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Federal Judge Denies Employer's Motion for Temporary Restraining Order (TRO) Despite Proving Likelihood of Success in Trade Secrets Claim Against Former Employee

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Earlier this month, a federal judge denied an employer's motion for a temporary restraining order against a former employee who left the company to form his own enterprise which later solicited an account held by his former employer. In ***Marketing Werks, Inc. v. Fox et al***., No. 13-7256 (N.D. Ill. Oct. 11, 2013), the District Court for the Northern District of Illinois held that, even though Marketing Werks showed a likelihood of success on the merits of its Illinois Trade Secrets Act claim, it was not entitled to prevent Fox and his new company, Foxsano, from competing with Marketing Werks for the **Indy Racing League** ("***IRL***") account because Marketing Werks had failed to demonstrate irreparable harm or that it lacked an adequate remedy at law.

While employed by Marketing Werks, Fox was primarily responsible for the IRL account which was re-bid on an annual basis. On August 4, 2013, Fox left Marketing Werks to form Foxsano and immediately submitted a bid for the 2014 IRL account. Foxsano and Marketing Werks were two of three finalists for the 2014 IRL marketing contract. Marketing Werks filed suit against Fox and Foxsano alleging that Fox used confidential information and trade secrets in order to secure the IRL bid and setting forth claims for violation of the Stored Communications Act ("SCA"), violation of the **Illinois Trade Secrets Act**, tortious interference, breach of fiduciary duty and conspiracy.

The Court held that Marketing Werks' pricing information, budgets, market and consumer research, data, designs, plans, and other strategic materials were likely trade secrets and that it was likely that Fox and Foxsano had used that strategic information in bidding on the 2014 IRL account. Despite the fact that this led the Court to conclude that Marketing Werks proved a likelihood of success on the merits of its Illinois Trade Secrets Act claim, it found that Marketing Werks failed to carry its burden to show irreparable harm and that it lacked an adequate remedy at law. In doing so, the Court noted that because the IRL contract was annually renewed, any harm to Marketing Werks would not extend beyond one year. Moreover, the Court found that the IRL account was not so large as to significantly affect Marketing Werks' revenue in the event it failed to procure the contract. Furthermore, the Court held that Marketing Werks had an adequate remedy at law in the form of monetary damages based on the prior years of data indicating the value of the IRL account to Marketing Werks.

In analyzing other considerations that counseled against issuing the TRO, the Court considered the fact that Marketing Werks failed to restrict or investigate Fox's computer use until it learned that Fox was going to be a competitor. This consideration was also relied upon by the Court in finding that Marketing Werks was unlikely to prevail on its claim for violation of the SCA because it could not show that Fox did not have authorization to access Marketing Werks' server.

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