

STATE OF NORTH CAROLINA

CATAWBA COUNTY

TSG FINISHING, LLC,

Plaintiff,

v.

KEITH BOLLINGER, AMERICAN  
CUSTOM FINISHING, LLC, VERYL  
ELSTON, GARY E. HARRIS, and JOHN  
DOE,

Defendants.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

14 CVS 104

MASTER FILE

(related case 15 CVS 2058)

**PRELIMINARY INJUNCTION  
ORDER**

1. **THIS MATTER** is before the Court *sua sponte* to enter a preliminary injunction against Defendant Keith Bollinger (“Bollinger”) as required by mandate of the North Carolina Court of Appeals reversing this Court’s (Murphy, J.) Order on Plaintiff’s Motion for Preliminary Injunction. *See TSG Finishing, LLC v. Bollinger*, \_\_\_ N.C. App. \_\_\_, 767 S.E.2d 870 (2014) (the “Court of Appeals’ Opinion”).

**PROCEDURAL BACKGROUND**

2. On January 23, 2014, Plaintiff filed a Motion for Preliminary Injunction (the “Motion”), seeking to enjoin Bollinger from breaching the non-disclosure (the “Non-Disclosure Provision”) and non-compete provisions (the “Non-Compete Provision”) of the Employment Agreement Relating to Confidential Information, Trade Secrets and Noncompetition Agreement dated December 14, 2007 between Plaintiff TSG Finishing, LLC (“Plaintiff”) and Bollinger (the “Agreement”) and from misappropriating Plaintiff’s trade secrets. This Court (Murphy, J.) denied the Motion on February 20, 2014. *See TSG Finishing, LLC v. Bollinger*, No. 14 CVS 104 (N.C. Super. Ct. Feb. 20, 2014) (order denying preliminary injunction).

3. Plaintiff appealed, and, on December 31, 2014, the North Carolina Court of Appeals reversed Judge Murphy's Order, concluding that Plaintiff had demonstrated a likelihood of success on its claims for misappropriation of trade secrets and breach of the Non-Compete Provision<sup>1</sup> and finding that Plaintiff is likely to suffer irreparable loss without preliminary injunctive relief. The Court of Appeals remanded the case to this Court with instructions that the Court enter a preliminary injunction against Bollinger. Bollinger thereafter filed a petition for discretionary review in the North Carolina Supreme Court under N.C. Gen. Stat. § 7A-31, which was denied on August 20, 2015. On August 25, 2015, the Court of Appeals certified to the Catawba County Clerk of Superior Court that the petition for discretionary review had been denied.

4. The Court became aware of the certification on October 19, 2015.<sup>2</sup> By order dated October 22, 2015, the Court ordered the parties to meet and confer and thereafter submit a joint proposed Preliminary Injunction Order to the Court no later than November 23, 2015, such order to comply in all respects with the instructions set forth in the Court of Appeals' Opinion. At the parties' request, the Court permitted Plaintiff and Bollinger to each submit a proposed

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<sup>1</sup> On January 16, 2014, Plaintiff initiated this action by filing a document entitled Verified Complaint and Motion for Temporary Restraining Order and Preliminary and Permanent Injunction. Plaintiff's Complaint contains a First Claim for Relief for alleged "breaches of contract" and asserts that Bollinger breached the Non-Compete Provision (Compl. ¶ 46) and the Non-Disclosure Provision (Compl. ¶ 47). Plaintiff's Complaint also contains a Fourth Claim for Relief for "injunctive relief, including temporary restraining order," which seeks an injunction "enjoining Defendant Bollinger from unfairly competing with Plaintiff in violation of the Agreement" and seeking to "prevent unauthorized disclosure [of] TSG's Confidential and Trade Secret Information." On January 23, 2014, Plaintiff filed its Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, in which Plaintiff argued that it was entitled to a preliminary injunction to prevent unauthorized disclosure of its trade secrets under N.C. Gen. Stat. § 66-152, *et seq.*, but did not seek injunctive relief based on Bollinger's alleged violation of the Non-Disclosure Provision. Neither Judge Murphy's February 20, 2014 order denying Plaintiff's motion for preliminary injunction nor the Court of Appeals' Opinion discuss, or deny or enter relief upon, Plaintiff's claim for breach of the Non-Disclosure Provision.

<sup>2</sup> The Court did not receive from the parties or court system personnel notification of the Supreme Court's denial of Defendant's petition for discretionary review, the Supreme Court's subsequent certification to the Court of Appeals, or the Court of Appeals' certification to the Catawba County Superior Court. The Court learned of the certification to the Catawba County Superior Court through its own investigation.

Preliminary Injunction Order, accompanied by the party's contentions concerning the proper scope of the preliminary injunction under the Court of Appeals' Opinion.

5. The Court has reviewed each party's submissions, the relevant parts of the record, and the Court of Appeals' Opinion, and now enters this Preliminary Injunction Order to comply with the instructions set forth in the Court of Appeals' Opinion.

### **FINDINGS OF FACT<sup>3</sup>**

1. Plaintiff is in the business of fabric finishing.<sup>4</sup> Plaintiff applies chemical coatings to fabric to achieve whichever result is desired by the customer, such as coloring, stiffening, deodorizing, and abrasion resistance. Achieving the desired result is a process of trial and error.

2. Bollinger began working in the field of fabric finishing for Geltman Corporation ("Geltman") after graduating from high school in 1982. When TSG, Incorporated ("TSG, Inc.") acquired Geltman in 1992, Bollinger stayed on to work for TSG, Inc. Defendant was eventually promoted to Quality Control Manager.

3. Bollinger was responsible for assessing a customer's finishing needs and developing a finishing protocol and Quality Control for that customer.

4. Bollinger also helped in the creation of a "style data card" for each customer. The style data cards contained information on each step of the finishing process, such as (1) the chemical finish compound, seventy percent of which was proprietary to Plaintiff; (2) "cup weight" density; (3) needle punch technique; (4) type of machine needed for the needle punch technique; (5) speed of needle punch; (6) types of needles used; (7) needle punch depths; (8)

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<sup>3</sup> The Court notes that "the findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits." *Kaplan v. Profile Action League*, 111 N.C. App. 1, 16, 1, 431 S.E.2d 828, 835 (1993).

<sup>4</sup> The Court cites to the facts recited and relied upon in the Court of Appeals' Opinion.

method of compound application; (9) speed of compound application; (10) blade size; (11) fabric tension; and (12) temperature and type of drying required.

5. Bollinger testified at his deposition that these factors required trial and error to achieve a customer's desired result. Bollinger also testified that the results of the trials he conducted for customers and the knowledge he gained regarding how to achieve these results were not known outside of Plaintiff.

6. Plaintiff expends great effort to keep its customer and finishing information confidential. Specifically, it uses a code system in its communications with customers that allows the customer to identify the type of finish it wants, but does not reveal the chemicals or processes involved in creating that finish. Plaintiff has confidentiality agreements in place with many of its customers. Third parties must sign confidentiality agreements and receive a temporary identification badge when visiting Plaintiff's facilities. Plaintiff's computers are password protected, with additional passwords being required to access the company's production information.

7. In 2007, TSG, Inc. and Bollinger entered into the Agreement. In exchange for an annual increase in compensation of \$1,300.00 and a \$3,500.00 signing bonus, Bollinger agreed to not to disclose TSG, Inc.'s confidential or proprietary trade secrets and further assented to employment restrictions after his tenure at the company ended.

8. The Non-Compete Provision provided that upon termination, Bollinger would be prevented from participating in the field of "textile finishing" for two years in the prohibited territory, which was defined, in part, as all of North America.

9. TSG, Inc. filed for bankruptcy in 2009. By a plan approved by the United States Bankruptcy Court on May 1, 2011, TSG, Inc. transferred its interests to Plaintiff, a wholly-owned operating subsidiary of TSG, Inc., which remained in operation.

10. In July 2013, Bollinger and a direct competitor of Plaintiff, American Custom Finishing, LLC (“ACF”),<sup>5</sup> began negotiations regarding Bollinger’s potential to leave Plaintiff and work for ACF.

11. Bollinger’s employment with Plaintiff was terminated on November 21, 2013.

12. Bollinger began working for ACF on November 25, 2013.

13. TSG and ACF share certain customers, and Bollinger is responsible for performing similar customer evaluations for ACF as he did at TSG.

## CONCLUSIONS OF LAW

1. A preliminary injunction “will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983).

### I. Likelihood of Success on the Merits

#### A. Misappropriation of Trade Secrets

2. Plaintiff’s claim for misappropriation of trade secrets is governed by North Carolina law and, thus, the North Carolina Trade Secrets Protection Act (“TSPA”), N.C. Gen. Stat. §§ 66-152 *et seq.* See *TSG Finishing*, \_\_ N.C. App. at \_\_, 767 S.E.2d at 875–76.

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<sup>5</sup> ACF was not a party-defendant at the time of Judge Murphy’s denial of Plaintiff’s motion for preliminary injunction. Plaintiff filed suit against ACF on August 21, 2015. See *TSG Finishing, LLC v. Am. Custom Finishing, LLC* (15 CVS 2058) (“ACF Action”). The ACF Action was consolidated into the above-captioned case by Order dated November 24, 2015.

3. Under the TSPA, “actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action . . . .” N.C. Gen. Stat. § 66-154(a).

4. A prima facie claim for misappropriation of trade secrets under the TSPA is established by the introduction of substantial evidence that the person against whom relief is sought both: (1) Knows or should have known of the trade secret; and (2) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155.

5. A “trade secret” is defined as business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that: (a) Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3).

6. In determining whether information should be treated as a trade secret for the purposes of protection under the TSPA, the Court considers the following factors:

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

*Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003).

7. “Misappropriation” is defined as the “acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a

right to disclose the trade secret.” N.C. Gen. Stat. § 66-152(1). “Direct evidence . . . is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence.” *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658, 670 S.E.2d 321, 329 (2009).

8. Each of the *Area Landscaping* factors weigh in favor of trade secret protection here. *See TSG Finishing*, \_\_ N.C. App. at \_\_, 767 S.E.2d at 877.

9. Plaintiff has presented prima facie evidence of Bollinger’s misappropriation of its trade secrets. *Id.*, \_\_ N.C. App. at \_\_, 767 S.E.2d at 878.

10. Plaintiff has therefore demonstrated a likelihood of success on the merits of its claim for trade secret misappropriation. *Id.*

*B. Breach of Contract*

11. Due to a choice of law provision in the Agreement, Pennsylvania law governs enforcement of the Non-Compete Provision. *Id.*

12. Although restrictive covenants are not favored under Pennsylvania law, they “are enforceable if they are incident to an employment relationship between the parties, the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent.” *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002). *See TSG Finishing*, \_\_ N.C. App. at \_\_, 767 S.E.2d at 878.

13. The Non-Compete Provision is reasonably necessary for the protection of the employer. *Id.* It permissibly restricts Bollinger from engaging in the specific industrial practices that could harm the legitimate business interests Plaintiff seeks to protect. *Id.*, \_\_ N.C. App. at \_\_, 767 S.E.2d at 880.

14. The time and geographic restrictions are also reasonable. Pennsylvania courts have consistently enforced non-competition agreements restricting employment for two or more years. *See John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1170 (Pa. 1977). Additionally, Pennsylvania courts have upheld covenants restricting competition nationwide or throughout the region of North America, where appropriate. *See Quaker Chem. Corp. v. Varga*, 509 F. Supp. 2d 469, 476 (E.D. Pa. 2007). *See TSG Finishing*, \_\_\_ N.C. App. at \_\_\_, 767 S.E.2d at 880.

15. The Non-Compete Provision is therefore enforceable under Pennsylvania law. *Id.*, \_\_\_ N.C. App. at \_\_\_, 767 S.E.2d at 879–80.

16. It is undisputed that Bollinger breached the Non-Compete Provision by working for ACF, a direct competitor of Plaintiff. *Id.*, \_\_\_ N.C. App. at \_\_\_, 767 S.E.2d at 882.

17. Plaintiff has therefore demonstrated a likelihood of success on the merits on its claim for breach of the Non-Compete Provision.<sup>6</sup> *Id.*

## **II. Irreparable Loss**

18. “Intimate knowledge of the business operations or personal association with customers provides an opportunity to [a] . . . former employee . . . to injure the business of the covenantee.” *QSP, Inc. v. Hair*, 152 N.C. App. 174, 178, 566 S.E.2d 851, 854 (2002) (internal quotation marks omitted). “[T]his potential harm warrants injunctive relief.” *Id.* *See TSG Finishing*, \_\_\_ N.C. App. at \_\_\_, 767 S.E.2d at 882.

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<sup>6</sup> Based on the matters of record set forth in footnote 1, including, in particular, that the Court of Appeals’ Opinion does not address or consider Plaintiff’s claim for breach of the Non-Disclosure Provision, and because neither party has suggested that the Court consider the entry of findings of fact or conclusions of law in connection with that claim, the Court concludes that the Court has not been directed to enter relief on Plaintiff’s claim for breach of the Non-Disclosure Provision in this Preliminary Injunction Order and further that Plaintiff has waived any request it may have made in its motion for preliminary injunctive relief based on an alleged breach of the Non-Disclosure Provision.

19. Plaintiff has demonstrated that it is likely to suffer irreparable loss unless an injunction is issued preventing Bollinger's misappropriation of Plaintiff's trade secrets and proprietary or other confidential information because Plaintiff is at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry. *Id.*

### **III. Appropriate Relief**

20. Plaintiff is entitled to an injunction prohibiting Bollinger from misappropriating any trade secrets, or any proprietary or other confidential information which is the property of Plaintiff.

21. The parties disagree concerning whether relief should issue on Plaintiff's claim for breach of the Non-Compete Provision. The Court of Appeals' Opinion, issued on December 31, 2014, instructed this Court to issue a preliminary injunction enjoining further violation of the Non-Compete Provision, which was then in effect. Bollinger argues that the Non-Compete Provision has subsequently expired by its own terms, on November 21, 2015, and that therefore any order to comply with the Provision would be a legal nullity since the Provision is no longer in effect.

22. In general, under Pennsylvania law, "[a]n injunction will not be granted to enforce a restrictive covenant when the restrictive period has by its terms expired." *Hayes v. Altman*, 266 A.2d 269, 271 (Pa. 1970). *See also Davis v. Buckman*, 421 A.2d 427, 431 (Pa. Super. Ct. 1980) (same). The Pennsylvania courts have identified two potential exceptions to this general rule. First, Pennsylvania courts have extended the time period for enforcement of a restrictive covenant where the parties included a provision in the contract extending the non-compete covenant if it were violated. *Worldwide Auditing Servs., Inc. v. Richter*, 587 A.2d 772, 776-77

(Pa. 1991). *See generally Maaco Franchising, Inc. v. Augustin*, No. 09-4548, 2010 U.S. Dist. LEXIS 39650 (E.D. Pa. Apr. 20, 2010).<sup>7</sup> Second, the Pennsylvania Supreme Court has indicated that an extension might be appropriate where there has been “fraud or unnecessary delay caused by the [enjoined party] which unjustly permitted the . . . time restraint to expire.” *Hayes*, 266 A.2d at 272. Otherwise, Pennsylvania courts have not extended the time period for enforcement. *See Davis*, 421 A.2d at 431 (“Since covenants not to compete must be strictly construed, it is questionable whether in any case a chancellor would be justified in extending the period of the restriction.”) (internal citation omitted).

23. Bollinger’s employment with Plaintiff was terminated on November 21, 2013. By its terms, the Non-Compete Provision remained in effect for two years after Bollinger’s termination from employment. As a result, absent an exception to the general rule under Pennsylvania law, the Non-Compete Provision expired on November 21, 2015 and may not be enforced for subsequent periods.

24. Concerning the first potential exception, the Agreement did not contain a provision extending the period of the Non-Compete Provision in the event it was violated. Thus, an extension of the restrictive period is not available under Pennsylvania law on this basis. *See Worldwide Auditing*, 587 A.2d at 776–77.

25. Concerning the second potential exception, the Court notes that when the Court of Appeals’ Opinion was issued on December 31, 2014, the Non-Compete Provision was in effect. Not surprisingly, the Court of Appeals’ Opinion does not discuss an extension of the restrictive

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<sup>7</sup> Such tolling provisions also appear to be valid under North Carolina law. *See, e.g., QSP, Inc.*, 152 N.C. App. at 177–78, 566 S.E.2d at 853; *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 417 (E.D.N.C. 2006) (applying North Carolina law); *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 718 (M.D.N.C. 2009) (same).

period, Pennsylvania law concerning such an extension, or any evidence of fraud or unnecessary delay by Bollinger in causing the restrictive period to expire.

26. Neither party has contended, nor is the Court otherwise aware from its review of the record, that evidence exists to suggest that Bollinger has engaged in fraud or unnecessary delay to cause the restrictive period to expire. To the contrary, Judge Murphy declined to enter a preliminary injunction in February 2014, and Plaintiff elected to appeal. When the Court of Appeals overturned Judge Murphy's decision, Bollinger timely exercised his legal right to file a petition for discretionary review with the North Carolina Supreme Court. Upon learning of the Supreme Court's denial of Bollinger's petition for discretionary review and the certification of that decision to the Catawba County Clerk of Superior Court, this Court has acted promptly to issue this Preliminary Injunction Order as directed by the Court of Appeals. Accordingly, the timing of the entry of this Order is the result of the normal processes of the North Carolina court system and not due to any "fraud or unnecessary delay" by Bollinger. *Hayes*, 266 A.2d at 272. Thus, an extension of the restrictive period based on the second potential exception is not available under Pennsylvania law. *Id.*

27. As a result, the Court concludes that the Non-Compete Provision expired on November 21, 2015, two years after Bollinger's employment with Plaintiff was terminated, and, thus, that under Pennsylvania law, no restrictions on Bollinger's ongoing employment under the Non-Compete Provision are appropriate.<sup>8</sup>

28. Plaintiff separately contends that Bollinger cannot work for ACF, or in the textile finishing industry generally, without misappropriating Plaintiff's trade secrets. Plaintiff's argument is essentially one of "inevitable disclosure." Although Plaintiff points out that

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<sup>8</sup> The Court notes that its conclusion does not preclude Plaintiff from seeking to recover any damages that it may be able to establish that arose as a result of Bollinger's alleged violation of the Non-Compete Provision during the restrictive period.

Pennsylvania recognizes the inevitable disclosure doctrine, *see Bimbo Bakeries USA, Inc. v. Botticella*, No. 10-0194, 2010 U.S. Dist. LEXIS 68990 (E.D. Pa. Feb. 9, 2010), the Court notes that Plaintiff’s claim for misappropriation of trade secrets is governed by North Carolina law. As this Court has repeatedly recognized, the North Carolina appellate courts have not explicitly adopted the inevitable disclosure doctrine. *See, e.g., Allegiance Grp. v. Zachary Piper, LLC*, 2013 NCBC LEXIS 12, at \*27 (N.C. Super. Ct. Feb. 25, 2013) (“It is less than clear as to how that doctrine is to be applied in North Carolina”); *RCR Enters., LLC v. McCall*, 2014 NCBC LEXIS 69, at \*17 (N.C. Super. Ct. Dec. 19, 2014) (“[T]he Court notes that the doctrine of ‘inevitable disclosure’ has not yet been firmly adopted by the North Carolina courts.”); *Velocity Solutions, Inc. v. BSG, LLC*, 2015 NCBC LEXIS 54, at \*25 (N.C. Super. Ct. May 26, 2015) (“It is uncertain whether the North Carolina appellate courts will adopt the doctrine, and if so, under what limitations.”)

29. Absent direction not found anywhere in the Court of Appeals’ Opinion, the Court declines to adopt the inevitable disclosure doctrine in this case, or enjoin Bollinger from working for Plaintiff or in the textile finishing industry generally, particularly when the Non-Compete Provision relied upon by the Court of Appeals in ordering injunctive relief has expired by its own terms and is now unenforceable as a matter of Pennsylvania law.

#### **IV. Security Bond**

30. Rule 65(c) of the North Carolina Rules of Civil Procedure provides that “[n]o . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” N.C. R. Civ. P. 65(c). “[T]he trial court has the discretion to determine what amount of security, if any,

is necessary to protect the enjoined party's interests." *Keith v. Day*, 60 N.C. App. 559, 561, 299 S.E.2d 296, 297 (1983).

31. Because this injunction does not prohibit Bollinger from employment and instead requires only that he refrain from misappropriation of Plaintiff's trade secrets or other confidential or proprietary information, Bollinger should be able to obtain employment. The potential risk for damages to Bollinger from the injunction is therefore minimal. Accordingly, the Court finds that a bond in the amount of \$250 is appropriate.

### **CONCLUSION**

**WHEREFORE**, pending the final resolution of this civil action, and unless and until otherwise ordered by this Court, the Court hereby enters this preliminary injunction **ENJOINING** Bollinger from misappropriating any trade secrets, or any proprietary or other confidential information which is the property of Plaintiff.<sup>9</sup> Pursuant to the provisions of North Carolina Rule of Civil Procedure 65(c), and as a condition of this Order, Plaintiff shall post security in the amount of \$250 in the form of cash, check, surety bond, or other undertaking satisfactory to the Catawba County Clerk of Superior Court on or before December 21, 2015.

**SO ORDERED**, this the 14th day of December, 2015.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Special Superior Court Judge  
for Complex Business Cases

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<sup>9</sup> To the extent this Preliminary Injunction Order enjoins Bollinger's misappropriation of "confidential or other proprietary information" that does not also constitute trade secrets, the Court notes that Bollinger included this language in his proposed Preliminary Injunction Order and thus the Court concludes that Bollinger has consented (and/or waived any objection) to the inclusion of this language in this Preliminary Injunction Order.