CITATION: Demand Science Group, LLC v. Gladish, 2024 ONSC 214
COURT FILE NO.: CV-23-00709772-0000
DATE: 20240110

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Demand Science Group, LLC and Demand Science Canada Inc., Plaintiffs

-and-

Lee Gladish and Skipintro Technologies Inc. c.o.b. as SendNow.ai, Defendants

BEFORE: Robert Centa J.

COUNSEL: Adam Hirsh and Elie Farkas, for the plaintiffs

Jason M. Berall and Evana Yukanna, for the defendants

HEARD: January 8, 2024

ENDORSEMENT

[1] In 2021, the defendant Lee Gladish sold his "sales enablement and engagement software solutions" business to the plaintiffs for USD $1.25 million. The transaction was thoroughly negotiated and both parties were represented by experienced counsel. As part of this lucrative commercial transaction, Mr. Gladish agreed not to compete with the plaintiffs for a period of three years. Mr. Gladish became an employee of Demand Science Canada Inc. and, in January 2022, he was promoted to become its Managing Director, Product. Mr. Gladish's primary responsibility was to develop e-mail software called ReplyForce, which was developed on the foundation of the assets that Mr. Gladish sold to Demand Science.

[2] In January 2023, Mr. Gladish incorporated the defendant Skipintro Technologies Inc. He then appointed another Demand Science Canada employee, Al-Janabi, a director of the company. Soon thereafter, Mr. Gladish began "consulting" with Mr. Hassan Khan who, in a remarkable coincidence, was also working on email software. Mr. Gladish did not disclose any of these activities to Demand Science Canada.

[3] In May 2023, Demand terminated Mr. Gladish's employment and the parties signed a separation agreement.

[4] In June 2023, Demand Science learned that a new competitor, called SendNow, had entered the marketplace. Demand Science observed that SendNow offered the same type of sales enablement and engagement services and features offered by ReplyForce. The SendNow user interface was also extremely similar to that of ReplyForce.

[5] Demand Science learned that SendNow operated through Skipintro, the company that Mr. Gladish incorporated while he was both the Managing Director of Demand Science and subject to the non-competition agreement from the sale of his business to Demand Science.

[6] Demand Science commenced an action against Mr. Gladish and his company, Skipintro. It now moves for an interlocutory injunction to restrain the defendants from operating the SendNow platform or engaging in any capacity in the business of sales enablement and engagement software solutions.

[7] For the reasons that follow, I grant the injunction. This case arises from a commercial transaction, not a traditional employment relationship. The non-competition provision in the restrictive covenants agreement flows directly from Mr. Gladish's decision to sell his business to the plaintiffs. Mr. Gladish has accepted the benefits of that transaction and he must also bear its burdens. I am satisfied that the plaintiffs have presented a strong *prima facie* case that they will demonstrate at trial that Mr. Gladish has violated the non-competition provision. I am also satisfied that the plaintiffs have demonstrated that they will suffer irreparable harm if the injunction is not granted. Finally, the balance of convenience strongly favours the plaintiffs.

[8] Given the urgency of this situation, I am releasing these reasons for decision as quickly as possible. I will not refer to all of the evidence, but I have considered all of the evidence and submissions of the parties.

Legal principles

[9] A party may seek an interlocutory injunction or mandatory order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 40 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In general, a party seeking an interlocutory injunction must meet the test set out in *RJR — MacDonald Inc.* and demonstrate that:

a. the action raises a serious question to be tried, in the sense that the claim is neither frivolous nor vexatious;

b. the moving party would suffer irreparable harm if the court does not grant the injunction until the completion of the trial; and

c. that the balance of convenience favoured granting the injunction because the moving party would suffer greater harm than the responding party if the injunction is not granted.[1]

[10] The parties dispute whether or not the plaintiffs must meet the more onerous standard of a "strong *prima facie* case" on the first branch of the test because they seek to enforce a

[1] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334.

restrictive covenant.[2] To meet the strong *prima facie* case standard, the plaintiffs must satisfy me that there is a strong likelihood on the law and the evidence to be presented at trial that it will prove the allegations set out in the statement of claim.[3]

[11] Nothing turns on this issue as I am satisfied that the plaintiffs have met the higher of the two standards and have demonstrated a strong *prima facie* case at the first branch of the test.

[12] Strength in one part of the *RJR-MacDonald* test can make up for weakness in another. Where a plaintiff demonstrates a strong *prima facie* case of the breach of a negative covenant, the issues of irreparable harm and balance of convenience cannot be ignored, but they may become less of a factor in reaching the final determination.[4]

The plaintiffs have established a strong *prima facie* case that Mr. Gladish breached the non-competition provision of the restrictive covenants agreement

[13] In its factum, Demand Science advances five allegations in support of its injunction. The plaintiffs allege that Mr. Gladish:

a. breached the non-competition clauses in the transaction agreements;

b. infringed Demand Science's rights in copyright and misappropriated its intellectual property;

c. breached the confidentiality clauses in the transaction documents;

d. breached his non-solicitation obligations in the transaction documents; and

e. breached the fiduciary duties owed to Demand Science.

[14] In my view, Demand Science succeeds on its first ground. I am satisfied that Demand Science has established that there is a strong likelihood on the law and the evidence to be presented at trial that it will prove that Mr. Gladish breached the non-competition provision in the restrictive covenants agreement.

[15] In light of those findings, it is not necessary to canvass Demand Science's other allegations.

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[2] *RJR-MacDonald*, at p. 335; *Precision Fine Papers Inc. v. Durkin*, 2008 CanLII 6871 (Ont. S.C.), at para. 17; *Aware Ads Inc. v. Walker*, 2022 ONSC 5543, at para. 48.
[3] *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, [2018] 1 S.C.R. 196, at paras. 17-18.
[4] *Jerger et al. v. Kaloti et al*, 2023 ONSC 4544, at para. 18; *GDI Solutions Inc. v. Walker et al*., 2012 ONSC 4378, at paras. 35 to 37; *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd*., [2008] O.J. No. 190 (S.C.), at para. 39, leave to appeal refused, [2008] O.J. No. 1707 (Div. Ct.); *Rogers Communications Inc. v. Shaw Communities Inc.*, [2009] O.J. No. 3842 (S.C.).

It is likely that the non-competition provision in the restrictive covenants agreement is reasonable

[16] It is essential to focus on the context in which these parties negotiated the restrictive covenant at issue when assessing its reasonableness. There is no inherent power imbalance between vendors and purchasers in a commercial context. For that reason, much more flexibility and latitude is required when interpreting restrictive covenants in a commercial transaction than one contained in an employment agreement.[5] The Supreme Court of Canada explained the approach this way:

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
>
> A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment.[6]

[17] Non-competition clauses are included in agreements of purchase and sale to protect the purchaser's investment, particularly where the purchaser is paying for goodwill.[7] Absent meaningful protection of their investment, purchasers will pay less for the businesses and assets they purchase. Having earned a higher price on the sale as a result of the protections offered by the inclusion of a non-competition clause, there is nothing unfair about holding the vendor to the terms of their bargain. This is especially true where, as in this case, the evidence shows that the parties negotiated on equal terms and were advised by competent professionals, and that the contract does not create an imbalance between them.[8]

[18] In the context of a sale of a business, the court will treat a restrictive covenant as lawful unless it is shown to be unreasonable.[9] In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term

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[5] *Payette v. Guay Inc.*, 2013 SCC 45, [2013] 3 S.C.R. 95, at paras. 1 to 3.
[6] *Elsley v. J. G. Collins Insurance Agencies Ltd*., [1978] 2 S.C.R. 916, at p. 924.
[7] *GDI Solutions*, at para. 46.
[8] *Payette*, at para. 39.
[9] *Payette* at para. 58; *MEDIchair LP v. DME Medequip Inc.*, 2016 ONCA 168, at para. 35.

and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted.[10] Whether a non-competition clause is valid in a commercial context depends on the circumstances surrounding the transaction. The factors that can be taken into consideration include the sale price, the nature of the business, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals.[11]

[19] For the reasons that follow, I am satisfied that the plaintiffs are very likely to establish at trial that the non-competition provision in the restrictive covenants agreement are reasonable in the circumstances of this transaction.

<u>The transaction and its circumstances</u>

[20] The transaction at issue took place on July 16, 2021. The parties to the transaction were Mr. Gladish (referred to as a founder) and Michael Morckos, their company Airborne Apps Inc., and the plaintiffs. To accomplish the transaction, the parties entered into five integrated agreements:

a. an asset purchase agreement;

b. a restrictive covenants agreement;

c. a founder IP assignment agreement;

d. an employment agreement; and

e. an employee nondisclosure, nonsolicitation, noncompetition and inventions agreement,

[21] The employment agreement and the nondisclosure agreements were subsequently updated for Mr. Gladish on January 1, 2022.

[22] According to the recitals of the asset purchase agreement, Mr. Gladish wanted to sell, transfer and assign to Demand Science Canada "all of the assets used or useable in connection with, or relating to the Business," including goodwill, except for the intellectual property assets associated with the Business, which were sold to the U.S. plaintiff, Demand Science Group, LLC.

[23] In the agreement of purchase and sale, the parties defined the term "Business" to mean "the sales enablement and engagement software solutions business of Seller as conducted and proposed to be conducted as of the Closing." This definition also appears in the restrictive covenants agreement. The defendants now disclaim this definition as "extraordinarily broad" and one that "captures many businesses that do not compete with Airborne." I reject

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[10] *Payette*, at para. 61,
[11] *Payette* at para. 61.

this submission. Mr. Gladish bargained for and agreed to this definition of Business. There is no reason to depart from it now.

[24] The total purchase price for all of the assets, including the IP and all goodwill, was USD $1.25 million. This was a significant transaction.

The non-competition provision of the restrictive covenants agreement

[25] As an essential part of the transaction, Mr. Gladish also signed a restrictive covenants agreement. The recitals to the restrictive covenants agreement demonstrate that it was integrally linked to the consideration the plaintiffs paid for the goodwill and other assets of the Business. The recitals confirmed that the plaintiffs were buying the business and assets of Airborne Apps as a going concern. Mirroring the agreement of purchase and sale, the restrictive covenants agreement specified that the purchased business was engaged in "the business of sales enablement and engagement software solutions for work…in Canada and the United States":

> A. Pursuant to an asset purchase agreement dated July 16, 2021 (the "Purchase Agreement") made between Buyers, Seller, [Mr. Gladish] and Michael Morckos, Seller agreed to sell and Buyer agreed to purchase the business and certain of the assets of Seller as a going concern (the "Acquired Business").
>
> B. [Mr. Gladish] and Michael Morckos are the registered and beneficial owners of more than $66^{2/3}$% of the shares of Seller.
>
> C. The Acquired Business is engaged in the business of sales enablement and engagement software solutions for work (the "Business") in Canada and the United States (the "Territory").
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> D. The consideration for the purchase by each Buyer of the Acquired Business includes the covenants of [Mr. Gladish] in this Agreement, and Section 5.2(b) of the Purchase Agreement provides that [Mr. Gladish] will sign a Restrictive Covenants Agreement at the time of Closing in respect of the Business.
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> E. [Mr. Gladish] and each Buyer acknowledge that this Agreement is necessary in order for Buyers to receive the full benefit of the goodwill of the Acquired Business and, accordingly, [Mr. Gladish] and each Buyer are willing to enter into this Agreement in order to protect that goodwill.

[26] The relevant non-competition clause is found in section 2 of the restrictive covenants agreement. It provided a time-limited (three years) and geographically limited (Canada and the United States, the same territory in which Airborne Apps conducted its business) restriction on Mr. Gladish's ability to engage in any way in the business of sales enablement and engagement software solutions or to solicit the plaintiffs' employees:

2. Non-Competition and Non-Solicitation

> Founder covenants with each Buyer that he shall not, for a period of 3 years, within the Territory, except to the extent permitted by this Agreement, either alone or in conjunction with any individual, partnership, firm, association, syndicate, company or other entity, whether as principal, agent, consultant, employee, shareholder (other than a holding of shares listed on a recognized North American stock exchange that does not exceed 2% of the outstanding shares so listed, provided that none of Founder, any of its Affiliates or any Person acting jointly or in concert with Founder is involved in any manner whatsoever with the management of such listed issuer), or in any other manner, whatsoever, directly or indirectly:
>
> (a) carry on or be engaged in, or be interested in the Business or advise, invest, lend money to, guarantee the debts or obligations of any person, firm, association, syndicate, company or corporation engaged in or concerned with or interested in the Business; …
>
> (c) solicit for employment, employ or otherwise contract for the services of any person who is employed (either as an employee, contractor or full-time consultant) by the Acquired Business, provided that this subparagraph (c) shall not prevent Founder from employing any such person who responds to Founder's general solicitation advertisements of employment not targeted toward employees of either Buyer or any Buyer's Affiliates.

Conclusion

[27] In my view, the plaintiffs are very likely to demonstrate that the non-competition provisions of the restrictive covenants agreement are reasonable.

[28] First, the restrictive covenants were negotiated in a commercial context. The transaction itself is complicated and conferred significant benefits directly on Airborne Apps and indirectly on Mr. Gladish. The agreements are bespoke, and Mr. Gladish received sophisticated legal advice throughout the negotiation of the agreements. In section 5 of the restrictive covenants agreement, Mr. Gladish acknowledged that the plaintiffs had relied on his covenants in section 2 and that they were an integral part of the transaction under which Mr. Gladish received significant benefits. Mr. Gladish also acknowledged that a breach of his section 2 covenants would cause the plaintiffs irreparable harm that was not

compensable in damages. All of these factors strongly support the reasonableness of the restrictive covenant.[12]

[29] Second, section 2 is carefully tailored to protect only the plaintiffs' legitimate proprietary interests. Under the agreement of purchase and sale, over 90% of the purchase price was allocated to the acquisition of Airborne Apps' intellectual property and goodwill. The recitals to the restrictive covenant agreement make clear that the purpose of the covenant was to permit the plaintiffs to receive the full economic benefits of the goodwill they purchased. The Court of Appeal for Ontario has held that this is a legitimate proprietary interest.[13]

[30] Third, the activities covered by the restrictions in section 2 are likely to be found to be reasonable. Mr. Gladish is only prevented from engaging in the Business. For convenience, I will repeat the operative portion of the clause. Mr Gladish shall not:

> (a) carry on or be engaged in, or be interested in the Business or advise, invest, lend money to, guarantee the debts or obligations of any person, firm, association, syndicate, company or corporation engaged in or concerned with or interested in the Business;

[31] The plaintiffs agreed to buy the Business, which was defined in the agreement of purchase and sale to mean "the business of sales enablement and engagement software solutions for work…in Canada and the United States." The defendants submit that "sales enablement is a broad term that "falls outside the scope of the Airborne software" and renders the restrictive covenant unenforceable. I disagree.

[32] If there was no ambiguity in the definition of Business for the purposes of the agreement of purchase and sale, I do not see how using the same definition in the restrictive covenant is ambiguous or an over-reach. The restrictive covenant carefully circumscribes Mr. Gladish's obligations to the scope of the Business, which was the very thing he sold to the plaintiffs. The provision appears to be limited and justifiable.

[33] Mr. Gladish submits that the clause is overly broad and therefore unreasonable because the clause restricts his ability to lend money to a corporation engaged in the Business or to be a minority shareholder in a competitive business. I disagree. There is nothing irrational about the plaintiffs wishing to prevent Mr. Gladish from investing the money they paid to him to purchase the business (or its fungible equivalent) in a competitor for a limited period of time. Given the commercial context of this contract, that is a reasonable term designed to protect the plaintiffs' proprietary interests in the purchased assets and goodwill. Mr. Gladish, with the advice of counsel, agreed to that term. In the commercial context of this agreement, there is no reason to depart from the parties' bargain. Finally, I note that this is

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[12] *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.) at p. 224.
[13] *MEDIchair LP v. DME Medequip Inc*., 2016 ONCA 168, 129 O.R. (3d) 161, at para. 38; *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.) at p. 224.

not a case about Mr. Gladish lending money to a business or acquiring a minority interest in a publicly traded company.

[34] Fourth, the restrictive covenants last only three years. This amount of time appears to be reasonable in the circumstances of this case. The plaintiffs agreed to allocate an additional $500,000 to complete the buildout of the Airborne product and appear to have allocated over $3.85 million in capital to build-out ReplyForce, the successor product to Airborne. In light of these investments, a three-year restrictive covenant is reasonable and is shorter than many other restrictive covenants that have been upheld in commercial contexts, where the parties negotiated over the duration of the covenant as equals.[14]

[35] Fifth, the geographic scope of the restriction is limited to the area in which the parties agreed Airborne Apps carried out its business. A non-competition clause that applies outside the territory in which the purchased business operates is unreasonable.[15] Here, however, the plaintiffs purchased an internet-based software business that operated in the United States and Canada. In my view, a trial judge is very likely to find that the geographic scope of this restrictive covenant is reasonable.

[36] In conclusion, the plaintiffs are very likely to succeed at trial in demonstrating that the non-competition provisions of the restrictive covenants agreement are reasonable.

The nondisclosure agreement

[37] The plaintiffs also relied on the non-competition provisions of the nondisclosure agreement. As a condition of the transaction, Mr. Gladish was required to sign an employee nondisclosure, non-solicitation, non-competition, and inventions agreement. In this agreement, Mr. Gladish acknowledged that he owed fiduciary duties, and duties of loyalty, fidelity and allegiance to Demand Science Group LLC that required him to act at all times in the best interests of the company.

[38] Approximately four and a half months later, the company promoted Mr. Gladish to the position of Managing Director, Product. The company increased his salary to $240,500. The company offered Mr. Gladish updated terms and conditions of employment in a letter dated January 1, 2022, which Mr. Gladish accepted. Mr. Gladish again acknowledged that he owed fiduciary duties and duties of loyalty, fidelity and allegiance to always act in the best interests of the company and to do nothing to injure the company's business or interests.

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[14] 5-year non-compete is reasonable: *Payette*, at para. 64; *Martinrea International Inc. v. Canadian Hydrogen Energy Company Ltd*., 2005 CanLII 36436 (Ont. C.A.); *Brand Solutions By Promotion Solutions Inc. v Elsey*, 2015 ONSC 2895, at para. 46; 10-year non-compete is reasonable: *Trans-Canada Thermographing (Ontario) Ltd. v. Trans-Canada Thermographing Ltd*., SOQUIJ AZ-92021644 (QC C.S.), and *Papeterie L'Écriteau inc. v. Barbier*, [1998] J.Q. no 5090 (QC C.S.).
[15] *Payette*, at para. 65; *MEDIchair*, at para. 40; *McAllister v. Cardinal*, [1965] 1 O.R. 221 (H.C.).

[39] Mr. Gladish agreed to sign a further nondisclosure agreement, which contained a non-competition provision. This non-competition provision was shorter than the previous obligation (6 months, instead of 12 months) and was limited to positions similar to his new role as Managing Director.

[40] The July 2021 nondisclosure agreement contained an Ontario choice of law and jurisdiction provision.[16] The January 2022 agreement, however, contained a Massachusetts choice of law and non-exclusive jurisdiction provision. Section 11(g) states:

> g. This Agreement shall be governed and construed by the laws of the Commonwealth of Massachusetts, without regard to its principles of conflict of laws. Employee consents to the jurisdiction of such courts of the Commonwealth of Massachusetts in relation to any actions, applications or proceedings whatsoever that relate to this Agreement and waives any rights or defenses to object to such jurisdiction based on forum non-convenient and/or otherwise, and without prejudice to the Company's right to bring an action, application or proceeding of any kind in any other forum or before any other court or tribunal of competent jurisdiction.

[41] The parties did not address this provision in their written or oral argument. Assuming that the courts of Ontario have jurisdiction to interpret and enforce this agreement, I have no evidence of the foreign law before me. In Ontario, foreign law is treated like a fact, the proof of which generally requires opinion evidence from a properly qualified expert.[17] In the absence of such evidence, I will not consider further the nondisclosure agreement to support the plaintiff's request for an injunction.

The plaintiffs have presented a strong* prima facie *case that that Mr. Gladish breached the non-competition provisions of the restrictive covenants agreement

[42] I find that the plaintiffs have presented a strong *prima facie* case that Mr. Gladish breached the non-competition provision of the restrictive covenants agreement.

[43] The plaintiffs have presented significant evidence to support its assertion that Mr. Gladish has been engaged in the business of sales enablement and engagement software solutions in violation of the restrictive covenants agreement.

[44] As part of the commercial transaction through which he sold his business to the plaintiffs for over US $1 million, Mr. Gladish agreed to be bound by the restrictive covenants

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[16] 11f. This Agreement shall be governed and construed by the laws of the Province of Ontario, without regard to its principles of conflict of laws. Employee consents to the jurisdiction of the courts of the City of Toronto in relation to any actions, applications or proceedings whatsoever that relate to this Agreement and waives any rights or defenses to object to such jurisdiction based on forum non-convenient and/or otherwise, and without prejudice to the Company's right to bring an action, application or proceeding of any kind in any other forum or before any other court or tribunal of competent jurisdiction.
[17] *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79, at para. 29.

agreement until July 16, 2024. The evidence indicates that before that covenant expired, Mr. Gladish:

a. incorporated Skipintro on January 3, 2023, five months before he was terminated, while he was Managing Director of Demand Science Canada;

b. began consulting with Hassan Khan in February 2023 about email software, which became SendNow;

c. allowed Mr. Khan to become a shareholder and director of Skipintro on April 1, 2023;

d. continued to consult with Mr. Khan as he developed and coded the product that became SendNow, including all of the features that mimic ReplyForce; and

e. through his company Skipintro, launched SendNow by June 2023, less than a month after his employment with Demand Science Canada was terminated.

[45] The evidence presented supports the conclusion that SendNow has almost all of the same features as Demand Science's ReplyForce software. Many of these features are also common to the Airborne Apps assets that Mr. Gladish sold to the plaintiffs. SendNow's user interface also appears to mimic closely the user interface used in ReplyForce. The evidence appears to be overwhelming that SendNow is a sales engagement and enablement platform that is available in Canada and the United States, which are terms that Mr. Gladish agreed described the business Demand Science purchased from him.

[46] Demand Science has presented a strong *prima facie* case that Mr. Gladish is directly, and indirectly through his company Skipintro, engaged in the business of sales enablement and engagement software solutions in violation of his obligations under the restrictive covenants agreement. It does not matter whether or not Mr. Gladish did the coding for SendNow or whether or not the plaintiffs' code migrated into SendNow. The plaintiffs have already presented a significant amount of evidence that appears to demonstrate that Mr. Gladish has violated the restrictive covenants. Once documentary production and oral examinations are complete, there may be a more complete picture of Mr. Gladish's conduct.

[47] I find that the plaintiffs are likely to prove at trial that Mr. Gladish has done the very things that he promised Demand Science he would not do.

<u>The plaintiffs are likely to suffer irreparable harm if the injunction is not granted</u>

[48] I find that the plaintiffs have demonstrated that they are likely to suffer irreparable harm if the injunction is not granted.

[49] Demand Science submits that it will suffer irreparable harm if this injunction is not granted, including loss of market share, goodwill and reputation, and the devaluation of its intellectual property.

[50] For the reasons set out above, I have found that the plaintiffs have demonstrated a strong *prima facie* case that Mr. Gladish violated the restrictive covenants agreement. In such circumstances, the court is entitled to place less weight on the irreparable harm branch of the test. In *Parekh*, Sharma J. helpfully explained the proper approach:

> [I]n this case, there is a strong *prima facie* case that Ira has promised not to do one thing, yet he has gone ahead and done it. A court, exercising its equitable jurisdiction, is obliged to respond to those facts. It is for this reason that in cases dealing with enforcement of restrictive covenants, courts have placed less weight on irreparable harm and the balance of convenience test. I quote the following passage from [*Dr. Jack Newton Dentistry Professional Corporation v. Towell*, 2005 CanLII 37351 (Ont. S.C.)] at paras 28-29:
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>> [28] In the case of *Button v. Jones*, [2001] O.J. No. 1976 (Ont. Sup. Ct.), Hambly J. stated that where the plaintiff seeks a prohibitory injunction to enforce a negative covenant it need not prove that it will suffer irreparable harm if the injunction is not granted, or that the balance of convenience favours granting an injunction. He quotes a passage from *Hardee Farms International Ltd. v. Cam & Crank Grinding Ltd*. (1973), 1973 CanLII 688 (ON SC), 33 D.L.R. (3d) 266, [1973] 2 O.R. 170 (H.C.J.) also cited in *Canadian Medical Laboratories Ltd. v. Windsor Drug Store Inc*. (1993), 1992 CanLII 8630 (ON SC), 99 D.L.R. (4th) 559 (Ont. Gen. Div.):
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>> The best analysis with which I am acquainted of the law applicable to prohibitory injunctions, as distinguished from mandatory injunctions, is contained in the judgment of Megarry, J. in *Hampstead & Suburban Properties Ltd. v. Diomedous* [1969] 1 Chancery 248. The learned Judge [at p. 257] examined the classic statement of Lord Cairns, L.C. in *Doherty v. Allman* (1878), 3 App. Cas. 709 at p. 720:
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>>> If the parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction do nothing more than give the sanction of the process of the Court to that which already is a contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the

> parties have made, with their eyes open, between themselves.
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> [29] The court went on to state that where there is a plain and uncontested breach of a clear covenant not to do a particular thing and the covenantor promptly begins to do what he has promised not to do, then, absent of special circumstances, it seems to me that the sooner he is compelled to keep his promise the better.[18]

[51] The breach of a valid restrictive covenant that formed part of a commercial transaction should typically be enforced through injunctive relief. Otherwise, the innocent party loses precisely the benefit for which they bargained.[19]

[52] Courts have frequently characterized loss of goodwill and market share as irreparable harm.[20] Mr. Gladish has already unlawfully attracted over 1,000 customers to SendNow. The quantification of the plaintiffs' losses will be difficult, if not impossible. Quantifying losses in potential market share in a nascent market, where Demand Science wished to use ReplyForce to drive traffic to its other commercial products, is particularly difficult.[21]

[53] Although this factor is not determinative, Mr. Gladish also acknowledged in the agreement that a breach of his non-competition covenants would cause the plaintiffs irreparable harm that was not compensable in damages. Mr. Gladish had the benefit of legal advice when he entered into this bespoke agreement that provided significant commercial benefits to him. It is difficult to see why he would not be held to this agreement.

[54] I do not accept the defendants' submissions that SendNow is an innocuous product that can cause no harm to the plaintiffs' interests. It is a clear competitor to the plaintiffs' business. Mr. Gladish engaged in unlawful conduct to start the corporate defendant while he was still an employee of the Demand Science Canada. The harm to the plaintiffs' interests is palpable, if extremely difficult to calculate. I also have no confidence that the defendants will be able to compensate the plaintiffs through an award of damages at the end of trial.

[55] While I place less weight on this factor given the strong *prima facie* case demonstrated by the plaintiffs, I find that the plaintiffs have demonstrated that they will suffer irreparable harm if the injunction is not granted.

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[18] *Parekh et al v. Schecter et al*, 2022 ONSC 302, at para. 76; see also *Canadian Hedge Watch Inc. v. Street*, 2015 ONSC 454, at paras. 46 to 47.
[19] *Jamuna Foods v. Meghna Pacific International Inc.*, 2016 ONSC 7625, at para. 19.
[20] *Stress-Crete Limited v. Harriman*, 2019 ONSC 2773, at para. 64; *Parekh*, at paras. 74 to 78; *Edgetch HVAC Services Ltd. v Ubhi*, 2016 ONSC 7564, at para. 38.
[21] *Polar Wireless Corporation v. Roberts*, 2012 ONSC 6482, at paras. 64 to 68.

The balance of convenience favours the plaintiffs

[56] In my view, the balance of convenience strongly favours the plaintiffs.

[57] The court typically places less weight on the balance of convenience when a plaintiff is seeking to enforce a valid restrictive covenant that formed part of a commercial transaction, especially where the plaintiff has demonstrated a strong *prima facie* case that the defendant has breached the covenant.[22]

[58] In this case, the injunction will not prevent Mr. Gladish from obtaining employment or starting a business, provided that he complies with his pre-existing obligations.[23]

[59] In the circumstances of this case, I do not accept the balance of convenience favours the defendants. Even if it did, that balance would be dramatically outweighed by the strong *prima facie* case and irreparable harm demonstrated by the plaintiffs.

The order and its scope

[60] For the reasons set out above, I am prepared to grant the plaintiffs' request for injunctive relief.

[61] The defendants submitted that this order should only apply to Mr. Gladish and not to Skipintro because only Mr. Gladish is a party to the restrictive covenants agreement. They submit that the court can do nothing, despite the fact that the company's founder engaged in unlawful competition to allow it to springboard its product to market. I disagree.

[62] Mr. Gladish incorporated Skipintro while he was an employee of Demand Science. He used that corporate vehicle to effect his unlawful competitive activities. Skipintro is his company, even if there are now other shareholders. It would be inequitable to allow Mr. Gladish to do indirectly through his corporate vehicle that which he agreed he would not do. In these circumstances, there is nothing inequitable about imposing this injunction against the defendant Skipintro.[24]

[63] The defendants also submit that the injunction should only last until July 31, 2024, which was the date that the restrictive covenant agreement was to expire. I disagree.

[64] Mr. Gladish has deprived the plaintiffs of the protections for which they bargained since approximately January 2023. It would be entirely inequitable to allow him to resume his competition on the timeline the parties set in the transaction documents. Demand Science is, at a minimum, entitled to protection from Mr. Gladish's unlawful competition for an additional year to reflect the time Mr. Gladish breached his covenants.

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[22] *Parekh*, at paras. 76 to 85, and the cases cited therein.
[23] *GDI Solutions*, at paras. 8, 71 and 73.
[24] *Elsey* at para. 57; *Precision Fine Papers*, at para. 23; *Parekh*, at para. 87; *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34, at paras. 29 and 35.

[65] In my view, it is equitable to impose an interlocutory injunction until the final disposition of this action. I will convene a case conference with the parties to set a timeline to get this action to a speedy trial as soon as practicable. The defendants may also move before a judge in July 2025 for relief from this injunction, if the matter has not already been concluded.

[66] For the reasons set out above, I am satisfied that Demand Science is entitled to the injunction it seeks. I make the following order:

> Pending the final determination of the action, the defendants are each restrained from:
>
> (i) operating the SendNow platform in any capacity;
>
> (ii) disclosing or making use of any confidential or proprietary information relating to Airborne, Demand Science or Demand Science's affiliates or customers for any purpose, and from encouraging or soliciting, directly or indirectly, anyone else from disclosing or making use of such information;
>
> (iii) making use of any intellectual property belonging to Demand Science or Airborne;
>
> (iv) being engaged in any capacity in the business of sales enablement and engagement software solutions for work in Canada and the United States;
>
> (v) being engaged in any capacity in the collection, management, or sale of data for the purpose of business, revenue intelligence or demand generation for work within Canada or the United States;
>
> (vi) inducing any agent, salesperson, contractor, customer, supplier or dealer of or relating to Demand Science or Airborne to cease dealing with Demand Science or its affiliates;
>
> (vii) soliciting or transacting business with Demand Science's or its affiliates' customers, clients or vendors; and
>
> (viii) soliciting, or attempting to interfere with, any employees, contractors, customers, vendors or other staff of Demand Science or its affiliates.

[67] If the parties are not able to resolve costs of this motion, the plaintiffs may email their costs submission of no more than three double-spaced pages to my judicial assistant on or before January 17, 2024. The defendants may deliver their responding submission of no more than three double-spaced pages on or before January 24, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: January 10, 2024