

E-Filed 7/9/10

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

TMX FUNDING, INC., a Delaware corporation,

Plaintiff,

v.

IMPERO TECHNOLOGIES, INC., A California Corporation; CLARENCE NICHOLAS STEIGELMAN, An Individual; RONALD J LESNIAK, An Individual; MITCHELL A HEINLEIN, An Individual; JOSEPH ZHANG, a.k.a. XIANGCHOU ZHANG, An Individual; MICHELLE DOVER, An Individual; And DAVID LESNIAK, An Individual,

Defendants.

Case Number C 10-00202 JF (PVT)

ORDER¹ DENYING MOTION FOR RECONSIDERATION

[re doc. no. 148]

On May 20, 2010, the Court modified the existing preliminary injunction (the “Injunction”), removing language prohibiting Defendants Ronald and David Lesniak (the “Lesniak Defendants”) from retaining certain property and carrying out certain business activities that the Court deemed likely to constitute a misappropriation of trade secrets belonging

¹ This disposition is not designated for publication in the official reports.

1 to Plaintiff TMX Funding, Inc. (“TMX”). TMX moves for the reconsideration of that order, and
2 the Lesniak Defendants oppose the motion. The Court has considered the moving and
3 responding papers and the oral argument of counsel presented at the hearing on July 2, 2010.
4 For the reasons discussed below, the motion will be denied, without prejudice.

5 **I. BACKGROUND**

6 On January 14, 2010, TMX filed the instant action against Defendants Impero
7 Technologies, Inc. (“Impero”), Clarence Steigelman (“Steigelman”), Ronald Lesniak (“R.
8 Lesniak”), Mitchell Heinlein (“Heinlein”), Joseph Zhang (“Zhang”), Michelle Dover (“Dover”),
9 and David Lesniak (“D. Lesniak”) (collectively, “Defendants”), asserting several claims for
10 relief including misappropriation of trade secrets in violation of the California Uniform Trade
11 Secrets Act (“UTSA”), Cal. Civ. Code § 3426.1; interference with prospective economic
12 advantage; breach of contract; unfair competition in violation of Cal. Bus. & Prof. Code §
13 17200, *et seq.*; and conversion in violation of Cal. Penal Code § 502(e).

14 **A. Factual history**

15 TMX purchased certain assets and collateral of Teledex, LLC (“Teledex”), a designer
16 and manufacturer of hotel guest room telecommunication solutions, including wireless
17 broadband internet, analog telephone, and voice-over internet protocol telephone systems. TMX
18 acquired the assets and collateral of Teledex after the expiration of several forbearance
19 agreements with respect to a loan on which Teledex was the borrower. R. Lesniak was the
20 president and chief executive officer (“CEO”) of Teledex, and D. Lesniak was a field service
21 manager at Teledex. (R. Lesniak Decl. ISO Defs.’ Opp’n to Prelim. Injx. ¶ 2; D. Lesniak Decl.
22 ISO Defs.’ Opp’n to Prelim. Injx. ¶ 2.) In connection with the acquisition, GE Capital
23 Corporation (“GECC”) confiscated Teledex’s assets, including its funds necessary to pay
24 employee wages. R. Lesniak claims that he terminated all Teledex employees on December 8,
25 2009. (R. Lesniak Decl. ISO Defs.’ Opp’n to Prelim. Injx. ¶ 9.) R. Lesniak allowed the
26 Teledex employees, including D. Lesniak, to retain possession of the Teledex laptop computers
27 they had used while employed. (*Id.* at ¶ 10.) On December 9, 2009, the Santa Clara Superior
28 Court appointed a receiver to take possession of Teledex’s property, with the exception of

1 “property that relates to membership interests and equity of [Teledex].” (TMX’s Complaint, Ex.
2 A at 2:19-20.) The Superior Court also issued a restraining order against Teledex, its agents,
3 officers, employees, and all persons acting under, in concert with, or for them, forbidding them
4 to “[e]xpend, disburse, transfer, assign, sell, convey, devise, pledge, mortgage, create a security
5 interest in, encumber, conceal or in any manner whatsoever deal in or dispose of the whole or
6 any part of [Teledex’s] assets without prior Court order.” (TMX’s Complaint, Ex. A at 9:18-20,
7 10:4-7.)

8 Teledex’s corporate counsel, Deborah Ludewig (“Ludewig”) instructed her IT
9 professional, Thomas Adler (“Adler”), to copy R. Lesniak’s emails and desktop information,
10 believing that it was “likely that communications between GECC and Teledex and company
11 information would be located in those locations.” (Ludewig Decl. ¶ 6.) Ludewig was concerned
12 about the antitrust implications of TMX’s purchase of Teledex’s assets and was interested in
13 preserving “any evidence relating to communications by and between GECC and TMX and
14 information relating to the status of the Teledex entity at the time of the transaction.” (Ludewig
15 Decl. ¶ 4.) On December 15, 2009, 117 files were copied from R. Lesniak’s desktop computer
16 onto compact disks (“CDs”). (McKnight Decl. ¶ 9.) On December 16, 2009, an additional file
17 from R. Lesniak’s computer was copied onto a CD. (*Id.*) Examples of the names of the files
18 copied onto the CDs include:

- 19 • Chart October Presentation Financial ComparisonBook1.xls
- 20 • Confidential follow-up.htm
- 21 • Confidentiality agreement(v4).DOC
- 22 • Confidentiality agreement(v5).DOC
- 23 • Purchase Order Dates.xls
- 24 • Sales By Category.rtf
- 25 • Terms and Conditions for a Purchase Order..htm [*sic*]
- 26 • Three Buckets Marketing.xls

27 (*Id.*) R. Lesniak denies making these copies. (R. Lesniak Decl. ISO Lesniak Defs.’ Opp’n to
28 Mot. for Reconsideration, ¶ 2). Adler also denies having made these copies or having seen

1 anyone make them, (Adler Decl. ¶ 11), and Ludewig does not discuss the CDs in her
2 declaration.

3 It is undisputed, however, that Adler met R. Lesniak at Teledex’s former facilities on
4 December 16, 2009 in order to copy the files requested by Ludewig. (Adler Decl. ¶ 4.) When
5 Adler arrived at 10:53 a.m., R. Lesniak already was there. (*Id.*) While he was copying the files,
6 Adler noticed that the “CD burner program” on R. Lesniak’s desktop computer was active. (*Id.*
7 at ¶ 11.) He attempted to shut down the program, but he was unable to do so, even after
8 referring to Google for information about the program. (*Id.*; *see also* McKnight Decl. ¶ 8
9 (noting that the following Google searches had been performed on R. Lesniak’s desktop
10 computer on December 16, 2009: Windows Files to Burn and Windows Remove Files to Burn.)
11 .) Adler proceeded to copy R. Lesniak’s emails and “desktop information” onto two external
12 storage devices – a Memorex TD Classic (“Memorex drive”) and a Seagate FreeAgent (“Seagate
13 drive”) (Adler Decl. ¶¶ 5, 13; McKnight Decl. ¶ 4.) – and then delivered the external storage
14 devices to Ludewig. (Adler Dec. ¶ 13.) Ludewig claims that R. Lesniak never had access to the
15 external storage devices. (Ludewig Decl. ¶ 10.)

16 In February 2010, two months after resigning from Teledex, R. Lesniak began working
17 for VTech Corporation (“VTech”), a competitor of Teledex. (R. Lesniak Decl. ISO Lesniak
18 Defs.’ Opp’n to Mot. for Reconsideration, ¶ 6-7.) During 2009, VTech and other entities had
19 considered acquiring Teledex. (*Id.* at ¶ 6.) R. Lesniak prepared possible business plans for
20 VTech and these other entities in connection with the potential acquisition. (*Id.*) D. Lesniak has
21 been unemployed since TMX’s acquisition of the assets of Teledex. (D. Lesniak Decl. ISO
22 Lesniak Defs.’ Opp’n to Mot. for Reconsideration, ¶ 4.)

23 TMX appears to have been in possession of R. Lesniak’s desktop computer since TMX
24 acquired Teledex’s assets in December 2009. TMX’s expert began investigating the contents of
25 this computer’s hard drive in April 2010, (TMX’s Mot. at 5:20-21), after which TMX
26 discovered that certain files had been copied, as discussed above. D. Lesniak’s laptop was in the
27 possession of his attorneys shortly after the instant litigation began, and it was transferred to
28 TMX in May 2010. (TMX’s Mot. at 4:24-25.) TMX’s expert began to investigate the laptop’s

1 hard drive on May 18, 2010. (McKnight Decl. ¶ 10.) The expert discovered that the laptop
2 contains local copies of D. Lesniak’s Microsoft Outlook emails generated during his
3 employment at Teledex and D. Lesniak accessed these files on February 6, 2010. (*Id.*) D.
4 Lesniak denies having accessed his Teledex emails intentionally after he was terminated. (D.
5 Lesniak Decl. ISO Lesniak Defs.’ Opp’n to Mot. for Reconsideration, ¶ 2-3.)

6 **B. Procedural history**

7 On January 20, 2010, TMX moved for a temporary restraining order (“TRO”) and an
8 order to show cause why Defendants should not be enjoined from unlawfully taking, retaining
9 and utilizing property and confidential, proprietary, and trade secret information allegedly
10 belonging to TMX. On January 29, 2010, the Court denied the request for a TRO. On February
11 12, 2010, the Court held a hearing on TMX’s motion for a preliminary injunction. The evidence
12 proffered by TMX in support of the preliminary injunction included admissions by several
13 Defendants that they had retained laptop computers belonging to TMX that likely contained
14 confidential and proprietary information, and that on several occasions Defendants had utilized
15 specific information obtained during their tenure at Teledex and not known generally by the
16 public or others in the industry in order to communicate with and generate business from several
17 TMX/Teledex customers and vendors.

18 In an order dated March 18, 2010, the Court found that TMX had satisfied its evidentiary
19 burden under California law for obtaining a preliminary injunction. The information contained
20 on the missing laptops and in email communications between Defendants and TMX/Teledex
21 clients and vendors met the definition for proprietary information or trade secret under the
22 UTSA, and TMX demonstrated a strong likelihood of misappropriation based on several facts.
23 In particular, the evidence showed that Defendants proffered sections of a Teledex contract that
24 TMX has been unable to locate since its acquisition of Teledex and that Defendants had
25 “picked up” the same thread of communications with Teledex clients and vendors – containing
26 content related to potential business deals and negotiations – that they had managed during their
27 employment with Teledex. TMX also demonstrated that the alleged misappropriation was
28 hindering its ability to operate Teledex, even after it had taken steps during and after the

1 acquisition to preserve the assets it had acquired. The Court found that this showing sufficiently
2 established a likelihood of irreparable harm, particularly in light of the presumption of
3 irreparable harm applied by California courts when proprietary information is misappropriated.
4 *See Western Directories, Inc. v. Golden Guide Directories, Inc.*, 2009 WL 1625945, at *6 (N.D.
5 Cal. June 8, 2009) (citing *Lillge v. Verity*, 2007 WL 2900568, at *7 (N.D. Cal. Oct. 2, 2007)).²
6 Finally, because Defendants claimed that they were not utilizing any proprietary information in
7 their new business, the Court concluded that a narrowly tailored injunction would prevent
8 further harm to TMX without unnecessarily infringing upon Defendants' right to work in their
9 chosen field.

10 On March 31, 2010, the Court issued the Injunction, enjoining Defendants from, among
11 other things, failing to return TMX's confidential, proprietary, and trade secret information.
12 Defendants filed a notice of appeal. On May 20, 2010, the Court modified the injunction,
13 removing the Lesniak Defendants from its scope and clarifying the bounds of the protected
14 information. For purposes of the Injunction,

15 "Confidential, Proprietary, and/or Trade Secret Information" shall include but is not
16 limited to the following information: (a) business plans and strategies of Teledex,
17 including any strategic plans that Teledex developed for its future relationships, (b)
18 "Proprietary Information" and customer information that Teledex sought to protect
19 through its Proprietary Information and Inventions Agreement and Confidential
20 Information and Policy Agreements, and (c) past communications and agreements
21 between Teledex and customer or vendors.

19 (Docket No. 141.) With respect to the Lesniak Defendants, the Court found that TMX had
20 failed to present evidence that they posed any present or future threat to TMX's interests.

21 (Docket No. 140 at 19:9-11.) Defendants subsequently dismissed their appeal. TMX argues
22 that its newly-discovered evidence demonstrates that the Injunction should be modified once
23 again to include the Lesniak Defendants.

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25 //

27 ² Defendants previously have challenge the validity of this presumption, which is
28 discussed below.

1 **II. DISCUSSION**

2 **A. Legal standard**

3 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a
4 clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council,*
5 *Inc.*, 129 S.Ct. 365, 376 (2008). A party seeking a preliminary injunction must show, “[1] that
6 [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the
7 absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an
8 injunction is in the public interest.” *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d
9 644, 651 (9th Cir. 2009), quoting *Winter*, 129 S.Ct. at 374. “To the extent that our cases have
10 suggested a lesser standard, they are no longer controlling, or even viable.” *Am. Truckin Ass’ns,*
11 *Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The issuance of a preliminary
12 injunction is committed to the discretion of the district court. *Indep. Living Ctr.*, 572 F.3d at 651.

13 Generally, a court may exercise its “inherent procedural power to reconsider, rescind, or
14 modify an interlocutory order for cause seen by it to be sufficient.” *City of L.A. v. Santa Monica*
15 *BayKeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551,
16 553 (5th Cir. 1981)). However, Civ. L.R. 7-9 controls motions for reconsideration, such as the
17 instant motion. Under Civ. L.R. 7-9(b)(1), TMX must show both that there is a material
18 difference between the current facts and the facts presented to the court before entry of the order
19 and that it has exercised reasonable diligence to discover such facts.

20 **B. Reasonable diligence under Civ. L.R. 7-9(b)(1)**

21 TMX did not gain possession of D. Lesniak’s laptop until May 2010, and TMX began to
22 investigate the contents of that laptop’s hard drive on May 18, 2010. (McKnight Decl. ¶ 10.)
23 Accordingly, TMX has demonstrated reasonable diligence in pursuing the facts regarding its
24 claims against D. Lesniak. At the same time, TMX has suspected at least since January 14, 2010
25 that R. Lesniak engaged in the theft of proprietary information. TMX does not dispute that it has
26 had possession of R. Lesniak’s desktop computer since its acquisition of Teledex’s assets in
27 December 2009, yet TMX’s expert did not begin reviewing the desktop computer’s hard drive
28 until May 2010. (McKnight Decl. ¶ 4.) TMX’s expert was able to analyze the hard drive of D.

1 Lesniak’s laptop in a matter of weeks. While TMX submitted a significant amount of evidence in
2 connection with its original motion for a preliminary injunction, (*see* Docket No. 13), TMX does
3 not offer any explanation as to why it took months for its expert to begin reviewing the hard drive
4 of R. Lesniak’s desktop computer.

5 **C. Misappropriation of trade secrets**

6 **1. Likelihood of success on the merits**

7 Under the Uniform Trade Secrets Act (“UTSA”), “misappropriation” is the: “(1)
8 [a]cquisition of a trade secret of another by a person who knows or has reason to know that the
9 trade secret was acquired by improper means; or (2) [d]isclosure or use of a trade secret of
10 another without express or implied consent by a person who: (A) [u]sed improper means to
11 acquire knowledge of the trade secret; or (B) [a]t the time of disclosure or use, knew or had
12 reason to know that his or her knowledge of the trade secret was: (i) [d]erived from or through a
13 person who had utilized improper means to acquire it; (ii) [a]cquired under circumstances giving
14 rise to a duty to maintain its secrecy or limit its use; or (iii) [d]erived from or through a person
15 who owed a duty to the person seeking relief to maintain its secrecy or limit its use” Cal.
16 Civ. Code § 3426.1(b).

17 **a. TMX’s claim against R. Lesniak**

18 The Injunction defines TMX’s confidential, proprietary, and trade secret information as:

19 (a) business plans and strategies of Teledex, including any strategic plans that Teledex
20 developed for its future relationships, (b) “Proprietary Information” and customer
21 information that Teledex sought to protect through its Proprietary Information and
Inventions Agreement and Confidential Information and Policy Agreements, and (c) past
communications and agreements between Teledex and customer or vendors.”

22 (Docket No. 141.) At least some of the information copied from R. Lesniak’s desktop computer
23 appears to come within this definition. Adler admits copying the email files of R. Lesniak, (Adler
24 Decl. ¶ 8), who was the president and CEO of Teledex, which likely contain some discussions of
25 TMX’s business plans and strategies, protected customer information, and past communications
26 between Teledex and its customers or vendors.

27 R. Lesniak claims that it was not improper for him to acquire the trade secrets and that he
28 was under no duty to maintain the secrecy of that information. The Superior Court’s restraining

1 order excluded property that relates to the membership interests and equity of Teledex, and
2 Ludewig contends that this exclusion covers evidence relating to the communications between
3 GECC and TMX. Even accepting Ludewig’s characterization as accurate, it is clear that Adler
4 copied R. Lesniak’s emails and other documents on the desktop computer indiscriminately.
5 (Adler Decl. ¶ 8-10.) While Adler claims that he targeted documents that might contain
6 communications and corporate information, he did not sort or review the documents. (*Id.* at ¶
7 10.) Not all communications and corporate information could have related to membership
8 interests and equity in Teledex, and many of them were likely to encompass confidential,
9 proprietary, and trade secret information as defined by the Injunction.

10 Ludewig asserts that she was directed by “the authorities” to preserve “any evidence
11 relating to communications by and between GECC and TMX and information relating to the
12 status of the Teledex entity at the time of the transaction.” (Ludewig Decl. ¶ 4.) While she
13 claims that she contacted the United States Department of Justice (the “DOJ”), the California
14 Attorney General’s Office, and “several other federal and state government agencies, (Ludewig
15 Decl. ¶ 4), she does not identify which specific authority instructed her to preserve this
16 information. Ludewig does refer to a Civil Investigative Demand (“CID”) from the DOJ, seeking
17 “all documents relating to, and communications between GE Capital and Teledex, but not limited
18 to communications relating to Teledex debt owed to GE Capital and any acquisition of Teledex
19 debt, assets, or equity by any person.” (Ludewig Decl. Ex. A.) However, the CID was dated
20 April 21, 2010, months after Adler copied the Teledex files. Moreover, Ludewig does not claim
21 that she received a court order allowing her to copy Teledex documents other than those relating
22 to the membership interests and equity of Teledex.

23 R. Lesniak claims that he did not actually acquire the files because he never had access to
24 the external storage devices used by Adler. Adler declares that he delivered the storage devices to
25 “DJL Corporate Law,” (Adler Decl. ¶ 13), which is Ludewig’s law firm, (*see* Ludewig Decl. Ex.
26 A (letter from the DOJ to Deborah J. Ludewig, DJL Corporate Law).) However, the address
27 listed for DJL Corporate Law, 17349 Parkside Court, Monte Sereno, California 95030, (Ludewig
28 Decl. Ex. A), also is the address of R. Lesniak, (*see* Dwyer Decl. Ex. 2 (results of an advanced

1 people search, showing R. Lesniak’s address.) Ludewig claims that she delivered the Seagate
2 device to the DOJ, but the DOJ did not confirm receipt of the hard drive until June 16, 2010.
3 (Ludewig Decl. Ex. B.) Thus, it is likely that R. Lesniak at least had access to the Seagate device
4 from December 16, 2010 to June 2010. Moreover, Ludewig provides no information as to the
5 current whereabouts of the Memorex device, which presumably remains at the shared address of
6 Ludewig and R. Lesniak. R. Lesniak also has not provided a credible explanation for the files
7 copied from his desktop computer to CDs on December 15 and 16, 2009. While R. Lesniak
8 claims that he did not copy these files, his computer is password protected, (Ludewig Decl. ¶ 6),
9 Adler noticed that the CD burner program was active when he arrived at the former Teledex
10 facility on December 16, 2009 at 10:53 a.m., (Adler Decl. ¶ 4), and R. Lesniak already was at the
11 facility when Adler arrived. (*Id.*) At least some of the files copied to the CDs appear to be
12 information protected by the Injunction. Accordingly, TMX has demonstrated that it is likely to
13 succeed on the merits of its claim that R. Lesniak has misappropriated its trade secrets.

14 **b. TMX’s claim against D. Lesniak**

15 TMX alleges that D. Lesniak’s laptop contained local copies of his Teledex emails. D.
16 Lesniak was a field service manager at Teledex. Neither TMX nor D. Lesniak attempts to explain
17 the job functions of a field service manager. Thus, it is not clear necessarily that D. Lesniak’s
18 email would include:

19 (a) business plans and strategies of Teledex, including any strategic plans that Teledex
20 developed for its future relationships, (b) “Proprietary Information” and customer
21 information that Teledex sought to protect through its Proprietary Information and
Inventions Agreement and Confidential Information and Policy Agreements, and (c) past
communications and agreements between Teledex and customer or vendors.”

22 Accordingly, TMX has not demonstrated that it is likely to succeed on the merits of its claim that
23 D. Lesniak has misappropriated confidential, proprietary, or trade secret information.

24 **2. Irreparable harm**

25 In its original order granting injunctive relief, the Court observed that irreparable harm
26 may be presumed upon a showing of the likelihood of success on the merits of a trade-secret-
27 misappropriation claim. *See Western Directories*, 2009 WL 1625945 at *6 (presuming
28 irreparable harm following a conclusion that the plaintiffs were likely to succeed on the merits of

1 a trade secret infringement claim). The continuing viability of this presumption appeared to be in
2 question following *Winter* and the Supreme Court’s prior decision in *eBay Inc. v. MercExchange,*
3 *L.L.C.*, 547 U.S. 388, 393-94 (2006) (concluding that district courts must apply traditional
4 principles of equity – including assessing the likelihood of irreparable harm – when applying a
5 permanent injunction in the context of patent infringement). Post *Winter*, the Ninth Circuit has
6 reaffirmed the ability of a district court to presume irreparable harm upon a showing of the
7 likelihood of success on the merits of a trademark infringement claim. *Marlyn Nutraceuticals,*
8 *Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009) (concluding, in a
9 trademark infringement action, that “[b]ecause the court found a likelihood of success on the
10 merits, it reasonably presumed irreparable injury.”). While the Ninth Circuit has not addressed
11 the presumption of harm in a *trade secret* action, it follows reasonably that the presumption
12 remains valid in this circuit following *Marlyn Nutraceuticals*.

13 Nonetheless, while the presumption of irreparable harm was informative, the Court issued
14 the original Injunction in part based on an actual showing of the likelihood of irreparable harm.
15 TMX has not demonstrated how it will be harmed irreparably by D. Lesniak’s previous access to
16 his Teledex emails. D. Lesniak no longer possesses the laptop, and Teledex has not shown that
17 D. Lesniak possesses a copy of these emails or is in any position to use the information in the
18 emails to the detriment of TMX.

19 The evidence is much closer with respect to R. Lesniak. TMX contends that R. Lesniak is
20 using or plans to use its trade secret information for the benefit of his current employer, VTech.
21 However, although it claims that R. Lesniak was creating VTech business plans while still
22 employed at Teledex, TMX has not provided a copy of such a business plan to the Court, nor
23 does its expert identify documents related to VTech on the hard drive of R. Lesniak’s desktop
24 computer. R. Lesniak admits preparing documents in connection with VTech’s inquiries into
25 acquiring Teledex, but TMX does not explain how these documents present the possibility of
26 irreparable harm. TMX alleges conclusorily that VTech plans to “launch a new line of
27 telecommunication products and services to the hospitality industry by using Teledex
28 confidential, proprietary, and trade secret information that it obtained from [R. Lesniak].”

1 (TMX's Mot. At 2:2-3.) At oral argument, TMX represented that VTech entered the hospitality
2 market only after hiring R. Lesniak. However, TMX does not identify the new products or
3 services, much less explain how Teledex's protected information is utilized in them. While R.
4 Lesniak may possess TMX's trade secret information in the form of the CDs and the Memorex
5 device, TMX has not shown that R. Lesniak is likely to use that information in a way that would
6 result in present or future harm to TMX's interests. When he was hired by VTech, R. Lesniak
7 signed an agreement stating that he would not disclose or use any Teledex confidential
8 information in his work for VTech. (Delany Decl. ¶ 7 and Ex. 1.) VTech already has
9 demonstrated its willingness to enforce the agreement by suspending R. Lesniak after the Court
10 issued the original injunction. (*Id.* at ¶ 8.)

11 The Court previously granted the Injunction upon TMX's showing that other Defendants,
12 after they were terminated from Teledex, had resumed conversations with Teledex customers by
13 using email chains they started while working at Teledex. TMX also offered concrete evidence
14 that other Defendants possessed copies of contracts between Teledex and Accor, a Teledex
15 customer, and signed a contract with Accor a mere ten days after they were terminated from
16 Teledex. In contrast, in the context of the instant motion for consideration, TMX has
17 demonstrated only that VTech has hired a person with experience in the hospitality industry and
18 then entered the hospitality industry. This is insufficient to demonstrate the likelihood of
19 irreparable harm. While *Marlyn Nutraceuticals* apparently permits the Court to presume
20 irreparable harm, the Court concludes that the application of the presumption against R. Lesniak
21 is unwarranted under the circumstances.³

22 //

24 ³ See *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1220 (9th Cir. 1987)
25 (noting that “[o]nce the plaintiff in an infringement action has established a likelihood of
26 confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive
27 relief does not issue,” but declining to apply the presumption based on the record in that case
because the plaintiff “ha[d] made no independent showing of irreparable harm.”)

1 **3. Balance of equities and the public interest**

2 The balance of equities also tips in favor of the Lesniak Defendants. TMX has not shown
3 how an injunction against the Lesniak Defendants would create significant benefit to it, while the
4 livelihood of the Lesniak Defendants would be severely impacted by once again making them
5 subject to the Injunction. Nick Delany, the president of VTech, declares that he suspended R.
6 Lesniak from employment after learning that the original Injunction included him. (Delany Decl.
7 ¶ 8.) R. Lesniak was reinstated only after the Injunction was modified, (*id.*), and it is likely that R.
8 Lesniak would be suspended if the Injunction once again was to include him. Similarly, though
9 D. Lesniak is unemployed, his employment prospects would be severely damaged if he again was
10 subject to the Injunction. While the public interest favors the protection of legitimate trade
11 secrets, “public policy and natural justice require that equity should also be solicitous for the right
12 inherent in all people . . . to follow any of the common occupations of life.” *Continental Car-Na-*
13 *Var Corp. v. Moseley*, 24 Cal. 2d 104, 110 (1944).

14 **C. TMX’s remaining claims**

15 TMX asserts several claims for relief, including breach of contract; unfair competition in
16 violation of Cal. Bus. & Prof. Code § 17200, *et seq.*; and conversion in violation of Cal. Penal
17 Code § 502(e). Regardless of its likelihood of success on the merits of these claims, TMX has
18 not demonstrated that the Lesniak Defendants pose any present or future threat of irreparable
19 harm to TMX’s interests in connection with these claims, and no authority exists for presuming
20 irreparable harm in the context of the claims. D. Lesniak has returned the laptop computer, and
21 TMX has not presented evidence that he threatens harm to its interests, given that he is not
22 competing currently against TMX. Nor, as discussed above, has TMX shown that R. Lesniak
23 poses any present or future threat to its interests. While it is likely that R. Lesniak has at least
24 confidential information that belongs to TMX, TMX has not shown that R. Lesniak is using or
25 plans to use that information. Under *Winter*, a party seeking a preliminary injunction *must* show
26 that it is likely to suffer irreparable harm absent the entry of a preliminary injunction. *See Am.*
27 *Truckin*, 559 F.3d at 1052.

28 //

1 **III. CONCLUSION**

2 While TMX has demonstrated its likelihood of success on the merits with respect to its
3 claim that R. Lesniak has misappropriated trade secrets, its showing of irreparable harm as a
4 result of R. Lesniak’s alleged wrongdoing is factually deficient. With respect to its claims against
5 D. Lesniak, TMX has demonstrated neither a likelihood of success nor a likelihood of irreparable
6 harm. Accordingly, the motion will be denied without prejudice. TMX may move for
7 reconsideration if it obtains more specific evidence with respect to its claims. TMX must show
8 that it exercised reasonable diligence to discover such evidence.

9
10 **IT IS SO ORDERED**

11
12 DATED: 7/8/2010

13 
14 JEREMY FOCX
United States District Judge