UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AUTO DRIVEAWAY FRANCHISE SYSTEM, LLC, Plaintiff, v. JEFFREY CORBETT, AUTO DRIVEAWAY RICHMOND, LLC, and INNOVAUTO USA, LLC, Defendants.	No. 18 CV 4971 Judge Manish S. Shah

PRELIMINARY INJUNCTION ORDER

Plaintiff's motion for a temporary restraining order and preliminary injunction, [55], is granted in part, denied in part. Plaintiff's emergency motion to extend the temporary restraining order and for expedited discovery, [68], is denied. No appearance on November 1, 2018, is necessary.

STATEMENT

Auto Driveaway Franchise System, LLC offers vehicle transportation and shipping management services via seventeen of its own offices and twenty-three franchised offices. These franchisees lease ADFS's trademarks and confidential business information through franchise agreements. Jeffrey Corbett owns Auto Driveaway Richmond, LLC, a former franchisee. ADFS, AD Richmond, and Corbett[1]

[1] Corbett is personally bound by the parties' agreement. The agreement defines "Franchisee" to include "not only the individual or entity defined as 'Franchisee' in the introductory section of this Agreement, but shall also include all partners of the entity that execute this agreement . . . all shareholders, directors and officers of the entity that execute this agreement . . . , and all members and managers of the entity that execute this agreement. *By their signature*, all [such people] that sign this Agreement as Franchisee acknowledge and accept the duties and obligations *imposed upon each of them, individually*, by the terms of this Agreement." (emphasis added). Exhibit F to the Agreement shows that Jeffrey Corbett signed as "Franchisee." Corbett's declaration admits he is the sole member of Auto Driveaway Richmond, LLC. [61-1] ¶ 1. Section 12.3 of the Agreement applies to both "you and the Bound Parties." The first page of the Agreement defines "you" to mean "Franchisee." Although Corbett argues he did not sign in a personal capacity, the context and content of the agreement sufficiently demonstrates his acceptance of the terms.

entered into a franchise agreement[2] on April 6, 2011. The agreement contained a "Post-Term Non-Competition" provision that prohibited AD Richmond, Corbett, and all "Bound Parties" from "engag[ing], directly or indirectly, as an owner, operator, or in any managerial capacity, in any Competitive Business, at or within a fifty (50) mile radius of the former Franchised Territory or any other Territory with an [ADFS] office" for two years following the termination of the agreement. *See* § 12.3. The agreement defined "Competitive Business" to mean "operating 'for hire' motor carrier businesses . . . or any business which operates . . . a business that provides similar services and/or products as those offered by [ADFS]." § 1. The agreement was set to terminate by its own terms on April 6, 2014. § 5.1.

AD Richmond admits that the "original franchise terms [were] extended by agreement between April 6, 2016 and January 31, 2018." [44] at ¶ 34. AD Richmond's conduct was consistent with that admission. *See* [56-1] ¶ 22(up until January 31, 2018, AD Richmond continued to present itself as an ADFS franchisee, pay royalties, book ADFS customers, use ADFS software and intellectual property, and rely on ADFS's insurance provider). AD Richmond also admits that the agreement was continued on a month-to-month basis after January 31, 2018. [44] ¶ 43 ("the parties had been operating on a month-to-month renewal until Plaintiff's termination notice"). Again, AD Richmond's conduct was consistent with this admission. [56-1] ¶¶ 26–28, Ex. 3 at 1 (in June of 2018, AD Richmond's lawyer, Thomas O'Brien, sent a draft document titled, "Mutual Non-Disclosure and Confidentiality Agreement," that said the franchise agreements were "being continued on a month-to-month basis pending the finalization of a mutually acceptable First Renewal Franchise Agreement"); [63-1] ¶¶ 4–6 (AD Richmond continued to make accident claims with, and provide insurance through, ADFS's insurance provider, and assist with the movement of vehicles, until at least September 29, 2018). On August 1, 2018, ADFS sent AD Richmond written notice of its intent to terminate the agreement. [63-1] Ex. G. That termination became effective sixty days after receipt. *See id.*

ADFS seeks a temporary restraining order and preliminary injunction to stop what it believes is conduct amounting to a violation of the agreement. To obtain a preliminary injunction, the moving party must show that it has a better than negligible chance of success on the merits, no adequate remedy at law, and that it will suffer irreparable harm if a preliminary injunction is denied. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044, 1046 (7th Cir. 2017); *Ayres v. City of Chicago*, 125 F.3d 1010, 1013 (7th Cir. 1997) (the suit must have "enough merit—which need not be great merit—to justify an order that

[2] There were at least two other agreements between ADFS and franchises owned by Corbett. *See* [6-2]; [6-3] (Nashville, TN); [6-4]; [6-5] (Cleveland, OH). These agreements are not material for present purposes; the alleged harms violate all three agreements, and there has been no showing of a material difference between the agreements.

will freeze the situation"); *see also Levas and Levas v. Villiage of Antioch, Ill.*, 684 F.2d 446, 448–49 (7th Cir. 1982) (TRO motion with notice to adversary can be treated as one for a preliminary injunction).

"[A] party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Johnson v. City of Rock Island, Ill.*, No. 4:11-CV-4058-SLD-JAG, 2012 WL 5425605 at *1 (C.D. Ill. Nov. 6, 2012). Even though it was filed before ADFS's August 1, 2018 termination notice, the complaint includes claims that AD Richmond and Corbett were engaged in post-termination violations of the non-competition provisions; the complaint quotes a post-termination non-competition provision in full, [1] ¶ 100, and alleges that AD Richmond and Corbett breached it. [1] ¶¶ 105, 172, 176. The complaint also alleges that AD Richmond and Corbett agreed to limit the ways they would make use of certain confidential information obtained from ADFS, and that AD Richmond and Corbett are now breaching those obligations. [1] ¶¶ 96–97, 116, 166, 174. The pending motion is not beyond the scope of the complaint.

The initial question—whether any contract exists—is governed by Illinois law. The forum state's choice-of-law principles apply when, as here, the federal court is exercising supplemental jurisdiction over a state law claim. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 684 (7th Cir. 2014). Illinois choice-of-law principles hold that where there is no conflict between Illinois law and the law of the other state, Illinois law governs. *See McGrew v. Pearlman*, 304 Ill.App.3d 697, 703–704 (1999).

There is no outcome-determinative conflict between Illinois and Virginia law with regards to contract formation. Illinois contract formation principles require offer and acceptance, definite and certain terms, consideration, a meeting of the minds, and an expression of an intent to be bound. *Tower Inv'rs, LLC v. 111 E. Chestnut Consultants, Inc.*, 371 Ill.App.3d 1019, 1027 (1st Dist. 2007) (offer and acceptance, definite and certain terms, consideration); *Lal v. Naffah*, 149 Ill.App.3d 245, 248–49 (1st Dist. 1986) (mutuality of assent); *Citizen's Bank-Illinois, N.A. v. Am. Nat. Bank & Tr. Co. of Chicago*, 326 Ill.App.3d 822, 831 (1st Dist. 2001) (the expression or promise can be inferred from conduct). Virginia law is in accord. *Green's Ex'rs v. Smith*, 146 Va. 442, 452–53 (1926) (mutuality of assent, offer and acceptance, expression or promise can be inferred from conduct); *Jones v. Holloway*, 73 Va. Cir. 46 at *3–4 (2007) (certain terms, consideration); *Com. v. Stewart*, 66 Va. Cir. 135 at *14 (2004) (all elements).[3] Illinois law governs.[4]

[3] Even if Virginia law applied, AD Richmond's arguments that Virginia law would preclude a finding that a contract was formed are not persuasive. For instance, AD Richmond points to a Virginia statute that defines "Franchise" to mean a "written contract or agreement," Va.

AD Richmond has already admitted that the agreement was continued by mutual assent through January 31, 2018, [44] ¶ 34, and that, thereafter, the parties were "operating on a month-to-month renewal" until August 1, 2018. [44] ¶ 43; [63-1] Ex. G. These are—for now—binding judicial admissions. *United States Sec. & Exch. Comm'n v. Battoo*, 158 F.Supp.3d 676, 689 (N.D. Ill. 2016); *Crest Hill Land Dev., LLC v. City of Joliet*, 396 F.3d 801, 805 (7th Cir. 2005) (statement in answer to complaint was a binding judicial admission).[5] And there is a better than negligible chance that ADFS can show an implied-in-fact contract (recognized by Illinois law) between ADFS, AD Richmond, and Corbett. "A contract implied in fact is one in which a contractual duty is imposed by reason of a promissory expression which may be inferred from the facts and circumstances and the expressions of [sic] the part of the promisor which show an intention to be bound." *Estate of Jesmer v. Rohlev*, 241 Ill.App.3d 798, 803 (1st Dist. 1993). An implied-in-fact contract can extend the terms of an earlier agreement where the parties act as if they desire to be bound by those same terms going forward. *See Kohlenbrener v. N. Suburban Clinic, Ltd.,* 356 Ill.App.3d 414, 419 (1st Dist. 2005); *see also Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 290 Va. 36, 47 (2015) ("'the material terms of the prior contract . . . survive intact' by way of a "subsequently formed implied-in-fact contract" where the "*same parties* are engaged in the *same course of dealing* both during and after the expiration of the express contract") (emphasis in original) (Virginia law). AD Richmond's conduct expressed an intention to be bound; in the months and years following April 6, 2014, AD Richmond held itself out as a franchise of ADFS, paid royalties, utilized ADFS's intellectual property, filed insurance claims and participated in ADFS vehicle transfers. [56-1] ¶ 22; [63-1] ¶¶ 4–6.[6] If ADFS took

---

Code Ann. § 13.1-559, but fails to identify Virginia law that prohibits extending the terms of a written franchise agreement via a course of conduct. AD Richmond's arguments about Virginia's statutes of fraud fail, too, because ADFS was able to perform its obligations under each month-to-month extension within one year. *Silverman v. Bernot*, 218 Va. 650, 654 (1977) (the statute of frauds is inapplicable if the contract can be fully performed "on one side" within one year).

[4] Illinois choice-of-law principles also hold that the "validity . . . of a contract [is] governed by the law of the place where it is made." *Progressive Insurance Co. v. Williams*, 379 Ill.App.3d 541, 546 (1st Dist. 2008). A contract is "made" in the place "where it is delivered, as consummating the bargain." *Walker v. Lovitt*, 250 Ill. 543, 546 (1911). Neither party submitted facts demonstrating that the agreement was "delivered" in Virginia. The agreement says that it was "accepted by [AD Richmond and Corbett] in the State of Illinois." § 20.1.

[5] Defendants have a pending motion to amend their answer, and the outcome of that motion could change the effect of the admissions in the current, operative answer.

[6] AD Richmond advances an alternative theory: that it is bound by "an implied license,

any steps prior to August 1, 2018, to repudiate the agreement, it has not identified them. The terms of the agreement continued to apply past April 6, 2014.

Section 12.3 is a restrictive covenant governed by Virginia law. § 20.1 (restrictive covenants in the agreement are to be "construed in accordance with the laws of the state(s) where such restriction(s) is(are) to apply"); § 12.3 (describing section 12.3 as a covenant); *see Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶¶ 11, 13 (non-compete clauses are covenants); *Turnell v. CentiMark Corp.*, 796 F.3d 656, 659 (7th Cir. 2015) (same); *Specialty Mktg., Inc. v. Lawrence*, 80 Va. Cir. 214 at *2 (2010) (same); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342 (1990) (Virginia law respects choice of law provisions); *Hall v. Sprint Spectrum L.P.*, 376 Ill.App.3d 822, 825–26 (5th Dist. 2007) (Illinois law would uphold a choice of law provision in circumstances such as these).

Virginia courts apply a less restrictive standard when deciding whether to uphold restrictive covenants in franchise agreements. *JTH Tax, Inc. v. Frashier*, No. 2:09CV40, 2009 WL 10689306, at *2 (E.D. Va. Apr. 15, 2009); *Brenco Enterprises, Inc. v. Takeout Taxi Franchising Sys., Inc.*, No. 177164, 2003 WL 21659422, at *14 (Va. Cir. Ct. May 2, 2003). Virginia courts have upheld as reasonable restrictive covenants that lasted for more than two years, *Anesthesia v. Gidich*, 239 Va. 369, 372–73, (Va. 1990) (upholding a three year noncompete); *Roanoke Eng'g v. Rosenbaum*, 223 Va. 548, 553–54 (Va. 1982) (upholding a three year non-compete), and that included fifty-mile radius competition restrictions. *Update, Inc. v. Samilow*, 311 F.Supp.3d 784, 792–93 (E.D. Va. 2018) (applying Virginia Law); *Advanced Marine Enterprises, Inc. v. PRC Inc.*, 256 Va. 106, 119 (1998) (fifty miles within any of PRC's 300 offices worldwide). Nothing about the function of the restrictive covenant (i.e., restricting AD Richmond and Corbett from running a competing business of the same type they were running before) suggests it runs counter to Virginia law in terms of its "function," either. *See Lanmark Tech., Inc. v. Canales,* 454 F.Supp.2d 524, 528–29 (E.D. Va. 2006). And, Virginia courts have upheld restrictive covenants in franchise agreements that prohibit the post-termination competitive use of confidential information obtained during the franchise-franchisee relationship. *See JTH Tax,* No. 2:09CV40, 2009 WL 10689306, at **19–20.

---

terminable at-will, to use [ADFS] trademarks and [the] ADFS system for a fee." [61] at 14. AD Richmond seems to believe these few terms apply because both parties have been complying with them, but there is no principled reason to stop at the terms AD Richmond has identified. AD Richmond has also continued to make use of many of the other terms of the Agreement (e.g., section 16.2, which requires AD Richmond to "cooperate and assist [ADFS] or [ADFS's] insurer in handling, adjusting, and settling all claims or losses"). And AD Richmond itself says it intends to comply with the non-compete provisions, too: it has not solicited business within the fifty-mile restricted areas and has at most "made preparations to compete." [61] at 19.

There is a better than negligible chance that ADFS will succeed in showing that the agreement has been breached. Corbett has a new business, "Tactical Fleet," with a new website and USDOT license number, that appears to be operating out of an office in Richmond, VA. [56-1] ¶ 44, 49–50; Exs. 9, 12–15. That website suggests that Tactical Fleet is (or will be shortly) "provid[ing] similar services and/or products as those offered by [ADFS]." § 1. *See also* [56-1] ¶ 49, Exs. 12 ("Tactical Fleet Services is a full-service fleet management company . . . TacFleet is now able to provide industry leading fleet data collection and customized reporting options for our clients and leasing companies"), 13–15. Other public documents reveal that Tactical Fleet has applied to engage in business referred to as "Auth. For hire," and has said that it expects its cargo to include "a) 'General Freight,' b) 'Motor Vehicles,' and c) 'Drive/Tow Away." [55-1] at ¶ 45. There is also evidence that Corbett and "Tactical Fleet" are "setting up a location in Manteca, California, within the fifty (50) mile non-compete radius" of another ADFS franchisee. [56-1] at Ex. 15. This evidence is sufficient to show a likelihood that Corbett has taken steps to provide fleet management products or services similar to ADFS's within the prohibited geographic areas—a breach of the non-compete covenant. The evidence that these steps are preliminary or tentative suggests that not much harm has been done, but does not demonstrate that there was no breach at all. *See* [61-1] ¶¶ 30, 32 (Corbett says that "Tactical fleet is not engaged in the for-hire motor carrier business and has not entered into any contracts for services," and that, as of recently, Corbett "no longer has any plans to form Tactical Fleet One, LLC as a separate business entity."); [61-1] ¶ 38 (Corbett says the Manteca location is not yet operational and was originally designed to operate as a "remarketing location").

Although there is evidence that Corbett and AD Richmond had access to and made use of ADFS's confidential information, I am not persuaded that there is sufficient evidence of a breach of confidentiality. A former employee has provided declaration testimony alleging that, prior to her departure from AD Richmond in early 2018, staff at AD Richmond were using information extracted from ADFS's proprietary software ("AD360") to develop their own Excel macros and pivot tables. [55-3] ¶¶ 5–6. But there is no evidence that this use has continued since the termination. ADFS is worried that Corbett's new technology derives from its confidential information but that inference is speculative on the current undeveloped record. The declaration submitted in support of ADFS's "emergency motion to extend the temporary restraining order and for expedited discovery," [68]; [68-1], adds little factual support to ADFS's fears. *See* [68-1] ¶ 6 (ADFS "believes" that Tactical Fleet's new software was "conceived of and developed by" AD Richmond and Corbett during their time with ADFS in part because it has been described as having "features that are similar to" ADFS's proprietary software, but fails to produce evidence showing

that AD Richmond and Corbett "used" ADFS's confidential information when developing this new software).[7]

Harm to consumer goodwill and the loss of customer relationships are each irreparable harms. *Promatek Indus., Ltd. v. Equitrac Corp.,* 300 F.3d 808, 813 (7th Cir. 2002), *as amended* (Oct. 18, 2002) (consumer goodwill); *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509–10 (7th Cir. 1994) (loss of sales and the opportunity to maintain and develop relationships with existing and potential customers). There is no remedy at law for these harms, either. *Promatek Indus., Ltd.*, 300 F.3d at 813 (consumer goodwill); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis,* 35 F.3d 1134, 1140 (7th Cir. 1994) (lost customers). ADFS has shown that its consumer goodwill is being harmed by ADFS's violations of the non-compete provisions and that it may lose customers because of those violations; there is evidence that AD Richmond is continuing to display ADFS's trademarks while providing services that are not subject to ADFS oversight and standards, [56-1] ¶ 22, (which harms ADFS's "unique reputation and public recognition for [] quality products and services," [15-1] ¶ 9) and there is evidence that Corbett and his new ventures are actively soliciting and obtaining ADFS's customers. [56-4] ¶¶ 8–9.

Any harm to AD Richmond and Corbett from an injunction requiring them to honor their agreement not to compete will be minimal; by their own admission, they have "at most . . . made preparations" to compete, [61] at 19, and maintaining the status quo will not require any additional effort. *See also Quizno's Corp. v. Kampendahl,* No. 01 C 6433, 2002 WL 1012997, at *7 (N.D. Ill. May 20, 2002) ("[a]ny harm caused to [franchisee] by the preliminary injunction derives entirely from his breach of the Franchise Agreement"). Nor will the public be harmed by an injunction; AD Richmond remains free to operate competing businesses that are not within the restricted geographic areas, and there is no reason to think there will be an anticompetitive effect on the vehicle transportation market. Moreover, the public benefits when parties are encouraged to adhere to their contractual obligations. *Id.* Without an injunction, ADFS stands to lose customers and its contractual right to preserve its market position with respect to its products and services. It may suffer harm to its business reputation if Corbett's conduct causes confusion over ADFS's intellectual property. The balance favors an injunction.

[7] ADFS's request for expedited discovery "on the issue of whether the application being marketed by Tactical Fleet . . . is the same as or derivative of ADFS' applications" is also denied. [68]. With an injunction reinforcing the non-compete provision, ADFS does not need a departure from the existing discovery schedule and it has not identified any harm flowing from the alleged use of this confidential information that could not be remedied at a later date.

An asset freeze is not necessary; such an "extraordinary" remedy is not appropriate where supported only by "unsubstantiated allegations that a defendant may dissipate assets." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 340 (1999). Here, ADFS has some evidence that Corbett intends to move his business into another entity, but ADFS has not shown that an award of money damages against Corbett and AD Richmond will be inadequate to make them whole for any financial obligations owed to them or that the equitable remedy of an accounting is jeopardized by Corbett's transition away from doing business with ADFS. Both sides here are divorcing; a realignment is to be expected and is not necessarily nefarious.

The other injunctive relief requested (including the requests that defendants return all documents and other tangible evidence of confidential information, submit reports, pay sums due, and transfer and assign all phone numbers, facsimile numbers, white and yellow page references, name registrations, business licenses, ideas, concepts, methods and techniques, etc., *see* [55] at 2) is intrusive, alters the status quo, and is not necessary to remedy the immediate threat of harm posed by Corbett's preparations to compete.

For these reasons, this Court orders that:

For the pendency of this litigation, until no later than September 30, 2020, defendants Auto Driveaway Richmond, LLC and Jeffrey Corbett are prohibited from engaging, directly or indirectly, as an owner, operator, or in any managerial capacity, in any 'for-hire' motor carrier businesses operating as either a common carrier or a contract carrier or any business which operates or grants franchises or licenses to others to operate a business that provides similar services and/or products as those offered by Auto Driveaway Franchise Systems, LLC at or within a fifty mile radius of AD Richmond's former offices or any other territory with an Auto Driveaway office other than as an authorized franchise owner of another Auto Driveaway office.

Because defendants are likely to incur some costs in ensuring compliance with this injunction and because it provides for a lengthy term, the risk of a wrongful injunction must be secured by ADFS. Plaintiff, through counsel Greensfelder, Hemker & Gale, P.C., shall deposit with the Court ten thousand dollars ($10,000.00), either cash, check, cashiers' check, certified funds, or surety bond, as security to be held in the Court Registry. The $1,000 used to secure the earlier TRO may be applied toward the balance due for this preliminary injunction.

Plaintiff's motion for a temporary restraining order and preliminary injunction, [55], is granted in part, denied in part. Plaintiff's emergency motion to extend the temporary restraining order and for expedited discovery, [68], is denied.

ENTER:

Date: 10/26/18

Manish S. Shah
U.S. District Judge