

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 20

DEL GLOBAL TECHNOLOGIES, INC.,
DYNARAD CORPORATION,

Plaintiffs,

INDEX NO.: 019965/2002
MOTION DATE: 02/07/2003
MOTION SEQUENCE: 001

- against -

VASILIOS MILONAS, SOURCE-RAY, INC.,
RAYMOND MANEZ,

Defendants.

The following papers have been read on this motion:

Revised Application for a Temporary Restraining Order and Order to Show Cause.....	1
Notice of Application for Expedited Discovery to compel Compliance with Plaintiffs’ Discovery Requests	2
Affidavit of Daniel J. Pisano.....	3
Revised Affidavit of Kim Erb.....	4
Affirmation in Further Support.....	5
Affidavits in Opposition (Vasilos Milonas; Raymond Manez; Jerry Palmese) & Exhibits.....	6
Memorandum of Law in Support (Preliminary Injunction).....	7
Memorandum of Law In Support (Expedited Discovery).....	8
Memorandum of Law In Opposition.....	9

Motion by plaintiffs Del Global Technologies, Inc. (“Del Global”) and Dynarad Corporation (“Dynarad”) for an order pursuant to CPLR 6311 enjoining defendants

Vasilios Milonas, Raymond Manez and Source X-Ray, Inc., from designing, developing, marketing, selling, displaying or promoting any portable x-ray system or monoblock technology; directly or indirectly accessing, copying, downloading, displaying, disclosing, revealing, divulging, e-mailing or using in any form, and from destroying, deleting or revising in any manner, all confidential information and data that is the property of plaintiffs; directly or indirectly soliciting any of plaintiffs' employees; or, directly or indirectly soliciting, diverting or taking away or attempting to take away any of plaintiffs' customers or their business; and, an order compelling defendants to participate in expedited discovery is granted only to the extent provided herein.

Plaintiff Del Global designs, manufactures and markets state-of-the-art cost-effective stationary and portable medical imaging and diagnostic systems, radiographic fluoroscopic systems, mammography systems, neo-natal systems and proprietary precision power conversion subsystems for medical and critical industrial applications. Plaintiff Dynarad designs, manufactures and markets monoblock x-ray source technology including stationary and portable x-ray systems and low and high voltage power conversion technology. For some time now, plaintiff Dynarad has been involved with the development of two portable x-ray systems, the HF-135 and the Phantom Lite systems, which allegedly have new monoblock technology. This technology utilizes integrated high voltage generators and x-ray tubes manufactured according to strict quality standards for x-ray equipment and has new performance output specifications. Plaintiffs allege that Dynarad invested over a half of a million dollars and 1,5000 engineering hours in designing and developing these new products. Plaintiffs allege that the design and pricing of these items is strictly confidential. In fact, access to this information is alleged to be very closely controlled and monitored within the plaintiff companies.

Defendant Milonas became the Vice-President of Technology in the plaintiff's Del Power Conversion Group as of September, 2000. He was responsible for, inter alia, the design and development of the new x-ray products. On September 27, 2001, he was

made Vice President of Engineering and continued with his responsibilities for these new products. Defendant Manez was the General Manager of plaintiff Dynarad. Plaintiffs allege that these two men were both integrally involved in the development of the HF-135 and the Phantom Lite products. They allegedly had complete knowledge of the specifications, design and costs involved and were required to approve changes. They allegedly had unfettered access to confidential customer lists, both actual and prospective, as well as costing and pricing. Plaintiffs allege that due to the individual defendants' departures (Manez in September of 2001 and Milonas in January of 2002), development of the HF-135 portable x-ray system was delayed, has not yet been completed, and is allegedly still under development.

Defendants Milonas and Manez both signed a confidentiality agreement on April 27, 1999. This agreement prohibits them from directly or indirectly revealing, divulging or using any confidential information to Dynarad's disadvantage or from using said information for their own purposes. Said agreement also prohibits them from soliciting any of Dynarad's or its affiliates' employees for one year after their termination. In addition, the plaintiff Del Global's Standards of Business Ethics Policy, with which defendants Milonas and Manez agreed to comply, prohibits them from disclosing confidential data or information to anyone and mandates that employees avoid outside financial interests which might impair their effective performance of their jobs. Manez was terminated by the company in October, 2001, and defendant Milonas resigned on January 18, 2002.

Defendants allegedly founded defendant Source-Ray, Inc., on January 9, 2002, which, plaintiffs allege, they were developing prior to their departure. Defendant Source-Ray is alleged to have displayed a portable x-ray system at a trade show on October 11 and 12, 2002, via Dynarad's former portable x-ray equipment sales manager, Jerry Palmese. According to plaintiff, the output performance specifications of defendant Source-Ray's portable x-ray system is identical to plaintiff Dynarad's proposed HF-135

portable x-ray system. Plaintiffs argue that the only way that defendant Source-Ray could have designed and manufactured their new product so quickly was by using confidential information – i.e., designs and specifications—acquired by them during their employment with Dynarad. The individual defendants are specifically alleged to have unnecessarily accessed and copied plaintiff Dynarad’s confidential information after their termination/resignation, including the output performance specifications of the HF-135 portable x-ray machine then under development.

There is no copy of the complaint in the record. However, plaintiffs presently seek injunctive relief preliminarily restraining defendants from designing and marketing any portable x-ray system or monoblock technology; using their confidential data and information, and, soliciting their employees as well as their customers.

In opposition, defendant Manez states that he was terminated by plaintiffs on September 21, 2001, and that he went out and established the new company, defendant Source-Ray. Defendant Milonas states that he left the plaintiff companies on January 18, 2002, and then went to work with defendant Manez.

The individual defendants categorically deny taking any confidential information from the plaintiff companies, let alone using any. They both note that their confidentiality agreements do not contain restrictive covenants prohibiting their competition post-employment. The defendants further deny the similarity between Source-Ray’s portable x-ray product and the plaintiffs’ new portable x-ray products. They allege that plaintiffs had serious reservations about proceeding with the development of the new products after it was poorly received at a trade show, and, in fact, at one point abandoned their development. Thus, defendants allege that plaintiffs seek via this lawsuit simply to unfairly quash their competition.

To obtain injunctive relief, plaintiffs must show a likelihood of success on the merits; that they will suffer irreparable injury if injunctive relief is not issued; and, that a balancing of the equities tips decidedly in their favor. Hoeffner v John F. Frank, Inc.,

__AD2d __, 2002 WL 31992876, citing Aetna Ins. Co. v Capasso, 75 NY2d 860; W.T. Grant Co. v Srogi, 52 NY2d 496; NCN Co. v Cavanagh, 215 AD2d 737. “Preliminary injunctive relief is a drastic remedy which will not be granted ‘unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.’ ” Nalitt v City of New York, 138 AD2d 580, 581 (2d Dept 1988), quoting First Natl. Bank v Highland Hardwoods, 98 AD2d 924, 926; see also, Peterson v Corbin, 275 AD2d 35, lv to app dism., 95 NY2d 919; William M. Blake Agency, Inc. v Leon, 283 AD2d 423 (2d Dept 2001). Notwithstanding this test, if the plaintiff has an adequate remedy at law and may be fully compensated by monetary damages, a preliminary injunction will not be granted. Neos v Lacey, 291 AD2d 434 (2d Dept 2002); Blueberries Gourmet v Aris Realty Corp., 255 AD2d 348, 350 (2d Dept 1998); Roushia v Harvey, 260 AD2d 687 (3d Dept 1999); Cliff v R.R.S., Inc., 207 AD2d 17, 20 (3d Dept 1994). “Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient.” McLaughlin, Piven, Vogel v W.J. Nolan & Co., 114 AD2d 165, 174 (2d Dept 1986), lv to app den., 67 NY2d 606; see also, Price Paper and Twine Co. v Miller, 182 AD2d 748 (2d Dept 1992). “Where the facts are in sharp dispute ... a temporary injunction will not be granted”. Family Affair Haircutters v Detling, 110 AD2d 745, 747 (2d Dept 1985); see also, Neos v Lacey, *supra*; Mosseri v Fried, 289 AD2d 545 (2d Dept 2001).

It is the law that in the absence of a restrictive covenant not to compete, an employee is free to compete with his or her former employer unless trade secrets are involved or fraudulent methods are employed. NCN Company, Inc. v Cavanagh, *supra*; Walter Karl, Inc. v Wood, 137 AD2d 22, 27 (2d Dept 1998). “Remembered information as to specific needs and business habits of particular customers is not confidential. ... Knowledge of the intricacies of a business operation does not necessarily constitute a trade secret and absent any wrongdoing, it cannot be said that a former employee should be prohibited from utilizing his knowledge and talents in this area. ... Nor will trade

secret protection attach to customer lists where such customers are readily ascertainable from sources outside the former employer's business." Catalogue Service of Westchester, Inc. v Henry, 107 AD2d 783, 784 (2d Dept 1985) [quotations and citations omitted].

In this case plaintiffs have failed to establish their entitlement to much of the relief sought, namely, restraining defendants' competition via manufacturing competitive products or doing business with plaintiffs' customers. There is no restrictive covenant prohibiting these activities and plaintiffs have not "demonstrated that [defendants] physically appropriated, copied, or intentionally memorized any purported confidential business information or that the customers were not ascertainable through sources other than plaintiffs' records." Best Metropolitan Towel & Linen Supply Co., Inc. v A&P Coat, Apron & Linen Supply, Inc., 149 AD2d 642 (2d Dept 1989) [citations omitted]. Not only have defendants raised issues of fact as to whether they have, in fact, taken any confidential information from plaintiffs, but also the confidentiality of such information allegedly pirated and used is open to question in light of information allegedly divulged by plaintiffs at an October, 2002 trade show. Thus, a likelihood of success has not been demonstrated. Nor have plaintiffs established irreparable injury. The products involved here comprise only a very small part of plaintiffs' large business and thus far it appears that money damages will suffice. Lastly, under the circumstances, a balancing of the equities tips in favor of the new business being established by the two individual defendants who seemingly have only the products in question to develop and market. See, NCN Company, Inc. v Cavanagh, *supra*; Best Metropolitan Towel & Linen Supply Co., Inc. v A&P Coat, Apron & Linen Supply, Inc., *supra*; see also, Arthur J. Gallagher & Co. v Klymenko, 248 AD2d 497; WMW Machinery Co., Inc. v Koerber AG, 240 AD2d 400 (2d Dept 1997).

Nevertheless, in light of the defendants' signed confidentiality agreements with the plaintiffs, plaintiffs are entitled to limited injunctive relief which was preliminarily granted by this Court in the moving Order to Show Cause. Accordingly, it is ORDERED

defendants are enjoined from directly or indirectly accessing, copying, downloading, displaying, disclosing, revealing, divulging, e-mailing, or using in any form, and from destroying, deleting or reusing in any manner, all confidential information, data and information that is the property of plaintiffs. The restriction on the solicitation of defendants' employees has expired.

As for plaintiffs' request for expedited discovery, the parties are directed to appear for a previously scheduled discovery conference prepared to schedule discovery forthwith on April 4, 2003, at 9:30 A.M.

Dated: March 13, 2003


J.S.C.

ENTERED

MAR 19 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**