COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
1584CV03652-BLS 2

MARK BUTTS and
BOSTON EQUITY ADVISORS, LLC
Plaintiffs

vs.

ARNOLD E. FREEDMAN, ODED BEN-JOSEPH, and
OUTCOME CAPITAL, LLC
Defendants

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANTS'MOTION FOR SUMMARY JUDGMENT

In 1999, the plaintiff Mark Butts and the defendant Arnold Freedman joined together to form Boston Equity Advisors, LLC (BEA), a limited liability company in the business of providing advice on matters of corporate finance, particularly in connection with the medical device business. Freedman and Butts each held a fifty percent interest. The defendant Oded Ben-Joseph worked for BEA beginning in 2010. In July 2012, Freedman and Ben-Joseph left BEA and joined the defendant Outcome Capital, LLC (Outcome), a BEA competitor. This lawsuit alleges various claims against the defendants, the primary ones being a breach of their fiduciary obligations and breach of contract. Specifically, the Complaint alleges that the defendants took with them certain confidential information of BEA and engaged in other actions harmful to BEA and to Butts, the sole member of BEA after Freedman departed.

The case is now before the Court on the defendants' Motion for Summary Judgment. In essence, the defendants argue that the plaintiffs have no reasonable expectation of proving any of their claims. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). After

review of a voluminous summary judgment record, this Court concludes that there are genuine disputes of material fact that make summary judgment inappropriate.

BACKGROUND

Without detailing all the facts (both disputed and undisputed) in the parties' submissions, this Court would highlight the following evidence which, if believed, could provide a basis for plaintiffs to recover on one or more of their claims.[1]

BEA was a closely held boutique investment banking firm that operated for many years with good success. Freedman focused on sales and business generation whereas Butts handled the legal and financial end of the business. In 2010, Freedman recruited Ben-Joseph to assist him on the sales end. Ben-Joseph joined the firm with the expectation of becoming a member. Although he never obtained an equity interest in BEA, he did receive an interest in receiving a percentage of the profits and was negotiating with Butts to become an equity member of BEA into 2012. Ben-Joseph worked closely with Freedman until his departure from BEA.

Around this same time period (August 2011 into early 2012), Freedman and Ben-Joseph were engaged in secret discussions with a BEA competitor, WWC Securities, LLC (WWC) to merge the two companies. Freedman and Ben-Joseph did not inform Butts about these negotiations. These discussions were extensive and are supported in the summary judgment record by defendants' own interrogatory answers as well as numerous emails and other documents. A merger did not take place, but shortly after these discussions, both Freedman and Ben-Joseph left BEA and joined WWC, which then changed its name to Outcome Capital, LLC (Outcome). On March 13, 2012 and March 19, 2012, respectively, Ben-Joseph and Freedman

[1] Defendants dispute much of this evidence. On a motion for summary judgment, however, this Court must resolve those disputes in favor of the plaintiff and draw all reasonable inferences in plaintiff's favor.

each informed Butts that they would be leaving the firm. Both continued to work at BEA until July 2012.

The plaintiffs allege that during these secret negotiations and while both Freedman and Ben-Joseph still worked at BEA, they stopped seeking new business for BEA and started directing prospective clients away from BEA to Outcome (then WWC). In particular, Ben-Joseph, with Freedman's knowledge and assistance, commenced discussions in February 2012 with Sirius Implantable Systems, Ltd., which was developing a medical device that fell directly in line with the types of investments that BEA promoted within the health care industry. In June 2012, Sirius became a client of Outcome. Freedman also had some dealings with Leading Indicator Systems in April 2012 but instead of soliciting the company as a client of BEA, he referred it to Outcome. Finally, the summary judgment record contains evidence regarding a third potential client, Nano MR. A reasonable inference can be drawn from this evidence that, while they were still working for BEA, the defendants diverted these prospective clients away from BEA to Outcome, precisely because they intended to leave BEA and join Outcome and wished to reap the benefit of that business.

Plaintiffs also allege that the defendants took confidential and proprietary information from BEA, including its client databases, business files and contacts (including deal history, financing and investing sources), marketing materials and other information. Here, the summary judgment record is much thinner. There is evidence, however, that the defendants did take certain information from BEA's "Goldmine" database for their use at Outcome. They also provided Outcome with a list of BEA past transactions and when the two joined Outcome, Outcome promoted these in marketing materials as deals that Outcome, not BEA, had performed.

Freedman took certain other BEA files, which BEA maintains contained confidential client information.

DISCUSSION

In support of their motion, the defendants makes two principal arguments. First, they contend that the plaintiffs will be unable to show that the defendants did anything wrong. Neither defendant was bound by any noncompete agreement. Indeed, Ben-Joseph was not even a member of BEA and thus (it is argued) had no fiduciary obligation to Butts or the company. As to confidential information, defendants maintain that the plaintiffs cannot specifically identify what was taken, much less prove that it was entitled to legal protection; at most, defendants took with them their own skills and experience, which they were free to do. Second, defendants argue that there is no causal connection between any alleged wrongdoing by the defendants and any harm to the plaintiffs. Even if there were discussions regarding a merger, no merger occurred. As to clients, the only existing client BEA had at the time the defendants left the firm was Histogenics. As to Leading Indicators, Sirius, and Nano MR, defendants assert that these entities would not have become clients of BEA. According to defendants, BEA failed as a business following the defendants' departure because Butts himself abandoned it.

The problem with both of these arguments is that they are fact-intensive and do not lend themselves well to resolution by way of summary judgment. In determining whether information is entitled to protection as confidential or proprietary, for example, this Court applies the multi-factored test set forth in Jet Spray Cooler v. Crampton, 361 Mass. 835, 840 (1972). Those factors include, among other things: a) the extent to which plaintiff took steps to keep the information confidential; b) the value of the information to plaintiff and its competitors; and c) the extent to which the information is already in the public domain. That is a factual inquiry

which is extremely difficult to decide based simply on affidavits and deposition testimony. The same is true with regard to whether there is a causal connection between the acts that the plaintiffs have identified as unlawful and the harm for which they seek compensation. Determining why BEA failed and why certain clients went to Outcome requires an assessment regarding the credibility of certain testimony, for example, and then a determination as to what weight to accord that evidence if it is believed. Plaintiffs may very well be unable to prove that BEA would have gotten certain business that ultimately went to Outcome, but the fact that defendants were engaged in discussions with Outcome at the same time that they were in contact with these prospective clients, coupled with the fact that these entities ultimately did go to Outcome (and thus benefited the defendants), provides some basis to infer such a causal connection. In short, plaintiffs may have very weak case, but that is not the test on a motion for summary judgment.

Although it was not emphasized at the hearing on this motion, one of the arguments that the defendants make is less fact specific, concerning whether either defendant owed any fiduciary or contractual duty to BEA or Butts. As to Freedman, defendants contend that BEA's Operating Agreement (OA) specifically renounces the existence of any fiduciary duties. This Court disagrees. A limited liability company is like a close corporation: the relationship among its members must be one of trust, confidence and absolute loyalty if the enterprise is to succeed. See Donahue v. Rodd Electrotype Co., 367 Mass. 578, 592-593 (1975). It is true that a contract (like an operating agreement) can limit or even eliminate these fiduciary obligations. See, e.g., Chokel v. Genzyme Corp., 449 Mass. 272, 278 (2007) ("When a director's contested action falls *entirely* within the scope of a contract between the director and the shareholders, it is not subject to question under fiduciary duty principles") (italics supplied); see also Blank v. Chelmsford

Ob/Gyn, P.C., 404 Mass. 408 (1995). On the other hand, the SJC has made it clear that "the presence of a contract will not always supplant a shareholder's fiduciary duty, " see Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 727-728 (2013), and that, "unless the contract clearly and expressly indicates a departure from those obligations, general fiduciary principles apply." Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 537-538 (2014). Here, the OA provided that the LLC "is not intended to be a general partnership, limited partnership or joint venture, and no Member shall be considered to be a partner or joint venture of any other Member for any purposes other than foreign, domestic, federal and provincial local income tax purposes, and this Agreement shall not be construed to suggest otherwise." Section 1.07 of OA, Exhibit 3 of Appendix. This Court does not regard this provision as a clear and unequivocal elimination of one member's fiduciary responsibility to another. As to Ben-Joseph, he was not a member of BEA and the evidence in the summary judgment record does not support the conclusion that he exercised sufficient control over the affairs of the LLC so as to owe to the plaintiffs a similar duty of loyalty and utmost good faith. There is evidence that he aided and abetted Freedman in breaching his fiduciary obligations, however. Thus, although the other claims against Ben-Joseph (like breach of contract) are dubious, there is enough to keep him in this case.[2]

CONCLUSION AND ORDER

For all the foregoing reasons, the defendant's Motion for Summary Judgment is **DENIED**. This matter is scheduled for a Final Pretrial Conference on December 5, 2017 at 2:00 p.m.

Dated: October 26, 2017

Janet L. Sanders
Justice of the Superior Court

[2] The contract claims against Freedman also appear to be questionable. Freedman had no employment agreement with BEA and, like Ben-Joseph, was free to leave at any time and even "engage in and possess interests in other business ventures" even where those business ventures are similar to BEA. See 4.09 of OA.