SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS PART 53

Index Number : 604077/2007

CLEAN EARTH HOLDINGS, INC.

vs.

KOPENHAVER,BRENT,

SEQUENCE NUMBER : 006

REARGUMENT/RECONSIDERATION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

...is motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

...is Disposed Of IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
APR 28 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/26/10

CHARLES E. RAMOS J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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CLEAN EARTH HOLDINGS, INC., CEI HOLDINGS CORPORATION, CLEAN EARTH, INC. AND ALLIED ENVIRONMENTAL GROUP, INC.,

Plaintiffs,

Index No. 604077/07

-against-

BRENT KOPENHAVER, CHRISTOPHER UZZI, STUART BERRY, THEODORE BUDZYNSKI, PURE EARTH INC., PEI DISPOSAL GROUP, INC., JEFFREY BERGER, JAMES CASE, RICHARD RIVKIN, AARON ENVIRONMENTAL GROUP, INC., AND STEPHEN SHAPIRO,

Defendants.

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Charles Edward Ramos, J.S.C.:

Motion sequence 006 and 007 are hereby consolidated for disposition.

In motion sequence 006, the defendants Jeffrey Berger, James Case, Richard Rivkin, Stephen Shapiro (collectively, the "Sales Defendants"), Aaron Environmental Group, Inc. ("AEG"), Brent Kopenhaver, Pure Earth, Inc. ("Pure Earth"), PEI Disposal Group, Inc. ("PEI"), and Christopher Uzzi (collectively, the "Moving Defendants") move to reargue this Court's decision, filed July 6, 2009, denying their motion for summary judgment (the "Decision"). The plaintiffs Clean Earth Holdings, Inc., CEI Holdings Corporation, Allied Environmental Group, Inc. ("Allied"), and Clean Earth, Inc. (collectively, "Clean Earth") cross-move for sanctions against the defendants.

In motion sequence 007, Clean Earth moves for penalties against the defendants pursuant to CPLR 3126. The Moving Defendants cross-move to compel responses to discovery requests

served in January 2008.

Background - Plaintiffs' Allegations

As alleged in the first amended complaint (the "Complaint"), Clean Earth is in the business of treating, recycling, reusing, transporting, and disposing of contaminated soil, dredge sediments, and other non-hazardous and hazardous materials. (Complaint, ¶ 28).

Clean Earth's success has been due to its unique position in the marketplace, pricing strategies, exclusive arrangements with third-party disposal facilities, and its client base that it has developed over the years (Complaint, ¶ 36).

Clean Earth alleges that it has detailed profiles of hundreds of its clients, including key personnel with personal cell phone numbers and other contact information, projects, pricing, terms of payment, marketing plans, pricing strategies, transport rates, and other non-public proprietary information (the "Proprietary Information") (Complaint, ¶¶ 33, 81). Additionally, Clean Earth has compiled a highly confidential pricing matrix (the "Matrix") that accounts for the size of the potential job as well as the client relationship to determine the price of its jobs (Complaint, ¶ 34). The Proprietary Information, the Matrix, and Clean Earth's client list (the "Client List", collectively, the "Information") comprise the three categories of Clean Earth's purported confidential information at issue in this action.

Clean Earth alleges that it maintained the Information

securely in its offices, which could not be entered without inputting a security code, or in Clean Earth's password protected information systems (Complaint, ¶ 37).

Clean Earth alleges that Kopenhaver, Stuart Berry, Pure Earth, and Uzzi solicited Clean Earth's employees and conspired to misappropriate the Information and interfere with Clean Earth's established business relationships (Complaint, ¶ 17).

Kopenhaver is Clean Earth's former Chief Financial Officer. On October 17, 2005, Kopenhaver sold his interest in Clean Earth for $1.8 million pursuant to a stock purchase agreement (the "SPA") (Complaint, ¶ 38). Kopenhaver agreed in the SPA not to compete against Clean Earth for a period of two years and not to solicit any Clean Earth employees for a period of four years (Complaint, ¶ 41).

Clean Earth alleges upon information and belief that Kopenhaver violated the SPA by forming Pure Earth in January 2006, a business that offers similar services to those provided by Clean Earth (Complaint, ¶¶ 44-5). Clean Earth further alleges upon information and belief that Uzzi is an officer of a Pure Earth subsidiary, who has a long standing business relationship with Berry (Complaint, ¶¶ 6, 67).

Berry[1] was a manager of Allied, a Clean Earth sales office located in New York, who was responsible for supervising the Sales Defendants, who are also former employees of Allied

[1] Berry is not moving for summary judgment in this instant motion, therefore, this decision shall not address the causes of action as alleged against Berry.

(Complaint, ¶¶ 29, 66). He was not a shareholder of Clean Earth. On August 17, 2007, Berry's employment was terminated by Clean Earth (Complaint, ¶ 51). Berry and Clean Earth entered into a termination agreement that contains a confidentiality provision prohibiting him from disclosing the Information (Complaint, ¶¶ 52-3). Additionally, the termination agreement incorporates the non-solicitation and non-compete provisions from Berry's employment agreement (Complaint, ¶¶ 54, 56).

Clean Earth alleges that Berry began to solicit senior sales personnel of Clean Earth and the Sales Defendants, around the time of his termination in order to facilitate a transfer of the Information to Pure Earth (Complaint, ¶ 22).

Clean Earth alleges upon information and belief that Kopenhaver and Berry were aware that the Sales Defendants were responsible for generating nearly four-fifths of Allied revenues (Complaint, ¶ 25). Clean Earth further alleges upon information and belief that six to eight weeks prior to their resignation, the Sales Defendants conspired with Kopenhaver, Pure Earth, Berry, and Uzzi to terminate their employment, remove the Information from Clean Earth's offices, and to solicit Clean Earth's actual and prospective clients (Complaint, ¶ 70).

After Pure Earth received the Information from the Sales Defendants, Kopenhaver, Pure Earth, and Uzzi structured a transaction to hire the Sales Defendants (Complaint, ¶ 25). On November 20, 2007, the Sales Defendants resigned en masse (Complaint, ¶ 72). On November, 27, 2007, Pure Earth issued a

press release announcing its affiliation with the Sales Defendants (Complaint, ¶ 75).

On December 12, 2007, Clean Earth commenced this action alleging sixteen causes of action in the original complaint. On December 3, 2008, Clean Earth moved to amend its original complaint purportedly after discovery revealed additional facts. On February 5, 2009, the Court heard oral argument on Clean Earth's motion to amend the complaint and the Moving Defendants' motion for summary judgment and issued the Decision. In the Decision, the Court granted Clean Earth leave to amend the complaint and denied the Moving Defendants' motion for summary judgment on the ground that it was premature. Thereafter, the Moving Defendants filed this motion to reargue.

On October 22, 2009, during oral argument on the instant motion, the Court granted leave to reargue, but reserved its determination on reargument of the underlying motion for summary judgment, which is addressed herein (Transcript, Oct. 22, 2009, 26:2-5).

Discussion

The Moving Defendants move to reargue on the basis that the Decision did not properly reflect the rulings made by the Court during oral argument on February 5, 2009. Specifically, the Moving Defendants argue that the Court overlooked its determinations during oral argument that: 1) granted summary judgment on the Sales Defendants' counterclaims, 2) narrowed the scope of the claims asserted against the Sales Defendants to

damages arising out of client solicitations made during their employment at Clean Earth, and 3) held that summary judgment was appropriate because Clean Earth failed to offer any proof of damages. A motion for leave to reargue pursuant to CPLR 2221(a) challenges whether the court overlooked or misapprehended the facts or the law or mistakenly arrived at its previous decision (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]).

The Moving Defendants' motion to reargue is granted to the extent of substituting this decision in the place of the Decision and prior determinations on the record and the underlying motion for summary judgment is granted in part and denied in part.

Motion Sequence 006

Defendant Uzzi

Uzzi was not a party to this action when the underlying summary judgment motion was filed, but he is a movant to the instant motion to reargue. Consequently, this Court will *sua sponte* include consideration of Uzzi's arguments in the underlying motion for summary judgment.

The Moving Defendants

The Moving Defendants' underlying motion for summary judgment sought dismissal of the original complaint as against them and summary judgment on the Sales Defendants' and AEG's counterclaims. However, the Court granted Clean Earth leave to amend the original complaint during oral argument and applied the Moving Defendants' motion for summary judgment to the Complaint

in the Decision.

First Cause of Action

The first cause of action in the Complaint is for breach of contract against Kopenhaver for his alleged breach of Section 5.17(b) of the SPA, which states:

> "[f]or a period of two (2) years from and after the Closing Date[2], Brent Kopenhaver, shall not engage, directly or indirectly, in the Identified Business[3], whether through the ownership, management or control, of any Person engaged, directly or indirectly, in the Identified Business, or be connected as an officer, employee, partner or director of any such Person, or otherwise be related or otherwise affiliated in any manner with or have any financial interest in any such Person, or otherwise aid any such person in the conduct of the Identified Business, in the Identified Territory, in each case as such Identified Business is conducted or proposed to be conducted as of the Closing Date..."(Def. Aff. in Opp., Exhibit C, § 5.17 [b]).

Clean Earth alleges that Kopenhaver's employment by Pure Earth is a violation of the SPA because he accepted a position as Chief Financial Officer and Chairman of Pure Earth in January 2006 (Complaint, ¶ 47-8).

Kopenhaver counters that there is a specific exception contained in Section 5.17(b) of the SPA permitting him to be employed in a financial capacity, which states:

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[2] The Closing Date is May 27, 2004.

[3] Identified Business is defined as any investment in, or substantive management of the operations of any Person engaged in the facilities based treatment of soil, soil disposal and /or soil brokerage business or the processing of dredged materials (SPA, p. 68).

> "[n]otwithstanding the Kopenhaver Non-Compete Period detailed above, Kopenhaver may perform the functions of a financial officer or serve as an employee or consultant performing financial functions in connection with a position relating to financial matters, in each case for any Person engaged directly or indirectly in the Identified Business and such employment or engagement shall not be deemed to be a violation of this Section 5.17" (Def. Aff. in Opp., Exhibit C, § 5.17 [b]).

Kopenhaver contends that his positions as Chairman and CFO of Pure Earth are purely financial and conform to the restrictions set forth in Section 5.17(b) of the SPA (*Id.* at Exhibit 2, ¶ 4). However, Clean Earth submits as evidence, Kopenhaver's Pure Earth employment agreement (the "Kopenhaver Employment Agreement"), which states that Kopenhaver "shall have full responsibility for and authority over the management of [Pure Earth], including, but not limited to, finances and expenditures, purchasing, project development, and personnel for [Pure Earth]" (Aronson. Aff., Exhibit R, ¶ 2).

It is clear from the Kopenhaver Employment Agreement that when Kopenhaver was retained by Pure Earth, the scope of his employment was sufficiently broad that he could perform functions beyond those of a financial officer. If he did, that would be a violation of the SPA. However, notwithstanding the fact that this litigation has been pending since 2007 and that voluminous discovery has been produced, Clean Earth is as yet unable to include in this record any evidence that Kopenhaver actually did exercise his full authority at Pure Earth in violation of the SPA.

Clean Earth repeatedly and adamantly argues that it requires further discovery to substantiate its causes of action, despite its continuing inability to provide a factual basis for any of its claims. At this juncture, Clean Earth's insistence that the action continue to permit additional discovery to be conducted appears to be an attempt to utilize the costs of litigation as a tool to retaliate against its former employees and to stifle competition. In light of Clean Earth's insistence that discovery will lead to triable issues of fact, the Court will deny this branch of this motion and permit the parties to conduct further discovery only on the condition that Clean Earth bears the costs of such discovery (including attorney's fees) if it is unsuccessful on its first and fourth cause of action.

Therefore, summary judgment is denied with respect to the first cause of action provided that a written commitment described above is delivered to the Moving Defendants' counsel within 30 days from the date hereof. In the absence of a written commitment, the motion for summary judgment is granted.

Third Cause of Action

Clean Earth's third cause of action is for breach of contract against Berger. Clean Earth alleges that Berger violated the confidentiality agreement (the "Berger Confidentiality Agreement") and the non-compete agreement (the "Berger Non-Compete Agreement"), both dated May 27, 2004 (Aronson Aff., Exhibit T). This Court will consider both agreements although the third cause of action refers only to the "the non-

compete provisions" (Complaint, p. 21).

Berger contends that the Berger Non-Compete Agreement was destroyed immediately after he executed it and therefore, it is unenforceable (Def. Aff. in Opp., Exhibit 3, ¶ 2).

Clean Earth disputes Berger's contention, but does not submit a fully executed version of either agreement. Moreover, Clean Earth fails to submit affidavits explaining why neither agreement was ever fully executed or representing that a fully executed version of the either the Berger Non-Solicitation Agreement or the Berger Non-Compete Agreement even exists. With respect to the Berger Confidentiality Agreement, Clean Earth's allegations are conclusory and based upon information and belief (Complaint, ¶¶ 62, 102). No further evidence of the alleged breach has been submitted and the two allegations in the Complaint, alone, are insufficient to raise a triable issue of fact that Berger breached the agreement (*Indig v Finkelstein*, 23 NY2d 728 [1968]).

Therefore, Berger is granted summary judgment on the third cause of action because Clean Earth fails to raise a triable issue that the Berger Non-Compete Agreement is enforceable or that Berger breached the Berger Confidentiality Agreement.

Fourth Cause of Action

The fourth cause of action is for breach of contract against Kopenhaver for allegedly breaching Section 5.17(e) of the SPA, which states:

> "During the Non-Compete Period[4], [Kopenhaver] shall, and shall cause their respective Affiliates to not, in any manner, directly or indirectly, hire away or attempt to hire away, engage in any conduct or communication with any employee of [Clean Earth] or its Subsidiaries that causes such employee to terminate its employment relationship with [Clean Earth] or any of its Subsidiaries or induce, solicit, encourage, or attempt to induce, solicit or encourage (i) any employee of [Clean Earth] or any of its Subsidiaries to leave the employ of [Clean Earth] or any of its Subsidiaries or (ii) any...business relation of [Clean Earth] or any of its Subsidiaries to cease doing business with [Clean Earth]..." (Def. Aff. in Opp., Exhibit C, § 5.17 [e])

Clean Earth alleges in a vague and conclusory fashion that "Kopenhaver has, either directly or indirectly, hired away, attempted to hire away, engaged in conduct and/or communicated with employees of Clean Earth that caused these employees to terminate their employment relations with Clean Earth" (Complaint, ¶ 93). Clean Earth has submitted emails that it claims show that Kopenhaver violated Section 5.17(e) of SPA (Aronson Aff., Exhibit K). However, in the emails, Kopenhaver is requesting a list of clients and sales figures from Rivkin to evaluate the salesmen in connection with the hiring of the Sales Defendants (Aronson Aff., Exhibit I). There is no evidence of solicitation in the email correspondence and logic would suggest that if there was evidence of solicitation, it would be found in these emails.

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[4] The SPA defines the Non-Compete Period as a period of four years from the Closing Date, May 27, 2004 (Def. Aff. in Opp., Exhibit C, § 5.17 [c]).

Kopenhaver has submitted multiple affidavits in opposition denying that he solicited any Clean Earth employees. The emails show that the sales figures referenced in the emails were requested only for accounting purposes and is not evidence of conduct on his part to induce employees of Clean Earth to terminate their employment (Kopenhaver Reply, ¶¶ 2, 6). Kopenhaver's inquiry makes sense only in the context that it was made after these Sales Defendants decided to leave, after the time for solicitation has passed.

In fact, Kopenhaver's statements in the emails pertain only to valuating the Prospect List and requesting the sales figures. The emails do not raise a triable issue that Kopenhaver was involved in the hiring of the Sales Defendants.

In light of Clean Earth's insistence that additional discovery will lead to triable issues of fact, the Court will also deny this branch of this motion and permit the parties to conduct further discovery only on the condition that Clean Earth bears the costs of such discovery if it is unsuccessful on its first and fourth cause of action.

Therefore, summary judgment is denied with respect to the fourth cause of action provided that a written commitment described above is delivered to the Moving Defendants' counsel within 30 days from the date hereof. In the absence of a written commitment, the motion for summary judgment is granted.

Sixth Cause of Action

The sixth cause of action is against Kopenhaver and Berger

for breach of the covenant of good faith and fair dealing.

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"(*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995][internal quotations omitted]). However, a cause of action for breach of the duty of good faith and fair dealing "will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for a claim for breach of covenant of an express provision of the underlying contract" (*Engelhard Corp. v Research Corp.*, 268 AD2d 358 [1st Dept 2000]).

The allegations recited in support of the cause of action for breach of the duty of good faith and fair dealing are identical to the allegations recited in support of the cause of action breach of contract. Therefore, dismissal of the sixth cause of action is warranted because it is redundant of Clean Earth's first cause of action against Kopenhaver for breach of contract and third cause of action against Berger for breach of contract.

Therefore, summary judgment is granted in favor of Kopenhaver and Berger on the sixth cause of action.

Seventh Cause of Action

The seventh cause of action is against Kopenhaver and the

Sales Defendants for breach of fiduciary duty.

Clean Earth alleges that Rivkin, one of the Sales Defendants, solicited certain Clean Earth clients after his employment with Clean Earth was terminated (Complaint, ¶¶ 89-92). Clean Earth predicates this cause of action on the theory that the Client List is a trade secret and that the Sale Defendants breached their fiduciary duties by providing the Client List to Kopenhaver, Pure Earth, and Uzzi.

A trade secret is defined as any formula, pattern, device or compilation of information, used in a business, that gives it the possibility of obtaining an advantage over competitors that do not use it (*Ashland Management v Janien*, 82 NY2d 395, 407 [1993]).

Six factors that are considered in trade secret claims are:

> "' (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others'" (*Id.* citing Restatement of Torts § 757, comment b).

Trade secret protection does not apply to names, addresses, and telephone numbers of clients or potential clients, if the information is readily available from public sources, such as a local telephone directory (*Ronald W. Freeman, P.C. v Li Zhu*, 209 AD2d 213, 214 [1st Dept 1994]).

The Client List

The Sales Defendants were hired through an asset purchase transaction, pursuant to which they incorporated an entity named Soil Disposal Group, Inc. ("SDG"). Thereafter, SDG sold a list of prospective clients (the "Prospect List") and its services to PEI, a wholly owned subsidiary of Pure Earth and entered into a five-year sales representative agreement and a five-year non-compete agreement (Aronson Aff., Exhibit P, p. 5). On its face, the Prospect List is merely a compilation of names, addresses, and contact information for various companies and do not appear to contain client profiles, key personnel, projects, or any other Proprietary Information (Aronson Aff., Exhibit O).

The Moving Defendants submit affidavits stating that the that the Prospect List does not contain any Clean Earth information and is only a list of Rivkin's personal prospective clients (Def. Aff. in Opp., Exhibit 5, ¶ 12). Furthermore, Berger submits an affidavit stating that he relied on public directories, news alerts, and cold-calling to find clients and that Clean Earth never provided him with a client list during his employment there (Def. Aff. in Opp., Exhibit 3, ¶ 11-12, 14).

In opposition to the motion for summary judgment, Clean Earth submits a reply certification from Vice President of Sales of Clean Earth, James Hull, stating that the Prospect List contains 126 Clean Earth clients that represent substantial revenue for Clean Earth (Hull Certification, ¶ 12). Furthermore, Clean Earth cites to Section 4.6 of the asset purchase agreement

(the "Agreement") between PEI and SDG, which defines the Prospect List along with other types of information, as "confidential information" and "a valuable and unique asset" (Aronson Aff., Exhibit Q, p. 8).

Additionally, Clean Earth references the Pure Earth Form 10 (the "Form 10") filed with the Securities and Exchange Commission. The Form 10 indicates that PEI purchased the Prospect List from SDG and that SDG and the Sales Defendants were to market and promote PEI's soil disposal and trucking services to their new and existing customers (Aronson Aff., Exhibit P, p. 5). Clean Earth argues that PEI could not have any existing clients because it was formed on November 19, 2007 and the acquisition of SDG was effectuated on November 20, 2007 (the date the Sales Defendants resigned). Therefore, Clean Earth concludes that the Sales Defendants must have the Client List.

Clean Earth's arguments are unpersuasive and insufficient to raise a triable issue that the Client List constitutes a trade secret.

First, Clean Earth fails to support Hull's statements with any documentary evidence. No invoices or records are submitted to establish any overlap between the Prospect List and the Client List. Additionally, Clean Earth's reliance on the Agreement and the Form 10 is misplaced. Those documents do not demonstrate that the Client List possess any trade secret attributes. The mere fact that the Prospect List is labeled as confidential information in the Form 10 and the Agreement, does not, as a

matter of law, make it a trade secret (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998][audit reports designated as confidential failed to qualify as trade secrets]).

Furthermore, the representation in the Hull Certification that "[t]his information is protected within our company in a number of ways, and access to the information is restricted internally" fails to demonstrate with sufficient detail the measures that were taken to guard the information's secrecy (Hull Certification, ¶ 5).

For these reasons, Clean Earth fails to raise a triable issue that the Client List was not readily ascertainable to those in the industry or that it was compiled through great effort and expense. Therefore, it fails to demonstrate that the Client List qualifies as a trade secret (*see also, Town & Country House & Home Service, Inc. v Newbery*, 3 NY2d 554, 559 [1958] [court determined that plaintiff's customer list was a trade secret due in part to the considerable effort and expense plaintiff expended in screening its customers]).

The Proprietary Information and the Matrix

Clean Earth fails to sufficiently articulate its basis for its assertion that the Proprietary Information is a trade secret beyond the vague and broad categories alleged in the Complaint (Complaint, ¶¶ 30, 33). Similarly, Clean Earth's allegations pertaining to the Matrix fail to establish that it has any trade secret attributes (Complaint, ¶¶ 34).

As determined above, Clean Earth fails to raise a triable

issue that the Client List qualifies for trade secret protection. Consequently, Rivkin's solicitation of Clean Earth's clients after his employment with Clean Earth, the basis for its cause of action for breach of fiduciary duty stemming from misappropriation of trade secrets, is not otherwise actionable because he not bound by a non-competition agreement (*Fredric M. Reed & Co. v Irvine Realty Group, Inc.*, 281 AD2d 352, 353 [1st Dept 2001]; *Ashland Mgmt. v Altair Invs. NA, LLC*, __ NY3d ___, 2010 NY Slip Op 2431 [2010]). This reasoning similarly applies to Case, Shapiro, and Berger, who are also not bound by non-competition agreements.

Clean Earth further alleges upon information and belief that Kopenhaver, Berger, Case, Rivkin, and Shapiro diverted business opportunities from Clean Earth, but it has failed to supply documentary evidence to support the cause of action against them. Generally, conclusory allegations are insufficient to defeat summary judgment (*S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

In the Complaint, Clean Earth alleges upon information and belief that the Sales Defendants diverted opportunities to Pure Earth because the sales leads generated by the Sales Defendants diminished from 82 to 6 in five months and asserts that depositions are necessary to demonstrate that the decline of its sales leads was the result of the Sales Defendants wrongful diversion of opportunities (Complaint, ¶ 87).

However, Clean Earth fails to articulate a non-speculative

basis for believing that conducting depositions would lead to evidence thereby warranting a denial of the summary judgment motion.

Furthermore, Kopenhaver is granted summary judgment because Clean Earth has not alleged any conduct to support this cause of action against him.

Eighth Cause of Action

The eighth cause of action is asserted against Kopenhaver, Uzzi, and Pure Earth for tortious interference with Kopenhaver, Berry, and Berger's non-compete agreements.

A cause of action for tortious interference with contract requires that there is: (1) an existing valid contract between the plaintiff and a third party, (2) that the defendant has knowledge of, (3) that the defendant intentionally procures the third party's breach of that contract without justification, (4) the actual breach, and (5) damages (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

This cause of action fails as to Berger (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002]). To the extent that, Clean Earth is alleging that Pure Earth and Uzzi tortiously interfered with Kopenhaver's contractual obligations to Clean Earth and that Pure Earth, Uzzi, and Kopenhaver tortiously interfered with Berry's contractual obligations to Clean Earth, Clean Earth's cause of action for tortious interference fails. It merely submits conclusory allegations based upon information and belief without the support

of evidentiary proof sufficient to raise a triable issue as to whether Kopenhaver, Pure Earth, and Uzzi actively and intentionally procured a breach of Berry's non-compete agreement (Complaint, ¶ 133). Therefore, the eighth cause of action is dismissed.

Ninth Cause of Action

The ninth cause of action is asserted against Berger, Case, and Shapiro for breach of fiduciary duty. This cause of action recites the same exact allegations contained in the seventh cause of action for breach of fiduciary duty (Complaint, ¶¶ 124-127, 136-139). Consequently, this cause of action is dismissed as redundant.

Tenth Cause of Action

The tenth cause of action is asserted against Kopenhaver, Uzzi, and Pure Earth for aiding and abetting Berger, Case, and Shapiro's breach of fiduciary duty to Clean Earth before their resignation. Clean Earth alleges that Kopenhaver, Uzzi, and Pure Earth induced the resignation of the Sales Defendants, encouraged the removal of the Information, and diverted opportunities to Pure Earth.

A cause of action for aiding and abetting breach of fiduciary duty merely "requires a prima facie showing of a fiduciary duty owed to plaintiff,...a breach of that duty, and defendant's substantial assistance...in effecting the breach, together with resulting damages" (*Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]). "Substantial assistance occurs when a

defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

Clean Earth has failed to raise a triable that Kopenhaver, Uzzi, or Pure Earth substantially assisted in connection with the alleged breach of fiduciary duty by Berger, Case, and Shapiro. Clean Earth's allegations are general in nature (Complaint, ¶ 142-143) and are inadequate to raise a triable issue of fact (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006]).

Eleventh Cause of Action

The eleventh cause of action is asserted against all defendants for unfair competition.

A cause of action for unfair competition predicated on misappropriation requires "the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007]).

Clean Earth's allegations are vague and fail to raise a triable issue of fact (Complaint, ¶ 147). Clean Earth submits no specific evidence of the alleged conduct in order to substantiate the conclusory allegations. Therefore, this cause of action is dismissed.

Twelfth Cause of Action

The twelfth cause of action is asserted against all defendants for misappropriation of trade secrets and confidential information.

Dismissal of this cause of action is appropriate because this Court has determined that Clean Earth has failed to raise a triable issue of fact that the Information that was allegedly misappropriated qualifies for trade secret protection.

Thirteenth Cause of Action

The thirteenth cause of action is asserted against all defendants for civil conspiracy. Clean Earth has alleged throughout its Complaint and opposition papers that there was a conspiracy by the defendants to misappropriate its trade secrets.

"New York does not recognize civil conspiracy to commit a tort as an independent cause of action" (*Steier v Shoshana Kraushar Schreiber*, 25 AD3d 519, 522 [1st Dept 2006] *lv denied* 6 NY3d 714 [2006]). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]). "The gravamen of the conspiracy is the underlying wrong and the resultant injury" (*McGill v Parker*, 179 AD2d 98 [1st Dept 1992]).

The thirteenth cause of action is dismissed.

Fourteenth Cause of Action

The fourteenth cause of action seeks an accounting asserted against Berger. Clean Earth predicates this cause of action on Section 2 of the Berger Non-Compete Agreement, which provides for an "accounting and repayment of lost profits" in connection with violations of Section 1 (Aronson Aff., Exhibit T, § 2).

For the reasons stated above, the Berger Non-Compete

Agreement is unenforceable, therefore, this cause of action must be dismissed.

Counterclaims

In their counterclaims, the Sales Defendants and AEG seek to recover unpaid commissions from Clean Earth and request an inquest to determine the amount. They allege that the commissions were earned before they terminated their employment with Clean Earth.

Clean Earth does not concede that any commissions are owed, but counters that the Sales Defendants and AEG are not entitled to the commissions in any event, because they were disloyal employees (Transcript, Feb. 5, 2008, 64:6-22).

Clean Earth fails to raise a triable issue of fact as to whether the Sales Defendants were disloyal employees. For the reasons stated above, the evidence submitted by Clean Earth fails to substantiate its allegations that the Sales Defendants breached any of their fiduciary duties owed to Clean Earth or otherwise engaged in any disloyal conduct. Therefore, summary judgment is granted on the Sales Defendants and AEG's counterclaims as to liability and an inquest shall be held to determine the amount of the commissions.

Cross-Motion

The Court does not find conduct warranting sanctions (*compare Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]). Therefore, Clean Earth's cross-motion for sanctions is denied.

Motion Sequence 007

Clean Earth moves for an order imposing penalties pursuant to CPLR 3126 against the defendants for failing to respond to outstanding discovery requests. The Moving Defendants cross-move pursuant to CPLR 3124 to compel responses to discovery requests served in January 2008.

Both parties have outstanding discovery obligations that remain unresolved. Neither party has demonstrated that the failure to produce discovery was willful. Therefore, this Court finds the imposition of penalties pursuant to CPLR 3126 is inappropriate at this time. Both parties are directed to resolve all outstanding discovery requests in accordance with the remaining causes of action and to appear for a status conference with the Court.

Accordingly, it is

ORDERED that the defendants' motion for leave to reargue is granted, and it is further

ORDERED that upon reargument, the defendants' underlying motion for summary judgment is granted in part thereby dismissing the third cause of action in its entirety, the sixth cause of action in its entirety, the seventh cause of action in its entirety, and the eighth through fourteenth causes of action in their entirety, and it is further

ORDERED that the second, fifth, sixth through eighth, and tenth through thirteenth causes of action against Berry remain in the action, and it is further

ORDERED that the amended complaint is severed and dismissed

as against defendant Christopher Uzzi and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the plaintiffs' motion for penalties pursuant to CPLR 3126 is denied, and it is further

ORDERED that the defendants' cross-motion to compel responses to the January 2008 discovery requests is granted to the extent that the plaintiffs are directed to respond to outstanding discovery demands, and it is further

ORDERED that the parties are directed to appear in Part 53 to conduct a discovery conference on June 9, 2010 at 10:00 am.

This constitutes the decision and order of the Court.

Dated: April 26, 2010

ENTER:

J.S.C.

CHARLES E. RAMOS