SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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CONTINENTAL INDUSTRIES GROUP, INC.,

Plaintiff,

- v -

HAKAN USTUNTAS, PLASMAR PLASTIK VE KIMYA SAN. TIC. A.S., A/K/A PLASMAR PLASTIC, INC., and MARCHEM INTERNATIONAL TRADING LLP,

Defendants.

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INDEX NO. 653215/2012

MOTION DATE 07/11/2019

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 545

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

Defendants move, pursuant to CPLR 3212, for summary judgment in this 2012[1] action dismissing all remaining causes of action and requesting costs and fees, including attorneys' fees, incurred in the defense of this action.

Plaintiff Continental Industries Group (CIG) "is a privately held company engaged in the international trade of commodities, including chemicals and resins" (NYSCEF Doc. No. [NYSCEF] 426, Complaint ¶ 9). CIG is incorporated in New York, where it also has its principal place of business, with multiple other global office locations,

[1] The court wishes to thank the parties for their patience during the COVID pandemic and for their continued patience as jury trials are not expected to begin until September 2021.

including Istanbul, Turkey (NYSCEF 501, Karabey[2] aff. ¶ 3). In 1989, defendant Hakan Ustuntas was hired to workalone and coordinate sourcing and sales of chemicals and polymers in Istanbul, Turkey (NYSCEF 426, Complaint ¶ 10). In 1994, nonparty Continental Kimya Sanayi ve Dis Tic. A.S. (CKS) was incorporated in Turkey (NYSCEF 501, Karabey aff. ¶ 5). "CKS is the exclusive distributer of CIG products in Turkey" (*id.* ¶ 6). That same year, Ustuntas started working for CKS (NYSCEF 408, Ustantas aff. ¶ 4). Karabey supervised Ustantas from 2000 to 2008 (NYSCEF 501, Karabey aff. ¶12).

In 2000, Ustuntas relocated to Canada and began receiving a salary from CIG, but he continued to be paid at a reduced rate by CKS until 2004 in order to complete his mandatory minimum working years under the Turkish social security regulations when he retired (NYSCEF 501, Karabey aff. ¶¶ 8, 12). However, according to Ustuntas, until 2008, he continued working out of his home in Toronto "performing the same services" as those he was performing before his retirement (NYSCEF 408, Ustuntas aff. ¶ 31).

During his employment at CKS, Ustuntas worked closely with nonparty Mehmet Altunkilic, who replaced Ustuntas as CKS's general manager in 2000 (NYSCEF 501, Karabey aff. ¶ 16). Altunkilic runs defendant Plasmer Plastik Ve Kimya San. Tic. A.S. (Plasmar) with nonparties Abdurrahman Bozkurt and Ismail Sungar and is a shareholder of Plasmar (NYSCEF 408, Ustuntas aff. ¶ 49).

In March 2004, while working for CKS, Ustuntas became a 20 percent shareholder of Plasmar (*id.* ¶ 28). Plasmar was a customer of CIG (NYSCEF 501, Karabey aff. ¶ 37). CIG alleges that, by 2008, Ustuntas also became an owner of defendant Marchem International Trading LLP (Marchem) (NYSCEF 426, Complaint ¶

[2] Omer T. Karabey is president of CIG. (NYSCEF 501, Karabey aff. ¶ 1).

17). Marchem is Plasmar's "sister company" (NYSCEF 408, Ustuntas aff. ¶ 7) that is alleged to function as "an intermediary to import products into Turkey" for Plasmar (NYSCEF 501, Karabey aff. ¶ 45, relying on Altunkilic's testimony at 1/22/14 jurisdiction hearing). In 2008, after acquiring an ownership interest in Plasmar and Marchem, Ustuntas retired and received a retirement bonus from CIG of $15,000 (NYSCEF 501, Karabey aff. ¶ 24).

The gravamen of CIG's complaint is that Ustuntas took CIG's "confidential and proprietary information", including information regarding CIG's suppliers and customers, and then used that information for his own benefit and for the benefit of Plasmar and Marchem (NYSCEF 426, Complaint ¶ 18). CIG contends that Ustuntas was recruited by Plasmar and Marchem with the intent that Ustuntas would "steal confidential and proprietary information from CIG for the use and benefit of Plasmar and Marchem" and would solicit other CIG and CKS employees to work for Plasmar and Marchem (*id*. ¶¶ 31, 69-70). Thus, CIG contends that Ustuntas misappropriated CIG's confidential and proprietary information to advance the interest of competing businesses by diverting customers, suppliers, and employees away from CIG (*id*. ¶ 1).

On September 13, 2012, CIG initiated this action by filing summons and complaint asserting eleven causes of action, including tortious interference with contract and prospective economic advantage, breach of fiduciary duty, aiding and abetting of breach of fiduciary duty, misappropriation of corporate opportunities, trade secrets and confidential information, unfair competition, unjust enrichment, constructive trust, conversion and violation of the Computer Fraud and Abuse Act (CFAA) (*id*. ¶¶ 53-99; 105-111).

Defendants now move for summary judgment dismissing the complaint.

CIG withdrew the CFAA and conversion claims (NYSCEF 485, CIG's Opposition Memorandum of Law at 24). Therefore, CIG's eighth and eleventh causes of action are dismissed.

CIG seeks damages and the following equitable remedies: (1) a permanent injunction to restrain defendants from possessing and using CIG's proprietary and confidential information, as well as divulging what has been used and returning such information to CIG; (2) a declaratory judgment that all documents generated by Ustuntas during the course of his employment belong to CIG, that retention of such documents constitutes conversion, that use of the information in the documents is improper, and that Ustuntas had a fiduciary duty to CIG until at least July 31, 2008; (3) the imposition of a constructive trust be imposed on all of defendants' profits; and (4) an accounting "for all jobs booked for CIG's customers and all jobs booked by Ustuntas while still employed by CIG." (NYSCEF 426, Complaint at 21-22).

For the reasons stated below, defendants' motion is granted to the extent that CIG's first, second, seventh, eighth, tenth, and eleventh causes of action are dismissed, and is otherwise denied.

To prevail on a motion under CPLR 3212, defendants must make a prima facie showing of entitlement to summary judgment as a matter of law through admissible evidence and eliminating all material issues of fact (*see Matter of New York City Asbestos Litig.,* 33 NY3d 20, 25-26 [2017]). If defendants satisfy these standards, the burden then shifts to plaintiff to rebut that prima facie showing by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering this motion, the court must construe all evidence in the light most favorable to plaintiff, as "summary judgment is a drastic remedy reserved for those cases where there is no doubt as to the existence of material and triable issues of fact" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 37 [2017]).

Standing

Defendants challenge CIG's standing to pursue this action, as Ustuntas was not an employee of CIG and did not owe it any fiduciary duty. Defendants maintain that Ustuntas was instead an employee of, and later a consultant to, CKS, a Turkish entity that is wholly separate and independent from CIG. CIG, however, contends that Ustuntas was its employee at all relevant times and points to Ustuntas's own affidavit in support of defendants' motion to dismiss in this action (# 001) to bolster this contention. In fact, Ustuntas admitted in that affidavit that "[f]rom approximately 1989 through 2008 I was employed as a sales representative for companies in Istanbul, Turkey, including . . . (CKS) and Plaintiff" (NYSCEF 5, Ustuntas aff. ¶ 10).

In further support of its contention that Ustuntas was its employee, CIG asserts that Ustuntas was paid by CIG, used CIG's business cards, received expense reimbursements from CIG, used CIG's email, and held himself out on social media to be CIG's general manager and submitted documentary evidence in support. Defendants, however, have submitted documentary evidence, including Turkish government and

CKS's employee records, indicating that Ustuntas was an employee of the separate entity CKS during the relevant years.

The conflicting statements and documentary evidence raise questions of fact that must be answered at trial. Therefore, that portion of defendants' motion that seeks to dismiss this action based upon lack of standing is denied.

Permanent Injunction (First Cause of Action)

"'To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Swartz v Swartz*, 145 AD3d 818, 828 [2d Dept 2016] [citations omitted]). "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*Icy Splash Food & Beverage, Inc. v Henckel,* 14 AD3d 595, 596 [2d Dept 2005]).

"Although it is permissible to plead a cause of action for a permanent injunction . . ., permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted by a plaintiff" (*Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368 [2d Dept 2010] [citation omitted], *affd in part, mod in part*, 18 NY3d 777 [2012]; *see also Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59 [1st Dept 2012]).

Defendants argue that the equitable causes of action are either derived from or are duplicative of CIG's claims for damages. As to CIG's cause of action for a permanent injunction, this action was commenced eight years ago. "Where the end or the means are unlawful, and the damage has already been done the remedy is given by

a criminal prosecution or by a recovery of damages at law. Equity is to be invoked only to give protection for the future" (*Exchange Bakery & Restaurant, Inc. v Rifkin*, 245 NY 260, 264 [1927]). CIG has not shown how a preliminary injunction that restrains defendants from using or divulging names and contacts, and any other allegedly confidential information, that is at least ten years old, would give protection for the future. Therefore, CIG's first cause of action for a permanent injunction is dismissed.

Tortious and Malicious Interference with Contract (Second Cause of Action)

Under New York law, tortious interference with contract contains five elements: "(1) . . . a valid contract between the plaintiff and a third party, (2) [] defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages" (*American Preferred Prescription, Inc. v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998]). Agreements that are terminable-at-will cannot support a tortious interference with contract claim (*see Snyder v Sony Music*, 252 AD2d 294, 294 [1st Dept 1999]). If there is no binding contract, there is no viable claim for tortious interference with contract (*see Herman & Beinin v Greenhaus*, 258 AD2d 260 [1st Dept 1999]).

Defendants first argue that the statute of limitations has run on CIG's tortious interference with contract claim. There is no dispute among the parties that under CPLR 214(4), the applicable statute of limitations is three years from when the injury is sustained (see *American Fed. Group v Edelman*, 282 AD2d 279 [1st Dept 2001]) and that the time limitation is measured from the time of the injury, not when the injury was discovered (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). CIG maintains that the

injury occurred as late as 2009, when its sales dropped (and points to worksheets to support their contention), where defendants assert that any possible injury could only have occurred prior to early 2008, before Ustuntas stopped work for CKS. CIG's assertion, accompanied by the worksheet evidence, is sufficient to defeat defendants' contention that this claim is time barred.

However, defendants successfully argue that CIG has no evidence of the actual contracts it alleges that it had with customers/suppliers. Instead, CIG relies upon a footnote in defendants' memorandum of law defining the elements of the tort to support its claim that there were contracts (*see* NYSCEF 485, CIG's Memorandum of Law at 22). Claiming that a definition of a tort raises issues of fact while providing no evidence of contracts with customers or suppliers is insufficient to raise issues of fact. Therefore, that portion of the second cause of action for tortious and malicious interference with contract is dismissed.

Tortious and Malicious Interference with Prospective Economic Advantage

For the reasons stated above, CIG's claim of tortious interference with prospective economic advantage also survives defendants' assertions that the claim is barred by the three-year statute of limitations.

In New York, to prevail on a claim of tortious interference with business relations, a plaintiff must prove (1) its business relations with a third party, (2) the defendant's interference with those relations, (3) the defendant's wrongful action or that it "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 v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv to appeal*

denied 14 NY3d 736 [2010]). "To establish such a claim, a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff" (*Snyder*, 252 AD2d at 299).

"[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

Again, defendants successfully argue that there is no evidence that defendants interfered with CIG's prospective business advantage, as defined by the Courts of this State. CIG relies on defendants' email trail. However, that chain in no way rises to the required action needed to meet the elements of the tort; it only tells part of the story. Without some further indication that defendants' conduct rose to the level of a crime or an "independent tort" is insufficient to defeat summary judgment. Therefore, CIG's allegation of tortious and malicious interference with prospective economic advantage is also dismissed.

Breach of Fiduciary Duty (Third and Fourth Causes of Action)

Under CPLR 213 (1), in actions where a plaintiff seeks only monetary damages for a breach of fiduciary duty, a three-year statute of limitations applies (see *Yatter v William Morris Agency*, 256 AD2d 260, 261 [1st Dept. 1998]), but where a breach of fiduciary duty action seeks both equitable relief and money damages, the six-year statute of limitations applies (*see Loengard v Santa Fe Indus.*, 70 NY2d 262, 267

[1987]). Because CIG seeks both equitable relief and monetary damages for defendants' alleged breach of fiduciary duty, the applicable statute of limitations on its breach of fiduciary duty claims is six years, and as such, are not time barred.

Breach of Fiduciary Duty Against Ustuntas (Third Cause of Action)

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). The foundational element of the claim is the existence of a fiduciary relationship, in that conventional business relationships are not fiduciary relationships (*see, e.g., DiTolla v Doral Dental IPA of New York*, 100 AD3d 586, 587 [2d Dept 2012]). A "fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts, § 874, Comment [a]).

Ustantas asserts that he was not CIG's employee during the relevant time periods and that, even if he was, he had no fiduciary duty to CIG. However, under New York law, "[t]he employer–employee relationship is one of contract, express or implied . . . and, in considering the obligations of one to the other, the relevant law is that of master–servant and principal–agent . . . . Fundamental to that relationship is the proposition that an employee is to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties'" (*Western Electric Co. v Brenner*, 41 NY2d 291, 295 [1977] [citation omitted]).

In the absence of an employment contract, CIG contends that Ustuntas was provided with a copy of CIG's employee handbook, which allegedly contains a confidentiality provision (*see* NYSCEF 501, Karabey aff. ¶ 51). CIG additionally has proffered previous oral statements made by Ustuntas that indicate that he was an employee of plaintiff. These assertions are sufficient to raise questions of fact regarding Ustuntas's alleged fiduciary duty that cannot be determined on this summary judgment motion. Therefore, that portion of this motion that seeks to dismiss CIG's third cause of action is denied.

Aiding and Abetting Breach of Fiduciary Duty as Against Plasmar and Marchem (Fourth Cause of Action)

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participate in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citation omitted]). "The defendants must have actual knowledge and not constructive knowledge of the breach" (*Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1, 15 [1st Dept 2019]). A "person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*Kaufman v Cohen*, 307 AD2d at 126).

Based on a related action pending in the SDNY, there may be reason for the why the aiding and abetting breach of fiduciary duty claim to proceed. However, this court cannot make a determination based on the record currently before the court. Since this motion was filed, the procedural posture of the federal action has completely changed. This court recently invited the parties to submit the relevant federal court decisions,

which the parties did. However, upon review of those decisions, this court has determined that supplemental briefing on this cause of action is required. Thus, the parties will have 30 days from the date that this decision and order is entered on NYSCEF to file supplemental briefs. Upon the filing of the supplemental briefs, this court will restore this portion of the motion to the calendar. The parties are directed to e-mail the court once the briefs are filed.

Misappropriation of Trade Secrets and Proprietary and Confidential Information (Fifth and Sixth Causes of Action)

Defendants also seek to dismiss CIG's fifth and sixth causes of action, seeking damages for misappropriation of trade secrets and proprietary and confidential information. Under CPLR 214 (4) misappropriation of trade secrets and confidential information is governed by a three-year statute of limitations (*see CDX Labs., Inc. v Zila, Inc.*, 162 AD3d 970, 971 [2d Dept 2018]). However, the date of accrual for trade secret misappropriation can be extended under the continuing tort doctrine, where a defendant keeps the secret confidential and continues to use the trade secrets for their commercial advantage (*see Andrew Greenberg, Inc. v Svane, Inc.*, 36 AD3d 1094 [3d Dept 2007]). If a defendant does so, "each successive use constitutes a new, actionable tort" (*Lemelson v Carolina Enterprises, Inc.,* 541 F Supp 645, 659 [SDNY 1982]).

Here, CIG alleges that, prior to the date Ustuntas retired from its employ, and during the time that he consulted for CKS and CIG, Ustuntas misappropriated confidential and proprietary information and trade secrets. Although the final date that Ustuntas allegedly performed these acts was longer than three years prior to the commencement of this action, CIG asserts that defendants were continuing to use the confidential and proprietary material even after the commencement of this action and

without CIG's knowledge. There is a limitation to this continuing tort doctrine—where "the plaintiff had knowledge of the defendant's misappropriation and use of its trade secret, the continuing tort doctrine does not apply" (*Synergetics USA, Inc. v Alcon Labs., Inc.*, 2009 WL 2016872, *2 [SDNY 2009]; *see also American Entrance Servs., Inc. v Roeder*, 129 AD3d 618 [1st Dept 2015]).

There remain questions of fact as to when, if ever, defendants misappropriated CIG's trade secrets, as well as when CIG became aware of any such alleged misuse. Therefore, that portion of defendants' motion that seeks to dismiss the misappropriation of trade secrets claim is denied.

In addition to allegations relating to trade secrets, it is alleged that defendants made use of CIG's proprietary and confidential information for several years, including after the commencement of the instant action.

"A cause of action for misappropriation of confidential information requires a showing that plaintiff took steps to protect the secrecy of the information allegedly being misappropriated" (*Marsh USA, Inc. v Alliant Ins. Servs., Inc.*, 49 Misc 3d 1210[A], 2015 NY Slip Op 51555[U], *5 [Sup Ct, NY County 2015][citations omitted]). CIG maintains that it did attempt to take precautionary measures to preserve its confidential information by providing Ustuntas with an employee handbook containing a confidentiality section. Defendants insist that any information that they could have received would have been limited to that which was publicly available. "[W]here the names and contact information of current and potential customers are easily ascertainable from public sources, the use of lists containing customer contact information is not misappropriation of confidential information or trade secrets"

(*id*. at *4, citing *Reed, Roberts Assoc., Inc. v Stauman*, 40 NY2d 303, 308 [1976]). CIG asserts that the names and contact information of its current and potential customers and suppliers as well as price lists were available to Ustuntas and were not "readily ascertainable as looking it up online or in a phonebook." (NYSCEF 501, Karabey aff. ¶ 39).

CIG has raised sufficient questions of fact as to whether or not proprietary and confidential information was misappropriated, and thus, the portion of defendants' motion that seeks to dismiss the claim of misappropriation of proprietary and confidential information is denied.

Usurpation of Corporate Opportunity and Unjust Enrichment

In order to sustain an unjust enrichment claim, "[a] plaintiff must show 'that (1) the other party was enriched, (2) at the plaintiff'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'" (*Mandarin Trading Lts. v* Wildenstein, 16 NY3d 173, 182 [2011][citations omitted]). However, this doctrine is narrow. Unjust enrichment, or an action in quasi-contract, "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon New York, Inc.,* 18 NY3d 777, 790 [2012], *reargument denied*, 19 NY3d 937 [2012]). "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*id.*).

This is not that sort of unusual case in that the unjust enrichment claim in the seventh cause of action duplicates and replaces the other claims in the complaint.

Defendants seek to dismiss CIG's allegation that Ustuntas misappropriated CIG's corporate opportunity to invest in defendants Marcham and Plasmar, and thereby all defendants were unjustly enriched. Specifically, CIG alleges that, in 2004, while Ustuntas was CIG's employee, he personally took advantage of an opportunity to purchase shares in CIG's customer, defendant Plasmar, without informing CIG of the opportunity. CIG asserts that such a purchase by its employee was a usurpation of a corporate opportunity. Defendants deny those allegations and, in addition, maintain that any claim that CIG might have had as the result of Ustantas's 2004 investment in co-defendant Plasmar was subject to a three-year statute of limitations, and therefore, the claim was time-barred prior to the commencement of this action.

Under CPLR 214 (4), a claim for diversion of corporate opportunity is governed by the three-year statute of limitations applicable to actions alleging injury to property (*see Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 121 [1st Dept 1985], *affd*, 67 NY2d 981 [1986]). The accrual of a cause of action for diversion of a corporate opportunity is on the date when the corporate opportunity was first diverted (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]). The claim, if actionable, accrued in 2004, on the date the alleged corporate opportunity was allegedly usurped. CIG has not provided any evidence to raise questions of fact regarding the alleged claim accrual date.

Therefore, the seventh cause of action that alleges usurpation and misappropriation of corporate opportunity and unjust enrichment is dismissed.

Constructive Trust

"The elements of a claim for a constructive trust are 'a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment'" (*Matter of Gupta*, 38 AD3d 445, 446 [1st Dept 2007 [citation omitted]). Imposition of a constructive trust is a remedy for the diversion of a corporate opportunity (*Ault v Soutter*, 167 AD2d 38 [1st Dept 1991]). However, in light of dismissal of CIG's corporate opportunity claim that portion of plaintiff's seventh cause of action that seeks imposition of a constructive trust must be dismissed.

Unfair Competition (Ninth Cause of Action)

An unfair competition claim is subject to a six-year statute oflLimitations in New York, because it is based on fraud (*Errant Genere Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 182 AD3d 506, 508 [1st Dept 2020]). Therefore, CIG's unfair competition claim is timely.

There are two theories of common-law unfair competition—palming off and misappropriation (*see ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467 [2007]; *see also Caldera Holdings LTD v Apollo Global Mgt., LLC,* 2019 NY Slip Op 33734[U] [Sup Ct, NY County 2019]). "Under the 'misappropriation theory' of unfair competition, a party is liable if they unfairly exploit the skill, expenditures and labors of a competitor. The essence of the misappropriation theory is not just that the defendant has 'reap[ed] where it has not sown,' but that it has done so in an unethical way and thereby unfairly neutralized a commercial advantage that the plaintiff achieved through 'honest labor'" (*EJ Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018] [citation omitted]). "Allegations of a 'bad faith misappropriation of a commercial advantage belonging to

another by exploitation of proprietary information' can give rise to a cause of action for unfair competition" (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015] [citation omitted]).

Defendants insist that CIG's unfair competition allegation is duplicative of "other claims", and therefore, should be dismissed. However, it is clearly a separate claim with a specific method of determining damages. (See *EJ Brooks Co. v Cambridge Sec. Seals*, 31 NY3d at 450). The portion of defendants' motion seeking to dismiss the ninth cause of action is denied.

Declaratory Judgment (Tenth Cause of Action)

In its tenth cause of action, CIG seeks a declaration that (1) all documents generated by Ustuntas during the course of his employment with plaintiff are plaintiff's property; (2) retention any copies of plaintiff's documents or documents created therefrom is improper and constitutes conversion; (3) any prior, current, and future uses of plaintiff's documents are improper, and defendants will be liable for damages flowing from such use; and (4) Ustuntas had a fiduciary duty to plaintiff until at least July 31, 2018.

"A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action" (*Apple Records v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). When a declaratory judgment cause of action effectively seeks the same relief as that demanded in other causes of action, the claim seeking declaratory relief is dismissed as duplicative (*see Cherry Hill Mkt. Corp. v Cozen O'Connor P.C.*, 118 AD3d 514 [1st Dept 2014]).

As the remedies that CIG seeks in its declaratory judgment cause of action are duplicative of other causes of action, there are adequate, alternative remedies available to it. Therefore, that portion of defendants' motion that seeks dismissal of CIG's tenth cause of action is granted.

Fees and Costs

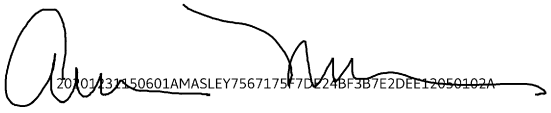
Defendants seek an award of fees and costs, including attorneys' fees. However, this action is not dismissed in its entirety, and defendants fail to proffer any legal basis for entitlement to such fees. The portion of defendants' motion that seeks an award of fees and costs is denied.

This constitutes the decision of this court. All remaining arguments have been considered and do not yield an alternative result.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, in part, and plaintiff's first, second, seventh, eighth, tenth, and eleventh causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that parties are directed to submit supplemental briefs on the fourth cause of action 30 days from the date of this decision and order's entry on NYSCEF. The parties are directed to e-mail the court once the briefs are filed in NYSCEF.



12/31/2020
DATE

ANDREA MASLEY, 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