

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**CELLCO PARTNERSHIP and
ALLTEL CORPORATION
d/b/a VERIZON WIRELESS**

PLAINTIFFS

V.

4:09CV00928 JMM

LEWIS E. LANGSTON, III

DEFENDANT

ORDER

Pending is the Plaintiffs' Motion for Temporary Restraining Order. A hearing was held before the Court on December 22, 2009. After consideration of the evidence presented at the hearing and the applicable law, the Court finds that the motion should be denied.

I. Background

Defendant Lewis Langston was employed by Alltel from 1984 until January 2009 when Verizon Wireless acquired Alltel Corporation. Verizon retained Langston as its Vice President of Transition Planning. His job was to transition parts of Alltel to a newly created Trust until such time as the properties could be sold to a third party. In June 2009, Atlantic Tele-Network, Inc. ("ATNI") signed an agreement to acquire 26 of Alltel's divestiture markets. In his position with Verizon, Langston was responsible for transitioning those Trust properties to ATNI.

Langston resigned from Verizon effective November 19, 2009. Two weeks later he accepted a position as Chief Information Officer with Atlantic Wireless Communications Corp. ("AWCC"), an operating subsidiary of ATNI. AWCC's officers are former Alltel employees whose employment was terminated when Verizon purchased Alltel in January 2009.

Plaintiffs claim that Mr. Langston has violated the Arkansas Trade Secrets Act and the terms of his Contract of Employment, specifically the non-disclosure portion of the Contract.

Plaintiffs seek to enjoin Langston from providing services as a senior executive officer with AWCC, to the extent that his services would require him to use or disclose, or to inevitably use or disclose Verizon's confidential, proprietary and trade secret information.

II. Discussion of the Law

A court generally considers four factors to determine whether a party is entitled to a preliminary injunction:

- (1) the probability that the movant will succeed on the merits;
- (2) the threat of irreparable harm to the movant;
- (3) the balance between the potential harm and any harm that granting the injunction will cause to other parties to the litigation; and
- (4) the public interest.

Dataphase Systems, Inc. V. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981)(en banc). “The party seeking injunctive relief bears the burden of proving these factors.” *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006).

A. Probability of Success on the Merits

First, it is undisputed that Mr. Langston possesses confidential information, or trade secrets, gained from his employment as Vice President of Transition Planning with Verizon. Specifically, Plaintiffs argued at the hearing that Langston's knowledge of the billing platform, Virtuoso 2, is a trade secret and that Langston's use of the billing platform information would give AWCC an unfair business advantage against the Plaintiffs. Mr. Langston's use of billing platform information that he acquired at Alltel and Verizon is one of the primary actions that Plaintiffs seek to enjoin.

The six factors used in determining what constitutes a trade secret are:

(1) the extent to which the information is known outside the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by appellee to guard the secrecy of the information; (4) the value of the information to appellee and to its competitors; (5) the amount of effort or money expended by appellee in developing the information; and, (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

City Slickers, Inc. v. Douglas, 40 S.W.3d 805, 808 (Ark.App. 2001)(internal citation omitted).

Frank O'Mara, CEO of AWCC, testified that he became familiar with Virtuoso 2 while employed with Alltel for 15 years. He testified that Alltel/Verizon tried to sell Virtuoso to GTE and that many people are familiar with Virtuoso and Virtuoso 2. He also stated that Virtuoso 2 would not work as a billing platform for AWCC because it was too expensive and required too much hardware to make it financially sustainable for AWCC. Wade McGill, Chief Administrative Officer for AWCC and former Alltel employee, testified that anyone who had worked in sales or information technology at Alltel would be familiar with Virtuoso. Based upon this evidence and the six factors, the Court finds that Plaintiffs have failed to meet their burden of proof that knowledge of Virtuoso 2 is confidential information or a trade secret under Arkansas law.

Plaintiffs are perilously close to arguing that Langston should not be able to use any institutional knowledge acquired during his career with Alltel or Verizon in his position with AWCC. "Our society is extremely mobile and our free economy is based upon competition; one who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience." *Bendinger v.*

Marshalltown Trowell Co., 994 S.W.2d 468, 475 (Ark. 1999). Therefore, to the extent that

Plaintiffs seek to enjoin Mr. Langston from using his knowledge of Virtuoso, Virtuoso 2, or any general knowledge of the wireless industry ,the Motion is denied.

As for Plaintiffs claim that Langston possesses confidential pricing information, detailed knowledge of the Transitional Services Agreement (“TSA”) between Verizon and ATNI, and the Buyers’ Support Organization, the record is clear that Langston possessed this information and that it is a trade secret. Further, it is undisputed that Langston had, and continues to have, a duty to keep this information confidential and not to disclose it to anyone without Verizon’s authorization.

Arkansas law defines "misappropriation" as:

(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

(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 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 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;

Ark. Code Ann. § 4-75-601(2). Courts will issue an injunction based on the "inevitable

disclosure" of trade secrets; proof of actual disclosure is not required. *See, e.g., Cardinal Freight Carriers v. JB. Hunt Transport Servs.*, 336 Ark. 143, 152,987 S.W.2d 642,646 (1999) (citing federal cases).

Plaintiffs contend that Langston will inevitably disclose to AWCC the confidential information which he acquired at Verizon. Carla Ussery, the successor to Langston's position at Verizon, testified that she believes that Langston would use his knowledge of the Verizon and Alltel billing platforms in his position with AWCC. She did not state that the pricing information and TSA information would be useful in Langston's duties developing AWCC's billing platform. Stephen Linskey, Executive Director of Property Planning and Acquisition for Verizon, testified that he believes that Langston, as CIO of AWCC, would have a fiduciary duty to share Verizon's confidential information with AWCC. While these witnesses were credible, their testimony does not amount to evidence of inevitable disclosure. Possession of confidential information alone is not misappropriation. There is no evidence that Langston has disclosed or intends to disclose confidential information.

Moreover, the Court finds Mr. Langston to be an individual of integrity based upon his demeanor, his longevity with Alltel and Verizon, and the testimony of Frank O'Mara. Langston testified that he was conscious of his duties to keep Verizon trade secrets confidential. Langston and AWCC have taken steps to ensure that Langston's duties would not pertain in any way to Verizon's confidential information. In fact, Mr. O'Mara testified that AWCC does not need Verizon's confidential information. Tom Morgan, an AWCC employee, leads the Verizon negotiations from the information technology standpoint. Wade McGill, Chief Administrative Officer of AWCC, leads the TSA negotiations with Verizon. O'Mara and McGill testified that

Langston would not be involved in any negotiations with Verizon.

Because there is no evidence that Langston has, or intends to, misappropriate Verizon's trade secrets and is merely using his general knowledge of the wireless industry gained through his experience at Alltel and Verizon, the Court finds that the probability of success on the merits of Plaintiffs' claim is low.

A. Threat of Irreparable Harm

"[T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). There is no evidence of actual harm. The Court finds that the Plaintiffs have not met their burden of proof as to any irreparable injury Plaintiffs will suffer if Defendant's employment is not enjoined.

B. Balancing the Harm

The Court heard testimony from the Plaintiffs on the harm they anticipate as a result of Langston's use of confidential information. Specifically, Plaintiffs argued at the hearing that Langston's knowledge of the billing platform Virtuoso 2 would give AWCC an unfair business advantage. As stated this information is not confidential or a trade secret, therefore it need not be protected by an injunction at this time. The harm to the Defendant, however, is much more concrete and ascertainable. If his employment with AWCC is enjoined, he will lose his family's sole income and his options for employment in Little Rock are limited.

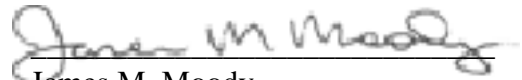
D. Public Interest

The State of Arkansas has an interest in protecting corporate trade secrets. However, there has been no evidence that Mr. Langston has violated either his Employment Agreement or the Arkansas Trade Secrets Act. The Court is also cognizant of the chilling effect an injunction would have on Verizon employees who, in the face of an insecure job future, are examining the job market in Arkansas. This chilling effect tips the balance in favor of the Defendant on this issue.

III. Conclusion

Plaintiffs' Motion for a Temporary Restraining Order (Docket # 4) is DENIED.

IT IS SO ORDERED this 23rd day of December, 2009.



James M. Moody
United States District Judge