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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nouveau Riche Corporation, a Nevada
corporation authorized to conduct business
in Arizona,

Plaintiff,

vs.

Cherianne Tree and John Doe Tree,
California residents; MONOPOLY
CONCEPTS, INC., a Utah corporation;
Kecia Wimmer and John Doe Wimmer,
California residents,

Defendants.

No. CV 08-1627-PHX-JAT

ORDER

The Court has reviewed the Application for Temporary Restraining Order and Preliminary Injunction (Doc. # 8) filed by Plaintiff Nouveau Riche Corporation (“Nouveau Riche”) against Defendants Cherianne Tree (“Ms. Tree”), Monopoly Concepts, Inc. (“Monopoly Concepts”), and Kecia Wimmer (“Ms. Wimmer”) (collectively “Defendants”). The Court also has reviewed Defendants’ Opposition to Plaintiff’s Request for Injunctive Relief (Doc. #7), Plaintiff’s Reply (Doc. # 20) in support of its Application, and the supporting documents filed herewith. On November 18, 2008, the Court heard evidence from both parties on the Application for Preliminary Injunction. Upon consideration of the above, the Court finds the following:

1 **I. FINDINGS OF FACT**

2 1. Plaintiff Nouveau Riche Corporation is a Nevada corporation authorized to
3 conduct business, and doing business, in Arizona and residing in Maricopa County, Arizona.

4 2. Defendant Cherianne Tree is a California resident.

5 3. Defendant Monopoly Concepts is a Utah corporation authorized to conduct
6 business, and doing business in, California and residing in California.

7 4. Ms. Tree is the sole shareholder and director of Monopoly Concepts.

8 5. Defendant Kecia Wimmer is a California resident.

9 6. Nouveau Riche employs, and sells products and services through, three levels of
10 advisors: Independent Student Advisors (“ISA”), Independent Regional Advisors (“IRA”),
11 and Independent National Senior Advisors (“INSA”).

12 7. On behalf of herself and her company, Monopoly Concepts, Defendant Cherianne
13 Tree signed an Independent National Senior Advisor Independent Contractor Agreement
14 (“INSA Agreement”) in January 2008.

15 8. The INSA Agreement signed by Ms. Tree contains restrictive covenants, including
16 Confidentiality, Non-Compete, and Non-Solicitation provisions.

17 9. The Confidentiality provision of the INSA Agreement provides:

18 **Confidentiality.** The INSA recognizes that the Company will disclose
19 to the INSA confidential information including business plans,
20 marketing plans, operational information, client and potential client
21 information, and information regarding sales and products costs
22 (collectively, "Confidential Information"). The Company's
23 Confidential Information is a valuable, special and unique asset of the
24 Company and needs to be protected from improper disclosure. In
25 consideration for the disclosure of the Confidential Information to the
26 INSA, the INSA agrees that the INSA will not at any time or in any
27 manner, either directly or indirectly, use any Confidential Information
28 for the INSA's own benefit, or divulge, disclose, or communicate in any
manner any Confidential Information to any third Party without the
prior written consent of the Company. The INSA will protect the
Company's Confidential Information and treat it as strictly confidential.
A violation of this paragraph is a material violation of this Agreement
and may be grounds for termination.

Unauthorized Disclosure of Information. If it appears that the INSA
has disclosed (or has threatened to disclose) Confidential Information
in violation of this Agreement, the Company shall be entitled to an
injunction to restrain the INSA and or the INSA's employees or agents

1 from disclosing, in whole or in part, such Confidential Information, or
2 from providing any goods or services to any Party to whom such
Confidential Information has been disclosed or may be disclosed.

3 **Confidentiality After Termination.** The confidentiality provisions of
4 this Agreement shall remain in full force and effect after the
termination of this Agreement.

5 10. The Non-Compete provision of the INSA Agreement provides:

6 **Non-Compete Agreement.** Recognizing that the Company's
7 Confidential Information is special and unique asset of the Company
8 that needs to be protected from disclosure to the public, and in
9 consideration of the disclosure of the Confidential Information to the
10 INSA and the fees paid pursuant to this Agreement, the INSA agrees
11 that for a period of one year following the termination of this
12 Agreement, whether such termination is voluntary or involuntary, the
13 INSA will not directly or indirectly engage in any business competitive
14 with the Company. This covenant shall apply to the geographical area
15 that includes all states in which the Company does at least 10% of the
16 Company's business. Sales will be deemed to take place in the state in
which the buyer resides. Directly or indirectly engaging in any
competitive business includes, but is not limited to: (I) engaging in a
competitive business as owner, partner, or agent; (ii) becoming an
employee of any third party that is engaged in such business; or (iii)
becoming interested directly or indirectly in any such business; or (iv)
soliciting any customer of the Company for the benefit of a third party
that is engaged in such business. The INSA agrees that this
non-competes provision will not adversely affect the livelihood of the
INSA.

17 11. The INSA Agreement also contains non-solicitation language:

18 Additionally, during the term of this Agreement and for a period of one
19 year following the termination of this Agreement, INSA shall not solicit
20 or employ or contract with any Company employee or independent
21 contractor (including, but not limited to, the Company's Independent
Regional Advisors and or the Company's Independent Student
Advisors) to market or sell any of the INSA'S products or services or
any other products or services.

22 12. Exhibit A to Ms. Tree's INSA Agreement defined the territory in which Ms. Tree
23 was to direct her sales and marketing activity for Plaintiff as Hawaii, Colorado, Wyoming,
24 Nebraska, Indiana, and Southern Michigan.

25 13. At various times prior to the 2008 Agreement, Ms. Tree's sales and marketing
26 territory had involved Utah and California.
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1 14. At no time in her dealings with Nouveau Riche did Ms. Tree's sales and
2 marketing territory ever include Idaho or Illinois.

3 15. Defendant Kecia Wimmer signed an Independent Student Advisor Agreement
4 ("ISA Agreement") in January 2008.

5 16. The ISA Agreement contains restrictive covenants, including Confidentiality,
6 Non-Compete, and Non-Solicitation provisions.

7 17. The Confidentiality provision of the ISA Agreement provides:

8 **Confidential Information.** You recognize that the Company will
9 disclose to You Confidential Information, including but not limited to
10 client lists, lists of potential clients or leads, client and potential client
11 information, contact lists, business plans, marketing plans, operational
12 information, information regarding sales and product costs, and
13 marketing materials. Confidential Information includes materials that
14 are developed or modified during the course of this Agreement either
15 by You or by You working in conjunction with the Company. All
16 Confidential Information, including but not limited to materials You
17 participated in developing or modifying, is the sole and exclusive
18 property of the Company. You agree that You will not at any time or
19 in any manner, either directly or indirectly, use any Confidential
20 Information for your own benefit, or divulge, disclose, or communicate
21 in any manner any Confidential Information to any third party. Upon
22 termination of this Agreement, You shall immediately deliver to the
23 Company all documents or recorded materials that contain or refer to
24 Confidential Information, (as well as Company equipment and or
25 records) that are in your custody or control. The confidentiality
26 provisions of this Agreement shall remain in full force and effect after
27 the termination of this Agreement. .
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19 18. The Non-Compete provision of the ISA Agreement provides:

20 **Non-Compete.** You agree that for the term of this Agreement and for
21 a period of one year following the termination of this Agreement, You
22 will not directly or indirectly engage in any business competitive with
23 the Company. You will not sell real estate Investment education or real
24 estate clubs or memberships. Additionally, You will not market or sell
25 any product or service (other than Company products and services) to
26 any Nouveau Riche™ students, ISAs or Nouveau Riche™ community
27 members without the Company's prior written permission. This
28 covenant shall apply to the geographical area that includes all states in
which the Company does at least 10% of the Company's business.
Sales will be deemed to take place in the state in which the buyer
resides. Directly or indirectly engaging in any competitive business
includes, but is not limited to: (I) engaging in a competitive business as
owner, partner, or agent; (ii) becoming an employee or independent
contractor of any third party that is engaged in such businesses; (iii)
soliciting any customer of the Company for the benefit of a third party

1 that is engaged in such business; or (iv) direct or indirect sales of
2 competing products, seminars, education, or services.

3 19. The Non-Solicitation provision of the ISA Agreement provides:

4 **Non-Solicitation.** Also, during the term of this Agreement and for a
5 period of one year following the termination of this Agreement, You
6 shall not solicit or employ or contract with any Company employee or
7 Independent Contractor (including, but not limited to, the Company's
8 Independent Student Advisors, Independent Regional Advisors, and or
9 Independent National Senior Advisors) to market or sell any other
10 products or services or to join or participate in any club or organization.

11 20. Plaintiff's Application for a Preliminary Injunction asserts that the Non-
12 Competition provision in the INSA and ISA Agreements at issue, which applies only to those
13 states in which the Company does at least 10% of its business, restricts Defendants Tree and
14 Wimmer from competing in California, Idaho, Illinois, and Utah.

15 21. On August 7, 2008, Ms. Tree and Ms. Wimmer resigned from Nouveau Riche in
16 order to begin working for a new company called Quattro Corporation.

17 22. Nouveau Riche has replaced Ms. Tree, and her replacement has been effective
18 in the position.

19 23. Nouveau Riche's students and independent contractors number in the thousands,
20 work in multiple different states, and many are unknown to one another.

21 24. The Court finds that the alleged confidential information at issue in this case,
22 specifically the information regarding Nouveau Riche's S.E.E.K. (Super Entrepreneurial
23 Encyclopedia of Knowledge) Program, is widely known and/or available to the public and
24 is therefore no longer confidential.

25 **II. CONCLUSIONS OF LAW**

26 1. Plaintiff Nouveau Riche and Defendants Tree, Wimmer, and Monopoly Concepts
27 are citizens of different states and the value of the injunctive relief sought exceeds \$75,000;
28 jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332.

2. Venue is proper pursuant to 28 U.S.C. § 1391.

1 3. To obtain injunctive relief, Nouveau Riche has the burden of proving "(1) a strong
2 likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if
3 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
4 advancement of the public interest." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113,
5 1120 (9th Cir. 2005)(citation omitted). A preliminary injunction "is an extraordinary and
6 drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries
7 the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in
8 original, citation omitted).

9 4. The moving party may meet this burden by showing either: (1) a combination of
10 probable success on the merits and a possibility of irreparable injury, or (2) the existence of
11 serious questions going to the merits and that the balance of hardships tips sharply in its
12 favor. *See Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003).
13 "These two alternatives represent extremes of a single continuum, rather than two separate
14 tests." *Id.* (internal quotations and citation omitted).

15 5. "There are two types of restrictive covenants: covenants not to compete and anti-
16 piracy, or 'hands off,' agreements. A covenant not to compete precludes former employees
17 from working in the same business as the employers for certain time periods in specified
18 areas." *Hilb, Rogal & Hamilton Co., v. McKinney*, 190 Ariz. 213, 946 P.2d 464 (App. 1997),
19 citing *Bryceland v. Northey*, 160 Ariz. 213, 772 P.2d 36 (App. 1989) and *Amex Distrib. Co.*
20 *v. Mascari*, 150 Ariz. 510, 514, 724 P.2d 596, 600 (App. 1986).

21 6. Covenants not to compete are disfavored because they restrain trade, and thus are
22 strictly construed against employers. *See Bryceland*, 160 Ariz. at 216, 772 P.2d at 39; *Amex*
23 *Distrib. Co. v. Mascari*, 150 Ariz. at 514, 724 P.2d at 600.

24 7. A restrictive covenant – whether a covenant not to compete or an anti-piracy
25 agreement – is enforceable as long as it is no broader than necessary to protect the
26 employer's legitimate business interest. *See Bryceland*, 160 Ariz. at 216, 772 P.2d at 39;
27 *Amex Distrib. Co.*, 150 Ariz. at 514, 724 P.2d at 601.

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1 8. Under Arizona law, which applies to both Cherianne Tree’s INSA Agreement and
2 Kecia Wimmer’s ISA Agreement, a post-employment restriction is unreasonable and will not
3 be enforced (1) if the restraint is greater than necessary to protect the employer's legitimate
4 interest; or (2) if that interest is outweighed by the hardship to the employee and the likely
5 injury to the public. *See Valley Med. Specialists v. Farber*, 194 Ariz. 363, 369, 982 P.2d
6 1277, 1283 (1999)(citation omitted).

7 9. Although the ultimate question of reasonableness is a question of law,
8 reasonableness is a fact-intensive inquiry that depends on weighing the totality of the
9 circumstances. *See Farber*, 194 Ariz. at 366-367, 982 P.2d 1280-1281 (citation omitted).

10 10. Under Arizona law, restrictive covenants cannot be used to prevent
11 competition per se. Rather, a restriction is valid only if it protects “some legitimate
12 interest [of the employer] beyond the employer’s desire to protect itself from
13 competition.” *See Farber*, 194 Ariz. at 367, 982 P.2d at 1281 (citations omitted).

14 11. A restraint’s scope is defined by its duration and geographic area. *See Farber*,
15 194 Ariz. at 370, 982 P.2d at 1284.

16 12. The activity prohibited by the restraint also defines the covenant’s scope, and
17 the restraint must be limited to the particular specialty of the present employment. *See*
18 *Farber*, 194 Ariz. at 371, 982 P.2d at 1285.

19 13. “When the restraint is for the purpose of protecting customer relationships, its
20 duration is reasonable only if it is no longer than necessary for the employer to put a new
21 man on the job and for the new employee to have a reasonable opportunity to demonstrate
22 his effectiveness to the customers.” *Amex Distrib. Co*, 150 Ariz. at 518, 724 P.2d at 604
23 (citation omitted).

24 14. With respect to customers, employees, and independent contractors, a non-
25 solicitation restriction may only protect against solicitation of those individuals with
26 whom the Defendants have formed a meaningful relationship. *See Olliver/Pilcher Ins. v.*
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1 *Daniels*, 148 Ariz. 530, 532, 715 P.2d 1218, 1220 (1986). *See also Amex Distrib. Co.*,
2 150 Ariz. at 517-18, 724 P.2d at 603-04.

3 15. The geographic scope of a restrictive covenant must be reasonably necessary
4 to protect the employer's business and may not unreasonably restrict the right of the
5 employee to work in his chose occupation. *See Olliver/Pilcher Ins. v. Daniels*, 148 Ariz.
6 530, 532, 715 P.2d 1218, 1220 (1986).

7 16. The subject matter of protectable confidential information must be secret and
8 be of such a character that it would not occur to persons in the trade with the knowledge
9 of the state of the art. Moreover, matters of public knowledge or of general knowledge in
10 an industry cannot be appropriated by one as his secret. *See Wright v. Palmer*, 464 P.2d
11 363, 366 (Ariz. App. 1970) (citations omitted).

12 17. Arizona follows the "blue-pencil" rule, which prohibits courts from rewriting
13 restrictive covenants. Although a court may "blue-pencil" and eliminate grammatically
14 severable, unreasonable provisions, "the court cannot create a new agreement for the
15 parties to uphold the contract." *Farber*, 194 Ariz. at 372, 982 P.2d at 1286, quoting
16 *Olliver/Pilcher*, 148 Ariz. at 533, 715 P.2d at 1221.

17 18. Assuming without deciding that the restrictive covenants as drafted were
18 unenforceable, the provisions at issue here could not be saved by blue-penciling.

19 19. As to the enforcement of the Non-Compete provision of the INSA Agreement,
20 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
21 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
22 the INSA Agreement is reasonable in geographical scope.

23 20. As to the enforcement of the Non-Compete provision of the ISA Agreement,
24 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
25 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
26 the ISA Agreement is reasonable in geographical scope.
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1 21. As to the enforcement of the Non-Compete provision of the INSA Agreement,
2 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
3 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
4 the INSA Agreement is reasonable in geographical scope given its vague and indefinite
5 restriction of competition in states in which Plaintiff does 10% of its business.

6 22. As to the enforcement of the Non-Compete provision of the ISA Agreement,
7 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
8 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
9 the ISA Agreement is reasonable in geographical scope given its vague and indefinite
10 restriction of competition in states in which Plaintiff does 10% of its business.

11 23. As to the enforcement of the Non-Compete provision of the INSA Agreement,
12 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
13 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
14 the INSA Agreement is reasonable in the scope of the activities it prohibits.

15 24. As to the enforcement of the Non-Compete provision of the ISA Agreement,
16 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
17 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
18 the ISA Agreement is reasonable in the scope of the activities it prohibits.

19 25. As to the enforcement of the Non-Compete provision of the INSA Agreement,
20 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
21 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
22 the INSA Agreement is reasonable in its duration.

23 26. As to the enforcement of the Non-Compete provision of the ISA Agreement,
24 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
25 because Plaintiff has failed to establish the likelihood that the Non-Compete provision of
26 the ISA Agreement is reasonable in its duration.
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1 27. As to the enforcement of the Non-Solicitation portion of the INSA Agreement,
2 Plaintiff, on this record, has failed to establish the likelihood of success on the merits
3 because Plaintiff has failed to establish the likelihood that the Non-Solicitation portion of
4 the INSA Agreement is reasonable and enforceable.

5 28. As to the enforcement of the Non-Solicitation provision of the ISA
6 Agreement, Plaintiff, on this record, has failed to establish the likelihood of success on
7 the merits because Plaintiff has failed to establish the likelihood that the Non-Solicitation
8 provision of the ISA Agreement is reasonable and enforceable.

9 29. As to the enforcement of the Confidentiality provisions of the INSA and ISA
10 Agreements, Plaintiff, on this record, has failed to establish the likelihood of success on
11 the merits because Plaintiff has failed to establish the likelihood that the Defendants have
12 acquired, used, or disclosed confidential or proprietary information.

13 30. As to the enforcement of the restrictive covenants, Plaintiff, on this record, has
14 failed to establish the existence of a serious question going to the merits.

15 31. Where a plaintiff in seeking a preliminary injunction fails to sustain his burden
16 of showing a likelihood of success on the merits, the court need not consider the issue of
17 irreparable injury. *See Germon v. The Times Mirror Co.*, 520 F.2d 786, 788 (9th Cir.
18 1975).

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20 **III. ANALYSIS**

21 Based upon the foregoing findings of fact and conclusions of law, this Court finds
22 that Nouveau Riche has failed to demonstrate a substantial likelihood of success on the
23 merits of its claims. Specifically, Nouveau Riche has failed to establish the likelihood
24 that the restrictive covenants in the INSA and ISA Agreements signed by Defendants
25 Tree and Wimmer are enforceable in: (1) geographic scope, (2) scope of the activity
26 prohibited, or (3) duration.

1 First, this Court finds that Plaintiff has failed to establish the likelihood that the
2 Non-Compete portions of the Agreements are reasonable and enforceable with respect to
3 their geographic scope. The specific provisions at issue attempt to restrict Defendants
4 from working in four states – California, Idaho, Illinois, and Utah. Based on the
5 undisputed evidence on this record, however, it is clear that Defendant Tree never
6 performed any work or maintained any business contacts in two of those states – Illinois
7 or Idaho – and that her sales and marketing territory did not include either California or
8 Utah during the performance of her 2008 INSA Agreement.¹ This Court finds that the
9 restriction as drafted is likely to be deemed overly broad and therefore is unlikely to be
10 enforceable. *See, e.g., Olliver/Pilcher Ins.*, 148 Ariz. at 532, 715 P.2d at 1220 (1986)
11 (finding that a non-compete restriction that was statewide in scope was unreasonable
12 where the employee worked in only one part of that state). Such a restriction appears not
13 to prevent Defendants from competing where they worked and maintained customer
14 relationships but in areas where the Company’s business is most successful. Restrictive
15 covenants, however, may not be used to restrict trade and prohibit competition per se but
16 can be used only to protect an employer’s legitimate interests. *See Farber*, 194 Ariz. at
17 367, 982 P.2d at 1281.

18 Moreover, the Non-Compete portion of the restrictive covenant at issue purports to
19 prohibit competition in any state in which the Company does at least 10% of its business.
20 Importantly, the provision does not specify which states that this includes nor does it
21 define the particular point in time that this 10% is to be measured in order to determine
22 the restricted areas. Such an indefinite restriction is not only likely to be overly broad to
23 the extent it restricts individuals from working in areas where they had no previous
24 contact, it is an unfairly amorphous and potentially inconstant standard that may be
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26 ¹The Court does not and need not reach a finding as to the territory within which Ms.
27 Wimmer performed sales functions or other work for Nouveau Riche as the Court finds that
28 Ms. Wimmer’s Non-Compete is not likely to be enforceable for the additional reasons stated
herein.

1 unknown even to those it purports to restrict. Again, such a restriction smacks of
2 prohibiting competition per se, and this Court cannot conclude that such a restriction is
3 likely to be determined reasonable and enforceable.

4 With respect to the activities prohibited by the Non-Compete, Nouveau Riche
5 seeks to enforce restrictions that prohibit Ms. Tree and Ms. Wimmer from marketing or
6 selling any product or service in competition with them rather than limiting the restriction
7 to those products or services with which Defendants were involved at Nouveau Riche.
8 Specifically, Ms. Tree's Agreement prohibits her from engaging in any business
9 competitive with Plaintiff and even goes so far as to prohibit her from "becoming
10 interested directly or indirectly in any such business." Ms. Wimmer's agreement
11 prohibits her from marketing or selling "any product or service" to any Nouveau Riche
12 student, ISA, or Nouveau Riche community member – even if it is completely unrelated
13 to any product or service Ms. Wimmer dealt with at Nouveau Riche or any product or
14 service offered by Nouveau Riche at all. Given such language, this Court finds that
15 Plaintiff is not likely to establish that its restriction was narrowly tailored to protect "some
16 legitimate interest beyond the employer's desire to protect itself from competition."²
17 *Farber*, 194 Ariz. at 367, 982 P.2d at 1281.

18 As to the duration of the restriction, this Court also concludes that such a
19 restriction is likely to be deemed unreasonable. Based on the record before this Court, it
20 is undisputed that Ms. Tree has already been replaced and that her replacement is working
21 effectively for Nouveau Riche. Given that Ms. Tree resigned from her employment
22 approximately four months ago – in August 2008, such a fact demonstrates that Nouveau
23 Riche was able to replace Ms. Tree and that her replacement has become effective in less
24 than five months time. Based on the foregoing, this Court cannot conclude that a one
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26 ²Given the Court's finding that the Non-Compete provisions are likely to be overly
27 broad with respect to the scope of the activities prohibited, the Court does not and need not
28 reach a finding as to whether the services provided by Quattro Corporation are competitive
with Nouveau Riche.

1 year restriction is likely to be considered reasonable and enforceable.³ As stated in *Amex*
2 *Distrib. Co.*, “When the restraint is for the purpose of protecting customer relationships,
3 its duration is reasonable only if it is no longer than necessary for the employer to put a
4 new man on the job and for the new employee to have a reasonable opportunity to
5 demonstrate his effectiveness to the customers.” 150 Ariz. at 518, 724 P.2d at 604
6 (citation omitted).

7 Both the INSA and ISA Agreements also contain Non-Solicitation language
8 separate from the Non-Compete provision. Such language does not apply to the
9 solicitation of Nouveau Riche customers but to the solicitation of its employees and
10 independent contractors.⁴ Given the fact that these individuals number in the thousands,
11 work in multiple different states, and are often unknown to one another, Plaintiff is not
12 likely to establish a protectable business interest in restricting Defendants from soliciting
13 them as a whole. Indeed, based on Ms. Tree’s testimony, which this Court finds credible,
14 Nouveau Riche has thousands of ISA’s working for them -- many if not most of whom
15 Ms. Tree has never met or had contact. Furthermore, the prohibition on solicitation as
16 drafted seeks to restrict Defendants from soliciting these individuals to join any club or
17 organization – even those of a recreational or non-business nature such as a book club.
18 Though the Court does not reach a decision as to whether Ms. Tree and/or Ms. Wimmer
19 actually solicited any employees or independent contractors of Nouveau Riche, the Court
20 finds the restriction unlikely to be reasonable and enforceable in any event. Plaintiff,
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23 ³Given Ms. Wimmer’s less senior ISA status, it would not be reasonable to conclude
24 that her replacement would require any more time than that to demonstrate his or her
effectiveness to Nouveau Riche’s customers.

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26 ⁴The solicitation of customers is prohibited in the Non-Compete portion of
27 Defendants’ Agreements. This particular solicitation language, which amounts to an anti-
28 piracy agreement, is contained in and inextricably intertwined with the Agreement’s Non-
Compete provision and, thus, is not likely to be found enforceable for the reasons discussed
supra.

1 therefore, has again failed to demonstrate the substantial likelihood of success on the
2 merits needed to obtain the requested injunctive relief.

3 Finally, to the extent Plaintiff seeks an injunction prohibiting Defendants from
4 disclosing confidential information, this Court finds that Plaintiff is unlikely to establish a
5 breach of the Agreements' Confidentiality provisions. Importantly, nowhere in the record
6 has Plaintiff identified with any specificity what information has been accessible to or
7 misappropriated or disclosed by Defendants. Indeed, the testimony at the November 18
8 hearing reflects that Plaintiff has failed to offer evidence identifying the specific
9 confidential information at issue in this matter, specifically information regarding
10 Plaintiff's SEEK project. Moreover, the evidence on this record makes clear that such
11 information, even if confidential at one time, is now publicly available. Given the
12 foregoing, the Court concludes that Plaintiff has not demonstrated the likelihood of
13 success on this claim needed in order to enjoin Defendants.

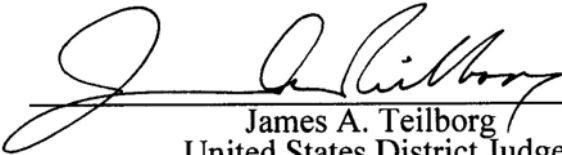
14 A preliminary injunction "is an extraordinary and drastic remedy, one that should
15 not be granted unless the movant, *by a clear showing*, carries the burden of persuasion."
16 *Mazurek*, 520 U.S. at 972 (1997) (emphasis in original). Given the above, this Court
17 concludes that Plaintiff has failed to carry the burden needed for relief. Specifically,
18 Plaintiff has, on this record, failed to establish the likelihood of success on the merits
19 because Plaintiff has failed to establish the likelihood that the restrictive covenants are
20 reasonable and enforceable. Similarly, Plaintiff has failed to establish the likelihood of
21 success on the merits of its claims regarding the Confidentiality provision given the
22 undisputed evidence that such information is no longer confidential. The Court also
23 concludes that Plaintiff, on this record, has failed to establish the existence of a serious
24 question going to the merits of any of the claims raised in the Application for Preliminary
25 Injunction. Because Plaintiff has failed to sustain its burden of showing a likelihood of
26 success on the merits or the existence of a serious question going to the merits, the Court
27 need not consider the issue of irreparable injury. *See Germon*, 520 F.2d at 788.
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Based on the foregoing findings and conclusions,

IT IS ORDERED DENYING Plaintiff's Application for Temporary Restraining Order (With Notice) and Preliminary Injunction (Doc. # 8).

DATED this 23rd day of December, 2008.



James A. Teilborg
United States District Judge