[* 1]

SCANNED ON 5/6/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE Justice

PART 10

GUARDIAN LIFE INSURANCE
-v- COMPANY OF AMERICA
BRILLI M

INDEX NO. 113709/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/28/11

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA and PARK AVENUE SECURITIES LLC.,

Plaintiffs,

-against-

MITCHELL BRILL, ANTHONY DESTEFANO, JAMES GIANGRANDE, JAMES DOWLING, ALTIUM PLANNING LLC, and ALTIUM WEALTH MANAGEMENT LLC,

Defendants.

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DECISION/ ORDER
Index No.: 113709/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltfs' OSC (§6301) w/JA affid, exhs	1
Summons & Complaint	2
Defs' opp w/JRH affirm	3
Pltfs' reply w/ JA affid	4
Defs' further opp w/JRH declaration, JA, AD, JD, MB, JG affids, exhs	5

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, Guardian Life Insurance Company of America ("Guardian"), is a mutual life insurance company, and Park Avenue Securties LLC. ("PAS") is one if its subsidiaries. Defendants, Mitchell Brill ("Brill"), Anthony ("DeStefano"), James Giangrande ("Giangrande"), James Dowling ("Dowling") (collectively, the "individual defendants") are former independent contractors of plaintiffs, who plaintiffs allege breached their duties by, among other things, misappropriating client information.

Defendants Altium Planning LLC ("Altium Planning") and Altium Wealth Management LLC ("Altium Wealth"), are companies established by the individual defendants.

Plaintiff commenced this action by filing and serving the summons and complaint, together with this order to show cause which seeks a preliminary injunction against defendants: (1) from disclosing, reproducing, transferring or using any confidential, proprietary, or trade secret information belonging to plaintiffs; (2) to return to plaintiffs all such information; (3) to provide sworn statements and accountings of all files, data, and information unlawfully retained or removed, belonging to plaintiffs; and (4) from directly or indirectly soliciting any of plaintiffs' clients that are identified in plaintiffs' confidential information.

Pending its decision on this motion, the court enjoined all defendants from disclosing any confidential or proprietary information and/or trade secrets of the plaintiffs. Order, Gische J., 10/19/10.

The court's decision is as follows:

Arguments

Guardian provides life insurance, disability income insurance, retirement services, employee benefits, and investments. It independently contracts with individual "field representatives" to solicit clients, sell Guardian's financial products, and service Guardian's clients. PAS is a broker-dealer firm with "registered representatives" who are qualified to service PAS's clients with investment advice and to provide wealth and asset management solutions to individuals and corporate clients. Many of PAS's

clients are referred from Guardian. Guardian developed and used a software program known as a Living Balance Sheet (sometimes "LBS"), to accumulate detailed information relating to its clients. The Living Balance Sheet was designed to be used by Field Representatives and Registered Representatives to better assist Guardian and PAS customers.

Each of the individual defendants were both Guardian field representatives and PAS registered representatives and were authorized to sell and provide financial services for both companies. It is undisputed that the individual defendants each signed a Field Representative Agreement with Guardian and Registered Representative Agreement with PAS, and that Brill and Dowling additionally signed a Financial Advisor Agreement with PAS (collectively, the "Agreements"). Brill and DeStefano's Agreements terminated on October 1, 2010 upon their resignations, and Giangrande and Dowling's Agreements terminated on September 29, 2010 upon their resignations.

The Field Representative Agreement with Guardian provides, in relevant part, as follows:

> 17. The Field Representative covenants and agrees that after termination of the Contract . . . the Field Representative will not, directly or indirectly . . . advise, induce or attempt to induce any policyholder or annuitant of [Guardian] or any subsidiary . . . to lapse, cancel or replace any insurance policy or annuity. . .These prohibitions shall last for a period of one (1) year following the termination of this Contract.

The Registered Representative Agreement with PAS provides, in relevant part, as follows:

> 49. Upon termination of this Agreement, you agree to return immediately to PAS' home office all funds, property, books and records and supplies of every kind belonging to PAS, including but not limited to, client lists . . . client files . . . client agreements and new account documents . . .
>
> 52. . . . You agree to safeguard the confidentiality of the Confidential Information and will not disclose Confidential Information to any third party, except as permitted under The Gramm-Leach-Bliley Act and federal privacy regulations . . .

The Financial Advisor Agreement with PAS, signed by Brill and Dowling only, provides, in relevant part, as follows:

> 9. You agree and fully understand that all client files and records are the property of PAS . . . and may not be sold, transferred or communicated to any person other than the client to whom such records pertain without prior written permission of PAS. Upon termination of this Agreement, you agree to return to PAS all materials including, but not limited to, prospect and client lists . . . client files . . . documents and all other written or audiovisual materials.
>
> 14. During the term of this Agreement and for one year following the date of termination of this Agreement, you will not, directly or indirectly, own, manage, operate, join . . . in the . . . operation . . of . . . any business . . . which provides . . . investment advice to any Client of PAS . . .

In support of its motion for a preliminary injunction against defendants, plaintiffs contend that the individual defendants had incorporated Altium on June 25, 2010, while they were still bound by the Agreements with Guardian and PAS, and without obtaining permission to engage in outside business activity. Plaintiffs further contend that the individual defendants were servicing their Altium clients through "eMoney," which they identify as a less sophisticated version of LBS. Plaintiffs allege that the individual

defendants transferred data for 319 of its clients from LBS to eMoney, thereby violating the confidentiality provisions contained in their Agreements. According to plaintiffs, defendants are using this information to steal plaintiffs' clients. Plaintiffs argue that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm to its business and business relationships.

In opposition, the individual defendants contend that they were all independent contractors and that the Agreements did not prohibit defendants from soliciting or competing against plaintiffs following the termination of the Agreements. Defendants argue that they lawfully own and possess the clients' information at issue because, *inter alia*, the clients are defendants' own personal contacts, family members, and friends, and the defendants were the ones to provide these clients with investment advice.

Defendants also contend that they received approval for outside business activity in 2000 when they received permission to collect financial and personal data of clients through a program called "Your Personal Financial Officer" ("Your PFO"). Defendants argue that obtaining permission to collect data through "Your PFO" put all clients on notice that their confidential data was being collected by defendants and not by plaintiffs. Defendants state that the "Your PFO" questionnaire was then used to provide almost all of the data now at issue on the Living Balance Sheet. Defendants state that in 2010, Dowling further received approval for an outside business activity that permitted him to aggregate client data on the eMoney system. Defendants do not dispute that, thereafter, they took information from Living Balance Sheet, regarding the 319 clients at issue, and moved this data to the eMoney system.

Thus, defendants argue that the plaintiffs do not show a likelihood of success on

the merits, and that the preliminary injunction must be denied.

Discussion

On a motion for a preliminary injunction, the movants (here the plaintiffs) must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*see* CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 N.Y.2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept. 2001]), a showing of likelihood of success is a bona fide requirement that must be met before a preliminary injunction will lie. Post v. Killian, 73 A.D.3d 507 (1st Dept. 2010); Famo, Inc. v. Green 521 Fifth Ave., LLC, 51 A.D.3d 578 (1st Dept. 2008). Generally, a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts. O'Hara v. Corporate Audit Co., 161 AD2d 309 (1st Dept. 1990). The purpose of a preliminary injunction is to maintain the *status quo* so as to insure that a victory is not worthless. *See* Moy v. Umeki, 10 A.D.3d 604 (2d Dept. 2004).

In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite,* and if granted, tailored to fit the circumstances so as to preserve the

status quo to the extent possible (*generally*, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]).

As more fully set forth below, a preliminary injunction is available only against Brill and Dowling to a limited extent. On the bulk of the claims, plaintiffs are unable to establish a likelihood of success on the merits. Plaintiffs have asserted 9 causes of action for: specific performance and injunctive relief (COA1); breach of contract (COA2); misappropriation of trade secrets (COA3); breach of fiduciary duty of loyalty (COA4); unfair competition (COA5); conversion (COA6); unjust enrichment (COA7); breach of good faith and fair dealing (COA8); and to recover possession of chattel wrongfully taken (COA9).

It is undisputed that defendants originally collected client data through "Your PFO," which was their own software program. Much of that information was then used to compile plaintiffs' database, Living Balance Sheet, where it was stored on plaintiffs' platform. Defendants eventually took back the client information, claiming that it was separately collected by them to begin with. Plaintiffs' response, that defendants had no personal right to this information, is belied by the fact that the information was already being used by defendants, with plaintiffs' knowledge and/or consent, for approved outside business activity. It is undisputed that defendants provided custodial and advisory services to clients outside of their duties for plaintiffs, as evidenced by the outside business activity forms. The outside business activity forms, approved by plaintiffs, allowed defendants to service clients listed on the Living Balance Sheet for services and products other than plaintiffs' insurance products.

The limited clause found in Paragraph 17 of the Field Representative Agreement

with Guardian (*supra*), says that defendants will not induce any policyholder to lapse, cancel, or replace any insurance policy or annuity. Plaintiffs have made no showing on this motion that there was any solicitation by defendants that caused Guardian's policyholders to lapse, cancel, or replace their insurance policies or annuities.

To the extent plaintiffs argue that Paragraph 51 of the Registered Representative Agreement with PAS prohibited defendants from solicitation, the court rejects this argument as well. Plaintiffs acknowledge that Paragraph 51 was crossed out in Dowling and Brill's Agreements. Defendants have provided a signed copy of Giangrande's Agreement, which also has Paragraph 51 crossed out. To the extent that defendants do not have DeStefano's Agreement, it would just as likely be in plaintiffs' possession. Plaintiffs have the burden on this motion of providing a copy of the signed agreement containing a non-solicitation clause; because they did not do so, there is no showing that DeStefano signed a non-solicit clause. Accordingly, the court finds that the Registered Representative Agreement imposes no restrictions on defendants' right to solicit clients.

Paragraph 52 of the Registered Representative Agreement with PAS also contains no prohibition against defendants soliciting plaintiffs' former clients. To the extent it requires defendants to protect client confidentiality, it is in consonance with and specifically references the Federal Gramm-Leach-Bliley Act. The Gramm-Leach-Bliley Act was enacted to provide procedures for financial institutions "(1) to insure the security and confidentiality of consumer records and information; (2) to protect any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which

could result in substantial harm or inconvenience to any customer." 15 U.S.C. § 6801 (b). The Gramm-Leach-Bliley Act, therefore, requires a financial institution to give its customers notice and an opportunity to opt out of disclosure before releasing any customer's "nonpublic personal information to a non-affiliated third-party." 15 U.S.C. § 6802; Alpha Funding Group v. Continental Funding, LLC, 17 Misc.3d 959 (N.Y.Sup. 2007).

Here, defendants are not classified as non-affiliated third-parties to the 319 clients at issue. In fact, defendants state that the 319 clients are friends, family members, neighbors, and defendants' own personal contacts. Defendants personally met with these clients and were the ones to initially upload the clients' information to defendants' own database.

Even if the court accepted plaintiffs' argument that Paragraph 52 of the Registered Representative Agreements restricts the use of plaintiffs' trade secrets or proprietary information, plaintiffs have failed to show that the client information it seeks to now protect was a trade secret.

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts § 757, comment b. The Restatement suggests that in deciding a trade secret claim, several factors should be considered: "(1) the extent to which the information is known outside of [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 business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5)

the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (Restatement of Torts § 757, comment b). Ashland Management Inc. v. Janien, 82 N.Y.2d 395 (1993). As these considerations demonstrate, a trade secret must first of all be secret. Ashland Management Inc. v. Janien, *supra*. Although plaintiffs assert that defendants utilized trade secrets by appropriating confidential customer lists, injunctive relief will not be given unless the client information cannot be ascertained outside the plaintiffs' business, are not known in the trade, and are discoverable only by extraordinary efforts. Leo Silfen, Inc. v. Cream, 29 N.Y.2d 387 (1972); Metal & Salvage Ass'n, Inc. v. Siegel, 121 A.D.2d 200 (1st Dept. 1986).

The client lists that plaintiffs seek to enjoin are not trade secrets under this definition. Defendants initially gathered the data from the clients independently of plaintiffs as part of outside business activity and defendants had relationships with these clients independently of plaintiffs. *See* Metal & Salvage Ass'n, Inc. v. Siegel, *supra*.

Paragraph 14 of the Financial Advisor Agreement with PAS, signed by Brill and Dowling, provides that they shall not directly or indirectly own, manage, operate or join in the operation of any business which provides investment advice to any client of PAS (*supra*).

In BDO Seidman, the Court of Appeals held that there was a three prong test of reasonableness that had to be satisfied before non-compete clauses in employment contracts were found to be enforceable. They are that the clause: [1] is no greater than

what is required to protect the legitimate interest of the employer; [2] does not impose undue hardship on the employee; and [3] is not injurious to the public. The first prong is often assessed by whether the restrictive covenant is reasonable as to time and area. BDO Seidman v. Hirshberg, 93 N.Y.2d 382 (1999); Gelder Medical Group v. Webber, 41 N.Y.2d 680 (1977); North Shore Hematology/Oncology v. Zevros, 278 A.D.2d 210 (2d Dept. 2000); Zelner v. Conrad, 183 A.D.2d 250 (2d Dept. 1992).

Here, the non-compete clause is limited to one year and has no geographical radius. On its face, this is a reasonable amount of time, and defendants do not make an issue regarding the lack of geographical restriction. However, it cannot be determined, at this time, which of the 319 clients are specifically plaintiffs' "clients" to whom the contractual provision applies. To the extent that the 319 clients at issue are defendants' personal clients who came to plaintiffs solely to avail themselves of defendants' services and only as a result of defendants' independent recruitment efforts, this provision of the Agreement is unenforceable. BDO Seidman v. Hirshberg, *supra* at 393. Where the goodwill of those clients was not acquired through the expenditure of plaintiffs' resources, plaintiffs have no legitimate interest in preventing defendants from competing for their patronage. BDO Seidman v. Hirshberg, *supra* at 393.

Accordingly, the Financial Advisor Agreement with PAS is enforceable, but only against Brill and Dowling, and only to the extent that they are preliminarily enjoined from directly or indirectly owning, managing, operating or joining in the operation of any business which provides investment advice to any client of PAS for one year from their date of termination (Brill from October 1, 2010 and Dowling from September 29, 2010).

The term "client" shall include only those clients to whom Brill and Dowling did not provide services and products outside of their work for plaintiffs.

It also does not appear that the balance of equities tip in plaintiffs' favor for the broad-based relief they seek. Defendants have come forward with strong arguments that the information they are accused of misappropriating is not proprietary, but widely available, or can be culled from, many sources. IVI Environmental, Inc. v. McGovern, *supra*. Additionally, defendants have shown that plaintiffs were aware of their outside business activities; it is undisputed that defendants' originally obtained and uploaded the client data at issue. The broad injunction plaintiffs seek would not only curtail defendants' outside business activities, which plaintiffs permitted while the defendants were independent contractors, but would also restrict the clients from being serviced by financial advisors of their own choosing.

Finally, to the extent plaintiffs seek an immediate accounting, it is denied because it is not necessary to maintain the status quo if it is not otherwise a branch of relief requested in the complaint, and even were it properly plead, it would be an ultimate relief not available as part of a preliminary injunction.

Since plaintiffs have not made a threshold showing of likelihood of success on the merits or that the equities balance in its favor, plaintiffs' motion for a preliminary injunction is hereby denied against defendants DeStefano, Giangrande and Altium. The temporary restraining order granted by the court is hereby vacated forthwith. However, a limited preliminary injunction is granted against Brill and Dowling, as per the terms set forth in this decision/order.

To the extent that plaintiffs seek to have its documents and files returned,

defendants represented to the Court that they agree to do so. Accordingly, defendants shall hereby return all documents and files in its possession over to plaintiffs, if they have not already done so.

Although plaintiffs seek an expedited discovery schedule, it appears as though a preliminary conference has not yet been held. Accordingly, a **preliminary conference** is hereby scheduled for **Thursday June 9, 2011 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232** so that discovery schedule can be set. No further notices will be sent.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED only to the extent that defendants, MITCHELL BRILL and JAMES DOWLING, are hereby enjoined for a period of one year from their respective resignations from directly or indirectly owning, managing, operating, or joining in the operation of any business which provides investment advice to any client of PAS; and it is further

ORDERED that within 30 days of entry of this order, defendants shall return all documents and files in its possession over to plaintiffs, if they have not already done so; and it is further

ORDERED that this motion is otherwise denied; and it is further

ORDERED that a **preliminary conference** is hereby scheduled for **Thursday**

June 9, 2011 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232. No further notices will be sent; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 28, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.