

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CONTROLLIX CORPORATION)	CASE NO. CV-15-839587
)	
Plaintiff)	
)	
-vs-)	JUDGE DICK AMBROSE
)	
DENNIS WILLIAMS, et al.)	
)	
Defendants)	<u>OPINION AND</u>
)	<u>JUDGMENT ENTRY</u>

{¶1} Before the court is the motion of Plaintiff, Controllix Corporation (“Controllix”), for Temporary Restraining Order and Preliminary Injunction.¹ A hearing on the Motion for Preliminary Injunction was held on the record beginning April 23, 2015, and concluding on April 28, 2015. Controllix called Defendants William Melis (“Melis”) and Dennis Williams (“Williams”) in its side of the case, as if on cross-examination. Controllix also presented the testimony of Cynthia Berry, its Comptroller. Williams also testified in Defendants’ side of the case. The Court denied Defendants’ oral motion for a directed verdict and after submission of exhibits and closing arguments, the case was submitted to the Court for ruling.

¹ On January 28, 2015, Controllix filed a motion for temporary restraining order and preliminary injunction seeking to enjoin Defendants Dennis Williams, William Melis, Zero Loss Engineering, LLC, and Kodiak Electric, LLC, from allegedly violating confidentiality and non-compete agreements Williams and Melis signed with Controllix. The Court granted Controllix’ request for a temporary restraining order on January 29, 2015 but reserved ruling on the issue of the Preliminary Injunction.

FACTS

{¶2} After considering all the evidence, the Court finds that: Controllix holds itself out as a manufacturer, installer, and servicer of low and medium voltage, metal-enclosed capacitor banks and harmonic filters designed to provide power factor correction for utility, industrial, institutional and commercial applications. Williams was initially employed in 2006 by Controllix and worked in the shop. Williams ultimately rose to the position of Field Service Manager. In conjunction with his employment, Williams entered into a Noncompetition, Trade Secret and Confidentiality Agreement with Controllix on June 1, 2006. Melis began his employment with Controllix in November 2001 as a salesperson. When he quit Controllix in January 2015, Melis' title was Vice-President of Sales². During Melis' employment with Controllix, he signed a Confidentiality, Non-Solicitation and Non-Competition Agreement, dated August 27, 2007. The agreements signed by Williams and Melis prohibited them from competing with Controllix in the power correction industry during, and five years after the termination of, their employment with Controllix

{¶3} In June of 2014, Williams and Melis "began doing work that [they] felt Controllix could not perform" regarding the service, repair, and modification of capacitor banks and/or harmonic filters for existing Controllix customers and others. Williams and Melis performed these "side jobs" via two Limited Liability Companies they set up - Zero Loss

² Melis' title while at Controllix is disputed. According to Controllix, Melis was the Vice President of Sales. According to Melis, however, he was Vice President Electrical Engineering.

Engineering and Kodiak Electric.³ In January of 2015, both Williams and Melis quit their jobs with Controllix⁴ and solicited business in the power factor correction field from Controllix customers and others until this Court issued a temporary restraining order on January 29, 2015.

{¶4} Based on the evidence presented, the Court finds that there is a substantial likelihood that Controllix would succeed on the merits of its claim that Williams and Melis violated their respective Agreements with Controllix. For example, Williams' Agreement states, in pertinent part, as follows: "During his employment with [Controllix] * * * Williams shall not, directly or indirectly * * * compete in any manner with [Controllix] and * * * will not * * * maintain or support products or services of the nature currently offered by or competitive with those offered by [Controllix] to any customer of [Controllix] * * * within the [United States]." Additionally, Melis' Agreement states, in pertinent part, as follows: "[Melis] agrees that during the term [of his employment with Controllix], * * * [Melis] shall not, * * * directly or indirectly, * * * engage in any of the following activities anywhere in any state in which [Controllix] transacted or attempted to transact business * * *: sell or market any [Controllix] equipment, machinery or services, or equipment, machinery and services similar to or competitive with those of [Controllix] * * *."

{¶5} In addition to the above specific restrictions, Melis' Agreement prohibits him from employment, in any capacity, within Controllix' industry, which is defined as "medium

³ Zero Loss Engineering, LLC was organized on February 25, 2013, and Kodiak Electric, LLC was organized on January 13, 2015.

⁴ Melis quit on January 8, 2015, and Williams quit on January 13, 2015.

and low voltage capacitors, mobile capacitors, metal-enclosed capacitor banks, harmonic filter banks and harmonic filters” for five years after his employment with Controllix ends. Furthermore, Williams’ Agreement prohibits him from employment, in any capacity, within Controllix’ “business,” which is defined as “the designing, manufacturing and selling [of] power factor correction equipment products and services associated with those products” for five years after his employment with Controllix ends.

LAW & ANALYSIS

{¶6} A party requesting a preliminary injunction must show that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction. Furthermore, the party seeking injunctive relief must establish its right to such relief by clear and convincing evidence. *Kyrkos v. Superior Beverage Group, Ltd.*, 2013-Ohio-4597, 8th Dist. No. 99444, ¶12.

{¶7} The Court first analyzes the second prong of the preliminary injunction test. When seeking the equitable remedy of an injunction, the plaintiff must show, by clear and convincing evidence, actual or threatened irreparable harm. *Ohio Urology, Inc. v. Poll*, 72 Ohio App.3d 446, 454 (1991). "Irreparable harm exists when there is a substantial threat of material injury which cannot be adequately compensated through monetary damages," and the actual impact and value of the loss of clients is difficult if not impossible to determine. *Restivo v. Fifth Third Bank*, 113 Ohio App.3d 516, 521 (1996). Therefore, evidence of harm to an employer through the loss of customers

and/or the opportunity to retain them as a result of a defendant's actions is sufficient to establish irreparable harm. See, *Charles Penzone, Inc. v. Koster*, 10th Dist. No. 07AP-569, 2008-Ohio-327, ¶23.

{¶8} The testimony of both Williams and Melis, as well as Plaintiff's Exhibit 4(A), demonstrates that defendants had solicited and were doing business with Controllix customers both before and after they left Controllix's employ. This is sufficient to establish the element of irreparable harm, as "[a]ttempting to start one's own business by taking away customers that were serviced by a former employer is precisely the type of irreparable harm that a covenant not to compete is designed to prevent." *Mike McGarry & Sons, Inc. v. Gross*, 8th Dist. No. 86603, 2006-Ohio-1759, ¶20.

{¶9} To prevail on the merits of enforcing a non-compete agreement, the employer would have to show that the restraint imposed by the non-compete agreement was reasonable. See, *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 25, 325 N.E.2d 544 (1975). In determining whether the restrictions are reasonable, the following factors should be considered: "[t]he absence or presence of limitations as to time and space * * *; whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a

bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment." *Kyrkos, supra*, at ¶20.

{¶10} In this case, Controllix established, by clear and convincing evidence, that Williams and Melis were both employed by Controllix and had executed non-competition agreements years before they left the employ of Controllix. The non-compete agreements contain slightly different terms, but both prohibit Defendants from working in the power modulation industry for a period of five years after termination of employment. These restrictions operate wherever Controllix does business, which uncontroverted testimony established as 44 of the 48 contiguous states and five provinces in Canada. The Court, having found that Controllix is likely to prevail on the merits of its claim for breach of the non-compete agreements, now focuses its attention on the issue of whether these restrictions are reasonable.

{¶11} The Agreements prohibit competition in the power factor correction field for five years after employment termination. This would make the Agreements effective until January of 2021. In examining the reasonableness of the restrictions contained in the non-compete agreements, one of the factors for review is whether the employee represents the sole contact with the customer. It is clear from the testimony at the hearing that Williams and Melis were not the sole contacts with Controllix customers. They were two members of a relatively small Controllix "team" that dealt with customers. There was no evidence that any Controllix customer discontinued its relationship with

Controllix due to Melis' and/or Williams' departure. This factor favors Defendants' position on this issue.

{¶12} The next factor for the Court to consider in determining the reasonableness of the non-compete agreements is whether the employee is possessed with confidential information or trade secrets. In addition to language barring defendants from working in the power correction industry, the Agreements also contain confidentiality provisions. According to the evidence presented, Williams and Melis are still in possession of or have access to some or all of the information on Controllix' server.⁵ The Court finds that although Controllix presented no evidence that Melis and/or Williams were in possession of any information which could be classified as a trade secret, the information contained on Controllix's server was not generally known or available to the public, was password protected, and is therefore deemed to be confidential. By admittedly downloading information from Controllix's server, Melis (and by inference, Williams) is in possession of confidential information belonging to Controllix. Possession of this information violates the confidentiality provisions contained within the Agreements and supports Controllix's position regarding enforcement of the Agreements.

{¶13} Other factors to consider in terms of the reasonableness of a restrictive covenant include whether the covenant seeks to eliminate unfair competition or mere ordinary competition; whether it would stifle the inherent skill of the employee; and whether the

⁵ During the Hearing, Melis admitted to downloading information from Controllix's server.

benefit to the employer is disproportional to the detriment the employee will suffer if the restriction is enforced. Non-compete agreements may restrict parties from engaging in unfair competition but may not interfere with ordinary competition. See, generally, *Century Bus. Servs., Inc. v. Urban*, 179 Ohio App.3d 111, 2008-Ohio-5744, ¶¶ 54-56. The broader the scope and timeframe of the Agreements, the more they potentially seek to eliminate ordinary competition. The evidence at the hearing failed to establish why a five-year restriction against Williams and Melis working within the power correction field was necessary. There was some testimony that it took approximately four years for Controllix to bring a particular sale to fruition, but this appeared to be the exception rather than the rule, and is insufficient to support Controllix's position on this issue.

{¶14} Next, in considering whether the restrictive covenants would stifle the inherent skill of the employee, testimony indicated that Williams and Melis each acquired and developed skills and experience in the power correction field while employed at Controllix. However, the evidence also showed that the education and training of Williams and Melis was not specific to Controllix and would be adaptable to other areas of employment. Controllix argues that the restrictions contained in the Agreements do not bar Williams' and Melis' sole means of support. However, because their training was more general than specific, the Court finds that restricting Williams and Melis from working in the power factor correction industry for five years goes beyond what is necessary to protect Controllix's legitimate business interests and would stifle Williams' and Melis' inherent skill and experience.

{¶15} The Court also finds that preventing Williams and Melis from working anywhere within the power correction field for five years would deny them their main, if not only, source of income. Agreements not to compete that prevent an employee from using his or her general skills and experience in the marketplace weigh against enforcement. *Kyrkos, supra*, at ¶25. The Court therefore finds that the benefit to Controllix in enforcing the Non-Compete Agreements as written is disproportional to the detriment Williams and Melis would suffer if restrained for that period.

{¶16} A covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests. *Raimonde, supra*, 42 Ohio St.2d 21, 26. Courts are permitted to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and may evaluate all the factors comprising 'reasonableness' in the context of employee covenants. *Id.*, at 25. Based on the facts adduced at the hearing, the Court finds the restrictive covenants at issue to be unreasonable due to the length of time they seek to prevent Williams and Melis from working in the power correction field. However, the Court finds the restrictions to be reasonable if reduced to a time frame more appropriate to protecting the legitimate business interests of Controllix while not interfering with Williams' and Melis' right to gainful employment.

{¶17} Therefore, while this action remains pending, Defendants Dennis Williams and William Melis are enjoined from designing, manufacturing, selling, and servicing

medium and low voltage power factor correction equipment, including: capacitors, mobile capacitors, metal-enclosed capacitor banks, harmonic filter banks, and harmonic filters. Furthermore, Williams and Melis are prohibited from using Controllix's customer list and customer contact information for any reason. This prohibition shall take effect as of the date this ruling is docketed and shall expire one year from that date.

{¶18} Defendants are also ordered to return any and all information, including electronically stored information, belonging to Controllix, which Defendants now have in their possession or, as referenced above, have access to, even if it is not within their immediate possession. Defendants shall not access, alter, modify, delete, or destroy any information that was directed to, uploaded, or stored on remote storage devices or services referred to or known as: i-Cloud Drive, Drop Box, Sky Drive, and/or Google Drive. Defendants shall provide Plaintiff's counsel with access to any sites or devices used to store electronic information belonging to Controllix sufficient to assure Plaintiff that all such information, and any copies thereof, has been returned to Controllix or otherwise removed pursuant to this Court's order or by agreement of the parties.

{¶19} This Order is contingent upon Plaintiff posting a bond of sufficient surety, which the Court determines to be \$150,000.00 for Melis and \$100,000.00 for Williams, to satisfy the requirements of Civil Rule 65(C). This Order shall not operate to restrain Defendants as stated above until Plaintiff complies with this bond requirement.

CONCLUSION

{¶20} Plaintiff Controllix Corporation’s Motion for Preliminary Injunction is granted, in part. The relief requested is modified as detailed in this Opinion and Journal Entry. The case remains pending on Controllix’s claims against all defendants as well as all Counterclaims now pending before the Court.

Date: _____

JUDGE DICK AMBROSE

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