New Jersey • New York • Florida • Colorado

Ronald D. Coleman, Member
Admitted in New Jersey and New York

rcoleman@lawfirm.ms
973.295.3654 Direct

3 Becker Farm Road
Roseland, New Jersey 07068
973.736.4600 Main
973.325.7467 Fax

3 Park Avenue, 16th Floor
New York, New York 10016
212.776.1834 Main
www.lawfirm.ms

June 21, 2018

BY ECF AND LAWYERS SERVICE

Hon. Anne E. Thompson, U.S.D.J.
United States District Court
District of New Jersey
402 East State Street, Room 2020
Trenton, New Jersey 08608

Re: Scherer Design Group, LLC v. Ahead Engineering, LLC *et al*.
Dkt. No. 3:18-cv-03540-AET-DEA

Dear Judge Thompson:

As Your Honor knows, we represent plaintiff Scherer Design Group, LLC ("SDG") in this matter. Please accept this letter brief in reply to the opposition to SDG's application for a preliminary injunction, scheduled for telephonic oral argument on July 11, 2018.

PRELIMINARY STATEMENT and STATEMENT OF FACTS

Defendants' opposition brief is largely premised on the repetition of legal arguments already rejected by the Court (*see* Oral Argument Transcript of April 3, 2018 at 25:19 to 26:2, 43:1 to 44:3) and factual assertions that are either irrelevant to the legal issues, readily negated by the documentary record, or based on fantastic speculation. Ignoring the law of the case doctrine, defendants refuse to come to terms with the fact that – consonant with every court that has considered the question – this Court has already determined that SDG was entitled to read the Facebook messages left open by Daniel Hernandez on his work computer. For that reason, it is irrelevant to defendants' liability whether Jason Gerstenfeld was justified in clicking every link he clinked on Hernandez's SDG computer.

The attempt to reargue this closed issue under the guise of the unclean hands doctrine is ironic, considering it is defendants who the thieves are here. The irony is enhanced by the

misrepresentation in their brief to the effect that Mr. Gerstenfeld used a program that recovers lost passwords – a patently false assertion for which **there is no evidence whatsoever**.[1] Mr. Gerstenfeld's two declarations about what he did and what he saw on Hernandez's computer remain unrebutted by facts of record (ECF 1 at 41-45; ECF 38-6), as opposed to speculation or misrepresentations.

Defendants also place great stock in their claim that ExteNet dropped SDG because of serious quality problems combined with the "refusal" of SDG to do new ExteNet work. The record now before the Court, however, demonstrates that this tale, along with a phony paper trail, was created by Ahead Engineering with the cooperation of ExteNet's Sam Compton.

LEGAL ARGUMENT

I. DEFENDANTS FAILED TO PRESENT NEW FACTS TO DEMONSTRATE WHY SDG IS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

Defendants rely on what they consider "new facts" from discovery. None of the factual claims on which they rely, however, are availing to them here.

1. Defendants failed to rebut SDG's trade secret claims.

In their brief in opposition to the preliminary injunction, defendants repeat their failed argument regarding the adequacy of SDG's precautions, trotting out the same routine as before regarding the existence of written policies, the lack of non-disclosures, and the like. These facts are not in dispute, but are irrelevant here. As set out in detail both in the Verified Complaint and Paragraphs 65 to 68 of the Declaration of Colleen Connolly, the "precautions" argument is irrelevant here because there is no evidence of any outside party obtaining this information **but for** the conduct of insiders Chad Schwartz, Ryan Waldron, Kyle McGinley, and Daniel Hernandez. Regardless of the level of security at SDG, each defendant would have had, and did have, complete access to the SDG material stolen. Moreover, as Ms. Connolly notes, these defendants hardly needed written policies to know they were taking valuable proprietary information from SDG, given their familiarity with the engineering field. Connolly Decl. ¶55.

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[1] It is impossible not to draw the Court's attention to the specific misrepresentation on page 7 of defendants' brief. Defendants state that Mr. Gerstenfeld used a software tool to recreate deleted browsing history, which is not controversial or improper. Db7. They observe that "a simple review of www.nirsoft.net's homepage further reveals that it also has password recovery tools." *Id.* There is **absolutely no evidence** that Mr. Gerstenfeld used or bought such a product, but defendants then go on to assert: "Stated differently, SDG, for the sole purpose of looking at Mr. Hernandez's private and personal history, **utilized a program that both**: (1) recreated deleted browsing history and (2) **recovered lost passwords**." This is nothing more or less than a false representation to the Court because there is no evidence of the purchase or use of such software by SDG, and indeed Mr. Gerstenfeld testified at this deposition that the only software from Nirsoft used by SDG is a tool for browsing history recreation. (Kistler Decl., Gerstenfeld Dep. 78:2 – 17).

As noted in SDG's reply brief on the temporary restraining order, "even if [the plaintiff] had employed all of the precautionary measures suggested . . . those measures would likely not have prevented [its] former employees from surreptitiously downloading information from computer files and stealing other confidential information and using it to jump-start [the new] business. . . . [T]he misappropriation was the result of misplaced trust, not lax security."" (ECF 9 at 10-11 (citing *Patriot Homes, Inc. v. Forest River Hous., Inc*., No. 3:05-CV-471, 2007 WL 2782272, at *3 (N.D. Ind. Sept. 20, 2007)).

Very conspicuously absent from defendants' opposition is any denial -- in fact, any mention of -- the tens of thousands of sensitive electronic files lifted wholesale from SDG. *See* Declaration of Brian M. Block ¶¶4-5. The documents produced to SDG in expedited discovery, pursuant to its request for, among other things, all SDG documents taken between December 1, 2017 and January 18, 2018, included, amongst the 77,732 files produced: (1) 8,307 SDG client documents spanning several years; (2) 68 Tilson client drawings documents dating from January 2018, the same time period that Daniel Hernandez declared on the Facebook messenger that he had downloaded Tilson documents to a flash drive (Verified Complaint ¶¶87-91) and changed SDG's password to access Tilson intranet (Connolly Decl., Hernandez Dep. 29:7 to 30:21); and (3) the entire SDG email account of Daniel Hernandez from mid-2016 to January 2018 and the entire SDG email account of Kyle McGinley up to January 2018, meaning, of course, that both defendants downloaded and removed all of their SDG emails and included files prior to leaving SDG. Block Decl. ¶¶3-5.

Because the facts regarding the defendants' complete abuse of SDG's trust are clear and defendants do not contest their wholesale transfer of sensitive SDG files, SDG is, as the Court found before, likely to succeed on the merits on its trade secrets claim.

2. <u>Defendants failed to rebut the basis for SDG's tortious interference claims.</u>

As the Court found in issuing its temporary restraining order, SDG does not need to prove prospective interference with every specific SDG client to justify granting an injunction. The purpose of such an injunction sought here is to prevent future harm based on past conduct. All SDG needs to show is "a deliberate plan" on the part of the new employer and a plaintiff's former employees "to cause damage to [the original employer] through diversion of its customers . . ." *Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 305 (Law. Div. 1995). This SDG has readily shown.

Defendants nonetheless claim that the "only" contractual relationship shown to have been interfered with is the one with Extenet, and then launch into the story they concocted to explain away that interference. The Waldron-Schwartz texts submitted by SDG last week demonstrate just how malicious a lie that story is and how utterly devoid of credibility is the testimony of their

confederate, Sam Compton.[2] The record also shows facts admitted to by Hernandez amount to interference on behalf defendant Far Field Telecom (in which he is a partner with defendants Schwartz and Waldron) with SDG's client Tilson. This, again, refers to the matter of Hernandez's (1) deliberate ignoring of multiple work orders from Tilson beginning in December of 2017, after he joined with defendants in competing with SDG and (2) unauthorized cutoff of SDG's access to Tilson's extranet site to prevent SDG from accessing necessary site files for the admitted purpose of directing that work to Far Field. (Connolly Decl. ¶¶16-38; *Exhibit B* to Connolly Decl., Hernandez Dep. 29:7 to 30:21).

As SDG's forensic experts observed, moreover, the quantity of files accessed on SDG's network by the defendants numbered in thousands beginning in November of 2017, and the frequency of that access "appears to increase over time. In addition to placing and accessing company files on USB drives, link files reflect access to company files in a directory structure used with the Dropbox desktop client . . . used to interact with the Dropbox cloud service where users can store and share files." (*Exhibit A* to Block Decl., ProActive Report at 12). Notably, among the thousands of files relating to SDG clients accessed by Hernandez between November 14, 2017 and January 16, 2018 – the majority occurring between Jan 9, 2018 and January 16, 2018 – Tilson, whose SDG work he was ignoring, was one. (*Id.*, ProActive Report at 4). In the face of all this, for their part defendants have come forward with no basis in the record for the Court to reconsider its earlier findings, based on the damning record submitted by SDG, regarding SDG's likelihood of success on the merits on its interference claim.

3. **Defendants failed to rebut SDG's claims based on breach of the duty of loyalty.**

Defendants spend over a page of their brief arguing that SDG cannot succeed on its claim for breach of the duty loyalty against defendant Schwartz because he was not an employee of SDG. But the duty of loyalty is not dependent on one's status as an "employee"; the duty of loyalty runs, instead, from agent to principal, as the district court explained in *Archer & Greiner, A Professional Corp. v. Rosefielde*, No. 1:16-CV-04023, 2017 WL 2539389, at *5-6 (D.N.J. June 12, 2017). Schwartz was not an employee as of December 8, 2017,[3] but there is no dispute that he remained a handsomely paid SDG sub-consultant. In any case, while he was free to fairly compete with SDG after his exit in December, "New Jersey imposes civil liability for knowingly aiding and abetting an agent's breach of a duty of loyalty to its principal." *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 634 (3d Cir. 2007). Neither Schwartz nor his companies Ahead Engineering and

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[2] Remarkably, neither defendants nor third-party Extenet, which SDG subpoenaed, has produced emails between defendant Schwartz and Compton via their private email accounts during this time period.

[3] That is not to rule out a claim against Schwartz for direct liability for breach of the duty of loyalty as an employee. SDG's forensic report notes that Schwartz's "Dear Glenn" resignation letter was first created on November 9, 2017, several weeks before his resignation, and a wide variety of SDG files were downloaded by him onto removable media beginning on November 1, 2017. (*Exhibit A* to Block Decl., ProActive Report at 20).

Far Field Telecom and their other principals were free to induce, aid, abet, direct or benefit from the disloyalty of the other defendants, which the record amply demonstrates they did.

Defendants remarkably proclaim that McGinley was never disloyal to SDG. Db23. Yet, McGinley does not deny telling his Far Field Telecom partner Taqi Khawaja, "let me know if you need me to access the server to send an example. I'll also look for NJ, NYC, NYS and PA non-ExteNet sites for reference" on December 29, 2017, or announcing, "I'm reaching out to CAD outsourcing companies and would like to indicate our experience in the telecom world" on December 27, 2017. (Verified Complaint ¶¶94-95). The damning December 29, 2017 emails transmitting SDG files produced in discovery corroborate McGinley's transmission of SDG files to Taqi, cementing the conclusion that his conduct was disloyal in the extreme. (*Exhibits C and D* to Connolly Decl.).

It is also remarkable that defendants would proclaim that Waldron never acted contrary to SDG's interests during the course of his employment. Db24. In fact, the evidence shows that Waldron competed directly against SDG on the Extenet sites diverted from SDG to Schwartz's companies; helped the new companies get more Extenet sites while still working for SDG; told Hernandez what files to copy on January 9, 2018; and followed up McGinley's "access to the server" offer by writing, "I should have some Extenet examples. I'll send a few of them over to Taqi soon." (Verified Complaint ¶¶78, 87 and 94). Waldron also followed Schwartz's orders to implement Sam Compton's "find the fuckups" project weeks before he resigned.

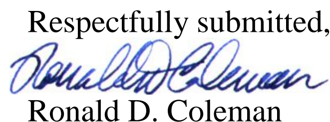
And for his part, Hernandez repeatedly downloaded and transmitted SDG data and information to the individual and corporate defendants while ignoring work orders from SDG to Tilson. (Verified Complaint ¶¶85-88, 91-92). SDG's forensic examiner found McGinley, Hernandez, and Waldron used their SDG work computers extensively to access the Outlook mail system of SDG's competitor defendant Far Field. (*Exhibit A* at 30 to Block Decl.).

Finally, damages can be recovered against a third party for inducing employee disloyalty. *See VFB LLC*, 482 F.3d at 634; *Callmann on Unfair Competition* §14:42 (2003). These defendants acted on behalf of their new companies, the corporate defendants in this case, and inducement by Schwartz is clear from the record, right up through his command that Waldron "go to the bathroom and then just walk out" instead of cooperating with SDG, as promised, during Waldron's next-to-last day of employment on January 18, 2018. (Connolly Decl. ¶71). Waldron duly obeyed.

<u>CONCLUSION</u>

For the foregoing reasons this Court should issue the preliminary injunction sought by SDG.

Respectfully submitted,



Ronald D. Coleman