

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

POLYONE CORPORATION)	CASE NO. CV 11 745478
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY AND</u>
)	<u>PRELIMINARY INJUNCTION</u>
JOHN PAPADOPULOS)	
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff PolyOne Corporation filed its complaint on January 10, 2011. The complaint included motions for a temporary restraining order and preliminary injunction. A temporary order was entered January 11 and the preliminary injunction hearing began January 25 and concluded two days later. This entry follows.

STATEMENT OF FACTS

PolyOne is a manufacturer of polymer compounds, most of which are plastics. Defendant John Papadopoulos started working full-time at PolyOne in December, 2007, as a product development engineer. His job entailed “working with the commercial team to develop innovative polymer products.”¹ His role was to formulate polymer compounds that would have specific characteristics required by PolyOne’s industrial customers.

Papadopoulos first worked at PolyOne beginning in 2004 as a co-op student and an extern before being hired full-time at the end of 2007 upon completing a Bachelor of Science degree in

¹ Hearing testimony of Papadopolus.

the University of Akron's mechanical polymer engineering major. His only other relevant work experience was as a summer research assistant at a Case Western Reserve University lab in 2001.

After beginning full-time work at PolyOne, Papadopoulos signed an employment agreement on December 21, 2007, with the following relevant non-competition provisions:

EMPLOYEE AGREEMENT

I am entering into this Employee Agreement ("Agreement") in consideration of becoming employed by or continuing my employment with PolyOne Corporation
...

* * *

5. ***Non-Competition After Employment.*** I agree that I will not compete with PolyOne by engaging in certain prohibited activities after my employment terminates due to voluntary resignation . . . as set forth in Attachment A. Attachment A applies to me if, at the time of or during the two-year period prior to my employment termination, I had . . . technical . . . responsibilities . . . Attachment A is included in and is a part of this Agreement.

Attachment A to Employee Agreement

Non-Competition After Employment

This Attachment sets forth restrictions on me competing with PolyOne after my employment with PolyOne ends. This Attachment is a part of the Agreement.

I will not compete with PolyOne's business by engaging in any Prohibited Activities (as defined in Paragraph 2 below) within the Restricted Territory for one (1) year following my termination due to voluntary resignation . . .

1. ***Restricted Territory.*** The scope of the Restricted Territory is determined by my job duties . . . The Restricted Territory is defined as and limited to any one or more of the following:

* * *

- (b) **Technical Responsibilities.** If, at the time of termination or during the two (2) years preceding my termination, I had any technical responsibilities, the Restricted Territory is the area(s) of PolyOne's business for which I had technical responsibility regardless of geographical location. Technical responsibilities includes, without

limitation, responsibility for or oversight of the design, development, formulation, testing, quality control, color matching, technical service support, and engineering (including process and maintenance engineering) for such areas of PolyOne's business as thermoplastic resins and compounds, thermoplastic elastomer compounds, specialty polymers, coating systems, colors and additives, thermoplastic resin distribution, and/or any other area(s) of PolyOne's business existing on the termination date;

* * *

2. Prohibited Activities. The Prohibited Activities within the Restricted Territory are:

- (a) I am prohibited from being employed by or entering into or engaging in any business which competes with PolyOne's business within the Restricted Territory applicable to me as defined above;
- (b) I am prohibited from soliciting customers, business, orders for, or selling any products or services in competition with, or for any business that competes with, the business of PolyOne;
- (c) I am prohibited from diverting, enticing, or taking away any customers, business, orders or sales of PolyOne or attempting to do so; and/or
- (d) I am prohibited from promoting or assisting, financially or otherwise, any person, firm, association, partnership, corporation or other entity engaged in any business which competes with the business of PolyOne.

* * *

Additionally, the agreement requires Papadopolus to protect and return PolyOne's confidential information by including the following:

- 11. Protection of Confidential Information.** I promise to keep secret all Confidential Information learned by me or disclosed to me . . . I will use the Confidential Information only for PolyOne's benefit, and not for my own or anyone else's benefit. This obligation for specific Confidential Information will continue until someone other than me lawfully discloses that specific Confidential Information to the public . . .
- 12. Return of Confidential Information and Property.** When my employment with PolyOne ends, I will return in good condition all PolyOne property and Confidential Information, including Derivative Works . . .

The defendant concedes that as a PolyOne product development engineer he had technical responsibility so that the prohibited activities listed in attachment A to the non-compete agreement apply to him. He also acknowledges that he was exposed to some of the company's trade secrets and other confidential information, mostly in the form of product formulation and blending methods, but also some commercial information. For example, the defendant was included in marketing meetings where near-term sales prospects and long-term product strategies were discussed. Papadopoulos was also the "project owner" of several dozen projects for identified customers. As project owner he knew the customer, or potential customer, and its peculiar need and had some personal communication with the customer although he was not PolyOne's primary liaison with any customer.

Late in 2010, Papadopoulos was approached by a private recruiter about working for DSM Engineering Plastics, Inc., in Evansville, Indiana. After a series of interviews in Michigan and Indiana he accepted an offer to work as a development specialist. He resigned from PolyOne on December 8 and began working at DSM on January 10, 2011.

DSM Engineering Plastics, Inc., is an affiliate of DSM Engineering Plastics, B.V., a Dutch company. DSM refers to itself as one of "the majors" in the plastics industry, with Dupont, BASF, and a few others. DSM does not consider PolyOne to be one of "the majors." Like PolyOne, part of DSM's business is to compound polymers for sale to manufacturers of plastic goods. Indeed, the defendant's job as a DSM development specialist, much like his job at PolyOne as a product development engineer, is to compound polymers using existing formulas and formulas he devises. Unlike PolyOne, DSM also manufactures the base polymers, called resins, that are used in the compounding formulas.

Much of the hearing was devoted to evidence of whether PolyOne and DSM are competitors. DSM's vice president of sales and marketing and its senior development specialist each testified to being aware of only one instance where they knew DSM competed for a customer directly with PolyOne, and its vice president of research and technology is not aware of a single specific instance of competition. On the other hand, PolyOne's global technology director testified that there is no question it competes with DSM. PolyOne holds itself out as being able to solve customers' compounding problems that other plastics companies, including DSM, cannot. PolyOne produced evidence of 27 distinct situations where it knew DSM was the competition for a particular customer. Publicly available marketing materials also depict the two companies as competitors. Hearing exhibits 25 through 27 summarize similar applications that two of the products Papadopoulos worked on at PolyOne – Nymax and Edgetek –share with DSM's compounds.

THE REQUESTED INJUNCTIVE RELIEF

PolyOne has asked for an injunction as follows:

- 1) That a temporary, preliminary and permanent injunction be entered enjoining further breaches or attempted breaches of the agreement;
- 2) That a temporary, preliminary and permanent injunction be entered enjoining Papadopoulos's use or disclosure of any of PolyOne's confidential or proprietary trade secret information and that all such information be preserved and returned to PolyOne by Papadopoulos;
- 3) Specific performance by Papadopoulos of the covenants contained in the agreement concerning confidential information (including ¶11 and ¶12 and related provisions) and non-competition (including ¶5, Attachment A and related provisions), such that the covenants begin to run from the date of entry by this court of a permanent injunction; and

4) That Papadopoulos preserve and return to PolyOne any and all property of PolyOne or anything containing the information of PolyOne, including, without limitation, any material relating to PolyOne formulations and technical information, business strategy, pricing, margins, costs, profitability, and customer information.²

LAW AND ANALYSIS

Preliminary Injunction Standard

An injunction is an equitable remedy to be fashioned on the specific facts and circumstances of a given case, and the court must give due consideration to the rights of both parties, not just the one seeking the injunction.³ In deciding whether to grant a preliminary injunction, a court must examine four factors: (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits, (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is not granted, and (4) whether the public interest will be served by the injunction.⁴ But no one factor is dispositive, so that when there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak.⁵ The plaintiff must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of a cause of action.⁶

A reasonable non-competition agreement may be enforced by injunction.⁷ An injunction is also an available remedy for common law and statutory causes of action for misappropriation of trade secrets.⁸

² See complaint, page 13.

³ *Sheehan v. Kaden* (March 25, 1999), Cuyahoga App. No. 75292.

⁴ *KLN Logistics Corp. v. Norton*, 174 Ohio App. 3d 712, 2008-Ohio-212, ¶ 12.

⁵ *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App. 3d, 1, 14.

⁶ *Jacono v. Invacare Corp.*, 2006-Ohio-1596, Cuyahoga App. No. 86605, ¶ 8.

⁷ See, e.g., *Raimonde v. Van Vlerah* (1975), 42 Ohio St. 2d 21, 25-26.

⁸ *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App. 3d 339, 2008-Ohio-6819, ¶ 22.

Likelihood of Success on the Merits

Breach of Contract

PolyOne's first cause of action is that the defendant has breached his contract not to compete by accepting the job at DSM.⁹ To demonstrate a substantial likelihood of success on the merits of this cause of action, PolyOne must prove by clear and convincing evidence the following elements: 1) the existence of a contract, 2) performance by the plaintiff, 3) breach by the defendant, and 4) damage or loss to the plaintiff.¹⁰ There is no question that a contract exists and that PolyOne performed its obligations; only the latter two elements are in dispute.

By the contract, Papadopoulos agreed to be "prohibited from being employed by...any business which competes with PolyOne's business within the Restricted Territory."¹¹ The restricted territory includes any company, anywhere, that engages in "the areas of PolyOne's business for which [Papadopoulos] had technical responsibility."¹² Papadopoulos is in breach, then, if DSM competes with PolyOne as a polymer formulator and compounder. The evidence is clear and convincing that DSM is a prohibited competitor.

Although much testimony was offered at the hearing on the distinctions, down to the molecule, between the products of the two companies, the fact is that both are in the business of compounding plastics for sale to injection molders and original equipment manufacturers. Those customers are concerned with the performance characteristics of a product, not necessarily with

⁹ The breach of contract cause of action also includes the claim that the defendant has breached, or will breach, the confidentiality provisions of his employment contract. The evidence on the claim that Papadopoulos has already breached his confidentiality agreement is non-existent. Although the defendant agrees that he knows some of PolyOne's trade secrets and other confidential information, no evidence, direct or circumstantial, was produced to show that he has used or revealed any of that knowledge. In this portion of the breach of contract cause of action the plaintiff also claims that the defendant, by accepting employment as a compounder with DSM, will inevitably breach the confidentiality provisions of the contract. This claim is addressed in the section of the journal entry discussing the alleged inevitable misappropriation of trade secrets.

¹⁰ *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App. 3d 849, 2009-Ohio-4816, ¶ 23.

¹¹ Hearing Exhibit 1, PolyOne employee agreement, page 6.

¹² Hearing Exhibit 1, page 5.

its exact chemical composition. If a customer can substitute a DSM product for a PolyOne product, or vice versa, for a given application and achieve an equal result for less money, or a better result that justifies additional expense, then the customer will make that change without regard to the specific chemical formulation of the polymer compound.

That PolyOne is not on DSM's "radar screen"¹³ as a competitor doesn't preclude a finding that they do compete. Other testimony showed that customers are loath to disclose their current supplier to a new supplier seeking their business, so that a plastics compounder cannot always tell who its competition is for any particular piece of business. Even if PolyOne has never succeeded in getting a customer's business away from DSM it does not mean they are not vying for the same customers. The Cleveland Browns in recent years have rarely beaten the Pittsburgh Steelers but the two are still competitors. DSM and PolyOne are just as surely competitors and Papadopoulos is violating his agreement by working at DSM.

However, putting aside the question of damages, which will be addressed below, a finding that the agreement has been breached does not end the inquiry since this case involves a covenant not to compete. Because a non-compete contract prohibits a former employee from working in competition with his former employer and amounts to a restraint of trade, it will be enforced only to the extent that the restraints imposed are reasonably necessary to protect the employer's legitimate business interests.¹⁴ A non-compete agreement is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.¹⁵ The court is therefore required to determine whether the agreement is reasonable. In doing so, the court should consider all factors bearing upon the reasonableness of the agreement, including whether the agreement will stifle

¹³ Hearing testimony of defense witness Emile Homsy.

¹⁴ *Raimonde, supra.*

¹⁵ *Id.*, at syllabus 2.

the inherent skill and experience of the employee and whether the covenant operates as a bar to the defendant's sole means of support.¹⁶

Papadopoulos is a polymer compounder by education first and by training at PolyOne second. Although his practical skills were no doubt honed by his experience at PolyOne, he acquired the know-how to enable those skills through his instruction at the University of Akron. Preventing him from any employment as a compounder for one year – as this contract would do – will deprive him of the ability for that year to use the qualifications he acquired, at his own expense, through several years of academic instruction.¹⁷ Moreover, the defendant's skill is specialized and barring him from work as a compounder will also keep him from earning a living. Despite testimony from the plaintiff that the defendant could move backward or forward in the supply chain – *i.e.*, a job at a manufacturer of base resins or working for an injection molder or original equipment manufacturer – it is clear that the defendant's specific function, formulating polymer compounds, is only needed at the same point in the supply chain he occupied at PolyOne. Insofar as the agreement effectively renders the defendant unable to use his particular talent it is unreasonable.

A court should also consider whether the covenant seeks to eliminate unfair competition or only ordinary competition; a covenant not to compete that eliminates ordinary competition is not reasonable. As noted, Papadopoulos is a polymer compounder. His knowledge and aptitude, while hard-earned and impressive, are not unique. Based on the hearing testimony, every company in the plastics industry uses compounders who all possess generally the same knowledge and technical capability and whose skills are transferable from one company to another. Ordinary competition for PolyOne comes from companies who already employ

¹⁶ *Id.*, at 25.

¹⁷ Albeit with some practical experience at PolyOne during college.

compounders with Papadopoulos's same basic skills so that, without more¹⁸, there is no unfair competition by the defendant simply working at DSM, and a covenant effectively prohibiting employment as a compounder at DSM, or any other plastics company, is not reasonable.

For these reasons, the court finds that the plaintiff is likely to succeed in proving that the defendant breached the contract, but is not likely to succeed on the merits of its claim to enforce the contract to the letter, and an injunction based only on count one of the complaint prohibiting Papadopoulos from any work at DSM is unwarranted. However, the court can reform the non-compete agreement so that it contains reasonable restrictions on activities that the defendant can undertake while working for DSM. What those changes are, though, should be decided only after a consideration of the other factors necessary for injunctive relief. If those factors don't exist then reformation of the contract is moot.

Misappropriation of Trade Secrets

The plaintiff's second cause of action is for misappropriation of trade secrets under Ohio Revised Code section 1333.61, *et seq.* The statute allows a lawsuit for damages where trade secrets are misappropriated, but also authorizes an injunction for "threatened misappropriation."¹⁹ The record here supports a finding that Papadopoulos is in possession of trade secrets – he admitted as much – but is devoid of evidence that he has already disclosed or used them. However, PolyOne also seeks to enjoin a threatened misappropriation under the "inevitable disclosure" rule: the theory that the defendant cannot possibly work for DSM without disclosing or using PolyOne's trade secrets.

The inevitable disclosure rule, by that label, was first described by an Ohio court in *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App. 3d 260, a Hamilton County case

¹⁸ Of course, the "more" is the possible use of PolyOne's trade secrets, discussed later in this entry.

¹⁹ O.R.C. § 1333.62(A).

decided by the First District Court of Appeals. Under the rule, a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and comprehensive knowledge of an employer's trade secrets and confidential information has begun employment with a competitor of the former employer in a position that is substantially similar to the position held during the former employment.²⁰

In *Stoneham*, the appeals court found that the trial court erred in denying injunctive relief where the evidence showed that Stoneham's use of P&G's confidential information was not only "a very real threat," but a "substantial probability"²¹ based on Stoneham's having "intimate knowledge" of the plaintiff's trade secrets that would allow his new company "to avoid the time-consuming and expensive steps that P&G took to develop the information."²² Stoneham had acquired his knowledge of the trade secrets as a senior-level manager responsible for international marketing of haircare products, mostly conditioners. As the person formulating P&G's global business strategies and goals he was required to know: market research results; financial data about the costs and profits of haircare products; technological developments in existing products and detailed information on new product launches; foreign markets' preferences; and strategies for the revitalization of old products. Stoneham also developed ten-year plans for some of the company's products. Indeed, "no one was more knowledgeable about P&G's hair-conditioning products, both existing and potential, than Stoneham."²³ Finally, Stoneham left P&G to work as the president of a company whose hair conditioners competed directly with the plaintiff's.

²⁰ *Procter & Gamble*, at 274.

²¹ *Id.*

²² *Id.*, at 274-275.

²³ *Id.*, at 266.

These facts stand in contrast to Papadopoulos's situation. He was hired by PolyOne just out of college and was there only three years. PolyOne produces many products but the defendant's detailed knowledge is limited to two or three product lines and the processes used to formulate and manufacture those lines, and the testimony at the hearing showed that DSM's competing products are already formulated and made in a certain way – a way that has been successful for DSM for many years – that is not likely to change. Marketing information was shared with Papadopoulos as necessary to allow him to do his job, but he had no responsibility for implementing overall marketing plans or creating new strategic directions for PolyOne. And although DSM's description of his new job as "entry level"²⁴ is clearly an understatement, he will not be part of his new employer's upper level of management. Even making an inference in PolyOne's favor to adjust for evidentiary gaps created by its understandable reluctance to enter unredacted trade secrets into evidence at the hearing, these circumstances do not give rise to the inevitable disclosure of the plaintiff's trade secrets. Although Papadopoulos may know some tricks of the compounding trade unique to PolyOne that might assist his day-to-day work at DSM, the evidence shows that he does not possess a sufficient quantum of important information to make disclosure inevitable.

A conclusion that inevitable disclosure only exists where the former employee sought to be enjoined was a high-level employee with a large volume of confidential information is supported by the discussion of the inevitable disclosure rule in *PepsiCo, Inc. v. Redmond* (7th Cir. 1995), 54 F. 3d 1262. The court there found inevitable disclosure only where the defecting employee was similar to a coach leaving a team "with playbook in hand." The "playbook" was not the "general skills and knowledge" that Redmond had acquired at Pepsico (like Papadopoulos in this case), but "extensive and intimate knowledge" that Redmond, as the general manager of a

²⁴ Hearing testimony of Homsy.

business unit that accounted for twenty percent of Pepsi's profits in the United States, had about Pepsi's "strategic goals."²⁵ The *PepsiCo* court distinguished that situation from two cases that could not support a finding of inevitable disclosure: *Teradyne, Inc. v. Clear Communications Corp.*, 707 F. Supp 353 (N.D. Illinois 1989), where the plaintiff could only show that the defendants had worked for the plaintiff, knew its business and hired some of its workers; and *AMP, Inc. v. Fleischhacker* 823 F. 2d 1199 (7th Cir. 1987), where the court emphasized that "the mere fact that a person assumed a similar position at a competitor" does not make disclosure inevitable. The latter two precedents are more comparable to Papadopoulos's situation than *PepsiCo* or *Procter & Gamble*.

Because the evidence that Papadopoulos has misappropriated trade secrets, or will inevitably do so, is not clear and convincing, PolyOne is not substantially likely to succeed on the merits of its second cause of action or its claim in the first count of the complaint for breach of the agreement not to disclose confidential information. Therefore, preliminary injunctive relief on those claims is not justified.

Irreparable Injury

PolyOne having shown a likelihood of success on the merits of its breach of contract claim, the court turns next to the question of whether the plaintiff will suffer irreparable harm if a preliminary injunction is denied. Irreparable harm is an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete.²⁶ PolyOne's claim of irreparable harm if Papadopoulos works for DSM in violation of his non-compete agreement – *i.e.*, within one year of leaving PolyOne – is that he will use the plaintiff's trade secrets and confidential information to benefit DSM.

²⁵ *PepsiCo, Inc.*, at 1269.

²⁶ *Miller v. Miller*, 2005-Ohio-1520, 11th Dist. App. No. 2004-T-0150, ¶ 16.

The court's finding, in connection with considering the likelihood of PolyOne's success on its cause of action for misappropriation of trade secrets, that the defendant's use of PolyOne's confidential information at DSM is not inevitable does not negate the possibility of irreparable harm by disclosure of trade secrets while working at DSM. The two inquiries are related but not inextricable. On count two the court concluded that there is not sufficient evidence, at this early stage, to find that Papadopoulos has already used confidential information or is in the kind of position where he will inevitably disclose or use it. But because disclosure is not inevitable to support a preliminary injunction on count two does not mean that there isn't a threatened or likely disclosure on count one – a claim where the plaintiff has shown by clear and convincing evidence the likelihood of success in proving a breach – sufficient to support a preliminary injunction. Indeed, this court finds that if Papadopoulos is allowed to work at DSM without restriction the plaintiff is likely to suffer the irreparable harm of the use by Papadopoulos of its trade secrets to the benefit of DSM, even though that harm is not inevitable.

The defendant's argument that his use of trade secrets would not result in irreparable harm because the plaintiff has a remedy at law in the form of an action for damages (count two) is unavailing. The plaintiff has demonstrated a substantial likelihood of success on its claim that working for DSM is a violation of Papadopoulos's contract. Since that likelihood has been demonstrated now, before any damage has been done, how can a lawsuit for damages after they are incurred ever be "plain, adequate, and complete" compared to an injunction preventing the damages from being inflicted in the first place? Having a court in equity step in and prevent damages before they happen is always a remedy that makes an award of damages after the fact inadequate, which is why courts have long held that where the plaintiff has demonstrated that it

is likely to succeed on the merits a preliminary injunction will be justified even if the claim of irreparable harm is weak.

The plaintiff has sufficiently proved the probability of irreparable harm if a preliminary injunction is not granted.

Harm to Third Parties/Public Interest

Granting an injunction under the circumstances of this case will not cause undue harm to third parties. The third party with the most direct interest, DSM, has become a self-proclaimed “major” chemical company without the benefit of Papadopoulos’s services and will no doubt retain that status if the defendant is preliminarily restrained from working there. Third parties with an indirect interest conceivably include all PolyOne employees with a non-compete agreement. Their interests won’t be harmed because covenants not to compete are considered in the context of the particular circumstances of the allegedly competing employment. PolyOne cannot use an injunction in this case to support an injunction in a future case different from this one; that future case will have to stand or fall on its own merits.

Another third party that the defendant argued will be harmed by an injunction keeping him from working for DSM is his family. While this court is sympathetic to the hardships that may befall the defendant and those who depend on him for support if he cannot work at DSM, it is fair to observe that any such harm will arise from his decision to agree to, and then breach, the contract, and not from an order of this court holding him to the contract.

The public interest is also not ill-served by a preliminary injunction. The public interest includes having confidence that courts will enforce reasonable non-compete agreements that balance the sanctity of contract and the importance of a mobile labor force to a vigorous free market economy.

Reformation of the Non-Compete Contract

The court has found that the non-compete contract, as written, bars Papadopolus completely from employment at DSM (or anywhere else) as a compounder and is therefore unenforceable because it unreasonably prevents him from practicing his trade. Nevertheless, the plaintiff did prove its entitlement to preliminary injunctive relief based on a contract that is reformed to reasonably protect its legitimate business interests. That leaves the question: How should the contract be reformed?

That question is answered by first recognizing that the legitimate business interests PolyOne can protect are those that keep DSM from unfairly competing with it. In that respect, the evidence shows that the only confidential information Papadopolus has that might allow DSM to unfairly compete with PolyOne is the identity of the plaintiff's customers and their idiosyncratic needs and preferences. DSM has no right to the customer information PolyOne has developed through years of effort in all aspects of its business. The object of reforming the agreement, then, should be to keep DSM from acquiring that information.

A prophylactic remedy – keeping the defendant away from DSM altogether – having been excluded as unreasonable, the court believes the next best thing is a preliminary injunction allowing Papadopolus to work at DSM but expressly preventing him not only from using any of the plaintiff's trade secrets or other confidential information but also imposing on him an obligation to disclose the identities of his DSM customers. The preliminary injunction detailed below is crafted to achieve that end. However, the order imposes affirmative duties on the parties and on DSM, giving it the character of a mandatory injunction and rendering it of dubious enforceability without the agreement of the parties and DSM. PolyOne, Papadopolus and DSM are therefore each asked to indicate their separate consent to the preliminary order by filing a

notice to that effect within 14 days of the date of this entry.²⁷ If consent is not given, the court will proceed with an alternative injunction.

PRELIMINARY INJUNCTION

For the reasons given, the plaintiff's motion for a preliminary injunction is granted and until this entry is vacated or modified, but in no event past December 9, 2011, Papadopoulos is ordered to:

- Have no contact with known current PolyOne customers, have no customer contact at DSM, and have no communications with anyone else regarding PolyOne customers;
- Not solicit for employment any current PolyOne employees;
- Work only on the Arnite, Arnitel, and Stanyl PA46 product lines at DSM;
- Not work on Akulon, Stanyl T4, Stamylan UH, Stapron, Xantar, Xantar C, Yparex, Electrafil, Fiberfil, Nylatron, and Plaslube products;
- Have no supplier contact;
- Not communicate to anyone any information regarding any PolyOne supplier or potential supplier; and
- Not communicate to anyone any information regarding any known PolyOne "Red Zone" customer target or opportunity.

Consistent with paragraphs 11 and 12 of the defendant's employee agreement with PolyOne, the defendant is ordered to return in good condition all PolyOne property and confidential information currently in his possession. (If he has done so already, he should certify

²⁷ A party or DSM should not be concerned that consent waives an appeal. If all do not consent, there is no order to appeal; if all do consent, no appeal is anticipated.

this to PolyOne's satisfaction.) And, until someone other than Papadopolus lawfully discloses PolyOne's specific confidential information to the public, he is further ordered to:

- Not divulge any PolyOne trade secrets, confidential information, or proprietary information; and
- Not communicate to anyone any information about the launch of the new PolyOne product which is referenced in paragraph 18 of PolyOne's complaint.

It is further ordered that, upon its consent to this order, DSM must:

- Circulate a memorandum directive to employees advising them of Papadopolus's restrictions; and
- Circulate a policy directive to employees restricting them from soliciting any information from Papadopolus regarding any PolyOne trade secret, confidential information, or proprietary information.

It is further ordered that PolyOne shall file with the court, separately and under seal, two identical copies²⁸ of a list of all names of customers or prospects that were redacted from hearing exhibits 11, 12, and 14 through 24. This list shall not be served on the defendant or opposing counsel, but parts of the list may be disclosed to the defendant and opposing counsel if a hearing as described below is ever needed.

It is further ordered that Papadopolus, once every 90 days until this order is vacated or modified, shall file with the court, separately and under seal, two identical copies of a list of the names of every customer or prospect whose products, or projects, he has worked on in the preceding 90 days. This list shall not be served on the plaintiff or opposing counsel, but parts of

²⁸ One for the court's use and the other to remain sealed as part of the record.

the list may be disclosed to the plaintiff and opposing counsel if a hearing as described below is ever needed.

If the court examines the parties' lists and identifies any common customers or prospects, then a hearing will be held to determine if Papadopulos violated this order by disclosing PolyOne's confidential information, and whether that violation caused, in whole or part, a PolyOne customer or prospect to become a DSM customer or prospect, or whether the joint customer or prospect came to DSM's attention through other means.

No bond is required.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date

SERVICE

A copy of this journal entry was sent by e-mail this 14th day of February, 2011, to the following:

Robert F. Ware, Esq.
Rob.Ware@ThompsonHine.com
Matthew D. Ridings, Esq.
Matt.Ridings@ThompsonHine.com
Christopher J. Klasa, Esq.
Chris.Klasa@ThompsonHine.com
Thompson Hine LLP
Attorneys for the plaintiff

Ted McCullough, Esq.
tmccullough@mgpllp.com
Forrest A. Norman, Esq.
fnorman@gallaghersharp.com
Attorneys for the defendant

Judge John P. O'Donnell