

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

CASE TYPE: Civil

TELLURIDE ASSET MANAGEMENT, LLC,

File No.: 27-CV-07-4832

Judge: Heidi S. Schellhas

Plaintiff,

v.

ERIC FALKENSTEIN,

Defendant.

**DEFENDANT'S CONSOLIDATED
MEMORANDUM IN RESPONSE TO
PLAINTIFF'S MOTION FOR A
TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Arguing from a base of innuendo and conjecture, Plaintiff Telluride Asset Management, LLC (“Telluride”) seeks overbroad “emergency” injunctive relief that would effectively bar Defendant Eric Falkenstein (“Falkenstein”) from working as a quantitative equity portfolio manager. Telluride neither bargained for nor obtained a non-competition provision in its contract with Falkenstein, its former employee. Instead, Telluride effectively seeks to prevent Falkenstein from working as an equity portfolio manager by claiming in vague and broad terms that *any* securities trading practice that utilizes the same general factors that were used in Telluride’s trading model (factors that were widely known and discussed throughout the industry and in academic literature) somehow involves a misuse of its confidential and proprietary information. Even more remarkably, Telluride complains that Falkenstein failed to accede to its demand that he prove to it that he was not doing something wrong by making a wholesale disclosure of the new investment techniques he is contemplating for use if and when his career continues. Having no evidence of wrongdoing on Falkenstein's part, Telluride now asks this Court to order Falkenstein to turn over all of his own proprietary and confidential materials to it on an expedited basis.

A temporary restraining order is an extraordinary remedy that should only be granted when the moving party has met its strong burden of presenting indisputable evidence that it is entitled to such a remedy. Here, Telluride is seeking to use this extraordinary remedy simply to prevent a talented equity portfolio manager from competing in the marketplace. And Telluride is attempting to meet its burden with generic, cut-and-paste pleadings that are devoid of any substantial evidentiary detail or support.

Telluride cannot establish its ultimate success in this matter because it has completely failed to present any evidence that that Falkenstein has violated, or threatened to violate, his confidentiality obligations. Telluride also has failed to identify any irreparable harm that might result if its motion for injunctive relief is denied. Most importantly, Telluride has failed to identify its alleged trade secrets with specificity, and to the extent it has identified well-known quantitative equity concepts, in general terms, that information is not worthy of trade secret protection because it is within the public domain.

Telluride's motions should be denied in their entirety.

STATEMENT OF FACTS

I. Falkenstein's Education and Experience Prior to Joining Telluride.

Falkenstein is a former quantitative equity portfolio manager for Telluride. *See* Affidavit of Eric Falkenstein ("Falkenstein Aff."), ¶ 4. Based upon his substantial knowledge and experience, he can be considered an expert in the field. *See* Falkenstein Aff., Ex. A.

Falkenstein's portfolio management career began after he received a Ph.D in Economics from Northwestern University. *Id.* at ¶ 2. Falkenstein's 1994 Ph.D. dissertation, titled "Mutual Funds, Idiosyncratic Variance, and Asset Returns," provided a clear focal point for his management strategies and methods going forward. *Id.* at ¶ 24. The dissertation introduced in large part the premise that high volatility assets have lower returns. *Id.* This idea

was eventually corroborated by other researchers and is now in the public domain. *Id.*

Motivated by his dissertation findings, Falkenstein soon created the Falken Fund (which he operated from 1996-2001) to use as a vehicle for the successful implementation of this theory regarding volatility. *Id.* at ¶¶ 3, 24. Thereafter, beginning in 2001, Falkenstein began working as a portfolio manager at Deephaven Capital Management (“Deephaven”). *Id.* at ¶ 4. Over the next two years he continued to develop his equity trading strategies, until he left Deephaven in January 2004. *Id.* at ¶¶ 4, 13.

While he was at Deephaven (and subsequently while employed at Telluride), Falkenstein managed hedge funds. *Id.* Hedge funds permit investors to make investments in certain ways that are not permitted in regulated funds. *Id.* at ¶ 5. Managers of hedge funds can take positions and apply strategies not used by normal mutual funds. *Id.* Many of these strategies are based on statistical studies done by academics or others. *Id.* Some of these studies reveal ways of grading stocks based on a particular attribute found to be correlated with good returns or based on good risks or both. *Id.* Typically, for a quantitative equity portfolio manager like Falkenstein, only a computer model can capture the complexity of the analysis and deal with the large universe of stocks or other assets studied as investment candidates for hedge fund strategies. *Id.*

A number of hedge funds have been highly successful both in attracting funds and in delivering returns above market indexes, providing evidence that the quantitative analysis and resulting strategies are sound. *Id.* at ¶ 6. However, some economists believe that once the strategies are employed in the market, the market adjusts so that the strategy becomes less valuable. *Id.* Thus, new research is done and new quantitative strategies are formulated continuously. *Id.* Many academic studies of the factors that seem to be associated with superior returns have been published, and these are focal point for portfolio managers. *Id.* Prominent Hedge Fund managers like Mark Carhart and Clifford Asness have Ph.D.s in economics and are

widely quoted, published, and familiar with academic finance. *Id.*

II. Falkenstein's Employment with Telluride.

Shortly after he left Deephaven, Falkenstein was contacted by Telluride CEO Peter Hajas (“Hajas”), with whom he had worked at Deephaven, to set up an interview. *Id.* ¶ 25. Falkenstein interviewed with Telluride and presented Hajas with an equity strategy based entirely on his previous experience, using a sequence of sorting various factors, such as momentum, profitability, and accruals. *Id.*; *see also* Falkenstein Aff., Ex. D. These factors, as well as several others (including “volatility” and “capital issuance”) are well-known characteristics (also known as “factors” or “anomalies”) relating to returns. *Id.* at ¶¶ 8, 23; *see also* Falkenstein Aff., Ex. B. In fact, the application of these factors has been the subject of considerable public discourse by top researchers in the field of academic finance. *Id.* at ¶¶ 8, 23; Falkenstein Aff., Exs. B, C.

Falkenstein was soon hired by Telluride to manage funds, which included implementing an existing trading strategy and developing new strategies. *See* Falkenstein Aff., ¶ 9. In this respect, Falkenstein used his extensive knowledge (including his knowledge of the well-known factors and anomalies used to formulate equity trading strategies) and prior research and experience, and he continued to monitor current research on statistically-based strategies. *Id.* at ¶¶ 8-9. While at various times he discussed investment strategies with Hajas and others at Telluride, no one at Telluride “instructed” Falkenstein to utilize certain factors or algorithms unique to Telluride, or made disclosures to Falkenstein regarding those factors and algorithms that would be considered trade secrets or proprietary, confidential information. *Id.* at ¶ 9. To the extent factors were used, these were used because Falkenstein chose to employ them based upon his review of academic literature or his familiarity with databases due to his work with them as a Ph.D. student in the early 1990's. *Id.* Falkenstein considered such factors to be in the public domain, because he recognized them as present in publications in the field and therefore not

trade secrets or proprietary, confidential information of anyone. *Id.*¹

As Falkenstein developed trading strategies at Telluride, he continued to employ well known, general concepts such as profitability, accruals, and volatility, as part of his strategies. *Id.* at ¶ 13. While it is true that Falkenstein did begin to use “capital issuance” to make a minor adjustment to his investment model while at Telluride, *see id.* at ¶ 26, as is the case with the other general factors like volatility and accrual, there is considerable public literature regarding capital issuance and its effect on equity returns. *See Falkenstein Aff.; Ex. C.* An investment strategy that utilizes this as one of several factors is not confidential or proprietary to Telluride. *See Falkenstein Aff.* ¶ 26.

Likewise, Falkenstein’s application of a “mean-variance variation” is part of Modern Portfolio Theory (MPT), a pillar of finance and is related to “portfolio optimization” and “Sharpe ratio maximization.” *Id.* at ¶ 27. Harry Markowitz won the Nobel Prize in 1990 for his development of this technique several decades earlier. *Id.* There are countless textbooks, websites, academic articles and business courses that discuss this ubiquitous equity objective in various levels of detail. *Id.* It is possible to purchase software or to hire consultants to assist with this objective. *Id.*²

III. Falkenstein’s Development of New Equity Strategies After Leaving Telluride.

Falkenstein resigned from Telluride on September 1, 2006. *Id.* at ¶ 4. Since that time he

¹ The only factor Falkenstein used at Telluride that was not, until recently, in the public domain, was volatility. *See Falkenstein Aff.*, ¶ 10. Volatility was not in the public domain at the time because Falkenstein discovered it in his 1994 PhD dissertation and chose not to publish it so that he could use it to build the Falken Fund based on its findings. *Id.* The volatility anomaly he initially discovered was published in 2006 the *Journal of Finance*, so at the present time each of the factors that Falkenstein employed in his trading models while working for Telluride are known to thousands of academics, students, and various outsiders. *Id.*

² In addition, a google search results in 191,000 hits under “mean-variance optimization,” 74,000 hits under “mean-variance optimization books,” and 73,5000 hits under “mean variance optimization software.” *See Falkenstein Aff.*, ¶ 27.

has spent many hours researching and developing the details of a new trading tool that he may use when, and if, he begins working for another hedge fund. *Id.* at ¶¶ 13, 19, 21. As has been the case throughout his career, Falkenstein’s tool continues to utilize the general concepts that are well known in the field of academic finance, as well as precise methodologies and other highly specific data. *Id.* at ¶¶ 22-23, 27. When it comes to the detailed implementation, however, his new approach bears no resemblance to the models that Falkenstein developed on behalf of Telluride. *Id.* at ¶¶ 13, 15.

IV. Falkenstein’s Attempts to Resolve Telluride’s Stated Concerns.

Falkenstein has not been employed since he resigned his position at Telluride. *Id.* at ¶ 17. Nor does he currently have an offer of employment. *Id.* In February 2007, Falkenstein spoke with Irv Kessler (“Kessler”) of Provident Advisors regarding starting a hedge fund. *Id.* at ¶ 18. Because Kessler is an acquaintance and former colleague of Hajas, Hajas soon learned that Falkenstein was considering whether to manage another hedge fund. *Id.*

After speaking with Kessler, Hajas contacted Falkenstein and expressed concern that Falkenstein would be using Telluride confidential information in his new venture. *Id.* at ¶ 19. Since that time, Falkenstein has done everything he could to alleviate Hajas’ concerns. For example, Falkenstein reiterated his promise that he would not use Telluride’s confidential information, and wrote to Hajas in an attempt to explain the various reasons why his newly developed trading tool did not incorporate information potentially protected under his confidentiality agreement with Telluride. *See* Complaint, Ex. C; *see also* Complaint at ¶¶ 23-28. While Falkenstein noted that there were “significant similarities” between the strategies he used while at Telluride, and his newly developed tool, these similarities refer only to general themes such as volatility, accrual, profitability, and capital issuance. *See* Complaint, Ex. C; *see also* Falkenstein Aff. ¶¶ 19, 22, 23, 27. As noted in recent academic journals, only a handful of these

anomalies even exist, and each of these has been the subject of considerable public discourse by top researchers. *Id.* at ¶ 23. Moreover, with regard to potentially proprietary details, as discussed above, Falkenstein’s new models bear no resemblance to the models that were used by Telluride. *Id.* at ¶¶ 13, 15, 19.

After Hajas wrote to Falkenstein to insist that he specifically identify any similarities between Telluride’s trading models and Falkenstein’s new trading models, Falkenstein met with Hajas on March 17, 2007, for approximately ninety minutes, to explain the investment approach he intends to use going forward, and how it differs from the models that had been used by Falkenstein at Telluride. *Id.* at ¶ 19. Falkenstein also explained to Hajas that, to the extent his new tool is similar to the Telluride models, that similarity is solely the result of the use classic factors/anomalies that are widely used throughout the industry. *Id.* Although Telluride now complains that Falkenstein provided only “selected” and “redacted” information at that meeting, Falkenstein in fact provided Hajas with a great deal of detail, and more than sufficient information for him to verify that his intended approach does not use confidential or proprietary information of Telluride. *Id.* at ¶ 20. In fact, the presentation Falkenstein made to Hajas was more detailed than any that Falkenstein would make to either a prospective employer or investor. *Id.*³ Moreover, in response to Telluride’s concerns about preservation of documents and evidence, Falkenstein authorized his counsel to create a mirror image of his computer’s hard drive.

None of these voluntary efforts and displays of good faith have been good enough for Telluride. Indeed, it is clear that it has had its lawyers preparing to initiate litigation. Telluride

³ The information that Falkenstein did not disclose to Hajas consisted only of additional specifics that would have revealed proprietary aspects of the investment approach he intends to utilize in his future employment. *See* Falkenstein Aff., ¶ 21. Had he disclosed this information to Hajas, Falkenstein would not be employable since his investment strategy already would have been completely disclosed to Telluride, a likely competitor of any prospective employer. *Id.*

served Falkenstein with its Complaint, as well as a Motion for a Temporary Restraining Order, a Motion for Expedited Discovery, and a Motion for an Order Requiring Preservation of Documents and Things. In these filings, Telluride generically asserts “on information and belief” that Falkenstein has misappropriated Telluride’s confidential information because Falkenstein’s new trading models use the same general factors—such as volatility and capital issuance—that were incorporated into the models Falkenstein used at Deephaven and Telluride. *See, e.g.*, Complaint at ¶¶ 21, 35, 39.

To date, Falkenstein has not started any new employment, *nor has he disclosed*, or threatened to disclose, any of Telluride’s alleged confidential or proprietary information. *See* Falkenstein Aff., ¶¶ 17; Complaint, Ex. F. In fact, what Telluride identifies as the “substantial similarities” between its investment model and Falkenstein’s contemplated approach are the basic building blocks of Falkenstein’s chosen profession: quantitative equity portfolio management. *Id.* at ¶ 28. Telluride’s actions to date already have resulted in Falkenstein’s inability to pursue the opportunity to start a hedge fund with Kessler. *Id.* If Falkenstein is enjoined from using a methodology that includes broad, well-known factors such as profitability, accruals, volatility and capital issuance, and techniques such as mean-variance optimization, as a practical matter he will be unable to obtain any employment as a portfolio manager because his experience has been applied to equities using quantitative methods, and those are the only arenas in which he is qualified to work. *Id.*

In addition, the discovery requests served upon Falkenstein in connection with Telluride’s motion for expedited discovery seek to force Falkenstein to disclose every single detail of his contemplated investment strategy. *Id.* at ¶ 29. Because it has taken Falkenstein several months of research to complete the details of a new trading strategy, revealing this strategy to a potential competitor would require him to disclose details of his current strategy that

he considers proprietary. *Id.* In addition, the disclosure of this information would make it more difficult for him to find employment, because any prospective employer would know that a competitor already possesses not just the basics but all of the details regarding the portfolio management strategy he would use. *Id.*

ARGUMENT

I. The Court Should Not Issue a Temporary Restraining Order Because Telluride Has Not Established that Such an Extraordinary Remedy is Warranted.

Courts do not lightly grant motions for a temporary restraining order. Injunctive relief is a drastic and extraordinary remedy that only may be granted if it *clearly* appears from specific facts shown that *immediate and irreparable injury, loss, or damage will result* to the applicant. *See* Minn. R. Civ. P. 65.02 (emphasis added); *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). To assure that a motion for a temporary restraining order receives strict scrutiny, Telluride bears the burden of demonstrating that a restraining order should issue through the following five factors:

- (1) the relationship between the parties before the dispute arose;
- (2) the harm that Telluride may suffer if the restraining order is denied, compared with the harm inflicted on the defendant if the order is granted;
- (3) the moving party's likelihood of success on the merits;
- (4) the public interest; and
- (5) the administrative burden of enforcing the temporary decree.

See, e.g., MGM Liquor Warehouse, Int'l, Inc. v. Forslund, 371 N.W.2d 75 (Minn. App. 1985), *citing Dahlberg Bros. Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965); *Thompson v. Barnes*, 200 N.W.2d 921 (Minn. 1972).

Telluride cannot satisfy the *Dahlberg* factors and cannot satisfy the other requirements necessary to prevail upon a court of equity for *any* injunctive relief, principally because: (1) it cannot demonstrate the existence of any sudden emergency; (2) it has not come close to identifying the confidential information that it claims is protected with the required specificity,

(3) the allegedly confidential information is in the public domain to the extent that it is identified, and (4) it cannot demonstrate the imminent misuse of any confidential information.

The Court need look no further, however, than Telluride's proposed Temporary Restraining Order to see that this motion should be denied. Any injunctive order must be precise. Our Supreme Court has made clear that "fundamental fairness, if not due process, requires that [an] injunction be so tailored that the defendant knows with some reasonable degree of certainty what it is restrained from doing." *Channel 10 v. Independent School Dist. No. 709*, 215 N.W.2d 814, 827-28 (1974). No confidentiality agreement and no temporary restraining order that fails to specify what a company claims to be confidential is valid or enforceable. See *IBM Corp. v. Seagate Technology, Inc.*, 941 F. Supp. 98, 99 (D. Minn. 1992) (reporting Eighth Circuit's reversal of injunction prohibiting "disclosure and use of plaintiff's confidential information" because of the vagueness of such an order).

Telluride's request for a patently overbroad TRO prohibiting any use of "confidential or proprietary information" or "trade secrets" violates those legal requirements on its face. Read literally, other aspects of Telluride's proposed order are downright silly. For example, Telluride seeks an order that would prohibit Falkenstein from "soliciting . . . former and *potential* customers" even though there is no allegation that such conduct is even part of this lawsuit.

Since little argument is necessary to establish that such an order makes no sense, the only remaining question is what one might infer about Telluride's purposes and strategies in requesting relief so blatantly improper. Its effort to prevent ex-employees from using their own knowledge and experience in subsequent employment and to chill legitimate competition with an overbroad prohibition of undefined "confidential information" illustrates how Telluride is using litigation as an alternative to legitimate tools of employee management and fair competition.

A. The Relationship of The Parties.

At the present time, Telluride is a business with significant assets while Falkenstein is a former employee who is looking for a job. But even if Falkenstein and Telluride were current competitors, this factor would weigh in Falkenstein's favor because "[c]ompetition is favored in the law. The law's preference for competition is illustrated by the establishment of a special privilege for competitors." *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982). The value Minnesota courts attach to competition, particularly competition by former employees, is expressed in cases analyzing covenants not to compete, which, were such a valid covenant in existence, *could* have formed a legitimate basis for Telluride to eliminate competition by its former employee. Although the common law's absolute bar to enforceability of such contracts no longer exists, "such covenants are looked upon with disfavor because their enforcement decreases competition in the marketplace and restricts the [employee's] right to work and his ability to earn a livelihood." *Jim W. Miller Construction, Inc. v. Schaefer*, 298 N.W.2d 455, 459 (Minn. 1980). Minnesota courts "look upon restrictive contracts with disfavor, carefully scrutinizing them." *Nat'l Recruiters v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982). That reasoning surely applies *a fortiori* when a corporation seeks the relief only a noncompete agreement could provide even though it lacks any valid noncompete agreement.

In part for those reasons, as is described more fully below, courts are becoming increasingly skeptical of competitors using vague claims of concerns about confidential information to restrict the ability of either competitors or former employees to compete and earn livings. Two of the more striking real-world facts about this motion, wholly apart from its legal flaws, are these: (1) most of the "confidential information" Telluride seeks to prevent Falkenstein from using is essentially the same "confidential information" he brought to Telluride after two years at Deeplaven and six years as hedge fund manager; and (2) if Telluride's request for an

injunction is granted, Falkenstein will be prevented from using any of the primary anomalies that are necessary to create a viable trading model, including the anomaly that Falkenstein wrote a Ph.D. dissertation about before he began working for Telluride. Those facts illustrate Telluride's effort to use litigation as a tool in employee management and in competition that it has apparently decided it cannot win by legitimate means.

B. There is No Threat of Irreparable Harm.

“A trial court may grant a temporary injunction if the party seeking it establishes that there is no adequate remedy at law and the denial of the injunction will result in irreparable injury.” *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 163 (Minn. 1993). Only “when it is clear that the rights of a party will be irreparably injured before a trial on the merits is held” should such an order be entered. *See Miller*, 317 N.W.2d at 712; *Sunny Fresh Foods, Inc. v. Microfresh Foods Corp.*, 424 N.W.2d 309, 310 (Minn. App. 1988) (order should issue only “in clear cases, reasonably free from doubt”). The burden of proof remains on the complainant to establish the material allegations entitling it to relief. *See Sunny Fresh Foods*, 424 N.W.2d at 310. The movant's failure to sustain its burden of proving irreparable harm ends the inquiry, and the denial of injunctive relief is warranted. *See Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987).

As Falkenstein is currently unemployed, Telluride's argument of irreparable harm is apparently based on the *risk* of a disclosure and use of the undefined “confidential and trade secret information that Telluride entrusted to Falkenstein during his employment with Telluride” at some point in the future. Memorandum of Law in Support of Plaintiff's Ex Parte Motion for Temporary Restraining Order and Temporary Injunction (“Plaintiff's Memorandum”), 17-18. But even when a former employee is “holding a comparable position with a competitor,” “merely possessing trade secrets” does not justify an injunction. *IBM Corp.*, 941 F. Supp. at 100.

A claim of trade secret misappropriation should not act as a *ex post facto* covenant not to compete.” *Id.*; see also *Hoskins Mfg. Co. v. PMC Corp.*, 47 F.Supp.2d 852, 856 (E.D. Mich. 1999) (allegations that defendant worked for plaintiff, knew plaintiff’s business, left plaintiff’s employ, and entered the same field does not state a claim of threatened misappropriation). Moreover, Telluride cannot prevent Falkenstein from taking his general knowledge and experience, gained before and during his employment, to a new employer. See *Roth v. Gamble-Skogmo, Inc.*, 532 F. Supp. 1029, 1032 (D. Minn. 1982). See also Employment Agreement, Exhibit A to Verified Complaint, at 2 (“Nothing in this Section shall be construed to restrict Employee’s use of general know-how and experience in future employment so long as Confidential Information is not used or disclosed.”).

Telluride cannot show a threat of irreparable harm in this case because Falkenstein is currently not in a position to actually use any of the trading models that are in dispute. In fact, Telluride does not appear to be using the trading models that Falkenstein developed while he was at Telluride and the facts suggest that it is currently taking a different investment approach. See *Falkenstein Aff.*, ¶ 30. Telluride’s conclusory assertions of potential future harm are mere speculation and are insufficient to support a restraining order. An injunction is not appropriate to prevent an imagined injury which there is no reasonable grounds to fear. See, e.g., *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 351 (Minn. 1961); *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990) (noting that failure to show irreparable harm is, by itself, a sufficient ground on which to deny a temporary injunction).

C. Telluride has not Shown That it is Likely to Succeed on the Merits.

Next, Telluride must establish that it is likely to succeed on the merits of this case. The movant’s success on the merits must be “at least . . . sufficiently likely to support the kind of relief it requests.” See *Sanborn Mfg. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 488

(8th Cir. 1993).

1. Telluride has not Defined Its Trade Secrets.

The threshold requirement for any injunction relating to confidential information or trade secrets is that such confidential information or trade secrets be defined. In *IBM Corp. v. Seagate Technology, Inc.*, 941 F. Supp. 98 (D. Minn. 1992), the Court of Appeals found that an injunction failing to define alleged trade secrets or confidential information and instead simply enjoining use of “confidential information” was subject to reversal for that reason alone. Similarly, a purported confidentiality agreement that fails to define what is supposed to be confidential cannot support an injunction. *Western Water Management, Inc. v. Heine*, 1996 WL 208489 (Minn. App. April 30, 1996).

Telluride clearly bears the burden of establishing precisely what information was improperly taken by Falkenstein. If it fails to describe specifically any trade secret or confidential information, it is not entitled to relief. *Electro Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 898 (Minn. 1983); *Jostens, Inc. v. National Computer Systems, Inc.*, 318 N.W.2d 691, 699 (Minn. 1982); *Surgidev Corp. v. Eye Technology, Inc.*, 648 F. Supp. 661, 898 (D. Minn. 1986); *Litton Systems, Inc. v. Sun Strand Corp.*, 750 F.2d 952, 957-58 (Fed. Cir. 1984). Producing a list of categories of information, without identifying specific secrets, does not satisfy its burden:

[A]n injunction is inappropriate if plaintiff fails “to identify specific trade secrets and instead produces long lists of general areas of information which contain unidentified trade secrets.”

IBM Corp., 941 F. Supp. at 100 (quoting *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1203 (7th Cir. 1987)).

Here, Telluride has made no effort at all to describe just what information it claims to be confidential. At times Telluride simply lists broad categories of information such as “resources .

. . in developing trading models,” and “strategies and concepts for Telluride.” Plaintiff’s Memorandum, at 6. Other times, Telluride cites to the generic language of Falkenstein’s employment agreement and then asserts that anything “that relates directly to the business of [Telluride]” constitutes protectible information. *Id.* at 12-13. Finally, Telluride vaguely asserts that the “ideas, strategies, methodologies, and algorithms” that were incorporated in the “Telluride Modified Model” and the “New Telluride Models” are the property of Telluride. *Id.* at 15. Without any supporting detail, these broad descriptions of categories of information are not sufficient to meet Telluride’s burden.

2. The Confidential Information that Telluride Attempts to Identify is Publicly Available.

Telluride’s claims must also fail because the trade secrets that it tries to identify are widely used concepts that are discussed in public literature. Under Minnesota law, the existence of a trade secret depends on three factors: (1) the information must not be generally known or readily ascertainable; (2) the information must derive independent economic value from secrecy; and (3) the party asserting the misappropriation must have made reasonable efforts to maintain the secrecy of the item. *See, e.g., SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC*, 292 F. Supp.2d 1173, 1178 (D. Minn. 2003).

Here, Telluride alleges that Falkenstein misappropriated its trade secrets when he applied factors like “accruals, profitability, volatility, and capital issuance” to his trading model after he was no longer employed at Telluride. Plaintiff’s Memorandum, at 15. Telluride also contends that “mean-variance optimization” is a trade secret. *Id.* These contentions do not pass the giggle test.

First, as reflected in the bibliography attached to Falkenstein’s affidavit, the application of the general factors identified by Telluride (including volatility, profitability, capital issuance and accruals) has been the subject of considerable public discourse by top researchers in the field

of academic finance. *See* Falkenstein Aff., Ex. C. Similarly, the use of “mean-variance optimization” cannot be Telluride’s trade secret because Harry Markowitz won the Nobel Prize in 1990 for his development of that technique. *See* Falkenstein Aff., ¶ 27.⁴

What Telluride identifies as the “substantial similarities” between its investment model and Falkenstein’s contemplated approach are the basic building blocks of quantitative equity portfolio management. *Id.* at ¶ 28. This is not, as Telluride suggests, a situation akin to misappropriating the secret formula for Pepsi by asserting that the formula includes basic concepts like water and sugar. In this case, Telluride is claiming that anything derived from the basic concepts (like water and sugar) constitutes a trade secret. Thus, under Telluride’s theory, Pepsi could levy a trade secret claim against any former employee who creates a beverage using sugar and water, claiming that no one could find these “needles” in the “haystack” without the benefit of confidential information. Telluride has failed to show that its trade secret claims are likely to succeed.

D. The Public Interest.

That Telluride and Falkenstein are potential competitors is highly relevant to the determination of the public interest. As the *Lasermaster* court observed, “A strong public interest exists in ensuring that two [competitors] are allowed to compete in the [relevant] market.” 931 F. Supp. at 638. Surely there is no public interest to be served in allowing Telluride to put Falkenstein out of work by making it impossible for him to use a trading model that involves any of the general factors upon which such models are based. Nor is there any public interest to be served in sanctioning Telluride’s s heavy-handed efforts to keep employees

⁴ Moreover, the doctrine of inevitable disclosure, which Telluride is attempting to assert when it claims that Falkenstein “cannot help but use what he learned,” at Telluride, is not accepted law in Minnesota. *See Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898 (Minn. 1965) (Minnesota cases clearly establish a “reasonableness” test for enforcement of covenants not to compete, not an “inevitable disclosure test”). Moreover, there is no such non-competition clause here.

under its thumb through aggressive litigation tactics.

E. Administrative Burdens.

An injunction should not issue if it would require substantial supervision over the parties. *Dahlberg*, 137 N.W.2d at 326. Telluride asks this court to issue a broad injunction that provides absolutely no clear guidelines for Falkenstein. And since Telluride has not bothered to identify its alleged trade secrets with specificity, the parties would be required to seek the Court's assistance early and often in order to determine whether certain financial models are permissible under the injunction. The Court could easily spend substantial amounts of time over the rest of the spring, and summer dealing with periodic charges by Telluride that this information or that reflects confidential information that Falkenstein should be prevented from using. That administrative burden weighs heavily against the issuance of injunctive relief.

II. Telluride's Motion for Expedited Discovery Should Be Denied.

In connection with its motion for a preliminary injunction, Telluride also requests that this Court order the parties to engage in expedited discovery. In support of that motion, Telluride blandly states that the discovery sought is "reasonable in scope" and necessary to prevent the "imminence and severity of irreparable harm" to Telluride. *See* Plaintiff's Emergency Notice of Motion and Motion for an Order Directing Expedited Discovery. Telluride's motion should be denied.

Motions for expedited discovery are granted in cases where a risk of significant loss exists if an immediate resolution is not achieved. *See LEXIS-NEXIS v. Beer*, 41 F.Supp.2d 950, 953 (D. Minn. 1999) (expedited discovery in non-competition lawsuit); *see also e.g., United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1178 (8th Cir. 1998) (expedited discovery permitted in case between direct competitors alleging false advertising); *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 205 (8th Cir. 1976) (expedited discovery permitted regarding whether

the issuance of stock should be permitted to proceed); *Stahl v. McGenty*, 486 N.W.2d 157, 158 (Minn. App. 1992) (expedited discovery permitted where risk of wasting assets of company existed).

In this case, Telluride's claims of emergency are based on the possibility that Falkenstein might employ certain trading models if and when he gets a new job. Clearly, there is no emergency warranting expedited discovery.

More importantly, it is apparent from the from face of Telluride's discovery requests, and the other deficiencies in Telluride's claims, that this litigation is designed solely to put pressure on Falkenstein while he remains unemployed. Telluride's overly aggressive actions have already destroyed Falkenstein's ability to pursue one employment opportunity. *See* Falkenstein Aff., ¶ 28. Moreover, Telluride's proposed discovery requests are so broad that they would force Falkenstein to disclose every single detail of his contemplated investment strategy, and thereby hinder his ability to obtain employment in the near future. *Id.* at ¶ 29.⁵ And Telluride's proposed injunction is so broad that it would effectively prevent Falkenstein from working in his chosen profession.

Telluride's motion for expedited discovery represents an abuse of the judicial process and it should be denied.⁶ Similarly, because there is no evidence in the record to support Telluride's claim that Falkenstein is suddenly about to destroy information (nearly six months after leaving Telluride), Telluride's Emergency Motion for An Order Requiring Preservation of Documents and Things should also be denied. Indeed, before this lawsuit was filed Falkenstein already had

⁵ This is especially appalling in light of Telluride's failure to submit such detailed information in support of its motion for a preliminary injunction, despite its obligation to do so.

⁶ Similarly, because there is no evidence in the record to support Telluride's claim that Falkenstein is suddenly about to destroy information (nearly six months after leaving Telluride), Telluride's Emergency Motion for An Order Requiring Preservation of Documents and Things should also be denied.

taken voluntary steps to preserve documents and evidence.

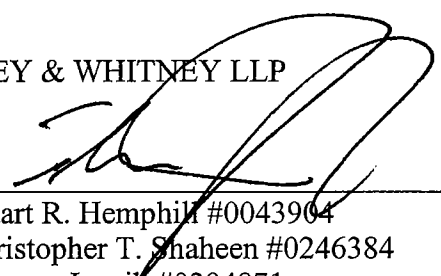
CONCLUSION

Telluride has come before this Court seeking extraordinary, emergency relief. However, it has failed to identify sufficiently any so-called “confidential information” or “trade secrets” and it has failed to identify any threat of irreparable harm. Because Telluride has not come close to meeting its burden of proving that it is entitled to this extraordinary relief, Defendant Eric Falkenstein respectfully request that this Court deny all of Telluride’s pending motions.

Dated: March 23, 2007

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