STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 28, 2020)

DAVID MEDEIROS,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2015-5680**
	:	
ALEX AND ANI, LLC; A AND A SHAREHOLDING COMPANY, LLC; ALEX AND ANI EMPLOYEE INCENTIVES HOLDINGS, LLC; and CAROLYN RAFAELIAN,	:	
Defendants.	:	

DECISION

STERN, J. Plaintiff David Medeiros (Plaintiff) moves for summary judgment on Defendants' Alex and Ani, LLC (Alex and Ani), A and A Shareholding Company, LLC (A and A Shareholding), Alex and Ani Employee Incentives Holdings, LLC, and Carolyn Rafaelian (Rafaelian) (collectively, Defendants) claims (1) that Plaintiff breached the terms of an Employee Confidentiality Agreement; (2) that Plaintiff breached the terms of a Non-Compete, Non-Solicit and Non-Disclosure Agreement (the NDA); (3) that Plaintiff breached his fiduciary duty to Alex and Ani; and (4) that Plaintiff committed computer theft in violation of G.L. 1956 § 11-52-4. Defendants have timely objected to Plaintiff's motion and have filed a cross-motion for summary judgment which requests judgment in their favor on Plaintiff's claims (1) that Plaintiff is vested with a certain number of Incentive Units which A and A Shareholding must purchase at fair market value; (2) that Plaintiff was discriminated against based on his gender in violation of G.L. 1956 § 28-5-7; and (3) that Plaintiff was discriminated against based on his military status in violation of G.L. 1956 § 30-11-1. Plaintiff timely objected to Defendants'

motion. Jurisdiction is pursuant to Super. R. Civ. P. 56(c) and G.L. 1956 §§ 8-2-13, 8-2-14, and 9-30-1 *et seq*.

I

Facts and Travel

A

Plaintiff's Employment

Alex and Ani is a Rhode Island limited liability company whose founder and CEO is Rafaelian. Compl. ¶¶ 2, 8; *see also* Defs.' Answer Compl. (Answer) ¶¶ 2, 8. In or about May of 2013, the Plaintiff was hired to serve as the Senior Vice President of Operations and Acting Chief Operational Officer of Alex and Ani. Defs.' Answer ¶ 12. Plaintiff was hired by Alex and Ani's then-Chief Executive Officer (CEO) Giovanni Feroce (Feroce). Pl.'s Mot. Summ. J. (Mot.), Ex. 7 (Feroce Dep.) at 8:18-23; 35:12-16.

At the time Plaintiff was hired, Alex and Ani had actual knowledge of the fact that he was an active member of the Rhode Island National Guard and was a combat veteran. Defs.' Answer ¶ 13. Plaintiff understood that he was hired by Feroce for his "military leadership, discipline, management, [and] logistic skills." Defs.' Mot. Summ. J., Ex. 7 at 7:17-19 (Medeiros Dep., July 9, 2018). Plaintiff's job responsibilities included working with a team to research quality control issues and locating additional manufacturing sources for Alex and Ani's products. Compl. ¶ 55; Defs.' Answer ¶ 55; Feroce Dep. 39:22-40:2; Pl.'s Mot., Ex. 3, ¶ 7 (Medeiros Aff.).

1

Employee Confidentiality Agreement

Concurrent with the start of his employment at Alex and Ani, Plaintiff executed an Employee Confidentiality Agreement. Pl.'s Mot., Ex. 5. Pursuant to the Employee

Confidentiality Agreement, Plaintiff "acknowledge[d] that A[lex & Ani] possesses certain 'Confidential Information,'" further defined as

> "all information relating to A[lex & Ani] or its business including but not limited to contemplated new products and services, marketing and advertising campaigns product designs and design techniques, creatives, creative campaigns and themes, sales projections, financial information, budgets and projections, system designs, employees, management procedures and systems, employee training materials, production plans and techniques, product and materials specifications, research, client information (including purchase history and client identifying information) and vendor information (including the identity of vendors and information concerning the capacity of or products or pricing provided by specific vendors)." *Id*. at 1.

Excluded from the definition of "Confidential Information" under the Employee Confidentiality Agreement was "information that becomes generally publicly available." *Id.* By signing the Employee Confidentiality Agreement, Plaintiff agreed not to "disclose or use . . . any Confidential Information." *Id*. at 2.

2

Non-Compete, Non-Solicit and Non-Disclosure Agreement

On or about October 11, 2013, Plaintiff executed a non-disclosure agreement (NDA), pursuant to which the Plaintiff "recognize[d] that [his] position with Alex and Ani . . . has entrusted [him] with highly sensitive, confidential, restricted and proprietary information." Pl.'s Mot., Ex. 6, § 4.1. By signing the NDA, Plaintiff agreed to hold Alex and Ani's Confidential Information in strictest confidence and not to disclose Alex and Ani's Confidential Information to any third party. Under the NDA, "Confidential Information" was defined as

> "information that Alex and Ani has obtained through a significant investment of resources in connection with its actual or anticipated business, including but not limited to copyrighted or patentable subject matter, research, development, innovations, inventions, designs, technology, techniques, 'know how,' improvements, trade

> secrets, business affairs and finances, customers, employees, manufacturers, operations, facilities, consumer markets, products, capacities, systems, procedures, security practices, data formats, and business methodologies." *Id.* § 4.3.

The NDA also "recognize[d] that Alex and Ani has received and will receive from third parties their confidential or proprietary information," and Plaintiff "agree[d] to hold all such confidential or proprietary information in the strictest confidence and not to disclose it . . . except as necessary in carrying out [his] work for Alex and Ani consistent with Alex and Ani's agreement with such third party." *Id.* § 5.6. Exceptions to the Plaintiff's confidentiality obligations under the NDA included information "which (i) is or becomes publicly available through no wrongful act or omission of mine or others . . . ." *Id.* § 5.7

3

Incentive Unit Agreement

Finally, on or about December 20, 2013, Plaintiff and A and A Shareholding executed the Incentive Unit Agreement [C-Level] (IU Agreement), pursuant to which the Plaintiff was issued Series 2 Incentive Units. Mem. Opp. Defs.' Mot. Summ. J., Ex. 30. The IU Agreement provided that if Plaintiff "is terminated for Cause, [he] shall . . . immediately forfeit . . . all of his . . . Series 2 Incentive Units (both that portion that is still subject to vesting and any vested portion)." *Id.* ¶ 3. Under the IU Agreement, "Cause" was defined as, *inter alia*,

> "unauthorized use or disclosure of [A and A Shareholding's] or any of its Subsidiaries'[1] confidential information or trade secrets which use or disclosure causes material harm to [A and A Shareholding] or any of its Subsidiaries, or breach of any provision of any non-competition or similar agreement between [Plaintiff] and [A and A Shareholding] or any of its Subsidiaries." *Id.*

[1] Alex and Ani is wholly owned by its member, A and A Shareholding. Compl. ¶ 3, Defs.' Answer ¶ 3.

B

Cinerama

At all times relevant, Cinerama was a manufacturer of some of Alex and Ani's products. Defs.' Countercl. ¶ 3. On or about September 1, 2011, Cinerama and Alex and Ani entered into a Mutual Nondisclosure Agreement (Cinerama NDA), pursuant to which the parties agreed that they would not disclose one another's confidential information. Pl.'s Mot., Ex. 1; Defs.' Countercl. ¶¶ 3-4. Under the Cinerama NDA, "Confidential Information" was defined as, *inter alia*,

> "all information relating in any manner to discloser's contemplated new products and services, . . . financial information, budgets and projections, . . . production plans and techniques, product and materials specifications, product designs and design techniques, . . . vendor information (including the identity of vendors and information concerning the capacity of or products or pricing provided by specific vendors). . . ." Pl.'s Mot., Ex. 1, ¶ 1.

Excluded from the definition of "Confidential Information" under the Cinerama NDA was "information that (a) becomes generally available to the public . . . ." *Id.*

On or about January 29, 2016, Alex and Ani Assembly, LLC (A&A Assembly) and Cinerama executed an Asset Purchase Agreement (Cinerama Purchase Agreement) whereby A&A Assembly bought Cinerama's property and assets, including "any claims or causes of action of [Cinerama] against any third party relating to the Business or the Assets, whether known or unknown, contingent or non-contingent . . . ." Pl.'s Mot., Ex. 13, § 2.1(l); Defs.' Countercl. ¶ 32.

C

Instant Litigation

On or about December 30, 2015, Plaintiff filed a five-count Complaint against Defendants (1) seeking a declaratory judgment that he is vested with 26,973 Incentive Units under the IU Agreement and that A and A Shareholding must purchase the Incentive Units at fair market value; (2) alleging wrongful termination; (3) alleging gender discrimination; (4) alleging military discrimination; and (5) alleging invasion of privacy. Thereafter, Defendants filed a motion to dismiss Count V—which alleged invasion of privacy—and a motion for judgment on the pleadings on Count I, which sought a declaratory judgment as to the IU Agreement. On July 19, 2016, the court entered an order granting Defendants' motion to dismiss Count V and denying Defendants' motion for judgment on the pleadings. On February 24, 2016, Defendants filed their Answer and a four-count Counterclaim, alleging (1) that Plaintiff breached the terms of the Employee Confidentiality Agreement and the terms of the NDA by forwarding an allegedly confidential spreadsheet to a prospective vendor and competitor of Alex and Ani's supplier; (2) that Plaintiff breached his fiduciary duty to Alex and Ani by allegedly disclosing Alex and Ani's confidential information to third parties; and (3) that Plaintiff committed computer theft in violation of § 11-52-4.

For over three years, the parties engaged in discovery and motion practice. The Court heard from both parties on the instant motions for summary judgment on January 16, 2020. Thereafter, the Court afforded Plaintiff the opportunity to submit a supplemental memorandum addressing arguments that Defendants raised for the first time at oral argument. After considering oral and written arguments, the Court now decides the cross-motions for summary judgment.

II

Standard of Review

"'Summary judgment is an extreme remedy and should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Rose v. Brusini*, 149 A.3d 135, 139 (R.I. 2016) (quoting *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005)) (internal quotation omitted). "'Only when a review of the admissible evidence viewed in the light most favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, will this Court . . . grant . . . summary judgment.'" *Id.* at 139-40 (quoting *National Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 971 (R.I. 2008)). "The party opposing 'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" *Id.* at 140 (quoting *National Refrigeration, Inc.*, 942 A.2d at 971).

III

Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims

Plaintiff moves for summary judgment on all Counts of Defendants' Counterclaim. Specifically, Plaintiff argues that Counts I, II, and III must fail as a matter of law because the Defendants have failed to prove damages with a reasonable degree of certainty; that Counts I and II must fail because Plaintiff did not disclose confidential information in violation of the Employee Confidentiality Agreement and/or the NDA; that Count II must fail because the NDA is void and unenforceable as it was not supported by adequate consideration; that Count III must

fail because Plaintiff, at all relevant times, was acting in accordance with the interests of Alex and Ani and owed no duty of loyalty to Cinerama; and that Count IV must fail because Plaintiff did not possess an intent to permanently deprive Alex and Ani of its computer or data.

A

Damages

Plaintiff moves for summary judgment on Counts I (Breach of Contract – Employee Confidentiality Agreement), II (Breach of Contract – Non-Compete, Non-Solicit and Non-Disclosure Agreement), and III (Breach of Fiduciary Duty – Alex and Ani's Confidences) of the Defendants' Counterclaim, arguing that the Defendants cannot establish a *prima facie* case for these Counts because they have failed to demonstrate damages with a reasonable degree of certainty. Plaintiff argues that Defendants have claimed their damages are that "information about [Cinerama] that Alex and Ani had agreed to keep confidential was disclosed to a competitor of [Cinerama]. Thus . . . [Cinerama's] confidential and proprietary information and trade secrets lost their secret status." *See* Pl.'s Mot., Ex. 20, Defs.' Answer to Pl.'s Int. No. 8. However, Plaintiff asserts that the only evidence of damages Defendants have purported to produce is the Cinerama Purchase Agreement, which does not quantify damages related to Plaintiff's alleged disclosure of confidential information. *Id.*

Moreover, Plaintiff argues that the record reveals that the only vendor the Spreadsheet was sent to is Michael McAllister (McAllister), who testified that he never disclosed the Spreadsheet to anyone and only used the information for "theoretical calculations," Pl.'s Mot., Ex. 19 at 64:2-4; 157:8-17, and that Cinerama's Super. R. Civ. P. 30(b)(6) (Rule 30(b)(6)) deponent testified that the company was unaware the Spreadsheet was released and accordingly did not investigate damages incurred and is unaware of any damages suffered. *Id.* at Ex. 21 at

33:1-24. Plaintiff also argues that any alleged damages suffered by the Defendants are not causally connected to Plaintiff's actions because in November of 2013—months before Plaintiff emailed the Spreadsheet to McAllister—other Alex and Ani employees had provided McAllister with samples and were corresponding regarding specifications and pricing. *See id*. at Exs. 37; 43; 44. As such, Plaintiff contends that the Defendants have failed to show how his alleged disclosure of the Spreadsheet was the cause of their purported damages. Therefore, Plaintiff maintains that the Defendants have failed to produce evidence supporting their claim for damages. Plaintiff argues that because discovery has closed, and the Defendants have not disclosed an expert witness, no genuine issue of material fact exists, and Plaintiff is entitled to judgment as a matter of law on Counts I, II, and III.

Defendants object, arguing that they have made a clear showing of damages. Principally, Defendants rely on the testimony of Rafaelian, which they allege shows that Alex and Ani suffered damages to its business reputation, delivery disruptions, and lost sales as a result of Plaintiff emailing the Spreadsheet to McAllister. Defendants also contend that Rafaelian claimed reputational damages with respect to both Cinerama and Alex and Ani, which could give rise to nominal damages. Defendants assert that Rafaelian's testimony causally connects the alleged damages to Plaintiff's alleged disclosure of confidential information

An element of Defendants' breach of contract claims and breach of fiduciary duty claim is damages proximately caused by the breach. *See Fogarty v. Palumbo*, 163 A.3d 526, 541 (R.I. 2017) (holding that claimant of breach of contract must prove breach and damages caused thereby); 37 Am. Jur. 2d *Fraud and Deceit* § 31 (reciting the elements of a breach of fiduciary duty claim as "(1) the existence of a fiduciary relationship; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary"); *see also Chain Store*

Maintenance, Inc. v. National Glass & Gate Service, Inc., No. PB-2001-3522, 2004 WL 877599, at * 13 (R.I. Super. Apr. 21, 2004) (finding in the Superior Court context that an element of a fiduciary duty claim is damages proximately caused by the breach).[2] The burden is on the Defendants to produce evidence "establishing that they incurred reasonably certain damages as a consequence of" Plaintiff's alleged wrongdoing. *Fogarty*, 163 A.3d at 537.

1

Existence of Damages

Here, the Court finds that the Defendants have failed to prove damages and therefore have presented no issue of material fact making Plaintiff entitled to judgment as a matter of law on Counts I, II, and III. The testimony of Rafaelian relied on by the Defendants to support its claim of damages includes her testimony that Plaintiff—by and through his alleged disclosure of confidential information—"spun everybody up," Pl.'s Reply, Ex. 39 at 113:22, which required Rafaelian to "run around and make sure people felt like things were safe" and that Alex and Ani's business was operating as usual. *Id.* at 117:23-118:4. However, Rafaelian also testified that Alex and Ani's sales continued to go up, *id.* at 119:7-15, and that "nobody said that they wouldn't do business with Alex [and] Ani because of" the Plaintiff's actions. *Id.* at 116:12-13. The only potentially quantifiable damages to Alex and Ani that Rafaelian testified about was that Alex and Ani "probably had a recess in the delivering of certain orders" because vendors were "wondering what's going on with Alex [and] Ani," *id.* at 119:23-120:2, but that Alex and Ani

[2] Although our Supreme Court has explained that unpublished opinions "have no precedential value," *Town of Cumberland v. Cumberland Town Employees Union*, 183 A.3d 1114, 1123 (R.I. 2018), it has also recognized that unpublished opinions are instructive and illustrative. *See Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1175 n.8 (R.I. 2019); *see also Whitaker v. State*, 199 A.3d 1021, 1030 n.5 (R.I. 2019).

did not calculate the amount of merchandise that allegedly went undelivered or whose delivery was delayed. *Id.* at 120:5-9.

In terms of alleged damage to Cinerama, Rafaelian testified that Plaintiff's actions "stirr[ed] up a lot of trouble" for relationships Cinerama had with its vendors, *id*. at 122:4-13, but could not identify any vendors that Cinerama allegedly lost as a result of Plaintiff's actions. *Id.* at 122:17-21. Moreover, Rebecca Rafaelian—the Rule 30(b)(6) deponent for Cinerama—testified that she is unaware if Cinerama suffered any damages and, in fact, never investigated whether Cinerama suffered any damages as a result of Plaintiff's alleged actions. Pl.'s Mot., Ex. 21 at 24:1-3; 33:1-24. Additionally, Rebecca Rafaelian testified that in 2014 Cinerama's sales to Alex and Ani slightly increased from those of the previous year. *Id.* at 33:25-34:7.

The testimony relied on by the Defendants clearly demonstrates that Rafaelian believes that Alex and Ani and/or Cinerama were damaged by Plaintiff's alleged actions. However, in order to withstand summary judgment, the Defendants must do more than merely state damages exist and instead must produce actual proof of damages. *See General Accident Insurance Company of America v. Cuddy*, 658 A.2d 13, 17 (R.I. 1995) (finding summary judgment appropriate on uninsured motorist claim where the only evidence of damages produced was an affidavit of the defendant stating her opinion that damages existed). The record is devoid of any evidence calculating the numerical damages of the Defendant, *cf. Abbey Medical/Abbey Rents, Inc. v. Mignacca*, 471 A.2d 189, 195 (R.I. 1984) (finding that in a suit for unfair competition against former manager that plaintiff produced reliable evidence of lost profits by showing difference between its average monthly net income prior to manager's departure and its operating loss after manager's departure), and the jury will not "be provided with some rational

model of how the [damages] occurred and on what basis they have been computed." *Fogarty*, 163 A.3d at 537.

While Defendants note that our Supreme Court has recognized that uncertain damages are permitted when the amount of damages is uncertain, *see id.* at 538 (citing *Patel v. Bayliff*, 121 S.W.3d 347, 356 (Tenn. Ct. App. 2003)), the Court finds the instant matter distinguishable from *Fogarty*. In *Fogarty*, the plaintiffs produced an expert witness who—although unable to quantify damages with certainty—was able to testify to "proof of the existence of damages and a formula by which to compute those damages." *Id.*; *see also Troutbrook Farm, Inc. v. DeWitt*, 611 A.2d 820, 824 (R.I. 1992) (recognizing lost profits are a proper element of damages where business has been interrupted but that in order to recover a plaintiff must "prove lost revenue as well as costs and expenses involved in the generation of that revenue"). Accordingly, our Supreme Court concluded that summary judgment based on uncertainty of damages was inappropriate. *See Fogarty*, 163 A.3d at 538. The evidence presented in *Fogarty* differs from the evidence presented by the Defendants. The Defendants have presented no expert testimony, and the very existence of damages is uncertain because the only evidence of purported damages is Rafaelian's own testimony, which does not satisfy Defendants' burden of showing that they incurred reasonably certain damages. *See id*. at 537.

2

Causation

Moreover, the Court finds that the Defendants have failed to adduce evidence showing that any purported damages suffered were caused by Plaintiff's alleged disclosure of confidential information. *See Rhode Island Resource Recovery Corporation v. Restivo Monacelli LLP*, 189 A.3d 539, 548 (R.I. 2018) (discussing that when proximate cause of damages is beyond a lay

person's knowledge expert testimony is required). The record reveals that beginning in November of 2013, Alex and Ani—through various employees—was already communicating with McAllister of Ira Green regarding samples, pricing, and specifications. *See* Pl.'s Mot., Exs. 37; 43; 44. Defendants have produced no evidence showing how Plaintiff's disclosure of the Spreadsheet to McAllister caused them damages, especially when McAllister was already communicating with other Alex and Ani employees regarding the same subject matter, and McAllister testified that he did not disclose the information contained on the Spreadsheet to anyone else. *See Rhode Island Resource Recovery*, 189 A.3d at 548 (recognizing that the issue of causation of damages is complicated when multiple parties may have been involved in the alleged act or omission). Defendants have also produced no expert testimony on the matter, and because discovery has closed and the time for expert disclosure has passed, the Court finds that Defendants have not adduced evidence of causation to withstand summary judgment. *See id*. (holding that expert testimony is necessary regarding causation of damages where the subject matter is a specialized field).

3

Reputational Harm

Lastly, the Court is not persuaded by Defendants' contention that Rafaelian alleged reputational harm, thereby allowing recovery of nominal damages. First, nominal damages on an action sounding in contract do not lie "absent the most egregious circumstances . . . ." *O'Coin v. Woonsocket Institution Trust Co.*, 535 A.2d 1263, 1266 (R.I. 1988). Second, the Court can find no precise authority—and the Defendants point to none—where our Supreme Court has allowed recovery of reputational damages for breach of contract or breach of fiduciary duty claims. Rather, the measure of damages for breach of contract under Rhode Island law is well settled:

"courts should award 'such measures of damage as will serve to put the injured party as close as is reasonably possible to the position he [or she] would have been in had the contract been fully performed.'" *Rhode Island Managed Eye Care, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 996 A.2d 684, 694 (R.I. 2010) (quoting *George v. George F. Berkander, Inc.*, 92 R.I. 426, 430, 169 A.2d 370, 372 (1961)); *see also McCone v. New England Telephone and Telegraph Co.*, 471 N.E.2d 47, 50 n.8 (Mass. 1984) (recognizing that under Massachusetts law reputational damage is not recoverable in contract suits). Moreover, even assuming reputational damages are recoverable, Defendants' alleged reputational damages suffers from the same issues of uncertainty and causation discussed above.

Based on the foregoing, Plaintiff's Motion for Summary Judgment is granted with respect to Counts I, II, and III of Defendants' Counterclaim.

B

Computer Theft

Plaintiff also moves for summary judgment on Count IV of Defendants' Counterclaim, which alleges that by forwarding the Spreadsheet to McAllister, Plaintiff transferred data contained on Alex and Ani's computer without claim of right. Defs.' Countercl. ¶¶ 48-51. Plaintiff argues that Defendants have failed to demonstrate that Plaintiff possessed an intent to permanently deprive them of their computer or data, and therefore, the claim for computer theft must fail as a matter of law.

In support of his argument, Plaintiff relies exclusively on a 2004 Superior Court decision, [3] which indeed held that summary judgment was appropriate to the plaintiff's claim of computer theft because no evidence was produced that the defendant possessed an intent to permanently

[3] *See Chain Store Maintenance, Inc. v. National Glass & Gate Service, Inc.*, No. PB 2001-3522, 2004 WL 877599, at *12 (R.I. Super. Apr. 21, 2004).

deprive plaintiff of its computer or data. However, in 2006, the legislature amended § 11-52-4 and removed the requirement that the offending party must have an intent to permanently deprive the owner of possession. As such, the Court finds the Plaintiff's argument without merit. Plaintiff's Motion for Summary Judgment as to Count IV is denied.[4]

IV

Defendants' Motion for Summary Judgment on Plaintiff's Claims

Defendants move for summary judgment on Counts I (Declaratory Judgment), III (Gender Discrimination), and IV (Military Discrimination) of Plaintiff's Complaint, arguing that no genuine issue of material facts exists, and they are entitled to judgment as a matter of law. Plaintiff objects to summary judgment.

A

Declaratory Judgment

Defendants move for summary judgment on Count I of Plaintiff's Complaint, which seeks a declaratory judgment that Plaintiff is vested with over 26,000 Incentive Units, that there was no early expiration of the Incentive Units, and that accordingly, A and A Shareholding must purchase the Incentive Units at fair market value. Defendants argue that they are entitled to summary judgment because Plaintiff forfeited his right to the Incentive Units because he breached the terms of the Employee Confidentiality Agreement and/or the NDA by disclosing confidential information to McAllister on January 31, 2014. Defendants' motion depends largely

[4] The Plaintiff also makes passing reference in his papers to two additional arguments: 1) that Plaintiff had authority to send the Spreadsheet; and 2) that Alex and Ani does not have standing to bring a claim under § 11-52-4. However, these arguments have not been adequately developed, and therefore, the Court will not pass on their merit. *See K&W Automotive, LLC, et al. v. Town of Barrington*, No. 2018-250-A, slip op. at 10 n.7 (R.I. filed Jan. 31, 2020) (finding an issue was not adequately developed and thereby preserved for appellate appeal because defendant referred to the argument in one sentence of its brief).

on whether the after-acquired evidence doctrine applies because the Defendants did not discover the alleged disclosure of the confidential information until after Plaintiff was terminated from his employment.

1

After-Acquired Evidence Doctrine

In this matter of first impression in Rhode Island, Defendants urge this Court to adopt the after-acquired evidence doctrine.[5] In the context of an employment discrimination claim, the after-acquired evidence doctrine may be used by the employer "when, after [the employee's] discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 354 (1995) (finding that where employee alleged age discrimination and during the course of discovery the employer discovered that employee had copied confidential documents, the employer could rely on that as evidence that employee would have been discharged for cause). Thus, evidence of wrongdoing on the part of the employee that the employer learns about subsequent to the actual termination can be used to support a claim that the employee engaged in misconduct warranting discharge, regardless of whether the discharge was originally motivated by discrimination. *See City of Springfield v. Civil Service Commission*, 14 N.E.3d 241, 249 n.14 (2014) (discussing the application of the after-acquired evidence doctrine which "permits an employer to show that later-discovered but legitimate reasons for taking adverse employment action against an employee, if they had been known at

[5] As a threshold matter, the parties disagree over whether Rhode Island or Delaware law is controlling as to whether the after-acquired evidence doctrine applies. However, as discussed below, the Court finds that the application of the after-acquired evidence doctrine under Rhode Island law or Delaware law would result in the same outcome and accordingly finds the choice of law issue of no moment.

the time, would have justified or mitigated the employer's otherwise impermissibly discriminatory action, [such as discharge,] relating to that employee, and can serve to limit the employee's recovery").

Some courts have also allowed use of the after-acquired evidence doctrine as a bar to recovery in breach of employment contract suits. *See Dobinsky v. Crompton & Knowles Colors, Inc.*, No. 3:02CV1291, 2004 WL 2303686, at *4 (M.D. Penn. 2004) (holding that defendant-employer could use after-acquired evidence in a breach of contract case to show that plaintiff-employee committed willful misconduct during his employment and therefore would have been terminated for "cause" and was not entitled to certain payments); *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792 (Ariz. 1998) (relying on Restatement (Second) of Contracts to find that after-acquired evidence of employee misconduct is a defense to a breach of contract action if the employer can show that it would have fired the employee had it known of the misconduct); *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (holding that an employer could avoid liability for breach of implied contract or promissory estoppel when employee who committed resume fraud which the employer did not discover until after it terminated the employee had come to court with unclean hands); *Davenport Group MG, L.P. v. Strategic Investment Partners*, 685 A.2d 715 (Del. Ch. 1996) (holding that limited partners' after-acquired discovery of general partner's improper use of transactions fees could be used to support a finding that a breach of partnership agreement occurred which justified removal of general partner). The Court is persuaded by the many jurisdictions which have adopted the after-acquired evidence doctrine and finds that the guiding principles set forth by the United States Supreme Court in *McKennon* justify allowing invocation of the doctrine here. *See* 513 U.S. at 361 (recognizing that allowing evidence of the employee's wrongdoing to be considered strikes a

balance between the legitimate interests of the employer and the important claims of the employee); *see also Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1182 (R.I. 2008) (recognizing that when procedural rules or case law "are silent on a particular issue, '[i]t makes eminent good sense to consider the experience and the reasoning of the judges in other jurisdictions . . .'" (quoting *Ciunci, Inc. v. Logan*, 652 A.2d 961, 962 (R.I. 1995))).

In *McKennon*, the United States Supreme Court held that the burden is on the defendants to prove that 1) the plaintiff was guilty of some misconduct which the employer was unaware; 2) the misconduct would have justified discharge; and 3) if the defendants had known of the misconduct, they would have discharged the plaintiff. *See Ricky v. Mapco, Inc.*, 50 F.3d 874, 876 (10th Cir. 1995) (iterating that in light of the holding of *McKennon*, an employer "must demonstrate to the jury, not only that it was unaware of the . . . misconduct . . . but also that the misconduct [] alleged was serious enough to justify discharge and that [defendant] would have discharged [plaintiff] if it had known about those allegations"). Here, the Defendants have failed to establish that there are no material issues of fact as to whether Alex and Ani was unaware of the alleged disclosure and whether Alex and Ani would have fired Plaintiff solely on the basis of the newly-discovered evidence. *See* Feroce Dep. 39:22-40:2; 139:8-23 (testifying that as CEO, he directed Plaintiff to investigate and seek additional suppliers and negotiate with Ira Green); *Id*. at 140:15-19; 152:4-16 (testifying that Plaintiff had authority and permission to disclose the prices Alex and Ani was paying to Cinerama to Ira Green); *Id*. at 247:14-248:5 (testifying that Plaintiff had "blanket authority" to get best pricing—including disclosing prices Alex and Ani was paying to Cinerama); *see also* Pl.'s Mot., Ex. 11 (Forcini Dep.) at 91:6-11 (testifying that none of his superiors prohibited disclosing Cinerama's pricing to another vendor). Based on the evidence in the record, Defendants have failed to meet their burden, and summary judgment is

denied as to Count I of Plaintiff's Complaint because a genuine issue of material fact remains as to whether Defendants were unaware of Plaintiff's alleged disclosure and/or whether Plaintiff would have been terminated forthwith had the Defendants known of the disclosure.[6]

B

Gender Discrimination

Defendants also move for summary judgment on Count III of Plaintiff's Complaint. Count III alleges that the Defendants unlawfully discriminated against Plaintiff on the basis of his gender.

First, Defendants contend there is no genuine dispute of material fact and Plaintiff's claim fails as a matter of law because, during his deposition, Plaintiff was asked why he believed he was terminated, and he responded with four reasons, none of which Defendants argue articulated discrimination on the basis of gender. *See* Defs.' Mot. Summ. J., Ex. 8. Plaintiff objects to summary judgment on these grounds, arguing that the Complaint sets forth detailed allegations of gender discrimination and that the Plaintiff's deposition testimony explains his basis for gender discrimination and, therefore, genuine issues of material fact exist to preclude summary judgment.

In reviewing the deposition testimony of Plaintiff presented in the motion and in Plaintiff's objection to the motion, Plaintiff testified regarding a variety of reasons he believed he was terminated, but added that there may be others he was not recalling at the moment. *See* Mem. Supp. Defs.' Mot. Summ. J., Ex. 8 at 94:6-10. This deposition testimony in no way amounts to an admission that Plaintiff was not discriminated against based on his gender. C*f.*

[6] The Court is not ruling on whether the information in the Spreadsheet is "confidential" or whether Plaintiff breached the terms of the Employee Confidentiality Agreement, the NDA, and/or the IU Agreement.

United States v. 6 Fox Street, 480 F.3d 38, 42 (1st Cir. 2007) (finding that a party's admission that he stored and distributed marijuana at his property resulted in no genuine issue of material fact as to whether the property was connected to drug sales).

Second, Defendants argue that Plaintiff's gender discrimination claim fails because he has failed to meet the applicable burden-shifting framework as he has not shown that the Defendants replaced—or sought to replace—him with a female employee with similar qualifications. Under Rhode Island law, a gender-based disparate treatment claim is analyzed under a three-step burden shifting framework. *See DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 21 (R.I. 2005). The first step requires the plaintiff to establish a *prima facie* case that

> "(1) [he or] she is a member of a protected class; (2) [he or] she was performing [his or] her job at a level that rules out the possibility that [he or] she was fired for inadequate job performance; (3) [he or] she suffered an adverse job action by [his or] her employer; and (4) [his or] her employer sought a replacement for [him or] her with roughly equivalent qualifications." *Id.* (quoting *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 15 (1st Cir. 1994)).

Here, the Court finds that Plaintiff has not sustained his burden of proving a *prima facie* case. Plaintiff—as a male—is a member of a protected class, and the evidence in the record shows that Plaintiff's job performance rules out the possibility that he was fired for inadequate job performance. *See* Pl.'s Mot., Ex. 49 (deposition testimony of then-CEO Feroce extolling Plaintiff's job performance and attributing Alex and Ani's growth to the Plaintiff's efforts); *id.* at Ex. 50 (deposition testimony of John Hansen explaining that Plaintiff did a "spectacular job" for Alex and Ani by reducing excess inventory, improving ordering process, and that Rafaelian spoke favorably to him regarding Plaintiff's job performance); *id.* at Ex. 52 (email from Rafaelian commending Plaintiff).

At the same time, Plaintiff has failed to show that Alex and Ani replaced him with an employee of roughly equivalent qualifications. Plaintiff, in his Post-Hearing Memorandum, asserts that there is no evidence in the record to suggest his replacement—Jane Fitzpatrick Conway (Conway)—was more qualified, but this argument distorts the burden of proof applicable to the framework. The burden to establish the *prima facie* case falls squarely on the Plaintiff. *See Center for Behavioral Health, Rhode Island, Inc v. Barros*, 710 A.2d 680, 685 (R.I. 1998). Accordingly, to maintain his gender discrimination claim, Plaintiff is required to present evidence that Conway's qualifications were roughly equivalent to his. *See Neri v. Ross-Simons, Inc.*, 897 A.2d 42, 49 (R.I. 2006) (holding that plaintiff presented a *prima facie* case of her gender discrimination claim sufficient to withstand summary judgment where the evidence showed that another employee with the same job classification assumed plaintiff's duties and worked hours similar to those that plaintiff worked prior to her termination). The only evidence regarding Conway is that she did, in fact, replace Plaintiff. Pl.'s Mot., Ex. 53 at 234:9-19. However, the Plaintiff has presented no evidence of Conway's qualifications. Therefore, Plaintiff has failed to establish a *prima facie* case of gender discrimination, and Defendants' Motion for Summary Judgment is granted with respect to Count III of Plaintiff's Complaint.

C

Military Discrimination

Lastly, Defendants move for summary judgment on Count IV of Plaintiff's Complaint, which alleges Plaintiff was unlawfully discriminated against and terminated because of his membership in the armed forces and military. In support, Defendants argue that Plaintiff's subjective belief that he was discriminated against based on his military affiliation is not enough to withstand summary judgment. Specifically, Defendants argue that the evidence shows that

Plaintiff was terminated for nondiscriminatory reasons and that the Defendants hired veterans, supported the military by contributing to military organizations, and that Rafaelian's own brother served in the military. Plaintiff objects to summary judgment, arguing that a genuine dispute of material fact remains as to whether Plaintiff was discriminated against because of his military status. Plaintiff argues that his deposition testimony shows that Rafaelian was observed making derogatory comments about the military; that after Feroce's termination, Rafaelian stripped the company of the military-style operation Feroce had implemented; and that Rafaelian made negative comments to the Plaintiff about the use of military jargon. Moreover, Plaintiff argues that the evidence Defendants purport demonstrates their support for the military and pro-military culture is not sufficient to warrant summary judgment.

Here, the Court finds that a genuine issue of material fact exists which precludes summary judgment. While the parties clearly dispute what credence should be given to Plaintiff's testimony during a summary judgment proceeding regarding his perceived observations of military discrimination, the Court does not pass upon the weight or credibility of the evidence. *See DeMaio v. Ciccone*, 59 A.3d 125, 129-30 (R.I. 2013). The Plaintiff's testimony reveals that the Defendants allegedly made anti-military comments and fostered a general atmosphere of discrimination towards military-style command. Moreover, the Court is unpersuaded by Defendants' argument that the comments relied on by Plaintiff were mere "stray remarks." While stray remarks standing alone are normally insufficient evidence of discriminatory animus, the Plaintiff points not only to the remarks of Rafaelian but also to the alleged systematic termination of military culture and employees from the company. *See* Mem. Opp. Defs.' Mot. Summ. J., Ex. 36 at 164:17-165:4. Accordingly, it is for the trier of fact to determine whether the evidence constitutes discriminatory intent. *See Velazquez-Garcia v.*

Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 18 (1st Cir. 2007) (finding that the plaintiff presented sufficient facts to withstand summary judgment on his military discrimination claim even though his deposition testimony may be self-serving because plaintiff testified about workplace remarks and complaints about adjusting to the plaintiff's military work schedule). As such, Defendants' motion for summary judgment on Count IV of Plaintiff's Complaint is denied because a genuine issue of material fact remains as to whether Plaintiff was discriminated against on the basis of his military status.

V

Conclusion

Based on the foregoing, Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim is granted with respect to Counts I, II, and III, and denied with respect to Count IV. Defendants' Motion for Summary Judgment on Plaintiff's Complaint is granted with respect to Count III and denied with respect to Counts I and IV. Counsel shall prepare and submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**David Medeiros v. Alex and Ani, LLC, et al.**
CASE NO:	**PC-2015-5680**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 28, 2020**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Michael A. Kelly, Esq.; Nicole Martucci, Esq.; Michael L. Mineau, Esq.; Joelle C. Rocha, Esq.**
For Defendant:	**John Tarantino, Esq.; Chelsea Kelly, Esq.; Nicole J. Benjamin, Esq.**
For Interested Party:	**David A. Wollin, Esq.**