

# The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

**Vention Medical Advanced Components, Inc. d/b/a Advanced Polymers, a  
Vention Medical Company**

v.

**Nikolas D. Pappas and Ascend Medical, Inc.**

**NO. 2014-CV-604**

## **ORDER**

Plaintiff, Vention Medical Advanced Components Inc. d/b/a/ Advanced Polymers, a Vention Medical Company (“Advanced Polymers”), has brought an action against the Defendants, Nikolas D. Pappas (“Pappas”) and Ascend Medical, Inc. (“Ascend”), seeking to enjoin both Defendants from utilizing certain trade secrets belonging to it and barring Pappas from directly or indirectly designing, manufacturing, producing, selling, or consulting regarding medical balloons until such time as this case may be finally adjudicated. Based on the preliminary injunction hearing held in this matter, which was conducted on offers of proof and testimony of certain witnesses, the Court finds, on a preliminary basis, that Defendants are using proprietary information within the meaning of the Employee Invention Assignment and Confidentiality Agreement executed by Pappas and therefore enjoins the Defendants from engaging in the design, manufacture, production, and/or sale of ultra-thin walled heat shrink tubing as further defined in this Order, pending resolution of this case. However, the injunction is conditioned upon Plaintiff providing a bond in the amount of \$350,000 to

compensate Defendants for damages caused by the injunctive relief granted should Plaintiff fail to succeed at trial.

## I

Plaintiff brought a petition for a preliminary injunction on an *ex parte* basis against the Defendants on October 23, 2014. The petition was denied on an *ex parte* basis, and hearings on Plaintiff's request for preliminary injunctive relief were held on November 17, 2014, November 18, 2014, and December 3, 2014.

Injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted. Kukene v. Genualdo, 145 N.H. 1, 4 (2000). Specifically, a "preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (citation omitted). In order to obtain a preliminary injunction, a party must show that: (1) a present threat of irreparable harm exists; (2) there is no adequate remedy at law; and (3) there is a likelihood of success on the merits. ATV Watch v. N.H. Dep't of Resources & Econ. Dev., 155 N.H. 434, 437 (2007) (citation omitted).

The preliminary injunction hearing was conducted by offers of proof, with both parties having the opportunity to present evidence in circumstances where the evidence was in dispute. The Court suggested that the parties engage in limited discovery and then have an evidentiary hearing on the request for preliminary relief, but the parties were unable to enter into an agreement to do so. However, both the principal of Advanced Polymers, Mark Saab ("Saab"), the principal of Ascend, Pappas, and several other witnesses testified. The Court's factual findings made in this Order, based on the offers of proof and testimony, are preliminary in nature and subordinate to any findings

that will be made after a full hearing on the merits.<sup>1</sup>

Advanced Polymers is a medical components manufacturer in the medical device industry that makes three niche products: highly specialized medical balloons, specialized medical tubing, and polyethylene (“PET”) and non-PET (urethane) heat shrink tubing. Advanced Polymers was founded in 1989 by Saab and his wife, Elisia Saab. The company was acquired by Vention Medical Holdings in 2010, and the value of the corporation was substantially comprised of Advanced Polymers’ proprietary and confidential medical balloon and heat shrink tubing technology.

Saab graduated from the University of Massachusetts-Lowell with a degree in plastics engineering in 1981. He worked in the field of medical instrumentation for several years and began working on ultra-thin heat shrink tubing while working on his thesis for his master’s degree at the University of Massachusetts. He ultimately chose not to publish his thesis and forego receiving his master’s degree in order to retain the confidentiality of the information he had developed involving the heat shrink tubing, which is one of the principal products of Advanced Polymers. According to the testimony and exhibits introduced at the hearing, Advanced Polymers is able to produce tubing that is the strongest and smallest heat shrink tubing in the world for use in the medical device industry and other industries. Advanced Polymers has developed a

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<sup>1</sup> Because of the confidential nature of the trade secrets claimed by the parties, the Court has placed the entire file under seal. However, the Court made clear in doing so, its sealing order would be preliminary in nature and subject to the right of the public to access to court documents. Accordingly, the Court orders that within 30 days of the Clerk’s Notice of Decision, the parties shall meet and confer and advise the Court as to what portions of the file, including transcripts and exhibits, must be sealed and what portions of the file may be made public. If the parties cannot agree on a certain document then the parties shall brief the issue and the Court will make the determination as to whether any document, to which a claim of confidentiality is made, is confidential.

software program which allows it to design, manufacture and track all of the data for every device it has manufactured. Advanced Polymers is able to run regression analyses on data, which allows it to generate equations to calculate and optimize the parameters used to design new products. Pappas was privy to this data and the formulations during his employment at Advanced Polymers.

Advanced Polymers takes a multitude of steps to maintain the confidentiality of its technology and business efforts. Employees are prohibited from seeing data and financial information apart from a “need to know basis.” Even the CEO of Vention Medical does not know, nor has he seen, how Advanced Polymers makes heat shrink tubing. All of Advanced Polymers’ sales representatives are required to sign confidentiality agreements. Advanced Polymers, as an original equipment manufacturer (OEM) for medical device manufacturers, keeps its business and financial information, such as customer contacts and lists, profit margins, and sales volumes confidential. Advanced Polymers holds exclusive manufacturing and supply agreements with several customers, which require that it not share its technology in specified fields with other companies.

Pappas began working for Advanced Polymers in 2004 as a plastics engineer, after receiving a bachelor’s degree in plastics engineering from the University of Massachusetts-Lowell. Prior to beginning his employment, he executed an “Employee Invention Assignment and Confidentiality Agreement” (“Agreement”). The Agreement provided in relevant part:

**5. Proprietary Information.** I understand that my employment by the Company creates a relationship of confidence and trust with respect to any Proprietary Information.

At all times, both during my employment and after its termination, I will

keep and hold all such Proprietary Information in strict confidence and trust, and I will not use or disclose any of such Proprietary Information without the prior written consent of the Company, except as may be necessary to perform my duties as an employee of the Company.

Upon termination of my employment with the Company, I will promptly deliver to the Company all documents and materials of any nature pertaining to my work with the company and I will not take with me any documents or materials or copies thereof containing any Proprietary Information.

(Agreement at 2–3.) “Proprietary Information” is defined in the Agreement as:

[I]nformation of a confidential or secret nature to which I may have access or which may be disclosed to me by the Company that relates to the business of the Company (or any parent, subsidiary, affiliate customer, contractor or supplier of the Company) or any other party with whom the Company agrees to hold information of such party in confidence, and includes, but is not limited to, Inventions, Intellectual Property Rights, Moral Rights, marketing plans, product plans, business strategies, financial information, forecasts, personnel information and customer lists.

(Id. at 1.)

The Agreement also contains a noncompetition agreement provides, in relevant part:

6. **Noncompetition.** The Employee hereby covenants and agrees with the Company that the Employee will not, at any time during the term of the employee’s employment with the company, or for a period of sixty (60) months thereafter directly or indirectly, for himself or on behalf of any person, corporation, association or other entity, other than the Company, engage in the business of, for profit or otherwise, the manufacture or sale of products or technology for polyester heat shrink tubing and/or balloons and/or the manufacture or sale of products or technology for extrusion filtration, at any place or places in the world. The Employee understands that the Company has customers and/or the ability to generate customers throughout the world and/or that its products and/or technologies are of such a nature that they could have worldwide market and hereby agrees that this worldwide geographic scope is reasonable and proper under the circumstances and therefore waives any challenge to the reasonableness of said scope . . . .

(Id. at 3.) The Agreement states that it is governed by New Hampshire law. (Id. at 4.)

Pappas had access to Advanced Polymers’ entire balloon technology and heat

shrink tubing technology while he worked at Advanced Polymers. By 2012, because of his senior position within the company, he was allowed intimate and unfettered access to both technology and confidential financial information, including customer lists, product costs and profit margins, product sales, product volume data, and product specifications.

Pappas worked for Advanced Polymers until December 2013. He then formed Ascend in January 2014. According to its website and marketing data, Ascend manufactures medical grade nylon heat shrink tubing in the same ultra-thin sizes as Advanced Polymers. Advanced Polymers is able to produce products with tensile strength two to ten times the industry norm. Within eight months after leaving Advanced Polymers, Pappas and Ascend began marketing tubing products that are virtually identical in size and have the same properties as Advanced Polymers' products.

## II

New Hampshire has enacted the Uniform Trade Secret Act ("UTSA") as RSA 350-B ("NHUTSA"). NHUTSA generally prohibits misappropriation of trade secrets. "Misappropriation" is defined in relevant part as use of a trade secret of another without express or implied consent by a person who knows or has reason to know that the trade secret was acquired by improper means. RSA 350-B:1, II(a). A trade secret is defined as information that "derives independent economic value . . . 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 "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1, IV.

It is generally said that to prevail in trade secret litigation, the claimant must establish the following: (1) it is the owner of matter that qualifies as a trade secret; (2)

the information has been received by the other party in a protected relationship, such as one with a contractual duty not to disclose, or a relationship that the law regards as a confidential one, such as employer-employee, or was taken in an unlawful manner; and (3) the other party has used or is about to use the information to plaintiff's detriment. See R. Milgrim, Trade Secrets § 15.01[1] (2014) (hereafter "Milgrim"). While RSA 350-B:2, I authorizes injunctive relief, such relief can only be granted upon a showing which would allow a court to award injunctive relief in any other case.

Here, there is no dispute that Pappas was an employee of Advanced Polymers. Many courts recognize a contractual obligation of employees to assume a duty of confidence with respect to information acquired through the employment that the employee knows or has reason to know is confidential. See, e.g., Henry H. Perritt, Jr., Trade Secrets: A Practitioner's Guide § 6:5.3 (2d ed. 2014) (hereafter "Perritt"). However, parties may also create a confidential relationship through express agreements, which are essentially contracts. Id. § 6:4.1.

Pappas signed a broad confidentiality agreement that prohibited him from utilizing confidential information belonging to Advanced Polymers. Defendants make a number of arguments that the Agreement between the parties does not provide a basis for relief because it is unenforceable. However, their arguments improperly conflate the analysis of the noncompetition provisions and the trade secret provisions of the Agreement.

The thrust of Defendants' arguments with respect to the unenforceability of Agreement is that section six of the Agreement, which purports to prohibit Pappas from competing with Advanced Polymers worldwide for 60 months, is unenforceable because it is "so broad and unreasonable as to both duration and geographic scope that it cannot

be enforced at all.” (Defs.’ Mem. at 22.) Defendants argue that Plaintiff “specifically seeks to apply its draconian restrictions to ‘extrusion filtration’ technology, even though Mr. Pappas was only involved with medical catheter balloons and, for a short period, polyester tubing, and never worked in the extrusion department.” (Id. at 23.) Defendants argue that “these restrictions also go far beyond what is necessary to protect any legitimate interest of [Plaintiff].” (Id.) They then conflate the analysis for noncompetition agreements and improper trade secret use:

Plaintiff also cannot legitimately ask the Court to use the “Proprietary Information” provisions contained in Section 5 of the Agreement as a substitute for an enforceable covenant not to compete, particularly where the effect would be to unduly restrict competition and preclude Mr. Pappas from engaging in any aspect of the medical tubing industry anywhere in the world and for an indefinite period of time.

(Id.) (emphasis in original).

While Defendants’ arguments with respect to the noncompetition provision at issue here may have merit, those arguments are inapplicable to the Plaintiff’s claim of misappropriation of trade secrets.

#### A

The public policy of New Hampshire encourages free trade and discourages covenants not to compete, which are generally considered to be in restraint of trade. Concord Orthopaedics Prof’l Ass’n v. Forbes, 142 N.H. 440, 443 (1997). For that reason, such agreements are narrowly construed. Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 197 (2005). Restrictive covenants are valid and enforceable if they are supported by consideration, and if the restraint is reasonable, given the particular circumstances of the case. Id. The New Hampshire Supreme Court has specifically held that continued employment constitutes consideration for a covenant not to compete.



Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 683 (1979).

To determine the reasonableness of a covenant not to compete, the New Hampshire Supreme Court has applied a three-pronged test: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. Syncom Indus. v. Wood, 155 N.H. 73, 79 (2007). This three-part test apparently finds its genesis in the Restatement (Second) of Contracts. See Technical Aid Corp. v. Allen, 134 N.H. 1, 8 (1991) (citing Restatement (Second) of Contracts § 188).<sup>2</sup>

The first step in determining the reasonableness of a restrictive covenant is to identify the legitimate interests of the employer, and to determine whether the restraint is narrowly tailored to protect those interests. Merrimack Valley Wood Prods., 152 N.H. at 197. The New Hampshire Supreme Court has stated:

Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of the employment; confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image.

Syncom Indus., 155 N.H. at 79 (quoting Nat'l Employment Serv. Corp. v. Olsten Staffing Serv., 145 N.H. 158, 160 (2000)). Employers also have a legitimate interest in protecting information about their customers gained by employees during the course of their

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<sup>2</sup> The Restatement takes the position that a restraint that is ancillary to an otherwise valid transaction or relationship is an unreasonable restraint of trade if one of two conditions is present. The first condition is that the restraint is greater than necessary to protect the promisee's legitimate interest. The second is that the promisee's need was outweighed by the hardship to the promisor and the likely injury to the public. If these conditions are not present, the covenant cannot be ancillary to an otherwise enforceable agreement and is simply a naked restraint of trade. Restatement (Second) Contracts §188.

employment. Technical Aid Corp., 134 N.H. at 9.

The noncompete agreement at issue in this case purports to restrict Pappas from “engaging in the business of, or profit or otherwise, the manufacture or sale of products or technology or polyester heat shrink tubing and/or balloons and/or the manufacture or sale of products or technology for extrusion filtration, at any place or places in the world.” (Agreement ¶ 6.) The New Hampshire Supreme Court has specifically held that when the employer seeks to protect its goodwill with customers, a covenant that restricts the former employee from soliciting business from *prospective* customers sweeps too broadly. See Syncom Indus., 155 N.H. at 80; see also Concord Orthopaedics, 142 N.H. at 443 (holding that restrictive covenant prohibiting physician from competing with former practice for new patients was overbroad). Literally read, the agreement would prohibit Pappas from working in any part of an industry in which he is qualified to work, without regard to whether his obligations under the confidentiality requirements of the Agreement would be affected. Moreover, there is no evidence before the Court from which the Court could find that a 60 month restriction is reasonable.

However, the fact that the noncompete agreement is overbroad is not the end of the matter in New Hampshire. In New Hampshire, unlike some jurisdictions, a noncompetition agreement that is overbroad may, in some circumstances, be narrowed and enforced. Concord Orthopaedics, 142 N.H. at 442; Restatement (Second) of Contracts § 184 (2). To give the employer an incentive to avoid overreaching, courts adopting this approach impose a general requirement of good faith on the employer. See generally Rothstein, Craver, Schroeder & Shoben, Employment Law § 8.5 (4th ed.) (West 2009).

Because there is no credible evidence that Advanced Polymers acted in bad faith,

the noncompetition portion of the Agreement could be subject to a narrowing. However, the thrust of both parties' arguments does not involve the noncompetition portion of the Agreement but the use by Defendants of what Advanced Polymers considers its trade secrets. Indeed, the Plaintiffs apparently do not seek to enforce the noncompetition agreement in accordance with its literal terms:

Granting this preliminary injunctive relief does not prevent respondent from working in his degree field — Plastics Engineering . . . . In the medical device industry, alone, there are hundreds of manufacturers of plastic products besides ultra-thin medical heat shrink tubing and/or medical balloons.

(Pl.'s Mem. at 34.)

The Court therefore finds that while the noncompetition agreement is overbroad on its face, it need not consider, for purposes of this preliminary injunction, whether or not it could be narrowed. Plaintiffs are not seeking to enforce the restrictive covenant and only seek to enjoin misappropriation of trade secrets. Of course, in making the finding of overbreadth, the Court does not suggest that Pappas may utilize Advanced Polymers' trade secrets in other employment in the industry.

## B

The critical issue for purposes of this Order is whether or not the Defendants can be enjoined from using trade secrets belonging to Advanced Polymers, and manufacturing and selling all ultra-thin heat shrink tubing. Defendants argue that the confidentiality agreement is unenforceable because it is overbroad. (Def.'s Mem. at 21–26.) Both parties ignore the fundamental distinction between actions enforcing confidentiality provisions regarding trade secrets and covenants not to compete.

In simplest terms, an obligation not to disclose trade secrets is generally not considered to be limited by time under the NHUTSA. As Milgrim notes:

While there is some (and, in your author's view, fundamentally misconceived) authority for the proposition that covenants not to disclose must also be reasonable as to duration, such view is patently unsound because the covenant simply ceases to be enforceable upon the underlying matter's becoming generally known or otherwise ceasing to be a trade secret, and hence such restriction can never be unreasonably enforced. Given the inherently indeterminate life of trade secrets and a practical inability to enumerate specific trade secrets which may be known to the employee as a consequence of the ensuing employment, the notion that restrictions on use and disclosure must be limited as to time is both unreasonable and harsh.

Milgrim § 4.02.

Milgrim notes that the better view—that restrictions on use and disclosure should not be limited as to time—is taken by the Uniform Trade Secret Act, which has been enacted in New Hampshire as RSA 350-B. RSA 350-B:2, I provides in relevant part that:

Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction *shall be terminated when the trade secret has ceased to exist*, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

A majority of courts also take this view. See, e.g., Milliken & Co v. Morin, 731 S.E.2d 288, 293 n.5 (S.C. 2012); Wang Laboratories, Inc. v. CFR Assocs., 125 F.R.D. 10, 13 (D. Mass. 1989). Indeed, even courts which, unlike New Hampshire, refuse to modify overbroad noncompetition agreements uphold covenants prohibiting disclosure of trade secrets because “a covenant not to disclose trade secrets is significantly different from a covenant not to compete. The former is consistent with public policy, whereas the latter is not.” Hi-Line Elec. Co. v. DowCo Electrical Prods., 765 F.2d 1359, 1363 n. 5 (5th Cir. 1985) (applying Texas law); see also Johns-Manville Corp. v. Guardian Indus. Corp., 586 F. Supp. 1034, 1074 (E.D. Mich. 1983) (applying Michigan law). There is a strong public policy against restricting a person's ability to obtain employment, but there is no public policy which encourages the theft of intellectual property.

When Defendants' argument is analyzed in light of trade secret law, it is obvious that the confidentiality agreement is enforceable, and Defendant Pappas is bound by it. The issue that remains is whether Pappas and Ascend are using a trade secret or secrets belonging to Advanced Polymers. This requires the Court to determine first whether or not Advanced Polymers possesses trade secrets and, second, whether the Defendants are using those trade secrets.

### III

Trade secret litigation often requires a plaintiff to build his case on circumstantial evidence. The United States District Court for the Eastern District of Pennsylvania has put the matter succinctly:

Plaintiffs in trade secret cases, who must prove by a fair preponderance of the evidence disclosure to third parties and use of the trade secret by the third parties, are confronted with an extraordinarily difficult task. Misappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants and defendants' witnesses who directly deny everything.

Greenberg v. Croydon Plastics Co., 378 F. Supp. 806, 814 (E.D. Pa. 1974). The Greenberg court's comments are peculiarly apposite here.

### A

The Court did not have the benefit of expert testimony at the preliminary injunction hearing. However, both parties presented technical evidence through Saab and Pappas about the heat shrink tubing and medical balloons technology at issue in this case. Based on the testimony at the hearing, the Court finds, for purposes of the preliminary injunction order, that Advanced Polymers uses a confidential and

proprietary process for making unique heat shrink tubing. Plaintiff has established that it is the only company in the world that makes ultra-thin heat shrink tubing with tensile strength beyond that available in the market. Its technology was created by the principal of Advanced Polymers, Saab, over the years since the company formed in the 1980s.

The circumstantial evidence that Advanced Polymers' products are made utilizing trade secrets also compels a conclusion that Ascend's products are the result of Pappas' utilization of Advanced Polymers' trade secrets. The Plaintiff sets forth many similarities between the products in its brief. (Pl.'s Mem. at 5–6.)<sup>3</sup> A significant part of Plaintiff's claim boils down to the fact that Ascend's product is identical in characteristics to its products, and like no other product in the world. Amongst other similarities, both Advanced Polymers' and Ascend's heat shrink tubing products:

1. Shrink at temperatures significantly below the melting point;
2. Shrink significantly in length upon recovery;
3. Do not shrink uniformly in diameter; and
4. Result in a similar, if not identical, material tensile strength, which is significantly higher than the tensile strength of any other product on the market.

As Milgrim notes, “where a plaintiff is the sole producer of a particular product, that alone may provide a basis for determining that the process or formula used to make the product constitutes a trade secret.” Milgrim § 15.01[1][a][ii]; see generally SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1256 (3d Cir. 1985); In re Innovative Constr. Sys., Inc., 793 F.2d 875, 886 (7th Cir. 1986); Henry Hope X-Ray Prods. Inc. v.

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<sup>3</sup> In an abundance of caution, the Court has limited reference to information describing the trade secrets at issue which is likely subject to sealing, since the entire Order itself cannot be sealed. See Petition of Keene Sentinel, 136 N.H. 121, 127–29 (1992); see also Hicklin Eng'g v. Bartell, 439 F.3d 346, 348–49 (7th Cir. 2006).

Marron Carrel, Inc., 674 F.2d 1336, 1340 (9th Cir 1982).

Ascend's heat shrink tubing material resins correlate by testing to within 98% of Advanced Polymers' in-house custom designed material resins. The Court finds it significant that Pappas only started researching and developing his product after he left Advanced Polymers in December 2013 and was able to take its product to market in less than eight (8) months. Saab testified that to produce a medical component that meets FDA biocompatibility requirements generally takes six (6) months after the sample product is created due to FDA testing requirements. This would mean that Pappas developed his product in roughly two months, when an essentially identical product took Saab years to develop. The Court credits Saab's testimony, which supports a determination that Pappas has misappropriated Advanced Polymers' trade secrets.

Defendant Pappas makes two principle arguments with respect to his claim that he is not using Advanced Polymer's trade secrets. First, he argues that the technologies used by Advanced Polymers are "public domain technologies that are fully disclosed (among other places) in numerous expired patents . . . ." (Def.'s Mem. at 4.) The Court does not credit this argument. A combination of well-known designs, like the synthesis of known facts, is protectable. Perritt § 3.9.1[C]. This concept is regularly extended to design of machinery and other products. See Salisbury Labs, Inc. v. Verieux Labs, Inc. 735 F. Supp. 1537, 1541–43 (M.D. Ga. 1987); Anaconda Co. v. Metric Tool & Die Co., 485 F. Supp. 410, 421 (E.D. Pa. 1980). Even a recipe for chocolate chip cookies can be a trade secret, where the exact formula of combining the various ingredients is not disclosed. Peggy Lawton Kitchens, Inc. v. Hogan, 466 N.E.2d 138, 139–40 (Mass. App. 1984). While general principles regarding the application of heat below the crystalline melting point of substances may be public domain technologies, the fact remains that the unique

products developed by Advanced Polymers is not duplicated or replicated by anyone but Defendants.

Defendants also assert that their products are made of nylon, and Advanced Polymers does not market nylon heat shrink tubing. This argument, however, misses the mark. Saab testified credibly that Advanced Polymers has manufactured heat shrink tubing products made from nylon, using the identical process it uses to manufacture its other heat shrink tubing, but made a business decision not to market nylon products because the nylon product would cannibalize sales of its polyurethane products.

Finally, the Court credits Saab's testimony that Pappas had access to Advanced Polymers' confidential business information. The evidence that Defendants are using as samples a product that is the exact diameter of Advanced Polymers' largest selling product—one out of 1244 possible diameters—is compelling evidence of misuse of confidential information.

#### IV

Courts often find irreparable injury will occur if misappropriation of trade secrets is not enjoined because it is difficult to quantify in dollar terms the impact of lost sales and diminished customer relationships. Imi-Tech Corp. v. Gaglani, 691 F. Supp. 214, 226 (S.D. Ca. 1986). In deciding whether to grant injunctive relief, courts also consider whether or not it is likely that a damage award will ever be collectible. Apollo Tech. Corp. v. Centrosphere Indus. Corp., 805 F. Supp. 1157, 1210 (D.N.J. 1992). Some courts have taken the view that loss of trade secrets cannot be measured in money damages, because where the secret is lost, it is lost forever. Ivy Mar Corp. v. C.R. Seasons Ltd., 907 F. Supp. 547, 567 (E.D.N.Y. 1995); see generally Perritt § 13:2.3.

Ultimately, the Court's task is to balance the risk of irreparable harm to the



Plaintiff with a likelihood of harm to the Defendants. Here, Defendant Pappas has asserted that he has invested \$250,000 in his startup business. Pappas notes that he and his family have invested money to start Ascend. (Def. Mem. at 27.) He states that he “hoped to earn as much as \$100,000 in his first year of operation.” (Id.)

Advanced Polymers, on the other hand, is now a subsidiary of Vention Medical, which paid \$100 million for the company, with the principal value being the intellectual property it claims Pappas has misappropriated. The Court has found a likelihood of success on Advanced Polymers’ claim that Pappas and Ascend have misappropriated its trade secrets. If Defendants continue to utilize those trade secrets and, after trial, it is found that the trade secrets did belong to Advanced Polymers, Advanced Polymers’ \$100 million business might well be badly injured or even destroyed. Plaintiff would have no practical way to recoup their damages from Defendants, who have no substantial assets.

Defendants have requested that the Court order that Plaintiff to post a bond of \$350,000 so that Pappas can recover that amount in the event that this Court’s findings on the basis of the preliminary injunction hearing are determined, after trial on the merits, to be inaccurate. A bond in a trade secret case is generally said to have two purposes: first, to assure the enjoined party that it may readily collect damages in the event it is wrongfully enjoined and, second, to give the plaintiff notice of the upper limit of damages to which it may be subject for a wrongful injunction. Perritt § 13:2.3. Conditioning injunctive relief on Plaintiff posting of a bond in the amount of \$350,000 will protect the Defendants from the consequences of a wrongful injunction and protect the Plaintiff from harm which may be irreparable in the circumstances of this case.

Accordingly, the Court orders as follows:

1. Defendants are hereby enjoined and restrained from directly or indirectly designing, manufacturing, producing and/or selling any ultra-thin walled— defined as a wall thickness less than .006" and/or a diameter less than 1.25"— heat shrink tubing until such time as this case is finally adjudicated;
2. Defendants are hereby enjoined and restrained from directly or indirectly disclosing or utilizing in any way any confidential or proprietary information, trade secrets, designs, inventions, intellectual property and moral rights or processes of the Plaintiff;
3. Defendants are enjoined and restrained from directly or indirectly soliciting or contacting a customers of the Plaintiff, which were customers during Pappas' employment with respect to the sale of any medical balloon product or heat shrink tubing product; and
4. The Plaintiff shall procure a bond in the amount of \$350,000 in favor of the Defendants to satisfy any judgment for wrongful injunction.

**SO ORDERED.**

1/8/15

\_\_\_\_\_  
DATE

*s/Richard B. McNamara*

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Richard B. McNamara,  
Presiding Justice

RBM/