SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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CAREER PARTNERS, INC.,

Plaintiff,

- v -

ANNA BRADY, JANELLE BAINES, GOLD COAST SEARCH PARTNERS, LLC

Defendant.

----------X

INDEX NO. 652451/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 22, 23, 24

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (1/7/2020), Anna Brady and Janelle Baines a/k/a Janelle Matthews, and Gold Coast Search Partners LLC d/b/a Gold Coast Search Partners (**Gold Coast**; Mses. Brady and Baines together with Gold Coast, hereinafter, collectively, the **Defendants**)'s motion to dismiss the complaint is granted solely to the extent that the third cause of action for unfair competition is dismissed without prejudice.

The Relevant Facts and Circumstances

Career Partners, Inc. (**CPI**) is an executive placement services company, with its principal place of business at 10 East 40th Street, New York, New York and offices in San Francisco, Los Angeles, and Chicago (NYSCEF Doc. No. 1, ¶¶ 3, 62). In its complaint, CPI asserts that it engages in a highly competitive business, which involves

> (1) recruiting pre-, pending, and post-MBA candidates for its clients; (2) executing investor relations and fundraising professional searches for its clients; (3) sourcing, assessing, and placing administrative talent, including receptionists and research coordinators for its clients; (4) collecting and analyzing compensation information for its clients; and (5) preparing and executing team building projects for its clients. The business is highly dependent on its personal contacts and confidential information, which includes without limitation the CPI Candidate Database, Customer Lists, Customer Requirements, Customer purchasing history, CPI Pitch Emails, CPI Business Proposals and Contracts, CPI Marketing Material, CPI Business Practices and Strategy, CPI mappings, trade secrets, and strategic plans. (*Id.*)

Both Mses. Brady and Baines began working for CPI's San Francisco office in 2010 as full-time recruiters pursuant to a certain CPI Protection Agreement (NYSCEF Doc. No. 2, the **Brady Agreement**), dated January __, 2010, by and between Career Partners, Inc. and Ms. Brady and a certain CPI Protection Agreement (NYSCEF Doc. No. 3, the **Baines Agreement;** the Brady Agreement and the Baines Agreement, collectively, hereinafter the **Agreements**), dated February 18, 2010, by and between Career Partners, Inc. and Ms. Baines, respectively. For completeness, Ms. Brady originally began working for CPI as a temporary employee from September 1, 2009 until she was hired as a full-time recruiter (NYSCEF Doc. No. 1, ¶¶ 12-13).

Pursuant to the Agreements, Mses. Brady and Baines agreed not to disclose certain confidential information acquired through their employment. To wit, the Agreements provide:

> SECOND: Confidential Information and Trade Secrets
>
> ...
>
> D. Non-Disclosure Obligation - Candidate hereby agrees that she will keep CPI's Confidential Information and Assets confidential during the Term of this Agreement and will not, without CPIs prior written consent, disclose any of the Confidential Information in any way whatsoever, will not permit unauthorized access to them, copy them, recreate them or attempt to recreate them or any aspect of them or place or encourage the placement of them into the public domain and will not use the Confidential Information other than in connection with her employment with CPI. This obligation shall obtain regardless of whether the Candidate quits or is terminated (NYSCEF Doc. Nos. 2, 3).

The Agreements also provided that employees, other than those who are primarily employed out of CPI's California offices, shall not compete within a 250 mile radius of CPI's principal place of business:

> THIRD: Covenant Not To Compete
>
> Candidate agrees that to the extent the Candidate is employed in the New York office, the Candidate agrees not to compete, directly or indirectly, either as principal, manager, agent, consultant, officer, stockholder, partner, investor, lender or employee or in any other capacity, carry on, be engaged in or have any financial interest in, any business or Person which is in competition with the business of CPI within a 250 mile radius of CPI's principal place of business. In view of the services which Candidate will perform and has performed for CPI, which are special, unique, extraordinary and intellectual in character and will place Candidate in a position of confidence and trust with the Customers and other employees of CPI and will provide her with access to Confidential Information of CPI, Candidate expressly acknowledges that the restrictive covenants set forth in this Agreement are necessary in order to protect and maintain the proprietary interests and other legitimate business interests of CPI. Candidate agrees and hereby acknowledges that (i) such provisions do not impose a greater restraint than is necessary to protect the goodwill or other business interests of CPI, (ii) such provisions contain reasonable limitations as to time and scope of activity to be restrained, (iii) such

> provisions are not harmful to the general public, and (iv) such provisions are not unduly burdensome to Candidate, and the consideration of employment is sufficient to compensate Candidate for the restrictions contained in such provisions. In consideration thereof and in light of Candidate's education, skills and abilities, Candidate agrees that she will not assert in any forum that such provisions prevent Candidate from earning a living or otherwise are void or unenforceable or should be held void or unenforceable. This provision is not intended to apply to any person primarily employed in the California offices and, to the extent that this provision is inconsistent with California law, it shall not apply. (*Id.*)

Inasmuch as Mses. Brady and Baines worked primarily out of CPI's San Francisco office, it is undisputed that the covenant not to compete did not apply to their employment.

Also, of significance as it relates to this motion, the Agreements provided for non-solicitation of CPI's customers and employees:

> FOURTH: Non-Solicitation of CPI Customers & Employees
>
> A. CPI Customers - Candidate agrees that he/she shall not, on their own behalf or on behalf of any business or Person other than CPI, directly or indirectly, solicit, call on or contact any Customer, as defined under Article FIRST, for any business purpose or otherwise as contemplated by this Agreement during the term of this Agreement without written permission from CPI. Candidate also agrees that he or she will not provide services to any CPI Customer or accept employment with any CPI Customer without the consent of CPI, which consent will not be unreasonably withheld.
>
> B. CPI Employee - Candidate agrees that he/she shall not, on their own behalf or on behalf of any business or Person other than CPI, directly or indirectly, solicit or offer employment to, or hire, any individual who has been employed by CPI at any time during the term of this Agreement without written permission from CPI. (*Id.*).

Finally, the Agreements provided that New York law would govern any disputes arising under these Agreements:

> SEVENTH: Choice of Law
>
> The validity, interpretation, terms, enforcement and performance of this Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of law principles. (*Id.*).

During their employment, Mses. Brady and Baines interacted daily with CPI's New York office and visited once or twice a year before July 2018 (NYSCEF Doc. No. 1, ¶¶ 15-16, 26). In and after July 2018, CPI alleges that Mses. Brady and Baines visited pre-MBA candidates in New York for the purpose of resigning from CPI and forming a competing company (*id.*, ¶¶ 49-52). Mses. Brady and Baines voluntarily resigned from CPI in December 2018 and formed Gold Coast which competes with CPI (*id.*, ¶¶ 22, 31, 49-58). Gold Coast is a limited liability

company formed in California on February 5, 2019 with offices in San Francisco and in New York at 1250 Broadway, 36th Floor, New York, New York (*id.*, ¶6).

CPI brought this lawsuit against Mses. Brady and Baines and Gold Coast alleging violations of the Agreements and based on the following five causes of action: (1) an injunction, (2) breach of contract, (3) theft of compensation/faithless servant, (4) unfair competition, and (5) tortious interference with contract.

After CPI filed this lawsuit, the Defendants filed two actions in California (NYSCEF Doc. No. 22, at 4). The first action is in the United States District Court for the Northern District of California regarding the enforceability of the Agreements (*id.*). The second action is in California state court regarding alleged statutory wage violations (*id.*). The first action was stayed in favor of the present action pending determination of the instant motion to dismiss (*see Gold Coast Search Partners LLC v Career Partners, Inc.*, 2019 US Dist LEXIS 155317 [ND Cal Sep. 11, 2019, No. 19-cv-03059-EMC]).

The Defendants now move to dismiss based on CPLR § 327 *forum non conveniens,* or in the alternative, pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action.

Discussion

A. Forum non conveniens

CPLR § 327 codifies the common law doctrine of *forum non conveniens*. Pursuant to CPLR § 327, a court may dismiss an action if it "finds that in the interest of substantial justice the action should be heard in another forum." The resolution of a motion to dismiss on *forum non conveniens* grounds is left to the sound discretion of the trial court (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). Courts consider the burden on New York courts, potential hardship to the defendant, the unavailability of an alternative forum in which the plaintiff may bring suit, the residency of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction (*id.*). Significantly, the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

In this case, CPI filed its lawsuit in New York to enforce employment agreements which provide that New York law governs against former employees who allegedly opened a business which has an office in New York – just a stone's throw away from CPI's offices located in New York. Simply put, CPLR § 327 dismissal is not appropriate. The Commercial Division in New York County regularly addresses the potential enforcement of restrictive covenants and alleged business torts and often is called upon to interpret and apply the laws of foreign states and, indeed, other countries. Put another way, there is little to no burden on this court in adjudicating the dispute between the parties. Although Mses. Brady and Baines reside in California, the dispute at issue allegedly arise out of their employment, which includes their activities in New York, as well as the formation and establishment of Gold Coast, which does business in New York (*see, e.g., Aon Risk Servs. v Cusack*, 102 AD3d 461, 462-463 [1st Dept 2013] [finding that the motion court properly exercised its discretion in denying dismissal for *forum non conveniens*

where the defendant employee was a long-time resident of California and worked for the plaintiff's subsidiary principally based in California for over 15 years before finding new employment]). Having been hired by a New York company, negotiated an employment agreement which indicates that New York law governs, travelled to New York in the course of their employment, and then, allegedly, set up a company – Gold Coast – that chose to continue doing business in New York, the Defendants simply cannot now claim that litigating in New York presents any real unforeseeable burden. Although California unquestionably presents a suitable alternative forum, this is the court of primary jurisdiction as the action involving the dispute between the parties was first filed here. Accordingly, dismissal based on *forum non conveniens* is denied.

B. Choice of Law

The New York Court of Appeals has held that a choice-of-law clause is valid and enforceable so long as the chosen law bears a reasonable relationship to the parties or the transaction (*Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 [2006]). And, it is the general policy of New York courts to enforce a choice of law provision (*see Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]). As discussed above, Section 7 of the Agreements provide that New York law governs disputes arising under the Agreements.

However, and relying primarily on *Marine Midland Bank, N.A. v United Missouri Bank, N.A.*, 223 AD2d 119, 123 [1st Dept 1996], notwithstanding the clear and unambiguous language in the Agreements, the Defendants nevertheless argue that California law should apply to the action because the Defendants argue that California has a materially greater interest in this litigation and applying New York law would violate California's codified public policy against enforcement of restrictive covenants.

At the time the Agreements were entered into, California had enacted the California Business and Professions Code § 16600, which provided that:

> Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. (Cal. Bus. & Prof Code § 16600).

Interpreting this statute, in *Dowell v Biosense Webster, Inc.*, 179 Cal App 4th 564 [2009], the California Court of Appeal, Second Appellate District affirmed the trial court's finding that section 16600 voided a non-solicitation clause, which mandated that the employee "will 'not solicit any business from, sell to, or render any service to, or, directly or indirectly, help others to solicit business from or render service or sell to any of the accounts, customers or clients' with whom the employee had contact during the last 12 months of employment," for 18 months after termination (*id.*, at 568). The court explained the strong public policy embodied by section 16600:

> Section 16600 expresses California's strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice. (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 706 [128 Cal. Rptr. 2d 172, 59

> P.3d 231]; *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 659 [60 Cal. Rptr. 2d 677] ["section 16600 was adopted for a public reason"].) California courts "have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 946 [81 Cal. Rptr. 3d 282, 189 P.3d 285] (Edwards).) "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." (*Id.*).

In addition, the Defendants rely on *AMN Healthcare, Inc. v Aya Healthcare Servs., Inc.*, where the California Court of Appeal, Fourth Appellate District affirmed the trial court's decision that a non-solicitation clause, prohibiting the solicitation of any employee of the former employer for one year or eighteen months after termination of employment was void. Again, the court referred to California's public policy underlying section 16600:

> '[A]t common law and in many states, a restraint on the practice of a trade or occupation, even as applied to a former employee, is valid if reasonable[.]' (*Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284, 288 [207 Cal. Rptr. 477].) However, California long ago rejected the so-called 'rule of reasonableness' when it enacted Civil Code former sections 1673 through 1675, the predecessor sections to Business and Professions Code sections 16600 through 16602. 'At least since 1872, a noncompetition agreement has been void unless specifically authorized by sections 16601 or 16602.' (*Bosley*, at p. 288.) These legislative enactments 'settled public policy in favor of open competition, and rejected the common law "rule of reasonableness," [and] [t]oday in California, covenants not to compete are void, subject to several exceptions … .' (*Edwards [v. Arthur Andersen LLP* (2008)] 44 Cal.4th [937,] 945 [81 Cal. Rptr. 3d 282, 189 P.3d 285].)" (*The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, 1233–1234 [98 Cal. Rptr. 3d 585] (*Galante*).) (*Id.*, at 587).

Although the non-solicitation clause was limited to solicitation of employees, the court noted that such a restriction remained void under the plain meaning of section 16600 and the absence of any statutory language to the contrary (*id.*, 589).

The Defendants also argue that pursuant to § 925 of the California Labor Code, employers are not permitted to require employees who primarily reside and work in California to agree to a provision which requires them to litigate outside of California a claim which arises in California and which deprives the employee of the substantive protection of California law. To wit, section 925 provides that:

> (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> > (1) Require the employee to adjudicate outside of California a claim arising in California.

> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
>
> (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.
>
> (c) In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney's fees.
>
> (d) For purposes of this section, adjudication includes litigation and arbitration.
>
> (e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.
>
> (f) This section shall apply to a contract entered into, modified, or extended on or after January 1, 2017. (Cal. Lab. Code § 925).

Therefore, based on the dicta in *Marine Midland,* the Defendants argue that California law should apply and that under California law, the restrictive covenants are void.

As an initial matter, even if California law were to apply, the court notes that section 925 of the California Labor Code would not apply to void the Agreements as they were entered into in 2010 – *i.e.*, well before January 1, 2017. In addition, the claim does not solely arise in California. Here, alleged breaches of the confidentiality and non-solicitation clause are occurring in New York.

But putting that aside, the Defendants' reliance on the *Marine Midland* dicta is misplaced.

Marine Midland involved the enforcement of a promissory note by an assignee of the promissory note and security agreement against the deceased obligor's Kansas estate. The plaintiffs brought an action in New York County seeking to recover and moved for summary judgment, the estate cross-moved for summary judgment arguing that Kansas, and not New York law, should govern and under Kansas law there was a nonclaims statute that precluded recovery. To wit, Kansas had enacted a nonclaims statute which provided:

> All demands, including demands of the state, against a decedent's estate, whether due or to become due, whether absolute or contingent, including any demand arising from or out of any statutory liability of decedent or on account of or arising from any liability as surety, guarantor or indemnitor, and including the individual demands of executors and administrators, not exhibited as required by this act within four months after the date of the first published notice to creditors as herein provided shall be forever barred from

> payment, except that the provisions of the testator's will requiring the payment of a demand exhibited later shall control. (Kan Stat Annot § 59-2239 [1]).

New York State Supreme Court Justice Ira Gammerman denied the motion for summary judgment and granted the cross motion, holding that notwithstanding the express choice of law provision in the agreement, indicating New York law governed enforcement of the promissory note, that Kansas law applied and under Kansas' nonclaims statute, recovery was precluded.

On appeal, the First Department reversed concluding that the New York choice of law provision was valid and enforceable and the transaction at issue bore a reasonable relationship to New York (*id.*, at 123). Namely, the original assignor of the note had headquarters in New York, payments on the note were made to the New York headquarters, and the plaintiff note holder was located in New York (*id.*). Although the First Department noted that a choice of law provision might be invalid where procured by fraud or where the issue was of such overring concern to the public policy of the other jurisdiction as to override the intent of the parties and the interest of this State in enforcing its own policies (*id.*, at 123-124, citing Restatement (Second) of Conflict of Laws § 187 (2) (b)), no such showing had been made in that case. The court further explained:

> "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world (*International Planning v Daystrom, Inc.*, 24 NY2d 372; see, also, *Bache & Co. v International Controls Corp.*, 339 F Supp 341). That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.
>
> "New York's interest in providing a convenient forum is least subject to challenge when a transaction is centered here (see *Rubin v Irving Trust Co.*, 305 NY 288, 305; and *Auten v Auten*, 308 NY 155, 160)." (*Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 581.)
>
> In contrast to these significant New York public policy considerations, we are confronted with a policy characterized by defendant as fundamental to the "prompt, orderly and efficient administration of estates" under Kansas law as embodied in a statute which on its face is violative of due process and has been held unconstitutional by that State's own Supreme Court on that basis. (See, *Matter of McDowell*, supra.) Such can hardly be held to be the kind of predominating public policy concern that would warrant overriding this State's very substantial interest in resolving a dispute in a commercial transaction centered here. Clearly, in this case the relevant public policy considerations strongly support the upholding of the New York choice of law provision agreed to by the parties themselves with respect to enforcement of the transaction in issue. (*Id.*, at 124).

Here, the allegations in the dispute at *nisi prius* involve a New York company's enforcement of Agreements concerning confidentiality and non-solicitation by two former employees who have allegedly opened shop (*i.e.*, Gold Coast) in New York City in violation of the Agreements which expressly provide that New York law governs. Put another way, the chosen law – New York – bears a reasonable relationship to the parties and the dispute *(Welsbach*, 7 N.Y.3d at 629). And, here, like in *Marine Midland,* the foreign jurisdiction simply does not have a greater interest which outweighs New York's substantial interest in resolving a commercial dispute involving a New York based company with a competitor set up in New York involving the potential violation of a confidentiality and non-solicitation provision so as to do business, among other places, in New York.

For the avoidance of doubt, to the extent that the Defendants also urge this court to follow *TGG Ultimate Holdings, Inc. v Hollett*, 224 F Supp 3d 275 [SDNY 2016] and *Medicrea USA, Inc. v K2M Spine, Inc.*, 2018 US Dist LEXIS 110286 [SDNY Feb. 7, 2018]), these cases do not lead to a different result.

In *TGG*, the plaintiffs brought an action for the defendants' violation of post-employment obligations pursuant to a non-compete and non-solicitation agreement. The court in that case found that California law applied despite a New York choice of law provision in the defendant employees' agreements because the choice of law provision was the only basis for contact with New York. For the avoidance of doubt, the court noted that TGG was incorporated in Delaware, with its principal place of business in South Carolina, that TGG maintained no operations in New York and only had one major client in New York (*i.e.*, the New York Department of Education), and that the defendants in that case were California residents:

> TGG has failed to demonstrate the existence of any contacts of this action with New York other than the choice-of-law provision itself. Neither TGG nor its subsidiaries are incorporated, ***nor operate principally, in New York.*** (See Dkt. No. 1, at 2-3) … All Defendants "worked in their various capacities under the contracts as California employees, ***working solely in California …"*** (*TGG*, 244 F Supp 3d at 282 [emphasis added]).

By contrast, the choice of law provision in this case is not the only basis for contact with New York. During Mses. Brady and Baines' employment, they undeniably travelled to New York in the course of their employment and, most significantly, the allegations which form the basis for relief are alleged violations of the confidentiality and non-solicitation provisions, and the formation of Gold Coast, which has offices in New York, pursuant to which Ms. Brady and Baines continue to violate their employment agreements in New York using, among other confidential information, the confidential customer requirements obtained while working for CPI.

In *Medicrea*, the court declined to apply a New York choice of law provision in an employment agreement in favor of California law because, in that case, the California defendants worked both during the employment ***and after the employment, in California.*** Again, this is very different than the case at bar. As discussed above, Mses. Brady and Baines allegedly now violate their Agreements in New York through their operation of Gold Coast.

Accordingly, the selected choice of law provision of New York bears a reasonable relationship to the parties, New York has a materially greater interest in the dispute and New York law governs the dispute.

C. Motion to Dismiss

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*, 88).

1. Second Cause of Action (Breach of Contract)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). For the avoidance of doubt, the Plaintiff's breach of contract claim solely concerns the non-solicitation and confidentiality provisions in the Agreements.

In the complaint, CPI sufficiently pleads each element for breach of contract by identifying those portions of the Agreements that were allegedly breached, the Defendants' alleged conduct in violation of the Agreements, and damages in the form of Gold Coast's engagement of at least one CPI customer (NYSCEF Doc. No. 1, ¶¶ 36-62).

At oral argument the Defendants argued that CPI should identify any CPI customer that the Defendants have obtained business from and CPI offered to provide a supplemental affirmation. Given the foregoing, and although the court is not requiring a supplemental affirmation at this time, at this stage of the proceeding, the branch of the Defendants' motion to dismiss the second cause of action is denied.

2. Third Cause of Action (Theft of Compensation/Faithless Servant)

The faithless servant doctrine provides that an employee who is faithless in the performance of services is not entitled to recover commission or salary (*Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 928 [1977]). An employee's preliminary steps to enter into a competitive business is not sufficient to invoke this doctrine unless the employee also works less on behalf of the employer and misappropriates business secrets or special knowledge derived from the employer (*id.*). The First Department has also explained that a "persistent pattern of disloyalty" is required before an employer can recover compensation paid to an employee (*Bon Temps Agency v Greenfield*, 212 AD2d 427, 428 [1st Dept 1995], citing *Schwartz v Leonard*, 138 AD2d 692, 693 [2d Dept 1988] [explaining that the defendant employee's single act of secretly planning to obtain new office space in the month preceding his departure did not constitute disloyalty entitling the plaintiff employer to recover all commissions paid to the defendant]).

Here, the complaint alleges that Mses. Brady and Baines travelled to New York and used CPI's confidential information, while employed at CPI between July 2018 to December 2018, for the purpose of looking for pre-MBA candidates, forming Gold Coast, or competing with CPI (NYSCEF Doc. No. 1, ¶¶ 49-62). According the Plaintiff every favorable inference as it must on a motion to dismiss, such conduct sufficiently states a claim pursuant to the faithless servant doctrine and the branch of the Defendants' motion to dismiss the third cause of action is denied.

3. Fourth Cause of Action (Unfair Competition)

The crux of an action for unfair competition concerns the protection of a business from the misappropriation of its labor, skill, and money (*Ruder & Finn, Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 671 [1981]). However, an action for unfair competition is duplicative of a claim for breach of contract where both claims arise from the same set of facts (*Lord Sec. Corp. v Abedine*, 2017 NY Slip Op 30522[U], *21 [Sup Ct, NY County 2017], citing *Fada Intl. Corp. v Cheung, 57 AD3d 406*, 406 [1st Dept 2008] [dismissing a claim for unfair competition because it was duplicative of the misappropriation of confidential information]).

The Plaintiff's claim for unfair competition is duplicative of its breach of contract claim because the complaint expressly acknowledges that the Defendants' alleged misappropriation was also prohibited by the Agreements (NYSCEF Doc. No. 1, ¶ 91). Accordingly, the branch of the Defendants' motion to dismiss the fourth cause of action for unfair competition is granted without prejudice.

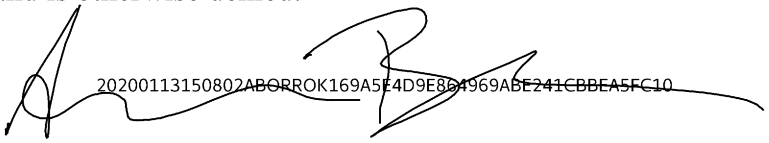
4. Fifth Cause of Action (Tortious Interference with Contract)

A claim for tortious interference with contract requires (i) a valid contract with a third party, (ii) defendant's knowledge of that contract, (iii) defendant's intentional and improper procuring of a breach, and (iv) damages (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]).

In sum and substance, the Plaintiff has sufficiently alleged that Gold Coast interfered with the Agreements by providing Mses. Brady and Baines with a platform to improperly solicit CPI clients and misappropriate CPI's confidential information, either individually or on behalf of Gold Coast (NYSCEF Doc. No. 1, ¶¶ 58-62). Accordingly, the branch of the Defendants' motion to dismiss the fifth cause of action for tortious interference with contract is denied.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is granted solely to the extent that the third cause of action is dismissed without prejudice and is otherwise denied.



1/13/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE