Hearing Date: March 8, 2023
Hearing Time: 8:30 a.m.
Judge/Calendar: Ex Parte

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF THURSTON

EMBRACE PET INSURANCE AGENCY, LLC,

Plaintiff,

v.

OFFICE OF THE INSURANCE COMMISSIONER and EMILY BRILL, an individual,

Defendants.

Case No.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

PRESENTED EX PARTE

I. RELIEF REQUESTED AND ARGUMENT SUMMARY

Plaintiff Embrace Pet Insurance Agency, LLC ("Embrace") moves the Court for a temporary restraining order ("TRO") and preliminary injunction to maintain the status quo and prevent the Defendant Office of the Insurance Commissioner ("OIC") from releasing information that Embrace disclosed to OIC in response to a now-closed OIC inquiry, and which Defendant Emily Brill ("Ms. Brill") has requested from OIC through a Public Records Act ("PRA") request. Disclosure of this information would publicly reveal Embrace's sensitive information, which consists of trade secret, proprietary, and confidential business information. OIC has stated that it will release the requested information unless this Court intervenes before 3:00 PM on March 9, 2023.

OIC's threatened disclosure endangers Embrace's trade secrets. Embrace's data is subject to extensive efforts to maintain its confidentiality and is of great economic value to Embrace and

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the companies and individuals to whom this information pertains. The release of Embrace's data would provide Embrace's business competitors with critical competitive information with no commensurate effort or expenditure, causing Embrace substantial and irreparable harm. Furthermore, disclosure would reveal detailed individual information pertaining to partners and parties who provide private information to Embrace that is not otherwise publicly available. No public interest is served by releasing this private information because disclosure would destroy those trade secrets, discourage business cooperation with government agencies, and invade the privacy interests of Embrace as well as its current and former business partners. Accordingly, Embrace asks this Court to enter a TRO and preliminary injunction prohibiting OIC from publicly disclosing Embrace's documents.[1]

II. STATEMENT OF FACTS

A. Embrace shared confidential business information with OIC according to law and with the clear understanding that the confidentiality of its information would be preserved.

On September 1, 2021, OIC informed Embrace that it had received a complaint that Embrace was paying unlicensed producers to solicit insurance in possible violation of RCW 48.17.490(1) and had opened an inquiry into that complaint (the "OIC Inquiry"). (Asai Decl. Ex. 2.) The OIC Inquiry required that Embrace disclose confidential information and documents, including but not limited to descriptions of Embrace's affiliate program and a spreadsheet of all of the individuals and entities involved with Embrace's affiliate program, including the total amount of money Embrace paid and the total amount of money that Embrace earned for the sale of any insurance product through the referral process. (*Id.*) The OIC informed Embrace that, pursuant to Washington law, Embrace had 15 days to produce the requested information. (*Id.*)

Before responding to the OIC Inquiry, Embrace sought clarification from OIC on how to protect its information and ensure it was properly treated as the confidential and trade secret

[1] Embrace provided notice of this motion to Defendants. (Decl. of Kristin Asai in Supp. of Pl.'s Mot. ("Asai Decl."), Ex. 1.) OIC does not oppose the TRO.

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information that it is. (Asai Decl., Ex. 3.) Specifically, attorneys for Embrace requested and received guidance from OIC, confirming that marking the responsive information and documents "Confidential & Trade Secret" would protect Embrace's confidential information from automatic public disclosure. (*Id.*)

On October 1, 2021 and October 12, 2021, Embrace submitted its responses to the OIC Inquiry, marking the responses and accompanying documents "Confidential & Trade Secret" (together, the "Embrace File"). (*Id.*) The Embrace File submitted to the OIC contained confidential information about Embrace's Marketing Affiliate Program, including details regarding the design, the negotiated partner fees, the participants, the associated revenues, and the contractual partner terms of the program. Embrace's disclosures specifically included business and financial data related to the relative success of each affiliate partner with regard to the program, as measured by the number of Embrace customers who were referred to Embrace's website through a specific partner and who ultimately purchased policies from Embrace. (Decl. of Brian Macias in Supp. of Pl.'s Mot. ("Macias Decl.") ¶¶ 3–7.) The information in the Embrace File contains Embrace's confidential, proprietary trade secret information under the Washington Uniform Trade Secrets Act ("UTSA"), which Embrace produced to OIC in confidence, and as required by law, in response to an OIC inquiry. (*See id.* ¶¶ 8, 10–24.) The information in the Embrace File is private and proprietary business information that is not readily available to the public, Embrace's competitors, or anyone outside of the business dealings in question. (*Id.* ¶¶ 25–31.) So far as Embrace is aware, this information was produced to OIC solely by Embrace and from no other source.

On December 16, 2021, the OIC informed Embrace that it determined the complaint against Embrace was unsubstantiated and that its inquiry was concluded. (Asai Decl., Ex. 4.)

B. Ms. Brill seeks Embrace's confidential disclosures to OIC under the PRA.

On February 14, 2023, OIC informed Embrace that OIC had received a public disclosure request from Ms. Brill seeking:

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> *Any/all available public records in your office's possession from 10/1/2020-9/14/2022 such as complaints, supporting documents, email correspondences between these firms and OIC:*
>
> *Walmart, Nationwide (pet insurance), or Nationwide affiliates*
> *Trupanion or American Pet Insurance Company (APIC)*
> *PetPartners/IAIC or "AKC Pet Insurance."*
> *Embrace / American Modern Insurance Group Records*

(Asai Decl., Ex. 5.) OIC informed Embrace that it had identified the Embrace File, submitted in 2021, as responsive to Ms. Brill's request. (*Id.*) It further informed Embrace that it would make the requested documents available to Ms. Brill on March 10, 2023, unless Embrace obtained a court order to stop the release of these records by 3:00 pm on March 9, 2023. (*Id.*)

Ms. Brill is the Executive Editor of an internet blog that reports on issues pertaining to pet insurance. (Asai Decl., Exs. 5 & 6.) She presumably requested communications between OIC and various pet insurers, including Embrace, to report on that information in her blog.

C. Embrace notified Defendants of its intent to seek a TRO.

Embrace objects to the release of its confidential records because it will reveal Embrace's confidential and proprietary business information. Consequently, on March 7, 2023, Embrace filed a complaint in this Court, seeking to prohibit OIC's disclosure of the data to Ms. Brill. Embrace also notified OIC and Ms. Brill that it would seek a temporary restraining order on March 8, 2023 in Thurston County Superior Court. (Asai Decl. ¶ 2 & Ex. 1.) The OIC indicated that it does not oppose the TRO. (Asai Decl. ¶ 2.) Ms. Brill has not agreed to withdraw her request. (*Id.*)

D. Embrace is the source of the confidential information proposed to be disclosed to Ms. Brill.

Embrace provided OIC with the Embrace File in response to the OIC Inquiry in 2021. As stated above, the information in the Embrace File is private and proprietary business information not readily available to the public, Embrace's competitors, or anyone not party to the business dealings in question. So far as Embrace is aware, this information was produced to OIC solely by

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Embrace and from no other source. The business and marketing strategies, financial data, and reports of business-related data that Embrace provided in response to the OIC Inquiry are not readily ascertainable from any public source. (Macias Decl. ¶¶ 15-17.) Ms. Brill presumably seeks this information from OIC because she otherwise does not have access to it. OIC has the information from the Embrace File only because of the OIC Inquiry in which OIC called upon Embrace to produce it (and then ultimately concluded that the complaint against Embrace was unsubstantiated). OIC has not demonstrated it independently came across this information, nor could it, as it is confidential.

III. STATEMENT OF THE ISSUES

Whether this Court should enter a temporary restraining order and preliminary injunction prohibiting OIC from disclosing the Embrace File to Ms. Brill or in response to any PRA requests pending trial on Embrace's claim for preliminary and/or permanent injunctive relief.

IV. EVIDENCE RELIED UPON

This motion relies upon the declarations of Brian Macias and Kristin Asai, the exhibits attached thereto, the record, and any evidence the Court takes at the hearing.

V. AUTHORITY AND ARGUMENT

A TRO or preliminary injunction issued under the PRA operates to preserve the status quo until the trial court can conduct a full hearing on the merits. *Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs*., 193 Wn. App. 377, 392 (2016). A court may enjoin disclosure of public records when it would "clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially or irreparably damage vital governmental functions." RCW 42.56.540. Thus, a party seeking a TRO under the PRA must show a likelihood that: (1) the records are subject to an exemption under the PRA or an applicable "other statute," such as the UTSA; and (2) disclosure would clearly not be in the public interest and would substantially and irreparably damage any person. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 796 (2018).

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The information OIC seeks to disclose is a trade secret of Embrace under the UTSA or is otherwise statutorily protected. Disclosure of this information would clearly not be in the public interest and would substantially and irreparably damage Embrace and its affiliates. Accordingly, Embrace is entitled to a TRO and preliminary injunction pending the court ruling on Embrace's requests for preliminary and/or permanent injunctive relief.

A. The Embrace File is protected from disclosure as it contains trade secrets.

Embrace is likely to prevail because the Embrace File contains Embrace's proprietary trade secret information under the UTSA, which exempts records from disclosure under the PRA.[2] *Lyft, Inc*., 190 Wn.2d at 781. Under the UTSA, a trade secret is information that: "(a) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RCW 19.108.010(4).

Embrace's confidential business and marketing strategies, financial data, and reports of business-related data—including which marketing affiliates Embrace chooses to partner with and to what outcomes—are the sort of information that may squarely be afforded trade secret protection. *See Lyft, Inc.*, 190 Wn.2d at 783–84 (confidential business data reports may be protected trade secrets under the UTSA); *see also Bureau Veritas Commodities & Trade, Inc. v. Nanoo*, No. CV 20-3374, 2021 WL 2142466, at *5 (E.D. La. May 26, 2021) (finding that "internal operational . . . information" and "actual and forecast financial . . . information" and "business plans and strategies" may be trade secrets under the federal Defend Trade Secrets Act, 18 U.S.C. § 1839, which defines trade secret similarly to the UTSA); *Franklin Interiors, Inc. v. Wesolosky*, No. 20CV1423, 2020 WL 8264115, at *5 (W.D. Pa. Oct. 21, 2020) (same for "internal sales and marketing strategies").

[2] The data is also exempt under RCW 42.56.270(11), which protects trade secret information pertaining to "unique methods of conducting business" or "data unique to the product or services of the vendor."

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1. The Embrace File is valuable because its contents are not readily known.

Embrace's partner lists, financial data, business data, and marketing strategies derive independent economic value from their secrecy. Thus, the Embrace File meets the first element for trade secret protection.

First, a full list of Embrace's partners in any given marketing program is not readily ascertainable from any public source. (Macias Decl. ¶ 15.) *Cf. Ed Nowogroski Ins. v. Rucker*, 137 Wn.2d 427, 441–42 (1999); *see also A Place for Mom v. Perkins*, 475 F. Supp. 3d 1217, 1225 (W.D. Wash. 2020) ("Customer reports and information may rise to the level of a trade secret in certain contexts."). Likewise, financial data concerning Embrace's payments to partners in the Marketing Affiliate Program and concerning the total value of customer premiums that Embrace attributes to this marketing program are not publicly available or readily ascertainable from any public source. (Macias Decl. ¶ 16.) The same is true for descriptions of an Embrace marketing strategy, its design, implementation, and the business data related to the outcomes of this marketing strategy. (Macias Decl. ¶ 17.)

Second, each of these categories of confidential information derives economic value from its confidentiality. The business and marketing strategies, financial data, and reports of business-related data that Embrace provided in response to the OIC Inquiry derive economic value from their secrecy. The effort and resources that Embrace expended in developing its Marketing Affiliate Program, in maintaining data relevant to the program, and in maintaining the confidentiality of this information, are indications in and of themselves of the economic value of this business information. (Macias Decl. ¶¶ 10-14.) Marketing programs and agreements reflecting their design and implementation are based on complicated analyses, and a significant amount of work goes into formulating the best offerings to maximize benefits and minimize costs. (Macias Decl. ¶ 13.) Embrace's marketing strategies and partner lists, as reflected in the Embrace File, exist because of those efforts. (*See* Macias Decl. ¶ 11.) *See McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 424 (2009) ("A key factor in determining whether

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information has 'independent economic value' under the statute is the effort and expense that was expended in developing the information.").

If the Embrace File became public—allowing anyone to identify Embrace's current and former marketing partners, its marketing-related financial data, and marketing strategies and outcomes, among others—competitors could and would use such information to compete unfairly with Embrace. (Macias Decl. ¶¶ 18-21, 33.) Details of Embrace's proprietary marketing programs, the costs associated with them, the number and identity of Embrace's marketing affiliate partners, and the outcomes of Embrace's marketing programs, including the relative success of each partner in driving website traffic and creating customer leads for Embrace, would be highly valuable to any of Embrace's competitors in the pet insurance space. (Macias Decl. ¶¶ 18-21, 33.) Moreover, with data regarding the relative success of each marketing partner, competitors could target Embrace's most successful partners, potentially even at the expense of their continued partnership with Embrace. (Macias Decl. ¶ 19.) Acquisition of the confidential business information in the Embrace File would allow any Embrace competitor to free-ride on Embrace's investments in this information in order to assess, emulate, or adapt Embrace's marketing strategies. (Macias Decl. ¶ 20.) These free-riding concerns also apply to smaller competitors and new entrants into the market, who could similarly glean valuable insights from the Embrace File without expending the significant effort and cost that Embrace undertook to learn the same information. (Macias Decl. ¶ 21.)

The financial data in the Embrace File renders the above marketing-related information all the more valuable, which is why Embrace protects its financial data from disclosure. (Macias Decl. ¶¶ 22.) What fees Embrace negotiated with each marketing affiliate, Embrace's total expenditures on a specific marketing program, and the total revenue attributable to that marketing program all provide points of comparison for a competitor to assess and better design its own marketing strategies with the goal of pulling market share from Embrace. (Macias Decl. ¶ 23.) Relatedly, the identity and number of Embrace's affiliate partners, and the cost, customer

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leads, and revenue attributable to these affiliate partners, are also an indicator of Embrace's market share (Macias Decl. ¶ 24), which in turn is a key indicator of market competitiveness and constitutes trade secret information. *See, e.g.*, *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins*., 169 S.W.3d 905, 911 (Mo. Ct. App. 2005) (noting market share data derives economic value because it shows areas of successful marketing or opportunity).

Accordingly, the Embrace File is economically valuable due to its confidentiality and meets the first requirement for trade secret protection.

2. Embrace maintains the secrecy of the Embrace File.

The Embrace File's information is secret under the second element of the UTSA and should remain confidential. Embrace stores its confidential business information, including the information in the Embrace File, on a private network drive protected by appropriate computer security controls. Embrace also requires that all team members sign a non-disclosure agreement regarding the appropriate treatment of Embrace's confidential information. (Macias Decl. ¶¶ 25–28.) Embrace further requires its team members to review and sign an annual information security manual regarding the company's information security policies and supporting procedures. (Macias Decl. ¶ 29.) And Embrace stores all its confidential business information—including documents containing non-public details of Embrace's marketing strategies and data regarding costs and revenues associated with specific partners in Embrace's Marketing Affiliate Program—on a security-controlled private network. (Macias Decl. ¶ 31.) Only those Embrace employees with a need to know this information to perform their job functions have access to this confidential information. (*Id.*)

In addition, Embrace protects the confidentiality of all business information related to its Marketing Affiliate Program in accordance with the terms of the affiliate program agreement, which contains specific confidentiality provisions. (Macias Decl. ¶ 30.) This agreement thus gives affiliate partners a reasonable expectation of privacy regarding financial and business data relating to their participation in the marketing program. (Macias Decl. ¶¶ 35–36.) Accordingly,

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the Embrace File—and the list of marketing affiliates in the file—is subject to reasonable secrecy measures and qualifies as trade secret.

B. Disclosure of the Embrace File will cause substantial and irreparable harm to Embrace.

Due to its highly competitive value, disclosure of the Embrace File would cause substantial and irreparable competitive harm to Embrace. (Macias Decl. ¶ 32.) If this information were disclosed, Embrace's competitors would use Embrace's information to gain an unfair competitive advantage over Embrace by using Embrace's own confidential information, and disrupt Embrace's significant investment in recruiting and retaining partners by recruiting partners away from Embrace. (Macias Decl. ¶ 33.) Those injuries would be irreparable and could cause significant harm to Embrace's business interests and unfairly undercut Embrace's competitive position in the market. (Macias Decl. ¶ 34.) *See Lyft, Inc.*, 190 Wn.2d at 795 (noting irreparable harm exists if disclosure presents the company with an existential threat).

Accordingly, a TRO and preliminary injunction is necessary to prevent irreparable harm to Embrace from the disclosure of the Embrace File.

C. Disclosure of the Embrace File is clearly not in the public interest.

Disclosure of the Embrace File is clearly not in the public interest. Specifically, disclosure would: (a) undermine the public interest in protecting trade secrets and harm the competitive market; (b) impede future agency functions by discouraging companies from providing information to, or entering into agreements with, the government; (c) threaten the privacy interests of partners who work with Embrace; and (d) depart from well-established precedent authorizing courts to preserve the status quo until a full trial on the merits.

1. Preserving the confidentiality of trade secrets is in the public interest.

Disclosure of the Embrace File would destroy its confidentiality and could unfairly undercut Embrace's competitive position in the market. Such substantial anticompetitive harms are not in the public interest. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483 (1974)

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(noting protecting confidentiality of trade secrets "encourages businesses to initiate new and individualized plans of operation, and constructive competition results").

Indeed, Washington specifically recognizes a public interest in protecting trade secrets from disclosure through the PRA. *See, e.g.*, *Versaterm Inc. v. City of Seattle*, No. C16-1217JLR, 2016 WL 4793239, at *8 (W.D. Wash. Sept. 13, 2016) (enjoining city from releasing trade secrets); *see also Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262 (1994) ("The [PRA] is simply an improper means to acquire knowledge of a trade secret."). In *Versaterm*, the court enjoined the city from releasing a business's software information that was not publicly known and the result of substantial time, effort, and expense. 2016 WL 4793239, at *8. The court explained that a business has a strong interest in keeping its trade secrets confidential to keep its competitive advantage in the industry, and the public interest is served by "protect[ing] commercial information concerning business methods." *Id.* at *7–8; *see also Evergreen Freedom Found. v. Locke*, 127 Wn. App. 243, 249 (2005) (upholding redactions from public records that would "lead to private gain and public loss" because the purpose of the PRA is to "prevent private gain derived from the exploitation of potentially valuable intellectual property created for public benefit").

Similarly here, disclosure of the Embrace File would harm the public by depriving Embrace of valuable confidential information it invested considerable time and effort to acquire, giving Embrace's competitors an unfair competitive advantage, and discouraging companies like Embrace from cooperating with governmental inquiries. (Macias Decl. ¶¶ 32–33.) Disclosure of the Embrace File would allow competitors to use Embrace's marketing strategies and the partners, costs, and outcomes related thereto, without having to make those same investments. (Macias Decl. ¶ 34.) That result is directly adverse to the public interest in fair competition and the laws protecting trade secrets. *See PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995) ("Trade secret law serves to protect standards of commercial morality and encourage

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invention and innovation while maintaining the public interest in having free and open competition in the manufacture and sale of unpatented goods.").

2. Disclosure of Embrace's trade secrets could impede government functions by discouraging cooperation by private businesses.

Embrace provided to OIC, in confidence, dozens of pages of documents and answers to questions outlining Embrace's market activities, marketing endeavors, partnership agreements, partnership lists, and more. Embrace cooperated fully with the OIC's requests for information because Embrace understood—and expressly confirmed with OIC—that the confidentiality of its information would be protected. (Asai Decl., Ex. 3.) Allowing OIC to disclose Embrace's trade secrets and other sensitive confidential business information would have a chilling effect on the business community, and materially impede cooperation between private businesses and the government. *See Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405,* 164 Wn.2d 199, 227 (2008) (upholding redaction of names from disclosure to prevent chilling communications).

3. Disclosure could violate partners' reasonable privacy expectations.

Embrace is committed to protecting all of its partners' and affiliates' confidential business information, including data collected from their collaboration with Embrace. (Macias Decl. ¶ 35.) The Embrace File contains confidential information regarding the specific terms of the marketing program in which Embrace's marketing affiliates participated as well as data regarding the relative success of each marketing affiliate compared to the others. Release of this confidential information threatens the privacy and confidentiality expectations of these partners. Parties are willing to provide this information to Embrace to operate in partnership subject to an agreement to keep such information private. (Macias Decl. ¶ 36.) Releasing such information is contrary to these parties' reasonable expectation of privacy when using Embrace's services or contracting with Embrace.

Additionally, those who provided this information in the Embrace File, and Embrace turning over the information for regulation purposes, have a reasonable expectation that their

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confidential business information will not be released for "commercial purposes." *See* RCW 42.56.070(8) ("This chapter [of the PRA] shall not be construed as giving authority to any agency . . . to give, sell or provide access to lists of individuals requested for commercial purposes[.]").

Here, although Ms. Brill's PRA request does not disclose its intended purposes, her role as executive editor and founder of a blog that reports on issues involving pet insurance strongly suggests that Ms. Brill intends to publish the information she acquires on her website, which is a subscription-based publication. If Ms. Brill seeks to use the information for profit through publication on her site, that, among other reasons, is a commercial purpose that precludes disclosure. *See Seiu Healthcare 775NW,* 193 Wn. App. at 403 (holding "commercial purpose" means "a business activity by any form of business enterprise intended to generate revenue or financial benefit").

4. Preserving the status quo is in the public interest.

It is well-established that a court may issue a TRO to maintain the status quo in a PRA matter until the trial court can conduct a full hearing on the merits. *Seiu Healthcare*, 193 Wn. App. at 392. The public interest particularly favors preserving the status quo when no injury would result from waiting for a full trial on the merits. *Nw. Gas Ass'n v. Wash. Utilities & Transp. Comm'n*, 141 Wn. App. 98, 123 (2007) ("Neither the general public's safety nor our citizens' need to oversee governmental functions will be harmed if disclosure of the shapefile data is postponed pending the permanent injunction trial.").

Here, no one will be harmed by delaying disclosure until the Court may hold a full evidentiary hearing to determine whether the Embrace File meets the PRA's injunction standard. No immediacy exists for this information, and no public interest will be served by its disclosure. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (noting no public interest is served by "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's

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own conduct"). To the extent any public interest exists in examining the Embrace File and obtaining contact information, that minor interest is outweighed by the public interest in protecting confidential business records, maintaining business confidence in submitting trade secrets to the government, and encouraging healthy business competition. *See Lyft, Inc*., 190 Wn.2d at 792, n.15 (describing the public interest analysis as a "balancing test" that takes into account trade secret protection). Because Embrace is likely to prevail on its claim for permanent injunctive relief, this Court should grant its request for a TRO and preliminary injunction.

VI. CONCLUSION

For the foregoing reasons, Embrace respectfully asks this Court to enter a temporary restraining order and/or preliminary injunction.

DATED this 7th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this date I caused the foregoing EMBRACE PET INSURANCE AGENCY, LLC'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on the following parties:

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DATED March 7, 2023.

s/ Kristin Asai
Kristin Asai

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