

**BDO USA, P.C. v Morris**

2024 NY Slip Op 33240(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652352/2020

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BDO USA, P.C., INDEX NO. 652352/2020
Plaintiff, 03/14/2024,
- v - 03/14/2024,
STEPHEN MORRIS, JAMES ANDREW STILES, MOTION DATE 03/15/2024,
03/14/2024
Defendant. MOTION SEQ. NO. 044 045 049
050

DECISION + ORDER ON MOTION

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 044) 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1053, 1064, 1103, 1104, 1105, 1106

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 045) 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1067, 1097, 1098, 1099, 1100, 1101

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 049) 808, 809, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 1054, 1069, 1107

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 050) 806, 807, 913, 1102

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, (i) BDO USA, P.C. (**BDO**)’s motions for summary judgment as against James Andrew Stiles (Mtn. Seq. No. 050) and Stephen Morris (Mtn. Seq. No. 045) are **GRANTED IN PART**, and (ii) Messr. Stiles’ (Mtn. Seq. No. 049) and Morris’ (Mtn. Seq. No. 044) motions for summary judgment are **DENIED**.

### **The Relevant Facts and Circumstances**

BDO sued Stephen Morris and James Andrew Stiles alleging, among other things, that Messrs. Stiles and Morris conspired with non-party Eric Jia-Sobota to steal BDO’s Industry Specialty Services Group (**ISSG**) by soliciting BDO’s current clients, prospective clients, and employees, causing them to terminate their relationships with BDO and bring their business or services to Mr. Jia-Sobota’s newly-founded and competing consulting firm, EverGlade Consulting (**EverGlade**). As to Mr. Stiles, BDO also alleges that he collected a second salary and performed work for Phlow, a BDO client, while still employed by and paid by BDO and that he misappropriated BDO’s confidential information to commit insider trading (conduct for which Mr. Stiles has been sued by the SEC in a civil proceeding and has pled guilty to in a criminal proceeding). As to both Messrs. Stiles and Morris, BDO argues that they each breached their respective employment contracts and were “faithless servants.” Finally, BDO argues that Messrs. Stiles and Morris’ counter-claim sounding in defamation must be dismissed.

For their part, Messrs. Stiles and Morris deny these allegations, and ask the Court to dismiss all of BDO’s claims and award them summary judgment on their respective counterclaims for defamation *per se*.

Mr. Stiles joined BDO in October 2012, signing a Manager Agreement on October 19, 2021 (NYSCEF Doc. No. 3; the **Manager Agreement**). Pursuant to the terms of his Manager Agreement, Mr. Stiles agreed to “to devote all of Employee’s working time energy and to give Employee’s best attention exclusively to the business of” BDO, protect BDO’s confidential information, and to not solicit clients, prospective clients, or employees to leave BDO:

2. Employee's employment under this Agreement shall be or continue to be "at will" and either party may terminate that employment at any time, with or without notice, for any reason whatsoever or no reason. Employee acknowledges and agrees that this Agreement does not constitute a commitment to employment or any position for any specific duration. While employment continues, *Employee agrees to devote all of Employee's working time and energy and to give Employee's best attention exclusively to the business of the Firm.*
3. Other than as set forth herein, Employee agrees to adhere to and be bound by the Firm's Workplace Guide and the BOO Code of Business Ethics and Conduct, as either or both may be revised from time to time, and the applicable policies, procedures, rules and requirements of the Firm, as implemented from time to time.
4. It is agreed that it is essential to protect the Firm and its clients from the unauthorized use or appropriation of confidential and proprietary information developed, held or used by the Firm concerning the Firm or the Firm's clients ("Confidential Information"). When used hereinafter, the term "Confidential Information" shall include, but not be limited to, the policies, practices, business, marketing and all other confidential and proprietary information of the Firm not generally known to the public, including (1) the identity of clients of the Firm and the identify of clients of firms with which the Firm has an Alliance relationship (the "Alliance Firms"), all information and knowledge concerning such clients such as names, addresses, tax identification numbers, trade secrets, audited and unaudited annual or interim financial statements, methods of keeping records, and information pertaining to fees billed to and paid by such clients; all records of accounting, auditing, tax and consulting services rendered to such clients, including workpapers, income tax returns, audit reports, reports or documents filed with any federal or state or local governmental or quasi-governmental body, or self-regulatory body; business and financial projections; the description and method of operations of such clients and information about their personnel; other accounting matters; any consultant reports or other reports evaluating or describing such clients' business or personnel in general or any particular aspect of the business; any correspondence or memoranda or reports concerning such clients; and any other document or report or writing or oral disclosure which includes important matters concerning the business or personal finances or history of such clients; (2) information relating to the Firm's personnel and any Alliance Firm's personnel; (3) information relating to the Firm's marketing efforts, including marketing plans, strategies, methodologies, database contents, and any and all

information regarding current and prospective clients, including client lists and materials; and (4) the structure, organization, standards, strategies, practices, policies and processes of the Firm's Alliance Program, to the extent any such Confidential Information is not generally known to the public. All such Confidential Information is proprietary to the Firm.

5. Employee agrees that during his/her employment, he/she will use, copy and disclose Confidential Information only as necessary to conduct Firm business, as dictated by the Firm's policies, or as required and authorized by the Firm's agreements with its clients, Alliance Firms, licensors or vendors. Upon Employee's departure from the Firm (whether by resignation, termination or otherwise) and prior to departure, Employee shall deliver to the Firm all Confidential Information in Employee's possession, custody or control, whether maintained electronically or otherwise, including any and all records, documents, and files containing such Confidential Information, as well as all other property of the Firm, and shall not make or retain any copy or extract thereof. Employee agrees that after his/her employment, he/she will not, without the specific consent of the Chief Executive Officer, or his designee, use or disclose any Confidential Information. If Employee is asked to disclose Confidential Information by subpoena or other legal process, Employee agrees to seek the consent of the Firm through the Office of the General Counsel, prior to making such disclosure.
6. It is understood, acknowledged and agreed that Employee has a fiduciary relationship with the Firm because of all the Confidential Information obtained or to be obtained concerning the Firm and its clients. It is also understood, acknowledged and agreed that if Employee left the employ of the Firm, Employee would be in an advantageous position, because of the Confidential Information known to Employee and/or the relationships Employee has developed with the Firm's clients and prospective clients, to obtain, or assist in obtaining, the business of, and to serve, the Firm's clients or prospective clients; and it is agreed that such use of Confidential Information or such relationships to obtain the business of the Firm's clients or prospective clients would be a breach of the Employee's fiduciary responsibilities to the Firm as well as of this Agreement, prejudicial to the conduct of the Firm's practice, and adverse to its interests.
7. In consideration of the Firm appointing Employee to a Manager position and/or for continued employment with the Firm in a Manager position, it is agreed that prior to, at, or within eighteen (18) months after, his/her departure from the Firm (whether by resignation, termination or otherwise):
  - a) If, without the specific consent of the Chief Executive Officer, or his/her designee, Employee performs by himself/herself, or through an entity with which he/she is or becomes associated, or arranges for such entity to perform, engagements involving accounting, auditing, tax or consulting services, or any related services, for a client with whom Employee developed a relationship which the Firm enabled him/her to acquire through his/her performance of direct and substantive services, or as to whom Employee has Confidential Information obtained through the Firm, or *causes a client or prospective client of the Firm to*

***terminate its relationship with the Firm through unfair competition or business practices, including through the unauthorized use of Confidential Information, then Employee will compensate the Firm for the loss and damages suffered by the Firm*** by reason of lost engagement(s) by paying liquidated damages in an amount equal to one and one-half times the fees charged for such engagement(s) by the Firm over the last full fiscal year during which the client was a client of the Firm, which the Firm loses as a result of such breach, or, in the case of a prospective client or a prospective engagement, one and one-half times the amount of the proposed fee for the next 12 months of such lost engagement(s) - OR- one and one-half times the amount of the fee paid for such lost engagement(s) in the 12 month period following Employee's departure from the Firm, whichever is higher. For purposes of this Paragraph 7(a), ***a prospective client is any person, company, partnership or other entity to which the Firm has made an oral or written proposal to perform services.***

Employee agrees to disclose in writing to his/her Office Business Line Leader or National Director, as applicable, within six (6) months after the last date of Employee's employment with the Firm, all engagements involving accounting, auditing, tax or consulting services, or any related services performed by Employee by himself or herself, or through an entity with which he/she is or becomes associated, or which Employee arranged for such an entity to perform, which resulted, in whole or in part, from Employee's prior employment by the Firm.

- b) If Employee, without the specific consent of the Chief Executive Officer, or his/her designee, ***solicits or otherwise causes another employee to leave the Firm through unfair competition or business practices or in violation of Employee's fiduciary duty, including the unauthorized use of Confidential Information, or to perform engagements involving accounting, auditing, tax and/or consulting services for any other firm, person or entity, then Employee will pay the Firm*** an amount equal to the total of (I) twenty-five percent (25%) of the Annual Earnings of the departing employee, to cover the costs of replacing the departing employee; and (II) an additional ten percent (10%) of the departing employee's Annual Earnings for each year of service of the departing employee, up to a maximum of fifty percent (50%) of the departing employee's Annual Earnings, to cover training costs. For purposes of this Paragraph 7(b), the term "Annual Earnings" means the total dollars received as wages (excluding any bonus) by the departing employee during the twelve months preceding the last date of employment.

(NYSCEF Doc. No. 3. ¶¶ 3-7 [emphasis added]).

Mr. Stiles remained employed by BDO until May 26, 2020, when he was terminated for gross misconduct (NYSCEF Doc. No. 740 ¶¶ 6, 22). While Mr. Stiles was an employee of BDO, he signed an offer letter with BDO's then-client Phlow on April 20, 2020, and began work at Phlow on May 1, 2020 – **i.e., while he was still employed by BDO** (*id.* ¶¶ 10-14, 18). Mr. Stiles collected a salary from both companies during this period of overlap. The offer letter did not describe any portion of Mr. Stiles' Phlow salary as a bonus (*id.*). Mr. Stiles had previously sworn under oath that his employment with Phlow began in June 2020, and that the payments he received from Phlow in May 2020 were merely a signing a bonus (*id.* ¶ 15; NYSCEF Doc. Nos. 256, ¶ 51; 294, ¶ 5). The offer letter does not describe any portion of Mr. Stiles' Phlow salary as a bonus and Mr. Stiles' testimony is irreconcilably at odds with the testimony of Robert Demeria who indicates that the payments that Mr. Stiles received during the period of overlap represent money received for work done for Phlow. Mr. Stiles began work with EverGlade on December 13, 2021 (NYSCEF Doc. No. 740 ¶ 23).

Mr. Morris' Manager Agreement with BDO, signed February 14, 2018, contains language identical to that of Mr. Stiles' Manager Agreement, set forth above. Mr. Morris was a Managing Director with BDO's ISSG team until May 22, 2020 (NYSCEF Doc. No. 740 ¶ 45). Mr. Morris reported to Mr. Stiles, who reported to Mr. Jia-Sobota (NYSCEF Doc. No. 790, at 494:20-495:2). Mr. Morris applied to work with EverGlade on May 6, 2020, and tendered his resignation to BDO on May 11, 2020 (NYSCEF Doc. No. 740 ¶¶ 49-50). Mr. Morris' last day at BDO was May 22, 2020 (*id.* ¶ 45).

Mr. Jia-Sobota was a BDO partner and National Practice Leader of BDO’s ISSG practice from August 24, 2011 until April 8, 2020 (*id.* ¶ 4). Mr. Jia-Sobota founded EverGlade in February 2020 (NYSCEF Doc. Nos. 780, at 103-104; 798, at 121:2-123:19, 220:4-231:22; 845). As alleged, Mr. Stiles and Mr. Morris—while still employed at BDO—worked with one another and with Mr. Jia-Sobota to divert business away from BDO and to EverGlade by soliciting BDO’s clients, prospective clients, and various employees of BDO’s ISSG team, in breach of their respective Manager Agreements.<sup>1</sup>

### **Discussion**

On a motion for summary judgment, the movant 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 issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

#### ***I. BDO’s Motion Against Stiles is Granted in Part (Mtn. Seq. No. 050)***

##### ***A. Stiles Breached His Manager Agreement by Working for Phlow While Simultaneously Employed by BDO***

As set forth above, Mr. Stiles’ Manager Agreement required him to “devote all of [his] working time and energy and to give [his] best attention exclusively to the business of the Firm”

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<sup>1</sup> BDO filed an action against Mr. Jia-Sobota in Superior Court of the District of Columbia on May 26, 2020 (NYSCEF Doc. No. 740 ¶ 5).

(NYSCEF Doc. No. 3 ¶ 2). Although Mr. Stiles previously disputed that he worked for both BDO and Phlow, he appears to no longer dispute that he was simultaneously employed by both BDO and Phlow from May 1, 2020 (when he started work at Phlow and was still employed by BDO) until May 26, 2020 (when he was terminated by BDO) (NYSCEF Doc. No. 740 ¶¶ 10-14, 18). However, now Mr. Stiles argues that, despite his admitted simultaneous employment, an issue of fact exists as to whether he failed to devote all of his working time to BDO. According to Mr. Stiles, the record is equally consistent with his having worked exclusively for BDO during May 2020, because the work he did for Phlow as a BDO consultant was the same work he did for Phlow as its employee, *i.e.*, helping Phlow obtain a contract from the Biomedical Advanced Research and Development Authority (**BARDA**).

The argument is unavailing. Mr. Stiles signed an offer letter with Phlow and an I-9 Form in April 2020 (NYSCEF Doc. Nos. 295, 826). Phlow's attorney confirmed that "Mr. Stiles' first day of employment with Phlow was May 1, 2020" (NYSCEF Doc. No. 828, at 2). Phlow paid Mr. Stiles as a full-time employee starting May 1, 2020 (NYSCEF Doc. No. 827). Phlow's corporate representative, Robert Demeria, testified that Mr. Stiles began full-time work on May 1, 2020 (NYSCEF Doc. No. 777, at 79:11-80:3). Phlow's CFO, Robert Mooney, testified that he believed Mr. Stiles' assertion that the payments he received from Phlow during May 2020 were not for any work he did for Phlow was false (NYSCEF Doc. No. 823, at 133:8-134:17). Mr. Mooney further testified that:

May was a critically important period for [Phlow]. We had been focusing on building a business, we had been focusing on getting consultants onboard, in addition to BDO and others. In fact, if you remember, we signed that contract on May 18th with BARDA, so we expected—in fact, Mr. Stiles did, was actively involved *as an employee* with us during that period of time.

...

This was work in payment for work that—from my point of view, from our point of view, his employment started on May 1. He was being paid for what he was doing.

(*id.*, at 133:24-134:7; 136:22-137:1 [emphasis added]).

Mr. Stiles is incorrect that Mr. Demeria's and Mr. Mooney's testimonies are inadmissible as hearsay. Pursuant to Commercial Division Rule 11-f, Mr. Demeria, as Phlow's corporate representative, may testify as to "information known or reasonably available to the entity" (NY Ct R 202.70) based on his personal knowledge or based on his review of Phlow's business records. Mr. Mooney testified based on his personal knowledge of Stiles' work at Phlow during April, May, and June of 2020 (NYSCEF Doc. No. 823, at 145:18-146:6). This is not hearsay.

BDO, by adducing Mr. Stiles' offer letter, I-9, payment records, and the testimony of Phlow executives, has met its *prima facie* burden of demonstrating that Mr. Stiles performed work for Phlow during May of 2020, in violation of his obligations to devote all of his working time to BDO. Mr. Stiles' fails to raise a trial issue of fact in response.

In his opposition papers, Mr. Stiles relies on his BDO timesheets for the month of May 2020 showing a total of some 114 hours billed between May 1 and May 21, 2020, as evidence that he devoted all his working time to BDO (NYSCEF Doc. Nos. 294 ¶ 7; 296). But the timesheet does not do that. The timesheet only shows that Mr. Stiles billed some work for BDO. What is fatal to his position is that he worked for Phlow and the testimony and documentary evidence from Phlow indicating that remains un rebutted. As such, there are no issues of fact that Mr. Stiles

devoted all of his working time to BDO. He did not do that and he breached his Manager Agreement.

The Court also notes that not only does Mr. Stiles fail to adduce any other evidence creating an issue of fact, when he was deposed in this case, he elected to invoke the Fifth Amendment in response to each and every question posed to him on the issue of what work he did for Phlow during May 2020. The Fifth Amendment privilege “does not relieve [Mr. Stiles] of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence” (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51 [1st Dept 2002]). Accordingly, BDO is entitled to summary judgment that Mr. Stiles breached his contract by working for Phlow during May of 2020.

***B. There are also no issues of fact that Mr. Stiles Was a “Faithless Servant”***

BDO is also entitled to summary judgment on its faithless servant claim against Mr. Stiles.

Under New York law an employee’s misbehavior warrants forfeiture of his compensation earned during the period of disloyalty where either (1) the conduct “substantially violates the contract of service” or (2) the employee “acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment” (*Phansalkar v Andersen Weinroth & Co., L.P.*, 344 F3d 184, 202 [2d Cir 2003] [applying New York law]).

As set forth above, BDO has demonstrated that Mr. Stiles substantially breached his contract of service (*i.e.*, his Manager Agreement). New York courts have found disloyalty not to be

substantial only where “the disloyalty consisted of a single act, or where the employer knew of and tolerated the behavior” (*id.*). Among other things, Mr. Stiles’ breach continued for nearly a full month during which he was paid as a full-time employee of Phlow. It is undisputed that Mr. Stiles did not inform BDO of his employment with Phlow. Thus, Mr. Stiles’ breach of his Manager Agreement was “substantial” and forfeiture of his compensation is appropriate under the circumstances.

Mr. Stiles is likewise liable under the second standard set forth above. In failing to inform BDO, Mr. Stiles omitted to disclose an interest that would naturally influence his conduct in relation to his services for BDO. BDO was entitled to know of any interest of Mr. Stiles’ that may have affected Mr. Stiles’ judgment in the performance of his job and whether he was working in BDO’s best interests, as was his obligation, or Phlow’s best interests (to the extent that they may not always be aligned). If BDO had known of Mr. Stiles’ employment with Phlow, BDO may have terminated him (as it eventually did), taken him off the project given his conflict, paid him less, or take any other action it deemed necessary to protect its commercial interests and reputation. Mr. Stiles acted deliberately to deprive BDO of the opportunity to do any of this putting his own interests ahead of BDO , and in doing so acted as a faithless servant. Accordingly, BDO is entitled to summary judgment on its faithless servant claim against Mr. Stiles.

***C. Mr. Stiles is not entitled to dismissal of the claims sounding in breach of 7(a) of the Manager Agreement based on Meissa (hereinafter defined) and Kodak***

Paragraph 7(a) of Mr. Stiles’ Manager Agreement prohibited Mr. Stiles, during the period of his employment and for 18 months thereafter, from soliciting any prospective client of BDO. To

prove breach, BDO must demonstrate that (i) BDO made an oral or written proposal to the business entity at issue, thus rendering it a “prospective client” as defined in the Manager Agreement, and that (ii) Mr. Stiles “cause[d]” that prospective client to terminate its relationship with BDO (iii) “through unfair competition or business practices,” including the unauthorized use of BDO’s confidential information (NYSCEF Doc. No. 3, ¶ 7[a]).

***1. Issues of Fact Exist as to Whether Mr. Stiles Solicited Meissa and Kodak as Prospective Clients of BDO***

Mr. Stiles does not dispute that Meissa Vaccines (**Meissa**) was a prospective client of BDO, and was in contract negotiations with BDO in April, 2020 (NYSCEF Doc. Nos. 791, at 37:11-38:6; 792; 793). It is also undisputed that Meissa terminated its agreement with BDO as of May 29, 2020, and subsequently entered into a contract with EverGlade for substantially the same work that was the subject of its negotiations with BDO (NYSCEF Doc. Nos. 740 ¶ 59; 780, at 272:3-7; 783, at 244:6-245:4; 791, at 62:20-24, 66:2-6; 796; 797). Mr. Stiles, however, argues that BDO has failed to adduce evidence that he (*i.e.*, as opposed to Mr. Morris) caused Meissa to terminate its relationship with BDO or pointed Meissa to Everglade. Thus, Mr. Stiles argues he is entitled to dismissal of the breach of contract claim predicated based on Meissa levelled against him (Mtn. Seq. No. 049).

Martin Moore, Meissa’s Chief Scientific Officer and corporate designee, testified that BDO informed him that Mr. Morris had left BDO, and that Mr. Moore discovered Mr. Morris’ new affiliation with EverGlade by looking up Mr. Morris on LinkedIn (NYSCEF Doc. No. 791, at 24:3-15). It was Mr. Morris who then directed Mr. Moore to Mr. Jia-Sobota (*id.*, at 24:15-21; 52:9-53:3). Mr. Moore was the “point person” for Meissa on its contract negotiations with both

BDO and EverGlade and testified that although he believed he spoke with Mr. Stiles based on certain emails shown to him during deposition, he had no specific recollection of ever meeting or speaking with Mr. Stiles (*id.*, at 22:17-23:15, 104:12-107:2, 107:20-25). When asked if Mr. Stiles had anything to do with Meissa's decision to hire EverGlade, Mr. Moore answered "no" (*id.*, at 108:18-23).

Questions of fact remain, however, preventing dismissal of this claim. Mr. Stiles was involved in BDO's contract negotiation with Meissa, including during May of 2020, just days away from both his own termination and Meissa's decision to terminate its relationship with BDO (NYSCEF Doc. Nos. 740 ¶ 58; 788; 789; 791, at 106:3-15). Mr. Moore testified that Mr. Stiles may have been on certain conference calls between Meissa and BDO (NYSCEF 791, at 22:17-23:15) and there is substantial evidence in the record that Mr. Stiles and Mr. Morris worked together in directing clients from BDO to Everglade. Thus, issues of fact preclude the award of summary judgment to Mr. Stiles.

In addition, the Court notes that when Mr. Stiles was asked if he was responsible for Meissa becoming an EverGlade client or if he assisted Mr. Morris in soliciting Meissa, he invoked the Fifth Amendment (NYSCEF Doc. No. 783, at 239:20-241:2, 242:13-243:2, 244:6-245:4). This warrants an adverse inference under the circumstances of this case. However, and to be clear, BDO is not entitled to summary judgment based on Meissa because "[t]he fact that a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege does not, however, mean that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to a judgment" (*Steinbrecher v Wapnick*, 24 NY2d 354, 365 [1969]). Thus, neither BDO

nor Meissa are entitled to summary judgment as to the breach of contract claim based on Meissa terminating its relationship with BDO and going to Everglade.

***2. Issues of Fact Exist as to Whether Kodak Was a Prospective Client of BDO***

BDO is also not entitled to summary judgment on its claim that Mr. Stiles breached his Manager Agreement with respect to Kodak because Kodak was not an actual client of BDO and there are issues of fact as to whether BDO made an oral presentation to Kodak such that it was a prospective client of BDO.<sup>2</sup>

In support of its contention that Kodak was a prospective client, BDO adduces an April 16, 2020 email communication from BDO employee Jeffrey Keene to, among others, Mr. Stiles and Mr.

Morris:

I spoke to Eric Samuels at Kodak.

He noted that the Company was still evaluating the impact of the CARES Act and would pass along our contact info.

Will advise.

Jeff

(NYSCEF Doc. No. 810).

This email certainly suggests that BDO was looking to acquire Kodak's business and that BDO had been in touch with Kodak. It does not however establish that a written or oral proposal was necessarily made. In fact, for his part, Mr. Stiles argues that Mr. Keene was in a separate department from Mr. Stiles and Mr. Morris and was in no position to make any presentation to

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<sup>2</sup> On the record, counsel to BDO confirmed that no written proposal to Kodak was ever made, and its claims are based only on an alleged oral proposal (*tr.* 9.5.24).

Kodak on behalf of BDO. This, too, however, is unclear from the record. Finally, the June 2020 email chain among several BDO employees pointed to by Mr. Stiles sheds no more light on the question. In this email chain in which several BDO employees discuss the prospect of doing work for Kodak, BDO employee Demetrios Frangiskatos writes that “Stiles was chasing some work with Kodak for Biodefense and was looking for contacts with Kodak” (NYSCEF Doc. No. 877). BDO employee Aaron Raddock responds, reporting Mr. Keene as saying that Mr. Keene’s contact at Kodak “wasn’t very interested” (*id.*). In a later message from Mr. Raddock, he says “the opportunity may have passed” (*id.*). This email chain also does not prove that a proposal to Kodak was or was not made. Accordingly, an issue of fact remains as to whether Kodak was a “prospective client” of BDO.

For the avoidance of the doubt, it does not matter that Mr. Stiles referred to Kodak as a “potential consulting client” of BDO’s in his sentencing memorandum filed in his criminal case (NYSCEF Doc. No. 1114). Although this is something he can be asked about at trial, what matters is how Kodak is defined in the Manager Agreement for the purpose of establishing whether a breach occurred. In the Manager Agreement, to be a prospective client, BDO must have made a written oral proposal. This remains unclear. Thus, BDO is not entitled to summary judgment on this claim. Nor is Mr. Stiles entitled to dismissal.

***D. Mr. Stiles Breached his Contract by Using BDO’s Confidential Information to Trade the Stock of a BDO Client, Novavax***

Novavax was a BDO client which had executed a master services agreement and various statements of work with BDO (NYSCEF Doc. No. 740 ¶ 28). Mr. Stiles worked on Novavax projects while employed at BDO, and billed 84 hours for Novavax work in May 2020 alone (*id.*

¶¶ 30-42; NYSCEF Doc. No. 296). As set forth above, Mr. Stiles' Manager Agreement prohibits “the unauthorized use or appropriation of confidential or proprietary information ... concerning [BDO] or [BDO]'s clients.” (NYSCEF Doc. No. 3 ¶ 4). In a separate provision of his Manager Agreement, Mr. Stiles also agreed to be bound by BDO's “Code of Business Ethics and Conduct” which prohibits BDO employees from “trading in securities of any non-attest client while in possession of material non-public information concerning that client” and from “disclosing or ‘tipping’ material non-public information about BDO clients to others” (*id.* ¶ 3, NYSCEF Doc. No. 448, at BDO\_SM-AS\_0107073-74).<sup>3</sup>

BDO relies on the allegations in the February 23, 2023, complaint filed by the SEC against Mr. Stiles, accusing Mr. Stiles of trading on material, non-public information in the stocks of both Kodak and Novavax (NYSCEF Doc. No. 600; the **SEC Complaint**).<sup>4</sup> As set forth in the SEC Complaint, Mr. Stiles worked Novavax's efforts to secure government funding for its efforts in creating a coronavirus vaccine (*id.*, ¶¶ 68-73). On May 1, 2020, Mr. Stiles dialed into two separate conference calls with Novavax executives to discuss the progress on these efforts (*id.*, ¶¶ 74-75). *Several minutes into each call and while the call was still ongoing, Mr. Stiles purchased a total of 1,844 shares of Novavax stock* (*id.*). On May 8, Mr. Stiles recommended Novavax to his cousin, Gary Stiles (*id.*, ¶ 76). On May 12, Novavax announced it had received

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<sup>3</sup> BDO's Code of Business Ethics and Conduct defines “Attest Client” as “Attest engagements are those in which a report is to be issued that contains an opinion or other assurance that financial statements are fairly stated in conformity with generally accepted accounting principles or another comprehensive basis of accounting (OCBOA) (e.g., tax basis). Examples of attest engagements are Financial statement Audits, Financial statement Reviews, or other attest services, as defined in Statements on Standards for Attestation Engagements (SSAEs)” (NYSCEF Doc. No. 448, at BDO-SM-AS\_0107083). Trading in the securities of a BDO attest client is proscribed regardless of whether the BDO employee is in possession of material non-public information or not. BDO does not contend that Meissa was an Attest Client, nor does Mr. Stiles dispute that Meissa was a Non-Attest Client.

<sup>4</sup> BDO's contractual claims against Mr. Stiles are based solely on Mr. Stiles' trades of Novavax stock. Mr. Stiles' trades of Kodak stock were also the subject of a separate criminal proceeding, in which Mr. Stiles has plead guilty (NYSCEF Doc. Nos. 601; 1101). Mr. Stiles is currently incarcerated.

over \$300 million in government funding, and its stock price soon increased by some 62% (*id.*, ¶ 77). Mr. Stiles sold all of his Novavax stock on June 3, 2020, realizing gains of \$45,000 (*id.*, ¶ 78; NYSCEF Doc. Nos. 740 ¶ 41; 821, at Stiles1.29.24Production.Bates#12).

BDO has established that Mr. Stiles had access to confidential information regarding Novavax by virtue of his employment with BDO and traded Novavax stock while in possession of that information. Thus, BDO has met its *prima facie* burden to show that Mr. Stiles misappropriated BDO's confidential information in violation of Paragraph 4 of his Manager Agreement.

Mr. Stiles fails to raise an issue of fact in response. At his deposition, Mr. Stiles invoked the Fifth Amendment when asked about the timing and circumstances of his Novavax stock purchases (NYSCEF Doc. No. 783, at 77:25-78:25, 149:4-156:9). Mr. Stiles must "bear the consequence" of his failure to produce evidence, and BDO is entitled to the adverse inference that Mr. Stiles used confidential information in his purchase of Novavax stock (*Yadav v Rajeev*, 11 CIV. 1500 HBP, 2014 WL 2218149, at \*5 [SDNY May 29, 2014], quoting *United States v Certain Real Prop. and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F3d 78, 83 [2d Cir 1995]).

Ultimately, with respect to his trades in Kodak stock, Mr. Stiles allocated to having traded on material non-public information:

THE COURT: So now I'm going to ask you the official question with respect to Count Four of the indictment. How do you plead?

THE DEFENDANT: Guilty.

THE COURT: And now just tell me in your own words what you did that makes you believe that you're guilty of this crime.

THE DEFENDANT: On July 27, 2020, I purchased shares of Kodak stock while in possession of material nonpublic information with the intent of profiting on these stock trades for my own personal benefit. I also shared this material nonpublic information with my cousin, Gray Stiles, with whom I have a close relationship. These actions are wrong and illegal. I broke a duty of trust and confidence to my employer by trading Kodak stock while in possession of confidential information. I am guilty of Count Four of the indictment, and I take full responsibility for my actions and my poor decisions which have brought me here today.

(NYSCEF Doc. No. 1101, at 17:14-18:6).

In his opposition papers, Mr. Stiles points to various news articles and SEC filings in an attempt to show that all the relevant information about Novavax's funding was already public (*see* NYSCEF Doc. No. 1067, at 8-11). The argument fails, because these documents only indicate that Novavax was seeking funding, not that it had received it. Accordingly, BDO is entitled to summary judgment that Mr. Stiles breached Paragraph 4 of his Manager Agreement by misappropriating BDO's confidential information.

BDO is also entitled to an award of summary judgment that Mr. Stiles breached Paragraph 3 of his Manager Agreement by trading in Novavax stock *while in possession* of material non-public information concerning Novavax. As set forth above, in Paragraph 3 of his Manager Agreement, Mr. Stiles agreed to be bound by BDO's "Code of Business Ethics and Conduct" which specifically prohibits BDO employees from "trading in securities of any non-attest client while in possession of material non-public information concerning that client" (NYSCEF Doc. Nos. 3 ¶ 3; 448, at BDO\_SM-AS\_0107073-74). Notably, showing a violation of this provision *does not*

*require showing that Mr. Stiles actually used* material non-public information in making his trades, but only that he was *in possession* of such information while making them. This accords with the purpose of the ethics code to “to prevent Insider Trading, as well as the appearance of Insider Trading” (NYSCEF Doc. No. 448, at BDO\_SM-AS\_0107073). As set forth above, Mr. Stiles indisputably was in possession of material, non-public information concerning Novavax when he made trades in its stock. Accordingly, BDO is entitled to summary judgment that Mr. Stiles’ Novavax trades also violated Paragraph 3 of his Manager Agreement.

***E. BDO is Entitled to Dismissal of Mr. Stiles’ Counterclaim for Defamation Per Se***

Mr. Stiles claims that BDO committed defamation *per se* through the actions of two of its employees, Lisa Cozza and Aaron Raddock, who emailed the complaint filed by BDO in an action brought against Mr. Jia-Sobota in Washington, D.C. (the **D.C. Complaint**; NYSCEF Doc. No. 482) to two companies, Meissa and Altavant, and a law firm (NYSCEF Doc. Nos. 302 ¶¶ 25-37; 476 ¶¶ 45-50, 96-103; 787; 802). In support of their motion, BDO argues that Lisa Cozza testified that when she forwarded the email with the complaint, she was acting on her own and not as a BDO employee. Thus, BDO argues Ms. Cozza’s email can not be attributed to BDO. BDO also argues that the statement in the mail is true and is nonetheless protected by the judicial privilege. Finally, BDO argues that dismissal is required because Mr. Stiles fails to offer any evidence that he was actually injured as a result of the allegedly defamatory statements (*Gertz v Robert Welch, Inc.*, 418 US 323, 350 [1974]; *Nolan v State*, 158 AD3d 186, 192 [1st Dept 2018]).<sup>5</sup>

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<sup>5</sup> Mr. Raddock did not make an independent statement of his own regarding Mr. Stiles, but merely forwarded the D.C. Complaint to a lawyer at the law firm Jenner & Block (NYSCEF Doc. No. 804).  
652352/2020 BDO USA, P.C., vs. STEPHEN MORRIS,  
Motion No. 044 045 049 050

BDO is not correct that Ms. Cozza's email is not attributable to BDO. She sent this email from her BDO email address to two companies, Meissa and Altavant, and a law firm (NYSCEF Doc. Nos. 302 ¶¶ 25-37; 476 ¶¶ 45-50, 96-103; 787; 802). However, the statements contained in the D.C. Complaint itself are protected by the judicial privilege, pursuant to which statements constituting a "a fair and true report of [a] judicial proceeding, legislative proceeding or other official proceeding" are not actionable as defamation (Civil Rights Law § 74; *Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013]). In addition, the statements are in fact true. The record evidence establishes that Messrs. Stiles and Morris conspired together to solicit BDO's current and prospective clients, and employees of its ISSG practice group. Finally, Mr. Stiles fails to allege any actual damages. In fact, in his opposition papers, Mr. Stiles "joins in any and all applicable arguments made by his codefendant Mr. Morris in this regard but does not assert any independent opposition herein" to BDO's motion to dismiss his defamation counterclaim (NYSCEF Doc. No. 1067, at 1). When given the opportunity to offer evidence of any injury at his deposition, Mr. Stiles invoked the Fifth Amendment (NYSCEF Doc. No. 783, at 96:18-99:18). Thus, Mr. Stiles has failed to meet his evidentiary burden, and his counterclaim must be dismissed (*Access Cap., Inc. v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept 2002]).

## ***II. Mr. Stiles' Motion for Summary Judgment (Mtn. Seq. No. 049) is Denied***

In his motion for summary judgment (Mtn. Seq. No. 049), Mr. Stiles moves to dismiss BDO's claims that Mr. Stiles breached his contract by soliciting BDO's employees, current clients, and prospective clients to leave BDO, and to dismiss BDO's claim that Mr. Stiles aided and abetted Mr. Jia-Sobota's breach of his fiduciary duty.<sup>6</sup>

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<sup>6</sup> As set forth above, issues of fact exist as to whether Mr. Stiles solicited Meissa and Kodak. Accordingly, this branch of Mr. Stiles' motion is denied.

*A. Issues of Fact Remain as to Whether Mr. Stiles Solicited BDO Employees*

Mr. Stiles' Manager Agreement prohibited him from "solicit[ing] or otherwise caus[ing] another employee to leave [BDO] through unfair competition or business practices or in violation of [his] fiduciary duty" (NYSCEF Doc. No. 3 ¶ 7[b]). Notably, this provision prohibits does not require the solicitation to result in the employee from actually leaving BDO. BDO claims that Mr. Stiles' breached this provision by soliciting ten BDO employees to leave the firm.

BDO adduces the testimony of three other former BDO employees and members of the ISSG team—Matthew Sigmund, Timothy Bane, and Adeyinka Pierce—who each told a similar story of how Messrs. Stiles and Morris, conspiring together presented the opportunity for them to leave BDO and to join EverGlade. During a May 4, 2020 call with the ISSG team, prior to the public announcement of EverGlade's launch, Messrs. Stiles and Morris informed the members of the ISSG team that there would be "opportunities for everyone" at EverGlade, and instructed them that once EverGlade was announced, the team members should send Mr. Jia-Sobota a congratulatory message on LinkedIn, at which point Mr. Jia-Sobota would reach out and request that the team member apply to EverGlade via its website (NYSCEF Doc. Nos. 779, at 105:12-106:9, 135:15-136:11; 1015 ¶¶ 6-12; 1065 ¶¶ 4-6, 11-23). As Ms. Pierce testified:

Q What else do you recall from that meeting where Mr. Stiles said he was resigning other than the fact that he said he was resigning that day?

MR. MEREDITH: Objection as to form. You can answer.

A He said he was going to Phlow for six to 12 months. Both he and Steve were -- Steve said that he would be resigning soon, but he didn't say specifically when during that call. And he said that Eric was starting a new firm, and that there would be opportunities for everyone in the group to go to Eric's firm.

...

Q Do you recall any discussions you had with anybody at BDO about applying to EverGlade between the meeting you had where Andrew Stiles resigned and the time that you applied for a position with EverGlade?

A Yes.

Q What do you recall?

A I recall being told that we should go on LinkedIn and congratulate Eric on his new firm and then go to the website and watch the videos. I don't recall whether they were on the website or on LinkedIn. And then -- and then submit an application.

(NYSCEF Doc. No. 779, at 105:12-106:3, 135:15-136:8).

Ms. Pierce later rescinded her resignation around the time she was granted a promotion and a \$50,000 raise, although she claimed at her deposition that she could not recall whether she rescinded her resignation prior to or after receiving the promotion:

Q Do you recall if you rescinded your resignation prior to learning that BDO was promoting you to director at the salary of \$215,000 a year?

MR. MEREDITH: Objection.

A I don't know.

Q Do you recall if you rescinded your resignation in that conversation with Mr. Raddock at the same time you learned you were being promoted to director?

MR. MEREDITH: Objection.

A I can't recall.

(*id.*, at 80:10-22).

In her declaration submitted to the Superior Court of the District of Columbia in connection with BDO's action against Mr. Jia-Sobota, Ms. Pierce averred that Mr. Jia-Sobota urged her to lie if BDO resisted her resignation:

9. Eric told me that if BDO gave me a hard time about resigning I should record that and complain of being harassed. Eric also urged me to make hostile work environment allegations against BDO. I was uncomfortable with this because it was not true.

(NYSCEF Doc. No. 773 ¶ 9).

*1. Albright, Kim, Paterson, Roy, and Wolfe*

Of these ten BDO employees, five of them—Drew Albright, Paula Kim, Dan Paterson, Julie Roy, and John Wolfe—went to work for EverGlade directly after leaving BDO.

Issues of fact preclude dismissal of BDO’s claims as to these five employees. Mr. Albright and Ms. Kim’s testimony that Mr. Stiles did not mention EverGlade during the May 4th call (NYSCEF Doc. Nos. 852, at 22:8-23:18; 25:5-12; 854, at 146:9-21) is contradicted by the testimony of Mr. Sigmund, Mr. Bane, and Mr. Pierce. And, Mr. Albright’s and Ms. Kim’s testimony that they chose to leave BDO for “personal reasons” is not dispositive under the circumstances (NYSCEF Doc. Nos. 825, at 21:4-9; 854, at 60:10-19). Messrs. Stiles’ and Morris’ representation that opportunities would be available may nevertheless have contributed to their decision to leave BDO and go to EverGlade.

Issues of fact also exist as whether Mr. Stiles solicited Mr. Paterson, Ms. Roy, and Mr. Wolfe. Despite testifying that no one told him to apply to EverGlade, Mr. Paterson’s application to EverGlade followed Mr. Stiles’ instructions as to how to do so: Mr. Paterson reached out to Mr. Jia-Sobota via LinkedIn on May 5, 2020, submitted an application to EverGlade the following day, and soon thereafter spoke with Mr. Jia-Sobota over the phone and received an offer from EverGlade (NYSCEF Doc. Nos. 857, at 118:14-18, 125:9-17; 955; 961; 965; 970; 977). Ms.

Roy and Mr. Wolfe's applications to EverGlade followed the exact same pattern (*see* NYSCEF Doc. Nos. 950, 962, 967, 971 [Wolfe]; 958, 963, 968, 975 [Roy]). This consistent pattern raises a question of fact as to whether Mr. Stiles solicited these five employees and caused them to leave BDO for EverGlade, in breach of Paragraph 7(b) of his Manager Agreement.

## 2. *Bane, McDaniel, and Enclade*

Three former BDO employees allegedly solicited by Mr. Stiles and Mr. Morris—Timothy Bane, Michael McDaniel, and Natalie Enclade—left the employment of BDO, but did not go to EverGlade. Mr. Stiles argues that BDO's claims as to these three employees must be dismissed because BDO fails to adduce any evidence that Mr. McDaniel's and Ms. Enclade's departures were caused by Mr. Stiles, and because Mr. Bane went to work for his primary client, Ridgeback. However, issues of fact preclude dismissal of BDO's claims as to these three employees.

Mr. Bane, like those employees who left BDO for EverGlade, submitted an application to EverGlade, following the instructions given by Mr. Stiles outlined above, and received an accepted an offer from EverGlade (*see* NYSCEF Doc. Nos. 973; 979; 981; 985; 1008; 1065 ¶¶ 11-23). Mr. Bane testified, however, that he was not "fully comfortable" with the EverGlade job, and when received an offer from Ridgeback he decided to pursue that opportunity (NYSCEF Doc. No. 1065 ¶ 24). Mr. Bane's resignation from BDO, however, was submitted before he received the offer from Ridgeback (*id.* ¶¶ 23-24). Thus, Messrs. Stiles and Morris are not entitled to dismissal of this claim because there is an issue of fact exists as to whether Mr. Stiles' solicitations caused Mr. Bane to leave BDO.

Mr. McDaniel and Ms. Enclade also applied to EverGlade, in exactly the same manner (*see* NYSCEF Doc. Nos. 949, 956, 960, 964 [Enclade]; 951, 954, 959, 972, 976, 1002 [McDaniel]). This similarly raises an issue of fact as to whether Mr. Stiles' solicitations caused Mr. McDaniel and Ms. Enclade to leave their employment with BDO, despite the fact that they did not ultimately join EverGlade.

### ***3. Apadula, Takagi, and Wolfinger***

BDO alleges that Mr. Stiles solicited three other employees—Giacoma Apadula, Shohei Takagi, and Parker Wolfinger—who ultimately remained at BDO. Each of these employees, however, applied to EverGlade following the instructions given by Mr. Stiles (*see* NYSCEF Doc. Nos. 953, 957, 966, 978 [Apadula]; 952, 969, 980, 983 [Takagi]; 974, 982, 984 [Wolfinger]). This consistent pattern creates an issue of fact as to whether these employees were solicited by Mr. Stiles, in breach of his Manager Agreement.

### ***B. Issues of Fact Prevent Dismissal of Claims leveled against Mr. Stiles that he Solicited Lexicon, Meabco, Phlow, Ridgeback, and Ology***

Mr. Stiles does not dispute that Lexicon, Meabco, Phlow, Ridgeback and Ology were clients of BDO. He nonetheless argues that he is entitled to BDO's claims for breach of Section 7(a) of the Manager Agreement in respect of these clients. For the reasons discussed below, his arguments fail.

#### ***1. Lexicon***

Lexicon executed a master services agreement and statement of work with BDO in September 2019 (NYSCEF Doc. Nos. 740 ¶ 54; 825). Mr. Stiles argues he is entitled to summary judgment

on BDO's claim that he solicited Lexicon because Lexicon's corporate designee, Praveen Tyle, testified that he did not know Mr. Stiles, and that he believed Lexicon was identified (by someone at Lexicon other than Mr. Tyle himself) via a Google search (NYSCEF Doc. No. 864, at 35:4-25, 98:15-25). But this does not suffice under the circumstances of this case, in which BDO claims and there is substantial evidence that Mr. Stiles, Mr. Morris, and Mr. Jia-Sobota worked in tandem to lure away BDO's clients. Indeed, it is actually irrelevant whether Mr. Stiles himself spoke to Mr. Tyle if in fact he acted to cause the solicitation of Lexicon to take its business from BDO.

Messrs. Stiles and Morris together with Mr. Jia-Sobota, were introduced to Lexicon in June, 2019 by a fellow BDO employee (NYSCEF Doc. No. 989). Mr. Stiles was Lexicon's primary point of contact at BDO (NYSCEF Doc. Nos. 825, at BDO-004328; 989; 993). Mr. Morris, while still employed at BDO, reviewed a white paper for Lexicon (NYSCEF Doc. Nos. 740 ¶ 55, 839). Mr. Morris conducted much of this work using his personal email address (*see, e.g.*, NYSCEF Doc. Nos. 817, 818, 819), as Mr. Stiles had instructed other BDO employees who later went to EverGlade to do (NYSCEF Doc. Nos. 1015 ¶ 7; 1065 ¶¶ 8-9). Lexicon became an EverGlade client immediately after its launch, paying EverGlade to continue work on a project for which Lexicon had previously used BDO (NYSCEF Doc. Nos. 811, at 123:5-124:6; 814). When asked about his involvement in the potential solicitation of Lexicon, Mr. Stiles invoked the Fifth Amendment (NYSCEF Doc. No. 783, at 230:10-236:16). As discussed above, BDO is entitled to an adverse inference as to Mr. Stiles' involvement in causing Lexicon to terminate its relationship with BDO. Given the foregoing, Mr. Stiles is not entitled to dismissal of this claim.

## 2. *Meabco*

Issues of fact also exist as to whether Mr. Stiles solicited Meabco, causing Meabco to terminate its relationship with BDO. Mr. Stiles argues he is entitled to summary judgment because Meabco's corporate designee, Beth Carino, testified that Mr. Stiles played no role in Meabco's decision to terminate its relationship with BDO (NYSCEF Doc. No. 865, at 124:2-25). The record raises substantial issues of fact otherwise. Mr. Stiles was introduced to and performed work for Meabco during his employment with BDO (NYSCEF Doc. Nos. 740 ¶ 61; 781, at 46:4-14). Mr. Morris told Ms. Carino that he would be leaving BDO to go to EverGlade, and Ms. Carino sent an email to EverGlade, addressed to Mr. Jia-Sobota, to ask for a quote for its services minutes after that call concluded (NYSCEF Doc. Nos. 740 ¶ 62; 781, at 80:2-82:10, 83:2-9). When asked if he collaborated with Mr. Morris and Mr. Jia-Sobota in soliciting Meabco, Mr. Stiles invoked the Fifth Amendment (NYSCEF Doc. No. 783, at 261:19-262:7). As discussed above, BDO is entitled to an adverse inference as to whether he violated Section 7(a) with respect to Meabco. For the avoidance of doubt, it is irrelevant whether Meabco became an Everglade client and whether they took the work in house. These are circumstantial facts to be considered by the fact finder. What matters is whether Meabco terminated its relationship with BDO and whether that was caused by Mr. Stiles.

## 3. *Phlow*

The record evidence shows that Mr. Stiles, while still employed by BDO, suggested to Phlow that it "look into" EverGlade (NYSCEF Doc. No. 777, at 93:22-25, 119:12-120:12). While Phlow did not ultimately enter into a contract with EverGlade, it did terminate its relationship with BDO. Once again Mr. Stiles invoked the Fifth Amendment questioned on his involvement

with Phlow (NYSCEF Doc. No. 783, at 261:10-18). Thus, Mr. Stiles is not entitled to dismissal of the breach of Section 7(a) claim with respect to Phlow.

#### ***4. Ridgeback***

Mr. Stiles argues he is entitled to summary judgment on BDO's claim that he caused Ridgeback to terminate its relationship with BDO because the evidence shows that Ridgeback terminated its relationship with BDO after BDO failed to properly transition Ridgeback's account following the numerous departures from the ISSG team. But issues of fact also prevent dismissal of the claims based on Ridgeback's termination of its relationship with BDO because, among other things, the record seems to suggest that Ridgeback's client portal was shut down to avoid further poaching by Messrs. Stiles, Morris and Jia-Sobota.

#### ***5. Ology***

Issues of fact also remain as to whether Mr. Stiles played a role in Ology's decision to terminate its relationship with BDO and execute a contract with EverGlade (NYSCEF Doc. Nos. 1004, 1011). Mr. Stiles worked on Ology projects while employed at BDO (NYSCEF Doc. Nos. 991, 994, 1001). EverGlade executed a Consulting Services Agreement with Ology on May 20, 2020, just days after Mr. Stiles submitted his resignation from BDO (NYSCEF Doc. No. 1004). The totality of evidence in this case and the circumstances surrounding Ology's on-boarding with Everglade, raise triable issues of fact as to whether Mr. Stiles caused Ology to terminate its relationship with BDO.

#### ***C. Mr. Stiles is Not Entitled to Dismissal of BDO's Claim for Aiding and Abetting Breach of Fiduciary Duty***

Mr. Jia-Sobota owed fiduciary duties to BDO (NYSCEF Doc. No. 55, at 10-11). As set forth above, questions of fact remain as to whether Mr. Stiles assisted Mr. Jia-Sobota in a scheme to solicit current and prospective clients of BDO to terminate their relationship with BDO and bring their business to EverGlade. BDO has adduced evidence of Mr. Jia-Sobota's breach of his fiduciary duties, and of Stiles' assisting that breach. Thus, dismissal of the aiding and abetting claim is simply not supported by the record.

***III. BDO's Motion as Against Mr. Morris is Granted in Part (Mtn. Seq. No. 045)***

***A. Mr. Morris Solicited Lexicon and Caused it to Terminate its Relationship with BDO in Breach of His Manager Agreement***

The record before the Court establishes that Mr. Morris breached his Manager Agreement by diverting Lexicon away from BDO and to EverGlade. Lexicon was a BDO client pursuant to a Master Services Agreement, dated June 11, 2019, and with an expiration date of June 10, 2020, pursuant to which BDO was to provide "ad hoc consulting services in the areas of government contracts/grants pursuit strategy, accounting, compliance, administration, and management" (NYSCEF Doc. Nos. 740 ¶¶ 54; 825). Mr. Morris performed work for Lexicon in April 2020 while employed at BDO, reviewing a policy paper as part of Lexicon's intention to apply for government funding for a certain LX-9211 technology (NYSCEF Doc. No. 740 ¶ 55). Notably, Mr. Morris handled this work exclusively with his personal email address (NYSCEF Doc. No. 840).

Mr. Morris continued to work with Lexicon in May 2020, after he submitted his resignation to BDO. Mr. Morris exchanged text messages with Mr. Tyle from May 19 to May 21, 2020, one

day before Mr. Morris' resignation from BDO became effective (NYSCEF Doc. No. 840). Mr. Morris also joined a call with Mr. Tyle and Mr. Jia-Sobota on May 21 (NYSCEF Doc. Nos. 840; 811, at 91:16-92:12). That same day, Lexicon sent materials to EverGlade relating to the LX-9211 work Mr. Morris had previously done for Lexicon as an employee of BDO, and signed a Consulting Services Agreement with EverGlade relating to that work (NYSCEF Doc. Nos. 819, 820, 839).

Mr. Morris contends that an issue of fact exists as to whether Lexicon was a "Client" for the purposes of the Manager Agreement, which defines "Client" as "a client with whom [Mr. Morris] has a relationship which [BDO] enabled him/her to acquire, develop and/or otherwise maintain while employed by the Firm through his/her performance of services for such client or other activity, or as to whom [Mr. Morris] has Confidential Information obtained through [BDO]" (NYSCEF Doc. No. 147 ¶ 7[a]). According to Mr. Morris, Mr. Tyle reached out to him because he had previously worked with Mr. Morris' wife, and thus Mr. Morris' relationship with Lexicon was not one that BDO enabled him to acquire. The argument is unavailing. Mr. Morris acknowledges in his text exchanges with Mr. Tyle that BDO's master services agreement with Lexicon "covers everything that needs to be done" with respect to the LX-9211 work:

We have a signed MSA between BDO and Lexicon. It covers everything that needs to be done. Give me a call when you are ready to start preparing the white paper. We are ready to go.

(NYSCEF Doc. No. 840).

Mr. Tyle later acknowledged that he had approved an invoice sent by Mr. Morris on behalf of BDO to Mr. Tyle:

By the way I signed off on your invoice for stage 1 application help.

(NYSCEF Doc. No. 840)

Mr. Morris' text exchanges with Mr. Tyle demonstrate that Mr. Morris knew that Lexicon was a client of BDO. Mr. Morris' relationship with Lexicon was one that BDO enabled him to "develop and/or otherwise maintain" for the purposes of his Manager Agreement, despite the fact that the referral may have come through his wife (NYSCEF Doc. No. 147 ¶ 7[a]).

Mr. Morris' text messages with Mr. Tyle also make clear that he participated in causing Lexicon to terminate its relationship with BDO and engage EverGlade:

Mr. Morris: You ok to listen in to our 3-5pm central call with Everglade. People joining will be Chris, Eric and Nathan.

Mr. Tyle: Yes- I can join. Please send me a phone number.

Mr. Morris: Yes. Will do.

...

Mr. Morris: Eric and Chris will be on call for sure.

(NYSCEF Doc. No. 840).

Finally, the fact that Mr. Morris did not use BDO resources but instead did all of the LX-9211 work for Lexicon with his personal email address does not show that Lexicon was not a BDO "Client." Instead, and as discussed below, this is further evidence that Mr. Morris was acting as

a faithless servant and intent on diverting Lexicon's business away from BDO and concealing his activities from BDO.

***B. Mr. Morris Solicited Meissa as Prospective Client of BDO and Caused it to Terminate its Relationship with BDO in Breach of his Manager Agreement***

Mr. Morris breached his Manager Agreement by causing Meissa, a prospective BDO client, to terminate its relationship with BDO and ultimately enter into an agreement with EverGlade.

There is no dispute that Meissa was a prospective client of BDO and was in contract negotiations with BDO (NYSCEF Doc. Nos. 791, at 37:11-38:6; 792; 793). Mr. Morris conceded that Meissa was a "BDO prospect" (NYSCEF Doc. No. 790, at 458:2-5). Mr. Morris was introduced to Meissa in March 2020 and was involved in its contractual negotiations with BDO (NYSCEF Doc. Nos. 788, 789, 792, 836). Mr. Moore, Meissa's Chief Scientific Officer, discovered that Mr. Morris was working for EverGlade via LinkedIn (NYSCEF Doc. Nos. 791, at 52:15-18; 794). After Mr. Moore connected with Mr. Morris via LinkedIn, Mr. Morris introduced Mr. Moore to Mr. Jia-Sobota (NYSCEF Doc. Nos. 791, at 24:12-17; 795). Messrs. Jia-Sobota Moore then entered into correspondence, which culminated with Meissa entering into an agreement with EverGlade to perform the same services it had been negotiating with BDO (NYSCEF Doc. Nos. 791, at 24:12-17, 62:20-24, 66:2-6; 780 at 148:24-149:6, 272:3-7; 783 at 244:6-245:4; 795; 796; 797). Mr. Morris' actions directly resulted in Meissa terminating its relationship with BDO and engaging EverGlade. Thus, Mr. Morris breached Paragraph 7(a) of his Manager Agreement.

***C. Issues of Fact Exist as to Whether Mr. Morris' Solicitations of Meabco Caused it to Terminate its Relationship with BDO***

The fully developed record before the Court also indicates that there are issues of fact as to whether Mr. Morris' solicitations of Meabco "cause[d]" Meabco "to terminate its relationship with" BDO (NYSCEF Doc. No. 147 ¶ 7[a]).

Meabco was a client of BDO. Mr. Morris developed his relationship with Meabco in the course of his employment with BDO. This is undisputed (NYSCEF Doc. No. 740 ¶ 61). Two years later, on May 14, 2020, Mr. Morris sent a text message to Ms. Carino of Meabco to set up a telephone call (*id.* ¶ 62). During the call, Mr. Morris told Ms. Carino he was leaving BDO. Ms. Carino learned that Mr. Morris' next employer was EverGlade by checking his LinkedIn profile (NYSCEF Doc. No. 865, at 80:24-83:9). ***A mere seventeen minutes after Mr. Morris' text message***, Ms. Carino sent an email to EverGlade, addressing her email to Mr. Jia-Sobota, inquiring into EverGlade's services (NYSCEF Doc. No. 782). On May 21, 2020, EverGlade sent Meabco a work proposal, listing Mr. Morris as one of EverGlade's consultants (NYSCEF Doc. No. 834). Meabco, however, ultimately decided not to hire EverGlade but to keep the work in-house, and terminate its relationship with BDO.

Although Meabco ultimately decided to bring the work in house and terminate its relationship with BDO because it found that government work was much more "user friendly" than anticipated (NYSCEF Doc. No. 865, at 124:2-15, 74:24-75:18), Mr. Morris is not entitled to dismissal of the claim for breach of Section 7(a) because the facts and circumstances suggest that the relationship would not have been terminated but for Mr. Morris actions. As discussed below, however, Mr. Morris' actions involving Meabco make him a faithless servant.

***D. Issues of Fact Exist as to Whether Kodak was a Prospective Client of BDO***

As discussed above, issues of fact exist as to whether Kodak was a prospective client of BDO because it is not clear on the record before the Court whether an oral proposal to perform services was ever made to Kodak. Thus, BDO is not entitled to summary judgment on its claim that Mr. Morris solicited Kodak as a prospective client of BDO.

***E. Mr. Morris Was a Faithless Servant***

As discussed above in the context of BDO's motion against Mr. Stiles, Mr. Morris' multiple breaches of his Manager Agreement also render him a faithless servant (*Phansalkar*, 344 F3d at 202 [2d Cir 2003]). And, as discussed above, although questions of fact remain as to whether Mr. Morris' efforts to divert Meabco to EverGlade caused that firm to terminate its relationship with BDO, the record nevertheless demonstrates that in doing so Mr. Morris was "act[ing] adversely to his employer" and failing "to disclose any interest which would naturally influence his conduct in dealing with the subject of his employment" (*id.*, citing *Murray v Beard*, 102 NY 505, 508 [1886]). Mr. Morris also acted as a faithless fiduciary when he participated in the May 4, 2020 call in which he and Mr. Stiles informed BDO employees that there would be "opportunities for everyone" at EverGlade and instructing those employees on how to apply (NYSCEF Doc. Nos. 779, at 105:12-106:9, 135:15-136:11; 1015 ¶¶ 6-12; 1065 ¶¶ 4-6, 11-23).

Thus, BDO is entitled to summary judgment on this claim, and Mr. Morris was forfeit his compensation from BDO (*St. James Plaza v Notey*, 95 AD2d 804, 806 [2d Dept 1983]).

***F. BDO is Entitled to Dismissal of Mr. Morris' Claim for Defamation Per Se***

Mr. Morris, like Mr. Stiles, claims that BDO committed defamation *per se* when Ms. Cozza and Mr. Raddock emailed the D.C. Complaint to two companies (Meissa and Altavant) and a law firm. Unlike Mr. Stiles, however, Mr. Morris is not named in the D.C. Complaint (*see* NYSCEF Doc. No. 482). Ms. Cozza, however, identified Mr. Morris as a “conspirator along with [Mr. Stiles] and [Mr. Jia-Sobota],” and explained that this was “why Steve Morris is no longer with BDO” (NYSCEF Doc. No. 802). BDO is entitled to dismissal of Mr. Morris’ defamation claim because Mr. Morris suffered no actual injury resulting from Ms. Cozza’s emails (*Gertz v Robert Welch, Inc.*, 418 US 323, 350 [1974]; *Nolan v State*, 158 AD3d 186, 192 [1st Dept 2018]). Mr. Morris acknowledged that the email was sent only to potential “referral sources,” and that there was no evidence that these companies had stopped referring business to Mr. Morris (NYSCEF Doc. No. 780, at 242:7-9, 242:20-243:7, 259:13-260:18). Mr. Morris also acknowledged that he is “not seeking damages because of referrals lost or anything like that” (*id.*, at 242:7-9). There are no issues of fact that Mr. Morris’ alleged emotional distress began prior to his learning of Ms. Cozza’s emails, therefore his alleged emotional distress could not have been caused to the allegedly defamatory statements under the circumstances (*id.*, at 300:24-301:12, 303:10-305:5).

#### ***IV. Mr. Morris’ Motion for Summary Judgment is Denied (Mtn. Seq. No. 044)***

In his motion for summary judgment (Mtn. Seq. No. 044), Mr. Morris moved to dismiss all of BDO’s claims that levelled against him. His motion is denied.

As discussed above, BDO is entitled to summary judgment that Mr. Morris breached his contract by causing Lexicon and Meissa to terminate their relationships with BDO, and that Mr. Morris

acted as a faithless servant. Issues of fact exist such that dismissal of the claims that Mr. Morris breached his contract by causing Kodak and Meabco to terminate their relationship with BDO.

***A. Issues of Fact Remain as to Whether Mr. Morris Solicited Phlow, Ridgeback, and Ology***

As set forth above, issues of fact exist as to whether Mr. Stiles solicited Phlow, Ridgeback, and Ology. Dismissal of these claims as to Mr. Morris is also inappropriate, because the record suggests Mr. Morris was also involved in the potential solicitation of these companies, working as co-conspirator with Mr. Stiles.

The fully developed record before the Court establishes that in May 2020, Mr. Stiles introduced Phlow to EverGlade (NYSCEF Doc. No. 777, at 119:12-120:12). On May 29, 2020, Mr. Stiles specifically recommended Mr. Morris and his team at EverGlade to Phlow's CEO (NYSCEF Doc. Nos. 800, 801). Mr. Morris acknowledged that he performed work for Ridgeback, a BDO client, while he was employed by BDO (NYSCEF Doc. No. 780, at 282:25-283:10). As discussed above, BDO shut down Ridgeback's client portal in part out of concern that Mr. Morris was misappropriating BDO's confidential information. Mr. Morris also communicated with Ology while employed at BDO, including with Ology's Senior Project Manager, Robert Seymour, who later took a job with EverGlade (NYSCEF Doc. Nos. 992, 994, 1018, 1019). Ology later executed a Consulting Services Agreement with EverGlade on May 20, 2020, days before Mr. Morris left BDO for EverGlade.

Mr. Morris' demonstrated involvement with each of these companies raises a question of fact sufficient to preclude an award of summary judgment and dismissal as to these claims.

***B. Issues of Fact Remain as to Whether Mr. Morris Solicited BDO Employees***

As discussed above in the context of Mr. Stiles' conduct, issues of fact also preclude dismissal of BDO's claims that Mr. Morris breached Paragraph 7(b) of his Manager Agreement by soliciting BDO employees Drew Albright, Paula Kim, and Ady Pierce. As discussed above, Mr. Morris was on the May 4, 2020 call with Mr. Stiles and Mr. Albright, Ms. Kim, and Ms. Pierce, at which Messrs. Morris and Stiles allegedly instructed all three of them to apply for positions with EverGlade (NYSCEF Doc. No. 779, at 105:12-106:3; 135:15-136:11). All three applied to EverGlade, in accordance with the step-by-step process identified by Messrs. Morris and Stiles (*id.*, at 190:10-193:16, 240:16-241:7, 281:6-23). To the extent Mr. Morris argues that testimony indicates that Mr. Stiles made these statements rather than Mr. Morris, the Court cannot determine that issue at this stage, as matters of credibility cannot be determined on a motion for summary judgment (*Art Cap. Grp. v Rose*, 149 AD3d 447, 448 [1st Dept 2017]). And, if Mr. Morris was working with Mr. Stiles to cause these statements to be made, this too would constitute a breach.

***C. Mr. Morris is Not Entitled to Dismissal of BDO's Tort and Quasi-Contract Claims***

Mr. Morris moves to dismiss BDO's claims for breach of fiduciary duty, aiding and abetting Mr. Jia-Sobota's breach of his fiduciary duty, breach of the covenant of good faith and fair dealing, tortious interference with business relations, and unjust enrichment making in sum and substance the same arguments that Mr. Stiles made and the Court rejected earlier in the case (NYSCEF Doc. No. 55). Mr. Morris points to no evidence produced during discovery that would change this Court's prior determinations.

Mr. Morris owed BDO a fiduciary duty by virtue of his Manager Agreement and his position as an employee. The allegations made in support of BDO's breach of fiduciary duty claims are independent of the allegations made in support of its breach of contract claim. Mr. Jia-Sobota also owed BDO fiduciary duties, and issues of fact exist as to whether Mr. Morris' actions aided and abetted breaches committed by Mr. Jia-Sobota when he founded a competing firm while still employed at BDO and then worked to solicit BDO's clients, prospective clients, and employees.

BDO's tortious interference with prospective business relations claim also cannot be dismissed, because issues of fact remain as to whether, as discussed above, Mr. Morris breached his fiduciary duties or misappropriated BDO's confidential information to divert prospective clients from BDO to EverGlade. Underlying torts such as breach of fiduciary duty or misappropriation of confidential information constitute "wrongful means" for the purposes of tortious interference claims (*Out of Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 [2d Dep't 2008]; *Insight Glob., LLC v. Wenzel*, 2018 WL 11318728, at \*5 [SDNY Aug. 27, 2018]).

Finally, BDO's claims for the breach of the covenant of good faith and fair dealing and unjust enrichment are also not properly dismissed, as there are triable issues of fact as to BDO's damages (*JAB Const. 1 Corp. v N. Broadway Estates, Ltd.*, 145 A.D.3d 673, 674 [2d Dept 2016]).

The Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is hereby

ORDERED that BDO’s motion for summary judgment as against Mr. Stiles (Mtn. Seq. No. 050) is granted in part; and it is further

ORDERED that BDO’s motion for summary judgment as against Mr. Morris (Mtn. Seq. No. 045) is granted in part; and it is further

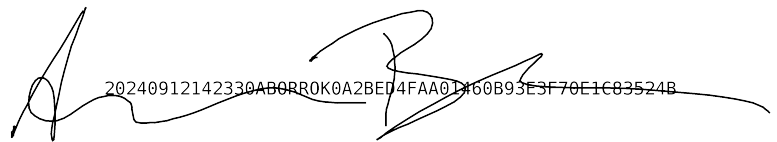
ORDERED that Mr. Stiles’ motion for summary judgment (Mtn. Seq. No. 049) is denied; and it is further

ORDERED that Mr. Morris’ motion for summary judgment (Mtn. Seq. No. 044) is denied; and it is further

ORDERED that the parties shall appear for a post-trial conference on October 11, 2024, at 12:00pm.

9/12/2024

DATE



ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE