COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 2284CV01678BLS1

ABD INSURANCE AND FINANCIAL SERVICES INC., d/b/a NEWFRONT INSURANCE SERVICES, LLC, LOUISA BOLICK, ERIKA PAPADOPOULOS, MICHAEL TALMANSON, and BRIAN KELLEHER

vs.

ARTHUR J. GALLAGHER & CO.

vs.

JAMES CIARLEGLIO

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs, ABD Insurance and Financial Services Inc., d/b/a Newfront Insurance Services, LLC ("Newfront"), Louisa Bolick, Erika Papadopulos, Michael Talmanson and Brian Kelleher ("Individual Plaintiffs"), commenced this action on July 25, 2022, against the defendant, Arthur J. Gallagher & Co. ("Gallagher"), seeking declaratory relief. The plaintiffs filed their First Amended Complaint on August 15, 2022, seeking a declaration that certain restrictive covenants contained in the Individual Plaintiffs' employment agreements with Gallagher are invalid and unenforceable. On November 8, 2022, Gallagher's motion to add counterclaims was allowed. In its counterclaims, Gallagher alleges breach of contract against the Individual Plaintiffs and James Ciarleglio (collectively, "Individual Counterclaim Defendants") (Count I), breach of fiduciary duty against the Individual Counterclaim Defendants (Count II), tortious interference with contractual relations against Newfront (Count III), civil conspiracy

against Newfront and the Individual Counterclaim Defendants (Count IV), aiding and abetting against Newfront and the Individual Counterclaim Defendants (Count V), and unjust enrichment against Newfront and the Individual Counterclaim Defendants (Count VI). The case is before the court on Gallagher's motion for a preliminary injunction against the Individual Counterclaim Defendants. The Individual Counterclaim Defendants oppose the motion. A hearing was held on December 15, 2022. After careful consideration of the written submissions and oral arguments, the motion is **ALLOWED** in part.

BACKGROUND

In 2015, Gallagher acquired William Gallagher Associates Insurance Brokers, Inc. ("William Gallagher"), including their clients and client goodwill, for 150 million dollars in cash and equity. Bolick, Talmanson and Kelleher were William Gallagher shareholders. Papadopoulos was a non-shareholder executive at William Gallagher. At the time of the acquisition, Bolick, Talmanson, Kelleher and Papadopoulos entered into contracts with Gallagher ("Plaintiffs' Agreements"). Gallagher argues that the Plaintiffs' Agreements contain provisions prohibiting Bolick, Talmanson, Kelleher and Papadopoulos from soliciting, accepting business from, and providing services to Gallagher's clients, including but not limited to those acquired by Gallagher in the William Gallagher Acquisition, for two years following their termination from Gallagher. Bolick, Talmanson, Kelleher and Papadopoulos disagree that the Plaintiffs' Agreements contain non-solicitation agreements. As part of the acquisition and in exchange for entering into the Plaintiffs' Agreements, Bolick, Talmanson, and Kelleher received payment for their shares, and substantial retention payments.[1]

[1] Bolick received more than $900,000 for her shares, and $400,000 as a retention payment. Talmanson received $172,000 for his shares, and $150,000 as a retention payment. Kelleher received $267,000 for his shares, and a $250,000 retention payment.

Ciarleglio joined Gallagher in June 2016 and signed an agreement that contained nondisclosure, non-solicitation and non-servicing provisions ("Ciarleglio's Agreement"). Ciarleglio's Agreement prohibits him from soliciting or servicing Gallagher clients for a period of two years following the termination of his employment with Gallagher. The Individual Counterclaim Defendants were highly compensated at Gallagher.

During a two-week period from June 30, 2022, to July 12, 2022, the Individual Counterclaim Defendants resigned from Gallagher to join Newfront.[2] In the weeks prior to their resignations, Kelleher and Ciarleglio sent over 100 documents containing what Gallagher characterizes as confidential information and trade secrets from their Gallagher email accounts to their personal email accounts.

In connection with this motion, Gallagher presented documentation reflecting communications between Bolick, Talmanson, Kelleher and Ciarleglio, and several Gallagher clients regarding moving their business to Newfront. These communications went well beyond merely notifying Gallagher clients that they were changing jobs. Fifteen clients switched from Gallagher to Newfront in the wake of these communications.

DISCUSSION

Gallagher seeks to enjoin each of the Individual Counterclaim Defendants from soliciting, servicing or accepting business from Gallagher clients. "A preliminary injunction is an extraordinary remedy never awarded as of right[,]" *see Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should not be granted unless the plaintiffs have made a clear showing of entitlement thereto." *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762 (2004).

[2] Before the resignations, Newfront did not have a presence in Boston. In addition to the named Individual Counterclaim Defendants, four other Gallagher employees left to join Newfront during this same period of time.

Generally, "[t]he party seeking a preliminary injunction must show '(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction'" (alterations omitted). *Garcia v. Department of Hous. & Cmty. Dev.*, 480 Mass. 736, 747 (2018) (quoting *Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Board of Health of Yarmouth*, 439 Mass. 597, 601 (2003)). Thus, Gallagher has the burden of establishing a likelihood that it will prevail at trial in showing that the restrictive covenants are enforceable, and in the absence of an injunction, it will suffer irreparable harm.

A restrictive covenant contained in an employment contract "will be enforced if it is reasonable, based on all the circumstances." *All Stainless, Inc. v. Colby*, 364 Mass. 773, 778 (1974); *see also Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287 (1974) (a non-solicitation provision, like an employee covenant not to compete, "generally . . . [is] enforceable only to the extent that . . . [it is] necessary to protect the legitimate business interests of the employer"). In deciding what is "reasonable," the court must consider, among other things, the "reasonable needs of the former employer for protection against harmful conduct of the former employee[,]" the "reasonableness of the restraint imposed on the former employee[,]" and the geographic scope of the covenant and its duration, as well as the "public interest" as a whole. *All Stainless, Inc.*, 364 Mass. at 778; *see also Marine Contractors Co.*, 365 Mass. at 289 (non-solicitation provision must be reasonable in its time, space, and scope). Legitimate business interests includes the protection of trade secrets and confidential information but does not include protection from ordinary competition, *see Boulanger v. Dunkin' Donuts Inc.*, 442 Mass. 635, 641 (2004), and the former employer bears the burden of demonstrating the existence of a

legitimate business interest. *New England Canteen Serv., Inc. v. Ashley*, 372 Mass. 671, 675 (1977). "The objective of a reasonable noncompetition clause is 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).

The Individual Counterclaim Defendants do not dispute that they may not take Gallagher's confidential information, and the court will enter a preliminary order consistent with that restriction, which is contained in both Plaintiffs' Agreements and Ciarleglio's Agreement.[3]

The court next turns the enforceability of the non-solicitation and non-servicing provisions. The court does not agree with Bolick, Papadopoulos, Talmanson and Kelleher that Plaintiffs' Agreements do not contain non-solicitation provisions. A fair reading of them clearly reflects an agreement not to solicit Gallagher clients for two years following termination from Gallagher. It is undisputed that Ciarleglio's Agreement contains a non-solicitation provision. There is substantial evidence in the preliminary injunction record that Bolick, Talmanson, Kelleher and Ciarleglio have engaged in solicitation in violation of these agreements. The court will issue a preliminary order prohibiting any further solicitation of Gallagher's clients.

The main focus of the Individual Counterclaim Defendants' arguments is the non-servicing provisions, which they contend are unenforceable. Since Bolick, Talmanson and Kelleher's agreements arose in the context of the sale of a business, Gallagher urges the court to apply a more lenient standard in evaluating the enforceability of this provision as to these three individuals. *See Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 496-97 (1986) (noting "that noncompetition covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of an employer-employee relationship"). In a situation

[3] Newfront has taken steps to identify and remove from its systems any documents that came from Gallagher.

involving restrictive covenants arising out of the sale of the business, "there is more likely to be equal bargaining power between the parties; the proceeds of the sale generally enable the seller to support himself temporarily without immediate practical need to enter into competition with his former business; and a seller is usually paid a premium for agreeing not to compete with the buyer." *Id*. at 496; *see also Boulanger*, 442 Mass. at 639-40. A sale of a business that includes good will, may require a broad noncompetition agreement in order to "assure that the buyer receives that which he purchased." *Id*.

On the other hand, Bolick, Talmanson and Kelleher urge the court to analyze the restrictive covenants in Plaintiffs' Agreements under the traditional employee/employer framework since the provisions are not connected to the goodwill Gallagher acquired from William Gallagher. *See Marine Contractors Co.*, 365 Mass. at 287-288. They base this argument on several factors, including the fact that seven years have passed since the acquisition, and they claim that the clients who Bolick, Talmanson and Kelleher allegedly solicited, were not William Gallagher clients. They further argue that the "non-servicing" provisions in the Plaintiffs' Agreements are unenforceable under the more restrictive employer/employee framework because it is not necessary to protect a legitimate business interest. *See Boulanger*, 442 Mass. at 639; *Bruett v. Walsh*, No. 2019SUCV00906-BLS1, 2019 WL 26605705, at *3-4 (Mass. Super. May 9, 2019); *Getman v. USI Holdings Corp*., No. 2005SUCV03286-BLS2, 2005 WL 2183159, at *3-4 (Mass. Super. Sept. 1, 2005).

The court disagrees. Similar to the circumstances in *Alexander & Alexander, Inc.*, 21 Mass. App. Ct. at 497-98, the provisions at issue were an integral part of the sale negotiations

and should be enforced as such. Thus, both the non-solicitation and non-servicing provisions are enforceable against Bolick, Talmanson and Kelleher.[4]

As to Papadopoulos and Ciarleglio, the non-servicing provisions in their agreements are to be interpreted under the employer/employee standard. The enforceability of the non-servicing provisions in this context depends in part on whether it is protecting the good will belonging and earned by the company or that belonging and earned by the individual brokers. *See Bruett*, 2019 WL 26605705, at *2-4; *Getman*, 2005 WL 2183159, at *3. The courts in *Getman* and *Bruett*, found that a fair balance was to bar the former employees from soliciting clients from their former employer, but to allow them to accept business from former clients if the clients on their own reach out to them. *See Bruett*, 2019 WL 2605705, at *3-4; *Getman*, 2005 WL 2183159, at *3. However, the court recognizes that "the difference between accepting and receiving business, on the one hand, and indirectly soliciting on the other, may be more metaphysical than real[.]" *Alexander & Alexander, Inc.*, 21 Mass. App. Ct. at 499. This case is further compounded by the fact that the court has been presented with substantial evidence that each of the Individual Counterclaim Defendants, other than Papadopoulos, have directly solicited Gallagher clients. Clearly, servicing those clients should be prohibited, even under the more stringent employer/employee standard. Since Bolick, Talmanson, Kelleher and Ciarleglio do not appear to understand their obligations under their agreements, the court finds it necessary to enforce the

[4] The Individual Counterclaim Defendants ask the court to follow the court's decision in *Gallagher v. Alliant Insurance Services*, No. 2184CV02828. There, the court found that "barring the five defendants from future dealings with their former clients and barring Alliant from accepting the former clients of the five defendants, are not reasonable and are unenforceable. . ." Here, the court is not being asked to prohibit Newfront from accepting Gallagher clients. Moreover, the *Alliant* court did not discuss its reasoning or whether or not the case involved a sale of a business.

non-servicing provisions against them in order to protect Gallagher's legitimate business interests.[5]

Gallagher has further established that absent an injunction it will suffer irreparable harm, since loss of clients constitutes irreparable harm in this context. *See HILB Rogal & Hobbs of Massachusetts, LLC v. Sheppard*, No. 2007SUCV05549-BLS2, 2007 WL 5390399 (Mass. Super. Dec. 31, 2007). Finally, since the evidence is that that Bolick, Talmanson, Kelleher and Ciarleglio have actively solicited Gallagher clients in violation of their agreements, the balance of harms weighs in Gallagher's favor when it comes to enforcing the non-servicing provisions against them at this stage in the litigation.

In sum, based on a careful consideration of the First Amended Complaint, Amended Answer to the First Amended Complaint and Counterclaim, the memoranda submitted in support and opposition to this motion, and the arguments made at the hearing, the court finds that Gallagher has met its burden of establishing a likelihood of success on the merits. Gallagher has also established that it will suffer irreparable harm if an injunction is not issued and that the risk of irreparable harm to Gallagher outweighs the potential harm to the Individual Counterclaim Defendants in granting the injunction.

ORDER

For the forgoing reasons, Gallagher's motion for a preliminary injunction is **ALLOWED** in part.

A. Until further written Order of this court, the court hereby enjoins Louisa Bolick, Michael Talmanson, and Brian Kelleher:

[5] The two-year restriction on servicing clients is not unreasonable. *See Bruett*, 2019 WL 2605705, at *5; *Browne of Bos., Inc. v. Levine*, No. C.A. 1997-05789-A, 7 Mass. L. Rptr. 685, 1997 WL 781444, at *4 (Mass. Super. Nov. 25, 1997).

1. From possessing, using or disclosing any "Trade Secrets" or "Confidential Information", as those terms are defined in Plaintiffs' Agreements.

2. For two years following their termination from Gallagher, from "soliciting," as that term is defined in Plaintiffs' Agreements, any Gallagher clients.

3. For two years following their termination from Gallagher, from directly or indirectly engaging in providing "Insurance Services" or "Benefit Services", as those terms are defined in Plaintiffs' Agreements, for any current Gallagher clients and any former Gallagher clients that have left Gallagher and retained Newfront since Bolick, Talmanson and Kelleher's termination from Gallagher.

B. Until further written Order of this court, the court hereby enjoins Erika Papadopoulos:

    1. From possessing, using or disclosing any "Trade Secrets" or "Confidential Information", as those terms are defined in Plaintiffs' Agreements.

    2. For two years following her termination from Gallagher, from "soliciting" as that term is defined in Plaintiffs' Agreements, any Gallagher clients.

C. Until further written Order of this court, the court hereby enjoins James Ciarleglio:

    1. From possessing, using or disclosing any "Trade Secrets" or "Confidential Information", as those terms are defined in Ciarleglio's Agreement.

    2. For two years following his termination from Gallagher, from "soliciting," as that term is defined in Ciarleglio's Agreement, any Gallagher clients.

    3. For two years following his termination from Gallagher, from directly or indirectly engaging in providing "Insurance Services" or "Benefit Services", as those terms are defined in Ciarleglio's Agreement, for any current Gallagher clients and any former Gallagher clients that have left Gallagher and retained Newfront since Ciarleglio's termination from Gallagher.

Dated: December 30, 2022

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Hélène Kazanjian
Justice of the Superior Court