPD-PR. Garcia never disclosed that he would not be submitting a proposal for funding on behalf of IIPD-PR. By the time YAI learned of Garcia's failure to submit a proposal on behalf of IIPD-PR, it was too late for YAI to prepare a proposal for timely submission." ¶ 97. "That loss of funding … forced YAI to effectively shut down IIPD-PR, because without adequate funding it is no longer able to serve the individuals it had been serving." ¶ 104. Garcia resigned

from IIPD-PR on September 1, 2016. "TCS immediately hired Garcia as Director of its Caribbean Region." ¶ 98.

By the end of August 2016, plaintiffs became aware of defendants' covert actions. That said, plaintiffs acknowledge that, "[i]n mid-July 2016, [] Blaine and Kramer notified YAI ... that TCS would be severing its relationship with YAI, effective September 1, 2016." ¶ 107. But, "[t]he YAI executive team was not yet aware that TCS had already been secretly working with the disloyal YAI employees and [Garcia] to transition its business or that TCS intended to hire YAI employees to provide the services previously provided by YAI." *Id.*

Plaintiffs commenced this action and filed their original complaint on September 19, 2016. *See* Dkt. 1. Defendants moved to dismiss the complaint on November 3, 2016. Discovery, including submission of an ESI protocol, occurred while the motion was pending. *See* Dkts. 34, 45, 48, 49. Discovery halted after the court, by order dated June 6, 2017, granted defendants' motion to dismiss without prejudice and with leave to amend. *See* Dkt. 55. The court found, *inter alia*, the complaint's allegations far too general, and that the group pleading rendered it impossible to ascertain which defendants allegedly committed culpable acts. *See* Dkt. 58 (6/6/17 Tr. at 18-19, 22-23).

Plaintiffs filed the AC on July 20, 2017. *See* Dkt. 57. As discussed, the AC contains detailed allegations regarding the individual actions of each defendant (though surely more detail could be proffered after the completion of discovery). There are nine causes of action in the AC: (1) breach of the fiduciary duty of loyalty based on the faithless servant doctrine, asserted by YAI against Quinn, Sawhney, Lapoff, and Baer (collectively, the Former YAI Employees); (2) aiding and abetting breach of the fiduciary duty of loyalty, asserted by YAI against TCS, Blaine, Kramer, and Brown (collectively, the TCS Defendants); (3) misappropriation of confidential

information, asserted by YAI against Sawhney and Lapoff; (4) aiding and abetting misappropriation of confidential information, asserted by YAI against the TCS Defendants; (5) conversion, asserted by YAI against Quinn; (6) breach of the fiduciary duty of loyalty based on the faithless servant doctrine, asserted by IIPD-PR against Garcia; (7) aiding and abetting breach of the fiduciary duty of loyalty, asserted by IIPD-PR against the TCS Defendants; (8) tortious interference with business relations, asserted by IIPD-PR against Garcia and the TCS Defendants; and (9) tortious interference with business relations, asserted by YAI against Garcia and the TCS Defendants.

Defendants filed the instant motion to dismiss the AC on September 20, 2017. The court reserved on the motion after oral argument. *See* Dkt. 96 (2/21/18 Tr.).

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "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." *Skillgames*, 1

AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes 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) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

It is settled law that employees owe a fiduciary duty of loyalty to their employer during the course of their employment. *Markowits v Friedman*, 144 AD3d 993, 996 (1st Dept 2016), citing *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133, 138-39 (1936). "Fundamental to that relationship is the proposition that an employee is to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.'" *W. Elec. Co. v Brenner*, 41 NY2d 291, 295 (1977), quoting *Lamdin*, 272 NY at 138. An employee who violates her fiduciary duty of loyalty is deemed a "faithless servant" and forfeits the right to any compensation earned during the period of disloyalty. *Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 (1st Dept 2012). An employer states a claim under the faithless servant doctrine by alleging that a former employee, during the period of her employment and using company resources, secretly planned and organized a competing business.[7] *CBS Corp. v Dumsday*, 268 AD2d 350, 353 (1st Dept 2000), citing *Maritime Fish Prod., Inc. v World-Wide Fish Prods., Inc.*, 100 AD2d 81, 88 (1st Dept 1984) ("When, as here, the employee engages in a business which, by its nature, competes with the employer's a double

[7] Plaintiffs do not dispute that since defendants are not subject to restrictive covenants, they would not have faced liability had they simply left and competed without putting their plan in action while they were still employed by YAI.

breach of duty occurs. Not only is the principal deprived of the services for which he has contracted, but he finds these services turned against himself. ... [I]t is apparent that [the former employee] abandoned all pretense to the loyalty expected of a trusted employee. He surreptitiously organized a competing corporation, corrupted a fellow employee, and secretly pursued and profited from one or more opportunities properly belonging to his employer.") (citations and quotation marks omitted); *see Bon Temps Agency Ltd. v Greenfield*, 184 AD2d 280, 281 (1st Dept 1992) ("By placing two of the plaintiff's own employees secretly and collecting a fee, and, by establishing and performing duties under a company in direct competition with the plaintiff while still under the plaintiff's employ, Greenfield acted in a manner inconsistent with her employment with the plaintiff and failed to exercise the utmost good faith and loyalty in the performance of her duties.").

Quinn, Sawhney, Lapoff, and Baer are each alleged to have secretly helped TCS compete with YAI while they were still employed by YAI. The allegations in the AC suggest they knew what they were doing was wrong and that they took steps to conceal their actions. Under the authority cited above, this is sufficient to state a claim for breach of fiduciary duty against them. Defendants' reliance on duties YAI may have owed to TCS is misplaced because Quinn, Sawhney, Lapoff, and Baer were employees of YAI and, therefore, owed duties to YAI. Even if they owed some duties to TCS, they, surely, did not owe a duty to TCS to undermine YAI's business. Helping TCS break away from YAI was not a necessary feature of the work they were tasked to perform for YAI. Any duties they owed to TCS, as employees of YAI, cannot justify their actions.

The AC also states a claim for aiding and abetting breach of fiduciary duty against the TCS Defendants. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003). The TCS Defendants argue that the AC fails to allege the second element. "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 101 (1st Dept 2006). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Kaufman*, 307 AD2d at 126. "Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty." *Global Minerals*, 35 AD3d at 101-02.

The AC sufficiently pleads knowing inducement and substantial assistance. "TCS's senior management, Blaine, Kramer, and Brown, obviously knew that Quinn, Sawhney, Baer, and Lapoff were YAI's employees, and they also clearly knew that those employees were acting in TCS's interests, and against YAI's, in secret." Dkt. 93 at 26. "For instance, Plaintiffs have alleged that TCS's management kept most of their communications with [the Former YAI Employees] off of email because they were concerned about their plan being uncovered. Plaintiffs have also alleged that TCS and its senior managers induced [the Former YAI Employees'] breach: indeed, the entire scheme was for TCS's benefit and could have originated only with TCS. Moreover, the TCS [D]efendants participated in and provided 'substantial

assistance' to the breach, collaborating with [the Former YAI Employees] by teleconference and otherwise, and by secretly sharing TCS's separation plans with them." *Id.* (citations omitted).

Based on the facts alleged in the AC, it is implausible to believe that the Former YAI Employees acted on their own and not at the direction of TCS. The emails cited in the AC suggest coordination. It is reasonable to infer, based on the timing of events over the summer of 2016, that the TCS Defendants were coordinating the Former YAI Employees' actions. While further definitive proof may only exist in emails that YAI does not yet have (the Former YAI Employees mostly avoided using their YAI email during this time period to conceal their actions, and discovery was paused after the court granted the prior motion to dismiss), precise proof is not required at this juncture. Rather, plaintiffs have met their pleading burden under CPLR 3016(b) by alleging facts that "permit a reasonable inference" of the TCS Defendants' substantial assistance of the Former YAI Employees' breach. *See Sargiss v Magarelli*, 12 NY3d 527, 531 (2009) ("The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of," thus, '[w]e have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.'"), quoting *Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

YAI has not, however, stated a claim for misappropriation of confidential information against Sawhney and Lapoff. Such cause of action exists under New York law only to the extent that the allegedly "confidential information" qualifies for trade secret protection. *See 2470 Cadillac Res., Inc. v DHL Exp. (USA), Inc.*, 84 AD3d 697, 698 (1st Dept 2011) (claim "for misappropriation of confidential information, fails to allege that DHL stole the information or that plaintiffs took steps to maintain the secrecy of the information."), citing *Fada Int'l Corp. v*

Cheung, 57 AD3d 406 (1st Dept 2008) (claim dismissed where alleged confidential information does not qualify as trade secret). To be sure, while the Appellate Division often refers to a cause of action for misappropriation of confidential information, when the Appellate Division uses this nomenclature, it is still referring to a claim for misappropriation of trade secrets. *See Chestnut Hill Partners, LLC v Van Raalte*, 45 AD3d 434, 435 (1st Dept 2007) (holding claim for misappropriation of confidential information not viable), citing *Precision Concepts, Inc. v Bonsanti*, 172 AD2d 737, 738 (1st Dept 1991) (setting forth standard for pleading trade secret claim); *see also Bitsight Techs., Inc. v SecurityScorecard, Inc.*, 143 AD3d 619, 620 (1st Dept 2016), citing *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 249 (1st Dept 2009) ("claim for misappropriation of proprietary information falls short because plaintiffs did not allege that Edelman took sufficient precautionary measures to insure that the information remained secret."), citing *Ashland Mgmt. Inc. v Janien*, 82 NY2d 395, 407 (1993) (seminal case setting forth New York trade secret standards). This makes sense. A rule to the contrary would effectively "gut the important requirement of proving that business information qualifies for trade secret protection" and "could open the floodgates to anticompetitive litigation by effectively permitting stealth trade secrets claims based on the alleged conversion of material that does not actually qualify for trade secret protection." *MLB Advanced Media, L.P. v Big League Analysis, LLC*, 2017 WL 6450546, at *5 n.4 (Sup Ct, NY County 2017) (addressing same concern with conversion claim).

In defendants' moving brief, they cite the elements of a claim for misappropriation of trade secrets and argue, *inter alia*, that the AC does not allege that any of the misappropriated

materials qualify for trade secret protection.[8] *See* Dkt. 84 at 17-19, citing *Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 (1st Dept 2015) ("To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. 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.") (citations and quotation marks omitted). In opposition, plaintiffs entirely ignore this issue. They do not cite any authority to justify the assertion of a claim based on misappropriation of "confidential information" that does not qualify for trade secret protection. To wit, this section of plaintiffs' brief *does not cite any case law at all*. *See* Dkt. 93 at 21-23. This cause of action, therefore, is dismissed. Likewise, YAI's claim for aiding and abetting misappropriation of confidential information is dismissed. This dismissal is without prejudice to YAI repleading based on allegations that some of the materials taken are trade secrets.

[8] For instance, much of the material is confidential *patient* information. That said, while stealing patient information does not give rise to trade secret liability, it may well give rise to liability on YAI's well pleaded fiduciary duty claims given the regulatory costs YAI incurred. In other words, the question of whether YAI has an independent claim for misappropriation is somewhat academic. The fiduciary claims should afford all of the relief YAI seeks, which do not include anti-competitive damages (i.e., profit disgorgement after the employees left) due the absence of restrictive covenants. Plaintiffs, notably, do not assert a claim for unfair competition, and make the limited scope of their damages demand quite clear in the AC. *See* Dkt. 57 at 36 (seeking disgorgement of the Former YAI Employees' "compensation for the period beginning with their disloyalty to YAI until the end of their employment with YAI"; "disgorgement of [Garcia's] compensation for the period beginning with [his] disloyalty to IIPD-PR until the end of his employment with IIPD-PR"; and "costs associated with recruiting, training and hiring replacements for [the Former YAI Employees]."). Consequently, the parties are urged to continue seeking a resolution through mediation, as the amount in controversy does not likely warrant full-fledged litigation. To the extent the parties do not settle, the cost of the remaining discovery must be kept proportional relative to such amount.

YAI's cause of action for conversion also is dismissed. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50 (internal citations omitted). YAI alleges that Quinn converted her YAI work emails and other electronic files by deleting them before she left the company. Electronic files can be converted. *See MLB*, 2017 WL 6450546, at *2, citing *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292 (2007); *Volodarsky v Moonlight Ambulette Serv., Inc.*, 122 AD3d 619, 620 (2d Dept 2014) ("electronic documents stored on a computer may be the subject of a conversion claim just as printed versions of the documents may."). Nonetheless, just because one "deletes" electronic files does not mean they cease to exist. Indeed, it appears from the allegations in the AC that YAI managed to get access to some of these files.[9] To state a claim for conversion, whether for tangible or intangible property, the plaintiff must plead it was deprived of access to its property. *See MLB*, 2017 WL 6450546, at *2 (collecting post-*Thyroff* cases). The deletion of emails by a departing employee is not, in the court's experience, an uncommon allegation in commercial cases. To state a claim against the former employee for conversion, this court believes the employer should have to unequivocally allege in the complaint that, as a result of the deletion, it actually lost access to the files. If such access was not lost, the employer has suffered no

[9] Usually, people do not email themselves (at least not from the same email address; work email to personal email is another matter). To the extent Quinn emailed her co-workers at YAI (even the ones who also left), those emails should be available to plaintiffs, as they are not alleged to have been deleted from the other employees' inboxes.

deprivation and, therefore, cannot maintain a claim for conversion. Since the AC does not clearly allege that YAI lost access to Quinn's emails and files, its conversion claim is dismissed without prejudice and with leave to replead.[10]

Turning now to the claims concerning IIPD-PR, as discussed, they concern the actions of Garcia, who lived and worked in Puerto Rico. Garcia seeks dismissal for lack of personal jurisdiction. The AC does not allege any act by Garcia either within the state of New York [CPLR 302(a)(1)] or that caused an injury in the state of New York [CPLR 302(a)(3)]. *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007); *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000). Garcia's role was limited to working for IIPD-PR in Puerto Rico and procuring funding for it from the Puerto Rican government. Consequently, he argues that the AC does not sufficiently plead specific jurisdiction. *See D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 (2017) ("A non-domiciliary defendant transacts business in New York when on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business."). Moreover, nothing in the AC suggests Garcia had the requisite minimum contacts with New York. *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988); *see Walden v Fiore*, 134 SCt 1115, 1122-23 (2014), accord *Burger King Corp. v Rudzewicz*, 471 US 462 (1985). Simply put, Garcia's actions are not alleged to have any nexus to New York. *See Bristol-Myers Squibb Co. v Superior Court of California, San Francisco Cty.*, 137 SCt 1773, 1780-81 (2017) ("In order for a state court to exercise specific jurisdiction, the suit must aris[e] out of or relat[e] to the defendant's

[10] The court will not opine, at this juncture, on what damages are available on a claim for conversion based on the deletion of emails where the emails were initially inaccessible but were eventually capable of being restored.

contacts with the forum" and there must "be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.")

Plaintiffs do not meaningfully address these arguments. Instead, they suggest that YAI's alleged status as the parent entity of IIPD-PR suffices to establish that Garcia's alleged wrongdoing has a nexus to New York. *See* Dkt. 93 at 30. They cite no controlling authority for this proposition. The court is unaware of any authority that stands for the proposition that an out-of-state defendant is subject to jurisdiction in New York merely because he works for a foreign subsidiary of a parent entity based in New York (where such separate corporate entities *are not* alleged to be alter egos). Since this is the only proffered basis for jurisdiction,[11] the court does not find that any plausible ground for exercising jurisdiction over Garcia can be inferred from the AC. Hence, these alleged facts do not "constitute a sufficient start in showing that jurisdiction could exist to justify pretrial jurisdictional disclosure." *IMAX Corp. v The Essel Group*, 154 AD3d 464, 465 (1st Dept 2017), citing *Peterson v Spartan Indus., Inc.*, 33 NY2d 463 (1974); *see SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 (1st Dept 2004).

That said, IIPD-PR has stated a claim against the TCS Defendants for aiding and abetting Garcia's breach of his fiduciary duty of loyalty.[12] As discussed, while still working for IIPD-PR, Garcia is alleged to have surreptitiously sought funding from the Puerto Rican government for TCS instead of for IIPD-PR. Under the authority cited earlier, this states a claim under the faithless servant doctrine. That Garcia did this at the behest of TCS, shortly before going to

[11] Garcia is not alleged to be subject to jurisdiction based on his causing a breach of the Management Agreement or the contract between YAI and IIPD-PR.

[12] Just because Garcia himself is not subject to jurisdiction does not mean that IIPD-PR cannot maintain an aiding and abetting claim against those within this jurisdiction. Defendants do not argue otherwise. It is not uncommon for aiding and abetting claims to proceed without the underlying tortfeasor where jurisdiction over him is lacking. *See, e.g., Wantickets RDM, LLC v Eventbrite, Inc.*, 2017 WL 3130436, at *4-5 (Sup Ct, NY County 2017).

work for TCS, qualifies as substantial assistance under the second prong of the aiding and abetting standard. *See Kaufman*, 307 AD2d at 126.

Plaintiffs also have stated a claim against the TCS Defendants for tortious interference with business relations. To state a claim for tortious interference with business relations, the plaintiff must plead "1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009). IIPD-PR claims the TCS Defendants knew of its funding relationship with the Puerto Rican government and, through their aiding and abetting of Garcia's breach of fiduciary duty (i.e., the requisite predicate tort), caused IIPD-PR to lose such funding. Likewise, YAI asserts a tortious interference claim against the TCS Defendants regarding the loss of its business with IIPD-PR. The premise of that claim is that Garcia's breach of fiduciary duty put IIPD-PR out of business, which caused the end of the relationship between YAI and IIPD-PR.

The TCS Defendants cannot procure dismissal of these claims based on their proffered documentary evidence – IIPD-PR board meeting minutes in which Garcia's conduct was purportedly ratified. As plaintiffs discuss, there are questions of fact about the import of these board minutes. One wonders how a *fully informed* board of directors would not have taken issue with an allegation that a former director effectively destroyed the company by causing it to lose all of its funding.[13] Plaintiffs also raise questions about the accuracy of the board minutes and

[13] The court notes that defendants' reliance on New York's business judgment rule is technically misplaced since IIPD-PR's internal affairs are governed by the laws of Puerto Rico. *Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 253 (2017) ("the internal affairs doctrine, which provides

the circumstances that resulted in the TCS Defendants putting the issue to the board in the first place. *See* Dkt. 93 at 28-29. The board minutes alone, without discovery into their context, do not conclusively establish that IIPD-PR has no claim based on Garcia's actions. *Hohwald v Farm Family Cas. Ins. Co.*, 155 AD3d 1009 (2d Dept 2017) ("For evidence to be considered documentary, it must be unambiguous and of undisputed authenticity.") (citation and quotation marks omitted); *see Goshen*, 98 NY2d at 326 ("motion to dismiss on the ground that the action is barred by documentary evidence … may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."). Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is granted only to the extent that: (1) the third (misappropriation of confidential information), fourth (aiding and abetting misappropriation of confidential information), and fifth (conversion) causes of action are dismissed without prejudice and with leave to replead to the extent set forth herein; (2) all of plaintiffs' claims against Garcia are dismissed without prejudice for lack of personal jurisdiction; and (3) defendants' motion is otherwise denied; and it is further

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that relationships between a company and its directors and shareholders are generally governed by the substantive law of the jurisdiction of incorporation."). In any event, even under New York law, ratification requires a "fully informed" vote. *In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 276-78 (2016) (adopting Delaware's ratification standard); *see Kahn v M & F Worldwide Corp.*, 88 A3d 635, 644 (Del 2014), accord *RBC Capital Markets, LLC v Jervis*, 129 A3d 816, 857 (Del 2015), citing *Corwin v KKR Fin. Holdings LLC*, 125 A3d 304, 309-12 (Del 2015).

ORDERED that the parties are to appear for a status conference on May 15, 2018, at 11:30 a.m., and, at least one week beforehand, the parties shall e-file and fax to Chambers a joint letter that summarizes the current status of discovery and sets forth the parties' positions on what discovery remains along with a proposed schedule.

Dated: April 11, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.