

IN CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITADEL INVESTMENT GROUP)
)
Plaintiffs,)
vs.)
)
TEZA TECHNOLOGIES LLC, MIKHAIL)
MALYSHEV, JACE KOHLMEIER and)
MATTHEW HINDERFELD)
)
Defendants.)
)

NO. 09 CH 22478

NOTICE OF MOTION

TO: SEE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on _____, 2009, at _____, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Mary Rochford, in Courtroom 2401 in the Richard J. Daley Center, Chicago, Illinois, and shall then and there present the following documents, copies of which is attached hereto:

1. DEFENDANTS' SECTION 2-615 MOTION TO DISMISS CITADEL'S VERIFIED COMPLAINT,
2. MEMORANDUM IN SUPPORT OF DEFENDANTS' SECTION 2-615 MOTION TO DISMISS CITADEL'S VERIFIED COMPLAINT, and
3. APPENDIX OF UNPUBLISHED AND OUT-OF-STATE CASES CITED IN MEMORANDUM IN SUPPORT OF DEFENDANTS' SECTION 2-615 MOTION TO DISMISS CITADEL'S VERIFIED.

DATED: July 24, 2009

Respectfully submitted,

TEZA TECHNOLOGIES LLC, MIKHAIL
MALYSHEV, JACE KOHLMEIER and
MATTHEW HINDERFELD

By: _____
One of their Attorneys

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CERTIFICATE OF SERVICE

I, Seth A. Travis, an attorney, certify that on July 24, 2009, I caused a true and correct copy of the foregoing Defendants' Section 2-615 Motion to Dismiss Citadel's Verified Complaint and Memorandum in Support of Defendants' Section 2-615 Motion to Dismiss Citadel's Verified Complaint to be served via Email and UPS, and Appendix of Unpublished and Out-of-State Cases Cited in Memorandum in Support of Defendants' Section 2-615 Motion to Dismiss Citadel's Verified Complaint to be provided in hard-copy form via UPS on counsel for plaintiff Citadel Investment Group, L.L.C.:

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MATTHEW HINERFELD,)

Defendants.)

No. 09 CH 22478

Judge Mary Rochford

**DEFENDANTS' SECTION 2-615 MOTION TO
DISMISS CITADEL'S VERIFIED COMPLAINT**

Defendants Teza Technologies LLC (“Teza”), Mikhail Malyshev, Jace Kohlmeier and Matthew Hinerfeld (together the “defendants”), by their attorneys and pursuant to 735 ILCS § 5/2-615, hereby move to dismiss Plaintiff Citadel Investment Group L.L.C.’s (“Citadel”) Verified Complaint (the “Complaint”). In support of their motion, defendants state as follows:

1. On July 9, 2009, Citadel filed its Complaint for preliminary and permanent injunctive relief. In its Complaint, Citadel asserts six causes of action for alleged breaches of non-compete agreements (Count I), breaches of non-disclosure agreements (Count II), breaches of non-solicitation agreements (Count III), trade secret misappropriation (Count IV), breaches of fiduciary duty (Count V), and tortious interference with contracts (Count VI). Based on these causes of action, Citadel asks this Court to enjoin defendants from preparing to compete and to forever prevent defendants from engaging in their chosen profession. But Citadel has not asserted any claims upon which injunctive relief may be granted. Rather, it has asserted claims based on conduct that is completely appropriate under Illinois law and based on unsupported conclusions and “information and belief” allegations that cannot support the extraordinary relief sought by Citadel.

2. *First*, Citadel's claim that defendants Kohlmeier and Malyshev breached their non-compete agreements (Count I) fails as a matter of law, for at least two reasons. Under the express terms of the non-compete agreements, Malyshev and Kohlmeier are only prohibited from affiliating with an entity that "engages in" competitive activity. There is no prohibition in the agreements or anywhere in the law against preparing to compete. Citadel has not set forth any factual allegations showing that either Malyshev or Kohlmeier is engaging in any competition with Citadel. Rather, Citadel has asserted facts confirming that Malyshev and Kohlmeier are only preparing to compete, which is permissible under Illinois law and the non-compete agreements. *See, e.g., Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman*, 368 Ill. App. 3d 353, 357 (1st Dist. 2006). Alternatively, if the non-compete agreements are somehow construed to forbid preparatory steps like those alleged here, the agreements would be void as against Illinois public policy. *See, e.g., Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1007 (1st Dist. 1998).

3. *Second*, Citadel's claims for breach of the non-disclosure agreement (Count II) and trade secret misappropriation (Count IV) should also be dismissed, for at least two reasons. Notably, Citadel has not identified any specific trade secret or confidential information that it claims has been misappropriated or disclosed by any of the defendants. Under Illinois law, a plaintiff may not enjoin a defendant from using broad areas of technology. Rather, a plaintiff must identify specific trade secrets and confidential information to assert claims under Illinois law. *See e.g. Thermal Zone Products Corp. v. Echo Engineering, Ltd.*, 1993 WL 358148, at *6 (N.D. Ill. Sep. 14, 1993). Citadel has wholly failed to meet that burden. (Comp., ¶¶ 2, 77, 89.) In addition, Citadel has not asserted any *factual allegations* demonstrating that any defendant misappropriated any of these undefined trade secrets or disclosed any supposed confidential information. For these reason, Counts II and IV should be dismissed.

4. *Third*, Citadel's claims for breach of the non-solicitation agreements (Count III), breach of fiduciary duty (Count V), and tortious interference with existing contracts (Count VI) also fail as a matter of law. A complaint for injunctive relief must be supported by specific facts,

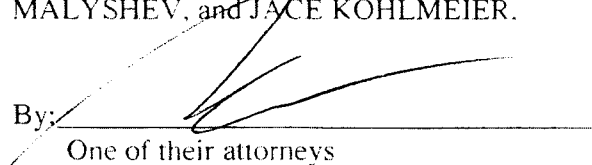
and not by conclusions and "information and belief" allegations. *See, e.g., Heerey v. Berke*, 179 Ill. App. 3d 927, 939 (1st Dist. 1989). Citadel has not come close to meeting this basic requirement. Rather, Citadel has set forth serious claims against these defendants based on conclusory allegation and its unsupported "information and belief." Citadel must do better than that to seek the extraordinary relief of an injunction preventing the defendants from engaging in their profession. Counts III, V, and VI should be dismissed.

5. In further support of this Motion, defendants submit the accompanying Memorandum In Support of Defendants' Section 2-615 Motion to Dismiss Citadel's Verified Complaint.

WHEREFORE, for the reasons set forth above and in their supporting Memorandum, defendants Teza Technologies LLC, Mikhail Malyshev, Jace Kohlmeier, and Matthew Hinerfeld respectfully request that this Court enter an order dismissing Plaintiff Citadel Investment Group LLC's Verified Complaint and grant such other relief as is just and reasonable.

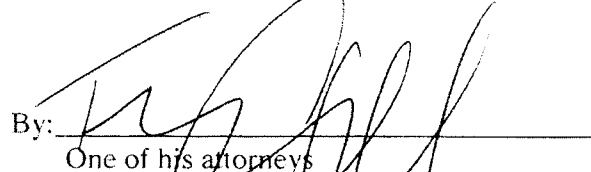
Respectfully submitted,

TEZA TECHNOLOGIES LLC, MIKHAIL MALYSHEV, and JACE KOHLMEIER.

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Dated: July 24, 2009

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**MEMORANDUM IN SUPPORT OF DEFENDANTS'
SECTION 2-615 MOTION TO DISMISS CITADEL'S VERIFIED COMPLAINT**

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Dated: July 24, 2009

INTRODUCTION

Mikhail Malyshev, Jace Kohlmeier and Matthew Hinerfeld used to work for Citadel -- Malyshev and Kohlmeier in Citadel's high-frequency trading group and Hinerfeld in the legal department. They are now principals in a start-up firm, Teza Technologies LLC, that has not commenced business. Citadel has sued the individual defendants and Teza for a variety of supposed wrongs, including alleged violations of a non-compete agreement, misappropriation of trade secrets, breach of non-disclosure and non-solicitation agreements, breach of fiduciary duty and tortious interference.

None of the counts in the Complaint states a claim upon which relief may be granted. The only count that includes any substantive factual allegations is Count I, which charges Malyshev and Kohlmeier with violating their non-compete agreements. However, the facts that Citadel alleges in support of Count I relate exclusively to *preparatory steps* permitted under the agreements and Illinois law, not competition, and thus as a matter of law do not amount to a breach of that agreement. If a ban on preparation was somehow read into the agreements, they would be unenforceable as against clear Illinois public policy. The other counts fail for a different reason: they contain no facts supporting the claims but only conclusions and "information and belief" allegations which are insufficient to state a claim for injunctive relief.

THE ALLEGATIONS OF THE COMPLAINT

1. Non-Compete Allegations (Count I)

Under paragraph 1 of their Non-Compete Agreements (Complt. Exhs. 4 & 5.), Malyshev and Kohlmeier each agreed that he would not "engage in any Competitive Activity" for up to nine months after he left Citadel, and that he would "be engaging in a Competitive Activity if:"

- i) I become an employee of a **Competitive Enterprise** in a capacity that is similar to the capacity I was in, or provide services that are similar to the services I provided, or with responsibilities that are similar to the responsibilities I had, in each case, when I was employed by Citadel; or
- ii) I become an advisor or consultant to a **Competitive Enterprise** in a capacity that is similar to the capacity I was in, or provide services that are similar

to the services I provided, or with responsibilities that are similar to the responsibilities I had, in each case, when I was employed by Citadel; or

iii) I, directly or indirectly, for or on behalf of a **Competitive Enterprise**, utilize or develop quantitative analytics which are based on information that is proprietary to Citadel and which I either utilized or developed when I was employed by Citadel; or

iv) I, directly or indirectly, for or on behalf of a **Competitive Enterprise**, oversee one or more individuals that utilize or develop quantitative analytics which are based on information that is proprietary to Citadel and which I either utilized or developed when I was employed by Citadel; or

v) I directly or indirectly become a partner or principal of a **Competitive Enterprise**; or

vi) I directly or indirectly form, or acquire greater than a 5% equity, voting, revenue, income, profit, loss or other economic interest in, any **Competitive Enterprise**.

According to these provisions, activities are only “competitive” if they are performed for or in connection with a “Competitive Enterprise,” which is defined in paragraph 1(c) as an entity that is *presently engaging in competition* with Citadel:

c) “**Competitive Enterprise**” means any business that (i) *engages in* any of the investment strategies, trading strategies or any other business activities identical or similar to any of those engaged in by Citadel, or (ii) owns or controls a significant interest in any entity that *engages in* any of the investment strategies, trading strategies or any other business activities identical or similar to any of those engaged in by Citadel. (Emphases added.)

Citadel alleges that since leaving Citadel in mid-February 2009, Malyshev and Kohlmeier have formed Teza and related entities, leased office space, hired employees, and started developing analytics and code. (Complt. ¶ 13.) From these factual allegations, Citadel draws the conclusion that defendants are now “illegally competing against Citadel.” (*Id.*) Notably, there is nothing in the Complaint suggesting that Teza or any of the individual defendants is engaging in any trading activities, investment activities, or other business activities conducted by Citadel.

2. Trade Secret Misappropriation and Non-Disclosure Allegations (Counts II & IV)

Citadel alleges on “information and belief” that Malyshev and Kohlmeier “already have misappropriated, disclosed, and used Citadel's Trade Secrets and other confidential and

proprietary information.” (Complt. ¶ 61; *see also* Complt. ¶¶ 54-55, 57, 59-61.) But Citadel has not specifically identified any trade secret, confidential or proprietary information that has allegedly been misappropriated or disclosed by any of the defendants.

Instead, Citadel slaps a trade secret label on hugely broad areas of knowledge, and describes its alleged trade secrets as “mathematical models, statistical methods, strategies, signals and algorithms, to generate computer code that executes high volumes of trade orders in a very short period of time (collectively, ‘Citadel’s Trade Secrets’).” (Complt. ¶ 2.) Nothing in the remainder of Citadel's allegations gives defendants any usable hint as to what they are accused of misappropriating or disclosing. (*See* Complt. ¶¶ 15, 26, 29, 30, 89.)

3. Additional Allegations (Counts III, V & VI)

Malyshev and Kohlmeier each entered into a Non-Solicitation Agreement with Citadel (the “Non-Solicitation Agreement”). (Complt. Exhs. 9-11.) Under paragraph 2 of the Non-Solicitation Agreement, Malyshev and Kohlmeier agreed that during the “12 month period following the end of [his] employment,” he would not “directly or indirectly . . . employ any Citadel Employee,” or “induce” or “solicit” any Citadel Employee “to cease employment with Citadel.” (*Id.*) “Citadel Employee” is defined as “any person that (i) is an employee of Citadel at the time of my contact, solicitation or inducement, or (ii) was an employee of Citadel at any time within the 30 day period immediately preceding such contact.” (*Id.*)

Citadel purports to assert claims for breach of the non-solicitation agreement and breach of fiduciary duty, based on naked conclusory allegations, many of them made on “information and belief.” (*See* Complt. ¶¶ 54-55, 57, 59-61, 82-84, 97-98.) For example, Citadel asserts on nothing but its own unsupported “information and belief” that “Malyshev and Kohlmeier solicited each other and attempted to induce others in the high frequency trading group to terminate their employment with Citadel and join their competitive business.” (Complt. ¶ 57.) Similarly, Citadel alleges that defendants breached a fiduciary duty by making “statements that have disparaged, defamed, and/or reflected adversely upon Citadel,” but never says what those

statements were or when or to whom they were made. (Complt. ¶¶ 55, 59.) Such allegations badly flunk the fact-pleading requirement.

ARGUMENT

I. Count I Should Be Dismissed Because The Activities Alleged in the Complaint Do Not, as a Matter of Law, Violate the Non-Compete Agreements.

Citadel does not (and could not truthfully) allege that Malyshev, Kohlmeier or Teza have engaged in any trading or investment activity in competition with Citadel. Rather, Citadel alleges in Count I that after leaving Citadel, the two formed entities, leased office space, hired employees, and began writing code for their planned business. (Complt. ¶ 13.) Taking these factual allegations as true, they simply do not state a claim upon which relief may be granted. Such activities are, as a matter of law, appropriate *preparations to compete* that are not -- and could not lawfully be -- restricted under the Citadel non-compete agreements.

A. The Non-Compete Agreements Do Not Prohibit Preparing To Compete.

It is well settled that even *current* employees and officers of a company, who indisputably owe a fiduciary duty to their employers, are allowed to prepare to compete with their current employers by planning, forming, and outfitting a competing business. *See, e.g., Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman*, 368 Ill. App. 3d 353, 357 (1st Dist. 2006) (“while still working for an employer, employees may plan, form, and outfit a competing corporation so long as they do not commence competition”); *Dowell v. Bitner*, 273 Ill. App. 3d 681, 691 (4th Dist. 1995) (same); *Exhibit Works, Inc. v. Inspired Exhibits, Inc.*, 2005 WL 3527254, *5 (N.D. Ill. Dec. 21, 2005) (“preparatory steps were lawful activities” by current employees); *Riad v. 520 S. Mich. Ave. Assocs.*, 2000 WL 680217, *3 (N.D. Ill. May 22, 2000).

Not surprisingly, the same principles apply to employees who have left but retain an obligation under a non-compete covenant during the period of that covenant. “[T]he line that divides permissible preparation from a breach of fiduciary duty is the same for an employee regardless of whether or not he has entered into a non-compete agreement.” *Nat’l Econ. Research Ass’n, Inc. v. Evans*, 2008 WL 4352600, *10 (Mass. Super. Sep. 10, 2008). Thus, a

former employee subject to a non-compete agreement may *prepare* to compete. For example, in *Brooks Automation, Inc. v. Blueshift Technologies, Inc.*, 2006 WL 307948, at *7 (Mass. Super. Jan 24, 2006), a former employee formed a company and was preparing to compete with plaintiff. Plaintiff argued that the former employee's one-year non-compete prohibited preparations to compete. The court disagreed, holding that the non-compete agreement did not prevent preparations to compete: "[i]f a former employee with a routine one year non-compete agreement cannot even prepare to compete with his former employer during the one year, the effective length of the non-competition period . . . would be significantly longer than one year. An employee . . . cannot be tricked into a longer effective period of non-competition by signing a routine non-compete provision." See also *MQ Assocs., Inc. v. North Bay Imaging, LLC*, 270 Fed. Appx. 761, 764 (11th Cir. 2008) (former employee with non-compete may form competing company with investors, prepare business plan, and lease space to operate business); *Viad Corp. v. Cordial*, 299 F. Supp. 2d 466, 479-80 (W.D. Pa. 2003) (former employee with non-compete may incorporate company, issue press releases, conduct market research, issue white paper, and conduct webcast for potential customers, because never "actually aided . . . competitors" and had "no customers, revenue, or even a product on the market"). It would make no sense to suggest that a former employee has some greater duty to his erstwhile employer than an officer has to his current employer.

The touchstone for interpreting any contract is the plain language of the agreement. The plain language here only prevents Malyshev and Kohlmeier during the nine-month period from affiliating with a company that presently "engages in" Citadel's investment or trading businesses; that is, it only prevents them from actively competing with Citadel. (Complt. Exhs. 4-5 & ¶ 1(c).) Nothing in the agreements suggests that either Malyshev or Kohlmeier may not prepare to compete or affiliate with a firm that is preparing to compete. And to the extent there is any uncertainty about the meaning of the term, those doubts have to be resolved against Citadel. Because "Illinois courts favor competition and frown on restraints of trade," trial courts are obliged to "strictly construe and interpret covenants not to compete, and any doubts or

ambiguities must be resolved against the restriction.” *Marwaha v. Woodridge Clinic, S.C.*, 339 Ill. App. 3d 291, 293 (2d Dist. 2003); *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 879 (7th Cir. 2000).

In a case on all fours with this one, a federal district court in Washington held that a former employee subject to a non-compete agreement had a right to prepare to compete because his restrictive covenant prevented him only from affiliating with a company that “engages in business” that is in competition with his former employer. *Ossur Holdings, Inc. v. Bellacure, Inc.*, 2006 WL 2401269, *4 (W.D. Wash. Aug. 18, 2006). In *Ossur*, at *4, Sterling agreed to a one-year non-compete under which he would not “own, operate, provide financial, technical, or other assistance or services to, accept any involvement with . . . any organization which *engages in business* that is in direct competition with” Ossur. Sterling prepared to compete with Ossur by purchasing software, tools and equipment to design his own knee brace, completing a majority of product development for his new knee brace, hiring a design company and a vice president of sales, applying for a patent, and filing articles of incorporation. Ossur filed an action for breach of the non-compete. The court granted summary judgment, holding that Sterling could prepare to compete because he was only prohibited from affiliating with a company that was presently engaging in a competitive business. The court explained:

[T]he court accepts Sterling’s construction of the term “engages in business . . . in direct competition” as limited to marketing and selling a rival product. This construction follows from Ossur’s selection of the present tense form of the verb ‘engage,’ as well as the limitation imposed by the word ‘direct’ to modify the term ‘competition.’ . . . An average person would read the contract to mean that, in order to violate its terms, Sterling would have had to entice Ossur’s customers (or potential customers) to buy his knee brace.

Similarly, in *Berardi’s Fresh Roast, Inc. v. PMD Enters., Inc.*, 2008 WL 4681825, *1 & *5 (Ohio App. Ct. Oct. 23, 2008), a former partner in a coffee business was subject to a non-compete agreement. During the term of the non-compete, he formed a competing coffee company, investigated financing opportunities, pricing, product options, and the availability of supplies from vendors, hired employees, ordered equipment and supplies, signed a lease for

warehouse space, and equipped the warehouse. The court held that the former partner had not violated the non-compete because he “was not actively engaging in the coffee industry. Instead, he was merely making preparations so that he could commence business the day after the noncompetition agreement expired.”

Ossur and *Berardi's* are directly on point. Here, Malyshev and Kohlmeier agreed only to refrain from affiliating with a company that “engages in any of the investment strategies, trading strategies or any other business activities identical or similar to any of those engaged in by Citadel.” (Complt. Exhs. 4-5 & ¶ 1(c), emphasis added).

There is no allegation in the Complaint that Teza is engaging in any such investment or trading strategies, or indeed, any business at all.¹ As the Illinois Appellate Court has recognized, the term “business activities” in this context does not include efforts to plan, form, and outfit a competing corporation. In *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160 (1st Dist. 1993), the court clearly distinguished a former employee’s right to “plan, form, and outfit a competing corporation” (which was permitted) from “demonstrable *business activity* by the former employee” (which was not permitted). Similarly, in *Dowell v. Bitner*, 273 Ill. App. 3d 681, 691 (4th Dist. 1995), the court concluded that “employees may plan, form, and outfit a competing corporation . . . , but they may not commence competition,” which means there may be “no demonstrable *business activities*.”² “Preparation” is indisputably not a competitive “business activity.” See *Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman*, 368 Ill. App. 3d 353, 360-62 (1st Dist. 2006); *James C. Wilborn & Sons, Inc. v. Heniff*, 95 Ill. App. 2d 155, 163 (1st Dist. 1968); *Exhibit Works, Inc. v. Inspired Exhibits, Inc.*, 2005 WL 3527254, *5 (N.D. Ill. Dec. 21,

¹ There is a good reason why Citadel does not make such an allegation--because it would be completely false to suggest that Teza is engaged in any investment or trading.

² In addition to its plain meaning, the term “business activity” in the non-compete must be read in conjunction with rest of the sentence, which clearly relates to actual ongoing business (e.g. investment, trading, investment banking, sales of services) engaged in by Citadel. See *Paul B. Episcopo, Ltd. v. Law Offices Of Campbell and Divincenzo*, 373 Ill. App. 3d 384, 390 (1st Dist. 2007) (at the end of a list, “‘other’ will generally be read as to [mean] other such like” things and will not “extend to things of a different quality”); *Save Our Little Vermillion Env’t, Inc. v. Illinois Cement Co.*, 311 Ill. App. 3d 747, 752 (3d Dist. 2000) (“where general words follow an enumeration of specific things of a particular class, the general words are to be construed as applying only to things of the same general class”).

2005); *Lawter Int'l, Inc. v. Carroll*, 116 Ill. App. 3d 717, 733-34 (1st Dist. 1983); *Maryland Metals, Inc. v. Metzner*, 382 A.2d 564, 570-73 (Md. 1978). In short, the non-compete agreements at issue do not even purport to preclude preparation to compete, which is all the Complaint alleges has occurred here.

B. Citadel's Interpretation of the Non-Compete Agreements Is Unenforceable.

It is little wonder that the non-competes here do not purport to proscribe preparatory steps. "In Illinois, restrictive covenants [like the Non-Compete Agreement] are disfavored in the law and closely scrutinized because they are repugnant to the public policy encouraging an open and competitive marketplace." *See Roberge v. Qualiteck Int'l, Inc.*, 2002 WL 109360, *4-5 (N.D. Ill. Jan. 28, 2002). Contractual provisions that are repugnant to public policy are unenforceable. *E.g. Peterson-Jorwic Group, Inc. v. Pecora*, 224 Ill. App. 3d 460, 462 (1st Dist. 1991) (non-compete agreements "will be enforced only if ... necessary to protect a legitimate business interest" and are not "contrary to public policy").

Thus, even if the non-competes were somehow construed to forbid preparatory steps like those taken by the defendants, which they do not, the agreements would be unenforceable under clear Illinois public policy that allows and endorses preparatory competitive steps, even by current employees who have a fiduciary duty to their employers. *See supra* at 4-7. For example, in *Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1007 (1st Dist. 1998), the First District held that "[a]lthough defendant is not . . . competing . . . , plaintiff still seeks to restrain his employment. In our view, such restriction is unreasonable and a violation of public policy." *See also Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 452 (1st Dist. 2007) (non-compete was unenforceable because it was "broader than necessary to protect the employer's legitimate business interests"); *Roberge*, 2002 WL 109360, at *4 (N.D. Ill. Jan. 28, 2002) (non-compete agreement prohibiting employee from working for any competitor was too broad to protect employer's legitimate interests).

Count I fails to state a claim upon which relief may be granted.

II. Citadel's Claims For Breach of the Non-Disclosure Agreement (Count II) and Trade Secret Misappropriation (Count IV) Fail As a Matter of Law Because Citadel Has Not Identified Any Alleged Trade Secrets or Confidential Information.

Under long-established Illinois law, a plaintiff cannot state a trade secret misappropriation claim without identifying the trade secret at issue with sufficient specificity to allow the defendants to answer and prepare for their defense. For example, in *Louis Milani Foods v. Scharf*, 335 Ill. App. 569 (1st Dist. 1948), the Court recognized that “[i]n actions to enjoin [a] former employee . . . from using plaintiff’s trade secrets,” a plaintiff could not rely on an “allegation that all of plaintiff’s formulas were trade secrets unsupported by any other allegations.”

Indeed, even under the far more liberal notice-pleading standard, federal courts applying Illinois law consistently dismiss trade secret claims pled without specificity because “[i]t is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated. The plaintiff must show concrete secrets.” *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992). For example, in *Thermal Zone Products Corp. v. Echo Engineering, Ltd.*, 1993 WL 358148, at *6 (N.D. Ill. Sep. 14, 1993), the court dismissed the plaintiffs’ claim under the Illinois Trade Secrets Act because the plaintiffs did not specifically “defin[e] certain pieces of information as trade secrets.” The court explained that “[a]lthough Plaintiffs have made blanket generalizations regarding the information and documentation of their cooking ovens, they have failed to specify with any exactitude which pieces of information actually constitute trade secrets.” *Id.* at *5.

Similarly, in *Combined Metals of Chicago, Ltd. v. Airtek, Inc.*, 985 F. Supp. 827, 832-33 (N.D. Ill. 1997), the court held that a plaintiff could not state a claim by describing trade secrets as “the knowledge of producing the catalytic converter shells used to build and develop” the plaintiff’s product. In *AMP Inc. v. Fleischhacker*, 823 F.2d 1199, 1203 (7th Cir. 1987), the Seventh Circuit held that plaintiff could not sustain a trade secret claim by identifying a six-page typed list of categories of information. There are, in fact, countless cases where a trade secret claim was dismissed because the plaintiff did not identify the purported trade secret with

sufficient specificity. *See, e.g., Lear Siegler, Inc. v. Glass Plastics Corp.*, 1987 WL 15749, at *1-2 (N.D. Ill. Aug. 12, 1987) (not sufficient to describe trade secrets as “technical drawings of a traffic barrel,” “marketing information, including the size of the market for the barrel, the increasing volume of sale, production costs, and the identities of its customers”); *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 672 (N.D. Ill. 1997) (Plaintiff “cannot state a claim for trade secret protection . . . by simply producing long lists of general areas of information which contain unidentified trade secrets.”).

The same standards apply to claims under non-disclosure agreements. In *Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 2009 WL 362118, at *5 (S.D.N.Y. Feb. 9, 2009), the court dismissed a breach of a confidentiality agreement claim because “plaintiff’s allegations fail[ed] to identify any confidential information that D.E. Shaw misused in conducting its negotiations [to purchase securities], or that defendant relied upon in making its failed bid.” Similarly, in *Tactica Intern., Inc. v. Atlantic Horizon Intern., Inc.*, 154 F. Supp. 2d 586, 607-08 (S.D.N.Y. 2001), the plaintiff sought an injunction based on the claim that “[i]n using Tactica’s confidential price, discount and volume information, [the defendants] breached [confidentiality] agreements.” The court denied plaintiff’s request for an injunction because those “vague allegations” did not provide a detailed description of the specific information that defendant could not disclose. *Id.*

Citadel’s Complaint abjectly fails these fundamental standards. Nowhere does it identify Citadel’s trade secrets or confidential information, let alone allege that they have been taken by any of the defendants. The best that Citadel offers is its conclusion that defendants have “breached, and will continue to breach the Non-Disclosure Agreement” and its description of *categories* of information to which Malyshev and Kohlmeier were exposed: “statistical and mathematical models, signals, methods for identifying signals, and algorithms used in Citadel’s high frequency trading.” (Compl. ¶¶ 77, 89). Thus, Citadel has done nothing more than “point to broad areas of technology and assert that something there must have been secret and misappropriated.” *Composite Marine*, 962 F.2d at 1266.

Citadel cannot be alleging that *all* strategies, signals, and algorithms used in high-frequency trading are its trade secrets. In *Wilmington Trust Co. v. Consistent Asset Mgmt. Co., Inc.*, 1987 WL 8459, at *6 (Del. Ch. March 25, 1987), the court denied an injunction against a former employee, holding: “Because [plaintiff] does not and surely could not claim as its trade secret all floating average models designed to generate buy or sell signals, Hudson's knowledge relating to how such models may be created and how they function must be regarded as part of his general skill and knowledge that may be utilized by him whatever his employment.” This conclusion applies with equal force here, as companies engaged in high-frequency trading before Citadel and dozens more do so now. Conversely, there may be many strategies, signals, and algorithms that are known to Citadel, and that Citadel claims as a trade secret, but have never been known to defendants, and could not possibly be misappropriated by defendants. Unless Citadel identifies its alleged trade secrets and confidential information with greater specificity, defendants will not have a fair opportunity to respond to the allegations against them and this Court will not have an opportunity to properly evaluate Citadel’s onerous demand that defendants never be allowed to join the high-frequency trading marketplace because they once worked at Citadel.

Citadel also does not come close to properly alleging that defendants misappropriated or disclosed *anything*. See *Composite Marine*, 962 F.2d at 1265-66 (plaintiff must show that trade secret was “misappropriated”); *Alpha School Bus Co. v. Wagner*, 2009 WL 1373149, at *12 (Ill. App. Ct. May 15, 2009) (same). Indeed, it does not allege a single instance -- even generally -- where any defendant used or disclosed any confidential or trade secret information. Counts II and IV should be dismissed.

III. Counts III, V And VI Should Be Dismissed Because They Are Not Supported by Factual Allegations.

Counts III, V, and VI fail to state a claim because they are not supported by well-pled factual allegations. It is well settled that “[b]ecause Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim.” *Napleton v.*

Village of Hinsdale, 229 Ill. 2d 296, 305 (2008). A complaint “must give notice to the defendant of the *specific manner* he has allegedly harmed the plaintiff so as to enable him to formulate an answer and prepare for trial.” *Gonzalez v. Thorek Hosp. and Med. Ctr.*, 186 Ill. App. 3d 648, 651 (1st Dist. 1989); *Parra v. Taraco, Inc.*, 230 Ill. App. 3d 819, 827 (1st Dist. 1992) (complaint must contain sufficient factual averments and set out every essential fact).

A plaintiff seeking injunctive relief is held to an even higher standard. *Hadley v. Dept. of Corrections*, 362 Ill. App. 3d 680, 684 (4th Dist. 2005). “A complaint for injunctive relief must contain on its face a clear right to relief and state facts which establish the right to such relief in a positive, certain, and precise manner.” *Heerey v. Berke*, 179 Ill. App. 3d 927, 939 (1st Dist. 1989). It “cannot present mere conclusions unsubstantiated by facts.” *Belden v. Tri-Star Producing Co.*, 106 Ill. App. 3d 192, 202 (5th Dist. 1982).

Because an injunction is an extraordinary remedy, “conclusions, opinion, or *allegations on information and belief* are not sufficient to support a claim for injunctive relief.” *Heerey*, 179 Ill. App. 3d at 939 (emphasis added). *See also, McErlean v. Harvey Area Cmty. Org.*, 9 Ill. App. 3d 527, 529 (1st Dist. 1972) (plaintiff cannot obtain injunction based on “opinion conclusion, or belief”). “[A]llegations verified on information and belief are insufficient to support an injunction order.” *Hope v. Hope*, 350 Ill. App. 190, 194 (1st Dist. 1953).

Based on these standards, dismissal is appropriate under Rule 2-615 when a complaint for injunctive relief relies on “information and belief” allegations, and conclusions of law or fact unsupported by specific factual allegations. 735 ILCS 5/2–615; *Shaper v. Bryan*, 371 Ill. App. 3d 1079, 1086 (1st Dist. 2007). These principles compel the dismissal of Counts III, V, and VI.

A. Citadel’s Claims For Breach of the Non-Solicitation Agreement (Count III) and Breach of Fiduciary Duty (Count V) Should Be Dismissed Because They Are Not Supported By Any Factual Allegations.

Count III alleges that Malyshev and Kohlmeier breached their Non-Solicitation Agreements with Citadel, and Count V alleges that the individual defendants breached their fiduciary duties to Citadel. (Complt. ¶¶ 82-85, 97-98.) But Citadel sets forth *no* facts to support those claims.

A plaintiff asserting a claim for breach of fiduciary duty or breach of a non-solicitation agreement must set out specific facts that give rise to its cause of action. *Flexible Fin. Mktg., Inc. v. McGarry*, 2004 WL 3269809, at *2 (Ill. Cir. Jan. 15, 2004) (dismissing fiduciary duty claim because allegations were “not specific facts, but . . . conclusions”); *Dangeles v. Muhlenfeld*, 191 Ill. App. 3d 791, 797 (2d Dist. 1989) (dismissing claim based on conclusory allegations that defendant “misappropriated funds and other personal property belonging to the plaintiff”); *Government Relations Inc. v. Howe*, 2007 WL 201264, at *11 (D.D.C. Jan. 24, 2007) (applying less rigorous standard than that found in Illinois, yet dismissing plaintiff’s breach of fiduciary claims because he did not set forth specific facts, only “blanket allegations”).

Here, Citadel’s conclusory allegations do not come close to meeting the requirements of Illinois law. Citadel does not assert *any* facts supporting its conclusion that Malyshev and Kohlmeier solicited Citadel employees. Nor does Citadel allege a single fact supporting its “belief” that Malyshev and Kohlmeier solicited each other. (Complt. ¶¶ 57, 82, 84.) There is no allegation, for example, about what statements or other actions rose to the level of solicitation, when these supposed discussions occurred, or what was discussed. Nor has Citadel identified a single other Citadel employee solicited by any individual defendant. Citadel cannot seek a permanent injunction preventing Malyshev and Kohlmeier from ever again engaging in high-frequency trading based on its “information and belief,” *Heerey*, 179 Ill. App. 3d at 939, or on unsupported conclusions. *See, e.g., Dangeles v. Muhlenfeld*, 191 Ill. App. 3d 791, 796 (2d Dist. 1990) (dismissing complaint alleging that former employee induced other employees to quit); *Riad v. 520 S. Michigan Ave. Assocs., Ltd.*, 2000 WL 680217, *8 (N.D. Ill. May 22, 2000) (employee allowed to have “conversations about future plans” with co-workers); *Cooper Linse Hallman*, 368 Ill. App. 3d at 358, 361-62 (employees did not breach fiduciary duties by “solicit[ing] fellow employees”).

Citadel’s allegations relating to disparaging statements are similarly deficient. Citadel has not identified a single disparaging statement made by any defendant, any person to whom

any defendant allegedly made any disparaging statement, or even when any of these statements were supposedly made. Citadel has not remotely satisfied its burden of pleading this claim.

Finally, Citadel's claim that Hinerfeld allegedly acted contrary to the interests of his former client are wholly unsupported. There is not a single instance identified in the Complaint in which Hinerfeld acted contrary to his obligations to Citadel. (See Compl. ¶¶ 60, 98.) Without factual allegations, Counts III and V should be dismissed.

B. Citadel's Claim For Tortious Interference With Existing Contracts (Count VI) Should Be Dismissed Because It Is Based On Conclusory Allegations.

Without allegations showing that any defendant breached any agreement, Citadel cannot show that any defendant tortiously interfered with any contract. See *Wheel Masters, Inc. v. Jiffy Metal Products Co.*, 955 F.2d 1126 (7th Cir. 1992) ("in a tortious interference with contract claim, the plaintiff must produce evidence proving [one of the defendant's] . . . breached the [a]greement"). But Citadel's claim for tortious interference fails for yet another reason: like many of Citadel's other claims, it is based on conclusory and information and belief allegations that are insufficient as a matter of law.

To state a claim for tortious interference with contract, Citadel "must recite specific facts" demonstrating that each individual defendant "intentionally and maliciously induced the breach of that contract." See *Gold v. Wolpert*, 876 F.2d 1327, 1332 (7th Cir. 1989) (dismissing tortious interference claim for failure to recite specific facts). Similarly, in *Exchange National Bank v. Farm Bureau Life Ins.*, 108 Ill. App. 3d 212, 214-15 (3d Dist. 1982), the court dismissed a tortious interference claim because the complaint did "not relate any facts which indicate that defendants' conduct was to intentionally induce a breach of contract Without a factual basis indicating how defendants' conduct was intentional, [defendants] could not be the legal cause of any contractual interference."

Citadel's allegations are no better than those in *Gold* and *Exchange National Bank*. Citadel alleges that "each individual defendant intentionally and unjustifiably induced the other individual defendants to breach his Non-Compete, Non-Disclosure Agreement and/or Non-

Solicitation Agreement with Citadel” (Complt. ¶ 105), but wholly fails to identify a single fact demonstrating that any of the individual defendants acted “intentionally and unjustifiably.” Indeed, with regard to Hinerfeld, the Complaint completely fails to even try to demonstrate any intentional effort to induce any other person to breach a contract. (Complt. ¶¶ 55, 57.)

As for Malyshev and Kohlmeier, Citadel has asserted a series of conclusions and information and belief allegations regarding their activities (*see* Complt. ¶¶ 53, 55, 57, 60), none of which can be considered in support of a request for injunctive relief. *McErlean*, 9 Ill. App. 3d at 529. But even if they were considered, none would be sufficient to prove that either of them intentionally or unjustifiably induced any breach of contract by any other person. *See Kraft Chem. Co. v. Illinois Bell Tel. Co.*, 240 Ill. App. 3d 192, 198 (1st Dist. 1992) (dismissing tortious interference claim based on “conclusory” allegations “unsupported by specific facts”).

Citadel cannot enjoin the legitimate activities of Malyshev, Kohlmeier, and Hinerfeld based on Citadel’s suspicion, belief, and conclusions. It must support its claims with well-plead facts, and it has entirely failed to do so. Count VI should be dismissed.

Respectfully submitted,

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