COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2284CV01162-BLS2

LIGHTHOUSE INSURANCE AGENCY, LTD.

v.

RALPH O. LAMBERT AKA JACK LAMBERT AND
INTEGRATED INSURANCE SOLUTIONS, LLC

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Jack Lambert used to work for Lighthouse Insurance Agency, Ltd. His most recent employment agreement included non-competition, non-solicitation, and confidentiality provisions. Lighthouse fired Lambert eleven months ago. Lambert now works for Integrated Insurance Solutions, LLC. Lighthouse seeks a preliminary injunction that would bar Lambert from competing with Lighthouse by writing any insurance business, soliciting or accepting any business from Lighthouse clients, or using or disclosing any of Lighthouse's confidential or proprietary information.

The Court will **deny** this motion because: (i) Lambert has shown that the non-competition agreement is unenforceable, prompting Lighthouse to withdraw that part of its request; (ii) Lighthouse has not shown that it is likely to succeed in proving that Lambert has violated the one-year non-solicitation agreement, or that it will suffer irreparable harm if he does so during the five weeks before that provision expires; and (iii) Lighthouse does not claim and has not shown that Lambert violated his confidentiality agreement.

Lambert remains bound, until July 15, 2022, by his contractual obligation not to solicit Lighthouse's customers. And he is also still bound by his promise not to use or disclose any of Lighthouse's confidential information. But Lighthouse has not met its burden of showing that it is entitled to a preliminary injunction enforcing those parts of its employment agreement with Lambert. The Court will therefore exercise its discretion to deny the preliminary injunction motion.

1. **Requirements for Preliminary Injunctions.** "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." *Student No. 9* v. *Board of Educ.*, 440 Mass.

752, 762 (2004). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc.* v. *Axsun Technologies, Inc.*, 469 Mass. 181, 194 (2014).

A plaintiff is not entitled to preliminary injunctive relief if it cannot prove that it is likely to succeed on the merits of its claim. See, e.g., *Fordyce* v. *Town of Hanover*, 457 Mass. 248, 265 (2010) (vacating preliminary injunction); *Wilson* v. *Commissioner of Transitional Assistance*, 441 Mass. 846, 858–859 (2004) (same).

Nor may a plaintiff obtain a preliminary injunction without proving that it will suffer irreparable harm in the absence of such an order, and that such harm to the plaintiff from not granting the preliminary injunction would outweigh any irreparable harm that defendants are likely to suffer if the injunction issues. See, e.g., *American Grain Products Processing Institute* v. *Department of Pub. Health*, 392 Mass. 309, 326–329 (1984) (vacating preliminary injunction on this ground); *Nolan* v. *Police Comm'r of Boston*, 383 Mass. 625, 630 (1981) (same).

"The public interest may also be considered in a case between private parties where the applicable substantive law involves issues that concern public interest[s]." *Bank of New England, N.A.* v. *Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991).

Lighthouse has the burden of proving all these things to justify a preliminary injunction. See, e.g., *Berrios* v. *Dept. of Pub. Welfare*, 411 Mass. 587, 598 (1992) (burden of showing likelihood of success); *GTE Products Corp.* v. *Stewart*, 414 Mass. 721, 726 (1993) (burden of showing irreparable harm); *Tri-Nel Mgmt., Inc.* v. *Board of Health of Barnstable*, 433 Mass. 217, 227 (2001) (burden of showing that injunction would serve the public interest).

2. **Factual Background**. The Court makes the following findings of fact based on the affidavits and documents submitted by the parties, and reasonable inferences drawn from that evidence.[1]

[1] In deciding a motion for preliminary injunction, a judge may make findings of fact based on verified pleadings, sworn affidavits, and documentary evidence supplied by the parties. See, e.g., *Carabetta Enterprises, Inc.* v. *Schena*, 25 Mass. App. Ct. 389, 391–392 (1988). When considering sworn affidavits, "the weight and credibility to be accorded those affidavits are within the judge's discretion" and "[t]he judge need not believe such affidavits even if they are undisputed." *Commonwealth* v. *Furr*, 454 Mass. 101, 106 (2009). An affidavit "is a form of

Staring in 2013, Lambert worked for Lighthouse as a licensed insurance producer, responsible for selling insurance products to clients. For about seven years, Lighthouse paid Lambert entirely on commission for accounts that he brought in. Lighthouse paid Lambert fifty percent of the commission it received for new business brought in by Lambert, and forty percent for any renewals by those accounts. Lambert was an employee. He did not own his accounts and held no ownership interest in Lighthouse.

In 2016, Lambert sold insurance for Lighthouse to a cannabis company called INSA, which became one of Lighthouse's largest accounts. Selling insurance to a cannabis company is a complex undertaking.

In October 2020, after firing seven other employees, Lighthouse asked Lambert to enter into a new employment agreement with a new compensation arrangement. Brian Boucher, who was and is the President and sole owner of Lighthouse, offered to put Lambert on a fixed salary with a new commission structure. Boucher offered that, going forward, Lighthouse would pay Lambert $80,000 per year plus forty percent of all commission payments collected by Lighthouse for new accounts originated by Lambert. It offered to buy back Lambert's existing commission rights, for policies that had already been sold, by paying Lambert (i) 15 percent of the total commissions earned by Lighthouse on Lambert's accounts over the prior twelve months, plus (ii) 5 percent of the total commissions on Lambert's accounts over the next twelve months. Although this last provision was described in the contract as constituting a purchase by Lighthouse of Lambert's book of business, in fact Lambert did not own and had no right to sell his accounts; the right to collect commissions from insurance companies on any policy renewal of a customer brought in by Lambert belonged to Lighthouse, not to Lambert.

The new employment agreement proposed by Lighthouse also included non-competition and non-solicitation agreements that would be in effect while Lambert worked for Lighthouse and for one year after his employment ended. The non-competition clause provided that Lambert would not "solicit or write insurance business" anywhere and for anyone. The non-solicitation clause provided that Lambert would not "solicit, divert or take away or attempt to solicit, divert or take away, [or] accept as customers" any of Lighthouse's "customers, businesses or prospective customers." The term "prospective

sworn testimony the credibility of which is to be determined by the judge." *Psy-Ed Corp*. v. *Klein*, 62 Mass. App. Ct. 110, 114 (2004).

customers" was defined to mean customers that Lighthouse was actively soliciting or actually planned to solicit at the time that Lambert's employment with Lighthouse was terminated.

In addition, this contract provided that Lambert would not ever disclose or use any confidential information that belonged to Lighthouse, except on behalf of Lighthouse or if ordered to do so by a court. And it also provided that the agreement would be governed by Massachusetts law.

Lambert and Lighthouse (through Boucher) signed the new employment agreement on October 8, 2020, the same day that Lighthouse presented it to Lambert. The contract took effect immediately. It did not provide that the terms of the contract would take effect at some later time. The contract did not say that Lambert had the right to consult with an attorney before signing it. And it also did not say that Lambert was entitled to take up to ten days (or any other period) to review the contract before signing it.

Lighthouse paid Lambert $18,000 in October 2020 and another $11,000 a year later in accord with the provision requiring two final sets of commission payments on accounts generated by Lambert before the new employment agreement took effect. The employment agreement specified, in two places, that these payments constituted consideration for the Lambert's agreement to the non-competition provisions in paragraph 8(d). Thus, the contract made clear that these payments were **not** consideration for the non-solicitation clause or any other part of the contract other than the non-competition clause.

Lighthouse fired Lambert on July 15, 2021. As a result, the non-solicitation and non-competition provisions expire by their terms on July 15, 2022.

Lambert emailed Boucher in late March 2022, out of the blue, at around 1am one day. The email had no subject line. Lambert asked, rather cryptically, "It's a look back as you said 2019-2020, a look back right?" Boucher responded the next morning, saying: "Jack, not sure what you are talking about but our deal is officially over. I hope things are going well for you and that you landed a job in the insurance world. Good luck Jack."

Soon thereafter, Lambert accepted a job working as an insurance producer for Integrated Insurance Solutions, LLC.

INSA quickly followed Lambert, transferring its insurance business from Lighthouse to Integrated. INSA's CEO called Lambert in early April 2022, saying that they wanted to move INSA's insurance business from Lighthouse

because they wanted to continue to work with Lambert. The Court credits Lambert's undisputed, sworn testimony that Lambert did nothing to solicit INSA after his employment with Lighthouse ended. INSA signed a "broker of record" form on April 8, 2022, to indicate that it was transferring its insurance away from Lighthouse. Boucher received a copy of that notice on May 3, 2022; he soon learned that INSA had moved its business to Integrated and that Boucher had started working for Integrated as a producer in March 2022.

This lawsuit followed.

3. **Non-Competition Agreement**. By statute, a non-competition agreement entered into with a current employee will be valid and enforceable only if the employee is given notice of the agreement "at least 10 business days before the agreement is to be effective," and only if the agreement is "in writing and signed by both the employer and employee," is "supported by fair and reasonable consideration independent from the continuation of employment," and "expressly states that the employee has the right to consult with counsel prior to signing." G.L. c. 149, § 24L(b)(ii). This statute applies to agreements entered into after October 1, 2018. See St. 2018, c. 228, § 21.[2]

The non-competition agreement that Lambert and Lighthouse entered into in October 2020 is invalid and unenforceable because, by its express terms, it took effect immediately without Lambert receiving at least ten days' advance notice, and because the new employment agreement does not expressly state that Lambert had the right to confer with an attorney before entering into the non-competition agreement.

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[2] This statute does not apply to noncompetition agreements that are "made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity or partnership, or division or subsidiary thereof, when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale or disposal." See G.L. c. 149, § 24L(a) (definition of "noncompetition agreement").

Though Lighthouse contends that Lambert entered into the new employment agreement as part of the sale of a "book of business," as discussed below, it does not argue and has not shown that Lambert sold a "business entity" or substantially all assets of a "business entity or partnership" to Lighthouse.

Though Lighthouse sought to enforce the non-competition clause in its preliminary injunction motion, during oral argument Lighthouse waived its request that the Court enjoin Lambert be barred from writing insurance in competition with Lighthouse.

The Court will therefore **deny** this portion of the pending motion.

4. **Non-Solicitation Agreement**. The Court is not persuaded by Lambert's waiver defense, because the March 2022 does not clearly and unmistakably waive Lighthouse's right to enforce the non-solicitation covenant. But it will nonetheless **deny** the request to enforce the non-solicitation provision because Lighthouse is not likely to succeed in proving that Lambert violated this clause, or that Lighthouse is likely to suffer irreparable harm without this part of the requested preliminary injunction.

4.1. **No Waiver**. Lambert contends that Boucher irrevocably waived Lighthouse's rights under the non-solicitation clause in Lambert's employment agreement when Boucher sent an email telling Lambert that "our deal is officially over." The Court disagrees.

Waiver occurs when a party intentionally gives up a known right under the contract. See *Psychemedics Corp.* v. *City of Boston*, 486 Mass. 724, 745 (2021). "Waiver must be shown clearly, unmistakably, and unequivocally." *Id.*, quoting *Boston* v. *Labor Relations Comm'n*, 48 Mass. App. Ct. 169, 174 (1999).

This email by Boucher did not clearly, unmistakably, and unequivocally waive Lighthouse's rights under the non-solicitation clause.

Boucher was responding to an inquiry in which Lambert seemed to be asking what period was covered by the promise to pay Lambert a share of the commissions earned on Lambert's then-existing accounts. In context, therefore, Boucher seems to be saying that the deal to pay Lambert those commissions was "officially over," because Lambert had been paid in full.

Lambert had not asked about the non-solicitation or non-competition provisions in his email, and Boucher did not mention them in his response. The reference to Lambert's deal being "over" did not constitute a clear and unmistakable waiver of Lighthouse's rights or Lambert's obligations under the non-solicitation and non-competition provisions "in the absence of explicit language" to that effect. Cf. *David* v. *Kelly*, 100 Mass. App. Ct. 443, 447 (2021).

4.2. **Classification of the 2020 Employment Agreement**. Under Massachusetts law, "restrictive covenants entered into as part of a sale of a business are examined less critically than those entered into as part of an employment agreement." *Automile Holdings, LLC* v. *McGovern*, 483 Mass. 797, 809 (2020). The business interests that may be protected in the context of a business sale are broader than those protectible in the employment context. *Id*. at 809–810.

In the employer-employee context, a non-solicitation or non-competition agreement is enforceable only to the extent necessary to prevent harm to the employer's good will or to guard against the release or use of trade secrets or other confidential information. *Id*. at 810; see also, e.g., *New England Canteen Service, Inc.* v. *Ashley*, 372 Mass. 671, 673–676 (1977); *All Stainless, Inc.* v. *Colby*, 364 Mass. 773, 778–780 (1974). ""Protection from 'ordinary competition' is not a legitimate business interest in any context, and a restrictive covenant 'designed solely for that purpose will not be enforced.' " *Automile Holdings*, 483 Mass. at 812, quoting *Marine Contractors, Inc.* v. *Hurley*, 365 Mass. 280, 287–288 (1974). Though most of these cases concerned non-competition covenants only, the same principles apply in actions seeking to enforce employee non-solicitation agreements. See *Automile Holdings*, 483 Mass. at 808; *Oxford Global Resources, LLC* v. *Hernandez*, 480 Mass. 462, 470–471 (2018).

In the employment context, a non-competition or non-solicitation agreement is enforceable only "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). Good will is a "positive reputation in the eyes of [one's] customers or potential customers." *North Am. Expositions Co. Ltd. P'ship* v. *Corcoran*, 452 Mass. 852, 869 (2009). "It has long been recognized that good will may sometimes attach to an employee who maintains distinctly personal or professional relationships with customers, so that the business entity possesses little of it." *P.A. Bldg. Co.* v. *Elwyn D. Lieberman, Inc.*, 642 N.Y.S.2d 300, 301 (N.Y. Sup. Ct. App. Div. 1996); accord *RE/MAX of New England, Inc.* v. *Prestige Real Estate, Inc.*., Civil Action No. 14-12121-GAO, 2014 WL 3058295, *3 (D.Mass. 2014) (O'Toole, J.) (real estate brokerage franchisor could not enforce non-compete agreement with franchisees in absence of proof that "any good will generated by the various offices is due to RE/MAX branding and methods" rather than created by "the work and personal relationships of the agents").

When someone sells their business and all good will in their existing customer relations, in contrast, broad non-competition and non-solicitation agreements

"may be necessary" and enforceable "to assure that the buyer receives that which [they] purchased." *Automile Holdings*, 483 Mass. at 809, quoting *Alexander & Alexander, Inc.* v. *Danahy*, 21 Mass. App. Ct. 488, 496 (1986) (sale of an insurance brokerage business).

The Court concludes that the restrictive covenants at issue here arose in the employment context, not in the context of the sale of a business. The contract offered by Lighthouse and accepted by Lambert is called an "Employment Agreement." The non-solicitation and non-competition covenants were conditions of Lambert's continued employment by Lighthouse. Indeed, the contract expressly stated that its terms—which included the restrictive covenants—would "control Lambert's employment relationship with Lighthouse as of the date set forth above."

Furthermore, Lambert was not selling a business or any part of a business to Lighthouse. Though Lighthouse characterized its new compensation arrangement with Lambert as involving the purchase and sale of "Lambert's book of business," the accounts on which Lambert had been earning commissions did not belong to him. The right to commission payments from the insurers on those accounts belonged to Lighthouse; Lambert could not sell or assign any interest in those accounts to Lighthouse or to anyone else. What Lighthouse was really doing was converting Lambert's continuing right to receive a share of Lighthouse's commissions on the accounts Lambert had brought to the agency into a new right to receive a fixed salary plus a small portion of the commissions to which Lambert had previously been entitled.

The Court must therefore apply the case law regarding restrictive covenants in an employment context to evaluate Lighthouse's claim against Lambert for allegedly breaching their non-solicitation agreement.

4.3. **Likelihood of Success**. Lighthouse is not likely to succeed in proving that INSA's decision to transfer its business to Integrated harms any legitimate business interest that Lighthouse may protect through its non-solicitation agreement with Lambert.

Since INSA approached Lambert and said they wanted him to keep servicing their insurance account, without having been solicited by Lambert, it appears that the good will in this client relationship belonged to Lambert, not to Lighthouse. See *Sentry*, 14 Mass. App. Ct. at 708. As noted above, Lighthouse

may not enforce its restrictive covenant to deprive Lambert of good will that belongs to him. *Id*.

Nor has Lighthouse mustered any evidence that Lambert has violated the non-solicitation covenant in any way other than accepting INSA's choice to transfer its insurance business to Integrated. And since there is no evidence that Lambert used or disclosed any of Lighthouse's confidential information, Lighthouse is not entitled to a preliminary injunction enforce the non-solicitation covenant "on that score." See *Sentry*, 14 Mass. App. Ct. at 708.

Lighthouse incorrectly contends that, if Lambert and Integrated are allowed to keep INSA as a new client, then Lighthouse will have received no value for paying Lambert a higher fixed salary plus $29,000 for his "book of business." This argument mischaracterizes the 2020 employment agreement. What Lighthouse received by compensating Lambert in this new way was greater certainty. It liquidated its contractual obligation to keep paying Lambert 40 percent of the commissions that Lighthouse earned month after month on Lambert's existing accounts, replacing it with the new obligations to pay Lambert a fixed salary plus 20 percent of the commissions that Lighthouse earned for only one more year on Lambert's then-existing accounts. That arrangement must have had real value to Lighthouse, or Boucher would not have sought to pay Lambert on this new basis.

4.4. **Irreparable Harm**. Even assuming that the non-solicitation provision could be enforced to bar Lambert and Integrated from accepting INSA as a customer, which it cannot, Lighthouse still has also not shown that it is likely to suffer any irreparable harm if the non-solicitation clause is not enforced by means of a preliminary injunction. This is an independent reason for denying this part of the pending motion.

As noted above, Lambert's non-solicitation obligations will expire on July 15, 2022. Since this covenant arises in an employment context, the Court may not extend it beyond the period agreed to by the parties—and could not do so even if Lighthouse had shown that Lambert has violated this covenant. See *Automile Holdings*, 483 Mass. at 816. To the contrary, where such a restrictive covenant has expired in whole or in part, the former employer may seek only money damages for past breaches; it is not entitled to equitable relief extending the term of the covenant. See *All Stainless*, 364 Mass. at 781. Parties to a written contract are generally "held to the express terms of their contract," including

time periods. *Automile Holdings*, *supra*, at 817, quoting *TAL Fin. Corp.* v. *CSC Consulting, Inc.*, 446 Mass. 422, 430 (2006).

It appears that any harm to Lighthouse from losing the INSA account may be remedied through an award of money damages. A preliminary injunction "must be denied" where money damages would adequately compensate for any harm that plaintiff may suffer before final judgment is entered, "no matter how likely it may be that the moving party will prevail on the merits." *Packaging Industries Group, Inc.* v. *Cheney*, 380 Mass. 609, 621 (1980); see also *American Grain Products Processing Institute* v. *Department of Pub. Health*, 392 Mass. 309, 326-329 (1984) (vacating preliminary injunction); *Nolan* v. *Police Comm'r of Boston*, 383 Mass. 625, 630 (1981) (same).

And Lighthouse has not shown that it will suffer any other harm, either quantifiable or irreparable, if no preliminary injunction is issued to enforce the non-solicitation clause for the next five weeks until it expires.

5. **Claims against Integrated Insurance Solutions**. Since Court has concluded that Lighthouse is not likely to succeed in proving that Lambert violated his non-competition and non-solicitation covenants, it necessarily follows that Lighthouse is also unlikely to succeed on its claims against Integrated, and therefore is not entitled to injunctive relief against Lighthouse.

5.1. **Tortious Interference**. The intentional interference claim is based on allegations that Integrated induced Lambert to violate his contractual obligations to Lighthouse. One of the elements of intentional interference with contractual relations is that the defendant "knowingly induced" a third party to violate their contract. See *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 84 (2014).

Since Lighthouse is not likely to succeed in showing that Lambert breached his contract, it is also not likely to succeed in showing that Integrated tortiously interfered with that contract.

Under Massachusetts law, if the third party did not breach their contract, then a defendant cannot be held liable for tortiously interfering with a contract. See *JNM Hospitality, Inc*. v. *McDaid*, 90 Mass. App. Ct. 352, 354–55 & 357 (2016) (where landlord did not breach lease by failing to make nonexclusive parking spaces available to customers of restaurant lessee, third party could not be liable for intentionally interfering with lease to detriment of tenant); *Cavicchi* v. *Koski*, 67 Mass. App. Ct. 654, 661 (2006) (where clients did not breach contingent

fee agreements when they discharged attorney, new lawyer who convinced them to do so could not be liable for intentional interference with contract).

Though Count III of the Complaint is labelled as a claim for tortious interference with advantageous business relations, it only alleges interferences with Lambert's contract. As result this claim must be for tortiously inducing a breach of contract, not for interfering with a non-contractual advantageous business relationship. See *Cachopa* v. *Town of Stoughton*, 72 Mass. App. Ct. 657, 658 n.3 (2008).

5.2. **G.L. c. 93A**. Lighthouse's claim against Integrated under G.L. c. 93A is wholly derivative of its claim that Integrated conspired with Lambert to breach his contract with Lighthouse. Since Lighthouse has not shown that it is likely to succeed on those underlying claims fail, it has necessarily failed to show it is likely to succeed on the c. 93A claim as well. See *Park Drive Towing, Inc.* v. *City of Revere*, 442 Mass. 80, 85–86 (2004) (where c. 93A claim is based on and derivative of some underlying claim that fails as a matter of law, that 93A claim "must also fail"); *Macoviak* v. *Chase Home Mortgage Corp.*, 40 Mass. App. Ct. 755, 760, rev. denied, 423 Mass. 1109 (1996) (c. 93A claim "necessarily fail[s]" where it "is solely based upon … underlying claim for common law" tort and that tort claim fails as a matter of law); *Frohberg* v. *Merrimack Mut. Fire Ins. Co.*, 34 Mass. App. Ct 462, 465 (1993) (c. 93A claim properly dismissed where it is based solely on "legally unsupportable" claim for breach of contract).

6. **Confidentiality Agreement**. Lighthouse has mustered no evidence that Lambert took any confidential information from Lighthouse, or that he has misused or improperly disclosed any confidential information that belongs to Lighthouse. It therefore has not shown that it is likely to succeed in proving that Lambert violated his confidentiality agreement. As a result, Lighthouse is not entitled to preliminary injunctive relief enforcing that covenant.

ORDER

Plaintiff's motion for a preliminary injunction is **denied**.

Kenneth W. Salinger
Justice of the Superior Court

8 June 2022