CITATION: Humi Holdings Corporation v. Millington et al, 2023 ONSC Number
COURT FILE NO.: CV-23-00703152-0000
DATE: 20231023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HUMI HOLDINGS CORPORATION Plaintiff

AND:

ANTHONY MILLINGTON, KEVIN LANGLOIS, SIMON BOURGEOIS and THE NMBR COMPANY LIMITED Defendants

BEFORE: Justice Chalmers

COUNSEL: *Z. Levy, L. Graham*, and *J. Allison* for the Plaintiff/Moving Party

D. Levangie, T. Obradovic, and *A. Sinclair* for the Defendants/Responding Parties

HEARD: September 11, 2023, by videoconference

ENDORSEMENT

OVERVIEW

[1] The Plaintiff, Humi Holdings Corporation brings this motion for an interlocutory injunction prohibiting the Defendants from directly or indirectly competing with Humi. Humi argues that the Defendants are using Humi's confidential and proprietary information as a "springboard" to develop a product that will compete in the same space as Humi.

[2] The Defendants, Anthony Millington, Simon Bourgeois, and Kevin Langlois (the Individual Defendants) were high-ranking employees with Humi until the termination of their employment in November and December 2022. After leaving Humi, the Individual Defendants incorporated the Defendant, The Nmbr Company Limited. Nmbr is currently developing an embedded payroll software product that is expected to be ready for sale in 2024.

[3] It is Humi's position that the embedded payroll software product will compete with its Human Resources Information System (HRIS) product. Both the HRIS product and the embedded payroll software have payroll infrastructure that provides a tax engine and the ability to move money from the employer to employees and the Canadian Revenue Agency. Humi argues that it can take years to develop an embedded payroll product and the fact the Defendants expect their product will be available in 2024 supports its position that the development has been accelerated because the Defendants used Humi's confidential and proprietary information.

[4] The Defendants state that they have not competed with Humi. It does not currently have a product or revenue. The Defendants argue that the product being developed by Nmbr is a different product than that offered by Humi and will be targeted to different customers. The Defendants also deny that they appropriated any of Humi's proprietary and confidential information. The Defendants state that the relief sought by Humi would put them out of business and deprive them of their livelihood.

[5] For the reasons set out below, I find that the Plaintiff is not entitled to the relief sought. I dismiss the Plaintiff's motion.

FACTUAL BACKGROUND

The Formation of Humi

[6] Humi was founded in 2016. Kevin Kliman is the co-founder, Chief Executive Officer, and Director. He deposed that Humi's purpose is to provide a digital solution for the payroll and human resources needs of Canadian small and medium-sized businesses. Mr. Kliman testified that Humi has an annual revenue of close to $16 million but is currently on a pace for $20 million annually. It has a customer base of 3,000 small businesses. It has 140 employees. According to Mr. Kliman, Humi has a current value of "conservatively 160 million dollars".

[7] Humi's product is an online centralized human resources management platform, or HRIS. One of the modules in the HRIS is payroll. The payroll module has a payroll infrastructure that has two main components; (1) a tax engine to calculate complex tax remittances, and (2) the ability to move money from an employer to its employees and to the CRA. Humi states that it has invested years of manpower and millions of dollars to build its payroll product.

The Individual Defendants

[8] In 2017, the Individual Defendants joined Humi. Kevin Langlois was hired as a senior software developer. Although he did not have any previous experience in payroll, Humi believed he would be able to engineer and develop the human resources side of the software. Simon Bourgeois was a family friend of Mr. Kliman and Mr. Millington was a friend of Mr. Bourgeois. Neither had expertise in human resources or payroll software. They were brought in for their experience in operations and sales. By the time of their termination, Mr. Langlois had been promoted to Vice President of Engineering, Mr. Bourgeois was the CEO and Mr. Millington was the Chief Commercial Officer. Mr. Bourgeois and Mr. Millington were also directors of Humi.

[9] Mr. Millington and Mr. Bourgeois each executed a Confidentiality and Proprietary Information Agreement dated February 15, 2017 (CPI Agreement). The CPI Agreement provides that they were to keep Humi's information and proprietary property confidential and to not use the information except for Humi's business. Mr. Langlois' employment agreement also provides that he would not use any confidential information for any reason or for any purpose other than for Humi.

[10] Mr. Bourgeois and Mr. Millington also entered into various employment agreements over the years they were employed with Humi. They both agreed that for one year after leaving Humi they would not engage in any employment or business activity which is the "same as or directly competitive" with Humi.

[11] Mr. Bourgeois and Mr. Millington are also parties to the Amended and Restated Investors' Rights Agreement (IRA) with Humi. Mr. Bourgeois and Mr. Millington are identified as key holders. The IRA also contains confidentiality and non-competition provisions. The non-competition provision in the IRA defines competitive business as any business that is directly competitive with the business conducted by Humi during the time the key holders are engaged as directors, or employees with Humi.

The Termination of the Employment of the Individual Defendants

[12] According to Mr. Kliman, in 2022 Mr. Bourgeois and Mr. Millington took steps to isolate him from the management of Humi. The Humi board decided to not support Mr. Bourgeois or Mr. Millington. As a result of the breakdown in the relationship, the employment of Mr. Bourgeois and Mr. Millington was terminated without cause. Although their employment was terminated, Mr. Bourgeois and Mr. Millington remain shareholders of Humi.

[13] Mr. Bourgeois was terminated effective November 28, 2022. He entered into a Separation Agreement with Humi dated March 9, 2023. Mr. Millington's termination was effective as of December 21, 2022. He entered into a Separation Agreement on March 17, 2023. Pursuant to the Separation Agreements, each of Mr. Bourgeois and Mr. Millington received a retirement allowance equivalent to one year salary together with company stock options. Both Separation Agreements provide that the former employee will not use or disclose any confidential information of Humi's. The agreement also provides that the non-compete obligations end one year following their respective terminations.

[14] Mr. Langlois was terminated without cause in December 2022. He entered into a separation agreement on February 9, 2023. He was provided with his full salary for six months along with some stock options. His separation agreement does not contain a non-compete obligation.

The Formation of Nmbr

[15] On May 1, 2023, Nmbr was incorporated. Its three directors are Mr. Bourgeois, Mr. Millington, and Mr. Langlois. Nmbr has added four employees including two software engineers. The current total company size is seven individuals. To date, Nmbr does not have a product, customers, or revenue.

[16] Nmbr intends to offer an embedded payroll infrastructure product that will be sold to software developers. The embedded payroll product will be provided through Application Programming Interfaces (APIs). The Defendants state that the embedded payroll product is a “coding toolkit” that allows software developers to build, embed and customize payroll services into one existing software, which can then be marketed to end-user companies. It is anticipated that Nmbr’s product will be available for sale in early 2024.

Humi Develops an Embedded Payroll Product

[17] Humi currently markets an HRIS system that is sold directly to end users. In addition, Humi is developing an embedded payroll product that will be provided through APIs.

[18] The Individual Defendants deposed that Humi did not discuss or contemplate developing an embedded payroll product during their tenures at Humi. Humi’s former vice president, Andrea Bartlett testified as a Rule 39.03 witness. She stated that Humi considered developing an embedded payroll product after the Individual Defendants were terminated from their employment. She testified that there was an “exploratory discussion” at an executive committee meeting sometime before June 12, 2023. At the executive committee meeting, Nick Gray, the Humi Vice President of Product shared a presentation about an embedded payroll product offering. The presentation from the June 2023 meeting provides that the “payroll API” or embedded payroll is a “new” product for Humi. The presentation provides that the product is not ready and that it will take several months before Humi can commit to embed.

[19] Mr. Kliman, in his cross-examination, did not dispute Ms. Bartlett’s evidence that an embedded payroll product was first formally discussed at the executive team meeting in the spring of 2023. Allan MacGregor is the Vice President of software engineering at Humi. He testified that he first started talking with Mr. Gray about embedded payroll in April 2023.

[20] According to Mr. Kliman, it is expected that Humi’s embedded payroll product will be available sometime toward the end of 2024.

THE ISSUES

[21] The following issues will be addressed in this endorsement:

Issue # 1 - Is the evidence of Matt Vaadi and Julien Roger admissible? and

Issue #2 - Should an interim injunction be granted?

DISCUSSION AND ANALYSIS

Issue #1 – The Admissibility of the Evidence of Mr. Vaadi and Mr. Roger

[22] The Defendants filed the expert report of Matt Vaadi. Matt Vaadi is the CEO of Executive Resource Group, LLC d.b.a. guHRoo Payroll & HR. He states that he has “extensive experience” in HRIS and payroll software. In his report dated August 22, 2023, he compares the

HRIS and embedded payroll products and sets out his opinion as to whether the two products are the same. The Plaintiff objects to his evidence being admitted into evidence on the basis that it does not meet the *Mohan* criteria for the admission of expert evidence.

[23] The Plaintiff filed the affidavit of Julien Roger sworn August 25, 2023. Mr. Roger provides a factual description of the HRIS and embedded payroll software products. Mr. Roger was the co-founder of Abletribe Inc., which is a software company that built cloud-based payroll infrastructure. He was also employed by Humi from September 2017 to November 2021. The Plaintiff argues that Mr. Roger has direct knowledge of payroll products and is providing factual evidence with respect to the products. The Defendants argue that he critiques the Vaadi report and purports to give opinion evidence.

Analysis – Vaadi Report

[24] I have considered the four *Mohan* factors for the admissibility of expert evidence; relevance; necessity, the absence of any exclusionary rule; and a properly qualified expert: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9, p. 20.

[25] The Vaadi report provides technical information with respect to the HRIS product sold by Humi and the embedded payroll software that is being developed by Nmbr. I am satisfied that the evidence is relevant to the matters in issue on this motion.

[26] The Plaintiff argues that the opinion set out in the Vaadi report is not necessary because specific information on this issue was provided by fact witnesses. The Plaintiff also argues that the opinion is essentially an opinion on the ultimate issue of whether Nmbr's product is competitive with Humi's. The evidence relates to human resources and payroll software which is technical information about a specialized field of inquiry which is likely outside the experience of a judge: *Whitfield v. Whitfield*, 2016 ONCA 581 (CanLII), at paras. 45-46. I am satisfied that the evidence is necessary and is not to be excluded on the basis that the expert evidence may go to the ultimate issue: *Hamilton v. Bluewater Recycling Association*, 2016 ONCA 805, at para. 21.

[27] The Plaintiff also argues that Mr. Vaadi is not a properly qualified or objective expert. Mr. Vaadi's experience is primarily in the United States. His "expertise" derives from his experience as a customer because he spent "100 hours of research" in deciding what to purchase. The Defendants argue that Mr. Vaadi has significant experience in the HRIS software space, having developed his own HRIS business and platform. He has also incorporated embedded payroll into his HRIS business. I find that Mr. Vaadi has relevant and practical experience in the field of HRIS and payroll software.

[28] I am satisfied that Mr. Vaadi's evidence meets the *Mohan* criteria.

Analysis – Roger Affidavit

[29] Mr. Roger is put forward by the Plaintiff as a participation expert: *Westerhof v. Gee Estate*, 2015 ONCA 206, at para. 60, leave to appeal refused 2017 CanLII 69446 (SCC). His affidavit addresses the technical information about the HRIS and embedded payroll products. It is based on the observations and experience from when he was employed with Abletribe and Humi.

[30] The Defendants argue that Mr. Roger is providing more than simply factual evidence. He provides a critique of Mr. Vaadi's report, which is the sort of evidence that is within the sole domain of an expert. The Defendants also argue that Mr. Roger is not impartial nor is he credible. Mr. Roger was terminated from Humi by Mr. Bourgeois in 2021.

[31] To be a participation expert, the witness's evidence must relate solely to their observations of the underlying facts. Mr. Roger was employed with Humi until 2021. During that period of time, he would have made observations about the HRIS product. He would have had knowledge with respect to payroll infrastructure. He was also the co-founder of Abletribe Inc. which had developed a standalone payroll infrastructure. I am satisfied that through his association with Humi and Abletribe, Mr. Roger would have gained firsthand knowledge of the various payroll software products.

[32] I am satisfied that Mr. Roger is a participation expert in accordance with the criteria set out in *Westerhof.*

Issue #2 - Interim Injunction

[33] Section 101 of the *Courts of Justice Act*, R.S.O. c. C.43 provides that an interlocutory injunction may be granted where it appears to the judge to be just or convenient to do so. The three-stage test for an interlocutory injunction is as follows:

a. There is a serious issue to be tried;

b. That the moving party will suffer irreparable harm if an injunction is not granted; and

c. Which of the parties would suffer greater harm from the granting or refusal to grant the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), at para. 91.

[34] The three elements of the test are to be considered as a whole. Strength, in one part of the test, can make up for weakness in another. The court is then to consider whether the injunctive relief is appropriate in all the circumstances: see *Struik v. Dixie Lee Food Systems Ltd.*, 2006 CanLII 27574 (ONSC), at paras. 35-36.

1. Serious Issue to be Tried/Strong Prima Facie *Case*

[35] The first branch of the test requires the court to make a preliminary assessment of the moving party's case.

[36] Humi argues that the "serious issue" to be tried standard applies in this case. Alternatively, Humi states that if the higher "strong *prima facie*" case standard applies, Humi's case meets that bar. The Defendants argue that the higher threshold of a strong *prima facie* case applies because the effect of the injunction is to restrict the Defendants' ability to engage in their chosen vocation and ability to earn a livelihood.

[37] Humi seeks to restrict its former employees from engaging in competitive conduct by soliciting Humi's strategic relationship holders and using Humi's confidential and proprietary information. When a plaintiff seeks to restrict a former employee from competing with it, the test requires the plaintiff to establish a strong *prima facie* case: *PointOne Graphics Inc. v. Roszkowski et al*., 2021 ONSC 629 (CanLII), at para. 11. The higher threshold is justified because a person's ability to earn a livelihood is sought to be enjoined by an injunction.

[38] The higher standard applies regardless of whether the restriction is based on a contract or a common law cause of action such as breach of fiduciary duty: *FLS Transportation Services Inc. v. Charger Logistics Inc*., 2016 ONSC 3652 (CanLII), at para. 18. As stated by O'Brien J. in *Camino Modular Systems Inc. v. Kranidis*, 2019 ONSC 7437, at para. 15:

> Instead of showing a serious issue to be tried at the first step of the test, the moving party must show that it has a strong *prima facie* case. This higher threshold is appropriate since the injunction is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood.

[39] A strong *prima facie* case is one in which the moving party is "very likely" or "almost certain" to succeed at trial: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (CanLII) at para. 17, and *Camino Modular Systems Inc. v. Roszkowski*, 2021 ONSC 629, at paras. 11-14; and *Berkeley v. Miller*, 2018 ONSC 3645, at para. 8. As stated by Sharma J., in *Parekh et al v. Schecter et al*, 2022 ONSC 302, at para. 32:

> What the strong *prima facie* case standard means is "that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice."

[40] I am of the view that with respect to the allegations of the use of confidential information, the Plaintiff must establish that there is a serious issue to be tried. With respect to the allegations of breach of the non-compete clauses in the agreements and the fiduciary duty to not compete, the Plaintiff must meet the higher threshold of establishing a strong *prima facie* case: *Storey et al. v. Irwin, et al*, 2021 ONSC 5676, at para. 25.

[41] Humi states that the evidence establishes a serious issue/strong *prima facie* case with respect to two issues. First, that the Defendants are competing with Humi despite the contractual and common law bars to that competition. Second, that the Defendants have used Humi's confidential and proprietary information in developing its embedded payroll product.

i) Breach of Contractual and Common Law Bars to Competition

[42] There are three issues to be considered when determining whether the Plaintiff has established a strong *prima facie* case with respect to the allegations of breach of the non-competition clauses in the agreements; (1) are the restrictive covenants enforceable; (2) is the product offered by Humi and Nmbr's proposed product sufficiently similar that they fall within the non-competition clauses of the agreements, and (3) was there "direct" competition.

a. Enforceability of the Restrictive Covenants

[43] As a rule, restrictive covenants are presumptively unenforceable: *Berkeley v. Miller*, at para. 18. A party seeking to enforce a restrictive covenant bears the onus of establishing on a balance of probabilities that it has a proprietary or trade interest entitled to protection. Restrictive covenants are to be strictly construed by the courts. The party seeking to enforce the covenants must establish that the temporal and spatial features of the clause are not too broad; that its terms are clear and certain, not vague and ambiguous, and in all circumstances the restriction is reasonably required for the party's protection: *Martin v. ConCreate USL Limited Partnership,* 2013 ONCA 72, at para. 49; *Ceridian Dayforce Corporation v. Daniel Wright*, 2017 ONSC 6763 (CanLII), at para. 39 *(Ceridian)*.

[44] Mr. Bourgeois and Mr. Millington's employment agreements contain non-competition clauses that apply to Canada and the United States. The clause precludes Mr. Bourgeois and Mr. Millington from engaging in any employment or business activity which, "is the same as or directly competitive" with Humi. Mr. Kliman confirmed that Humi does not offer payroll services to customers outside of Canada. I am of the view that Humi did not establish that the geographic restrictions in the employment agreements are reasonable: *Ceridian*, at para. 49.

[45] The non-competition clauses in the employment agreements specify that for one year following the termination of their employment, Mr. Bourgeois and Mr. Millington will not engage in any employment of business activity which is the same as, or directly competitive with Humi. The separation agreements also provide that Mr. Bourgeois and Mr. Millington are restricted from competing with Humi for one year following the separation date. I am satisfied that a 12-month temporal scope in the employment agreement and separation agreement is reasonable.

[46] The non-competition clause in Mr. Millington and Mr. Bourgeois IRAs provide that they are prohibited from participating "in any capacity" in a competitive business. The IRA defines competitive business as any business that is directly competitive with the business conducted by Humi during the time the key holders were engaged as directors, or employees.

[47] There is no geographic area in the IRA. The IRA provides that the non-competition clause applies while Mr. Bourgeois and Mr. Millington hold common shares in Humi and for 12 months thereafter. Humi is a privately held corporation. The sale of their shares is subject to a right of first refusal. As a result, their ability to sell their shares may be tied to the other shareholders of Humi. The temporal scope of the non-compete clause in the IRA is potentially indefinite: *Berkeley v. Miller*, at para. 21.

[48] It is my view that when considered as a whole, the non-competition restrictive covenants are overly broad. Notional severance does not apply in the case of restrictive covenants and the clauses must be enforced in their entirety or not at all: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 (CanLII), [2009] 1 SCR 157, at para. 42. I conclude that the non-compete clauses in the various agreements are not enforceable.

b. Are the Products Sufficiently Similar?

[49] I am of the view that the Plaintiff has not established that the products are substantially the same or similar, such that there has been a breach of the non-compete clauses or breach of the fiduciary duties.

[50] In oral argument, there was a great deal of time devoted to setting out the differences or similarities between the HRIS product offered by Humi and the embedded payroll product that is being developed by Nmbr. Both products include a payroll infrastructure, which include a tax engine and allow for the movement of money from the employer to the CRA and the employee. Humi argues that the Nmbr's revenue will come from getting Humi's customers to switch from Humi's payroll system to Nmbr's.

[51] While it is true that the two products include a payroll infrastructure, I am of the view that the products are not substantially the same.

[52] Humi's product is an online centralized, all-in-one human resources management platform or HRIS. It has seven modules, one of which is payroll. The product is offered to small and medium Canadian businesses that need human resources services, including payroll. If a business wants to leverage Humi for payroll, it would be necessary for the business to become a HR customer. Its employees would be added to the Humi system. The payroll software provided through the HRIS is not a standalone product but instead is part of the overall HR services provided by Humi. The Humi product is sold directly to those companies that use payroll; business to business (B2B).

[53] The product that is being developed by Nmbr is not an all-in-one HRIS platform. The product is described as an "embedded payroll infrastructure backend product for developers to build-out, customize and monetize." Nmbr's embedded software product is to be sold to software developers who will incorporate the embedded payroll into its existing software which can then be marketed to end-user enterprises. The Defendants state that the product is not sold to businesses that use payroll. Instead, its intended market is software developers who sell payroll services. The Nmbr intended product is business to business to business (B2B2B).

[54] Humi’s former vice president, Andrea Bartlett testified as a Rule 39.03 witness. She was a member of the executive leadership team as well as the spokesperson for speaking to the media. As such, she had a “very intimate level of knowledge” with respect to the immediate and long-term business of Humi. She testified that Humi did not have an embedded payroll product or any embedded payroll customers before the Individual Defendants were terminated from their employment. She testified that there was an “exploratory discussion” about the development of an embedded payroll product at an executive committee meeting in June 2023. The presentation materials provide that a standalone, “payroll API” or embedded payroll is a “new” product for Humi. The presentation provides that the embedded payroll product “isn’t ready” but would have to be built and that it will take several months before Humi can commit to embed.

[55] Mr. Kliman, in his cross-examination, did not dispute Ms. Bartlett’s evidence that an embedded payroll product was first formally discussed at an executive team meeting in the spring of 2023. The fact that the embedded software product was first formally discussed in the spring of 2023, is also confirmed by Allan MacGregor, the vice president of software engineering at Humi.

[56] The evidence with respect to Humi’s development of the embedded payroll product supports the Defendants’ position that the embedded payroll product is different from the HRIS product. If the two products were the same, the embedded product would not have been identified as a “new” product in the executive presentation in June 2023. Also, if the embedded payroll software was the same or similar to the HRIS product, one would not expect that it would take Humi one-and one-half years to build out the embedded payroll product.

[57] I conclude that the Plaintiff has not established that Nmbr’s proposed embedded payroll product is sufficiently similar to the Humi HRIS product to support a claim of breach of the non-competition clauses.

c. Direct Competition

[58] I am also of the view that there is no evidence that the Defendants are directly competing with Humi. The restrictive covenants in the employment agreements provide that Mr. Bourgeois and Mr. Millington are not permitted to “directly” compete with Humi. The non-compete clauses in the IRA refers to “direct” competition with respect to any business activity conducted by Humi and its affiliates, while the key holders were engaged with Humi.

[59] It is my view that the use of the word “directly” in the agreements means that indirect competition would not be a breach. Here, the Nmbr product will not be sold to Humi customers. Instead, the product is intended to be sold to Humi’s competitors. I am of the view that marketing the product to Humi’s competitors does not constitute “direct” competition.

[60] The IRA restricts the Individual Defendants from directly competing with Humi with respect to any business activity conducted by Humi when the Individual Defendants were engaged with Humi. The embedded payroll product that is being developed by Nmbr was not a Humi product at the time Mr. Bourgeois and Mr. Millington were employed with Humi. The development of the product was first formally discussed at Humi in the spring of 2023, several

months after the Individual Defendants were terminated from their employment. I find that the embedded payroll product was not "business activity" of Humi when Mr. Bourgeois and Mr. Millington were engaged with Humi.

[61] I conclude that the Plaintiff has not established that the Defendants are directly competing with Humi.

[62] I am also of the view that the Plaintiffs have not established a strong *prima facie* case that the Defendants breached their fiduciary duties to not compete with Humi. A fiduciary is not precluded from competing with their former employer however they must not do so unfairly: *Aquafor v. Whyte, Dainty and Calder*, 2010 ONSC 2733, at para. 47. Here, there is no evidence of any competition or planning on the part of the Individual Defendants before they were terminated from their employment. To date, the Defendants have not completed the development of its product. It has not sold a product or earned revenue. I am of the view that the Defendants' conduct does not constitute a breach of fiduciary duty.

ii) Use of Confidential and Proprietary Information

[63] The Plaintiff states that the Defendants have an obligation to not use Humi's confidential information other than for Humi's benefit. According to the Plaintiff, building an embedded payroll infrastructure is a long and difficult process. The Defendants expect to launch their product in early 2024. The Plaintiff argues that this timeline is "incredible". The Plaintiff argues that the only logical inference is that the Individual Defendants are using the proprietary knowledge they gained during their tenure at Humi, to accelerate the development of the Nmbr embedded payroll product.

[64] The Plaintiff notes that none of the Individual Defendants had any prior experience in human resources or payroll before joining Humi. In argument, counsel for the Plaintiff notes that the Individual Defendants were very defensive when it was suggested that they took confidential information from Humi. She referred to the cross-examination of Mr. Langlois who stated that he learned more about payroll software from reading course materials for a course he did not take than in the five years he was at Humi. Counsel for the Plaintiff argues that his testimony is not credible.

[65] When the Individual Defendants were terminated from their employment, their access to Humi's system was immediately cut-off. Mr. Kliman confirmed that no confidential information was provided to the Individual Defendants after they were terminated. However, the Plaintiff suggests that the Defendants accessed and deleted e-mails on Humi's system in March 2023. Mr. Kliman deposes that, "unfortunately, to the best of my knowledge, none of the Defendants left a paper trail on their Humi work e-mails indicating their intention to take Humi proprietary information and compete". On cross-examination, Mr. Kliman confirmed that Humi carried out an investigation into whether the Defendants had accessed and deleted the e-mails in March 2023. He stated that to the best of the investigative tools available at the time, there was no evidence that the Defendants accessed the e-mails or took any confidential information.

[66] In his affidavit, Mr. Kliman states that if Nmbr sells a payroll infrastructure product, Nmbr will be using Humi's confidential information. The Individual Defendants denied accessing any Humi code or confidential information. Mr. Kliman, in his cross-examination, confirmed that he does not have any evidence to contradict the Defendants' statement that they did not take the code from Humi or that Nmbr's product uses Humi's code. He stated that he has "no evidence whatsoever that Mr. Langlois or any of the defendants took Humi code". In his reply affidavit, Mr. Kliman conceded that the code in the Nmbr product may not have any Humi code.

[67] As noted above, Humi decided to develop an embedded payroll product after the Individual Defendants were terminated from their employment. As a result, there would have been no proprietary or confidential information with respect to the embedded payroll product when the Individual Defendants were at Humi. Even if there was evidence that the Defendants accessed and deleted Humi e-mails in March 2023, the e-mails would not have included any information about the development of the embedded payroll product. The Plaintiff's evidence is that the embedded payroll product was first formally discussed at Humi in April 2023.

[68] It is my view that the evidence is not sufficient to establish a serious issue is to be tried with respect to whether the Defendants used confidential information to develop the embedded payroll product.

2. *Irreparable Harm*

[69] Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other: *Jerger et al v. Kaloti et al,* 2023 OSC 4544 (CanLII), at paras. 49-50. The onus is on the moving party to place clear evidence before the court to support a finding of irreparable harm. Irreparable harm cannot be based on speculation: *Labrador Recycling Inc. v. Folino*, 2021 ONSC 2195, at para. 31.

[70] In the Amended Statement of Claim, Humi claims damages of $27 million. It is not clear as to how the Plaintiff came up with this figure. Humi concedes that Nmbr does not currently have a product that competes with Humi. Humi concedes that it has not yet suffered a loss of customers, revenue, employees, or market share to Nmbr, as a result of the Defendants' conduct.

[71] Humi argues that there is clear evidence that it will suffer irreparable harm in the future if the injunction is not granted. Nmbr is targeting Humi's competitors who will sell the product to Humi's customers. Nmbr will be able to accelerate the development of its embedded payroll product, which will allow Nmbr to enter the market before Humi completes the development of its embedded payroll product. Humi states that this will result in a permanent loss of market position and will reduce Humi's ability to grow.

[72] The Defendants argue that there is no evidence of irreparable, or any, harm. The Defendants state that Humi is seeking a *quia timet* injunction, where a wrong or damage is anticipated in the future. A *quia timet* injunction is an extraordinary remedy and therefore a high standard must be met: *Boehmer Box L.P. v. Ellis Packaging Limited*. [2007] O.J. No. 1694

(SCJ), at para. 74. As stated by Slade J. in *XY, Inc. v. IND Lifetech, Inc.*, 2008 BCSC 1215, 61 C.P.C. (6th) 148, at para. 66:

> In an application for a *quia timet* injunction, the requirement for proof of irreparable harm is refined to account for the fact that the applicant, seeking an injunction in anticipation of future harm, has not yet suffered any harm. The applicant must lead clear evidence showing how such harm will occur and establishing a high probability that, without the injunction, the harm will occur imminently or in the near future.

[73] The evidentiary record with respect to the issue of irreparable harm must provide as much detail as possible: *11123688 Canada Limited v. Springthorpe et al*, 2021 ONSC 1657, at para. 26 (*11123688)*. Here the evidentiary record does not provide any detail with respect to irreparable harm, beyond bald assertions that if the injunction is not granted, Humi will lose market share.

[74] I am of the view that Humi has failed to put forward the "clear evidence" necessary to establish a high probability that without the injunction, harm will occur and that the harm could not be compensated for, through an award of damages.

3. Balance of Convenience

[75] The third branch of the test weighs the balance of convenience. The court must balance which party will suffer more harm or convenience if the order is granted or not granted. The moving party must put forward evidence directed to the balancing exercise*: 11123688*, at para. 26.

[76] Humi argues that an injunction would not deprive the Defendants of an opportunity to make a livelihood. The Individual Defendants could all work in areas within their expertise. All three Individual Defendants have a background and established credibility in a number of different industries. Humi argues that, on the other hand, it will not be able to move out of the HR space. It is a large business which makes them less able to pivot.

[77] Humi also argues that at its core, the injunction seeks to prevent the Defendants from using expertise and information that was developed when they were employed with Humi. Humi states that requiring the Defendants to honour their contractual commitments is not likely to cause them any harm, especially as they have many other options available to them.

[78] The Defendants argue that the balance of convenience favours the Defendants because the injunction will affect the ability of the Defendants to develop their careers in a rapidly evolving industry: *Semiconductor Insights Inc. v. Kurjanowicz,* [1995] O.J. No. 3280, at para. 36.

[79] The Defendants also argue that the balance favours not granting the injunction because if the injunction is granted, the Defendants stand to lose everything, but if the injunction is not granted, Humi will be able to continue its business. Nmbr is a small company. It has seven employees. It does not currently have any revenue. On the other hand, Humi is a large company with a valuation of "conservatively $160 million". Even without an embedded payroll product,

Humi's annual sales are on pace for $20 million. Mr. Kliman confirmed on his cross-examination that if Humi lost $27 million (the amount claimed in the Statement of Claim) it would be a meaningful hit, but he did not think it would end the company.

[80] I am satisfied that in the circumstances of this case, the balance of convenience favours the Defendants. As stated by Morgan J. in dismissing the motion for an injunction in *UAP Inc. v. Yako*, 2021 ONSC 5065, at paras. 41-44:

> [41] Even if it were debatable that the Plaintiff has a strong *prima facie* case or that a lesser standard is demanded of the Plaintiff under the first head of the *RJR-MacDonald* test, it is clear to me that the balance of convenience favours the Defendants. The Plaintiff is a large corporate enterprise that will weather this storm through trial. If it is successful, it will have shown that it has lost expected profits and can make its claim in damages.
>
> [42] Plaintiff's counsel submits that this is more than just a damages claim and that, in fact, the Plaintiff may lose the entire value of the Agreement in which they purchased Paste's business. That may or may not turn out to be true, but it does not compare with what the Defendants will lose if the Plaintiff is unsuccessful at trial. The Plaintiff stands to suffer a great financial loss, but Precise and Sako, with their respective principals, stand to lose everything. The Plaintiff's financial loss will be unfortunate but ultimately the Plaintiff will survive; the Defendant's loss of business will be fatal.
>
> [43] The same is true of the injunction sought by the Plaintiff against Dinino and Bacchus. Those employees covenanted not to work for a competing business for one year, which will expire in about two months' time. The potential harm to the Plaintiff in allowing them to continue in their jobs for another month or two is miniscule compared with the harm to the employees in being forced out of their jobs. Given that the Plaintiff, with all of its investigative resources, has not managed to identify a single individual customer that Dinino or Bacchus solicited, I find no grounds to issue an injunction against them.
>
> [44] In all, the Plaintiff has not demonstrated a strong *prima facie* case against any of the Defendants and, in any case, the balance of convenience is in each of the Defendants' favour. Accordingly, the grounds for an injunction have not been made out.

[81] In my view, Morgan J.'s comments are applicable here. The granting of an injunction would have the effect of stopping the Defendants' business in its tracks. If the injunction is not granted, the Plaintiff's business would continue.

[82] I conclude that the balance of convenience favours not granting the injunction.

<u>DISPOSITION</u>

[83] I dismiss the Plaintiff's motion for an interlocutory injunction.

[84] The Defendants are successful on this motion and are entitled to their costs. Counsel jointly advise that the parties agreed between themselves that the successful party should receive their costs for the motion fixed in the amount of $100,000 inclusive of counsel fee, disbursements and HST. I am satisfied that costs in this amount is appropriate in all the circumstances. I award costs to the Defendants fixed in the amount of $100,000. The costs are payable within 30 days of the date of this endorsement.

CHALMERS, J.

Date: October 26, 2023