Supreme Court of New York.
New York County
RENAISSANCE TECHNOLOGIES CORPORATION, Plaintiff,
v.
MILLENNIUM PARTNERS, LP, Millennium Management, LLC, Millennium International Management, LLC, Pavel Volfbeyn, and Alexander Belopolsky, Defendants.
No. 603839/03.
April 2, 2004.

Part No. 18575

GAMMERMAN, J.H.O.:

This action is brought by plaintiff Renaissance Technologies Corporation ("Renaissance") against two former employees, Pavel Volfbeyn and Alexander Belopolsky, along with their present employer and related entities, Millennium Partners, LP; Millennium Management, LLC; and Millennium International Management, LLC (collectively "Millennium").

In motion sequence no. 001, plaintiff moves for a preliminary injunction, as follows:

- enjoining the individual defendants and others from managing, controlling or directing equity trades or an equity trading portfolio on behalf of any Millennium partnership;

- enjoining all defendants and others from disclosing, using or applying plaintiffs "confidential information" or "intellectual property" as defined in the individual defendants' employment agreements;

- enjoining all defendants and others from destroying or failing to preserve all products, objects, notes, memoranda manuals, emails, charts, graphs, programs, disks, magnetic tapes, business plans or any other written, recorded or graphic materials and all copies thereof, in their possession or under their control, wherever located, which do or may contain, reflect or relate to, directly or indirectly, any trade secrets, intellectual property or confidential business information of plaintiff, or to communications, negotiations or agreements relating to any relationship between the individual defendants and Millennium or any other potential employer; and

- enjoining Millennium from employing the individual defendants to develop, manage or use a statistical arbitrage system or strategy based on computerized analysis and models to generate trading instructions.

This motion was orally adjudicated on the record on March 9, 2004. At that time I advised the parties that a written opinion would be forthcoming.

FACTS

Defendants Volfbeyn and Belopolsky are former employees of Renaissance. Renaissance engages in statistical arbitrage, described by plaintiff as the use of "complex and proprietary models to forecast price trajectories of securities and futures, and to decide how to place trades so as to maximize expected profits while managing risk and costs." It is undisputed that plaintiff has achieved considerable success. Both of the two individual defendants signed confidentiality agreements at

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the time they were hired. Subsequently, they were given promotions to "principal" status. It is undisputed that both at the time they were hired, and at the time they were offered the promotions, they were not told that either the promotions or their continued employment was contingent on signing noncompete agreements. Subsequent to the promotions, they were asked to sign one-year noncompete agreements. Both refused to sign. Both were fired for refusing to sign. After being fired, they were hired by Millennium. It is undisputed that defendants' responsibilities and duties were not changed by the promotions, and that plaintiffs employees who are not "principals" have access to confidential information but are not required to sign noncompete agreements.

For the purpose of this decision, I assume, without deciding, that Millennium is a "competitor" within the scope of the relevant case law.

Plaintiff proffers no direct evidence of any misappropriation or misuse, or of any threats of misappropriation or misuse. Instead, plaintiff relies on a doctrine called "inevitable disclosure." That doctrine is based on the premise that if there is enough of a nexus between the nature of the information and the nature of the work done by the employee, it is predictable that, even if inadvertently, the employee, in serving his or her new employer, will use knowledge and understanding gained during his or her former employment. [FN1] In addition, despite having conducted considerable discovery already, plaintiff relies on what can best be described as a combination of circumstantial evidence and conjecture in an attempt to suggest that defendants intended to use plaintiffs alleged confidential information. [FN2]

FN1. Contrary to plaintiffs assertion at p 10 of its reply memo of law, my ruling earlier in this action regarding defendants' proposed expert witness was unrelated to any concern about "inevitable disclosure."

The "inevitable disclosure" doctrine relates only to the use of confidential information for the employee's new employer. It does not substitute for actual evidence of disclosure to the marketplace generally, and there is a wholesale dearth of evidence to support even the conjecture that any such marketplace disclosure would occur. To the contrary, if plaintiffs "harm" theory is correct, then any benefit that defendants might realize by using plaintiffs confidential information for Millennium, would be destroyed if defendants disclosed it to the marketplace in general.

FN2. By way of example, plaintiff points to the fact that after plaintiff insisted that the individual defendants sign the noncompete clauses, the individual defendants began to explore alternative employment without informing plaintiff that they were doing so. Plaintiff contends that this supports the conclusion that the individual defendants intended to misappropriate plaintiffs confidential information. Such a weak inference fails to support the drastic relief that plaintiff seeks. It is neither unusual nor improper for employees who anticipate a potential need for new employment, to seek it while still employed and without telling their present employer that they are doing so.

In its reply papers, plaintiff relies on certain deposition testimony to argue that defendants are using protected information. Regardless of whether that testimony was available at the time of the initial motion, and even assuming arguendo that the testimony support plaintiffs contentions, relief may not be granted if the moving papers do not, independently, and in the first instance, support the relief sought.

Thus, in essence, this case presents the issue of whether two employees who were fired for refusing to sign one-year noncompete agreements can be restrained,

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potentially indefinitely, based on the premise that it is "inevitable" that they will disclose or use the former employer's confidential information.

To the extent that plaintiff seeks to enjoin defendants' employment, that relief is contrary to the principles enunciated by the Court of Appeals in *American Broadcasting Cos. v Wolf,* 52 NY2d 394 (1981):

After a personal service contract terminates, the availability of equitable relief against the former employee diminishes appreciably. * * * Only if the employee has expressly agreed not to compete with the employer following the term of the contract, or is threatening to disclose trade secrets or commit another tortious act, is injunctive relief generally available at the behest of the employer [citations omitted].

The Court of Appeals held further:

Equally unavailing is ABC's request that the court create a noncompetitive covenant by implication. Although in a proper case an implied-in-fact covenant not to compete for the term of employment may be found to exist, anticompetitive covenants covering the postemployment period will not be implied. [fn omitted]. Indeed, even an express covenant will be scrutinized and enforced only in accordance with established principles.

In *Maltby v Harlow Meyer Savage, Inc.,* 223 AD2d 516 (1st Dept), *lv dismissed* 88 NY2d 874 (1996), citing *Wolf,* the First Department affirmed a preliminary injunction against competitive employment *because* the employee *had* opted to sign the noncompete clause in return for a quid pro quo. The implication is that had the employee not signed the noncompete clause, *Wolf* would preclude an injunction against competition.

Wolf did not address the "inevitable disclosure" doctrine. The doctrine has been the subject of a very small number of New York State cases. Most notably, in *Willis of New York, Inc. v DeFelice,* 299 AD2d 240 (1st Dept 2002), the First Department held that the doctrine could be applied to high-level employees who had signed restrictive covenants. However, neither the lower court nor the First Department issued any injunction as to the scope of employment, which is what plaintiff seeks herein, or of the employment itself.

The only injunctive relief that was issued (either by the Supreme Court or the First Department) was to enjoin solicitation of plaintiffs clients, and to enjoin disclosure and use of trade secrets. [FN3] Since solicitation and disclosure would have been per se wrongful, enjoining them did not prohibit the defendants from doing what they were otherwise permitted to do. Here, plaintiff seeks to enjoin defendants from activities that are both legal and contractually permissible.

FN3. The lower court's order, contained in the Record on Appeal in *Willis* at pp 13 et seq., provides, in pertinent part:

1. Plaintiffs' motion is denied, on the grounds of enforcement of the restrictive covenants contained in certain employees' employment contracts, plaintiffs having failed to satisfy the elements for such relief, including probability of success on the merits, irreparable harm and balancing of the equities in their favor. Plaintiffs may renew their motion only on the grounds of unfair competition and/or corporate raiding and solely in the event employees of Willis en masse join Aon Risk Services, Inc. of New York as a result of solicitation by the individual defendants restrained below.

2. The court, in the exercise of its equitable powers and to prevent unfair

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competition, hereby (a) restrains defendants DeFelice, McCarthy and Andler from soliciting, directly or indirectly, Willis clients in contravention of their agreements with Willis, and (b) restrains defendants DeFelice, McCarthy, Andler Galiano, Berlingiori and Nowicki from violating their common law duty to not divulge any confidential or proprietary information of Willis concerning Willis clients, that they gained through their employment at Willis.

Of special interest is the following discussion by the First Department regarding paragraph 2(b) of the order, which restrained the individual defendants from divulging plaintiffs confidential or proprietary information:

plaintiffs failed to demonstrate that they would likely prevail in demonstrating that the individual defendants were, in fact, misappropriating and exploiting their confidential information, and thus the restraint imposed is not sustainable as to defendants [names] who were not shown to be high-level employees upon whom such a restraint might be sustainable under the "inevitable disclosure" doctrine without a showing of actual misappropriation or exploitation [citing *Earthweb, Inc. v Schlack,* 71 F Supp 2d 299, 310 (SD NY 1999), remanded 205 F3d 1322 (2d Cir 2000)]. Defendants DeFelice and McCarthy, on the other hand, were properly included in the paragraph 2(b) restraint since they were undisputedly high-level Willis employees with access to confidential information that could be easily utilized by them in their new positions at Aon to Willis's detriment [citing *Lumex, Inc. v Highsmith,* 919 F Supp 624 (ED NY 1996)]. Since plaintiffs showed that the use and disclosure of their confidential information by DeFelice and McCarthy was likely to occur, they satisfied the requirement of showing a likelihood of irreparable injury to justify the paragraph 2(b) restraint [citation omitted] and, given their showing of irreparable harm, and the lack of significant countervailing equities to support permitting DeFelice and McCarthy unfettered use of the confidential and proprietary information acquired by them during their employment with plaintiffs, the equities favor the paragraph 2(b) restraint with respect to these two defendants.

Subsequent to the First Department's decision in *Willis,* the Third Department decided ***Marietta Corp. v Fairhurst,* 301 AD2d 734 (3d Dept 2003)**. The lower court had relied on the inevitable disclosure doctrine to grant a preliminary injunction. As in the present case, there was a confidentiality provision but no noncompete clause. When defendant's contract was due to expire, plaintiff offered a new contract that contained both a confidentiality provision and a noncompete provision. Defendant sought to obtain additional compensation correlating to the noncompete provision, but the negotiations failed. While defendant signed the confidentiality provision, he did not sign the noncompete provision. He was terminated.

Plaintiff sought to enjoin, defendant from working for his new employer, a competitor. The lower court granted a preliminary injunction. Reversing, the Third Department held as follows:

Plaintiff contended that Fairhurst had, or would inevitably, use confidential information and trade secrets from plaintiff in carrying out the duties of his new position and that such conduct constituted a misappropriation of trade secrets and breach of the confidentiality agreement. Absolutely no evidence was proffered to support the assertion that Fairhurst had already intentionally disclosed any proprietary information; nor was an anticompetitive employment agreement in effect. Building from the concept of a threatened disclosure of trade secrets, Supreme Court utilized a doctrine, not yet adopted by the state courts, [FN4] of inevitable disclosure (*see* *EarthWeb, Inc. v Schlack,* 71 F Supp 2d 299, 309-310; *PSC Inc. v Reiss,* 111 F Supp 2d 252, 258-259; *International Paper Co. v Suwyn,* 966 F Supp. 246, 258-259). It concluded, after finding "no persuasive evidence that Fairhurst has intentionally disclosed any proprietary information he obtained from plaintiff

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to Pacific Direct, or any of its employees," that plaintiff met the irreparable harm prong necessary for the issuance of a preliminary injunction. Despite the lack of evidence that Fairhurst had actually misappropriated any alleged trade secrets, the court reasoned that since it was extremely likely that he would "use those secrets-- if only unconsciously--in carrying out his duties with Pacific Direct, to [plaintiffs] unfair advantage," that plaintiff had established a likelihood of success on its claims of misappropriation and breach of the confidentiality agreement. We find insufficient record evidence to support these findings.

FN4. The Third Department's decision in *Marietta* decision does not mention *Willis.* The lower court's decision in *Marietta* was issued prior to the Appellate Division's decision in *Willis.*

Acknowledging that irreparable harm can be established if a trade secret has been misappropriated, where there is no actual theft of a trade secret, the court, in applying the doctrine of inevitable disclosure, is "asked to bind the employee to an implied-in-fact restrictive covenant" not to compete (*EarthWeb, Inc. v Schlack, supra* at 310). As no restrictive covenant was in existence here and our well entrenched state public policy considerations disfavor such agreements, the doctrine of inevitable disclosure is disfavored as well, "[a]bsent evidence of actual misappropriation by an employee" (id. at 310). *In those rare instances where such doctrine is applied, it is further cautioned that the proponent should not be permitted to "make an end-run around the [confidentiality] agreement by asserting the doctrine of inevitable disclosure as an independent basis for relief*" (id. at 311). In assessing whether such injunctive relief is appropriate, the court should consider whether:

"(1) the employers * * * are direct competitors providing the same or very similar products or services; (2) 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 trade secrets at issue are highly valuable to both employers [;... and (4)] the nature of the industry and [its] trade secrets" (*id.* at 310). (*See PSC Inc. v Reiss, 111 F Supp 2d 252, 256- 257, supra.*)

Assessing the proof presented here to support the issuance of a preliminary injunction under the theory of inevitable disclosure, we find a failure in the proffer demonstrating irreparable harm. As there was no actual misappropriation, the showing emanates from the presumption that there will be an inevitable disclosure of trade secrets by Fairhurst since Pacific Direct is in direct competition with plaintiff and he possesses such "highly confidential or technical knowledge concerning manufacturing processes, market strategies, or the like" (*EarthWeb, Inc. v Schlack, 71 F Supp 2d 299, 309, supra*). *While we agree that Fairhurst was privy to confidential information, there exists a valid and enforceable confidentiality agreement which clearly anticipated that he may change his employment during its duration after acquiring plaintiffs confidential information.* Upon the record presented, we fail to find any evidence of a breach of such agreement or that the confidential information also constituted a trade secret [emphasis added.]

In a footnote, the Third Department cited and quoted from *Wolf, supra.*

Here, as in *Marietta,* there is a dearth of evidence of actual misappropriation or misuse. Here, as in *Marietta,* the claim is based on the disfavored "inevitable disclosure" doctrine. Here, as in *Marietta,* there is a written employment confidentiality agreement that contemplates, at least impliedly, that the employee may work for a competitor subsequent to his termination.

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Two federal decisions, while only persuasive authority, contain useful analyses of the doctrine and its application in New York law. The first is *EarthWeb, Inc. v Schlack,* 71 F Supp 2d 299 (SD NY 1999), by Judge Paniev, discussing the inevitable disclosure doctrine (at pp 11-13). *EarthWeb* is cited by both *Wilits* and *Marietta, supra.* On appeal, in an unpublished decision reported at 205 F3d 1322 (2d Cir 2000), the Second Circuit found no error or abuse of discretion in denying a preliminary injunction based on the breach of contract claim based on the anticompete clause, but remanded for the district court to set forth precise findings and reasons for denying injunctive relief relating to the preliminary injunction based on the breach of contract claim based on the confidentiality clause, and for clarification as to the grounds for denying injunctive relief based on the misappropriation of trade secrets claim. On appeal after remand, *Earthweb, Inc. v Schlack,* 2000 WL ?? 3320 (2d Cir 2000), the Second Circuit, affirming, agreed that there was no showing of irreparable harm,

In a similar vein, in *Colonize.com, Inc. v Perlow,* 2003 US Dist LEXIS 20021 (ND NY 2003), a case in which there was a noncompete clause, the court denied a preliminary injunction, holding:

The doctrine of inevitable disclosure is disfavored in New York because the State's strong public policy against restrictive non-competition agreements. Federal courts have also displayed reluctance in using the doctrine. New York courts have used the doctrine very sparingly to grant injunctive relief only in circumstances where other evidence of theft of trade secrets exists. That is not the casein this action. The Company's claim here is insufficient to support the theory that Perlow has used or threatened to use any of the Company's trade secrets. Absent any wrongdoing that would constitute a breach under the non-compete agreement, mere knowledge of the intricacies of a business is simply nkt enough.

In *Doubleclick, Inc. v Henderson,* 1997 WL 731413 (Sup Ct NY County 1997), the court granted a preliminary injunction although there was no anticompete agreement. The decision focused on the ample evidence of misappropriation. The court described the "inevitable disclosure" doctrine as "bolstering" its finding of misappropriation. The court held:

there is substantial evidence that defendants 1) used DoubleClick's proprietary information to prepare for the launch of Alliance and to position it to compete with DoubleClick, 2) worked on their plans for their new company during working hours at DoubleClick and used resources given to them by DoubleClick to do so, and 3) sought customers and financing for Alliance without regard to their duties to their current employer. Plaintiff has been able to marshall [sic] these facts without the benefit of discovery.

Here, plaintiff offers nothing but supposition and inferences. In any event, while *Wolf* was decided prior to *Doubleclick,* the *Doubleclick* decision does not mention *Wolf.* I conclude that the decision in *Doubleclick* is inconsistent with the relevant principles as enunciated by the Court of Appeals in *Wolf.*

Plaintiffs reliance on *U.S. Reinsurance Corp. v Humphreys,* 205 AD2d 187 (1st Dept 1994) is misplaced. In that case, as described by the court:

defendant resigned from the company on one day's notice, advising plaintiffs president and general counsel that he did not feel bound to observe confidentiality with respect to any information he had obtained through his employment and directorship, including the proprietary products at issue herein. The next day he appeared at an insurance trade association conference, handed out personal business cards, approached a number of plaintiffs clients, and was heard boasting that he would take about $1 million in brokerage commissions away from plaintiff.

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No such facts are demonstrated here. The fact that a party makes legal arguments in the course of litigation as to whether alleged trade secrets qualify as such, when the party represents that it will not and has not disclosed or used the information at issue, does not constitute a threat of disclosure. [FN5]

FN5. In its reply papers, plaintiff describes the security measures that it presently has in place. However, the issue is whether the security measures that were in place *at the time of defendants' employment,* were adequate to endow the information at issue with trade secret status. Plaintiffs own assertion that it had inadvenently failed to obtain noncompete agreements from some of its "principal" employees, coupled with its insistence that such protection is necessary, adds considerable credence to defendants' contention that plaintiffs practices were slipshod.

While I do not reach the issue, it would appear that whether or not the information at issue qualifies as a trade secret within the common law meaning of the term, is not necessarily dispositive here, since the parties' rights and obligations concerning confidentiality are governed by contract. The contract broadly defines "intellectual property." "Trade secrets" are included in that definition, along with other types of intellectual property as thus defined. I do not read defendants' papers as contending that plaintiffs failure to protect its trade secrets would relieve the individual defendants of their contractual obligations.

But in any event, in *U.S. Reinsurance* the plaintiff did not seek to enjoin defendant's employment. As in *Willis,* the plaintiff sought an injunction against use and disclosure. Thus, even if the present facts were analogous to those in *U.S. Reinsurance,* it would support only the injunction against use and disclosure, an injunction which, as discussed below, I am granting despite the lack of any showing of a breach or threatened breach.

The central premise of the inevitable disclosure doctrine is that even with a good faith effort, the employee will not be able to divorce what he learned from the prior employment, when carrying out the functions of the new job. The ability to do so would require mental compartmentalization: having knowledge but not using it. As stated in plaintiffs reply memo of law, its premise is the supposed "?? inability to 'forget' or ignore confidential scientific information even when attempting in good faith to do so." But this is essentially the same mental discipline that New York law deems those same humans to be capable of when they serve as jurors, absent a showing the the contrary. Jurors are routinely instructed to disregard, e.g., statements made in open court.

In its reply papers, plaintiff supplies the affidavit of Kenneth Griffin, the President and CEO of another hedge fund ("Citadel") which, according to Griffin:

uses a variety of trade secrets, proprietary processes and other proprietary information to pursue highly sophisticated investment strategies in an attempt to deliver high risk-adjusted rates of return for the investors in its Funds ... Citadel uses complex, and often proprietary, mathematical/statistical techniques, generally computer-aided, to identify investment opportunities." *** the disclosure of the contend of Citadel's models to those with access to the capability to trade at significant levels would likely severely impact or destroy tho effectiveness of those models. Therefore, Citadel considers the details of its trading models to be highly proprietary and critically valuable intellectual property and will not disclose such information outside Citadel. To protect that information, Citadel requires all employees to sign nondisclosure agreements. Senior employees with access to Citadel's models and strategies are *often* required red to sign

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noncompetition agreements in addition [emphasis added].

The statement that senior employees with access to the models and strategies are "often" required to sign noncompetition agreements is another way of saying that such employees are not *always* required to sign such agreements. That is, notwithstanding the "inevitable disclosure" theory, Citadel does *not* find it necessary, in order to protect its proprietary information, to prohibit all of its senior employees with access to such sensitive information, from working for competitors after their departure.

Similarly, the affidavit of Eric Wepsic, likewise supplied by plaintiff, states that his company, D. E. Shaw, "requires all of its employees to sign confidentiality (nondisclosure) agreements to protect its trading models as trade secrets." No mention is made of any requirement that D. E. Shaw's employees sign noncompete agreements.

Here, in the absence of any direct proof of misappropriation, plaintiff asks for an injunction that goes beyond what its own chosen witnesses deem necessary for adequate protection.

BALANCING OF THE EQUITIES

In marked contrast to the situation described by the First Department in *Willis,* here the equities balance heavily in defendants' favor. Unlike *Willis,* in which the injunctive relief sought was congruent with the nondisclosure agreement, here the net result of the injunctive relief sought would be that plaintiff would obtain the benefit of a noncompete clause without providing any quid pro quo in return, in effect rewarding plaintiff for its refusal to offer sufficient incentive to obtain such a drastic commitment from defendants.

Defendants have demonstrated that the injunction sought would essentially deprive the individual defendants of their livelihoods, and cause irreparable damage to the corporate defendant, their present employer. The suggestion that defendants could obtain employment in another field is insufficient grounds to support injunctive relief; the defendants would be deprived of the benefit of their labor and there is no assurance that they would find substitute employment if they were enjoined by a court from their present employment in a lawsuit in which they are accused of misusing confidential information.

Nor is there any showing sufficient to require that I preliminarily enjoin defendants from engaging in the field of endeavor in which they have found employment by Millennium. Such an injunction would interfere not only with the rights of the individual defendants, but with Millennium's contractual rights to defendants' services. It is evident that Millennium would not have hired the individual defendants had they signed a noncompete clause with plaintiff. Plaintiffs slipshod administration cannot equitably be permitted to prejudice Millennium.

Plaintiffs moving papers fail to supply adequate support for its conclusory assertions that it will suffer irreparable harm in the absence of an injunction. It attempts to remedy that defect in its reply papers. However, as noted above, adequate, nonconclusory support for the relief sought must be supplied in the moving papers. By placing the supporting material in its reply papers, plaintiff has deprived defendant of an opportunity to respond. Therefore even assuming, arguendo, that the new material is sufficient to show irreparable harm to plaintiff absent the injunction, I decline to consider it to support the injunction.

In *Doubleclick. supra,* the court found the "equities" element to be satisfied

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because "equity does not favor the employee who seeks to breach his fiduciary duties to his former employer." But in *Doubleclick* there was persuasive evidence of such a breach. Even if the Court of Appeals' discussion in *Wolf* did not preclude enjoining defendants' employment and business, the irreparable harm, that would be suffered by defendants from such an injunction cannot be justified where the only basis for an injunction is not what defendants have actually done, but merely the prediction of what could occur in the future.

In balancing the equities, I also consider which party is responsible for the present circumstances. Here, plaintiff could have contractually entitled itself to noncompete protection by obtaining an appropriate noncompete clause at the time it hired or promoted the defendants, in return for a mutually agreeable quid pro quo for the restriction. Yet it is undisputed in the present papers that, both at the time they were hired, and at the time they were promoted, the individual defendants were not told that promotions were contingent on signing anticompete clauses. Instead, through no fault of the defendants, plaintiff promoted them without advising them that the promotion would require a noncompete clause. Then it fired them because they refused to waive rights to which New York law affords strong protection. Whether characterized as slipshod administration or abusive overreaching, plaintiffs conduct weighs heavily against the drastic injunctive relief sought.

Defendants assert, with considerable detail, that they developed the Millennium software independently, using different languages and different techniques. They assert that the development of the Millennium code is documented line-by-line on an ongoing basis, so as to make it possible to verify its independent development. To enjoin them from utilizing the fruits of their intensive labors would not he an appropriate exercise of my equitable discretion.

INJUNCTION AGAINST USE DISCLOSURE

While Wolf and the balancing of the equities effectively preclude use of the "inevitable disclosure" doctrine to enjoin employment, this does not mean that defendants cannot be enjoined from using or disclosing the alleged confidential information, as was done in *Willis.* Here, while defendants make a persuasive showing that the material is not a trade secret in the common law sense because plaintiff failed to take adequate measures to protect its secrecy, defendants do not rest their defense on this premise, and affirmatively state that they have not and will not disclose or use the information at issue. Thus, an injunction enjoining defendants not to disclose or use the information would mean only that defendants will be enjoined from doing what they have represented they will not do. Since the defendants contractually agreed not to disclose or use the information, I conclude that, notwithstanding the dearth of evidence of any breach, an injunction is appropriate, such injunction to be limited by the parameters of the contractual confidentiality agreement itself.

DESTRUCTION OF DOCUMENTS

There is nothing in the moving papers to suggest that defendants will not preserve any documents or other materials relevant to this action. Both sides have indicated that such materials and documents will be preserved. Accordingly, in accordance with the colloquy on the record, this injunctive relief is granted as to both sides.

Accordingly, it is hereby

ORDERED that defendants are hereby enjoined, during the pendency of this action, from disclosing, using or applying plaintiffs "confidential information" or

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"intellectual property" as defined in the individual defendants' employment agreements; and it is further

ORDERED that all parties are enjoined, during the pendency of this action, from destroying or failing to preserve from destroying or failing to preserve all products, objects, notes, memoranda, manuals, emails, charts, graphs, programs, disks, magnetic tapes, business plans or any other written, recorded or graphic materials and all copies thereof, in their possession or under their control, wherever located, which do or may contain, reflect or relate to, directly or indirectly, any issue known or reasonably expected to be at issue in this action; and it is further

ORDERED that plaintiffs motion for a preliminary injunction is otherwise denied.

Dated: 4/2/04

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J.H.O.

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