

Columbia Tech. Corp. v Yoo

2023 NY Slip Op 33205(U)

September 14, 2023

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 NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE

PART

60M

Justice

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COLUMBIA TECHNOLOGY CORPORATION,

INDEX NO. 653273/2013

Plaintiff,

- v -

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

DECISION
AFTER TRIAL

Defendant.

-----X

Melissa A. Crane, J.S.C.

This dispute involves plaintiff Columbia Technology Corporation (“CTC”) and defendants John Yoo (“Yoo”), Eric Ross (“Ross”), Jack Roth (“Roth”) and Ross and Roth’s company EJRS Search Partners (“EJR”) (collectively, the “EJR Defendants”), Evan Hecht (“Hecht”), Evan Gary Capital, Inc., d/b/a Quantitative Systems (“Quantitative”), and Eric Sultzer (“Sultzer”).

CTC alleges that Yoo, a former employee, violated his Employment Agreement and Duty of Loyalty by taking CTC candidates and secretly forwarding their information to the EJR Defendants, Hecht, Quantitative, and Sultzer so that they could place them with their own clients,

costing CTC substantial amounts of money in potential commissions. Specifically, CTC contends that defendants improperly obtained and used CTC's proprietary client and candidate information, to gain an advantage, steal business, and increase their own profits at CTC's expense.

The court held a bench trial in the matter. While plaintiff has carried its burden to prove that some of the defendants' actions deprived it of certain commissions, plaintiff has fallen far short of carrying its burden on lost profits. Nevertheless, plaintiff has carried its burden to show that defendant Yoo must disgorge the salary CTC paid him. Yoo will not recover on his counterclaim.

Credibility Determinations

At trial, the court heard testimony from all parties and experts also testified. The court found Mr. Yoo not credible at times, considering some shifty and contradictory answers. For instance, at trial Yoo testified on direct examination that he did not talk to candidate Ezzard Batiste between the time that he left CTC and around 2012 (Trial Tr. at 619). However, evidence presented later at trial, specifically Plaintiff's Exhibit 22, revealed that Yoo did communicate with and reach out to Batiste after he left CTC (Trial Tr. at 625). Moreover, Yoo pled the fifth to questions involving emails about his "Jack Levin" account. Accordingly, the Court drew an adverse inference that (1) "The emails tend to show Yoo used the CTC information funneled through the Levin account to try to place certain candidates and compete with CTC" and (2) The emails "tend to show Yoo obtained confidential contact information from CTC for Nomura." (*See* Doc 499 [Decision and Order, dated 2/23/2023]).

The other defendants were largely credible, except the court does not believe the EJR Defendants were correct when they claimed to have a prior relationship with Christopher Smith.

Plaintiff's witnesses were credible. In particular, Mr. Vitiello was very honest and even testified against his own interests concerning Mr. Nath.

Findings of Fact

I. The Parties

CTC is an IT recruiting and staffing firm that targets the financial sector and maintains relationships with IT professionals and financial institutions to match professionals with open IT positions. CTC has contracts with several financial firms, such as JP Morgan, Goldman Sachs, Barclays Capital, Societe Generale, Deutsche Bank, UBS, BNP Paribas, and Citigroup, that enables it to submit applicants to open positions.

Defendants Ross and Roth work together as recruiters at their company, EJR, another IT staffing firm that specializes in placing IT candidates with financial firms, including firms CTC also works with.

Defendant Sultzer has recruited for about 30 years. In October 2009, and for about 8 months after, Sultzer worked at CTC and oversaw the job requirements for its Barclay's Capital account. Sultzer also recruited Yoo to work at CTC and worked with him daily to place CTC candidates. In June 2010, Sultzer left CTC to start his own recruiting company.

At trial, the court dismissed CTC's claims against Sultzer because plaintiff failed to prove that he placed any candidate in violation of CTC's rights. The only client Sultzer placed was Julia Tenenbaum with whom he had a prior relationship and whom he did not place until 2013. Moreover, Sultzer merely obtaining CTC's information from Yoo, without using it, was an insufficient basis to establish lost profit damages against him (Trial Tr. at 451).

Defendant Hecht has recruited for about 19 years. He began his career at Open Systems (“OS”) in or about 2003 and remained there until 2008 when he left to start his own company (Trial Tr., at 749). At OS, Hecht worked with Sultzter, Roth, Ross, and Yoo (*id.*, at 750).

Defendant Yoo began recruiting in 2003 at OS (*id.*, at 36). At OS, Yoo met Sulzter, Roth, Ross and Hecht (*id.*, at 37). Yoo worked at OS until 2008, when he left for Solomon Page (*id.*, at 36-37). In January 2010, Yoo began working at CTC and remained there until his termination on September 24, 2010 (Plaintiff’s Exhibit 622).

II. CTC’s Business Practices and Confidential Database

CTC earned revenue through commissions after successfully matching a candidate with a client (Vitiello Aff. ¶ 8). To do so, CTC employed recruiters, who identified and contacted candidates and attempted to match them with client job openings called “requirements” (*id.*, ¶ 9). CTC also had a non-public database, containing candidate information it had compiled not only through public sources, but also through referrals, live discussions and in person discussions. CTC considered this database highly confidential. Recruiters logged new information and resumes for candidates they reviewed into the database. Recruiters could then search for candidates when making placements, and could filter based on skills, salaries, or past work history (*id.*, ¶ 20). The database was password protected, accessible only on CTC’s office computers, and was not to be copied or taken by a recruiter when leaving CTC (*id.*, at ¶ 32). CTC did not allow employees to download software onto their CTC computers to protect its proprietary business information further and did not allow employees to access their CTC computers or the database from their homes (Trial Tr. at 43:6-11).

III. The Employment and Duty of Loyalty Agreements

CTC required employees to sign Employment Agreements that detailed the employee's compensation and commissions for the placements an employee made. Compensation was comprised of a commission and a draw. The commission for each candidate "placement" was 26% of the fee the company received for full time and permanent placements, and 20% of the net profit the company made on consulting placements (Plaintiff's Exhibit 610). The Employment Agreement stated that the employee "[has] not relied on any statements made by [CTC] with respect to any term or condition not contained in this letter in deciding whether to accept employment with [CTC]" (*id.*). It also required employees to sign a Duty of Loyalty Agreement, that required employees to "keep confidential all Confidential Information" and prohibited them from taking "any Confidential Information with [them] upon leaving [CTC]" (Plaintiff's Exhibit 623, ¶ 3[b]).

The Duty of Loyalty Agreement defined the term "Confidential Information" as:

"[A]ll 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."

(Plaintiff's Exhibit 623, ¶ 1[b]).

The portion stating, "Confidential Information also includes information concerning CTC's clients..." did not refer to CTC's candidates (Trial Tr. at 500:7-16). Thus, information regarding CTC's clients is included in this definition, whereas information on CTC candidates is not, unless candidate information was in CTC's database, which is included in the definition as well.

The Duty of Loyalty Agreement also required that the employee: (1) “agree[] that upon termination of his/her employment by CTC for any reason, or at such earlier time as CTC may request, the Employee shall forthwith return to CTC all Confidential Information in tangible form and all documents and other property in his/her possession belonging to CTC” (Plaintiff’s Exhibit 623, ¶ 3[d]); (2) not to “solicit or call upon any candidate or potential candidate that the Employee placed or attempted to place on behalf of CTC with the goal, intention or aim of finding employment for or otherwise placing the candidate with any person or entity for a fee that will be payable to any person or entity other than CTC” for the twelve-month period after termination (*id.*, ¶ 5[a]); (3) to refrain from interfering with CTC’s business relationships during employment and for the twelve months after employment, including refraining from taking actions, directly or indirectly, that would be “reasonably likely” to advance others’ interests “in any way that will or may injure CTC or any of its business interests” (*id.*, ¶ 4); and (4) to refrain from disparaging CTC by making “any statement that is likely to have the effect of undermining or disparaging [its] reputation...or its goodwill” (*id.*, ¶ 6). The agreement also stated that “the covenants made...shall survive the cessation of...employment with CTC, regardless of the reason...” (*id.*, ¶ 9).

Yoo signed his Employment Agreement on January 4, 2010 (Plaintiff’s Exhibit 610). It provided him with an \$80,000 annual salary, paid through 24 semi-monthly installments as a draw against commissions he made while recruiting for CTC (*id.*, ¶ 1[a]). It also provided a 26% commission for each full-time candidate placement, and a 20% commission, paid monthly, for each consulting placement, based on the net fee the employer paid CTC (*id.*, ¶ 1[b]). For the short time he was at CTC, Yoo received \$56,410.20 in compensation (Plaintiff’s Exhibit 654).

IV. Yoo's Interactions with the Other Defendants

Before 2010, defendants worked together at OS for about four years. After Yoo left OS, he continued his relationship with Ross and sent him candidate resumes (Trial Tr. at 708:9-17). On January 4, 2010, Roth emailed Yoo wishing him luck with his new job at CTC (Plaintiff's Exhibit 42). Just months later, in the summer of 2010, Yoo and EJR agreed to split recruiting commissions on candidates that Yoo would send for EJR to place, although EJR was aware of Yoo's continued employment with CTC (Trial Tr. at 51:8-53:16).

Starting in July 2010, Roth began soliciting candidates from Yoo and asking him for resumes so that Yoo and EJR could profit from placements (*see* Plaintiff's Exhibit 41 [July 10, 2010 email from Roth to Yoo stating "send me good C#, Java and C++ resumes. Let's make some money"]). In response, Yoo supplied information about candidates, firms that CTC was sending them to, CTC's status on firm vendor lists, and other information (Trial Tr. at 54:18-57:9, 59:2-60:24, Plaintiff's Exhibit 146).

Yoo did not tell CTC's CEO, David Vitiello ("Vitiello"), about this arrangement, and continued to collect a paycheck from CTC. Ross testified that he knew Yoo was working at CTC in the summer of 2010 and did not recall learning that he left CTC before September 2010 (*id.* at 708:24-709:1, 743:15-21). Other communications also indicated that Ross and Roth knew that Yoo was still at CTC while he was sending them information (Plaintiff's Exhibits 15, 39, 57).

Between July 2010 and September 2010, Yoo sent over 80 candidates from CTC's database to EJR by email and communicated with them through online chats from a computer in CTC's office while working there (Plaintiff's Exhibits 15, 99, 111, 114-16).

In September 2010, because of a falloff in placements, Vitiello became concerned that an employee might be sabotaging CTC's relationships and installed surveillance software on all CTC

computers, including Yoo's (Vitiello Aff. ¶ 79). The program was installed from September 15, 2010 to September 20, 2010. CTC could view results for those days. The reports showed Yoo communicating with Ross and Roth about candidates through his personal instant messaging username (Plaintiff's Exhibits 15, 116, 99).

Yoo also sent EJR candidates he found while working at CTC, but deliberately failed to add to the database or failed to try to place on CTC's behalf. For instance, on September 21, 2010, Roth requested that Yoo find individuals for a "Java associate level" role for JP Morgan and other senior roles at UBS (Plaintiff's Exhibit 15; *see also* Plaintiff's Exhibit 39). Yoo suggested two CTC candidates that CTC had arranged interviews for within the past three months, Henry Fang and Akhil Gupta. Yoo also suggested another candidate, Jagan Kanu, and provided his background information to Ross (Plaintiff's Exhibit 99). CTC had obtained an interview for Kanu three months earlier (Plaintiff's Exhibit 118). After reviewing the communications, CTC terminated Yoo on September 21, 2010.

Afterwards, Yoo could no longer access CTC computers, but could still access information from the database that he had sent himself or saved to his Dropbox. The Dropbox folder's metadata showed that many resumes in the folder were created or modified while Yoo was at CTC. Screenshots also indicated that he was uploading CTC's proprietary information, from its files to his Dropbox, while still working there (Plaintiff's Exhibit 614). Yoo even admitted that he continued to use the resumes from his Dropbox for recruiting, including information he had uploaded to it while at CTC (Trial Tr. at 50:13-18). Yoo also had access to the login and passwords that he sent himself for CTC's client's portals, including those for JP Morgan, where he placed two candidates between 2011 and 2012, and Bloomberg, where he placed a candidate in April 2011, less than a year after he was fired (Plaintiff's Exhibit 131 at 1; 625 at 20).

After he was fired, Yoo confirmed that he would respect the Duty of Loyalty Agreement and would refrain from jeopardizing the work he did at CTC (Plaintiff's Exhibit 172). However, he later reached out to Ross and Roth, informed them that CTC had fired him, and asked for their advice. They did not end their arrangement with him then. Instead, they requested he continue sending more resumes on a full-time basis (Trial Tr., at 74:11-13). Yoo continued sending Ross and Roth CTC candidate resumes.

Hecht did not keep in touch with Yoo after leaving OS in 2008 and did not hear from him again until February 2011 (Trial Tr., at 80, 672, 751). Hecht reconnected with Yoo after renting shared space in the building in which Yoo, Roth and Ross also rented space (*id.* at 80, 751).

In early 2011, while working in the same shared office, Ross and Roth informed Hecht of their arrangement with Yoo (*id.*, at 80:10-18, 126-127:2). Eventually, Hecht told Yoo that he had some jobs, and that if Yoo had candidates for them, Yoo could send them to him (*id.* at 753). After, they agreed to split commissions 45% each, with 10% going to EJR for reintroducing them (*id.* at 81, 127-128, 753; Plaintiff's Exhibit 9, at 2). Eventually, Hecht, the EJR defendants and Yoo memorialized their agreement in an email from Hecht in June 2011 (Plaintiff's Exhibit 9). It was not until then that Yoo then began sending Hecht information and resumes, including CTC candidates' (Trial Tr. at 753:22-754:13; Plaintiff's Exhibits 12, 122, 125, 154, 617).

V. CTC's Profit History

In 2009, CTC maintained \$1.3 million in gross profits. CTC was able to increase profits in 2010 to about \$1.9 million. In 2010's first half, CTC made about 42 placements, and was doing "better than it had ever done" before (Trial Tr. at 314:2-7). However, CTC's gross profits started decreasing in 2010's second half.

In 2011 and 2012, CTC's profits dropped further to \$1.7 million and \$1 million. Despite CTC's profits increasing in 2010, it began seeing placements decline starting in July 2010, with only 22 placements in 2010's second half, compared to 42 placements in the first half. After two more years of declining profits, CTC was able to reverse its profits' downward trajectory by earning \$1.5 million in profits in 2013 (Trial Tr. at 392:24-25). CTC blames Yoo's theft of information for the decline.

Vitiello testified that CTC's employee headcount decreased between 2010 and 2011, after Sultzer left in June 2010, Yoo left in September 2010, and other recruiters followed (Trial Tr. at 467-468; 478-479). He could not recall whether or when the departing recruiters were replaced (*id.* at 479). The departures would have impacted CTC's payroll expenses and profits, as Vitiello grudgingly admitted that CTC's staffing levels impacted its ability to place recruiting calls (Trial Tr. at 466-467; 470; 482).

Analysis and Legal Conclusions

A. CTC's Information Was Confidential

Defendants contend that the information Yoo forwarded was not confidential in the first place. This is incorrect. CTC compiled the information in its database through years of effort. Information was gleaned not just from on-line sources, but through referrals, in person interviews or meetings, phone calls and the like. CTC recruiters would call many people per day to obtain non-public information, such as whether they were interested in moving to a new job, their experience, salary requirements and visa status.

The recruiters, all on CTC's dime, would then log the information into CTC's internal database. This database was password protected, only accessible from CTC's offices and was not to be copied by a recruiter when they left CTC. CTC did not allow employees to download software

onto CTC's computers to protect CTC's proprietary information. Nor could CTC employees access their work computers or CTC's database from home. These circumstances render much of the information in CTC's database a trade secret or confidential business information (*see E. Bus. Sys., Inc. v Specialty Bus. Sols., LLC*, 292 AD2d 336, 337, [2d Dep't 2002] ["[t]his information was compiled through considerable effort by Eastern and its employees over several years and was not available to the public."]; *Paz Systems Inc v Dakota Group Corp.*, 514 FSupp2d 402, 408 [EDNY 2007] [customer names and related information were trade secrets where company took pains to guard its information that was not known outside of the business]; *see also Novus Partners, Inc v Vaichenker*, 32 Misc 3d 1241[A] at *4 [Sup. Ct. New York Cty 2011]).

B. Plaintiff's Theory of Lost Profits Is Speculative

"Under New York law, the damages for unfair competition are limited to "the loss of profits sustained by reason of the improper conduct," and "[t]he offending party's conduct must be a substantial factor in causing the loss" (*eCommission Sols., LLC v. CTS Holdings, Inc.*, 2018 WL 2078816, at *4 (S.D.N.Y. May 1, 2018), *aff'd*, 860 F. App'x 758 (2d Cir. 2019), *citing Suburban Graphics Supply Corp. v. Nagle*, 5 AD3d 663, 666 [2d Dep't 2004]). To recover lost profits, the "losses must be directly attributed to the unfair acts of the defendant" (*Continental Indus. Group, Inc v Altunkilic*, 2020 WL 3884312 at 5 [SDNY July 1, 2020]). CTC argues that defendants' actions in contacting some of its candidates and purloining its confidential information caused CTC significant damage in the form of lost profits to the tune of \$1,761,250.00. Plaintiff's efforts to recoup lost profits of almost \$2M based on some alleged general "interference" with a small number of candidates in Plaintiff's database of over 10,000 candidates, most of whom Plaintiff failed to show it was trying to place, is rank speculation.

To prove lost profits, CTC relies exclusively on the timing of its downturn in business that allegedly started in the middle of 2010. This is insufficient (*see Seven-Up Co. v Coca-Cola Co.*, 86 F3d 1379, 1388 [5th Cir. 1996] [in unfair competition case, 5th Circuit held “an inference of causation based merely on the chronology of events is not a reasonable one for the jury to make”]; *A.L.S. Enterprises, Inc. v Robinson Outdoor Prod., LLC*, 2017 WL 393307 at 8 [W.D. Mich. Jan. 30, 2017] [“[g]iven the number of potential reasons for ALS's declining sales to Cabela's and Gander Mountain, ALS could not rely on mere temporal sequence to show cause and effect”]).

While Plaintiff points to the timing of its falloff in business in mid-2010, Plaintiff attributes its ability to increase profitability in 2009 and the first half of 2010 to its hiring of additional employees, including Sultzer and Yoo (Vitiello Aff. ¶¶ 166-167). Plaintiff then ignores the correlation between the departure of those same employees, beginning with Sultzer leaving CTC in June 2010, followed by at least four (4) other recruiters, and its lost profits beginning in that period (Trial Tr. at 144). There is evidence that Sultzer, who had years of experience, was good at recruiting as he successfully started his own business following his departure from CTC. Fewer or poorer quality recruiters is more likely the cause of plaintiff's downturn in business than the handful of candidates that defendants may have placed or the theft of confidential information (*see Vitiello Tr. at 465* [“I might be able to make the same amount of placements with three good recruiters than I would with 11 recruiters”]; *see also Suburban Graphics Supply Corp., v Nagle*, 5 AD3d 663, 666 [2d Dep't 2004] [limiting plaintiff's award for lost profits because the evidence established that customers were dissatisfied with plaintiff and would have gone elsewhere anyway]).

Recruiting is a highly competitive business. In addition, publicly available information via the internet increases every day. Plaintiff did not succeed in showing, by a preponderance of the

evidence, that defendants: (1) contacted thousands of individuals utilizing information from plaintiff's database or (2) that plaintiff, as opposed to some other recruiter, or no one at all, would have placed them. Indeed, there is no evidence that Plaintiff even tried to place most of the candidates whose information Yoo stole. Instead, sometimes years would elapse between contact. Thus, plaintiffs have not carried their burden to show that the offending conduct was a substantial factor in causing the loss of \$1.7M.

In cases with similar speculative proof, courts have declined to award lost profits (*see e.g. Pure Power Boot Camp, LLC v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 519 [SDNY 2011] [court rejected plaintiff's attempt to recover lost profits where defendant allegedly solicited only 20 of plaintiff's former customers]; *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at 23 [Del. Ch. Jan. 29, 2010] ["the only basis for awarding damages advanced by Great American's claim that it suffered an actual loss in excess of \$1 million is the overly-expansive theory that, but for Cherrydale's actions, all three of the former KB sales reps...would have joined Great American and transitioned all of their customers to it."]; *Stoeckel v Block*, 170 AD2d 417, 417 [1st Dep't 1991] ["[a]lthough defendant established a decline in profits during the period subsequent to plaintiffs' termination, which was the result of a majority of defendant's clients utilizing the services of plaintiffs' new enterprise, it was not demonstrated that this decline in business was attributable to plaintiffs' alleged wrongful conduct during the term of their employment with defendant"]; *See also In re Elysium Health-ChromaDex Litig.*, 2022 WL 421135 at *20 (S.D.N.Y. Feb. 11, 2022) [rejecting expert report of lost sales as a non sequitur]; *Am. Home Prod. Corp. v. Johnson & Johnson*, 682 F.Supp 769, 771 [S.D.N.Y. 1988] [dismissing false advertising claim where theory of injury relied on the "highly questionable premise[]" that

a product's entire sales decline “is attributable to false and misleading advertising by” the defendant]).¹

Plaintiff's theory here suffers from similar infirmities. It simply does not stand to reason that by defendants placing the few individuals plaintiff might possibly have placed that plaintiff has suffered \$1.7M in lost profits due to defendants' misconduct. The logic simply does not follow. Again, the temporal coincidence of lost profits, without more, is insufficient (*see 7-Up, supra*, 86 F3d at 1388).

C. **Disgorgement: Hecht and EJR**

Plaintiff seeks disgorgement of commissions for the following candidates from Hecht/Quantitative Systems and EJR: Luis Reyes, Apurba Nath, Ezzard Batiste, and Christopher Smith.

a. **Hecht**

Yoo and Hecht did not work together to place any candidates while Yoo was at CTC (Trial Tr. at 672). Plaintiff failed to carry its burden that Hecht: (1) even knew Yoo had worked at CTC, much less knew where Yoo derived the candidates he sent to Hecht or (2) knew that Yoo had a non-compete with CTC that lasted a year. Rather, the credible evidence demonstrated that Hecht had lost touch with Yoo and only reconnected after Yoo had left CTC (*id.*, at 751). Accordingly, there is no evidence that Hecht had the requisite awareness to support plaintiff's remaining claims against him for: (1) tortious interference with Yoo's employment and loyalty agreements; or (2) aiding and abetting Yoo's breach of fiduciary duty.

Nor is Hecht liable for misappropriation of trade secrets. Hecht placed only two candidates that CTC claims potentially involved their trade secrets: Ezzard Batiste and Kevin Byrne. Batiste

¹ *S&K Sales Co., v Nike Inc.*, 816 F2d 843 (2d Cir 1987) is not to the contrary. In that case plaintiff established at trial that it likely would have continued its relationship with Nike, but for the disloyal acts.

was not placed until 2012. Batiste's 2010 resume and information was what was in CTC's database. This resume was stale by 2012. It was Batiste's 2012 resume that Hecht used to place him (Exhibit QS-B1; QS-B2). Therefore, Hecht did not use CTC's confidential information to place Hecht. But, even if he did, Yoo testified in great detail how he has known Batiste since 2005 (Trial Tr. at 618-620). The non-solicitation provision cannot apply to clients and candidates with whom Yoo had a prior relationship (*see Marshall & Sterling Inc v Southard*, 148 AD3d 1009, 1011 [2d Dep't 2017]; *see also BDO Seidman v Hirshberg*, 93 NY2d 382, 393 [1999]; *see also E. Bus. Sys., Inc. v Specialty Bus. Sols., LLC*, 292 AD2d 336, 338 [2d Dep't 2002] [injunction would not apply to "(a) blood relatives of the defendants, (b) former customers of the plaintiff brought to it solely through the individual appellants' own efforts, and (c) any persons or entities who, without solicitation, approach the appellants and request that they provide service"]).

As for Byrne, plaintiff did not prove that Hecht used any of its confidential information concerning this candidate. Rather, the credible evidence showed Hecht located Byrne's resume in eFinancial Careers, a database resource to which he subscribed, after searching for a candidate with Charles River expertise (Trial Tr. at 760-761).

At bottom, Hecht: (1) had no duty to CTC; (2) had no knowledge about Yoo's duty; and (3) did not use any of plaintiff's information. Accordingly, plaintiff has no damages attributable to Hecht. Therefore, the court dismisses Hecht and Quantitative Systems from this action.

b. EJR

Unlike Hecht, the EJR defendants knew that Yoo was working for CTC and knew Yoo was sending confidential information to them. After Yoo left OS, he stayed in touch with Ross (*see* Plaintiff's Exhibit 57 [July 28, 2010 email Yoo telling Roth to send a candidate to companies

"columbia does not work with"]; Plaintiff's Exhibit 15 [Roth asking Yoo on September 21, 2010, the day Yoo was fired whether "you guys" [i.e. CTC] were "doing deals"]).

Indeed, starting in July 2010, while Yoo was at CTC, Roth requested that Yoo send him "good C#, Java and C++ resumes" so they could "make some money" (*see* Plaintiff's Exhibit 41). Yoo acceded to this request. Between July and September 2010, Yoo sent EJR information on over 80 candidates in CTC's database via email (Doc 511 [Post-Trial Briefing Demonstrative Ex. 7]). Yoo would also intentionally not put information he found into CTC's database, but instead would inform EJR about them (*see e.g.* Plaintiff's Exhibit 39). Under these circumstances, EJR is liable for misappropriation of trade secrets.

Nevertheless, despite this unscrupulous behavior, plaintiff has not succeeded in proving anywhere near the damages they claim from EJR. As discussed above, plaintiff's theory for \$1.7 in lost profits is speculative. Meanwhile, plaintiff has proven that EJR received commissions from the use of plaintiff's confidential information for only two candidates: Luis Reyes and Christopher Smith.

Yoo placed Luis Reyes at Nomura relying on CTC's Nomura contact, Kara Morissey, in June 2011 (Plaintiff's Exhibits 704, 515). EJR and Yoo split the **\$22,000** commission for Reyes' placement at Nomura (Plaintiff's Exhibit 625). Given the extent to which EJR must have been aware of Yoo's obligations, and that they had knowingly been receiving confidential information from Yoo since the summer of 2010, EJR knew Yoo could have used confidential information to place Reyes. Under these circumstances, they should pay their share of the commission for Yoo placing Reyes (\$11,000) (*see Paz Systems, Inc. v Dakota Group Corp.*, 514 FSupp2d 402, 409 [EDNY 2007] [awarding damages for diverted and lost sales]). Because Yoo forwarded the

confidential information to place Reyes, he is jointly and severally liable for this amount. Moreover, this amount equates to the profits CTC would have earned had it placed Reyes itself.

On August 27, 2010, Yoo saved Christopher Smith's resume to his dropbox account. On August 30, 2010, Yoo sent Smith's resume to the EJR defendants (Plaintiff's Exhibits 434-436). Plaintiff contends the EJR defendants placed Smith at Elliot Asset Management in 2012. EJR admits that it received a commission for placing Smith of \$45,787. However, EJR claims that it had a prior relationship with Christopher Smith, and therefore Yoo did not receive any part of the commission. Unfortunately for EJR, the only documentary evidence in the record concerning Christopher Smith and his prior relationship with EJR, (Yoo Exhibit HH), is from December 2011. Given that EJR knowingly accepted Smith's resume from Yoo, while Yoo was at CTC, coupled with the lack of evidence of a preexisting relationship, that surely EJR could have produced, renders EJR's testimony about knowing Smith beforehand perhaps mistaken. Accordingly, EJR must pay the **\$45,787.00** EJR received for Smith. Because Yoo forwarded the confidential information to place Smith, he is jointly and severally liable for this amount. This amount equates to the profits CTC would have earned had it placed Smith itself.

D. Yoo

By contrast, Plaintiff has carried its burden to show that Yoo breached his contracts and his duty of loyalty while working for CTC and being paid by CTC. There is no question that Yoo went to great lengths to copy or download CTC's confidential information about thousands of candidates to his own accounts, some of which he then forwarded to the other defendants. To the extent Yoo argues that he was supposed to be paid double commissions, this court has already found that the agreements did not provide for double commissions (*see* Trial Tr at 580:14-23). Moreover, this court has already issued an adverse inference, due to Yoo's invocation of his 5th

amendment rights, that his Levin account emails tend to show Yoo used CTC information to try to place certain candidates. Yoo does not seriously contend that he did not divert confidential customer information while he was working for CTC.

Yoo's actions have consequences. First, Yoo has forfeited his entire salary for the entire time he was at CTC under the faithless servant doctrine (*see Paramount Painting Grp., LLC v. Nichtberger*, 212 A.D.3d 533, 533 [1st Dep't 2023]; *Panos v Mid Hudson Medical Group*, 204 AD3d 1016, 1019 [2d Dep't 2022]). This means not only that Yoo cannot recover on his counterclaim, but he also must disgorge the \$56,410.00 that CTC paid him for his blatant breaches of fiduciary duties, including the duty of loyalty to the employer who was paying him (*Nichtberger* 212 AD3d at 533).

Nevertheless, few of the placements Yoo made caused CTC damage. This decision has already discussed Luis Reyes and Christopher Smith for whom Yoo is jointly and severally liable with EJR for the commission received (see discussion – *supra*). However, Yoo is not liable for Yulia Tenebaum, Ezzard Batiste and Kevin Bryne as discussed above.

Moreover, Yoo's misconduct did not cause damage when Yoo and EJR placed Apurba Nath. Yoo placed Nath at Nomura on May 24, 2010 and received a commission. Yoo took the information about Nath from CTC (Plaintiff's Exhibits 191-192). Yoo and the EJR defendants then placed Nath at Citigroup in June 2011. However, this did not damage CTC. As Vitiello testified, CTC would not have even tried to place Nath so close in time to having placed him at Nomura:

“It's not our normal course of business to place someone and then within a year try to pull them out of that candidate at that time and place them somewhere else...as an ethical course of business, I don't think it makes sense.”

(Trial Tr. at 302-303:25)

Thus, CTC could not have suffered damages from the other defendants' placement of Nath, because CTC would not have tried to place him itself.

Plaintiff does not appear to be seeking payment for any other candidates, such as Mr. Nair or Mr. Karayan. There were various other individuals whose information Yoo may have downloaded (for example Prakesh Patel, Victor Kazoba and Reshma Badani) whom none of the defendants placed. Therefore, CTC did not sustain damages with respect to these candidates. Meanwhile, with respect to Rajesh Kuwar, EJR placed him at Morgan Stanely in 2010 without Yoo's assistance (Trial Tr. at 702:11-704:22). Therefore, EJR's placement of Mr. Kuwar could not have damaged CTC.

E. Punitive Damages

Because the EJR defendants did not owe plaintiff a fiduciary duty, there can be no award of punitive damages without a public injury. Indeed, none of plaintiff's cases cited in support awarded punitive damages against a non-fiduciary without public injury (*see Barbagallo v. Marcum LLP*, 820 FSupp2d 429, 449 [E.D.N.Y. 2011] [accounting firm whose certified public accountant (CPA) had left the firm to work for a competitor could not maintain claim for punitive damages against employee's new firm]).

Nor did the EJR defendants provide substantial assistance such that they would be liable for aiding and abetting Yoo's breach of fiduciary duty. "[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v. Cohen*, 307 AD2d 113, 126 [1st Dep't 2003]). Plaintiff has failed to prove that EJR split any commissions while Yoo was working for CTC and merely offering to compensate Yoo is insufficient for substantial assistance (*BCG Partners, Inc. v Avison Young*, 160 AD3d 407, 408[1st Dep't 2018]).

In accepting the confidential information and, after Yoo was fired from CTC, splitting commissions, EJR's role was more passive. They did not help steal the confidential information. Accordingly, the court dismisses plaintiff's claim for punitive damages against the EJR defendants.

However, Yoo did owe plaintiff a fiduciary duty. Against a fiduciary, "[t]o sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another" (*Don Buchwald & Assocs., Inc. v. Rich*, 281 AD2d 329, 330 [1st Dep't 2001]).

What Yoo did was reprehensible. Almost immediately upon arriving at CTC, he went to great lengths to copy CTC's information, collaborate with CTC's competitor and hide his tracks, such as by using instant messaging. Even after being caught, Yoo continued to use and forward CTC's confidential information. Courts award punitive damages for this type of conduct (*see Paz Systems, Inc. v Dakota Group Corp.*, 514 FSupp2d 402, 409 [EDNY 2007]; *Giblin v. Murphy*, 73 NY2d 769, 771 [1988] [punitive damages awarded for fiduciaries' repeated wrongful diversion of corporate assets to themselves and others]).

Nevertheless, the compensatory damages in this case are small. Moreover, plaintiff was unreasonable to dig in its heels and insist on \$1.7 million in speculative lost profits when the actual damages it was able to prove are a small fraction of that amount. Also, Yoo now has to disgorge his salary, pay his lawyer and pay prejudgment interest. Accordingly, the court sees fit to award \$33,893.00 in punitive damages which is ½ of the amount of commissions that Yoo diverted from CTC (*see Paz, supra* at 409).

F. Miscellaneous

It does not appear that Plaintiff is still pursuing claims against UTC, J-Search or its claim for trespass to chattels. Thus, this claim and these defendants are dismissed. The court finds the remainder of plaintiff's arguments and claims unavailing.

Accordingly, after trial, the court conforms the pleadings to the proof and awards judgment as follows:

It is ORDERED that the clerk is directed to enter judgment in the amount of \$11,000.00 against the EJR Defendants and John Yoo, jointly and severally, for misappropriation of trade secrets in the case of EJR and misappropriation of trade secrets and breach of fiduciary duty in the case of John Yoo, with prejudgment interest from September 19, 2011; and it is further

ORDERED that the clerk is directed to enter judgment against John Yoo, for misappropriation of trade secrets and breach of fiduciary duty, in the amount of \$11,000; with prejudgment interest from September 19, 2011; and it is further

ORDERED that the clerk is directed to enter judgment in the amount of \$45,787.00, against the EJR Defendants and John Yoo, jointly and severally, for misappropriation of trade secrets in the case of EJR and misappropriation of trade secrets and breach of fiduciary duty in the case of John Yoo, with prejudgment interest from December 31, 2012; and it is further

ORDERED that the clerk is directed to enter judgment against John Yoo in the amount of \$56,410.20 with prejudgment interest from September 21, 2010 for breach of fiduciary duty; and it is further

ORDERED that the clerk is directed to enter judgment against John Yoo in the amount of 33,893.00 as punitive damages for breach of fiduciary duty; and it is further

ORDERED that the court dismisses this action against defendants United Tech Corp. D/B/A Jyoosearch.com, J-SEARCH, Evan Hecht, Evan Gary Capital Inc. D/B/A Quantitative Systems, and Eric Sultzer; and it is further

ORDERED that the court dismisses John Yoo's counterclaims; and it is further

ORDERED that the clerk is directed to mark this matter disposed.

14
9/14/2023
DATE

[Signature]

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE