COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 0x-XX

xxxxxxxxxx INSURANCE AGENCY, INC., Plaintiff	)
v.	)
Mxxxxx Sxxxxxx, and XXXXX, Defendants	)

DEFENDANT Mxxxxxx Sxxxxxxxxx'S MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. FACTS

a. Mxxxx Sxxxx has been licensed as an insurance agent and broker in Massachusetts since 1986. On February 2, 1992, he began his employment as a producer with Xxxxx Xxxxx Insurance Agency, Inc., and worked there until May 12, 2006. On May 15, 2006, he began his current employment with Xxxxx Insurance Xxxxxxx. Sxxxx Aff., ¶ (Tab A, attached hereto).

b. The employment agreement which is Exhibit 1 to plaintiff's moving papers was written by the Xxxxx Agency. It was signed after Mr. Sxxxx had been working at the Xxxxx Agency for 7 months, and no additional consideration was given to Mr. Sxxxx to sign it. Mr. Sxxxx signed it reluctantly and only after significant pressure was applied to him by Xxxxx Xxxxx. Sxxxx Aff., ¶2.

c. The employment agreement prohibits Mr. Sxxxx for five years from "not directly or indirectly . . . solicit or accept the customers, trade or business, or interfere with the customer list . . . of the Agency anywhere in the County of Hampden, Massachusetts.

Nor shall [Mr. Sxxxx] refer any such Agency business to any other agency or person." See Ex. 1 to plaintiff's moving papers, §V.

c. The agreement further provides Mr. Sxxxx "will not disclose to any third party . . . any information which could reasonably be considered confidential including customer lists." Id.

d. The agreement then provides that the agency may bring suit in court to obtain damages or enforce specific performance for breach of the restrictive covenant. Agreement, §V. Elsewhere, the agreement provides: "Any controversy, claim or breach arising out of the contract shall be submitted for settlement to an arbitrator" either appointed by agreement of the parties of the American Arbitration Association. Id., at Agreement, §6.3.

e. When Mr. Sxxxx terminated his employment with the Xxxxx Agency he did not take any confidential customer list or other property of Xxxxx with him. Sxxxx Aff., ¶4.

f. On May 22, 2006, Mr. Sxxxx sent an announcement letter written on Xxxxx Insurance Xxxxxxx letterhead to 86 people/businesses, as follows:

> I want to let you know I have accepted a new position as Vice President of the Xxxxx Insurance Xxxxxxx at ### Xxxx Street in Xxxxfield, MA. Although I have moved only a few blocks down the street, this new position allows me to represent more insurance companies. I'm looking forward to this great opportunity and I'm confident all my customers will benefit. If you need to contact me, my phone number is (413) ###-XXXX (x31). We also have a toll free number listed below. My email address is MSxxxx@XxxxxInsuranceXxxx.com I'm looking forward to hearing from you.

Sxxxx Aff., ¶5.

g. On or about June 29, 2006, Mr. Sxxxx sent a solicitation letter to Lxxxxx Bxxxxxxx, a client of the Xxxxx Agency. Ex. C to plaintiff's moving papers. The information concerning Lxxxxxxx's current premium and experience modification rating was gleaned from the internet, more particularly the website of the Massachusetts Workers' Compensation Rating and Inspection Bureau. Sxxxx Aff., ¶6.

h. Lxxxxxxx *did not* move any of its insurance business to Xxxx Insurance Xxxxx. Other than Lecrenski, Mr. Sxxxx has not sent two other letters to customers of the Xxxxx Agency . Id., ¶8.

I. Since he began his new employment in May, there have been eight Xxxxx Agency-Mike Sxxxx clients in Hampden County who have moved one or more policies to Xxxxx. The accounts and the circumstances are set forth below:

Mxxx X. Sxxxx	Unsolicited. Mike Sxxxx's wife.
Tim & Regina Xxxxxx	Unsolicited. Neighbors and personal friends of Mary Pat Sxxxx (Mike's wife).
Jim & Ann Xxxxx	Unsolicited. Neighbors and good friends of Mike Sxxxx.
Mxxxxxx Market	Unsolicited. Mike Sxxxx eats lunch there twice a week, owner asked him to quote ("you're my agent").
XXXXfield Womens' Club	Unsolicited. Client contacted Mike Sxxxx and asked him to quote.
Gerry Bxxxx	Unsolicited. Existing Xxxxx Customer for homeowners. Moved his auto policy and two commercial policies from Xxxxx to Xxxxx.

Cxxxx Real Estate	Unsolicited. Client contacted Mr. Sxxxx, was unhappy with Xxxxx. Mr. Sxxxx advised her to keep her contractor's policy with Xxxxx, but did obtain dwelling policy for two-family for her.
Hxxxx Realty	Unsolicited. Client had policies with three different agencies (Xxxxx, Xxxxx and another) and wanted to consolidate. He does banking business with Xxxxx.

Sxxxx Aff., ¶7.

j. During the time he was employed by the Xxxxx Agency Mr. Sxxxx was awarded bonuses and permitted to buy shares in the agency. He owns 5% of the Xxxxx Agency. Xxxxx Xxxxx has refused Mr. Sxxxx's request to redeem his shares of stock. Id., ¶4.

II. LAW

In determining whether to grant a preliminary injunction, this Court must perform the three-part balancing test articulated in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-17 (1980). First, the court must evaluate the moving party's claim of injury and its likelihood of success on the merits. Id. at 617. Second, it must determine whether failing to issue a preliminary injunction would subject the moving party to irreparable injury losses that cannot be repaired or adequately compensated upon final judgment. Id. at 617 & n.11. Third, "[i]f the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." Id. at 617. In balancing these factors, "[w]hat matters as to each party is not the raw

amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." Id.

Irreparable harm occurs when a loss of rights cannot be remedied even though the party seeking an injunction prevails after a full hearing on the merits. Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990).

While covenants not to compete may be enforced in limited circumstances to protect the legitimate business interests of the employer, they are not favored and may not be used to restrain free competition or to deprive the employee of the opportunity to use acquired skills and knowledge to secure other employment. New England Canteen Services v. Ashley, 371 Mass. 671, 674 (1977); Marine Contractors Co., Inc. v. Hurley, 365 Mass 280, 287-88 (1974); Club Aluminum v. Young, 263 Mass. 233, 226-27 (1928). The reason for this rule is based on sound public policy considerations. There is a public policy in favor of every person carrying on his trade or occupation freely. Woolley's Laundry v. Silva, 304 Mass 383, 387 (1939); Commonwealth v. CRINC, 392 Mass. 79, 87-88 (1984).

Although courts may enforce non-competition agreements, they are scrutinized carefully and strictly construed against the employer. Sentry Insurance v. Firnstein, 14 Mass. App. Ct. 706, 707 (1982); Alexander & Alexander, Inc. v. Danahy, 21 Mass.App.Ct. 488, 496 (1986). An employer may successfully seek enforcement of the terms of a non-solicitation agreement with a former employee when it demonstrates that the agreement is necessary to protect a legitimate business interest of the employer, is supported by consideration, is reasonably limited in all circumstances, including time and space, and is otherwise consonant

with public policy. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 102-03 (1962). See also, Blackwell v. E.M. Helides, Jr., Inc., 368 Mass. 225, 228 (1975); All Stainless, Inc. v. Colby, 364 Mass. 773, 778 (1974). The burden of proof as to the enforceability of a non-competition agreement is on the employer. Folsom Funeral Service v. Rodgers, 6 Mass.App.Ct. 843, 843 (1978).

Employee covenants not to compete generally are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer. Novelty Bias Binding Company v. Shevrin, 342 Mass. 714 (1961). Such legitimate business interests might include trade secrets, other confidential information or the good will of the employer that was acquired through dealings with its customers. See All Stainless, Inc. v. Colby, 364 Mass. 773 (1974). Protection of the employer from ordinary competition, however, is not a legitimate business interest and a covenant not to compete designed solely for that purpose will not be enforced. Richmond Brothers, Inc. v. Westinghouse Broadcasting Company, Inc., 357 Mass. 106, 111 (1970).

A non-competition agreement to be enforceable also must be reasonable in geographical scope and length of time, in other words, must be reasonable in time and space. See Blackwell v. E.M. Helides, Jr., Inc., 368 Mass. 225, 228; Becker College of Business Administration and Secretarial Science v. Gross, 281 Mass. 355 (1933).

The Court must also consider and balance the harm to the Plaintiff from failure to grant the injunctive relief it seeks. Contracts like the one before me here, "are 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 suffer later on through the loss

of his livelihood." Sentry Insurance v. Firnstein, 14 Mass. App. Ct. 706 (1982). Accord, Boulanger v. Dunkin' Donuts, Inc., 442 Mass. 635 (2004). The burden is on the Plaintiff to show that the non-competition part of the agreement is necessary to achieve some protectable purpose other than a mere shelter from ordinary competition. See Richmond Brothers, Inc. v. Westinghouse Broadcasting Corp., 357 Mass. 106 (1970).

"The mere fact that one could obtain the name and contact information of a customer via public means does not negate confidentiality." Oxford Global Resources, Inc. v. Guerriero, 2003 WL 23112398, *8 (D.Mass. 2003). However, information is not confidential if competitors could obtain the same information from a third party, or the information is obtainable from publicly available sources. Id. Consequently, it is clear that "[o]ne seeking to prevent the disclosure or use of trade secrets or information must demonstrate that he pursued [an] active course of conduct designed to inform his employees that such secrets and information were to remain confidential." Jet Stray Cooler v. Crampton, 361 Mass. at 841. To that end, the employer must "exercise eternal vigilance," and the employee must be "constantly admonished" that information is confidential and "must be kept so." J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 357 Mass. 728, 738 (1970).

A trade secret is defined as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §39 (1995). In Jet Spray Cooler, Inc. v. Crampton, the SJC adopted the six factor test set forth in the Restatement of Torts for defining the term trade secret. Therefore, when determining whether a piece of information qualifies as a trade secret, a court in Massachusetts must

consider the following factors:

- the extent to which the information is known outside of the business;
- the extent to which it is known by employees and others involved in the business;
- the extent of measures taken by the employer to guard the secrecy of the information;
- the value of the information to the employer and to his competitors;
- the amount of effort or money expended by the employer in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

Under Massachusetts law, customer relationships themselves are not protectable. Slade Gorton & Co. v. O'Neill, 355 Mass. 4, 9 (1968). Also, an employee may take personal skill that was earned before arrival, even if the skill was enhanced while employed. Junker v. Plummer,[1] 320 Mass. 76, 79 (1946); Dynamics Research Corp.,supra at 274-75 (1980). Non-compete agreements are not favored and may not be used to restrain free competition or to deprive the employee of the opportunity to use acquired skills and knowledge to secure other employment. New England Canteen Services v. Ashley, 371 Mass. 671, 674 (1977); Marine Contractors Co., Inc. v. Hurley, 365 Mass 280, 287-88 (1974); Club Aluminum v. Young, 263 Mass. 233, 226-27 (1928).

Moreover, it is firmly established in Massachusetts law that when a court is determining "whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed

[1] For instance, in Richmond Bros., Inc. v. Westinghouse Broad. Co., 357 Mass. 106 (1970), radio talk show personality allegedly breached his covenant not to compete by working for a competing radio station. The court stated: "An employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment. The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer." Id., at 110.

against both the reasonableness of the restraint imposed on the former employee and the public interest."[2] When the covenant is too encompassing in time, in area, or in any other respect, only those portions that can be severed and are reasonable will be enforced. Finally, an employer cannot use an employment contract to restrain "ordinary competition," which occurs when an employee is rightfully terminated and takes the expertise of the trade acquired while working for the former employer and applies these skills for the benefit of a new employer, often a rival in the trade of the former employer. See Club Aluminum Co. v. Young, 263 Mass. 223, 226-27 (1928) ("An employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment.").

A non-competition agreement which is too broad in time, geography or subject matter, will be enforced only to the extent it is reasonable. All Stainless, Inc. v. Colby, 364 Mass. 773, 778 (1974). See also W.B. Mason Co., Inc. v. Staples, Inc., 2001 Mass. Super. LEXIS 50, at *19 (van Gestel, J.) ("A non-competition agreement, to be enforceable, also must be reasonable in geographic scope and length of time.").

III. ARGUMENT

a. THE XXXXX AGENCY HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

"The sine qua non of [preliminary injunction] formulation is whether the plaintiffs are

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[2] All Stainless, 364 Mass. at 778; accord Richmond Bros., 357 Mass. at 110; Cedric G. Chase Photo. Lab., Inc. v. Hennessey, 327 Mass. 137, 139 (1951); Economy Grocery Stores Corp. v. Mc Menamy, 290 Mass. 549, 553(1935); Walker Coal & Ice Co. v. Westerman, 263 Mass. 235, 238 (1928); see also RESTATEMENT OF CONTRACTS 515-516 (1932); 6A Arthur Linton Corbin, Corbin on Contracts 1394 (1962); Annotation, Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction, 43 A.L.R.2d 94, 116 (1955).

likely to succeed on the merits. Warer v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993). Plaintiffs who are unable to prove they will "probably succeed on the merits" are not entitled to a preliminary injunction. Roll Systems, Inc. v. Shupe, 1998 U.S. Dist. LEXIS 3142, at *3 (D.Mass.). Here, except for one improvidently mailed letter, the Xxxxx Agency offers no proof - - other than inadmissible and uncorroborated hearsay - - to demonstrate Mike Sxxxx has been soliciting Xxxxx Agency clients in Hampden County. Further, there is no showing of any damages suffered by the Xxxxx Agency over the last six months.

For there to be a breach of contract, a party must prove a material and substantial breach. Mr. Sxxxx's letter to Lxxxxxx hardly suffices, but even if it did there is no justification for the relief sought. Other than unsupported speculation, the Xxxxx agency has not submitted any reliable proof that Mike Sxxxx has committed a substantial and material breach of contract. Mike Sxxxx's sending a letter notifying clients he had joined Xxxxx was not a solicitation[3] and therefore that conduct cannot constitute a breach of contract. It was not solicitation for Mike Sxxxx to explain, to clients who initiated contact with him, in summary terms why he left Xxxxx and joined Xxxxx, or describe what his new position entails. See Getman v. USI Holdings Corp., 19 Mass. L. Rptr. 679, 2005 Super. Ct. LEXIS 407, 2005 WL 2183159 (Tab B, attached hereto). Further, there is no evidence has had done any more than

[3] In Getman v. USI Holdings Corp., 19 Mass. L. Rptr. 679, 2005 Super. Ct. LEXIS 407, 2005 WL 2183159, Judge Gants, in an identical fact situation, stated: "It is not solicitation when an insurance agent, prior to or immediately after his termination, notifies his clients, as [defendant-employee] Getman did here, that he is leaving his insurance company and joining another insurance company, and provides them with his new address, telephone number, and email address. Such notice is common courtesy to clients who an agent has come to know over the years and who have relied on him to handle their insurance needs. The law does not require his clients to learn of his departure from [plaintiff-agency] USI only by informal word of mouth or by calling his office at USI to speak with him and learning then that he had earlier left USI's employ, perhaps weeks or months ago. Written notice is preferable to oral notice, because its content can be carefully worded and it does not invite further communication with the client unless the client initiates that communication."

this so as to be in breach of the terms of the agreement with Xxxxx, even if they were enforceable.

Additionally, the Xxxxx Agency cannot meet its burden of establishing a likelihood of success on the merits because the non-compete provision contained in the agreement was executed post-employment without any additional compensation. See IKON Office Solutions, Inc. v. Belanger, 59 F.Supp.2d 125, 131 (D.Mass. 1999) (Neiman, USMJ), aff'd, 1999 US Dist. LEXIS 11558 (Ponsor, USDJ) ("[i]n order for a restrictive covenant to withstand scrutiny, some consideration ought to pass to an employee upon the execution of the post-employment agreement."). The Xxxxx Agency did not have Mr. Sxxxx sign the employment agreement in consideration of becoming an employee. It was only after Mr. Sxxxx had worked at the agency for several months that he was requested to sign it as a condition of his employment.[4] There was no additional consideration provided for the signing of the agreement. Sxxxx Aff., ¶4 (Tab A).

The fact that Mr. Sxxxx was entitled to "continued employment" in return for signing the agreement is not sufficient consideration. Courts have refused to enforce non-competition and non-solicitation agreements for a lack of consideration where the only purported consideration was the employee's continued employment. First Eastern Mortgage Corp. v.

[4] In determining whether to enforce the agreement against Mr. Sxxxx, the terms of the agreement must be strictly construed against the Xxxxx Agency. First, Massachusetts courts interpret contracts against the interests of the drafter, which in this case was Xxxxx. See, e.g., Sentry Insurance v. Firnstein, 14 Mass. App. Ct. 706, 707 (1982). Second, Massachusetts courts "scrutinize with particular care" post-employment restraints imposed by the employer's standardized form contract, such as the agreement in this case. Sentry, 14 Mass. App. Ct. at 706 (citing Restatement (Second) of Contracts §188, comment g (1981). Finally, the agreement is akin to an adhesion contract, and while this fact does not mean that it is unenforceable *per se*, it does mean this Court should scrutinize the agreement more closely to determine whether it is unconscionable, offends public policy, or is unfair under the circumstances. Id.

Gallagher, 1994 Super. Ct. LEXIS 585, at *3 (refusing to enforce restrictive covenant in part because the employee had not agreed to it as part of his original employment and had signed it reluctantly, under "practical duress"); New Boston Systems, Inc. v. Joffee, 1993 WL 818570, at 2 (Mass. Super. Ct.) (denying injunctive relief where employee had related cities in reliance on job, was never informed of the existence of non-competition clause until her first day of work, and signed it believing she would lose her job otherwise). See also, IKON, 59 F.Supp.2d at 131 (holding that employer must "demonstrate that consideration was paid and negotiations pursued at the time the covenants were executed."). Compare, Bowne of Boston, Inc. v. Levine, 7 Mass. L. Rptr. 685 (Mass. Super. 1997) (finding non-solicitation agreement supported by consideration where signed in exchange for employer's agreement to establish minimal level of compensation). Accordingly, the non-compete agreement is void and unenforceable for a want of consideration.

The agreement is likewise unenforceable because it is unreasonable in time and scope. The time provision which is offensive is five years. That is too long. In Getman, Judge Gants ruled that the USI Agency's three year non-solicitation ban by an agency producer was too long. "By barring Getman's insurance clients from doing business with him for three years, USI is not only protecting its good will but taking the good will that belongs to Getman. It is also imposing a significant burden on Getman's clients, who may have come to trust him, but not necessarily USI, to handle their insurance needs." Id., at __, *8. Judge Gants reasoned that due to the nature of the insurance agency business, most, although not all, of the good will belongs to the producer himself and not to the agency, since the producer is the one who works with the client to select the best policy to meet the client's needs, works with the client when

claims arise, and follows up with renewals. Id. Therefore a three year prohibition on solicitation was not consonant with a fair balance between protecting confidential information and the agency's good will vs. taking the good will earned by and belonging to the producer. In the end, Judge Gant ruled only a one-year ban on Getman's solicitation of USI clients was warranted.

Although this court is not bound by Judge Gants' decision or its reasoning, Mr. Sxxxx suggests it is persuasive.

In sum, the Xxxxx Agency does not have a substantial likelihood of success of prevailing on its attempt to enforce the non-compete agreement against Mr. Sxxxx. Consequently, the Xxxxx Agency's motion for a preliminary injunction should be denied.

b. THE XXXXX AGENCY WILL NOT BE IRREPARABLY HARMED IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

A plaintiff experiences irreparable harm if there is no adequate remedy at final judgment. GTE Products Corp. v. Stewart, 414 Mass. 721, 724 (1993). The Xxxxx Agency has not demonstrated that it will suffer any irreparable harm if it is left to a remedy at law. Its supposed harm at this point is speculative. Xxxxx brings evidence before the court of one letter soliciting business, which did not result in any loss of business. Xxxxx then says "other customers" say they have been solicited by Mike Sxxxx. Xxxxx does not name them, or enumerate if this is two or two hundred customers.

The fact the Xxxxx Agency has waited six months to attempt to enforce its non-compete clause lends support to Mr. Sxxxx's position no irreparable harm has occurred. The case of Alexander & Alexander, Inc. v. Danahy, an insurance broker case, provides an

"[u]nexplained delay in seeking relief for allegedly wrongful conduct may indicate an absence of irreparable harm and may make an injunction based upon that conduct inappropriate." Id., 21 Mass.App.Ct. 488, 494-495 (1986).

Mr. Sxxxx does not possess any list of Xxxxx Agency customers. Even if he did, the Xxxxx Agency's customer list is not really "confidential" and information regarding the coverages and policies held by those clients are not really "trade secrets." As to clients whose workers' compensation coverages are in the involuntary risk pool administered by the WCRB under G.L. c. 152, §65C, this information is all posted on the internet. The fact that potential insurance customers is publicly available through the internet would seem to dilute or scotch any claim that such customers are "confidential." For instance in Chiswick, Inc. v. Constas, 18 Mass. L. Rep. 104; 2004 Mass. Super. LEXIS 272, Judge Kane held customer lists were neither protected by the employer or secret, denying a motion for a preliminary injunction, since "the identification of potential shipping and packaging customers and contacts is generally, publicly available via the internet, the Thomas Register, Dun & Bradstreet, as well as the Yellow Pages." Id. Similarly, Judge Agnes made findings regarding the a legal secretarial services broker in Boston:

> Sales people gather information, almost exclusively from public sources, regarding law firms' needs for secretaries and support staff. The identities of these firms is obtained from such sources as Massachusetts Lawyers Weekly, Martindale & Hubbell, Lawyers Diary, telephone books and conversations with applicants. In fact, the major source is an annual supplement of the Massachusetts Lawyers Weekly, entitled "Lawyers Weekly's Annual Survey of the 100 Largest Law Firms in Massachusetts." That publication identifies the name of the firm, its address, telephone number, managing partner and practice areas. That survey is the most valuable source to legal staffing companies and is used, probably, by all of them in Massachusetts. The sales person also locates available positions by placing "cold calls."

Routhier Placement Specialists, Inc. v. Denise L. Brown, 15 Mass. L. Rep. 246; 2002 Mass.

Super. LEXIS 362 (Super. Ct. 2002).

The defendant Mike Sxxxx used and uses similar methods of reviewing publicly available information to identify potential insurance customers. Since both workers' compensation and automobile insurance coverage are compulsory in Massachusetts, it is not a question for commercial businesses whether to buy insurance, the only question is from whom they should purchase it.

Mike Sxxxx's knowledge of what insurer a particular client's insurance is placed with and the amount of premium that client is paying is not confidential information. This is because the client is free to share this information with other insurance agents quoting on that business themselves. This point was made by Judge Kottmyer in the case of R.E. Moulton, Inc. v. Lee, 18 Mass. L. Rep. 157; 2004 Mass. Super. LEXIS 268, in denying an injunction sought by an insurance broker against a former sales employee.

Based on all the foregoing, the Xxxxx Agency has incurred no harm at all, let alone irremediable harm which cannot be adequately compensated by an award of damages following an adjudication on the merits.

c. BALANCING THE HARMS TO EACH PARTY WEIGHS HEAVILY TOWARD THE DENIAL OF RELIEF.

The court should be reluctant to deprive Mr. Sxxxx of the ability to earn a living and support his family. The grant of an improvidently granted injunction would fall much harder on Mr. Sxxxx than its denial would upon the Xxxxx Agency. Further, in equity the court should consider that the Xxxxx Agency has refused to redeem Mr. Sxxxx's shares of stock, and that there is no proof of solicitation other than one mistaken letter. To issue an injunction

putting Mr. Sxxxx out of his employment would be draconian and unwarranted.

Since the Xxxxx Agency has no damages, it need not fear Mr. Sxxxx will not be able to satisfy an award in its favor following trial on the merits. This is not a case where the plaintiff will be left with an unsatisfied award, and needs a pre-judgment remedy.

In addition, the court should consider the relative strength of the plaintiff's claim on the merits. Without conceding the point, it appears possible that Mr. Sxxxx's letter to Lecrenski was solicitation in breached of his agreement. If the Xxxxx Agency were to prevail on that claim it cannot show actual damages so would be awarded nominal damages. This is not a strong case, and injunctive relief ought to be denied.

IV. CONCLUSION

Mr. Sxxxx did not take with him any customer list and is not calling Xxxxx Agency clients. He is not soliciting. He signed the non-compete with the Xxxxx Agency after he had already worked there for eight months, under considerable pressure, without additional consideration. The non-compete and solicitation-ban period of five years is unreasonable, and ought not be enforced by the court.

Mxxxxx Sxxxx,
Defendant

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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 06-971

Xxxxx Xxxxx INSURANCE AGENCY, INC., Plaintiff)
v.)
Mxxxxx Sxxxx, and Xxxxx INSURANCE Xxxxxx, Defendants)

DEFENDANT Mxxxxx Sxxxx'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Now comes the defendant, Mxxxxx Sxxxx, and sets forth his opposition to the plaintiff's motion for a preliminary injunction. As grounds, Mr. Sxxxx submits the plaintiff has not demonstrated a likelihood of success on the merits of his claim, the balance of harms favors the denial of the requested injunction, and the public interest would be adversely affected if such injunction were issued. Mr. Sxxxx files herewith a memorandum of law and affidavit in support of his opposition.

WHEREFORE, the defendant, Mxxxxx Sxxxx, respectfully requests this Honorable Court to deny the plaintiff's motion for a preliminary injunction.

Mxxxxx Sxxxx,
Defendant

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