IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ZRII, LLC, Plaintiff, v. WELLNESS ACQUISITION GROUP, INC., KIRBY ZENGER, CLINT MCKINLAY, CURTIS CALL, JASON DOMINGO, and KEITH FITZGERALD, Defendants.	)	Civil Action No. 4374-VCP

MEMORANDUM OPINION

Submitted: June 26, 2009
Decided: September 21, 2009

Kevin R. Shannon, Esquire, Brian C. Ralston, Esquire, Kirsten A. Zeberkiewicz, Esquire, Meghan M. Dougherty, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Brent P. Lorimer, Esquire, Sterling A. Brennan, Esquire, L. David Griffin, Esquire, WORKMAN NYDEGGER, Salt Lake City, Utah; *Attorneys for Plaintiff Zrii, LLC*

Robert A. Penza, Esquire, Peter M. Sweeney, Esquire, Christopher M. Coggins, Esquire, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware; *Attorneys for Defendants Wellness Acquisition Group, Inc. and Keith Fitzgerald*

Matthew F. Boyer, Esquire, Jeremy D. Anderson, Esquire, CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware; John C. Rooker, Esquire, ROOKER RAWLINS, Salt Lake City, Utah; *Attorneys for Defendants Kirby Zenger, Clint McKinlay and Curtis Call*

Joseph C. Schoell, Esquire, Todd C. Schiltz, Esquire, DRINKER BIDDLE & REATH LLP, Wilmington, Delaware; Jeffrey J. Hunt, Esquire, David C. Reymann, Esquire, Cheylynn Hayman, Esquire, PARR BROWN GEE & LOVELESS, PC, Salt Lake City, Utah; *Attorneys for Defendant Jason Domingo*

PARSONS, Vice Chancellor.

In this case, Plaintiff, a direct marketing company that specializes in nutritional drinks, claims that Defendants, former officers, employees, and contractors of Plaintiff, have conspired to overtake or destroy it by improper means. According to the company, in implementing their scheme to seize control, Defendants committed breaches of contract and fiduciary duty, as well as various other torts against Plaintiff. On or about May 20, 2009, the parties advised that they thought they had reached a settlement and asked the Court to defer ruling on Defendants' motions to dismiss and hearing Plaintiff's motion for a preliminary injunction until June 5, while they tried to document their tentative agreement. Ultimately, those negotiations failed. Thus, this litigation was reactivated and, in a previous oral ruling, I denied Defendants' motions to dismiss.

Before me now is the company's request for a preliminary injunction to prevent Defendants from misappropriating its trade secrets and confidential information, tortiously interfering with its business and contractual relations, and further breaching their contracts with the company. Having carefully considered the voluminous briefing and record on Plaintiff's motion for preliminary injunction, I have concluded for the reasons stated herein that Plaintiff is entitled to preliminary injunctive relief, but only for a period of three months.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Zrii, LLC ("Zrii" or the "Company"), is a Delaware limited liability company with its principal place of business in Draper, Utah. The founder, CEO, and

sole managing member of Zrii is William Farley. Farley, who owns a controlling interest in Zrii, is not a party to this action.

Using a network marketing business model, Zrii specializes in the sale of nutritional drink supplements. Like all companies that employ a network marketing business model, Zrii earns its revenues by enrolling a large group of contractors who serve as its distributors, or Independent Executives ("IEs") as they are called at Zrii.[1] The strength of this distribution chain is critical to the success of a network marketing company, and Zrii considers the individual contact information for its distributors to be confidential, valuable, and proprietary.[2]

Consequently, each Zrii distributor is required to sign an Independent Executive Agreement ("IEA") that expressly binds each IE to adhere to the Zrii Policies and Procedures (the "ZPP").[3] The ZPP terms thereby contractually prohibit each Zrii distributor from recruiting or soliciting other Zrii distributors, "Preferred Customers," or "Direct Retail Customers" to alter their business relationship with Zrii for a period of six months after the distributor's relationship with Zrii ends.[4] A Zrii IE is not prohibited by

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1 At Zrii, the term "Independent Executive" is used interchangeably with "distributor." McKinlay Dep. at 20.

2 Compl. ¶ 68. The Complaint is verified.

3 *Id.* ¶ 12.

4 *Id.*; Decl. of Cara J. Baldwin in Supp. of Pl.'s Mot. for Prelim. Inj. ("Baldwin Decl.") Ex. 101. Baldwin is counsel for Plaintiff Zrii and is co-counsel in this matter. A "Preferred Customer" is one who purchases Zrii products directly from the Company at IE prices, and a "Direct Retail Customer" is one who purchases

the ZPP from participating in other network marketing companies provided, however, the Zrii IEs honor their nonsolicitation covenants.[5]

Out in the field, the role of the IE is to become familiar with Zrii's products and to talk to friends and acquaintances about the products so that those friends and acquaintances will tell more people.[6] In addition to selling the products, IEs focus on enrolling new IEs,[7] who become the original IE's "downline."[8] As new IEs are enrolled, the network expands, with each IE being compensated both for his own sales and for those of his downline.[9] Zrii calls its most successful IEs "Ten Star IEs", reflecting their superior ability to enroll new IEs and sell products.[10] To do that, Ten Star IEs coach, influence, and mentor their downlines.[11]

Zrii products directly from the Company at retail prices. *Id.* Because Plaintiff's motion for preliminary injunctive relief does not refer to Preferred Customers or Direct Retail Customers, I will not discuss them further.

5 Baldwin Decl. Ex. 101.

6 Compl. ¶ 11; *see also* McKinlay Dep. at 17.

7 McKinlay Dep. at 16.

8 Compl. ¶ 13.

9 *Id.* ¶ 11.

10 *Id.* ¶ 6.

11 *Id.* ¶ 13.

Defendants Kirby Zenger, Clint McKinlay, and Curtis Call are residents of Utah. Each was a member of the executive management team ("EMT") at Zrii.[12] Zenger was the General Manager and McKinlay and Call were Vice Presidents of Sales.[13] Each now works for another network marketing company, LifeVantage, in a comparable position to the one he held at Zrii.[14]

Defendant Jason Domingo is a resident of California. Domingo, called the "Master Distributor," was the senior-most Zrii IE and a Ten Star IE, the highest level attainable by an IE.[15] As the Master Distributor, Defendant Domingo's downline included every IE and every customer of the entire company – somewhere around 70,000 people, by Domingo's estimate.[16] In this capacity in 2008, his first full year with Zrii, Domingo earned approximately $600,000.[17] Domingo and virtually every other Zrii IE signed an agreement with the Company.[18] Domingo's IEA expressly states that he would

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12 *Id.* ¶ 9.

13 *Id.*

14 Call Dep. at 5; McKinlay Dep. at 14.

15 Compl. ¶ 6.

16 Domingo Dep. at 52.

17 *Id.* at 61.

18 Compl. ¶¶ 6-7, 12.

comply with and be bound by the ZPP.[19] Domingo has moved to LifeVantage as a distributor.[20]

Defendant Keith Fitzgerald resides in New Hampshire. He is another former Zrii IE who, through an agent, had signed an IEA. Like Domingo, Fitzgerald later became a distributor at LifeVantage.

Defendant Wellness Acquisition Group, Inc. ("WAG") is a Delaware corporation incorporated in January 2009. WAG was formed at the direction of Fitzgerald for the purpose of undertaking and facilitating a potential acquisition of Zrii.[21]

B. Facts

Founded in February 2007, Zrii is a relatively new network marketing company. It specializes in nutritional drink supplements made from the Indian Amalaki fruit. On the corporate level, Zrii is run by its executive (or corporate) management team. The role of the EMT includes overseeing customer service, supply and logistics, ordering and shipping, information technology, compensation, marketing, and regulatory compliance.[22] Defendants Zenger, McKinlay, and Call were members of the EMT, and as such, ran Zrii on a day-to-day basis.

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19 *Id.* ¶ 6.

20 Domingo Dep. at 285.

21 Fitzgerald Dep. at 172.

22 Compl. ¶¶ 9-10.

The success of a network marketing company depends, in large part, on the productive relationships among the network of sales people called the distributors, or IEs, who collectively are called the "field," the executive management team, and the owners.[23] Disputes like this one arise when those relationships go awry.

1. Domingo and Zenger begin discussing how to remove Farley, and lay the groundwork for their scheme

Late in 2008, Farley's relationship with the leaders of Zrii was tenuous and appeared to be growing progressively weaker. As early as November 17, 2008, Defendants Domingo and Zenger, Zrii's "Master Distributor" and General Manager, respectively, discussed with one another their displeasure with Farley's leadership and with his actions. By December, Domingo and Zenger had begun considering how they might wrest power away from Farley.[24] On January 8, 2009, Domingo sent an email to Zenger cementing his views that Farley must be removed.[25] The email, entitled, "Why Farley is ill-equipped for network marketing," detailed Domingo's growing dissatisfaction with Farley's personal and professional behaviors.[26]

The following day, Domingo and Zenger met in person in Sacramento, California, to continue their discussions.[27] At or about this same time, Domingo and Zenger shared

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23 *Id.* ¶ 8.

24 Baldwin Decl. Ex. 104.

25 *Id*. Ex. 105.

26 *Id.*

27 Call Dep. at 137-38.

with Defendant Fitzgerald, another Zrii IE and a personal friend of Domingo, their view that Farley was not suited to continue running Zrii.[28] In connection with these conversations, Zenger disclosed to Domingo and Fitzgerald information about the financial condition of Zrii.[29] Additionally, at or around this time, Zenger and Domingo began including in their discussions Zrii's entire EMT as well as several top IEs. Thus, by mid-January 2009, the corporate executives and top distributors of Zrii were meeting without Farley's knowledge and discussing how to remove him from control.[30]

On January 11, Zenger and Fitzgerald convened a meeting of the EMT, including Defendants Call and McKinlay, at the Alta Club in Salt Lake City, Utah. Although he was not a member of the EMT, Domingo also attended this meeting. Zenger and Fitzgerald then presented a plan that called for the removal of Farley as CEO and President of Zrii and the formation of a new entity to acquire ownership of Zrii from Farley.[31] This proposed entity would become Defendant WAG.

The day after this meeting with the EMT, Domingo sent a personal and confidential email to several high-performing IEs.[32] This email asked each recipient to attend a secret meeting to be held following the conclusion of a Zrii-sponsored rewards

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28 Domingo Dep. at 82.

29 *Id.*

30 Call Dep. at 143.

31 Zenger Dep. at 28, 52.

32 Baldwin Decl. Ex. 109.

trip to Hawaii that these high-performing IEs would be enjoying the following week. Domingo stressed the importance of maintaining the confidentiality of this planned meeting.

2. The Hawaiian retreat and the secret meeting

During the third week of January 2009, Farley, the EMT, and the Ten Star IEs attended the company meeting or retreat in Hawaii. Although Defendant Fitzgerald did not have a formal title or Ten Star IE status, he also attended the meeting, but as Defendant Domingo's invited guest.[33] When the retreat was about to conclude around January 20, Defendants informed Farley that they wished to remain in Hawaii for another night, purportedly to work on Zrii business. In fact, they remained to conduct the secret meeting of high-performing IEs previously arranged by Domingo.

This covert conclave took place on January 20. The primary speakers were Defendants Domingo, Zenger, and Fitzgerald. Together, they used specific Zrii financial information to persuade the Ten Star IEs to join in the effort to wrest control of Zrii away from Farley.[34] Fitzgerald emphasized that all the Ten Star IEs and the members of the

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[33] Domingo Dep. at 133; Zenger Dep. at 116. As mentioned, Defendants Zenger and Domingo first approached Fitzgerald in early January to enlist Fitzgerald in their plan to take control of Zrii. Domingo Dep. at 82. It was believed that Fitzgerald, who had an investment banking background, could help Domingo, Zenger, and the EMT analyze the finances of Zrii for improprieties committed by Farley and help raise funds for the transition. Call Dep. at 150.

[34] Domingo Dep. at 142-44, 163-64; Call Dep. at 199.

EMT would be given an equity position in the new entity to be formed following the change in control.[35]

3. Defendants obtain more confidential Zrii information, and cover their tracks

For the next week, Defendants covertly planned the coup they hoped would enable them to take over Zrii. In furtherance of that plan, Fitzgerald instructed that WAG be incorporated under the laws of the State of Delaware on January 29.[36] WAG was formed to facilitate a transaction involving control or ownership of Zrii.[37]

Additionally, at or around this time, Fitzgerald began asking for and receiving more detailed and confidential year-end financial information about Zrii.[38] Fitzgerald obtained this confidential information from Gene Tipps, Zrii's V.P. of Operations.[39] Tipps knew that Zrii financial information was confidential and proprietary to Zrii and that Zrii and Farley trusted in him to protect the confidentiality of this information.[40] Nevertheless, Tipps evidently gave Fitzgerald and others associated with him all the

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35 Domingo Dep. at 169.

36 Compl. ¶ 2; Domingo Dep. at 204, 206; Call Dep. at 155. The earliest conversations about WAG evidently occurred on January 11, 2009. *See* Zenger Dep. at 52.

37 Fitzgerald Dep. at 172.

38 Baldwin Decl. Exs. 175-79.

39 Tipps Dep. at 127-30.

40 *Id.* at 165-66.

information Fitzgerald sought.[41] He allegedly did so because he was instructed to by Defendant Zenger, who was still the General Manager at Zrii.[42]

On January 30 or 31, 2009, Defendant Call accessed Zrii's back office from his home desktop computer and, as directed, downloaded Zrii's "All Reps" list ("All Reps List"), a confidential distributor list[43] and an asset Zrii considered contractually protected and valuable, as it would be to any network marketing company.[44] Call testified that he downloaded the list to his personal computer to "protect the integrity of the list" and to "insure that [the EMT] had a backup copy of our distributor list."[45]

During this same time period and throughout the week before February 1, Defendants evinced concern about their actions being discovered. To guard against that possibility, Zenger instructed Tipps to delete all email correspondence between Zenger, Fitzgerald, and the EMT on the subject of forcing a sale of Zrii.[46] Zenger's exact instructions to Tipps were to "[p]lease contact Mr. Hoalridge [a Zrii IT employee] and have him delete any correspondence between myself, Keith Fitzgerald, and vice versa,

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41 Baldwin Decl. Exs. 175-79.

42 Tipps Dep. at 127.

43 Call Dep. at 32-35, 37.

44 Compl. ¶¶ 12, 24, 68-72.

45 Call Dep. at 34.

46 Tipps Dep. at 296-300.

amongst any of the management team."[47] Tipps did as he was told and repeated the instruction to Hoalridge, who then deleted the emails.[48] In addition, Defendants, or others under their instruction and instigation, apparently took from Zrii's human resources files a stack of Non-Disclosure Agreements signed by the EMT and other Zrii employees.[49]

4. The pivotal February 1 meetings – putting the plans into action

On Sunday evening, February 1, Fitzgerald and Domingo orchestrated three separate meetings at the Alta Club in Salt Lake City. The first was with the Ten Star IEs, the second was with key Zrii corporate employees, and the third was with the EMT.[50] During the second meeting, Zenger told the employees that the EMT and Ten Star IEs were demanding that Farley resign as chief executive and cede control to their group, and that the EMT was staging a walkout Monday morning to that end.[51] The employees were encouraged to participate in the walkout by not showing up for work the next day, and were asked to call the lower-level employees who reported to them to recommend they do the same.[52] Zenger assured the employees they would get their next paychecks, and

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47 *Id.*

48 *Id.*

49 Decl. of Staci Heard, Zrii Human Resources Manager, ¶¶ 5-6, Mar. 31, 2009.

50 Baldwin Decl. Ex. 121.

51 Zenger Dep. at 195-98.

52 *Id.*

promised them that if Zrii fired anyone for participating in the walkout, he would find a job for them.[53]

5. The overnight break-in

Following the sequence of meetings on Sunday, February 1, over a four and a half hour period, commencing at 11:00 p.m. Sunday and ending at 3:30 a.m. on Monday, February 2, Defendants Zenger and Call and other EMT members and IT personnel were recorded using their keycards to access Zrii's place of business.[54] This group entered Zrii's computer system and, in furtherance of their scheme, destroyed certain computer backups, changed access codes needed to enter the computer system, and disabled network accounts.[55] For example, IT personnel, acting under directions from the EMT, disabled access to Zrii's system for key third-party vendors ByDesign and Duplimark.[56]

Consequently, Zrii could not access its own system. In fact, when Farley arrived at corporate headquarters on February 2, he found his network access had been deactivated by an IT employee at the instruction of Defendants.[57] Additionally, Zrii

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53 *Id*.

54 Compl. ¶ 20.

55 *Id.* ¶¶ 21-23.

56 Hoalridge Dep. at 68-74. The interruption of these two vendors' access to Zrii's systems prevented potential Zrii distributors from enrolling online and prevented Zrii from processing commission checks and otherwise conducting normal business and financial operations. Decl. of Richard Cox, President and owner of DupliMark, ¶ 6, Mar. 31, 2009.

57 Compl. ¶ 27.

could not sign up new IEs, the lifeblood of its business, and outside vendors and service providers could not provide critical services and information for the ongoing operations of Zrii. Furthermore, throughout the chaotic day of Monday, February 2, members of the former Zrii IT team who evidently were cooperating with Defendants surreptitiously recorded at least thirteen phone calls into or out of Zrii.[58]

6. The work stoppage and the two letters

Normally, there would be about forty employees working at Zrii headquarters. When Farley arrived there on February 2, however, the building was empty except for a few customer service staff.[59] About thirty to forty employees did not show up to work Monday morning pursuant to the walkout, which Domingo hoped would force Farley to capitulate and cede control of Zrii.[60]

Farley received separate letters on February 2 from Ken Okazaki, legal counsel for WAG, the Ten Star IEs, and the EMT.[61] Each letter urged Farley to resign and to sell his controlling interest in Zrii to Defendants' cohorts. The Ten Star IE letter also indicated that the EMT Defendants, the Ten Star IEs, and many top-level managers all were united behind this effort and threatened to "dismantle the entire field" of distributors if Farley

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58 Baldwin Decl. Exs. 193-208.

59 Compl. ¶ 25.

60 Domingo Dep. at 195-98.

61 Baldwin Decl. Ex. 122.

did not cooperate.[62] The letter further warned Farley that if that dismantling should happen, Zrii would cease to exist within thirty days.[63]

Counsel for Zrii responded with a letter rejecting the Ten Star IE and EMT's demands, and accepting the executives' voluntary resignations. In addition, Zrii demanded that the EMT Defendants return all Zrii property, including laptop computers and other belongings, and all proprietary and confidential information within their control. The EMT was told not to use or access any of the information or trade secrets obtained from Zrii or to disclose it to any person for any purpose.[64]

The work stoppage continued into the next day, February 3, 2009, exacerbating the stalled operations at Zrii's corporate headquarters and affecting Zrii's entire field operation.[65] In a conference call that day, Defendants again told the Zrii employees that their salaries still would be paid if they did not show up for work.[66] For its part, Zrii notified its employees that failure to return to work on February 4 would constitute a

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62 *Id.*

63 *Id.*; Compl. ¶ 30.

64 As of the preliminary injunction hearing, Defendants still had not returned to Zrii most of the information and items they took, although Defendants have indicated they will return the items in question.

65 Compl. ¶ 36.

66 Defendant Fitzgerald had devised a way to pay everyone's salary during the February 2–3, 2009 work stoppage, based on confidential employee payroll numbers that he obtained as early as January 15, 2009 in preparation for the work stoppage. Zenger Dep. at 198-200; Fitzgerald Dep. at 93-94. Fitzgerald made payments totaling roughly $47,000 on February 13 to honor Defendants' promise. Fitzgerald Dep. at 92. Those funds ultimately came from LifeVantage. *Id.* at 97.

resignation. Nevertheless, most of the employees who did not report on February 2 and 3 never returned to Zrii and now work at LifeVantage.[67] In fact, only three employees ever returned to work at Zrii.[68]

7. Defendants send two emails to Zrii IEs

On February 4, 2009, Domingo emailed his "personally sponsored IEs,"[69] over which he admittedly had influence,[70] and urged them to stop their automatic product shipments ("autoships") immediately,[71] so as to stop Farley and Zrii from receiving the resulting revenues.[72] Domingo also expected his personally sponsored IEs would

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67 Call testified on March 10, 2009 that of the approximately 45-50 employees then employed by LifeVantage in its Utah office, only one had not been employed by Zrii as of January 30, 2009. Call Dep. at 7.

68 *See* Zenger Dep. at 214. Defendants also supplied the entire group of employees with a template of a resignation letter to submit to Zrii. *Id.* at 216.

69 Compl. ¶ 38.

70 Domingo Dep. at 48-49.

71 Autoships are recurring shipments of Zrii products that occur at regularly scheduled intervals, and represent an important source of revenue for Zrii. Compl. ¶ 41. This was a particularly crippling blow to Zrii because February 5 was expected to be the biggest autoship day of the month. Zrii company records indicate that the IEs did, in fact, start canceling their autoships on February 4, 2009. Compl. ¶ 41.

72 Domingo Dep. at 57 (characterizing autoship revenues as "significant" and "really important"), 247-48 ("Well, I knew that Mr. Farley was behind in his payments to vendors; I knew that he was behind in his obligations to the states for sales tax; and so if he didn't have the resulting autoship revenue, he wouldn't have been able to make good on those obligations; and then the company would, more than likely, not be able to go forward.").

forward his email to their downlines.[73] In his February 4 email, Domingo assured the IEs that all of the Ten Star IEs and the EMT were behind him, standing in "100% solidarity,"[74] and that they would hold a conference call for the IEs as soon as possible. Domingo also attached a copy of the Ten Star IEs' February 2 letter to Farley.

On February 5, 2009, at the likely direction of Defendants Domingo and Fitzgerald, other Ten Star IEs sent an email to many, if not all, of Zrii's IEs announcing an "URGENT Zrii Call," to be held that night with the Ten Star IEs and the EMT.[75] Although the email assured the IEs that the group was "united and [stood] together as a team for Zrii,"[76] the evidence shows they were deemed by Farley to have resigned as of February 4.[77] Also on February 5, after he had resigned from Zrii and contrary to Zrii's demands, Defendant Zenger attempted to access Zrii's computer network using his password.[78]

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73 *Id.* at 261-62.

74 Compl. ¶ 38.

75 *Id.* ¶ 43.

76 *Id.* ¶ 44.

77 It is reasonable to infer that the email list Defendants used on February 5 constituted proprietary Zrii information, which Farley expressly asked Defendants to stop using on February 2.

78 Compl. ¶ 45.

8. Defendants' goal throughout the events of January and February 2009 was to dismantle Zrii

When it became clear that Defendants could not acquire Zrii, they decided to "pick up the Zrii distributors who made up the field, and move them to another network marketing company"[79] and to "execute strategic phone calls to key distributor personnel and begin dismantling the field."[80] Domingo acknowledged repeatedly in his deposition that he understood many distributors likely would follow their upline[81] away from Zrii,[82] and stated he would encourage the field to follow the Ten Star IEs away from Zrii.[83]

9. Defendants' efforts at LifeVantage

After Defendants' efforts to force Farley to sell Zrii failed, LifeVantage, another network marketing company, announced on February 13 that it was interested in former Zrii distributors and in the executive team.[84] Additionally, LifeVantage paid the salaries of former Zrii employees and the former executive management team for the first two

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79 Domingo Dep. at 203-04.

80 *Id*. at 222.

81 An IE's "upline" is the group of IEs who brought him into Zrii. IEs look to their upline for training, support, and mentoring.

82 Domingo Dep. at 202 ("[N]etwork marketing is a relationship business, so once the leadership leaves, typically there are others that follow."), 223 ("[I]t was my belief that the leadership of the company, because it's a relationship business, would follow."), 224 ("Whoever decided to follow, it was their right to follow or not. I believed they would.").

83 *Id*. at 224 ("Q: In fact, you would encourage [the field to follow]? A: Yes.").

84 Fitzgerald Dep. at 90-98.

weeks in February.[85] Three days later, on February 16, LifeVantage issued a press release announcing that Domingo, two other former Zrii Ten Star IEs, and "their team" would be joining LifeVantage.[86]

Currently, all five individual Defendants are employed at LifeVantage. Domingo, and possibly other Defendants, was offered transition money to come to LifeVantage.[87] On March 2, LifeVantage opened a new Utah office staffed overwhelmingly with former Zrii employees. Indeed, all of the forty-five to fifty LifeVantage corporate employees, except one, are former Zrii employees.[88]

A stated goal of Defendants was to grow the number of distributors at LifeVantage to 10,000 by May 2009. To that end, Domingo has admitted that he would encourage any current or former Zrii distributor who attended one of his opportunity meetings to sign up with LifeVantage. In fact, Domingo and Fitzgerald appear to have participated in a recruiting meeting in New Hampshire in mid-March 2009 at which they recruited former Zrii people over to LifeVantage.[89] It is also noteworthy that five of the seven Zrii Ten Star IEs are now LifeVantage distributors, as is Defendant Fitzgerald.[90]

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85 *Id.*

86 Baldwin Decl. Ex. L.

87 Domingo Dep. at 286-87.

88 Call Dep. at 6-7.

89 Domingo Dep. at 326.

90 McKinlay Dep. at 30.

C. Procedural History

Zrii filed its Verified Complaint ("Complaint") in this action on February 17, 2009. On February 20, Zrii moved for a preliminary injunction and for expedited proceedings. On February 26, I granted the motion to expedite and issued a Scheduling Order, which the parties later modified to enable briefing on various motions to dismiss by Defendants. After hearing argument on Defendants' motions to dismiss on April 22, 2009, I denied those motions in an oral ruling on June 5.

For purposes of responding to Plaintiff's motion for a preliminary injunction, Defendants aligned themselves into three separate sub-groups and presented a plethora of defenses, leading to well over 200 pages of briefing on that preliminary injunction motion. I heard argument on the preliminary injunction motion on June 5, 2009, and, thereafter, the parties filed supplemental submissions relating to certain evidentiary matters pertaining to the allegations of irreparable harm. I turn now to the merits of Plaintiff's motion. In doing so, however, I note that for reasons discussed at length in connection with the motions to dismiss, it appears almost certain that the merits of this dispute ultimately will be resolved in another forum, most likely in arbitration or a court proceeding in Utah. Thus, the sole question before me is whether some form of interim injunctive relief is warranted in advance of a final resolution on the merits.

II. ANALYSIS

A. Standard for a Preliminary Injunction

The standard for determining whether to grant a preliminary injunction is procedural and therefore governed by Delaware law.[91] The Court of Chancery has broad discretion in considering a motion for a preliminary injunction.[92] The Court may grant a preliminary injunction where the moving party demonstrates: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balancing of the equities tips in its favor.[93] The moving party is required to make some showing for each element, and a strong demonstration as to one element may serve to overcome a marginal demonstration of another.[94] A preliminary injunction is an extraordinary remedy that should only be granted sparingly.[95]

B. Whether Zrii is Entitled to a Preliminary Injunction

1. Reasonable probability of success on the merits

To obtain preliminary injunctive relief, Plaintiff Zrii need not establish that it will win at trial, an arbitration hearing, or some other final disposition of its claims. Instead,

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91 *Deloitte & Touche USA LLP v. Lamela*, 2005 WL 2810719, at *5 (Del. Ch. Oct. 21, 2005).

92 *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citation omitted).

93 *Argyle Solutions, Inc. v. Prof'l Sys. Corp.*, 2009 WL 1204351, at *2 (Del. Ch. May 4, 2009) (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987) and *Deloitte & Touche*, 2005 WL 2810719, at *5).

94 *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *13 (Del. Ch. Dec. 4, 2007).

95 *Id.*

as to the merits of its claims, Zrii must show that there is a reasonable probability that it would prevail at a final hearing on the merits of one or more of these claims. For purposes of this opinion, I focus on Zrii's claims that Defendants engaged in a civil conspiracy. The elements for civil conspiracy under Utah law[96] are: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof.[97] A plaintiff alleging civil conspiracy has the burden of proving its elements by clear and convincing evidence.[98]

a. A combination of two or more persons

Zrii alleges that all of the individual Defendants, Zenger, McKinlay, Call, Domingo, and Fitzgerald, participated in the civil conspiracy. Defendants have not seriously disputed this element of the alleged conspiracy. Moreover, I find based on the facts recited *supra* Part II.B, that all of the individual Defendants, in fact, did participate in the alleged conspiracy. Thus, Zrii has shown a reasonable probability of success of proving this element.

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96 There is no dispute that the substantive law of Utah will govern the ultimate disposition of this controversy on the merits because the injury to Zrii occurred in Utah, as did much of the conduct causing that injury, and Utah is the place of business of Zrii and the place where the relationship between the parties is centered. *See, e.g.*, *In re Am. Int'l Group, Inc.*, 2009 WL 366613, at *35-36 (Del. Ch. Feb. 10, 2009) (applying the most significant relationship test of the Restatement (Second) of Conflict of Laws).

97 *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct. App. 1987).

98 *Id.* (citing *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978)).

b. An object to be accomplished

Zrii claims that Defendants intended to wrest control of the Company from Farley by presenting him with an offer to buy out his interest and forcing him to accept it. According to Zrii, if Farley refused to resign, Defendants would act in concert to dismantle the Company. The admissions of at least four of the alleged conspirator Defendants that they planned to oust Farley from his position of control over Zrii supports Plaintiff's claim.[99] In addition, Defendant Domingo sent a letter to Farley on February 2, 2009 (the "Ten Star Letter"), on behalf of himself and six of Zrii's other top distributors urging the acceptance of WAG's offer to purchase Zrii or else . . . .[100] The Ten Star Letter stated in relevant part:

> We request you immediately remove yourself as the CEO of Zrii.
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> * * * *
>
> Should you choose to reject our request, we will be forced to dismantle the entire field, leader-by-leader, and take our talents to another network marketing company. In all practicality, once that process begins, Zrii will cease to exist within 30 days.[101]

Also on February 2, Defendants Zenger, McKinlay, and Call, among others, sent a similar letter to Farley enumerating allegedly harmful acts to the corporation committed

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99 *See* Domingo Dep. at 81-82; Fitzgerald Dep. at 139-40; Zenger Dep. at 64-65; McKinlay Dep. at 38-39.

100 *See* Baldwin Decl. Ex. 122, Ten Star Letter.

101 *Id.*

by him and suggesting that he accept the offer of the EMT to purchase a controlling interest in Zrii. Defendant Fitzgerald formed WAG, which made the offer to purchase Farley's interest in Zrii. Based on these facts, I find Zrii is likely to prove that Defendants shared an object to be accomplished, *i.e.*, the goal of ousting Farley and taking control of or dismantling Zrii.

c. A meeting of the minds on the object or course of action

Under Utah law, the party claiming a civil conspiracy need not prove by direct evidence that alleged conspirators actually came together and entered into a formal agreement to do the acts of which the plaintiff complains.[102] Instead, conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the conspirators.[103]

The evidence demonstrates that two groups, an executive management group including Defendants Zenger, McKinlay, and Call, and a coterie of top IEs, including Defendant Domingo, sent letters dated the same day as WAG's letter to Farley in an effort to purchase his controlling interest in Zrii. The letters alleged malfeasance by Farley and indicated that the two groups wished to acquire Zrii and oust Farley. In addition, the letter from WAG's counsel identified interested members of WAG as "the

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102 *Israel Pagan Estate*, 746 P.2d at 791 (citation omitted).

103 *Id.*

executive team at Zrii, as well as all Ten Star distributors."[104] Zenger, McKinlay, Call, and Domingo all signed one or the other of the letters from the two groups.

The several meetings among Defendants and other executive team members and distributors further support the existence of the requisite meeting of the minds. On January 11, 2009, Defendants and other EMT members met at a private club in Salt Lake City and discussed the formation of WAG to purchase Zrii and the removal of Farley as CEO. Defendants and the Ten Star IEs met in Hawaii to discuss the scheme, as well. In fact, Domingo brought Defendant Fitzgerald along on the trip, at Zrii's expense, for the apparent purpose of providing the conspirators with the benefit of Fitzgerald's financial expertise. Defendants met again in Salt Lake City on February 1. At that meeting, Defendants signed subscription agreements for equity in WAG and encouraged Zrii employees to skip work the following day, consistent with the threats contained in the various letters to Farley. Zenger and Fitzgerald also promised employees they would be paid if Zrii fired them for not reporting to work.

Based on this evidence, both circumstantial and direct, I find that Zrii has shown a reasonable probability of successfully establishing that Defendants reached a meeting of the minds on the scheme to either take over or dismantle Zrii.

d. One or more unlawful overt acts in furtherance of the conspiracy

Plaintiff has identified several allegedly unlawful overt acts in furtherance of the conspiracy to take control of Zrii.

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[104] Baldwin Decl. Ex. 122.

Defendant Call's download of Zrii's "All Reps" distributor list to his home computer represents an audacious unlawful act. This list contained information on all of Zrii's distributors, including their names, phone numbers, addresses, and email addresses.[105] On January 30 or 31, mere days before Defendants' letter campaign to oust Farley, Call downloaded the "All Reps" list to his personal computer. The evidence shows that both Zrii and Defendants consider detailed information about the distributors on that list to be confidential and proprietary.[106] Call admitted he downloaded the list after a discussion with Zrii's EMT on January 24 or 25.[107] Call also lamely asserted that the executive management team of Zrii required a backup copy of the list, but neither Zrii nor Farley ever requested any such copy.[108] In addition, Defendants failed to present any evidence that would suggest a plausible reason why such a backup to Call's home computer would be necessary or in Zrii's interest. Under these circumstances, Zrii is reasonably likely to succeed in demonstrating that Call downloaded the list for the unlawful purpose of using it as part of Defendants' plan to undermine Zrii's business and poach its distributors.

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105 Call Dep. at 32-33.

106 *See* Domingo Dep. at 295-96.

107 Call Dep. at 37. Although Call could not recall if he had been directed to download the list by any specific member of the EMT, Zrii likely will be able to convince the trier of fact that one or more of the other Defendants instigated his actions.

108 *See id*. at 34.

The impropriety of Call's action stems, in part, from the allegedly trade secret nature of the "All Reps" list. A plaintiff must establish three elements to prove a claim for misappropriation of trade secrets: (1) the existence of a trade secret, (2) communication of the trade secret under an express or implied agreement limiting disclosure of the secret, and (3) use of the trade secret that harms plaintiff.[109] Utah, like Delaware, has adopted a version of the Uniform Trade Secrets Act.[110] Utah law defines a trade secret as:

> [I]nformation, 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.[111]

The "All Reps" list constitutes a compilation of the identities and contact information for all of Zrii's distributors, which is a valuable asset for a network marketing company.[112] Although Domingo denies the list is confidential, he concedes it is unique to Zrii and that it would be improper to "take the distributor list from Zrii" and

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109 *Water & Energy Sys. Tech., Inc. v. Keil*, 974 P.2d 821, 822 (Utah 1999) (citation omitted).

110 *See* Utah Code Ann. §§ 13-24-1 – 13-24-9; 6 *Del. C.* §§ 2001-2009.

111 Utah Code Ann. § 13-24-2(4).

112 *See* Domingo Dep. at 297.

disclose it.[113] Additionally, Zrii took reasonable steps to maintain the secrecy of the list. It could be accessed only by password, and any distributor given access to the list was first required to execute a copy of the ZPP, which expressly prohibit disclosure of distributor lists.

Defendants deny the list constitutes a trade secret because, they contend, the names and addresses of Zrii distributors are readily ascertainable. For example, Defendants point to the fact that Zrii encourages its distributors to market themselves and their products. That encouragement, however, does not eradicate the protections afforded by Utah's Uniform Trade Secret Act. It may be true, for example, that the name and contact information for a Zrii distributor in a specific geographic location may be readily ascertainable. It does not follow from that fact, however, that the list of all Zrii distributors and their contact information could be obtained easily. Indeed, the evidence suggests that a comparable compilation of the names of the thousands of Zrii distributors and their nonpublic information, including their addresses, phone numbers, and email addresses, would take a considerable amount of time to create. Here, the information existed in one electronic document, which Call downloaded to his home computer. I find, therefore, that Zrii is reasonably likely to succeed in proving that Call

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[113] Domingo Dep. at 295-96.

misappropriated a trade secret in furtherance of Defendants' scheme to seize control of Zrii when he downloaded the All Reps list.[114]

Zrii also alleges Defendants Zenger, McKinlay, and Call breached their fiduciary duties owed to Zrii[115] by conspiring against Farley and using Zrii's resources, as well as their positions on the executive management team, to implement their plan to take over the Company.

A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty.[116] The first prong is satisfied because Zenger, McKinlay, and Call owed fiduciary duties to Zrii as officers of the company identical to those typically owed by a company's directors.[117] Indeed, they

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114 Defendants posit a "no harm no foul" argument that Zrii has not suffered any harm because no one ever used the Zrii distributor list. I reject that argument because it appears likely Zrii will be able to show the list was used without its authorization, at least in terms of the communications with numerous IEs in February 2009.

115 Although Utah law governs the majority of Zrii's claims, I apply Delaware law to its breach of fiduciary duty claim. In its opening brief, Zrii cited to persuasive and binding authority in Utah and in Delaware. *See Envirotech Corp. v. Callahan*, 872 P.2d 487, 497 (Utah Ct. App. 1994); *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del. Ch. 1972). Defendants Zenger, McKinlay, and Call cited only Delaware authority and argued for its application because Zrii is a Delaware limited liability company. *See* Defs.' Zenger, McKinlay, and Call's Br. in Opp. to Pl.'s Mot. for Prelim. Inj. at 46. Because Zrii offered no opposition to this argument and cited only Delaware authority in its reply brief, I conclude that Delaware law controls this issue.

116 *Heller v. Kiernan*, 2002 WL 385545, at *3 (Del. Ch. Feb. 27, 2002).

117 *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (involving corporate officers).

admit they owed fiduciary duties to Zrii.[118] For purposes of this motion, therefore, Zrii must demonstrate that it has a reasonable probability of success in proving that Defendants breached their duties.

In support of its breach of fiduciary duty claim, Zrii has shown that Zenger, McKinlay, and Call planned to take over or dismantle the Company with Domingo, Fitzgerald, and numerous other Zrii executive officers and distributors. While serving as officers, they secretly met in Hawaii and Salt Lake City. The meeting in Hawaii occurred during a Zrii-sponsored trip, *i.e.*, it was on company time. Call downloaded confidential Zrii information in the form of the All Reps list for Defendants' use in forcing a sale of Zrii or "dismantling" it for the benefit of a new company in which Defendants would have an ownership interest. That act occurred in furtherance of a conspiracy in which Zenger and McKinlay participated. At a minimum, they likely knew about and acquiesced in the alleged misappropriation. Thus, Zenger and McKinlay share the responsibility for the misappropriation.[119] Furthermore, Zenger, McKinlay, and Call directed Zrii employees to stage a lockout of Zrii's offices on February 2 and 3, 2009. They asked employees to refuse to report for work and to shut down Zrii's computer systems, thereby locking out Farley and other Zrii employees who were not involved in

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118 *See* Compl. ¶ 51; *see also* Defs. Zenger, McKinlay, and Call's Answer ¶ 51.

119 Under Utah law, "[w]here several combine together to commit an unlawful act, each is responsible for the acts of his associates or confederates committed in furtherance thereof or in the prosecution of the common design for which they combined." *State v. Kukis*, 237 P. 476, 481 (Utah 1925).

the scheme. Thus, Zrii is likely to succeed in proving Defendants took these actions in their own interests, rather than the best interests of Zrii.

Defendants attempt to circumvent their apparent breaches of fiduciary duty by contending that Zrii's past acts should preclude it from obtaining a preliminary injunction. Indeed, Defendants virtually concede they breached their fiduciary duties to Zrii, but argue those actions are past history and immaterial to Plaintiff's preliminary injunction motion, because Defendants no longer are constrained by concerns of loyalty to a company from which they resigned on February 2. This argument lacks merit in the context of Zrii's civil conspiracy claim. Defendants breached their fiduciary duties in their capacity as participants in a conspiracy to harm Zrii and it's owner, Farley. That breach represents another unlawful overt act in furtherance of the conspiracy. The fact that Defendants ceased to be employed by and to owe fiduciary duties to Zrii does not mean the conspiracy cannot continue after February 2, 2009, and does not absolve them from responsibility for their own acts and those of their co-conspirators after that date in furtherance of the conspiracy.

In addition, Zrii alleges Fitzgerald and Domingo breached contractual nonsolicitation obligations in furtherance of Defendants' scheme to take control of or dismantle Zrii. The relevant question, for the purposes of the motion for preliminary injunctive relief, is whether Zrii has shown a reasonable probability of proving Domingo

or Fitzgerald is contractually bound by a valid and enforceable nonsolicitation obligation and breached that obligation.[120]

Domingo and Fitzgerald likely were bound by the nonsolicitation provision. They both were Zrii distributors and, as such, agreed to be bound by the ZPP.[121] The ZPP prohibit Zrii distributors from recruiting other Zrii distributors or inducing distributors to alter their business relationships with Zrii.[122] Plaintiff is likely to succeed in showing Domingo breached this provision when he urged his downline distributors to cancel their autoships, thereby inducing those distributors to alter their business relationship with Zrii. The ZPP also prohibit former Zrii distributors from recruiting Zrii distributors to any other network marketing company for a period of six months after termination of their IEA with Zrii.[123] The evidence suggests Domingo and Fitzgerald have breached this provision and continue to do so by recruiting current and former Zrii distributors to LifeVantage. Therefore, Zrii also has demonstrated a reasonable likelihood of success in

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120 "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388, 392 (Utah 2001) (*citing Nuttall v. Berntson*, 30 P.2d 738, 741 (Utah 1934)). Domingo and Fitzgerald dispute the validity and enforceability of the nonsolicitation provision on numerous grounds and Domingo argues Zrii materially breached the ZPP, but Domingo and Fitzgerald do not seriously dispute the existence of the other elements for a breach of contract.

121 *See* Domingo Dep. at 38-42 (acknowledging he signed an agreement subjecting him to the terms of the ZPP); Fitzgerald Dep. at 32-33, 49 (admitting he authorized Art Duel to enter an agreement binding him to the ZPP).

122 Baldwin Decl. Ex. 101 ¶¶ 6.1.1, 7.1.4.

123 *Id.*

proving that Domingo and Fitzgerald breached their nonsolicitation obligations to Zrii in furtherance of Defendants' conspiratorial scheme.

Domingo and Fitzgerald raise a number of challenges to the validity and enforceability of the nonsolicitation provisions. Among other things, Domingo and Fitzgerald argue the nonsolicitation provisions are unenforceable under Utah law because the provisions: (1) are not supported by consideration; (2) were not negotiated between the parties; (3) are not necessary to protect the legitimate interests of Zrii; and (4) are unreasonably restrictive.[124] A few of these defenses raise close questions of law or fact, and Defendants ultimately may prevail on one or more of them. Zrii, however, has presented several persuasive counterarguments.[125] Having considered competing arguments at this preliminary stage of the litigation, I find that Zrii probably will be able to prove that Domingo or Fitzgerald or both have breached certain nonsolicitation provisions in furtherance of Defendants' conspiratorial scheme. Further, I note that even if I had reached the opposite conclusion as to this category of allegedly unlawful acts, it would not have affected materially the outcome on the motion for preliminary injunction or the scope of the relief.

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[124] *See Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 88 (Utah 1992) (listing four requirements for restrictive covenants to be enforceable).

[125] In connection with Domingo's contention that the ZPP are not supported by consideration, for example, Zrii notes that it paid Domingo approximately $600,000 in 2008, his first full year with Zrii. Domingo Dep. at 61.

I, therefore, find that Zrii has shown a reasonable likelihood of success in proving the existence of an unlawful act in furtherance of the alleged conspiracy among Defendants.

e. Damages as a proximate result of the alleged conspiracy[126]

Zrii also is reasonably likely to be able to prove that it suffered some damage as a result of the subversive actions taken by Defendants. According to Defendant Call, Zrii has lost 45 to 50 of its corporate employees, and will have to hire and train new personnel.[127] Additionally, Defendants' scheme has caused Zrii to lose five of its seven Ten Star IEs.[128] While the actual amount of damages suffered cannot be determined at

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126 Zrii's damages, past and ongoing, are discussed in more detail *infra* Part III.B.2 in relation to the second prong of the preliminary injunction analysis, *i.e.*, whether there exists an imminent threat of irreparable injury.

127 Call Dep. at 7.

128 McKinlay Dep. at 30. The full extent to which Defendants' conspiracy has succeeded in recruiting Zrii distributors over to LifeVantage remains unclear. To date, based on confidentiality concerns, the parties have been unable to agree on terms under which they would exchange or compare the LifeVantage and Zrii distributor lists. This difficulty confirms that such lists are proprietary, valuable, and generally treated as trade secrets by network marketing companies. Furthermore, having considered the application of Defendants on June 22, 2009 for leave to file the LifeVantage distributor list *in camera*, Zrii's objection to that request, and the California Superior Court's entry of a protective order, at Defendants' behest, preventing Zrii from conducting third-party discovery of LifeVantage in connection with this litigation, I hereby deny Defendants' request.

Additionally, in his March 12, 2009 deposition, Defendant McKinlay estimated that "maybe half" of the current LifeVantage distributors were current or former Zrii distributors. *Id*. at 40. Since then, McKinlay has stated in a sworn affidavit, dated June 17, that he believes that only approximately four percent of LifeVantage distributors came from Zrii. There has not yet been a reliable comparison of the distributor lists of Zrii and LifeVantage, and McKinlay's self-

this point, Zrii probably will succeed in proving that Defendants' conspiratorial scheme caused it some damage.

In each of their briefs, Defendants advanced numerous personal and individual defenses pertaining to some or all of Plaintiff's other claims. Based on the showing as to a conspriracy, I need not consider the various individual defenses for purposes of ruling on Zrii's motion for a preliminary injunction.[129] Thus, Plaintiffs have demonstrated a reasonable likelihood of success in proving that an actionable civil conspiracy exists among Defendants.

2. Imminent threat of irreparable injury

Irreparable harm generally exists where injury cannot be adequately compensated by damages.[130] Essentially, the injury claimed "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be

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serving departure from his earlier sworn testimony is hardly reliable evidence. Moreover, even if McKinlay's backtracking affidavit were sufficient to warrant a significant downward adjustment to his original estimate that maybe half the LifeVantage distributors had been with Zrii, Plaintiff still has shown a likelihood of irreparable harm in that Defendants unquestionably lured away many of Zrii's top performers and key corporate personnel, and the evidence strongly suggests that through their ongoing conspiracy Defendants have continued to cause distributors to leave Zrii for LifeVantage.

129 *See State v. Kukis*, 237 P. at 481.

130 *State v. Delaware State Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974). Preliminary injunctive relief is a powerful remedy available in extraordinary circumstances and should not be granted if the injury may be adequately compensated for after a full trial on the merits, either by an award of damages or by some form of final equitable relief. *See Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998).

a denial of justice."[131] Because a preliminary injunction is an extraordinary form of equitable relief, it "should not be granted if the injury to Plaintiff is merely speculative"[132] or if the act complained of has already occurred.[133] Further, the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief.[134]

Zrii contends it will suffer imminent and irreparable harm if Defendants are not enjoined from recruiting its distributors. According to Zrii, the conspiracy to recruit its distributors and their customers has caused an injury that is ongoing and is not compensable by money damages. Defendants deny that they have breached any agreements or otherwise acted unlawfully in their new positions with LifeVantage. They contend any harm suffered by Zrii already has occurred and, because Zrii failed to identify any ongoing harm, their request for preliminary relief also must fail.

I find that Zrii has shown it will suffer irreparable harm if Defendants are not preliminarily enjoined for a number of reasons. First, Zrii has demonstrated that the harm it suffered and is likely to suffer cannot be remedied solely with monetary damages. The

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131 *Delaware State Educ. Ass'n*, 326 A.2d at 875.

132 *Cantor*, 724 A.2d at 586.

133 *See In re Digex Inc. S'holders Litig.*, 789 A.2d 1176, 1215 (Del. Ch. 2000).

134 *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price*, 1989 WL 108412, at *2-4 (Del. Ch. Sept. 13, 1989) (concluding that irreparable harm had been shown in that damages resulting from solicitation of plaintiff's customers are incalculable because one cannot know how customers would have behaved in the absence of defendant's solicitation).

damage to Zrii's relationships with its distributors and the ensuing loss of customers cannot be calculated accurately.[135] Absent an injunction, the recruitment of Zrii distributors likely will continue and cause even greater harm to Zrii that also will be difficult or impossible to quantify. Additionally, monetary damages are not likely to provide an adequate remedy for the continuing income stream and goodwill gained from a sustained relationship between Zrii and its distributors and their customers.[136]

Second, Zrii has presented sufficient evidence that it is likely to suffer ongoing harm as a result of Defendants' actions. No individual Defendant has declared his intent to refrain from recruiting Zrii distributors. Indeed, in March 2009, Domingo and Fitzgerald gave a presentation at a meeting in New Hampshire where Zrii distributors were present and among those actively recruited to join LifeVantage.[137] Since February 2009, LifeVantage has expanded from a network marketing company of approximately 250 distributors to over 1,000 distributors. Defendant McKinlay estimated that at least

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135 *See Singh v. Envtl. Assocs., Inc.*, 2003 WL 21039115, at *9 (Del. Ch. May 21, 2003) (loss of customers recruited by former employer was impossible to calculate and constituted irreparable harm in context of a request for injunctive relief).

136 The nature of the network marketing business model is such that goodwill and word-of-mouth advertising is essential, as is continuing harmonious relationships among the distribution chain. The loss of a distributor deprives the company of her sales revenue, the potential sales revenues of her downlines, and the potential sales revenues she and her downlines would generate going forward.

137 Domingo Dep. at 325-26.

half of that growth could be attributed to Zrii distributors joining LifeVantage.[138] Although Defendants claim they never have and never will use the All Reps List downloaded by Call, the evidence shows Zrii is likely to succeed in proving otherwise. Further, there is nothing currently preventing Defendants from using the information brought by newly-recruited, former Zrii distributors to target more Zrii distributors in violation of the ZPP. The evidence, therefore, supports a reasonable inference that Defendants continue to recruit Zrii distributors and disparage Farley and the remaining Zrii management in order to "dismantle the field" and permanently disrupt Zrii's business. Accordingly, I find that Zrii faces a risk of further depletion of its ranks by Defendants and likely will suffer immediate and irreparable harm in the absence of a preliminary injunction.

3. Balance of the equities

In considering a motion for preliminary injunction, the Court also must weigh the equities in favor of and against granting such relief. This requires the Court to "consider the potential harm in wrongfully granting the injunction, discounted by its probability, against the harm of wrongfully denying the preliminary injunction, discounted by its

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[138] McKinlay Dep. at 40-41. As discussed *supra* note 126, McKinlay has since tried to back off from his sworn testimony, and now claims the number should be closer to four percent, rather than half. The reliability of McKinlay's later averment is suspect, because it has not been subjected to cross examination. Moreover, even if the number of distributors Defendants caused to switch from Zrii to LifeVantage were only ten percent of LifeVantage's network, that still would be in the range of 100 distributors.

probability."[139] To merit the relief it seeks, Zrii must demonstrate that imposition of a preliminary injunction will result in less harm to Defendants than the harm Zrii will suffer if I deny its request for an injunction, taking into account the parties' respective probabilities of success on the merits.

Absent a preliminary injunction, Defendants and those acting in concert with them may continue poaching Zrii's distributors and recruiting them to join LifeVantage. Zrii will continue to lose distributors and, presumably, the majority of those distributors' customers. While Zrii stands to lose a potentially significant portion of its distributors and customer base in the absence of an injunction, Defendants only will be prohibited from engaging in targeted recruitment activities. LifeVantage already has grown dramatically since the beginning of 2009, whereas Zrii has suffered significant losses in personnel and top-producing distributors. Enjoining Defendants from recruiting Zrii distributors for a few months is not likely to interfere materially with Defendants' and LifeVantage's ability to carryout their network marketing business. Domingo conceded, for example, that he could recruit a large distributor force (10,000) without recruiting Zrii distributors because Defendants have "got innumerable contacts outside of Zrii."[140] For these reasons, Zrii would face a significant risk of competitive harm if no preliminary

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139 *HDS Inv. Holding, Inc. v. Home Depot, Inc.*, 2008 WL 4606262, at *9 (Del. Ch. Oct. 17, 2008) (citations omitted).

140 Domingo Dep. at 293.

injunction is issued, but Defendants and LifeVantage would not. Thus, I find that the balance of equities tips in favor of granting a preliminary injunction.

4. The Remedy

Because Zrii has satisfied the elements for a preliminary injunction, some form of injunctive relief against Defendants is in order. The Independent Executive Agreement incorporates the Zrii Policies and Procedures, or the ZPP, which restrain signatories from engaging in recruiting and related activities for a period of six months after the end of their relationship with Zrii. Not all the individual Defendants, however, were subject to the ZPP. In addition, six months is the longest restraint on recruiting that Zrii attempted to impose contractually on any of the Defendants. It is likely, therefore, that even after a full trial or arbitration hearing and a final disposition on the merits, Zrii would not be entitled to enforce the prohibition on recruiting Zrii distributors for more than six months. The purpose of a preliminary injunction here would be to maintain the status quo for a reasonable period to dissipate the risk of irreparable harm while the parties pursue a final resolution of their underlying dispute on the merits. By all indications, the merits of this controversy must be resolved in Utah through either an arbitration or litigation in the courts or both. At that time, Zrii may request additional injunctive relief or monetary damages to remedy Defendants' alleged wrongdoing.

In the unusual circumstances of this case, where this Court's involvement is likely to be limited to the pending request for preliminary injunctive relief and no arbitration appears to have been commenced, granting an injunction of six months duration effectively could give Zrii all the injunctive relief it would be entitled to after a final

hearing on the merits. I do not consider that appropriate or equitable. Moreover, it is not clear whether Zrii has or ever will seek permanent relief against these Defendants via arbitration or otherwise in Utah. Accordingly, I will grant only a three-month injunction aimed at preventing further harm to Zrii in the near term and preserving the status quo among the parties consistent with the record presented on Zrii's motion for interim relief.

III. CONCLUSION

For the reasons stated in this memorandum opinion, I grant Plaintiff's motion for a preliminary injunction. In particular, I am entering concurrently with this opinion an order preliminarily enjoining Defendants from (1) disclosing or using any trade secret information of Zrii and (2) knowingly recruiting or enrolling any Zrii distributor for any other network marketing company, including LifeVantage, for a period of three months from the date of that order.[141]

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[141] This injunction is limited to "knowing" recruitment of Zrii distributors for reasons of practicality. Zrii allegedly has thousands of distributors, and the record suggests that it is unlikely Defendants know the identity of all or even a majority of them. Nevertheless, I expect Defendants and those acting in concert with them to take reasonable precautions under the circumstances to avoid recruitment of Zrii IEs or distributors.