

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA**

**BIO-ENGINEERED SUPPLEMENTS & CASE NO.: 502013CA013954XXXXMB  
NUTRITION, INC. f/k/a WINCHESTER, CIVIL DIVISION: AB  
INC.,**

**Plaintiff,**

**vs.**

**MUSCLE ELEMENTS INC. d/b/a  
MUSCLE ELEMENTS, CASEY CRANE,  
JAMES TRACY, ERIC TOMKO, KEVIN  
RAMOS and MARCUS SMALLS,**

**Defendants.**

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**PRELIMINARY INJUNCTION**

**THIS MATTER** came before the Court for hearing on September 20 and 24, 2013, upon an Emergency Motion for Preliminary Injunction [hereinafter, “motion”] by Bio-engineered Supplements & Nutrition, Inc., f/k/a/ Winchester, Inc. [hereinafter, “BSN”]. The Court, having reviewed the motion and the submissions of the parties; having heard live witness testimony; having carefully observed the demeanor and determined the credibility of the witnesses; having heard arguments of counsel; having considered the evidence and applicable legal authority and being otherwise fully advised in the matter, finds that the motion should be granted and this preliminary injunction issued. In support of this determination, the Court sets forth these facts and law conclusions, the former which it finds by a preponderance of the evidence.<sup>1</sup>

**Fact Findings**

1. BSN is engaged in the business of producing and marketing sports nutrition products.
2. Defendants, Casey Crane [hereinafter, “Crane”], James Tracy [hereinafter, “Tracy”], Eric Tomko [hereinafter, “Tomko”], Kevin Ramos [hereinafter, “Ramos”] and Marcus

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<sup>1</sup> Ordinarily, in order to draft an order involving the abundance of evidence received in approximately eighteen hours during two hearing days, the Court would insist on having a transcript in its possession. Unfortunately, given the emergent circumstances, that was not possible in this case.

Smalls [hereinafter, "Smalls"] were all formerly employed by BSN. Collectively, these gentlemen are referred to as "defendants."

3. In 2003, BSN hired Tracy as its Director of Marketing. As the Director of Marketing, Tracy was responsible for all of BSN's marketing efforts, and had access to BSN's trade secrets and other confidential and proprietary information, including but not limited to product-launch plans, marketing strategies, compensation data, budgets and cost information and preferred-vendor lists.

4. On or about January 24, 2011, Tracy executed an agreement with BSN [hereinafter, "Tracy Agreement"]. Pursuant to the Tracy Agreement, [Plaintiff's Exhibit 3] during and for one year after his employment with BSN, Tracy agreed that he would not (i) "divulge, furnish or make accessible to anyone" "any confidential or secret knowledge of [BSN] that [Tracy] has acquired" during his employment with BSN; (ii) directly or indirectly "divert, solicit, or accept business from any customer or potential customer of BSN" or "interfere, or attempt to interfere, with [BSN's] relationships with any of its actual or potential vendors or suppliers"; and/or (iii) directly or indirectly "hire, engage, or solicit any person who was an employee of [BSN]" at the time of his termination or whose employment with BSN terminated one year prior to his termination.

5. In 2003, BSN hired Tomko as a regional sales manager. After several years at BSN, Tomko was promoted to Vice President of Sales. As the Vice President of Sales, Tomko was responsible for all of BSN's sales functions, and he had access to BSN's trade secrets and other confidential and proprietary information including, but not limited to, customer lists, pricing, cost of goods sold and profit margins.

6. On or about January 18, 2011, Tomko executed an Employment Agreement with BSN [hereinafter, "Tomko Agreement"]. Pursuant to the Tomko Agreement, [Plaintiff's Exhibit 4] during and for one year after his employment with BSN, Tomko agreed that he would not (i) "divulge, furnish or make accessible to anyone" "any confidential or secret knowledge of [BSN] that [Tomko] has acquired" during his employment with BSN; (ii) directly or indirectly "invest in, own, manage, operate, finance, control, advise, render services (including consulting services or providing product endorsements) to or guarantee obligations of" any person or business engaged in any business engaged in by BSN; (iii) directly or indirectly "divert, solicit, or accept business from any customer or potential customer of BSN" or "interfere, or attempt to interfere,

with [BSN's] relationships with any of its actual or potential vendors or suppliers"; and/or (iv) directly or indirectly "hire, engage, or solicit any person who was an employee of [BSN]" at the time of his termination or whose employment with BSN terminated one year prior to his termination.

7. In 2004, BSN hired Ramos as an International Account Executive. As an International Account Executive, Ramos was responsible for managing all of BSN's international sales, and he had access to BSN's trade secrets and other confidential and proprietary information.

8. On or about June 1, 2004, Ramos executed an Employee Non Compete / Non Disclosure Agreement with BSN [hereinafter, "2004 Ramos Agreement"]. Pursuant to the 2004 Ramos Agreement, [Plaintiff's Exhibit 5] Ramos agreed that, during and for one year after his employment with BSN, (i) Ramos would not directly or indirectly compete with the business of BSN; and (ii) Ramos would maintain all of BSN's "trade secrets, customer information, vendor information, or any other 'confidential information,' and good will" as confidential.

9. On or about January 24, 2011, Ramos executed an Agreement with BSN [hereinafter, "2011 Ramos Agreement"]. Pursuant to the 2011 Ramos Agreement, [Plaintiff's Exhibit 6] during and for one year after his employment with BSN, Ramos agreed that he would not (i) "divulge, furnish or make accessible to anyone" "any confidential or secret knowledge of [BSN] that [Ramos] has acquired" during his employment with BSN; (ii) directly or indirectly "divert, solicit, or accept business from any customer or potential customer of BSN" or "interfere, or attempt to interfere, with [BSN's] relationships with any of its actual or potential vendors or suppliers"; and/or (iii) directly or indirectly "hire, engage, or solicit any person who was an employee of [BSN]" at the time of his termination or whose employment with BSN terminated one year prior to his termination.

10. In 2005, BSN hired Crane as its Director of Purchasing. As the Director of Purchasing, Crane was responsible for purchasing functions and supplier relations at BSN. As part of his job, Crane had access to BSN's trade secrets and other confidential and proprietary information including, but not limited to, product formulas and specifications, raw material costs, raw material vendor lists, and pricing.

11. On or about February 25, 2005, Crane executed an Employee Non Compete / Non Disclosure Agreement with BSN [hereinafter, "2005 Crane Agreement"]. Pursuant to the 2005

Crane Agreement, [Plaintiff's Exhibit 7] Crane agreed that, during and for one year after his employment with BSN, (i) Crane would not directly or indirectly compete with the business of BSN; and (ii) Crane would maintain all of BSN's "trade secrets, customer information, vendor information, or any other 'confidential information,' and good will" as confidential.

12. On or about January 24, 2011, Crane executed an Agreement with BSN [hereinafter, "2011 Crane Agreement"]. Pursuant to the 2011 Crane Agreement, [Plaintiff's Exhibit 8] during and for one year after his employment with BSN, Crane agreed that he would not (i) "divulge, furnish or make accessible to anyone" "any confidential or secret knowledge of [BSN] that [Crane] has acquired" during his employment with BSN; (ii) directly or indirectly "divert, solicit, or accept business from any customer or potential customer of BSN" or "interfere, or attempt to interfere, with [BSN's] relationships with any of its actual or potential vendors or suppliers"; and/or (iii) directly or indirectly "hire, engage, or solicit any person who was an employee of [BSN]" at the time of his termination or whose employment with BSN terminated one year prior to his termination.

13. In 2007, BSN hired Smalls as an R&D/QC Formulator. As an R&D/QC Formulator, Smalls was responsible for aspects of research, development and quality control at BSN. In that position, Smalls had access to BSN's trade secrets and other confidential and proprietary information including, but not limited to, product formulas and specifications, new product development, raw material ingredients and approved vendors.

14. On or about February 28, 2008, Smalls executed the Terms and Conditions of Employment and Proprietary Information and Nondisclosure Agreement with BSN [hereinafter, "2008 Smalls Agreement"]. Pursuant to the 2008 Smalls Agreement, [Plaintiff's Exhibit 11] during and for two years after his employment with BSN, Smalls agreed that he would not (i) solicit or utilize any existing manufacturers, vendors, distributors or customers of BSN in any manner similar to that of BSN; and/or (ii) use any of BSN's confidential information.

15. On or about January 24, 2011, Smalls executed an Agreement with BSN [hereinafter, "2011 Smalls Agreement"]<sup>2</sup>. Pursuant to the 2011 Smalls Agreement, [Plaintiff's Exhibit 12] during and for one year after his employment with BSN, Smalls agreed that he would not (i) "divulge, furnish or make accessible to anyone" "any confidential or secret knowledge of

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<sup>2</sup> Collectively, the various non-compete/non-solicitation agreements between the BSN Employees and BSN will be referred to herein, collectively, as the "Agreements."

[BSN] that [Smalls] has acquired” during his employment with BSN; (ii) directly or indirectly “divert, solicit, or accept business from any customer or potential customer of [BSN]” or “interfere, or attempt to interfere, with [BSN’s] relationships with any of its actual or potential vendors or suppliers”; and/or (iii) directly or indirectly “hire, engage, or solicit any person who was an employee of [BSN]” at the time of his termination or whose employment with BSN terminated one year prior to his termination.

16. Separate from and in addition to the aforementioned Agreements, during the course of the defendants’ employment with BSN, BSN had an Employee Handbook [Plaintiff’s Exhibit 1] that set forth the various rights and responsibilities of its employees, including provisions regarding the protection of BSN’s trade secrets and other confidential and proprietary information.

17. Pursuant to the Employee Handbook, all BSN employees, including defendants, were required to “refrain from discussing confidential or proprietary [BSN] business and information . . . with anyone who does not have a legitimate reason to know the information.” Further, it is “vital to the interests and success of BSN” that its employees protect BSN’s “confidential information and trade secrets.” At section 2-107, the Employee Handbook also includes a list of examples of confidential materials, which includes, but is expressly not limited to, customer lists, marketing strategies, research-and-development materials and financial information.

18. At all times relevant to this action, all BSN employees, including defendants, were required to acknowledge, in writing, that they would abide by BSN’s policies and procedures set forth in the Employee Handbook.

19. Defendants all signed acknowledgments that they received the Employee Handbook and agreed to abide by its terms.

20. Additionally, during the course of the defendants’ employment with BSN, BSN had an Information Systems Use and Security Policy. [Plaintiff’s Exhibit 16] Among other things, the Information Systems Use and Security Policy provided that (i) all marketing, manufacturing and sales information contained on BSN’s systems was confidential and proprietary; (ii) all information is stored on the central file servers for data integrity and security and that the storing of data on personal systems is strictly prohibited; (iii) and “Under no circumstances is proprietary information or any portion of proprietary information allowed to be

removed from the building, either physically or electronically, unless approved by the Legal Department.”

21. As a condition of their employment, defendants were required to agree, in writing, that they received a copy of BSN’s Information Systems Use and Security Policy and that they would abide by its terms. The defendants all signed such acknowledgments.

22. BSN provided qualified employees, who wanted to work remotely, with a Webmail application to access their BSN e-mail accounts. In certain instances, BSN provided qualified employees with a BSN-approved laptop computer and Virtual Private Network (“VPN”) access. For example, BSN provided Tomko with Webmail access and a BSN laptop computer with VPN access.<sup>3</sup>

23. During their employment with BSN, the defendants had access to BSN’s trade secrets and other confidential and proprietary information including, but not limited to, customer lists, distributor lists, vendor lists, vendor contracts, pricing lists, product costs, profit margins, purchase patterns, marketing strategies, product profiles, product mixes, quality control procedures, compensation data and employee rosters. [hereinafter, collectively, “Confidential Information”]

24. But for their employment with BSN, the defendants would not have had access to BSN’s Confidential Information. Furthermore, it is unlikely that but for their employment with BSN some of the defendants would not likely have had ready access to high-level decision makers in BSN’s customers, vendors and suppliers.

25. On or about August 19, 2011, Crane resigned from his position at BSN.

26. On or about February 1, 2013, Smalls’ employment was terminated by BSN.

27. On or about April 9, 2013, Tracy abandoned his position at BSN. Tracy’s resignation was made effective as of April 18, 2013.

28. On or about April 30, 2013, Tomko resigned from his position at BSN.

29. On or about June 19, 2013, Ramos resigned from his position at BSN.

30. BSN has compensated the BSN Employees pursuant to established policy. BSN has not withheld any compensation from the BSN Employees to which they are entitled.

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<sup>3</sup> Although there was ample testimony proving that this policy was not uniformly enforced, the policy is reasonable and serves a legitimate purpose to protect BSN’s interests. Therefore, violation of the policy by several of the defendants, given the timing and totality of the circumstances is evidence of a scheme to violate the Agreements.

31. On or about March 19, 2013, Defendant, Muscle Elements Inc. d/b/a Muscle Elements [hereinafter, "Muscle Elements"], was incorporated under Florida law. On or about June 5, 2013, Muscle Elements was incorporated under Delaware law. On or about June 6, 2013, Muscle Elements was dissolved as a Florida corporation. On or about July 26, 2013, Muscle Elements registered its fictitious name "Muscle Elements" with the Florida Secretary of State.

32. Crane is the President and Co-Founder of Muscle Elements. Tomko is the CEO and Co-Founder of Muscle Elements. Tracy is the Vice President and Co-Founder of Muscle Elements.

33. It is undisputed that the defendants now are working for and/or affiliated with Muscle Elements.<sup>4</sup>

34. Muscle Elements operates in the same industry as BSN and plans to be a direct competitor of BSN.

35. On or about March 19, 2013, Crane registered the internet domain name "Muscle-Elements.com" with Go-Daddy, an internet domain registrar. Significantly, this was shortly before Tomko, Tracy and Ramos left BSN.

36. Between April and June 2013, Muscle Elements registered seven stylized trademarks of its corporate name and product names with the United States Patent and Trademark Office.

37. Muscle Elements has developed four products, which were manufactured by BSN's largest contract manufacturer (Valentine Enterprises, Inc.) and which are being marketed and sold to BSN's long-standing customers and distributors.

38. During the months preceding his resignation from BSN (June to August 2011), Crane sent several e-mails from his BSN e-mail address to his personal e-mail address with attachments containing BSN's Confidential Information, including formulas and specifications, raw material costs and approved raw material vendors for some of BSN's best-selling products. [Plaintiff's Exhibits 9 and 10]

39. In March 2013 (approximately one month prior to his separation from BSN), Tracy forwarded BSN's Confidential Information from his BSN e-mail address to his personal e-

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<sup>4</sup> During the second day of hearing on the motion, testimony revealed that very recently Tiffany Trout left BSN to go to work for Muscle Elements. That testimony was the first time the person who had supervised Ms. Trout at BSN knew of her hiring by Muscle Elements.

mail address, including a confidential BSN marketing execution plan for the first quarter of 2013, all of the contacts in his BSN-provided Microsoft Outlook program, a confidential BSN marketing research spreadsheet analyzing BSN's competition's visibility in print media during 2012 and 2013, and a confidential BSN file reflecting 2013 salaries for all personnel in the marketing department. [Plaintiff's Exhibits 32, 33 and 34]

40. On or about March 14, 2013 (approximately six weeks before resigning from BSN and a few days prior to Muscle Elements' incorporation), Tomko sent an e-mail from his BSN e-mail address to his personal e-mail address, describing in detail the marketing and branding strategy for Muscle Elements and making clear that Muscle Elements will be directly competing with BSN. [Plaintiff's Exhibit 19]

41. Throughout the month of April 2013 (the month during which he resigned from BSN), Tomko forwarded from his BSN e-mail address to his personal e-mail address BSN's Confidential Information, including a Microsoft Excel file that contained BSN's confidential 2013 budget, a Microsoft Excel file that contained BSN's confidential 2011 and 2012 budgets, a Microsoft Excel file that contained BSN's confidential year-over-year sales comparisons and forecasts, broken down by customer, a Microsoft Excel file that contained BSN's confidential product pricing and costs breakdown, a Microsoft Excel file that contained all of his contacts developed on behalf of BSN, and a confidential BSN April 2013 sales report that contains confidential information regarding BSN's sales, broken down by customer and product, for 2013. [Plaintiff's Exhibits 21, 22, 23, 24, 25, and 26]

42. Tomko testified about other contacts he had with high-ranking individuals of BSN vendors shortly before he left BSN. The timing of those contacts causes this Court to conclude they were part of the scheme.

43. In recent months, the defendants and Muscle Elements have marketed Muscle Elements through Facebook, a social-networking site. In one such Facebook post, a BSN marketing presentation is located on a desk in front of a laptop computer, surrounded by the defendants. [Plaintiff's Exhibit 14]

44. In recent months, representatives of Muscle Elements have contacted Lone Star Distribution ("Lone Star"), one of America's leading wholesale distributors for sports and fitness supplements and one of BSN's largest customers, with which BSN has conducted business with for several years.



45. On August 16 and 17, 2013, Tomko, Ramos and other representatives of Muscle Elements attended the Europa “Get Fit & Sport Expo” in Dallas, Texas. At that Expo, Tomko, Ramos and other representatives of Muscle Elements met with representatives of Lone Star and of Europa, one of BSN’s largest customers with which BSN has conducted business for several years.

46. Muscle Elements intends to attend and participate in the Olympia Fitness and Performance Expo, the nation’s largest bodybuilding competition and trade show in Las Vegas, Nevada, from September 26 through September 29, 2013.

### **Law Conclusions**

47. Under Florida law, a party seeking a temporary injunction must establish four elements: “(1) irreparable harm will result if the temporary injunction is not entered; (2) an adequate remedy at law is unavailable; (3) there is a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest.” *Anarkali Boutique, Inc. v. Ortiz*, 104 So. 3d 1202, 1204 (Fla. 4th DCA 2012) (quoting *Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So. 3d 1191, 1195 (Fla. 4th DCA 2011)).

48. Under Florida law, “[t]he purpose of a temporary or preliminary injunction is not to resolve disputes, but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur when full relief may be given.” *Michele Pommier Models, Inc. v. Diel*, 886 So. 2d 993, 995-96 (Fla. 3d DCA 2004) (citing *Grant v. Robert Half Int’l, Inc.*, 597 So. 2d 801 (Fla. 3d DCA 1992)).

49. Each of the agreements executed by the defendants in 2011 contains a provision expressly saying it “will be governed by, and interpreted in accordance with, the laws of the State of Illinois.”

50. Significantly, defendants’ counsel directed this Court’s attention to only one area of Illinois substantive law which would arguably have required a slightly-different analysis from that required under Florida substantive law. Generally, Illinois law requires a balancing of the equities in considering injunctive enforcement of post-employment restrictive covenants. Consistent with that position, the individual defendants adduced evidence calculated to show that BSN had dealt with them in bad faith, disrespected them, abandoned its product integrity and improperly deprived the individual defendants from enjoying careers in their chosen industry.

51. Defendants have not argued that in any other respect relevant Illinois law differs from Florida law and this Court's review of Illinois cases and Florida cases leads this Court to believe that the balancing of the equities requirement in Illinois law is the only material difference. Accordingly, this order does refer to substantive provisions of Florida law where relevant and apparently not inconsistent with Illinois law<sup>5</sup> as represented to the Court orally and in writing by defendants' counsel and in accordance with the Court's research. Unfortunately, because of the emergent nature of the matter, that research was not so thorough as this Court normally conducts.<sup>6</sup>

52. A "trade secret" is "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Fla. Stat. § 688.002(4).

53. In light of both the great lengths taken by BSN to protect its Confidential Information and the actual and potential economic value derived from the Confidential Information not being known by people outside of BSN, BSN's Confidential Information constitutes trade secrets.

54. The defendants have misappropriated BSN's Confidential Information by disclosing the Confidential Information to Muscle Elements, and, in all likelihood, other third parties, without the express or implied consent of BSN. Fla. Stat. § 688.002(2).<sup>7</sup>

55. Muscle Elements has misappropriated BSN's Confidential Information because it acquired the Confidential Information under circumstances pursuant to which Muscle Elements through its founders and others of the defendants knew or should have known were improper. Fla. Stat. § 688.002(2).

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<sup>5</sup> The parties do not dispute the reasonableness of the one-year duration, the geographic scope, the consideration paid or the applicability to involuntarily-terminated employees of the post-employment no-competition and confidential-and-other-interests protective covenants.

<sup>6</sup> Curiously, defendants' cite as many Florida cases as they do Illinois cases. In any event, this Court found most enlightening *Medline Industries, Inc. v. H. Royal Grubb*, 670 F. Supp. 831 (U.S.D.C.E.D. Ill. 1987) and *Reliable Fire Equipment Company v. Arredondo*, 965 N.E. 2d 393 (Ill. 2011).

<sup>7</sup> While the defendants argue the lack of evidence of divulgence of information to third parties, sending it even to themselves while they were creating an admitted competitor to BSN is sufficient. Furthermore, Smalls' obvious memorization of at least one trade-secret formula is clear-and-convincing evidence that BSN's confidential information is being misappropriated in violation of the Agreements.

56. The party seeking enforcement of a restrictive covenant must plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. Fla. Stat. § 542.335(1)(b). The term “legitimate business interest” includes, but is not limited to, trade secrets, other valuable confidential business or professional information that otherwise does not qualify as trade secrets and/or substantial relationships with specific prospective or existing customers, vendors or suppliers. *Id.*

57. The party seeking enforcement of a restrictive covenant must plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. Fla. Stat. § 542.335(1)(c).

58. BSN has a legitimate business interest in protecting its Confidential Information because such information constitutes trade secrets and other valuable confidential business or professional information.

59. BSN has a legitimate business interest in protecting its substantial relationships with specific prospective or existing customers or vendors.

60. The Agreements between BSN and the defendants are reasonably necessary to protect BSN’s legitimate business interests, and the restrictive covenants are reasonable in time and scope.

61. Defendants argue that BSN breached certain of the Agreements first and that this antecedent breach excused Defendants performance under the Agreements. The Court finds, however, that BSN has fulfilled its obligations to the Defendants - - including its compensation obligations - - such that there was no antecedent breach. *See Charles Schwab & Co., Inc. v. McMurry*, No. 208-CV-534-FTM-29SPC, 2008 WL 5381922, at \*2 (M.D. Fla. Dec. 23, 2008) (holding that a delay in payment, which is the result of established policy permitting delayed payments while errors are corrected and adjustments are made, is not an antecedent breach).

62. While defendants adduced during the hearing a great deal of information concerning the hardship an injunction will cause them and that they felt disrespected by BSN and that BSN had engaged in “pixie dusting,” the Court is not persuaded that those factors are sufficient to outweigh the necessity to protect BSN’s interests. For example, there is no proof that BSN treated any of the defendants less favorably than any other BSN employees in compensation matters. Indeed, Tomko testified that he’d been instructed to trim a half million dollars from his labor budget. Also, none of the defendants who professed concern about alleged

“pixie dusting” took any steps to rectify or challenge the issue before leaving BSN’s employ though they’d known of the “rumors” for nearly a year prior to their departures. Only Smalls took any steps whatsoever to mitigate the losses when his BSN employment terminated. This not only serves to negate the defendants’ hardship claims but also constitutes evidence that they’d intended for some time to challenge BSN in the marketplace.

63. In short, a balancing of the equities does not favor the defendants.

64. Irreparable harm is presumed in cases involving the misappropriation of trade secrets and/or tortious interference. *Dotolo v. Schouten*, 426 So. 2d 1013, 1015 (Fla. 2d DCA 1983) (citing *Silvers v. Dis-Com Securities, Inc.*, 403 So. 2d 1133 (Fla. 4th DCA 1981)); *Unistar Corp. v. Child*, 415 So. 2d 733, 735 (Fla. 3d DCA 1982) (“such irreparable harm could be presumed and need not be alleged or proved in a case involving wrongful interference with a business relationship”) (citing *Sentry Insurance v. Dunn*, 411 So. 2d 336 (Fla. 5th DCA 1982)); see also Fla. Stat. § 688.003(1) (“Actual or threatened misappropriation [of a trade secret] may be enjoined.”)

65. Harm also is irreparable where it is not capable of being quantified. *Hatfield v. AutoNation, Inc.*, 939 So. 2d 155, 157 (Fla. 4th DCA 2006) (“[A]n injury is irreparable where the damage is estimable only by conjecture, and not by any accurate standard.”) (quoting *JonJuan Salon, Inc. v. Acosta*, 922 So. 2d 1081, 1083 (Fla. 4th DCA 2006), in turn quoting *Sun Elastic Corp. v. O.B. Indus.*, 603 So. 2d 516, 517 n.3 (Fla. 3d DCA 1992)).

66. Here, not only has BSN asserted claims of, *inter alia*, breach of non-compete agreements, misappropriation of trade secrets and tortious interference such that irreparable harm to BSN presumed, BSN has established by the greater weight of the evidence that it has suffered and will continue to suffer irreparable harm if the defendants’ wrongful conduct is not enjoined. In just a few months, the defendants have formed and/or gained employment with a competing business and have used BSN’s Confidential Information to aid that business to BSN’s detriment. The defendants have begun developing products and have solicited BSN’s long-standing, established clients and vendors to purchase those products. Further, the defendants have solicited remaining BSN employees. The precise damage caused to BSN as a result of defendants’ conduct is unquantifiable and, thus, irreparable.

67. It is well-established that the concepts of “irreparable injury” and “no adequate remedy at law” are “indistinguishable.” *Special Purpose Accounts Receivable Co-op Corp. v.*

*Prime One Capital Co.*, 125 F. Supp. 2d 1093, 1105-06 (S.D. Fla. 2000) (citing *Lewis v. S.S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976); *Morris Commun. Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322, 1330 (M.D. Fla. 2000)).

68. Here, BSN does not have an adequate remedy at law because money damages alone would be insufficient to remedy the defendants' unlawful conduct in light of the irreparable injury discussed above.

69. Courts within this district routinely enter temporary and/or permanent injunctions to protect employers from former employees' breaches of their confidentiality/non-compete/non-solicitation agreements. *See, e.g., Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So. 3d 1191, 1195 (Fla. 4th DCA 2011)) (affirming entry of temporary injunction to prevent violation of employment agreement); *Salamon v. Anesthesia Pain Care Consultants, Inc.*, 10 So. 3d 1112, 1113 (Fla. 4th DCA 2009) (upholding injunction against former employee because employee, in violation of his non-compete agreement, treated former employer's patients and used former employer's confidential and proprietary information in his subsequent practice); *4UOrtho, LLC v. Practice Partners, Inc.*, 18 So. 3d 41, 42 (Fla. 4th DCA 2009) (affirming trial court's entry of temporary injunction because of former employer's violation of non-compete agreement); *Fulford v. Drawdy Bros. Const., II, Inc.*, 903 So. 2d 1007 (Fla. 4th DCA 2005) (upholding injunction against former employee to protect former employer's legitimate business interests relating to its bidding process, customer list, and specialized industry training). *See also Hilb Rogal & Hobbs of Fla., Inc. v. Grimmel*, 48 So. 3d 957 (Fla. 4th DCA 2010) (reversing dissolution of injunction against former employee after former employee solicited former employee's customers in violation of non-compete agreement).

70. Likewise, courts within this district will enter temporary and/or permanent injunctions to protect employers from misappropriation of trade secrets by former employees. *See, e.g., Hatfield v. AutoNation, Inc.*, 939 So. 2d 155, 157 (Fla. 4th DCA 2006). In *Hatfield*, an employer sued its former employee for, among other things, misappropriation of trade secrets. *Id.* at 156. In the weeks immediately preceding his resignation, the former employee removed confidential and proprietary information from his employer: He took a box of materials, downloaded twenty-six confidential files and sent five e-mails with attachments including proprietary data to his personal e-mail account. *Id.* The trial court entered an injunction in favor of the employer to prevent the former employee's disclosure and misappropriation of the former

employer's confidential and proprietary information. *Id.* at 156. The Fourth District Court of Appeal affirmed. *Id.* at 157. In finding that the employer had proven a substantial likelihood of success on the merits, the court explained:

The trial court found that [the employer] had a clear legal right and substantial likelihood of success on these merits, under section 688.003, Florida Statutes—the Florida Uniform Trade Secrets Act. The statute deals not with restrictive covenants and employment by a business' competition, but with misappropriation. It provides injunctive relief when trade secrets have actually been misappropriated, as here, or misappropriation has been threatened. An injunction with respect to stolen business secrets is authorized where it will eliminate commercial advantage derived from the misappropriation and affirmative acts to protect a trade secret can be compelled by court order.

*Id.* Central to the court's analysis was the "state's interest in protecting businesses from theft of confidential information." *Id.* at 158.

71. This Court finds *Hatfield* particularly instructive. As in *Hatfield*, certain of the defendants sent e-mails with attachments containing confidential and proprietary information to their personal e-mail accounts in the weeks leading up to their departure from BSN. As in *Hatfield*, the unauthorized removal of BSN's Confidential Information and the defendants' actual and threatened misappropriation of same mandate an injunction.

72. Further, the Court finds that BSN has a substantial likelihood of proving its claims. The Defendants' use of BSN's Confidential Information (i) to identify potential customers, vendors and distributors; (ii) to develop and market products similar or identical to BSN's; and (iii) to undercut BSN by offering substitute products at a discounted price, is in violation of BSN's Employee Handbook, BSN's Information Systems Use and Security Policy, the Agreements and applicable law.

73. Entry of an injunction in this case serves several important policy goals. First, an injunction protects the public's interest in the protection and enforcement of contractual rights. *See, e.g., Hilb Rogal & Hobbs of Fla., Inc. v. Grimmel*, 48 So. 3d 957, 962 (Fla. 4th DCA 2010) ("[A]n injunction here will not be adverse to the public interest. On the contrary, the public has a cognizable interest in the protection and enforcement of contractual rights.") (quoting *Pitney Bowes Inc. v. Acevedo*, No. 08-21808-CIV, 2008 WL 2940667, at \*6 (S.D. Fla. July 28, 2008)); *see also Leedom Mgmt. Group, Inc. v. Perlmutter*, No. 8:11-CV-2108-T-33TBM, 2012 WL 909322, at \*9 (M.D. Fla. Feb. 15, 2012) ("The award of an injunction serves to provide both parties the benefit of the bargain they made. Enforcement of the same on this record does no

harm to the public interests.”), *report and recommendation adopted*, No. 8:11-CV-2108-T-33TBM, 2012 WL 909311 (M.D. Fla. Mar. 15, 2012). Here, the agreements between the defendants and BSN evince important contractual obligations. In exchange for employment with and compensation from BSN, the defendants agreed not to disclose or use BSN’s Confidential Information and, for a reasonable period after their employment ended, agreed not to compete with, solicit from or raid BSN. Public policy, as well as basic contract law, requires that the defendants be enjoined from violating their confidentiality/non-compete/non-solicitation agreements.

74. Second, an injunction furthers the policy goals of the Florida Legislature, which has recognized by statute the importance of restrictive covenants and trade secrets. *Hilb Rogal*, 48 So. 3d at 962 (“the Florida Legislature has determined that the enforcement of such [employment] agreements is in the public’s best interest”) (quoting *Pitney Bowes Inc.*, 2008 WL 2940667, at \*6); *Autonation, Inc. v. O’Brien*, 347 F. Supp. 2d 1299, 1308 (S.D. Fla. 2004) (“[A]s evidenced by the Legislature’s enactment of Section 542.335 of the Florida Statutes, public policy in Florida favors enforcement of reasonable covenants not to compete.”); *see also* Fla. Stat. § 688.003(1) (“Actual or threatened misappropriation [of a trade secret] may be enjoined.”); *VAS Aero Servs., LLC v. Arroyo*, 860 F. Supp. 2d 1349, 1363 (S.D. Fla. 2012) (“a preliminary injunction would affirmatively serve the public interest by protecting businesses from employees who misappropriate their trade secrets”).

75. Entry of an injunction in this case furthers the state’s public policy goals by preventing Muscle Elements and the defendants from violating enforceable restrictive covenants and misappropriating protected trade secrets.

76. Third, the Court recognizes the public’s interest in prohibiting duplicitous conduct by employees. In this case, the Confidential Information improperly was taken from BSN by its employees and is being used to directly compete with BSN. Public policy supports an injunction to prevent such misconduct.

77. BSN, having come forward with substantial, competent evidence to satisfy each of the elements necessary for temporary injunctive relief, it is hereby:

**ORDERED and ADJUDGED** that BSN’s Emergency Motion for Preliminary Injunction is **GRANTED**. Accordingly, it is:

**ORDERED** that the defendants are enjoined from discussing or using BSN's confidential or proprietary business information and from all further violations of BSN's Employee Handbook.

**ORDERED** that the defendants are enjoined from misappropriating BSN's trade secrets including, but not limited to, BSN's product launch plans, marketing strategies, compensation data, budgets, cost information, preferred vendor lists, customer lists, distributor lists, vendor contracts, purchase patterns, pricing information, cost of goods sold, profit margins, product formulas and specifications, product mixes, quality control procedures, raw material costs, raw materials vendor lists, employee rosters and compensation data.

**ORDERED** that the defendants are enjoined from violation of their respective confidentiality/non-competition/non-solicitation Agreements with BSN including, but not limited to, the use and/or disclosure of BSN's Confidential Information, solicitation of BSN's employees, engaging in business in competition with BSN and solicitation of and engaging in business with BSN's customers, for the remaining temporal terms of the Agreements.

**ORDERED** that Muscle Elements and Crane are enjoined from tortiously interfering with the Agreements between BSN and the other BSN Employees by, *inter alia*, facilitating the violation of said Agreements through the use and/or or disclosure of BSN's Confidential Information, solicitation of BSN's customers, engaging in business in competition with BSN and solicitation of and engaging in business with BSN's customers.

**ORDERED** that the defendants are enjoined from tortiously interfering with BSN's business relationships with its established customers and distributors. While the Court believes it is without authority to prohibit the defendants from attending as individuals the Las Vegas trade show or convention which begins tomorrow, it does prohibit Muscle Elements from erecting a booth or disseminating any promotional information either orally, on paper, or electronically at the Olympia Fitness and Performance Expo.



**ORDERED** that the defendants are enjoined from further use of any e-mail, web address or social media account that contains the term “BSN” or any similar variation.

**ORDERED** that Muscle Elements is enjoined from launching its website for the remaining temporal terms of the Agreements.

**ORDERED** that, in accordance with Fla. R. Civ. P. 1.610(b), BSN shall post a bond of one-hundred and twenty-five thousand dollars, (\$125,000.00).

**DONE AND ORDERED** in Chambers, at West Palm Beach, Palm Beach County, Florida, on this 25<sup>th</sup> day of September, 2013.

  
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JEFFREY DANA GILLEN, Circuit Judge

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