VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CLARK & ASSOCIATES INC FINANCIAL SOLUTIONS	)	
Plaintiff,	)	
v.	)	Case No. CL-2023-8553
MICHAEL DANJCZEK ET AL.	)	
Defendants.	)	

ORDER

BEFORE THE COURT is the Plaintiff's motion for preliminary injunction. For the reasons stated in the Court's Memorandum Opinion issued this date and which is incorporated herein, the Plaintiff's motion for preliminary injunction is DENIED.

SO ORDERED this 17th day of August 2023.

The Honorable Manuel A. Capsalis
Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.

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Defendants.	)	

MEMORANDUM OPINION

This matter came before the Court on Clark & Associates' motion for a preliminary injunction. For the reasons stated below, the motion is **DENIED**.

BACKGROUND

Clark & Associates ("Plaintiff") provides financial services such as financial planning, asset management, and tax planning. Two former Clark & Associates employees, Michael Danjczek and Kristen Money left the company in March 2023 to start First Light Financial.[1] Mr. Danjczek provided financial advisory services to clients for almost five years – from July 2018 to March 2023. Ms. Money served as a "paraprofessional" assisting advisors from July 2016 to March 2023. Both Danjczek and Money signed a "Restrictive Covenant Agreement" upon beginning their employment with Clark & Associates.[2]

Paragraph 6 sets forth the parameters of the restrictive covenant, stating:

[1] Collectively, the Defendants are Michael Danjczek, Kristen Money, and the company First Light Financial.
[2] Danjczek signed the restrictive covenant agreement on July 10, 2018, and Money signed the agreement on July 26, 2016.

> **Restriction on Providing Services to Clients.**
>
> Consultant acknowledges that during his employment with Employer, Consultant has had or will have contact with and became aware of certain of the Company's Clients, specific Client needs and requirements, and other Confidential Information pertaining to such Clients. Consultant further acknowledges that employment with the Company has resulted in Consultant being in a position of trust and responsibility with respect to Company's Clients. Accordingly, Consultant agrees that during his employment, except on behalf of Employer and during the Restriction Period, Consultant will not (i) provide or assist any other Person to provide, or (ii) enter into a contract or agreement or assist any other Person to enter into a contract or agreement with any Client to provide, the services or products that are competitive with those sold or provided by the Consultant to such Client on behalf of Employer during the Look-Back Period. This restriction shall apply only to any Client of the Company with whom Consultant had contact during the Look-Back Period.[3] For the purposes of this paragraph, "contact" means interaction between Consultant and the Client which is intended to further the business relationship, or the performance of services for the Client on behalf of the Company.[4]

The agreement lasts for "the one (1) year period commencing on and immediately following the Consultant's last day of employment with Company."[5]

In March 2023, Danjczek and Money left their employment with Clark & Associates and formed the company First Light Financial. The Plaintiff alleges that Defendants violated their non-compete covenant agreement by *immediately* "providing financial advisory services" at First Light to former Clark & Associates Clients.[6]

The Plaintiff's complaint alleges breach of contract, statutory conspiracy, common law conspiracy, and tortious interference with contract. The Plaintiff, thereafter, filed a motion for

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[3] "'**Look-Back Period**' means the one (1) year period immediately prior to and including the date upon which Employee's employment with the Company ceases for any reason." (Alteration in original).

[4] Pl. Amended Comp., Exh. B.

[5] *Id.* (See definition of "Restriction Period.").

[6] Pl. Amended Comp. ¶ 51.

preliminary injunction.[7] The Court heard arguments on the Plaintiff's motion on July 20, 2023, and July 27, 2023, and took the matter under advisement.

ANALYSIS

a. Standard of Review

In Virginia, "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 53 (2008). The purpose of a preliminary injunction is to maintain the status quo until a trial on the merits can be held. *See Capital Tools Mfg. v. Maschinenfabrik Herkules*, 837 F.2d 171, 173 (4th Cir. 1988). In Virginia, "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." Va. Code Ann. § 8.01-628.[8]

The Virginia Supreme Court has not specifically established elements or standards that the moving party must establish before an injunction is granted; however, the Fairfax County Circuit

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[7] The Court notes that the Plaintiff filed their motion for a preliminary injunction three months after the events in question.

[8] Section 20 of the Employment Agreement states as follows:
"Consultant further acknowledges that a breach of the covenants contained in this Agreement will result in irreparable and continuing damage to the Company, for which there will be no adequate remedy at law, and Employee agrees that in the event of any breach or attempted breach of the aforesaid covenants by Consultant, Company shall be entitled, in addition to any other remedy which it may have, to an injunction restraining such breach or attempted breach."
Pl. Amended Comp., Exh. B.
The Court does not find this language controlling. Virginia Code § 8.01-628 grants the Circuit Court sole jurisdiction to award or deny injunctions. The Indiana Court of Appeals considered a similar provision and held: "parties may not contractually oust the jurisdiction of the courts. The contract provision for an issuance of an injunction would impermissibly remove the determination of whether to grant or deny an injunction from the discretion of the trial court and oust that court's inherent jurisdiction." *Ed Bertholet & Assocs., Inc. v. Stefanko*, 690 N.E.2d 361, 363–64 (Ind. Ct. App. 1998) (internal citations omitted); *see also Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 46, 120 S.E. 247, 251 (1923) (In a case involving an arbitration agreement, the Court stated "[p]arties litigant cannot by such agreements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies") (internal citation omitted).

Court has adopted the following factors set forth by the United States Supreme Court, each of which requires a *clear showing*:[9]

(1) the plaintiff's likelihood of success on the merits;

(2) the likelihood of irreparable harm to the plaintiff in the absence of preliminary relief;

(3) the balance of equities; and

(4) the injunction is in the public interest.

See Wings, L.L.C. v. Capitol Leather, LLC, 88 Va. Cir. 83 (2014) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 14 (2008)).

Ultimately, the decision to grant or deny an injunction is within the trial court's discretion. *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 341 (2005) ("we will not reverse the trial court's decision to grant or deny an injunction absent an abuse of discretion.").

b. Application of Preliminary Injunction Factors

i. Plaintiff Has Not Demonstrated of a Likelihood of Success on the Merits

To determine the Plaintiff's likelihood of success, the Court must analyze the restrictive covenant agreement to determine what the agreement restricts and whether that restriction is enforceable.

a. Factors for Assessing Restrictive Covenants

As in all preliminary injunctions involving restrictive covenants, the likelihood of success on the merits relies heavily on the enforceability of the restrictive covenant at issue. "The enforceability of a provision that restricts competition is a question of law that we review de novo." *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249 (2005).

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[9] For instance, the Plaintiff must demonstrate, by "a clear showing," their likelihood of success on the merits. *See, e.g.*, *Marik v. Sentara Healthcare*, 109 Va. Cir. 88 (2021) (quoting *Real Truth About Obama, Inc.* v. *Fed. Election Comm'n*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*).

The employer "bears the burden" of proving that a restrictive covenant is enforceable. *See, e.g.*, *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412, 415 (2011); *Modern Env'ts, Inc. v. Stinnett,* 263 Va. 491, 493 (2002).

Courts consider a variety of factors when assessing the enforceability of a restrictive covenant, including the "function, geographic scope, and duration" elements of the restriction. *Simmons v. Miller,* 261 Va. 561, 581 (2001). These elements are "considered together" rather than as independent factors. *Id.*

The Plaintiff argues the agreement is narrowly drawn, not unduly burdensome, and not against public policy; and is, therefore, enforceable. Specifically, the Plaintiff asserts, in part:

- The noncompete is specific to the services the Defendants provided to the Plaintiff during their respective employment tenures.
- The length of the noncompete agreement, twelve months, is reasonable.

In contrast, the Defendants argue the agreement is unenforceable because:

- The agreement is ambiguous.
- The agreement is overbroad.
- Defendants Danjczek and Money performed different services while at Clark – and Money performed merely administrative functions.[10]

The function of the restrictive covenant is the predominant factor at issue.[11]

[10] Defendants relied on "the distinction between the services provided by Mr. Danjczek and the services provided by Ms. Money" as another argument against Plaintiff's likelihood of success on the merits. Because the Court finds the restrictive covenant ambiguously drafted, the Court does not need to make a determination with respect to this argument. *See* Tr. 7/27/23 at 53.

[11] Both parties appeared to agree that the duration element is reasonable, and the lack of a geographic limitation was not a focus of the briefing or oral argument.

b. What the Agreement Restricts is Not Sufficiently Clear

It is clear to the Court that there remains significant disagreements as to what the plain text of Section 6 means. The clause reads, in relevant part, as follows:

> Consultant agrees that during his employment, except on behalf of Employer and during the Restriction Period, Consultant will not (i) provide or assist any other Person to provide, or (ii) enter into a contract or agreement or assist any other Person to enter into a contract or agreement with any Client to provide, the services or products that are competitive with those sold or provided by the Consultant to such Client on behalf of Employer during the Look-Back Period. This restriction shall apply only to any Client of the Company with whom Consultant had contact during the Look-Back Period. For the purposes of this paragraph, "contact" means interaction between Consultant and the Client which is intended to further the business relationship, or the performance of services for the Client on behalf of the Company.

A significant portion of oral argument focused on the meaning of the first sentence of the restrictive covenant, and specifically, whether the absence of a particular comma rendered the clause meaningless. In the pleadings, the Plaintiff added a comma, changing the clause to:

> Consultant agrees that during his employment, except on behalf of Employer[,] and during the Restriction Period, Consultant will not (i) provide or assist any other Person to provide, or (ii) enter into a contract or agreement or assist any other Person to enter into a contract or agreement with any Client to provide, the services or products that are competitive with those sold or provided by the Consultant to such Client on behalf of Employer during the Look-Back Period.[12]

The Defendants argue that the clause is defective, because as written, "the post-termination 'Restriction Period' by definition does not occur 'during' the consultant's employment and does not occur during the prohibition on competition that applies 'during' employment with Clark by the express terms of Section 6."[13] As the Defendants read the restrictive covenant, it is "not

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[12] *See* Pl. Amended Comp. ¶ 17, 25 (alteration in original) (the alteration is the addition of a comma after "employer" in the first sentence of the section).

[13] Def. Opp. at 5.

effective" during the one-year period after the end of the employment relationship.[14] Defendants state that the Plaintiff "revised and misstated the text" in the clause to add "an additional comma . . . to change the meaning of the agreement."[15] The Plaintiff argues that the intended meaning of the paragraph makes the missing comma immaterial.

Nevertheless, the question surrounding the comma demonstrates a fundamental problem with the restrictive covenant: it is ambiguous.

i. What Constitutes Contact and Service is Ambiguous

The agreement defines contact as "interaction between Employee and the Client which is intended to further the business relationship, or the performance of services for the Client on behalf of the Company." The Plaintiff argued that contact is clearly defined and limited to contact with someone the Consultant "sold or provided the service."[16] However, the Court is not convinced that the restrictive covenant contains that limitation. For one, "service" is not defined in the employment agreement.[17] To determine the definition of service, the Court asked "how far from zero do you go up to where you believe it rises to the level of services? . . . what is the interaction?"[18] The Plaintiff insisted that services should be defined by "common sense."[19] Even when applying "common sense", the definition of services is circular and not self-defining.[20]

Furthermore, the Court finds that there remains significant ambiguity with respect to what constitutes "contact"[21] and consequently, there remains significant ambiguity as to which clients

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[14] Tr. 7/27/23 at 49.
[15] Def. Opp. at 5.
[16] Tr. 7/27/23 at 16.
[17] Plaintiff conceded that services is undefined in the agreement. *See id.* at 20.
[18] *Id.* at 21-22.
[19] *Id.* at 22 ("I would cite to the Mount Aldie case which is 293 Va. 190, which just says quote, 'Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.'").
[20] *Id.* at 20 ("you're saying services is services.").
[21] The Court inquired as to the reason for including the definition of contact, asking: ". . . the language in the last couple of sentences about contact. Why even have that?" Tr. 7/2/23 at 19.

are off-limits to the Defendants.[22] Prior to oral argument, the Defendants highlighted that the Plaintiff has not "produce[d] a list of clients with which Defendant had 'contact' during the year prior to their departure . . . ."[23] Relatedly, what constitutes "services" is also unclear. As Defendants highlighted, there is "no definition of what services . . . actually are."[24]

However, the Plaintiff maintained that "there's an extremely limited pool of people, 255 people that that one year window that they serviced, that's – those are the only people they can't go after."[25] The Court questioned that assertion, asking: "[i]sn't it more than that?"[26] and later referenced the testimony of the CEO of Clark & Associates, who "testified that the number was actually, as I understood it, greater than the number of individuals listed in Exhibit 44, which was not put into evidence, with respect to contact . . . that's a number that's not determined."[27] The Plaintiff conceded: "I understood that -- that as well that it would be more."[28]

It is a well-established principle of contract law that ambiguity in an agreement "must be construed against the drafter." *See, e.g.*, *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 256 Va. 288, 291 (1998). Furthermore, restrictive covenants "must be strictly construed and, if ambiguous, it must be construed in favor of the employee." *Motion Control Sys., Inc. v. East*, 262 Va. 33, 37 (2001).

The burden rests with the employer to establish by *a clear showing* the enforceability of the restrictive covenant. *See, e.g.*, *Wings*, 88 Va. Cir. 83. Because of the ambiguity in the

[22] The Court attempted to determine to scope of "contact" through hypotheticals. Plaintiff argued that "contact" is limited by "services – however, "services" is undefined. Additionally, "in furtherance of the business relationship" is sufficiently vague to widen the scope of "contact" such that it is unclear what clients are off-limits to the Defendants pursuant to the restrictive covenant.
[23] Def. Opp. at 6-7.
[24] Tr. 7/27/23 at 50.

[25] *Id.* at 8-9.
[26] *Id.* at 9.
[27] *Id.* at 14.
[28] *Id.* (Plaintiff also questioned the relevance of the number of affected clients).

restrictive covenant, the Court cannot find that the agreement is reasonable – or in other words, not unduly burdensome – and therefore, enforceable. *See, e.g., Home Paramount Pest Control Companies, Inc*, 282 Va. at 415; *Simmons*, 261 Va. at 581.

This Court's conclusion, along with the understanding that a preliminary injunction is an *extraordinary* remedy, leads the Court to conclude that the Plaintiff has not sufficiently demonstrated, by a clear showing, a likelihood of success on the merits.

ii. The Plaintiff Has Not Demonstrated Irreparable Harm

The Plaintiff asserts they will suffer irreparable harm in the absence of an injunction because "money damages are simply inadequate"[29] and the damages in this case "are difficult to quantify."[30] In contrast, the Defendants believe "somebody can calculate damages" and thus, there is no irreparable harm.[31]

In *Wings*, this Court considered a preliminary injunction in the context of a noncompete agreement. 88 Va. Cir. 83 (2014). The Plaintiff's irreparable harm argument was based on a loss of customers and business. *Id.* Although the Court agreed that the Plaintiffs may lose customers and business if the injunction was denied – and it was – the Court disagreed with the Plaintiffs' assertion that this harm was irreparable. *Id.* Specifically stating:

> Wings has not put forth a legitimate argument as to why it does not have an adequate remedy at law in this case. For example, when asked by the Court at oral argument why money damages would not be sufficient, counsel for Wings only replied that there was no baseline upon which to calculate damages. The Court questions this assertion. It does not seem reasonable that Wings would not be able to determine how much income they received from certain customers both prior to and after the breach of the Agreements, the difference presumably being the income lost due to the breaches. Perhaps Wings would face problems proving causation or asserting damages that are speculative (such as lost income due to referrals) however, Wings has not met its burden of showing that it will suffer irreparable harm in the absence of the preliminary injunction.

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[29] *Id.* at 28.
[30] *Id.* at 30.
[31] *Id.* at 56.

Id. The Plaintiff concedes that "we can figure out, going back in time, how much money we made from a particular Client[;]" however, the Plaintiff further argues "that doesn't mean that we would have made that same amount of money from that same Client over the coming year, because there would have been financial decisions made and different stock selections made. And the assets under management could have increased or decreased."[32] Furthermore, the CEO of Clark & Associates testified as to $30,000,000 of lost assets due to the lost clients.[33]

This Court finds no basis to distinguish the harm in this case from the harm in *Wings*. Although Plaintiff argued that the damages are incalculable in this case, the Court is not persuaded. The fact that a damages calculation may require an expert does not make the damages impossible to quantify. Furthermore, paragraph twenty of the employment agreement includes a liquidated damages clause.[34] Although the Plaintiff is not alleging a breach of that section, "when considering the meaning of any part of a contract, [Courts] will construe the contract as a whole." *Doctors Co. v. Women's Healthcare Assocs.*, 285 Va. 566, 572–73, 740 S.E.2d 523, 526 (2013). Accordingly, the Plaintiff has not demonstrated irreparable harm.

iii. The Balance of Equities and Whether the Public Interest Supports Sustaining the Injunction is Inconclusive

The final two factors for a preliminary injunction are interrelated and considered together. First, "Plaintiffs must demonstrate that the harm to them before the trial on the merits without the requested preliminary relief is greater than the harm to the [Defendant] during the same time period with the requested relief." *Dillon v. Northam*, 105 Va. Cir. 402 (2020). As the balance tips

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[32] *Id.* at 30.

[33] Ms. Clark's testimony was referenced by Defense Counsel in closing arguments. *See id.* at 57.

[34] The inclusion of a liquidated damages clause suggests to the Court that there is a way to calculate damages.

away from the plaintiff, a stronger showing on the merits is required. *See Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980).

The public interest prong relies entirely on the reasonableness of the restrictive covenant at issue. If the Court were to find the agreement reasonable, then public policy considerations would support enforcing the agreement – and, therefore, public policy would support sustaining the injunction. *See Blue Ridge Anesthesia & Critical Care, Inc.*, 239 Va. at 373 ("the former employees contend that this covenant is unreasonable from a public policy standpoint because it restrains trade and promotes a monopoly. However, any non-competition agreement restrains trade to some extent. The issue is whether it is an *unreasonable* restraint.") (Emphasis in original). If the Court were to find that the agreement is unreasonable, the opposite is true and public policy would weigh against the injunction. *See, Wings, L.L.C.*, 88 Va. Cir. 83.

Plaintiff and Defendants disagree regarding the equity and public interest prongs. However, as the Court cannot find that the Plaintiff met their substantial burden in proving, by a clear showing, a likelihood of success on the merits and demonstrated irreparable harm, these final two factors are inconclusive at best, and, in any preliminary injunction analysis, would not be the dispositive factors for the Court's decision.

CONCLUSION

For the reasons stated above, the Plaintiff's motion for preliminary injunction is **DENIED**.

SO ORDERED this 17th day of August 2023.

The Honorable Manuel A. Capsalis
Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.