STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 8817
THE VANGUARD GROUP, INC., Plaintiff, v. MATTHEW PHILIP SNIPES and TOPSAIL WEALTH MANAGEMENT, LLC, Defendants.	**[CORRECTED] ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**

1. **THIS MATTER** is before the Court upon Plaintiff The Vanguard Group, Inc.'s ("Vanguard") Motion for Temporary Restraining Order (the "Motion") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)") in the above-captioned case. (ECF No. 3.)

2. Having considered the Motion, the Verified Complaint, the arguments of counsel at the hearing on the Motion, relevant case law, and other documents filed in support of and in opposition to the Motion, the Court makes the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW** and hereby **DENIES** the Motion as set forth below.

I.

PROCEDURAL HISTORY

3. Plaintiff filed a combined Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction, and Expedited Discovery[1] in

[1] When referring to this filing's claims and allegations, (the "Complaint"). When referring to this filing's request for a TRO, (the "Motion").

Mecklenburg County Superior Court on 31 May 2022, alleging claims for breach of contract, misappropriation of confidential information and trade secrets, tortious interference with contractual and business relationships, unfair competition, and breach of fiduciary duty of loyalty. (ECF No. 3.)

4. Defendants sought designation as a mandatory complex business case on 1 June 2022, and the case was designated and assigned to the undersigned that same day. (ECF Nos. 1, 2, 4.) Later that day, the Court held a hearing (the "Hearing") on the Motion, at which all parties were represented by counsel. (*See* ECF No. 5.)

II.

FINDINGS OF FACT

5. The Court makes the following findings of fact, which are made solely to decide the Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits.").

6. Vanguard is an investment management corporation incorporated in the Commonwealth of Pennsylvania with its principal place of business in Malvern, Pennsylvania. (Compl. ¶¶ 1, 9.)

7. Defendant Matthew Snipes ("Snipes") is a resident of Matthews, North Carolina who began his employment with Vanguard on 30 January 2006 and resigned from Vanguard on 22 April 2022 to form his own investment management company, Defendant Topsail Wealth Management, LLC ("Topsail"). (Compl. ¶ 2–3, 8, 38, 44.)

8. Snipes began at Vanguard as a Client Relationship Associate and was promoted to a Financial Planner in 2007. (Compl. ¶ 8.) In connection with this promotion, Snipes executed Vanguard's Proprietary and Confidentiality Agreement (the "Confidentiality Agreement"). (Compl. ¶ 12–14; Compl. Ex. A [hereinafter "Confidentiality Agreement"], ECF No. 3.) In relevant part, the Confidentiality Agreement provides as follows:

> 2. Confidential Information.
>
> During and after my employment at Vanguard, I will:
>
> (a) Keep in strict confidence all Confidential Information as defined in Section 7(b);
>
> (b) Not use Confidential Information for any purpose not authorized by Vanguard;
>
> (c) Not destroy any Confidential Information, unless authorized or instructed by Vanguard; and
>
> (d) Not disclose or distribute Confidential Information to any third party – nor will I provide any third party with access to Confidential Information - without Vanguard's permission.
>
> I agree that all Confidential Information is owned by Vanguard and/or its clients or licensors, as the case may be, and not by me.
> . . .
> 7. Definitions.
> . . .
> (b) "Confidential Information" means any proprietary or confidential Work Product of Vanguard and/or its clients, licensors, or crew members, including but not limited to:
> - All Inventions;
> - Personal and financial information about clients, prospective clients, and crew members;
> - Corporate plans and strategies;
> - Trading methodologies;
> - Information technology processes, services, and products;
> - Information security strategies, policies, and procedures; and

- Fund-related information and fund holdings not otherwise publicly disclosed.

(Confidentiality Agreement.)

9. Snipes continued his employment with Vanguard, ultimately becoming an Ultra High Net Worth Senior Financial Advisor responsible for managing approximately $4.75 billion in assets. (Compl. ¶¶ 9–11.)

10. On or about 19 June 2020, Vanguard presented Snipes with a Transition Payment Agreement ("TPA") that provided:

> Subject to the terms and conditions, you will receive a Transition Payment in the amount of $40,042. The Transition Payment will be paid in cash in two equal installments. The first installment will be made on the pay day in the last full pay period in June 2022 and the second will be made on the pay day in the last full pay period in June 2023.
> . . .
> In order to be eligible for the Transition Payment, you must: (i) continue to perform the duties of your position or such other duties as your manager may assign, in good faith to the best of your abilities and (ii) be continuously and actively employed with the Company through June 1, 2022 and June 1, 2023 respectively (collectively, the "Completion Dates") or, if not employed on the applicable Completion Dates, you must have voluntarily retired from Vanguard pursuant to the retirement policy applicable to you. Accordingly, you will not be eligible for this Transition Payment if prior to the applicable Completion Date, you resign from employment with Vanguard (other than as a retiree) or your employment is terminated by Vanguard for Cause.

(Compl. Ex. D [hereinafter "TPA"] App. A, ECF No. 3.)

11. The TPA contained promises Snipes made to Vanguard in return for his eligibility for the Transition Payment: (i) Snipes's promise not to solicit Vanguard customers or employees to leave Vanguard during Snipes's employment and for one year following the end of his employment and (ii) Snipe's promise to provide Vanguard with sixty days' notice of resignation of employment and not to work for

any other employer during that sixty-day notice period. (TPA App. A.) Snipes executed the TPA on 22 July 2020. (Compl. ¶ 26.)

12. Between January and April 2022, Snipes sought reimbursement for $23,000 in travel and client entertainment expenses he incurred during visits to cities where Vanguard clients reside. Plaintiff avers that these expenses were inordinately high compared to Snipes's peers at Vanguard. (Compl. ¶¶ 32, 34.) Snipes has offered evidence, however, suggesting that the expenses for this period were similar to those he had incurred in the past.

13. On 22 April 2022, Snipes informed his supervisor that he was resigning his employment with Vanguard, effective immediately. (Compl. ¶ 38.)

14. Snipes formed Topsail on 4 May 2022. (Compl. ¶¶ 3, 44.)

15. On 9 May 2022, Independent Advisor Alliance, LLC ("IAA"), an investment advisory firm based in Charlotte, North Carolina, filed a Form U4, a Uniform Application for Securities Industry Registration or Transfer form, for Snipes. (Compl. ¶ 42.) Vanguard suspects IAA will provide compliance support and other administrative services to Topsail. (Compl. ¶ 45.)

16. Topsail was fully operational at least as of 24 May 2022 and provides investment services similar to those Snipes provided at Vanguard. (Compl. ¶ 44.)

17. According to Vanguard, at least four clients Snipes visited before his resignation have expressed to Vanguard that they are considering transferring their accounts to Topsail. Plaintiff asserts that these clients contacted Vanguard after Snipes contacted each by telephone following his resignation. (Compl. ¶ 36.) Plaintiff

avers that three other clients that Snipes visited while at Vanguard have "been reluctant to engage with their new proposed advisors," (Compl. ¶ 37), and suggests that these clients may be considering a transfer of their accounts to Topsail as a result of Snipes's contact with them.[2]

18. On 1 June 2022, Plaintiff filed this action alleging claims for breach of contract under the Confidentiality Agreement and the TPA, (Compl. ¶¶ 51–65), and for various torts related to Snipes's and Topsail's conduct, (Compl. ¶¶ 66–96).

III.

CONCLUSIONS OF LAW

19. **BASED UPON** the foregoing **FINDINGS OF FACT**, the **COURT** makes the following **CONCLUSIONS OF LAW**.

20. The purpose of an injunction "is ordinarily to preserve the status quo . . . [and i]ts issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913 (1980)). A temporary restraining order, however, is a "drastic" procedure that "operates within an emergency context which recognizes the need for swift action . . . ." *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 448 (1980); *see also Leonard*

[2] Shortly before the issuance of this order, Plaintiff's counsel advised that it had discovered new evidence of a client account transfer to Topsail that it wished to bring to the Court's attention in connection with the Motion. The Court advised counsel that the record on the Motion was closed but indicated that Plaintiff retained the right to bring the new evidence to the Court's attention through a new, properly supported motion, to which Defendants will have the opportunity to review and respond, in accordance with the Business Court Rules.

E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 76 (1984) (observing that a temporary restraining order has been called an "extraordinary privilege").

21. Our courts have made clear that immediate injunctive relief should only be issued:

> (1) if [Plaintiff] is able to show *likelihood* of success on the merits of [its] case and (2) [Plaintiff] is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiff's] rights during the course of litigation.

A.E.P. Indus., 308 N.C. at 401 (citations omitted) (emphasis in original); *see, e.g.*, 2 Wilson on North Carolina Civil Procedure, § 65-3 (explaining that a plaintiff's likelihood of success on the merits of his claims is a factor to be considered by the court in ruling on a motion for a temporary restraining order).

22. Moreover, "[a] court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction." *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 694 (1976). A trial court generally "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted . . . ." *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16 (1993) (citation and quotation omitted), *overruled on other grounds by Sharpe v. Worland*, 351 N.C. 159 (1999).

A. <u>Whether a Temporary Restraining Order is Warranted for Alleged Breach of the Notice and Customer Non-Solicitation Provisions of the TPA</u>

23. To begin, the Court notes that the TPA and the Confidentiality Agreement are both governed by Pennsylvania law. (*See* Compl. ¶¶ 12, 24; TPA; Confidentiality Agreement.)

24. Turning first to the TPA, the parties dispute whether the TPA and its attendant notice and customer non-solicitation provisions are enforceable. Defendants contend that these provisions are unenforceable as illusory because Vanguard could terminate Snipes, as an at-will employee, without cause before Snipes could complete the conditions required to receive the Transition Payments under the TPA. Plaintiff argues in response that the TPA contains an implied covenant of good faith that prevents Vanguard from terminating Snipes to deprive him of Transition Payments, rendering the notice and non-solicitation provisions enforceable.

25. Under Pennsylvania law, "[i]f an employment contract containing a restrictive covenant is entered into subsequent to employment, it must be supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status." *Modern Laundry & Dry Cleaning Co. v. Farrer*, 370 Pa. Super. 288 (1988).

26. However, "[i]f the promise is entirely optional with the promisor, it is said to be illusory and, therefore, lacking consideration and unenforceable." *Geisinger Clinic v. Di Cuccio*, 414 Pa. Super. 85 (1992). Courts applying Pennsylvania law have applied this principle to find employment contracts unenforceable where the employer retains the ability to deprive the employee of a

promised future benefit. *See, e.g.*, *Gagliardi Bros., Inc. v. Caputo*, 538 F. Supp. 525, 528–29 (1982) (holding, under Pennsylvania law, that a noncompete agreement that entitled an employee to a 30-day notice period and severance pay—without otherwise changing the employee's compensation or employment status—was illusory consideration because the notice period and severance pay did not apply if the employee was discharged for cause); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327 (1974) (voiding as illusory under Pennsylvania law a restrictive covenant that entitled an employee to a notice period because the "contract provides that the company may dispense with the [notice period] if 'in the sole judgment of the COMPANY [sic]' " the employee acted contrary to the company's interests); *Cardiac Consultants P.C. v. Feinberg*, 2004 WL 3401756 (Pa. Com. Pl. Oct. 22, 2004) (holding, under Pennsylvania law, that a contract providing that an at-will employee who had completed more than ten years of employment could not be terminated without cause was illusory because the at-will employee, who had worked at the company for only four years, could be terminated at any time for any reason during the six additional years he had to be employed to receive the promised benefit); *see also Red Oak Water Transfer NE, LLC v. Countrywide Energy Servs., LLC*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 236, *38 (denying a preliminary injunction to enforce restrictive covenants against former employees because it was unlikely "that stock options that have not vested [we]re adequate consideration" for the restrictive covenants, particularly when "the employer . . . retained the full right to prevent the options from ever vesting by terminating the employee.")

27. Under the TPA, Vanguard promised Snipes the opportunity to receive the Transition Payment if he performed his duties "in good faith to the best of [his] abilities" and if he was "continuously and actively employed with [Vanguard] through June 1, 2022 and June 1, 2023 (collectively, the "Completion Dates")." The TPA further provided, however, that it did "not in any way change the at-will nature of [Snipes's] employment relationship with Vanguard and [did] not serve as a guarantee that [Snipes would] remain employed for any particular employment period." (TPA App. A.) Thus, by its express terms, the TPA permitted Vanguard to terminate Snipes at any time and for any reason prior to the Completion Dates. Because the opportunity to receive the Transition Payment was the consideration Snipes received in exchange for his promises under the TPA, including his promises concerning non-solicitation and notice, Vanguard's promise to provide that opportunity while at the same time retaining the ability to deny that opportunity from Snipes altogether appears to render Vanguard's promise illusory under the principles established in *Gagliardi Bros., Inc.*, *Maintenance Specialties, Inc.*, *Cardiac Consultants P.C.*, and *Red Oak Water Transfer*.

28. The cases on which Plaintiff relies do not compel a contrary result. For example, the Third Circuit's decision in *L.B. Foster Co. v. Barnhart*, 615 Fed. Appx. 63 (2015), the case on which Plaintiff places heaviest reliance, and *Axalta Coating Systems, LLC v. Peck*, Civil Action No. 20-cv-5655, 2001 U.S. Dist. LEXIS 12911 (E.D. Pa. Jan. 22, 2021), a federal magistrate recommendation, are inapposite because there is no indication in either case that the defendant employee was an at-will

employee like Snipes is here. *Waldron v. Mendelson*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 5898 (Pa. Com. Pl. May 5, 2017) likewise is inapposite because, unlike Snipes, the defendant employee received a contemporaneous salary increase upon signing a restrictive covenant, constituting consideration. And *Liberty Mutual Insurance Co. v. Gemma*, 301 F.Supp.3d 523 (W.D. Pa. 2018) is distinguishable because, unlike Snipes, the defendant employee received compensation under the incentive contract at issue, again constituting consideration.

29. The Court also finds unavailing Plaintiff's reliance on the second sentence in Appendix A of the TPA stating that "Accordingly, you will not be eligible for this Transition Payment if prior to the applicable Completion Date, you resign from employment (other than as a retiree) or your employment is terminated by Vanguard for Cause." Rather than imply that the Transition Payment opportunity is preserved in the event Snipes is terminated without cause, thus providing mutuality of obligation as Plaintiff contends, the Court finds that the plain language of this sentence does not alter the conditions for payment expressly set forth in the first sentence of Appendix A and instead simply identifies two non-exclusive circumstances in which a Transition Payment will not be paid. Finally, Plaintiff's reliance on an implied covenant theory to preclude Snipes's termination cannot stand when the TPA's express terms permit Snipes to be terminated at any time and for any reason. *See, e.g.*, *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 706) ("The duty of good faith and the doctrine of necessary implication apply only in

limited circumstances. Implied duties cannot trump the express provisions in the contract.").

30. Based on the foregoing, the Court concludes that Plaintiff has failed to show a likelihood of success on its claim against Snipes for breach of the TPA.

B. Whether a Temporary Restraining Order is Warranted for Breach of the Confidentiality Agreement

31. The parties dispute whether the Confidentiality Agreement is unenforceable for lack of consideration and whether Snipes has breached its terms. Even if the Court assumes the Confidentiality Agreement is enforceable, however, Plaintiff's only evidence of breach—other than conclusory assertions made "upon information and belief"—are (i) its averment that four clients received a phone call from Snipes after he resigned from Vanguard and are now considering whether to transfer their accounts to Topsail, (ii) its averment that three clients that Snipes visited earlier in 2022 have "been reluctant to engage with their new proposed advisors," (Compl. ¶ 37); and (iii) a 29 April 2022 email from a Vanguard client to Snipes indicating that the client was considering transferring his family's accounts after receiving Snipes's call.

32. Although the Court can certainly understand Plaintiff's concerns in these circumstances, the Court cannot conclude on this record that Plaintiff is likely to succeed on its claim for breach of the Confidentiality Agreement. Although it is certainly possible that Snipes has used customer lists and the personal and financial information of Vanguard's customers to identify customers and target his solicitation efforts, it is also possible on this record that Snipes relied on his memory to place calls

or send emails to these clients, received unsolicited calls and emails from these clients containing their contact information, and/or made communications to these clients that did not constitute a solicitation under the Confidentiality Agreement. The Court will require further evidence before it can reach the conclusions that Plaintiff seeks.

33. Based on the foregoing, the Court concludes that Plaintiff has failed to show a likelihood of success on its claim against Snipes for breach of the TPA.

C. Whether a Temporary Restraining Order is Warranted for the Remaining Tort Claims

34. In light of the Court's conclusion that Plaintiff has failed to show a likelihood of success on its claim for breach of the Confidentiality Agreement on this record, the Court likewise concludes that Plaintiff has failed to show a likelihood of success on Plaintiff's claims for misappropriation of trade secrets, tortious interference with contractual and business relationships, and unfair competition since the evidence supporting those claims is identical and, at this stage, insufficient to show a likelihood of success on the merits.

35. Similarly, in light of the Court's conclusion that Plaintiff has failed to show a likelihood of success on its claim for breach of the TPA, the Court likewise concludes that Plaintiff has failed to show a likelihood of success on its claim for tortious interference with contract against Topsail, which necessarily depends upon the enforceability of the TPA.

36. Finally, the Court concludes that Plaintiff has not shown a likelihood of success on its breach of fiduciary duty of loyalty claim against Snipes because it appears to the Court that North Carolina law likely applies to Snipes's alleged

misconduct and North Carolina law does not recognize an independent claim for an employee's breach of a duty of loyalty. *See Dalton v. Camp*, 353 N.C. 647, 653 (2001) ("[A]lthough our state courts recognize the existence of an employee's duty of loyalty, we do not recognize its breach as an independent claim. Evidence of such a breach serves only as a justification for a defendant-employer in a wrongful termination action by an employee.").

37. In addition, although Plaintiff argues that the law of up to thirteen other states may apply to Snipes' various tort claims, Plaintiff has made minimal effort at this stage to identify which state's law applies to which of Plaintiff's claims and, as a result, the Court concludes that Plaintiff has failed to show a likelihood of success on any of Plaintiff's tort claims under any other state's law at this time.

D. Whether Expedited Discovery is Warranted

38. Plaintiff has included a request for expedited discovery at paragraph 104 and its prayer for relief in its Verified Complaint without offering a supporting justification, without suggesting a proposed timeframe for expedited discovery, and without identifying the specific document requests, interrogatories, and depositions it wishes to pursue on an expedited basis. Accordingly, the Court concludes, in the exercise of its discretion, that Plaintiff's request for expedited discovery should be and hereby is denied, but without prejudice to either party's right to file a separate motion for expedited discovery with supporting briefs and evidence consistent with Business Court Rule ("BCR") 7.

39. Similarly, because BCR 7 requires any motions, including motions for preliminary injunctions, to be filed as separate motions with supporting briefs, the Court will not take further action on Plaintiff's request for preliminary injunction, which is contained within Plaintiff's Verified Complaint, pending Plaintiff's compliance with BCR 7.

40. **WHEREFORE**, for the reasons set forth above and in the exercise of its discretion, the Court hereby **DENIES** Plaintiff's Motion for Temporary Restraining Order.

SO ORDERED, this the 6th day of June, 2022.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge