

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:

THE ULTIMATE SOFTWARE
GROUP, INC.,
a Florida corporation,

Plaintiff,

v.

BRYAN S. CAMP,
an individual,

Defendant.

**PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING
ORDER WITHOUT NOTICE AND PRELIMINARY INJUNCTION,
WITH INCORPORATED MEMORANDUM OF LAW**

Plaintiff, The Ultimate Software Group, Inc. ("USG"), pursuant to Fed. R. Civ. P. 65, moves for entry of a temporary restraining order without notice and preliminary injunction against Defendant Bryan S. Camp ("Camp"). USG seeks to enjoin Camp from continuing to misappropriate and utilize USG's trade secret, confidential and proprietary information that Camp improperly acquired prior to his termination of employment from USG. As more fully described herein, the information taken by Camp includes client contact lists numbering in the thousands, forecasts and leads for prospective clients, and a list of clients deemed by USG as vulnerable to leave USG for a competitor's products and services – information that was gathered by USG over the course of 20 years and fiercely protected by USG over that period.

Exacerbating the immediacy of this motion is the fact that Camp is now employed by one

of USG's direct competitors, and is selling that competitor's products and services to the same geographic area and limited pool of clients as he was when employed by USG. Moreover, Camp has already admitted that he has contacted several USG contacts readily identifiable in the client lists he misappropriated. USG seeks an Order from this Court: (1) compelling Camp to return USG's confidential and propriety information (in electronic or any other format); (2) enjoining Camp from utilizing or otherwise relying on USG's confidential and proprietary information; (3) enjoining Camp from disclosing such information to any third party, including his current employer; and (4) enjoining Camp from making any further contact with USG's clients.

FACTUAL BACKGROUND

A. USG and its Business

Together with its subsidiary, USG designs, markets, implements and supports human resources, payroll and talent management solutions principally in the United States and Canada. See Declaration of Greg Swick, dated February 3, 2011 (the "Swick Decl."), at ¶ 3. USG's UltiPro software is a comprehensive Internet-based solution delivered primarily as an online service and designed to deliver the functionality businesses need to manage the complete employment life cycle from recruitment to retirement. Id. The solution includes feature sets for talent acquisition and onboarding, HR management and compliance, benefits management and online enrollment, payroll, performance management, learning management, salary planning and budgeting for compensation management, reporting and analytical decision-making tools, time and attendance, and a self service Web portal for executives, managers, administrators, and employees. Id. USG's focus on excellence has earned the company a solid reputation and a history of long-term relationships. Id. The company's employees work closely with its many customers representing diverse industries. Id.

USG markets and sells its products and services primarily through its direct sales force. Swick Decl., at ¶ 4. USG's direct sales force includes business development vice presidents, directors and managers who have defined territories, typically geographic. Id. The sales cycle begins with a sales lead generated through a national, corporate marketing campaign or a territory-based activity. Id. In one or more on-site visits, phone-based sales calls, or Web demonstrations, sales managers work with application and technical sales consultants to analyze prospective client needs, demonstrate USG's UltiPro solutions and, when required, respond to requests for proposals. Id. The sale is finalized after customers complete their internal sign-off procedures and the terms of the contract are negotiated and signed. Id. USG supports its sales force with a comprehensive marketing program that includes public relations, advertising, direct mail, trade shows, seminars and workshops, email marketing, and Web marketing. Id. at ¶ 5. Working closely with the direct sales force, customers and strategic partners, the marketing team defines positioning strategies and develops a plan for implementing these strategies. Id.

The market for USG's products is highly competitive. Id. at ¶ 6. USG's products compete primarily on the basis of technology, delivered functionality, price/performance and service. USG's competitors include companies such as Workday, Automatic Data Processing Inc., Ceridian Corp., PeopleSoft/Oracle, Lawson, and Kronos, Inc., each of which offer human resource management and payroll software products similar to UltiPro. Id. USG's success is dependent, in part, on its ability to protect its proprietary technology, customer information (both current and prospective), and business forecast information. Id. USG relies on a combination of copyright, trademark and trade secret laws, as well as confidentiality agreements and sales and licensing arrangements, to establish and protect its proprietary rights. Id. The value of this proprietary information to USG cannot be overstated. Id. at ¶ 7. USG has spent many years and

incurred substantial expense to both develop this proprietary information and safeguard it from competitors. Swick Decl., at ¶ 7. In a highly competitive market, USG's trade secret information such as the names, contact information, and needs of current and prospective customers gives USG a continuing competitive advantage. Id. This information is not generally known and would be extremely difficult, if not impossible, to duplicate. Id.

In addition to the protective measures described above, USG follows effective measures to safeguard its proprietary information internally. Id. at ¶ 8. These steps include use of individual user passwords to gain network access, on-screen confidentiality warnings, and auto-stamping of certain generated reports as "Confidential." Id. Further, to the extent USG's sales force is allowed access to this proprietary information, they are required to execute confidentiality agreements by which they agree to protect USG's proprietary information, acknowledge that the information is the sole property of USG, and agree to return any such information upon termination of their employment with USG. Id. Moreover, even if such agreements are not executed, USG's Employee Handbook also provides that every employee is obligated to protect USG's confidential and proprietary information both during and post-termination of employment. Id.

B. Camp's Employment by USG

In November 2005, USG hired Camp as a member of its sales team, allowing Camp to market USG's products and services to the Northeast sales region (generally including New Hampshire, Vermont, Connecticut, and portions of upstate New York). See Declaration of Kevin O'Dowd, dated February 3, 2011 (the "O'Dowd Decl."), at ¶ 3. As a condition of his employment, Camp executed an "Employee Proprietary Information and Intellectual Property Agreement," dated November 7, 2005 (the "Confidentiality Agreement"), which, as described

above, requires Camp to both protect USG's "proprietary information" while employed by USG and promptly return any such information to USG upon termination of employment. Id. A true and correct copy of the Confidentiality Agreement is attached hereto as Exhibit "A." The Confidentiality Agreement defines "Proprietary Information" as:

"Proprietary Information" is all information, whether or not in writing, that was or will be developed, created, or discovered by or on behalf of the Company or its clients, which has commercial value to the Company. "Proprietary Information" includes, but is not limited to, trade secrets, computer programs, computer codes, modules, features, designs, technology, data inventions (whether patentable or not), plans, *forecasts, customer and supplier lists* and other information concerning the Company or its clients which is received in confidence by or for the Company from any other person.¹

The Confidentiality Agreement sets forth a number of Camp's obligations with respect to the protection of Proprietary Information and Company Materials. Specifically, the Confidentiality Agreement provides, in pertinent part:

- All Proprietary Information... shall be the sole property of the Company.... At all times, both during my employment by the Company and after its termination, I will keep in confidence and trust and will not use or disclose any Proprietary Information or anything relating to it without the prior written consent of an officer of the Company. See Exhibit A, at ¶ 3(a).
- All Company Materials shall be the sole property of the Company.... I further agree that, immediately upon the termination of my employment by me or by the Company for any reason... I will return all Company Materials, apparatus, equipment and other physical property, or any reproduction of such property.... See Exhibit A, at ¶ 3(b).
- I understand that my employment creates a relationship of confidence and trust between me and the Company with respect to Proprietary Information. See Exhibit A, at ¶ 1.

¹ See Exhibit A, at ¶ 1 (emphasis added). The Confidentiality Agreement further defines "Company Materials" as documents or other tangible items that contain or embody Proprietary Information. Id. at ¶ 2.

USG employed Camp as a member of its sales team through September 2010. O'Dowd Decl., at ¶ 4. Throughout his employment, however, Camp's performance was consistently below USG's quota requirements and far below his peer salesmen. Id. During this time period, Kevin O'Dowd, USG's Vice President of Sales for the Northeast region, frequently and directly informed Camp that his job was in jeopardy due to poor performance. Id. In late July 2010, Camp asked O'Dowd if he should begin the process of looking for another job, to which O'Dowd replied that he should, since Camp's results were not improving. Id. On September 24, 2010, O'Dowd sent a letter to Camp (after a telephone discussion between the two) summarizing USG's and Camp's agreement to terminate Camp's employment (the "Termination Agreement") (together with the Confidentiality Agreement, the "Agreements"). Id. at ¶ 5. A true and correct copy of the Termination Agreement is attached hereto as Exhibit 'B.'

Rather than immediately terminate Camp's employment, the Termination Agreement provided that Camp's termination date would be October 29, 2010, providing Camp approximately one month to close any deals that Camp may have had in the 'pipeline,' thereby allowing him to maximize his financial benefit for the time he had invested in those deals. Id. at ¶ 6. The Termination Agreement further provided that, if Camp fully complied with the Termination Agreement's terms, Camp would be paid severance through November 30, 2010. Id. Similar to the Confidentiality Agreement signed by Camp in November 2005, the Termination Agreement again obligated Camp to protect USG's confidential and proprietary information following his termination from USG:

You are obliged to turn in any equipment, keys, diskettes, manuals or any other company property on the last day of employment. As stated in the Employee Handbook section 2-2, all employees are obligated to protect and not disclose any confidential and propriety information, regardless of whether a Confidential Non-Disclosure has been signed.

After sending the Termination Agreement, USG allowed Camp continued access to his e-mail and USG's network until October 28, 2010, the date Camp officially left USG and sent via UPS his laptop, Blackberry, and other items to USG. O'Dowd Decl., at ¶ 7. In particular, Camp was allowed access to USG's Salesforce.com tracking system, an internal website used by USG to track sales opportunities, including summaries of conversations with potential clients, contact information, and other information used by USG to effectively sell its products and services. Id. Although Camp was given access to the network until October 28, 2010, his access to Salesforce was removed on October 19, 2010. O'Dowd informed Camp of this on or about October 17, 2010 so that Camp would not be surprised or hurt that his access was removed. Id. Camp's laptop and other equipment was received and logged by USG's IT department on November 15, 2010. Id.

C. Camp's Breach of the Confidentiality and Termination Agreements and Tortious Conduct

Contemporaneously with Camp's termination of employment, USG hired Mike Ouellette as a salesperson to take over sales to Camp's assigned region. O'Dowd Decl., at ¶ 9. Ouellette started work at USG on October 18, 2010, ten days prior to Camp returning his laptop and other equipment to USG. See Declaration of Mike Ouellette, dated February 3, 2011 (the "Ouellette Decl."), at ¶ 3. Upon beginning his employment with USG, Ouellette immediately began the process of familiarizing himself with prospective clients in his assigned region, including any efforts made by Camp to market USG's products to these clients. Id. at ¶ 4. As part of this process, Ouellette reviewed Camp's logged data in Salesforce in addition to Camp's archived e-mails in an effort to determine what correspondence Camp had sent to prospective clients in addition to any notes Camp may have saved. Id.

In mid-December 2010, Ouellette asked O'Dowd for access to documents that might be located on Camp's returned laptop. Id. at ¶ 5. In particular, Ouellette sought to review the "My Documents" folder on the laptop's hard drive, which typically contains PowerPoint presentations, agendas, and other documents used in marketing efforts to prospective clients. Id. On December 15, 2010, O'Dowd sent an e-mail to USG's IT department requesting that Camp's hard drive be sent to his attention. O'Dowd Decl., at ¶ 9. After receiving the hard drive, O'Dowd subsequently mailed it to Ouellette, who in turn received the hard drive on or about January 7, 2011. Id., Ouellette Decl., at ¶ 6.

On January 21, 2011, while reviewing Camp's hard drive, Ouellette noticed a folder on the hard drive called "Territory." Ouellette Decl., at ¶ 7. Upon opening the folder, he discovered eighteen Excel spreadsheets, each of which were reports generated in Salesforce.com and exported to Excel by Camp. Id. Notably, these reports indicate that they were generated by Camp on dates beginning on September 5, 2011 and ending on October 19, 2011. Id. Each report included an auto-stamped warning stating: "Confidential Information – Do Not Distribute," along with information indicating that Camp ran the reports using his Salesforce.com User ID and the exact date/time each report was run. Id. For example, the file "860 all prospects 10-10.xls contained the following auto-stamped message at the bottom of the spreadsheet:

Copyright (c) 2000-2010 salesforce.com, inc. All rights reserved.
Confidential Information - Do Not Distribute
Generated By: Bryan Camp 10/19/2010 11:58 AM
Ultimate Software²

The information Camp downloaded contains extremely confidential data to USG. Swick Decl., at ¶ 9. It contains all of USG's prospective accounts, contacts (numbering in the

² Ouellette Decl., at ¶ 7.

thousands), and leads in Camp's territory, as well as the accounts, contacts, and leads in an adjoining territory. Id. Camp also downloaded hundreds of forecasted accounts to be sold in the neighboring territory, in addition to downloading USG's entire customer list for the Northeast and Mid-Atlantic regions – *approximately 8,800 individual contacts*. Id. One especially sensitive report Camp downloaded was USG's 'watch list,' a document containing those clients in the Northeast region that USG deemed vulnerable to switch to a competitor's products or that had expressed satisfaction concerns with USG's products. Swick Decl., at ¶ 9.

The importance and proprietary nature of the information downloaded by Camp cannot be overstated. Id. at ¶ 10. In a matter of days, Camp downloaded USG's customer list, its prospective customer list, contacts that USG had gathered over 20 years, projected accounts to be sold, and a 'watch list' of potentially vulnerable clients. Id. USG fiercely protects this data because, in the hands of a competitor, USG's success rate is likely to be dramatically altered. Id. The improper use of this data would likely cost USG millions of dollars a year and would cause irreparable harm for the foreseeable future. Id. Upon discovering the severity of this breach, USG immediately analyzed Camp's hard drive and confirmed that Camp copied each of the downloaded files to an external storage device that, upon information and belief, Camp retained after his termination from USG. See Declaration of Rob Vetter, dated February 3, 2011 (the "Vetter Decl."), at ¶¶ 4 – 6. In addition, USG performed a keyword search of the hard drive for any documents containing the word "Workday" and discovered a file on the hard drive that appears to be a Workday expense report form that was filled out by Camp. Id. at ¶ 7. This report indicates that Camp traveled for an interview at Workday on September 9, 2010 – four days after Camp downloaded a substantial number of the eighteen spreadsheets from USG's Salesforce.com website. Id.

D. Camp's Employment by Workday and Contact with USG Clients

After termination of his employment by USG, Camp accepted a position as a salesman with Workday, a direct competitor of USG. O'Dowd Decl., at ¶ 8. Much like USG, Workday sells human resources, payroll, and benefits software through a team of salesmen. Id. Workday markets to the same demographic segment of prospective clients as USG, and competes directly with USG on many accounts. Id. If Workday were to obtain the data misappropriated by Camp, it would gain an immediate competitive advantage over USG, and would allow Workday unfettered access to proprietary data that USG has fought to protect from its competitors. Id. Moreover, it is USG's understanding that Camp is responsible for the same geographic territory at Workday as he was at USG. Id.

On January 24, 2011 (prior to USG's discovery of the full extent of material downloaded by Camp), USG's Greg Swick, Chief Sales Officer, called Camp to alert him that USG had discovered that Camp downloaded certain files and that USG had hired legal counsel to further investigate. Swick Decl., at ¶ 11. Camp informed Swick that he was at a Workday kickoff event, and admitted that he had downloaded certain reports prior to his termination from USG. Id. Camp maintained, however, that he respected Swick and O'Dowd too much to ever use the data he took. Id. Later that night, Camp called O'Dowd and asked for help to diffuse the situation. O'Dowd Decl., at ¶ 11. During that call, Camp admitted that he was in contact with several clients in Connecticut who he previously sold to while employed by USG. Id.

ARGUMENT

I. USG is Entitled to a Temporary Restraining Order and Preliminary Injunction Against Camp

To obtain a temporary restraining order or preliminary injunction,³ the moving party must demonstrate all four of the following:

- (a) There is a substantial likelihood on the success on the merits;
- (b) The temporary restraining order is necessary to prevent irreparable injury;
- (c) The threatened injury outweighs the harm that the temporary restraining order would cause to the nonmovant; and
- (d) The temporary restraining order would not be adverse to the public interests.

See Snowden v. Town of Bay Harbor Islands, Florida, 358 F. Supp. 2d 1178, 1188 (S.D. Fla.

2004) (citing Parker v. State Board of Pardons and Paroles, 275 F. 3d 1032, 1035 (11th Cir.

2001). The goal of a preliminary injunction “is to prevent irreparable harm and to preserve the district court’s power to render a meaningful decision after a trial on the merits.” Loans of America FL, LLC v. Rapid Auto Loans, LLC, No. 10-60416-CIV, 2010 WL 2754336, at *5 (S.D. Fla. July 12, 2010).

A. There is a Substantial Likelihood that USG will Succeed on the Merits of its Claims

Because Camp has engaged in conduct that is in direct violation of the Agreements and has misappropriated USG’s confidential, proprietary, and trade secret information, there is a substantial likelihood that USG will succeed on the merits of its claims.

1. Breach of Contract (Count One)

In Florida, the elements of a breach of contract action are: “(1) a valid contract; (2) a

³ “[T]he same four factors apply to the determination of whether to grant a temporary restraining order or preliminary injunction.” Textron Fin. Corp. v. Unique Marine, Inc., No. 08-10082-CIV, 2008 WL 4716965, at *5 (S.D. Fla. Oct. 22, 2008); see also Chandnani v. V. Secret Catalogue Inc., No. 00-7820, 2001 WL 586692, at *2 (S.D. Fla. Mar. 19, 2001) (same).

material breach; and (3) damages.” Abbott Labs., Inc. v. Gen. Elec. Capital, 765 So. 2d 737, 740 (Fla. 5th DCA 2000). There is no dispute that the Agreements are binding, enforceable contracts containing reasonable restrictive covenants that survive the termination of Camp’s employment with USG. Moreover, the restrictions against misappropriation of USG’s trade secret, confidential, and proprietary information support legitimate business interests that justify the restrictions, including but not limited to protection of trade secrets, confidential business information, and substantial relations with specific existing and prospective customers.

Relevant to this litigation, the Agreements contractually required Camp to (1) protect and not disclose USG’s confidential and propriety information, and (2) return USG’s confidential and proprietary information to USG upon termination of employment. Camp materially breached these obligations by downloading (and transferring to an external storage device), at a minimum, eighteen spreadsheets containing contact information for thousands of USG’s clients, business forecasts, leads, and a watch list of clients deemed vulnerable to leave USG for its competitors. The confidential and proprietary nature of this information is indisputable.⁴ Moreover, Camp did this at a time he was on notice of his termination from USG and contemporaneous with his acceptance of employment with one of USG’s direct competitors. The information misappropriated by Camp was developed by USG over the course of twenty years and provides USG a competitive advantage in its dealings with current and prospective customers. The loss of this information, or the disclosure to a competitor, would result in millions of dollars in damages to USG.

2. *Misappropriation of Trade Secrets (Count Two)*

To state a claim for violation of Florida’s Uniform Trade Secret Act, “a plaintiff must

⁴ Notably, each of these spreadsheets is auto-stamped “Confidential – Do Not Distribute” and therefore Camp cannot feign ignorance to the confidential nature of these documents.

aver that: (1) the plaintiff possessed secret information and took reasonable steps to protect its secrecy and (2) the secret it possessed was misappropriated, either by one who knew or had reason to know that the secret was improperly obtained or by one who used improper means to obtain it.” Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 136 F. Supp. 2d 1271, 1291 (S.D. Fla. 2001) (citing Fla. Stat. § 688.002). “To qualify as a trade secret, the information that the plaintiff seeks to protect must derive economic value from not being readily ascertainable by others and must be the subject of reasonable efforts to protect its secrecy.” Id.

Here, USG has shown that it “possessed secret information” – its valuable contact lists, business forecasts, leads, watch lists, and other proprietary information. This information is the product of great expense and effort, and was gathered over the course of twenty years of building USG’s business. Numerous Florida courts have recognized that this type of information constitutes trade secrets that should be afforded protection under Florida law. See, e.g. Marlite, Inc. v. Eckenrod, No. 09-22607-CIV, 2011 WL 39130, at *5 (S.D. Fla. Jan. 5, 2011) (“There is ample authority holding that the term ‘trade secret’ includes active customer lists.”) (collecting cases); Cytodyne Technologies, Inc. v. Biogenic Technologies, Inc., 216 F.R.D. 533, 535-36 (M.D. Fla. 2003); East v. Aqua Gaming, Inc., 805 So. 2d 932, 934 (Fla. 2d DCA 2001); Sethscot Collection, Inc., v. Drbul, 669 So. 2d 1076, 1078 (Fla. 3d DCA 1996). Moreover, as demonstrated by the Swick Decl., USG “took reasonable steps to protect its secrecy,” by means of the Agreements, USG’s Employee Handbook, and many other safeguards including the use of individual user passwords to gain network access, on-screen confidentiality warnings, and auto-stamping of certain generated reports as “Confidential.” Swick Decl., at ¶ 8.

Further, there is no dispute that the information was misappropriated by Camp. Prior to his last day at USG, Camp downloaded a minimum of eighteen spreadsheets containing USG’s

confidential and proprietary information. The spreadsheets were located in a folder on Camp's returned laptop, which only Camp had access to. Camp then transferred the documents to an external storage device prior to returning his laptop to USG. Vetter Decl., at ¶ 6. USG therefore has a substantial likelihood of success on its claim under Florida's Uniform Trade Secrets Act.

3. Conversion (Count Three)

In Florida, "a conversion is an act of dominion wrongfully asserted over another's property inconsistent with his ownership therein." Thomas v. Hertz Corp., 890 So. 2d 448, 449 (Fla. 3d DCA 2004); see also Intelsat Corp. v. Multivision TV LLC, No. 10-21982-CIV, 2010 WL 5437261, at *5 (S.D. Fla. Dec. 27, 2010) (same). Here, by misappropriating USG's confidential and proprietary information, Camp is wrongfully asserting dominion over USG's property. The fact that Camp only downloaded a copy of the material is immaterial. See, e.g. Warshall v. Price, 629 So. 2d 903 (Fla. 4th DCA 1993) (finding substantial likelihood of success on conversion claim where former employee copied patient list prior to termination of employment); Spa Parts, Accessories & Servs., LLC v. Seeker, No. 8:09-CV-1247, 2009 WL 2496287 (M.D. Fla. Aug. 12, 2009) (finding substantial likelihood of success on conversion claim where former employee copied customer list). Here, the value of the information taken by Camp is in its secrecy and exclusive use by USG. If this information is disclosed to USG's competitors, USG will immediately lose its competitive advantage and the value of the information will greatly diminish.

4. Breach of Fiduciary Duty (Count Four)

To state a claim for breach of fiduciary duty under Florida law, a plaintiff must establish: "(1) the existence of a fiduciary duty; (2) its breach; and (3) damages proximately caused by the breach." Minotty v. Baudo, 42 So. 3d 824, 835-836 (Fla. 4th DCA 2010). "It is well-established

under Florida law that an employee owes a fiduciary duty and a duty of loyalty to his or her employer.” Charles Schwab & Co., Inc. v. McMurry, No. 2:08-cv-534, 2008 WL 5381922, at *1 (M.D. Fla. Dec. 23, 2008). Here, Camp acknowledged in the Confidentiality Agreement that his employment created “*a relationship of confidence and trust* between me and the Company with respect to the Proprietary Information.” See Exhibit A (emphasis added). Under Florida law, a relationship of confidence and trust is equivalent to the existence of a fiduciary relationship. See, e.g. Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So. 2d 536, 540 (Fla. 3d DCA 2003) (“A fiduciary relationship is based on trust and confidence between the parties.”); Treco Intern. S.A. v. Kromka, 706 F. Supp. 2d 1283, 1288 (finding allegation that plaintiff placed defendant “in a position of trust and confidence” sufficient to allege existence of fiduciary duty). Camp breached this relationship of confidence and trust by misappropriating the very information he was entrusted with. Finally, as described above, Camp’s actions could cause damages in the millions of dollars if disclosed to USG’s competitors.

B. Irreparable Injury

“In Florida, a statutory presumption of irreparable harm exists upon violation of an enforceable restrictive covenant. Under § 542.335(j), Florida Statutes, a party seeking to enforce a restrictive covenant by injunction need not directly prove that the defendant’s specific activities will cause irreparable injury if not enjoined.” Variable Annuity Life Ins. Co. v. Dull, No. 09-80113-CIV, 2009 WL 3180498, at *5 (S.D. Fla. Sept. 25, 2009) (granting preliminary injunction against former employee who, inter alia, downloaded sensitive customer data days before resigning and accepting employment with competitor). Rather, the statute provides that “[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant.” Fla. Stat. §§ 542.335(j); see also VALIC

v. Hausinger, 927 So .2d 243, 245 (Fla. 2d DCA 2006) (trial court’s failure to consider the harm presumed under Florida law, which includes the potential damage to plaintiff’s longstanding relationships with customers and the protection of confidential client information, was reversible error).

“Florida courts have repeatedly held that injunctive relief is appropriate where customer lists are involved.” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hagerty, 808 F. Supp. 1555, 1559 (S.D. Fla. 1992); see also Variable Annuity Life Ins. Co., 2009 WL 3180498, at * 5 (“Where customer lists are involved Florida courts have held that injunctive relief is appropriate.”) (citing cases); Exchange Int’l, Inc. v. Vacation Ownership Relief, LLC, No. 6:10-cv-1273, 2010 WL 4983669, at *5 (M.D. Fla. Oct. 27, 2010) (“Florida law protects customer lists and related information (addresses, phone numbers, etc.) from misappropriation and conversion through injunctive relief, especially when the lists are converted by former employees.”); Spa Parts, Accessories & Services, LLC v. Seeker, No. 8:09-cv-1247-T-27MAP, 2009 WL 2496287, at *1 (M.D. Fla. Aug. 12, 2009) (finding conversion of customer list and entering preliminary injunction to prevent use of customer information by former employee); Sethscot Collection, Inc. v. Drbul, 669 So. 2d 1076, 1078 (Fla. 3d DCA 1996) (enjoining former employee’s use of clothing retailer’s active customer list containing names of customers who had ordered from retailer in past eight years and detailed purchasing history for each one).

In this case, even absent the statutory presumption, there can be no question that USG will suffer irreparable injury if injunctive relief is not granted. Prior to his termination by USG, Camp downloaded USG’s client lists, business forecasts, watch lists, and other confidential and proprietary information that USG has gathered over the course of twenty years. The value in this information is its secrecy and protection from competitors – if Camp is allowed to disclose this

information to his current employer, or any other third party, it will not be possible to reverse the harm to USG's business. This factor weighs strongly in favor of granting injunctive relief.

C. Balance of the Harms

The relative hardships to the parties heavily favors the granting of injunctive relief. Here, the Agreements demonstrate an understanding between the parties that the information at issue is the sole property of USG that must be returned to USG upon termination of employment. Camp simply has no right to keep USG's confidential and proprietary information or to use it in competition against USG, particularly given that the information was developed at great expense and years of effort by USG. Camp cannot be "harmed" by an order requiring him to return and not use information he had no right to take from USG. In contrast, USG has a statutorily protected right to preserve its most confidential and proprietary information in a manner that shields USG from damage that could be caused by someone acquiring or disclosing the information through improper means. See Fla. Stat. § 688.002. The harm to USG from disclosure or use of this information could be incalculable, and would result in the immediate loss of USG's competitive advantage in the marketplace. Clearly, the third factor also weighs heavily in favor of injunctive relief.

D. The Public Interest

The public has an interest in protecting businesses from theft of confidential information. Tedder Boat Ramp Systems, Inc. v. Hillsborough County, Fla., 54 F. Supp. 2d 1300, 1305 (M.D. Fla. 1999) ("[I]t is well within the public interest to keep trade secrets free from general disclosure."); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lovekamp, No. 4:01CV318SPM, 2001 WL 810749, at *4 (N.D. Fla. July 16, 2001) (noting that the public interest "demands the enforcement of reasonable agreements between employees and employers

and to protect business investments and confidential customer information.”). Remedies at law are often insufficient “because of the time-sensitive nature” of confidential information and trade secrets “and the possible advantage it could engender.” Hatfield v. Autonation, Inc., 939 So. 2d 155, 158 (Fla. 4th DCA 2006). Here, Camp breached numerous contractual obligations by misappropriating USG’s confidential and proprietary information – the public clearly does not have an interest in sanctioning a former employee’s theft and use of sensitive information to gain a competitive advantage over his former employer. The fourth factor also greatly weighs in favor of injunctive relief.

II. The Court Should Grant the Temporary Restraining Order Without Notice

Pursuant to Fed. R. Civ. P. 65(b), a temporary restraining order may be granted without notice to the adverse party only if: (1) it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result before the adverse party can be heard in opposition, and (2) the applicant’s attorney certified the reasons that notice should not be required. Fed. R. Civ. P. 65(b). Here, as shown above, there is a real risk that providing notice to Camp would exacerbate the irreparable harm that Camp has already caused by encouraging Camp to quickly contact USG’s clients and prospective clients (which Camp admits he has already begun doing) and possibly destroy the evidence of his misappropriation. Upon learning of his termination from USG, Camp downloaded USG’s confidential and proprietary data. Shortly thereafter, Camp accepted employment with USG’s direct competitor, in whose hands the information Camp misappropriated could prove devastating to USG’s business. Under these circumstances, providing notice to Camp would frustrate the very purpose of the limited restraints that USG seeks here.

CONCLUSION

For the foregoing reasons, USG seeks and Order from this Court: (1) compelling Camp to return USG's confidential and propriety information (in electronic or any other format); (2) enjoining Camp from utilizing or otherwise relying on USG's confidential and proprietary information; (3) enjoining Camp from disclosing such information to any third party, including his current employer; and (4) enjoining Camp from making any further contact with USG's clients. USG requests that the Court immediately grant the above relief pursuant to a temporary restraining order, without notice to Camp, and set a hearing date on USG's motion for a preliminary injunction prior to expiration of the temporary restraining order.

**CERTIFICATE IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER**

Pursuant to Fed. R. Civ. P. 65, the undersigned attorney for USG certifies that no efforts have been made to give notice to Camp in advance of the Motion because, as set forth in the Motion and Complaint, Camp is now employed by a direct competitor of USG, and is marketing that competitor's products and services to the same limited pool of clients as USG. If notice is provided to Camp, he may rapidly increase his contact with USG's clients (which he admits has already begun) and disclose the entirety of USG's confidential and proprietary data to his new employer. These actions would cause immediate and irreparable harm to USG before Camp could be heard in opposition of the Motion. Unless a temporary restraining order is entered without notice to Camp, USG's confidential and proprietary information will be lost, and it will have no effective remedy available to it.

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