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SHIRLEY WERNER KORNREICH
J.S.C.

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

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TWIN CITY FIRE INSURANCE COMPANY, HARTFORD INSURANCE COPANY OF ILLINOIS, HARTFORD INSURANCE COMPANY OF THE MIDWEST, TRUMBULL INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE SOUTHEAST, NUTMEG INSURANC COMPANY, PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, PACIFIC INSURANCE COMPANY, LIMITED, and HARTFORD FINDANCIAL SERVICES GROUP, INC.

Plaintiffs,

Index No. 602062/2009

-against-

DECISION & ORDER

ARCH INSURANCE GROUP, INC., ARCH CAPITAL GROUP LTD., DAVID MCELROY, JOHN RAFFERTY, and MICHAEL PRICE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Defendants Arch Insurance Group, Inc. (AIGI), Arch Capital Group Ltd (ACG, collectively with AIGI, Arch), David McElroy, John Rafferty and Michael Price (McElroy, Rafferty and Price, collectively, Individual Defendants, and collectively with Arch, Defendants), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Motion Sequence 011. Plaintiffs (plaintiffs, collectively, Hartford) oppose. For the reasons which follow, the motion is granted.

The complaint contains the following causes of action, numbered here as in the complaint: 1) breach of fiduciary duty against the Individual Defendants; 2) aiding and abetting breach of fiduciary duty against Arch; 3) breach of confidentiality agreements against McElroy

and Price; 4) breach of contract based upon Hartford's code of ethics against the Individual Defendants; 5) tortious interference with contract against Arch; 6) tortious interference with prospective contractual relations against Defendants; 7) unfair competition and "raiding" against Arch; 8) unjust enrichment against Arch; and 9) misappropriation of trade secrets against Defendants. Dkt 143.

Factual Background

The Individual Defendants are former, senior executives of Hartford's Financial Products division (HFP) and present employees of Arch. Hartford purchased HFP from Reliance Group Holdings (Reliance) in 2000, and its senior management team, including the Individual Defendants, joined Hartford at that time. The leader of the team was McElroy.

According to the unsworn report of Hartford's expert, Ryan Sullivan, HFP is a division of Hartford's property and casualty segment (P&C). 4/18/11 Report of Ryan Sullivan (Ps' Expert Report), Dkt 144, pp 4-6, annexed as Ex E to 10/10/14 Affirmation of Stephen M. Kramarsky (Kramarsky Aff), Dkt 159. HFP sells insurance policies that cover directors and officers liability (D&O), employment practices liability, fiduciary liability, fidelity, management liability, professional errors and omissions (E&O), and crimes. *Id.*

Effective June 5, 2009, McElroy retired from his positions as a senior vice president of Hartford and president of HFP. On June 8, 2009, Arch announced that McElroy would head its Financial and Professional Liability Group. Rafferty and Price, then vice presidents of HFP, resigned days after McElroy's retirement and followed him to Arch on June 9 and June 12, respectively. Shortly after the Individual Defendants left Hartford, over 60 former Hartford employees followed them to Arch, including virtually all of HFP's senior management. The

record contains a list of HFP employees who had left Hartford for Arch by June 28, 2009. Kramarsky Aff, Ex B-77.

It is undisputed that HFP and AIGI are competitors. Specifically, the parties agree HFP and AIGI sell D&O policies. *Id*; & 6/20/11 unsworn report of defendants' expert, Richard H. Hershman, (Ds' Expert Report), Dkt 145, p 1, annexed as Ex G to 9/10/14 Replacement Affirmation of Peter N. Wang (Wang Aff, Dkt 139), R 1932-1937.[1]

McElroy and Price had executed confidentiality agreements with Hartford. Kramarsky Aff, Exs B-1 through B-4. Rafferty had not. In McElroy's confidentiality agreements, signed in July 2000 and December 2001, he agreed to keep confidential Hartford's trade secrets and information, during his employment, that was "not generally known" and of "significant value" to Hartford. *Id*, Ex B-1 & B-2. This information is defined as including, but not limited to, information on attachments referred to in the agreement; the attachments are not in the record. *Id.* AIGI's CEO admitted that he knew of McElroy's confidentiality agreement before he joined Arch. Kramarsky Aff, Ex A-13, EBT Mark Lyons, p 256.

Price's confidentiality agreements, signed in February 2002 and October 2003, contain the same language. Kramarsky Aff, Exs B-3 & B-4. However, a referred to attachment is annexed to Price's October 2003 agreement. *Id.* It defines confidential information as including "cost data" and a "customer list" that has actual or potential economic value "for not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use" and is the subject of reasonable efforts to maintain its secrecy. *Id*, Ex B-4. Also defined as confidential in the attachment is financial

[1] Defendants refer in their memorandum of law to pages of their exhibits by "record" page numbers, denominated by an R.

information concerning profit margins, financial forecasts, product pricing, and employee compensation. *Id.*

Additionally, Hartford had written ethics and conduct standards that the Individual Defendants agreed to in writing in early 2009. Kramarsky Aff, Ex B-5, The Hartford Financial Services Group, Inc., Code of Ethics and Business Conduct revised March 15, 2008 (Ethics Code). The Ethics Code provided that any violation of it "by an employee is against the Company's [Hartford's] interest and shall be considered activity beyond the scope of that employee's authority to act." Ethics Code, p 3. It prohibited employees from disclosing non-public financial information and confidential information without permission:

> Financial information regarding The Hartford that has not been disclosed publicly shall not be made public without the prior approval of The Hartford's General Counsel or Chief Financial Officer. Hartford employees must not disclose confidential information received or obtained in the course of their duties, except as authorized or required by law.

Id, p 31. The Ethics Code further prohibited employees from using Hartford's information to compete against it or for personal gain:

> Employees may not use any Company property, information, resource or position for personal gain or to compete with the Company in any way.

Id, p 13. Price, Rafferty and McElroy reaffirmed their agreement to the Ethics Code on January 27, February 2, and February 18, 2009, respectively. Kramarsky Aff, Exs B-6, B-7 & B-8.

Hartford's unsworn expert report agrees with Arch that during the recession of December 2007 through June 2009, Hartford experienced rating downgrades by various credit rating agencies beginning around September 2008. Ps' Expert Report, pp 15-17. Hartford also does not dispute that at the time that McElroy resigned, Hartford's stock price had declined, its CEO, Ramani Ayer had just resigned, and Hartford had agreed to accept federal Troubled Asset Relief

Program (TARP) bailout funds. Wang Aff, Ex A-1, EBT Juan Andrade, pp 51-56, R 5-7. Moreover, a Hartford human resources (HR) executive, Erin Bolduc, testified that other senior people left Hartford before McElroy. Wang Aff, Ex A-4, R 176-177. Also undisputed is the requirement that Hartford's acceptance of TARP funds placed restrictions on executive compensation. Kramarsky Aff, Ex A-2, Ramani Ayer EBT, pp 115-166. Bolduc admitted that the decision to accept TARP funds at the end of 2008 spawned a discussion that the top 25 employees might leave Hartford, including the Individual Defendants, and two other HFP executives, Cathy Kelly and Mike Karmilowicz. Kramarsky Aff, Ex A-3, Bolduc EBT pp 211-215; *see also*, Kramarsky Aff, Ex A-1, Andrade EBT, p 189. Kelly left HFP for Arch on June 12, 2009. Kramarsky Aff, Ex B-77.

There is evidence from which a trier of fact could infer that in early 2009, McElroy was planning to leave with the team he had brought to HFP from Reliance. On February 27 of that year, McElroy emailed that: "I may have to unplug the group again...." Kramarsky Aff, Ex B-18. On April 23, 2009, McElroy responded to a broker who asked for an off-site meeting, that "I am bound to convince my crew that the stag is prone." Kramarsky Aff, Ex B-29. In another email discussing the Treasury Department's preliminary approval of Hartford's participation in a Capital Purchase Program, McElroy wrote: "The Stag is a GS-14 employee." Kramarsky Aff, Ex B-78. Hartford contends that McElroy meant that it was "the stag."

Further, there are factual disputes as to whether, while still working for HFP, McElroy attempted to sell HFP to Arch and whether he had been authorized to explore selling it. Michael Dandini, who replaced McElroy as head of HFP, testified that, in the Spring of 2009, McElroy said that he wanted to leave Hartford and had been authorized by Ayer, then Hartford's CEO, to look for a buyer for HFP. Kramarsky Aff, Ex A-4, Dandini EBT, pp 31-36. Dandini said that

McElroy told him that he had approached several potential buyers, including Arch. *Id.* However, Ayer and Juan Andrade, a co-president of Hartford's P&C segment, denied telling McElroy to explore selling HFP. Kramarsky Aff, Ex-2, Ayer EBT, pp 112-113; Kramarsky Aff, Ex A-1, Andrade EBT, pp 337-338.[2]

The parties agree that in May 2009, Hartford had a pending reinsurance treaty renewal application that it had submitted to non-party Arch Reinsurance (ArchRe), an affiliate of Arch. Hartford's prior reinsurance treaty was expiring on June 30, 2009, the end of the month in which McElroy retired and moved to Arch.

On or about May 13, 2009, McElroy met with AIGI's CEO, Mark Lyons (May 13 Meeting). EBT Mark Lyons, Kramarsky Aff, Ex A-13, pp 37-38. In addition to his position as CEO of AIGI, Lyons was the CFO of the holding company that owns AIGI, defendant ACG. Kramarsky Aff, Ex A-9, Constantine "Dinos" Iordanou EBT, pp 24-26. The day before the May 13 Meeting, Rafferty sent an email to McElroy with the subject line "HP Documents." Kramarsky Aff, Ex B-44. Lyons prepared for the meeting by obtaining a copy of Hartford's confidential reinsurance application for 2008 from ArchRE. Lyons EBT, pp 145-146 ; Kramarsky Aff, Ex A-8, Marc Grandisson EBT, pp 28-32 & 49-51; Kramarsky Aff, Ex A-16, Timothy Olson EBT, pp 10-13, 18-25 & 34-36. Timothy Olson had sent Lyons, as email attachments, Hartford's 2008 reinsurance application on May 7, 2009, together with Hartford's "most recent underwriting and claims reports." Kramarsky Aff, Ex C-3 (Reinsurance App); Lyons EBT p 311; Kramarsky Aff, Ex C-11 (Ex 23 to Lyons EBT). Olson is the President and

[2] Dandini testified that he counseled McElroy that he couldn't "orchestrate a mass departure" without getting in trouble. Dandini EBT, pp 51-52. Dandini said he talked about McElroy's need to be careful about what he put in email and on his cellphone, and that he needed a different cellphone. *Id.*

CEO of ArchRE in the US. Olson EBT, pp 12-13. He testified that he was not permitted to send Hartford's confidential Reinsurance App and supporting audits to Lyons, but he did it anyway. Olson EBT, pp 10-11, 19-20, 25 & 35-37.

McElroy admitted that he went to the May 13 Meeting in order to explore selling HFP to Arch, which, if a jury were to credit Ayer, was an unauthorized action. Lyons took notes at and after the May 13 Meeting with McElroy. Kramarsky Aff, Ex A-13, Lyons EBT, pp 37-38; Kramarsky Aff, Ex C-5, Lyons Ex 1. Lyons dubbed the deal he was pursuing with McElroy at the May 13 Meeting "Project Pilgrim." *Id,* Lyons EBT, pp 17-20. According to Lyons, Project Pilgrim referred only to his assessment of McElroy and Rafferty as potential Arch executives. *Id.* He denied that he and McElroy discussed selling HFP to Arch. *Id.* On the other hand, McElroy testified that the purpose of the May 13 Meeting was to explore whether Arch would buy HFP. Kramarsky Aff, Ex A-15, 3/13/13 & 8/7/13 EBTs David McElroy (McElroy EBT), pp 189-196. Also in the record is a May 11, 2009, internal Hartford presentation that recommended retaining HFP, which buttresses the testimony of Ayer and Andrade that McElroy was not authorized to explore selling HFP when he went to the May 13 Meeting. Kramarsky Aff, Ex B-42. Juan Andrade testified that he told McElroy about the recommendation. Kramarsky Aff, Ex A-1, Andrade EBT, p 209.

There is evidence that McElroy shared Hartford's information with Lyons at the May 13 Meeting. Lyons' notes reflect that Hartford's reinsurance treaty was expiring on June 30, 2009. Lyons EBT, Ex 1. On his notepad, Lyons jotted down a list of "Fortune 500 19 Active D&O w/ 25M limits" and a list of customers that had "HFP Primary" policies. *Id*, Lyons EBT, pp 94-104 & Lyons Ex 1. A comparison of the list of HFP Primary policy holders and its 19 Active D&O customers over $25 million in Lyon's notes and the document Rafferty sent to McElroy on May

12 is evidence that, at the May 13 Meeting, McElroy shared with Lyons the information that Rafferty sent. Compare Kramarsky Aff, Exs B-44 Bates HART064113 and C-5 Bates AD-H 0002924, marked as Lyons Exs 1 and 5. The lists are identical. Then too, Lyons' notes contain dollar amounts relating to HFP's 2009 first quarter performance and its forecast for the balance of 2009 that are identical to an excel spreadsheet that McElroy received on April 27, 2009, in an email attachment sent by HFP's employee Kevin Burke (Spreadsheet). Compare Lyons Ex 1, supra & Kramarsky Aff, Ex B-32, Lyons Ex 26, Bates Hart064291.

At the May 13 Meeting, McElroy shared with Lyons the ages, compensation and bonuses of several HFP executives that went to work for Arch in June 2009, which are reflected in Lyons' notes. Kramarsky Aff, Exs A-13 & C-15, Lyons EBT, pp 172-174, 181-187 & Ex 28. In his notes, Lyons calculated $27.5 to 33.5 million to match their 2009 HFP incentive bonuses and $28 million as the cost to take on the Individual Defendants and other key employees through 2012. *Id.* The key employees whose bonuses were noted by Lyons included the Individual Defendants, as well as, Kelly, Karmilowicz, Price, Burke, Shulman, Marshall, Kramer, Ross and a few other illegible names. Three -- Karmilowicz, Burke and Ross -- are not HFP employees who had moved to Arch by August 19, 2009. Kramarsky Aff, Ex B-77. The rest had. *Id.*[3] Lyons admitted that he "probably" spoke to McElroy about Hartford's bonus structure at the May 13 Meeting. Lyons EBT, pp 160-161. Lyons' notes reflect the insurance premiums that were generated by certain Hartford employees who reported to Rafferty at the time, i.e., Psaki, Karmilowicz, Terezakis, and Draddy. Lyons EBT, pp 114-123 & Ex 1 at BATES AD-

[3] While Arch argues that the employees were free to share their compensation information, the record reflects that McElroy, not they, shared it.

H0002930, annexed as Ex C-5 to Kramarsky Aff. Except for Karmilowicz, these employees had joined Arch by June 16, 2009. Kramarsky Aff, Ex B-77.

Lyons and McElroy admitted that Hartford's non-public information was shared with Arch at the May 13 Meeting.[4] McElroy testified that he was not authorized to share the information with Arch, that he had Hartford's Fortune 500 client list with him on May 13, that some of the information he shared with Arch was not public, that Lyons had the Hartford reinsurance application at the May 13 Meeting, and that a reinsurance application is non-public information to be used only for reinsurance purposes. Kramarsky Aff, Ex A-15, 3/13/13 & 8/7/13 McElroy EBTs (McElroy EBT), pp 196, 292, 344-347, & 418-419.

Lyons testified that the specific information that he obtained about Hartford's reinsurance structure and the expiry date of its treaty were not public information. Lyons EBT, pp 38-40. Indeed, Hartford's Reinsurance App on its face is confidential, non-public information. It states on the second page that it is confidential and is provided only in connection with Harford's reinsurance placement submission. Reinsurance App, Bates AD-E0013680. In addition, Stephen Pyrmas, who was HFP's Assistant Vice President in June 2009, submitted an affidavit, which states that the Reinsurance App materials, the Fortune 500 client list, and the Spreadsheet that McElroy shared were confidential information, not generally available from public sources, that these materials were prepared and generated over a long period of time at great expense, that they would provide a competitor with a significant advantage over HFP, and that Hartford took care to protect the information with confidentiality/non-disclosure agreements, electronic passwords and the Ethics Code. Kramarsky Aff, Ex M, 9/10/14 Stephen B. Pyrmas Affidavit.

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[4] As previously noted, a customer list, financial forecasts, and employee compensation were defined as confidential in the attachment to Price's confidentiality agreement, but there is no evidence that Price shared information of that kind.

There is evidence from which it is possible to infer that while still working for HFP, McElroy solicited Rafferty to join Arch, which used confidential information received from McElroy to hire him. On May 21 or 22, 2009, McElroy asked Rafferty if he wanted to meet with someone new, Lyons, and an old friend, Dennis Brand. Kramarsky Aff, Ex A-20, Rafferty EBT, pp 250-255 & Lyons EBT, 248-250 & 257-259. The meeting took place on May 21, 2009. *Id.* McElroy, Rafferty, Lyons and Brand met in Arch's corporate apartment in Jersey City, New Jersey. *Id.* Rafferty, who had never met Lyons before, was surprised when Lyons slid an employment contract across the table. *Id* & Rafferty EBT, pp 284-286. Arch offered Rafferty a base salary of $300,000, plus a bonus of up to 75% of the base, which Rafferty eventually accepted. *Id.* Rafferty first submitted an employment application to Arch on June 16, 2009, almost a month after Lyons' offer. Kramarsky Aff, Ex C-38. The application indicates that Rafferty's last salary at HFP was $275,000. However, Rafferty testified that he never told Arch what he was making at HFP. Rafferty EBT, pp 307-311. And, he admitted that he signed his employment application the day after he started working at Arch. *Id.* Thus, there is direct evidence that, before McElroy resigned, he solicited Rafferty, and it can be inferred that Arch used the salary information McElroy gave Lyons to offer Rafferty an increase over his HFP salary.

Similarly, there is evidence from which it could be inferred by a trier of fact that Arch solicited Cathy Kelly using salary and bonus information that McElroy gave Lyons at the May 13 Meeting. Kelly testified that she signed an employment application for a job at Arch on June 8, 2009, the same day that McElroy began work at Arch, and four days before Kelly went to work there. Kramarsky Aff, Ex A-10, pp 133-134 & 145-148. Kelly testified that she had no conversations with Arch before she signed the application and that, subsequently, Carl Sullo, an

Arch employee, called and offered her a job that paid more than what she was earning at HFP. *Id.* Kelly said she did not negotiate her compensation with Sullo, she "just listened." *Id.* Given the timing and Kelly's failure to negotiate salary before signing the employment application, it is possible to infer that Arch solicited Kelly and knew what she was making at HFP from information given by McElroy at the May 13 Meeting.

Other than Rafferty and Cathy Kelly, there is no evidence that Defendants solicited the specific HFP employees whose compensation information McElroy shared with Lyons. Hartford relies on inadmissible hearsay and tenuous inferences to prove this. For example, Hartford points to Sullo's testimony that Arch set up a hot line for HFP employees to call if they wanted a job. Kramarsky Aff, Ex A-24, pp 62-64, 69-72 & 145-147. Sullo testified that this was done on or about June 3, 2009, two days before McElroy announced his retirement. *Id.* Sullo said that he discussed it with Brand, who told Sullo that there "was a possibility that certain underwriters would be coming over from HFP" and "there was a possibility" that people from Hartford would be "contacting Arch for opportunities ...." *Id.* The hot line was answered only by Sullo and Sharon Murphy, who worked in Arch's legal division. *Id.* It was set up in anticipation of volume and because Arch "didn't want to have anyone else talking to people outside." *Id.* When asked how the HFP employees got the hot line number, Sullo testified that:

> We gave it to the Raffertys, Prices of the world and said, if you get a call from anyone, you really shouldn't take it and if people are interested in applying to Arch, give them this number and that's it and stay away from it.

Id. Sullo said that he could recall no further effort to distribute the hot line number. *Id.* Hartford points to the hot line as proof of improper solicitation by Defendants, but there is no admissible evidence that they told any HFP employee that was hired by Arch to call the hot line, or that any former HFP employee was hired by Arch as a result of calling the hot line.

Hartford urges that it is not surprising that the people who went to Arch would not testify that they were solicited and, conveniently for Defendants, only those who remained at Hartford or went to a company other than Arch, were willing to testify about solicitation. As a result, Hartford explains, they could not provide a causal nexus between Defendants' alleged use of confidential compensation information and Hartford's alleged damages.[5] Despite the lack of direct evidence of wrongful solicitation, a jury could infer that it happened. At the very least, an inference exists that Rafferty and Kelly were hired using confidential salary and bonus information. Although defendants argue that the employees were free to share their compensation information with Arch, the record reflects that McElroy shared other people's information with Lyons, who wrote it down.

With respect to the remaining confidential information, i.e., information not involving compensation, there is no showing of how or whether Arch used it to compete with Hartford, or how Hartford was damaged because it was shared. In fact, in its interrogatory responses, Hartford refused to identify how confidential information was used. Wang Aff, Ex N, R 2033-2050. In addition, twice during discovery, Hartford was ordered to identify business it allegedly lost as a result of Arch's conduct, and it refused to do so. *Id*, Ex l, R 2017-2020. Even after the

[5] For example, Dandini testified that, before McElroy left Hartford, he asked whether Dandini would go with him to a new company and McElroy emailed Rafferty that Dandini was "definitely coming with us wherever we go." Dandini EBT, pp 71-72; Kramarsky Aff, Ex B-23. However, McElroy did not ask whether Dandini would go to Arch specifically and, in any event, Dandini stayed on and took McElroy's job at HFP. *Id*. Similarly, Hartford points to an email in which a former HFP employee, Shamesh, who had gone to Arch, solicited HFP information technology (IT) employees to call the hot line and to use their personal email accounts to hide what they were up to. Kramarsky Aff, Ex B-61. However, the IT employees did not move to Arch. Other evidence shows that an employee who had followed McElroy to Arch wrote to Price that two HFP employees "were out" because they were staying with Hartford. Kramarsky Aff, Ex C-46. Price replied: "OK. To clarify, they called you and told you this. You did not solicit them, right?" But again, the employees did not go to Arch, so Hartford was not damaged by their solicitation.

motions were submitted, the court asked plaintiffs' counsel to provide schedules referred to in their expert's report that allegedly contained information about Hartford's lost business, and, once more, they refused, saying that their theory of damages was not based on lost business.[6]

Hartford presents no evidence of specific losses, despite the voluminous evidence it submitted. The only damage identified in admissible form is general testimony that Hartford paid retention bonuses, renewed policies at a less favorable position, bargained away one coverage defense, and lost productivity because of employees distracted by McElroy's departure. However, no admissible evidence of specific retention bonuses, expenses, lost business, or less favorable business caused by Arch is in the record, nor is there evidence of damage caused by improperly shared confidential information.

Hartford CEO, Sean Fitzpatrick, testified that Hartford was damaged by having to pay "stay-put" or "retention bonuses" and by employee distraction, but he provided no specifics. Kramarsky Aff, Ex A-7, pp 374-381. In addition, he admitted that retention bonuses may have been partially offset by the HFP employee bonuses forfeited by those who left. *Id.* And, Hartford's HR executive, Bolduc, admitted that Hartford paid two waves of retention bonuses, one of which occurred before the TARP bailout that preceded McElroy's departure. Wang Aff, Ex A-4, pp 238-239, R 181. The first round was caused by Hartford's rating downgrades or "just the environment, the market." *Id.* The first round bonuses cannot be a basis for damages.

With respect to lost business or potential business, Fitzpatrick said that Arch was "partially responsible" for lost premium renewals at a less favorable position in a tower; that Hartford agreed to at least one compromise on a coverage defense to retain business; and that he could not say "how much business didn't come to our doors because there was concern about the

[6] 5/21/15 letter from Ariel P. Cannon improperly submitted to the court without efiling.

company in light of Dave's [McElroy's] departure with 60 some-odd people." *Id.* Another executive, Christopher Lewis, testified that Hartford had a loss of $200 million in "gross written premium" from 2009 to 2012. Kramarsky Aff, Ex A-11, pp 125-128 & 133-135. But he admitted that he had not "done any work to pinpoint the effects of Arch's competition on HFP's ability to write business." *Id.*

Likewise, with respect to disparaging comments that Hartford claims amounted to trade libel, tortious interference with contract, or tortious interference with prospective economic advantage, the record is devoid of anything linking the alleged comments to identifiable losses suffered by Hartford. Moreover, the comments are almost exclusively inadmissible hearsay.

Instead of admissible evidence of damages, Hartford chose to rely on the unsworn report of its expert, Sullivan, who used an "econometric" theory that, purportedly, measured statistically what Hartford would have earned absent Arch's alleged wrongdoing, after taking into account other factors that caused its losses, such as the financial crisis and Hartford's rating downgrades, but not, notably, Hartford's acceptance of a TARP bailout. Ps' Expert Report [Kramarsky Aff, Ex E]. However, an unsworn expert's report is not evidence that can be used to oppose a motion for summary judgment. *Spierer v Bloomingdale's*, 43 AD3d 664, 665 (1st Dept 2007), app den 10 NY3d 705 (2008) (plaintiffs' unsworn medical reports not in admissible form); *Nazario v St. Barnabas Hosp.*, 34 AD3d 345 (1st Dept 2006) (unsworn doctor's report not competent evidence); *Marden v Maurice Villency, Inc.*, 29 AD3d 402, 403 (1st Dept 2006) (unsworn report of interior designer had no evidentiary value).

Further, Sullivan does not point to losses incurred by Hartford or gains realized by Arch as a result of Defendants' alleged wrongdoing. While he does identify "direct expenses" incurred for retention bonuses, "sign-on bonuses" for new employees, and costs relating to restaffing and

retraining, he states only in conclusory fashion that they "would not have been incurred but for the alleged conduct." Ps' Expert Report, p 35. Sullivan failed to break down the "direct costs" by employees who went to Arch. There is no connection between these costs and the replacement of employees who left because their confidential information was shared by McElroy. Nor did Sullivan take into account money saved by Hartford due to bonuses forfeited by employees who went to Arch, which Hartford admitted would have offset bonuses. *Id* & Kramarsky Aff, Ex A-7, pp 374-381.

Discussion

A. Standard of Review

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." CPLR 3212(b). A failure to make such a prima facie showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The evidence submitted on the motion for summary judgment must be examined in the light most favorable to the parties opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, 49 NY2d, at 562. Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept

1994). Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Discussion

A. Breach of Fiduciary Duty & Abetting Breach of Fiduciary Duty

An employee has a fiduciary duty toward his employer. *Front, Inc. v Khalil*, 103 AD3d 481 (1st Dept 2013); *N.K. Intl., Inc. v Dae Hyun Kim*, 68 AD3d 608 (1st Dept 2009). Employees are bound by express or implied contract not to disclose trade secrets communicated to them through and by means of their confidential employment. *Kaumagraph Co. v Stampagraph Co.*, 235 NY 1, 7 (1923). Damages in breach of fiduciary duty cases are difficult because "'breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.'" *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 189 (1st Dept 2000), citing to *Milbank, Tweed, Hadley & McCloy v Boon*, 13 F3d 537, 543 (2d Cir 1994). Damages in such cases are intended not only to compensate the plaintiff but also to deter fiduciaries from breaching their responsibilities. *Id.* Nonetheless, "[t]o succeed on a cause of action to recover damages for breach of fiduciary duty, a plaintiff must do more than make allegations of unscrupulous acts." *Greenberg v Joffee*, 34 AD3d 426, 427 (2d Dept 2006). The plaintiff in such cases "must, at a minimum, establish that the offending parties' actions were a substantial factor in causing an identifiable loss.'" *Id.*, citing *Gibbs, supra*.

"A principal may recover damages based on the harm caused by an agent's breach of fiduciary duty although it is not possible to show that the agent profited through the breach." Restatement Third of Agency § 8.01(d)(1). Also, a party liable for breaching a fiduciary duty may have to disgorge any gains realized therefrom, even where the injured party has sustained no direct economic loss. *Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 (1st Dept 1990). Also, punitive damages are recoverable where the alleged wrongdoing has been intentional and deliberate. *Sardanis v Sumitomo Corp.*, 279 AD2d 225, 230 (1st Dept 2001). However, there at least must be a viable cause of action for nominal damages to recover punitive damages. *Id.* Merely alleging that damages exist without a tender of proof is insufficient to defeat a motion for summary judgment. *Seaman v Berman*, 239 AD2d 738, 739 (3d Dept 1997).

Aiding and abetting a breach of fiduciary duty which requires providing substantial assistance to the primary violator, occurs when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach. *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). One who aids and abets a breach of fiduciary duty is liable for breach. *Caprer v Nussbaum*, 36 AD3d 176, 193 (2d Dept 2006).

Here, there is no evidence that McElroy's sharing of confidential information caused a loss or benefitted Defendants. Hartford has failed to prove that compensation information shared by McElroy was a substantial factor in causing an identifiable loss. Sullivan's inadmissible report identifies losses arising from direct employment-related expenses in the aggregate. He does not tie them to the employees whose information was shared. It would be pure speculation to conclude on this record that because Hartford had some direct employment related costs, they were attributable to the employees whose bonus and salary information McElroy gave to Lyons. With respect to Rafferty and Price, there is no evidence that they shared compensation

information with Arch. Nor is there any admissible evidence that Hartford sustained a loss, or Defendants profited, through any other confidential information shared by the Individual Defendants. As there is no primary liability for breach of fiduciary duty, due to lack of damages, the aiding and abetting breach of fiduciary duty claim against Arch also fails. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999) (aiding and abetting requires underlying tort).

Accordingly, the court grants summary judgment in favor of the Individual Defendants dismissing the first cause of action for breach of fiduciary duty and in favor of Arch dismissing the second cause of action for aiding and abetting breach of fiduciary.

B. Breach of Confidentiality Agreements & Ethics Code

It is hornbook law that a breach of contract claim must be supported by proof of damages resulting from the breach. *Furia v Furia*, 116 AD2d 694 (2d Dept 1986). Damages in an action for breach of contract are intended to restore the injured party to the position he would have had if the contract had been fully performed. *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 262 (1998). The damages a party may recover for breach are those that ordinarily and naturally flow from the breach, are proximately caused by the breach, are certain or capable of ascertainment, and are not remote, speculative or contingent. *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 (1st Dept 2003).

Here, as previously noted, there is no evidence that Hartford suffered a loss as a result of sharing allegedly confidential information by McElroy and Price in violation of their confidentiality agreements, or as a result of the Individual Defendants sharing information in violation the Code of Ethics. In addition, there is no evidence that the attachment defining compensation information as confidential was annexed to McElroy's contract, as it was to Price's. Accordingly, the court grants summary judgment to McElroy and Price dismissing the

claim for breach of their confidentiality agreements and to the Individual Defendants dismissing the fourth case of action for breach of the Ethics Code.

C. Misappropriation of Trade Secrets

In order to recover for misappropriation of a trade secret, there must be a showing that the trade secret was improperly ***used*** by the offending party. *Falconwood Corp. v In-Touch Techs.*, 227 AD2d 215, 216 (1st Dept 1996). The measure of damages for the misappropriation and exploitation of confidential information is the loss of profits sustained by reason of the improper conduct..." *Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 (2d Dept 2004).

Here, it is not necessary to resolve whether any information shared by the Individual Defendants with Arch was a trade secret because, even though some of Hartford's confidential information was shared, Hartford submitted no admissible evidence to support a loss arising from its use. Again, based on the record, it is pure speculation that Hartford lost, or Arch gained, profits as a result of misappropriation.

D. Interference with Contract & Prospective Contractual Relationship

Breach of a binding agreement and interfering with a nonbinding "economic relation" can both be torts, but the elements of the two torts are not the same. *Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004). The elements of a claim for tortious interference with an existing contract are: 1) the existence of a valid contract with a third party, 2) defendant's knowledge of that contract, 3) defendant's intentional and improper procuring of a breach, and 4) damages. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). Where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract,

a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. *Carvel* at 189-190.

Where a suit is based on interference with a non-binding economic relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable," such as a crime or an independent tort, or conduct intended to inflict harm on the plaintiff. *Carvel* at 190. Other wrongful means that would support the claim are physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and economic pressure on potential customers of the plaintiff. *Id*, 191-192. Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct. *Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266-267 (1st Dept 2002); *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 49 (1st Dept 2009); 2 *Pattern Jury Instructions, Civil*, 2nd Ed. © 2009, 3:57.

In its opposing brief, Hartford argues only that Defendants interfered with the confidentiality agreements of McElroy and Price, and that it lost renewals of policies as a result of Defendants' wrongful conduct. Dkt 190, pp 27-28. As previously noted, there is no proof that the breach of the confidentiality agreements caused damage. Nor is there admissible proof of a policy renewal that would have occurred but/for the alleged conduct. Consequently, the court grants summary judgment to Defendants dismissing the fifth and sixth causes of action for interference with contract and prospective contractual relationships.

E. Unfair Competition

A cause of action for unfair competition requires allegations of obtaining business by means of wrongful conduct, trick or device, such as fraud or false representations. *S. W. Scott & Co. v Scott*, 186 AD 518, 527-528 (1st Dept 1919). It can consist of wrongful tactics in

connection with solicitation of a competitor's customers. *Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 (1972); *Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 570 (1959).

Damages for unfair competition can be based on lost profits sustained by reason of the improper conduct. *Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 (2d Dept 2004). Alternatively, a defendant who engages in unfair competition can be called on to account for profits attributable to its wrongful acts. *Winifred Warren, Inc. v Turner's Gowns, Ltd.*, 285 NY 62, 68 (1941). But, profits made by a defendant must be tied to its wrongdoing in order for the plaintiff to recover. *Michel Cosmetics, Inc. v Tsirkas*, 282 NY 195, 202-204 (NY 1940)(new trial ordered because evidence did not support finding that all sales by defendant wrongfully made in plaintiff's territory).

Here, there is no admissible evidence to prove that Arch's employment of improper means to compete caused a loss by Hartford or a gain by Arch. The element of damages is missing. As a result, Arch is granted summary judgment dismissing the seventh cause of action for unfair competition.

F. Unjust Enrichment

"The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein*, 884 NYS2d 47 (1st Dept 2009) (nor); Tarrytown *House Condominiums, Inc. v Hainje*, 161 AD2d 310, 313 (1st Dept 1990) (unjust enrichment requires proof that plaintiff conferred benefit on defendant for which defendant did not adequately compensate plaintiff); *Waldman v Englishtown Sportwear, Ltd.*, 92 AD2d 833, 836 (1st Dept 1983)); (plaintiff must demonstrate it would be unjust for defendant to retain benefit). Hartford supports its unjust enrichment claim by referring to "evidence" cited in

footnote 11 on page 17 of its opposing brief, which allegedly contains proof of lost policy renewals. Dkt 158, p 28. However, the "evidence" refers to inadmissible hearsay and statements that renewals were lost to Arch without any connection to alleged bad behavior by Defendants. Proof that Arch obtained a former Hartford client, standing alone, is not enough to prove unjust enrichment. Hartford failed to establish that any wrongdoing by Arch enabled it to obtain a former Hartford client. Therefore, summary judgment is granted to Defendants dismissing the eighth cause of action for unjust enrichment. Accordingly, it is

ORDERED that the motion by defendants ARCH INSURANCE GROUP, INC., ARCH CAPITAL GROUP LTD., DAVID MCELROY, JOHN RAFFERTY, and MICHAEL PRICE for summary judgment dismissing the complaint is granted, and the complaint is dismissed with prejudice.

Dated: August 21, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.