

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 EI CORPORATION, INC.,

4 Plaintiff

5 v.

6 GALLANT CAPITAL PARTNERS, LLC;
7 QUALITY BUILT, LLC; and JOHN
8 GILLETT,

9 Defendants

Case No.: 2:20-cv-01119-APG-NJK

**Order Granting in Part Motion for
Temporary Restraining Order and
Granting Motions for Leave to File Sur-
Reply and for Leave to File Supplemental
Declarations
and
TEMPORARY RESTRAINING ORDER**

[ECF Nos. 4, 41, 43]

10 Plaintiff Ei Corporation seeks a temporary restraining order (TRO) against defendants
11 John Gillett, Gallant Capital Partners, LLC, and Quality Built, LLC based on their alleged
12 breaches of two agreements containing non-solicitation clauses. Having considered the parties'
13 briefs, the evidence, and the arguments at the July 15, 2020 hearing, I grant in part Ei's motion
14 and enter a limited TRO as set forth below.

15 **I. ANALYSIS**

16 To qualify for a TRO, a plaintiff must demonstrate: (1) a likelihood of success on the
17 merits, (2) a likelihood of irreparable harm, (3) the balance of hardships favors the plaintiff, and
18 (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
19 20 (2008). Alternatively, under the sliding scale approach, the plaintiff must demonstrate:
20 (1) serious questions on the merits, (2) a likelihood of irreparable harm, (3) the balance of
21 hardships tips sharply in the plaintiff's favor, and (4) an injunction is in the public interest.
22 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

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1 **A. Serious Questions on the Merits**

2 **1. Gillett**

3 Section 9.1 of Gillett’s employment agreement prohibits him from
4 directly or indirectly, without the prior written consent of [Ei], hir[ing] or
5 caus[ing] to be hired, solicit[ing], recruit[ing], raid[ing], or encourag[ing] to cease
6 to work with [Ei] . . . any person who is at the time of such activity, or who was
7 within the six (6) month period preceding such activity, an employee of [Ei].

8 ECF No. 4 at 55. Section 9.2 prohibits Gillett from “directly or indirectly, solicit[ing],
9 encourag[ing], or caus[ing] any customer, vendor, supplier, or manufacturer of [Ei] to cease
10 doing business with [Ei] or to reduce the amount of business such customer, vendor, supplier, or
11 manufacturer does with [Ei].”

12 Ei has met its burden of showing serious questions on the merits as to whether Gillett
13 breached his employment agreement. As to section 9.1, Ei presents evidence that Danielle
14 Armentrout, who worked closely with Gillett at Ei, ceased her employment with Ei to move to
15 Quality. ECF No. 40-1 at 1-2. It appears she did so because Ei notified her she would be
16 terminated. *See id.* But she left Ei before her final date of employment and was hired by Quality.
17 *Id.* Thus, there are at least serious questions as to whether Gillett, as Quality’s president, hired
18 Armentrout or caused Quality to hire her and whether he directly or indirectly caused or
19 encouraged her to cease working for Ei earlier than she otherwise would have.

20 Ei also presents evidence that Gillett reached out to various customers and vendors of Ei
21 on Quality’s behalf, one of which has an exclusive arrangement with Ei. *See* ECF No. 40-1 at 4-
22 5. Gillett would not breach his employment agreement unless he encourages customers or
23 vendors to cease or reduce business with Ei. However, Ei’s evidence indicates that Gillett has
24 attempted to contact a company with whom Ei has an exclusive relationship and that Quality

1 recently secured contracts for 45L tax work from two builders who were Ei customers. *See id.*¹
2 As I stated at the hearing, more information about these communications and contracts may
3 show that Gillett has not breached his employment agreement. But at present, the evidence
4 raises serious questions as to whether Gillett has breached his employment agreement.

5 2. Quality

6 Ei has shown serious questions on the merits as to whether Quality breached the
7 nondisclosure agreement (NDA). Although Quality disputes it is bound by the NDA, as
8 discussed at the hearing there are at least serious questions as to whether Quality is bound by it.
9 There does not appear to be any genuine dispute that Gallant signed the NDA as part of the
10 overall process by which Gallant and Quality were considering purchasing Ei. Throughout that
11 process, Gallant, who is Quality's majority shareholder, represented it was signing documents on
12 Quality's behalf. *See* ECF No. 40-1 at 8, 12, 18. And it would make little sense for the non-
13 solicitation/hiring clause to apply to Gallant and not Quality. Gallant is an investment firm,
14 while Quality is a competitor with Ei. Thus, it is likely the parties' intent and understanding that
15 Quality could not solicit and hire Ei employees as set forth in the NDA.

16 There are also serious questions as to whether Quality breached the agreement. The
17 NDA states that for 18 months following its effective date, Gallant:

18 shall not solicit for employment or employ any employee of [Ei] without the prior
19 written consent of [Ei]. Nothing contained herein shall be construed to restrict

20 ¹ The defendants object to Ei's hearsay evidence as well as to the reply and supplemental
21 declarations. But I can consider hearsay when ruling on a TRO motion. *Herb Reed Enters., LLC*
22 *v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) ("Due to the urgency of
23 obtaining a preliminary injunction at a point when there has been limited factual development,
the rules of evidence do not apply strictly to preliminary injunction proceedings."); *Republic of*
the Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988) (stating district courts have
discretion to consider hearsay when deciding whether to issue a preliminary injunction). And
given the time-sensitive nature of TRO motions generally, as well as the rapidly evolving
circumstances in this case, I must evaluate the evidence currently before me.

1 [Gallant] from any general forms of solicitation for employees (including through
2 the use of employment agencies) not specifically directed toward employees of
3 [Ei] and provided further that [Gallant] shall not be restricted from hiring any
such person who responds to any such general solicitation or who contacts
[Gallant] on his or her own initiative.

4 ECF No. 4 at 60. Ei presents evidence that Quality employees have solicited Ei employees to
5 apply to or work for Quality, and one of those former Ei employees now works for Quality. ECF
6 Nos. 43-1; 43-2.

7 **B. Irreparable Harm**

8 Ei has shown a likelihood of irreparable harm. Ei has already lost at least one employee
9 that was solicited by a Quality employee. There is evidence that Ei lost 45L tax business from
10 two builders and that Gillett attempted to make inroads on Ei's exclusive relationship with
11 Sunrun. ECF No. 40-1 at 4-5. Loss of talent and goodwill are not readily quantifiable in money
12 damages. *See Herb Reed Enters., LLC*, 736 F.3d at 1250 (stating that damage to goodwill can
13 constitute irreparable harm).

14 **C. Balance of Hardships/Public Interest**

15 The balance of hardships tips sharply in Ei's favor on the narrow grounds for which I will
16 enter a TRO. The defendants contractually agreed not to engage in certain conduct, so enjoining
17 them from violating their contractual obligations imposes little to no hardship on them while I
18 preserve the status quo until a preliminary injunction hearing. In contrast, if I do not enjoin the
19 defendants, Ei is likely to suffer irreparable harm in the loss of talented employees and goodwill
20 with customers and vendors.

21 Additionally, the public interest favors enforcing the defendants' contracts. *Abdou v.*
22 *DaVita Inc.*, No. 2:16-cv-02597-APG-CWH, 2017 WL 7036659, at *3 (D. Nev. Nov. 17, 2017)
23 (“[T]he public has an interest in protecting the freedom of persons to contract.”). Enforcing

1 contracts is particularly important in situations like this, where the plaintiff has disclosed
2 information to its competitor under a nondisclosure agreement, a key employee with institutional
3 knowledge then switched to the plaintiff's competitor, and there is some evidence that the
4 protections the plaintiff bargained for in the employment and nondisclosure agreements are not
5 being honored.

6 **D. Other Requests**

7 Ei requested a broader restraining order than I am entering. I deny Ei's other requested
8 relief at this time because Ei has not met its burden of showing it is appropriate under *Winter* or
9 *Alliance for the Wild Rockies*. Ei may seek an expansion of the TRO as part of the preliminary
10 injunction hearing. And the defendants may be able to narrow or eliminate the injunction after
11 the evidentiary hearing. The preliminary injunction hearing may result in this restraining order
12 being terminated, narrowed even further, or expanded.

13 **E. Bond**

14 The TRO orders the defendants to do only what they are contractually required to do, and
15 the defendants have presented no evidence to support anything other than a nominal bond. I
16 therefore will order Ei to post a bond in the amount of \$1,000.

17 **F. Preliminary Injunction Hearing**

18 As discussed at the TRO hearing, the parties are to confer and attempt to resolve issues
19 related to the preliminary injunction hearing, including whether they need discovery, how long
20 the hearing would last, how out-of-state witnesses should be handled in light of the COVID-19
21 pandemic, and when the hearing should be scheduled (including whether it ought to be held
22 before or after I resolve the motion to transfer venue). Unless the parties reach an agreement
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1 before then, I will address these issues, as well as related issues about extending the TRO until a
2 preliminary injunction hearing can be held, at the hearing presently scheduled for July 21, 2020.

3 **II. CONCLUSION**

4 I THEREFORE ORDER that the motion for leave to file sur-reply (**ECF No. 41**) and
5 motion for leave to file supplemental declarations (**ECF No. 43**) are **GRANTED**.

6 I FURTHER ORDER plaintiff Ei Corporation, Inc.'s motion for temporary restraining
7 (**ECF No. 4**) is **GRANTED in part**.

8 I FURTHER ORDER that plaintiff Ei Corporation, Inc. shall post a \$1,000 bond by
9 Friday, July 17, 2020.

10 **TEMPORARY RESTRAINING ORDER**

11 I HEREBY TEMPORARILY RESTRAIN defendant John Gillett from violating his
12 contractual obligations under his Executive Employment Agreement with plaintiff Ei
13 Corporation, Inc. as set forth in sections 9.1 and 9.2 of that agreement. Specifically, defendant
14 John Gillett is hereby restrained from directly or indirectly, without Ei's prior written consent,
15 hiring or causing to be hired, soliciting, recruiting, raiding, or encouraging to cease to work with
16 Ei any person who is at the time of such activity, or who was within the six (6) month period
17 preceding such activity, an Ei employee. Defendant John Gillett is also restrained from directly
18 or indirectly soliciting, encouraging, or causing any customer, vendor, supplier, or manufacturer
19 of Ei to cease doing business with Ei or to reduce the amount of business such customer, vendor,
20 supplier, or manufacturer does with Ei.

21 I HEREBY TEMPORARILY RESTRAIN defendant Quality Built, LLC from violating
22 its contractual obligations under the Confidentiality and Nondisclosure Agreement entered into
23 between Gallant Capital Partners, LLC and Capstone Headwaters as set forth in section 7 of that

1 agreement. Specifically, Quality is restrained from soliciting for employment or employing any
2 employee of Ei without Ei's prior written consent. This does not restrict Quality from any
3 general forms of solicitation for employees (including through the use of employment agencies)
4 not specifically directed toward Ei employees. Nor does it restrict Quality from hiring anyone
5 who responds to such a general solicitation or who contacts Quality on his or her own initiative.

6 DATED this 16th day of July, 2020 at 8:20 am.

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9 ANDREW P. GORDON
10 UNITED STATES DISTRICT JUDGE
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