IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIGMA II INSURANCE AGENCY, INC.	)	**CASE NO. CV 11 750336**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
PATRICK QUINN	)	
	)	
Defendant.	)	

John P. O'Donnell, J.:

Plaintiff Sigma II Insurance Agency, Inc., filed this lawsuit on March 7, 2011. The complaint alleges causes of action against the defendant Patrick Quinn, Sigma's former employee, for breach of a confidentiality and non-solicitation agreement, unfair competition, misappropriation of trade secrets, interference with business relationships, interference with contractual relationships, unjust enrichment, and breach of duty of loyalty.

The plaintiff also seeks an injunction against the defendant to restrain Quinn from using Sigma's confidential information.

An *ex parte* temporary restraining order was granted on the date the complaint was filed. A hearing on the motion for a preliminary injunction went forward on March 21 and this entry follows.

Joe Hiles is Sigma's vice president and he runs the sales department. Sigma is a company that sells insurance for group health, life, short-term disability and long-term disability. The plaintiff has about 371 current clients. Sigma earns commissions from insurance companies by selling the companies' policies to Sigma's customers.

Among the ways that Sigma attracts customers is through a database of 15,000 potential clients. Hiles testified that the database was developed over many years by Sigma, mostly through telemarketing efforts. Sigma employs at least two full-time telemarketers who identify potential insurance customers. The information created by the telemarketers is more than what might typically be found in a phone book or other similar resource. In particular, through its efforts, Sigma has learned the renewal dates for existing insurance of over 8,000 of the leads. This information gives Sigma a competitive advantage because it allows Sigma to time an approach to these customers to coincide with when the customers are considering renewing or changing their insurance.

The database is constantly edited as Sigma learns of new leads or changes in the status of existing leads.

Defendant Patrick V. Quinn has held a license to sell life, health, and variable annuity insurance products in Ohio since 1977. He began working at Sigma on June 1, 2004, as an account executive. In that position, he was not selling new policies; instead, he was servicing existing customers. He was hired by Sigma as an employee and paid wages that were reported at the end of the year on a federal W-2 form.

Before working at Sigma, Quinn worked for Medical Mutual of Ohio in a similar account support position. Although he was not a sales agent, he testified that when he left Medical Mutual to work at Sigma, he brought to Sigma the business of at least two clients: LJL (Cookies by Design) and Holiday Camplands.

On January 3, 2005, in consideration for his continued employment at Sigma, Quinn executed a confidentiality and non-solicitation agreement. That agreement includes the following pertinent provisions:

CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT

> THIS Agreement is made and entered as of the 3rd day of January, 2005, by and between Sigma II, hereinafter referred to as the "Corporation" and Patrick Quinn, hereinafter referred to as "Producer."
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> ***
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> 3. **Confidentiality.** Producer agrees that Producer shall not at any time (whether during or after the period of Producer's employment with the Corporation) directly or indirectly copy, disseminate or use, for Producer's personal benefit or the benefit of any third party, any Confidential Information (as defined below), regardless of how such Confidential Information may have been acquired, . . .
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> ***
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> 5. **Non-Solicitation of Clients.** During the time that Producer is employed by the Corporation and for a period of two (2) years thereafter (the "Restricted Period"), Producer shall not, . . ., solicit, attempt to solicit or cause to be solicited, conduct business with, render any services to or accept money from any Client . . . of the Corporation . . .
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> ***

Quinn continued at Sigma as a W-2 employee and account executive until October 1, 2007, when he was promoted to sales executive. In that position, he was required to generate new business by selling insurance. To help find customers, Sigma would provide Quinn with numerous leads each week from its database. Quinn was expected to call on these leads to generate sales.

Quinn testified that the sales leads were distributed to him on paper, usually with six leads per sheet of paper. These papers would be distributed about once a month and the total number of leads given in a month could exceed 100. Quinn testified that he did not have access to the entire database of leads through his own laptop. Hiles disagreed on this point, saying that the sales executives had computer access to the database.

On June 1, 2008, the defendant remained in his position as a sales executive but his income began to be reported on a federal Form 1099. The defendant asserts that he became an independent contractor at that time. The plaintiff argues that the change to a 1099 employee from a W-2 employee was at Quinn's request and as an accommodation to him because he wanted more money in each paycheck by not having federal taxes withheld. Except for that difference, Hiles testified that "absolutely nothing changed" about the other terms and conditions of Quinn's employment. Quinn differed. He testified that his independent contractor's status gave him "freedom" that he did not have as a W-2 employee. That freedom included, among other things, the ability to pursue clients that would be his own and where he would not have to share the commission with Sigma.

However, that freedom also came with the responsibility of filing quarterly estimated tax payments, something Quinn did not relish. Ultimately, on October 1, 2010, Quinn was returned to W-2 employee status at his request. Then, in January, 2011, his employment was terminated for reasons that are not relevant to this case.

After he left Sigma, the defendant formed the QBC Agency, LLC, to sell health insurance. He contacted 31 of the approximately 46 clients that he had while at Sigma to persuade them to place their insurance business with him as the agent of record, *i.e.*, the agent to whom the insurance carrier would have to pay a commission. About 14 customers switched to Quinn as their agent of record.

By its motion for preliminary injunction, Sigma seeks to have the defendant restrained from using its confidential information and from soliciting its current clients.

Before a preliminary injunction can be granted, a plaintiff must show that: there is a substantial likelihood the plaintiff will prevail on the merits of the claims in its complaint; the

plaintiff will suffer irreparable injury if the injunction is not granted; third parties will not be unjustifiably harmed by the injunction; and the public interest will be served by the injunction.[1]

As for the likelihood of success on the merits, most of the attention at the hearing was focused on the plaintiff's breach of contract claim. In particular, the defendant argued that when he became a 1099 employee in 2008, his employment under the contract ended and that he remained bound by the agreement for only 24 months, until June 1, 2010, so that when he resumed W-2 employment in October, 2010, and did not sign a new agreement he was no longer bound by any written agreement.

But the plaintiff asserts that Quinn's 1099 status made him an independent contractor in name only and he was an employee continuously through the date of his termination so that the 24-month non-disclosure and non-solicitation period did not begin until January, 2011. In support of that position, the plaintiff proffered evidence that the defendant continued while on 1099 status to be treated like every other sales executive at Sigma.

Although it is not necessary to decide now whether Quinn was an employee or a true independent contractor from June, 2008 until October, 2010, it is worth noting that under the defendant's interpretation of events he would have been in violation of the agreement from June, 2008 until June, 2010, because he claims that during those years he was able to solicit business of his own but at the same time was using Sigma's confidential information for potential Sigma clients, an arrangement that does not square with the language of the agreement.

That proposition notwithstanding, the court defers on a finding of whether the plaintiff is substantially likely to succeed on the breach of contract claim, but finds that the plaintiff is substantially likely to succeed on the misappropriation of trade secrets claim.

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[1] *Mike McGarry & Sons, Inc. v. Gross*, 2006-Ohio-1759, Cuyahoga App. No. 86603, ¶ 10.

Under Section 1333.61(D) of the Ohio Revised Code, a trade secret includes "business information or plans, financial information, or listing of names, addresses, or telephone numbers" that derives independent economic value from not being generally known to competitors and that is the subject of efforts to maintain its secrecy. The evidence in this case is clear that the plaintiff's client list and database of leads are trade secrets.

Actual or threatened misappropriation of trade secrets may be enjoined.[2] Quinn no longer works for Sigma and does not have the right to use its trade secrets, whether he has those secrets on his computer, in writing, or in his head. That prohibition applies even in the absence of a written confidentiality and non-solicitation agreement. Quinn has testified to using the client list from Sigma to get those clients for himself. Sigma is substantially likely to succeed on its claim for misappropriation of trade secrets.

Quinn's use of Sigma's trade secrets will also result in irreparable harm. Although damages may be quantified if only several customers leave Sigma and place their business with Quinn (as has already happened), the plaintiff's reputation, goodwill, and economic momentum will be damaged with each day that Quinn calls on its existing customers or potential new customers. There is no way to measure that harm. For instance, how can Sigma calculate the loss of the advantage it gained over competitors by expending time and effort to develop sales leads, only to see that advantage disappear by Quinn becoming a competitor using that information? Additionally, an injunction is an equitable remedy. It is always more equitable to prevent damage before it occurs than to try to calculate compensation for it later.

The defendant and third parties will not be unduly harmed if Quinn is enjoined from using Sigma's trade secrets. Quinn is still free to work as a health insurance sales agent, just without using Sigma's trade secrets. This is ordinary competition and is what Quinn should have

[2] O.R.C. Section 1333.62(A).

expected when he formed his own business. As for third parties, since an injunction here is intended to preserve ordinary competition, the court is confident that insurance customers and insurance carriers will suffer no deleterious effects if Quinn is not allowed to use Sigma's trade secrets.

The public interest is also served by an injunction. Misappropriation of trade secrets is a civil wrong. The public deserves to know that courts will use available remedies to avoid wrongs before they occur or to redress them after they happen.

The plaintiff has sufficiently demonstrated its entitlement to an injunction and the motion for a preliminary injunction will be granted.

What is left to decide is the status of the approximately 14 clients who have already switched from Sigma to Quinn as their agent of record.[3] As for those customers, they constitute a small enough class that damages should be readily ascertainable in the event the plaintiff does succeed at trial on the merits. It would also not serve those clients' interests to order Quinn not to have any communication with them. Such an order could cause harm to the clients by leaving them confused and uncounseled about the state of their insurance affairs. Moreover, any order to that effect would be of dubious value since the court could only order Quinn to refrain from contact with the customers, but could not order the customers to reinstate Sigma as their agent of record. Therefore, both parties are free to continue to compete for those 14 clients as identified by Quinn during his testimony from defendant's hearing Exhibit C.

For these reasons, defendant Patrick V. Quinn is ordered restrained from using any of Sigma's confidential information, which includes the identities of the 46 insurance customers served by Quinn while at Sigma (except LJL [Cookies by Design] and Holiday Camplands), and

[3] Three of these clients have returned to Sigma as their agent of record according to Hiles.

from soliciting the business of any of Sigma's other current clients. The defendant is also ordered restrained from using any information from Sigma's leads database to solicit customers.

This order remains in effect until further order of this court. The plaintiff posted a $10,000 bond for the temporary restraining order and that same bond applies to the preliminary injunction.

IT IS SO ORDERED:

_____ Date: _____
JUDGE JOHN P. O'DONNELL

SERVICE

A copy of this Journal Entry was sent by e-mail, this 5th day of April, 2011, to the following:

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JUDGE JOHN P. O'DONNELL