

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EDIX MEDIA GROUP, INC.,)	
a Delaware corporation,)	
)	
Plaintiff,)	
)	Civil Action No. 2186-N
v.)	
)	
)	
PARHAM MAHANI,)	
)	
Defendant.)	

MEMORANDUM OPINION

Date Submitted: November 27, 2006
Date Decided: December 12, 2006

Matthew F. Boyer and Timothy M. Holly, of CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware, Attorney for Plaintiff.

Joseph M. Bernstein, Wilmington, Delaware, Attorney for Defendant.

CHANDLER, Chancellor

Before me is a seemingly ordinary dispute in an unusual industry. Plaintiff EDIX Media Group and defendant Parham Mahani both operate within a multi-billion dollar “niche” industry concerning after-market modifications to the vehicles of automotive enthusiasts. These hobbyists spend great amounts of time, effort, and money “pimping their rides” or “tricking out” their cars through such alterations as vertically-opening doors, bass-heavy audio systems, or highly-customized paint work. Like any group of aficionados, custom car fans employ their own colorful argot, gather to compete or display their achievements, seek the newest, greatest or most stylish customizations in order to stand out, and most importantly pay attention to events and people active in their hobby. The world of “whips” is a small one in which reputation matters greatly.¹

Personal reputation plays a significant role in this dispute. Plaintiff hired defendant first as an employee and then as an independent contractor to sell advertising space in its magazine and on its website. After two years of working together, the relationship between the parties began to deteriorate, and plaintiff terminated defendant’s contract. From that moment starts a story

¹ “Whip,” as used in the name of defendant’s company SponsoredWhips, is a slang term for an automobile. See, e.g., 50 Cent, *Poor Lil Rich*, on Get Rich or Die Tryin’ (Shady Records/Aftermath Records/Interscope Records, 2003) (“I let my watch talk for me, my whip talk for me, my gat [gun] talk for me, BOW!”).

of recriminations and revenge, accusation and counter-accusation, and pointed language hurled back and forth in a very public manner.

Plaintiff comes before this Court seeking both damages and injunctive relief, listing ten different theories under which defendant has violated his duties as an employee or independent contractor, breached his contractual obligations of confidentiality and non-competition, or otherwise revealed EDIX's secrets and caused it to lose face in the community. Plaintiff asks this Court to enjoin defendant from working with plaintiff's clients or customers within its territory, from revealing any further confidential information, and from making any further damaging statements.

The parties disagree upon both legal and factual issues. The provenance of three anonymous emails, two of them sent from accounts controlled by EDIX, remains contested. The parties dispute plaintiff's motivation in terminating defendant's relationship. Over three days of trial testimony, it became clear that plaintiff and defendant even disagree upon the factual scope of plaintiff's operations within the industry, let alone what activities constitute competition with EDIX's business.

Before I may address the legal issues, I must pull from the evidence submitted by both parties a set of facts to which I may apply the law. In disputes such as this, in which passions run high and there is no particular

concealment of the parties' distaste for one another, a finder of fact is challenged to separate reliable testimony from inevitable overstatement. This case presents no exception. The two chief witnesses—Lance Burris, the CEO of EDIX, and the defendant himself—both provided testimony that concerns this Court and raises questions as to their credibility. The evidence overwhelmingly indicates that defendant accessed plaintiff's computer systems and fraudulently contacted dozens, if not hundreds, of customers while purporting to be an "insider" still employed by the firm. On the other hand, evidence strongly suggests that plaintiff recharacterized defendant's employment relationship as one of an independent contractor not because his duties and activities fairly merited the description but in order to avoid withholding taxes and providing other benefits. Further, some of Burris's testimony, both on the stand and in depositions, seemed overly cunning and calculated, designed to obfuscate rather than enlighten. Such responses, whatever their intended purpose, do not provide comfort to a finder of fact in considering other testimony from the same witness.

For this reason, I rely very heavily upon the paper record in my findings of fact, and assign little weight to the testimonial evidence of either Mahani or Burris. Where I credit the testimony of one party or another, I

make specific mention of it, bearing in mind the burdens of proof and production borne by each party.

I. FINDINGS OF FACT

A. *EDIX employs Mahani*

Plaintiff is a Delaware corporation that serves a demographic, mostly consisting of young men, who enjoy modifying and tuning automobiles. Plaintiff describes its business in the broadest possible manner, but evidence presented at trial suggests that the bulk of EDIX operations involve selling memberships to automotive enthusiasts and advertising space to industry players. Members receive certain exclusive discounts on parts and accessories and a one-year subscription to *StreetTrenz*, EDIX's glossy magazine full of the latest news on car shows, how-to modification guides, comely female models, and ever-present advertisements. Manufacturers, resellers, and car shows provide the bulk of EDIX's revenue by paying for placement in either *StreetTrenz* magazine or on its accompanying website.² While plaintiff's internet presence theoretically gives it world-wide reach, its

² Two websites, <http://www.streettrenz.com> and <http://www.myspace.com/streettrenz>, were mentioned at trial as belonging to plaintiff. The latter website, hosted on the community portal MySpace.com, provided an additional channel for EDIX to market to enthusiasts, many of whom were also MySpace users.

main business markets are eastern Pennsylvania, Delaware, Maryland, and southern New Jersey. Lance Burris is EDIX's majority owner and President.

Burris hired defendant Parham Mahani, a Delaware resident, in the summer of 2004 primarily to sell advertising for *StreetTrenz* magazine and banner advertisements on related websites, although testimony suggested that his duties occasionally extended beyond these two roles. As a condition of his employment, defendant executed a non-competition and confidentiality agreement, pursuant to which he would: keep confidential any non-public information provided to him during his period of employment; refrain from soliciting "any Customer for the purpose of transacting business with [EDIX's] Customers in the products or services provided by [EDIX];" make no attempt to interfere with any contractual relationship between EDIX and any independent contractor or employee; and enter into no business relationship with an entity "conducting any business which is in competition with respect to [EDIX's] Business or is substantially similar to Corporation's Business" within the same territory.³ The agreement also specified that

³ Pl. Ex. 2. The agreement defines Customer as "those readers of [EDIX's] publications, vendors, advertisers, and/or show facility owners and operators who have contracted with the Corporation at any time before or during the term of [Mahani's] engagement, or who have contacted [EDIX] or be contacted or solicited by [EDIX] with respect to [EDIX's] Business during the 24 months before or at any time during the term of [Mahani's]

defendant would indemnify plaintiff for any attorney's fees arising from enforcement of the agreement.

By all accounts, defendant enjoys modifying cars, attends car shows regularly, and is well-connected with other enthusiasts. Plaintiff credits him with developing the *StreetTrenz* web-presence on MySpace.com, a strategy that led to several new memberships, and plaintiff raises no doubts as to defendant's enthusiasm for or experience with the after-market modification industry. Indeed, Mahani brought more to the table than merely marketing expertise and technical acumen. His family had a long-standing and personal friendship with one of EDIX's customers, a friendship that Mahani quickly put to use. His personal relationship with model Kerry Acteson allowed him to introduce to EDIX several models who could grace the pages of *StreetTrenz* magazine or distribute literature at car shows for EDIX or their clients.

Nevertheless, the relationship began to sour in early 2006, although the parties disagree as to the sources of discontent.⁴ On May 14, plaintiff

employment or engagement, as well as any such person's or entity's subsidiaries and affiliates."

⁴ According to plaintiff, Mahani contacted Sony Electronic, Inc. in April 2006, requesting a digital camera and various accessories in order to write a product review. The next month, EDIX learned that Sony had received an empty box instead of its camera and had been told by defendant that they should file an insurance claim for the missing item. EDIX

terminated its relationship with its “independent contractor,”⁵ and although it did listen to an appeal, eventually told defendant that its decision was final.

B. Mahani’s campaign to discredit EDIX

Mahani did not go quietly. By May 19, plaintiff had already heard from customers that Mahani was contacting them in efforts to solicit business for a competing magazine,⁶ and instructed its attorneys to issue Mahani a shot

conducted an investigation and concluded that digital photos taken by Mahani after the return date on the box contained digital imprints matching the missing equipment. On May 14, after confronting defendant with this evidence, plaintiff terminated his contract. Mahani requested reinstatement and wrote a letter asking for forgiveness from EDIX’s partners, but they denied him any leniency and refused to reconsider.

At trial, Mahani disavowed his letter and protested his innocence in the Sony matter, suggesting a different motive for his termination. On April 3, 2005, EDIX required Mahani—who at that point was working as an independent contractor—to submit to a new commission structure. Purportedly addressing a problem with rising receivables, the new structure provides for a sliding commission based upon collected revenue and penalizes Mahani if Burriss “writes” one of his accounts. This agreement provided plaintiff with the potential for a substantial windfall if defendant were to be terminated, as no commission would be required on revenues that had been booked but not collected.

No legal question requires me to make a factual finding as to the actual motivation behind Mahani’s dismissal, nor are the two alternatives mutually exclusive: EDIX may have been quite pleased to be free of a duplicitous “contractor” while happily pocketing the resulting profits. I describe the dispute in detail to highlight the degree to which the parties differ as to each other’s motivations.

⁵ Although plaintiff insists upon characterizing its relationship with defendant in its legal filings as one of contractor/customer, the April 3, 2006 agreement renegotiating defendant’s commissions certainly seems inconsistent with this assertion. The document, a letter from Burriss with a signature by Mahani to show his consent, states, “You [Mahani] have presented some very good ideas and I do like where *we* are going *as a company and a team*.” (Emphasis added). Mahani’s title and company affiliation are given as “Account Executive” and “StreetTrenz Magazine,” respectively, as opposed to any reference to a position in an external entity.

⁶ Mr. Alfred Vega, owner of a customization business that advertises with EDIX, testified that Mahani offered him a quarter page advertisement in a to-be-published magazine on May 17. Plaintiff offered no evidence, however, that plans for such a magazine ever left the drawing board.

across the bow in the form of a cease and desist letter. Rather than complying, Mahani took this as a sign that he should resort to skullduggery.

Shortly after 6:00 a.m. on May 21, Mahani entered a copy center in Wilmington, Delaware and rented time on a computer terminal connected to the internet. From here he gained access to EDIX's mail server using a username and password he had acquired during his employment. Within the next hour, over sixty of plaintiff's largest customers received an email, claiming to be from an insider in the *StreetTrenz* billing department, that contained allegations of inflated membership numbers and web traffic statistics. The letter provided details of advertising rates paid by various customers, information which EDIX obviously would not wish other advertisers to know. Even worse, a second email followed only a few minutes later, supposedly releasing all advertisers from their contracts and any payments still due on their accounts.⁷ Almost immediately after receiving these emails, customers began to call and email plaintiff and defendant asking for explanations. Advertisers began cancelling their contracts.

From this point onward, Mahani began a continual and underhanded campaign to discredit EDIX, refusing to cease his activities even after

⁷ Mahani seems to have been unaware that the server logs on computers at EDIX and the copy center could be used to verify the location from which he sent the email, or that the video cameras at the copy center would capture him at the scene.

agreeing to a stipulated restraining order entered by this Court.⁸ In emails carrying his own name, Mahani's temperate prose merely referred customers to Burriss for further information. He reserved his venom for messages sent under various aliases. Advertisers received at least one anonymous email from "Tuner Mag Fan" encouraging them to "get the diverted dollars" back from EDIX and to contact defendant directly. On June 6, Mahani donned yet another mask, and as "*StreetTrenz* Insider" distributed a mass mailing from a computer at his local YMCA.⁹ This last email not only disparaged *StreetTrenz's* ability to provide value for an advertising dollar and revealed rates that EDIX supposedly had charged to different customers, but also described the membership program as a "scam" and made various none-too-

⁸ On June 1, 2006, this Court issued a Stipulated Temporary Restraining Order supposedly acceptable to both parties. I enjoined Mahani from making any further disclosures of confidential information, from operating a business that competes with EDIX, from working with or for EDIX customers, and from engaging in certain specific communications.

⁹ Analysis of server logs demonstrates that the message was sent from a YMCA where Mahani is a member. Membership records show that Mahani entered the YMCA shortly before the June 6 email was distributed. Nevertheless, Mahani denied having written the email at a hearing to show cause why he should not be found in contempt of the temporary restraining order.

While it is not entirely impossible that the protestations of innocence in defendant's deposition are sincere, and that his presence at the YMCA that morning is an incredibly unfortunate coincidence, the strong preponderance of the evidence suggests that he is the author of the June 6 email. He has certainly presented nothing credible to suggest otherwise.

veiled insinuations about Burriss's private life. To distract attention from himself, Mahani left as a signature only the initials "JB."

Shortly after the June 6 email, Burriss notified EDIX customers that Delaware State Police were investigating defendant. Mahani then distributed a response, entitled "My Side," to those same customers. (Mahani considered this to be a merely "technical violation" of the restraining order issued by this Court.) For this infraction, as well as for posting the question "Did you get screwed, or scammed, by 'Sport Compact Pro', 'StreetTrenz' or 'CarSponsorship.com'?" on a website under his control, Mahani was found in contempt on June 27, 2006 and ordered to pay plaintiff \$5,000.

C. Sponsored Whips

Disparaging a former employer, however satisfying it may have been for Mahani, does not pay the bills. While keeping the pressure on EDIX in his spare time, Mahani sought a way to make money within the industry. He kept his contacts current: when Shawn Ramsey of TunerAction asked if he knew someone who could sit at a car show booth for him, Mahani recommended a personal friend.¹⁰ When he heard that Sound of Tri-State or

¹⁰ An unclear relationship exists between plaintiff, defendant and TunerAction, a company owned by Shawn Ramsey. Ramsey's deposition testimony suggests, as an initial matter, that TunerAction exists as little more than a website with a few members that never grew into a business. Plaintiff accuses Mahani of helping Ramsey start a membership program

other firms might need models, he suggested that his girlfriend and her associates work for them. And on June 14, he registered SponsoredWhips.com, a website he would use to pursue his own business.¹¹

The parties dispute whether SponsoredWhips competes with EDIX and whether Mahani's business violates the terms of the restraining order. Both companies seek to attract the same types of auto enthusiasts wishing to improve their vehicles. SponsoredWhips' principle customers and main source of revenue, however, are enthusiasts who want free (or heavily discounted) parts from major manufacturers in exchange for displaying products (and "vinyls")¹² at car shows. Mahani's firm offers to evaluate a prospective owner's case for sponsorship and write proposals that can be sent to manufacturers. SponsoredWhips receives no revenue from manufacturers themselves. EDIX, on the other hand, receives most of its revenue from advertisers—who may be manufacturers, resellers, car shows, or other

in competition with EDIX, while Ramsey suggests that the program was his own idea. Similarly, Ramsey accuses Mahani of starting a MySpace.com site for TunerAction without his authorization and stealing from him the idea to start a company that writes sponsorship proposals.

¹¹ Mahani also registered a MySpace account for SponsoredWhips.com.

¹² A vinyl is a sticker that may be affixed to an automobile, often displaying a company's logo. Vinyls are particularly useful to manufacturers or retailers whose products are installed in places where their logos are otherwise hidden, *e.g.*, a subwoofer mounted in a trunk.

industry players—in order to put their message before members of EDIX’s car club.

EDIX does offer “a sponsorship” to one member per year. This member is chosen by the EDIX editorial staff and receives free parts from EDIX advertisers. Plaintiff spent considerable time at trial attempting to convince this Court that SponsoredWhips assistance as a scrivener was “substantially similar” to EDIX’s offer of what is, essentially, a membership prize.¹³ I cannot agree.

Although both businesses appeal to the same automotive enthusiasts, manufacturers and trade shows, they do so in very different ways. Only in an attenuated sense does SponsoredWhips provide advertising services for manufacturers. This is at best a tertiary part of its business, from which it derives no revenue. Plaintiff also complains that SponsoredWhips competes by “advertising” for car shows, in that it lists dates for events on a specific web page. This stretches the concept of advertising beyond its logical limit: defendant has placed a calendar of events useful to its members on a website,

¹³ Burris also testified that he had made several “verbal” offers to help with sponsorships, but EDIX provided no evidence that it had ever offered such a service commercially or that writing sponsorship proposals was a regular part of EDIX’s business. Nor was any written evidence presented to suggest that EDIX had ever consummated such an offer.

having received no compensation from the organizers themselves. This is a far cry from the promotions for which EDIX is paid.

II. CONTENTIONS

Although plaintiff's complaint weighs in with ten distinct legal theories, they can be usefully grouped into three categories. The first category involves disclosures of plaintiff's proprietary information that constitute violations of defendant's contract (Count I), the unlawful use of plaintiff's trade secrets (Count V), and the breach of common law duties to an employer (Count VI). The second category focuses on breaches of the covenant not to compete with EDIX, including unlawful competition (Count II), unlawful solicitation of customers (Count III), and unlawful solicitation of workers (Count IV). The last category encompasses three common law claims, unfair competition (Count VII), tortious interference with business relationships (Count VIII), and defamation (Count IX), and a statutory cause of action under the Deceptive Trade Practices Act (Count X). In addition to denying all allegations, defendant requests that this Court determine SponsoredWhips to be outside the reach of the parties' non-competition agreement.

III. ANALYSIS

A. Claims involving breaches of confidentiality, non-disclosure and trade secrets

Counts I, V and VI all turn upon defendant's unlawful disclosure of information belonging to EDIX. Given the facts recited above, there can be no doubt that defendant violated both his contractual duties and the common law through his series of antagonistic messages. Indeed, the addresses contained in the May 21 and June 6 emails themselves revealed confidential information. When EDIX sent emails to multiple customers, its general practice was to hide the list of distributees using a 'blind carbon copy' function, both to safeguard the privacy of individual recipients' email addresses and to keep the list from falling into competitor's hands. Mahani made no attempt to follow standard corporate practice, thus exposing this list to the world.

Even had Mahani concealed the address list, his emails flagrantly violated his duty to keep information confidential. To the extent that the information therein was true, both messages purported to disclose membership numbers, employee salaries, rates charged for advertising, in-

kind deals and other information never given to the general public.¹⁴ Mahani's liability for these actions is certain. It remains necessary to consider plaintiff's three counts only because they differ in appropriate legal and equitable remedies available to plaintiff.

The breach of contract claim contained in Count I presents the most straightforward issue. Plaintiff has proven that defendant breached his agreement and that the breach led to damages. Mahani agreed to keep confidential "information not in the public domain . . . including . . . financial data, . . . invoices and other financial statements, . . . any and all information concerning Customers, Corporation employee salaries, . . . names, addresses or any other compilation of information, written or unwritten, which is used in the Corporation's business."¹⁵ His emails contained information concerning all of these. To the extent that such revelations damaged plaintiff, defendant stands responsible for the harm.

¹⁴ To attempt to weave a list of truths and untruths from the snarled allegations penned by defendant would be inappropriate. If the emails damaged EDIX's reputation among its customers, no good can come from this Court affirming their content. Thankfully, I need make no determination as to their truth. To the extent that any statement in the May 21 or June 6 emails were confidential and true, Mahani's liability devolves from his breach of duties of confidentiality. To the extent that they were false and misleading, he is similarly liable for defamation under Count IX.

¹⁵ Pl. Ex. 1.

Count V, involving the unlawful use of trade secrets, requires more consideration. To prove the misappropriation of a trade secret, plaintiff must show first that a trade secret actually existed; second, that it was communicated by plaintiff to defendant; third, that it was accompanied by an express or implied understanding that secrecy would be respected; and fourth, that the secret has been improperly used or disclosed by plaintiff to defendant's injury.¹⁶ Plaintiff has met the last three of these four requirements, but it remains to be determined which, if any, disclosures qualify as a trade secret.

Not all confidential information is a trade secret. The Delaware Trade Secrets Act provides three prerequisites for trade secret protection.¹⁷ First, the Act protects only information, including but not limited to formulae, compilations, patterns, programs, devices, methods, techniques, and processes. Second, this information must derive independent economic value from not generally being known or readily accessible by proper means by other people. Third, reasonable steps must be taken to protect the information. Of the data revealed in the May 21 and June 6 emails, only the

¹⁶ *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *16 (Del. Ch. Oct. 23, 2002).

¹⁷ 6 *Del. C.* § 2001(4).

customer list and listing of prices could colorably constitute trade secrets as opposed to simply confidential information.¹⁸

In determining whether a customer list qualifies as a trade secret, this Court places great weight upon whether competitors could assemble a similar list through information in the public domain without a similar expenditure of time and money. Where such assembly would be difficult or impossible, trade secret protection may be appropriate, but “[w]here customers in a particular industry can be easily identified, their identity is less likely to be a trade secret”¹⁹ The May 21 and June 6 emails were sent primarily to advertisers, and the bulk of the list could be compiled simply by paging through an issue of *StreetTrenz* magazine and listing the customers found there. To the extent that the list contained addresses from advertising agencies, rather than advertisers themselves, I am not convinced by plaintiff’s assertion that compiling this list would require considerable efforts on the part of a determined competitor. Nor does the fact that the list contained personal email addresses of account representatives elevate it to the status of a trade

¹⁸ The distribution numbers mentioned in the email might arguably constitute trade secrets were they true. Plaintiff attests that the numbers are false, however, and if false they would not constitute information *given* to the defendant.

¹⁹ *Delaware Express Shuttle, Inc.*, 2002 WL 31458243, at *18 (quoting *Franklin Fibre-Lamitex Corp. v. Marvec Mfg., Inc.*, 1997 WL 153825, at *2 (Del. Ch. Mar. 26, 1997)).

secret.²⁰ The information may be personal, but marketing executives by their very nature want to be in contact with potential advertising services. Given the small market plaintiff described at trial, it seems unlikely that considerable expenditure would be necessary to compile plaintiff's list from public sources.²¹ Nor did plaintiff convincingly demonstrate that the list has independent economic value. It is doubtful, for instance, that EDIX's competitors would pay for a copy.

On the other hand, the rates that advertisers pay to EDIX would constitute a trade secret. A magazine such as *StreetTrenz* derives substantial value by concealing any deviations from published rates given to large or favored advertisers, as this secrecy helps them to enforce the rate card with respect to other firms. Mahani willfully and maliciously revealed this information to the world, and as such must pay EDIX any actual damages arising from his conduct and exemplary damages up to twice that value.²²

²⁰ Mahani used some personal addresses containing the name of specific customer contacts in his mailing lists, but he also included several generic mailboxes (akin to "billing@streettrenz.com," the supposed sender). Such addresses are often listed on company websites.

²¹ A list of subscribers to StreetTrenz, on the other hand, might qualify for trade secret protection. To the extent that EDIX has alleged that Mahani took such a list, it has not proven that Mahani used it to either his advantage or the detriment of EDIX.

²² 6 *Del. C.* § 2003.

Finally, Count VI, concerning Mahani's breach of common law duties of confidentiality to an employer, either fails to state a claim or is wholly redundant and need not be considered. To the extent that plaintiff complains that defendant disclosed trade secrets, the Uniform Trade Secrets Act bars any common law claim.²³ Plaintiff makes no attempt to identify confidential information disclosed by defendant not covered by the breach of his confidentiality agreement. Thus, even if Count VI somehow states a claim, its damages are entirely coterminous with those of Count I.

B. Claims involving the agreement not to compete with EDIX

Plaintiff's reliance upon its covenant not to compete presents two difficult issues. As an initial matter, I must determine to what degree and in what manner a covenant not to compete is enforceable. Only then should I decide the extent to which Mahani's actions breached the enforceable aspects of the covenant.

Covenants not to compete are not subject to mechanical enforcement.²⁴ As a policy matter, such covenants concern both the legitimate interests of commercial enterprises and restrictions on the ability of individuals to support

²³ 6 Del. C. § 2007(a) (displacing conflicting common or statutory law involving trade secrets).

²⁴ *Delaware Express Shuttle, Inc.*, 2002 WL 31458243, at *11 (quoting *McCann Surveyors Inc. v. Evans*, 611 A.2d 1, 3 (Del. Ch. 1987)).

themselves and their families. When considering such agreements, the Court must carefully consider the factual circumstances surrounding both the contract and the parties.²⁵ The analysis requires two steps. This Court must determine whether the contract may be enforced at all, taking into account both standard concerns of contract formation such as consideration, agreement, or excuse of performance, and two specific limitations on covenants not to compete. First, a covenant must be reasonably limited in geography and time. Second, the covenant must advance a legitimate interest of the employer.²⁶ This Court traditionally exercises discretion in specifically enforcing a covenant's terms, balancing the equities and refusing enforcement where the benefit to the employer is ephemeral or the harm to the employee would be grave.²⁷ This Court does not enforce an agreement "that is more restrictive than an employer's legitimate interests justify or that is oppressive to an employee."²⁸

1. May the covenant not to compete be enforced as written?

Defendant fails to show a breach of plaintiff's own contractual duties that might excuse performance. At trial, defendant suggested that plaintiff

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Elite Cleaning Co., Inc. v. Capel*, 2006 WL 1565161, at *8 (Del. Ch. June 2, 2006) (quoting *RHIS, Inc. v. Boyce*, 2001 WL 1192203, at *6-7 (Del. Ch. Sept. 26, 2001)).

failed to pay commissions due to him during his last period of employment. Although both parties' testimony raises suspicions that Mahani should have received some payment in May, such doubts do not constitute a preponderance of the evidence demonstrating a prior material breach on the part of plaintiff.²⁹ Nor are there any concerns that the covenant is overbroad in time or geography: the text of the agreement limits its scope to plaintiff's primary operating areas for a period of two years.

Nevertheless, the covenant not to compete may not be enforced against defendant as rigidly as plaintiff desires because it exceeds EDIX's legitimate interests in restricting the "substantially similar" operations of an independent contractor. On its face, the Non-Compete and Confidentiality Agreement applies equally to employees and independent contractors, but courts

²⁹ Plaintiff's estimate of damages discloses significant revenue billed in the month of May, and suggests that many of the clients who cancelled their advertising were similarly billed in the months of March and April. Plaintiff explained that Mahani did not receive a draw for his commissions within his terminal period because of low call volume. Given this fact, plaintiff would seem to owe defendant commissions unless (a) draws from prior months had not been earned by defendant or (b) plaintiff collected absolutely no revenue on defendant's accounts during that time or (c) none of these accounts were, in fact, Mahani's.

Defendant did not present any documentary evidence to suggest that plaintiff in fact collected revenues on these accounts in April or May, and plaintiff's damages claim alone is insufficient to prove the existence of such revenues. Thus, defendant does not meet the burden required to show a breach of contract. On the other hand, plaintiff's assertion that Mahani was owed no money under his April 31, 2006 commission agreement casts great suspicion upon the plaintiff's claims for damages, a matter that I will revisit in my discussion of remedies.

traditionally treat the two relationships distinctly.³⁰ Although the Court is unaware of a prior Delaware decision directly addressing covenants not to compete in the context of employees and independent contractors, there are strong reasons to recognize the distinction.³¹

The traditional employee/employer relationship usually involves a much more intimate relationship than that of an independent contractor. Independent contractors maintain a greater degree of control over how they accomplish tasks; remain engaged to a much greater extent in a distinct

³⁰ See, e.g., *Rypac Packaging Mach. Inc. v. Coakley*, 2000 WL 567895, at *13 (Del. Ch. May 1, 2000) (differentiating between employees and contractors for purposes of Wage Act); *In re McKelvey v. Manley*, 1997 WL 528001, at *2-3 (Del. Super. Feb. 20, 1997) (describing the difference between employee and contractor as a matter for the fact-finder, unbound by parties' own self-description); RESTATEMENT (SECOND) OF AGENCY § 220(2) (providing factors for consideration in determining whether one acting for another is a servant or an independent contractor, including extent to which the master may oversee details of the work and extent to which one is engaged in a distinct occupation or business).

³¹ Few jurisdictions have directly addressed the effect of independent contracting status on the enforceability of covenants not to compete. Most jurisdictions allow such agreements with an independent contractor, subject to limitations similar to those on employees. See, e.g., *Eichmann v. Nat'l Hosp. and Health Care Services, Inc.*, 719 N.E.2d 1141, 1146 (Ill. App. 1999) (finding no less scrutiny appropriate to covenants of independent contractors than employees); *Bristol Window and Door, Inc. v. Hoogenstyn*, 650 N.W.2d 670 (Mich. App. 2002); *Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1087-9 (Pa. Super. 1987). Other jurisdictions have taken this Court's position that the nature of the relationship constitutes one factor in considering the enforceable scope of a non-compete agreement. See, e.g., *Hope Found., Inc. v. Edwards*, 2006 WL 3247141, at *9 (S.D. Ind. Apr. 12, 2006) ("If a person is an independent contractor, that fact may signal a greater likelihood that he has brought his own strengths and abilities to the joint enterprise, such that the party seeking to enforce a covenant not to compete may have a more limited protectable interest."); *Starkings Court Reporting Services, Inc. v. Collins*, 313 S.E.2d 614 (N.C. App. 1984) (finding covenant not to compete to exceed legitimate interests of employer where employee was independent contractor).

occupation or business (as opposed to an employee, who may be asked to perform other reasonable tasks as required); and traditionally work with a lesser degree of supervision.³² Independent contractors are not protected under the Wage Act³³ (and thus accept a greater risk of non-payment) and are responsible for paying their own income taxes. Both the traditional and statutory relationships between employers and employees reflect a closer bond: the employer pays a percentage of the employee's social cost (through tax contributions or social security payments), must accept greater legal duties, and is responsible for the employees' torts in negligence.³⁴ Firms will in general invest a greater amount of firm-specific know-how in employees than in contractors who are engaged in a "distinct occupation."³⁵

The legitimate economic interests of an employer in restricting the substantially similar activities of an independent contractor will be more limited than they would be with respect to an employee. A firm like EDIX that hires a salesman as an independent contractor may very well have a legitimate interest in preventing the contractor from engaging in activities that "directly compete" with the firm after the contract is terminated. Preventing

³² RESTATEMENT (SECOND) OF AGENCY § 220(c).

³³ See *Rypac Packaging Mach. Inc.*, 2000 WL 567895, at *13.

³⁴ See *Fisher v. Townsend*, 695 A.2d 53, 58 (Del. 1997).

³⁵ RESTATEMENT (SECOND) OF AGENCY § 220(2)(b).

such a contractor from engaging in any activities “substantially similar” to plaintiff’s activities, however, raises the risk that a contractor in an independent business may be forced entirely from employment in a given industry. This implicates the traditional concern of this Court for the preservation of competition, and suggests strongly that enforcement of “substantially similar” provisions in non-competition clauses will be both inequitable to the contractor and against public policy.³⁶

This case presents just such an injustice. Defendant’s relationship to the after-market modification industry is more than ephemeral: he is romantically attached to an industry model, has personal friendships with industry participants, and is himself an auto enthusiast. Plaintiff insists that its non-compete agreement must be read so broadly that defendant breaches it by publishing a calendar of upcoming automotive events, merely because *some* of those car shows advertise in their magazine, or that a collage of logos on a webpage, only *some* of which include EDIX advertisers, compete with

³⁶ To the extent that plaintiff relies upon *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243 (Del. Ch. Apr. 20, 2002), the distinction between competing with a former employer and being involved in a substantially similar business should be familiar. When interpreting a non-competition clause without a geographic limitation in *Delaware Express*, this Court declined to enforce the “substantially similar” clause on the grounds that no workable geographic limitation emerged from the text, but held that a defendant could be prevented from “competing with” his former firm because the phrase was self-limiting geographically. *Id.* at 13.

advertisements in their magazine, despite a lack of evidence to suggest that the manufacturers ever paid anything to SponsoredWhips, or indeed were aware of the use of their trademarks.³⁷ Indeed, plaintiff suggests that Mahani would violate his non-compete agreement by the simple act of showing up at a car show in his truck, opening the tailgate, and revealing the manufacturer's vinyl for the speakers in his own car. Certainly EDIX's interests in an independent contractor cannot be so broad as to drive defendant not only from his livelihood, but also from his hobbies. Plaintiff asks this Court to deny Mr. Mahani—supposedly an independent contractor—virtually any opportunity to work in his chosen industry in the area in which he lives.³⁸ This requested relief is unenforceable as a matter of policy.

The non-competiton agreement is therefore limited to actions that are the same as, and compete directly with, EDIX's own business activities.

³⁷ The idea that the logo collage is competitive flies in the face of common sense. Given SponsoredWhips' size and customer base, the logo collage exists to provide credibility to Mahani's company, not as promotional advertising for manufacturers.

³⁸ All evidence before the Court suggests that plaintiff converted Mahani from employee to independent contractor status solely because EDIX desired to avoid withholding taxes on Mahani's income. Whether this recharacterization of Mahani's role would survive scrutiny by the Internal Revenue Service is beyond the jurisdiction of this Court. Certainly the expectation that Mahani would work fixed hours, meet a particular target for daily phone calls (irrespective of whether he felt this technique would in fact earn him fees), and was given the title "Account Executive," leaves this Court unconvinced that for any other purpose it would actually consider Mahani to be a contractor rather than an employee. Plaintiff has insisted upon the form of the relationship, however, and should be estopped from considering defendant an employee for purposes of its non-compete agreement.

There is evidence that such competition did occur. EDIX provides models for its advertisers, and Mahani connected EDIX advertisers with the modeling services of his girlfriend and their associates. Similarly, defendant used pictures paid for by EDIX as images on his own websites. If not enjoined, SponsoredWhips could, in the future, feature paid-for banner advertisements on its website, and this too would constitute a competing service. Plaintiff's claims of unlawful competition, however, must be constrained to this *limited* scope. I evaluate each Count in turn.

2. Count II: Breach of contract resulting from unlawful competition

Neither SponsoredWhips nor TunerAction engage primarily in activities directly in competition with EDIX's business. First, according to Shawn Ramsey's deposition testimony, TunerAction is barely a going concern, at most operating a website and having no paid-for members at present. Its business model is entirely different, deriving what profits it may eventually achieve by forwarding customers to a single automotive reseller. Overall, however, TunerAction appears to be a shell company waiting for a purpose.

I find Shawn Ramsey's deposition testimony claiming to have written the advertising copy for TunerAction's membership plan to be credible. The

appearance of this text on TunerAction’s website cannot be attributed to Mahani and, thus, does not violate his covenant. Though Mahani may have engaged in unlawful competition by collaborating with TunerAction in other ways, I do not find the evidence before me sufficient to conclude that either plaintiff suffered damage or defendant received profits that he might disgorge.³⁹

Nor does SponsoredWhips, for the most part, directly compete with EDIX. Plaintiff has not shown that the *writing* of sponsorship proposals is a significant part of its business, nor has it shown revenues or activities undertaken by SponsoredWhips that directly compete with EDIX. It is not enough that the same customers might seek out both firms for different purposes, even though ultimately the customer’s goal is to receive parts. Nor is it enough, as plaintiff alleges, that an enthusiast who gains a sponsorship through the assistance of defendant will be less likely to buy parts through EDIX in the future.⁴⁰ Such activities may be substantially similar to EDIX business, but they are not directly competitive.

³⁹ I do find that defendant unlawfully solicited customers from EDIX, as discussed in Count III below.

⁴⁰ Plaintiff’s repeated assertion that selling parts at a discount to their members constituted the same act of “sponsorship” as would be undertaken by a company solicited by SponsoredWhips strikes this Court as particularly fanciful. Plaintiff insists that the term “sponsorship” or “partial sponsorship” is used in the industry to describe what in ordinary

SponsoredWhips might eventually compete with EDIX in the area of paid-for banner advertisements, or by expanding into provision of modeling services. To avoid this risk, Mahani shall for an appropriate time be enjoined as I describe below. Under Count II, EDIX failed to prove that Mahani has engaged in unfair competition within the enforceable scope of his contract and, thus, states no claim for damages.

3. Count III: Breach of contract arising from unlawful solicitation of customers

Plaintiff presented testimony clearly showing that Mahani unlawfully solicited customers in two ways. First, he contacted a *StreetTrenz* customer and offered him a TunerAction membership as a replacement for *StreetTrenz* services. This customer, however, remains a *StreetTrenz* customer, and it is not clear that he ever actually joined TunerAction.⁴¹ More importantly, Mr. Ramsey no longer seems to be running TunerAction as a going concern. To

language would be considered a membership discount. Whatever the industry terminology, however, this Court looks to the substance of the transaction, not its label. SponsoredWhips does not offer memberships, let alone membership discounts, while EDIX does not write proposals.

EDIX also compares its sponsorship of a vehicle with defendant's business activities. When EDIX "sponsors" a car they are determining which end user will receive free or discounted goods, essentially *providing* a sponsorship. SponsoredWhips does no such thing, but rather helps customers *solicit*. Far from being competitors, these services compliment each other. In an ideal world, EDIX might even accept sponsorship proposals from their former employee.

⁴¹ According to Shawn Ramsey's deposition, TunerAction has eight or nine members, and although there is a nominal membership fee of \$99 that would entitle these individuals to additional benefits, no member has actually paid.

the extent that this was a violation, plaintiff has proven very little in the way of damages.

Second, Mahani also unlawfully solicited customers by greeting visitors to the SponsoredWhips website with the question, “Did you get screwed, or scammed, by . . . ‘*StreetTrenz*’ . . . ?” Such a question is always rhetorical, asserting that a scam exists. Once again, however, plaintiff has failed to show any particularly concrete damages arising from the incident. Nor has it shown that these statements—a few lines on a website—motivated customers to leave EDIX, unsubscribe from *StreetTrenz*, or even request a sponsorship proposal. Without such evidence, Mahani should not be required to disgorge any profits he may have made from his otherwise non-competing enterprise.

Finally, plaintiff suggests that Mahani solicited customers by offering them the use of models for the Ocean City car show. The evidence consists of a single email to an EDIX customer (who is also a close personal friend of the Mahani family), reading almost in its entirety: “[Acteson and Kirchman] used to work for me at [*StreetTrenz*], but don’t want to if I am not there. [Another EDIX Customer] was going to hire them, now isn’t sure. I didn’t

want to wait for his answer. They really love the OC show and they def. want to come, do you think [you] can use them?”⁴²

It is likely that defendant breached his contract through his email. On the other hand, plaintiff’s only suggestion that its customer actually *did* use either model is Burris’s belief that they worked the Ocean City show. And even if the models did work, there is no testimony that allows me to conclude that (a) plaintiff would have been paid by their advertiser in the absence of the offer, or (b) that this client didn’t desire the services of Acteson or Kirchman in particular.

I find that plaintiff has failed to show any actual damages arose with respect to TunerAction and *StreetTrenz*, or in solicitation for the use of models. Some of these actions were breaches of the covenant not to compete, however, and I award plaintiff nominal damages in an amount in accordance with our common law tradition, six cents.⁴³ Additionally, Mr. Mahani will be

⁴² On its own, the email is subject to two interpretations. It might represent an attempt by defendant to intrude upon plaintiff’s activities as a provider of models. On the other hand, it may simply be read as a recommendation letter for two models searching for work. While it would no doubt have been better for the two models to contact a potential employer directly, there is no indication that defendant was paid for any services rendered by the models. Nor is there any indication that SponsoredWhips gained any customer goodwill by providing a model, as its customers are end users, not retailers.

⁴³ See *Standard Distrib. Co. v. NKS Distribs., Inc.*, 1996 WL 944898, at *11 (Del. Super. Jan. 3, 1996).

enjoined from similar activities for the remaining duration of the non-competition agreement.

4. Count IV: Breach of contract by unlawfully soliciting workers

The complaint alleges that defendant urged three individuals to cease working with plaintiff: Kelly Acteson, Jessie Kirchman and Mark Hernandez. I must consider whether, in violation of his agreement, Mahani induced or attempted to induce any employee or contractor to quit “employment or any contractual relationship.” The trial transcript says remarkably little about Hernandez’s role at EDIX, and only one series of emails suggests a contract ever existed.⁴⁴ In this document, Mr. Hernandez first agrees to participate in the OC Car show on May 29, and subsequently backs down from his agreement on June 1. He gives as one reason among many the fact that he has been talking to TunerAction, and specifically

⁴⁴ Plaintiff wishes me to find that the following conversation via email constitutes a contractual relationship frustrated by defendant:

BURRIS: “Please let me know which shows you can attend and I will let you know how much space we have.”

HERNANDEZ: “You can for sure put me down for the OC Car Show. I know, I really want to go to that and I will be up there The OC Car Show is a go for me.”

BURRIS: “OK, we will be getting down there on Friday and staying thru Sunday.”

The bare bones of a contractual relationship can be inferred from this conversation: an offer (“You can for sure put me down for the OC Car Show”); an acceptance (“OK”); and through prior relationships, the implication of consideration (a percentage of any sponsorships sold).

Mahani, about a car sponsorship. Phone records indicate that defendant spoke to Hernandez on May 30. Plaintiff wishes me to infer from this that Hernandez's change of heart stemmed from his conversation with defendant. Defendant, on the other hand, denies knowing that Hernandez had ever been paid or employed by plaintiff prior to his dismissal. Plaintiff submits not a single cancelled check to that effect.

Burris at trial described Hernandez as a contractor, not an employee, whose job was to speak to potential members at car shows and try to sell memberships. Plaintiff has presented no evidence that Hernandez had an ongoing contractual relationship with EDIX. Even assuming the existence of a contract, plaintiff's only admissible evidence suggesting Mahani's interference is a phone call between defendant and a personal friend.⁴⁵ This is thin soup indeed.

⁴⁵ Plaintiff also relies upon a portion of the June 1, 2006 email exchange between Burris and Hernandez, where in response to Burris's question, "Who have you been talking to over there?" Hernandez replies, "I am pretty sure it has been [Mahani] and [Acteson]." I allowed, over defendant's objection, emails from third parties not present to be admitted into evidence *solely* for the purpose of proving the motivation of those parties. Del. R. Evid. 803(3). Mahani testified that he did not recall speaking to Hernandez about TunerAction. If plaintiff wished to rebut that statement with Hernandez's words, then he should have been put on the stand, where defendant would have had an opportunity for cross-examination. To prove that Hernandez *thought* he was speaking to defendant, the email suffices. To prove that a prohibited conversation actually took place, or that Mahani actually made an offer of sponsorship, such evidence is hearsay.

It is clear from the evidence that Mahani did solicit work for his girlfriend and some of her friends. Plaintiff does not suggest that either model was under an exclusive contract, nor that they were contracted to work at the Ocean City show. Further, plaintiff strains the imagination of the Court in asking me to believe that after firing Ms. Acteson's boyfriend and proceeding into a very acrimonious lawsuit, it is in any way likely that the models were going to work for EDIX in the future, whether or not Mahani attempted to induce such refusal. In the absence of such evidence, it is difficult to see how plaintiff has established a contractual relationship with which defendant interfered, let alone what damages might plausibly be considered.

C. Common law and statutory claims not concerning confidentiality or non-competition

Plaintiff also demands compensation for three claims at common law and one statutory violation. Two of the three common law claims are redundant and need be given only cursory consideration. Plaintiff's allegations of defamation require slightly more discussion, particularly as to appropriate damages. Finally, plaintiff requests treble damages for violation of the Deceptive Trade Practices Act.

1. Count VII: Unfair competition and Count VIII: Tortious interference with business relationships

Plaintiff maintains that defendant has engaged in and will continue to engage in unfair competition. The complaint provides no detail as to precisely what actions constitute unfair competition, and I note as an initial matter that Delaware courts have struggled to precisely define the boundaries of the common law in this area.⁴⁶ The essential element separating unfair competition from legitimate market participation, however, is an unfair action on the part of defendant by which he prevents plaintiff from legitimately earning revenue.⁴⁷

Count VII thus becomes completely redundant in light of plaintiff's other claims. Unfair competition affords plaintiff no relief at common law

⁴⁶ See, e.g., *State ex rel. Brady v. Wellington Homes, Inc.*, 2003 WL 22048231 (Del. Super. Aug. 20, 2003) (“Deceptive conduct constituting unreasonable interference with another's promotion and conduct of business is part of a heterogeneous collection of legal wrongs known as ‘unfair trade practices.’ This type of conduct is notoriously undefined. Commonly referred to as ‘unfair competition,’ its metes and bounds have not been charted.”)

⁴⁷ In *Total Care Physicians, P.A. v. O'Hara*, the Superior Court held that to succeed in a claim for unfair competition, a plaintiff must show (a) a reasonable expectancy of entering into a valid business relationship, (b) interference with that relationship by defendant, and (c) consequent defeat of plaintiff's legitimate expectancy. *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001). There are other definitions used in differing factual situations, as befits this rather amorphous cause of action. See, e.g., *State ex rel. Brady v. Wellington Homes, Inc.*, 2003 WL 22048231, at *2 (“The essence of unfair competition is the fraudulently seeking to sell one's goods for those of another, and the true test is whether the defendant's acts are reasonably calculated to deceive the average buyer under the ordinary conditions prevailing in the particular trade.” (quoting *Coca-Cola Co. v. Nehi Corp.*, 36 A.2d 156, 165 (Del. 1944))).

from breaches of confidentiality that its claim in contract does not. Nor does it expand upon damages derived from the non-competition agreement: if defendant's post-employment activities do not breach his contractual duties, they are not in some other way wrongful. No additional damages may stem from this Count.

Likewise, plaintiff's claim for tortious interference with business relationships makes no case for any additional liability. Tortious interference requires that plaintiff demonstrate that (1) a contract existed, (2) the defendant knew of the contract, (3) defendant's intentional actions played a significant role in causing the breach of such contract, (4) defendant acted without justification, and (5) the breach caused injury.⁴⁸ Mahani's emails no doubt qualify as a tortious interference in EDIX contractual relationships, being intentional, unexcused and the cause of cancellation for some contracts. The scope of Count VII compliments that of Count I in only one respect: where a customer cancelled their contract with EDIX on the basis of information in Mahani's emails, their motivation becomes irrelevant. If the customer reacted to information that was *not* confidential but otherwise wrongful, damages are

⁴⁸ *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983 (Del. Ch. 1987).

appropriate under Count VII but not necessarily Count I.⁴⁹ I find, however, that where EDIX suffered damages from lost contracts, such damages arose primarily on the basis of confidential disclosure of information and, thus, Count VII does little additional work. Unfair competition and tortious interference are thus almost entirely redundant, and need not be considered in calculating damages.

2. Count IX: Defamation

In Delaware, defamation requires (a) a defamatory communication, (b) publication, (c) communication that refers to the plaintiff, such that (d) a third party understands the communication's defamatory character, and (e) there is an injury.⁵⁰ Four types of defamatory statement do not require plaintiff to show any special damages: maligning a person in his trade or business, imputing a crime of moral turpitude, implying a person suffers from a loathsome disease, or imputing the unchastity of a woman.⁵¹ Additionally, for the letter to be defamatory to plaintiff, as opposed to plaintiff's employees, it

⁴⁹ For instance, a hypothetical customer might have cancelled his contract because of defamatory statements concerning Burris, but not because of confidential disclosures.

⁵⁰ *Delaware Express Shuttle*, 2002 WL 31458243, at *21.

⁵¹ *Id.*

must contain statements that “reflect discredit upon the method by which the corporation conducts its business.”⁵²

There can be no doubt that defendant defamed EDIX in his June 6 email, to say nothing of any other communication. Plaintiff deserves nominal damages in the amount of six cents, as well as compensatory damages. Once again, however, compensatory damages will be largely the same as those implicated by Count I.

3. Count X: Deceptive Trade Practices

Finally, plaintiff seeks the protection of 6 *Del. C.* § 2532(a), which forbids deceptive trade practices, in order to justify an award of treble damages and attorney’s fees. The facts proven at trial do not justify such relief.

The Deceptive Trade Practices Act forbids “disparage[ment] of the goods, services or business of another by false or misleading representations of fact,”⁵³ acts that defendant committed, but requires such activity to be conducted “in the course of a business, vocation, or occupation.”⁵⁴ The

⁵² *Id.*

⁵³ 6 *Del. C.* § 2532(a)(8).

⁵⁴ 6 *Del. C.* § 2532(a).

DTPA was designed to prevent “patterns of deceptive conduct,” not isolated incidents.⁵⁵

Mahani’s deceptive acts were the emails of May 21 and June 6, both of which made disparaging accusations about EDIX. I am not convinced that defendant wrote these emails, as suggested in plaintiff’s complaint, in an effort to “destroy and eliminate competition from EDIX.”⁵⁶ At the point that Mahani wrote these emails, he had neither a magazine nor an auto club with which he might benefit were EDIX to go out of business, and to the extent that he might have plans for such an operation in mind, there is no evidence that he had the financing, experience or other required wherewithal to start one. Mahani’s motivation for writing the emails was almost certainly the simplest and most old-fashioned of all: revenge. For this he is liable under both defamation and breach of contract theories, and in addition will quite possibly suffer criminal penalties. But I do not believe that the Legislature adopted the Deceptive Trade Practices Act in order to convert acts of passion into acts of corporate malfeasance resulting in treble damages.

⁵⁵ *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655 (Del. Super. 1992). (“Treble damages are available only in conjunction with injunctive relief under 6 *Del. C.* § 2533(a). The association of the treble damage remedy with injunctive relief indicates that the Act is directed at patterns of deceptive conduct, not isolated incidents of consumer fraud.”)

⁵⁶ Supplemental Verified Compl. at 17.

IV. DAMAGES AND INJUNCTIVE RELIEF

A. *Compensatory damages*

Having woven a path through plaintiff's various theories, it remains only to determine the amount of damages to which plaintiff is entitled. Compensatory damages, arising primarily from breaches of the confidentiality agreement, are warranted by Counts I, III, V, and IX. Both parties have briefed this issue, debating in detail each and every contested and cancelled contract.

The law "does not require certainty in the award of damages where a wrong has been proven and injury established."⁵⁷ Nevertheless, the law does require that plaintiff show not only an injury, but also that the injury was caused by defendant. I am not convinced that Mahani's actions were the root cause of each and every cancelled payment that EDIX suffered. After all, plaintiff itself forced a revision in the payment structure for independent contractors in part to encourage collection of a mountain of over \$60,000 worth of uncollected receivables that had accrued over a month before any conflict arose. This suggests considerable uncertainty as to whether some of

⁵⁷ *Total Care Physicians*, 2003 WL 21733023, at *3 n.16 (citing *Delaware Express Shuttle*, 2002 WL 31458243, at *13).

these revenues were ever to be collected. Mahani should pay for his sins, but not the obstinacy of others.

In making a client-by-client listing of damages, plaintiff has presented a mélange of differing agreements (including signed contracts, unsigned contracts, and testimony involving verbal contracts) and various proofs of cancellation. As already mentioned, I have given considerable weight to documentary evidence provided by third parties. Having found the testimony of Burris to be not much more credible than that of defendant, I do not consider plaintiff to have proven causation by a preponderance of the evidence when the sole sign that a contract existed is trial testimony. On the other hand, I do not believe (as defendant suggests) that plaintiff must put forward a signed contract in order to prove that a contractual relationship existed. Where plaintiff has shown that a client placed advertisements in the magazine consistent with the claimed contract, and defendant has put forth no evidence to rebut the existence of a contract, plaintiff has met its burden.

The same general rule applies to causation. Plaintiff and defendant both spoke at trial regarding reasons that advertisers *might* have cancelled contracts, and not all evidence points towards defendant. Plaintiff's own evidence suggests that some customers were irregular in their payments. There are indications in the record that some customers' loyalty was to

Mahani, and that they would have withdrawn their support after his firing without further provocation.⁵⁸ It is not unusual for clients to leave when a favored salesperson is dismissed. In order to provide a preponderance of evidence, plaintiff needs to produce some non-hearsay evidence in addition to Burris's testimony to indicate that a customer ceased their relationship due to defendant's actions.⁵⁹ Where no such evidence is available, and there are many possible reasons the contract might have been cancelled, plaintiff has not shown that it is more likely than not that the cancellation was caused by Mahani. With these rules in mind, it is easy to identify several categories of advertisers.

The first category consists of advertisers for which plaintiff has provided either no independent proof of motive or causation, or where that proof is insufficient to show that Mahani's emails led to plaintiff's loss. I have only conflicting trial testimony with regard to the motivations of Texas Heat Wave, Mobil Spec, the Installer Institute or Apollo America in

⁵⁸ The one advertiser upon which both parties agree that defendant is liable, Aamp of America, actually gives the Court considerable pause. Aamp's detailed explanation of their reasons for canceling their contract includes confusion as to the reasons behind the dismissal of Mahani. Other advertisers may have felt the same way, irrespective of Mahani's emails.

⁵⁹ I allowed considerable testimony by Burris, over defendant's objections, as to the motivations of EDIX advertisers. As I explained at trial, the testimony was properly admitted as it was offered to show motivation rather than truth of the statements themselves. In the absence of other evidence, however, I have given this little weight.

cancelling their contracts. For some advertisers, the emails introduced by plaintiff as evidence of motive simply do not allow me to make a confident inference as to the advertiser's state of mind. For instance, JGY Customs simply notes that there was a "lot of drama" after Mahani was fired. Elevation Audio gripes that "this is getting to be a nonsense situation," and asks for a phone call from Burris, but gives no indication that Mahani's emails provide the impetus for cancelling their advertisements. Finally, plaintiff complains that Absolute USA refused to pay for advertisements run in April, May, and June, although two months of bills would have been payable *before* Mahani sent any messages. It is possible that they refused to pay at defendant's urging, but it is equally possible that they simply continued in their delinquency. Plaintiff has failed to meet the burden of proof necessary to show damages with regard to any of these accounts.

Two other accounts merit special consideration: O2 and Dual Electronics. Plaintiff presents no signed contract with O2, nor any non-testimonial evidence that they ever intended to renew their contract.⁶⁰ As for Dual Electronics, plaintiff submits a written contract and evidence that Dual

⁶⁰ Defendant, on the other hand, submits an email from O2 stating that the company cancelled its contract due to the receipt of a better offer for advertising from an EDIX competitor. Once again, the letter is inadmissible for purposes of proving the truth of the matter—that an offer was received—but is admissible as evidence of O2's motivation.

advertised for their first month as planned and, thus, it is reasonable to conclude that a contract existed. On the other hand, the email submitted by plaintiff to show Dual's motivation in cancelling their advertisements lists a number of concerns, some of which implicate Mahani's actions and some of which do not.

I conclude that no damages can be awarded with regard to O2, as plaintiff has not shown the existence of a contract. Dual Electronics is a more difficult matter. The email provided by plaintiff shows that Dual was motivated in part by Mahani's actions, and in part by other concerns. For this reason, I find that plaintiff should be awarded nothing for this claim. Because of the mixture of motives underlying Dual's decision to end its advertising relationship with EDIX, I cannot find that plaintiff has proved any damages attributable to Mahani.

Defendant's liability for the other customers is hardly in doubt. Plaintiff has presented either written contracts or shown that advertisers actually ran advertisements. Emails plaintiff has submitted from these advertisers unambiguously indicate that Mahani's actions motivated their cancellations or non-payments. Therefore, plaintiff is awarded the full amount requested with regards to HD Wheels (\$5,000), Metra (\$3,600),

Monkey Video (\$2,400), and Aamp of America (\$3,500), for actual damages arising from lost advertisers in the amount of \$14,500.

B. Plaintiffs' motions for contempt of court and leave to file lis pendens

Plaintiff also asks that I award damages for defendant's alleged violations of the stipulated restraining order. Penalties for civil contempt of a restraining order are appropriate when the Court seeks to achieve compliance with its order and preserve the rights of an aggrieved party.⁶¹ Even an imperfect or erroneous order of this Court must still be followed, and a court may punish disobedience with penalties for contempt so long as the order was not issued in excess of the Court's jurisdiction.⁶² Nevertheless, I find that further damages for contempt would be inappropriate.

First, the damages delineated above are adequate recompense for the actual harm suffered by plaintiff, especially when coupled with the \$5,000 already paid by defendant as a result of plaintiff's first motion for contempt. Second, evidence offered at trial has convinced me that the initial temporary restraining order, despite having been stipulated to by both parties, was nonetheless more expansive than appropriate, preventing defendant from

⁶¹ See *City of Wilmington v. Gen. Teamsters Local Union 326*, 321 A.2d 123, 125 (Del. 1974). The Court of Chancery possesses both common law and statutory contempt powers that may be used to enforce its judgments. See *id.*; 10 *Del. C.* §§ 370-71.

⁶² See *Mayer v. Mayer*, 132 A.2d 617, 621 (Del. 1957).

many reasonable and appropriate activities. Although plaintiff complains of several violations, most of them are either *de minimus* or not matters for which damages are awarded in this final judgment. Nor is the final permanent injunction to be as broad as the temporary restraining order. Thus damages for these infractions seem neither equitable nor necessary.

On the other hand, given defendant's less than exemplary record in following orders of this Court, I note here that failure to abide by any further orders will be met with punitive sanctions. Further, plaintiff's leave to file *lis pendens* on property purportedly transferred from Mahani to his father is granted pending either satisfaction of this judgment in full or plaintiff's prosecution of a fraudulent conveyance action.

C. Other damages

Besides compensatory damages arising from plaintiff's claims or from contempt of court, plaintiff is also entitled to exemplary damages for willful and malicious misappropriation of trade secrets, and nominal damages for breach of contract arising from unlawful solicitation and defamation. Nominal damages on all counts that merit them are awarded in the amount of

six cents. In addition, I find that \$2,000 should be awarded to plaintiff in exemplary damages under the Delaware Trade Secrets Act.⁶³

D. Attorney's fees, costs of litigation, and other costs

As part of the Non-Compete and Confidentiality Agreement, defendant agreed to indemnify plaintiff for any legal fees incurred by plaintiff in attempting to enforce this agreement, and such agreements are enforceable.⁶⁴

I do not hesitate to award fees in this case, as defendant has done very little at any stage of this litigation to mitigate plaintiff's costs in pursuing its rights under the employment agreement. Plaintiff is also entitled to reasonable reimbursement of expenses paid to third parties in investigating the source of defendant's malicious emails. Plaintiff shall submit affidavits detailing these expenses for reimbursement.

E. Injunctive relief

Finally, plaintiff should enjoy the protection of both the confidentiality agreement and, to the degree it is enforceable, the non-competition agreement. Therefore, defendant shall be enjoined from the following activities until May 13, 2008: (a) directly or indirectly using or disclosing to

⁶³ 6 *Del. C.* § 2003(b) (exemplary damages not to exceed twice any award made for compensatory damages). It is difficult to divine with precision how much of the \$14,500 in compensatory damages derive from defendant's misappropriation of advertising rates, but \$1,000 would be a reasonable, if conservative, estimate.

⁶⁴ *Delaware Express Shuttle*, 2002 WL 31458243, at *23.

any person or other entity any of plaintiff's confidential or proprietary information; (b) directly or indirectly owning, managing, operating, joining, being employed by, controlling or managing any automotive club or other membership-based subscription business involving the after-market automotive parts industry; (c) directly or indirectly providing paid-for or otherwise compensated advertising, either in print or online, for any EDIX advertiser, as limited by the non-competition agreement; or (d) directly or indirectly providing modeling services.

V. CONCLUSION

Plaintiff is awarded monetary damages in the amount of \$16,500.06, the total of \$14,500 in compensatory damages, \$2,000 in exemplary damages and six cents in nominal damages. Defendant shall be enjoined from revealing confidential information and engaging in activities that directly compete with EDIX operations as defined above.

Counsel shall confer and submit within twenty days a proposed form of final order to implement this Memorandum Opinion. The order shall make provision for attorney's fees and costs, as described herein.