Richmond Global Compass Fund Mgt. GP, LLC v Nascimento
2023 NY Slip Op 31448(U)
May 1, 2023
Supreme Court, New York County
Docket Number: Index No. 654190/2021
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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RICHMOND GLOBAL COMPASS FUND MANAGEMENT GP, LLC,RICHMOND GLOBAL COMPASS CAPITAL LP, PETER KELLNER,

Plaintiff,

- v -

DECIO NASCIMENTO, SEAN JUSSEN, FRANK JONES, NORBURY PARTNERS LP, NORBURY PARTNERS FUND LP, NORBURY PARTNERS FUND LTD., NORBURY PARTNERS INTERNATIONAL FUND LP, NORBURY CAPITAL ADVISORS GP LLC

Defendant.

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INDEX NO. 654190/2021

MOTION DATE 04/27/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 72, 73, 74, 91, 92

were read on this motion to/for DISMISS.

Upon the foregoing documents, the Defendants' motion to dismiss (Motion Seq. No. 003) the First Amended Complaint (NYSCEF Doc. No. 42; the **FAC**) is granted to the extent that the claims sounding in breach of contract for breach of the Letter Agreement's (hereinafter defined) non-competition clause (Section 11 of the Letter Agreement -- *i.e.*, first cause of action) and non-solicitation clause (Section 10 of the Letter Agreement – *i.e.*, second cause of action) must be dismissed because the Letter Agreement expired according to its terms (*see Gramercy Park Animal Ctr. v Novick*, 41 NY2d 874, 875 [1977]).

These obligations were only in effect during the term of the Letter Agreement because the Section 6(b) predicate notice required to trigger the tail period never occurred, and the survival provision of the Letter Agreement which the parties otherwise bargained for did not include

these obligations and expressly concerned only other obligations specifically referred to in the Letter Agreement's survival provision. The Plaintiffs' attempt to save these claims based on a post-expiration email pursuant to which the Defendants merely acknowledged the lapse of the agreement fails as evidence of a resignation. The Plaintiffs' response to this post-lapse email, together with the email chain (NYSCEF Doc. No. 92) utterly refute any claim predicated on the notion that the parties understood that there was a continuation of the Letter Agreement and its restrictions. Indeed, the email exchange irrefutably establishes that the parties understood that the Letter Agreement had in fact lapsed (*id*., at 3). The parties were discussing a potential new arrangement which they ultimately did consummate.

The unjust enrichment (fourth cause of action), unfair competition (fifth cause of action) and misappropriation of trade secrets (sixth cause of action) claims all must also be dismissed because they are based on alleged conduct already governed by the Letter Agreement (*Linkable Networks, Inc. v Mastercard Inc.*, 125 NYS3d 92, 93 [1st Dept 2020]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]).

However, the Defendants are not entitled to dismissal of the breach of contract claims based on breach of the Letter Agreement's confidentiality provision (third cause of action). The parties expressly agreed pursuant to Section 7 of the Letter Agreement that this provision survives termination of the Letter Agreement. Confidential information is defined as including "non-public confidential, proprietary or trade secret information concerning … investment and trading performance … strategies and techniques." As pled, the Defendants disclosed Compass's trading performance and its trading strategies to unauthorized person(s), including Investor A,

without Compass's prior consent. This is sufficient at this stage of the litigation. To the extent that the Defendants argue the information was otherwise publicly available and not confidential, this raises issues of fact not properly resolved at this stage of the litigation.

The Defendants are also not entitled to dismissal of the breach of fiduciary duty claim (seventh cause of action). Decio Nascimento was employed by Compass as the Chief Investment Officer (**CIO**) and fund manager and owed fiduciary duties (*Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010]). As pled, Investor A had expressed sincere and real interest in investing in Compass. Mr. Nascimento was not permitted to take this corporate opportunity from Compass immediately after claiming that his employment relationship with Compass had lapsed and appropriate it to his new competitive fund set up with virtually mirror image materials and focus (*Neurvana Med., LLC v Balt USA, LLC*, 2020 WL 949917 at *12 [Del Ch 2020]).

Finally, the aiding and abetting of a breach of fiduciary duty claim (eighth cause of action) against Frank Jones also cannot be dismissed. The FAC alleges that Mr. Jones left Compass and joined Mr. Nascimento and provided substantial assistance in misappropriating the opportunity of soliciting and obtaining Investor A's allocation in this type of investment based on confidential information of the Plaintiffs (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). This is plainly sufficient.

The Relevant Facts and Circumstances

Reference is made to a certain Letter Agreement (the **Original Agreement**; NYSCEF Doc. No. 43), dated May 1, 2016, as extended by a certain letter agreement, dated May 16, 2017 (the **First**

Extension; NYSCEF Doc. No. 44) which First Extension extended the term of the agreement from May 1, 2017 to April 30, 2018, as further extended by a certain letter agreement, dated March 27, 2018 (the **Second Extension;** NYSCEF Doc. No. 45) which Second Extension further extended the term of the agreement from May 1, 2018 to April 30, 2019, as further amended by a certain letter agreement, dated May 2, 2019 (the **Third Extension**; NYSCEF Doc. No. 46; the Original Agreement, the First Extension, the Second Extension, and together with the Third Extension, hereinafter collectively, the **Letter Agreement**), which Third Extension further extended the term of the agreement from May 1, 2019 to April 30, 2020, each by and between Decio Nascimento and Richmond Global Compass Fund Management, LP (the **Management Company**) and Richmond Global Compass Fund Management GP, LLC (the **General Partner** and together with the Management Company, **Compass**).

Pursuant to the terms of the Letter Agreement, the parties agreed that Mr. Nascimento would be employed by and serve as CIO of Compass. As referred to above, pursuant to the various letter extension agreements, the parties agreed that Mr. Nascimento's engagement would extend until April 30, 2020 and that he would be paid the amounts set forth in the Letter Agreement.

The parties also agreed to certain restrictive covenants during the term of the Letter Agreement (and potentially during a 90 day tail period following the termination of the Letter Agreement) and to certain other covenants which would survive the expiration or termination of the Letter Agreement.

As relevant to the instant motion, the parties agreed that Mr. Nascimento, while employed by Compass and for a period of twelve (12) months following the Notice Date, would not solicit or hire employees of Compass:

> 10. **Non-Solicitation.** You agree that during your association with the Management Company and for a period ending twelve (12) months following the Notice Date, you will not, without the express written consent of the Management Company, directly or indirectly (i) solicit, induce or encourage the resignation of, or attempt to solicit, induce or encourage the resignation of, any member, partner or employee of the Company Entities; (ii) interfere, or attempt to interfere, in any way with the relationship with the Company Entities and any member, partner, or employee; (iii) hire, or attempt to hire, any member, partner or employee of the Company Entities or any individual who was a member, partner or employee of the Company Entities at any time during the six (6) month period immediately prior to the termination of your association with the Management Company; (iv) interfere, or attempt to interfere, with the relationship between the Company Entities and any of their investors or clients who was an investor or client of the Company Entities at any time during the six (6) month period immediately prior to the termination of your association with the Management Company

(NYSCEF Doc. No. 43, § 10).

Significantly, the Notice Date is defined in Section 6 of the Letter Agreement as the date upon which (x) Compass receives notice of Mr. Nascimento's resignation or intention to withdraw as a Limited Partner and Non-Managing Member or (y) the date on which Compass notified Mr. Nascimento of the termination of his employment or their intention to require Mr. Nascimento to withdraw as a Limited Partner and Non-Managing Member of Compass:

> 6. **Termination and Withdrawal**.
>
> (b) Notwithstanding the foregoing, given the importance of your position with the Management Company, your access to and use of Confidential Information (as defined below) and the significant harm that your departure would likely cause to the Management Company, its investor relationships and its investment opportunities, you agree that during the period ***commencing on the date on which the Management Company and General Partner receive notice of your resignation as an employee or your intention to withdraw as a Limited Partner***

> ***and Non-Managing Member or the date on which the Management Company notifies you of the termination of your employment or the Management Company and General Partner notify you of their intention to require you to withdraw as a Limited Partner and Non-Managing Member for any reason (the date notice is given, the "Notice Date")*** and (i) for ninety (90) days thereafter, or (ii) until such earlier date as designated by the Management Company and the General Partner (the date the termination of your association becomes effective, the "Separation Date," and the period from the Notice Date through the Separation Date, the "Notice Period"), you will remain an employee of the Management Company or a Limited Partner and Non-Managing Member, as applicable, and will not be free to begin a relationship with another Non-Managing Member, as applicable, and will not be free to begin a relationship with another entity, absent the Management Company's and the General Partner's authorized written consent. The Management Company and General Partner have the discretion to waive or terminate the Notice Period at any time and for any reason or for no reason, in which case the Separation Date will be the date on which the Management Company and General Partner notify you that your employment will terminate or your withdrawal will become effective

(*id.*, § 6[b] [emphasis added]).

As discussed below, neither predicate notice to trigger the "Notice Date" was sent prior to the expiration of the Letter Agreement.

The parties also agreed during Mr. Nascimento's employment and for a period of 90 days following the Notice Date, that Mr. Nascimento would not compete with Compass:

> 11. **Non-Competition**. You agree that during your association with the Management Company and, in the event you resign your association with the Management Company or the Management Company terminates your association with Cause, for a period ending ninety (90) days following the Notice Date, you will not, without the express written consent of the Management Company, directly or indirectly, as principal, agent, independent contractor, consultant, director, officer, employee, employer, advisor, stockholder, partner, member or in any other individual or representative capacity whatsoever, whether paid or unpaid, either for your own benefit or the benefit of any other person or entity, other than on behalf of the Management Company, organize, establish, operate, manage, control, engage in, participate in, invest in, permit your name to be used by, act as a consultant or advisor to, render services for (alone or in association with any person, firm, corporation or business organization), or otherwise assist any person or entity that engages in or owns, invests in, operates, manages or controls any

> venture or enterprise which engages or proposes to engage in ESG and value-driven investment management if, in any of the foregoing roles, you would engage in activity (i) which is similar or substantially related to any activity in which you were engaged, in whole or in part, while performing work for the Management Company; (ii) for which you had direct or indirect managerial or supervisory responsibility while employed by the Management Company or (iii) which calls for the application of the same or similar specialized knowledge or skills as those utilized by you while performing work for the Management Company. Notwithstanding the foregoing, nothing in this Letter Agreement will prevent you from owning for passive investment purposes, that are not intended to circumvent this Letter Agreement, less than five percent (5%) of the publicly traded common equity securities of any company (so long as you have no power to manage, operate, advise, consult with or control the competing enterprise and no power, alone or in conjunction with other affiliated parties, to select a director, manager, general partner, or similar governing official of the competing enterprise other than in connection with the normal customary voting powers afforded to you in connection with any permissible equity ownership).

(*id.*, § 11).

As discussed above, the parties also agreed that certain information of Compass was confidential and that such confidential information must be kept confidential:

> 7. **Confidential Information**. You acknowledge that during your association with the Management Company you will acquire Confidential Information (as defined below) regarding the business of the Company Entities. Accordingly, you agree that, without prior written consent of the Management Company, you will not, at any time, disclose to any unauthorized person or otherwise use any such Confidential Information for any reason other than the business of the Company Entities. If you receive a request to disclose any Confidential Information, you will promptly notify the Management Company, in writing, in order to permit the Management Company or the applicable Company Entity to seek a protective order to take other appropriate action. You will also cooperate with all efforts to obtain a protective order or other reasonable assurance that confidential treatment will be accorded to the Confidential Information, provided your cooperation does not violate any law or legal process. If, in the absence of a protective order, you are compelled as a matter of law to disclose Confidential Information, you may disclose to the party compelling such disclosure only that part of the Confidential Information that is required by law to be disclosed (in which case, to the extent permitted by law or legal process, prior to such disclosure, you will advise and consult with the Management Company or the applicable Company Entity and counsel as to such disclosure and the nature and wording of such disclosure), and

> you will use best efforts to obtain confidential treatment therefor at the Management Company's expense. "Confidential Information" means non-public confidential, proprietary or trade secret information concerning trading performance, philosophies, strategies and techniques, structure, products, product development, technology, valuation models and analysis, credit files, risk management tools, portfolio composition, trading parameters and risk limits, and clients and investors and client and investor lists (including, without limitation, the identity of clients or investors, names, addresses, contact persons and the client or investors' business or investment status, strategies or needs)

(*id.*, § 7).

Significantly, as it relates to this motion, the parties agreed that certain of the provisions of the Letter Agreement survived expiration of the License Agreement:

> 16. **Miscellaneous.**
>
> (e) **Survival**. Paragraphs 7 through 13 and 16 of this Letter Agreement will survive the termination of your employment with the Management Company and association with the General Partner.

(*id.*, §16[e]).

As Section 6(b) makes clear, however, the parties did not agree that Sections 10 and 11, the non-competition and non-solicitation provisions survived expiration of the Letter Agreement.

Although in prior years, the parties had agreed to an additional year extension, in 2020, the parties did not agree to an extension prior to the Letter Agreement's expiration on April 30, 2020. In fact, on May 4, 2020, Mr. Nascimento emailed Mr. Kellner acknowledging that the Letter Agreement had lapsed and Mr. Kellner acknowledged the same. Indeed, as the email exchange makes clear, not only did the parties understand that the Letter Agreement had expired, but they also discussed an alternative structure to their arrangement where Mr. Kellner might continue as the Outside Chief Investment Officer:

Decio Nascimento Mon, May 4, 2020 at 10:27 AM
To: "Peter B. Kellner"

Peter - I just wanted to point out that our agreement expired last Thursday 4/30. Please let me know when you have some time today so we can talk about it.

(NYSCEF Doc. No. 36).

...

On May 4, 2020, at 9:23 PM, Peter B. Kellner wrote:

Decio,

Kindly do not communicate anything to the team until I have come back to you.

Thanks, Peter

From: Decio Nascimento
Sent: Monday, May 4, 2020 9:49 PM
To: Peter B. Kellner
Subject: Re: P&L

No problem. Please let me know when you talk to them so I can have a follow up and see if they need anything from me.

From: Peter B. Kellner
Sent: Monday, May 4, 2020 10:45 PM
To: Decio Nascimento
Subject: RE: P&L

I ask that you keep business as usual wrt trading until I can figure out what works.

From: Decio Nascimento
Sent: Tuesday, May 5, 2020 4:00 PM
To: Peter B. Kellner
Cc: George Kellner
Subject: RE: P&L

Peter,

I'm sure you spoke with your father by now about our conversation, so I think it would be important to involve him since he is our largest and most important investor. As we discussed yesterday, my contract expired last Thursday 4/30th, and since I don't have an agreement in place, I need some direction on the details of business as usual. Should I only consider liquidating positions when the time is right, and refrain from opening new positions for the time being?

Thanks, Decio

From: Peter B. Kellner [mailto:peter.kellner@rglobal.com]
Sent: Tuesday, May 05, 2020 4:33 PM
To: Decio Nascimento
Cc: George Kellner
Subject: RE: P&L

Decio,
My father and I have spoken and I am doing my best to figure out what to do. Please don't focus on contracts right now, or liquidating the fund positions. Please do your job as if the contract were in place as you are getting paid as you may do so as an "OCIO" going forward. You have given me no time, utterly surprised me with your decision, left me facing $11 million of sunk costs, with no prospect to keep the fund going with new money or GP investment on May 1st as planned, until I can figure out what to do, which may mean shutting down.
I have asked for some time to speak with investors and advisors. I believe I deserve this and if you consider me as you say "a close friend" then I would hope you would want to support me in this very difficult situation. Kindly continue to manage the portfolio for return and nothing has changed in your current contract – I can have Alicia send such amendment, as I expected that was what we would do when you said we needed to speak as the contract ended, and I had forgotten.

Thanks, Peter

From: George Kellner
Sent: Wednesday, May 6, 2020 8:21 AM
To: Peter B. Kellner ; Decio Nascimento
Subject: RE: P&L

My 2 cents is I want you,Decio, to continue doing what you're doing until at least year end.I'll let you and Peter figure out what your relationship is going forward but I'd like to maintain a non-merger component at Catalyst.

From: Decio Nascimento
Sent: Wednesday, May 6, 2020 8:57 AM
To: George Kellner ; Peter B. Kellner

Subject: RE: P&L

Peter,
Thank you for your note, and thank you too, George. I'm happy to keep going until at least year-end, but we need a structure in place, as George points out, as the contract expired, as you know.

I've suggested that we formalize things with an OCIO arrangement. These terms make sense to me, and we can do it as a term sheet for the moment, just so I have formal authority to make trades. At the moment, I have no formal authority, and it would be important to have something like that in place. Here's what I suggest:

- I will manage the money for a flat fee equivalent to my salary today (there is no incentive fee, and all my shares are Peter's going forward, he keeps all the upside)
- The agreement is flexible were he pays me every 15 days in advance and can cancel at anytime
- I am then allowed to provide OCIO services to other clients, including you, George. If there is some new investment or fund you would like my services
- This agreement also giver Peter more flexibility on the management of the fund as I will be only making trade recommendations

The contract expired, and I don't think that an amendment to an expired contract will work at this point. I'm trying to come up with a sensible arrangement to avoid having to close out the positions in the fund and to impact investors and partners.

Let me know if you want to have Alicia circle back with a term sheet or something that formalizes my authority, as OCIO, to act for the portfolio.

Let's please figure this out today. I'm just uncomfortable continuing without some structure. Thanks

From: Peter B. Kellner
Sent: Wednesday, May 6, 2020 11:56 AM
To: Decio Nascimento ; George Kellner
Subject: RE: P&L

Alicia is working on it now

From: Peter B. Kellner
Sent: Wednesday, May 6, 2020 12:25 PM
To: Decio Nascimento ; George Kellner
Cc: Peter B. Kellner
Subject: RE: P&L

Can you outline your responsibilities to RGC in this capacity? Describe how you will interact with me, Sean and the team? What daily trading will look like? How much time will you devote to our strategy given you will seek out other mandates? To what extent will the recommendations that you are making to RGC be shared with other clients?

I request that you not notify the team of anything until I have spoken with them, as they report to me – de facto in your new position – and I need to make sure they are comfortable with this arrangement. This follows my establishing with investors that this makes sense to them.

Thanks, Peter

From: Decio Nascimento
Sent: Wednesday, May 6, 2020 2:23 PM
To: Peter B. Kellner ; George Kellner
Subject: RE: P&L

Peter, Please find below.

Can you outline your responsibilities to RGC in this capacity?
I will serve as Outsourced Chief Investment Officer (OCIO), providing asset allocation and discretionary trade recommendations to the Investment Committee (IC), the process will be the same as today. At a point when you decided that someone else will have the last word on investment decisions, be it an equity analyst or yourself, we will have it in writing that I am not the decision-maker on those investments, and we will have clearly delineated which track record is directly my decision and which one is based on my recommendations but not directly my cal.

Describe how you will interact with me, Sean and the team?
We will continue to communicate the same as in the past.

What daily trading will look like?
It will look the same as today, up to the point when you decide that someone else will have the last word on investment decisions. When that happens, and a trade recommendation exists, I will provide the trade recommendation to the Investment Committee, and I am also happy to provide guidance on execution, if necessary. How much time will you devote to our strategy given you will seek out other mandates? The work is the same as it was during our previous arrangement, so I will devote the necessary time to perform my responsibilities. I don't intend to seek mandates that do not align with this one.

To what extent will the recommendations that you are making to RGC be shared with other clients?
As stated above, I expect other client mandates to be similar to RGC and as such, would expect them to receive similar asset allocation and thematic recommendations. Having

> said that, to the extent that I have access to proprietary and confidential RGS data, I will not be sharing the specific security selection with other clients or anyone else.
>
> Thank you, Decio

(NYSCEF Doc. No. 92).

Ultimately, the parties did not come to a new agreement and, on May 20, 2020, Mr. Kellner then sent a letter to Mr. Nascimento, purporting to treat Mr. Nascimento's May 4th email as a resignation letter (NYSCEF Doc. No. 47).

Seven days later, on May 27, 2020, Mr. Nascimento formed Norbury Partners LP (**Norbury**) (NYSCEF Doc. No. 48) and filed investment advisor registration materials with the U.S. Securities and Exchange Commission (the **SEC**) (NYSCEF Doc. No. 49). On May 31, 2020, Frank Jones and Sean Jussen resigned from Compass (NYSCEF Doc. No. 42, ¶ 116). They are also listed on the investment advisor registration materials as officers of Norbury (NYSCEF Doc. No. 49 at Schedule A).

Shortly after forming Norbury, Mr. Nascimento successfully solicited an investment from Investor A (NYSCEF Doc. No. 42, ¶ 128) – which Investor A had been a significant prospect for Compass and had expressed significant interest in investing with Compass. Norbury continued to receive outside investments allegedly based on Compass' confidential information including the data points which made up Compass' track record (which track record Norbury marketed as its own) such that as of March 2021 Norbury had $109 million in assets under management (NYSCEF Doc. No. 53 at 4).

Mr. Kellner alleges that Norbury must have used Compass's three-year track record and its underlying trading strategies in order to solicit the investments from Investor A and the other outside investors in violation of Section 7 of the Letter Agreement (NYSCEF Doc. No. 42, ¶ 139). Additionally, Mr. Kellner alleges that Norbury's solicitation of Investor A's investment was a usurpation of Compass's business opportunity since he and Mr. Nascimento has previously solicited Investor A while Mr. Nascimento was still employed with Compass (*id.*, ¶ 209).

Thus, on January 13, 2022, the Plaintiff sued Mr. Nascimento for breach of contract – competition (first cause of action), breach of contract – hiring & solicitation (second cause of action), breach of contract – use and disclosure of non-public information (third cause of action), and breach of fiduciary duties (seventh cause of action), Mr. Nascimento and Mr. Jones for unjust enrichment (fourth cause of action), unfair competition (fifth cause of action), and misappropriation of trade secrets (sixth cause of action), and Mr. Jones for aiding and abetting a breach of fiduciary duties (eighth cause of action).

Discussion

On a motion to dismiss, the pleading is to be afforded a liberal construction, and the court is to accept the facts as alleged as true, accord the non-moving party the benefit of every favorable inference, and determine only whether the facts alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

I. Counts I and II for breach of contract asserted against Mr. Nascimento must be dismissed

The breach of contract claims predicated on the Letter Agreement's Non-Competition (Section 11) and Non-Solicitation (Section 10) provisions must be dismissed. The Plaintiffs' argument that these provisions were breached during the tail period to the Letter Agreement fails. As discussed above, Mr. Nascimento did not send a notice of resignation during the term of the Letter Agreement and Compass did not send a termination notice during the term of the Letter Agreement either. Mr. Kellner's emails where he acknowledged the lapse of the Letter Agreement are documentary evidence which utterly refutes any suggestion to the contrary and any suggestion that Mr. Nascimento was continuing to work under the same arrangement and subject to the same restrictive covenants. As the emails discussed above indicate, the parties were discussing an alternative arrangement where Mr. Nascimento would work as an Outsourced Chief Investment Officer. Even if this were not so (which it is), Mr. Kellner's May 20 Letter would also doom this claim as it purports to treat Mr. Nascimento's May 4th email as a resignation letter which it was not for two reasons. First, the May 4 email is not a resignation letter. It is a letter merely acknowledging that there was no Letter Agreement in effect and that as of Thursday, April 30, the Letter Agreement had lapsed. Second, as of May 4, the term of the Letter Agreement had already expired. Thus, the restrictive covenants in Sections 10 and 11 were no longer applicable to Mr. Nascimento after April 30 and "breaches" of those covenants after that date are not actionable (*Birch Tree Partners, LLC v Windsor Digital Studio, LLC*, 95 AD3d 1154, 1155-56 [2nd Dept 2012]; *Gramercy Park Animal Ctr.*, 41 NY2d at 875).

II. *The Cause of Action Based on Breach of Section 7 of the Letter Agreement is not ripe for dismissal*

Mr. Nascimento is not entitled to dismissal of this claim based on his argument that as a factual matter the track record and data points were public knowledge and were not confidential information of Compass. Simply put, the documents he adduces do not firmly establish that he did not misappropriate confidential information because the information he used to market his fund was not confidential and did not belong exclusively to Compass.

III. *The unjust enrichment, unfair competition, and misappropriation of trade secrets claims must be dismissed*

The existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out the same subject matter (*EBC I, Inc.*, 5 NY3d at 23). As discussed above, the parties negotiated pursuant to terms of the Letter Agreement which restrictive covenants survive expiration of the Letter Agreement and which are subject to a tail period if a tail period applies and end upon expiration of the Letter Agreement in the absence of a tail period. Having permitted the Letter Agreement to lapse without sending the requisite notice to trigger the tail period, the Plaintiffs can not now make a claim predicated on damages stemming from the violation of provisions in the Letter Agreement requiring the tail period to be in place. To wit, the unfair competition claim is predicated on the fact that Mr. Nascimento hired Compass employees and solicited a potential investor. This is addressed in Section 11 – which does not survive expiration of the Letter Agreement in the absence of the tail period. The misappropriation of trade secrets claim is predicated on Mr. Nascimento's unauthorized use of Compass's track record and trade strategies. This is the Section 7 claim (which does survive). Inasmuch that these claims are "entirely based on alleged conduct that is proscribed by" the Letter Agreement, they must be dismissed (*Linkable Networks, Inc.*, 125 NYS3d at 93).

IV. *The breach of fiduciary duty claim against Mr. Nascimento cannot be dismissed*

A claim for breach of fiduciary duty requires (i) that a fiduciary duty existed and (ii) that the defendant breached that duty (*Beard Research, Inc.*, 8 A3d at 601). As the CIO of Compass, Mr. Nascimento owed fiduciary duties. The Plaintiffs allege two bases for breach. First, the Plaintiffs allege that Mr. Nascimento, while still employed with Compass, took steps to form a competing fund and recruit and hire Compass employees. Second, the Plaintiffs allege that Mr. Nascimento, after his employment with Compass had ended, diverted a corporate opportunity that belonged to Compass when he solicited and obtained an investment from Investor A for Norbury.

As an initial matter, the Court notes that to the extent that this theory is predicated on the assumption that Mr. Nascimento was employed by Compass after April 30, the claims fail. To wit, the Certificate of Limited Partnership (NYSCEF Doc. No. 48) demonstrates that Norbury was formed on May 27, 2020 and as of April 30, 2020, Mr. Jones and Mr. Sussen were employed by Compass (NYSCEF Doc. No. 42, ¶ 116).

However, a former officer breaches his fiduciary duty if he engages in transactions that had their inception before the termination of the fiduciary relationship or were founded on information acquired during the fiduciary relationship (*Neurvana Med., LLC*, 2020 WL 949917 at * 12). As alleged in the FAC, Mr. Nascimento accompanied Mr. Kellner on his meetings with Investor A in 2019, while Mr. Nascimento was an officer and fiduciary of Compass. Mr. Nascimento was thus prohibited from usurping the Investor A opportunity from Compass to Norbury since the transaction had its inception while Mr. Nascimento's fiduciary duty to Compass still existed. Mr.

Nascimento is not entitled to dismissal of this claim based on his argument that Compass did not have a "tangible expectancy" in Investor A's investment. As pled in the FAC, Investor A had expressed a sincere interest in investing in Compass. To the extent that this claim is predicated on misappropriating this opportunity, it is actionable.

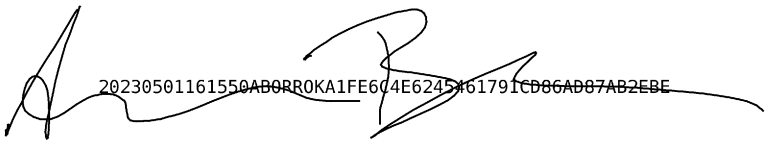
V. *The aiding and abetting a breach of fiduciary duty claim against Mr. Jones cannot be dismissed*

A claim for aiding and abetting a breach of fiduciary duty requires (i) a breach by a fiduciary, (ii) that the defendant knowingly induced or participated in the breach, and (iii) that the plaintiffs suffered damages as a result of the breach (*Kaufman*, 307 AD2d at 125). As discussed above, Mr. Nascimento was prohibited from soliciting an investment from Investor A on behalf of Norbury. As alleged in the FAC, Mr. Jones joined Norbury shortly after resigning from Compass and substantially participated in soliciting Investor A's investment on behalf of Norbury.

It is hereby ORDERED that the defendants' motion to dismiss is granted to the extent of dismissing the causes of action for breach of the non-competition clause of the Letter Agreement, breach of the non-solicitation clause of the Letter Agreement, unjust enrichment, unfair competition, and misappropriation of trade secrets; and it is further

ORDERED that the defendants' motion to dismiss is denied as to all other claims; and it is further

ORDERED that the parties shall appear for a status conference May 25, 2023, at 11:30am.



5/1/2023
DATE

ANDREW BORROK, J.S.C.

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