

**Kind Operations Inc. v Aua Private Equity Partners,
LLC**

2020 NY Slip Op 33059(U)

September 16, 2020

Supreme Court, New York County

Docket Number: 653788/2019

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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KIND OPERATIONS INC.,

Plaintiff,

-against-

**AUA PRIVATE EQUITY PARTNERS, LLC,
AOG, LLC d/b/a TRUFOOD MANUFACTURING,
PA CO-MAN, INC. f/k/a TRUFOOD MFG., INC.,
TSUDIS HOLDING COMPANY, PETER TSUDIS,
GEORGE TSUDIS, ANDY UNANUE,
DAVID BENYAMINY, KYCE CHIHI, and JACK LIN,**

Defendants.

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O. PETER SHERWOOD, J.:

I. FACTS

As these are motions to dismiss, the following facts are taken from the amended complaint (Complaint, NYSCEF Doc. No. 003) and assumed to be true.

Plaintiff Kind Operations, Inc. (Kind) markets and sells food, including energy bars and granola. Kind had a contract, the Amended and Restated Manufacturing Agreement (together with its amendments, the Manufacturing Agreement), with defendant TruFood Manufacturing (TruFood) to manufacture the bars and granola. TruFood purchased ingredients and packaging from other suppliers, used Kind’s intellectual property to manufacture and package the product, and sold Kind the finished goods. Pursuant to section 7.1(b) of the Manufacturing Agreement, TruFood was required to give Kind notice of any “Change of Control Transaction,” which included a transfer of substantially all TruFood’s Kind Assets. TruFood was also required to obtain Kind’s consent to any such transaction.

On April 29, 2019, TruFood CEO and President Peter Tsudis wrote a letter requesting Kind’s consent to a major investment in TruFood by an undisclosed investor. Kind responded on May 13, 2019, declining to consent and asking for more information about the proposed transaction. Kind was concerned about the continuation of its product supply and the protection of its confidential business information. TruFood did not respond directly to plaintiff’s May 13 letter. On June 18, 2019, defendant AUA Private Equity Partners, LLC, (AUA) announced it had acquired TruFood’s assets through its affiliate company, defendant AOG, LLC (AOG), and would

do business as TruFood (the Transaction). Andy Unanue, David Benyaminy, Kyce Chihi, and Jack Lin (together, the Individual Defendants) are the principals of AUA and AOG.

AOG told Kind it acquired TruFood's assets only, so would not pay TruFood's debts to suppliers for product received before the transaction. AOG also took the position it and AUA were not subject to the Manufacturing Agreement. Kind believes the Transaction was a de facto merger, since AOG continued TruFood's business, using the same name, employees, website, and processes to produce the same products for the same customers. Kind alleges that AOG's failure to pay TruFood's debts to suppliers has damaged Kind's relationships with those suppliers, and suppliers threatened to stop providing the materials Kind needs without being paid. Kind then either paid or committed to pay the suppliers. AOG and AUA also demanded Kind pay the outstanding TruFood invoices for pre-Transaction product. Kind demanded AOG pay the suppliers first.

Kind brought this action with the following claims:

Claim 1- alleges breach of the Manufacturing Agreement against TruFood, Holding, Peter Tsudis, George Tsudis and/or AOG for entering into the Transaction without Kind's consent, failing to purchase sufficient supplies to make the required products, and (as to TruFood and Peter Tsudis) for telling Kind it had to go to AOG and AUA regarding TruFood's obligation, while AUA and AOG claimed they had no obligations under the Manufacturing Agreement. Kind also alleges TruFood breached the covenant of good faith and fair dealing when it entered into the Transaction without Kind's consent and while Kind was still seeking additional information. Alternatively, AOG breached the Manufacturing Agreement and its covenant of good faith and fair dealing.

Claim 2- alleges breach of the Manufacturing Agreement against TruFood, Holding, Peter Tsudis, George Tsudis, and/or AOG for providing Kind's confidential information to AOG. If AOG is not TruFood's successor in interest, Kind's confidential information and intellectual property should not have been transferred. Alternatively, AOG breached sections 11, 12, and 14 of the Manufacturing Agreement.

Claim 3- alleges fraudulent omissions by Peter Tsudis and TruFood for failing to disclose the nature and terms of the Transaction.

Claim 4- alleges aiding and abetting the fraud in claim 3 by AUA, Unanue, Benyaminy, Chihi, and Lin. Plaintiff alleges these defendants were aware of Peter Tsudis' and TruFood's fraudulent omissions and assisted in the fraud by directing them to make those omissions.

Claim 5- alleges tortious interference with contractual relations by AUA, AOG, Unanue, Benyaminy, Chihi, and Lin for procuring TruFood's breach of section 7.1(b) of the Manufacturing Agreement.

Claim 6- alleges tortious interference with contractual relations against AUA, AOG, Unanue, Benyaminy, Chihi, and Lin for procuring TruFood's breach of section 11 of the Manufacturing Agreement concerning Kind's confidential information and TruFood's employees' breach of their confidentiality and non-compete agreements for which Kind was an intended third-party beneficiary.

Count 7- seeks a declaratory judgment that Kind is entitled to recover vendor payments it has made or will make to satisfy TruFood's debt from amounts Kind would otherwise owe AOG for product provided.

Count 8- seeks a declaratory judgment that AOG is bound by the Manufacturing Agreement and Kind is entitled to enforce that agreement.

Count 9- alleges AOG misappropriated trade secrets which, if AOG is not TruFood's successor in interest, AOG obtained improperly.

Count 10- alleges AOG converted ingredients and packaging stored in TruFood's facilities, if AOG is not successor in interest to TruFoods, since, pursuant to Amendment 1 of the Manufacturing Agreement, title to those materials belonged to Kind as soon as they entered TruFood's facility and AOG has exercised dominion and control over those materials.

Defendants George Tsudis and Holding have filed answers. The other defendants move to dismiss in three groups.

II. MOTION 001- AUA and AOG

AUA and AOG (together, the "Corporate Defendants" or "AUA/AOG") move together to dismiss all of the claims as against them pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and failure to state a claim for which relief can be granted.

A. Standards

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit

of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ ” (*id.* at 84-85). Here, the documentary evidence is the Manufacturing Agreement, the Purchase and Sale Agreement by which AOG purchased TruFood’s assets (the PSA, NYSCEF Doc. No. 18), and the Acknowledgement, an agreement between AOG and Kind (NYSCEF Doc. No. 19), which are proper documentary evidence.

B. Breach of Contract against AOG (Claims 1, 2, and 8)

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

In claims 1, and 2, plaintiff alleges AOG breached sections 7.1 and 11-13 of the Manufacturing Agreement. Section 7.1 of the Agreement requires TruFood to provide notice of its intention to perform certain kinds of transactions, including a “change of control transaction”, which includes “the sale, transfer or exclusive license . . . of substantially all of the KIND Assets” (Manufacturing Agreement, NYSCEF Doc. No. 17, §7.1[g]). According to the Manufacturing Agreement, if Kind rejects the proposed transaction in writing, TruFood is prohibited from proceeding (*id.*, § 7.1[b]). Kind alleges TruFood provided the notification on April 29, 2019, and Kind sent a written rejection on May 13, 2019, making the Transaction in violation of the Manufacturing Agreement. It is undisputed the Corporate Defendants are not signatories to the Manufacturing Agreement.

In the first two claims, as well as in claim 8, in which plaintiff seeks a declaratory judgment, Kind argues AOG is subject to the Manufacturing Agreement and may be held responsible for its because the Transaction was a de facto merger between TruFood and AOG. Corporate Defendants contend there was no such de facto merger, that the Transaction was the purchase of TruFood’s assets from TruFood’s secured creditors, and the assets were thus purchased “free and clear of any lien or interest subordinate to the security interest of the foreclosing party” (001 Memo, NYSCEF Doc. No. 12, at 9, quoting *Quinn v Thomas H. Lee Co.*, 61 F Supp 2d 13, 21 [SDNY 1999], *affd sub nom. Quinn v Teti*, 234 F3d 1262 [2d Cir 2000] [applying Article 9 of New

York's Uniform Commercial Code]). The PSA explains that Alostar Capital Finance (Alostar) held a first priority security interest on "all or substantially all of [TruFood's] assets" pursuant to the terms of a loan (PSA, Recitals, §C). TruFood defaulted on the loan and Alostar took possession of the collateral, then sold it to AOG. The PSA specifies that AOG "does not assume and shall not be responsible for . . . any obligations or liability of [TruFood]" (*id.*, PSA §2).

"The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation" (*Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573, 574 [1st Dept 2001]). There is no perfect test for determining a de facto merger. The idea is "that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*id.* at 575 quoting *Grant-Howard Assocs. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). "The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation" (*Fitzgerald*, 286 AD2d at 575). To make this determination, a court "must consider factors such as, but not limited to, whether the successor purchased the predecessor's intangible assets, goodwill, customer lists, accounts receivable, trademarks, and records, and whether there was any continuity of ownership, management, employees or the business in general" (*State Farm Fire & Cas. Co. v Main Bros. Oil Co.*, 101 AD3d 1575, 1578-79 [3d Dept 2012]). While Kind has alleged AOG purchased all or substantially all of TruFood's assets from its secured creditors, there are few allegations about continuity of personnel and management, or continuity of ownership.

Kind alleges AOG intended to continue to use the TruFood name and do business with TruFood's customers, but the Second Circuit, applying New York law, has noted that "continuity of ownership is the essence of a merger. It is, by contrast, the nature of an asset sale that the seller's ownership interest in the entity is given up in exchange for consideration; the parties do not become owners together of what formerly belonged to each" (*Cargo Partner AG v Albatrans, Inc.*, 352

F3d 41, 47 [2d Cir 2003] [parentheticals omitted]). While the First Department has noted that “[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a de facto merger will be made” *Fitzgerald*, 286 AD2d at 575, This case is distinguishable. That defendant was deemed to have merged with the acquired corporation when the defendant purchased all of the acquired corporations’s stock. This is a very different fact pattern. AOG purchased the assets from the secured creditors, to whom TruFood had surrendered the collateral, as described in the PSA. Plaintiff requests additional discovery, but this appears to be a general fishing expedition.

Finally, Kind has acknowledged “AOG is not a party to the Manufacturing Agreement” (Acknowledgment, attached as exhibit C to Chihi affidavit, NYSCEF Doc. No. 19). Kind’s argument that AOG is subject to the Manufacturing Agreement therefore fails. The pleading is insufficient to sustain claims for breach of the Manufacturing Agreement against AOG as Kind’s successor in interest.

In claim 2, Kind alleges in the alternative that as a successor in interest to TruFood, AOG breached sections 11-13 of the Manufacturing Agreement (Opp at 16). Because AOG may not be deemed a party to the Manufacturing Agreement, this breach of contract claim also fails against it. Kind also brings claim 8, for a declaratory judgment that AOG is bound by the Manufacturing Agreement. For the reasons discussed above, that claim fails and will be dismissed as against AOG.

C. Aiding and Abetting Fraud (claim 4)

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]. The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Kind asserts AUA aided and abetted TruFood's fraud by directing and encouraging TruFood not to give Kind information about the Transaction until it was completed. AUA/AOG contend this claim fails because TruFood only had a duty to provide this information pursuant to section 7.1 of the Manufacturing Agreement, and a "cause of action for fraud will not arise when the only fraud charged relates to a breach of contract" (*id.*, quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). They argue this claim is really a cause of action for aiding and abetting a breach of contract, which is not a valid cause of action in New York (*id.* citing *Purvi Enterprises, LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2009]). AUA/AOG also contend this claim fails for lack of an underlying fraud and because Kind fails to allege the elements of an aiding and abetting fraud claim with the required particularity, including how AUA directed the concealment of the details of the Transaction, or how the alleged direction was conveyed (001 Memo at 15-16, 001 Reply at 8).

Kind argues it has stated a claim for fraudulent omission because the defendants conspired to mislead Kind and keep Kind ignorant while increasing their leverage (Opp at 21). Kind argues it alleges sufficient facts to support its claim because it is not required to allege facts of a fraud which are solely within the defendants' knowledge at this point (*id.* at 26). Further, Kind clarifies TruFood had an obligation to disclose separate from the Manufacturing Agreement, since the company provided a "false description of the transaction, and then neither correcting that false description nor informing [Kind] of the extensive work Defendants engaged in to bring about a different transaction" (*id.* at 24).

This claim also fails. According to the complaint, TruFood notified Kind of a proposed transaction in April 2019. Kind rejected that transaction in writing and requested more information. Later, TruFood engaged in a different transaction (the Transaction) without providing the required notice. The failure may have been a breach of contract, not fraud. As the underlying duty requiring disclosure is contractual, this claim for aiding and abetting fraud fails for lack of an underlying fraud.

D. Tortious Interference with a Contract Claim (claim 5)

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendant's intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

AUA/AOG argue this claim should fail for lack of factual allegations. There are no allegations about actions taken by AOG to support this claim, only that TruFood's former CEO told representatives of Kind that AUA had directed him to conceal the terms of the Transaction (001 Memo at 17). They contend the complaint does not specify how AUA procured TruFood's breach of the Manufacturing Agreement since AUA never entered into an agreement with TruFood (*id.* at 18). AOG contends that what Kind characterizes as AUA procuring TruFood's withholding of information could not have been more than a mere request (*id.*). Kind also alleges AUA was motivated to interfere by its desire to protect the Transaction in that TruFood disclosing information to Kind would result in the failure of the deal (*id.* at 18-19). AUA/AOG contend there is no allegation of actions by AUA that violated a minimum level of ethical behavior, and no allegation of damages, as even if it had known, Kind was only contractually entitled to withhold approval from TruFood, which would not have affected the Transaction between the Secured Creditors and AOG (*id.* at 19).

Kind contends its allegations that AUA directed Peter Tsudis to conceal information about the Transaction are sufficient to show interference (Opp at 29). As far as there is a dispute about whether the AUA directed Peter Tsudis or merely suggested a course of conduct to him, this is an issue of fact, and discovery is needed to determine whether AUA's conduct meets the standard for the cause of action. Also, while AUA/AOG argue they could not have engaged in tortious interference because neither of them entered into an agreement with TruFood, Kind takes the position that the nature of the relationship is in dispute, and issues of fact exist.

AUA/AOG reply that the burden is Kind's to make factual allegations which would support the inference that AUA could and did procure TruFood's breach, and that the interference violated a standard of ethical behavior in a competitive marketplace (001 reply at 9-10). AUA/AOG argue Kind has not done so, and the claim should be dismissed.

Plaintiff has alleged the existence of a valid contract between it and TruFood. It is undisputed that AUA knew about the Manufacturing Agreement. Plaintiff has alleged AUA “directed” TruFood to breach the Manufacturing Agreement, and the facts of that conversation are wholly within the defendants’ knowledge. However, there are no allegations to show how that alleged conversation qualifies as procurement of the breach without justification. Plaintiff merely asserts the conclusion. “Although on a motion to dismiss plaintiffs’ allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). Further, the purchase from the secured creditors is not the cause of plaintiff’s injury. This claim fails.

E. Tortious Interference by AUA/AOG with TruFood’s Obligations Under Manufacturing Agreement (Claim 6)

Although the description of claim 6 in the Complaint is not specific, it appears Kind asserts the AUA/AOG tortiously interfered with TruFood’s performance of sections 11 and 12 of the Manufacturing Agreement, which restricted TruFood’s use of the Kind intellectual property, by receiving some of those assets in the Transaction (Complaint, ¶¶ 104-108).

According to AUA/AOG, this claim is premised on AOG receiving Kind’s confidential information and intellectual property before completion of the Transaction (001 Memo at 19). They argue there are no facts alleged to support this assertion, Kind does not identify the intellectual property or confidential information allegedly transferred before the Transaction, and any claim based on AOG or AUA getting Kind’s confidential information has been waived when Kind hired AOG to produce its product (*id.* at 19).

Kind contends this claim survives for the same reasons discussed above, in section D. As the arguments were unavailing there, they are similarly unavailing here. Further, to support a claim for tortious interference with a contract, “the interference must be intentional, not merely negligent or incidental to some other, lawful, purpose” (*Alvord and Swift v Stewart M. Muller Const. Co., Inc.*, 46 NY2d 276, 281 [1978]). There is no dispute that AOG’s purchase of the assets from TruFood’s secured creditors was otherwise lawful. There have been no allegations AOG’s receiving the Kind IP was anything but incidental to the AUA’s purpose in engaging in the Transaction. Accordingly, this claim also fails.

F. Declaratory Judgment for Amounts Kind Paid Suppliers (Claim 7)

“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed” (CPLR § 3001). A court “may decline to hear the matter if there are other adequate remedies available” (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). As far as such claims have merit, the amounts of payments made by Kind to the suppliers are known and there are other adequate remedies available in equity. Accordingly, the claim for a declaratory judgment fails.

In considering whether Kind has articulated a different kind of claim, such as one in equity, as far as Kind asserts claims for amounts it paid to suppliers which were not paid by TruFood, AUA/AOG contend they are not responsible for those debts (001 Memo at 20). They argue AOG was not TruFood’s successor and did not take on any of TruFood’s liabilities, and if TruFood did leave debts unpaid, it was those suppliers who were injured, not Kind. If Kind paid the suppliers, it did so of its own volition.

Kind contends it had no choice but to pay the suppliers, since AOG and AUA’s refusal to do so threatened its supply chain (Opp at 31). Kind argues these payments were not voluntary, as they were not made in the absence of fraud (*id.* citing *Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]).

AUA/AOG note that while Kind has attempted to make a claim for fraud (even though these defendants argue the claims should fail) against AUA, Kind has not alleged any such conduct by AOG. Nor has Kind alleged it was deceived about either AUA or AOG’s intention to reimburse Kind for paying the suppliers (001 Reply at 12).

As discussed in Section C, above, Kind has failed to allege an underlying fraud. Accordingly, if plaintiff has a claim in equity, it is against TruFood, the suppliers’ debtor, not against either of the Corporate Defendants. This claim fails as against the Corporate Defendants.

G. Trade Secret Claim (count 9)

“To establish a claim for misappropriation of trade secrets, plaintiff must show (1) that it possesses a trade secret, and (2) that defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means” (*Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, 5 Misc 3d 285, 297 [Sup Ct, NY County 2004]).

Although “[t]here is no generally accepted definition of a trade secret, that found in section 757 of Restatement of Torts, comment b has been cited with approval by [the Court of Appeals]” (*Ashland Mgmt. v Jamien*, 82 NY2d 395, 407 [1993]). 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” (*id.*, quoting Restatement of Torts § 757, Comment *b*). One is liable for the tort of misappropriation if “his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him” (Restatement of Torts § 757).

Kind claims that its confidential information was turned over the AOG in the Transaction and that AOG has used that information to produce Kind products (Complaint, ¶ 119). AOG argues the claim is waived by Kind’s actions in contracting with AOG to produce Kind-branded products, which indicate Kind’s consent to AOG’s possession and use of the information, and a lack of damages (001 Memo at 21). Kind disputes the existence of a waiver because AOG extorted Kind for a million dollars to protect the confidential information it had improperly obtained (Opp at 31), explaining that in June 2019, Kind asked AOG to sign an acknowledgment that AOG was bound by the terms of sections 11 and 12 of the Manufacturing Agreement (the Acknowledgment), and AOG demanded a million dollars to sign it (*id.* at 13).

The Acknowledgment is an agreement between AOG and Kind¹ by which AOG agrees to keep confidential information obtained in the Transaction confidential, as though it were bound by section 11 and 12 of the Manufacturing Agreement so that AOG and Kind could “engage in good faith discussions regarding the terms of a commercial relationship regarding the manufacture and sale of certain food products” (Acknowledgment, NYSCEF Doc. No. 19, at 1). A trade secret claim requires the plaintiff to allege unauthorized use of a trade secret. Plaintiff has not alleged AOG used the confidential information to make products without Kind’s permission. As far as Kind seems to argue its damages are the money which it paid to AOG to induce AOG to enter into the Acknowledgment, that payment was not caused by use of the confidential information. Plaintiff has failed to allege the elements of a trade secret claim, and this claim fails.

¹ While the document submitted (NYSCEF Doc. No. 19) is only signed by Kind, AOG acknowledges entering into the agreement (001 Memo at 21).

H. Conversion Claim (count 10)

“The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff’s possessory right or interest in certain property and (2) defendant’s dominion over the property or interference with it in derogation of plaintiff’s rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers’ Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff’s right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014)). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

AOG argues the Conversion claim fails because Kind only claims “ingredients and packaging” along with “equipment” were converted by AOG (001 memo at 22). No specific items are identified and Kind does not allege it ever made demand for their return. AOG explains that, after the complaint was filed, AOG’s counsel provided a list of ingredients and packaging stored in what had been TruFood’s facility before the Transfer and items subsequently purchased by AOG and offered to allow Kind to collect them (*id.*). Kind’s counsel disclaimed ownership in those items (*id.*). As to equipment, AOG stated it has returned four printers to Kind, but has been unable to locate a nut roaster Kind claims was at the TruFood facility (*id.* at 23). Kind has refused to provide identifying information for the roaster or to take AOG up on its offer to come and look for it (*id.*). Accordingly, AUA/AOG argue the conversion claim should be dismissed.

Kind argues that AOG’s arguments are admissions it has property belonging to the plaintiff and that the parties’ discussions about the return of the property are issues of fact, and not proper for a motion to dismiss (Opp at 32). AOG counters that Kind has now admitted AOG is not in the possession of any of Kind’s property which Kind has identified and demanded, and so the claim should be dismissed (001 Reply at 14).

It is undisputed that AOG received certain “ingredients”, “packaging” and “equipment” at issue in this this claim (Complaint, ¶¶ 124-125) by way of the Transaction, in which it is undisputed AOG purchased TruFood’s assets, including spaces in which these items were stored, from the

secured creditors for money. “If possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand” (*Matter of White v City of Mount Vernon*, 221 AD2d 345, 346 [2d Dept 1995]). Plaintiff fails to allege it made a demand for the return of these items and that AOG refused, only claiming there were some “discussions” which are issues of fact (Opp at 32). Accordingly, plaintiff has failed to state a claim for conversion.

III. Motion 002- The Individual Defendants

According to the allegations in the Complaint, Andy Unanue is the Managing Partner of AUA and a member of the AUA investment committee which approved the Transaction, David Benyaminy is an AUA partner, Kyce Chihi is an AUA Managing Director, and Jack Lin is an AUA Vice President (Lin, together with Unanue, Benyaminy, and Chihi are the “Individual Defendants”) (Complaint, ¶¶ 21-24). There are no allegations the Individual Defendants are employees, officers, directors, or members of AOG.

The Individual Defendants move to dismiss the claims asserted against them for aiding and abetting fraud (count 4) and tortious interference (counts 5 and 6). They join Corporate Defendants in their arguments described in sections C and D, above. Further, Individual Defendants contend Kind has failed to allege any actions by the Individual Defendants to support the claims against them (*id.* at 6-7). Nor has Kind made factual allegations to support piercing the corporate veil to make the Individual Defendants personally liable. Kind has neither alleged any conduct by any Individual Defendant which would give rise to this kind of liability, nor their control and domination of the Corporate Defendants.

Kind does not argue the corporate veil should be pierced, but asks that, as far as the allegations about the Individual Defendants’ conduct are insufficient, it should be allowed discovery, as the facts are entirely in defendants’ possession (Opp at 26-27). Without discovery it would be impossible for Kind to know the details of “the precise roles and conduct” of the Individual Defendants, but that Unanue was a founding partner of AUA and approved the Transaction, Benyaminy was an AUA partner and involved in the conversations AOG had with Kind after the Transaction, and Chihi was AUA’s managing director and involved in AOG’s post-Transaction dealings with Kind, as was Lin, an AUA vice-president (*id.* at 27-28).

As discussed above, the claim for aiding and abetting fraud failed for lack of an underlying fraud, as plaintiff's claim was really for breach of contract. For the same reasons, the claim fails as against the Individual Defendants.

As above, Kind asserts tortious interference claims against the Individual Defendants for procuring TruFood's breach of section 7.1(b), the notice and approval provision, of the Manufacturing Agreement and for procuring TruFood's breach of section 11 of the Manufacturing Agreement concerning Kind's confidential information and TruFood's employees' breach of their confidentiality and non-compete agreements for which Kind was an intended third-party beneficiary. As above, plaintiff has failed to plead facts to support the argument that Individual Defendants intentionally procured the third-party's breach without justification. Kind's allegations are vague and conclusory and cannot survive the motion to dismiss. Accordingly, these claims fail, and the Individual Defendants will be dismissed from this action.

IV. Motion 003- TruFood and Peter Tsudis Motion to Dismiss Fraudulent Concealment Claim (count 3)

"To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation. A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

Peter Tsudis (Peter) is alleged to be TruFood's CEO and President. Peter and TruFood (the "TruFood Defendants") contend Kind has failed to state a cause of action for fraudulent concealment. According to the TruFood Defendants, Kind has failed to plead facts to support the existence of a duty to disclose the Corporate Defendants' intentions and plans. The Manufacturing Agreement may require TruFood to disclose the nature of a planned transaction, but it does not require TruFood to disclose the intentions of a third party, even if TruFood knew the intentions of that party (003 Memo, NYSCEF Doc. No. 26, at 5). The TruFood Defendants also contend plaintiff failed to plead it relied on any such omissions to its detriment (*id.*). Kind stated in the Complaint that it told TruFood it did not consent to the transaction described in the notice it

received, due to insufficient information. Kind has not stated any actions taken in reliance on TruFood's alleged omissions. Further, any such reliance would not be justifiable, as Kind has acknowledged needing additional information. Nor did Kind allege it acted with a "heightened degree of diligence" after initially receiving insufficient information (003 Reply, NYSCEF Doc. No. 34, at 7). Nor has Kind alleged damages caused by TruFood's omissions. Additionally, this tort claim should be dismissed because it is duplicative of the first two claims for breach of contract, for which Kind claims economic damages (003 Memo at 8). Kind has not alleged a breach of a duty outside of the contractual duties which are the subject of the contract claim.

Kind points out the TruFood Defendants concede the first two claims in this action (for breaches of the Manufacturing Agreement) are properly pled and do not move to dismiss them (Opp at 2). Kind also argues it properly pled a claim for fraudulent omission, including "justifiable reliance, duty, and damages", contrary to the TruFood Defendants' arguments (*id.* at 21). Kind claims TruFood Defendants had information about the Transaction which was not available to Kind, and they made misleading partial disclosure of that information, which triggered a duty to disclose (*id.* at 23). This is a separate duty from the obligations in the Manufacturing Agreement and supports the fraud claim (*id.* at 24). Kind argues it alleged injuries from that fraudulent omission, and the TruFood Defendants have acknowledged the Complaint alleges injuries such as AUA and AOG refusing to honor TruFood's debts, and the Corporate Defendants demanding additional payments, and shut down production of Kind products (*id.* at 24, citing 003 Memo at 7).

This claim also fails. In the Complaint, Kind alleges "[u]nder the Manufacturing Agreement, [the TruFood Defendants] had a duty to disclose . . . information regarding the nature of the AOG-TruFood transaction" (Complaint, ¶ 86). Accordingly, a failure to disclose that information describes a breach of contract claim. As far as Kind alleges the TruFood Defendants made partial disclosure, giving them a non-contractual obligation to complete the disclosure, Kind has also failed to allege its justifiable reliance on the TruFood Defendants' representation. "[I]n order to be actually deceived by a false representation, a party must not only reasonably believe that the representation is true, but he must also be justified in taking action in reliance thereon" (*Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976], *aff'd*, 43 NY2d 778 [1977]). Kind was aware of the insufficiency of the disclosure, since it acknowledged rejecting the proposal and "specifically requested additional information" which was not provided (Complaint, ¶ 87). Kind

acknowledges it, in fact, did not have the information it wanted about the proposed transaction, so reliance on that information would not have been reasonable. Accordingly, this claim is also dismissed.

Accordingly, it is hereby

ORDERED that Motion Sequence 001 is hereby GRANTED and all claims against the Corporate Defendants (1, 2, 4-10) are dismissed as to the Corporate Defendants; and it is further

ORDERED that Motion Sequence 002 is hereby GRANTED and all claims against the Individual Defendants (4-6) are dismissed as to the Individual Defendants; and it is further

ORDERED that Motion Sequence 003 is hereby GRANTED and claim 3 is dismissed as to the TruFood Defendants; and it is further

ORDERED that counsel for the remaining parties shall appear for a conference on Tuesday, September 22, 2020, at 10:30 am by calling in together to chambers at 914-824-5785.

This constitutes the decision and order of the court.

DATED: September 16, 2020

ENTER,


O. PETER SHERWOOD J.S.C.