

SUPERIOR COURT OF JUSTICE

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B E T W E E N :

INFOLINK TECHNOLOGIES CORP.

Plaintiff

10  
-and-

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STEVEN PAUL GRABENHEIMER, PUNIT LALA &  
THE LEAD BOUTIQUE

Defendants

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P R O C E E D I N G S  
REASONS FOR JUDGMENT

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BEFORE THE HONOURABLE JUSTICE J. T. AKBARALI  
on July 3, 2018, at TORONTO, Ontario

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APPEARANCES:

J. A. Wygodny

Counsel for the Plaintiff

J. Spotswood

Counsel for the Defendant,

Steven Paul Grabenheimer

(i).

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SUPERIOR COURT OF JUSTICE

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EXHIBIT NUMBER ENTERED ON PAGE

**Legend**

[sic] - indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - indicates preceding word has been spelled phonetically.

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1.  
Reasons for Judgment - Akbarali, J.

TUESDAY, JULY 3, 2018

R E A S O N S   F O R   J U D G M E N T

5 Akbarali, J. (orally):

10 The plaintiff moves for summary judgment against the defendant, Punit Lala, and the defendant, The Lead Boutique, together with their various aliases. The plaintiff is not moving against the defendant, Steven Paul Grabenheimer, because he has entered into a cooperation agreement with the plaintiff and has given evidence in support of the plaintiff's motion. The plaintiff and Mr. Grabenheimer have addressed Mr. Grabenheimer's responsibility for damages in a cooperation agreement.

15 The summary judgment motion seeks restitutionary damages of \$751,659.88 for breach of contract, among other causes of action. The plaintiff also seeks a permanent injunction and punitive damages as set out in its factum. This relief is not sought in the plaintiff's notice of motion. The plaintiff asks for leave to amend the notice of motion to seek this relief. I grant this request. The fact that the plaintiff would be seeking this relief is obvious from its factum, which was served on the defendants. The fault in the notice of motion is technical only.

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30 With respect to liability, the plaintiff's evidence establishes that Mr. Grabenheimer and Mr. Lala were

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employees of the plaintiff. They had access to confidential information. They entered into a scheme whereby they diverted clients and potential clients from the plaintiff to their own business. They misused confidential information of the plaintiff, including by taking photographs of computer screens with confidential client information on them. They misrepresented to clients the relationship between their business and the plaintiff. They created fake accounts in the plaintiff's system to access the plaintiff's customer relations management system and obtain services and data from third party providers to the plaintiff. The evidence establishes that they did all of this deliberately and surreptitiously. This conduct grounds a number of causes of action that the plaintiff advances.

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First, breach of contract. The employment contract between Mr. Lala and the plaintiff required Mr. Lala not to engage in other employment while employed by the plaintiff: section 2.4. The agreement required that Mr. Lala would not compete during his employment and for one year thereafter with the plaintiff: section 6.1. The agreement required that Mr. Lala would not solicit any customers of the plaintiff or any other employee of the plaintiff during the course of the agreement or for one year thereafter: section 6.5. Also, section 6.3 required Mr. Lala to keep confidential the plaintiff's confidential records and not to use it or them, except for the plaintiff's benefit.

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It is apparent that these provisions have been breached by the evidence that I have reviewed. Breach of contract has been established. I will deal with damages in the context of the plaintiff's claim with respect to waiver of tort.

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Second, the plaintiff makes a claim in breach of confidence. As I have explained, the contract required Mr. Lala to keep confidential information confidential, and only use it for the benefit of the employer. The test for breach of confidence requires, first, that the information conveyed must be confidential. In this case, the client data that was misused by Mr. Lala was confidential. Mr. Lala understood this, as demonstrated by his efforts to surreptitiously take photographs of computer screens with the confidential information on them.

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Second, the information must have been communicated in confidence. I accept that this has been established, given the contract that exists between Mr. Lala and the plaintiff, and as I have just explained, the efforts taken by Mr. Lala to obtain the confidential information surreptitiously.

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Third, the information must have been misused by Mr. Lala to the detriment of the plaintiff. This element is also established on the evidence, because the information was used to divert business from the plaintiff to Mr. Lala and the Lead

Boutique.

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The plaintiff seeks a permanent injunction to ensure there would be no future misuse of confidential information, which Mr. Lala has in his possession only because of his employment. The plaintiff relies on the *Celanese* decision, 2010 CanLII 29089. A permanent injunction can issue once a party has established his rights, as the plaintiff has here, and if it is an appropriate remedy.

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In this case, the interference by Mr. Lala with the property rights of the plaintiff with respect to the confidential information justifies a permanent injunction enjoining use of this information by Mr. Lala or the Lead Boutique, which only has this information due to Mr. Lala's breach of confidence.

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Third, I will address waiver of tort. The plaintiff seeks disgorgement, rather than compensatory damages, and relies on *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980 at paragraph 63. Waiver of tort allows the plaintiff to seek disgorgement, rather than compensatory damages in tort.

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Here, evidence of Mr. Grabenheimer establishes that at least \$751,659.88 was deposited into the Lead Boutique's bank account. His evidence establishes that the Lead Boutique derived its business by

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diverting it from the plaintiff and that the Lead Boutique did not undertake its own marketing or advertising efforts to get its own clients. I therefore accept that the plaintiff is entitled to \$751,659.88 in restitution arising out of Mr. Lala's wrongs.

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The plaintiff also pleaded other causes of action, including deceit and injurious falsehood. The plaintiff concedes that injurious falsehood is a weaker cause of action. In my view, it is not necessary to consider whether Mr. Lala can be said to have made a false representation or published false statements, given my earlier conclusions.

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I agree with the plaintiff that it has established wrongful interference with economic relations. Mr. Lala interfered in the plaintiff's business by unlawful means, that is wrongly in breach of his contract by diverting customers, and that he did so intentionally, in that Mr. Lala's unlawful act was, in some measure, directed against the plaintiff, and the plaintiff suffered loss of business as a result. See *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. Of Canada*, 2003 CanLII 27828 (ON CA) at paragraphs 44 to 46.

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Finally, I agree that Mr. Lala's liability also attaches to the Lead Boutique by the tort of civil conspiracy. Mr. Grabenheimer, Mr. Lala and the Lead Boutique entered into an arrangement, whereby unlawful conduct was directed towards the

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plaintiff, and all the defendants knew or ought to have known the plaintiff was likely to be injured. The Lead Boutique participated in the unlawful conduct.

This is an appropriate case for the Lead Boutique and Mr. Lala to be jointly liable, due to their concerted action, acting together in furtherance of a common design to divert the business of the plaintiff to the Lead Boutique.

As I have already noted, there is a cooperation agreement in place with respect to Mr. Grabenheimer. The plaintiff does not seek judgment against him.

In addition to the restitution sought, the plaintiff seeks punitive damages. The plaintiff abandoned its claim for aggravated damages at the hearing of this motion. I accept that Mr. Lala had a contractual duty of good faith that he breached by his actions. This is sufficient to meet the requirement of an independent actionable wrong for purposes of punitive damages. The plaintiff alleges that Mr. Lala's conduct is egregious, reprehensible and deserving of condemnation through a punitive damages award. I am mindful that a punitive damages award must only be made if compensatory damages, in this case restitution, does not suffice to achieve the objectives of retribution, deterrence and denunciation.

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In my view, a punitive damages are necessary in this case. If all Mr. Lala has to do is disgorge the amounts he and the Lead Boutique received, there is not sufficient deterrence for such morally reprehensible behaviour. Mr. Lala misused the trust his employer had placed in him to take for himself and the Lead Boutique the fruits of the plaintiff's labour. He did so over a lengthy period, using an elaborate scheme designed to deceive the plaintiff. He likely would have continued had he not been fired. He has not shown any remorse in the conduct of this proceeding. Accordingly, some amount must be added to the disgorgement, proportionate to Mr. Lala's blameworthiness.

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The plaintiff suggests \$250,000 or about one third of the restitutionary award, but states that the quantum of the punitive damages is discretionary, and damages are at large. In my view, \$150,000, or about 20 percent of the restitutionary award, is appropriate and proportionate, taking into account the harm caused to the plaintiff, the high degree of Mr. Lala's misconduct, and the exploitation of the plaintiff's trust.

...PROCEEDINGS RECORDED BUT NOT TRANSCRIBED

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THE COURT: Earlier today I gave partial reasons in this summary judgment motion. I asked the plaintiff to address whether the Lead Boutique should be responsible for punitive damages that I

had ordered against Mr. Lala and to address costs.

5 On reconvening, the plaintiff asked that I specifically address deceit, as it may become relevant if there is a bankruptcy of either The Lead Boutique or Mr. Lala. I thus begin with deceit.

10 The tort of deceit requires (a) a false representation of fact to the plaintiff; (b) that the defendant knew the representation was false or had no belief in its truth or was reckless as to its truth; (c) the defendant intended that the plaintiff act on the representation; (d) the plaintiff did act on the representation; and, (e) the plaintiff suffered a loss by so doing.

15 In his employment contract, section 2.2, Mr. Lala agreed to perform his duties faithfully and to diligently serve the plaintiff. He agreed to use his best efforts to promote the interests and reputation of his employer. In my view, this was an explicit representation that was false. Mr. Lala did not faithfully and diligently serve the plaintiff and promote the plaintiff's interests. Rather, he preferred his own interests and engaged in an elaborate scheme to appropriate his employer's opportunities for himself. The defendant knew the representation either was false when made or became false. Moreover, by coming to work daily and taking pains to conceal his scheme from his employer, he perpetuated the

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representation that he was working faithfully and diligently in the employer's best interests, when he was not. He intended the plaintiff rely on that representation to keep his job and his ability to continue to take for himself that which belonged to the plaintiff. The plaintiff did rely on the representation in continuing to employ Mr. Lala and suffered loss as a result. I, therefore, conclude that deceit has been made out. Disgorgement remains the appropriate remedy.

With respect to punitive damages, I agree with the plaintiff that the punitive damages award should be joint between Mr. Lala and the Lead Boutique. The Lead Boutique was an active participant in this scheme to defraud the plaintiff and is the legal entity created by Mr. Lala and Mr. Grabenheimer to perpetuate their scheme. The role of the Lead Boutique in this scheme is worthy of retribution, denunciation and deterrence, just as Mr. Lala's role is. Accordingly the punitive damages award shall be joint between Mr. Lala and the Lead Boutique.

Finally, the plaintiff seeks costs on a full indemnity scale, arguing that where fraud is made out, it would be unjust for the victim to bear its costs of the proceedings, especially when an unproven allegation of fraud generally warrants an award of substantial indemnity costs in favour of the successful party. Costs are in the discretion of the court: section 131 *Courts of Justice Act*.

5 The discretion is to be exercised having regard to the factors laid out in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity, the amount claimed and amount recovered, and the reasonable expectations of the unsuccessful party. Overall, the goal is to make an award that is fair and reasonable.

10 In my view, where fraud is proven and punitive damages have been proven to be warranted, the principle of indemnity takes on particular importance. I agree that full indemnity costs are warranted in this case.

15 I note also that the full indemnity costs sought by the plaintiff include a reduced rate for Mr. Das, who often discounted his rate on this file.

20 Overall, given the various attendances in this file, and the nature of the record that had to be compiled on the motion, the time for which the plaintiff claims is reasonable. I thus conclude that the defendants, Mr. Lala and the Lead Boutique, shall pay costs of \$78,947.46 to the plaintiff within 30 days.

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30 ...END OF EXCERPT AS REQUESTED

11.  
Certification

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

5 I, Crystal Deisting, certify that this document is a true and accurate transcript of the recording of Infolink Technologies Corp. v. Grabenheimer et al, in the Superior Court of Justice, on July 3, 2018, held at 393 University Avenue, Toronto, Ontario, taken from Recording 10 4899\_805\_20180703\_092530\_\_10\_AKBARAJ, which has been certified in Form 1.

JUL 06 2018

15 (Date)



(Signature of Authorized Person(s))

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