

Contour Design v. Chance Mold Steel CV-09-451-JL 1/14/10
UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Contour Design, Inc.

v.

Civil No. 09-cv-451-JL
Opinion No. 2010 DNH 011

Chance Mold Steel Co., Ltd.
and EKTtouch Co., Ltd.

MEMORANDUM OPINION

Contour Design, Inc., moves for a temporary restraining order preventing the defendants, Chance Mold Steel Co. and EKTtouch Co., from marketing a product known as the "ERGO Roller," which they allegedly developed by misappropriating Contour's trade secrets.¹ This court has subject-matter jurisdiction over

¹Contour originally filed a motion seeking a temporary restraining order ex parte. See Fed. R. Civ. P. 65(b). The court scheduled a hearing on that request for 10 a.m. on January 5, but, as a result of Contour's efforts to notify the defendants of both the motion and the hearing, their newly retained counsel appeared at the appointed time and requested a continuance so that they could file a response. The court afforded them until 8 p.m. that day to do so, with the hearing to take place at 1:30 p.m. the following afternoon. This schedule was intended to provide the defendants with an opportunity to respond while maintaining the court's ability to grant effective relief, if warranted. As discussed infra, the conduct that Contour sought to enjoin was scheduled to commence on January 7, 2010.

Though the defendants filed an objection to the motion by the appointed deadline, they filed supplementary materials later that night, the next morning, and even the next afternoon just before the hearing, viz., a declaration from their president, Hsiu-Yuan Nien. The court has considered these materials despite their late arrival. At the hearing, the defendants nevertheless objected that, because they had insufficient time to respond, the

this action between Contour, a Delaware corporation with its principal place of business in New Hampshire, and the defendants, Taiwanese corporations, under 28 U.S.C. § 1332(a)(2) (diversity). After a hearing, the court grants Contour's motion. Though the parties have provided the court with only limited facts so far, they show that Contour is likely to succeed on the merits of its claim that the defendants have misappropriated one of its trade secrets. Given the nature of that claim, the remaining criteria for issuing a temporary restraining order are readily satisfied.

I. Background

For purposes of Contour's motion, the court makes the following findings of fact, see Fed. R. Civ. P. 52(a)(2), based on the verified complaint and affidavit submitted by Contour's president, Steven Wang, and the documents and declaration submitted by the defendants. See Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986) (noting with approval that

court could not grant a preliminary injunction, but only a temporary restraining order. But see Fed. R. Civ. P. 65(a)(1) (authorizing a preliminary injunction "on notice to the adverse party"). Out of sensitivity to the defendants' predicament, the court has styled its order as a temporary restraining order and has therefore provided for its expiration in 14 days from the date of its issuance. See Fed. R. Civ. P. 65(b)(2).

"[a]ffidavits and other hearsay materials are often received in preliminary injunction proceedings").

Contour designs, manufactures, and sells ergonomically friendly "computer pointing devices," including the "Roller Mouse" series. The products from this line feature a wide roller bar incorporated into a component placed centrally below the keyboard, as opposed to the configuration of a traditional computer mouse, which has a narrow trackball incorporated into a smaller component placed to one side of the keyboard. In 1995, Contour engaged defendant Chance to manufacture its ergonomic products, based in part on assurances that it would "establish a production line exclusively for Contour and that all of [its] ideas, trade secrets, products, specifications and know-how would remain secret from others and that Chance would not manufacture any similar products for any other person or entity."

To that end, Contour and Chance executed a "Non-Disclosure Agreement" (the "NDA"), dated June 15, 1995 and set to expire on June 15, 2015. The NDA recited that Contour "has certain inventions, designs, methods, samples, market information[,] concepts and ideas," defined as the "Confidential Information," that relates "to consumer mouse products," defined as "the Product." The NDA further recited that Chance "desired to receive some of the Confidential Information to evaluate the

desirability of entering into a manufacturing and distribution arrangement with [Contour] for the Product.”

Chance agreed in the NDA to preserve the confidentiality of the Confidential Information, to make no use or disclosure of it without Contour’s prior written consent, and that Chance had been granted no right or license in any trade secret by its receipt of the information. Chance further agreed not to “produce, manufacture or otherwise commercially exploit the Product” without Contour’s prior agreement. And Chance acknowledged that its breach of the NDA will cause Contour “irreparable harm for which no adequate remedy exists at law, and that upon any such breach or threatened breach [Contour] shall be entitled to injunctive relief. The NDA provided that Colorado law “shall apply to [its] performance and interpretation.”²

²Despite this provision, the parties’ submissions rely solely on the New Hampshire version of the Uniform Trade Secrets Act (and caselaw from other jurisdictions interpreting their versions of that Act). The court treats that as a tacit agreement that New Hampshire law applies, at least at this preliminary stage of the litigation. See Anderson v. Century Prods. Co., 943 F. Supp. 137, 150 n.2 (D.N.H. 1996). In any event, under New Hampshire choice-of-law rules, which apply in a diversity action brought here, a contractual provision to apply a particular jurisdiction’s law controls only if “the contract bears any significant relationship to that jurisdiction.” Stonyfield Farm, Inc. v. Agro-Farma, Inc., 2009 DNH 150, 10 (quoting Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000)). There appears to be no relationship at all between Colorado and the manufacturing agreement, which calls for a Taiwanese company to produce goods in that

Chance and Contour subsequently signed a "Manufacturing and Supply Agreement," dated December 1, 1996. This agreement contained a confidentiality provision, expressly "[i]n addition to" the NDA, requiring Chance to maintain secrecy over all confidential information provided to it by Contour "in connection with the design and manufacture of molds and/or the Products," a term defined as "various types of computer mechanisms and mouse." The agreement called for Chance to "manufacture, process and assemble the Products," setting forth a schedule for delivery of the Products over a maximum two-year period, at which point the agreement was to expire, though the confidentiality provision "shall survive the termination or expiration of the agreement."

The manufacturing agreement also contained a "Penalty" provision stipulating that if "any Products . . . are found to have been directly or indirectly manufactured, sold or delivered by [Chance] . . . in violation of this Agreement," then Chance will pay the greater of (a) the "gross sales price of all such

jurisdiction for a Delaware corporation with its principal place of business, at least at that point, in California.

Moreover, given the uniform nature of the Trade Secrets Act, there is no reason to believe that Colorado would interpret its version any differently from the way New Hampshire--or any other state--would interpret its version of the Act. In the absence of an actual conflict between the potentially applicable law of another jurisdiction and its own, New Hampshire simply applies its own law. See Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 13 (1988).

Products or items manufactured, sold or delivered during the term of this Agreement" or (b) 20,250,000 New Taiwan dollars.³

There is no dispute that this manufacturing agreement terminated when Chance delivered all of the goods required of it. As Contour proceeded to develop additional ergonomic mouse products, however, Chance continued to serve as the exclusive manufacturer of those products. Contour provided the designs and technical information for these products to Chance, including at meetings where Chance employees worked with Contour to implement its designs.⁴ Chance continued to maintain secrecy over the confidential information provided by Contour.

In 2006, Contour designed the most recent installation in its ergonomic mouse series, the "Roller Mouse Free," which represents an improvement over prior models in its "open bar"

³The manufacturing agreement also provided that it "shall be governed by and construed in accordance with the laws of the Republic of China." Because neither party has argued Chinese law--or any other law but New Hampshire's--at this point, see note 2, supra, the court need not yet consider the potential applicability of this provision.

⁴In his declaration submitted just before the hearing, Yuan denies that Contour provided any designs, alleging that it was Chance's engineers who designed the products. Viewed in the light most charitable to Chance, this statement seems to suggest that the "designs" for Contour's products were Chance's because its engineers figured out how to make them. As discussed infra, though, even if that characterization is accurate, it does not follow that Contour's concepts for the products, even if not fully realized, are not protectable trade secrets.

design, i.e., there is no housing around the roller. Contour characterizes the "concept, design and specifications" of the Roller Mouse Free as a trade secret, noting that it generally "has expended large sums of money in the design, development, and marketing of its products."⁵ As reflected in drawings shown to Chance, Contour originally designed the Roller Mouse Free to have a removable roller bar to allow for easier cleaning. But due to delays in engineering this feature, as well as staff turnover at Chance, Contour ultimately decided to defer including a removable roller until the next "Roller Mouse" release. Contour told Chance of that decision in August 2008.

Within a few months, however, Contour learned that defendant EKTouch was marketing a mouse called the "ERGO Roller," which Contour characterizes as "significantly similar to the Roller Mouse Free"--but with the elusive removable roller. EKTouch has been offering its product at a much lower price than what Contour charges for the Roller Mouse Free, though Contour does not know of any sales of the ERGO Roller to any of Contour's distributors, or to anyone in the United States at present. EKTouch, however,

⁵As the defendants point out, Contour's president does hold a patent for a "Tray Mounted Cursor Control Input Device for Integration with Computer Keyboard." U.S. Patent No. 7,199,792 (filed Nov. 20, 2001). But the patent does not appear to embody the open bar design or, more importantly, the removable roller bar described infra.

has agreed to meet with at least one of Contour's distributors in Las Vegas at the Consumer Electronics Show, scheduled to take place from January 7 through January 10, 2010, leading Contour to suspect that EKTouch plans to use that stage for the American premiere of the ERGO Roller. That distributor, in fact, has contacted Contour to express doubt about their continuing relationship in light of the ERGO Roller's availability.

Contour charges that, because EKTouch and Chance have the same main principal, business address, and telephone number listed on their corporate filings, Chance must be manufacturing the ERGO Roller for it--which the defendants have not denied.⁶ Contour further claims that this amounts to a misappropriation of its trade secrets by both defendants, presumably because one or both of them used those secrets in designing the product.

Contour therefore asks for a temporary restraining order preventing either defendant "from showing, selling, marketing, distributing, discussing or displaying" the ERGO Roller at the Consumer Electronics Show or, for that matter, "to any person . . . within the United States." Contour has historically been the only "centrally located Ergonomic Mouse manufacturer"

⁶In Yuan's declaration, in fact, he states that he is "the President of Chance Mold/EK Touch" and suggests that EKTouch did not even come into existence until 2009.

(parenthetical omitted) to appear at the Consumer Electronics Show, and invited a number of its customers to attend this year. Unless the defendants are restrained from hawking the ERGO Roller at the show, Contour fears that its relationships with these customers will be jeopardized.

II. Applicable legal standard

In deciding whether to issue a temporary restraining order, this court examines (1) the plaintiff's likelihood of success on the merits of its claim, (2) the risk of irreparable harm to the plaintiff absent the injunction, (3) how that threatened harm balances against the harm that granting the motion threatens to cause the defendant, and (4) any effect the ruling would have on the public interest. See, e.g., Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 32 (1st Cir. 2008). While all four factors must be considered, "[t]he sine qua non of this four-part inquiry is likelihood of success on the merits." New Comm Wireless Servs. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

That point is particularly apt here because, as discussed infra at Part III.A, (1) irreparable harm to the plaintiff is generally presumed to follow from the violation of intellectual property rights (and has been shown here in any event),

(2) injunctions to protect those rights are generally considered to serve the public interest, and (3) the balance of harms presumptively favors Contour (assuming it can show a likelihood of success on the merits). So Contour's motion, like most motions for preliminary relief, hinges on its likelihood of success on the merits. As discussed at Part III.B infra, Contour has made a sufficient showing in that regard to justify the issuance of its requested restraining order.

III. Analysis

A. Irreparable harm, balance of harms, and the public interest

First, there is no serious question that the harm Contour faces without an injunction would be irreparable. As Contour points out, New Hampshire's version of the Uniform Trade Secrets Act specifically authorizes an injunction against misappropriation, N.H. Rev. Stat. Ann. § 350-B:2, I, and a number of courts have held--due to this provision in the Uniform Act or otherwise--that irreparable harm can be presumed to follow from such conduct.⁷ See, e.g., Union Nat'l Life Ins. Co. v. Tillman,

⁷Pointing out that § 2 of the Act provides that "[i]n exceptional circumstances, an injunction may condition future use upon the payment of a reasonable royalty," N.H. Rev. Stat. Ann. § 350-B:2, II, the defendants argue that they should be permitted to market the ERGO Touch at the Consumer Electronics Show subject to this limitation. Under the Act, though, "[e]xceptional

143 F. Supp. 2d 638, 641-42 (N.D. Miss. 2000); Inflight Newspapers, Inc. v. Magazines In-Flight, LLC, 990 F. Supp. 119, 123-24 (E.D.N.Y. 1997); PepsiCo, Inc. v. Redmond, No. 94-6838, 1996 WL 3965, at *28-*29 (N.D. Ill. Jan. 2, 1996); cf. Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171, 172-73 (4th Cir. 1988) (noting that, while irreparable harm is not essential to an injunction against a violation of the Act, a court can still consider that factor in deciding whether to grant injunctive relief).

That rule is consistent with authority from the court of appeals that presumes irreparable harm in cases of trademark infringement, see I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir. 1998), or copyright infringement, see Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 611-12 (1st Cir. 1988). It is also consistent with the parties'

circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation." The defendants do not explain how that describes their situation; as discussed infra, the materials now before the court strongly suggest that EKTouch knew that the removable roller concept was Contour's trade secret. Nor do the defendants persuasively demonstrate other "exceptional circumstances." See Uniform Trade Secrets Act § 2 cmt., 14 ULA 620 (2005) (noting that "[e]xceptional circumstances include the existence of an overriding public interest," e.g., that "enjoining a misappropriator from supplying the U.S. with an aircraft weapons control system would have endangered military personnel in Viet Nam").

understanding, expressed in the NDA, that Chance's breach of the agreement will cause Contour "irreparable harm for which no adequate remedy exists at law." This provision, while not dispositive of the issue, lends further support to a finding of irreparable harm.⁸ See, e.g., Baker's Aid, Div. of M. Raubvogel Co. v. Hussman Foodservice Co., 830 F.2d 13, 16 (2d Cir. 1987).

In any event, Contour has specifically demonstrated irreparable harm. Should EKTtouch begin marketing its ERGO Roller to American customers at the Consumer Electronics Show, it will injure Contour's existing relationships with its customers, who (as has already happened in one documented instance) may well view the ERGO Roller as a superior and cheaper alternative to Contour's existing product line. That sort of competitive wrong

⁸In arguing that injunctive relief is nevertheless inappropriate, the defendants rely on the penalty provision of the manufacturing agreement which, as discussed supra, provides for actual or liquidated damages in case Chance manufacturers goods in violation of that agreement. At this stage, however, there are numerous problems with this argument, including that: (1) the provision does not say that damages are the exclusive remedy for a breach; (2) the NDA provides that injunctive relief is the appropriate remedy, at least for a breach constituting a misappropriation of Contour's trade secrets; (3) the manufacturing agreement has expired (though neither its confidentiality provision nor the NDA has); and (4) the defendants make no attempt to show that the penalty clause, insofar as it authorizes liquidated damages, meets the criteria necessary to enforce such a provision under New Hampshire law, see Orr v. Goodwin, 157 N.H. 511, 514 (2008), if in fact New Hampshire law applies, see notes 2-3, supra.

cannot readily be righted by money damages and is appropriately remedied by injunctive relief. See Gen. Elec. Co. v. Sung, 843 F. Supp. 776, 778 (D. Mass. 1994) (issuing injunction to prevent defendants' use of misappropriated trade secrets which "enabled them to produce [goods] for commercial sale and thereby to compete with [plaintiff] in the [relevant] industry before it would have been otherwise possible"). Indeed, that is the very premise of § 2(a) of the Uniform Trade Secrets Act, which authorizes an injunction "to eliminate commercial advantage that otherwise would be derived from the misappropriation." N.H. Rev. Stat. Ann. § 350-B:2, I.

The public interest likewise favors the issuance of an injunction against the misappropriation of trade secrets to "reinforce the public policy of commercial morality." Gen. Elec., 843 F. Supp. at 778; cf. Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006) ("as a matter of public policy, trademarks should be protected against infringing uses"); Concrete Mach., 843 F.2d at 612 ("it is virtually axiomatic that the public interest can only be served by . . . preventing the misappropriation of the skills, creative energies, and resources which are invested" in copyrighted works). The

defendants' argument that Contour has failed to show that an injunction would serve the public interest is without merit.⁹

B. Likelihood of success on the merits

New Hampshire's Uniform Trade Secrets Act defines "misappropriation," in relevant part, as "use of a trade secret of another without express or implied consent by a person who," at that time, "knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it." N.H. Rev. Stat. Ann. § 350-B:1, II(b)(2). The term "improper means" includes, also in relevant part, "breach or inducement of a breach of a duty to maintain secrecy." Id. § 350-B:1, I.

To show a likelihood of success on its claim for misappropriation of trade secrets sufficient to enjoin EKTough, then, Contour must show that (1) it had a trade secret, (2) EK Touch is using it, and (3) EKTough knows or has reason to know that it has derived its knowledge of the trade secret through a

⁹As the defendants suggested at the hearing, the public interest generally favors competition in the marketplace, but that principle yields when the competition in question embodies the misappropriation of trade secrets or other unfair forms. See Concrete Mach., 843 F.2d at 612. That is why a likelihood of success on the merits on a trade secrets claim virtually guarantees that a remedial injunction will serve the public interest.

person--namely Chance--who used improper means to acquire it. See Burten v. Milton Bradley Co., 763 F.2d 461, 463 (1st Cir. 1985). The court finds that Contour has made an adequate showing as to each of these elements.

a. Contour's trade secret

While Contour's written submissions are somewhat elliptical on what exactly its trade secrets are, it clarified at the hearing that the trade secret at issue is its "idea" or "concept" for the removable roller.¹⁰ The Uniform Trade Secrets Act defines "trade secret" as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.H. Rev. Stat. Ann. § 350-B.1, IV. Contour's idea to incorporate a removable roller into its ergonomic mouse series

¹⁰Contour argued that its protectable trade secrets also included its marketing methods, sales volumes, and profit margins. Since there is no evidence before the court at present that Contour ever shared this data with Chance, or that EK Touch plans to make use of it, the court need not consider the trade secret status of that information here.

possesses both of these characteristics, at least based on the evidence submitted to the court so far.

First, Contour's idea has the independent economic value required by § 350-B.1, IV(a). That section of the Act encompasses confidential information that has "potential" economic value, not just "actual" economic value, and therefore "extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use." Uniform Trade Secrets Act § 1 cmt., 14 ULA 538 (noting that the Act eliminated the prevailing common-law requirement "that a trade secret be continuously used in one's business") (internal quotation marks omitted).

A number of courts have applied the Act "to confidential disclosures of concepts, or as yet-untested, ideas for a new product or a new process." 2 Roger M. Milgrim, Milgrim on Trade Secrets § 9.05[4], at 9-487--9-488.2 & n.36 (Eric E. Bensen, ed., 2003 rev. ed. & 2009 supp.) (discussing cases). These include the Seventh Circuit's decision in Learning Curve Toys, Inc. v. Playwood Toys, Inc., 342 F.3d 714 (7th Cir. 2003), which overruled a directed verdict against a trade secret claim based in part on the district court's conclusion that the plaintiff's concept for a new product "had no economic value" because its "prototype did not work perfectly" and therefore "lacked value

until it was refined, developed and manufactured by” the defendant. Id. at 726.

The court of appeals relied on evidence at trial that the concept had value in the industry nonetheless, including the fact that, once the concept was perfected by the defendant, its sales “skyrocketed” despite the defendant’s prior difficulties in differentiating its products from those of its entrenched competitor. Id. In light of such evidence, that the plaintiff “did not actually use the concept in its business” was “irrelevant,” because a jury could have found that “the concept was ‘of value’ to” the plaintiff, which was sufficient to convey the “economic value” the Act demands. Id. at 727.

This court considers Learning Curve both persuasive and instructive here. It is true, as the defendants emphasize, that Contour’s concept for an ergonomic mouse with a removable roller proved difficult to execute, to the point that Contour decided to release the new version of its Roller Mouse product without that feature. As in Learning Curve, however, there is evidence that the removable roller concept had “potential economic value” nonetheless: despite the fact that neither Chance nor EKTtouch had ever sold its own products, they experienced early success in marketing the ERGO Roller, as reflected in the interest of one of Contour’s customers as well as EKTtouch’s plan to showcase the

product at the Consumer Electronics Show--where Contour had previously been the only seller of similar products.

Also as in Learning Curve, this chronology supports a finding that the removable roller concept derived its value from its secrecy, i.e., "not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."¹¹ The fact that Chance, despite its decade of experience in manufacturing ergonomic mouse products, had not incorporated a removable roller into any of those products until after Contour had divulged that concept to Chance tends to indicate that the concept was not "readily ascertainable." And, so far as the record shows, nobody else had marketed an ergonomic mouse with a removable roller before that time, suggesting that the concept was not "generally known." In short, if the concept "really was obvious" in the

¹¹In attempting to dispute this point, the defendants rely solely on the patent Wang holds on an ergonomic mouse device. See note 6, supra. That patent, though, does not appear to disclose the removable roller. Without more, the patent in no way undermines Contour's likely success on its claim that the removable roller concept was a trade secret. See 2 Rudolf Callman, The Law of Unfair Competition, Trademarks and Monopolies § 14:29, at 14-251--14-252 (Louis Altman, ed., 4th ed. 1982 & 2005 rev.) ("trade secret protection may coexist with patent protection on the same product if the published patent does not destroy the trade secret. The mere fact that a trade secret further implements a patented invention does not affect its status as a protectable trade secret.") (footnotes omitted).

sense that it was readily ascertainable or generally known, then Chance--or someone else in the industry--"would have thought of it earlier." Id. at 729.

Second, Contour's removable roller concept was the subject of reasonable efforts to maintain its secrecy, as also required of a protectable trade secret. There is no indication that Contour divulged the concept to anybody besides Chance, who had agreed in the NDA to preserve the secrecy of Contour's "Confidential Information," defined to include "concepts and ideas . . . relating to consumer mouse products." That would seem to encompass Contour's concept for the removable roller.¹²

Even if it did not, however, Contour attests that it had received assurances from Chance that "all of Contour's ideas,

¹²At the hearing, the defendants maintained that, in light of the relationship between the NDA and the manufacturing agreement, the former provided for confidentiality over only information disclosed during the life of the latter; under this view, the NDA's 20-year term dictated the length of Chance's obligation to preserve the secrecy of whatever it learned from Contour during the term of the manufacturing agreement, rather than whatever Chance learned from Contour during the term of the NDA. This argument has some plausibility, but it is not without its weaknesses: for example, the manufacturing agreement has its own confidentiality provision which specifically states that it is "[i]n addition to" the one in the NDA, suggesting that the duration of one is not necessarily tied to the duration of the other. Given the breadth of the NDA's definition of "Confidential Information," the court takes the view, for the moment at least, that it includes Contour's removable roller concept, even though it was not disclosed to Chance until after the manufacturing agreement had expired.

trade secrets, products, specifications and know-how would remain secret from others" (emphasis added), and Chance has not meaningfully disputed that the parties labored under this broad understanding of confidentiality throughout their relationship.¹³ The fact that these assurances were verbal, moreover, is not fatal to Contour's claim, because the Trade Secrets Act does not require written confidential agreements, only "efforts that are reasonable under the circumstances." See, e.g., Learning Curve, 342 F.3d at 725-26; Editions Play Bac, S.A. v. W. Publ'g Co., 1993 WL 541219, at *8 (S.D.N.Y. Dec. 28, 1993); 2 Callman, supra, § 14:26, at 14-204.

Indeed, over the course of Chance's ten-year relationship with Contour prior to their discussion of the removable roller concept, Chance had never, so far as Contour knows, disclosed any of its confidential information to any third parties. Based on this history, Contour could have reasonably believed that no

¹³Yuan's declaration states that "[o]n March 27, 2007, Contour authorized Chance to develop and design certain new products, but did not require confidentiality." This statement appears to refer to another of the defendants' submissions, an "Authorization" document purporting to bear Wang's signature. Putting aside the fact that the "Authorization" is largely unintelligible, neither it nor Yuan's declaration indicates what "products" it covers. So the defendants have provided no support for the notion that--contrary to Wang's account of how the parties had done business in the past--Contour permitted Chance to produce any version of the Roller Mouse Free without preserving Contour's confidential information.

further precautions, such as additional written confidential agreements, were necessary. As the court of appeals has observed, "a confidential relationship typically will be implied where disclosures have been made in business relationships," including between "purchasers and suppliers." Burten, 763 F.2d at 463. Accordingly, based on the materials before the court at this stage, Contour has shown that its removable roller concept was "the subject of efforts that [were] reasonable under the circumstances to maintain its secrecy." Cf. Mortgage Specialists, Inc. v. Davey, 153 N.H. 764, 771-72 (2006) (finding no such efforts as a matter of law where the documents containing the information "were never marked confidential or trade secret" and the employees handling them "were not consistently and uniformly given instructions as to the proper treatment of the information as confidential").

b. EKTough's use of the trade secret

As just discussed, there is no question at the moment that Chance--and EKTough, by virtue of its close relationship with Chance--came by their knowledge of the removable roller concept as a result of Chance's dealings with Contour. There is also no question that, as Contour alleges, EKTough's ERGO Roller is substantially similar to Contour's Roller Mouse Free, except that

EK Touch's product boasts the removable roller that Contour decided to omit from its latest ergonomic mouse.

"These showings--access and similarity--may support a trade secret misappropriation claim" because they suggest that the defendant derived its product from the plaintiff's trade secret, rather than from an independent source. Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353, 1361 (Fed. Cir. 2002). While the defendants dispute that the removable roller concept was a protectable trade secret, they do not dispute (at least for present purposes) that the ERGO Roller incorporates that concept. Due to the similarity between that product and Contour's original concept of the Roller Mouse Pro, and the defendants' access to that concept--as well as the fact that the ERGO Roller appeared just months after Contour had informed Chance that the Roller Mouse Pro would not include the removable roller--the court finds (for present purposes) that EKTtouch used Contour's removable roller concept in developing the ERGO Roller.

c. EKTtouch's knowledge that the trade secret was derived through improper means

Finally, there is also no serious dispute, based on what is now before the court, that EKTtouch "knew or had reason to know that [its] knowledge of the trade secret was derived from or

through a person who had utilized improper means to acquire it," N.H. Rev. Stat. Ann. § 350-B:1, II(b)(2), i.e., "breach or inducement of a breach of a duty to maintain secrecy," id. § 350-B:1, I. As already noted in several places, Chance and EKTouch share the same president, which is reason enough to find that Chance as a corporate personage "knows" what EKTouch "knows" as a corporate personage. See, e.g., United States v. Bank of New Eng., N.A., 821 F.2d 844, 856 (1st Cir. 1987); New Hampshire v. Zeta Chi Fraternity, 142 N.H. 16, 22 (1997).

EKTouch knew, then, that Chance had "a duty to maintain secrecy" over Contour's confidential information, including the removable roller concept, by virtue of either the written confidentiality provision of the NDA or Chance's verbal assurances to the same effect, as already discussed. See Part III.B.a, supra. Whatever its source, that duty prevented Chance from disclosing any of Contour's confidential information to anyone else without Contour's consent (which, so far as the record reflects, it never gave). As also already discussed, see id., the removable roller concept was neither generally known nor readily ascertainable, so the record as it stands fairly compels the conclusion that EKTouch gained its knowledge of the concept from Chance--in what both parties knew was a breach of Chance's duty. Based on the materials presently before the court, Contour

has shown that EKTtouch knowingly derived its appreciation of the removable roller through Chance's breach of its duty of secrecy, making EKTtouch's use of that concept a misappropriation under the Act. N.H. Rev. Stat. Ann. § 350-B.1, II(b)(2).

IV. Conclusion

Contour has demonstrated a likelihood of success on the merits of its claim that EKTtouch's ERGO Roller product amounts to a misappropriation of one of Contour's trade secrets. Contour has also satisfied the other criteria for issuance of a temporary restraining order issued with prior notice to the defendant. The court therefore GRANTS Contour's motion for a temporary restraining order,¹⁴ which has been entered on the docket as a separate document.¹⁵

As that document indicates, the issuance of the order was contingent upon Contour's giving "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Based on Contour's submission, and in the absence of any countervailing evidence or argument from the defendants, the

¹⁴document no. 2.

¹⁵document no. 11.

court finds the sum of \$50,000 sufficient for that purpose, and notes that Contour has posted such security according to the court's instructions.¹⁶

The temporary restraining order also indicates that it shall expire fourteen days from the date it issued. See Fed. R. Civ. P. 65(b)(2). As discussed at the hearing, however, the court anticipates conducting proceedings to dissolve the temporary restraining order or convert it into a preliminary injunction at the parties' earliest convenience. See Fed. R. Civ. P. 65(b)(3).

SO ORDERED.

/s/Joseph N. Laplante
Joseph N. Laplante
United States District Judge

January 14, 2010

cc: Lawrence L. Blacker, Esq.
Peter G. Callaghan, Esq.

¹⁶document no. 12.