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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Zep, Inc.,  
Plaintiff,  
vs.  
Brody Chemical Company, Inc. and  
individuals Mark Bartley, Neil Carse,  
Wayne Cassidy, Richard Crouse, and  
Anthony Strukel,  
Defendants.

No. CV09-505-PHX-NVW  
**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
and  
ORDER**

Before the Court is Plaintiff Zep, Inc.’s (“Zep”) motion for preliminary injunction. (Doc. # 1.) A hearing on the preliminary injunction was held on April 14 and 15, 2009. This order states findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a)

**I. Findings of Fact**

Zep is a publicly traded company that sells industrial cleaning products. Defendant Brody Chemical Company, Inc. (“Brody”) is a direct competitor of Zep. It employs over 20,000 people in various locations. The individual Defendants in this case (collectively “the Sales Representatives”) were originally employed as Zep outside sales representatives. Beginning in early 2008 and continuing through early 2009, each of the Sales Representatives began working for Brody. Brody paid referral bonuses to

1 Defendants Bartley, Strukel, and Carse for helping to bring Zep sales representatives to  
2 Brody.

3 Each Sales Representative admits to having started to work for Brody and to  
4 having sold Brody product to Zep customers before his employment at Zep was  
5 terminated. During the time that they worked for both Brody and Zep, the Sales  
6 Representatives accessed confidential information maintained by Zep, such as customer  
7 names, addresses, contact information, sales histories, and pricing information. They  
8 used such confidential information to help them sell Brody products to Zep customers.  
9 After ceasing employment with Zep, the Sales Representatives retained documents  
10 containing such confidential information on their personal computers. Defendants  
11 Cassidy, Crouse, and Carse admitted to downloading customer lists and information from  
12 Zep's databases onto their personal computers shortly before ceasing employment with  
13 Zep. Defendant Cassidy, in particular, downloaded several hundred pages of detailed  
14 customer information and purchasing history from Zep's databases the day after entering  
15 into an employment relationship with Brody. Defendants Cassidy and Carse sent the  
16 customer information they obtained from Zep to Brody employees.

17 Zep derives substantial value from keeping the pricing of its products and the  
18 identity, contact information, purchasing history, and payment history of its customers  
19 secret. Access to such information would allow a competitor to identify Zep's customers,  
20 their needs, the timing of their purchases, the reliability of their payments, and the pricing  
21 that would undercut Zep. A competitor would have to invest substantial amounts of time  
22 and resources to compile such information from publicly available sources, such as by  
23 visiting each of Zep's customers.

24 Zep makes reasonable efforts to maintain the secrecy of its information. It stores  
25 such information on password protected computer systems inside its own secured  
26 facilities. Each of its sales representatives has a unique user name and password to access  
27 Zep's databases. A Zep sales representative can only access information regarding his or  
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1 her own customers and only while employed at Zep. Zep's pricing information is  
2 encrypted.

3 Zep also requires its sales representatives to sign contracts containing covenants  
4 not to disclose Zep's confidential information or solicit Zep's customers or employees for  
5 certain periods of time after leaving Zep. Two forms of such contracts are at issue in this  
6 case. Defendants Strukel and Cassidy signed an older version of the contract, which  
7 contained the following covenant regarding non-solicitation of customers:

8 Sales Representative hereby expressly covenants and agrees that during the  
9 term of employment hereunder and for a period of eighteen (18) months  
10 following the termination of employment hereunder, whether such termination  
11 is voluntary or involuntary, Sales Representative will not, for or on behalf of  
12 Sales Representative or any person, persons, partnership, or corporation  
13 (except Company), directly or indirectly, within the Territory [defined as  
14 Maricopa County, Arizona] sell or attempt to sell or solicit the sale of any  
products of the same or similar kind as those offered or sold by Company at  
any time during the twelve (12) month period immediately preceding the  
termination of Sales Representative's employment hereunder, to any person,  
persons, partnerships, or corporation who was solicited for the sale of or sold  
any such products by Sales representative at any time during Sales  
Representative's employment hereunder.

15 It also contained the following covenant regarding non-solicitation of employees:

16 Sales Representative hereby expressly covenants and agrees that during the  
17 term of employment hereunder and for a period of eighteen (18) months  
18 following the termination of employment hereunder, whether such termination  
19 is voluntary or involuntary, Sales Representative will not, for or on behalf of  
20 Sales Representative or any person, persons, partnership, or corporation  
21 (except Company), directly or indirectly, induce, persuade, or encourage or  
22 attempt to induce, persuade, or encourage any person who was employed by  
23 the Company at any time during the term of Sales Representative's  
employment hereunder, to terminate such employee's position with the  
Company and become employed by any person, persons, partnership, or  
corporation which is engaged in the offer or sale of products of the same or  
similar kind as those offered or sold by Company at any time during the twelve  
(12) month period immediately preceding termination of Sales Representative's  
employment hereunder.

24 It also contained the following covenant regarding non-disclosure of confidential  
25 information:

26 Sales Representative hereby agrees that during the term of Sales  
27 Representative's employment with Company and for a period of eighteen (18)  
28 months following termination of Sales Representative's employment with  
Company, whether such termination is voluntary or involuntary, Sales

1 Representative will not, for or on behalf of Sales Representative or any person,  
2 persons, partnership, or corporation (except Company), directly or indirectly,  
3 use for Sales Representative's own benefit or disclose to any other party any  
4 confidential information of Company disclosed or made known to Sales  
5 representative at any time during Sales Representative employment with  
6 Company. "Confidential Information" as used herein means any data or  
7 information, other than trade secrets, that is material to Company and not  
8 generally known by the public, including, without limitation, customer lists,  
9 pricing policies, prices, product development plans, and market strategies.

6 Defendants Carse and Crouse signed a newer version of the contract that contained the  
7 following covenant regarding non-solicitation of customers:

8 Non-Solicitation Covenant. Employee covenants and agrees that during the  
9 term of Employee's employment with employer and for a period of twelve (12)  
10 months following the termination of such employment, whether voluntary or  
11 involuntary, Employee shall not for or on behalf of Employee or any such  
12 person or entity (except Employer), directly or indirectly, solicit, contact, or  
13 communicate with or attempt to solicit, contact or communicate with any  
14 customer or potential customer of Employer that Employee solicited,  
15 contacted, communicated with, sold or received commissions or other  
16 compensation with respect to at any time during the six (6) month period  
17 immediately preceding the termination of Employee's employment with  
18 Employer, for the purpose of or with the view to selling or providing any  
19 products, services or equipment or items competitive with the Product Line.

15 It also contained the following covenant regarding non-solicitation of employees:

16 Non-Inducement Covenant. Employee covenants and agrees that during the  
17 term of Employee's employment with Employer and for a period of twelve (12)  
18 months following termination of such employment, whether voluntary or  
19 involuntary, Employee shall not, for or on behalf of Employee or any person  
20 or entity, directly or indirectly, induce, persuade or encourage or attempt to  
21 induce persuade or encourage any person who was employed by Employer  
22 during the twelve (12) month period immediately preceding Employee's  
23 termination, to terminate such employee's position with Employer.

20 It also contained the following covenant regarding non-disclosure of confidential  
21 information:

22 Non-Disclosure Covenant. Employee covenants and agrees that during the  
23 term of Employee's employment with Employer and following the termination  
24 of such employment, whether voluntary or involuntary, Employee shall not,  
25 for or on behalf of Employee or any such person or entity (except Employer),  
26 directly or indirectly, use for the Employee's own benefit or disclose to any  
27 other party any Trade Secrets or Confidential Information (as defined below)  
28 of Employer. "Trade Secrets" means information without regard to form,  
relating to Employer's business which is not commonly known by or available  
to the public and which derives economic value, actual or potential, from not  
being generally known to other persons and is the subject of efforts that are  
reasonable under the circumstances to maintain its secrecy or confidentiality,

1 including, but not limited to, technical or nontechnical data, formulae, patterns,  
2 compilations, programs, devices, methods, techniques, drawings processes,  
3 financial data, financial plans, product plans, or lists or actual or potential  
4 customers or suppliers. "Confidential Information" means information of  
5 Employer that is non-public, proprietary and confidential in nature but is not  
6 a Trade Secret. The foregoing confidentiality obligations shall commence as  
of the date hereof and shall continue (A) with respect to all Trade Secrets, at  
all times thereafter so long as such Trade Secrets constitutes trade secrets  
under applicable law, and (B) with respect to all Confidential Information, for  
a period of eighteen (18) months following termination of Employee's  
employment with Employer.

7 Zep has not produced any evidence that Defendant Bartley signed a contract containing  
8 either version of the restrictive covenants.

9 New Zep sales representatives are expected to develop their own customer base  
10 through their own efforts. Zep has a training program for new sales representatives that  
11 can last up to twenty-four months. A new sales representative is given a salary while  
12 participating in the training program. New sales representatives that perform well can  
13 transition to a largely commission-based pay structure in much less than twenty-four  
14 months. Defendant Carse, for example, was placed on full commission after only three  
15 weeks with Zep.

16 No Zep sales representative is permitted to sell to an "active customer" of another  
17 sales representative. An active customer is one who the sales representative has sold to in  
18 the last six months. An "inactive customer" is one to whom the assigned sales  
19 representative has not made a sale in the last six months. Any Zep sales representative  
20 can receive a commission for selling to an inactive customer.

21 When a Zep sales representative leaves the company, that representative's  
22 accounts are reassigned to existing Zep sales representatives. When possible, an account  
23 will be assigned to a sales representative with specific knowledge and experience selling  
24 to other customers in the same industry segment. Otherwise, the account will be assigned  
25 to a sales representative that has demonstrated growth potential or to a newer sales  
26 representative to speed his or her transition off of the training program.

1 On February 11, 2009, Zep sent letters to Brody and to the Sales Representatives  
2 demanding that they cease and desist violating the restrictive covenants in their  
3 employment contracts. The Sales Representatives have not disavowed any intention to  
4 continue soliciting customers that they had previously serviced for Zep. Brody has not  
5 indicated that it will instruct the Sales Representatives to abide by the terms of the  
6 covenants. Zep has been unable to recapture a substantial number of the customers it lost  
7 when the Sales Representatives departed for Brody.

## 8 **II. Conclusions of Law**

9 To obtain preliminary injunctive relief, a plaintiff must demonstrate “that he is  
10 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence  
11 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is  
12 in the public interest.” *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). “[T]he less certain  
13 the district court is of the likelihood of success on the merits, the more plaintiffs must  
14 convince the district court that the public interest and balance of hardships tip in their  
15 favor.” *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir.  
16 2003) (en banc) (per curiam).

### 17 **A. Likelihood of Success on the Merits**

#### 18 **1. The Restrictive Covenants**

19 It is likely that the covenants regarding non-solicitation of Zep customers and  
20 employees are unenforceable. “A restrictive covenant — whether a covenant not to  
21 compete or an anti-piracy agreement — is enforceable as long as it is no broader than  
22 necessary to protect the employer’s legitimate business interest.” *Hilb, Rogal &*  
23 *Hamilton Co. v. McKinney*, 190 Ariz. 213, 219, 946 P.2d 464, 467 (Ct. App. 1997). With  
24 respect to sales representatives, the “employer’s protectable interest [is limited] to those  
25 customers to whom the employee represented the employer’s goodwill.” *Amex Distrib.*  
26 *Co. v. Mascari*, 150 Ariz. 510, 518, 724 P.2d 596, 604 (Ct. App. 1986). “When the  
27 restraint is for the purpose of protecting customer relationships, its duration is reasonable  
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1 only if it is no longer than necessary for the employer to put a new man on the job and for  
2 the new employee to have a reasonable opportunity to demonstrate his effectiveness to  
3 the customers.” *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 370, 982 P.2d 1277,  
4 1284 (1999) (quoting *Amex Distrib. Co.*, 150 Ariz. at 518, 724 P.2d at 604).

5 Both versions of the non-solicitation covenants at issue purport to restrict the Sales  
6 Representatives from soliciting prospective customers in whom Zep has no legitimate  
7 business interest. The older agreement would restrict them from soliciting anyone who  
8 they had ever solicited on behalf of Zep at any time during their employment with Zep.  
9 So, for example, if one of the Sales Representative had unsuccessfully solicited a given  
10 prospect a single time twenty years ago, he would be forbidden to solicit that prospect on  
11 behalf of Brody. The newer contract limits the scope of the restriction to those prospects  
12 that the representative “solicited, contacted, communicated with, sold or received  
13 commissions or other compensation with respect to at any time during the six (6) month  
14 period immediately preceding the termination of Employee's employment with  
15 Employer.” According to this provision, if a Sales Representative simply left his business  
16 card at a prospect’s office once in the past six months but never contacted that customer  
17 again and never sold a Zep product, he would be forbidden to solicit that prospect on  
18 behalf of Brody. Zep does have some legitimate interest in protecting prospective  
19 customers that its sales representatives have worked to develop, even if no sale has yet  
20 been made. However, that interest does not extend to the passing, unsuccessful encounter  
21 included within the scope of its covenant.

22 Furthermore, the duration of Zep’s restrictions is longer than necessary for it to put  
23 a different sales representative on the job and have that representative demonstrate his or  
24 her effectiveness to the customer. The restriction in the older contract lasts for eighteen  
25 months. The restriction in the newer contract lasts for twelve months. Zep justifies this  
26 duration as the amount of time it takes them to train a new sales representative to take  
27 over the accounts. However, Zep admits that it often reassigns the accounts of a departed  
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1 representative to existing representatives with experience in the given industry segment.  
2 It also frequently reassigns accounts to existing representatives that have demonstrated  
3 growth potential. Therefore, the restrictive covenant does not necessarily need to last  
4 long enough to train a brand new sales representative to take over the accounts. Even  
5 when Zep does have to train a new employee, skilled sales people can transition to  
6 commission-based pay with as little as three weeks of training. The evidence also shows  
7 that most of Zep's customers order cleaning products more frequently than once a year.  
8 Consequently, a sales representative that has been transferred an existing account will  
9 likely have multiple opportunities to demonstrate his or her effectiveness to the customer  
10 in far less than a year's time.

11       Considering these problems altogether, Zep's customer non-solicitation covenants  
12 are broader than necessary to protect its legitimate business interests. Similarly, its  
13 employee non-solicitation covenants are likely overbroad. They purport to prevent  
14 departing sales representatives from soliciting any of Zep's employees for at least a year,  
15 no matter the extent of the sales representative's relationship, if any, with that employee.  
16 To save Zep's covenants would require more than "eliminating grammatically severable,  
17 unreasonable provisions." *Farber*, 194 Ariz. at 372, 982 P.2d at 1286. It would require  
18 supplying new terms for the duration of the restrictions and qualifications to their scope,  
19 inappropriately "rewrit[ing] and creat[ing] a restrictive covenant significantly different  
20 from that created by the parties." *Id.* It is therefore likely that the restrictive covenants in  
21 Zep's agreements regarding non-solicitation of customers and employees are  
22 unenforceable.

## 23                   **2. Trade Secrets**

24       Under Arizona law, a trade secret is information, including a compilation, that  
25 both:

- 26       (a) Derives independent economic value, actual or potential, from not being  
27       generally known to, and not being readily ascertainable by proper means  
28       by, other persons who can obtain economic value from its disclosure or use.



1 (b) Is the subject of efforts that are reasonable under the circumstances to  
2 maintain its secrecy.  
3 A.R.S. § 44-401(4). “A list of customers, if their trade and patronage have been secured  
4 by years of business effort and advertising and the expenditure of time and money,  
5 constitutes an important part of a business and is in the nature of a trade secret.”  
6 *Prudential Ins. Co. v. Pochiro*, 153 Ariz. 368, 371, 736 P.2d 1180, 1183 (Ct. App. 1987)  
7 (quoting *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314, 319,  
8 189 A.2d 390, 393–394 (1963)). A person who acquires knowledge of a trade secret  
9 “under circumstances giving rise to a duty to maintain its secrecy or limit its use” and  
10 who proceeds to use or disclose that trade secret without express or implied consent of the  
11 owner has misappropriated the trade secret. A.R.S. § 44-401(2)(b)(ii). Likewise,  
12 acquisition of a trade secret by a person who knows or has reason to know that it is being  
13 revealed in breach of a duty to maintain secrecy has misappropriated the trade secret. §  
14 44-401(1)–(2)(a). A court may enjoin actual or threatened misappropriation and may  
15 continue the injunction for a “reasonable period of time in order to eliminate commercial  
16 advantage that otherwise would be derived from the misappropriation.” § 44-402(A); *see*  
17 *also Pochiro*, 153 Ariz. at 370–72, 736 P.2d at 1182–84 (upholding an injunction  
18 prohibiting an insurance salesman from soliciting any business from policyholders whose  
19 information he improperly obtained from his former employer’s records).

20 As stated in the Court’s findings of fact, Zep derives economic value from keeping  
21 secret its pricing and customer information, including names, addresses, contact details,  
22 purchasing, and payment history. Such information is not readily available to Zep’s  
23 competitors and Zep makes reasonable efforts to maintain its secrecy. Therefore, Zep’s  
24 pricing and customer information is likely a trade secret.

25 There is little doubt that each of the Sales Representatives misappropriated Zep’s  
26 pricing and customer information. The Sales Representatives had a duty not to use Zep’s  
27 trade secrets for their own benefit and to their employer’s detriment. “The law will  
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1 import into every contract of employment a prohibition against the use of a trade secret by  
2 the employee for his own benefit, to the detriment of his employer, if the secret was  
3 acquired by the employee in the course of his employment.” *Pochiro*, 153 Ariz. at 371,  
4 736 P.2d at 1183 (quoting *Evans*, 150 Conn. at 319, 189 A.2d at 393–394). Each of them  
5 surreptitiously began working for Brody while remaining employed at Zep. During the  
6 time that they were employed by both Zep and Brody, they accessed and used Zep’s  
7 pricing and customer information to facilitate sales of Brody product. Such use of Zep’s  
8 pricing and customer information constituted misappropriation of its trade secrets.

9 Furthermore, several of the Sales Representatives have admitted deliberately  
10 downloading pricing and customer information from Zep’s databases immediately prior  
11 to leaving Zep and retaining that information while working for Brody. Defendant  
12 Cassidy downloaded several hundred pages of detailed pricing and customer information  
13 and sent that information to Brody employees. By the very nature of that information,  
14 Brody had reason to know that it was being revealed in breach of a duty to maintain its  
15 secrecy. Brody has not stated that it refused to accept such information. Brody has  
16 therefore misappropriated Zep’s trade secrets and it is likely that Zep will prevail on the  
17 merits. An injunction to eliminate the commercial advantage obtained by Defendants’  
18 misappropriation of trade secrets is appropriate.

19 The Sales Representatives are not liable for merely failing to return or to destroy  
20 Zep information that they received from Zep in the ordinary course of business and which  
21 Zep did not explicitly ask them to return or destroy.

### 22 **B. Irreparable Harm and Balance of Hardships**

23 Zep is likely to suffer irreparable harm in the absence of preliminary injunctive  
24 relief. It has lost customers as a result of Defendant’s misappropriation of its trade  
25 secrets. The longer that Brody and the Sales Representatives are able to service those  
26 customers, the less likely it is that Zep will ever regain them. An injunction will impose  
27 substantial hardship upon the Sales Representatives, who testified that their already  
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1 modest earnings have substantially declined since leaving Zep. However, their liability is  
2 clear, and if the Court were to allow them to continue to sell to customers they obtained  
3 or retained with the assistance of improper means, Zep would continue to suffer  
4 substantial harm that is difficult and costly to quantify. The hardship to the Sales  
5 Representatives stems from their own wrongful actions, so the balance of hardships tips  
6 decidedly in Zep’s favor and preliminary injunctive relief is appropriate.

7 **C. Injunction**

8 The Court will order Brody to destroy or return all of Zep’s customer information,  
9 including customer names, address, contact information, pricing, purchasing, and  
10 payment history, including any derivations thereof, that it obtained from the Sales  
11 Representatives.

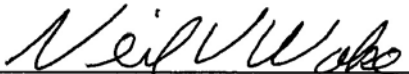
12 Furthermore, the Court will enjoin soliciting or selling to certain customers as  
13 follows. The evidence shows that six months is the period of time required for a sales  
14 relationship in this industry to go cold. For example, Zep deems a customer who has not  
15 purchased any product for six months “inactive,” opening that customer up to competition  
16 from other sales representatives. Furthermore, in its newer contracts, Zep limited its non-  
17 solicitation covenant to those customers with whom a sales representative had done  
18 business in the past six months. Therefore, in its discretion, the Court will place the  
19 following limits on the customers included within the scope of the injunction (the  
20 “Restricted Customers”).

21 To be a Restricted Customer, during the six month period immediately preceding  
22 the establishment of a given Sales Representative’s employment relationship with Brody,  
23 the customer 1) must have purchased \$150 or more of Zep product from that Sales  
24 Representative and 2) must not have purchased Brody product from any Brody sales  
25 representative. A Sales Representative will be enjoined from soliciting or selling to any  
26 Restricted Customer for six months if that Sales Representative has solicited or sold to  
27 that customer on behalf of Brody since establishing an employment relationship with  
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1 Brody. All other Brody sales representatives will be enjoined from soliciting or selling to  
2 any Restricted Customer for three months.

3 IT IS THEREFORE ORDERED that Plaintiff Zep, Inc.'s motion for preliminary  
4 injunction (doc. # 1) is granted. Plaintiff shall lodge a proposed form of preliminary  
5 injunction, including a list of Restricted Customers, after conferring with the Defendants  
6 to determine if a form of order can be agreed upon, but in any event no later than April  
7 27, 2009. If the parties cannot agree on the list, further evidentiary proceedings will be  
8 held expeditiously to resolve it. A preliminary injunction bond in the amount of  
9 \$100,000.00 must be posted before a preliminary injunction will issue.

10 Dated: April 20, 2009.

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13 Neil V. Wake  
14 United States District Judge

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