

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

CAPITAL DISTRICT PHYSICIANS' HEALTH PLAN,
INC.

Plaintiff,

-against-

DECISION
AND
ORDER

DAVID W. HENDERSON,

Defendant.

Index No. 1174-07

(Judge Richard M. Platkin, Presiding)

APPEARANCES: Brian M. Culnan, Esq.
 Iseman, Cunningham, Riester and Hyde, L.L.P.
 Attorneys for Plaintiff CDPHP
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 James E. Dering, Esq.
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 Albany, New York 12207

Hon. Richard M. Platkin, A.J.S.C.

Plaintiff, Capital District Physicians' Health Plan, Inc. (hereinafter "CDPHP") has moved, by Order to Show Cause, for a preliminary injunction enjoining defendant David Henderson from: participating in business activities that are in competition with plaintiff; disclosing or using confidential business and customer information belonging to CDPHP; and

soliciting employees or clients of CDPHP. Plaintiff's complaint in the underlying action seeks a permanent injunction enforcing certain covenants contained in the parties' employment agreement, as well as a demand for both compensatory and punitive damages for, *inter alia*, the alleged breach of said agreement.

Defendant was employed with plaintiff as Senior Vice President, Marketing and Chief Marketing Officer from on or about April 27, 2005 through his resignation on December 21, 2006. Although there is some disagreement regarding defendant's precise duties and responsibilities while employed with plaintiff, there is no real dispute that defendant was an executive at the highest levels within plaintiff organization and, as such, had access to sensitive and proprietary corporate and client information.

Defendant Henderson signed an agreement dated April 27, 2005 (hereinafter "Executive Employment Agreement"), which recited, in pertinent part:

5. COVENANTS. . . .

5.1 Executive further agrees that, for a period of six (6) months immediately following the last day of employment with CDPHP . . . Executive will not directly or indirectly, without the prior written consent of the Board of Directors of CDPHP . . . (a) engage in any business . . . associated with any business that provides health care insurance coverage or conducts any managed care business of the type, or which is the same or similar to that, then conducted by CDPHP, or which is competitive to that of CDPHP, in any county of any state in which CDPHP then conducts business; and (b) solicit or entice away from CDPHP any then current CDPHP . . . customers, clients or employees . . .

6. CONFIDENTIALITY. Executive will be entrusted and provided with, and exposed to, documents, materials, information, communications and conversations of or relating to CDPHP and its related entities . . . which are highly sensitive, proprietary, privileged and confidential in nature Executive agrees that all such information is strictly proprietary and confidential in all instances, and may not be disclosed . . . with anyone outside of CDPHP

Notwithstanding the above agreement, defendant, on January 8, 2007, began working for MVP Service Corp. (hereinafter “MVP”) as Executive Vice President and Chief Marketing Officer. It is undisputed that: MVP is a direct competitor of CDPHP; the defendant’s position within MVP is comparable to his former position at CDPHP; and CDPHP did not grant its prior written consent to such employment.

In support of its application for a preliminary injunction, CDPHP argues that defendant has breached the Executive Employment Agreement by: (1) working for MVP during the six-month period covered by the restrictive covenant; (2) enticing CDPHP employees to follow defendant to MVP; and (3) misappropriating CDPHP’s proprietary and confidential information. Plaintiff contends that it will suffer irreparable injury absent the requested preliminary relief. In opposition, defendant Henderson contends that: (1) the Executive Employment Agreement is not enforceable due to a lack of consideration; (2) he neither solicited anyone to leave CDPHP nor misappropriated any confidential or proprietary information; and (3) there is no legitimate employer interest that justifies specific performance of the covenant not to compete.

In order to obtain preliminary injunctive relief, the moving party must demonstrate “that irreparable harm will occur if the injunction is not granted, that such party has a likelihood of success on the merits, and that the balance of equities tip in its favor” (*Marietta*

Corp. v Fairhurst, 301 AD2d 734, 736 [3rd Dept. 2003] [citation omitted]). In determining whether plaintiff has met this standard, the Court must be mindful that a preliminary injunction is a “drastic remedy which is not routinely granted” (*id.*).

For the reasons that follow, the Court finds that plaintiff has failed to meet its heavy burden of demonstrating a clear entitlement to the extraordinary preliminary relief that it seeks.

Likelihood of Success on the Merits

The injunction requested by plaintiff would order specific performance of a covenant not to compete contained in an employment agreement. It is well established that non-compete clauses “are not favored” under New York law and will only be enforced in limited circumstances (*Morris v Schroder Capital Management International*, 7 NY3d 616, 620 [2006]). “Undoubtedly judicial disfavor of these covenants is provoked by ‘powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood’” (*Reed, Roberts Assocs. v Strauman*, 40 NY2d 303, 307 [1976] (*quoting Purchasing Assoc. v Weitz*, 13 NY2d 267, 272 [1963])). Accordingly, restrictive covenants in employment contracts will only be enforced to forestall unfair competition (*BDO Seidman v Hirshberg*, 93 NY2d 382, 391 [1999]; *see American Broadcasting Cos. Inc. v Wolf*, 52 NY2d 394, 404 [1981]).

“‘[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee’” (*BDO, supra*, at 389 (*quoting Reed, supra*, at 307)). On this motion, defendant does not contend

that the duration or geographic scope of the restrictive covenant is unreasonable, but argues that plaintiff has failed to demonstrate a “legitimate interest” in obtaining judicial enforcement of the restrictive covenant.

New York courts have enforced restrictive covenants based on an employer’s “legitimate interest” in “the protection against misappropriation of the employer’s trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary” (*BDO Seidman, supra*, at 389; see *Empire Farm Credit, ACA v. Bailey*, 239 AD2d 855 [3rd Dept.1997] [restrictive covenants will only “be enforced to the extent necessary to prevent the use of trade secrets or confidential customer information”]).

Plaintiff neither contends nor has proven that the services that defendant rendered to CDPHP were unique or extraordinary. Therefore, the only possible legitimate employer interest before the Court arises from plaintiff’s allegation that enforcing the non-competition agreement through injunctive relief is necessary to prevent defendant from using and disclosing CDPHP trade secrets or other confidential customer information.

The most detailed and specific evidence submitted by plaintiff in support of its allegation of actual misappropriation is found in the affidavit of Jason Sterling, the Director of Technical Services of CDPHP. His affidavit recites, in pertinent part:

3. During our inspection of Mr. Henderson’s e-mail account, we were able to determine that on December 4, 2006, Mr. Henderson sent his home e-mail address . . . a document entitled “Establishing Guidelines for CDPHP Web-Design.” A copy of the e-mail forwarding this document to Mr. Henderson’s home e-mail address is attached as Exhibit A.

4. We were also able to determine that on December 7, 2006, Mr. Henderson forwarded to his home e-mail address a Letter of Understanding for CDPHP's Medicare strategy project. A copy of the e-mail sending this document to Mr. Henderson's home e-mail address is attached as Exhibit B.

Plaintiff argues that this evidence of defendant's electronic transmission of these two sensitive CDPHP documents from his work email account to his personal email account establishes a misappropriation of trade secrets or confidential customer information, thereby providing a basis for injunctive relief.

Defendant Henderson does not dispute he emailed the two referenced documents to his personal email account, but claims that he did so in connection with legitimate CDPHP business duties. His affidavit recites, in pertinent part:

75. On the dates of those two e-mails, I was living at a property known as Crest Hill Suite while my family was waiting for renovations to our current home to be completed. CDPHP refers out-of-town executives and others to Crest Hill Suite, which is near CDPHP headquarters.

76. Mr. Sterling claims that I sent a document entitled "Establishing Guidelines for CDPHP Web-design" to my personal e-mail address. However he notes this occurred on December 4, 2006, which is well before I tendered my resignation or stopped working for CDPHP. That is true.

77. I e-mailed this document to my personal e-mail address so that I could access it from a computer at an office provided by Crest Hill Suite, and prepare for my dealings with Ravi Ika, President of Ika Solutions. . . .

78. Ika Solutions is one of the leading web-based sales platforms in the country. On behalf of CDPHP, I was working with Mr. Ika regarding possible web joint venturing proposals for CDPHP. I was also using this document for discussions with another company concerning web portal design.

79. After the guidelines document was used in CDPHP business, I did not need it for CDPHP anymore and discarded it. I no longer have a copy of that document. Further, the document contained nothing proprietary

80. Mr. Sterling's affidavit also states that I forwarded to my personal e-mail address a letter of understanding for CDPHP's Medicare strategy project. Again, however, he notes this occurred on December 7, 2006, which is well before I tendered resignation or stopped working for CDPHP. That is true.

81. I used that letter solely for purposes of my work for CDPHP. CDPHP was in separate discussions with two corporations regarding potential collaborative efforts, and I used the letter in preparing for my separate dealings with those entities.

82. There was nothing proprietary in the letter. It outlined deliverables and timelines for a consultant to develop a business plan for existing CDPHP Medicare products. I discarded the document after I no longer needed it for CDPHP, and I no longer have a copy of it.

Plaintiff's papers contain nothing inconsistent with this explanation. Indeed, an examination of the relevant emails, which are attached as exhibits to Mr. Sterling's affidavit, shows that they were forwarded to Henderson's personal account roughly contemporaneously with their receipt, which, on its face, appears consistent with defendant's explanation. Even assuming these emails contain trade secrets or confidential customer information (*see Leo Silfen, Inc. v. Cream*, 29 NY2d 387 [1972]; *H. Meer Dental Supply Co. v. Commisso*, 269 AD2d 664 [3d Dept. 2000]), in the absence of more detailed proof of an actual misappropriation, which may include demonstrating that defendant's proffered explanation for forwarding these documents to his personal email account is false or pretextual, the Court finds that this evidence is insufficient to demonstrate a likelihood of success.

Plaintiff also alleges that defendant physically removed confidential files from the CDPHP offices. In support of this allegation, plaintiff relies on the affidavit of Barbara Downs, a Senior Vice President of CDPHP, in which she avers: “Mr. Henderson was observed leaving his office at CDPHP with large numbers of binders which, *upon information and belief*, contained confidential and proprietary information belonging to CDPHP” (Downs Aff. ¶ 9 [emphasis added]). Further, Ms. Downs avers that “Mr. Galt and I reviewed the file drawers in Mr. Henderson’s former office at CDPHP. We discovered that some very sensitive strategic information was absent and that other recently created files appeared to be ‘light’ or missing” (Downs Aff. ¶ 14). In response, defendant acknowledges removing some personal items from his office prior to leaving CDPHP, including several binders, and discarding other items. The Court finds that plaintiff’s proof in this regard simply is too vague, conclusory and unsupported by personal knowledge to demonstrate a clear likelihood of success.

In addition to arguing that the restrictive covenant is enforceable on the basis of defendant’s misappropriation of trade secrets and confidential customer information, plaintiff also contends that preliminary injunctive relief is warranted under the doctrine of “inevitable disclosure”. According to plaintiff, defendant’s high-level executive employment with CDPHP gave him access to the company’s business practices, plans and sales and marketing information. Plaintiff contends that by accepting a similar position with a competitor, Mr. Henderson will necessarily use such information in his new employment (*see* Plaintiff’s Reply Memorandum of Law In Support of Plaintiff’s Application for a Preliminary Injunction, p 9 [“The centrality of Mr. Henderson to CDPHP’s sales, marketing and product development operations makes it highly unlikely that he can somehow eradicate CDPHP’s trade secrets from

his mind”]). In this connection, plaintiff also relies upon evidence that defendant accessed confidential CDPHP computer files and documents prior to his departure from the company.

Defendant, in turn, asserts that plaintiff has failed to establish that Mr. Henderson would inevitably use CDPHP’s trade secrets in his new employment. Defendant further argues that what plaintiff is actually seeking to do is to deny him the use of the business and marketing skills that he has developed over the course of his professional career and which he uses to earn a livelihood.

Under the doctrine of “inevitable disclosure”, a claim of trade secret misappropriation may be established by demonstrating that defendant’s new employment will inevitably lead him to rely upon his former employer’s trade secrets (*see PepsiCo, Inc. v. Redmond*, 54 F3d 1262, 1268-70 [7th Cir. 1995]). Disclosure is inevitable even assuming that the defendant acts in the best of faith (*Lumex, Inc. v. Highsmith*, 919 F Supp 624, 636 [SDNY 1996]) (“even assuming the best of good faith, it is doubtful whether the [former employee] could completely divorce his knowledge of the trade secrets from any . . . work he might engage in”).

Factors to be considered in determining whether disclosure of trade secrets is inevitable include, but are not limited to: (1) the extent to which the new employer is a direct competitor of the former employer; (2) whether the employee's new position is nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former employer; (3) the extent to which the trade secrets at issue would be valuable to the new employer; and (4) the nature of the industry and its trade secrets. *See Marietta, supra*, at 737 (citing *EarthWeb, Inc. v. Schlack*, 71 F Supp 2d 299, 310 [SDNY 1999], *remanded*, 205 F3d 1322 [2d Cir. 2000], *affd* 2000 WL 1093320 [2d Cir. 2000]).

A review of the decisions applying the doctrine of inevitable disclosure reveals that it has been relied upon in two distinct situations in which evidence of actual misappropriation is lacking. First, proof of inevitable disclosure has been used as a surrogate for an express restrictive covenant not to compete. Thus, in *PepsiCo v. Redmond*, even in the absence of an express restrictive covenant against post-employment competition and no proof of an actual misappropriation, a former employee was enjoined from working for a competitor (*see id.*).

In reversing a preliminary injunction issued under similar factual circumstances, the Third Department cautioned that reliance on inevitable disclosure to imply a restrictive covenant against competition is “disfavored” absent an actual misappropriation of trade secrets (*Marietta, supra*, at 737; *see Doubleclick Inc. v. Henderson*, 1997 N.Y. Misc. LEXIS 577 [1997] [proof of actual misappropriation in addition to inevitable disclosure]). Accordingly, while the *Marietta* decision suggests that proof of inevitable disclosure would not provide a basis for injunctive relief independent of an express restrictive covenant – though it does not foreclose the possibility entirely, since the Court’s decision ultimately rests on its holding that plaintiff failed to establish the existence of trade secrets – it does not address a situation where, as here, the doctrine is used in support of an application for specific performance of an express restrictive covenant.

A number of recent trial court decisions, principally from federal district courts applying New York law, have used proof of inevitable disclosure as a basis for enforcing restrictive covenants where proof of actual misappropriation has been lacking (*see e.g. Estee Lauder Cos. v. Batra*, 430 F Supp 2d 158 [SDNY 2006]; *Lumex, Inc. v. Highsmith, supra*). In fact, the New York courts have long relied upon similar considerations in enforcing restrictive employment

covenants, though necessarily not under the rubric of “inevitable discovery”. Thus, for example, in *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 AD 556, 561-62 (1919), the Fourth Department explained the basis for its reinstatement of an injunction providing for specific performance of a restrictive covenant as follows:

It is also apparent that the value of [the former employee’s] services to the defendant company arises from his experience while in the plaintiff’s employ, growing out of the practical application of these trade secrets and not otherwise. It is because of his special training and special knowledge that the defendant company must necessarily involve his bringing to its aid such knowledge as he has and which is entirely developed in connection with these secret processes. In this view, if he is permitted to enter this employ, injunctive relief in form against the imparting of such special knowledge is more than likely to prove inefficient. The mere rendition of the service along the lines of his training would almost necessarily impart such knowledge to some degree. Warren cannot be loyal both to his promise to his former employer and to his new obligations to the defendant company.

In this context – where the parties have agreed to an express restrictive covenant against post-employment competition – proof of inevitable disclosure may be used to demonstrate both: (1) the threatened disclosure of trade secrets; and (2) imminent and irreparable harm to the former employer resulting therefrom. Thus, in considering plaintiff’s likelihood of success, proof of inevitable disclosure goes to the second prong of the *BDO Seidman* test: demonstrating a legitimate employer interest in enforcing the restrictive covenant. As discussed previously, it is well established that the protection of a former employer’s trade secrets from disclosure to a competitor represents a legitimate employer interest that warrants enforcement of a covenant not to compete through injunctive relief (*see BDO Seidman, supra*, at 389).

While there is some authority suggesting that the doctrine may also be “disfavored” in this context (*see Colonize.com, Inc. v. Perlow*, 2003 US Dist LEXIS 20021 [NDNY 2003]), its application to such cases should not be controversial. Unlike the implied restrictive covenant at issue in *Marietta*, all that is sought in these cases is enforcement of an express agreement between the parties – an agreement that the employer may well have been deemed necessary precisely because of concerns regarding the inevitability of disclosure (*see e.g. Kodak*, 189 AD at 562 [“Quite evidently it was exactly this situation which led to the making of the contract.”]).

And while proof of inevitable disclosure may demonstrate that the employer has a legitimate interest in protecting against the imminent loss of trade secrets, enforcement of the express restrictive covenant still must be shown to be reasonable in time and geographic scope and not harmful to the general public – factors that ensure enforcement of the covenant is consistent with the well established public policy considerations that animate this area of law (*see Reed, Roberts*, 40 NY2d at 307). At the same time, reliance on the doctrine of inevitable disclosure must be respectful of the principle that our free economy is based upon competition, and workers cannot be compelled to erase from their minds all of the general skills, knowledge, and acquaintances and the overall experience acquired during employment upon taking another job (*Kalnitz v. Ion Exchange Prods., Inc.*, 2 Ill. App.3d 158, 161, 276 NE2d 60, 62 [Ill. App. Ct.1971]).

In reviewing plaintiff’s claim of inevitable disclosure, several of the factors set forth in *Marietta* weigh strongly in favor of CDPHP. It is undisputed that: defendant left CDPHP to work for a competitor; Mr. Henderson was a high-level executive at CDPHP with responsibilities for business development and marketing; Mr. Henderson enjoyed broad access

to CDPHP's proprietary business and customer information; and Mr. Henderson performs very similar duties for his new employer.

However, several of the other factors relevant to plaintiff's claim of inevitable disclosure necessarily involve particularized consideration of the specific trade secrets at issue. For example, the Court must determine, *inter alia*, the extent to which such secrets would be valuable to the new employer, as well the role that trade secrets play within the health insurance and health maintenance organization industry (*see Marietta, supra*, at 738). Depending on its analysis of these factors, the Court may find that disclosure is not necessarily inevitable or that the competitive harm to the former employer caused by disclosure may not warrant injunctive relief (*see International Paper Co. v. Suwyn*, 966 F Supp 246 [SDNY 1997]; *see also Jay's Custom Stringing, Inc. v. Jonghwan Yu*, 2001 US Dist LEXIS 9298 (SDNY 2001) [rejecting inevitable disclosure based on lack of utility of trade secrets to new employer]).

In this case, plaintiff has not put forward sufficient evidence regarding the nature of the alleged trade secrets at issue to apply fully the doctrine of inevitable disclosure. While plaintiff broadly avers that the business practices, plans and sales and marketing information that defendant had access to during his employment were in fact trade secrets, these conclusory allegations do not provide an adequate basis upon which to determine: whether Mr. Henderson would necessarily recall and disclose such secrets in his new employment; the value of the trade secrets to MVP; the harm to CDPHP that would be caused by disclosure; and the role and nature of trade secrets within the industry in which CDPHP and MVP compete. These factors are relevant not only to likelihood of success, but also to the balancing of the equities and determining whether plaintiff has shown imminent and irreparable harm.

Even more fundamentally, plaintiff must demonstrate not only the nature of the proprietary confidences that Mr. Henderson enjoyed, but also that such confidences represent trade secrets under New York law. As noted previously, “mere knowledge of the intricacies of a business is simply not enough” (*see Marietta, supra*, at 739 [pricing data and market strategies held not to constitute trade secrets]). On the other hand, strategic business information has, in some cases, been held to constitute a trade secret (*see Estee Lauder, supra*, at 175; *PepsiCo, supra*, at 1265 [discussing the valuable and sensitive nature of an employer's "Strategic Plan" and "Annual Operating Plan"]). In this connection, the Court must also consider the measures that CDPHP has taken to safeguard its proprietary information, as well as the availability of such information from other sources, including public regulatory filings. In the absence of a clear demonstration that the business information that defendant had access to were trade secrets and proof that these trade secrets would inevitably be disclosed to defendant's new employer, the current record fails to establish a likelihood of success on plaintiff's claim of inevitable disclosure.

In view of the foregoing, the Court find that plaintiff has not established, on this limited evidentiary record, a likelihood of success in establishing that specific performance of the restrictive covenant is necessary to protect a legitimate business interest of CDPHP. While plaintiff may well succeed in establishing such a claim on the merits after an opportunity for pre-trial discovery, the evidentiary record before the Court does not demonstrate a clear entitlement to the requested preliminary relief.

Plaintiff has requested the opportunity for an immediate evidentiary hearing in the event that the Court finds that disputed issues of fact preclude the issuance of preliminary injunctive

relief. “Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.” CPLR 6312(c). The Court has considered plaintiff’s request for an immediate hearing, but is not persuaded that it is warranted at this juncture. As discussed above, plaintiff’s moving papers do not provide the Court with sufficient evidence to demonstrate the inevitable disclosure of CDPHP trade secrets. Further, in seeking to establish actual misappropriation, plaintiff’s reliance on inferences drawn from equivocal actions on defendant’s part – actions not even sworn to by individuals with personal knowledge in some cases – simply is not enough to demonstrate the elements necessary to establish an entitlement to the extraordinary interim relief sought by plaintiff. Accordingly, plaintiff’s request for an immediate hearing is denied.

In addition to seeking an injunction to enforce the covenant not to compete, plaintiff also seeks to restrain defendant from violating two other provisions of the Executive Employment Agreement: a provision that prohibits defendant from soliciting CDPHP customers or employees, and another that prohibits defendant from using trade secrets or other confidential information belonging to CDPHP. Defendant does not raise any specific legal objection to the enforceability of these particular covenants, but contends that the entire Executive Employment Agreement is invalid and unenforceable due to a lack of consideration (Henderson Aff. ¶ 8), though his counsel cites no legal authority in support of that contention.

Defendant's principal argument in this regard is that because he had been hired and worked for plaintiff for a number of months prior to signing the Executive Employment Agreement, new consideration – separate and apart from the consideration that supported his original employment agreement – was required. In response, plaintiff points to the following: (1) the offer letter of March 16, 2005, which specifically states that Henderson's employment is contingent upon signing the Executive Employment Agreement; (2) Henderson's delay in signing the agreement when he was first requested to do so, which CDPHP avers was immediately upon the commencement of his employment; and (3) defendant's continued at-will employment with CDPHP from late 2005 through the end of 2006, which plaintiff argues is adequate consideration for any new covenant imposed upon Mr. Henderson, even assuming that new consideration were required.

Having reviewed the agreements at issue, the Court finds plaintiff is likely to succeed in establishing that no new consideration was required for the Executive Employment Agreement and, in any event, plaintiff's continued employment of defendant, an at-will employee, would be adequate consideration if additional consideration were required (*see Zellner v Conrad*, 183 AD2d 250, 256 [2nd Dept. 1992] ["Because in at-will employment the employer has the right to discharge the employee . . . without cause . . . forbearance of that right is a legal detriment which can stand as consideration for a restrictive covenant."]; *cf. Sysco Corp. v Maines Paper & Food Serv. Inc.*, 254 AD2d 611 [3rd Dept. 1998] [reaching contrary conclusion under Pennsylvania law]). Accordingly, the Court finds that plaintiff has established a likelihood of success with respect to the enforcement of covenants against

defendant soliciting CDPHP customers and employees and using CDPHP trade secrets or other confidential information.

Irreparable Harm

In addition to demonstrating a likelihood of success, a party seeking a preliminary injunction must also show, as a threshold requirement, the prospect of irreparable injury if such relief is not granted (*see Town of Liberty Volunteer Ambulance Corp. v Catskill Regional Med. Ctr.* 30 AD3d 739 [3rd Dept. 2006]). Irreparable injury in this context means any injury for which a monetary award alone cannot be adequate compensation (*see Winkler v Kingston Housing Authority*, 238 AD2d 711 [3rd Dept. 1997]). Plaintiff must also demonstrate that such an injury is more than just a mere possibility and, in fact, is likely and imminent absent injunctive relief (*Golden v Steam Heat, Inc.*, 216 AD2d 440 [2nd Dept. 1996]).

Plaintiff argues that irreparable harm must be presumed in cases where a trade secret or confidential customer information has been misappropriated. Defendant does not dispute this contention, and it is an accurate statement of the law (*see e.g. Marietta, supra*, at 737). However, in view of the Court's determination that plaintiff has not established a likelihood of success in establishing the actual misappropriation of trade secrets or confidential customer information, reliance on this presumption must fail. Plaintiff's reliance on inevitable disclosure is unavailing for the same reason.

With respect to the covenants restricting the use of confidential information and prohibiting the solicitation of CDPHP employees and customers, the Court notes that defendant has entered into an agreement with his current employer whereby Mr. Henderson has committed that he: “[w]ill fulfill his duty of loyalty to CDPHP and the restrictions associated with duty,

included the duty not to use confidential information or trade secrets belonging to CDPHP”; “[w]ill not disclose . . . any nonpublic information belong to CDPHP, such as strategic planning and customer information; “[w]ill not solicit any of CDPHP’s clients, or engage in any conduct that could be construed as soliciting . . . for the six month limitation period set forth in his employment agreement with CDPHP; and “[w]ill not solicit any of his CDPHP coworkers to join him in leaving the company”. (Henderson Aff., Exhibit A). Further, defendant’s new employer has provided written assurances to plaintiff that it: “will not request Mr. Henderson to . . . solicit or entice away from CDPHP any employer groups, enrollees, members, customers, clients or employees of CDPHP”; “will not request Mr. Henderson to disclose, use or discuss any alleged confidential or proprietary information that he obtained while working at CDPHP”; “will direct Mr. Henderson not to . . . solicit or entice away from CDPHP any employer groups, enrolles, members, customers, clients or employees of CDPHP”; and “will direct Mr. Henderson not to disclose, use or discuss any alleged confidential or proprietary information that he obtained while working at CDPHP” (Henderson Aff., Exhibit B).

In view of the express agreements of defendant (and his current employer) to refrain from disclosing, using or discussing CDPHP’s proprietary information and from soliciting CDPHP’s customers and employees – agreements that were submitted to this Court by defendant and his counsel for purposes of deciding this motion and which the Court relies upon in so doing – and in the absence of any substantial evidence to the contrary, it cannot be said that plaintiff has established that a violation of these two covenants is imminently threatened and likely to occur absent injunctive relief.

With respect to the covenant restricting defendant from soliciting of CDPHP employees and customers, the Court notes that plaintiff does submit an affidavit in which a corporate officer avers that “we have been advised that Mr. Henderson has either directly or indirectly contacted the spouses of at least two key CDPHP marketing department management personnel, in an attempt to entice the CDPHP employees to join him at MVP.” (Downs Aff. ¶ 15). Defendant responds by observing that plaintiff does not state by whom it was so advised, the identities of the individuals allegedly contacted or any other specific information. (Henderson Aff. ¶ 67). Further, defendant acknowledges that he did have post-employment communications with the spouse of one current CDPHP employee, but avers that the conversation was initiated by the spouse and that he terminated the conversation once he became aware of the subject matter (*Id.* ¶ 68). In the absence of stronger evidence demonstrating that defendant is likely to solicit CDPHP employees and customers going forward, the Court finds that plaintiff has failed to establish the type of imminent and likely harm necessary to warrant preliminary injunctive relief.

Balance of the Equities

Plaintiff’s complaint and moving papers raise serious and troubling allegations of potential unfair competition resulting from the actions of a high-level executive with broad access to a wide array of proprietary CDPHP information who departed to a competitor in violation of an express covenant not to do so. *See PepsiCo, supra* at 1270 (“In other words, PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game.”). Plaintiff is likely to succeed in establishing that the restrictive covenant is reasonable in duration and geographic scope and was part of a

binding legal contract. All plaintiff seeks is for defendant to abide by his agreement (*see Outsource Intl., Inc. v. Barton*, 192 F3d 662 [7th Cir. 1999, Posner, J., dissenting] [advocating enforcement of all post-employment covenants in accordance with general contract law principles]). Accordingly, the Court finds considerable equities in favor of plaintiff,

Nonetheless, the Court must be mindful that defendant Henderson already is working for MVP, and the injunction that plaintiff seeks would require him to discontinue this employment. As such, the requested injunction would not merely maintain the status quo pending a full adjudication on the merits, but would instead grant to plaintiff a portion of the ultimate relief that it seeks. It is well settled that the purpose of a preliminary injunction “is to preserve the status quo pending resolution of the underlying dispute (*see Bonnieview Holdings, Inc. v. Allinger*, 263 AD2d 933, 935 [3d Dept. 1999]), and injunctions that seek to alter the status quo on a provisional basis are subject to more rigorous scrutiny (*see e.g. Residential Bd of Managers of the Columbia Condominium v. Alden*, 178 AD2d 121 [1st Dept. 1991]; *Xerox Corp. v. Nieves*, 31 AD2d 195, 197 [1st Dept. 1968]).

This is particularly true with respect to preliminary relief that would deny a litigant the opportunity to continue employment. The Court of Appeals has cautioned that powerful considerations of public policy militate against depriving an individual of his livelihood (*see Purchasing Assoc. v. Weitz*, 13 NY2d at 273; *see also Continental Group, Inc. v. Kinsley*, 422 F Supp 838 (D. Conn. 1976) [“A preliminary injunction that interferes with a person's gainful employment should never be ordered unless manifestly warranted.”]). Based on these considerations, the Court concludes that the requested interim relief should only be granted upon the strongest possible demonstration of likelihood of success and irreparable harm.

While the Court is constrained, based on the limited evidentiary record before it and precedent that disfavors the enforcement of restrictive employment covenants through specific performance, to deny plaintiff's application for a preliminary injunction, the manner and circumstances under which defendant left his employment with CDPHP raise legitimate questions with respect to the continued protection of CDPHP's corporate confidences. Pre-trial discovery in this case may well result in proof of actual misappropriation or establish the inevitable disclosure of plaintiff's trade secrets. Further, the prudential and policy concerns that hamper plaintiff's case today may not be present at later stages of this litigation. Finally, the Court recognizes that due to the nature of the Executive Employment Agreement, that plaintiff is laboring under serious time constraints with regard to continued viability of certain of its claims. Accordingly, the Court intends to provide plaintiff with a prompt adjudication of its claims for injunctive relief.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is hereby denied; and it is further

ORDERED that the parties are to appear in my chambers on March 16, 2007 at 2 p.m. for a preliminary conference to establish an expedited discovery and trial schedule.

This constitutes the Decision and Order of the Court. All papers, including this Decision and Order are returned to defendant's counsel. The signing of this Decision and Order

shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
March 12, 2007

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

By Plaintiff:

Order to Show Cause, dated February 7, 2007;
Affidavit of Barbara A. Downs, sworn to February 6, 2007 with attached exhibit A;
Affidavit of Jason Sterling, sworn to February 6, 2007 with attached exhibits A-D;
Affidavit of Frederick B. Galt, sworn to February 16, 2007 with attached exhibit A;
Plaintiff's Reply Memorandum of Law In Support of Plaintiff's Application for a Preliminary Injunction

By Defendant:

Affirmation of James E. Dering, Esq., dated February 12, 2007, with attached exhibit A;
Affidavit of David W. Henderson, sworn to February 11, 2007, with attached exhibits A-D;
Sur-Reply Affidavit of David W. Henderson, sworn to February 21, 2007.