

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

PRESENT: **BARBARA R. KAPNICK**
Justice

PART **89**

HOL BORN CORP

INDEX NO.

601831/09

MOTION DATE

- v -

GUY CARPENTER & CO

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Dated: *10/19/11*

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 39

-----X
HOLBORN CORPORATION,

Plaintiff,

- against -

DECISION/ORDER

Index No. 601831/09

Motion Seq. No. 001

GUY CARPENTER & COMPANY, LLC,

Defendant.
-----X

BARBARA R. KAPNICK, J.:

In this action, plaintiff Holborn Corporation ("Holborn") seeks damages from defendant Guy Carpenter & Company LLC ("Carpenter") on five causes of action: (i) inducing, aiding, and abetting breach of fiduciary duties; (ii) tortious interference with business relationships; (iii) tortious interference with prospective business relations; (iv) misappropriation of trade secrets and confidential information; and (v) unfair competition. Holborn seeks \$10,000,000 in compensatory damages and \$75,000,000 in punitive damages. Defendant now moves for summary judgment on res judicata grounds, or alternatively, on the merits.

Background

From 1993 to 2003, Jeffrey Daniels worked as a reinsurance broker for the Benfield Corporation ("Benfield"). During this time, Daniels serviced the Oregon Mutual Insurance Company ("OMI") account. In 2003, Daniels left Benfield to work at Holborn. A

year after Daniels began working at Holborn, OMI elected to transfer its account from Benfield to Holborn.

In February of 2008, Carpenter's Managing Director and Branch Manager for the Minneapolis office, Ralph Bone, and its Executive Vice President and Regional Manager, Terry Russell, met with Daniels to explore the possibility of hiring him. During this meeting, Daniels, Bone and Russell had a general discussion regarding the accounts Daniels was working on. Also at this meeting, Daniels told Bone and Russell that he believed, based on the strength of his relationship with OMI, that if he left Holborn and went to Carpenter, he hoped OMI would follow. Daniels then told Holborn's CFO that he was thinking about leaving the company. Holborn responded by offering him an equity interest in the company if he agreed to sign a restrictive covenant. Daniels chose not to sign the covenant.

Carpenter made a verbal offer of employment to Daniels on June 27, 2008. On July 10, 2008, Russell sent an email to Andrew Marcell, Carpenter's CEO for the Americas, stating that "the client wants to give us the [broker of record] now," an apparent reference to the fact that OMI wanted to move its account to Carpenter.¹

¹ However, Marcell testified in his deposition that he did not believe that this email constituted a firm commitment from OMI to transfer its account to Carpenter, and Russell testified in his deposition that he was not telling the truth when he sent the email. Instead, he claims, he was only trying to get Marcell to approve making a written offer to Daniels.

On July 11, 2008, Carpenter made a written offer to Daniels. On July 15, 2008, Daniels told Holborn that he was resigning from the company. Daniels then booked a flight to Oregon to meet with OMI along with several Carpenter employees.

On July 17, 2008, Daniels and several other Carpenter employees met with OMI in Oregon to discuss transferring their account to Carpenter. The next day, OMI informed Holborn that it was moving its account from Holborn to Carpenter.

Before Daniels met with OMI, Holborn had called OMI and offered to return half of the fees earned by Holborn in connection with OMI's business for the year 2008 as well as cut their fees in half for 2009 if OMI agreed to stay with Holborn, but OMI declined.

After Daniels resigned from Holborn, he allegedly became aware that he had retained certain documents that belonged to Holborn, including a user's manual for their proprietary "Eye in the Sky" software. This manual (which was not the most current edition) included a preliminary statement advising the reader that it was the property of Holborn, and was apparently made available to a small number of Holborn clients after they agreed to a verbal non-disclosure and confidentiality agreement. However, none of the pages of the manual were marked "confidential." Daniels allegedly

gave this user's manual to another Carpenter broker, who gave it to one of the developers of Carpenter's "I-aXs" program, a program that competes with Holborn's "Eye in the Sky" program. What the developer did with the manual is not clear and is the subject of a discovery request in the present action that remains unanswered by Carpenter.

Procedural History

On September 19, 2008, Holborn filed a complaint against Daniels in federal court in Kansas. It alleged that (i) Daniels solicited the business of OMI on Carpenter's behalf while he was still employed by Holborn, and (ii) Daniels disclosed purported trade secrets and confidential information to Carpenter regarding Holborn.

In response to a subpoena served by Holborn on Carpenter in the Kansas case, Carpenter produced thousands of pages of documents, and allowed eight of its employees to be deposed, including its CEO and other high-level executives.

On April 29, 2009, Daniels filed a motion to stay discovery in the Kansas action, allegedly in anticipation of Holborn's asserting claims against Carpenter. Holborn opposed the motion. In its Order of May 28, 2009, the Court stated that "[i]t appears plaintiff may

soon assert claims against Guy Carpenter, defendant's current employer. Defendant's attorneys of record in this action are also representing Guy Carpenter." Nonetheless, the Court denied the motion, noting that "the mere possibility of future litigation is too indefinite to warrant a stay," that the deadline to amend the Complaint to add additional parties had passed, and that, in fact, the plaintiff had given no indication that it intended to seek leave to amend the Complaint by asserting claims against Carpenter.

On June 12, 2009, Holborn filed the current action against Carpenter in New York, where both companies have their principal places of business. On June 23, 2009, Carpenter and Holborn entered into a Stipulation providing, *inter alia*, that any discovery taken in the Kansas action could be used in the New York action, and that any additional discovery would be "dual captioned" for use in both cases.

On July 15, 2009, Carpenter served its Answer and Counterclaims in this action. It asserted an affirmative defense based on *res judicata* pursuant to CPLR 3211(a)(5), but not one based on CPLR 3211(a)(4) (current action pending in another court). On August 5, 2009, counsel for Holborn and Daniels entered into a Stipulation of Dismissal With Prejudice of the Kansas action.

On or about December 24, 2009, Holborn served Carpenter with its First Notice for Production and Inspection in this action. On or about January 12, 2010, Carpenter served its Response and Objections to plaintiff's request, and failed to produce any documents that had been requested. Counsel attempted to resolve the disputes regarding the discovery requests, but those attempts were not successful. Carpenter then filed its motions to stay discovery² and for summary judgment.

Discussion

Summary Judgment Based On Res Judicata

Defendant Carpenter argues that it is entitled to summary judgment in this case on the basis of *res judicata*. "Where the judgment to be given preclusive effect is made in a Federal forum the scope of that judgment, including the applicability of principles of *res judicata* and collateral estoppel, are governed by Federal law." *Jerome J. Steiker Co. v. Eccelston Props.*, 156 Misc 2d 308, 313 (Sup Ct, NY Co 1992). "A voluntary dismissal with prejudice is an adjudication on the merits for purposes of *res judicata*." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F3d 343, 345 (2d Cir 1995).

² The motion to stay discovery was granted on the record on July 10, 2010, pending determination of this summary judgment motion.

"*Res judicata* 'applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same [claim, or] cause of action.' (citation omitted)." *Cameron v. Church*, 253 FSupp2d 611, 619 (SDNY 2003).

The doctrine of *res judicata*, frequently referred to as "claim preclusion", provides that "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485). This doctrine is based on the principle that a "judgment in one action is conclusive in a later one ... when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuykill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307 [emphasis added]).

Singleton Mgt. v Compere, 243 AD2d 213,215 (1st Dep't 1998).

In support of its argument that it was in privity with Daniels and thus can use the dismissal of the Kansas action against Daniels to bar this action on the grounds of *res judicata*, Carpenter relies on the case of *Cahill v. Arthur Anderson & Co.*, 659 F Supp 1115, 1120 (SDNY 1986), *aff'd* 822 F2d 14 (2d Cir 1987). In that case, the plaintiff claimed that he was forcibly removed from the company he had co-founded and was forced to sell his stock at a rate far

below market value. He also claimed that he entered into a consulting agreement with the company for a period of ten years which referred to his alleged misuse of corporate funds and provided that he would agree to an examination by Arthur Andersen as to those allegations. In a prior action, Cahill had sued the members of the company who were involved in forcing him out, seeking rescission of his agreements and damages to compensate him for the true value of his shares and based on RICO violations. The first dispute was eventually settled with a stipulation agreement which discontinued plaintiff's action with prejudice after making minor changes in some of the agreements he was allegedly forced to sign. In the later action, plaintiff sought to sue the company's accountant - Arthur Andersen - for its involvement in the scheme to force him out of the company.

In *Cahill*, District Judge Miriam Cederbaum found that the second case was practically the same as the first. "The primary difference between the present suit and the prior one is that the plaintiff is unable to name any of the other co-conspirators in this action because he has already executed releases of his claims against them." *Cahill* at 1121. Second, the original case named five "John Doe" defendants, and the Court mentioned in FN 7 on page 1121 of her decision that "[i]t appears that plaintiff may have had Arthur Andersen in mind as one of the co-conspirators in that

action ...” However, the Court went on to state that “since Andersen was not specifically named in that suit, plaintiff cannot rely exclusively on that possibility to relieve it from liability in the present action.” But most importantly, the plaintiff in Cahill knowingly and expressly waived his right to pursue further claims on the contracts in question when he entered into the first stipulation of settlement. The following conversation took place before the Judge in the first case on the day the stipulation was entered:

THE COURT: You understand that your action, if I approve this, your action is completed and it will be discontinued on the record and you will have no more cause of action with respect to these Contracts?

MR. CAHILL: I understand that, your Honor.

THE COURT: You understand that 'with prejudice' means no more on these causes of action?

MR. CAHILL: Yes, your Honor, that is very clear to me.

THE COURT: If you bring them in this court and it happens to get spun out to another judge, they will look back and they will see this, and that will be the end of it.

MR. CAHILL: I won't bring it back again. I think at this point we have reached an agreement and we are all ready to move on.

Id. at FN 5.

In this case, plaintiff did not specifically agree to waive any other claims it might have against any other party relating to the situation with Daniels, Carpenter and OMI, and the causes of

action sought by plaintiff, other than misappropriation, are different.

Carpenter also relies on *Amadsau v. Bronx Lebanon Hosp. Ctr.*, 2005 WL 121746 (SDNY) to support its claim that the Kansas action against Daniels precludes the current action against Carpenter because the two parties were in privity. That case, however, is distinguishable. In *Amadsau*, plaintiff sued his former employer and some of his co-workers for wrongful termination in Supreme Court, which granted summary judgment. Plaintiff then made a substantially similar claim again but brought in additional defendants, including additional co-workers. The Court found privity between the parties in the first action and the second action because it was essentially the same claim as the first action, except that the plaintiff just added some additional defendants in an attempt to re-litigate the case.

Holborn points out here that it is not suing Carpenter under a theory of respondent superior for anything Daniels did as an employee of defendant, but rather for allegedly inducing Daniels, then an employee of plaintiff's, to flip a Holborn client, and for other causes of action.

The fourth requirement for *res judicata*, that the two cases involve the same cause of action, is also absent in the instant case. The Kansas action focused on whether Daniels breached his fiduciary duty to Holborn by enticing OMI to move its account to Carpenter while he was still employed by Holborn, and whether he stole documents from the company at the time. The instant action asserts causes of action against Carpenter for inducing Daniels to breach his fiduciary duty, tortious interference with relationships, misappropriation of trade secrets and confidential information and unfair competition. While there is certainly a connection between the causes of action in each case, they are clearly not the same.

Carpenter argues that a "transactional test" should be used to determine if the second case arises from the same "nucleus of operative facts" as the first case. *Male v Tops Mkts, LLC*, 2009 WL 4249847 at *1, (2nd Cir 2009). However, in that case the claim was against the same party as in the first case, and the second claim was a simple recharacterization of the same facts against the same party in an attempt to pursue a second case under a different theory. Here, the two cases are against different parties and allege, except for misappropriation, different causes of action.

Holborn cites *Singleton Mgmt. v. Compere, supra*, to argue that *res judicata* should not apply here because the instant action concerns different causes of action against a different defendant, and there is no privity between the two parties. In *Singleton*, plaintiff had sued a musical band for breach of contract after the band signed a management contract with plaintiff and then signed another agreement with another manager and rebuffed its agreement with plaintiff. Plaintiff settled the suit with the band and then sued the band's new manager for tortious interference with a contract. Defendant in that case moved for summary judgment on *res judicata* grounds, and the trial court granted the motion, but the Appellate Division reversed, holding that the causes of action for breach of contract and for tortious interference with that contract "...are not the same or identical causes of action, but, rather, wholly separate and distinct legal wrongs, ..." *Id.* at 216. Similarly here, the claims in the Kansas action were for breach of fiduciary duty and misappropriation, while here they are for, *inter alia*, inducing, aiding and abetting breach of fiduciary duty, tortious interference with business relations and unfair competition - "separate and distinct legal wrongs."

Accordingly, based on the papers submitted and the oral argument held on the record, this Court denies defendant's motion to dismiss based on *res judicata*. Thus, this Court will not reach

plaintiff's alternative arguments as to whether defendant acquiesced and consented to this action.

Summary Judgment Based On The Merits

Carpenter argues, in the alternative, that each cause of action is amenable to summary judgment because Holborn cannot prove its case on the merits.

Count I

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 AD2d 113, 125 (1st Dep't 2003). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator (citations omitted)." *Id* at 126.

Defendant argues in the first instance that Holborn's stipulated dismissal of its claims in Kansas against Daniels with prejudice establishes conclusively that Daniels did not breach any duty to Holborn, and, therefore, Holborn cannot now attempt to prove the underlying breach of fiduciary duty by Daniels required

to prove its claim of aiding and abetting that breach by Carpenter here. *Chase Manhattan Bank, N.A. v Celotex Corp.*, supra at 345.

However,

when prior to a determination on the merits a plaintiff reverses a decision to sue an employee and grants him or a her a release (with which the party released would normally obtain a discontinuance with prejudice), [there is] no reason to bar continuance of the action against the employer. While a discontinuance with prejudice has res judicata consequences to the extent that it prohibits the assertion of the same claim in another action against the employee, it should have no similar effect on the employer when there has been no judicial determination on the merits.

Philan Ins. v Hall & Co., 170 Misc2d 729, 734 (Sup Ct, NY Co 1996).

Defendant further contends that even if this claim is considered anew on the merits, there is no evidence that Carpenter "substantially assisted" Daniels to breach any legal obligation, or that Holborn suffered any damages as a result of the alleged breach.

However, Holborn has presented evidence showing that Carpenter may have conditioned Daniels' employment offer on his ability to secure the OMI account for Carpenter while he was still employed with Holborn. Specifically, plaintiff refers to the July 10, 2008 email from Russell to Marcell confirming that "the client wants to

give us the [broker of record]" now, which was sent one day before Daniels received his written offer from Carpenter and five days before he resigned from Holborn.³ While Carpenter claims that its offer to Daniels was not contingent on his ability to secure the OMI account for Carpenter, and cites to various deposition transcripts, it appears that there are issues of fact which would preclude granting summary judgment on this Count.

Moreover, Holborn has also raised issues of fact as to whether the alleged breach caused the company damages. Specifically, Holborn has presented evidence, by way of emails from OMI to another reinsurance agency dated June 19 and June 20, 2008, that OMI was satisfied with its relationship and expected it to continue with Holborn. This was shortly before it moved its account to Carpenter. Defendant cites to the deposition testimony of Michael Keyes, the CEO and President of OMI, and of Edward J. Yorty from OMI that OMI executives switched the account to Carpenter because they wanted to continue to be represented by Daniels in the reinsurance market and because they were unhappy with the services provided by Holborn. Plaintiff disputes this claim and refers again to the July 10, 2008 email from Russell to Marcell. If plaintiff is able to prove this cause of action against Carpenter, it will

³ The deposition testimony of Russell and Marcell raising questions as to what was actually intended by this email, also raises issues of credibility and issues of fact which cannot be resolved on a motion for summary judgment.

certainly be able to assert damages it suffered as a result of the loss of OMI as a client.

Based on the conflicting evidence presented, defendant's motion for summary judgment on plaintiff's first cause of action is denied.

Counts II and III

Carpenter next argues that it is entitled to summary judgment on plaintiff's second and third causes of action for tortious interference with current and prospective business relationships, respectively. It argues that it was simply engaged in competition with Holborn, and Holborn cannot show that OMI moved its account from Holborn due to Carpenter's actions.

To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party.

Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 47 (1st Dep't 2009), *lv* *dism in part, den in part* 14 NY3d 736 (2010). The elements of tortious interference with prospective business relations are the same, except plaintiff must also establish that

"but for" the defendant's acts, plaintiff would have entered into new business relationships. *Algomod Tech. Corp. v Price*, 65 AD3d 974 (1st Dep't 2009), *lv den* 14 NY3d 707 (2010).

Carpenter argues that Holborn cannot prevail on these claims because the evidence establishes that Carpenter hired Daniels in pursuit of its "normal economic self-interest" without any malice toward Holborn, which does not give rise to a claim for tortious interference. *See, Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004).

Moreover, Carpenter contends that Holborn has not established that it would have retained the OMI account "but for" Carpenter's action. Carpenter points out that Holborn failed to secure a non-compete agreement with Daniels and thus he was free to pursue other employment and compete, and further that there is evidence that OMI was unhappy with Holborn because it lacked "the analytical ability that some of the larger brokers [seemed] to have" at that time.

However, plaintiff counters that tortiously inducing another to breach his fiduciary duty may constitute wrongful means sufficient to support a tortious interference with contractual and prospective business relations claim. *See, Hannex Corp. v GMI, Inc.*, 140 F.3d 194, 206 (2nd Cir. 1998). Again, Holborn points to the emails referenced above and other evidence which create an

issue of fact as to whether Holborn would have retained the OMI account "but for" Carpenter's actions.

It thus appears to this Court that it would be premature to dismiss the tortious interference claims at this time.

Count IV

Carpenter also argues that it is entitled to summary judgment on the fourth cause of action for misappropriation of trade secrets and confidential information. Holborn has alleged that Carpenter misappropriated trade secrets by accepting and reviewing the user's manual for Holborn's "Eye in the Sky" software program. Carpenter argues that the user's manual does not qualify as a trade secret because Holborn failed to take precautionary measures to protect the information. *See Ashland Mgmt., Inc. v Janien*, 82 NY2d 395 (1993); *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246 (1st Dep't 2009), *lv den* 14 NY3d 706 (2010).

Relying on the deposition testimony of John DiGregoria, Holborn's CFO, taken in March 2009 in the Kansas action, defendant points out that DiGregoria conceded that Holborn did not designate or mark the user manual as "confidential", that it does not have a written policy requiring its clients to return the manual to Holborn, and that any employee who can access the Holborn servers

was able to view the manual, which was posted on the Holborn system, without restrictions. Moreover, Carpenter refers to DiGregoria's deposition testimony that Holborn has no policy that prevents employees from taking a hard copy of Holborn documents with them when they travel to meet a client, and finally that since Holborn never treated the document as confidential or protected its dissemination, any confidentiality was long ago waived.

Defendant also contends that even if Holborn could establish that the manual was a trade secret, and that Carpenter used it, it cannot establish any damages related thereto because the information contained therein is out of date and obsolete.

Defendant further argues that to the extent this cause of action is also premised on information that Daniels allegedly provided to Carpenter about Holborn's business before resigning - such as Holborn's brokerage fees on three accounts, employee salary information and its customer list - it cannot stand, because this type of information is readily ascertainable through publicly available information and thus does not qualify for trade secret

protection.⁴ *Fada Int'l Corp. v Cheung*, 57 AD3d 406 (1st Dep't 2008), *lv den* 12 NY3d 706 (2009).

The Court notes that "an insurance company's customer list is generally not considered to be a trade secret." *Arnold K. Davis & Co., v Ludemann*, 160 AD2d 614, 615 (1st Dep't 1990). Moreover, employee salary information does not fall within the definition of "trade secret". *ENV Services, Inc. v Alesia*, 10 Misc 3d 1054(A) at *5 (Sup Ct, Nassau Co, November 28, 2005); *see also Ashland Mgt. Inc. v. Janien, supra*.

Finally, defendant asserts that even if this information was a trade secret, summary judgment is still warranted because Holborn cannot establish that defendant used the information or that any harm flowed from such alleged use. Holborn, however, argues that "[i]n any context, 'secrecy' is a relative term and, as used in the law of trade secrets, it is not an absolute but an equitable concept." *A.H. Emery Co. v. Marcan Products Corp.*, 389 F2d 11, 16 (2nd Cir 1968), *cert. den* 393 US 385 (1968). Thus, plaintiff contends there is plainly a triable issue of fact as to whether it

⁴ According to Russell's deposition, Carpenter was already familiar with OMI before it had its initial meeting with Daniels because it had solicited OMI in the past and was able to estimate prospective brokerage fees for potential clients based on publicly available information.

maintained a sufficient degree of secrecy with respect to the manual.

Plaintiff further contends that marking a document as "confidential" is not a prerequisite for trade secret protection or even to maintain confidentiality.

It is implied in every contract of employment that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment.... This is a duty that the employee assumes not only during his employment but after its termination. It is an absolute and not a relative duty.

L.M. Rabinowitz & Co. v Dasher, 82 NYS2d 431, 435 (Sup Ct, NY Co 1948).

Plaintiff also argues that one of defendant's own employees testified that she gave Holborn's manual to one of the software developers who then gave it to a member of defendant's "I-aXs" team, which at a minimum raises a triable issue of fact as to whether defendant used Holborn's "Eye in the Sky" user manual. In addition, plaintiff points out that defendant has failed to provide any documents in response to plaintiff's document requests seeking discovery about defendant's use of the manual, and this is a further reason why the motion should be denied as premature as to Count IV.

However, this Court will dismiss this cause of action as to the information allegedly provided to Carpenter about Holborn's business, because all this information is publicly available and is not treated as a "trade secret" under New York law.

In addition, Count IV is also dismissed as to the user manual, since plaintiff has not offered any evidence that it undertook even the most basic measures to protect the alleged secrecy of the manual.

Count V

Finally, Carpenter argues that it is entitled to summary judgment on Holborn's fifth cause of action for unfair competition because it is entirely derivative in nature and based on the conduct alleged in Counts I-IV which defendant has argued should all be dismissed. Specifically, Paragraph 109 of the Complaint states as follows:

By virtue of the conduct described herein, including but not limited to Guy Carpenter's aiding and abetting Daniels' breaches of his fiduciary duties to Holborn, its tortious inducement and interference, and its misappropriation and use of Holborn's proprietary and confidential information and trade secrets, Guy Carpenter has engaged in unfair competition resulting in harm to Holborn.

Plaintiff however, points out that

New York Courts have noted the "incalculable variety" of illegal practices falling within the unfair competition rubric,... calling it a "broad and flexible doctrine" that depends "more upon the facts set forth...than in most causes of action,"... It has been broadly described as encompassing "any form of commercial immorality,"... or simply as "endeavoring to reap where (one) has not sown,"... it is taking "the skill, expenditures and labors of a competitor,"... and "misappropriati(ng) for the commercial advantage of one person... a benefit or 'property' right belonging to another,"... The tort is adaptable and capacious.

Roy Export Co. Establishment of Vaduz, Liechtenstein v Columbia Broadcasting System, Inc., 672 F2d 1095, 1106 (2nd Cir 1982), cert. den 459 US 826 (1982).

Since this Court has left in three of the four causes of action upon which this cause of action relies and there is still discovery outstanding that may relate to this cause of action for unfair competition which was not alleged in the Kansas action, it would be premature to grant defendant summary judgment at this time.

Defendant is directed to serve an Answer to the remaining four causes of action within 30 days of entry of this decision.

Counsel for both parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on December 7, 2011 at 10:30 a.m.

This constitutes the decision and order of this Court.

Dated: October 19, 2011



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.