IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THERMOFORMING MACHINERY & EQUIPMENT, INC., *et al.*	)	**CASE NO. CV 10 742497**
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
vs.	)	
BRIAN SWAIN	)	**JOURNAL ENTRY FINDING THE DEFENDANT IN CONTEMPT OF COURT**
Defendant.	)	

John P. O'Donnell, J.:

Plaintiffs Thermoforming Machinery & Equipment, Inc. and Extrusion Machinery & Equipment, Inc. filed this lawsuit against defendant Brian Swain on December 1, 2010. The gist of the complaint was that Swain, a former salesman for both plaintiffs, was violating a covenant not to compete. Swain counterclaimed on February 28, 2011, alleging, among other things, that the plaintiffs wrongfully discharged him, failed to pay him overtime, and did not pay him commissions that he earned.

Eventually, after discovery, the parties settled all claims by an agreement that was signed on April 11, 2011. The terms of the settlement were adopted in a consent judgment entry journalized two weeks later, on April 25. The parties stipulated that the court retained jurisdiction to enforce the settlement.

On July 15, 2011, the plaintiffs filed a motion for Swain to appear and show cause why he should not be held in contempt for violating the consent judgment entry requiring him to

abide by the settlement agreement. Swain opposed the motion and, after the plaintiffs filed a reply brief, a three-day evidentiary hearing was held. This entry follows.

The plaintiffs' businesses and Swain's work there

The plaintiffs are pass-through sellers of equipment used to manufacture and process plastic products. They identify sellers of such equipment and then, once they identify a buyer, they purchase the equipment without taking title and sell it immediately to the buyer. There are five different kinds of plastic product processing: blow molding, extrusion, rotational, injection and thermoforming. The plaintiffs deal in equipment used in all of these processes except injection.

The businesses are owned by Don Kruschke, who testified that he started in 1990 under a different name. Since then, Kruschke's companies have developed a database of about 30,000 accounts with 70,000 different individual contacts for those accounts. Kruschke described this database as the company's most valuable asset and said it took millions of dollars' worth of effort to amass the information. Because of that, the database is protected by a password and access to it is very limited.

Swain was hired as a sales representative in 2007. His responsibility while working for the plaintiffs was the sale of primary and ancillary equipment used for the blow molding and extrusion processes. He was never given access to the full database. Instead, he was allowed to use information for about 1,000 accounts. He used those accounts to buy and sell plastic processing equipment.

In 2009 Swain and the plaintiffs entered into a "sales representation and non-competition agreement." Germane to this case, the essence of that contract was to prohibit Swain from

competing with the plaintiffs and soliciting their customers for five years after he left his employment. He also agreed not to use the plaintiffs' trade secrets.

Swain's employment with the plaintiffs ended in August 2010. He then started Plastiwin Capital Equipment LLC, which buys and sells machinery and equipment used in the manufacturing and processing of plastic products. He began that business despite his agreement not to have any connection with a company engaged in the sale and purchase of plastic processing equipment. This lawsuit ensued and, as noted above, was resolved through a written settlement agreement incorporated into the April 25, 2011, journal entry and order.

Swain's settlement obligation not to compete with the plaintiffs

The consent judgment entry requires that Swain "shall abide by the terms of the Settlement Agreement entered into on April 11, 2011." The settlement agreement includes a non-competition clause by which Swain agreed

> that until May 1, 2012 . . . he shall not, directly or indirectly, . . . be in any way connected or affiliated with . . . any business engaged in the Business (for purposes of this Agreement, the "Business" of the Company is defined as the sale and purchase of machinery and equipment that is used in connection with the manufacturing and/or processing of blow molded and/or extruded plastic products throughout North America).

The plaintiffs' motion to show cause alleges that Swain violated this term of the settlement agreement by, through Plastiwin, buying and selling equipment used in connection with the processing of blow molded and/or extruded plastic products.

Swain does not dispute that he has bought and sold machinery and equipment that *can be* used in connection with the manufacturing and processing of blow molded and extruded plastic products. He testified that Plastiwin purchased two grinders from Polytech LTD, one of the plaintiffs' vendors. Plastiwin unsuccessfully bid on a third grinder. He also testified that

Plastiwin tried to sell a de-duster to Blue Ridge Industries, a company with which Swain did business while working for the plaintiffs.

Swain concedes that all three grinders and the de-duster could be used by a company in the manufacture or processing of extruded or blow molded plastics. But he contends that his conduct was permissible under the settlement agreement because he was only involved with buying and selling injection molding machinery and equipment. As he testified at the hearing:

> It was my understanding that I could buy and sell injection molding machinery, thermoforming machinery, and rotational molding machinery, as well as any type of ancillary products to anyone as long as it did not pertain to the business of blow molding and extrusion.[1]

By Swain's reasoning, so long as the particular item to be bought or sold *was not going to be used* in connection with the processes of blow molding or extrusion then he would not violate the settlement agreement by dealing in that equipment even if it *could be used* for blow molding or extrusion. He added that he ensured compliance with this interpretation of his obligations by screening potential Plastiwin customers to find out the purpose for which they would be using the equipment they bought, and if they expected to use the equipment for either of the prohibited processes – blow molding and extrusion – then Plastiwin would decline to broker the sale.

But the settlement agreement does not say that Swain must refrain from being engaged in "the sale and purchase of machinery and equipment that is *going to be* used in connection with" blow molding and/or extrusion; instead, the contract says that he cannot engage in "the sale and purchase of machinery and equipment that *is* used in connection with the manufacturing and/or processing of blow molded and/or extruded plastic products." Even if they are broader than Swain now prefers, these terms are clear: if a piece of machinery or equipment *is* used in

[1] Hearing transcript, volume I, page 109.

connection with the two prohibited areas, then Swain, by himself or through Plastiwin, cannot deal in it, even if it is what Swain refers to as ancillary.[2]

Moreover, even though Swain testified that grinders and de-dusters are used primarily in injection molding, he sold both of those types of equipment while working for the plaintiffs in the extrusion area. Additionally, the four pieces of equipment Swain sold, or tried to sell, were all transactions and attempted transactions with clients of the plaintiffs. For example, Swain became acquainted with Polytech's contact person through working for the plaintiffs. Finally, the Polytech grinder that Plastiwin unsuccessfully bid on was ultimately bought by the plaintiffs, who ended up having to pay more than if Swain's company had never placed the bid. All of this is the exact type of conduct a non-compete is designed to prevent.

Kruschke testified that, in addition to the equipment already mentioned, Swain's lists of Plastiwin's 2011 and 2012 sales show that Swain engaged in many transactions involving equipment that is used in connection with blow molding or extrusion. Plastiwin's website also lists for sale many categories of machines and equipment that are prohibited under the terms of the settlement agreement. Louis Fow, the plaintiffs' expert, said that two of the categories marketed by Plastiwin – shredders and de-dusters – are typically used in extrusion.

Swain's settlement obligation not to solicit the plaintiffs' customers

The settlement agreement also contains a non-solicitation clause. By that portion of the contract with the plaintiffs, Swain agreed as follows:

> [T]hat until May 1, 2012 . . . he shall not, either directly or indirectly, divert, take away, solicit, interfere with, or attempt to

[2] Swain argues that this is overbroad because items such as computers, buckets and even electricity could fall under the umbrella of the "in connection with" language. But the parties clearly intended the prohibition against dealing in ancillary equipment to encompass only machinery and equipment typically bought or sold by someone in the industry of buying and selling things used to make plastic products. The industries of buying and selling computers, buckets and electricity are totally separate from the industries in which the customers of the plaintiffs and Swain are engaged.

> divert, take away, solicit or interfere with any present or future customer (it being agreed that future customers include all those persons and entities set forth in the Company's customer list/data base), vendor, referral source, or account of the Company, or offer to provide, sell or lease to, or purchase from, any such customer, vendor, referral source, or account of the Company, at any location, goods or services related to the Business.

The clause has two parts. First, the clause prohibits Swain from soliciting any of the plaintiffs' present or future customers. Second, it prohibits Swain from offering to sell to, or purchasing from, any of the plaintiffs' customers machinery or equipment used in connection with the manufacturing or processing of blow molded or extruded plastic products.

Swain testified that Plastiwin engaged a company called Constant Contact to send out email blasts to a list of email addresses provided by Plastiwin. Swain said he has no way of knowing if the email addresses on that list belong to customers of the plaintiffs because without lists of the plaintiffs' customers he cannot compare their databases to Plastiwin's. But the settlement contract and the court order incorporating it obligate Swain to not solicit "any present or future customer" of the plaintiffs, and that obligation is not contingent on the plaintiffs giving to Swain a list of those customers.

Swain also imputed the blow molding and extrusion limitations in the non-competition portion of the settlement agreement into the non-solicitation provision. As he testified:

> There was no real restrictions as long as I didn't impede on, you know, the business of blow molding or extrusion made products, but I could solicit those to anyone, but again, what I did was, we went above and beyond that. We identified -- we spent hundreds of thousands of hours identifying what companies did what, and if Don and his group were selling to those people, or we projected that they were selling to them, we stayed away. So again, we sold to anyone as long as it didn't impede on -- we sold injection molding because we're an injection molding business, and auxiliary equipment, as long as it, again, didn't interfere with or was part of the blow molded or extrusion processes.[3]

[3] Transcript, vol. 1, pp. 110-111.

Here, Swain either misunderstood or deliberately misinterpreted his obligation under the non-solicitation provision in the settlement agreement. But the language is unambiguous: it prohibits him from soliciting any of the plaintiffs' customers without regard to the uses those customers put to the equipment acquired through the plaintiffs.

According to Kruschke's testimony, at least some recipients of Swain's email blasts are the plaintiffs' customers, including MAAC Machinery and Brown Machine. Kruschke also testified that many of the deals made by Swain in 2011 and 2012 were with the plaintiffs' customers, identifying twelve such transactions from Swain's 2011 sales alone. And there is little doubt that Swain knew he was making deals with at least some of the plaintiffs' customers. He acknowledged that he knew contact people for Polytech from working for the plaintiffs and conceded that he had many dealings with Blue Ridge Industries while working for the plaintiffs before he tried to sell Blue Ridge a de-duster through Plastiwin.

Swain's settlement obligation not to use the plaintiffs' trade secrets

A third portion of the settlement agreement prohibits Swain from using the plaintiff's trade secrets. That section states, in pertinent part:

> . . . Swain agrees that he shall not retain any Trade Secrets[4] and agrees that he shall not communicate, disclose, or divulge to any person, firm, or other party, or use for his own benefit or the benefit of others, any Trade Secrets, which he may now know or hereafter come to know.

There is no question that the plaintiffs' customer database qualifies as a trade secret.

Swain contends that he and others created Plastiwin's customer database using Google searches of publicly available information, trade publications, and personal networking at the National Plastics Exposition. He claims to have accumulated in this fashion about 65,000

[4] "Trade secrets" is defined in the same clause as "information relating to customers, accounts (both sales and purchasing), data base, vendors, referral sources, contract prices, books and records, sales, confidential methods, processes, techniques, designs, information, and all other trade secrets of the Company."

contacts over less than a year. By contrast, Kruschke testified that his list has taken many years to build.

Swain's testimony lacks credibility in the face of a comparison between excerpts of the plaintiffs' database and Plastiwin's customer list.[5] Perhaps the matching individualized language on the two lists could be explained by noting that Swain worked for the plaintiffs for several years and so he continued to use the plaintiffs' argot. But references on Plastiwin's customer list to NPE 2006 – a National Plastics Exposition that occurred before Swain was even in the industry – are less easily explained. And the corresponding amount of duplicates is peculiar at best and damning at worst.[6]

Moreover, there is other persuasive objective evidence that Swain has the plaintiffs' customer database. John Liptak is an expert in computer forensics who examined Swain's computers before the April 2011 settlement. He testified that his review showed that a thumb drive containing a copy of the plaintiffs' database existed. Yet Swain never produced the thumb drive for inspection – either before or after the settlement – claiming as late as the date of the evidentiary hearing on the show cause motion that he could not find the thumb drive even after a thorough search by him, his wife, and everyone at Plastiwin.[7]

And a second forensic examination done post-settlement – this time including an additional computer that Swain had not produced for the initial inspection – revealed that the same thumb drive that was never produced was actually connected to the newly-produced computer as recently as June 2011, or two months after the settlement agreement.

[5] See hearing exhibits 42 and 29.
[6] As one small example, each list has two references to 3B Products and four references to A and B Brush Manufacturing.
[7] It is worth noting that Jay Grissom, a former employee of Plastiwin, testified that Swain never asked him to look for any flash drives or other media storage devices.

The evidence from the forensic examination demonstrating that Swain kept a copy of the plaintiffs' database makes it impossible to believe his claim that he created Plastiwin's customer list without the benefit of the plaintiffs' database.

Contempt of court finding

Based on all of the hearing evidence, the plaintiffs have demonstrated by clear and convincing evidence that Swain violated the settlement agreement's prohibitions against competition, solicitation and the use of the plaintiffs' trade secrets.

Contempt is defined in general terms as disobedience of a court order. *State ex rel. Corn v. Russo*, 90 Ohio St. 3d 551, 554 (2001). To show contempt, it is necessary to establish a valid court order, knowledge of the order, and a violation of it. *State ex rel. Petro v. Pure Tech Sys.*, 8th Dist. No. 101447, 2015-Ohio-1638, ¶68. Swain agreed not to compete with the plaintiffs in the sale of blow molding and extrusion equipment, he agreed not to solicit the plaintiffs' customers for any purpose, and he agreed not to use the plaintiffs' trade secrets. These prohibitions were all incorporated into the court's April 25, 2011, order. Thus, there is no question that Swain has violated a court order and is in civil contempt of court.

The remedy

The remaining question is what to do about Swain's contempt. The plaintiffs propose three remedies: compensatory damages, punitive damages and injunctive relief.[8] In particular, the plaintiffs want compensatory damages in the amount of lost profits because of Swain's actions, attorneys' fees incurred to investigate and prosecute the violations, and an injunction "to put [Swain] out of the business" for two years.[9]

[8] Plaintiffs' memorandum in support of motion to show cause, p. 9.
[9] Transcript, plaintiffs' closing argument, vol. II, p. 217-218.

The purpose of sanctions imposed for civil contempt is to coerce compliance with the underlying order or to compensate the complainant for loss sustained by the contemnor's disobedience. *ConTex, Inc. v. Consolidated Technologies, Inc*., 40 Ohio App. 3d 94, 96 (1988). Lost profits proximately caused by Swain's disobedience and attorneys' fees to detect and prove the contempt will serve to compensate the plaintiffs for Swain's wrongdoing and an evidentiary hearing on those elements of damage will be scheduled in the near future.

The plaintiffs' request for an injunction keeping Swain "out of the business" for two years is more problematic. Initially, because Swain had the customer database all along and because he made sales in 2011 that were contrary to the court order, it is plain that to whatever extent he may have mostly complied with his contract not to compete and not to solicit until May 12, 2012, he never fully complied. Yet even assuming the plaintiffs never got the year of non-competition and non-solicitation to which they were entitled, there is no sound basis to now order a period of non-competition and non-solicitation twice as long as that originally bargained for. Moreover, now that Plastiwin has been in business for almost five years it is likely that the lost profits is an accurate measure of the damage done to the plaintiffs by Swain so that an injunction is not necessary.

Additionally, although there is no debate that the delay from the conclusion of the hearing in April 2013 until this decision is my fault, it is also true that the delay from filing the motion to show cause a little over three months after the settlement – and with ten months still to go on Swain's restrictions – until the end of the evidentiary hearing, by which time the restrictions had been expired for almost a year, was occasioned mostly by the parties.[10] But whatever the reason for the delay – and while acknowledging that Swain has no one but himself

[10] See the August 23, 2011, entry setting an evidentiary hearing for September 13, 2011, and then the subsequent continuances mostly at the parties' request explicitly for discovery or implicitly because of discovery disputes. At least one continuance – in November 2012 – is because I was engaged in a trial.

to blame for any sanction imposed because of his failure to abide by the court order – the punishment cannot exceed what he agreed to in the first place. Hence, the plaintiffs' request to put Swain "out of business" for two years is denied today, just as it would have been if this decision was published in the spring of 2013.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email on July 6, 2015, to the following:

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Judge John P. O'Donnell