COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1984CV04024-BLS2

TOWNSEND OIL CO., INC.

v.

JOHN TUCCINARDI AND DEVANEY ENERGY, INC.

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Townsend Oil Company seeks to enforce non-competition and confidentiality agreements against a former employee. It seeks a preliminary injunction that would bar John Tuccinardi from directly or indirectly soliciting any Townsend customer through September 30, 2021, bar his new employer Devaney Energy from aiding and abetting any such conduct by Tuccinardi during the same period, and bar Tuccinardi from using or disclosing any confidential information that belongs to Townsend.

The Court will deny the request to enforce the non-competition provision by means of a preliminary injunction because Townsend has not yet shown it is likely to succeed on the merits of its claims and because the balance of harms weighs against granting the relief. It will deny the request to enforce the confidentiality provision because Townsend has not shown that it is likely to succeed on that aspect of its claims.

1. **Factual Background**. The Court makes the following findings of fact based on Townsend's verified complaint, Defendants' affidavits, and reasonable inferences it has drawn from that evidence.

Townsend sells heating oil and other fuels to, and installs and services heating equipment for, home owners, renters, and small businesses. Customer turnover is a regular part of these energy services markets. All of the competitors in this area in these markets regularly gain new customers and lose existing customers.

For many years, John Tuccinardi worked for a different company that came to be known as Federal Energy Services, LLC. While employed by Federal, Tuccinardi entered into an employment agreement that included non-competition and confidentiality provisions. The non-competition provision says that, while he was employed by Federal and for two years thereafter,

Tuccinardi may not "solicit or attempt to solicit, directly or indirectly," any client or customer of Federal in order to engage in any business similar to those offered by Federal. The confidentiality provision says that Tuccinardi may not use or disclose, for any purpose other than Federal's business, any information that Federal "treats as confidential."

Townsend is entitled to enforce Tuccinardi's prior employment agreement. Federal merged into Townsend in December 2011.[1] As a result, Townsend is the legal successor to Federal. After the merger, Tuccinardi became Vice President of Sales & Marketing for Townsend.

Tuccinardi resigned from Townsend on or about October 1, 2019. Two weeks later he went to work for Devaney Energy, Inc. Tuccinardi is employed by Devaney as a Sales Representative. Townsend and Devaney provide competing fuel and energy services to home owners in the greater Boston area.

Devaney creates and maintains mailing lists of potential customers for its energy services by searching public real estate records to determine, for example, which homes are oil heated. It solicits new business by sending out mailers with promotional offers for its services to heating oil users who are not current Devaney customer. Devaney routinely identifies a specific contact person in its mailings.

When Tuccinardi left Townsend he did not have and did not take with him any list of customers. Tuccinardi has never provided Devaney with any customer lists, names, or contact information. He has provided no input to and has had no involvement whatsoever in the creation of any Devaney mailing list.

In the time since October 2019, Devaney has sent out one or more mailings to prospective customers that list Tuccinardi as the person to contact for more

[1] As requested by Townsend, the Court takes judicial notice of this fact based on public records maintained by the Secretary of the Commonwealth and submitted at the preliminary injunction hearing. See *Tilcon-Warren Quarries Inc.* v. *Commissioner of Revenue*, 392 Mass. 670, 671 n.4 (1984) (taking judicial notice of publicly-accessible list of manufacturing corporations maintained by state official); *Marhefka* v. *Zoning Bd. of Appeals of Sutton*, 79 Mass. App. Ct. 515, 516 n.5 (2011) (taking judicial notice of official online database maintained by local assessors); see generally *Commonwealth* v. *Greco*, 76 Mass. App. Ct. 296, 301 n.9, *rev. denied*, 457 Mass. 1106 and 458 Mass. 1105 (2010) (court may take judicial notice of facts "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned" (quoting Mass. Guide Evid. § 201(b)(2)).

information. Those mailings include Tuccinardi's name together with his Devaney email address and phone number.

Since Tuccinardi joined Devaney, Townsend has lost 19 customers to Devaney. For context, the Court takes judicial notice that Townsend says on its website that it has "approximately 12,000 residential and commercial customers in both Massachusetts and New Hampshire."[2]

Every one of those 19 customers was on a Devaney mailing list before Tuccinardi joined the company; none was added based on information provided to Devaney by Tuccinardi.

Although Tuccinardi did not directly solicit any of these 19 customers to move their business from Townsend to Devaney, at least five of these customers did so because they know Tuccinardi, recognized his name in a mailing they received from Devaney, and then called Tuccinardi at Devaney and said they wanted to transfer their business to his new employer.

2. **Legal Background**.

2.1. **Preliminary Injunctions.** "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). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc.* v. *Axsun Technologies, Inc.*, 469 Mass. 181, 194 (2014).

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); *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).

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[2] See www.townsendtotalenergy.com/about [last visited January 9, 2020].

"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).

2.2. **Non-Competition Agreements**. Under Massachusetts law, non-competition provisions in employment agreements are enforceable only to the extent they are consistent with the public interest and consonant with public policy. *New England Canteen Services, Inc.* v. *Ashley*, 372 Mass. 671, 673 (1977); *All Stainless, Inc.* v. *Colby*, 364 Mass. 773, 778 (1974); *Thomas* v. *Paker*, 327 Mass. 339, 341 (1951).

An employer may enforce a non-competition or non-solicitation agreement only 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 the employer's goodwill, but do not include merely avoiding lawful competition. See *New England Canteen Services, Inc.* v. *Ashley*, 372 Mass. 671, 673–676 (1977); *All Stainless*, 364 Mass. at 778–780.

"Protection of the employer from ordinary competition … is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced." *Marine Contractors, Inc.* v. *Hurley*, 365 Mass. 280, 287-288 (1974); accord, e.g., *Boulanger* v. *Dunkin' Donuts, Inc.*, 442 Mass. 635, 641 (2004), cert. denied, 544 U.S. 922 (2005).

That is because the right of employees to use their knowledge, experience, and skill to compete against their prior employer "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); accord *Club Aluminum Co.* v. *Young*, 263 Mass. 223, 227 (1928).

3. **Enforcing the Non-Competition Agreement**.

3.1. **Likelihood of Success**. Townsend has not shown that Tuccinardi has breached his contractual obligation not to solicit clients or customers of Townsend on behalf of a competitor.

The challenged mailings were certainly solicitations by Devaney. They were postcards advertising the Devaney name and business and offering a particular

deal—a fixed rate for a period of time, a $100 account credit, and free oil burner service for two years—to customers that switched to Devaney.

But it is not so clear that these mailings were indirect solicitations by Tuccinardi. Although Devaney put Tuccinardi's name and contact information on the mailer, Townsend has not shown that Tuccinardi himself had anything to do with the design or distribution of these solicitations. The Court credits Defendants' evidence that Devaney sent these mailers to distribution lists of its own creation, and Tuccinardi had no input into who received the mailers.

The contract between Federal and Tuccinardi does not make clear whether the inclusion of Tuccinardi's name and contact information in a mailing distributed by a competitor constitutes indirect solicitation by Tuccinardi, absent any personal involvement by Tuccinardi in the solicitation.

Any ambiguity in applying the non-competition agreement must be construed "strongly against" Townsend because the contract was drafted by the contracting party (Federal) that Townsend contends was representing its future interests. See *Leblanc* v. *Friedman*, 438 Mass. 592, 599 n.6 (2003) (ambiguity in written contract must be construed "strongly against the party who drew it" (quoting *Bowser* v. *Chalifour*, 334 Mass. 348, 352 (1956)); accord, e.g., *Costa* v. *Brait Builders Corp.*, 463 Mass. 65, 76 (2012) (where contract "provision is ambiguous, we construe it against the drafter" (citing Restatement (Second) of Contracts § 206, at 105 (1981)).

This general rule of contract construction applies with full force to employment contracts, perhaps especially those imposing "a post-employment restraint imposed by the employer's standard form contract." *Sentry Ins.* v. *Firnstein*, 14 Mass. App. Ct. 706, 707 (1982). Under Massachusetts law, such contracts must be "scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood." *Id*., quoting Restatement (Second) of Contracts § 188, comment g (1981).

With these rules of construction in mind, the Court concludes that Townsend has not shown that the mailers with Tuccinardi's name on them constitute solicitation by Tuccinardi in violation of the non-competition agreement.

Townsend argues that this does not matter, because Tuccinardi violated his non-competition agreement every time he has taken or returned a call from a

current Townsend customer who is interested in switching their business to Devaney. The Court disagrees.

If a Townsend customer decides they are or may be interested in switching their business to Devaney, and they contact Devaney or even directly contact Tuccinardi at Devaney, it is not at all clear that Tuccinardi would violate his non-solicitation obligations by accepting that business or explaining Devaney's current offer to new customers. The verb "solicit" typically means "to seek to obtain by persuasion, entreaty, or formal application." THE AMERICAN HERITAGE DICTIONARY, 2d Coll. Ed. at 1163 (1985). Where the customer is doing the seeking, it is not clear that such an interaction violates the contractual prohibition on solicitation of Townsend customers. Once again, the Court must construe the contractual ambiguity against Townsend.

Townsend also argues that the inclusion of Tuccinardi's name on Devaney mailers necessarily constitutes solicitation by Tuccinardi, because at least some customers who saw the mailer switched their business from Townsend to Devaney because they are long-time friends of Tuccinardi. Once again, the Court disagrees.

If a customer decides to switch from Townsend to Devaney because they are personally loyal to Tuccinardi, that means that the goodwill as to that customer belongs to Tuccinardi, not Townsend. That provides no lawful basis to bar Tuccinardi from competing against Townsend.

Goodwill is a company's or an employee's "positive reputation in the eyes of its customers or potential customers." *North Am. Expositions Co. Ltd. P'ship* v. *Corcoran*, 452 Mass. 852, 869 (2009). "It has long been recognized that good will may sometimes attach to an employee who maintains distinctly personal or professional relationships with customers, so that the business entity possesses little of it." *P.A. Bldg. Co.* v. *Elwyn D. Lieberman, Inc.*, 642 N.Y.S.2d 300, 301 (N.Y. Sup. Ct. App. Div. 1996).

A non-competition or non-solicitation agreement is enforceable only "to protect the employer's good will, not to appropriate the good will of the employee." *Sentry Ins.* v. *Firnstein*, 14 Mass. App. Ct. 706, 708 (1982); accord *RE/MAX of New England, Inc.* v. *Prestige Real Estate, Inc.*., Civil Action No. 14-12121-GAO, 2014 WL 3058295, *3 (D.Mass. 2014) (O'Toole, J.) (real estate brokerage franchisor could not enforce non-compete agreement with franchisees in absence of proof that "any good will generated by the various

offices is due to RE/MAX branding and methods" rather than created by "the work and personal relationships of the agents").

Since Townsend has not shown it is likely to succeed on its claims against Tuccinardi, it is also not likely to succeed on its claims against his new employer. Devaney is free to compete for the business of Townsend's customers or potential customers 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.

3.2. **Balance of Harms**. In addition, the risk of irreparable harm to Townsend from not issuing the preliminary injunction is far outweighed by the risk of irreparable harm to Tuccinardi from granting the requested relief. This is a second, independent reason why Townsend is not entitled to a preliminary injunction. See *Packaging Industries Group, Inc.* v. *Cheney*, 380 Mass. 609, 622 (1980).

It appears that any economic loss to Townsend from losing customers to Devaney as a result of Tuccinardi's new employment is not very large and is readily quantifiable. To date Townsend has only lost a handful of customers to Devaney in the region where Tuccinardi works. Any future such customer transfers can be determined by comparing customer lists. And with a specific set of transferred customers identified, Townsend could readily estimate the lost profits it claims have been caused by Tuccinardi violating his non-competition agreement.

In contrast, Tuccinardi would suffer serious harm if subject to the preliminary injunction sought here. Although Tuccinardi never agreed not to compete with Federal or its successor, and instead agreed only not to solicit customers of his employer, the injunction sought by Townsend would effectively prevent Tuccinardi from working in his field in this area. Townsend seeks to bar Tuccinardi from speaking with any Townsend customers, even if he does not know until after the customer decides to switch to Devaney that the customer currently gets service from Townsend. The requested injunction, as construed by Townsend, would have the effect of putting Tuccinardi out of work.

4. **Enforcing the Confidentiality Agreement**. Finally, the Court will not enter an injunction to enforce the confidentiality agreement because there is no evidence that Tuccinardi has done anything to violate that part of his contract.

Townsend has not shown that Tuccinardi took any customer lists or other confidential information with him, or that he has used or disclosed any of Townsend's confidential information. It would be inappropriate to preliminarily enjoin Tuccinardi from violating a contractual provision without proof that such equitable relief is needed to remedy some actual violation.

ORDER

Plaintiff's motion for a preliminary injunction is DENIED.

Kenneth W. Salinger
Justice of the Superior Court

13 January 2020