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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

EARTHBOUND CORPORATION &	}	Case No. CV 16-7223 DMG (JPRx)
INTACT STRUCTURAL SUPPLY, LLC,		ORDER RE PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS’ MOTION TO VACATE TEMPORARY RESTRAINING ORDER [117, 120]
Plaintiffs,	}	
v.		
MITEK USA, INC., et al.,		
Defendants.		

Before the Court are Plaintiffs Earthbound Corporation (“Earthbound”) and Intact Structural Supply, LLC’s (“ISS”) Motion for Preliminary Injunction (“MPI”) [Doc. # 120] and Defendants Ken Keyse, James Miller, and Jason Birdwell’s (collectively, the “Employee Defendants”) Motion to Vacate Temporary Restraining Order (“MTV”) [Doc. # 117]. For the reasons set forth below, the MPI is **GRANTED in part** and **DENIED in part**, and the MTV is **GRANTED**.

**I.
PROCEDURAL BACKGROUND**

On August 19, 2016, Hon. Ricardo S. Martinez, United States District Judge for the Western District of Washington, granted Plaintiffs’ motion for a temporary

1 restraining order (“TRO”) and set a preliminary injunction (“PI”) hearing for September
2 28, 2016. *See* Doc. # 46. In addition to ordering all Defendants to deliver to a neutral
3 third-party expert all relevant flash drives, cell phones, SD cards, passwords, and online
4 or cloud-based data storage accounts, the Court enjoined Keyse from accessing or
5 destroying certain drives or storage accounts, Birdwell and Miller from destroying any
6 storage accounts, and all Defendants from using any of Earthbound’s confidential or
7 proprietary information or trade secrets, including customer lists and information. *Id.*

8 Before the PI hearing could occur, the case was transferred to this District on
9 September 22, 2016 [Doc. ## 62, 64] and to this Court on September 26, 2016 [Doc.
10 # 65]. When Judge Martinez granted Defendant MiTek USA, Inc.’s (“MiTek”) motion to
11 transfer venue, he ordered that the TRO “remain in effect unless or until” this Court
12 dissolves it. [Doc. # 62.]

13 The Employee Defendants now ask this Court to vacate the TRO, citing its
14 “effect[ive] prohibit[ion]” on their ability to “work[] in their profession.” MTV Memo at
15 5 [Doc. 117-1]. Plaintiffs, on the other hand, seek a PI that restrains all Defendants from
16 directly or indirectly using, disclosing, or acquiring Earthbound’s trade
17 secrets or confidential information, including but not limited to, confidential
18 customer lists, customer information, pricing and other specified information
19 related to Earthbound’s business operations, strategies or finances, whether
20 based on actual documents or memory of such information; and . . . from
21 providing any services, directly or indirectly, to any customer or account or
22 on any project for which individual defendants had marketed, developed,
23 bid, or were responsible while employed by Earthbound—*i.e.*, the pending
24 projects.

25 MPI Memo at 8 [Doc. # 120-1].

II.

FACTUAL BACKGROUND

A. The Parties

Earthbound manufactures products and provides services and systems for earthquake tie-down connections in building construction. Chin TRO Decl. at ¶ 2 [Doc. # 22]. ISS markets and sells Earthbound products, services, and systems in California *id.*, to construction companies, general contractors, and subcontractors, Chin Depo. at 18:1–18:23 [Doc. # 134-6]. Plaintiffs have two competitors in the tie-down market, one of which is MiTek. *Id.* MiTek sells its tie-down products exclusively to tie-down system distributors and dealers, not to the construction companies themselves. Mort Decl. at ¶ 3–5 [Doc. # 28]. The Z4 (or Zone 4) tie-down systems compete directly with Earthbound’s tie-down system products. *See id.* at ¶ 4. Prior to the events that triggered this lawsuit, the products and services ISS sold in California constituted a large percentage of Earthbound’s total business. Espinosa TRO Decl. at ¶ 2 [Doc. # 20].

Until they resigned in June 2016, Employee Defendants were ISS’s only employees and they comprised ISS’s California sales team; Keyse was regional sales manager, Miller was product representative, and Birdwell was product service representative. Chin TRO Decl. at ¶ 3. As part of their employment, the Employee Defendants never entered into a noncompetition, nonsolicitation, or confidentiality agreement. Miller Decl. at ¶ 10 [Doc. # 117-5]; Keyse Decl. at ¶ 8 [Doc. # 117-4]; Birdwell Decl. at ¶ 7 [Doc. # 117-2]. The Employee Defendants developed and oversaw ISS’s customers and projects, and they were required to be knowledgeable about ISS’s contracted and pending work and where ISS stood in the bidding process. Espinosa TRO Decl. at ¶ 8. Their sole role, however, was to develop and close sales, which included scheduling deliveries and ensuring customer satisfaction. *Id.* at ¶ 3. Neither Keyse nor Miller used or developed any of Plaintiffs’ technical information. *Id.* They did not bid, design, or engineer projects. *Id.* Miller did, however, supervise projects. *Id.*

1 **B. Confidential and Proprietary Information and Trade Secrets**

2 Earthbound created a Microsoft Excel template referred to as the “Super-
3 Template,” which houses detailed client, project, and other internal information, and
4 which was kept on the Earthbound servers’ G-Drive. *See* Chin TRO Decl. at ¶ 4; Keyse
5 Depo. at 93:18–20 [Doc. # 122-2]. The process of creating the Super-Template was
6 lengthy and complex. Earthbound’s President designed the template’s “theory, process,
7 and logic,” and Earthbound engineers developed the actual tool. Espinosa TRO Decl. at
8 ¶ 5. The template was tested and refined over decades. *Id.*

9 Earthbound’s President, one of ISS’s owners, describes the Super-Template’s
10 contents as “‘Earthbound’s DNA,’ representing a culmination of over [20] years of
11 design, refinement, and testing.” Espinosa TRO Decl. at ¶ 4. Specifically, the Super-
12 Template shows bid prices; project revenue; costs; profit margins; negotiated supplier
13 pricing; proprietary design methodology, including value engineering; products selected
14 for each project; bid documents; invoices; takeoff (project specifications pulled from
15 design documents); design and engineering folders; a pending job tracker with customer
16 names, project address, dates to follow up for review, etc.; engineering calculations on
17 load pressures and deflection and elongation; and inventory. *Id.*; Chin TRO Decl. at ¶ 4.
18 Moreover, once a takeoff is performed, the template “can create data that directly links
19 shop drawings, selects the appropriate hardware and wood, and assigns and tracks
20 locations for the product in the design,” based on pre-loaded data and built-in formulas.
21 Espinosa TRO Decl. at ¶ 4.

22 Earthbound uses the Super Template for every tie-down project. *Id.* A copy of
23 only a single job spreadsheet from the template, however, could be used to reverse-
24 engineer any of Earthbound’s designs. *Id.* An engineer would also learn from the Super-
25 Template how Earthbound sets up and prices its jobs. *Id.* In fact, the Super-Template is
26 a “base prototype and numerical model of a patented online design tool, and the only
27 such tool” in the tie-down industry. *Id.*

28

1 Also on the G-Drive is a “Job Folders” file, which holds all of the company’s past,
2 contracted, and pending projects. *See* Chin TRO Decl. at ¶ 4; Keyse Depo. at 93:18–20.
3 Other files on the server include design, engineering, invoice, pricing, and customer list
4 folders. Espinosa TRO Decl. at ¶¶ 7, 9. Access to the G-Drive reveals Earthbound’s
5 customer names, contact information, price lists, and their requirements and preferences;
6 negotiated supplier and vendor costs; self-designed parts; proprietary design methods; job
7 files; prior, current, and pending bids, estimates, and project lists; technical project data;
8 revenue, costs, and profit margins; financial goals; strategic planning; and sales
9 projections. *See* Chin TRO Decl. at ¶ 4.

10 **C. Employee Access**

11 Earthbound stored its proprietary information on a private network that required
12 user credentials and a password to access the G: Drive and Super-Template. Chin TRO
13 Decl. at ¶ 5; Keyse Depo. At 92:2–25. Earthbound limited employee access to the
14 template, and of the Employee Defendants, only Keyse had access. Chin TRO Decl. at
15 ¶ 5. As ISS’s regional sales manager, he supervised the office and could access
16 Earthbound’s bids, designs, and engineering information. *Id.* at ¶ 3. His access to
17 Earthbound’s proprietary information was nonetheless limited; none of the Employee
18 Defendants had access to the G-Drive’s design and engineering folders or the underlying
19 data, design logic, or pricing information stored within the Super-Template. Espinosa
20 TRO Decl. at ¶¶ 6–7. In fact, a “couple” years before this lawsuit, Earthbound President
21 instructed Keyse not to access the Super-Template and instead to rely on PDF files of the
22 template that the company would email him. *Id.* at ¶ 7.

23 Earthbound prohibited Keyse, Miller, and Birdwell from using flash drives or
24 cloud-based storage systems to “drag and drop” information from the Earthbound servers.
25 Chin TRO Decl. at ¶ 5; Espinosa TRO Decl. at ¶ 7. Keyse was further directed not to
26 copy or change any information in the Earthbound computer systems. Chin TRO Decl. at
27 ¶ 3. Earthbound did, however, provide Keyse and Birdwell with company laptop
28 computers and Samsung cellphones, which stored Earthbound’s proprietary information,

1 including customer names and contact information, company communications, job site
2 photos, and project bids. Chin TRO Decl. at ¶ 7. Miller was permitted to use his own
3 laptop and telephone. *Id.*

4 Earthbound also set up a Dropbox account using Keyse's work email account so
5 that he could conduct ISS business by interacting (and sharing) with customers project
6 specifications and plans and drawings that would later be entered into the Super-
7 Template. Chin TRO Decl. at ¶ 6.

8 **D. MiTek and Earthbound Acquisition**

9 In 2007 and 2014, MiTek and Earthbound entered into a non-disclosure agreement
10 regarding trade secret and confidential, proprietary information, and started negotiations
11 for the sale of Earthbound. Chin TRO Decl. at ¶ 8. The parties exchanged information
12 regarding Earthbound's profit and loss statements, production reports, sales data,
13 customer information, pending projects, and employee information. *Id.* Through these
14 discussions, MiTek learned of ISS's operations and employee team. *Id.* Earthbound's
15 President specifically spoke to MiTek's President about the strength of the ISS team
16 (Keyse and Miller). Espinosa TRO Decl. at ¶ 10.

17 The negotiations did not result in the consummation of a sale. *Id.* Earthbound's
18 President contends that the focus of the negotiations was to secure Earthbound's Super-
19 Template and similar technologies, as well as future designs and product developments.
20 *Id.* He states the negotiations failed because he refused to release his intellectual property
21 and would agree only to license it. *Id.*

22 Outside of the Earthbound-MiTek discussions, subject to a non-disclosure
23 agreement, Earthbound never made available, other than to some employees, its
24 proprietary information. *Id.*

25 **E. Employee Defendants Join MiTek**

26 In November 2015, MiTek's Senior Vice President of Sales and Marketing,
27 Tom Mort, contacted Miller about an available sales position. Miller Decl. at ¶ 6 [Doc.
28 # 117-5]. After interviewing with MiTek in February 2016, Miller recruited Keyse and

1 subsequently advised MiTek that his acceptance was conditional on MiTek hiring Keyse.
2 Miller Decl. at ¶ 6; Miller Depo. at 19:9–11 [Doc. # 145-1]. Although Miller, Keyse, and
3 MiTek entered into preliminary employment negotiations as early as April 2016,
4 including salary stipends and signing bonuses, Keyse signed employment agreements in
5 late May 2016, and Miller signed in either early or late May 2016. *See* Keyse Decl. at ¶ 6
6 (May 31); Miller Depo. at 36:8-16; Miller Decl. at ¶ 8 ; *id.* (preliminary negotiations).
7 Between mid-April and early May 2016, Birdwell learned of and expressed interest in a
8 job opportunity at MiTek. Miller Decl. at ¶ 8. Birdwell later received a job offer and
9 signed employment-related papers on May 24. Birdwell Decl. at ¶ 5.

10 Prior to signing employment agreements, MiTek sent the Employee Defendants
11 letterheads acknowledging their employment applications and informing them “not to
12 provide any MiTek personnel with any confidential or trade secret information of a prior
13 employer” and “to protect and not disclose [ISS]’s confidential or trade secret
14 information.” Mort Decl. at ¶¶ 14–15.

15 Although they entered into an employment arrangement with MiTek in late May,
16 the Employee Defendants resigned from ISS on June 13 or June 14, 2016. Miller Decl. at
17 ¶ 9; Miller Depo. at 25:3–26:2, 29:15–19; Keyse Decl. at ¶ 7; Keyse Depo. at 6:2–7:1;
18 Birdwell Decl. at ¶ 6; Birdwell Depo. at 17:21 [Doc. # 122-10]. When Keyse resigned,
19 he informed Earthbound’s Vice President, Edward Chin, that “MiTek would eventually
20 purchase [Plaintiffs] and that [Plaintiffs] should accept the inevitable outcome and join
21 MiTek.” Chin TRO Decl. at ¶ 9. Similarly, Keyse and Miller told Earthbound’s
22 President that he should “come to the negotiating table with MiTek” because
23 “Earthbound would not survive against the ‘big boys,’” and that MiTek had targeted
24 certain Earthbound engineers and designers for recruiting. Espinosa TRO Decl. at ¶ 11.
25 It appears that the Employee Defendants began working with MiTek around the time they
26 resigned. Decl. at ¶ 9; Miller Depo. at 25:1–26:2; Keyse Decl. at ¶ 7; Keyse Depo. at
27 6:2–7:1; Birdwell Decl. at ¶ 6; Birdwell Depo. at 17:21.

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1 After their resignation, Plaintiffs’ representatives learned that the Employee
2 Defendants “had failed to forward important customer emails, sales reports, or forecasts
3 to [Plaintiffs’] headquarters as had been their practice,” which “explained a drop-off in
4 ISS sales activities.” Chin TRO Delc. at ¶ 9.

5 Defendants declined to comply with July 2016 cease-and-desist letters from
6 Earthbound’s counsel requesting return of all ISS devices in the Employee Defendants’
7 possession and that MiTek withdraw from Earthbound-pending projects, which
8 ultimately led to the instant lawsuit and the August 2016 TRO. *See* James Decl. at ¶¶ 3–
9 14.

10 **F. Employee Defendants’ Use of Confidential and Proprietary Information**

11 Miller and Keyse contend that they did not perform any work for MiTek while
12 employed by ISS. Miller Decl. at ¶ 7; Keyse Decl. at ¶ 5. It is clear from all parties’
13 submissions, however, that in the approximately three-week period between the
14 Employee Defendants’ acceptance of MiTek employment and their resignation from
15 employment with Plaintiffs, and during some instances after they began work at MiTek,
16 Miller and Keyse accessed Earthbound’s server, copied or memorized customer and
17 project-related information from G-Drive folders and the Super-Template, and used that
18 information to further MiTek’s projects and sales, in direct competition with Plaintiffs.

19 As a result of Employee Defendants’ resignation and MiTek employment,
20 Earthbound contends that it has lost at least one job. *See* Chin Depo. at 85:25–86:23.

21 **1. Miller**

22 The day after resigning from ISS, Miller forwarded himself documents, including a
23 project he had been working on for Plaintiffs. *See id.* at 29:15–25. That same day, he
24 transferred everything from his Earthbound phone, which also housed personal
25 communications and data, to his MiTek phone. *Id.* at 40:6–41:23. He later reset the
26 phone so that the Earthbound phone was “clean.” *Id.* at 44:6–13.

27 Miller explained in his deposition that: (1) in transitioning to MiTek, he planned
28 on emailing (and appears to have emailed) Earthbound customers from his MiTek email

1 account to solicit new customers for MiTek, *id.* at 46:1–4, 47:15–18; (2) using this
2 method, he met in the field with 10 customers, texted with about five, and spoke over the
3 phone with 10 to 15, *id.* at 47:19–48:1; (3) of all the Earthbound client meetings he had
4 using this method of solicitation, two or three generated work for MiTek, *id.* at 48:4–6,
5 49:1–11; (4) he forwarded Earthbound project information from his Earthbound email
6 account to his wife’s email and then submitted (on MiTek’s behalf) a bid on that project,
7 which MiTek did not win, *id.* at 51:24–52:10; (5) while at MiTek, he used Dropbox to
8 communicate with Earthbound customers about Earthbound jobs, reviewed the project to
9 determine whether updated plans had been submitted, and assisted MiTek in getting or
10 bidding on the project, *see id.* at 52:18–53:24; (6) he used that method of winning
11 projects for MiTek on three or four projects, *id.* at 53:25–54:5; (7) on more than one
12 occasion, a MiTek supervisor instructed him to find out Earthbound’s price on a project
13 and relay that information to MiTek, and he complied, *see id.* at 54:23–55:11, 55:21–
14 58:17, 79:13–80:9, 80:25–81:23; (8) on more than one occasion, he would reach out to
15 Earthbound customers regarding projects where there was no set contract, but where a
16 verbal indication to contract had been given, to bring the business to MiTek, *id.* at 65:4–
17 66:25; (9) sometimes he would simply bid using memory of Earthbound price quotes and
18 bid strategy, *id.* at 77:2–78:1, 78:7–14, 78:19–79:9, 79:24–80:9, 82:14–19 [Doc. # 122-6];
19 and (10) preparing a bid for a project is “front loaded” in that it usually takes a couple
20 weeks to prepare a bid from various pieces of information, such that simply learning a
21 live bid price avoids hours of work, *see id.* at 89:14–90:2.

22 **2. Keyse**

23 According to Keyse, after his resignation from ISS, he removed his personal
24 information and documents from ISS-issued devices. Keyse Decl. at ¶ 10. He states that
25 if other information was transferred to his new personal cell phone, and later to his
26 MiTek cell phone, such transfer was unintentional. *Id.* Keyse also states that he deleted
27 certain personal information from the ISS devices, such as a personal email account,
28 banking information, and personal contacts. *Id.* He explains that his practice of

1 accessing ISS programs and documents through the remote desktop portal and not saving
2 much ISS information to the ISS computer itself may explain “why ISS believes [he]
3 deleted its documents from the laptop.” *Id.*

4 At his deposition, Keyse admitted that, after he joined MiTek, he (1) contacted
5 every Earthbound customer he worked with while working with Plaintiffs, including by
6 sending out an email to all Earthbound customers to provide them with his new work
7 contact information, Keyse Depo. at 8:13–8:22, 53:10–54:3; (2) helped prepare MiTek
8 bids for about five of the customers he worked with while employed by ISS, *id.* at 8:2–
9 8:9 (3) disclosed to MiTek the names of Earthbound’s customers, *id.* at 22:6–8;
10 (4) solicited or bid on (on behalf of MiTek) about seven projects that were pending with
11 Earthbound, *id.* at 24:20–22; (5) suggested to a MiTek supervisor pricing parameters on
12 about four Earthbound projects, 35:16–36:18, 66:24–67:12; (6) accessed Earthbound’s
13 server before resigning to view projects that MiTek would later bid on, *id.* at 39:23–40:6,
14 to retrieve (with a thumb drive) Earthbound quotes for approximately 16 or 18 pending
15 Earthbound jobs, *id.* at 42:21–43:19, and to copy (with a thumb drive) the customer list
16 from the G-Drive, *id.* at 44:19–22; (7) created a list, prior to resigning, of Earthbound
17 customers, took a photo of the list and sent it to a MiTek supervisor, *id.* at 22:24–24:16;
18 (8) discussed other projects with MiTek employees that he had worked on when at
19 Earthbound, *id.* at 41:16–22, 42:13–18; (9) used Dropbox to share with MiTek
20 Earthbound pending projects, *id.* at 56:4–18; and (10) told two or three Earthbound
21 customers that the company would not be able to service California clients because of his
22 and Miller’s departure, *id.* at 65:24–66:14, 66:24–67:12; *see also* Keyse Decl. at ¶ 12
23 (explaining his pre- and post-resignation use of Earthbound information). A forensic
24 analysis revealed much, if not all, of Keyse’s server-access activity, and the forensic
25 analyst’s declaration provides much more detail. *See* Goodman TRO Decl. at ¶¶ 19–24,
26 36–44, 46, 48–52, 54–55.

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1 **3. Birdwell**

2 In August 2016, before returning his ISS cell phone, SD card (for the phone), and
3 laptop, Birdwell went to the AT&T store to transfer personal communications stored on
4 that phone to a new MiTek-issued cell phone. Birdwell Decl. at ¶ 9. Because he had an
5 SD card in his phone, the AT&T representative informed him that he did not need to
6 transfer the information and that he could retrieve it on his own. *Id.* Birdwell had the
7 AT&T store perform a factory reset on the phone. *See id.* (“I [Birdwell] had the AT&T
8 store employee perform a factory reset on the phone because I received a phone without
9 any data on it from ISS and believed that the company would want the phone returned in
10 the same condition. I did not, as alleged in the declaration of Allison Goodman, have my
11 phone factory reset because I received an email alerting me to delete text messages.”);
12 Goodman TRO Decl. at ¶ 30 (the subject line of an otherwise unrecovered email, dated
13 June 14, 2016, reads, “Text Messages”). Birdwell’s deposition testimony is consistent
14 with his declaration. *See* Birdwell Depo. at 25:9–29:5.

15 The forensic analysis conducted on Birdwell’s laptop indicated that he did not use
16 his work laptop on a regular basis, and because his phone was reset before being returned
17 to ISS, no analysis was completed. Goodman TRO Decl. at ¶¶ 5.g, 28. The analyst
18 stated that there was little evidence at all of Birdwell’s server activity prior to his
19 resignation. *Id.* at ¶ 57.g.

20 Birdwell attests that because his role with Plaintiffs involved supporting the project
21 after a sale was completed, he did not access any ISS information that “was not given to
22 the customer for the purpose of running the project. Accordingly, [he] did not have
23 access to ISS’s list of pending projects, quotes/bids, pricing information, design
24 information, customer list, or any other sales information, and [he] did not access that
25 information after [he] resigned.” Birdwell Decl. at ¶ 13.

26 **G. The Public or Private Nature of the Acquired Earthbound Information**

27 The parties dispute the private and confidential nature of the Earthbound
28 information that Keyse and Miller accessed and used to advance MiTek sales. Miller

1 asserts that the Earthbound bid information he used to advance MiTek sales derived from
2 his memory and from customers themselves, whom Miller and Keyse both contend are
3 publicly known customers common to all industry competitors, rather than from ISS's
4 pricing scheme or Super-Template. Miller Decl. at ¶ 13; Keyse Decl. at ¶ 11. He
5 contends further that the bids he relayed to MiTek were (1) "based on stagnant
6 information" not "current project specifications," (2) "were not a reproduction of ISS's
7 bid-generating process," and (3) "were only accurate as of the date that [he] resigned"
8 because bids in the industry are revised as job specifications change. Miller Decl. at ¶ 13.

9 Although Keyse admits to using portable storage devices to transfer and copy ISS
10 information, such as project lists and bids, he states that such information was "not
11 'secret'" but rather "final dollar amounts that ISS had actually quoted to potential
12 customers as of the date that [he] resigned." Keyse Decl. at ¶ 12. Like Miller, Keyse
13 also argues about the public nature of Plaintiffs' customers and bids and the stagnant
14 nature of the pricing and bid information relayed to MiTek or used to advance MiTek
15 sales. *See id.* at ¶¶ 13–14. Additionally, Keyse contends that any information he retained
16 from memory or from Plaintiffs' files is now "stale" because the information "pertain[s]
17 to projects that have either likely been contracted or that have likely significantly
18 changed since" his resignation. *Id.* at ¶ 15.

19 When asked how a company wanting to get into the tie-down business would find
20 subcontractor clients, Chin testified that one could "drive around and look for jobs that
21 are being built and start there" or "[p]ossibly" search for customers via the Internet. Chin
22 Depo. at 25:5–19. He also stated that "[t]he name itself of the customer," presumably
23 referring to Earthbound customers, "is public," which can then be used to locate the
24 customer's telephone information "[f]rom the white pages." *See id.* at 29:4–8. When
25 asked whether customers would reveal the projects they are working on, he replied,
26 "They may reveal [that information], they may not." *Id.* at 29:17–19. Although Chin
27 testified that he did not know of an instance where Earthbound's pricing information was
28 shared with a competitor by a customer, he admitted that Earthbound or ISS sales

1 representatives have received competitors' bids from customers. *Id.* at 33:5–25; *see also*
2 *id.* at 50:15–18 (stating “[i]t is possible” that “the best way” for a customer to have a
3 competitor beat Earthbound’s price is by giving the Earthbound price to a competitor).

4 **H. Employee Defendants’ Post-TRO Employment Activities**

5 From the time he began his employment with MiTek until around August 1, 2016,
6 Keyse’s positions at MiTek and Earthbound were similar. *See* Keyse Depo. at 8:24–10:9.
7 Miller’s MiTek position, too, involves the same customers and products and services, in
8 the same market. Miller Depo. at 15:23–16:21. Currently, however, neither Keyse nor
9 Miller are selling any products or systems that are in direct competition with Plaintiffs.
10 *See* Mort Decl. at ¶¶ 4, 22. Rather, they are focusing on other MiTek products. *Id.*
11 Birdwell’s role at MiTek appears similar to his role with Plaintiffs, as he does not engage
12 in sales quotes or pricing specifications with customers and his involvement begins only
13 after the sale is complete. *Id.* at ¶ 22; Birdwell Decl. at ¶ 13.

14 Keyse contends that since the issuance of the TRO, he has not been able to work,
15 on behalf of MiTek, with the customers with whom he worked while with ISS, despite
16 the fact that some of those customers “are not exclusive to ISS and are common to all
17 three industry competitors.” Keyse Decl. at ¶ 11. Further, he states that because “more
18 than 50 percent” of his MiTek salary was to be derived from commissions on sales of
19 products in direct competition with Plaintiffs, his “present inability to communicate or
20 work with customers with which [he] also worked while at ISS seriously interferes with
21 [his] ability to earn a living,” or to “work in [his] chosen profession.” *Id.* Keyse does not
22 seek to use any of ISS or Earthbound’s remaining proprietary or confidential information
23 in connection with his work at MiTek. *See id.* Miller attests to the same concerns.
24 Miller Decl. at ¶ 13.

25 **II.**

26 **LEGAL STANDARD**

27 The purpose of injunctive relief is to preserve the rights and relative positions of
28 the parties, *i.e.*, the status quo, until a final judgment issues. *See U.S. Philips Corp. v.*

1 *KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) (citing *Univ. of Tex. v. Camenisch*,
2 451 U.S. 390, 395 (1981)). An injunction is an exercise of a court’s equitable authority,
3 which should not be invoked as a matter of course, and “only after taking into account all
4 of the circumstances that bear on the need for prospective relief.” *Salazar v. Buono*, 559
5 U.S. 700, 714 (2010).

6 A plaintiff seeking injunctive relief must show that: (1) he is likely to succeed on
7 the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief;
8 (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest.
9 *Fox Broad. Co., Inc. v. Dish Network LLC*, 723 F.3d 1067, 1072-73 (9th Cir. 2013)
10 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In this Circuit,
11 courts employ a “sliding scale” approach, under which “‘serious questions going to the
12 merits’ and a balance of hardships that tips sharply towards the plaintiff can support
13 issuance of a preliminary injunction, so long as the plaintiff also shows that there is a
14 likelihood of irreparable injury and that the injunction is in the public interest.” *Arc of*
15 *Cal. V. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014) (quoting *Alliance for the Rockies v.*
16 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). “[I]njunctive relief [is] an extraordinary
17 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to
18 such relief.” *Winter*, 555 U.S. at 22.

19 III.

20 DISCUSSION

21 Plaintiffs seek a PI in connection with three of the claims alleged against
22 Defendants: (1) breach of the duty of loyalty, (2) tortious interference with a business
23 expectance, and (3) misappropriation of trade secrets. MPI Memo at 20–26. Before
24 turning to the PI test, however, the Court must determine which state’s law—California
25 or Washington—applies.

26 A. Choice of Law

27 MiTek asserts that Plaintiffs improperly rely on Washington law in moving for
28 injunctive relief. Because this case was transferred from the District Court in the

1 Western District of Washington, Washington’s choice-of-law rules apply. *Allstate Ins.*
2 *Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1222 (C.D. Cal. 2012) (citing *Van*
3 *Dusen v. Barrack*, 376 U.S. 612, 639 (1964)). An actual conflict between Washington’s
4 and California’s laws or interests must exist for this Court to engage in a conflict-of-laws
5 analysis. *See Erwin v. Cotter Health Ctrs.*, 161 Wash. 2d 676, 692 (2007) (*en banc*).
6 Where no actual conflict exists, the “presumptive local law” (i.e., Washington law)
7 applies. *Id.* (quoting *Seizer v. Sessions*, 132 Wash. 2d 642, 649 (1997) (*en banc*)).

8 **1. Actual Conflict**

9 Because “choice-of-law depends upon which of two or more jurisdictions has the
10 ‘most significant relationship’ to a specific issue,” “[a] court ‘may be required to apply
11 the law of one forum to the issue while applying the law of a different forum to another
12 issue in the same case.’” *Brewer v. Dodson Aviation*, 447 F. Supp. 2d 1166, 1175 (W.D.
13 Wash. 2006) (quoting *Williams v. State*, 76 Wash. App. 237, 241 (1994); Kelly Kunsch, 1
14 Wash. Practice § 2.21 (4th ed. 2006)). Here, MiTek seeks the application of California
15 law with respect to the trade secret claim. MPI Opposition at 14. MiTek argues further
16 that there “may” be a conflict with respect to Plaintiffs’ tortious interference claim. *See*
17 *id.*. Otherwise, MiTek presents no argument as to the remaining common law claims,
18 and its briefing at the motion-to-dismiss stage asserts that no actual conflict exists as to
19 Plaintiffs’ remaining common law claims at issue in this motion. *See id.* at 14, 17–18
20 n.5, 19 n.7; Doc. # 98 at 4–5. In an abundance of caution, the Court will first determine
21 whether an actual conflict exists with respect to the misappropriation of trade secrets and
22 tortious interference claims, but will apply the presumptive local law—Washington’s—to
23 the remaining claims.¹

24
25 ¹ California and Washington’s uniform trade secret acts supersede common law tort claims based
26 on the misappropriation of a trade secret. *See Silvaco Data Sys. V. Intel Corp.*, 184 Cal. App. 4th 210,
27 232–36 (2010), *disapproved of on other grounds by Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310
28 (2011); *K.C. Multimedia Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 958–59
(2009); *Thola v. Henschell*, 140 Wash. App. 70, 81–82 (2007). There appears to be some intra-Circuit
disagreement over whether California law’s trade secret act displaces common law misappropriation
claims relating to information that does not meet the statutory definition of a trade secret. *See Robert*
Half Intern., Inc. v. Ainsworth, 68 F. Supp. 3d 1178, 1187–1188 (S.D. Cal. 2014) (collecting cases).

1 **a. Misappropriation of Trade Secrets**

2 An actual conflicts exists when “the result for a particular issue ‘is different under
3 the law of the two states.’” *Erwin*, 161 Wash. 2d at 692. MiTek contends that Plaintiffs
4 rely on an inevitable disclosure doctrine, which California does not recognize and which
5 is unclear under Washington law. MPI Opposition at 14 (citing *Edifecs Inc. v. TIBCO*
6 *Software Inc.*, 756 F. Supp. 2d 1313, 1318 (W.D. Wash. 2010) (in a choice of law
7 analysis, explaining California and Washington’s recognition of inevitable disclosure)).
8 In its brief response to MiTek’s choice-of-law argument, Plaintiffs assert that the doctrine
9 is “irrelevant” under their theory of trade secret liability because the Employee
10 Defendants actually used and intend to use Earthbound’s trade secrets. Plaintiffs’ MiTek
11 Reply at 7 n.1 [Doc. # 143].

12 Although California and Washington appear to have differing approaches with
13 regard to the inevitable disclosure doctrine, they define the doctrine the same way:

14 The inevitable disclosure doctrine permits an employer to enjoin the former
15 employee without proof of the employee’s actual or threatened use of trade
16 secrets based upon an inference (based in turn upon circumstantial evidence)
17 that the employee inevitably will use his or her knowledge of those trade
18 secrets in the new employment.

19 *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1461–62 (2002); *see also Edifecs*,
20 756 F. Supp. 2d at 1318 n.2 (“The inevitable disclosure doctrine permits a plaintiff to
21

22 Because the parties’ displacement and preemption arguments focus on the factual allegations underlying
23 the trade secret and common law claims, the Court is able to discern that these claims arise from a
24 common nucleus of facts and therefore there is no apparent conflict between California and Washington
25 law as to the treatment of information that falls outside the statutory definition of a trade secret. Under
26 the law of either state, the common law claims would be displaced by the statutory scheme given the
27 facts in this case. *See K.C. Multimedia*, 171 Cal. App. 4th at 955 (“[The California Act] preempts
28 common law claims that are ‘based on the same nucleus of facts as the misappropriation of trade secrets
claim for relief.’” (quoting *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal.
2005))); *Thola*, 140 Wash. App. at 82 (“A plaintiff ‘may not rely on acts that constitute trade secret
misappropriation to support other causes of action.’” (quoting *Ed Nowogroski Ins., Inc. v. Rucker*, 88
Wash. App. 350, 358 (1997))).

1 prove trade secret misappropriation by showing that the defendant’s new employment
2 will inevitably lead to reliance on plaintiff’s trade secrets. This theory allows courts to
3 enjoin a defendant’s competitive employment. Injunctions granted on the basis of
4 inevitable disclosure presuppose that ‘the employee will necessarily rely—consciously or
5 unconsciously—upon knowledge of the former employer’s trade secrets in performing
6 his or her new job duties.’” (citation omitted) (quoting *PepsiCo, Inc. v. Redmond*, 54 F.3d
7 1262, 1269 (7th Cir.1995))).

8 The Court agrees with Plaintiffs. Setting aside the question of whether Plaintiffs’
9 confidential and proprietary information at issue constitutes a trade secret, Plaintiffs’
10 theory of trade secret misappropriation centers on Defendants’ alleged actual, past
11 misappropriation. *E.g.*, MPI Memo at 22–26. Thus, MiTek’s argument that Plaintiffs
12 rely on a future, inevitable disclosure is off the mark. Although Plaintiffs indeed argue
13 that future use of the already misappropriated trade secrets will harm them, this is not a
14 case wherein the claimants premise their arguments on fear of some future inchoate
15 misappropriation.

16 Because there is no actual conflict between the laws or interests of California and
17 Washington that is germane to this case, the Court will apply Washington law to
18 Plaintiffs’ trade secret misappropriation claim, the presumptive local law.

19 **b. Tortious Interference**

20 As for the tortious interference claim, there appears to be an actual conflict
21 between Washington and California law. Under California law, there are two distinct
22 causes of action for tortious interference: one relates to existing contractual relationships
23 and the other deals with prospective business or contractual relationships. *See Fresno*
24 *Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). The
25 former requires the following elements:

- 26 (1) a valid contract between plaintiff and a third party; (2) defendant’s
27 knowledge of this contract; (3) defendant’s intentional acts designed to
28 induce a breach or disruption of the contractual relationship; (4) actual

1 breach or disruption of the contractual relationship; and (5) resulting
2 damage.

3 *Id.* (quoting *Pac. Gas & Elec. Co. v. Bear Stearns*, 50 Cal. 3d 1118, 1126 (1990)).
4 California’s tortious interference with prospective economic advantage cause of action
5 requires those elements but adds another: “proof that the defendant ‘not only interfered
6 with the plaintiff’s expectancy, but engaged in conduct that was wrongful by some legal
7 measure other than the fact of interference itself.” *Fresno Motors*, 771 F.3d at 1125; *see*
8 *also Crown Imports, LLC v. Superior Court*, 223 Cal. App. 4th 1395, 1404 (2014) (“[A]
9 plaintiff must plead and prove that the conduct alleged to constitute the interference was
10 independently wrongful, i.e., *unlawful* for reasons other than that it interfered with a
11 prospective economic advantage.” (emphasis added) (quoting *Stevenson Real Estate*
12 *Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215, 1224
13 (2006))).

14 Under Washington law, however, tortious interference with business expectancy
15 occurs when (1) a “valid contractual relationship or business expectancy” exists, (2) the
16 defendant knows about that relationship, (3) the defendant intentionally interferes by
17 inducing or causing breach or termination of that relationship or expectancy (4) for an
18 “improper purpose” or by “improper means,” and (5) damages occurs as a result. *Manna*
19 *Funding, LLC v. Kittitas County*, 173 Wash. App. 879, 897, *as amended on denial of*
20 *reconsideration* (Apr. 9, 2013). “A valid ‘business expectancy’ includes any prospective
21 contractual or business relationship that would be of pecuniary value.” *Id.* Although the
22 defendant’s interference must be somehow improper, Washington does not appear to
23 require an independently unlawful act even though an unlawful act would suffice to show
24 improper purpose or means. *See Moore v. Comm. Aircraft Interiors, LLC*, 168 Wash.
25 App. 502, 509 (2012) (interfering out of greed constitutes an improper purpose sufficient
26 to satisfy the fourth element); *Pleas v. City of Seattle*, 112 Wash. 2d 794, 804 (1989) (*en*
27 *banc*) (“Interference can be ‘wrongful’ by reason of a statute or other regulation, or a
28 recognized rule of common law, or an established standard of trade or profession.”).

1 It appears that the resolution of this claim could be different under California and
2 Washington law, and the parties have not pointed to any contrary authority on this
3 choice-of-law question. The Court thus assumes an actual conflict exists and turns to the
4 most-significant-relationship test. *Cf. Edifecs*, 756 F. Supp. 2d at 1318 (“Erring on the
5 side of caution, the Court presumes that an actual conflict of law exists and applies the
6 significant relationship test to determine the appropriate law to be applied.”).

7 **2. Most Significant Relationship**

8 Washington has adopted the Restatement (Second) of Conflict of Laws section 145
9 to determine which state has the most significant relationship to the case. *Brewer*, 447 F.
10 Supp. 2d at 1175–76. Accordingly, the Court considers the following “contacts” with
11 respect to their “relative importance” to the “particular issue”:

12 (a) the place where the injury occurred, (b) the place where the conduct
13 causing the injury occurred, (c) the domicil, residence, nationality, place of
14 incorporation and place of business of the parties, and (d) the place where
15 the relationship, if any, between the parties is centered.

16 *Id.* (quoting Restatement (Second) of Conflict of Laws § 145(2) (1971)).

17 The Restatement contacts weigh toward California. The first contact points toward
18 Washington because that is where Plaintiffs’ financial injury was felt due to their
19 Washington citizenship. *See Edifecs*, 756 F. Supp. 2d at 1318. The second contact,
20 however, strongly favors California: Defendants’ conduct occurred overwhelmingly in
21 California—that is where the Employee Defendants were working when under ISS’s
22 employ and when working with Earthbound information; where they were located when
23 they took the alleged proprietary information, reached out to customers on MiTek’s
24 behalf, assumed positions with MiTek, and used Plaintiffs’ bid information to advance
25 MiTek sales; and where Plaintiffs’ customers with whose prospective business
26 Defendants allegedly interfered reside. *See id.* The third contact also weighs slightly in
27 favor of California because the three Employee Defendants reside there, and the
28 remaining three parties reside in Washington or Missouri. Finally, for the same reasons

1 the second contact favors California, the fourth contact does as well. Although some part
2 of the employment relationship occurs in Missouri and Washington by virtue of MiTek's
3 and Plaintiffs' respective headquarters and corporate citizenship, the center of the
4 relationship is California because that is where Employee Defendants work or worked
5 and where they conduct or conducted business on behalf of all three companies.

6 The Court will therefore apply California law to Plaintiffs' tortious interference
7 claim.

8 **B. Likelihood of Success on the Merits**

9 As Defendants argued in their motion-to-dismiss, Washington's Uniform Trade
10 Secrets Act ("WUTSA") "displaces conflicting tort, restitutionary, and other law of
11 [Washington] pertaining to civil liability for misappropriation of a trade secret," RCW
12 19.108.900(1), such that the Act "preempts common law actions based on trade secret
13 misappropriation," *Thola v. Henschell*, 140 Wash. App. 70, 85 (2007). *See* Doc. # 98.
14 Accordingly, the Court turns to the misappropriation of trade secrets claim.

15 **1. Misappropriation of Trade Secrets**

16 To state establish such a claim under Washington law, "the plaintiff must first
17 prove that a legally protectable trade secret exists." *Pac. Aerospace & Elecs., Inc. v.*
18 *Taylor*, 295 f. Supp. 2d 1188, 1200 (E.D. Wash. 2003).² Thus, Plaintiffs must show
19 "(1) that the information derives independent economic value from not being generally
20 known or readily ascertainable to others who can obtain economic value from knowledge
21 of its use and (2) that reasonable efforts have been taken to maintain the secrecy of the
22 information." *Id.* (citing Wash. Rev. Code § 19.108.010(4) (West 2016)).
23 "Misappropriation includes the 'acquisition . . . by a person who knows or has reason to
24 know that the trade secret was acquired by improper means,'" including "theft" or
25 "breach or inducement of a breach of a duty to maintain secrecy." *Id.* (quoting
26 § 19.108.010(2), (1)).

27 ² Plaintiffs bring suit for misappropriation of trade secrets under both Washington and federal
28 law, but their arguments relate only to Washington's trade secrets act.

1 **a. Trade Secrets**

2 Here, Plaintiffs contend that Earthbound’s Super-Template and compilations (*e.g.*,
3 the customer, pricing, and pending project lists; and the bid, pricing, profit margin, and
4 proprietary project design information retained in the Super-Template or in designated G-
5 Drive folders) are trade secrets. *See* MPI Memo at 23; Plaintiffs’ Employee Reply at 7
6 [Doc. # 144]; Plaintiffs’ MiTek Reply at 6–8; Complaint at ¶ 3.11.³ As discussed below,
7 the Court concludes that this information constitutes trade secrets.

8 **i. Super-Template**

9 Plaintiffs have shown that the Super-Template in and of itself derives independent
10 economic value. For example, Plaintiffs submitted evidence that the MiTek-Earthbound
11 acquisition negotiations broke down in part because of Earthbound’s refusal to sell the
12 Super-Template. Moreover, Earthbound expended decades of effort developing the
13 template. *See Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 438 (1999) (a “key
14 factor” in determining whether information has “independent economic value” under the
15 WUTSA is “the effort and expense that was expended on developing the information”).
16 The evidence also makes clear that login credentials and a password are required to
17 access the G-Drive, and then in turn to access the Super-Template, and that not all of
18 Plaintiffs’ employees who could access the G-Drive could access the Super-Template.
19 *See T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1193 (W.D.
20 Wash. 2015) (limiting and monitoring access to the area where trade secret was housed
21 was sufficient to show reasonable efforts to maintain information’s secrecy).

22 _____
23 ³ Defendants argue that Plaintiffs broadly identify their alleged trade secrets, such that Plaintiffs
24 cannot prevail on their misappropriation claim. MiTek Opposition at 21–22; Employee Opposition at
25 13. The Court agrees that Plaintiffs have pointed to a plethora of alleged trade secrets and have not
26 precisely delineated their scope. *See, e.g.*, MPI Memo at 23 (calling “Earthbound’s detailed information
27 about its current and prospective customers, pending projects, bids, pricing, profit margins, proprietary
28 product design, and other elements of its business” trade secrets). The Court concludes that any
improper breadth has not prejudiced Defendants’ ability to respond to the misappropriation claim or this
Court’s ability to determine the merits of the claim, particularly in light of Plaintiffs’ arguments
regarding Earthbound’s reasonable efforts to maintain that information’s secrecy. *See T-Mobile USA,*
Inc. v. Huawei Device USA, Inc., 115 F. Supp. 3d 1184, 1193 (W.D. Wash. 2015).

1 MiTek's strongest argument against the Super-Template's trade-secret status
2 relates to a RunBuilder tool on Plaintiffs' website. *See* MiTek Opposition at 22–23. The
3 excerpted deposition testimony (on the docket and in MiTek's brief), however, does not
4 permit the Court to determine precisely what the RunBuilder is or how it is used. *See*
5 Chin Depo. at 68:1–25, 85:1–3. Moreover, it appears from the limited testimony made
6 available to the Court that the testimony does not support MiTek's assertion that the
7 Super-Template and RunBuilder are effectively fungible; in fact, the testimony suggests
8 that they are not. *E.g., id.* at 68:1–9 (the authentication process to access the RunBuilder
9 requires only a valid e-mail address), 68:10–25 (Chin answering that while MiTek may
10 be able to use the RunBuilder to “find out all the components that Earthbound is going to
11 be using on [a] project,” MiTek could only estimate Earthbound's costs for that project
12 “if [MiTek] knew of [Earthbound's] internal manufacturing costs,” which are not
13 necessarily the same as MiTek's or another competitor's costs because of proprietary
14 materials).

15 That some of the information stored in the Super-Template is publicly available,
16 such as well-known tie-down industry customer names or searchable contact information,
17 does not negate the Super-Template's trade secret status. It is “well recognized” in the
18 Ninth Circuit that “a trade secret may consist of a compilation of data, public sources or a
19 combination of proprietary and public sources” because “a compilation that affords a
20 competitive advantage and is not readily ascertainable falls within the definition of a
21 trade secret.” *United States v. Nosal*, --- F.3d ---, 2016 WL 7190670, at *13–14 (9th Cir.
22 July 5, 2016).

23 **ii. Compilations**

24 Plaintiffs have shown that the customer, pricing, and pending project lists, and the
25 bid, pricing, profit margin, and proprietary project design information retained in the
26 Super-Template or in G-Drive folders constitute trade secrets. Earthbound's lists are
27 housed on Earthbound's secure server, and only some Earthbound employees have access
28 to them. Defendants argue that the information in these lists is generally publicly

1 available to the industry’s competitors, due to customers’ shopping or sharing of bids and
2 the competitive nature of the market itself, precluding a trade secret determination.
3 MiTek Opposition at 23–24; Employee Opposition at 13–14; *see Boeing Co. v. Sierracin*
4 *Corp.*, 108 Wash. 2d 38, 49–50 (1987) (*en banc*) (“For trade secrets to exist, they must
5 not be ‘readily ascertainable by proper means’ from some other source” (quoting
6 Wash. Rev. Code § 19.108.010(4)(a))).

7 Defendants’ argument understates the value of a compilation of such information.
8 *See Nosal*, 2016 WL 7190670, at *13–14. As Miller’s deposition testimony
9 demonstrates, the difficulty in submitting a bid derives from the hours expended
10 calculating a price. A list containing all bid and price estimates for any given project
11 permits those with access to that list to avoid the hours of labor expended in calculating
12 the bid and price numbers. The same is true for a list of past, current, and pending
13 projects. So while MiTek—or any other competitor—might be able to discover
14 submitted or finalized bids from customers or one another, or to determine Earthbound’s
15 past, present, and potential customers or projects by conducting its own research,
16 Earthbound’s compiled lists present all of that information in one location such that an
17 independent and time-consuming review is unnecessary. Thus, these lists “are classic
18 examples” of trade secrets. *Id.* at *14.

19 Miller or Keyse’s ability to cull from memory Plaintiffs’ bid, project, and pricing
20 information does not affect the Court’s determination that the compilations (and
21 information therein) are a trade secret. Washington courts have made clear that “trade
22 secret protection does not depend on whether the list is taken in written form or
23 memorized.” *Nowogrowski*, 137 Wash. 2d at 449.

24 **b. Misappropriation**

25 It is clear that the Employee Defendants, at times at the direction of MiTek upper
26 management, used and disclosed Earthbound’s customer and project lists and bid
27 information. For example, Keyse admitted to taking the customer list from the G-Drive
28 and transferring it to his own portable storage device, and that he and Miller relayed to

1 MiTek Earthbound’s bid, project, and client information. MiTek argues that even if
2 Plaintiffs’ information constitutes trade secrets, Plaintiffs have not shown that Defendants
3 misappropriated the Super-Template itself.⁴ Defendants likely will succeed on this
4 aspect, and this aspect alone, of the trade secret claim. Plaintiffs have a strong likelihood
5 of succeeding on the remaining aspects of their WUTSA misappropriation claim as to
6 MiTek’s, Keyse’s, and Miller’s activity regarding Earthbound’s trade secrets.

7 **2. Common Law Claims**

8 **a. Duty of Loyalty**

9 Under Washington law, an employee owes his employer a duty of loyalty that
10 encompasses a duty not to act “in direct competition with his employer’s business.”
11 *Kieburz & Assoc., Inc. v. Rehn*, 68 Wash. App. 260, 265 (1992); *see also Keystone Fruit*
12 *Marketing, Inc. v. Brownfield*, 352 F. App’x 169, 171–72 (9th Cir. 2009) (“We predict
13 the Washington Supreme Court would follow the Restatement [section 393, which
14 prohibits an employee from acting in direct competition with his employer’s business].”
15 (citing *Kieburz*, 68 Wash. App. at 265)). As explained above, the WUTSA preempts
16 common law claims that “rely on acts that constitute trade secret misappropriation.”
17 *Thola*, 140 Wash. App. at 82. To determine whether this claim is preempted, the Court
18 applies the following test: “(1) assess the facts that support the plaintiff’s civil claim; (2)
19 ask whether those facts are the same as those that support the plaintiff’s [WUTSA] claim;
20 and (3) hold that the [WUTSA] preempts liability on the civil claim unless the common
21 law claim is factually independent from the [WUTSA] claim.” *Id.*

22 Defendants point out that much of Plaintiffs’ breach of the duty of loyalty claim
23 stems from the same facts underlying the WUTSA claim, such as accessing Earthbound’s
24 servers and copying information from those servers for the purpose of advancing MiTek
25 sales. *See* MiTek Opposition at 17; Employee Opposition at 15–16; MPI Memo at 20–

26
27 ⁴ The Employee Opposition does not dispute the misappropriation element of a trade secret
28 misappropriation claim, and MiTek does not appear to dispute that other information which may
constitute trade secrets were used or disclosed.

1 21. To the extent that Plaintiffs allege breach of the duty of loyalty in connection with
2 such activity, the claim is preempted.

3 Plaintiffs also argue, however, that the Employee Defendants stopped performing
4 some of their job functions during the last few weeks of their employment with ISS
5 because, having accepted positions with MiTek, they planned to bring their ISS business
6 to MiTek. MPI Memo at 21; Plaintiffs' MiTek Reply at 16–17; Complaint at ¶ 11.4.
7 Plaintiffs also contend that Miller's recruitment of Keyse and Birdwell to leave ISS and
8 join MiTek, while he was employed by ISS, was disloyal conduct that suffices to state a
9 claim for breach. Plaintiffs' Employee Reply at 10. These underlying allegations are
10 unrelated to the WUTSA claim and, therefore, are not preempted. Moreover, the
11 Plaintiffs likely will succeed on these aspects of their claim. *See Evergreen*
12 *Moneysources Mortgage Co. v. Shannon*, 167 Wash. App. 242, 252–53 (2012)
13 (allegations of solicitation of employees for employer's competitor, when supported by
14 evidence, constitutes breach of the duty of loyalty); *Kieburz*, 68 Wash. App. at 265
15 (same).

16 **b. Tortious Interference**

17 As with the duty of loyalty claim, many of the facts underlying the tortious
18 interference claim relate to Defendants' use of Earthbound's trade secrets. To the extent
19 Plaintiffs seek recovery for tortious interference on the basis of those allegations, the
20 claim is similarly preempted.

21 Plaintiffs also argue that Miller and Keyse "planted seeds" in Plaintiffs' customers'
22 minds that Plaintiffs would not be able to meet their California clients' needs with Miller
23 and Keyse employed by MiTek. MPI Memo at 22; Plaintiffs' Employee Reply at 10–11;
24 Complaint at ¶ 10.3. This conduct may amount to a tortious interference with prospective
25 economic advantage under California law if the conduct is independently unlawful. *See*
26 *Fresno Motors*, 771 F.3d at 1125. To this end, Plaintiffs appear to argue that the conduct
27 was improper because it amounts to fraud. *See* Plaintiffs' Employee Reply at 11 (the
28 assertion that Earthbound would not be able to sustain its California clientele without

1 Keyse and Miller was “untrue and was part of MiTek’s plan to ‘take out’ Earthbound’s
2 business”). Plaintiffs have not provided the Court with any substantiating evidence that
3 Keyse and Miller knew or believed their statements to be untrue. In fact, Plaintiffs
4 argue—with supporting evidence—that MiTek’s recruitment of Miller and Keyse and
5 that Employee Defendants’ eventual move to MiTek in fact compromised Plaintiffs’
6 business.

7 The Court therefore concludes that Plaintiffs have not presented sufficient
8 evidence to demonstrate that they are likely to succeed on their tortious interference
9 claim.

10 **C. Irreparable Harm**

11 “[I]ntangible injuries, such as damage to ongoing recruitment efforts and goodwill,
12 qualify as irreparable harm.” *Rent-A-Center, Inc. v. Canyon Television & Appliance*
13 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Evidence of threatened loss of
14 prospective customers supports a finding of irreparable harm. *Stuhlberg Int’l Sales Co. v.*
15 *John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001); *Super-Krete Int’l, Inc. v.*
16 *Sadleir*, 712 F. Supp. 2d 1023, 1037 (C.D. Cal. 2010); *see also OOO Brunswick Rail*
17 *Mgmt. v. Sultanov*, No. 5:17-cv-00017-EJD, Doc. # 15, at 5 (N.D. Cal. Jan. 6, 2017)
18 (“Dissemination of the confidential information to [plaintiff]’s creditors, competitors, and
19 adverse parties . . . would cause [plaintiff] irreparable harm.”).

20 Plaintiffs argue that to permit MiTek to continue to rely on the Employee
21 Defendants’ knowledge of Earthbound’s trade secret information may destroy Plaintiffs’
22 business such that monetary damages are insufficient. *See* MPI Memo at 26–27 (citing
23 *Semmes Motors, Inc. v. Ford Motors Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970)). The risk
24 of harm in this case is distinct from the irreparable harm presented in *Semmes*, where
25 absent injunctive relief the plaintiff would have to close the family business he ran for 20
26 years. 429 F.2d at 1205. Nevertheless, the Court concludes that there is a strong
27 likelihood of irreparable harm in the absence of a preliminary injunction.

28

1 Keyse and Miller appear to have committed to memory Earthbound's proprietary
2 bid prices, and from Plaintiffs' trade secret information, they are intimately
3 knowledgeable about Plaintiffs' bidding strategy, internal costs, and how those figures
4 affect Plaintiffs' bids regarding certain tie-down systems. Defendants contend that the
5 utility of that knowledge is temporal and likely now stale because bid prices change
6 depending on the project and the manufacturing costs, among other considerations. *See*
7 *Chin Depo.* at 68:10–25. This argument is unavailing. Given Miller's and Keyse's
8 familiarity with Plaintiffs' pricing and bidding procedures and the moving components
9 therein, Defendants' knowledge of Earthbound's protected information, even at a discrete
10 moment from the past, likely would permit Defendants to determine Plaintiffs' current
11 price and bid information on a given project and cause Plaintiffs irreparable harm. This
12 is particularly true in light of Miller and Keyse's demonstrated efforts to damage
13 Earthbound's goodwill through their outreach to and communications with Earthbound
14 customers, as well as MiTek's encouragement of such conduct. Accordingly, the Court
15 concludes that Plaintiffs have established a likelihood of irreparable harm.

16 **D. Balance of Equities**

17 “When a court balances the equities, it compares the harm to the moving party if
18 the injunction is not issued to the harm the non-moving party would suffer from a
19 wrongfully-issued injunction.” *Nat'l City Bank, N.A. v. Prime Lending, Inc.*, 737 F.
20 Supp. 2d 1257, 1270 (E.D. Wash. 2010). The Court has considered the parties'
21 arguments and evidence and concludes that the balance of equities weighs in favor of
22 granting the narrowly tailored injunctive relief, set forth below.⁵

23 Plaintiffs have demonstrated that there is a strong likelihood of irreparable harm if
24 Defendants are permitted to utilize Earthbound's trade secret information. Moreover, the
25

26 ⁵ Plaintiffs request a broader injunction. The Court concludes that enjoining Defendants from
27 working with any customer with whom the Employee Defendants worked while employed by ISS
28 creates an unworkable standard and overly curtails MiTek's business, particularly in light of MiTek's
corporate history, size, and reach, and the fact that MiTek and Plaintiffs historically have shared many
customers by virtue of the nature of the industry.

1 restraint on Defendants’ abilities to conduct sales is not severely limited by the injunctive
2 relief sought; they would only be precluded from working on bids and projects that Keyse
3 and Miller were involved with while working with Plaintiffs. Additionally, Defendants
4 do not appear to seek access to Plaintiffs’ trade secret information. *See* Employee
5 Opposition at 22. Rather, the Employee Defendants want to resume their work with
6 customers that MiTek and Plaintiffs share. *Id.*

7 **E. Public Interest**

8 The Washington legislature authorizes the grant of injunctive relief “to eliminate
9 [the] commercial advantage that otherwise would be derived from the misappropriation
10 [of trade secrets].” Wash. Rev. Code § 19.108.020(1).

11 Because Plaintiffs have demonstrated a likelihood of success on the merits of their
12 WUTSA and breach of the duty of loyalty claims and a likelihood of irreparable harm
13 absent injunctive relief, those factors weigh strongly in favor granting the MPI. Further,
14 the balance of equities and the public interest weigh, in part, in Plaintiffs’ favor, such that
15 the Court will narrowly tailor the requested injunctive relief to protect Plaintiffs, promote
16 the public interest, and avoid unnecessary hardship to Defendants.

17 **IV.**

18 **CONCLUSION**

19 In light of the foregoing, the Court **GRANTS in part** Plaintiffs’ MPI, as follows:

- 20 1. Keyse and Miller shall not work with any Zone 4 earthquake tie-down
21 customer with whom they developed or obtained a consummated bid or
22 project while employed by ISS, except to the extent Keyse and Miller can
23 demonstrate that these customers sought out Defendants’ services of their
24 own accord.
- 25 2. Defendants shall not work on any job or project for which Keyse and Miller
26 marketed, developed, bid, or were responsible while employed by ISS.
- 27 3. Defendants are restrained from using, disclosing, or acquiring the following
28 Earthbound compilations (from the G drive), whether based on actual

1 documents or memory of such information: customer list, project and job
2 lists, and price list.

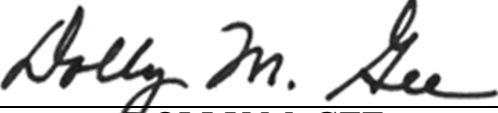
3 4. Defendants are restrained from using, disclosing, or acquiring the following
4 information contained on the Super-Template, whether based on actual
5 documents or memory of such information: bid information, pricing
6 information, internal financial information, and proprietary project design
7 information.

8 5. Plaintiffs' remaining requests for injunctive relief are **DENIED**.

9 The aforementioned terms will supersede the injunctive relief imposed by the
10 Western District of Washington's TRO. Accordingly, the Employee Defendants' MTV
11 is **GRANTED in part** consistent with this Order.

12 **IT IS SO ORDERED.**

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14 DATED: February 10, 2017

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17 DOLLY M. GEE
18 UNITED STATES DISTRICT JUDGE
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