Indeck Energy Servs., Inc. v Merced Capital, L.P.
2018 NY Slip Op 30233(U)
February 9, 2018
Supreme Court, New York County
Docket Number: 652171/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652171/2014
INDECK ENERGY SERVICES, INC.
vs.
MERCED CAPITAL, L.P.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 12/27/17
MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). 132-194

Answering Affidavits — Exhibits ______ No(s). 262-264

Replying Affidavits ______ No(s). 274-283, 321

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 2/9/18

______, J.S.C.
SHIRLEY WERNER KORNREICH J.S.C.

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 54
--X
INDECK ENERGY SERVICES, INC.,

Index No.: 652171/2014

Plaintiff,

DECISION & ORDER

-against-

MERCED CAPITAL, L.P. MERCED PARTNERS III, L.P., MERCED HALYARD VENTURES, LLC, and CARSON BAY ENERGY HOLDINGS IV, LLC,

Defendants.
--X
SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition.

Plaintiff Indeck Energy Services, Inc. (Indeck) moves, pursuant to CPLR 3212, for partial summary judgment on liability on the first, third, fourth, fifth, and sixth causes of action in its complaint. Seq. 006. Defendants Merced Capital, L.P. (Merced Capital), Merced Partners III, L.P. (Merced Partners), Merced Halyard Ventures, LLC (Merced Halyard), and Carson Bay Energy Holdings IV, LLC (Carson Bay) oppose and move for summary judgment seeking dismissal of the complaint in its entirety. Seq. 007. The motions are granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.[1]

Indeck owns and operates power plants. Merced Capital manages private equity funds. Merced Partners is a fund managed by Merced Capital. Carson Bay is a special purpose investment vehicle formed in October 2010 by Merced Capital to purchase "grey market"

[1] *See* Dkt. 198 (joint statement of material undisputed facts). References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

electric power generation turbines. Merced Halyard is an LLC formed by Merced Partners and non-party Halyard Energy Ventures LLC (HEV) to develop a power generation project in an area known as the Electric Reliability Council of Texas (ERCOT). HEV in an LLC owned by non-parties Christopher DePodesta and Karl Dahlstrom. DePodesta and Dahlstrom are former employees of Indeck. DePodesta was a Vice President of Business Development. Dahlstrom was a Director of Business Development. As discussed herein, they resigned from Indeck within days of each other in November 2013 and partnered with defendants, through their interest in HEV, to develop a power generation project in the ERCOT market. Indeck sued DePodesta and Dahlstrom in an Illinois state court (the 19th Judicial Circuit in Lake County), pursuant to a contractual forum selection clause, for wrongful competition (e.g., breach of their restrictive covenants). *See Indeck Energy Servs., Inc. v DePodesta*, Case No. 14-CH-602 (the Illinois Action). That case is currently being tried.

DePodesta and Dahlstrom are not parties to this action. This action concerns Indeck's allegation that defendants breached a March 5, 2013 Mutual Confidentiality Agreement (the MCA) by working with DePodesta and Dahlstrom on Merced Halyard. *See* Dkt. 199. The MCA, a contract executed by Indeck and Carson Bay, is governed by New York law and contains a New York forum selection clause.[2] *See id.* at 4-5. While Carson Bay is the only defendant that is a signatory to the MCA, under the definitions of "Representatives" and "affiliate" in paragraph 2 of the MCA, all of the other defendants are bound by the MCA's confidentiality and non-solicitation provisions; and since paragraph 13 provides that the MCA is

[2] While the parties decided to litigate in two forums under applicable forum selection clauses, it obviously would have been more efficient for all of the litigation to be conducted in the same action (though, it should be noted, discovery was coordinated).

binding on all Representatives and that Carson Bay is liable for Representatives' breaches, all of the defendants are bound by the MCA.. *See id.* at 2, 5.

The parties entered into the MCA while they were contemplating defendants' involvement in one of Indeck's projects in the ERCOT market. Specifically, Indeck was interested in one of Carson Bay's turbines. There was discussion as to whether Carson Bay would contribute its turbine for equity in the project or if it would simply sell the turbine to Indeck.[3] Indeck insisted on execution of the MCA prior to conducting negotiations to protect the secrecy of the project details, which were bound to be revealed during negotiations. To this end, paragraph 2 of the MCA provides that defendants "shall not use ... the Confidential Information for any purpose whatsoever other than to evaluate and, if applicable, pursue the Potential Transactions." *See id.* at 2. Confidential Information is defined broadly in paragraph 1 as "information of a confidential or proprietary nature about the Potential Transactions (including the identity of the specific opportunity) from a Party disclosing such information." *See id.* at 1. Paragraph 1 makes clear that such information includes myriad forms of records "in any tangible form" and any information that "is a trade secret within the meaning of applicable trade secret law."[4] *See id.* at 1-2. Confidential Information also is defined to include information such as "the fact that the Parties are considering the Potential Transactions" and all information disclosed discussing such transactions. *See id.* at 2. Publicly available information is excluded from the definition. *See id.* The MCA prohibits defendants from using "the Confidential Information in

[3] The parties' intentions are recited in the MCA's whereas clauses. *See* Dkt. 199 at 1.

[4] Based on this definition, and for other reasons discussed herein, Indeck's claim for misappropriation of trade secrets (the only claim on which it does not seek summary judgment) is duplicative of its claim for breach of the MCA.

relation to any bids, offers, negotiations or any other potential transactions related to the Potential Transactions." *See id.* The confidentially period lasts for two years. *See id.* at 5.

Paragraph 5 of the MCA provides:

> For the two (2) year period following the date of this Agreement, the Parties shall not solicit for hire for engagement, or **hire** or engage, **any employee** of the other Party who is now or was during the six (6) months prior to such proposed solicitation, hire, or engagement, engaged or employed by the other Party about whom a Party became aware of as a result of the exchange of Confidential Information or discussion of the Transaction hereunder; *provided, however*, that the Parties shall not be precluded from soliciting or hiring any such person who (i) responds to general or public solicitation not targeted at such persons (including by a bona fide search firm), (ii) ceases employment with a Party or any of its subsidiaries **prior** to commencement of potential employment discussions, or (iii) initiates discussions regarding such employment without any solicitation by a Party.

Dkt. 199 at 3 (bold added for emphasis; italics in original).

After the MCA was executed, the parties engaged in negotiations. DePodesta and Dahlstrom interfaced with defendants on behalf of Indeck. In doing so, they disclosed sensitive information such as specific contemplated projects and planned locations, as well as financial and regulatory details. For instance, in an email sent on March 28, 2013, Indeck's president informed DePodesta and Dahlstrom that an ERCOT project had been given "the green light" and that development would begin on the site "as proof of concept," and, consequently, Indeck could begin the regulatory approval process. *See* Dkt. 141. At the trial in the Illinois Action, Dahlstrom testified that this "proof of concept" was "confidential." *See* Dkt. 142 at 70. He also admitted that he disclosed it to defendants. *See id.* at 73-74.

Ultimately, the parties did not reach an agreement. However, while DePodesta and Dahlstrom were discussing Indeck's confidential project details with defendants, in July 2013, they secretly decided to leave Indeck and enter into a venture with Merced Capital to develop

projects in the ERCOT market. There is no question of fact that while DePodesta and Dahlstrom were employed by Indeck and while the MCA was in effect, defendants, in direct violation of the MCA, were planning to partner with DePodesta and Dahlstrom. Defendants' records reflect that "[d]uring the process of marketing our gas turbines, we met with Karl Dahlstrom and Chris DePodesta of Indeck Energy," that "Karl and Chris will be leaving Indeck **and working for us** on an exclusive basis for power plant development in the ERCOT market," and that "[t]hey would identify, permit, and handle full development responsibilities for the power plant sites." *See* Dkt. 146 (emphasis added).

After months of discussions with defendants, DePodesta resigned from Indeck on November 1, 2013. He told Indeck that he was going to work on a restaurant. Dahlstrom resigned on November 4, 2013, telling Indeck he intended to do consulting work. Prior to resigning, they both copied thousands of Indeck's documents regarding ERCOT projects on external hard drives. The very same week of their resignation, on November 6, 2013, they, along with defendants, formed Merced Halyard, which was financed by Merced Capital.

Given the extensive discovery record from the Illinois Action and the extensive trial proceedings there, the record is replete with uncontroverted evidence that DePodesta and Dahlstrom disclosed Confidential Information to defendants and that defendants began negotiations to work with DePodesta and Dahlstrom while they were still employed with Indeck. An extensive discussion of this evidence is not warranted at this juncture since, as discussed below, defendants' liability cannot be disputed. Simply put, defendants violated paragraph 2 of the MCA by improperly using Confidential Information, and they violated paragraph 5 by working with DePodesta and Dahlstrom shortly after they resigned from Indeck after having

negotiated their defections while they were still employed by Indeck. The proper scope of damages is disputed, but such scope is not at issue on this motion. Rather, the only damages issue is whether there is record evidence upon which a reasonable finder of fact could conclude that Indeck was harmed in a manner proximately caused by defendants' breaches.[5]

Indeck commenced this action on July 15, 2014. Its complaint, which has never been amended, asserts six causes of action against all of the defendants: (1) breach of contract (paragraphs 2 and 5 of the MCA); (2) misappropriation of trade secrets; (3) unfair competition; (4) aiding and abetting (DePodesta's and Dahlstrom's) breach of the fiduciary duty of loyalty; (5) aiding and abetting (DePodesta's and Dahlstrom's) breach of fiduciary duty (misappropriation of corporate opportunity); and (6) unjust enrichment. Dkt. 1. Defendants filed an answer to the complaint on August 18, 2014. Dkt. 34. After the completion of discovery and the filing of a Note of Issue, the parties filed their respective motions for summary judgment on August 22, 2017. All of the causes of action are at issue on both motions except for the second, on which only defendants moved for summary judgment. The court reserved on the motions after oral argument. *See* Dkt. 310 (10/24/17 Tr.)

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving

[5] While the parties dispute whether nominal damages are available on certain of Indeck's claims, as discussed herein, the record on this motion supports a reasonable inference that Indeck suffered actual damages. That said, while nominal damages are always available on a claim for breach of contract under New York law (and thus summary judgment due to lack of damages could not be granted to defendants on Indeck's claim for breach of the MCA) [*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 (2017), citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 (1993) ("Nominal damages **are always available** in breach of contract actions.") (emphasis added)], the academic question of whether nominal damages are available on Indeck's other causes of action need not be decided since those claims are dismissed as duplicative.

party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Indeck is entitled to summary judgment on liability on its claim that defendants breached paragraphs 2 and 5 of the MCA. None of the material facts concerning liability are in dispute. Uncontroverted record evidence establishes that defendants discussed working with DePodesta and Dahlstrom while they were still employed by Indeck, and began working with defendants within days of their resignation. *See* Dkt. 133 at 21-23. This is a clear breach of paragraph 5 of the MCA. The court rejects defendants' suggestion that they never "engaged" with DePodesta and Dahlstrom. Defendants devote much of their opposition brief to justifying their narrow understanding of the word "engage", but in doing so, they ignore the full scope of the non-

solicitation prohibition in paragraph 5, which does not permit defendants to "solicit for hire for engagement, or hire or engage" Indeck's employees. *See* Dkt. 199 at 3. The notion that negotiating with DePodesta and Dahlstrom to partner with defendants on a project within the ERCOT market is not prohibited by paragraph 5 is not a reasonable.[6]

Under New York law, which governs the MCA, contracts are to be construed in accordance with their plain meaning. *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002). "This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." *Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 (1st Dept 2015). The court's interpretation must not be based on extrinsic evidence if the contact is unambiguous. *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 163 (1990). Contractual provisions are not ambiguous merely because parties proffer competing interpretations. *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015). Rather, ambiguity only exists if, "when the contract, read as a whole, fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Id.* (internal citations omitted; collecting cases). Disputed contractual provisions may not be read in isolation, but rather they must be interpreted in a manner consistent with the entirety of the contract. *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007) ("a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'"), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003).

Section 5 is not ambiguous regarding the scope of the manner in which defendants were prohibited from working with DePodesta and Dahlstrom. That defendants' relationship with

[6] *See* Dkt. 133 at 21 (citing dictionary definitions of "engage").

them was structured through LLCs is of no moment. Surely, the parties did not intend to permit DePodesta and Dahlstrom to work for defendants so long as they did so through LLCs, rather than merely as employees. It is commercially unreasonable to interpret the word "engage" in this manner, as such an interpretation would defeat the reasonable expectations of the parties – which was that defendants were not permitted to obtain the benefits of DePodesta's and Dahlstrom's expertise in ERCOT market energy projects. Moreover, defendants' interpretation cannot be squared with their confidentially obligations in paragraph 2, whose stated purpose is to prevent defendants from using Indeck's confidential information to compete in the ERCOT market. Prohibiting defendants from working with DePodesta and Dahlstrom is consistent with this purpose. Read as a whole and in a manner consistent with the MCA's purpose, the only reasonable interpretation of paragraph 5 is that it prohibits defendants' interactions with DePodesta and Dahlstrom.

Defendants' interpretation also is inconsistent with their implied covenant of good faith and fair dealing. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship,' they do encompass '**any promises which a reasonable person in the position of the promisee would be justified in understanding were included**.'" *Id.* (emphasis added), quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978). Hence, even if the MCA could be

said to be silent on the propriety of the way in which defendants partnered with DePodesta and Dahlstrom, the implied covenant would fill the MCA's gap on this issue. No reasonable finder of fact could conclude that the parties, when they were negotiating the MCA, would have agreed that such a venture was acceptable.

Defendants' breach of section 2 is equally clear. There is no question of fact that, with the aid of DePodesta and Dahlstrom, defendants have been developing a project in the ERCOT market. A reasonable finder of fact cannot conclude that defendants did not use Indeck's Confidential Information to aid them in doing so. Knowing they were going to work with defendants, and after having already disclosed Confidential Information to defendants while working for Indeck, DePodesta and Dahlstrom secretly copied thousands of pages of Indeck's documents before they resigned and (unsuccessfully) tried to cover their tracks.[7] Within months, with the aid of DePodesta and Dahlstrom, defendants, who at that point were not yet in the business of developing energy projects (they were just looking to sell turbines), formed a new venture and began developing energy projects in the very same county as Indeck's proposed project sites. To accept this as a coincidence requires a level of naivete not exhibited by a reasonable finder of fact.[8] Yet, there is no need to speculate. Indeck's site locations, pro formas, and commissioned sites were known to DePodesta and Dahlstrom, but not to defendants. This information falls within the definition of Confidential Information, as it is non-public information about Indeck's projects in the ERCOT market. Defendants' contention that this information was public is not supported with any evidence and, it should be noted, was rejected

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[7] It should be noted that DePodesta and Dahlstrom were sanctioned in the Illinois Action for withholding relevant ESI. *See* Dkt. 299.

[8] The case, it should be noted, will be tried by the court, not a jury. *See* Dkt. 85.

by the Illinois court. *See* Dkt. 274 at 11. Indeed, defendants did not submit any evidence in the record that explains how they were able to develop these projects so expeditiously based on their independent work product. The only reasonable inference, which is supported by record evidence that Indeck's Confidential Information was shared with defendants, is that defendants used Confidential Information to do so. *See, e.g.*, Dkt. 133 at 13-14, citing Dkt. 154. A Carson Bay employee even admitted that he obtained Confidential Information. *See, e.g.*, Dkt. 140 at 45 (admitting that DePodesta and Dahlstrom disclosed potential site locations). Defendants' current conclusory denials to the contrary are of no moment, as "a party may not create a feigned issue of fact to defeat summary judgment." *Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 (2016).

Since there is no material question of fact that defendants breached paragraphs 2 and 5 of the MCA, Indeck is granted summary judgment on liability on its first cause of action. Regarding damages, the record permits a reasonable inference that defendants' project has value, the amount of which, as Indeck concedes, is a question of fact for trial. As noted earlier, since the claim for breach of the MCA is governed by New York law, establishing damages is not necessary prior to trial. *See Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 517 (1st Dept 2015) (the "trial court erred in dismissing plaintiffs' cause of action for breach of contract" because plaintiffs could have proven "nominal damages on their contract claim").[9]

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[9] The court nonetheless rejects defendants' contention that all of Indeck's claimed damages are speculative. While there are disputed material questions of fact as to the value of defendants' project, defendants' own expert concedes that, though not completed and not having yet turned a profit, projects have value throughout the development phase. *See* Dkt. 274 at 17. Indeed, there is record evidence of a third-party investor's interest in the project, though the actual level of interest and that investor's view of the project's value is disputed. *See id.* That being said, to be

That said, the remainder of Indeck's claims are dismissed as duplicative. To be sure, there is record evidence suggesting that defendants aided and abetted DePodesta's and Dahlstrom's breaches of the fiduciary duties they owed to Indeck as employees (e.g., misappropriating of a corporate opportunity to form a joint venture with Merced Capital). Nonetheless, as Indeck concedes, the viability of this claim was impaired by virtue of the Illinois court's rejection of Indeck's contention that it was deprived of a corporate opportunity. *See* Dkt. 274 at 12 n.6. Given the collateral estoppel issue this raises, to avoid the possibility of inconsistent judgments and since any damages Indeck would recover on this aiding and abetting claim would be duplicative of the damages it could recover for breach of the MCA, this claim is dismissed.

Similarly, the court cannot divine what damages Indeck might recover from defendants for unfair competition that it could not otherwise recover on its claim for breach of the MCA. The alleged unfair competition is based on defendants' use of the Confidential Information. The damages that flow from that breach should include profits made by defendants through the use of such materials.[10] The unfair competition claim is therefore dismissed as duplicative.

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clear, while the court is granting summary judgment on the question of whether defendants breached paragraphs 2 and 5 of the MCA, nothing herein should be construed as the court relieving Indeck of its obligation to prove that its alleged damages flowed from these breaches.

[10] The claim might have been independently necessary and viable were there no contract that prohibited defendants' use of the Confidential Information. *Compare RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 469 (1st Dept 2015) (permitting lost profits claim on claim for breach of confidentiality agreement where defendant's "breach of the confidentiality agreement caused plaintiff to lose its deal."), with *Epstein Eng'g, P.C. v Cataldo*, 124 AD3d 420, 421 (1st Dept 2015) ("Plaintiff may elect to measure its damages in this unfair competition action by reference to the profits made by defendants from clients or business opportunities diverted from plaintiff."). But here, where such a contract exists and where it specifically prohibits using Indeck's Confidential Information to develop a competing project, lost profits were surely within the contemplation of the parties. *See Biotronik A.G. v Conor Medsystems*

Finally, where, as here, a written contract governs the parties' rights, the plaintiff cannot maintain a claim for unjust enrichment. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."). Accordingly, it is

ORDERED that Indeck is granted summary judgment on liability on its first cause of action, the second though sixth causes of are dismissed, and the parties' motions are otherwise denied; and it is further

ORDERED that within the next 30 days, the parties shall engage in further good faith settlement negotiations in light of this decision; and it is further

ORDERED that if the parties have not settled, they shall jointly call the court (646-386-3363) on April 2, 2018, at 4:30 p.m., to discuss the scheduling of a pre-trial conference.

Dated: February 9, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

Ireland, Ltd., 22 NY3d 799, 808-09 (2014). Likewise, the remedy for breach of a non-solicitation agreement is disgorgement of profits attributable to the impermissible solicitation. *Pencom Sys., Inc. v Shapiro*, 193 AD2d 561 (1st Dept 1993); *see Hunts Point Realty Corp. v Pacifico*, 56 AD3d 721 (2d Dept 2008), citing *Earth Alterations, LLC v Farrell*, 21 AD3d 873, 874 (2d Dept 2005). Hence, an independent cause of action for unfair competition is duplicative.