IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LELAND O. STEVENS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 11 C 2223**
	)	
INTERACTIVE FINANCIAL ADVISORS, INC. and REDTAIL TECHNOLOGY, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Leland Stevens has sued Interactive Financial Advisors, Inc. and Redtail Technology, Inc. for conversion, tortious interference with business expectancy, and unjust enrichment under Illinois law. He also asserts that defendants violated the Illinois Trade Secrets Act (ITSA), 765 ILCS 1065/4. The case is in federal court based on diversity of citizenship. Defendants have moved for summary judgment on all four of Stevens's claims. Stevens has cross moved for summary judgment on the conversion and unjust enrichment claims. Defendants have also separately moved to strike Stevens's expert disclosures. For the reasons stated below, the Court partly grants and partly denies defendants' motion for summary judgment, denies Stevens's motion for summary judgment, and denies defendants' motion to strike without prejudice.

Background

Stevens has worked as a financial adviser since 1983, when he was first licensed

to sell insurance by the Commonwealth of Virginia. For a period of time, Stevens only sold insurance products. Eventually, however, Stevens began selling investment advice as well. Because neither Stevens nor his company was registered with the U.S. Securities and Exchange Commission (SEC), he was required to associate with a registered investment adviser (RIA) before doing so. *See* 15 U.S.C. § 80b-3.

Interactive Financial Advisors, Inc. (IFA) is an RIA. In 2003, Stevens entered into an oral agreement with IFA to serve as an independent adviser representative—that is, an independent contractor—for the company. Under this agreement, Stevens was authorized to provide investment advisory services on IFA's behalf. Stevens was also permitted to use IFA's market research, sales material, and proprietary software. Although the fees collected from Stevens's clients were divided between Stevens and IFA, the clients were procured by Stevens alone.

In February 2006, IFA entered into a written agreement with Redtail Technology, Inc. to use Redtail's electronic database services. At some point before February 2006,[1] Stevens began uploading information about his investment clients and insurance clients to a Redtail database.[2] Stevens initially paid Redtail directly for its database services. Later, Redtail was paid by IFA, which then deducted the cost from Stevens's

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[1] IFA and Redtail had an oral agreement for a period of time before February 2006. The duration of this oral agreement is unclear from the record. Stevens contends that he had an oral agreement with Redtail that predated IFA's oral agreement with Redtail.

[2] Stevens alleges that "[o]f the 650 clients" uploaded to the Redtail database, "426 had insurance products only (not using advisory services offered through IFA) where Leland Stevens was the insurance agent." Pl.'s LR 56.1(a) Stmt. ¶ 10. He asserts, furthermore, that "[o]f the 224 advisory clients" uploaded to the Redtail database, "only 10 were advisory clients with no previous insurance products with Leland Stevens." *Id.* ¶ 13. But as the Court will discuss below, Stevens failed to authenticate the exhibit that supports these facts (he cites to other exhibits as well, but they do not support the facts directly). In any event, this exhibit does not affect the Court's ruling.

share of the client fees.

Stevens and IFA did not enter into a written contract until June 3, 2009, approximately six years into their business relationship. Before executing the contract, Stevens met with Richard Peterbok, IFA's president. Stevens alleges that he received Peterbok's assurance that Stevens "owned" the client information and that the written contract would not affect his ownership rights. Defendants dispute that Peterbok made that statement.

IFA terminated its relationship with Stevens on October 19, 2009. IFA alleges that the reason for the termination was Stevens's involvement in a Ponzi scheme. Four days later, IFA sent a letter to Stevens's investment clients stating that IFA was reassigning them to other independent adviser representatives; IFA assigned the clients to Robert Gardner and Richard Williams. IFA also directed Redtail to block Stevens's access to his database. Redtail complied with this request.

Stevens filed this suit in February 2010. By terminating his access to the Redtail database and reassigning his clients, Stevens alleges, defendants converted his property, misappropriated his trade secrets, tortiously interfered with his business expectancy, and were unjustly enriched.

Discussion

Defendants have moved for summary judgment on all four of Stevens's claims: conversion, misappropriation of trade secrets, tortious interference with business expectancy, and unjust enrichment. Stevens has moved for summary judgment on his conversion and unjust enrichment claims. A party is entitled to summary judgment if it shows that there is no genuine issue of material fact and it is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(a). On a motion for summary judgment, the Court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). Summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. On cross motions for summary judgment, the court assesses whether each movant has satisfied the requirements of Rule 56. *See Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005).

I. Authentication

Defendants contend that many of the exhibits attached to Stevens's Local Rule 56.1(a) statement are not properly authenticated and are hearsay. On a motion for summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). In other words, the Court must determine whether the material can be presented in a form that would be admissible at trial, not whether the material is admissible in its present form.

Defendants argue that Exhibits 5-17, 19-22, 25-26, 32-34, and 49 are not properly authenticated and are hearsay. All of these exhibits, however, are Stevens's business records, and Stevens has sufficiently laid the foundation for them in his affidavit. *See* Fed. R. Evid. 803(6); Pl.'s Reply in Supp. of Mot. for Summ. J., Ex. 2 (Stevens Decl.). As the custodian of the records, Stevens is qualified to authenticate them.

Defendants argue that Exhibits 23 and 59 are not properly authenticated and are hearsay. These documents, however, were produced to Stevens by defendants (though one of them is a notice that Stevens sent to IFA and others). *See* Pl.'s Reply in Supp. of Mot. for Summ. J., Ex. 2 (Stevens Decl.), at 2. It is highly likely that Stevens will be able to get this evidence admitted at trial through one of defendants' employees or otherwise.

Defendants argue that Exhibit 4, a purported printout of the Redtail database, is not properly authenticated and is hearsay. Stevens fails to address this exhibit in his affidavit and thus has not authenticated it. That said, Stevens likely would have little trouble getting this exhibit admitted in evidence at trial. As defendants readily admit, the information in Stevens's Redtail database was preserved by Redtail. *See* Defs.' Resp. to Pl.'s LR 56.1(a) Stmt. ¶ 41. Had the exhibit been dispositive, the Court would have provided Stevens an opportunity to submit an additional affidavit to lay the foundation for its admissibility. Because the exhibit is not dispositive, however, the Court will decide the motion without it.

Defendants argue that Exhibit 2, Stevens's insurance license, is not properly authenticated. That exhibit, however, is a copy of a public record that bears a seal appearing to be that of the Commonwealth of Virginia, and a signature appearing to be an attestation by the Commonwealth's commissioner of insurance. Thus, the exhibit is likely self-authenticating. *See* Fed. R. Evid. 902(1).

Defendants argue that Exhibit 44, an exemption certificate from the Commonwealth of Virginia, is not self-authenticating. But although the document bears a seal, it is not signed. Stevens does not offer any other form of authentication. The

Court notes, however, that the exhibit is not dispositive.

Defendants argue that Exhibit 35, a transcript of Joanne Woiteshek's testimony at a Financial Industry Regulatory Authority (FINRA) hearing, is not properly authenticated. Defendants contend that "[t]here is no cover page indicating the forum of the purported proceeding and there is no indication of who the court reporter was." Defs.' Resp. to Pl's. LR 56.1(a) Stmt.¶ 18. Stevens has addressed the authentication objection by providing the entire transcript. *See* Pl.'s Reply in Supp. of Mot. for Summ. J., Ex. 4 (Woiteshek FINRA Test.). Defendants also contend that the testimony is hearsay. However, the testimony is the statement of an opposing party's employee on a matter within the scope of that relationship, and thus is not hearsay. *See* Fed. R. Evid. 801(d)(2)(D).

Defendants argue that Exhibit 40, alleged notes from Stevens's meeting with IFA's president, is not authenticated and is hearsay. Although Stevens's affidavit is sufficient authentication, the notes likely are inadmissible except as a recorded recollection. *See* Fed. R. Evid. 803(5). But because Stevens testified to the same effect in his deposition, the Court may consider the alleged statements by IFA's president that Stevens related during his testimony. Defs.' LR 56.1(a) Stmt., Ex. D (Stevens Dep.), at 152:16-156:17. Those statements are not hearsay. *See* Fed. R. Evid. 801(d)(2)(D).

Finally, defendants argue that Exhibit 36, plaintiff's expert report, is not admissible for two reasons. First, defendants argue that the report is not properly authenticated. Second, defendants have filed a separate motion to strike the expert disclosures. The Court has determined that the outcome of the motions for summary

judgment does not turn on the expert report. Accordingly, the Court does not consider the expert report in ruling on the motions and, consequently, need not resolve these arguments. Defendants' motion to strike is therefore denied without prejudice. Defendants may refile the motion as a motion in limine before trial.[3]

II. Conversion claim

The parties have filed cross motions for summary judgment on Stevens's conversion claim. To survive summary judgment, Stevens must point to evidence from which a reasonable jury could find that (1) he has a right to the property, (2) this right includes the absolute and unconditional right to the immediate possession of the property, (3) he made a demand for possession of the property, and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property. *See Cirrincione v. Johnson*, 184 Ill. 2d 109, 114, 703 N.E.2d 67, 70 (1998). Conversely, to survive summary judgment, defendants must point to evidence tending to show that at least one of these elements is not satisfied.

Stevens asserts that defendants converted two distinct property interests: the Redtail database, which contained confidential information about his investment clients and his insurance clients, and the investment accounts themselves. The Court concludes that no reasonable jury could find that defendants converted the investment client information and investment client accounts. The Court also concludes, however, that a reasonable jury could find that the defendants converted the insurance client information. Accordingly, the Court grants defendants' motion in part and denies it in

[3] In his affidavit, Stevens also attempts to authenticate exhibits that are attached to his response to defendants' Local Rule 56.1(a) Statement. Some of these exhibits are offered by defendants as well; others are not dispositive. Accordingly, the Court need not address whether these exhibits are properly authenticated.

part. And because the Court concludes that a reasonable jury could find that defendants did not convert any of Stevens's property interests, the Court denies Stevens's motion for summary judgment in its entirety.

A. Investment client accounts

1. Right to the investment client accounts

Stevens contends that he had a right to the investment client accounts. The contours of the right he claims, however, are less than clear in Stevens's briefs and absent from his complaint. Stevens acknowledges that "the clients themselves maintain unconditional and undisputed control over the funds in the accounts and the information." Pl.'s Mem. in Supp. of Mot. for Summ. J. at 5. Thus, Stevens says, "[o]wnership in this context means the right to have access to confidential information and transfer that information to other parties for the purpose of sale, administration, or service of the clients." *Id.* That would seem to suggest that the right he alleges is a right to the investment client information. But if so, the right to the investment client accounts would be duplicative of Stevens's alleged right "in client confidential information stored on the Redtail database." *Id.* at 3. That may be why Stevens later argues that his right to the investment client accounts also includes "the right to transfer or sell [his] book of business." *Id.* at 9. Similarly, he contends in his reply brief that he "had the right to contact the clients and move them to a different RIA." Pl.'s Reply in Supp. of Mot. for Summ. J. at 8.

It is perhaps clearer what Stevens's claimed right is not. First, Stevens is not claiming a right to continue servicing the investment client accounts following his termination. Indeed, it is undisputed that Stevens was not an RIA and thus that he had

to be associated with an RIA to provide investment advice. *See* 15 U.S.C. § 80b-3 ("[I]t shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser."). Absent such affiliation, Stevens was prohibited from servicing the investment client accounts. Second, Stevens is not claiming a right to derive revenue from IFA's accounts following his termination. As defendants note, "[t]here is no allegation that IFA was required to share any of its revenues with Stevens once he left IFA." Defs.' Resp. to Pl.'s Mot. for Summ. J. at 14. Stevens does not dispute this assertion in his briefs.[4] Third, Stevens is not claiming a right to transfer the accounts without the client's approval, likely because investment advisers are required to obtain the client's consent before transferring advisory contracts. *See* 15 U.S.C. § 80b-5(a)(2) ("No investment adviser . . . shall enter into, extend, or renew any investment advisory contract . . . if such contract . . . fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party . . . ."); *id.* § 80b-2 (defining "assignment" to include any direct or indirect transfer of an investment advisory contract). Stevens admits as much in his briefs. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 5. (acknowledging that the clients "maintain absolute and undisputed control" over both the account funds and information).

The Court concludes that the right Stevens claims amounts to the right to transfer the investment client accounts upon approval from the clients, as well as the right to

[4] Indeed, Stevens's own expert states that Stevens could not "be paid commissions or fees based on transactions within the affected accounts" while he was not affiliated with an RIA. Pl.'s LR 56.1(a) Smt., Ex. 36 (Conlon Report), at 6.

contact the clients to seek this approval, but nothing more than that. It may be that Stevens thinks there is more to the right. If so, he hasn't made this argument in his briefs. Because Stevens is restricted from servicing and deriving revenue from the accounts, it is difficult to see how he could.

Having determined that the right Stevens claims amounts to a right to transfer the investment client accounts, the Court now turns to whether Stevens did, in fact, have this right. The contract between defendants and Stevens does not expressly state whether Stevens had a right to transfer the investment client accounts. Stevens argues that he did have a right to transfer the investment client accounts under the contract, pointing to three undisputed facts. First, the investment clients were exempt from the noncompete provision in Steven's contract. Pl.'s LR 56.1(a) Stmt., Ex. 39 (Indep. Adviser Rep. Agr.), at 11. Second, his contract included a buyout provision that states, "[d]uring the term of this Agreement, should Contractor or his/her estate wish to sell Contractor's client accounts . . . Company will purchase the IFA/client accounts of Contractor." Pl.'s LR 56.1(a) Stmt., Ex. 39 (Indep. Adviser Rep. Agr.), at 17. Third, in a FINRA arbitration hearing, IFA's chief compliance officer testified that "in our contract, [Stevens] own[ed] the accounts" and "the clients really are [Stevens's] clients" because he could have transferred the accounts to another firm. Pl.'s Reply in Supp. of Summ. J., Ex. 4 (Woiteshek FINRA Testimony), at 75-76. Stevens also contends that IFA's president assured him that the investment clients "belong[ed] to me" and that "[i]t was my business to sell." Defs.' LR 56.1(a) Stmt., Ex. D (Stevens Dep.), at 152:16-156:17.

Defendants, in turn, argue that Stevens did not have a right to transfer these accounts upon termination. They contend that Stevens "conflates IFA's recognition" of

his personal relationships with the investment clients with actual legal relationships. Defs.' Mem. in Supp. of Summ. J. at 4. To "respect" the fact that Stevens procured certain of the clients, defendants say, IFA would not have sought "to legally prohibit Stevens from transferring the IFA [c]lients he serviced to [a] new firm," and, had Stevens retired in good standing, "IFA would have provided [him] a payout." *Id.* But, defendants argue, that does not "change the fact that the clients entered into legal agreements with IFA, not Stevens." *Id.* Defendants assert that their relationship was "[s]imilar to a law firm" in the sense that "clients may be referred to colloquially as belonging to a particular partner and the firm may reward the partner for such relationships," but legally "they are law firm clients, not partner clients." *Id.* at 4-5.

Defendants contend that four undisputed facts support this interpretation of their agreement with Stevens. First, the investment client contracts were between IFA and the clients, not Stevens and the clients. Pl.'s Resp. to Defs.' LR 56.1(a) Stmt. ¶¶ 2-3.[5] Second, the contract between IFA and Stevens states that Stevens "desires to contract with IFA to offer and provide those investment advisory services permitted under the terms of this Agreement *on behalf of IFA* . . . ." Pl.'s LR 56.1(a) Stmt., Ex. 39 (Indep. Adviser Rep. Agr.), at 1 (emphasis added). Third, the contract between IFA and Stevens also states that "all investment decisions are subject to approval by IFA, and may be rejected by IFA in its sole discretion . . . ." *Id.* at 3. Fourth, the investment clients paid IFA directly, and IFA then paid Stevens a portion of the fee. Pl.'s Resp. to

[5] Stevens notes that he "personally provided investment advisory services to all the clients and assisted with 100% of the forms needed to open advisory accounts with IFA . . . ." Pl.'s Resp. to Defs.' LR 56.1(a) Stmt. ¶ 3. That does not change the fact that Stevens was not a signatory to the contract between IFA and his investment clients.

Defs.' LR 56.1(a) Stmt. ¶ 8.[6]

Although each party has presented facts that support its respective interpretation of the contract, none of these facts conclusively establish either interpretation. Accordingly, the question of ownership of these accounts does not provide a basis for summary judgment. *See Wilson v. Career Educ. Corp.*, 729 F.3d 665, 687 (7th Cir. 2013) ("It is well established that a party who can show that a contract is ambiguous is entitled to survive summary judgment and to introduce evidence that will resolve the ambiguity.")

2. Right that includes the absolute and unconditional right to the immediate possession of the investment client accounts

As discussed above, it is undisputed that Stevens was not an RIA and, therefore, had to associate with an RIA in order to provide financial advice. Accordingly, once Stevens was no longer affiliated with IFA, he was prohibited from servicing the investment client accounts; he could only do so after associating with another RIA. *See* 15 U.S.C. § 80b-3. Stevens's alleged right to the accounts, then, amounts to a right to transfer the accounts upon affiliation with a new RIA.

No reasonable jury could find that Stevens had an absolute and unconditional right to immediate transfer of the investment client accounts, for two reasons. First, it is undisputed that Stevens did not attempt to affiliate with a new RIA. Indeed, in his deposition, Stevens admitted that he "didn't make any attempts to seek an association with another [RIA]." Defs.' LR 56.1(a) Stmt., Ex. D (Stevens Dep.), 228:1-5. He explained that, once an independent adviser representative is under FINRA

[6] Stevens notes that his fee was disclosed to clients. That does not change the fact that clients paid IFA directly.

investigation (in Stevens's case, for involvement in a Ponzi scheme), "there is no way an [RIA] is going to take you on board." *Id.* at 227:17-24. Thus, even if Stevens had some right to transfer the accounts, he would have needed to associate with a new RIA for that right to ripen into a right to immediate possession. Because Stevens did not do so, no reasonable jury could find that he held the sort of right necessary to sustain a conversion claim.

Second, when an independent adviser representative moves to a different RIA, the representative must obtain each client's consent before transferring the accounts to his or her new firm. For this reason as well, then, no reasonable jury could find that Stevens held an absolute and unconditional right to immediate possession of the accounts.[7] Indeed, the record suggests that at least some of the clients would have withheld their consent. *See* Defs.' LR 56.1(a) Stmt., Ex. O (Palmer Dep.), at 55:21-56:6 (stating that some of Stevens's former clients informed IFA that Stevens "was contacting them," and that these clients were "very uncomfortable with the situation").

Stevens notes that defendants sent him "cease and desist letters regarding contacting these clients and threatening to sue him for said contact." Pl.'s Mem. in Supp. of Summ. J. at 12; *see also id.* at 6. Though Stevens relies on this for other purposes in his briefs, he could also argue, perhaps, that the letters deterred him from contacting the investment clients and that defendants thereby undermined his ability to obtain the clients' consent and thus deprived him of his right to transfer the accounts.

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[7] If Stevens had associated with a new investment firm and obtained his investment clients' consent to transfer their accounts, then he would have had an absolute and unconditional right to immediate possession of the accounts. Had IFA nevertheless refused to transfer the accounts, Stevens would have a viable claim for conversion.