Columbia Tech. Corp. v Yoo
2022 NY Slip Op 30226(U)
January 22, 2022
Supreme Court, New York County
Docket Number: Index No. 653273/2013
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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COLUMBIA TECHNOLOGY CORPORATION,

Plaintiff,

- v -

JOHN YOO, UNITED TECH CORP. D/B/A JYOOSEARCH.COM, J-SEARCH, EJR SEARCH PARTNERS, ERIC ROSS, JACK ROTH, EVAN HECHT, EVAN GARY CAPITAL INC. D/B/A QUANTITATIVE SYSTEMS, ERIC SULTZER, JOHN DOE DEFENDANTS 1-100

Defendants.

INDEX NO. 653273/2013

MOTION DATE 01/09/2020, 12/27/2019, 01/09/2020

MOTION SEQ. NO. 007 008 009

DECISION + ORDER ON MOTION

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HON. MELISSA CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 272, 276, 277, 282, 283, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 278, 279, 284, 285, 288, 300, 304

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 264, 265, 266, 267, 268, 269, 270, 271, 280, 281, 286, 287, 299, 301

were read on this motion to/for SUMMARY JUDGMENT.

Introduction

In this case, plaintiff Columbia Technology Corporation ("CTC"), an IT recruiting and staffing firm, alleges that defendant John Yoo ("Yoo"), its former employee, violated his duty of loyalty by taking CTC candidates and covertly forwarding their information to defendants Eric Ross ("Ross"), Jack Roth ("Roth"), their company EJR Search Partners ("EJR"), Evan Hecht ("Hecht"), Evan Gary Capital, Inc., d/b/a Quantitative Systems ("Quantitative"), and Eric Sultzer ("Sultzer"). CTC alleges that defendants would place those candidates with their own clients,

costing CTC tens of thousands of dollars in commissions in every instance. CTC further alleges that defendants improperly obtained and used information regarding CTC's clients and hundreds of candidates that was proprietary to CTC and that CTC had spent had spent years identifying, gathering, culling, and documenting. CTC alleges that defendants did this to gain an advantage over CTC, steal CTC's business, and increase their own profits at CTC's expense.

The court consolidates Motion Seq. Nos. (MSQ #) 007, 008, and 009 for disposition. In MSQ #007, defendants Ross, Roth, and EJR (collectively, the "EJR defendants" or "EJR") move, pursuant to CPLR 3212, for summary judgment dismissing the third amended complaint as against them. In MSQ #008, defendants Hecht and Quantitative (together, the "Hecht defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the third amended complaint as against them. In MSQ #009, defendant Sultzer moves, pursuant to CPLR 3212, for summary judgment dismissing the third amended complaint as against him.

Facts and Background

The IT Staffing Industry

CTC is an IT recruiting and staffing firm targeting the financial sector (Joint Statement of Undisputed Material Facts [JSMF] [NYSEF Doc No. 233], ¶ 1). In 2010, CTC had written agreements with about 10 to 12 financial firms, including J.P. Morgan, Goldman Sachs, Barclays Capital, Societe Generale, Deutsche Bank, UBS, BNP Paribas, and Citigroup, that enabled it to submit applicants to certain open positions (*id.*). David Vitiello ("Vitiello") is CTC's president (*id.*).

Roth and Ross work together as recruiters at EJR, an IT staffing firm, and specialize in placing IT candidates. EJR focuses on placing candidates with financial firms, including J.P. Morgan Chase, Morgan Stanley, and UBS (*id.*, ¶ 3).

The IT staffing industry is highly competitive, with many recruiters competing to place candidates in available positions (*id*., ¶ 5). As such, at times, recruiters at a firm may contact candidates with whom they have previously communicated while at the firm (*id*., ¶ 6).

CTC's Business

From 2010 to 2013, CTC was a vendor for, and had written agreements with, approximately 10 to 12 financial firms. This allowed CTC to supply information about potential candidates for certain open positions at those financial firms (*id*., ¶ 7). However, CTC was not the only staffing firm permitted to supply those financial firms with information concerning candidates (*id*., ¶ 8). Many recruiters competed for limited available placements resulting in an extremely competitive environment (*id*., ¶ 9; *see also* Roth aff [NYSCEF Doc No. 229], ¶¶ 9-10).

Between 2009 and 2010, CTC increased from 6 to 27 employees, including recruiters and "sourcers," whom Vitiello referred to as "junior recruiters" (*id*., ¶ 10, citing Vitiello dep [NYSCEF Doc No. 255], at 11-12; 14). According to Vitiello, sourcers "find candidates" and "aid the recruiters" by "look[ing] through the [CTC] database" for "appropriate candidates" (*id*., citing Vitiello dep at 14-15). To find candidates, CTC recruiters or sourcers would search the internet, including websites such as Monster.com or Dice.com, or within CTC's own database (*id*., ¶ 11).

CTC did not have agreements with candidates to work only with CTC (*id*., ¶ 12). That a candidate appeared in CTC's database did not restrict the candidate from seeking employment through other recruiters, but candidates could choose to work exclusively with CTC (*id*.).

In 2009 and 2010, CTC used software called "MaxHire" to store and search candidate information and résumés it accumulated from various sources (*id*., ¶ 13). The system was password protected (*id*.). At his deposition, Vitiello estimated that CTC's database contained over

10,000 candidates (*id*., citing Vitiello dep, at 254). CTC recruiters received a salary or were on a combined salary and commission basis (*id*., ¶ 14).

Yoo and Sultzer's Employment at CTC

Yoo began working in recruiting in or about 2003, when Open Systems Technologies ("OST") hired him (*id*., ¶ 18). At OST, Yoo also met Sultzer, Roth, Ross, and Hecht (*id*., ¶¶ 16, 18). Yoo worked at OST for approximately five years, until 2007 or 2008, and later worked at Solomon Page for approximately one year (*id*., ¶ 19).

Sultzer has worked as a technology recruiter for more than 27 years (*id*., ¶ 15). For approximately eight months, beginning in October 2009, Sultzer worked at CTC and was in charge of the job requirements for the Barclay's Capital account (*id*., ¶ 16). He recruited Yoo, whom CTC hired in January 2010 (Sultzer dep [attached to the Diana Sterk aff, NYSCEF Doc No. 283, as exhibit 82], at 49). Yoo and Sultzer worked together on a "day-to-day basis" to place CTC candidates (*id*. at 57-58). Sultzer left CTC in June 2010 and started his own technology recruiting business, ESultzer & Associates (JSMF, ¶ 17).

In January 2010, Yoo began working at CTC (*id*., ¶ 19). By employment letter dated January 4, 2010 (NYSCEF Doc No. 212), CTC hired Yoo as a recruiter, with a "salary" that was a "draw against commissions" of $80,000 per year (*id*., ¶ 20).

Yoo's and Sultzer's Duty of Loyalty Agreements

Duty of loyalty or confidentiality agreements are common in the recruiting industry (Vitiello aff [NYSCEF Doc No. 276], ¶ 28; Vitiello dep at 37). All CTC employees, including Yoo and Sultzer, were required to sign a Duty of Loyalty Agreement ("Loyalty Agreement") as a condition of employment and a prerequisite to accessing CTC's database and systems (Vitiello aff, ¶¶ 15, 17, 31; JSMF ¶ 21). When Yoo was hired, Sultzer told Yoo to call "if [he] [had] any

questions" about the agreements (*see* 12/24/2009 email from Sultzer to Yoo with subject line "John Yoo Offer Letter" [Sterk aff, exhibit 4]). The Loyalty Agreement required employees to "keep confidential all Confidential Information" and prohibited them from taking "any Confidential Information with him/her upon leaving the employ of CTC" (Loyalty Agreement [NYSCEF Doc No. 213], ¶¶ 3 [b], 3 [b] [1]). "Confidential Information" was defined as:

> "all nonpublic and/or proprietary information and trade secrets respecting the business of CTC, including, without limitation, its products, programs, projects . . . business operations, employees, research and development, intellectual property, software, databases . . . regardless of whether such information has been reduced to documentary form. Confidential information also includes information concerning CTC's clients, such as their identity, address and other information kept by CTC" (*id*., ¶ 1).

CTC regarded all its candidate information to be confidential information under the Loyalty Agreement (Vitiello aff, ¶ 27).

The Loyalty Agreement also required that the employee "will not directly or indirectly, as a director, officer, employee . . . perform any acts intended to advance, reasonably likely to advance or having the effect of advancing the interest of any person or entity in any way that will or may injure CTC" during their employment and for twelve months after their employment ceased, (Loyalty Agreement [NYSCEF Doc No. 213], ¶ 4). The Loyalty Agreement also prohibited employees from "solicit[ing] or call[ing] upon any candidate or potential candidate that the Employee placed or attempted to place on behalf of CTC" for twelve months (*id*., ¶ 5).

Yoo read and signed the Loyalty Agreement (JSMF, ¶ 22). Sultzer also signed a Duty of Loyalty Agreement when working at CTC (*id*.; *see* signed Sultzer Duty of Loyal Agreement [Sterk aff, exhibit 7]). Yoo worked at CTC for a total of approximately nine months (*id*., ¶ 24).

The Alleged Confidentiality of CTC's Candidate and Client Information

Vitiello alleges that CTC has achieved success through its development of a proprietary database of highly skilled IT professionals and its parallel development of close relationships with financial services institutions that seek those IT professionals (Vitiello aff, ¶¶ 4-6). According to Vitiello, CTC's proprietary and highly confidential candidate database was developed over years by expending countless hours and significant resources devoted to identifying candidates with requisite educational qualifications and experience. CTC would contact candidates individually, interview them, and develop their experiential profile. All these factors were incorporated in the database (*id*., ¶ 8). Vitiello further alleges that CTC's database contains non-public information, including contact details, résumés, compensation and expectations, CTC communications, location preferences, immigration status, placement and interview history, and reasons for seeking placement. CTC depended on this database to serve its clients (*id*., ¶ 7).

Although some information in CTC's database derived from online sources, such as LinkedIn, Monster, or Dice (JSMF, ¶ 11), Vitiello asserts that these sources represented a small fraction of CTC's candidate information (Vitiello dep at 16-17; 400-401). Instead, CTC acquired the vast majority of its candidates and their information from various non-public sources, including referrals, live discussions, in-person interviews, or meetings (Vitiello aff, ¶ 9). CTC sought "passive candidates" who were already employed and may not be looking for a new job or posting résumés, but whom CTC could convince should be open to new employment opportunities (*id*., ¶ 15). Yoo agreed that passive candidates were desirable (*see* 7/21/10 email between Yoo, Roth, and Ross with subject line "resumes" [Sterk aff, exhibit 8] [Yoo looking for "passive candidates"]).

According to Vitiello, although websites such as LinkedIn are ubiquitous today, it was not nearly as common for candidates to post their résumés publicly or place contact information online in 2010 (Vitiello aff, ¶ 12). For example, if a person publicly posted a résumé on Dice or Monster,

their current boss could learn that their employee was looking for another job. This was not typically a result that CTC's candidates wanted (*id*., ¶ 13). Vitiello alleges that most people did not, and still do not, post their full experiential résumés on LinkedIn. Therefore, personal contact and trust is required to obtain full résumés, even if the person's name is found online (*id*., ¶ 14).

Vitiello further alleges that CTC found that many individuals who posted résumés online were not qualified for the types of jobs that CTC placed candidates in (*id*., ¶ 13). Clients were looking for their recruiters to find candidates who were not simply gathered from the internet (*see* 12/20/11 email between Yoo and Jack Levin with subject line "barcap" [Sterk aff, exhibit 9] [Barclays in-house recruiter saying, "Please don't just pull a resume off of the internet"]).

To maintain CTC's information's confidentiality, the database was password protected and only accessible via CTC office computers (Vitiello aff, ¶ 20). CTC did not allow employees to access CTC documents from external computers or use personal email accounts for work purposes (*id*.). According to Vitiello, CTC's client information was also considered confidential because its clients, client contracts, points of contact at the clients, and job openings the clients reported were valuable, non-public information (*id*., ¶ 21). CTC did not store this client information in its MaxHire database, or any other CTC database (*id*., ¶ 22).

EJR's Communications with Yoo

In 2010, EJR had no business communications with Yoo until late June or July, when Yoo requested a meeting. In the meeting, or shortly thereafter, Yoo told Roth that he felt CTC mistreated him. CTC was not paying Yoo what he believed he was entitled to, and he intended to leave CTC to form his own company. He wanted to work with EJR as an independent recruiter and split commissions on joint placements (Roth aff, ¶ 16; Yoo dep [NYSCEF Doc No. 226], at 19-20). Yoo intended to remain at CTC only until he received his earned commissions at the end

of the third quarter (Yoo dep, at 29-30; 60-61). In 2010, while Yoo was still at CTC, and within months of him starting his position, Yoo and Roth agreed to split recruiting commissions on candidates Yoo brought to Roth to place (Roth aff, ¶ 17; Ross dep [Sterk aff, exhibit 80], at 35-36, 37). Though mid-2013, Yoo sent candidate résumés to, and communicated with, EJR about placing candidates (JSMF, ¶ 23; Roth aff, ¶¶ 17-18). When they made the agreement, Roth knew that Yoo was a CTC employee (Roth dep [Sterk aff, exhibit 81], at 40, 43-44; Roth aff, ¶¶ 16-17). Sultzer and Hecht made similar deals with Yoo as Yoo provided them with CTC information (Sultzer dep at 102-105).

EJR went forward with this agreement to "make some money" (*see* 10/12/10 email chain produced between Yoo, Roth, and Ross with subject line "good stuff in here" [Sterk aff, exhibit 10]). While still at CTC, Yoo responded to EJR's requests with information concerning CTC candidates, firms CTC was sending candidates to and those candidates' names, information about CTC's status on firm vendor lists, and other CTC business information (*see* 7/29/10 email between Yoo, Roth, and Ross with subject line "Java C++ guys" [Sterk aff, exhibit 12] [sending CTC candidate Krishna Mukherjee], various emails from Yoo [Sterk aff, exhibits 40-42] [sending CTC candidates], 10/12/10 email chain [Ross telling Yoo that there is "good stuff in here" in response to email from Yoo]; Roth aff, ¶¶ 16-19; Yoo dep, at 52-53).

For multiple candidates, such as Ke Pan and Essien Dario LeRoy, Yoo sent information directly to EJR without adding it to CTC's database or working with the candidate on CTC's behalf (*see* 10/26/10 email chain between Yoo and Ross with subject line "Fwd: Ke Pan C++ [Sterk aff, exhibit 70] [Yoo told Pan he would send his résumé to CTC, but instead sent his information to EJR]; 8/11/10 email between Yoo, Roth, and Ross with subject line "ESSIEN DARIO LEROY FIX SUPPORT – citigroup" [Sterk aff, exhibit 71] [Yoo sent LeRoy's information to EJR, despite

LeRoy being open to placement with CTC clients]). For other candidates, such as Douglas Young, Yoo suggested potential placements outside CTC's client list to EJR (*see* 7/28/10 email chain between Yoo, Ross, and Roth with subject line "Doug Young C# FIX in CT" [Sterk aff, exhibit 11] [telling EJR he had sent Young's information to UBS, a CTC client, but that EJR should send him to "ab, bwater & SAC," companies CTC did "not work with"]).

CTC's Discovery of Yoo's Diversion of CTC Information to EJR

Vitiello alleges that CTC had no knowledge of Yoo and EJR's communications or agreement (Vitiello aff, ¶ 35). However, in August or September 2010, CTC noticed some of its candidates failing to show up for scheduled interviews without informing CTC (including candidates who had been in the process of finalizing resignation letters or conducting other late-stage activity), or suddenly ceasing communications with CTC (*id*., ¶ 33). CTC became concerned that an employee might be sabotaging CTC's relationships, and installed surveillance software on company computers, including Yoo's (*id*., ¶ 34). The surveillance software, E-Blaster, provided CTC with reports regarding communications on CTC computers (JSMF, ¶ 25). The software only tracked communications during the period of installation (Vitiello aff, ¶ 35). As a result, CTC received reports for three days (*id*.).

The September 20, 2010 report (Sterk aff, exhibit 15) showed Yoo communicating with Ross and Roth of EJR using his personal email chat function (*see id.*, *see also* JSMF, ¶ 25). The communications discussed the potential placement of CTC candidates by Yoo and EJR (*see id*.). For example, Yoo discussed Lisa Gold and Jagan Kanu, who were candidates in CTC's database (*see* 7/26/10 email between Yoo, Roth, and Ross with subject line "Some QA and PM" [Sterk aff, exhibit 72] [Yoo sent Kanu's information to EJR because other CTC recruiters were working with

him]). The software did not show any communications between Yoo and Hecht on that one day (JSMF, ¶ 25).

After reviewing these communications, CTC terminated Yoo's employment the next day, September 21, 2010 (*id*., ¶ 26). Vitiello concluded that Yoo was committing fraud against CTC by "stealing [CTC's] candidates, other people's deals, other recruiter's candidates and sending them to Jack Roth and Eric Ross, a competitor of ours" (JSMF, ¶ 27, citing Vitiello dep at 137). CTC's "main concern" when it first saw the E-Blaster results was that Yoo and EJR were "tampering with [its] ongoing deals," and that information from its records was being provided to competitors (*id*., ¶ 28). According to Vitiello, Yoo's actions "diminished the chances of [CTC] collecting money for those people [i.e., candidates] from taking those jobs" (*id*., ¶ 29). Vitiello testified that he believes that Yoo was diverting candidates to CTC's competitors from "the moment [Yoo] came to [CTC] until the time he left" (*id*., ¶ 30, citing Vitiello dep at 259).

After terminating Yoo, CTC conducted a more substantive review of his CTC computer and the E-Blaster results (JSMF, ¶ 31; Vitiello aff, ¶ 39; *see also* 2/17/16 email chain between Vitiello and Jeffrey Bocci with subject line "FW: Eblaster Monitoring" [Sterk aff, exhibit 14]). CTC learned that Yoo had set up an external Dropbox system that allowed him to upload documents from CTC's system to a folder that he could access from outside CTC's system (JSMF ¶ 31; Vitiello aff, ¶ 39). Within Yoo's Dropbox folder, CTC discovered spreadsheets with entries for hundreds of candidates and résumés (JSMF, ¶ 32). These included CTC candidate information (*see* Yoo's spreadsheet, entitled "JY MH List" [Sterk aff, exhibit 15]).

Many résumés in Yoo's Dropbox contained notes at the top that were added while Yoo was employed at CTC, including information collected through interactions with candidates (Vitiello dep at 207; Vitiello aff, ¶ 40; *see* emails between Yoo, Roth, and Ross, dated between

July and October 2010 [Sterk aff, exhibits 16-20]). Many résumés also contained metadata indicating they were modified or created while Yoo was employed at CTC (Vitiello aff, ¶ 39; *see* Yoo's spreadsheet). The Dropbox files also indicated that Yoo, while at CTC, saved certain résumés to his Dropbox that he did not add into CTC's database (Vitiello aff, ¶ 39). Vitiello testified that he believes Yoo "was downloading resumes that belonged to other recruiters [within CTC] pretty much from the day he started to work for [CTC]" (JSMF, ¶ 33, citing Vitiello dep at 260). After CTC fired Yoo in September 2010, Yoo, EJR, and the Hecht defendants all shared office space, by February 2011 (11/30/17 Hecht dep [Sterk aff, exhibit 83] at 29-30).

Defendants' Use of CTC Information After Yoo's Termination

After CTC fired him, Yoo continued sending the materials and information stored in his Dropbox to defendants (Yoo dep at 136-137, 210-211; JSMF ¶ 36). Yoo also sent himself candidate information through an email address he created under the name Jack Levin (Yoo dep at 136:13-23; *see* 11/20/11 email between Yoo and Jack Levin with subject line "barcap" [Sterk aff, exhibit 9]; 2/17/20 email between Yoo and Jack Levin with subject line "nomura job list" [Sterk aff, exhibit 21]; and 2/17/10 email between Yoo and Jack Levin with subject line "support" [Sterk aff, exhibit 22]). At his deposition, Yoo asserted his 5th Amendment privilege and refused to testify about whether the information in his Jack Levin emails: (1) contained information he obtained through CTC (Yoo dep at 313, 315, 380-381); (2) was obtained through unlawful or improper means (*id*. at 365-366); (3) was known about by defendants (*id*. at 310-311); (4) was given or sent to any defendants (*id*. at 313-315, 327-329, 334, 337); or (5) was used to place candidates with or through other recruiters such as defendants (*id*. at 386-387; 390).

EJR reconnected Yoo with Hecht when they were both working in its office (JSMF, ¶ 35). Yoo, Hecht, and EJR all entered into a commission sharing agreement where EJR received 10%

of any Hecht commissions stemming from Yoo's information and Yoo and Hecht would evenly split the remainder 45/45 (JSMF, ¶ 35; Roth aff, ¶¶ 20-21). These individuals memorialized their agreement in writing, as reflected in a June 2011 Memorandum of Understanding (the "MOU") (NYSCEF Doc No. 214). It was Hecht's idea to enter into the MOU (Hecht dep at 29-33 [Sterk aff, exhibit 83]; *see* 6/6/11 email between Yoo and Hecht with subject line "memo of understanding" [Sterk aff, exhibit 2]). As a result, Yoo began sending Hecht information and résumés from his DropBox (*see* 5/9/22 email chain between Yoo, Roth, and Ross with subject line "Fwd; RICHARD LUO – senior c#" [Sterk aff, exhibit 23]; 5/6/11 email chain between Yoo and Hecht, with subject line "Re: Douglas Young – C#.net WPF" [Sterk aff, exhibit 24]; 4/19/11 between Yoo and Hecht with subject line "Harry Medina – c# - elliot" [Sterk aff, exhibit 25]). While Hecht alleges he did not know that Yoo worked at CTC and had never discussed CTC with Yoo or EJR (*see* Hecht aff, ¶ 7 [NYSCEF Doc No. 235]), he testified at his deposition that he could not recall whether CTC was ever mentioned (*see* Hecht dep at 35).

On October 13, 2010, less than a month after leaving CTC, Yoo contacted Sultzer to discuss a collaboration to "split" commissions for candidate placements (Sultzer dep at 102-105; *see* 10/13/10 email between Yoo and Sultzer with subject line "Java Prime brokerage consultant" [Sterk aff, exhibit 1]). Sultzer had worked with Yoo, Ross, Roth, and Hecht for years and, like the EJR defendants, wanted to share commissions with Yoo for candidates Yoo brought in (Sultzer dep at 100, 102-103). As part of this agreement, Yoo began sending Sultzer candidate information only months after they both left CTC (*see* 10/13/10 email; 4/27/11 email between Yoo and Sultzer with subject line "Biren Patel – Serverside Java" [Sterk aff, exhibit 26]). Yoo shared various CTC candidates with Sultzer for open positions, and targeted CTC clients (*see* 5/11/11 email chain between Yoo and Sultzer with subject line "Re: Kalyan Vishnubhatla – Jr. Java develop" [Sterk

aff, exhibit 27]; 11/16/11 email between Yoo and Sultzer with subject line, "Re: Hai 'Charles' Huang – serverside Java lead," [Sterk aff, exhibit 28]; 12/14/11 email between Yoo and Sultzer with subject line "Ben D. Cotton III – Java Rockstar" [Sterk aff, exhibit 29]; 6/14/12 email between Yoo and Sultzer with subject line "RE: David w. – Risk Quant" [Sterk aff, exhibit 30]).

Sultzer's Separation Agreement with CTC, dated June 24, 2010, stated that "the Restricted Period is 24 months for all purposes under the [Duty of Loyalty Agreement] as it applies to Barclays Capital" (*see* Confirmation of Resignation and Post-Termination Issues letter from CTC to Sultzer [Sterk aff, exhibit 5]). Sultzer became a vendor for Barclays Capital on or before June 14, 2012, less than 24 months after resigning from CTC. In an email congratulating Sultzer on becoming a vendor for Barclays Capital, Yoo said: "Nice little F.U. to dave. Can I come to the vendor meeting just to rub it in his face" (*see* 6/14/12 email between Yoo and Sultzer).

Defendants' Placement of CTC Candidates

CTC asserts defendants placed well over a dozen candidates by working with Yoo from 2010 through 2013, with benefit of all the information he provided. Eight or more their placements were candidates who were either in CTC's database, placed with CTC clients, or both (JSMF, ¶¶ 42-50; Roth aff, ¶¶ 31, 40), collectively earning over $200,000, and earning commissions well over that on additional placements that originated from Yoo (*id*.). CTC did not receive commissions for defendants' placements (*see* Vitiello aff, ¶¶ 48-59). Vitiello alleges that seven of defendants' placements, Apurba Nath ("Nath"), Christopher Smith ("Smith"), Luis Reyes ("Reyes"), Krishna Mukherjee ("Mukherjee"), Yulia Tenenbaum ("Tenenbaum"), Kevin Byrne ("Byrne"), and Ezzard Batiste ("Batiste"), were in CTC's database from at least 2010 to 2013 (*id*., ¶ 48).

Apurba Nath: Defendants admit that Nath "could be called a CTC Candidate" (EJR's memorandum of law [NYSCEF Doc No. 232], at 2). Nath had been working with CTC since 2004, and Yoo had directly worked with Nath on CTC's behalf in 2010 (Vitiello aff, ¶ 49). Yoo added Nath's information to his Dropbox in June 2010, prior to leaving CTC (*id*.). Yoo and EJR jointly placed Nath at CTC client Citigroup in 2011 (Roth aff, ¶ 31). EJR admits that it placed Nath based on referrals from Yoo (*see* amendment to EJR's objections and responses to first set of interrogatories [Sterk aff, exhibit 73]).

Ezzard Batiste: Batiste was a CTC candidate in 2010. CTC attempted to place him and obtain interviews for him in July, August, and September 2010, while Yoo was employed at CTC (JSMF, ¶ 39; *see* 7/29/10 email chain between Vitiello and Jeremiah Valera of CTC with subject line "FW: Columbia Technology" [Sterk aff, exhibit 31]; 8/30/10 email chain between Vitiello and Marisa Bailey of Goldman Sachs with subject line "RE: Requesting onsite availability for Ezzard Batiste – Goldman Sachs – Black Professionals in Technology Recruiting Event" [Sterk aff, exhibit 32]). Yoo added Batiste's information to his Dropbox in July 2010 (Vitiello aff, ¶ 53). On July 22, 2010, while still at CTC, Yoo sent Batiste's résumé to EJR (JSMF, ¶ 40). Yoo continued contacting Batiste after he left CTC. For example, Yoo emailed Batiste about a potential placement a month after CTC terminated Yoo (*see* 10/20/10 email chain between Yoo and Batiste with subject line "Re: C++ fixed income" [Sterk aff, exhibit 33]). Yoo later sent Batiste's résumé to EJR and Hecht. Yoo and Hecht placed Batiste in August 2012 (JSMF ¶¶ 40, 42; Yoo aff [NYSCEF Doc No. 272], ¶ 6; Roth aff, ¶ 34; Hecht aff, ¶ 12). Pursuant to the prior MOU, EJR also received a commission for this placement (JSMF, ¶ 42; Roth aff, ¶ 34).

Christopher Smith: According to Vitiello, Smith was added as a candidate to CTC's system in 2009 and was in communication with CTC recruiters in 2010 and 2011 (Vitiello aff, ¶ 50). Yoo

added Smith's information to his Dropbox in August 2010 (*id.*). Yoo sent Smith's résumé to EJR on August 30, 2010, and EJR later placed Smith (JSMF, ¶¶ 43, 46). While EJR claims that they "made efforts to place Smith as early as 2004" (Roth dep at 42), they have not produced any documents showing that they ever worked or communicated with Smith in the past, or that they obtained his name and résumé from anywhere other than from Yoo's email.

Krishna Mukherjee: Vitiello alleges that Mukherjee was a CTC candidate in 2010 when Yoo used one of his personal email accounts to send himself information about Mukherjee (JSMF, ¶ 43; *see* 4/21/10 email between Yoo and Jack Levin with subject line "icap" [Sterk aff, exhibit 34]; Vitiello aff, ¶ 52). Yoo uploaded Mukherjee's information to his Dropbox and sent it to EJR on July 29, 2010 (JSMF ¶¶ 43, 45; *see* 7/29/10 email between Yoo, Roth and Ross with subject line "Java C++ guys" [Sterk aff, exhibit 35]). Two weeks after receiving Yoo's email, on August 13, 2010, EJR submitted Mukherjee's résumé to Bank of America (*see* 8/13/10 email between Ross and Matt Yardeni of Bank of America with subject line "Krishna Mukherjee for Ken Leder" [Sterk aff, exhibit 36]). EJR scheduled a phone interview for Mukherjee on August 19, 2010 (*see* 8/9/10 email chain between Roth and Ross with subject line "Fw: Krishna Mukherjee for Ken Leder" [Sterk aff, exhibit 37]), a day before an interview that CTC had scheduled for him at Goldman Sachs [10/1/10 email chain between Vitiello and Erica Cogen of Goldman Sachs with subject line "RE: Requesting Onsite Availability for Krishna Mukherjee – FTC FICCTech IRP Analyst Develop – Java or C++ 8043" [Sterk aff, exhibit 38]). Only a month after receiving Yoo's email about Mukherjee, EJR placed him at CTC client UBS on September 30, 2010 (*see* 8/3/10 email chain between Vitiello, Brant Cherne, and Milana Azaryayeva of CTC with subject line "Krishna Mukherjee for BNP Paribas #3621" [Sterk aff, exhibit 39]; Roth aff, ¶ 40; JSMF ¶ 45). Yoo continued to contact Mukherjee and circulate his résumé as a potential candidate in 2012 (*see*

3/6/12 email between Yoo, Roth and Ross with subject line "Krishna C. Mukherjee – C++ - Getco" [Sterk aff, exhibit 40]).

Luis Reyes: Vitiello alleges that Reyes was a CTC candidate starting in 2007, before Yoo joined CTC, and was in communication with CTC recruiters up through 2011 (Vitiello aff, ¶ 51). Yoo and EJR placed Reyes with CTC client Nomura in 2011 (JSMF ¶ 48; *see* 9/14/11 email between Yoo and Vanessa Cummings of Nomura with subject line "Star Date – Luis Reyes" [Sterk aff, exhibit 41; 9/7/11 email between Yoo and Sridev Raghavan of Nomura with subject line "RE: Luis Reyes – Acceptance" [Sterk affirmation, exhibit 42]). While Yoo claims to have had a relationship with Nomura prior to joining CTC (Yoo aff, ¶ 3), Vitiello alleges that CTC had been a vendor for Nomura since at least 2006 (Vitiello aff, ¶ 56). Vitiello introduced Yoo to Nomura representatives while Yoo was at CTC and allowed Yoo to work with Nomura in his role at CTC (*id*.). Yoo communicated directly with Nomura to place Reyes and forwarded those communications to EJR (*see* 6/27/11 email between Yoo, Ross, Roth, and Hecht with subject line "nomura phone screens" [Sterk aff, exhibit 43]; 9/13/11 email between Yoo and Ross with subject line "FWD: Offer Letter – Nomura" [Sterk aff, exhibit 44]; 9/6/11 email between Yoo and Ross with subject line "Pre-hire Paperwork – Nomura" [Sterk aff, exhibit 45]).

Yulia Tenenbaum: According to Vitiello, Tenenbaum was a CTC candidate in 2009. She was communicating with CTC recruiters before and after Yoo's employment at CTC and was placed by CTC in 2009 (Vitiello aff, ¶ 54). Yoo added Tenenbaum's information to his Dropbox a month before he was terminated and forwarded a résumé to EJR at the same time (*id*.; *see* 8/20/10 email between Yoo, Roth, and Ross with subject line "more resumes – JAVA C#" [Sterk aff, exhibit 46]). Tenenbaum had been in CTC's internal database while Sultzer was working at CTC, and Sultzer placed Tenenbaum at CTC client Citigroup in 2013 (JSMF ¶ 50).

Kevin Byrne: Vitiello alleges that Byrne was in CTC's database since at least October 2007 and that CTC continued making efforts to place Byrne in May 2013 (Vitiello aff, ¶ 55). Although EJR claims that they were not involved in his placement in 2012 (Roth aff, ¶ 48), documents show that EJR received part of the fee (*see* 6/20/10 email between Yoo, Roth, and Ross with subject line "kevin byrne" [Sterk aff, exhibit 47]).

Additionally, Yoo and EJR placed Vijay Nair at J.P. Morgan, a CTC client (*see* 6/13/10 email chain between Yoo, Roth, and Ross with subject line "FW: VIJAYNATH NAIR" [Sterk aff, exhibit 48]; JSMF ¶ 37). Yoo and EJR also jointly placed Ramon Zamora and Marcin Wojcik in 2011 (*see* Yoo's response to interrogatories [NYSCEF Doc No. 218]). CTC also alleges that defendants and Yoo used information on more than 10 CTC candidates in attempting to place people, and that, instead of sourcing candidates from the internet, referrals or other sources, Yoo, with CTC's lists, was acting as a source for the defendants' candidate lists (*see* Sterk aff, exhibits 49-64 [emails between defendants]).

CTC's Business Allegedly Declined When Yoo Began Working with Defendants

According to Vitiello, in 2010, CTC hired additional employees to expand its business, and went from employing approximately six individuals in 2009 to 27 in 2010 (Vitiello aff, ¶ 42). With the additional employees, CTC's total income rose in 2010, and its recruitment fees rose from $432,000 in 2009 to $1,281,660 in 2010 (*id*., ¶ 44; *see* CTC Profit & Loss Spreadsheet for 1988 through 2017 [Sterk aff, exhibit 65]). Vitiello alleges that the increase in recruitment fees, however, occurred mostly in 2010's first half, and that after Yoo's agreement with defendants began in mid-2010, CTC's total number of placements dropped, and continued to drop for the next two years (Vitiello aff, ¶ 45). Vitiello further alleges that CTC had half the number of placements from July to December 2010 than it had from January to June 2010. That significant change was

part of what had prompted CTC to become suspicious (*id.*). In 2011, CTC's recruitment fees dropped to $1,178,568, and in 2012, they dropped further to $569,750 (*id.*, ¶ 46; *see* Profit & Loss spreadsheet).

Claims in This Action Against the Moving Defendants

CTC asserts the following causes of action against the moving defendants: misappropriation of trade secrets (sixth cause of action); tortious interference with prospective business relations (seventh cause of action); unjust enrichment (eighth cause of action); aiding and abetting breach of fiduciary duty (ninth cause of action); and tortious interference with contract (tenth cause of action). By Order dated October 5, 2016 (NYSCEF Doc No. 250), Judge Marcy Friedman granted Hecht's motion to dismiss in part, and dismissed the causes of action for tortious interference with prospective business relations and unjust enrichment as against him.

Discussion

Defendants EJR, Hecht, and Sultzer now move for summary judgment dismissing the claims as against them. Given the issues of fact present, the motions are largely denied.

" '[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). When ruling on a

motion for summary judgment, courts must view facts "'in the light most favorable to the non-moving party'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [citation omitted]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

"Where different conclusions can reasonably be drawn from the evidence," or where issues of fact are arguable, the motion should be denied (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). Circumstantial evidence can create triable issues of fact, and "may be used to defeat a motion for summary judgment" (*Vetere v Pembrooke Land Dev. LLC*, 156 AD3d 1195, 1198 [3d Dept 2017]; NY Pattern Jury Instructions -- Civil 1:70 ["Circumstantial evidence is not inherently weaker than direct evidence and frequently circumstantial evidence may be stronger than direct evidence"]; *see e.g. Weiss v City of New York*, 170 AD3d 579, 580 [1st Dept 2019] [denying summary judgment because "issues of fact were raised by the circumstantial evidence as to the liability of each of the defendants"]; *A. L. v New York City Hous. Auth.*, 169 AD3d 40, 49 [1st Dept 2019] ["sufficient circumstantial evidence exists to raise an issue of fact for trial"]).

Damages

Defendants' main argument in their summary judgment motions is that CTC has failed to show proof of actual damages. CTC must prove damages as a necessary element of each of its claims (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] ["Tortious interference with contract requires . . . damages resulting therefrom"]; *Tri-Star Lighting Corp. v Goldstein*, 151 AD3d 1102, 1107 [2d Dept 2017] [aiding and abetting breach of fiduciary duty]; *Shah v Ortiz*, 2012 NY Slip Op 33361[U], * 6 [Sup Ct, NY County 2012] [tortious interference

with prospective business relations]; *see E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441 [2018] [discussing damages in trade secret and unjust enrichment context]).

CTC contends that its damages arise from defendants' "pervasive scheme to pilfer information on hundreds of CTC candidates and its clients, directly from CTC's database and systems, and to use that information to unfairly compete for a limited number of job placements" (CTC memorandum of law [NYCEF Doc No. 277], at 2) and that "[d]efendants' long-running scheme to use CTC's confidential information in order to gain a competitive advantage caused damage to CTC's business in multiple respects." Specifically, CTC contends that it was damaged by defendants' efforts to contact and place several candidates Yoo sent to them, regardless of whether the candidates were actually placed. CTC argues that, because defendants interfered on a widespread scale with CTC's relationships with its candidates, and with the competitive edge that CTC had gained from hiring numerous employees to find, contact, and vet candidates, its placements and revenues dropped (*id*. at 29).

A plaintiff seeking to recover compensatory damages for misappropriation of trade secrets, aiding and abetting a breach of fiduciary duty, or other tortious conduct must show that defendant's actions were the proximate cause of its damages (*E.J. Brooks*, 31 NY3d at 448). Where a plaintiff seeks lost profits, it must prove that such losses were "sustained by reason of the improper conduct" (*id*. at 453 [internal quotation marks and citation omitted]). In other words, plaintiff must establish that, but for defendant's conduct, the loss would not have occurred. " 'The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred' " (*id*. at 448 [citation omitted]). Although courts may award a defendant's unjust gains as a proxy for compensatory damages, an award requires a causal relationship between defendant's gain and the plaintiff's loss (*id*. 450). Additionally, plaintiffs must prove damages

with reasonable certainty, and damages cannot be remote, contingent, or speculative (*id*. at 448; *see also IDX Capital, LLC v Phoenix Partners Grp. LLC*, 83 AD3d 569, 570 [1st Dept 2011] [granting summary judgment dismissing damages as speculative]; *American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 419 [1st Dept 1998] [dismissing tortious interference claim because plaintiff's damages were "entirely speculative"]).

Nevertheless, courts recognize that "[p]roof of damages is essentially an issue of fact" and "difficulty in proof of damages is not a ground for dismissing a complaint on a motion for summary judgment" (*A. W. Fiur Co. v Ataka & Co.*, 71 AD2d 370, 375 [1st Dept 1979] [reversing grant of summary judgment on breach of contract claim based on damages]; see *Jagopat v Rao's City Views, LLC*, 2008 NY Slip Op 30317[U] [Sup Ct, NY County 2008] [denying summary judgment motion that argued plaintiff could not prove proximate causation, and finding that "plaintiff will have the burden of proving at trial that she suffered damages as the proximate result of defendants' acts, but proof of damages is an issue of fact, and the prospective difficulty of such proof is not a ground upon which to dismiss a complaint on a motion for summary judgment"]). Similarly, "'[p]roximate cause is a question of fact for the jury where varying inferences are possible'" (*Sweeney v Bruckner Plaza Assocs.*, 57 AD3d 347, 348 [1st Dept 2008] [citation omitted]).

Indeed, almost every case defendants cite to support their argument with respect to CTC's damages was decided after a full trial (*see e.g. American Fed. Group, Ltd. v Rothenberg*, 136 F3d 897, 907-908 [2d Cir 1998]; *Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 519 [SD NY 2011]; *E.J. Brooks Co.*, 31 NY3d at 446; *Michel Cosmetics, Inc. v Tsirkas*, 282 NY 195, 198 [1940]; *Stoeckel v Block*, 170 AD2d 417, 417 [1st Dept 1991]).

Here, multiple issues of fact predominate on the question of damages that must be left for trial. First, defendants argue they did not cause CTC's compensatory damages. Specifically,

defendants argue that CTC cannot establish with reasonable certainty that, but for defendants' actions, CTC would have placed certain candidates (*see* EJR defendants' memorandum of law at 11-13; Hecht defendants' memorandum of law [NYSCEF Doc No. 263] at 20-21). However, this argument focuses solely on candidate placement, while CTC argues that its damages are based on defendants' scheme as a whole, regardless whether candidates were placed. To support this argument, defendants only cite two cases that were decided on summary judgment. In *Twin City Fire Ins. Co. v Arch Ins. Grp., Inc.* (143 AD3d 533 [1st Dept 2016]), the court rejected plaintiff's damages claims because he had not pointed to any identifiable loss in discovery and provided no admissible evidence of loss in opposition to summary judgment. Similarly, in *R.M. Newell Co. v Rice* (236 AD2d 843, 844 [4th Dept 1997]), the court found no evidence of damages because plaintiff's profit and loss statements showed that its business had grown when plaintiff claimed that it had declined, and there was undisputed evidence that a third party was going to terminate the contract regardless of defendants' action.

Here, in contrast, CTC has submitted admissible evidence to support its alleged losses, including, among other evidence, its profit and loss statement showing a marked decline in placements fees that exactly corresponds to the period of defendants' allegedly wrongful actions, Vitiello's testimony and affidavit, and defendants' corresponding profits that can act as a proxy for CTC's losses. This evidence, combined with defendants' admitted actions in collaborating with Yoo, is sufficient to show, at minimum, an issue of fact as to whether defendants' actions were a substantial factor in CTC's lost placement revenue from 2010 through 2013 (*see Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 1148 [3d Dept 2021] ["defendants failed to demonstrate their entitlement to summary judgment on the merits, as the record evinces questions of fact regarding . . . causation and damages"]; *Gosden v Elmira City Sch. Dist.*, 90 AD3d 1202,

1204 [3d Dept 2011] ["On causation and damages, the record reveals factual issues"]; *Manhattan Ctr. for Early Learning Inc. v New York Child Resource Ctr., Inc.*, 59 AD3d 365, 365 [1st Dept 2009] ["plaintiffs' submissions in opposition to the motion raise triable issues of fact regarding their claim for tortious interference with contract, including on the element of damages"]; *MUFG Bank, N.A. v Axos Bank*, 68 Misc3d 1229[A], 2020 NY Slip Op 51101[U], * 7 [Sup Ct, NY County 2020] [finding triable issues of fact on damages with respect to causation]).

Next, defendants argue that CTC's claim that its business suffered grievous damage – significant lost profits – due to defendants' ongoing scheme to contact and/or place CTC candidates – is "sheer speculation" (EJR defendants' memorandum of law at 13). Defendants contend that CTC's damages theory fails because there is no evidence that they did anything that impeded CTC's ability to place any specific candidate; or that, but for defendants' specific actions, CTC would have placed any specific candidate. Defendants further contend that CTC does not explain exactly how it was damaged. They argue that damages to CTC's recruiting business cannot be determined with any reasonable certainty from year-to-year changes in revenue or profit & loss due to a litany of market factors that impact the financial services recruiting business, including individual clients' performance, the proliferation of professional networking websites, and internal company dynamics (*see* Sultzer memorandum of law, at 15).

The court rejects this argument. Under New York law, damages do not always have to be determined with mathematical certainty (*see S & K Sales Co. v Nike, Inc.*, 816 F2d 843, 852 [2d Cir 1987] ["under New York law while S & K is required to establish with certainty that it suffered some loss, it need not prove the amount of loss with certainty"]). Rather, a plaintiff "need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost as a result of [defendants'] actions" (*id.*). Courts recognize that there are some cases where damages

may be difficult to calculate, but that those difficulties should not and do not operate as a bar to recovery (*see e.g. Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999] [finding that damages on breach of contract were not too speculative even where there was no proof that plaintiff's studio had ever operated at a profit, and much of the rise in value was attributable to other factors]; *S & K Sales Co.*, 816 F2d at 851 [finding that "lost profits were an appropriate measure of the damages suffered by S & K," despite defendants' arguments that they were too speculative]). This is especially true where, as here, plaintiff alleges that defendants' wrongdoing has "rendered it difficult to ascertain the damages suffered with the precision otherwise possible" (*Matter of Rothko*, 43 NY2d 305, 323 [1977]). The law does not allow wrongdoers to "'escape liability simply because there [are] . . . none of the ordinary standards for measuring the damages'" (*Dinicu*, 257 AD2d at 224 [citation omitted]). Thus, defendants' gains can be used as a proxy for plaintiff's losses in cases where damages are otherwise difficult to calculate (*E.J. Brooks Co.*, 31 NY3d at 450 ["courts may award a defendant's unjust gains as a proxy for compensatory damages"]).

Again, defendants focus solely on the placements they made in analyzing the allegedly speculative nature of CTC's damages. However, CTC asserts that its damages stem from more than the 10 candidate placements by defendants, and that defendants' actions in contacting its candidates caused CTC significant damage in the form of lost profits. Indeed, defendants do not deny that they contacted, and tried to place, a number of the candidates that Yoo sent to them (Roth aff, ¶¶ 22, 23). The fact that may have failed to place some of CTC's candidates, despite their efforts, does not mean that CTC did not suffer any damages.

Specifically, CTC contends that defendants interfered with CTC's relationships with its candidates, and the competitive edge CTC had gained from hiring numerous employees to find,

contact, and vet candidates. CTC presents evidence that, due to defendants' actions, its placements and revenues dropped (*see* Vitiello aff, ¶¶ 45-47; *see also* Profit & Loss Statement). CTC also contends that it hired a number of recruiters to put itself in a position to place more candidates and increase its business in late 2009 and early 2010, and that this strategy was successful, with CTC placing more candidates in the first half of 2010 than in years prior (*see* Vitiello aff, ¶¶ 42-44).

However, CTC further contends that, in the period directly after defendants' scheme began, this increase in competition that targeted a curated list of CTC's top candidates caused CTC's income to drop precipitously as its placement numbers fell (*id*., ¶¶ 45-46). According to Vitiello, CTC had half the number of placements from July to December 2010 than it had from January to June 2010, and that this significant change was part of what had prompted CTC to become suspicious and install surveillance software (*id*., ¶ 45). The numbers continued to decline in 2011, when CTC's recruitment fees dropped to $1,178,568 from $1,281,660 the year before. In 2012, they dropped further to $569,750 (Vitiello aff, ¶ 46; *see also* Profit & Loss Statement).

Given CTC's decrease in revenue through 2013 due to its decline in placements, and the fact that CTC's upward trend was clearly halted as soon as defendants' actions began, the record raises issues of fact as to whether CTC suffered lost profits as a result of defendants' actions, and whether CTC's evidence provides a basis for the fact finder to approximate with reasonable certainty the profits lost as a result of defendants' actions (*see S & K Sales Co.*, 816 F2d at 851 [evidence showing slight decrease in the plaintiff's commissions after Nike terminated the agreement was enough for the jury to conclude that the plaintiff was damaged in the form of lost profits]; *see also Anbe Realty Co. v City of New York*, 223 AD2d 416, 417 [1st Dept 1996] ["the court's award of lost profits to plaintiff was not against the weight of evidence since plaintiff's

experts provided the fact finder with a sound basis for approximating with reasonable certainty the profits lost as a result of defendant's action"]).

Accordingly, defendants' motions for summary judgment on the ground that CTC has failed to provide proof of damages must be denied (*see Gosden*, 90 AD3d at 1204 [denying summary judgment on ground that "(t)he issue of damages for purported lost profits is replete with factual issues"]; *P.W.B. Enters. v Moklam Enters.*, 243 AD2d 350, 351 [1st Dept 1997] [denying motion for summary judgment because "(t)he (lower) court properly found the existence of triable issues of fact regarding plaintiff's claim for damages from lost profits"]; *Levine v American Fed. Group*, 180 AD2d 575, 580 [1st Dept 1992] [material issue of fact as to whether insurance brokers had proven lost profits damages with exactitude precluded granting summary judgment]; *see also Gartenberg v Supreme Co. I LLC*, 189 AD3d 540, 541 [1st Dept 2020] ["plaintiff raised an issue of fact as to whether lost profits suffered by his personal business were the direct result" of defendants' negligence]).

Trade Secret Claims

A plaintiff alleging trade-secret misappropriation " 'must demonstrate [as relevant here]: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret . . . as a result of discovery by improper means' " (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [citation omitted]).

Defendants contend that CTC's trade secrets claim fails both prongs. First, defendants argue that CTC's candidate information does not constitute a trade secret because the information was publicly accessible (EJR defendants' memorandum of law at 14-15; Hecht defendants' memorandum of law at 9; Sultzer memorandum of law at 5). However, whether CTC's candidate information constitutes a trade secret is ordinarily an issue of fact that should be left for trial

(*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *affd as modified*, 14 NY3d 774 [2010] [finding whether a plaintiff's customer list "constitutes a trade secret" is "ordinarily a triable issue of fact"]; *Suburban Graphics Supply Corp. v Nagle,* 5 AD3d 663, 666 [2d Dept 2004] ["The question whether the plaintiff's customer lists constituted a trade secret or were readily ascertainable from public sources was an issue of fact relating to liability"]; *A.F.A. Tours, Inc. v Whitchurch*, 937 F2d 82, 89 [2d Cir 1991] ["The question of whether or not a customer list is a trade secret is generally a question of fact"]). In making trade secret determinations, New York courts consider six 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; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others' "

(*Spec Simple, Inc. v Designer Pages Online LLC*, 56 Misc 3d 700, 712-713 [Sup Ct, NY County 2017], quoting *Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993]).

Using this test, New York courts have denied summary judgment motions, like defendants', that argue customer lists are not protected as trade secrets (*see USI Ins. Servs. LLC v Miner*, 801 F Supp 2d 175, 195-196 [SD NY 2011] [applying New York law]). In *USI Insurance*, plaintiff claimed that defendant, a former employee, forwarded company client lists to a personal email account and solicited USI clients. The court denied summary judgment, despite the parties agreeing that some of the information could have been gathered from outside sources, because questions of fact remained as to whether all information was publicly available (*id.* at 196). Similarly, in *Giffords Oil Co. v Wild* (106 AD2d 610, 611 [2d Dept 1984]), the plaintiff company alleged that its ex-employee retained access to its customer list and had solicited its customers. In finding for plaintiff, the court determined that the list, "which could only be achieved through

personal solicitation" and would "aid plaintiffs in establishing prices," was a protectable trade secret (*id.*). Where "it would be difficult to duplicate a customer list because it reflected individual customer preferences, trade secret protection should apply" (*North Atl. Instruments, Inc. v Haber*, 188 F3d 38, 46 [2d Cir 1999]).

Under this analysis, CTC has raised issues of fact as to whether its database of candidate information could be considered a trade secret. While defendants argue that the database was simply a collection of information that CTC pulled from the internet (*see* EJR defendants' memorandum of law at 15-16; Hecht defendants' memorandum of law at 10; Sultzer memorandum of law at 6), CTC submits evidence that its database, and the information Yoo took, included candidate information that could only be learned through personal solicitation, and was neither publicly available nor easily accessible (*see* Vitiello aff, ¶ 8). Vitiello alleges that CTC took steps to protect its electronically stored information including using password protection, limiting access to office computers, and requiring Loyalty Agreements (*id.*, ¶¶ 20, 25). Vitiello further alleges that the information was valuable as it provided key information for building its relationships and sourcing appropriate candidates (*see id.*). CTC also presents evidence that its candidate information was not "easily compiled," as defendants contend, because CTC had 27 employees helping to develop the information in its database in 2010 alone (*id.*, ¶ 42). These submissions sufficiently raise issues of fact as to whether CTC's database of candidate information could be considered a trade secret.

Defendants also argue that they cannot be liable for misappropriation because they did not acquire the information through improper means. They argue that they were blindly provided information by Yoo, and had no knowledge, or possible means to know, that the information Yoo provided included CTC trade secrets (*see* EJR defendants' memorandum of law at 18-19; Hecht

defendants' memorandum of law at 12-13; Sultzer memorandum of law at 7-8). However, CTC has raised issues of fact as to whether the EJR defendants understood that the information Yoo provided was improperly obtained. CTC submits evidence that it was Roth who first asked Yoo, while aware that Yoo was working at CTC, to "[s]end me good C#, Java and C++ resumes" in order to "make some money" (*see* 10/12/10 email chain produced between Yoo, Roth, and Ross with subject line "good stuff in here"; *see also* Roth dep at 43-44, 40). There is further evidence in the record that Yoo provided the EJR defendants with candidate information that was clearly developed and part of the CTC database while he was working for CTC (*see* 10/12/10 email [résumés Yoo sent included desired salaries, and in one instance, the name of another CTC recruiter]). Moreover, in Yoo's chats with the EJR defendants, Yoo told them about where CTC was sending certain candidates, and then suggested places that the EJR defendants should send them (*see* 6/6/11 email between Yoo and Hecht with subject line "memo of understanding"). These submissions are clearly sufficient to raise issues of fact.

Hecht claims that he had no knowledge of Yoo's employment with CTC, or the existence of the Loyalty Agreement. However, he was part of the profit sharing agreement with EJR and Yoo, and shared office space with them. Viewed in the light most favorable to nonmovant CTC (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345, 353 [2002]), this circumstantial evidence raises issues of fact as to his knowledge of how Yoo's information was acquired and whether it was confidential.

There is also sufficient circumstantial evidence to raise issues of fact as to whether Sultzer knew that Yoo was providing him with confidential information and was paying him to do so through joint commissions. Sultzer worked at CTC and was required to sign the same Loyalty Agreement as Yoo. He was thus aware of the agreement's provisions that restricted Yoo's ability

to solicit certain candidates within twelve months of his employment at CTC and prohibited him from disclosing CTC's confidential information and trade secrets. Even so, with full knowledge of the CTC agreements, Sultzer started working with Yoo to place candidates. Accordingly, defendants' motion to dismiss the misappropriation of trade secrets cause of action is denied.

Aiding and Abetting a Breach of Fiduciary Duty

A claim for aiding and abetting a breach of fiduciary duty should be dismissed unless the defendant "knowingly induced or participated in the breach" (*Tri-Star Light, Corp. v Goldstein*, 151 AD3d 1102, 1107 [2d Dept 2017]). To meet this requirement, the plaintiff must establish that the aider and abettor gave "substantial assistance" or encouragement (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]; *Carnegie Deli, Inc. v Levine*, 2015 NY Slip Op 31069[U], * 7 [Sup Ct, NY County 2015]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Kaufman*, 307 AD2d at 126).

Defendants argue that CTC's claim for aiding and abetting Yoo's breach of fiduciary duty should be dismissed because they had no knowledge of Yoo's fiduciary duty, and there is no evidence that they provided substantial assistance or encouragement to Yoo. However, there is circumstantial evidence in the record sufficient to raise issues of fact as to whether defendants were aware of Yoo's duty of loyalty. The EJR defendants began working with Yoo while he was still employed at CTC and knew that he was still employed. Sulzer worked for CTC while Yoo was employed there and had himself signed a Loyalty Agreement with CTC. Knowledge of a person's employment is enough to establish knowledge of that person's duty to his employer (*Shearson Lehman Bros. Inc. v Bagley*, 205 AD2d 467, 467 [1st Dept 1994]).

Hecht also claims that he was unaware of Yoo's agreement, but his close involvement with Yoo and EJR for years, and the common nature of non-compete and non-disclosure agreements for employees in the recruiting industry, provides sufficient evidence at this stage to draw an inference that the subject had been broached with Hecht, and that he was aware of Yoo's duty (*see Roulette Records v Princess Prod. Corp.*, 15 AD2d 335, 338 [1st Dept 1962], *affd* 12 NY2d 815 [1962] ["proof of actual knowledge may be predicated upon circumstantial evidence"]; *Dabbagh v Newmark Knight Frank Global Mgt. Servs.*, LLC, 99 AD3d 448, 449 [1st Dept 2012] [courts must provide the non-moving party with "the benefit of all reasonable inferences in their favor"]). Moreover, Hecht's credibility is at issue because, while he now alleges that he had no knowledge that Yoo worked at CTC (*see* Hecht aff, ¶ 7), he testified at his deposition that he could not recall whether CTC was ever mentioned (*see* Hecht dep at 35).

CTC must also show that defendants "knowingly induced or participated in the breach." Where a defendant encourages a person to solicit the clients of and disclose confidential information of his employer, he has aided and abetted a breach of fiduciary duty (*see Aon Risk Servs., Northeast v Cusack*, 34 Misc 3d 1205[A], 2011 NY Slip Op 52433[U], * 13 [Sup Ct, NY County 2011]). Exerting influence over the breaching party can be enough to show that a defendant induced a breach (*Higgins v New York Stock Exch., Inc.*, 10 Misc 3d 257, 290 [Sup Ct, NY County 2005]).

Roth admits that he met with Yoo while Yoo was employed at CTC, and that EJR told Yoo it would split commissions with him 50/50 (Roth aff, ¶ 17). At that time, they knew Yoo was still employed at CTC, and that CTC was a competitor (*id.*, ¶¶ 16-19). Sultzer and Hecht also agreed to compensate Yoo for candidates that he brought to them, and willingly accepted the candidates that he provided. Whether their conversations and offers to split commissions with Yoo provided

the incentive that Yoo needed to breach his duty of loyalty is a triable issue of fact. This requires denial of defendants' motion to dismiss this cause of action (*see National Fin. Partners, Corp. v USA Tax & Ins. Servs., Inc.*, 145 AD3d 440, 441 [1st Dept 2016] ["issues of fact as to whether . . . USA Tax knowingly induced or participated in any such breach [of fiduciary duty], preclude summary judgment dismissing the claim for aiding and abetting breach of fiduciary duty"]; *Fakiris v Gusmar Enters., LLC*, 53 Misc3d 1215[A], 2016 NY Slip Op 51665[U], * 9 [Sup Ct, Queens County 2016] ["The court finds that the conflicting allegations of the parties have created issues of fact and credibility which prelude summary judgment on the cause of action for aiding and abetting breaches of fiduciary duty by defendant Kostas"]).

Tortious Interference with Contract

A plaintiff asserting a tortious interference with contract claim must prove (1) the existence of a contract between plaintiff and a third-party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach; (4) without justification; (5) the third-party's actual breach, and (6) damages (*Lama Holding Co.*, 88 NY2d at 424).

Defendants argue that the court should dismiss the tortious interference claim because they (1) had no knowledge of Yoo's contract with CTC, (2) did not intend to "procure a breach," and (3) their actions were not the Cause of Yoo's breach (*see* EJR defendants' memorandum of law at 20; Hecht defendants' memorandum of law 16-17; Sultzer memorandum of law at 11-12). However, CTC raises disputed issues of material fact with respect to each of these elements. Although proof of actual knowledge of the contract is required for tortious interference of contract, this proof can be "predicated upon circumstantial evidence" (*Roulette Records, Inc.*, 15 AD2d at 338). In addition, the plaintiff is not required to show that defendants had "full knowledge of the detailed terms" of the agreement (*Gold Medal Farms, Inc. v Rutland County Co-op. Creamery,*

Inc., 9 AD2d 473, 478 [3d Dept 1959]; *see also Hidden Brook Air, Inc. v Thabet Aviation Intl. Inc.*, 241 F Supp 2d 246, 279 [SD NY 2002]).

The EJR defendants do not eliminate all issues of act as to their awareness of Yoo's contract with CTC, or that they did not intend to procure a breach (EJR defendants' memorandum of law at 20-21). Indeed, defendants state elsewhere in their motion that "Yoo told EJR that he believed CTC had breached its obligations to him" (*id*. at 19). Roth testified that he could not recall the substance of his conversation with Yoo when they discussed Yoo's experience at CTC, but recalled he was still working at CTC (*see* Roth dep at 40, 45). Roth also testified that he was aware that it was common for employment contracts in the recruiting space to have limitations on information that recruiters could share (*see id*. at 37). This circumstantial evidence raises issues of fact as to whether the EJR defendants had actual knowledge that Yoo had an agreement with CTC. Similarly, as discussed with respect to the aiding and abetting claim, the record raises issues of fact as to whether Hecht and Sultzer were aware of Yoo's agreement with CTC.

As with knowledge, intent of the parties may be inferred based on all of the facts and circumstances (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 116 [1st Dept 2018] [" 'if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper' "] [citation omitted]; *Macnish-Lenox, LLC v Simpson*, 17 Misc 3d 1118[A], 2007 NY Slip Op 52055[U], * 16 [Sup Ct, Kings County 2007]). Making an offer of better terms with the intent of persuading a breach is enough to impose liability (*Gold Medal Farms*, 9 AD2d at 479] [finding sufficient evidence for a jury to infer defendants intended to bring about a breach]). Persuasion to breach, alone, may be sufficient to impose liability (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 [1980]).

The evidence here raises issues of fact as to whether defendants intended to procure a breach of Yoo's agreement with CTC, and whether their actions caused him to breach that agreement. Defendants clearly had financial incentives to encourage Yoo to breach his agreement. Indeed, the EJR defendants believed that recruiting was "a numbers game," that meant the more candidate information they had, and the more people working on their behalf to contact candidates, the more money they could make (Roth aff, ¶ 14). Similarly, Sultzer and Hecht clearly entered into their commission sharing agreements with Yoo in order to earn more money (*see* Sultzer dep at 102-105). Defendants all proactively told Yoo that they would provide him with commissions if he brought them information (*see id.*). Yoo testified that it was not until having a conversation with defendants that he even thought about sharing commissions (*see* Yoo dep at 78). This evidence raises issues of fact as to whether an inference can be drawn that defendants ignored and encouraged Yoo to breach his contract to increase their own placements, and whether their actions caused him to breach that contract. Accordingly, CTC has raised triable issues of fact as to elements of its tortious breach of contract that defeat summary judgment (*see MUFG Bank, N.A.*, 68 Misc 3d 1229[A], 2020 NY Slip Op 51101[U] at * 6).

Tortious Interference with Business Relations

"A claim for tortious interference with prospective business advantage must allege 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 (4) there was resulting injury to the business relationship" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). "[C]onduct 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. v*

Noonan, 3 NY3d 182, 192 [2004]); *see also RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 469 [1st Dept 2015]).

Justice Friedman dismissed the tortious interference with business relations claim against Hecht on the ground that CTC had "fail[ed] to allege wrongful conduct directed at third party clients" (*id*. at 22). CTC has similarly failed to plead wrongful conduct by either the EJR defendants or Sultzer or submit any evidence of such conduct in response to defendants' motions. Accordingly, this cause of action is also dismissed as against the EJR defendants and Sultzer.

Unjust Enrichment

Only three elements are required to plead unjust enrichment: " 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered' " (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citation omitted]).

Justice Friedman dismissed the unjust enrichment claim against Hecht, noting that the claim "is not a catch-all basis for seeking recovery of damages and cannot be used to avoid pleading and ultimately proving the elements of established business torts that govern the types of transactions at issue" (*See* 2016 Order at 22; *see also E.J. Brooks*, 31 NY3d at 455). In addition, "there must exist a relationship or connection between the parties that is not 'too attenuated' " (*Georgia Malone & Co.*, 19 NY3d at 516). An unjust enrichment claim should be dismissed unless there is a non-attenuated relationship between the parties that could have induced reliance (*id*. ["a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party"]). CTC does not submit any evidence that CTC and the EJR defendants or Sultzer had the type of non-attenuated, direct relationship required to induce reliance. Thus, the unjust enrichment cause of action is also dismissed as against the EJR defendants and Sultzer.

The court has considered the remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that MSQ #007 is granted to the extent that the seventh cause of action for tortious interference with prospective business relations and the eighth cause of action for unjust enrichment are dismissed as against defendants Ross, Roth, and EJR. MSQ #007 is denied in all other respects; and it is further

ORDERED that MSQ #008 is denied; and it is further

ORDERED that MSQ #009 is granted to the extent that the seventh cause of action for tortious interference with prospective business relations and the eighth cause of action for unjust enrichment is dismissed as against defendant Sultzer. MSQ #009 is denied in all other respects; and it is further

ORDERED that the parties shall attend a Pre-Trial Conference (remotely via Microsoft Teams) on Tuesday, March 1, 2022 at 2:15 p.m.

1/22/22
DATE

MELISSA CRANE, 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