Heritage Auctioneers & Galleries, Inc. v Christie's, Inc.
2018 NY Slip Op 30255(U)
February 8, 2018
Supreme Court, New York County
Docket Number: 651806/2014
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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HERITAGE AUCTIONEERS & GALLERIES, INC. d/b/a HERITAGE AUCTIONS, and HERITAGE ART & COLLECTIBLES, INC.,

Plaintiffs, Index No. 651806/2014

- against -

CHRISTIE'S, INC., MATTHEW RUBINGER, RACHEL KOFFSKY, and CAITLIN DONOVAN,

Defendants.
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MASLEY, J.:

In motion sequence 007, plaintiffs Heritage Auctioneers & Galleries, Inc. (HAGI) and Heritage Art & Collectibles, Inc. (HACI) (collectively, Heritage) move, pursuant to CPLR 3212, for partial summary judgment on liability with respect to the first through fifth causes of action against defendants Christie's, Inc. (Christie's) and Matthew Rubinger. In motion sequence 008, defendants move, pursuant to CPLR 3212, for partial summary judgment as follows: (1) dismissing the second and fourth through ninth causes of action; (2) dismissing all causes of action asserted by HACI; and, (3) limiting Heritage's alleged damages with respect to any of the remaining causes of action.[1]

Background

Plaintiff HAGI is an auction house specializing in niche collectibles. It is alleged that HAGI created a lucrative, specialized market category, called Luxury Accessories, to sell rare, high-end, luxury handbags. According to the complaint, co-plaintiff HACI is

[1]Motion sequence nos. 007 and 008 are consolidated for disposition.

related to HAGI by common ownership and, "[f]or managerial purposes," both HACI and HAGI report "combined performance metrics and abbreviated financial results for their respective participation in the Luxury Accessories business group" (the Heritage Luxury Accessories Business Group) (amended complaint, ¶ 6).[2] With respect to the Heritage Luxury Accessories Business Group, HACI purchases inventory directly from third-parties and from auctions held by HAGI, and HAGI sells the inventory to the public at large. (*id.*). Heritage claims that they have invested millions of dollars and years of trial and error efforts so as to create this niche market. In bringing this lawsuit, Heritage alleges that Christie's, the largest auction house in the world, "launched a corporate raid to misappropriate Heritage's creation" (*id.*, ¶ 1). Specifically, Heritage alleges that Christie's induced the head of the Heritage Luxury Accessories Business Group, Matthew Rubinger and two key members of its staff, Rachel Koffsky and Caitlin Donovan, to breach their respective employment contracts and engage in unfair business practices.

The amended complaint alleges the following causes of action: as against Christie's, unfair business practice; aiding and abetting breach of fiduciary duty; and tortious interference with employee contracts; and as against Rubinger, Koffsky, and Donovan, breaches of fiduciary duty/duty of loyalty; and breaches of contract.

In the amended complaint, Heritage claims that HAGI protects its trade secrets through written agreements with employees, "prohibiting the disclosure of those trade secrets, including its customer and dealer lists, customer requirements, methods of

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[2] In the amended complaint, Heritage alleges that HACI is a subsidiary of nonparty Heritage Capital Corporation. HAGI and Heritage Capital Corporation have "similar ownership" and are "sub-chapter 'S' corporations under United States Treasury regulations" (amended complaint, ¶ 6).

doing business, computer programs, compilations of information, records, specifications, sales procedures, processes and other confidential information" (amended complaint, ¶ 7). As noted, defendant Rubinger was a director at HAGI and served as the department head of the Heritage Luxury Accessories Business Group (*id.*, ¶ 8). His employment was subject to a written contract that ran to December 31, 2014, and included a post-employment non-compete covenant, a post-employment covenant not to solicit Heritage's employees or customers, and a covenant not to use or disclose HAGI's trade secrets (*id.*). Defendant Koffsky served as Director of Operations of the Heritage Luxury Accessories Business Group (*id.*, ¶ 9). Defendant Donovan was the Director of Consignments in the same department (*id.*, ¶ 10). Koffsky and Donovan signed agreements, which provided that they would maintain HAGI and any of its operating subsidiaries' trade secrets as confidential, though neither agreement included any non-compete provisions nor set forth any specific term of employment.

Together, Rubinger, Koffsky, and Donovan comprised the entire management team for the Heritage Luxury Accessories Business Group (*id.*, ¶ 11). Heritage describes themselves as the "global leader" in the luxury accessories business (amended complaint, ¶ 13), and claims that they "developed the first Luxury Accessories collectibles business" (Rohan aff., ¶ 8). Heritage claims that before it developed that business, competitors sold individual handbags and other luxury accessory collectibles as only part of larger sales of couture and private collections of celebrities and others, but no one focused on buying and selling vintage designer bags and other fashion accessories as a category unto itself (*id.*).

HAGI hired Rubinger in 2010, shortly after his graduation from college, and promoted him as a "star" in the business, funding an extensive public relations

campaign to make Rubinger the "face" of the Heritage Luxury Accessories business (amended complaint, ¶¶ 17, 19). Heritage claims that it "hired an outside expert to take Rubinger to Hong Kong and Japan and introduced him to the most valuable, coveted, and confidential supply sources in Asia" (*id.*, ¶19).

Rubinger's employment was at all times subject to an employment agreement, first, a two-year agreement dated August 26, 2010, and, second, another two-year agreement dated April 30, 2012 (respectively, the 2010 and 2012 Employment Agreement[s]). Both Employment Agreements included the following express covenants: Rubinger would not use or disclose HAGI's trade secrets in any other employment; Rubinger would not compete with Heritage in the North American auction market post-employment for a specified period of time; and Rubinger would not solicit Heritage's employees (amended complaint,¶ 28). The nondisclosure provision of the 2012 Employment Agreement defines "trade secrets and confidential information" as information:

> "not previously known or made available to the public or Employee, consisting of, but not limited to, information relating to the following: (a) costs estimates, terms, proposals and projections, (b) pricing estimates, terms, proposals and projections, (c) actual or proposed contract or investment terms, including terms relating to the development, operation, business cooperation, financing or funding of the business of the Employer and/or the Employer's Affiliates, projects, sales or other business activities, (d) financial statements, financial information or financial projections, whether current, historical, projected or pro forma, (e) actual and proposed project structures, transaction structures, organizational structures, personnel plans or human resource development or training plans, (f) actual or proposed marketing, product development, product distribution plans or roll-out plans, (g) plans, proposals, economic models, economic projection and due diligence materials relating to acquisitions or development projects under consideration, (h) licenses, patents, know how rights, technical specifications, product descriptions, product modifications and descriptions and trade secrets, (i) memoranda, opinions, comments and advice of legal, tax or business consultants, (j) information relating to business relationships with past, present and proposed customers and

> dealers, service providers or advisors relating to projects or business, (k) documents, information and reports relating to customer and dealer lists, customer surveys, customer comments, customer suggestions, call on customers and potential customers, and the like, (l) formulas, patterns, devices, secret inventions, processes, computer programs, compilations of information, records, specifications, sales procedures, methods of doing business, and other confidential information (all of which are hereinafter referred to as "Trade Secrets and Confidential Information"), which are owned by the Employer and which are used in the operation of the business of the Employer or any of the Employer's Affiliates"

(Rohan aff ¶ 2).

The nondisclosure provision further provides that he:

> "shall not disclose any of the Trade Secrets and Confidential Information, directly or indirectly, or use them in any way, either during the Employment Term or at any time thereafter, except as required in the course of employment under this Agreement. All such Trade Secrets and Confidential Information, whether prepared by Employee or otherwise coming into Employee's possession, shall remain the exclusive property of the Employer and shall not be removed from the premises of the Employer unless necessary for the business of the Employer, or in any event shall be promptly delivered to the Employer upon termination of this Agreement..."

(*id.*).

The restrictive covenant provision of the 2012 Employment Agreement provides that such "Trade Secrets and Confidential Information" are known by him "solely by virtue of [his] employment with [HAGI]" and "provide [HAGI] with a competitive advantage over those who do not have access to such information" (*id.*, ¶ 4). As a result of the fact that, "disclosure or use of such Trade Secrets and Confidential Information" would "provide Employee with an unfair advantage if the Employee were to engage in a business that is competitive with the business of the Employer and the Employer's Affiliates," Rubinger agreed that during the term of the 2012 Employment Agreement, and for twenty-four months following the termination of the agreement for any reason, to not:

> "engage or participate in, or own any interest in, provide any financing for,

> perform any service for, or act in any other capacity for, any business or organization which engages or participates, directly or indirectly, in the business of auctioning collectibles anywhere in North America that is competitive with the collectibles auctioning business of the Employer or any of the Employer's Affiliates..."

(*id.*, ¶4, 4[a][i]).

According to the 2012 Employment Agreement, Rubinger acknowledged and agreed that, "enforcement of this section will not interfere with [his] ability to pursue a proper livelihood" because he "has no experience in the business of collectible auctioneering in live forums or proprietary Internet auctions, ... and can make a living with [his] talents without entering into the auction field" (*id.*, ¶ 4[a][i]). According to this same paragraph, Rubinger "further acknowledge[d] and represent[ed] that [he] is capable of pursuing a career in the collectible business without soliciting" Heritage customers and "agree[d] that due to the nature of [Heritage's] business, the restrictions set forth in this Agreement are reasonable as to time, scope of activity and geographic area" (*id.*).

The non-compete provision would be in effect for a period of twenty-four months from the termination of Rubinger's employment for any reason and prohibited Rubinger from, among other things, soliciting Heritage employees and/or customers (*id.*, ¶ 4[a][i]–[iv]). The employment agreement further provided that, in the event that this section were found unreasonable by any court, "and for that reason unenforceable, then such term, restriction, covenant or promise shall be deemed modified to the extent necessary to make it enforceable by such court or governmental entity" (*id.*, ¶ 4[b]).

As noted, the agreements signed by Koffsky and Donovan only included a "Trade Secrets" provision (*id.*) (the Trade Secret Agreement[s]). The Trade Secret Agreements provide that "as a material condition to employment with [HAGI] or any of

the its operating subsidiaries (the 'Employer')," Koffsky and Donovan understand and agree that:

> "During the term of employment you will have access to and become familiar with various trade secrets, consisting of formulas, patterns, devices, secret inventions, process, computer programs, compilations of information, records, specifications, sales procedures, customer requirements, customer and dealer lists, methods of doing business and other confidential information (hereinafter referred to as "Trade Secrets") which are owned by Employer and which are used in the operation of the business of the Employer. The Employee shall not disclose any of the Trade Secrets, directly or indirectly, nor use them in any way, except as required in the course of his/her employment. All files, records, documents, drawings, specifications, information, data and similar items relating to the business of the Employee, whether prepared by the Employee or property of the Employer shall not be removed from the premises of the Employer under any circumstances, without prior written consent of the employer, and in any event shall be promptly delivered to the Employer upon termination"

(*id.*).

According to Gregory Rohan, Heritage's president, Rubinger was allowed to select both Koffsky and Donovan as part of his "team" (Rohan aff., ¶ 28). Neither defendant had any prior auction experience (*id.*). "Although Rubinger, Koffsky and Donovan were supported by administrative staff" and "the occasional intern," they were the "only dedicated Luxury Accessories employees until April 2014" (*id.*, ¶ 30).

Rubinger resigned from his position on May 19, 2014 (*id.*, ¶¶ 31, 49). Koffsky and Donovan resigned by email the same day (*id.*). According to Heritage, Christie's induced Rubinger to leave the Heritage's Luxury Accessories Business Group and "take the entire Luxury Accessories management team," *i.e.*, Koffsky and Donovan, with him (amended complaint, ¶ 32). Heritage alleges that, prior to their resignations, the individual defendants used their positions of trust and confidence with Heritage to obtain confidential information from Heritage for their later use at Christie's (*id.*, ¶ 34). For instance, by way of example, Heritage claims that, "[a]n analysis of Rubinger's

computer activity shows that from April – May 2014, he repeatedly accessed a file titled 'top 100 luxury buyers,' a file that he has not previously accessed in the normal course of his work" (Rohan aff, ¶ 40). Similarly, days before resigning, Rubinger allegedly asked Rohan if Koffsky could attend their monthly strategy meeting, held on May 14, 2014, which she had never attended and which he had never asked for her to attend (*id.*, ¶ 41). Rohan agreed to allow Koffsky to attend and among the topics discussed at the meeting were future auctions, growth and profits margins, international expansion of the department, digital advertising, and a potential joint venture with a major upscale department store, among others (*id.*). Following their departure, Rubinger, Koffsky and Donovan all signed employment contracts with Christie's (amended complaint, ¶¶ 36-37).

Christie's employed Rubinger out of its Hong Kong office (*id.*, ¶¶ 46-47). However, Heritage alleges that Rubinger is still in direct competition with Heritage as he is actively involved in "online internet auctions, with bids and customers from all over the world, which are directly marketed to wealthy North American customers of luxury accessories (*id.*, ¶ 46). Moreover, Heritage asserts that, while Rubinger is technically working out of the Hong Kong office, Koffsky and Donovan set up and operate Christie's New York Luxury Accessories group (*id.*, ¶ 47). Christie's did not previously have a Luxury Accessories group in New York (*id.*). The Heritage Luxury Accessories Business Group, meanwhile, was left with a single, newly-hired hourly employee with no prior auction experience and a $3.5 million inventory of bags that Rubinger had purchased and left with no instruction as to how to sell (Rohan aff., ¶ 51). When Heritage reached out to the individual defendants to "at least help with transitioning matters," Rubinger offered to help for two weeks, but because he was already under

contract with Christie's, any such help would be conditioned on Christie's permission and Heritage's release of all of its legal claims (*id.*, ¶ 53).

Heritage maintains that, in the twelve months that followed Rubinger's departure, its luxury accessories profits declined by 27 % (Rohan aff, ¶ 60). According to Rohan, after the individual defendants' departure, it "struggled to simply break even" (*id.*).

Christie's first contacted Rubinger on October 31, 2013 (Rubinger tr 22:14-20; 26-28). Rubinger's employment agreement with Christie's is dated May 16, 2014 and lists "Christie's Hong Kong" as the counter-signing party ("Rubinger-Christie's agreement"). Pursuant to the Rubinger-Christie's Agreement, Rubinger took the title of Senior Vice President, International Director, Handbags & Accessories, 20th and 21st Century Culture - Asia (*id.*). Christie's Hong Kong "operates under the Christie's International plc umbrella, but is a separate company that is located in Hong Kong and auctions collectibles in Hong Kong (defendant's Rule 19-A Statement, ¶ 89, citing Rubinger aff., ¶ 3 and Rubinger-Christie's Agreement). According to Heritage, there is no "separate Christie's Hong Kong website" and a search of "Christie's Hong Kong" on the internet, simply brings up www.christies.com (Rohan aff, ¶ 57).

Donovan and Koffsky also entered into employment agreements with Christie's dated May 16, 2014. As noted, unlike Rubinger, Donovan and Koffsky had no non-compete agreement with Heritage and were hired to work out of Christie's New York office. There, Donovan and Koffsky are responsible for executing handbag sales across Christie's multiple platforms, including live auctions, online auctions, and the Handbag Shop, Christie's online retail platform (defendant's Rule 19-A Statement, ¶¶ 95-97).

According to Christie's, the company has taken a number of precautions to avoid

infringing on Heritage's interests, such as structuring Rubinger's employment to be with Christie's Hong Kong and focusing on auctions conducted in Hong Kong (*id.*, ¶¶ 102-104; Rubinger aff, ¶¶ 12-14). Although bidders at such auctions need not be present in Christie's Hong Kong's premises and may bid over the phone or the internet (*id.*, ¶ 105, citing Rubinger aff, ¶ 12). Christie's contends that such auctions are not marketed in North America (*id.*). However, Heritage maintains that Christie's website lists all of its worldwide operations, including auctions, to customers in North America (Rohan aff, ¶ 56). Heritage also claims that the "majority of bidders at live auctions are not physically present at the auction" (*id.*, ¶ 57).

For his part, Rubinger states in an affidavit that he was instructed "upon beginning work at Christie's Hong Kong Ltd. that [he] was not to have any involvement with Christie's Inc. Handbags and Accessories Department (*i.e.*, the Christie's United States business)," and that, "the same instruction was related to the relevant Christie's Inc. personnel" (Rubinger aff, ¶ 14). Rubinger also states that he was "instructed to have no business-related contacts with Caitlin Donovan and Rachel Koffsky," and "not to use or disclose to Christie's any confidential information relating to the business of Heritage" (*id.*). Finally, Rubinger claims that, "because of a non-solicit provision in [his] agreement with Heritage, [he was] instructed not to have contact with any client of Heritage that became known to [him] while [he] was employed at Heritage" (*id.*). Rubinger contends that he has "followed all of these instructions without exception" (*id.*). Insofar as Heritage asserts that Rubinger visited a business in New York on its customer list to solicit consignments for Christies, Rubinger claims he "cannot recall" this instance or comment on it (*id.*, ¶ 15). Rubinger also disputes Heritage's assertion that he obtained or took any confidential materials from Heritage prior to his resignation

(*id.*, ¶ 17). As concerns the meeting with Rohan, in May of 2014 that was attended by Koffsky, Rubinger asserts that he actually asked Koffsky to participate in that meeting so as to prevent Rohan from discussing certain confidential information with him in light of his imminent departure (*id.*, ¶ 19). Rubinger claims that, in particular, he did not want to discuss a certain real estate transaction Heritage was planning to undertake and knew that if Koffsky attended the meeting, Rohan would not discuss it (*id.*).

Discussion

On a motion for summary judgment, a court's function is one of issue finding, not issue determination (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1st Dept 1995] [quotation and citation omitted]). The movant must establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] [citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, both sides move for partial summary judgment: plaintiffs with respect to liability on their claims for unfair business practice, aiding and abetting breach of fiduciary duty and tortious interference against Christie's and on their claims for breach of fiduciary duty/loyalty and breach of contract against Rubinger; and defendants with respect to HAGI's claims against Christie's for abetting breach of fiduciary duty and HAGI's claims against the individual defendants for breach of fiduciary duty/loyalty and breach of contract, as well as on all claims asserted by HACI. Defendants also move to limit damages with respect to all causes of action. The court will address each of these causes of action in turn, however, to the extent that the claims against Christie's are, at least in part, dependent on the claims against the individual defendants, the court will address those claims first.

Claims Against Rubinger

Heritage asserts two claims against Rubinger: breach of fiduciary duty/duty of loyalty (4th cause of action) and breach of contract (5th cause of action). Heritage argues that partial summary judgment is warranted on these claims because Rubinger breached the 2012 Employment Agreement with Heritage by (1) breaching the term of the Agreement; (2) breaching the non solicitation covenant by helping Christie's recruit Koffsky and Donovan for employment; (3) and by breaching his non compete covenant through his worldwide auction activities. Heritage also argues that, as an employee and a manager, Rubinger owed Heritage fiduciary duties of good faith and loyalty, which he breached by, among other things, revealing confidential information regarding Heritage's business operations to Christie's during his recruitment.

In opposition, defendants argue that the non compete covenant, which is governed by Texas law under the terms of the 2012 Employment Agreement, is unenforceable, and, thus, cannot support a claim for breach of contract. Likewise, defendants argue that the non solicitation covenant is unenforceable because it is overbroad and unreasonable as drafted. As concerns Rubinger's early resignation, defendants contend that Heritage's failure to establish damages bars any claim for breach of contract as a result. Finally, with respect to the fiduciary duty claim against Rubinger, defendants argue that there is no evidence Rubinger disclosed confidential information to Christie's and, in any event, that such claim is duplicative of the breach of contract cause of action.

Breach of Contract

Paragraph 10 of Rubinger's employment agreement with Heritage, "Governing Law," provides that it shall be "governed and construed in accordance with the laws of

the state of Texas" (¶ 10). Under Texas law, to be enforceable, a non compete covenant must first be "ancillary to or part of an *otherwise enforceable agreement* at the time the agreement is made" (*31-W Insulation Co., Inc. v Dickey,* 144 SW 3d 153, 157 [Tex App 2004], citing Tex. Bus. & Com. Code Ann. § 15.50 [Vernon 2004] [emphasis in original]). To make this determination, a court must "set aside the Agreement's noncompete covenants and determine whether any other promises remain to bind the parties under the agreement," and "examine the remaining promises to ensure that ... [they] are non-illusory promises that the parties are in fact bound to perform" (*id.*). Here, in light of the fact that the 2012 Employment Agreement guarantees Rubinger a term of employment, salary, bonus compensation, and contains a number of other promises the parties are bound to perform, the Agreement is clearly "otherwise enforceable" apart from the non compete covenant.

Next, to be enforceable, the non compete covenant must be reasonable as to time, geographical area, and scope of activity to be restrained, and it must not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee (*Cobb v Cave Publishing Group, Inc.,* 322 SW3d 780, 783 [Tex App 2010]). A restraint will be found unreasonable if it is "broader than necessary to protect the legitimate interests of the employer" (*id.*). The question of "[w]hether a covenant imposes a reasonable restraint on trade is a question of law for the court" (*id.*). If a court determines that the limitations as to time, geographical area, or scope of activity are unreasonable, the court shall reform the covenant so as to make it enforceable (*id.*, citing Tex. Bus. & Com. Code Ann. § 15.05[a] [Vernon 2002]).

As discussed above, the 2012 Employment Agreement with Heritage prohibited Rubinger from competing with Heritage during the term of his employment and for a

period of twenty-four months following termination of his employment by providing services for "any business or organization which engages or participates, directly or indirectly, in the business of auctioning collectibles anywhere in North America that is competitive with the collectibles auctioning business of the Employer or any of the Employer's Affiliates" (¶ 4[a][i]). Defendants contend this non compete covenant is impermissibly overbroad because it prohibits Rubinger from working or performing "in any capacity for a competitor," citing *McNeilus Cos. v Sams* (971 SW2d 507, 511 [Tex App 1997]). In *McNeilus Cos.,* the court found that the defendant was engaged to work for a competitor in a different capacity from the one in which he was employed by the plaintiff, which is what rendered the restraint in that matter unreasonable. The restraint here is identical to that in *McNeilus* since here it would prohibit Rubinger from working as a janitor for Sotheby's London office or in Christie's Amsterdam mailroom, as defendants contend in their opposition memorandum of law. Accordingly, the restraint on Mr. Rubinger is precisely the unreasonable restraint on trade prohibited in Texas by McNeilus. However, Texas Law, §15[a] directs the court to reform the unreasonable provision to transform it into a reasonable provision. According to *McNeilus*, prohibiting the identical activity would be a reasonable restraint. Since Mr. Rubinger's actual role at Christie's - as the international director of its luxury accessories division - is the mirror image of his former role at Heritage, where he served as the department head of the Heritage Luxury Accessories Business Group, the scope of activity, as modified by the court, from which Rubinger is prohibited in engaging is reasonable.

Turning to the time limitation, Texas courts have held that two years is a reasonable limitation as to time in covenants not to compete (*e.g.*, *Gallagher Healthcare Ins. Servs. v Vogelsang,* 312 SW3d 640, 655 [Tex App 2009]; *Butler v*

Arrow Mirror & Glass, Inc., 51 SW3d 787, 790-91 [Tex App 2001]). Defendants do not contest the reasonableness of the time limitation.

As concerns the scope of the geographic area, *i.e.*, North America, Heritage argues that it is reasonable because "it tracks the specific areas in which he managed a business unit on Heritage behalf," and prohibits him only "from working for a company that engages in activities in North America that are competitive with Heritage's business (plaintiffs reply memo, mtn. seq 007, p. 4). To be reasonable, geographic restrictions must be commensurate with the territory in which the employee worked during his employment with the employer (*Butler*, supra, 51 SW3d at 793). Texas courts have upheld "covenants with wide geographic areas" where "the area covered constitutes the employee's actual sales or work territory" *(M-I LLC v Stelly*, 733 F Supp 2d 759, 798 [SD Tex 2010]). "Even a worldwide non-competition agreement may be upheld under circumstances where determining the scope of the geographical area of former employment was difficult" (*Daily Instruments Corp. v Heidt,* 998 F Supp 2d 553, 567 [SD Tex 2014] [citing *See Learn2.com, Inc. v Bell,* No. 3:00–CV–812–R, 2000 US Dist LEXIS 14283, at *31 (ND Tex July 20, 2000).

For instance, in *M-I LLC,* supra, the District Court found that the broad geographic scope did not make the covenant not to compete unenforceable in light of the defendant's upper management position, where he was responsible for the company's relationship with major international clients, and especially because he possessed intimate knowledge of sensitive company information, including trade secrets (733 F Supp 2d at 799). Substantially the same conclusion can be reached with respect to Rubinger's non compete covenant here: he was the head of the Heritage Luxury Accessories Business Group, he maintained critical relationships with

both Heritage's buyers and consignors, and he acknowledged in his employment agreement that, by virtue of his position, he was privy to sensitive company information, including trade secrets.

Moreover, as Rubinger acknowledged in the employment agreement, "due to the nature of Employer's and its Affiliates' business, the restrictions set forth in this Agreement are reasonable as to time, scope of activity and geographic area" (¶ 4[a][i]). Just as importantly, as Rubinger further acknowledged, these restrictions would not "interfere with [his] ability to pursue a proper livelihood" because he could "make a living with [his] talents without entering into the auction field" (*id.*). This fact is further borne out by the job offers Rubinger received from such luxury conglomerate companies such as LVMH, which led to the 2012 Employment Agreement, Rubinger's second employment contract with Heritage (Rohan aff., ¶ 25).

In short, based on the foregoing, the non compete covenant is plainly reasonable and enforceable. The only issue left to determine is whether Rubinger violated the covenant while working out of Christie's Hong Kong office. Because of the nature of the auction business, in today's internet age, it cannot be said that you must be present in North America to affect commerce in North America. Defendants concede as much by acknowledging that customers can bid in Hong Kong auctions without being present in Hong Kong. However, whereas the issue of the non compete covenant's enforceability is a legal one for the court, the issue of whether Rubinger violated the non compete covenant is a factual one. Whether the noncompete was breached is a triable issue of fact that cannot be determined on this motion.

Turning to the other allegedly breached provision of Rubinger's contract, the non solicitation covenant, defendants argue that this provision is likewise overbroad and

unreasonable as drafted, and is, therefore, unenforceable. Under Texas law, non solicitation covenants must generally meet the same criteria as non compete covenants in order to be enforceable (*Marsh USA Inc. v Cook*, 354 SW 3d 764, 768 [Tex 2011], citing Tex. Bus. & Com. Code Ann. § 15.05). Agreements not to disclose trade secrets and confidential information, however, "are not expressly governed" by section 15.50 of the Texas Business and Commerce Code Act (*id.*).

As set forth above, the non solicitation covenant in the 2012 Employment Agreement prohibits Rubinger from soliciting for employment or recommending "to any other person that such other person employ or solicit for employment, any then current employee" for a period of 24 months following his employment (¶ 4[a][ii]). The agreement likewise prohibits Rubinger, for a period of twenty-four months, from soliciting, attempting to solicit or inducing any Heritage customers to not do business with Heritage or to divert any business of such customer from Heritage, and from interfering with any relationship between Heritage and any of its "respective customers, clients, suppliers, consultants, or employees" (*id.*, ¶4[a][ii] and [iii]).

Although the non solicitation covenant in Rubinger's employment contract is reasonable and enforceable for all the same reasons his non compete covenant is reasonable and enforceable, the claim with respect to Rubinger's solicitation of Koffsky and Donovan must nonetheless be dismissed. Even if Rubinger solicited Koffsky and Donovan to resign with him, as Heritage argues, the prohibition, by its terms, only applies to the "period of twenty-four (24) months *after* the termination of [his] employment" (*id.*, ¶4[a][ii] [emphasis added]). Here, as Heritage's president Gregory Rohan attests in his affidavit, Rubinger, Koffsky and Donovan all notified him that they would be resigning the morning of May 19, 2014 (Rohan aff., ¶ 48-50). By Heritage's

own account, any soliciting by Rubinger of Koffsky and Donovan took place *prior* to his resignation.

Finally, as concerns the term of employment, it is not disputed that Rubinger breached the 2012 Employment Agreement by resigning in May of 2014, some seven months before completing the full term of his employment. Whether Heritage can ultimately establish damages as a result of this breach, however, is a matter for trial and not properly determined on this summary judgment motion.

Breach of Fiduciary Duty

An employee owes a fiduciary duty to his employer as a matter of law, and is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000] [internal quotation marks and citation omitted]). Defendants argue that Heritage's breach of fiduciary duty claim against Rubinger is unsupported by the record and, in any event, duplicative of the breach of contract claim. At this point, however, whether Rubinger disclosed confidential information about Heritage's luxury accessories business to Christie's during his recruitment or at some other time is a question of fact. Heritage has alleged that Rubinger, Koffsky, and Donovan purposefully accessed various customer lists and other sensitive and/or confidential files prior to their departure for Christie's. Although defendants deny that they misappropriated any Heritage information, "there are factual questions as to what information had been taken and whether that information was improperly used" by defendants (*Don Buchwald & Assocs., Inc. v Marber-Rich,* 11 AD3d 277, 279 [1st Dept 2004]).

To the extent that defendants contend that the breach of fiduciary duty claim is

duplicative of the breach of contract cause of action, "conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out the relationship created by contract which is nonetheless independent of such contract" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). As an employee and director entrusted with highly sensitive information, Rubinger's fiduciary duty to Heritage was not based upon his employment agreement alone, and it is possible for a trier of fact to find that he violated his fiduciary obligation to Heritage independent of any obligation contained in his employment agreement.

Claims Against Koffsky and Donovan

In seeking summary judgment dismissal of the claims against Koffsky and Donovan, defendants argue that Koffsky and Donovan were both free to resign from their employment and there is no evidence in the record that either defendant disclosed any alleged trade secrets. As noted above, the Trade Secret Agreements signed by Koffsky and Donovan only contain a single prohibition on disclosing "trade secrets." The Trade Secret Agreements contain no choice of law provision, and, therefore, New York law applies as both defendants are New York residents who worked out of Heritage's New York office.

To be sure, to the extent that Heritage claims that Koffsky and Donovan breached their fiduciary duties to the company by resigning and/or by failing to notify Heritage of Rubinger's planned resignation, neither action constitutes a breach of fiduciary duty. Similarly, to the extent that Koffsky attended a digital marketing class paid for by Heritage, wherein she created a PowerPoint presentation describing Heritage's luxury accessories business which was later purportedly shown by Rubinger to Christie's, it is unclear how this constitutes a breach of fiduciary duty. Koffsky

presented the PowerPoint presentation to her entire class, thus undermining any claims by Heritage concerning trade secrets or confidentiality. Further, there is no evidence in the record that Koffsky took the class with any intent of competing with Heritage.

However, to the extent that Koffsky and Donovan may have taken documents and other sensitive materials in the days leading up to their resignation, an issue of fact exists as to whether they may have breached the Trade Secret Agreements. As indicated above, that document provides that:

> "All files, records, documents, drawings, specifications, information, data and similar items relating to the business of the Employee, whether prepared by the Employee or property of the Employer shall not be removed from the premises of the Employer under any circumstances, without prior written consent of the employer, and in any event shall be promptly delivered to the Employer upon termination."

The record demonstrates that, at a minimum, the individual defendants retained a number of hard-copy documents belonging to Heritage, which were not returned to Heritage until nearly four months after defendants' resignation (Quinn Cover Email dated September 4, 2014, promising return of the documents). However, because the only articulable breach by Koffsky and Donovan concerns confidential information and/or trade secrets that is the express subject of their employment agreement, any claim for breach of fiduciary duty here would be duplicative. As such, defendants motion with respect to dismissal of the breach of fiduciary duty claims against Koffsky and Donovan should be granted.

Claims Against Christie's

Unfair Competition

The "primary concern in unfair competition is the protection of a business from another's misappropriation of the business's organization or its expenditure of labor,

skill, and money" (*Macy's, Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015] [internal quotation marks and citation omitted]). The emphasis in unfair competition claims is not on the competition, but rather on the manner in which it is carried out. It is the "bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information" that gives rise to a claim for unfair competition, not the competition itself (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008] [internal quotation marks and citation omitted]). To be entitled to summary judgment on liability with respect to the unfair competition claim against Christie's, Heritage "must demonstrate that the defendant wrongfully diverted the plaintiff's business to itself" (*CSI Group, LLP v Harper,* 153 AD3d 1314, 1319 [2d Dept 2017] [citations omitted]). However, to the that extent Heritage attempts to establish that Christie's wrongfully obtained Heritage's confidential information via Rubinger, Koffsky, and Donovan, this presents a factual issue for the trier of fact and is not appropriate for summary judgment disposition on this record.

Aiding and Abetting Breach of Fiduciary Duty

A claim for aiding and abetting a breach of fiduciary duty requires "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). The aiding and abetting must be substantial: "a person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*id.* at 126).

As a threshold matter, because the Court is dismissing the claims for breach of fiduciary duty against Koffsky and Donovan as duplicative of the breach of contract claim, the claim for aiding and abetting a breach of fiduciary duty against Christie's can

only be maintained with respect to Rubinger. As concerns Rubinger, the record indicates that Christie's pursued Rubinger dating back to October 31, 2013. As such, to the extent that Rubinger may have breached his fiduciary duty to Heritage, as discussed above, there is a factual issue as to whether Christie's may have aided and abetted him in that breach.

Tortious Interference with Contract

An essential element of any claim for tortious interference with contract is a breach of an existing and enforceable contract (*NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]). Contrary to defendants' argument that Heritage has "completely failed to demonstrate any cognizable breach of Rubinger's Employment Contract" (Defendants opp. memo, mtn. seq. 007, at 14), at a minimum Rubinger breached his employment agreement by terminating his employment with Heritage seven months early. Whether Heritage can establish damages arising from that breach, or establish additional breaches of contract in connection with the other restrictive covenants in the 2012 Employment Agreement, is a matter for trial. Thus, whether Christie's tortiously interfered with this contract is an issue to be determined at trial.

Claims by HACI

Defendants argue that to the extent that they are asserted by HACI, and not HAGI, all claims in the amended complaint must be dismissed because it was HAGI, not HACI, that employed the individual defendants. However, the Trade Secret Agreements with HACI identify "Employer" as "Heritage Auctions or any of its operating subsidiaries." Likewise, the restrictive covenants in Rubinger's employment agreement apply to "Employer [HAGI] and the Employer's Affiliates." The employment agreement

further defines "Affiliates" to mean "corporations and other entities and natural persons controlling, controlled by, or under common control with the Employer" (*id.*). HACI and HAGI both have identical ownership (Ptf. Rule 19-A Statement, ¶¶ 3-4). In addition, because of the way Heritage has structured its business, the individual defendants bought, sold and managed inventory on behalf of, and for the benefit of, HACI (*id.*, ¶¶ 12, 18, 22). As such, summary judgment cannot be granted in favor of Christie's on HACI's claims.

Damages

Defendants also contend that Heritage's claim of $40 million in damages is simply too speculative. However, as is well established, the requirement that damages "be reasonably certain, does not require absolute certainty" (*Ashland Mgmt., Inc. v Janien*, 82 NY2d 395, 403 [1993]). The law only requires that damages "be capable of measurement upon known reliable factors without undue speculation" (*id.* [citations omitted]). Importantly, determinations as to whether damages were too speculative, including in many of the very cases cited by defendants, are litigated and decided following trial, not before. To the extent that defendants disagree with the calculation of lost profits submitted by Heritage's expert, "'[vi]gorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attaching shaky but admissible evidence'" (*Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 87 [1st Dept 2012] [quoting *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 596 [1993]). A "degree of uncertainty is to be expected in assessing lost profits" (*id.* at 88 [citing *Duane Jones Co. v Burke*, 306 NY 172, 192 [1954]). In particular, "[a]n estimate of lost profits incurred through a breach of contract necessarily requires some improvisation, and the party who has caused the

loss may not insist on theoretical perfection" (*id.* at 89 [internal quotation marks and citation omitted]).

Accordingly, it is

ORDERED that plaintiffs' motion, sequence number 007, for partial summary judgment is granted only with respect to liability for plaintiffs' fifth cause of action for breach of contract against defendant Matthew Rubinger to the extent that Rubinger breached the term of his employment, and is otherwise denied; and it is further

ORDERED that defendants' motion, sequence number 008, for partial summary judgment is granted only with respect to dismissing plaintiffs' sixth and eighth causes of action for breach of fiduciary duty against defendants Rachel Koffsky and Caitlin Donovan, and is otherwise denied; and it is further

ORDERED that the parties appear for a pre-trial conference in Part 48, 60 Centre Street, Rm. 242, New York, New York, on March 8, 2018, at 11 AM.

Dated: Febny 8, 2018

ENTER:

J.S.C.
HON. ANDREA MASLEY