IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COURTALERT.COM, INC., Plaintiff, v. AMERICAN LEGALNET, INC., EREZ BUSTAN, and ROBERT LOEB, Defendants.	No. 1:20-cv-07739

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

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Defendants American LegalNet, Inc. ("ALN"), Robert Loeb ("Loeb"), and Erez Bustan (collectively "Defendants") submit this brief in response to Plaintiff CourtAlert.com, Inc.'s ("Plaintiff") opposition to their motion to dismiss Plaintiff's Complaint for failure to state a claim and/or for summary judgment. In a misguided attempt to salvage its Complaint, Plaintiff repeats the tired shibboleth that, on a motion to dismiss, the Court must accept the allegations as true. Plaintiff fails to recognize, however, that its pleadings are defective on their face.

More specifically, as detailed in Defendants' moving brief and below, even assuming Plaintiff's allegations are true, the information Plaintiff alleges Defendants misappropriated are not protectable trade secrets as a matter of law. Plaintiff further conveniently ignores that Defendants alternatively moved for summary judgment, relying on public records demonstrating that the information at issue is not confidential. Put simply, Plaintiff's misappropriation claims, as well as its contract claims based upon the alleged misappropriation, are baseless.

Moreover, as Defendants explain in their moving brief, settled law makes clear that a party cannot assert tort claims that are duplicative of breach of contract claims. Notwithstanding Plaintiff's opposition, Plaintiff's breach of fiduciary duty, unfair competition, and unjust enrichment claims merely duplicate its misappropriation and contract-based claims. As these claims arise out of the same conduct, they cannot independently survive.

In short, Plaintiff's opposition confirms that Plaintiff's claims are meritless. Plaintiff tacitly acknowledges its claims' weakness – and the absence of cognizable damages beyond vague and conclusory allegations of harm – by failing to seek injunctive relief, which courts routinely grant when plaintiffs demonstrate potential irreparable harm and a likelihood of success on the merits. Here, Plaintiff can do neither, admitting that an application for injunctive relief would have been futile. Accordingly, Defendants' motion should be granted in its entirety.

ARGUMENT

I. Plaintiff Does Not Oppose Defendants' Summary Judgment Motion.

As a threshold matter, Plaintiff fails to rebut – let alone address – Defendants' request for summary judgment. Nor does Plaintiff even attempt to dispute any of the facts contained in Loeb's supporting declaration. To that end, Loeb's uncontradicted declaration confirms that he did not breach any obligations to, or misappropriate any proprietary information from, Plaintiff. Loeb further confirmed that the information at dispute is publicly available and/or readily ascertainable. For this reason alone, Plaintiff's claims fail as a matter of law.

II. Plaintiff's Misappropriation Claims Fail Because the Court Can Determine, as a Matter of Law, that the Allegedly Misappropriated Items Are Not Trade Secrets

A. Courts Routinely Dismiss Complaints Where, as Here, the Purported Information is Not a Trade Secret as a Matter of Law.

Plaintiff mistakenly asserts that its Complaint adequately alleges the existence of confidential and/or proprietary information. In support of this misguided contention, Plaintiff incorrectly contends that a court may not determine whether certain information is a trade secret before the parties have completed discovery. (Pb at 3-4). Incredibly, Plaintiff does not articulate what, if any, discovery it needs in order to show that its information is confidential.

Notwithstanding Plaintiff's attempt to force Defendants to engage in nebulous and meaningless discovery, courts routinely dismiss misappropriation claims at the pleading stage where, as here, the information alleged to have been misappropriated does not constitute a trade secret as a matter of law. *See, e.g.*, *Zirvi v. Flatley*, 433 F.Supp.3d 448, 465 (S.D.N.Y. 2020) (noting "in some situations whether information is a trade secret may be evident from the pleadings alone" and observing "[c]ourts dismiss trade secrets claims when the alleged trade secrets are not, in fact, secret"). That determination is appropriate here.

B. The Allegedly Misappropriated Information Does Not Constitute Trade Secrets

Plaintiff argues that the Complaint sufficiently alleges the items at issue are trade secrets by identifying the information (which it conclusorily characterizes as "confidential") and describing the efforts it undertook to protect the information's secrecy. (Pb at 5-6). These arguments ignore both applicable precedent and Loeb's unrefuted declaration, which confirm that the information qualifies neither legally nor factually for protection as a trade secret.

Contrary to Plaintiff's self-serving characterization of the information as "confidential," courts consistently hold that customer lists "are generally not considered confidential unless information contained therein is not known in the trade and discoverable only through extraordinary efforts." *Battenkill Veterinary Equine v. Cangelosi*, 1 A.D.3d 856, 858 (3d Dep't 2003). Similarly, "[p]rice lists, product samples, and 'marketing plans' are all items that are not, as a matter of law, protected as trade secrets." *Estee Lauder Cos. v. Batra*, 430 F.Supp.2d 158, 175 (S.D.N.Y. 2006). Moreover, "an employee's 'knowledge of the intricacies of his former employer's business operation' does not enjoy trade secret status." *Id.* (quoting *Reed, Roberts Assocs., Inc. v. Strauman*, 40 N.Y.2d 303, 309 (1976)). In short, contrary to Plaintiff's gloss, none of its Salesforce records, current and potential client lists, pricing lists, and product comparisons (or Loeb's knowledge of them) are enforceable trade secrets as a matter of law.

In an attempt to salvage its defective Complaint, Plaintiff relies upon readily distinguishable cases, several of which are more than three decades old. For example, Plaintiff relies on *Doubleclick Inc. v. Henderson*, 1997 WL 731413 (Sup. Ct. Nov. 7, 1997), a twenty-three-year-old New York trial court decision concerning the "new … business of selling advertising on the internet." (Pb at 6). In *Doubleclick*, an employer sought an injunction against defendant former employee, alleging the employee misappropriated certain "highly sensitive information regarding the company." *Id.* at *4. Unlike here, the defendants in *Doubleclick* did not advance arguments or provide evidence regarding the public availability of the information, beyond generalized references to information published on the plaintiff's website. *Id.* at *4-5.

Plaintiff further relies on a case from more than three decades ago, *Churchill Commc'ns Corp. v. Demyanovich*, 668 F.Supp. 207 (S.D.N.Y. 1987) (Pb at 6). There, the court found the information at issue confidential partly based on the defendant's own affidavit prepared in connection with a separate dispute when he was still plaintiff's employee. *Id.* at 213. Here, in contrast, Loeb's declaration challenges, rather than supports, Plaintiff's assertions regarding the information, emphasizing that it was publicly available and/or readily accessible through basic research or conversations with prospective clients. Loeb Decl. at ¶¶ 19-22.

Finally, in *Greenwich Mills Co. v. Barrie House Coffee Co.*, 91 A.D.2d 398 (2d Dep't 1983) (Pb at 7), the alleged trade secrets at issue were various customers' "preferences for particular, precise blends of coffee and the prices those customers were willing to pay for those blends." *Id.* at 405. Precise coffee blend preferences (which are subjective and not publicly available) are obviously quite different from the allegedly confidential information at issue here.

In addition to relying on outdated, distinguishable cases, Plaintiff attempts to portray the categories of information at issue as protectable trade secrets by arguing that the lists and other items "were developed through substantial efforts." (Pb at 8). These alleged "confidential development efforts" however, do not change the information's publicly available and/or readily accessible character. Indeed, as Plaintiff acknowledges, "[a] customer list developed by a business through substantial effort and kept in confidence may be treated as a trade secret … ***provided the information it contains is not otherwise readily available***." *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 44 (2d Cir. 1999) (emphasis added). Here, as detailed in Defendants' moving brief and supported by Loeb's declaration, the information at issue is "readily ascertainable from sources outside plaintiffs' business," *Marcone APW, LLC v. Servall Co.*, 85 A.D.3d 1693, 1695 (4th Dep't 2011), and therefore cannot be a trade secret as a matter of law.

Accordingly, Plaintiff's common law and statutory misappropriation claims, and its contract-based claims arising from the alleged misappropriation, should be dismissed.

III. Courts Can Determine A Restrictive Covenant's Enforceability on a Motion to Dismiss, and Loeb's Overbroad Covenant is Unenforceable as a Matter of Law

Plaintiff incorrectly contends that its breach of contract and tortious interference claims must be allowed to proceed because (i) it sufficiently pleads that the information at issue was confidential, (ii) the enforceability of Loeb's agreement cannot be resolved on a motion to dismiss, and (iii) Loeb's agreement is enforceable in any event. (Pb at 12). As explained above and in Defendants' moving brief, the Complaint fails to support the information's confidentiality sufficient to sustain Plaintiff's breach of contract and tortious interference claims. Moreover, the covenant's enforceability may be determined on its face, and it is plainly unenforceable.

A. The Court Can Determine the Restrictive Covenant's Enforceability at this Juncture

Contrary to Plaintiff's contention, courts can (and do) grant motions to dismiss where a contractual provision is unenforceable as a matter of law. *See, e.g.*, *Lodging Sols., LLC v. Miller*, 2020 WL 6875255, *5-7 (S.D.N.Y. Nov. 23, 2020) (granting motion to dismiss breach of contract for failure to state a claim based on finding that restrictive covenant unenforceable as a matter of law); *Doller v. Prescott*, 167 A.D.3d 1298, 1300 (3d Dep't 2018).

This Court's very recent decision in *Miller*, issued only last month, is instructive. There, the plaintiff alleged a breach of a restrictive covenant arising from the hiring of its former employee. The parties disputed "how rigorously a court should scrutinize" the restrictive covenant at issue in the context of a motion to dismiss, and whether it should use the stricter standard applicable to employment agreements, or the more lenient standard applicable to business sale transactions. *Miller*, 2020 U.S. Dist. LEXIS 219223 at *5. The Court found that, regardless of the standard, "the agreement is plainly unreasonable" and unenforceable, and granted defendants' motion to dismiss. *Id.* at *6-7. The same result should obtain here.

In a further attempt to salvage its Complaint, Plaintiff irrelevantly asserts that courts enforce restrictive covenants "to prevent the employee's solicitation or disclosure of trade secrets" and "to prevent the employee's release of confidential information regarding the employer's customers." (Pb at 16). It is well settled, however, that "a restrictive employment covenant will not be enforced unless the plaintiff can demonstrate that the information … was not readily available through other sources." *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F.Supp.2d 489, 510 (S.D.N.Y. 2011) (citation omitted). Accordingly, a breach of contract claim based on a customer non-solicitation clause's enforceability "is not actionable unless the customer list could be considered a trade secret or there was wrongful conduct by the employee such as … using confidential information[.]" *Id.* As set forth above and in Defendants' moving brief, the information at issue here is readily available through other sources, and thus is not confidential or a protectable trade secret as a matter of law.

B. The Restrictive Covenant is Unreasonable, and Unenforceable, as a Matter of Law

Plaintiff alternatively contends that the restrictive covenant's temporal and geographic scopes are not unreasonable as a matter of law, citing factually distinguishable opinions where courts upheld covenants with two-year restriction periods and no geographic limits. (Pb at 13-15). However, the restrictive covenant at issue here is unreasonable as a matter of law not only because of the two-year period and unlimited geographic scope, but also because Plaintiff seeks to enforce these onerous restrictions on an employee ***whose tenure lasted less than a year***.

Nor does Plaintiff address Defendants' separate argument that, regardless of its temporal or geographic limits, courts will not enforce a restrictive covenant if, like the covenant at issue here, "it seeks to bar the employee from soliciting customers of the employer with whom the employee did not acquire a relationship through his or her employment, or if the provision extends to customers recruited through the employee's own independent efforts." *Id.* at 511 (citation omitted). In short, even if the covenant's temporal and geographic restrictions are reasonable (and they are not), the covenant's broad prohibition on "solicit[ing] or accept[ing] business from any Customers or prospective Customers of [Plaintiff]" renders it unenforceable.

In a last-ditch attempt to save its contract-based claims, Plaintiff suggests that the Court should partially enforce the unreasonably overbroad restrictive covenant in lieu of dismissal. However, "[c]ourts have held that partial enforcement is inappropriate where an employer attempts to prohibit solicitation of its entire customer base[.]" *Veramark Techs. Inc. v. Bouk*, 10 F.Supp.3d 395, 407 (W.D.N.Y. 2014). As noted above, the restrictive covenant here does precisely that: it precludes Loeb from engaging with any current or prospective CourtAlert customers. Accordingly, dismissal, not partial enforcement, is appropriate here.

IV. Plaintiff's Breach of Fiduciary Duty, Unfair Competition, and Unjust Enrichment Claims are Duplicative of Its Primary Claims and Therefore Must Be Dismissed

Notwithstanding Plaintiff's assertion to the contrary, and as detailed in Defendants' moving brief, Plaintiff's claims for Breach of Fiduciary Duty, Unfair Competition, and Unjust Enrichment are not based on conduct independent from its misappropriation and/or contract-based claims. They merely duplicate those claims, and must therefore be dismissed.

A. Breach of Fiduciary Duty

Plaintiff claims its breach of fiduciary duty claim is based on a duty distinct from the obligations Loeb owed Plaintiff under his employment agreement. (Pb 17). As this Court recognized earlier this year, "where a plaintiff and defendant are parties to a contract, an action in tort cannot lie unless the plaintiff alleges that the defendant breached a duty independent of its duties under the contract[.]" *Spectrum Dynamics Med., Ltd. v. Gen. Elec. Co.*, 2020 U.S. Dist. LEXIS 102660, 18-cv-11386[1] (S.D.N.Y. June 1, 2020) (Broderick, J.) (citation omitted).

To state a breach of fiduciary duty claim, "a plaintiff must allege the breach of an independent legal duty that 'spring[s] from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.'" *AMBAC Assur. Corp. v. U.S. Bank Nat'l Ass'n*, 328 F.Supp.3d 141, 156 (S.D.N.Y. 2018). Accordingly, a breach of fiduciary duty claim will fail where premised upon the same grounds as "a claim for breach of contract that a court has already considered and addressed." *Goss v. E.S.I. Cases & Accessories, Inc.*, 2020 WL 5817163, *5 (S.D.N.Y. Sept. 29, 2020) (citing *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 763 (2d Cir. 1990)).

Here, Plaintiff's breach of fiduciary duty claim is not based on any independent duty it alleges Loeb owed. Instead, the claim arises solely from duties Plaintiff claims Loeb owed under his employment contract and breached: to preserve confidentiality, to not solicit Plaintiff's customers, and to refrain from diverting trade secrets. (Compl. ¶ 93 and Ex. A). Moreover, as Defendants explained in their moving brief – and Plaintiff does not address in its opposition – this cause of action would fail even if it stated an independent claim for relief. The purportedly misappropriated information is not a confidential or protectable trade secret, and thus Loeb's alleged conduct does not constitute a breach of any duty. The claim must be dismissed.

B. Unfair Competition

In a desperate attempt to preserve its unfair competition claim, Plaintiff argues that the claim "concerns information that may not rise to the level of a trade secret, as well as ALN's

[1] No Westlaw citation is available for this opinion, so the Lexis citation and docket number are provided.

unethical practice of poaching employees to acquire such information." (Pb 18). Significantly, Plaintiff tacitly acknowledges – as it must – that some or all of the allegedly misappropriated information at the center of this case may not constitute a trade secret. Regardless, it is undisputed that Plaintiff's misappropriation and unfair competition claims are based on the same underlying conduct: Plaintiff's belief that Loeb retained Plaintiff's information.

As Defendants observed in their moving brief, "[a]n unfair competition claim can only survive dismissal of a duplicative misappropriation claim if the two rest on different factual predicates." *Ferring B.V. v. Allergan, Inc.*, 4 F.Supp.3d 612, 629 (S.D.N.Y. 2014). Where a misappropriation claim and an unfair competition claim are based on the same alleged conduct, they cannot both proceed. *See, e.g.*, *Abernathy-Thomas Eng'g Co. v. Pall Corp.*, 103 F. Supp. 2d 582, 599-600 (E.D.N.Y. 2000). Plaintiff's unfair competition claim, founded upon the same allegations as its misappropriation claim, must therefore be dismissed.

C. Unjust Enrichment

Plaintiff also incorrectly avers that its unjust enrichment claim may proceed because such claims may be plead in the alternative, and it has alleged a direct benefit. (Pb 19). Contrary to Plaintiff's assertion, "Courts in the Second Circuit have recognized that an unjust enrichment claim cannot survive where it simply duplicates, or replaces, a conventional contract or tort claim." *Reynolds v. Lifewatch, Inc.*, 136 F.Supp.3d 503, 524 (S.D.N.Y. 2015). "[E]ven pleaded in the alternative, claims for unjust enrichment will not survive a motion to dismiss where plaintiffs fail to explain how the unjust enrichment claim is not merely duplicative of the other causes of action." *Nelson v. Miller Coors, LLC*, 246 F.Supp.3d 666, 679 (E.D.N.Y. 2017).

Moreover, as discussed in Defendants' moving brief, Plaintiff fails to allege that ALN benefited directly from the conduct on which the unjust enrichment claim is based, an essential element of the claim. Absent "a 'specific and direct benefit' moving from the plaintiff to the defendant[,]" an unjust enrichment claim fails. *Brenner v. Brenner*, 821 F.Supp.2d 533, 540-41 (E.D.N.Y. 2011) (quoting *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000)). Plaintiff admits that the only benefit it alleges in connection with its unjust enrichment claim is that the purportedly misappropriated trade secrets allowed ALN to "accelerate[] development of its own competing product and gain[] an unfair commercial advantage." This vague, indirect benefit cannot support an unjust enrichment claim. *See, e.g.*, *Laydon v. Mizuho Bank, Ltd.*, 2014 WL 1280464, *43 (S.D.N.Y. Mar. 28, 2014) ("conclusory assertions that [defendants] financially benefited from" alleged wrongful conduct fail to sustain unjust enrichment claim).

V. Plaintiff's Vague Allegations of Lost Business Fail to Adequately Plead Damages

As Defendants detailed in their moving brief, Plaintiff's "damages" allegations are limited to two paragraphs describing Plaintiff's relationships with two separate clients and vaguely speculating that Loeb may have contributed to Plaintiff's client issues. These allegations are plainly insufficient. Notably, Plaintiff does not explain why, if its damages were serious, it waited months to file the complaint and did seek preliminary injunctive relief.

Ignoring the myriad of cases in which courts grant injunctive relief, Plaintiff incoherently contends that it never bothered to request the return of its purported confidential information or seek to protect customer relations, based on its idiosyncratic perception that "it is common in misappropriation cases for courts to deny injunctive relief." (Pb 21). To the contrary, it is only common for courts to deny such relief where, as here, Plaintiff's claims are groundless. As Defendants established in their moving papers, and Plaintiff does not dispute, Plaintiff did not file this Complaint to protect any legally cognizable right. Rather, Plaintiff has attempted to misuse the judicial process solely to embarrass Defendants and chill legitimate competition.

CONCLUSION

For these reasons, and those set forth in Defendants' moving papers, Defendants respectfully request that the Court grant this motion and dismiss Plaintiff's Complaint in its entirety and with prejudice.

Respectfully submitted,

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