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5 **UNITED STATES DISTRICT COURT**  
6 **EASTERN DISTRICT OF CALIFORNIA**  
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8 **PSC INDUSTRIAL OUTSOURCING,**  
9 **LP, a Delaware limited partnership,**

10 **Plaintiff**

11 **v.**

12 **KENNETH KODYSZ, and Individual,**

13 **Defendant.**

**CASE NO. 1:13-cv-0964**

**ORDER ON PLAINTIFF'S *EX PARTE***  
**APPLICATION FOR TEMPORARY**  
**RESTRAINING ORDER AND ORDER**  
**TO SHOW CAUSE RE: PRELIMINARY**  
**INJUNCTION**

**Doc. # 5**

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16 In this action for damages and injunctive relief, plaintiff PSC Industrial Outsourcing, L.P.  
17 (“Plaintiff”) has filed an *ex parte* application to enjoin defendant Kenneth Kodysz (“Defendant”)  
18 from violation of confidentiality and non-competition agreements entered into by Defendant at the  
19 beginning of his employment with Plaintiff’s predecessor. The underlying complaint alleges  
20 diversity jurisdiction pursuant to 28 U.S.C. § 1332. Venue is proper in this court.

21 **FACTUAL BACKGROUND**

22 Plaintiff is an environmental and industrial services company that provides services such  
23 as hydro-blasting, chemical cleaning, tank cleaning, dredging and other industrial cleaning  
24 services on a contract basis to large businesses, including refineries. Defendant was hired by  
25 Plaintiff’s predecessor, Allwaste Environmental Services/West Coast, Inc.(“Allwaste”) on or  
26 about May 17, 1994. Allwaste was acquired by Plaintiff in 1998. Upon employment with  
27 Allwaste, Defendant signed an employment agreement (the “Agreement”) that included, *inter alia*,  
28 a one-year non-compete and non-solicitation agreement, an agreement for return of company

1 property, including lists and memoranda, and a non-disclosure of trade secrets agreement. See  
2 Exh. “A” to Declaration of Josh M. McMorro, Doc # 5-4 at ¶¶ 3, 4 and 7. Defendant resigned  
3 from Plaintiff’s employ on or about May 10, 2013, and immediately began employment with a  
4 major competitor, Matrix Service Co., Inc. (“Matrix”).

5 At the end of his employment with Plaintiff, Defendant attended an “exit interview” with  
6 his supervisor where Defendant was asked to return all of Plaintiff’s property “including all  
7 documents and information that [Defendant] maintained on his cell phone, iPad and his laptops.”  
8 Doc. # 5-1 at 14:19-20. A letter reminding Plaintiff of his obligation to return Plaintiff’s property  
9 and to abide by the non-compete and trade secret agreements was sent to Plaintiff on or about May  
10 20, 2013. Plaintiff alleges that, as of the date of Plaintiff’s filing of the complaint and the instant  
11 request, Defendant has not responded to demands for return of Plaintiff’s property nor  
12 acknowledged his obligations under the non-compete and trade secret agreements.

13 Plaintiff also alleges that immediately after his resignation from employment with  
14 Plaintiff, Defendant “remotely accessed former PSC e-mail account without consent and  
15 forwarded a chain of emails between him and a client [of Plaintiff’s] to [Defendant’s] Matrix  
16 email account. The chain of emails is alleged to contain, among other things, the client’s contact  
17 information, Plaintiff’s pricing information and information regarding Plaintiff’s “pending  
18 contracted projects for other clients that may affect [Plaintiff’s] ability to perform the project for  
19 the relevant client.” Doc. #5-1 at 15:21-23. Plaintiff asserts that Defendant’s conduct is  
20 consistent with an underlying effort by Matrix to recruit Plaintiff’s employees and to  
21 misappropriate Plaintiff’s trade secrets in order to facilitate Matrix’s transition from a company  
22 that builds tanks into the business of servicing tanks in competition with Plaintiff. Plaintiff alleges  
23 that Defendant is the third of Plaintiff’s employees to be “poached” by Matrix.

24 Plaintiff seeks injunctive relief by way of a temporary restraining order (“TRO”) to force  
25 the return of over “27,000 files and folders and approximately 30 gigabytes of data currently in  
26 Defendant’s possession and enforcement of the non-compete and trade secret provisions of the  
27 Agreement. For the reasons that follow, that request will be granted in part and denied in part.  
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2 **LEGAL STANDARD**

3 Because Plaintiff seeks issuance of a TRO without notice to the Defendants, Plaintiff must  
4 satisfy both the general standard for temporary restraining orders and the requirements for ex parte  
5 orders set forth in Federal Rule of Civil Procedure 65(b). The general standard for issuing a TRO  
6 is identical to the standard for issuing a preliminary injunction. Brown Jordan Int'l, Inc. v. Mind's  
7 Eye Interiors, Inc., 236 F.Supp.2d 1152, 1154 (D.Haw.2002); Lockheed Missile & Space Co., Inc.  
8 v. Hughes Aircraft Co., 887 F.Supp. 1320, 1323 (N.D.Cal.1995). A plaintiff seeking a  
9 preliminary injunction must make a four-fold showing: (1) that he is likely to succeed on the  
10 merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that  
11 the balance of equities tips in his favor; and (4) that an injunction is in the public interest. Winter  
12 v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008); Amer.  
13 Trucking Assocs., Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir.2009). Pursuant to  
14 Rule 65(b), Federal Rules of Civil Procedure, a temporary restraining order may be granted  
15 without notice to the adverse party only if: 1) it clearly appears from specific facts shown by  
16 affidavit or verified complaint that immediate and irreparable injury, loss or damage will result  
17 before the adverse party can be heard in opposition, and 2) the applicant's attorney certifies the  
18 reasons that notice should not be required. The purpose in issuing a temporary restraining order is  
19 to preserve the status quo for a short time pending a fuller hearing. The Ninth Circuit has  
20 cautioned that there are very few circumstances justifying the issuance of an ex parte TRO. Reno  
21 Air Racing Assoc., Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir.2006). Such circumstances  
22 include "a very narrow band of cases in which ex parte orders are proper because notice to the  
23 defendant would render fruitless the further prosecution of the action." Id. (quoting Amer. Can Co.  
24 v. Mansukhani, 742 F.2d 314, 322 (7th Cir.1984)).

25 **ANALYSIS**

26 In the underlying suit, Plaintiff has alleged claims for breach of contract, violation of  
27 California's Uniform Trade Secrets Act, Cal. Civ. Code § 3426 et seq. ("UTSA"), violation of  
28 California's Unfair Competition statute and violation of California Penal Code section 502.

1 Plaintiff alleges it will be irreparably harmed by divulgence of Plaintiff’s confidential information  
2 and trade secrets, the solicitation of Plaintiff’s customers in violation of the non-compete  
3 agreement and the solicitation or interference of Plaintiff’s employees.

4 **I. Likelihood of Success on the Merits**

5 California Business and Professions Code section 16600 codifies California’s general policy  
6 with regard to non-compete agreements in the context of employment contracts. Except for two  
7 statutory exceptions not relevant here, “every contract by which anyone is restrained from  
8 engaging in a lawful profession, trade, or business of any kind is to that extent void.” Bus. & Prof.  
9 Code § 16600. Dowell v. Biosense Webster, Inc., 179 Cal.App.4th 564, 575 (2nd Dist. 2010). A  
10 good deal of California case authority is devoted to the tension that is acknowledged to exist  
11 between section 16600 and the UTSA. See e.g., Thompson v. Impaxx, Inc., 113 Cal.App.4th  
12 1425, 1429-1430 (2nd Dist. 2003). Although California courts have expressed skepticism that  
13 there is a common law “trade secret exception” to section 16600, see Dowell, 179 Cal.App.4th at  
14 577, there appears to be no doubt that employee conduct that is otherwise tortious under UTSA or  
15 under unfair competition law may be enjoined. “We distill from the foregoing cases that section  
16 16600 bars a court from specifically enforcing (by way of injunctive relief) a *contractual* clause  
17 purporting to ban a former employee from soliciting former customers to transfer their business  
18 away from the former employer to the employee’s new business, but a court may enjoin *tortious*  
19 conduct (as violative of either the Uniform Trade Secrets Act (Civ. Code § 3426 et seq.) and/or the  
20 unfair competition law) by banning the former employee from using trade secret information to  
21 identify existing customers to facilitate the solicitation of such customers, or to otherwise unfairly  
22 compete with the former employer.” The Retirement Group v. Galante, 176 Cal.App.4th 1226,  
23 1233 (2009) (italics in original).

24 From the foregoing it is apparent that section 16600 constrains the breadth of equitable  
25 remedies that are available to those that are necessary to protect trade secrets. The sort of  
26 injunctive relief that would be required to enforce Plaintiff’s requested injunctions against, for  
27 example, solicitation of former customers or current employees as broadly requested in paragraphs  
28 (f) and (h) of Plaintiff’s proposed Temporary Restraining Order is not available. In addition, the

1 California appellate court’s opinion in Thompson cautions that what is or is not a “trade secret” is  
2 question of fact, not merely a matter of labeling. 113 Cal.App.4th at 1430. Thus, while Defendant  
3 may be obliged as a matter of *contract* to return all of the “27,000 files and folders and  
4 approximately 30 gigabytes of data” claimed to be in Defendant’s possession, the court cannot  
5 presume on the information alleged that the court can exercise injunctive authority over the  
6 entirety of that material because it is all “trade secret” or confidential information.

7 California’s UTSA defines a trade secret as a “formula, pattern, compilation, program, device,  
8 method, technique, or process, that: (1) Derives independent economic value, actual or potential,  
9 from not being generally known to the public or to other persons who can obtain economic value  
10 from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the  
11 circumstances to maintain its secrecy.” Cal. “Civ. Code § 3426.1(d); Thompson, 113 Cal.App.4th  
12 at 1430. Based on this definition, the court finds that, to the extent Plaintiff seeks to enjoin by  
13 means of TRO Defendant’s conduct with respect to the entirety of the data alleged to be in  
14 Plaintiff’s possession, the court presently lacks a legal basis for such broad regulation. However,  
15 where the categories of data are further specified such that they clearly come within the ambit of  
16 the statutory definition of trade secret, the court may appropriately impose injunctive relief.

17 At paragraph (i) of Plaintiff’s proposed TRO, Plaintiff requests that the court enjoin Defendant  
18 from “disclosing and using [Plaintiff’s] Confidential Information and Trade Secrets and to return  
19 such documents, data and information to [Plaintiff] and to not retain any copies, summaries or  
20 other partial or complete excerpts of such documents and information.” Doc. # 5-5 at 4:4-8.  
21 Plaintiff defines “Confidential Information and Trade Secrets” in the following paragraph as: “key  
22 contact information for [Plaintiff’s] clients and potential clients, [Plaintiff’s] pricing data and  
23 formulas, knowledge of upcoming client projects six to twelve months before the project will  
24 become available for bidding, information regarding contracts and pricing arrangements with  
25 clients, analysis and bids to clients relating to potential new projects, and details of particular  
26 contracts handled by [Plaintiff].” Id. at 4:10-14.

27 Except for the first of the elements listed – “key contact information for [Plaintiff’s] clients  
28 and potential clients” -- the court finds that the list of data categories Plaintiff uses to define

1 confidential information and trade secrets come well within the scope of the statutory definition of  
2 trade secrets set forth in the USTA. While there is no doubt that customer lists *may* constitute  
3 trade secret information, the determination is not determined simply by the fact that a company  
4 has a list of actual or potential clients. To the extent a potential customer lists embodies  
5 information that is readily ascertainable, courts are reluctant to impose injunctive protection.  
6 Morelife, Inc. v. Perry, 56 Cal.App.4th 1514, 1521-1522 (1997). In a similar vein, some  
7 California courts have declined to assert injunctive authority over a defendant's use of memory of  
8 personal contacts from customer lists that might otherwise have been confidential. Moss, Adams  
9 & Co. v. Shilling, 179 Cal.App.3d 124, 129 ((1986). The court feels that any attempt to curtail  
10 Defendant's use of or reliance on Plaintiff's lists of actual or potential clients must be fairly  
11 narrow to meet the standard of "likely to prevail on the merits." With regard to the remainder of  
12 the categories listed by Plaintiff and set forth above, the court finds that Plaintiff meets the "likely  
13 to succeed on the merits" standard.

## 14 **II. Irreparable Harm and Balance of Equities**

15 The court may grant a preliminary injunction when there is evidence of the threat of  
16 committing an act in violation of the rights of another party respecting the subject of the action.

17 Dodge, Warren & Peters Ins. Services, Inc. v. Riley, 105 Cal.App.4th 1414, 1418 (2003).

18 Plaintiff has presented evidence of an on-going effort by Matrix to "poach" Plaintiff's employees  
19 for the purpose of accelerating its entry into the business of environmental tank maintenance. To  
20 the extent Matrix accomplishes this by use of Plaintiff's bidding formulae, discount  
21 considerations, confidential bids, or knowledge of pending projects, the rights of Plaintiff to the  
22 continuing confidentiality of information it has expended time and capital to acquire is violated.  
23 Given that Defendant was recruited by Matrix, and that other key employees were similarly  
24 recruited by Matrix for the purpose of developing its new environmental services business, it is  
25 fair to presume that the Confidential and Trade Secret Information in possession of Defendant  
26 will be acquired and used by Matrix to Plaintiff's detriment and in violation of California's unfair  
27 business practices statute. The court therefore finds that, with respect to categories of data listed  
28 above as fitting within the statutory definition of "Trade Secret," Plaintiff has adequately

1 demonstrated the likelihood of imminent harm in the absence of preliminary relief and that the  
2 balance of equities tips in Plaintiff's favor.

3 **III. Rule 65(b) Elements**

4 The court is informed that Defendant's counsel has received notice of this application and that  
5 opposition can be expected in the next few days. Strictly speaking, the matter is therefore not *ex*  
6 *parte* and the additional requirements of Rule 65(b) do not apply. However, it is the court's intent  
7 to impose injunctive limitations on Defendant's conduct to the extent supported by the foregoing  
8 analysis and necessary to prevent violation of Plaintiff's right to the continuing confidentiality of  
9 information that clearly falls within the definition of Trade Secret. The court does so with the  
10 understanding that the order imposed herein may be modified by the court upon agreement of the  
11 parties or upon good cause shown by either party and that the restrictions imposed hereby are  
12 crafted to cause minimal disruption of either parties' lawful activities.

13 **ORDER**

14 THEREFORE, in consideration of the foregoing, it is hereby ORDERED that:

- 15 1. Defendant shall not use or disclose any Trade Secret or Confidential Information  
16 belonging to Plaintiff; including specifically any pricing data or formulas, information or  
17 knowledge pertaining to upcoming client projects six to twelve months before the project  
18 will become available for bidding, information regarding contracts and pricing  
19 arrangements with clients, and details of particular contracts handled by Plaintiff.
- 20 2. Defendant shall not use, copy or disseminate client contact information that was made  
21 available to Defendant by Plaintiff. Plaintiff shall not use, copy or disseminate potential  
22 client contact information that was made available by Plaintiff to Defendant except to the  
23 extent that such list of potential clients is readily available to the public or consists of a  
24 class of potential clients whose identities may be readily discerned from public  
25 information.
- 26 3. Defendant shall not copy, disseminate or use any information obtained from Defendant's  
27 email account at Plaintiff's place of business and shall promptly delete any such  
28 transferred files, messages or other information except to the extent any transferred email

1 files or communications are personal to Defendant and do not represent Plaintiff's  
2 proprietary information.

3 4. Plaintiff shall serve this order on Defendant and shall serve a copy of this order on  
4 Defendant's employer.

5 5. Plaintiff shall file any reply to Defendant's opposition not later than fourteen (14) days  
6 from the date of filing of Defendant's opposition.

7 6. Upon filing of Plaintiff's reply, the parties shall meet and confer to schedule a hearing and  
8 shall contact the Deputy Clerk to schedule a hearing at the parties' earliest convenience.

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11 IT IS SO ORDERED.

12 Dated: July 3, 2013

  
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13 SENIOR DISTRICT JUDGE