SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

E-FILE

PRESENT: HON. BERNARD J. FRIED PART 60
Justice

Index Number : 651673/2011
AON RISK SERVICES NORTHEAST
vs.
CUSACK, MICHAEL
SEQUENCE NUMBER : 003
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 651673/11
MOTION DATE
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

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

Dated: 12/20/2011

_____, J.S.C.
HON. BERNARD J. FRIED

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

AON RISK SERVICES, NORTHEAST, a New York corporation and AON CORPORATION, a Delaware corporation,

Plaintiffs,

-against-

Index No. 651673/11

MICHAEL CUSACK, an individual, and ALLIANT INSURANCE SERVICES, INC., a Delaware corporation,

Defendants.

----------X

For Plaintiffs:

DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020
(Shand Stephens, Barbara Harris)

For Defendant Michael Cusack:

Fensterstock & Partners, LLP
30 Wall Street
New York, NY 10005
(Blair Fensterstock, Eugene Kublanovsky)

For Defendant Alliant Insurance Services, Inc.:

Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, NY 10153
(Jeffrey S. Klein, Allan Dinkoff)

FRIED, J.

This action involves a systematic and coordinated raid by defendant Michael Cusack and his new employer, defendant Alliant Insurance Services, Inc., on the clients and employees of the Construction Services Group of plaintiffs Aon Corporation and Aon Risk Services, Northeast (Aon CSG), Cusack's former employer. After weeks of planning, while still employed by Aon, Cusack, a former senior executive and Managing Director of Aon, along with Peter Arkley, the former Chief Executive Officer of Aon CSG, and other senior executives, abruptly resigned on June 13, 2001 to join Alliant, and 15 Aon clients moved their business to Alliant. That same day, 38 Aon CSG employees left to join Alliant, including seven who reported directly or indirectly to Cusack. Since then, 60 employees in total have left Aon to join Alliant, and Aon has received more than 100 broker of record letters from clients transferring more than $20 million in revenue from Aon to Alliant.

Based on these facts, on September 28, 2011, I issued a temporary restraining order enjoining Cusack from soliciting business from or entering into any business relationship with any Aon client or customer for whom Cusack was the producer or on whose account he worked; soliciting any Aon CSG employees to work for Alliant; or using any information downloaded from Aon's computer system. I also ordered Cusack to return to Aon any documents taken by him. On October 13, 2011, I likewise temporarily enjoined Alliant and its employees who were formerly employed by Aon and who were subject to restrictive covenants with Aon from soliciting business from or entering into any business relationship with any Aon client; soliciting any Aon CSG employees to work for Alliant; or using any information belonging to Aon, including any information downloaded from Aon's computers and subsequently uploaded to Alliant's computers. I also ordered Alliant to return to Aon any documents taken by any former Aon employee.

After the temporary restraining orders were entered, discovery was conducted, including depositions, document exchange, and forensic examination of computer information.

Aon now moves for a preliminary injunction consistent with the relief granted in the temporary restraining orders. On November 9 and 10, 2011, I conducted a hearing on the preliminary injunction motion. Numerous documents were entered into evidence, and I heard testimony from multiple witnesses, including former Aon employees and current Alliant employees Cusack, Leslie Curry, Richard Ferrucci and Kathleen Flanagan, as well as Kevin White, the CEO of Aon CSG, Eric Andersen, the CEO of plaintiff Aon Risk Services Northeast, Inc., and Jerold Hall, Alliant's chief operating officer.

FINDINGS OF FACT

Aon is a global insurance broker, providing commercial insurance brokerage services (Second Amended Complaint, ¶ 11). Aon delivers these services through groups organized by product specialty, including the Aon CSG, which provides surety bonding services to construction clients around the world (*id.*, ¶ 13). Aon asserts that, because the commercial insurance business is highly competitive, and Aon CSG depends on long-term relationships with its clients, Aon carefully

protects its confidential employee and client-related information, which are trade secrets (*id.*, ¶ 20). Aon only shares this information with senior executives and other professional staff to the extent necessary to perform their jobs (*id.*).

Since 1993, Cusack has worked in Aon's Boston office, as a Senior Vice President and Managing Director of Aon CSG, as well as an Executive Vice President for Global Surety (White Aff., ¶ 14). He was a member of Aon CSG's Executive Committee, and a major producer of client accounts (*id.*). Cusack initially reported to Kevin White, and later also reported to Arkley, who was the Chairman and CEO of Aon CSG (*id.*). Cusack and Arkley were longtime friends (Cusack Dep., at 64).

Cusack was the mostly highly compensated of the Boston CSG employees, with annual compensation exceeding $1 million (White Aff., ¶ 14). In 2006, Aon offered Cusack a compensation package worth millions of dollars. The compensation package was comprised of three agreements: (1) Cusack's January 1, 2006 employment agreement (PX 17); (2) Cusack's participation in the Aon CSG Performance Incentive Program effective January 1, 2006 (the Performance Plan [PX 18 and 19]); and (3) Cusack's participation in the Aon Corporation Leadership Performance Program for 2009-2011 (the Leadership Program [PX 23]).

All of these agreements contained restrictive covenants not to compete for the business in which Aon was investing, not to solicit Aon employees, and not to misappropriate Aon's confidential and trade secret information. Specifically, Cusack's employment agreement contained a "Covenant Not to Compete," pursuant to which Cusack expressly agreed, for a two-year period following the termination of his employment, not to compete directly or indirectly with Aon's business, including not entering into a business relationship with Aon's existing customers. The employment agreement also contained a "Covenant Not to Hire," pursuant to which Cusack agreed not to solicit any employees of Aon to leave Aon's employ, for a period of two years after the end of his employment. Finally, Cusack's employment agreement contained a section entitled "Trade Secrets and Confidential Information," which provided that Cusack could not disclose any trade

secrets or confidential or proprietary information belonging to Aon, including client and customer lists, data, records, computer programs, and the like. All of these agreements contained an Illinois choice of law provision.

Cusack, who was represented by counsel when he signed these agreements (White Aff., ¶ 19; Hearing Tr., at 70-71), testified that he intended to be bound by these agreements to the extent that they were enforceable (*see* Hearing Tr., at 72-77).

Alliant is headquartered in California, and, like Aon, provides specialized brokerage services (Hall Aff., ¶ 3). Before January 1, 2011, Alliant had virtually no construction surety business (PX 52). At the close of 2010, Alliant acquired TH Holdings, which included RFF Associates, a construction surety business headed by Richard Ferrucci, a former Aon senior executive who led Aon CSG from 1992 through 2003 (Ferrucci Aff., ¶¶ 6-7, 9). The Alliant Construction Services Group was formed with the acquisition of RFF Associates, which had a revenue of approximately $9-12 million per year (Ferrucci Dep., at 12-13). Alliant's Construction Services Group, although much smaller than Aon, competes with Aon CSG (Hall Aff., ¶ 4; Hall Dep., at 21). Ferrucci, a Managing Director of Alliant's Construction Services Group who is headquartered in New York, testified that, almost immediately after acquiring RFF, Alliant directed him to begin calling his "old friends" at Aon (*id.* at 44, 69-71). In early 2011, Ferrucci contacted Cusack to discuss the possibility of joining Alliant in early 2011 (Ferrucci Dep., at 121; Cusack Aff., ¶ 11).

Beginning in the first quarter of 2011, Cusack began to secretly meet and negotiate with Alliant for employment through Ferrucci (Hearing Tr., at 238). According to Cusack, Ferrucci and Cusack discussed Ferrucci's favorable view of Alliant, including Alliant's privately-held status, good management, solid financial backing, and its platform of services (Hearing Tr., at 78; Cusack Dep., at 42). Ferrucci testified that he did not tell Cusack that he was also speaking to other Aon employees about Alliant, and did not discuss with Cusack the value or client identities of Cusack's book of business at Aon (Hearing Tr., at 244; Ferrucci Aff.,

¶¶ 14-16). Ferrucci further testified that he did not tell any of the Aon employees that he spoke to about Alliant that he was also speaking with other Aon employees about Alliant (Hearing Tr., at 251; Ferrucci Aff., ¶¶ 14-15).

Cusack testified that, after speaking with Ferrucci, he received a telephone call from Jerry Hall, Alliant's Chief Operating Officer, and he was invited to meet the Alliant senior management team in California in late February or early March 2011 (Hearing Tr., at 78). While attending an Aon leadership meeting in California, Cusack interviewed and had dinner with Alliant's most senior management (Cusack Aff., ¶ 12; White Aff., ¶ 38). Cusack expensed the cost of this trip to Aon (White Aff., ¶ 38; Hearing Tr., at 78-79).

Although Alliant was actively recruiting Arkley, Cusack's long-time friend, and others from Aon at this time, Cusack testified that: (1) Arkley's name never came up during his interview and dinner with Alliant; (2) he never discussed Aon's clients, revenues, trade secrets or other Aon employees with Alliant during this trip; and (3) when he saw Arkley at the Aon leadership conference the next day, he never mentioned to him that he had met with Alliant (Cusack Dep., at 62-64; Cusack Aff., ¶ 12).

Cusack met again with Alliant's senior management team on May 17, 2011 in Garden City, New York. Cusack did not conduct any Aon-related business on this trip, but again expensed the entire trip to Aon (Cusack Dep., at 69; White Aff., ¶ 38). At this meeting, Cusack and Alliant discussed his interest in working with Ferrucci and his New York operation at Alliant. Again, Cusack testified that he did not have any discussions with Alliant about his Aon clients, Arkley, or any one else at Alliant who might be interested in going to Alliant (Hearing Tr., at 84-85; Cusack Dep., at 71-72).

On May 23, 2011, Cusack forwarded to his wife's personal email account a confidential 63-page Aon client financial report for April 2011 (the Aon April Financial Report [PX 40]). Cusack admitted that the Aon April Financial Report, which contained key performance indicators, specific client account and renewal revenue figures, and detailed profit and loss

information, was "sensitive information for Aon" that "should not be shared with a competitor" (Cusack Dep., at 232); *see also* White Aff., ¶ 39 ["this information would be of great value to a competitor of Aon such as Alliant and constitutes highly confidential, proprietary and sensitive information about Aon's CSG business"]).

Two days later, on May 25, 2011, Arkley sent a similar 493-page Aon financial report entitled "CSG 2011 MTD - as of 5/24/11" (PX 41) to his personal email address, which contained Aon revenue projections, revenue compared to budget, and client revenue.

In May or June 2011, Cusack's wife sent Alliant a hard copy of Cusack's Aon Employment Agreement (Cusack Dep., at 115-117). Alliant admits that it was aware that Cusack was subject to restrictive covenants which precluded him from soliciting or doing business with his former clients, soliciting Aon employees, or disclosing Aon's confidential information (Hearing Tr., at 445-446).

On June 1, 2011, Cusack flew back to California to meet again with Alliant's senior management team (Hearing Tr., at 81). During this meeting, Cusack discussed his compensation expectations, and demanded a $1.5 million salary, as well as a $6 million signing bonus (Cusack Dep., at 82-84). Cusack once again expensed this trip, including first-class airfare, to Aon (White Aff., ¶ 38; PX 44). Notwithstanding his demand for more than $7.5 million in compensation, Cusack testified that there was no discussion at this meeting with Alliant about Cusack's clients, revenue that he might bring over with him from Aon, any other Aon employees who might be interested in joining Alliant, or Arkley (Cusack Dep., at 81-82).

On June 7 and June 8, 2011, after it was clear that Arkley was leaving Aon, Cusack attended Aon senior management meetings in New York. At these meetings, Aon's senior management discussed, among other things, the strategy for Arkley's departure, and the possibility that Arkley might join Alliant (White Aff., ¶ 38; Andersen Aff., ¶ 4). At these meetings, Cusack never disclosed that he was negotiating with Alliant, had interviewed with Alliant, or was expecting an offer from Alliant (Andersen Aff., ¶ 8; Cusack Dep., at 151). On June 10, 2011, Cusack was

copied on confidential Aon emails and draft communications about Arkley's departure from Aon, and Aon's future strategic plans (PX 61).

On June 8, 2011, Alliant sent an offer of employment to Cusack. The terms of the Alliant offer included: (1) an annual salary of $1.5 million; (2) a $3.25 million signing bonus; and (3) eligibility for another $3.25 million bonus if the Construction Services Operating Group generated $20 million in revenue as of October 31, 2012 (PX 49). The offer was contingent upon Cusack executing the enclosed Alliant Employment Agreement, which contained non-solicitation, non-compete and confidentiality clauses that are virtually identical to the Aon clauses.

During this same time period, Alliant also sent employment offers to Aon CSG Senior Executives Arkley, Michael Parizino, Ken Caldwell and Leslie Curry, all of whom Alliant had been interviewing at the same time it was interviewing Cusack (PX 48). Alliant agreed to pay Arkley over $10 million in his first year, and a $3 million bonus if Alliant CSG reached $20 million in revenue (PX 45). The others were collectively offered millions of dollars in compensation and bonuses based on production of business.

Like Cusack, Arkley, Parizino and Caldwell had employment agreements with Aon that contained the same restrictive covenants and Illinois choice of law provisions as those in Cusack's employment agreement, and those employees likewise participated in the Performance Plan, which also contained restrictive covenants, and were subject to Illinois law (PX 14, 15, 16, 18, 23, 24, 26). Curry was subject to a restrictive covenant by virtue of her participation in the Aon Leadership Program (PX 25; White Aff., ¶¶ 20-25).

On June 8, 2011, Jerold Hall, Alliant's Chief Operating Officer, sent a memo to Alliant's Board of Directors, which stated:

> As of today, we have provided the key members of [Aon's] construction team with formal offer letters. We now believe there is a very high probability of this team joining Alliant which could be as soon as next week. There are 5 key individuals which we believe collectively control approximately $24mm of revenue. We also anticipate other producers (both Aon and non-Aon) will be interested in joining Alliant upon hearing about these recent events. A more detailed financial projection is attached.

> Although our desire will be to enter into some form of mutually acceptable agreement with this team's prior employer, we are nonetheless prepared to defend ourselves legally. In this regard, we have engaged Musick, Peeler & Garrett along with other law firms based on the geography of the candidates to represent Alliant in this process

(PX 52).

The spreadsheet attached to the memo is entitled "LH Team Projection," and projects the total revenue that Alliant expects to realize over the next five years from hiring the Aon team. The spreadsheet showed that Alliant expected to realize $37 million of revenue in 2012, and $250 million in the first five years from the hiring of these key Aon executives. It also stated that they had calculated as part of the "Build Up Costs" $19.2 million in "Settlement Costs" and $4.8 million in "Legal" costs.

Hall testified that he calculated the settlement and legal costs based on Alliant's prior experience with these types of cases (Hearing Tr., at 435-436, 456-457). Hall further testified that he arrived at his revenue projections based on conversations with the Aon executives about how much revenue they thought they could generate at Alliant. Specifically, Hall testified that he had discussions with "each of the candidates" about "how much revenue [] they thought they could develop, either through transition clients or new business and have some combination of the two" (*id.* at 422). Although Hall denied that he discussed revenue specific to Aon or any Aon clients who might follow the producers to Alliant or any employees who might follow the producers to Aon (*id.* at 424), Hall's testimony is completely inconsistent with the memo he sent to the Alliant board, which states" [t]here are 5 key executives which we believe controlled $24 million in revenue" (PX 52).

Hall also testified that Alliant hired counsel in New York, Illinois, California and Massachusetts to review the employment agreements of the Aon employees that Alliant was recruiting, and to represent Alliant and the Aon employees in litigation resulting from such recruitment (Hearing Tr., at 439-432).

Turner Construction was an Aon insurance client (Hearing Tr., at 304). On the afternoon of June 8, 2011, Cusack and Arkley, both having received offer letters from Alliant, went together to meet with Turner in New York, supposedly on behalf of Aon, to solicit Turner's construction surety business. On June 9th, Turner sent Cusack a broker of record letter (BOR) awarding its surety business to Aon, which represented $1 million to $5 million in surety business annually for Aon (Cusack Dep., at 162; Hearing Tr., at 296). However, instead of immediately filing the BOR with the insurance/surety market, as was his usual practice, Cusack placed the letter in a file (Cusack Dep., at 154-158; Hearing Tr., at 133), and did not inform anyone at Aon about it. Cusack testified that the fact that he and Arkley were headed to Alliant had nothing to do with his decision not to file the BOR, or his failure to tell Aon about it. Rather, Cusack's explanation is that he was hoping not embarrass Aon and Turner, given Arkley's planned departure from Aon (Hearing Tr., at 134).

On June 12, Cusack played golf with Ferrucci in New York, and advised Ferrucci that he was leaving Aon for Alliant. After the game, Cusack drove Ferrucci back to Boston. Cusack testified that, during the entire round of golf and on the 3 ½ hour car ride to Boston, he and Ferrucci never discussed (1) any other Aon employees who were about to go to Alliant the next day; or (2) any of Cusack's clients at Aon, or any revenue associated with them (Cusack Dep., at 99-100).

On the morning of June 13, 2011, Arkley sent an email to Aon stating "effective immediately, I resign my position at Aon" (PX 65). Within an hour of Arkley's resignation, Cusack, along with Caldwell, Parizino, Curry and others, also abruptly resigned from Aon (PX 66-69). On the same day, 34 other Aon CSG employees also resigned and joined Alliant (White Aff., ¶ 30). Within 72 hours of Cusack and Arkley's resignations, 50 employees left Aon CSG for Alliant (*id.*). To date, 60 Aon CSG employees have resigned from Aon to join Alliant (*id.*). Alliant offered these Aon employees jobs and employment contract with salaries and benefits similar to what they were receiving at Aon (*see* Aff. of Shand Stephens, Exh D [Declarations of William Hyndman, James Reilly, Thomas Branigan, KeAna Wapato-Conrad in support of Illinois TRO]). These same

advances were made to other Aon employees who refused to take part, and did not accept the overtures (*id.*).

That same day, Aon received 15 BORs from clients, transferring their business to Alliant (White Aff., ¶ 29). Within 72 hours, Aon had received over 100 BORs transferring business to Alliant. Aon alleges that, in total, it has lost approximately $20 in annual revenue, nearly $5 million of which came from Aon's Boston and Hartford CSG divisions (Cusack's offices), as a result of clients transferring their business from Aon to Alliant on or after June 13, 2011 (*id.*). Cusack was the first point of contact for at least seven of these clients at Alliant (*id.*). None of these clients were clients Cusack originally brought with him to Aon (*id.*).

On June 13, 2011, Cusack, Arkley, Parizino, Curry and Caldwell all signed employment agreements with Alliant (PX 71-75). Cusack and Arkley immediately became Managing Directors in Alliant's Construction Services Group (Hearing Tr., at 57-58). Cusack's Alliant employment agreement contained restrictive covenants that were substantially similar to those contained in his Aon employment contract (*see* PX 75). Cusack's Alliant employment agreement also contained a paragraph that required Alliant to pay him his base salary of $1.5 million and a $3.25 million signing bonus, even if he was enjoined by a court of law as a result of litigation (*id.*).

Also on the morning of June 13th, within an hour of their resignations, Arkley, Parizino and Caldwell, all represented by the same lawyer hired by Alliant, filed a lawsuit in Los Angeles, California. In the California action, Arkley, Parizino and Caldwell sought a declaration, via a temporary restraining order (TRO), that the Aon restrictive covenants were unenforceable, as contrary to California public policy. The California court denied the TRO, finding that the covenants were controlled by Illinois law, and were enforceable.

After his resignation, Cusack testified that, between June 13th and June 15th, he began calling all of his Aon clients to tell them that he was leaving Aon and going to Alliant (Cusack Dep., at 124 -126). Cusack could not remember a single client that he called to tell he was leaving that he

did not also tell he was going to Alliant (*id.* at 132; Hearing Tr., at 103). On June 13th, the day he resigned, Cusack met with Don Naber of Gilbane Construction. Gilbane Construction subsequently transferred its business to Alliant (Hearing Tr., at 106-107). On June 14th, Cusack sent an email to Aon client Keith Construction regarding a meeting set for the following Monday (PX 78). Cusack testified that Keith Construction was one of the clients that he called on June 13th or 14th to tell he was leaving Aon for Alliant (Hearing Tr., at 107-108). On June 17, 2011, Cusack sent an email to Arkley with a list of 31 Aon clients who had moved their business to Alliant during the week of June 13 (PX 99). By June 21, 2011, Cusack had 10 BORs from clients transferring their business from Aon to Alliant (PX 105).

During that same period, Curry called and visited all of her Aon clients as well, resulting in many of them sending BORs moving their business from Aon to Alliant (Hearing Tr., at 210-214; *see also* PX 83, 83, 88, 89, 90, 91, 106 [emails from Curry soliciting Aon clients]). Curry testified that she understood before she was hired that she would be targeting her Aon clients to come over to Alliant (Curry Dep., at 30-31).

On June 14, 2011, Turner sent a letter to Aon rescinding the BOR, and terminating its relationship with Aon. The next day, Cusack met with Turner in New York on behalf of Alliant. Cusack denied that the purpose of this meeting was to solicit Turner's business for Alliant (Hearing Tr., at 144). However, on June 17, 2011, Turner and Alliant entered into a Surety Consulting Services Agreement that required "[t]he personal dedicated involvement of Peter Arkley and Michael Cusack in the performance of the services" (PX 113). This business opportunity was so important to Alliant that it agreed to indemnify Turner against any costs it incurs in connection with this litigation (Hearing Tr,. at 144-145; *see* PX 97). Thereafter, Turner sent a BOR letter to Alliant (*see* PX 125).

On June 15, 2011, after learning that Cusack and Arkley intended to meet in New York with one of Aon's largest clients, Aon filed this lawsuit against Cusack and served him as he was leaving the client's office. On that same day, Aon sued Alliant and Arkley in Illinois, where

Aon has its principal place of business, and sought a TRO pending a preliminary injunction hearing. On June 17, 2011, the Illinois Chancery Court granted Aon's application, and issued a TRO prohibiting Alliant, Arkley, and all other former Aon CSG employees, including Cusack, from soliciting Aon's clients and employees, pending a preliminary injunction hearing (PX 110). The Illinois court also ordered Alliant to return all confidential information the former Aon employees took from Aon, and to produce biweekly reports identifying any Aon client transfers and the name of the Alliant employee who was the "first contact' with that client (*id.*). Subsequently, Alliant moved to dismiss the Illinois action on the ground of forum non conveniens, arguing that California was a more convenient forum than Illinois for Aon to litigate its claims against Arkley. The Illinois court granted the forum non conveniens motion, with the condition that the current TRO stay in effect long enough for Aon to make an application for a preliminary injunction and TRO application in another forum.

After the Illinois TRO was issued, Cusack continued to contact, either directly or indirectly, his former Aon clients. On July 5, 2011, Cusack sent an email to his associate Ken Kirkland asking him to solicit Aon client Liddell Construction: "When you have a chance, call Gary [Liddell at Liddell Construction] and mention that I have a nonsolicitation – not a non compete. We can accept business" (PX 121, 122). Cusack testified that this was not a solicitation, or an attempt to circumvent the Illinois TRO (Cusack Dep., at 253).

On July 6, 2010, Cusack was involved in discussing the strategy for obtaining the surety business for Aon client JF Shea (*see* PX 119). On July 10, 2011, Laurie Stokes, Senior Vice President/Account Executive for Alliant's Construction Services Group, asked Cusack to discuss Alliant's strategy/presentation for an upcoming July 18 Meeting with Aon client Meadow Valley (*see* PX 123).

From July 8 through September 2, as part of the Illinois TRO, Alliant produced charts identifying clients who transferred business from Aon to Alliant after the Illinois TRO was issued, and the "first point of contact" for these clients (9/26/11 Stephens Aff., ¶ 14). Alliant identified

Cusack as the "First Point of Communication" for seven clients that had transferred their business from Aon to Alliant following the Illinois TRO (*id.*).

On September 14, 2011, Cusack had a telephone conversation with one of the owners of AA Will, an Aon client, about whether AA Will planned to keep its surety business with Aon (PX 131, Hearing Tr., at 116-117).

Aon also presented evidence that the departing Aon executives solicited Aon CSG employees to leave Aon to work for Alliant. On June 13, when Cusack told Mike Scott, Aon's Vice President for Insurance that he was leaving for Alliant, he put his arm around Scott and said "I know we're going to work together very soon" (Scott Aff., ¶ 10). Later that evening, John Gambino, who reported to Cusack and also left for Alliant, called Scott and set up an interview with Alliant the next day (Scott Aff., ¶ 11). Later that night, Gambino also told Scott that Cusack and Arkley had identified Scott to run Alliant's Boston office, and that he had "blank check" to hire Scott (Scott Aff., ¶ 11).

Leslie Curry was also soliciting Aon employees to come to Alliant with her. William Hyndman, who worked for Curry at Aon, alleges that Curry told him "that Alliant has a position similar to the position I held at Aon" (Hyndman Aff., ¶ 3 [PX 94]). In addition, Curry testified that she called all of her Aon employees within hours of leaving Aon to tell them that she was leaving, and to direct them to the Alliant website where they could apply for a job with Alliant (Hearing Tr., at 204-205, 207, 232-233).

Aon contends that Alliant has also misappropriated its trade secrets and confidential information. According to White, Aon and its competitors view much of the client-related information, and many other aspects of their business, as trade secrets. This includes client-related information such as the identities of clients and their key decision-makers, client financial information, bid-related information, confidential compensation about employees and financial and other strategic information (White Aff., ¶ 11).

Aon asserts that a number of Aon employees downloaded information from Aon's

computer system before resigning. As part of the Illinois TRO, Alliant was ordered to return all Aon confidential data. On September 19, 2011, Alliant produced its "Inbound Transmission Report" of the portable electronic devices that were attached to the former Aon employees' Alliant computers after they joined Alliant. When the "Inbound Transmission Report" was compared to an "Outbound Transmission Report" prepared by Michael Weil, Aon's forensic consultant, it revealed that 19 former Aon employees attached 27 different USB data storage devices to Aon's computers before they left, and then attached the same 27 devices to Alliant's computers once they arrived (Weil Aff., ¶ 11A). That data revealed that two of those employees, James Holobaugh and Maurice Davis, downloaded a large number of files. On June 13, 2011, Holobaugh downloaded 6,883 files consisting of approximately 7.2 gigabytes, or 360,000 printed pages (*id.*, ¶ 6). On June 14, 2011, Maurice Davis downloaded approximately 7,590 files consisting of approximately 14.5 gigabytes or 725,000 printed pages (*id.*, ¶ 7).

In addition, Kathleen Flanagan, a surety syndicator who worked for Rich Leveroni in Aon's Connecticut office, testified that on June 14, 2011, she downloaded the Aon Surety Bond Form File, a compilation of various bond forms that different clients and sureties preferred to use, that she used nearly every day at her job at Aon (Hearing Tr., at 344-345, 350). Although Flanagan had brought some of these bond forms with her to Aon from prior employers, she continued to add to and build this into a comprehensive Aon Bond Form library during her seven years at Aon (*id.* at 351). In addition, while at Aon, Flanagan prepared an Aon Bid Calendar for Rich Leveroni, her boss (PX 12; Hearing Tr., at 356). The Aon Bid Calendar listed all of the upcoming bids for all of Leveroni's clients. Flanagan printed the Aon Bid Calendar for Leveroni every few days, because it was important to Leveroni (*id.* at 357). Flanagan printed Aon's Bid Calendar on June 14th, 20 minutes prior to her resignation from Aon (Weil Aff., ¶ 3).

SUMMARY OF FINDINGS OF FACT

After hearing the testimony and reviewing the evidence adduced at the preliminary injunction hearing, as well as reviewing the pre-hearing discovery, I conclude that much of the

testimony of the Alliant witnesses is simply not believable. Alliant contends in this litigation that none of the Aon employees who left for Alliant was solicited by Cusack or any other former Aon employees either before or after they left Aon for Alliant, or communicated with each other about their decision to leave Aon for Alliant. Alliant contends that each Aon employee was recruited by Alliant in a "silo" (Hearing Tr., at 262). I do not find this testimony to be credible. The coordinated departure of the Aon executives the morning of June 13, 2011, coupled with a request for a TRO in California within an hour of their resignations (*id.* at 444), followed by the mass exodus of Aon employees that same day, could not have happened without the prior planning by the former Aon executives and Alliant.

Specifically, although Cusack, Arkley and the other Aon executives who went to Alliant all testified that each of them did not know the others were negotiating with Alliant until either shortly before or shortly after June 13, I do not find this testimony credible. Cusack and Arkley were close friends who worked together to build Aon CSG for more than 17 years. It is not credible that they would not have discussed the prospect of leaving Aon together to work at Alliant. Moreover, it is obvious that these people did not individually decide to leave their high-paying jobs at Aon after years of employment to accept jobs at what was essentially a "start-up" operation, without knowing who they were going to work with, and what clients would follow.

In addition, I find not credible the testimony by Cusack, Parizino, Curry and the other Alliant witnesses who testified that the former Aon executives did not discuss who else at Aon might be a potential target for Alliant. This conclusion is buttressed by the facts that the five key executives had worked at Aon for seven to seventeen years, and their compensation was between $600,000 and $3.6 million a year. Executives of this seniority and compensation do not agree to go to work at a competitor with a newly formed business without knowing who they would be working with, or how they would be service their clients. Alliant also agreed to pay Arkley and Cusack each a $3 million bonus, if the Alliant Construction Services Group reached $20 million in revenue. It is not believable that Arkley and Cusack would agree to a bonus plan based on revenue without knowing

with whom they would be working.

Additionally, several of the former Aon employees were offered compensation packages by Alliant that were substantially similar to the terms and conditions of their Aon employment, without having provided information to Alliant as to what their salary, compensation or benefits were at Aon. Upon arriving for interviews at Alliant, they were presented with employment contracts and offer letters, which already set forth their compensation terms (White Aff., ¶ 34). For example, Kathleen Flanagan, who worked in Aon's Connecticut office, was offered a salary by Alliant that was within a few hundred dollars of what she was making at Aon, even though she never told anyone at Alliant what she was making at Aon (Hearing Tr., at 337). There is no way Alliant could have found out this information on its own.

I also do not find it credible that Richard Ferrucci, who was close friends with Cusack and Arkley (Hearing Tr., at 238-239, 253), and who was the trustee of Arkley's life insurance trust and godfather to Arkley's wife (*id.* at 253-254), never discussed with Cusack and Arkley who else from Aon might come over to Alliant, and who Cusack and Arkley would be working with if they came to Alliant.

Cusack and the other former Aon executives who went to Alliant have all also testified that, during their discussions with Alliant, they never discussed clients, revenue that they generated at Aon, or other Aon employees who might be interested in joining Alliant. I do not find this testimony credible, given that Hall testified that he estimated certain revenue and compensation for each of the key Aon executives based on conversations with them about "revenue" (Hearing Tr., at 422), and that the Alliant board memo states that the five key Aon executives "control approximately $24 million in revenue" (PX 52). In addition, it is simply not believable that Alliant would pay such astronomical salaries and bonuses to Arkley and Cusack without some understanding of the magnitude of the revenue to be brought over.

It is also not credible that Aon's confidential revenue information was not discussed among Alliant and these five employees during the negotiations with Alliant, given the facts that

each of these employees was being paid based upon how much revenue there were going to bring to Alliant; Alliant was to pay each of these individuals bonuses ranging from $1 million to $3.25 million if the Alliant CSG Group produced $20 million in revenue in 15 months; Alliant created an entire CSG budget based on what these employees were bringing to Alliant; and Alliant offered no explanation for where this revenue was to come from if not from the senior executives' Aon books of business.

I also find that much of the testimony of Jerold Hall, Alliant's CEO, was not believable. For instance, although Hall testified that Alliant did not "target" Aon, this testimony is not credible. The 60 producers and employees that Alliant hired in 2011 were from Aon, and the "5 key executives" mentioned in Hall's memorandum to Alliant's Board of Directors were from Aon (*see* PX 52). In addition, although Hall denied that he discussed revenue specific to Aon or Aon clients who might follow, I do not find it credible that Alliant would spend millions of dollars on salaries for five people, set bonus targets for generating $20 million in revenue, and commit to "$112 million in expenses over five years," without discussing with the Aon executives the revenue they were generating at Aon, and the employees they were working with at Aon.

With respect to Turner, the evidence reveals that Cusack and Arkley misappropriated one of Aon's clients: Cusack and Arkley insisted that Turner communicate only with them during their last two weeks at Aon (Hearing Tr., at 304); Arkley and Cusack secured Turner's surety business for Aon; concealed the letter evidencing the Turner engagement; and then secured the Turner business for Alliant. Indeed, Turner demanded, and received, an indemnity from Alliant as a condition of giving Alliant the business. Cusack admits that, rather than file the Turner BOR with the surety and insurance markets, he put the BOR in his file. Although Cusack's explanation for this it that he was hoping not to embarrass Aon and Turner, given Arkley's planned departure from Aon (Hearing Tr., at 134), I do not find this explanation to be believable, and indeed, the only conclusion that can be drawn is that Cusack intentionally hid from Aon the Turner BOR letter because he knew that he and Arkley would be joining Alliant in the coming days.

The evidence also indicates that Alliant knew that its behavior in raiding Aon's CSG practice was wrong, given that Alliant reserved $19.2 million to pay Aon in settlement; Aon reserved nearly $5 million to cover legal fees; before hiring the senior executives, Alliant hired lawyers in California, New York, Massachusetts and Illinois because it knew it would be sued for its conduct; and Cusack's Alliant employment agreement provided that he would be paid his $1.5 million base salary and a $3.25 million bonus, even if enjoined by a court.

CONCLUSIONS OF LAW

Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]).

Here, Aon has established that it is likely to succeed on the merits of its breach of contract and breach of fiduciary duty claims against Cusack, as well as it claims for aiding and abetting breach of fiduciary duty, interference with contract, and conspiracy claims against Alliant. In addition, it is clear that Aon will sustain irreparable injury if a preliminary injunction does not issue, and that the equities are in Aon's favor. Accordingly, Aon has demonstrated that it is entitled to a preliminary injunction

Likelihood of Success on the Merits

A. ***Aon is Likely To Succeed On Its Claims Against Cusack***

In its verified second amended complaint, Aon brings causes of action against Cusack for breach of the employment agreement (first cause of action), breach of the performance and incentive programs (second cause of action), breach of the covenant of good faith and fair dealing (third cause of action); breach of fiduciary duty (sixth cause of action); and breach of the duty of loyalty (eighth cause of action)

1. ***Breach of the Restrictive Covenants***

With respect to the breach of contract claims, New York law generally honors choice

of law provisions in contracts (*Marine Midland Bank v United Mo. Bank*, 223 AD2d 119 [1st Dept], *lv dismissed* 88 NY2d 1017 [1996]). Illinois law applies to Aon's breach of contract claims against Cusack because Cusack's employment agreement specifies that it is governed by Illinois law.

The issue of whether or not to impose injunctive relief to enforce a restrictive covenant not to compete in a employment contract depends on the validity of the contract (*Steams Sales Corp. v Summers*, 405 Ill App 3d 442 [2d Dist 2010]; *see also Mohanty v St. John Heart Clinic, S.C.* 225 Ill 2d 52 [2006]). A restrictive covenant is generally enforceable under Illinois law if: (1) it is reasonable in geographic and temporal scope; and (2) it is necessary to protect a legitimate business interest of the employer (*Millard Maint. Serv. Co. v Bemero*, 207 Ill App 3d 736 [1st Dist 1990]; *see also Arpac Corp. v Murray*, 226 Ill App 3d 65 [1st Dist], *appeal denied* 146 Ill 2d 621 [1992] [restrictive covenants are enforceable if restrictions are reasonably related to the employer's interest in protecting customer relationships employees developed while working for employer]).

Defendants argue that Aon's restrictive covenants with Cusack are overly broad, and are intended to restrict competition, and are thus unenforceable. I reject this argument.

In the restrictive covenants, Cusack repeatedly agreed not to compete for the business he serviced at Aon for a two-year period following his termination of employment. A two-year time period limiting Cusack's ability to solicit customers is objectively reasonable in scope (*Midwest Television, Inc. v Oloffson*, 298 Ill App 3d 548, 557 [3d Dist 1998] ["our courts have often permitted restrictions of two or even three years"]; *Tomei v Tomei*, 235 Ill App 3d 166 [1st Dist 1992] [three years permissible]).

In addition, the fact that the Aon restrictive covenants contain no geographic limitation does not render them unreasonable: "Covenants containing no geographic limitation have been upheld as reasonable where the purpose of the restriction was to protect the employer from losing customers to a former employee who, by virtue of his employment, gained special knowledge and familiarity with the customers' requirements" (*Eichmann v Natl. Hosp. & Health Care Servs., Inc.*, 308 Ill App 3d 337, 344 [1st Dist 1999], *appeal denied* 187 Ill 2d 567 [2000]).

The Aon restrictive covenants are reasonable in scope as "activity restraints," rather than blanket prohibitions on competition of any kind. "Illinois courts have recognized a distinction between those agreements that contain a blanket prohibition on competition and those that limit an employee from engaging in particular types of activities with competitors after they leave the employ of the former employer" (*Roberge v Qualitek Intl., Inc.*, 2002 WL 109360, * 5 [ND Ill 2002]). A covenant which restricts Cusack from entering into business with those employees with whom he conducted business on behalf of Aon is reasonable as an "activity restraint" rather than a blanket prohibition on competition of any kind.

Indeed, an employer has "a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 392 [1999]; *Donald McElroy, Inc. v Delaney*, 72 Ill App 3d 285 [1st Dist 1979]). In addition "an employer can utilize a restrictive covenant to protect itself from the disadvantageous use of confidential information revealed to an employee during the course of his employment" (*Tower Oil & Tech. Co., Inc. v Buckley*, 99 Ill App 3d 637, 644 [1st Dist 1981]).

Both New York and Illinois recognize an employer's business interest in its own confidential information. "'[C]ourts ... recognize the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy. Thus, restrictive covenants will be enforceable to the extent necessary to prevent the disclosure or use of trade secrets or confidential information'" (*Ashland Mgt., Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *affd as modified* 14 NY3d 774 [2010] [citation omitted]; *see also Brunswick Corp. v Jones*, 784 F2d 271, 275 [7th Cir 1986] [applying Illinois law and affirming enforcement of restrictive covenant and confirming that the employer had a protectable interest in its confidential information "concerning ... failures and successes, financial performance and projections, and marketing plans"]).

Here, Aon has a legitimate business interest in (1) preventing Cusack and other

former executives from exploiting the goodwill of Aon's clients; and (2) protecting itself from the disadvantageous use of its confidential information by its former employees. Therefore, I find that the restrictive covenants in Cusack's employment agreement with Aon are reasonable and enforceable. Indeed, these covenants do not prevent Cusack from working for Alliant, but merely prevent him, for a period of two years, from soliciting and doing business with those Aon clients with whom he worked or became familiar with during his time at Aon (*see Arpac Corp. v Murray*, 226 Ill App 3d 65, *supra* [non-solicitation covenants enforceable if restrictions are reasonably related to the employer's interest in protecting customer relations employees developed while working for employer]).

I also find that Aon has a legitimate business interest in protecting its substantial investment in its employees and in maintaining a stable work force (*id.* at 76] ["Because it appears that the covenant restricting the solicitation of Arpac's employees was reasonably calculated to protect Arpac's interest in maintaining a stable work force, we find that this portion of the restrictive covenant was enforceable and not void"]). Therefore, I conclude that the covenant preventing Cusack from soliciting Aon employees for two years is likewise reasonable and enforceable.

As set forth below, Aon has established that it is likely to succeed on its claim that Cusack violated these restrictive covenants by doing business with his former clients, and directly and indirectly soliciting Aon's clients and employees.

The "Covenant Not to Compete" restricts Cusack, for a two year period following the termination of his employment, from competing "directly or indirectly" with those clients that he serviced in the 24 months after his termination. Pursuant to the contract, "compete directly or indirectly in any way with the Business" means "to enter into" or "attempt to enter into ... any business relationship of the same type or kind as the business relationship which exists between Aon Group and its clients or customers to provide services related to the Business for any individual, partnership, corporation, association or other entity who or which was a client or customer for whom the Employee was the producer or on whose account the Employee worked or became familiar with

during the twenty-four (24) months prior to the end of employment."

It is clear that Cusack breached this provision by both "entering into" business relationships with his former clients, and by "attempting to enter into" those relationships. First, Cusack is plainly transacting business on behalf of Alliant with his former Aon clients. Indeed, Alliant's disclosure listed him as "the first point of contact" for seven of the clients who have moved to Alliant. Therefore, Cusack is in breach of his covenant not to enter into business with his former Aon clients.

Second, Cusack also breached his covenant not to solicit, i.e. attempt to "enter into business," with, his former Aon clients. In the context of a restrictive covenant, Illinois law defines "solicitation" broadly (*YCA, LLC v Berry*, 2004 WL 1093385 [ND Ill 2004]). "[C]ourts applying Illinois law have defined solicitation to encompass any direct contact that the recipient would understand as a solicitation for business" (*Gateway Sys. v Chesapeake Sys. Solutions, Inc.*, 2010 WL 3714558, * 3 [ND Ill 2010]). "Indeed, under Illinois law, an employee violates a non-solicitation covenant even if he contacts clients merely to inform them he has changed employers, as the clients might understand that as a request to move with him to the new company" (*YCA, LLC v Berry*, 2004 WL 1093385 at *10; *see e.g. Merrill Lynch, Pierce, Fenner & Smith*, 1998 WL 122780, * 2 [ND Ill 1998] [defendant who "merely advised" his customers that he had resigned and was going to work for a competitor violated non-solicitation clause because he contacted the customers personally, knowing that they had a need for his financial services]). Moreover, a private communication, such as a phone call or email, may be reasonably understood by the customer as a solicitation for business (*Tomei v Tomei*, 235 Ill App 3d 166 [1st Dist 1992]).

I find that Cusack breached the non-solicitation portion of his restrictive covenant by "attempting to enter into business" with his former Aon clients, given the fact that Cusack admits that he personally called all of his Aon clients to inform them that he was moving to Alliant. In addition, the emails to and from Cusack in the weeks following his departure from Aon demonstrate that Cusack was directly and indirectly soliciting business from his former Aon clients. Cusack

admits that he called Aon client Turner on June 14th, and met with Turner on June 15th. Although Cusack denies that he solicited Turner's business, I do not find this denial to be credible, as Turner entered into a Surety Consulting Services Agreement requiring Cusack and Arkley's "personal dedicated involvement" shortly after this meeting. Finally, Hall's testimony that Alliant received hundreds of BORs in the day following Cusack and the other senior executives' departure from Aon without any solicitation of those clients by Cusack and others with restrictive covenants is simply not believable.

Although defendants argue that Cusack did not breach his restrictive covenants with Aon because Cusack only told clients with whom he had longstanding relationships that he was resigning, I reject this argument, as it is clear that, under Illinois law, as even the act of merely telephoning clients to tell them that he was going to work for Alliant constitutes solicitation.

I also find that Cusack breached the "Covenant Not To Hire," given his explicit solicitation of Mike Scott to run Alliant's Boston office.

2. *Breach of Fiduciary Duty and Breach of Loyalty*

Aon has also established a likelihood of success on the merits with respect to its breach of fiduciary duty and breach of loyalty claims against Cusack. An employee owes a duty of loyalty to his or her employer at all times, and is prohibited "from acting in any manner inconsistent with his agency or trust, and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 430 [2001] [citation omitted]; *Bon Temps Agency Ltd. v Greenfield*, 184 AD2d 280 [1st Dept], *lv dismissed* 81 NY2d 759 [1992]).

A corporate officer, like Cusack, owes a fiduciary duty to his employer, and is held to a standard "stricter than the morals of the marketplace. Not honesty alone, but the punctilio of honor the most sensitive, is ... the standard of behavior" (*In re Bernard L. Madoff Invs. Secs, LLC*, 458 BR 87, 128 [Bankr SD NY 2011] [quoting *Meinhard v Salmon*, 249 NY 458, 464 [1928]). Thus, corporate officers owe a fiduciary duty to their employer "not to (1) actively exploit their

positions within the corporation for their own personal benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed" (*Alpha School Bus Co., Inc. v Wagner*, 391 Ill App 3d 722, 737 [1st Dist 2009]). Where an agent has a conflict of interest with his principal, and fails to disclose the conflict, the agent is liable for a breach of fiduciary duty (*Sokoloff v Harriman Estates Dev. Co.*, 96 NY2d 409, *supra*).

I find that Aon has established a likelihood of success on the merits with respect to its claim that Cusack has violated his fiduciary duty and duty of loyalty to Aon, by submitting evidence that Cusack continued to participate in highly confidential Aon senior management meetings, namely the June 7 and June 8 meetings in New York, during which Aon's business strategy related to Arkley's departure from Aon and potential employment at Alliant was discussed in detail, while negotiating with and planning to go to Alliant as well. As a senior executive at Aon, privy to Aon's most confidential strategic, financial and client information, once Cusack entered into employment negotiations with Alliant, he had a conflict of interest as to his continued dealings with Aon, and had a duty to disclose such negotiations.

In addition, Cusack breached his fiduciary duty and duty of loyalty by traveling to California and New York to meet secretly with Alliant, and expensing those trips to Aon (*see Natoli v Carriage House Motor Inn., Inc.*, 1988 WL 53397, * 7 [ND NY 1988] ["Deriving personal profit at the corporation's expense is a breach of fiduciary duty ... A corporation's money and property may not be used to meet a director's or officer's personal desires or obligations"]).

Finally, I find that Cusack also breached his fiduciary duty and duty of loyalty by meeting with Turner on behalf of Aon, concealing from anyone at Aon that he and Arkley had obtained the Turner BOR, and then subsequently securing Turner's business for Alliant.

B. ***Aon is Likely To Succeed On Its Claims Against Alliant***

1. ***Aiding and Abetting Breach of Fiduciary Duty and Loyalty***

I find that Aon has established that it is likely to succeed on its claims that Alliant aided and abetted Cusack in the breach of his fiduciary duty and duty of loyalty to Aon. "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 damages as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [3d Dept 2003]). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*id.* at 126). "Substantial assistance occurs when a defendant affirmative assists" the primary violator (*id.*). "[A] plaintiff is not required to allege that the aider had an intent to harm, [but] there must be an allegation that such defendant had actual knowledge" of the underlying breach of fiduciary duty (*id.* at 125; *see also Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

I find that Alliant aided and abetted Cusack's breaches of fiduciary duty and duty of loyalty by providing the following "substantial assistance" to him: encouraging Cusack and the "5 key employees" to solicit Aon employees and clients both before and after their resignations, in violation of their contracts; encouraging Cusack to disclose Aon's confidential revenue information to enable Alliant to create a budget for his hiring and others; providing Cusack with a contractual provision entitling him to be paid even in the face of a court injunction; agreeing to indemnify Turner related to this litigation; and entering into a Surety Consulting Services Agreement with Turner, and agreeing with Turner to allow Cusack and Arkley to be personally involved (*see Shearson Lehman Bros., Inc. v Bagley*, 205 AD2d 467 [1st Dept 1994] [defendant aided and abetted breach of fiduciary duty where employees had fiduciary duty to plaintiff, defendant knew of the employment relationship and thus of their fiduciary duty, and plaintiff suffered damages as a result of those actions]).

2. *Conspiracy*

I also find that Aon is likely to succeed on its claim that Cusack, Alliant, and the other former employees conspired against Aon to breach their employment contracts, and to misappropriate Aon's business.

"[T]o establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary

tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury'" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [citation omitted]).

Aon has demonstrated a likelihood of success on the merits of its conspiracy claim by demonstrating that Cusack and Alliant have engaged in an ongoing pattern of unlawful behavior, and have aided and abetted the former Aon executives' violations of their restrictive covenants, and aided and abetted the violations of duty of loyalty owed to Aon by all of its former employees by: engaging in secret employment negotiations with key members of Aon's CSG practice without disclosing those negotiations to Aon; targeting the key executives in Aon's CSG, and encouraging them to disclose confidential information regarding revenues generated for Aon by their clients; engaging in discussions with Aon executives regarding the revenue their clients generated for Aon and could generate for Alliant, in violation of their restrictive covenants; hiring counsel to prepare a lawsuit challenging the restrictive covenants of key Aon executives while they were still employed by Aon, and facilitating the filing of such lawsuit; soliciting Aon's clients, even after the imposition of the Illinois TRO; and encouraging the former Aon employees to solicit their colleagues to leave Aon and join Alliant, in violation of the applicable restrictive covenants.

3. *Violation of the Illinois Trade Secrets Act*

However, I do not find that Aon is likely to succeed on the merits of its claim that Alliant violated the Illinois Trade Secrets Act. To succeed on a claim of misappropriation, a plaintiff must allege that (1) the information was a trade secret; (2) it was misappropriated; and (3) defendant used it in business (*System Dev. Services, Inc. v Haarmann*, 389 Ill App 3d 561 [5th Dist 2009], *appeal denied* 233 Ill 2d [2009]).

The Illinois Trade Secrets Act defines a trade secret as "information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or

supplies that: (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality" (765 ILCS 1065/2 [d] [emphasis added]).

To determine whether a trade secret exists, a court must consider "(1) the extent to which the information is known outside the plaintiff's business; (2) the extent to which it is known by the employees and others involved in the plaintiff's business; (3) the extent of the measures taken by the plaintiff to guard the secrecy of the information; (4) the value of the information to the plaintiff and to the plaintiff's competitors; (5) the amount of effort or money expended by the plaintiff in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (*Alpha School Bus Co., Inc. v Wagner*, 391 Ill App 3d at 740; *ILG Indus. Inc. v Scott*, 49 Ill 2d 88 [1971]).

Aon's allegation of misappropriation of trade secret information fails because Aon has not shown that any such information was actually taken, or that it was disclosed to, or used by, Alliant. Aon presents no evidence that Cusack took any confidential information with him when he left Aon, instructed anyone at Aon to take any materials with them from Aon to Alliant, or used any Aon confidential information while employed at Alliant, and indeed, Cusack specifically denies doing so (Cusack Aff., ¶¶ 41-42, 45). In addition, Aon presents no evidence that Alliant took, instructed anyone to take, improperly disclosed, or used any Aon trade-secret or confidential and proprietary information. Other than a bond form folder of generic bond forms that Flanagan had collected for over 15 years, and the Bid Calendar, Aon fails to point to any specific trade secret or confidential and proprietary information that it claimed was taken.

For instance, Aon proffers two affidavits from Michael C. Weil to testify on computer forensics. In these affidavits, Weil discussed the use of USB devices by former Aon employees who now work for Alliant: employees Jim Holobough, Maurice Davis and Kathleen Flanagan. Weil indicated that Holobough connected a portable hard drive to Aon's computer system and

downloaded files. However, the unrebutted forensic evidence submitted by defendants' expert demonstrates that Holobough never accessed any of the files after he downloaded them, and that the USB device was used to back up files which contained only personal information (Aff. of J. Christopher Racich, ¶¶ 32-35). With respect to Davis, the unrebutted forensic evidence demonstrates that approximately 90% of the files were pictures (Def Exhs 36-37). In addition, Aon submits no evidence that either Holobough or Davis copied any Aon trade secret or confidential or proprietary information to their hard drives.

As to Flanagan, the evidence reveals that the Aon Bond Form File that Aon alleges that Flanagan took with her to Alliant is not maintained by Aon (Racich Aff., ¶ 28), but rather is Flanagan's personal bond folder (Flanagan Aff., ¶ 11). Indeed, Flanagan alleges that she did not use the Aon Bond Form File that resides on Aon's computer system during her seven years at Aon, but instead continued to use her personal bond folder (*id.*). Flanagan did not copy the Aon Bond Form File or any Aon documents from Aon's bondlink file (Hearing Tr., at 379; Flanagan Aff., ¶ 15). Indeed, everything in Flanagan's bond form file was publicly available (Hearing Tr., at 387). With respect to the Aon Bid Calendar, Flanagan testified that the bid calendar was her own creation (Flanagan Aff., ¶ 10; Hearing Tr., at 349). Aon proffers no evidence establishing that any information contained in Flanagan's bond form file or the bid calendar constituted a trade secret, or that it was confidential or proprietary to Aon.

Although Aon also contends that Aon's financial data – the 63-page report of Aon CSG's financial results which Cusack forwarded to his wife's home email address on May 23, 2011, and the 493-page financial report which Arkley sent to his personal email account – are entitled to trade secret protection, I reject this argument. Aon has failed to produce any evidence that this information is entitled to trade secret protection, or that such information was used by Alliant.

4. *Intentional Interference With Contractual Relations*

To state a claim for intentional interference with contractual relations or tortious interference with contract, a plaintiff must allege (1) the existence of a valid contract between the

plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional interference with that contract; and (4) resulting breach and damages (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *accord Foster v Churchill*, 87 NY2d 744 [1996]; *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265 [1st Dept 2002]).

A plaintiff need not show actual malice to prove a claim of tortious interference with existing contract (*Sokol Holdings, Inc. v BMB Munai, Inc.*, 726 F Supp 2d 291 [SD NY 2010], *affd in part* 438 Fed Appx 45 [2d Cir 2011]). Instead, Aon need only show that Alliant's procurement of Cusack's breach of contract was without justification (*Cerveceria Model, S.A. de C.V. v USPA Accessories LLC*, 2008 WL 1710910 [SD NY 2008]). Alliant's status as Aon's competitor does not justify its procurement of a breach of Cusack's employment contract *(White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007] ["A defendant who is simply plaintiff's competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract. In other words, mere status as plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits defendant's inducement of a breach of contract"]). With respect to an existing contract, "persuasion to breach alone, as by an offer of better terms has been sufficient to impose liability on one who thereby interferes with performance" (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 [1980] [internal citations omitted])..

Aon is likely to succeed on this claim because it has shown that Cusack, Parizino, Caldwell, Curry and Arkley all had employment contracts containing restrictive covenants; Alliant was admittedly aware of the existence of these contracts and of the restrictive covenants contained therein; Alliant encouraged Cusack to breach those covenants by providing him with a contractual provision which would entitle him to full compensation even if a court were to enjoin him from contacting Aon's former clients; Alliant encouraged Arkley, Parizino and Caldwell to breach the restrictive covenants contained in their Aon employment agreements by hiring legal counsel to held them avoid enforcement of the covenants; Alliant provided indemnity to former Aon clients to facilitate their transfer of business from Aon to Alliant; Alliant continued to solicit and transact

business with Aon's former clients, even after an Illinois court enjoined it from doing so; and Aon has demonstrated that it has been harmed by this conduct.

5. *Tortious Interference With Prospective Economic Advantage*

To prevail on a claim for tortious interference with prospective economic advantage, a plaintiff must show that (1) he had a reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the expectation; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (4) damage to the plaintiff resulting from the defendant's interference (*Biosafe-One, Inc. v Hawks*, 639 F Supp 2d 358 [SD NY 2009], *affd* 379 Fed Appx 4 [2d Cir 2010]; *Rad Adver. v United Footwear Org.*, 154 AD2d 309 [1st Dept 1989]). The essential element of this claim is that the complaining party would have obtained the economic advantage but for the defendant's interference (*id.*).

Aon has demonstrated a likelihood of success on the merits of this claim because it has shown that it had a reasonable expectation of entering into a valid business relationship with Turner; Cusack and Arkley were aware of the expectation as they received the Turner BOR; Cusack, along with Arkley and Alliant, intentionally interfered with this expectation by concealing the BOR from Aon; and Alliant induced Turner to withdraw its BOR from Aon by agreeing to indemnify Turner against any costs it may incur in litigation with Aon.

Irreparable Harm

It is well-established that a preliminary injunction will not issue unless the moving party shows it will suffer irreparable injury, loss or damage without such relief (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]). To be "irreparable," the injury alleged must be incapable of being adequately compensated in money damages (*see OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348 [1st Dept 2007]; *Rosenthal v Rochester Button Co.*, 148 AD2d 375 [1st Dept 1989]). To obtain a preliminary injunction, a movant need only "show that irreparable injury is 'likely' to occur" (*Lumex, Inc. v Highsmith*, 919 F Supp 624, 628 [ED NY

1996]). I find that Aon has met this burden.

According to White, the loss of 60 employees and dozens of clients doing business with Aon CSG in hundreds of lines of insurance and surety harms Aon's goodwill, reputation in the marketplace with its clients and prospects, and relations with its remaining employees, because it causes clients to question Aon's ability to service the business (White Aff., ¶ 46). The loss also encourages competitors to solicit Aon's employees, clients and prospects because competitors believe Aon to be "wounded" (*id.*). White further asserts that Aon cannot replace the expertise and relationships, both employee and client, with money, in that, given that the investment of time and effort that goes into educating and training long-time employees is enormous, Aon cannot simply replace these employees with new ones who have no knowledge of Aon's business or clients (*id.*, ¶ 47). In addition, White asserts, the loss of long term relations with clients has a value beyond dollars (*id.*).

Likewise, Andersen testified that it almost impossible to put a value on the loss of 60 employees in one week: "It's certainly damage to the company, not only the Construction Services Group, but to the Aon company overall; relationships with markets, relationships with other clients who are wondering whether we have the capability to service them, cost of paying other employees to stay. I mean it's hard to calculate, but it's material, very substantial" (Hearing Tr., at 402).

I find credible Aon's explanation of the non-economic harm that it has and will continue to suffer absent a preliminary injunction, including reputational harm, loss of confidence in the marketplace, and the loss of goodwill. Indeed, my finding of irreparable harm is reinforced by Cusack's employment agreement, in which Cusack acknowledged that a violation of the post-employment covenants would irreparably harm Aon, and consented to the entry of injunctive relief on that basis (Cusack Employment Agreement,

§ 5; *see Ticor Title Ins. Co. v Cohen*, 173 F3d 63 [2d Cir 1999] [where an employment agreement contains a provision stating that a breach of a post-employment competition provision would cause

irreparable injury to the employer, that provision may be viewed as an admission by the employee that such irreparable harm would occur in the event of a breach]). Moreover, under New York law, it is clear that the continuing violations of restrictive covenants that result in the loss of customer goodwill or proprietary information constitute irreparable harm, incapable of being measured monetarily at the time injunctive relief is requested (*see e.g Laro Maint. Corp. v Culkin*, 255 AD2d 560 [2d Dept 1998] [the continued solicitation by former employee, who misappropriated and used proprietary information and trade secrets, would result in irreparable injury]).

Balance of Hardship

Courts consider a variety of factors when balancing the equities, including whether the irreparable injury to plaintiffs is more burdensome than the harm to defendant through the imposition of the injunction (*see Metropolitan Steel Corp. Industries, Inc. v Perini Corp.*, 50 AD3d 321 [1st Dept 2008]).

The balance of hardships in this action clearly favors Aon, rather than Cusack. Cusack agreed to the restrictive covenant, and acknowledged that injunctive relief would be appropriate when he signed his employment agreement with Aon. Where, as here, a restrictive covenant is "freely bargained for as part of a negotiated contract, it cannot be said that the equities favor defendant" (*Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 203 [1st Dept 1996]). Moreover, as Aon has demonstrated that it will likely succeed in proving that Cusack violated his fiduciary obligations, the equities do not aid him here. Equity cannot favor an employee who seeks to breach his fiduciary duties to his former employer (*Kaufman v Intl. Bus. Mach. Corp.*, 97 AD2d 925 [3d Dept 1983], *affd* 61 NY2d 930 [1984]; *see also DoubleClick Inc. v Henderson*, 1997 WL 731413, * 7 [Sup Ct, NY County 1997]). In addition, Cusack's employment agreement with Aon ensures that he will continue to receive pay during the pendency of any injunction.

Although Alliant argues that an injunction will be unfairly harmful to its own employees, equity does not support Alliant's position, especially as Alliant included covenants in its employment contracts with the former Aon employees which expressly contemplated injunctive

relief.

Thus, a balance of the hardships weighs in favor of Aon. A preliminary injunction preventing Cusack and Alliant from soliciting and doing business with Aon's clients, will cause little or no harm to Cusack and Alliant. They will be in exactly the same position they were before they attempted to misappropriate Aon's business. Cusack and the other former Aon employees are free to continue to work for Alliant, and to solicit any of the thousands of other contractors in the marketplace, except for those Aon clients with whom Cusack and the other former Aon employee worked while at Aon.

However, given that Aon has failed to establish that either Cusack or Alliant misappropriated any of Aon's confidential information, the scope of the preliminary injunction will be narrower than that proposed in the orders to show cause and in the prior temporary restraining orders. Although Alliant argues that, if an injunction is granted, there should be no prohibition on Alliant accepting business, absent solicitation, because a client's free choice in selecting a broker would be unduly restricted, I reject this argument. It is clear that, under Illinois law, a restrictive covenant prohibiting both solicitations and the acceptance of certain limited business is enforceable (*see Howard Johnson & Co. v Feinstein*, 241 Ill App 3d 828, 836 [1st Dist 1993] [enforcing noncompetition agreements that prohibited defendants, for a three-year period, "from soliciting or accepting business of the kind engaged in by Howard Johnson from former Howard Johnson clients"]; *see also Abbot-Interfast Corp. v Harkabus*, 250 Ill App 3d 13, 20 [2d Dist 1993] ["Prohibiting a former employee from accepting orders or doing business with a customer .... can be reasonable" even though it "places restrictions on that customer"] [internal citations omitted).

I have considered the remaining claims, and finds them to be without merit.

Accordingly,

Due deliberation having been had, and it appearing that a cause of action exists in favor of plaintiffs and against defendants, and that plaintiffs are entitled to a preliminary injunction on the ground that defendants threaten or are about to do, or are doing or procuring or suffering to

be done, an act in violation of plaintiffs' rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $2,000,000, conditioned that the plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants Michael Cusack and Alliant Insurance Services, Inc., as well as any of Alliant's employees in its Construction Services Group who were formerly employed by Aon Risk Services Northeast, Inc. and resigned from Aon on June 13, 2011, and who were subject to restrictive covenants with Aon, and their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants or such former employees, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants, any of the following acts:

> (1) soliciting business from or entering into any business relationship with, on behalf of Alliant, any Aon client or customer for whom any such former Aon employee was the producer or on whose account he or she worked during the twenty-four (24) months prior to June 13, 2011; or
>
> (2) soliciting any Aon Construction Services Group employees to work for Alliant;

and it is further

Dated: December 20, 2011

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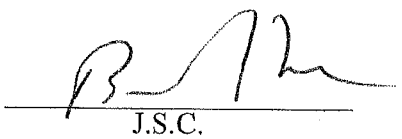

J.S.C.

HON. BERNARD J. FRIED