IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SIMPLEXITY, LLC, a Delaware Limited Liability Company,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 8171-VCG*
ANDREW ZEINFELD, an individual, BRIGHTSTAR CORP., a Delaware Corporation, and BRIGHTSTAR U.S., INC., a Florida Corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 15, 2013
Date Decided: April 5, 2013

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GLASSCOCK, Vice Chancellor

This case arises from a dispute between two companies, Simplexity, LLC and Brightstar Corp., over Brightstar's hiring of Simplexity's former CEO, Andrew Zeinfeld. Simplexity and Brightstar are engaged in fierce competition in the mobile telecommunications marketplace, and Simplexity has filed this action seeking a preliminary injunction against Brightstar's hiring of Zeinfeld on several grounds. First, Simplexity contends that Brightstar, in hiring Zeinfeld, has breached a contract with Simplexity, the MOU, in connection with the companies' joint venture in providing in-store activation services to Retailer A. Second, Simplexity argues that Zeinfeld has divulged Simplexity's confidential information and trade secrets, and that this constitutes a breach of Zeinfeld's fiduciary duties, his confidentiality agreement with Simplexity, and the Virginia Uniform Trade Secrets Act ("VUTSA"). Third, Simplexity contends that Zeinfeld's employment with Brightstar would violate his non-competition agreement with Simplexity. For the reasons below, I find that 1) Plaintiff Simplexity has not shown that it will likely prevail on its breach of contract claim that Brightstar has violated the MOU, because the MOU was superseded by a subsequent agreement; 2) Simplexity has not shown that its claims for breach of fiduciary duty, breach of Zeinfeld's confidentiality agreement, or violation of the VUTSA justify enjoining Zeinfeld's employment at Brightstar; 3) Simplexity *has* shown a reasonable probability of success in ultimately demonstrating that the non-competition agreement is

enforceable and that Brightstar's proposed employment of Zeinfeld will violate the non-competition agreement; and 4) the Plaintiff has demonstrated threatened imminent irreparable harm that outweighs the harm to the Defendants of an improvidently granted injunction. Therefore, I conclude that the Plaintiff is entitled to preliminary injunctive relief.

I. BACKGROUND

The facts, as they appear in the record at this preliminary stage, are as follows.

A. Simplexity

Simplexity has developed technology to manage the activation of new mobile devices, such as tablets and cell phones, on the networks of major U.S. wireless service providers, such as Verizon Wireless or AT&T.[1] Simplexity's activation technology is difficult to replicate, because streamlining and integrating the various activation processes of the different carriers requires technological investment and close collaboration with each carrier over an extended period of time.[2] Simplexity utilizes its activation platform to (1) sell mobile devices directly to consumers through its own websites, such as Wirefly.com; (2) provide web-based activation infrastructure for other retailers' online sales of mobile devices;

[1] Compl. ¶ 15.
[2] *See id.* ¶ 14-15.

and (3) partner with retailers to sell and activate mobile devices for customers at traditional brick-and-mortar stores.[3]

In the past, the bulk of Simplexity's business consisted of online sales and activations of cell phones, but in recent years that business has declined.[4] In 2012, Simplexity undertook to expand its business to provide more in-store activation and sales services for brick-and-mortar clients and considered this expansion to be its most important strategic initiative.[5] By the end of 2012, Simplexity was providing in-store sales, activation, and VIP services to Retailer E and Retailer F and was in active discussions with other major retailers to provide the same services.[6]

Zeinfeld has served as CEO of Simplexity since the company's founding in 2007.[7] He oversaw every aspect of Simplexity's operations, including formulating business strategies; developing relationships with customers, suppliers, and other partners; and managing Simplexity's intellectual property.[8] In 2008, Zeinfeld signed an agreement with Simplexity that restricted Zeinfeld's ability to work for a

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[3] *Id.* ¶ 16.
[4] *See* Jowers Transmittal Aff. Ex. 52, at 1, Jan. 25, 2013 ("[L]et me clarify one thing. I may have mis-stated when I said the core business is in decline. The overall core business as defined by selling phones and activating them over the Internet may well not be in decline, but OUR core business is.").
[5] Bennett Aff. ¶ 10, Jan. 25, 2013.
[6] *Id.* ¶ 8.
[7] Compl. ¶ 19.
[8] *Id.* ¶¶ 19-22.

competitor or disclose Simplexity's confidential information.[9] Zeinfeld and Simplexity renewed the contract in 2012.[10]

The non-competition portion of his contract provides that:

> [F]or a period of 12 months following the date of termination of your employment . . . you will not, directly or indirectly, engage in any activity, whether as owner, partner, shareholder (other than as the owner of less than five percent of the outstanding capital stock of a publicly traded corporation), consultant, agent, employee, coventurer or otherwise, that is competitive with any business activities, products or services conducted by the Company or any subsidiary of the Company during the period of your employment by the Company, anywhere in the United States or any foreign country in which any such company has conducted business, is conducting business or, to your knowledge, is presently contemplating conducting business.[11]

His contract also prohibited him from soliciting Simplexity customers, suppliers, or employees.[12]

B. Brightstar

Brightstar is a large, multinational company that provides a broad array of services to its customers in the wireless industry.[13] These services are grouped into six categories.

1. Value-Added Distribution.

Brightstar acts as a wholesale distributer of cell phones, purchasing products from manufacturers and selling them to retailers. Brightstar also provides other

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[9] *See id.* ¶¶ 27-34.
[10] *Id.* ¶ 26.
[11] Jowers Transmittal Aff. Ex. 12, at A-3.
[12] *Id.*
[13] Gower Aff. ¶ 2, Jan. 31, 2013.

services to retailers, including marketing services, channel development and management services, product development for wireless devices and accessories, [and] manufacturing and assembly services.[14]

2. Supply Chain Solutions.

Brightstar assists retailers in managing their supply chains for mobile devices.[15]

3. Handset Protection and Insurance Services.

Brightstar partners with retailers to provide insurance, extended warranties, and security services to customers.[16]

4. Buy-back and Trade-in Solutions:

Brightstar assists retailers with developing systems to allow customers to get credit for trading in their old devices that they can apply to the purchase of a new phone.[17]

5. Financial Services.

Brightstar offers its customers assistance with leasing and other financing services.[18]

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[14] *Id.*
[15] *Id.* ¶ 4.
[16] *Id.* ¶ 5.
[17] *Id.* ¶ 6.
[18] *Id.* ¶ 7.

6. Multi-Channel Retail Solutions.

Brightstar offers its customers a "turn-key" solution to manage all aspects of retail sales for mobile devices. Brightstar can provide training, distribution-network management, technology to coordinate device activation, and other services to a retailer. These services extend to online sale and activation, in-store sale and activation, or both.[19] For each of the various services that Brightstar provides as part of its whole turn-key retail product, Brightstar either provides the service itself or hires a subcontractor to provide the service.[20]

C. Retailer A *Joint Venture*

In 2011, Brightstar and Simplexity became partners in providing services to the nation's largest retailer, Retailer A. Retailer A hired Brightstar to manage all sales of mobile devices through its website. Brightstar, in turn, hired Simplexity to manage the online activation process, because at the time Brightstar lacked the technological capability to manage the activation process.[21]

In the early stages of their collaboration on the Retailer A project, in late 2011, Brightstar and Simplexity signed a Memorandum of Understanding ("MOU"), which governed the parties' relationship until the signing of a final agreement.[22] The MOU contains provisions prohibiting both Brightstar and

[19] *Id.* ¶ 8.
[20] *Id.*
[21] *Id.* ¶ 15.
[22] Compl. ¶ 37.

Simplexity from soliciting or hiring each others' employees.[23] The MOU also restricts each party's use and disclosure of the other party's confidential information.[24] Eventually the MOU was superseded by the Master Services Agreement ("MSA") in March 2012.[25]

D. Brightstar's Acquisition of LetsTalk.com

Despite their decision to collaborate on the Retailer A project, the relationship between Brightstar and Simplexity grew more complicated as time passed. Brightstar was concerned that a direct relationship between Simplexity and Retailer A could pose a threat to Brightstar's business. In August of 2012, a Brightstar executive, Dave Stritzinger, expressed his worry about the competitive threat from Simplexity, saying "[w]e have to have our own technology in order to succeed at Retailer A and other customers. [Simplexity] is a threat not just at Retailer A but at other customers as well."[26] Another Brightstar executive, Sally Lange, emailed Brightstar's CEO, Marcelo Claure, expressing similar concerns:

> It won't take much for [Retailer A] to form the opinion that the real value is coming from Simplexity and we are just the middle man. Despite the clear value we believe we are showing and producing on all fronts – we have a serious challenge.

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[23] Sensing Transmittal Aff. Ex. 13, at 4, Jan. 31, 2013.
[24] *Id.* Ex. 13, at 3.
[25] *Id.* Ex. 14, at 33 ("Entire Agreement. This Agreement supersedes all previous letters, offers, quotations, negotiations and agreements in respect of its subject matter including, by way of example and not limitation, the Memorandum of Understanding entered into by the Parties."). The extent to which the MSA supersedes the MOU is discussed in detail, infra.
[26] Jowers Transmittal Aff. Ex. 10, at 2, Jan. 25, 2013.

> We know Simplexity is engaging directly with the carriers and with Retailer A on the agent agreement side – I am increasingly concerned they are building a case for themselves that would be detrimental to our business.[27]

Claure agreed with Stritzinger's and Lange's assessments that Simplexity's relationship with Retailer A threatened Brightstar.[28] Brightstar mitigated the competitive threat posed by Simplexity by acquiring LetsTalk.com, a competitor of Simplexity's that had developed its own technology to provide online activation for mobile devices on multiple wireless carriers.[29]

LetsTalk was one of Simplexity's only competitors in the market for online activation services.[30] Brightstar acquired LetsTalk in September of 2012 when it was close to bankruptcy and rebranded the company as Consensus.[31] Brightstar understood that its acquisition of LetsTalk could strain its relationship with Simplexity and increase the risk that Simplexity might make a separate deal with Retailer A for in-store activation services at Brightstar's expense.[32]

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[27] *Id.* Ex. 74, at 1, Jan. 25, 2013.
[28] *Id.* Ex. 10, at 3, Jan. 25, 2013.
[29] Grower Aff. ¶ 12.
[30] Compl. ¶ 43.
[31] Grower Aff. ¶ 12.
[32] *See* Jowers Transmittal Aff. Ex. 74, at 1 (email from Claure in response to Lange's email expressing concerns about a potential deal between Retailer A and Simplexity, saying "[t]his is scary when I read your email Sally considering that Retailer A is our number one account in the US from a margin perspective . . . . I bet simplexity will find out about our let's talk play. Do we have a CLEAR plan of attack?").

Indeed, the working relationship between Simplexity and Brightstar changed from collaborative to competitive after the LetsTalk acquisition.[33] When Zeinfeld notified his team at Simplexity that Brightstar had acquired a major Simplexity competitor, he said "I'm sending this info for several reasons: 1. I'm sure this news will make you question our Retailer A/Brightstar relationship status. 2. When dealing with anyone from outside Simplexity you never know when they 'might' be a competitor."[34] Though they were engaged in a joint venture to provide online activation services to Retailer A, Simplexity and Brightstar began competing over who could provide Retailer A's in-store activation services.[35] At Retailer A's request, Simplexity submitted a bid on October 5, 2012.[36] Brightstar later submitted a competing bid to provide in-store activation services.[37]

E. Brightstar's Hiring of Zeinfeld

The Simplexity-Brightstar relationship further deteriorated when Brightstar hired Zeinfeld to head a new division at Brightstar. Brightstar's CEO, Claure, wanted Zeinfeld because of his extensive brick-and-mortar experience as an executive at RadioShack.[38] In particular, Claure wanted Zeinfeld to manage the company's global retail business, with an immediate focus on two specific retail

[33] *See* Jowers Transmittal Aff. Ex. 1 (Zeinfeld Dep.) 110:20-112:21.
[34] *Id.* Ex. 36, at 1.
[35] *See id.*
[36] *Id.* Ex. 29, at 9.
[37] *Id.* Ex. 2 (Claure Dep.) 104:12-23.
[38] *Id.* Ex. 1 (Zeinfeld Dep.) 118:13-119:23.

projects: Retailer B and Retailer D.[39] Zeinfeld's responsibilities for the Retailer B project would include overseeing all of Retailer B's mobile device sales, including:

> [P]rovid[ing] point of sale ("POS") systems, the people to staff the department, marketing assistance, inventory management and fulfillment services both in the store and outside the store through virtual inventory programs, reverse logistics, buy-back and trade in services, device protection and insurance programs, financial reporting and management services, and [activating] the devices.[40]

Zeinfeld would have similar responsibilities with respect to Retailer D and would supervise Retailer D's retail operations and website.[41] Brightstar will *not* provide the technology for in-store or online activations.[42] Claure was interested in hiring Zeinfeld because Zeinfeld's decades of brick-and-mortar experience would be valuable on both the Retailer B and Retailer D projects.[43]

Brightstar's internal communications also indicate that hiring Zeinfeld would improve Brightstar's competitive advantage over Simplexity by derailing Simplexity's bid to provide in-store activation services to Retailer A. Sally Lange sent Claure an email explaining her concerns that Retailer A was close to signing an

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[39] Sensing Transmittal Aff. Ex 3 (Zeinfeld Dep.) 129:15-138:24.

[40] Grower Aff. ¶ 11.

[41] *Id.* ¶ 13. Retailer D is a new mobile-device retailer that will sell Retailer G products primarily to the Hispanic community. Retailer D is a joint venture between Brightstar, Partner A , and the Partner B . *Id.*

[42] *Id.* Retailer D has engaged Partner A to provide the technology for in-store activations and Provider A to create the website and handle online sales and activations.

[43] Sensing Transmittal Aff. Ex 3 (Zeinfeld Dep.) 121:24-122:20. *See also* Grower Aff. Ex 2, at 1.

agreement with Simplexity for in-store activation services. "We have found out that they [Retailer A] are weeks away from signing a deal with Simplexity for an in-store solution. . . . We need to stop the LOI from happening."[44] In response to that email, Claure replied that he would meet Zeinfeld that day, November 10, 2012.[45] Within the hour, Dave Stritzinger sent an email to Claure outlining his views on how to deal with Simplexity: "[t]here is no need for SX [Simplexity] in our future world and going forward we will just end up fighting each other in every deal. Maybe now is the time to do some type of transaction with them OR, hire Andy away from SX. . . . Without Andy, they are dead."[46]

Claure first approached Zeinfeld about a possible job opportunity while both of them were attending an industry event in late October 2012.[47] After the event, they exchanged emails in which Claure further explained what Zeinfeld's responsibilities at Brightstar would entail.[48] On November 10, 2012, Zeinfeld and Claure met at the Four Seasons in Washington D.C. to further discuss Claure's offer.[49] Zeinfeld informally accepted the offer on November 19.[50] Brightstar sent Zeinfeld a draft copy of his employment agreement on November 27.[51] During the

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[44] Jowers Transmittal Aff. Ex. 44, at 2.
[45] *Id.* Ex. 44, at 1.
[46] *Id.* Ex. 43, at 1.
[47] Sensing Transmittal Aff. Ex 3 (Zeinfeld Dep.) 117:18-119:7.
[48] *See* Jowers Transmittal Aff. Ex. 41, at 1-2.
[49] *Id.* Ex. 2 (Claure Dep.) 67:7-9.
[50] *Id.* Ex. 48, at 1.
[51] *Id.* Ex. 49, at 1.

course of negotiations with Brightstar over his future employment, Zeinfeld participated in strategic discussions related to Brightstar's business. For instance, in an email to Claure, Zeinfeld explained the importance of Retailer D establishing a website that is easy to access from a mobile device:

> You asked me last week why I didn't think the Hispanic web sites did much in the way of sales... well I've been digging into that and from what I can tell, more hispanics use their phone to surf the web than pc's or laptops. In fact, mobile surfing is by far the #1 way that demographic accesses the web. If this is true, and I believe it is, then the first thing we should do is build a MOBILE version of Retailer D or [Retailer G 's] Hispanic version should be designed for mobile. Imagine having this in Spanish. http://mobile.wirefly.com/.[52]

The link that Zeinfeld provided in that email was to the mobile version of Simplexity's website that sells mobile phones.[53]

In the course of finalizing negotiating the terms of Zeinfeld's employment agreement, Brightstar became concerned about Zeinfeld's non-compete with Simplexity.[54] Brightstar and Zeinfeld agreed to screen Zeinfeld from involvement with Consensus, the newly acquired subsidiary of Brightstar that focused on activation technology and online mobile device sales.[55] Zeinfeld's employment agreement with Brightstar provides that:

> Executive [Andrew Zeinfeld] acknowledges and agrees that Executive's initial duties will not include activities related to the

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[52] *Id.* Ex. 59, at 2, Jan. 25, 2013.
[53] *Id.* Ex. 1 (Zeinfeld Dep.) 211:7-14.
[54] *Id.* Ex. 82, at 1.
[55] Sensing Transmittal Aff. Ex. 5 (Claure Tr.) 161:24-162:17.

> Company's online activation business, including, without limitation, the Company's Let's Talk [Consensus] operations.
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> . . . .
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> In addition, Company will establish a firewall policy providing that no company personnel engaged in Company's online activation business shall work or engage Executive in its day-to-day operations, disclose or communicate with Executive on matters relating to the online business.[56]

Zeinfeld announced he was leaving Simplexity on December 11, 2012.[57] Simplexity alleges that notwithstanding the "firewall" policy in his agreement with Brightstar, Zeinfeld engaged in competitive behavior immediately after he announced his resignation. For example, he has participated in at least one conference call with Consensus employees, even after he agreed to an employment contract with Brightstar that created a "firewall" between Zeinfeld and Consensus.[58] Via email, Zeinfeld consulted with Brightstar's CEO, Claure, about a potential acquisition of a major Simplexity customer and business partner.[59] Zeinfeld also agreed to speak to a consulting firm about carrier contracts, including providing "Simplexity info."[60]

II. ANALYSIS

This Court will grant preliminary injunctive relief when the moving party can demonstrate, (1) a reasonable probability of success on the merits, (2)

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[56] *Id.* Ex. 11 §§ 3(e), 3(g).
[57] Zeinfeld Aff. ¶¶ 23-24, Jan 31, 2013.
[58] Jowers Transmittal Aff. Ex. 1 (Zeinfeld Dep.) 219:14-223:9.
[59] *Id.* Ex. 60, at 2.
[60] *Id.* Ex. 73, at 1-2.

irreparable harm will occur in the absence of an injunction, and (3) the balance of the equities weighs in favor of granting the injunction.[61]

Simplexity brings several claims that it argues support injunctive relief. First, Simplexity argues that Brightstar breached its obligation under the MOU not to solicit Simplexity's employees and that Brightstar should be enjoined from employing Zeinfeld in any capacity. Second, Simplexity contends that Zeinfeld's conduct in accepting employment with Brightstar, specifically his alleged divulging of Simplexity confidential information, constitutes a breach of the confidentiality provision of Zeinfeld's employment agreement, a breach of Zeinfeld's fiduciary duties, and a breach of the Virginia Uniform Trade Secrets Act. Simplexity asserts that these breaches justify injunctive relief prohibiting Zeinfeld from accepting employment with Brightstar. Third, Simplexity asks for an injunction against Zeinfeld working for Brightstar based on the non-compete provision of Zeinfeld's employment agreement with Simplexity.

A. Claims Arising from the MOU.

Simplexity contends that under the MOU Brightstar is forbidden from hiring Zeinfeld in any capacity. Brightstar responds by arguing that the MOU has been superseded by a subsequent agreement, the Master Servicing Agreement, ("MSA") which does not contain a non-solicitation clause. For reasons I explain below, I

[61] *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1371 (Del. 1995); *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 179 (Del. 1986).

agree with Brightstar that the MOU is no longer in force. Accordingly, Simplexity likely cannot prevail on this claim at trial and no injunction is warranted.

Section 9 of the MOU consists of the following:

> **Nonsolicitation of Employees.** Each Party agrees that, during the period from the Effective Date until the later of: (a) twelve (12) months following the expiration or termination of this MOU; and (b) if the Definitive Agreement is executed, twelve (12) months following the expiration or termination of the Definitive Agreement, such Party will not, directly or indirectly, solicit for employment or hire (i) any member or senior management of the other Party . . . .[62]

Based on the plain language of this clause, if this language were still in effect, the MOU would preclude Brightstar from employing Zeinfeld. At the time of the MOU, the parties intended for the non-solicitation clause to survive the expiration of the MOU.[63] The pertinent language provides that "Sections 6 . . . through 16 of this MOU shall survive the termination of this MOU."[64] Nonetheless, it is clear from reading through the MOU that the parties did not intend for the MOU to represent their entire agreement. Indeed, the MOU specifies that the parties contemplated executing a comprehensive agreement after the MOU was signed.[65] In any event, section 12 of the MOU provides that the MOU may be "superseded" by a written agreement executed by the parties.[66]

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[62] Pl.'s Op. Br. Ex. 94, at ¶ 9.
[63] *See id.* at ¶ 2.
[64] *Id.*
[65] *Id.* at ¶ 3.
[66] *Id.* at ¶ 12.

On March 21, 2012, the parties executed the MSA. Notably absent from the MSA is any clause which prevents either company from soliciting the other's employees. Therefore, the issue before me is whether the non-solicitation clause in the MOU survives the MSA, or whether it has been superseded by the MSA. The Plaintiff argues that the non-solicitation clause should survive the MSA because of the parties clearly expressed intent (in the MOU) for the non-solicitation clause to survive the MOU's termination. The Defendants argue that the MOU has been entirely superseded by the MSA because of the merger clause, which provides:

> This Agreement supersedes all previous letters, offers, quotations, negotiations and agreements in respect of its subject matter including, by way of example and not limitation, the Memorandum of Understanding entered into by the Parties . . .[67]

The effect of such a merger clause, in general, is to nullify the effects of any prior agreements or intentions of the parties.[68] Simplexity notes, however, that the clause indicates that the MSA only supersedes prior agreements "in respect of the [MSA's] subject matter." This means, according to Simplexity, that I must comb through both agreements, comparing the "subject matter" of each clause in each agreement to determine whether a particular provision has been superseded.[69] I

[67] Defs.' Ans. Br. Ex. 14 § 21.9.
[68] *See Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.3d 624, 627 (N.Y. 1997); *Health-Chem Corp. v. Baker*, 915 F.2d 805, 811 (2d. Cir. 1990).
[69] Pl.'s Op. Br. 45-47.

find it unnecessary to do so with respect to the MOU.[70] The merger clause is unambiguous and clearly expresses the parties' intent to "supersede . . . the Memorandum of Understanding . . ."[71] The parties placed no limitation on the extent to which the MOU would be superseded; for example, there is no carve out for the non-solicitation. In light of the specific supersession of the MOU, the term "subject matter" does not provide such a limitation. The parties could easily have provided for portions of the MOU to survive; they did not. The language is clear. Therefore, I agree that the MSA entirely superseded the MOU. As a result, the MOU is no longer in force, and Brightstar was not bound by the MOU no-hire clause.

B. Claims for Breach of Fiduciary Duty, Breach of Zeinfeld's Confidentiality Agreement, and the Virginia Uniform Trade Secrets Act.

Simplexity argues that Zeinfeld's conduct before and after his resignation from Simplexity constitutes a breach of Zeinfeld's fiduciary duties,[72] a breach of

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[70] Here, the merger clause expressly names the MOU as superseded. Most of the cases Simplexity has cited for performing a detailed analysis are distinguishable from the case here in that the merger clause in each of those cases did not expressly supersede a named prior agreement. *See, e.g., Kreiss v. McCown De Leeuw & Co.*, 37 F. Supp. 2d 294, 301 (S.D.N.Y. 1999) (holding that the subject matter of a preliminary agreement was not superseded by a stockholders' agreement when the stockholders' agreement did not expressly name the preliminary agreement in its merger clause).

[71] Def.'s Ans. Br. Ex. 14 § 21.9.

[72] To the extent Simplexity seeks injunctive relief against future breaches of Zeinfeld's duty of loyalty, its request must be denied because Zeinfeld owes no fiduciary duties after termination. *See Hilb, Rogal & Hamilton Co. of Richmond v. Duke*, 440 S.E.2d 918, 923 (Va. 1994) (affirming trial court's decision to strike evidence relating to breach of fiduciary claim for post-termination activity despite the existence of a valid non-compete). *Cf. In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 758 (Del. Ch. 2005) *aff'd*, 906 A.2d 27 (Del. 2006) ("[F]ormer

his employment agreement,[73] and a violation of the VUTSA.[74] Brightstar does not dispute that under Zeinfeld's employment agreement, under VUTSA, and under Virginia fiduciary duty law, Zeinfeld is obligated not to disclose Simplexity's confidential information.

However, to obtain injunctive relief, Simplexity bears the burden of showing that these duties will actually be breached, and that Simplexity will suffer harm that is "imminent and genuine, as opposed to speculative."[75] Simplexity has failed to present evidence of actual disclosures of confidential information arising from Zeinfeld's employment with Brightstar. Zeinfeld's discussions with Claure and other Brightstar officers did not contain non-public information about Simplexity. It is true that Zeinfeld was asked to contact consultants from Consultant A to discuss the wireless industry, but the call with Consultant A never took place.[76] Simplexity simply argues that because of the breadth of Zeinfeld's knowledge of Simplexity's business, and because he was actively collaborating with Claure before he began his official employment with Brightstar, there is such a high

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directors [and officers] owe no fiduciary duties, and after [he was terminated] Ovitz could not breach a duty he no longer had.").

[73] In relevant part, Zeinfeld's agreement with Simplexity provides that "during the period of [Zeinfeld's] employment and at all times thereafter . . . you shall not use for yourself or anyone else, and shall not disclose to others, any Confidential Information." Jowers Aff. Ex. 12 at A-1.

[74] The VUTSA provides for injunctive relief to protect trade secrets, which are defined as "information . . . not generally known to . . . other persons who can obtain economic value from its disclosure or use." Va. Code Ann. § 59.1-336 (West).

[75] *Aquila, Inc. v. Quanta Services, Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

[76] Sensing Aff. Ex. 3 (Zeinfeld Dep.) 215:5-217:4.

likelihood that Zeinfeld will divulge Simplexity's confidential information that he should be enjoined from accepting any employment with Brightstar. Because Simplexity's concerns are speculative and unsupported by actual evidence, I find that they have failed to meet their burden of showing irreparable harm, and that their claims arising from the disclosure of confidential information do not support an injunction.

C. Claims Arising from Zeinfeld's Non-Compete Agreement

Finally, Simplexity seeks an injunction on the grounds that Zeinfeld's employment with Brightstar will violate the non-compete clause of his employment agreement with Simplexity.

1. Likelihood of Success on the Merits

Brightstar and Zeinfeld challenge Simplexity's claim that Zeinfeld will breach his non-compete on two grounds. First, they argue that the non-compete is invalid and unenforceable under Virginia law. Second, they argue that even if the non-compete is valid, Zeinfeld will not breach it by accepting employment with Brightstar.

a. Validity of the Non-compete

Under Virginia law, covenants not to compete in employment contracts are disfavored as restraints against trade.[77] Accordingly, "the employer bears the

[77] *Omniplex World Servs. Corp. v. U.S. Investigs. Servs., Inc.*, 618 S.E.2d 340, 342 (Va. 2005).

burden of proof and any ambiguities in the contract will be construed in favor of the employee."[78] The Virginia Supreme Court in *Roanoke Engineering Sales Co., Inc. v. Rosenbaum* explained the legal standard that a court should apply when determining the facial validity of a non-compete agreement:

> (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
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> (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
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> (3) Is the restraint reasonable from the standpoint of a sound public policy?[79]

In determining whether the employer has met its burden to prove those factors, I am to consider the restrictive provision in terms of its function, geographic scope, and duration.[80] These elements of the restrictive covenant are not to be considered separately, but I am to consider whether, together, they are reasonable in light of the circumstances of the particular case.[81]

i. Is Zeinfeld's Non-Compete Overbroad?

A non-compete agreement is overly broad, and therefore invalid in its entirety under Virginia law, if it restricts an employee from engaging in a broader array of activities than those necessary to protect the legitimate business interests

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[78] *Id.*
[79] 290 S.E.2d 882, 884 (Va. 1982).
[80] *Simmons v. Miller*, 544 S.E.2d 666, 678 (Va. 2001).
[81] *Id.*

of an employer.[82] For example, in *Omniplex*, the Virginia Supreme Court held invalid a non-compete restricting an employee from accepting employment with *any* entity that both (1) required government security clearance as a term of employment and (2) provided *any* services to the government agency that was a client of the original employer.[83] Because that restriction could encompass services not offered by the employer or engaged in by the employee, the court reasoned, the non-compete went beyond the employer's reasonable business interests and was impermissible under Virginia law.[84]

Notwithstanding the Virginia Supreme Court's rejection of the non-compete at issue in *Omniplex*, other cases have upheld broad non-competes in light of the business interests at stake. *Roanoke Engineering* concerned the employment agreement between a family-owned building supply company, Roanoke Engineering, and Curtis Rosenbaum, who managed a branch of the company as well as serving as its Senior Vice President, Treasurer, and as a director.[85] In that case, the court upheld an agreement providing that:

> For a period of three years after the termination of this agreement, for a reason other than the cessation of Roanoke's business or its bankruptcy, Employee will not, in the territory covered by Roanoke, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be associated in any manner with the ownership,

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[82] *Lanmark Tech., Inc. v. Canales*, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006).
[83] *Omniplex*, 618 S.E.2d at 342-43.
[84] *Id.*
[85] *Id.*

> management, operation or control of any business similar to the type of business conducted by Roanoke at the time of the termination of this agreement.[86]

In upholding the non-compete, the court relied on the fact that "Curtis, through his corporate offices, had access to the confidential financial records of all four branches, as well as lists of customers, lists of suppliers, detailed knowledge of overhead factors, pricing policies, and bidding techniques."[87] Because this knowledge enabled Curtis to be a "formidable competitor" to Roanoke, the court concluded that the restriction was no greater than necessary to protect Roanoke's legitimate business interest.[88]

The different outcomes in *Omniplex* and *Roanoke* illustrate that Virginia eschews per se rules on the permissible content of non-compete agreements, and evaluates each such agreement "on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved."[89] Even a non-compete that completely restricts an employee from working in *any* capacity for a competitor—the very type of agreement struck down as invalid in *Omniplex*—is valid if it constitutes a reasonable means to protect legitimate business interests.[90]

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[86] *Roanoke Eng'g*, 290 S.E.2d at 883.
[87] *Id.* at 885
[88] *Id.*
[89] *Omniplex*, 618 S.E.2d at 340.
[90] *Home Paramount Pest Control Cos. v. Shaffer*, 718 S.E.2d 762, 765 (Va. 2011) (citing *Modern Env'ts., Inc. v. Stinnett*, 561 S.E.2d 694, 696 (Va. 2002)).

Turning to the case before me today, I find that the non-compete between Simplexity and Zeinfeld is not overly broad. Simplexity operated a cell-phone activation business largely over the internet, and thus not limited geographically. The Defendant was the CEO of the Company, and thus presumably expected to be involved in all phases of the business. The relevant portion of Zeinfeld's Non-Compete states,

> [F]or a period of 12 months following the date of termination of your employment . . . you will not, directly or indirectly, engage in any activity, whether as owner, partner, shareholder (other than as the owner of less than five percent of the outstanding capital stock of a publicly traded corporation), consultant, agent, employee, coventurer or otherwise, that is competitive with any business activities, products or services conducted by the Company or any subsidiary of the Company during the period of your employment by the Company, anywhere in the United States or any foreign country in which any such company has conducted business, is conducting business or, to your knowledge, is presently contemplating conducting business.[91]

The relevant language of Zeinfeld's non-compete is narrower than some provisions that have been upheld by the Virginia Supreme Court. The defendant in *Roanoke Engineering* agreed to a three-year restriction on having *any* association with *any* company "similar to the type of business conducted by Roanoke at the time of the termination of this agreement."[92] In contrast, Zeinfeld's non-compete simply restricts engaging in any *activity* that is competitive with Simplexity.[93]

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[91] Jowers Transmittal Aff. Ex. 12, at A-3, Jan. 25, 2013.
[92] *Roanoke Eng'g*, 290 S.E.2d at 883.
[93] Jowers Transmittal Aff. Ex. 12, at A-3, Jan. 25, 2013.

Furthermore, Simplexity has a legitimate business interest in not allowing its CEO to take expertise he acquired at Simplexity's expense, and sell it, along with his services, to a competitor. The provisions of the non-compete are limited to protecting that interest. As noted above, the agreement limits only employment in which Zeinfeld himself engages in activity competitive with the company—he is not strictly prohibited from working for a competitor, only from engaging in competitive activity. The restriction is temporally limited to one year, which is reasonable given the nature of the business and Zeinfeld's position as CEO. While the restriction is geographically broad—it applies to the entire United States as well as any country in which the Simplexity conducts business[94]—that comports with the business interest of the Company as an internet-based business. Coupled with the restriction only on competitive activities (as opposed to employment by a competitor), the geographic scope of the provision does not seem unduly burdensome. Because I find that the restriction is narrowly drawn to protect Simplexity's legitimate business interests, is not unduly burdensome and is not otherwise against public policy, I find that Simplexity will likely be able to demonstrate that the provision is valid under Virginia law.[95]

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[94] The geographic restriction also covers areas where, at the time Zeinfeld signed his agreement, Simplexity was contemplating conducting business.

[95] I must also reject Brightstar's argument that mere usage of words such as "competitive," "business," "activities," or "services," without a specific definition renders the non-compete overbroad and unenforceable. Defs.' Supp. Br. 9 n.2. As discussed above, Virginia law requires a case-by-case analysis of covenants not to compete. I find that on these facts the broad scope of

ii. Is Zeinfeld's Non-Compete Unduly Harsh or Against Public Policy?

Zeinfeld's non-compete is not unduly restrictive on Zeinfeld's ability to earn a living, nor does it violate public policy. As mentioned above, the non-compete only prevents Zeinfeld from engaging in competitive activities. He is free to accept employment with a competitor, such as Brightstar, as long as his job responsibilities do not constitute competition with Simplexity. The fact that Zeinfeld has agreed to a non-compete as part of his employment with Brightstar[96] also suggests that his arrangement with Simplexity is neither unduly burdensome nor offensive to public policy.

b. Scope of the Non-Compete

I now consider what services Zeinfeld may appropriately render to Brightstar consistent with his non-compete agreement. The agreement itself prohibits Zeinfeld for 12 months following his termination from engaging, directly or indirectly, in "any activity . . . that is competitive with any business activities, products or services conducted by [Simplexity]."[97] Simplexity and Brightstar are in substantial agreement that the "business activities, products, or services" offered by Simplexity include the online retail sale and activation of mobile devices, as well as in-store sales (through a virtual inventory program, or VIP) and activation.

Zeinfeld's employment as CEO of Simplexity is a legitimate business reason for using broad language in his non-compete agreement.

[96] Jowers Transmittal Aff. Ex. 49, at 12.

[97] Jowers Transmittal Aff. Ex. 12, at A-3.

Consensus constitutes the most obvious source of direct competition between Brightstar and Simplexity, and Brightstar concedes as much.[98] Consensus is a part of Brightstar's Multi-Channel Retail Solutions ("MCRS") division. Consensus, like Simplexity, owns proprietary technology that enables consumers, through the Internet, to shop for and activate mobile devices on the networks of different carriers. Consensus, like Simplexity, generates revenue by selling phones through its own website and by licensing its online activation technology to other retailers. And, Consensus, like Simplexity, seeks to leverage its technology to enable it to provide brick-and-mortar retailers with in-store activation technology.[99] This clear competition between Consensus and Simplexity formed the basis for the amendments to Zeinfeld's employment agreement with Brightstar that excluded Consensus from Zeinfeld's duties and established a firewall between Zeinfeld and Consensus employees.[100] Accordingly, I find that Zeinfeld's participation in any aspect of Consensus' operations would violate his non-compete.

However, Brightstar offers many more services in its turn-key retail solution than just those relating to activation. The more difficult question is whether, and to what extent, Zeinfeld's non-compete precludes his involvement in providing

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[98] *See* Defs' Supp. Br. 10 (describing the businesses of online sales, in-store activation, and virtual inventory as areas of potential conflict between Brightstar and Simplexity).
[99] *See* Jowers Transmittal Aff. Ex. 1 (Zeinfeld Dep.) 191:16-193:7 (explaining that Consensus will be responsible for providing in-store activation work on the Retailer B project).
[100] Sensing Transmittal Aff. Ex. 11 §§ 3(e), 3(g).

Brightstar's broader array of retail services to clients such as Retailer B and Retailer D .[101] For the reasons that follow, I find that Zeinfeld's management of either Retailer B or Retailer D would likely violate his non-compete.

i. Retailer B

Brightstar contends that Zeinfeld's participation in, and management of, the Retailer B account is appropriate for two reasons: 1) Brightstar has already won Retailer B's business, so any competition between Simplexity and Brightstar is over; and 2) the Retailer B project encompasses many more services than activation, and Zeinfeld may manage those aspects of the projects that are not directly competitive with Simplexity. Neither of those arguments is persuasive.

Brightstar argues that Zeinfeld's management of the Retailer B account falls outside the scope of the non-compete, because it had already secured Retailer B's business before Zeinfeld joined Brightstar.[102] According to Brightstar, because Simplexity is now foreclosed from providing in-store sales and activation services to Retailer B, Simplexity is no longer competing with Brightstar for Retailer B's business. This argument is wrong. First, it is contrary to the plain language of Zeinfeld's employment contract with Simplexity. Under the terms of Zeinfeld's non-compete, he is restricted from participating in "competitive activities." There is no

[101] Brightstar has agreed that Zeinfeld will not work on any retail projects for Retailer A. Defs' Supp Br. 13.
[102] Defs.' Supp Br. 15.

contractual language defining "competitive activities" as only encompassing the bidding process, as opposed to actually *providing* the offered services.

Furthermore, interpreting "competitive activities" to mean no more than "landing a client" would prove too much; it would render the agreement almost entirely meaningless. Such a narrow definition of "competitive activities" would justify Zeinfeld's participation in *all* aspects of the Retailer B project, including managing Consensus's provision of online and in-store activation of cell phones. The same logic would apply to all of Brightstar's clients going forward: as long as Zeinfeld is not involved in the sales process, he would be free to provide online and in-store activation services, because Simplexity would not be actively bidding for those services. Such a result would be absurd and inequitable. When two companies compete to win business from a potential client, the competition is not over the moment a deal is signed. Competition also entails the actual provision of the goods or services, even after a deal is signed. Successful provision of services by Brightstar to Retailer B, in other words, competes with Simplexity's provision of services to other customers.

Brightstar's second argument, that Zeinfeld may manage the Retailer B project as long as he is separated from the activation services that Consensus provides, is also unpersuasive. This argument must fail, because his non-compete (which I have already found valid under Virginia law), provides that "[Zeinfeld] will not,

directly or indirectly, engage in any activity . . . that is competitive with any business activities, products or services conducted by Simplexity." I find that because Consensus's in-store and online activation services, which Brightstar concedes are competitive, are an integral part of Brightstar's larger turn-key solution, that Zeinfeld's management of the Retailer B project—even subject to Brightstar's proposed firewall—would constitute impermissible competition and would violate Zeinfeld's non-compete.

Brightstar describes its MCRS solution as a turn-key solution that can manage every aspect of a retailer's mobile phone sales process, including staffing, distribution, insurance, buy-back and trade-in, and returns.[103] Brightstar points to its engagement with Retailer B as a good example of the wide array of services in its MCRS solution.[104] In that engagement, the "Point of Sales & Activation Services" to be provided by Consensus constitute just one of many types of services that Brightstar will offer to Retailer B to support Retailer B's retail sales of mobile devices.[105] Brightstar argues that Zeinfeld could, consistent with his non-compete with Simplexity, have oversight responsibilities for Consensus' part of the Retailer B

[103] Defs.' Br. 11.
[104] Defs.' Br. 12.
[105] Sensing Transmittal Aff. Ex. 17.

project so long as he leaves the day-to-day management of Consensus' work to other members of his team.[106]

On the record before me, Brightstar's argument does not accurately reflect the deep integration between the various component parts of its whole turn-key retail solution. Brightstar's internal communications suggest that Consensus was viewed as an integral element of the "turn-key solution" for retail customers. On August 11, Dave Stritzinger described the competition between Brightstar and Simplexity over handling Retailer A's in-store activation center. In describing a meeting between Brightstar and Retailer A, he said

> We point out many things that Simplexity cannot do for them and why our VIP solution that we had was a much better fit for Retailer A. They agree on an intellectual level, but we cannot be naïve to the fact that "Andy" is perceived as the guy with the technology and we are perceived as his consultants. In Retailer A's way of thinking, I am sure that it must be occuring[sic] to them that it would be cheaper to deal directly with Simplexity the technology vendor.[107]

On August 12, Sally Lange explained her concerns about how Simplexity's development of an in-store activation solution posed a threat to Brightstar's retail business generally:

> Simplexity or Synchronoss getting the right to create an instore solution gives them access to the point of sale for the first time. . . . All of the players in this space (including us) need to rapidly evolve their business models at retail and we all seem to be focusing on the

[106] Defs.' Br. 30.
[107] Sensing Transmittal Aff. Ex. 10 at 1.

> [sic] sets of solutions. First one with the solution will have a serious advantage.[108]

In light of these facts, I conclude that Brightstar's whole package of retail solutions, which now includes in-store and online activation services through Consensus, is competitive with Simplexity's business. When a retailer, such as Retailer B, chooses Brightstar to provide those services, that decision represents a lost opportunity to Simplexity. The record with regard to Retailer B illustrates that very point. Simplexity sought to provide activation services to Retailer B, but their overtures were ignored, because Retailer B had already chosen Brightstar. This is direct competition.[109] Brightstar's proposed "firewall" does not change this fact. Even if Zeinfeld were to perfectly abide by the firewall restrictions, under Brightstar's current plan, he would still be providing Retailer B with a turn-key solution, which incorporates various services from one vendor in a complementary way, such that the whole is more valuable than the component parts considered separately. Indeed, this appears to be the very reason why Brightstar purchased Consensus in the first place. If the service provided to Retailer B is superior to the

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[108] Sensing Transmittal Aff. Ex. 10 at 1.

[109] At least one Simplexity executive was losing sleep over exactly this issue. In an email dated December 10, shortly before Zeinfeld announced he was leaving to join Brightstar, Grant Yoder, Executive Vice President for Simplexity's Consumer Wireless Division, told Zeinfeld that "I could not get my mind off this [Brightstar] stuff all weekend. I had trouble sleeping as I feel like they are running full speed to build a comprehensive retail product to compete with us." Sensing Transmittal Aff. Ex. 34 at 2.

service Simplexity provides to its clients, Simplexity's business is damaged—this is the essence of competition.

Given the importance of Consensus's activation technology to Brightstar's turn-key solution, I find that Zeinfeld's agreement likely precludes him from managing existing MCRS clients, such as Retailer B, or being involved in marketing or implementing Brightstar's retail solutions for future clients.

ii. Retailer D

Zeinfeld's management of the Retailer D account also constitutes competition against Simplexity. As noted above, Brightstar has agreed to provide a wide array of supply-chain and distribution services to Retailer D. Consensus will also serve as the general project manager of Retailer D's website to ensure that it is up and running on time. However, Retailer D's website, and the technology and systems that will handle sales and activations online, will be created and operated by Provider A . A different provider, Partner A , will provide Retailer D's in-store activation services and technology.

Brightstar argues that this division of responsibility means that Zeinfeld would not be engaged in competitive activities if he were to oversee Retailer D as Brightstar's representative. Again, I must disagree with Brightstar. First, Brightstar's status as a non-controlling, minority shareholder of Retailer D has

little to do with whether Zeinfeld will breach his non-compete with Simplexity. The non-compete prevents Zeinfeld from engaging in any competitive activity "whether as owner, partner, shareholder . . . consultant, agent, employee, coventurer or otherwise." [110] The dispositive question is whether Zeinfeld's *activities*, as they pertain to Retailer D, would be competitive with Simplexity.

The answer to that question appears to be yes. The evidence before me contradicts Brightstar's argument that they are generally uninvolved in the development of Retailer D's online operations. On November 17, 2012, nearly a month before Zeinfeld notified Simplexity that he would be joining Brightstar, he emailed Brightstar's CEO strategic advice on how to maximize sales of mobile devices to Hispanic customers through the internet. He explained that, in light of the fact that "mobile surfing is by far the #1 way that [the Hispanic] demographic accesses the web . . . the first thing we should do is build a MOBILE version of [Retailer D's website]."[111] As an example, Zeinfeld asked Claure to imagine *Simplexity's* website, mobile.wirefly.com, in Spanish.[112] Brightstar's CEO, Claure, did not treat this email as an interesting piece of trivia. He immediately emailed the CEO of Consensus, Dave Stritzinger, asking him about Brightstar's capabilities

[110] Jowers Transmittal Aff. Ex. 12, at A-3.
[111] Jowers Transmittal Aff. Ex. 59, at 2.
[112] *Id.*

on their own website, LetsTalk.com.[113] Stritzinger's response is illuminating. He not only outlined the current capabilities of Brightstar's website, but he also explained in some detail Brightstar's plans for Retailer D's website.

> What we envision to have in Retailer D are several mobile/social components 1) a Retailer D mobile [sic] shopping site that launches from a browser as described above most probably in HTML5 2) a Retailer D downloadable app to stay connected to our customers that works on iphone, android, or windows that gives the Retailer D customer directe [sic] messaging to Retailer D events, etc. that are location based, Partner B related, Retailer G related, etc. 3) mobile directed marketing via QR codes in store and in print and at Partner B , etc. 4) a Facebook gateway that allows for streamlined buyflows from Partner B etc.[114]

This indicates that Brightstar's role at Retailer D includes developing strategies to maximize sales through Retailer D 's website. Simplexity's core business is selling and activating phones on its website. Customers purchasing from Retailer D 's website are customers lost to Simplexity. For Zeinfeld to join Brightstar and oversee Retailer D would be to engage in direct competition with Simplexity's core business. Therefore, Simplexity will likely be able to show that Zeinfeld's overseeing Retailer D is a competitive activity, barred by the non-compete.

2. Irreparable Harm and Balance of Equities

There is ample evidence that Brightstar's employment of Zeinfeld in violation of Zeinfeld's non-compete will cause Simplexity imminent, irreparable

[113] *Id.*
[114] *Id.* at 1.

harm. First, this Court has "consistently found a threat of irreparable injury in circumstances when a covenant not to compete is breached."[115] Second, Zeinfeld acknowledged in his Simplexity employment agreement that any breach or threatened breach of his non-compete clause would be irreparable at law.[116] Such a contractual stipulation normally suffices to establish irreparable harm for the purposes of establishing the right to a preliminary injunction in this Court.[117] Third, the record indicates that any potential screen, to prevent irreparable harm, would be ineffective.[118] Therefore, the Plaintiff has shown that it would suffer irreparable harm absent an injunction.

Furthermore, the balance of harms tips heavily in favor of Simplexity. The harm to Simplexity is clear and difficult to mitigate absent an injunction: Zeinfeld was Simplexity's CEO and the architect of Simplexity's past strategy as a company. Zeinfeld also has relationships with several of Simplexity's customers which could be leveraged against Simplexity. Zeinfeld understands Simplexity's pricing and cost structure, and would be perfectly positioned to use that knowledge

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[115] *Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at * 18 (Del. Ch. Jan. 17, 2007).
[116] Bennett Aff. Ex. A § 3.
[117] *See Cirrus Hldg. Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001).
[118] Though Zeinfeld's Brightstar employment agreement provided that some sort of firewall would be used to keep Zeinfeld from competing with Simplexity, any "firewall" has been ineffective thus far. Zeinfeld admitted that the details of the firewall had not even been discussed at the time of his deposition. Zeinfeld Tr. 196:23-197:5. Claure confirmed that the mechanics of the firewall had not yet been worked out. Claure Tr. 125:15-19, 127:11-11. Furthermore, Zeinfeld was treated as a valuable Brightstar resource while Zeinfeld was still working for Simplexity. *See* Pl.'s Op. Br. Exs. 42, 59-72, 92, 93.

against Simplexity. The harm to Zeinfeld is relatively small. If Zeinfeld finds employment with Brightstar consistent with his non-compete, he is not harmed, and a bond can compensate him for lost income if he ultimately prevails at trial. I note that Zeinfeld is free to work for Brightstar outside of the United States or in the non-retail segments of Brightstar's core businesses. Any harm to Brightstar is slight compared to the harm to Simplexity. Brightstar has succeeded in removing Zeinfeld from its competitor, Simplexity. Although Brightstar has an interest in receiving Zeinfeld's services, they have not shown that those services are indispensable. Therefore, the balance of harms weighs in favor of Simplexity.

D. Unclean Hands

Brightstar argues that Simplexity should be barred from equitable relief in the form of a preliminary injunction, under the doctrine of unclean hands. Specifically, Brightstar points to Simplexity's competition for the Retailer A business, which, according to Brightstar, violates contractual duties Simplexity owes Brightstar. Even if I assume that Simplexity is in breach, however, unclean hands is no bar to the relief Simplexity seeks here.

> "Unclean hands" is a doctrine under which this Court preserves and vindicates its status as a court of equity. The Court of Chancery jealously guards its domain as a court of equity; therefore, one who seeks equity from the Court must not have acted inequitably himself in the same transaction. Under the doctrine, the Court will refuse

> equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals.[119]

Because my decision here is predicated on a likelihood that Simplexity will show that Zeinfeld's contemplated employment by Brightstar would violate his employment contract, and *not* on a violation of the MOU concerning the Retailer A venture, there is no relationship between the equitable relief I provide below and any contractual violations alleged by Brightstar against Simplexity.

III. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion for a Preliminary Injunction is GRANTED. The Plaintiff shall file a bond in the amount of $350,000. The parties should provide an appropriate form of order.

[119] *Wagamon v. Dolan*, 2013 WL 1023884, at *2 n.19 (Del. Ch. Mar. 15, 2013) (internal citations omitted).