COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2484CV02039

GLENN FRANK

vs.

HIGHTOWER HOLDING, LLC[1] & others[2]

Counsel notified by email 8/30/24 BWL Asst Clerk

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF GLENN FRANK'S MOTION FOR A PRELIMINARY INJUNCTION PROHIBITING ENFORCEMENT OF OVERBROAD NON-SOLICITATION AND NON-SERVICE CLAUSES

Glenn Frank (Frank) is a sixty-nine-year-old financial advisor who since 2010 has worked at Lexington Wealth Management (LWM), a firm acquired by Hightower Holding, LLC (Hightower) in 2019.[3] He filed this age discrimination case against Hightower and others (together Defendants), alleging that Hightower engaged in a campaign to phase Frank out of work and, essentially, compel retirement. Frank asserts various claims including age discrimination under G. L. c. 151B, and aiding and abetting discrimination against the individual defendants. Relevant here, Frank, who wants to leave LWM and bring his long-term clients with him, also asserts a declaratory judgment claim relating to a non-solicitation and non-interference provision in Frank's employment contract with Hightower. Frank asks the court to declare the provision overbroad, against public policy, and unenforceable. In connection with that claim, Frank now seeks an order enjoining Hightower from enforcing that provision.

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[1] d/b/a Lexington Wealth Management

[2] Michael Tucci and Kristine Porcaro

[3] Hightower does business in the Commonwealth as LWM.

After hearing and review, and for the reasons stated below the Motion For a Preliminary Injunction Prohibiting Enforcement of Overbroad Non-Solicitation and Non-Service Clauses (Motion) is **ALLOWED**.

BACKGROUND

The following relevant facts are taken from the Verified Complaint.[4] Frank is a personal financial specialist and was a certified financial planner and public accountant. Frank has thirty-nine years' experience in investing, planning, financial counseling, and investment related tax strategies. Frank writes articles and books in his field and has taught investment courses to financial advisers and the public. Frank was the Founding Director of Bentley University's Master's program in Financial Planning.

In or about 2010, Frank began working for LWM initially as Director of Investment Tax Strategy and was appointed to LWM's Investment Committee.[5] When he was hired, Frank also had fifty clients with whom he had developed relationships who followed him from his prior employer, Wells Fargo, to LWM. Most of Frank's clients have followed him from various investment firms over the years.

At the beginning of 2024, Frank served approximately twenty-five clients, approximately twenty-one to twenty-three of whom had been his clients when he joined LWM in 2010. The other two to three clients were referred to Frank by one of his other clients. Frank's clients' portfolios total more than $150 million. Frank's client work included "ongoing, direct contact with clients initiating and attending all non-clerical client meetings; ongoing client-service team meetings; serving as a client

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[4] Frank amended his Verified Complaint after the hearing on the Motion. I rely on the original complaint.

[5] Registered investment advisory firms, like LWM, generally have an Investment Committee that determines overall investment strategy and policy, sets asset-allocation targets, oversees portfolio performance, monitors risk, and oversees managers.

advocate as a senior member of LWM's Investment Committee, conducting outside research for atypical client needs, and higher-level income and estate-tax planning." Frank understands and believes that his clients have stayed with LWM because of Frank's attention to their accounts.

In 2019, Hightower acquired LWM and Frank signed a Standard Protective Agreement (SPA) in consideration of his "future or continued employment with, and compensation and benefits from," Hightower. Relevant here, the SPA includes a twelve-month post-employment non-solicitation and non-interference clause (non-solicitation clause or non-solicitation provision).

Beginning in 2021, Defendants engaged in the following wrongful conduct: (i) unilaterally changing Frank's role on client service teams to "member emeritus"; (ii) giving final decision making authority for Frank's clients to younger advisors; (iii) removing Frank from the Investment Committee without notice to make room for "younger advisors"; (iv) discussing with Frank the need to turn over the reigns to younger successors so the firm could grow; (v) informing LWM staff and Frank's clients that Frank would be "phasing out" or retiring, while knowing Frank has no plans to retire; and (vi) removing Frank from client accounts and giving the accounts to younger advisors. In late fall 2023, Hightower cut Frank's pay in half as of January 1, 2024 and removed client service from Frank's job responsibilities. Frank is no longer permitted to contact his clients about their portfolios. No other employee had their salaries reduced.

Frank complained to Human Resources of age discrimination and filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). The day he filed his MCAD complaint, Hightower suspended Frank from employment for six weeks. Hightower reinstated Frank from his leave on May 7, 2024 with a new job description that explicitly required him to transition his clients to younger advisers.

Frank would like to secure new employment but believes that the restrictions in the SPA, if enforced, limit his ability to solicit business from clients, even those he brought with him to LWM. Frank is rapidly losing clients. His salary remains half of what it was previously, and Hightower continues to restrict and impede his interactions with his clients.

DISCUSSION

I. Applicable Law

To obtain injunctive relief, Frank must establish "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of [his] likelihood of success on the merits, the risk of irreparable harm to [him] outweighs the potential harm to the defendant in granting the injunction." Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). A "movant's likelihood of success is the touchstone of the preliminary injunction inquiry." Foster v. Commissioner of Correction, 484 Mass. 698, 712 (2020), quoting Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 152 (1st Cir. 2012). When a movant cannot show a likelihood of success on the merits, "the remaining factors become matters of idle curiosity." Id., quoting Maine Educ. Ass'n Benefits Trust, 695 F.3d at 152.

"A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment." GTE Prods. Corp. v. Stewart, 414 Mass. 721, 724 (1993). Thus, although "[t]rial judges have broad discretion to grant or deny injunctive relief," LightLab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 194 (2014), a preliminary injunction must be denied where money damages would adequately compensate for any harm a plaintiff may suffer before final judgment enters, "no matter how likely it may be that the moving party will prevail on the merits." Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 621 (1980). "[A]n attempt to show irreparable harm cannot be evaluated

in a vacuum;" instead, it must be evaluated as part of a "sliding scale analysis" in which "the predicted harm and the likelihood of success on the merits [are] juxtaposed and weighed in tandem." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996).

"If 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." Abner A. v. Massachusetts Interscholastic Athletic Ass'n, 490 Mass. 538, 545 (2022), quoting Packaging Indus. Group, Inc., 380 Mass. at 617. "What 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." Id., quoting Packaging Industries Group, Inc. 380 Mass. at 617.

Finally, because "[a] preliminary injunction is an extraordinary remedy never awarded as of right[,]" Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008), it "should not be granted unless the [moving party] ha[s] made a clear showing of entitlement thereto." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004).

II. Likelihood of Success on the Merits

Frank argues that he is likely to succeed on his claim for a declaration that the non-solicitation provision in the SPA is unenforceable. I agree.

The provision provides, in relevant part, that Frank may not:

> a. contact, request, solicit or encourage . . . [directly or indirectly] any of the Company's . . . Customers or Prospective Customers . . . for the purpose of (i) providing . . . any of the products, services and / or advice that are the same as or similar to any of the products, services and / or advice provided by the Company, (ii) entering into any agreement, engagement or opportunity to

> provide any such products, services and / or advice . . ., and /or (iii) accepting or receiving any transfer or assets or accounts of said [Customers or Prospective Customers]; or
>
> c. otherwise interfere with, reduce or harm the Company's relationships with such [Customers or Prospective Customers] . . .

Should Frank leave LWM, this provision prohibits Frank from soliciting business from his own clients and from accepting business from them should they seek to retain him to manage their portfolios. It also prohibits Frank from communicating with or soliciting others who may be Hightower / LWM Customers or Prospective Customers, whether or not Frank worked with or learned about those individuals during his employ at LWM.[6]

Because the SPA contains a choice of law provision requiring the application of Illinois law, "without reference to any conflict of law principles," I consider the enforceability of the non-solicitation provision under that state's law.[7] Under Illinois law, post-employment restrictive covenants are "scrutinized carefully." Cambridge

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[6] A non-solicitation provision falls under the general rubric of a "covenant not to compete."

[7] Massachusetts and Illinois law regarding the enforceability of a post-employment prohibition on solicitation are substantially similar. As such, I need not conduct an analysis to determine whether the choice of law provision is contrary to public policy. See Kaufman v. Richmond, 442 Mass. 1010, 1011 (2004)("Choice of law analysis is unnecessary when that choice will not affect the outcome of the case"); UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 n.12 (2019). See also Oxford Glob. Res., LLC v. Hernandez, 480 Mass. 462, 468–469 (2018) (choice of law provision not honored where chosen state has "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice" or "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state" in connection with the particular issue "and is the State whose law would apply" absent the choice of law provision), quoting Restatement (Second) of Conflict of Laws § 187(2) (1971).

Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 378 Ill. App. 3d 437, 447 (2007). "For a restrictive covenant to be valid and enforceable in Illinois, the terms must be 'reasonable and necessary to protect a legitimate business interest of the employer.'" Id., quoting Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc., 292 Ill. App. 3d 131, 138 (1997). Illinois courts "have long recognized two situations in which an employer has a legitimate business interest to justify enforcement of a covenant not to compete: (1) where, by the nature of the business, the customer relationship is near-permanent and but for [his] association with plaintiff, defendant would never have had contact with the clients in question; and (2) where the former employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit." Office Mates 5, North Shore, Inc. v. Hazen, 234 Ill. App. 3d 557, 569 (1992) (internal quotes omitted).[8] "An employer seeking to enforce a restrictive covenant bears the burden of demonstrating that the full extent of the restraint is necessary for protecting its interests." Cambridge Eng'g, Inc., 378 Ill. App. 3d at 447.

Here, Frank argues that the provision protects no legitimate business interest of Hightower. He has shown this is likely in two respects.

First, to the extent the non-solicitation provision prohibits Frank from communicating with persons who may be Customers or Prospective Customers, but

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[8] This is consistent with Massachusetts' law. See Harrell v. Backstage Salon & Day Spa, Inc., 2022 WL 618681, at *4 (Mass. Super. Feb. 22, 2022) ("The employer has the burden of proving that the agreement protects legitimate business interests and thus is enforceable. . . . An employer may enforce a non-competition or non-solicitation agreement against a former employee only to the extent necessary to prevent harm to the employer's goodwill or to guard against the release or use of trade secrets or other confidential information."), citing New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 673-676 (1977).

who he did not work with while at LWM, the provision is overbroad. As to this conclusion, Hightower Holding, LLC v. Kedir, 2024 WL 3398361 (N.D. Ill. July 11, 2024) is exactly on point.

In that case, the court considered the precise non-solicitation provision at issue here. 2024 WL 3398361 at *2. Hightower sought to enforce it against another recently departed financial adviser and the court analyzed whether it protected a legitimate business interest of Hightower. Id. at *1, *6-8. The court held that the provision was overbroad and "greater than necessary to protect Hightower's legitimate business interest" because it encompassed customers and other individuals and entities with whom the defendant had not worked. Id. at *7. The court refused to modify or reform the provision and held it unenforceable in its entirety. Id. at *9.

The same is true here – the non-solicitation provision bars Frank from dealing in any way with Customers or Prospective Customers that he had no contact with while working at LWM. Hightower has no protectible business interest in preventing Frank from communicating with or soliciting customers of Hightower / LWM with whom Frank had no relationship during his employment. See also Source One Staffing, Inc. v. Lewis, 2018 IL App (1st) 172842-U, ¶ 20 (provision purporting to bar former employee from "soliciting customers he 'knew about' during his employment" was "facially overbroad").

Second, to the extent the provision applies to customers with whom Frank worked with *prior* to LWM and who he *brought* to LWM, Hightower has no legitimate business interest in preventing Frank from working with these clients. Put elsewise, Frank did not develop his relationship with these customers based on his work at LWM or any confidential or trade secret information belonging to LWM. Any goodwill Frank has with those clients belongs to him. See Sentry Ins. v. Firnstein, 14 Mass. App. Ct.

706, 708 (1982) (non-solicitation agreement is enforceable only "to protect the employer's good will, not to appropriate the good will of the employee"). And there is no legitimate business interest in preventing competition. Marine Contractors Co. v. Hurley, 365 Mass. 280, 287–288 (1974); Lifetec, Inc. v. Edwards, 377 Ill. App. 3d 260, 268 (2007) ("Because restrictive covenants in employment agreements are a form of restraint of trade, they are scrutinized carefully to ensure their intended effect is not to prevent competition per se.")

Hightower argues that there is a legitimate business interest for the non-solicitation clause because the customers at issue are "near permanent" clients of Hightower / LWM. I am not persuaded. As an initial matter, Hightower offered no evidence that Frank's clients who followed him to LWM have since become Hightower / LWM's near permanent customers. See Office Mates 5, 234 Ill. App. 3d at 569. Moreover, the two cases on which Hightower relies are inapposite.

In CUNA Mut. Life Ins. Co. v. Kuperman, 1998 WL 409880 (N.D. Ill. July 7, 1998), the defendant had no prior expertise in the specific field and brought no clients with him when he was hired. Id. at *7 ("but for [plaintiff's] employment by CUNA Mutual, he would not have had access to the Credit Union members"); Id. at *1 (defendant "had not . . . had any experience marketing financial services through credit unions, nor any access to the individual members of the MECU"). Further, in Kuperman, the defendant used confidential information to engage in solicitation. The defendant had "obtained detailed and personal information about individual members, including individuals' names, home addresses, social security numbers, and similar information regarding other family members . . . [and] confidential financial information including net worth, investments, securities holdings, insurance policies, bank accounts and the like," which he took with him to use to solicit plaintiff's clients. Id. at *1, *8. Finally, the non-

compete provision at issue in Kuperman "prohibit[ed] only competition which threatens [plaintiff's] interest in its confidential information and its long-standing customer relationships" and the court construed the provision as permitting solicitation of "any individual or group, so long as [defendant] does not use CUNA Mutual's confidential and proprietary information." Id. at *6.

Scheffel Fin. Servs., Inc. v. Heil, 2014 IL App (5th) 130600, also does not assist Hightower. There, unlike here, the defendant / employee "would not have had any contact with those individual investors absent his employment" with the plaintiff. Id. at ¶ 13.

Kuperman and Scheffel Fin. Servs., Inc. thus support the conclusion that there is no legitimate business interest in prohibiting Frank from soliciting clients broadly so long as he does not rely on any confidential information, which he does not intend to do. Frank does not seek to use any Hightower / LWM confidential information and does not need to rely on any confidential information to communicate with his clients. With respect to his long-term clients, Frank brought them to LWM and did not develop his relationships through his work at LWM or because of any LWM confidential information.

Accordingly, Frank has shown a likelihood of establishing that the non-solicitation clause is unenforceable as to clients he brought with him to LWM and clients and customers of LWM with whom Frank never interacted.

III. Irreparable Harm

Having found a likelihood of success on the merits, I turn to the issue of irreparable harm. Frank argues that he will be irreparably harmed if he is denied the ability to change his employment and provide financial advice to his long-standing clients for a year because he will lose the goodwill he has established with those clients.

I agree. The inability to work with those clients will irreparably harm the goodwill he has developed and maintained with those clients over decades. Damage to goodwill is "not easily measured" and the harm thereto "may well be irreparable." Oxford Glob. Res., Inc. v. Consolo, 2002 WL 32130445, at *6 (Mass. Super. May 6, 2002).

Further, enforcement of the non-solicitation clause, which would ostensibly prohibit Frank from soliciting any clients – even those with whom he never worked while at LWM – would significantly impair if not impede Frank's ability to work in his field for a year, which likewise would constitute irreparable harm. This is particularly egregious where Frank is sixty-nine years old and he alleges Hightower and LWM are engaging in age discrimination with a goal to force him to retire despite his desire to continue to work. Indeed, Frank alleges that the conduct of which he complains is already impacting his client relationships. "An employee's loss of his or her means of support in his or her chosen field can constitute irreparable harm for purposes of obtaining injunctive relief." Bradley v. Bradford & Bigelow, Inc., 2020 WL 8182797, at *3 (Mass. Super. Nov. 13, 2020), citing Edwards v. Athena Capital Advisors, Inc., 2007 WL 2840360, at *4 (Mass. Super. Aug. 9, 2007) ("This covenant, if enforced on its own terms, would preclude [the former employee] from any work in the financial services industry throughout the world for one year. That poses clear irreparable harm to [the former employee's] future career") and Lunt v. Campbell, 2007 WL 2935864, at *5 (Mass. Super. Sept. 24, 2007) (denying injunction that would "deprive [former employee] of her only means of support at least until such time as she could obtain employment outside of Essex County, or in another field of work").[9]

[9] Given the circumstances alleged in Frank's Verified Complaint and his evident desire to leave LWH, I am not persuaded by Hightower's contention that Frank cannot establish irreparable harm because he remains employed with the company.

Frank has thus established irreparable harm.

IV. Balance of Harms

While Hightower will face competition if the non-solicitation provision is found unenforceable, so long as Frank neither takes nor uses any Hightower / LWM confidential information, such competition does not constitute irreparable harm.[10] The harm to Frank from being unable to communicate with his long-time clients or solicit or work with other customers with whom he never worked or communicated with during his time at LWM, far outweighs any harm to Hightower from ordinary competition.

In addition, I agree that the public interest favors allowing Frank's long-time clients to select their own financial advisors. Some may depart Hightower / LWM to work with Frank. Some may not. The choice, especially given the length of their relationship with Frank, should be theirs to make.

V. Hightower's Additional Arguments

Hightower make two additional arguments in opposition to the Motion. First, that this forum is not appropriate and whether a preliminary injunction is warranted must be decided in Illinois pursuant to the forum selection clause in the SPA. Second, that the requested injunction is premature. I address each in turn.

With respect to the forum selection clause, the SPA provides that suit must be brought in Chicago, Illinois. Defendants have not filed a motion to dismiss based on the forum selection clause. Rather, they argue that its existence compels denial of the

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[10] I do not credit Hightower's assertion that it will suffer irreparable harm because granting the injunction will: (1) hamper its goodwill and relationships with its clients, business reputation, its common law and contractual rights, and its confidential and trade secret information; and (2) encourage other employees to breach their contractual obligations, their fiduciary duties, and their duties of loyalty, and may encourage Hightower's competitors to induce Hightower employees to do so.

requested injunctive relief because the forum selection clause establishes the lack of any likelihood of success on the merits. I do not agree.

As an initial matter, I have analyzed Frank's likelihood of success on the merits applying *Illinois* law and found he has established such a likelihood. I see no reason why an Illinois court would reach a different result. Moreover, issuing the injunction does not prejudice Hightower's right to argue that the forum is improper on a motion to dismiss. If it is correct, the injunction and the case will go away.

Lastly, I am not persuaded dismissal will be required. Although I take no position on any forthcoming motion to dismiss, the Supreme Judicial Court has made clear that a forum selection clause is not be enforceable in all circumstances. See Oxford Global Res., LLC v. Hernandez, 480 Mass. 462, 474 (2018) (affirming motion to dismiss on forum non conveniens grounds notwithstanding forum selection clause requiring suit in Massachusetts). In particular, the Court noted that certain factors, including the "convenience of witnesses" may be a legitimate objection to a forum selection clause. Id. at 474–475 ("[W]e do not believe that a defendant's agreement to a forum waives an objection to the forum based on any other private factor, including the convenience of witnesses. Witnesses to be called by a party are not 'their witnesses' in the sense that they are invariably agents of the party or persons whose concerns about inconvenience can be waived by the party, especially where the party is unlikely to know who these witnesses will be and the extent of their inconvenience when the party agrees to a choice of forum."). Moreover, a forthcoming motion is not guaranteed. Certainly, Hightower could waive its contractual right and agree to proceed in this forum. And the potential motion to dismiss is no reason to require Frank to remain in limbo regarding the enforceability of the non-solicitation clause.

The latter point leads me to Hightower's second argument which is that Frank has not resigned and left LWM and, therefore, the requested injunctive relief is premature. I disagree.

Hightower does not dispute the existence of an actual controversy regarding the enforceability of the non-solicitation clause in the SPA or that "[t]he determination of contractual rights is a proper subject of a declaratory judgment proceeding." Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 705 (2002). Nor does it contest that a declaratory judgment claim in connection with a dispute over contractual rights or obligations may be filed "*either before or after* a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." G. L. c. 251A, § 1 (emphasis added). Moreover, the declaratory judgment statute anticipates that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Id. § 5. It also provides that the declaratory judgment statute is remedial, "[i]ts purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered." Id. § 9.

Having shown that he is likely to establish that the non-solicitation clause is unenforceable, Frank is entitled to an Order enjoining Hightower from seeking to enforce the clause against him when he leaves. It serves no purpose to require Frank to leave his employ, solicit clients, receive a demand from Hightower to cease his solicitations, and only then be able to obtain an injunction. The dispute having arisen as to the enforceability of the non-solicitation clause, Frank is entitled under the

declaratory judgment to preliminary injunctive relief so he can act without the "uncertainty and insecurity" he otherwise faces.[11]

ORDER

Wherefore, the Motion for Preliminary Injunction Prohibiting Enforcement of Overbroad Non-Solicitation and Non-Service Clauses is **ALLOWED.**

It is hereby **ORDERED** that Hightower Holding LLP d/b/a Lexington Wealth Management is **ENJOINED** from enforcing paragraph 4 of the Standard Protective Agreement (Agreement) to the extent it purports to

(a) prohibit Glenn Frank from contacting or soliciting Customers or Prospective Customers (as defined in the Agreement) with whom he had a client relationship prior his employment with LWM or

(b) prohibit Glenn Frank from contacting or soliciting Customers or Prospective Customers (as defined in the Agreement) with whom Glenn Frank had no contact or relationship during his employment with LWM.

Nothing in this Order affects Glenn Frank's remaining obligations under the Agreement including, without limitation, his obligations concerning Confidential Information as provided in paragraph 3 of the Agreement.

SO ORDERED:

Debra A. Squires-Lee
Justice of the Superior Court

August 29, 2024

[11] Hightower has not asserted that enforcement of the non-solicitation clause is unlikely or will not occur. If that were the case, it would not have opposed the motion but would have entered a stipulation.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPT.
BUSINESS LITIGATION SESSION

GLENN FRANK

Plaintiff,

v.

HIGHTOWER HOLDING, LLC, d/b/a LEXINGTON WEALTH MANAGEMENT, MICHAEL TUCCI, *individually,* and KRISTINE PORCARO, *individually,*

Defendants.

C.A. No. 24-2039

PLAINTIFF GLENN FRANK'S MOTION FOR A PRELIMINARY INJUNCTION PROHIBITING ENFORCEMENT OF OVERBROAD NON-SOLICITATION AND NON-SERVICE CLAUSES

Plaintiff Glenn Frank ("Mr. Frank" or "Plaintiff") is a financial adviser who as of January 1, 2024, served approximately 25 clients with assets under management totaling $150 million. Verified Complaint ("VC") at ¶¶ 24, 26. He has served most of these individuals for decades, long before he began working for Defendant Hightower Holdings, LLC ("Hightower"), d/b/a Lexington Wealth Management ("LWM"). VC at ¶¶ 24, 33. For the reasons stated herein and in his accompanying memorandum of law ("MOL"), Mr. Frank moves for a preliminary injunction enjoining enforcement of Hightower's non-solicitation and non-service covenants. *See* VC at Exhibit A, at "Standard Protective Agreement" ("SPA"), at ¶ 4.

"To succeed in an action for a preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of

ALLOWED Injunction 8/29/24 Decision and Order of Today's Date. After hearing and review, See Memorandum of Decision - The Issue

irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." *Tri-Nel Mgt. v. Bd. of Health*, 433 Mass. 217, 219 (2001). Mr. Frank has demonstrated a likelihood of success on the merits. *See id.;* MOL at pp. 9-18. Chiefly, an employer may not use a restrictive covenant to usurp goodwill belonging to the employee. *Sentry Ins. v. Firnstein*, 14 Mass. App. Ct. 706, 708 (1982). Here, the overbroad restrictive covenants in the SPA would have the unlawful effect of usurping Mr. Frank's goodwill, earned over nearly four decades, to Mr. Frank's detriment and to that of his largely Massachusetts-based clients. *See* VC at ¶¶ 9, 25, 33. Mr. Frank's client relationships almost entirely predate his employment with Hightower/LWM, in some cases by more than 20 years, *see id.* at ¶¶ 19-26, 33. "The goodwill . . . that a financial services company legitimately may preserve is its own goodwill, not the goodwill earned by the employee that fairly belongs to the employee." *See Smith Barney Div. of Citigroup Glob. Mkts., Inc. v. Griffin*, 0884CV00022-BLS1, 2008 Mass. Super. LEXIS 44, at *12 (Suffolk Super. Ct. Jan. 23, 2008) (Gants, J.). As such, and for the reasons set forth in the MOL, the restrictive covenants are unenforceable.

Mr. Frank has likewise demonstrated that irreparable harm will result if the injunction is denied. *See Tri-Nel Mgt.* 433 Mass. at 219; MOL at pp. 18-19. "An employee's loss of his or her means of support in his or her chosen field can constitute irreparable harm for purposes of obtaining injunctive relief." *Bradley v. Bradford & Bigelow, Inc.*, Nos. 145566, 2084CV02504-BLS1, 2020 Mass. Super. LEXIS 165, at *6 (Suffolk Super. Ct. Nov. 13, 2020). Likewise, continued damage to Mr. Frank's goodwill through Hightower's unlawful appropriation thereof also constitutes irreparable harm. *Cf. Oxford Glob. Res. v. Consolo,* 0284CV04763-BLS2, 2002 Mass. Super. LEXIS 559, at *17, 16 Mass. L. Rep. 415 (Suffolk Super. Ct. Jun. 6, 2003) ("These activities have a real potential for damaging Oxford's good will, and if they continue, the damage

is likely to continue as well. It is damage that is not easily measured, and for this reason, the harm may well be irreparable."). Moreover, as Judge Gants recognized, "the enforcement of the confidentiality and non-solicitation provisions punishes the clients of the departing financial advisors, many of whom have relied upon the advice of their financial advisor for many years in deciding how to invest their life savings." *Smith Barney, supra*, at *7-8. "If these provisions are enforced to the letter, as is generally sought by the jilted financial services company, the clients' financial advisor one day simply disappears without warning." *See id.* at *8.

Finally, the balance of harms weighs in favor of the injunction. *See Tri-Nel Mgt.* 433 Mass. at 219; MOL at pp. 20-21. Hightower has no legitimate business interest in prohibiting Mr. Frank's solicitation or service of his long-standing clients, many of whom he has had relationships with spanning decades before he worked for Hightower/LWM. Therefore, Hightower will not suffer cognizable harm if the clients at issue are able to select their financial adviser of their choosing, including Mr. Frank. Conversely, Mr. Frank stands to suffer serious, and difficult to measure, harm to his career if he is prohibited from continuing to service his longstanding clients. *Cf. Banc of Am. Corporate Ins. Agency, LLC v. Verille*, 0782CV01099, 2007 Mass. Super. LEXIS 454, *6-8, 23 Mass. L. Rep. 243 (Norfolk Super. Ct. Aug. 7, 2007) (impact on employee and "his interests in pursuing his livelihood in the area of employee benefits" bore greater weight than potential harm to former employer where evidence showed that allegedly purloined customers emanated from employee's goodwill, not employer's). The injunction sought here would also advance the public interest. "The 'right [of an employee] to use [his] general knowledge, experience, memory and skill' promotes the public interest in labor mobility and the employee's freedom to practice his profession and in mitigating monopoly." *Dynamics Research Corp. v. Analytic Scis. Corp.*, 9 Mass. App. Ct. 254, 267 (1980). In short,

where Hightower has no legitimate business interest in restricting Mr. Frank's solicitation or service of his own clients, a preliminary injunction is necessary and should be granted to afford Mr. Frank professional mobility and to ensure that his clients can choose who they want to manage and advise on their portfolios and financial-planning goals.

CONCLUSION

For the reasons stated herein and in Plaintiff's Memorandum of Law, this Court should issue a preliminary injunction enjoining enforcement of Defendant Hightower Holding, LLP's non-solicitation and non-service covenants contained in Paragraph 4 of the SPA.

Respectfully Submitted,

Glenn Frank, Plaintiff,
By His Attorneys,

Dated: August 1, 2024

/s/ Michaela C. May
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