

Tonchi v Adavance Mag. Publs. Inc.

2021 NY Slip Op 31518(U)

May 4, 2021

Supreme Court, New York County

Docket Number: 653720/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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STEFANO TONCHI,

Plaintiff,

- v -

ADVANCE MAGAZINE PUBLISHERS INC., ADVANCE
PUBLICATIONS INC.

Defendants.

INDEX NO. 653720/2019

MOTION DATE 10/19/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 55, 70, 75

were read on this motion to DISMISS COUNTERCLAIMS.

This case arises from the sale of *W* Magazine. Plaintiff Stefano Tonchi (“Plaintiff” or “Tonchi”) is the former Editor-in-Chief of the magazine, while Defendant Advance Magazine Publishers Inc. (“AMPI”) (and together with Defendant Advance Publications, Inc., “Defendants”) is its former owner. Shortly after selling *W* in the summer of 2019, AMPI terminated Tonchi, purportedly “for Cause,” as that term is used in Tonchi’s Employment Agreement. Tonchi then brought this action against Defendants to recover certain severance and bonus payments to which he is allegedly entitled. In response, AMPI asserted tort- and contract-based counterclaims against Tonchi, alleging that Tonchi interfered with AMPI’s sale of *W* in order to benefit himself.

On this motion, Tonchi seeks to dismiss AMPI’s two tort counterclaims for breach of the duty of loyalty and breach of fiduciary duty. For the reasons set forth below, Tonchi’s motion is

granted in part and denied in part, and Defendants' cross-motion to amend its Answer and Counterclaims is denied.

BACKGROUND¹

Tonchi's Employment with Defendants

Tonchi was hired as Editor-in-Chief of *W* magazine pursuant to a written employment agreement with AMPI, the magazine's owner, dated March 22, 2010 ("Employment Agreement") (Compl. ¶ 5; Answer ¶ 5; *see* NYSCEF 50).² Under the Employment Agreement, Tonchi "agree[d] to perform the duties which are appropriate to such position, devoting [his] best efforts, skills and abilities to further the business and affairs of *W*" (NYSCEF 50 at 1). The Employment Agreement also provided that if Tonchi were "involuntarily terminated by the Company," AMPI would make severance and other payments to Tonchi, unless he were terminated for "Cause" (*id.* at 2). And "Cause" was defined to mean "(i) conviction of a felony, (ii) abuse of office, (iii) intentional failure to perform material duties for which you are responsible, and/or (iv) a violation of any material term of this agreement" (*id.*).

As Editor-in-Chief, Tonchi was responsible for, among other things, overseeing the brand's multi-platform editorial content, meeting its established revenue goals, and managing its operations and strategic initiatives (Counterclaims ["CC"] ¶ 9). Tonchi was the leader of the *W* brand and tasked with ensuring its success (*id.*). As a trusted and senior-level executive, Tonchi was provided access to, and gained knowledge of confidential information, and trade secrets

¹ For purposes of the present motion, the factual allegations in the Counterclaims are assumed to be true.

² The agreement itself refers to Tonchi's "employment by Condé Nast Publications," which is AMPI's business name (CC ¶ 3).

belonging to AMPI (*id.* ¶ 10). Therefore, AMPI required Tonchi to enter into a Confidentiality & Rights Agreement as a condition of his employment with AMPI (*id.* ¶11). Tonchi entered into this Confidentiality & Rights Agreement on May 10, 2010, in which he agreed to “hold . . . in the strictest confidence” all information regarding AMPI’s “business plans, financial records . . . and other information that if appropriated for [Tonchi’s] own use or disclosed to others could injure [AMPI]” (*id.*).

AMPI Seeks to Sell W

On August 8, 2018, AMPI announced that it planned to sell *W* (CC ¶12). The next day, the *New York Post* reported that Tonchi was “scouting for investors in an attempt to buy *W*” from AMPI (*id.* ¶ 13). Tonchi, however, never made any formal offer to purchase *W* (*id.*). Instead, AMPI commenced a formal sale process for the brand in September 2018 (*id.* ¶14). Brad Stoutenburgh, an Advance Publications executive, was responsible for managing the sale process (*id.* ¶ 15). All decisions regarding the sale were made by Stoutenburgh and a team of AMPI corporate executives (the “AMPI Sales Team”) and ultimately approved by the AMPI Board of Directors (*id.*). AMPI also engaged an investment banking firm, Greenhill & Co., LLC (“Greenhill”), to advise on the sale (*id.* ¶ 16). Tonchi was not part of the AMPI Sales Team (*id.* ¶ 18).

The sale process was a two-phase competitive auction (*id.* ¶ 17). During the initial phase, which lasted from September 2018 through December 2018, Greenhill and the AMPI Sales Team identified potential buyers for *W* and invited them to submit initial, non-binding expressions of interest (*id.*). Greenhill and the AMPI Sales Team reviewed these expressions of interest and, in or around January 2019, selected three potential buyers to progress to the second round of bidding (*id.*). These potential buyers were given access to a data room of information

about the brand, conducted due diligence, and, met with *W*'s management team, including Tonchi (*id.*).

Although he was not a member of the AMPI Sales Team, Tonchi was among a small group of senior employees with access to confidential information about the sale process, including information about the number and identity of potential buyers (*id.* ¶ 24). While he had no decision-making authority over the sale process, Tonchi was expected and required to assist AMPI in the sale of *W* and to devote his best efforts, skills and abilities towards the sale process (*id.* ¶ 20). That included, among other things, meeting with potential buyers to discuss *W*'s business and operations, in furtherance of AMPI's efforts to sell the brand (*id.* ¶ 21). As part of the second round of bidding, several members of *W*'s management team, including Tonchi, met in-person with each potential buyer (*id.* ¶ 22). In addition, Tonchi was expected to meet with any potential buyer upon such buyer's request (*id.* ¶ 23). At the outset of the sale process, potential buyers were advised that any requests to speak with Tonchi should be directed to, and arranged by, Greenhill (*id.*).

During the sales process, Tonchi was subject not only to the terms of his Confidentiality & Rights Agreement, but also to a set of internal communication and confidentiality rules and guidelines implemented by AMPI specifically for the sale process (the "Rules") (*id.* ¶¶ 25-26). Among other things, the Rules required Tonchi: (1) to keep confidential all information about the sale, including, but not limited to, the transaction timetable and the number and identities of potential buyers; (2) to not communicate with potential buyers about the sale, unless such communications were scheduled through and approved by Greenhill; (3) to immediately inform Greenhill of any non-sale related communications with potential buyers; and, (4) to treat equally all potential buyers (*id.* ¶ 29).

AMPI informed Tonchi of the Rules, and his obligation to comply with them, on multiple occasions (*id.* ¶¶ 30-33). More than once, for example, Stoutenburgh reminded Tonchi not to communicate with potential buyers without Greenhill’s prior authorization, including in writing on October 19, 2018 and November 7, 2018 (*id.* ¶33). And in January 2019, Stoutenburgh and Gregory Miller, a Greenhill Managing Director, provided Tonchi with a written copy of the Rules, which included a reminder that “*Everything is Confidential!*” (*id.* ¶34 [emphasis in original]). A few months later, in March 2019, Stoutenburgh provided Tonchi with a second copy of the Rules and reminded Tonchi to “not reveal any details about bidders to your staff or to other [AMPI] employees, and of course never to anyone outside of our company under any circumstances. If information leaks to the press, we run the risk that buyers revoke their offers or take legal action against us, which would be a shame after all the work we've done to get here. Let's be very careful please” (*id.* ¶ 35).

Tonchi Allegedly Interferes with the Sale Process

Despite these warnings, according to Defendants, Tonchi engaged in a number of unauthorized discussions with potential buyers and disclosed confidential information about the sale process, and also leaked sensitive information about the sale process to the press (*id.* ¶¶ 36-59). Tonchi also failed to inform Greenhill of several meetings that he held with potential buyers, even though he was required to do so under the Rules (*see, e.g., id.* ¶¶ 39, 47, 54). Tonchi acted intentionally, Defendants say, in order to steer the bidding process toward his preferred buyer, a venture capital fund denoted here as “Buyer 1” (*id.* ¶ 37).

Examples of Tonchi’s alleged improper conduct include:

- Tonchi met with the Chief Executive Officer of a media publishing company on or around October 15, 2018. Although this company was a potential buyer, Tonchi did not arrange this meeting through Greenhill and did not inform Greenhill that such meeting took place.

No one from Greenhill or the AMPI Sales Team was present at this meeting. Either during the meeting or shortly thereafter, Tonchi improperly provided the Chief Executive Officer with a purported figure that Tonchi represented was the “asking price” for *W*—this figure was far less than AMPI’s then-target sale price (*see id.* ¶¶ 39-42).

- Tonchi improperly disclosed information about the sale process, transaction timeline and existence of other potential buyers to the Chairman of a media investment firm (“Buyer 3”) without informing Greenhill or the AMPI Sales Team. Tonchi also met with the Chairman for dinner without arranging the meeting through Greenhill or informing Greenhill that the meeting took place (*see id.* ¶¶ 45-48).
- Tonchi met jointly with representatives from Buyer 1 and the President of Buyer 3 without arranging the meeting through Greenhill or informing Greenhill that the meeting took place. Tonchi later improperly revealed to Buyer 3 that Buyer 1 had withdrawn from the sale process. In an email to the President of Buyer 3, he wrote that “Conde [*sic*] is a real mess. They let my group go . . . they walked away from the deal. I am really upset. Let me know if you get any new ideas or future project. [*sic*] I want out” (*see id.* ¶¶ 53-58).

While Buyer 1 still was a potential buyer, Tonchi allegedly interfered with Buyer 1’s attempts to meet with senior members of *W*’s editorial team (*id.* ¶ 60). Tonchi met with a representative from Buyer 1 on or around March 13, 2019 (*id.* ¶ 61). Prior to the meeting, the representative from Buyer 1 had asked Tonchi whether *W*’s Editor-at-Large could also attend the meeting, as the representative from Buyer 1 was interested in speaking with her about her work for *W*, but Tonchi told the representative that the Editor-at-Large could not attend, and that the representative from Buyer 1 was “not allowed” to contact her (*id.* ¶¶ 62-63). Tonchi never informed Greenhill or the AMPI Sales Team of the representative’s request (*id.* ¶ 64). Tonchi also never asked the Editor-at-Large whether she was available to meet with the representative from Buyer 1 (*id.* ¶ 65). Tonchi’s actions were allegedly motivated by self-interest and intended to minimize the impact and importance of other *W* staff members to the brand so that Tonchi could appear indispensable to Buyer 1 (*id.* ¶ 66).

Tonchi Allegedly Attempts to Disrupt the Sale to Surface

After Buyer 1 withdrew from the sale process, AMPI focused on its negotiations to sell *W* to Surface Media (“Surface”) (*id.* ¶ 67). While these negotiations were ongoing, Tonchi allegedly sought to disrupt the sale to Surface by making unreasonable and bad faith demands regarding his own potential employment with Surface; refusing to meet with Surface's Chief Executive Officer, Marc Lotenberg, unless his bad faith demands were met; encouraging *W* employees not to work for Surface; and disparaging Lotenberg (*id.* ¶ 68).

While AMPI and Surface were negotiating a sale, Surface purportedly met with Tonchi and offered to hire him as Editor-in-Chief of *W* if the sale was finalized (*id.* ¶ 69). Surface offered Tonchi a higher annual salary than he earned at AMPI and an annual bonus that was comparable to or greater than the annual bonus he received from AMPI (*id.*). In addition, Surface offered Tonchi equity compensation, which was never part of Tonchi's compensation package at AMPI (*id.* ¶ 70). In response, Tonchi stated he would only agree to work for Surface if either AMPI or Surface agreed to pay him an additional one million dollars upon closing of the sale and refused initially to meet with Lotenberg unless his “bad faith demands were met” (*id.* ¶¶ 71, 73). Tonchi ultimately refused to execute an employment agreement with Surface (*id.* ¶ 72). Tonchi told numerous *W* employees that he was “not going with the sale” because he believed Lotenberg would “let people go and then say he doesn't have funds to pay [Tonchi] off” (*id.* ¶ 74).

According to Defendants, Tonchi knew or should have known that he was jeopardizing the sale by encouraging *W* employees not to work for Surface (*id.* ¶ 75). Had a large group of *W*'s staff followed Tonchi's lead and refused to work for Surface, “it is possible, and perhaps likely, that Surface would not have agreed to purchase *W*” (*id.*),

In the event, however, AMPI completed the sale of *W* to Surface (Compl. ¶¶ 14-16). The next day, Defendants informed Tonchi that his employment was terminated “for Cause” effective immediately (*id.* ¶¶ 15-16, 18).

The Instant Action

Tonchi initiated this action by filing a Summons and Complaint on June 26, 2019 (NYSCEF 1). The Complaint asserts two causes of action against Defendants arising from his termination – (1) breach of the Employment Agreement and (2) breach of a Closing Bonus Agreement (*see id.*).

Defendants filed an Answer with Counterclaims on August 12, 2019, in which Defendants asserted four causes of action against Tonchi: (1) breach of the duty of loyalty/faithless servant; (2) breach of fiduciary duty; (3) breach of the Confidentiality & Rights Agreement; and (4) breach of the Employment Agreement. The third and fourth counterclaims have been withdrawn (NYSCEF 78), leaving the two tort counterclaims remaining.

DISCUSSION

On a motion to dismiss, “the pleading is to be afforded a liberal construction” and the Court must “accept the facts as alleged in the [pleading] as true, accord [the pleading party] 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]). But “allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]).

A. Defendants Allege Fiduciary Duties Independent of Tonchi's Employment Contract

“[W]hile causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed, conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract” (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]; *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-68 [1st Dept 1987]) [“It is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself.”]; *Heritage Auctioneers & Galleries, Inc. v Christie's, Inc.*, 2018 WL 902308 [Sup Ct, New York County Feb. 15, 2018], at *9 [declining to dismiss fiduciary duty claim on summary judgment because “it is possible for a trier of fact to find that [employee] violated his fiduciary obligation to Heritage independent of any obligation contained in his employment agreement”] [Masley, J.]

The threshold question raised in Tonchi's motion to dismiss is whether Defendants have alleged the existence of fiduciary duties (including a duty of loyalty) “independent of the contract itself” (*Clark-Fitzpatrick, Inc. v Long Island R. R. Co.*, 70 NY2d 382, 389-90 [1987]). “A fiduciary relation exists 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” (*Mandelblatt*, 132 AD2d at 168, citing Restatement [Second] of Torts § 874, comment [a]).

In *Mandelblatt*, the First Department sustained an employer's breach of fiduciary duty claim against its former employee under similar circumstances. There, the respondent was retained, pursuant to a contract, “to provide consulting services ‘in connection with the management, operation and disposition’ of Devon Stores, which its parent company was

attempting to sell” (132 AD2d at 164). He was discharged “for cause,” however, as a result of his “threats to fail to perform his duties unless he received ‘a new and more lucrative contract’ and [his] ‘lack of cooperation with and discouragement of prospective purchasers of Devon Stores, Inc.’ after his demand for a new contract had been rejected by appellants” (*id.* at 165). The company learned that the respondent “had disparaged Devon’s business and financial condition in meetings with the prospective buyers,” and “then canceled or postponed trips scheduled to inspect Devon’s assets and operations” (*id.* at 166). The First Department held that “[t]he charge that respondent disparaged Devon and injured appellants’ business opportunity when he was under a duty, as a highly paid consultant, to give advice and act for appellants’ benefit, is sufficient to state a claim for” breach of fiduciary duty (*id.* at 168).

Here, Defendants sufficiently allege that Tonchi owed an independent common law duty not to undermine the *W* sale process for his own personal benefit. While Tonchi was not part of the AMPI Sales Team, he was given responsibilities related to the sale process and expected “to act for . . . the benefit of” AMPI by meeting with potential buyers, coordinating with Greenhill, and generally advancing AMPI’s interests. Defendants allege that Tonchi instead sought to undermine the sale process and leverage it for his own benefit. These allegations go beyond the terms of the Employment Agreement and Confidentiality & Rights Agreement. The Employment Agreement requires Tonchi “to perform the duties which are appropriate to [his] position, devoting [his] best efforts, skills and abilities to further the business and affairs of *W*” (NYSCEF 90). As alleged, Tonchi not only failed to perform his duties, he did so in a manner directly against his employer’s business interests and in favor of his own. Moreover, not every allegation of Tonchi’s misconduct is alleged to constitute a breach of the underlying contracts. For example, Tonchi is alleged to have interfered with a potential buyer’s attempts to meet with

senior members of *W*'s editorial team in order to minimize the impact and importance of other *W* staff members (*see* CC ¶¶ 60-66), which Defendants do not allege to be a breach the Confidentiality & Rights Agreement (*see id.* ¶¶ 89-96).

Accordingly, Defendants' counterclaims for breach of fiduciary duties of loyalty and good faith cannot be dismissed on the ground that they are, as a matter of law, based on the alleged breach of purely contractual obligations.

B. Breach of Duty of Loyalty/Faithless Servant (First Counterclaim)³

“[I]t is axiomatic that an employee 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’” (*CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000], quoting *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]; *see W. Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977] [“Fundamental to [the employer-employee] 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”] [internal citation omitted]).

Moreover, under the faithless servant doctrine, “[a]n employee forfeits his right to compensation for services rendered by him if he proves disloyal” (*Visual Arts Found., Inc. v*

³ Defendants assert separate counterclaims for “breach of duty of loyalty” and “breach of fiduciary duty.” Analytically, the former is a subset of the latter. “A fiduciary has both a duty of loyalty and an obligation to act in the best interests of the principal” (*ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept 2012]). Indeed, courts often refer collectively to the “fiduciary duty of loyalty” (*e.g.*, *Epstein Eng'g, P.C. v Cataldo*, 150 AD3d 411, 411 [1st Dept 2017]; *NRT New York, LLC v Morin*, 147 AD3d 589, 590 [1st Dept 2017]; *Newco Waste Sys., Inc. v Swartzenberg*, 125 AD2d 1004, 1004 [4th Dept 1986]). Nevertheless, to align with the pleadings, the Court will address the two claims (which seek different forms of relief) separately.

Egnasko, 91 AD3d 578, 579 [1st Dept 2012] [internal citations omitted]; *see also Two Rivers Entities, LLC v Sandoval*, 192 AD3d 528 [1st Dept 2021] [“faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties is not entitled to recover either salary or commission”]; *In re Blumenthal*, 40 AD3d 318 [1st Dept 2007] [finding “appellant was a faithless servant, and that her acts of faithlessness warrant disgorgement of all compensation paid after the first such act”]).

Here, Tonchi is alleged to have acted disloyally in the *W* sale process, elevating his own interests at the expense of AMPI’s. Among other things, Defendants allege that Tonchi selectively disclosed confidential information to potential buyers without notice to Greenhill or the AMPI Sales Team and blocked a potential buyer’s attempts to meet with senior members of *W*’s editorial team in order to minimize the importance of other *W* staff members, so that Tonchi could appear indispensable to the potential buyer (CC ¶¶ 60-66). Defendants also allege that Tonchi jeopardized the sale to Surface by engaging in bad-faith negotiations and disparaging Surface and its Chief Executive Officer to other *W* employees and encouraging *W* employees not to work for Surface (*see id.* ¶¶ 67-75).

Together, these allegations are sufficient to state a cause of action for breach of duty of loyalty, including a claim for disgorgement of previously paid compensation during the period of disloyalty under the faithless servant doctrine (CC ¶82 [seeking “all monies paid to [Tonchi] during his period of disloyalty, as a faithless servant”]; *Dawes v J. Muller & Co.*, 176 AD3d 473, 474 [1st Dept 2019] [holding that “plaintiff is entitled to a disgorgement of the fees which were paid to decedent individually” upon finding that decedent “breached his duty of loyalty to the plaintiff”]; *see Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 928-29 [1977] [“One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally

disentitled to recover his compensation, whether commissions or salary”]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 13 [1st Dept 2008] [“Where, as here, forfeiture is part of the recovery sought in the action, the issue of whether the attorney should be required to disgorge the compensation received during the period of alleged disloyalty is properly entertained on a full record after trial”]).

Contrary to Tonchi’s argument, a claim for breach of duty of loyalty is not narrowly confined to instances where the plaintiff “personally profited from his allegedly actionable conduct, or stole or embezzled funds from Defendants or otherwise competed with Defendants” (NYSCEF 53 at 20). It is enough to allege that Tonchi acted at cross-purposes with Defendants by trying to undermine the sales process. Such conduct, if true, would mean that Plaintiff “acted directly against the employer’s interests,” which is the basis for the tort (*see Bluebanana Grp. v Sargent*, 176 AD3d 408, 409 [1st Dept 2019]). Indeed, courts have sustained duty of loyalty and faithless servant claims covering a wide variety of alleged misconduct (*see, e.g., 854 Carnegie Real Estate Corp. v Siricharoen*, No. 159574/2015, 2015 WL 257826, at *7 [Sup Ct, NY County Jan. 15, 2015] [finding that plaintiff landlord properly alleged breach of duty of loyalty against employee who offered artificially depressed rent to tenant with whom employee was having a romantic relationship because employee failed to attempt to maximize the corporate asset by taking advantage of substantial lawful rent increases in apartments which experienced vacancies]).

Therefore, the branch of Tonchi’s motion seeking to dismiss the counterclaim for breach of the duty of loyalty/faithless servant is denied.

C. Breach of Fiduciary Duty (Second Counterclaim)

To plead a claim for breach of fiduciary duty, “a plaintiff must allege that the defendant owed him a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct” (*NRT N.Y., L.L.C. v Morin*, 147 AD3d 589, 589 [1st Dept 2017]).

A well-pled allegation that an employee has acted “directly against the employer’s interest” can state a viable cause of action for breach of fiduciary duty (*Beach v Touradji Capital Mgt., LP*, 144 AD3d 557, 562 [1st Dept 2016]; *United Staging Solutions, Inc. v. Humanedge, Inc.*, No. 656623/2019, 2020 WL 4207353, at *4 [Sup Ct, New York County July 22, 2020] [“With ‘at will’ employees, the cause of action for breach of fiduciary duty is only available when it is alleged that the employee acted directly against the employer’s interests”] [Borrok, J.]).

As noted above, Defendants have adequately pled that Tonchi breached a fiduciary duty of loyalty giving rise to potential disgorgement of compensation. However, their separate claim for breach of fiduciary duty must be dismissed because it fails to adequately plead that Defendants suffered any compensable harm.

The only theory of damages specified in the Counterclaims in connection with the fiduciary-duty claim is that Tonchi’s misconduct caused the diminution of “the market value and ultimate purchase price of *W*” (CC ¶ 87). But Defendants have withdrawn that claim (NYSCEF 78 [order granting Defendants’ motion to withdraw contract counterclaims and to preclude discovery pertaining to diminution in value]). Defendants argue they nonetheless “allege adequate facts from which damages beyond the decline in value of *W* may properly be inferred,” such as: “(1) meetings that Tonchi had with potential buyers and investors during which Tonchi

engaged in self-dealing for which Tonchi sought and received reimbursement of expenses from AMPI; (2) the cost in time and money incurred by AMPI's sales team on 'damage control' as a result of Tonchi's misconduct and self-dealing; and (3) the impact on future transactions resulting from the embarrassment suffered by AMPI based on Tonchi's conduct" (NYSCEF 71 at 3).

While "[t]here is no requirement that the measure of damages be stated in the complaint so long as facts are alleged from which damages may properly be inferred" (*A. S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 383 [1957]), here the Counterclaims do not allege such facts. There is no indication in the Counterclaims, for instance, about what sort of "damage control" the AMPI Sales Team deployed in response to Tonchi's actions. Nor do the Counterclaims touch on any "future transactions" which could be impacted by Tonchi's conduct. And the Counterclaims also do not mention "reimbursement of expenses from AMPI," a measure of damages that is subsumed within the disgorgement remedy for breach of the duty of loyalty (*see Part B, supra*).

Because Defendants have failed to allege the required element of damages, their claim for breach of fiduciary duty is dismissed.

D. Leave to Amend Answer and Counterclaims

Defendants' proposed Answer and Amended Counterclaims ("Proposed Counterclaims") do not correct the deficiency in their claim for breach of fiduciary duty. Under CPLR 3025 [b], leave to amend "shall be freely given" provided that the movant satisfies its burden of showing that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). But "in determining whether to grant leave to amend the court must examine the underlying merits of the causes of action asserted therein, since to do otherwise would constitute a waste of judicial resources" (*Glenn Partition*,

Inc. v Trs. of Columbia Univ. in N.Y., 169 AD2d 488, 489 [1st Dept 1991]). Accordingly, “[a] proposed amendment that cannot survive a motion to dismiss should not be permitted” (Scott v Bell Atl. Corp., 282 AD2d 180, 185 [1st Dept 2001]; see Olam Corp. v Thayer, 2021 NY Slip Op 30345[U], 3-4 [Sup Ct, New York County 2021] [“A proposed amended complaint that would be subject to dismissal as a matter of law is, by definition, ‘palpably insufficient or clearly devoid of merit’ and thus should not be permitted under CPLR 3025. Any other conclusion would lead to the waste of public and private resources”]).

While the Proposed Counterclaims make additional allegations about Tonchi’s conduct during the sale process, still absent are facts sufficient to show any concrete harm resulting from Tonchi’s conduct. Therefore, Defendants’ cross-motion for leave to amend is denied.

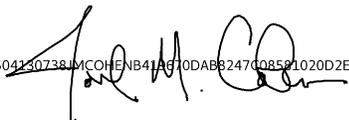
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Accordingly, it is

ORDERED that Plaintiff’s motion to dismiss Defendants’ counterclaims is **GRANTED** with respect to the claim for breach of fiduciary duty and **DENIED** with respect to the claim for breach of the duty of loyalty/faithless servant; and it is further

ORDERED that Defendants’ cross-motion to amend its Answer and Counterclaims is **DENIED**.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

5/4/2021
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
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APPLICATION:

CHECK IF APPROPRIATE: