

Canon U.S.A., Inc. v Giordano
2010 NY Slip Op 31733(U)
July 1, 2010
Sup Ct, Nassau County
Docket Number: 9126-10
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CANON U.S.A., INC.,

Plaintiff,

- against -

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 9126-10
Motion Seq. Nos: 1 & 2
Submission Date: 6/14/10

PAUL GIORDANO, MARIO CASTANO and NIKON, INC.,

Defendants.
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The following papers have been read on this Order to Show Cause and this Motion:

- Order to Show Cause, Affidavit of Immediacy, Affidavits in Support of E. Pitchford, K. Adams and G. Pavan and Exhibits.....X
- Plaintiff's Memorandum of Law in Support.....X
- Affidavit in Opposition of J. Browne and Exhibits.....X
- Defendant Nikon's Memorandum of Law in Opposition.....X
- Affidavits of P. Giordano, M. Castano, S. Cacace, L. Pellegrino, J. Browne, J. Fowler and D. Silverman in Opposition.....X
- Affidavit of L. Fox and Exhibits.....X
- Defendants Giordano and Castano's Memorandum of Law in Opposition....X
- Notice of Motion, Affidavits of D. Monachino, K. Adams (2), P. Giordano, G. Pavan (2) and Exhibits.....X
- Amended Notice of Motion.....X
- Plaintiffs' Memorandum of Law in Support.....X
- Affidavit in Opposition of P. Giordano and Exhibit.....X
- Affidavit of J. Messina.....X
- Defendant Giordano's Memorandum of Law in Opposition.....X
- Affidavit of D. Monachino in Further Support and Exhibits.....X
- Affidavit of K. Adams in Further Support.....X
- Reply Memorandum of Law in Further Support.....X

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiff Canon U.S.A., Inc. (“Canon” or “Plaintiff”) on May 11, 2010 and 2) the Motion filed by Canon on June 2, 2010, both of which were submitted on June 14, 2010. For the reasons set forth below, the Court 1) denies Plaintiff’s Order to Show Cause in its entirety; 2) denies Plaintiff’s motion in its entirety; and 3) vacates the Temporary Restraining Order issued on May 11, 2010.

BACKGROUND

A. Relief Sought

In its Order to Show Cause, Plaintiff seeks an Order permitting Plaintiff to 1) engage in expedited discovery; 2) inspect and image all electronic devices, including, but not limited to, removable storage devices (*e.g.* thumb drives) or all other similar electronic storage devices (“Devices”) belonging to, under the control of, accessible to, or operated by Defendant Paul Giordano (“Giordano”) on which Plaintiff’s information, documents, correspondence, materials, e-mails, records and property of any kind or nature and in whatever form (collectively “Materials”) reside or may have resided; 3) inspect and image all Devices belonging to, under the control of, accessible to, or operated by Defendant Mario Castano (“Castano”) on which Plaintiff’s Materials reside or may have resided; 4) notice the depositions of the Defendants upon five (5) days’ written notice; 5) notice the deposition of any non-party, pursuant to CPLR § 3106, upon five (5) days’ written notice; and 6) propound written discovery requests on Defendants to which Defendants must respond within five (5) days.

In its Motion, Plaintiff seeks an Order 1) entering a judgment of liability against Giordano based on his alleged spoliation of evidence consisting of Corsair and Google thumb drives (“Thumb Drives”); 2) directing that all issues to which the Thumb Drives and iStockphoto images are relevant shall be deemed resolved in this action in accordance with Plaintiff’s claims; 3) prohibiting Giordano from opposing any claims, or supporting any defenses, with any physical evidence or testimony in connection with the foregoing information and devices; 4) striking any portion of Giordano’s Answer and/or defenses and/or opposition to Canon’s Order to Show Cause in connection with the foregoing information and devices; 5) entering a judgment of liability in favor of Plaintiff as to the First through Sixth Causes of Action in the Complaint against Giordano based on his alleged spoliation of evidence; and 6) directing that an

adverse inference instruction shall be given at trial and other proceedings in this matter based on Giordano's alleged spoliation of evidence.

B. The Parties' History

1. The Allegations in the Complaint

Paragraph one of the Complaint (Ex. 1 to OSC) describes the nature of this action as follows:

This is an action for: (i) declaratory relief and specific performance of certain post-employment non-compete, non-disclosure, and non-solicitation provisions of the Individual Defendants' respective employment agreements ("Employment Agreements"), including injunctive relief available thereunder, arising from the Individual Defendants' blatant violation of their Employment Agreements and restrictive covenants with Canon, as well as their common law obligations by, among other things, unlawfully commencing employment with Nikon, a direct competitor of Canon, in direct violation of the narrow non-competition provisions of the Employment Agreements and armed with confidential and proprietary trade secret information belonging to Canon, (ii) declaratory relief and injunctive relief against Nikon for its unfair competition and knowing tortious interference with contract as a result of Nikon's targeted and unlawful efforts to gain the advantage of Canon's confidential information, business strategies, and trade secrets related to its eCommerce platform in an attempt to bolster its own foundering eCommerce efforts, by directly and indirectly hiring the Individual Defendants and soliciting other Canon employees involved in and with detailed knowledge of Canon's internet marketing and eCommerce business, and (iii) substantial monetary damages against Nikon and the Individual Defendants for misappropriating Canon's confidential and trade secret information, tortiously interfering with contracts, unfairly competing with Canon, and being unjustly enriched by systematically soliciting Canon's internet marketing group employees with known employment restrictions and, currently (if not imminently) replicating certain of Canon's unique and proprietary web-based platforms.

The Complaint describes Canon as a provider of consumer, business-to-business, and industrial digital imaging solutions whose products include cameras, lenses, camcorders, facsimile machines and copiers. Defendant Nikon Inc. ("Nikon") is described as a direct competitor of Canon.

The Complaint alleges that Castano worked for Canon from April of 2003 until his resignation on February 18, 2010. While at Canon, Castano held the positions of Manager in the Systems and Technical Support Division, Senior Project Manager in the Corporate Information Technology Group and Business Applications and Development Manager. Castano began

working for Nikon in March of 2010.

The Complaint further alleges that Giordano worked for Canon in June of 2006 until his resignation on February 27, 2010. While at Canon, Giordano held the positions of Software Products Marketing Specialist, Associate Printer Marketing Specialist and Associate Internet Marketing Specialist. Giordano began working for Nikon in or about March 2010.

The Complaint makes specific reference to the following paragraphs of the Employment Agreements that the Individual Defendants executed (Exs. A and B to OSC): 1) paragraph 3 titled "Non-Disclosure of Confidential Information," 2) paragraph 8 titled "Maintaining Records," 3) subparagraphs 1, 2, 5 and 6 of paragraph 9 titled "Obligations After Termination," and 4) paragraph 11 titled "Specific Performance." Pursuant to paragraph 9.1 of the Agreements, the Individual Defendants agreed that:

For a period of one year after my employment with CANON ends (or for a period equal to the length of my employment with CANON, if shorter), I will not, directly or indirectly, render services in the geographic region where I performed my duties for CANON (including, where applicable, the United States as the relevant region) if my services would relate to the development, manufacture, marketing, sale, merchandising, promotion or maintenance of any products or processes which are similar to, or compete with, (a) products or processes of CANON with which I worked at any time during the last two years of my employment with CANON, or (b) products or processes about which I acquired CONFIDENTIAL INFORMATION through my employment at any time during the last two years of employment with CANON.

The Definitions section of the Employment Agreements ("Agreements") defines "Confidential Information" as follows:

"CONFIDENTIAL INFORMATION" means all information of any type or kind, including know-how and INTELLECTUAL PROPERTY rights, whether of CANON or of others, including without limitation entities related to CANON and respective customers and suppliers, that is (1) disclosed to or known to you or made or conceived by you (whether solely by you or jointly with others) as a consequence of or through your employment with CANON, (2) not generally available to the public (or available only as [a] result of an unauthorized disclosure), and (3) treated by CANON as confidential during the time of your employment, regardless of whether or not such information is a "trade secret" as defined by law. In addition to technical information, the term "CONFIDENTIAL INFORMATION" shall also include materials, ideas and know-how relating to the development, manufacture, maintenance, packaging and marketing of products including without limitation marketing policies and information, types and kinds of products sold or to be sold, relationships with and lists of customers, distribution procedures, pricing discounts and policies and other

pricing information, supplier information and vendor information, and any other financial information whether about CANON, entities related to CANON, or their respective customers.

The Definitions section of the Agreements defines “Intellectual Property” as follows:

“INTELLECTUAL PROPERTY” means all INVENTIONS, DESIGNS, COPYRIGHT WORKS, MASK WORKS AND TRADEMARK/SERVICE MARK CONCEPTS (1) made or conceived by you (whether solely by you or jointly with others), 2) which relate to the actual or anticipated business of CANON, or to the actual or anticipated research or development of CANON or are suggested by or as a result [from] any task assigned to you on behalf of CANON, and (3) which you made or conceived from the time you became employed by CANON until you leave, whether or not made or conceived during normal business hours and whether or not you used CANON resources.

The Complaint contains nine (9) causes of action: 1) a request for a declaratory judgment, as to Giordano and Castano (“Individual Defendants”) that the restrictive covenants in the relevant Employment Agreements are enforceable, the Individual Defendants breached those Employment Agreements and injunctive relief is warranted, 2) a request for specific performance and injunctive relief against the Individual Defendants in light of their allegedly improper conduct including the misappropriation of Canon’s confidential and trade secret information, 3) misappropriation of trade secrets against all Defendants, 4) breach of contract against the Individual Defendants, 5) conversion against Giordano, 6) breach of the duty of loyalty against the Individual Defendants, 7) unfair competition against Nikon, 8) unjust enrichment against Nikon, and 9) tortious interference with the Individual Defendants’ Employment Agreements against Nikon.

2. The Temporary Restraining Order

On May 11, 2010, the Court granted some, but not all, of the temporary injunctive relief requested by Plaintiff. That temporary restraining order (“TRO”), which has been in effect since its issuance, directed that, pending the hearing and determination of Plaintiff’s Order to Show Cause, 1) Defendants and all persons acting in concert with them are restrained and enjoined from directly or indirectly disclosing, reproducing, or using any confidential, proprietary and/or trade secret information of any kind, nature or description belonging to or removed from Canon, including, but not limited to, information known to have been taken by Giordano from Canon’s computer system, such additional similar information revealed through discovery in aid of this

application, as well as information relating to Plaintiff's web and eCommerce platforms, services, developments, processes, inventions, source codes, technology, products, software, business and financial information, and marketing and pricing strategies and techniques;

2) Defendants and all persons acting in concert with them are directed to immediately deliver copies to Plaintiff of all information, documents, correspondence, materials, emails, records and property of any kind or nature whatsoever and in whatever form, if any, including reproductions of any aforementioned items (including copies thereof and computer records) obtained by the Individual Defendants during their employment with Plaintiff and belonging to Plaintiff (collectively referred to as "materials"), which are within the Defendants' possession, custody or control; 3) Defendant Giordano is to immediately produce for inspection and imaging electronic copies of (i) UT163 USB2 Flash Storage USB device serial number 0805130472962c&0, (ii) a Canon MX700 series USB device serial number 7&32d6fdce&0&10011E&0, and (iii) Corsair Flash Voyager USB Device serial number 38E59B5439E0C1&0, to verify the use, access, disclosure, printing, copying, and return of Plaintiff's material, including, but not limited to, all confidential, proprietary and/or trade secret information belonging to Plaintiff; 4) Defendant Castano is to immediately produce for inspection and imaging electronic copies of all electronic devices, including, but not limited to, removable storage devices (*e.g.*, thumb drives) or all other similar electronic storage devices (collectively "Devices") belonging to, under the control of, accessible to, or operated by Castano, to verify the use, access, disclosure, printing, copying, and return of Plaintiff's material, including, but not limited to, all confidential, proprietary and/or trade secret information belonging to Plaintiff; 5) Defendants and all persons acting in concert with them are temporarily restrained and enjoined from directly or indirectly hiring (or attempting to hire), recruiting, contacting, soliciting, encouraging or inducing employees of Plaintiff (and its affiliates) to terminate their employment with Plaintiff in order to work for Nikon where such Canon employees are subject to employment agreements containing restrictive covenants of the type contained in the employment agreements attached as Exhibits A and B of the Affidavit of Ellen Pitchford ("Pitchford"); 6) Giordano and all persons acting in concert with him are, within two days of the TRO, temporarily restrained and enjoined from directly or indirectly using any images obtained from Canon's iStockphoto pre-paid account, including, but not limited to, Giordano's personal business websites www.wiifitroutine.com and www.mojera.com; and 7) all parties and persons acting in concert with them shall preserve, and

not destroy, damage or alter in any way, all potentially relevant evidence in this action, including, but not limited to, any of Plaintiff's material residing on the Defendant's business or personal computer(s) and any and all Devices, belonging to, under control of, accessible to, or operated by the Defendants. Defendants shall also preserve, and not destroy, damage, or alter in any way, all emails in any and all of the Defendants' email accounts, including but not limited to any personal email accounts, which refer to, relate to and/or contain Plaintiff's material of any kind.

3. The Submissions Regarding Plaintiff's Order to Show Cause and Motion

Plaintiff provides an Affidavit in Support of Pitchford dated May 7, 2010 in which she affirms as follows:

Pitchford is Canon's Director of Internet Marketing and eCommerce and worked directly with the Individual Defendants until their resignations. Pitchford affirms that the Individual Defendants worked with and were privy to Canon's trade secrets, proprietary systems and web-based platforms including, but not limited to, Single Sign-On Platform and Canon Image Gateway. She avers, further, that these systems and platforms were the result of Canon's extensive research and testing, and provided a competitive edge to Canon.

Pitchford asserts her belief that Nikon does not have systems or capabilities in place that are similar to those described above. Pickford affirms that, while Nikon has a website on which it advertises its products, it does not have an eCommerce site that can efficiently handle direct sales of its products. In support of these assertions, Pitchford attests to conversations she had a year earlier with a former colleague named Lucy Pellegrino ("Pellegrino") who is now employed by Nikon. Pitchford affirms that Pellegrino advised Pitchford that she was responsible for developing Nikon's eCommerce strategy and asked Pitchford if she could "pick [her] brain" (Pitchford Aff. at ¶ 8) as to how to develop Nikon's eCommerce. Pickford provides an e-mail dated March 6, 2009 from Pellegrino to Pickford (Ex. C to Pickford Aff.) in which Pellegrino sought Pickford's advice in developing an "e-store strategy." This e-mail includes the sentence "Obviously I am not looking for any confidential information/or to create any conflicts, but if you feel you can share any learnings [sic], I would GREATLY [emphasis in original] appreciate it."

Pickford also alleges that Pellegrino suggested that Pickford work for Nikon, which Pickford "took...as a sign that Nikon was still having difficulties setting up the eCommerce

platform and looking for someone with direct experience to expedite the development and launch process” (Pickford Aff. at ¶ 11). In support of this assertion, Pickford provides a copy of an e-mail dated June 3, 2009 (Ex. D to Pickford Aff.) from Pellegrino to Pickford which read “I have just listed this job on LinkedIn and thought you or someone you know might be a good fit. Feel free to forward it on to others.” Pellegrino made no reference in this e-mail to any difficulties experienced by Nikon.

Pickford also affirms, *inter alia*, that 1) at least eight (8) of the twelve (12) current Canon Internet Marketing and eCommerce team members were contacted by Pellegrino and/or a recruiter working on behalf of Nikon to work for Nikon in similar positions to those held at Canon; 2) Pellegrino, as a former Canon employee, should have known about the restrictive covenants in the Agreements; 3) as a result of their employment with Canon, the Individual Defendants have extensive knowledge of Canon’s eCommerce and internet marketing platforms and future marketing plans; 4) even if the Individual Defendants do not attempt to replicate Canon’s systems, they will use the information they learned while at Canon to improve and/or modify Nikon’s eCommerce platform; 5) in light of the proprietary nature of Canon’s platforms and systems, Canon takes steps to secure that information which include requiring outside vendors to sign non-disclosure agreements, retaining most information on password-protected servers, requiring usernames and passwords for access to computer terminals, and locking computers after a period of nonuse; and 6) Pickford believes, in part based on the wording of his LinkedIn site (Ex. O to Pickford Aff.), that Castano has been working for Nikon in “near identical roles that he performed at Canon” (Pickford Aff. at ¶ 59).

Plaintiff also provides an Affidavit in Support of Kevin Adams (“Adams”) dated May 7, 2010 in which he affirms as follows:

Adams is a computer forensic examiner for Protek International, Inc. (“Protek”), a computer forensic, advisory services, investigations and electronic discovery firm headquartered in Illinois. Adams has been involved in the engineering and Information Technology field since 1979 and has specialized in computer forensics for the past three (3) years. Adams was retained by Plaintiff’s counsel to conduct a forensic examination of a forensic image of a hard drive from a computer system that, upon information and belief, was assigned to Giordano (“Giordano System”). Adams attempted to determine user activity on the Giordano System between January 1 and February 28, 2010.

Adams concluded that, on two days in the month prior to Giordano's resignation and on the last day of his employment, a Corsair thumb drive was connected to his System. Specifically, on February 26, 2010, the day before Giordano's resignation, a Corsair Flash Voyager was connected to the Giordano System, and Adams determined that eleven (11) folders or files were present on this device. Adams concluded that the eleven (11) LNK files pointing to the eleven (11) folders and files accessed from the Corsair thumb drive were "specifically targeted for deletion and wiping, presumably to avoid detection through forensic recovery" (Adams Aff. at ¶ 18). Adams bases this conclusion on several factors including the fact that the 11 LNK files pointing to the Corsair device were not found where other LNK files were found, but rather were recovered from another, less accessible location.

Adams also affirms that, during his examination of the computer, he observed that a software application called "Filerenamer Basic" had been present on the Giordano System but was uninstalled on February 26, 2010. Filerenamer can be used for large scale alteration of information about computer files and folders, including file and folder names and text. Although there are legitimate uses for this application, it may also be used "to thwart a subsequent forensic examination to investigate user activity on a computer" (Adams Aff. at ¶ 24).

Adams concludes that his examination revealed suspicious user activities on the Giordano System based on 1) evidence of the destruction of the 11 LNK files pointing to folders and files located on the Corsair device, and 2) the presence and subsequent removal of the Filerenamer application, which Adams affirms was not authorized by Canon. Adams also submits that his observations suggest that sensitive information was removed from the Giordano System through the use of the Corsair device.

Plaintiff also submits an Affidavit in Support of Gary Pavan ("Pavan") dated May 10, 2010 in which he affirms as follows:

Pavan affirms that he is the Senior Manager of Canon's CIG Internet Marketing Division Director and that he directly supervised Giordano during his employment with Canon in 2009. While with Canon, Giordano used a "highly advanced graphic design/developer computer" (Pavan Aff. at ¶ 3) that was specifically acquired for Giordano, and that only Giordano used. In Pavan's experience, Canon computers require a system access password, and Giordano would be the only individual with knowledge of his own password. In addition, each user is required by the Information Technology department to change their login password periodically. Canon

requires its employees to keep their passwords safe, and to attend a course regarding the prevention of security breaches.

As part of his duties at Canon, Giordano had access to Canon's iStockphoto account, which was used to purchase images for its online marketing campaigns. Giordano researched iStockphoto and purchase images through a pre-paid Canon account "and appl[ied] these images into the marketing creative [sic]" (Pavan Aff. at ¶ 7).

As a result of Protek's investigation of the Giordano System, which suggested Giordano's misuse of Canon's iStockphoto account for his own purposes, Pavan researched Canon's download log from iStockphoto. Pavan affirms that he discovered that Giordano had downloaded or purchased many images from the Canon iStockphoto account that were not part of any planned marketing campaigns. Pavan also determined that many of these images were downloaded or purchased outside Canon's normal business hours. Pavan concluded that many of these downloaded images were not part of any Canon marketing effort.

Pavan affirms that Giordano used these downloaded images on his own personal business websites www.wiifitroutine.com and www.mojera.com. Pavan provides a list of the files downloaded using Canon's account (Ex. U to Pavan Aff.) with notations highlighting the non-Canon related downloads, and printouts of personal websites managed by Giordano with notations highlighting Giordano's improper use of these files.

With respect to Adams' conclusion that a Corsair thumb drive was connected to Giordano's System in the month preceding his resignation, Pavan affirms that Canon does not issue thumb drives to its employees, and Giordano never turned a thumb drive in to Canon prior to his departure. Pavan knows that Giordano possessed his own personal thumb drive.

Defendants submit an Affidavit in Opposition of John P. Browne ("Browne") dated May 11, 2010 in which he affirms as follows:

Browne is Vice President and General Counsel of Nikon and has worked for Nikon since 1978. Brown submits that Plaintiff's Order to Show Cause and supporting papers make erroneous factual assertions and seek injunctive relief that is improperly broad and would require Nikon to terminate the employment of the Individual Defendants. Browne affirms, *inter alia*, that 1) Nikon has not specifically targeted Canon employees for hiring; the Individual Defendants responded to a general advertisement posted on the website LinkedIn; 2) on learning of the Agreements, Nikon spoke with the Individual Defendants who advised Nikon that they

a) had consulted with counsel; and b) have not disclosed any property or trade secret of Canon during their employment with Nikon; 3) the Individual Defendants, through their attorneys, confirmed to Canon that they have not disclosed, or been asked to disclose, any Canon property or trade secret or other Canon information during their employment with Nikon; 4) in response to Canon's April 15, 2010 inquiry regarding the Individual Defendants' employment, Nikon sent a letter to Canon dated April 23, 2010 (Ex. K to Browne Aff.) advising Canon, *inter alia*, that a) Nikon did not solicit the Individual Defendants for employment; b) Nikon was unaware of the Agreements until March 17, 2010 when it received copies of a March 16, 2010 letter from Canon to the Individual Defendants (Ex. C to Browne Aff.); c) upon learning of the Agreements, Nikon advised the Individual Defendants to speak with independent counsel to determine whether their employment with Nikon would breach any agreement they had with Canon; d) counsel for the Individual Defendants subsequently advised Nikon that the Individual Defendants' employment with Nikon complies with their obligations to Canon; and e) Nikon was prepared to meet with Canon "to discuss the relevant facts in an effort to reach an amicable resolution of this matter[;]" and 5) Canon has not responded to Nikon's April 23rd offer, or to Browne's subsequent invitations to Plaintiff's counsel, to discuss resolution of these issues. Browne submits that Canon's failure to respond to Nikon's offer to meet to discuss these issues undermines its claim that it faces immediate and irreparable harm without injunctive relief.

Browne also describes Adams' forensic examination of the Giordano System as a "post-hoc attempt to create the illusion of immediacy" (Browne Aff. at p.3). Browne notes that Canon did not submit the Giordano System for analysis until April 29, 2010 and the analysis was not completed until several days later. Browne submits that this is further proof of Canon's unreasonable delay in bringing this application, and its effort to create immediacy where none exists.

In support of Browne's assertion that Nikon was unaware of the Agreements, Browne provides copies of the Individual Defendants' employment applications ("Employment Applications") with Nikon (Exs. A and B to Browne Aff.) dated June 16, 2009 (Castano) and January 12, 2010 (Giordano). These Applications reflect that Castano and Giordano answered "No" to the question whether they had any agreement with their current and/or past employers that would restrict, limit or prevent them from being employed by Nikon and/or performing any of the functions of the positions for which they were applying.

On March 22, 2010, in consultation with their attorneys, the Individual Defendants signed documents in which they acknowledged, *inter alia*, that 1) they had not been requested to disclose or use, have not disclosed or used and would not use or disclose to any third party, including Nikon, any confidential and/or proprietary information of Canon acquired through their employment with Canon; and 2) they believed that they were in compliance with the restrictive provisions in the Agreements, including the limitation on their performance of work in geographic areas where they performed work for Canon. These acknowledgments are annexed to Brown's Affidavit as Exhibits F and G.

With respect to their Motion for sanctions for alleged spoliation of evidence, Plaintiff provides Affidavits in Support of Adams and Pavan, two of which were previously submitted and are outlined above, as well as an Affidavit of Giordano submitted in connection with the TRO.

In his Supplemental Affidavit dated May 25, 2010, Adams reaffirms the statements in his May 20, 2010 Affidavit, outlined *supra*. He supplements that prior Affidavit by clarifying that a Canon printer, known as an MX700, should be included in the list of USB storage devices described in his prior Affidavit. Adams suggests that this printer, which allows for storage devices and flash cards to be attached, can be used as a means through which data from a system can be transferred to an external storage device.

In his Affidavit dated May 19, 2010, Pavan addresses Plaintiff's application for sanctions based on Giordano's alleged spoliation of evidence, including the personal thumb drives that Giordano allegedly used improperly in his System. Pavan reasserts statements contained in his prior Affidavit, including that 1) Canon does not issue thumb drives to its employees; and 2) Pavan has personal knowledge that Giordano owned his own personal thumb drives while he worked at Canon.

As part of the TRO, the Court directed Giordano to produce certain thumb drives for inspection by Canon. Pavan expresses his skepticism regarding a letter from Giordano's counsel to Canon's outside counsel (Ex. B to Pavan Aff.), written after the issuance of the TRO, in which Giordano's counsel stated, *inter alia*, that Giordano did not possess, and did not know whether he ever possessed, the devices that he was directed to produce. Pavan suggests that the Court should reject Giordano's claim that he does not possess the thumb drives because 1) it is not credible that Giordano, a "technically advanced person" (Pavan Aff. at ¶ 9), would be unable to

locate the thumb drives less than three months after his resignation from Canon; and 2) Canon sent a letter to Giordano on March 16, 2010 (Ex. C to Pavan Aff.) regarding his possible violation of the Agreement which “place[d] him on notice that he was obligated to maintain all potentially relevant information, including his thumb drives” (Pavan Aff. at ¶ 9). Although that letter does make reference to Giordano’s obligations to Canon under his Agreement, it does not contain the explicit direction suggested by Pavan. Pavan also notes that, by letter dated May 13, 2010 (Ex. D to Pavan Aff.), Canon’s outside counsel asked Giordano to delineate all thumb drives in his possession and account for any thumb drives he was unable to locate, and characterized Giordano’s claimed inability to locate the thumb drives as “gamesmanship.”

Pavan also outlines observations he made that led him to conclude that Giordano had violated the TRO including 1) Pavan determined that Giordano’s www.wiifitroutine.com website was still active and contained assets purchased from the Canon iStockphoto account. Pavan submits that “[w]hile it is possible that Giordano repurchased these images at his own expense after he left Canon, there is no doubt he purchased them without authorization while employed at Canon” (Pavan Aff. at ¶ 12); 2) Pavan obtained screen shots from iStockphoto showing the last six months of activity which reflected the use of three different Internet Protocol (“IP”) addresses on twelve different downloads between February 26, 2010 and April 14, 2010; and 3) two of the three IP addresses were not Canon IP addresses and reflected the downloading of images to Lindenhurst and Melville, New York which are the cities in which Giordano lives and works. Pavan concludes that Giordano’s 1) purportedly implausible claim that he does not possess the thumb drives, 2) allegedly unlawful use of Canon’s iStockphoto account after his resignation from Canon and 3) failure to remove iStockphoto images acquired through Canon’s account from his websites, all demonstrate that Giordano is attempting to avoid discovery of items that he impermissibly removed from Canon.

Defendants submit Affidavits in Opposition of Giordano, Castano, Stephanie Cacace (“Cacace”), Pellegrino, John P. Browne (“Browne”), Jonathan P. Fowler (“Fowler”) and Douglas Silverman (“Silverman”).

In his Affidavit dated May 21, 2010, which addressed certain provisions of the TRO, Giordano affirms, *inter alia*, that 1) while employed at Canon, he was directed to create an account at iStockphoto.com, an online business that maintains an inventory of stock photographs; 2) while working from home on a Canon assignment, he accessed the Canon

iStockphoto account on his home computer, resulting in the Canon username and password being saved on his home computer; 3) he recently became aware that while he was using his home computer to access the iStockphoto site for his own purposes, iStockphoto logged him into the Canon account instead of his own personal account; 4) none of the photographs inadvertently purchased through Canon's account were used for his employment with Nikon; 5) Giordano has not disclosed, reproduced or used any confidential or trade secret information of Canon since he left Canon, and does not possess any Materials of Canon; 6) while working for Canon, Giordano obtained several thumb drives which he, like many of his Canon colleagues, used for purposes including the transporting of large image files from one Canon computer to another; 7) he has searched for but cannot locate the Google and Corsair thumb drives that he purchased while working for Canon, but believes that these drives contained no Canon information; 8) he has, and agrees to produce, the Verizon Fios thumb drive that he purchased which also contains no Canon information; 9) he gave the Lexar thumb drive to his wife, a psychologist, who has stored confidential patient information on this thumb drive which contains no Canon information; 10) the Canon MX700 series USB device to which the TRO refers is a printer which, along with other computer-related items, Giordano turned over to Pitchford on his last day of employment with Canon; and 10) with the exception of the iStockphoto images discussed above, for which Giordano offers to reimburse Canon, he has not retained any Canon property since his resignation from Canon.

In his Affidavit in Opposition dated June 9, 2010, Giordano affirms, *inter alia*, that 1) upon beginning his employment with Canon in 2006, Giordano was required to sign numerous forms, including the Agreement, prior to commencing his employment with Canon; 2) Canon did not advise Giordano that he was signing a non-compete agreement or restrictive covenant which Giordano describes as "buried within the Confidentiality Agreement" (Giordano Aff. at ¶ 7); 3) Giordano believed that the Agreement was focused on the confidentiality of Canon's intellectual property; 4) no Canon representative provided Giordano with a copy of the Agreement or advised Giordano that there were restrictions on Giordano's employment upon his departure from Canon; 5) Canon has "vastly overstated [Giordano's] role as an Associate in the Internet Marketing Group and [his] knowledge of Canon's alleged trade secrets and confidential information;" 6) Canon's eCommerce website and structure were already in place prior to Giordano's employment with Canon and Giordano's primary tasks were to make artistic changes

to and modify the content of the website; 7) during his employment with Canon, Giordano had no responsibilities with respect to the Single Sign-On Platform, SQS Repair System, or ECP System; 8) prompted by his dissatisfaction with his employment at Canon, Giordano sought other employment and located a public job posting for an eCommerce Graphic Designer at Nikon on the website LinkedIn, a professional networking website of which he is a basic member; 9) after responding to this job posting, Giordano was interviewed by several Nikon representatives, including Cacace and Pellegrino; 10) during those interviews, Giordano did not disclose any confidential information about Canon or discuss its future activities; the interviews focused on Giordano's qualifications and abilities to perform the duties of a graphic designer at Nikon; 11) Giordano believed that he answered truthfully when he stated on the Employment Applications that there were no restrictions preventing his employment at Nikon; and 12) Giordano's responsibilities at Nikon are different than they were at Canon.

Giordano outlines the differences in his employment at the two companies, which include 1) at Nikon, Giordano provides input into the graphics and visuals of Nikon's developing eCommerce platform; at Canon, Giordano provided no such input because the design of the website was completed before he joined Canon's Internet Marketing Group; 2) at Nikon, Giordano assists in the graphic design and construction of the user interface of the eCommerce site; at Canon, Giordano could not provide such assistance because the user interface had been established prior to his joining Canon's Internet Marketing Group; and 3) at Nikon, Giordano interacts with the vendor retained by Nikon to assist in constructing its eCommerce site; at Canon, Giordano never had occasion to meet with a vendor because the website was already built.

Giordano affirms that his knowledge and performance of his job responsibilities at Nikon are not based on any confidential information obtained during his employment with Canon. Giordano avers, further, that he has not disclosed any confidential information or trade secrets of Canon during his employment at Nikon, and will not make any such disclosure in the future. Finally, Giordano affirms that any injunctive relief that results in the loss of his employment at Nikon will have a devastating effect on his family, for whom he is the primary breadwinner. Since the inception of this lawsuit, he has pursued alternative employment but has been unable to secure a job with a different company.

In his Affidavit in Support dated June 9, 2010, Castano reaffirms the statements made by

Giordano regarding the circumstances of signing the Agreement and the fact that no Canon representative ever orally advised him of post-employment restrictions. Castano, like Giordano, submits that Canon has overstated the importance of his role at Canon. Castano affirms that his primary responsibility for the last two years of his employment were maintenance and support of Canon's Service, Quality, Speed Repair System ("SQS Repair System") and the Electronic Claims Processing System ("ECP System"), both of which were "legacy" systems (Castano Aff. at ¶ 12) because these systems are no longer supported by the manufacturer that developed them, and the underlying computer language for these programs is now obsolete.

Castano also affirms that he was not involved in high-level or marketing strategies; he simply ensured that these strategies were implemented in accordance with management's instructions. He denies the allegations that he attended a marketing presentation in the summer of 2009, or has detailed knowledge of Canon's expansion of its Ecommerce technology or its strategic marketing plans. Castano denies knowledge of any Canon trade secrets, and affirms that the Single Sign-On Platform, B2C Web Platform, Canon Image Gateway, SQS Repair System and ECP System are "simply Canon's version of widely known business concepts in the eCommerce community" (Castano Aff. At ¶ 19). By way of example, the B2C Use Cases for Canon's website, or any website, can be obtained by anyone with an internet connection by clicking through all the pages on its website and observing the links among the site's various pages.

Like Giordano, Castano affirms that his responsibilities at Nikon are different than those at Canon. Examples of work that he performs at Nikon that he did not perform at Canon include: 1) creating a new virtual warehouse in connection with the new eCommerce store; and 2) developing tables to determine how much to charge customers for shipping.

Castano also avers that he does not believe that he possesses any trade secrets or confidential information but, even if he is in possession of such information, he has never disclosed this information to Nikon. Castano has never discussed his Canon work with Nikon personnel, and has never used information from Canon in performing his work for Nikon.

Castano affirms that during his exit interview prior to leaving Canon, he advised his interviewer that he was leaving Canon because he had been passed over for promotion several times and did not see a future there. The interviewer did not try to convince Castano to stay, or offer to renegotiate his salary, and made no mention of Castano's post-employment obligations

to Canon. The interviewer did not ask Castano about thumb drives, and Castano avers that nearly all IT personnel possessed thumb drives.

Like Giordano, Castano submits that Canon has exaggerated the importance of his position at Canon and outlines his disagreements with Pitchford's description of his responsibilities. Castano affirms that injunctive relief that prevents his employment at Nikon will have a devastating effect on his family, for whom he is the primary breadwinner, and his parents whom he supports. Castano also submits that Nikon would suffer injury if the Court grants injunctive relief because Castano's absence may affect Nikon's ability to have its website operating in time for the holiday shopping season.

Pellegrino and Cacace also dispute many of Canon's allegations regarding, *inter alia*, 1) Nikon's need for assistance in developing an eCommerce platform, 2) Nikon's knowledge of the restrictive aspects of the Agreements, and 3) Nikon's intention to target Canon employees for employment.

Browne, Vice President and General Counsel of Nikon, and Douglas Silverman, General Manager of Human Resources of Nikon, dispute certain Canon claims in its Responses to Nikon's First Set of Interrogatories (Ex. A to Fox Aff.). Specifically, Canon asserted in its Response to Interrogatory Number 14 that Robert Rothschild ("Rothschild"), Canon's Director of Compensation and Benefits, "contacted Nikon employee Mr. Silverman in or about December 2009 to inform Nikon of the Individual Employees restriction." Silverman admits speaking with Rothschild in December of 2009, but affirms that during that conversation 1) Silverman disputed Rothschild's suggestion that Nikon was targeting Canon employees; 2) Rothschild never mentioned the Agreements; and 3) Rothschild never said that Nikon's recruiting efforts would pose any non-compete/confidentiality issues or lead to a breach of the Agreements. Silverman notes, further, that Plaintiff has not submitted an Affidavit of Rothschild regarding this conversation. Silverman affirms that he first became aware of the Agreements on or about March 17, 2010.

Fowler, a Senior Regional Practice Leader for the Computer Forensics practice of First Advantage Litigation Consulting, outlines several weaknesses he perceives in the methodology used by Adams in reaching the conclusions set forth in his May 7, 2010 Affidavit. Those include 1) Adams' failure to describe the manner in which the original forensic image of the Giordano System was created, 2) the lack of information regarding which personnel had access

to the Giordano System subsequent to his resignation, 3) Adams' temporal limitation of his examination which may have resulted in his failure to consider activity on the System by other Canon personnel, and 4) Adams' failure to explain the manner in which he conducted the examination of the LNK files. Fowler submits that the facts described by Adams do not suggest the targeted destruction of files by Giordano or the suspicious or improper use of the Giordano System.

In his Affidavit in Further Support dated June 9, 2010, Adams disputes alleged misstatements by Defendants and reaffirms his opinion that Giordano intentionally destroyed evidence of his activities on the System.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the relief sought by establishing, *inter alia*, that 1) while employed at Canon, the Individual Defendants were directly involved in the development and support of Canon's eCommerce and internet marketing platforms and eCommerce business; 2) while employed at Canon, the Individual Defendants learned information regarding Canon's marketing plans; 3) the Individual Defendants signed the Agreements which limit their future employment in a reasonable manner; 4) Nikon was aware of the Agreements, including the restrictive covenants therein, prior to hiring the Individual Defendants; 5) Nikon targeted Canon employees, including the Individual Defendants, to assist Nikon in developing its eCommerce platform which was inferior to Canon's; 6) Giordano intentionally destroyed computer files, installed a tool assigned to avoid detection by a forensic examiner, retained Canon information on several thumb drives and misappropriated files using Canon's iStockphoto account; and 7) without injunctive relief, the Individual Defendants will divulge Canon's confidential and proprietary information to Nikon, resulting in the irreparable harm of Canon's loss of goodwill. In light of the foregoing, Plaintiff contends that it has demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm without the requested injunctive relief and a balancing of the hardships weighing in Plaintiff's favor. Plaintiff also submits that, under the circumstances, the Court should order expedited discovery.

Plaintiff also submits that, in light of Giordano's inability to produce two of the thumb drives based on his claimed lack of possession of those items, the Court should impose sanctions. Plaintiff argues that, in light of 1) Giordano's knowledge of Canon's claims on

March 16, 2010, 2) Giordano's use of the Corsair USB drive on the last day of his employment with Canon and 3) the fact that "Giordano should reasonably have anticipated future litigation and preserved all relevant data and information because he knew he was resigning to work for a competitor, Nikon, Inc., and that this competing position was in violation of the covenant not-to-compete contained in his Employment Agreement" (P's Memorandum of Law at p.8), the Court should impose the sanctions outlined in Plaintiff's motion. Alternatively, Plaintiff argues that the Court should draw an adverse inference against Giordano at trial.

Nikon submits that the Court should deny Plaintiff's application for injunctive relief for reasons including 1) Canon's failure to file this application for over eight weeks after learning of Nikon's employment of the Individual Defendants demonstrates that Canon is not in danger of immediate harm without injunctive relief; 2) the restrictive covenant "buried" in the Agreements (Nikon's Memorandum of Law at p. 2) is unenforceable because it is unreasonably long in duration and broad in geographic scope; 3) Canon has not demonstrated Nikon's knowledge of the Agreements prior to its hiring of the Individual Defendants, and the submissions are more consistent with the conclusion that Nikon did not know about the Agreements prior to employing the Individual Defendants; 4) Canon has failed to establish that the alleged trade secrets are, in fact, trade secrets, and the submissions suggest that the information at issue is readily available and frequently used on numerous websites; 5) Nikon's hiring of the Individual Defendants does not constitute unfair competition; and 6) a balancing of the equities favors Nikon because its loss of the Individual Defendants would affect Nikon's ability to launch its eCommerce initiative, the public will lose the opportunity to choose among competing providers and the Individual Defendants's ability to earn a livelihood will be adversely affected, while Canon has not demonstrated that Defendants have engaged in conduct injurious to Canon. Giordano and Castano join in the arguments of Nikon in opposing Plaintiff's application.

With respect to Canon's application for sanctions in connection with the alleged spoliation of evidence, Giordano submits that he has not negligently or intentionally spoiled any evidence in this matter. Giordano submits that he first learned of Canon's request for evidence more than two weeks after his last day at Canon. Giordano contends that he has been cooperative in attempting to locate the thumb drives as demonstrated by 1) his search of his home and personal belongings to locate all Devices in his possession, 2) his preparation of an affidavit describing the Devices he used while employed at Canon, 3) his production of a thumb

drive and external hard drive to Canon's forensic experts for examination, and 4) his offer to reimburse Canon for stock photos inadvertently purchased on its account. Giordano submits that, through his Affidavit, he has satisfactorily explained his use of the System prior to his departure from Canon and established that he did not improperly remove Canon information from that System. Giordano also argues that Canon has not demonstrated any prejudice by the loss of certain thumb drives because 1) the lost thumb drives contained only personal photos and other non-Canon material; and 2) Nikon did not obtain or use the thumb drives. In light of the foregoing, Giordano submits that the Court should deny Canon's application for sanctions.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v. Samsung*

Techwin Co., Ltd., 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Relevant Causes of Action

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat & Apron v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). It is well settled that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party, for any reason or even for no reason. *DeSimone v. Supertek, Inc.*, 308 A.D.2d 501 (2d Dept. 2003), citing, *inter alia*, *Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001).

To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff's rights. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dept. 1992).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice.

Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

An employee owes a fiduciary duty to his employer as a matter of law and is prohibited from acting in any manner inconsistent with that relationship and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. *Lamdin v. Broadway Surface Advertising Corp.*, 272 NY 133, 138 (1936); *DDS Partners, LLC v. Celenza*, 16 A.D.3d 114, 115 (1st Dept. 2005). The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). A cause of action for aiding and abetting breach of fiduciary duty requires a *prima facie* showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, and 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept 2008).

It is well settled that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party, for any reason or even for no reason. *DeSimone v. Supertek, Inc.*, 308 A.D.2d 501 (2d Dept. 2003), citing, *inter alia*, *Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001).

A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to gain an advantage over competitors who do not know or use it. *Ashland Mgt. v. Janian*, 82 N.Y.2d 395, 407 (1993), citing Restatement of Torts Section 757, comment b. In deciding a trade secret claim, the court should consider the following factors: 1) the extent to which the information is known outside of the business, 2) the extent to which it is known by employees and others involved in the business, 3) the extent of measures taken by the business to guard the secrecy of the information, 4) the value of the information to the business and its competitors, 5) the amount of effort or money

expended by the business in developing the information, 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

C. Sanctions for Failure to Provide Discovery

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In addition, under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party of the ability to prove its claim, the responsible party may be sanctioned by the striking of the pleading. *Gotto v. Eusebe-Carter*, 69 A.D.3d 566, 567 (2d Dept. 2010) citing, *inter alia*, *Denoyelles v. Gallagher*, 40 A.D.3d 1027 (2d Dept. 2007). A less severe sanction is appropriate, however, where the absence of the missing evidence does not deprive the moving party of the ability to establish its case. *Id.* at 567-568 citing, *inter alia*, *Gerber v. Rosenfeld*, 18 A.D.3d 812 (2d Dept. 2005). The determination of a sanction for spoliation is within the broad discretion of the court. *Id.* at 568 citing, *inter alia*, *Dennis v. City of New York*, 18 A.D.3d 599 (2d Dept. 2005).

Huezo v. Silvercrist, 68 A.D.3d 820 (2d Dept. 2009) is instructive on the issue of sanctions for spoliation. There, the Second Department held that the trial court had improvidently exercised its discretion in granting plaintiffs' motion to strike appellant's answer, based on the loss or spoliation of evidence. *Id.* at 821. The Second Department reasoned that

plaintiffs failed to demonstrate that the evidence in question was central to their case, or that they were prejudiced by the purported loss of the evidence. *Id.* Plaintiffs also failed to establish that the purported loss of the evidence was the result of intentional or negligent conduct on defendant's part after it was placed on notice that the evidence might be needed for future litigation. *Id.* In light of these determinations, the Second Department reversed the trial court's order and denied plaintiffs' motion. *Id.* at 820.

Similar reasoning was employed in *Sloane v. Costco*, 49 A.D.3d 522 (2d Dept. 2008). There, the Second Department affirmed the trial court's denial of plaintiff's cross motion to strike defendant's answer, pursuant to CPLR § 3126, based on spoliation of evidence. *Id.* The Second Department held that the trial court had properly exercised its discretion in light of plaintiff's failure to establish that the defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that such evidence might be needed for future litigation. *Id.*

D. Restrictive Employment Covenants

Powerful considerations of public policy militate against sanctioning the loss of a person's livelihood. *Post v. Merrill Lynch*, 48 N.Y.2d 84, 86 (1979), citing *Purchasing Assoc. v. Weitz*, 13 N.Y.2d 267, 272 (1963). This policy is so potent that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored, and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer, and are not unduly harsh or burdensome to the one restrained. *Id.* at 87, citing, *inter alia*, *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977). Restrictive covenants contained in employment contracts are disfavored by the courts and are to be enforced only if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information. *Gilman & Ciocia, Inc. v. Randello*, 55 A.D.3d 871, 872 (2d Dept. 2008).

E. Application of these Principles to the Instant Action

The submitted papers present numerous disputed issues of fact regarding, *inter alia*,
1) the nature and level of responsibility of the positions held by the Individual Defendants at

Canon, 2) the extent to which the Individual Defendants were privy to, or involved in decisions regarding, the design and promotion of Canon's eCommerce website, 3) the circumstances under which the Individual Defendants left Canon and went to work for Nikon, 4) Nikon's knowledge of the Agreements prior to hiring the Individual Defendants, 5) the extent, if any, to which Giordano improperly obtained Canon information from his computer immediately prior to his departure from Canon, and 6) the sophistication of Nikon's eCommerce system and its need, if any, for input from Canon for its improvement.

In light of these factual disputes, the Court concludes that Canon has not demonstrated its likelihood of success on the merits. Moreover, even assuming *arguendo* that Defendants were fully aware of the content of the Agreements, the Court still has doubts regarding the enforceability of the restrictive covenants in those Agreements. Those doubts come, in part, from the geographical restriction that arguably limits the ability of the Individual Defendants to work anywhere in the United States. In addition, the parties have presented sharply different views as to whether the Individual Defendants' current responsibilities at Nikon are sufficiently similar to those performed at Canon and, therefore, whether their current employment with Nikon violates the Agreements.

Although Plaintiff's failure to demonstrate a likelihood of success on the merits precludes injunctive relief, the Court notes that it also appears that Plaintiff has failed to demonstrate that it will suffer irreparable injury without injunctive relief, or that the equities balance in its favor. As to the issue of irreparable injury, the record before the Court does not establish that any potential loss of goodwill is directly attributable to the Individual Defendants' recent employment at Nikon. Thus, it appears that any injury suffered by Canon is compensable by money damages. As to the balancing of the equities, given the potential loss of employment by the Individual Defendants with the requested injunctive relief, and the claims by both Nikon and Canon as to the financial injury they will suffer with or without injunctive relief respectively, the Court cannot conclude that the equities balance in favor of Canon.

The Court also denies Canon's application for sanctions in connection with Giordano's failure to produce certain thumb drives. Given the principles outlined above, and the factual disputes regarding when Giordano became aware of Canon's request for those items, the significance of those items, and the extent to which Giordano has attempted to comply with

Canon's requests and the TRO's direction to produce those items, the Court cannot conclude that the imposition of a sanction is appropriate at this time. The Court is not prepared to conclude now, as Plaintiff urges, that, simply by virtue of the existence of the Agreements, Giordano should have known that litigation was inevitable and he would be asked to produce those thumb drives. While Canon submits that Giordano cannot credibly state that he has used his best efforts to produce those thumb drives, there is an insufficient record before the Court to support Canon's conclusion. The Court's denial of sanctions is, however, without prejudice as to a future motion for sanctions by Canon should information gained during discovery provide a factual predicate for such a motion.

In light of Giordano's affirmations, and the Court's refusal to deem his explanation incredible, there no longer exists the need for the direction in the TRO regarding the production of those thumb drives. The circumstances regarding Giordano's attempts to produce the thumb drives may, of course, be an appropriate subject for further exploration during discovery.

In light of the Court's conclusions that injunctive relief is not warranted, and sanctions for alleged spoliation are inappropriate at this time and on this record, the Court also denies Plaintiff's application for expedited discovery.

Accordingly, the Court 1) denies Plaintiff's Order to Show Cause in its entirety; 2) denies Plaintiff's motion in its entirety; and 3) vacates the TRO.

All matters not decided herein are hereby denied.

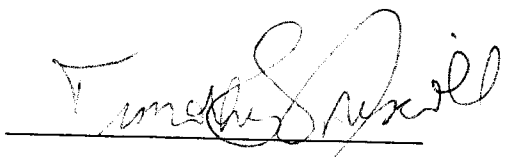
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on July 27, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 1, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUL 06 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE