COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2284CV02596

EMPIRE DEALER SERVICES, INC. and JOHN KANE

vs.

KIMBERLY A. GUERIN and DRIVER DEALER PERFORMANCE, INC.

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The plaintiff Empire Dealer Services, Inc., a close corporation, and its sole director and president, treasurer, and secretary, John Kane (collectively, "Empire"), filed suit against Kimberly A. Guerin, a former Empire Vice President and, in Empire's view, a minority shareholder of Empire, for competing with Empire through a new company she formed in November 2022, Drive Dealer Performance, Inc. ("DDP"). Empire seeks to enjoin Guerin from pursuing the new venture because doing so violates her fiduciary duties to Empire and the terms of restrictive covenants contained in a Confidentiality, Non-Solicit & Non-Compete Agreement ("Agreement) signed in January 2021. Guerin argues that she should not be considered a shareholder any longer and thus not subject to fiduciary duties to Empire, and that the Agreement is unenforceable.

The Court need not reach the arguments concerning the Agreement because Empire's fiduciary duty claim drives this analysis and demonstrates that Empire is entitled to an injunction. Accordingly, for the reasons that follow, the motion for preliminary injunction as framed below is **ALLOWED IN PART**.

BACKGROUND

In or about August 29, 2012, Kane and Edward Adamson incorporated Empire for

the purpose of serving as an agent selling a wide variety of insurance and warranty products and other services to car dealerships. Empire is an "S" corporation. When Empire was formed, Mr. Adamson and Mr. Kane each owned 42.5% percent of the shares of stock in Empire and all of the voting shares.

Empire was successful; between 2018 and 2021 Empire had annual revenues of more than $2.5 million.

In or about 2016, Guerin was hired as an account representative at Empire.

On January 19, 2021, Guerin entered into the Agreement, which imposed restrictive covenants on her.

On August 19, 2021, Adamson filed a lawsuit, Edward Adamson v. John Robert Kane, Suffolk Sup. Ct. Case No. 2184-CV-01895-BLS, seeking, among other things, to dissolve Empire pursuant to M.G.L. c. 156D, §14.30 ("Dissolution Litigation").

On or about January 10, 2022, Guerin and Kane agreed in writing that upon resolution of the Dissolution Litigation, Guerin would be promoted to Vice President, become a shareholder in the Company, and receive 20% ownership in Empire, among other benefits.

In 2022, Guerin was on track to earn in excess of $400,000.

On or about March 22, 2022, Adamson and Kane settled the Dissolution Litigation, as a result of which Kane became an 80% shareholder in Empire and Guerin became a 20% shareholder in Empire. On that date, Empire issued a stock certificate for 1,000 common shares to Guerin which equals 20% of the total shares of the Company. Guerin accepted the stock certificate by e-signing the stock certificate via DocuSign. Since March 22, 2022, Guerin and Kane have been the only shareholders of Empire.

In or about March 2022, Guerin was also appointed to be the Vice President of Empire and her name and title were identified in the Annual Report and Business Entity Summary filed with the Massachusetts Secretary of the Commonwealth, Corporations Division.

As an employee, officer and shareholder of Empire, Guerin played an integral role in the daily operations of Empire and had access to all of Empire's customer information, business plans, financial information and sales numbers. Kane and Guerin spoke on almost a daily basis about the Company. In 2022, Empire was on track to have an extremely profitable year.

On November 1, 2022 at 11:44 a.m., Kane received an unexpected email from counsel for Guerin (and her counsel in this matter), attaching a 5 page, single spaced letter ("Letter"). The Letter accused Kane of committing a number of frauds or other wrongs against Empire and informed Kane the Guerin "relinquish[ed] any and all rights she has as a stockholder in Empire" and resigned as Vice President. Among other things, Guerin contended that Kane had breached his fiduciary duties to Empire by (1) paying his ex-wife from a company account, about which Guerin conceded he had previous knowledge, and paying his girlfriend from Empire payroll ,even though neither provided no services to Empire; (2) paying an employee's wife from Empire payroll so that the employee would qualify for unemployment benefits; (3) obligating Empire on a loan to pay Kane's personal expenses; (4) having Guerin sign documentation for an attempted real estate purchase by Kane in which Kane falsely represented that he had full access to Empire's bank account; (5) unilaterally increasing his salary even though he had told Guerin he took no salary; (6) charging personal expenses to an Empire credit card; (7) slow-paying commissions due to

Empire's dealer-customers; (8) discontinuing payment to a person with a "position in this industry," which Guerin alleged would be "highly damaging to Empire and, by extension, Ms. Guerin personally. She does not want even the appearance that she had anything to do with [this] decision"; (9) filing Empire's 2021 Annual Report and inaccurately reflecting Guerin's start date as a stockholder and vice president which "only expose Ms. Guerin to reputational harm and other harm"; (10) failing to disclose to Guerin Adamson's allegations of mismanagement against Kane in the Dissolution Litigation and the terms of the settlement of the Dissolution Litigation with Adamson; and (11) violating the Wage Act with respect to Guerin's compensation.

Guerin took no steps to discuss her allegations with Kane prior to her sending the Letter, and took no steps in court to address them.

Over the course of the next three days, from November 1 to November 4, 2022, all but one of Empire's clients left Empire and immediately began obtaining the services Empire had previously provided them from Guerin and eventually Guerin's new company, DDP.

On or about November 1, 2022, Guerin applied to become an independent agent so that she could compete directly with Empire by offering the same products.

On November 11, 2022, Guerin filed Articles of Organization with the Massachusetts Secretary of the Commonwealth, Corporations Division to register DDP in which Guerin is identified as the President, Treasurer, Secretary, and Director.

DISCUSSION

"A preliminary injunction is an extraordinary remedy never awarded as of right," Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008), and "should not be granted unless the

plaintiffs have made a clear showing of entitlement thereto." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004). Generally, "[t]he party seeking a preliminary injunction must show '(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction.'" Garcia v. Dep't of Hous. & Cmty. Dev., 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003) and Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). "Where the moving party has failed to demonstrate that denial of the injunction would create any substantial risk that it would suffer irreparable harm, the injunction must be denied, no matter how likely it may be that the moving party will prevail on the merits." Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 621 (1980). "Economic harm alone … will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business.'" Tri-Nel Mgmt., Inc., 433 Mass. at 227, quoting Hull Mun. Lighting Plant, 399 Mass. at 643

A. Likelihood of Success

Shareholders in close corporations,[1] including minority shareholders, "owe fiduciary duties not only to one another, but to the corporation as well." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 552 (2014), citing Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 394 (2013); Donahue, 367 Mass. at 593. See also Donahue, 367 Mass. at 593, n. 17 ("[w]e do not

[1] A close corporation has "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." See Brodie v. Jordan, 447 Mass. 866, 868–869 (2006), quoting Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 586 (1975).

limit our holding to majority stockholders. In the close corporation, the minority may do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority."). "Because of the fundamental resemblance ... to [a] partnership ... stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another[, that is,] the 'utmost good faith and loyalty.' " Donahue, 367 Mass. at 592–593, quoting Cardullo v. Landau, 329 Mass. 5, 8 (1952).

At the time of the alleged wrongs described in Guerin's Letter, she was both a shareholder and officer of Empire, and thus had a duty to address her concerns to protect the company. See, e.g., G. L. c. 156D, § 8.42 (corporate officer required to discharge duties "(1) in good faith; (2) with the care that a person in a like position would reasonably exercise under similar circumstances; (3) in a manner the officer reasonably believes to be in the best interests of the corporation."). Yet she took no steps to do so.

Guerin claims that through the Letter, she resigned as Empire's vice president and "renounced" her shares in Empire because of Kane's alleged fraudulent activity, and thus shed herself of any fiduciary duty to him or the company. The Court strongly disagrees with this argument and concludes that Guerin remains a minority shareholder in Empire and thus owes fiduciary duties to Empire and Kane.

The theme of Guerin's Letter and position in this litigation is that Kane's alleged wrongs put Guerin at personal risk and justified her abandoning Empire and Kane. Leaving aside the speculative nature of this claimed risk,[2] Guerin plainly elevated her personal interests over those

[2] The bylaws of Empire, produced after the hearing, includes an indemnification provision for officers and others who "acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation" (Section 5.01), which Guerin does not address in her Letter or argument here. See also G. L. c. 156D, §6.22(b) (limiting liability of shareholders for corporate debts except arising from shareholder's own acts or conduct).

of Empire and its majority shareholder. This is the opposite of what the law required of her as a shareholder of a close corporation -- and, for that matter, as an officer of it. As a shareholder, she was required to "discharge [her] management and stockholder responsibilities in conformity with [a] strict good faith standard" of utmost good faith and loyalty, and "not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." Donahue, 367 Mass. at 593. Her failing to take any action on behalf of the company and Kane, and her decision to abandon both to directly compete with Empire, is directly inconsistent with these duties.

Guerin's claim that her duties to Empire and Kane ended when she renounced her shares is meritless on the facts and the law. Factually, she concedes that Empire and Kane have not accepted her renunciation, and nothing in the company's by-laws permit her return of shares. Legally, nothing supports the notion that a shareholder of a close corporation can terminate her responsibilities this way. See Goode v. Ryan, 397 Mass. 85, 90–91 (1986) ("In the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or by-laws, neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation.").[3] Moreover, Guerin's novel theory of "renunciation" would run directly contrary to the guidance in Donahue and Selmark. Indeed, the Supreme Judicial Court held in Selmark that the termination of a shareholder from employment with the company did not end that shareholder's duties to the company: "Allowing a party who has suffered harm within a close corporation to seek retribution

[3] Guerin's further claim that the shares were a gift is unsupported; the record shows they were part of compensation for past performance and part of her compensation plan going forward.

by disregarding its own duties has no basis in our laws and would undermine fundamental and long-standing fiduciary principles that are essential to corporate governance. We see no reason to take such a drastic step. If shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase. Rather, if unable to resolve matters amicably, aggrieved parties should take their claims to court and seek judicial resolution." Selmark Assocs., 467 Mass. at 552–553 (citations, internal punctuation omitted). The same principle applies here. Thus, even assuming the truth of all of Guerin's allegations against Kane, none of them authorized Guerin to walk away from her duties to Empire and Kane, and certainly do not permit her to actively undermine those duties by competing with the company.

When asked at argument whether she was advocating for a rule permitting "renunciation" of shares at will by a shareholder in a close corporation, Guerin said she was not and that her renunciation was premised on Kane's fraud in failing to advise her of his alleged wrongdoing. But this claim rings hollow for the reasons expressed above and on the merits of what is evidently a fraud in the inducement claim. The elements required to prove fraud in the inducement are: (1) a misrepresentation of material fact; (2) made to induce action; and (3) reasonable reliance on the false statement to the detriment of the actor. Hogan v. Riemer, 35 Mass. App. Ct. 360, 365 (1993). Reliance is an essential element of actionable fraud. Nei v. Burley, 388 Mass. 307, 311 (1983). "To show fraud by omission, the plaintiff must allege both concealment of material information and a duty requiring disclosure." Buffalo-Water 1, LLC v. Fid. Real Est. Co., LLC, 481 Mass. 13, 25 (2018). Guerin has not shown concealment or reasonable reliance. She concedes that some of the frauds she alleges were known to her when she received the shares -- the Letter and her affidavit filed in this case acknowledge that Guerin

knew that Kane was paying his ex-wife from a company account. She participated in at least one of the alleged frauds when she signed allegedly false loan documentation, and admits she was told about alleged unemployment fraud before it occurred.. Nor has she shown damage; all that she points to is speculation about adverse personal consequences to her if the frauds she alleges are true, but as noted above, these concerns do not excuse Guerin from ignoring her duty to take action and address these concerns.

Empire thus has shown a likelihood of success on the merits of the breach of fiduciary duty claim

B. Irreparable Harm/ Balance of Harms

Empire has demonstrated that unless Guerin is enjoined from servicing Empire's customers, Empire has no hope of recovering that business and will go out of business. It further argues an injunction is necessary, otherwise breaches of fiduciary duty such as are at issue here will succeed. For her part, Guerin claims that the business is already lost, and the injunction will simply prevent her from paying any damages that Empire can prove and harm the customers.

The Court does not accept Guerin's argument that, in effect, she can buy her way out of an ongoing breach of fiduciary duty. Such a conclusion would undermine Donahue and Selmark and encourage, rather than discourage, such breaches. Where a shareholder in a close corporation violates duties to other shareholders, "[t]he proper remedy .. is to restore [the wronged shareholder] as nearly as possible to the position [s]he would have been in had there been no wrongdoing. … the remedy should, to the extent possible, restore to the [wronged] shareholder those benefits which she reasonably expected, but has not received because of the fiduciary breach. … The remedy should neither grant … a windfall nor excessively penalize the

[wrongdoer]. Rather, it should attempt to reset the proper balance between" the two sides. Brodie v. Jordan, 447 Mass. 866, 870–871 (2006) (citations, internal punctuation omitted).

Here, allowing Guerin to perpetuate an ongoing breach of fiduciary duty, and harm both the company and its majority shareholder -- both of which are owed a fiduciary duties -- is plainly unacceptable. Indeed, if the preliminary injunction requested in this case were not granted, Empire's business and goodwill would be lost, which Empire argues with some force is not compensable in damages and may be terminal for the company. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18-19 (1st Cir. 1996) ("If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel") (internal citations omitted). See also Bowne of Boston, Inc. v. Levine, 1997 WL 781444, at *5 (Mass. Super. Nov. 25, 1997) (Burnes, J.) ("the loss of goodwill has been recognized as being particularly hard to quantify, giving rise to the need for equitable relief"). "Prospective injunctive relief may be granted to ensure that the plaintiff is allowed … to enjoy financial or other benefits from the business, to the extent that her ownership interest justifies." Brodie, 447 Mass. at 874.

While an injunction plainly has negative consequences for Guerin, and potentially for the customer at issue, those harms are heavily outweighed by the threat of irreparable harm to Empire and Kane. But Guerin's claim that the customers in dispute will be harmed is overblown. Guerin remains a shareholder of Empire with obligations to protect its interests. She thus must take steps to protect Empire's interests, including facilitating the return of those customers to Empire. The obvious path is that she can serve Empire and the clients by providing them services through Empire.

ORDER

For the foregoing reasons, Plaintiff's motion for a preliminary injunction is **ALLOWED IN PART, AS FOLLOWS:**

Defendants Kimberly Guerin and Driver Dealer Performance, Inc. ("Defendants") are hereby enjoined as follows:

a. Defendants are prohibited from directly or indirectly competing with or working for any competitor of Empire;

b. Defendants are prohibited from calling upon, soliciting, diverting, servicing, deriving revenue from, and taking away Empire's customers, business or prospective customers, except as necessary to comply with this Order;

c. Defendants shall immediately take all necessary steps to alert all former Empire customers of this Order and their obligation to cease providing services to them;

d. Guerin shall comply with her obligations to Empire and take all necessary steps to facilitate the return of Empire's customers to Empire;

e. Defendants are prohibited from using for their own benefit, or the benefit of any other person or entity, or disclosing to any third person any confidential or proprietary information or trade secrets of Empire.

SO ORDERED.

/s/ Michael D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: November 30, 2022