SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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UNIVERSAL PROCESSING LLC,

Plaintiff,

- v -

WEILE ZHUANG a/k/a VERA ZHUANG, HUMMINGBIRD MARKETING AGENCY INC., and ARGUS MERCHANT SERVICES LLC,

Defendants.

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INDEX NO. 650702/2019

MOTION DATE 07/03/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion for DISMISSAL.

Upon the foregoing documents, the motion of defendants Weile Zhuang a/k/a Vera Zhuang, Hummingbird Marketing Agency Inc., and Argus Merchant Services LLC (together, "Defendants") for an order dismissing the second through sixth causes of action in the complaint (the "Complaint" [NYSCEF Doc. No. 2]) is granted in part, in accord with the following decision.

BACKGROUND

Plaintiff Universal Processing LLC ("Plaintiff") is a New York limited liability company engaged in the business of offering credit card processing services to corporate customers (Complaint ¶¶ 2,14).[1] Defendant Weile Zhuang a/k/a Vera Zhuang ("Zhuang") worked for Plaintiff as a marketing associate from July 20, 2017 until November 6, 2017 (*id.* ¶¶ 16, 25, 78). Defendant Argus Merchant Services LLC ("Argus") is one of Plaintiff's direct competitors (*id.* ¶

[1] Unless otherwise noted, the facts are recited here as set forth in the Complaint and accepted as true, as required on a motion to dismiss.

52). Defendant Hummingbird Marketing Agency Inc. ("Hummingbird") is Argus' affiliate or business partner and provides marketing services in the United States and China (*id.* ¶ 5). Zhuang is a current Argus employee and a Hummingbird shareholder (*id.* ¶¶ 6, 78).

In contemplation of Zhuang's employment with Plaintiff, the two parties entered into a "Confidentiality and Nondisclosure Agreement" (the "Agreement"), dated July 19, 2017 (NYSCEF Doc. No. 4). The Agreement, which identifies Plaintiff as "UP" and Zhuang as "Business Associate," states that both parties "agreed to hold discussions in contemplation of a business relationship," and defines the phrase "Confidential Information" as "[a]ll information disclosed to the other party, or an affiliate, parent company, subsidiary, partner, or advisor of the other party during these discussions, regardless of the form or media on which it is stored or disclosed" (*id*. at 1). Pursuant to the Agreement, they agreed to the following:

> "Each party will: (a) treat all Confidential Information confidentially and will not disclose such information to any other person, corporation or entity except as permitted in writing by the disclosing party or as expressly permitted by the terms of this Agreement; . . . (e) use the Confidential Information only for the purpose of evaluating the contemplated business relationship, and not for its own business purpose or for its own monetary gain"

(*id*.). Other relevant provisions of the Agreement provide that the receiving party shall "maintain the confidentiality, and will not use for its own purposes, any Confidential Information," the document is the "entire Agreement between the parties relating to the subject of confidentiality and permitted use, and any promise not contained in this Agreement . . . will not be binding on either party unless set forth in a written agreement signed by both parties," and "[i]n the event of a breach of this Agreement, the parties agree that the disclosing party will suffer irreparable harm . . . [and] will be entitled to injunctive relief" (*id*.).

On July 25, 2017, Zhuang entered into a second agreement with Plaintiff, a "Memorandum of Employment" (the "Memorandum") (NYSCEF Doc No. 3 at 1). The

Memorandum designates July 20, 2017 as the start date of Zhuang's employment as an at-will employee, and contains the following confidentiality provision:

> "By signing this Memorandum you agree that you will retain in strictest confidence all information and data belonging to or relating to the business of Universal … including but not limited to: workflows, client information, vendor information, staff information, directories & databases, company practices [and] any additional information that the company might deem confidential. It is hereby agreed that each party will safeguard such information and data by using the same degree of care and discretion that it uses with its own data that such party regards as confidential."

(NYSCEF Doc No. 3 at 2.) The Memorandum also contains the following clause:

> You acknowledge that this Memorandum, along with the final form of any enclosed documents, represents the entire agreement between you and Universal Processing LLC and that no verbal nor written agreements, promises or representations that are not specifically stated in this employment offer letter, are or will be binding upon Universal Processing LLC.

(*id.* at 3-4.)

During the course of her employment, "professional differences" developed between Zhuang and Plaintiff's managing member, Steven Ding (Complaint ¶ 43). On October 3, 2017, Zhuang complained of these differences to the Universal Human Resource Department (*id.*). On November 3, 2017, Zhuang met with Plaintiff's chief executive officer, Saint Hung, who attempted to mediate the differences between Zhuang and Ding (*id.* ¶¶ 44-47). Hung offered Zhuang a future equity interest in a marketing spin-off from Plaintiff, but Zhuang declined and stated that she was applying for positions elsewhere (*id.* ¶¶ 47-49). Prior to the November 3, 2017 meeting with Hung, Zhuang engaged in employment negotiations with Argus, for whom she began working shortly thereafter (*id.* ¶¶ 51-53, 78).

Between November 3, 2017 and November 6, 2017, Zhuang forwarded numerous emails containing Plaintiff's confidential, detailed marketing information from her company email account to her personal email account before deleting the forwarded messages from her company

account (*id.* ¶¶ 67-71). Zhuang then tendered her resignation to Plaintiff on November 6, 2017 (*id.* ¶ 78). Zhuang also refused, and continues to refuse, to surrender her account administrator credentials for "WeChat" and the "CS Platform," two forums used by Plaintiff's clients to exchange confidential information (*id.* ¶¶ 81-88). Both WeChat and the CS Platform contain confidential information owned by Plaintiff (*id.* ¶¶ 95-96). After her departure from Plaintiff, Zhuang approached two of Plaintiff's merchant consultants, nonparties Sanjun Chen ("Chen") and Yuchan Zhai ("Zhai") (together, the "Consultants"), and encouraged them to encourage them to join her at Argus (*id.* ¶¶ 113-117).

Nonparty James Liu ("Liu") worked for Plaintiff until October 24, 2017 and now works for Argus (*id.* ¶¶ 149-50). Working on behalf of Argus or Hummingbird, Liu allegedly poached one of Plaintiff's clients, L&G Nail Salon ("L&G"), by "surreptitiously" replacing L&G's credit card terminal, which had been furnished by Plaintiff, with a terminal supplied by Argus (*id.* ¶¶ 151, 154). Plaintiff also owns the commercial brand name "NYChinaRen.com" (*id.* ¶ 163). On or about November 5, 2018, one of Plaintiff's clients contacted Liu through an advertisement Liu had placed on NYChinaRen.com (*id.* ¶ 162). Plaintiff claims that Liu told this unnamed client that he worked for Plaintiff, furnished the client with a merchant application which the client signed and returned, and then opened an account for this client with Argus (*id.* ¶¶ 164-67). Plaintiff submits that Liu used its confidential and proprietary information, namely the merchant application, in order to secure this unnamed client's business and gain a commercial advantage for Argus (*id.* ¶¶ 169-73).

On February 4, 2019, Plaintiff commenced this action by filing by a summons and complaint asserting the following six causes of action: (1) breach of the Memorandum against Zhuang; (2) breach of the Agreement against Zhuang; (3) intentional interference with

contractual relations against Argus, Hummingbird and Zhuang; (4) tortious interference with prospective advantage against Argus and Hummingbird; (5) unjust enrichment against Argus; and (6) injunctive relief against Zhuang. In lieu of serving an answer, Defendants now move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the second through sixth causes of action in the complaint.

DISCUSSION

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1,* 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). As such, affidavits and deposition testimony do not qualify as documentary evidence (*Lowenstern v Sherman Sq. Realty Corp*., 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc*., 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta,* 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc*., 31 NY3d 100, 106 [2008]) may be considered.

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable

legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). The motion will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Whether the plaintiff can ultimately prevail is not part of the court's calculus on a motion to dismiss (*see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Nevertheless, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). A pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom. Spiegel v Rowland*, 552 US 1257 [2008]).[2]

A. The Second Cause of Action for Breach of Contract against Zhuang

Defendants move to dismiss Plaintiff's second cause of action for breach of the Agreement on the grounds that it defines "Confidential Information" as information exchanged during the pre-employment discussions between the parties, yet the Complaint only alleges that Zhuang wrongfully disclosed information obtained during the course of her employment. Plaintiff opposes and asserts that the Agreement and the Memorandum should be read together to ascertain the parties' intent and to avoid a commercially unreasonable result.

[2] The court declines Defendants' request to reject Plaintiff's opposition papers as untimely. Although the parties' stipulation dated April 3, 2019 provides that Plaintiff shall file its opposition on or before June 14, 2019 (Walters reply affirmation, exhibit 1 at 1), and the opposition papers were filed on June 26, 2019, Defendants have not suffered any demonstrable prejudice as they have submitted reply papers responding to the arguments raised in Plaintiff's opposition.

To sustain a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Housing Corp.*, 426 [1st Dept 2010]). Because a written agreement must be construed according to the parties' intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]), the document must be read as a whole "to determine its purpose and intent" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). The "particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018], quoting *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). The words must also be given their plain meaning (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). Thus, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assocs.*, 77 NY2d at 162). Furthermore, "the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" (*Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Applying these precepts here, the court finds that the second cause of action for breach of the Agreement fails under CPLR 3211 (a) (1). The plain language of the Agreement defines "Confidential Information" as "[a]ll information disclosed to the other party . . . during these discussions." In opposition to the motion, Plaintiff fails to identify even a single allegation in the Complaint that Zhuang disclosed information obtained during the course of her employment. On the contrary, the complaint alleges that Zhuang had access to confidential information "[i]n accordance with her level of responsibility within Universal," that Plaintiff granted Zhuang access to this information for the "sole and express purpose of Zhuang performing her duties . . .

as a Universal employee" (*id.* ¶ 18), and that Zhuang's access was "conditional on, and limited to, her continued employment with Universal" (*id.* ¶ 19). Accordingly, Plaintiff has not stated a cause of action for breach of the Agreement. Therefore, this cause of action must be dismissed.

Plaintiff's contention that the Agreement and Memorandum should be read together is unpersuasive because both documents contain merger clauses where each party acknowledged that the documents represented the complete agreements between them, and a broad merger clause "bars any claim based on an alleged intent that the parties failed to express in writing" (*Ashwood Capital, Inc. v OTG Mgt., Inc*., 99 AD3d 1, 9 [1st Dept 2012]). The Agreement and the Memorandum must, therefore, be understood as two complete, and separate, agreements. Thus, defendants are entitled to dismissal of the second cause of action.

B. The Third Cause of Action for Intentional Interference with Contractual Relations against Argus, Hummingbird and Zhuang

Defendants next move to dismiss the third cause of action for intentional, or tortious, interference with contractual relations, which is predicated upon (1) "Argus's procuring of Zhuang's breaches of the Memorandum and the Agreement," and (2) Zhuang's actions to induce the Consultants to breach their employment obligations by resigning from their positions with Plaintiff and taking up employment with Argus (NYSCEF Doc No. 2 ¶ 231). Defendants contend that Plaintiff fails to state a claim with respect to Argus because the Complaint does not allege that Argus was aware of any restrictive covenant between Zhuang and Plaintiff or identify any affirmative act taken by Argus to induce a breach thereof. Defendants further contend that Plaintiff fails to state a claim with regard to the Consultants because the Complaint does not identify any specific contractual provision that was breached; nor does it allege that Defendants were aware of the existence of the agreements between Plaintiff and the Consultants.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).[3] The "interference must be intentional, not merely negligent or incidental to some other, lawful, purpose" (*Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281 [1978]). The defendant's actions must also be the "but for" cause of the breach (*see Meer Enters., LLC v Kocak*, 173 AD3d 629, 631 [1st Dept 2019] [internal quotation marks and citation omitted]). A tortious interference with contract claim must also be supported by something more than mere speculation (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept], *lv denied* 7 NY3d 704 [2006]), or conclusory allegations (*see L.Y.E. Diamonds, Ltd., v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591 [1st Dept 2019]).

Here, Plaintiff's claim for tortious interference lacks necessary elements because the Complaint does not allege that Defendants had knowledge of the Memorandum, Agreement, or the Consultants' separate contracts with Plaintiff; nor does it plead the specific contract terms Defendants purportedly induced Zhuang or the Consultants to breach (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013] [dismissing a tortious interference with contract claim where the complaint failed to identify the term of the agreement that was allegedly breached]; *Lama Holding*, 88 NY2d at 424). Furthermore, as pertains to Chen, a valid contract did not exist between Chen and Plaintiff at the time of the purported interference because the consulting agreement was not executed until November 15, 2017 (NYSCEF Doc. No. 5 at 5), more than one

[3] Contrary to Defendants' assertion, a defendant need not be aware of the specific terms of the contract to plead a claim for tortious interference (*see Gold Medal Farms, Inc. v Rutland County Co-Operative Creamery, Inc.*, 9 AD2d 473, 478-479 [3d Dept 1959]).

week after Zhuang is alleged to have approached Chen to encourage her to leave Plaintiff's employ (Complaint ¶¶ 113, 117).

To the extent that the Complaint alleges that Argus intentionally procured a breach of the Memorandum, Agreement, or the Consultants' contracts, the assertions are wholly conclusory (*see 57th St. Arts, LLC v Calvary Baptist Church*, 52 AD3d 425, 426 [1st Dept 2008] [dismissing a tortious interference with contract claim on the ground that the complaint "failed to set forth sufficient facts showing that . . . [the defendants] intentionally procured a breach"]; *CDR Creánces S.A. v Euro-American Lodging Corp*., 40 AD3d 421, 422 [1st Dept 2007] [dismissing a tortious interference claim where the complaint failed to plead the "intent to induce a breach in nonconclusory fashion"]). Plaintiff merely pleads, upon information and belief, that Defendants, Zhuang, and the Consultants had discussions, which is insufficient to evince intent. Moreover, the Complaint fails to describe the specific events by which Defendants procured a breach (*see e.g. Tekton Builders LLC v 1232 Southern Blvd. LLC*, 180 AD3d 616 [1st Dept 2020] [concluding that the plaintiff sufficiently pled that the defendants intentionally procured "a breach by Owner by improperly failing to promptly pay invoices and approve change orders, thereby interfering with plaintiff's ability to meet contract deadlines and its relationship with its subcontractors"]).

In addition, fatal to the tortious interference claim is the absence of any nonconclusory allegations supporting any reasonable conclusion that, but for Defendants' actions, Zhuang and the Consultants would have continued to work for plaintiff (*see Pursuit Inv. Mgt. LLC v Alpha Beta Capital Partners, L.P.*, 127 AD3d 580, 581 [1st Dept 2015] [granting dismissal where the complaint failed to allege that the defendant's conduct was the but for cause of the plaintiff's damages]; *Burrowes*, 25 AD3d at 373 [dismissing a tortious interference claim where the

plaintiff failed to allege that but for the defendants' actions, a third party would have continued her talent management contract with the plaintiff]). The Complaint needs to, but doesn't, support its "but for" causation allegations with nonconclusory facts (*see BGC Partners, Inc. v Avison Young [Can.] Inc*., 160 AD3d 407, 407 [1st Dept 2018]). Plaintiff failed to offer specific arguments addressing this cause of action in its opposition or at oral argument. It also has not tendered an affidavit or other evidence to cure these pleading deficiencies. Accordingly, the branch of Defendants' motion seeking to dismiss the third cause of action is granted.

C. The Fourth Cause of Action for Tortious Interference with Prospective Advantage against Argus and Hummingbird

Plaintiff's fourth cause of action alleges that Liu, acting as an employee or agent of Argus and Hummingbird, tortiously interfered with Plaintiff's business relationships with L&G and others (NYSCEF Doc No. 2 ¶¶ 242, 248). Defendants contend that the Complaint fails to plead a claim for tortious interference with prospective economic advantage because it does not identify Plaintiff's customers with specificity; it does not describe the wrongful conduct directed at them; it does not explain how such conduct constituted improper means; and it does not plead but for causation. Defendants further argue that L&G was aware that it had contracted with Argus for credit card processing services, as evidenced in an Argus agreement that L&G executed on October 25, 2017 (NYSCEF Doc No. 22 at 3-4).

To state a claim for tortious interference with prospective advantage, a party must allege (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 JP Morgan Chase & Co*, 71 AD3d 40, 47 [1st Dept 2009], *appeal dismissed* 14 NY3d 736

[2010]). The conduct complained of must be directed "at the party with which the plaintiff has or seeks a relationship" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Generally, to satisfy the third prong of the test, the conduct must be criminal, independently tortious, or the defendant must act for the sole purpose of inflicting intentional harm on the plaintiff (*id.* at 190).

At the outset, the allegation that "Argus and Hummingbird . . . induced longstanding Universal merchants to cease doing business with Universal" is not sufficiently specific as to the identities of those clients or the specific business relationships Defendants allegedly interfered with (*see Rondeau v Houston*, 118 AD3d 638, 639 [1st Dept], *lv dismissed* 24 NY3d 999 [2014], *rearg denied* 24 NY3d 1115 [2015]), or whether the interference was wrongful or unlawful. Nevertheless, Plaintiff has adequately pled a claim for tortuous interference with respect to L&G and the unnamed NYChinaRen.com client. Plaintiff's allegation that Liu, acting as an agent for Argus, surreptitiously switched and retained L&G's credit terminal, sufficiently pleads the necessary elements of the claim, including the wrongful means element because the purported conversion of the Plaintiff's credit card terminal alleges an independently tortious act. The application purportedly completed by L&G that Defendants submit in support of their motion (NYSCEF Doc. No. 22) is inadmissible because Defendants have failed to lay the proper foundation to support its admissibility as a business record and, in any event, that document does not conclusively establish falsity of the allegations of conversion; nor does that document offer any proof regarding the mindset or knowledge of the signatory, from whom no affidavit is submitted.

As to the unnamed client who contacted Liu through NYChinaRen.com, Plaintiff alleges that Liu, acting for Argus or Hummingbird, represented that he was Plaintiff's employee and sent that client a copy of Plaintiff's merchant application (Complaint ¶¶ 162-66). Liu then opened an

account for that client with Argus (*id*. ¶ 167). This alleged fraud or misrepresentation also satisfies the wrongful means element of a prospective advantage claim, and Plaintiff has pled the remaining elements of the claim (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]). Defendants' moving papers did not address these allegations on its motion. Accordingly, the motion seeking to dismiss the fourth cause of action is denied as it pertains to L&G and the unnamed NYChinaRen.com client.

D. Fifth Cause of Action for Unjust Enrichment against Argus

Defendants next move to dismiss Plaintiff's fifth cause of action for unjust enrichment on the grounds that there is no relationship between Argus and Plaintiff such that an unjust enrichment claim lies. Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). While a plaintiff need not be in privity with the defendant to recover, "a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). The relationship between the parties must be such that it "could have caused reliance or inducement" (*id.* at 183). Therefore, to state a cause of action for unjust enrichment, the "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citations omitted]).

Plaintiff pleads that Argus or its agent committed wrongful acts, such as instructing Zhuang to retain Plaintiff's confidential information, thereby enriching Argus at Plaintiff's expense (NYSCEF Doc No. 2 ¶¶ 262, 264). Plaintiff's claim for unjust enrichment fails because it lacks any allegation of a prior relationship between them that could have caused inducement or

reliance on Plaintiff's part (*see Mandarin Trading Ltd.*, 16 NY3d at 182; *Joseph P. Carroll Ltd. v Ping-Shen*, 140 AD3d 544, 544 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017] [dismissing an unjust enrichment claim where the plaintiffs failed to plead the existence of a prior relationship]). The plaintiff must plead that it performed at the defendant's behest (*see AJ Contr. Co., Inc. v Farmore Realty Inc.*, 47 AD3d 501, 501 [1st Dept 2008], *lv denied* 10 NY3d 715 [2008]; *Eastern Consolidated. Props. v Chemical Bank*, 269 AD2d 261, 261 [1st Dept 2000] [stating that if the plaintiff performed at the behest of another, the plaintiff must look to that person for recovery]). The Complaint does not allege that Zhuang divulged Plaintiff's proprietary information at Argus's behest, and therefore fails to state a cause of action for unjust enrichment. Accordingly, that part of the motion seeking to dismiss the fifth cause of action is granted.

E. Sixth Cause of Action for Injunctive Relief against Zhuang

Finally, Defendant seeks dismissal of the sixth cause of action for injunctive relief on the basis that injunctive relief is not a stand-alone cause of action. It is well settled that injunctive relief is "a remedy for an underlying wrong, not a cause of action" (*Talking Capital LLC v Omanoff*, 169 AD3d 423, 424 [1st Dept 2019]). Here, Plaintiff and Zhuang agreed to the imposition of an injunction in the event of a breach. Nevertheless, in light of the dismissal of the second cause of action for breach of the Agreement, the sixth cause of action must also be dismissed.

Accordingly, it is

ORDERED that the motion of defendants Weile Zhuang a/k/a Vera Zhuang, Hummingbird Marketing Agency Inc., and Argus Merchant Services LLC to dismiss the Complaint is granted in part, such that the second, third, fifth and sixth causes of action of the Complaint are dismissed; and it is further

ORDERED that the portion of the motion that seeks to dismiss the fourth cause of action is granted in part, such that the fourth cause of action is dismissed to the extent that it pertains to unnamed "longstanding merchants" only; and it is further

ORDERED that defendants Weile Zhuang a/k/a Vera Zhuang, Hummingbird Marketing Agency Inc., and Argus Merchant Services LLC are directed to serve an answer to the complaint within 20 days after entry of this decision and order in the electronic docket of the court; and it is further

ORDERED that a telephonic preliminary conference will be held on August 19, 2020 at 3:00 p.m.

This will constitute the decision and order of the court.

Dated: New York, New York
July 16, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.

MOTION GRANTED IN PART CASE NOT DISPOSED