

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**AGJUNCTION LLC,**

**Plaintiff,**

**v.**

**AGRIAN INC., ET AL.,**

**Defendant.**

**Case No. 14-CV-2069-DDC-KGS**

**MEMORANDUM AND ORDER**

This matter comes before the Court on the Motion for Preliminary Injunction (Doc. 25) filed by plaintiff AgJunction, LLC. The Court conducted a hearing on this motion on June 24 and 25, 2014 and received additional submissions from the parties after this hearing. After considering the evidence, submissions, and the parties' arguments, the Court denies AgJunction's motion for preliminary injunction.

**I. Introduction**

Plaintiff AgJunction is in the business of developing and selling "precision" agronomy hardware and software. Defendant Agrian, historically, has developed and marketed "compliance" ag software and did not have its own line of precision ag software. In early April 2013, Agrian decided to begin developing a competing precision ag product as part of a new system it dubbed "NextGen." Over the next nine months, from April to December 2013, Agrian hired five employees who worked in AgJunction's precision ag division—Aaron Hunt, Matt Dedmon, Jeff

Dearborn, Derrick Anderson, and David Nerpel (the “Employee Defendants”).<sup>1</sup> The Employee Defendants immediately began working to develop Agrian’s precision ag business.

Over the past couple of years, a company named Crop Production Services, Inc. (“CPS”) has been AgJunction’s largest precision ag client. In January 2014, CPS’ CEO called Rick Heinger, AgJunction’s CEO, to tell him that CPS would not renew its precision ag contract with AgJunction for 2015. Instead, CPS was switching to Agrian’s new “NextGen” system, which had all the functionalities of AgJunction’s precision ag software and would become available in early 2015.

AgJunction contends that Agrian could not possibly have developed a comparable precision ag software so quickly on its own. According to AgJunction, defendants “deliberately plotted the serial exodus of key employees and the misappropriation of proprietary information” to create a competing, nearly identical precision ag software platform.<sup>2</sup> AgJunction filed this lawsuit on February 16, 2014, and now seeks a preliminary injunction that prevents “Defendants from further development of features and functionalities of its NextGen product that exist in AgJunction’s Precision Ag software.”<sup>3</sup>

## II. Legal Standard

To prevail on a motion for preliminary injunction, the movant must prove that all four of the following equitable factors weigh in its favor: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury

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<sup>1</sup> AgJunction’s Complaint (Doc. 1) brought claims against Agrian and all five Employee Defendants. On July 9, 2014, the Court dismissed two of the defendants, Hunt and Dedmon, because this Kansas court lacks personal jurisdiction over them (Doc. 140). However, for simplicity, this Order will refer to all five individuals as the Employee Defendants—that Hunt and Dedmon are no longer defendants in this action is not material to the Court’s decision on AgJunction’s Motion for Preliminary Injunction.

<sup>2</sup> Doc. 143 at 2 (Pl.’s Supplemental Br.).

<sup>3</sup> Doc. 143 at 20 (Pl.’s Supplemental Br.).

outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction will not be adverse to the public interest. *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 888 (10th Cir. 2013). A preliminary injunction is an extraordinary remedy, so the right to relief must be “clear and unequivocal.” *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). “In general, a preliminary injunction ... is the exception rather than the rule.” *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

Because the limited purpose of a preliminary injunction merely is to preserve the relative positions of the parties until the Court can hold a full trial on the merits, the Tenth Circuit has identified three types of specifically disfavored preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief it could recover at the conclusion of a full trial on the merits. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005). Such disfavored injunctions “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary in the normal course.” *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). A party seeking a disfavored injunction must make a “strong showing” both with regard to the likelihood on the merits and with regard to the balance of harms. *Id.* at 976

An injunction disrupts the status quo when it changes the “last peaceable uncontested status existing between the parties before the dispute developed.” *Schrier*, 427 F.3d at 1260. “In determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties and not solely to the parties’ legal rights.” *Id.* Defendants argue that “none of the conduct alleged in the Complaint occurred before the first

[Employee Defendant]—Hunt—join[ed] Agrian.”<sup>4</sup> Defendants have provided evidence, which AgJunction apparently does not dispute, that Agrian decided to begin developing precision ag software on April 1, 2013, before AgJunction alleges any wrongdoing occurred. AgJunction makes no argument in rebuttal—it claims it does not seek a mandatory injunction, but otherwise glosses over Defendants’ status quo argument.<sup>5</sup>

Based on the facts before it, the Court concludes that the requested injunction would change the “last peaceable uncontested status” between the parties because Agrian had started developing NextGen before any alleged wrongdoing occurred. The requested injunction asks the Court to halt defendants’ development of NextGen. This would disturb the status quo and is disfavored. Defendants therefore must make a “strong showing” both with regard to the likelihood on the merits and with regard to the balance of harms for the Court to grant an injunction here.

### **III. Likelihood of Success on the Merits**

AgJunction filed three briefs and gave testimony over two days as support for its motion for a preliminary injunction. After combing through AgJunction’s arguments, the Court has identified several “irreparable harms” AgJunction claims it has suffered and will continue to suffer because of defendants’ wrongful conduct. The alleged wrongdoing underlying those harms falls into two categories: (1) defendants stole AgJunction’s confidential and proprietary information; and (2) the Employee Defendants breached their contractual duty not to compete. AgJunction must make a strong showing of likelihood that defendants committed at least one of those wrongful acts, and that the wrongful acts caused AgJunction irreparable harm, for the Court to grant a preliminary injunction. The Court will address each in turn.

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<sup>4</sup> Doc. 144 at 5 (Defs.’ Supplemental Br.).

<sup>5</sup> Doc. 114 at 13 (Pl.’s Reply Br.).

## **I. Theft of Confidential and Proprietary Information**

AgJunction alleges that Agrian and the Employee Defendants conspired to steal proprietary and confidential information from AgJunction which irreparably harms AgJunction in several ways. Specifically, AgJunction claims that defendants' theft: (1) gave Agrian an "unfair head start" in developing NextGen, allowing it to develop a competing product much faster than if it had competed fairly; (2) caused AgJunction to lose customers and goodwill and will lead to further losses of customers and goodwill; (3) threatens the viability of AgJunction's business; and (4) caused the collapse of a potentially lucrative joint venture. For purposes of this motion, the Court will assume that each of those harms is irreparable. However, AgJunction must still make a "strong showing" that it is likely to prove the wrongdoing underlying those harms: that defendants have misappropriated its confidential and proprietary information.

AgJunction alleges that defendants misappropriated three types of information: proprietary customer information and requirements, particularized know how, and the AgJunction Precision Ag product.<sup>6</sup> AgJunction argues that this information is protected by both Kansas Trade Secret Law and the employment agreements signed by the Employee Defendants. The Court will examine whether AgJunction is substantially likely to prevail under either theory.

### **1. Trade Secrets**

Kansas adopted the Uniform Trade Secrets Act's definition of a "trade secret."

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

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<sup>6</sup> Doc. 143 at 16 (Pl.'s Supplemental Br.).

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

K.S.A. § 60-3320(4). Thus, to show that particular information is a trade secret, a plaintiff must demonstrate that it is valuable, not known to others who might profit by its use, and has been handled by means reasonably designed to maintain its secrecy. *Dodson Int'l Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1010 (D. Kan. 2004). The plaintiff's burden is not met by general allegations; instead, the plaintiff must describe the subject matter of its alleged trade secrets in sufficient detail to establish each element of a trade secret. *Id.* "Although plaintiffs are not required to disclose all of their trade secrets, they must do more than merely allege that they had trade secrets." *Id.* "[C]ursory descriptions do not meet [a plaintiff's] burden of providing that legitimate trade secrets and confidential information are actually at stake." *Menzies Aviation (USA), Inc. v. Wilcox*, 978 F. Supp. 2d 983, 995 (D. Minn. 2013) (holding allegations that "information such as marketing information, internal reports, employment matters and financial condition were confidential" are not enough to prove the existence of trade secrets under the Uniform Trade Secrets Act's definition).

"Reluctance to be specific is understandable; the more precise the claim, the more a party does to tip off a business rival to where the real secrets lie and where the rival's own development efforts should be focused." *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 583 (7th Cir. 2002). Still, the plaintiff must make a serious effort to identify its trade secrets or the court cannot do its job. *Id.*

#### **i. Customer Information and Requirements**

"Customer lists and other customer information may constitute a trade secret." *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate-Palmolive Co.*, 840 F. Supp. 1433, 1438 (D. Kan. 1993). Customer lists containing merely public information that could be easily compiled

by third parties will not be protected as trade secrets; however, where the party compiling the customer lists, while using public information as a source, expends a great deal of time, effort, and expense in developing the lists and treats the lists as confidential in its business, the lists may be entitled to trade secret protection. *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102, 1106 (D. Kan. 2000). “It is the tangible customer lists and notes, as opposed to the customers themselves, that are the protected trade secrets.” *Dodson*, 347 F. Supp. 2d at 1010.

AgJunction’s allegations about stolen customer information are meager. It claims that:

Defendant Dearborn, a director level employee, and Defendants Nerpel and Anderson regularly managed AgJunction’s customer relationships, learning customer preferences and pain points, for example. During their periods of employment with AgJunction and after they defected to Agrian, the Employee Defendants took this proprietary information and used it to Defendant Agrian’s advantage.<sup>7</sup>

AgJunction also asserts that Dearborn “made it a habit” to use a private email address to contact AgJunction customers.<sup>8</sup>

AgJunction makes no further attempt to identify what customer trade secrets AgJunction took. AgJunction did not produce a copy of its customer list or tell the Court, specifically, how much it cost to develop, and there is no allegation that the list or even generic “customer information” was not generally ascertainable by others in the industry. *See Bradbury Co., Inc. v. Teissier-duCros*, 413 F. Supp. 2d 1209, 1228 (D. Kan. 2006); *Dodson*, 347 F. Supp. 2d at 1010-11. AgJunction never alleges that defendants misappropriated a tangible customer list. AgJunction does claim that defendants “stole” its client CPS, but one cannot fairly classify the identity of CPS as a trade secret—CPS was an existing Agrian client. Based on the evidence before it,

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<sup>7</sup> Doc. 114 at 23 (Pl.’s Reply Br.).

<sup>8</sup> Doc. 114 at 23-24 (Pl.’s Reply Br.).

the Court finds that AgJunction has failed to provide sufficient evidence to establish a substantial likelihood that its customer information and requirements constitute trade secrets.

**ii. Particularized Know How**

The Court assumes for purposes of AgJunction's motion for preliminary injunction only that "know how" can constitute a trade secret. "There must be a delineation between the general knowledge and experience of the employee and the trade secrets of the employer." *Utah Med. Prods., Inc. v. Clinical Innovations Assocs., Inc.*, 79 F. Supp. 2d 1290, 1312 (D. Utah 1999) (applying the Uniform Trade Secrets Act). A plaintiff "must define its claimed trade secret with the precision and particularity necessary to separate it from the general skill and knowledge" possessed by others. *Id.* at 1313. Here, AgJunction claims that Employee Defendants Hunt and Dedmon obtained "intimate knowledge of [the precision ag product], its functionalities, source code, and processes."<sup>9</sup> The Court concludes that such bare allegations fail to provide sufficient detail to establish a substantial likelihood that any particularized know how possessed by the Employee Defendants constitutes a trade secret.

**iii. AgJunction's Precision Ag product**

AgJunction claims that confidential and proprietary code and other information used in its precision ag software system are trade secrets. Specifically, AgJunction claims that defendants stole "compilations of data such as those embodied in AgJunction's proprietary databases, the methods or algorithms used by AgJunction's proprietary software," and "information stored and protected by JIRA, a proprietary issue tracking product."<sup>10</sup> JIRA allegedly "contains all the knowledge that it takes to create the code," and "stores the secrets of development ... [w]hat it

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<sup>9</sup> Doc. 143 at 18 (Pl.'s Supplemental Br.).

<sup>10</sup> Doc. 114 at 24 (Pl.' Reply Br.).



takes to create that product.”<sup>11</sup> The Court is skeptical that those allegations establish the existence of a trade secret. AgJunction has not described in any detail the “compilations of data,” “methods or algorithms,” or information contained in JIRA that it alleges are trade secrets or demonstrated that they are valuable or unknown to others who might profit by their use.

Even if the Court assumes that AgJunction has alleged sufficiently that its confidential and proprietary information constitutes trade secrets, however, AgJunction also must show that defendants actually misappropriated the trade secrets. To do so, a plaintiff must show either that: (i) another person acquired the trade secret with knowledge that the trade secret was acquired by improper means; or (ii) a person used or disclosed the trade secret without consent. K.S.A. § 60-3320(2).

AgJunction’s evidence that defendants acquired or disclosed information about its precision ag product is pure speculation. In early April 2013, Agrian decided to begin developing precision ag software as part of NextGen. Shortly thereafter, Agrian began hiring the Employee Defendants, who were working in AgJunction’s precision ag division. Things came to a head between the parties in January 2014 when CPS, AgJunction’s largest client, told AgJunction that it had chosen not to renew its precision ag contract in 2015, but instead was switching its business to Agrian.

AgJunction claims that it took 10 years to develop its precision ag software and that Agrian could not possibly have developed a comparable product so quickly without misappropriating AgJunction’s proprietary software information.<sup>12</sup> Defendants dispute this claim, citing evidence that AgJunction did not start development of its software until 2008. More significantly, defendants claim that it has devoted substantially more resources to the project than AgJunction,

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<sup>11</sup> *Id.* at 24-25.

<sup>12</sup> Doc. 114 at 21 (Pl.’s Reply Br.).

allowing it to accelerate its development process. According to defendants, AgJunction and its predecessor had only 3-5 developers working on its precision ag software at any one time; in contrast, AgJunction has invested millions of dollars in development over the past year and has over 30 developers currently working on the product.

To be sure, AgJunction has produced some evidence suggesting that defendants, at best, acted in an underhanded manner in their departure from and dealings with AgJunction. For instance, emails indicate that at least some Employee Defendants had agreed to work for Agrian months before they actually notified AgJunction of their plans and left it. David Nerpel, while still an AgJunction employee, sent an email to Agrian CEO Nishan Majarian stating that Agrian needed to put AgJunction “out of the software business.”<sup>13</sup> Heiniger asserts that, as the Employee Defendants continued to leave for Agrian, Majarian repeatedly assured him that Agrian had no intention of competing in the precision ag business. While a jury may conclude that defendants conducted themselves deceitfully and it thus points to actionable misconduct of some sort, it does not, without more, show a substantial likelihood that defendants stole AgJunction’s proprietary product information.

AgJunction did produce an expert, Robert Stillerman, who testified that it was “more likely than not” that part of Agrian’s code was based on AgJunction software. Stillerman identified overlapping “functionality” between the two software systems. In addition, he identified several sections of Agrian’s code that were electronically “signed” by Employee Defendants Hunt and Dedmon, indicating that they had authored those sections of the code.

In response, defendants presented their own expert, George Edwards, who testified that Agrian did not copy AgJunction’s code. To arrive at his conclusion, Edwards looked for any di-

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<sup>13</sup> Ex. P25.

rect copying of code and then analyzed the structure and design of the code and its overall architecture. He drew several conclusions. First, he found no evidence of direct, line-for-line copying, a conclusion with which Stillerman agrees. This finding is unsurprising because the two systems are written in different programming languages—AgJunction uses “CGI/Python” while Agrian develops code in what is called “Ruby on Rails.” Second, Edwards found that the code in each system had different internal structures—if there had been copying, one would see similarities in the structure. Third, Edwards found only a small overlap in the technologies used in both sets of code. Edwards testified that he found a total of 40 technologies used between the two systems, but only eight existed in both. The overlap consisted of very common technologies like JavaScript and JQuery which, he said, are present in thousands and thousands of software programs worldwide. Fourth, Edwards found that each product had a different software architecture, which suggests no copying. AgJunction used a traditional “three-tiered” system, whereas Agrian used a newer “service-oriented” approach. Finally, Edwards found that the AgJunction code was much more mature—it contained 3.1 million lines of code compared to only 270,000 lines in Agrian’s. This suggests that the AgJunction code is much older and has been in development for much longer than the new Agrian code.

In response to Stillerman’s evidence that Hunt and Dedmon wrote some of Agrian’s code, Edwards found that the sections purportedly authored by Hunt and Dedmon constituted less than 1% of the code in Agrian’s software system. Furthermore, evidence that Hunt and Dedmon wrote a portion of the code in Agrian’s system does not establish that they misappropriated AgJunction’s code.

The Court finds that on AgJunction’s best day, so far, Stillerman’s and Edwards’ conclusions are equally plausible and therefore it cannot grant a preliminary injunction based on Still-

erman's report. This means AgJunction's case largely depends on its allegations that Agrian and the Employee Defendants schemed to leave AgJunction and "destroy" AgJunction's precision ag division. The Court does not diminish AgJunction's claims that it suffered harm as a result of the Employee Defendants' wrongdoing. However, the Court concludes, based on the evidence before it, that AgJunction has not shown the substantial likelihood that defendants misappropriated its proprietary and confidential software information necessary for a preliminary injunction.

## 2. Employment Contracts

Four of the five Employee Defendants signed employment contracts with AgJunction which contained a "Confidential and Intellectual Property Agreement."<sup>14</sup> The Employee Defendants agreed to "preserve as strictly confidential [] full particulars of" AgJunction's "Intellectual Property"<sup>15</sup> as well as to "hold all ... Proprietary Information in strict confidence and trust ...."<sup>16</sup> The Agreements define the term "Intellectual Property" very broadly to include:

[A]ll inventions, works of authorship, innovations, improvements, derivatives, discoveries, productions, research, results, assemblies of information, work, trade secrets, systems, models, devices, formulations, pre-formulations, computer programs, electronic media, computer technology, trade-marks, patents, copyrights, industrial design, source code, object code, methods of doing business, topography, business plans, know how, show how, and any other intellectual property ....<sup>17</sup>

"Proprietary Information" includes "any information of a confidential or sensitive nature that may be disclosed to [the Employee Defendants] by" AgJunction "that relates to the business of" AgJunction.<sup>18</sup> The Agreements are governed by the laws of the province of Alberta.

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<sup>14</sup> At the preliminary injunction hearing, Heiniger conceded that Employee Defendant Derrick Anderson never signed his employment agreement (Hr'g Tr., 171:10-12).

<sup>15</sup> *E.g.*, Doc. 1-1 at 43 (Ex. E to Comp.).

<sup>16</sup> *E.g.*, Doc 1-1 at 43, 45 (Ex. E to Comp.).

<sup>17</sup> *E.g.*, Doc. 1-1 at 43 (Ex. E to Comp.).

<sup>18</sup> *E.g.*, Doc. 1-1 at 45 (Ex. E to Comp.).