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

RETROPHIN, INC. Plaintiff, v. TIMOTHY PIEROTTI, Defendant.	Index No. 651104/13

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TIMOTHY PIEROTTI'S MOTION TO DISMISS

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Defendant Timothy Pierotti ("Defendant"), by and through the undersigned counsel, respectfully submits this memorandum of law in support of his motion to dismiss ("Motion"), pursuant to N.Y. C.P.L.R. 3211(a)(1) and (7), the complaint ("Complaint") of Plaintiff Retrophin, Inc. ("Plaintiff"), as follows.

PRELIMINARY STATEMENT

Plaintiff's curious bid to obtain shares of stock it never actually owned suffers from a basic and incurable defect: it is foreclosed by a fully integrated contract that completely governs the true ownership of these shares.

This contract is the purchase agreement entered into by the Defendant and the actual seller of the shares, and is the sole means by which Defendant acquired his ownership interest in this stock. By paying the agreed upon price for the stock, Defendant fully satisfied his obligations under the purchase agreement, and, as result took possession of this stock free and clear of any external obligations that Plaintiff is trying to impose through the tortured reasoning of its Complaint.

The existence of this purchase agreement prevents Plaintiff from proceeding under the two causes of action it has chosen as the means to obtain Defendant's stock, unjust enrichment and promissory estoppel. These causes of action are quasi-contractual in nature and can only be pled in the absence of a contract governing the subject matter in dispute.

Plaintiff's unjust enrichment and promissory estoppel claims are defective in another important respect. In asserting these claims, Plaintiff fails to plead that it suffered any harm resulting from Defendant's ownership of this stock. This failure is not surprising given that Plaintiff never owned this stock, was not a party to its sale, and was unaffected by the subsequent appreciation of the stock's value.

In addition to its unjust enrichment and promissory estoppel claims, Plaintiff has tacked on two causes of action through which it alleges that Defendant misused confidential information and trade secrets. These claims fail on their face. For example, Plaintiff fails to identify the confidential information and trade secrets Defendant was alleged to have misused. In addition, Plaintiff says nothing about how, when, and to whom this information was divulged. These defects warrant the dismissal of Plaintiff's third and fourth causes of action.[1]

For the foregoing reasons, this Court should grant Defendants' motion and dismiss the entire Complaint.

STATEMENT OF FACTS[2]

A. The Parties

Defendant is a former employee of MSMB Healthcare Management LLC ("MSMB") and resides in Summit, New Jersey. (Compl. ¶¶ 6,8).[3] Plaintiff is located at 777 Third Avenue, 22nd Floor, New York, NY 10017. (Compl.¶ 7). During all relevant times, Defendant was not employed, nor was he subject to any employment agreement with, Plaintiff. (See Compl.¶¶ 31, 32). Desert Gateway, Inc. ("Desert Gateway") is Plaintiff's former parent company, and was the subject of a reverse-merger with Plaintiff that was in or about December 2012. (Compl.¶¶ 33, 36).

B. The Purchase Agreement

On December 11, 2012, Defendant entered into a Purchase Agreement for the sale of shares of Desert Gateway with Troy Fearnow ("Fearnow"), a shareholder of Desert Gateway.

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1 Plaintiff also asserts a claim for a preliminary injunction. This claim is defective because New York law does not allow for a separate injunction cause of action without an underlying claim. It should be dismissed as well.

2 For the purpose of this Motion, Defendant accepts the allegations of the Complaint as true except for those allegations that are directly contradicted by the documentary evidence pursuant to N.Y. C.P.L.R. 3211(a)(1). However, Defendant vigorously denies Plaintiff's allegations and claims against him.

3 Numbers in parentheses prefixed by "Compl. ¶" refer to paragraphs in the Complaint.

A true and correct copy of the Purchase Agreement is attached as Exhibit A ("Ex. A") to the Kern Affirmation ("Kern Aff.") that is submitted in support of this motion. Defendant and Fearnow agreed to the sale of 400,000 shares (the "Shares") of common stock, par value $0.0001 per share, of Desert Gateway for the good and valuable consideration of $400.00. (Kern Aff., Ex. A ¶ 1). It is undisputed that Defendant paid for the Shares under the terms of the Purchase Agreement. (Compl. ¶ 37). Pursuant to the Purchase Agreement, the Shares were free and clear of any encumbrances or restrictions on transfer. (Kern Aff., Ex. A ¶ 2). The Purchase Agreement further contained a merger clause and a no oral modification clause, stating the following:

> This Agreement sets forth the entire understanding and agreement (and supersedes any and all understandings, negotiations and agreements, written or oral, not expressly set forth in this [Purchase] Agreement) between the parties hereto relating to the subject matter thereof. This [Purchase] Agreement shall be binding upon and shall inure solely to the benefit of the parties and their respective successors and assigns. This [Purchase] Agreement cannot be modified, changed, amended or terminated or assigned except by an instrument in writing signed by the party sought to be charged.

(Id. ¶ 3).

On December 15, 2012, stock certificates for 350,000 of the Shares were transferred to Defendant. (Compl.¶ 38). The remaining 50,000 shares are being held in escrow. (Id.).

ARGUMENT

A. The Standard On A Motion To Dismiss

While the facts alleged in the Complaint are presumed to be true, this Court need not accept as true factual allegations or legal conclusions that are flatly contradicted by documentary evidence. See 681 Chestnut Ridge Rd. LLC v. Edwin Gould Found. for Children, No. 108868/08, 2009 WL 1011642, at *5 (Sup. Ct. N.Y. Cnty. Mar. 18, 2009); see also Ullmann

v. Norma Kamali, Inc., 207 A.D.2d 691, 692 (1st Dep't 1994)). Moreover, a court will not accept as true "[v]ague and conclusory allegations." Gordon v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436 (1st Dep't 1988); Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007) (stating that "[v]ague and conclusory allegations are insufficient" to sustain a cause of action). Rather, a complaint must set forth the essential elements of the cause of action or be subject to dismissal. See Mobil Oil Corp. v. Joshi, 202 A.D.2d 318 (1st Dep't 1994). Indeed, a complaint must be dismissed if it provides no more than bare assertions of legal conclusions or a formulaic recitation of the elements of a cause of action. See Icahn v. Lions Gate Entm't Corp., No. 651076/2010, 2011 WL 1233362, at *7 (Sup. Ct. N.Y. Cnty. Mar. 30, 2011). Here, even if the Complaint is liberally construed, the causes of action are (1) contradicted by documentary evidence; (2) based on conclusory allegations; and (3) do not allege facts that "fit within any cognizable legal theory." 681 Chestnut Ridge, 2009 WL 1011642, at *4.

B. Plaintiff's Promissory Estoppel And Unjust Enrichment Claims Must Be Dismissed Because They Are Barred By The Purchase Agreement

The very first paragraph of Plaintiff Retrophin's Complaint describes its action as one seeking to "recover" 350,000 shares of Plaintiff's common stock. (Compl. ¶ 1). Plaintiff pursues this recovery through its First Cause of Action for unjust enrichment (Compl. ¶¶ 44-48), and its Second Cause of Action for promissory estoppel (Compl. ¶¶ 49-54).

These causes of action, however, are quasi-contractual in nature, and can be asserted only in the absence of an actual contract. Rakus, Inc. v. 3 Red G, LLC, No. 16594/09, 2010 WL 26252, at *6 (Sup. Ct. Kings Cnty. Jan. 5, 2010) (quoting Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987)). "It is well-settled that '[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery under a quasi-contract theory for events arising out of the same subject matter.'" Id. In Rakus, the court

granted a motion to dismiss an unjust enrichment claim because an agreement "explicitly cover[ed] the same subject matter for which the plaintiff [sought] relief . . . ." Id.; see also Niagara Falls Water Bd. v. Niagara Falls, 64 A.D.3d 1142, 1143-44 (4th Dep't 2009) (dismissing unjust enrichment claim where valid contract exists); Anyika v. MoneyGram Payment Sys., Inc., No. 13467/08, 2009 WL 3817464, at *3 (Sup. Ct. Kings Cnty. Nov. 16, 2009) (same).

In this case, there is an actual contract that governs the particular subject matter from which Plaintiff's unjust enrichment and promissory estoppel claims arise, and, therefore operates to bar these quasi-contractual causes of action. The Purchase Agreement, entered into between Defendant and Fearnow, "explicitly covers" Defendant's ownership of the Shares, the same shares, or their cash equivalent, that Plaintiff seeks "to recover" through its unjust enrichment and promissory estoppel claims.

The Purchase Agreement is a straightforward contract that sets forth the basic bargain entered into between Defendant and Fearnow for the sale of Fearnow's Desert Gateway shares that ultimately converted into Retrophin stock. Under the terms of the Purchase Agreement, "[t]he Seller hereby sells the Shares to Purchaser, and the Purchaser hereby purchases the Shares from the Seller, for a purchase price of $0.001 per share ($400 in the aggregate)." (Kern Aff., Ex. A ¶ 1). Defendant and Fearnow executed this contract and subsequently Defendant paid Fearnow the sale price and Fearnow conveyed the Shares to Defendant. (Compl. ¶¶ 37-38). Significantly, this is the only document that governs Defendant's ownership of the Shares. For this reason alone, Plaintiff's unjust enrichment and promissory estoppel claims cannot survive.

Moreover, the Purchase Agreement, in addition to setting forth the terms of the sale, also contains explicit language regarding its primacy as the document controlling the ownership of the Shares at issue. In relevant part, the Purchase Agreement states:

> This Agreement sets forth the entire understanding and agreement (and supersedes any and all understandings, negotiations and agreements, written or oral, not expressly set forth in this [Purchase] Agreement) between the parties hereto relating to the subject matter thereof. This [Purchase] Agreement shall be binding upon and shall inure solely to the benefit of the parties and their respective successors and assigns. This [Purchase] Agreement cannot be modified, changed, amended or terminated or assigned except by an instrument in writing signed by the party sought to be charged.

(Kern Aff., Ex. A ¶ 3). This language conclusively bars Plaintiff's claims that Defendant's purchase of the Shares obligates him to "work to ensure Plaintiff's development and growth by performing business development, and other, future services for Plaintiff." (Compl. ¶¶ 33-34).

The First Department has emphasized that "merger clauses are not mere boilerplate," but rather demonstrate a clear intent by all parties that any extrinsic evidence is barred from varying the terms of an agreement. Schron v. Grunstein, 32 Misc. 3d 231, 917 N.Y.S.2d 820, 825 (Sup. Ct. N.Y. Cnty. 2011), aff'd sub nom, Schron v. Troutman Saunders LLP, 97 A.D.3d 87 (1st Dep't 2012), aff'd, 20 N.Y.3d 430 (2013); Torres v. D'Alesso, 80 A.D.3d 46, 53 (1st Dep't 2010). Therefore, a cause of action premised on promises not contained in a fully integrated contract must be dismissed. See Structures Credit Partners, LLC v. Paine Webber Inc., 306 A.D.2d 132, 132-33 (1st Dep't 2003) (affirmed dismissal of plaintiff's causes of action that attempted to hold defendant liable for actions that it was not obligated to perform under a fully integrated agreement). A prime example of such a promise is the one Plaintiff alleges Defendant made to "work to ensure Plaintiff's development." (Compl. ¶¶ 33-34).

In this case, Defendant satisfied his obligations under the Purchase Agreement. Having paid the agreed upon price, Defendant took the 350,000 Shares unencumbered by any purported obligation to Plaintiff.

Because the Purchase Agreement—a fully integrated document—addresses Defendant's obligations with respect to the Shares, Plaintiff cannot recover the Shares through either an unjust enrichment or a promissory estoppel claim based on Defendant's alleged failure to fulfill a promise independent of the Purchase Agreement. Accordingly, Plaintiff's First and Second Causes of Action should be dismissed.

C. Plaintiff's Unjust Enrichment and Promissory Estoppel Claims Must Be Dismissed Because Plaintiff Fails To Sufficiently Plead That It Was Harmed By Defendant's Alleged Actions

As set forth above, the very first paragraph of Plaintiff Retrophin's Complaint describes its action as one seeking to "recover" the Shares. (Compl. ¶ 1). The use of the word "recover," which is obviously central to Plaintiff's action, implies that, at one point in time, Plaintiff owned or possessed this stock, and, more broadly, that Defendant's ownership of this stock somehow causes present harm to Plaintiff. However, Plaintiff never actually owned the Shares at issue, a fact fatal to Plaintiff's bid to deprive Defendant of his lawful ownership of the Shares because Plaintiff cannot demonstrate, and has not alleged in the Complaint, how it has sustained any loss resulting from Defendant's purchase of this stock from a third party.

Plaintiff's failure to allege how it was damaged by Defendant's acquisition of these 350,000 Shares means that it cannot effectively plead causes of action for unjust enrichment and promissory estoppel because both these equitable remedies require a showing that a plaintiff sustained some type of loss or harm. To prevail on a claim of unjust enrichment,

a plaintiff must establish that the defendant was enriched at plaintiff's expense.[4] Howard v. CitiMortgage, Inc., No. 105454/11, 2011 WL 7025340 (Sup. Ct. N.Y. Cnty. Dec. 23, 2011). To successfully plead a cause of action based upon promissory estoppel, a plaintiff must allege that it sustained an injury in reliance upon the promise made by the defendant.[5] Rock v. Rock, 100 A.D.3d 614, 616 (2d Dept't 2012).

In this case, Plaintiff cannot effectively plead the necessary element of loss because, even under its version of events, it had no connection to Defendant's purchase of the stock. So, while according to its Complaint, Plaintiff "facilitated" this purchase, it was not a party to the sale or the Purchase Agreement that governs the sale. More specifically, Plaintiff received none of the purchase price nor parted with any of its stock.[6]

As a result, Plaintiff was unaffected by the subsequent fluctuations in the value of the stock. When the share price rose in the market, Plaintiff suffered no economic loss.[7] Similarly, had the value of the Shares actually declined, Plaintiff would have suffered no economic loss.[8] Accordingly, what happened in the marketplace subsequent to Plaintiff's facilitation is simply not relevant because it did not affect Plaintiff at all. For this reason,

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4 A plaintiff also must establish that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.

5 A plaintiff must also establish that the promise was clear and unambiguous and that the plaintiff's reliance upon it was reasonable and foreseeable.

6 In this connection, it is important to note that Defendant purchased Desert Gateway stock, and not Retrophin stock, from Fearnow. Only later did this stock convert into Retrophin stock.

7 To the contrary, by the time the price of the Shares began their dramatic climb in value, they had been converted into Retrophin shares so Plaintiff, as the issuer, benefitted tremendously from the market upswing.

8 Query: If Defendant's stock remained at the price Defendant paid for it, would Plaintiff have filed an action to recover $400.00?

Plaintiff is unable to articulate anywhere in the Complaint how it suffered any harm either by "facilitating" Defendant's acquisition of the Desert Gateway stock or Defendant's continued ownership of this stock. Without this showing, Plaintiff cannot sustain causes of action for unjust enrichment and promissory estoppel and these claims must be dismissed.

D. Plaintiff's Breach Of Contract Claim Must Be Dismissed Because Plaintiff Fails To Plead That Defendant Impermissibly Used The Alleged Confidential Information Or That It Was Harmed By Defendant's Alleged Misconduct

In order to plead a breach of contract cause of action, the plaintiff must allege the "(1) formation of a contract between plaintiff and defendants; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damage." Barker v. Time Warner Cable, Inc., No. 016438/08, 2009 WL 1957740, at *3 (Sup. Ct. Nassau Cnty. July 1, 2009) (emphasis added) (granting motion to dismiss breach of contract claim), aff'd, 83 A.D.3d 750 (2d Dep't 2011); see also Hermandad Y Asociados, Inc. v. Movimiento Misionero Mundial, Inc., No. 100211/06, 2009 WL 765036, at *3 (Sup. Ct. N.Y. Cnty. Mar. 6, 2009) (same). Further, a complaint must "fully inform a defendant as to extent of claims being made against him, and to achieve this goal, vagueness is to be avoided so that defendant can intelligently plan and prepare to respond without risk of surprise." Iannone v. Cayuga Const. Corp., 66 A.D.2d 745 (1st Dep't 1978); see also N.Y. C.P.L.R. § 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."). Here, Plaintiff does not allege any facts in support of its conclusory allegation that Defendant failed to perform his obligations under the Termination Agreement with Plaintiff and MSMB (the "Termination Agreement"), or that Defendant's alleged misconduct in any way resulted in damages to Plaintiff.

It is well settled that "[v]ague and conclusory allegations concerning disclosures of confidential information are not a sufficient basis upon which to base a claim that a confidentiality agreement has been breached." Anonymous v. Anoymous, 233 A.D.2d 162, 166 (1st Dep't 1996); see Gordon, 141 A.D.2d at 436. Indeed, allegations of breach of an agreement are insufficient where they fail to allege facts constituting the breach. See Johnson v. Goord, 290 A.D.2d 844 (3d Dep't 2002) ("[C]onclusory and generalized statements . . . unsupported by any specific factual allegations, fall far short of meeting the requirements of CPLR 3013 . . . ."); Gordon, 141 A.D.2d at 436 (complaint dismissed where it alleged "in boilerplate fashion that defendant disclosed confidential information"); see also Jennings v. Burlington Indus., Inc., 19 A.D.2d 877 (1st Dep't 1963) ("[T]he complaint is plentifully besprinkled with allegations that defendants did certain things 'wrongfully and maliciously,' but these amount to nothing more than the pleader's conclusions from unalleged facts.")

Pursuant to the Termination Agreement, Defendant agreed not to "use, publish, disseminate or disclose" any confidential information. (Compl. ¶ 27). However, Plaintiff alleges in a general and conclusory manner that Defendant breached the Termination Agreement by "us[ing] . . . Confidential Information in an attempt to acquire Garreco for his own benefit." (Id. ¶¶ 56, 58). The Complaint is utterly devoid of any facts that Defendant has used such information improperly. At no point does Plaintiff give notice to Defendant as to when he impermissibly used the alleged confidential information, how he impermissibly used the alleged confidential information, to whom he impermissibly divulged the alleged confidential information, or precisely what confidential information he impermissibly "used."

Moreover, in the absence of specific facts and details demonstrating damage, mere allegations of a breach of contract are not sufficient to sustain a complaint. Gordon, 141

A.D.2d at 436; see also Ryan Ready Mixed Concrete Corp. v. Coons, 25 A.D.2d 530 (2d Dep't 1966) ("[A]llegations of breach of contract are not sufficient to sustain a complaint in the absence of allegations of fact showing damage."). Accordingly, a pleading must be subject to dismissal if it does not set forth facts showing the damage upon which the action is based. See Gordon, 141 A.D.2d at 436

Aside from general allegations that "Plaintiff has incurred substantial damages" (Compl. ¶ 60), the Complaint lacks any assertions of fact demonstrating how Plaintiff has been injured as a result of the alleged breach of the Termination Agreement. Indeed, Plaintiff's claims that it is "damaged" are merely boilerplate allegations. See Gordon, 141 A.D.2d at 436 (boilerplate allegations of damage are insufficient). The Complaint fails to state—as it must—how Defendant's alleged breach of the confidentiality agreement caused plaintiffs any injury. Id.

Simply stating, as Plaintiff does, that Defendant has "used" allegedly confidential information thereby causing Plaintiff "substantial damaged" without pleading specific facts is insufficient. See Gordon, 141 A.D.2d at 436. Accordingly, Plaintiff's cause of action for breach of contract must be dismissed.

E. Plaintiff's Common Law Misappropriation Claim Must Be Dismissed Because Plaintiff Fails To Plead That Defendant Impermissibly Used The Alleged Trade Secrets

Similarly, Plaintiff's common law misappropriation cause of action fails to adequately state a claim. To establish a claim for misappropriation of trade secrets, plaintiff must show (1) that it possesses a trade secret, and (2) that defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means. Bear Stearns Funding v. Interface Grp.-Nevada, 361 F. Supp. 2d 283 (S.D.N.Y. 2005) (emphasis added); see Delta Filter Corp. v. Morin, 108 A.D.2d 991, 992 (3d Dep't 1985) (affirmed trial court's dismissal of misappropriation of trade secrets claim for failure to state cause of action);

see also 1-800 Postcards, Inc. v. AD Die Cutting & Finishing Inc., No. 101822/2010, 2010 WL 3020705 (Sup. Ct. N.Y. Cnty. July 9, 2010) (denied injunctive relief where plaintiff failed to allege facts sufficient to show that defendant was misappropriating plaintiff's trade secrets).

Here, Plaintiff conclusorily alleges that Defendant has "willful[ly] and intentional[ly]" misappropriated Plaintiff's trade secrets in connection with the contemplated acquisition of Garreco. (Compl. ¶¶ 63-64). Plaintiff fails to assert any facts whatsoever that Defendant has used such information improperly. The Complaint does not specify when Defendant impermissibly used the alleged trade secrets, how he impermissibly used the alleged trade secrets, to whom he impermissibly divulged the alleged trade secrets, or precisely what trade secrets are at issue. Plaintiff's vacant and bare assertions that Defendant misappropriated the alleged trade secrets without pleading specific facts as to how or when he used such information is insufficient. See North Shore Neon Sign Co., Inc. v. Nat. Maintenance, Inc., No. 009492/00, 2000 WL 35918643 (Sup. Ct. Nassau Cnty. December 18, 2000) (misappropriation of trade secrets claim dismissed where it was alleged in such conclusory fashion that the plaintiff failed to give the court and defendants notice of the relevant transactions and occurrences alleged as a basis for liability); see also Di Raimondo v. Lembo, 63 N.Y.S.2d 906, 908 (Sup. Ct. Kings Cnty. 1946) (allegation that defendants were using special information and knowledge obtained during employment by plaintiffs to plaintiffs' detriment was conclusory and insufficient to state a cause of action). For the foregoing reasons, Plaintiff's common law misappropriation claim must be dismissed.

F. Plaintiff Is Not Entitled To A Preliminary Injunction Because It Cannot Be Pled As A Stand-Alone Cause Of Action

An injunction is an equitable form of relief that is available only if a plaintiff cannot be compensated for a defendant's allegedly wrongful conduct by a remedy at law. See

Reuben H. Donnelley Corp. v. Mark I Mktg. Corp., 893 F. Supp. 285, 294 (S.D.N.Y. 1995). New York, however, does not recognize a "injunctive" cause of action. NAS Electronics, Inc. v. Transtech Electronics PTE Ltd., 262 F. Supp. 2d 134 (S.D.N.Y. 2003) ("[A] preliminary injunction is a form or relief, and not a claim or a cause of action."). Rather, New York courts require that a plaintiff allege some wrongful conduct on the part of the defendant for which the requested injunction is an appropriate remedy. Rabos v. R&R Bagels & Bakery Inc., No. 3754/2011, 2011 WL 10702301, at *6 (Sup. Ct. Queens Cnty. Nov. 23, 2011) (dismissing cause of action for a preliminary injunction that merely repeats the claims alleged in the complaint) (citing Reuben H. Donnelly, 893 F. Supp. at 293).

While the Termination Agreement entitles Plaintiff to seek a preliminary injunction, Plaintiff cannot simply assert a cause of action for injunctive relief without pleading an underlying claim and expect that it be granted. See Rabos, 2011 WL 10702301, at *6. Accordingly, Plaintiff's cause of action for a preliminary injunction must be dismissed.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint together with such other and further relief as this Court deems just and proper.

Dated: June 25, 2010
New York, New York

Respectfully submitted,

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