STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 39534
CTS METROLINA, LLC, Plaintiff, v. DUSTIN BERASTAIN, TIMOTHY MOREAU, and INKWELL EMERGENCY RESPONSE, LLC, Defendants.	**ORDER FOLLOWING SHOW CAUSE HEARING**

1. **THIS MATTER** came on for hearing before the Court following the issuance of a Show Cause Order, (ECF No. 67), resulting from Plaintiff's Motion for Order to Show Cause and for Expedited Briefing (the "Motion"), (ECF No. 54).[1] The Show Cause Order required Defendants Dustin Berastain, Timothy Moreau, and Inkwell Emergency Response, LLC (Chakyra Cherry—Director of Operations) to appear for a hearing on 7 May 2024 to show cause why they should not be held in civil contempt for failing to comply with the Court's 19 January 2024 Preliminary Injunction Order, (ECF No. 37).

2. The Court, having considered the evidence presented at the hearing, the arguments of counsel, and other relevant matters of record, **FINDS** and **CONCLUDES** as follows:

[1] Plaintiff moved to hold Defendants in civil contempt, not criminal contempt. The Court, therefore, approached the Motion pursuant to N.C.G.S. § 5A-23, as opposed to § 5A-11 *et seq*.

A. Findings of Fact[2]

3. Plaintiff CTS Metrolina, LLC ("CTS Metrolina" or "Plaintiff") is a Louisiana limited liability company that provides emergency property restoration services. (Ver. Compl. ¶¶ 4, 11, ECF No. 3.)

4. In March 2022, CTS Metrolina purchased the assets of Metrolina Restoration LLC ("Restoration"), a North Carolina limited liability company owned and operated by Defendants Dustin Berastain ("Berastain") and Timothy Moreau ("Moreau"). (Ver. Compl. Ex. 3, ECF No. 3.3; May Hr'g. Tr. 15:12-16, 22:1-2, ECF No. 83.)

5. In the transaction, CTS Metrolina acquired Restoration's assets, including its intellectual property and trade secrets, accounts, relationships, and employment contracts. (Ver. Compl. Ex. 3 § 1.1.) In exchange, Berastain and Moreau received $3.6 million and were offered positions as co-presidents of CTS Metrolina. (May Hr'g. Tr. 22:1-10, 23:11-12, 67:8-12.) Additionally, both Berastain and Moreau were required to agree to the terms of a Confidentiality and Protective Covenant Agreement (the "Restrictive Covenant Agreement") that includes noncompetition, nonsolicitation, and confidentiality provisions. (Ver. Compl. Exs. 4 & 5 ["Restrictive Covenant Agreement"], ECF Nos. 3.4, 3.5; May Hr'g. Tr. 44:14-16.)

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[2] To the extent the Court's findings of fact are more properly considered conclusions of law or vice versa, the finding or conclusion may be properly reclassified. *N.C. State Bar v. Key*, 189 N.C. App. 80, 88 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

6. The noncompetition provisions in the Restrictive Covenant Agreement prohibit Berastain and Moreau from:

> *directly or indirectly through the use of others*: (a) [e]ngag[ing] in *or assist[ing] any other Person in engaging in* the Business in the Territory . . . in a capacity that is substantially similar to the capacity in which [Berastain or Moreau] served [Restoration] within the 12-month period preceding the Closing; (b) [p]rovid[ing] or perform[ing] services or duties to any Person in the Business in the Territory . . . that are the same or substantially similar to those services or duties provided by [Berastain or Moreau] to [Restoration] anytime during the 12-month period preceding the Closing; or (c) *[h]aving an active interest* in any Person that engages in the Business in the Territory, including as a partner, shareholder, member, employee, principal, agent, trustee or consultant . . . [except that Berastain or Moreau] may own, solely as a passive investment, securities of any Person traded on any national securities exchange if [Berastain or Moreau] is not a controlling Person . . . and does not, directly or indirectly, own five percent (5%) or more of any class of securities of such Person.

Restrictive Covenant Agreement, Sections 3.1(a)-(c) (emphasis added).

7. The Business is defined as:

> the business, practices and operations of [Restoration], as conducted and as proposed to be conducted as of the date of this Agreement and as conducted as of the Closing Date and during the Restricted Period, which includes, without limitation, *the provision of disaster recovery, mitigation, and restoration services primarily to owners of damaged or otherwise affected residential and commercial structures* in the eastern United States, based out of North Carolina. For the sake of clarity, the "Business" does not include the post-remediation construction activities of Affinity Construction, LLC, which is owned in part by Owner.

Restrictive Covenant Agreement, Section 4(b) (emphasis added).

8. In their new roles, Berastain and Moreau developed business, managed, and operated CTS Metrolina on a day-to-day basis. (May Hr'g. Tr. 23:7-10, 67:8-12.) American Homes for Rent ("AH4R") was one of Restoration's largest customers and

became a significant customer for CTS Metrolina following Berastain and Moreau's sale of Restoration to CTS Metrolina. (May Hr'g. Tr. 41:14-23, 78:4-12, 160:11-23.)

9. Berastain's employment with CTS Metrolina was terminated on 10 October 2023. (May Hr'g. Tr. 67:16-19.) Following Berastain's termination, Moreau resigned. (May Hr'g. Tr. 24:7-9.) Around the same time, both Berastain and Moreau invested in IER Holdings, LLC ("IER Holdings") as equal partners. (May Hr'g. Tr. 24:14-20, 67:20-22.)

10. By 26 October 2023, only two weeks after Berastain and Moreau's departure from CTS Metrolina, IER Holdings had formed Inkwell Emergency Response, LLC ("Inkwell"), a Wyoming limited liability company that competes with CTS Metrolina in the emergency restoration services industry. (Ver. Compl. Ex. 1, ECF No. 3.1; May Hr'g. Tr. 25:1-10.) Inkwell is the only business held by IER Holdings. (May Hr'g. Tr. 25:5-7.)

11. Since forming Inkwell, Berastain and Moreau claim that they have worked for Inkwell only as unpaid laborers. (May Hr'g. Tr. 26:15-16, 27:18-19, 68:4-15, 69:11-12.) However, Chakyra Cherry ("Cherry"), also a former employee of CTS Metrolina, (May Hr'g. Tr. 121:20-21), and currently Director of Operations for Inkwell, (May Hr'g. Tr. 25:23-25, 121:1-7), testified that Berastain and Moreau do not report to her. (May Hr'g. Tr. 149:25, 150:1-7.) She further testified that, despite being responsible for all of the company's operations, she does not know who signs company checks or authorizes payroll. (May Hr'g. Tr. 149:1-3, 153:2-6.)

12. Concerned that Defendants were violating the Restrictive Covenant Agreement, Plaintiff filed a Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction on 19 December 2023, (ECF No. 6). After entering a temporary restraining order, (TRO, ECF Nos. 11, 16, 32), the Court held a hearing on Plaintiff's Motion for Preliminary Injunction on 11 January 2024. (Not. of Hr'g., ECF No. 17.) On 19 January 2024, the Court granted Plaintiff's Motion for Preliminary Injunction. (PI Order, ECF No. 37.)

13. In relevant part, the PI Order provided:

> Defendants Dustin Berastain and Timothy Moreau and their respective agents, servants, employees, and attorneys, and other persons in active concert or participation with them, including Defendant Inkwell, are enjoined from (i) engaging in, (ii) assisting any other entity or person (including any person working on or behalf of Inkwell) to engage in, or (iii) providing or performing services for, any person or entity in the commercial property restoration business, to the extent Berastain or Moreau would be acting in a capacity that is substantially similar to the capacity Berastain or Moreau served Restoration within the 12-month period preceding the closing date of the APA between Restoration and CTS Metrolina.

(PI Order ¶ 51(3).) The above prohibition applied to specific metropolitan areas, including Raleigh, North Carolina; Greensboro, North Carolina; Greer, South Carolina; and Jacksonville, Florida.

14. In February and March of 2024, CTS Metrolina received emails meant to be sent to Cherry at her new Inkwell email address. These emails reflect continued efforts by Inkwell to solicit business from AH4R. (May Hr'g. Tr. 160-164.)

15. On 14 March 2024, Plaintiff filed the Motion contending that Defendants were violating the PI Order. On 18 March 2024, the Court ordered

expedited briefing, (ECF No. 57). After full briefing, the Court issued the Show Cause Order on 4 April 2024, requiring Defendants to appear on 7 May 2024 to show cause why they should not be held in civil contempt.

16. Berastain, Moreau, and Cherry, (on behalf of Inkwell), all appeared at the Show Cause Hearing. Each testified that they interpreted the PI Order to enjoin them from performing restoration services only if the job involved the restoration of a *commercial* property. (May Hr'g. Tr. 36:8-15, 48:19-21, 49:20-23, 125:8-13.) Cherry testified that a "commercial property" is "a property that a business is operating in[.]" (May Hr'g. Tr. 125:15-16.) Defendants further testified that because they had only engaged in restoration projects that involved *residential* properties, they believed they had complied with the PI Order. (May Hr'g. Tr. 33:7-10, 68:16-17, 125:14-19.)

17. On 24 April 2024, two weeks prior to the hearing on 7 May 2024, Berastain and Moreau sold both IER Holdings and Inkwell to S & P Cap Partners, LLC ("S & P") for three hundred thousand dollars. (May Hr'g. Tr. 27:20-25, 98:9-11, 103:4-6; Aff. of Frank Muraca ["Muraca Aff."] ¶ 2, ECF No. 81.)[3] Nevertheless, as of the date of the hearing, both men were still employed "as laborers for Inkwell projects." (Muraca Aff. ¶ 3.)

18. While Moreau testified that he intended to continue to work for Inkwell as a laborer after the sale to S & P, (May Hr'g. Tr. 28:10-19), Inkwell thought better

[3] After the show cause hearing, Inkwell filed the affidavit of Frank Muraca, updating the Court on Inkwell's decision to part ways with Messrs. Moreau and Berastain "because doing so was the simplest and safest way to ensure that Inkwell would remain in compliance with the injunction[.]" (Muraca Aff. ¶ 5.) There being no objection to the Court's consideration of this affidavit, the Court includes it in its analysis as a supplement to Mr. Muraca's sworn testimony at the hearing.

of the idea. According to Muraca, as of 23 May 2024, Berastain and Moreau "are not providing any services, work, or other assistance to Inkwell in any capacity whatsoever." (Muraca Aff. ¶ 4.) Furthermore, "Inkwell has no intention . . . of employing, contracting with, or otherwise obtaining services, work, or other assistance from Berastain or Moreau at any time during the pendency of this action or the term of their restrictive covenants." (Muraca Aff. ¶ 4.)

B. Conclusions of Law

19. By statute, "[f]ailure to comply with an order of a court is a continuing civil contempt as long as:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C.G.S. § 5A-21(a).

20. "Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties." *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 20, at **7 (N.C. Super. Ct. Feb. 26, 2016) (quoting *O'Briant v. O'Briant*, 313 N.C. 432, 434 (1985)). Upon a finding of civil contempt, the Court's only remedy is to order imprisonment for "as long as the civil contempt continues, subject to

certain time limitations." *Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 57, at **79 (N.C. Super. Ct. Sept. 3, 2019); *see also* N.C.G.S. § 5A-21(b).

21. Given that "[t]he purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order[,]" *Bethea v. McDonald*, 70 N.C. App. 566, 570 (1984), an order holding a party in civil contempt must specify how the contemnor may purge the contempt. N.C.G.S. § 5A-23(e); *see also Cox v. Cox*, 133 N.C. App. 221, 226 (1999). Once the purge conditions are met, a person imprisoned for civil contempt must be released. N.C.G.S. § 5A-22(a).

22. When, as here, the court has found probable cause and issued a show cause order, the alleged contemnor has the burden of proof to show cause why he or she should not be held in civil contempt. *Cumberland County ex rel. Ala. O. B. O. v. Lee*, 265 N.C. App. 149, 153 (2019).

23. Turning to the section § 5A-21(a) factors, the PI Order that is the subject of the Motion remains in force. It was entered pending a final judgment or other order of the Court, and the Court has not entered any order dissolving the PI Order. (*See* PI Order ¶ 51(6): "The Preliminary Injunction Order shall remain in effect until the entry of final judgment in this case or until a further order is entered modifying or terminating the Preliminary Injunction Order.") Further, the purpose of the PI Order may still be served by compliance.

24. However, Defendants' noncompliance with the PI Order must be willful to constitute civil contempt. N.C.G.S. § 5A-21(a)(2a). "Noncompliance with a court order is willful when it involves either a positive action (a purposeful and deliberate

act) in violation of a court order or a stubborn refusal to obey a court order (acting with knowledge and stubborn resistance)." *Total Merch. Servs., LLC v. TMS NC, Inc.*, 2022 NCBC LEXIS 87, at *10 (N.C. Super. Ct. Aug. 2, 2022) (quoting *Hancock v. Hancock*, 122 N.C. App. 518, 525 (1996)) (cleaned up).

25. Defendants admittedly have knowledge of the PI Order because it was filed through the Court's electronic filing system, which automatically sent notice to Defendants' counsel. Defendants argue, however, that their noncompliance was not willful because they did not understand the PI Order to prevent them from starting a competing business and soliciting one of Plaintiff's top clients. For the reasons stated herein, the Court is skeptical of Defendants' claimed lack of understanding. Still, given the gravity of the punishment – Defendants' imprisonment – the Court is not prepared to conclude as a matter of law that the language of its PI Order was so clear that it defies reality for Defendants to have misunderstood it.

26. The PI Order prohibits Defendants from engaging in, assisting, or providing or performing services for, any person or entity in the "*commercial* property restoration business." The Court added the word "commercial" as an adjective to differentiate property restoration that happens at a commercial level and is performed by businesses, like Inkwell, from property restoration undertaken by homeowners engaged in do-it-yourself home improvement projects. Defendants, on the other hand, emphasize the first two words of the phrase and argue that they understood the prohibition to apply to the restoration of only *commercial property*.

On that basis, they contend, they are free to engage in the restoration of residential property such as that owned by American Homes for Rent ("AH4R").

27. While plausible given the words on the page, in the context of this case, Defendants' interpretation of this language in the PI Order is astonishing. As Defendants are well-aware, the PI Order was entered in large part because of evidence that Defendants were actively soliciting one of Plaintiff's largest customers, AH4R. (PI Order ¶ 48.) AH4R is a commercial business that owns residential properties and leases them to individuals. (May Hr'g. Tr. 42:7-11.) The competitive activity at issue in the hearing on the PI motion was restoration work on those residential properties. There was no mention of restoration work on commercial property in either the TRO or the PI proceedings. Indeed, Inkwell does not engage in the restoration of commercial properties. (May Hr'g. Tr. 125:17-25.)

28. Furthermore, Defendants cannot escape the fact that the PI Order was entered as a result of Plaintiff's motion to enforce the parties' Restrictive Covenant Agreement. The Restrictive Covenant Agreement prohibits Berastain and Moreau from engaging in "the Business in the Territory," and the "Business" is defined to include "restoration services primarily to owners of damaged or otherwise affected *residential* and commercial structures[.]" (PI Order ¶ 11, n. 4; Restrictive Covenant Agreement § 4(b) (emphasis added).) These circumstances make dubious Defendants' assertions that they did not understand the PI Order to restrict their efforts to solicit business from AH4R because the jobs involved the restoration of residential properties.

29. Defendants' argument that Berastain and Moreau worked as mere laborers for Inkwell and, therefore, did not act in a capacity that is "substantially similar to the capacity Berastain or Moreau served Restoration within the 12-month period preceding the closing date of the APA between Restoration and CTS Metrolina" is even more easily dispatched. As the hands-on founders and co-owners of Restoration, Berastain and Moreau built the business from the ground up and were responsible for serving Restoration in every capacity necessary for it to be profitable. As the owners of Inkwell, they were motivated to do the same, even while ostensibly assisting on particular jobs as laborers. The Court does not give credence to Defendants' testimony to the contrary.

30. In conclusion, Defendants' position causes them to teeter on the precipice of contempt. Nevertheless, the Court cannot conclude as a matter of law that their noncompliance with the PI Order was willful. *See Williams v. Chaney*, 250 N.C. App. 476, 480 (2016) ("If the prior order is ambiguous such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have knowledge of that order for purposes of contempt proceedings." (cleaned up)); *see also Blevins v. Welch*, 137 N.C. App. 98, 103 (2000) (same). Instead, the proper remedy here is for the Court to amend the PI Order to ensure Defendants' complete understanding moving forward[4] and to make plain that any future

[4] The Court observes, without ordering, that nothing herein prevents counsel for Defendants from conferring with counsel for Plaintiffs prior to Defendants' decision to engage in an activity that could violate the PI Order to determine and evaluate Plaintiff's position in that regard.

violations will result in the Court's review for purposes of determining whether the party in question has engaged in criminal contempt.

31. Accordingly, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the Court shall amend paragraph 51(3) of the PI Order as follows:

> Defendants Dustin Berastain and Timothy Moreau and their respective agents, servants, employees, and attorneys, and those persons in active concert or participation with them, are enjoined from, either directly or through the use of others: (i) engaging in disaster recovery, mitigation, and property restoration services, (ii) assisting any other entity or person (including Inkwell or any person working for or on behalf of Inkwell), to engage in disaster recovery, mitigation, and property restoration services, (iii) providing or performing services for any person or entity in the business of disaster recovery, mitigation, and property restoration that are the same or substantially similar to those services or duties provided by Berastain or Moreau to Restoration within the 12-month period preceding the closing date of the APA between Restoration and CTS Metrolina; or (iv) having an active interest in any entity or person that engages in disaster recovery, mitigation, and property restoration services, including as a partner, shareholder, member, employee, principal, agent, trustee or consultant, except that Berastain or Moreau may own, solely as a passive investment, securities of any entity traded on any national securities exchange if Berastain or Moreau does not, directly or indirectly, control the entity or own five percent (5%) or more of any class of securities of the entity. The prohibitions herein shall apply to the following metropolitan areas:
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> a. Phoenix, Arizona;
> b. Jacksonville, Florida;
> c. Tampa Bay, Florida;
> d. Orlando, Florida;
> e. Atlanta, Georgia;
> f. Marietta, Georgia;
> g. Boise, Idaho;
> h. Indianapolis, Indiana;
> i. Chicago, Illinois;
> j. Louisville, Kentucky;
> k. Southaven, Mississippi;
> l. Albuquerque, New Mexico;
> m. Charlotte, North Carolina;
> n. Raleigh, North Carolina;

o. Greensboro, North Carolina;
p. Columbus, Ohio;
q. Akron, Ohio;
r. Cincinnati, Ohio;
s. Portland, Oregon;
t. Greer, South Carolina;
u. Charleston, South Carolina;
v. Columbia, South Carolina;
w. Knoxville, Tennessee;
x. Nashville, Tennessee;
y. Memphis, Tennessee;
z. Austin, Texas;
aa. Dallas, Texas;
bb. Houston, Texas;
cc. San Antonio, Texas;
dd. Salt Lake City, Utah;
ee. Seattle, Washington; and
ff. Milwaukee, Wisconsin

32. Pursuant to N.C.G.S. § 5A-11(a)(3), a Court may find a person in criminal contempt for the "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." Should Defendants display "a bad faith disregard for authority and the law" by refusing to comply with this Order, criminal contempt is an appropriate sanction. *See Mason v. Mason*, 2019 NCBC LEXIS 79, at *29 (N.C. Super. Ct. Nov. 26, 2019). "A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500), or any combination of the three[.]" N.C.G.S. § 5A-12(a).

33. Defendants are hereby **ORDERED** to preserve all records relating to the formation, operation, and sale to S & P Cap Partners, LLC of both IER Holdings and Inkwell.

34. As for Inkwell, because Berastain and Moreau recently sold Inkwell and are no longer working for Inkwell "in any capacity," the Court concludes that Inkwell itself is not in continuing violation of the PI Order. *See Rose's Stores, Inc. v. Tarrytown Ctr., Inc.*, 270 N.C. 206, 214 (1967) ("Civil contempt . . . is applied to a continuing act[.]"); *Blue Jeans Corp. v. Amalgamated Clothing Workers of America,* 275 N.C. 503, 508 (1969) ("Civil contempt proceedings look only to the future."). Under the circumstances, Inkwell will not be held in civil contempt.

IT IS SO ORDERED, this 31st day of May, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases