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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 ALLCELLS, LLC,

8 Plaintiff,

9 v.

10 JACK ZHAI, et al.,

11 Defendants.

Case No. [16-cv-07323-EMC](#)

REDACTED/PUBLIC VERSION

**ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Docket Nos. 11, 65

12
13 Plaintiff AllCells, LLC has filed suit against Defendants Cepheus Biosciences, Inc. and
14 two of its employees, Jack Zhai and James Lee, asserting claims for, *inter alia*, trade secret
15 misappropriation under both state and federal law. Mr. Zhai and Mr. Lee are former employees of
16 AllCells and currently work for Cepheus (as CEO and CFO, respectively).

17 Currently pending before the Court is AllCells's motion for a preliminary injunction.
18 Having considered the parties' briefs and accompanying submissions, as well as the oral argument
19 of counsel, the Court hereby **GRANTS** in part AllCells's motion.

20 **I. FACTUAL & PROCEDURAL BACKGROUND**

21 Jie "Jay" Tong founded the company that eventually became AllCells in 1998. *See* Tong
22 Decl. ¶ 3. "AllCells is a biotechnology company dedicated to providing global researchers and
23 biomanufacturing organizations with a dependable supply of biologically relevant, high quality
24 primary cells that enable drug discovery, development, and manufacturing of cell therapies."
25 Tong Decl. ¶ 3. "AllCells receives the raw blood or bone marrow directly from donors or from
26 suppliers and then processes that biological material . . . to isolate the particular type of cells to
27 sell to customers." Tong Decl. ¶ 3; *see also* Tong Decl. ¶ 44 (noting that AllCells processes tissue
28 into cellular products and that AllCells "sells more than 300 different cellular products and

1 services”).

2 AllCells hired Mr. Lee in October 2000. Mr. Lee worked in various capacities at AllCells,
3 including, *e.g.*, as a lab manager, Associate Director of Productions, and Associate Director of
4 Technical Support and Customer Projects. *See* Lee Depo. at 26-28,45; Tong Decl. ¶ 16; Lee Decl.
5 ¶ 2. During his tenure at AllCells, Mr. Lee worked on, *inter alia*, developing standard operating
6 procedures or protocols (“SOPs”) for the company (*i.e.*, for isolating, storing, and shipping
7 AllCells’s biological products). *See* Lee Depo. at 21-22.

8 AllCells hired Mr. Zhai in 2010. Mr. Zhai was AllCells’s Vice President of Marketing and
9 Sales. *See* Tong Decl. ¶ 18; Zhai Decl. ¶ 2. Mr. Zhai’s “job duties were not scientific or
10 technical, and were primarily related to business development.” Tong Decl. ¶ 18; *see also* Zhai
11 Decl. ¶ 2 (testifying that he was “responsible for supervising the sales team, managing customer
12 relationships, and high-level marketing”).

13 At the time of hire, Mr. Lee and Mr. Zhai each signed an Employee Confidentiality
14 Agreement and General Handbook Acknowledgment.¹ *See* Wong Decl. ¶ 3 & Exs. A-D
15 (agreements and acknowledgments).

16 AllCells terminated Mr. Zhai’s employment on December 18, 2015. The parties dispute
17 the events that led to the termination. Soon after his termination, Mr. Zhai founded Cepheus. *See*
18 Jacob Decl. ¶ 2 & Ex. A (Delaware state website) (reflecting that Cepheus was incorporated in
19 Delaware on January 21, 2016).

20 In the meantime, Mr. Lee continued to work at AllCells. However, on April 5, 2016, Mr.
21 Lee resigned from the company. *See* Tong Decl. ¶ 16. Before resigning from AllCells, Mr. Lee
22 was in communication with Mr. Zhai, and e-mails between the two indicate that they intended on
23 working together in a new company. *See, e.g.*, Lui Decl., Exs. E-F (e-mail exchange from May
24 2015); Lui Decl., Ex. G (e-mail exchange from December 2015).

25 According to Defendants, the “end-goal [of Cepheus] was . . . to serve a niche market
26 within the immunotherapy space[,] [but], while developing the specialized immunotherapy-

27 _____
28 ¹ In addition, at the time of his termination, Mr. Zhai signed a severance agreement that contained
a confidentiality provision. *See* Wong Decl. ¶ 8.

1 oriented business, to keep the lights on, Cepheus started by selling several ‘commodity’ items
2 (e.g., unaltered whole blood).” Zhai Decl. ¶ 8.

3 In or around September 2016, Mr. Tong of AllCells learned of Cepheus as, well as the
4 involvement of Mr. Zhai and Mr. Lee in the company. See Tong Decl. ¶ 22. After viewing the
5 Cepheus website, “AllCells immediately launched an investigation into [Mr.] Zhai’s and [Mr.]
6 Lee’s departures from AllCells.” Tong Decl. ¶ 23.

7 As part of the investigation, AllCells hired a computer forensic analyst to evaluate the hard
8 drives associated with the laptops that had previously been used by Mr. Zhai and Mr. Lee. As
9 stated in the declaration from the analyst (Bruce Pixley), his preliminary focus was to see if
10 AllCells company data had been “exfiltrated” by an employee using external storage devices,
11 mobile devices, cloud storage, file transfer protocols, and/or email communication. Pixley Decl. ¶

12 5. The analyst uncovered the following.²

- 13 • **Mr. Zhai.** Mr. Zhai plugged in one external storage drive on December 12, 2015,
14 *i.e.*, several days before he was terminated.³ See Pixley Decl. ¶ 8. He “created
15 more than 56,900 files and folders on this specific external drive.” Pixley Decl. ¶
16 9. “Among the folders he created on the external drive . . . were: ‘AllCells Outlook
17 Backup 12122015’; ‘Product info’; ‘CDAs’; and ‘ERP system.’ Based on the

18
19 ² The Court acknowledges Defendants’ objection to the Pixley declaration. More specifically,
20 Defendants have asked the Court to strike the Pixley declaration on the basis that AllCells violated
21 Mr. Lee’s “privacy by using [his] old AllCells laptop to access, without Mr. Lee’s authorization,
22 his personal Gmail emails, including his communications with attorneys.” Opp’n at 22 (arguing
23 that, “at a minimum,” AllCells violated the Stored Communications Act, *see* 18 U.S.C. §§ 2701-
24 11, and the right to privacy protected by the California Constitution). Defendants have also asked
25 for additional sanctions – *i.e.*, that “AllCells should be prevented from using any information
26 derived from the violations.” Opp’n at 23.

27 For purposes of the pending motion, the Court denies Defendants’ request for relief. The
28 record has not been sufficiently developed for the Court to rule on the merits as to whether there
was, *e.g.*, a violation of any federal or state law. (In fact, it appears that Defendants intend to
assert a counterclaim based on Mr. Pixley’s actions.) Moreover, Defendants’ request is overbroad.
Finally, it appears that at least some of the emails were subsequently produced by Defendants
during discovery. While this does not insulate AllCells from a claim of wrongdoing, it
nevertheless allows the Court to consider the evidence. Moreover, it is not clear at this point that
exclusion of evidence unlawfully obtained is an appropriate remedy.

³ Mr. Zhai also plugged in a second external USB storage drive but this device appears to have
been returned to AllCells. See Pixley Decl. ¶ 8.

1 findings it appears that Zhai made a backup of his entire Outlook data.” Pixley
2 Decl. ¶ 9. Among the files in the Outlook data were pricing documents and
3 contracts/agreements. *See* Pixley Decl. ¶ 10. In his deposition, Mr. Zhai
4 maintained that he downloaded his entire Outlook file only because he was not able
5 to cherry pick which documents he wanted to copy. According to Mr. Zhai, he
6 wanted to copy certain documents in order for an attorney to review them and give
7 him advice. *See* Zhai Depo. at 86, 103, 111.

- 8 • **Mr. Lee.** Mr. Lee plugged in thirteen external storage drives on April 4, 2016, *i.e.*,
9 the day before he voluntarily resigned. *See* Pixley Decl. ¶¶ 8, 14. At the time he
10 plugged in the external drives, Mr. Lee created new folders on the devices and
11 transferred dozens of documents. *See* Pixley Decl. ¶ 14. Documents in Mr. Lee’s
12 Outlook included agreements and a cryopreservation document. *See* Pixley Decl. ¶
13 15. In his declaration, Mr. Lee testified that he had many personal files on his
14 AllCells computer and that he “may have inadvertently copied some work-related
15 files” when he transferred his personal files to flash drives. Lee Decl. ¶ 5.

16 According to AllCells, the AllCells trade secrets that were misappropriated by Mr. Zhai
17 and Mr. Lee can largely be broken down into three major categories: (1) SOPs⁴; (2) information
18 about AllCells’s internal operations (in particular, a slide deck titled “2013 AllCells Q3 Business
19 Meeting”); and (3) customer identities and customer-related information (in particular,
20 information about customer needs/preferences, key contacts within a customer-company, pricing,
21 and sales forecasts/projections).⁵ AllCells takes the position that, without the misappropriation of
22 its trade secrets, there was no way that Cepheus could have launched products for sale within only
23 a few months. According to AllCells, it needed two years to launch its first products and then
24 needed “at least five years to ramp up to its current quality levels.” Tong Decl. ¶ 60.

25 _____
26 ⁴ AllCells contends there is forensic evidence that Mr. Zhai and/or Mr. Lee downloaded over 100
SOPs.

27 ⁵ Although AllCells has claimed additional information as trade secrets (*e.g.*, product supply
28 agreements and distributor agreements), its briefs have largely focused on the above three
categories and, accordingly, the Court addresses these three categories only.

1 AllCells claims irreparable injury as a result of Defendants' actions because (1) Dr. Ian
2 Gaudet, a person whom AllCells characterizes as a "key" customer, placed an order with Cepheus
3 and (2) Amgen, another "key" customer, has informed AllCells that "Cepheus is eager for their
4 business." Tong Decl. ¶ 59. AllCells "believe[s] that Amgen either has, or in the coming year
5 will, move their business from AllCells to Cepheus" and that "this damage is just the tip of the
6 iceberg." Tong Decl. ¶ 59. For example, Cepheus "could strongly compete with AllCells . . .
7 because [it] know[s] exactly who AllCells sell[s] to without any research and [it] can convince the
8 customer to switch products for dramatically cheaper without any of the sunken cost
9 development." Tong Decl. ¶ 60.

10 II. DISCUSSION

11 A. Legal Standard

12 When bringing a motion for a preliminary injunction, a plaintiff
13 must demonstrate: (1) that he is likely to succeed on the merits of his
14 claim; (2) that he is likely to suffer irreparable harm in the absence
15 of preliminary relief; (3) that the balance of equities tips in his favor;
16 and (4) that an injunction is in the public interest. A preliminary
17 injunction can also be issued if "a plaintiff demonstrates . . . that
serious questions going to the merits were raised and the balance of
hardships tips sharply in the plaintiff's favor," as well as satisfaction
of the other *Winter* [*v. NRDC, Inc.*, 555 U.S. 7 (2008)] factors.

18 *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016).

19 B. Likelihood of Success on the Merits/Serious Questions Going to the Merits

20 Although AllCells has raised multiple claims for relief, the driving force of the lawsuit is
21 the trade secret misappropriation claim (brought under both federal and state law). This is
22 especially true since the breach-of-contract claim applies to Mr. Zhai and Mr. Lee only, and not
23 Cepheus. Accordingly, the Court focuses on the misappropriation claim at this juncture of the
24 proceedings.

25 The Court finds that, for the most part, AllCells has sufficiently shown serious questions
26 going to the merits on the misappropriation claim. The critical issue here is whether the alleged
27 trade secrets were generally known or reasonably ascertainable, *see* 18 U.S.C. § 1839(e); Cal. Civ.
28 Code § 3426.1(d), in which case the information could not be deemed a trade secret.

1 With respect to the AllCells SOPs, while they may include some public information, there
2 is no evidence that the SOPs possessed by Defendants are simply wholesale copies of public
3 information. There is also evidence suggesting that AllCells invested at least some time and
4 research in deriving specific steps, formulations, etc. in producing the SOPs. This is not to say
5 that Defendants will not have meritorious arguments on some or all of the SOPs – if, *e.g.*, they
6 merely reflect information already known in the industry or were simply small “tweaks” of
7 publicly available SOPs and were thus effectively generally known. But at this juncture in the
8 proceedings, AllCells has met at least the lesser standard of serious questions going to the merits.

9 As for information about AllCells’s internal operations, AllCells’s motion focuses on
10 Defendants’ copying of a slide deck titled “2013 AllCells Q3 Business Meeting.” *See* Lui Decl.,
11 Ex. U (email with attachment). Here as well, AllCells has satisfied the standard of serious
12 questions going to the merits. The Court cannot say that the slide deck simply contains general
13 knowledge about how to improve workflow.

14 Finally, for customer identities and customer-related information, AllCells has shown at
15 least serious questions going to the merits on the latter. Defendants argue with some force that
16 customer identities by themselves are not trade secrets in this instance. AllCells’s customers
17 largely seem to be big, well-known companies – obvious potential customers. *See Les*
18 *Fields/C.C.H.I. Ins. Servs. v. Hines*, No. 15-cv-03728-MEJ, 2016 U.S. Dist. LEXIS 162163, at
19 *46 (N.D. Cal. Nov. 22, 2016) (stating that “[c]ourts are reluctant to protect customer lists to the
20 extent they embody information [that is] “readily ascertainable” through public sources, such as
21 business directories[, but] where the employer has expended time and effort identifying customers
22 with particular needs or characteristics, courts will prohibit former employees from using this
23 information to capture a share of the market[;] [s]uch lists are to be distinguished from mere
24 identities and locations of customers where anyone could easily identify the entities as potential
25 customers”). However, there is a stronger argument that the customer-related information (in
26 particular, information about customer needs/preferences, key contacts within a customer-
27 company, pricing, and sales forecasts/projections) is a trade secret. AllCells has raised a serious
28 question that, *e.g.*, the compilation of information about customer needs/preferences is a trade

1 secret, as is information about sales forecasts/projections. *See Courtesy Temp. Serv., Inc. v.*
2 *Camacho*, 222 Cal. App. 3d 1278, 1288 (1990) (“[T]he evidence established that Courtesy’s
3 customer list and related information was the product of a substantial amount of time, expense and
4 effort on the part of Courtesy. Moreover, the nature and character of the subject customer
5 information, *i.e.*, billing rates, key contacts, specialized requirements and markup rates, is
6 sophisticated information and irrefutably of commercial value and not readily ascertainable to
7 other competitors.”). *See generally Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (1997)
8 (stating that, “[a]s a general principle, the more difficult information is to obtain, and the more
9 time and resources expended by an employer in gathering it, the more likely a court will find such
10 information constitutes a trade secret”). As for pricing, while AllCells may make some pricing
11 information public, it also appears that, at least in some instances, pricing is tailored to a specific
12 customer taking into account various nonpublic factors.

13 C. Irreparable Injury/Balance of Hardships

14 “An irreparable injury is one which cannot be redressed by a legal remedy such as
15 monetary damages.” *Corp. Express Document & Print Mgmt. v. Coons*, No. CV 00-2426 AHM
16 (Mex), 2000 U.S. Dist. LEXIS 22243, at *32 (C.D. Cal. Apr. 21, 2000). Here, there is an
17 argument that AllCells’s injuries could be compensated by money damages, [REDACTED]
18 [REDACTED] Nevertheless, AllCells’s concern that, without limitations, Cepheus
19 could make unfair inroads into the industry and inflict long-term damage is not without any basis.

20 Moreover, the balance of hardships tips sharply in AllCells’s favor. If a substantial
21 volume of trade secrets were taken from AllCells and used unfairly by Defendants to directly
22 compete with AllCells, AllCells would suffer significant hardship. On the other hand, Defendants
23 will suffer little hardship from a narrowly drawn injunction. For example, Defendants have
24 represented that they have given all of the copied SOPs to their counsel. Defendants have further
25 represented that “[t]here are only three ‘protocols’ that Cepheus could use,” all of which are “well-
26 known”; the protocols are “simply directions written by a supplier on how to use its product.” Lee
27 Decl. ¶ 10. If that is the case, then Defendants cannot claim any harm if they were enjoined from
28 using AllCells’s SOPs.

1 Similarly, Defendants cannot claim harm if they are enjoined from using the slide deck
2 identified above. As above, they have returned that information to AllCells. Moreover,
3 Defendants have disavowed that the slide deck has any value to Cepheus given the different
4 statuses of the companies.

5 Finally, Defendants have failed to show that any hardship to them from an injunction
6 barring use of the customer-related information outweighs any hardship to AllCells without an
7 injunction – that is, so long as Defendants are not barred from soliciting AllCells’s customers (as
8 requested by AllCells). To the extent AllCells claims undue hardship without an anti-solicitation
9 injunction, the Court is not persuaded. Here, the balance of hardships weighs in Defendants’ favor
10 as such an injunction would effectively put Cepheus out of business.

11 **III. CONCLUSION**

12 For the foregoing reasons, the Court concludes that a limited preliminary injunction in
13 favor of AllCells is appropriate. More specifically, Defendants, their agents, and others acting in
14 concert with them are hereby enjoined from disclosing or using the following: (1) AllCells’s
15 SOPs; (2) AllCells’s slide deck “2013 AllCells Q3 Business Meeting”; and (3) AllCells’s
16 information about customer needs/preferences, key contacts within a customer-company, pricing,
17 and sales forecasts/projections. However, the limited scope of this injunction will not affect the
18 availability of damages should AllCells later prove not only that its SOPs were protected trade
19 secrets but also that Defendants used or disclosed not only the SOPs but derivative information
20 therefrom found protectable under law.

21 This injunction does not bar Defendants from using publicly available SOPs (*e.g.*, from
22 Alta Bates) or from using their “general knowledge and experience acquired in . . . former
23 employment.” *Morlife*, 56 Cal. App. 4th at 1525.

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Finally, the Court orders AllCells to post a bond in the amount of [REDACTED]

[REDACTED]

This order disposes of Docket Nos. 11 and 65.

IT IS SO ORDERED.

Dated: March 28, 2017



EDWARD M. CHEN
United States District Judge