Safehold Special Risk, Inc. v Coaction Specialty Ins. Group, Inc.
2023 NY Slip Op 32914(U)
August 22, 2023
Supreme Court, New York County
Docket Number: Index No. 654484/2022
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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SAFEHOLD SPECIAL RISK, INC.,

Plaintiff,

- v -

COACTION SPECIALTY INSURANCE GROUP, INC., NEW YORK MARINE AND GENERAL INSURANCE COMPANY, GOTHAM INSURANCE COMPANY, and COACTION SPECIALTY MANAGEMENT COMPANY, INC. F/K/A PROSIGHT SPECIALTY MANAGEMENT COMPANY, INC.

Defendants.

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INDEX NO. 654484/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

This action involves a dispute over a 2016 Program Management Agreement whereby plaintiff Safehold Special Risk, Inc. (Safehold or plaintiff) agreed to serve as a Program Administrator for the above-captioned defendants' motorsports insurance business. On June 30, 2022, defendants gave plaintiff a six-month termination notice of the Program Management Agreement. About two months prior to the termination effective date, plaintiff commenced the present action and, by order to cause (OSC) sought a temporary restraining order and a preliminary injunction respecting, *inter alia*, Safehold's confidential information, the customers in the motorsports program, and defendants' use of Safehold's former employee, Joseph Trull. Defendants oppose the motion. Several conferences were held to resolve this matter but the efforts failed. Plaintiff then filed an amended OSC. At oral argument on June 20, 2023, the court denied plaintiff's application for a temporary restraining order. Following a merits hearing on July 6, 2023 (*see* NYSCEF # 89 – Hearing Tr), the court now considers the preliminary injunction.

BACKGROUND

The amended complaint sets forth nine causes of action (NYCSEF # 35, ¶'s 64–115). Those counts, lacking headers, variously involve misappropriation of trade

secrets, breach of contract, unfair competition, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and tortious interference (*id.*).

Pursuant to the Program Management Agreement (the Agreement), Safehold acted as defendants' program administrator for their motorsports insurance business since September 2016 (NYSCEF # 37 – the Agreement). Safehold notes that as a managing general agent "it is an intermediary between the retail insurance broker assisting an insurance customer . . . and an insurance company" (NYSCEF # 36 – Beckler Aff, ¶ 5). Safehold explains, as defendants' program administrator, it "placed insurance coverage for [their] existing customers and other customers it developed" (NYSCEF # 45 – MOL at 1).

Safehold also has a good number of "direct relationships" with other insurance customers (*id.*, ¶ 7). Safehold shared certain information—called "expirations"—with defendants about Safehold's existing motorsports customers (NYSCEF # 45 at 1). Expirations include "the date of the insurance policy, the date of its expiration, the name of the insured, the amount of insurance, premiums, property covered and terms of insurance" (NYSCEF # 5 – Paulk Aff, ¶'s 6-7). Safehold alleges that it conditioned sharing such information on defendants' agreement to safeguard it "and, should the Agreement terminate, not to use it to solicit the Customers" (NYSCEF # 45 at 1).

The information Safehold shared allegedly included a spreadsheet with over 24,000 lines of data, including "the amount of commissions earned by the retail broker/agent as opposed to merely gross commissions earned [by] both Safehold and any retail agent or broker combined" (NYSCEF # 36, ¶ 14). Safehold identifies other allegedly proprietary documents defendants are using, including underwriting and risk management guidelines and customized motorsports forms used for quotes or otherwise, such as a participant "medpay form" that defendants were allegedly lacking entirely and documents identified as GL461 and GIA67 (*id.*, ¶'s 27-29, 69). Safehold proffers that, in the industry, in the event of termination, an "insurer may attempt to hire a new managing general agent to develop a new program with new data, but it is not permissible to usurp the existing program and information created by the [previous agent] for its own use" (*id.*, ¶ 10).

The Agreement allows termination by either side for any reason on 180 days' notice, following which defendants "shall be permitted to pursue and solicit any customers of the Motorsports Program, for any insurance product or services, so long as, in the course of such solicitation, [defendants do] not use or refer to any data related to such customers that was obtained" during the Agreement's term (NYSCEF # 37, §'s 24-25). On June 30, 2022, defendants gave termination notice, to be effective December 26, 2022 (NYSCEF # 30, ¶ 17). On November 2, 2022, Safehold wrote to defendants requesting that they "discontinue sending conditional notices of renewal for policies expiring after December 26, 2022" on the basis that defendants "could not do so without the use of Safehold's data" (*id.*, ¶ 19). Defendants responded that they intended to continue sending the conditional renewals (*id.*, ¶ 20). Defendants indeed did continue sending renewals, together

with, in Safehold's eyes, a misleading indication that Safehold would continue to be the producer on the accounts (*id.*, ¶ 21). Defendants' notices also asked the customers to contact defendants to continue coverage if so desired, which Safehold views as making improper solicitations using Safehold's proprietary information (NYSCEF # 5, ¶ 17 citing NYSCEF # 14).

By its amended complaint, Safehold takes issue with defendants having hired Safehold's former employee, Joseph Trull. Trull—who is not a party to this action—has worked in Safehold's insurance program since Safehold's parent company acquired Trull's former employer in 2017 (NYSCEF # 30, ¶'s 30-32). In connection with the acquisition, Trull signed a "Confidentiality, Non-Solicitation & Non-Interference Agreement" (*id.*, ¶'s 30-33; NYSCEF # 39 – the Trull Agreement). Safehold avers that the Trull Agreement "was the gateway to employment with Safehold" as "he was placed in a role with significant responsibility over Safehold's clients that he would not overwise have had" (NYSCEF # 30, ¶ 35-36).

Safehold adds that "Trull was a key employee of Safehold in their handling of the motorsports business and his knowledge of Safehold's confidential information was substantial due to his role as an underwriter and his role as a sales consultant" (*id.*, ¶ 38). Safehold continues that "Trull has proprietary knowledge of Safehold marketing strategies" (NYSCEF # 32 – Weldon Supp Aff, ¶ 10). It opines that Trull "would undoubtedly retain much of Safehold's . . . trade secrets in his personal memory due to his significant involvement with the accounts" (NYSCEF # 36, ¶ 46). Safehold asserts that, apart from Trull, only a handful of other Safehold employees had access to its specialized underwriting knowledge (*id.*, ¶ 11). Trull allegedly "has a set of unique skills" as "there are very few insurance carriers in the country focusing on motorsports and very few underwriters capable and talented enough to be familiar with this class of business to underwrite it profitably. Trull is one of those few individuals" (*id.*, ¶ 68).

Despite Safehold's warning to Trull about violating his agreement, Trull left Safehold in March 2023 to join defendants (NYSCEF # 30, ¶ 43). Specifically, Safehold asserts that Trull is violating the agreement by his "very employment" with defendants' motorsports business and his involvement in using Safehold's confidential information to solicit its business (*id.*, ¶ 49). Safehold raises these issues to assert defendants' liability for their "substantial assistance" in Trull's breaches (*id.*, ¶'s 107-108).

Safehold now seeks a preliminary injunction which would essentially enjoin defendants from: (i) using Safehold's confidential information including to take or solicit Safehold's motorsports customers including via conditional renewal notices with solicitation language; (ii) using Trull "to underwrite, manage or solicit any" motorsports business; and (iii) representing to any customer "that Safehold will continue to act as the producer on their policy" (NYSCEF # 31 – Amended Order to Show Cause at 2-3).

DISCUSSION

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing . . . . Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], citing *Doe v Axelrod*, 73 NY2d 748 [1988]). 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" (86 AD3d at 23).

Likelihood of Success on the Merits: Safehold's Contentions

Safehold argues that it is likely to succeed on the merits, asserting its legitimate interest in safeguarding against commercial piracy (NYSCEF # 45 at 2). It avers that there "is no question" that defendants are using its confidential information as defendants are "only aware of these customers because Safehold brought them to Defendants" (*id.* at 4). Defendants are allegedly taking Safehold's information "through knowledge of the expirations, use of Safehold created insurance forms . . . [and] the retention of Trull, who understands the underwriting process and how to effectively use Safehold's proprietary information for its advantage" (*id.*). Safehold posits that this misappropriated information constitutes trade secrets because it is not generally known since it was "limited to certain key employees, including Trull," and which took 30 years and $45 million for Safehold to create (*id.* at 4-5).

Safehold shares more detail on the asserted misappropriation. "In one specific instance, we know that Safehold would develop underwriting information, then a retail broker would forward Safehold's work product to [defendants so they could] compete with Safehold in part by removing a portion of the fee that would normally be paid to Safehold and passing a portion of that savings onto the retail broker" (NYSCEF # 36, ¶ 63). Safehold also "provided names of retail insurance agencies and brokers to Defendants that they would not otherwise have had. This list not only gave Defendants information that matched retail brokers to insureds but it also reflected the amount of the commission split between Safehold and the retail agent or broker" (*id.*, ¶ 26). Safehold contends that Defendants' solicitations could only be accomplished "with knowledge of confidential renewal dates that Defendants would not otherwise have without Safehold's efforts" (*id.*, ¶ 64).

In support of its misappropriations claim, Safehold explains that before working with Safehold, defendants' motorsports program was allegedly "stagnant and ineffective" amounting to below $5 million dollars in 2016 (*id.*). "Defendants were only selected by customers who had been rejected by other insurers," Safehold claims (NYSCEF # 36, ¶ 19). But after defendants entered into the Agreement with Safehold, defendants' business grew to around $20 million (NYSCEF # 45 at 4).

Now "in just a short time . . . Defendants may have taken as much as 25 % of Safehold's prior business" (*id.* at 5). Specifically as to a particular agent named Jones Birdsong, Safehold avers that Safehold had around $2.5 million in business spread over 282 accounts compared to defendants' five accounts worth around $162,000 (NYSCEF # 63 - Beckler aff - ¶ 22).

Safehold argues that the causes of action it identifies as tortious interference with prospective contractual relations, tortious interference with prospective business relations, aiding and abetting Trull's breach of fiduciary duty and breach of loyalty, breach of contract, conversion, and unfair competition demonstrate its likelihood of success on the merits and entitlement to the sought injunction (NYSCEF # 45 at 5-9). As for tortious interference with prospective contractual relations, Safehold asserts that defendants "interfered with Safehold's at-will contract with" Trull (*id.* at 5). Safehold posits that it would need to "prove that Defendants used wrongful means to interfere with Safehold's contract with Trull." (*id.*). To Safehold, defendants' actions were clearly "intentional and wrongful" in using Safehold's confidential and proprietary information and in causing Trull to breach his Non-Interference Agreement (*id.* at 6). The claim identified as tortious interference with business relations is connected to its outside retail producers, which defendants allegedly usurped in acting "with improper means and means which amount to one or more independent torts" (*id.* at 6-7). On this point, Safehold refers generally to its memorandum of law and supporting papers (*id.*).

On its aiding and abetting breach of fiduciary duty and loyalty claim, Safehold maintains that defendants have allegedly affirmatively assisted Trull in violating his agreement. It cites an email that defendants sent to Trull's Safehold address on March 23, 2023, allegedly one day before his departure when he was still employed at Safehold, to indicate their interest in having Trull help them solicit customers (NYSCEF # 45 at 8, citing NYSCEF # 41). Additionally, Safehold submits that using Trull's name on quotes to customers perpetuates a misinterpretation that defendants are handling Safehold's program seamlessly and with continuity regarding the individuals involved, except with the added advantage of saved costs resulting from cutting Safehold out of the picture (NYSCEF # 45 at 10). Safehold adds that Trull, when employed by defendants, signed a May 1, 2023 broker-of-record letter by which defendants "ha[d] no choice but to use and rely on the data and confidential information . . . brought by Safehold" (NYSCEF # 63 – Beckler Supp Aff, ¶ 26 citing NYSCEF # 64).

Finally, Safehold asserts that its breach of contract, conversion, and unfair competition claims support its likelihood of success on the merits, as demonstrated by defendants' conversion of its information, hiring of Trull, and unfairly exploiting Safehold's "skill, expenditures and labor" (NYSCEF # 45, ¶'s 8-9).

Likelihood of Success on the Merits: Defendants' Contentions

Defendants argue that Safehold has not demonstrated a likelihood of success on the merits. Safehold is not seeking to maintain the status quo, but instead

prevent defendants from competing altogether (NYSCEF # 58 – Opp at 12). Pointing to the parties' Agreement, defendants deny that they are misappropriating confidential, proprietary information of Safehold (*id.* at 14). Defendants maintain that the Agreement narrowly defines the term "confidential" while granting broad exclusions as to (i) "information generally available to and known by the public," (ii) information available on a non-confidential basis from a different source, and (iii) information independently acquired or developed" (*id.* citing NYSCEF # 37 § 31 [C]).

As to names, defendants note that they "issued insurance policies to all such customers and therefore ha[ve] records in their underwriting system identifying the name of each insured customer," which they have "an ongoing need to maintain . . . in order to properly service . . . [the] accounts" (NYSCEF # 58 at 14-15). So "to suggest that [defendants] cannot retain or use the names of its own insureds for any purpose is absurd" (*id.*). Defendants further deny that they are using the names of insureds introduced by Safehold to solicit such business, insisting that they are treating all applications as new business as allowed by the Agreement (*id.* at 15-16).

Defendants state that prior to the Agreement's commencement, defendants had a book of business amounting to $4 million (not $5 million) and Safehold had approximately $12 million (*id.* at 20). Since termination of the Agreement, more than 90% of their motorsports business has come through a longstanding relationship with its agent Birdsong, whom defendants understand currently does not do business with Safehold (*id.* at 7, 15). To the extent customers request "an extension of existing coverage terms, such requests are routed through Safehold first; the requests do not come directly to [defendants]" (NYSCEF # 52 – Topper Aff, ¶ 29). Defendants deny that they are interfering with Safehold's contracts with retail brokers, averring that they are "not even accepting broker of record submissions on currently in-force Safehold business" (*id.*, ¶ 32). Defendants further clarify how broker-of-record letters play into their appointment process and that the specific letter dated May 1, 2023 that Beckler raises did not involve any use of Safehold's data (NYSCEF # 74 – Topper Supp Aff, ¶'s 3-14, citing NYSCEF # 64).

Furthermore, defendants posit that policy forms, rates, and underwriting guidelines are not confidential, certain of which are publicly filed with insurance regulatory authorities and others of which were generally created by defendants or even a non-party advisory organization, ISO (NYSCEF # 58 at 16-17). Defendants admit that Safehold had input on underwriting guidelines that defendants provided to Safehold but deny that that somehow converted the guidelines into Safehold's property (*id.* at 17). As to the spreadsheet with over 24,000 lines of data Safehold alleges it sent, defendants' senior vice president of live entertainment and sports underwriting, Kevin Topper, denies knowing that Safehold shared any such chart (NYSCEF # 52 – Topper Aff ¶ 61).

Defendants assert that neither Trull nor defendants have violated their respective agreements with Safehold by Trull's employment with defendants (NYSCEF # 58 at 18-19). Trull has a limited underwriting role with defendants, which means he "will not sell, solicit, produce, or market [defendants'] insurance

products" or "consult for insureds or brokers" (*id.* at 18). "[H]e will only communicate with brokers or insureds upon their submission of a new application" so he will not be inducing termination of any client accounts (*id.* at 8). At Safehold, Trull was an employee, not a manager or owner, and defendants hired him not for his knowledge of Safehold, but "because of his underwriting acumen and good reputation" (*id.* at 7; *see also* NYSCEF # 52, ¶ 67 [contrasting Trull with the others whom Safehold identifies as key employees in that they were managers or owners]). Defendants' March 23 email to Trull, which Safehold found as significant, was a welcome email inadvertently sent to Trull's Safehold email address; it did not ask Trull to engage in sales or marketing activities (NYSCEF # 58 at 8; NYSCEF # 52, ¶ 71). Defendants also point out that they wrote to Safehold's counsel on April 7 and again on May 4 of this year to assert, respectively, the invalidity of Safehold's interpretation of the Trull Agreement and the specific limitations of Trull's employment with defendants for his first two years (NYSCEF # 46 – Lopes-McLeman Aff, ¶'s 8-9 citing NYSCEF #'s 47-48). Trull confirms his adherence to these restrictions, adding that on April 7, his supervisor restated these limitations by email (NYSCEF # 49 – Trull Aff, ¶'s 4-6 citing NYSCEF # 51). Trull affirms that he did not "take any materials or documents belonging to Safehold" when he left (NYSCEF # 49, ¶ 7).

Finally, defendants note that they have ceased including the language Safehold objected to about Safehold remaining on as insurance producer in defendants' renewal notices as of December 5, 2022, so there is no action to enjoin (NYSCEF # 58 at 13). Defendants also aver that they are "statutorily required to send out these nonrenewal notices" (*id.*).

Likelihood of Success on the Merits: Hearing Testimony

At the July 6 merits hearing, the court heard testimony from Safehold's program executive John Paulk, Safehold's chief operations officer Shawn Beckler, defendant's representative Topper, and Trull.

Testimony demonstrated further nuance in the parties' respective books of business. Topper and plaintiff's counsel recognized some uncertainty as to the amount of Safehold's book of business prior to the Agreement, with indications that it could have been $10 or $12 million (NYSCEF # 89 at 108:7-16). As for defendants' book of business, Topper agreed that in 2016 when defendants signed the Agreement with Safehold, defendants had "just started doing things" and only had five client accounts (*id.* at 120:19). And defendants' $4 million book may have been reduced at some point by a $2 million sale to another agency (*id.* at 107:22 – 108:6). The parties agree that around the time of the Agreement's termination, their collective business had grown to $20 million (*id.* at 36:16-19).

At the hearing, the parties also developed the record as to defendants' practices since the Agreement's termination. Topper averred that defendants do not use Safehold's data to solicit new business; instead, business comes to defendants via brokers (*id.* at 155:15-21). When questioned about defendants' use of

information about "losses that occurred during the program," Topper noted that such loss-run information was in defendants' systems (*id.* at 135:20 – 136:3). Nevertheless, for new applications, defendants' brokers would "provide new loss runs" without "us[ing] the loss runs on its own system" (*id.* at 149:14-19). In other words, defendants "have the capacity" to generate loss runs but they "self-impose[] restraints . . . in order to abide by the agreement" (*id.* at 163:6-11).

As to the use of the "Medpay" form, Beckler apparently agreed that it became public but contended that that did "not change that it was a confidential idea that came from" Safehold to defendants (*id.* at 86:1-4). Beckler also agreed that defendants had underwriting guidelines prior to working with Safehold and that they retained the right to dictate the terms of such guidelines whether they adopt Safehold's guidance (*id.* at 71:7-25).

The parties also elicited testimony as to underwriter functions, relevant to the claims involving defendants' employment of Trull. Beckler acknowledged that it is "standard practice in the industry for the name of the underwriter to appear on a quote" (*id.* at 159:15-17). Beckler averred though "that any quote which is an offer of terms or coverage for a price is a solicitation of business [ ] whether it's a broker or a direct insured. So the mere fact of quoting something is a solicitation" (*id.* at 70:18-21). Trull seemed to echo this sentiment, asserting that "underwriting does include sales" (*id.* at 168:20-23).

To close, defendants argued that Safehold misinterprets Section 25 of the Agreement as prohibiting defendants from soliciting "any business previously placed through Safehold" (*id.* at 182:12-18). Safehold noted that the word "related" in Section 25 imparts a broad preclusion on defendants even if they are not using "the exact same data" that Safehold provided (*id.* at 192:4:10). "It's related to data of those customers. And everything they do with any accounts is related to data . . ." (*id.* at 193:8-12).

Likelihood of Success Analysis

"A plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means" (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 452 [2018]). "[A] trade secret as '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' " (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 407 [1993] [quoting the Restatement of Torts]). "[I]t is the custom and practice in the insurance field that, in the absence of a contract to the contrary, the independent insurance agent" that brings data during the agency "owns the expirations at the termination of his agency. The practice is a protection of the work product of the individual agent and represents a valuable asset in the nature of goodwill" (*Matter of Estate of Corning*, 108 AD2d 96, 100 [3d Dept 1985]). "[A]n

insurance company's customer list is generally not considered to be a trade secret" (*Arnold K. Davis & Co., Inc. v Ludemann*, 160 AD2d 614, 615 [1st Dept 1990]).

Applying the above standards, the injunctive relief Safehold seeks is fundamentally overbroad based on Safehold's misconstruction of the parties' Agreement. The proposed injunction would preclude defendants from:

> a. Disclosing or using in any way any of the confidential and/or proprietary data of [Safehold's] including as described in Safehold's supporting papers (the "Trade Secrets") to take current underlying insureds of Safehold's book or business;
>
> b. Using the Trade Secrets or any other data or information provided by Safehold to Defendants in connection with the Motorsports Program at issue in the Agreement to solicit any customer of the Motorsports Program, including using any such Trade Secrets or other data, including, but not limited to, issuing conditional renewals and/or cancellation notices with solicitation language to said customers.
>
> c. Representing to any customer of the Motorsports Program that Safehold will continue to act as the producer on their policy;
>
> d. Pursuing any prior members of the Motorsports Program to continue insurance coverage with Defendants, except for those who have already had their coverage bound or renewed for a term of not less than one year from the date of this Order, except for those customers who have already secured a policy for a year or more with Defendants since the effective date of the termination of the Agreement, December 26, 2022;
>
> f. Taking any of Safehold's motorsport book of business utilizing any proprietary/confidential data.
>
> (NYSCEF # 31 – amended OSC at 2-3.)

Safehold's interpretation of the breadth of Section 25 would preclude defendants' solicitation of customers using information other than the "exact same data" obtained during the Agreement's term, so long as the data is "related to data of those customers" (NYSCEF # 89 at 193:8-12). The text of the Agreement, however, disallows solicitation by use of "data related to [motorsports] customers that was obtained by [defendants]" through the program during the term of the Agreement (NYSCEF # 37, § 27). In other words, data related to customers is protected, not necessarily information related to data of the customers. The Agreement's express terms are clear and not subject to Safehold's construction (*see e.g. W.W.W. Assocs., Inc. v. Giancontieri*, 77 NY2d 157, 162 [1990] ["when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"]).

Paragraph (d) in Safehold's proposed amended OSC demonstrates this overbreadth. Safehold would preclude defendants from "[p]ursuing any prior

members of the Motorsports Program to continue insurance coverage with Defendants" (NYSCEF # 31 at 2 [d]).[1] If the parties had meant broadly to restrict defendants from soliciting any Motorsports Program business, their Agreement could have reflected that understanding. Instead, the parties' Agreement expressly authorized defendants to solicit customers so long as defendants do not use "any data related to such customers that was obtained" through the Motorsports Program during the Agreement's term (NYSCEF # 37, § 25).

Compared to paragraph (d), to the extent the injunctions in paragraphs (a), (b), and (f) are more closely tied to enjoining solicitation through the use of Safehold's information, Safehold has still failed to demonstrate likelihood of success.

Safehold's best evidence of defendants' using Safehold's information in violation of the Agreement is the set of six sample notices of nonrenewal of insurance that defendants sent to customers, with a copy to Safehold, in late 2022 (NYSCEF # 14). The portion of Safehold's injunction paragraph (b) seeking to preclude defendants from "issuing conditional renewals and/or cancellation notices with solicitation language to [the motorsports] customers" raises questions for defendants. Defendants claim that "what Safehold alleges is that [defendants are] somehow using the names of [ ] insureds introduced by Safehold to solicit motorsports business from those insureds. . . . As explained, however, any such allegation lacks support and is false" NYSCEF # 58 at 15). Defendants' (apparently limited) issuance of conditional renewal notices with solicitation language suggests otherwise (NYSCEF # 58 at 14-15).

Nevertheless, Safehold has again drafted the injunction overbroadly by seeking to preclude defendants from "using any [ ] Trade Secrets or other data" to issue the renewals (NYSCEF # 31 at 2 [b]). Safehold has drafted the injunction so that it precludes defendants from using "other data," an inordinately vague reference. Safehold's definition of "Trade Secrets" is also problematic in vaguely tying the injunction to dozens of pages of legal briefing, affidavits, and other exhibits (*id.* at 2 [a]). Given the uncertainties and overbroad drafting, an injunction will not be issued on the conditional renewals (*City of New York v 330 Cont. LLC*, 60 AD3d 226, 234 [1st Dept 2009] ["preliminary injunction is a drastic remedy that should not be granted unless the movant establishes a clear right to such relief"]).

Putting aside the overbroad drafting, Safehold has failed to demonstrate likelihood of success on the merits more generally on the paragraphs (a), (b), and (f) relief because, apart perhaps from the sample of renewal notices Safehold identifies that defendants sent, Safehold has not demonstrated that defendants are using its confidential information to solicit customers. Even if, for argument's sake, trade secret status applies to the compilation of customer names, policy expirations, broker names, and broker fees, still Safehold has not sufficiently established for the

[1] Two clauses beginning with "except" limit the injunction's reach based on various timings but the paragraph (d) breadth still basically precludes defendants from pursuing any prior customers of the parties' motorsports program.

present purposes that defendants have used such compilation to solicit customers. Defendants aver that they obtain new business via brokers, even restraining itself from accessing loss-run information stored in their systems connected to Safehold, which is generally not contradicted by the record (*see e.g. Falconwood Corp. v In-Touch Tech., Ltd.*, 227 AD2d 215, 216 [1st Dept 1996] [rejecting trade secrets misappropriation claim in the absence of any evidence of misappropriation; access is insufficient]; *cf Clarion Assoc., Inc. v D.J. Colby Co., Inc.*, 276 AD2d 461, 463 [2d Dept 2000] [granting preliminary injunction where insurance agent demonstrated defendant misappropriated confidential information in contacting and soliciting book of expirations]).

Nor has Safehold demonstrated its entitlement to the injunction on the basis of forms like Medpay which are apparently publicly filed and therefore not subject to trade secret protection (NYSCEF # 89 at 86:1-4; *see e.g. Ashland*, 82 NY2d at 407 ["a trade secret must first of all be secret"]). Safehold's allegations about defendants' misappropriations of underwriting guidelines are also unavailing, nor does Safehold establish Trull's May 1 broker-of-record letter necessarily relied on information Safehold brought.

The record suggests that a not-insignificant portion of the dispute focuses on the parties' dealings with the agent Birdsong. Defendants indicate that 90% of their recent business has come from Birdsong. It appears that Birdsong is no longer working with Safehold, and defendants are pursuing customers referred by Birdsong, perhaps replacing the business previously held by Safehold (*see* NYSCEF # 63, ¶ 22 [indicating that Safehold had $2.5 million in business spread over 282 accounts with Birdsong]). If that is indeed the state of affairs, that does not connect to Safehold's claims that defendants are misappropriating Safehold's information rather than Birdsong, or other brokers, just choosing to work directly with defendants instead of going through Safehold. That is the case even though the parties' agreement prohibits defendants' use of certain data to "pursue and solicit," which could extend to indirect pursuit of customers by directing brokers to pursue specific customers based on the restricted data (NYSCEF # 37, § 27). Even with that construction, Safehold has not established defendants are so directing brokers.

Safehold's application for an injunction enjoining defendants "from using Joseph Trull to underwrite, manage or solicit any business from the Motorsports Program, or for Mr. Trull to assist other employees or agents of Defendants in said activities" (NYSCEF # 31 at 3) is also denied.

Safehold posits that it "must prove that Defendants used wrongful means to interfere with Safehold's contract with Trull" averring that "[a] competitor's use of confidential or proprietary information to interfere with a prospective economic relationship is wrongful interference" (NYSCEF # 45 at 5-6). This fails as Safehold has not established defendants' misappropriation of Safehold's confidential or proprietary information. Similarly, Safehold has not shown a likelihood of success on the merits as to the claim that defendants interfered with Safehold's business relations with outside retail producers (*id.* at 6). Safehold has not established, as it

posits it must, that defendants "acted solely out of malice or used improper or illegal means amounting to a crime or independent tort" (*id.*).

As for the aiding and abetting breach of fiduciary duty claim, Safehold has not established a basis for finding an underlying breach of fiduciary duty. Safehold at best may have adduced support of a post-employment breach of contract by Trull of restrictive covenants whose enforceability this court need not and does not reach. The court need not reach such enforceability because Safehold does not offer any authority to equate the putative breach of contract with a breach of fiduciary duty, the latter of which would be necessary for this aiding and abetting claim. Safehold contends that after "employment is terminated, wrongful conduct, including but not limited to, taking files or [using] confidential information is actionable" (NYSCEF # 46 at 7 [quotation marks omitted]). That may be true in the abstract, but Safehold has failed sufficiently to establish such wrongful conduct by Trull.

The record does not present any evidence that Trull took documents with him when he left Safehold; Trull avers he did not (NYSCEF # 89 at 172:23 – 173:12). Nor is there any charge that Trull deliberately memorized customer information, and "the use of information about an employer's customers which is based on casual memory . . . is not actionable" (*Ludemann*, 160 AD2d at 615 [citing *Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392]). There is disagreement between the parties whether the March 23 email that defendants sent to Trull's Safehold email address was sent on Trull's first day with defendants or the day before. In any event, Safehold's argument about that email demonstrating Trull's involvement in soliciting customers is only speculative and insufficient to support an aiding and abetting breach of fiduciary duty claim (NYSCEF # 45 at 8 citing NYSCEF # 41).

As for the conversion cause of action, the claim that defendants "converted [Safehold's] confidential and proprietary information and ha[ve] exercised an unauthorized dominion over the same to the exclusion of Safehold" is unsupported (NYSCEF # 45 at 9). Nowhere does Safehold explain how it has been excluded from the use of its information (*see McKinnon Doxsee*, 187 AD3d at 738 [rejecting conversion claim of insurance information where "plaintiffs failed to demonstrate that the defendants exercised control over the client information that they copied to the exclusion of the plaintiffs, as the plaintiffs still had access to this information which had not been deleted"]).

Nor has Safehold sufficiently identified usurpation of business opportunity for likelihood of success on the merits as to the unfair competition claim to support the injunctions sought. "Under the 'misappropriation theory' of unfair competition, a party is liable if they unfairly exploit 'the skill, expenditures and labors' of a competitor" (*E.J. Brooks*, 31 NY3d at 449). While a duty may end upon the termination of a fiduciary relationship, that does not entitle a fiduciary "to directly and unfairly compete . . . in bad faith . . . and misappropriat[e] the confidential information . . . obtained during . . . employment" (*7th Sense, Inc. v Liu*, 220 AD2d 215, 216 [1st Dept 1995]). This is what Safehold has failed sufficiently to establish, however. " '[N]o restrictions should fetter an employee's right to apply to his own

best advantage the skills and knowledge acquired by the overall experience of his previous employment.' Restrictions are justified only when necessary to protect the former employer 'against deliberate surreptitious commercial piracy' " (*Inv. Access Corp. v Doremus & Co., Inc.*, 186 AD2d 401, 403-404 [1st Dept 1992] [quoting *Reed, Roberts Assoc., Inc. v Strauman*, 40 NY2d 303, 307-308 [1976]). The present record is insufficient to demonstrate piracy (*cf McKinnon Doxsee*, 187 AD3d at 738 [unfair competition demonstrated where "defendants electronically copied information from the subject books of business, including customer contact information and information regarding the customers' insurance policies. The record, including the copies of the change of broker letters, also contains evidence from which it may be inferred that the defendants solicited some of those customers prior to their resignation from [their prior employer]").

Nonetheless, the paragraph (c) proposed injunction seeks to preclude defendants from "[r]epresenting to any customer of the Motorsports Program that Safehold will continue to act as the producer on their policy," and it is unclear what legitimate objection defendants may have; none are stated (NYSCEF # 31 at 2 [c]). While the record does not demonstrate surreptitiousness by defendants in indicating Safehold would remain producer (*see e.g.* NYSCEF # 11 at 3 [Safehold copied on the conditional renewal notices]), Safehold has nonetheless demonstrated likelihood of success on the merits that defendants may be liable for indicating to customers that Safehold would continue to act as the producer "under a misappropriation theory of unfair competition" which prohibits defendants from "unfairly exploit[ing] the skill, expenditures and labors of a competitor" (*E.J. Brooks*, 31 NY3d at 449 [quotation marks omitted]). The court therefore turns to the questions of irreparable harm and balance of the equities for this limited injunction.

Irreparable Harm and Balance of the Equities

Safehold argues it will suffer irreparable harm, because defendants have "[used] Safehold's name on [the] conditional renewals . . . [leading] the Customers to believe that Safehold will continue to service these policies" risking customers blaming Safehold if defendants "fail to properly service these accounts" (NYSCEF # 45 at 9-10). In response, defendants assert that any "harm would be potentially redressable through money damages," that there is no presumption for irreparable injury in the absence trade secrets being at issue, and that Safehold has raised no facts demonstrating irreparable harm (NYSCEF # 58 at 19-20).

The reputational damage and risk of loss of goodwill is sufficient for Safehold to demonstrate irreparable injury should defendants continue to indicate to customers that Safehold would be servicing accounts when, in fact, Safehold would not be servicing (*see e.g. Advent Software, Inc. v SEI Glob. Services, Inc.*, 195 AD3d 498, 499 [1st Dept 2021] ["The loss of the goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief"]).

As for balancing of the equities, Safehold speaks to the injunctive relief it seeks generally (NYSCEF # 45 at 10-12). Defendants respond by asserting that the

equities are not with Safehold, alleging that "Safehold . . . failed to honor its duty of exclusivity under Section 3 of the" Agreement and that "Safehold has also refused to turn over [defendants'] files and policy documents" under Section 9 of the Agreement (NYSCEF # 58 at 21-22).

Given the disconnection between defendants' asserted exclusivity and documents complaints and the limited scope of the paragraph (c) injunction that Safehold seeks, for which issue the court finds the balance of equities is in Safehold's favor, accordingly the paragraph (c) injunction is granted, conditional on the posting of an undertaking or, in lieu thereof, agreement by the parties to stipulate to this relief.

CONCLUSION

In view of the above, it is hereby

ORDERED that plaintiff Safehold Special Risk, Inc.'s motion for a preliminary injunction is granted only to the extent that defendants are enjoined from "[r]epresenting to any customer of the Motorsports Program that Safehold will continue to act as the producer on their policy" (plaintiff's Amended Order to Show Cause, ¶ c); and it is further

ORDERED that the injunctive relief sought for the remaining provisions (¶'s a, b, d, e, and f) in plaintiff's Amended Order to Show Cause is denied; and it is further

ORDERED that Safehold shall file a CPLR 6312 undertaking, in an amount to be determined subject to the parties' letter briefing to be jointly submitted by September 1, 2023; and it is further

ORDERED that based on the stipulation dated May 30, 2023 (NYSCEF # 29), Coaction Specialty Management Company, Inc. (f/k/a ProSight Special Management Company, Inc.) is added as defendant to the caption, and the caption is hereby amended to reflect that addition as follows:

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SAFEHOLD SPECIAL RISK, INC.,

Plaintiff,

- v -

COACTION SPECIALTY INSURANCE GROUP, INC., NEW YORK MARINE AND GENERAL INSURANCE COMPANY, GOTHAM INSURANCE COMPANY, and COACTION SPECIALTY MANAGEMENT COMPANY, INC. F/K/A PROSIGHT SPECIALTY MANAGEMENT COMPANY, INC.

Defendants.

----------X

and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of General Clerk's Office and the County Clerk, who are directed to mark their records to reflect the change in the caption; and it is further

ORDERED that such service upon the General Clerk's Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/supctmanh); and it is further

ORDERED that a preliminary conference to schedule discovery shall take place on September 13, 2023 at 2:30 p.m. or such time as the parties may schedule with the court's law clerk (provided that the parties shall first meet and confer to determine if there is agreement to stipulate to the schedule); and it is further

ORDERED that counsel for plaintiff shall serve of a copy of this decision, along with notice of entry, on all parties within ten days of entry.

08/22/2023

DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE