

meridianEMR, INC.,

Plaintiff,

v.

INTUITIVE MEDICAL SOFTWARE, LLC
d/b/a UROCHART and
THE SHAPPLEY CLINIC,

Defendants.

Civil Action No.

**BRIEF IN SUPPORT OF PLAINTIFF'S
APPLICATION FOR ORDER TO SHOW CAUSE**

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PRELIMINARY STATEMENT

Defendants, Intuitive Medical Software, LLC d/b/a UroChart ("UroChart"), and The Shappley Clinic ("Shappley") (collectively, "Defendants"), have intentionally devised and implemented a scheme to steal and copy meridianEMR, Inc.'s ("Meridian") confidential and proprietary software and templates, which are used in connection with its business of maintaining electronic medical records in the field of urology. Therefore, Meridian seeks emergent, ex parte relief to obtain the immediate return of its confidential data and to prohibit Defendants' continued use, copying and dissemination of Meridian's confidential materials, so as to prevent further irreparable harm.

Based on the foregoing, and for the reasons set forth below, this Court should enter the restraints set forth in the accompanying Order to Show Cause.

STATEMENT OF FACTS

Meridian relies upon and incorporates by reference the detailed facts set forth in its Verified Complaint and the Declaration of Chris Bartlett, filed herewith.

ARGUMENT

POINT I

MERIDIAN IS ENTITLED TO PRELIMINARY
INJUNCTIVE RELIEF AND TEMPORARY RESTRAINTS.

A. Legal Standard.

To obtain injunctive relief, a movant must demonstrate both a likelihood of success on the merits and the probability of irreparable harm absent the injunction. Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). Our courts generally consider four factors when determining whether to issue an injunction. The four factors are whether: (1) the movant has shown a reasonable probability of success on the merits; (2) the movant will be irreparably injured by denial of the relief; (3) granting the preliminary relief will result in even greater harm to the nonmoving party; and (4) granting the preliminary relief is in the public interest. ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996); AT&T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994); see The Nutrasweet Co. v. Vit-Mar Enters., Inc., 176 F.3d 151, 153 (3d Cir. 1999).

As set forth fully below, Meridian's application easily satisfies all of the criteria warranting injunctive relief.

B. An Order Granting Ex Parte Seizure of Property Should Be Granted in This Case.

If given notice of a temporary restraining order, Defendants undoubtedly will seek to hide, remove, destroy or otherwise make inaccessible the information that they have stolen from Meridian. That is precisely the type of situation in which a court is permitted to issue an ex parte order for the seizure of property. Cf. Lorillard Tobacco Co. v. Bisan Food Corp., 377 F.3d 313, 320 (3d Cir. 2004) (nothing less than an ex parte seizure is required to vindicate applicant's rights upon showing that defendant is likely to hide or destroy evidence if given notice of temporary restraints).

Indeed, Defendants have already **twice** attempted to hide the fact of their actions from Meridian. First, after cloning Meridian's server, Defendants uninstalled the hacking software from the system. See Verified Complaint at ¶24. Then, after Meridian advised Defendants that it was concerned from a security standpoint that unpermitted software was installed and that an unidentified individual had logged onto the server locally from Shappley's office, the settings within the clone server were altered to prevent communications or detection of communications with Meridian's master server in Newton, New Jersey. See Verified Complaint at ¶¶ 35-38. After two prior attempts to cover its unlawful conduct, Defendants will

undoubtedly attempt further concealment of their actions if this application is not granted on an ex parte basis.

C. Meridian Faces a Threat of Immediate Irreparable Harm.

Without question, Defendants' unlawful and covert conduct has caused Meridian to suffer irreparable harm. Because Defendants have access to Meridian's encrypted data through the disaster recovery account, Defendants are able to not only replicate Meridian's confidential and proprietary business processes, but also identify and exploit security loopholes and can corrupt data to disrupt Meridian's business and/or its master server. See Verified Complaint at ¶ 40. This access would be devastating to Meridian's business.

Indeed, since 2003, Meridian has expended substantial resources to establish, develop and promote its electronic medical records business, and it has expended substantial resources in connection with the development of trade secrets and confidential data, including software applications to store and retrieve urological patient data in a proprietary format. See Verified Complaint at ¶ 9. Meridian's confidential data also includes certain proprietary business processes for customer and prospective customer presentations, patient consultations, advertising, promoting and developing marketing strategies for electronic medical record keeping. See Verified Complaint at ¶ 10.

Moreover, in addition to the irreparably harm to Meridian's business, **millions** of patients whose confidential records are stored on Meridian's servers, including the master server in Newton, New Jersey, are at risk. See Verified Complaint at ¶ 11. Defendants' conduct has placed these patients and hundred of other urology practices in the threat of irreparable harm through a risk of corrupted data or other loss, and by Shappley's conduct of providing access to patient data to UroChart. See Verified Complaint at ¶ 41. Defendants' have had, and continue to have, unlawful access not only to Meridian's confidential data, but also to private medical information in violation of patient privacy rights.

Undoubtedly, the loss of patients' private medical records will also cause irreparable harm to the goodwill that Meridian has developed with its customers. See Laidlaw, Inc. v. Student Transp. of Am., 20 F. Supp. 2d 727, 766 (D.N.J. 1998) ("the loss of goodwill, the disclosure of confidential and proprietary information, and the interference with customer relationships may be the basis for a finding of irreparable harm"). Since its inception, Meridian has become the recognized leader in the electronic medical records field for urologists and has developed significant goodwill in connection with its electronic medical records business. See Verified Complaint at ¶¶ 10-12. The loss of such goodwill simply would be irreparable.

Based on the foregoing, it is clear that unless Defendants are immediately restrained from further access and compelled to disclose and return all confidential data obtained, Meridian will suffer irreparable harm.

D. Meridian Will Suffer Greater Harm if the Court Does Not Grant Temporary Restraints and Injunctive Relief.

Meridian faces greater harm if temporary relief is not granted. As set forth more fully above, Meridian has expended substantial resources to develop its electronic medical records business, including the necessary software applications to store and retrieve urological patient data in a proprietary format. See Verified Complaint at ¶ 9. By covertly hacking into Meridian's encrypted software and copying its confidential information, Defendants are able to replicate Meridian's confidential and proprietary business processes, identify and exploit security loopholes, and corrupt data to disrupt Meridian's business and/or its master server. See Verified Complaint at ¶ 40. There simply is no doubt that such access would be devastating to Meridian's business, and without an injunction and temporary restraints, Defendants will have the opportunity -- until final judgment is rendered -- to continue to unlawfully utilize Meridian's confidential and proprietary information, resulting in further irreparable harm.

To the contrary, any harm to Defendants would be minimal, at worst. Certainly, Meridian is not seeking to restrain Defendants from conducting legitimate business, but rather to prohibit their continued interference with Meridian's business relationships and continued utilization of Meridian's confidential and proprietary business information.

Accordingly, the temporary restraints sought by Meridian should be granted.

E. Meridian is Likely to Succeed on the Merits.

1. Breach of Contract.

To prevail on a breach of contract claim, the moving party must demonstrate that: (1) a valid contract existed; (2) the other party defectively performed its duties under that contract; and (3) the moving party has suffered damages as a result of the other party's actions. See, e.g., Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985); AT&T Credit Corp. v. Zurich Data Corp., 37 F. Supp. 2d 367, 370-71 (D.N.J. 1990).

Here, Shappley entered into an agreement with Meridian, through which it agreed not to make Meridian's software, applications or related documentation "available to any other person, entity or business." See Verified Complaint at ¶¶ 13-15. Shappley also agreed not to "reverse assemble, reverse compile, reverse engineer, modify, [or] reproduce" Meridian's

software applications. Id. Despite these contractual obligations, Shappley not only made Meridian's software and applications available to UroChart through Shappley's server, it also covertly utilized cloning software to reproduce Meridian's software and applications. Id. at ¶¶ 22-32. These actions constitute a gross violation of the terms of the Agreement.

Meridian has suffered, and continues to suffer irreparable harm as a result of Shappley's egregious breach of the Agreement. Accordingly, Meridian is exceedingly likely to succeed on its breach of contract claim.

2. Breach of Good Faith and Fair Dealing.

"Every contract in New Jersey contains an implied covenant of good faith and fair dealing." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). In other words, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" Id.

Here, Meridian had an overriding interest in protecting its confidential and proprietary software and business processes as well as the confidential information contained within those systems. Through its brazen disregard of the Agreement, Shappley has not only breached its contract with Meridian (as set forth in Section I.A.1., supra), it also has breached the implied covenant of good faith and fair dealing. Clearly, by

cloning Meridian's server and the information contained on it, Shappley has denied Meridian of its primary interest in the Agreement -- protecting its confidential information.

Accordingly, Meridian is exceedingly likely to prevail on its claim under the implied covenant of good faith and fair dealing.

3. Common Law Misrepresentation.

Meridian is likely to succeed on its claims of intentional misrepresentation and negligent misrepresentation. The elements of an action for intentional misrepresentation are: (1) a false representation; (2) knowledge or belief of the falsity; (3) an intention that other party act thereon; (4) reasonable reliance in acting thereon by the other party; and (5) resultant damage. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Similarly, a cause of action for negligent misrepresentation requires proof of an incorrect statement, negligently made and justifiably relied upon, which result in damages to the relying party. See Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000).

Here, under either standard, Meridian is likely to prevail. Shappley represented to Meridian that it would keep confidential and not disclose any proprietary or confidential information that it obtained in connection with its relationship with Meridian. It further represented that it would not permit any third party to access the information contained on Meridian's

server. These representations were made in an effort to induce Meridian to enter into the Agreement.

However, Shappley knew, or should have known, that its representations were false when made. Meridian relied upon Shappley's misrepresentations by entering into the Agreement, providing the Shappley server, and otherwise developing and investing time, money, manpower and assets to pursue its business relationship with Shappley. As a result, Meridian's confidential and proprietary software and confidential information have been compromised, and it has suffered, and continues to suffer, irreparable harm and damages.

Accordingly, Meridian is exceedingly likely to prevail on its common law misrepresentation claims.

4. Tortuous Interference With Prospective Economic Advantage.

"There is no question that New Jersey law protects both contracts and prospective business relationships from tortuous interference." Van Natta Mech. Corp. v. DiStaulo, 277 N.J. Super. 175, 182 (App. Div. 1994).

To establish a cause of action for tortuous interference with contract, a plaintiff must demonstrate: (1) the existence of the contract; (2) that the defendants' interfering actions were malicious in the sense that the harm was inflicted intentionally and without justification or excuse; (3) that the

interference caused the loss of the contract; and (4) that the injury caused damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989); see Interstate Realty Co., L.L.C. v. Sears, Roebuck & Co., 2009 U.S. Dist. LEXIS 35141 at *31-32 (D.N.J. 2009).

Similarly, a claim for interference with a prospective economic advantage requires the moving party to prove: (1) it had some reasonable expectation of economic advantage; (2) the other party's actions were malicious in the sense that the harm was inflicted intentionally and without justification or excuse; (3) the interference caused the loss of the prospective gain or there was a reasonable probability that the moving party would have obtained the anticipated economic benefit; and (4) the injury caused damage to the moving party. Singer v. Beach Trading Co., Inc., 379 N.J. Super. 63, 81 (App. Div. 2005).

Here, it is undisputed that UroChart tortuously interfered with Meridian's contract with Shappley. UroChart knew or should have known about the contractual relationship between Meridian and Shappley but nevertheless covertly accessed Meridian's confidential and proprietary software and business processes. Clearly, UroChart's tortuous conduct was willful, malicious and done for the purpose of enriching itself at Meridian's expense. This is particularly evidenced by the fact that the cloning

software was removed in an attempt to cover up the unlawful access. See Verified Complaint at 24.

Likewise, it is undisputed that Defendants tortuously interfered with Meridian's prospective economic relationships. With knowledge of Meridian's proprietary and confidential information, Defendants are able to not only replicate Meridian's confidential and proprietary business processes, but also identify and exploit security loopholes and can corrupt data to disrupt Meridian's business or its master server, resulting in a threatened loss of goodwill and irreparable harm.

Accordingly, it is beyond dispute that Meridian has demonstrated its likelihood of success on its causes of action for tortuous interference with a contract and tortuous interference with prospective economic advantage.

5. Conversion.

"Conversion consists of the wrongful exercise of dominion and control over the property of another in a manner inconsistent with that other's rights." Life Ins. Co. v. Snyder, 141 N.J. Super. 539, 545 (App. Div. 1976), citing Mueller v. Technical Devices Corp., 8 N.J. 201, 207 (1951).

Clearly, Meridian is likely to succeed on the merits of its claim of conversion against Defendants. Although it is unable to determine the level of encrypted patient data, encrypted proprietary software, encrypted clinical templates, or other

confidential proprietary information that Defendants accessed, Meridian has unequivocally established that the confidential information was accessed through a "clone server" created through Defendants' account. See Verified Complaint at ¶¶ 22-34.

Accordingly, Meridian is likely to succeed on its claim of conversion against Defendants.

F. Granting Temporary Restraints and Injunctive Relief is in the Public Interest.

Finally, the public interest would be best served by granting the temporary and preliminary relief sought in this application. Namely, Defendants' unlawful conduct has placed **millions** of patients in Meridian's system at risk of having their personal medical records released in violation of patient privacy rights. See Verified Complaint at ¶ 11; see also Health Insurance Portability and Accountability Act, 104 P.L. 191 [H.R. 3103] (providing for protection of "the confidentiality of the information and the privacy of individuals receiving health care services"). If temporary restraints are not granted, there is a substantial risk that third parties -- including Defendants themselves -- will have access to these lawfully protected patient records.

On balance, the equities here heavily favor the grant of temporary and preliminary relief to protect Meridian, and the public, from continued irreparable harm.

CONCLUSION

For the foregoing reasons, Plaintiff, meridianEMR, Inc., respectfully requests that this Court grant its request for temporary restraints and preliminary injunctive relief pending a final determination of the merits of this case.

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Dated: June 16, 2011