AON Corp. v Alliant Ins. Serv., Inc.

2014 NY Slip Op 31735(U)

June 26, 2014

Sup Ct, New York County

Docket Number: 650700/2014

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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AON CORPORATION, a Delaware corporation, and AON PLC, a United Kingdom public limited company,

Plaintiffs,

- against -

ALLIANT INSURANCE SERVICES, INC., a Delaware corporation,

Defendant.

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Index No.: 650700/2014

DECISION/ORDER

Motion Seq. 001

In this action between commercial insurance brokerage firms, plaintiffs Aon Corporation and Aon PLC (collectively Aon) contend that defendant Alliant Insurance Services, Inc. (Alliant) conducted on orchestrated raid on Aon's employees in California. Aon sought a temporary restraining order and now seeks a preliminary injunction to enjoin Alliant from soliciting Aon clients and Aon employees and from using "Aon client-specific or employee-specific information obtained from the Aon former employees."[1]

Aon contends that it and Alliant are direct competitors in a highly competitive marketplace to provide, among other things, specialized insurance brokerage services. (Complaint, ¶¶ 1, 41, 44.) Aon alleges that it has developed "significant goodwill" and "has devoted substantial resources to the recruitment, training, and compensation of employees so

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[1] These parties or their affiliates have been before this Court previously in an action involving similar allegations. The court takes judicial notice of the decisions and orders rendered by the Appellate Division, First Department and this Court (Fried, J.) in that prior action. (See e.g. Aon Risk Servs. v Cusack, 102 AD3d 461 [1st Dept 2013]; Aon Risk Servs. v Cusack, 34 Misc 3d 1205[A], 2011 WL 6955890 [Supreme Court, New York County, Dec. 20, 2011, No. 651673/11].)

they can perform the necessary services for clients, as well as develop and nurture the close relationships necessary to keep clients and client referral sources satisfied." (Id., ¶¶ 42-44.) To service its clients, Aon further alleges that it also spends "time and resources" developing and maintaining relationships with insurance companies so that it can offer "affordable pricing for sale to customers." (Id., ¶ 46.) In turn, Aon contends that this pricing information as well as the identities of its clients are trade secrets and confidential and proprietary information.[2] (Id., ¶ 47.)

On February 25, 2014, several "senior leaders" from Aon's central California offices resigned. (Complaint, ¶ 26.) Specifically, the following "valuable key employees," who worked at Aon Risk Services West, Inc. (Aon West) offices in Fresno, Salinas, and Walnut Creek, California, resigned on that day: John Day, Resident Managing Director of Aon West; Larry Edde, Executive Vice President and Resident Director of Aon West; Ralph Busch, Executive Vice President and Chief Operating Officer of Aon West; Peter Baldwin; Nicholas Bellasis; Regina Carter; Gerald Droz; Steven Edwards; Salvatore Marra; and Tomlyn Winn. (Id., ¶¶ 51-55.) Within one week, more than 75 employees had resigned. (Id.) The Fresno office decreased in size from 60 employees to 5. (Id.) Aon alleges, and Alliant does not dispute, that these approximately 75 employees have all joined Alliant. (Id., ¶ 28.)

A small number of these employees were subject to "a variety of agreements in which they voluntarily accepted certain restrictive covenants and other contract provisions designed to

[2] Specifically, Aon alleges that the following comprises trade secrets and confidential and proprietary information: "the identities of its clients and their key insurance purchasing decision-makers, compilations of clients and client contacts, Aon's pricing structures, its negotiated commission rates with insurance carriers, management and business plans and strategies, surety bonding rates, the contracts it has with its clients and the terms thereof, as well as Aon clients' policies numbers, buying histories and preferences, future business needs, premium amounts, fee arrangements, renewal information, internal revenues figures and projections, and the salaries and benefits Aon provides to its employees." (Complaint, ¶ 47.)

protect Aon's trade secrets." (Complaint, ¶ 57.) The parties have identified the 2011 Aon Stock Incentive Plan Restricted Stock Unit Agreements (2011 RSUs), the 2001 Incentive Plan Restricted Stock Unit Agreements (2001 RSUs), Employment Agreements, and Confidentiality and Non-Solicitation Agreements as containing restrictive covenants. In the 2011 RSUs, for a period of two years after cessation of employment, the Aon employees covenant not to,

> "directly or indirectly, call upon, solicit, accept, engage in, service or perform ... any business of the same type or kind as the business performed by Aon from or with respect to (i) clients of Aon with respect to whom the [employee] provided services, either alone or with others, or had a business relationship, or on whose account he worked or became familiar, or supervised directly or indirectly the servicing activities related to such clients, during the twenty-four (24) month's prior to the [employee's] Termination Date or within twelve (12) months prior to such Termination Date and (ii) prospective clients of Aon which the [employee] alone, in combination with others, or in a supervisory capacity, solicited during the six (6) months prior to the [employee's] Termination Date and to which a proposal for services was rendered by Aon during the six (6) months prior to the [employee's] Termination Date."

(§ 9 [b].) In addition, for the same period of two years after cessation of employment, Aon employees covenanted not to "directly or indirectly, solicit or induce ... any employee of Aon to ... leave the employ of [Aon]." (§ 9 [c].) Without any time limitation, Aon employees covenanted not to disclose trade secrets or confidential information gained during their employment. (§ 9 [g]). The 2011 RSUs also contain a choice of law provision, specifying the application of Illinois law. (§ 10 [j].) Baldwin, Bellasis, Busch, Droz, Edwards, and Winn are subject to the 2011 RSU. (March 20, 2014 Supp. Aff. of Douglas Turk, Exs. 12 and 13 [Baldwin 2011 RSUs]; Exs. 14 and 15 [Bellasis 2011 RSUs]; Ex. 16 [Busch RSU]; Ex. 17 [Droz 2011 RSU]; Ex. 18 [Edwards 2011 RSU]; and Ex. 19 [Winn RSU].)

The 2001 RSUs contain provisions substantially similar to the 2011 RSUs, including a restrictive covenant not to compete (§ 8 [a] [ii]), a covenant not to solicit Aon employees (§ 8 [a] [iii]), and a confidentiality and trade secret protection provision (§ 8 [c].) The 2001 RSUs also contain a choice of law provision, specifying the application of Illinois law. (§ 9 [1].) Day, Carter, and Busch are subject to the 2001 RSU. (Complaint, ¶ 59; Turk Supp. Aff. Ex. 20 [Carter 2001 RSU], Ex. 21 [Day 2001 RSU].)

Marra has a separate written Employment Agreement that contains restrictive covenants. In that Employment Agreement, Marra acknowledges that Aon's "clients and prospective clients remain at all times the clients and prospective clients of Aon" (§ 4 [a]) and agrees "for a period of two years after [cessation of employment] not to, directly or indirectly, solicit or induce, or to cause any person or other entity to solicit or induce, any employee of Aon" to leave the employment of Aon (§ 4 [d]). (March 3, 2014 Aff. of Douglas Turk, Ex. 2 [Marra Employment Agreement].) The Employment Agreement also precludes Marra from using any Confidential Information gained during his employment at Aon, including but not limited to "lists of clients and prospective clients; contract terms and conditions; client information relating to services . . . corporate, management and business plans and strategies . . . ." (§ 6 [a].) Notably Marra's employment contract provides that the law of Marra's residence – California – governs. (§ 8 [d].) Carter, Day, Edde, and Edwards are alleged to have also entered into employment agreements with "substantially identical prohibitions on soliciting Aon employees and on disclosing Aon trade secrets and confidential information." (March 3, 2014 Turk Aff., ¶ 26.) Those agreements have not been provided to the court, however.

In addition, Baldwin, Bellasis, Busch, Day, Droz, Edde, Edwards, and Winn are subject to Confidentiality and Non-Solicitation Agreements. These Agreements contain the same terms

as the Employment Agreement, acknowledging that all clients and prospective clients "remain" with Aon, and preventing solicitation of Aon employees. (§ 1 [a], [b]). The Confidentiality and Non-Solicitation Agreements also contain a definition of Confidential Information virtually identical to that of the Employment Agreement, and prohibit former employees from using or disclosing "any Confidential Information which has not been publicly disclosed" (§ 3 [a]). (Aff. of Peter Baldwin, Ex. 1; Aff. of Nicholas Bellasis, Ex. 1; Aff. of Ralph Busch, Ex. 1; Aff. of John Day, Ex. 1; Aff. of Gerald Droz, Ex. 1; Affidavit of Larry Edde, Ex. 1; Aff. of Steven Edwards, Ex. 1; Aff. of Tomlyn Winn, Ex. 1.) As with the Employment Agreements, the Confidentiality and Non-Solicitation Agreements contain a choice of law provision providing for the application of the law of the employee's residence (§ 5 [c]). In all cases, that was California. (Baldwin Aff., Ex. 1; Bellasis Aff., Ex. 1; Busch Aff., Ex. 1; Day Aff., Ex. 1; Droz Aff., Ex. 1; Edde Aff., Ex. 1; Edwards Aff., Ex. 1; Winn Aff., Ex. 1.)

The employees identified in the agreements discussed above (supra at 3-5) are the only employees Aon (or Alliant) alleges are subject to contractual restrictive covenants. It is undisputed that Alliant is not a party to any of these contracts.

Aon alleges that Alliant had to have organized and orchestrated such a "raid" well in advance of February 25, 2014, and that, as a result of hiring over 75 Aon employees, Alliant has access to and has "misappropriated and utilized Aon's confidential, proprietary and trade secret information for its own benefit." (Complaint, ¶ 76.) In addition, Aon alleges that when they were employed by Aon and afterward, some of the over 75 employees solicited Aon clients and other Aon employees with Alliant's knowledge. (Id., ¶¶ 36-37.) Further, Aon alleges that all of the employees owed it a duty of loyalty and that the executives owed it a fiduciary duty. (Id., ¶¶ 111, 120.) Based on these allegations, Aon asserts six causes of action against Alliant:

misappropriation of trade secrets (first cause of action), misappropriation of confidential and proprietary information (second cause of action), intentional interference with contractual relations (third cause of action), intentional interference with prospective economic advantage (fourth cause of action), aiding and abetting breach of fiduciary duty (fifth cause of action), and conspiracy (sixth cause of action). All of Aon's causes of action lie in tort and all are asserted solely against Alliant. Notably, none of the individual defendants, who are the parties to the restrictive covenants, are named as defendants.

On this motion, Aon seeks the following preliminary injunction:

> "(a) Enjoining Alliant, and those acting in concert with Alliant, from directly or indirectly:
> (i) Soliciting business from or entering into any business relationship with any Aon client or customer for whom any of the Aon former employees Peter Baldwin, Nicholas Bellasis, Ralph Busch, Regina Carter, John Day, Gerald Droz, Larry Edde, Steven Edwards, Salvatore Marra, or Tomlyn Winn was the producer or on whose account he or she worked during the twenty-four (24) months prior to February 25, 2014;
> (ii) Soliciting any Aon employees to work for Alliant;
> (iii) Using Aon client-specific or employee-specific information obtained from Aon former employees, including but not limited to any information downloaded or retrieved from Aon's computers; and
> (b) Ordering the immediate return to Aon of any documents or information taken by any of the Aon former employees, and any Aon documents or information Alliant has on its computer network or on the hard drives of any Alliant employees."

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's

favor." (Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606 [2d Dept 1986]; Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005].) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].) While the proponent "need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations, quotation marks and brackets omitted].)

Conflict of Laws

In evaluating Aon's likelihood of success on the merits, the court must make a threshold determination as to the applicable law. In this action, Aon does not assert a breach of contract claim against its former employees, who allegedly breached the restrictive covenants in their agreements, or against Alliant. Instead, Aon asserts tort claims against Alliant predicated on the enforceability of the restrictive covenants. The laws of California and New York law differ as to the enforceability of those covenants. Aon asserts that Illinois law governs the enforceability of the restrictive covenants set forth in the 2001 and 2011 RSU's as that is the applicable law set forth in the choice of law provisions. Aon also cites the decisions of this Court (Fried, J.) and the Appellate Division in the prior action, holding that Illinois law applies. (Aon Memo. of Law in Supp. at 16-17; Aon Reply Memo. of Law at 6.) For the tort causes of action, however, Aon

relies on New York law. (See e.g. Aon Memo. of Law in Supp. at 17-19.) Alliant contends that California law governs, as all of employees are located in California, all of the alleged actions took place in California, and California has the greatest interest in regulating the conduct at issue. (Alliant Memo. of Law in Opp. at 6-9.)

The court rejects Aon's contention that Illinois law governs. Aon's reliance on the findings of this Court and the Appellate Division in the prior action is misplaced. In that action, Aon Risk Services Northeast, Inc. (Aon Northeast) sued a former employee, Michael Cusack, who was based in the Boston office, for, among other things, breach of contract for alleged violation of various restrictive covenants. (Aon Risk Servs. v Cusack, 2011 WL 6955890, at *1-2.) Aon Northeast and Cusack were parties to several contracts, all with Illinois choice of law clauses. In applying Illinois law, this Court emphasized the parties' contractual choice of Illinois law: "With respect to the breach of contract claims, New York law generally honors choice of law provisions in contracts." (Id. at *12 [internal citation omitted]. See also Aon Risk Servs. v Cusack, 102 AD3d 461, 463 [1st Dept 2013] ["New York courts are willing to enforce parties' choice of law provisions. Here, the parties' agreements selected Illinois law to govern their disputes, and the IAS court sought to uphold this choice of law provision"] [internal citations omitted].) This Court then applied New York law to the tort causes of action. (2011 WL 6955890, at *16-17, *19-20.)

Unlike the Court in the prior action, this court is not called upon to enforce the agreement of the parties to apply Illinois law. Alliant is not a party to the agreements containing the choice of law clauses and therefore cannot be bound by them. Aon offers no basis supporting the application of Illinois law other than the choice of law clause. The court accordingly turns to the

issue of whether to apply the law of California, the place where many of the acts in question indisputably occurred, or New York, the place of the forum.

Before reaching the question of whether California or New York law applies, however, the court must determine that the laws of the proposed states indeed conflict. (See TBA Global, LLC v Proscenium Events, LLC, 114 AD3d 571, 461 [1st Dept 2014].) To be in conflict, "the laws in question must provide different substantive rules in each jurisdiction that are relevant to the issue at hand and have a significant possible effect on the outcome of the trial." (Elmaliach v Bank of China, Ltd., 110 AD3d 192, 200 [1st Dept 2013] [internal quotation and citation omitted].)

By statute, California has expressed its public policy that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[3] (Void Contracts, Cal. Bus. & Prof. Code § 16600.) "Section 16600 expresses California's strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice." (Dowell v Biosense Webster, Inc., 179 Cal App 4th 564, 575 [Cal App 2009] [holding that "illegal noncompete agreements" also violate the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.].) "The law protects Californians and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." (Edwards v Arthur Andersen LLP, 44 Cal 4th 937, 946 [Cal 2008] ["[O]ur courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility"]. See also Continental Car–Na–Var Corp. v Moseley, 24 Cal 2d 104, 110 [Cal 1944] ["A former employee

[3] The exceptions, none of which are present here and neither party contends apply, are codified at §§ 16601, 16602, 16602.5 of the California Business and Professions Code.

has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of . . . his former employer, provided such competition is fairly and legally conducted"].)

California courts have applied Section 16600 not only to invalidate absolute prohibitions on the exercise of a profession, trade, or business but also to invalidate restrictive covenants, like the one at issue here, that prevent an employee from doing business with a former employer's clients. (See e.g. Edwards, 44 Cal 4th at 948 [affirming invalidation of employment agreement that prohibited employee from performing services to employer's clients for 18 months, if he worked on the account previously, and for 12 months, if not]; Robinson v Jardine Ins. Brokers Intl. Ltd., 856 F Supp 554, 559 [N D Cal 1994] [on preliminary injunction motion, finding that where "the alleged employment contract . . . purport[s] to prohibit Plaintiff from doing any business with Defendant's clients, regardless of who initiates contact[,] Plaintiff has demonstrated a probability of succeeding on the claim that such a restriction is invalid under § 16600"].)

Under California law, a former employee may, however, be enjoined from soliciting customers if that solicitation requires the use of trade secrets. (Wanke, Indus., Commercial, Residential, Inc. v Superior Court, 209 Cal App 4th 1151, 1177 [Cal App 2012] [holding that under Edwards, "section 16600 generally prohibits the enforcement of a nonsolicitation agreement in all cases in which the trade secret exception does not apply"] [emphasis in original; footnote omitted]; Thompson v Impaxx, Inc., 113 Cal App 4th 1425, 1429 [Cal App 2003] [reversing grant of judgment on pleadings after finding that whether customer list was trade secret was question of fact, and holding that "[l]abeling information as a trade secret or as confidential information does not conclusively establish that the information fits this

description"].)[4] Non-public customer lists developed through the employer's "time and effort" may constitute trade secrets in certain circumstances. (Retirement Group v Galante, 176 Cal App 4th 1226, 1237 [Cal App 2009] [reversing grant of preliminary injunction prohibiting former employee from soliciting employer's customers and/or transferring any account, and holding that employer had not established that information other than that located solely and exclusively on employer's servers was a trade secret]; American Paper & Packaging Prods., Inc. v Kirgan, 183 Cal App 3d 1318, 1326 [Cal App 1986] [affirming denial of preliminary injunction where "information sought to be protected here, that is lists of customers who operate manufacturing concerns and who need shipping supplies to ship their products to market, may not be generally known to the public, [but] they certainly would be known or readily ascertainable to other persons in the shipping business"].)

Protection of trade secrets is governed by statute, and not necessarily by the parties' contractual language:

> "[S]ection 16600 bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin tortious conduct (as violative of either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer."

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[4] Some courts have questioned whether, absent a violation of the California Uniform Trade Secrets Act and/or the Unfair Competition Law, a common law cause of action can exist prohibiting an employee from soliciting clients of a former employer even if that solicitation is based on the use of trade secrets. (See Dowell, 179 Cal App 4th at 577 [quoting Retirement Group and questioning the "continued viability of the common law trade secret exception to covenants not to compete"]. See also Arthur J. Gallagher & Co. v Lang, 2014 WL 2195062, *4 n 3 [ND Cal 2014, No. No. C 14–0909] [applying California law and holding that, even if "trade secret exception to section 16600" continued to exist, restrictive covenant precluding former employee from soliciting clients "'about which [he] received trade secrets,'" as opposed to preluding him from soliciting clients "using" those trade secrets, was unenforceable as too broad] [emphasis in original].)

(Retirement Group, 176 Cal App 4th at 1238 [emphasis in original].)

In contrast, New York follows a reasonableness standard in determining the validity of restrictive covenants between employees and employers. A restrictive covenant "will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." (Reed, Roberts Assocs. v Strauman, 40 NY2d 303, 307 [1976]; accord BDO Seidman v Hirshberg, 93 NY2d 382, 388-389 [1999] [describing this test as "[t]he modern, prevailing common-law standard of reasonableness for employee agreements"]; see Model Mgt., LLC v Kavoussi, 82 AD3d 502, 503 [1st Dept 2011].) "[J]udicial disfavor of these covenants is provoked by powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood. . . . Therefore, no restrictions should fetter an employee's right to apply to [the employee's] own best advantage the skills and knowledge acquired by the overall experience of [the employee's] previous employment." (Reed, Roberts Assocs., 40 NY2d at 307 [internal quotation marks and citations omitted].)

Restrictive covenants will accordingly be enforceable, if reasonable, "to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information" (Reed, Roberts Assocs., 40 NY2d at 308; accord Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp., 42 NY2d 496, 499 [1977]) or where there is actual misappropriation of customer information, as by copying or intentional memorization.[5] (Natural Organics, Inc. v Kirkendall,

[5] Under New York law, even in the absence of a restrictive covenant, where "customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets," particularly "where the customers' patronage had been secured by years of

52 AD3d 488, 489 [2d Dept 2008], lv denied 11 NY3d 707; Apa Sec., Inc. v Apa, 37 AD3d 502, 503 [2d Dept 2007].) In addition, restrictive covenants, if reasonable, may be enforced "where an employee's services are unique and extraordinary and the covenant is reasonable." (Reed, Roberts Assocs., 40 NY2d at 308; 1 Model Mgt. LLC, 82 AD3d at 503.)

An employee will not, however, be enjoined from soliciting clients "who came to the firm solely to avail themselves of [the employee's] services and only as a result of [the employee's] own independent recruitment efforts, which [the employer] neither subsidized nor otherwise financially supported as part of a program of client development." (BDO Seidman, 93 NY2d at 392, 393.)

Perhaps the best evidence that the laws of California and New York conflict is provided by prior decisions rendered under California law in actions between these parties or their affiliates. In actions involving Aon contracts with restrictive covenants similar to those at issue here and Illinois choice of law provisions, both a California trial court and a federal district court applying California law rejected the application of Illinois law. Citing California's stated public policy, these Courts found that Aon's non-competition restrictive covenants violated Section 16600, and held them to be unenforceable under California law. (Aff. of Timothy Stephens, Ex. H [Alliant Ins. Servs., Inc. v Aon Risk Servs. Cos, Inc., No. BC463382, at 8 [unpublished "tentative ruling"]; Arkley v Aon Risk Servs. Cos., Inc., 2012 WL 2674980 [CD Cal, June 13, 2012, No. CV 12-1966].) In contrast, this Court (Fried, J.), under the same contracts at issue in the California litigation, enforced the choice of law provisions, applied Illinois law, and found the restrictive covenants enforceable. (See Aon Risk Servs., 2011 WL 6955890, at *12-15; see

effort and advertising effected by the expenditure of substantial time and money." (Leo Silfen, Inc. v Cream, 29 NY2d 387, 393-394 [1972].)

also Aon Risk Servs. v Cusack, 102 AD3d 461, 463 [1st Dept 2013] ["Here, the parties' agreements selected Illinois law to govern their disputes, and the IAS court sought to uphold this choice of law provision. By contrast, the California courts ignored the parties' choice of law provision in favor of its own public policy"].) In doing so, this Court implicitly found that the enforcement of the restrictive covenants did not violate the public policy of New York. (See Cooney v Osgood Mach., Inc., 81 NY2d 66, 78-79 [1993].)

On the above authority, the court holds that California and New York law conflict on the issue of the enforceability of the restrictive covenants. (See e.g. Lynch v Bailey, 275 AD 527, 534-535 [1st Dept 1949], affd 300 NY 615 [1949] [citing § 16600 and finding that it would be inequitable to enforce a restrictive covenant against one partner because of his residence in New York when that same covenant would not be enforceable against another partner because of his residence in California].) Aon may be correct that the torts at issue have the same or similar elements under either California or New York law. (Reply Memo. of Law at 5.) As discussed further below, however, a determination that a valid, enforceable contract existed is crucial to Aon's proof of the majority of Aon's causes of action. Whether that determination is made under California or New York law thus could affect the outcome of the action.

Having determined that there is a conflict between California and New York law, the court turns to the next element of the conflict of law analysis. New York has adopted a "flexible approach intended to give 'controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" (Cooney, 81 NY2d at 72 [quoting Babcock v Jackson, 12 NY2d 473, 477-478, 481 [1963] [rejecting mechanical application that "that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place

of the tort," and holding that "[j]ustice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation"] [internal quotation and citation omitted].) The determination as to which of "the two competing jurisdictions has the greater interest in having its law applied to the litigation" is made through two separate inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss." (Padula v Lilarn Props. Corp., 84 NY2d 519, 521 [1994] [citing Schultz v Boy Scouts, 65 NY2d 189, 197-198 [1985].)

The significant contacts "are, almost exclusively, the parties' domiciles and the locus of the tort." (Schultz, 65 NY2d at 197.) "[I]f the plaintiff and the defendant are domiciled in different states, the law of the situs of the injury generally applies," but "where the parties share a common state of domicile, an analysis will determine which state's law (that of the common domicile or that of the situs) has the predominant interest." (Aviles v Port Auth. of New York and New Jersey, 202 AD2d 45, 46 (1st Dept 1994), appeal withdrawn, 84 NY2d 1008 [1994] [citing Neumeier v Kuehner, 31 NY2d 121 [1972] and Schultz, 65 NY2d at 198.)

New York also distinguishes between laws that serve to regulate conduct and those that allocate loss. Conduct-regulating laws "have the prophylactic effect of governing conduct to prevent injuries from occurring" whereas loss-allocation laws rules "prohibit, assign, or limit liability after the tort occurs." (Padula, 84 NY2d at 522.) Where, as here, the "conflicting rules involve the appropriate standards of conduct . . . the law of the place of the tort will usually have a predominant, if not exclusive, concern because the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in

the admonitory effect that applying its law will have on similar conduct in the future assume critical importance and outweigh any interests of the common-domicile jurisdiction." (Schultz, 65 NY2d at 198 [internal quotations and citations omitted]. See also Elmaliach, 110 AD3d at 202-203.) If the conduct underlying the tort takes place in one jurisdiction, but the injury is suffered in another, "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." (Schultz, 65 NY2d at 195 [internal citations omitted].)

Aon pleads that both Aon Corporation and Alliant are Delaware corporations with offices in New York. (Complaint, ¶ 39-40.) Aon PLC is a United Kingdom public limited company. (Id., ¶ 40.) Alliant has not answered the complaint, but, at a minimum, does not deny that it does business in New York.[6] (Reply Aff. of Shand Stephens, Ex. 4 [Zimmer Dep. Tr.] at 56.) For the purposes of this motion, the court need not determine whether or not Aon and Alliant share a domicile in New York as both the situs of the injury and the state with the predominant interest is California. (See e.g. Aviles, 202 AD2d at 47 [finding defendant to have "dual domicile" for choice of law analysis].)

It is undisputed that all of Aon's former employees were employed at Aon offices in California and resided in California. It is further undisputed that all of the former employees now are employed at Alliant offices in California. Some of the agreements containing the restrictive covenants contain choice of law provisions selecting California law. The alleged solicitations of Aon employees took place in California, and the alleged solicitation of Aon clients involved clients serviced from the Aon California offices. Unrebutted testimony

[6] Alliant has responded to the complaint by moving to dismiss on the grounds of forum non conveniens, and not for lack of personal jurisdiction.

demonstrates that Fresno, Salinas, Walnut Creek, and Sacramento Aon offices serviced approximately 1,100 clients, many of whom were construction companies active in California. (Reply Aff. of Shand Stephens, Ex. 5 [Day Dep. Tr. at 25, 30-31]; Ex. 6 [Turk Dep. Tr. at 204-205] [testifying that Aon's clients could, in part, be determined by reviewing publicly-filed bids in Fresno, California]. See also Reply Aff. of Shand Stephens, Ex. 4 [Zimmer Dep. Tr. at 56] [testifying that it is atypical for brokers to place risk nationally].) Aon has "a very large client list" of approximately 9,000 clients for central California alone. (Aff. of Benjamin Wolfe, ¶ 7.)

In response, Aon relies on this Court's holding in the prior action that the raid was "initiated and orchestrated" from New York and that Alliant planned and executed the instant raid from New York. (Aon Reply Memo. of Law at 1-2.) The record reveals, however, that most of Alliant's activity in this respect was conducted in California. Greg Zimmer, President and Chief Financial Officer of Alliant, testified that Alliant's leveraged hiring strategy was to "to hire good, qualified individuals capable over time of building a business." (Zimmer Dep. Tr. at 22.) In unrebutted testimony, Zimmer stated that, although Alliant's board was "made aware of leveraged hires," the board did not "direct" the hiring. (Id. at 38.) Two of Alliant's five board members are based in New York, and the board meetings were held in New York and Newport Beach, California. (Id. at 33-35.) Indeed, the impetus to hire Day and the other employees came from Peter Arkley, an Alliant employee in California who was a former Aon employee. (Id. at 68.) According to Zimmer, although he was "generally aware" of the hirings, it was Arkley who approved the sign on bonuses and compensation of Day and the others in California. (Id. at 93-94.) Aon undertook a forensic review of the Blackberry devices of some of the senior former employees, which revealed multiple communications among themselves and with Arkley, but none with Alliant in New York. (March 24, 2014 Aff. of Karl Rademacher, ¶¶ 9, 11, 13, 14.)

Zimmer testified that he traveled to Fresno in February 2014 at Arkley's request "to meet with certain producers that were looking to join Alliant," including Day, Edde, Baldwin, Bellasis and others, because the potential hires "wanted to know more about Alliant and [to] meet [Zimmer] and [to] answer any questions" they may have. (Id. at 118-119, 122.) Significantly, Zimmer stated that Arkley arranged the meetings, he relied on Arkley, and traveled to California to assist him in the hirings. (Id. at 132-133, 140.) Day also testified that all of his meetings with Arkley and Zimmer were in California. (Day Dep. Tr. at 54, 57, 94.)

Almost every action underlying the alleged torts took place in California. The fact that Alliant maintains offices in New York and that some actions with respect to the hiring of the Aon employees may have taken place in New York does not outweigh the significance and the number of the contacts with California. The court is particularly mindful of California's stated public policy to protect the livelihoods of its citizens. Aon chose to locate its offices in California and thereby subjected itself to the benefits and burdens of doing business in that jurisdiction. Further, Aon has offered no evidence that it suffered injury in New York as opposed to California. In any event, it is undisputed that the "last event[s] necessary to make the actor liable occurred" (see discussion supra at 16) – the departures by the employees, the alleged use of trade secrets, and the solicitations of customers and of other Aon employees – all took place in California. On this record, California is both the locus of the tort and the place of injury. Accordingly, the court finds that California has the most significant contacts and the greatest interest in regulating the alleged conduct. California law should therefore be applied.

Causes of Action

Misappropriation of Trade Secrets and Misappropriation of Confidential and Proprietary Information

Aon alleges that Alliant, through its hiring of former Aon employees, "has utilized and will utilize" Aon's trade secrets and confidential and proprietary information to solicit Aon's. (Complaint, ¶¶ 90, 100.) California recognizes an independent statutory cause of action for misappropriation of trade secrets. (Uniform Trade Secrets Act [UTSA], Cal. Civil Code, § 3426.1 [d].) A trade secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to 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." (Id.) "A violation of the UTSA occurs when an individual misappropriates a former employer's protected trade secret client list, for example, by using the list to solicit clients or to otherwise attain an unfair competitive advantage." (Reeves v Hanlon, 33 Cal 4th 1140, 1155 [Cal 2004] [internal citations omitted]. See UTSA § 3426.1 [b] [defining "misappropriation"]; § 3426.1 [a] [defining "improper means"].)

California "courts have repeatedly held [that] a former employee may be barred from soliciting existing customers to redirect their business away from the former employer and to the employee's new business if the employee is utilizing trade secret information to solicit those customers." (Retirement Group, 176 Cal App 4th at 1237 [emphasis in original]. See also Morlife, Inc. v Perry, 56 Cal App 4th 1514, 1519 [Cal App 1997] ["While it has been legally recognized that a former employee may use general knowledge, skill, and experience acquired in

his or her former employment in competition with a former employer, the former employee may not use confidential information or trade secrets in doing so"].)

Whether or not a client list rises to the level of a trade secret is a question of fact for the court to determine. (See Morlife, Inc., 56 Cal App 4th at 1521-1522 ["[W]here the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers"].)

The court need not reach the issue of whether Aon's customer list constituted a trade secret under California law or whether a contractual confidentiality provision broader than the statutory definition of trade secret would be enforceable, because Aon has failed to meet its burden of showing a likelihood of success on the merits of its claim that Alliant used or threatened to use any of Aon's confidential or proprietary information.

First, Aon claims that the former employees departed with trade secrets and/or confidential information, as demonstrated by the return of "hard copy documents and USB thumb drives that contained Aon confidential information." (Aon Memo. of Law in Supp. at 18.) Aon performed a forensic analysis of these USB thumb drives and others surrendered by the former employees prior to their departure, as well as their hard drives and Blackberry devices. (Aff. of Robert B. Fried [Director in the Digital Evidence practice of Huron Consulting Group], ¶ 6; March 4, 2014 Aff. of Karl Rademacher [Aon's Senior Manager of eDiscovery and Forensics], ¶¶ 5-7; March 24, 2014 Rademacher Aff., ¶ 4.) Specifically, Aon focused on three USB thumb drives from former employees Mark Steitz, Lisa Edwards, and Lori Howard, which were returned to it. The forensic evidence demonstrates that, prior to joining Alliant, each of the

three copied files, and the names of these files suggest that they may have contained confidential information. (March 4, 2014 Rademacher Aff., ¶ 13 [Howard copied "revenue by client," "copy of revenue report as of 1 27 14," etc.], ¶ 14 [Edwards copied "contact list"]; Fried Aff., ¶ 14 [Steitz copied "2013 Archive" and "2014" containing email communications].) The evidence fails, however, to demonstrate that any of these files was then copied, printed, uploaded, emailed or otherwise accessed after the employees left Aon.[7] Moreover, Aon does not identify any information in the hard copy documents that constitutes trade secrets or confidential information.

Aon also contends that Larry Edde removed his hard drive from his Aon computer and that paper client files were missing from John Day's office. (Aon Memo. of Law in Supp. at 18.) In response, Alliant submits the affidavit of Teddy Henley, previously an Aon employee and now the Accounting Supervisor and Vice President for Alliant, who states that she was directed by Aon personnel to collect Edde's hard drive for Aon. (Henley Aff., ¶¶ 6-8.) Henley further states that she did so and that Aon maintained custody of Edde's hard drive. (Id., ¶¶ 9, 11. See also Turk Dep. Tr. at 31-33.) In addition, Mark Steitz, previously an Aon employee and now an account manager for Alliant testified that he removed Edde's hard drive at Henley's direction and that he left the computer casing open to demonstrate that the hard drive had been removed. (Affidavit of Mark Steitz, ¶ 10. See also March 3, 2014 Aff. of Douglas Turk, Ex. 1 [photograph].) In response, Aon submits the affidavit of Thomas Branigan, Managing Director

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[7] In addition, Aon analyzed USB drives from John Gizzo and Lori Jacinth. (Fried Aff., ¶¶ 16, 18.) As with the other USB drives and despite its forensic analysis, Aon fails to show that the drives were accessed after the employee left Aon's employment. (Aff. of John Gizzo, ¶¶ 13 [stating that he turned over his USB drive to Alliant to return to Aon "[i]mmediately] upon his resignation" and that he "never copied, uploaded, or accessed the memory stick at any time after initially copying the information"]; Aff. of Lori Jacinth, ¶¶ 9, 13 [stating that she copied her hard drive onto her USB drive when she received a new computer at Aon in February 2014 and that she "never copied, uploaded, or accessed the memory stick at any time after resigning from Aon"].)

for Aon Construction Services Group, which makes the equivocal statement that Henley did not tell him she had caused the hard drives to be collected and that he did not observe any hard drives in her office. (March 24, 2014 Aff. of Thomas Branigan, ¶ 6.)

As to the paper client files alleged to be missing from Day's office, Day avers that he did not maintain paper client files, as he did not service clients' insurance needs directly, and had not for some time. (March 20, 2014 Day Aff., ¶ 16.) Aon submits the affidavits of employees, who went to the Fresno office after the February 25, 2014 departures, stating that client files they "expected" to find were missing. (See e.g. Aff. of Le Ronda Gaines, ¶¶ 8-9; Aff. of Ashley Robinson, ¶ 3; Aff. of Tony Katz, ¶ 5.) None of these employees could testify from personal knowledge that certain files existed and were then missing. Moreover, Aon's forensic experts are silent as to whether any files were deleted from the Aon network.

Douglas Turk, Executive Vice President, Western Region Managing Director for Aon Risk Solutions, testified that he could not identify any trade secrets or confidential information taken by Bellasis, Carter, Edde, Droz, Winn, or any support staff in connection with the February 25, 2014 departures. (Turk Dep. Tr. at 22-24, 27-31.) Although Turk stated that he believed Steitz had taken trade secrets because he took a flash drive, Turk could not identify what those trade secrets were. (Id. at 26.) Further, Steitz testified that he returned the USB drive to Aon at Alliant's instruction without deleting, copying, uploading, or accessing the USB drive "in any way."[8] (Steitz Aff., ¶¶ 13, 15.)

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[8] Two other former Aon employees also returned USB drives. (Howard Aff., ¶¶ 9-12; Edwards Aff., ¶¶ 9-10.) Neither is alleged to have contained Aon's client list or related materials. These returns were made pursuant to an Alliant policy that new hires return all information and materials from former employers. (Dec. of Reshma Dalia, ¶¶ 3-7.)

Aon further alleges that it has received more than 80 "change of broker" letters from clients switching to Alliant and that the "letters arrived so quickly that the process must have been started" while the former employees were still employed with Aon. (Complaint, ¶ 29.) However, 80 letters from a client list of over 9,000 for central California alone does not indicate a wholesale solicitation of Aon's clients using its client list and information. Indeed, Alliant introduces evidence that at least some of Aon's clients could be ascertained from publicly available sources such as professional associations, construction bids on public projects, and Aon's Twitter followers. (Turk Dep. Tr. 199-204; Douglas Dep. Tr. 107-108.)

In sum, although some or all of the former employees unquestionably had access to Aon's trade secrets and confidential information, Aon does not make a showing of likelihood of success on the merits of its claim that confidential information or trade secrets were both misappropriated and used. (See Sargent Fletcher, Inc. v Able Corp., 110 Cal App 4th 1658, 1668 [Cal App 2003] ["[T]o prove misappropriation of a trade secret under UTSA, a plaintiff must establish [among other things] that the defendant improperly 'used' the plaintiff's trade secret"].) The mere fact that some clients transferred their business from Aon to Alliant is not de facto proof of misappropriation of trade secrets. (Retirement Group, 176 Cal App at 1237 ["[I]t is not the solicitation of the former employer's customers, but is instead the misuse of trade secret information, that may be enjoined."] [emphasis in original].)

Intentional Interference with Contractual Relations

Under California law, intentional interference with contractual relations requires a showing of "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the

contractual relationship; and (5) resulting damage." (Reeves, 33 Cal 4th at 1148.) "To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action." (Id.)

Aon alleges Alliant interfered with Aon's contractual relations with its employees by inducing the employees to solicit other Aon employees, using trade secrets and confidential information to the detriment of Aon, by soliciting Aon's clients and raiding Aon's employees. (Complaint, ¶ 105. See also Aon Memo. of Law in Supp. at 16-17.) As held above, Aon fails to demonstrate a likelihood of success that it will prevail on claims that Alliant misappropriated Aon's trade secrets or confidential information. However, Aon does show a likelihood of success on the merits that Alliant intentionally acted to induce the former employees to violate their contractual provisions prohibiting solicitation of their Aon co-workers. In response, Alliant does not contest the validity of the non-solicitation of co-workers provision or its knowledge of the provision, but contends that Alliant itself was free to solicit Aon employees, absent the use of unlawful means. (Alliant Memo. of Law in Opp. at 16.) Alliant fails to address Aon's contention that Alliant incited the former employees to breach their contractual (and possibly fiduciary duties) to Aon by soliciting their coworkers en masse.

In Loral Corp. v Moyes (174 Cal App3d 268, 279-280 [Cal App 1985]), the California intermediate appellate court enforced a "noninterference agreement not to solicit former coworkers" to the extent of restraining the departing employee from initiating contact with his former coworkers for a period of one year, but did not prevent the coworkers from contacting the departing employee or his new employer. However, consistent with section 16600, the court also held that "[e]quity will not enjoin a former employee from receiving and considering

applications from employees of his former employer even though the circumstances be such that he should be enjoined from soliciting their applications." (Id. See also Arthur J. Gallagher & Co., 2014 WL 2195062, at *4 [applying California law and holding "[a]lthough California courts recognize that an employer may not prohibit its former employees from hiring the employer's current employees, an employer may lawfully prohibit its former employees from actively recruiting or soliciting its current employees"]; Thomas Weisel Partners LLC v BNP Paribas, 2010 WL 546497, *5-6 [ND Cal 2010, No. C 07–6198] [applying California law and holding that "no-hire" provision was unenforceable under section 16600, as absolute ban on hiring former co-workers for one year "would serve to restrain mobility in much the same way as a covenant not to compete"].)

It strains credulity to suggest that Aon West's Resident Managing Director, Executive Vice President and Resident Director, Executive Vice President and Chief Operating Officer, and seven additional senior employees, all of whom were Aon's "top producers" (Day Dep. Tr. at 10-11), would all resign on one day and all immediately join Alliant without acting in concert. It further strains credulity to suggest that 75 employees in the Aon Central California offices resigned and joined Alliant within one week without some orchestration from the departing senior employees and from Alliant. On the very day of the resignations, February 25, 2014, Alliant and the former employees filed an action in California seeking a declaration that the restrictive covenants were unenforceable under California law. (Aff. of Timothy Stephens, Ex. A.) Day and some of the other high level employees stated that they did not speak with one another prior to deciding to join Alliant, but Day admitted that he knew that both Arkley and Zimmer were speaking with other Aon employees and that Arkley intended to hire a number of Aon employees. (Day Dep. Tr. 63, 72, 126-129; Aff. of Ralph Busch, ¶¶ 7, 14; Aff. of Larry

Edde, ¶ 7.) In fact, it appears that Alliant acquired not only 75 employees but the entire Aon Fresno office. Day stated that, prior to February 2014, Alliant did not have an office with "producers and account executives" in Fresno, but maintained only a call center. (Day Dep. Tr. at 47.) After February 2014, Alliant had a full complement in Fresno, including Aon's entire Construction Services Group. (Id. at 33; Aon Memo. of Law in Supp. at 7.)

In light of these undisputed facts, Alliant should be preliminarily enjoined from inducing Baldwin, Bellasis, Busch, Carter, Day, Droz, Edde, Edwards, Marr, and Winn, who are subject to non-solicitation provisions, to solicit current Aon employees to join Alliant. In the absence of such an injunction, Aon would be irreparably harmed as it could lose additional employees to a direct competitor from an already depleted workforce. The balance of equities also weighs in Aon's favor, as the injunction does not prohibit Aon employees from seeking employment with Alliant or Alliant from hiring them, absent solicitation by the above-named employees.

Intentional Interference with Prospective Economic Advantage

"In order to prove a claim for intentional interference with prospective economic advantage, a plaintiff has the burden of proving five elements: (1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party." (Edwards, 44 Cal 4th at 944.) "The plaintiff must also prove that the interference was wrongful, independent of its interfering character." (Id. See also Korea Supply Co. v Lockheed Martin Corp., 29 Cal.4th 1134, 1159 [Cal 2003] ["Because we have determined

that the act of interference with prospective economic advantage is not tortious in and of itself, the requirement of pleading that a defendant has engaged in an act that was independently wrongful distinguishes lawful competitive behavior from tortious interference"].)

Aon alleges that Alliant interfered with Aon's relationship with its clients and with Aon's employees by inducing the latter "to solicit other Aon employees, and inducing these employees to use confidential information to the detriment of Aon." (Complaint, ¶¶ 110-111. See also Aon Memo. of Law in Supp. at 17-18.) Aon further claims that Alliant "poached Aon's employees for the purpose of acquiring [Aon's] business." (Aon Memo. of Law in Supp. at 18.) From the record available on this motion, it appears that all of the employees, except Marra, were employed at will.[9] California law recognizes that interference with an at-will employment contract can constitute intentional interference with prospective economic advantage. (See Hanlon, 33 Cal 4th at 1152-1153.) To recover under this theory, Aon must "plead and prove that the defendant engaged in an independently wrongful act—i.e., an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard—that induced an at-will employee to leave the plaintiff. Under this standard, a defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment." (Id. [internal quotation and citation omitted].)

As held above, Aon does not show that Alliant induced the former employees to use Aon's trade secrets or confidential information to solicit Aon's clients or other Aon employees. Aon also does not allege that Alliant engaged in an independent, wrongful act to entice Aon

[9] Pursuant to his Employment Agreement, Marra's term of employment was to end on November 30, 2014. [Marra Employment Agreement, § 1.]

clients to transfer their business to Alliant. To the extent that Aon is relying on the former employees' alleged breach of their contractual obligations or of their fiduciary duties to meet the requirement of an independent, wrongful act, this cause of action is duplicative of the causes of action for intentional interference with contractual relations and aiding and abetting breach of fiduciary duty.

Aiding and Abetting Breach of Fiduciary Duty

Aon alleges that Day, Edde, and Busch owed it fiduciary duties and that Bellasis, Carter, Droz, Edwards, Marra, and Winn owed it duties of loyalty to devote their time and attention to Aon, not to engage in a business activity in competition with Aon or any activity "inimical to Aon's best interest," and "to refrain from using, divulging, publishing or otherwise revealing confidential information." (Complaint, ¶ 120; Aon Memo. of Law in Supp. at 14.) Aon contends that the former employees breached these duties by coordinating their resignations such that "Aon's leadership would be unable to quickly respond," soliciting their Aon co-workers, breaching their restrictive covenants, and "utilizing trade secrets and confidential or proprietary information of Aon in their solicitation of other Aon employees as well as Aon clients." (Aon Memo. of Law in Supp. at 14.)

Under California law, "[t]he elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage." (Pellegrini v Weiss, 165 Cal App 4th 515, 524 [Cal App 2008].) California courts have recognized that the "fiduciary of a subsidiary also owes a fiduciary duty to the subsidiary's parent corporation." (Thomas Weisel Partners LLC, 2010 WL 1267744, at *5.) Alliant does not dispute that some of the former employees owed fiduciary duties to Aon, but contends that Alliant did not commit a "wrongful act," regardless of the actions of the former employees.

(Alliant Memo. Of Law in Opp. at 16-17.) As held above, it is not credible that senior management and all of the top producers in the Aon central California offices would resign from Alliant on the same day without acting in concert. Alliant's assistance in this departure is, in part, demonstrated through its filing of a declaratory judgment action on behalf of the former employees on the very same day. Alliant was seemingly willing and able to hire any Aon employee who wanted to join Alliant, leading to a mass exodus. The departure and hiring of over 75 plus employees could not have occurred without the active planning and participation of Alliant. Further, it is unrefuted these departures took place at a time with the greatest likelihood of crippling Aon, i.e. when many members of Aon executives were at a retreat and immediately before the March renewal period for many insurance policies. (March 3, 2014 Aff. of Douglas Turk, ¶¶ 4, 14)

For the reasons stated above, Aon has shown a likelihood of success on the merits on this cause of action.

Conspiracy

Aon alleges that Alliant conspired with the former employees to breach their fiduciary duties and duties of loyalty, to solicit Aon's clients and employees, and to misappropriate Aon's trade secrets and confidential information. (Complaint, ¶ 126.)

Under California law, a "nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (American Master Lease LLC v Idanta Partners, Ltd., 225 Cal App 4th 1451, 1474 [Cal App 2014] [internal quotation and citation omitted].) Aon does not claim that Alliant owes it a fiduciary duty, and thus fails to show a likelihood of success on the merits for any claim of conspiracy to breach a fiduciary duty owed by the former employees. The conspiracy claim, to the extent based on solicitation or misappropriation, is duplicative of the other causes of action.

By granting only a limited portion of Aon's application for a preliminary injunction, the court is not depriving Aon of its only redress. Alliant and the former employees commenced an action in California against Aon involving the same allegations as here. (March 5, 2014 Aff. of T. Stephens, Ex. A [complaint].) Additional injunctive relief may be available in that action. In any event, Aon has availed itself of the legal process in another forum.

The court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, it is hereby ORDERED that plaintiff's motion for a preliminary injunction is granted to the following extent: Alliant and those acting in concert with Alliant are preliminarily enjoined from either directly or indirectly soliciting any current Aon employees to work for Alliant; and it is further

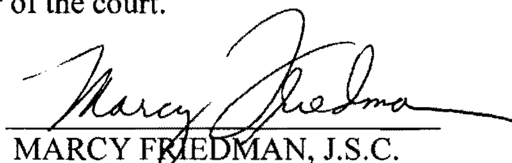
ORDERED that plaintiffs shall post an undertaking in the form of cash or surety bond in the amount of $50,000.00, conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the temporary restraining order imposed by this court's order, dated March 5, 2014 is vacated; and it is further

ORDERED that the parties shall appear in Part 60, Room 248, 60 Centre Street, New York, New York for oral argument on defendant's motion to dismiss on September 18, 2014 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
June 26, 2014



MARCY FRIEDMAN, J.S.C.