LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-01096-BRO (GJSx)**	Date	February 26, 2016
Title	**LATERAL LINK GROUP CO-OP, LLC V. RYAN TURLEY ET AL**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER DENYING PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER [13, 17]

I. INTRODUCTION

Pending before the Court is Plaintiff Lateral Link Group Co-Op, LLC's Ex Parte Application for Temporary Restraining Order ("TRO") and Order to Show Cause Regarding Preliminary Injunction against Defendants Ryan Turley and Austin Wilson. (Dkt. Nos. 13, 17.) After considering the papers filed in support of and in opposition to the instant Application, the Court deems this matter appropriate for resolution without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the reasons set forth below, the Court **DENIES** Plaintiff's Ex Parte Application.

II. BACKGROUND

A. Factual Background

Plaintiff Lateral Link Group Co-Op, LLC ("Plaintiff" or "Lateral Link") is a boutique legal search firm based out of California. (Decl. of Michael A. Allen Supp. Ex Parte Appl. (hereinafter, "Michael Allen Decl.") ¶ 2.) Plaintiff specializes in placing attorney candidates as associates and/or partners with law firms, as well as general counsel placements. (*Id.*) The company currently employs over thirty recruiters. (*Id.*) Beginning in August 2014, Plaintiff employed Defendants Ryan Turley and Austin Wilson (collectively, "Defendants") as Directors for the Chicago, Illinois market, responsible for recruiting and marketing in the Chicago region. (Michael Allen Decl. ¶ 9;

Decl. of Austin C. Wilson Supp. Defs.' Opp'n (hereinafter, "Wilson Decl.") ¶ 2; Decl. of Ryan M. Turley Supp. Defs.' Opp'n (hereinafter, "Turley Decl.") ¶ 4.)

1. Plaintiff's Attorney Candidate Database

Attorney candidates that are interested in browsing Lateral Link's open positions, or being considered by a recruiter for such positions, are invited to become "Members" on Plaintiff's website. (Michael Allen Decl. ¶ 3.) In order to become a Member, the attorney candidate confidentially submits, via Plaintiff's website, his or her name, contact information, employer, law school, and law school grade point average. (*Id.*) If an attorney does not register as a Member, Plaintiff's database tracks information regarding communications with those non-Member candidates. (*Id.*) Plaintiff's database includes over 270,000 non-Member and Member candidates. (*Id.*) Plaintiff requires its recruiters to enter a unique user ID and password to access the database; upon termination of employment, recruiters lose this access. (Michael Allen Decl. ¶ 7.)

The database additionally compiles information about jobs for Plaintiff's recruiters to access. (*Id.*) When Members access the list of available positions on Lateral Link's website, Members are given general information about the position, but not the name of the firm or company itself. (Michael Allen Decl. ¶ 4.) A recruiting firm can make twenty to thirty percent of the first year compensation for attorney and partner placements; the fees from a single placement range from $30,000 for a low-level associate placement, to $250,000 or more for a partner placement. (Michael Allen Decl. ¶ 5.)

Plaintiff requires that its recruiters enter into Employee Agreements that include certain "Confidentiality Provisions," which define "Proprietary Information" as "including but not limited to the non-public content of the database of Lateral Link candidates and the non-public identity of law firms." (Michael Allen Decl. ¶ 8, Ex. B at 3, 11.)

2. Defendants' Resignation from Plaintiff's Company

On January 18, 2016, Defendants informed Plaintiff's founder and principal, Michael Allen, that Defendants were resigning from Lateral Link to start their own legal recruiting company. (Michael Allen Decl. ¶ 10.)

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After Defendants resigned, Plaintiff reviewed Defendants' work email accounts and logs from the "admin database," and collected Defendants' company laptops, which Plaintiff sent to a consulting firm for analysis. (Michael Allen Decl. ¶ 11.) Plaintiff discovered "multiple instances" of Defendants emailing "highly sensitive candidate and client information" from Defendants' work email accounts to Defendants' personal email accounts. (Michael Allen Decl. ¶ 13.) A hiring partner from one of Plaintiff's law firm clients told Plaintiff that Defendants continued to contact him after Defendants resigned from Plaintiff's company. (Michael Allen Decl. ¶ 15.) Plaintiff also observed that Defendants' logs from the admin database showed a "marked and significant drop" in activity. (Michael Allen Decl. ¶ 12.)

Plaintiff received a declaration from a Managing Director at the consulting firm Plaintiff hired to do a forensic analysis of Defendants' work computers, Erik Laykin. (Decl. of Kevin R. Allen (hereinafter, "Kevin Allen Decl.") ¶ 11, Ex. A (hereinafter, "Laykin Decl.").) Laykin's declaration concludes that there were "numerous instances of apparent copying" by both Defendants that "appear very likely to be instances of theft of Lateral Link propriety information." (Laykin Decl. ¶ 22.)

B. Procedural Background

Plaintiff initiated this action by filing a Complaint for Injunctive Relief in this Court on February 17, 2016, alleging the following causes of action: (1) misappropriation of trade secrets under California's Uniform Trade Secrets Act ("CUTSA"), California Civil Code section 3426.1(d); (2) breach of contract; and, (3) violation of Penal Code section 502. (Dkt. No. 4.)

On February 19, 2016, Plaintiff filed the instant Ex Parte Application, seeking a temporary restraining order and an order to show cause as to why a preliminary injunction should not issue enjoining Defendants from engaging in the following activities:

(1) Making use of or otherwise disclosing or distributing any of Lateral Link's proprietary data, documents and files that they came into possession while employed by Lateral Link that refer to or contain information about Plaintiff's attorney candidates and law firm clients, including client lists, law firm marketing lists, candidate resumes,

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transcripts and application materials, and, Lateral Partner Questionnaires ("LPQ's");

(2) Destroying, modifying, or disposing of, in any manner, any of Lateral Link's proprietary data, documents, or files that that they came into possession while employed by Lateral Link refer to or contain information about Plaintiff's attorney candidates and law firm clients, including client lists, law firm marketing lists, candidate resumes, transcripts and application materials, and, Lateral Partner Questionnaires ("LPQ's");

(3) Destroying, modifying, or disposing of, in any manner, any communications, documents, or files relating to Lateral Link searches that Defendants worked on while employed by Lateral Link, including records contained on each Defendant's personal computers, their personal email accounts, "cloud" storage accounts (including "dropbox" and "google drive" accounts), and/or any other storage devices where said information and data resides; and,

(4) Submitting attorney candidates to law firms on searches that Defendants, or either of them, first learned of and/or worked on during their employment with Lateral Link.

(Dkt. No. 13; *see* Dkt. No. 16 (hereinafter, "Ex Parte Appl.") at 3.) Plaintiff's Ex Parte Application is accompanied by declarations of Plaintiff's founder and principal, Michael Allen, as well as Plaintiff's counsel, Kevin Allen. (*See* Dkt. Nos. 14, 15.) Kevin Allen's declaration attaches the declaration of Erik Laykin, which Plaintiff's counsel refers to as an "Expert Report." (Kevin Allen Decl. ¶ 11, Ex. A.)

On February 22, 2016, Defendants filed their Opposition to Plaintiff's Ex Parte Application. (Dkt. No. 20 (hereinafter, "Opp'n").) Defendants' Opposition is accompanied by the declarations of both Defendants and their counsel, Daniel Parker Jett. (*See* Dkt. Nos. 20-1 (hereinafter, "Jett Decl."), 20-22, 20-30.)

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III. DISCUSSION

As discussed above, Plaintiff seeks a temporary restraining order and an order to show cause as to why a preliminary injunction should not issue enjoining Defendants from engaging in various activities. Defendants argue that: (1) this Court lacks subject matter jurisdiction over this case; (2) Plaintiff's Employment Agreement requires that the parties arbitrate Plaintiff's claim for injunctive relief; (3) Plaintiff lacks standing to enforce the Employment Agreement as to the breach of contract causes of action against each Defendant; and, (4) the Court should deny Plaintiff's request for a temporary restraining order for various reasons. (*See* Opp'n at 5–16.) The Court will address each of Defendants' arguments in turn.

A. Diversity Jurisdiction Exists In This Matter

Plaintiff's Complaint alleges diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Compl. ¶ 5.) Federal courts are of limited jurisdiction and possess only that jurisdiction as authorized by the Constitution and federal statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under 28 U.S.C. § 1332(a)(1), a federal district court has original jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," and the dispute is between citizens of different states. *See* 28 U.S.C. § 1332. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977).

Defendants do not contest the complete diversity of citizenship between Plaintiff and Defendants here. (*See generally* Opp'n; *see also* Compl. ¶¶ 1, 2, 3.) Rather, Defendants argue that this Court lacks jurisdiction over this case because "an injunction to cease and desist or turn over non-existent records is worth very little in cash, if not nothing" and thus "[t]he value of the injunction sought does not have a value exceeding $75,000.00." (Opp'n at 11–12.) Defendants fail to cite to any legal authority in support of this claim. (*See* Opp'n at 8–12.)

According to Plaintiff's Complaint for Injunctive Relief, "Plaintiff values the injunctive relief sought by this complaint as exceeding $75,000" because "the

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information Defendants have [allegedly] misappropriated could be used to generate hundreds of thousands of dollars in search fees that . . . properly belong to Lateral Link." (Compl. ¶ 20.) Plaintiff claims that it "could miss out on over $75,000 worth of placement fees if [Plaintiff] cannot obtain copies of its proprietary information that is now believed to be in Defendants' possession." (*Id.*) Michael Allen further states in his declaration that "[t]he fees from a single placement can range anywhere from $30,000 for a low level associate to $250,000 or more for a partner." (Michael Allen Decl. ¶ 5 (emphasis omitted).) Plaintiff additionally maintains that "if Defendants were to disclose [Plaintiff's] proprietary information about Lateral Link candidates to a third party, Lateral Link could be the target of a lawsuit by candidate(s) and the damages from such a lawsuit and/or Lateral Link's defense fees could easily exceed $75,000." (Compl. ¶ 20.)

The amount in controversy requirement is generally determined by the amount stated in the complaint, and "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938). "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* at 289; *see Naffe v. Frey*, 789 F.3d 1030, 1039 (9th Cir. 2015) ("When a plaintiff files suit in federal court, we use the 'legal certainty' test to determine whether the complaint meets § 1332(a)'s amount in controversy requirement." (citing cases)). As the Ninth Circuit has recognized, "the legal certainty test makes it very difficult to secure a dismissal of a case on the ground that it does not appear to satisfy the jurisdictional amount requirement." *Id.* (quoting *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986) ("[I]n the Ninth Circuit we have permitted a determination of 'legal certainty' when a rule of law or limitation of damages would make it virtually impossible for a plaintiff to meet the amount-in-controversy requirement.")).

The Court finds that Plaintiff's allegations regarding the amount in controversy in this case sufficiently control and that this Court has jurisdiction over this matter. Defendants have not convinced this Court that Plaintiff made its claim in bad faith. Nor have Defendants established with any legal certainty that the injunction would be worth less than $75,000, as they must.

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B. Claims for Injunctive Relief are Exempted from the Parties' Agreement to Arbitrate

Defendants argue that Plaintiff must arbitrate its claims for injunctive relief pursuant to the arbitration clause attached to Defendants' Employment Agreements. (Opp'n at 5–6; *see also* Michael Allen Decl. ¶ 8, Ex. B at 6–7, 14–15.) However, paragraph 9(ii) of Exhibit "C" to the Employment Agreement excludes "claims seeking only injunctive relief" from the requirement to arbitrate. (Michael Allen Decl. ¶ 8, Ex. B. at 7, 15; *see also* Opp'n at 6 ("Defendants anticipate that Lateral Link will rely upon Section 9(ii) as excluding 'claims seeking only injunctive relief.'").) Defendants maintain that Plaintiff must arbitrate its claims seeking injunctive relief because "[e]xempting claims for injunctive relief is indicative of a lack of mutuality that renders an arbitration agreement unenforceable for unconscionability." (Opp'n at 6.)

The Court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4; *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719–20 (9th Cir. 1999); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477–78 (9th Cir. 1991)). In order for this Court to find that the arbitration provision in the Employment Agreements is unconscionable and thus unenforceable, both procedural and substantive unconscionability must be present in the agreement. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000) ("But [procedural and substantive unconscionability] need not be present in the same degree."); *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 391 (Cal. Ct. App. 2010) ("Unconscionability, as contemplated in judicial review of a contractual arbitration clause, has two components; procedural unconscionability and substantive unconscionability.").

Even assuming paragraph 9(ii) requires a finding of substantive unconscionability, Defendants fail to establish procedural unconscionability here. While Plaintiff offered the Employment Agreement on a take-it-or-leave-it basis, and there is an inequality of bargaining power between Plaintiff, the employer, and Defendants, the employees, such inequality does not rise to the level required to find that the arbitration agreement is procedurally unconscionable. The Supreme Court has explained that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are

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never enforceable in the employment context." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

By arguing that Plaintiff must arbitrate the instant issue, it is Defendants, the employees, that seek to enforce—not invalidate—the arbitration agreement against Plaintiff. Based on the express terms of the Employment Agreements signed by Defendants, the Court concludes that Plaintiff's current causes of action, "claims seeking only injunctive relief," are not covered by the parties' agreement to arbitrate all claims.

C. The Court Need Not Address Plaintiff's Breach of Contract Claims in Connection with Plaintiff's Ex Parte Application

Defendants claim that Plaintiff lacks standing to allege breach of contract claims in connection to Defendants' Employment Agreements because the Employment Agreements are between Defendants and "Lateral Link Co-Op, LLC," and not Plaintiff Lateral Link Group Co-Op, LLC. (Opp'n at 7–8.) First, this contention may be relevant to the merits of Plaintiff's breach of contract claims, but it is irrelevant to the issue currently before the Court: whether to grant Plaintiff's request for TRO as to Plaintiff's misappropriation and California Penal Code section 502 claims. Plaintiff's request for TRO does not rely on its breach of contract causes of action. (*See* Ex Parte Appl. at 3.)

Moreover, Defendants' contention that Plaintiff has no standing to enforce the Employment Agreements is undercut by Defendants' argument that Plaintiff must arbitrate its claims for injunctive relief pursuant to those same Employment Agreements. (*See* Opp'n at 5–6.) The Court accordingly need not address Defendants' claim that Plaintiff lacks standing as to Plaintiff's breach of contract claims.

D. Plaintiff's Request for Temporary Restraining Order

Rule 65(b) governs the issuance of a temporary restraining order. Fed. R. Civ. P 65(b). A temporary restraining order may issue only if the movant provides specific facts in an affidavit that clearly shows an immediate and irreparable injury. *Id.* The standard for a temporary restraining order is identical to the standard for a preliminary injunction. *Frontline Med. Assocs., Inc. v. Coventry Healthcare Worker's Comp., Inc.*, 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009). A plaintiff seeking preliminary relief must establish

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"[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Doe v. Reed*, 586 F.3d 671, 676 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

The elements of this test are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1049–50 (9th Cir. 2010), *rev'd on other grounds*, 632 F.3d 1127 (9th Cir. 2011). Thus, a court may grant temporary relief where a plaintiff demonstrates "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Id.* at 1052 (internal quotations omitted). In other words, where a plaintiff is unable to show a *likelihood* of success on the merits but can at least demonstrate that there are serious questions going to the merits, and the balance of hardships strongly favors the plaintiff, a court may grant preliminary injunctive relief so long as there is still a showing on the last two elements. *See Alliance for Wild Rockies*, 632 F.3d at 1131, 1134–35 ("[A] stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.").

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). Nevertheless, "[t]he district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).[1]

Generally, a temporary restraining order is considered to be "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. An applicant seeking such relief must detail his efforts to notify opposing counsel and ascertain his position. *See* C.D. Cal. L.R. 7-19.1.

[1] The Court notes that neither side addresses the bond requirement nor an appropriate amount for a bond. The Court need not address the bond requirement here, where the Court denies Plaintiff's request for a TRO.

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a. Likelihood of Success on the Merits

Plaintiff's misappropriation of trade secret and section 502 causes of action are relevant to the Court's decision whether to grant Plaintiff's Ex Parte Application.[2] The Court will therefore analyze Plaintiff's likelihood of success on these two claims.

1. Misappropriation of Trade Secret

As discussed above, Plaintiff alleges a misappropriation of trade secrets claim against Defendants pursuant to the CUTSA. (Compl. ¶¶ 22–29.) To establish a misappropriation of trade secret claim, Plaintiff must satisfy two elements: (1) the existence of a trade secret; and, (2) misappropriation of the trade secret. *Pellerin v. Honeywell Int'l, Inc.*, 877 F. Supp. 2d 983, 988 (S.D. Cal. 2012) (citing Cal. Civ. Code § 3426.1(b)).

i. Plaintiff's Attorney Candidate Database Likely Qualifies as a Protectable Trade Secret

Plaintiff argues that its candidate files in its attorney candidate database qualify as a trade secret. (Ex Parte Appl. at 16–19.) Defendants do not oppose the existence of a trade secret; rather, Defendants maintain that they did not misappropriate Plaintiff's trade secret. (*See* Opp'n at 12–16.) A "trade secret" is defined as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or 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.

[2] As discussed, Plaintiff's request for TRO does not rely on its breach of contract causes of action. The type of relief Plaintiff seeks is in regard to Plaintiff's misappropriation and section 502 causes of action.

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Cal. Civ. Code § 3426.1(d). "Client lists can receive trade secret protection if they satisfy the requirements." *Hilderman v. Enea TekSci, Inc.*, 551 F.Supp.2d 1183, 1201 (S.D. Cal. 2008).

Plaintiff provides sufficient evidence at this stage to show that its attorney candidate database derives independent economic value.[3] As described above, Attorney candidates that are interested in browsing Lateral Link's open positions, or being considered by a recruiter for such positions, are invited to become Members on Plaintiff's website. (Michael Allen Decl. ¶ 3.) In order to become a Member, the attorney candidate confidentially submits his or her name, contact information, employer, law school, and law school grade point average. (*Id.*) If an attorney does not register as a Member, Plaintiff's database tracks information regarding communications with those non-Member candidates. (*Id.*) Plaintiff's database includes over 270,000 non-Member and Member candidates. (*Id.*)

The database additionally compiles information about jobs for Plaintiff's recruiters to access. (*Id.*) When members access the list of available positions on Lateral Link's website, members are given general information about the position, but not the name of the firm or company itself. (Michael Allen Decl. ¶ 4.)

A recruiting firm can make twenty to thirty percent of the first year compensation for attorney and partner placements; the fees from a single placement range from $30,000 for a low-level associate placement, to $250,000 or more for a partner placement. (Michael Allen Decl. ¶ 5.) Plaintiff's attorney candidate database identifies attorneys who are presumably interested in a new job. (*Id.*) Law firms or other legal recruiting firms would likely find the attorney candidate database valuable because it contains data on attorneys that are interested in being contacted by a recruiter for new job prospects, as well as information regarding other firms' practices. The database thus "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 a list of people who only might be interested." *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (Cal. Ct. App. 1997); *see MAI Sys. Corp. v.*

[3] Although Defendant Turley states that the "vast majority of the information . . . is publicly-available through a wide variety of online resources" and that the database "is of limited usefulness," (*see* Turley Decl. ¶ 8), Defendants do not claim Plaintiff's database lacks actual or potential economic value.

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Peak Comput., Inc., 991 F.2d 511, 521 (9th Cir. 1993) (holding that a customer database had potential economic value because it allowed competitors to direct its sales efforts to those potential customers that are already using the MAI computer system).

Moreover, the Court finds that Plaintiff has likely maintained the secrecy of its database by efforts reasonable under the circumstances. "Reasonable efforts to maintain the secrecy of certain information include limiting access to the information, advising employees of existence of a trade secret, requiring employees to sign nondisclosure agreements, and keeping secret documents under lock." *Cinebase Software, Inc. v. Media Guar. Tr., Inc.*, No. C98–1100 FMS, 1998 WL 661465, at *10 (N.D. Cal. Sept. 22, 1998) (citing *Religious Tech. Ctr. v. Netcom On–Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1253 (N.D. Cal. 1995)). Plaintiff requires that its recruiters enter into agreements that include certain "Confidentiality Provisions," which define "Proprietary Information" as "including but not limited to the non-public content of the database of Lateral Link candidates and the non-public identity of law firms." (Michael Allen Decl. ¶ 8, Ex. B at 3, 11.) Plaintiff additionally protects its database by requiring its recruiters to enter a unique user ID and password to access the database; upon termination of employment, recruiters lose this access. (Michael Allen Decl. ¶ 7.)

ii. It is Unlikely That Plaintiff Can Prove Defendants Misappropriated Plaintiff's Trade Secret

It is not enough, however, for Plaintiff to show its likelihood of success with regard to its possession of a trade secret. To establish that it is likely to succeed on the merits as to Plaintiff's misappropriation of trade secret claim, Plaintiff must also show that Defendants likely misappropriated Plaintiff's trade secret.

After Defendants resigned in late January 2016, Plaintiff reviewed Defendants' work email accounts. (Michael Allen Decl. ¶ 11.) Plaintiff discovered "multiple instances" of Defendants emailing "highly sensitive candidate and client information" from Defendants' work email accounts to Defendants' personal email accounts. (Michael Allen Decl. ¶ 13.) Specifically, Plaintiff found emails showing that a hiring manager at a large law firm in Chicago, looking for a real estate partner, "repeatedly attempted" to follow up with Defendant Turley on the search in October and November 2015. (Michael Allen Decl. ¶ 14.) Defendant Turley "appeared to make very little effort to

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work on the search until January 11, 2016," one week before Defendants resigned, when Defendant Turley asked the hiring partner to schedule a meeting for the following week. (*Id.*) Defendant Turley's calendar on his work laptop indicated he had a meeting scheduled with the hiring manager for the day after Defendant Turley resigned from Plaintiff's company. (*Id.*)

On January 19, 2016, Defendant Wilson called the hiring manager as planned. (Wilson Decl. ¶ 13.) Defendant Wilson told the hiring partner that Defendants had resigned from Lateral Link to start their own company, and that Defendants would be unable to work with the hiring partner "barring some agreement with Lateral Link that permitted [Defendants] to do so." (*Id.*) Defendant Turley did not have contact with the hiring partner between the date of his resignation and February 2, 2016, when Defendants received "an unsolicited invitation to connect with the Hiring Partner on LinkedIn." (Turley Decl. ¶ 20.) When Defendant Turley spoke with the hiring partner over the phone, Defendant Turley told the hiring partner that Defendants "could not assist . . . on the real estate partner search." (Turley Decl. ¶ 22.) Defendants contend that they expected Plaintiff to "craft a transition plan for the search, whether Lateral Link took over the search entirely or [Defendants] continued the search and paid Lateral Link the same amount of money that it would have received had [Defendants] still been [employed by] Lateral Link." (Wilson Decl. ¶ 11.)

The hiring partner informed Plaintiff that Defendants had worked with the client law firm to compile a targeted list of thirty-three potential candidates and had formally submitted a candidate for the position. (Michael Allen Decl. ¶ 15.)[4] The hiring partner also indicated that Defendants continued to contact him after Defendants resigned from Plaintiff's company. (*Id.*)

[4] The timing of these activities is not made clear in Michael Allen's declaration. Defendants' declarations provide, however, that these activities occurred prior to Defendants' resignation. (*See* Wilson Decl. ¶ 13 ("I informed the Hiring Partner that Lateral Link was in possession of all of the work materials relating to the search, including specifically the 'Target List' of potential attorney candidates created in coordination with the Hiring Partner which listed attorneys we had identified for potential outreach efforts, . . ."); Turley Decl. ¶ 17 ("While I was still employed with Lateral Link, Mr. Wilson and I submitted a single proposed candidate to the [hiring partner] after compiling a 'Target List' of approximately 30 potential candidates for the opportunity.").)

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Plaintiff additionally reviewed logs from the "admin database"; this database shows the number of emails sent from a recruiter's work email account, the number of candidates a recruiter assigns to himself from the company's attorney candidate database, and the number of candidates that the recruiter submitted for positions. (Michael Allen Decl. ¶ 11.) Based on Plaintiff's review of the admin database, Defendants sent a combined 360 emails from their Lateral Link email accounts in May 2015, but a total of fifty-nine emails in December 2015. (Michael Allen Decl. ¶ 12.) Plaintiff also observed that Defendants collectively assigned themselves seventeen candidates in July 2015, but assigned themselves one candidate in October 2015, and one in December 2015. (*Id.*) This "marked and significant drop" in activity, (*id.*), likely reflects Defendants' intent to resign in January 2016, not an intent to misappropriate. This is particularly true where Defendants were entitled to full payment of commission earnings for placement of a candidate only if they were employed by Plaintiff at the time Plaintiff received payment from the law firm client. (Turley Decl. ¶ 16; Turley Decl. ¶ 5, Ex. 1 at 3 ("Timing of Earning and Receiving Commission").)

Defendants further provide that their activity slowed because of their recognition of "the limited utility of Lateral Link's admin system." (Turley Decl. ¶ 16.) Instead, Defendants would contact attorney candidates with whom they were already working and attorney candidates who voluntarily initiated contact with Lateral Link by registering through Lateral Link's website. (*Id.*) Defendant Turley states that he has used and continues to use Leopard Solutions, a commercially available database requiring a paid subscription that compiles information on attorneys in every legal market in which Plaintiff operates, on a daily basis since his recruiting career began. (Turley Decl. ¶ 9.)

Finally, Plaintiff collected Defendants' company laptops and sent them to a consulting firm for analysis. (Michael Allen Decl. ¶ 11; Laykin Decl. ¶ 2.) On January 27, 2016, the consulting firm collected forensic images of the internal hard drive from each Defendant's computer. (Laykin Decl. ¶ 7.) Plaintiff retained Erik Laykin on January 28, 2016, to review electronic evidence of Defendants "for the purpose of examining that evidence to reconstruct any activity that took place on their computers in the period leading to" Defendants' departure. (Laykin Decl. ¶ 6.) This included determining "if there were indications of deletions of, alterations to, or misappropriation of confidential information belonging to Lateral Link." (*Id.*)

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The user files contained on each laptop included "numerous proprietary documents belonging to" Plaintiff. (Laykin Decl. ¶¶ 13, 19.) Laykin's review found a number of instances where "numerous documents" were "accessed with[in] a short period of time." (Laykin Decl. ¶ 14; *see also* Laykin Decl. ¶¶ 15, 20, 21.) Laykin does not define what it means to "access" a document, yet concludes that the documents were "potentially copied" due to the "nearly simultaneous accessing of [the] documents." (Laykin Decl. ¶ 20; *see also* Laykin Decl. ¶ 27.)

Laykin does not explore the possibilities that the last accessed date could reflect the movement of the files between folders, or opening the files for Defendants' review prior to their resignation. (*See* Jett Decl. ¶ 15, Ex. 19 at 245 ("Any viewing, copying, or moving of the documents, images, and other files automatically alters the last accessed date stamp of the file. Sometimes, last accessed time is changed due to some program's operation with files or folders. It might be antivirus software, which accesses files for virus scanning purpose or Windows Explorer, which extracts an icon from an executable file thus changing the last accessed date."); Wilson Decl. ¶ 15; Turley Decl. ¶¶ 32–36.) In fact, when Laykin received Defendants' computers, both computers were powered on; Laykin explains that "upon powering down the computers for purposes of running the images, last access for several records was recorded on January 27, the date the images were generated by" the consulting firm. (Laykin Decl. ¶ 13 n.1.) Nor does Laykin specify if the documents were copied from or copied to Defendants' work laptops.

Moreover, the Court finds it troubling that Plaintiff's expert assumpted that Defendants misappropriated Plaintiff's proprietary documents, and relied entirely upon the theory provided to him by Plaintiff. (*See* Laykin Decl. ¶ 22 ("When viewed in light of the probability that [Defendants] worked in collusion to remove Lateral Link proprietary documents for their own benefit in connection with their new venture, the other numerous instances of apparent copying . . . are also suspicious, and appear very likely to be instances of theft of Lateral Link proprietary information.").) Laykin's report concludes that:

> [T]he immediate preservation and access to relevant additional devices, systems, documents and cloud-based storage accounts, including Google Drive, Dropbox, iCloud, and Office 360 controlled by [Defendants] or their agents, are of vital interest to Lateral Link and *will be necessary to*

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> *determine the extent of potentially stolen material* currently in their possession.

(Laykin Decl. ¶ 27 (emphasis added).) Laykin does not and cannot conclude that Defendants misappropriated Plaintiff's proprietary information; rather, he speculates that the material is "potentially stolen," based on Plaintiff's representations to Laykin. In response, Defendants provide screenshots of activity logs from their various accounts with cloud-based digital data storage services. (Wilson Decl. ¶¶ 17, 18, 19, 21, 22, Exs. 4, 5, 6, 7; Turley Decl. ¶¶ 64, 65, 66, Exs. 15, 16, 17.) Although not a complete record of the files within Defendants' possession, this evidence weighs against Plaintiff's misappropriation allegations against Defendants.

Based on the current record, the Court does not find it likely that Plaintiff will prevail upon its misappropriation claim. The only evidence Plaintiff provides amounts to speculation. Nor does Plaintiff's proffered evidence raise serious questions going to the merits.

2. Penal Code Section 502

California Penal Code section 502, the Comprehensive Computer Data Access and Fraud Act, allows the owner of a "computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation" of any provision of section 502(c) of the statute to bring a private civil action. Cal. Penal Code § 502(e)(1). Plaintiff alleges that Defendants violated subsections (c)(1) and (2), which provide that a person is liable if he:

> (1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.
>
> (2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or

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> takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

Cal. Penal Code § 502(c).

For purposes of section 502, parties act "without permission" when they "circumvent[] technical or code-based barriers in place to restrict or bar a user's access." *Facebook, Inc. v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025, 1036 (N.D. Cal. 2012); *see Sunbelt Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1032 (N.D. Cal. 2014) (dismissing claim under section 502 where party failed to allege facts showing alleged violator circumvented technical or code-based barriers); *see also United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (explaining that a narrower interpretation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, is "a more sensible reading of the text and legislative history of a statute whose general purpose is to punish hacking—the circumvention of technological access barriers—not misappropriation of trade secrets—a subject Congress has dealt with elsewhere").

In Plaintiff's own words, "Defendants used *their access* to Plaintiff's computer system to take proprietary information and use it to defraud Plaintiff by then using that data in the furtherance of a competing business venture." (Ex Parte Appl. at 21 (emphasis added).) Plaintiff does not claim that Defendants circumvented any barriers, but rather, used their access to Plaintiff's computer system to commit allegedly unauthorized acts.

Even assuming Plaintiff properly alleges a cause of action under section 502, Plaintiff fails to establish the likelihood of success at this stage for the same reasons discussed above. Plaintiff's evidence does not suggest that Defendants have likely misappropriated Plaintiff's proprietary information. Plaintiff's allegations of use and copying are based on speculation.

b. Likelihood of Irreparable Harm

Plaintiff must demonstrate that irreparable harm is likely—not just possible—in the absence of a TRO. *See Winter*, 555 U.S. at 22; *see also Alliance for Wild Rockies*, 632 F.3d at 1131, 1134–35 ("[A] stronger showing of one element may offset a weaker

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showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits."). "Evidence of a loss of control over business reputation and damage to goodwill" may be sufficient to show irreparable harm. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). Here, Plaintiff may suffer irreparable harm through damage to Plaintiff's reputation. If Defendants are in fact improperly using the data submitted by Members via Plaintiff's website, "attorneys may not be willing to sign up to become Lateral Link members out of fear that their employers will discover they are searching for jobs, and law firms may be unwilling to work with Lateral Link to find new employees." (Ex Parte Appl. at 22–23.) Although irreparable harm is possible, it centers upon the success of the misappropriation claim. The Court finds that Plaintiff has not demonstrated that it is likely to suffer irreparable injury because Plaintiff does not establish the likelihood of its success on its misappropriation or section 502 claims.

c. Balance of Hardships

Plaintiff must also show the balance of hardships weighs in favor of granting a TRO. *See Doe*, 586 F.3d at 676. Similar to its argument regarding irreparable harm, Plaintiff claims damage to its goodwill and reputation. (Ex Parte Appl. at 23.) Plaintiff additionally argues that Defendants' alleged activities "could also expose [Plaintiff] to a potential privacy breach class action under California law, [as well as] suits by law firms whose trade secrets have been unlawfully retained." (*Id.*)[5]

The breadth of Plaintiff's proposed TRO suggests to the Court that the balance of hardships tilts in Defendants' favor. "Injunctive relief . . . must be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). Defendants contend, in two sentences, and without citing to any legal authority, that "Plaintiff's [Proposed] Order is far too vague and overbroad to be

[5] Plaintiff does not adequately explain what law firm trade secrets have been unlawfully retained.

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effectively enforceable" because it "does not include definitions of terms, or identify any clients or candidates it believes that Defendants 'stole.'" (Opp'n at 16.) Despite Defendants' brevity and unsupported arguments, the Court agrees that Plaintiff's requested TRO is overbroad.

Plaintiff provides no evidence, nor does Plaintiff allege, that Defendants are "[d]estroying, modifying, or disposing of" Plaintiff's proprietary information or other records. (Ex Parte Appl. at 3.) Moreover, Plaintiff establishes no reason for this Court to enjoin Defendants from otherwise "[s]ubmitting attorney candidates to law firms on searches that Defendants, or either of them, first learned of and/or worked on during their employment with" Plaintiff. (*Id.*) The Court is unwilling to inhibit Defendants' ability to compete with Plaintiff any more than necessary. The balance of hardships weighs against Plaintiff.

d. Public Interest

Finally, the Court must consider whether the requested TRO is in the public's interest. *See Doe*, 586 F.3d at 676. In analyzing the public interest factor, the court is to consider "whether there is some critical public interest that would be injured by the grant of preliminary relief." *Alliance for the Wild Rockies*, 632 F.3d at 1138. Plaintiff claims that the proposed TRO is in the public's interest because it protects the private information of attorney applicants that submitted data to Plaintiff when signing up to be a Member via Plaintiff's website. (Ex Parte Appl. at 24.) "However, the district court need not consider public consequences that are 'highly speculative.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (quoting *Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008)). As discussed, Plaintiff's contention that Defendants retained or are using the attorney applicants' private information is speculative at this point in time.

Because the Supreme Court "requires the plaintiff to make a showing on all four prongs," *Alliance for the Wild* Rockies, 632 F.3d at 1135, and the Court finds that Plaintiff has not established any one of the four requirements to obtain a TRO, the Court **DENIES** Plaintiff's Ex Parte Application.

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IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Ex Parte Application seeking a TRO.[6]

IT IS SO ORDERED. :

Initials of Preparer rf

[6] The Court declines to award Defendants attorneys' fees and costs incurred in connection with their Opposition where there is no evidence of Plaintiff's bad faith in bringing its misappropriation cause of action against Defendants. (*See* Opp'n at 17–18.) The issue before the Court is limited to whether a TRO is warranted, not whether Plaintiff has failed to state any claim.