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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

GINKGO, LLC, a Nevada limited
liability company,

Case No.: CV16-01869

Dept. No.: 7

Plaintiff,

vs.

JOHN L. KIM, an individual, and
DOES I-X, inclusive,

Defendants.

ORDER

Procedural History

Currently before the Court is Plaintiff GINKGO, LLC's *Ex Parte Motion for Preliminary Injunction, or in the Alternative, a Temporary Restraining Order*, filed on September 13, 2016. On September 15, 2016, a hearing was held before the Court to address Plaintiff's *Motion for Temporary Restraining Order*. The Court ordered that an evidentiary hearing be held on September 23, 2016. The Court subsequently vacated the September 23, 2016 hearing date and ordered a hearing be set on October 6, 2016. On October 6, 2016, an evidentiary hearing was held before the Court, where both parties were present and represented by counsel. Counsel for both parties presented evidence for their respective positions. In conclusion, the Court did not find that Plaintiff had presented sufficient evidence to established that they would suffer irreparable harm by the non-issuance of a preliminary injunction. The Court ordered supplemental briefing on the element of irreparable harm, to which both parties filed

1 briefing on October 31, 2016. On November 1, 2016, the matter was submitted to the
2 Court for decision.

3 **Factual History**

4 The facts alleged in the Complaint are as follows:

5 This matter arose for an alleged violation of a restrictive employment covenant
6 between Defendant JOHN L. KIM (hereinafter "Defendant") and his former employer
7 Plaintiff GINKGO, LLC (hereinafter "Plaintiff"). Defendant was employed with
8 Plaintiff from April, 2014 to March, 2016. Plaintiff is a qualified trading firm that
9 engages in trading, investment, and other business activities in connection with US,
10 European, and Asian Markets. Defendant was employed as a trader and conducted
11 trading practices on the Chicago Mercantile Exchange and Intercontinental
12 Exchange. Prior to his employment, Defendant executed an "An Agreement to Protect
13 Company's Information and Other Business Interests" (hereinafter "Agreement") on
14 March 20, 2014. The Agreement contained several restrictive covenants, including a
15 non-compete provision which states that Defendant agreed not to "directly or
16 indirectly, alone in or association with or on behalf of any other person or entity,
engage in or provide competitive services" during the "restrictive period" of one year.¹

17 On February 26, 2016, Defendant provided a verbal resignation to Plaintiff and
18 effectively terminated his position on March 11, 2016. As per the terms of the
19 Agreement, Defendant was to receive monthly payments following his termination
20 for the amount of \$9,167.00 for the period of 12 months so long as he abides by the
21 non-compete provision of the Agreement. Following his resignation, Defendant was
22 informed that Plaintiff would in fact enforce the non-compete provision of the
23 Agreement. On May 5, 2016, Defendant attempted to negotiate with Plaintiff
24 regarding the non-compete provision, but Plaintiff informed him they would still
25 pursue enforcement of the non-compete provision. Defendant also informed Plaintiff
26 that he intended to take a position with Allston Holdings, LLC.

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¹ *Agreement*, ¶ 5, ¶ 15(c).

1 On September 12, 2016, Defendant began his employment with Allston
2 Holdings, LLC. On September 13, 2016, Defendant brought suit alleging that he
3 breached the non-compete provision of the Agreement and filed their *Ex-Parte Motion*
4 *for Preliminary Injunction, or in the Alternative, a Temporary Restraining Order.*

5 Applicable Law

6 The decision to enter a preliminary injunction is within the sound discretion of
7 the district court.² The court's decision to grant or deny a preliminary injunction is
8 based upon "whether the moving party has shown a likelihood of success on the merits
9 and a [reasonable probability] that the nonmoving party's conduct, should it continue,
10 would cause irreparable harm" that cannot be quantified and remedied by
11 compensatory damages.³ A preliminary injunction is an extraordinary remedy that
12 must be accompanied by specific identification of the necessary irreparable harm,
13 whether it is articulated in "the issuing order" or "sufficiently apparent elsewhere in
14 the record."⁴ "[C]ourts also weigh the potential hardships to the relative parties and
15 others, and the public interest."⁵ A preliminary injunction should only be granted if
16 the movant does not have an adequate remedy at law.⁶

17 **Irreparable Harm**

18 At the conclusion of the October 6, 2016 hearing, the Court requested
19 additional briefing from the parties on the element of irreparable harm if a
20 preliminary injunction did not issue. Plaintiff has the burden of establishing a
21 reasonable probability that Defendant's conduct would cause irreparable harm that
22 cannot be remedied by monetary damages.⁷ Plaintiff argues that by Defendant's
23 employment with Allston Holdings, LLC, the potential for him to divulge critical
24 proprietary data would lead Plaintiff to suffer irreparable damage. The Court does

25 ² *Labor Comm'r of State of Nevada v. Littlefield*, 123 Nev. 35, 38 (2007).

26 ³ *Id.* at 38-39; *see also, Danberg Holdings Nevada, L.L.C. v. Douglas County*, 115 Nev. 129, 142 (1999).

27 ⁴ *Dept. of Conservation and Natural Resources, Div. of Water Resources v. Foley*, 121 Nev. 77, 80 (2005).

28 ⁵ *Univ. and Cmty Coll. Sys. of Nevada v. Nevadans for Sound Gov't.*, 120 Nev. 712, 721 (2004); *See also*, NRS 33.010.

⁶ *Id.*

⁷ *Number One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 587 P.2d 1329 (1978).

1 not agree. As it stands, Allston Holdings, LLC, in conjunction with Defendant, has
2 put into place an arrangement whereby Defendant would not work in any form as it
3 relates to operational trading. Defendant is to work only in a compliance role for the
4 duration of the non-compete agreement. The Court finds that this a reasonable
5 alternative to a complete prohibition of Defendant's employment at Allston Holdings,
6 LLC.

7 Plaintiff also argues that irreparable harm could occur through either trade
8 secret misappropriation or disclosure of confidential information under the doctrine
9 of inevitable disclosure. Under the doctrine of inevitable disclosure, "a plaintiff may
10 prove a claim of trade secret misappropriation by demonstrating that defendant's new
11 employment will inevitably lead him to rely on the plaintiff's trade secrets."⁸ When
12 applying the doctrine of inevitable disclosure courts have "considered the degree of
13 similarity between the employee's former and current positions, the degree of
14 competition between the former and current employers, the current employer's efforts
15 to safeguard the former employer's trade secrets, and the former employee's "lack of
16 forthrightness both in his activities before accepting his job ... and in his testimony."⁹
17 However, Nevada has not adopted the inevitable disclosure doctrine and the Court is
18 not inclined to do so now.

19 Additionally, by the very nature of Plaintiff's business, the continuing
20 development of new trading signals and strategies would likely be critical to the
21 success of a business who practice in high frequency trading in multiple markets. If
22 a company failed to adapt to the changing markets, it would seem that the business
23 would likely fall behind their competitors. Here, Defendant began his employment
24 with Allston Holdings, LLC, six months after the termination of his employment with
25 Plaintiff. It would seem in all likelihood that if Plaintiff were to maintain their
26 success as a high frequency trading company, they would need to continue developing
27 their trading signals and strategies. Therefore, one could infer that any proprietary

28 ⁸ *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1458, 125 Cal. Rptr. 2d 277 (2002).

⁹ *Whyte*, 101 Cal. App. 4th 1443, 1459, 125 Cal. Rptr. 2d 277 (2002)(citing *PepsiCo, Inc. v. Redmond*
(7th Cir. 1995) 54 F.3d 1262, 126).

1 knowledge Defendant gained during his employment with Plaintiff would be outdated
2 and thus Plaintiff would unlikely suffer much if any irreparable harm.

3 Conclusion

4 After a careful review of the briefing submitted and the arguments presented
5 by counsel at the evidentiary hearing, the Court finds that Plaintiff has not met their
6 burden of establishing that irreparable harm would occur if the Court did not issue a
7 preliminary injunction. Furthermore, the Court gathers from the parties' briefing
8 that the issuance of the preliminary injunction was only necessary for the period prior
9 to arbitration, to which the parties indicated they have recently initiated. Therefore,
10 the *Motion* is essentially moot.

11 Accordingly, and good cause appearing, Plaintiff's *Ex Parte Motion for*
12 *Preliminary Injunction, or in the Alternative, a Temporary Restraining Order* is
13 DENIED.

14 IT IS SO ORDERED.

15 DATED this 5 day of December, 2016.

16 
17 PATRICK FLANAGAN
18 District Judge