

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRENTWOOD INDUSTRIES, INC.,)	
)	Civil Action
Plaintiff)	No. 04-CV-03892
)	
vs.)	
)	
ENTEX TECHNOLOGIES, INC.,)	
WAYNE FLOURNOY,)	
RICHARD PEHRSON and)	
SARAH HUBBELL,)	
)	
Defendants)	

* * *

APPEARANCES:

JOSEPH E. WOLFSON, ESQUIRE
DEAN R. BATSON, ESQUIRE
On behalf of Plaintiff

JOHN A GUERNSEY, ESQUIRE
RACHEL B. WEIL, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the oral Motion for Judgment on Partial Findings in Accordance with Rule 52(c) of the Federal Rules of Civil Procedure, which motion was made by counsel for defendants in open court on the record at the close of plaintiff's case-in-chief on December 20, 2004 at the hearing on Plaintiff's Motion for Preliminary Injunctive Relief, which motion was filed August 17, 2004. After oral argument conducted

before the undersigned December 20, 2004, and for the reasons expressed below, we grant defendants' oral motion for judgment on partial findings pursuant to Rule 52(c) and dismiss Plaintiff's Motion for Preliminary Injunctive Relief.

JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b). The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial number of the events giving rise to plaintiffs' claims allegedly occurred in this judicial district.

SUMMARY OF DECISION

Plaintiff Brentwood Industries, Inc. had an Exclusive License Agreement with former defendants, collectively referred to as "Apex", to market and install an industrial fabric product patented by Apex, known as BioWeb. The product can be used to purify the water in wastewater plants and sewage treatment systems. The product enhances the growth of bacteria, which is beneficial in removing waste products and filtering sewage.

Defendant Wayne Flournoy was employed by plaintiff as the Director of Brentwood's Water and Wastewater Division. Defendant Sarah Hubbell was the Project Manager for Brentwood's BioWeb project. Defendant Richard Pehrson was hired by Brentwood

as a consultant to help promote and sell BioWeb.

Mr. Flournoy was terminated without notice from his position at Brentwood. Subsequently, he and Mr. Pehrson formed a company known as Entex, which is also a defendant in this case. Entex presented a plan to Apex to market BioWeb and requested Apex to grant them the exclusive license to distribute the product. Thereafter, Entex hired Mrs. Hubbell away from Brentwood.

Over a period of three years Brentwood failed to make its minimum annual guaranteed purchase of BioWeb from Apex as required by Brentwood's Exclusive Licensing Agreement with Apex. As a result Brentwood determined it could not meet the minimum purchase requirements of the agreement and terminated its exclusive license to market and sell BioWeb. Apex then granted the exclusive rights to Entex.

Brentwood filed this lawsuit against Apex, Entex, Flournoy, Pehrson and Hubbell. Plaintiff alleges seven causes of action for violations of the federal Lanham Act, and six pendent state-law claims.

Brentwood filed a motion for preliminary injunctive relief on numerous grounds. At the commencement of the hearing, plaintiff narrowed its request to the issuance of two preliminary injunctions: one against defendant Pehrson to prohibit him from violating the terms of a restrictive covenant not to compete with

plaintiff; and another against defendants Entex, Flournoy, Pehrson and Hubbell to prohibit them from unfairly competing with plaintiff by using allegedly misappropriated trade secrets or confidential material.

At the close of plaintiff's case-in-chief at the preliminary injunction hearing before the undersigned, defendants moved for judgment on partial findings in accordance with Federal Rule of Civil Procedure 52(c). After oral argument, we took the matter under advisement. Hence this Opinion.

For the following reasons we granted defendants' motion for judgment on partial findings and denied plaintiff's motion for preliminary injunctive relief.

Because we conclude that plaintiff Brentwood breached its Exclusive License Agreement with Apex by failing to satisfy its minimum purchase requirements from Apex, plaintiff's non-competition clause with Pehrson is void and of no effect by operation of the language of Article 5 of plaintiff's consulting agreement with Pehrson. That Article provides that Pehrson shall be relieved of any restrictions in his non-compete clause with Brentwood in the event of Brentwood's breach of contract on the Bioweb License Agreement with Apex.

Because the non-compete clause is void, plaintiff cannot show a likelihood of success on the merits of its motion for a preliminary injunction. Therefore, we deny Brentwood's

request for an injunction to enforce its non-competition clause against Pehrson.

We conclude that plaintiff cannot establish that the information it seeks to protect is a trade secret because plaintiffs have taken no steps to protect any of the information it seeks to be declared a trade secret or proprietary information, because the information has little or no value to plaintiffs, because defendants have no real interest in most of the information sought to be protected, because much of the information could be easily acquired by defendants and because a good portion of the information has already been disseminated under circumstances that do not indicate the need for trade secret protection.

Accordingly, because plaintiff cannot establish a trade secret, we conclude that plaintiff does not have a likelihood of success on the merits of its claim for misappropriation of trade secrets. Thus, it is not entitled to a preliminary injunction prohibiting defendants Entex, Flournoy, Pehrson and Hubbell from unfairly competing with plaintiff by using misappropriated trade secrets or confidential materials.

In addition, plaintiff has failed to establish that it will suffer irreparable injury if an injunction is not granted. A preliminary injunction will harm defendants much more than plaintiff because plaintiff no longer has any right, title or

interest in the BioWeb license and defendants are the current license holders. Finally, any injury suffered by plaintiff is fully compensable by money damages.

STANDARD OF REVIEW

Preliminary Injunction

In considering a motion for preliminary injunction the court has to look at four factors: (1) the likelihood of success on the merits; (2) the extent of irreparable injury from the conduct complained of; (3) the extent of irreparable harm to the defendants if a preliminary injunction issues; and (4) the public interest. Clean Ocean Action v. York, 57 F.3d 328, 331 (3d Cir. 1995).

To demonstrate irreparable harm, the moving party must show that the potential harm cannot be redressed by a legal or equitable remedy following a trial. A preliminary injunction must be the only means of protecting the moving party. If monetary damages will adequately compensate the moving party, a preliminary injunction should not be issued. See Campbell Soup Company v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992).

PROCEDURAL HISTORY

On August 17, 2004 plaintiff Brentwood Industries, Inc., ("Brentwood") filed its Complaint in this matter. In its Complaint, plaintiff named seven defendants including Apex Aridyne Corp., Apex Mills Corporation and Apex Texicon, Inc.

(collectively "Apex" or "Apex defendants"), Entex Technologies, Inc., ("Entex"), Wayne Flournoy, ("Flournoy") Richard Pehrson ("Pehrson") and Sarah Hubbell ("Hubbell").

Plaintiff alleges seven causes of action. Count I avers violations of the federal Lanham Act¹ against all defendants. All remaining counts allege pendent state-law claims. Count II alleges unfair competition against all defendants. Count III avers misappropriation of trade secrets against all defendants. Count IV asserts breach of contract against the Apex defendants. Count V alleges tortious interference with contractual relations against defendants Entex, Flournoy, Pehrson and Hubbell. Count VI claims a breach of fiduciary duties against defendants Flournoy, Pehrson and Hubbell. Finally, Count VII avers breach of restrictive covenant against defendant Pehrson.

On August 17, 2004 plaintiffs filed the underlying Motion for Preliminary Injunctive Relief and a Motion for Expedited Discovery. On September 21, 2004, the Motion of Defendants/Counterclaim Plaintiffs Entex Technologies, Inc., Wayne Flournoy, Richard Pehrson and Sarah Hubbell for Preliminary Injunctive relief was filed.

By two separate Orders of the undersigned dated October 21, 2004 we approved the Stipulation of the parties to

¹ 15 U.S.C. §§ 1051-1127.

permit pre-hearing discovery, set a schedule for submission of proposed findings of fact and conclusions of law together with all pre-hearing submissions in support of, or in opposition to, the cross-motions for preliminary injunctive relief. Moreover, we scheduled a hearing on the cross-motions for injunctive relief for November 22-23, 2004.

On November 22, 2004, at the commencement of the hearing on the cross-motions for injunctive relief, the parties informed the court that all issues between plaintiff and the Apex defendants had been resolved. On December 28, 2004 a signed Stipulation and Order of the undersigned were filed memorializing this agreement.

Moreover, on November 22, 2004, as a result of the settlement between Brentwood and Apex, defendants Extex, Flournoy, Pehrson and Hubbell withdrew their motion for preliminary injunctive relief. In addition, plaintiff limited its motion for injunctive relief to two distinct issues: (1) whether plaintiff is entitled to a preliminary injunction against defendant Pehrson to prohibit him from violating the terms of a restrictive covenant not to compete with plaintiff; and (2) whether plaintiff is entitled to a preliminary injunction to prohibit defendants Extex, Flournoy, Pehrson and Hubbell from unfairly competing with plaintiff by using allegedly misappropriated trade secrets or confidential materials.

On November 22, 23, 29 and December 20, 2004 we conducted hearings comprising the case-in-chief on Plaintiff's Motion for Preliminary Injunctive Relief. The court heard testimony from four plaintiff witnesses and one defense witness.² In addition plaintiff introduced 69 exhibits into evidence at the hearing and defendant identified 17 exhibits.

At the close of plaintiff's case-in-chief, defendants made the within motion to dismiss pursuant to Rule 52(c).

RULE 52(c) MOTION

Rule 52(c) of the Federal Rules of Civil Procedure provides:

(c) Judgment on Partial Findings.

If during a trial without jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

² Plaintiff offered the testimony of Michael Whittemore, Vice-President of Brentwood; Dr. Curt McDowell, Manager of Engineering for the Water and Wastewater Group of Brentwood; David Krichten, National Sales Manager of the Water Technology Group; and defendant Sarah Hubbell as of cross examination. In addition, by agreement of the parties, defendant presented the testimony of Edward Schlusel, President of the Apex companies, out-of-turn in plaintiff's case-in-chief to accommodate the schedule of that witness. Because plaintiff offered the deposition testimony of Mr. Schlusel as part of its case-in-chief, we considered the live testimony of Mr. Schlusel as well as his deposition testimony in our decision.

The pertinent section of Rule 52(a) states:

In all actions tried upon facts without a jury...the court shall find the facts specially and state separately its conclusions of law thereon...and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

In making our determination pursuant to Rule 52(c) we may make appropriate findings of fact and resolve disputed factual questions on a partial record. See Rego v. ARC Water Treatment Company of PA, 181 F.3d 396 (3d Cir. 1999).

FINDINGS OF FACT

Based upon the pleadings, exhibits, deposition testimony, the joint findings of fact submitted by the parties, the testimony of the witnesses and stipulations at the hearings conducted November 22, 23, 29 and December 20, 2004, and based upon the credibility determinations made by the undersigned pursuant to Rules 52(a) and (c), the court makes the following findings of fact.³

³ By Order of the undersigned dated and filed October 21, 2004 we approved the stipulation of the parties concerning the scheduling of the cross-motions for injunctive relief. Paragraph 4 of the Stipulation provides: "The parties shall further submit to the Court no later than November 12, 2004, all evidence in support of, or in opposition to, the cross motions for preliminary injunctive relief by affidavit, deposition, or admission, except for those matters that require credibility determinations by the Court or involve complex expert testimony."

Accordingly, for purposes of our Findings of Fact, we consider the deposition testimony of any witness not called during the hearings on this matter to be uncontested.

1. Plaintiff Brentwood is in the business of, among other things, the research, design, manufacture and supply of wastewater and sewage treatment systems.

2. Former Apex defendants are the manufacturers of a patented industrial fabric technology known by the trade name BioWeb.

3. Apex is in the business of manufacturing industrial fabrics.

4. From 1998 through early 2003 defendant Wayne Flournoy was employed by Brentwood as Brentwood's Director of Water and Wastewater Division of the Water Technology Group.

5. In January 2003 Mr. Flournoy was terminated without notice from his position at Brentwood.

6. In March 1999 Apex engaged defendant Richard Pehrson to help promote and sell BioWeb, including finding a licensee for the distribution of BioWeb. Soon thereafter, Pehrson called Flournoy about BioWeb.

7. In 1999 defendant Sarah Hubbell was hired by Brentwood as a sales engineer. In 2002 she assumed the position of Product Manager for Brentwood's BioWeb project. Mrs. Hubbell held this position with Brentwood until July 2004.

8. BioWeb is a patented technology consisting of high strength, hexagonal mesh, rope-type, fixed film media for use in Integrated Fixed-film Activated Sludge ("IFAS") systems and in

BioBaffle lagoon upgrades. The BioWeb product enhances the growth of bacteria, which increase the removal of organic and nitrogen components from waste product streams thereby enhancing the efficiency of an existing waste water system without increasing the size of the activated sludge basin.

9. The presence and increased growth of bacteria in sewage treatment systems is beneficial in removing waste products and filtering sewage.

10. On June 30, 1998 the BioWeb patent was issued to its inventor, Edward Schlussel, the President of Apex.

11. On August 24, 1999, Mrs. Hubbell signed an Employee Innovation and Proprietary Information agreement in which she agreed, among other things:

(a) not to use, publish, or otherwise disclose, except as my Brentwood duties require, either during or after my employment by Brentwood, any secret, confidential or proprietary information, trade secrets or data, including computer source code, of Brentwood, or any of its customers, associated companies of the like, whether of a technical or business nature unless such use, publication, or disclosures is made with prior written consent of Brentwood;

(b) not to disclose or utilize in connection with any work done with or for Brentwood any secret, confidential or proprietary information or trade secrets of others, including any prior employer, which are not included within the scope of this [Employee Innovation and Proprietary] Agreement; and

(c) Upon termination of my employment with Brentwood, for any reason, I shall not remove

or retain, and shall promptly deliver to Brentwood, all drawings, blueprints, manuals, letters, notes, notebooks, records, data, equipment, computer printouts and all other materials of any nature and all copies thereof, which are in my possession and/or control and which are the property of Brentwood.

12. In mid-1999, BioWeb had been successfully installed in two wastewater plant facilities, but the development and commercial potential for the use of BioWeb in wastewater and sewage treatment systems was incomplete as there were technical and marketing hurdles to be overcome.

13. After internal meetings and discussions, including a meeting with the Executive Committee of Brentwood's Board of Directors, Mr. Flournoy received approval to move forward with respect to BioWeb. Brentwood then entered into negotiations with Apex for license rights to BioWeb and with Mr. Pehrson for his services as a consultant.

14. Apex and Brentwood entered into an Exclusive License Agreement dated February 1, 2000.

15. Section 1.4 of the Exclusive License Agreement named Brentwood the exclusive licensee of BioWeb for use in water and wastewater treatment applications in the United States, Canada and Mexico. Furthermore, in Section 2.1 of the Exclusive Licensing Agreement Apex granted Brentwood "all rights and privileges to a sole and exclusive license" for BioWeb in the

territories set forth in the agreement. Finally, in Section 2.5 of the Exclusive License Agreement Apex granted Brentwood a right of first refusal for the exclusive license to BioWeb in other international territories and other environmental markets.

16. Section 3.1 of the Exclusive License Agreement required Brentwood to commit a specific initial investment of at least \$150,000 during the first 18 months of the agreement for various activities including: product hardware development, including developing competitive frame system; retaining the sales and marketing services of Mr. Pehrson; paying Mr. Pehrson's travel and living expenses; and developing and expanding BioWeb marketing material including brochures, application guidelines, case studies, advertisements and purchasing product samples for distribution to sales representatives and potential customers.

17. Section 7.1 of the Exclusive License Agreement provides:

Brentwood and/or Apex may elect to provide or disclose certain valuable information and/or technology which is of a confidential nature ("Information") concerning any or all of the following: trade secrets, know-how, inventions, techniques, processes, contracts, financial information, sales and marketing plans, and other information and business plans. Such Information to be held in confidence shall be clearly marked in writing as "Confidential", without such clear designations, any obligations hereunder shall not be applicable.

18. On February 18, 2000, pursuant to the Exclusive License Agreement, Brentwood entered into a separate agreement with Mr. Pehrson ("Pehrson Agreement") to retain his services as a consultant for an initial period of one year. That agreement was subsequently modified and extended for an additional year.

19. The Pehrson Agreement provides that Mr. Pehrson's services were to be focused on the sales and marketing of BioWeb for Brentwood and that these services included such areas as business planning, sales and marketing program development and execution, field implementation of sales force training, sales calls with sales representatives, attendance at state and national trade shows, project development and follow-up and bid strategy and implementation.

20. Article 5 of the Pehrson Agreement provides:

In the event this Agreement terminates, Pehrson Associates hereby agrees for a minimum period of five (5) years not to sell or license a product which would be in direct competition with Brentwood Industries. This Article 5 shall be void and of no effect, and Pehrson Associates shall be fully relieved of any restrictions under the following circumstances:

1.1.1 In the event of breach of contract by Brentwood under this Agreement.

1.1.2 In the event of Brentwood's breach of contract on the BioWeb License agreement with Apex.

21. The Pehrson Agreement also includes a provision in which Mr. Pehrson (and Pehrson Associates) agreed that he "shall

not publish, copy or disclose any Information to any third party without prior written approval from Brentwood, and shall use its best efforts to prevent inadvertent disclosure of the Information to any third party...."

22. The Pehrson Agreement defines "Information" as "certain valuable information and/or technology which is of a confidential nature...concerning any or all of the following: trade secrets, know-how, inventions, techniques, processes, contracts, financial information, sales and marketing plans, and other information and business plans." Furthermore, the agreement provides: "Such information to be held in confidence shall be clearly marked in writing as "Confidential", without such clear designation, any obligations hereunder shall not be applicable."

23. Brentwood used the trade name Accuweb to refer to the Bioweb product.

24. Prior to Mr. Flournoy's termination in January 2003, defendants Flournoy, Hubbell and Pehrson constituted the Brentwood BioWeb/AccuWeb "team" and were involved with the research, technical development, marketing and promotion of BioWeb on behalf of Brentwood. In addition, Mr. Flournoy, Dave Krichten, Mike Whittemore and Dr. Curt McDowell were involved in the leadership and direction of the project.

25. Dr. McDowell was assigned to put the design material for BioWeb into usable form, including preparing spreadsheets, Excel models and other computer programs for costing and other tasks. As a result of his efforts, Dr. McDowell created a process design model for BioWeb.

26. The process design model created by Dr. McDowell incorporated publically available material into a spreadsheet to enable efficient design of a BioWeb system.

27. Dr. McDowell changed the way that the amount of BioWeb was determined for use in a specific installation. Specifically, Dr. McDowell changed from a surface area kinetics calculation base to a biomass weight as a design basis.

28. Mr. Flournoy encouraged Dr. McDowell to move past using a biomass weight as a design basis, but was interested in the testing that Dr. McDowell was performing.

29. Mr. Pehrson was adamant that a different design approach was needed and he recommended reverting to the kinetic basis used in the past. Dr. McDowell was adamant that biomass weight provided the correct design basis.

30. Brentwood installed BioWeb in four different facilities (Mamaroneck; Mathews, Virginia; Windsor Locks; and Donner Summit) and none of these projects have been completely successful or have met the expectations of either Brentwood or the purchaser.

31. The Exclusive License Agreement required Brentwood to spend a minimum of \$150,000 between February 1, 2000 and August 1, 2001 to market and develop BioWeb. Brentwood met this initial requirement.

32. Section 3.2 of the Exclusive License Agreement contained minimum guaranteed purchases of BioWeb that Brentwood was required to purchase from Apex in order to maintain its exclusive license to sell BioWeb.

33. Brentwood's minimum guaranteed purchase requirement from August 1, 2001 to July 31, 2002 was \$150,000. Brentwood failed to make its minimum guaranteed purchase of BioWeb for the 2001-2002 contract year, purchasing only \$117,588 of BioWeb instead of the required \$150,000.

34. Brentwood's minimum guaranteed purchase of BioWeb for the period from August 1, 2002 to July 31, 2003 was \$300,000. Brentwood did not meet this minimum purchase requirement.

35. Brentwood's minimum guaranteed purchase of BioWeb for the period from August 1, 2003 to July 31, 2004 was \$500,000. Brentwood did not meet this minimum purchase requirement.

36. On April 23, 2003 Mike Whittemore, in his capacity as Vice-President of Brentwood, wrote Apex, "This letter is to act as the written declaration to reject the commitment to the Minimum Guaranteed purchases of \$500,000 for the year 8/1/03 - 8/1/04 per the contract." In the same letter, he further

informed Apex that Brentwood would not be able to meet the minimum guaranteed purchase requirements under the Exclusive Licence Agreement for the contract year August 1, 2002 through July 31, 2003. In addition, Mr. Whittemore informed Apex that "[d]espite this lack of sufficient new orders, Brentwood continues to believe in this product and would like to continue the development of this market and product on behalf of Apex and our own investments of time, money and reputation."

37. Section 3.2.2 of the Exclusive License Agreement provides: "Any such written notification by Brentwood to reject the Minimum Guaranteed Purchases automatically terminates this agreement."

38. On April 29, 2003 Apex and Brentwood had a meeting during which there was discussions about coming to an alternative arrangement and the future relationship between Apex and Brentwood. Moreover, it was agreed that Mr. Whittemore, on Brentwood's behalf, would send to Apex proposed revisions to the Exclusive Licensing Agreement.

39. On May 29, 2003 Mr. Whittemore, on behalf of Brentwood, sent a letter to Apex regarding the proposed revisions to the Exclusive License Agreement. That same day, Mr. Whittemore and Mr. Schlüssel spoke about the proposed revisions. The parties did not come to any agreement on the issue of a revision of the Exclusive License Agreement.

40. In July or August 2003 Mr. Schlusssel contacted Mr. Flournoy who was now working for another company Kaldnes, to inform him that the license for BioWeb was available and to gauge his interest in selling BioWeb. Mr. Flournoy replied that his new employer was not interested selling BioWeb.

41. On August 14, 2003 Mr. Schlusssel, in his capacity as President of Apex, faxed a proposed addendum to the Exclusive License Agreement to Brentwood which included a proposed extension of the Exclusive License Agreement beyond the contract year ending July 31, 2003. The August 14, 2003 proposal included language that asked Mr. Whittemore to sign the proposal if he agreed to it.

42. The proposed agreement sent by Mr. Schlusssel included a \$100,000 minimum purchase by Brentwood for the period 8/1/03 to 7/31/04, an agreement that Brentwood had not met its contractual obligation for the 2002-2003 fiscal year and other terms and conditions regarding how the parties would proceed into the future.

43. Neither Mr. Whittemore nor anyone else at Brentwood ever signed the August 2003 proposal. Moreover, no written addendum, revision, extension or other modification containing terms and conditions that were agreeable to both parties to the Exclusive Licensing Agreement was ever signed by Brentwood or Apex.

44. Section 8.2 of the Exclusive License Agreement provides: "This agreement may not be amended, or any of its provisions waived unless pursuant to an instrument signed by both parties."

45. After August 2003 Brentwood continued to develop the technical and marketing information necessary to commercialize BioWeb.

46. In October 2003 Brentwood began operating a "wetlab" to test BioWeb under numerous conditions. This testing included testing BioWeb against other media because Brentwood was considering dropping the BioWeb product line entirely because of the failed BioWeb installations and the lack of financial success with Bioweb.

47. Brentwood participated in the Water Environment Federation's Technical Exhibition and Conference ("WEFTEC") 2003 in Los Angeles, California during which Brentwood displayed and advertised BioWeb. Moreover, at WEFTEK 2003 Brentwood was presented the 2003 Innovative Technology Award-Process Equipment Category for its work with BioWeb.

48. During December 2003 and January 2004 Brentwood and Mr. Pehrson conducted negotiations for Mr. Pehrson to work full-time with Brentwood to promote BioWeb. Brentwood considered hiring Mr. Pehrson to replace Mrs. Hubbell and to upgrade and improve its efforts to commercialize BioWeb. These negotiations

did not result in an agreement.

49. In January 2004 Mrs. Hubbell announced she was pregnant. She informed Daveid Krichten that after the birth of her child she sought to obtain a position within Brentwood that would not require her to travel and was looking for a part-time position. Brentwood refused to offer her a part-time position.

50. In February 2004 Mr. Whittemore informed Brentwood employees that Mrs. Hubbell was pregnant and that she would be leaving the company when her child was born and would not be returning.

51. In February 2004 representatives of Brentwood and Apex including Mr. Schlussel, Mr. Whittemore and Mr. Pehrson conducted a telephone conference call regarding Brentwood's current sales efforts with respect to BioWeb, including Brentwood's efforts and commitment to BioWeb in the future. Mr. Whittemore indicated that Brentwood was committed to funding BioWeb through 2005. The parties agreed that Mr. Pehrson should pursue an international license for BioWeb under the AccuWeb name.

52. Following the February 2004 conference call, Mr. Pehrson followed up on the international licensing of BioWeb in numerous countries including among others Germany, Australia, Spain and Belgium. Mr. Pehrson indicated that he was a consultant to Brentwood with regard to international licensing.

53. On April 14, 2004 Mr. Pehrson contacted Mr. Flournoy, who was no longer working for Kaldnes, and expressed his opinion that Brentwood was not making the necessary commitments to make BioWeb successful. Mr. Pehrson further indicated that he needed to find another licensee for BioWeb. During this conversation, Mr. Flournoy outlined his idea for starting a new company.

54. Beginning on April 18, 2004 Mr. Pehrson and Mr. Flournoy met in Providence, Rhode Island for approximately one week, during which they formulated a plan to start a business. During that week, defendants Pehrson and Flournoy worked on a business plan which included an effort to acquire the exclusive rights to distribute Bioweb. Furthermore, during this week, Flournoy contacted Hubbell by telephone to schedule a meeting and inform Hubbell of the plans to form a business.

55. During the week in Providence, Mr. Pehrson called Mr. Schlusell and explained that he wanted to discuss the future of BioWeb. Mr. Pehrson called later in that same week to confirm a meeting time.

56. The day after leaving Providence, Flournoy and Pehrson drove to Reading, Pennsylvania to meet with Hubbell and discuss their plans for a business venture. During this meeting, Hubbell was given a draft of the business plan, it was explained to her that Pehrson and Flournoy wanted to integrate both fixed

and moving bed systems and hoped to convince Apex that they were the right licensees to move forward with BioWeb. Hubbell agreed to review the draft business plan and consider the proposal.

57. At the time Pehrson and Flourney met with Hubbell in April 2004, she was employed with Brentwood as the Product Manager of BioWeb.

58. In late April or early May 2004, following their meeting with Hubbell, both Pehrson and Flourney met with Mr. Schluskel at Apex's offices in New York. During this meeting, defendants Pehrson and Flourney presented their plan to market BioWeb and requested Apex to grant them the exclusive license to distribute the product. At the conclusion of the meeting, Mr. Schluskel told Pehrson and Flourney that he was 90% sure that he would give them, as Entex, the exclusive rights to Bioweb.

59. In May 2004 Flourney contacted Hubbell by telephone, at which time Hubbell committed to join the Flourney-Pehrson venture.

60. In late May 2004 Mr. Schluskel contacted Mr. Whittemore and informed him that Apex was considering awarding the exclusive license for BioWeb to an entity other than Brentwood. Mr. Whittemore replied that he wanted to meet with Mr. Schluskel about this and other issues.

61. On June 4, 2004 another meeting was held between Mr. Flournoy, Mr. Pehrson and Mr. Schlussel about the exclusive license for BioWeb being awarded to Entex. Mr. Schlussel requested Flournoy and Pehrson to provide him with a list of questions to ask during his meeting with Brentwood, to enable him to make a fair evaluation of the decision regarding the BioWeb license.

62. On June 10, 2004 Mr. Schlussel met with representatives of Brentwood at Brentwood's Reading, Pennsylvania facilities. During this meeting, the Brentwood representatives explained to Mr. Schlussel the company's efforts to bid on, and win, numerous projects both in the short-term and long-term time frame. Furthermore, Mr. Schlussel toured the wet lab which included modules used for the comparative testing of BioWeb with other different materials. Mrs. Hubbell participated in the June 10, 2004 meeting with Mr. Schlussel. At the meeting, Mr. Whittemore told Mr. Schlussel that, depending upon the results of the testing Brentwood was doing, it was possible that Brentwood would stop promoting BioWeb.

63. On June 11, 2004 Flournoy and Pehrson again met with Mr. Schlussel regarding the license rights to BioWeb and made a presentation as to why they believed they (as Entex) were the better choice to distribute BioWeb.

64. Sometime between Mr. Schlusssel's meeting with Brentwood on June 10, 2004 and his meeting the next day with Flournoy and Pehrson, Mr. Flournoy contacted Mrs. Hubbell and discussed the meeting between Brentwood and Apex. Sometime after this meeting Mr. Schlusssel and his other family members met to decide who should receive the exclusive license rights to sell BioWeb.

65. On June 14, 2004 Mr. Schlusssel sent Entex, by electronic mail (e-mail), a letter of intent, expressing Apex's intent to grant Entex exclusive rights to sell BioWeb.

66. On June 17, 2004 Mrs. Hubbell submitted her letter of resignation to Dave Krichten at Brentwood. At no time prior to her last day at Brentwood on July 9, 2004 did Mrs. Hubbell tell Brentwood about her plans to go to work for Extex.

67. On June 21, 2004 Mr. Schlusssel called Mr. Flournoy to advise him that Schlusssel had informed Brentwood that Apex was awarding the BioWeb license to Extex and that Entex consisted of Pehrson and Flournoy.

68. After learning of the Apex decision to grant the exclusive license to Extex, Mr. Whittemore asked Mrs. Hubbell what, if anything, she knew about the potential change. Mrs. Hubbell lied to Mr. Whittemore and told him she knew nothing about Entex and that she was not involved with Mr. Flournoy and Mr. Pehrson.

69. On June 23, 2004 an Exclusive License Agreement was signed between Apex and Entex. Subsequently, Entex issued a press release in which it announced that Entex has an exclusive license for the BioWeb fixed-film technology for advanced wastewater treatment.

70. On July 27, 2004 Brentwood issued a "purchase order" to Apex for \$100,000 of BioWeb product. This "purchase order" provided a tentative ship date of June or July 2005 and contained directions not to manufacture until Brentwood confirms in writing the final mesh size and loop configuration of the web. The "purchase order" did not have a "ship to" address and was not in conformance with other purchase orders Brentwood had issued in the past.

71. Apex did not consider the July 27, 2004 "purchase order" as a valid and legitimate purchase order and did not accept it.

72. Section 3.2.4 of the Exclusive License Agreement between Apex and Brentwood provides: "In the event of a shortfall in purchases below the applicable Minimum Guaranteed purchase in any given Commitment Period, Brentwood shall issue a purchase order in the amount of the outstanding shortfall by the 15th day of the last month of the Commitment Period."

73. Defendants have not used, and do not intend to use, any information that can be considered proprietary or a

trade secret of Brentwood.

74. No document prepared by Brentwood was ever marked confidential, including those documents Brentwood claims are propriety or constitute a trade secret.

75. No documents were ever marked "confidential" with regard to either the Pehrson Agreement or the Exclusive License Agreement between Apex and Brentwood.

76. No information provided to Mrs. Hubbell, Mr. Pehrson, Mr. Flournoy or Mr. Schlusser either, orally or in writing, was ever designated by Brentwood as "confidential".

77. Brentwood took no steps to protect the confidentiality, either internally or externally, of any information it considered either a trade secret or proprietary information.

78. Based upon the settlement agreement between Brentwood and Apex, Brentwood no longer has any license rights to market or sell BioWeb.

79. Brentwood has obtained a new product it will market under the AccuWeb trade name.

80. Brentwood failed to meet the \$150,000 minimum purchase requirements of the Exclusive License Agreement with Apex for the time period from August 1, 2001 to July 31, 2002.

81. Brentwood failed to meet the \$300,000 minimum purchase requirements of the Exclusive License Agreement with

Apex for the time period from August 1, 2002 to July 31, 2003.

82. Brentwood failed to meet the \$500,000 minimum purchase requirements of the Exclusive License Agreement with Apex for the time period from August 1, 2003 to July 31, 2004.

CONCLUSIONS OF LAW

In applying our factual findings to the standard of review for issuance of a preliminary injunction, we make the following legal conclusions.

1. Brentwood's failure to meet the minimum purchase requirements of the Exclusive License Agreement constitutes a breach of that agreement by Brentwood.

2. Because Brentwood breached the Exclusive License Agreement with Apex, the non-compete clause contained in Article Five of the Pehrson Agreement is void and unenforceable.

3. Regarding Count VII of its Verified Complaint, plaintiff has not demonstrated a likelihood of success on the merits of establishing that Mr. Pehrson breached his restrictive covenant not to compete with Brentwood.

4. No information communicated to Extex, Flournoy, Pehrson or Hubbell by Brentwood constitutes either a trade secret or proprietary information.

5. Regarding Count III of its Verified Complaint, Brentwood has not demonstrated a likelihood of success on the merits of establishing misappropriation of trade secrets from

Brentwood by any defendant.

6. On the evidence presented, Brentwood has not suffered irreparable harm.

7. On the evidence presented, all of Brentwood's injuries, if any, are compensable by monetary damages.

8. Plaintiff is not entitled to a preliminary injunction.

DISCUSSION

At the beginning of the hearing on November 22, 2004 plaintiff clarified that it is seeking two distinct preliminary injunctions.

First, plaintiff seeks a preliminary injunction against defendant Pehrson to prohibit him from violating the terms of a restrictive covenant not to compete with plaintiff.

Second, plaintiff seeks a preliminary injunction to prohibit defendants Entex, Flournoy, Pehrson and Hubbell from unfairly competing with plaintiff by using misappropriated trade secrets or confidential materials. We address plaintiff's requests in that order.

Pehrson's Covenant Not to Compete

Plaintiff seeks a preliminary injunction to prohibit Mr. Pehrson from violating the terms of a restrictive covenant not to compete. Under Pennsylvania law, non-competition clauses are enforced when: (1) supported by adequate consideration;

(2) reasonably limited as to time and territory; (3) related to or ancillary to a contract of employment; and (4) necessary to protect a legitimate interest. Prison Health Services, Inc. v. Emre Umar and Correctional Medical Care, Inc., No. Civ.A. 02-2642, 2002 U.S. Dist. LEXIS 12267, at *15 (E.D. Pa. May 8, 2002)(Surrick, D.J.).

Plaintiff contends that its agreement with Mr. Pehrson satisfies all of the requirements for a restrictive covenant. Specifically, plaintiff asserts that the payment of money to Mr. Pehrson under the consulting arrangement between Brentwood and Pehrson satisfies the adequate consideration requirement.

Next, plaintiff asserts that the five-year time limitation in the Pehrson Agreement is reasonable considering the nature of the product involved. Specifically, plaintiff contends that the nature of BioWeb is that it has a limited market (municipalities and other businesses that have sewers). Moreover, plaintiff contends that because of the world-wide nature of this limited market, the absence of territorial limits in the restrictive covenant is proper.

Regarding the third factor, plaintiff asserts that the non-compete clause was a condition of entering into the consulting agreement with Mr. Pehrson, which is a contract of employment. Finally, plaintiff contends that its success in its industry depends on developing new technology and effectively

marketing it. What plaintiff seeks to protect from disclosure, through the non-compete clause with Mr. Pearson, is its trade secrets, other business information and customer goodwill.

Defendant Pehrson asserts that the non-compete clause is unenforceable because plaintiff breached the terms of its Exclusive License Agreement with Apex. Mr. Pehrson contends that under the terms of the consulting agreement between Pehrson and Brentwood, the non-compete clause is void as a matter of law. Thus, Mr. Pehrson contends that because Brentwood breached the agreement with Apex, he was free to compete with Brentwood pursuant to the terms of his separate agreement with Brentwood. For the following reasons, we agree with defendant Pehrson.

The Pehrson Agreement does not contain a choice-of-law provision. However, both parties rely on caselaw from either Pennsylvania appellate courts or federal courts sitting in Pennsylvania. Accordingly, we apply Pennsylvania law in reviewing this contract claim.

Under Pennsylvania law, "when a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed." Steuart v. McChesney, 498 Pa. 45, 49, 444 A.2d 659, 661 (1982). In this case, the Pehrson Agreement contains a restrictive covenant in the form of a non-compete clause, which states:

5. Non-Compete Clause

5.1 In the event this Agreement terminates, Pehrson Associates hereby agrees for a minimum period of five(5) years not to sell or license a product which would be in direct competition with Brentwood Industries. This Article 5 shall be void and no effect, and Pehrson Associates shall be fully relieved of any restrictions under the following circumstances:

1.1.1 In the event of breach of contract by Brentwood under this Agreement.

1.1.2 In the event of Brentwood's breach of contract on the BioWeb License Agreement with Apex.

We conclude that plaintiff breached the Exclusive License Agreement on at least three occasions and possibly a fourth.⁴ As noted in Findings of Fact 33, 34 and 35, Brentwood did not meet the minimum purchase requirements for the 2001-2002, 2002-2003 or 2003-2004 time periods. That failure constitutes a breach of the Exclusive License Agreement. It is of no moment that Apex did not seek to hold plaintiff in breach of the Exclusive License Agreement. The fact that Apex did not seek to hold Brentwood in breach of contract does not insulate Brentwood

⁴ In our Findings of Fact we conclude that Brentwood and Apex did not agree to extend the Exclusive License Agreement after it was terminated by Brentwood. In the event that we are incorrect in that finding, we conclude that Brentwood breached the Exclusive License agreement a fourth time when it failed to send a purchase order by the 15th day of the last month of the commitment period. In this case, Brentwood did not send its purported purchase order until July 27, 2004, eleven days after it was required to be sent under the Exclusive License Agreement.

Accordingly, we conclude that act, in and of itself, was a breach of the contract that would relieve Mr. Pehrson from the non-compete clause in the Pehrson Agreement.

from the fact that Brentwood's breach of its Exclusive License Agreement with Apex constituted a breach of section 5.1.1.2 of Brentwood's agreement with Pehrson.

Because we conclude that plaintiff breached its Exclusive License Agreement with Apex, plaintiff's non-compete clause with Pehrson is void and of no effect by operation of the clear and unambiguous language of Article 5 of the Pehrson Agreement. Furthermore, because the non-compete clause is void, plaintiff cannot show a likelihood of success on the merits of its motion for a preliminary injunction.

Accordingly, we grant defendant's oral motion to dismiss pursuant to Rule 52(c) of the Federal Rules of Civil Procedure and deny plaintiff's request for injunctive relief to enforce its non-compete clause against Mr. Pehrson.

Trade Secrets and Proprietary Information

Plaintiff asserts that it is entitled to a preliminary injunction to prohibit Mr. Flournoy, Mr. Pehrson and Mrs. Hubbell from unfairly competing with Brentwood or using Brentwood's allegedly misappropriated trade secrets.

Specifically, plaintiff seeks to protect, among other things: (1) calculations designed to maximize the bacterial enhancement from proper sizing, distribution and placement of BioWeb in wastewater treatment systems; (2) the most beneficial systems to perform calculations to maximize the bacterial

enhancement from proper sizing, distribution and placement of BioWeb in wastewater treatment systems; (3) the formulas to interpret computer generated bacterial growth estimates to maximize the bacterial enhancement from proper sizing, distribution and placement of BioWeb in wastewater treatment systems; (4) test results obtained by Brentwood in connection with its efforts to technically develop BioWeb; (5) biomass growth weights and kinetics of the biomass on different BioWeb densities and at different temperatures; (6) the selection of criteria of different web densities and spacings; (7) mixed media to enhance overall plant performance; (8) specific installation specifications on structural frames and the design of the structural frames to promote improved hydraulics, biological performance, aeration and structurally strong modules; (9) the optimal pH and dissolved oxygen controls to enhance bacterial growth; (10) the marketing and promotional strategies to maximize the potential for BioWeb; and (11) target customers and the most optimum methods of marketing to such customers.

Plaintiff asserts that trade secret protection encompasses such information. Furthermore, plaintiff avers that this information is extremely valuable to Brentwood in the conduct of its business. Plaintiff contends that armed with this information, defendants possess an unfair ability to frustrate, obstruct and usurp plaintiff's existing and prospective business

plans, opportunities and relationships and erase any competitive advantage and goodwill which plaintiff has developed.

Plaintiff further contends that it has the right to use and enjoy these trade secrets. Finally, plaintiff asserts that all three individual defendants were in a position of trust to make it inequitable to allow them to use the trade secret information for themselves and to the prejudice of plaintiff.

Accordingly, plaintiff alleges that it has shown a likelihood of success on the merits, and irreparable harm to it if an injunction were not granted.

Initially, defendants contend that plaintiff did not take any steps to guard the secrecy of any alleged trade secret or proprietary information. In addition, defendants assert that all of the alleged trade secrets fall into two distinct categories (1) customer information and (2) technical and marketing data relevant to the development, sale and use of BioWeb.

Regarding customer lists, defendants contend that in the wastewater treatment industry, potential customers are no secret. Potential customers consist of a small universe of municipalities and industrial and manufacturing concerns, the identities of which are readily available from numerous public sources as well as from industry sources, including trade publications and trade conventions and shows. Simply stated,

defendants assert that everyone in this industry competes for the same customers and everyone knows or can easily find out who these potential customers are.

Thus, defendants contend that these so-called customer lists are not trade secrets. Moreover, defendants contend that the alleged "optimum marketing strategies" were never communicated in confidence, nor guarded as such. In addition, defendants contend that plaintiff was not very successful in its attempts to sell BioWeb and has not sold any amount of the product since early 2003. Defendants contend that they will not be relying on any marketing strategies of plaintiff as those strategies clearly did not work.

Defendants contend that the second category of alleged trade secrets advanced by plaintiff is a laundry list of categories of technical information. Defendants contend that plaintiff fails to allege what, if any, steps it took to guard and protect the alleged confidentiality of this information. Moreover, defendant contends that without exception, every piece and category of information alleged by plaintiff was either publically available or could be ascertained by reverse engineering. Defendants assert that under Pennsylvania law, such information cannot constitute a trade secret. Van Products Company v. General Welding and Fabricating Company, 419 Pa. 248, 213 A.2d 769 (1965).

In this case, defendants contend that sources of the allegedly secret information can be found in: (1) published trade papers prepared for and presented at trade conventions; (2) information available on the internet; (3) reports and proposals transmitted to third parties; (4) commercially available computer programs; (5) subcontractors responsible for the manufacture and design of relevant processes or products; and (6) advertising in trade publications;

Thus, defendants contend that none of the information plaintiff attempts to protect is a trade secret or proprietary information because it is already in the public domain. Accordingly, defendants contend that plaintiff has not proven that it will succeed on the merits of this action. In addition, defendants assert that they will be harmed much more than plaintiff will be benefitted if an injunction issues.

Defendants' ultimate contention is that plaintiff is not entitled to a preliminary injunction. For the following reasons, we agree with defendants that plaintiff is not entitled to a preliminary injunction.

To enjoin defendant's use and disclosure of the Brentwood BioWeb information, plaintiff must show:

(1) that the information constitutes a trade secret; (2) that it was of value to the employer and important in the conduct of his business; (3) that by reason of discovery or ownership the employer had the right to use and enjoyment of the secret; and (4) that the

secret was communicated to the defendant while employed in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer.

SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1255 (3d Cir 1985).

In addition, there must be a substantial threat or likelihood of defendants disclosing the trade secrets in the immediate future. Den-Tal-Ez, Inc. v. Siemens Capital Corporation, 389 Pa. Super. 219, 566 A.2d 1214 (1989).

Some of the factors we must consider in determining whether given information is a trade secret are:

(1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired by others.

SI Handling, 753 F.2d at 1256, citing Restatement of Torts § 757 comment b (1939); International Election Systems Corporation v. Shoup, 452 F. Supp. 684, 706 (E.D. Pa. 1978).

With these general principles in mind, we consider plaintiff's contention that defendants are in possession of trade secrets or proprietary information which require the court to

grant injunctive relief.

We agree with defendants that plaintiff's alleged trade secrets can be grouped into two categories customer information and technical and marketing data relevant to the development, sale and use of BioWeb.

Moreover, as noted above, plaintiff settled its claims with the Apex defendants who were originally sued by Brentwood together with defendants Entex, Flournoy, Pehrson and Hubbell. As a result of Brentwood's settlement with Apex, plaintiff no longer has any claim to an exclusive license, or any license at all, with Apex regarding BioWeb. In addition, at the November 29, 2004 hearing, Mr. Whittemore testified that Brentwood has obtained another source for web material and will continue to market this new product under the AccuWeb trade name. We interpret this testimony to imply that the information which Brentwood seeks to protect as trade secrets is beneficial to Brentwood for the purpose of marketing and selling this new web product.

Plaintiff's proposed Conclusion of Law 59 states:

"BioWeb is a unique product as it is protected by a patent." We find plaintiff's assertions, both that BioWeb is a unique product and that the technical and marketing information regarding BioWeb is somehow transferrable to this new web product which Brentwood will market, are, in part, inherently contradictory.

Specifically, we find that the marketing information could conceivably be useful over a broad range of products because of the limited nature of the wastewater industry. However, if BioWeb is such a unique product, it is difficult to conceive of how the scientific and technical data would be useful unless the new product somehow infringes on the Apex patent for BioWeb.

In applying the factors outlined by the United States Court of Appeals for the Third Circuit in SI Handling, supra, we reach several conclusions. With regard to the first factor, the extent to which the information is known outside of the owner's business, we conclude that plaintiff has voluntarily released at least some of the claimed protected marketing and other information to Mr. Schluskel from Apex during the June 10, 2004 meeting at Brentwood's facility when Brentwood was trying to convince Schluskel to extend their marketing agreement.

Other allegedly protected information was released to Mr. Pehrson in his role as a consultant to Brentwood. Certain information regarding pH and other subjects was shared with the operators and engineers of the specific plants where BioWeb was installed. Thus, we conclude that there is significant disclosure of the scientific and technical information sought to be protected.

The second SI Handling factor is the extent to which the information is known by employees and others involved in the

owner's business. The record is clear that this information was shared with the people at Brentwood who were working on the BioWeb project

The third factor is the extent of measures taken by the owner to guard the secrecy of the information. Plaintiff had agreements to limit the disclosure of confidential information with Apex, Mr. Pehrson and Mrs. Hubbell. However, the agreements with Apex and Mr. Pehrson required that any information deemed to be confidential be marked as such by plaintiff. No such designation was made with regard to any information provided to either Apex or Mr. Pehrson. Thus, any information shared with them is, by the terms of the agreements with both, not confidential. Moreover, the record reflects that Brentwood did not mark any information either internally or externally with any confidential designation.

A trade secret need not be kept in absolute secrecy. However, reasonable precautions must be in place to prevent disclosures to unauthorized third parties. "The degree of secrecy must be such that it would be difficult for others to obtain the information without using improper means." National Risk Management, Inc. v. Bramwell, 819 F. Supp. 417, 431 (E.D. Pa. 1993). In this case, plaintiff has not shown that it took any measures to protect any of the information it claims is confidential. On the contrary, it shared much of the information

it seeks to protect.

Accordingly, we conclude that although Brentwood did establish a system to guard any information it considered to be a trade secret or proprietary information, at least as it relates to Apex and Mr. Pehrson, it took no measures to actually protect any of this information by designating any information either internally or externally as confidential.

Next, we address the fourth factor, the value of the information to the owner and his competitors. Plaintiff categorizes BioWeb as a "unique product". Because plaintiff no longer possesses a license to market or sell BioWeb, the value to plaintiff of the information regarding this unique product is minimal at best.

Moreover, we find persuasive defendants' contention that they do not intend to use any of the information they possess about the scientific and technical data produced by plaintiff or any of the sales or marketing strategies employed by Brentwood. We find compelling the deposition testimony of Mr. Pehrson and Mr. Flournoy that they have disagreed with the direction taken by Brentwood regarding BioWeb from almost the beginning. We find credible their testimony that because Brentwood was not very successful in marketing or installing BioWeb, they are going to employ different strategies.

We conclude that the information sought to be protected will not be utilized by defendants in any way other than possibly as a model for what not to do in their efforts to market and sell BioWeb. Furthermore, it appears that the model that Entex plans to follow is the one that was utilized for the two successful installations which occurred prior to Brentwood obtaining the license for BioWeb.

Accordingly, we find that there is little value to the information sought to be protected to either the owners of the information or to its competitors.

The fifth factor we must address is the amount of money expended by the owner in developing the information to be protected. In this regard, Mr. Whittemore testified that Brentwood has expended approximately \$850,000 to \$900,000 in its BioWeb project. This figure includes testing costs, set-up costs for the wet lab, salaries of employees who have worked on the BioWeb project, and the cost of retaining Mr. Pehrson as a consultant. Moreover, Brentwood dedicated over four years of time and resources to the BioWeb project. We consider this a substantial investment of time and money for the purposes of our review.

The final SI Handling factor in our analysis is the ease or difficulty with which the information could be properly acquired or duplicated by others. On this factor, defendants

assert that even though they are not interested in what Brentwood did, simple reverse engineering could produce much, if not all, of the information that plaintiff seeks to protect. We agree in part and disagree in part.

Specifically, we agree that defendants could easily determine certain information by simply viewing the projects done by plaintiff. Such information as the amount of BioWeb in a certain project, the size and spacing of the web, the design and the installation specifications of the structural frames. Moreover, the actual promotional materials utilized by plaintiff are conceivably easily obtained as those materials have been distributed to potential customers at trade shows and by direct mail.

However, we conclude that defendants would not have been able otherwise to ascertain all the test results obtained in connection with plaintiff's efforts to technically develop BioWeb. Some of that information has been shared with Apex, Mr. Pehrson and third parties. Thus, it is in the public domain. Other testing information was divulged, without any request for confidentiality or removal of defendants from the courtroom at the hearings on this matter, including information relating to testing which occurred after Mrs. Hubbell left her employment with Brentwood.

Accordingly, we conclude that some of the information sought to be protected could have duplicated or acquired with great ease, and some of the information may have been difficult to obtain if plaintiff was actually attempting to keep the information confidential.

In weighing all of the foregoing factors, we conclude that because plaintiffs have taken virtually no steps to protect any of the information it seeks to be declared a trade secret or proprietary information, because the information now has little or no value to plaintiffs, because defendants have no real interest in most, if not all, of the information sought to be protected, because much of the information could be easily acquired by defendants and because a good portion of the information has already been disseminated under circumstances that do not indicate the need for trade secret protection, we conclude that plaintiff cannot establish that the information constitutes a trade secret.

Accordingly, because plaintiff cannot establish a trade secret, we conclude that it does not have a likelihood of success on the merits of its motion for a preliminary injunction against defendants.

In addition, plaintiff has failed to establish that it will suffer irreparable injury if an injunction is not granted. Much of plaintiff's evidence may support its cause of action for

breach of fiduciary duties by defendant Hubbell and to a lesser extent by defendant Pehrson. However, if plaintiff is successful on that cause of action, monetary damages can compensate plaintiff for any harm established.

Moreover, in balancing the harms to the respective parties, we conclude that a preliminary injunction will harm defendants much more than plaintiff because plaintiff no longer has any right, title or interest in the BioWeb license and defendants are the current license holders. To enjoin defendants from the use and enjoyment of the license would severely harm defendants and there is no harm to plaintiff because it currently has no interests in the license.

Conclusion

For all the foregoing reasons, we conclude that plaintiff is not entitled to injunctive relief because plaintiff has not shown a likelihood of success on the merits, has not established irreparable injury or has shown that it will suffer more harm than defendants.

Accordingly, we grant defendants' oral Motion for Judgment on Partial Findings in Accordance with Rule 52(c) of the Federal Rules of Civil Procedure and deny Plaintiff's Motion for Preliminary Injunctive Relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRENTWOOD INDUSTRIES, INC.,)
) Civil Action
Plaintiff) No. 04-CV-03892
)
vs.)
)
ENTEX TECHNOLOGIES, INC.,)
WAYNE FLOURNOY,)
RICHARD PEHRSON and)
SARAH HUBBELL,)
)
Defendants)

O R D E R

NOW, this 31st day of March, 2005, upon consideration of defendants' oral Motion for Judgment on Partial Findings in Accordance with Rule 52(c) of the Federal Rules of Civil Procedure, which motion was made in open court by counsel for defendants on the record at the close of plaintiff's case-in-chief on December 20, 2004 at the hearing on Plaintiff's Motion for Preliminary Injunctive Relief, which motion was filed

August 17, 2004; upon consideration of the Response of Defendants/Counterclaim Plaintiffs Extex Technologies, Inc., Wayne Flournoy, Richard Pehrson, and Sarah Hubbell to Plaintiff's Motion for Preliminary Injunctive Relief filed September 24, 2004; upon consideration of the briefs of the parties; after hearings held before the undersigned on November 22, 23, 29 and December 20, 2004; after oral argument conducted December 20, 2004; and for the reasons expressed in the accompanying Opinion, including Findings of Fact, Conclusions of Law, and Discussion,

IT IS ORDERED that defendants' Motion for Judgment on Partial Findings in Accordance with Rule 52(c) of the Federal Rules of Civil Procedure is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunctive Relief is denied.

BY THE COURT:

/s/ JAMES KNOLL GARDNER

James Knoll Gardner

United States District Judge