COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2084CV00060-BLS2

ROBERT HALF INTERNATIONAL INC.

*v.*

LEWIS SIMON, KEITH ELKINSON, AND
COMPLETE STAFFING SOLUTIONS, INC.

# MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Robert Half International Inc. ("RHI") seeks a preliminary injunction to enforce restrictive covenants that impose non-competition, non-solicitation of customers, anti-raiding of employees, and confidentiality obligations upon two former employees, Lewis Simon and Keith Elkins. It also seeks to have part of that injunctive relief applied against Complete Staffing Solutions, Inc. ("CSS"), which is the new employer of the two individual defendants.

The Court concludes that RHI is entitled to a more limited preliminary injunction that enforces the non-solicitation covenant by barring Simon and Elkinson from soliciting RHI clients (employers) with whom they had personally worked with while at RHI during the twelve month period agreed to by contract. The Court will not enforce this covenant with respect to solicitation of clients with which Simon or Elkinson had not previously worked or solicitation of candidates (workers); it also will not extend the contractual period of the non-solicitation covenant as requested by RHI. In addition, the Court will enjoin Simon from using, disclosing, or retaining confidential information belonging to RHI or its customers.

The Court will deny the remaining requests for preliminary injunctive relief. It will not enter injunctive relief with respect to the non-competition and anti-raiding covenants because such additional relief is not needed to protect RHI's legitimate and enforceable interests. It will not do so with respect to Elkinson's confidentiality agreement or as to any relief against CSS because RHI has not shown any likelihood of succeeding on these claims. And it will not enter the relief sought with respect to expedited discovery of electronic storage devices because that can be resolved through the normal discovery process. The denial of RHI's request to access electronic storage devices owned or used by Mr. Simon is without prejudice to RHI pursuing such access through discovery.

1. **Factual Background**. The Court makes the following findings of fact based on the verified complaint and affidavits as well as reasonable inferences drawn from that evidence. Where some evidence is inconsistent with the Court's findings, for example with respect to what territory was served by Simon and Elkinson while they worked for RHI, the Court has made credibility determinations based on the record evidence.[1]

RHI provides professional staffing services to companies seeking to fill upper level positions. The professional staffing industry is highly competitive. It is common for clients to work with several staffing firms at the same time to fill their open positions. Several if not many of the RHI clients that RHI has identified in this case have also been clients of CSS for years.

RHI works to obtain repeat business with the companies (clients) for which it finds employees, and often succeeds in doing so; as a result it has built goodwill with its clients. In contrast, RHI has not shown that it builds goodwill with the individuals (candidates) it identifies as good job prospects for its clients. For example, RHI has not shown the extent to which it obtains repeat business with individual job candidates by placing them into a series of successive jobs.

Mr. Simon worked for RHI out of its Westborough, Massachusetts office from January 2016 until he quit on November 12, 2019. He was employed as a Division Director within RHI's "Management Resources" group, which helped clients fill senior level finance, accounting, and human resource positions. Simon worked to identify, develop, and manage clients and to find and place job candidates on behalf of those clients. Simon's territory consisted of and was limited to the area within Massachusetts as far east as Wellesley, as far west as Sturbridge, as far north as Lunenburg, and as far south as Douglas. He also supervised other RHI employees doing the same work in the same region.

Mr. Elkinson worked for RHI in its Westborough office from July 2003 until November 22, 2019. When he resigned Elkinson was employed as a Resource Manager and reported to Simon. His territory was the same as Simon, and he was engaged in substantially the same work as Simon, except Elkinson did not

[1] In deciding a motion supported or opposed by sworn affidavits, "the weight and credibility to be accorded those affidavits are within the judge's discretion" and "[t]he judge need not believe such affidavits even if they are undisputed." *Commonwealth* v. *Furr*, 454 Mass. 101, 106 (2009). An affidavit "is a form of sworn testimony the credibility of which is to be determined by the judge." *Psy-Ed Corp*. v. *Klein*, 62 Mass. App. Ct. 110, 114 (2004).

supervise other employees. Simon and Elkinson were not the only members of their team; other RHI employees also served clients in that territory.

Simon and Elkinson entered into written employment agreements with RHI that included terms by which they both agreed not to:

- work for a competitor within 50 miles of RHI's Westborough, Massachusetts, office during the 12 months after their RHI employment ended (the non-competition covenant);
- solicit or perform services during the 12 months after their RHI employment ended for any client or candidate who received service from anyone working at RHI's Westborough office during the 12 months before Simon or Elkinson left RHI (the non-solicitation covenant);
- solicit during the 12 months after their RHI employment ended any other RHI employee to leave RHI or become connected in any way with a competitor (the anti-raiding covenant); or
- disclose or make use of any confidential information belonging to RHI (the confidentiality agreement).

These contracts provide that they are governed by Massachusetts law.

Both Simon and Elkinson had access while at RHI to confidential and proprietary information regarding current and potential clients and job candidates. RHI has not shown that the individual defendants had access to any confidential information regarding RHI's business strategies or methods. Nor has it shown that either Simon or Elkinson had access to any other information that would constitute a trade secret.

Simon and Elkinson left RHI to work for CSS, which is one of RHI's direct competitors. They now work out of CSS's Lincoln, Rhode Island, office, which is roughly 30 miles from RHI's Westborough office. Before leaving RHI, Simon and Elkinson communicated with each other about their plans to do so.

CSS had a good faith belief that hiring Simon and Elkinson to work in its Lincoln, Rhode Island, office would not cause Simon or Elkinson to breach their employment agreements with RHI. CSS had previously recruited and hired RHI employees who had entered into the same restrictive covenants. On some or all of those prior occasions, RHI contended that doing so was a violation of its employment agreements. Each time, CSS took the position that it had not employed any of the former RHI employees in violation of any protectible legal

interest that RHI could assert. And each time RHI agreed not to pursue the matter further so long as its former employee worked out of CSS's Rhode Island office, and not in a Massachusetts office, for at least a year.

The day before Simon resigned and left RHI, he deliberately forwarded to his personal email account several then-current lists of the top clients serviced by RHI's Westborough office and of clients of that office with whom RHI had done no business in the last 90 or 180 days. Several weeks earlier Simon had similarly forwarded to his personal email account an "IPO Client List," consisting of RHI clients that were preparing to or had recently filed an initial public offering. All of these listings were proprietary and could be valuable to a competitor.

Simon represents that he has now deleted those emails and that he no longer has and has not used any of those files since leaving RHI. The current evidentiary record does not establish that Simon or CSS made any use of those proprietary customer lists since Simon joined CSS.

There is no evidence the Elkinson has breached his obligation not to use or disclose RHI's confidential information. Nor has RHI shown that Simon, Elkinson, or anyone else has used any RHI confidential information on behalf of or to benefit CSS.

On his last day at RHI, Simon emailed several of his RHI clients to let them know he was leaving, and asking to stay in touch. At some point thereafter, Simon engaged in a text exchange with another RHI employee, and suggested she contact Simon if she was interested in leaving RHI.

Since joining CSS, Simon has solicited at least one current client of RHI's Westborough office and Elkinson has solicited at least one RHI job candidate. RHI has not shown, however, that since leaving RHI Simon or Elkinson have solicited any of the clients that they personally worked with while at RHI.

2. **Legal Background**.

2.1. **Preliminary Injunctions.** "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." *Student No. 9* v. *Board of Educ.*, 440 Mass. 752, 762 (2004). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc.* v. *Axsun Technologies, Inc.*, 469 Mass. 181, 194 (2014).

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

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

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

2.2. **Non-Competition and Non-Solicitation Covenants**. Under Massachu–setts law, contractual covenants barring employees from competing with their employer or soliciting the employer's customers are enforceable only to the extent they are consistent with the public interest and consonant with public policy. *Automile Holdings, LLC* v. *McGovern*, no. SJC–12740, slip op. at 20–21, 136 N.E.3d 1207, 1218, 2020 WL 205279 (Mass. Jan. 4, 2020); *New England Canteen Service, Inc.* v. *Ashley*, 372 Mass. 671, 673 (1977); *All Stainless, Inc.* v. *Colby*, 364 Mass. 773, 778 (1974); *Thomas* v. *Paker*, 327 Mass. 339, 341 (1951); see also *Oxford Global Resources, LLC* v. *Hernandez*, 480 Mass. 462, 470–471 (2018) (same principles apply to both non-competition and non-solicitation provisions of employment agreements).

An employer may enforce a non-competition or non-solicitation agreement against a former employee only to the extent necessary to protect its legitimate business interests—which include guarding against the release or use of trade secrets or other confidential information, or harm to the employer's goodwill, but do not include merely avoiding lawful competition. See *New England Canteen Service*, 372 Mass. at 673–676; *All Stainless*, 364 Mass. at 778–780.

"Protection of the employer from ordinary competition … is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced." *Marine Contractors, Inc.* v. *Hurley*, 365 Mass. 280,

287-288 (1974); accord, e.g., *Automile Holdings*, *supra*, slip op. at 28, 136 N.E.3d at 1221; *Boulanger* v. *Dunkin' Donuts, Inc.*, 442 Mass. 635, 641 (2004).

That is because the right of employees to use their knowledge, experience, and skill to compete against their prior employer "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 Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980); accord *Automile Holdings*, *supra*, slip op. at 20, 136 N.E.3d at 1218 ("We have long recognized a public interest in the ability of individuals to be able to carry on their trade freely."); *Club Aluminum Co.* v. *Young*, 263 Mass. 223, 227 (1928).

2.3. **Anti-Raiding Covenants**. The same public policy considerations that limit enforcement of employers' non-competition and non-solicitation covenants also apply to "anti-raiding" provisions that prohibit a departing employee from soliciting other employees to work for a competitor. See *Automile Holdings*, *supra*, slip op. at 20–23 & 28–29, 136 N.E.3d at 1218 & 1221.[2]

All forms of non-solicitation agreements, whether they bar solicitation of customers or the so-called raiding of employees, operate to constrain competition. *Id*. at 28–29. Non-solicitation of customer provisions limit competition in a market to sell goods or services to potential consumers. Anti-raiding of employee provisions similarly limit competition in the market to purchase labor from qualified workers. When such provisions are included in an employment agreement, both types of restrictions limit an employee's ability to compete with the employer after their employment ends, either by trying to sell to the employer's customers or by trying to recruit the employer's workers. See, e.g., *Manitowoc Co., Inc.* v. *Lanning*, 906 N.W.2d 130, 134 & 139–140 (Wisc. 2018) (covenants barring solicitation or recruitment of employees are restraints of trade that restrict free competition in labor market); *Schmersahl, Treloar & Co., P.C.* v. *McHugh*, 28 S.W.3d 345, 349 (Mo. Ct. App. 2000) (same).

An anti-raiding covenant in an employment agreement is therefore enforceable only to the extent necessary to protect a legitimate business interest in trade secrets, other confidential information, or goodwill. *Automile Holdings*, *supra*,

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[2] Since enforcement of the anti-raiding covenant in *Automile Holdings* arose in the context of the sale of an interest in a closely-held business, the scope of legitimate and enforceable business interests was broader than in the context of enforcing provisions in an employment agreement. See *Automile Holdings*, *supra*, slip op. at 21–28, 136 N.E.3d at 1218–1221.

slip op. at 20, 23, & 28–29, 136 N.E.3d at 1218 & 1221; accord *Manitowoc Co.*, 906 N.W.2d at 141–145 (anti-raiding covenant not enforceable under Wisconsin law because employer had no protectible interest in guarding against loss of employees it had trained); *McHugh*, 28 S.W.3d at 350–351 (anti-raiding covenant not enforceable under Missouri law because it did not protect trade secrets or customer goodwill, and "an employer does not have a proprietary interest in its employees at will or in their skills").[3]

3. **Likelihood of Success.** Given the findings of fact above, RHI is likely to succeed on some but not all of its claims.

3.1. **Claims against Simon and Elkinson**. RHI is likely to succeed in proving that Simon and Elkinson violated their non-competition covenants by working for a competitor at an office less than 50 miles from RHI's Westborough office. It is also likely to succeed in proving that both individual defendants violated their non-solicitation covenants, in Simon's case by soliciting at least one RHI client and in Elkinson's case by soliciting at least one RHI job candidate.

Furthermore, RHI is likely to succeed in showing that Simon violated his confidentiality agreement by sending himself copies of proprietary RHI client lists just before he left to work for a competitor. Sending those lists to his personal email account, at a time when Simon knew he was about to start working for CSS, violated Simon's contractual obligation not to "make accessible" RHI's confidential information to anyone outside of RHI. Doing so may have also constituted a misappropriation of trade secrets giving rise to appropriate injunctive relief under G.L. c. 93, §§ 42–42A.[4]

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[3] The holding in *McHugh* was superseded by statute; under current Missouri law, an anti-raiding covenant in an employment agreement is generally enforceable even if confidential or trade secret information or customer goodwill is not implicated. See Mo. Rev. Stat. § 431.202; *Morrow* v. *Hallmark Cards, Inc.*, 273 S.W.3d 15, 28 n.7 (Mo. Ct. App. 2008); *Pampered Chef* v. *Alexanian*, 804 F.Supp.2d 765, 785 (N.D. Ill. 2011).

[4] Massachusetts enacted a modified version of the Uniform Trade Secrets Act (MUTSA), effective October 1, 2018. See G. L. c. 93, §§ 42–42G. The statute defines "trade secret" to mean any information that is not generally known or readily ascertainable to others who might obtain economic advantage from it, and that was the subject of reasonable efforts to protect against it being acquired, disclosed, or used without consent; a "customer list" is expressly mentioned as a possible trade secret. See G.L. c. 93 § 42(1).

In contrast, RHI has not shown that Elkinson ever violated his confidentiality agreement or took any trade secrets belonging to RHI.

Nor has RHI shown that Simon or Elkinson violated their anti-raiding covenants by soliciting any RHI employee to leave RHI. The fact that Simon and Elkinson communicated with each other about their shared desire to leave RHI does not show they engaged in prohibited solicitation. RHI's further assertion that Simon engaged in a text exchange with another RHI employee, and suggested she contact Simon if she was interested in leaving RHI, would not show improper solicitation even if it could be proved by something more reliable than unspecified hearsay from an unidentified source.

Even if the anti-raiding covenants were ambiguous as to whether they applied to Simon and Elkinson's discussions, or to Simon's text exchange with another RHI employee, that would not mean that RHI has any likelihood of succeeding on its claims for breach of those covenants. Any ambiguity in applying RHI's employment agreements must be construed "strongly against" RHI because it drafted those contracts. See *Leblanc* v. *Friedman*, 438 Mass. 592, 599 n.6 (2003) (ambiguity in written contract must be construed "strongly against the party who drew it" (quoting *Bowser* v. *Chalifour*, 334 Mass. 348, 352 (1956)); accord, e.g., *Costa* v. *Brait Builders Corp.*, 463 Mass. 65, 76 (2012) (where contract "provision is ambiguous, we construe it against the drafter" (citing Restatement (Second) of Contracts § 206, at 105 (1981)).

This general rule of contract construction applies with full force to employment contracts, perhaps especially those imposing "a post-employment restraint imposed by the employer's standard form contract." *Sentry Ins.* v. *Firnstein*, 14 Mass. App. Ct. 706, 707 (1982). Under Massachusetts law, such contracts must be "scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood." *Id*., quoting Restatement (Second) of Contracts § 188, comment g (1981); accord *Automile Holdings*, *supra*, slip op. at 22; 136 N.E.3d at 1218.

3.2. **Claims against CSS**. Finally, RHI is unlikely to succeed in proving that CSS tortiously interfered with the employment agreements that RHI had entered into with Simon and Elkinson.[5] To prevail on this claim at trial, RHI will have

[5] RHI's claim against CSS for unjust enrichment appears to add nothing to its claim of tortious interference; it is based on the allegation that CSS was unjustly enriched as a result of its allegedly tortious conduct.

to prove that (1) it had contracts with Simon and Elkinson, (2) CSS "knowingly induced" those individuals to break their contract, (3) the interference by CSS "was improper in motive or means," and (4) RHI was harmed as a result. See *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 84 (2014).

For the reasons discussed above, RHI has not shown it can prove that CSS "knowingly induced" a breach of contract; to the contrary, the Court has found that CSS had a good faith basis for believing that RHI did not have a protectible legal interest in enforcing its non-competition, non-solicitation, and anti-raiding covenants with Simon and Elkinson.

In any case, RHI is unlikely to succeed in proving that CSS had an improper motive or acted with improper means.

RHI cannot show that the desire of CSS to compete against it is an "improper motive"; a party's "legitimate advancement of its own economic interest" is not an improper motive "for purposes of a tortious interference claim." *Pembroke Country Club, Inc.* v. *Regency Sav. Bank, F.S.B.*, 62 Mass. App. Ct. 34, 39 (2004); accord *Brewster Wallcovering Co.* v. *Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 609 (2007).

Nor has RHI presented any evidence that CSS used some "improper means" to recruit Simon or Elkinson. "To demonstrate improper means, a plaintiff must prove improper conduct beyond the fact of the interference itself." *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 380 (2011); accord *United Truck Leasing Corp.* v. *Geltman*, 406 Mass. 811, 815–816 (1990). RHI has not done so on the current evidentiary record. For example, RHI has not shown that CSS ever made any knowing use of the proprietary customer lists that Simon sent to his personal email address.

4. **Protectible Interests and Scope of Injunction.** RHI is not entitled to prelim–inary injunctive relief against CSS because it has not demonstrated it is likely to succeed on its claims against CSS. See *Fordyce*, 457 Mass. at 265. In the exer–cise of its discretion, the Court will grant some but not all of the injunctive relief sought against Mr. Simon and Mr. Elkinson.

4.1. **Confidential Information**. RHI's legitimate interest in making sure that Mr. Simon does not disclose or use the confidential customer lists he took with him can adequately be protected through an injunction that requires Simon to return and then destroy any RHI confidential information he still has in his possession, custody, or control, to certify in writing that he has permanently

deleted or destroyed all confidential information he took from RHI, and to specify when and how he did so.

The Court will not enter such relief against Mr. Elkinson because RHI has not shown it is likely to succeed on its claim that he took or misused trade secrets or other confidential information.

RHI has made no showing that Simon made any use of RHI's confidential information after he left and started working for CSS. As a result, certification by Simon that he has destroyed all such information is adequate; injunctive enforcement of the non-competition, non-solicitation, or anti-raiding covenants is not necessary to prevent unfair use of RHI's confidential information.

4.2. **Goodwill**. RHI argues that "Simon and Elkinson acted as RHI's public 'face' in their interactions with current and prospective candidates and clients," and that therefore the restrictive covenants in their employment agreements should be enforced "to protect RHI's legitimate business interest in preserving its goodwill." The Court is not entirely convinced.

4.2.1. **Goodwill—Employer Clients**. The Court concludes that RHI is entitled to a preliminary injunction barring Simon and Elkinson from soliciting or servicing employer clients for whom they provided services during their last 12 months at RHI, in accord with their contracts. Such relief is needed to protect RHI's goodwill with respect to clients who actually associate Simon or Elkinson with RHI.

But there is no reason to believe that Simon or Elkinson became the face of RHI for other clients, and therefore no reason to enforce the non-solicitation covenant as to clients with whom they had never worked, or to enforce the much broader non-competition covenant.

Where an employee functions as the exclusive sales representative of a company within a particular area, and as a result that employee makes "repeated attempts to sell to potential customers in the same geographical area," the company may be able to enforce a covenant barring competition within the same area if it can show that the salesperson had essentially become the face of the company to all potential customers in that region. See *All Stainless*, 364 Mass. at 779–781. But RHI has not shown that to be true here.

RHI's interest in protecting goodwill justifies enforcing the non-solicitation provision with respect to RHI clients who worked with Simon and Elkinson while they were RHI employees. But it does not justify enforcing the non-

solicitation covenant more broadly, or barring Simon or Elkinson from working for a competitor near RHI's Westborough office to solicit and serve clients they did not support while working for RHI.

Efforts by Simon or Elkins to solicit client employers who have worked with RHI, but have no reason to consider Simon or Elkinson to be the face of RHI, is ordinary competition that RHI may not restrain. See *National Hearing Aid Centers, Inc.* v. *Avers*, 2 Mass. App. Ct. 285, 289 (1974) (reversing final decree that enforce non-competition covenant). The evidence before the Court suggests RHI's purpose in attempting to enforce the non-competition covenant or to enforce the non-solicitation covenant with respect to clients who never worked with Simon or Elkinson "is to protect itself from ordinary competition. This it cannot do." *New England Canteen Service*, 372 Mass. at 676.

4.2.2. **Goodwill—Job Candidates**. RHI has not shown that any good will generated by Simon and Elkinson in their dealings with individual job candidates attached and belonged to RHI rather than to Simon and Elkinson personally. As a result, it would not be appropriate to enjoin Simon or Elkinson from soliciting individual candidates who have worked with RHI in the past.

A non-competition agreement is enforceable only "to protect the employer's good will, not to appropriate the good will of the employee." *Sentry Ins.*, 14 Mass. App. Ct. at 708; accord *RE/MAX of New England, Inc.* v. *Prestige Real Estate, Inc.*., Civil Action No. 14-12121-GAO, 2014 WL 3058295, *3 (D.Mass. 2014) (O'Toole, J.) (real estate brokerage franchisor could not enforce non-compete agreement with franchisees in absence of proof that "any good will generated by the various offices is due to RE/MAX branding and methods" rather than created by "the work and personal relationships of the agents"). "It has long been recognized that good will may sometimes attach to an employee who maintains distinctly personal or professional relationships with customers, so that the business entity possesses little of it." *P.A. Bldg. Co.* v. *Elwyn D. Lieberman, Inc.*, 642 N.Y.S.2d 300, 301 (N.Y. Sup. Ct. App. Div. 1996).

4.3. **Time Period**. The non-solicitation period in RHI's employment agreements with Simon and Elkinson ends 12 months after the individual defendants' employment with RHI ended. Despite this clear temporal limit, RHI asks the Court to create an enforce a new non-solicitation obligation that would run for one year beginning as of the date of this order. The Court declines to do so.

In the employment context, Massachusetts appellate courts have not allowed covenants restricting competition to be extended beyond the period of time

agreed to by the parties, even if a former employee has violated the covenant. See *Automile Holdings*, slip op. at 34–35 & n.18, 136 N.E.3d at 1223 & n.18. To the contrary, where such a restrictive covenant has expired in whole or in part, the former employer may seek only money damages for past breaches; it is not entitled to equitable relief extending the term of the covenant. See *All Stainless*, 364 Mass. at 781. Parties to a written contract are generally "held to the express terms of their contract," including time periods. *Automile Holdings*, *supra*, slip op. at 36–37, 136 N.E.3d at 1224, quoting *TAL Fin. Corp.* v. *CSC Consulting, Inc.*, 446 Mass. 422, 430 (2006).

Even assuming that such an extension is theoretically permissible, the Court finds in the exercise of its equitable discretion that such an extension is not appropriate here because money damages would be a sufficient remedy for any harm to RHI from past violation of these employment agreements. Cf. *Automile Holdings*, slip op. at 37–38, 136 N.E.3d at 1224–1225.

4.4. **Professional Development of Simon and Elkinson**. In its verified complaint and affidavits, RHI emphasizes that it provided Simons and Elkinson with training, support, and experience that allowed them to become successful in the business of matching skilled professionals with open jobs.

But RHI is not entitled to avoid ordinary competition from Simon and Elkinson merely because they learned and honed skills while working there. See *Abramson* v. *Blackman*, 340 Mass. 714, 715-716 (1960); *National Hearing Aid Centers*, 2 Mass. App. Ct. at 293. The fact that RHI invested in Simon's and Elkinson's professional development provides no basis for barring them from working for a competitor.

As the Supreme Judicial Court has explained:

> "[A]n employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment. The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer."

*Richmond Bros., Inc.* v. *Westinghouse Broadcasting Co., Inc.*, 357 Mass. 106, 111 (1970), quoting *Club Aluminum*, 263 Mass. at 226-227. RHI has not shown that the training it provided to Simon and Elkinson "was based upon secrets possessed by the plaintiff to the exclusion of others." *Id*. at 227.

4.5. **Anti-Raiding Provision**. As discussed above, RHI is not likely to succeed on its claims that Simon and Elkinson violated their anti-raiding covenants by soliciting RHI employees to leave and join a competitor. That is sufficient reason not to enter a preliminary injunction enforcing those provisions. See *Fordyce*, 457 Mass. at 265.

But even if RHI had gotten over the likelihood of success hurdle, it still has not shown that enforcement of the anti-raiding covenant through injunctive relief would serve to protect any of RHI's legitimate interests, rather than merely protect it against ordinary competition.

Unlike in *Automile Holdings*, this case does not involve the sale of a business interest, and RHI has not shown that it paid Simon or Elkinson extra consideration for agreeing to the anti-raiding provision. Contrast *Automile Holdings*, *supra*, slip op. at 30–32, 136 N.E.3d at 1222. Nor has RHI demonstrated that the anti-raiding enforcement protects against the misuse of confidential information or the loss of goodwill. See *id*., slip op. at 20, 23, & 28–29, 136 N.E.3d at 1218 & 1221.

Since RHI does not have a legitimate interest in barring employees from using their training and experience on behalf of a competitor, it also has no legitimate interest in restraining former employees from soliciting current RHI employees to leave and join a competitor. Compare *Richmond Bros.*, 357 Mass. at 111 (no legitimate interest in barring employees from using training and experience) with *Manitowoc Co.*, 906 N.W.2d at 141–145 (no legitimate interest in forestalling recruitment of other employees).

## ORDER

Plaintiff's motion for a preliminary injunction is ALLOWED IN PART and DENIED IN PART. The Court will issue a preliminary injunction consistent with its written decision.

Kenneth W. Salinger
Justice of the Superior Court

28 January 2020

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2084CV00060-BLS2

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## PRELIMINARY INJUNCTION

The Court has considered Plaintiff's motion for preliminary injunction, Defendants' opposition, and the record evidence. For the reasons explained in the accompanying Memorandum and Order, the Court hereby ORDERS that:

(1) During the twelve months ending November 13, 2020, Lewis Simon shall not directly or indirectly solicit the trade or patronage of or perform any services for any employer client of Robert Half International Inc. ("RHI") for whom Simon provided services in his capacity as an RHI employee during the twelve months ending November 12, 2019. This does not restrict Mr. Simon's ability to solicit or provide services for job candidates, including candidates who previously worked with or were placed by RHI.

(2) During the twelve months ending November 23, 2020, Keith Elkinson shall not directly or indirectly solicit the trade or patronage of or perform any services for any employer client of Robert Half International Inc. ("RHI") for whom Elkinson provided services in his capacity as an RHI employee during the twelve months ending November 22, 2019. This does not restrict Mr. Elkinson's ability to solicit or provide services for job candidates, including candidates who previously worked with or were placed by RHI.

(3) Lewis Simon shall not directly or indirectly disclose, furnish, or use any confidential information belonging to RHI or its clients or job candidates that he obtained from RHI. If Simon has any such confidential information in his possession, custody, or control, he shall immediately return it to RHI and immediately thereafter shall permanently delete or destroy it. No later than February 7, 2020, Simon shall, in writing and under the pains and penalties of perjury, identify to RHI any such confidential information that he had in his possession, custody, or control after he stopped working for RHI, certify that he has permanently deleted or destroyed such confidential information, and specify when and how he did so.

Kenneth W. Salinger
28 January 2020 Justice of the Superior Court