IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NUTZZ.COM and ALEX MESHKIN, Plaintiffs, v. VERTRUE INCORPORATED f/k/a MEMBERWORKS, INC., CAMERON TOUSI, JOHN ADALIO, JOHN WALTERS, JOINT MARKETING GROUP, LLC and JOINT MARKETING GROUP MEDIA, LLC, Defendants.	)	Civil Action No. 1231-N

MEMORANDUM OPINION

Date Submitted: May 13, 2005
Date Decided: July 6, 2005

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PARSONS, Vice Chancellor.

On July 16, 2004, Plaintiff Nutzz.com ("Nutzz") and Defendant Vertrue Incorporated f/k/a Memberworks Incorporated ("Vertrue") contracted to develop a motorsports themed membership program named Nutzz Elite (the "Agreement"). Nutzz and Vertrue's working relationship, however, did not proceed as they envisioned. Vertrue claims that Nutzz missed deadlines and promotion requirements and, because of such performance failures, it terminated the Agreement. After Vertrue terminated the Agreement,[1] it sent 1,200 members of Nutzz Elite[2] an email advertising Vertrue's own motorsports themed membership program, FastTrack Savings ("FastTrack"), as a "program upgrade" to Nutzz Elite.[3] Nutzz claims that Vertrue's actions constitute use of Nutzz's confidential information in violation of the Agreement and misappropriation of trade secrets.

Nutzz seeks a preliminary injunction against Vertrue prohibiting Vertrue from: (1) servicing FastTrack members who were obtained through the use of Nutzz's confidential information; (2) inhibiting in any manner the provision of benefit providers' services and benefits to Nutzz Elite members; (3) utilizing benefit providers in its

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1 Nutzz contests the validity of the purported termination.

2 *See* Pl. Nutzz.com, LLC's Reply Br. in Further Supp. of its Mot. for a Prelimin. Inj. Against Vertrue Incorporated ("PRB") at 17, 22; Scarfi Decl. Ex. B. Nutzz's opening brief is designated "POB" and Defendant Vertrue's opposition brief is designated "DAB". Declarations and Affidavits are cited to by reference to the declarant's surname followed by "Decl." or "Aff.", as applicable, and the paragraph or exhibit designation. Where a declarant has given more than one declaration, the date is also provided.

3 Am. Compl. Ex. C.

FastTrack program whose selection was derived from Nutzz's confidential information and whose participation was obtained through the Nutzz Elite program; and (4) utilizing NASCAR.com as a benefits provider. Additionally, Nutzz seeks a mandatory injunction requiring Vertrue "to provide the services that would enable the Nutzz Elite program to function properly for such time as it takes Nutzz to find a replacement vendor or for 120 days, whichever is shorter."[4]

Vertrue argues that to the extent Nutzz's claims allege anything more than a breach of the confidentiality clause of the Agreement those claims are subject to mandatory arbitration. Vertrue further contends that it neither breached the confidentiality clause of the Agreement nor misappropriated any trade secrets in a manner that would warrant the preliminary injunction sought by Nutzz.

For the reasons stated below, the Court finds that Nutzz has failed to meet its burden of proof in seeking preliminary injunctive relief. In particular, Nutzz has not demonstrated a reasonable probability of success on the merits as to its breach of contract claim, and has not demonstrated irreparable injury with regard to its misappropriation of trade secrets claim. Therefore, Nutzz's motion for a preliminary injunction is denied.

I. FACTS

Plaintiff Alexander Meshkin is a recognized individual in the NASCAR® racing circuit; he has owned, operated and managed NASCAR® racing teams through Bang Racing, LLC ("Bang Racing").

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[4] Nutzz's proposed order filed May 3, 2005 in connection with its motion for preliminary injunction.

On December 1, 2003, Meshkin incorporated Nutzz as a Delaware limited liability company.[5] Through Nutzz, Meshkin intended to create an internet based membership club targeted at NASCAR® fans. Meshkin envisioned a two-tiered membership structure comprised of a general membership tier ("Nutzz Basic"), free for anyone to join, and an elite membership tier, Nutzz Elite, for which an annual fee would be charged. Nutzz Basic and Nutzz Elite members would earn points by purchasing products or services from NASCAR® sponsors. The points could then be redeemed for NASCAR® related experiences and memorabilia at an online auction. Nutzz Elite members, however, would be offered more opportunities to earn auction points and receive additional services such as discounts at certain retailers.

In early 2004, Meshkin determined that Nutzz would have to affiliate with another company in order to successfully develop Nutzz Elite. In or around April 2004, Nutzz began discussions with Vertrue, a leading designer and provider of membership programs that had a substantial number of membership programs and a vast member base. Vertrue appeared to be well suited to help Nutzz develop and expand the membership features of Nutzz Elite.[6]

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[5] Meshkin has served as President, CEO and director of Nutzz at all times relevant to this case.

[6] In January 2004, another company, CMG, owned by Roger Brooks, launched a membership program called "TeamRaceFan" that targeted NASCAR® fans and used NASCAR.com as a benefit provider. May 12, 2005 Weiss Decl. ¶¶ 5-8. Brooks and TeamRaceFan disclosed to Vertrue that NASCAR.com was a benefit provider under that program. *Id*. On or about May 6, 2004, Vertrue met with Brooks to discuss the possibility of Vertrue offering the TeamRaceFan program but decided not to do so. *Id*.

A. The Agreement

On July 16, 2004, Nutzz and Vertrue entered into the Agreement to "develop a customized and branded 'Elite Membership Fan Club,' [Nutzz Elite] to be marketed to [consumers] and [Vertrue] program members enabling [consumers] to enroll in [Nutzz Elite] and receive certain privileges and opportunities and benefits from Nutzz and [Vertrue]."[7] The Agreement is governed by Connecticut law.

1. Nutzz's obligations

The Agreement required Nutzz to use funds obtained from Vertrue to procure sponsorship rights for display of the Nutzz logo and one billion eBay impressions. By October 14, 2004, Nutzz was obligated to: (1) produce a website promoting Nutzz Elite and commence member sign-up on the website; (2) commence advertising Nutzz Elite through eBay impressions; (3) have a full trackside marketing plan in place and attempt to commence marketing Nutzz Elite through trackside channels; and (4) have an auction launched and operational on eBay that allows consumers to redeem Nutzz points. The Agreement also obligated Nutzz to provide motorsports content and merchandise to be sold or given away to Nutzz Elite members, create and maintain distribution channels, and publish press releases and corporate communications with respect to Nutzz Elite.

2. Vertrue's obligations

Vertrue paid Nutzz $1,250,000 as an advance against anticipated revenues (*e.g.*, membership fees) under the Agreement.[8] The Agreement provided that Vertrue would

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[7] Agreement at 1.

[8] *See* discussion *infra* Section I.A.3.

develop, maintain and support Vertrue benefit fulfillment materials associated with Nutzz Elite membership. Vertrue also was obligated to promote Nutzz Elite to members of its other programs and Nutzz Basic and Nutzz Elite to certain of Vertrue's other business partners.

3. Profit-sharing arrangement

Under the Agreement, Nutzz and Vertrue shared the fees generated by Nutzz Elite membership. Vertrue was entitled to 100% of the fees paid by the first 20,000 Nutzz Elite members during the first year. In the following years, membership fees from those first 20,000 Nutzz Elite members would be split 60% to 40% in favor of Vertrue. For members after the first 20,000, fees would be split 70% to 30% in favor of Vertrue during the first year and 60% to 40% in favor of Vertrue thereafter. Additionally, the Agreement prescribed a bonus structure under which Nutzz would receive bonuses upon reaching certain milestone membership numbers.

4. Confidentiality

Section 12 of the Agreement, entitled "Confidentiality" (the "Confidentiality Clause"), defined "Confidential Information" to include information disclosed by one party (the "Disclosing Party") to the other (the "Receiving Party") regarding a party's:

> business, products, services, formats, computer programs, policies, procedures, methods, technical developments, trade secrets, customers, members, clients, financial results, formulas, marketing research and development methods, marketing statistics, product development plans, membership solicitation methods, strategies, research strategies, research data, themes and/or creative ideas related to upcoming Nutzz or [Vertrue] events or other corporate activity.

The Agreement excluded from the definition of Confidential Information:

> information which (a) was already in the Receiving Party's possession, (b) is generally available to the public other than as a result (directly or indirectly) of disclosure by the Receiving Party or (c) was available to the Receiving Party on a nonconfidential basis from a source other than the Disclosing Party.[9]

Under the Confidentiality Clause, the Receiving Party could use Confidential Information of the Disclosing Party "solely to perform its obligations under this Agreement," and the Confidential Information remained the sole property of the Disclosing Party.[10]

The Agreement further provided that, with the exception of relief sought for a violation of the Confidentiality Clause, all disputes arising out of or relating to the Agreement were subject to arbitration. Additionally, the parties agreed that any remedy at law for a breach of the Confidentiality Clause would be inadequate and the non-breaching party would be entitled to obtain injunctive relief without proof of irreparable injury or posting bond. In an effort to take advantage of these provisions, Nutzz explicitly limited its breach of contract claims to violations of the Confidentiality Clause.

Although the Confidentiality Clause generally included information regarding a party's "customers" in the definition of Confidential Information, the Agreement elsewhere defined a narrower term called "Customer Information." That term was defined to mean "a Member(s) name, address, telephone number, email address, Valid Credit Card name, number, and expiration date and confirmation of sales information,

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9 Agreement ¶ 12.

10 *Id.*

including conversion result reports."[11] Neither party was permitted to "use, sell, transfer or distribute . . . Customer Information obtained" from the other party except in connection with Nutzz Elite and pursuant to the Agreement.[12] Vertrue, however, was permitted to use Customer Information obtained from Nutzz to market other Vertrue membership programs to Nutzz Elite members.[13] Another provision of the Agreement, entitled "Exclusivity," limited Vertrue's ability to market other membership programs during the term of the Agreement to programs that were not "substantially similar" to Nutzz Elite or "in the field of motorsports."[14]

5. Termination

The initial term of the Agreement was for five years. During this time period, a party could terminate the Agreement by written notice to the other party "in the event of fraud, insolvency, bankruptcy, winding-up or liquidation or willful misconduct by the other Party."[15] The Agreement could also be terminated in the event of a material breach if the breaching party failed to cure the breach within thirty days after receipt of written notice setting forth the "specific nature of each breach upon which such termination is

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11 *Id.* Ex. A. The Agreement defined "Member" as "a User [i.e. consumer] who has paid for membership in the Club [i.e. Nutzz Elite] and whose membership has not been cancelled." *Id.*

12 *Id.* ¶ 2(d).

13 *See id.* ¶ 2(e)(ii).

14 *Id.* ¶ 19.

15 *Id.* ¶ 1(b).

based."[16] If Nutzz ceased to provide comparable benefits to Nutzz Elite members after termination of the Agreement, Vertrue was entitled to enroll the Nutzz Elite members obtained through Vertrue distribution channels in another Vertrue program without making any kind of payment to Nutzz.[17]

B. Nutzz and Vertrue's Working Relationship

In late July 2004, Meshkin met with Vertrue representatives to determine which retailers might be most appealing to Nutzz Elite's targeted NASCAR® fan base. Vertrue already had an extensive list of retailers that it worked with in connection with its other membership programs. Vertrue approached various retailers about providing Nutzz Elite benefits and signed up a number of them. Of those who agreed to become Nutzz Elite retailers, Vertrue had pre-existing working relationships with all but one, NASCAR.com.[18]

On November 17, 2004, approximately one month after the October 14, 2004 target date, Nutzz and Vertrue jointly launched Nutzz Elite. Consumers could reach Nutzz Elite either directly or through an upgrade option to Nutzz Basic. The Nutzz Basic website was hosted by Nutzz and had an "Upgrade" button that was linked to the Nutzz Elite website hosted by Vertrue. When a Nutzz Basic customer used the upgrade option to access the Nutzz Elite website, Nutzz pre-populated certain fields of data including name, mailing address, phone number and e-mail address. Vertrue would then obtain

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16 *Id.*

17 *Id.* ¶ 1(d).

18 *See* Scarfi Dep. at 80.

further information, including all billing information, from the Nutzz Basic member to enroll them in Nutzz Elite. Vertrue did not have the ability independently to access Nutzz's databases or general membership data.[19] Nutzz and Vertrue were to share information regarding new Nutzz Elite members.

Vertrue alleges that Nutzz failed to perform its obligations under the Agreement in several ways, including failing to run a satisfactory amount of eBay impressions and e-mail solicitations, to timely complete the Nutzz Elite link from the Nutzz Basic webpage and the online auction, and to deliver a developed trackside marketing plan. Nutzz alleges, however, that it did deliver a trackside marketing plan and that Vertrue was at least partly responsible for any delays.

Nutzz admits that Vertrue complained about shortfalls in the number of eBay impressions but argues that Vertrue never asserted that Nutzz had materially breached the Agreement because of this shortfall.[20] Rather, Nutzz claims that Vertrue tried to renegotiate the contract instead to make Nutzz's compensation dependent on the number of Nutzz Elite members it obtained through its Nutzz Basic website.[21]

In addition to performance concerns, Vertrue was wary of Nutzz's financial condition. One of Nutzz's close affiliates, Bang Racing, was experiencing financial

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19 *See* Fredrich Decl. ¶¶ 3-4.

20 POB at 13.

21 *Id.*

hardship.[22] In connection with Bang Racing's restructuring, Meshkin proposed a renegotiation of the Agreement, including possibly handing over all management responsibilities to Vertrue and increasing Vertrue's equity stake in Nutzz Elite to 100%.[23] In response, Carl Peru, one of the main contacts for Nutzz Elite at Vertrue, sent Meshkin an e-mail on February 1, 2005 that stated, "[t]o be perfectly straightforward, at this point Vertrue is not interested in pursuing a business relationship with Bang Holdings or any associated entity. Our sole goal is [to] recoup the $1.25MM we advanced to Nutzz.com."[24] Thus, although Vertrue did not send formal notice of termination to Nutzz for another nine days, by February 1st it considered the Agreement all but dead.

On February 10, 2005, Vertrue sent a letter to Nutzz stating that it was terminating the Agreement "due to Nutzz'[s] breach of the Agreement (including, but not limited to, Nutzz and Bang Racing, LLC's failure to perform their obligations under Section 2.a. of the Agreement)."[25] Though several attempts at delivery were made, the letter was returned to Vertrue because Nutzz's office was shut down and no forwarding information

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22 In an e-mail dated January 31, 2005, Meshkin represented to Vertrue that a "recent internal reorganization of Bang!Racing" had occurred. DAB App. at A0378. In fact, on or about January 21, 2005, due to the loss of a major sponsor, Line-X, "Bang Racing was not in a position to fund a staff to build and maintain racing vehicles and accordingly laid off its employees engaged in those duties" and underwent a corporate restructuring. Meshkin Aff. ¶ 4.

23 DAB App. at A0378.

24 *Id.* at A0409.

25 *Id.* at A0229. Vertrue sent the termination letter via DHL overnight delivery to the address listed for Nutzz in the Agreement. This form of delivery appears to have been proper under the Agreement. *See* Agreement ¶ 18.

had been provided.[26] Vertrue claims that because of this incident, its knowledge of Bang Racing's financial troubles and a February 7, 2005 Business Week/Online article that detailed the motorsports industry's growing distrust of Meshkin and his financial prowess, it believed Nutzz was longer in business.[27] In February 2005, Vertrue deactivated the hyperlink that allowed consumers to link to the Vertrue-hosted Nutzz Elite enrollment page from the Nutzz Basic website.

Before Vertrue sent the formal termination notice on February 10, 2005 and before the thirty day cure period had lapsed, Vertrue already had begun to develop a substitute membership program for Nutzz Elite called FastTrack Savings. FastTrack has many of the same features as Nutzz Elite. Though it does not offer points or an online auction, FastTrack offers its members discounts at many of the same retailers as Nutzz Elite. With regard to marketing efforts, however, there is no evidence that Vertrue has ever used trackside marketing to market the FastTrack Savings program.[28]

On March 24, 2005, Vertrue sent an e-mail to 1,200 Nutzz Elite members stating that "as part of a program upgrade, we've changed the program name to FastTrack Savings."[29] This e-mail also stated that "due to the program upgrade, your Nutzz Points

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[26] Cassin Decl. ¶ 5.

[27] *See* Apr. 11, 2005 Weiss Decl. ¶ 7.

[28] *See* Scarfi Decl. ¶ 6.

[29] Am. Compl. Ex. C.

are no longer valid and the Nutzz Auction is no longer available," but advertised that new savings and benefits were available through FastTrack.[30]

C. Procedural History of this Litigation

Nutzz filed this suit on April 6, 2005 seeking a temporary restraining order against Vertrue, three of its former employees or agents, Cameron Tousi, John Adalio and John Walters, and Joint Marketing Group LLC and Joint Marketing Group Media LLC, two companies that the three former employees founded after they left Nutzz (the three employees and two companies are collectively referred to as "Affiliate Defendants"). In its Verified Complaint, Nutzz sought injunctive relief prohibiting Defendants' use of confidential and proprietary information including software provided by Nutzz to Vertrue, Nutzz's trackside marketing plan and retailers from Nutzz Elite's benefit provider list. Nutzz also asserted claims against all Defendants for: (1) interference with business relations and expectations; (2) violation of the Delaware Deceptive Trade Practices Act; (3) conversion; and (4) unfair competition. In addition to these claims, Nutzz accused Vertrue of breach of contract and its former employee, Tousi, of breach of his fiduciary duties and defamation. The Court heard and denied Nutzz's motion for a TRO on April 11, 2005, and set a schedule for presentation of its motion for a preliminary injunction.

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[30] *Id.* The preliminary record suggests that some of the statements in Vertrue's March 24, 2005 e-mail were false or misleading. I need not address that issue at this point, however, because such allegations are not relevant to Nutzz's claims for breach of the Confidentiality Agreement or misappropriation of trade secrets.

On April 26, 2005, Nutzz amended their complaint to add a count for misappropriation of trade secrets under the Delaware Trade Secrets Act against all Defendants and withdrew its allegation that Vertrue was using Nutzz's proprietary software programs. Thereafter, Nutzz also decided not to pursue a preliminary injunction against the Affiliate Defendants and ultimately dismissed this action against all of them, except John Walters. The Court heard Nutzz's motion for a preliminary injunction against Vertrue on May 23, 2005.

II. ANALYSIS

A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief.[31] Though there is no steadfast formula for the relative weight of each element, at least some showing is required for each one. A strong demonstration as to one element may serve to overcome a marginal demonstration of another.[32] A preliminary injunction, however, "will not issue if any of these three factors are not present."[33] It is an extraordinary remedy that is "granted sparingly and only upon a

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31 *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987).

32 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

33 *In re Aquila Inc.*, 805 A.2d 184, 189 (Del. Ch. 2002). *See also In re Digex Inc. S'holder Litig.*, 789 A.2d 1176, 1216 (Del. Ch. 2000) (denying a preliminary injunction for one claim based on a failure to demonstrate a likelihood of success on the merits and for another claim based on the failure to demonstrate imminent irreparable harm).

persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently."[34]

A. Reasonable Probability of Success on the Merits

In its Amended Complaint, Nutzz asserts various causes of action against Vertrue including, but not limited to, breach of contract and misappropriation of trade secrets. Those two causes of action, however, form the sole bases for Nutzz's motion for a preliminary injunction. Both Delaware and Connecticut have adopted the Uniform Trade Secrets Act ("UTSA"), which displaces claims for common law torts stemming from the same wrongful conduct on which a claim for misappropriation of trade secrets is based.[35] This displacement does not apply, however, to claims for contract remedies.[36] Therefore, I will address Nutzz's breach of contract and misappropriation of trade secrets claims separately.

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34 *Cantor*, 724 A.2d at 579.

35 *See* Conn. Gen. Stat. Ann. § 35-57(a); 6 *Del. C.* § 2007(a). *See also Savor, Inc. v. Fmr Corp.*, 812 A.2d 894, 898 (Del. 2002).

36 *See* Conn. Gen. Stat. Ann. § 35-57(b) (noting that an exception applies to contract remedies "not based on misappropriation of a trade secret"); 6 *Del. C.* § 2007(b) (noting that an exception applies to contract remedies "whether or not based upon misappropriation of a trade secret"). Though the Delaware and Connecticut statutes differ on this point, the difference is immaterial in this case because Nutzz's breach of contract claim is based on the use of information that it alleges is Confidential Information under the Agreement, whether or not that information also would constitute a trade secret.

1. Breach of contract

The Agreement at issue contains a choice of law provision specifying that it is governed by Connecticut law. Therefore, I turn to Connecticut law to determine Nutzz's likelihood of success on its breach of contract claim against Vertrue.

Under Connecticut law, "[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction."[37] "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract."[38] Where the language of a contract is "clear and unambiguous, the contract is to be given effect according to its terms."[39]

In this case the clear and unambiguous language of the Agreement requires that "any dispute arising out of or relating to this Agreement, including any issues relating to arbitrability or the scope of this arbitration clause, . . . be finally settled by arbitration."[40] The only exception to this requirement is for claims seeking injunctive or other relief for

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37 *Issler v. Issler*, 737 A.2d 383, 389 (Conn. 1999) (quoting *Lawson v. Whitney's Frame Shop*, 697 A.2d 1137 (Conn. 1997)).

38 *Niehaus v. Cowles Bus. Media, Inc.*, 819 A.2d 765, 771 (Conn. 2003); *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1288 (Conn. 2000).

39 *Issler*, 737 A.2d at 389.

40 Agreement ¶ 13.

violation of the Agreement's Confidentiality Clause.[41] In an attempt to take advantage of that exception, Nutzz has limited its contract claim to an alleged breach of the Confidentiality Clause. Therefore, I will limit my breach of contract analysis to Vertrue's alleged violations of that clause.[42]

As discussed above, the Confidentiality Clause defines Confidential Information as including information regarding a Disclosing Party's "customers, members, clients . . . product development plans, [and] membership solicitation methods."[43] This definition, however, specifically excludes "information which (a) was already in the Receiving Party's possession, (b) is generally available to the public other than as a result (directly or indirectly) of disclosure by the Receiving Party or (c) was available to the Receiving Party on a nonconfidential basis from a source other than the Disclosing Party."[44] Additionally, the Confidentiality Clause only authorizes a Receiving Party to use Confidential Information of a Disclosing Party to perform its obligations under the Agreement.

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41 *Id.*

42 While I have considered Nutzz's (and Vertrue's) arguments regarding the parties' obligations under provisions of the Agreement outside the Confidentiality Clause, which are subject to arbitration, I have done so only for the purpose of determining the intent of the Confidentiality Clause through a "fair and reasonable" construction of the language used and interpreted "in the light of the situation of the parties and the circumstances connected with the transaction." *Issler,* 737 A.2d at 389.

43 Agreement ¶ 12. *See also* discussion *supra* at Section I.A.4.

44 Agreement ¶ 12.

Nutzz claims that Vertrue used three types of Confidential Information in violation of the Confidentiality Clause: (1) Nutzz's customer information, i.e. name, mailing address, e-mail address and phone numbers ("Basic Customer Information"); (2) Nutzz Elite's benefit provider list; and (3) Nutzz Elite's trackside marketing plan. I will address each of those categories in turn.

a. Basic customer information

Nutzz claims that it owned the Basic Customer Information under the Agreement[45] and was the Disclosing Party under the Confidentiality Clause because it pre-populated certain fields on the Vertrue-hosted Nutzz Elite website when a Nutzz Basic member chose to join Nutzz Elite. Thus, according to Nutzz, Vertrue's use of Nutzz Elite member names and e-mail addresses to advertise FastTrack violated the Confidentiality Clause. Nutzz also argues that Nutzz Elite's benefit provider list and trackside marketing plan were developed through confidential disclosures of Meshkin and, therefore, also qualify as Confidential Information.

In response, Vertrue first argues that its use of Nutzz Elite Basic Customer Information does not violate the Confidentiality Clause because the Basic Customer Information was made available to Vertrue on a non-confidential basis from a source other than Nutzz, namely, the consumer. I find this argument sufficiently persuasive as

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[45] Specifically, Nutzz argues that paragraphs 4(e) (providing that "Nutzz has the right to grant any and all rights specified hereunder with respect to Nutzz intellectual property and Customer Information") and 1(d) (allowing Vertrue to enroll Nutzz Elite members in a competing Vertrue program after termination of the Agreement only when and if Nutzz ceases to provide comparable benefits) of the Agreement demonstrate that Nutzz owned the Basic Customer Information.

to diminish Nutzz's likelihood of success on the merits of its breach of contract claim in this Court. Even if Nutzz does own the Basic Customer Information, it remains that the *consumer* was the one who chose to become a Nutzz Elite member and resubmit their Basic Customer Information along with their billing information to Vertrue.[46] Vertrue did not have the ability independently to access Nutzz's databases. The consumer, presumably after reviewing all of their Customer Information, basic as well as billing, submitted this information to Vertrue.[47] The pre-population method, therefore, appears to have been used for the convenience of the consumer, rather than as a method of disclosing Confidential Information or Basic Customer Information to Vertrue.[48] Accordingly, for purposes of Nutzz's preliminary injunction motion, I find that Vertrue is at least as likely as Nutzz to prevail on Vertrue's argument that the Basic Customer Information was available to Vertrue on a non-confidential basis from the consumers.

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46 It is noteworthy that Vertrue did not send the e-mail regarding FastTrack to all Nutzz Basic members (which Vertrue numbered at 40,000 and Nutzz put at 150,000), only to 1,200 Nutzz Elite members.

47 *See* Fredrich Dep. at 14, 16-19, 22.

48 The Agreement contains a provision dealing with the "Transfer of Customer Information." Agreement ¶ 2(e)(ii). That provision requires Nutzz to "provide [Vertrue] with Customer Information with respect to all new enrolling Members (in a format designated by Vertrue and reasonably acceptable to Nutzz) not less frequently than once per week . . . ." Nutzz failed to present any credible evidence that Vertrue's alleged misuse of Confidential Information pertained to Customer Information supplied by Nutzz in accordance with that requirement.

Thus, there is a reasonable likelihood that such Basic Customer Information would be excluded from Confidential Information, as defined in the Agreement.[49]

Nutzz's claim for breach of the Confidentiality Clause suffers from another serious flaw: it assumes that the parties general obligations regarding Confidential Information also apply to Customer Information. I consider this assumption questionable, at best. Customer Information, a defined term in the Agreement, is the subject of clauses other than the Confidentiality Clause that specifically address permissible uses of Customer Information.[50] Under Connecticut law, it is "well settled that 'the particular language of a contract must prevail over the general.'"[51] Because provisions other than the Confidentiality Clause are likely to govern whether Vertrue's use of Customer Information was permissible under the Agreement, that aspect of

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49 Additionally, Nutzz's reliance on *Horty & Horty, Inc. v. Baltrusch*, 1983 WL 18008 (Del. Ch. Feb. 23, 1983) for the proposition that it must "merely establish a likelihood that at a final hearing on the merits it will be able to demonstrate at least a co-ownership interest in the confidential information" in order to have a preliminary injunction issue is misplaced. POB at 21. The issue addressed in *Horty* was who owned a program, and subsequent copyright, developed by an employee in connection with their work for their employer. The demonstration of at least co-ownership in the program gave the plaintiff a right to relief. In this case, even assuming Nutzz is a co-owner of the Confidential Information or Customer Information at issue, the issue remains whether Vertrue's use of the information constitutes a violation of the Confidentiality Clause of the Agreement or a misappropriation of trade secrets. Therefore, the focus is not on ownership of the information alone, but also on the permissibility of Vertrue's use of the information under the Agreement and UTSA.

50 *See* Agreement Ex. A, ¶ 2(e).

51 *Issler*, 737 A.2d at 390 n.12 (quoting *Miller Bros. Constr. Co. v. Maryland Cas. Co.*, 155 A. 709 (Conn. 1931)).

Nutzz's claim is probably subject to arbitration. Therefore, Nutzz has not demonstrated a reasonable likelihood of success on the merits with regard to Vertrue's alleged violation of the Confidentiality Clause through its use of Nutzz Elite Basic Customer Information.

b. Benefit provider list

With regard to the alleged misuse of benefit provider information, Vertrue argues that its use of the information in question does not violate the Confidentiality Clause because not only does the combination of retailers that became Nutzz Elite benefit providers not qualify as Confidential Information, but in fact, the list was already in their possession. With the exception of NASCAR.com, Vertrue had pre-existing contracts with all of the retailers that provided benefits to Nutzz Elite. Vertrue presented evidence that it was first made aware of the potential of NASCAR.com being a retailer for a NASCAR® themed membership program through a meeting with the proponent of a competing program.[52] Nutzz argues that Meshkin's disclosure of his opinion regarding appropriate retailers makes Nutzz Elite's benefit provider list Confidential Information. Yet, Meshkin failed to produce any list that he had prepared before, or in connection with, his discussions with Vertrue identifying the appropriate retailers. Moreover, as one would expect, the retailers with which Nutzz Elite had a relationship were advertised on

[52] *See* May 12, 2005 Weiss Decl. ¶¶ 5-8. In fact, the competing program, TeamRaceFan, advertises NASCAR.com as one of its retailers. *See id.* Thus, NASCAR.com's willingness to serve as a benefit provider is generally available to the public. Furthermore, the TeamRaceFan program was launched in January 2004, before Meshkin's discussion with Vertrue. *Id.*

its website, negating any claim of continued confidentiality.[53] The Court therefore finds that Nutzz has failed to demonstrate a reasonable probability of success on its claim that Vertrue violated the Confidentiality Clause through the use of Nutzz Elite's benefit provider list.

c. Trackside marketing plan

Nutzz also claims misuse of its trackside marketing plan. In response, , Vertrue argues that it has not used any trackside marketing plan to promote FastTrack and, therefore, cannot be found to have violated the Confidentiality Clause on that basis. In addition, the parties dispute whether Nutzz ever even delivered any trackside marketing plan to Vertrue.[54] The latter issue is immaterial, however, because Nutzz adduced no evidence demonstrating that Vertrue ever used, or plans to use, any kind of trackside

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[53] *See* Apr. 11, 2005 Weiss Decl. ¶ 13; Nutzz.com's Resps. to Vertrue's First Set of Interrogs. at 8; DAB at 22-23. Additionally, Vertrue presented evidence that in choosing which benefit providers to include in the FastTrack program it did not rely on any information or insight learned from Nutzz or Meshkin.

> Rather, as it does in developing all of its programs, Vertrue assessed which pool of retailers it currently had contracts with and packaged the benefits and features offered by those retailers together to create a program that Vertrue believed would be appealing to consumers, based on its more than 15 years of experience in developing membership programs.

Scarfi Decl. ¶ 3.

[54] *See* DAB at 10, 24-25; PRB at 8-10.

marketing.[55] Thus, Nutzz has failed to demonstrate a reasonable probability of success on its claim for misuse of its alleged Nutzz Elite trackside marketing plan.

Having failed to demonstrate a reasonable likelihood of success as to any of the three alleged violations of the Confidentiality Clause, Nutzz has not met its burden of proof on the merits for obtaining a preliminary injunction based on its breach of contract claim.

2. Misappropriation of trade secrets

Under the UTSA, adopted by both Delaware and Connecticut, misappropriation of a trade secret is defined as "disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that his [or her] knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use."[56]

Nutzz claims that Nutzz Elite's member lists, billing information and demographic information constitute protectable trade secrets under the UTSA. Vertrue disputes that claim. In any event, Nutzz also must demonstrate misappropriation by Vertrue in order show a reasonable likelihood of success on its trade secret claim.

There is no dispute that the Agreement contemplated that both parties would use Nutzz Elite's member lists, billing information and demographic information. For

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[55] In fact, the evidence shows that Vertrue traditionally has not used trackside marketing as a sales channel. *See* Scarfi Decl. ¶ 6.

[56] Conn. Gen. Stat. Ann. §35-51(b); 6 *Del. C.* § 2001(2). *See also Total Care Physicians, P.A. v. O'Hare*, 2002 WL 31667901, at *5 (Del. Super. Oct. 29, 2002).

example, the Agreement permitted Vertrue to use Customer Information to market its other non-competing programs.[57] In fact, the Agreement provides that if, after termination, "Nutzz ceases to provide [Nutzz Elite] benefits to [Nutzz Elite] Members that are comparable to those benefits provided to such Members prior to such expiration or termination," Vertrue may solicit Nutzz Elite members obtained through Vertrue's distribution channels to join a comparable Vertrue program.[58] Accordingly, the Agreement dictates the permissible uses and limitations of use of the information Nutzz claims as trade secrets.[59] Furthermore, the applicable provisions are outside the Confidentiality Clause.

The parties vehemently dispute whether Vertrue's use of Nutzz Elite's membership information, billing information and demographic information was permissible under the Agreement. This dispute is telling. As discussed above, the linchpin of Nutzz's misappropriation argument is likely to necessitate a determination of the parties' duties and obligations under provisions of the Agreement other than the Confidentiality Clause. The Agreement expressly provides, however, that such disputes "arising out of or relating to this Agreement, including any issues relating to arbitrability

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57 *See* Agreement ¶ 2(e)(ii).

58 Agreement ¶ 1(d). The evidence demonstrates that of the 1,200 Nutzz Elite members who received Vertrue's email advertising FastTrack, less than 150, and perhaps as few as 36, became Nutzz Elite members through the upgrade option to Nutzz Basic. *See* Scarfi Decl. Ex. B; POB at 26 (quoting Scarfi Dep. at 152-53).

59 *See Total Care*, 2002 WL 31667901 (using the AMA Code of Medical Ethics to determine what use of client information, which was a trade secret, was permissible use versus misappropriation).

or this scope of th[e] arbitration clause, will be finally settled by arbitration. . . ."[60] Nutzz's misappropriation claim, therefore, appears to suffer from a serious jurisdictional flaw that would make it unlikely that Nutzz could succeed on the merits of that claim in this Court. In any event, I need not decide this issue because, as discussed below, Nutzz has failed to demonstrate irreparable harm with regard to its trade secrets claim.

B. Irreparable Harm

Irreparable harm generally exists where injury cannot be adequately compensated by damages.[61] Essentially, the injury claimed "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[62] Because a preliminary injunction is an extraordinary form of equitable relief, it "should not be granted if the injury to Plaintiff is merely speculative"[63] or if the act complained of has already occurred.[64]

Nutzz asserts that its injury is irreparable because the parties' "contractual agreement as to irreparable injury is dispositive" and because Vertrue's use of the

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60 Agreement ¶ 13.

61 *State v. Delaware State Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974). Preliminary injunctive relief is a powerful remedy available in extraordinary circumstances and should not be granted if the injury may be adequately compensated for after a full trial on the merits, either by an award of damages or by some form of final equitable relief. *See Cantor*, 724 A.2d at 586.

62 *Delaware State Educ. Ass'n*, 326 A.2d at 875.

63 *Cantor*, 724 A.2d at 586.

64 *See Digex*, 789 A.2d at 1215; Wolfe & Pittenger, § 10-2(a), 10-4 (citing 1 J.L. High, A Treatise on the Law of Injunctions (4th ed. 1905)).

Confidential Information threatens continued irreparable injury to Nutzz.[65] In appropriate circumstances, this Court has held that "contractual stipulations as to irreparable harm alone suffice to establish that element for the purposes of issuing preliminary injunctive relief."[66] The contractual stipulation in this case, however, relates only to Nutzz's claim for breach of the Confidentiality Clause, as to which Nutzz has failed to demonstrate a reasonable likelihood of success on the merits.[67]

Apart from its misplaced reliance on the language in the Confidentiality Clause, Nutzz's showing of irreparable harm from the alleged misappropriation of trade secrets is quite cursory and largely conclusory. That showing is inadequate for several reasons. First, the harm resulting from the alleged misappropriation of Nutzz's trade secrets has already occurred. Vertrue has already sent out an e-mail soliciting Nutzz Elite members to join its competing program, FastTrack. The number of Nutzz Elite members that actually joined FastTrack is ascertainable by the parties and, therefore, damages from any such misappropriation are calculable.[68] Alternatively, based on the preliminary record before the Court, it appears that Nutzz can be adequately compensated for any injury by

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65 POB at 31.

66 *Cirrus Holding Co. v. Cirrus Indus., Inc*., 794 A.2d 1191, 1209 (Del. Ch. 2001).

67 My conclusion to that effect above applies, as well, to any claim that Vertrue's use of Nutzz Elite's alleged trade secrets constitutes a violation of the Confidentiality Clause.

68 Additionally, I note that the parties had a clear compensation structure set forth in the Agreement under which Vertrue was entitled to receive 100% of the first year membership fees generated from the first twenty thousand Nutzz Elite members. *See* Agreement Ex. E.

the imposition of a constructive trust upon Vertrue's FastTrack program. In addition, though Nutzz complains of irreparable harm resulting from Vertrue's sudden termination of the Agreement and subsequent disconnection of links to Nutzz Elite, these actions do not relate to Nutzz's misappropriation of trade secrets claim. The availability of arbitration to Nutzz as a vehicle to pursue redress for its misappropriation and related claims further supports the conclusion that it has an adequate remedy at law.[69] Therefore, I find that Nutzz has failed to demonstrate irreparable harm caused by misappropriation of trade secrets.

C. Balance of Equities

Finally, though an analysis of the balance of equities is unnecessary based on my conclusions as to a reasonable probability of success on the merits and irreparable injury, I note that the balance of the equities does not tip in Nutzz's favor in terms of the preliminary injunction it seeks. Rather, the relief Nutzz seeks only loosely relates to the harm it alleges and threatens to create more harm than it rectifies.

For example, Nutzz seeks an injunction prohibiting Vertrue from servicing FastTrack members who were obtained through the use of Nutzz's confidential information. Even if Nutzz had demonstrated a likelihood of success on the merits, such relief might harm the former Nutzz Elite members more than either party. The evidence presented raised serious questions about Nutzz's ability to service the Nutzz Elite members absent Vertrue. To the extent Nutzz also seeks an injunction requiring Vertrue

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[69] *See IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001) (availability of arbitration provides an adequate legal remedy).

to provide the services that were the benefit of the parties' bargain for such time as it would take Nutzz to find a replacement vendor or for 120 days, whichever is shorter, it seeks mandatory relief akin to specific performance. Such relief requires an even stronger showing on the merits, which Nutzz plainly has failed to provide. Furthermore, the requested relief is geared more to compensating Nutzz for Vertrue's termination of the Agreement in general, rather than its alleged breach of the Confidentiality Agreement or misappropriation of trade secrets.

III. CONCLUSION

For the reasons discussed above, the Court denies Nutzz's motion for a preliminary injunction. In addition, having considered the evidence and arguments presented, the Court does not find that Nutzz's action in pursuing its motion for a preliminary injunction rises to the level of bad faith conduct that would justify an award of attorneys' fees. Therefore, the Court denies Vertrue's request for attorneys' fees under Conn. Gen. Stat. § 35-54 and 6 *Del. C.* § 2004.

IT IS SO ORDERED.