SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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FAREPORTAL, INC.,

Plaintiff,

-against-

JASON WARE, and TRAVANA, INC.,

Defendants.

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DECISION AND ORDER

Index No. 653995/16

MOT SEQ . 002

NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

The plaintiff, Fareportal, Inc. (Fareportal), commenced this action for declaratory and injunctive relief against its former employee, Jason Ware, and Travana, Inc. (Travana), Ware's subsequent employer. Fareportal alleges that Travana, a startup company, is its direct competitor in the online travel agency market, Ware misappropriated Fareportal's trade secrets and confidential and proprietary information, and Ware provided this information to Travana, thus unfairly competing with Fareportal. By order dated May 24, 2017, a trustee in bankruptcy was appointed to liquidate Travana in connection with a proceeding in Chapter 7 bankruptcy.

Fareportal moves, pursuant to CPLR 6301 and 6313, for a preliminary injunction (1) enjoining Ware from working at Travana, or any other competitor of Fareportal, for one year; (2) enjoining Ware from working with any former Fareportal employees, or soliciting any of Fareportal's employees or customers, for three years; (3) enjoining Ware, Travana, and their employees, officer, agents, subsidiaries or affiliates from using, referencing, or relying on any trade secrets and confidential and proprietary information misappropriated from Fareportal; (4) compelling Ware, Travana, and their employees, officers, agents, subsidiaries or affiliates, to

return to Fareportal all trade secrets and confidential and proprietary documents and information, including electronic copies of such information, that were transmitted or removed from Fareportal's premises. It further moves for expedited discovery and to compel an attorney-supervised inspection of all computers, including hard drives and mobile storage devices, in the defendants' possession, custody or control. The defendants oppose the motion. The motion is denied.

II. BACKGROUND

A. Fareportal and Travana's Businesses and Ware's Job Responsibilities

Fareportal is a high-tech, "high-touch" travel technology company that provides travel-related services to customers and businesses worldwide. According to its vice president of human resources, Corissa Leong, Fareportal owns and operates a number of online travel agencies (OTAs), that primarily focus on helping customers search for and find inexpensive airfare, It is undisputed that, on October 29, 2013, Ware began his employment at Fareportal as the Associate Director of its Loyalty program and Customer Relationship Manager (CRM). Travana was a travel technology company that, as of August 1, 2016, when this action was commenced, was in the process of launching its own OTA. On June 17, 2016, Ware provided Fareportal with two weeks' notice of his intent to resign from his employment at Fareportal, and his resignation became effective on July 1, 2016. Following his resignation from Fareportal, Ware commenced employment at Travana with the title of Director of Loyalty and CRM.

Leong asserts that Travana is a direct competitor of Fareportal and that, "[u]pon information and belief, Ware is performing job duties identical to the ones that he performed at Fareportal, and Travana is trying to develop the same type of platforms, databases, and strategies

that Fareportal uses." She further contends that it has spent substantial resources developing trade secrets and confidential and proprietary information that is crucial to its success, and that Travana would gain an unfair advantage were it to acquire such information.

According to Leong, Fareportal decided in 2013 to create and launch a loyalty and CRM program. Fareportal contends that it undertook an exhaustive search to find its first Associate Director, Loyalty & CRM, considering over 70 candidates, because the appropriate candidate needed to have a unique and specialized background and skills, including significant relevant experience working in the airline industry. On October 29, 2013, Fareportal hired Ware as its first and only Associate Director, Loyalty & CRM. In connection with the commencement of Ware's employment at Fareportal, Ware entered into an employment agreement, dated November 6, 2013 (the Agreement), which, among other things, set forth Ware's obligations to Fareportal both during and following the end of his employment. Specifically, the terms of the Agreement provided that Ware was to hold any trade secrets or any other proprietary information relating to the business in a fiduciary capacity solely for the benefit of Fareportal. Ware agreed that he would not, at any time, either during or after the term of the Agreement, disclose that information to anyone outside of Fareportal. The Agreement also prohibited Ware from hiring or accepting any business relationship with any former, present, or future employee, consultant or independent contractor of Fareportal for a period of three years after the termination of his employment, or directly or indirectly engaging in any online consumer travel business activities, including working freelance, for any company that is directly or indirectly related to the online consumer travel business for a period of one year after the termination of his employment.

According to Leong, Ware created and then managed Fareportal's Customer Relations

and Loyalty Department (the Department). The Department was responsible for all aspects of Fareportal's customer generation, development, and retention efforts, as well as the collection and analysis of Fareportal's customer data, marketing efforts, and pricing strategies. Leong asserts that Ware was the only employee at Fareportal capable of performing the Department's duties or managing projects. Leong further contends that, in order to assist Ware in the performance of his job duties, Fareportal provided him with access to certain of its trade secrets and confidential and proprietary information. She asserts that Ware was provided with special privileges to access all of Fareportal's customer information, including customer profiles and customer booking data, and was given full access to Fareportal's Google Analytics database, which included marketing sources, website traffic, and conversion rate information. Ware was also provided with access to Fareportal's internal data reporting and analytics tools, which analyzed Fareportal's customer database for customer trends and projected future sales, pricing, and other strategies.

According to Fareportal, additional types of trade secrets and confidential and proprietary information to which Ware was provided access – some of which Ware helped to create – included business plans and models, customer profile databases, customer contact information, pricing plans, marketing strategies and future plans with respect to customers, contracts with CRM software suppliers, repeat booking statistics, numerous analytic reports, passenger detail schematics, customer booking details, and website traffic source information.

Leong contends that none of the foregoing information is publicly available, and that it has taken significant steps to protect such information, although she does not provide details of what steps were indeed undertaken.

According to Leong, on June 8, 2016, Fareportal learned that Ware had begun working at Travana as the Director of its loyalty program and CRM. Fareportal contends that, upon information and belief, Travana hired Ware to develop the same programs, platforms, databases, and strategies that he developed for Fareportal, and that Ware used Fareportal's trade secrets and confidential and proprietary information to do so. Leong asserts that Ware was the only Fareportal employee capable of performing his specific job duties, and that Fareportal could thus not replace Ware from within the organization.

As Leong describes it, after Fareportal learned that Ware had commenced employment at Travana, it began reviewing Ware's email activity on his Fareportal email account. Fareportal contends that Ware misappropriated Fareportal's trade secrets and confidential and proprietary information by emailing such information from his Fareportal email account to his personal Yahoo email account, and that Ware had started developing business models for Travana while still employed at Fareportal. Specifically, Leong asserts that, on June 8, 2016, Ware forwarded to his personal email account a Loyalty Strategy and Loyalty Rewards Program model that he had prepared for Travana while still employed by Fareportal. She further asserts that, on June 10, 2016, Ware also sent himself an Excel spreadsheet containing Fareportal's entire credit card program database, and that, on June 16, 2016, he emailed himself a document containing depictions of Fareportal's credit card artwork designs . Leong avers that, on June 17, 2016, Ware emailed himself Fareportal's Loyalty Dashboard, which details weekly program enrollment, bookings and redemption data, as well as Fareportal's user profile and loyalty statistics. In addition, Leong states that, on June 22, 2016, Ware emailed himself an Excel spreadsheet detailing Fareportal's loyalty rewards program model, and that on June 23, 2016, he emailed

himself Fareportal's draft customer communications and advertisements. Leong asserts that Ware also forwarded himself other emails containing Fareportal source code, profit and loss statements, multiple designs of Fareportal's credit card program artwork, Fareportal user profile signup materials, total booking and total hit reports, and designs for Fareportal's rewards programs.

In his affidavit, Ware contends that, contrary to Fareportal's claims, he did not work in the same role at Travana as he had at Fareportal, did not misappropriate Fareportal's trade secrets and confidential and proprietary information, and is not unfairly competing with Fareportal. Ware asserts that he does not have a unique background and skill set, nor did he provide unique and extraordinary services to Fareportal. Ware explained that he had worked in the airline and travel industries since graduating college in 2002, and that Fareportal recruited him from JetBlue in 2013, where he had been working as Director of Loyalty, Marketing Operations. As Ware describes himself, he is not a computer programmer or coder and never created any software code for Fareportal. He explains that the field of "Customer Loyalty" or "Loyalty Marketing," in which he work for 2 ½ years at Jet Blue, and nearly 3 years at Fareportal, is what consumers know as "frequent flier miles." Ware asserts that, although he did set up the customer loyalty program at Fareportal, he had nothing to do with the creation of the technology that administered that program, and that the initiation of that program at Fareportal did not involve the use of any trade secrets, inasmuch as the details about how companies like Fareportal have set up their respective customer loyalty programs are publicly available and there are only several possible permutations in how they are run. As Ware explains it, some providers award points in ratio to the number of miles flown or traveled, while others award points or miles depending on the

number of dollars spent.

Ware states that he was also involved in the development of a co-branded credit card while at Fareportal, and contends that there is nothing proprietary about credit-card based loyalty programs because co-branded credit cards are issued in the names of tens of thousands of companies worldwide and, as with any other credit cards, they are the property of the credit card companies and the financing institutions. As Ware described it, his role in this co-branding program included reviewing the terms for the program, which were principally fixed by the credit card company and the sponsoring financial institution, reviewing the proposed artwork, and ensuring that the credit card companies awarded credits to cardholders in accordance with Fareportal's customer loyalty program. According to Ware, all co-branded credit cards work this way, and there is nothing secret or unique about it.

Ware asserts that Travana was just a start-up company, launched a few weeks prior to the inception of this lawsuit in 2016, that did not have a customer loyalty program or co-branded credit card, or any plans to launch such programs. Ware, as well as Travana's former director of human resources, Randey Arnold-Kraft, assert in their affidavits that Ware performed no work on any consumer loyalty program at Travana, but that the work instead encompassed revenue management, which entailed service as the marketing team's liaison to the commercial team, and working with the product and engineering teams to improve Travana's website. Ware further explained that his role was also to assist Travana in attracting and retaining new customers. Thus, although Ware concedes that he was initially hired as Travana's "Director, Loyalty & CRM," Arnold-Kraft asserts that the title did not fit Ware's responsibilities and had been changed prior to the date that Travana was liquidated to Director of Marketing Operations.

Ware contends that none of the documents attached to the Leong affidavit contain confidential information, nor are they trade secrets. As he explains, the document attached to the Leong affidavit as exhibit D is not a Fareportal document, but was instead one that Ware created as part of the hiring process at Travana, and contained only general ideas that Ware shared with Travana about his vision for a potential Travana customer loyalty program, should it ever have implemented one. Ware asserts that he emailed himself the documents attached as exhibits E, F and I to the Leong affidavit because he wanted to work on them at home, and that it was not unusual fore Fareportal employees to send documents to their personal email account so that they could continue to work on them at home. Ware further asserts that exhibits G and H to the Leong affidavit contain the presentation of data using publicly available software, which Ware wished to retain as templates. Ware contends that, other than exhibit D, which he created from his general recollections, he never sent any Fareportal documents to anyone at Travana and that, even if he did, they would have been no use to Travana, because Travana operated on a very different business model, and had done no work on a customer loyalty or a corporate credit card program.

B. Travana's Bankruptcy

On April 19, 2017, an involuntary petition was filed in the United States Bankruptcy Court for the Northern District of California seeking relief against Travana under Chapter 7 of the United States Bankruptcy Code. On May 12, 2017, Travana filed a consent to entry of an order for relief. On May 24, 2017, an order for relief under Chapter 7 was entered, and a Chapter 7 Trustee was been appointed to liquidate Travana. The action against Travana, in which Fareportal asserts causes of action sounding unfair competition (fourth cause of action), aiding

and abetting breach of fiduciary duty (fifth cause of action), tortious interference with contract (sixth cause of action), tortious interference with prospective economic advantage (seventh cause of action), and misappropriation of trade secrets (eighth cause of action), is thus automatically stayed, pending the lifting of the stay. See 11 USC § 362; Howell v New York Post Co., 81 NY2d 115 (1993); Lubonty v U.S. Bank Natl. Assn., 159 AD3d 962 (1st Dept. 2018). Although the Bankruptcy Court may authorize the trustee in bankruptcy to operate the business of a Chapter 7 debtor for a limited period of time (see 11 USC § 721), inasmuch the bankruptcy court order here does not provide such authorization, Travana has ceased operations, and the request for injunctive relief against it must be denied as academic.

However, "[t]he automatic stay provisions of the Federal bankruptcy laws do not extend to non-bankrupt codefendants." Rosenbaum v Dane & Murphy, 189 AD2d 760, 761 (2nd Dept. 1993). Hence, this action is not stayed as against Ware.

III. DISCUSSION

A. Preliminary Injunction

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." 1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 (1st Dept 2011). A preliminary injunction may only be granted where the party seeking a injunction demonstrates, by clear and convincing evidence , (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75

NY2d 860 (1990). If any one of these three requirements is not satisfied, the application must be denied. See Faberge Intl. v Di Pino, 109 AD2d 235 (1st Dept 1985). That branch of Fareportal's motion which is to preliminarily enjoin Ware from working for Travana for one year after he terminated his employment with Fareportal must be denied as academic, both because the one-year period has expired and because Travana ceased doing business. The other requests for injunctive relief are denied, as Fareportal has failed to demonstrate a likelihood of success on the merits of any of its causes of action, irreparable harm, or a balance of equities in its favor.

1. Likelihood of Success on the Merits

a. Breach of Contract Claim (First Cause of Action)

In its first cause of action Fareportal contends that Ware breached the non-competition, non-solicitation, and confidentiality covenants of the Agreement by virtue of his employment at Travana, as well as his "transmission of Fareportal's trade secrets and confidential information to his personal email account." Fareportal fails to show a likelihood of success on this claim.

"Covenants not to compete should be strictly construed because of the 'powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood.'" Gramercy Park Animal Ctr. v Novick, 41 NY2d 874, 874 (1977), quoting Purchasing Assoc. v Weitz, 13 NY2d 267, 272 (1963); see Brown & Brown, Inc. v Johnson, 25 NY3d 364 (2015). A restrictive covenant will be enforced only "if it: (1) is no greater than required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." BDO Seidman v Hirschberg, 93 NY2d 382, 388-389 (1999); see Brown & Brown, Inc. v Johnson, supra. A restrictive covenant will withstand the legitimate interest inquiry only (1) "to the extent necessary to prevent the

disclosure or use of trade secrets or confidential information," or (2) "where an employee's services are unique or extraordinary." Reed, Roberts Assoc. Inc. v Strauman, 40 NY2d 303, 308 (1976). Fareportal has failed to demonstrate that Ware is a unique or extraordinary employee under the law, or that he possesses any of Fareportal's trade secrets or confidential information.

For an employee to be unique or sufficiently extraordinary to satisfy this inquiry, it is not enough "that the employee excels at his work or that his performance is of high value to his employer. It must appear that his services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury" Purchasing Assoc., Inc. v Weitz, supra, at 274. Work characteristics adequate to meet this burden "have traditionally been associated with various categories of employment where the services are dependent on an employee's special talents; such categories include musicians, professional athletes, actors and the like" Earthweb Inc. v Schlack, 71 F Supp 2d 299, 313 (SD NY 1999) (internal quotation marks and citation omitted).

Contrary to Fareportal's contention, an extensive recruiting process and dearth of competent employees does not transform an otherwise non-unique employee into a unique one. While Ware may have been "of high value to his employer," such "value" is not sufficient to demonstrate uniqueness. Purchasing Assoc., Inc., supra, at 274. Ware simply worked on customer loyalty strategies for an OTA website, and Fareportal adduces no evidence to support its suggestion that marketing strategy employees are unique in its industry. As such, it has not shown that Ware's "replacement [is] impossible" or that the loss of his services "would cause the employer irreparable injury." Id.

Fareportal has also failed to demonstrate that Ware possesses any trade secrets. A trade

secret is defined as "'any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it.'" Ashland Mgt. v Janien, 82 NY2d 395, 407 (1993), quoting Restate of Torts, § 757, comment b; see Matter of New York Tel. Co. v Public Serv. Commn., 56 NY2d 213 (1982) ; see also Delta Filter Corp. v Morin, 108 AD2d 991 (3rd Dept. 1985); Eagle Comtronics v Pico, Inc., 89 AD2d 803 (4th Dept. 1982); EarthWeb, Inc. v Schlack, supra. Courts must consider the following factors in determining whether information constitutes a trade secret:

> "'(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others'"

Ashland Mgt. Inc. v Janien, supra, at 407 (citation omitted); see Mann v Cooper Tire Co., 33 AD3d 24 (1st Dept 2006). None of the information that Fareportal claims Ware emailed to himself fits this description. See Buhler v Michael P. Maloney Consulting, Inc., 299 AD2d 190 (1st Dept. 2002). The documents include "Fareportal's credit card artwork designs," "draft customer communications and advertisements," material prepared by an intern relating to a prospective co-branded credit card, tables that Ware used as a formatting template, and a rewards program model available to all Fareportal employees. A trade secret must provide an employer with some sort of competitive advantage. Fareportal does not describe the competitive damage that these documents would have provided. Moreover, Fareportal has failed to demonstrate that any of this information was given to Travana. See id. As Ware states in his affidavit, he sent the

documents from work to his home, not to Travana.

Fareportal contends that "Ware was provided access to and helped create a number of Fareportal's trade secrets . . . including: (i) business plans and models, (ii) customer profile databases, (iii) customer contact information, (iv) pricing plans, marketing strategies and future plans with respect to customers, (v) contracts with CRM software suppliers and other vendors . . ., (vi) repeat booking statistics, (vii) passenger detail schematics, (viii) customer booking details and (ix) website traffic source information." However, many of these items are not documents that Ware is alleged to have sent to his personal email account, but rather information that he was provided access to while at Fareportal. The mere access to such material and information, without more, does not constitute appropriation. See Falconwood Corp. v In-Touch Techs., Ltd., 227 AD2d 215 (1st Dept. 1996). In addition, "[m]ere 'knowledge of the intricacies of a former employer's business operation'" is not enough to constitute impermissible possession of a trade secret (International Paper Co. v Suwyn, 966 F Supp 246, 256 [SD NY 1997], quoting Reed, Roberts Assoc., Inc. v Strauman, 40 NY2d 303, 309 [1976]), and "'an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential.'" Investor Access Corp. v Doremus & Co., 186 AD2d 401, 404 (1st Dept. 1992), quoting Walter Karl, Inc. v Wood, 137 AD2d 22, 27 (2nd Dept. 1988); see Buhler v Michael P. Maloney Consulting, Inc., supra. If mere knowledge of "the intricacies of a former employer's business" were enough, "those in charge of operations or specialists in certain aspects of an enterprise [would be] virtual hostages of their employers." Reed, Roberts Assoc., Inc. v Strauman, supra, at 309. The items characterized by Fareportal as trade secrets amount to nothing more than Ware's "recollection of information," or Ware's knowledge of the "intricacies

of a former employer's business" that cannot be deemed trade secrets.

b. Breach of Fiduciary Duty and Duty of Loyalty (Second Cause of Action)

In its second cause of action, Fareportal alleges that Ware breached the fiduciary duty and duty of loyalty that he owed to it by misappropriating its trade secrets and confidential information for his benefit and the benefit of Travana. "To the extent that the portion of this cause of action suggests a breach of fiduciary duty owed by an employee to an employer, it is based on the same factual allegations as the breach of contract claim, and is duplicative." Meregildo v Diaz, 154 AD3d 630, 631 (1st Dept. 2017). Since Fareportal is unlikely to succeed on the merits of breach of contract cause of action, it is similarly unlikely to succeed on the breach of fiduciary duty cause of action.

In any event, Fareportal has not shown a likelihood of success on the merits of its claim for breach of fiduciary duty against Ware since it cannot demonstrate that a fiduciary "committed misconduct," and that it "suffered damages caused by that misconduct." Burry v Madison Park Owner, LLC, 84 AD3d 699, 700 (1st Dept 2011). Moreover, although an employee is prohibited by the duty of loyalty from soliciting fellow employees to join a competing firm, taking his or her former employer's trade secrets or confidential and proprietary information, or using such information for the benefit of other parties (see Fewer v GFI Group, Inc., 124 AD3d 457 [1st Dept. 2015]; DDS Partners, LLC v Celenza, 16 AD3d 114 [1st Dept. 2005]; Maritime Fish Prods. Inc. v World-Wide Fish Prods., Inc., 100 AD2d 81 [1st Dept. 1984]), and that duty would be breached by embezzlement, improper competition with the current employer, or usurpation of the employer's business opportunities (see Veritas Capital Mgt., LLC v Campbell, 82 AD3d 529 [1st Dept. 2011]; see also Grika v McGraw, 161 AD3d 450 [1st Dept. 2018]), Fareportal has not

described any misconduct on Ware's part or any conduct that could be construed as a breach of the duty of loyalty. Rather, it erroneously contends that Ware's email delivery of documents to himself– a practice he engaged in for the duration of his employment at Fareportal – implies a breach of both fiduciary duty and duty of loyalty. Nor has Fareportal described any specific damages that is has suffered, only vaguely alluding to reputational loss. It cannot show that Ware misappropriated any information, or otherwise used that information to compete with it.

Accordingly, Fareportal has failed to demonstrate that it will likely succeed on its second cause of action, which alleges breach of fiduciary duty and duty of loyalty.

c. Misappropriation of Trade Secrets (Third Cause of Action)

The third cause of action alleges that Ware directly misappropriated Fareportal's trade secrets and confidential and proprietary information by engaging in a pattern and practice of improperly forwarding it to his personal email account. Since Fareportal has failed to demonstrate that the information it describes are trade secrets, it is unlikely to succeed on the merits of its third cause of action. Moreover, Ware did no more than email documents to himself, which, in and of itself, does not constitute misappropriation. See Eastman Kodak Co. v Carmosino, 77 AD3d 1434 (4th Dept. 2010). Crucially, Fareportal fails to demonstrate that Travana actually used that information.

d. Unfair Competition (Fourth Cause of Action)

In its fourth cause of action, Fareportal bases its claim of unfair competition on Ware's forwarding of the emails to himself, as described above. A claim of unfair competition involving misappropriation "usually concerns the taking and use of plaintiff's property to compete against

the plaintiff's own use of the same property." ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478 (2007). In order for this claim to be sustained, there must be a showing that the defendant acted in bad faith. See Capital Records, Inc. v Naxos of America, Inc., 4 NY3d 540, 545-546 (2005); see also Beverage Mktg. USA, Inc v South Beach Beverage Co., Inc., 20 AD3d 439, 440 (2nd Dept 2005). Fareportal has not demonstrated that Ware misappropriated any trade secrets, or that he acted in bad faith. There is no indication that Travana was complicit in a scheme to take Fareportal's property, and Fareportal has produced no evidence that Travana has used that property. Accordingly, the unfair competition claim is not likely to succeed,

e. Tortious Interference with Prospective Economic Advantage (Seventh Cause of Action)

Fareportal is also unlikely to succeed on its claim for tortious interference with prospective economic advantage. To succeed on that claim, a plaintiff must establish "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 47 (1st Dept. 2009); see Cardiocall, Inc. v Serling, 492 F. Supp. 2d 139, 152 (ED NY 2007). To the extent that Fareportal claims that Ware aided and abetted Travana in interfering with Fareportal's prospective customer relationships, Fareportal has specified no injury, other than an unspecified and undocumented "loss of market share" due to Travana's purported attempts to lure its customers away, and concedes that the defendants acted, if at all, for economic gain, not out of malice. These allegations are insufficient. "Tortious

interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." Vigoda v DCA Prods. Plus Inc., 293 AD2d 265, 267 (1st Dept 2002). "[A] general allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship" cannot sustain such a cause of action. McGill v Parker, 179 AD2d 98, 105 (1st Dept. 1992); see B&M Linen Corp. v Kannegiesser, USA, Corp., 679 F Supp 2d 474, 485 (SD NY 2010).

2. Irreparable Harm

To demonstrate irreparable harm, Fareportal must demonstrate not only that Ware had access to the information in question, but also that he either misappropriated trade secrets, or that his new position would inevitably require disclosure of such secrets. Fareportal contends that it has suffered irreparable harm because of its "loss of its trade secrets and confidential and proprietary information," as well as "the loss of Ware's unique and extraordinary services." Simply having "access to some confidential information is not sufficient to show irreparable harm." International Business Machs. Corp. v Visnentin, 2011 WL 672025, *16 [SD NY 2011], affd 437 Fed Appx 53 (2nd Cir. 2011). Fareportal must do more than demonstrate "the mere possibility of harm." Earthweb, supra, at 308. Rather, the "harm must be imminent." Id. In contrast to Ware's averment that he has not used these documents, and is prepared to delete and destroy them , and Arnold-Kraft's statement that Travana never possessed or used any of the documents, Fareportal has provided nothing but speculation that Ware has utilized the documents he emailed to himself, and it has failed to explain how Ware or Travana might use the information to compete with Fareportal. Given that Fareportal has failed to demonstrate that

Ware misappropriated trade secrets or confidential information, or that Ware was a unique employee, it will not suffer irreparable harm if the preliminary injunction is not granted.

Moreover, even if the information in dispute constituted trade secrets, Fareportal cannot demonstrate that Ware will inevitably disclose such information to Travana or any other person or entity. In determining whether an employee will "inevitably disclose" trade secrets, courts consider factors such as whether: (1) the employers are direct competitors who provide the same or very similar services, (2) the employee's new position is nearly identical to his old one, and (3) the trade secrets at issue are highly valuable to both employers. See EarthWeb, supra.

In any event, Ware's position with Travana encompassed considerably different responsibilities than his position with Fareportal, given that Travana did not have a customer loyalty program or a co-branded credit card arrangement, and none of Ware's duties involved such programs. Fareportal provides no contrary evidence, and fails to demonstrate that Travana has used any confidential information generated by these programs.

3. Balancing of the Equities

Fareportal has also failed to show that the burden caused to Ware through imposition of an injunction is less than the harm caused to it by Ware's activities. Here, the equities strongly favor Ware, since, if the preliminary injunction were granted, the restrictive covenant would be enforced, which might prevent Ware from working in the online travel industry, and possibly render him unemployed. See Post v Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 NY2d 84 (1979); Eastman Kodak Co. v Carmosino, supra.

B. Request for Expedited Discovery

Fareportal is not entitled to expedited discovery. Expedited discovery is only warranted where it can be shown that the defendants' unique possession information is necessary to determine the extent of their unlawful conduct. See Bel Geddes v Zeiderman, 228 AD2d 393 (1st Dept. 1996). Fareportal relies solely on speculative allegations to suggest potential misappropriation, and claims a need for expedited discovery to locate any actual evidence as to whether any such misappropriation occurred. Such a request is must thus be denied. See Business Networks of N.Y., Inc. v Complete Network Solutions., Inc., 1999 WL 126088, *8 (Sup Ct, NY County, Feb. 24, 1999) (Ramos, J.). For the same reason, its request for attorney-supervised inspection of all of the defendants' computers is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that Fareportal's motion for a preliminary injunction, expedited discovery, and attorney-supervised inspection of the defendants' computers is denied.

This constitutes the Decision and Order of the court.

Dated: August 20, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON