

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**J.B. POINDEXTER & CO., INC., et al.** :

Plaintiffs : **CASE NO. 2013 CVH 01867**

vs. :

**KELLERMAN COACHWORKERS, INC.,  
et al.** : **Judge McBride**

Defendants : **DECISION/ENTRY**

:

Janszen Law Firm Co., L.P.A., August T. Janzen, counsel for the plaintiffs J.B. Poindexter & Co., Inc. and Eagle Specialty Vehicles, LLC, 4750 Ashwood Drive, Suite 201, Cincinnati, Ohio 45241-2446.

Graydon Head & Ritchey LLP, Michael A. Roberts, counsel for defendants Kellerman Coachworks, Inc., Joseph Kellerman, Robert Toney, Brian McCarthy and Kurt Frankhauser, 511 Walnut Street, Suite 1900, Cincinnati, Ohio 45202.

Nichols, Speidel & Nichols, Donald White, counsel for defendants Mike Kellerman, Stephen Kellerman and K2 Products LLC, 237 East Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion for temporary restraining order filed by the plaintiffs J.B. Poindexter & Co., Inc. and Eagle Specialty Vehicles, LLC.

The court scheduled and held a hearing on the motion for temporary restraining order on December 30, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## **FACTS OF THE CASE**

In 1982, the plaintiff Eagle Coach Company (hereinafter referred to as "Eagle") approached Michael Kellerman, who owned a body shop, to paint some of their used and new funeral hearses and later to cut and stretch new cars into hearses.<sup>1</sup> In 1983, Michael Kellerman agreed to do all of Eagle's manufacturing and in 1989 he purchased Eagle Coach Company from its owner.<sup>2</sup>

In 1994, Michael Kellerman made a video to show how his company built Eagle hearses in an effort to address a competitive threat from Accubilt, a company which also manufactures hearses.<sup>3</sup> The video shows and mentions the roll cage, steel partition, Swagelok fittings, jig fixture, angle iron, rocker panels, and saw-zall cutting welding of the car.<sup>4</sup> Michael Kellerman had over 2,000 copies of this video and distributed them to dealers and funeral directors at trade shows.<sup>5</sup> At this point, Michael Kellerman states that there was nothing secret about his process or his product.<sup>6</sup> He would also allow interested persons, including competitors, to visit his shop and observe how they manufactured the Eagle funeral coach.<sup>7</sup> Additionally, Accubilt was permitted to receive

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<sup>1</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 2, ¶ 6.

<sup>2</sup> Id. at ¶¶ 6-7.

<sup>3</sup> Id. at ¶ 9.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

an Eagle coach in 1994 to examine and determine how the electric extend table was constructed.<sup>8</sup>

In 2005, Michael Kellerman felt that it was best to sell his company for the safety and security of the company's dealers and employees.<sup>9</sup> He ultimately decided to sell his business to John Poindexter.<sup>10</sup> On January 3, 2006, J.B. Poindexter & Co., Inc. and Michael Kellerman's company, the Kellerman Coach Company, Inc. entered into a Stock Purchase Agreement.<sup>11</sup> In the Stock Purchase Agreement, the sellers warranted that they held all necessary interests and enforceable rights to use the company's intellectual property and acknowledged that the confidential information obtained or possessed by them concerning the business was the property of the buyer from the date of closing.<sup>12</sup> Section 9.1 of the Stock Purchase Agreement contains a confidentiality agreement with respect to said confidential information of the company which essentially prevented the selling stockholder from using or disclosing said confidential information for his own purposes for a period of five years following the closing date.<sup>13</sup> Section 9.2 of the Stock Purchase Agreement contains a non-competition agreement that prevented the selling stockholders from competing with J.B. Poindexter Co. until 11:59 p.m. on the fifth anniversary of the closing date.<sup>14</sup>

Also included as part of the Stock Purchase Agreement, was an Employment Agreement between J.B. Poindexter Co. and Michael Kellerman.<sup>15</sup> The agreement provided that Michael Kellerman would continue his employment as President and Chief

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<sup>8</sup> Id.

<sup>9</sup> Id. at ¶ 16.

<sup>10</sup> Id. at ¶¶ 16 and 18.

<sup>11</sup> Affidavit of Tim Lautermilch at ¶ 5.

<sup>12</sup> Id., Exhibit 1 at pgs. 28 and 39.

<sup>13</sup> Id., Exhibit 1 at pgs. 39-40.

<sup>14</sup> Id., Exhibit 1 at pg. 40.

<sup>15</sup> Id., Exhibit 1, Employment Agreement.

Operating Officer.<sup>16</sup> Section 8 of this agreement provides that “the Executive [Michael Kellerman] shall observe and comply with confidential information, non-competition, and non-solicitation provisions contained in Article 9 of the [Stock] Purchase Agreement during the time of his employment hereunder and thereafter as required by the Purchase Agreement.”<sup>17</sup>

On March 10, 2010, J.B. Poindexter & Co., through its Specialty Vehicle Group (SVG), and Michael Kellerman entered into a Consulting Agreement, in which Michael Kellerman agreed to assist in the design, development, manufacture, and sale of hearses.<sup>18</sup> The term of the Consulting Agreement was from March 1, 2010 to February 28, 2013.<sup>19</sup> The Consulting Agreement contains the following confidentiality and non-competition language:

“A. Confidentiality. Consultant acknowledges that he may be provided information by SVG relevant to the Business, including confidential strategy plans, books, and other proprietary and confidential information \* \* \*. Consultant acknowledges that all such items are trade secrets and are valuable, special and unique assets of SVG’s business. Consultant agrees not to disclose any such information to any third party whatsoever, without prior written consent from SVG. Consultant also agrees to return all such information to SVG at the termination of this Agreement.

B. Noncompetition. (1) \* \* \* Consultant will not during the Term of this Agreement \* \* \* engage \* \* \* in any business that designs, manufactures, sells or is otherwise engaged in the funeral carriage and/or human remains transportation business \* \* \*.”<sup>20</sup>

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id., Exhibit 2, Consulting Agreement, Sec. I(A).

<sup>19</sup> Id. at Sec. IV(A).

<sup>20</sup> Id. at Sec. VI(A) and (B).

Michael Kellerman's nephew Joe Kellerman also worked at Eagle and was hired there by Michael over 20 years ago.<sup>21</sup> When the company was purchased by J.B. Poindexter Co., Joe Kellerman served as the Director of New Product Development and manager in charge of the research and development team.<sup>22</sup> The defendants Robert Duane Toney, Brian McCarthy and Kurt Frankhauser all worked under Joe Kellerman on or with the research and development team.<sup>23</sup> The defendant Steve Kellerman was a sales-production manager for Eagle.<sup>24</sup> Those same employees each entered into an Employee Confidentiality Agreement with SVG while working there which required handling information in a confidential manner "at all times during [their] employment."<sup>25</sup> Michael Kellerman, Joe Kellerman, Steve Kellerman, Robert Duane Toney and Brian McCarthy also entered into the J.B. Poindexter Co. Policy and Procedure Agreement which contains a prohibition against disclosure of confidential information as well as a business confidentiality provision which requires the employee to maintain the confidentiality of the company's business, products, information systems, plans, and strategies while employed by the company and following termination of employment.<sup>26</sup>

In June 2011, General Motors awarded Eagle Coach Company the exclusive opportunity to build two vehicles and develop conversion and modification specifications for the Cadillac XTS, which had not yet been released.<sup>27</sup> This opportunity gave Eagle a six-month "head start" in product development over its competitors with regard to the

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<sup>21</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 1 at ¶ 6.

<sup>22</sup> Lautermilch Aff. at ¶ 9.

<sup>23</sup> Id. at ¶ 10.

<sup>24</sup> Id.

<sup>25</sup> Lautermilch Aff., Exhibit 5.

<sup>26</sup> Id. at Exhibit 3, pgs. 5 and 8; and, Exhibit 4.

<sup>27</sup> Id. at ¶ 20.

Cadillac XTS.<sup>28</sup> As mandated by General Motors, the development of this product was subject to strict security measures, including housing the Cadillac XTS in a separate building to which only six employees, including Joe Kellerman, had a key.<sup>29</sup> Over \$500,000.00 was invested by Eagle in the Cadillac XTS product development.<sup>30</sup>

At the outset of the Cadillac XTS development, Joe Kellerman was not directly involved with the project and was, instead, working on a Mercedes Benz assignment.<sup>31</sup> Eagle initially attempted to build the Cadillac XTS through a CAD program, which is a skill set not possessed by Joe Kellerman.<sup>32</sup> In 2011, when the effort to perform the work through the CAD program failed, Eagle requested that Joe Kellerman create the Cadillac XTS model for the National Funeral Directors Association convention using his own methods.<sup>33</sup> In performing this work, Joe Kellerman used his typical methods and does not believe that he used any trade secrets.<sup>34</sup> Eagle displayed the Cadillac XTS products publicly in October 2012 at the National Funeral Directors Association National Industry Trade Show.<sup>35</sup> Upon the release of Eagle's Cadillac XTS in January 2013, the company's coach sales increased by approximately two hundred percent and those sales of the Cadillac XTS account for approximately seventy-five percent of the company's sales.<sup>36</sup>

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<sup>28</sup> Id.

<sup>29</sup> Id. at ¶ 21.

<sup>30</sup> Id. at ¶ 25.

<sup>31</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 1 at ¶ 9.

<sup>32</sup> Id.

<sup>33</sup> Id. at ¶ 10.

<sup>34</sup> Id. at ¶¶ 10-12.

<sup>35</sup> Id. at ¶ 13. See also, Lautermilch Aff. at ¶ 29.

<sup>36</sup> Lautermilch Aff. at ¶ 30.

In the spring of 2013, Joe Kellerman learned that he could soon be terminated by Eagle and decided to leave Eagle and start his own business.<sup>37</sup> He informed Tim Lautermilch of his resignation and gave a two-week notice which Eagle requested be extended by two days to May 21, 2013.<sup>38</sup> Joe Kellerman later completed an application with General Motors to become a Master Coachbuilder.<sup>39</sup> He then acquired a 2012 XTS from Cadillac/GM and a 2001 Accubilt funeral coach, which he bought for parts.<sup>40</sup>

Joe Kellerman began to design and create a funeral coach and fiberglass molds in his garage.<sup>41</sup> In his affidavit, Joe Kellerman describes how he went about designing his Cadillac XTS model and how they are built and also provides photographs of the process.<sup>42</sup> Throughout this development and the process of building their model, Joe Kellerman avers that he uses methods which are commonly known to the industry and uses methods and products either different from Eagle or that are readily known and available to the industry.<sup>43</sup>

Joe Kellerman hired “body-men” and other general laborers to assist with the body and project and completed the body for fiberglass tooling in mid-September 2013.<sup>44</sup> In October 2013, he signed a lease for a manufacturing facility for his new company, Kellerman Coachworks, Inc. (hereinafter referred to as “Kellerman Coachworks”), hired employees, stocked inventory, and purchased common paint booths and body shop tools.<sup>45</sup> Some Eagle employees contacted him to ask if they

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<sup>37</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 1 at ¶¶ 15-16.

<sup>38</sup> Id. at ¶ 17.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at ¶¶ 17-18 and 26; and, Exhibits B1 through B49.

<sup>43</sup> Id.

<sup>44</sup> Id. at ¶ 18.

<sup>45</sup> Id.

could join Kellerman Coachworks and Joe Kellerman hired several of those employees.<sup>46</sup> Those employees were specifically directed by Joe Kellerman to not take any information from Eagle or to bring any information from Eagle to Kellerman Coachworks.<sup>47</sup>

Joe Kellerman states in his affidavit that the Cadillac XTS sold by Kellerman Coachworks is vastly different than the Eagle model, other than having to follow the required General Motors guidelines.<sup>48</sup> Joe Kellerman avers that funeral coach builders use the same basic processes known by any skilled body mechanic to lengthen and stabilize a car and to build a cage and outfit and finish the car.<sup>49</sup> Joe Kellerman further states that the building process and specific items Eagle claims are proprietary are, in fact, widely known outside of Eagle Coach Company.<sup>50</sup>

In his affidavit in support of the temporary restraining order request, Kevin Klatte, the current Director of Engineering for Eagle Coach Company, specifically identifies fifteen designs, tools, parts, and/or methods of manufacturing that are unique and proprietary to Eagle Coach.<sup>51</sup> Joe Kellerman disputes that any of these fifteen are trade secrets.<sup>52</sup> He lists eight things specifically that are not utilized by Kellerman Coachworks.<sup>53</sup> He then discusses at more length ten of the items at issue in Klatte's affidavit and explains how the product or process used by Kellerman Coachworks is

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<sup>46</sup> Id. at ¶19.

<sup>47</sup> Id. at ¶ 29.

<sup>48</sup> Id. at ¶ 28.

<sup>49</sup> Id. at ¶ 32.

<sup>50</sup> Id. at ¶ 35.

<sup>51</sup> Affidavit of Kevin Klatte at ¶¶ 1 and 8.

<sup>52</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 1 at ¶ 37.

<sup>53</sup> Id.

different from that employed by Eagle or how the process or product is commonly known to coachbuilders in the business and is not unique to Eagle.<sup>54</sup>

Michael Kellerman avers in his affidavit that, while his only involvement with Kellerman Coachworks is as a creditor, based on his experience and his tour of the Kellerman Coachworks facility and prototype vehicle, the procedures used are well-known processes he used for decades that were demonstrated in the video he distributed throughout the industry.<sup>55</sup>

Robert Duane Toney denies ever disclosing proprietary or trade secret information, if any, belonging to Eagle.<sup>56</sup> Toney is now the Materials Purchasing Manager for Kellerman Coachworks.<sup>57</sup> He notes in his affidavit that the majority of the vendors with whom Kellerman Coachworks does business also do business with multiple competitors in the industry and, as such, are not trade secrets.<sup>58</sup>

Like Toney, Brian McCarthy, Kurt Frankhauser and Stephen Kellerman all deny using or disclosing any proprietary or trade secret information belonging to Eagle.<sup>59</sup> Stephen Kellerman further had no role in the development or production of Eagle's Cadillac XTS.<sup>60</sup>

Joe Kellerman notes in his affidavit that Eagle has never used "Kellerman" as its trade name and that his company does business as "Platinum," not Kellerman.<sup>61</sup>

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<sup>54</sup> Id. at ¶ 38.

<sup>55</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 2 at ¶¶ 24-25.

<sup>56</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 3, ¶ 3.

<sup>57</sup> Id. at ¶4.

<sup>58</sup> Id. at ¶¶ 6-7.

<sup>59</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 4 at ¶ 8; Exhibit 5 at ¶ 4; and Exhibit 6 at ¶ 5.

<sup>60</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 6 at ¶ 6.

<sup>61</sup> Joint Memorandum in Opposition to Motion for Temporary Restraining Order, Exhibit 1 at ¶ 42.

## LEGAL ANALYSIS

“When deciding whether to grant a motion for a temporary restraining order, “a \* \* \* court is to review factors such as the party’s [substantial] likelihood of success on the merits and the threat of irreparable injury.”<sup>62</sup> The court should also consider whether third parties will be unjustifiably harmed if the injunction is granted and if the public interest will be served by the issuance of injunctive relief.<sup>63</sup>

The proponent of the motion must establish these elements by clear and convincing evidence.<sup>64</sup> “Clear and convincing evidence is the measure or degree of proof more than a mere ‘preponderance of the evidence,’ but less than ‘beyond a reasonable doubt’ required in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.”<sup>65</sup>

“An injunction is an extraordinary remedy in equity that is available only where there is no adequate remedy available at law.”<sup>66</sup> “Injunctive relief is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot.”<sup>67</sup>

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<sup>62</sup> *Imperial Home Décor Group (US) LLC v. Murray*, 75 F.Supp.2d 753, 755 (N.D. Ohio, 1999), citing *Proctor & Gamble Co. v. Banker’s Trust Co.*, 78 F.3d 219, 226-227 (6<sup>th</sup> Cir., 1996).

<sup>63</sup> *Mike McGarry & Sons, Inc. v. Gross* (April 6, 2006), 8<sup>th</sup> Dist. No. 86603, 2006-Ohio-1759, at ¶ 10, citing *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (Ohio App. 1<sup>st</sup> Dist., 2000).

<sup>64</sup> *Imperial Home*, supra, 75 F.Supp.2d at 755, citing *Ohio Urology, Inc. v. Poll*, 72 Ohio App.3d 446, 594 N.E.2d 1027 (Ohio App. 10<sup>th</sup> Dist., 1991). See also, *Gross*, supra, at ¶ 11, citing *Stoneham*, supra.

<sup>65</sup> *Gross*, supra, at ¶ 11, citing *Cincinnati Bar Assn. v. Massengale* (1991), 58 Ohio St.3d 121, 122, 568 N.E.2d 1222.

<sup>66</sup> *Brentlinger Enterprises v. Curran*, 141 Ohio App.3d 640, 752 N.E.2d 994, 999 (Ohio App. 10<sup>th</sup> Dist., 2001), citing *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496, 498-499.

<sup>67</sup> *Id.*

“The issue whether to grant or deny an injunction is a matter solely within the discretion of the trial court \* \* \*.”<sup>68</sup> “Further, in determining whether to grant an injunction, a court must look at the specific facts and circumstances of the case.”<sup>69</sup>

The plaintiffs' first claim in their complaint is against all the defendants for misappropriation of trade secrets.

Pursuant to R.C. 1333.61(B), misappropriation is defined as:

“(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;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their 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.”

R.C. 1333.62 provides that “[a]ctual or threatened misappropriation may be enjoined.” A trade secret is defined by R.C. 1333.61(D) which provides as follows:

“(D) “Trade secret” means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern,

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<sup>68</sup> *Gross* at ¶ 9, citing *Garono*, *supra*.

<sup>69</sup> *Id.*, citing *Keefer v. Ohio Dept. of Job and Family Services* (Dec. 9, 2003), 10<sup>th</sup> Dist. No. 03AP-391, 2003-Ohio-6557, at ¶ 14.

compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

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

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

“The Supreme Court of Ohio adopted six factors to consider in analyzing a trade secret claim: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.”<sup>70</sup>

“An entity claiming trade secret status bears the burden of identifying and demonstrating that the information is protected under this statute and, furthermore, must demonstrate that it has actively sought to maintain that information's secrecy.”<sup>71</sup>

This court has examined the memoranda and, most importantly, the affidavits submitted in support of and in opposition to the motion for temporary restraining order. The affiants supporting the motion, including Kevin Klatter, Tim Lautermilch, and Rick

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<sup>70</sup> *Columbus Bookkeeping & Business Servs., Inc. v. Ohio State Bookkeeping, LLC* (Dec. 30, 2011), 10<sup>th</sup> Dist. No. 11AP-227, 2011-Ohio-6877, ¶18, quoting *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524–25, 687 N.E.2d 661.

<sup>71</sup> *84 Lumber Co., L.P. v. Houser*, 188 Ohio App.3d 581, 936 N.E.2d 131, 2010-Ohio-3683, ¶ 65 (Ohio App. 10<sup>th</sup> Dist., 2010), citing *Cary Corp. v. Linder* (Nov. 27, 2002), 8<sup>th</sup> Dist. No. 80589, 2002-Ohio-6483, ¶ 23, citing *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 181, 707 N.E.2d 853.

Gullette, state generally that the design, engineering and manufacturing processes used by Eagle, particularly with respect to development and production of the Cadillac XTS, constitute valuable trade secrets. The affidavits of Tim Lautermilch and Kevin Klatte affidavit also set forth more specific examples of what they believe to be Eagle's trade secrets and what brought them to that conclusion. In contrast, the affidavits submitted in opposition to the motion, the most detailed of which are the affidavits of Michael Kellerman and Joe Kellerman, state that no trade secrets or proprietary information of Eagle has been used at Kellerman Coachworks and that much of what Eagle claims to be trade secrets are known widely throughout the industry and are, consequently, not trade secrets or confidential proprietary information.

At this juncture, based on its examination of the affidavits, the court finds that the plaintiffs have not shown that its processes, parts, methods, etc. are, in fact, trade secrets or confidential proprietary information. The affidavits in opposition to the motion raise a significant question as to the extent the things claimed by plaintiff to be trade secrets are known throughout the funeral coach industry by Eagle competitors. As such, the first factor set forth above for considering whether information is a trade secret falls in favor of the defendants at this juncture.

Furthermore, while development of the Cadillac XTS was kept confidential except to an exclusive group of Eagle employees, there is no evidence that, now that the Eagle Cadillac XTS is in production and available for sale, that the methods to manufacture the vehicle are not widely known throughout Eagle by its employees. Therefore, the second factor of the trade secrets test is, at best, neutral and does not fall in favor of either party.

The third factor is what precautions have been taken by the holder of the trade secret to guard the secrecy of the information. Most of the confidentiality agreements set forth in support of the motion expired at the time the employment of the given employee expired. This court's initial examination of the J.B. Poindexter Co. Policy and Procedure Agreement, signed by Michael Kellerman, Joe Kellerman, Steve Kellerman, Robert Duane Toney, and Brian McCarthy, shows that it contains a prohibition against disclosure of confidential information as well as a business confidentiality provision which requires the employee to maintain the confidentiality of the company's business, products, information systems, plans and strategies while employed by the company and following termination of employment.<sup>72</sup> Therefore, Eagle took some steps to maintain confidentiality in its business. However, this still raises the question as to whether the information specifically at issue in this case would fall into the category of products, plans or strategies which specifically belong to Eagle such that their confidentiality must be maintained or whether they are well-known outside the industry and not trade secrets.

The final factors are the savings effected and the value to the holder in having the information as against competitors; the amount of effort or money expended in obtaining and developing the information; and the amount of time and expense it would take for others to acquire and duplicate the information.

Eagle spent approximately \$500,000 developing its Cadillac XTS model and it has experienced great commercial success as a result of offering this vehicle for sale. There is no evidence as to the particular time and expense to it would take for others to

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<sup>72</sup> Id. at Exhibit 3, pgs. 5 and 8; and, Exhibit 4.

acquire and duplicate the Cadillac XTS manufacturing process, but it is not disputed that this model has been available for sale since January 2013. In general, “[a]n injunction ‘should generally terminate when a former trade secret becomes either known to good faith competitors, or is obtained by them because of the lawful availability of products that can be reverse engineered to reveal such trade secrets, subject to any additional period of restraint necessary to negate lead time acquired by the misappropriator.’ ”<sup>73</sup> If a “trade secret” is no longer secret at the time the injunction is sought, no injunction should be imposed.<sup>74</sup> The products utilized in Eagle’s Cadillac XTS are now available to the funeral coach industry to reverse engineer and have been so available for the past twelve months. Therefore, this also raises a question as to whether many of the items claimed by Eagle to be trade secrets are, in fact, still secret at this time and not known by the industry.<sup>75</sup>

Based on this analysis, the court finds that the plaintiffs have not shown at this juncture a substantial likelihood of success on the merits on its claim for misappropriation of trade secrets by clear and convincing evidence.

Similarly, the plaintiffs have not shown by clear and convincing evidence a substantial likelihood of success on the merits of its causes of action of breach of contract against the various defendants. As set forth above, many of the obligations under the various contracts terminated upon termination of the subject employee’s employment with the plaintiffs. The relevant obligations under the J.B. Poindexter Co. Policy and Procedure Agreement could be interpreted as remaining in effect after

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<sup>73</sup> *Jacono v. Invacare Corp.* (March 30, 2006), 8<sup>th</sup> Dist. No. 86605, 2006-Ohio-1596, ¶ 20, quoting *Valco Cincinnati, Inc. v. N&D Machining Service, Inc.* (1986), 24 Ohio St.3d 41, 48, 492 N.E.2d 814.

<sup>74</sup> *Id.* at ¶ 21.

<sup>75</sup> See, e.g., *Id.* at ¶ 23, citing *Valco*, *supra*, at 45 (“Once a product is released, the design, components, and technology are no longer secret”).

termination of employment, but any success under those clauses is still contingent upon use or disclosure of what could be properly considered confidential information, proprietary information, or trade secrets and, as discussed above, success on that element has not been demonstrated by clear and convincing evidence.

As to the plaintiffs claim for tortious interference with business and contractual relations based on the hiring of their former employees by Kellerman Coachworks, the standard is as follows: “[t]he torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into, or continue a business relation with, another or not to perform a contract with another.”<sup>76</sup> “The elements of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages.”<sup>77</sup> There has not been a sufficient showing at this stage that there was any breach of the contracts at issue and, without the showing of a breach, the plaintiffs cannot show a likelihood of success on the merits on this claim by clear and convincing evidence for the purpose of the present motion.

Finally, to the extent that the plaintiffs are seeking to bring a claim for deceptive trade practices or confusion in the market with regard to the name of the companies, the evidence before the court demonstrates that neither the plaintiffs nor the defendant

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<sup>76</sup> *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 807 N.E.2d 953, 2004-Ohio-1661, ¶ 57 (Ohio App. 6<sup>th</sup> Dist., 2004), citing, *A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 14, 651 N.E.2d 1283.

<sup>77</sup> *PNH, Inc. v. Alfa Laval Flow, Inc.* (2011), 130 Ohio St.3d 278, 958 N.E.2d 120, 2011-Ohio-4398, ¶ 40, quoting *Fred Siegel Co., L.P.A. v. Arter & Hadeen* (1999), 85 Ohio St.3d 171, 707 N.E.2d 853, paragraph one of the syllabus.

company do business under the Kellerman name and, as such, there has been no demonstration of a likelihood of success on the merits under this theory.

With regard to a threat of irreparable injury, even the threat of harm is a sufficient basis to grant injunctive relief and courts “have found that an actual threat of harm exists when the employee possesses knowledge of the employer's trade secrets and begins working in a position that causes her to compete directly with the former employer or the product line that the employee formerly supported.”<sup>78</sup> “This is similar to the inevitable-disclosure rule, which reasons that a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and comprehensive knowledge of the former employer's trade secrets and confidential information now works for a competitor of the former employer in a position that is substantially similar to the position held during the former employment.”<sup>79</sup>

This analysis of irreparable harm still necessarily involves an assumption that trade secrets exist and are in danger of being revealed by the former employee. As set forth above, the plaintiffs have not demonstrated at this stage that the processes and products at issue are trade secrets or confidential proprietary information. Therefore, the court finds that the plaintiffs have not demonstrated a threat of irreparable injury by clear and convincing evidence.

As to the two final factors, whether third parties will be unjustifiably harmed if the injunction is granted and if the public interest will be served by the issuance of injunctive relief, the court finds that the first weighs in favor of the plaintiffs, as there is no evidence that third parties would be unjustifiably harmed if an injunction was granted,

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<sup>78</sup> Id. at ¶ 38, citing *Stoneham*, supra, at 274.

<sup>79</sup> Id.

and the second weighs in favor of the defendants as the court finds no showing that the public interest would be served by the issuance of a temporary restraining order.

Therefore, the plaintiffs have failed to demonstrate that they are entitled to a temporary restraining order.

**CONCLUSION**

Based on the above analysis, the plaintiffs' motion for temporary restraining order is not well-taken and is hereby denied.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge Jerry R. McBride

## **CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 6th day of January 2014 to all counsel of record and unrepresented parties.

\_\_\_\_\_  
Administrative Assistant to Judge McBride