

No. 67650-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DICKINSON EQUIPMENT COMPANY, LLC,

Appellant,

v.

NORTHWEST PUMP & EQUIPMENT CO.,
DONALD MAYFIELD aka DAVE MAYFIELD,
and MARK STEINBERGER,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

The present action arises out of the misappropriation of Dickinson Equipment Company's ("Dickinson") trade secrets by Northwest Pump & Equipment Co. ("Northwest Pump") and the violations of Dickinson's noncompete, nondisclosure agreements by Donald Mayfield and Mark Steinberger, former Dickinson employees who went to work for Northwest Pump. In a larger sense, this is a classic case of a big fish in the business world doing everything it can to swallow up a smaller competitor. Rather than buying the smaller competitor, that big fish appropriated the smaller's confidential information and staff talent, trying to squeeze the smaller competitor out of business.

The trial court here initially granted a preliminary injunction to Dickinson against Northwest Pump, Mayfield, and Steinberger where Northwest Pump used Dickinson customer lists and other confidential information obtained by its employment of Mayfield and Steinberger to its advantage. Northwest Pump then ignored the terms of that preliminary injunction and actually destroyed documents, something Dickinson learned only days after Northwest Pump filed its motion for summary judgment.

The trial court reversed its own preliminary injunction and granted summary judgment to Northwest Pump, rewarding that company's

spoliation of evidence in doing so and in denying Dickinson's CR 56(f) motion that would have allowed Dickinson a complete opportunity to address the spoliation issue.

Northwest Pump misappropriated Dickinson's trade secrets it obtained from Mayfield and Steinberger who violated the noncompete and nondisclosure provisions of their employment agreement with Dickinson, their former employer, to facilitate misappropriation by Northwest Pump, their new employer. Summary judgment was highly inappropriate here, given the preliminary injunction, the many fact issues in the case, and Northwest Pump's arrogant post-injunction actions, including spoliation of key evidence.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying Dickinson's CR 56(f) motion.

2. The trial court erred in granting Northwest Pump's motion for summary judgment.

3. The trial court erred in denying Dickinson's motion for reconsideration.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in refusing to grant a continuance on Northwest Pump's motion for summary judgment under CR 56(f) when Dickinson's counsel learned just three days after the filing of Northwest Pump's motion that it had destroyed documents potentially pertinent to its misappropriation of Dickinson trade secrets and illicit competition with Dickinson by use of former Dickinson employees who were violating their noncompete/nondisclosure agreements with Dickinson? (Assignment of Error Number 1)

2. Did the trial court err in granting summary judgment to Northwest Pump on Dickinson's trade secret misappropriation claim where there were genuine issues of material fact on that claim, including Northwest Pump's spoliation of evidence and given the trial court's findings of fact in connection with its preliminary injunction? (Assignments of Error Numbers 2 and 3)

3. Did the trial court err in granting summary judgment to Mayfield and Steinberger on Dickinson's claims for violation of the noncompete and nondisclosure agreement where there were genuine issues of material fact on those claims? (Assignments of Error Numbers 2 and 3)

4. Is Dickinson entitled to its fees on appeal? (Assignments of Error Numbers 1-3)

C. STATEMENT OF THE CASE

Dickinson has been in the air compressor business selling and servicing air compressors and related equipment since 1958. CP 739. In 2006, Ed Tudor bought Dickinson and formed Dickinson Equipment Company, LLC. CP 53. Dickinson continued the employment of the employees of its predecessor company on condition that they agreed to protect Dickinson's confidential information from disclosure to outsiders for two years and to not compete with the Company for one year after termination of employment. CP 69-74, 161, 175. This was further made clear by the provision in the employment agreements in which employees released any claims they had against the former corporation. CP 70, 75.

Tudor hired Dave Mayfield to be Dickinson's director of sales in September 2006. Mayfield knew of Dickinson's confidential information on suppliers, their costs, their strengths and weaknesses; Dickinson's profit margins on its product line; Dickinson's customers, their equipment needs and their needs for parts and services, as Tudor testified:¹

¹ Dickinson maintained sales contact information for each customer, sales prospect, or business inquiry, including information on make and model of equipment, use of equipment, date installed, maintenance done if Dickinson did it, prior parts ordered from Dickinson, frequency of repairs, and other proprietary data. This data was available and used by Dickinson's sales manager, sales staff, and management to prepare sales plans, business plans, and simply to be able to do a better job of representing Dickinson's product line to its potential customers and better service its existing customer. This information was key to Dickinson's economic success. Its investment in this confidential information was over \$2 million. CP 53, 57, 62-63. Mayfield used that information to help develop Dickinson's detailed business plan for 2009. CP 57-58.

2. Defendant Donald (Dave) Mayfield (“Mayfield”) was hired by me and became the Director of Sales and de facto general manager at Dickinson which has been engaged for years in the air compressor equipment, parts, sales and service business. Mr. Mayfield commenced employment with the new Dickinson company on September 1, 2006. Mr. Mayfield was given extensive exposure to all aspects of Dickinson’s business, including Dickinson’s industry, vendors, suppliers and customers. As its Director of Sales, Mr. Mayfield was responsible for all aspects of Dickinson’s air compressor equipment sales, parts, and service business, supervising all sales representatives, and supervising marketing to current and prospective Dickinson customers. He was intimately familiar with Dickinson’s business model, its procedures for selling and servicing air compressor equipment, its cost, pricing, and discounts on the air compressor equipment, parts, and related equipment, its established customers, and its proposals to existing customers and prospective customers for the purchase and sale of air compressor equipment, parts, and servicing agreements. Mr. Mayfield was intimately familiar with Dickinson’s methods and systems of tracking customer account information including those customers who needed replacement air compressors. He was intimately familiar with Dickinson’s product line and possessed the technical know-how to match the needs of the consumer with the right product to meet those needs.

3. As Director of Sales, Mr. Mayfield was intimately familiar with Dickinson’s business plan, its business affairs, Dickinson’s strengths and weaknesses, Dickinson’s marketing plans, and Dickinson employees who could be valuable to him and a competitor in the event a competitive air compressor sales and service business was established in Dickinson’s market. In short, Mr. Mayfield had access to and knew Dickinson’s valuable, confidential, proprietary, trade secret information (“Information”). He was responsible to protect that Information he promised and he promised to keep the Information confidential throughout the course of his employment and thereafter.

CP 53-55.

Northwest Pump, a large company with operations in many states, CP 86-87,² decided it wanted to enter the air compressor market in the Pacific Northwest in light of Dickinson's success. CP 63-64. It determined to do this by hiring away key Dickinson personnel to enter the air compressor market. CP 395-96. In 2009, Dickinson and Sullair, its principal client, discussed and developed Dickinson's three-page typewritten business plan. CP 400, 442-44. Mayfield was privy to that plan. CP 57-58. Mayfield actually met with Northwest Pump and gave it a copy of his Dickinson employment agreement with the confidentiality, nondisclosure and noncompete provisions. CP 163. Northwest Pump hired Mayfield in November, 2009. CP 166, 292, 396.³ Mayfield

² On its website, Northwest asserts it is "America's largest distributor of Petroleum equipment, industrial pumps, and Car Wash systems, plus comprehensive service. Industry leader in the West since 1959."

³ Mayfield's own declarations make clear that he came to Northwest to work in the air compressor field. Mayfield testified that he was hired to work in Northwest's pump sales. CP 166. But he concedes that he serviced Sullair's air compressor customers as Northwest's negotiations with Sullair intensified. CP 166-67. His testimony became even clearer in a later declaration:

When Northwest Pump launched their air compressor division it was expected that I would assist in Northwest Pump's development of its air compressor business, but only in an advisory capacity.

CP 292-93. Clearly, Mayfield was involved in Northwest's plan to compete with Dickinson early on in his employment there. His credibility on that issue could not be resolved on summary judgment *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) ("Credibility issues involving more than collateral matters may

suddenly left Dickinson without giving the 30-day notice required under his employment agreement. CP 58. Tudor reminded Mayfield of his obligations under the confidentiality and noncompete provisions. *Id.* Mayfield assured Tudor that Northwest Pump was not in the air compressor business and was not a threat to Dickinson. *Id.* Tudor followed up that meeting with a January 6, 2010 letter to Mayfield with a copy to Northwest Pump reminding him again of these obligations. CP 79-80.

Tudor met with Gregg Miller, Northwest Pump's president, on January 13 where they discussed Mayfield's activities. CP 60. Tudor sent Miller a letter the next day again reinforcing the terms of Mayfield's employment agreement. CP 82. Miller then sent a revealing letter to Tudor on January 18 in which he stated, quite mistakenly:⁴

Your letter states that Dave could not "... assist Northwest Pump in any way in entering the air compressor business ..." and we do not believe that is a correct statement. Dave is certainly able to help us develop our air compressor business and the only restriction is he cannot contact Dickinson's customers for that one year period. It is our

preclude summary judgment."); *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) ("Summary judgment should not be granted when the credibility of a material witness is at issue.").

⁴ Miller acted as if he was oblivious to the terms of Mayfield's noncompete. Not only was Mayfield precluded from soliciting Dickinson customers in the sales or servicing of air compressors, he was precluded from being an agent or employee of a firm in the air compressor business, CP 69, and he was barred from divulging confidential information from Dickinson directly or indirectly to anyone else. *Id.*

belief there is a large market and certainly Dave will help us deal with both Northwest Pump's existing customers and new customers, as long as they were not Dickinson customers while Dave was there.

CP 84.

Mayfield groomed Mark Steinberger, Dickinson's top salesman, to be his successor as director of sales. CP 58. But Northwest Pump and Mayfield targeted Steinberger to sell air compressors for Northwest Pump. CP 64-65, 407. Steinberger left Dickinson on January 22, 2010, to go "to work with Dave at Northwest Pump," CP 723, after serving as director of sales for little over two months, and, like Mayfield, without giving 30-days notice. CP 61.⁵ Steinberger began selling air compressors for Northwest Pump in March, violating his Dickinson non-compete. CP 369.⁶ Again, Tudor advised Steinberger of his obligations to Dickinson under his employment agreement. CP 61.

Northwest Pump's contention below was that Dickinson was in precarious financial condition and was in peril of losing its principal supplier in the air compressor business, Sullair. CP 162-65, 175-77, 181-

⁵ Steinberger accepted employment with Northwest on January 13, 2010 to sell air compressors and service agreements. CP 396, 727, 740.

⁶ Steinberger sold compressors to numerous Dickinson customers. CP 370-71.

82. Moreover, Northwest Pump argued, Dickinson had changed its form of business, or was allegedly going out of business entirely. CP 209-10.⁷

Northwest Pump's contentions regarding its financial condition were untrue. CP 214-20. They were part of a rumor process initiated by Northwest Pump to undercut Dickinson's customer relations. CP 373-74, 527-28. Those contentions were belied by the fact that Dickinson's air compressor revenues in 2008-09 were healthy with the total reaching more than \$8 million in 2009. CP 403, 456-97. Dickinson sold a record 85 new service agreements in the first six months of 2009. CP 443.

Moreover, Dickinson merely reorganized the way it conducted its business, licensing DEC Services Co., LLC, to utilize its proprietary and confidential information to "provide sales and service to [Dickinson's] customers." CP 313.

Dickinson's Chris Tudor testified that Mayfield lied to him about his involvement with Northwest Pump and Sullair; Mayfield used his knowledge of Sullair, acquired at Dickinson, to advance Northwest Pump's effort to become a Sullair distributor and to displace Dickinson. CP 521-27. Tudor believed Mayfield downloaded Dickinson confidential

⁷ In denying Northwest relief from the preliminary injunction, the trial court found Dickinson's business status was "a disputed issue of fact." CP 234. If this fact figured into the trial court's summary judgment decision, it remained a disputed fact issue.

information into his home computer and used it to later advance Northwest Pump's objectives. CP 523-24. *See also*, CP 554-55, 636-37.

In January 2010, Northwest Pump achieved a significant aspect of its goal to displace Dickinson in the air compressor business when Gregg Miller signed a distribution agreement with Sullair. CP 299. Only a few days after Steinberger's January 22, 2010 departure, Northwest Pump hired former Dickinson service technician John Vansant to service Dickinson customers in Eastern Washington. CP 396, 727, 740. Northwest Pump achieved its ultimate goal a few months later. Sullair terminated its relationship with Dickinson and simultaneously announced its *exclusive* relationship with Northwest Pump in March 2010. CP 342-44.

Dickinson commenced this action on February 22, 2010 in the King County Superior Court against Northwest Pump, alleging violation of the Uniform Trade Secrets Act, RCW 19.108, and against Mayfield, and Steinberger alleging breach of contract, including breach of their Dickinson noncompete and nondisclosure agreements; Dickinson also asserted that the defendants violated the Consumer Protection Act, RCW 19.86. Dickinson asked for injunctive relief and damages. CP 1-17.

Dickinson simultaneously moved for a temporary restraining order ("TRO"), a hearing date on a motion for a preliminary injunction, and

expedited discovery. CP 18-137. Commissioner Nancy Bradbury-Johnson on February 23, 2010 granted the TRO barring Northwest Pump from employing Mayfield and Steinberger and misappropriating and using Dickinson confidential information and employees in the air compressor business. CP 138-50. The TRO also directed Northwest Pump to produce extensive discovery as to Northwest Pump's use of Dickinson information through Mayfield and Steinberger. CP 148-49.

Northwest Pump moved to vacate or modify the TRO. CP 153-57. Commissioner Bradbury-Johnson did not vacate the TRO, but on March 1, 2010 stayed its discovery provisions pending a hearing on Dickinson's request for a preliminary injunction. CP 829.⁸ The case was assigned to the Honorable Jay White for trial.

Dickinson amended its motion for a preliminary injunction in light of Commissioner Bradbury-Johnson's March 1 order to focus on the preliminary injunction issues rather than discovery. CP 158-59. Northwest Pump vigorously opposed a preliminary injunction. CP 160-89. After a hearing on March 12, 2010, the trial court granted Dickinson's request for a preliminary injunction. CP 192-94. The court incorporated by reference paragraphs E and F of the TRO which stated:

⁸ The motion to vacate was the first indication of Northwest's later pattern of behavior in which it filed repeated "motions to clarify" or the like seeking to whittle away at the court's decision.

E. Defendants Mayfield and Steinberger shall neither disclose nor use any confidential and/or trade secret protected information owned by Dickinson, consistent with their confidentiality agreement;

F. Defendant NW Pump shall neither disclose nor use in any means or manner any confidential and/or trade secret protected information owned by Dickinson as outlined in the Mayfield and Steinberger confidentiality agreements.

CP 194. The court enjoined Mayfield and Steinberger from “soliciting any customer of Dickinson during their prior employment with Dickinson.” CP 192. Dickinson’s counsel was directed to submit findings of fact and conclusions of law appropriate for a preliminary injunction.

CP 193. The court noted that Dickinson would likely prevail on its contract breach claims, but indicated that the applicable noncompete provisions did not bar Mayfield’s or Steinberger’s employment by Northwest Pump. *Id.* The court further warned all defendants “that violation of this order likely would increase damages provable at trial.”

Id.

Dickinson presented proposed findings of fact and conclusions of law, to which Northwest Pump objected at length. CP 195-205. Northwest Pump even went so far as to present a further order on the preliminary injunction, which the trial court signed on March 30, 2010.

CP 206-08.

Northwest Pump moved to vacate the preliminary injunction, claiming Dickinson was no longer in business. Dickinson responded, noting that Northwest Pump's assertion was untrue and could have been resolved by a simple call to counsel; Dickinson sought CR 11 sanctions. CP 209-20.

The trial court denied Northwest Pump's motion for relief from the preliminary injunction on April 9, 2010. CP 233-34. The court entered its preliminary findings of fact and conclusions of law on April 23, 2010 in which it stated:

3. The nondisclosure provisions are valid and enforceable. The noncompete agreement is also valid and enforceable, except it is over broad to the extent that it would prevent the employee from any employment where the employee would not use or disclose Dickinson confidential information and would not solicit Dickinson customers. With this exception, defendants are bound by the agreements made by Mayfield and Steinberger.

4. In January 2010, NW Pump openly stated its intention to sue Mayfield "to help us develop our air compressor business," used him for that purpose, and hired Dickinson employee Steinberger to assist in developing its business.⁹

⁹ The court's determination was supported by Mayfield's own testimony in connection with the preliminary injunction in which he indicated that he, in fact, participated in air compressor work for Northwest:

19. I joined Northwest Pump on November 23, 2009 and was aware that Sullair and Northwest Pump were in negotiations. I distanced myself from those negotiations and focused on selling pumps in the northwest of Washington industrial place. I was not hired to, nor was I selling, compressors when I started with Northwest Pump. As negotiations between Sullair and Northwest Pump moved to a point

CP 251-52. The trial court's directive in the preliminary injunction was clear:

Defendants are enjoined: Defendants may not contact Dickinson customer which were customer of Dickinson known to or serviced by defendants Mayfield and Steinberger during their prior employment with Dickinson. Defendants Mayfield and Steinberger shall not disclose and shall not use any confidential and/or trade secret protected information owned by Dickinson, as set forth in their confidentiality agreements. Defendant NW Pump shall not disclose and shall not use in any manner or by any means any confidential and/or trade secret protected information owned by Dickinson, as outlined in the above Mayfield and Steinberger confidentiality agreements.

CP 253.

Northwest Pump also filed a motion to "clarify" the preliminary injunction and findings of fact on March 21, 2011. CP 254-66. The court clarified the scope of the findings in an order dated April 26, 2011. CP 267-68. More than a year after the case was filed, the defendants finally answered Northwest Pump's complaint and counter-claimed against Dickinson on May 19, 2011. CP 269-77.

where both parties were convinced it would probably move forward, there were some customers with immediate needs that contact Northwest Pump or Sullair and asked them to provide services which their current suppliers were unable to assist with. CP 166-67.

Notwithstanding the court's limitation on its actions, Northwest Pump continued to hire key Dickinson employees to carry out its strategy to develop its air compressor business with Dickinson's valuable information and staff. Northwest Pump gave Mayfield an exclusive air compressor sales territory in March 2010. CP 783. On March 18, 2010, just six days after the court's preliminary injunction, Northwest Pump hired Dickinson's service manager, Dot Thayer, to be its lead service supervisor. CP 727. In that capacity, she sent former Dickinson service technicians to service Dickinson customers, despite noncompete, confidentiality, and nondisclosure agreements she and the service technicians had signed with Dickinson. CP 802-03.

By March 2010, in rapid succession, Northwest Pump hired Dickinson's service technician Dave Demers, lead service technician Dave Taylor, service technical Glen Muse, service technician Kurt Ashbridge, air compressor salesman Mike Bartholik, parts manager Don Bertram, and Vice-President J. R. Vaupell. CP 396, 727.

Further, Northwest Pump unabashedly solicited Dickinson customers such as Metagenics and Les Schwab Tires, even after the trial court's TRO and preliminary injunction. CP 724-25, 728-38. Mayfield *admitted* to contacts with Les Schwab. CP 333-34, 417-18, 733-38. Steinberger *admitted* to servicing Metagenics. CP 336. *See also*, CP 724-

25, 729-32. He further admitted to visiting Dickinson customers with former Dickinson service personnel now employed by Northwest Pump. CP 374. Ed Tudor testified to extensive intrusions by both former Dickinson employees into Dickinson's customer base. CP 397-410. Dot Thayer admitted in her deposition that she was intimately familiar with Dickinson customers, their needs for service, and how Dickinson charged for service calls; the skills, training and experience she had at Dickinson were transferable to Northwest Pump; and that she felt she was free to discuss confidential information about Dickinson with the people at Northwest Pump. CP 798-99. She testified that she was servicing 275 of Dickinson's customers while at Northwest Pump. CP 802. Sullair's John Levitsis boasted in his July 8, 2010 review that Thayer and her team of former Dickinson employees were soliciting Dickinson customers for Northwest Pump:

Dot Thayer and her whole team did an absolutely fantastic job getting out before the Sales Blitz and making contact with a lot of the old DEC accounts. . . . We are winning the battle with the Gardner Denver distributor (B & K) over the former DEC service accounts in the Seattle market.

CP 578. *See also*, CP 780.

Northwest Pump moved for summary judgment on June 27, 2011.

CP 278-317. Shortly thereafter, on June 30, after a KCLR 37 meet and

confer conference required before a motion to compel could be filed,¹⁰ Dickinson's counsel discovered that Northwest Pump had been routinely destroying documents relevant to the controversy with Dickinson that had been the subject of the earlier TRO. CP 362, 545. Dickinson moved on shortened time to compel production of documents and for a continuance of Northwest Pump's motion under CR 56(f). CP 537-38. The trial court denied the latter motion, CP 710-11, but granted summary judgment to Northwest Pump, CP 712-14, stating:

After extended colloquy with plaintiff's counsel during oral argument and a further review of the record following the hearing, the court finds that there has been no showing of specific facts establishing that there is a genuine issue for trial and therefore defendants are entitled to summary judgment as a matter of law. Specifically, in addition to the court's consideration of the record as a whole, the strong assertions and opinions offered in the Declarations of Edward Tudor and Chris Tudor lack a factual basis sufficient for a jury to do any more than speculate as to whether there has been any solicitation of plaintiff's prior customers or use of plaintiff's trade secret or confidential information by the defendants in violation of confidentiality and noncompete provisions of the employment agreements entered into by defendants Mayfield and Steinberger during their prior employment by plaintiff as previously enjoined by this court.

CP 714.

¹⁰ Northwest's responses to Dickinson's interrogatories were inadequate, as it did not produce requested documents. CP 543-44, 556-68.

Dickinson timely filed a motion for reconsideration with additional evidentiary materials. CP 715-814. Northwest Pump responded to the motion, asking the court to strike certain portions of the evidentiary materials. CP 816-26. The trial court denied the motion, but, in doing so, considered Dickinson's additional evidentiary materials, declining to strike them. CP 838-39. This timely appeal ensued. CP 830-37, 840-49.

D. SUMMARY OF ARGUMENT

As part of an effort to invade the air compressor market in the Pacific Northwest Pump, Northwest Pump developed a plan to employ former Dickinson employees and exploit their confidential information to Northwest Pump's advantage, driving Dickinson out of the market. The trial court erred in ruling as a matter of law that Dickinson had not proved a prima facie case of trade secret misappropriation under RCW 19.108, particularly given its findings in awarding Dickinson a preliminary injunction and Northwest Pump's spoliation of evidence.

Similarly, Dickinson's noncompete and nondisclosure agreements, signed by Mayfield and Steinberger as a condition of their continued employment with Dickinson, given its new management, were enforceable, as the trial court ruled as a matter of law. The trial court erred in granting summary judgment on the violation of those agreements,

given its findings in support of the preliminary injunction and Northwest Pump's spoliation of evidence.

E. ARGUMENT¹¹

(1) Dickinson Presented a Prima Facie Case of Trade Secret Misappropriation that Should Not Have Been Dismissed on Summary Judgment

Washington adopted the Uniform Trade Secrets Act, RCW 19.108, in 1981. RCW 19.108.010(4) broadly defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The misappropriation of a trade secret occurs when there is

- (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

¹¹ This Court is well-acquainted with the standard of review on summary judgment. A party is not entitled to summary judgment unless there is no genuine issue of material fact and it is entitled to judgment as a matter of law. CR 56(c). A court must construe the facts and all inferences from them in a light most favorable to the nonmoving party, here, Dickinson. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The motion should only be granted "if, from all the evidence, reasonable persons could reach but one conclusion." *Id.* This Court reviews a summary judgment de novo. *Dowler v. Clover Park School Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RCW 19.108.010(2). Improper means are defined as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” RCW 19.108.010(1).

The party claiming a trade secret has the burden of proving the existence of the trade secret and its misappropriation. *Boeing Co. v. Sierrofin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665 (1987). The existence of a trade secret is a question of fact. *Ed Nowogroski Ins. v. Rucker*, 137 Wn.2d 427, 436, 971 P.2d 936 (1999).

Ed Nowogroski Ins. is instructive on how this Court must analyze the trade secret issue present in this case. There, an insurance firm filed an

action against three of its former insurance agents for trade secret misappropriation. One of the employees signed a noncompete agreement upon being hired; another signed a nonsolicitation agreement. The trial court found that the three employees misappropriated trade secrets of the firm and solicited its customers upon their departure from it, awarding damages to the firm. The Supreme Court affirmed the decision that the firm's trade secrets were misappropriated. The defendants there conceded that the firm's customer list was a trade secret "because it derived independent economic value from not being known and had been subject to reasonable efforts to keep it secret." *Id.* at 436. The Court, however, explained in detail in the opinion how customer lists could be trade secrets. *Id.* at 440-42. The Court also discussed how the misappropriation of such customer lists constitutes misappropriation of trade secrets. *Id.* at 440-42. The Court noted that misappropriation of such customer lists as trade secrets occurs where the former employee actively solicits the customers of the former employer. *Id.* at 440 n.4. The customer lists may be trade secrets whether the lists are in writing or in the memory of the former employee. *Id.* at 445-50.

In this case, the record discloses that the trial court agreed with Dickinson and ruled that the customer information Dickinson possessed constituted a "trade secret" within the meaning of RCW 19.108.010(4).

The trade secret was described as follows in the Mayfield and Steinberger confidentiality agreements as:

information regarding the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how, and other vital information.

CP 69-74.¹² In fact, in its motion for summary judgment, Northwest Pump *conceded* these materials were trade secrets because it *nowhere* argued in that motion that these materials were not trade secrets. CP 285-86.

Issues pertaining to the existence of a trade secret and its misappropriation are fact-intensive and often not susceptible to resolution on summary judgment. *See, e.g., Nat'l City Bank N.A. v. Prime Lending, Inc.*, 737 F. Supp.2d 1257 (E.D. Wash. 2010) (bank's confidential customer business information); *Ultimate Timing LLC v. Sims*, 715 F. Supp.2d 1195 (W.D. Wash. 2010) (fact questions as to whether a race timing system was a trade secret and whether trade secret was misappropriated); *Thola v. Henschell*, 140 Wn. App. 70, 164 P.3d 524 (2007) (chiropractor's confidential customer list was trade secret; Act could be violated vicariously); *Pacific Aerospace & Electronics, Inc. v.*

¹² The Tudor February 22, 2010 declaration similarly described the Dickinson trade secrets. CP 54-55.

Taylor, 295 F. Supp.2d 1205, 1211 (E.D. Wash. 2003) (whether customer list is trade secret is fact question).

The trial court apparently concluded that there was insufficient evidence presented by Dickinson to document a misappropriation under RCW 19.108.010(2). The trial court was wrong, both because there was evidence before the court documenting misappropriation *supra* and because of the spoliation of evidence by Northwest Pump described *infra*. The record here is clear that Dickinson's customer information was a trade secret. Moreover, whether Mayfield misappropriated that information to allow Northwest Pump to enter the market to compete with Dickinson is a question of fact. Mayfield *admitted* that when Northwest Pump launched its air compressor division to compete with Dickinson, "it was expected that I would assist in Northwest Pump's development of its air compressor business, but only in an advisory capacity." CP 292-93. Mayfield *admitted* that he aided Northwest Pump to develop air compressor sales in the Washington market and that his experience made this possible, particularly his Sullair experience while at Dickinson. CP 391-92. It defies logic to believe that Mayfield would not use his knowledge of Dickinson's trade secrets to benefit his new employer.

(2) Dickinson Presented a Prima Facie Case of Breach of Contract by Mayfield and Steinberger as to Their Noncompete/Nondisclosure Agreements that Should Not Have Been Dismissed on Summary Judgment

The trial court erred in granting summary judgment to Mayfield and Steinberger on their breach of their noncompete/nondisclosure agreements with Dickinson. Upon their retention as Dickinson employees in 2006, they agreed not to compete with Dickinson should they leave its employ:

7. NONCOMPETE AGREEMENT

Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for the term of this agreement and for a period of one year following the voluntary termination of Employee or the involuntary termination for cause, Employee will not directly or indirectly engage in any business competitive with Dickinson. Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Dickinson for the benefit of a third party that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho and Montana.¹³

CP 69, 74. They further agreed not to disclose any significant information derived from their Dickinson employment to any new employer:

¹³ Nonsolicitation agreements are a form of noncompete agreement. *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp.2d 1205, 1216 (E.D. Wash. 2003).

5. CONFIDENTIALITY

Employee recognizes that Dickinson has and will have information regarding the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how, and other vital information (collectively, "Information") which are valuable, special and unique assets of Dickinson. Employee agrees that the Employee will not, at any time or in any manner, directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without the prior written consent of the Dickinson. Employee will protect the Information and treat it as strictly confidential. A violation by Employee of this paragraph shall be a material violation of this Agreement and will justify legal and/or equitable relief.

6. UNAUTHORIZED DISCLOSURE OF INFORMATION

If it appears that Employee has disclosed (or has threatened to disclose) Information in violation of this Agreement, Dickinson shall be entitled to an injunction to restrain Employee from disclosing, in whole or in part, such Information, or from providing any services to any party to whom such Information has been disclosed or may be disclosed. . . . The confidentiality provisions of this Agreement shall remain in full force and effect for a two-year period after the termination of Employee's employment.

Id. Nevertheless, they violated those agreements.

Washington law has long approved the enforcement of such agreements treating continued employment as sufficient consideration.

Racine v. Bender, 141 Wash. 606, 252 Pac. 115 (1927); *Wood v. May*, 73

Wn.2d 307, 438 P.2d 587 (1968); *Knight, Vale & Gregory v. McDaniel*,

37 Wn. App. 366, 680 P.2d 448, *review denied*, 101 Wn.2d 1025 (1984). In *Racine*, a CPA employee did not sign a noncompetition agreement at any time during his 5-year employment, but, at the end of each week, he was required to prepare and sign a report showing the clients' accounts on which he worked. In the report, above the employee's signature line, was a section entitled "warranty" which contained language to the effect the CPA was not to perform accounting work for any of the clients he served for 3 years after his employment, nor was he to disturb his employer's relationship with those clients. Our Supreme Court held the "warranty" on each report "was ... a basis and a part consideration for future employment" and formed part of the enforceable employment contract.

In *Wood*, a master horseshoer hired an apprentice who, after 2 years, became an effective horseshoer. Although the apprentice signed a noncompete agreement, he left his employment to set up his own horseshoeing business within the proscribed area. The Court held the agreement was supported by consideration because the employer taught the employee the skill of horseshoeing in return for a promise not to compete.

In *Knight*, two employees signed a noncompetition agreement on their first day of work. In response to the employees' contention the agreement lacked consideration, the court held that continued employment

and training were sufficient consideration for an employee's promise not to compete.¹⁴

Washington courts generally enforce noncompete agreements, despite the fact that they restrain trade, so long as they are reasonable in scope—including duration, geographical scope, and covered employment. The test for reasonableness considers “whether or not the restraint is necessary for the protection of the business or good will of the employer,” and “whether it imposes on the employee any greater restraint than is reasonably necessary to secure to the business of the employer, or the good will thereof, such protection.” *Racine*, 141 Wash. at 611-12; *Wood*, 73 Wn.2d at 309. In *Perry v. Moran*, 109 Wn.2d 691, 748 P.2d 224 (1987), for example, our Supreme Court upheld a noncompete for an accountant that was five years in duration post-employment that allowed the employer to elect an alternative of liquidated damages that paid it 50% of any fees generated post-employment for three years by the departing employee from former firm clients. Three-year periods for noncompetes were approved in *Racine* and *Knight*. A five-year period in *Wood* was

¹⁴ In *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), our Supreme Court held that a noncompete agreement entered into after an employee had worked for the employer without new consideration was unenforceable. That situation is not applicable here where Tudor was the new owner of Dickinson in 2006 and considered the employment of all employees afresh at that time.

held to be excessive and the Court remanded the case to the trial court to modify the agreement for a shorter duration. *Wood*, 73 Wn.2d at 312.

The cases cited *supra* regarding a fact question as to the existence of a trade secret and its misappropriation also often involved breaches of employment contract noncompete/nondisclosure provisions. In *Pacific Aerospace*, for example, the court upheld a nondisclosure provision and determined that an employee breached it in soliciting customers of his former employer for his new employer. 295 F. Supp.2d at 1215-20.

In this case, the trial court did not explain why it concluded as a matter of law that Mayfield and Steinberger did not breach the terms of their employment agreements, particularly where there was clear evidence they competed with Dickinson after their departure and communicated confidential information to Northwest Pump to enable it to take Dickinson's business. The trial court ruled that the nondisclosure provision was enforceable. CP 251. It also ruled that the noncompete, though overbroad, was also valid and enforceable as modified by the court. *Id.* The trial court erred in granting summary judgment on this issue.

(3) The Trial Court Erred in Denying Dickinson's CR 56(f) Motion

Washington law permits a party to seek a continuance of a summary judgment motion. CR 56(f).¹⁵ A party may obtain a continuance of the motion to secure necessary affidavits to oppose the motion. *Cofer v. County of Pierce*, 8 Wn. App. 258, 505 P.2d 476 (1973) (witness was ill; trial court abused its discretion in denying continuance); *Cogle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (trial court abused its discretion in denying continuance in medical malpractice case where new counsel appeared to represent plaintiff one week after summary judgment motion was filed); *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671, *review denied*, 150 Wn.2d 1017 (2003) (new counsel). Generally, motions under CR 56(f) are addressed to the trial court's discretion and the exercise of such discretion is reviewed by this Court for its abuse. *Id.* at 299.

The centerpiece to the trial court's exercise of its discretion must be justice. *Cogle*, 56 Wn. App. at 508; *Butler*, 116 Wn. App. at 299. In *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 838 P.2d 111 (1992), for example, our Supreme Court made

¹⁵ CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

clear that parties should be allowed the opportunity to complete discovery, holding the trial court abused its discretion in denying the State a continuance to allow it to do so.

A court may deny a continuance when

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). But the trial court here abused its discretion in denying Dickinson's CR 56(f) motion.

In this case, Dickinson articulated very clearly the evidentiary materials it sought and the reason for them in Gordon Woodley's July 26, 2011 declaration. CP 545-47. Despite being aware of the significance of these materials from the TRO, CP 148-49,¹⁶ Northwest Pump destroyed 15 months of emails that were not only the type of document covered by the TRO, they were entirely within the scope of Dickinson's discovery requests. *Northwest Pump never offered a word of explanation for the*

¹⁶ The fact that Commissioner Bradbury-Johnson stayed the discovery portions of the TRO does not detract from the fact that Northwest was on notice that emails relating to its Dickinson—related activities were significant; the TRO specifically referenced emails. CP 148.

destruction of these highly relevant emails essential to the proof of a case under RCW 19.108.

Plainly, given the fact that Dickinson had a motion to compel production pending in the case because Northwest Pump had not fully answered its discovery requests, and because the spoliation issue was now present in the case, CP 537-646, the trial court abused its discretion in refusing to grant a continuance on Northwest Pump's summary judgment motion to allow Dickinson and the court the opportunity to get to the bottom of the problem regarding Northwest Pump's destruction of evidence. The trial court's order simply denied Dickinson's motion to shorten time on the motion to compel and CR 56(f) motion. CP 710-11. The only insight on the trial court's thought process was its cryptic assertion: "The underlying motion appears untimely in any event." CP 711. It is unclear if that statement references the motion to compel or the CR 56(f) motion. In any event, the CR 56(f) motion was timely. Nothing in the rule establishes a time deadline for motions. Similarly, cases on CR 56(f) do not establish a time deadline.

The trial court's actions run counter to the central truth-finding function of our courts. A party like Northwest Pump should not be permitted to benefit from its apparent misdeeds in destroying evidence.

The trial court had a responsibility to defer a decision on summary judgment until these issues were addressed.

(4) Spoliation of Evidence by Northwest Pump Created Factual Inferences Barring the Grant of Summary Judgment to It

Washington law has long recognized that tampering with witnesses or evidence affects the honesty of a party's case: "It is a rule of evidence, as old as the law itself, applicable alike to both civil and criminal causes, that a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses or the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth." *State v. Constantine*, 48 Wash. 218, 221, 93 Pac. 317 (1908). Thus, if there is relevant evidence under a party's control and that party fails to produce it without satisfactory explanation, the trier of fact may infer such evidence was unfavorable to that party. *British Columbia Breweries (1918) Ltd. v. King County*, 17 Wn.2d 437, 454-55, 135 P.2d 870 (1943). Building upon that general rule, our Supreme Court in *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977) applied it to a case involving the valuation of a property for tax purposes where a county did not preserve the pertinent tax records even though the county had been on notice that the appellant was making such evidence an issue in the case.

The most extensive discussion of the spoliation doctrine is found in *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996). There, Division III defined spoliation as the intentional destruction of evidence, in that case, a wrecked car. *Id.* at 605. Noting that the destruction of evidence was a long-standing problem, but one receiving added attention in recent years, the court held that the doctrine was evidentiary, resulting in a presumption about the significance of such evidence. *Id.* at 605-07. A court must look to the conduct of the party against which the presumption is sought, whether it was under a duty to preserve such evidence, and the significance of the evidence in the case. As spoliation is in the nature of a discovery sanction, the trial court's decision on such a sanction is discretionary and it is reviewed by this Court for abuse of that discretion. *Id.* at 604.

This Court has applied the *Henderson* court's analysis of spoliation. *Ripley v. Lanzer*, 152 Wn. App. 296, 326-27, 215 P.3d 1020 (2009). Similarly, in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999), Division II recognized that spoliation creates a rebuttable presumption that the evidence that has been destroyed was adverse to the destroying party, shifting the burden to that party to demonstrate how the evidence was not consequential in the case. There, the court concluded that a fitness club was not culpable for the destruction

of the CPUs on its fitness machines that were the subject of a personal injuries lawsuit because the destruction of the CPUs were not the result of any bad faith.

The court in *Morris v. Mitsubishi Motors North America, Inc.*, 2011 WL 1085873 (E.D. Wash. 2011) held that where the defendant was on notice of the significance of a vehicle involved in an accident, its sale of the vehicle before its examination by the plaintiff could constitute spoliation as to key components of the vehicle at issue in the case.

The trial court abused its discretion in giving short shrift to the spoliation issue here. Northwest Pump was under a duty to preserve emails and other evidence relevant to its conduct here. Although stayed, the trial court had ordered production of specific documents pertinent to its hiring of Dickinson personnel and aggressive penetration of the air compressor market. CP 148-49. That Northwest Pump had an alleged routine practice of destroying such documents is a matter that should have been the subject of discovery, at a minimum, but such a practice was not justified in light of the court's order. Northwest Pump should have known, at some point in the litigation, it was highly likely such documents would be the subject of discovery and it should have taken steps to preserve such documents. That the documents "disappeared" in the face of this litigation is highly suspicious.

Moreover, the documents were critical to Dickinson's case both as to trade secret misappropriation and breach of contract. Obviously, the best means of demonstrating misappropriation and breach are the contemporaneous documents. The ex post facto testimony of witnesses, unrooted in such documents, can allow those witnesses to create whatever rationalization for their behavior they choose, without fear of impeachment.

In light of the foregoing, summary judgment here was particularly inappropriate. Just as it was an abuse of discretion for the trial court here to deny Dickinson's CR 56(f) motion, it was an abuse of discretion for the trial court not to apply the spoliation presumption that 15 months of Northwest Pump emails would have documented Northwest Pump's misappropriation of Dickinson's trade secrets. This is particularly true where there was evidence, apart from those emails, that created a question of fact on summary judgment as to Northwest Pump's misappropriation. Northwest Pump has offered *no explanation* for its destruction of vital documents. Spoliation applies here.

(5) Dickinson Is Entitled to Its Attorney Fees on Appeal

Under RAP 18.1, a party entitled to attorney fees under "applicable law" must devote a separate section of its brief to the fee request. RAP 18.1(b). Dickinson is entitled to its fees under RCW 19.108.040, which

provides: “If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.” Washington courts have approved fee awards under RCW 19.108.040 where the misappropriation is willful and malicious. In *Sierracin v. Boeing Co.*, 108 Wn.2d 38, 738 P.2d 665 (1987), our Supreme Court upheld a fee award where Boeing successfully proved that a window supplier misappropriated its aircraft window design. *See also, Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 58 P.3d 292 (2002), *review denied*, 149 Wn.2d 1034 (2003) (prevailing party, even if only partially successful, on RCW 19.108 claim is entitled to fees at trial and on appeal).

In this case, if the Court agrees with Dickinson and reverses the summary judgment of dismissal, it could be the prevailing party under RCW 19.108.040. Dickinson is entitled to its fees on appeal.

F. CONCLUSION

Northwest Pump, a large national company, decided to enter the air compressor market locally by seizing and exploiting Dickinson’s expertise and personnel. Northwest Pump enticed key Dickinson personnel to leave that firm and then misappropriated the trade secrets those former Dickinson employees possessed. Those former Dickinson employees

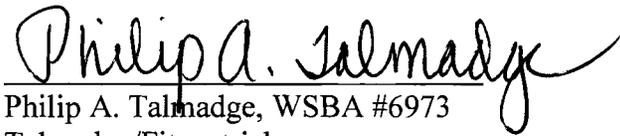
violated the terms of noncompete and confidentiality agreements they signed upon their employment by Dickinson.

There are clear questions of fact regarding both Dickinson's trade secrets misappropriation and breach of contract claims against the various defendants where the record discloses that, undeterred by the trial court's preliminary injunction, RCW 19.108, or the contractual provisions signed by Dickinson's former employees, Northwest Pump aggressively solicited Dickinson's customers and utilized trade secrets gleaned from the former Dickinson employees to do so. This question of fact is made more prominent by the fact that Northwest Pump disclosed shortly after filing its summary judgment motion that it had destroyed key evidence relating to solicitation of Dickinson customers when it was on notice from the trial court that this evidence was important, and the trial court, nevertheless, denied Dickinson's CR 56(f) motion to assess precisely what had been destroyed.

This Court should reverse the summary judgment in Northwest Pump's favor, and remand the case for trial on the merits. Costs on appeal, including reasonable attorney fees, should be awarded to Dickinson.

DATED this 4th day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "Philip A. Talmadge". The signature is written in a cursive style with a horizontal line underneath the name.

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APPENDIX

PRESENT IN PERSON
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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DICKINSON EQUIPMENT)
COMPANY LLC)

Plaintiff,)

v.)

NORTHWEST PUMP &)
EQUIPMENT CO.,)
DONALD MAYFIELD aka)
DAVE MAYFIELD, and)
MARK STEINBERGER,)

Defendants.)

NO. **10-2-07872-0KNT**

TEMPORARY RESTRAINING ORDER,
ORDER SETTING A HEARING DATE FOR
PRELIMINARY INJUNCTION, EXPEDITING
DISCOVERY, AND
ISSUING A PROTECTIVE ORDER

This matter came before the Court on the Dickinson Equipment Company LLC ("Dickinson") motion for issuance of a temporary restraining order, protective order, and expedited discovery. The record on file demonstrates that Dickinson's motion was served upon Defendant Donald (Dave) Mayfield ("Mayfield"), Defendant Mark Steinberger ("Steinberger"), and Defendant Northwest Pump & Equipment Co. ("NW Pump") by service on NW Pump's registered agent. The Defendants received notice of this motion by facsimile as well.

TEMPORARY RESTRAINING ORDER ETC -1

WOODLEY
LAW OFFICES

1 Based on the evidence presented, the Court finds the following facts establish that
2 Dickinson is likely to succeed on the merits of its Breach of Contract claims and
3 Washington Uniform Trade Secrets Act claims and irreparable harm will likely occur
4 without the issuance of a temporary restraining order:
5

6 1. Defendant Donald (Dave) Mayfield was the air compressor Director of Sales and
7 de facto general manager at Dickinson which has been continually engaged in
8 the air compressor equipment, parts, service, and sales business. Mr. Mayfield
9 commenced employment with the new Dickinson company on September 1,
10 2006. Mr. Mayfield was given extensive exposure to all aspects of Dickinson's
11 business, including Dickinson's industry, vendors, suppliers and customers.
12

13 2. As its Director of Sales, Mr. Mayfield was responsible for all aspects of
14 Dickinson's air compressor equipment sales, parts, and service business,
15 supervising all sales representatives, and supervising marketing to current and
16 prospective Dickinson customers. He was intimately familiar with Dickinson's
17 business model, its procedures for selling and servicing air compressor
18 equipment, its cost, pricing, and discounts on the air compressor equipment,
19 parts, and related equipment, its established customers, and its proposals to
20 existing customers and prospective customers for the purchase and sale of air
21 compressor equipment, parts, and servicing agreements. Mr. Mayfield was
22 intimately familiar with Dickinson's methods and systems of tracking customer
23 account information including those customers who needed replacement air
24 compressors. He was intimately familiar with Dickinson's product line and
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1 possessed the technical know-how to match the needs of the consumer with the
2 right Dickinson product to meet those needs.

3 3. As Director of Sales, Mr. Mayfield was intimately familiar with Dickinson's
4 business affairs, Dickinson's strengths and weaknesses, Dickinson's marketing
5 plans, and Dickinson employees who could be valuable to him and a competitor
6 in the event a competitive air compressor sales and service business was
7 established in Dickinson's market. In short, Mr. Mayfield had access to, and
8 knew Dickinson's valuable, confidential, proprietary, trade secret information.
9 He was responsible to protect that trade secret information and promised to keep
10 it confidential throughout the course of his employment and thereafter.
11

12 4. Mayfield's 2006 employment agreement expressly addressed this promise:
13

14 "5. CONFIDENTIALITY.

15 Employee recognizes that Dickinson has and will have information
16 regarding the equipment, software, systems, products, prices, costs,
17 discounts, future plans, business affairs, processes, trade secrets, technical
18 matters, customer lists, product design, technical know-how, and other
19 vital information (collectively, "Information") which are valuable, special
20 and unique assets of Dickinson. Employee agrees that the Employee
21 will not, at any time or in any manner, directly or indirectly, divulge,
22 disclose, or communicate in any manner any Information to any third
23 party without the prior written consent of the Dickinson. Employee will
24 protect the Information and treat it as strictly confidential. A violation by
25 Employee of this paragraph shall be a material violation of this
26 Agreement and will justify legal and/or equitable relief."

27 5. Mr. Mayfield was an integral part of Dickinson's sales force, visiting clients,
28 analyzing their air compressor needs, and specifying particular products, parts,
and service options specifically based on customer needs and preferences.

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6. Mr. Mayfield was deeply involved in developing and maintaining Dickinson's sales tools including a large compilation of information that is proprietary and confidential to Dickinson.

7. Dickinson derives significant value from its sales tools and the compiled information which allow Dickinson to analyze where strategic opportunities in price or product may exist for their customers.

8. In developing these tools and client contacts, Mr. Mayfield learned proprietary and trade secret information on the customers' preferences, the customers' history of purchased product, parts, and service, and the aging of the air compressor equipment in Dickinson's market territory of Washington, Oregon, Idaho, and Montana.

9. Mr. Mayfield had knowledge of all of then current sales proposals and prospects while he was at Dickinson. Mr. Mayfield had knowledge of all of the current orders in Dickinson's pipeline that were to be delivered in the Spring of 2010. Mr. Mayfield was also aware of which products and sales approaches Dickinson decided not to pursue for various business reasons.

10. Mr. Mayfield left Dickinson in November 2009 without giving Dickinson the agreed-upon thirty days advance notice. Before leaving on November 20, 2009, Mr. Mayfield hand-picked Mr. Steinberger to be his replacement as Director of Sales and worked with him to bring him up to speed on the above areas of Dickinson's business affairs, business prospects, and the status of Dickinson's

1 customers' equipment, parts, service, and accounts.

2 11. Mr. Mayfield assured Dickinson principal, Ed Tudor, that Mayfield would not
3 be working in the air compressor business. Mr. Mayfield said he was going to
4 work for NW Pump and NW Pump was not in the air compressor business. Mr.
5 Tudor had not heard of NW before that time.
6

7 12. Dickinson has since discovered that NW Pump was looking to get into the air
8 compressor business and was looking for someone with extensive air
9 compressor business experience who could jump start NW Pump's new business
10 venture in selling and servicing air compressor equipment. Mr. Mayfield was
11 that person and was hired by NW Pump.
12

13 13. By December 20, 2009, Dickinson had received reliable information from
14 vendors and customers that NW Pump was contacting Dickinson's air
15 compressor customers with assistance from Mr. Mayfield. On January 6, 2010,
16 Dickinson wrote both Mr. Mayfield and NW Pump about NW Pump's sales
17 and business overtures to Dickinson customers and asked that both respect
18 Mayfield's confidentiality, non-disclosure, and non-compete agreements that
19 Mayfield made with Dickinson as a condition of his 2006 employment.
20 Dickinson asked them to abide by these agreements and observe the ethical
21 boundaries.
22

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24 14. On January 13, 2010, Dickinson principal Ed Tudor met with NW Pump's
25 principal Gregg Miller urging him to abide by the terms of Mr. Mayfield's
26 agreement with Dickinson.
27

1 15. NW Pump and its key air compressor business employee Mayfield rebuffed
2 Dickinson's efforts to amicably encourage both of them to comply with
3 Mayfield's agreement with Dickinson. On January 18, 2010, NW Pump wrote
4 Dickinson:

5
6 "Dave [Mayfield] is certainly able to help us develop
7 our air compressor business and the only restriction is he
8 cannot contact Dickinson customers for that one year period."

9 NW Pump claimed that it had not reviewed Mr. Mayfield's employment
10 agreement with Dickinson saying, "It would be helpful if you would forward a
11 copy of Dave's non-compete." Dickinson had supplied NW Pump with a copy
12 of Mayfield's agreement with Dickinson on January 14, 2010, when Dickinson
13 wrote NW Pump, reiterating Dickinson's request that NW Pump respect and
14 abide by the terms of Mayfield's agreement with Dickinson.

15 16. On January 22, 2010, Mr. Steinberger, who had been hand-picked by Mr.
16 Mayfield to succeed him as Director of Sales for Dickinson and who was privy
17 to much of the valuable, proprietary Dickinson information that Mr. Mayfield
18 possessed, suddenly announced that he was leaving Dickinson to work with
19 Dave and NW Pump and that January 22, 2010 was to be his last day at
20 Dickinson. Dickinson reminded Mr. Steinberger that he too had agreed to
21 maintain confidentiality, to not disclose Dickinson's Information, and to not
22 compete for one year following termination. Mr. Steinberger told Dickinson to
23 do what it had to do, but he was going to work with Dave and NW Pump.
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17. The agreements signed by Mr. Mayfield and Mr. Steinberger as a condition of their employment were nearly identical and stated in part:

“6. UNAUTHORIZED DISCLOSURE OF INFORMATION

If it appears that Employee has disclosed (or has threatened to disclose) Information in violation of this Agreement, Dickinson shall be entitled to an injunction to restrain Employee from disclosing, in whole or in part, such Information, or from providing any services to any party to whom such Information has been disclosed or may be disclosed. . . . The confidentiality provisions of this Agreement shall remain in full force and effect for a two-year period after the termination of Employee’s employment.

7. NON-COMPETE AGREEMENT

Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for the term of this agreement and for a period of one year following the voluntary termination of Employee or the involuntary termination for cause, Employee will not directly or indirectly engage in any business competitive with Dickinson. Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Dickinson for the benefit of a third party that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho and Montana.

17. Mr. Mayfield and Mr. Steinberger are directly engaged in a business competitive with Dickinson by becoming employees of NW Pump that is engaged in the air compressor business.

18. Mr. Mayfield and Mr. Steinberger have either disclosed or has threatened to disclose Dickinson Information in violation of their Confidentiality Agreement. Each needs to be restrained from disclosing Dickinson Information and from

1 "providing any services to NW Pump or any other party to whom such
2 Information has been disclosed or may be disclosed." Paragraph 6, Employment
3 Agreement. NW Pump was able to ramp up its air compressor sales and
4 service business when it brought on board Mr. Mayfield, with his knowledge of
5 Dickinson confidential, proprietary, trade secret information, to help "develop"
6 its air compressor business. NW Pump is a direct competitor to Dickinson, in
7 all aspect of its air compressor sales and service business.
8

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10 19. Despite reasonable efforts by Dickinson to stop Mayfield and NW Pump from
11 unfairly and wilfully competing with Dickinson, in violation of the
12 confidentiality, non-disclosure, and non-compete agreement, NW Pump has
13 continued its effort to develop its new compressor business by hiring away
14 Dickinson's top air compressor sales person, Mark Steinberger.

15
16 20. Dickinson had taken reasonable measures to protect the Information at issue in
17 this case. As a condition of employment, Mr. Mayfield and Mr. Steinberger each
18 signed an employment agreement upon commencing employment containing
19 certain acknowledgments of valuable, confidential information and each
20 promised to keep the confidential information confidential and to not disclosure
21 such information and not compete with Dickinson.

22
23 21. Both Mayfield and Steinberger voluntarily terminated their employment with
24 Dickinson, without giving Dickinson the thirty-day advance notice required by
25 the signed employment agreement. Both Mayfield and Steinberger breached
26 their contract with Dickinson by failing to give the contractually required thirty-
27

1 day notice, by providing services to NW Pump to which confidential information
2 has been disclosed or may be disclosed, and by becoming an employee of a third
3 party that is engaged in a business competitive with Dickinson.
4

5 22. Both Mayfield and Steinberger threaten to disclose further Dickinson
6 Information in their employment with NW Pump. NW Pump threatens to
7 unjustly enrich itself by using confidential information supplied or threatened to
8 be supplied by Mr. Mayfield and Mr. Steinberger, all causing irreparable harm
9 to Dickinson. Armed with Mr. Mayfield's Dickinson information, NW Pump
10 now has the ability to quickly ramp up and divert substantial business from
11 Dickinson, using information that took Dickinson years and thousands of dollars
12 to develop. NW Pump threatens to further disrupt Dickinson's relations with its
13 business partners including its customers, their goodwill, and their business. A
14 money judgment may not adequately compensate Dickinson for these losses.
15

16 23. Mr. Mayfield and his employment with NW Pump has violated or threatens to
17 violate the express terms of confidentiality, non-disclosure and non-compete
18 agreements, causing irreparable harm to Dickinson, and he should be restrained.
19

20 24. Mr. Mayfield's actions and his employment with NW Pump has resulted, or
21 threaten to result, in the disclosure of Dickinson's trade secrets.
22

23 25. Mr. Mayfield and his employment with NW Pump misappropriates or threatens
24 misappropriation of Dickinson's trade secrets and should be enjoined.
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26 26. Mr. Steinberger and his employment with NW Pump has violated or threatens to
27 violate the express terms of confidentiality, non-disclosure and non-compete
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agreements, causing irreparable harm to Dickinson. He should be restrained.

27. Mr. Steinberger actions and his employment with NW Pump has resulted or threatens to result in disclosure of Dickinson's trade secrets.

28. Mr. Steinberger and his employment with NW Pump misappropriates or threatens misappropriation of Dickinson's trade secrets and should be enjoined.

29. As a result of NW Pump employing Mr. Mayfield to develop it air compressor business, NW Pump may be unjustly enriching itself at the expense of Dickinson, has already misappropriated or threatens to misappropriate trade secrets, and should be enjoined

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

- A. Defendant NW Pump shall not employ Defendant Mayfield for the remaining twelve months of his non-competition agreement, commencing December 20, 2009, thirty-days after his voluntary termination at Dickinson given without the required advance notice;
- B. Defendant NW Pump shall not employ Defendant Steinberger for the remaining twelve months of his non-competition agreement, commencing February 22, 2010, thirty-days after his voluntary termination at Dickinson given without the required advance notice;
- C. Defendant Mayfield shall not serve as an employee providing any other service in the interest of Defendant NW Pump until at least December 20, 2010;
- D. Defendant Steinberger shall not serve as an employee providing any other service in the interest of Defendant NW Pump until at least January 25, 2011;

1 E.. Defendants Mayfield and Steinberger shall neither disclose nor use any
2 confidential and/or trade secret protected information owned by Dickinson,
3 consistent with their confidentiality agreement;

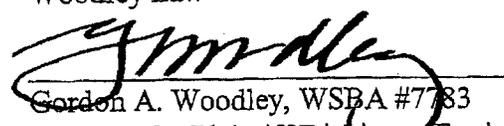
4 F. Defendant NW Pump shall neither disclose nor use in any means or manner any
5 confidential and/or trade secret protected information owned by Dickinson as
6 outlined in the Mayfield and Steinberger confidentiality agreements;

7 G. Within 7 days from the date of this Order, Defendant NW Pump shall produce
8 the following to Dickinson:
9

- 10 1. Documents relating to Defendants Mayfield's and Steinberger's
11 personnel files and employment with NW Pump;
- 12 2. Documents relating to agreements between Defendants NW Pump and
13 Mayfield and/or Steinberger;
- 14 3. Mr. Mayfield's and Mr. Steinberger's payroll information,
15 including pension and profit sharing;
- 16 4. Information relating to Mr. Mayfield's and Mr. Steinberger's
17 recruitment and hiring;
- 18 5. Information including but not limited to Email and text messaging,
19 correspondence, notes, memos, and computerized information regarding
20 a) Dickinson;
21 b) Mayfield or Steinberger's Employment Agreement with
22 Dickinson and/or its Employment Agreement with NW Pump;
23 c) NW Pump wanting to start up an air compressor business;
24 d) NW Pump and its contacts with vendors and suppliers to
25 Dickinson or in the air compressor industry;
26 e) NW Pump and its contacts with Dickinson customers and
27 prospective customers for air compressor business, and
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Presented by:
Woodley Law



Gordon A. Woodley, WSBA #7783
Attorney for Plaintiff Dickinson Equipment Company LLC

American Mediation Center
14929 SE Allen Road, Suite 101
Bellevue, WA 98006
Telephone: (425) 453-2000
Facsimile: (425) 747-3073

Defendants did not appear or respond. NRO

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The Honorable Jay V. White
Presentation of Preliminary Injunction
Findings of Fact and Conclusions of Law
Friday, April 16, 2010 Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DICKINSON EQUIPMENT)
COMPANY LLC)

Plaintiff,)

v.)

NORTHWEST PUMP &)
EQUIPMENT CO.,)
DONALD MAYFIELD aka)
DAVE MAYFIELD, and)
MARK STEINBERGER,)

Defendants.)

NO. 10-2-07872-0 KNT

PRELIMINARY INJUNCTION
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Court on the Dickinson Equipment Company LLC ("Dickinson") Motion for Preliminary Injunction on March 12, 2010, and the Court having considered Plaintiff's Motion for Preliminary Injunction which is based on the Motion for Temporary Restraining Order and the Memorandum in Support of the Motion, the Declaration of Ed Tudor and attachments, the Declaration of Gordon

PRELIMINARY INJUNCTION FINDINGS OF FACT
AND CONCLUSIONS OF LAW-1

EXHIBIT

WOODLEY
LAW OFFICES

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Steinberger and Donald Mayfield with attachment, Plaintiff's Reply, Declaration of Paul McClellan and attachment, and the Supplemental Declaration of Ed Tudor and *Mauff's Note for Rescission, Defendants' Objections, and Plaintiff's Reply* attachments, the Court being fully advised, and for good cause shown, based on the evidence presented, the Court granted in part plaintiff's motion for preliminary injunction by orders dated March 12th and March 30th, 2010, the Court makes the following written findings of fact and conclusions of law:

1. Defendants Mayfield and Steinberger entered into non-disclosure and non-compete agreements as part of their September 1, 2006 employment agreements with Dickinson Equipment Company LLC ["Dickinson"]. Valuable consideration was given for these agreements. Both Dickinson employees promised to protect Dickinson's valuable, confidential, proprietary, trade secret information and to keep it confidential *in part for purposes of a preliminary injunction.*
2. The signed, enforceable 2006 Dickinson employment agreements provided in part:

"5. CONFIDENTIALITY.

Employee recognizes that Dickinson has and will have information regarding the equipment, software, systems, products, prices, costs, discounts, future plans, business affairs, processes, trade secrets, technical matters, customer lists, product design, technical know-how, and other vital information (collectively, "Information") which are valuable, special and unique assets of Dickinson. Employee agrees that the Employee will not, at any time or in any manner, directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without the prior written consent of the Dickinson. Employee will protect the Information and treat it as strictly confidential. A violation by Employee of this paragraph shall be a material violation of this Agreement and will justify legal and/or

PRELIMINARY INJUNCTION FINDINGS OF FACT AND CONCLUSIONS OF LAW-2

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equitable relief.

6. UNAUTHORIZED DISCLOSURE OF INFORMATION

If it appears that Employee has disclosed (or has threatened to disclose) Information in violation of this Agreement, Dickinson shall be entitled to an injunction to restrain Employee from disclosing, in whole or in part, such Information, or from providing any services to any party to whom such Information has been disclosed or may be disclosed. . . . The confidentiality provisions of this Agreement shall remain in full force and effect for a two-year period after the termination of Employee's employment.

7. NON-COMPETE AGREEMENT

Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for the term of this agreement and for a period of one year following the voluntary termination of Employee or the involuntary termination for cause, Employee will not directly or indirectly engage in any business competitive with Dickinson. Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Dickinson for the benefit of a third party that is engaged in sales or service of air compressors in the states of Washington, Oregon, Idaho and Montana."

3. The non-disclosure provisions are valid and enforceable. The non-compete agreement is also valid and enforceable, except it is over broad to the extent that it would prevent the employee from any employment where the employee would not use or disclose Dickinson confidential Information and would not solicit Dickinson customers. With this exception, defendants are bound by the agreements made by Mayfield and Steinberger.

4. In January 2010, NW Pump openly stated its intention to use Mayfield "to help

PRELIMINARY INJUNCTION FINDINGS OF FACT AND CONCLUSIONS OF LAW-3

WOODLEY
LAW OFFICES

14929 SE Allen Road • Bellevue, Washington 98006
(425) 747-0202 • Fax (425) 747-3073

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us develop our air compressor business”, used him for that purpose, and hired Dickinson employee Steinberger to assist in developing its business.

5. ~~Mayfield and Steinberger threaten to disclose Dickinson Information in their employment with NW Pump. NW Pump threatens to use such confidential Information to develop its business, causing irreparable harm to Dickinson. NW Pump now has the ability to quickly ramp up and divert substantial business from Dickinson, using information that took Dickinson years and millions of dollars to develop. NW Pump threatens to further disrupt Dickinson’s relations with Dickinson’s business partners including its customers, their goodwill, and their~~

business. Dickinson does not have an adequate remedy at law and a money judgment will not adequately compensate Dickinson for these losses. Dickinson has a clear legal or equitable right to ensure that its confidential Information not be disclosed and not be used against it. The evidence before the Court including the declarations of Ed Tudor and the attached exhibits demonstrate that Dickinson has a well grounded fear of immediate invasion of that right. The actions of defendants complained of by Dickinson have or will result in actual or substantial injury to Dickinson.

6. The facts establish that Dickinson is likely to prevail at least on the merits of its ^{one of} Breach of Contract claims, separate and apart from its Washington Uniform Trade Secrets Act claims, and irreparable harm will likely occur without the issuance of the preliminary injunction.

PRELIMINARY INJUNCTION FINDINGS OF FACT AND CONCLUSIONS OF LAW-4

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7. The preliminary injunction is necessary at this time. Defendants are enjoined:
Defendants may not contact Dickinson customers which were customers of
Dickinson ^{known to or serviced by} ^{David's Ther} during defendant's Mayfield and Steinberger's prior employment with
Dickinson. Defendants Mayfield and Steinberger shall not disclose and shall not
use any confidential and/or trade secret protected information owned by
Dickinson, as set forth in their confidentiality agreements. Defendant NW Pump
shall not disclose and shall not use in any manner or by any means any
confidential and/or trade secret protected information owned by Dickinson, as
outlined in the above Mayfield and Steinberger confidentiality agreements.

Entered this 23 day of April, 2010.


King County Superior Court Judge Jay V. White

Presented by:
Woodley Law

Gordon A. Woodley, WSBA #7783
Attorney for Plaintiff Dickinson Equipment Company LLC
American Mediation Center
14929 SE Allen Road, Suite 101
Bellevue, WA 98006
Telephone: (425) 453-2000
Facsimile: (425) 747-3073

Copy Received; Approved as to Form only:

Robert J. Miller, Sr. WSBA #32,196
Thomas H. De Buys, WSBA #10,621
Of Attorneys for Defendants

PRELIMINARY INJUNCTION FINDINGS OF FACT
AND CONCLUSIONS OF LAW-5

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IN THE KING COUNTY SUPERIOR COURT
IN KENT, WASHINGTON

DICKINSON EQUIPMENT COMPANY,
LLC,

Plaintiff,

v.

NORTHWEST PUMP & EQUIPMENT CO.,
DONALD MAYFIELD aka DAVE
MAYFIELD, and MARK STEINBERGER.

Defendants.

No. 10-2-07872-0 KNT

GRANTING
ORDER ~~FOR~~ DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

~~RECEIVED~~ *OW*

THIS MATTER having come on regularly for hearing before the Honorable Judge Jay V. White on Motion for Summary Judgment in the above-captioned matter by Defendants Northwest Pump & Equipment Co., Donald Mayfield, and Mark Steinberger, through their attorneys Robert J. Miller, Sr. and Thomas H. De Buys, and the Plaintiff being represented by Gordon Woodley, and the Court having reviewed Defendants' Motion for Summary Judgement Brief, the Declaration of Donald Mayfield, the Declaration of Mark Steinberger, the Declaration of Greg Miller, and the Declaration of Robert J. Miller, Sr. with attachments, Plaintiff Dickinson Equipment Company, LLC's Response Brief and attachments, the Declarations of Ed Tudor, Chris Tudor, Gordon Woodley (2), and exhibits attached to said declarations, the Defendants' Reply to Plaintiff's Response Brief, the Supplemental Declaration of Donald Mayfield, the Supplemental Declaration of Mark Steinberger, and the Declaration of John Levitsis with attachments, and the Court having

GRANTING DEFENDANTS' MOTION FOR *OW*
ORDER ~~FOR~~ SUMMARY JUDGMENT - 1

THOMAS H. DE BUYS

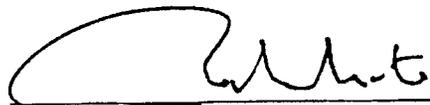
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1 reviewed the records and file herein, and having considered the argument of counsel, now,
2 therefore, it is,

3 *(defendants' judgment)*
4 ~~IS~~ ORDERED, ADJUDGED and DECREED that the motions for summary ~~be granted~~
~~GRANTED.~~ *JW*
5 *JW*

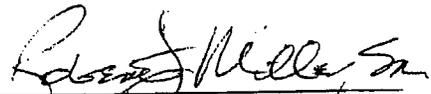
6 DONE IN OPEN COURT this 28th day of July, 2011.

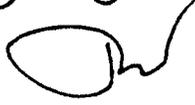
7 
8 Judge Jay V. White

9 Presented by:

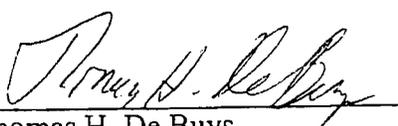
10 LAW OFFICES OF ROBERT J. MILLER, SR., PC

see attached addendum incorporated herein by reference.

11 By 
12 Robert J. Miller, Sr.
13 Attorney for Defendants
14 WSBA #32096

JAY V. WHITE 

15 LAW OFFICES OF THOMAS H. DE BUYS

16 By 
17 Thomas H. De Buys
18 Attorney for Defendants
19 WSBA #10621

20 Approved for Entry:

21 WOODLEY LAW

22 By _____
23 Gordon Woodley
24 Attorney for Plaintiff
25 WSBA #7783

26 *GRANTING DEFENDANTS' MOTION FOR*
ORDER ~~FOR~~ SUMMARY JUDGMENT - 2

ADDENDUM TO ORDER FOR SUMMARY JUDGMENT INCORPORATED BY
REFERENCE INTO THE FOREGOING ORDER

After extended colloquy with plaintiff's counsel during oral argument and a further review of the record following the hearing, the court finds that there has been no showing of specific facts establishing that there is a genuine issue for trial and therefore defendants are entitled to summary judgment as a matter of law. Specifically, in addition to the court's consideration of the record as a whole, the strong assertions and opinions offered in the Declarations of Edward Tudor and Chris Tudor lack a factual basis sufficient for a jury to do any more than speculate as to whether there has been any solicitation of plaintiff's prior customers or use of plaintiff's trade secret or confidential information by the defendants in violation of confidentiality and non-compete provisions of the employment agreements entered into by defendants Mayfield and Steinberger during their prior employment by plaintiff as previously enjoined by this court.

[After the court completed this ruling, it received a working copy of Dickinson's Memorandum Answering the Court's Question On Whether Misappropriation and Misuse of Dickinson's Trade Secret, Confidential Information Was Inevitable, dated July 27, 2011. The court did not consider this pleading, submitted without leave of the court, in reaching its decision.]

OW 7/28/11
JAY V. WHITE

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellant of Clerk's Papers in Court of Appeals Cause No. 67650-4-I to the following:

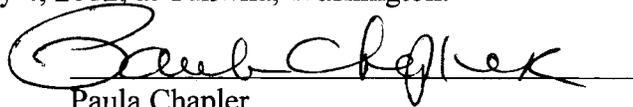
Thomas H. De Buys Law Offices of Thomas H. De Buys 1218 3 rd Avenue, Suite 1000 Seattle, WA 98101	Robert J. Miller, Sr. Law Offices of Robert J. Miller, Sr. P.C. 12275 SW 2 nd Street Beaverton, OR 97005-2829
Gordon Woodley Woodley Law Offices 14929 SE Allen Road Bellevue, WA 98006	Howard M. Goodfriend Law Offices of Smith Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101

Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division I
600 University Street
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 4, 2012, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick