

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

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HENNEPIN CO. DISTRICT COURT ADMIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT  
CASE TYPE: OTHER CIVIL

TELLURIDE ASSET MANAGEMENT, LLC,  
a Delaware Limited Liability Company,  
Plaintiff,

Court File No.: 04-017921

vs.

**CONSENT JUDGMENT**

STANLEY ZHENG,

Defendant.

**STIPULATED ORDER OF DISMISSAL  
AND CONSENT JUDGMENT**

The parties by their undersigned counsel stipulate, subject to the approval of the Court, as follows:

1. On December 2, 2004, Plaintiff Telluride Asset Management, LLC ("Telluride" or "the company") commenced this action against Defendant Stanley Xu Zheng, Ph.D. ("Zheng").
2. The parties have agreed to a voluntary settlement of this matter in accordance with the terms of a Confidential Settlement Agreement dated as of December 13, 2004. In accordance with that agreement, defendant Zheng consents to the entry of the Consent Judgment contained herein.
3. The Court has determined that there is good cause to enter the Consent Judgment, based upon the pleadings.

4. The parties acknowledge, and the Court so finds, that this Court has jurisdiction over the parties and the subject matter of this action.

5. Defendant Zheng acknowledges that on or about June 10, 2004 he entered into a valid and enforceable Employment Agreement with Telluride wherein defendant agreed to return all property of the company to Telluride upon his termination of employment.

6. Defendant Zheng also acknowledges under the terms of the Employment Agreement he agreed that he would not use or disclose Telluride's confidential information upon termination of employment. He further agreed that upon termination of employment with Telluride, he would unconditionally surrender to Telluride all confidential information and company property.

7. Defendant Zheng acknowledges that under the terms of the Employment Agreement, the "4 Sharpe Ratio strategy," as defined by the parties Settlement Agreement, conceived or developed by Zheng while at Telluride is the property of Telluride.

8. Upon entry of the Consent Judgment contained herein, Plaintiff Telluride agrees to seek withdrawal with prejudice of its claims in this action against Zheng.

#### CONSENT JUDGMENT

9. Defendant Zheng shall:

a. Return to Telluride no later than five (5) business days from the date of entry of this Order, all of Telluride's property ("the property") in his possession or control, including but not limited to documents and electronic files, credit cards, keys, software, computer data, records or any other materials, including all documents which were sent from Telluride's computer to Zheng's personal e-mail account. Zheng shall immediately upon returning the property, destroy any and all copies of the property. Zheng warrants and represents

that copies of the above property are not in the possession of any third-party, and that he has not disclosed the above property to any third-party.

b. Deliver to Telluride, no later than ten (10) business days from the date of this Order, a full and complete written summary of the "4 Sharpe Ratio strategy," including, but not limited to, any derivation thereof, all theoretical models used in developing the theory, the equations and theory surrounding those equations, any known flaws in the theory, and any and all other information regarding the "4 Sharpe Ratio strategy" and its future success or viability as a trading analysis tool.

c. Deliver a signed affidavit (i) specifically acknowledging that the written description of the "4 Sharpe Ratio strategy" set forth in paragraph "b" above, is a complete and accurate representation of the current status of the underlying theory; and (ii) acknowledging that he has returned all of Telluride's property, including computer files, to Telluride, has not disclosed any such information to any third-party, and has not maintained copies of any such information.

d. If deemed necessary by Telluride, make himself available to Telluride for a deposition solely related to the "4 Sharpe Ratio" Strategy, or any derivation thereof, or to provide a written response within 5 business days to any Telluride request for clarification or explanation of the strategy.

10. Defendant Zheng shall be enjoined from using any invention, discovery, computer software programs, trade concepts, designs, patents, ideas, and copyrightable and/or patentable materials made, conceived or developed by him while employed by Telluride.

11. The Court retains continuing jurisdiction to enforce this Consent Judgment and the Settlement Agreement.

**ORDER OF DISMISSAL**

- 12. Plaintiff's Complaint is dismissed with prejudice.
- 13. All costs of court shall be paid by the party that incurred them.

**LET THE JUDGMENT BE ENTERED ACCORDINGLY**

*mjk*  
*January 7, 2004*  
Dated: ~~December 15, 2004~~

BY THE COURT

*Marilyn Johnson-Koman*  
Judge of the Hennepin County District Court

**TELLURIDE ASSET MANAGEMENT LLC**

By: *Mark Kuy* 12-23-04

Its: Chief Operating Officer

**STANLEY XU ZHENG, Ph.D.**

*Stanley Xu Zheng*, 12/21/04

I hereby certify that the order of Dismissal contained in this document shall constitute the Judgment of this Court.

District Court Administrator  
By *[Signature]* Deputy

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

FILED FOR  
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 04 DEC 17 AM 9:08  
 BY HENNEPIN COUNTY DEPUTY  
 HENNEPIN COUNTY DEPUTY  
 COURT DEPUTY

Telluride Asset Management, LLC, a  
Delaware Limited Liability Company,

Court File No. 04-17921  
Judge Marilyn Justman Kaman

Plaintiff,

v.

Stanley Xu Zheng, Ph.D.,

Defendant.

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**MEMORANDUM OF LAW  
 IN OPPOSITION TO  
 PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION OR, IN THE  
 ALTERNATIVE, TEMPORARY RESTRAINING ORDER**

*"More than a risk of irreparable harm must be demonstrated ... [an injunction] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights ... [i]njunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties."*

*-International Business Mach. Corp. v. Seagate Technology, Inc., 941 F. Supp. 98 (D. Minn. 1992).*

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## INTRODUCTION

Defendant Stanley Xu Zheng, Ph.D., (“Dr. Zheng”) submits this Memorandum of Law in Opposition to Plaintiff Telluride Asset Management LLC’s (“Telluride”) Motion for a Temporary Injunction or, in the Alternative, a Temporary Restraining Order. This Court should deny Plaintiff’s motion because Telluride has failed to allege sufficient facts that would justify the imposition of any injunctive relief and because Telluride cannot meet the “five factors” set forth under the *Dahlberg* test. Additionally, Plaintiff’s request that Dr. Zheng be enjoined from violating provisions of his Employment Agreement with Telluride is overreaching, as Dr. Zheng is already contractually bound to abide by its terms and Telluride would have an adequate remedy if any breach is proven.

Dr. Zheng is a highly-educated and skilled economist who holds a Ph.D. from Princeton University. See Affidavit of Dr. Stanley Xu Zheng (“*Zheng Affidavit*”), attached hereto. From 1992 to 2000, Dr. Zheng held the position of Assistant Professor in the Department of Economics at the University of Texas-Austin. *Id.* at ¶ 2. From the five (5) month period of June 10, 2004 to November 16, 2004, Dr. Zheng was employed by Telluride as a Portfolio Manager Manager. *Id.* at ¶ 4. In that position, Dr. Zheng was responsible for managing investment portfolios and trading stocks. *Id.* at ¶ 5. On or about November 15, 2004, Dr. Zheng gave verbal notice to Peter Hajas, CEO of Telluride, that he would be leaving the company to begin employment in New York City, New York.

Within two weeks of Dr. Zheng’s resignation, Telluride initiated this lawsuit seeking, *inter alia*, injunctive relief. However, Telluride has failed to describe with particularity the specific “trade secret” it seeks to protect, and cannot satisfy the relevant five factors under *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965) to demonstrate entitlement to an injunction. Similarly, Telluride also fails to adequately describe the content of

the computer files Dr. Zheng allegedly e-mailed to himself so as to permit this Court to assess whether Telluride's allegations, even if true, warrant the issuance of injunctive relief. The allegations in the Complaint, without more, allege a simple breach of contract and should be treated as such. Accordingly, this Court should deny Telluride's motion. In the alternative, this Court should simply set this matter for an expedited settlement conference so as to facilitate resolution without undue expense to either party.

### LEGAL STANDARD

The trial court has the discretion on whether to grant an injunction. *Cherne Indus., Inc. v. Grounds Assoc. Inc.*, 278 N.W.2d 81, 91 (Minn. 1973). It is the plaintiff's burden to show the requested injunction is necessary to prevent irreparable injury and that the available legal remedy is not adequate. *Id.* at 92. Minnesota Courts then use a five factor test to decide whether to grant injunctive relief: (1) the nature of the relationship between the parties before the dispute;<sup>1</sup> (2) the likelihood that the moving party will prevail on the merits; (3) the moving party's harm if the injunction is denied compared to harm to the nonmoving party if injunction is granted; (4) public policy considerations triggered by the fact situation; and (5) administrative burdens to supervise or enforce the injunction. *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965); *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. Ct. App. 1999); *Eason v. Independent School Dist. No. 11*, 598 N.W.2d 414, 417 (Minn. Ct. App. 1999). Telluride, by requesting the injunctive relief, bears the complete burden of proving all the factors listed above. *Lindberg v. Gebo*, 381 N.W.2d 905, 907 (Minn. Ct. App. 1986). "A temporary injunction is an extraordinary equitable remedy that preserves the status quo pending a trial on the merits." *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 294 (Minn. Ct.

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<sup>1</sup> Dr. Zheng does not contest the validity of his contract with Telluride.

App. 1995) (quoting *Central Lakes Educ. Ass'n v. Independent Sch. Dist. No. 743*, 411 N.W.2d 875, 878 (Minn. Ct. App. 1987)); *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. Ct. App. 1999). “Injunctive relief should be awarded only in clear cases, reasonably free from doubt \* \* \*.” *Sunny Fresh Foods, Inc. v. MicroFresh Foods Corp.*, 424 N.W.2d 309, 310 (Minn. Ct. App. 1988) (quoting *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348, 351 (1961)).

Having failed to establish any of the elements for an injunction as set forth below, Telluride has utterly failed to meet its burden.

## ARGUMENT

### **I. Telluride Cannot Succeed on the Merits Because it Cannot Prove Irreparable Harm.**

#### **A. Telluride Admits No Harm or Disclosure Has Occurred.**

As a threshold matter, Telluride fails to establish irreparable harm to warrant the extraordinary remedy of injunctive relief. “It is well-established that the failure to show irreparable harm is, by itself, a sufficient ground upon which to deny an injunction.” *See e.g., Carl Bolander & Sons Co. v. City of Minneapolis*, 488 N.W.2d 804, 811 (Minn. Ct. App. 1992); *Morse v. City of Waterville*, 458 N.W.2d 728, (Minn. Ct. App. 1990). A temporary injunction should be issued “only when it is clear that the rights of the party will be irreparably injured before trial on the merits can be held.” *Webb Publishing Co. v. Fosshage*, 426 N.W.2d 445, 448 (Minn. Ct. App. 1988) (citing *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982)).

Telluride admits that Dr. Zheng has not disclosed any of the relevant information, whether confidential or otherwise. In its motion, Telluride states:

Telluride cannot afford to wait until its valuable and proprietary information is used by or disclosed to a competitor to be more severely damaged by Zheng’s conduct.

See Plaintiff's Memorandum of Law at 2. Further, Telluride states:

If a competitor gained access to this information, it would receive an unfair competitive advantage since it has not devoted the substantial resources to develop the information.

See *id.* at 11. Additionally, Telluride warns:

If Zheng is allowed to unlawfully compete, Telluride will lose the benefit of its contract, valuable confidential and proprietary information, goodwill, market position and, ultimately, its existing and potential customers.

See *id.* at 15.

Under Minnesota law, Telluride must wait until a disclosure has occurred (or at least allege as much, which Telluride has not done) in order to show an entitlement to injunctive relief. See *International Business Mach. Corp. v. Seagate Technology, Inc.*, 941 F. Supp. 98, 101 (D. Minn. 1992) (Injunction denied where plaintiff failed to prove that any disclosure of confidential information had occurred; mere possession of company's information, without more, cannot justify injunction). The *Seagate* court makes it clear that Telluride should not be permitted to secure an injunction against Dr. Zheng based on the facts it has alleged. There, the court stated:

"More than a risk of irreparable harm must be demonstrated ... [an injunction] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights ... [i]njunctive relief will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties."

*Seagate*, 941 F. Supp. at 101 The only allegations Telluride makes in support of its argument of irreparable harm is that "...Zheng e-mailed at least 171 computer spreadsheets, databases, and other files to himself." Plaintiff's Memorandum of Law at 9 (emphasis added). Telluride has not alleged that Dr. Zheng has disclosed these files, whether confidential or not, to any third party. In fact, such files are not confidential information, but publicly-available data on stock

performance history, Dr. Zheng's personal information. See *Zheng Affidavit* at ¶ 12. Telluride cannot show that it has been harmed by Dr. Zheng's e-mailing of documents to himself.

**B. Irreparable Harm Cannot Be Inferred Under Minnesota Law.**

Telluride argues that irreparable harm is demonstrated by Zheng's consent to the non-compete agreement. This argument has no merit and should be rejected by this Court.

Irreparable harm cannot be inferred in non-compete cases unless the competition follows the sale of a business. *Rosewood Mortgage Corp. v. Hefty*, 383 N.W.2d 456, 459 (Minn. Ct. App. 1986) ("Irreparable harm to an employer from a former employee's competing business is generally not inferred, as it is where competition follows the sale of a business."). Irreparable harm only exists when monetary damages cannot adequately remedy the party. Under Minnesota law, damages must be proven in order to demonstrate an entitlement to injunctive relief. See *Luigino's Inc. v. Peterson*, 317 F.3d 909 (8<sup>th</sup> Cir. 2003) (Injunction denied where frozen food producer could not demonstrate harm or that former employee used any confidential information); *B&Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813 (Minn. 1979). Speculative damages cannot justify injunctive relief. See *I.S.D. No. 35 v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966). In the case cited by Telluride for this proposition, *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405 (N.D. Iowa 1996) (see Plaintiff's Memorandum of Law at 14-15), the federal District Court for the Northern District of Iowa applied Iowa state law sitting in diversity in a dispute involving parties from Iowa, Virginia, and Illinois. Here, Telluride apparently asks this Court to apply Iowa state law to this dispute. Such request should not be granted, as Minnesota law does not permit injunctive relief without a showing of damages.

Additionally, the *Swindle* case cited by Plaintiff is factually distinguishable and has no bearing on the instant motion. In *N.I.S. Corp. v. Swindle*, 724 F.2d 707 (8<sup>th</sup> Cir. 1984), the Eighth Circuit Court of Appeals applied Missouri law and upheld the issuance of injunctive

relief. There, former employees admitted to having actively solicited business from their former employer. *Id.* Here, Telluride has not alleged that Dr. Zheng has any affirmative steps to compete, disclose any confidential information, or otherwise harm Telluride's business. Dr. Zheng has not engaged in any conduct that would warrant the issuance of a temporary injunction. Because Telluride has not made a *prima facie* showing of damages as to Dr. Zheng's alleged actions, this Court should deny Plaintiff's motion.

**C. Monetary Relief Can Remedy Any Claimed Damages**

Because monetary relief can adequately remedy any claimed wrongdoing here, irreparable harm is lacking as a matter of law. Therefore, injunctive relief must be denied without even considering the "five factors" under the *Dahlberg* case.

**II. Telluride Cannot Succeed on the Merits Because it Has Failed to Describe the "Trade Secret" it Seeks to Protect.**

In its pleadings, Telluride has not identified exactly what constitutes a "trade secret" sought to be protected by this lawsuit. Accordingly, Telluride cannot succeed on the merits of a claim under the Minnesota Uniform Trade Secrets Act ("MUTSA").

In an action for misappropriation of trade secrets under the Minnesota Uniform Trade Secrets Act, the plaintiff must specify what information it seeks to protect. *Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.3d 329 (8<sup>th</sup> Cir. 2003). Without a proven trade secret, there can be no action for misappropriation. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983). An injunction is not appropriate without a showing of trade secret status or likelihood that an employee would disclose any trade secret. *International Business Mach. Corp. v. Seagate Technology, Inc.*, 941 F. Supp. 98 (D. Minn. 1992).

Here, Telluride has presented this Court with two general descriptions of alleged trade secrets: 1) files sent by Dr. Zheng to himself via e-mail; and 2) a trading strategy Telluride calls a “4 Sharpe strategy.” Yet, Telluride’s pleadings are absolutely devoid of any further description of exactly what “trade secrets” it seeks to protect. In fact, these files are not confidential at all, and the information they contain (with the exception of Dr. Zheng’s own personal information) is readily available to the public. See *Zheng Affidavit* at ¶ 11. Information that is publicly available cannot be treated as a trade secret. *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950 (D. Minn. 1991); *Ikon Office Solutions, Inc. v. Dale*, 2001 WL 1269994 (D. Minn. 2001) (information that is generally known or readily ascertainable to the public does not qualify for protection via injunction) (unpublished), attached to *Pearson Affidavit* as Exhibit A; see generally *Seagate*, 941 F. Supp. at 100-101 (“long lists of general areas of information which contain unidentified trade secrets” cannot establish the existence of actual trade secrets). Telluride’s pleadings are completely insufficient to satisfy the definition of a trade secret because “mere variations on widely used [information] cannot be trade secrets” and “Simply to assert a trade secret resides in some combination of otherwise known data, is not sufficient.” *Strategic Directions Group, Inc. v. Bristol-Myers Squibb Co.*, 293 F.3d 1062, 1065 (8<sup>th</sup> Cir. 2002); See *Zheng Affidavit* at ¶ 6-10

In fact, this lawsuit, though in its very early stages, is similar to two notable, yet unreported, Minnesota trade secret cases. In *Harris Waste Management, Inc. v. Forrest Wildes*, Judge M. Michael Monahan issued sanctions of \$68,121 against a plaintiff that sought injunctive relief, yet could not, over a two year period, describe the trade secrets that allegedly formed the basis of that litigation. Judge Monahan stated:

There was no information in Plaintiff’s possession from which it could have reasonably concluded that Defendants had misappropriated any trade secrets, no information that Defendants were using or had disclosed any of Plaintiff’s business data. This allegation was based solely on the fact that the business data

resided in Defendants' mind on Plaintiff's assumption that Defendants might misappropriate it.

See *Harris Waste Management, Inc. v. Forrest Wildes*, Court File No. CO-95-6168 (J. Monahan, October 24, 1997) (unpublished) (Order and Memorandum) at 11, attached to *Pearson Affidavit* as Exhibit B.

Also, *Associated Lithographers, Inc. v. Maximum Graphics, Inc.*, is also instructive on Telluride's claims. There, the Court stated:

ALI also argues that Warner has or threatens to misappropriate trade secrets, including confidential information related to customer lists, customers needs, prior work performed for customers, and other general information concerning ALI's customers. ALI has failed to establish that these are trade secrets. Moreover, there is no evidence that Warner has or threatens to misappropriate any trade secret or confidential information. ALI acknowledges that on August 5, 1998, Warner has returned to ALI the floppy disks, business cards, and ALI internal documents. There is no evidence that Warner is in possession fo any ALI property. ALI has not met its burden to establish any evidence of an actual or threatened misappropriation of trade secret by Warner. Therefore, ALI is not entitled to a temporary injunction on this basis.

See *Associated Lithographers, Inc. v. Maximum Graphics, Inc.*, Court File No. CT 98-11405 (J. Philip D. Bush, Hennepin County Dist. Ct., Nov. 4, 1998) (unpublished) (Order and Memorandum) at 11, attached to *Pearson Affidavit* as Exhibit C. As one court suggested, an employee need not be required to "perform a prefrontal lobotomy on himself or herself" in order to return all information and skill to an employer upon departure. *Fleming Sales Co., Inc. v. Bailey*, 611 F.Supp. 507, 514 (N.D. Ill. 1985). Here, Telluride's request that this Court issue an injunction upon Dr. Zheng for an alleged trade secret that Telluride itself cannot articulate is unreasonable and should not be granted.

Without describing the information sought to be protected, it is without precedent for Telluride to petition this Court to issue an injunction. Telluride's conclusory allegations of "trade secrets" and "valuable and proprietary information," and "highly sensitive, confidential

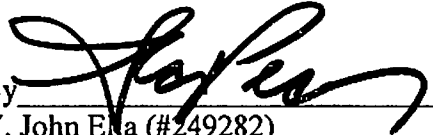
and valuable financial information and investment strategies” cannot, without more, rise to the legal standard necessary to sustain Plaintiff’s burden under *Dahlberg*. As such, Plaintiff has not demonstrated that it will succeed on the merits of its trade secrets claim (Count III). This Court should deny the instant motion.

### CONCLUSION

For the above reasons, this Court should deny Plaintiff Telluride’s Motion for a Temporary Injunction, or in the Alternative a Temporary Restraining Order.

MANSFIELD, TANICK & COHEN, P.A.

Dated: December 13, 2004.

By   
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