

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

TECHNICAL INNOVATION, LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 2:14-cv-2899-SHL-dkv
)	
MICHAEL TOWNE,)	
)	
Defendant.)	
)	

TEMPORARY RESTRAINING ORDER

This matter is before the Court upon the Verified Complaint by Technical Innovation, LLC, and upon the Application for Temporary Restraining Order. The Court held a hearing on Plaintiff’s application for a temporary restraining order (“TRO”) on November 20, 2014. Both Plaintiff (hereinafter “TI”) and Defendant (hereinafter “Towne”) were represented by counsel at the hearing and had an opportunity to present their arguments to the Court. The parties also submitted four memorandums of law regarding the TRO. (See ECF No. 6, Motion for Temporary Restraining Order; ECF No. 14, Response to Motion for Temporary Restraining Order; ECF No. 17, Reply Memorandum in Support of TRO; and ECF No. 20, Response to Plaintiff’s Supplemental Reply.)

TI provides and installs electronic and audio-visual equipment for corporate and institutional clients. Towne worked for TI as an Account Executive, who was responsible for “soliciting and servicing customer projects, handling customer issues and concerns, and supervising and managing customer projects” until TI terminated him on September 16, 2014. (ECF No. 1 at 3-4.) Plaintiff and Defendant had entered into an employment agreement on April 20, 2006, which contained a Covenant against Diversion of Projects or Customers. The covenant

provides that:

Employee shall not, directly or indirectly, while Employee is in the Company's employ and through the period ending one year after the termination of Employee's employment for any reason, solicit, divert, appropriate, or attempt to solicit, divert, or appropriate, directly or by assisting others (i) any Project from a Customer or Prospective Customer (in either case with whom Employee had Material Contact during Employee's employment hereunder) for purposes of providing products or services that are competitive with those provided by the Company.

(ECF No. 1-3 at 3.)

The employment agreement defines Project as

any (i) project of the Company which is evidenced by any written agreement or contract, or (ii) proposal for project of the Company which is evidenced by correspondence or other documentation or otherwise reflected in the books and records of the Company, in each case described in items (i) and (ii), which (1) is in process, existing or otherwise active at any time during the last two years prior to the date of Employee's termination, and (2) Employee had actual knowledge of or should have reasonably had actual knowledge of due to Material Contact.

(ECF No. 1-3 at 2.)

While working for TI, Towne assisted the University of Memphis in developing and installing multiple projects, including the Collierville Classroom Project and the FedEx Institute Ticker Project. (ECF No. 1 at 4-5; ECF No. 14-1 at 2-8.) Towne began working in a similar role for M3 Technology Group shortly after TI terminated his employment. Subsequently, the University of Memphis awarded M3 Technology Group contracts for the entirety of FedEx Institute Ticker Project and a portion of the Collierville Classroom Project. TI alleges that Towne violated the Covenant against Diversion of Projects or Customers by working on these projects for M3 and seeks a temporary restraining order to prevent Towne from soliciting, diverting, or appropriating other projects that he previously worked on while at TI.

The factors considered in issuing a temporary restraining order mirror those considered when issuing a preliminary injunction. See 11A C. Wright, A. Miller & M. Kane, Federal

Practice and Procedure § 2951, at 301-302 (3d ed. 2013). The factors considered in determining whether to issue a preliminary injunction include: “(1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without a preliminary injunction; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction” McNeilly v. Land, 684 F.3d 611, 615 (6th Cir. 2012) (citing American Imaging Services, Inc. v. Eagle–Picher Indus., Inc. (In re Eagle–Picher Indus., Inc.), 963 F.2d 855, 858 (6th Cir.1992)). Plaintiffs have met their initial burden to justify a temporary restraining order.

First, TI has demonstrated a likelihood of success on the merits of a breach of contract claim. The covenant provides that Towne shall not “solicit, divert, [or] appropriate” any “Project” from a customer with whom Towne had “Material Contact” during his employment with TI “for purposes of providing products or services that are competitive with those provided by the Company.” (ECF No. 1-3 at 3.) Towne does not dispute that he worked with the University of Memphis on the Collierville Classroom Project and FedEx Institute Ticker Project while he was employed by TI. Specifically, Towne admits that he helped the University of Memphis prepare technical bid specifications for the FedEx Institute Ticker project, and that he consulted with the University regarding the Collierville Classroom Project while he was employed by TI. (ECF No. 14-1, ¶¶ 13, 24.) Towne also admits that, while he was working for M3, he bid on and was awarded the FedEx Institute Ticker contract and worked on a portion of the Collierville Classroom Project. (ECF No. 14-1, ¶¶ 21, 34.) Despite these admissions, Towne argues that he did not violate his employment agreement because the FedEx Institute Ticker and Collierville Classroom projects were not “Projects” as defined by the contract, and that, even if they were, he did not solicit the University for these projects or divert them.

The parties agree that these Projects were not evidenced by a written agreement or contract at the time Towne was employed by TI, however, TI alleges that these were “proposals for projects” “in process, existing or otherwise active” which Towne worked on while employed at TI. Towne argues that no proposals for these projects existed while he worked at TI, arguing that the term “proposal” refers to a document that is part of a formal Request for Proposal (“RFP”) process. Towne’s interpretation does not stand up to scrutiny. The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 890 (Tenn. 2002) (citing Empress Health & Beauty Spa, Inc. v. Turner, 503 S.W.2d 188, 190 (Tenn.1973)). There is nothing in the contract to indicate that the parties intended the term “proposal” to refer solely to the document produced in a formal RFP process and not to a more generic definition of proposal. Particularly when one adds the language “in process, existing or otherwise active” to modify “proposal,” and noting that the “p” in “proposal” is not capitalized, it appears that the parties intended this provision to cover situations where TI was working with a potential customer on a specific piece of business in an effort to obtain that business. By interpreting the contract to only apply where an RFP has issued would strip this provision of its essential purpose. Not every project goes through an RFP process (in fact, only one of the two projects at issue here went through that process) and there is no justification for having a covenant that only applies to a portion of the company’s work.

Having decided the correct interpretation of the term proposal, the next task facing the Court is to determine whether either project meets that definition. The University’s FedEx Ticker project was a proposed idea for which Towne, by his own admission, helped develop bid specifications. This meets the plain language definition of proposed project. The Collierville

Classroom project as a whole meets the definition of a proposed project, however, Towne worked on two different proposed portions of that project. When Towne worked for TI, he consulted on the installation of LCD panels, and when he worked for M3 he assisted in the installation of AMX equipment. (ECF No. 14-1, ¶¶ 24-37.) These appear to be two distinct projects and the Court has no evidence at this stage which shows that Towne worked on the AMX project while he was at TI. The indications at this stage of the proceedings are that, according to the University rules, the AMX portion of the project could not be combined with the LCD panels being installed by TI. Therefore, for the purposes of this Order, only the FedEx Ticker project was a proposed project that Towne worked on while at TI.

Towne next argues that he did not violate the agreement because he did not solicit or divert business from the University of Memphis. This argument fails because Towne does not give fair meaning to all of the language of the employment agreement. Towne agreed not to “directly or indirectly,” “for any reason,” “solicit, divert, or appropriate” any project or proposed project. The parties spent significant time arguing over whether placing a bid in response to an RFP could be a solicitation, and a shorter amount of time discussing whether this situation meets the definition of “divert.” However, given Towne’s knowledge that he gained in helping to prepare the bid specifications for the RFP while at TI, there is sufficient proof at this stage that he “diverted” and/or “appropriated” the FedEx Institute Ticker project for M3. Because the FedEx Ticker project was a “proposed project” that Towne worked on while at TI, diverting and/or appropriating this project for M3 was a breach of his employment agreement. Therefore, TI has shown that there is a likelihood of success in their breach of contract claim because they have shown facts tending to support the conclusion that Towne used his inside information from working at TI to divert or appropriate the FedEx Institute Ticker project for M3.

The other preliminary injunction factors also favor TI. First, TI is likely to suffer irreparable harm without the injunction because of the potential loss of customer goodwill and the loss of fair competition.¹ See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 551 (6th Cir.2007) (noting that interference with customer relationships, the loss of customer goodwill and loss of fair competition are typically irreparable injuries). TI is not seeking to interrupt the two projects that have already been awarded to M3 and there is no evidence of substantial harm to others that will occur if an injunction is granted. Finally, the public interest is served by preventing unfair competition and holding the parties to the terms of the contract they entered.

TI has shown a likelihood of success on the merits, that TI is likely to suffer irreparable harm absent an injunction, that an injunction would not harm third parties, and that an injunction is in the public interest. Therefore, a Temporary Restraining Order should issue against Michael Towne to enjoin him from further breaches of his employment agreement with TI. Upon TI posting security in the amount of \$2,500, to be secured by a bond signed by Plaintiff's counsel, which the Court considers proper to pay the costs and damages sustained if Defendant is found to be wrongfully enjoined or restrained, the Court grants the application and a Temporary Restraining Order will issue enjoining Michael Towne from soliciting, diverting, or appropriating any projects or proposed projects that Towne worked on within the past two years while at TI, as evidenced by the books and records of the Company, in accordance with the terms of the employment agreement.

¹ TI is not seeking to enjoin Towne or M3 from working on the FedEx Institute Ticker Project or the AMX portion of the Collierville Classroom Project, therefore there is currently no proof that irreparable harm will *definitely* happen. TI *has* shown that Towne has violated his agreement in the past, and that he is in the position to violate the agreement in the future. Therefore, TI has met their burden of showing irreparable harm for the purposes of this TRO. However, going forward, TI must provide specific proof of actual projects they believe Towne may solicit, divert, or appropriate in order to meet their burden at the preliminary injunction stage.

IT IS THEREFORE ORDERED:

1. Michael Towne is hereby enjoined and restrained from soliciting, diverting, or appropriating, or attempting to do so, either directly or by assisting others, any projects or proposed projects, evidenced by correspondence or other documentation or otherwise reflected in the books and records of TI, that Towne directly worked on in the course of his employment with TI between September 16, 2012 and September 16, 2014. This Temporary Restraining Order will expire at 11:59 p.m. on Friday, December 19, 2014, unless dissolved sooner by order of this Court.

IT IS FURTHER ORDERED:

2. That the Court will hold a hearing on the Plaintiffs' Request for Preliminary Injunction on the 19th day of December, 2014, in Court Room No. 7, United States District Court, Western District of Tennessee, 167 N. Main Street, Memphis, TN 38103 at 1:30 p.m.

IT IS SO ORDERED, at 5:05 p.m. this 5th day of December, 2014.

/s/ Sheryl H. Lipman
UNITED STATES DISTRICT JUDGE