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| **Dkt. No. CV 05 4009529** | : | **SUPERIOR COURT** |
| **Charter Oak Lending Group, Inc.** | : | **Complex Litigation Docket** |
| **v.** | : | **at Waterbury** |
| **Janet August, et. al.** | : | May 7, 2013 |

**MEMORANDUM OF DECISION**

**Preliminary Statement**

This action began in 2005 and at that time contained 33 counts against 11 defendants.[1] The complaint alleged as to various defendants: conversion; civil theft, unauthorized use of computers; violations of the Connecticut Unfair Trade Practices Act (CUTPA); violations of the Connecticut Uniform Trade Secrets Act (CUTSA), breach of fiduciary duty, and civil conspiracy. The matter was first tried to the court in 2008. The court (Roche, J.), pursuant to Practice Book Section 15-8, dismissed the CUTSA claims and the breach of fiduciary duty claims for having failed to make out a prime facie case. Thereafter, the court rendered judgment in favor of all defendants on the conversion, statutory theft, computer offenses, CUTPA and conspiracy counts. The plaintiff appealed. The Appellate Court reversed the judgment of the court dismissing the CUTSA and breach of fiduciary duty claims and remanded those claims for a re-trial. *Charter Oak Lending Group, LLC v. August,* 127 Conn. App. 428, 439, 445 (2011). Further, insofar as the court relied upon the decision on the motion to dismiss in rendering judgment for the defendants on the CUTPA and conspiracy claims, the CUTPA claims and conspiracy count were also remanded for retrial. *Id* at 446-447.

[1] The plaintiff withdrew its claims against three of the individual defendants prior to or during the first trial of this matter.

This court heard evidence on the re-trial of this matter over the course of 10 days in October 2012. The court heard the live testimony of six witnesses; heard the prior trial transcript testimony of nine witnesses;[2] and received hundreds of exhibits comprising thousands of pages of information.

Thereafter, the parties filed post-trial briefs as follows: The plaintiff filed its memorandum on January 14, 2013. The defendants filed their memorandum on February 21, 2013. The plaintiff filed a reply memorandum on March 25, 2013. The court has reviewed the evidence admitted, the testimony provided, the arguments advanced in the parties' briefs, the cases and authority cited therein and renders this decision after consideration of all of these items.[3]

The operative complaint tried to the court is dated October 14, 2005. It alleges against each of the individual defendants[4] one count of breach of fiduciary duty, CUTPA and CUTSA. The complaint includes a CUTPA and a CUTSA claim against CTX, Inc. as well as a conspiracy count against all defendants.

**Factual findings**

The court makes the following findings of fact based upon the more credible evidence presented by a fair preponderance of the evidence.

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[2] Due to the somewhat unusual mechanism by which the transcripts were offered and ultimately received into evidence, and because plaintiff wanted the court to know the content of the testimony in advance of certain other witnesses, the transcripts were not marked as full exhibits. Rather, selective portions were read into the record such that the transcript of these proceedings will constitute the record with respect to the testimony of these witnesses. Notwithstanding, the parties agreed that the transcripts would be marked for identification as an aid to the court in deliberations and for economy of briefing by the parties.

[3] The court does not attempt to include in this decision all of the evidence relied upon in the court's factual findings. The court has considered all of the evidence admitted and the reference to any subset of the evidence presented should not be construed as identifying the exclusive basis for the court's finding. Nor should the court's failure to identify or mention specific evidence give rise to an inference that such evidence has not been considered..

[4] The individual defendants still in the case at re-trial were Janet August, Lia Stites, Barbara Coles, John McKenna, Patricia Holland, Patricia Kay, and John Migliaro.

This case arises out of a series of events occurring in the late Autumn of 2004. Each of the individual defendants was employed by the plaintiff, Charter Oak Lending Group, LLC (COLG) as a mortgage originator/specialist. COLG was owned by Deborah Killian ("Killian") and Don DeRespinis (DeRespinis"). It was a licensed mortgage broker which began operations in 1999. It employed mortgage originators/mortgage specialists to identify people who are looking for financing and to bring them to COLG for that purpose. As a broker, COLG had agreements with a variety of lenders who would ultimately provide the financing sought by the client. COLG, and by extension the mortgage originator, received a fee for originating the mortgage. Each individual defendant was an "at will" employee, a status acknowledged and agreed upon by all parties. None had a contract for any definite term or compensation rate. Nor had any of the individual defendants entered into a confidentiality or non-compete agreement related to the terms of employment or termination thereof.

The individual defendants were generally responsible for their own marketing efforts. COLG did not engage in mass marketing, advertising or other traditional marketing techniques. It relied upon word of mouth and the efforts of its originators to build its reputation and business in the market place. Each individual defendant/originator had their own way of getting their name out in the market place. Each developed referral sources from within the real estate industry to include lawyers, accountants, realtors, appraisers, builders, contractors and others. The goal was to have these referral sources send a person to the originator when the person needed financing of some sort. COLG brokered first mortgages as well as refinancing loans. It goes without saying that the more loans closed, the more profitable COLG and the higher the

commissions paid to the originator. In 2004, as COLG mortgage originators, the individual defendants received 50% of the fee received by COLG for each loan brought in by that defendant.

The circumstances under which a person might contact COLG and one of its loan originators varied. A person might be seeking financing in order to purchase a particular property; a person might be seeking to refinance a pre-existing mortgage; a person might be seeking a pre-approval at a time when no particular property has been chosen or identified; a person might simply inquire as to the process and prospect of obtaining financing.

Whatever the circumstances, when a person contacted one of the individual defendants, a file was opened in "Loan Manager." Loan Manager was a software system designed and developed by DeRespinis. It was used to track loans in process; as a communication network within COLG; and as a repository for contact information as it was capable of holding information regarding referral sources, friends, family, previous clients and current clients. Loan originators, to include the individual defendants, could and did enter this type of data into Loan Manager. They were encouraged to do so by DeRespinis and Killian.[5]

DeRespinis would routinely update the software and make improvements to the system so as to make it more user friendly and helpful to COLG staff. On an as needed basis, he would roll out the changes and provide training to the employees using Loan Manager.

[5] To the extent that Killian and/or DeRespinis testified that a person's information was entered into Loan Manager only under circumstances when a loan was sought by that person, such testimony is not credited. Nor does the court credit the testimony that COLG did not want the originators to enter the names of friends, family or prior customers into Loan Manager.

Loan Manager had varying levels of access. DeRespinis and Judy Short, an IT employee, had the highest level of access allowing them to monitor all usage by any employee, which they did on occasion. Loan processors had lesser access but could track any loan that was in process. Loan originators had the most limited access. Loan originators could only access information related to the specific loans that they had brought in and contact information for persons they had put into the system.

In approximately July 2004, DeRespinis held a meeting at which he instructed employees on updates to Loan Manager. At that meeting, DeRespinis advised the employees that the purposes of the upgrade was to assist the originators in maintaining relationships with their clients, so as to make them "clients for life." He told those present at the meeting that the information regarding contacts, clients and referral sources stored on Loan Manager was information that the loan originators would have forever, even in the event that they left the employ of COLG.[6]

Although in dispute in this case, such a practice is widespread throughout this industry. Loan originators are, in many ways, separate profit centers. Their livelihood depends entirely on their productivity, which derives directly from the network of contacts, clients and referral sources they develop over time. It is also quite common within the industry for loan originators to work for multiple brokerage firms. Indeed, each of the individual defendants worked for a variety of employers either before or after they worked for COLG. *See, infra. pp.* 8-15, and their contacts, customers, and referral sources followed them throughout their careers. The size of this book of business and an originator's productivity is, in fact, an important factor to employers in both offering a

[6] The court credits the testimony of Janet August, Barbara Coles, John Migliaro, Patricia Holland and John McKenna who recall the meeting and the statements made.

position as well as determining what, if any, transition or signing bonus might be appropriate.[7]

From 1999 through mid-2004, COLG had grown to a point where it had four separate offices and employed over 20 mortgage originators. During 2004, COLG management, primarily co-owner Killian, began to explore further training models for its employees and embarked on a series of seminars and product purchases designed to raise the productivity of the originators and thereby further grow the business. She was very excited about COLG's potential with the application of these training models and felt COLG was poised to "go to the next level." As part of this plan, in October 2004, COLG engaged the services of Building Champions to provide a trainer or coach to implement some of these growth strategies.

By November 2004, COLG had devised a new and markedly different business model. On November 8, 2004, DeRespinis sent a message "blast" on Loan Manager to all employees, including the defendants, requiring their presence at a mandatory meeting to be held November 12, 2004, a date frequently referred to as "Black Friday" during the testimony. Patricia Kay, who worked in Florida, was not in attendance and only learned the content of the meeting after the fact in conversation with Janet August. Barbara Coles had plans to be away and so was not at the meeting and learned of the content of the meeting through conversations with John McKenna and Lia Stites. The remaining defendants were present at the meeting of November 12, 2004.

Therein, with the aid of a power point presentation, COLG rolled out its new business model, which included many changes to the then existing business model. First,

[7] DeRespinis' testimony that signing or transition bonuses were illegal or not common in the industry is rejected.

the commission structure was being changed. Loan originators would no longer receive 50% of the fee received by COLG for loans closed. The originators would receive 40% of fees for total fees generated of $120,000 or less; 45% of fees for total fees generated of $240,000 or less; and 50% of fees for total fees generated of $360,000 or less.[8] Once a percentage tier was hit, it related back to the first dollar of fees earned. At the then existing origination rates, of the individual defendants, the only defendant whose commission would not be affected was John McKenna, COLG's top producer. Each of the others would have had to increase their productivity substantially in order to earn the same commission percentage in 2005, as was earned in 2004. Management believed that such an increase in productivity was attainable given the training and coaching tools which had been procured and made available to the employees.[9] Management also believed that the new commission structure would serve to motivate the loan originators to increase their productivity.

Additionally, COLG intended to cease matching contributions to the employee's 401k plans and was going to further limit the extent to which it would reimburse employees for costs associated with individual marketing efforts. Finally, COLG was going to further limit the health benefits available to employees.

The new business model was presented as an opportunity for employees to invest in the training; to invest in the future, and was designed to motivate increased productivity for the financial benefit of all. It was, to say the least, not well received. It should be noted that Beverly Balaz, a COLG employee knew of the proposed plan before it was implemented. She strongly cautioned COLG management from proceeding with

[8] The compensation plan also provided commissions in excess of 50% for fees generated in excess of $480,000.

[9] Several of the defendants did not like the mandatory training materials or their attendant costs.

the plan. After it was received with such displeasure, apparently in vain, she advised management to repeal it immediately.

On December 1, 2004, John McKenna, Janet August, Barbara Coles and Lia Stites resigned effective immediately. Each, through a variety of channels, had accepted employment with CTX, Inc. at its Danbury office. Thereafter, on December 16, 2004, Patricia Kay resigned, also having accepted a position with CTX in Florida. On December 16, 2004, Patricia Holland resigned and went to work for CTX in Danbury.[10] John Migliaro resigned effective December 20, 2004 having accepted an offer from CTX to work in its Milford office.[11]

While many of the events leading up to these resignations was similar for each of the individual defendants, the conduct of each must be examined separately.

John McKenna began working at COLG in 2001. Prior to working for COLG, he had worked as a loan originator for five different mortgage brokers. He was COLG's top producer. His employment with COLG was not without issues however. Indeed, McKenna had a very contentious relationship with DeRespinis. McKenna had left COLG in 2003 but was convinced to return. During that time period, DeRespinis openly acknowledged that he did not like McKenna, a feeling he reluctantly admitted at trial.

Prior to his resignation on December 1, 2004, McKenna had been actively looking for a new employer. He had spoken with and received offers of employment from two other brokerage firms, to include American Home. He was in the process of considering those offers when COLG rolled out the new business model. It was also in this time

[10] Holland was unaware until the first trial of this case that Kay had resigned on the same date. She did not know Kay well and did not coordinate her resignation to occur on the same date.

[11] Consistent with the plaintiff's myopic and sometimes distorted view of history, the plaintiff completely ignores the role of the new business model in the resignation of the individual defendants.

frame that McKenna came to learn of CTX and began discussions with CTX about a possible move. Ultimately, McKenna accepted employment with CTX and began working there on December 2, 2004. He received a transition or signing bonus of $60,000.00.

In conjunction with his move to CTX, McKenna created a list of clients, referral sources and contacts that he had accumulated over the years as a mortgage originator.[12] The lists included the names and contact information for those clients who had closed loans through COLG, as well as those clients who had closed loans prior to McKenna's employment with COLG. The lists included family, friends, and contacts developed over the course of McKenna's career. He provided those names to CTX in electronic format, for input into the Media Center, a marketing tool employed by CTX to assist its originators. Upon joining CTX, the Media Center would generate an announcement to everyone on the list advising them that McKenna now worked for CTX.

Barbara Coles began working for COLG in 2000. In 2003, she became a loan originator. By the autumn of 2004, Coles had begun looking for a different employer. She had also received an offer from American Home in approximately early November 2004. She learned of CTX through McKenna who had been contacted by CTX. Eventually, she agreed to work for CTX and began there on December 2, 2004. She received a transition or signing bonus for joining CTX in the amount of $30,000.00.

[12] McKenna was not particularly savvy in the area of computer usage. He therefore enlisted the assistance of his niece to create the list in electronic format, which she did, which was then placed on a cd and delivered to CTX. The lists McKenna provided to CTX were submitted as Plaintiff's Exhs 128, 129 and 130B.

She left COLG because morale was very low; she was unhappy with the new business model; she had encountered issues with respect to the funding of her 401k and she did not have a lot of confidence in management.

In conjunction with joining CTX, Coles put together a list of her friends, family, clients, previous clients, referral sources and contacts. These lists were prepared largely from an ACT database, her note pads, palm pilot, and a collection of business cards. She provided these lists to CTX for input into the Media Center in the form of a disk. The purpose for providing these lists was so that the Media Center could send out an announcement regarding Coles' employment, once it became effective. The lists included the names and contact information of clients who had closed loans through COLG.[13]

Janet August began work at COLG in 1999. August began looking for a new employer in the Summer of 2004. She had received an offer from GMAC, an offer which included a signing bonus of $11,000.00. She became aware of CTX through her attendance at "Passion for Production" a training and recruitment seminar sponsored by CTX in Atlanta, Georgia. Immediately following the seminar, she met with David Johnston ("Johnston") and William Dolbier ("Dolbier"), CTX managers in Connecticut. Eventually, she accepted an offer from CTX and began work there on December 2, 2004. She also received a transition/signing bonus of $25,000.00.[14]

August left COLG because she did not like the new business model; she had encountered issues with respect to the funding of her 401k; she was dissatisfied with management.

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[13] The lists provided to CTX by Coles were submitted as plaintiff's exhs. 131 and 132.
[14] August left CTX in December 2006. Thereafter she worked for Charter Funding. She left Charter Funding and worked for Main Street Financials.

In conjunction with her imminent employment at CTX, August prepared a list of her friends, family, clients, previous clients, referral sources and contacts. These lists were prepared from an ACT database, her outlook contacts and other lists, to include screen shots from Loan Manager. She provided these lists to CTX for input into the Media Center in the form of an excel spreadsheet.[15] The purpose of providing these lists was so that the Media Center could send out an announcement regarding August's employment, once it became effective. The lists included the names and contact information of clients who had closed loans through COLG.

Patricia Kay began working for COLG in 2002. She lived in Florida and worked out of her home under COLG's Florida broker's license. During 2004, Kay had determined to leave COLG and perhaps the industry altogether. She was unhappy working for COLG. She was isolated from her colleagues in Connecticut and often felt short changed insofar as she provided her own office, computer, fax machine, phones and supplies with little assistance from COLG. She received a monthly allowance of $150.00 towards these expenses.

During 2004 she had been actively recruited by Wells Fargo, SunTrust, Palm Beach Financial and Mortgage Pro. In October 2004, she attended a seminar called "Fiscal Literacy" at which she met Barry Habib. He suggested she talk to Doug Newman at CTX about going to Passion for Production, which she did. She liked the presentation, the use of Media Center, and eventually began work with CTX in their Fort Lauderdale, Florida office. She received a transition/signing bonus of $30,000.00.

In conjunction with her imminent employment at CTX, Kay compiled information regarding her friends, family, clients, previous clients, referral sources and

[15] The lists August provided to CTX were submitted as plaintiff's exhs. 126 and 127.

contacts. These lists were prepared largely from her rolodex as well as screen shots printed from Loan Manager.[16] She provided the screen shots to CTX so that the information could be loaded into the Media Center. It does not appear this occurred until approximately March of 2005. The purpose of providing this information was so that the Media Center could send out an announcement regarding Kay's employment. The information provided included the names and contact information of clients who had closed loans through COLG.

Lia States began working for COLG in 1998 as a loan originator. In the autumn of 2004 she had determined to leave her employment with COLG. In fact, she too had received an offer from American Home, to include a signing bonus. Around this time period, CTX had contacted McKenna through its recruiter. McKenna told Stites of the contact; she had heard of CTX and decided she wanted to speak with CTX as well. Thereafter, she accepted a position with CTX and received a signing/transition bonus of $30,000.00.

Stites left COLG for a variety of reasons. She was increasingly dissatisfied with its management; she felt that the business model was constantly changing; she did not like the required training models; she had concerns regarding the funding of her 401k; she felt management was unavailable to the staff and she did not like the new business model rolled out on November 12, 2004.

In preparation for leaving COLG, in approximately October 2004, Stites put together an excel spreadsheet comprised of her friends, family, referral sources, clients,

[16] Kay testified that she relied on her assistant to maintain this type of information but at the time she was preparing the information, her assistant was in Las Vegas and so unavailable. Kay was not capable of creating an electronic database and so printed screen shots from Loan Manager as a means of ensuring she had the information she needed. The screenshots were submitted as plaintiff's exh. 138.

and other contacts. She created the list from the various business cards, funding reports, day timers, and journals she had accumulated over time. Much of the information was available on Loan Manager and some came from Loan Manager.[17] When she accepted employment with CTX, Stites provided the spreadsheets to CTX for the Media Center. As with the other individual defendants, the Media Center was to use the information to send announcements after Stites began her employment at CTX.[18]

John Migliaro began working for COLG in 2003. Prior to working for COLG he had been with American Mortgage Services (AMS) as a loan officer/mortgage originator. While at AMS he was twice recruited by COLG. Each time, he interviewed with Killian and in each interview she asked him about his volume of productivity and the size of his database of contacts and referrals. After the second interview, he determined to leave AMS and join COLG. He brought with him his database of contacts which included the names of persons collected over the course of his work at AMS as well as 23 years as a real estate broker.[19] He was asked to input this database into Loan Manager, which he did, with the assistance of Judy Shortt.

Migliaro decided to leave COLG after the November 12, 2004 meeting and the roll out of the new business model. He had never previously achieved the level of production which would have been required for him to earn a 50% commission under the new business model. He felt he could receive a 50% commission anywhere else. He first learned of CTX in mid-December. When he learned that CTX had a Milford office, he was particularly interested as most of his contacts were in the New Haven County area

[17] The lists provided by Stites to CTX were submitted as plaintiffs exhs. 134, 135 and 136B.
[18] Stites left CTX in May 2006 for a position at Countrywide, a move that also involved a signing bonus. In November 2007, she left Countrywide for Wells Fargo, and again received a signing bonus.
[19] Migliaro was one of four individuals recruited away from AMS to join COLG.

and the commute would be much shorter. He asked for an interview and was hired the next day. He resigned from COLG on December 20, 2004 and signed his employment agreement with CTX on December 22, 2004. After taking some time off, he began work for CTX in January 2005.

In late December of 2004, Migliaro provided his database and all of the information on it to CTX in an electronic format. He did not use Loan Manager to create the database but many of the names on the database included customers for whom he had closed loans or otherwise dealt with while at COLG and whose information was contained within Loan Manager.[20]

Migliaro's decision to leave COLG and join CTX was made independent of other COLG employees' decision to do the same. He was not recruited by CTX but rather it was Migliaro who initiated contact with CTX.

Patricia Holland began working for COLG in 1999 upon its founding. She had worked for DeRespinis' prior firm, Westport Mortgage, and stayed on with the new entity. Prior to working for Westport mortgage she had worked for many different brokerage firms over a 12 year period. She was recruited to work for Westport Mortgage by Killian while she worked at AMS. When she joined Westport Mortgage, she brought several loans files with her which had been in process at AMS.[21] Killian assisted her in getting these loans processed through Westport Mortgage.

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[20] The information provided by Migliaro to CTX was submitted as plaintiff's exhs. 143, 144 and 145B, though exhs. 144 and 145B appear to be identical.

[21] She brought these loans with the permission of the customers. The files contained the Form 1003 loan applications, and other customer information necessary to obtain financing.

Once Loan Manager was set up, Holland began to input names of her AMS clients into the computer. Mostly, she maintained her "database" of contacts, clients, referral sources and others in various mediums, to include notes, cards, or calendars.

Holland began to become disenchanted with COLG when Killian began attending seminars on how to train loan officers and thereafter began implementing mandatory training. Holland had been in the business for many years and felt the training was both unnecessary and costly. She did not however determine to leave COLG until after November 12, 2004 when the new business model was rolled out. When it became clear that she would not be exempted from its application, she began her job search. Around the same time that she received an offer from CTX, she also received an offer from American Home Mortgage. She accepted the offer from CTX; signed on in late December, and began work after January 1, 2005.

In connection with her imminent employment with CTX, Holland created a list of friends, family, contacts, customers, referral sources and others for input into the CTX media center. She retrieved the information from her prior entries into Loan Manager. Although she created the list from Loan Manager, the information included was also in her notebooks, rolodexes, business cards and other locations.[22]

CTX, Inc. is a national company that was engaged in the business of brokering loans and mortgages. It began operations in Connecticut in approximately 1997 with the purchase of one or more branches of Ameriquest.

Unlike COLG, CTX marketed its business through mailings of announcements, newsletters, advertisements and other marketing techniques. Much of the marketing was

[22] The information provided by Holland to CTX was offered as plaintiff's exh. 139. Though Holland testified that she provided a broad spectrum of names to CTX, exh. 139 contains only the names of realtors.

conducted through use of the Media Center, which could, at the election of a loan originator, produce and send out mass marketing materials. CTX did not require any loan originator to use the Media Center. CTX did not require the individual defendants to provide the various lists submitted to the Media Center. The use of the Media Center and the input of information into the Media Center was not a condition of the defendants' employment and was not something for which the individual defendants were compensated.

In 2004, CTX maintained an office in Danbury, Connecticut which was, by all accounts, under performing. Dolbier and Johnston were branch managers for CTX whose responsibilities included offices in Connecticut. In the autumn of 2004, the office manager at the Danbury office was terminated. Thereafter, Dolbier and Johnston oversaw the operations of the Danbury office, to include the hiring of new loan originators.

In that vein, in an effort to attract productive loan originators, CTX engaged the services of Providyn, an employee search or recruiting firm. At this time, neither Doblier nor Johnston had ever heard of COLG and was not aware of COLG as a competitor in the Danbury area market. Consequently, they were not aware of how large or how small COLG was in the industry.

In 2004, Johnston learned through industry contacts that McKenna and another individual (not employed by COLG) might be interested in moving. Johnston told his recruiter who then contacted McKenna. The recruiter advised Johnston that McKenna was poised to join a different firm but that he would talk to CTX. Johnston called McKenna on a Friday afternoon and made arrangements to meet with him the following

week. In fact, Johnston met with both McKenna and Coles, eventually making a job offer to both.

Dolbier also met with many of the individual defendants and negotiated transition/signing bonuses for each. According to both Dolbier and Johnston, although during the process they may have met with a few of the individual defendant's together, they did not discuss with any of the individual defendants, the employment of any other individual defendant.[23] The employment decisions were made on an individual basis and the hiring was not a collective effort or an attempt to hire a particular group of employees. In fact, Johnston interviewed two additional originators from COLG who he determined not to hire.[24]

Dolbier had the responsibility of collecting the information to be input in the Media Center. He gathered photographs and the lists of contacts from new hires at CTX. He did not input the information personally, but rather, sent it to Media Center personnel in Colorado. Over the course of his experience, the Media Center information has arrived in many forms: a box of business cards; scraps of paper; electronic databases and even cocktail napkins. Once input in the Media Center, the names and contact information was accessible only to the loan originator who had provided the information. If a loan originator leaves CTX, the loan originator is permitted to take all of the contact information that person had provided to the Media Center. Further, CTX does not access

[23] Kathy Leo, a previously identified defendant, was hired by CTX to be a loan assistant for John McKenna. McKenna and Leo had a long standing excellent working relationship. To that end, CTX did speak to McKenna about hiring Leo as his assistant as well as the terms of that employment.

[24] The evidence includes a series of emails between CTX personnel and several of the individual defendants regarding their potential employment with CTX. These emails further demonstrate the individualized nature of the hiring decisions made by CTX.

or otherwise use the Media Center information. If a loan originator leaves CTX, after a period of time, the account is purged of all information.

Dolbier did not talk to any of the individual defendants hired by CTX about bringing pipeline loans from COLG to CTX. CTX does not "go after" pipeline loans when it hires new loan originators.[25]

Additional factual findings will be set forth as necessary.

**The Plaintiff's Claims**

The Plaintiff alleges a conspiracy between all of the defendants to misappropriate its trade secrets and to violate CUTPA. The plaintiff further alleges that each of the defendants violated both CUTPA and CUTSA. The plaintiff alleges further that the individual defendants breached their fiduciary duty to the plaintiff.

Each of the plaintiff's claims arises out of the individual defendants' compilation of the contact lists and providing of those lists to CTX. Each claim is premised on a finding that the information contained on the lists was proprietary to the plaintiff, confidential, a trade secret, and/or otherwise the subject of a duty not to disclose. This premise is wholly unproven by the plaintiff. Based upon the credible evidence, the contact lists provided to CTX by the individual defendants did not contain trade secrets or confidential or proprietary information. Not only were defendants not under a duty to maintain the secrecy of this information, the plaintiff had given permission for the defendants to take and use this information should they ever leave the employment of

[25] This is consistent with the evidence regarding the many loans that were processed through COLG after the individual defendants left COLG and began work at CTX. Each defendant testified that, as needed, they would assist in closing loans that were in process at the time they left COLG. The pay stubs and commissions paid for those loans is consistent with all of this testimony.

COLG. For this and other reasons set forth below, each of the plaintiff's claims fail. Judgment will enter in favor of the defendants as to all counts of the operative complaint.

**Discussion**

**CUTSA Claims -- count three (August), six (Stites), nine (Coles), twelve (McKenna), eighteen (Holland), twenty-one (Kay), twenty seven (Migliaro) and thirty two (CTX)**

Under the Uniform Trade Secrets Act, Conn. Gen. Stat. §35-50 et. seq., a plaintiff can seek damages, among other remedies, for the misappropriation of trade secrets. Under the act, "misappropriation" includes "acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by "improper means." Conn. Gen. Stat. §35-51(b)(1). It also includes:

> [d]isclosure or use of a trade secret ... without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret or (B) at the time of the disclosure or use, knew that the knowledge of the trade secret was (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy ...; or (iii) derived from a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use...

Conn. Gen. Stat. §35-51(b)(2)(A) and (B).

"Improper Means," for purposes of the allegations in this complaint include: theft and "breach or inducement of a breach of a duty to maintain secrecy." Conn. Gen. Stat, §35-51(a). The individual defendants are alleged to have breached their duty to maintain the secrecy of the information contained in the contact lists. CTX is alleged to have induced that breach.

Finally, "trade secret" is defined to include:

> "information, including a ... compilation, ... or customer list that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or

> use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Conn. Gen. Stat. §35-51(d). Determining whether any of the defendants used "improper means" or "misappropriated" the information contained on the contact lists provided to CTX requires, in the first instance, that such information constituted "trade secrets." "A primary issue to be determined ... is whether there is a trade secret existing which is to be protected. *Platic and Mewtal Fabricators, Inc. v. Roy,* 163 Conn. 257, 267 ... (1972)." *Elm City Cheese Co. v. Federico,* 251 Conn. 59, 71 (1999).

The statutory definition of a trade secret set forth above is reflective of the factors courts typically consider when determining the existence of a trade secret: "(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Additional factors cited by courts are: (7) the extent to which the principal-agent relationship was a confidential or fiduciary one; (8) the method by which the former agent acquired the alleged secret; (9) the former agent's personal relationship with the customers; and (10) the unfair advantage accruing to the former agent from the use of his former principal's alleged secret." *Nationwide Mutual Ins. Co. v. Stenger,* 695 F.Sup. 688, 691 (D.Conn.1988).

Here, the evidence established that many of the names and contact information contained in the lists provided to CTX were contained in the Loan Manager database and

some of the names included clients who had closed loans through COLG. The lists also included family, friends, business and social acquaintances who had not closed loans with COLG as well as many referral sources -- lawyers, accountants, realtors, investment advisors and others. As indicated, the plaintiff alleges that these "customer lists" were trade secrets. The plaintiff has failed in its proof on this issue.

"[T]he party claiming trade secret protection must prove that the information ... was the subject of reasonable efforts to maintain its secrecy." *Elm City Cheese Co. v. Federico,* 251 Conn. 59, 78 (1999). "[T]he question of whether in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry ... What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another. According to §35-51(d)(2), the efforts need only be '*reasonable under the circumstances* ...'"[Emphasis in original. Internal citations omitted.] *Id.* at 80.

Here, the plaintiff employed certain computer security measures to limit access to Loan Manager, i.e. each employee had a log in and password. Employees had varying levels of access to the Loan Manager data. For example, a loan processer could access all loan data while a loan originator could only access loan data pertinent to a loan that he or she had originated. Additionally, loan originators could only access their own contact, referral source, or customer information. The plaintiff also monitored the use of Loan Manager by the employees.

The plaintiff also employed reasonable but standard measures to secure the office building. It locked its doors when the business was closed and used an alarm and security system. Inside the offices, were file rooms which could be locked. These efforts

at securing the offices served not simply the purpose of maintaining the secrecy of the information contained in Loan Manager (some of which was contained within the information provided to CTX) but also the reasonable and appropriate measures to secure the premises. These are steps that any business, whether it had trade secrets or not, would be wise to undertake. Similarly, the use of log-in IDs and passwords are standard in any business and while probative of the issue, does not carry the plaintiff's burden regarding reasonable efforts to maintain the secrecy of the information at issue.

Giving loan originators access to only their contact, customer, and referral source information served dual purposes as well. It protected disclosure of the information to other loan originators (thereby maintaining its secrecy in that context), but it also served the business purpose of preventing the originators from competing with each other, a practice which would tend to reduce the overall profitability of COLG. Thus, there was evidence that the plaintiff took steps to protect this information and maintain its secrecy.

However, the evidence is overwhelming in terms of the measures the plaintiff did not take to identify this information as proprietary, confidential, a trade secret or to otherwise maintain its secrecy. The plaintiff did not advise originators that once they input the contact information gathered over the course of their careers, prior to and during their employment with COLG, into Loan Manager, the information became the property of COLG and could not be further disclosed. Plaintiff did not advise or require the originators to destroy or delete the information contained on other media, i.e. rolodexes, note pads, cell phones, home computers, business cards, etc. Indeed, plaintiff assisted at least one defendant with the transfer of her database to her home computer. The defendants often worked at home which required the alleged "trade secrets" to be

available at their homes, either through access to Loan Manager or by reference to the other media on which the information may have been stored. Plaintiff's employee handbook, while identifying and discussing confidential information does not identify the referral, customer or contact information input into Loan Manager as falling within its scope. During marketing events such as an open house, the customers' completed satisfaction surveys were displayed for guests to review. Customer information was regularly disseminated with paychecks and on funding reports, a practice which continued even after the individual defendants were no longer working for COLG.

None of this is a surprise of course because the mortgage broker industry contemplates that this information travels with the originator as the originator moves from broker to broker. Indeed, DeRespinis acknowledged as much when he told the individual defendants that the Loan Manager system was designed to assist them in ensuring that their customers were "customers for life." His further acknowledgement that the originators could take the compiled database of contacts with them should they leave the employ of COLG defeats the plaintiff's claim that this information was a "trade secret" as defined above.[26]

Additionally, the statute requires that the information "derives independent economic value" because it is not "readily ascertainable by proper means." Conn. Gen. Stat. §35-51(d)(1). Here, the vast majority of the information contained in the contact lists is "readily ascertainable by proper means."[27] Given the personal and business

[26] DeRespinis' consent also defeats any claim that the information was obtained through "improper means." Such a finding requires that the information was obtained by breach of a duty to maintain its secrecy. As the individual defendants were told the information was theirs to keep, no such duty or breach can be established.

[27] An examination of the actual lists, an exercise the plaintiff eschews, is necessary in this regard. The overwhelming majority of the information regarding individual clients or contacts provided included names, addresses, telephone numbers and sometimes an email address. With respect to referral sources,

relationships that exist between the defendants and the names provided, the defendant's own memory would contain this information. *See,Holiday Food Co., v. Munroe,* 37 Conn. Sup. 546, 555 (1981)(concurring opinion); *Heritage Benefits Consultants, Inc. v. Cole,* judicial district of Waterbury, Dkt. No. CV 00162270 (February 23, 2001, Rogers, J.). To the extent the rate or term of a loan was included in the information provided to CTX, that information is generally available in land records. Telephone numbers are readily available on the internet or in telephone books. An individual could be contacted directly by a defendant for all of the information contained in these lists. *See, Heritage Benefits Consultants, Inc. v. Cole, supra.,* Finally, the name and contact information for the many businesses, professionals and other referral sources included in the lists are readily available to the public at large through a multitude of forums.[28]

To conclude, the plaintiff's effort to turn the names and contact information input by loan originators into the Loan Manager system, even those who closed loans with COLG, into trade secrets, is akin to the alchemists' efforts to turn lead into gold. The mortgage broker business rises or falls on the success of the originators, which necessarily flows from the extent and nature of the originators contacts, referrals, customers and network of associates -- social and business. The transient nature of the loan originator's career, as made clear by the evidence, contemplates that the originator's customers, contacts, referral sources and social or business acquaintances follow them

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the information included business addresses, telephone, email and sometimes website information. A limited number of lists included loan data of an already closed loan. There were a few instances where a client's SSN or DOB was included as well.

[28].Plaintiff offered evidence that the individual defendants closed loans with CTX for customers who appeared in the Loan Manager database. It relies principally on CTX records which demonstrate closed loans with former COLG customers. From this, plaintiff asks this court to infer that the defendants provided (unspecified) proprietary customer information to CTX. Under the body of evidence produced in this case, the inference is unreasonable and is not drawn. Further, to the extent plaintiff relies on the provision of a customer's name to CTX, as the court finds that the names of COLG customers are not "trade secrets," the argument fails for this reason as well.

throughout their careers. The plaintiff was well aware of the industry practice and actively recruited productive originators from other brokerage firms, based in part, on the size of the originator's contact database. Indeed, the defendants with prior experience as originators brought their then existing list of contacts and customers to their work at COLG. At the plaintiff's request, that information was added to the Loan Manager database. The mere act of inputting the information into Loan Manager did not transform the information into COLG property or trade secrets.[29] The same is true of contacts and customers developed and input during the course of the defendant's employment at COLG.[30] *See also, Holiday Food Co., v. Munroe,* 37 Conn.Sup. 546 (1981)(Customer list was not a trade secret where: defendant acquired names from the list with the plaintiff's permission; defendant kept the list of names so acquired with plaintiff's knowledge and without objection; the customers were both clients and friends of the defendant; the addresses were otherwise easily obtainable.); *Heritage Benefits Consultants, Inc. v. Cole, supra.*(Customer's identities were not a trade secret where, *inter alia,* they were readily ascertainable through classified business or trade directories and plaintiff did not make reasonable efforts to maintain their secrecy.).

Judgment will enter in favor of all defendants on the counts alleging violations of the Connecticut Uniform Trade Secrets Act.

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[29] To the extent that Killian testified that customers from prior employers were not input into Loan Manager, her testimony is not credible.

[30] The court's conclusion regarding industry practice also finds support in the practice followed by CTX. The originator is the only person who can access the Media Center contact lists; the originator is permitted to take all of the Media Center data with him or her if he leaves the employ of CTX; if an originator leaves CTX, after a period of time, CTX purges the data from the Media Center. Clearly, a loan customer's identity, is not considered proprietary to or a trade secret of CTX Faced with the cataclysmic consequences of the new business model rolled out on November 12, 2004, the plaintiff attempts to re-write industry practice to lay blame for its ruin at the feet of the defendants.

**CUTPA Claims – count four (August), seven (Stites), ten (Coles), Thirteen (McKenna), nineteen (Holland), twenty-two (Kay), twenty-eight (Migliaro), and thirty-three (CTX)**

In Connecticut, whether an act or practice violates the Connecticut Unfair Trade Practices Act is determined by application of the so-called "Cigarette Rule." *Conaway v. Prestia,* 191 Conn. 484, 492 (1983). There are three inquiries required: (1)"[w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen)]]." *Id.*

The plaintiff's proof fails to meet any of these criteria.

First, to the extent the CUTPA claim is premised upon an alleged violation of CUTSA, the court's decision regarding these claims precludes a finding of a CUTPA violation based thereon.

Further, given the factual findings set forth above, the court finds that the defendants' conduct was neither unscrupulous nor unethical. It did not implicate public policy as embodied in our common law or statutory schemes.[31] Rather, the individual defendants' move from COLG to CTX was consistent with widely accepted industry practice, a practice the plaintiff was both aware of and had participated in previously.[32]

[31] Plaintiff's effort to cloak the entirety of the information provided in the sacrosanct protections of the Graham-Leach-Blighly Act are misguided and are rejected.

[32] COLG actively recruited originators away from competitive mortgage brokers and encouraged those recruits to input their databases into Loan Manager for use by the originator in producing for COLG.

*See, Sanford Hall Agency v. Dezanni,* judicial district of New Haven, Dkt. No. CV 04400576, (December 2, 2004, Meadow, J.T.R).

As to CTX, although "argued" during opening statements, there was little evidence that the circumstances under which the individual defendants were hired by CTX was a so-called "corporate raid," the result of a determination to acquire COLG's proprietary or trade secret information, or even to otherwise collectively take away COLG's originators. Indeed, although totally ignored by the plaintiff, every individual defendant was going to quit employment with COLG before the start date for the new business model – January 1, 2005. Even before the new business model was rolled out on November 12, 2004, several of the individual defendants had already determined to leave and had offers from competitors.

Further undermining plaintiff's claim of a corporate raid is the fact that Patricia Kay was hired in Florida through completely different channels than the other six individual defendants. John Migliaro was not recruited at all but rather, it was he who contacted CTX to inquire about a job. In addition, CTX interviewed but determined not to hire at least one, perhaps more, of COLG's employees. CTX was actively recruiting people who worked at brokers other than COLG. And as previously found, the hiring decisions were made independent of each other. Certainly, the individual defendants spoke with each other and talked about the opportunities that might be available at CTX. This does not translate however, into a CUTPA violation by either CTX or any of the individual defendants.

Judgment will enter in favor of the defendants for all counts alleging CUTPA violations.

**Breach of Fiduciary Duty Claims – count two (August), five (Stites), eight (Coles), eleven (McKenna), seventeen (Holland), twenty (Kay), and twenty-six (Migliaro).**

Under Connecticut law, "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." (Internal quotation marks omitted.) *Cadle Co. v. D'Addario,* 268 Conn. 441, 455 (2004). A fiduciary relationship exists where the fiduciary is "under a special duty to act for the benefit of another." *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.,* 255 Conn. 20, 38 (2000).

"The fiduciary duty comprises two prongs: a duty of care, and a duty of loyalty ... While the duty of care requires that the ... fiduciaries exercise their best care and judgment ... the duty of loyalty derives from the prohibition against self-dealing that inheres in the fiduciary relationship." (Internal quotation marks omitted.) *Matrix Investment Corp. v. Ward,* Superior Court, judicial district of New London, Docket No. 567613 (September 16, 2004, Hurley, JTR) (37 Conn. L. Rptr. 896, 897).

It is clear under Connecticut law that a fiduciary relationship may exist in the employee-employer context. *See, Town & Country House & Homes Service v. Evans,* 150 Conn. 314 (1963); *Risdon AMS (USA), Inc. v. Levine,* judicial district of Waterbury, Dkt. No. CV 030181029, (February 10, 2004, Schuman, J.). An employee, as a fiduciary, "is obligated to exercise the utmost good faith, loyalty, and honesty toward his ... employer." *Id.* at 317. "[An employee] **during the term of the agency**, is subject to a duty not to compete with the principal concerning the subject matter of the agency." (emphasis added.) *Id.* "Generally speaking, in the absence of a restrictive covenant, a former employee may compete with his or her former employer **upon the termination of**

**employment."** (Emphasis added.) *Elm City Cheese Co. v. Federico,* 251 Conn. 59, 69 (1999). "Thus, before the end of his employment, he can properly purchase a rival business and upon termination of the employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment ... in direct competition with the agent's business." (Internal quotation marks omitted.) *Town & Country House & Homes Service v. Evans, supra,* at 317. *See also, Jet Courier Service, Inc. v. Mulei,* 771 P.2d 486 (Colo. 1989)(Employee is permitted to prepare or make arrangements to compete with their employers prior to leaving the employ of their employer without fear of incurring liability for breach of their fiduciary duty of loyalty.); *Maryland Metals, Inc. v. Metzner,* 282 Md. 31, 382 A.2d 564, 569 (1978)(Employee breaches fiduciary duty when he solicits employer's customers prior to cessation of his employment). "The line separating mere preparation from active competition may be difficult to discern in some cases." *Maryland Metals, Inc. v. Metzner, supra.,* n.3. Therefore, the courts should look at the "nature of the [employee's] preparations to determine whether a breach has occurred. *Jet CourierService, Inc., v. Mulei, supra.* at 493.

Furthermore, "[e]ven after the employment has ceased, ... the employee remains subject to a duty not to use trade secrets or other confidential information, which he has acquired in the course of his employment, for his own benefit or that of a competitor to the detriment of his former employer." (Internal quotations marks omitted.) *Elm City Co. v. Federico, supra,* at 69; *Allen Manufacturing Co., v. Loika,* 145 Conn. 509, 514 (1958).

Thus, the first issue presented in this case is whether, while still employed by COLG, the individual defendants engaged in permissible preparations to leave

employment or impermissible actions to compete with COLG.[33] The overwhelming weight of the evidence mandates a finding of the former.

In the Autumn of 2004, each and every individual defendant was actively seeking a new employer. Some had secured offers from more than one competing broker. Once the determination was made to join CTX, each, through varied methods, put together their respective contact lists for input into the Media Center.

With respect to McKenna, Stites, Coles and August, this information was provided to CTX prior to their last day with COLG. However, the information was not put to any use, marketing or otherwise, until after McKenna, Stites, Coles and August left COLG. The court finds this conduct permissible preparation for employment at CTX. It was not an effort to compete with COLG in advance of their resignations.[34]

With respect to Migliaro, Holland and Kay, the information for the Media Center was provided **after** each began their employment with CTX. Thus, their conduct prior to their departure consisted solely of interviewing with CTX (and others) and negotiating the terms of their employment with CTX. As indicated, such conduct does not give rise to a breach of their fiduciary duties.[35]

The second issue presented is whether, having left the employ of COLG, the defendants impermissibly used trade secrets or confidential information gleaned during

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[33] The court assumes, without holding, that the situation presented is one where the burden of proof shifts to the defendants to establish, by clear and convincing evidence, that they did not engage in self-dealing to the detriment of COLG.

[34] The plaintiff speculates that several customers' files were re-directed to CTX at or about the time the employees were preparing to leave, to include, for example the McNally and Walkovich loans. The evidence does not support a finding that these, or any, particular customers were diverted by any individual defendant prior to the time they left their employment. To the contrary, the evidence is clear that the individual defendants left the "pipeline" loans in place and assisted as necessary to get them closed with COLG.

[35] The court also rejects the suggestion, as unfounded by the evidence, that any of the individual defendants recruited or induced others to leave COLG.

their employment for the benefit of CTX. As already found above, the identity of the persons who had closed loans with COLG as well as the other information contained in the lists provided to CTX did not constitute "trade secrets" under CUTSA. Further, the court found that COLG anticipated and gave permission for the individual defendants to take the entirety of their contact database, to include those who had closed loans with COLG, with them in the event that they left the employ of COLG. These two findings negate any claim that the individual defendants breached this fiduciary duty.

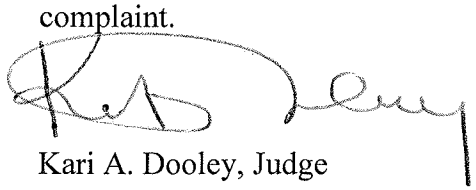
Judgment will enter in favor of each individual defendant on the breach of fiduciary duty counts.

**Conspiracy Claim**

Connecticut does not recognize an independent tort of civil conspiracy. Rather, a cause of action may be asserted for damages caused by acts committed pursuant to a conspiracy to commit a substantive tort. "Thus, the purpose of the civil conspiracy claim is to impose civil liability for damages on those who agree to join in a tortfeasor's conduct." *Macomber v. Travelers Property and Casualty Corp.*, 277 Conn. 617, 636 (2006). The allegations [and proof] must therefore include allegations [and proof] that a substantive tort was committed by a co-conspirator. *Id.*

Here, insofar as the CUTSA, CUTPA and breach of fiduciary duty claims have failed on their merits, the conspiracy count likewise is unproven.

Judgment will enter in favor of the defendants as to all counts of the operative complaint.



Kari A. Dooley, Judge