

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

SELECT MEDICAL CORPORATION,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 05-3341
	:	
WILLIAM BROCK HARDAWAY,	:	
	:	
Defendant.	:	
	:	

MEMORANDUM AND ORDER

Tucker, J.

March24, 2006

Presently before this Court are Plaintiff’s Motion for a Preliminary Injunction (Doc. 2), Defendant’s Response in Opposition (Docs. 8 & 25), Defendant’s Motion to Transfer Venue (Doc. 7), Plaintiff’s Response in Opposition (Doc. 10), Plaintiff’s Motion for Adverse Inference and Sanctions Based on Spoilation of Evidence (Doc. 24), Defendant’s Brief in Response (Doc. 26) and the Parties’ Supplemental Memoranda of Law (Docs. 31 & 32). The Court held a Preliminary Injunction Hearing on September 6, 2005 and September 7, 2005. For the reasons set forth below, the Court will deny the Defendant’s Motion to Transfer Venue to the Southern District of Texas, deny Plaintiff’s Motion for a Preliminary Injunction, and deny Plaintiff’s Motion for an Adverse Inference.

I. FACTUAL BACKGROUND

Plaintiff, Select Medical Corporation (“Select”) operates a national network of acute healthcare facilities and services. Select’s facilities include long-term acute care hospitals (“LTACHs”), inpatient and outpatient rehabilitation clinics, and contract therapy services. LTACHs provide specialized acute healthcare to patients who require complex care over an extended period

of time, usually more than twenty-five days. Select operates ninety-nine LTACHs in twenty-six states. Select also operates approximately 753 rehabilitation clinics throughout the United States and Canada.

Defendant, William Hardaway (“Hardaway”) served as one of Select’s regional vice-presidents (“RVP”) from late 2001, until his resignation on June 20, 2005. Hardaway began his employment with Select in January 2000, as Chief Executive Officer of one of Select’s Houston LTACHs. Ultimately, Select expanded Hardaway’s responsibilities to include all three of the Houston LTACHs. In 2001, Select promoted Hardaway to RVP; Hardaway’s region then covered LTACHs within Texas, Arizona, Colorado, Hawaii, Kansas, Missouri, and Oklahoma. Hardaway’s area of geographic responsibility changed twice during his tenure as RVP, and by the time he resigned, he had been responsible for LTACHs in Tennessee, Indiana, Wisconsin, Arkansas, West Virginia, North Carolina, Kentucky, Louisiana, South Dakota, Texas, Arizona and Michigan. According to Select, Hardaway gained detailed knowledge about ongoing development projects, as well as information regarding Select’s patient referral sources, proprietary software, financial and business models, marketing plans, and contracts with third-party providers and payors.

When Hardaway accepted the RVP position at Select, he executed a Confidentiality and Non-Compete Agreement dated October 18, 2001 (the “October 2001 Agreement”). (*See* Pl.’s Prelim. Inj. Mem. at Ex. A.) In the October 2001 Agreement, Hardaway agreed that he would not (1) disclose confidential material without prior written consent; (2) engage, directly or indirectly, with any competitor of Select for one year after his termination date; (3) solicit any of Select’s customers for two years after his termination date; and (4) solicit any of Select’s employees for two years after his termination date. Several months later, Select offered Hardaway the option to purchase 30,000

shares of Select's common stock. Hardaway accepted Select's offer and as consideration for the stock options, executed an agreement amending the October 2001 Agreement, dated June 21, 2002 (the "June 2002 Agreement"). (*See* Pl.'s Prelim. Inj. Mem. at Ex. B.) The June 2002 Agreement extended all of the October 2001 Agreement's time periods to two years. *Id.* As a result, Hardaway could not solicit Select customers, solicit Select employees or work for a Select competitor for two years after his termination date. Hardaway resigned from Select on June 20, 2005. (*See* Pl.'s Prelim. Inj. Mem. at Ex. C.) In addition to the October 2001 and June 2002 Agreements, Hardaway agreed to participate in Select's Long Term Incentive Compensation Plan in a June 1, 2001 Agreement (the "June 2001 Agreement"). All three agreements contained clauses determining that Pennsylvania law would govern any dispute between the parties and that the parties would litigate such disputes in the Eastern District of Pennsylvania. (Def.'s Trans. Mem. at Ex. A.)

Despite the agreements, on June 20, 2005, Hardaway became the Chief Operating Officer ("COO") for Triumph Healthcare, LLC ("Triumph"), a direct competitor of Select. Triumph is one of the largest providers of long-term acute care in Houston, Texas, currently operating five LTACHs in the greater Houston area. Select initiated this action on June 21, 2005 to enjoin Hardaway from accepting the position at Triumph and to prevent Hardaway from disclosing any of the alleged confidential information he learned as a Select RVP. After removal from the Philadelphia County Common Pleas Court, Select moved for a Temporary Restraining Order. On July 1, 2005, this Court granted the TRO in part, and gave the parties forty-five days to complete expedited discovery. Subsequently, Hardaway filed a Motion to Transfer Venue to the Southern District of Texas. After expedited discovery, the parties came before this Court for a preliminary injunction hearing. Before

the hearing, Select also filed a Motion for a Spoilation Inference for events that took place during expedited discovery.

II. DISCUSSION

A. Choice of Law Analysis

Initially, the Court must consider which forum's law governs the disposition of Select's Motion for a Preliminary Injunction as well as Hardaway's Motions. Select submitted that the Court should apply Pennsylvania law due to the choice of law provision contained in the employment agreements. (*See* Pl.'s Prelim. Inj. Mem. at 10; Pl.'s Suppl. Mem. at 9-13.) Hardaway disagreed and argued that Texas law should apply because Texas has a greater interest and connection to this litigation than Pennsylvania. (Def.'s Prelim. Inj. Mem. at 19-22; Def.'s Suppl. Mem. at 8-10.)

In a diversity action, a district court must apply the choice of law rules of the state wherein the court resides, here Pennsylvania, to determine which forum's law should govern the claims at issue. *Schum v. Bailey*, 578 F.2d 493, 495 (3d Cir. 1978) (citing *Klaxson Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). In Pennsylvania, the first question to be answered in addressing a potential conflict of laws dispute is whether the parties have chosen the relevant law. *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161, 164 (3d Cir. 1999). If the parties have chosen a forum, it is well established that Pennsylvania courts will generally enforce their choice of law. *See, e.g., Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 55 (3d Cir. 1994) (citing *Smith v. Commonwealth Nat'l Bank*, 557 A.2d 775, 777 (Pa. Super. 1989), *appeal denied*, 569 A.2d 1369 (Pa. 1990)). However, the deference to the parties' choice is not absolute. District courts sitting in Pennsylvania will invalidate a choice of law clause if (1) the chosen state has no substantial relationship to the parties or the transaction, or (2) if application of the law of the chosen state would be contrary to a

policy of a state with a materially greater interest than the chosen state in the determination of the particular issue. *Kruzits*, 40 F.3d at 55 (quoting *Schifano v. Schifano*, 471 A.2d 839, 843 (Pa. Super. 1984)); *see also* RESTATEMENT (SECOND) OF CONFLICTS § 187 (1971).

A review of the facts of this case does not support either exception. It is clear to this Court that Pennsylvania has a substantial connection to both the parties and the transaction, the employment contract. That Select is incorporated and has its principal place of business in Pennsylvania is sufficient to establish a relationship with this forum. *Stone St. Servs. v. Daniels*, No. 00-1904, 2000 U.S. Dist. LEXIS 18904, at *12-13 (E.D. Pa Dec. 29, 2000). Hardaway's connections to this forum also support the application of Pennsylvania law. As a Select RVP, Hardaway had numerous contacts with colleagues in Select's corporate office. It is equally clear to the Court that Texas does not have a materially greater interest in this litigation than Pennsylvania. This dispute involves a Pennsylvania corporation that happens to do business in other states, including Texas. Regardless of Texas's interest in the transactions of its citizens, Pennsylvania corporations have an interest in uniformity in dealings with their locations throughout the country. *Bishop v. GNC Franchising LLC*, No. 05-827, 2005 U.S. Dist. LEXIS 30384, at *6 (E.D. Pa. Dec. 1, 2005). Therefore, the Court will apply Pennsylvania law to the motions under consideration.

B. Hardaway's Motion to Transfer Venue

Next, the Court considers Defendant Hardaway's Motion to Transfer Venue. As noted above, Select invoked this Court's jurisdiction pursuant to the forum selection clauses in the October 2001 Agreement and the June 2002 Agreement. In support of his Motion to Transfer, Hardaway contends that the Forum Selection Clauses are unenforceable and that the Court should transfer this action to the Southern District of Texas, a forum (he claimed) is more convenient. (Def.'s Trans.

Mem. at 3-5, 5-9.) Select disagreed, and argued that the clause is valid and as such, the Eastern District of Pennsylvania is the proper forum.¹ (Pl.’s Trans. Mem. at 12-14.)

Even if venue is proper, a district court “may transfer any civil action to any other district where it might have been brought . . . for the convenience of the parties and witnesses” or “in the interest of justice.” 28 U.S.C. § 1404(a). Section 1404(a) places discretion in the district court to adjudicate motions for transfer according to an “individualized, case-by-case consideration of convenience and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The district court, using its discretion, can dismiss or transfer an action in favor of another venue where trial will best serve the convenience of the parties and ends of justice.

In deciding motions to transfer, the Court must first determine whether the proposed alternative forum is a proper venue. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3rd Cir. 1988). Once appropriateness of the alternative forum has been established, the defendant has the burden of convincing the court to exercise its broad discretion and transfer the action. *Id.* If an alternative forum exists, the Court then must consider several private interest factors as well as public interest factors. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). The private interest factors for the Court to consider include: (1) the Plaintiff’s forum preference; (2) the Defendant’s forum preference; (3) the location where the events occurred and claims arose; (4) the convenience of the

¹ Select also made the argument that the forum selection clause alone requires litigation in this district. (Pl.’s Trans. Mem. at 7-12.) Plaintiff’s position is not a correct statement of the law. District courts cannot decide motions to transfer *solely* based on the existence of a forum selection clause. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988) (“[t]he flexible . . . analysis Congress prescribed in § 1404(a) . . . encompasses consideration of the parties’ private expression of their venue preferences”); *see also* RESTATEMENT (SECOND) OF CONFLICTS § 80 (1971) (giving courts greater discretion in determining enforceability of forum selection clauses). Accordingly, the Court will consider Plaintiff’s arguments regarding the *validity* of the Forum Selection Clauses, and then decide the issue of enforceability consistent with § 1404(a).

parties; (5) the convenience of the witnesses; and (6) the ease of access to sources of proof. *Id.* The public interest factors to be considered include: (1) the relative congestion and burden of the courts in the two fora; (2) the relative ability of the two fora to resolve the case more expeditiously and inexpensively; (3) the interest of the community at-large, including the interest of a potential jury that would be required to resolve a case that has no relation to its community, and the interest of the communities in having controversies resolved where they arise; and (4) the familiarity of the court with the state law of a foreign state and appropriateness of trying a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court untangle problems in conflict of law, and in law foreign to itself. *Id.* at 879-80. When balancing the case-specific factors under § 1404(a), the presence of a forum-selection clause can be a significant factor that figures centrally in the district court’s calculus. *Stewart*, 487 U.S. at 30. However, such a clause is not dispositive. *Id.* Section 1404(a) requires that a district court consider all public and private interest factors and not solely the “factors . . . that bear solely on the parties’ private ordering of their affairs.” *Id.*

1. The Forum Selection Clause

Initially, Hardaway argued that the forum selection clause in the October 2001 Agreement is unenforceable because Select did not require that he sign a non-compete covenant when it first hired him. (Def. Trans. Mem. at 3.) Furthermore, Hardaway contended that Select forced him to sign the October 2001 Agreement in order to keep his job (according to Hardaway, the terms were non-negotiable), and therefore the clause is unenforceable because the Third Circuit does not enforce forum selection clauses in employment contracts if the parties executed the agreement after the commencement of employment. (*Id.* at 3-4.) Select responded by highlighting Hardaway’s three

separate agreements to litigate in the Eastern District of Pennsylvania and claims that they are presumptively valid and enforceable because they were (1) all for good and valuable consideration and (2) all agreed to as the result of equal bargaining power. (Pl.'s Trans. Mem. at 7-12.) Select concludes that because Hardaway's agreements to litigate in the Eastern District of Pennsylvania are valid and enforceable, they trump his argument that the Eastern District of Pennsylvania is an inconvenient forum. (*Id.* at 12-14.)

When parties voluntarily agree to submit to suit in a given venue, the court will generally not disturb that choice. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("the forum selection clause should control absent a strong showing that it should be set aside"). A forum selection clause is presumptively valid unless the party objecting to its enforcement establishes that: (1) it is the result of fraud or overreaching, (2) enforcement would violate a strong public policy of the forum, or (3) enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983). None of those circumstances exist here. The Court agrees with Select that Hardaway entered into the agreements for consideration – the RVP position, the stock options, and the Long Term Incentive Compensation Plan. Furthermore, Hardaway has offered the Court no evidence of fraud, undue influence or any other defense to contract formation. The Court is not convinced that Select threatened to fire Hardaway if he refused to sign any of the agreements. The record supports the conclusion that Hardaway freely entered into the three agreements. Consequently, the Court will not void the choice of forum clause.

2. Additional § 1404(a) Factors

Having determined that the forum selection clauses are valid, the Court now turns to the issue of which forum is more convenient to litigate the instant case. Hardaway argued that the Court should grant his motion to transfer because the Southern District of Texas is a more convenient forum than the Eastern District of Pennsylvania. (Def.'s Trans. Mem. at 5-9.) In support of his position, Hardaway indicated that Select could have filed this action in the Southern District of Texas.² *Id.* at 5-6. Hardaway also submitted that the Southern District of Texas is a more convenient venue than the Eastern District of Pennsylvania because: (1) Hardaway lives in Texas, and is an individual with limited financial resources to enable him to defend an action in Pennsylvania; (2) all of the potential witnesses Select would seek to depose work and reside within the Southern District of Texas, and thus are outside the subpoena power of the Eastern District of Pennsylvania; (3) none of the operative facts surrounding this action took place in Pennsylvania; (4) all of the documents relevant to Select's claims and Hardaway's defenses are located in Houston, Texas; and (5) Texas has the greatest local interest in deciding the enforceability of the non-compete covenant at issue because Hardaway is a Texas resident and the alleged breaches of the confidentiality and non-compete provisions of the employment agreement occurred within Texas's borders. *Id.* at 6-9.

² This is a diversity action between Select, a Pennsylvania corporation, and Hardaway a Texas resident. According to 28 U.S.C. § 1391(a), a Plaintiff may initiate an action in "(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred..., or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." Hardaway contends that the Southern District of Texas constitutes a proper venue because he resides in Magnolia, Texas, and all of the alleged events giving rise to Select's claims occurred in Houston, Texas.

In response, Select submitted a number of reasons why Hardaway cannot show that the Eastern District of Pennsylvania is a sufficiently inconvenient forum to warrant transfer to the Southern District of Texas. First, Select contended that Hardaway's claim of financial hardship is "disingenuous" because he is a well-compensated executive and Triumph is likely paying the costs of this litigation. (Pl.'s Trans. Mem. at 14.) Secondly, the Federal Rules of Civil Procedure provide nationwide subpoena power and permit Select to subpoena any witness located in Texas for a deposition and then to use the depositions at trial in the place of the witnesses' attendance. *Id.* at 15 (citing FED. R. CIV. P. 45(a)(3)(B); 32(a)(3)(B)). Thirdly, Select disputed Hardaway's contention that "none of the operative facts surrounding this action took place in Pennsylvania." *Id.* at 15-16. Select's corporate headquarters is in Mechanicsburg, Pennsylvania. As an RVP, Hardaway reported to other Select corporate officers, received information (including trade secrets) from Pennsylvania, and was required to travel to Pennsylvania many times. Lastly, Select argued that Pennsylvania has a greater interest in this controversy than Texas because Pennsylvania contract law governs this dispute. *Id.* at 17.

As stated above, when deciding a motion to transfer venue, district courts must consider a number of public and private interest factors. After applying the § 1404 factors, this Court has determined that Hardaway cannot show that litigating in the Eastern District of Pennsylvania is sufficiently inconvenient to justify transfer to the Southern District of Texas. The private factors are of no assistance to Hardaway. The Court has already determined that the parties have chosen the Eastern District of Pennsylvania as the forum for this dispute. While many of the events did take place in the Southern District of Texas, the record shows that parties' dispute involved Pennsylvania as well. Regarding the convenience of the parties and witnesses, Hardaway has not met his burden

here either. Mere financial hardship does not justify a transfer of venue. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991). Moreover, transferring this case to the Southern District of Texas will substitute the hardship of the Texas parties for the hardship of the Pennsylvania parties.

The public interest factors do not offer Hardaway support either. Hardaway offers no evidence that the Southern District of Texas is less congested or better able to handle this case than this Court. Regarding the interest of the community, having determined that Pennsylvania law applies to this case, the Court reasons that Pennsylvania would have a greater interest in applying its own contract law than would Texas. Additionally, the Southern District of Texas is less familiar than this Court is with Pennsylvania law. In light of the public and private interest analysis, the Court denies Hardaway's Motion to Transfer.

C. Select's Motion for a Preliminary Injunction

Having denied the Motion to Transfer, the Court will now address Select's Motion for a Preliminary Injunction. In its Motion, Select asked that the Court enjoin Hardaway from disclosing its trade secrets or soliciting others that have access to its trade secrets pending trial. (Pl.'s Prelim. Inj. Mem. at 11.) Additionally, Select sought to prevent Hardaway from continuing his employment at Triumph while the parties await a trial on the merits. *Id.* at 10-12. Select took the position that Hardaway's very employment with Triumph is a threat to its competitive advantage.

A court may properly issue a preliminary injunction when it is proven that Plaintiff: (1) will be immediately and irreparably harmed by the Defendant's conduct, (2) has a reasonable likelihood of success on the merits, (3) will suffer harm that outweighs the possible harm to Defendant if the motion is granted, and (4) if the public interest lies in granting the motion. *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 191-92 (3d Cir. 1990). "Preliminary injunctive relief

is an extraordinary remedy and should be granted only in limited circumstances.” *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citation and internal quotations omitted). “One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties.” *Id.* (quoting *Opticians Ass’n of Am.*, 920 F.2d at 197). Generally, “[a] party is entitled to a preliminary injunction if it shows that it is (1) reasonably likely to succeed on the merits of his lawsuit, and (2) likely to be irreparably harmed.” *Basic Fun v. X-Concepts, LLC*, 157 F. Supp 2d 449, 454 (E.D. Pa. 2001) (citing *Adams v. Freedom Forge Corp.*, 204 F. 3d 475, 484 (3d Cir. 2000)).

1. Likelihood of Success on the Merits

Select’s Complaint requested relief in two areas – (1) Hardaway’s alleged misappropriation of trade secrets, and (2) Hardaway’s alleged breach of the non-compete agreements. (Compl. ¶¶ 39-42, 44-46.) Select predicted success on the trade secrets claim because (from its perspective) Hardaway could not perform his duties as Triumph COO without divulging the “confidential and trade secret information” that he acquired as a Select RVP. (Pl.’s Prelim. Inj. Mem. at 12.) According to Select, Hardaway’s job as COO will require him to reveal trade secret information to Triumph, its competitor. *Id.* at 13. Such revelations, might cause Select to “lose...its competitive advantage with respect to Triumph.” *Id.* at 14. Hardaway disputed the validity of the non-competes, and also argued that Select is not likely to succeed on the merits because Select cannot establish that Hardaway had access to anything more than generalized knowledge, which in Pennsylvania, cannot be a trade secret. (Def.’s Prelim. Inj. Mem. at 18.) Hardaway reasoned that the non-competition agreements are void due to unreasonableness because Select cannot prove that he had access to any trade secret information. *Id.*

Select's Complaint alleges that Hardaway has (1) knowledge about ongoing and planned development projects, (2) information regarding the Select hospitals in the Houston region (this information includes patient referral sources, business models and strategies, marketing plans, financial data and contracts with third-party providers and payors) and (3) information regarding reorganization and relocation projects. (Compl. ¶¶ 26-27.) To prevail on both of its claims, Select must establish that the information at issue qualifies as a trade secret.

Select brought its claim against Hardaway for misappropriation of trade secrets pursuant to Pennsylvania's Uniform Trade Secrets Act (the "UTSA"), 12 PA. CONS. STAT. ANN. §§ 5301-5308 (2005), which makes it unlawful to disclose or use the trade secret of another without consent. *See* 12 PA. CONS. STAT. ANN. § 5302 (2005). In order to prevail on a claim for injunctive relief against the disclosure of trade secret information, Select must show: (1) that the information in fact constitutes a trade secret; (2) that it was of value to the employer and important in the conduct of his business; (3) that the employer had the right to the use and enjoyment of the secret; and (4) that the information 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 Sys., Inc. v. Heisley*, 753 F.2d 1244, 1255 (3d Cir. 1985).

Select's second claim, breach of the non-competition agreements, involves the issue of trade secrets as well. To prevail on the breach claim, Select will need to establish that non-competition agreements were reasonably necessary to protect its legitimate interests. *See Prison Health Servs. v. Umar*, No. 02-2642, 2002 U.S. Dist. LEXIS 12288, at *33-34 (E.D. Pa. July 2, 2002) (citations omitted). *See also Piercing Pagoda, Inc. v. Hoffner*, 351 A.2d 207, 210-11 (Pa. 1976) (enforcing

a restrictive covenant in a franchise agreement because it protected a legitimate business interest). While Pennsylvania courts have found that the protection of trade secrets is a legitimate subject for a restrictive covenant, the subject matter of the covenant must actually involve trade secret information, or the injunction will be denied. *See Thermo-Guard, Inc. v. Cochran*, 596 A.2d 188, 193-94 (Pa. Super. 1991) (citing *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957); *see also Umar*, 2002 U.S. Dist. LEXIS 12288 at *34-35 (stating that the types of activities embraced affect a court's determination of the reasonableness of non-competition agreements). Because both of Select's claims involve the potential disclosure of trade secrets to Hardaway's current employer, Triumph, there must be a determination whether the information Hardaway acquired at Select qualifies as a trade secret, and if so, does his employment at Triumph create a risk that he will disclose that information.

A trade secret is any information that “[d]erives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use.” 12 PA. CONS. STAT. ANN. § 5302 (2005). A trade secret may consist of any formula, pattern, device or compilation of information that is used in one's business, and gives that person an opportunity to obtain an advantage over competitors who do not know or use it. *Felmlee v. Lockett*, 351 A.2d 273, 277 (Pa. 1976). However, trade secrets may not be mere general secrets of a trade. *Id.* To determine whether given information is a trade secret, Pennsylvania courts consider: (1) the extent to which the information is known outside of the business, (2) the extent to which it is known by employees and others involved in the business, (3) the measures taken to guard the secrecy of the information, (4) the value of the information to the business and to its competitors, (5) the amount

of effort or money expended in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Heisley*, 753 F.2d at 1256.

When applying the above standard, it is clear that the information Select identified in its Motion are not trade secrets. The information Select sought to protect in the non-compete agreements is generally known in the LTACH industry and not unique to Select. “[G]eneralized knowledge and know-how gained by an employee cannot be a trade secret” in Pennsylvania. *G. Neil Corp. v. Cameron*, No. 03-4419, 2003 U.S. Dist. LEXIS 19509, at *4-5 (E.D. Pa. Oct. 20, 2003). The concept of a trade secret does not include an employee’s subjective knowledge obtained while in the course of employment. *Heisley*, 753 F.2d at 1255. Moreover, the record contains evidence that some of Select’s future business plans and plans for expansion were public knowledge. Information disclosed to the public cannot be protected as a trade secret either. *G. Neil Corp.*, 2003 U.S. Dist. LEXIS 19509 at *4-5. Select presented no persuasive evidence that it took measures to guard the secrecy of the information or that the information was in fact a secret from its competitors. While it is possible that Select could prevail at trial on the issue of trade secrets, it has not shown this Court that it is likely to do so. Given the fact that the information at issue does not qualify as a trade secret, the Court finds that Select cannot meet its burden of success on the merits for either the breach of contract claim or trade secrets claim.

2. Potential for Irreparable Harm

Furthermore, Select has not shown that it is likely to suffer irreparable harm in the absence of a preliminary injunction. Without the preliminary injunction, Select submitted that they will suffer irreparable harm because it could lose its competitive advantage over Triumph in the LTACH market if Hardaway disclosed its trade secrets. (Pl.’s Prelim. Inj. Mem. at 13; Pl.’s Suppl. Mem. at

22-24.) However, Select does not support this accusation with evidence. The Court has already ruled against Select on the issue of trade secrets. Even if the Court were to find for Select on the trade secret issue, Select still would not meet its burden on the irreparable harm element. Select offered no proof as to why injunctive relief is necessary now. When he resigned, Hardaway did not retain copies of any Select information. (Prelim. Inj. Hr'g Tr. 75:2-7, 77:13-78:5, 80:2-19, Sept. 7, 2005.) Select has also failed to offer any proof that Hardaway is using any of the information it wishes to protect. Not only has Select failed to show irreparable harm, the record in this case will not support a finding of *any* harm to Select. Because Select cannot meet its burden to prove the likelihood of success and potential for irreparable harm, the Court will deny the Motion for a Preliminary Injunction.

D. Select's Motion for a Spoilation Inference

Finally, the Court will address Select's Motion for a Spoilation Inference. Select brought this motion based on events that took place during expedited discovery. In its brief, Select complained that Hardaway "intentionally destroyed records of [its] confidential and proprietary information on the hard drive of his home computer" and provided no explanation for doing so. (Pl.'s Spoilation Mem. at 6.) Select claimed that it has been prejudiced by Hardaway's actions because his home computer was the "best evidence" of the scope of proprietary information in Hardaway's possession at time he accepted the Triumph position. *Id.* at 7. Hardaway contends that a spoilation inference is improper because his conduct was not fraudulent or done for the purposes of avoiding discovery. (Def.'s Mem. at 5.) In his response, Hardaway claims to have deleted the files to ensure that he no longer had access to Select's information after he resigned his employment. *Id.* at 6.

Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D. N.J. 2004) (internal citations omitted). Evidence of spoliation may give rise to sanctions, such as an adverse inference, referred to as the spoliation inference. *Id.* The evidentiary rationale for the spoliation inference is nothing more than the common sense observation that a party who proceeds to destroy evidence relevant to litigation, is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the evidence. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994). Key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and serve to deter such conduct by others in the future. *Id.* at 79. For the rule to apply, the evidence in question must be within the party’s control. *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995). Furthermore, it must appear that there has been an actual suppression or withholding of the evidence. *Id.* A court will not grant an unfavorable inference when the evidence in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for. *Id.*

The Court finds that the record does not support a spoliation inference. Select did not established that Hardaway was at fault for deleting the files on his computer or that such actions require a spoliation inference. A finding of fault requires evidence that the party accused of spoliation intended to impair the moving party’s ability to uncover evidence. *See Schmid*, 13 F.3d at 80. The only evidence before the Court leads to the conclusion that Hardaway intended to comply

with his non-disclosure agreement, not violate it. Moreover, Select did not established that the degree of prejudice it suffered justifies a spoliation inference. Select cannot now claim prejudice because it is seeking to enjoin him from using those same deleted files. It is apparent to the Court that Hardaway's deletion of the files is the best way to ensure that he does not use any Select information at his new job. As a result, this Court will deny Select's Motion for an Adverse Inference.³

III. CONCLUSION

For the reasons stated above, the Court will deny the Defendant's Motion to Transfer Venue to the Southern District of Texas, deny Select's Motion for a Preliminary Injunction, and deny Select's Motion for an Adverse Inference. An appropriate order follows.

³ Having found no cause to grant a an adverse inference, the Court will deny Select's Motion for Sanctions as well.

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

	:	
SELECT MEDICAL CORPORATION,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
	:	NO. 05-3341
	:	
WILLIAM BROCK HARDAWAY,	:	
Defendant.	:	
	:	

ORDER

AND NOW, on this 24th day of March, 2006, upon consideration of Plaintiff's Motion for a Preliminary Injunction (Doc. 2), Defendant's Response in Opposition (Docs. 8 & 25), Defendant's Motion to Transfer Venue (Doc. 7), Plaintiff's Response in Opposition (Doc. 10) Plaintiff's Motion for Adverse Inference and Sanctions Based on Spoilation of Evidence (Doc. 24), Defendant's Brief in Response (Doc. 26) and the Parties' Supplemental Memoranda of Law (Docs. 31 & 32), and the Preliminary Injunction Hearing on September 6, 2005 and September 7, 2005, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion to Transfer Venue to the Southern District of Texas is **DENIED**,
2. Plaintiff's Motion for a Preliminary Injunction is **DENIED**, and
3. Plaintiff's Motion for an Adverse Inference is **DENIED**.

BY THE COURT:

/S/ **Petrese B. Tucker**

Hon. Petrese B. Tucker, U.S.D.J.