

Prager Metis CPAs LLC v Stark

2025 NY Slip Op 31329(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 652186/2023

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X

PRAGER METIS CPAS LLC,

Plaintiff,

- v -

LEWIS STARK and ADEPTUS PARTNERS LLC,

Defendant.

INDEX NO. 652186/2023

MOTION DATE _____

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 62, 70, 71, 75, 77, 82

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 63, 64, 65, 66, 67, 68, 69, 76, 78, 83

were read on this motion to/for DISMISSAL.

In motion sequence numbers 003 and 004, defendants Lewis Stark and Adeptus Partners LLC (Adeptus) move pursuant to CPLR 3211(a) (1) and (7) to dismiss the amended complaint.

Background

Unless indicated otherwise, the following facts are taken from the amended complaint, and for the purposes of this motion, are accepted as true.

Plaintiff Prager Metis CPAs LLC (Prager), Stark’s former employer, “is an international advisory and accounting firm that provides accounting, audit, tax, consulting, and international services throughout the United States.” (NYSCEF 44, Amended Complaint [AC] ¶ 1.) On August 11, 2017, Prager admitted Stark as a Class

C Member. (*Id.* ¶ 6.) Stark executed a Practice Assumption Agreement (PAA) and a Class C Member (Non-Equity) Agreement (Class C Agreement), “which incorporated the January 1, 2013 Fourth Amended and Restated Limited Liability Company Operating Agreement” (Fourth LLCOA) “and the January 1, 2013 Limited Liability Company Agreement of Prager Metis International LLC” (International Agreement). (*Id.* ¶¶ 6, 11.)

Pursuant to section 5.02(b) of the PAA,¹ if Stark elected to bring any clients he had from his former employer, Eisner Amper (EA), to Prager, then Prager would pay up to \$300,000 in Client Acquisition Costs. (*Id.* ¶ 12.) However, if the Client Acquisition Costs exceeded \$300,000, then Stark was to pay one third of the excess cost pursuant to section 5.02(c)². (*Id.* ¶ 13.) Stark elected to bring his former clients from EA and

¹ Section 5.02(b) provides that “[i]f the continuation of any client relationship on Stark’s Client List by Stark while a Member of [Prager] requires the payment of money by Stark to EA or any other party whether (i) pursuant to an existing agreement, or (ii) pursuant to a new agreement reached by Stark or by [Prager] on his behalf, (collectively, a ‘Client Acquisition Cost’), [Prager] agrees to contribute up to a maximum of \$300,000 to the Client Acquisition Costs, subject to the following limitations: (i) if [Prager] is able to negotiate an independent agreement with EA, [Prager] shall pay such amounts directly on behalf of Stark (otherwise it shall reimburse Stark as and when actually paid by Stark to EA); (ii) the amounts paid by [Prager] shall not be in excess of what Stark is contractually required to pay and (iii) unless [Prager] otherwise agrees with EA, the Client Acquisition Costs shall be paid over three years to EA. Notwithstanding any other provision herein to the contrary, [Prager] shall have the discretion to reject any new client to be obtained from EA pursuant to its intake policies and procedures or otherwise.” (NYSCEF 8, PAA at 7.)

² Section 5.02 (c) provides that “[t]o the extent that Stark’s Client Acquisition Costs payable to EA will require payment in excess of \$300,000 (the ‘Excess’), [Prager] may, but shall not be obligated to take on any Excess. If [Prager], however, agrees to pay any Excess of Client Acquisition Costs to EA beyond \$300,000, as a condition to doing so, Stark shall be required to personally bear one-third of the Excess. Stark’s obligations with respect to his one-third share of the Excess may be satisfied by [Prager] by setting off any compensation, bonus or other amounts due to Stark pursuant to his arrangements with [Prager] and shall be limited to \$25,000 per calendar year.” (*Id.* at 7-8.)

Prager paid \$408,585.00 in Client Acquisition Costs. (*Id.* ¶ 15.) During Stark's employment with Prager, Prager collected \$4,034,600 from the clients Stark brought from EA. (*Id.* ¶ 16.) Among other things, section 5.03 of the PAA³ states that, if Stark terminated his employment with Prager before December 31, 2024, then Stark would reimburse Prager for any Client Acquisition Costs Prager paid. (*Id.* ¶ 14.)

³ Section 5.03 provides that "[i]n the event that Stark's membership is terminated prior December 31, 2024 for any reason other than death or Disability, then Stark shall be required to (i) reimburse [Prager] for any amounts that [Prager] may have paid directly to EA for Client Acquisition Costs within thirty days after termination or withdrawal, (ii) assume [Prager]'s future financial obligations, if any, to EA in connection for Client Acquisition Costs ; (iii) indemnify and hold [Prager] harmless for any failure to pay EA or any third party in accordance with the terms thereof; (iv) reimburse [Prager] for its legal fees incurred after the Effective Date in connection with the defense of Stark and/or [Prager] in any threatened or instituted claim by any former employer of Stark, and reimburse [Prager] for any amounts paid by [Prager] in settlement thereof. [Prager] may set-off the amounts due from Stark to [Prager] under this Section against any other amounts that may be otherwise due to Stark under this Agreement or the Class C Agreement. Notwithstanding any provision herein to the contrary, Stark's obligations to reimburse [Prager] in accordance with the terms hereunder for any Client Acquisition Costs shall be reduced by twenty-five percent (25%) in each calendar year beginning with the year 2020 (such that if his membership is terminated for any reason other than death or Disability in 2020, he would only owe 75% of Client Acquisition Costs, if his membership is terminated for any reason other than death or Disability in 2021, he would only owe 50% of Client Acquisition Costs, if his membership is terminated for any reason other than death or Disability in 2022, he would only owe 25% of Client Acquisition Costs. Notwithstanding any other provision herein to the contrary, Stark shall not be required reimburse [Prager] for Client Acquisition Costs once the aggregate amount of Stark Collections (as defined in the Class C Member (Non-Equity) Agreement) since the Effective Date equal or exceed ten (10) times the amounts [Prager] paid or is required to pay to EA for Client Acquisition Costs. The restrictions (including any restrictive covenant) set forth in Section 9 of the [Prager] Operating Agreement and Section 9 of the International Operating Agreement shall not apply to the Client Acquisition Costs, and no other sums or compensation, damages or sums will be due and owing from Stark to [Prager] or International in connection with such Client Acquisition Costs except those sums provided for in this Section." (*Id.* at 8.)

On April 9, 2020, Joseph Fox⁴ sent Stark an email with a “Notice to Class C Members from the Office of the CEO.” (NYSCEF 10, Fox Email.) The Notice contains two signature lines – one for the CEO and one for the Class C Member. (*Id.*) The Notice provides that, because of the Covid-19 pandemic, Class C Members’ compensation will be reduced by 10% for the second quarter (April-June 2020); Prager would reevaluate whether the reduction will need to remain in place beyond the second quarter. (*Id.*) The draw schedule for all equity and non-equity partners paid on a K-1 also changed in that members would “receive 60% of [their] compensation (adjusted to reflect the 10% COVID Reduction described above) in the form of monthly draws, and the remaining 40% will be paid in quarterly installments (10% per quarter) coinciding with the tax deadlines for filing quarterly estimated payments.” (*Id.*) Stark did not sign the Notice. (NYSCEF 13, July 2020 Email From Prager CEO.) On July 9, 2020, Stark sent Prager a 45-day notice to cure their breach of the Class C Agreement as required under section 7.⁵ (NYSCEF 12, Stark’s Notice to Cure at 1.)

In his notice, Stark states that Prager paid him 50% less than it was contractually required to and accused Prager of breaching the Class C Agreement by withholding “40% of that amount and claiming that [Prager] would pay 25% of such withheld amounts in payments on April 15, June 15, September 15, and December 31.” (*Id.*)

⁴ Joseph Fox is Prager’s general counsel. (NYSCEF 15, Fox Letter at 2.)

⁵ Section 7 provides that “...The parties agree that in the event that the Company shall breach its obligations under this Agreement and shall fail to remedy such breach within forty-five (45) days following written notice of such breach from Stark to the Company, Stark shall have the right by further written notice to the Company to declare the Company in default hereunder, and upon such declaration of default, the covenants set forth in Sections 9.3 and 9.4 of the Company Operating Agreement and the International Operating Agreement shall no longer bind or apply in any manner to any of the Stark.” (NYSCEF 7, Class C Agreement at 9.)

Stark claims that Prager informed him of this in February 2020 and made it retroactive to January 1, 2020 without his consent. (*Id.*) He also states that he did not agree to the 10% reduction in salary. (*Id.*)

On July 16, 2021, Stark resigned from Prager and joined Adeptus soon after. (NYSCEF 44, AC ¶ 17.) Pursuant to section 8.5 of the Fourth LLCOA,⁶ if Stark resigns from Prager, he must provide “not less than six (6) months’ notice.” (*Id.*) Section 9.4 of the Fourth LLCOA prohibits Stark from engaging in the following conduct for 2 years after leaving Prager:

“(a) provide any services or products provided by [Prager] ... in the normal course of its business, to any person, business entity, association, trust, estate, not-for-profit entity or corporation who is or has been (i) a client of [Prager] ... at any time during the eighteen (18) months prior to the date of termination . . . ;

⁶ Section 8.5 (a) provides that “[i]n the event any Member desires to withdraw from the Company and the Firm, such Member shall give the Board of Managers and the International Executive Committee not less than six months’ prior written notice; provided, however, that the Company and the Firm may shorten such notice period prior to such Member’s withdrawal if the Board of Managers or the International Executive Committee reasonably determines that the continued presence of such withdrawing Member is reasonably likely to have a material adverse effect on the Company and the Firm, its employees or its professional practice; provided further, however that if the notice period designated by the Board of Managers or the International Executive Committee is less than thirty (30) days, the withdrawing Member shall be entitled, subject to the other terms and conditions of this Agreement, to payments of Total Remuneration from the effective date of such termination as established by the Board of Governors or the International Executive Committee to the date specified in the notice of withdrawal if such withdrawn Member cooperates with the Firm and the International Executive Committee in effecting a professional transition of clients and if such withdrawn Member is not otherwise disruptive to the practice of the Firm. The withdrawal of a Member must be effective as of the last day of a fiscal quarter, which date shall be specified in the notice. Upon withdrawal, the withdrawing Member shall cease to be a Member of the Company and a member of International, and/or a partner of Prager NY, for all purposes. Any Member who withdraws from the Company and the Firm without having satisfied the criteria for Mandatory Retirement or Early Retirement shall not be deemed a Retired Member under this Agreement or the International LLC Agreement, as applicable.” (NYSCEF 6, Fourth LLCOA at 41-42.)

(b) solicit any party described in paragraph (a) above for the purpose of providing any services or products provided by [Prager]; or

(c) hire, retain, employ, working with or for such purpose any person who has been a Member or an employee of [Prager] ... at any time during the twelve-month period prior to the date of withdrawal. (NYSCEF 6, Fourth LLCOA at 45-46.)

If Stark breaches section 9.4 of the Fourth LLCOA, then section 9.5 of the Fourth LLCOA provides for liquidated damages. (*Id.* at 46; NYSCEF 44, AC ¶ 8.) Sections 1.1(g)⁷ and 7 of the Class C Agreement incorporate section 9 of the Fourth LLCOA. (*Id.* ¶ 10.)

On May 5, 2023, Prager commenced this action alleging: (1) breach of contract against Stark; (2) breach of the implied covenant of good faith and fair dealing against Stark; (3) unfair competition against Stark and Adeptus; (4) tortious interference with contractual relations against Adeptus; and (5) tortious interference with prospective business opportunities against Adeptus and Stark.

The court dismissed the second cause of action for breach of the implied covenant of good faith and fair dealing against Stark as duplicative of the first cause of action for breach of a contract claim. (NYSCEF 83, tr at 35:4-13; 43:5-7 [mot. seq. nos. 003, 004].) The remaining causes of action will be addressed below.

⁷ Section 1.1 (g) provides that “Stark acknowledges and agrees that he shall be bound by the terms and provisions of the Operating Agreements applicable to Class C Members at all times during the term of this Agreement, and, if applicable, after termination of this Agreement, including, without limitation, those provisions related to non-competition, non-solicitation, confidentiality, proprietary information, and independence. Stark s agreement to be bound by the Operating Agreements shall survive the termination of this Agreement.” (NYSCEF 7, Class C Agreement at 3.)

Discussion

On a CPLR 3211 (a) (1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211 (a) (1) only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “essentially undeniable.” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted].)

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Breach of Contract (Stark)

Prager alleges that Stark breached (1) section 8.5 (a) of the Fourth LLCOA that requires “not less than six months’ notice” when he gave the same day notice before resigning; (2) the PAA by failing to pay one third of the Client Acquisition Costs in excess of \$300,000.00 and half of the Client Acquisition Costs upon resignation; (3) sections 1.1(g) and 7 of the Class C Agreement and section 9.4 of the Fourth LLCOA by soliciting Prager’s employees to join him at Adeptus and servicing Prager clients. (NYSCEF 39, AC ¶¶ 28-35.) Prager seeks compensatory and liquidated damages.

The elements of a cause of action for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].)

Liquidated damages

Prager seeks liquidated damages pursuant to section 9.5 of the Fourth LLCOA and sections 9.4 and 9.5 of the International Operating Agreement. (NYSCEF 44, AC at 10 [Wherefore Clause], ¶¶ 8-9.) Section 9.5 of the Fourth LLCOA provides for liquidated damages if Stark breaches the non-solicitation provision of the Fourth LLCOA. (NYSCEF 6, Fourth LLCOA at 46.) “Sections 9.4 and 9.5 of the International Operating Agreement contain identical provisions concerning post-employment restrictions and liquidated damages.” (NYSCEF 44, AC ¶ 9.)

However, the Class C Agreement provides that neither the restrictive covenants nor the liquidated damages provisions in the Fourth LLCOA apply to prior clients. (NYSCEF 7, Class C Agreement § 7 [“it is understood and agreed that such legacy

clients from Stark shall be deemed clients of (Prager) for all purposes of Section 9 of the Company Operating Agreement and the International Operating Agreement, and Stark shall be subject to all restrictive covenants contained therein insofar as such clients are concerned, including without limitation, the provisions related the non-solicitation of such clients and the amount and method for the payment of liquidated damages in the event of a breach thereof, except with respect to those client relationships that are being acquired from EA for which Stark shall be obligated only to compensate (Prager) in accordance with Section 5.02 of the Practice Assumption Agreement”].)

Stark asserts that the only clients at issue are prior clients that he brought over from EA when he joined Prager. (NYSCEF 51, Stark Aff; NYSCEF 18, Prager’s Counsel Letter at 4; NYSCEF 21, EA client list.) In response, Prager does not dispute Stark’s assertion; rather, it asserts that it does not seek liquidated damages for solicitation of clients, and even if it did, a determination of whether such a clause is enforceable is premature. Although the Wherefore Clause in the Amended Complaint mentions liquidated damages, Prager admittedly is not seeking such damages. (See NYSCEF 70, Memo in Opp at 20 [“Preliminarily, the Amended Complaint does not seek any liquidated damages against Defendant for soliciting clients”].) Thus, this issue is moot and any claim to liquidated damages is dismissed.

Client Acquisition Costs

Prager alleges that it “paid at least \$408,585 in Client Acquisition Costs pursuant to the PAA,” and upon his resignation, Stark owed Prager half of these costs. (NYSCEF 44, AC ¶¶ 15, 32.) Stark, however, argues that he has no repayment obligation under

the terms of PAA as Prager reached the 10x threshold in “Stark Collections”⁸ during his employment.

Section 5.03 of the PAA clearly provides that if Stark’s membership is terminated prior December 31, 2024, then he must reimburse Prager for any Client Acquisition Costs that Prager paid directly to EA. (NYSCEF 8, PAA at 8.) If his membership terminated in 2021, he owes 50% of Client Acquisition Costs. (*Id.*) However, “Stark shall not be required reimburse [Prager] for Client Acquisition Costs once the aggregate amount of Stark Collections (as defined in the Class C Member (Non-Equity) Agreement) since the Effective Date equal or exceed ten (10) times the amounts [Prager] paid or is required to pay to EA for Client Acquisition Costs.” (*Id.*)

Prager does not dispute that Stark would not be required to reimburse Prager if the 10x threshold is met. Rather, Prager argues that, while the amended complaint contains the allegation that it paid at least \$408,585 in Client Acquisition Costs, the matter is still in the pleading stage and the exact amount is not fixed. Prager alleges

⁸ Stark Collections are defined as “the aggregated annual cash fee collections received by [Prager] in each calendar year (net of out-of-pocket third party disbursements made by [Prager] or an Affiliate in furnishing the work to which the fee collections pertain, whether or not such third party disbursement is included in the overall client fee or separately stated on the invoice and billed for reimbursement, excluding any overhead allocations) from (a) any clients originating with Stark, whether legacy clients that were sold to [Prager] as part of the Practice Assumption Agreement or new clients that are acquired by Stark after the Effective Date on behalf of [Prager] (whether or not such clients originating with Stark are serviced by [Prager]’s Royalty Audit and Compliance Group or by any other practice groups and members of [Prager]), (b) any clients acquired by [Prager] from Eisner Amper LLP (‘EA’) in accordance with Section 5.02(b) of the Practice Assumption Agreement, (c) revenues generated by a Company Affiliate from any client originating with and referred to such Affiliate by Stark.” (NYSCEF 7, Class C Member Agreement at 4.)

that during Stark's time with Prager, Prager collected \$4,034,600.00 in Stark Collections. (NYSCEF 44, AC ¶ 16.) Thus, accepting the allegations of the amended complaint as true, the amount of the Stark Collections falls just shy of the 10x threshold of the \$408,585 Prager paid in Client Acquisition Costs. While Stark submit an email purporting to show additional payments to Prager after Stark left, totaling \$136,697, which Stark argues should be added to the Stark Collections, it is insufficient to "utterly refute[] plaintiff's factual allegations and conclusively establish[] a defense to the asserted claims as a matter of law." (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted] [holding that emails can qualify as documentary evidence, but they still must meet the essentially undeniable test].) While the court acknowledges that Prager does not deny that it received these monies, but rather, disputes the conclusiveness of the evidence, it is defendant's burden on this motion.

Non-Solicitation

Prager alleges that Stark breached sections 1.1(g) and 7 of the Class C Agreement and section 9.4 of the Fourth LLCOA by soliciting Prager's employees to join him at Adeptus and servicing Prager clients. In response, Stark asserts that Prager is barred from enforcing any restrictive covenants because of its own breaches of the Class C Agreement, which Prager never remedied despite Stark's notice.

In April 2020, Prager reduced Stark's compensation even though Stark did not sign the compensation reduction notice. (NYSCEF 10, Fox Email; NYSCEF 13, July 2020 Email From Prager CEO.) In July 2020, Stark sent Prager a 45-day notice to cure

its breach of the Class C Agreement. (NYSCEF 12, Stark’s Notice to Cure at 1.) Stark did not resign from Prager until July 16, 2021. (NYSCEF 44, AC ¶ 17.)

“Under the election of remedies doctrine, a party, upon learning of a material breach of a contract, must choose between terminating the contract and continuing performance.” (*Parlux Fragrances, LLC v S. Carter Enters., LLC*, 204 AD3d 72, 86 [1st Dept 2022] [citations omitted].) It cannot be determined at this stage whether Stark’s conduct in continuing his association with Prager for an additional year amounted to an affirmation of the terms of the Notice to Class C Members from the Office of the CEO reducing compensation. Further, there is also the issue of whether continuing his association constituted a waiver; an issue typically reserved for a trier of fact. (*Id.* [finding existence of triable issues of fact as to whether a party waived a contractual right despite a no-waiver clause].)

Stark also asserts that the restrictive covenants only apply to Prager’s compliance with the condition precedent set forth in section 9.4 of the Fourth LLCOA. Section 9.4 states, in relevant part, that “[a] Member who...voluntarily withdraws...then for a so long as such former Member is receiving payments pursuant to Section 8 ...and for a period of two years from the receipt of the last such payment, such former Member shall not... provide any services or products provided by [Prager] ...to any personwho is or has been (i) a client ... or (ii) potential client” (NYSCEF 6, LLCOA at 45.) Stark argues that the restrictive covenants only apply if he is receiving payments pursuant to Section 8.

The court disagrees that this provision contains a condition precedent. Rather, it is a time restriction. The member is restricted from providing services and products as

long as the member is receiving payments pursuant to section 8 and for two from the receipt of the last of those payments. There is no language that requires payment pursuant to section 8 in order to trigger the restrictive covenants. The use of the word “and” bridging the two temporal occurrences of (1) for as long as a member receives payments and (2) two years from the last payment can only be interpreted in one way. The plain language does not create “acts or events which must occur before a party is obliged to perform a promise.” (*Oppenheimer & Co. v Oppenheim*, 86 NY2d 685, 690 [1995] [citation omitted].)

Stark also seeks to bar, based on the doctrine of judicial estoppel, Prager from arguing that Stark was anything other than an employee based on litigation involving other Prager Class-C Members. “The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.” (*Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006] [internal quotation marks and citations omitted].)

In *Brister, et al. v Prager Metis CPAs, LLC*, Index No. 156737/2015, the plaintiffs sought to enjoin Prager from enforcing the restrictive covenant provision in a Practice Assumption and Class C Member Agreement. In the complaint, Brister alleged that the Agreement was void under New York law because he was not a CPA, and thus, he could not be an equity member of Prager. (Index No. 156737/2015, NYSCEF 2, Complaint.) The main issue before the court was whether Brister should be required to arbitrate under the Agreement. (NYSCEF 48, Tr of Argument in *Brister, et al. v Prager*.)

Brister took the position that since the Agreement was void, so too, was the arbitration provision contained therein. (*Id.*) Prager took the position that Brister was aware that as a non-CPA he could not hold an equity interest. (NYSCEF 45, Freidman aff.) The court upheld the arbitration provision and agreed that Brister “had no equity.” (NYSCEF 48, Tr at 22:23, 23:8-19.) Here, Prager is has not taken a different position from that in Brister – Class C Members are not equity members. Stark attempt to apply judicial estoppel is misplaced.

Further, Stark’s argument, that the restrictive covenant is not enforceable on a motion to dismiss, is premature as indicated by his reliance on cases involving summary judgment. The same is true for his argument that Prager has not “shown” damages.

Stark also raises an issue regarding what notice obligation was effect when he resigned in July 2021. According to the Fifth Amended and Restated Limited Liability Company Operating Agreement, dated as of January 1, 2022, the Fourth LLCOA “was further modified by a special meeting of the Members on January 22, 2020 and on December 11, 2020.” (See NYSCEF 49, Fifth LLCOA at 1.) It is unknown to the court if any of these modifications involved the notice of termination provision. Discovery is necessary.

Accordingly, Stark’s motion to dismiss the breach of contract claim is denied.

Unfair Competition (Stark and Adeptus)

Prager alleges that Stark and Adeptus “used wrong means” to solicit and hire Prager’s employees and to solicit Prager’s clients without paying Prager. (NYSCEF 39, AC ¶¶ 45-46.) Stark asserts that this claim is duplicate of the breach of contract claim. Adeptus asserts that there is not misappropriation in bad faith.

To plead a claim for unfair competition, Prager must allege a “bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information.” (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015] [internal quotation marks and citations omitted].) “[T]he primary concern in unfair competition is the protection of a business from another’s misappropriation of the business organization or its expenditure of labor, skill, and money.” (*Id.* [internal quotation marks and citation omitted].)

As to Stark, the unfair competition claim is duplicative of the breach of contract claim as Prager alleges the same conduct that the breach of contract claim is premised on, i.e., soliciting Prager’s clients and employees. (NYSCEF 44, AC ¶¶ 20, 21, 35; *Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 418 [1st Dept 2020] [holding that the trial court properly dismissed the unfair competition claim because it was entirely based on alleged conduct that is proscribed by contract (internal quotation marks omitted and citations omitted)].) Thus, Stark’s motion to dismiss the unfair competition claim is granted.

As to Adeptus, Prager has not sufficiently plead that Adeptus misappropriated a commercial advantage in bad faith. “Bad faith can be shown through acts of fraud, deception, or an abuse of a fiduciary or confidential relationship.” (*Valkyrie AI LLC v PriceWaterhouseCoopers LLP*, 233 AD3d 460, 461 [1st Dept 2024] [internal quotation marks and citation omitted].) Here, Prager does not allege that there is fiduciary or confidential relationship between Prager and Adeptus. Similarly, there are no allegations that Adeptus engaged in fraud or deception. Prager’s only allegations are that Adeptus is a direct competitor which induced Stark to terminate his employment

with Prager and induced Stark to violate certain agreements to obtain Prager's employees, clients, and trade secrets/confidential information. (NYSCEF 44, AC ¶¶ 18-19, 22.) These allegations are insufficient to maintain this claim as there are no allegations of fraud, deception, or abuse of a fiduciary or confidential relationship. To the extent that Prager alleges Adeptus obtained trade secrets, putting aside the lack of an allegation of bad faith, "[a] plaintiff is required to precisely identify the trade secrets it alleges that the defendant misappropriated." (*Valkyrie AI LLC*, 233 AD3d at 461 [citation omitted].)

This claim is dismissed.

Tortious Interference with Contractual Relations (Adeptus)

Prager alleges that Adeptus tortiously interfered with Prager's prospective business opportunities by (a) inducing Stark to breach his employment agreements with Prager, (b) inducing Stark to solicit Prager's employees, and (3) inducing Stark to solicit Prager's client without compensation. (NYSCEF 44, AC ¶ 50.)

To state a claim for tortious interference with contractual relations, Prager must allege (1) a valid contract between Prager and Stark; (2) Adeptus' knowledge of that contract; (3) Adeptus' "intentional procurement of Stark's breach of contract without justification;" (4) "actual breach of the contract," and (5) "damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted].)

Prager's tortious interference with a contractual relation claim fails because there are no allegations that Adeptus knew of Stark's contract with Prager at the time Stark allegedly breached. "It suffices to say that the operative consideration for tortious interference with contractual relations is the state of a defendant's knowledge at the

time breach of a valid contractual obligation is induced.” (*Bogoni v Friedlander*, 197 AD2d 281, 287 [1st Dept 1994].) In the amended complaint, Prager alleges that Adeptus was “on notice of Stark’s numerous and material breaches of the Company Operating Agreement and the Agreement when Prager’s counsel sent a cease-and-desist letter to Stark on November 23, 2022.” (NYSCEF 44, AC ¶ 25.) Thus, it does not follow that Adeptus knew of the agreements and induced Stark to breach the agreement when, according to Prager’s own allegation, Adeptus did not learn of the breaches until after they already occurred. Adeptus motion to dismiss the tortious interference with contractual relationship is granted.

Tortious Interference with Prospective Economic Advantage/Business Relations (Stark and Adeptus)

Prager alleges that Stark interfered with Prager’s prospective economic advantage and business relations when he solicited Prager’s employees and served Prager’s clients without compensating Prager. (NYSCEF 44, AC ¶¶ 55,57.) Prager alleges that Adeptus interfered with Prager’s prospective economic advantage and business relations when Adeptus hired Prager employees and served Prager’s clients without compensating Prager. (*Id.* ¶¶ 56-57.)

“To state a claim for tortious interference with prospective business relations, a plaintiff must allege (1) business relations with a third party, (2) the defendant’s interference with those business relations, (3) the defendant acted for the sole purpose of harming plaintiff or used wrongful means, and (4) injury to the business relationship. For this cause of action it must be affirmatively alleged that the defendant’s conduct was motivated solely by malice or to inflict injury by unlawful means going beyond mere self-interest or other economic considerations.” (*Valkyrie AI LLC*, 233 AD3d at 462 [citations

omitted].) The amended complaint is devoid of any allegations that defendants' conduct was motivated by malice or by any unlawful means going beyond mere self-interest. Further, as to Stark, this claim is duplicative of the breach of contract claim as Prager alleges the same conduct that the breach of contract claim is premised on, i.e., soliciting Prager's clients and employees.

Accordingly, it is

ORDERED that the motion of defendant Adeptus Partners LLC to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety as against the Adeptus, with costs and disbursements to Adeptus as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Adeptus; and it is further

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

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

ORDERED that counsel for Adeptus shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

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

ORDERED that defendant Lewis Stark’s motion to dismiss is granted, in part, and the second, third, and fifth causes of action of the amended complaint are dismissed; and it is further

ORDERED that defendant Stark is directed to serve an answer to the amended complaint by May 2, 2025; and it is further

ORDERED that counsel are directed to submit a proposed Part 48 preliminary conference order via email (SFC-Part48@nycourts.gov) and NYSCEF by May 9, 2025. If the parties cannot agree to a joint proposed order, they may submit competing orders by that date.

4/10/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT