

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AFFINITY WEALTH MANAGEMENT, LLC,	:
	:
Plaintiff,	:
	:
v	: Civil Action
	: No. 2019-0441-JTL
BRENDAN McPOYLE,	:
	:
Defendant.	:

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Chancery Court Chambers  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware  
Tuesday, June 18, 2019  
3:00 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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TELEPHONIC ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND RULING OF THE COURT

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CHANCERY COURT REPORTERS  
Leonard L. Williams Justice Center  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801  
(302) 255-0532

1 APPEARANCES: (via telephone)

2 FRANCIS G. X. PILEGGI, ESQ.  
3 CHAUNA A. ABNER, ESQ.  
4 Eckert, Seamans, Cherin & Mellott, LLC  
for Plaintiff

5 NEIL R. LAPINSKI, ESQ.  
6 PHILLIP A. GIORDANO, ESQ.  
Gordon, Fournaris & Mammarella, P.A.  
7 for Defendant

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1 THE COURT: This is Travis Laster  
2 speaking. Who is on the line for the plaintiff?

3 MR. PILEGGI: Good afternoon, Your  
4 Honor. This is Francis Pileggi. Also with me from my  
5 office is Chauna Abner.

6 THE COURT: Welcome.

7 And how about for the defendant?

8 MR. LAPINSKI: Neil Lapinski with Phil  
9 Giordano from my office, Your Honor. Good afternoon.

10 THE COURT: Welcome to you as well.

11 Mr. Pileggi, do you want to go ahead?

12 MR. PILEGGI: Yes, Your Honor, with  
13 your permission. May it please the Court, Francis  
14 Pileggi of Eckert Seamans for Affinity Wealth  
15 Management.

16 As Your Honor knows, Delaware law is  
17 well established that restrictive covenants are  
18 generally enforceable. And there are plenty of  
19 reported decisions allowing injunctive relief to  
20 enforce them, as well as specifically recognizing  
21 irreparable harm to exist where a former employee is  
22 using a client list to solicit clients of his former  
23 employer in this context. In a little more than a  
24 week since he left, the defendant has transferred

1 accounts to his new employer with assets valued at  
2 over \$9 million. To use an analogy, some of the  
3 horses have already left the barn, and we're asking  
4 the Court to prevent the defendant from taking any  
5 more horses from the barn or to keep the door closed,  
6 as it were.

7           The Court is familiar with the  
8 prerequisites for granting a motion for expedited  
9 proceedings. The record establishes that we have a  
10 colorable claim. In their responses, I did not see  
11 any denials from the defendant denying a breach.  
12 There are plenty of Delaware cases that recognize  
13 irreparable harm in this context and balancing the  
14 pros and cons. The defendant, in the agreement, has  
15 already consented to injunctive relief and has already  
16 expressly agreed that in the event of a breach,  
17 irreparable harm exists.

18           And I realize and appreciate the  
19 nuance distinction between a TRO and a preliminary  
20 injunction. And when we filed this complaint with our  
21 motions, we did not know how soon we would be heard by  
22 the Court or how long it would take the defendant to  
23 hire counsel. I understand that now that we have the  
24 responses from the defendant and able counsel, that

1 this might be more like a preliminary injunction  
2 standard, which requires a probability of success on  
3 the merits, which I think we also satisfy. In  
4 essence, without getting too caught up in the  
5 terminology, we were really seeking at this early  
6 stage for a status quo order.

7           By way of background, I've actually  
8 represented Affinity Wealth Management for the last 25  
9 years or so, and we have had occasion to enforce many  
10 restrictive covenants. And in the past few times that  
11 I have obtained injunctive relief, we entered into a  
12 status quo order. We tried to do that in this  
13 instance, but I understand that my friends  
14 representing the defendant -- I understand his  
15 position, although he can more eloquently state his  
16 position -- my understanding is he's not interested --  
17 or his client is not interested in a status quo order.  
18 I understand that one of the key issues at this early  
19 stage is an application of the liquidated damages  
20 clause and how that interfaces with or impacts the  
21 prerequisite for irreparable harm. So I'd like to  
22 address that.

23           By its terms, paragraph 6, the  
24 "Liquidated Damages" provision, only applies to

1 violations of paragraph 2 of the noncompetition  
2 agreement. And it expressly states in the first  
3 sentence of the "Liquidated Damages" clause it is in  
4 addition to any other equitable relief. We will  
5 stipulate on the record that we are not seeking to  
6 enforce that "Liquidated Damages" provision against  
7 any clients who stay and who the defendant does not  
8 solicit or does not service.

9           And I think it might be helpful, very  
10 briefly, as briefly as I can, to describe some  
11 background of the "Liquidated Damages" clause. And  
12 maybe it was not as artfully drafted as it should have  
13 been, but it was added to this restrictive covenant  
14 after the last injunctive relief case we had for the  
15 last employee who left. And after we obtained a  
16 status quo order, and while we were preparing for  
17 trial, we spent an enormous amount of time and effort  
18 and money trying to quantify the damages for the  
19 clients who had already left and were not coming back.  
20 And my recollection is that there was a lot of  
21 competing or conflicting expert testimony on exactly  
22 what the value of those are.

23           So the purpose -- I realize this  
24 might not be in the record, but we'll get it in the

1 record -- the purpose of that "Liquidated Damages"  
2 clause was limited to the value or the quantifying  
3 damages for clients who left Affinity Wealth  
4 Management and were not returning as opposed to those  
5 who remained. So if that "Liquidated Damages" clause  
6 were to apply to all of the clients, including those  
7 who remain, I think it could quite likely be conceived  
8 or perceived or interpreted as punitive, which my  
9 understanding is liquidated damages can't be  
10 enforceable if they are punitive because -- if the  
11 defendant had to pay 2.5 times the revenue of all the  
12 clients who stayed at Affinity Wealth Management, we'd  
13 still be getting a revenue for those clients and the  
14 defendant would still have to pay 2.5 times that  
15 revenue. So if it were interpreted in that way, I  
16 think it would be punitive and likely not enforceable.  
17 And therefore, if an interpretation is likely not  
18 enforceable, then it's not likely a reasonable  
19 interpretation.

20 I would like to review my notes, Your  
21 Honor. I want to try not to be repetitive.

22 So in sum, paragraph 6, the  
23 "Liquidated Damages" provision, should not be read to  
24 apply to clients who remain at Affinity Wealth

1 Management and who the defendant is enjoined from  
2 servicing or soliciting and should only apply to those  
3 clients who have left as a result of the defendant's  
4 breach and who are not returning. Any other  
5 interpretation would likely make that provision  
6 unenforceable because it would be punitive. And this  
7 court generally is not considered to have jurisdiction  
8 over punitive damages.

9           The last point I'd like to make, Your  
10 Honor, in closing is that we also have a claim under  
11 the Delaware Trade Secrets Act and at Section 2002(a)  
12 of Title 6 of the Delaware Code. That act provides a  
13 separate basis for an injunction for misappropriation  
14 of trade secrets. And Delaware law has recognized  
15 client lists as trade secrets, as in this case. So  
16 there's an additional statutory basis for injunctive  
17 relief in addition to other statutory remedies  
18 available.

19           Unless Your Honor has questions, that  
20 completes my opening remarks.

21           THE COURT: Thank you, Mr. Pileggi.  
22           Mr. Lapinski.

23           MR. LAPINSKI: Thank you, Your Honor.  
24 On behalf of Mr. McPoyle, I want to start, I think,

1 with our discussions over a status quo order, Your  
2 Honor. We did attempt to negotiate one. It did fail.  
3 The request, frankly, on the first draft was much  
4 broader than the, admittedly, narrow relief sought in  
5 the TRO motion. So with that said, I think I'll  
6 briefly go over the argument and then address  
7 Mr. Pileggi's points.

8           The argument is also narrow. It's  
9 simply, as Mr. Pileggi stated it, in the presence of a  
10 liquidated damages clause which seems to cover all of  
11 the harms alleged in the verified complaint. And that  
12 is solicitation that results in loss of clients or the  
13 use of confidential information, which, as pled, is  
14 client lists that would be used to solicit clients who  
15 then would be lost, would result in 2.5 times  
16 essentially the annual fee or average annual fee  
17 garnered by that client. Under those circumstances,  
18 in light of the rationale in the *Lyons* case, for  
19 instance, Vice Chancellor Glasscock's case, there is  
20 no irreparable harm because there are easy calculable,  
21 ready damages.

22           And as I read the complaint, one of  
23 the requests for relief is to pay damages for the  
24 wrongs alleged, which, again, as I said, are unlimited

1 to poaching clients. Using CI is the acronym. And  
2 now I'm hearing for the first time that the clients at  
3 Mr. Pileggi's firm may have drafted "may not be  
4 enforceable" because it could be deemed punitive to  
5 the extent that it would apply to clients who were  
6 solicited unsuccessfully by folks like Mr. McPoyle.

7           But that same contract has a  
8 "Severability" clause at paragraph 7. "In the event  
9 that one or more of the provisions of this Agreement  
10 or any word, phrase, clause, sentence, or other  
11 portion thereof (including, without limitation, the  
12 geographical and temporal restrictions contained  
13 herein) shall be deemed to be illegal or unenforceable  
14 for any reason, such provision or portion thereof  
15 shall be modified or deleted in such a manner as to  
16 make this Agreement, as modified, legal and  
17 enforceable to the fullest extent permitted," et  
18 cetera, et cetera.

19           So our position, again, is a simple  
20 one. In the presence of such a liquidated damages  
21 clause that covers all of the harm alleged in the  
22 complaint, there cannot be irreparable harm. And  
23 therefore, a temporary restraining order and, for that  
24 matter, a preliminary injunction are unavailable to

1 this plaintiff.

2 THE COURT: Thank you very much. Any  
3 reply, Mr. Pileggi?

4 MR. PILEGGI: Your Honor, if I may.  
5 I'll try to be as brief as possible.

6 I appreciate Mr. Lapinski referencing  
7 paragraph 7 of the agreement, the "Severability"  
8 clause, which, as I understand it, would allow the  
9 Court to only enforce those parts of the "Liquidated  
10 Damages" clause that are not punitive. Paragraph 6,  
11 the "Liquidated Damages" clause, specifically only  
12 relates damages for paragraph 2. Paragraph 2  
13 specifically refers to clients that have left as a  
14 result of the defendant's actions. And I acknowledge  
15 that it's not as artfully drafted as it should be, but  
16 we're willing to stipulate that that's the only  
17 limited application of that damage clause that we're  
18 seeking to enforce.

19 THE COURT: All right. Thank you all.  
20 I appreciate you getting on the phone. It's helpful  
21 to have your presentations. I am going to grant the  
22 motion for a temporary restraining order. I do so  
23 based on the terms of the contract and the  
24 stipulations that it contains.

1           The primary argument against the  
2 issuance of injunctive relief is the presence of this  
3 "Liquidated Damages" clause. Two things make me think  
4 that this is not a complete remedy. The first is the  
5 introduction to the "Liquidated Damages" provision,  
6 which states that "The parties expressly agree that in  
7 addition to the injunctive and equitable remedies  
8 provided for herein, they have determined that a fair  
9 formula to determine the monetary loss," et cetera.  
10 The point is that that language is in there reflecting  
11 "in addition to," which suggests that this damages  
12 provision is there for a monetary award that does not  
13 foreclose the availability of injunctive relief.  
14 Instead, as it says, it is to be in addition to that  
15 injunctive relief.

16           I also credit the argument that the  
17 "Liquidated Damages" provision only covers paragraph 2  
18 and does not necessarily cover the other restrictive  
19 covenants in the agreement. Part of the reason why I  
20 think that this structure makes sense and still holds  
21 out the possibility of injunctive relief is that the  
22 actual harm from individual clients isn't the only  
23 type of harm that a business can suffer. It can  
24 suffer loss of goodwill. And goodwill, read broadly,

1 takes in all kinds of factors, including reputation in  
2 the marketplace, future earning power, ability to  
3 attract new clients, et cetera. So it's not only the  
4 loss of existing clients that's problematic, which the  
5 "Liquidated Damages" clause seems to go some way to  
6 addressing, but also these other factors.

7           So I am going to enter the temporary  
8 restraining order. I would ask you all to work on  
9 getting this litigation resolved fairly quickly. I  
10 think that to the extent that there are going to be  
11 limitations on this individual, he deserves to know  
12 that. To the extent that there are defenses to this  
13 individual's restrictive covenants such that they  
14 should not be fully enforced or enforced at all, then  
15 that should be addressed as quickly as possible so  
16 that he can start working again. So that's my ruling.

17           Mr. Pileggi, do you have any  
18 questions?

19           MR. PILEGGI: No, Your Honor, other  
20 than as to the form of order. Is that something you'd  
21 like us to submit, or is the one that we attached to  
22 our motion sufficient? I'm just looking for  
23 clarification from the Court on that.

24           THE COURT: Let me take a look at it

1 now. I'll confess that I focused on your briefs, I  
2 read the agreement, and I didn't look at the form of  
3 order. So let me take a look at that right now, and  
4 I'll give you an answer.

5 I'll tell you that this looks fine to  
6 me.

7 Mr. Lapinski, is there anything  
8 specific about the form of order -- I know that you  
9 disagree with the ruling, and I'm not asking you to  
10 waive anything by weighing in on the form of order --  
11 but is there anything about the form of order that you  
12 find problematic? It seems relatively narrow, at  
13 least from my look at it.

14 MR. LAPINSKI: No, Your Honor.  
15 Candidly, we would have agreed to a status quo limited  
16 to those two forms of relief.

17 THE COURT: Well, there you have it.

18 Mr. Lapinski, any other questions from  
19 your side?

20 MR. LAPINSKI: No, Your Honor. Thank  
21 you for making the time this afternoon.

22 THE COURT: Well, it's good to have  
23 you all on the phone. If you could get me some type  
24 of schedule that would put this case on the right

1 track to getting resolved. I think these types of  
2 matters benefit from being handled more quickly rather  
3 than less quickly for the interests of all concerned.

4 Have a good day, everyone.

5 (Proceedings concluded at 3:16 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 15 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 11 through 15, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 21st day of June, 2019.

/s/ Dennel Niezgoda  
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Dennel Niezgoda  
Official Court Reporter  
Registered Merit Reporter  
Certified Realtime Reporter