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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT.
MICV2015-00724

CYNOSURE, INC.

v.

SPENCER DETTER, JOHN FEATHERSTONE, KIPP DAVIT, LARRY LABER, and CUTERA, INC.

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND ALLOWING PLAINTIFF'S MOTION TO PRESERVE EVIDENCE

Cynosure, Inc., seeks a preliminary injunction that would bar (1) Spencer Detter, John Featherstone, and Kipp Davit from working for Cutera, Inc., (2) Larry Laber from recruiting, soliciting, or attempting to induce any Cynosure employee to terminate his or her employment with Cynosure, (3) Cutera from employing Detter, Featherstone, or Davit, or from interfering with Laber's contractual obligation not to recruit any Cynosure employees, and (4) Detter, Featherstone, Davit, and Cutera from using or disclosing any of Cynosure's confidential information, and require them to return any such confidential information to Cynosure. In a separate motion, Cynosure also seeks an order requiring the Defendants to preserve any relevant evidence they may have.

The Court will DENY the motion for a preliminary injunction because Cynosure has not met its burden of proving it will likely succeed on its claims that Detter, Featherstone, or Davit have violated their non-competition agreements with Cynosure or have any confidential information belonging to Cynosure, and becaue Cynosure has not shown that it will suffer any irreparable harm as a result of Laber's alleged violation of his non-solicitation agreement.

1. Background. The affidavits filed in this case establish the following facts.

1.1. The Market and Publicly Available Information. Cynosure and Cutera are direct competitors in selling high-end laser- and light-based systems that plastic surgeons, dermatologists, and other medical practitioners use to perform non-invasive and minimally invasive treatments such as tattoo removal,

scar reduction, elimination of pigmented lesions such as so-called port wine stains, and varicose vein treatments. The market to sell such systems in the United States is very competitive. In addition to Cynosure and Cutera, vendors that sell competing systems include Syneron, Lumenis, Zeltiq, Alma, Sciton, Ulthera, and Venus Concept, among others. In this particular industry, sales people and managers frequently move from one competitor to another. For example, Cynosure's chief executive officer, one of its executive vice presidents, and one of its senior vice presidents are all former employees of Cutera.

The systems sold by Cutera typically cost in the range of $50,000 to $250,000, and have an average purchase price of roughly $100,000. The useful life of these systems is typically between five and seven years. As a result, customers that purchase such a system for a particular office typically do not purchase another similar system, whether from the same company or from a competitor, for at least several years.

In this industry sales leads are typically developed by making cold calls to dermatologists, plastic surgeons, and other relevant medical practitioners that the sales representative has identified using the Internet and other public sources of information. Cynosure does not keep the identity of its past customers secret. To the contrary, Cynosure's website provides a public "practitioner locator" that anyone can use to identify practitioners offering various specified services using Cynosure equipment within a specified distance of any zip code area within the United States. See http://cynosure-locator.com/patients.

Information regarding the products offered by Cynosure and its competitors is readily available to potential customers, and to anyone else. Cynosure posts detailed information regarding each of its product lines on its publicly-accessible website at http://www.cynosure.com/products. Any competitor that wants to learn how Cynosure markets its products can do so in part by visiting Cynosure's own website. In addition, Cynosure markets its products every year at large trade shows that are open to dermatologists, plastic surgeons, and other potential Cynosure customers. Cynosure publicly discloses information at these trade shows regarding the capabilities of its products, its pricing, and plans for future product

development. Cynosure also public discloses information about its products and their capabilities and specifications by, among other things, holding webinars, placing advertisements in magazines, and issuing press releases. Cynosure also publicly disclosed additional information about how it markets its products, and works to convince customers that they will have a significantly positive return-on-investment if they purchase a Cynosure system, in November 2013 when Cynosure's CEO described its marketing techniques during a discussion at the Barclay Select Growth Conference, a transcript of which is available from Bloomberg Transcript services.

Cynosure does not keep secret the prices that it offers to potential customers. Often a customer that is considering competing systems offered by Cutera and Cynosure will tell its Cutera sales representative the pricing offered by Cynosure, and ask whether Cutera will match or beat it. Cynosure does not require or ask its customers to keep Cynosure's pricing confidential.

1.2. Larry Laber has been Cutera's Executive Vice President of Sales for North America since September 2014. He came to Cutera from Cynosure, which he had joined in February 2003. While at Cynosure, Laber worked his way up in the sales organization from Senior Sales Representative for the Northern California territory (his initial position) to Executive Direct of Sales for Cynosure's North American salesforce (his final position).

When Laber left Cynosure he returned all Cynosure property that he had in his possession, including his work computer. Laber did not keep and does not have any confidential documents or information from Cynosure.

When Laber first joined Cynosure in 2003, he signed an employment agreement that included several non-competition and non-solicitation provisions. In paragraph IV.B. of that contract Laber agreed that, while employed by Cynosure and for one year after the termination or cessation of that employment, he would not "directly or indirectly ... recruit, solicit or hire any employee of the Company, or induce or attempt to induce any employee of the Company to terminate his/her employment with, or otherwise cease his/her relationship with, the Company."

In late 2014, after Laber joined Cutera, he had several conversations with Kristopher Huston, who is a top salesperson at Cynosure, about potential employment opportunities for Huston at Cutera. Laber says that Huston initiated these conversations, while Huston insists that Laber took the initiative and reached out to Huston. Featherstone backs up Laber on this point, testifying that Huston had told Featherstone that Huston reached out to Laber to discuss employment opportunities at Cutera. But it is undisputed that Huston and Laber had such conversations, and also that Huston decided not to leave Cynosure and never applied for a position at Cutera.

1.3. Spencer Detter began working for Palomar Medical Technologies as a sale representative in February 2008. At that time Detter signed a "Non-Competition and Non-Solicitation Agreement" in which he agreed that, while employed by Palomar and for one year after the termination or cessation of that employment, he would not (among other things) market or sell any products that compete with those that were sold by Palomar while Detter worked for Palomar.

Cynosure merged with and acquired Palomar in 2013. At no time thereafter did Cynosure ask Detter to enter into a new non-competition and non-solicitation agreement. But the Palomar agreement that Detter signed in 2008 provided that it would inure to the benefit of Palomar's successors and assigns, including any corporation with which or into which Palomar may be merged. After Cynosure acquired Palomar, Detter continued to sell the Palomar line of products and also became responsible for selling Cynosure's Smartlipo line of surgical products. From 2013 to January 2015 Detter's sales area for Cynosure consisted of Indiana, Ohio, and Michigan. Detter never sold Cynosure's aesthetics and tattoo removal products. Cynosure paid Detter roughly $267,500 during 2014 in salary and sales commissions.

Detter left Cynosure in January 2015 to join Cutera. Detter is responsible for overseeing Cutera's sales activities in 12 states: Minnesota, Wisconsin, Michigan, Ohio, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont, and Maine. Detter oversees the sale of all lines of Cutera products, including tattoo and aesthetic products that do not compete with any of

the product lines that Detter had sold for Cynosure. Unlike his job at Cynosure, in his new position Detter no longer makes sales directly to customers, but instead is responsible for managing and overseeing other sales representatives. As a result Detter interacts with customers at Cutera much less than he did at Cynosure.

When Detter worked for Cynosure, he knew the list prices of the Cynosure products that he sold, and he also knew the range of discounted prices that his immediate superior, a regional sales manager, could offer to customers. But Detter never knew what level of discounts a higher-level sales manager could authorize. Detter was not responsible for setting the prices of products that he sold for Cynosure.

After Detter left Cynosure, he returned to Cynosure all equipment, devices, sample products, and marketing materials belonging to Cynosure. Detter did not knowingly keep any Cynosure electronic files, documents, or devices. Cynosure does not claim and presents no evidence that Detter was recruited to Cutera by Laber, or that Detter kept any materials, media, or paper or electronic files containing any confidential information belonging to Cynosure. There is no evidence that Cynosure has lost even a single sale because Detter resigned and now works for Cutera.

Detter has used the same personal cell phone number for the past 15 years or so. He had it before he went to work at Palomar, and the number did not belong to Palomar and does not belong to Cynosure. After Detter left Cynosure, five or six prospective Cynosure customers, with whom Detter had been working on potential deals while at Cynosure, called Detter's personal cell phone regarding those deals. Detter let all of those calls go to voice mail, did not speak with or contact any of those prospective customers, and promptly informed Cynosure of those customer calls so that it could have its own sales representatives return those customers' calls.

Detter and his spouse live in Cleveland, Ohio. They are in the process of trying to buy a home. They both depend on the Detter's income from his job with Cutera.

1.4. John Featherstone worked for Cynosure from May 2006 until January 2015. He left Cynosure to work at Cutera. When Featherstone joined

Cynosure he signed an Invention, Non-Disclosure, Non-Solicitation, and Non-Competition Agreement in which he agreed that, while employed by Cynosure and for one year after the termination or cessation of that employment, he would not (among other things) market or sell any products that compete with those that were sold by Cynosure while Featherstone worked for Cynosure.

Featherstone first worked for Cynosure as a territory manager with responsibility for generating sales leads in Washington State. At the time that Featherstone left Cynosure his job involved selling all of Cynosure's products in Alaska, Idaho, Oregon, and Washington. Cynosure paid Featherstone roughly $278,000 during 2014 in salary and sales commissions.

Featherstone left Cynosure in January 2015 to join Cutera. Detter is responsible for overseeing Cutera's sales activities in Alaska, Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, Nebraska, Iowa, and all of Canada. Unlike his job at Cynosure, in his new position Featherstone no longer makes sales directly to customers, but instead is responsible for managing and overseeing other sales representatives. As a result Featherstone now interacts with customers much less than he did at Cynosure.

While at Cynosure, Featherstone never learned any confidential, non-public information regarding Cynosure's products. Featherstone was a low-level sales representative at Cynosure. He learned about Cynosure product development and future business plans by dialing into presentations and earnings calls that Cynosure's CEO made to or engaged in with Wall Street analysts. These presentations and calls were open to any member of the public and were not kept confidential or secret by Cynosure. Featherstone was familiar with the list prices and discounted prices that Cynosure publicly disclosed to potential customers. But Featherstone never learned Cynosure's product gross margins and was never told what Cynosure's "bottom line" prices would be with respect to any products, replacement parts, warranties, or servicing.

During Featherstone's tenure at Cynosure, he and his Cynosure sales colleagues identified potential customers from publicly available websites, medical directories, lists maintained by dermatology practice associations, and other public

sources of information. Featherstone does not have any confidential information belonging to Cynosure regarding past or potential customers.

When Featherstone left Cynosure, he did not take or keep any confidential trade secrets or business information belonging to Cynosure. Featherstone has used the same personal cell phone number for years. There is no evidence that Cynosure has lost even a single sale because Featherstone now works for Cutera.

Featherstone and his spouse have two children. They live in Seattle, Washington. Featherstone's spouse is a stay-at-home mother. His family depends on his income from Cutera.

1.5. Kipp Davit worked for Cynosure from October 2005 until November 2014. Davit was fired by Cynosure in November 2014, and was able to land a sales job at Cutera in January 2015. When Davit joined Cynosure he signed an Invention, Non-Disclosure, Non-Solicitation, and Non-Competition Agreement in which he agreed that, while employed by Cynosure and for one year after the termination or cessation of that employment, he would not (among other things) market or sell any products that compete with those that were sold by Cynosure while Featherstone worked for Cynosure.

Davit first worked for Cynosure as a sales representative in Arizona and New Mexico. When Davit was fired by Cynosure he was a sales representative selling all of Cynosure's products in Arizona, New Mexico, and Las Vegas. In between Davit held a number of other sales jobs at Cynosure. Cynosure paid Davit roughly $241,000 during 2014 in salary and sales commissions.

When Davit left Cynosure, he did not take or keep any confidential trade secrets or business information belonging to Cynosure. After Davit was fired in November 2014, Cynosure asked him to throw away the remaining Cynosure sales brochures in his possession. He did so. At that time Davit was renting a storage unit that contained sample Cynosure products. At Cynosure's request, Davit signed over that unit to Cynosure so that it could collect those product samples. There is no evidence that Cynosure has lost even a single sale because Davit now works for Cutera. Davit and his spouse have two children. They live in Scottsdale, Arizona. Davit's family depends on his income from Cutera.

2. Legal Standards. An employee's agreement not to compete with his or her employee by soliciting away customers or other employees may only be enforced under Massachusetts law to the extent necessary to protect the employer's legitimate business interests—which include guarding against the release or use of trade secrets or other confidential information, or other harm to a business's or person's goodwill, but do not include merely avoiding lawful competition—and to the extent it is reasonable in scope in terms of the activities it restricts, the geographic limitations it imposes on those activities, and the length of time it is in effect. See *New England Canteen Service, Inc.* v. *Ashley*, 372 Mass. 671, 673-676 (1977); *All Stainless, Inc.* v. *Colby*, 364 Mass. 773, 778-780 (1974).

"Protection of the employer from ordinary competition ... is not a legitimate business interest," however, "and a covenant not to compete designed solely for that purpose will not be enforced." *Marine Contractors, Inc.* v. *Hurley*, 365 Mass. 280, 287 (1974); accord, e.g., *Boulanger* v. *Dunkin' Donuts, Inc.*, 442 Mass. 635, 641 (2004), cert. denied, 544 U.S. 922 (2005).

Thus, "[a]n employer may prevent his employee, upon termination of his employment, from using, for his own advantage or that of a rival and to the harm of his employer, confidential information gained by him during his employment; but he may not prevent the employee from using the skill and general knowledge acquired or improved through his employment." *Abramson* v. *Blackman*, 340 Mass. 714, 715-16 (1960); accord *Woolley's Laundry* v. *Silva*, 304 Mass. 383, 387 (1939); *Club Aluminum Co.* v. *Young*, 263 Mass. 223, 226 (1928). "The 'right (of an employee) to use (his) general knowledge, experience, memory and skill' promotes the public interest in labor mobility and the employee's freedom to practice his profession and in mitigating monopoly." *Dynamics Research Corp.* v. *Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980), quoting *J. T. Healy & Son* v. *James A. Murphy & Son*, 357 Mass. 728, 740 (1970).

3. Motion for Preliminary Injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear

showing of entitlement thereto." *Student No. 9* v. *Board of Educ.*, 440 Mass. 752, 762 (2004). A plaintiff is not entitled to preliminary injunctive relief if it cannot prove that it is likely to succeed on the merits of its claim. See, e.g., *Fordyce* v. *Town of Hanover*, 457 Mass. 248, 265 (2010) (vacating preliminary injunction on this ground); *Wilson* v. *Commissioner of Transitional Assistance*, 441 Mass. 846, 858-859 (2004) (same). Nor may a plaintiff obtain a preliminary injunction without proving that it will suffer irreparable harm in the absence of such an order, and that such harm to the plaintiff from not granting the preliminary injunction would outweigh any irreparable harm that defendants are likely to suffer if the injunction issues. See, e.g., *American Grain Products Processing Institute* v. *Department of Pub. Health*, 392 Mass. 309, 326-329 (1984) (vacating preliminary injunction on this ground); *Nolan* v. *Police Comm'r of Boston*, 383 Mass. 625, 630 (1981) (same). "The public interest may also be considered in a case between private parties where the applicable substantive law involves issues that concern public interest[s]." *Bank of New England, N.A.* v. *Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991). Under Massachusetts law, "[a] covenant not to compete contained in a contract for personal services" is only enforceable to the extent that it is consistent with the public interest. *All Stainless*, 364 Mass. at 778.

3.1. Claims Against Detter, Featherstone, and Davit. Cynosure has not met its burden of proving that Detter, Featherstone, or Davit (collectively the "Non-Compete Defendants") is in possession of any proprietary information belonging to and kept confidential by Cynosure, or that any of these Non-Compete Defendants could and is likely to harm Cynosure's goodwill if they were to continue to help Cutera sell competitive equipment. Cynosure is therefore not entitled to preliminary injunctive relief against these defendants. See *Richmond Bros., Inc.* v. *Westinghouse Broadcasting Co.*, 357 Mass. 106, 110 (1970); *National Hearing Aid Centers, Inc.* v. *Avers*, 2 Mass. App. Ct. 285 (1974). In the absence of evidence that a salesman is using confidential information taken from a former employer, or interfering with the good will of the former employer's business, a former employer cannot enforce a non-competition agreement with a former salesperson. See *Club Aluminum*, 263 Mass. at 227-228.

Although Cynosure asserts that the Non-Compete Defendants "became intimately aware of the functionality of Cynosure's products" while they worked for Cynosure, it has not proved that any of this product information constitutes a trade secret or some other confidential information. Cynosure has failed to prove that the Non-Compete Defendants know anything about Cynosure's products that any potential customer could not easily learn from public information by visiting Cynosure's website, speaking with a Cynosure sales representative at a trade show, or reading product brochures that Cynosure willingly distributes to anyone expressing interest in its products. Cynosure is not entitled to enforce a non-compete agreement to keep former sales representatives from making use of general, publicly available knowledge that they happened to learn while they were employed by Cynosure. See, e.g., *Folsum Funeral Services, Inc.* v. *Rodgers*, 6 Mass. App. Ct. 843 (1978) (rescript). To meet its burden of proof Cynosure must do more than submit an affidavit that asserts in conclusory fashion that the Non-Compete Defendants were "privy to" confidential information of import to Cynosure. Rather, it must demonstrate the nature of the information at issue and also prove that Cynosure has in fact kept the information confidential.

Nor does the evidence that the Non-Compete Defendants had access to Cynosure's "sell sheets" provide any basis for enforcing their non-compete agreements. Cynosure asserts that these sell sheets provide Cynosure sales representatives with suggestions on how to distinguish Cynosure's products from competing systems sold by Cutera, and other ideas on how to convince customers to buy Cynosure's products. But Cynosure has not shown that the sell sheets contain confidential information that is not readily apparent to any potential customer who talks with a Cynosure sales representative. Cynosure "has no proprietary interest" in merchandising techniques that are publicized or otherwise disclosed to potential customers, and thus are not kept confidential. *National Hearing Aid Centers*, 2 Mass. App. Ct. at 290. Cynosure provides no evidence—by way of description, example, or otherwise—that its sell sheets contain any information that Cynosure actually keeps confidential and does not routinely disclose in its dealings with potential customers. The fact that Cynosure marks its sell sheets as "confidential"

or for "internal use only" does not make them so: publicly-available information does not become legally protectable merely by being marked, inaccurately, as "confidential."

Cynosure has also not proven that the Non-Compete Defendants have any confidential information regarding Cynosure's past or potential customers. Cynosure does not contest Defendants' proof that Cynosure publicizes the identity of its past customers through its own website, and has not proved that any of the Non-Compete Defendants made off with confidential information regarding past Cynosure customers. Cynosure asserts that the Non-Compete Defendants all "had access to Cynosure's confidential and proprietary Salesforce.com databased, which stores all information about Cynosure's current and prospective customers." But Cynosure presents no evidence that any Defendant copied, downloaded, or otherwise retained any information contained in that database. Cynosure is not entitled to enforce non-compete agreements on the ground that a former employee may have once seen, but no longer has a copy of and can no longer access, purportedly confidential information.

In the absence of proof that the Non-Compete Defendants have retained confidential information regarding Cynosure's past customers or current customer prospects, Cynosure cannot prove that its good will with past and potential customers will be damaged on the theory that the Non-Compete Defendants used to be "the face" of Cynosure but now work for a competitor. Since the evidentiary record establishes that typically Cynosure makes only one sale of its capital equipment to a particular customers, and generally does not make repeated sales to the same customers for many years, Detter, Featherstone, and Davit are not "in a position to exploit customer contacts made while employed by the plaintiff' and pose no threat to good will that Cynosure has established with past customers. See *National Hearing Aid Centers*, 2 Mass. App. Ct. at 291-292; accord *Folsum Funeral Services*, 6 Mass. App. Ct. 843 (holding that covenant not to compete was "completely unenforceable" for this reason).

The Court is not convinced by Cynosure's evidence regarding the Non-Compete Defendants' knowledge of Cynosure pricing, gross margins, and "bottom-

line" prices, for several reasons. The list prices and discounted prices that Cynosure sales representatives actually quote to customers are not confidential. The affidavit by Cynosure's Vice President of North American Sales presents no facts establishing that he has personal knowledge that each of these defendants actually learned confidential pricing information while employed by Cynosure. When Mr. Aronson says that the Non-Compete Defendants were "privy to" Cynosure's "underlying pricing and gross margins," it appears that he is merely saying that the Defendants were able to access that information, not testifying that he has personal knowledge that the Defendants actually reviewed, saw, or were given copies of such data. Furthermore, Cynosure has presented no evidence that any internal pricing information that the Non-Compete Defendants may have learned during their tenures as Cynosure employees remains current and still constitutes the pricing, gross margins, and "bottom-line" prices that apply today to Cynosure's current product offerings.

For all of these reasons, Cynosure has not met its burden of proving that any of the Non-Compete Defendants have any memory of, possession of, or continuing access to any material proprietary information that Cynosure has in fact kept confidential, or that the Non-Compete Defendants will likely harm Cynosure's good will if they continue to work for Cutera. As a result, Cynosure has failed to demonstrate that it is likely to succeed on its claims that these Defendants have violated some enforceable aspect of their non-competition agreements.

Even if Cynosure had demonstrated some reasonably likelihood that it will succeed on the merits of its claims against the Non-Compete Defendants, which it has not, Cynosure would still not be entitled to a preliminary injunction because the balance of harms and the public interest all weigh against granting such pre-judgment relief. Cynosure has not shown that it will suffer irreparable harm if the preliminary injunction is not granted. There is no evidence that Cynosure has lost any sales or customers to Cutera as a result of any actions by Detter, Featherstone, Davit, or Laber, which weighs against granting preliminary injunctive relief in favor of Cynosure. See *Richmond Bros., Inc.* v. *Westinghouse Broadcasting Co.*, 357 Mass. 106, 110 (1970). Similarly, although Mr. Aronson asserts that "Cutera could

use" the Non-Compete Defendants knowledge of Cynosure's past pricing practices "to undercut Cynosure sales," neither he nor any other Cynosure witness presents any evidence that Cutera has done so. In other words, Cynosure has not met its burden of proving that it has been or likely will be irreparably harmed because the Non-Compete Defendants have some non-public information about Cynosure's costs and prices.

In contrast, Detter, Featherstone, and Davit all support families that depend on their incomes from Cutera. They and their dependents would likely be irreparably harmed if the Court ordered them to stop working for Cutera before Cynosure has proved its claims and obtained final judgment in its favor.

Finally, since Cynosure has not shown that any of the Non-Compete Defendants is making improper use of some trade secret or other confidential information stolen from Cynosure, or that its good will is threatened by these Defendants working for Cutera, granting the requested preliminary injunction would be against the strong public interest in allowing the Non-Compete Defendants to use their knowledge and skills to earn a living.

3.2. Claim Against Laber. The sole basis for the claim that Mr. Laber violated his non-solicitation agreement is the assertion and evidence that Mr. Laber spoke several times with Mr. Huston in an unsuccessful attempt to convince Mr. Huston to leave Cynosure and instead work for Cutera. Cynosure makes no claim and has presented no evidence that Laber played any role in convincing Detter, Featherstone, Davit, or anyone else to quit their job at Cynosure and begin working for Cutera, or that Laber has done anything else to violate the non-solicitation agreement other than speak with Mr. Huston.

The evidence seems to establish that Laber violated his non-solicitation agreement by speaking with Huston about working for Cutera. Whether Laber or Huston was the one who initiated those discussions is not dispositive. Laber's contract bars him from "attempt[ing] to induce" a Cynosure employee to resign and join Cutera, even if Laber does not initiate the conversation.

But the evidence regarding Laber's conversations with Huston nonetheless does not support the issuance of a preliminary injunction against Laber. Cynosure

has not met its burden of proving that it will suffer any irreparable harm in the absence of a preliminary injunction against Laber. Whatever conversations Laber had with Huston about joining Cutera did not succeed in convincing Huston to leave Cynosure. And there is no evidence that Laber has or likely will do anything else to violate his non-solicitation agreement. Cynosure is not entitled to a preliminary injunction against Laber since it cannot prove it will be irreparably harmed without such an order. See *American Grain Products Processing Institute*, 392 Mass. at 326-329; *Nolan*, 383 Mass. at 630.

3.3. Claim Against Cutera. Defendant Cutera is free to compete for business against Cynosure so long as it does not do so "through improper motive or means." *Brewster Wallcovering Co.* v. *Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 608 (2007). It is perfectly lawful to try to lure away customers from a competitor out of "a desire for financial or competitive gain" at the competitor's expense. *Id.* at 609 (reversing jury finding that defendant tortuously interfered with customer relationships). Since Cynosure has not yet shown that defendants Detter, Featherstone, or Davit has violated any enforceable aspect of their non-competition agreements, or that Cutera has interfered with Cynosure's customer relationships in some other improper manner, Cynosure is highly unlikely to succeed on its claim that Cutera has tortiously interfered with any of the Non-Compete Defendants' non-competition agreements.

Nor is Cynosure likely to succeed on its claim that Cynosure tortiously interfered with Mr. Laber's non-solicitation agreement. Although Cynosure has presented evidence that Mr. Labor made some attempt to induce Mr. Huston to leave his job at Cynosure, it has not proven that anyone at Cutera was aware Mr. Laber was doing so until sometime after the conversations between Laber and Huston had ended. Mr. Laber cannot tortiously interfere with his own non-solicitation contract with Cynosure. See *Psy-Ed Corp.* v. *Klein*, 459 Mass. 697, 716-717 (2011). So, to succeed on its claim that Cutera tortiously interfered with the contract between Cynosure and Laber, Cynosure would have to prove that someone at Cutera other than Mr. Laber improperly interfered with that contract.

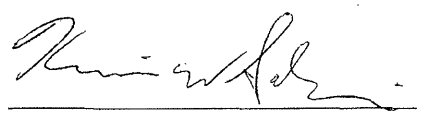
In any case, as discussed above, Cynosure has not shown that it faces irreparable harm from Mr. Laber's alleged breach of his non-solicitation agreement. For much the same reason, it also has not shown that it faces irreparable harm from Cutera's alleged past interference with that same non-solicitation agreement.

4. Preservation of Evidence. Defendants stated in open court that they would not object to the motion to preserve evidence so long as it were made reciprocal and applied with equal force to Cynosure. In turn, Cynosure stated that it had no objection to being subject to the same preservation of evidence order. The Court will therefore allow the motion to preserve evidence and order that all parties comply with it.

ORDER

The motion by Cynosure, Inc., for a temporary restraining order and preliminary injunction is DENIED.

Cynosure's motion for an order to preserve documents and evidence is ALLOWED. The Court hereby ORDERS that Cynosure, Inc., Spencer Detter, John Featherstone, Kipp David, Larry Laber, and Cutera, Inc., together with their agents, attorneys, employees, officers, directors, affiliates, and successors and any other persons acting in concert with them or on their behalf are hereby restrained and enjoined from destroying, disposing of, or otherwise preventing the discovery of any documents, computer records or data, or other information or materials that relate in any manner to the subject matter of any claims or defenses asserted in this civil action.



Kenneth W. Salinger
Justice of the Superior Court

February 26, 2015