

Synergy Advanced Pharm., Inc. v Capebio, LLC

2013 NY Slip Op 31042(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 603824/2009

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SYNERGY ADVANCED PHARMACEUTICALS, INC.,

Plaintiff,

-against-

CAPEBIO, LLC, COMBIMAB, INC. and
PER LINDELL,
Defendants.

INDEX NO. 603824/2009

MOTION DATE May 8, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...


Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, defendants' motion for summary judgment dismissing the three remaining causes of action in the amended complaint is decided in accordance with the accompanying decision and order.

Dated: March 27, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49**

-----X
SYNERGY ADVANCED PHARMACEUTICALS, INC.

Plaintiffs,

-against-

**CAPEBIO, LLC, COMBIMAB, INC. and
PER LINDELL,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

This is an action by plaintiff, Synergy Advanced Pharmaceuticals, Inc. (“Synergy”), a small, publicly traded drug development company, against its former employee, defendant Per Lindell (“Lindell”), and two entities Lindell formed, defendants CapeBio, LLC (“CapeBio”) and CombiMab, Inc. (“CombiMab”) (collectively “defendants”), *inter alia*, for breach of confidentiality, non-compete and assignment of inventions provisions of a services agreement between Synergy and CapeBio, which was executed by Lindell as President of CapeBio.

This action was originally brought in this court, but was removed in March 2010 to the United States District Court for the Southern District of New York (*Synergy Advanced Pharmaceuticals, Inc. v CapeBio, LLC et al.*, Index No. 10 Civ. 1736 [SAS]) on the basis of diversity jurisdiction, where it was assigned to the Honorable Shira A. Scheindlin. The discovery phase of this litigation was conducted in federal court, including depositions and document exchange. After the case was trial ready, Synergy moved before Judge Scheindlin to remand the action to this court based on lack of diversity of citizenship. While holding that the case had been improperly removed to federal court as there was no diversity of citizenship between the parties, all of which are Delaware corporations, and that the federal court did not have original jurisdiction as the case did not arise under federal patent law as defendants contended, Judge Scheindlin denied Synergy’s motion, finding that federal court should retain jurisdiction on the ground of judicial efficiency, and granted defendants’ motion to dismiss the action against CapeBio and CombMab so that the federal court had subject matter jurisdiction on the basis of diversity as Lindell is a citizen of Maryland (*see* Gabarini Declaration in Support of Motion, Ex. “J”).

**DECISION AND ORDER
Index No. 603824/2009
Mot. Seq. No. 001**

Synergy sought reconsideration of its motion. Judge Scheindlin denied Synergy's motion, while certifying an interlocutory appeal from her prior order denying remand, and stayed the proceedings while the appeal was pending. In light of plaintiff's prospective appeal, defendants withdrew their opposition to plaintiff's motion to remand this action to New York Supreme Court. By order dated October 19, 2011, Judge Scheindlin reinstated CapeBio and CombiMab as defendants in this action and remanded the action to this court (NYSCEF Doc. No. 4).

Defendants have now filed a motion for summary judgment in their favor dismissing the three remaining counts in plaintiff's amended complaint, namely, breach of fiduciary duty, breach of contract and unfair competition, on the grounds that: (1) the confidential information Synergy alleges defendants misused was either in the public domain before defendants' disclosure or was information that could not be considered restricted by an employment agreement; (2) plaintiff is limited to its response to defendants' interrogatory no. 7 as to information alleged to have been misused by defendants as it has never sought to amend its response thereto; (3) defendants had no duty to protect the information that was alleged to have been shared; (4) plaintiff is barred from objecting to any actions by defendants as such actions alleged by plaintiff as giving rise to its cause of action in the amended complaint occurred after the one-year period following Lindell's separation from Synergy; and (5) plaintiff has failed to submit any evidence to support the remaining three causes of action.

Plaintiff opposes the motion on the ground that there are numerous issues of fact that cannot be resolved on a motion for summary judgment and further that resolution of such factual issues turns upon resolution of credibility issues which are not appropriate for summary disposition by motion.

For reasons to be discussed, defendants' motion is denied.

Factual Background

A. The Parties

Synergy is a company incorporated under the laws of the State of Delaware with its principal place of business in New York. Its primary business is the development of urgoguanlylin or ST-peptide derivatives, including a compound called SP-304 or Guanilib, which are used to treat

gastrointestinal (“GI”) disorders and diseases (12/22/09 Complaint ¶¶ 1-2, 13).¹ CapeBio is a consultancy company that provides services for companies developing various pharmaceuticals.² Lindell is its President and only shareholder. CombiMab is a company formed by Lindell, who is also its President and only shareholder, for the development of drugs for the treatment of lower GI disorders such as diarrhea and constipation (Lindell Aff. In Support of Motion [Lindell Aff.] ¶ 4).

B. Services Agreement Between Synergy and CapeBio

On September 25, 2007, Lindell, as President of CapeBio, and Bernard Denoyer, as President of Synergy, executed a services agreement (the “Agreement”), pursuant to which CapeBio agreed to perform consulting services related to the research and development of GI pharmaceutical products in exchange for monetary compensation (Lindell Aff. ¶ 6, Ex. “A”). The Agreement commenced on October 1, 2007 and was to expire on August 31, 2008, unless terminated earlier (*id.* ¶8, Ex. “A”, ¶ 3). On July 1, 2008, Synergy terminated the Agreement pursuant to paragraph 6 (a) thereof allegedly due to a series of bad acts in which Lindell engaged while in Synergy’s employ (*id.* Ex. “B”; Gabarini Declaration, Ex. “A” ¶¶ 20-24). The Agreement expressly provides in paragraph 6 (e) that paragraphs 8 through 19, which include a confidentiality provision, a covenant not to compete and a provision regarding the assignment of inventions, “shall remain in effect notwithstanding the termination of this Agreement for any reason” (*id.*).

¹This factual recitation is derived, in large part, from opinions of the United States District Court, the first on plaintiff’s motion for a preliminary injunction published as *Synergy Advanced Pharmaceuticals, Inc. v CapeBio, LLC et al.*, 2010 WL 2194809 [S.D.N.Y. 2010], and the second on defendants’ motion to remand the action to state court and plaintiff’s motion to drop defendants CapeBio and CombiMab to create diversity jurisdiction or retain original jurisdiction under the patent law, published as *Synergy Advanced Pharmaceuticals, Inc. v CapeBio, LLC et al.*, 797 F Supp 2d 276 [S.D.N.Y. 2011], as well as from the pleadings and papers submitted on the instant summary judgment motion.

²Synergy contends that CapeBio was “specifically formed for the purpose of providing consulting services to Synergy” (Plaintiff’s Rule 19-a Counter Statement of Facts ¶ 1) and “to avoid any claim of conflict by [Lindell’s] prior employe[er], Genta, which is involved in the oncology business and not in the GI drug business” (Affidavit of Gary S. Jacob in Opposition ¶ 3).

1. Non-Disclosure Provisions

a. Good Will

Paragraph 10 (a) of the Agreement contains an acknowledgment that CapeBio, as a result of providing consulting services to Synergy, would have the opportunity to obtain confidential information as to Synergy and its affiliates and would also have the opportunity to develop relationships with Synergy's existing employees, customers and business associates, which relationships constitute Synergy's "good will", and further that Synergy would suffer significant damage if CapeBio were to use Synergy's confidential information or to take actions that would damage or misappropriate Synergy's good will.

b. Confidentiality Provision

Paragraph 10 (b) of the Agreement prohibits CapeBio from disclosing to third parties any confidential information it obtained during the performance of its consulting services or using such confidential information for its own benefit. Confidential information is defined to include:

(i) any information which is proprietary or unique to [Synergy] or its affiliates (or their businesses), whether or not identified as being confidential, including, but not limited to, trade secret information, matters of a technical nature such as processes, systems, research techniques, computer programs, know-how, improvements, discoveries, designs, inventions, devices, techniques, data and formulas, research subjects and results; (ii) information of a strategic nature, including, but not limited to, any information with respect to marketing methods, plans and strategies, investigation research studies, forecasts, products, operations, revenues, unpublished financial statements, expenses, budgets, projections, profits, sales, key personnel, customers (including customer lists and customer contacts), suppliers, costs and pricing policies; (iii) information as to employees and consultants, including, but not limited to, capabilities, competence, status with [Synergy] and compensation levels; and (iv) any information, whether communicated to [CapeBio] in written, electronic or oral form, where [Synergy] or an affiliate has indicated the confidential nature of such information to [CapeBio].

Excluded from the definition of confidential information is any information:

(x) that is otherwise public knowledge or known within the applicable industry, (y) that has become available to [CapeBio] on a non-confidential basis from a source which is not prohibited from

disclosing such information to [CapeBio] by a legal, contractual or fiduciary obligation to [Synergy], or (z) compelled to be disclosed pursuant to the order of the court or other governmental or legal body having jurisdiction over such matter.

c. Covenant Not to Compete

Paragraph 10 (e) of the Agreement prohibits CapeBio from performing any services related to the treatment of GI diseases for two competing companies, Forest Laboratories, Inc. and Microbia, Inc. Specifically, this provision states:

neither [CapeBio] nor any direct or indirect principal or employee of [CapeBio] will directly or indirectly work for or with, own, invest in, render any service or advice to or act as officer, director, employee, or independent contractor, for Microbia, Inc. or any division, subsidiary, or joint venture of Forest Laboratories, Inc. that is exclusively engaged in the research, development, marketing or sale of drugs for the treatment of or mitigation of symptoms related to gastro-intestinal diseases.

The covenant not to compete, which is stated to be applicable anywhere in the United States, remained in effect during the term of the Agreement and for one (1) year following the termination of the Agreement.

2. Assignment of Inventions

Paragraph 11 (a) of the Agreement provides that “all ideas, methods, inventions, discoveries, improvements, work products or developments, whether patentable or unpatentable, that relate to [CapeBio’s] work with [Synergy], made or conceived by [CapeBio], solely or jointly with others, while providing consulting services to [Synergy] (collectively, ‘Inventions’), shall belong exclusively to [Synergy] (or its designee), whether or not patent applications are filed thereon.” Accordingly, CapeBio was required by the Agreement to assign to Synergy “such Inventions and all patents that may issue thereon in any and all countries” (§ 11 [b]). These provisions apply to all inventions as so defined produced within one (1) year of termination or expiration of the Agreement (§ 10 [a]).

C. The Initial Complaint

On August 25, 2009, Synergy commenced an action against CapeBio and Lindell in this court seeking, *inter alia*, declaratory and injunctive relief and compensatory damages on the ground that

Lindell and CapeBio had breached the Agreement by using Synergy's confidential information and goodwill to develop a molecule for treating GI disease and violated the Agreement's covenant not to compete (*see Synergy Advanced Pharmaceuticals, Inc. v CapeBio, LLC*, Index No. 602647/09) (Gabarini Declaration, Ex. "A").

Following the submission of an affidavit by Lindell that neither he nor CapeBio had "engaged in a research and development program to develop and commercialize the compounds that [Lindell] had worked on, or learned of, while performing services for Synergy" . . . and that he had "no intent to engage in a research and development program to develop and commercialize the compounds that [he] had worked on, or learned of, while performing services for Synergy" (*id.*, Ex. "B"), Synergy filed a voluntary Notice of Discontinuance without prejudice.

D. The Current Action

Four months after discontinuing the August 25, 2009 action, Synergy commenced an action in this court by filing a complaint on December 22, 2009, which, in amended form, is the subject of the instant motion for summary judgment (Gabarini Declaration, Ex. "F"). The amended complaint repeats the allegations of the prior action and further alleges that Lindell formed a new entity, CombiMab, as a shell corporation and alter ego of Lindell, in order to conceal Lindell's ongoing violations of the Agreement. Specifically, Synergy alleges that Lindell, through CapeBio and CombiMab, breached the Agreement by, *inter alia*, filing a patent or patents in competition with Synergy, attempting to assemble a team of consultants and listing as consultants on a business plan several scientists that have contracts with Synergy, making presentations to various venture capital firms regarding the development of uroguanylin analogs and analogs of ST Peptides, and misappropriating Synergy's confidential information for his own benefit. Synergy also asserts that Lindell committed perjury by submitting the affidavit that caused Synergy to discontinue the prior action (Gabarini Declaration ¶ 3, Ex. "C"). The amended complaint asserts four causes of action, namely, for a declaratory judgment (first cause of action), preliminary and permanent injunction (second cause of action), breach of fiduciary duty (third cause of action) and breach of contract (fourth cause of action).

As noted above, defendants removed this action to federal court on the basis of diversity jurisdiction. After removal, Synergy moved for preliminary injunctive relief against defendants.

Judge Scheindlin, by decision and order dated June 1, 2010, denied Synergy's motion for a preliminary injunction on the ground that Synergy had failed to demonstrate that any of the requested relief was necessary to prevent irreparable harm (Gabarini Declaration, Ex. "E", *Synergy Advanced Pharmaceuticals, Inc.*, 2010 WL 2194809).

Thereafter, defendants moved to dismiss Synergy's amended complaint. In a proceeding on July 23, 2010, Judge Scheindlin issued a decision on the record dismissing the first cause of action for a declaratory judgment and the second cause of action for a preliminary and permanent injunction, but denying the motion as to the remaining causes of action. Judge Scheindlin held that the declaratory judgment cause of action was duplicative of the breach of contract cause of action as it would accord Synergy no relief beyond its contract. Judge Scheindlin opined further that while Synergy's request for a permanent injunction could properly be framed as a remedy, it should be dismissed to the extent that it presented a separate claim.

Over the course of the following year, the parties engaged in and completed discovery. A trial was scheduled to commence before Judge Scheindlin on April 23, 2011. Shortly before the trial was to commence, Synergy sought to have the action remanded to state court, claiming that defendants' prior counsel had fraudulently removed the case to federal court on the basis of diversity when no diversity of citizenship existed. While defendants opposed remand, such opposition was later withdrawn resulting in the action being remanded to this court. Defendants immediately moved for summary judgment dismissing the amended complaint.

Discussion

Legal Standard on Summary Judgment Motion

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see*, *Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “a shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine credibility issues, but simply to determine whether issues of fact requiring a trial exist (*see Powell v HIS Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]; *F. Garafolo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

1. Breach of Restrictive Covenants in the Contract

In *BDO Seidman v Hirschberg* (93 NY2d 382 [1999]), the Court of Appeals recognized that an employer has a legitimate and protectable interest in preventing former employees from exploiting its client relationships and goodwill which was created and maintained at the employer’s expense and effort (*id.* at 391). The *Seidman* court also provided for the severability and partial enforcement of non-compete covenants to the extent that they protect an employer’s “legitimate interests”, rather than refusing to enforce overly broad restrictive covenants in their entirety (*id.* at 394-95). The court adopted a three-part analysis for determining the validity of employee agreements not to compete, stating that: “A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public” (*id.* at 388-389)(*emphasis in original*). A violation of any prong renders the covenant invalid. In addition, a restrictive covenant will be subject to specific performance only if it is reasonable in duration and geographic scope (*id.*).

With respect to covenants aimed at protecting against misappropriation of trade secrets or confidential customer lists, such covenants will be enforceable to the extent necessary to prevent the disclosure or use of proprietary information (*see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303,

308 [1976]). Whether an employer's proprietary information constitutes a trade secret or is readily ascertainable from public sources is ordinarily a triable issue of fact (*see Ashland Mgmt. Inc. v Altair Investments NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *modified* 14 NY3d 774 [2010]).

In seeking dismissal of the breach of contract cause of action predicated on defendants' breach of the confidentiality and non-compete provisions of the Agreement, defendants contend that all of the information or business activities alleged by Synergy to be confidential were part of Synergy's day-to-day business, information that was separately publicly available, or were "skillful variations of general processes known in the trade". Specifically, defendants claim that the scientific tests known as "assays" to analyze the efficacy of various compounds on humans were generally available in a wide variety of public documents including Synergy's own patent applications, scholarly works and public website. Defendants further claim that Dr. Leonard Forte, a scientist employed by Synergy, and Dr. Kunwar Shailubhai, Synergy's Chief Scientific Officer, used such assays in their own research and published articles concerning the use of such assays in question here. Thus, such information is readily available by a simple Google search.

Defendants further aver that the terms of the restrictive covenant in the Agreement are unreasonable as they seek to prevent Lindell from entering into the gastrointestinal ("GI") field in any way in perpetuity, a field in which he claims he has worked for over two decades. In any event, defendants maintain that Synergy cannot show that defendants engaged in any competitive action during the one-year period of duration of the restrictions following termination of Lindell's employment.

In opposition, Synergy maintains that although Lindell had worked in the pharmaceutical industry for over 20 years prior to his employment with Synergy, he had no experience in the GI field. During his employment with Synergy, Lindell was advised of Synergy's mandate to develop SP-304 (a/k/a guanilib) and a class of GCCR agonists to treat GI disorders and diseases and learned in detail the attributes of Synergy's GCCR compounds, particularly SP-304, and learned what Synergy's scientists were doing to maximize the compounds' benefits and address their limitations. Lindell was also privy to Synergy's development and marketing strategies in seeking to develop a patent estate to maximize Synergy's potential market share of GI pharmaceutical drugs.

In an affidavit, Synergy's CEO, Gary Jacobs, states that in late June 2008 while still employed at Synergy, Lindell solicited Dr. Shailubhai to leave Synergy with him to form a new company for the purpose of developing a competing compound with him for GI products. The

statement is confirmed by Dr. Shailubhai. Mr. Jacobs also states that Synergy learned that in July 2009 that Lindell contacted Dr. Forte, one of Synergy's consultants, requesting that he analyze certain molecules using the same cell-based assays that Dr. Forte was using to test Synergy's molecules. In addition, Lindell had contacted an associate of Synergy's IP counsel asking her to represent him with regard to a patent application on a ST-peptide GCCR agonist similar to ones Synergy was developing, telling her that he had determined where Synergy had gone wrong. Synergy also notes that only six days after the August 25, 2009 lawsuit was discontinued based on an affidavit Lindell provided, stating that neither he nor CapeBio had used any of Synergy's confidential information to develop ST-peptide derivatives and/or uroguanylin derivatives or derived any patentable idea, method etc. relating to his work at Synergy, Lindell filed a provisional patent application for a product directly competing with Synergy based on ST-peptides or their derivatives.

The patent application was allegedly for Dr. Henry Wolfe, who had assigned it to defendant CombiMab and Lindell. Lindell contends that Dr. Wolfe developed the ST-peptide CMB 101 molecule, based on his 10 years of research in the field of ST peptide structure, without any input from him. Lindell claims that he met with Dr. Wolfe for the first time on August 26, 2009 to discuss his joining CombiMab as Chief Scientific Officer, with his first task being to design ST peptide analogues. Dr. Wolfe testified at deposition that he did not begin working for Lindell until September 3, 2009. Both Dr. Shailubhai and Jacobs assert that it is virtually impossible for a team, much less an individual, to create a molecule from scratch in less than sixty days. Dr. Wolfe acknowledged at his deposition that he considered Dr. Shailubhai an expert in the GI field, based his doctoral thesis which involved the use of ST-peptides, upon Dr. Shulabhai's work, and that from 2006, when he completed his dissertation, to 2009, when he was hired by Lindell, he had conducted no research and had nothing to do with GI drugs (Jaroslawicz Affirmation in Opposition, Exhibit "H", Wolfe Deposition, p. 52). On or about August 28, 2009, Lindell was already seeking to raise money by claiming he had a lead compound free of competing IP, and a molecule and formulation had been created.

Synergy claims that Lindell copied Synergy's business plan and created a Powerpoint presentation based thereon to show to potential investors. Synergy claims further that knowing Synergy had spent over \$400,000 to have its compound supplier, Peptisyntha, develop its molecule, Lindell sought to have Peptisyntha sell him plaintiff's molecule so that he did not have to spend \$400,000.

Synergy has a legitimate interest in (1) preventing CapeBio and its principal, Lindell, from exploiting Synergy's goodwill; and (2) protecting itself from the disadvantageous use of its confidential information by CapeBio, its principal, Lindell, and CombiMab, the company Lindell allegedly created to disguise his activities in competition with Synergy.

The covenants in the Agreement are not over broad. They do not prevent Lindell from working in the GI field. Rather, they prevent him from misappropriating and using Synergy's confidential information and from taking any action to damage or misappropriate Synergy's good will, essentially by doing business with Synergy's employees, customers or business associates with whom he worked or became familiar with during his tenure at Synergy.

Whether or not the proprietary information Synergy seeks to protect is in the public domain involves disputed issues of fact which cannot be resolved on a motion for summary judgment. Similarly, whether defendants engaged in competitive action in breach of the restrictive covenants involves issues of credibility, which issues the court may not resolve on a motion for summary judgment (*see Powell v HIS Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]; *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]). With regard to the misuse of confidential information and despite Lindell's protestations that he took no action during the one-year period subsequent to the termination of his employment by Synergy to compete with Synergy in the GI field, questions remain as to Lindell's post-termination conduct including the circumstances surrounding the 2009 patent application and fund-raising on behalf of CombiMab. Defendants have not shown that the information they are charged with having misappropriated is readily ascertainable through the public domain and is not confidential.

2. Breach of Fiduciary Duty

It is well settled that an employee is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000]). When an employee uses an employer's time, facilities or proprietary or confidential information when establishing a competing business, the employee breaches his or her fiduciary duty to the employer (*id.*).

Here, plaintiff has presented evidence sufficient to create a triable issue of fact as to whether Lindell and Capebio violated a fiduciary duty to Synergy. Lindell appears to have been in a position of trust and in the course of his work for Synergy was exposed to highly confidential information.

As is reflected in the Agreement, Lindell acknowledged that disclosure of such confidential information could harm Synergy. Further, Synergy has shown facts sufficient to require denial of the motion that Lindell, while still employed by Synergy, solicited Dr. Shailubhai to join him in forming a new company to produce a competing compound for GI products competing and contacted Dr. Forte requesting that he analyze certain molecules using the same cell-based assays Dr. Forte was using to test Synergy's products. Defendants' motion for summary judgment to dismiss the cause of action for breach of fiduciary duty must be denied.

3. Unfair Competition

"New York courts have held that the misappropriation and improper use of another's trade secrets is sufficient to constitute a claim for unfair competition" (*Louis Capital Markets, L.P. v REFCO Group Ltd., LLC*, 9 Misc3d 283, 289 [Sup. Ct. N.Y. Co. 2005], citing *CBS Corp.*, 268 AD2d at 353). Such a claim can be brought by an employer against a former employee in the absence of a restrictive covenant (*see e.g., Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460 [2d Dept 2004]).

Here, plaintiff has sufficiently demonstrated that triable issues of fact exist concerning defendants' misappropriation of Synergy's good will. Specifically, Synergy has produced evidence of efforts to use Synergy's employees, suppliers and consultants and misappropriation of Synergy's confidential and proprietary information to develop products in competition with Synergy. Defendants' motion for summary judgment dismissing the unfair competition claim must also be denied.

Conclusion

Based upon the foregoing discussion, it is

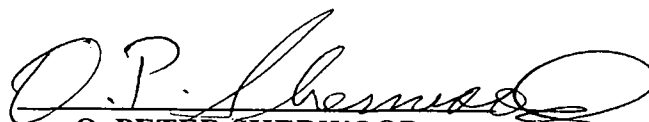
ORDERED that defendants' motion for summary judgment dismissing the remaining causes of action in the amended complaint is **DENIED**; and it is further

ORDERED that the attorneys for the parties are directed to appear for a pre-trial conference in Part 49, Room 252, 60 Centre Street, New York, New York, on May 15, 2013, at 10:30 a.m.

This constitutes the decision and order of this court.

DATED: March 27, 2013

ENTER,


O. PETER SHERWOOD
J.S.C.