

ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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**TRAVELSAVERS ENTERPRISES, INC. d/b/a
TRAVELSAVERS PARTNER SERVICES,**

Plaintiff,

-against-

**ANALOG ANALYTICS, INC., KENNETH KALB,
BARCLAYCARD UK, BARCLAYS BANK
DELAWARE, and BARCLAYS PLC,**

Defendants.
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**TRIAL/IAS PART: 15
NASSAU COUNTY**

**Index No. 602696-13
Motion Seq. Nos. 1 and 2
Submission Date: 6/6/14**

Papers Read on these motions:

**Notice of Motion.....X
Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affidavit in Opposition, Exhibits and
Memorandum of Law in Opposition.....X
Reply Memorandum of Law in Further Support.....X
Notice of Motion, Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affidavit in Opposition, Exhibits and
Memorandum of Law in Opposition.....X
Reply Memorandum of Law in Further Support.....X**

This matter is before the court on 1) the motion filed by Defendants Analog Analytics, Inc. ("AA"), Barclays Bank Delaware and Barclays PLC ("Company Defendants") on January 31, 2014, and 2) the motion filed by Defendant Kenneth Kalb ("Kalb") on January 31, 2014, both of which were submitted on June 6, 2014 following oral argument before the Court. The Court has already dismissed the eighth cause of action in the Complaint. For the reasons set forth below, the Court 1) grants the motion by the Company Defendants to dismiss the second,

fourth, fifth, sixth and seventh causes of action in the Complaint, and holds that, with respect to the first cause of action alleging breach of the applicable Agreement, Plaintiff's claim for damages is limited, pursuant to the Agreement's limitation of liability clause, to what AA was actually paid under the Agreement, and otherwise denies the motion; and 2) grants the motion by Defendant Kalb and dismisses the Complaint as asserted against him.

BACKGROUND

A. Relief Sought

The Company Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the complaint ("Complaint") with prejudice as against the Company Defendants.

Defendant Kalb moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint with prejudice as against Kalb.

Plaintiff Travelsavers Enterprises, Inc. d/b/a Travelsavers Partner Services ("Travelsavers" or "Plaintiff") opposes the motions.

B. The Parties' History

The parties' history, including an outline of the allegations in the Complaint, the documentary evidence and the affidavit in opposition to the motions, is set forth in a prior Order ("Prior Order") of the Court dated April 16, 2014 and the Court incorporates the Prior Order by reference as if set forth in full herein. In the Prior Order, the Court granted the motions to dismiss the eighth cause of action in the Complaint, seeking punitive damages and attorney's fees, and directed that the remaining causes of action in the Complaint would be the subject of oral argument. The Court conducted that oral argument and the motions were subsequently submitted.

As noted in the Prior Order, the Complaint (Ex. A to Gottridge Aff. in Supp.) alleges that in January 2012 Travelsavers entered into an exclusive ten-year contract with AA ("Agreement"), pursuant to which the parties agreed to work together to advertise and market brand-named travel deals, including luxury ocean cruises and vacation resorts, through electronic and other media directly to consumers. Plaintiff alleges that AA and Kalb, its founder and chief executive, breached the Agreement and, instead of performing, misappropriated Travelsavers' know-how and technology to launch a rival electronic travel offer service through Barclaycard UK which competes with, and undermines the value of, the Travelsavers contract and benefits Barclaycard UK, Barclays Bank Delaware and Barclays PLC (collectively "Barclays"). The

Complaint alleges that Defendant Barclaycard UK is a wholly-owned subsidiary of Barclays PLC and is organized under the laws of England with its principal place of business in London, England.

As also noted in the Prior Order, the Complaint contains eight (8) causes of action: 1) against AA for breach of the Agreement by virtue, *inter alia*, of its failure to cooperate to develop direct reservation capability, delay in launching the Agreement and failure to promote and distribute travel offers submitted to the Syndication Network online portal by Travelsavers, 2) against AA for the breach of good faith and fair dealing by making false representations and entering into a long-term exclusive joint venture when it knew that it did not have the ability or intention to abide by the Agreement, 3) against Barclays for tortious interference with contract by causing AA to divert its resources and personnel away from implementation and execution of the Agreement to develop Bespoke Offers, a competing platform, 4) against AA and Kalb for fraudulent inducement by making material representations to Plaintiff during the negotiations leading to the execution of the Agreement, 5) against Barclays under the theory of unjust enrichment by virtue of Barclays diverting AA personnel and resources, and obtaining Plaintiffs' trade secret proprietary information that Plaintiff had shared with AA, 6) against all Defendants for misappropriation of Plaintiff's trade secrets, which AA improperly induced Plaintiff to share under the false pretense that AA was bound by the Agreement, 7) against AA for unfair competition, and 8) against all Defendants for punitive damages and attorney's fees.

Pursuant to the Prior Order, the oral argument addressed the following issues: 1) whether Plaintiff's argument, in opposition to the motions, that the written agreement is not the entire agreement between Plaintiff and AA, can be reconciled with the allegation in the Complaint that "[t]he contract between Travelsavers... and AA...was set forth in a written agreement...executed by both parties in January 2012" (Compl. at ¶ 2) and applicable case law regarding the interpretation of contracts; 2) whether the second cause of action, alleging a breach of the implied covenant of good faith and fair dealing, is duplicative of other causes of action in the Complaint; 3) whether the third cause of action, alleging tortious interference with contract, provides the parties with adequate notice of the material elements of each cause of action alleged against it, adequately pleads the necessary elements and/or is precluded by the economic justification

doctrine; 4) whether the fourth cause of action, alleging fraudulent inducement, fails because the disclaimer in the written agreement, set forth at Paragraph 8, precludes Plaintiff's justifiable reliance on the alleged oral representations; 5) whether Plaintiff alleges a sufficient relationship between Plaintiff and the Barclay Defendants to support the fifth cause of action alleging unjust enrichment; 6) whether, with respect to the sixth cause of action for misappropriation of trade secrets, Plaintiff has alleged the necessary element of secrecy of the information allegedly misappropriated and/or alleged facts demonstrating that any Defendant used the alleged trade secrets in breach of an agreement or duty, or as result of discovery by improper means; 7) whether the seventh cause of action, alleging unfair competition, alleges conduct to which this cause of action is applicable; and 8) assuming *arguendo* that Plaintiff has adequately stated a claim, whether the Court should limit Plaintiff's claim for damages in light of the written agreement's limitation of liability clause set forth at Paragraph 6 of the Agreement.

C. The Parties' Positions

The Court incorporates by reference the parties' positions as set forth in the Prior Order.

RULING OF THE COURT

The Court incorporates by reference the legal principles set forth in the Prior Order regarding dismissal standards, breach of contract, fraudulent inducement, tortious interference with contract, the covenant of good faith and fair dealing, unfair competition, misappropriation of trade secrets, unjust enrichment, contract interpretation, disclaimers and contractual provisions limiting damages. The Court has set forth other relevant legal principles below.

Under the defense of economic justification, a party with an economic stake in the business of another may interfere with a contract that the other business has with a third person in order to further its own economic interests. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l, Inc.*, 241 F. Supp. 2d 246, 280 (S.D.N.Y. 2002), quoting *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 63 (2d Cir. 1988). The imposition of liability in spite of a defense of economic interest requires a showing of either malice or fraudulent or illegal means. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l, Inc.*, 241 F. Supp. 2d at 280, quoting *WMW Mach. Co. v. Koerber AG*, 240 A.D.2d 400, 401 (2d Dept. 1997) (internal quotation marks and citations omitted).

To succeed on a claim for the misappropriation of trade secrets under New York law, a

party must demonstrate 1) that it possessed a trade secret; and 2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. *The A Star Group, Inc. v. Manitoba Hydro*, 2014 U.S. Dist. LEXIS 88825, * 24 (S.D.N.Y. 2014), quoting *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 43-44 (2d Cir. 1999).

With respect to the motion by the Company Defendants, the Court dismisses the second, fourth, fifth, sixth and seventh causes of action in the Complaint, and holds that, with respect to the first cause of action alleging breach of the Agreement, Plaintiff's claim for damages is limited, pursuant to the Agreement's limitation of liability clause, to what AA was actually paid under the Agreement, and otherwise denies the motion. The Court so rules based on its determinations that 1) the first cause of action, alleging breach of contract, is viable, in part because the Court cannot reject, as a matter of law, Plaintiff's argument that interpreting the Agreement to mean that AA has the discretion "to reject *all* travel offers...would nullify the entire purpose of the TS Agreement" (P's Memo. of Law in Opp. at p. 10; emphasis in original) but the Court also rules that Plaintiff's damages under this cause of action are limited, pursuant to the Agreement's limitation of liability clause, to what AA was actually paid under the Agreement; 2) the second cause of action, alleging a breach of the duty of good faith and fair dealing is duplicative of other causes of action in the Complaint; 3) Plaintiff has asserted a viable cause of action for tortious interference with contract and the Court cannot rule, at this juncture, that the economic justification defense defeats that cause of action as a matter of law; 4) the fourth cause of action, alleging fraudulent inducement, is precluded by the disclaimer in the Agreement; 5) the fifth cause of action for unjust enrichment against Barclay is not viable because Plaintiff has not alleged a sufficient relationship between Plaintiff and Barclay to support this cause of action; 6) the sixth cause of action, alleging misappropriation of trade secrets, is not viable because there is no allegation that trade secrets were used in the breach of any agreement, any confidential duty or relationship, or as a result of discovery by improper means; and 7) the seventh cause of action, alleging unfair competition, is not viable, in part because Travelsavers and AA are not alleged to be competitors.

The Court grants the motion by Defendant Kalb and dismisses the Complaint as asserted against him. Plaintiff has not asserted a viable basis for holding Kalb personally liable for the

conduct in the Complaint, in part because the Agreement was entered into by Plaintiff and AA and because the record supports the conclusion that Kalb acted in his corporate capacity during the relevant transactions. In light of that fact, and in consideration of the issues outlined above with respect to the Company Defendants' motion, the Court concludes that the Complaint is not viable as asserted against Kalb personally.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiff and counsel for the Company Defendants of their required appearance before the Court for a Preliminary Conference on August 19, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 18, 2014

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUL 22 2014

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**