UAB, Inc. v Ethos Auto Body, LLC
2021 NY Slip Op 32037(U)
March 29, 2021
Supreme Court, Westchester County
Docket Number: 70850/2018
Judge: Gretchen Walsh

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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UAB, INC. d/b/a ULTIMATE AUTO BODY, INC.,

Plaintiffs,

-against–

ETHOS AUTO BODY, LLC, MATTHEW BEOBIDE, AND DAN ZIMDAHL,

Defendants.

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MATTHEW BEOBIDE,

Plaintiff,

-against-

G&M AUTOMOTIVE ENTERPRISES, INC.,

Defendant.

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Index No. 70850/2018

Mot. Seq. No. 3
Return Date: 1/27/21

DECISION AND ORDER

WALSH, J:

The following e-filed documents, listed in NYSCEF under document numbers 124-128, 132-137 were read on this motion by Defendants Ethos Auto Body, LLC ("Ethos"), Matthew Beobide ("Matthew"), and Dan Zimdahl ("Dan") (collectively "Defendants") made pursuant to CPLR 3211(a)(7) and CPLR 3016(b) to dismiss the Second Amended Complaint ("SAC") filed by Plaintiff UAB, Inc., d/b/a Ultimate Auto Body, Inc. ("UAB" or "Plaintiff"). Upon the foregoing papers, the motion is granted only to the extent that the claim against Ethos for breach of fiduciary duty is dismissed, but in all other respect, the motion is denied as is Plaintiff's request for an award of sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff initiated this action alleging breach of fiduciary duty and unfair competition against Defendants by filing a Summons & Complaint and an Order to Show Cause seeking preliminary injunctive relief on December 18, 2018.[1] The parties entered into a stipulated temporary restraining order thereby obviating the need for the Court to decide the motion. On January 23, 2019, Defendants filed an Answer with Counterclaims. On April 15, 2019, Plaintiff amended its Complaint and on June 7, 2019, Defendants filed their Answer and Counterclaims responding to the First Amended Complaint. The parties requested that the Court hold a settlement conference, and at the conference, an agreement in principle (with the understanding it was not binding until reduced to a writing) was reached whereby Matthew and Dan were going to buy UAB's Bedford Hills location from Gregory Beobide ("Gregory") (UAB's owner). On December 4, 2019, the parties signed a stipulation of discontinuance without prejudice believing that the settlement would be finalized. On November 13, 2020, the Court received a letter from Plaintiff's counsel, which informed the Court that the parties spent a tremendous amount of time and effort in coming to a deal in which Plaintiff would sell UAB's Bedford Hills location to Defendants, but Defendants reneged and, as a result, Plaintiff was seeking to reinstate the action. On December 21, 2020, the Court reinstated the action and held a preliminary conference at which it signed a Preliminary Conference Order setting a trial readiness date of June 16, 2021. With leave of Court, Plaintiff filed the SAC on December 23, 2020 and at a Rule 24 pre-motion conference, Defendants were granted leave to make a motion to dismiss, but were advised discovery would not be stayed pending the resolution of that motion. This motion ensued.

THE SAC'S ALLEGATIONS

The First Cause of Action is against all Defendants for misappropriation of confidential/proprietary/trade secret information. The Second Cause of Action is against all Defendants for unfair competition based on their alleged misappropriation of confidential/proprietary/trade secret information. The Third Cause of Action is against Ethos and Matthew for breach of fiduciary duty. The Fourth Cause of action is against Ethos and Dan for aiding and abetting Matthew's alleged breach of fiduciary duty and his alleged misappropriation of, *inter alia*, Plaintiff's proprietary customer list.

Plaintiff alleges that it has been in the auto body industry since 1977 and in the last forty-one years expended significant time and resources to developing and creating its customer base through marketing strategies (SAC at ¶¶ 33-34). Plaintiff contends that Matthew use to work at UAB, but abandoned his position to open Ethos, a competing auto repair shop, in 2018 (*id.* at ¶ 39). Plaintiff contends that Matthew "fraudulently insinuated that Ethos was 'a new location' for

[1] By stipulation dated January 14, 2021, the parties consolidated this action with a dissolution proceeding (Index No. 59071/2019) brought by Matthew seeking to dissolve G&M Automotive Enterprises, Inc. ("G&M"). Matthew also asserts claims against UAB's owner Gregory based on Gregory's alleged breaches of fiduciary duty and waste of corporate assets in his role as 51% owner and CEO of G&M, a company in which Matthew holds a 49% interest.

[UAB] by posting" online that "I wanted to let everyone know that although I am still a Co-Owner of [UAB], I have decided to open a new location in Bedford Hills on Route 117 …." (*id.*). Plaintiff alleges that Matthew, while employed[2] by Plaintiff, took its customer and employee lists for UAB's Bedford Hills location, where Matthew was Manager, and used the customer list to solicit "hundreds, if not thousands of [UAB's] customers through email blasts telling them to bring their business to his new location" (*id.* at ¶¶ 41-42). In addition, it is alleged that Matthew contacted at least four UAB employees, three of whom left UAB for Ethos (*id.* at ¶¶ 43-44). Matthew also allegedly stole company "photographs, OEM certification plaques, the actual certifications and the equipment required for the certifications, the Company website domain, Yelp, Google and Facebook pages, and the car dealership contacts" (*id.* at ¶ 45). The photographs were originals, commissioned and paid for by UAB for its marketing plan, and were allegedly misappropriated from downloaded of a database owned by Plaintiff (*id.* at ¶ 46). Plaintiff alleges that Matthew contacted Plaintiff's OEM Certification company and "fraudulently misrepresented that Gregory . . . was also an owner of [Ethos] in order to transfer [UAB's]" certifications without additional work or costs, and Matthew physically removed the OEM certification plaques and required certification equipment from UAB prior to leaving its employment (*id.* at ¶ 47). Plaintiff alleges Matthew also "hijacked Plaintiff's website domain" and replaced it with a "ghost website" which did not contain any contact information for UAB (*id.* at ¶ 48). Matthew also allegedly removed Plaintiff's administration access to its Facebook, Google, and Yelp pages (*id.* at ¶ 49).

Plaintiff alleges Dan worked as a manager at G&M[3] in Mount Vernon until 2018 (*id.* at ¶ 51). Plaintiff alleges that Dan "knowingly aided and abetted" Matthew while working at G&M by assisting in the misappropriation of customer lists, employee information, photographs, certifications, and website domains (*id.* at ¶ 53).

Plaintiff contends its customer lists, employee lists, photographs, certifications, and company domains are confidential and proprietary information amounting to trade secrets (*id.* at ¶¶ 64-68). Plaintiff contends that Matthew misappropriated the information when he solicited UAB employees to leave for Ethos, and when he took "proprietary equipment and certification plaques from UAB" (*id.* at ¶¶ 67, 69). Plaintiff alleges Dan aided and abetted the misappropriation, that he knew Matthew owed UAB a duty of good faith and loyalty, and he assisted in the breaches by soliciting customers using email blasts (*id.* at ¶ 68). Plaintiff alleges that it has suffered damages, including lost revenue, lost opportunities, loss of valuable employees, confusion and loss of customer base, and damage to UAB's brand, reputation, and goodwill (*id.* at ¶ 70).

Plaintiff contends that Defendants' misappropriation rose to the level of unfair competition based on the confusion caused to UAB's customer base who were led to believe Ethos was just a new location for UAB, as well as the time and money savings to Defendants since they did not

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[2] According to Plaintiff, while employed by UAB, Matthew was "tasked with the responsibility of marketing [UAB] through personal connections, constructing estimates for incoming jobs, and communicating directly with customers, their insurance companies, car dealerships, and the employees who ultimately fix the cars" (*id.* at ¶ 41).

[3] As discussed *supra*, G&M is a company owned 49% by Matthew and 51% by Gregory.

have to expend resources to (1) "establish their new business through advertising and other marketing tools in order to develop a customer base;" (2) hire and train new employees; and (3) create content for their website and internet pages (*id.* at ¶ 81).

Plaintiff alleges Matthew breached his fiduciary duty by misappropriating the confidential information described above, by acting in secret and with Dan to open a competing auto repair shop using the misappropriated information, and by poaching UAB employees (*id.* at ¶¶ 85-86, 89). Plaintiff contends Dan aided and abetted Matthew by assisting in the misappropriation of confidential information, by redirecting and soliciting clients to Ethos, and by taking part in opening, owning and operating Ethos (*id.* at ¶¶ 90-98).

THE PARTIES' CONTENTIONS

A. Defendants' Contentions in Support

In support of their motion, Defendants submit: (1) an affirmation of Jonathan Nelson Esq. dated December 30, 2020, the purpose of which is to submit a copy of the SAC; and (2) a memorandum of law in support.

In their memorandum of law, Defendants contend that Plaintiff has failed to establish entitlement to injunctive relief because Plaintiff has failed to demonstrate "the restriction 'is no greater than is required for the protection of the legitimate interest of the employer'" and the absence of overreaching (Defs' Mem. at 2-3).

Defendants contend that the First Cause of Action for "misappropriation of confidential or proprietary information or trade secrets" against Ethos and Dan should be dismissed because Dan worked for an entity called G&M (*id.* at 5-6). Defendants argue that since Dan worked for G&M, he could not have had access to, or knowledge of, trade secrets from UAB (*id.* at 6). Defendants argue that Plaintiff "does not explain or particularize how [Ethos] or [Dan] would have access to Plaintiff's information while [Dan] was working at [G&M]" (*id.*). Defendant argues the pleadings "run afoul" of *Goel v Ramachandran* (111 AD3d 783, 792 [2d Dept 2013]), because Plaintiff "alleges the cause of action against [Matthew] and simply combines that with conclusory allegations that [Dan] had knowledge" (*id.*).

Defendants contend the Second Cause of Action for unfair competition based on the alleged misappropriation must be dismissed because Plaintiff fails to specify which Defendant did what in violation of the specificity requirements of a fraud cause of action under CPLR 3016 (*id.* at 7). Defendants argue that Plaintiff makes "blanket and conclusory allegations" about allegedly tortious conduct which it contradicts in the SAC by also alleging that "[Matthew] alone committed the tortious conduct" and "[Dan] aided and abetted" (*id.*).

According to Defendants, the Fourth Cause of Action for aiding and abetting should be dismissed because Plaintiff fails to state its cause of action with specificity (*id.* at 8-9). Defendants argue Plaintiff attempts to confuse and conflate G&M and UAB by making it appear that they are one and the same (*id.*). For example, Defendants point to portions of the SAC which allege that Dan worked for Plaintiff as Manager of G&M, and that Dan misappropriated Plaintiff's customer list and clients while working at G&M (*id.* at 8). Defendants contend Plaintiff fails to specify or

explain how Dan "redirected, solicited, and misappropriated Plaintiff's clients to Ethos" while he worked at G&M (*id.*). Defendants also question how offering to hire Plaintiff's employees is an act of aiding and abetting when a non-solicitation agreement does not exist (*id.* at 8-9). Defendants contend that Plaintiff attempts to allege causes of action against Matthew and then combines them with conclusory allegations that Dan had knowledge to allege aiding and abetting, which is prohibited by *Goel* (111 AD3d at 792).

B. Plaintiff's Contentions in Opposition

In opposition Plaintiff submits: (1) an affidavit in opposition of Gregory Beobide, sworn to January 22, 2021 ("Gregory Opp. Aff."); (2) an affirmation in opposition of Patrick V. DeIorio, Esq. dated January 22, 2021 ("DeIorio Opp. Aff."); and (3) a memorandum of law in opposition.

To begin with, in its opposition, Plaintiff makes clear that it is not seeking injunctive relief and is solely seeking damages (DeIorio Opp. Aff. at ¶ 11). As such, to the extent the SAC could be read as requesting injunctive relief, that claim of relief is dismissed.

In his affidavit, Gregory states he is the owner of UAB, and that he owned G&M (Gregory Opp. Aff. at ¶¶ 1-2). It is Gregory's contention that customer lists are considered trade secrets in the auto body business (*id.* at ¶ 6). Gregory avers that Matthew is his nephew and he worked as Manager of UAB's Bedford Hills location from 2001-2018 (*id.* at ¶ 8). Gregory avers that Dan was G&M's manager from 2014-2018 (*id.* at ¶¶ 9-10). Gregory states that Plaintiff uses Constant Contacts to maintain its customer lists at all UAB locations, including its location in Mount Vernon (*i.e.*, the G&M location), and that Constant Contacts uses cloud storage (*id.* at ¶ 12). According to Gregory, Matthew had access to the Constant Contacts, he gave Dan access by providing him with the user credentials, and that Dan "misappropriated Plaintiff's confidential and proprietary information and was able to send out e-mail blasts and posts on his LinkedIn page directly to Plaintiff's customers" (*id.*). Gregory avers that Plaintiff hired Gil Vaknin Photography in March 2018 to take pictures of the UAB shop and employees to be used in a new UAB website, but Defendants stole them from the "protected computer data base" which housed them (*id.* at ¶ 13). Gregory avers that Matthew and Dan started Ethos on July 9, 2018, and that the duo was "conspiring for the last few years to start a competitive business with the exact same branding, products, services, imaging and customer base as [UAB]" (*id.* at ¶¶ 14-15). It is Gregory's contention that Matthew and Dan left their respective manager roles in October 2018, and that Ethos was up and running within one week of their departure (*id.* at ¶ 16). Gregory further avers that Defendants "pulled many of Plaintiff's customers' cars that were currently being serviced at [UAB's] Bedford Hills location and took them to Ethos" and that they were redirecting UAB customers to Ethos using UAB's social media accounts, which Matthew had administratively "hijacked" (*id.*).

According to Gregory, Defendants downloaded UAB's customer list from Constant Contacts and used it to solicit Plaintiff's customers (*id.* at ¶ 18). The solicitations included an email blast from Matthew with the subject line "Grand Opening Ultimate Autobody, Formally" and an email blast from Dan announcing the opening of Ethos with the subject line "Dan Formerly [UAB] Invites You" (*id.* at ¶ 19). Gregory avers this caused confusion among UAB's clients and he provides an example of what happened with UAB's customer, Tom Ferguson, who received the

emails mentioned, brought his vehicle to Ethos and later contacted Gregory by email inquiring when his car would be ready (*id.* at ¶ 20). Gregory further avers that prior to Matthew leaving UAB, he contacted Aaron Clark, Vice President of Assured Performance Network, which is UAB's OEM certification company, and "fraudulently informed [him] that [Gregory] was also an owner of Ethos, to make a seamless transfer of the certification of [UAB] to Ethos without requiring any additional qualifications, work or costs" (*id.* at ¶ 21). Gregory avers that Matthew also took the OEM certification plaques and equipment from UAB's Bedford Hills shop for his use at Ethos (*id.*). In addition, it is Gregory's contention that Defendants stole UAB's photographs for use in their own advertising, that Defendants reposted them on social media platforms for Ethos, and the pictures were unaltered showing UAB's logo on the employees' clothing (*id.* at ¶ 22). According to Gregory, Matthew used his administrative access to UAB's website, Facebook, Google, and Yelp Pages to: (1) take UAB's website down and replace it with a "ghost website" that did not contain contact or location information; (2) delete UAB's Facebook page; and (3) post his personal phone number to UAB's Google and Yelp pages (*id.* at ¶ 23). This was all allegedly done to trick customers into contacting Ethos instead of UAB (*id.*). Gregory contends Defendants used the misappropriated employee information to solicit employees and offer them jobs at Ethos and that three employees accepted the offers (*id.* at ¶ 24).

In his affidavit, DeIorio claims Defendants' motion to dismiss "consists of false, bald, conclusory assertations … with no facts or documentary evidence to support their claims" (DeIorio Opp. Aff. at ¶ 5). DeIorio repeats Gregory's claim that Defendants misappropriated Plaintiff's customer list, marketing photos, employee information, certifications, company website domain, and Facebook, Yelp and Google pages (*id.* at ¶ 6). In addition, DeIorio argues that Matthew breached his fiduciary duty to Plaintiff, caused Dan to aid and abet Matthew in his breach, and caused unfair competition against Plaintiff (*id.*). DeIorio claims Defendants' bootstrap argument is an attempt to distract the Court from the facts of the case, and Defendants' motion fails to acknowledge the business and personal relationships between the parties (*id.* at ¶¶ 8-9). According to DeIorio, the SAC is pled with specificity but in any event, Defendants are misguided in their argument since Plaintiff did not assert a cause of action of action for fraud or aiding and abetting a fraud. Therefore, CPLR 3016 is inapplicable (*id.* at ¶ 16). DeIorio states that the SAC contains specific details regarding each Defendant's conduct, including how the individual Defendants were able to access Plaintiff's customer list and other proprietary information, and that the SAC annexes exhibits evidencing Defendants' malfeasance[4] (*id.* at ¶ 17).

DeIorio argues that Dan aided and abetted Matthew in breaching his fiduciary duty to Plaintiff (*id.* at ¶ 19). DeIorio claims that Dan's managerial position at G&M put him in close proximity of Plaintiff's proprietary information. It also gave him an opportunity to form a personal and business relationship with Matthew, which led to the pair's conspiring to cause unfair competition against Plaintiff by Matthew giving Dan access to Plaintiff's "Constant Contracts" and computer databases so that they could secretly misappropriate Plaintiff's confidential and

[4] Although the Court does not see exhibits annexed to the SAC (NYSCEF Doc. No. 122), there were numerous exhibits of Defendants' alleged wrongdoing attached to the First Amended Complaint (NYSCEF Doc No. 79-92).

proprietary information (*id.*). Lastly, DeIorio seeks sanctions against Defendants for filing a frivolous motion to dismiss (*id.* at § III).

In its memorandum of law, Plaintiff argues that the SAC's allegations must be accepted as true, and that Defendants' motion must be denied because it fails to attach documentary evidence disproving the SAC's allegations (Plf's Opp. Mem. at 3). In support of its claim that Defendants "misappropriated confidential or proprietary information or trade secrets," Plaintiff contends Defendants illegally downloaded the customer list from Plaintiff's Constant Contact cloud and downloaded original photos of UAB's Bedford Hills shop. Plaintiff asserts that Defendants then used the photos on their own social media platforms without permission, misrepresented Ethos as a new UAB location on LinkedIn, and sent emails to the customers on the customers list announcing the opening of Ethos (*id.* at 7-8). In addition, Plaintiff contends that Defendants misappropriated Plaintiff's confidential employee data to solicit three employees from UAB thereby saving effort, time, and money by not having to train employees (*id.* at 7). Based on the foregoing, Plaintiff maintains that its unfair competition cause of action is sufficiently alleged and should not be dismissed (*id.* a 9). Plaintiff argues Defendants' misappropriation of its customer list, marketing photos, employee information, certifications, website domain, and Facebook, Yelp and Google pages caused unfair competition by generating confusion among Plaintiff's customers causing them to believe Ethos was UAB (*id.* at 10). One such victim of the confusion was Tom Ferguson who "unknowingly brought his damaged vehicle to Ethos" believing it was a UAB location, and then emailed Gregory to inquire when his car would be ready (*id.*). Plaintiff alleges Defendants' misappropriation of proprietary information constitutes unfair competition because Defendants did not have to expend time or money to: (1) establish their new business through advertising and marketing; (2) hire or train new employees; or (3) create content for their website and business webpages (*id.* at 11).

In support of its claim against Matthew for breach of fiduciary duty, Plaintiff contends a fiduciary duty is present because Matthew had a special relationship with Plaintiff (*i.e.*, the family relationship between Matthew and Gregory, his position as manager of UAB's Bedford Hills location, and his 49% ownership interest in G&M) (*id.* at 12-13). Plaintiff alleges Matthew breached his fiduciary duty in six ways: (1) illegally downloading customer lists and employee information from Plaintiff's Constant Contacts; (2) "removing company-owned photographs from [UAB's] computer files and uploading [them] to Ethos website, Facebook page, Google and Yelp domains;" (3) removing the OEM certification plaque and certifications from UAB's Bedford Hills shop for use at Ethos; (4) removing Gregory from administrative control over UAB's website and Facebook page so that Plaintiff could no longer control or access them; (5) "pirating and hijacking Plaintiff's internet search engines, with the intention of redirecting [UAB's] customers to Ethos' website;" and (6) redirecting, solicitating, and misappropriating Plaintiff's clients to Ethos via email blasts "by instructing [UAB's] clients to bring their business to [Matthew's] new location" (*id.* at 13).

Plaintiff argues that Dan aided and abetted Matthew in breaching his fiduciary duty (*id.* at 14). It is Plaintiff's contention that Dan aided and abetted by providing "substantial assistance" in (1) illegally downloading customer lists and employee information from Plaintiff's Constant Contacts; (2) "removing company-owned photographs from [UAB's] computer files and

uploading to Ethos website, Facebook page, Google and Yelp domains;" (3) redirecting, solicitating, and misappropriating Plaintiff's clients to Ethos via e-mail blasts "by instructing [UAB's] clients to bring their business to [Dan's] new location;" and (4) solicitating and hiring Plaintiff's employees and "blatantly admitting in an e-mail blast, 'My staff is unchanged and previously worked with me at my prior location'" (*id.* at 15). Lastly, Plaintiff seeks sanctions and attorneys' fees for what it sees as a frivolous motion (*id.* at 17-18).

C. Defendants' Contentions in Further Support of their Motion

In further support of their motion, Defendants submit a reply memorandum of law. In it, Defendants contend the SAC must be dismissed because it seeks injunctive relief (Defs' Reply at 1). Defendants quote the first sentence of the SAC that "Plaintiff brings this action to **enjoin** Defendants . . . from unlawful activities, which have serious consequences, effect and impact, upon Plaintiff and its customers and members of the public," and claim that Plaintiff failed to oppose and "seemingly joined" Defendants' position in its opposition memorandum (*id.*). Defendants maintain that Dan was not an employee of UAB, but instead of G&M, to which Plaintiff admits (*id.* at 2). Defendants accuse Plaintiff of purposefully conflating UAB and G&M, and Defendants point to various examples in the Gregory affidavit as proof (*id.*). Defendants contend that this conflation renders the SAC "defective as against [Dan]" (*id.* at 3). Defendants also argue Plaintiff failed to identify the specific actions that either Ethos or Dan took in their "aiding and abetting," instead attempting to avoid doing so by blanketly referring to them both as Defendants (*id.*). In addition, Defendants argue there are no allegations as to how Ethos allegedly misappropriated anything, thus the First and Second Causes of Action against Ethos and Dan must be dismissed (*id.* at 5). Finally, Defendants assert that Plaintiff's request for sanctions is without merit and should be denied (*id.*).

DISCUSSION

A. Standard of Review

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action *(Cooper v 620 Props. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper*, 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152, *quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 W. 232nd Owners Corp.*, 98 NY2d 144).

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v*

Martinez, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]).

Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello*, 40 NY2d 633; *Pace v Perk*, 81 AD2d 444, 449-50 [2d Dept 1981]; *see Kempf*, 37 AD3d 763; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

B. Plaintiff's Claim of Misappropriation of Trade Secrets Against all Defendants

To state a claim for misappropriation of a trade secret, a plaintiff must allege "(i) that it possessed a trade secret and (ii) that the defendant used that trade secret in breach of an agreement, a confidential relationship, or duty, or as a result of discovery by improper means" (*Hudson Hotels Corp. v Choice Hotels Intl.*, 995 F2d 1173, 1176 [2d Cir 1993]).

The Restatement (Second) of Torts § 757(d) defines a trade secret as "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" (Restatement [Second] of Torts § 757[d]; *see also Ashland Mgt. Inc. v Janien*, 82 NY2d 395 [1993]). The Restatement sets forth the factors to be considered in determining whether something is a trade secret as:

> (1) the extent to which it 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 (Restatement [Second] of Torts § 757[d]).

However "mere 'knowledge of the intricacies of a business operation does not qualify'" (*Silipos, Inc. v Bickel*, 2006 WL 2265055 at *3-4 [SD NY 2006]) and courts have held that marketing or other financial information, market strategies, technical know-how, and pricing arrangements and price margins are not trade secrets (*see, e.g. Silipos,* 2006 WL 2265055*; Marietta Corp. v Fairhurst*, 301 AD2d 734, 739 [3d Dept 2003]). With regard to customer information, customer identities that are readily ascertainable from nonconfidential sources are not

trade secrets as long as there is no evidence that the employee copied or memorized customer information from confidential sources (*Apa Sec., Inc. v Apa*, 37 AD3d 502, 502 [2d Dept 2007]; *Samuel-Rozenbaum USA, Inc. v Felcher*, 292 AD2d 214 [1st Dept 2002]; *Starlight Limousine Serv., Inc. v Cucinella*, 275 AD2d 704 [2d Dept 2000]). The qualification of a customer list as a trade secret is dependent upon whether the names and addresses of the customers are unknown in the trade or can be obtained only through extraordinary effort such as where the customers' patronage has been secured through years of effort and advertising involving a substantial expenditure of time and money (*Stanley Tulchin Assoc., Inc. v Vignola*, 186 AD2d 183 [2d Dept 1992]). In *Eastern Bus. Sys., Inc. v Specialty Bus. Solutions, LLC* (292 AD2d 336 [2d Dept 2002]), the Appellate Division, Second Department found the customer list at issue, which included clients and potential client names, addresses, contact names, machines possessed by the clients and lease terms to be a trade secret because plaintiff presented evidence that "the information ... was not available to the public, was available to limited personnel inside [Plaintiff], was highly valuable to Eastern and its competitors, and that considerable effort and money was expended in obtaining the information" (*Eastern Bus. Sys., Inc.*, 292 AD2d at 338; *see also McLaughlin, Piven, Vogel v W.J. Nolan & Co.*, 114 AD2d 165 [2d Dept 1986], *lv denied* 67 NY2d 606 [1986]). In *Marcone APW, LLC v Servall Co.* (85 AD3d 1693 [4th Dept 2011]), the Appellate Division Fourth Department affirmed the grant of a preliminary injunction finding the documents misappropriated were not merely customer names and contact information, but included customer-specific pricing information, credit terms and limits, and the customers' rankings based on margin performance and that the information was compiled through considerable effort and expense and therefore, were either protectable as trade secret or proprietary information that was wrongfully misappropriated.

In *Laro Maint. Corp. v Culkin* (267 AD2d 431, 432 [2d Dept 1999]), two former employees were found to have solicited plaintiffs' customers while still employed by Plaintiff and improperly used plaintiff's trade secrets in such solicitation (confidential pricing information for customers based on costs of labor, equipment, supplies and risk factors which information plaintiff restricted its employees access). The Appellate Division, Second Department, held the trial court properly found that plaintiff had established its unfair competition claim and its breach of fiduciary duty claim because the employees did not dispute that their access to this information would permit them to undercut plaintiff's bids on private contracts. Moreover, the Court found the evidence established that defendants exploited this confidential information to obtain contracts from plaintiff's customers. According to the Appellate Division, defendants, while employed by plaintiff, were required to exercise good faith and loyalty in performance of their duties which duty was breached when they used proprietary information to build a competing business (*id.* at 433; *see also Ingenuit, Ltd. v Harriff*, 33 AD3d 589 [2d Dept 2006] [plaintiff established likelihood of success and properly granted preliminary injunction based on breach of restrictive covenant not to solicit employees for one year following termination and based on plaintiff's claim of unfair competition and misappropriation of trade secrets; defendants' irreparable injury established based on misappropriation of trade secrets]).

There is currently no denial of the material allegations of the SAC. In addition, Defendants have not attempted to explain away the evidence submitted by Plaintiff in connection with its original motion for preliminary injunctive relief and its First Amended Complaint. Instead, Defendants rely on their argument that Dan could not have possibly misappropriated anything

because he worked at G&M. However, what Defendants fail to acknowledge is that G&M was owned by Gregory and Matthew jointly, and kept, at a minimum, its customer list in Constant Contacts with UAB's. Nor do Defendants deny that Dan utilized the customer lists to send emails to UAB and G&M customers soliciting them to bring their busines to Ethos. Furthermore, Defendants reliance on *Goel*, is misplaced. In *Goel*, the Second Department found the facts pled were insufficient to permit a reasonable inference of the defendant's knowledge or assistance in the scheme (*Goel*, 111 AD3d at 792-93). However, "[t]he heightened pleading requirements of CPLR 3016(b) may be met when the material facts alleged in the complaint, *in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct'* including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*id., quoting Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). Given the allegations in the SAC and the Gregory Affidavit, the Court finds a reasonable inference of Dan's participation in the misappropriation can be reached. Dan is alleged to have worked with Matthew, a 49% owner of G&M, to misappropriate, *inter alia*, customer lists. In pursuit of this, Matthew allegedly provided Dan with the login credentials for UAB's Constant Contacts, which not only housed UAB's customer information, but G&M's as well. Defendants then took this information and sent emails to UAB and G&M customers soliciting them to come to Ethos.

In addition, in order to establish that customer information is a legitimate interest worthy of protection, the employer must establish that "the information is not known in the trade and is only discoverable through extraordinary efforts" (*Silipos,* 2006 WL 2265055 at *5, *citing Battenkill Veterinary Equine P.C. v Cangelosi*, 1 AD3d 856 [3d Dept 2003]). Here, Plaintiff has satisfied this requirement by alleging it is kept in a secure cloud server using Constant Contacts, and that only Gregory and Matthew had access to the customer information prior to Matthew sharing the credentials with Dan.

Based on the foregoing, Plaintiff has sufficiently alleged a claim for misappropriation of trade secrets against Dan. In addition, given that Matthew and Dan are alleged to have engaged in the misappropriations while they were officers of their already formed corporation and given the fact that this misappropriated information was allegedly used by Ethos, Plaintiff has sufficiently alleged a claim of misappropriation of trade secrets against Ethos as well (*Marcone,* 85 AD3d 1693).

C. Plaintiff's Claim of Unfair Competition Against All Defendants

"The central principle underlying a claim for unfair competition under New York law is that one may not misappropriate the results of the labor, skill and expenditures of another ... An unfair competition claim must also involve some degree of bad faith ... This 'adaptable and capacious tort' proscribes all forms of commercial immorality, the confines of which are marked only by the 'conscience, justice and equity of common-law judges'" (*LinkCo, Inc. v Fujitsu, Ltd.*, 230 F Supp 2d 492, 500-01 [SD NY 2002], *quoting Demetriades v Kaufmann*, 698 F Supp 521, 525 [SD NY 1988]; *see also Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 568 [1959], *quoting Ronson Art Metal Works, Inc. v Gibson Lighter Mfg. Co.*, 3 AD2d 227, 230-31 [1st Dept 1957] ["'Unfair competition is a form of unlawful business injury .... The incalculable variety of illegal commercial practices denominated as unfair competition is proportionate to the unlimited

ingenuity that overreaching entrepreneurs and trade pirates put to use'"]). "A claim of unfair competition based on misappropriation generally involves the taking of a property right ... New York courts have found that persons have a protectable property interest in their 'labor, skill, expenditure, name and reputation ....'" (*LinkCo, Inc.*, 230 F Supp 2d at 501).

"A claim of unfair competition based on misappropriation generally involves the taking of a property right ... New York courts have found that persons have a protectable property interest in their 'labor, skill, expenditure, name and reputation ....'" (*id.*). Moreover, a claim for unfair competition can even involve the taking of information that does not rise to the level of misappropriation of trade secrets or ideas (*id.*, *citing Robotic Vision Sys., Inc. v General Scanning, Inc.*, 1997 WL 1068696 [ED NY 1997]; *Demetriades*, 698 F Supp 521; *Continental Dynamics Corp. v Kanter*, 64 AD2d 975 [2d Dept 1978]).

Here, Plaintiff's "claim is based upon the alleged bad faith misappropriation of a commercial advantage belonging to another 'by exploitation of proprietary information or trade secrets" (*Beverage Marketing USA, Inc. v South Beach Beverage Co.*, 20 AD3d 439, 440 [2d Dept 2005], *quoting Eagle Comtronics v Pico Prod.*, 256 AD2d 1202, 1203 [4th Dept 1998], *lv denied* 688 NYS2d 372 [4th Dept 1999]). Assuming the allegations of the SAC and the facts asserted in the Gregory Affidavit to be true, as this Court must do for purposes of resolving this motion, Dan and Ethos' unlawful assistance in taking Plaintiff's customer list and soliciting those customers alone states a viable claim of unfair competition.[5] Indeed, such solicitation of Plaintiff's clients through the proprietary information allegedly misappropriated from Plaintiff, while under a fiduciary duty to remain loyal to Plaintiff, is exactly the type of behavior for which a claim of unfair competition is thought to redress (*Leo Silfen, Inc. v Cream*, 29 NY2d 387 [1972]; *Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183 [2d Dept 1992]; *Advanced Magnification Instruments of Oneonta v Minuteman Opt. Corp.*, 135 AD2d 889 [3d Dept 1987]; *Continental Dynamics Corp*, 64 AD2d 975; *Ecolab, Inc. v Paolo*, 753 F Supp 1100, 1111 [ED NY 1991]). Accordingly, the branch of the Defendants' motion which seeks to dismiss the claim of unfair competition shall be denied (*Louis Capital Mkts., L.P. v Refco Group, Ltd.*, 9 Misc 3d 283 [Sup Ct, NY County 2005]).

D. Plaintiff's Claims for Breach of Fiduciary Duty and Aiding and Abetting a Breach of Fiduciary Duty

Plaintiff's Third Cause of Action is against Ethos and Matthew for breach of fiduciary duty and its Fourth Cause of action is against Ethos and Dan for aiding and abetting Matthew's alleged breach of fiduciary duty and his alleged misappropriation of Plaintiff's proprietary customer list.

Under New York law, to establish a claim for breach of fiduciary duty, a party must show "'(1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss'" (*Walnut Hous. Assoc. 2003 L.P. v MCAP*

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[5] There are other allegations in the SAC and in the Gregory Affidavit which support Plaintiff's cause of action for unfair competition, including that Matthew and Dan worked on company time to create and start Ethos; that they used employee information to solicit UAB employees to work for them; and that Matthew and Dan took UAB commissioned photographs for their own use at Ethos.

Walnut Hous. LLC, 2018 NY Slip Op 30544[U] [Sup Ct, NY County 2018], *quoting People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]; *Fitzpatrick House III LLC v Neighborhood Youth & Family Serv.*, 55 AD3d 664 [2d Dept 2008]). To sufficiently allege a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship; (2) breach of that relationship; (3) knowing participation and substantial assistance in the breach by a defendant who is not a fiduciary; and (4) damages proximately caused by the breach (*Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461 [1st Dept 2007]; *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]; *Samuel M. Feinberg Testamentary Trust v Carter*, 652 F Supp 1066, 1082 [SD NY 1987]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]; *Gupta v Rubin*, 2001 WL 59237 at * 7 [SD NY 2001]). "One who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider/abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" (*Caprer v Nussbaum*, 36 AD3d 176, 193 [2d 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'" (*Sandford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210 [2d Dept 2011] [citations omitted]; *Kaufman*, 307 AD2d at 126). It is well settled that "'[s]ubstantial assistance' requires an affirmative act on the defendant's part; 'mere inaction' can constitute substantial assistance 'only if the defendant owes a fiduciary duty directly to the plaintiff'" (*Baron v Galasso*, 83 AD3d 626, 629 [2d Dept 2011], *quoting Kaufman*, 307 AD2d at 126).

"'New York law establishes that the employee-employer relationship is fiduciary'" (*Fairfield Fin. Mtg. Group, Inc. v Luca*, 584 F Supp 2d 479 [ED NY 2008]). An employee breaches his fiduciary duty to his employer where the employee creates a competing business while still employed if the employee uses the employer's time, facilities or the employer's confidential or proprietary secrets (*Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 [1977]; *Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277 [1st Dept 2004]; *Maritime Fish Prod., Inc. v Worldwide Fish Prod., Inc.*, 100 AD2d 81 [1st Dept 1984], *lv dismissed* 63 NY2d 275 [1984]). An employer has "a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment" *(Aon Risk Servs., N.E. v Cusack*, 2011 NY Slip Op 52433[U], 34 Misc 3d 1205[A] [Sup Ct, NY County 2011]; *BDO Seidman v Hirshberg*, 93 NY2d 382, 392 [1999]). Further, "[w]here it has been established that an employee breached his fiduciary duty by making improper use of the employer's time, facilities or proprietary secrets to create a competing business, 'third parties who have knowingly participated in the breach may be held accountable'" (*Berman v Sugo, LLC*, 580 F Supp 2d 191, 205 [SD NY 2008], *quoting Schneider Leasing Plus, Inc. v Stallone*, 172 AD2d 739, 741 [2d Dept 1991] [emphasis added]).

As recognized by the court in *Maritime Fish Prod., Inc.*, "[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. Not only must the employee or agent account to his principal for secret profits but he also forfeits his right to compensation for services rendered by him if he proves disloyal" (*Maritime Fish Prod., Inc.*, 100 AD2d at 88). In

Maritime Fish Prod., Inc., the employee, while still employed with the employer, set up a competing business and diverted customers (and prospective customers) from the employer's business to the defendant's competing business. The employee was found to have breached his fiduciary duty since the employee had an obligation at all times to act in his employer's best interests and was required to account to plaintiff for the business so diverted.

Based on the foregoing pleading requirements, and based on the sufficiency of Plaintiff's claims of misappropriation of trade secrets and unfair competition, Plaintiff has adequately alleged a cause of action for breach of fiduciary duty against Matthew, but not Ethos since there is no allegation that Ethos had a fiduciary relationship to Plaintiff. Accordingly, the branch of the motion which seeks dismissal of the Third Cause of Action as against Ethos shall be granted. In addition, Plaintiff has adequately alleged that a cause of action for aiding and abetting a breach of fiduciary duty against Dan and Ethos (*see Aranki v Goldman & Assoc., LLP*, 34 AD3d 510 [2d Dept 2006]; *Louis Capital Mkts.*, 9 Misc 3d 283). Dan is alleged to have been given access to Constant Contacts to aid in the taking of customer lists. He also allegedly worked during company hours to create Ethos, and sent out emails utilizing the stolen customer lists in order to solicitate UAB and G&M customers to move their business to Ethos. Accordingly, the branch of Defendants motion seeking to dismiss the aiding and abetting cause of action shall be denied.

E. Plaintiff's Request for Sanctions Shall Be Denied

The Plaintiff seeks sanctions under 22 NYCRR 130-1.1. Pursuant to 22 NYCRR § 130-1.1, the court may choose to impose financial sanctions upon any party or attorney who engages in "frivolous" conduct. Conduct is deemed to be "frivolous" if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (*Curet v DeKalb Realty, LLC*, 127 AD3d 916 [2d Dept 2015]). Moreover, frivolous conduct exists where "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*Freidman v Yakov*, 138 AD3d 554 [1st Dept 2016]; *Caplan v Tofel*, 65 AD3d 1180 [2d Dept 2009]). Conduct that "asserts material factual statements that are false" is frivolous (22 NYCRR § 130-1.1[c][3]; *see In re Kover*, 134 AD3d 64 [1st Dept 2015]).

When assessing whether certain conduct was frivolous, courts may examine the circumstances behind the conduct, "including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR § 130-1.1[c][3]). "'[T]he decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, is generally entrusted to the court's sound discretion'" (*Congregation Ahavas Moische, Inc. v Katzoff*, 134 AD3d 934 [2d Dept 2015], *quoting Coccia v Liotti*, 129 AD3d 763 [2d Dept 2015], *lv denied* 26 NY3d 1096 [2016]). However, the court may only impose sanctions after the penalized party has had a reasonable opportunity to be heard (22 NYCRR § 130-1.1[d]; *Oppedisano v Oppedisano*, 138 AD3d 1080 [2d Dept 2016]).

The Court does not view Defendants' motion to dismiss as constituting "frivolous" conduct within the meaning of 22 NYCRR § 130-1.1 (*see Notaro v Performance Team*, 161 AD3d 1092

[2d Dept 2018]; *Rabinowitz v Gottlieb*, 167 AD3d 410 [1st Dept 2018] *lv dismissed* 33 NY3d 944 [2019]; *Behrins v. Campanella*, 138 AD3d 656, 656 [2d Dept 2016]; *Wu v Xu*, 137 AD3d 1016, 1016 [2d Dept 2016]). Although all but one part of Defendants' claims proved to be pleaded sufficiently, the Court shall decline to exercise its discretion to impose any sanction.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Defendants Ethos Auto Body, LLC, Matthew Beobide, and Dan Zimdahl for an Order dismissing the Second Amended Complaint is granted in part and denied in part; and it is further

ORDERED that the branch of the motion seeking to dismiss the Third Cause of Action as against Ethos Auto Body, LLC is granted, but in all other respects, Defendants' motion is denied; and it is further

ORDERED that Plaintiff's request for sanctions under 22 NYCRR § 130-1.1 is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 29, 2021

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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