

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WEST PLAINS, L.L.C. d/b/a CT FREIGHT
COMPANY,

Plaintiff,

vs.

RETZLAFF GRAIN COMPANY
INCORPORATED d/b/a RFG LOGISTICS,
BRYCE WELLS, JEFFREY BRADLEY,
THOMAS DANNER, REBECCA DANNER,
JODY MAY, CHAD NEEDHAM, TODD
PAYZANT, SAMANTHA RHONE,
CRYSTAL KONECKY, CINDY
SCHOLTING, DREW WAGGONER,

Defendants.

8:13CV47

MEMORANDUM AND ORDER

This matter is before the Court on the Plaintiff's Motion for Preliminary Injunction (Filing No. 5). Having considered the parties' briefs, evidence, and arguments heard on February 20, 2013, the Court will grant the Plaintiff's Motion, in part.

PROCEDURAL HISTORY

Plaintiff West Plains, L.L.C. d/b/a CT Freight Company ("CT Freight") asserts seven causes of action: (1) misappropriation of trade secrets in violation of Neb. Rev. Stat. § 87-504 against former employees of CT Freight; (2) misappropriation of trade secrets in violation of Neb. Rev. Stat. § 87-504 against Defendants Retzlaff Grain Company, Inc., and Bryce Wells; (3) tortious interference with business relationships against all Defendants; (4) tortious interference with employment relationships against Defendants Retzlaff Grain Company, Inc., and Bryce Wells; (5) breach of the duty of loyalty against former employees of CT Freight; (6) conspiracy against all Defendants; and (7) violation of the computer fraud and abuse act, 18 U.S.C. § 1030, against

Defendant Chad Needham. CT Freight generally seeks to enjoin the Defendants from soliciting its clients or using its confidential information and trade secrets during the pendency of this action, and requests that the Defendants be required to return to CT Freight any documentation that contains its confidential information. At the hearing held on February 20, 2013, counsel for CT Freight acknowledged that the basis for its Motion for Preliminary Injunction is its claims for misappropriation of trade secrets and breach of duty of loyalty.

CT Freight filed its Complaint (Filing No. 1) on February 8, 2013, and its Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction (Filing No. 5) on February 11, 2013. The Court held a hearing on CT Freight's Motion for TRO that day, and entered a TRO (Filing No. 17) on February 12, 2013. The TRO expires, at the latest, on February 26, 2013, at 3:20 p.m. (*Id.*)

FACTUAL BACKGROUND

I. The Freight Brokerage Industry

Both CT Freight and Retzlaff Grain Company Incorporated d/b/a RFG Logistics ("RFG Logistics") are in the business of freight brokerage. (Filing No. 9-1 ¶ 3; Filing No. 40-2.) Freight brokerages match customer loads for shipment with available trucks and drivers. (Filing No. 40-1, Affidavit of Michael T. Fouts, ¶ 7.) Individual freight brokers arrange transportation of a customer's freight with a shipper or carrier. (*Id.* ¶¶ 12, 13.) Brokers generate revenue by arranging transport at a price that is lower than the price a customer is willing to pay, and collecting the difference as the broker's fee. (*Id.* ¶ 12.) Customers of freight brokerages include companies of all sizes, and in many cases, customers use multiple freight brokerages to arrange and satisfy their shipping needs.

(*Id.*) Evidence has been presented that there are approximately 12,000 freight brokers in the United States, and approximately 50,000 motor carriers. (*Id.* ¶¶ 7, 9).

The parties disagree about the relative availability of carrier and customer information in the brokerage business. CT Freight has submitted evidence that its business as a freight logistics brokerage depends on special relationships maintained by its brokers with CT Freight's customers and contract carriers, and CT Freight's special knowledge about such customers and carriers. (Filing No. 9-1 ¶ 4.) By maintaining close relationships with customers and contract carriers, CT Freight brokers can quickly and economically source customer load requests and arrange for return loads for the contract carriers. (*Id.* ¶ 6.) These relationships depend on the use of information such as customer needs¹; pricing processes and rates; driver databases and/or spreadsheets and information contained therein or derived therefrom; proposals made or planned by CT Freight for such customers; and technical analyses or other data provided by CT Freight for use by CT Freight's brokers in servicing customers and contract carriers (this information referred to collectively herein as the "Confidential Information"). (*Id.* ¶¶ 14, 32; *see also* Filing No. 5 at 2.) CT Freight has submitted evidence that it required its employees to adhere to a confidential information policy, and its employees agreed through the employee handbook to refrain from working for competitors while employed with CT Freight. (Filing No. 9-1 ¶ 15; Filing No. 9-7.)

¹ According to CT Freight, information about a "customer's needs" includes the quantity of resources and location of resources needed by customers, as well as information about customer contact personnel and their corresponding facsimile numbers, telephone numbers, or email contact information. (*Id.* ¶¶ 14, 32.)

Defendants presented evidence suggesting that the names and contact information for companies in the business of shipping freight--and those carriers that can ship freight--is available in the public domain. For example, Defendants stated that such information can be obtained from Google, phone books, and multiple websites. (See Filing No. 40-1, Affidavit of Michael Fouts, ¶¶ 9-11; Filing No. 40-3, Affidavit of Chad Needham, ¶¶ 8-11, and Filing Nos. 40-4, 40-6, 40-7, 40-8, 40-9, 40-10, and 40-11; Filing No. 40-14, Affidavit of Cindy Scholting, ¶ 21; Filing No. 40-15, Affidavit of Drew Waggoner, ¶ 31; Filing No. 40-16, Affidavit of Todd Payzant, ¶ 30; Filing No. 40-18, Affidavit of Crystal Konecky, ¶ 22; Filing No. 40-20, Affidavit of Samantha Rhone, ¶ 26; Filing No. 40-17, Affidavit of Jeffrey Bradley, ¶ 23; Filing No. 40-13, Affidavit of Thomas Danner, ¶ 24; Filing No. 40-21, Affidavit of Rebecca Danner, ¶ 15). Defendants also stated that data on shipping rates in specific lanes (origin to destination) are available by monthly subscription to such public sites as Truckloadrate.com, Transcore (DAT), Transcore.DAT.com, Freightquote.com, and www.rateindex.transcore.com. (Filing No. 40-1 ¶¶ 10, 15.) The data available to all subscribers include prices paid by shippers and prices paid to carriers, as well as the availability of trucks anywhere in the United States. (Filing No. 40-1 ¶ 10.)

II. Asset Purchase and Operations Under West Plains, LLC

Plaintiff purchased the assets of West Plains CO ("WPCO") on or about February 25, 2012. (Filing No. 40-2, Affidavit of Bryce Wells, ¶ 4.) Defendant Bryce Wells owned WPCO at the time of the asset purchase. (Filing No. 9-1 ¶ 5.) After the purchase, the Plaintiff obtained all the assets, intellectual property, and records of WCPO (*id.* ¶ 5; see also Filing No. 40-2 at 10) and operated its freight logistics and brokerage services

division using the CT Freight trade name. (*Id.*) CT Freight also hired many of WPCO's former employees, including Defendants Jeffrey Bradley, Thomas Danner, Rebecca Danner, Jody May, Chad Needham, Todd Payzant, Crystal Konecky, Samatha Rhone, Cindy Scholting and Drew Waggoner (the "Individual Defendants"). (*Id.* ¶¶ 7, 8.) The Individual Defendants composed the vast majority of CT Freight's brokers and support staff. (*Id.* ¶ 8.) The Individual Defendants also brought in almost all of CT Freight's customer freight broker business, and all of CT Freight's non-livestock broker business. (*Id.* ¶¶ 8, 10, 13.) CT Freight brokers and support staff secure and manage business in large part through access to CT Freight's electronic data and other sources included within the Confidential Information described above. (*Id.* ¶ 13.)

III. RFG and Departure of Individual Defendants

In the fall of 2012, Bryce Wells decided to start a new freight brokerage venture. (Filing No. 39 at 2.) He began contacting employees of CT Freight about coming to work for his company. (*Id.*) Wells had numerous meetings and contacts with those individuals, and all the Individual Defendants agreed to work for his new business venture, RFG Logistics. (*Id.*)

On February 5, 2013, all the Individual Defendants submitted their resignations to CT Freight. (Filing No. 9-1 ¶ 17; *see also* Filing No. 39 at 3-4.) The Individual Defendants' departure dates were staggered, with the last resignation scheduled to take effect on February 13, 2013. (*Id.*) When Defendant Bradley submitted his resignation, he was locked out of his work computer at CT Freight's Manning, Iowa, office. (Filing No. 40-17 ¶ 14.) Also on February 5, 2013, Defendants Waggoner, May, Rhone, and Konecky were informed that since they no longer wanted to work at CT Freight, they

must hand over their keys and cell phones, not touch anything on their desks, and leave immediately. (Filing Nos. 40-15 ¶ 15; 40-19 ¶ 13; 40-20 ¶ 15; 40-18 ¶ 9.) CT Freight later invited some of the Individual Defendants to return to help CT Freight in the transition. (See Filing No. 39 at 3-4.) Some of the Individual Defendants were told that if they remained and were willing to sign a non-compete agreement, all would be forgiven; but if they left CT Freight, they would be sued. (See *id.* at 4.)

IV. Information Taken By Individual Defendants

The Individual Defendants each accepted employment with RFG Logistics in a capacity similar to that held while employed at CT Freight. (Filing No. 9-1 ¶ 18.) CT Freight discovered through a search of its company email database that while the Individual Defendants were still employed by CT Freight, they stopped booking loads for CT Freight's customers scheduled to be shipped after February 13, 2013; and the Individual Defendants planned their departure while still employed by CT Freight. (Filing No. 9-1 ¶¶ 21, 22, 23; Filing No. 9-3.)

The evidence submitted demonstrates that at least one of the Individual Defendants, Chad Needham, attempted to erase a block of emails from his computer. (*Id.* ¶ 21.) In an email dated January 5, 2013, from Defendant Wells to Defendants Danner, Scholting, and Needham, Wells referenced several matters he considered important to the transition, including a "Data Dump to capture the old West Plains Co. information." (Filing No. 9-9 at 7-8.) The evidence also demonstrates that at least one Defendant sent a copy of all contact information of contract carriers used by CT Freight to his personal email account (Filing No. 9-4) and Defendant Payzant sent an email to Defendants Danner and Bradley on January 17, 2013, with a spreadsheet attachment of

customer hauling rates. (Filing No. 9-1 ¶ 24; Filing No. 9-5.) Additional evidence shows that Defendants Payzant and Konecky sent emails containing customer contact information to their personal email addresses shortly before submitting their resignations. (Filing No. 9-6.) CT Freight states that there is no valid business reason why a CT Freight employee would need to send such Confidential Information to his or her personal email account. (Filing No. 9-1 ¶ 24.) Defendant Bradley admitted that he e-mailed CT Freight's information from his work account to a Yahoo account, and explained that he did so because he "did not want to lose the personal and business contact information after I resigned." (Filing No. 40-17 ¶ 18.) Other Defendants admit they took contact information and other notes about CT Freight customers. (See Filing No. 39, pp. 5-6).

Instant messenger data reveal that Defendant Needham asked Defendant Waggoner how to "go about getting info [from a CT Freight customer] . . . without tipping our hand." (Filing No. 41-1 at 10). Defendants Payzant and Waggoner discussed taking out things "for the new office from [CT Freight] like notes. . . slowly" and "before [CT Freight] pays attention." (Filing No. 41-1 at 13.) Defendant Waggoner told Defendant Payzant to "make sure you get those #s somewhere for the transition." (Filing No. 41-1 at 15.) CT Freight continues to investigate the nature of the information transferred by the Individual Defendants, including information concerning customer inquiries for upcoming load deliveries. (*Id.* ¶ 34.)

At least one carrier used by CT Freight stated that Individual Defendants contacted her prior to February 5, 2013. (See Filing No. 41-3, Affidavit of Pam Campbell, ¶¶ 3, 5.) Pam Campbell, a co-owner of Campbell Trucking, stated that prior

to January 2013, Campbell Trucking was contracting with CT Freight to book hauling loads for one of their tractor trailers. (*Id.* ¶ 3.) On or about February 1, 2013, Campbell contacted Defendant Payzant to book loads. (*Id.* ¶ 4.) Payzant worked with Campbell to book five loads through CT Freight, and four loads through RFG Logistics. (*Id.*) Payzant told Campbell that CT Freight was no longer in business. (*Id.* ¶ 5.) Defendant Payzant led her to believe she was dealing with the same employees and same company under a different name. (*Id.*) Payzant also told Campbell that two commodity companies Campbell Trucking regularly hauled for, Land-o-Lakes and Cargill, would be using RFG Logistics. (*Id.*) A few days later, when Campbell needed to cancel a load, she called Payzant but was told she needed to call CT Freight (a company she had previously been informed was no longer in business) to cancel her load. (*Id.* ¶ 6). Campbell did not attempt to reschedule the load with CT Freight because she believed that CT Freight was no longer in operation. (*Id.*) Instead, she called Payzant and booked the load through RFG Logistics for a different time. (*Id.*)

STANDARD

A district court considers the four factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc), when deciding whether to issue a preliminary injunction. *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011) (citing *Dataphase*, 640 F.2d at 114). Those factors are: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase*, 640 F.2d at 114. “No single factor is determinative.” *WWP, Inc. v. Wounded Warriors, Inc.*,

566 F. Supp. 2d 970, 974 (D. Neb. 2008). The movant bears the burden of establishing the propriety of the injunction. See *Roudachevski*, 648 F.3d at 705.

DISCUSSION

I. Likelihood of Success on the Merits

“In deciding whether to grant a preliminary injunction, likelihood of success on the merits is most significant.” *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012) (quoting *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir.1995)). At the hearing on CT Freight's Motion, counsel for CT Freight conceded that the request for preliminary injunctive relief is based on CT Freight's claims for misuse of confidential information and breach of the Individual Defendants' duty of loyalty to CT Freight. The Court's analysis of the evidence presented demonstrates that CT Freight has met its burden of demonstrating a likelihood of success on each of these claims sufficient to support the issuance of a preliminary injunction.

A. Misappropriation of Trade Secrets

CT Freight has submitted sufficient evidence to demonstrate a likelihood of success on the merits with regard to its misappropriation claims. To succeed on its misappropriation of trade secrets claim, CT Freight must prove:

(1) the existence of a trade secret . . . , (2) the value and importance of the trade secret to [CT Freight] in the conduct of [its] business, (3) [CT Freight's] right by reason of discovery or ownership to the use and enjoyment of the secret, and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice.

Softchoice Corp. v. MacKenzie, 636 F. Supp. 2d 927, 936-37 (D. Neb. 2009) (citing *Richdale Dev. Co. v. McNeil Co.*, 508 N.W.2d 853 (Neb. 1993)). The Nebraska Trade Secrets Act (“NTSA”) defines a “trade secret” as:

information . . . that:

- (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Neb. Rev. Stat. § 87-502(4). Under Nebraska law, “[m]isappropriation mean[s] . . . [d]isclosure or use of a trade secret of another without express or implied consent by a person who . . . [a]t the time of the disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was . . . [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use[.]” Neb. Rev. Stat. § 87-502(2)(b)(ii)(C). The customer contact, load, and pricing information CT Freight seeks to protect could fit within the definition of a trade secret under the NTSA. The Nebraska Supreme Court has held that under certain circumstances, a customer list can be included in the definition of a trade secret. *Home Pride Foods, Inc. v. Johnson*, 262 Neb. 701, 709, 634 N.W.2d 774, 781 (2001). The Nebraska Supreme Court recognized that “[c]ourts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources.” *Id.* at 709, 634 N.W.2d at 782 (citing *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 66 Cal.Rptr.2d 731 (1997)).

But where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market. . . .

Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers.

Id. (internal citations omitted).

The evidence indicates that information taken from CT Freight and used by Defendants contained information not available from public lists, and was more specific than the mere identities and locations of potential customers and carriers. CT Freight has demonstrated that it expended time and effort to develop information about particular customers with particular needs and characteristics. (See Filing No. 9-1 ¶¶ 6, 13, 14, 32.) Based on relationships between CT Freight and its customers and carriers, CT Freight compiled information about key customer contacts, key variables driving the customers' needs for hauls, historical pricing, and critical factors unique to each customer. (See Filing No. 9-1 ¶ 6, 14.) CT Freight maintained similar information for its contract carriers. (*Id.*) Although Defendants assert that pricing information was not confidential, almost none of the "publicly available" information cited by Defendants contains pricing information for loads. (See Filing Nos. 40-3 through 40-13.) While the Individual Defendants were employed with CT Freight, several of them were responsible for negotiating pricing. (See *e.g.* Filing No. 40-15 ¶ 5; Filing No. 40-16 ¶ 17.) There is no evidence that information about these negotiations was public or could be found through a website database. Defendants' own evidence demonstrates that "[f]reight brokers must either arrange services for the price dictated by the customer or bid for the business against multiple other freight brokerage companies using pricing information from whatever source." (Filing No. 40-1 ¶ 15.) Thus, the information included in the "Data Dump" and that taken by the Individual Defendants had independent economic