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

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RSSM CPA LLP,

Plaintiff,

-against-

Index No. 653533/2014

COREY D. BELL, ROBERT A. MODANSKY, MITCHELL RUBIN, MATTHEW MURPHY, FRED SHAPSS, MARK PELTZ, DAVID OSTROW, HILTON SOKOL, MICHAEL BERNSTEIN, JOEL A. COOPERMAN, CITRIN COOPERMAN & CO., LLP, and WEISERMAZARS LLC,

DECISION & ORDER

Defendants.

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DAVID OSTROW,

Third Party-Plaintiff,

-against-

STEVEN BIBAS, STEVEN ELLER, NEIL SONNENBERG, and ALAN WILLINGER,

Third-Party Defendants.

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MARK PELTZ,

Third Party-Plaintiff,

-against-

STEVEN BIBAS, STEVEN ELLER, NEIL SONNENBERG, and ALAN WILLINGER,

Third-Party Defendants.

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HILTON SOKOL,

Third Party-Plaintiff,

-against-

STEVEN BIBAS, STEVEN ELLER, NEIL SONNENBERG, and ALAN WILLINGER,

Third-Party Defendants.

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MICHAEL BERNSTEIN,

Third Party-Plaintiff,

-against-

STEVEN BIBAS, STEVEN ELLER, NEIL SONNENBERG,

ALAN WILLINGER, and FABIO BERKOWICZ,

Third-Party Defendants.

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H0N. SHIRLEY WERNER KORNREICH, J.S.C.

Motion Sequences 002, 003 and 004 are consolidated for disposition.

In this action involving the break-up of the accounting practice of plaintiff, RSSM CPA LLP (RSSM), defendant WeiserMazars LLP (WM), another accounting firm, moves for summary judgment dismissing all claims against it in the amended complaint (AC) -- the fourth through eighth causes of action. Motion Sequence 002. RSSM opposes, except for part of its claim for injunctive relief.

Defendant Michael Bernstein, moves for summary judgment dismissing all claims against him in the AC and partial summary judgment on his first counterclaim for breach of contract for compensation allegedly not paid by RSSM, as well as the balance in his capital account. Motion Sequence 003. RSSM opposes, except for the injunction cause of action.[1]

RSSM is no longer in business, and stipulated to the dismissal of its eighth cause of action for injunctive relief, so long as the portion of that claim barring use of its confidential information is dismissed without prejudice. Dkt 242 & 4/22/16 RSSM Memorandum of Law in Opposition to Bernstein Motion, Dkt 241, p 16.[2] The court grants summary judgment dismissing the eighth cause of action against WM and Bernstein without prejudice. RSSM withdrew by stipulation its eighth cause of action against Defendants for injunctive relief. Dkt 242.

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[1] RSSM's claims against defendants Bell, Modansky, Murphy, Rubin, Schapps, Cooperman and Citrin Cooperman & Co., LLP, and the third-party claims by Bell Modansky, Murphy, Rubin and Schapps, were settled and discontinued.

[2] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

Defendant Michael Bernstein moves to dismiss the AC and the answers of the third-party defendants (TPDs) for violations of discovery orders and spoliation of evidence, or alternatively for other sanctions. Motion Sequence 004. RSSM and the TPDs, other than Fabio Berkowicz, oppose and cross-move to shift the cost of production of electronically stored information (ESI) to Bernstein. Berkowicz, an employee of RSSM, did not respond to the motion or join in the cross-motion.

The AC contains the following causes of action, excluding the injunction claim, numbered here as in RSSM's pleading: 1) breach of contract against Bernstein, Ostrow, Peltz, and Sokol (collectively, Individual Defendants, with WM, Defendants); 2) breach of fiduciary duty against the Individual Defendants; 3) breach of duty of loyalty against the Individual Defendants; 4) aiding and abetting breach of fiduciary duty and duty of loyalty against WM; 5) tortious interference with contractual relations against Defendants; 6) tortious interference with prospective economic advantage against Defendants; and 7) conspiracy against Defendants. Dkt 151.[3] For simplicity, the second through seventh causes of action in the AC will be referred to collectively as the Tort Claims. The gravamen of the Tort Claims is RSSM's claim that within weeks after the Individual Defendants left the firm, it lost clients, partners and key employees because Defendants wrongfully used confidential information and conspired with WM to obtain them. 11/13/14 Steve Bibas Injunction Affidavit (Bibas Inj Aff), Dkt 5, ¶¶ 3-5 & 33-34.[4]

Bernstein's answer to RSSM's AC contains the following counterclaims, numbered here as in his pleading: 1) breach of contract; 2) violation of Labor Law §§ 193 and 198 for failure to

[3] The AC was efiled as part of the summary judgment motions as Dkt 209 and 221.
[4] RSSM settled its claims against Citrin Cooperman, another accounting firm, and other partners/contract partners of RSSM who went to work there.

pay him compensation; 3) defamation; 4) tortious interference with his contracts with his clients; 5) unfair competition; 6) unjust enrichment; 7) conversion of his client documents, computer files and other property; 8) negligent failure to provide client documents; 9) violation of General Business Law §349; and 10) breach of the implied covenant of good faith and fair dealing. Dkt 160.[5] The essence of Bernstein's counterclaims is his claim that after he terminated his employment with RSSM for non-payment of compensation, RSSM wrongfully interfered with his client agreements by soliciting them, back-billing them for amounts the firm had written off, and refusing to give him their files.

Bernstein's third-party complaint[6] against Steve Bibas, Steven Eller, Neil Sonnenberg, Alan Willinger and Fabio Berkowicz contains the following claims against all of the TPDs, numbered here as in the pleading, except that the second cause of action only is against Berkowicz: 1) withholding wages, i.e., his contractual compensation, in violation of Labor Law §§ 193 and 198; 2) defamation against Berkowicz; 3) tortious interference with Bernstein's contracts with clients; 4) aiding and abetting RSSM's tortious interference with contract; 5) unfair competition; 6) unjust enrichment for services and information provided by Bernstein after he left RSSM; 7) conversion of money, client documents, computer files and other personal information; and 8) negligent failure to provide documents needed to service Bernstein's clients. Essentially the same facts are alleged in Bernstein's third-party complaint as in his counterclaims.

I. The Summary Judgment Motions

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[5] Bernstein's answer to the AC with counterclaims was filed originally as Dkt 160 and was submitted on his summary judgment motion as Dkt 222.

[6] Bernstein's third-party complaint was originally filed as Dkt 163 and was submitted on the sanction motion as Dkt 262.

A. Procedural Background

These summary judgment motions were made before depositions were held, despite the court's contrary advice. The only witness who has been deposed is Neil Sonnenberg, a managing equity partner of RSSM, who was examined concerning alleged spoliation of RSSM's ESI, not on the merits. On this motion, the parties largely rely on affidavits that were submitted previously in connection with a preliminary injunction motion, which was made simultaneously with the filing of the complaint.

By order dated November 14, 2014, entered November 17, 2014, the court granted a temporary restraining order (TRO), enjoining Defendants from both using RSSM's confidential information and soliciting its partners, clients and employees, pending the hearing of its motion for a preliminary injunction. Dkt 21. At oral argument, the TRO was continued until determination of the motion. 3/5/15 Transcript, Dkt 131. In a December 16, 2015 decision (PI Decision), RSSM's motion for a preliminary injunction was denied and the TRO was vacated. Dkt 198. RSSM argues that the same issues of fact found in the PI Decision govern this motion. However, the standards of proof are not the same.[7]

After the motions were submitted, Bernstein stipulated to accept RSSM's late reply to the counterclaims in his answer to the AC. Dkt 306.[8] Thus, Bernstein's arguments predicated on

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[7] In order to obtain preliminary injunctive relief, the moving party must show irreparable injury, a likelihood of success and that the balance of the equities weighs in his favor. CPLR 6301; *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept1982), app dismissed, 58 NY2d 1113 (1983). A party moving for summary judgment must establish a prima facie case and if he does so, the opposing party must come forward with admissible evidence demonstrating that there is a material question of fact that requires a trial. CPLR 3212(b); *Cusano v General Electric Co.*, 111 AD2d 557, 558 (3d Dept 1985), *affirmed* 66 NY2d 844 (1985); *Hasbrouck v Gloversville*, 63 NY2d 916 (1984).

[8] RSSM failed to reply due to law office failure, and Bernstein failed to move for a default judgment on the counterclaims in his answer to the AC within one year. CPLR 3215(c);

RSSM's default in serving a reply are moot.

On December 2, 2015, Bernstein served an amended notice to admit on RSSM. Dkt 225 (Notice to Admit). It is conceded that RSSM did not respond within the time limit set forth in the CPLR. Pursuant to CPLR 3123(a), RSSM's failure to respond within twenty days is deemed an admission as to facts ***about which Bernstein reasonably believed there could be no substantial dispute, and were within the knowledge of RSSM, or could be ascertained by it upon reasonable inquiry***. *See Marguess v New York*, 30 AD2d 782, 782-783 (1st Dept 1968), *affirmed* 28 NY2d 527 (1971) (sweeping, generalized demands in notice to admit, relating to questions of ultimate liability, inadmissible because not reasonably without substantial dispute); *Berg v Flower Fifth Ave. Hospital*, 102 AD2d 760, 760-761 (1st Dept 1984). Some of Bernstein's requests were in substantial dispute and not subject to a notice to admit. *See Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453 (1st Dept 1995) (where notice to admit sought admissions as to material and ultimate issues, notice to admit properly stricken).[9]

Further, the copy of the Notice to Admit submitted on the motion says it intentionally omitted attached exhibits. *Id.* Without the corresponding exhibits, the court cannot deem anything about them admitted. It matters not that the Notice to Admit alleged that certain exhibits were business records of RSSM, prepared by RSSM, back up materials for RSSM's tax

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Clemente v Clemente, 50 AD3d 514, 514–15 (1st Dept 2008), citing *Geraghty v Elmhurst Hosp. Ctr. of New York City Health and Hosps. Corp.*, 305 AD2d 634, 634 (2d Dept 2003). But, RSSM had replied to the same counterclaims, which Bernstein asserted in response to the original complaint. The court pointed this out to counsel, and Bernstein accepted RSSM's reply.

[9] For example, Bernstein asked RSSM to admit that he did not delay billing in contemplation of leaving and that RSSM computed the amount of compensation he is owed, which RSSM claims he waived. Notice to Admit, ¶¶ 22 & 25. The court struck Bernstein's initial notice to admit because it contained similar requests. 11/17/15 Order, entered 11/20/15, Dkt 186.

return, or accurate reflections of information contained in them. The Notice to Admit by itself is not evidence and proves nothing.

B. Factual Background

RSSM is a firm that primarily provided accounting and tax services to its clients. The Individual Defendants joined RSSM, when their prior firm, Miller Ellerin & Company, LLP (ME), entered into a January 1, 2009 merger agreement with RSSM (Merger Agreement). Dkt 95. The whereas clauses in the Merger Agreement provided that ME's practice had serviced the clients listed on an annexed schedule, ME was to merge its practice with RSSM, RSSM was to undertake servicing ME's clients as clients of RSSM during the succeeding year, and the parties would transition the clients using all reasonable commercial efforts to maintain them as clients of RSSM. Dkt 95. ME agreed to transfer its assets, practice, client files (subject to their consent), and good will. *Id*, §1. Bernstein alleges that at the time of the merger, RSSM hid the fact that it had overextended itself financially. 12/16/14 Bernstein Affidavit (Bernstein Inj Aff), Dkt 46, ¶4.[10]

Each Individual Defendant had a written contract with RSSM, effective January 1, 2009, the same day as the Merger Agreement, and a capital account with ME that was transferred to RSSM upon the merger. The Bernstein, Ostrow and Sokol contracts designated them as "Contract Partners"; Peltz, a lawyer and the only Individual Defendant who was not a CPA, had a contract that designated him as a "Contract Principal". [11] One of the Merger Agreement's

[10] Bernstein claims that at the time of the merger, RSSM had, *inter alia*, a significant cash deficit, substantial accounts payable, unfunded retirement obligations to partners, cash overruns for office renovations, accrued liabilities to its partners, an over extended bank loan, and was improperly and extensively billing partners' personal expenses to the firm. *Id*, ¶4.

[11] Bernstein's contract will be referred to as the Bernstein Contract or Bernstein's Contract, and the other Individual Defendants' contracts will be referred to in the same manner. Collectively, the Individual Defendants' contracts will be referred to as Contracts.

whereas clauses referred to the Individual Defendants' separate, simultaneous Contracts. They clearly are integrated agreements.[12]

This court held in the PI Decision that it was a question of fact whether the Individual Defendants were partners of RSSM and nothing in this record changes that determination. See PI Decision, citing *Mazur v Greenberg*, 110 AD2d 605 (1st Dept 1985), *affirmed*, 66 NY2d 927 (1985) ("Whether partnership status is enjoyed turns on various factors, including sharing in profits and losses, exercising joint control over the business, and making capital investment and possessing an ownership interest in the partnership."). The parties rely on the same affidavits with respect to whether the Individual Defendants were or were not partners. Although RSSM admits that Bernstein did not share in losses or a "fixed percentage" of the profits and did not own equity in the firm, those are not the only factors to be considered. Notice to Admit, ¶¶ 5 through 7. Questions of fact remain because Bernstein admits that he was Managing Partner and a member of RSSM's Executive Committee, which shows control. Additionally, he contributed his capital account to the firm when he joined in 2009, and his contract gave him many rights that were the same as those of RSSM's partners.[13]

Moreover, as will be discussed in greater detail below, the Individual Defendants had fiduciary duties to RSSM, whether they were partners or employees. At oral argument, Bernstein's attorney admitted that, even if he was not a partner of RSSM, Bernstein had fiduciary duties to the firm as an employee. 8/16/16 Transcript, p 23.[14] WM's memorandum of

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[12] "Agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one." *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 (1st Dept 2009).

[13] Bernstein's Contract gave him parity with RSSM's partners with respect to benefits, voting rights, the title of partner, and bonuses. Dkt 223, §§ 1 & 3.

[14] The parties did not file the transcript, as directed by the court.

law also concedes that employees have a duty of loyalty, which encompasses a prohibition on using the employer's time, resources or confidential information to prepare to leave, or to compete. 1/4/16 WM Memorandum of Law, Dkt 207, p 18.

Bernstein's Contract provided that RSSM's failure to pay compensation would be a "willful material breach" which, by definition, would constitute "Good Reason" for him to terminate. Bernstein Contract, §7(b)(1), p 10.[15] The Contracts of the other Individual Defendants had the same provision. Ostrow Contract, Dkt 213, §4(b)(1); Sokol Contract, Dkt 214, §4(b)(1); and Peltz Contract, Dkt 212, §4(b)(i). None of the Contracts required the Individual Defendants to give RSSM notice of breach separate from notice to terminate.

To terminate for Good Reason, the Individual Defendants were required to give RSSM notice of the contractual provision breached and state the underlying facts and circumstances in reasonable detail. Bernstein Contract, §7(c); Ostrow, Sokol and Peltz Contracts, §4(c). The AC alleges that Ostrow, Peltz and Sokol gave written notice that their Contracts were terminated on October 28, 2014, while Bernstein gave notice of termination on October 31, 2014 (collectively, Termination Notices). Dkt 93; AC, ¶46; *see also* Bibas Inj Aff, ¶33. In the Termination Notices, the Individual Defendants stated they were terminating their Contracts because RSSM had failed to pay their compensation. Dkt 93. Ostrow, Sokol and Peltz stated that they were owed money for 2013 and 2014, as well as their capital account monies,[16] while Bernstein said he was owed $387,312 to date, excluding his capital account. *Id.* There is no dispute that the Termination Notices complied with the termination notice provisions in the Contracts.

[15] Bernstein's Contract has two sections numbered 7. Dkt 223.
[16] Sokol and Peltz referred to their capital accounts as withdrawal payments. Dkt 93.

In the event that Bernstein notified RSSM that he was terminating for Good Reason, RSSM was obligated to pay him "all earned, but unpaid amounts of his Base Distributions and Additional Distributions to which [he] was entitled as of the date of termination" and to reimburse him for "all business expenses incurred by [him] through the date of termination." Bernstein Contract, §7(d). Upon Bernstein's withdrawal ***for any reason***, RSSM was required to pay him the balance in his capital account in twelve equal installments beginning the first day of the first month following his departure, i.e., November 1, 2014. Bernstein Contract, §3(i). The other Individual Defendants had the same provision in their Contracts. Peltz & Sokol Contracts, §5(f); Ostrow Contract, §5(e). Admittedly, RSSM has never paid any of their capital account installments or the compensation that the Individual Defendants claim that they are owed.

Although RSSM claims that the Contracts provided that the Individual Defendants' compensation could be adjusted in the sole discretion of the Executive Committee, that is not so. The Executive Committee had discretion to adjust the Individual Defendants' compensation based upon their "performance". Bernstein, Ostrow & Sokol Contracts, §3(e); Peltz Contract, §3(f). However, RSSM does not claim that the Individual Defendants' compensation was cut due to anything but RSSM's inability to pay them, except for Peltz. RSSM admitted that it cut the compensation of the Individual Defendants, because the firm had financial difficulties and was not profitable. 1/6/15 Willinger Reply Affidavit (Willinger Inj Aff), Dkt 239, ¶¶ 17-20.

There is a factual dispute as to whether Peltz earned the compensation he seeks to recover. Willinger avers that Peltz did not earn his compensation in 2013 and was not on track to do so in 2014 because he and his assistant each did not bill 1750 hours per year, which was required by Peltz's Contract. Willinger Inj Aff, ¶21; Peltz Contract, §3(f). Peltz's affidavit states that he was owed approximately $230,000 for 2013 and 2014, when he gave notice of

termination. 12/11/14 Mark Peltz Affidavit, Dkt 42.

The Individual Defendants agreed to maintain the confidentiality of RSSM's "Confidential Information" ***during the terms of their Contracts, and for two years after termination***. Bernstein Contract, §8(f); Peltz, Ostrow and Sokol Contracts, §6(f). In addition, the Peltz and Sokol Contracts designated RSSM's "Contacts" as confidential, while the Bernstein and Ostrow Contracts used the term "Clients". *Id.* All of the Contracts provided that information brought by the Individual Defendants to RSSM at the time of engagement was not confidential. *Id.* Bernstein's Contract also excluded from confidential treatment information about "Bernstein Aggregate Clients", if he terminated the agreement for Good Reason. *Id.* "Bernstein Aggregate Clients" was defined as clients he brought with him to RSSM and clients he introduced to RSSM. Bernstein Contract, §§ 1(b) and 2(b). [17]

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[17] "Confidential Information" was defined in the Contracts as:

> any and all information concerning, current distribution methods and processes, current customer requirements, price lists, billing rate, market studies, business plans, computer software and programs (including object code and source code), computer software and database technologies and systems of RSSM; (ii) any and all information concerning the business and affairs of RSSM (which includes historical financial statements, financial projections and budgets, historical and projected sales, capital spending budgets and plans, the names and backgrounds of key personnel, personnel training and techniques and materials, however documented; and (iii) any and all notes, analyses, compilations, studies, summaries, and other material prepared by or for RSSM containing or based, in whole or in part, on any information included in the foregoing, except for information that [BERNSTEIN, PELTZ, OSTROW or SOKOL] brings to RSSM at the commencement of his engagement. Confidential Information shall also include any Confidential Information (as the term is defined above) about any of the [in Peltz, and Sokol Contracts: "Contacts of RSSM"] [in Ostrow Contract: "Clients of RSSM"] [in Bernstein Contract: "Clients of RSSM but shall not include Confidential Information about any of the Bernstein Aggregate

Although the Contracts contain post-termination restrictions on the solicitation of RSSM clients, partners and employees, the restrictions did not apply if the Individual Defendants terminated their Contracts for Good Reason. Bernstein Contract, §8(b)(1); Ostrow, Sokol and Peltz Contracts, §6(b)(1). The restrictive covenants apply only in the event of retirement, disability, termination by RSSM for cause, or termination by the Individual Defendants without Good Reason. *Id.*

Apart from the restrictive covenants, RSSM alleges that the Individual Defendants breached their common law fiduciary duties as RSSM partners and/or their duty of loyalty as employees by using confidential information to recruit key employees, partners and clients. RSSM alleges that this occurred before they terminated their Contracts, as well as between the period that this court granted the TRO and denied the preliminary injunction, i.e., from November 14, 2014 through December 16, 2015 (TRO Period). Dkt 21 & 198. WM is alleged to have aided and abetted the breaches.

Although Bernstein and WM (collectively, Movants) argue that the Individual Defendants were at-will employees, Bernstein was not; it is a question of fact as to whether Ostrow and Peltz were at-will; and Sokol was not, as of January 1, 2011.[18] Bernstein's Contract had a fixed duration, i.e., until he retired permanently from accounting and consulting; RSSM could only terminate him for cause. Dkt 223, §§ 4(a) and 7(a). Thus, Bernstein was not at-will

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Clients ... if Bernstein terminates his engagement hereunder for Good Reason"].

[18] Absent an agreement of fixed duration, an employment agreement is presumed to be at-will and terminable by either party. *De Petris v Union Settlement Ass'n, Inc.*, 86 NY2d 406, 410 (1995). However, the presumption may be rebutted by conduct of the parties, including their writings, that contain an agreement not to dismiss the employee without cause. *Weiner v McGraw-Hill*, 57 NY2d 458, 465-466 (1982). Where the employer must have cause to terminate, whether an employee is at-will is a question of fact. *Id.*

because his Contract had a definite duration. The Ostrow, Sokol and Peltz Contracts said that they were employed on an at-will basis, that their Contracts could be terminated on 90-days' written notice, but that they could be terminated only for cause for seven years, two years, and until the age of sixty-five, respectively. Dkt 212-214, §2 of each. Sokol's two-year for cause only termination provision ended in 2011. Dkt 214. The record does not reflect when Peltz will be 65. It is a question of fact whether Ostrow and Peltz could be terminated for cause as of October 2014, and Sokol was an at-will employee in October 2014. *De Petris* and *Weiner*, *supra.*

In the Bernstein Contract, RSSM agreed to pay him a minimum of $1,000,000 per year, composed of: 1) $550,000 draw payable in twenty-six, bi-weekly installments of $21,154, defined as "Base Distributions"; 2) "Additional Distributions" in the amount of $300,000 payable in four $75,000 installments (April 15, June 15, September 15 and January 15 of the following year); 3) life insurance premiums, health insurance premiums, automobile expenses, and taxi and limousine expenses, aggregating $100,000 to $125,000 per year; and 4) additional monies to equal $1,000,000, payable April 15 the following year. Bernstein Contract, Dkt 223, §3. The compensation of the other Individual Defendants also was composed of Base Distributions, quarterly Additional Distributions, various expenses, and additional money to bring the compensation up to the total compensation RSSM was required to pay, payable on the same schedule as Bernstein's compensation. Peltz, Ostrow and Sokol Contracts, Dkt 212-214, respectively, §3.

Bernstein avers that he was not paid $135,004 of his 2013 bi-weekly draw, three 2014 quarterly payments of $70,000, and two bi-weekly 2014 draws in the amount of $21,154, for a total of $387,312 (collectively, Unpaid Compensation), plus the balance in his capital account on

October 31, 2014, the amount of which Bernstein does not know. 1/28/16 Derfner Affirmation, Dkt 220 (Derfner Aff), ¶¶ 5& 6, & 1/29/16 Affidavit of Michael Bernstein, Dkt 221 (Bernstein Moving Aff), ¶2, adopting Derfner Aff. It can be inferred, because Bernstein is claiming only two outstanding bi-weekly payments for 2014 and he resigned at the end of October, that RSSM paid, and he accepted, his other 2014 bi-weekly draws through termination. RSSM admitted, by failing to respond to the Notice to Admit, that it "accurately computed" and did not pay Bernstein's Unpaid Compensation. Notice to Admit, ¶¶ 22.[19]

According to Willinger, on September 5, 2014, the Executive Committee that governed RSSM decided that there would be a ten percent pay cut for all partners for 2013, which was essentially a formality because the money had already been withheld. *Id.* Willinger avers that Bernstein, as Managing Partner, was the principal architect of the decision not to pay 2013 compensation. Willinger Inj Reply, ¶¶ 13 & 22.

Minutes of four RSSM Executive Committee meetings, which took place on February 19, March 5, September 8 and October 13, 2014, confirm that the firm was having substantial

[19] Bernstein also relied on two documents to prove the amount owed for his 2013 partner draw, which were filed under seal, but they are both hearsay. Dkt 57 & 58. One is clearly labeled an estimate (Estimate). Dkt 58. The second is an RSSM spreadsheet (Spreadsheet), showing the same amount of 2013 draw owed. Dkt 57. The Spreadsheet says that in 2013, RSSM paid Bernstein late for his first three quarterly payments of $70,000, on December 30, 2013, April 15, 2014, and May 23, 2014, which were due in April, June and September, 2013. Dkt 57 & Bernstein Contract, §3. In his reply affidavit on the preliminary injunction motion, which was resubmitted on this motion, RSSM equity partner Alan Willinger averred that the opposing affidavits, including Bernstein's, attached unreliable documents labeled estimates to prove what they were owed. 1/6/15 Reply Affidavit of Alan Willinger (Willinger Inj Reply), Dkt 239, ¶23. He did not address the Spreadsheet, but it is not admissible evidence because there is nothing in the record to authenticate it as a business record. CPLR 4518; *People v Kennedy*, 68 NY2d 569, 579-580 (1986) ((three-prong test for business record: 1) must reflect routine, regularly conducted business activity that is relied upon in the functions of the business; 2) must be regular practice of business to make such a record, and 3) must be created at or near the time of event being recorded); *see also*, *People v Cratsley*, 86 NY2d 81, 89 (1995).

financial difficulties and was considering what to do, but it is unclear whether the final decision to cut pay was made on September 8 or October 13 of 2014. Dkt 92 & 297.[20] The minutes conclusively establish that through March, the Executive Committee had made no decision to cut partners' pay.[21]

The September minutes are inconclusive as to whether the decision was final. They state:

> **I. Resolution: Proposed 10% pay-cut to all Partners for 2013**
> A. Exception: Martin Greenberg - 30% pay-cut effective January 1, 2014 for 2013.
> B. A schedule was distributed of all monies due to be studied by executive Committee. It was pointed out that since money has been held, the pay-cut was essentially just a formality.
> C. It was also pointed out that early in 2015, years 2014 [sic] and 2014 will be reviewed and appropriate increases and decreases will be made in accordance with goals and other criteria.
> **II. Review June 2014 Financial Statement**
> A. As a result of what is believed to be a more appropriate conservative Work in Process & Accounts Receivable valuation on a GAAP Basis, the June 2014 data reflected an approximate $ 4 million lower net income than the prior year.
> B. Cash basis projections currently appear to be down $1.1 million....
> **VII. Other Matters**
> A. Michael Bernstein to send notice to partners on 9/8/14 advising that no September 15, 2014 distributions will be made to Partners.
> B. Michael Bernstein to call staff meeting with Principals, Managers and Seniors to discuss firm. Such notice to be distributed on Monday, 9/8/14.

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[20] A missing page of the March minutes was efiled as Dkt 297.

[21] At the February meeting, the minutes reflected that the firm projected receipts to be 10% lower in 2014 than 2013 actual receipts and that if "significantly lower projections are accurate then further measures ***to be considered*** by the Executive Committee to make up shortage." *Id* [emphasis supplied]. In March, the minutes stated that in 2013, RSSM's cash statement showed a $265,000 loss after Partner draws and expenses; cash flow projections showed a shortfall $902,802 after Partner packages; lower fee income in 2014 would lead to a cash flow deficit of between 1.2 to 2.7 million; the Executive Committee would evaluate all of the Partners' compensation for 2013; and "***years 2013 and 2014 will be evaluated to determine whether respective Partners should receive restoration of monies - increases or further decreases***." *Id*, March minutes, ¶¶ IV(B), VI & VII(B)(1).

Dkt 92. There is a question of fact as to the finality of the pay cut in September because of the word "proposed" and also because it was contemplated that in early 2015, the prior two years would be reviewed and possibly increased.

The October minutes (October Minutes) reflect a four to two vote, with one abstention (by Corey Bell), to cut all Partners' remaining distributions ***for 2013*** by at least 10%. *Id.* They state:

> **III. 2013 Remaining Distribution**
>
> A. Cut a minimum of 10% across the board for all Partners on gross pay.
>
> All of the above as approved in a 4 to 2 vote. Corey abstained. *Id.*

It is undisputed that the two nays were Bernstein and Ostrow. The October minutes also reflect that an official letter would be sent to the Partners "with the admonishment that if anyone is contemplating leaving with firm assets they will incur the full legal wrath of the Partnership" and that any member of the Executive Committee who desired to leave should resign from the committee as it would conflict with their fiduciary duty. *Id.*

RSSM maintains that Bernstein waived his right to compensation because he was on the Executive Committee and is trying to take advantage of his decision not to pay himself. Bernstein concedes that in 2012, he became the interim Managing Partner of RSSM and held that position until he resigned on October 31, 2014. Bernstein Inj Aff, ¶8.[22] It is undisputed that he was a member of RSSM's Executive Committee in 2013 through October 2014. 4/21/16

[22] Bernstein's reply affidavit on this motion incorporates by reference the Bernstein Inj Aff, Bernstein's Answer to the AC [Bernstein Answer, Dkt 160] and his amended notice to admit, dated 12/2/15 [Dkt 225, Notice to Admit]. 1/29/16 Bernstein Reply Affidavit (Bernstein Reply Aff), Dkt 249.

Affidavit of Alan Willinger (Willinger Aff), Dkt 240, ¶3. RSSM further contends that Bernstein cannot recover for breach of contract because before he terminated his employment, he breached by soliciting clients, partners and employees of RSSM using its confidential information. Bibas Inj Aff, ¶¶ 33 & 34.

Bernstein's position is that his Contract contained a clause stating that waivers had to be in writing, a waiver of breach or performance would not create a future waiver of the same breach or performance, and a continuing waiver had to be specifically stated (Written Waiver Clause).[23] RSSM admits that Bernstein never agreed in writing to waive any provision of his Contract. Notice to Admit, ¶4. Furthermore, as previously noted, RSSM admitted that it did not have the money to pay him. Willinger Inj Reply, Dkt 239, ¶¶ 17-20. Bernstein disputes soliciting or using confidential information before he left. Bernstein Inj Aff, ¶26.

In support of its motion, WM offers the affidavit of its CEO and Chairman of the Board, Douglas Phillips, which was submitted in opposition to RSSM's preliminary injunction motion. 12/16/14 Affidavit of Douglas Phillips (Phillips Aff), Dkt 216.[24] Phillips avers that WM and RSSM were negotiating a possible merger in the Spring and Summer of 2014. Phillips Aff, ¶6.

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[23] The Bernstein Contract, §9, provided, in pertinent part:

> (c) Waivers. The waiver by either party hereto of any right hereunder or any failure to perform or breach by the other party hereto shall not be deemed a waiver of any other right hereunder or of any other failure or breach by the other party hereto, whether of the same or similar nature or otherwise. No waiver shall be deemed to have occurred unless set forth in a writing executed by or on behalf of the waiving party. ...
> (f) Amendment; Waiver.. This Agreement may not be amended or any provision hereof waived, except by mutual agreement of BERNSTEIN and RSSM in writing.

[24] The copy of Phillips Aff submitted on the motion is not signed, but there is a signed copy that was efiled as Dkt 70.

In the Summer, he was told by an unnamed partner that RSSM had voted against the merger. *Id*, ¶7. He denies that, during the merger discussions, WM communicated with individual RSSM partners about joining RSSM "outside of the context of the proposed contemplated business combination...." *Id*, ¶8. Phillips avers that "shortly after" RSSM voted down the merger, he was approached by the Individual Defendants about joining WM. *Id*, ¶9. He then says that the Individual Defendants notified WM that they had terminated their contracts with RSSM for failure to pay compensation. *Id*, ¶10. Consequently, Phillips admits that there was a gap of time between the time he was approached by the Individual Defendants, shortly after the Summer,[25] and October 28 or 31, when the Individual Defendants terminated their employment.

Phillips further avers that WM performed "standard employment-related due diligence" on the Individual Defendants, and "analyzed issues that regularly arise in retaining professionals, including non-competition, nonsolicitation (and similar) agreements." *Id*, ¶¶12 & 13. Phillips does not say when this happened, what kind of "standard" due diligence was performed by WM, or what information it considered as part of that process. He claims that WM determined that the Individual Defendants were not bound by the restrictive covenants in their Contracts because RSSM did not pay their compensation. *Id*, ¶19. He denies that he came into possession of RSSM's confidential information as part of WM's hiring the Individual Defendants. *Id*, ¶20. He does not mention whether anyone else at WM did. He does not address how RSSM personnel, other than the Individual Defendants, came to be hired by WM, or whether he reviewed confidential RSSM information before hiring them. He denies in conclusory fashion the allegations of the Tort Claims against WM.

RSSM claims that Movants wrongfully used confidential information to steal its partners,

[25] The court takes judicial notice that Summer ends in September.

key personnel, clients and prospective clients. Other than the Individual Defendants, RSSM did not identify anyone that Defendants allegedly poached, or offer any information concerning the terms of the contracts they had with RSSM. In an affidavit submitted in support of the preliminary injunction motion, one of RSSM's partners alleges that WM and Citrin Cooperman, who has settled, hired RSSM's partners, principals, managers, bookkeepers, supervisors, and secretaries, all of whom had employment agreements. Bibas Inj Aff, ¶41. That statement refers to both WM and Citrin Cooperman. The only particulars relating to clients and personnel who went to WM are that: 1) twenty-two employees had begun, or were to begin, working for WM at the time of the preliminary injunction motion; "two of RSSM's most important tax specialists" who gave notice on November 10, 2014, went to WM; and the Individual Defendants took $8-10 million in business to WM. Bibas Inj Aff, ¶¶ 46, 47 & 52. At the time of the preliminary injunction motion, RSSM alleged that it expected that, by June 2015, it would have to spend money for retention bonuses and other payments to retain personnel, but in opposition to the summary judgment motions, it offers no evidence of money spent for that purpose. Bibas Inj Aff, ¶48.

In addition, RSSM alleges the following additional breaches of fiduciary duty by Bernstein (Bernstein Accusations): 1) he set up his WM voice mail before he left; 2) he block voted on the Executive Committee to force a merger and to make it impossible for RSSM to enact unspecified important measures; 3) he misdirected over $63,000 to cover his personal expenses, including a limousine he used to commute to work; 4) he billed less for the months immediately preceding his 2014 departure than in comparable months in 2013; and 5) in October 2014, he spent over $7,700 of RSSM's money for an ad for the firm in *Crains*, which included his photograph and identified him as Managing Partner. Bibas Inj Aff, ¶38; Willinger Inj Aff,

¶15.

Bernstein denies using RSSM's funds to pay personal expenses that were not approved by the firm. Bernstein Inj Aff, ¶20. Bernstein's Contract provided, in §3(c), for reimbursement for personal expenses, including limousines, of up to $125,000 per year. Other than the car expenses, RSSM does not offer any evidence of other improper, personal expenses, or any evidence of expenses the firm paid that exceeded Bernstein's annual $125,000 allotment. RSSM admits that Willinger reviewed and approved all of Bernstein's car expenses and signed all the checks to the car service, and that Bernstein was authorized to sign firm checks, but never did so. Notice to Admit, ¶¶ 23 & 24; Bernstein Inj Aff, ¶20. RSSM does not explain how it was damaged by Bernstein's votes against the merger, an action he was entitled to take. Moreover, someone other than Bernstein must have paid *Crains* because RSSM admits that Bernstein never signed a check and RSSM did not aver that the *Crains* ad was unauthorized.

Bernstein's affidavit says that through October 10, 2014, he billed 97% of what he billed for the same period in 2013, and his collections for 2014 exceeded the prior year. Bernstein Inj Aff, ¶21. He contends he met with Sonnenberg on November 11, 2014, and asked for time runs to prepare bills, which Sonnenberg promised to supply, but never did. *Id.* Bernstein further avers that Willinger approved all of his billing. *Id*, ¶20. Bernstein Inj Aff, ¶20. Willinger disputes this. Willinger avers that, "unbeknownst to the rest of RSSM's partners, Bernstein repeatedly entered into agreements with his clients in which he agreed to cap RSSM's fees, causing RSSM to write off millions of dollars [sic] worth of work to those clients (Write-Offs). Willinger Inj Aff, ¶14. Yet, in opposition to the summary judgment motion, RSSM does not name a single client whose bill Bernstein agreed to cap, or submit any evidence of bills that Bernstein wrote off without authorization. Nor does RSSM put in any evidence comparing what

Bernstein billed in 2013 and 2014.

C. 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 denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). A movant cannot prevail on summary judgment by pointing to gaps in the other side's proof, but must demonstrate affirmatively the merits of a claim or defense. *River Ridge Living Ctr., LLC v ADL Data Sys., Inc.*, 98 AD3d 724, 726 (NY 2d Dept 2012). However, a defendant moving for summary judgment does not have to prove a negative on an issue as to which he does not bear the burden of proof. *Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 (1st Dept 2010). 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).

On a summary judgment motion, once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). A failure to contradict facts is an admission. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere

conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, *supra*, 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). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate acceptable excuse for his failure to offer admissible evidence. *Id.* Upon the completion of the court's examination of all of 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).

If it appears from the affidavits submitted in opposition to a summary judgment motion that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion, or order a continuance to permit affidavits to be obtained or disclosure to be had. CPLR 3212(f). Where such facts are in the possession of the non-moving party and discovery has not taken place, the motion should be denied as premature. *Ohara v New School*, 118 AD3d 480 (1st Dept 2014; *Uddin v City of New York*, 52 AD3d 422 (1st Dept 2008). The motion should not be denied on this ground if the party has not had sufficient discovery due to its own inaction. *Stevens v Hilmy*, 185 AD2d 840 (2d Dept 1992); *Douglas Manner Assn., Inc. v Alimaras*, 215 AD2d 522, 626 NYS2d 552 (2d Dept 1995). A motion for summary judgment should not be denied for lack of disclosure unless the party opposing the motion identifies the needed disclosure. *Auerback v Bennett*, 47 NY2d 619, 636 (1979). "To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on summary judgment...." *Id.*

When a motion for summary judgment is based on pleading defects, the court should examine the record as a whole and may use it to cure pleading deficiencies. *New York Civil Practice*, CPLR ¶3212.10, Matthew Bender & Company, Inc., a member of the LexisNexis Group, © 2016 and cases cited therein. A motion to dismiss for failure to state a cause of action can be made at any time. CPLR 3211(a)(7) and (e). A claim for breach of fiduciary duty must plead the circumstances constituting the wrong with particularity. CPLR 3016(b). The purpose of the rule is to clearly inform the defendant of the incidents of which he stands accused. *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). The rule should not be interpreted to prevent the assertion of a claim where it would be impossible to state the circumstances in detail, such as where the information is peculiarly in the defendant's knowledge. *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320-321 (1st Dept 1997), citing *Jered Contr. Corp. v NYC Tr. Auth.*, 22 NY2d 187, 194 (1968).

D. Discussion of Summary Judgment Motions

1. RSSM's Tort Claims against Bernstein and WM

a. Breach of Fiduciary Duty & Duty of Loyalty against Bernstein, & Aiding & Abetting against WM

The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss. *People v Grasso*, 50 AD3d 535 (1st Dept 2008), *aff'd* 11 NY3d 64 (2008). 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). And, an employee has a duty not to compete with his or her employer. *Brown Associates Inc v Fileppo*, 38 AD2d 518, 519 (1st Dept 1971). "Every employee is an agent for the discharge of the duties within the sphere of his employment." *People v Dempsey*, 180 AD 765, 772 (2d Dept 1917). 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. *Western Electric Co. v Brenner*, 41 NY2d 291, 295 (1977); *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133, 138 (1936); *Bon Temps Agency v Greenfield*, 184 AD2d 280, 281 (1st Dept 1992).

"An employee may create a competing business prior to leaving his employer unless he makes improper use of the employer's time, facilities or proprietary secrets in doing so." *Don Buchwald & Assocs. v Marber-Rich*, 11 AD3d 277, 278 (1st Dept 2004), citing *Schneider Leasing Plus, Inc. v Stallone*, 172 AD2d 739 (2d Dept 1991). After the employment terminates, solicitation of the employer's customers is actionable only if the employee engages in wrongful conduct, such as taking files or using confidential information. *Island Sports Physical Therapy v Kane*, 84 AD3d 879, 880 (2d Dept 2011).

Similarly, a partner has a fiduciary duty to his partners, which requires him to act with loyalty and good faith, consider his partners' welfare, and refrain from acting for private gain. *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 (1st Dept 2000). The duty exists during the life of the partnership and while a partner is planning to withdraw. *Id.* Prior to giving notice of withdrawal, a partner violates his fiduciary duty by surreptitiously recruiting partnership personnel to move to a new firm using salaries, average billable hours, billing rates and other confidential information. *Id.* Sharing this type of confidential information gives unfair advantage in recruiting, and puts the old firm in the position of not knowing which personnel are targets, or what it could do to retain them. *Id.*

Turning to damages, for breach of the duty of loyalty, an employee must account to his principal for secret profits and forfeits his right to compensation for services rendered by him.

Lamdin, supra; *Bon Temps supra*; *Henderson v Rep Tech, Inc.*, 162 AD2d 1028 (4th Dept 1990); *St. James Plaza v Notey*, 95 AD2d 804, 805-806 (2d Dept 1983). 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 because damages are intended to deter fiduciary misconduct, as well as to provide compensation to the injured party. *Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 (1st Dept 1990). 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 must show that the breach was a substantial factor in causing an identifiable loss. *Gibbs v Breed, Abbott & Morgan, supra*. Expenses, benefits and bonuses paid to retain employees may be recovered if they result from the misconduct. *Vasomedical, Inc. v Barron*, 137 AD3d 778, 778-779 (2d Dept 2016). However, in *Gibbs*, the First Department let stand the trial court's conclusion that damages for a partner's breach of fiduciary duty did not include his share of profits prior to withdrawal, or forfeiture of his capital account. *Gibbs v Breed, Abbott & Morgan*, at 184.[26]

Aiding and abetting a breach of fiduciary duty requires a showing that the defendant knew of and provided substantial assistance to the primary violator, which occurs when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). One who aids

[26] In *Gibbs*, the Appellate Division vacated the award for lost profits, and remanded for a determination on that element of damages, because the trial court had awarded all lost profits from the time of the partners' withdrawal, without making findings as to whether the wrongfully shared employee information was a substantial factor in causing lost profits.

and abets a breach of fiduciary duty is liable for breach. *Caprer v Nussbaum*, 36 AD3d 176, 193 (2d Dept 2006).

The motions by Movants for summary judgment dismissing the breach of fiduciary duty, breach of duty of loyalty, and aiding and abetting claims are denied, due to the lack of necessary deposition testimony. However, the claims are limited to allegations of: 1) solicitation and recruitment of the Individual Defendants; and 2) slowdown of Bernstein's billing before leaving in order to bill work at WM. As previously noted, there is a question of fact as to whether the Individual Defendants were partners, which bears on whether Bernstein is entitled to compensation if he breached his duty of loyalty. *See Gibbs*, *supra*. WM and Bernstein conceded that the Individual Defendants owed RSSM a duty of loyalty as employees.

In *CBS, Inc. v Dumsday*, 268 AD2d 350 (1st Dept 2000), the plaintiff alleged that three employees resigned, quickly went to work for a competitor, and that the defendants used confidential information to recruit in violation of their employment agreements. The First Department held that a motion to dismiss the breach of fiduciary duty and aiding and abetting claims should be denied for lack of discovery, given the employees' departure and almost immediate hiring by the defendant. While *CBS* ruled on a motion to dismiss, here WM and the Individual Defendants have not been deposed, and the case is not ripe for summary judgment. *CPLR 3212(f)*; *Ohara*, *supra*; *Uddin*, *supra*. RSSM is quite right that what WM and Bernstein did to recruit is exclusively in their own knowledge, and, if confidential information was used improperly, it was done behind closed doors. Without depositions, RSSM has not had an opportunity to develop a record concerning whether, and when, WM or Bernstein took and/or used confidential information about the Individual Defendants' salaries and client billings, and used them to make attractive offers to the Individual Defendants. Similarly, only WM and the

Individual Defendants know whether they used RSSM's time and/or resources prior to leaving, during the interval between the end of the merger talks in the Summer, when Phillips said that WM was first approached by the Individual Defendants, and end of October, when the Individual Defendants terminated their Contracts. Whether or not solicitation came only after termination with Good Reason cannot be considered without depositions of the key players. If termination was not with Good Reason, the restrictive covenants applied after termination.

Likewise, only Bernstein knows whether he delayed his billing prior to departure. His claim that his billing was comparable in 2013 and 2014 is not sufficient as a matter of law to prove that he did not have more business while at RSSM in 2014 that he failed to bill in anticipation of leaving, which he billed when he went to WM.

However, the prongs of the claims against Movants for breach of fiduciary duty and aiding and abetting it, are dismissed to the extent that they relate to personnel and clients, other than the Individual Defendants. RSSM did not come forward with the names of clients and other personnel that they allegedly lost. Hence, RSSM has not pointed to an identifiable loss, which is an element of these claims. *People v Grasso*, *supra*. This information was available to RSSM without discovery. Without the names of the clients and other personnel, there is only a shadowy semblance of an issue, which is insufficient to defeat a motion for summary judgment. *Jeffcoat*, *supra*. Bernstein and WM did not have to prove a negative -- that they did not wrongfully take other clients and personnel, an issue as to which RSSM has the burden of proof. *Martinez v Hunts Point Coop. Mkt., Inc.*, *supra*.

In addition, Bernstein is granted summary judgment with respect to the portions of RSSM's claims for breach of fiduciary duty and duty of loyalty relating to the Bernstein Accusations and the Write-Offs. RSSM admitted that it approved all his car expenses and that

he never signed a check. RSSM did not point to any other expenses allegedly improperly paid, or any in excess of the amount specified in Bernstein's Contract. RSSM presented no bills for 2013 and 2014 for the court to compare. RSSM did not explain how Bernstein's votes for merger caused damage, or present any evidence concerning the Write-Offs, such as the bills and clients involved. RSSM need not depose anybody to present evidence on these portions of its claims, and there is no evidence from which to infer that they caused an identifiable loss. *People v Grasso*, *supra*. Setting up Bernstein's WM voice mail before he left is a non-actionable part of preparing to leave. *Don Buchwald*, *supra*.

b. Tortious Interference with Contract and Prospective Contractual Relations

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). A competitor may be held liable for interference with an existing contract. *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-191 (1980).

Where a suit is based on interference with a non-binding economic relationship, the plaintiff must show that defendant's conduct was not "lawful" and "more culpable," such as a crime or an independent tort, or conduct intended to inflict harm on the plaintiff. *Carvel Corp. v Noonan*, *supra*, 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*, 2d Ed.

Where the interference is with an at-will contract, the contract is considered prospective only, and only tortious interference with prospective contractual relations lies. *Miller v Mount Sinai Med. Ctr.*, 288 AD2d 72, 72 (1st Dept 2001). A competitor may use persuasion to interfere with an at-will contract, but use of wrongful means is tortious. *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, *supra* at 193-194. A competitor's use of confidential or proprietary information to interfere with a prospective economic relationship is wrongful interference. *CBS Corp. v Dumsday*, 268 AD2d 350 (1st Dept 2000).

The motions for dismissal of RSSM's claims against Movant for tortious interference with contract is granted, except for the portion of the fifth cause of action for tortious interference with the Contracts of the Individual Defendants. RSSM does not identify contracts with which Movants interfered. This is evidence within RSSM's own knowledge, on an element of the claim on which it has the burden of proof, the existence of a contract. However, whether Bernstein interfered, or WM aided and abetted interference, with the Contracts of the Individual Defendants by wrongful means by using confidential information to hire them, is a subject that is exclusively within the possession of Movants. While WM argues that dismissal is warranted because the Individual Defendants were at-will employees, the use of confidential information to hire an at-will employee constitutes wrongful means. *CBS v Dumsday*, *supra*. Moreover, as previously noted, only Sokol was at-will as a matter of law.

The motions for summary judgment on the sixth cause of action for interference with prospective economic relationships are granted to the extent of dismissing the portion of the claim relating to: 1) Bernstein's Contract, and 2) clients and personnel, other than Sokol, Peltz and Ostrow. Bernstein was not an at-will employee, due to his contract of fixed duration, terminable only for cause. *De Petris v Union Settlement Ass'n, Inc.*, and *Weiner v McGraw-Hill, supra.* With respect to the Sokol, Peltz and Ostrow, for whom at-will employment is established or presents a question of fact, whether confidential information was used to recruit them is exclusively with Movants' knowledge and the motions are denied for lack of discovery. *De Petris v Union Settlement Ass'n, Inc.*; *Weiner v McGraw-Hill*; and *CBS v Dumsday, supra.* To the extent that the sixth cause of action rests on prospective economic relationships with potential clients, or relationships with unnamed former RSSM personnel, it is dismissed. RSSM failed to name any contract other than the Individual Defendants' that it would have obtained, but for tortious interference, an element of the claim on which it has the burden of proof, and for which it does not need discovery. *Vigoda v DCA Prods. Plus, Inc.*, and *Martinez v Hunts Point Coop. Mkt., Inc., supra.*

c. Conspiracy

RSSM's cause of action for conspiracy is dismissed against Bernstein and WM as redundant. A conspiracy may be alleged to connect the actions of separate defendants with an otherwise actionable tort. *American Baptist Churches v Galloway*, 271 AD2d 92, 101 (1st Dept 2000). However, conspiracy is redundant where the torts and the defendants' collusion in them are already pleaded. *Id.* Here, all of the Defendants are accused of the same Tort Claims or of aiding and abetting them. In addition, to the extent that the underlying Tort Claims have been

dismissed, the conspiracy claim fails as well. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Linden v Moskowitz*, 294 AD2d 114 (1st Dept 2002).

2. Bernstein's Counterclaim for Breach of Contract

The elements of a breach of contract claim are the existence of valid contract, plaintiff's performance of his obligations thereunder, the defendant's breach, and resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007). A party's performance under a contract may be excused by a material breach by the other party. *Cipriano v Glen Clove Lodge #1458, B.P.O.E.*, 1 NY3d 53, 63 (2003). Nonetheless, the non-breaching party loses an affirmative defense of excuse for breaching a contract, where it continues to perform in spite of a known excuse for non-performance. *Computer Possibilities Unlimited, Inc. v Mobil Oil Corporation*, 301 AD2d 70, 80 (1st Dept 2002). Where one party breaches a contract, the non-breaching party may elect to terminate the contract, or it may choose to give notice of breach, continue to perform and sue later for breach. *Albany Med. College v Lobel*, 296 AD2d 701 (3d Dept 2002); *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 900 (4th Dept 2007). By choosing not to terminate and continuing to accept the benefits of the contract, the non-breaching party surrenders the right to terminate later based on that particular breach. *Albany Med. College v Lobel, supra.*

The Bernstein Contract does not have a provision requiring notice of breach. When no time for doing an action is stated in a contract, a reasonable time is implied in law. *Heyman Cohen & Sons, Inc. v M. Lurie Woolen Co.*, 232 NY 112, 114 (1921) (Cardozo, J) (time to exercise option), citing *Pope v Terre Haute Car & Mfg. Co.*, 107 NY 61, 65 (NY 1887) (time for delivery of goods); 15 *Williston on Contracts* §48:7 (4th ed.).

A waiver is the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. *Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 184 (1982). *In Nassau Trust*, the Court of Appeals explained the difference between waiver and estoppel, but later cases of often mix their elements.[27] Because it is not a binding agreement, a waiver can be withdrawn to the extent that it is executory, provided that the party whose performance has been waived is given notice and a reasonable time to perform. *Id.* An intention to waive must be "unmistakably manifested," cannot be inferred from "doubtful or equivocal" acts, and should not be lightly presumed. *Nautilus Tile, Inc. v Turner Constr. Co.*, 2 AD3d 209 (1st Dept 2003). It is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from silence. *Barringer v Donahue*, 168 AD2d 406, 407 (2d Dept 1990). The party raising the defense of waiver has the burden of proving it. *New York v State*, 40 NY2d 659, 669 (1976).

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[27] An estoppel to deny an oral modification of a contract is analytically distinct from waiver. *Nassau Trust v Montrose*, *supra* at 184. Estoppel consists of words or actions of one party, on which the other party justifiably and detrimentally relies by changing position. *Id.* Estoppel is an equitable remedy invoked to prevent the fraud or injustice that would arise if a party were misled into acting on the belief that the other party would not enforce a contractual provision. *Id.* In order to find estoppel, the conduct upon which the party asserting the oral modification relies must be unequivocally referable to the oral modification. *Rose v Spa Realty Assoc.*, 42 NY2d 338 (1977); *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 (1999); *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413 (2013); *Tierney v Capricorn Investors, LP*, 189 AD2d 629 (1st Dept 1993). Conduct unequivocally referable to an oral modification must not be otherwise compatible with the written agreement [*Tierney v Capricorn Investors, LP*, *supra*], and must be explainable only with reference to the oral agreement [*Gotee v Global Credit Services, Inc.*, 139 AD3d 551 (1st Dept 2016)]. When the parties dispute whether an oral agreement has been formed, it is the conduct of the party advocating for the oral agreement that is determinative, although the conduct of both parties may be relevant. *Messner*, *supra* at 237-238; *Eujoy*, *supra* at 425-426. Here, RSSM does not argue estoppel or oral modification. Nor could it because Bernstein's acceptance of part of the money he was owed was consistent with his Contract and RSSM suffered no detriment from having him do the same job for less money.

Breach of contract can be waived by acceptance of non-conforming performance over a long period of time. *GM Acceptance Corp. v Clifton-Fine Cent. Sch. Dist.*, 85 NY2d 232 (1995) (question of fact whether assignee impliedly consented to purchaser's payment to assignor by not objecting when that occurred on prior sale). In the absence of prejudicial reliance on the failure to enforce a contractual provision, the innocent party does not waive its rights, particularly if it gives notice of breach. 13 Williston on Contracts §39:35 (4th ed.).[28] Where a party waives the right to terminate in the face of a known breach and there is a Written Waiver Clause, it does not waive the right to terminate for ***subsequent*** breaches. *Awards.com v Kinko, Inc.*, 42 AD3d 178 (1st Dept 2007).

The First Department recently construed a virtually identical Written Waiver Clause in a case where an employee continued to work at reduced compensation and changed duties without giving written notice of breach until five months later. *Gotee v Global Credit Services, Inc.*, 139 AD3d 551 (1st Dept 2016). In *Gotee* there was evidence that the employer could not afford to pay the contractually agreed upon salary and benefits, and the parties attempted, but failed, to negotiate a new contract. The First Department held that in the Written Waiver Clause, the employer unambiguously gave up the right to modify the employee's duties, compensation and benefits without a writing. *Id.* However, it found a question of fact as to whether the employee

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[28] "[F]orbearance to assert or insist on a right does not, by itself, constitute a waiver. A party's reluctance to terminate a contract for breach and its attempts to encourage the breaching party to adhere to its obligations under the contract should not ordinarily lead to a waiver of the innocent party's rights. Certainly, if the party who did not commit the breach brings the complaints about the performance rendered or the failure to perform to the defaulting party's attention, and continues the relationship only on the assurance of better future performance, the innocent party will not be barred from asserting its rights. It is only if the party not in default induces the other party to continue its performance or otherwise to alter its position in reliance on continued recognition of the existence of the contract despite the defective performance or nonperformance that the innocent party will not be permitted later to alter its position and claim that its obligations under the contract have been discharged." [emphasis supplied]

"waived" the no oral modification clause, which required a written waiver, by partially performing an alleged oral agreement to become a consultant at a reduced salary. The Court did not grant summary judgment based on the Written Waiver Clause for past compensation, due to a possible estoppel unequivocally referable to the acceptance of an oral modification of the employment agreement. The *Gotee* analysis combined estoppel and waiver.[29] In other cases, the First Department has held that a substantially identical Written Waiver Clause is uniformly enforced. *Awards.com v Kinko, Inc.*, 42 AD3d 178 (1st Dept 2007); *see also*, *DLJ Mtge Capital Corp. v Fairmont Funding, Ltd.*, 81 AD3d 563 (1st Dept 1011) (summary judgment granted where four prior waivers were discrete and no written waiver was produced).

Bernstein's motion for summary judgment on his first counterclaim for breach of contract is granted as to his capital account and otherwise denied. There are questions of fact as to whether Bernstein waived compensation by staying on and accepting less money from 2013 through a reasonable time before October 31, 2014, when he terminated, by participating in the decision not to pay himself, and by failing to give notice of breach. Whether or not his actions were unequivocal acts manifesting an intent to relinquish the money and for what period of time, are questions of fact. Bernstein could be found by the trier of fact to waive some, but not all of his compensation. In addition, Bernstein cannot recover for breach of contract unless he performed his contractual obligations. *Morris v 702 E. Fifth St. HDFC, supra.* Bernstein's Contract prohibited sharing confidential information while employed, and the court has found it is an issue of fact whether he did so. Furthermore, if Bernstein is correct that he was an

[29] Assuming that *Gotee* found a possible estoppel because the employer accepted reduced duties to its detriment, that factor is not present here. Bernstein accepted reduced money for performing the same job. Moreover, RSSM does not argue estoppel or oral modification. Nor could it because Bernstein's acceptance of part of the money he was owed was consistent with his Contract and RSSM benefitted from having him do the same job for less money.

employee, as he insists, and he breached his duty of loyalty by sharing confidential information, he forfeited his compensation.

Since Bernstein's Contract provided that he was entitled to the return of his capital account (his own money) after termination for any reason, he is entitled to recover it. *Gibbs v Breed, Abbot & Morgan supra.* He is granted summary judgment for the balance in his capital account on October 31, 2014, with interest from November 1, 2014. That portion of his first counterclaim is severed and the issue of the amount he is owed is referred to a Special Referee to hear and determine.

III. Sanctions/Spoliation Motion

In October 2014, the month before this action was commenced, RSSM's then attorneys, Wilson Elser, notified RSSM about its preservation obligations. 7/19/16 Sonnenberg EBT Transcript (Sonnenberg EBT), Dkt 300, pp 33-35. Bernstein filed his third-party complaint in May 2015. Dkt 163. The third-party defendants (TPDs) answered on July 3, 2015. Dkt 173. The electronic discovery process began that month. At all times since Bernstein's third-party action was commenced, RSSM and third-party, equity partner defendants Sonnenberg, Bibas, Eller, and Willinger (collectively, Partner TPDs) have been represented by the same counsel, although they changed counsel in June of 2016.[30]

On July 28, 2015, the court ordered the parties to be ready at a September 17, 2015, conference to discuss any ESI disputes. Dkt 174. There were four more conference orders during the period September 18 through December 4, 2015, that gave RSSM and the TPDs

[30] On June 6, 2016, Maurice Heller of Garvey Schubert and Barer appeared as counsel for RSSM and the Partner TBDs named in Bernstein's third-party complaint, but not for third-party defendant Berkowicz. Dkt 254. Prior to that, RSSM was represented by Katsky Korins, LP, Seji Newman and Wayne Esanu of counsel, who appeared for all of the third-party defendants named by Bernstein. Dkt 1 & 173.

extensions of time, through December 18, 2015, to file an ESI stipulation, or a letter outlining ESI disputes. Dkt 176, 180, 185 & 195. On December 22, 2015, four days after the deadline, the parties filed an ESI stipulation (ESI Stip). Dkt 204 & 205. It required the parties to search all electronic records in their possession, custody or control, not just email, with a few exceptions not relevant here. It contained search terms and twenty-nine RSSM ESI custodians. Dkt 205. The parties reserved their rights to object to production, discoverability of ESI, as well as the right to seek reimbursement for costs associated with collection, review, or production of ESI. ESI Stip, Dkt 204, ¶¶ E(1) & (2).

From December 22, 2015 through October 2016, RSSM and the TPDs obtained extensions of time to produce ESI and failed to run the searches required by the ESI Stip, in violation of orders dated February 25, May 16, May 24, and October 7, 2016. Dkt 230, 243, 244 and 284. During a June 1, 2016, conference, the court learned for the first time that RSSM might have disposed of computers and laptops containing ESI. Dkt 228. At the next conference, on July 19, 2016, RSSM agreed to produce Neil Sonnenberg for a deposition concerning the missing hardware. Dkt 256. Sonnenberg testified that as a Co-Managing Partner, beginning in March 2015, he was responsible for preserving RSSM's records. Sonnenberg EBT, pp 25 and 29-30. He said that all of the RSSM computers were backed up daily and that the firm policy was that all information should be saved on a server, not a personal computer. *Id*, pp 26, 34-39. Sonnenberg believed that Shiny Samuels, RSSM's head IT person, backed everything up daily as part of her job. *Id*, pp 25-27 & 37-38. Sonnenberg further testified that RSSM knew that it would have to cease operating in October 2015, and closed its offices on January 31, 2016. *Id*, pp 31 & 89. When RSSM closed, some of its accountants went to two firms -- JM and Marks Paneth. *Id*, p 31.

On January 12, 2016, David Kleinmann, the attorney for Bernstein's co-defendants, Ostrow, Peltz and Sokol, wrote to counsel for RSSM and third-party defendants, Seji Newman. Dkt 299. Kleinmann said that he understood that RSSM was closing and reminded Newman of his clients' obligations to preserve information relating to the action, including ESI and hardware containing it. *Id.* Kleinmann asked Newman to forward the letter to all individuals responsible for preservation, including the TPD Partners. *Id.* The record does not elucidate whether or not Kleinmann did so.

At his deposition, Sonnenberg admitted that in January 2016, RSSM told its equity partners and employees to take their hardware and laptops because it was their property and the firm did not want to pay for storage. *Id*, pp 44-45. Sonnenberg said that they were given preservation instructions, but not by him, and he did not know who gave them. *Id*, pp 41-44. He was sure that everything on RSSM's computer hardware was forensically imaged before the office closed. *Id*, pp 46-49. He said that this was done over several days by a professional, who removed the server and transferred it to JM. *Id*, pp 46-49. He did not know whether anything was deleted from local "c" drives prior to that, and he did not know how everyone saved their files. *Id*, pp 62 & 122.

Sonnenberg believed that Shiny Samuels pulled out the hard drives from all of the computers of the Individual Defendants when they left in October 2014, and out of the rest of the computers when RSSM closed. *Id*, pp 68-75. He said "in all likelihood" the brains were stored in a closet at RSSM's office and, during the move, were brought to Marks Paneth. *Id*, pp 74-75. Sonnenberg admitted that he could not say with certainty whether all of the hard drives were preserved and some may have been left in the closet. *Id*, pp 71-87. Nor could he say who had laptops. *Id*, pp 63, 69 & 73. No inventory was made of laptops and desktops. *Id*, p 85. He

could not say whether the hard drive from the controller's desktop was preserved, although he said it was backed up. *Id*, pp 79-81. The controller, Rosemarie Miranda, kept records showing the amounts due and owing to contract and equity partners, a central issue on the Individual Defendants' counterclaims for unpaid compensation and their capital accounts. *Id.*

Sonnenberg said that he knew that accounting information was needed for this litigation, not just email, and that it was preserved and provided to RSSM's bank. *Id*, pp 106-108. The bank asked for, and RSSM provided ***the bank*** with, its accounts receivable; cash receipts records relating to collections from the Individual Defendants' clients; financial statements; payroll records; distributions; expenditures; partners' expenses; partners' T & E; partners' bi-weekly distributions; and overall receipts and disbursements for 2014, 2015 and part of 2016. *Id.* It took Andrea Gonzalez a week, maybe less, to compile the information for the bank. *Id.* There is no showing that RSSM or the Partner TPDs gave this material to Bernstein.

In January or February, RSSM received a bill from its ediscovery vendor for approximately $75,000. *Id*, pp 103- 105 & 109. RSSM's partners were shocked by it. *Id.* They changed attorneys because of that and because Seji Newman had left the firm that was representing them. *Id*, p 109. It was during this period of time that RSSM obtained conference orders extending its time to produce ESI and run the searches required by the ESI Stip. Dkt 230, 243, & 244.

After Sonnenberg's deposition, on July 26, 2016, the court ordered that all hard drives taken by RSSM personnel had to be searched in accordance with the ESI Stip. Dkt 257. However, in Sonnenberg's affidavit in response to this motion, he admitted that of the twenty-nine RSSM custodians named in the ESI Stip, RSSM has eleven of their hard drives, and possibly one is in the hands of an uncooperative former partner, Martin Greenberg. 10/28/16

Sonnenberg Affidavit, Dkt 291, ¶¶ 8-9 & ESI Stip, Exhibit A, Dkt 205. Sonnenberg averred that after his deposition he learned from Sam Braginsky, a former RSSM technology employee, that the hard drives of the computers used by ten ESI custodians, including the Individual Defendants, were left in the closet "unintentionally," when RSSM left its offices on January 31, 2016, and "RSSM is unable to recover those computers from its former landlord." *Id.* It is unclear from this statement whether the landlord has them or not.[31] RSSM has the hard drives of eleven custodians and "suspects" that Greenberg has his computer, but he will not cooperate. *Id.* The balance of the hard drives for RSSM's ESI custodians were lost or destroyed. *Id.* However, Sonnenberg swears that it is "highly unlikely" that any documents not on RSSM's servers would be on the hard drives. *Id*, ¶10.

Shiny Samuels and Sam Braginsky were not deposed. Nor were any of the other RSSM personnel who might have their computers and laptops.

RSSM does not want to pay to search its servers. In support of it cross-motion to shift the cost of any further discovery to Bernstein, RSSM cries poverty. Sonnenberg's affidavit states that the firm cannot pay its technology vendor, Evolve, because Sterling National Bank (Bank), the firm's secured lender, froze its bank accounts on May 12, 2006, and took $400,000 on September 22, 2006, leaving RSSM with less than $100,000. *Id*, ¶¶ 2-6. Sonnenberg said that RSSM owes Evolve $73,000, which is less than RSSM has, but the Bank controls its funds and will not allow RSSM to pay the vendor. *Id.*

Sonnenberg further stated that RSSM's Executive Committee has not called for a capital contribution from its partners. *Id*, ¶11. Section 8(b) of the Partnership Agreement permits the Executive Committee to make a capital call for "normal business operations" or "on account of

[31] Sonnenberg testified that RSSM has a "big liability" to its landlord. Sonnenberg EBT, p 28.

special exigencies." 1/1/98 RSSM Partnership Agreement, Dkt 295, p 8. Sonnenberg does not address whether the Partner TBDs have funds to pay for discovery that they, and their firm, agreed to produce in the ESI Stip on December 22, 2015. In their memorandum of law, in a footnote, RSSM and the Partner TBDs speculate that if the firm paid Evolve, the Bank might hold them liable for conversion. 10/28/16 Memorandum of Law, Dkt 296, p. 7, fn 3. No authority is cited to support this speculation. They also argue that §8(e) of the Partnership Agreement does not require the partners to make loans to RSSM and that, if they made loans or contributions, the Bank would take the money. *Id*, p 6-7.

RSSM's current attorney, Maurice Heller, affirmed that it was his "understanding" that RSSM's prior counsel searched "all of the emails residing upon RSSM's server," pursuant to the ESI Stip. Heller Affirmation, Dkt 290 (Heller Aff), ¶2. Heller averred, based on an attached, unsworn letter from David Katsky, RSSM's former counsel, that applying the search terms to RSSM's emails generated 760,000 documents, of which 60,000 were reviewed and withheld on the ground of attorney client privilege, and the remaining 700,000 were produced to Defendants, including Bernstein. *Id* and 5/26/16 David Katsky Letter (Katsky Letter), Dkt 293.

With respect to ESI other than email, Heller said that RSSM has sixteen servers with seven terabytes of data and that it would cost $300,000 to search. Dkt 290. This statement too comes from the Katsky Letter, which quotes the discovery vendor, making it double hearsay. The Katsky Letter states that according to the discovery vendor there were 70 to 700 million pages on the servers, which is a gigantic range (up to a factor of 10,000,000) for an estimate. Katsky Letter, p 2.

In terms of proportionality, RSSM claimed that its damages caused by defections to WM were $8 to $10 million. Bibas Inj Aff, ¶52. However, that was before this court limited the

remaining Tort Claims against Bernstein and WM, as set forth above. Heller does not say that all sixteen servers were backing up data in 2013 through 2014, the crucial years for purposes of what remains in this lawsuit. Heller's affirmation pointed out that the parties had discussed modifying the search terms to further cut down on the volume of email, but admitted that this has not happened due to RSSM's failure to pay Evolve, who has been taken over by Fronteo, and holds the data hostage. *Id*, ¶¶ 3 & 4.[32] Heller also said that RSSM's former counsel ***may have*** a copy of the hard drives, but will not turn it over until the discovery vendor is paid. *Id.*

On the other hand, it is unclear that Bernstein has been denied anything that he needs to prepare for trial. CPLR 3101(a); *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 (1968). Bernstein does not say whether he has looked at the emails that were produced. His motion is based on the concept that RSSM turned over ***too much*** email, which RSSM should have pared down. There was never an order requiring RSSM to do that.

For the first time in his reply papers on the sanction motion, Bernstein raised RSSM's failure to fully comply with a conference order, dated October 7, 2016. Dkt 298. Bernstein alleges that RSSM did not produce balance sheets of RSSM for the years 2014 through December 31, 2016, which were due October 19, 2016. RSSM has not had an opportunity to respond to that allegation.

A. Spoliation

The obligation to preserve ESI begins when litigation is reasonably anticipated. *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 46 (1st Dept 2012). A party seeking

[32] The May 3, 2016 conference order memorialized that RSSM could not say whether it had run ESI searches, and that it was looking into predictive coding to save money, and gave RSSM a deadline of May 13 to file a letter concerning the cost. Dkt 244. A May 16, 2016, order extended RSSM's deadline to file the letter. Dkt 230. This was after the freeze of RSSM's bank accounts, which was not mentioned to the court during the conference.

sanctions for negligent spoliation of evidence must demonstrate: 1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction; 2) that the evidence was destroyed with a culpable state of mind; and 3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 (2015). Where the evidence is determined to have been intentionally or wilfully destroyed, or destroyed as a result of gross negligence, the relevancy of the destroyed documents is presumed, i.e., the third prong of the test need not be shown. *Id*, at 547-548 & 553; *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 (1st Dept 2016). Even where gross negligence is shown, dismissal of the complaint is warranted only where the spoliated evidence constitutes the sole means to establish a claim or defense, or where a claim or defense is otherwise fatally compromised. *Arbor Realty*, *supra*.

Trial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator, requiring the spoliator to pay costs to the injured party for the development of replacement evidence, or an adverse inference instruction at trial. *Pegasus*, *supra* at 551. An adverse inference charge can be appropriate where evidence has been negligently destroyed. *Id*, at 554.

Bernstein's spoliation motion is denied with leave to renew after the close of discovery. The state of mind of RSSM and the Partner TPDs cannot be determined on the factual record before the court. Given the lack of depositions concerning how the hard drives came to be lost, what hard drives are extant, and what has been imaged, it is impossible to know whether more than negligence was involved, what if anything was lost and whether what was lost was the sole means of proving, or fatally compromised, any of Bernstein's claims or defenses. *Arbor*, *supra*.

B. Failure to Comply with Discovery Orders & Cross-Motion to Shift Costs

CPLR 3126 provides as follows:

> Penalties for refusal to comply with order or to disclose
>
> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In discussing the statute, the Court of Appeals has explained that:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders ... as are just," including dismissal of an action .... Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.

Kihl v Pfeffer, 94 NY2d 118, 123 (1999).[33]

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[33] *See also*, *Reynolds Secur., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-572 (1978) (court "more than eminently justified" in striking answer where party disobeyed four court orders to appear for deposition); *Lasidi, S.A. v Financiera Avenida, S. A.*, 73 NY2d 947, 951 (1989) (pleading struck for refusal to appear for deposition); *Zletz v Wetanson*, 67 NY2d

A trial court has discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is "dilatory, evasive, obstructive and ultimately contumacious." *CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 (2014). The sanction under CPLR 3126 is not the same as spoliation of evidence. *Strong v City of New York*, 112 AD3d 15, 21 (1st Dept 2013). However, the ultimate penalty of striking pleadings is an extreme, harsh remedy to be used with restraint and discretion. *CDR*, *supra*, at 321. The following factors are appropriately considered and warrant striking the answer: 1) whether the conduct prejudiced the plaintiff by impeding its ability to obtain true discovery and forcing plaintiff to spend enormous amounts of money and time to prove his or her case; 2) whether misconduct was not isolated and defendants did not attempt to correct it; and 3) whether in considering a lesser sanction, the court concluded that the wrongdoing would continue if the lawsuit was allowed to proceed. *Id*, at 323.

A default judgment may be granted where conduct is particularly egregious; designed to conceal critical matters; and perpetrated repeatedly and wilfully. *Id*, at 321. Where a party's conduct is not "central to the success of the scheme to hide information from the court and the plaintiffs," the drastic sanction should not be imposed. *Id*, at 324. When granting a default judgment, "the court should note why lesser sanctions would not suffice to correct the offending behavior." *Id*, at 322. An action should, if at all possible, be resolved on the merits and that the drastic remedy of striking a pleading is appropriate only where the moving party conclusively

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711, 713 (1986) (complaint dismissal well within court's discretion for plaintiff's failure to answer interrogatories and other strategies designed to yield one-sided disclosure); *Hall v Integrity Real Estate Props, Inc.*, 124 AD3d 1270, 1271 (4th Dept 2015) (trial court did not abuse discretion is dismissing complaint where plaintiff's failure to comply with discovery was willful and contumacious). In *Kihl*, the plaintiff's complaint was stricken for flouting two court orders to answer interrogatories concerning the alleged design defect for approximately a year and three months; the plaintiff had served an interrogatory response that was not meaningful.

demonstrates that the nondisclosure was willful, contumacious or due to bad faith. *Commerce & Indus. Ins. Co. v Lib-Com, Ltd.*, 266 AD2d 142, 145 (1st Dept 1999) (deficiencies in document production not so egregious as to outweigh general policy that actions should be resolved on merits), citing *Remuneration Planning & Services Corp. v Berg & Brown, Inc.*, 151 AD2d 268, 269 (1st Dept 1989).

Here, RSSM and its partners have come close to the line, but the court will give them the benefit of the doubt with respect to their understanding of their obligation to fund their discovery obligations, provided that there is no future non-compliance, or tardy production. With respect to ESI other than email, the court does not agree that the RSSM's partners, especially the Partner TPDs, have no financial obligations. CPLR 3126 makes clear that RSSM's partners are responsible for its discovery obligations, as well as their own. The RSSM Partnership Agreement does not govern discovery. RSSM brought this action. Its partners controlled the decision to bring it. Having done that, they must fund reasonable ESI searches and production. There is no showing that the partners have no funds or that their funds were seized by the Bank. Further, the ESI Stip was agreed to by the TPDs, not just RSSM. It was an agreement between the parties, not imposed by the court.

Nevertheless, the ESI Stip preserved their right to object to discovery demands, and this court has discretion to modify it to avoid unreasonable expense. CPLR 3103(a). Given the limitation on the issues left to try and the importance of proportionality when crafting ESI discovery, the court will revisit the scope of ESI searches and limit them to what is reasonably necessary to prepare for trial, at the next discovery conference. CPLR 3101(a); *Allen, supra.* The court warns RSSM and the TPDs that they will have one chance to run more limited searches and produce ESI, at their own expense. In addition, RSSM must produce the balance

sheets previously ordered to be produced.

The cross-motion to shift costs is denied. It would be monumentally unfair to shift the cost of ESI to Bernstein. Nevertheless, ESI discovery is not a punishment administered to an adversary to gain an advantage. Bernstein is required to review the email that has been produced and determine what else he needs to defend and prosecute before any final decision is made as to what needs to be searched by RSSM and the TPDs. Accordingly, it is

ORDERED that the motion by WeiserMazars LLP for summary judgment dismissing the amended complaint of RSSM CPA LLP (Seq 002) is granted solely to the extent of dismissing RSSM's seventh and eighth causes of action for a preliminary injunction and for conspiracy, and portions of RSSM's fourth through sixth causes of action for aiding and abetting breach of fiduciary duty, tortious interference with contract and tortious interference with prospective contractual relationships, to the extent indicated in this opinion, and the motion is otherwise denied; and it is further

ORDERED that the motion by Michael Bernstein for summary judgment dismissing RSSM's amended complaint and for summary judgment on his first counterclaim for breach of contract (Seq 003) is granted solely to the extent of dismissing RSSM's seventh and eighth causes of action for a preliminary injunction and for conspiracy, and portions of RSSM's second, third, fifth and sixth causes of action for breach of fiduciary duty, breach of duty of loyalty, tortious interference with contract and tortious interference with prospective contractual relationships, to the extent indicated in this opinion, and granting Michael Bernstein partial summary judgment as to liability against RSSM CPA LLP on the portion of his first counterclaim for the balance in his capital account on October 31,2014, with interest from November 1, 2014, and the motion is otherwise denied; and it is further;

ORDERED that the portion of Michael Bernstein's first counterclaim for the balance in his RSSM capital account is hereby severed and shall continue as a separate action, and the issue of the amount owed to him, with interest, is referred to a Special Referee to hear and determine; and it is further

ORDERED that within twenty days of the date of this decision and order, Michael Bernstein shall serve a copy of it with notice of entry, on the Clerks of the Court and the Trial Support Office, at cc-nyef@nycourts.gov and trialsupport-nyef@nycourts.gov, and said Clerks are directed to note the severance in the preceding decretal paragraph in their respective records; and it is further

ORDERED that within twenty days of the date of this decision and order, Michael Bernstein shall serve a copy of it with notice of entry, as well as a completed information sheet,[34] on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date; and it is further

ORDERED that the motion by Michael Bernstein for spoliation and sanctions (Seq 004) is granted solely to the extent of granting Bernstein leave to renew the sanctions motion after the close of discovery, and ordering the parties to appear for an in-person discovery conference on February 2, 2017, at 10:30 a.m., prior to which Bernstein shall review the email already produced and, by January 13, 2017, RSSM shall produce its balance sheets for the years 2014 through December 31, 2016, and the motion is otherwise denied; and it is further

ORDERED that RSSM's cross-motion to shift the cost of ESI review and production to

[34] Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".

Bernstein is denied.

Dated: January 6, 2017

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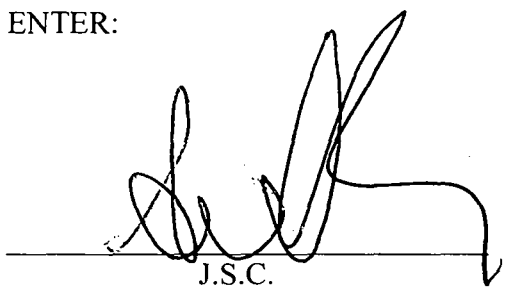

J.S.C.

SHIRLEY WERNER KORNREICH