Netologic Inc v Goldman Sachs Group Inc
2018 NY Slip Op 31409(U)
February 1, 2018
Supreme Court, New York County
Docket Number: 600394/2009
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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NETOLOGIC INC, d/b/a INVESTARS,

Plaintiff,

- v -

GOLDMAN SACHS GROUP INC, WALL STREET ON DEMAND INC. and BEVERLY WESTLE,

Defendants.

INDEX NO. 600394/2009

MOTION DATE 3/28/2017

MOTION SEQ. NO. 006

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 372, 373, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527

were read on this application to/for Judgment - Summary

HON. SALIANN SCARPULLA:

Defendant The Goldman Sachs Group, Inc. ("Goldman") moves for summary judgment dismissing the complaint of plaintiff Netologic Inc. d/b/a Investars ("Netologic"), and for summary judgment on Goldman's first counterclaim for breach of contract.

Background[1]

In 2004, Goldman began developing Hudson Street Services ("Hudson Street"), a platform for Goldman to "invest in and distribute independent, Internet-based, third-party financial research" to Goldman's clients (Goldman's Rule 19-a statement, ¶ 2). One of the companies whose research was offered as a part of Hudson Street was Netologic, which offered the Investars Insight Product Suite ("Insight") to Goldman customers (Zwillinger affirmation dated 3/14/17, exhibit 10, Heimsath tr dated 6/8/16 at 53:3-59:24).[2] Insight included a "broker vote" program, for evaluation of broker services (*id.* at 56:20-57:11), and a "performance management" program, for companies to evaluate internal and external market research providers (Zwillinger affirmation, exhibit 11, Kianpoor tr dated 6/21/16 at 80:9-81:12).[3]

During negotiations between Netologic and Goldman, Netologic provided Goldman with access to Spectrum, a product that was the precursor to Insight (Heimsath tr at 71:20-72:19, 83:4-16; Kianpoor tr at 69:23-71:17). Spectrum was not a product covered by the parties' subsequent agreements (Kianpoor tr at 69:16-71:17), and did not provide Goldman access to any confidential information (*id.* at 67:3-68:8; Heimsath tr at 230:9-15). Access to Spectrum was turned off before Netologic and Goldman completed

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[1] Except where otherwise noted, Netologic has admitted to the following cited facts contained in Goldman's Rule 19-a statement of material facts (Uniform Rules for Comm. Div. [22 NYCRR] § 202.70 [g], Rule 19-a).

[2] Lars Heimsath, Vice-President of Netologic (Zwillinger affirmation, exhibit 46, Investars data sheet).

[3] Kei Kianpoor, CEO of Netologic (Investars data sheet).

negotiations, and Netologic never provided Goldman with access to Insight (Kianpoor tr at 98:10-14).

At the same time that Goldman and Netologic were negotiating, Goldman acquired 97% of the outstanding shares of defendant Wall Street on Demand, Inc. ("WSOD") (Zwillinger affirmation, exhibit 12, Sanders tr dated 6/15/16 at 186:2-8).[4] WSOD served as a "private label financial [website] for on-line brokerage houses," and also "built and hosted [websites] for a lot of research-oriented firms and built [websites] for other financial institutions" (Zwillinger affirmation, exhibit 6, Conigliaro tr dated 7/12/16 at 31:7-23).[5]

Netologic agreed to give WSOD access to Insight data as a Goldman affiliate (Zwillinger affirmation, exhibit 20, email dated 6/26/06 from Kianpoor to Conigliaro; Kianpoor tr at 343:22-344:10; Sanders tr at 186:18-187:5), and gave WSOD access to Spectrum to further discussions of future collaboration (Goldman's Rule 19-a statement, ¶ 21). Additional discussions did not prove fruitful, however, and WSOD did not use any of Netologic's data or information in developing its own products (Tanner tr dated 8/10/16 at 122:5-23).[6]

On October 13, 2006, Goldman and Netologic entered into several agreements governing Netologic's inclusion in Hudson Street. Pursuant to a License and Distribution

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[4] J. Michael Sanders, Goldman (Sanders tr at 15:17-21).

[5] Thomas Conigliaro, Goldman (Sanders tr at 17:13-17).

[6] James Tanner, CEO of WSOD (Tanner tr at 14:19-15:2).

Agreement ("LDA"), Netologic granted Goldman "and its [a]ffiliates" a "non-exclusive . . . worldwide enterprise license to use [Insight] . . . for internal purposes and to integrate certain Data in its own externally distributed products" (Zwillinger affirmation, exhibit 26, LDA dated 10/13/06, ¶ 1.1). This license included an "exclusive worldwide right to market" Insight and other Netologic products to Goldman's investment customers and certain brokers listed in the LDA (*id.*, ¶¶ 2.1, 2.2). The marketing right included Goldman's right to provide a link to Netologic's website on Goldman's websites, as well as access to a limited version of Insight "for the purpose of introducing" potential customers to Netologic (*id.*).

Goldman agreed to pay Netologic $1,000,000 as consideration for the marketing right, and Netologic agreed to pay Goldman "a distribution fee equal to twenty-five percent (25%) of Compensation received by [Netologic]" (*id.*, ¶¶ 4.1, 4.2). The LDA defined "Compensation" as "all annual revenue accrued by [Netologic]" from sales made to customers that Goldman introduced to Netologic (*id.*, ¶ 4.2).

In the LDA Goldman agreed to use "commercially reasonable efforts" to, among other things, market Insight and other Netologic products to its customers (*id.*, ¶ 5.1). The LDA provides that, in the event of a breach, neither party could recover consequential damages such as lost profits, or damages in excess of $1,000,000 (*id.*, ¶ 6.6). Finally, the parties agreed that any confidential information gained while carrying out the LDA would be kept as such, and that neither party would use such information except to provide services contemplated by the LDA or as otherwise permitted (*id.*, ¶ 9.1).

Goldman marketed Insight to its clients as per the LDA, alongside WSOD and the other Hudson Street programs (Zwillinger affirmation, exhibit 5, Cohen tr dated 7/26/16 at 40:3-23). Both the Hudson Street sales team and Goldman's general sales team were involved in presenting Insight to Goldman's customers (Conigliaro tr at 72:22-74:2), who could then ask for further information and introductions to companies on Hudson Street whose products interested them (*id.* at 71:21-72:10; Zwillinger affirmation, exhibit 8, Dias tr dated 9/23/16 at 24:23-25:12; 36:11-38:12).[7] Between 2007 and 2008, Goldman introduced Netologic to 97 of its clients (Zwillinger affirmation, exhibit 86, Hudson Street -- P&L Summary at 263; *see also* Zwillinger affirmation, exhibit 9, Eagleton tr dated 9/28/16 at 202:15-23 ["all our efforts were focused on the Goldman clients because we were -- as you can see, we were overwhelmed"]).[8] Following the introduction, Netologic then took over the sales process, with Goldman providing support where needed (Eagleton tr at 88:18-93:20; 117:15-118:2).

Netologic met with little success with Goldman clients, signing contracts with only four of them (Goldman Rule 19-a statement, ¶¶ 32-33), and earning a total of $2,626,613 in revenue on those deals (*id.*, ¶ 34).[9] Goldman argues that, for various

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[7] Sashi Dias Valtz, Goldman Sales Representative (Dias tr at 22:8-19).

[8] John Eagleton, President of Netologic (Investars data sheet).

[9] Netologic objects to the revenue figures for two of the four customers, but provides no citation to evidence for it objection. Accordingly, the facts set forth in Goldman's statement are deemed admitted (*e.g. Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 [1st Dept 2010]).

reasons, Insight was simply not what its clients were looking for (*e.g.* Tanner tr at 141:12-142:14; Conigliaro tr at 98:19-99:16).

Ultimately, the relationship between Netologic and Goldman soured. In March 2008, when Goldman reached out to Netologic for financial statements and information required by paragraph 4.6 of the LDA and paragraph 4.2 of the Purchase Agreement, Netologic raised, allegedly for the first time, concerns that WSOD was marketing a similar product in competition with Insight, and that Goldman had diverted one of its clients, Wellington Capital Management (Wellington), to WSOD from Netologic (Zwillinger affirmation, exhibit 71, email dated 3/13/08 from Kianpoor to Conigliaro). Netologic asked that the reporting requirements be eased until Goldman had become a shareholder in Netologic, as it was in WSOD (*id.*). Notably, in that same email, Netologic declared that it was very happy with its relationship with Goldman (*id.*).

Goldman attempted to develop an alternative arrangement to address some of Netologic's concerns (Conigliaro tr at 141:11-143:14), but, ultimately, Goldman terminated the LDA effective October 27, 2008 (Zwillinger affirmation, exhibit 80, letter dated 8/28/08 from Trautmann to Eagleton). Goldman states that it terminated the LDA due to low sales numbers and personality conflicts between Goldman and Netologic's officers (Conigliaro tr at 214:10-17; Dias tr at 61:6-11).

According to Netologic, Goldman had access to Netologic's confidential information through its nonvoting observer on Netologic's board (Ford affirmation dated 6/13/17, exhibit 6, Investars board chart), and that various marketing documents, meeting notes, customer feedback, and potential client lists were obtained by Goldman employees

while working with Netologic (*see* Plaintiff's opposition to Rule 19-a statement at 14 n 8 [collecting various emails and documents allegedly constituting confidential information]). Netologic posits that Goldman improperly used its access to Netologic's proprietary information to develop Maestro, a product very similar to Insight in terms of its features (Ford affirmation, exhibit 14, email dated 2/15/07 from Cohen to Sanders; exhibit 15, email dated 3/6/07 from Conigliaro to Sanders; exhibit 16, email dated 11/1/07 from Dias to Conigliaro).

Netologic states that Maestro and Insight shared significantly similar language and user interfaces (Heimsath aff dated 6/13/17, exhibit 1, Maestro/Insight comparison powerpoint; exhibit 2, Maestro website images). Netologic also claims that Goldman developed Maestro through WSOD, which, as set forth above, was almost wholly owned by Goldman (Tanner tr at 12:5-12:15, 15:8-11, 16:23-17:3; Cohen tr at 28:19-29:18.

Netologic alleges that, upon the development of Maestro, Goldman began steering business to WSOD from Investars, even going so far as to send Goldman personnel to pitch Maestro without WSOD (Ford affirmation, exhibit 19, email dated 2/14/08 from Dias to Anido). For example, in June 2008, Goldman employees proposed marketing Maestro to Goldman's clients for commission management instead of Insight (Ford affirmation, exhibit 21, email dated 6/30/08 from Conigliaro to Sanders).

WSOD, allegedly at Goldman's urging, signed two deals, each totaling almost $700,000, that Netologic argues should have belonged to it (Ford affirmation, exhibit 24, Hudson Street Services inception to date bookings). Further, Netologic states that Goldman personnel admitted that they had a conflict of interest with respect to Netologic

due to their work with WSOD (Ford affirmation, exhibit 33, email dated 6/12/08 from Conigliaro to Coughlin).

Procedural History

Netologic sued Goldman, WSOD, and Beverly Westle ("Westle") in February 2009. In its original complaint Netologic alleged causes of action for common law fraud against Goldman (first cause of action), breach of contract and of the covenant of good faith and fair dealing against Goldman (second cause of action), conspiracy against all defendants (third cause of action), breach of fiduciary duty against Goldman (fourth cause of action), an accounting against Goldman and WSOD (fifth cause of action), a failure to account against Goldman (sixth cause of action), unjust enrichment against Goldman and WSOD (seventh cause of action), breach of the confidentiality agreement against Goldman (eighth cause of action), breach of the confidentiality agreement and breach of loyalty against Westle (ninth cause of action), tortious interference with prospective economic advantage against Goldman and Westle (tenth cause of action), and an injunction against Goldman and WSOD (eleventh cause of action).

Relevant to this motion, in its second cause of action for breach of the covenant of good faith and fair dealing, Netologic asserted that Goldman breached its duty by failing to use "its best efforts to promote sales and use of [Insight]", and by diverting business from Netologic to WSOD (*id.*, ¶ 76). In contrast, in its seventh cause of action for unjust enrichment Netologic asserted that Goldman and WSOD were unjustly enriched from the "exploitation of the opportunities provided in the agreements and *by virtue of the access granted to [Goldman]*" (*id.*, ¶ 95, emphasis supplied). Finally, in its ninth cause of

action Netologic asserted that Goldman breached the confidentiality provision of the LDA when it allowed certain companies access to Netologic's proprietary information through Goldman's web portal access to Netologic's systems (*id.*, ¶¶ 57 [b], 99).

Defendants made a pre-answer motion to dismiss and Justice Kapnick dismissed the action against WSOD in its entirety, and against Westle with leave to replead (NYSCEF Doc. No. 18, decision and order dated 3/31/11). Further, Justice Kapnick dismissed all claims against Goldman, except for the branch of the second cause of action in which Netologic alleged breach of the implied covenant of good faith and fair dealing, holding that Netologic had failed to state any other claim (*id.* at 10, 18, 21).

Netologic appealed Justice Kapnick's decision, arguing, among other things, that while the LDA was in force, "Goldman allowed access via Spectrum to [Netologic's] proprietary information via the internet which access was not for the purpose of promoting [Netologic] sales," in breach of the confidentiality provision (Zwillinger affirmation, exhibit 108, brief for plaintiff-appellant dated 2/19/12 at 14-15). Moreover, Netologic argued that the seventh cause of action for unjust enrichment claim was viable, as Netologic had pleaded that

> "by allowing Goldman into its innermost circle and business plans and strategies, and affording it Board Observation Rights as well as unfettered access to its website, Goldman (and WSOD) were able to wrongfully take advantage of that trusting set of circumstances, deprive plaintiff of business opportunities it would have otherwise had, and thereby cause damage to plaintiff"

(*id.* at 32).

While the appeal was pending, Netologic filed an amended complaint alleging largely the same causes of action against the defendants. Specifically, that Goldman had breached the LDA by failing to use commercially reasonable efforts to market Insight and other Netologic products, and by steering business towards WSOD (NYSCEF Doc. No. 22, amended complaint dated 5/4/11, ¶¶ 73-74) (second cause of action); that Goldman had breached the covenant of good faith and fair dealing by steering business towards WSOD (*id.*, ¶ 78) (third cause of action); and that Goldman had breached the confidentiality provision by "granting access to plaintiff's website and other confidential information for its own purposes" (*id.*, ¶ 84) (fourth cause of action).

Goldman and WSOD moved to dismiss the amended complaint and Justice Kapnick granted the motion, in part, by adhering to her prior decision to dismiss the breach of contract and breach of the confidentiality provision claims, but denying the motion with respect to the claim for breach of the implied covenant (NYSCEF Doc. No. 45, Decision and order dated 6/21/13 at 2-3, 5-7).

On October 1, 2013, the Appellate Division, First Department modified Justice Kapnick's decision and order by reinstating the breach of contract cause of action and dismissing the breach of the implied covenant cause of action, and otherwise affirmed the dismissal of the remaining causes of action (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433 [1st Dept 2013]). In its decision, the First Department stated that Netologic had sufficiently pleaded that Goldman "breached its duty under the parties' [LDA] to engage in 'commercially reasonable efforts' to sell [Insight] to Goldman's own customers," (second cause of action), and had likewise sufficiently pleaded a breach of

the confidentiality provision (eighth cause of action) (*id.* at 433). The court affirmed that the remainder of the complaint, including the unjust enrichment claim, was properly dismissed (*id.* at 434). Netologic did not further appeal this decision.

The parties then proceeded with discovery. On April 10, 2014, Netologic served Goldman with its responses to Goldman's interrogatories (Zwillinger affirmation, exhibit 114, interrogatory responses dated 4/10/14). In its responses, Netologic stated that the breach of confidentiality provision cause of action was based on the fact that Goldman had, among other things, allowed a discrete list of nine companies, including WSOD, to access Spectrum without any legitimate business purpose, in violation of the confidentiality provision of the LDA (*id.* at 10); and, that the commercially reasonable efforts clause would have required Goldman to market Insight "in the same fashion and with the same degree of diligence and attention as [Goldman] would have employed" if Insight were a Goldman product (*id.* at 8). Netologic also identified several other ways in which Goldman had allegedly been commercially unreasonable (*id.* at 8-9).

When Netologic served its discovery demands, Goldman asserted that the First Department had narrowed the issue of commercial reasonableness down to whether Goldman had "breached its duty under the parties' [LDA] to engage in 'commercially reasonable efforts' to sell [Insight] to Goldman's own customers," (Zwillinger aff, exhibit 116, Monaghan affirmation in support of motion for clarification dated 10/28/14, ¶ 2).

Netologic then moved before the First Department to clarify whether its October 2013 decision limited the breach of contract claim to that sole ground, or whether all the previously dismissed grounds for breach of contract had been reinstated (*id.*, ¶¶ 12-15).

On December 30, 2014, the First Department denied Netologic's motion to clarify/expand the breach of contract claim (*Netologic Inc. v Goldman Sachs Group, Inc.*, 2014 NY Slip Op 94234[U] [1st Dept 2014]).

Now that discovery is completed Goldman moves for summary judgment dismissing the remaining two causes of action against it (second and eighth causes of action), and for summary judgment on its first counterclaim for breach of contract.

Discussion

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

Second Cause of Action for Breach of the Obligation to Use Commercially Reasonable Efforts

In the second cause of action, as limited by the First Department, Netologic alleges that Goldman failed to use commercially reasonable efforts to market Insight to its clients and customers, and that it was commercially unreasonable for Goldman to market WSOD's Maestro product, which directly competed with Insight. On this summary judgment motion Goldman claims that Netologic has failed to provide any

evidence to measure what was commercially reasonable under the circumstances of Goldman and Netologic's business relationship.

Goldman also argues that it is entitled to summary judgment on the breach of contract claim because Goldman, despite Netologic's poor sales figures, used commercially reasonable efforts to sell Insight to its customers. As Goldman points out, it arranged nearly 100 meetings between Netologic and potential customers, and assisted with every stage of the marketing process. Goldman asserts that its efforts, not Netologic's ultimate sales figures, are the metric by which to judge whether Goldman complied with its obligations under the LDA. Additionally, Goldman claims that Netologic did not lose business to WSOD, but instead, to other companies not affiliated with Goldman or the Hudson Street Platform, and that, in any case, Netologic did not object to competing with WSOD.[10] Finally, Goldman argues that Netologic cannot prove its damages, as its claims for lost profits are barred by the LDA and, in the absence of the LDA, are impermissibly speculative.

In opposition, Netologic first expressly disclaims reliance on the theory that Goldman did not do enough to connect Netologic with Goldman's customer base (Netologic mem at 19). Instead, Netologic now argues that its claim for breach of the commercially reasonable efforts provision in the LDA is based on Goldman allegedly taking Netologic's proprietary information to design Maestro, and offer Maestro in competition with Insight.

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[10] Kianpoor tr at 357:8-358:9 ("We've always competed with [WSOD] at a certain level").

Netologic also now claims that evidence assessing what is commercially reasonable is unnecessary, as it was inherently unreasonable for Goldman to utilize Netologic's proprietary information to design a competing product, while also obligated to market Netologic's product. Additionally, Netologic argues that it was unreasonable to steer business away from Netologic and to WSOD. Finally, Netologic asserts that its damages are easily measurable based on WSOD's sales figures for Maestro, and the value at which Goldman ultimately sold WSOD.

In reply, Goldman argues that Netologic, by now basing its breach of contract claim on the alleged theft of proprietary information, is inappropriately attempting to revive its previously dismissed quasi-contractual and tort claims. Goldman claims that, in any case, there is no proof that Maestro was developed using Netologic's proprietary information, that WSOD made sales of its performance measurement tool, or that Goldman diverted business from Netologic. Finally, Goldman points out that Netologic does not address the LDA's bar on lost profit damages for the breach of contract claim.

The LDA requires Goldman to use commercially reasonable efforts to market Insight and other Netologic products to Goldman's customers (LDA, ¶ 5.1 [a]). The First Department has held that this is the basis on which Netologic stated a claim for breach of the LDA. (*Netologic, Inc.*, 110 AD3d at 433). Netologic's motion to further clarify/expand the First Department's holding was denied (*Netologic Inc.*, 2014 NY Slip Op 94234[U]).

The First Department's decision was not appealed further, and is now law of the case (*e.g.*, *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2d

Dept 2007] ["An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court"]).

Goldman has submitted sufficient evidence showing, and Netologic does not dispute, that Goldman expended significant, commercially reasonable efforts to introduce Netologic to Goldman clients who were potential customers. Therefore, Goldman has made out its *prima facie* case in support of its motion for summary judgment dismissing Netologic's claim for breach of the LDA on that ground.

The theory that Netologic now argues in support of the breach of LDA claim, that Goldman failed to use commercially reasonable efforts by creating Maestro with WSOD using Netologic's proprietary information, was rejected by the First Department in its affirmance of the dismissal of Netologic's previously pled unjust enrichment claim.[11] Indeed, counsel for Netologic confirmed that Netologic had previously asserted this claim and that it had been dismissed, though he identified it as a tortious interference claim against WSOD (oral argument transcript at 35:14-36:14).

The First Department affirmed Justice Kapnick's dismissal of Netologic's unjust enrichment claim (*Netologic, Inc.*, 110 AD3d at 434) and Netologic may not revive this previously dismissed claim as a new theory of liability under a preexisting claim, because the prior dismissal is now law of the case (*J-Mar Serv. Ctr., Inc.*, 45 AD3d at 809).

Even if I considered Netologic's repackaged unjust enrichment theory of liability in the context of its breach of contract claim, Goldman has established its *prima facie*

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case that Maestro was not developed with Netologic's proprietary information. Goldman submits the uncontradicted testimony of WSOD employees showing that WSOD did not use any of Netologic's data or information in developing its own products (Tanner tr at 122:5-23).[12]

Netologic does not rebut this testimony with competent evidence sufficient to raise an issue of fact. Instead, it simply speculates that Maestro must have been designed using Netologic's information, because Insight and Maestro are similar and because Maestro was designed shortly after Netologic and Goldman began exchanging information. Netologic then concludes that Goldman must have utilized Netologic's proprietary information in an unreasonable manner to design Maestro and compete with Netologic through WSOD, in breach of its obligation to use commercially reasonable methods to market Netologic products. (Netologic mem at 14-17, 19-21).

Netologic's argument fails for two reasons. First, speculation is insufficient to oppose a summary judgment motion (*e.g. Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270 [1st Dept 2009]). Second, the only evidence Netologic submits in support of its claim that Maestro and Insight are similar is the affidavit of Lars Heimsath, a Netologic representative. The Heimsath affidavit, however, is not probative, because Heimsath

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[12] On reply Goldman further supports its *prima facie* showing with the affidavit of Sofia Rossato (formerly of WSOD), who avers that no Netologic information was used in creating Maestro, and that WSOD developed Maestro based on a request by one of its clients, rather than Goldman (Rossato aff, ¶¶ 3, 8, 11).

admittedly never had access to Maestro (Heimsath tr at 214:25-215:10).[13] Netologic provides no other evidence of similarities between the two products.

For the foregoing reasons, that branch of Goldman's motion for summary judgment dismissing the second cause of action for breach of the provision of the LDA which required Goldman to use commercially reasonable efforts is granted. [14]

Breach of the Confidentiality Provision (Eighth Cause of Action)

For its eighth cause of action, Netologic alleges that Goldman violated the confidentiality provision of the LDA by allowing certain companies to access Netologic's proprietary information through the Spectrum web portal. Goldman argues that the challenged access occurred prior to the parties' signing the LDA, which Netologic has conceded. Moreover, such access was to Spectrum; Goldman never received access to Insight. Goldman points out that Netologic has also conceded, through its employees' testimony, that Spectrum did not provide any access to proprietary information. Goldman also claims that any alleged access to Insight during the term of the LDA was permitted

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[13] Heimsath gave the following answers when questioned on this subject:

Q. Did you ever use the Maestro product?
A. No.
Q. Did you ever run a trial of the Maestro product?
A. No.
Q. Did you ever review the product in any way?
A. I never had access to the product.

[14] Considering my holdings on this issue I do not reach the parties' remaining arguments related to this cause of action.

under the license Netologic granted to Goldman. Finally, Goldman asserts that Netologic's damages for this cause of action are impermissibly speculative.

In opposition, Netologic expressly states that it has abandoned and is not pursuing claims related to Spectrum, or access thereto (Netologic mem at 13). Instead, Netologic again resurrects the theory of liability posited in its previously dismissed claims, specifically, that Goldman used its access to Netologic's proprietary information to develop Maestro, and to market it in competition with Insight through WSOD. Netologic argues that Goldman's board observer position, its communications with Netologic management and employees, and Goldman's employees' attendance at Netologic sales meetings, all combined to give Goldman access to Netologic's proprietary information.

In reply, Goldman argues that Netologic's allegations regarding access to Spectrum have provided the basis for Netologic's claim for breach of the confidentiality provision during the pendency of this action, and these allegations cannot now be replaced with a new/repackaged theory of liability in opposition to summary judgment. Further, Goldman points out that, as Netologic has expressly abandoned the Spectrum theory of liability, it has failed to raise an issue of fact that would require trial.

To the extent Netologic's new/repackaged theory of liability is considered, Goldman asserts that it has no basis. As discussed above, Goldman points to the essentially unrebutted testimony of WSOD's CEO, as well as other record evidence, that Maestro was not developed with Netologic's proprietary information. Goldman again argues that Netologic's proposed inferences to the contrary are speculative and insufficient to raise an issue of fact requiring trial.

In its original complaint, amended complaint, and appellate briefing, Netologic consistently and uniformly stated that the basis for its claim that Goldman breached the confidentiality provision of the LDA was that Goldman allowed a defined list of companies access to Spectrum through Goldman's web portal connection to Spectrum (NYSCEF Doc No. 2, complaint, ¶ 57 [b]; NYSCEF Doc. No. 22, amended complaint, ¶ 56 [b]; Zwillinger affirmation, exhibit 108, brief for plaintiff-appellant at 14-15). When asked, in Goldman's interrogatories, to state all facts supporting Goldman's alleged misuse of Netologic's proprietary information in breach of the LDA, Netologic stated that at least nine companies had been given access to Spectrum, and that Goldman had refused to identify the "legitimate business purpose of granting that access" (Zwillinger affirmation, exhibit 114, Interrogatory responses at 10).

Goldman has shown, and Netologic does not dispute, that Netologic turned off access to Spectrum prior to Goldman and Netologic entering into the LDA, and, therefore, any access to Spectrum would not be covered by the LDA (Kianpoor tr at 69:16-71:17, 98:10-14). Moreover, Goldman has shown, and Netologic does not dispute, that Spectrum did not provide access to any of Netologic's proprietary information (*id.* at 67:3-68:8; Heimsath tr at 230:9-15). Accordingly, Goldman has made out a *prima facie* case that it did not breach the confidentiality provision of the LDA by giving companies access to Spectrum through Netologic's web portal.

In light of its disclaimer of reliance on any Spectrum related claims (Netologic mem at 13), Netologic now argues, for the first time, that the basis of its claim for breach of the confidentiality provision is that Goldman obtained Netologic's proprietary

information and used it to develop Maestro, which it marketed as a competing product through WSOD. A review of the extensive record and procedural history in this case does not show any prior occasion when Netologic based its claim for breach of the confidentiality provision on Goldman's alleged use of proprietary information to create Maestro. Accordingly, Netologic may not raise it for the first time in opposition to a motion for summary judgment (*Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 492 [1st Dept 2015] ["A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers"]).

Moreover, as set forth above, Netologic has failed to submit sufficient competent evidence to raise a material issue of fact that would support its claim that WSOD and Goldman developed Maestro using Netologic's proprietary information.

Accordingly, that branch of Goldman's motion for summary judgment dismissing the eighth cause of action for breach of the confidentiality provision is granted.

Breach of the LDA (First Counterclaim)

For its first counterclaim, Goldman alleges that, pursuant to section 4.2 of the LDA, it is entitled to 25% of any revenue derived by Netologic from an introduction to a Goldman customer (LDA, ¶ 4.2). Goldman argues that Netologic has admitted that it received revenue from four Goldman clients, to which it was introduced during the pendency of the LDA, and that it is thus entitled to summary judgment on its counterclaim for 25% of that revenue, plus 9% pre-judgment interest, in the total amount of $975,992. In opposition, Netologic does not dispute that it earned such revenues, but

argues that Goldman's own breaches and termination of the LDA raise material issues of fact preventing summary judgment.

The unambiguous terms of the LDA entitle Goldman to summary judgment. The LDA provides that Goldman is entitled to 25% of all annual revenue accrued by Netologic from transactions with Goldman customers (LDA, ¶ 4.2). Goldman has established, and Netologic does not dispute, that Netologic entered into four agreements with Goldman customers and earned a total of $2,626,613 in revenue from those agreements (Goldman's Rule 19-a statement, ¶¶ 32-34). Twenty-five percent of that total, plus accrued interest, is $975,992, and Netologic does not challenge Goldman's calculation of that amount (*see* Zwillinger affirmation, exhibit 104, Kinrich expert report dated 12/8/16). Indeed, Netologic does not raise any material issues of fact with respect to its indebtedness under this provision.

Netologic's only defense to Goldman's first counterclaim is that Goldman breached the LDA, and that such breach relieves Netologic of its obligation to pay 25% of the specified revenues to Goldman. As I've granted summary judgment dismissing Netologic's remaining claims against Goldman, Goldman's alleged breach of the LDA is not a bar to judgment on Goldman's first counterclaim. Accordingly, that branch of Goldman's motion for summary judgment on its first counterclaim is granted.

The court has considered the remainder of the parties' arguments, and finds them to be without merit.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Goldman Sachs Group, Inc. for summary judgment dismissing complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that defendant Goldman Sachs Group, Inc. is granted summary judgment against plaintiff Netologic Inc. d/b/a Investars on its first counterclaim, in the amount of $975,992.25, together with interest at the statutory rate from the date of the decision on this motion, as calculated by the Clerk; and it is further,

ORDERED the Goldman Sachs Group's second counterclaim is voluntarily discontinued; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

2/1/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE