

PatientPoint Network Solutions, LLC v. Contextmedia, Inc.

United States District Court for the Southern District of Ohio, Western Division
March 21, 2014, Decided; March 21, 2014, Filed
Case No. 1:14-cv-226

Reporter: 2014 U.S. Dist. LEXIS 37443

PATIENTPOINT NETWORK SOLUTIONS, LLC,
Plaintiff, vs. CONTEXTMEDIA, INC., et al., Defendants.

Core Terms

terminate, drive, trade secret, flash, temporary restraining order, non-compete, track, purportedly, separate agreement, forensic analysis, likelihood of success, injunction, irreparable harm, laptop computer, non-disclosure, confidential, photograph, forensic, template, proprietary information, sponsor, ipad

Counsel: [*1] For PatientPoint Network Solutions, LLC, Plaintiff: David A Skidmore, Jr, LEAD ATTORNEY, Aaron Micah Bernay, Frost Brown Todd LLC, Cincinnati, OH; Grant Spencer Cowan, LEAD ATTORNEY, Frost Brown Todd LLC - 1, Cincinnati, OH; Jeanah Park, PRO HAC VICE, Vedder Price P.C., Chicago, IL; Thomas Roger Dee, PRO HAC VICE, Vedder Price, Chicago, IL.

For Contextmedia, Inc., Defendant: Cole Douglas Bond, Thomas Frost Hankinson, LEAD ATTORNEYS, Keating Muething & Klekamp, Cincinnati, OH; Charles Kenneth Schafer, PRO HAC VICE, Sidney Austin, LLP, Chicago, IL; Richard John O'Brien, Jr, PRO HAC VICE, Sidley & Austin LLP, Chicago, IL.

For Christopher N Hayes, Defendant: Cole Douglas Bond, Thomas Frost Hankinson, LEAD ATTORNEYS, Keating Muething & Klekamp, Cincinnati, OH.

Judges: Timothy S. Black, United States District Judge.

Opinion by: Timothy S. Black

Opinion

DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER (Doc. 2)

This civil action is before the Court on the Motion for Temporary Restraining Order filed by Plaintiff PatientPoint Network Solutions, LLC ("PatientPoint"). (Doc. 2). The Court held an informal preliminary telephone conference regarding PatientPoint's Motion for

Temporary Restraining Order [*2] on March 13, 2014, at which time the Court set a briefing schedule and a hearing on the Motion. Pursuant to the Court's briefing schedule, Defendants Contextmedia, Inc. ("Context") and Christopher Hayes ("Hayes") filed a Brief in Opposition to PatientPoint's Motion for Temporary Restraining Order. (Doc. 12). On March 20, 2014, this case came before the Court for hearing by telephone on PatientPoint's Motion. The Motion is now ripe for decision by the Court.

I. FACTS

The parties agree that Plaintiff PatientPoint and Defendant Context are direct competitors in the business of delivering educational, health-related content to physician practices at the point-of-care. These businesses pursue specific medical practices focusing on diabetes, rheumatology and cardiology. The businesses compete by targeting physician practices in these medical specialties and by marketing their point-of-care products to pharmaceutical and other companies in the business of selling drugs treating conditions within these specialties.

Plaintiff hired Defendant Hayes as an Executive Vice-President, Business Development Specialist in May 2012. According to Hayes, before working for PatientPoint, he worked in various [*3] sales positions since 1997, including working for WebMD as its Director, Strategic Accounts from 2007 until 2011. (Doc. 12-1). While working for WebMD, Hayes states that he developed a spreadsheet template for tracking his sales efforts and leads that he called an "Opportunity Tracking Report." (*Id.*)

In June 2011, Mr. Hayes left WebMD and began working for Healthcare Regional Marketing ("HRM") as Vice President, Pharmaceutical Markets. (*Id.*) In that position, Hayes continued to use his "Opportunity Tracking Report" document in his work for HRM. (*Id.*) When he left WebMD and began working at HRM, Hayes overwrote the data in that spreadsheet template and began tracking his sales efforts at HRM using that same template. (*Id.*) Hayes still maintains a copy of a version of the spreadsheet that he used while at HRM. (*Id.*)

After being hired by PatientPoint in May 2012, Hayes began work on June 1, 2012 and received a promotion in

July 2012. (*Id.*) Hayes did not sign an employment agreement with PatientPoint or any other document containing any restrictive covenants upon his hiring or for fourteen months thereafter. (*Id.*) As with his prior two jobs, Hayes was responsible for calling on marketers [*4] at pharmaceutical and medical supply companies, as well as their partner advertising agencies, to seek sponsorship dollars for PatientPoint's business. (*Id.*) As he did in his prior employment positions, Hayes brought his Opportunity Tracking Report with him to PatientPoint, overwriting the data from his time at HRM with new data for his sales efforts on behalf of PatientPoint. (*Id.*)

PatientPoint provided an iPad and laptop computer to Hayes. (*Id.*) Hayes used the computer as his personal and work computer. (*Id.*) Between June 2012 and January 2014, the laptop computer and the iPad issued to Hayes by PatientPoint were the only computers he owned. (*Id.*) The only other computer in the Hayes household, which consists of Hayes, his wife, and three children, belonged to his wife. (*Id.*) Thus, according to Hayes, the computer given to him by PatientPoint was often used by his three children for homework and other family purposes until March 2014. (*Id.*)

During his employment with PatientPoint, Hayes alleges that he was subjected to instances of sexual harassment and a hostile work environment. (*Id.*) Hayes contends he was one of the only men on a largely female team of salespeople. (*Id.*) In April [*5] 2013, a recruiter contacted Hayes and he accepted the call because of his discomfort with the working environment at PatientPoint. (*Id.*) Ultimately, the opportunity presented did not interest Hayes, and he continued in his employment with PatientPoint. (*Id.*)

A few weeks later, however, Hayes contends that the recruiter disclosed to PatientPoint that he was exploring other employment opportunities. (*Id.*) Linda Ruschau, Hayes' supervisor, confronted Hayes and he admitted that he had discussed a potential opportunity with a recruiter, but that he was not interested in the opportunity presented and intended to continue his employment with PatientPoint. (*Id.*) Thereafter, Hayes continued to explore other work opportunities, but he nevertheless continued his productive work for PatientPoint and continued to receive positive reviews from Ruschau. (*Id.*) According to Hayes, he received positive performance feedback from PatientPoint up until the date of his termination. (*Id.*)

In July 2013, PatientPoint's Chief Financial Officer, Gregory Robinson, called Hayes and informed him that he was required to sign an agreement in order to continue working for PatientPoint. (*Id.*) Hayes signed an "Employee [*6] Agreement" containing a non-compete

provision and a non-disclosure provision on July 22, 2013. (*Id.*; *see also* Doc. 2-2, PAGEID 102-106). On August 28, 2013, Ruschau and Robinson scheduled a call with Hayes and informed him that PatientPoint was terminating his employment with the company effective immediately. (*Id.*) The evidence presented to date fails to indicate the reason, if any, PatientPoint terminated Hayes.

Two days after his termination, Hayes reached out to PatientPoint's Chief Financial Officer, Tom McGuinness, to request continued coverage of his COBRA expenses and to request that PatientPoint pay his salary through the end of the year. (*Id.*) In response to Hayes' request, Meg Paul, PatientPoint's Director of HR Compliance, Compensation and Benefits, emailed Hayes and informed him that, "[a]fter careful review of the request you made of Tom McGuinness, PatientPoint will pay your full medical COBRA premium for the first 3 months of COBRA coverage." (*Id.*, ¶ 23; *see also* Doc. 12-1, PAGEID 312). Paul informed Hayes, however, that in order for PatientPoint to pay his COBRA benefits and a commission payment, he would have to sign a Separation Agreement. (*Id.*; *see also* Doc. 12-1, [*7] PAGEID 312). The Separation Agreement attached to the email contained restrictive covenants regarding confidentiality, as well as non-competition and non-solicitation provisions. (*Id.*) Hayes refused to sign that agreement because he did not want to agree to a non-competition provision. (*Id.*)

On September 11, 2013, roughly two weeks after his termination, and after additional negotiations with PatientPoint, Paul proposed a revised Separation Agreement. (*Id.*; *see also* Doc. 12-1, PAGEID 326-327). This version of the Separation Agreement removed any non-compete and non-disclosure provisions, and it also contained an express clause, under the heading "Entire Agreement," stating that the "[a]greement contains all the understandings and representations between the Employee and Employer pertaining to the subject matter hereof and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter." (*Id.*; *see also* Doc. 12-1, PAGEID 326-327). Hayes signed this version of the Separation Agreement on September 16, 2013 and mailed it to Ms. Paul. (*Id.*; *see also* Doc. 12-1, PAGEID 329-330).

According to Hayes, [*8] at no point during his conversation with Robinson and Ruschau on August 28, 2013, nor during any subsequent conversation with anyone at PatientPoint, did anyone instruct Hayes to destroy any PatientPoint documents or information in his possession, nor did anyone request or demand that Hayes return the laptop and iPad until Hayes received a letter from PatientPoint on February 24, 2014. (*Id.*)

In January 2014, Context hired Hayes as Director of Strategic Sponsorships. (*Id.*) Hayes began his employment with Context on January 2, 2014. (*Id.*) In his role for Context, Hayes is responsible for calling on marketers at pharmaceutical and medical supply companies, as well as their partner advertising agencies. (*Id.*) Hayes concedes that his duties are the same or similar to the duties he performed in his previous positions with PatientPoint, HRM, and WebMD. (*Id.*)

In his employment at Context, Hayes has attempted to contact only a handful of the more than eighteen companies he attempted to contact while at PatientPoint. (*Id.*) Of those companies, Hayes was unsuccessful at making contact with roughly half of them. (*Id.*) Of the companies that he has attempted to contact while at Context, only one was [*9] a company that he had actually successfully contracted with while at PatientPoint. (*Id.*) According to Hayes, that contract came about because he went to college with the contact person at the particular company, and because he had done business with that contact person while employed at WebMD. (*Id.*) Hayes contends he also had preexisting relationships with the contacts at several of the other companies that he is now attempting to contact on behalf of Context based on his time working at WebMD and HRM. (*Id.*)

Hayes contends that he has not used any other documents from his laptop computer provided to him by PatientPoint for his work at Context, with the exception of an Opportunity Tracking Report he accessed to use as a template. (*Id.*) According to Hayes, when Hayes began working for Context, he took the spreadsheet template that he had created for his Opportunity Tracking Report, removed the information specific to his work for PatientPoint, and began using that same template to track his sales activities and prospects for Context. (*Id.*)

Upon receiving the aforementioned letter dated February 24, 2014 from PatientPoint, Hayes saved from that computer to separate flash drives all of his [*10] personal files, including personal photographs, home movies, his children's homework, his personal financial information, as well as the relatively few files that he had created for Context on that computer. (*Id.*) After receiving the letter from counsel for PatientPoint, Hayes states that he did not save any documents belonging to PatientPoint from that laptop computer to any external source. (*Id.*)

Forensic Analysis of Hayes' Computer

Both PatientPoint and Context have forensically analyzed the computer and the iPad PatientPoint issued to Hayes. PatientPoint's forensic analysis reveals that Hayes accessed and opened over twenty files allegedly containing highly confidential and proprietary information

on February 28, 2014. PatientPoint's forensic analysis also revealed that Hayes opened a document titled "PPT_Opportunity Tracking Report 2014_082213.xls" from a flash storage device on January 26, 2014.

Defendants' forensic analysis of the equipment suggests that files purportedly accessed and opened by Hayes on February 28, 2014 were not in fact opened in their native applications, and may not have been opened deliberately. (Doc. 12-2). Defendants' forensic examiner indicates that, out [*11] of a total of 138 link files associated with Microsoft Office based applications listed in Exhibit B to the Declaration of PatientPoint's forensic examiner, only nineteen link files indicate purposeful opening of the files in their native applications, and most of the nineteen files contain information seemingly unrelated to PatientPoint, such as Hayes' personal financial information and other non-business documents. (*Id.*)

According to Defendants, the same is true of the non-Office documents analyzed by Defendants' forensic examiner, which appear from their file names and file types to be primarily photographs, movies and other files personal to Hayes. (*Id.*) Thus, in the view of Defendants' forensic examiner, there is a significant question as to whether the vast majority of activity cited by PatientPoint as improper is the result of deliberate user initiated activity. (*Id.*)

Purported Use of Proprietary Information

PatientPoint's forensic analysis of the computer equipment also revealed emails in which Hayes sent a high level competitive analysis regarding PatientPoint's business to executives of Context. Hayes admits preparing a high level competitive intelligence analysis of PatientPoint [*12] using information contained on PatientPoint's website and in its marketing materials distributed at conferences and other events. (Doc. 12-1). Hayes contends that he never disclosed any information to Context in that document or otherwise that he believed reasonably could be considered confidential to PatientPoint. (*Id.*)

Patient Point also points to forensic analysis which shows that Hayes connected over twenty flash drives to his PatientPoint laptop after his termination, and that he connected six flash drives to the computer on the day he returned the computer to PatientPoint. (Doc. 2-5). Defendants' forensic analysis reveals that it examined fourteen flash drives recovered from Hayes, all fourteen of which account for every such drive that was connected to the laptop computer between January 2, 2014 and March 1, 2014, with the exception of a single flash drive shown as having been last connected to the laptop on February 13, 2014. (Doc. 12-2).

Defendants' forensic review of those flash drives revealed that: (1) on two flash drives purportedly containing old work files, the most recent last written date or file create date of any user-generated file is dated October 15, 2012; (2) on [*13] one flash drive purportedly containing Hayes' personal information, only two documents appear to be related to Hayes's work, and those documents do not appear to relate to PatientPoint and have created and last written dates of September 29, 2011 and May 23, 2012, respectively; (3) on ten flash drives purportedly containing personal photographs and videos, nearly all of the files consist of photographs and videos, and that the most recent last written date or file create date of any other user-generated file (*i.e.*, not a photograph or video) is August 6, 2011; and (4) on one flash drive purportedly containing emails and photographs from PatientPoint employees relating to potential claims Hayes might have against PatientPoint related to his termination and alleged harassment, forensic analysis confirmed that the most recent last written date or file create date of any user-generated file on these drives is September 4, 2013, *i.e.*, one week after PatientPoint terminated Hayes. (Doc. 12-2).

II. STANDARD OF REVIEW

"The Sixth Circuit has explained that 'the purpose of a TRO under *Rule 65* is to preserve the status quo so that a reasoned resolution of a dispute may be had.'" *Reid v. Hood, No. 1:10 CV 2842, 2011 U.S. Dist. LEXIS 7631, at *2 (N.D. Ohio Jan. 26, 2011)* [*14] (citing *Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996)*). "The standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm given that the purpose of a temporary restraining order is to maintain the status quo." *Id.* (citing *Motor Vehicle Bd. of Calif. v. Fox, 434 U.S. 1345, 1347 n.2, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977)*). Plaintiff bears the heavy burden of demonstrating its entitlement to a preliminary injunction. An "injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 573 (6th Cir. 2002)*.

In determining whether to grant injunctive relief, this Court must weigh four factors: (1) whether the moving party has shown a strong likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public [*15] interest would be served by issuing the injunction. *Id.* These four considerations are factors to be balanced, not prerequisites

that must be met. *McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997)*. "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000)*. The Court does not subscribe to the argument that a movant need only raise a "fair question" as to the merits rather than "a substantial likelihood of success" on the merits.

III. ANALYSIS

PatientPoint asserts three causes of action in this case: (1) a claim that both Context and Hayes violated the Ohio Uniform Trade Secrets Act ("UTSA"); (2) that Hayes breached his agreement with PatientPoint by taking employment with Context and soliciting PatientPoint accounts; and (3) that Context is tortiously interfering with the contract between Hayes and PatientPoint by employing Hayes despite knowing of the non-compete provision purportedly binding Hayes and prohibiting his employment with Context. In seeking a temporary restraining order, PatientPoint argues that [*16] it is likely to prevail on: (1) its claim for an alleged breach of the non-compete agreement; and (2) for alleged misappropriation of trade secretions in violation of UTSA).

A. Likelihood of Success on the Merits

1. Non-Compete Agreement

The Court first addresses the merits of PatientPoint's assertion that it is likely to prevail on its claim that Hayes breached the non-compete provision of his Employee Agreement. In so arguing, PatientPoint omits any evidence regarding the specific circumstances surrounding Hayes' separation from employment.

Ruschau's declaration contains potentially conflicting statements regarding the Hayes' separation employment. (Doc. 2-6). At one point, Ruschau states that she "supervised Hayes . . . until his *termination* in August 2013[.]" and at another point states that Hayes "*resigned* from PatientPoint." (Doc. 2-6) (emphasis added). PatientPoint's Verified Complaint contains the same potential inconsistencies. (Doc. 1). The Verified Complaint states that Hayes "*resigned*" from PatientPoint, but also that "PatientPoint terminated Hayes effective August 28, 2013." (Doc. 1, PAGEID 14, 16). Hayes specifically states in his declaration that PatientPoint unilaterally [*17] terminated his employment on August 28, 2013. (Doc. 12-1).

The circumstances surrounding Hayes' separation from employment appears critical. Specifically, the July 22,

2013 Employee Agreement expressly states that it becomes effective only "if Employee voluntarily terminates his or her employment or if [PatientPoint] terminates Employee's employment for 'cause' [.]*" (Doc. 2-3, PAGEID 113). Additionally, the Employee Agreement expressly states that "[t]he parties agree that the Covenant Not to Compete will be null and void if [PatientPoint] terminates Employee's employment for reasons other than for 'cause'." (Doc. 2-3, PAGEID 115). The Employee Agreement defines "cause" as:

any of the following: (i) a material breach of any agreement you have with the Company; (ii) a felony or any other crime involving dishonesty, breach of trust, moral turpitude, or physical harm to any person; (iii) an act of fraud, misconduct, or dishonesty in connection with the business of the Company; (iv) failure to satisfactorily or adequately perform your duties here as determined by the Company based upon objective facts, including, but not limited to, your ability to achieve goals, inability to work with [*18] others, insubordination or excessive tardiness; (v) your receipt of a Final Written Warning for any reason; (vi) insobriety or other substance abuse during work activities; or (vii) death or permanent disability[.]

(Doc. 2-3, PAGEID 117).

PatientPoint, in failing to offer evidence regarding Hayes' separation from employment, fails to demonstrate that Hayes was terminated for cause, or that Hayes voluntarily terminated his employment. In fact, the only evidence before the Court at this time is Hayes' statement that PatientPoint simply unilaterally terminated his

employment abruptly despite positive reviews in the time leading up to his termination. Accordingly, PatientPoint fails to demonstrate that the non-compete provision binds Hayes under the circumstances, and therefore, fails to demonstrate a likelihood of success on the merits of such a claim at this stage.¹

2. Ohio Uniform Trade Secrets Act

To prevail on a misappropriation of trade secrets claim under the Ohio UTSA, a plaintiff must prove: "(1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret." *MEMC Electronic Materials v. Balakrishnan, No. 2:12-cv-344, 2012 U.S. Dist. LEXIS 128877, 2012 WL 3962905, *6 (S.D. Ohio Sept. 11, 2012)* (citing *Heartland Home Fin., Inc. v. Allied Home Mortg. Capital Corp., 258 F. App'x 860, 861 (6th Cir.2008)*; *Hoover Transp. Servs., Inc. v. Frye, 77 Fed. Appx. 776, 782 (6th Cir.2003) [*21]* (*per curiam*)). Ohio's UTSA defines a trade secret as:

information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It 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.

¹ The Court also concludes that, assuming the non-compete provision is triggered and not superseded by the Separation Agreement, PatientPoint also fails to show a likelihood of successfully demonstrating that the non-compete provision is reasonable. Under Ohio law, "a noncompetition agreement is reasonable if (1) it is no greater [*19] than is required for the protection of the employer; (2) it does not impose undue hardship on the employee; and (3) it is not injurious to the public." *Am. Bldg. Services, Inc. v. Cohen, 78 Ohio App.3d 29, 603 N.E.2d 432 (Ohio App. 1992)* (citing *Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544 (Ohio 1975)*). Additional factors considered in determining the reasonableness of a non-compete provision include "whether the covenant seeks to stifle the inherent skill and experience of the employee . . . whether the covenant operates as a bar to the employee's sole means of support; [and] whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment[.]" *Raimonde, 325 N.E.2d at 547* (citations omitted).

Here, Hayes worked for PatientPoint for a single month after signing the non-compete provision, and now PatientPoint seeks to limit his employment for a year after his termination. Hayes establishes that he has worked in the same industry, performing the same tasks, and contacting many of the same companies for the five years before his brief stint with PatientPoint. In addition, Hayes states that others within PatientPoint worked [*20] on accounts with the companies he contacted before he began working at PatientPoint. Thus, it appears clear that the non-compete provision seeks to stifle all of the experience Hayes gained and developed in his career before his brief employment with PatientPoint, despite the fact that other PatientPoint employees had contact with these same customers. See *Am. Bldg. Services, 603 N.E.2d at 435* (finding a non-compete agreement unreasonable where defendant worked for plaintiff only a short period of time and defendant "obtained much of his experience and skill as a salesperson and manager" during his previous employment).

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ohio Rev. Code § 1333.61(D). In addition, the Supreme Court of Ohio has set forth a number of factors to consider in determining whether information constitutes a trade secret, namely:

“(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings [*22] effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.”

State ex rel. Besser v. Ohio State Univ., 89 Ohio St.3d 396, 2000 Ohio 207, 732 N.E.2d 373, 377-78 (Ohio 2000) (citations omitted).

Here, Defendants contend that the information at issue, namely the names of potential sponsor brands, is not a secret, and that Ruschau’s declaration admits as much by stating that “over the last few years, PatientPoint and Context have attempted to reach the same sponsor brands.” (Doc. 2-6, PAGEID 148). However, the Court agrees with PatientPoint that the information at issue consists of more than the mere identity of potential sponsors.

Nevertheless, even assuming that the information has “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[.]” the record presently before the Court fails to evidence that PatientPoint’s efforts to maintain the secrecy [*23] of its information were reasonable under the circumstances. Initially, the Court notes that Hayes had access to PatientPoint’s alleged proprietary information and/or trade secrets throughout his employment. However, PatientPoint never sought to bind Hayes to a non-compete or non-disclosure agreement until

over a year after his employment began, and then only a month before his termination.

Further, with regard to the PPT Opportunity Tracking Reports specifically, while Ruschau declares that only she, members of PatientPoint’s business development team, and PatientPoint’s executives have access to these reports, PatientPoint does not yet present any declaration or other evidence that any of these individuals are bound by non-compete or non-disclosure agreements or are otherwise instructed to keep the information secure from other employees or third parties.

In addition, while PatientPoint generally alleges in its Verified Complaint that it requested the return of its laptop computer and iPad at the time PatientPoint terminated Hayes, PatientPoint evidences no specific written request made of Hayes at that time. The record before the Court at this time also fails to demonstrate that PatientPoint [*24] requested Hayes to turn over any other purportedly proprietary and/or trade secret information then in his possession. Instead, the only written demand in the record was sent at the end of February 2014, approximately six months after his termination. Even assuming PatientPoint did make a specific request that Hayes to return the equipment at the time of his termination, the Court cannot conclude that waiting six months to make any additional demand amounts to a reasonable effort under the circumstances to secure purportedly proprietary and/or trade secret information.

Finally, although PatientPoint initially requested that Hayes sign a detailed separation agreement that included strict non-disclosure provisions and non-compete provisions, PatientPoint ultimately accepted a separation agreement from Hayes setting forth no non-compete or non-disclosure provisions. PatientPoint’s concession in this regard perhaps adds credence to Defendants’ suggestion that the information known by Hayes was not of such value that PatientPoint believed that these provisions were necessary. Further, the Separation Agreement ultimately accepted by PatientPoint arguably supersedes the earlier executed Employee [*25] Agreement by stating that it “contains all the understandings and representations between the Employee and the Employer pertaining to the subject matter hereof² and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter.” (Doc. 12-1).

² During oral argument on Plaintiff’s Motion, Plaintiff cited the case of Try Hours, Inc. v. Douville, 2013 Ohio 53, 985 N.E.2d 955 (Ohio App. 2013), wherein the Ohio Sixth District Court of Appeals concluded that that a separation agreement with an integration clause did not supersede a prior employment agreement containing non-compete and non-solicitation provisions. There, the court found that the integration clause in the separation agreement was “expressly limited in scope to the subject matter of the separation agreement[.]” *i.e.*, continued benefits in exchange for a release of claims. *Id.* Further, the court noted that

Based on the foregoing, the Court concludes that PatientPoint fails to establish a likelihood of success on the merits of its UTSA claim.

B. Irreparable Harm

"To demonstrate irreparable harm, the plaintiffs must show that . . . they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated." Abney v. Amgen, Inc., 443 F.3d 540, 552 (6th Cir. 2006). Harm is irreparable if it cannot be fully compensated by monetary damages. Overstreet v. Lexington-Fayette Urban County Gov't., 305 F.3d 566, 578 (6th Cir. 2002).

Here, because PatientPoint has failed to establish a likelihood of success on the merits, the Court does not need to analyze the existence of irreparable [*27] harm. See Gonzales v. Nat'l Bd. of Med. Examiners, 225 F.3d 620, 632 (6th Cir. 2000); see also Novak v. Farneman, No. 2:10-cv-768, 2010 U.S. Dist. LEXIS 123526, 2010 WL 4643002, *6 (S.D. Ohio Nov. 9, 2010) (stating that "[b]ecause [plaintiff] has not established a likelihood of success on the merits on either of his claims, the Court need not address irreparable injury").

Nevertheless, the Court concludes here that, in light of an agreement between the parties, PatientPoint will suffer no actual and imminent harm. As the Court understands the parties' agreement, Hayes will not solicit ten specific target sponsors on behalf of Context until resolution of the issues in this case; that Defendants will not use or disclose any of PatientPoint's confidential information; and that Defendants will return any and all of PatientPoint's confidential and proprietary information to PatientPoint. In light of the parties' proposed agreement, which counsel shall formally reduce to writing and submit to the Court, the Court finds the prospect unlikely that PatientPoint will suffer irreparable harm in the absence of a temporary restraining order.

C. Substantial Harm to Others and the Public

With regard to determining the probability [*28] that granting a temporary restraining order will substantially harm others, "the focus is on the harm that a defendant will

suffer[.]" Lander v. Montgomery Cty. Bd. Comm'rs, 159 F. Supp.2d 1044, 1053 fn. 18 (S.D. Ohio 2001). Here, the record now before the Court demonstrates that PatientPoint terminated Hayes' employment and now seeks to prevent him from continuing to work in the industry he has worked since 2007. PatientPoint has not demonstrated a likelihood of prevailing on the merits, yet Defendants have agreed to limit Hayes' contact with potential sponsors for the time being. The Court concludes that imposing further restrictions on Context and Hayes in the absence of a showing that PatientPoint will succeed on the merits or suffer irreparable harm is unwarranted.

With regard to harm to the public, "the trade secret policies in Ohio are to maintain the standards of commercial ethics and the encouragement of invention, as well as the protection of the substantial investment of employers in their proprietary information." MAR Oil Co. v. Korpan, No. 3:11cv1261, 2011 U.S. Dist. LEXIS 121706, 2011 WL 5023263, *5 (N.D. Ohio Oct. 20, 2011) (citing Valco Cincinnati, Inc. v. N & D Machining Service, 24 Ohio St.3d 41, 24 Ohio B. 83, 492 N.E.2d 814 (1986)). [*29] In the absence of a showing "by clear and convincing evidence" that Defendants have violated the Ohio UTSA, courts should not "intervene to protect those interests[.]" *Id.* (citation omitted). Finding that PatientPoint has not demonstrated a likelihood of success on the merits, the Court concludes that public interest is furthered by denying the relief requested.

IV. CONCLUSION

Accordingly, based on all of the foregoing, the Court **DENIES** PatientPoint's Motion for Temporary Restraining Order. (Doc. 2).

IT IS SO ORDERED.

Date: 3/21/14

/s/ Timothy S. Black

Timothy S. Black

United States District Judge

integration clause in that case only superseded prior or subsequent *oral* Agreements, representations or understandings[.]" and, therefore, could not have superseded the employee's previous written non-compete and non-solicitation agreements. *Id.* at 960.

This [*26] Court is inclined to conclude that the phrase "pertaining to the subject matter hereof[.]" set forth in the Separation Agreement, is, at the least, ambiguous. One could reasonably conclude that the "subject matter" of the Separation Agreement is the broad subject of Hayes' separation from employment with PatientPoint. Certainly, the previous non-compete agreement pertained, in part, to Hayes' separation by governing his ability to compete with PatientPoint for twelve months following his separation.