SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58
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OPMI BUSINESS SCHOOL, INC.,

Plaintiff,

-against- Index No. 650645/17

AMLOTUS, LLC, JUNHO CHANG, JAREK SZCZYSLAK, and MARK VINCENT BUSA,

Defendants.

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DAVID COHEN, J

Plaintiff OPMI Business School, Inc. (OPMI) moves, pursuant to CPLR 6302, for a preliminary injunction barring defendants from: (a) soliciting and diverting students from OPMI to defendant AMLotus, LLC (Amlotus); (b) accepting the transfer of students from OPMI; (c) using or disclosing plaintiff's confidential information, including student contact information, attendance records and other records; (d) continuing to disparage the reputation and status of OPMI; or (e) destroying, disposing of, amending or otherwise altering any and all records, whether physical or electronic, relating to this action. Amlotus cross-moves, pursuant to CPLR 2215, 3211, and 6311-6313, to dismiss the complaint. Defendants Junho Chang, Jarek Szczyslak. and Mark Vincent Busa cross-move to dismiss the complaint, pursuant to CPLR 3211 (a) (7).

The gist of the complaint is that the individual defendants, while employed by plaintiff as private school agents, conspired with Amlotus to cause 140 students to transfer from plaintiff to Amlotus in September 2017. Plaintiff and Amlotus are both for-profit schools that cater, mostly,

to foreign students. School agents, who are registered with the New York State Department of Education, recruit students, and provide them with various forms of administrative assistance. The complaint alleges the following seven causes of action: (1) as against the individual defendants, misappropriation of trade secrets; (2) as against all defendants, tortious interference with prospective advantage and prospective economic relations; (3) as against the individual defendants, breach of fiduciary duty and loyalty; (4) as against all defendants, unfair competition; (5) as against all defendants, unjust enrichment; (6) as against the individual defendants, defamation; and (7) as against all defendants, prima facie tort. An ostensible eighth cause of action is simply a request for injunctive relief. These will be discussed in turn.

Section 757 of the Restatement of Torts, quoted with approval in *Ashland Mgt. v Janien* (82 NY2d 395, 407 [1993]), defines "trade secret "as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know it or use it. (internal quotation marks and citation omitted)" The essential characteristic of a trade secret is that a plaintiff's "'competitors may gain some competitive advantage as a result of discovery of secret business procedures or information.'" *JPMorgan Chase Funding, Inc. v Cohan*, 134 AD3d 455, 455 (1st Dept 2015), quoting *Linderman v Pennsylvania Bldg. Co.*, 289 AD2d 77, 78 (1st Dept 2001). The trade secrets alleged to have been misappropriated by the individual defendants are students' "attendance records, contact information, and student curriculum." Verified complaint (complaint), ¶ 51. Plaintiff does not even suggest how this information about its students could help Amlotus, or any other competitor, gain a competitive advantage in recruiting new students. As for the 140 students who sought to transfer to Amlotus in January

2017, the complaint alleges both that the individual defendants were observed speaking to students at the Amlotus campus, with whom they had earlier spoken at the OPMI campus (Complaint, ¶ 20), and that they communicated directly with students, many of whom they had recruited as students for OPMI. *Id., ¶ 23*. Given the acknowledged personal familiarity of the individual defendants with the students who sought to transfer, plaintiffs allegation that, in the course of their employment by OPMI, they had access to student records, falls far short of alleging use of "'secret business procedures and information.'" *JPMorgan Chase Funding, Inc. v Cohan*. 134 AD3d at 455 (citation omitted).

Plaintiff relies upon *McLaughlin, Piven, Vogel. v W. J. Nolan* (114 AD2d 165, 167 [2d Dept 1986]) and *U.S. Reins. Corp. v Humphreys* (205 AD2d 187, 188-189 [1st Dept 1994]). In the former, the information at issue consisted of a security broker's records of the "investment activity, employment data, annual income, and assets" of its customers; in the latter, the information consisted of a reinsurance product: both a far cry from the student information that is at issue here.

To state a claim for interference with prospective business relations, a plaintiff must allege that:

> "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship."

Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 108 (1st Dept 2009) citing *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004).

With regard to Amlotus, the complaint alleges that "[d]efendants have wrongfully

solicited students of Plaintiffs," and that "[d]efendants conspired to obtain [the student records discussed above]." Plaintiff alleges no fact to support the conclusory allegation that Amlotus conspired with the individual defendants to obtain student records, and, to the extent that the complaint alleges that Amlotus acted to facilitate the transfer of students from OPMI, for example, by providing the individual defendants with student application forms, any such action would have been taken in Amlotus's "'normal economic interest'" (*Devash LLC v German Am. Capital Corp.,* 104 AD3d 71, 79 (1st Dept 2013) quoting *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 (1st Dept 2007). It would, therefore, not be actionable. *NBT Bancorp* v *Fleet/Norstar Fin. Group,* 87 NY2d 614, 624 (1996).

As for the claim against the individual defendants, the Complaint alleges neither that they acted solely to harm OPMI, nor that they acted unlawfully. Rather, the Complaint alleges that they were instrumental in causing the 140 students to transfer to Amlotus, and that they had been seen copying student records. The Complaint also alleges that physical copies of student records went missing, and it alleges, upon information and belief, that the individual defendants are in possession of those records, but it fails to specify that information, or the grounds for that belief, and it undercuts the allegation by also alleging that OPMI must check those records, and "confirm attendance prior to allowing for the transfer of the student[s]." Complaint, ¶ 33.

It is established that an employee owes a duty of loyalty to his or her employer. While an employee may prepare to compete with the employer, while still employed, the employee may not use the employer's time or resources in that venture. *Ashland Mgt., Inc.* v *Altair Invs. NA, LLC*, 59 AD3d 97, 107 (1st Dept 2008); *Schneider Leasing Plus v Stallone,* 172 AD2d

739, 741 (2d Dept 1991). The Complaint alleges that: emails recovered from the computers of Chang and Szczyslak show that, prior to their departure from OPMI, they were providing students with information on transferring to Amlotus; and that, prior to leaving OPMI, Chang and Szczyslak were downloading OPMIi student information. Those allegations of the use of OPMI's computers suffice to state a cause of action. There are no similar allegations concerning Busa.

To state a claim for unfair competition, a plaintiff must allege that the defendant "acted in bad faith in misappropriating a commercial advantage belonging to plaintiff." REDF-Organic *Recovery, LLC v Rainbow Disposal Co.*, 116 AD3d 621, 622 (1st Dept 2014); *Ahead Realty LLC v India House,* Inc., 93 AD3d 424, 425 (1st Dept 2012). Again, the only factually supported allegation in the Complaint, that Amlotus gained a commercial advantage over plaintiff, is that it assisted students who wished to transfer from one school to the other. The gaining of a commercial advantage is not, of itself, unfair. As for the individual defendants, there is no allegation that they diverted any of OPMI's business to themselves.

Unjust enrichments is a quasi contractual remedy, which "contemplates 'an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties.'" *Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511, 516 (2012), quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.,* 12 NY3d 132, 142 (2009). Plaintiff and Amlotus had no business relationship, and the business relations between plaintiff and the individual defendants were governed by written contracts. Accordingly, this claim is dismissed.

. The defamation claim rests upon allegations that the individual defendants told some OPMI students that OPMI was closing.

> "Defamation is the making of a false statement . . . that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society.'"

Frechtman v Gutterman, 115 AD3d 102, 104 (1st Dept 2014), quoting *Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 379 (1977) (alteration in the original). A statement that a school, or other institution, is closing, without more, may be false, but it does not constitute defamation.

The cause of action alleging prima facie tort is dismissed, because plaintiff fails to allege that "disinterested malevolence was [any] defendant's sole motive," a sine qua non of a claim of prima facie tort (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 439 [1st Dept 2017], citing *Burns Jackson Miller Summit & Spitzer v Linder,*59 NY2d 314, 333 [1983], quoting *American Bank & Trust Co. v Federal Bank*, 256 US 350, 358 [1921]), and also because plaintiff fails to allege special damages. *Aramid Entertainment Fund Ltd. v Wimbeldon Fin. Master Fund, Ltd.*, 105 AD3d 682, 682 (1st Dept 2013).

Even were it not the case that seven of the eight causes of action alleged in the Complaint lack merit, plaintiff would not be entitled to the injunctive relief that it seeks. Students are not chattel, and they may not be barred from applying to transfer to a school of their choice. Moreover, students at OPMI may have had particular reasons to wish to seek another school. In April 2016, the news spread that a former OPMI school director had been arrested and charged with immigration fraud, in connection with a "stay for pay" scheme at a bogus school in New Jersey. In addition, some students in OPMI vocational programs were issued incorrect visas, and some of those students had to leave the United States, before being able to receive proper visas.

Accordingly it is hereby

ORDERED that the motion of plaintiff OPMI Business School, Inc. is denied; and it is further

ORDERED that the cross-motions of defendants AMLotus, LLC and Mark Vincent Busa are granted and the complaint is severed and dismissed as against said defendants with costs and disbursements as charged by the Clerk of the Court upon the submission of appropriate bills of costs; and it is further

ORDERED that the cross-motion of defendants Junho Chang and Jarek Szczyslak is granted to the extent that the first, second, fourth, fifth, sixth, and seventh causes of action are dismissed as against said defendants, and the cross-motion is otherwise denied; and it is further

ORDERED that the rest of this action shall continue.

Dated: 3-27-2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.