



SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Dept. No. 16

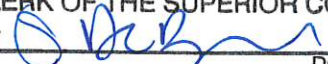
Date: 7/30/2021

Hon. MICHAEL MARKMAN, Judge

FILED
ALAMEDA COUNTY

JUL 30 2021

CLERK OF THE SUPERIOR COURT

By  Deputy

KYTCH, INC.,

Plaintiff,

v.

JONATHN TYLER GAMBLE; J.L. GAMBLE
MANAGEMENT LLC; TFGROUP LLC; AND
TAYLOR COMMERCIAL FOODSERVICE, LLC
DBA TAYLOR COMPANY,

Defendants.

Case Nos. RG21099155

ORDERS ON APPLICATION FOR
TEMPORARY RESTRAINING ORDER;
MOTIONS TO SEAL; and
EXPEDITED DISCOVERY

APPLICATION FOR TEMPORARY RESTRAINING ORDER

I. OVERVIEW

Plaintiff Kytch, Inc. ("Kytch") seeks a Temporary Restraining Order ("TRO") and an Order to Show Cause why a preliminary injunction should not issue against Defendants Tyler Gamble, JL Gamble Mangement LLC dba McDonald's, TFGroup LLC, and Taylor Commercial FoodService LLC dba Taylor Company ("Taylor") (collectively "Defendants"). The TRO is based on Kytch's claims for trade secret misappropriation, tortious interference with contract, and breach of contract.

In a nutshell, Kytch contends that it makes a particularly effective diagnostic tool for fixing temperamental soft-serve ice cream machines made by Taylor Company and used in McDonald's restaurants around the country. The tool, called the "Kytch Solution" or "Kytch Solution Device," uses a combination of hardware and software; it links to an online system. The system is called the "Kytch Solution Platform" or "Kytch Platform." (See Nelson Decl. at ¶¶ 2, 15-19, 35-39.)

Kytch contends that Taylor and TFGroup, which performs maintenance and repair services for Taylor soft-serve machines, conspired to misappropriate Kytch's technology to

make a competing diagnostic tool. Kytch believes they got the help of J. Tyler Gamble, who is a McDonald's franchisee and member/leader of a group, the "National Supply Leadership Council" or "NSLC," which tests and introduces new products into McDonald's restaurants. Gamble agreed to test Kytch's product in a trial, entering into a formal "Kytch Trial Agreement" with Kytch to do so. Kytch gave Gamble access credentials – unique username and password pairs – so that Gamble and others working for him could access the Kytch Platform and work with it. Kytch alleges that Gamble, in turn, turned the proverbial keys over to TFGGroup and Taylor Company. He signed up at least one TFGGroup employee to get a Kytch username and password, and that person accessed the Kytch Platform with it. Gamble later shared with TFGGroup and Taylor confidential and/or trade secret information about the platform and its feature-set. (See Nelson Decl. at ¶¶ 115-137.) According to Kytch, TFGGroup and/or Taylor had at least one Kytch device for a period of weeks and may have had access to others.

This case is at an extremely early stage, though briefing has been more thorough than in many cases involving applications for TRO. After receiving notice of Kytch's Complaint and application for TRO, Defendants filed oppositions to the application. At the hearing on the application, Kytch asked the Court to consider further reply briefing. Those additional reply briefs were not formally filed until late July. The parties are currently completing their briefing of motions to quash filed by all but the individual defendant; those motions are set to be heard on August 3.

After reviewing the submissions of the parties, including the specially-appearing defendants, and after considering the arguments of counsel, the Court GRANTS IN PART Plaintiff's Application for Temporary Restraining Order ("TRO"). The Court denies Kytch's motion in two respects. First, the Court finds that it lacks personal jurisdiction to make orders binding JL Gamble Management LLC dba McDonald's. Second, the Court's TRO is more narrowly tailored than the order Kytch proposed.

Kytch also filed a motion seeking limited expedited discovery in support of its request for a preliminary injunction. The Court GRANTS Kytch's motion, as explained below. The Court GRANTS Kytch's various requests to seal documents as described below.

Defendants Tyler Gamble, TFGGroup LLC, and Taylor Commercial FoodService LLC dba Taylor Company, collectively the "Restrained Defendants," had notice of the TRO and filed opposition papers. In the absence of an agreement between the parties, however, the Court will set the hearing on the Order to Show Cause Re Preliminary Injunction consistent with the timing provisions set out in section 527(d)(1) of the Code of Civil Procedure (between 15 and 22 days from the day the restraining order is issued). If the parties agree, the Court would entertain a stipulation to a more extended briefing schedule with a renewal of the TRO to include the date of the hearing date agreed upon by the parties.

II. PERSONAL JURISDICTION

A. Legal Standards

Each defendant, with the exception of individual defendant Mr. Gamble, challenges the Court's personal jurisdiction. Defendants' motions to quash are set for hearing on August 3. The parties appear to agree that general jurisdiction is not at issue here. If this Court has jurisdiction then it is specific rather than general jurisdiction.

The Court may exercise specific jurisdiction over a claim where there is "an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.' When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." (Bristol-Myers Squibb Co. v. Super. Ct., 137 S.Ct. 1773, 1781 (2017) [quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)].)

In recent years, the Ninth Circuit has used a three-pronged test to evaluate specific jurisdiction (including in trade secret cases). (CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1073 (9th Cir. 2011).) The Court must evaluate whether:

- (1) The non-resident defendant ... purposefully direct[ed] his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim [is] one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction ... comport[s] with fair play and substantial justice, i.e., [is] reasonable.

(CollegeSource, 653 F.3d at 1073 [quoting Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) [quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)]]).)

Merely emailing people who live in the jurisdiction alone is not sufficient to establish the minimum contacts necessary to allow a court to exercise jurisdiction. (See In re Boon Global Ltd., 923 F.3d 643, 652-53 [citing Walden v. Fiore, 571 U.S. 277, 285 (2014)].) "[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." (Walden, 571 U.S. at 285.)

B. Minimum Contacts/Purposeful Direction to the Forum

Based on the record before the Court at the time Defendants' filed their oppositions to the application for TRO, and without waiving the specially-appearing Defendants' right to pursue their pending motions to quash, the Court finds that it has specific personal jurisdiction to issue a TRO relating to the conduct of Defendants Jonathan Tyler Gamble, TFGGroup LLC, and

Taylor Commercial FoodService LLC dba Taylor Company ("Taylor"). The Court finds that it lacks jurisdiction over JL Gamble Management LLC dba McDonald's, and that entity will not be included within the scope of the TRO.

Tyler Gamble: Jurisdiction is not an issue for the sole individual defendant, J. Tyler Gamble. Mr. Gamble concedes the Court has jurisdiction over him. He participated in Kytch's trial for its "Kytch Solution." He signed an agreement with Kytch to conduct a trial of the "Kytch Platform." That agreement included a forum selection clause specifying jurisdiction in this Court. After doing so, Kytch issued Mr. Tyler a username and password to access its platform, which is hosted in Fremont, California (in Alameda County).

TFGroup: The Court has specific jurisdiction over TFGroup. Kytch contends that TFGroup committed intentional acts expressly aimed at California and causing alleged injury that TFGroup had reason to know would be suffered in California generally (and Alameda County in particular). (See CollegeSource, 653 F.3d at 1077 [citations omitted].) According to Kytch, TFGroup gained access to confidential information relating to the "Kytch Platform" that could only be obtained by getting access to the platform. (See Nelson Decl. at ¶ 100; Nelson Reply Decl. at ¶ 6.) The platform itself is hosted at Kytch's offices in Fremont, California. (Nelson Decl. at ¶ 9.)

TFGroup allegedly obtained access to the platform in California by using Mr. Gamble's username and password, which Kytch states could only have been obtained by TFGroup in violation of Gamble's written agreement with Kytch. According to Kytch, TFGroup accessed the platform on multiple occasions. TFGroup had reason to know that Kytch has its offices in Fremont, California by virtue of prior communications with it. Additionally, the "terms of service" for Kytch's website, which is used to access the "Kytch Platform," specifically reference California law as governing disputes relating to the use of the website. (Nelson Decl. Ex. 4; Nelson Reply Decl. at ¶ 3.)

Taylor Company: The Court has specific jurisdiction over Taylor. In addition to working with its maintenance and repair partner, TFGroup, as outlined above, Taylor spent time and resources to obtaining information about Kytch's product from Kytch in California. Those included efforts by Taylor's COO, James Minard, to negotiate a business relationship with Kytch. If nothing else, those communications put Taylor on notice that (a) it was dealing with a California company whose system resides on servers in California, and (b) Kytch considered aspects of the Kytch Platform to be confidential trade secrets that it would only disclose under a Non-Disclosure Agreement ("NDA"). Kytch contends that Taylor was able to access the online Kytch Platform in Fremont, California, using login credentials it knew or should have known were not Taylor's to use, and to intercept "hard-to-detect errors and problems." (See Nelson Decl. at ¶¶ 74-83.)

JL Gamble Management LLC: The Court finds that it lacks specific jurisdiction with respect to JL Gamble Management LLC dba McDonald's. Kytch attempts to tie the LLC to Tyler Gamble, and argues that Gamble's contacts with California are equally attributable to the LLC.

Kytch points to a LinkedIn page in which Gamble appears to flag himself as the "owner/operator" of the LLC. (Kytch Reply to Defendant Tyler Gamble's Opp. at 2.) In response, however, JL Gamble Management LLC has submitted evidence that Tyler Gamble's father owns and operates this LLC, which does business entirely outside of California (it holds a McDonald's restaurant that operates in Tennessee). Further, Mr. Gamble himself declares under penalty of perjury that he has no role with the LLC. Mr. Gamble's LinkedIn page is not enough to tie JL Gamble Management LLC to California for purposes of due process under the 14th Amendment. Without more, the Court cannot identify a basis for exercising specific jurisdiction over the LLC.

C. Reasonableness/Fair Play and Substantial Justice

The Court finds that exercising specific jurisdiction as to Mr. Gamble, TFGGroup, and Taylor is reasonable under the circumstances. In reaching this conclusion, the Court has considered the requisite seven factors:

(1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of the conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

(CollegeSource, 653 F.3d at 1079 (quoting Dole Food Co. v. Watts, 303 F.3d 1104, 1114 (9th Cir. 2002)).)

Based on the existing record, the three Defendants improperly accessed Kytch's confidential servers in California and obtained information from them (whether or not the information turns out later to constitute information that could be readily discovered in the public domain). They had reason to know that Kytch maintained access controls over the technology, and accessed the systems anyway with a username and password obtained from Mr. Gamble as a result of his participation in the "Kytch Trial."

Litigating in California should not be a particularly significant burden to defendants. Defendants have highly capable counsel. The Alameda County Superior Court is a short distance from the Oakland International Airport and accommodations are readily available nearby; much motion-practice is likely to be conducted via videoconference technology (either using BlueJeans or Zoom's government platform), making the exact physical location of attorneys and witnesses unimportant until trial. Near as the Court can tell on the existing limited record, there is no likelihood of a conflict with the sovereignty of the defendant's states of incorporation or their principal places of business. California has a strong interest in business disputes involving the technology sector (as implicitly recognized by cases like CollegeSource). The Court is in a position to resolve the controversy efficiently, and is familiar with trade secret

law and with complex commercial business disputes. The “importance of the forum to the plaintiff’s interest in convenient and effective relief” is unclear, since Kytch has counsel just as capable of litigating the dispute in other forums as counsel for Defendants is capable of litigating the dispute in this Court. That said, of course, California has long recognized a plaintiff’s interest in being able to select its desired forum.

Finally, while it seems possible that Tennessee might be an alternative forum since Mr. Gamble is there and TFGroup appears to conduct a significant percentage of its business there, it is also possible that Taylor could contest jurisdiction there just as much as in California because Taylor’s home jurisdiction appears to be in Illinois. TFGroup itself is a Louisiana LLC and so might contest general jurisdiction (even if specific jurisdiction might exist by virtue of its work with Kytch devices connected to soft serve machines in Tennessee restaurants). The Court concludes that exercising specific jurisdiction is appropriate under the circumstances.

III. MERITS OF THE APPLICATION FOR TRO

A. Legal Standards

The Court is required to assess Kytch’s likelihood of success on the merits and “the relative interim harm to the parties depending on whether or not a TRO issues. (See ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016 [quoting Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1449-50 [quoting Hunt v. Super. Ct. (1999) 21 Cal. 4th 984, 999]].) The Court will also assess whether a TRO will harm the public interest.

Kytch seeks to make a showing of the likelihood of success on the merits of its breach of contract claim. Its contract claim is focused on Mr. Gamble (Complaint at ¶¶ 218-239), though his breach is an element of Kytch’s tortious interference with contract claim. Mr. Gamble’s breach, standing alone, could have been addressed with monetary damages and not required injunctive relief. The Court is therefore focused on assessing Kytch’s likelihood of success on its trade secret misappropriation and tortious interference with contract claims, as to which injunctive relief could be appropriate.

The Court may enjoin actual or threatened trade secret misappropriation. (Civ. Code § 3426.2.) A “trade secret” is:

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

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Civ. Code § 3426.1(d).)

"Misappropriation" is the:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(Civ. Code § 3426.1(b).) In this context, "improper means" include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. (Civ. Code § 3426.1(a).) Importantly, "Reverse engineering or independent derivation alone shall not be considered improper means." (Id.)

B. Analysis

Kytch contends that Defendants all knew that Kytch considered the means of operating its device and platform to be confidential information, subject to protection under an NDA and by virtue of its terms of service, and accessible only with credentials obtained from Kytch. Mr. Gamble signed the Kytch Trial Agreement, while TFGGroup and Taylor both decided not to enter into a formal contractual relationship or informal joint development arrangement with Kytch. Kytch argues that Gamble surreptitiously obtained access credentials for TFGGroup under false pretenses.

Gamble and TFGGroup were able to access and study the Kytch device and platform, including at least a subset of information that is data not generally available and that has independent economic value because, at a minimum, it is helpful in speeding up the development of a competing product. They then shared information about the Kytch Platform with Taylor (and perhaps with others). All of this happened as Taylor was working with PowerHouse Dynamics on a new "Open Kitchen" solution that would capture the vast majority of the Kytch Platform's features and thereby basically render the Kytch Platform obsolete.

Kytch's evidence indicates that Mr. Gamble twice electronically invited someone with the alias "Matt Wilson" to access the Kytch Platform. (Nelson Decl. at ¶ 119 & Exh. 8.) The invitation requests triggered Kytch's systems to send email invitations to the address provided for "Matt Wilson." (Id. at ¶ 121.) Kytch later determined that "Matt Wilson" was really Blaine Martin, who Kytch describes as TFGroup's Managing Partner. (Id. at ¶¶ 122-125.) At the time, however, the Kytch system simply generated access codes and emailed them to the address provided by Gamble. Kytch's evidence indicates that someone used those login credentials to access the Kytch Platform. (Id. at ¶ 127-128.)

Importantly, TFGroup itself does not appear to contest that it obtained access to the Kytch Platform during its work on one or more of Gamble's Taylor soft-serve machines. Somewhat implausibly, TFGroup appears to suggest that it was simply "invited" by Kytch "to set up access to the Taylor Equipment at some Gamble locations." (TFGroup Opp. at 7 [citing Martin Decl. at ¶ 41].) While the system-generated email with access credentials may have come from the email address "invitation@kytch.com," there is little question that TFGroup knew it was not being "invited" to access the Kytch Platform by Kytch. Rather, it had gotten access to the credentials via Gamble. When prompted to enter the username and password, the user also had to click his or her assent to abide by the Kytch terms of service before accessing the platform.

TFGroup even more implausibly argues that "Kytch touts its product as reducing downtime and need for repairs, so there would be no reason for one to believe accessing the information from a Kytch product to repair Taylor Equipment would be 'unauthorized.'" (TFGroup Opp. at 7.) As near as the Court can tell, there is nothing in Kytch's materials that would suggest the product could be freely accessible by anyone who wants to repair a Taylor soft-serve machine without first licensing or buying the Kytch device or paying the fees to access the Kytch Platform subject to Kytch's terms of service.

According to Kytch, accessing the Kytch Platform using improperly-obtained access credentials gave the user(s) access to a number of Kytch's alleged trade secrets. Those secrets included customer data relating to functionality, feature-sets, and common or recurring bugs. Kytch has presented evidence that at least some subset of this information is not available to the public. Rather, it was only available to Gamble and the "Matt Wilson" account user at TFGroup as a result of Gamble's apparent breach of the Kytch Trial Agreement.

For its part, Taylor denies ever accessing a Kytch device. "Gamble never invited Taylor to access his Kytch devices, or otherwise provide[] Taylor access to his devices." (Minard Decl. at ¶ 119.) Taylor's COO, Mr. Minard, is unaware whether Gamble gave TFGroup access to a Kytch device. (Id. at ¶¶ 120-121.) Mr. Minard says Taylor never instructed or advised Gamble to give TFGroup access to a Kytch device, and TFGroup never provided Taylor with a Kytch device or gave Taylor access to one (or to the Kytch Platform). (Id.)

Taylor's COO admits that a Taylor engineer sought to obtain a Kytch device on at least one occasion. (Minard Decl. at ¶ 88.) According to Taylor, they wanted the device "in order to evaluate and assess its potential technology-related impacts upon our Soft Serve Machine—such as whether the radio frequency of the Kytch device would interfere with our software signal, or whether the Kytch device would drain the power source of our software and/or cause it to malfunction—and understand its basic Wi-Fi connectivity, which ... [Minard] spoke about directly" with Kytch's co-founder. (Minard Decl. at ¶ 89.) Kytch did not approve Taylor's engineer's request. (Id.)

Mr. Minard denies that Taylor has "ever come into possession of a Kytch device." (Minard Decl. at ¶ 86.) He confirms "Taylor currently does not have a Kytch device in its possession." (Id.)

Taylor's COO also states that Taylor was unaware of the Kytch Trial, did not know that Mr. Gamble was participating in Kytch's trial, and did not know what Taylor equipment owners or operators have ever had a Kytch device. (Minard Decl. at ¶¶ 106-108.) Taylor denies it had anything to do with Gamble's Kytch device going offline in May 2020. (Id. at ¶ 110.)

Taylor's Minard admits that "Gamble has provided Taylor with very limited, generic information about the Kytch device." (Id. at ¶ 111.) Mr. Minard states that the information Gamble shared "was either public information or not contained in the redacted filings in this case that Kytch has claimed as trade secrets. Taylor did not request Gamble provide such information and Taylor did not need such information." (Id.) Gamble did share screenshots of the Kytch platform with Taylor and McDonalds in what Mr. Minard called a "high level comparison between the Taylor IoT platform and the Kytch platform." (Minard Decl. at ¶¶ 111-118 & Exh. 10.) Among other things, the discussion revealed that Kytch's control panel was a copy of Taylor's control panel. (Id. at ¶ 116.)

Defendants collectively contend that Kytch has not adequately identified any true trade secret. They point to the absence of a formal trade secret list from Kytch at the time it filed its TRO application. At the initial hearing on the application for TRO, to more easily frame the parties' arguments in connection with the request for a preliminary injunction in the next phase of the case, the Court ordered Kytch to provisionally file under seal and serve a formal trade secret list that would also satisfy section 2019.210 of the Code of Civil Procedure. For purposes of assessing the application for TRO, however, the Court confines itself to consideration of the information identified in the Complaint and in the Nelson Declaration as Kytch trade secrets (including portions of those documents filed under seal).

Taylor further contends that much of what Kytch knows about soft-serve machines came from a venture with Taylor to develop a "Frobot machine," which dated back to May 2013. (Minard Decl. at ¶¶ 68-74.) Taylor also complains that Kytch has been misusing Taylor's soft serve machine trade dress. (Minard Decl. at ¶¶ 90-92.)

Taylor appears prepared to argue that Kytch's predecessor violated an NDA by "hacking the Taylor Soft Serve Machine." (Minard Decl. at ¶¶ 75-82.) Taylor relies on an April 20, 2021 article in Wired Magazine. The article includes details about a Kytch co-founder sending a Taylor soft serve machine to Shenzhen, China so hardware hackers could crack the Taylor device. (Minard Decl. at ¶ 80; Hsiao Decl. Ex. 3.) According to Wired and Taylor, Kytch's co-founder moved to China to do the reverse engineering. (Minard Decl. at ¶ 81; Hsiao Decl. Ex. 3.) The Wired article is hearsay, and the Court will not rely on the facts described in it unless corroborated by admissible evidence.

Taylor explains that all of the datapoints collected and tracked by the Kytch Platform regarding Taylor's machines have been tracked internally by those same machines for many years. Those datapoints are accessible only from a "Service Menu" so that only certified technicians (as opposed to untrained soft-serve machine operators) can access them. (Minard Decl. at ¶¶ 25-30, 34.) Defendants submit evidence that pieces of information that Kytch seeks to treat as trade secrets are in fact generally available in the public domain. Taylor further contends that its own work on a competing Internet of Things ("IoT") product is based on independent development that began in 2002. (See Minard Decl. at ¶¶ 37-58.) This has included exploring possible communications with a service platform via the internet. (Id. at ¶¶ 59-62.)

Taylor further explains that it began working with PowerHouse Dynamics, "a leading developer of IoT technology," in 2019. (Minard Decl. at ¶¶ 63-65.) The PowerHouse Dynamics "OpenKitchen device and platform for Taylor is nearly complete." (Minard Decl. at ¶ 66.) Kytch describes the OpenKitchen device as substantially similar to the Kytch Platform. (Nelson Decl. at ¶¶ 144-155.)

In summary, Kytch has presented evidence that trade secret information is readily accessible via the Kytch Platform. The Kytch Platform is accessible via a secure username and password combination. Mr. Gamble obtained access credentials to the Kytch Platform for TFGroup's use in violation of the terms of the Kytch Trial Agreement and the Kytch Platform terms of service. One or more users associated with TFGroup, in turn, accessed and used the Kytch Platform on more than one occasion. They knew or had reason to know of Gamble's participation in the Kytch Trial. They also knew that the Kytch Platform was confidential because they had to click to agree to the Kytch terms of service when they entered their improperly-obtained access credentials.

TFGroup and Gamble, in turn, gave a presentation about the Kytch Platform to a group that included representatives from Taylor. The evidence indicates that the presentation included information obtained using the improperly-obtained access credentials that Gamble gave to TFGroup, and from Gamble himself in violation of the Kytch Trial Agreement.

Whether and how Kytch's confidential information, including trade secrets, were then used (if at all) remains an open question. There is no doubt that aspects of the PowerHouse Dynamics product are substantially similar to the Kytch Platform. These include aspects of the

user interface itself. But, the interface does not appear to be a protectable trade secret since it would be visible to someone working with the device to repair a Taylor soft-serve machine.

Beyond that, according to Kytch, the PowerHouse Dynamics offering appears to incorporate features that would not be generally available to the public and that, Kytch contends, must have been developed by someone with access to Kytch trade secrets. (Id.) Taylor, by contrast, argues that the PowerHouse Dynamics “Open Kitchen” does not incorporate Kytch trade secrets or confidential information but rather is the result of PowerHouse Dynamics’ own expertise coupled with Taylor’s own independent development efforts to bring its soft-serve machines into the Internet of Things over a period extending back to 2002.

Given the state of the evidence, the Court finds Kytch has made a showing that it is likely to succeed on the merits of its breach of contract claim against Gamble, its tortious interference claim against TFGroup, and at least some small portion of its trade secret misappropriation claims against Gamble, TFGroup, and Taylor. The harm to Kytch absent a TRO is potentially substantial. The “Open Kitchen” product Taylor has been developing with PowerHouse Dynamics is nearing completion, and Kytch would suffer competitive harm if its trade secrets were used to help speed up or complete the development of the Open Kitchen. One cannot un-ring the proverbial bell. The public would not be served by avoiding an injunction. The Court therefore finds it is appropriate to enter a limited temporary restraining order.

IV. SCOPE OF THE TEMPORARY RESTRAINING ORDER

Kytch proposes that the Court enter an exceptionally broad TRO. The TRO would bar all four defendants, their employees, agents, or any others acting with them or on their “behalf from: possessing, accessing, using, imitating, copying, disclosing, or making available to any person or entity Kytch’s trade secrets, including but not limited to those described in the Complaint and in” the Nelson Declaration accompanying Kytch’s application for TRO. (See Proposed Order to Show Cause.)

The Court will not adopt Kytch’s proposed order because it is overbroad and vague. For example, it would encompass “imitating” a firmware device or cloud platform, which in itself is not actionable unless misappropriated trade secrets were involved. It could also sweep in products independently developed or reverse engineered in a legal manner. Additionally, the TRO will not include Gamble Management LLC dba McDonald’s. Based on the record before it in connection with the TRO, the Court lacks jurisdiction over that entity.

Instead, the TRO will require the following:

1. Defendants Jonathan Tyler Gamble, TFGroup, and Taylor (“the Restrained Defendants”) are to return any and all Kytch devices in their possession, custody, or control to Kytch via counsel within twenty-four hours of this order.

2. The Restrained Defendants are to each prepare and serve on counsel for Kytch declarations confirming that they have complied with paragraph 1 above or, in the alternative, confirming that they have never had a Kytch device in their possession, custody, or control at any time.
3. The Restrained Defendants must not use, copy, disclose, or otherwise make available in any way information, including a formula, pattern, compilation, program, device, method, technique, or process, obtained by any of them via access credentials for the Kytch Platform obtained by Defendant Gamble on or anytime after March 19, 2020.

The TRO is framed to protect Kytch trade secrets by reference to the precise source of unauthorized access as to which Kytch has established a likelihood of success on the merits. The TRO does not rely on more speculative theories of misappropriation, which will require more evidence on a more-developed record in the context of preliminary injunction motion-practice or at trial.

The parties appear to agree that no bond should be required.

ORDERS ON MOTIONS TO SEAL DOCUMENTS

The Court has reviewed Plaintiff Kytch, Inc.'s ("Kytch's") motions to seal documents and Defendants' papers in opposition. In order to protect Kytch's potential trade secret and other non-public information, the Court finds good cause to GRANT the motions. The Court notes that redactions to documents are fairly minimal and are drawn to protect non-public information, at least some of which may constitute trade secret information. The Court confirms that Defendants waive no right to litigate whether the sealed information and documents constitute trade secrets under California law. The Court is not attempting to adjudicate that question in the context of the motions to seal.

The Court orders the following documents to be sealed:

2. Kytch's Confidential Complaint. Kytch's non-confidential complaint, which has been redacted, will remain in the public record. The provisionally-sealed unredacted complaint (with allegedly confidential information in red and bold, and with screenshots marked "confidential") lodged with the Court will be sealed.
3. Kytch Complaint, Exhibits B and C.
4. Confidential Declaration of Melissa Nelson. Ms. Nelson's non-confidential declaration, which has been redacted, will remain in the public record. The provisionally-sealed unredacted Nelson Declaration (with allegedly confidential information in red and bold, and with screenshots marked "confidential") lodged with the Court will be sealed.

5. Confidential Declaration of Melissa Nelson, Exhibits 1, 2, and 7.
6. Kytch's preliminary Trade Secret List, lodged June 21, 2021.
7. All parties' lodged confidential memoranda of points and authorities, as redacted. Redacted copies of the parties' memoranda will remain in the public record.
8. Minard Declaration, as redacted in the version attached to Exhibit 1 to Kytch's motion to seal.
9. Hsiao Declaration, as redacted in the version attached to Exhibit 2 to Kytch's motion to seal.
10. Taylor Food Company's Opposition To TRO, as redacted.

ORDER GRANTING EXPEDITED DISCOVERY

The Court has reviewed Kytch's motion seeking expedited discovery and Defendants' opposition. The Court GRANTS IN PART the motion with respect to Defendants Jonathan Tyler Gamble, TFGGroup LLC, and Taylor Commercial Foodservice, LLC dba Taylor Company.

The Court finds that, in a number redacted portions of the confidential declaration of Melissa Nelson, Kytch disclosed information that may constitute trade secrets under California law sufficient to satisfy the requirements of section 2019.210 of the Code of Civil Procedure. The Court makes this finding on a preliminary record solely for purposes of conducting very limited expedited discovery. The Court anticipates that the parties will need to litigate the question of whether the information in Ms. Nelson's declaration constitutes a trade secret under California law, or whether some or all of that information is publicly known or derived via independent analysis and reverse engineering rather than via misappropriation.

The fact that Plaintiff's disclosure is made in the context of a declaration rather than a document captioned as a trade secret list is not a particularly meaningful distinction at this point in the litigation. Plaintiff followed the Court's directive and lodged a more-formal trade secret list on June 21, 2021. For purposes of finding the prerequisites for discovery satisfied under section 2019.210, the Court's findings are based only on the confidential Nelson declaration. Going forward, however, including in connection with the Order to Show Cause why a preliminary injunction should not issue, the Court anticipates the parties will utilize the June 21, 2021 trade secret list to frame discovery and the litigation.

Plaintiff may seek limited discovery in support of its motion for preliminary injunction that include: (1) Documents and communications relating to Defendants' use, testing, and access and disclosure of information relating to the Kytch Solution Platform (including but not limited to information obtained using access credentials procured by Mr. Gamble on or after March 19, 2020); (2) Documents and communications relating to Defendants' attempts, if any, to reverse engineer the Kytch Solution, from a Kytch device that was not licensed or was

obtained through misappropriation under section 3426.1(b); and (3) Inspection and imaging of each computing device used in connection with (2) above.

The Court DENIES Plaintiff's motion seeking expedited discovery of all "attempts to reverse engineer the Kytch Solution," because that request is overbroad under section 3426.1(a). The Court also DENIES Plaintiff's motion seeking "documents sufficient to fully describe the operation and features of the TCCS/Open Kitchen solution." The Court is not persuaded on the limited record currently available that, for purposes of expedited discovery, Plaintiff has established a sufficient link between a Kytch trade secret as set out in the Nelson declaration and the third party "Open Kitchen" solution to justify discovery relating to the competing system. Discovery will likely be appropriate on a non-expedited basis, including pursuant to subpoenas duces tecum directed to the pertinent third party.

The Court DENIES the motion with respect to Defendant JL Gamble Management LLC dba McDonald's for lack of an adequate showing that the Court has personal jurisdiction.

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

The Court Orders the Restrained Defendants – Defendants Gamble, TFGGroup, and Taylor Company – to Show Cause before this Court on August 23, 2021 at 10am in Department 16, why a preliminary injunction should not issue barring each of them, their employees, agents, assigns, and others acting in concert with any of them, from using, copying, disclosing, or otherwise making available in any way information, including a formula, pattern, compilation, program, device, method, technique, or process, obtained by any of them via access credentials for the Kytch Platform obtained by Defendant Gamble on or anytime after March 19, 2020.

The Restrained Defendants are further ordered to show cause why the preliminary injunction should not also include the following provisions:

1. If the Restrained Defendants provided a third party or parties with information, including a formula, pattern, compilation, program, device, method, technique, or process, obtained by any of them via access credentials for the Kytch Platform obtained by Defendant Gamble on or anytime after March 19, 2020, they are to immediately notify such third party or parties of this TRO and request that the third party cease using that information immediately. The Restrained Defendants are to preserve copies of any notices sent out pursuant to this paragraph.
2. The Restrained Defendants must gather and provide to their counsel any and all copies of information, including a formula, pattern, compilation, program, device, method, technique, or process, obtained by any of them from Kytch via access credentials obtained by Defendant Gamble on or anytime after March 19, 2020. Their counsel are to inventory the information. Counsel is to provide to counsel for Kytch (i) a declaration itemizing the information, including where and when it was gathered, and (ii) copies of the information so gathered.

Although the Restrained Defendants had notice of the TRO, in the absence of an agreement between the parties the Court has set the hearing on the Order to Show Cause in a manner consistent with the timing provisions set out in section 527(d)(1) of the Code of Civil Procedure (between 15 and 22 days from the day the restraining order is issued).

TEMPORARY RESTRAINING ORDER

1. Defendants Jonathan Tyler Gamble, TFGrou, and Taylor ("the Restrained Defendants") are to return any and all Kytch devices in their possession, custody, or control to Kytch via counsel within twenty-four hours of this order.
2. The Restrained Defendants are to each prepare and serve on counsel for Kytch declarations confirming that they have complied with paragraph 1 above or, in the alternative, confirming that they have never had a Kytch device in their possession, custody, or control at any time.
3. The Restrained Defendants must not use, copy, disclose, or otherwise make available in any way information, including a formula, pattern, compilation, program, device, method, technique, or process, obtained by any of them via access credentials for the Kytch Platform obtained by Defendant Gamble on or anytime after March 19, 2020.

IT IS SO ORDERED.

July 30, 2021



Michael M. Markman
Judge, Superior Court of California
Alameda County

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG21099155
Case name: KYTCH, INC. VS GAMBLE

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of this Order was emailed to the addresses shown on at the bottom of this document.

Dated: July 30, 2021

Sonya De Baca
Courtroom Clerk, Dept. 16

jsheasby@irell.com

Jason Sheasby

Attorneys for Plaintiff, KYTCH, INC.

dvr@manningllp.com
aje@manningllp.com
ndv@manningllp.com

David R. Roth
Anthony J. Ellrod
Natalya Vasyuk

*Attorneys for Defendants Jonathan Tyler Gamble and J.L. Gamble
Management LLC*

lance.etcheverry@skadden.com
abraham.tabai@skadden.com

Attorneys for Defendant Taylor Commercial Foodservice, LLC

libby@clarelocke.com
daniel@clarelocke.com

Attorneys for Plaintiff, KYTCH, INC.

jkirke@donahue.com
amackay@donahue.com

Attorneys for Plaintiff, KYTCH, INC.

winston.hsiao@skadden.com
raza.rasheed@skadden.com

Attorneys for Defendant Taylor Commercial Foodservice, LLC