

PRESENT: Helen E. Freedman  
Justice

PART 39

Index Number : 600877/2006  
BLUE STAR JETS, LLC  
vs  
REVOLUTION AIR  
Sequence Number : 001  
DISMISS

I  
E INDEX NO. \_\_\_\_\_  
V MOTION DATE \_\_\_\_\_  
F  
S MOTION SEQ. NO. \_\_\_\_\_  
[ MOTION CAL. NO. \_\_\_\_\_

**FILED**

OCT 06 2006

NEW YORK COUNTY CLERK'S OFFICE

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

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the motion sequence numbers 001 and 002 are consolidated for joint disposition in accordance with the accompanying memorandum decision.

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

Dated: October 4, 2006

HEF  
Helen E. Freedman J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK plaintiff Blue Star Jets, LLC (Blue Star),

COUNTY OF NEW YORK: 1AS PART 39

-----x

BLUE STAR JETS, LLC,

Index No. 600877/06

Plaintiff,

-against-

REVOLUTION AIR, ANSWERING SERVICE  
PROFESSIONALS, INC., DANIEL MCKEVITT,  
RON GOLDSTEIN, ASHLEY BRUEMLEVE  
AND ANNA "DOE",

Defendants.

-----x

**FREEDMAN, J.:**

**FILED**  
OCT 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002, in which defendants seek partial dismissal of the complaint, are consolidated for joint disposition.

In this action, plaintiff Blue Star Jets, LLC ("Blue Star"), a private jet charter brokerage company, alleges that defendant Answering Service Professionals, Inc. ("ASP"), an answering service, acted in concert with defendant Revolution Air to divert business to Revolution Air, another private jet chart brokerage company. Blue Star hired ASP, a company located in Indiana, to field client calls. According to Blue Star's Complaint, ASP employees, defendants Ashley Bruemleve and Anna "Doe," made an illicit arrangement with defendants Ron Goldstein and Daniel McKevitt, defendant Revolution Air's principals, to steal Blue Star's clients.

In motion sequence 001, defendants Revolution Air and its founder, Ron Goldstein, move to dismiss the first, third, fifth and sixth causes of action, pursuant to CPLR 3211 (a) (7), and to strike certain paragraphs of the complaint pursuant to CPLR 3024 (b), on the ground that they

contain scandalous statements. In motion sequence 002, defendant ASP moves, pursuant to CPLR § 302 (a) and CPLR 3211 (a) (8), to dismiss the complaint on the ground that the court lacks personal jurisdiction over it, and, alternatively, to extend its time to serve and file a verified answer, pursuant to CPLR § 2004 and CPLR 3012 (d).

For the reasons set forth below, defendants' motions are granted, in part, and denied, in part.

### *Background*

The complaint sets forth the following contentions.

In November of 2005, Blue Star was brokering a charter jet for a potential customer, who appeared ready and willing to book Blue Star's services. The prospective customer never called back to retain Blue Star's services. Around this time, defendant Daniel McKeivitt, a Revolution Air employee, called a Blue Star employee saying "I just snagged your California trip right out from underneath you". Revolution was also utilizing ASP's services.

Thereafter, Blue Star contacted ASP to inquire about this lost prospective client and about its below average call volume. Blue Star learned that one of ASP's employees, Ashley Bruemleve, had been fired. Blue Star contacted Bruemleve, who purportedly divulged to Blue Star details of a scheme masterminded by Revolution Air founder and former Blue Star employee, Goldstein, to misappropriate and divert clients from Blue Star to Revolution Air by using ASP employees, including defendant Bruemleve, with whom Goldstein was having an intimate relationship at the time, and Anna "Doe." In exchange for cash payments and lavish vacations from Goldstein and McKeivitt, Bruemleve and Anna "Doe" would obtain basic contact and trip request information (client information) from callers attempting to reach Blue Star, and

instead of putting the call through the “call board” that connected them with Blue Star, conveyed the client information to Revolution Air, who would solicit the clients.

Blue Star asserts seven causes of action. The first cause of action alleges that defendants converted Blue Star’s confidential client information. The second cause of action asserts that all defendants misappropriated Blue Star’s confidential client information and sold it to enable Revolution Air to unfairly compete with Blue Star. The third cause of action for common law fraud alleges that defendants made material misrepresentations to Blue Star’s prospective clients by eliciting and misusing the clients’ personal contact information and misrepresenting to Blue Star the cause of its below average call volume. The fourth cause of action sounding in breach of contract is asserted against ASP only, based on breach of its obligation to maintain Blue Star’s client information in strict confidence.

The fifth cause of action for aiding and abetting breach of contract and common law fraud as against Revolution Air, Goldstein and McKeivitt, alleges that these defendants substantially assisted Bruemleve and Doe in the commission of common law fraud and breach of contract. The sixth cause of action for tortious interference with contract alleges that the Revolution Air defendants were aware of ASP’s contract with Blue Star, and that Revolution Air through Goldstein and McKeivitt induced ASP, Bruemleve and Doe to breach the contract. The seventh cause of action seeks an order prohibiting defendants from using Blue Star’s client information. Blue Star seeks compensatory and punitive damages for the alleged breaches.

*Revolution Air and Goldstein’s Motion to Dismiss*

Revolution Air and Goldstein move to dismiss causes of action for conversion or theft, for common law fraud, for aiding and abetting breach of contract and common law fraud, and

for tortious interference with contract. Additionally, Revolution Air and Goldstein move pursuant to CPLR 3024 (b) to strike paragraphs 17 and 18 of the complaint, which allege that Goldstein and Bruemleve were engaged in an intimate relationship when the events at issue in this action transpired, on the ground that such allegations are scandalous. The motion is granted, in part, and denied in part.

According to Blue Star, its claim for common law theft sounds in conversion, for the taking of its client information, or its trade secrets. Specifically, the complaint alleges that all defendants engaged in the wrongful taking of Blue Star's client information, namely the personal needs and requests of its potential clients.

The tort of conversion is defined as the unauthorized exercise of control over goods which belong to another person to the exclusion of that person's rights, and occurs when a defendant denies the rightful owner access to the property (*Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [1<sup>st</sup> Dept 2006]). New York limits conversion claims to the taking of tangible property (*MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1<sup>st</sup> Dept 1995]). See also *Sporn v. MCA Records*, 58 N.Y.2d 482, 489 [1983]). Here, Blue Star alleges conversion or theft of contact information of its prospective clients. That does not constitute the taking of a tangible asset. Moreover, in order to properly state a claim for conversion, a plaintiff must allege that it exercised ownership, possession or control over the property (*Soviero*, 27 AD3d at 276). Blue Star makes no claim that it first possessed or had control over the personal contact information of its prospective clients. Rather, it alleges that this information was in the possession and control of ASP, who then transmitted the information to Revolution Air instead of Blue Star.

Accordingly, the motion to dismiss the conversion claim is granted.

As for the third claim for fraud, Blue Star avers that all defendants acted in concert in furtherance of a scheme to divert Blue Star's prospective customers to Revolution Air in exchange for secret cash payments, lavish vacations, and a personal relationship. The alleged misrepresentations that form the basis of the fraud claim are misleading statements made to Blue Star's potential clients who called Blue Star, via ASP, and misrepresentations made to Blue Star by ASP as to the source of its low call volume. Defendants seek dismissal of the claim for fraud on the ground that it is not stated with the requisite degree of particularity, pursuant to CPLR 3016 (b).

In order to sufficiently state a claim for fraud, a plaintiff must establish that a defendant made a misrepresentation that it knew to be false, that plaintiff was justified in relying upon it and reliance caused injury. (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]). Each element must be pled with particularity (CPLR 3016 [b]).

The complaint does not specify any false statements made either to Blue Star or its potential customers. (*Joyce v JF Assoc., LLC*, 8 AD3d 190, 191 [1<sup>st</sup> Dept 2004]). The claim for fraud against ASP for alleged disclosures of confidential client information to Revolution Air will not lie where, as here, the fraud arises solely out of an alleged breach of contract. (*Trusthouse Forte [Garden City] Mgt., Inc. v Garden City Hotel, Inc.*, 106 AD2d 271, 272 [1<sup>st</sup> Dept 1984]). Accordingly, defendants' motion to dismiss the claim for fraud is granted, and the third claim is dismissed.

Blue Star's fifth cause of action is for aiding and abetting fraud and breach of contract. In order to adequately plead a claim for aiding and abetting fraud, Blue Star must allege the existence of an underlying fraud, that the defendants had knowledge of the fraud and provided

assistance or failed to act when required to enable other's acts of fraud to proceed (*Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 100 [1<sup>st</sup> Dept 2003]). Since the claim for fraud is not viable for failure to plead with the requisite particularity, no claim for aiding and abetting fraud can lie. Blue Star has apparently abandoned that branch of the fifth cause of action that alleges aiding and abetting breach of contract. Accordingly, the fifth claim for aiding and abetting fraud and breach of contract is dismissed.

The sixth claim for tortious interference with contract alleges that Revolution Air, Goldstein and McKeivitt induced ASP, Doe and Bruemleve to breach ASP's agreement with Blue Star by passing on Blue Star's client information and diverting customers. Blue Star submits a copy of the service agreement it executed with ASP in addition to invoices reflecting charges for the answering services ASP provided to Blue Star. Blue Star alleges that the agreement between it and ASP obligated ASP and its employees to answer its phone calls, relay call information to it, and maintain Blue Star's Client Information in confidence.

A claim for tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's intentional procurement of the third party's breach of the contract, and resulting damages (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d at 424). Construing the factual allegations of Blue Star's complaint in its favor, the actions of Goldstein and McKeivitt vis a vis ASP, Doe and Bruemleve are sufficient to state a claim for tortious interference. Accordingly, the motion to dismiss the sixth claim for tortious interference is denied.

Defendants Revolution and Goldstein move to strike the paragraphs of the complaint that refer to an alleged "intimate relationship" between defendants Goldstein and Bruemleve. A

motion to strike scandalous or prejudicial material from a pleading pursuant to CPLR 3024 (b) will be denied if the allegations are relevant to a cause of action (*New York City Health and Hosp. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 [1<sup>st</sup> Dept 2005]). Blue Star's allegations are relevant to the means by which Revolution Air and its employees, Goldstein and McKeivitt, allegedly induced ASP to breach its agreement with Blue Star (*see Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 438 [1<sup>st</sup> Dept 1995] [allegations as to how and what means were employed to induce a breach of an agreement were relevant to claim of tortious interference with contract]).

Accordingly, the motion to strike is denied.

*ASP's Motion to Dismiss*

ASP's motion to dismiss the complaint in its entirety and all cross-claims asserted against it is based upon lack of personal jurisdiction. That motion is denied based upon New York's long-arm statute, CPLR § 302 (a) (1), and (3).

For a non-domiciliary to be amenable to personal jurisdiction, a court must find that the exercise of long arm jurisdiction is compatible with both CPLR 302 and due process. (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [1990]). CPLR § 302 (a) (1) permits a court to exercise personal jurisdiction over a non-domiciliary if it conducts "purposeful activities" within the state and the claim against it involves a transaction bearing a "substantial relationship" to those activities § 302 (a) (*Deutsche Bank Securities Inc. v. Montana Board of Investments*, 7 NY3d 65, 71 [2006]).

A transaction of business for the purposes of CPLR § 302 (a) (1) covers a wide range of activities, and may be based upon a single act, as long as the "activities were purposeful, and the

there is a substantial relationship between the transaction and the claim asserted". *Deutsche Bank Securities Inc. v. Montana Board of Investments*, supra at 71. Although, the mere solicitation of business in New York, without more, does not establish the requisite contacts between the state and the non-domiciliary (*Holness v Mar. Overseas Corp.*, 251 AD2d 220, 222 [1<sup>st</sup> Dept 1998]), commercial actors who utilize electronic and telephonic means to deliberately project themselves into New York to conduct business transactions are subject to long arm jurisdiction under CPLR 302 (a)(1) (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71; *Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 17-18 [1970]; see also *Chestnut Ridge Air, Ltd. v 1260269 Ontario Inc.*, 2006 WL 2663729 [Sup Ct, NY County 2006] [long-arm jurisdiction found under CPLR 301 where defendant substantially solicits New York clients through an interactive website]; accord *Thomas Pub. Co. v Industrial Quick Search, Inc.*, 237 F Supp 2d 489, 491-92 [SDNY 2002]).

Here, Blue Star alleges that ASP had substantial and continuous contacts within this state beginning with ASP's establishing an ongoing contractual relationship with Blue Star, a New York corporation, to perform services for Blue Star. While ASP is based in Indiana, it advertises its services nationally through its interactive website where prospective customers can directly post inquiries to ASP employees regarding the services ASP provides. After Blue Star initiated contact with ASP, the latter transmitted a service agreement to Blue Star via e-mail, which was executed by Blue Star in New York. Although ASP answered Blue Star's telephone calls in Indiana, the majority of customers were attempting to reach Blue Star in New York and called a New York telephone number.

While the placing of interstate telephone calls without more may not be sufficient to

transact business CPLR 302 (a) (1) (*Burrows Paper Corp. v R.G. Eng'g Inc.*, 363 F Supp 2d 379, 386 [SDNY 2005]), here ASP was acting as an agent for Blue Star for clients who would do business with Blue Star in New York. By performing services for a New York entity, ASP actively projected itself into activities occurring within this state (*see Parke-Bernet Galleries, Inc.*, 26 NY2d at 17-18 [jurisdiction over non-domiciliary who had been the highest bidder in an auction based in New York was proper where the defendant was an active participant in the auction by his frequent receipt and transmittal of bids over an open telephone line in addition to his direct assistance by someone who was physically present in the state]; *see also Deutsche Bank Sec., Inc.*, 7 NY3d at 71-72; *Lazard Freres & Co. LLC v West Group Properties LLC*, 3 AD3d 351, 351 [1<sup>st</sup> Dept 2004]; *PDK Labs, Inc. v Friedlander*, 103 F3d 1105, 1109 [2d Cir 1997] [defendant's frequent telephone calls and letters to plaintiff located in New York over several months constituted transacting business there]).

Pursuant to the service agreement, ASP also regularly contacted Blue Star in New York to provide it with details about prospective clients who had attempted to reach Blue Star and regularly sent invoices to Blue Star, in New York (*see Sunward Elecs., Inc. v McDonald*, 362 F3d 17, 22 [2d Cir 2004]). Further, ASP maintains business relationships with other New York clients, including its co-defendant in this action, Revolution Air (*see Spigel v Henry H. Ackerman & Co.*, 221 AD2d 167, 167-68 [1<sup>st</sup> Dept 1995] [maintenance of a New York customer base significant factor in establishing long-arm jurisdiction over defendant under CPLR 302 (a) (1)]).

Considering the totality of circumstances (*Liberatore*, 293 AD2d at 220), including ASP's ongoing contractual relationship with New York-based corporations, ASP's solicitation

of business within this state via its interactive website, its regular transmittal of invoices into this state and collection of monies paid from a New York account, its participation in innumerable telephone calls that were placed, sent and received to and from New York by ASP employees, New York residents attempting to contact Blue Star, and by Blue Star itself, it is clear that ASP was transacting business in New York within the meaning of CPLR 302 (a) (1).

The activities underlying the breach of contract and tortious interference claims are clearly related to the service agreement with the New York corporation that forms the basis for jurisdiction. The due process aspect of the jurisdictional claim is also satisfied. ASP, who solicited New York business via its interactive website and then established an ongoing contractual relationship with a New York based business and knowingly entered the state by its active participation in that New York business by frequent telephonic communication with Blue Star's current and prospective clients located in New York, should have reasonably expected to defend actions in this state. Having transacted business in New York, assertion of jurisdiction over ASP is proper, and the motion to dismiss the complaint for lack of personal jurisdiction is denied.

As for the unfair competition claim against ASP, CPLR § 302 (a) (3) (ii) provides a basis for asserting jurisdiction.

Jurisdiction predicated upon CPLR § 302 (a) (3) (i) and (ii) requires the commission of a tort without the state causing injury within the state, if the defendant regularly does or solicits business in New York or reasonably expects the alleged tortious act to have consequences in the state. In determining whether an injury has occurred within this state, a "situs of the injury" inquiry is appropriate. (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-02 [1<sup>st</sup> Dept

2003]; *Hermann v Sharon Hosp., Inc.*, 135 AD2d 682, 683 [2d Dept 1987]). The relevant inquiry is ordinarily where the event that caused the injury occurred, and not where the resultant damages took place (*id.*). However, where a claim for unfair competition is predicated upon the misappropriation of trade secrets and other confidential data, courts have recognized a tortious act outside the state causing injury within the state. (*see Sybron Corp. v Wetzel*, 46 NY2d 197, 205-06 [1978]; *accord International Flavors & Fragrances Inc. v Van Eeghen Intl. B.V.*, 2006 WL 1876671, \*4 [SDNY 2006]; *Harrison Conference Servs., Inc. v Dolce Conference Servs., Inc.*, 768 F Supp 405, 407 [EDNY 1991]; *7773888 Ontario Ltd. v Lencore Acoustics Corp.*, 142 F Supp 2d 309, 324 [EDNY 2001]).

According to Blue Star, ASP diverted and misappropriated Blue Star's client information in Indiana and sold the information to Blue Star's competitor, Revolution Air, which caused injury to Blue Star within New York by the loss of its New York clients. Here, as in *Sybron Corp.*, 46 NY2d at 205, Blue Star is seeking to redress the economic injury flowing from the loss of its New York clients that ASP caused. by misappropriating trade secrets and client information. The court can infer that ASP should have reasonably expected the tortious acts to have consequences within the state if it purposefully diverted Blue Star's New York customers to another. Thus, the claims are within the purview of CPLR § 302 [a] [3] [ii]. Based on the foregoing, ASP's motion to dismiss for lack of jurisdiction is denied.

ASP additionally moves to extend its time to file a verified answer with cross-claims, pursuant to CPLR 2004 and 3012 (d) on the ground that Blue Star has not obtained personal jurisdiction over it. ASP's motion to extend its time to file a verified answer is granted pursuant to CPLR 3012 (d)(*see Guzetti v City of New York*, 32 AD3d 234 , 820 NYS2d 29, 30 [1<sup>st</sup> Dept 2006]).

Accordingly, it is

ORDERED that so much of the motion (001) to dismiss the complaint by Revolution Air and Ron Goldstein as seeks to dismiss claims one, three, five and six, is granted, only to the extent that the first, third and fifth claims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that so much of the motion (001) by Revolution Air and Ron Goldstein as seeks to strike certain paragraphs of the complaint, is denied; and it is further

ORDERED that so much of the motion (002) to dismiss the complaint by Answering Service Professionals, Inc., is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the motion (002) by Answering Service Professionals, Inc. to extend its time to serve and file a verified answer is granted; and it is further

ORDERED that Answering Service Professionals, Inc., Revolution Air and Ron Goldstein shall serve their answers to the complaint within 30 days after receipt of a copy of this order.

Parties shall appear for a preliminary conference on November 6, 2006 at 9:30 a.m. in Room 208.

Dated: October 4, 2006

ENTER:

**FILED**

OCT 06 2006

NEW YORK  
COUNTY CLERKS OFFICE

Helen E. Freedman, J.S.C.