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**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

WAGNER AERONAUTICAL, INC.,  
et al,

Plaintiffs,

v.

DAVID DOTZENROTH; et al,

Defendants.

Case No.: 21CV0994 L AGS

**(1) ORDER VACATING PRIOR  
SEALED ORDER [ECF NO. 373];**

**(2) AMENDED ORDER DENYING  
PLAINTIFFS’ RE-CALENDARER  
MOTION FOR PRELIMINARY  
INJUNCTION [ECF NO. 161-1];**

**(3) ORDER DENYING  
DOTZENROTH DEFENDANTS’ *EX  
PARTE* APPLICATION FOR  
LEAVE TO FILE SUPPLEMENTAL  
OPPOSITION [ECF No. 218];**

**and**

**(2) ORDER DENYING  
DOTZENROTH DEFENDANTS’ *EX  
PARTE* APPLICATION FOR  
ENTRY OF REDACTED ORDER  
[ECF NO. 376]**

On September 29, 2022, the Court issued a sealed Order denying Plaintiffs’ motion for preliminary injunction. [ECF No. 373.] On October 6, 2022, the Dotzenroth

1 Defendants filed an unopposed *ex parte* application for entry of redacted order denying  
2 Plaintiffs’ motion for preliminary injunction. [ECF No. 376.] The Dotzenroth Defendants  
3 request that the Order be publicly filed in part to disclose the contents of the Order to  
4 their clients. Plaintiffs’ counsel has no objection other than redacting two mentions of a  
5 confidential business name. (Fitzgerald Dec. at ¶ 2 Ex, A.) The NIAR Defendants’  
6 counsel joined the request to publicly docket the redacted Order. (Fitzgerald Dec. ¶ 3, Ex  
7 B.) The Court has amended the prior sealed Order to omit the confidential name, as  
8 evidenced below. Accordingly, the Court vacates the prior Order [ECF No. 373], files the  
9 Amended Order, and denies the application to file redacted order as moot [376.]

10 Pending before the Court is Plaintiffs’ re-calendared motion for preliminary  
11 injunction [ECF No. 161]. The Dotzenroth Defendants and NIAR Defendants filed  
12 oppositions, and Plaintiffs filed a reply. Also pending before the Court is Dotzenroth  
13 Defendants’ *ex parte* application for leave to file supplemental briefing in opposition to  
14 Plaintiffs’ re-calendared motion for preliminary injunction. [ECF No. 218.] The Court  
15 has granted the parties’ requests to seal the documents and their attachments. The Court  
16 decides the matter on the papers submitted and without oral argument. *See* Civ. L. R.  
17 7.1(d.1). For the reasons stated below, Plaintiffs’ motion is denied.

18  
19 I. FACTUAL BACKGROUND

20 The facts as asserted in Plaintiffs’ Complaint include the following:

21 Plaintiff Mammoth Freighters LLC (“Mammoth” or “Mammoth Freighters”) is  
22 developing a passenger aircraft conversion program, designed in part by Plaintiff Wagner  
23 Aeronautical, Inc. (“Wagner Aeronautical”), that takes passenger aircraft and modifies  
24 them to carry cargo for the world’s leading air freight companies. The co-CEOs of  
25 Mammoth are Plaintiffs William Wagner (“Wagner”) and William Tarpley (“Tarpley”).  
26 Wagner is the founder and president of Wagner Aeronautical and Tarpley is the business  
27 lead for Mammoth’s conversion program.  
28

1 When Wagner and Tarpley began work on the conversion program, they asked  
2 Defendant David Dotzenroth (“Dotzenroth”), a long-time friend with connections in the  
3 financial industry, if he would be interested in exploring the possibility of a collaboration  
4 whereby Wagner and Wagner Aeronautical would contribute the engineering expertise;  
5 Tarpley would contribute project management expertise and marketing expertise to  
6 attract potential clients; and Dotzenroth would secure investment capital to fund the  
7 development of the conversion program.

8 Plaintiffs now allege that Defendants David Dotzenroth, Charles Wiley  
9 Dotzenroth, and Andrew Mansell, along with the NIAR Defendants, stole valuable,  
10 confidential and proprietary information belonging to Plaintiffs including a business plan,  
11 budget, and schedule roadmap, in order to launch a competing business converting large  
12 passenger aircraft into cargo freighters.

13 The Dotzenroth Defendants purportedly shared the trade secrets with the National  
14 Institute for Aviation Research (“NIAR”), which is part of Wichita State University. The  
15 NIAR Defendants, including David Jones, Ronald Towry, and Eric Kivett, have  
16 developed a 777 Conversion Program that is currently operating. Plaintiffs seek to enjoin  
17 Defendants from using the trade secrets, and developing aircraft based on that  
18 information.

19 I. PROCEDURAL BACKGROUND  
20

21 On May 25, 2021, Plaintiffs filed a complaint in this Court alleging  
22 misappropriation of trade secrets under federal and state law, false advertising under the  
23 Lanham Act, unfair competition under California law, breach of fiduciary duty, and civil  
24 conspiracy. (Complaint [ECF No. 1.]) On June 21, 2021, Plaintiffs filed a motion for  
25 preliminary injunction. (Mot. [ECF No. 16.]) On July 8, 2021, Plaintiffs withdrew the  
26 motion for preliminary injunction. [ECF No. 48.] On November 9, 2021, Plaintiffs filed a  
27 First Amended Complaint, adding a claim for misappropriation against Defendant NIAR.  
28 [ECF No. 132.] On November 23, 2021, the Dotzenroth Defendants filed a Motion to

1 Dismiss Counts Four and Five. [ECF No. 142.] By Order dated September 16, 2022, the  
2 Court granted Defendants’ Motion to Dismiss. [ECF No. 369.]

3 On December 21, 2021, Plaintiffs filed the present motion for re-calendared  
4 preliminary injunction. [ECF No. 161-1.] The Dotzenroth Defendants filed a response in  
5 opposition on January 24, 2022. [ECF No. 201.] On February 3, 2022, the Dotzenroth  
6 Defendants filed an ex parte application for leave to file a supplemental opposition to  
7 Plaintiffs’ recalendared motion for preliminary injunction. [ECF No. 218.] On February  
8 4, 2022, Plaintiffs filed a response in opposition to Defendants’ ex parte application for  
9 leave to file supplemental opposition, and a reply to the motion for preliminary  
10 injunction. [ECF Nos. 222, 225.] On February 23, 2022, Defendants filed Newly  
11 Acquired Evidence in opposition to Plaintiffs’ motion for preliminary injunction. [ECF  
12 No. 250.]

## 13 II. DISCUSSION

14  
15 “[P]laintiffs seeking a preliminary injunction must establish that (1) they are likely to  
16 succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of  
17 preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary  
18 injunction is in the public interest.” *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9<sup>th</sup>  
19 Cir. 2009). “A preliminary injunction is an extraordinary remedy never awarded as of  
20 right.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9<sup>th</sup> Cir. 2011). “In  
21 exercising their sound discretion, courts of equity should pay particular regard for the  
22 public consequences in employing the extraordinary remedy of injunction.” *Winter v.*  
23 *Nat. Resource Def. Council*, 555 U.S. 7, 24 (2008)(citing *Romero-Barcelo*, 456 U.S. 305,  
24 312 (1982)).

25  
26 [T]he elements of the preliminary injunction test are balanced, so that a stronger  
27 showing of one element may offset a weaker showing of another. For example, a  
28 stronger showing of irreparable harm to plaintiff might offset a lesser showing of  
likelihood of success on the merits. [The Ninth] circuit has adopted and applied a

1 version of the sliding scale approach under which a preliminary injunction could  
2 issue where the likelihood of success is such that serious questions going to the  
3 merits were raised and the balance of hardships tips sharply in plaintiff's favor.  
That test was described in this circuit as one alternative on a continuum.

4 *Alliance for the Wild Rockies*, 632 F.3d at 1131.

5  
6 *A. Likelihood of Success on Merits*

7 Trade secret misappropriation includes “disclosure or use of a trade secret of  
8 another without express or implied consent.” 18 U.S.C. § 1839(5)(A). Such disclosures  
9 are unlawful when they are made “by a person who at the time of disclosure or use, knew  
10 or had reason to know that the knowledge of the trade secret was acquired under  
11 circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the  
12 use of the trade secret; or derived from or through a person who owed a duty to the  
13 person seeking relief to maintain the secrecy of the trade secret or limit the use of the  
14 trade secret. *Id.*; see Cal.Civ.Code §3426.1(b). Similarly, under the UTSA, a plaintiff  
15 must allege two elements: ‘(1) the existence of a trade secret, and (2) misappropriation of  
16 the trade secret.’” *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F.Supp.2d 941,  
17 950 (N.D.Cal.2003) (citing Cal. Civ.Code § 3426.1(b)). This standard has been adopted  
18 by the Ninth Circuit. *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164–65 (9th  
19 Cir.1998). Plaintiffs seeking relief for misappropriation of trade secrets “must identify the  
20 trade secrets and carry the burden of showing that they exist.” *MAI Sys. Corp. v. Peak  
21 Computer, Inc.*, 991 F.2d 511, 522 (9th Cir.1993).

22  
23 1. *Existence of Trade Secrets*

24 Trade secrets include: “all forms and types of financial, business, scientific,  
25 technical, economic, or engineering information, including patterns, plans, compilations,  
26 program devices, formulas, designs, prototypes, methods, techniques, processes,  
27 procedures, programs, or codes. . .” 18 U.S.C.A. § 1839(3)(A). To prove ownership, the  
28 holder of the information must show that (1) they have “taken reasonable measures to

1 keep such information secret; and (2) the information derives independent economic  
2 value, actual or potential, from not being generally known to, and not being readily  
3 ascertainable through proper means by, another person who can obtain economic value  
4 from the disclosure or use of the information.” 18 U.S.C.A. § 1839(3)(A).

5 Similarly, CUTSA defines trade secrets as:

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

8 (1) Derives independent economic value, actual or potential, from  
9 not being generally known to the public or to other persons who can  
10 obtain economic value from its disclosure or use; and

11 (2) Is the subject of efforts that are reasonable under the  
12 circumstances to maintain its secrecy.

13 Cal.Civ.Code § 3426.1(d)(2).

14 As a preliminary matter, a plaintiff seeking trade secret protection “should describe  
15 the subject matter of the trade secret with sufficient particularity to separate it from  
16 matters of general knowledge in the trade or of special knowledge of those persons ...  
17 skilled in the trade.” *Imax Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161, 1164-65  
18 (9th Cir. 1998); see also *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 244, 67 Cal.Rptr. 19  
19 (2d Dist.1968); *Pellerin v. Honeywell Int'l, Inc.*, 877 F. Supp. 2d 983, 988 (S.D. Cal.  
20 2012); see also Cal.Civ.P. § 2019.210(“the party alleging the misappropriation shall  
21 identify the trade secret with reasonable particularity.”)

22 Here, Plaintiffs describe the alleged trade secrets as the business plan, roadmap,  
23 FAA certification schedules and descriptions, along with design specifications and  
24 drawings. (Mot. at 9-11). The business plan was reflected in PowerPoint slide decks that  
25 described the conversion process, analyzed risks and included competitive advantage  
26 analysis and engineering details. (*Id.* at 3). The roadmap was a multi-tab Microsoft  
27 Excel spreadsheet that included “revenue projections, month-by-month cost estimates,  
28

1 development costs, schedule estimates, the rate of return, program input financing,  
2 staffing inputs and engineering headcounts, and other details.” (*Id.*)

3         These descriptions identify broad categories of documents, but do not describe  
4 what part of those documents is protectable. *See Calendar Rsch. LLC v. Stubhub, Inc.*,  
5 No. 2:17-cv-04062-SVW-SS, 2020 WL 4390391, at \*8 (C.D. Cal. May 13,  
6 2020)(“‘[B]road, categorical terms’ are insufficient for the Court to discern the alleged  
7 trade secret.”) In addition, Plaintiffs contend that “all drafts and variations” of the  
8 documents are protectible trade secrets, but this overbroad request without clear  
9 identification of the contents of those documents falls short of the “reasonable  
10 particularity” requirement of CCP §2019.210.

11  
12         Additionally, Defendants allege that much of the information contained within  
13 these documents is actually in the public domain, and therefore cannot be included as a  
14 trade secret. Plaintiffs acknowledge that some of the material originated from various  
15 public sources, but argue that a compilation of data collected from various sources may  
16 still qualify for trade secret protection. However, Plaintiffs do not make efforts to identify  
17 the protectable information from that which may be generally known. *See Imax Corp.*,  
18 152 F3d at 1164. Plaintiffs do not provide sufficiently detailed descriptions of their trade  
19 secrets for the Court to discern whether they possess ownership of the information.  
20 Despite this shortcoming, the Court presumes Plaintiffs can, or have, sufficiently  
21 identified the protectible portions of those documents, and proceeds to determine whether  
22 a preliminary injunction is warranted.

23                     *a. Secrecy*

24         It is incumbent on the owner of trade secrets to protect the secrecy of that  
25 information to retain its value. “Because of the intangible nature of a trade secret, the  
26 extent of the property right therein is defined by the extent to which the owner of the  
27 secret protects his interest from disclosure to others.” *Ruckelshaus v. Monsanto Co.*, 467  
28

1 US. 986, 1002 (1984). “If an individual discloses his trade secret to others who are under  
2 no obligation to protect the confidentiality of the information, or otherwise publicly  
3 discloses the secret, his property right is extinguished.” *Id.*

4 Plaintiffs argue they made reasonable efforts to protect the secrecy of the alleged  
5 trade secrets by using secure IT systems to store documents, Wagner Aeronautical  
6 employees signed confidentiality agreements, Wagner Aeronautical offices were only  
7 accessible to authorized personnel, and information was provided to outsiders only on a  
8 need-to-know basis. (Mot. at 12). Plaintiffs claim they marked versions of trade secrets as  
9 “proprietary,” and they obtained non-disclosure agreements with potential customers  
10 before sharing the information. (*Id.*) In addition, Plaintiffs assert that any disclosures they  
11 made did not imperil the secrecy of the trade secrets because the information did not go  
12 to competitors and did not become generally known. (Reply at 14). They also contend  
13 that there was an understanding between Wagner, Tarpley and Dotzenroth that the  
14 information was confidential and not to be divulged to outsiders.

15  
16 Defendants counter that Plaintiffs shared their data without non-disclosure  
17 agreements (“NDA”) in place and as a result they lost their property interest in the data  
18 because secrecy is a requisite element of a trade secret. (Dotzenroth Def. Oppo. at 14).  
19 For example, Defendants contend that neither Defendant Dotzenroth nor Defendant  
20 Wiley were bound by an NDA, yet Plaintiffs emailed all of their alleged trade secrets to  
21 Wiley and to Dotzenroth without any “proprietary” or “confidentiality” indicators on  
22 them. (*Id.*) Defendants also allege that Plaintiff Tarpley continued to send Dotzenroth  
23 purportedly secret information even after Tarpley had parted ways with Dotzenroth,  
24 therefore he could not have had any possible expectation of confidentiality. (*Id.*)

25 The record before the Court indicates that neither Wagner nor Tarpley took  
26 consistent measures to protect the purportedly valuable trade secrets. Although Tarpley  
27 stated that he and Wagner “had potential investors, partners, and customers sign non-  
28



1 disclosure agreements (‘NDAs’) and that the business plan was stamped  
2 ‘PROPRIETARY,’” the evidence shows that Tarpley emailed Dotzenroth the following  
3 documents with no NDA in place, and no markings on the documents indicating they  
4 were confidential or proprietary: Program Development Schedule, Payload Range  
5 Capability, work schedules, Business Plan, slide presentation (Def. Ex 1-5, 8, 9, 21 [ECF  
6 No. 199.]

7 In addition, Defendants submitted evidence that Tarpley emailed the business plan  
8 to Steve Yeager, who was not bound by any NDA. (Supp. Ev. at 1 [ECF No. 250.] On  
9 September 6, 2020, Tarpley texted Yeager at approximately 2 pm, and said, “Ok. I think  
10 we need to get through next Thursday’s meetings to know we are a go. I can send you the  
11 business plan -52 pages.” (Id. at 7). He follows at 6:34 P.M., “Sent you a big file via  
12 email.” To which Yeager responds, “I have it ... Thank you.” (Id. at 8). On September 8,  
13 2020, Tarpley texted Yeager again asking, “Did you get a chance to look at the  
14 presentation?” (Id.) Yeager responded, “I looked through it the other day. I plan to go  
15 back through in more detail one night this week.” (Id.)

16 On October 11, 2021, Tarpley texted Yeager stating “You may get a call from Eric  
17 Nitz, our attorney, asking you if you understood the business plan I sent you for  
18 Mammoth was confidential and if you sent it to anyone else. Of course it was confidential  
19 but I never asked you to sign an nda.” (Id. at 10). The disclosure of purported trade  
20 secrets to outside parties with no NDA or other indicia of secrecy on the documents  
21 suggests that the information was not truly secret. *Ruckelshaus*, 467 US. at 1002. In  
22 addition, Wagners’s text to Yeager claiming the prior disclosure was confidential is an  
23 after the fact effort to claw back the disclosure of information which is insufficient to  
24 demonstrate genuine efforts to keep the information secret.

25 In an effort to explain that the disclosures did not compromise the secrecy of the  
26 information, Plaintiffs allege that most of the disclosures were made to Tarpley’s friends,  
27 family, and business associates under a mutual understanding of confidentiality and that  
28 potential customers were bound by ethics policies, or the documents were stamped

1 proprietary. (Reply at 13). Such disclosures for a limited purpose to a customer or  
2 investor does not extinguish trade-secret status, according to Plaintiffs. (*Id.*)

3 Wagner disclosed the information to a potential business partner with only the  
4 assurance that their employee was bound by their ethics policy requiring the  
5 representative to maintain the confidentiality of non public information. This does not  
6 ensure secrecy the way an NDA would for purportedly valuable information. However, if  
7 a jury determined that there was an implied relationship of confidentiality between  
8 Wagner and the potential business partner, the ethics policy could constitute reasonable  
9 efforts to maintain secrecy. *See DirectTechnologies v. Electronic Arts*, 836 F.3d 1059,  
10 1070 (9th Cir. 2016)(“It may be that in some factual circumstances, a rational jury could  
11 find that when an implied relationship of confidentiality exists between two business  
12 partners, it is ‘reasonable under the circumstances’ for the prospective seller to not make  
13 additional efforts to maintain secrecy.”)

14 The facts before the Court indicate that Plaintiffs did not consistently protect the  
15 secrecy of the alleged trade secrets as some copies of the documents included  
16 “proprietary” stamps, while others had no indicia of secrecy. This is insufficient to  
17 demonstrate Plaintiffs took reasonable efforts to protect the secrecy of the documents and  
18 information for purposes of this request for injunctive relief. *Ruckelshaus*, 467 U.S. 986,  
19 1011 (1984)(“Once the data that constitute a trade secret are disclosed to others, or others  
20 are allowed to use those data, the holder of the trade secret has lost his property interest in  
21 the data.”)

### 22 *b. Economic Value*

24 In addition to taking reasonable measures to ensure the secrecy of the information,  
25 the holder of a trade secret must also show that the information has independent  
26 economic value that derives from not being generally known. *See* 18 U.S.C. §  
27 1839(3)(A). Plaintiffs argue that the time and resources Wagner expended demonstrate  
28

1 the economic value of the information. (Mot. at 10). They contend more than \$1 million  
2 in Wagner Aeronautical time in the course of about 18 months was spent developing the  
3 conversion plan documents listed as trade secrets. (*Id.*) Defendants counter that Plaintiffs  
4 “dramatically exaggerate the time and effort spent on their business plan” noting that the  
5 evidence suggests it was closer to three weeks. (Dotzenroth Oppo. at 21).

6 The facts illustrate that both parties found economic value in the documents, as  
7 both used them to further the discussions with each other, and outside parties, to garner  
8 investment backing and general support. However, the fact that Plaintiffs divulged the  
9 alleged trade secrets without attempting to consistently protect them counsels against  
10 finding economic value, as “[a] trade secret’s value is the competitive advantage it gives  
11 its owner.” *Ruckelhaus*, 467 U.S. at 1011. The independent economic value of trade  
12 secrets derives from their secrecy. *U.S. v. Chung*, 659 F.3d 815, 825 (9th Cir. 2011). As  
13 noted above, Plaintiffs made inconsistent efforts at protecting the purported trade secrets,  
14 and disclosed them to individuals with no known connection to the business endeavor, in  
15 addition to others. For purposes of the present preliminary injunction motion, the Court  
16 finds that any economic value the trade secrets had was diminished by the disclosure of  
17 them without efforts to protect their secrecy. Consequently, trade secret ownership has  
18 not been sufficiently demonstrated by Plaintiffs. For the reasons discussed above, the  
19 Court finds that Plaintiffs failed to establish ownership of the trade secrets. However,  
20 even if Plaintiffs can demonstrate ownership of the alleged trade secrets, they cannot  
21 demonstrate a likelihood of success on the merits for the following reasons.

## 22 23 2. *Misappropriation*

24 Trade secret misappropriation includes “disclosure or use of a trade secret of  
25 another without express or implied consent.” 18 U.S.C. § 1839(5)(A). Such disclosures  
26 are unlawful when they are made “by a person who at the time of disclosure or use, knew  
27 or had reason to know that the knowledge of the trade secret was acquired under  
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1 circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the  
2 use of the trade secret; or derived from or through a person who owed a duty to the  
3 person seeking relief to maintain the secrecy of the trade secret or limit the use of the  
4 trade secret. *Id.*; *see* Cal.Civ.Code §3426.1(b).

5 Injunctive relief is warranted, according to Plaintiffs, because Defendants used and  
6 disclosed Plaintiffs' trade secrets to third parties without authorization. (Mot. at 13).  
7 Specifically, Plaintiffs claim that Dotzenroth emailed the business plan and trade secrets  
8 to NIAR Defendants Jones, Kivett, Wiley Dotzenroth, and Andy Mansell, a conversion  
9 marketer in February 2020, among others. (*Id.* at 14). Plaintiffs claim that Defendants  
10 agreed to keep the trade secrets confidential, or at a minimum had an implied duty of  
11 confidentiality. (*Id.* at 16-18).

12  
13 The Dotzenroth Defendants counter that Plaintiffs shared their data with no NDAs  
14 in place, emailing them to Dotzenroth and Wiley as they hammered out the details of the  
15 possible business venture. (Oppo. at 14). Plaintiff Tarpley continued to send purportedly  
16 secret information to Dotzenroth even after May 2019, when the parties went their  
17 separate ways. (*Id.*) The fact that Wagner entered into NDAs with outside parties did not  
18 govern the relationship between Dotzenroth and Plaintiffs, according to Defendants.  
19 Moreover, Wagner knew that Defendants were using the allegedly secret materials in  
20 discussions with NIAR when he attended meetings at NIAR, expressing hope that the  
21 NIAR/KMC business would include him, yet he did nothing to stop the dissemination of  
22 the information at that time. (*Id.* at 16). Dotzenroth argues that there was never an  
23 agreement between Wagner, Tarpley and Dotzenroth that the information could only be  
24 used to benefit Tarpley and Wagner, and if the information was so valuable, they would  
25 have protected it with NDAs. (*Id.* at 17). There was no implied duty of confidentiality  
26 either, according to Dotzenroth Defendants, because no inference of confidentiality is  
27 warranted where a plaintiff broadly discloses its supposed trade secrets. (*Id.* at 18-19).

1 As with many business relationships, the parties in this case began discussions with  
2 high hopes for future success. The parties were operating in a highly competitive market  
3 and there is evidence that they were not working in concert at various points. Tarpley  
4 formed Mammoth, the corporation that would be responsible for the Conversion  
5 Program, without Wagner. Dotzenroth developed a plan to approach the Wichita State  
6 University in Kansas to provide financial backing and resources, and Wagner was  
7 included in the development of that plan, but he ultimately did not become a partner to  
8 the venture. When the relationship ruptured, the individuals began leveling serious  
9 allegations at each other.<sup>1</sup>

10 The facts as gleaned from competing declarations indicate that Wagner, Tarpley,  
11 and Dotzenroth shared ideas, information, and resources liberally with each other in  
12 developing the business plan and “roadmap” for the conversion program, sometimes with  
13 markers of confidentiality, and sometimes without. Dotzenroth stated that:

14  
15 Tarpley, Wagner, and I never agreed that the information we shared and the  
16 business plan that resulted from that sharing was required to be kept confidential  
17 by any one or all of us. NDA’s are standard practice in the aviation industry, so if  
18 Tarpley or Wagner believed any of the information related to the potential 777  
19 conversion was confidential, or constituted proprietary information belonging to  
20 them, they would have protected that information with an NDA with me. Because I  
21 was never bound by an NDA or other agreement defining ownership of any  
22 intellectual property or information shared amongst Tarpley, Wagner, and myself, I  
23 considered myself free to use that information for my own benefit once our attempt  
24 to start a business unraveled, just as Tarpley and Wagner used it for their own  
25 benefit.

26 (Dotzenroth Dec. at ¶ 9)

27 In contrast, William Wagner explained that he and William Tarpley “considered  
28 the information and data contained in the business plan and roadmap to be proprietary

---

<sup>1</sup> The Parties have made serious accusations of dishonesty, doctoring documents, paying bribes, and other malfeasance against each other. The Court will not engage in determining credibility of these allegations at this stage in the proceedings.

1 and highly confidential.” (Wagner First Supp. Dec. at ¶2 [ECF 161-3.]) Both Wagner and  
2 Tarpley stated that Wagner, Tarpley and Dotzenroth agreed to keep the information about  
3 the conversion program confidential, using them only to obtain financing for Plaintiffs’  
4 program. (Mot. at 17). Wagner stated that he told Dotzenroth as much in a May 21, 2019  
5 text that read “Please remember that the schedule, budget and man loading info is  
6 proprietary.” (*Id.*) According to Wagner, he participated in meetings with Dotzenroth at  
7 NIAR, but he did not authorize David or Wiley Dotzenroth to use the “information in the  
8 business plan and roadmap in connection with those meetings.” (*Id.* at ¶ 3).

9       The record demonstrates that both parties shared the information claimed to be  
10 trade secrets without NDA’s in place, or other indicators of secrecy and ownership, at  
11 various times in efforts to promote the conversion plan and secure funding. The parties  
12 agree there was no formal arrangement between them, though it appears that details about  
13 profit sharing and distributions were almost settled when the relationship soured.  
14 Plaintiffs note many instances of disclosure by Dotzenroth to various NIAR Defendants  
15 as evidence of misappropriation, however, Wagner knew that the information was being  
16 disseminated in an effort to advance the NIAR relationship, and attended a meeting in  
17 Kansas with NIAR to that purpose, even seeking to be included in the NIAR conversion  
18 program. In fact, Wagner and Wichita State University, NIAR’s partner, entered into an  
19 NDA in March 2020 to discuss a potential collaboration related to the 777 conversion  
20 plan. (NIAR Oppo. at 18). NIAR Defendants David Jones and Ronald Towry flew to  
21 Wagner Aerospaces’ offices for further discussion in September 2020, but according to  
22 NIAR, Wagner failed to demonstrate he owned the 757 conversion material as he  
23 claimed, and Wagner made clear that nothing discussed in the meeting was confidential  
24 or proprietary. (*Id.* at 7). NIAR decided to pursue its program without Wagner, concerned  
25 that Wagners small facilities and limited staff could not deliver on the 757 conversion  
26 program. (*Id.*)  
27  
28

1 Plaintiffs argue that there was an implied duty of confidentiality between the  
2 Parties, however, Defendants have stated they were not on notice that the information  
3 was confidential. “[C]ourts will consider the factual circumstances of each case on an  
4 individual basis, to determine whether a confidential relationship may reasonably be  
5 implied.” *Pachmayr Gun Works v. Olin Mathieson Chem. Corp.*, 502 F.2d 802, 808 (9th  
6 Cir. 1974). “An implied duty of confidentiality is found when the other party has reason  
7 to know that the information was in fact confidential.” *Carr v. AutoNation*, 798  
8 Fed.Appx. 129, 130 (9th Cir. 2020) “[N]o duty of confidence will be inferred unless the  
9 recipient has notice of the confidential nature of the disclosure.” *See* Restatement (Third)  
10 of Unfair Competition § 41 cmt. b (Am. Law Inst. 1995).

11 The limited facts before the Court in this request for injunctive relief indicate that  
12 there are serious questions going to the merits regarding whether Defendants “knew or  
13 had reason to know that the knowledge of the trade secret was acquired under  
14 circumstances giving rise to a duty to maintain the secrecy of the trade secret.” 18 U.S.C.  
15 § 1839(5)(A). Moreover, the after- the- fact text message from Wagner to Dotzenroth  
16 stating that the documents were confidential is insufficient in light of the numerous  
17 instances of non-protected disclosures made by Plaintiffs themselves.

### 18 19 *B. Irreparable Harm*

20 Plaintiffs argue that they will be irreparably harmed if they are not granted  
21 injunctive relief to protect their trade secrets, contending that disclosure of trade secrets  
22 to competitors constitutes irreparable harm on its own. (Mot. at 20). Loss of customers  
23 to a competitor due to trade secret misappropriation also constitutes irreparable harm,  
24 according to Plaintiffs. (*Id.* at 20-21). Plaintiffs claim they will suffer irreparable harm  
25 because the theft of their trade secrets “dramatically accelerated Defendants’ competing  
26 P2F program” and as a result Defendants are able to compete for the same small pool of  
27 customers in a “zero-sum market.” (*Id.* at 20). For example, Plaintiffs note that they have  
28

1 already lost one customer because the first 777 aircraft has arrived at NIAR and KMC for  
2 conversion. (*Id.* at 21). Plaintiffs explain their delay in filing for injunctive relief by  
3 stating it was not until the public announcement in February 2021 that they realized the  
4 competing conversion program posed a real risk, at which time they decided to try to  
5 protect the alleged trade secrets. They also explain that they waited to file until the  
6 possibility of irreparable harm ripened into a likelihood and argue that they are seeking  
7 injunctive relief based on “ongoing, worsening injuries” (*Reply* at 21).

8 No presumption of irreparable harm should be made in trade secret cases,  
9 according to Defendants. (*Dotzenroth Defendants Oppo.* at 24). Defendants claim that the  
10 two- year delay in filing the preliminary injunction, indicates that there is no danger of  
11 irreparable harm to Plaintiffs. (*NIAR Def. Oppo.* at 20; *Dotzenroth Def. Oppo.* at 22). If  
12 Plaintiffs request was granted, Defendants contend that it would stop the NIAR/KMC  
13 conversion program that has been operating for over two years with Plaintiffs’ knowledge  
14 which would not serve the purpose of a preliminary injunction to preserve the status quo.  
15 (*Id.* at 23).

16  
17 Plaintiffs have not shown they will suffer irreparable harm in the absence of an  
18 injunction. First, it is not certain that the trade secrets at issue are protectable, but even if  
19 this case involves trade secrets, the Court is not required to presume irreparable harm  
20 because of alleged trade secret loss. *Calence, LLC v. DimensionData Holding, PLC*, 222  
21 Fed.Appx.563, 566 (9th Cir. 2007).

22 Second, Plaintiffs’ delay in seeking injunctive relief weighs against a finding of  
23 irreparable harm. The facts indicate they knew as early as 2019 that Defendants began  
24 distributing allegedly proprietary information but Plaintiffs did not seek injunctive relief  
25 for over two years. The original complaint was filed on May 25, 2021 and Plaintiffs filed  
26 a motion for preliminary injunction on June 21, 2021, which was withdrawn on July 8,  
27 2021. Plaintiffs waited another six months before filing the present motion on December  
28



1 21, 2021. Tarpley was also on notice from at least early 2020 that Dotzenroth had formed  
2 a new company, relying in part on “the information from the business plan that Wagner  
3 and I had developed.” (Tarpley Dec. Ex 27 ¶ 18 [ECF No. 163-3.] )

4 A plaintiff's failure to seek judicial protection can imply “the lack of need for  
5 speedy action,” *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014). “Plaintiff's  
6 long delay before seeking a preliminary injunction implies a lack of urgency and  
7 irreparable harm.” *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374,  
8 1377 (9th Cir.1985); *iFreedom Direct Corp. v. McCormick*, 622 Fed.Appx.550, (9th Cir.  
9 2016)(“ten-month delay in seeking a preliminary injunction undermined [plaintiff's]  
10 claim of irreparable harm.”) Here, Plaintiffs did not act with sufficient urgency to protect  
11 the trade secrets, indicating they will not be irreparably harmed if no injunctive relief is  
12 granted.

13  
14 Plaintiffs claim that “delay is but a single factor to consider in evaluating  
15 irreparable injury” where plaintiffs suffer “ongoing, worsening injuries” citing *Arc of*  
16 *California v. Douglas*, 757 F.3d 975 (9th Cir. 2014). However, they do not demonstrate  
17 “ongoing, worsening injuries” sufficient to justify the delay. In *Arc*, “non-profit  
18 organizations sought a preliminary injunction enjoining California's reduction in its  
19 reimbursement for services provided to developmentally disabled individuals under the  
20 Medicaid program.” *Id.* at 979. The appellate court reversed the district court's denial of  
21 a preliminary injunction, noting that “the alleged injuries resulted from various cuts in  
22 compensation, enacted over a period of time and having a cumulative impact. In such  
23 circumstances, the magnitude of the potential harm becomes apparent gradually,  
24 undermining any inference that the plaintiff was “sleeping on its rights.”” The Court  
25 noted that the delay in seeking injunctive relief was offset by “ongoing, worsening  
26 injuries,” making it only one factor to consider in the determination. *Id.* at 990. Here,  
27 Plaintiffs have not sufficiently demonstrated that they are suffering from ongoing and  
28

1 worsening harm as a result of the alleged misappropriation by Defendants of their trade  
2 secrets for purposes of this motion.

3 Instead, the Court finds that the delay of almost two years before filing the initial  
4 preliminary injunction indicates Plaintiffs will not be irreparably harmed in the absence  
5 of injunctive relief.

6  
7 *C. Balance of Equities*

8 “To determine which way the balance of the hardships tips, a court must identify  
9 the possible harm caused by the preliminary injunction against the possibility of the harm  
10 caused by not issuing it.” *Univ. Hawaii Prof. Assembly v Cayetano*, 183 F.3d 1096, 1108  
11 (9th Cir. 1999). The party seeking a preliminary injunction “must establish ... that the  
12 balance of equities tips in his favor.” *Winter*, 129 S.Ct. at 374. A district court has a “duty  
13 ... to balance the interests of all parties and weigh the damage to each” in determining  
14 whether a party has met this burden. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football*  
15 *League*, 634 F.2d 1197, 1203 (9th Cir.1980). In balancing the relative hardships to the  
16 parties the court may weigh the relative size and strength of the parties to determine the  
17 respective ability to endure the potential hardship. *Sardi's rest. Corp. v. Sardie*, 755 F.2d  
18 719, 726 (9th Cir. 1985).

19  
20 Plaintiffs claim they have invested thousands of hours tailoring their decades of  
21 experience into the conversion program which would be unfairly diminished in the  
22 absence of an injunction. (Mot. at 24). The Dotzenroth Defendants counter that Plaintiffs  
23 and Fortress Investments, the \$54 billion private equity firm that owns and funds  
24 Plaintiffs, have attempted to destroy the Dotzenroth Defendants financially through this  
25 litigation. (Oppo. at 25). The NIAR Defendants contend that Plaintiffs are seeking to  
26 enjoin the use of broad, ill-defined trade secrets, but they are not entitled to such an  
27 injunction because it is not tailored to remedy the specific harm alleged citing *E.Bay*  
28 *Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). (NIAR Oppo. at 24).

1 In the present case, Plaintiffs assert they have lost business in a highly competitive  
2 market through Defendants' use of their information, which indicates that a preliminary  
3 injunction could balance the scales by stopping the use of those secrets in the conversion  
4 program that is in progress. However, the lucrative backing of Fortress suggests that  
5 Wagner and Tarpley have plentiful resources to continue to develop competing  
6 conversion programs, utilizing the information they have developed. In contrast, the  
7 issuance of a preliminary injunction would halt the NIAR conversion program and cause  
8 unemployment, lost income, and delay the delivery of important cargo aircraft. These  
9 interests weigh heavily in favor of not granting injunctive relief, and tip the balance to the  
10 Defendants.

11 *D. Public Interest*

12 “In exercising their sound discretion, courts of equity should pay particular regard for  
13 the public consequences in employing the extraordinary remedy of injunction.” *Winter*,  
14 555 U.S. at 376-77, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).  
15 “The award of an interlocutory injunction by courts of equity has never been regarded as  
16 strictly a matter of right, even though irreparable injury may otherwise result to the  
17 plaintiff . . . (but is rather) a matter of sound judicial discretion . . .’ and careful balancing  
18 of the interests of the respective parties.” *Friends of the Earth v. Coleman*, 518 F.2d 323,  
19 (9th Cir. 1975)(citing *Yakus v United States*, 321 U.S. 414, 440 (1944).

20 Plaintiffs contend that a preliminary injunction will serve the public interest in  
21 protecting trade secrets as an investment in innovation. (Mot. at 24). This is particularly  
22 true in the P2F industry because the public has become increasingly dependent on air-  
23 freight shipping including the delivery of groceries, medication and other necessities.  
24 (*Id.*) The public therefore has a strong interest in “ensuring ingenuity and creativity in the  
25 air-cargo industry.” (*Id.* 24-25).

26 The Dotzenroth Defendants do not address this factor, but the NIAR Defendants  
27 contend that the mission of both WSU and NIAR is to serve as an “educational, cultural  
28

1 and economic driver for Kansas and the Wichita community” and the 777 Conversion  
2 Program supports this mission by employing a substantial number of Wichita residents.  
3 (NIRA Def. Oppo. at 24). An injunction that affects NIAR’s ability to support the 777  
4 Conversion Program would impact WSU, the Wichita community, and the State of  
5 Kansas which has recognized the importance of the aerospace industry in its growth. (*Id.*)

6 Preserving and protecting innovation in the air cargo industry is clearly in the public’s  
7 interest, and for that very reason, the issuance of a preliminary injunction would not be in  
8 the public interest because it would mean the cessation of NIAR’s involvement with the  
9 777 Conversion Program which has been operating for over two years. The impact to  
10 WSU, NIAR and the Wichita community would be tremendous, and weighs heavily in  
11 favor of denying injunctive relief. (Kuwayti Dec. Ex A-E [ECF No. 196-1.]) Kansas  
12 boasts a long history of aviation manufacturing, and “the KMC, in partnership with  
13 Wichita State University’s National Institute for Aviation Research (NIAR) WERX  
14 program, will help solidify the Wichita area as a leader in the maintenance, repair, and  
15 overhaul (MRO) industry.” (*Id.* Ex B at 15). In light of the above, an injunction that has  
16 the effect of preventing the operation of the conversion program in Kansas would not be  
17 in the public interest.

18 III. CONCLUSION AND ORDER

19 For the foregoing reasons, the Court VACATES the prior sealed ORDER [ECF No  
20 373], files this AMENDED ORDER DENYING Plaintiffs’ motion for preliminary  
21 injunction [ECF No. 161], DENIES Defendants’ request to file supplemental briefing as  
22 moot [ECF No. 218], and DENIES Defendants’ ex part request to file a redacted order as  
23 moot [ECF No. 376.]  
24

25 **IT IS SO ORDERED**

26 Dated: October 7, 2022

27   
28 Hon. M. James Lorenz  
United States District Judge