Mercer Global Advisors, Inc. v Kraemer
2020 NY Slip Op 33856(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 654495/2019
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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MERCER GLOBAL ADVISORS, INC., MERCER ADVISORS, INC.

Plaintiff,

- v -

SKYLER KRAEMER, MISSION WEALTH MANAGEMENT LP,

Defendant.

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INDEX NO. 654495/2019

MOTION DATE 10/13/2020, 10/13/2020

MOTION SEQ. NO. 001 005

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 37, 40, 58

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 52, 53, 54, 55, 56, 57, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for LEAVE TO FILE.

This action was initially brought by plaintiff Mercer Global Advisors, Inc. and plaintiff Mercer Advisors, Inc., its parent (collectively Mercer) against defendant Skyler Kraemer, a former Mercer employee, and his new employer, defendant Mission Wealth Management LP (Mission Wealth), to enjoin defendants from unfairly competing with Mercer and for damages resulting from defendants' alleged misappropriation of Mercer's confidential client information. The original complaint asserts first and second causes of action against Kraemer for breach of his employment agreement and a confidentiality agreement, respectively, and third and fourth causes of action against all defendants for misappropriation of trade secrets and tortious interference with business relations, respectively. (Compl., ¶¶ 31-59 [NYSCEF Doc. No. 1].)

By stipulation dated September 27, 2019 (NYSCEF Doc. No. 11), the parties agreed to submit the claims against Kraemer to arbitration, pursuant to his employment agreement, and to stay the action against him pending resolution of the arbitration. Mission Wealth moves to

dismiss the two causes of action against it, pursuant to CPLR 3211 (a) (7). Mercer moves for leave to file an amended complaint. The proposed amended complaint withdraws the causes of action that were asserted solely against Kraemer and asserts five causes of action solely against Mission Wealth. The proposed amended complaint also adds facts assertedly obtained through discovery. The first and second causes of action in the proposed amended complaint are for misappropriation of trade secrets and tortious interference with business relations, respectively. The allegations constituting these causes of action are largely unchanged from the original complaint. The proposed amended complaint also adds a third cause of action for tortious interference with contract, a fourth cause of action for unfair competition, and a fifth cause of action for aiding and abetting breach of fiduciary duty.

Background

As pleaded in the proposed amended complaint, Mercer provides financial planning, investment management, and other financial services to individuals, businesses, and employers across the United States. (Proposed Am. Compl., ¶ 15 [NYSCEF Doc. No. 55].) Mission Wealth is a competitor of Mercer. (Id., ¶ 51.) Skyler Kraemer worked for Mercer from February 1, 2013 until his resignation on August 5, 2019. (Id., ¶¶ 24, 44.) Kraemer signed an Employment Agreement and a Confidentiality Agreement when he joined Mercer. (Id., ¶¶ 24, 25.)

The Employment Agreement provides, in pertinent part:

> "Exclusive Services: Employee shall devote his full working time, abilities, and energies to Employer's business and shall use his best efforts, skills, and abilities to promote the general welfare and interest of Employer. Employee represents that he has no other agreement, contract, or arrangement that will or may conflict with or be violated by Employee's acceptance of employment with or performance of duties for Employer. Employee shall not, directly or indirectly, render any services of a business, commercial, or professional nature to any other person, firm, or organization, whether for compensation or otherwise, while

employed by Employer unless Employer first consents in writing."

(Employment Agreement, § 1.5 [NYSCEF Doc. No. 2].)

The Confidentiality Agreement provides, in pertinent part:

> "Confidential Information: Confidential Information means all of Employer's or any Affiliated Companies' Trade Secrets as defined in A.R.S. § 44-401(4)[], and by this Agreement also expressly includes, but is not limited to: business plans; financial statements/records and budgets; marketing and sales strategies; data, compilations, or lists of past and current client or potential client names, addresses, telephone numbers, fax numbers, email addresses, financial information, and other personal or demographic information related to clients or potential clients; proprietary software and source code and object code; personnel and payroll information; and other secret or proprietary information or compilations of information relating to Employer's business or the business of any Affiliated Company."

(Confidentiality Agreement, Recitals [NYSCEF Doc. No. 3].) The Confidentiality Agreement further provides:

> "Employee agrees and covenants to not remove, appropriate, or convert, or use for himself or for others, or divulge or disclose to any other person or entity, either directly or indirectly, while employed by Employer or at any time thereafter, for a personal benefit or for the benefit of any other person or entity or for any reason whatsoever, any of the Confidential Information conceived, developed, obtained, or learned about while employed by Employer, unless specifically authorized to do so in writing by the Chief Executive Officer or President of Employer or the affected Affiliated Company."

(Confidentiality Agreement, § 1.5 [NYSCEF Doc. No. 3].) The non-solicitation clause in the Confidentiality Agreement provides:

> "To safeguard Employer's Confidential Information and the relationships Employer and the Affiliated Companies have developed with their Clients and Associates and employees over many years and with great expense, Employee covenants and agrees that she will not at any time during Employee's employment, or within twelve (12) months following termination of employment, directly or indirectly, whether on his own behalf or on behalf of any other person or entity, solicit the business of any past, potential, or current Client or Associate, or employee of Employer or of any Affiliated Company, other than for the sole and exclusive benefit of Employer or any Affiliated Company. "Potential"

> Clients or Associates include individuals who have attended events sponsored by Employer or by an Affiliated Company or who have responded to Employer or Affiliated Company marketing or sales campaigns during the previous twelve (12) months, or who are identified in Employer's or an Affiliated Company's sales or marketing database. Employee expressly acknowledges and agrees that this non-solicitation clause is necessary and appropriate to protect the legitimate business interests and Confidential Information of Employer and its Affiliated Companies."

(Confidentiality Agreement, § 1.9.)

As further pleaded in the proposed amended complaint, on or around February 27, 2019, Mission Wealth made an "initial overture" to Kraemer. Mission Wealth believed Kraemer was a "'great' candidate to open Mission Wealth's new Northeast office and specifically noted his six years of experience with Mercer." (Proposed Am. Compl., ¶ 30.) Kraemer traveled to Mission Wealth's California headquarters on or around June 7, 2019, to meet with Mission Wealth's leadership. (Id., ¶ 31.) Following that meeting, Kraemer informed Adams, Mission Wealth's President, that he was "'highly interested in joining' Mission Wealth and that Mercer—which was still Kraemer's employer—would be joining the Fidelity Wealth Advisor Solutions . . . network, a referral network for Fidelity clients, in 'mid-July' 2019." (Id., ¶ 32.)

While he was still employed by Mercer, Kraemer "executed an Employment Agreement with Mission Wealth." (Id., ¶ 33.) The Employment Agreement between Kraemer and Mission Wealth provided for an official start date of August 12, 2019. (Id.) Kraemer did not inform Mercer that he had signed this "Employment Agreement" and "continued to meet with, entertain, and 'service' Mercer clients, while maintaining access to Mercer's systems and Confidential Information." (Id., ¶ 34.) Following Kraemer's acceptance of employment with Mission Wealth, but before he resigned from Mercer, Kraemer "continued to conduct non-Mercer activity for the benefit of Mission Wealth." (Id., ¶ 35.) The alleged Mission Wealth activity that Kraemer conducted while employed by Mercer includes: Discussions between Kraemer and

Adams about "scheduling some more of the logistics related to those initial east coast Fidelity branch meetings, setting up your office in NYC, clients that may follow you, etc." (id., ¶ 35 [emphasis in original]); frequent emails and telephone calls between Kraemer and Mission Wealth during regular business hours (id., ¶ 44); and Kraemer's "increase[] [of] his client outreach," in the time after he signed the Mission Wealth Employment Agreement, "intending to divert business away from Mercer in violation of his legal duties to Mercer." (Id., ¶ 42.)

As further alleged, "[b]eginning on or around July 24, 2019, Mission Wealth, with Kraemer's assistance, prepared solicitation materials for Kraemer to send to Mercer's clients." (Id., ¶ 37.) Kraemer mailed the solicitations on August 3, 2019, two days before he officially terminated his employment with Mercer, using Mercer's confidential client information. (Id., ¶¶ 41, 44.)

Standard on the Motion to Dismiss

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). "[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted

conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88.)

Standard for Leave to Amend the Complaint

It is well settled that leave to amend a pleading "should be freely granted (CPLR 3025 [b]), absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010]; accord Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 505 [1st Dept 2011].) As discussed in this court's prior decisions, the authorities in this Department have been in conflict as to whether, or to what extent, an evidentiary showing must be made of the merit of a proposed amendment, although recent authorities have increasingly held that the party seeking leave to amend is not required to submit an affidavit of merit or to make an evidentiary showing of the merit of the proposed amendment. (See Cortlandt St. Recovery v Bonderman, 2019 NY Slip Op 31222 [U], 2019 WL 1789852, * 1-2 [Sup Ct, NY County 2019] [reviewing cases]; Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2016 NY Slip Op 32868 [U], 2016 WL 7475831, * 3 n 4 [Sup Ct, NY County 2016] [same].)

Misappropriation of Trade Secrets

The third cause of action in the original complaint and the first cause of action in the proposed amended complaint are for misappropriation of trade secrets, based on allegations that Kraemer, "in concert with Mission Wealth," used Mercer's confidential client list to "gain an unfair advantage in the market." (Compl., ¶ 52; Proposed Am. Compl., ¶ 51.) The proposed amended complaint does not add any significant or material allegations to this cause of action,

and Mercer does not claim, on its motion to amend, that the proposed amended complaint addresses any deficiencies in this pleading asserted by Mission Wealth.

"[T]o 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.'" (Schroeder v Pinterest Inc., 133 AD3d 12, 27 [1st Dept 2015], quoting North Atl. Instruments, Inc. v Haber, 188 F3d 38, 43-44 [2d Cir 1999].) A trade secret is "'any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'" (Ashland Mgt. Inc. v Janien, 82 NY2d 395, 407 [1993], quoting Restatement of Torts § 757, comment b].)

As the Court of Appeals has explained, in determining whether the first element is satisfied – i.e., whether a trade secret exists – the court must consider several factors:

> "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

(Ashland Mgt. Inc., 82 NY2d at 407, quoting Restatement of Torts § 757, comment b [brackets in decision].)

Mercer's proposed amended complaint contains allegations, unchanged from those in the original complaint, that "Mercer dedicates tens of millions of dollars in time and resources to developing and maintaining existing and prospective client relationships," and that "Mercer maintains robust and confidential information on its existing and prospective clients, including

biographical information, risk tolerance, investment preferences, financial plans, tax returns, estate plans, insurance needs, and all other investment information and performance both for investments and assets held by Mercer and for those at other financial institutions." (Compl., ¶¶ 14, 18; Proposed Am. Compl., ¶¶ 16, 20.) The proposed amended complaint also details the "substantial steps" Mercer takes to protect this information, including, among other things, "entering into strict confidentiality agreements with its employees"; keeping "the database that stores its customer information protected with a password and login requirement so that only authorized Mercer employees can access the information"; and "lock[ing] and protect[ing] with security codes all cabinets and rooms containing hard copies of client files." (Compl., ¶ 19; Proposed Am. Compl., ¶ 21.) These allegations adequately plead that Mercer's client lists and client information are trade secrets.

The court reaches a different conclusion as to the adequacy of the pleading of the second element of the cause of action for misappropriation of trade secrets. The complaint and proposed amended complaint do not plead that Mission Wealth, as opposed to Kraemer, had any agreement or confidential relationship with Mercer. In order to plead a cause of action for misappropriation of trade secrets against Mission Wealth, the complaint must accordingly plead that Mission Wealth obtained the trade secrets by wrongful or improper means. (See Schroeder, 133 AD3d at 28.) Here, however, neither the complaint nor the proposed amended complaint pleads wrongful or improper means.

Wrongful or improper means "include 'fraud or misrepresentation, . . . and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.'" (BGC Partners, Inc. v Avison Young (Canada) Inc., 160 AD3d 407, 408 [1st Dept 2018] [quoting Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980], which articulated the standard for determining whether a defendant

used wrongful means in the context of a cause of action for tortious interference with prospective contractual relationships].) Under this high standard, an offer of "competitive compensation" by a defendant does not constitute "wrongful or improper" means. (BGC Partners, Inc., 160 AD3d at 408.) Nor will a defendant be found to have used wrongful or improper means, even where the defendant knowingly receives trade secrets from a competitor's former employee who "voluntarily" appropriated the trade secrets. (See Schroeder, 133 AD3d at 28.)

Mercer appears to contend that a claim for misappropriation of trade secrets is maintainable against an employee's subsequent employer based on a non-specific allegation as to the employer's "cooperation and involvement" with the employee's appropriation of the former employer's trade secrets. (See Pls.' Memo. In Opp. To Motion To Dismiss, at 13-14 [NYSCEF Doc. No. 16].) Mercer, however, provides no legal support for its contention that an allegation of mere cooperation and involvement, without additional allegations of serious tortious acts on Mission Wealth's part to access or obtain the trade secrets, is sufficient to plead wrongful means. While Mercer pleads that Mission Wealth assisted Kraemer in preparing the solicitation materials, Mercer cites no authority that such conduct rises to the level of wrongful means, under these circumstances in which Kraemer voluntarily obtained the Mercer confidential client information through his own efforts. Put another way, Mercer does not cite any case in which a new employer's assistance in preparing a "tombstone announcement" – i.e., an announcement by an employee to clients of his former employer that he has assumed employment with a new employer – has been held to constitute wrongful means and therefore to support a cause of action for misappropriation of trade secrets.[1]

[1] The original complaint alleged that Kraemer admitted to maintaining possession of Mercer confidential client lists after he terminated his employment at Mercer (Compl., ¶ 52), and that, on the day Kraemer tendered his resignation to Mercer, he "admitted that he had taken Mercer Confidential Information and that he intended to exploit it by notifying Mercer's clients of his departure from Mercer and his new employment." (Id., ¶ 26.) The proposed amended complaint alleges not merely that Kraemer intended to, but that he did, use the Mercer client information,

The third cause of action in the complaint for misappropriation of trade secrets will accordingly be dismissed. The branch of the motion for leave to amend the complaint, to the extent it seeks to assert additional allegations in support of a proposed first cause of action for misappropriation of trade secrets, will also be denied, as no proposed amendment remedies the defects in the pleading of this cause of action.

Tortious Interference with Business Relations

The fourth cause of action in the original complaint and the second cause of action in the proposed amended complaint is for tortious interference with business relations, based on Mission Wealth's alleged tortious interference with Mercer's relationship with its clients. (Compl., ¶ 56; Proposed Am. Compl., ¶ 55.) In the complaint and proposed amended complaint, Mercer alleges that Mission Wealth disrupted its relationships with its "clients and prospective clients." (Compl., ¶ 59; Proposed Am. Compl., ¶ 58.) Specifically, Mercer claims that "Mission Wealth, by and with Kraemer, solicited existing clients using confidential information that Kraemer stole from Mercer in breach of his agreements with Mercer." (Pls.' Memo. In Opp. To Motion To Dismiss, at 15 [emphasis in original].) Here, again, the proposed amended complaint does not add any material allegations to this cause of action. Nor do the briefs filed on the motion for leave to amend the complaint address this claim.

In order to state a claim for tortious interference with business relations, a plaintiff must show that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business

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and states that "Kraemer has admitted to using Mercer's confidential client list to send solicitations to Mercer clients after he terminated his employment at Mercer. . . ." (Compl., ¶ 52; Proposed Am. Compl., ¶ 51.) These allegations address Kraemer's conduct, not Mission Wealth's conduct, and therefore do not cure the deficiencies in the pleading of wrongful means.

relationship." (Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 108 [1st Dept 2009], lv denied 15 NY3d 703 [2010].) The Court of Appeals has held that the means employed by the defendant to support this cause of action must be "wrongful" or "culpable." (Carvel Corp. v Noonan, 3 NY3d 182, 189-190, 193 [2004].) "Wrongful means" include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." (Guard-Life Corp., 50 NY2d at 191 [1980]; accord Carvel Corp., 3 NY3d at 191.) Further, conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship. (Carvel Corp., 3 NY3d at 192.)

As held in connection with the cause of action for misappropriation of trade secrets, Mercer does not allege that Mission Wealth engaged in any acts which constitute "wrongful means." Mercer cites no authority for its apparent contention that the mere use of its confidential information constitutes wrongful means. (See Pls.' Memo. In Opp. To Motion To Dismiss, at 16.) In view of this holding, the court does not reach Mission Wealth's further objection to the maintenance of this cause of action on the ground that Mercer does not plead damages.

The fourth cause of action in the complaint for tortious interference with business relations will accordingly be dismissed. The branch of the motion for leave to amend the complaint, to the extent it seeks to assert additional allegations in support of a proposed second cause of action for tortious interference with business relations, will also be denied, as no proposed amendment remedies the defects in the pleading of this cause of action.

Tortious Interference with Contract

The proposed amended complaint seeks to add a third cause of action for tortious interference with contract, based on allegations that Mission Wealth directed Kraemer to breach his contractual obligations to Mercer. (Proposed Am. Compl., ¶ 64.) Specifically, the proposed amended complaint alleges that, after Kraemer accepted employment with Mission Wealth and while still employed by Mercer, Kraemer engaged in activities for the benefit of Mission Wealth, including accessing Mercer confidential information and engaging in communications with Mercer clients to divert business from Mercer. (Id., ¶¶ 34-37, 42.) The proposed amended complaint further alleges:

> "Kraemer breached his contractual obligations to Mercer when he accepted employment with Mission Wealth, a direct competitor of Mercer, and began performing services for Mission Wealth. Kraemer also breached his contractual obligations to Mercer when he improperly accessed and used Mercer's Confidential Information to solicit Mercer clients on behalf of Mission Wealth. The solicitation materials were created by Mission Wealth in breach of the express terms of Kraemer's agreements with Mercer."

(Id., ¶ 62.) As also alleged, "Kraemer breached his contractual obligations to Mercer with Mission Wealth's knowledge and at Mission Wealth's direction." (Id., ¶ 64.)

To plead a claim for tortious interference with a contract, a plaintiff must allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996]; accord Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 594 [2012], rearg denied 19 NY3d 1065.) "Specifically, a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct." (Burrowes v Combs, 25 AD3d 370, 373 [1st Dept 2006], lv denied 7 NY3d 704; accord Carlyle, LLC v Quik Park 1633 Garage LLC, 160 AD3d 476, 477 [1st Dept 2018].)

"The degree of protection" available to a plaintiff for tortious interference with a contract "is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant." (NBT Bancorp Inc. v Fleet/Norstar Fin. Group, 87 NY2d 614, 621 [1996] [internal citations omitted]; accord Carvel Corp., 3 NY3d at 189-190.)

The court holds that the amended complaint adequately pleads a cause of action for tortious interference with contract based on the allegations, detailed above, that Mission Wealth induced Kraemer to breach his Confidentiality Agreement with Mercer by using Mercer's confidential information to solicit Mercer's clients, and that Mission Wealth induced Kraemer to breach his Employment Agreement with Mercer by engaging in competitive activity with Mercer while he was still employed by Mercer. Such allegations support the tortious interference with contract cause of action because, under the governing law discussed above, this cause of action, unlike the causes of action for misappropriation of trade secrets and tortious interference with business relations, does not require allegations of wrongful means.

In arguing that this cause of action is not adequately pleaded, Mission Wealth relies on authority which holds that "the case law is clear that agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts." (Snyder v Sony Music Entertainment, 252 AD2d 294, 299 [1st Dept 1999] [internal citations, quotation marks, and brackets omitted]; see Def.'s Memo. In Opp. To Motion For Leave To Amend, at 9-10 [NYSCEF Doc. No. 62].) This authority is

inapposite, as it involves tortious interference claims where the interference allegedly caused the termination of employment. Here, Mercer does not claim that Mission Wealth tortiously interfered with the contracts by causing Kraemer to terminate his employment with Mercer. Rather, Mercer claims that Mission Wealth tortiously interfered with the contracts by inducing Kraemer to "wrongfully access[] and us[e] Mercer's highly confidential information and disloyally compet[e] against Mercer's interests while still employed by Mercer." (Pls.' Memo. In Reply To Motion For Leave To Amend, at 6 [NYSCEF Doc. No. 67].)[2] A cause of action for tortious interference with an at-will contract is maintainable based on these claims. (See Barbagallo v Marcum LLP, 820 F Supp 2d 429, 444 [ED NY 2011] [holding, under New York law, that non-compete clauses are enforceable even when the employment contract is terminable at-will].)

In upholding the tortious interference with contract claim, the court rejects Mission Wealth's further argument that the allegations of the proposed amended complaint do not plead an unlawful solicitation. As alleged in the proposed amended complaint, "Mission Wealth created a marketing solicitation with full Mission Wealth branding for Kraemer to send to Mercer clients to solicit them away from Mercer and bring their business over to Mission Wealth. To send the solicitation, Kraemer wrongfully took and used Mercer's confidential client list and contact information. All of this, as Mission Wealth knew, was in express breach of Kraemer's contracts with Mercer and the fiduciary duties he owed to his employer." (Proposed Am. Compl., ¶ 7.) As further alleged, "[t]he solicitation materials that Mission Wealth prepared

[2] As noted above, the complaint pleads that "Kraemer breached his contractual obligations when he accepted employment with Mission Wealth. . . ." (Proposed Am. Compl., ¶ 62.) This language is susceptible to the interpretation that the claim of tortious interference is based on Kraemer's acceptance of employment with Mission Wealth, a competitor. Mercer clarifies on this motion, however, that it is not advancing such a claim, and that the breach is based on Kraemer's engaging in competitive acts in concert with Mission Wealth while still employed by Mercer, as well as use of Mercer's confidential information to solicit clients on Mission Wealth's behalf. (Pls.' Memo. In Reply To Motion for Leave to Amend, at 6.)

included Kraemer's color photo, his phone number, his Mission Wealth office address, and Mission Wealth's logo, branding, and slogan." (Id., ¶ 37.)

Mercer argues that the Confidentiality Agreement contains a choice of law clause which provides for the application of Arizona law, and that under Arizona law the solicitation is unlawful. (Pls.' Memo. In Supp. Of Motion For Leave To Amend, at 6 n 4 [NYSCEF Doc. No. 53].) Mercer further argues that even if California or New York law were to be applied, the result would be the same. (Pls.' Memo. In Reply To Motion For Leave To Amend, at 6.) Mission Wealth argues that the choice of law provision is unenforceable because "Kraemer and Mercer did not have, nor currently has [sic], significant contacts with Arizona to justify the application of Arizona law." (Def.'s Memo. In Opp. To Motion For Leave To Amend, at 12.) Mission Wealth further argues that, even under Arizona law, Kraemer did not engage in any conduct that could be construed as solicitation. (Id., at 11 n 1.) According to Mission Wealth, the result would be the same under California or New York law.

The parties have not comprehensively briefed the enforceability of the choice of law clause or the issue of whether Kraemer, in concert with Mission Wealth, engaged in solicitation which, under the potentially applicable laws of Arizona, California, and New York, violated the anti-solicitation provision of the Confidentiality Agreement. The court need not, however, determine which state's law applies to the Confidentiality Agreement, as the court finds that Mercer's pleading of Kraemer's alleged solicitation is not "palpably insufficient" to support the tortious interference with contract cause of action under the laws of all three states, as briefed on this record.[3] Under Arizona law, Compass Bank v Hartley, (430 F Supp 2d 973, 981 [D Ariz 2006]), held that a letter written by a former employee to his clients "constitute[d] a solicitation

[3] The court does not make a final determination as to what constitutes unlawful solicitation under the laws of Arizona, California, and New York. Further briefing as to the applicable state's law will be required at the time of resolution of the action.

not only because it was a targeted mailing, but because it contained contact information initiating customers to call/e-mail/write [defendant]." Under California law, a former employee may be enjoined from soliciting customers if that solicitation makes use of trade secrets.

> ". . . [California Business & Professions Code] section 16600 bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin tortious conduct . . . by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer."

(The Retirement Group v Galante, 176 Cal App 4th 1226, 1238 [Cal App 2009] [emphasis in original].) Under New York law, a reasonableness standard is applied in determining the validity of restrictive covenants between employees and employers. Like California, New York enforces anti-solicitation restrictive covenants, if reasonable, "to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information." (Comgroup Holding LLC v Greenbaum, 2013 NY Slip Op 33609 [U], 2013 WL 2356291 [Sup Ct NY County 2013] [this court's decision quoting Reed, Roberts Assocs., Inc. v Strauman, 40 NY2d 303, 307 [1976] rearg denied 40 NY2d 918, and collecting authorities].) There is authority under New York law that an anti-solicitation provision may be violated by an employee's announcement to his former employer's clients of his assumption of employment with a competitor of his former employer. [Mercer Health & Benefits LLC v DiGregorio, 307 F Supp 3d 326, 351-352 [SD NY 2018] [holding, under New York law, that employees' announcements to existing clients of their departure to a competitor, as well as use by the employees of the employer's confidential information in the pursuit of potential clients, "likely violated" non-solicitation and confidentiality agreements].)

The court also rejects Mission Wealth's more far reaching contention that the anti-solicitation provision in the Confidentiality Agreement is overbroad and therefore invalid. (Def.'s Memo. In Opp. To Motion For Leave To Amend, at 10, 13-16.) Mission Wealth claims that, under California law, the anti-solicitation provision is "outright invalid." (Id., at 14.) In addition, Mission Wealth argues that, under New York law, the anti-solicitation provision is invalid because "the clause is geographically broader than is necessary to protect Mercer's business interests"; "restricts Kraemer from soliciting any Mercer client, including clients with whom he never had a relationship"; and "places an undue hardship on Kraemer." (Id., at 15-16.)

As discussed above, the parties dispute whether the choice of law clause in the Confidentiality Agreement is enforceable and therefore whether Arizona law or the law of California or New York should apply. The parties have not comprehensively briefed the choice of law issue or the extent to which the three states' laws differ on the enforceability of anti-solicitation covenants. The court accordingly will not address the ultimate enforceability of the anti-solicitation clause on this record.

The court holds, however, that the limited authority cited by Mission Wealth does not support its claim that the anti-solicitation clause is invalid as a matter of law under California law. On the contrary, it recognizes that, while non-compete agreements will not be enforced, "[n]arrower contractual restraints on a departing employee, which prohibit him/her from using confidential information taken from the former employer, have been held to be lawful." (Kolani v Gluska, 64 Cal App 4th 402, 406 [Cal App 1998] [cited in Def.'s Memo. In Opp. To Motion For Leave To Amend, at 14].) Mission Wealth's claim that the anti-solicitation clause is invalid under New York law is also unsupported on this record. New York courts have adopted "the modern, prevailing common-law standard of reasonableness" in determining the validity of employee agreements not to compete. (BDO Seidman v Hirshberg, 93 NY2d 382, 388 [1999].)

This standard "applies a three-pronged test. A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (Id., at 388-389 [emphasis in original].) Mission Wealth makes no showing that the anti-solicitation clause at issue is unenforceable in its entirety under this standard.

Finally, to the extent that Mission Wealth opposes the amendment of the complaint based on its claim that Mercer's allegations lack merit (see Def.'s Memo. In Opp. To Motion For Leave To Amend, at 2), that basis for opposition reflects a misapprehension of the standard for determination of a motion for leave to amend. As set forth above, a party seeking leave to amend a pleading must demonstrate that the pleading is not palpably lacking in merit. Even assuming that some showing of merit of the amendment continues to be required in this Department on a motion for leave to amend (see supra at 6), that showing is met by plaintiff here. For example, Mercer attaches deposition testimony by Mission Wealth's president in which he acknowledges Mission Wealth's role in the announcement by Kraemer to his Mercer clients of his employment by Mission Wealth. Even if this evidence is not properly considered because submitted for the first time on the reply, Mercer submitted evidence as to Mission Wealth's role in opposition to the motion to dismiss. In particular, Mercer attached an example of a notification by Kraemer to a Mercer client on Mission Wealth letterhead, informing the client that he was no longer with Mercer and announcing his new position with Mission Wealth, effective August 12, 2019. (Gerstein Aff., Ex. B [NYSCEF Doc. No. 19].) This evidence is sufficient to support the tortious interference with contract cause of action.

The court accordingly holds that the branch of the motion to assert a third cause of action for tortious interference with contract in the proposed amended complaint should be granted.

Unfair Competition

The fourth cause of action in the proposed amended complaint is for unfair competition, based on Mission Wealth's "willful and malicious" acts "taken . . . to gain an unfair competitive advantage over Mercer." (Proposed Am. Compl., ¶¶ 69, 71.) This cause of action is based on the acts previously alleged in the proposed amended complaint. (Id., 69.) The acts Mission Wealth is alleged to have taken, which Mercer highlights as the basis for this cause of action, include using "non-public information relating to Mercer's strategic planning, coordinat[ing] with Kraemer on business activities in direct competition with Mercer, communicat[ing] with Kraemer concerning solicitation of Mercer clients, and prepar[ing] solicitations for Kraemer to mail out to Mercer clients—knowing Kraemer would wrongfully misappropriate Mercer's confidential client information to do so." (Pls.' Memo. In Reply To Motion For Leave To Amend, at 11 [footnote omitted].)

"Under New York law, an unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiffs own use of the same property. The term 'commercial advantage' has been used interchangeably with 'property' within the meaning of the misappropriation theory." (ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478 [2007] [internal quotation marks and citations omitted].) "Allegations of a bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information can give rise to a cause of action for unfair competition." (Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 56 [1st Dept 2015] [internal quotation marks omitted]; see also Barbagallo, 820 F Supp 2d at 446 [applying New York law].) In order to state a cause of action for unfair competition, a plaintiff must allege "a bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary

information. . . ." (Macy's Inc., 127 AD3d at 56 [internal quotation marks omitted]; Fairfield Fin. Mortg. Group, Inc. v Luca, 584 F Supp 2d 479, 488 [ED NY 2008] [applying New York law].) In the context of an unfair competition claim, "bad faith can be established by a showing of fraud, deception, or an abuse of a fiduciary or confidential relationship." (Schroeder, 133 AD3d at 30.)

The proposed amended complaint does not plead facts which constitute the bad faith necessary to sustain a claim for unfair competition. It is undisputed that there is no fiduciary or confidential relationship between Mercer and Mission Wealth. Mercer's allegations in support of the unfair competition claim, cited above, do not constitute fraud or deception or that otherwise meet the standard for bad faith. (See Schroeder, 133 AD3d at 30).

The court accordingly holds that the branch of the motion to assert a fourth cause of action for unfair competition in the proposed amended complaint should be denied.

Aiding and Abetting Breach of Fiduciary Duty

The fifth and final cause of action in the proposed amended complaint is for aiding and abetting breach of fiduciary duty. This cause of action is based on allegations that "[w]hile Kraemer was still employed with Mercer, Mission Wealth knowingly induced and/or participated in Kraemer's breach of his fiduciary duty by, among other things, discussing aspects of Mercer's business with Kraemer; requesting Kraemer to conduct various Mission Wealth business activities prior to Kraemer's resignation from Mercer; advising Kraemer concerning Kraemer's communications with Mercer clients about his resignation; and preparing the marketing materials that Kraemer wrongfully used to solicit Mercer clients." (Proposed Am. Compl., ¶ 76.) The complaint also alleges that "Mission Wealth repeatedly contacted Kraemer during regular business hours in June and July 2019 to have Kraemer compete against" Mercer. (Id., ¶ 38.)

Although the cause of action is denominated one for aiding and abetting breach of fiduciary duty, and the proposed amended complaint refers to breach of the "fiduciary duty of loyalty" (id., ¶¶ 74-76.), the complaint pleads acts in support of a claim of aiding and abetting breach of an employee's common law duty of loyalty. (Id., ¶¶ 74-76.)

It is well settled that at-will employment relationships are subject to a duty of fidelity or loyalty. "[I]t is axiomatic that an employee 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 . . . ." (CBS Corp. v Dumsday, 268 AD2d 350, 353 [1st Dept 2000], quoting Lamdin v Broadway Surface Adv. Corp., 272 NY 133, 138 [1936]; Maritime Fish Prods., Inc. v World-Wide Fish Prods., Inc., 100 AD2d 81, 87-88, appeal dismissed 63 NY2d 675.)

In considering the adequacy of the pleading, the court is guided by the standards for pleading of the analogous cause of action for aiding and abetting breach of fiduciary duty. (See BGC Partners, Inc., 160 AD3d at 408.) In that context, a leading case, Kaufman v Cohen (307 AD2d 113 [1st Dept 2003]), held that "[a]lthough a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty." (Id., at 125.) "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." (Id.) "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." (BGC Partners, Inc., 160 AD3d at 408, quoting Kaufman, 307 AD2d at 126.)

The court holds that the proposed amended complaint adequately pleads that Mission Wealth aided and abetted Kraemer's breach of his common law duty of loyalty. The proposed amended complaint adequately alleges that Mission Wealth had knowledge of Kraemer's

common law duty of loyalty and provided assistance for Kraemer's breaches that qualifies as substantial. (Proposed Am. Compl., ¶¶ 74-76.) BGC Partners, Inc. is not to the contrary. There, the court dismissed a cause of action for aiding and abetting breach of the duty of fidelity where the assistance was an offer of competitive compensation, which the court held was insufficient to support the cause of action. (BGC Partners, Inc., 160 AD3d at 408.) Here, in contrast, the complaint alleges that Mission Wealth assisted Kraemer by, among other things, working with Kraemer on Mission Wealth business during work hours while he was still employed by Mercer, and actively working with Kraemer to solicit Mercer's clients.

The court accordingly holds that the branch of the motion to assert a fifth cause of action for aiding and abetting breach of fiduciary duty in the proposed amended complaint should be granted.

ORDER

It is accordingly hereby ORDERED that the motion of defendant Mission Wealth Management LP (Motion Seq. No. 001) to dismiss the complaint is granted to the extent of dismissing the third cause of action (misappropriation of trade secrets) and fourth cause of action (tortious interference with business relations); and it is further

ORDERED that the motion of plaintiffs Mercer Global Advisors, Inc. and Mercer Advisors, Inc. (Motion Seq. No. 005) for leave to amend the complaint is granted to the following extent:

Plaintiffs may serve a complaint in the form of the proposed amended complaint filed as NYSCEF Doc. No. 55, with the omission of 1) the first cause of action (misappropriation of trade secrets), 2) the second cause of action (tortious interference with business relations), and 3) the fourth cause of action (unfair competition); and it is further

ORDERED that cause of action for tortious interference with contract shall be pleaded as in the proposed amended complaint; and the cause of action for aiding and abetting breach of fiduciary duty shall be pleaded as in the proposed amended complaint, with the title amended to read: Aiding and Abetting Breach of the Duty of Loyalty; and it is further

ORDERED that the amended complaint shall be served within ten (10) days of the date of entry of this order; and it is further

ORDERED that defendant shall answer or move with respect to the amended complaint within twenty (20) days after service of the complaint.

This constitutes the decision and order of the court.

11/18/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE