SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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EDWARD O'BRIEN and THE ESOP SHOP, LLC,

Plaintiffs,

- v -

LAWRENCE KAPLAN, CSG RE III CONSULTING PARTNERS, LLC, CSG RE PARTNERS, LLC, CORPORATE SOLUTIONS GROUP I, LLC, CORPORATE SOLUTIONS GROUP, LLC, CITY LINE CAPITAL, LLC, ABC CORPS. 1-10, JOHN DOES 1- 10, and BLUE HIPPO ESOP ADVISORS, INC.,

Defendants.

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INDEX NO. 652840/2020

MOTION DATE _____

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 70, 71, 72, 73, 75

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 68, 69, 74

were read on this motion to/for DISMISS.

In motion sequence number 001, defendants CSG RE III Consulting Partners LLC (CSG RE III) and CSG RE Partners, LLC (CSG RE) (together, CSG RE Defendants) move, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the complaint. In motion sequence number 003, Blue Hippo ESOP Advisors, Inc. (Blue Hippo) moves, pursuant to CPLR 3211 (a) (7), to dismiss Corporate Solutions Group I, LLC (CSG I) and Corporate Solutions Group, LLC's (CSG LLC) (collectively, CSG) counterclaims for aiding and abetting breach of fiduciary duty, misappropriation, tortious interference with business and contractual relations, tortious interference with prospective business and contractual

relations, unfair competition, unjust enrichment and equitable relief (accounting and permanent injunction).[1]

Background

The following facts are taken from the complaint, and for the purposes of this motion, are accepted as true.

Plaintiff O'Brien is an investment banker who specializes in selling and servicing employee stock ownership plans (ESOPs). (NYSCEF 23, Complaint ¶10.) In 2009, O'Brien and defendant Lawrence Kaplan formed a business relationship where they would independently serve as investment bankers to middle-market company owners interested in ESOP transactions. (*Id*. ¶10.) O'Brien agreed to recruit potential customers, utilizing a preexisting network of banking, legal and accounting contacts, and bring them to one of Kaplan's entities to effectuate and service the ESOP transactions. (*Id*. ¶¶13-15.)

In exchange for services provided, ESOP clients paid a fee. (*Id*. ¶17.) O'Brien and Kaplan agreed to evenly split the gross revenue, which was primarily derived from client fees. (*Id*. ¶18.) Expenses were spilt evenly by O'Brien and Kaplan and were deducted from their shares of the gross revenue. (*Id*.) It was also agreed that plaintiff ESOP Shop LLC (ESOP Shop), which was owned by O'Brien, would invoice CSG for half of any fee paid by a client recruited by O'Brien. (*Id*. ¶19.) From 2009 to 2019, ESOP Shop invoiced CSG for half of the ESOP generated fees, and CSG remitted those fees without any deduction of expenses. (*Id*. ¶21.)

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[1] In their answer, CSG asserted counterclaims against plaintiffs Edward O'Brien and the ESOP Shop, LLC (ESOP). (NYSCEF Doc. No. [NYSCEF] 18, Answer with Counterclaims.) They also asserted counterclaims against Blue Hippo (*id*.) and served a summons on Blue Hippo. (NYSCEF 19, Summons; *see* CPLR 3019 [a], [d].)

In 2013, O'Brien and Kaplan started to explore expanding their business relationship to also include "1042 Transactions" where ESOP clients would invest their proceeds from the ESOP transactions in tax advantage real estate investments. (*Id*. ¶22.) The 1042 Transactions were dependent on the ESOP clients originated by O'Brien as the 1042 Transactions required that those clients purchase income producing real estate (Properties). (*Id*. ¶¶30-31.) Kaplan advised O'Brien that, if he agreed to work with Kaplan and CSG on the 1042 Transactions, it would be the same fee splitting arrangement as the ESOP transactions. (*Id*. ¶25.) In April 2013, Kaplan formed CSG RE for the purposes of effectuating the 1042 Transactions. (*Id*. ¶26.) O'Brien agreed to work on 1042 Transactions with the fee splitting agreement in place. (*Id*. ¶27.)

In July 2015, CSG RE proposed a written commission agreement to O'Brien, which reduced O'Brien's compensation from 50% of gross revenue to 50% of net revenue; O'Brien declined to execute the agreement. (*Id*. ¶¶44, 46.) In May 2016, O'Brien sought compensation for four 1042 Transactions; although he requested his 50% share, O'Brien received limited payments with no explanation. (*Id*. ¶¶48-49.) O'Brien sought an accounting, which he was eventually provided with in March 2018; the accounting showed that CSG based O'Brien's 2015-2017 compensation on net revenue, not gross. (*Id*. ¶¶50-52.) Kaplan, CSG, and CSG RE also started to deduct expenses from O'Brien's pay. (*Id*. ¶¶53, 61.)

In July 2019, O'Brien's business relationship with Kaplan and his entities ended. (*Id*. ¶2.) In 2020, O'Brien commenced this action by a summons with notice. In January 2021, O'Brien filed a complaint alleging breach of contract (against Kaplan, CSG, and CSG RE), unjust enrichment (against all defendants), breach of the covenant of good faith

and fair dealing (against all defendants), and a declaratory judgment declaratory judgment declaring that plaintiffs have an enforceable contract with the defendants as to the 1042 Transactions (against Kaplan, CSG, and CSG RE).

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].) "On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) based on the statute of frauds, a court must [also] take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader." (*Makris v Boylan*, 175 AD3d 1400, 1401 [2d Dept 2019] [internal quotation marks and citations omitted].)

The CSG RE Defendants' Motion to Dismiss

CSG RE III

The CSG RE Defendants assert that the claims for unjust enrichment and breach of the covenant of good faith and fair dealing asserted against CSG RE III must be dismissed because no factual allegations against CSG RE III are set forth in the complaint. The court agrees. Although plaintiffs argue that CSG RE III is not a separate entity from CSG RE, and both are alter-egos of CSG and Kaplan, the complaint is devoid of such allegations as to CSG RE III. Plaintiffs mention CSG RE III twice in the complaint - once to identify it, its

place of business, and that Kaplan is its majority owner and once alleging that it was a majority owner of nonparty City Line Capital LLC. (See NYSCEF 23, Complaint ¶¶ 9, 80.) These allegations do not establish an alter-ego theory or any claims against CSG RE III. Thus, CSG RE III is dismissed.

CSG RE

1. Alter-Ego[2]

"In order to state a claim for alter-ego liability plaintiff is generally required to allege complete domination of the corporation … in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC v Kellwood Co*., 123 AD3d 405, 407 [1st Dept 2014] [internal quotation marks and citation omitted].) Plaintiff's burden is heavy and "mere conclusory alter ego allegations are insufficient to survive a motion to dismiss." (*226 Fifth Ave. LLC v SBF Intl., Inc.,* 2012 NY Slip Op 33491[U], *11-12 [Sup Ct, NY County 2012] [citations omitted].) Plaintiff must "allege particularized facts to warrant piercing the corporate veil" on an alter ego theory. (*Andejo Corp. v S. St. Seaport LP*, 40 AD3d 407, 407 [1st Dept 2007].) The question of control is highly fact-dependent and in determining that question,

> "courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the

[2] In their moving brief, the CSG RE Defendants apply New York law to support dismissal of the alter-ego claim. However, on reply, they assert that Delaware law governs the alter-ego claim as CSG RE is a Delaware corporation. Further, on reply, they admit that New York law is quite similar to Delaware law in regard to alter-ego and veil piercing. As the issue of applying Delaware law was raised for the first time on reply and the CSG RE Defendants concede that New York law is "quite similar" (NYSCEF 70, CSG RE Defendants' Reply at 14), this court will apply New York law to this claim.

> corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity … ."

(*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]), citing *TNS Holdings v MKL Sec. Corp.*, 243 AD2d 297, 300, *revd on other grounds*, 92 NY2D 891 [1998].) "No one factor is controlling, and all need not be present to support a finding of alter ego status." (*Trustees of the NY City Dist. Council of Carpenters Pension Fund v Centurion Cos., Inc.*, 2016 NY Slip Op 31265[U], *4 [Sup Ct, NY County 2016] [internal quotation marks and citations omitted].)

Here, plaintiffs allege, "[u]pon information and belief, defendant CSG RE is an alter ego of defendant CSG which does not maintain books or records separate and apart from those maintained by CSG, and has no employees, telephone number or website." (NYSCEF 23, Complaint ¶7.) While this allegation alone is insufficient to meet the heavy burden to sustain this claim, plaintiffs submit an affidavit by O'Brien, which in turn attaches the affidavit of Andreas Calianos, the former president of CSG RE. (NYSCEF 46, O'Brien Aff; NYSCEF 53, Calianos Aff.) Calianos' affidavit was submitted in an unrelated action commenced by CSG against Calianos to stay an arbitration that Calianos commenced against CSG and CSG RE. In his affidavit, Calianos avers that CSG RE was an inactive wholly owned shell company of CSG LLC. (NYSCEF 53, Calianos Aff ¶ 2.) He states that CSG RE did not actively conduct business transactions, had only one employee – himself, shared offices with CSG LLC, had no website, had no filing system – "correspondence, files, spreadsheets and work product was created and stored on CSG LLC's network and computer systems," used CSG LLC telephones, used CSG LLC's email server, and had no tax identification number. (*Id.* ¶¶2-3.) He further states that CSG RE was completely dependent on CSG LLC. (*Id.* ¶7.)

In opposition to a motion to dismiss, "a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims. Though limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be given their most favorable intendment." (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [internal quotation marks and citations omitted].) Thus, the court will consider this affidavit to remedy plaintiffs' insufficient allegation that CSG RE is an alter-ego of CSG.[3]

However, even according plaintiffs every possible favorable inference of the facts contained in the Calianos affidavit, these statements are still insufficient to pierce the corporate veil based on the theory that CSG RE is an alter-ego of CSG. As stated above, "plaintiff is generally required to allege complete domination of the corporation … in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d at 407.) Plaintiffs have not sufficiently alleged "any fraud or malfeasance to support [their] attempt to reach [CSG RE]" to hold them liable for their contractual claims. (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016].) While plaintiffs allege a breach of contract claim, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." (*Id.*) In their opposition, plaintiffs assert that defendants are abusing the

[3] Although the CSG RE Defendants have submitted evidence that refutes Calianos' statement that CSG RE did not have a tax identification number (see NYSCEF 72, 2013 Tax Return), the other statements are not refuted, and at most, the CSG RE Defendants' submission creates a credibility issue which cannot be address on this pre-answer motion to dismiss.

corporate form to avoid contractual obligations, but there are no allegations of such conduct.

2. Breach of Contract Claim

The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages." (*Alloy Advisory v 503 W. 33rd St. Assoc.*, 195 AD3d 436, 436 [1st Dept 2021] [citation omitted].) Even assuming that there is an existing oral contract[4] between plaintiffs and CSG RE, any purported oral agreement is barred by the statute of frauds.

"The statute of frauds is codified in General Obligations Law (GOL) § 5-701. Under the statute of frauds, to be enforceable, certain types of agreements cannot be oral; they must be in writing." (*Dorfman v Reffkin*, 144 AD3d 10, 15 [1st Dept 2016] [citations omitted].) GOL § 5-701 (a) (10) provides, in relevant part,

> "(a) Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking
>
> (10) Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein... . 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

[4] There are no allegations in the complaint that the parties executed a written agreement. Rather, plaintiffs allege that Kaplan advised O'Brien that, if he worked on the 1042 Transactions, the parties' prior arrangement of a 50/50 split of gross revenue would continue, and that O'Brien agreed to work with Kaplan on these transactions based on the agreement by Kaplan, CSG, and CSG RE. (NYSCEF 23, Complaint ¶¶ 25, 27.) Indeed, O'Brien declined to sign a proposed agreement with different terms. (*Id.* ¶¶44, 46.)

As plaintiffs pleaded in the complaint, "Kaplan sought O'Brien's agreement to work with Kaplan and CSG to solicit the ESOP clients introduced by O'Brien to participate in the proposed 1042 Transactions" and O'Brien "agreed to work with Kaplan on the 1042 Transactions and to solicit clients to participate in the 1042 Transactions based on the agreement by Kaplan, and the Kaplan controlled entities, CSG and CSG RE, to evenly split all gross or 'top line' revenue generated from the 1042 Transactions." (NYSCEF 23, Complaint ¶¶ 25, 27.) O'Brien's work soliciting ESOP clients to participate in these transactions falls squarely within negotiating a business opportunity. (*See Freedman v Chem. Constr. Corp.*, 43 NY2d 260, 267 [1977] [finding that an agreement where plaintiff agreed used his connections, ability, and knowledge to arrange for defendant to meet appropriate persons to procure a business opportunity fell within the statute].)

Plaintiffs, however, assert that this section does not apply to O'Brien because he was more than a "finder." Plaintiffs argue that CSG, in their answer, admits that O'Brien was a sale representative and managing director of CSG and that the role of a managing director goes beyond solicitation as it includes originating transactions, managing relationships, negotiating terms, signing engagement letters, and directing support staff. (*See* NYSCEF 25, CSG Answer ¶¶ 2, 10, 12, and 7-8 [counterclaim allegations].) Thus, plaintiffs argue that the CSG RE Defendants cannot claim that O'Brien was not an employee and seek the application of GOL § 5-701 (a) (10).

If a plaintiff seeks to recover compensation earned while an employee of a defendant, as opposed to seeking compensation for services rendered in negotiating or to recover a finder's fee, GOL § 5-701 (a) (10) is inapplicable. (*Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009].) Here, plaintiffs allege that O'Brien

was not an employee of Kaplan or any Kaplan affiliated entity. (NYSCEF 23, Complaint ¶ 12.) Although CSG states that O'Brien was a sales representative and managing director of CSG, they too agree that "O'Brien was not an employee of CSG or any entity affiliated with Defendants, but rather an independent contractor." (NYSCEF 25, CSG Answer ¶ 12.) Thus, both parties agree that O'Brien was not an employee of Kaplan or any Kaplan affiliated entity. Even if CSG contends that O'Brien was assigned the title of managing director, plaintiffs have not changed their position that O'Brien was not an employee and CSG does not dispute that in its answer or admit otherwise. The court also notes that these "admissions" were by CSG and not CSG RE.

Further, the allegations of the complaint clearly demonstrate that, in accordance with the alleged oral contract, O'Brien's role would be "to solicit the ESOP clients introduced by O'Brien to participate in the proposed 1042 Transactions." (NYSCEF 23, Complaint ¶ 23.) No other duties or roles are alleged in connection with this agreement. Thus, based on the nature of this oral agreement, it is barred by GOL § 5-701 (a) (10).

The court also disagrees with plaintiffs that GOL § 5-701 (a) (10) cannot apply because relationships that are akin to a joint venture do not require a writing to evidence an agreement. In *Dura v Walker, Hart & Co.*, 27 NY2d 346 (1971), the case relied on by plaintiffs, the Court of Appeals held that GOL § 5-701 (a) (10) did not apply to an oral agreement between two finders to share a commission. The Court of Appeals opined that this section of the statute of frauds applied to agreements between a finder and its principal and not agreements between finders. (*Id.* at 350). This is not the situation here. Further, there are no allegations that O'Brien and Kaplan created a joint venture or

partnership. In fact, plaintiffs specifically allege that O'Brien was working in his individual capacity. (NYSCEF 23, Complaint ¶ 14.)

Plaintiffs also imply that GOL § 5-701 (a) (10) only applies in "one-off" transactions. However, in *Snyder v Bronfman*, 13 NY3d 504, 509-510 (2009), the Court of Appeals stated that

> "[i]n *Freedman v Chemical Constr. Corp.* (43 NY2d 260, 267, 372 NE2d 12, 401 NYS2d 176 [1977]) we remarked, in the course of holding a plaintiff's claim to be barred by General Obligations Law § 5-701 (a) (10), that the plaintiff's role in a transaction was 'limited and transitory'--but that does not mean that every broker or finder who plays more than a 'limited and transitory' role in a transaction is entitled to recover. The more relevant language in Freedman says that 'where … the intermediary's activity is … that of providing 'know-how' or 'know-who', in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise,' the statute of frauds applies."

Here, O'Brien agreed to solicit clients for the 1042 Transactions, and thus, the section of the statute of fraud applies.

Plaintiffs also assert that the parties' partial performance renders the statute of frauds inapplicable. However, "[t]he exception to the statute of frauds for part performance does not apply to General Obligations Law § 5-701 (a) (10)." (*Nemelka v Questor Mgt. Co., LLC*, 40 AD3d 505, 506 [1st Dept 2007] [citation omitted].)

Additionally, plaintiffs assert that the statute of frauds may not be used to perpetrate a fraud or create an injustice. *In Matter of Hennel*, 29 NY3d 487, 494 (2017), the Court of Appeals held that "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds." However,

plaintiffs have not alleged facts demonstrating "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise."
(*Odonata Ltd. v Baja 137 LLC*, 206 AD3d 567, 569 [1st Dept 2022] [citation omitted].)

Finally, plaintiffs assert that Kaplan and CSG RE's writings prove that there is an agreement, and those writing satisfy the statute of frauds. Specifically, plaintiffs direct the court to the affidavits of Kaplan and Calianos. (NYSCEF 57, Kaplan Aff; NYSCEF 53, Calianos Aff.) First, Calianos "belief" and "understanding" that CSG managing directors received payment on 50% of all top line revenue that CSG RE generated is not enough to establish an agreement with O'Brien. (See NYSCEF 53, Calianos Aff ¶ 13.) Second, Kaplan's statement that "[t]he policy of CSG is to pay 50% of transaction fees to Managing Directors who originate such transactions" is also not a sufficient to prove the existence of an agreement to pay O'Brien 50% of gross revenue in connection with the 1042 Transactions. These affidavits fail to "contain all of the essential terms of the contract." (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54 [1953].

3. Unjust Enrichment

"To state a claim for unjust enrichment, a plaintiff must allege that: (1) the [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015] [internal quotation marks and citation omitted].) Plaintiffs allege that CSG RE collected fees and revenue from the 1042

Transactions originated by O'Brien without making payment to O'Brien of his share owed, enriching CSG RE.

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012] [citations omitted].) Further, unjust enrichment claims involving a contract implied in fact are also barred by GOL § 5-701 (a) (10). (*Snyder v Bronfman*, 13 NY3d at 508 [GOL § 5-701 (a) (10) shall apply to a contract implied in fact or in law to pay reasonable compensation].) Plaintiffs' claim for unjust enrichment duplicates its claim for breach of contract and is too barred by GOL § 5-701 (a) (10).

4. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff asserts that CSG RE breached the duty of good faith by diverting funds collected from the 1042 transactions to avoid paying O'Brien his fair share. However, "[a]bsent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing." (*Keefe v NY Law Sch.*, 71 AD3d 569, 570 [1st Dept 2010] [citation omitted].

5. Declaratory Judgment

Plaintiffs seek a declaratory judgment declaring "that plaintiffs have an enforceable contract with the defendants which entitles them to receive 50% of the gross revenue to be derived from the 1042 Transactions entered into by clients originated by plaintiffs, as well as to receive 50% of any profits obtained from
a sale of the Properties." (NYSCEF 23, Complaint at 18.) As any alleged oral agreement is barred by the statute of frauds, the court cannot grant this relief.

Blue Hippo's Motion to Dismiss Counterclaims

Blue Hippo moves to dismiss CSG's counterclaims for aiding and abetting breach of fiduciary duty, misappropriation, tortious interference with business and contractual relations, tortious interference with prospective business and contractual relations, unfair competition, unjust enrichment and equitable relief (accounting and permanent injunction).

Aiding and Abetting Breach of Fiduciary Duty

Blue Hippo argues that CSG has not sufficiently pleaded substantial assistance. CSG alleges that O'Brien misappropriated CSG's confidential and proprietary information and appropriated CSG's business for his own interests. CSG alleges that Blue Hippo aided and abetted in this breach as it was aware of and complicit in O'Brien's actions.

> "To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damage resulting from the breach. A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator. Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty. Furthermore, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff."

(*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006] [internal quotation marks and citations omitted].) "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 v Cohen*, 307 AD2d 113, 126 [1st Dept 2003] [citation omitted].)

CSG's allegation that Blue Hippo was "at all times aware of and complicit in [O'Brien's] Actions" (NYSCEF 25, CSG Answer ¶44 [counterclaim allegations]) implies

mere inaction by Blue Hippo, which CSG does not dispute or otherwise address in its opposition. Thus, without allegations of a direct fiduciary duty owed by Blue Hippo to CSG, this claim is dismissed.

Tortious Interference

CSG alleges that Blue Hippo tortiously interfered with CSG's business and contractual relations and with prospective business and contractual relations.

> "To prevail on a claim for tortious interference with business relations, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party. While a cause of action for interference with prospective contract or business relationship is closely akin to one for tortious interference with contract, the former requires proof of more culpable conduct on the part of defendant. This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party. Wrongful means has been defined to include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. [A]s a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be lawful and thus insufficiently culpable to create liability for interference with prospective contracts or other nonbinding economic relations. In addition, conduct which is motivated by economic self-interest cannot be characterized as solely malicious."

(*Stuart's v Edelman*, 196 AD3d 711, 713-714 [2d Dept 2021] [internal quotation marks and citations omitted].) CSG alleges that Blue Hippo employed wrongful means when it induced potential clients on CSG's confidential client list to enter into business relationships with Blue Hippo instead of CSG. Specifically, CSG alleges that Blue Hippo used misappropriated confidential information to solicit potential clients. At this stage, CSG has adequately pleaded this claim.

"The elements of tortious interference with contractual relations are (1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to the plaintiff." (*Anesthesia Assoc. of Mount Kisco, LLP v N. Westchester Hosp. Ctr.*, 59 AD3d 473, 476 [2d Dept 2009] [citation omitted].) "[W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." (*Id.* [citation omitted].) "Specifically, a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct." (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006] [citation omitted].) CSG fails to allege that the contracts would not have been breached but for Blue Hippo's conduct.

Misappropriation

> "A misappropriation cause of action exists under New York law only to the extent that the allegedly 'confidential information' qualifies for trade secret protection. To be sure, while the Appellate Division often refers to a cause of action for misappropriation of confidential information, when the Appellate Division uses this nomenclature, it is still referring to a claim for misappropriation of trade secrets. This makes sense. A rule to the contrary would effectively gut the important requirement of proving that business information qualifies for trade secret protection and could open the floodgates to anticompetitive litigation by effectively permitting stealth trade secrets claims based on the alleged conversion of material that does not actually qualify for trade secret protection."

(*Young Adult Inst., Inc. v Corporate Source, Inc.,* 2018 NY Slip Op 30640[U], *18-19 [Sup Ct, NY County 2018] [internal quotation marks and citations omitted].) "To prevail on a claim for misappropriation of trade secrets, a plaintiff must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of

an agreement, confidential relationship or duty, or as a result of discovery by improper means. A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (*Schroeder v Pinterest Inc.*, 133 AD3d at 27.)

Factors to consider when analyzing whether information constitutes a trade secret are as follows:

> "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. As these considerations demonstrate, a trade secret must first of all be secret: whether it is is generally a question of fact."

(*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993] [internal quotation marks and citations omitted].) On this motion, the court cannot determine whether the information described in CSG's answer, allegedly used by Blue Hippo, is in fact a trade secret.

Blue Hippo also argues that this counterclaim must be dismissed because it had no relationship with or duty to CSG. However, CSG sufficiently alleges that Blue Hippo used the information after it was obtained by improper means.

Unfair Competition

"The tort of unfair competition is based upon the misappropriation and improper use of another's commercial asset or trade secrets to gain an advantage." (*Tate & Lyle Ingredients Am., Inc. v Whitefox Tech. USA, Inc.*, 2011 NY Slip Op 33870[U], *25 [Sup Ct, NY County 2011] [citation omitted].) "To state a claim for unfair competition, plaintiff must

allege bad faith misappropriation of a commercial advantage or property which belonged exclusively to it, as well as special damages and a confidential relationship." (*Creative Circle, LLC v Norelle-Bortone*, 2019 NY Slip Op 34004[U], *10 [Sup Ct, NY County 2019] [citations omitted].) "In the context of an unfair competition claim, bad faith can be established by a showing of fraud, deception, or an abuse of a fiduciary or confidential relationship." (*Mercer Global Advisors, Inc. v Kraemer*, 2020 NY Slip Op 33856[U], *20 [Sup Ct, NY County 2020] [internal quotation marks and citation omitted].) CSG fails to allege such here against Blue Hippo.

Unjust Enrichment

"To state a claim for unjust enrichment, a plaintiff must allege that: (1) the [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." (*Schroeder v Pinterest Inc.*, 133 AD3d at 26 [internal quotation marks and citation omitted].) "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v Verizon NY, Inc.*, 18 NY3d at 790 [citations omitted].)

CSG alleges that Blue Hippo's actions, i.e., its misappropriation and diversion of CSG clients, unjustly enriched Blue Hippo. This claim simply duplicates CSG's tort claims. Thus, it is dismissed.

Equitable Relief (accounting and permanent injunction)

CSG's counterclaim for an accounting is dismissed as there is no confidential or fiduciary relationship between it and Blue Hippo. (*Palazzo v Palazzo*, 121 AD2d 261 [1st Dept 1986].)

CSG's counterclaim seeking to permanently enjoin Blue Hippo from using CSG's confidential and proprietary information is viable. At this stage, the court cannot determine whether this information constitutes a trade secret, and if in fact, Blue Hippo is using CSG's trade secrets to conduct business, this equitable remedy is appropriate to prevent further harm to CSG.

Punitive Damages

Punitive damages are permitted only when "defendants' actions were aimed at the public or 'evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419 [1st Dept 2020] [citations omitted].) This is not a situation that warrants punitive damages.

Accordingly, it is

ORDERED that the motion of defendants CSG RE III Consulting Partners LLC and CSG RE Partners, LLC to dismiss the complaint is granted and the complaint is dismissed in its entirety as against these defendants, with costs and disbursements to these defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of

the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Blue Hippo ESOP Advisors, Inc.'s motion to dismiss Corporate Solutions Group I, LLC and Corporate Solutions Group, LLC's counterclaims is granted in part, in so far as the counterclaims for aiding and abetting breach of fiduciary duty, tortious interference with prospective business and contractual relations, unfair competition, unjust enrichment and an accounting are dismissed.

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10/16/2022
DATE

ANDREA MASLEY, 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