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TULLETT PREBON PLC, TULLETT PREBON FINANCIAL SERVICES LLC F/K/A TULLETT LIBERTY SECURITIES LLC, and TULLETT PREBON AMERIAS CORP.	:	HUDSON COUNTY: LAW DIVISION
Plaintiffs,	:	DOCKET NO. HUD-L-3796-11
vs.	:	**Civil Action**
BGC PARTNERS, INC.	:	**OPINION**
Defendants.	:	

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Introduction[1]

Presently before the Court are Defendant BGC Partners, LLC's ("BGC") motions for involuntary dismissal and directed verdict pursuant to R. 4:37-2(b) and 4:40-1. This motion, which has been the subject of briefs filed by BGC on November 12, 2014 and December 22, 2014 and briefs filed by Plaintiffs Tullett Prebon PLC, Tullett Prebon Financial Services LLC, and Tullett Prepon Americas Corp. (collectively "Tullett") on November 24, 2014 and December 29, 2014, seeks to dismiss all or part of Tullett's Complaint for failing to adduce necessary evidence at trial for a rational jury to find necessary elements of Tullett's claims.

This matter arises out of a complex commercial dispute between competitors in the interdealer brokerage industry. Tullett alleges that BGC engaged in an unlawful scheme to destroy Tullett's business through a mass hiring of Tullett's brokers. Plaintiff's complaint, filed July 14, 2011, alleges four (4) causes of action, including: (1) a violation of the New Jersey Racketeering Influenced and Corrupt Organizations Act (N.J. RICO); (2) unfair competition; (3) misappropriation of trade secrets and confidential information; and (4) tortious interference with business relationships (also known as prospective economic advantage)

To preface the Court's written opinion, the Court notes that it is not bound by the findings of fact and conclusions of law articulated in its August 2014 written opinion denying Defendant's motion for summary judgment a few weeks before the trial started in September. Generally, "summary judgment motions are . . . decided on documentary-evidential materials, while the directed verdicts are based on evidence presented during a trial." Brill v. The Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). Courts, therefore, decide motions for involuntary dismissal and directed verdict on a different evidentiary basis than when deciding motions for summary judgment. See, e.g., Fox v. Taubman, 2008 N.J. Super. Unpub. LEXIS 59 at *7 (App. Div. Mar. 27 2008) (concluding its prior decision reversing the Law Division's grant of summary judgment did not preclude the Law Division's ability to grant a motion for involuntary dismissal because "that decision was based on the procedural posture and the documentary evidence available at that time.").

Dismissal is appropriate under R. 4:37-2(b) and R. 4:40-1 on any claim where "no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present." Perez v. Professionally Green, LLC, 215 N.J. 388, 407

[1] The Court now issues this written opinion on defendant's motions for a directed verdict which was the subject of the Court's bench opinion on January 2, 2015. Ultimately the case was resolved by settlement during Jury deliberations 11 days later, but the Court felt the complex commercial issues presented in this 4 and a half month trial including the issues presented in this motion merited the issuance of this opinion.

(2013) (internal quotation marks and citation omitted). Both R. 4:37-2(b) and R. 4:40-1 apply the same standard and prohibit the Court from granting judgment if the plaintiff has shown a prima facie case. Verdicchio v. Ricca, M.D., 179 N.J. 1, 30 (2002). The standard is as follows:

> [I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.

Verdicchio, M.D., supra, 179 N.J. at 30.

Stated differently, dismissal is only appropriate when no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present. See Pitts v. Newark Bd. Of Education., 337 N.J. Super. 331, 340 (App. Div. 2011). Under R. 37-2(b) and R. 4:40-1, the judge is prohibited from considering "the worth, nature or extent (beyond a scintilla) of the evidence," and must focus only on "its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-7 (1969). However, evidence that raises a mere possibility or conjecture is not sufficient to defeat dismissal. Fox, supra, 2008 N.J. Super. Unpub. LEXIS 59 at *7.

For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** BGC's motion for involuntary dismissal and directed verdict pursuant to R. 37-2(b) and R. 4:40-1, **GRANTING** BGC's motion in regard to Plaintiff's NJ RICO count, but **DENYING** BGC's motion in regard to Plaintiff's common law claims for unfair competition and misappropriation of trade secrets and confidential information.

Analysis

(1) RICO

After analyzing the evidence adduced at trial, the Court finds New York law should apply and dismisses Tullett's RICO claim because New York's RICO statute does not provide for a private, civil cause of action to redress RICO violations.

Although not critical to its decision, which dismisses the RICO claim based on choice of law considerations, the Court will comment generally on the adequacy of the

predicate acts asserted by the Plaintiff, more specifically: commercial bribery, computer related theft, mail fraud, and wire fraud.

A. Choice of Law:

In the Court's August 18, 2014 written opinion denying Defendant's motion for summary judgment, the Court decided the legal question of whether New Jersey's or New York's law would apply to the present action. After analyzing the legislative findings for both New York's and New Jersey's RICO statutes and relying on Cornett v. Johnson & Johnson, 211 N.J. 362, 377 (2012), the Court concluded (1) a conflict does not exist between New York and New Jersey Law, and (2) even if a conflict did exist, which would necessitate a conflicts of law analysis, New Jersey law would still apply. S.J. Op. at 18-20.

The Court now revisits the issue following the trial and after reviewing the following cases more closely:

1. Prudential Insurance Company of America, et al. v. Goldman, Sachs & Company, et al. 2013 WL 1431680 (D.N.J. Apr. 9, 2013).
2. Fairfax Financial Holdings Limited v. S.A.C. Capital Management, et al., MRS-L-2032-06 (Law Div. 2012).
3. Ferris, Baker, Watts, Inc. v. Deutsche Bank Securities LTD, 2004 U.S. Dist. LEXIS 22588 (D. Minn. Nov. 5, 2004).

In New Jersey, the law of the case doctrine provides that "[p]rior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." Underwood v. Atl. City Racing Ass'n, 295 N.J. Super. 335, 340 (App. Div. 1996) (internal quotation and citation omitted).

Presently, the Court is not confronted with substantially different evidence or new controlling authority although the Court did have the benefit of listening to approximately 50 witnesses whose testimony added to the question of which state had more substantial contacts as to the alleged predicate acts. However, it is well established that the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Lombardi v. Masso, 207 N.J. 517, 534 (2011) (internal citation and quotation marks omitted). Accordingly, the Court will reconsider the legal question of whether New York or New Jersey law applies as part of the Defendant's motion for involuntary dismissal and directed verdict on the RICO count.

BGC argues New York or English law should apply and therefore, the Court should dismiss Tullett's RICO claim because New York and English Law do not provide a private, civil cause of action to redress RICO violations.

In response, Tullett argues New Jersey law should apply because there is not a conflict between New Jersey and New York Law. Tullett also argues that even if there is a conflict, the Court should still apply New Jersey law because New Jersey has the most important interest in the present action

The first step the Court must undergo is to determine whether an actual conflict exists between New York, New Jersey, or English law applies to. This step requires the Court to examine "the substance of the potentially applicable laws to determine whether there is a distinction between them." P.V. v. Camp Jaycee, 197 N.J. 132, 143 (2008) (quotations omitted).

The second step the Court must undergo is to decide which state has the most significant relationship to the parties and their underlying conduct. Camp Jaycee, supra, 197 N.J. at 145-57. This step, in itself, has two steps.

First, the Court must answer four questions, identified in Restatement (Second) Choice of Laws Section 145(2), to determine which state has the most significant relationship to the parties and their corresponding conduct. Camp Jaycee, 197 N.J. at 143, 145-47. Section 145(2) states:

> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflict of Laws § 145(2) (1971); see Camp Jaycee, supra, 197 N.J. at 143, 145-47.

Second, the Court, as stated in Section 145(2), must analyze its responses to the Restatement Section 145(2) factors in conjunction with the Restatement Section 6 principles. See Restatement (Second) of Conflict of Laws § 145(2) (1971); see Camp Jaycee, supra, 197 N.J. at 147.

Section 6 states:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971)

The Section 6 principles, "reduced to their essence," are (1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." Camp Jaycee, supra, 197 N.J. at 147 (internal quotations omitted). At this stage, the Court must ask, "do the [S]ection 6 considerations gin up or diminish the values to be ascribed to the contracts relative to the issue presented?" Camp Jaycee, supra, 197 N.J. at 147.

First, the Court finds there is, in fact, a conflict between New Jersey's and New York's respective RICO statutes. The New York RICO statute, unlike the New Jersey RICO statute, does not provide a private, civil cause of action. Accordingly, Tullett would not have a cause of action in the present matter but-for the Court applying New Jersey Law.

The Court's conclusion that New Jersey's and New York's RICO statutes are in conflict also has adequate support in both state and federal case law, albeit, unreported decisions. The Law Division in Fairfax Fin. Holdings Ltd., supra, MRS-L-2032-06, when tasked with determining whether there was a conflict between New Jersey and New York RICO statutes, found a conflict "because the application of New Jersey law would permit plaintiffs' claim to go forward, while the application of New York law would end the claim. Fairfax Fin. Holdings Ltd., supra, MRS-L-2032-06 at *9-10.

Similarly, the U.S. District Court of the District of New Jersey in Prudential Insurance Co. of America, supra, 2013 WL 1431680, concluded, when asked to determine whether a conflict exists between the New Jersey and New York RICO statutes, that "an actual conflict of law exists between New Jersey and New York's RICO statute" because "application of the New York RICO statute would effectively dispose of Plaintiff's RICO claim." Prudential Insurance Company of America, supra, 2013 WL 1431680 at *6.

The U.S. District Court for the District of Minnesota made a similar conclusion when finding that a conflict exists between New Jersey and Minnesota RICO statutes, stating "an actual conflict of laws" between the New Jersey and Minnesota RICO statutes "because Minnesota's RICO Act does not recognize a private cause of action." Ferris, Baker, Watts, Inc., supra, 2004 WL 2501563 at *3.

Tullett argues there is no conflict between New Jersey and New York RICO statutes because they share a common public policy of reducing or eliminating the impact of criminal racketeering activity on their respective economies, citing Cornett, supra, 211 N.J. at 377.

The situation in Cornett, supra, however, based upon the Court's closer reading of that decision, in light of the cases just cited above, is distinguishable.

In Cornett, supra, 211 N.J. 362, plaintiff, a Kentucky resident, suffered an injury from a medical implant that was manufactured by a New Jersey corporation. Kentucky has a one (1) year statute of limitations, whereas New Jersey has a two (2) year statute of limitations. Although the Court applied Kentucky law to find that plaintiff's complaint was time-barred, the Court explained that the difference between the statute of limitations was not a true conflict. Specifically, the Court explained:

> [I]t is clear that no conflict of laws exists between New Jersey and Kentucky. Both states apply the discovery rule. Although Kentucky does not apply the discovery rule to all product liability actions, it does apply the discovery rule to latent injuries caused by product defects. To be sure, Kentucky requires filing of a complaint within one year of accrual of the cause of action; New Jersey requires filing within two years of accrual. This difference, however, does not create a true conflict of laws between these states, unless the differences are offensive or repugnant to the public policy of this state.

Cornett, supra, 211 N.J. at 377-78 (citation omitted)

Unlike the present situation, the two states at issue in Cornett, supra, – New Jersey and Kentucky – both allowed for such claims and used statutes of limitations. The only difference was that New Jersey's statute of limitations was one year longer than Kentucky's statute of limitations. Here, the Court's application of New York law means that Tullett has no private, civil cause of action under RICO. Because Tullett is foreclosed from pursuing a civil remedy if the Court applies New York Law, a decision New York made in order to place RICO enforcement "solely in the hands of the State Attorney General," the Court finds there is a substantive difference between New Jersey and New York RICO statutes. Fairfax Fin. Holdings Ltd., supra, MRS-L-2032-06 at *15.

Second, the Court finds (1) NJ RICO does not have a statutory directive to apply NJ law, and (2) New York has the most significant interest in applying their law to the present situation.

First, NJ RICO does not contain a statutory directive that would require this Court to apply New Jersey law when the alleged racketeering activity impacts New Jersey commerce.

In support of concluding NJ RICO contains a statutory directive, Plaintiff cites to the statute's broad definitions of "person,"[2] "enterprise,"[3] and "racketeering activity,"[4] Plaintiff also cites to N.J.S.A. 2C:41-2, which states

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Plaintiff also relies on Turner v. Aldens, 179 N.J. Super. 596 (1981) where the Appellate Division applied the Retail Installment Sales Act extraterritorially to an out-of-state retailer because applying foreign law would contravene New Jersey's fundamental policy of ensuring "New Jersey consumers the protection of RISA no matter from where the seller deals." Turner, supra, 179 N.J. Super. at 601.

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[2] "Person" includes any individual or entity or enterprise as defined herein holding or capable of holding a legal or beneficial interest in property.

[3] Enterprise" includes any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities.

[4] Racketeering Activity" includes "any of the following crimes which are crimes under the laws of New Jersey or are equivalent crimes under the laws of any other jurisdiction. . . ."

Tullett's argument, however is not persuasive. The definitions and statutes cited by Tullett are written in broad language, but they do not show that the New Jersey General Assembly intended New Jersey law to always apply and prohibit this Court from undergoing a choice-of-law analysis under Section 145(2) and Section 6(2). See Fairfax Financial Holdings Limited, supra, MRS-L-2032-06 at 11 ("Had the legislature intended to ignore common law [choice-of-law analysis], it was incumbent upon the legislature to state that."); Prudential Insurance Company of America, supra, 2013 WL 1431680, at *6 (deferring the choice-of-law analysis but noting that the common law "most significant relationship" test would apply to determine which state's law governed civil NJ RICO claim). Furthermore, Tullett has not cited a case that says Restatement (Second) of Conflict of Laws § 6(1) applies to prevent the Court from undergoing a choice-of-law analysis under Section 145(2) and Section 6(2).

Next, the Court will undergo a choice-of-law analysis.

The Court finds that applying the Section 145(2) factors to the evidence adduced at trial shows New York has the most contacts to the present action. England has a significant interest too because Tullett is headquartered in England and is seeking damages for the decrease in its publicly traded stock on the London Stock Exchange. See Tr. 8065:23-8066:10 (Mr. Smith), Tr. 11165:25-11166:11 (Mr. Grinblatt). However, the evidence adduced at trial demonstrates that most of the conduct relevant to the jury's assessment of BGC's conduct occurred in New York.

For example,

1. A majority of the brokers hired in the 2009 U.S. Hiring worked in the Tullett Subsidiaries' New York offices. Tr. 2202:10-21 (Mr. Bolton).
2. All of the brokers were recruited to work in the BGC Subsidiaries' New York offices and were hired pursuant to contracts, which included New York choice-of-law provisions, drafted in New York. See Tr. 2202:22-25 (Mr. Bolton).
3. Messrs. Del Vecchio's and Ozzimo's alleged actions occurred at the New York Tullett office or at their New York homes. See Tr. 7409:14-20 (Mr. Ozzimo), Ex. D1072, Ex. P1066
4. Every recruitment meeting BGC officials had with Tullett brokers occurred in New York. See, e.g., Tr. 3927:14-23 (Mr. Lynn), Tr. 4467:10-21 (Mr. Webster), Tr. 4426:23 – 4427:5 (Mr. Windeatt), Tr. 5343:20-5344:8 (Mr. Rogers), Tr. 6717:3-11 (Mr. Pagan), Tr. 2893:5-9 (Mr. Farrell).

The Section 6 factors also do not diminish the values "to be ascribed to the contacts relative to the issue presented." Camp Jaycee, supra, 197 N.J. at 147. Both New Jersey and New York have an interest in combatting organized crime. However, New York purposely chose not to provide private citizens a private, civil cause of action,

presumably to prevent litigants from acquiring treble damages and to defer RICO enforcement to the state's Attorney General, while New Jersey provided a private, civil cause of action, presumably to provide treble damages to victims of organized crime. New Jersey's interest, however, is diminished because Tullett, the alleged victim in this present action, is a corporation headquartered in England who suffered its injury in England when it's stock allegedly dropped as a result of BGC's recruitment practices. Because most of the alleged criminal activity that BGC allegedly committed occurred in New York, and Tullett suffered its injury in England, New York has a more significant interest to apply its law in the present action.

Tullett argues New Jersey has the most significant interest in the present action because BGC sought to hire away its brokers from its subsidiaries, which had principal place of business in New Jersey.

This argument, however, is not persuasive. The corporate parent, Tullett, not Tullett's U.S. Subsidiaries, is seeking damages in the present action. Tullett cannot argue New Jersey law applies because its U.S. subsidiaries are located in New Jersey when Tullett is not seeking damages suffered by its U.S. subsidiaries.

Accordingly, because New York law applies and New York's RICO statute does not have a private, civil cause of action to redress RICO violations, the Court grants Defendant's motion in regard to Tullett's NJ RICO count.

The Court will now comment on the balance of Defendant's argument for the dismissal of the RICO count, although it is not necessary to reach its conclusion for dismissal based on the choice of law analysis.

B. Pleading

BGC argues Tullett failed to adequately plead the Commercial Bribery and Computer-Related Theft Claims in its Complaint.

Under R. 4:5-7, pleadings "shall be simple, concise and direct, and no technical forms of pleading are required." R. 4:5-7. The complaint in a civil action must "fairly apprise an adverse party of the claims and issues to be raised at trial." Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 75 (1990); Ash v. Frazee, 37 N.J. Super. 542, 546 (App. Div. 1955). To comply with this requirement,

> The acts upon which the claim or claims are based need only be pleaded according to their legal effect in form fairly to apprise the adversary of the facts intended to be proved . . . . The grand objective of the movement for

> simplified procedure by rules of court is the elimination of the interminable prolixity and absurd technicalities of special pleading. . . . But however liberal pleadings may be, the requirement still remains that at least the gist of a substantive ground of relief must be set forth, albeit informally.

Jersey City v. Hague, 18 N.J. 584, 602 (1955).

Because R. 4:5-7 only requires Tullett to plead the facts that will be at issue in the present action, BGC's argument is not persuasive. The Court finds that Tullett's Complaint averred adequate facts to put BGC on notice to comply with R. 4:5-7 that it was suing BGC for commercial bribery and computer related theft as predicate crimes for liability under NJ RICO. For example,

1. Complaint at ¶ 94(b): Tullett alleged BGC conspired with Tullett's senior desk managers to conceal an unlawful scheme of commercial bribes
2. Complaint at ¶¶ 29-35, 40-46: Tullett detailed BGC's efforts to induce breaches of duties by Tullett's managers by offering millions of dollars of up-front payments;
3. Complaint at ¶¶ 29-35, 40-46, 79-82: Tullett described BGC's efforts to obtain confidential information, including salary and compensation information, its success in obtaining that information as part of its poaching campaign, and specifically naming Mr. Del Vecchio as the person who secretly met with BGC and stole confidential Tullett documents from Tullett's electronic databases

Accordingly, Tullett has adequately put BGC on notice of its claims for Commercial Bribery and Computer-Related Theft.

C. Predicate Crimes

Even if New Jersey law applies, Defendant argues that Tullet's RICO claim should still be dismissed because Tullett has failed to failed to introduce sufficient evidence, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, to permit the jury to find that BGC committed any of the RICO predicate acts (e.g. commercial bribery, computer related theft, mail fraud, and wire fraud).

To establish liability under NJ RICO, a plaintiff must prove the following elements:

(1) the existence of an enterprise;
(2) that the enterprise engaged in or its activities affected trade or commerce;
(3) that the defendant was employed by, or associated with the enterprise;
(4) that [the defendant] participated in the conduct of the affairs of the enterprise; and
(5) that [the defendant] participated through a pattern of racketeering activity.

State v. Ball, 141 N.J. 142, 181 (1995) (internal quotation marks omitted).

Tullett must also establish that the damages suffered were proximately caused by the defendant's prohibited conduct. Interchange State Bank v. Veglia, 286 N.J. Super. 164, 177-178 (App. Div. 1995). To determine if damages were proximately caused by the defendant's conduct, "the court must examine the chain of events to determine who was directly injured by the predicate RICO acts. If a plaintiff is harmed only in an indirect way by the predicate acts, the plaintiff does not have standing to pursue a RICO claim." Interchange State Bank, supra, 286 N.J. Super. at 180.

i. Bribery

BGC argues has failed to introduce sufficient evidence to permit the jury to find that BGC bribed numerous former Tullett employees.

Bribery constitutes racketeering activity under the New Jersey RICO statute. N.J.S.A. 2C:41-1(a)(1)(g). Under the New Jersey bribery statute, a person commits the crime of bribery if he "solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject; as (1) [a]n agent, partner, or employee of another[.]" N.J.S.A. 2C:21-10(a). Bribery also is committed if a person "confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal[.]" N.J.S.A. 2C:21-10(c). To prove commercial bribery, the moving party "must establish that the payments to the agent were made secretly, without the knowledge and consent of the principal, and must be attended with the intent to influence the agent's action with respect to his employer's business." Jaclyn, Inc. v. Edison Bros. Stores, Inc., 170 N.J. Super. 334, 354 (Law Div. 1979).

First, the Court finds the jury will be forced to speculate on the reasonableness of the compensation packages that BGC provided to Tullett's former employees because Tullett failed to present expert testimony on what constitutes customary industry compensation in the inter-dealer brokerage industry.

It is well settled that a "[a] jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have

sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997) (quotation omitted). The Court, therefore, must determine the question of whether a financial compensation package is reasonable in the inter-dealer broker industry is within the "kin of the average juror." Kapuscenski v. Hess Corp., 2014 WL 1125055, at *4 (N.J. App. Div. Mar. 24, 2014).

The Court finds that expert testimony is required to decide the reasonableness of BGC's compensation packages because the inter-dealer brokerage industry is a highly specialized industry outside the "kin of the average juror." Compensation such as sign-on bonuses routinely vary from person to person based on a variety of factors, including market conditions, anticipated revenue generation, and general business objectives. See, e.g., Tr. 2555:13-15 (Mr. Bolton stating "there are multiple reasons why [two brokers] secured a large sign-on bonus"); Tr. 3877:24-3880:22 (Mr. Lynn explaining that sign-on bonus levels "varies on individual . . . From my perspective and from my very senior guys, everyone knows that we go outside of that many times and have done many times for either desk heads or top senior producers, people that are going to make a massive difference to you. So when someone comes along that's unhappy where they're working at today or a certain opportunity, you will go through that many times to attract and bring into the company a key person or a key hire."). Furthermore, it is not uncommon for Courts to use expert testimony aid their determination of whether compensation is considered "reasonable." See, e.g., Multi-Pak Corp. v. C.I.R., 99 T.C.M. (CCH) 1567 at *5 (T.C. 2010) ("Courts often use expert witness opinions to evaluate the reasonableness of compensation.") Accordingly, Tullett should have provided the jury with expert testimony on the industry standards for compensation in the inter-dealer brokerage industry to determine whether BGC's sign-on bonuses were reasonable or could constitute bribes.

Second, there is no factual basis in the record for a juror to reasonably conclude BGC committed bribery. Tullett has failed to adduce evidence that the sign-on payments BGC made to Tullett's employees were done to influence the said employees' actions viz Tullett's business.

An "employee owes a duty of loyalty to the employer, and the employee must not, while employed, act contrary to the employer's interests. . . ." Auxton Computer Enterprises, Inc. v. Parker, 174 N.J. Super. 418, 425 (App. Div. 1980). When pursuing new employment that is in completion with his or her current employer, the employee "may not solicit his employer's customers for his own benefit before he has terminated his employment" or do "similar acts in direct competition with the employer's business." Auxton Computer Enterprises, Inc., supra, 174 N.J. Super. at 424. To determine whether certain behavior is actionable under law, the Court must analyze "the nature

and character of the act performed . . . and whether or not the act has caused some particular injury to the employer." Auxton Computer Enterprises, Inc., supra, 174 N.J. Super. at 424.

Tullett has not presented any cognizable evidence of an agreement from its former employees to engage in wrongful conduct in exchange for the sign-on bonus from the BGC Subsidiaries. Testimony shows that sign-on bonuses are commonplace in the inter-dealer broker industry and are not wrongful. See, e.g., Tr. 7822:7-14 (Mr. Smith), Tr. 10550:15-18 (Mr. Mainwaring); Tr. 2554:10-15 (Mr. Bolton). Tullett, itself, has provided substantial sign-on bonuses when hiring brokers from other firms. See, e.g., Tr. 5347:21-5349:5 (Mr. Rogers); Tr. Ex. J451 (Tullett Subsidiary's contract including $5 million bonus to broker being recruited by ICAP); J448 (Tullett Subsidiary's contract including $4 million bonus to broker being recruited by ICAP); D2004 (proposing $1 million bonus for hiring of broker employed by competitor); D1798-99 (listing paid or contemplated bonuses for brokers employed by other firms in amounts of $2.5 million, $1.7 million, and $1 million, among others).

BGC also had a legitimate business interest in providing large bonuses to the brokers it recruited. Testimony shows BGC wanted to enter new markets and increase its share in the market place for certain desks. See, e.g., Tr. 3894:14-3899:19. Testimony shows that desk heads have a "track record of building a business, of growing a business, [and] developing the business." Tr. 4477:11-19 (Mr. Windeatt). Testimony also shows that brokers such as Messrs. Rogers, Byrne, Siedem, Miller were top brokers in their respective marketplaces. Tr. 3890:9-3894:13 (Mr. Lynn).

Tullett, in opposition to BGC's motion, argues the size of the sign-on businesses give a reasonable inference that BGC bribed Tullett's former employees to act against Tullett's interest.

This argument, however, is not persuasive.

Again, the jury will not know what the industry custom for compensation in the inter-dealer brokerage industry without providing expert testimony on the reasonableness of BGC's signing bonuses. Tullett cites to Mr. Windeatt's and Mr. Lynn's testimony that "the rule of thumb" for sign-on bonuses is 5% to 10% of future projected revenue. Tr. 4123:5-18 (Mr. Windeatt); Tr. 3660:17-20, 3663:14-3664:22 (Mr. Lynn). The jury, however, will still be left to speculate on whether BGC's "rule of thumb" corresponds with industry custom at the time of the U.S. attack.

Second, the cases cited by Tullett are distinguishable from the present situation. Jaclyn v. Edinson Brothers Stores, 170 N.J. Super. 334 (Law Div. 1979) involved retailers and fashion buyers providing a manufacturer of popular hand bags with kickbacks and gifts to influence the manufacturer's business decisions. The remaining cases, U.S. v. McNair, 506 F.3d 1152 (11th Cir. 2010), New Jersey v. Smollok, 148 N.J. Super. 382 (App. Div. 1977), United States v. Uriuoli, 613 F.3d 11 (1st Cir. 2010), and U.S. v. Bryant, 655 F.3d 232 (3d. Cir. 2011) all involve bribes between government officials and private sector citizens.

Accordingly, the Court finds BGC has failed to introduce sufficient evidence to permit the jury to find that BGC bribed numerous former Tullett employees.

ii. Computer Related Theft

BGC argues has failed to introduce sufficient evidence to permit the jury to find that BGC committed computer related theft.

Theft constitutes racketeering activity under the N.J. RICO statute. N.J.S.A. 2C:41(a)(1)(n) provides that "racketeering activity" means "theft and all crimes defined in chapter 20 of Title 2C of the New Jersey Statutes." Under New Jersey's computer-related theft statute, a person commits the crime of computer-related theft if he "purposely or knowingly and without authorization, or in excess of authorization: (a) [a]ccesses any data, data base, computer storage medium, computer program, computer software, computer equipment, computer, computer system, or computer network[.]" N.J.S.A. 2C:20-25(a).

New Jersey defines "authorization" as

> "permission, authority or consent given by a person who possesses lawful authority to grant such permission, authority or consent to another person to access, operate, use, obtain, take, copy, alter, damage or destroy a computer, computer network, computer system, computer equipment, computer software, computer program, computer storage medium, or data."

N.J.S.A. 2C:20-23(q).

The Chancery Division has defined New Jersey's computer related theft statute narrowly to "the actions of an insider, who enjoys password or code-based access to information, but uses it in a way that violates internal policies." State v. Riley, 412 N.J. Super. 162, 179 (Ch. Div. 2009).

First, the Court finds Messrs. Del Vechhio and Ozzimo could not have caused the injury for which Tullett seeks damages. Most of the computer-related evidence that Tullett has elicited during the trial relates to conduct that occurred after the 2009 U.S. Hiring had already occurred, and after the stock drop that Tullett Parent relies on as its sole measure of injuries. See, e.g., Tr. 10307:14-10308:12 (Mr. Harrison). Thus, Messrs. Del Vechhio and Ozzimo's could not have cause the injury that Tullett seeks damages for.

Second, BGC has not engaged in conduct that constitutes a violation of New Jersey's computer-related theft statute.

Tullet has not adduced evidence that Messrs, Del Vecchio, or Ozzimo transferred a Tullett document to BGC related to the 2009 U.S. Hiring or that BGC received or possessed a Tullett document that it used in connection with the 2009 U.S. Hiring. Tr. 7560:12-20; 7639:11-20 (Mr. Ozzimo); Tr. 8594:24-8595:11 (Mr. Del Vecchio); Tr. 9165:17-25 (Mr. Lynn). Mr. Harrison, Tullett's computer forensic expert, did not make a finding of whether BGC received the files either. Tr. 10313:9-19 (Mr. Harrison)

Furthermore, Tullet has not adduced sufficient evidence to show Messrs. Del Vecchio and Ozzimo exceeded their authorization when they accessed the computer information. According to the Chancery Division, New Jersey's computer related theft statute was not meant to criminalize "the actions of an insider, who enjoys password or code-based access to information, but uses it in a way that violates internal policies." State v. Riley, 412 N.J. Super. 162, 179 (Ch. Div. 2009).

Tullett argues the jury could infer Mr. Del Vecchio engaged in computer-related theft because (1) Mr. Del Vecchio failed to inform his Tullett superiors that he had been approached by BGC or that he was scheduling and attending meetings with BGC executives, (2) Mr. Del Vecchio forwarded confidential information to his personal email, (3) Mr. Harrison's expert testimony shows documents were accessed and portable hard drives were inserted into Mr. Del Vecchio's laptop, (3) BGC provided Mr. Del Vecchio and Mr. Ozimo with legal indemnities, and (4) Mr. Del Vecchio gave Mr. Ozimo a DVD with confidential information.

Tullet's arguments, however, are not persuasive. Tullett failed to adduce evidence of Messrs. Del Vecchio and Ozzimo accessing information that it did not have access to or send information to people who were not granted access to the information. Furthermore, Tullett's arguments do not create an inference of computer-related theft to withstand BGC's motions for directed verdict and involuntary dismissal.

"[A] jury may not be permitted to draw a factual inference essential to liability unless the evidence is such that reasonable men could fairly disagree on the legitimacy of the inference on the basis of probability rather than mere conjectural possibility." Mason v. Niewinski, 66 N.J. Super. 358, 370 (App. Div. 1961). A reasonable juror could not conclude BGC engaged in computer related theft simply because Del Vecchio and Ozzimo accessed certain documents were accessed, a portable hard drive was inserted into Del Vecchio's laptop, and Del Vechhio forwarded confidential information to his personal email, etc. Accordingly, Tullett has failed to meet its burden to adduce evidence from which a juror could reasonably conclude that Mr. Del Vecchio or Ozzimo exceeded their authorization as that term is defined under the law, or that BGC could possibly be liable for any such conduct.

iii. Wire and Mail Fraud

BGC argues has failed to introduce sufficient evidence to permit the jury to find that BGC committed wire and mail fraud.

New Jersey's RICO statute includes in "racketeering activity" any conduct defined as "racketeering activity" under the federal RICO statute, 18 U.S.C. 1961(1). See N.J.S.A. 2C:41-1((2). Although the prohibitions against mail fraud and wire fraud have their roots in the federal RICO statute, the N.J. RICO statute requires the same standards of proof. See e.g., In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 2009 U.S. Dist. LEXIS 58900 (D.N.J. July 10, 2009); Cetel v. Commw. Life Ins. Co., 460 F.3d 494, 510 (3d Cir. 2006); State v. Ball, 141 N.J. 142, 661 (1995) ("[T]he New Jersey Supreme Court believed the New Jersey RICO statute was and should be consistent with the federal RICO statute.").

The mail and wire fraud statutes contain the same substantive elements: (1) the existence of a scheme to defraud; (2) the use of the mails (18 U.S.C. § 1341) or interstate wires (18 U.S.C. § 1343) in furtherance of the fraudulent scheme; and (3) culpable participation by the defendant. United States v. Pearlstein, 576 F.2d 531, 534 (3d Cir. 1978) (mail fraud); United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994) (wire fraud is identical to mail fraud statute except that it requires interstate wires instead of mailings). To prove the first element, the plaintiff must show that the defendant's "scheme to defraud" included "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." Pearlstein, 576 F.2d at 535. In addition, the misrepresentation or omission must be material. Neder v. United States, 527 U.S. 1, 25 (1999).

"[A]s its terms and purpose make clear, [t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." Parr v. United States, 363 U.S. 370, 389-90 (1960) (internal citation and quotation marks omitted). Mere use of the mails or interstate wires is not enough to satisfy this element of the federal statutes. See, e.g., Garrick-Aug Assocs. Store Leasing, Inc. v. Hirschfeld, 652 F. Supp. 905, 907 (S.D.N.Y. 1986) (dismissing RICO claim despite allegations of mailings). Rather, the mails or interstate wires must be used in furtherance of the fraudulent scheme. See, e.g., United States v. Hagler, 708 F.2d 354, 354 (9th Cir. 1982) (reversing mail fraud conviction where mailings "were not in furtherance of the scheme to defraud").

Courts have noted that unless closely controlled, the use of the mail and wire fraud statutes as RICO predicate acts risks transforming run-of-the-mill common law claims into trumped-up racketeering claims:

> to find the necessary criminality in those activities requires substantive inquiry beyond the mere fact of the communication, ordinarily by reference to other relevant considerations such as the extent to which the mailings were part of an intentional scheme to defraud, and in fact deceived, the victim. And even in connection with an actual fraudulent scheme, there may be substantial innocent or incidental use of the mail or wires that may not relate to the any unlawful activity of the enterprise or that involves no deception of the plaintiff. . . . virtually every ordinary fraud is carried out in some form by means of mail or wire communication. Thus, the potential for transforming garden-variety common law actions into federal cases is greater if grounded entirely on these predicates.

Gross v. Waywell, 628 F. Supp. 2d 475, 493 (S.D.N.Y. 2009).

The Court finds there is insufficient evidence for a jury to find BGC guilty of wire fraud because there is no support in the record that BGC made a material misrepresentation to a broker who actually joined in the 2009 U.S. Hiring for which Tullett Parent seeks damages.

First, the Court finds the brokers' resignation faxes were not, in themselves, fraudulent schemes. "For conviction under the mail fraud statute, the mails must be used 'for the purpose of executing' the fraudulent scheme, and not merely as a result of' such scheme." United States v. Alston, 609 F.2d. 531, 538 (D.C. Cir. 1979). Thus, the resignation/notice faxes might have revealed the results of the alleged scheme, but the mailings or wires do not count as mailings or wires "in furtherance of" the scheme.

Tullett, in response, argues the brokers lulled it into believing that they would stay at Tullett until their contract concludes. This argument, however, is not persuasive. The brokers who departed are not defendants here, and were already sued for their allegedly wrongful departures. Instead, the allegedly wrongful scheme at issue for the purposes of the wire fraud allegation can only relate to the mechanisms that BGC employed to recruit the brokers

Second, the Court finds the wires and/or emails discussing BGC's technology and recruitment of entire Tullett desks are not material misrepresentations. In considering whether a statement constitutes a material misrepresentation, New Jersey courts have recognized that the trier of fact should consider the importance of the statement to the plaintiff. Misunderstandings cannot be the basis for wire and mail fraud. Sanville v. Bank of Am. Nat. Trust & Sav. Ass'n., 18 F. App'x 500, 501 (9th Cir. 2001) (must be proof of misrepresentations or omissions which were "reasonably calculated to deceive persons of ordinary prudence and comprehension").

Tullett has failed to adduce evidence that BGC's representations about its technology and recruitment practices actually deceived the brokers who left Tullett for BGC. Many brokers testified they signed their contracts with full awareness of the obvious uncertainty as to the decisions that their colleagues were making. See, e.g., Tr. 5681:2-5; 5682:17-21 (Mr. Feza); Tr. 5863:6-19 (Mr. Venzenio); Tr. 6227:7-13 (Mr. Miller). Furthermore, not a single broker whose hiring is the subject of Tullett Parent's damages claim has testified that he was misled about BGC's technology. See, e.g., Tr. 5679:2-9 (Mr. Feza); Tr. 5362:10-25 (Mr. Rogers).

Accordingly, there is insufficient evidence for a jury to find BGC guilty of wire fraud because there is no support in the record that BGC made a material misrepresentation to a broker who actually joined in the 2009 U.S. Hiring for which Tullett Parent seeks damages.

The Court now addresses the balance of Defendant's motion for a directed verdict on the balance of the complaint (the common law claims) and denies same for the reasons which follow.

(2) Common Law Claims

BGC's motions for directed verdict and involuntary dismissal for Tullett's claims of (1) Misappropriation of Confidential Information, and (2) Unfair competition[5] are denied because Tullett has introduced sufficient evidence, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, to permit the jury to find that BGC committed the common law claims.

The Court will now address each common law claim in turn.

A. Misappropriation of Confidential Information

BGC argues Tullett has failed to introduce sufficient evidence to permit the jury to find that BGC misappropriated confidential information.

To prevail on this claim, plaintiffs must prove five elements by a preponderance of the evidence:

> the existence of a trade secret, (2) communicated in confidence by the plaintiff to the employee, (3) disclosed by the employee in breach of that confidence, (4) acquired by the competitor with knowledge of the breach of confidence, and (5) used by the competitor to the detriment of the plaintiff.

Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424 (3d Cir. 1982).

A Plaintiff must also produce evidence that it "took precautions to maintain the secrecy of the trade secret." Sun Dial Corp v. Rideout, 16 N.J. 252, 260 (1954).

BGC makes three arguments in support of its motion. First, BGC argues Tullett failed to prove that any information that is the subject of Tullett's misappropriation claim is confidential because Tullett did not present the jury with an expert witness to explain what constitutes confidential information in the interdealer broker industry. Second, BGC argues Tullett has failed to prove that confidential information obtained by BGC belonged to the Tullett Parent. Third, BGC argues Tullett failed to show it took adequate measures to protect its confidential information.

The Court is not persuaded by BGC's arguments.

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[5] Prior to the Court's bench decision on January 2, 2015, Plaintiff had voluntarily dismissed its count for Tortious Interference with Tullett's subsidiaries.

First, testimony was adduced that shows that former Tullett employees provided BGC with Tullett information, such as broker contracts and brokers' revenue production, during their recruitment meetings with BGC executives. See, e.g., Ex. 14 at 5981:15-5982:3, 5983:25-5985:14 (Mr. Miller); Ex. 9 at 4128:3-4129:9, 4188:3-16 (Mr. Windeatt); Ex. 16 at 6577:23-6578:3 (Mr. Pagan); Ex. 9 at 4227:14-4228:3 (Mr. Windeatt).

Second, the Court finds the jury can decide the question of whether the information misappropriated was confidential without the assistance of expert testimony. Unlike the question of whether broker's sign on bonuses were reasonable in the inter-dealer brokerage industry where the jury would have to interpret market data and projections on labor market compensation, a juror can determine whether or not the information BGC allegedly acquired was confidential by applying the facts at trial to a legal standard. The jury can also rely on BGC and Tullett executives' testimony that the information misappropriated, such as brokers' revenue production, relationships with customers and the terms of broker contracts, was confidential and proprietary information. See, e.g., Ex. 2 at 1952:5-1954:23 (Mr. Bolton); Ex. 8 at 3971:22-3973:13 (Lynn); Ex. 14 at 5930:21-5934:6 (Miller), Ex. 14 at 5751:11-20 (Mr. Veneziano); Ex. 17 at 6884:4-6885:11 (MR. Shand); Ex. 24 at 9128:16-9130:6 (Mr. Norton).

Third, testimony was adduced that shows Tullett made efforts to protect its confidential information. Tullett's employment contracts with its former desk heads and other employees contained clauses prohibiting the disclosure of confidential information. See, e.g., Ex. 91 (J363) at § 12(a). Tullett protected its confidential financial and technical information by maintaining it in restricted databases that only certain Tullett employees could access. See Ex. 23 at 8796:14-8797:20, 8806:12-8807:15 (Mr. Shamberger); Ex. 41 (P2650); Ex. 26 (Day 32) at 9746:18-9748:6; 9767:6-13 (Mr. Monaco). Tullett's employee handbooks also prohibited all employees from disclosing Tullett's confidential information and defined confidential information broadly to include:

> all customer pricing information, profit and loss statements, the Firm's or your productivity data . . . product information about traders and other customer representatives, trading records, client lists . . . information about direct communication lines . . . all other information about any customer (including, without limitation, volume discounts, details of trading volumes, details of discounts and operating costs, trading philosophy and trading patterns).

Ex. 93 (P565) at 12

Accordingly, Tullett has introduced sufficient evidence to permit the jury to find that BGC committed the misappropriation of trade secrets and confidential information.

B. Unfair Competition

BGC argues has failed to introduce sufficient evidence to permit the jury to find that BGC engaged in unfair competition.

The case law cited by either party does not explicitly define the elements of a claim for unfair competition. See, e.g,, N.J. Optometric Ass'n v. Hillman-Kohan Eyeglasses, Inc., 144 N.J. Super. 411 (Ch. Div. 1976); Longmont United Hosp. v. Saint Barnabas Corp., 2007 U.S. Dist. LEXIS 48187, *10-11 (D.N.J. June 26, 2007); Duffy v. Charles Schwab & Co., 123 F. Supp. 2d 802, 815 (D.N.J. 2000).

The U.S. District for the District of New Jersey went as far as saying

> New Jersey's law of unfair competition is an amorphous area of jurisprudence. It knows of no clear boundaries. . . . The concept is as flexible and elastic as the evolving standards of commercial morality demand.

Duffy v. Charles Schwab & Co., 123 F. Supp. 2d 802, 815 (D.N.J. 2000).

There are basic principles that the Court can consider, however, when determining if a jury could infer from the evidence adduced that BGC committed unfair competition. According to the Appellate Division,

> [T]he essence of unfair competition is fair play. Thus, the purpose of the law regarding unfair competition is to promote higher ethical standards in the business world. Accordingly, the concept is deemed as flexible and elastic as the evolving standards of commercial morality demand. The judicial goal should be to discourage, or prohibit the use of misleading or deceptive practices which renders competition unfair. The law must be sufficiently flexible to accommodate those goals.

Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92 (App. Div. 2001) (internal citations and quotations omitted).

BGC argues Plaintiff must prove that Defendant misappropriated Tullett's property before Tullett can prevail on a claim for unfair competition. See Duffy, supra,

123 F. Supp. 2d at 816 (stating a prerequisite to an act of unfair competition is that one party misappropriates another's property).

The Court is not persuaded by BGC's arguments.

First, the Court finds the rule of law articulated in Duffy, supra, requiring the misappropriation of property to be overly restrictive. No other case cited by the parties requires the misappropriation of property. Furthermore, "the essence of unfair competition is fair play . . . and the law must be sufficiently flexible to accommodate" this goal. Ryan, 341 N.J. Super. at 92. Even the Duffy Court concluded unfair competition "is a business tort" whose purpose is to "enforc[e] increasingly higher standards of fairness or commercial morality in trade," applying "flexible and elastic" concepts "as the evolving standards of commercial morality" dictate. Duffy, 123 F. Supp. 2d at 815

Second, even if Tullett is required to adduce evidence that BGC misappropriated Tullett's property, Tullett has adduced evidence that BGC misappropriated confidential information. Courts have found that the misappropriation of a company's confidential information by a company employee can constitute unfair competition. See Lamorte Burns & Co. v. Walters, 167 N.J. 285, 308-09 (2001); Torsiello v. Strobeck, 955 F. Supp. 2d 300, 314 (D.N.J. 2013). Here, Testimony was adduced that shows that Tullett employees provided BGC with Tullett information, such as broker contracts and brokers' revenue production, during their recruitment meetings with BGC executives. See, e.g., Ex. 14 at 5981:15-5982:3, 5983:25-5985:14 (Mr. Miller); Ex. 9 at 4128:3-4129:9, 4188:3-16 (Mr. Windeatt); Ex. 16 at 6577:23-6578:3 (Mr. Pagan); Ex. 9 at 4227:14-4228:3 (Mr. Windeatt). Accordingly, Tullett has introduced sufficient evidence to permit the jury to find that BGC committed Unfair Competition.

(3) BGC's Remaining Arguments

BGC's motions for involuntary dismissal and directed verdict of Tullett's claims because (1) Tullett is seeking damages that Tullett's subsidiaries sought in the FINRA Arbitration; and (2) BGC did not proximately cause Tullett's damages, are also denied.

The Court will address each argument in turn.

A. Duplicative Damages

BGC argues it is entitled to involuntary dismissal and a directed verdict because Tullett is seeking damages that Tullett's subsidiaries sought and acquired a remedy for in the FINRA arbitration.

"New Jersey has a strong public policy against permitting double recoveries." Finderne Management Co., Inc. v. Barrett, 402 N.J. Super. 546, 580 (App. Div. 2008). Accordingly, New Jersey law provides "a harmed plaintiff is permitted to recover for the wrongdoing of a tortfeasor, but that the plaintiff's recovery should be reduced by any benefits received from the wrongdoers' actions." Barrett, supra, 402 N.J. Super. at 581 (quotation omitted).

It is true that Tullett's subsidiaries sought and acquired a remedy in a FINRA Arbitration proceeding. New Jersey Law, however, provides that a corporation has the exclusive right to seek redress for an injury arising from a stock drop that harms its shareholders equally. Supreme Court in Strasenburgh v. Straubmuller, 146 N.J. 527 (1996) succinctly articulated this legal standard. The Supreme Court stated

> [a] corporation is regarded as an entity separate and distinct from its shareholders. It is a principle of corporation law that regard for the corporate personality demands that suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation. Reasons of policy and practicality more than abstractions about the nature of a corporation underlie the principle. The policy reasons include maintaining the investment resources of the corporation, avoiding a multiplicity of suits, providing equal benefit for all shareholders and avoiding partial dividends or partial liquidation. The prevailing American rule is that when an injury to corporate stock falls equally upon all stockholders, then an individual stockholder may not recover for the injury to his stock alone, but must seek recovery derivatively in behalf of the corporation. New Jersey accepts the general principle. Shareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations.

Strasenburgh, supra, 146 N.J. at 549.

Federal case law also supports the Supreme Court's proposition that a corporation has standing to sue for a decrease in its shares' value. See Winer Family Trust v. Queen, 503 F.3d 319, 338 (3d Cir. 2007) ("[A] diminution in the value of [a company's] stock . . . if proved, belongs to [the company], and [the company] alone has standing to sue as a corporation."); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-33 (3d Cir. 1970) (holding shareholder lacked standing where alleged injury is inflicted on corporation and "the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares"); State Bd. of Admin. v. Cendant

Corp., 2003 U.S. Dist. LEXIS 14333 at *2 (D.N.J. Aug. 19, 2003) ("Because a corporation is regarded as an entity separate and distinct from its shareholders, 'suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation.'").

The Court finds that Tullett has adduced sufficient evidence at trial for the jury to conclude Tullett is not seeking duplicative damages. The evidence at trial, specifically Mr. Grinblatt's expert testimony, confirms Tullett is seeking damages for its own loss of value, as represented by the decline in the value of its stock price. See, e.g., Ex. 31 at 11110:5-14, 11157:19-11159:2, 11159:17-11160:25, 11163:23-11164:23, 11165:15-19 (Mr. Grinblatt). Accordingly, the Court finds the jury could reasonably conclude Tullett is not seeking duplicative damages.

The Court will also allow Professor Grinblatt's testimony about his secondary methodology to calculate damages, the market-place multiples approach, to remain in evidence. Despite Professor Grimblatt relying upon data used at the FINRA Arbitration, Professor Grimblatt explained when testifying that the injury he measured is the injury to the Tullett Parent calculated by the decline in Tullett Parent's market capitalization. Ex. 31 (Day 37) at 11110:11-14, 11157:19-11159:2, 11159:17-11160:25, 11163:23-11164:23, 11165:14-19 (Mr. Grinblatt).

Accordingly, a jury could reasonably determine that Tullett is not seeking duplicative damages, but damages that Tullett parent independently suffered as a result of BGC's alleged conduct.

B. Proximate Causation

BGC argues Tullett has failed to adduce evidence that BGC proximately caused Tullett's injury and damages.

Generally, the determination of proximate cause, including the determination of whether there were any superseding/intervening events that caused the plaintiff's injury, is a decision left for the jury to decide. Komlodi v. Picciano, 217 N.J. 387, 418 (2014). According to the Supreme Court,

> proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court. In the routine case in which the plaintiff's injury can be traced to a single cause, the standard instruction on proximate cause -- and the one used by the trial court in this case -- describes it as a cause which necessarily set the other causes in motion

and was a substantial factor in bringing the accident Proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court.

Scafidi v. Seiler, 119 N.J. 93, 101 (1990) (quotation omitted).'

A component of proximate cause is foreseeability. "An act is foreseeable when a reasonably prudent, similarly situated person would anticipate a risk that her conduct would cause injury or harm to another person.. So long as the injury or harm suffered was within the realm of reasonable contemplation, the injury or harm is foreseeable." Komlodi, supra, 217 N.J. at 417-18 (2014).

BGC has proffered multiple arguments in support of the contention that BGC did not proximately cause Tullett's damages. First, BGC argues that Tullett has failed to show proximate cause because the connection between its allegedly wrongful behavior and Tullett's injury is not sufficiently direct. Second, BGC argues Tullett has failed to show that it was required to publish the IMS because Tullett did not provide expert testimony. Third, BGC argues Tullett has not adduced testimony to show how the jury is apportion its damages with 81 brokers who left Tullett for BGC. Fourth, BGC argues Tullett failed to provide the jury expert testimony on the IMS's accuracy or completeness.

The Court is not persuaded by BGC's arguments.

First, the question of how direct the causal connection between the BGC's alleged conduct, Tullett's IMS, and the injuries Tullett suffered is a jury question that is fact intensive. See Scafidi, supra, 119 N.J. at 101.

Second, Tullett is not precluded from seeking damages because it has failed to apportion with certainty the damages for each broker who left Tullett for BGC. "The rule relating to the uncertainty of damages applies to the uncertainty as to the fact of damage and not as to its amount, and where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." Desai v. Board of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586, 597 (App. Div. 2003). Accordingly, the decision on the amount of damages, apportioned for the brokers who left Tullett for BGC, is a decision for the jury.

Third, Tullett provided adequate expert testimony for a jury to reasonably conclude BGC proximately caused Tullett's injuries. Professor Grimblatt provided expert testimony on how Tullett releasing IMS, which disclosed the departure of 81 brokers to BGC, impacted its stock price.

Professor Grinblatt's primary method for assessing the damages caused to the Tullett Parent by BGC's actions is an event study. Tr. at 11125:5-15, 11137:23-11138:20, 11219:6-11220:4. Professor Grinblatt's event study focused on the decline in the Tullett Parent's stock price following the announcement of its November 13, 2009 Interim Management Statement ("IMS"), specifically on the decline on November 13 and 16, 2009. *Id.* at 11193:17-11195:19, 11199:7-11208:25, 11278:21-11279:20.

Professor Grinblatt testified that the November 13, 2009 IMS was the first time the market learned that the brokers who had or were expected to depart from Tullett to BGC accounted for about 7.5% of the Tullett Parent's worldwide revenue, and this information caused the Tullett Parent's stock price to drop. See id. at 11194:13-11195:12; 11223:3-12, 111295:24-11301:17. Professor Grinblatt also testified that had the raid-related information in the November 13, 2009 IMS been disclosed earlier, the damage to the Tullett Parent would have been "the same or possibly greater." Ex. 34 (Day 40) at 11869:24-11872:5.

Professor Grinblatt also utilized a secondary method that applies a market-based valuation multiple to the revenue streams. Professor Grinblatt explained he used the market-based valuation multiple method not as an alternative measure of damages, but as a "gut check" on his primary methodology, utilizing it to ensure that the harm he measured by analyzing the decline in the Tullett Parent's stock price was consistent with the harm measured by a market-based price-to-earnings ratio analysis. Ex. 31 at 11168:10-11169:10.

Professor Grimblatt's above referenced testimony, along with his detailed expert report, establish an inference of a link between BGC's 2009 U.S. hiring of Tullett's brokers and Tullett's subsequent stock drop.

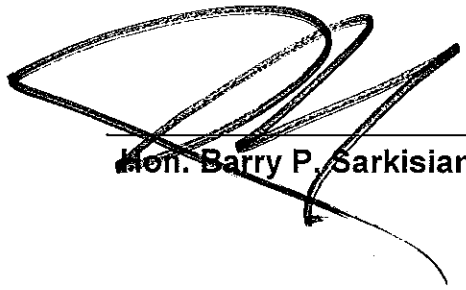
Fourth, Tullett was not required to provide expert testimony to aid the jury to determine if and when Tullett was required to release the IMS and disclose the departure of 81 of its brokers to BGC. The determination of whether an intervening or superseding cause (e.g.. whether Tullett made a mistake releasing the IMS) is generally a jury question. Komlodi, supra, 217 N.J. at 418. Furthermore, BGC has not cited any authority that would necessitate the Court requiring in determining to provide expert testimony to aid the jury in determining if and when Tullett was required to release the IMS and disclose the departure of 81 of its brokers to BGC.

Accordingly, the Court finds a jury could reasonably determine that BGC proximately caused Tullett's damages.

CONCLUSION

Based upon the foregoing , Defendant's motion for a directed verdict is **GRANTED** as to Tullett's RICO count and DENIED as to Tullett's common law claims of unfair competition and misappropriation of trade secrets and confidential information.

SO ORDERED (as reflected in the Court's order of January 2, 2015)



Hon. Barry P. Sarkisian, J.S.C.