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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WORKERS' COMP EXECUTIVE™
A SEMIMONTHLY PUBLICATION FOR THE WORKERS' COMP EXECUTIVE

SWMH INSURANCE SERVICES, INC.,

Plaintiff and Respondent,

v.

ERM INSURANCE BROKERS, INC. et al.,

Defendants and Appellants.

G057025

(Super. Ct. No. 30-2018-01005525)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Theodore R. Howard, Judge. Affirmed.

Stone Dean, Kristi W. Dean and Tim G. Ceperley for Defendants and Appellants.

Buchalter, Robert M. Dato, Dylan W. Wiseman and Peter H. Bales for Plaintiff and Respondent.

*    *    *

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This is an appeal from the trial court's order granting a preliminary injunction against ERM Insurance Brokers, Inc. (ERM), Paul Beakes, David Tostado, and Rocio Tlaseca (collectively defendants). This relief was sought by SWMH Insurance Services, Inc. (SWMH), which does business as Excelsure Insurance (Excelsure) (plaintiff). Both ERM and Excelsure are insurance brokers who provide various types of insurance coverage to businesses. Prior to going to work for ERM, Beakes, Tostado, and Tlaseca worked at Excelsure. Excelsure filed the instant lawsuit alleging that its former employees breached their employment agreements and misappropriated trade secrets. Excelsure sought a temporary restraining order (TRO), which the court granted, and issued an order to show cause why a preliminary injunction should not issue. After briefing and a hearing, the court issued a preliminary injunction prohibiting the individual defendants from a number of activities, including soliciting business from Excelsure's customers and using information about customers they had learned during their employment.

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On appeal, defendants argue the nondisclosure and confidentiality provisions in the individual defendants' employment agreements are void, the identities of Excelsure's customers are not trade secrets, and the trial court's factual findings were not supported by the evidence. We conclude the relevant provisions of the employment agreements are not invalid to the extent they fall within the statutory exception of protecting trade secrets, and we find the trial court had substantial evidence from which it could conclude the information constituted trade secrets. To the extent defendants argue there was insufficient evidence in the record generally to support the trial court's findings, any such argument is waived for failure to fairly set forth all of the evidence, not merely the evidence that supports their own contentions.

Accordingly, we find the trial court did not err in granting the preliminary injunction, and we affirm the order.



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## I

## FACTS

Excelsure and ERM are independent insurance brokers. To provide some context to this dispute, Excelsure describes this business as "extremely competitive" and ERM states the companies both rely on workers' compensation coverage as a "lynchpin" of their "similar business models," acknowledging that "[b]oth brokerages target those workers' comp policyholders who recently experienced a rise in their premiums due to claims." According to Excelsure's CEO, "sales personnel are expected to make 100 calls per day to potential customers. Excelsure purchases lists which depict which customers[] . . . are present within a particular geography, but those lists do not indicate whether any of the prospects have any inclination to switch brokers. The primary way to generate business is to engage in labor intensive cold calling." Because businesses can be very loyal to their brokers, sales personnel are fortunate to set up one in-person meeting with a potential customer each week. They are expected to bring in one new customer per month, and through that method, they develop a book of business over time and provide service to those customers. "[T]he identities of Excelsure's customers are the lifeblood of its operations."

ERM asserts that because all businesses are required to have workers' compensation insurance, "it is no secret who [sales] prospects are," and the identities of potential customers is readily available through third party vendors. "Excelsure's clients are ripe for the taking through publicly available information just as ERM's clients can be targeted by their competitors."

Because companies are most likely to consider switching brokers around the time their policies renew, Excelsure contends, renewal dates are valuable information. The company permits employees to access the confidential information it collects, and employees use that information to pursue potential customers and service existing ones.



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That information includes contact information, the type of policies the customer purchases, and policy renewal dates.

The individual defendants each worked in sales roles for Excelsure. Each signed a Confidentiality and Nonsolicitation Agreement (the Agreement) and each also signed an acknowledgment they had received an Employee Handbook (the Handbook). The Agreement stated the individual defendants agreed "not to use any Confidential Information for any purpose except to evaluate and those related to his/her employment with Company . . . [and] not to disclose any Confidential Information to third parties or to other employees of Company, unless expressly authorized in this behalf by Company." The Agreement defines "Confidential Information" as "any information disclosed to Recipient by Company, either directly or indirectly in writing, orally or by inspection of tangible objects, including without limitation . . . customer names, customer list, customer data."

The Handbook also included a confidentiality policy: "All Excelsure Insurance Services financial data, or other non-public proprietary company information are confidential and employees must, therefore, treat all matters accordingly. This type of Excelsure Insurance Services confidential information, including without limitation, documents, notes, files, records, oral information, computer files or similar materials may not be removed from Excelsure Insurance Services premises without permission from Excelsure Insurance Services except in the ordinary course of performing duties on behalf of Excelsure Insurance Services. [¶] Employees must not disclose any confidential information, purposefully or inadvertently (through casual conversation), to any unauthorized person inside or outside the Company."

Additionally, the Agreement included the following nonsolicitation clause: "Recipient agrees that during the term of your employment with the Company and for twelve (12) months after the termination thereof, regardless of the reason for the employment termination, Recipient shall not either, directly or indirectly, solicit or



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attempt to solicit any business from any of the Company's Customers, Customer Prospects, or Vendors with whom you had Material Contact during the last two (2) years of your employment with the Company."

In late June 2018, Beakes and Tostado resigned from their employment at Excelsure without notice. Tlaseca followed in early July. All three went to work for ERM after they were located and interviewed by a hiring consultant. According to ERM, none of the employment offers made to the individual defendants were conditioned on their ability to bring confidential information with them.

Duncan Prince, the president and sole shareholder of ERM, later testified in a declaration that he told the individual defendants that he "did not expect them to wipe away their memory banks and forget everything they learned and did at Excelsure. I expected them to bring their training and skills and also to advise their former contacts that they had relocated and currently work for ERM. In that way, it was my expectation that they could capitalize on their existing relationships, personal and professional, which could provide a foundation for prospective client development."

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Around the same time, ERM attempted to recruit Rebecca Plank, a vice president at Excelsure. Plank later testified she was told that if she was sued by Excelsure, ERM would provide a defense. She was offered 100 percent commission for any business she brought from Excelsure within 90 days for a one-year period, an offer which she considered "an obvious incentive to raid Excelsure's clients."

During the recruiting process, Plank testified she was presented with a document entitled "'Instructions for contacting clients and prospects.'" While those instructions included leaving all files at their former employer and not soliciting clients prior to giving notice, it also stated a new ERM employee should "[o]n first day at ERM sit down and make up a list of the clients you remember" and "[a]dd the names of the key contacts if you remember them." Afterward, the new employee was instructed to "[c]all or visit each one and talk to your prior contact and ask if they will come with you to



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ERM." Once they were employed by ERM, the individual defendants sat down together and wrote down the names of Excelsure policyholders and their contacts with those companies.

Plank ultimately decided to stay with Excelsure. After the individual defendants left, Plank testified, she heard from a client that Beakes had contacted that Beakes had stated "that Excelsure was going out of business, that 'half their company quit,' 'that Excelsure was going under,'" and that Plank was also leaving Excelsure. She received a call from another client that the client had been "'bombarded'" with high pressure sales tactics by Tlaseca. Without telling the client she had left Excelsure, Tlaseca arranged a meeting and disclosed she had left after the meeting began. Tlaseca had told the client that "Excelsure 'was bankrupt' and would be 'going out of business'" and no longer able to handle the client's policies when they came up for renewal. Another client also gave Plank a report about being approached by Tlaseca. Tlaseca referenced specific workers who were pursuing workers' compensation claims to this client.

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The individual defendants eventually persuaded four companies to switch their business from Excelsure to ERM.

In July 2018, Excelsure filed a complaint stating causes of action for breach of contract, breach of duty of loyalty, breach of fiduciary duty, misappropriation of trade secrets, unjust enrichment, inducing breach of contract, violations of Business & Professions Code section 17200, intentional interference with prospective economic relations, and conspiracy. The complaint, among other things, sought monetary damages and injunctive relief.

Shortly thereafter, Excelsure applied for a TRO and order to show cause regarding a preliminary injunction to prevent defendants from: 1) soliciting or attempting to solicit business from any of Excelsure's customers or prospective customers learned of as a result of the individual defendants' employment with Excelsure; 2) disclosing or



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using the identities of such customers or prospective customers; and 3) stating, suggesting, or implying that the individual defendants are current Excelsure employees.

The court granted the TRO, but struck the requested language regarding "prospective customers" and issued the order to show cause. In opposing the request for a preliminary injunction, defendants acknowledged contacting or attempting to contact Excelsure customers, claiming the individual defendants recalled the information from their time at the company and that the information was available from public sources; therefore, this information was not a "trade secret" under California law.

As Excelsure points out, Prince's declaration in opposition included the following two statements: "While I am sure there have been Excelsure customers targeted by my sales team in the last few months, in no way have I encouraged a concerted effort to focus on taking business from Excelsure. We have contracted many prospective leads, irrespective of the identity of their current broker." He further stated: "I have assessed the projected earnings of ERM's three new employees, and I estimate that lost earnings resulting from an order precluding ERM from soliciting customers that are current Excelsure customers may exceed $180,000 in revenue in policy placement over the next 30 days. If a similar order is imposed upon ERM for a year or more, the damage to ERM could exceed $1.8 million in damages." As Excelsure rather acidly pointed out in its reply, "Stated otherwise, 'unless my employees are permitted to break the law by targeting and soliciting Excelsure's customers, ERM will stand to lose over $180,000 per month.'"

Excelsure also pointed out that contrary to defendants' argument that the individual defendants only used customer information, Excelsure's president, Mark Habibeh, submitted a declaration stating that a search of Excelsure's e-mail system revealed that Tostado had sent copies of customer lists and contacts to his private e-mail account days before leaving Excelsure. Tostado's own declaration had stated that "[o]ther than my memory and my skills, I did not bring any information concerning



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customers or anything else with me from Excelsure, whether in hard copy, electronic or any other form."

After briefing, the court issued the preliminary injunction. The minute order stated: "Plaintiff has produced sufficient evidence on these issues to show a probability of prevailing on its misappropriation of trade secrets claims. Further, plaintiff has produced sufficient evidence showing it will suffer irreparable harm should the requested relief not be granted." The preliminary injunction prohibited defendants "[f]rom soliciting or attempting to solicit business from any customers of Excelsure . . . named in the e-mails by defendant [Tostado] from Plaintiff's database to himself (at his personal e-mail account) on June 19, 2018, June 24, 2018, June 27, 2018, June 28, 2018, as well as the lists created by defendants Beakes, Tlaseca and Tostado attached to their opposition as Exhibit 4." Exhibit 4 consisted of the handwritten lists the individual defendants had created at the commencement of their employment at ERM.

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Defendants were also prohibited from "[d]isclosing or using the identities of and information about any customers of Excelsure which Defendants learned of as a result of employment with Excelsure" which included the information Tostado had e-mailed to himself and the handwritten lists created by the individual defendants. Defendants were also restrained from "[s]tating, suggesting, or implying" that the individual defendants were current Excelsure employees. Finally, defendants were ordered to return and preserve certain records, and Excelsure was ordered to post a $25,000 bond.

Defendants now appeal.



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## II

## DISCUSSION

*Statutory Overview and Standard of Review*

Code of Civil Procedure section 525, et seq., sets forth the statutory basis for injunctive relief, which is defined as "a writ or order requiring a person to refrain from a particular act." Among other circumstances, an injunction may be granted "[w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of . . ." or "[w]hen it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action." (Code Civ. Proc., § 526, subd (a)(1), (2).) Injunctive relief is also specifically authorized by certain statutes, including, as relevant here, a provision of California's Uniform Trade Secrets Act (USTA). (Civ. Code, § 3426.2.)

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"The ultimate questions on a motion for a preliminary injunction are (1) whether the plaintiff is 'likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant,' and (2) whether there is 'a reasonable probability that the plaintiffs will prevail on the merits.'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408 (*Huong Que, Inc.*).) "These two showings operate on a sliding scale: '[T]he more likely it is that [the party seeking the injunction] will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue.'" (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183.) An order granting injunctive relief must be affirmed if the trial court "properly applied the law[] in assessing the likelihood of success on *any* cause of action." (*Huong Que, Inc.*, at p. 410.)

A challenge to a preliminary injunction "may trigger any or all of three standards of appellate review. Insofar as the court's ruling rests on evaluating and



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weighing the substantive factors noted above—the preponderance of likely injury and the likelihood of success—it is said to be vested in the discretion of the trial court, whose ruling will not be disturbed on appeal unless an abuse of discretion is made to appear. [Citation.] Insofar as the trial court's ruling depends on determination of the applicable principles of law, however, it is subject to independent appellate review. [Citations.] And insofar as the court resolved disputed issues of fact, its findings are reviewed under the substantial evidence standard, i.e., they will be sustained unless shown to lack substantial evidentiary support." (*Huong Que, Inc.*, *supra*, 150 Cal.App.4th at pp. 408-409.)

*Validity of Nondisclosure Provisions*

ERM first argues the nondisclosure and nonsolicitation provisions in the Agreement were invalid under Business and Professions Code section 16600, which "prohibits employee noncompetition agreements unless the agreement falls within a statutory exception." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 942, 947.) But as defendants at least tacitly admitted in the trial court, one such statutory exception is a violation of the USTA by misusing trade secrets. (*Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1430.) Because that is one of Excelsure's key contentions, we reject this argument as inapplicable here.

*Customer Information as Trade Secrets*

The pertinent question, then, is whether the information the individual defendants had access to is protectable as trade secrets, specifically, "the identities of Excelsure's customers and its customer list information (i.e., customer contacts, the insureds' renewal dates, and the policies they have purchased)."

While ERM persistently argues that "all the individual appellants took with them when they left its employ were the names of customers that they were able to recall



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from their own memories" and characterizes this as an "undisputed fact"—this does not accurately reflect the record or the trial court's findings. The trial court's order included a prohibition on "[d]isclosing or using the identities of and information about any customers of Excelsure which Defendants learned of as a result of employment with Excelsure, *which include[s] the information e-mailed by defendant [Tostado] from Plaintiff's database to himself* (at his personal email account) on June 19, 2018, June 24, 2018, June 27, 2018, June 28, 2018 . . . ." (Italics added.) The trial court would not have included this had it not found the evidence on this issue credible; further, it explicitly found Excelsure had produced sufficient evidence to demonstrate that the customer information was "detailed and sophisticated" and not "readily available from public sources." We therefore reject ERM's contention that the only information at issue here are the names of Excelsure's customers which the individual defendants recalled from memory.

ERM, however, chose, in its briefing, to disregard any arguments that were not about the names of customers, and it has waived any arguments it could have made with respect to customer contacts, types of policies, and renewal dates.

As to the substance of Excelsure's cause of action, we look first to the relevant statutory underpinnings. The USTA defines a trade secret as information that: (1) "[d]erives independent economic value . . . from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use"; and (2) "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.l, subd. (d).) Only the first element is at issue here.

The trial court's decision that Excelsure's customer information – not only limited to customer names, but also the identities of contact persons for each customer, renewal dates, and the type of coverage carried by each customer – was protectable as a trade secret. ERM admits the independent agency business is highly competitive. Moreover, ERM acknowledges that customer lists may qualify as trade secrets if they



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meet the statutory criteria. (See, e.g., *The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, 1237-1238.)

In *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521-1522, the court held that generally, "the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret." Further, customer lists "can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to only a list of people who only might be interested. [Citation.] Its use enables the former employee 'to solicit both more selectively and more effectively.'" (*Id.* at p. 1522.) Here, the information Excelsure seeks to protect is more than simply the names of its customers, but also contact information, renewal dates, and types of policies.

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The trial court considered evidence that because companies are most likely to consider switching brokers around the time their policies renew, renewal dates are valuable information which can assist a competitor in targeting which customers to solicit, and when. Excelsure's president stated in a declaration that "customer identities and information about when their policies come up for renewal are extremely valuable. It is during a window of a few months before policies expire that most customers are receptive to even considering shopping their policy. A list of customers and information about their renewal dates is highly confidential in the independent insurance agency business."

Further, there was evidence that "most businesses have a gatekeeper which makes it more difficult for our sales personnel to reach the actual decision-maker." Accordingly, it is a reasonable inference that having specific contact information at prospective clients can help avoid the gatekeeper and reach the decision-maker directly. The evidence also supports an inference that the types of policies carried by each



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customer could assist a competitor in solicitation, and therefore, that information also had economic value.

Based on the evidence we find the trial court properly concluded that the information Excelsure sought to prevent ERM from using was protectable as trade secrets, and based on the record, we conclude the trial court did not abuse its discretion in finding Excelsure was likely to prevail on the merits of its cause of action.

*Sufficiency of the Evidence*

ERM contends the trial court's decision to issue the preliminary injunction was not supported by sufficient evidence. As noted above, we apply the substantial evidence standard to determine the adequacy of the trial court's factual findings. In doing so, we do not "independently search the evidentiary record to determine its sufficiency." (*Huong Que, Inc.*, *supra*, 150 Cal.App.4th at p. 409.) We presume the record contains evidence to support every finding of fact; the burden is on the appellant to establish deficiencies in the evidence. "This burden is a 'daunting' one." (*Ibid.*) "'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*.'" (*Ibid.*) "In applying this standard of review, we 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .'" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.)

Where the facts were disputed, ERM has failed in its responsibility to summarize both favorable and unfavorable evidence. Instead, in its statement of facts, it cites only the evidence most favorable to its own argument. For example, ERM asserts: "Mr. Tostado and Ms. Tlaseca were given the same admonition by ERM against bringing any of Excelsure's property with them and neither of them did so." Nowhere does ERM mention that the trial court considered evidence that Tostado had sent copies of customer



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lists and other materials to his private e-mail account days before leaving Excelsure. With respect to the solicitations to Excelsure's customers after the individual defendants began working at ERM, completely ignores Plank's testimony regarding what she was told about these attempts by Excelsure's clients.

In its argument on this point, defendants treat the evidence equally disingenuously, repeatedly asserting that the individual defendants recalled the names of every customer it listed from memory while ignoring evidence to the contrary. This was not, as defendants assert, an undisputed fact, yet they repeatedly treat it as such: "Appellants proved the identities of Respondent's customers that the individual appellants recalled from memory are like any other businesses with employees . . . ." "[T]he names that the individual appellants recalled were businesses . . . ." "The information that the Appellants took from memory consisted of names only. There was no other information." "[T]he names of the businesses recalled by Appellants were . . . publicly available resources."

Given that defendants have made no attempt to evenhandedly discuss the evidence in the record, we conclude they have waived any issue of substantial evidence. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737-738.)

Moreover, were we to consider this issue on the merits, we would conclude that the evidence Excelsure submitted, including substantive declarations with supporting documentation, was more than sufficient to support the court's factual findings.



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III

DISPOSITION

The order is affirmed. Excelsure is entitled to its costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.

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