IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

L&W INSURANCE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2730-VCP
	)	
LEWIS B. HARRINGTON, III,	)	
and THE LYONS COMPANIES, LLC,	)	
a Delaware limited liability company,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: February 21, 2007
Decided: March 12, 2007

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PARSONS, Vice Chancellor.

Currently before the Court is an application for a preliminary injunction to enforce the non-solicitation covenants contained in an employment contract. The Defendant and former employee, Lewis B. Harrington, III ("Harrington"), has, in apparent disregard of the non-solicitation covenants contained in his employment contract with his former employer, L&W Insurance, Inc. ("L&W"), been soliciting clients he once serviced at L&W. L&W has filed this action seeking an injunction to prohibit Harrington from servicing clients that he already has solicited and to prevent him from soliciting other former clients. L&W also has asserted a claim against Harrington's new employer, The Lyons Companies, LLC ("Lyons"), for tortious interference with contract. L&W seeks to enjoin Lyons from servicing clients solicited by Harrington and to prevent further solicitation. L&W also seeks money damages for Lyons' alleged tortious interference with contract. Harrington has responded to the complaint by arguing that L&W is in material breach of the employment contract, and that L&W's breach relieves him of the contract's obligations, including the non-solicitation provisions. Lyons denies any tortious interference.

L&W filed its verified complaint on February 9, 2007, and moved for a temporary restraining order against Harrington. On February 13, the Court heard argument on that motion and denied the requested relief, but scheduled a prompt hearing on L&W's request for a preliminary injunction. The Court heard argument on the motion for a preliminary injunction on February 21, 2007. For the reasons stated herein, the Court denies the requested preliminary injunction.

I. BACKGROUND

A. The Parties and Facts

Plaintiff L&W Insurance, Inc. is a Delaware corporation and a licensed insurance agency with its principal place of business in Dover, Delaware.

Defendant Lewis B. Harrington, III is an insurance broker who was employed by L&W from 1997 or 1998 until January 12, 2007. Before joining L&W, Harrington had no prior work experience with insurance agencies and had never worked as an insurance broker.[1]

Defendant The Lyons Companies, LLC is a Delaware corporation and a licensed insurance agency.[2] Lyons is one of L&W's competitors and has offices in Wilmington and Rehoboth Beach, Delaware. Harrington is currently employed by Lyons in the Rehoboth office.

1. Harrington's employment contract

When Harrington first went to work at L&W, the parties executed an employment contract containing covenants restricting Harrington's post-employment solicitation of L&W clients.[3] On or about December 21, 2004, L&W and Harrington entered into a new

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[1] Harrington Dep. at 19-20. Unless otherwise noted, the deposition transcripts and exhibits cited in this memorandum opinion are contained in the J.A. to Brs. Submitted in Connection with Pl.'s Application for a Prelim. Inj. ("Joint Appendix" or "JX"), filed on February 20, 2007.

[2] During his deposition, Daniel McCutcheon, chief operating officer of Lyons, testified that Defendant's correct name is Lyons Insurance Agency, Inc. McCutcheon Dep. at 4. This memorandum opinion refers to the Defendant insurance company as "Lyons."

[3] Harrington Dep. at 4-5.

agreement, called the Producer Employment Agreement, with an effective date of January 1, 2005 (the "Agreement").[4] This Agreement is substantially the same as the initial contract executed by the parties. Section G.3 of the Agreement contains the following non-solicitation clauses:

> To protect the interests of Employer in Employer's accounts, as hereinafter described, Employee covenants and agrees as follows:
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> a. For a period of 90 days following termination of his employment, Employee will not publish, distribute, or cause or allow to be published or distributed, notice to any of the Class A, Class B, Class C and Class D Accounts to the effect that Employee is no longer employed by Employer or that Employee has relocated his business or is affiliated with or employed by any direct or indirect competitor of Employer.
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> b. For a period of 36 months following termination of employment, Employee shall neither call upon or solicit, either for himself or for any other person or firm, any Class A, Class B, Class C or Class D Accounts, nor shall Employee make known to any other person or firm, either directly or indirectly, the names or addresses of any such Accounts, or any confidential information relating to any of them; provided, however, that the foregoing limitation is not intended to prevent Employee from soliciting any accounts that have not had any business in force with Employer during the 12 month period preceding termination of Employment.[5]

The different classes of accounts reflect the employee's relationship with each account. Class A accounts are those that Harrington originally produced for the company as new

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[4] Verified Compl. ("Compl.") ¶ 6.

[5] Compl. Ex. A, the Agreement, at 8-9 (internal quotation marks omitted). In the Agreement, Section G.2 is mistakenly called Section H.

business.[6] Class B accounts are those that were assigned to Harrington by L&W.[7] Until the time of his resignation, Harrington had handled only Class A and Class B accounts.[8]

The Agreement includes a signed document entitled Compensation Agreement Addendum to Producer Employment Agreement (the "Addendum").[9] Section VIII of the Addendum, labeled "Bad Debt Holdback and Accounts Receivable," states:

> Employee will be responsible to pay the Employer the full amount of bad debt write-offs that may occur on any of the Employees [sic] accounts on which Employee elects not to cancel account before an earned premium is incurred. In addition, each month on the 15th of the month premiums receivable for Employee's accounts will be reviewed, and on any receivables balances outstanding over 90 days and over $10,000. (Excluding audits and carrier disputed items) the Employee shall have 3% of the Employee commissions deducted from his next commission or salary payment or commission participation payment due.[10]

Section S of the Agreement contains the following provisions pertaining to arbitration:

> 1. Any controversy or claim arising out of or relating to the Employment Agreement or the Addendum hereto, shall, if the same involves a claim for money or compensatory damages, be resolved by binding arbitration before a single arbitrator in accordance with the rules of the American Arbitration Association, and judgment upon the award

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[6] Agreement at 7; Strickland Dep. at 83.

[7] Agreement at 7.

[8] Harrington Dep. at 14.

[9] Although the Addendum is part of the Agreement, I refer to it separately in this opinion because its pagination differs from the rest of the Agreement.

[10] Compl. Ex. A, the Addendum, at 5 (internal quotation marks omitted).

> rendered by the arbitrator may be entered in any court having jurisdiction thereof. Upon initiation of an arbitration proceeding by either party, the parties shall have 30 days within which to agree upon a single arbitrator. Failing such agreement within such period, either party may request that an arbitrator be appointed by the association in accordance with its rules.
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> 2. If such controversy or claim involves a claim for injunctive or other equitable relief, and suit or cross-claim for such relief is filed in a court of competent jurisdiction, the litigation shall be bifurcated to the extent feasible, to the end that all issues other than those required to be determined by the court shall be determined by Arbitration pursuant to subparagraph 5.1 [sic] above.[11]

The Agreement also provides that any modification to its terms must be "in writing and duly executed by the party to be charged therewith."[12] Both L&W's president, William Strickland ("Strickland"), and Harrington signed the Agreement and Addendum.

2. Harrington's compensation structure

Harrington worked for L&W on a commission basis. Pursuant to the Addendum, L&W paid Harrington a predetermined biweekly advance against commissions that he was owed.[13] At the end of each quarter, L&W would calculate Harrington's commissions, determine whether it owed him any amount more than his regular biweekly advancements and pay him any excess amount due.[14] In determining the "quarterly settle up" amount, L&W presumably would take into account any adjustments warranted under

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[11] Agreement at 13.

[12] Agreement at 11.

[13] Addendum at 1; Strickland Dep. at 11; Harrington Dep. at 103.

[14] Strickland Dep. at 11.

Section VIII of the Addendum for bad debts or accounts receivable outstanding for more than 90 days.

During discovery, Strickland produced a single page excerpt from an unidentified document containing an alternative version of Section VIII of the Addendum ("Alternate Section VIII"), also labeled "Bad Debt Holdback and Accounts Receivable." That version states:

> Employee will be responsible to pay the Employer the full amount of bad debt write-offs that my [sic] occur on any of the Employees [sic] accounts on which Employee elects not to cancel account before earned premium is incurred. In addition the Employee will be subject to 1½% penalty on all premiums due over 60 days on all Employee accounts, to be charged against commissions earned at the end of each month. When overdue premium balances are over 180 days they will be considered bad debt.[15]

L&W has offered no evidence that Alternate Section VIII is part of L&W and Harrington's Agreement. Nor has it shown that Harrington signed or assented to Alternate Section VIII or was even aware of it.[16] In Harrington's first and third quarter commission summaries for 2006, however, the 1.5% penalty was assessed on accounts

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[15] Strickland Dep. Ex. 3 (internal quotation marks omitted).

[16] Strickland was not sure whether Alternate Section VIII applied to Harrington. *See* Strickland Dep. at 24-25. He also testified that the differences in the language of Section VIII of the Addendum and Alternate Section VIII were insignificant and would not have required a signed, written modification pursuant to the Agreement. *Id.* at 25-27.

"over 60" and "over 90" days, reducing his quarterly commissions by $834.00 and $2,971.00, respectively.[17]

Effective September 15, 2006, L&W enacted an Aged Receivables Settlement Plan ("ARSP"), a different policy that purported to treat all accounts with balances over 90 days old as interest free loans from L&W to the employees in charge of the accounts.[18] In other words, the ARSP permits L&W to deduct the outstanding balance of any receivables account over 90 days due from the quarterly commissions owed to the employee who handles that account. L&W offers no evidence that Harrington agreed to the ARSP as a modification to the Agreement or that he signed it. Beyond any effect that Alternate Section VIII and the ARSP might have, Strickland admitted that no language in the Agreement explicitly entitles L&W to offset any amounts due for bad debts or overdue accounts against commissions owed.[19]

For the third quarter of 2006, Harrington earned commissions totaling $34,727.00 and other "additions" of $9,284.00.[20] In this period, L&W advanced Harrington $17,500 (approximately $3000 bi-weekly), and presumably under Alternate Section VIII, deducted $2,971.00 as a 1.5% penalty on aged receivables. L&W also subtracted

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[17] Strickland Dep. Ex. 2, Quarterly Commission Summ. The parties do not address whether this reduction constituted a breach of the Agreement, and the Court expresses no opinion on that point.

[18] Affidavit of C. Michael Cronin, filed February 20, 2007 ("Cronin Aff.") ¶ 17, Ex. C at 1. *See also* Strickland Dep. at 28 (testifying that such a deduction was a "general practice as an agency").

[19] Strickland Dep. at 27-28.

[20] Quarterly Commission Summ.; Strickland Dep. at 17.

$8,142.00 as a commission deferral. After these deductions, the net balance owed to Harrington was $15,398, or nearly half of his earned commissions. According to the quarterly commission summary, however, Harrington also owed L&W $189,623.00 for an "over 90 days loan," presumably pursuant to the ARSP. The commission summary further indicates that L&W withheld the entire $15,398 and used it to reduce the "loan" balance.[21] L&W has not submitted any evidence specifically showing how the $15,398 was applied beyond the very limited information provided in Harrington's quarterly commission summary.

3. The Fresh Cut account

After seeking its business for several years, in the fourth quarter of 2005, Harrington succeeded in procuring the account of a company named Fresh Cut.[22] The parties agree that Fresh Cut was a large client that could generate substantial income for both Harrington and L&W. As of January 2006, L&W began providing property and worker's compensation coverage for Fresh Cut with Harrington as the primary agent assigned to the account.[23] Shortly thereafter, L&W also became the provider for Fresh

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[21] Quarterly Commission Summ.; Cronin Aff. ¶ 17. As explained *infra*, more than $92,000 of the total "over 90 days loan" amount stems from a bad debt in the Fresh Cut account.

[22] Harrington actively pursued the Fresh Cut account for approximately five years before Fresh Cut became a client of L&W. Harrington Dep. at 81. Harrington met with Fresh Cut ten times in December 2005. *Id.* at 85-86; Cronin Aff. ¶ 4. Harrington also continued to meet with representatives of Fresh Cut throughout March, April and May 2006. Cronin. Aff. ¶ 10.

[23] Strickland Dep. at 30-31.

Cut's health and life insurance coverage.[24] Harrington, however, was not the agent for Fresh Cut's health and life insurance needs.[25]

When negotiating the payment structure for the Fresh Cut account, Harrington, along with L&W's commercial underwriting manager (and Harrington's supervisor), Mike Cronin, and one of L&W's principals, Andy Cousins, met with a Fresh Cut principal, Todd Glenn, and a representative from one of Fresh Cut's insurance carriers.[26] After Harrington gave his proposal to Fresh Cut, Glenn asked if Fresh Cut could pay L&W the second week of the month, even though the insurance carriers required payment on the first of the month.[27] This type of payment arrangement effectively would require L&W to advance the premium payments to the insurance companies on behalf of Fresh Cut, and then collect the premium from Fresh Cut. Because the premium was relatively large and such a decision would require approval from senior L&W principals, Harrington turned to Cousins. When Glenn asked Harrington, "What are you looking at him for?"[28] Cousins responded, "Because it's my money."[29] L&W, through Cousins,

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[24] *Id.* at 31; Harrington Dep. at 119-20.

[25] Harrington Dep. at 119-20.

[26] *Id.* at 112; Strickland Dep. at 33-34; Cronin Aff. ¶ 6; Affidavit of Andrew Cousins, filed February 20, 2007 ("Cousins Aff.") ¶ 5.

[27] Harrington Dep. at 112-13.

[28] *Id.* at 113.

[29] *Id.*

approved the payment arrangement, so long as Harrington picked up Fresh Cut's check by the 12th of each month, and the check was dated no later than the 15th of that month.[30]

L&W advanced the February and March 2006 payments in accordance with the agreed-upon payment structure.[31] In March, however, Fresh Cut was late with its payment to L&W, and when it did pay, there were insufficient funds to clear the check. On March 24, after discovering that Fresh Cut's check had bounced, and before advancing the April premium, Strickland met with Harrington to discuss whether L&W should continue to advance Fresh Cut's premiums.[32]

Although the parties dispute the exact contents of this conversation, they agree that the topic involved the Fresh Cut account. Harrington acknowledges that he told Strickland and Cousins about a recent Fresh Cut management change and that a potential investor had been looking to buy some or all of Fresh Cut's equity.[33] Strickland admits that after speaking with Harrington, and before advancing any more premiums, he called his contact at Fresh Cut to confirm what Harrington had told him.[34] Based on Harrington's advice and Strickland's conversations with Fresh Cut's controller, L&W

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[30] *Id.* at 115; Strickland Dep. at 34.

[31] Strickland Dep. at 35.

[32] *Id.* at 43-44; Harrington Dep. at 90-91.

[33] Harrington Dep. at 93-94; Strickland Dep. at 43.

[34] Strickland Dep. at 45, 48.

advanced the April premium. Meanwhile, Harrington obtained from Fresh Cut a certified check for the full amount of the delinquent payment that was due in March.[35]

The parties dispute whether Strickland or Cronin spoke with Harrington about advancing the May premium, but L&W did advance that premium. Fresh Cut did not reimburse L&W for the May premium, and on May 20 or 21, 2006, Harrington and L&W learned that Fresh Cut had declared bankruptcy.[36]

At some time during the next few months, L&W determined that the Fresh Cut bankruptcy meant that L&W would not be able to collect the May premium. As a result, L&W declared the Fresh Cut account receivable a bad debt (the "Fresh Cut Debt").[37]

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[35] Harrington Dep. at 89; Strickland Dep. at 47. The record is unclear as to whether the bounced check represented payment for the advanced March premium or the April premium. *See* Strickland Dep. at 35 (admitting that the premiums were advanced for the first four months of 2006), *id.* at 39-40 (admitting that the amount due on the Fresh Cut account was for the entire outstanding balance); Harrington Dep. at 111 (recalling that the bounced check was for the March payment); *cf.* Harrington Dep. Ex. 4 (admitting in an email from Cousins to Harrington that one of Fresh Cut's insurance carriers was paid through June 1, 2006). Although not necessary to resolve for purposes of this analysis, I assume that Fresh Cut paid L&W for premiums advanced for insurance coverage through April, and the outstanding balance represents the premium advanced for May.

[36] Harrington Dep. at 96; Cronin Aff. ¶ 11.

[37] Strickland Dep. at 75. Plaintiffs have not produced evidence showing when this declaration took place. Cronin's emails to Harrington suggest that the Fresh Cut account went from 31-60 days overdue to over 90 days overdue sometime between August 21, 2006 and September 12, 2006. Cronin Aff. Ex. A (Aug. 22, 2006 email from Cronin to Harrington) (showing the Fresh Cut account classified as a 31-60 Days Aged Receivable in the amount of $99,854.97 and as an Over 90 Days Aged Receivable in the amount of negative $7,225.00 for a balance of $92,629.97 due on Aug. 21); Cronin Aff. Ex. A (Sept. 15, 2006 email from Cronin to Harrington) (showing that the Fresh Cut account was classified as an Over 90 Days Aged Receivable in the amount of $92,599.97 with an identical balance due

The Fresh Cut Debt totaled $92,599.97.[38] L&W argues that the Fresh Cut Debt qualified as bad debt under the first sentence of Addendum Section VIII, which entitled it to offset the full amount of the Fresh Cut Debt against any commissions owed to Harrington.[39] Despite this argument, the evidence indicates that L&W did not apply the $15,398 commission against the Fresh Cut Debt; instead, it apparently applied the withheld third quarter commissions toward others of Harrington's accounts that were included in the 90 days loan pursuant to the ARSP.[40]

4. Harrington begins seeking new employment and L&W demands Harrington sign a $92,599.97 promissory note

Upset that L&W withheld his entire third quarter commission settle up and that his future commissions were going to be reduced, Harrington began to consider alternative employment in October or November 2006.[41] He discovered that Lyons was hiring and eventually contacted Daniel McCutcheon, the Chief Operating Officer of Lyons, in mid-November.[42] In a phone conversation, Harrington and McCutcheon briefly discussed his

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on Sept. 22). Because Cronin's Aged Receivables list has a third category of 61-90 Days Aged Receivables, however, it is unclear how the Fresh Cut account went from being 31-60 days overdue on August 21 to being over 90 days overdue 22 days later on September 12.

[38] Strickland Dep. at 39.

[39] *See id.* at 28.

[40] Cronin Aff. ¶ 17. The total of the Fresh Cut Debt and Harrington's accounts over 90 days due was approximately $189,000. *Id.*; Quarterly Commission Summ.

[41] Harrington Dep. at 21.

[42] *Id.*; McCutcheon Dep. at 6. Harrington also spoke to a friend at another insurance agency but did not follow up on that conversation. Harrington Dep. at 29.

background and work for L&W, the fees he had generated, and that he was in a dispute with L&W over a supposed bad debt.[43] Harrington met with McCutcheon on November 15, 2006, and they further discussed his opportunities with Lyons and reasons for wanting to leave L&W.[44] Particularly, they discussed the Fresh Cut Debt and the circumstances leading up to it, and McCutcheon suggested that Harrington speak with an attorney.[45] In November or December 2006, Harrington retained counsel. McCutcheon also asked Harrington to produce a copy of the Agreement, which he did within a few days.[46] There is no evidence that McCutcheon or Harrington discussed anything with regard to any specific, existing clients or other confidential L&W information Harrington may have had.[47]

McCutcheon learned that Harrington had only a modest client base from his work at L&W and testified that Harrington's portfolio of business was marginal compared to Lyons' overall revenues and that Harrington's existing client base was not an important consideration in Lyons' decision to hire him.[48] Ultimately, McCutcheon offered Harrington a position in Lyons' Rehoboth office on January 12, 2007.[49]

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43 McCutcheon Dep. at 7-8.

44 Harrington Dep. at 27; McCutcheon Dep. at 7-11.

45 McCutcheon Dep. at 9-12, 17.

46 *Id.* at 18-19.

47 *Id.* at 39-43; McCutcheon Dep. Ex. 1; Harrington Dep. at 35.

48 McCutcheon Dep. at 40-43.

49 *Id.* at 47.

During the last quarter of 2006, L&W continued to press Harrington for the Fresh Cut Debt. Cronin had regular meetings with Harrington and counseled him that he was going to be responsible for the Fresh Cut Debt and other past due accounts.[50] Harrington, meanwhile, consulted with counsel about the enforceability of the Agreement and its applicability to the Fresh Cut Debt.[51] On December 13, 2006, L&W presented a promissory note to Harrington for the entire Fresh Cut Debt of $92,599.97.[52] The terms of the interest-free note called for a relatively low $2,315 deduction from Harrington's quarterly commission payments for a period of ten years.[53] Further, if for any reason Harrington were to change employers or be terminated from L&W, the entire unpaid balance would become due.[54]

Harrington did not sign the note, and on Friday, January 12, 2007, Cousins and Cronin of L&W told him that he needed to fax them the signed promissory note that day. They specifically rejected as "unacceptable" Harrington's suggestion that he deliver the note to them the following Monday morning.[55] Harrington then faxed his resignation letter, which had been drafted by his counsel, to L&W on January 12 at 5:00 p.m.[56]

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[50] Cronin Aff. ¶ 3; Cronin Aff. Ex. A.

[51] Harrington Dep. at 44-48.

[52] Strickland Dep. at 39; Strickland Dep. Ex. 4.

[53] Strickland Dep. Ex. 4.

[54] *Id.*

[55] Harrington Dep. at 37, 41-42.

[56] *Id.* at 42; Harrington Dep. Ex.1.

In his resignation letter, Harrington asserted that L&W had breached the Agreement by withholding his commissions and by insisting that he was liable for the Fresh Cut Debt, and that the Agreement was therefore invalid.[57] Specifically, the concluding paragraph of the letter stated:

> L&W breached my Employment Agreement by attempting to characterize the advance premium as a "bad debt" and requesting that I sign a promissory note for the balance of the advance premium, together with the improper withholding of commissions described above. I have been advised by counsel that L&W's breach of Employment Agreement invalidates the "Post-Termination Limitations" in Paragraph G of the Producer Employment Agreement.[58]

Based on this letter, Lyons both permitted and assisted Harrington in contacting his former clients.[59] Harrington sent letters to 20-25 of his previous clients to inform them that he had changed employers and to solicit their business.[60] In the introduction to these letters, Harrington informed his former clients that "a significant and irreconcilable financial disagreement [had] obligated [him] to seek an alternative employer."[61] When L&W learned of this, it informed Harrington that it planned to enforce the Agreement and that it considered Harrington, as a result of his solicitations, to be in direct breach of

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[57] Harrington Dep. Ex. 1; *see* Harrington Dep. at 48.

[58] Harrington Dep. Ex. 1 at 2.

[59] McCutcheon Dep. at 45-47, 57-60.

[60] McCutcheon Dep. at 61-62.

[61] Harrington Dep. Ex. 2.

the Agreement. By the time of the preliminary injunction argument on February 21, 2007, six of Harrington's former clients had switched from L&W to Lyons.[62]

II. ANALYSIS

A. Standard of Review

The standard for a preliminary injunction is well-established. A preliminary injunction is an extraordinary form of relief that will be granted only where the moving party demonstrates: (1) a reasonable probability of success on the merits at a final hearing; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable harm; and (3) that, after balancing the equities, the harm to the plaintiff if relief is denied will outweigh the harm to the defendant if relief is granted.[63] This conjunctive, three-part test requires the moving party to demonstrate all three elements to prevail, but a strong demonstration of one element may outweigh the weakness of another.[64] The three elements are considered in tandem by the court in determining whether to issue a preliminary injunction.[65]

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[62] McCutcheon Dep. at 75-79.

[63] *See, e.g.*, *Abrons v. Marée*, 911 A.2d 805, 810 (Del. Ch. 2006); *Flight Options Int'l, Inc. v. Flight Options, LLC*, 2005 WL 2335353, at *6 (Del. Ch. 2005); *Cantor Fitzgerald, L.P. v. Cantor,* 724 A.2d 571, 579 (Del. Ch. 1998); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

[64] *Abrons*, 911 A.2d at 810; *Nutzz.com v. Vertrue Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005); *Cantor Fitzgerald*, 724 A.2d at 579.

[65] *See Abrons*, 911 A.2d at 810.

Where the parties agree that the underlying dispute will be resolved by arbitration, however, "the analysis of the merits of the underlying claims may be more limited."[66] This more limited review requires the party seeking the preliminary injunction to "establish a reasonable probability that its arbitration position is sound; that it will be irreparably injured in the interim before the arbitration is concluded; and that its threatened injury is graver than any irreparable injury that may be suffered by defendant by reason of granting of the relief."[67] Thus, the only difference between reviewing an application for a preliminary injunction generally and where arbitration is involved is in determining the likelihood of success. In evaluating whether the moving party has established a reasonable probability that its arbitration position is sound, the court examines: (a) the moving party's entitlement to arbitration; and (b) the merits of its arbitration claims.[68]

1. L&W's likelihood of success on the merits at the arbitration

The parties have agreed that, in accordance with Section S of the Agreement, "[a]ny controversy or claim arising out of or relating to the Employment Agreement or the Addendum hereto, shall, if the same involves a claim for money or compensatory

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66 *Flight Options*, 2005 WL 2335353, at *6 (quoting *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, at *2 (Del. Ch. Nov. 4, 2003)).

67 *Price Org., Inc. v. Universal Computer Servs., Inc.*, 1992 WL 356026, at *8 (Del. Ch. Dec. 2, 1992), *aff'd,* 630 A.2d 1103 (Del. 1993) (Table).

68 *Flight Options*, 2005 WL 2335353, at *6; *Kansas City S.*, 2003 WL 22659332, at *2; *Price Org.*, 1992 WL 356026, at *8.

damages, be resolved by binding arbitration . . . ."[69] Section J of the Agreement, however, contains the parties' stipulation that the employee's violation of the post-termination provisions would result in damages that are difficult to ascertain and that the employer is entitled to seek injunctive relief to remedy any such breach.[70] In accordance with Section J, L&W seeks a preliminary injunction to prevent Harrington from disclosing any confidential information of L&W, notifying his former accounts of his change of employment for a period of 90 days, soliciting his former accounts for 36 months, placing any insurance business with current or former L&W customers he has contacted and continuing to serve any such customers that recently placed business with Lyons, until this dispute is resolved.[71] Because there is no dispute that the claims for damages against Harrington in this action arise out of or relate to the Agreement, and are therefore subject to arbitration, this Court need only evaluate the merits of L&W's underlying arbitration claims.

"[A] preliminary injunction will not issue unless the complainant satisfies the court that there is at least a reasonable probability of ultimate success upon a final hearing."[72] The dispute currently before the Court essentially involves the question of who, if anyone, likely breached the Agreement first. L&W has argued, and Harrington

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69 Agreement at 13.

70 *Id*. at 11.

71 L&W also seeks similar injunctive relief against Lyons. *See* L&W's Mot. for Prelim. Inj.

72 *Consol. Film Indus. v. Johnson*, 192 A. 603, 608 (Del. 1937); *Arbor Park Civic Ass'n v. City of Newark*, 267 A.2d 904, 906 (Del. Ch. 1970).

has not denied, that Harrington's post-termination solicitation of his former L&W clients constitutes a breach of Section G of the Agreement, if that Agreement is still binding on Harrington. Harrington argues that he is no longer bound by the Agreement's post-termination provisions because by the time he left, L&W had materially breached that contract. Thus, the Court must examine the limited record before it to determine the likelihood that L&W breached the Agreement before January 15, 2007. If Harrington is right, and L&W probably breached the Agreement before Harrington joined Lyons, he has presented a serious defense to L&W's claim of breach. In fact, I find that is the case. Thus, L&W has failed to show a reasonable likelihood of success on its arbitration claims.

Because L&W's claim against Lyons is intimately dependent upon L&W's likelihood of success against Harrington, I find that L&W also has not shown a probability of success against Lyons. In addition, L&W would need to rebut Lyons' defense that it has a privilege to compete against L&W for L&W's current and past clients. L&W has not shown that it has an exclusive relationship with its clients or that its clients do not engage in competitive bidding for insurance based on price, type of coverage, etc. The absence of a showing of a reasonable probability of success on the merits supports denying any preliminary injunctive relief against either Harrington or Lyons.[73]

[73] Although it is not subject to arbitration, I will stay L&W's claim against Lyons for damages for tortious interference with contract, pending the outcome of L&W and Harrington's arbitration proceedings.

a. L&W's withholding of Harrington's $15,398 commission

An employer's unilateral decision not to pay earned compensation constitutes a material breach of an employment agreement.[74] In *Dickinson Medical Group, P.A. v. Foote*, the plaintiff medical group employer sued its former employee-physician for breach of an employment agreement, including a covenant not to compete. The court found that nothing in the physician's employment agreement allowed the medical group employer to deduct or adjust the fees she generated from her services, and that the failure to pay this compensation constituted a material breach of the employment agreement.[75]

Surveying the record presently before the Court, the first plausible instance of breach of contract between L&W and Harrington was L&W's unilateral withholding of $15,298 of Harrington's earned commissions in September, 2006.[76] Thus, for L&W to show a reasonable likelihood of success on the merits, it must set forth a plausible argument that the Agreement authorized its withholding of those commissions. L&W has failed to carry this burden.

L&W argues that, under Section VIII of the Addendum, Harrington became liable for the Fresh Cut Debt because he failed to cancel the account before L&W advanced

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[74] *See Dickinson Med. Group, P.A. v. Foote*, 1989 WL 40965, at *7 (Del. Super. Ct. Mar. 23, 1989). *See also Shutzman v. Gill*, 154 A.2d 226, 230 (Del. Ch. 1959) ("If the plaintiff was guilty of any material breach of his employment contract, he may not enforce its provisions against the defendant.").

[75] *Dickinson Med. Group*, 1989 WL 40965, at *7.

[76] L&W has not argued, and has not drawn the Court's attention to any evidence indicating, that Harrington breached the Agreement at any time before he joined Lyons on or about January 15, 2007.

money for the May premium. Based on the Fresh Cut Debt and other delinquent accounts, L&W asserts that Harrington owes it at least $189,000.[77] Whether Harrington in fact owes this amount is an issue the parties will need to resolve in arbitration. The question this Court must consider is whether L&W's self-help measure of withholding Harrington's earned commission violated the Agreement.

L&W argues that, in accordance with the first sentence of Section VIII, Harrington is liable for the Fresh Cut Debt because it is a bad-debt write off, and Harrington chose not to cancel the Fresh Cut account before the earned premium was incurred (*i.e.*, before L&W advanced the money for the premium). Harrington has responded by arguing that, because Fresh Cut was a large account with a large earned premium, L&W had to agree to advance money for the premium, and that Harrington could not make such an important decision on his own. He could "advise" management on the course to take, but L&W's management made the ultimate business decision to advance money for Fresh Cut's premiums.

The Court has two concerns about L&W's argument. First, the record is unclear as to whether Harrington actually "elect[ed] not to cancel [the Fresh Cut] account before an earned premium is incurred," as Section VIII requires. L&W claims that Harrington was repeatedly warned that he would be personally responsible for Fresh Cut's bad debt if Fresh Cut failed to pay, and that Harrington understood and assented to that

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[77] Strickland Dep. at 29. This includes the Fresh Cut Debt of $92,599.97 and other delinquent receivables from Harrington's accounts. Cronin Aff. ¶ 17.

responsibility.[78] Harrington, on the other hand, says that, as a 34 year old who is in the process of building his own house and the father of two young children, he never would have put his family at risk by agreeing to be financially responsible for more than $92,000 of someone else's debt.[79] In addition, the evidence shows that L&W ultimately made the decision to advance the funds in question. Although L&W received advice from Harrington, it sought and obtained information directly from Fresh Cut before advancing the premiums in question. In the end, whether Harrington is responsible for the Fresh Cut Debt will need to be resolved in arbitration. In my opinion, however, the issue is not free from doubt. Thus, for purposes of determining whether to grant L&W's motion for a preliminary injunction, L&W has presented a relatively weak case that Harrington owes it the full amount of the Fresh Cut Debt.

But even if L&W had demonstrated that Harrington owes it the full amount of the Fresh Cut Debt, L&W has not shown any contractual or legal support for its withholding of Harrington's commission. Section VIII of the Addendum apparently contemplates a distinction between a bad-debt write off, addressed in the first sentence of Section VIII, and premiums receivable with balances outstanding over 90 days and over $10,000, addressed in the second sentence. If L&W considered the Fresh Cut account "bad debt," it failed to identify any section of the Agreement that justifies its withholding of Harrington's commissions to cover that bad debt. Indeed, the contract is silent as to how

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78 Strickland Dep. at 43-44, 77; Cronin Aff. ¶¶ 7, 9; *see* Cronin Aff. Ex. A.

79 Harrington Dep. at 113-14.

L&W could recover on any obligation Harrington might have as to bad-debt write offs. Nowhere in the Agreement or Addendum is there any indication that L&W may unilaterally withhold compensation to offset against bad-debt write offs.

The only provision of the Agreement or Addendum that addresses the withholding of compensation is the second sentence of Section VIII of the Addendum which addresses aged accounts receivable. Section VIII entitles L&W to deduct 3% of Harrington's quarterly commissions from all receivables with balances over 90 days old and over $10,000 in amount.[80] The record shows that the total amount of Harrington's earned commissions for the third quarter of 2006 was 34,727,[81] but Section VIII is unclear as to how the 3% deduction should be applied. Is it deducted from the commissions associated with the affected aged receivables, or is it deducted from the total amount of Harrington's commissions before any deductions, such as various penalties for accounts due over 60 and over 90 days, are made from his account? In the latter case, the maximum L&W could have deducted for the third quarter of 2006 would have been 3% of $34,727, which is $1,041.81. This arguably is the maximum withholding Section VIII permits. If the 3% withholding could only be taken from Harrington's net earned commissions, on the other hand, L&W only could have withheld $461.94 of Harrington's third quarter commissions. Thus, nothing in Section VIII clearly

[80] Addendum at 5.

[81] Strickland Dep. Ex. 2.

supports either L&W's withholding of the entire $15,398 or its denial that its withholding of Harrington's commissions was a material breach of the contract.

Indeed, when asked in his deposition about L&W's withholding of Harrington's commissions, Strickland answered as follows:

> Q. Now, getting back to my question about when I asked you to show me the provision in Strickland Number 1 [the Agreement and Addendum] that entitles L&W to offset what you characterize as an over 90 days loan against commissions owed, can you show me the language in Paragraph VIII on page five of the compensation agreement, which is part of Strickland Number 1, which entitles L&W to do that?
>
> A. Nothing in that paragraph addresses that specific language.
>
> Q. Okay. And is there anywhere else in Strickland 1 that entitles L&W to offset against the commission owed at the end of the third quarter and not pay that $15,398?
>
> A. Nothing that I think specifically mentions that.
>
> Q. Is there something that generally mentions that?
>
> A. That our general practice as an agency, that is how we handled our agents.[82]

L&W further argues that it was entitled to withhold Harrington's commissions because it had instituted the Aged Receivables Settlement Plan as a new policy effective September 15, 2006.[83] Under the ARSP, L&W essentially would treat customer accounts with premiums due over 90 days as an interest free loan from L&W to the Producer in

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82 Strickland Dep. at 27-28.

83 Pl.'s Br. at 15; Cronin Aff. ¶ 17; Cronin Aff. Ex. C.

charge of that account. This "debt" would then be discharged by withholding the Producer's quarterly commission income until the "loan" is fully liquidated.

L&W has not shown a reasonable probability of success in proving that the ARSP can justify its withholding of Harrington's commissions. Section L of the Agreement explicitly states that the terms of the Agreement may not be waived or modified by either party unless such waiver or modification is in writing and "duly executed" by the party to be charged. The ARSP is a substantial modification of Section VIII, which only provides for a three percent reduction of commissions to offset accounts with premiums of more than $10,000 outstanding more than 90 days. Yet, L&W has produced no copy of the ARSP signed by Harrington or otherwise showing that Harrington agreed to its contents. Nor has L&W shown that this purported modification of the Agreement was supported by fresh consideration. Instead, the ARSP appears to be a unilateral (and therefore probably ineffective) attempt by L&W to modify the terms of the Agreement. Thus, I consider it unlikely that the ARSP could justify L&W's unilateral withholding of Harrington's earned commissions.

Presumably recognizing that reliance on the ARSP is problematic, L&W argues that they withheld Harrington's third quarter commissions because of the Fresh Cut Debt and in accordance with the first sentence of Section VIII. Although understandable, this argument seems to reflect revisionist history. The contemporaneous documentary evidence suggests that, consistent with the ARSP, L&W used the withheld commission to offset other aspects of the "over 90 days loan." In fact, L&W's actions seem to confirm that the withheld commission was not offset against the Fresh Cut Debt, as bad debt,

because if that were the case, the amount of the promissory note presented to Harrington in December would have been approximately $77,000 ($92,000 - $15,000) rather than the full amount of the Fresh Cut Debt.

b. The promissory note

L&W's insistence that Harrington sign the promissory note also may have constituted a material breach of the Agreement. When the note was first presented to Harrington in December 2006, he refused to sign it.[84] Rather than resolve their monetary dispute through arbitration, as required by the Agreement, L&W continued to press Harrington to sign the note. Harrington disagreed with both the terms of the note and L&W's assertion that he owed it over $92,000, yet L&W insisted that Harrington sign the note by January 12, 2007. Harrington considered resigning, and after some discussion with Lyons, he had his counsel draft a resignation letter. When it became clear that L&W wanted the note signed without further discussion, Harrington faxed his resignation letter to L&W.[85]

L&W argues that the terms and conditions of the promissory note are favorable to Harrington because they provide for an interest-free, low-quarterly-payment schedule. The note would have acknowledged the disputed debt, however, and obligated Harrington to make quarterly payments to L&W for ten years. If Harrington stopped working for L&W or his employment were terminated for any reason, L&W could

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[84] Cronin Aff. ¶ 15.

[85] Harrington Dep. at 41-42.

accelerate the full amount of the note so that it became due immediately. L&W has not explained how they reached these terms or why the amount of the note, $92,599.97, was not reduced to reflect $15,398 in third quarter commissions it withheld for the alleged purpose of covering the Fresh Cut Debt.

The Agreement requires the parties to resolve these kinds of disputes through arbitration. L&W's attempt to unilaterally resolve the dispute through its repeated insistence on Harrington signing the promissory note, rather than pursuing arbitration, may have constituted a second material breach of the Agreement. Accordingly, I conclude that L&W has not shown a reasonable probability that its arbitration position, that Harrington breached his post-termination non-solicitation obligations, is sound because there is a real possibility that its unilateral, self-help measures materially breached the Agreement.[86]

Because L&W has failed to show that it is likely to prevail in arbitration based on its inability convincingly to rebut Harrington's defense that L&W breached the Agreement first, L&W also has failed to show a likelihood of success against Lyons for tortious interference with contract.

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[86] The Court has not been asked to adjudicate, and makes no holding regarding, whether other provisions of the Agreement, such as Section F prohibiting Harrington's use of confidential information and trade secrets, would be enforceable even if L&W is found to have materially breached the Agreement before Harrington resigned.

2. Immediate and irreparable harm

"Without irreparable harm, there is no need for the Court to grant interim relief and the parties can fairly wait until final decision on the merits."[87] L&W asserts that due to Harrington's post-termination conduct, it already has suffered the loss of six of its former customers to Harrington and Lyons. Because Harrington and Lyons have solicited approximately 20-25 of Harrington's former clients, L&W fears that more clients may transfer their business to Lyons. L&W also argues that Harrington's solicitation of former clients damages L&W's goodwill because Harrington's letter to his former clients begins by stating that he had "a significant and irreconcilable disagreement" with L&W that obligated him to seek alternative employment.

The protection of substantial business relationships and goodwill are legitimate business interests whose impairment may give rise to irreparable harm.[88] The record in this case indicates that Harrington has aggressively solicited his former L&W clients and has drawn several away from L&W to Lyons. Nevertheless, L&W has failed to show that it had a legitimate expectancy of retaining the clients, or how often clients and customers tend to change insurance agencies based on factors such as price, location, etc., which force insurance agencies and carriers to engage in competitive bidding. In other

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87 *Flight Options Int'l, Inc. v. Flight Options, LLC*, 2005 WL 2335353, at *9 (Del. Ch. 2005).

88 *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *5 (Del. Ch. Aug. 10, 2004); *RHIS, Inc. v. Boyc*e, 2001 WL 1192203, at *6 (Del. Ch. Sept. 26, 2001).

words, L&W has not shown that it was likely to retain these clients even if Harrington did not solicit them.

Furthermore, Harrington argues that Section H of the Agreement, which provides for post-termination commission sharing in certain circumstances, shows that L&W has an adequate monetary remedy and will not suffer irreparable harm if an injunction is not issued. I agree that Section H corroborates the difficulty of retaining an insurance client after an agent like Harrington leaves an agency. In arguing that the section demonstrates the adequacy of a monetary remedy, however, I believe Harrington reads too much into that provision.

Section H is a recognition that some L&W clients may desire to follow Harrington with their insurance business if Harrington leaves L&W, regardless of whether or not Harrington solicits their business. In such cases, Harrington and L&W agreed to share the resulting gross commissions on a 50/50 basis for up to 36 months after the inception of the insurance with Harrington and his new firm.[89] In Section H.2, the parties explicitly agree that the contemplated fee sharing is not intended to act as liquidated damages in the event of Harrington's breach of the non-solicitation provisions or to abrogate any injunctive or equitable relief to which L&W may be entitled. In my opinion, Section H reasonably could be construed as merely a recognition of certain business realities and an attempt to mitigate what the parties, at the time of executing the contract, thought were some potential inequities that might result from those realities. Moreover, the express

89 Agreement at 9-10.

language of Section H suggests that it was not intended to be an accurate estimate of L&W's damages in the event of a breach by Harrington, a limitation of any such damages or a substitute for equitable relief.

The Court also notes that L&W's own behavior in waiting approximately one month before seeking to enjoin Harrington from soliciting former clients undermines its claim of irreparable harm. Harrington resigned from his position at L&W on January 12, 2007, and his resignation letter clearly states that he thinks L&W breached the Agreement and that he is no longer bound by its "Post-Termination Limitations." This suit was not filed until February 9, almost one month after Harrington's resignation. Under the circumstances, it is hard to understand L&W's torpor. Thus, although L&W may have a plausible basis for claiming irreparable injury, its own delay in bringing suit, the relative ease with which clients can change insurance agencies and the availability of potential money damages against Harrington and Lyons render its showing of irreparable harm weak, at best.

For these same reasons, I find that L&W has made only a weak showing that it will suffer irreparable harm if Lyons is not enjoined from continuing to service clients that Harrington has solicited, and perhaps will continue to solicit.

3. Balancing of the equities

L&W also has the burden of demonstrating that the harm it will suffer if relief is denied is greater than the harm to Harrington and Lyons if an injunction is granted. "[A] preliminary injunction must be affirmatively earned and should never issue merely

because it will do no harm."[90] Although I find that the balance of equities tips slightly in favor of the plaintiff, L&W's showing on this factor is too weak in the context of the parties' showings on the likelihood of success on the merits and irreparable harm to warrant issuing a preliminary injunction.

Both Harrington and McCutcheon consistently testified that Harrington was not hired for his existent book of clients.[91] McCutcheon also made it clear that Harrington's existing accounts were inconsequential to Lyon's overall business and that Lyons is hiring Harrington because it thinks he has strong, long-term potential as an employee.[92] The non-solicitation provisions of the Agreement do not prohibit Harrington from competing with L&W, nor do they appear to prohibit him from contacting his former prospective clients, to whom he may have been introduced in the course of his employment. In short, these are not the unfortunate and all too common circumstances where an injunction would impose substantial hardship on a former employee and his dependents by prohibiting him from engaging in his chosen profession.

L&W, on the other hand, has shown that at least six clients whom Harrington solicited have moved their business to Lyons. Although some of these clients may have followed Harrington without his solicitation, it is reasonable to infer that some of them would not have. It is also reasonable to infer from this record that continued solicitation

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[90] *Schnell v. Chris-Craft Indus.*, 285 A.2d 430, 437 (Del. Ch. 1971), *rev'd on other grounds*, 285 A.2d 437 (Del. 1971).

[91] McCutcheon Dep. at 39, 41, 68, 96; Harrington Dep. at 34-35.

[92] McCutcheon Dep. at 95-97.

by Harrington may cause other former clients to move their business to Lyons. Thus, not issuing an injunction probably will work some hardship on L&W because of lost business. L&W has not shown, however, that this hardship would be significant. An injunction against Harrington and Lyons continuing to serve the six former L&W clients who switched to Lyons is not likely to cause those clients to choose to return to L&W. Further, although I question Harrington's interpretation of Section H as providing an adequate remedy, L&W has not made a strong showing that money damages will be inadequate to compensate it for its losses. Indeed, if the arbitrator ultimately rejects Harrington's position in this litigation, Defendants may face a significant damages claim, particularly if they continue to solicit Harrington's former L&W clients.

Thus, comparing the likely hardship to L&W in the absence of a preliminary injunction to the limitations on Defendants' freedom of action if an injunction issues, I find that the balance of equities favors L&W, but only very modestly.

III. CONCLUSION

Plaintiff L&W has made a positive, but relatively weak, showing on two of the elements necessary to warrant the Court's issuing a preliminary injunction – irreparable harm and the balance of the equities. L&W has failed to demonstrate, however, that it is likely to succeed in arbitration on the merits of its claim. Balancing these elements, the Court concludes that L&W has failed to meet its burden of showing the need for the extraordinary remedy of a preliminary injunction. Thus, L&W's motion for a preliminary injunction is denied.

Because L&W's claim against Lyons for tortious interference with contract is intimately connected to L&W's claims against Harrington, the claim against Lyons is stayed pending the outcome of L&W and Harrington's anticipated arbitration.

IT IS SO ORDERED.