CORPORATE HEALTHCARE FINANCING, INC., ET AL.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs		
vs.	*	FOR
DANIEL HARLAN BREEDLOVE	*	HOWARD COUNTY
Defendant	*	Case No. 13-C-06-65007

* * * * * * * * *

MEMORANDUM

Before the Court is the request of the Plaintiffs, Corporate Healthcare Financing, Inc. ("CHF") and Performax, Inc. ("Performax"), to conduct immediate limited discovery from the Defendant, Daniel Harlan Breedlove ("Breedlove"), in advance of the regular time envisioned by the Maryland Rules. The discovery relates to Plaintiffs' Motion for Preliminary Injunction and its claim of irreparable harm to their business. A hearing was held on the request on April 18, 2006.

On March 27, 2006, Plaintiffs filed a complaint for breach of certain provisions contained in an employment agreement (the "Agreement") executed between CHF and Breedlove. Plaintiffs claim that Breedlove, one of their veteran employees, misappropriated their trade secrets, converted their property, and violated the confidentiality and non-compete provisions of the Agreement by compiling certain of Plaintiffs' highly proprietary and confidential customer information and transferring such information to his home or personal computer.

Plaintiffs have alleged counts of breach of contract, common law trade secret, Maryland Uniform Trade Secrets Act, and conversion. Plaintiffs seek compensatory and punitive damages in a total amount of $10,000,000.00 as well as preliminary and permanent injunctive relief enjoining Breedlove from "further misappropriation and improper disclosure of Plaintiffs' trade secrets and other confidential and proprietary information" and "enjoining Defendant from directly or indirectly contacting, soliciting, marketing, selling to, consulting with or performing any services whatsoever for any Performax or CHF customer". (Complaint at 9).

The Plaintiff corporations[1] provide services in the field of self-funded employee health benefits consulting and administration. They design, sell, manage, and administer customized employee health and benefit plans for employers across the country. Breedlove went to work for CHF in April, 1992, as its Director of Management Services, and later became a sales consultant. It is alleged that he was involved in the design of client plans, served as the main contact for some of the client base, and had access to proprietary internal information of the Plaintiffs.

Shortly before filing the complaint, Plaintiffs discovered that between March 8 and March 16, 2006, Breedlove e-mailed five e-

[1] CHF is wholly owned and controlled by Performax.

mails with attachments from his business e-mail account to his home or personal e-mail account. Plaintiffs assert that the attachments are "highly confidential and proprietary client information" or other internal data or information of a similar confidential nature.

An affidavit of Jacob L. Canova, President and Chief Executive Officer of Performax, states that upon discovery that Breedlove was e-mailing such items to his personal e-mail accounts, he and "others"[2] met with Breedlove. Canova states that during this meeting:

> ...Breedlove admitted that he had copied the information about the Plaintiffs'clients and brokers onto spreadsheets and sent these spreadsheets and other confidential and proprietary information to his personal e-mail account so that he could access them at home and that he had created a number of documents that were forwarded to that e-mail account. Breedlove further conceded that such actions constituted a breach of his Employment Agreement and the confidentiality provisions contained therein. When asked to retrieve this information from his personal e-mail account and to show Plaintiffs whether the information had been transmitted to others, Breedlove left Plaintiffs' office under the guise that he would think about it and return to advise Plaintiffs.[3]

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[2] At the hearing, Plaintiffs' counsel identified that among the "others" was Plaintiffs' general counsel as well as one of Plaintiffs' counsel in this litigation.

[3] At the hearing, the parties seemed to agree that Breedlove, having been confronted with the allegations, stated that he wished to consult with counsel prior to continuing the discussion. He then left the premises.

(Canova Aff. March 30, 2006, at 4)

It is undisputed that Breedlove never returned to his place of employment, and counsel agree that he is no longer employed by Plaintiffs.

Service of the complaint and summons were effected on March 30, 2006. As of today's date, Breedlove has not responded to the complaint, but he has responded to Plaintiffs' Request for Immediate Hearing. He also orally responded at the hearing to Plaintiffs' Motion to Shorten Defendant's Time to Respond to Discovery.

Breedlove asserts that granting any relief to Plaintiffs at this juncture would "frustrate Breedlove's right to a full adversary hearing before the entry of an order that could prejudice Breedlove throughout this litigation." (Def.'s Opp'n to Pls.' Req. for Immediate Hr'g at 1) More to the immediate point before this Court, Breedlove states that he would consent to three of the five items of injunctive relief requested. More specifically, he consents to an order:

> (i) enjoining him from disclosing Performax's purportedly confidential and proprietary information; (ii) requiring him to return Performax's purportedly confidential and proprietary information; and (iii) enjoining him from 'contacting, soliciting, marketing, selling to, consulting with or performing any services whatsoever for any of the Plaintiffs' customers with whom he had any contact or

> about whom he has access to any confidential information during his employment.'

(Id. at 3-4).

At the April 18th hearing, counsel for Breedlove consented to the entry of a order as to these points regardless of how the Court may rule on the remaining issues.

Through discussions with counsel, the remaining requests for immediate discovery have been distilled to: (i) Plaintiffs' request for access to Breedlove's personal e-mail account; (ii) access to Breedlove's personal computer hard drive in order to discover the fate of the e-mails and attachments; and, (iii) a deposition of Breedlove aimed at discovering what use, if any, he has made of the business information he transferred to his personal computer.

Plaintiffs assert that they will certainly obtain access to this information during normal discovery and that to delay their access to such information could have serious effects on their business. They argue that if the information about clients or business methods reach their current or potential competitors, irreparable harm would be done, given the highly competitive nature of this field. If the information has already been disseminated to others, Plaintiffs wish to take immediate steps to contain the damage. In their view, waiting weeks or months for normal discovery processes will only magnify the damage and perhaps make

containment impossible.

Breedlove argues that granting the requested relief amounts to an affirmative relief request rather than mere maintenance of the status quo, and that access to Breedlove's personal e-mail account is an unwarranted intrusion. He also argues that his wife has an interest in the home computer and that she is not a party to this litigation, and that taking his deposition early would prejudice him in preparing a defense.

This Court has no doubt that it may, in the appropriate case, order immediate discovery where a party makes out a substantial case of harm and where the opposing party would not be unduly harmed or prejudiced. *See, e.g.*, *Jasinover v. The Rouse Company*, 2004 WL 2747382 (Md. Cir. Ct.); *Quotient, Inc. v. Toon*, 2005 MDBT 10 (Md. Cir. Ct.). In this case, Plaintiffs have made a strong showing by affidavit and exhibits that Breedlove transferred some confidential or proprietary information to his home computer through his personal e-mail account. It also appears that there was no legitimate business reason for his having done so, given that his business e-mail account and his business computer could be accessed by him at home or other locations. It also appears there is evidence that in March, Breedlove communicated confidential information to a member of the news media, and that he may have distributed a confidential memo from Mr. Canova to a competitor of

Plaintiffs and to a person who is a witness against the Plaintiffs in federal court litigation. (Pls.' Reply to Def.'s Opp'n to Req. for Immediate Hr'g at 4-5). It is also noteworthy that Breedlove has not offered an alternative explanation for his actions, even through proffers by counsel.

There is no doubt that there are very legitimate privacy concerns for both Breedlove and his wife regarding access to the home computer and to his personal e-mail account. On the other hand, given what the Court has heard so far, it is hard to conclude that discovery regarding the March e-mails will not have to be provided eventually, since it is core to Plaintiffs' claims. Accelerating this discovery will not cause a greater invasion of privacy, but merely allow the needed discovery somewhat earlier than normally required. It is also relevant that identifying and segregating the data at issue early will prevent any spoliation or corruption of the evidence, even of an unintentional nature, that may occur through simple continual usage of the home computer.

Plaintiffs' counsel assured the Court at the hearing that in discussions with Breedlove's counsel prior to the hearing, they have worked out a satisfactory computer forensic protocol and protective order that will provide access for Plaintiffs without unduly invading the privacy concerns of Breedlove and his spouse, should the Court grant the relief requested.

On balance, the Court finds that Plaintiffs have presented sufficient grounds to obtain limited discovery at this time. However, the expedited discovery should be limited to the five March e-mails and attachments. At this juncture, there is no need to provide access to the personal e-mail account for the period prior to March 8, 2006, the date of the first e-mail that Plaintiffs are able to establish. Plaintiffs should have access to any indication that these e-mails or their attachments were forwarded, filed, deleted, copied or otherwise acted upon by anyone since that date. Similarly, they should at this juncture have access to the computer hard drive, but only to the degree that the hard drive might reflect the March e-mails or the attachments in any fashion or format.

Finally, an expedited deposition of Breedlove will be allowed, but again limited to the actions taken regarding the March e-mails and the attachments thereto. Counsel for Breedlove has indicated that a full deposition would be unfair at this juncture since Breedlove, facing a damage claim for up to $10,000,000.00, should have ample time to prepare to defend. While the Court is sensitive to this concern, Breedlove has acknowledged that he did send the e-mails and attachments to his home computer, a practice that is at least unusual and apparently not authorized by standard practice in Plaintiffs' business. Given this, the Court believes the competing

interests are best handled by containing the deposition at this early point to the mechanics of the March e-mails. In other words, Breedlove may be asked about what he did with the e-mails, who he sent or forwarded them to, whether he made any electronic or paper copies or files of them or their attachments, whether he discussed the e-mails or the attachments with anyone and the content of those discussions, and other questions specifically related to the fate of the e-mails, the attachments, or the information contained therein. Such a scope will allow the Plaintiffs to track the trail of the e-mails and the attachments and to determine the degree to which their concern about unauthorized access to business information has been realized, but this scope will not require Breedlove to prematurely explain any justifications or rationales he may have for his actions. This can await a later date.

Counsel shall prepare an Order consistent with this Memorandum.

April 19, 2006

Dennis M. Sweeney
JUDGE

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