

FILED

SUPERIOR COURT, WASHINGTON

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Honorable Steven C. Gonzalez
Hearing Date: February 4, 2011, 11:00 a.m.
With oral argument

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

Kashless, Inc., a Delaware corporation; and
Tippr.com, LLC, a Washington limited liability
corporation, ,

Plaintiffs,

v.

Andrew DeLorenzo, an individual; Andrew
Moss, an individual; BuyWithMe, a foreign
corporation,

Defendants.

No. 10-2-43928-5SEA

[PROPOSED] ORDER GRANTING
KASHLESS'S MOTION FOR
PRELIMINARY INJUNCTION TO
CONTINUE PROHIBITION ON
FURTHER USE & DISCLOSURE OF
CONFIDENTIAL INFORMATION

THIS MATTER came before this Court upon the motion of plaintiffs Kashless, Inc. and Tippr.com, LLC (collectively "Kashless"). The Court considered the arguments of counsel, Kashless's Motion, the Declaration of James C. Fowler dated January 14, 2011, Declaration of Martin Tobias dated December 20, 2010, Supplemental Declaration of Martin Tobias dated January 14, 2011, Exhibits A-E to the motion, Opposition of Defendants BuyWithMe and Andrew Moss to Kashless' Motion for Preliminary Injunction, Exhibits 1-4 to the Opposition, Declaration of Andrew Moss dated January 28, 2011, Declaration of Michael Wesner dated January 27, 2011, Defendant DeLorenzo's Response to Plaintiff's Motion for Preliminary Injunction, Declaration of Andrew DeLorenzo dated January 31, 2011 and Exhibit A thereto, Kashless's Reply Memorandum in Support of Motion for Preliminary Injunction, Exhibits A-H to the Reply, Declaration of Martin Tobias dated February 2, 2011, and

[PROPOSED] ORDER GRANTING KASHLESS'S
MOTION FOR PRELIMINARY INJUNCTION - 1

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2 Based upon the foregoing, the Court enters the following:

3 I. **Findings of Fact**

4 1. Kashless and BuyWithMe are “deal of the day” Internet marketing companies.
5 This is a new and competitive business. Kashless and BuyWithMe are competing directly for
6 merchants, consumers, employees, and venture funding. BuyWithMe’s own email
7 acknowledges the possibility that BuyWithMe will go out of business in less than 12 months.

8 2. Defendant Andrew DeLorenzo worked in sales for Kashless from June through
9 December 10, 2010. As part of his job, DeLorenzo was given access to a wide range of
10 confidential and proprietary information regarding Kashless and its business, including
11 information regarding Kashless’s financial performance and status.

12 3. At the start of his job, DeLorenzo signed a Proprietary Information and Inventions
13 Agreement (“PIA”). In the PIA, DeLorenzo promised, generally: a) not to use or disclose any
14 proprietary information about Kashless to any third parties, including information regarding
15 sales, pricing, customers, costs or any other financial data; b) not to compete with Kashless for
16 one year after the termination of his employment; and c) not to recruit or solicit Kashless’s
17 employees, customers or suppliers for one year after the termination of his employment.

18 4. On December 10, 2010, DeLorenzo quit his job with Kashless. Kashless then
19 investigated DeLorenzo because it understood that DeLorenzo intended to take a competitive job
20 at The Seattle Times. In the course of its investigation, Kashless discovered email traffic from
21 October 2010 showing that BuyWithMe founder and Director Andrew Moss had solicited
22 financial information about Kashless from DeLorenzo while DeLorenzo was still employed at
23 Kashless. This email traffic shows that by October 9, 2010, DeLorenzo had given Moss:

- 24 a. Kashless’s total gross sales revenues (Exhibit B-1);
25 b. Weekly and monthly cash burn rates (Exhibit B-1);
26 c. Kashless’s total expenses (Exhibit B-1);

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1 d. A table identifying every Kashless sales person; gross sales for each
2 salesperson; net sales of each salesperson; margin for each salesperson; the number of
3 deals closed by each salesperson; and the average value of each deal (Exhibit C-1-2); and

4 e. Kashless's total number of subscribers (Exhibit B-1);

5 5. The next day, on October 10, 2010, Moss sent a "Tippr Stats & Facts" report to
6 other senior officers at BuyWithMe containing detailed information regarding Kashless's
7 employees, specific customer agreements, commission splits, monthly gross revenues, revenues
8 broken down for different markets, marketing expenditures, and money raising strategies.
9 (Exhibit D-1-2).

10 6. The email traffic shows that Moss and BuyWithMe solicited Kashless information
11 from DeLorenzo. In an email of October 9, 2010, Moss asked DeLorenzo:

12 "Do you think you can find out how much \$\$ is left in the bank, and how
13 much he is spending every month in overhead, personnel, etc.?... Do you have
14 these same reports by city?"

(Exhibit B-1).

15 7. Moss and BuyWithMe personnel used this information to, in their own words,
16 plan to "significantly disrupt Tippr...". The emails indicate that BuyWithMe knew the
17 information was confidential and valuable. In one the email, BuyWithMe Vice President
18 Wesner noted: "Really interesting stuff here. Big question- why was he [DeLorenzo] so
19 forthcoming and do we want [to hire] someone who is so eager to share insider info?". (Exhibit
20 D-3). The information was sufficiently valuable and damaging in BuyWithMe's eyes that Mr.
21 Moss suggested that BuyWithMe "Stop sharing our details to all salespeople bc they will do this
22 same thing." (Exhibit E-2).

23 8. Kashless acknowledges that, to its knowledge, DeLorenzo is not now competing
24 with Kashless. Thus the only issue at this point involves the Defendants' use and disclosure of
25 Kashless's financial information.

26
[PROPOSED] ORDER GRANTING KASHLESS'S
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1 II. **Conclusions of Law.**

2 1. Kashless is entitled to a preliminary injunction if it can show: (1) it has a clear right;
3 (2) it has a legitimate fear that right is being invaded; and (3) the violation of its right will cause it
4 substantial injury:

5 It is an established rule in this jurisdiction that one who seeks relief by temporary or
6 permanent injunction must show (1) that he has a clear legal or equitable right, (2)
7 that he has a well grounded fear of immediate invasion of that right, and (3) that the
acts complained of are either resulting in or will result in actual and substantial
injury to him.

8 *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).
9 Kashless satisfies all three criteria.

10 2. The evidence shows that Kashless has a clear right to enforce the non-competition
11 and confidentiality provisions of the PIA. Washington law has long held that reasonable
12 noncompetition and confidentiality agreements are enforceable. *See, e.g., Cooper & Co. v. Anchor*
13 *Securities Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941); *Perry v. Moran*, 109 Wn.2d 691, 699-700, 748
14 P.2d 224 (1987), *judgment modified on recons.*, 111 Wn.2d 885, 766 P.2d 1096 (1989); *Boeing*
15 *Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). It seems very likely that
16 Kashless will prevail on its claim that DeLorenzo violated his PIA.

17 3. It also appears likely that much of the information exchanged between DeLorenzo
18 and Moss and BuyWithMe constitutes trade secrets. RCW 19.108.010(4) defines "trade secret" as
19 follows:

20 (4) "Trade secret" means information, including a formula, pattern, compilation,
21 program, device, method, technique, or process that:

22 Derives independent economic value, actual or potential, from not being generally
23 known to, and not being readily ascertainable by proper means by, other persons
who can obtain economic value from its disclosure or use; and

24 (b) Is the subject of efforts that are reasonable under the circumstances to
25 maintain its secrecy.

26 4. BuyWithMe's own Vice President Wesner acknowledged the information is "inside

1 information". Moss agreed with this thought, stating BuyWithMe had to "Stop sharing our details
2 to all salespeople bc they will do this same thing". Paragraph 4 of Mr. Tobias's Supplemental
3 Declaration makes clear that the information taken by BuyWithMe has competitive value, is not
4 generally known to or readily ascertainable by competitors, and subject to reasonable efforts to
5 maintain its secrecy.

6 5. It also appears likely that BuyWithMe "misappropriated" the information as defined
7 by RCW 19.108.010(2), and BuyWithMe used "improper means" by inducing DeLorenzo to
8 "breach his duty to maintain secrecy" of the information under RCW 19.108.010(1). Wesner's own
9 email acknowledged as much. It also appears that there is a substantial likelihood that the evidence
10 will show that their actions constituted theft under RCW 9A.56.010(6) and 9A.56.030.

11 6. RCW 19.108.020 specifically provides for injunctive relief to protect trade secrets,
12 and authorizes courts to compel affirmative acts to protect trade secret information. RCW
13 19.108.050 similarly provides that:

14 In an action under this chapter, a court shall preserve the secrecy of an alleged
15 trade secret by reasonable means, which may include granting protective orders in
16 connection with discovery proceedings, holding in-camera hearings, sealing the
17 records of the action, and ordering any person involved in the litigation not to
18 disclose an alleged trade secret without prior court approval.

19 7. The evidence regarding the value and confidentiality of the information also shows
20 that Kashless will likely be substantially injured without injunctive relief.

21 **III. Order.**

22 Based upon the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED:

23 a) All Defendants shall continue to comply with Paragraphs 2 and 4 of the
24 Temporary Restraining Order dated December 20, 2010, Continuing the Temporary
25 Restraining Order's prohibition from further using or disclosing Kashless's confidential
26 information. Defendants shall not alter or destroy evidence, except as required under
Subparagraphs (c) and (e) below;

b) Defendants Moss and BuyWithMe shall ~~make and deliver to BuyWithMe's~~

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Preserve JOT
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1 ~~outside counsel: i) forensically sound bit stream images of all computer hard drives~~
2 ~~(including personal computers) containing any communications with or any information~~
3 obtained from DeLorenzo; and ii) any and all hard copies or other records containing
4 such information;

delus. to counsel JCF (SG)

5 c) After complying with subsection b) above, Defendants Moss and BuyWithMe
6 officers Pedro Martins and Michael Wesner shall provide to Kashless written
7 certifications under penalty of perjury that, apart from copies of hard drives given to their
8 outside counsel, all records containing any information obtained from DeLorenzo,
9 including, but not limited to, hard copies and electronically or magnetically stored data,
10 have been permanently destroyed and deleted from BuyWithMe's data preservation
11 systems, and describing with specificity the steps taken to achieve that end;

he has access to (SG)

12 d) Defendant DeLorenzo shall make and deliver to DeLorenzo's outside counsel:

13 i) forensically sound bit stream images of all computer hard drives containing
14 information obtained from Kashless or sent to BuyWithMe or Moss; and ii) any and all
15 hard copies or other records containing such information;

(SG)

she has access to

16 e) After complying with Subparagraph (d) above, defendant DeLorenzo shall
17 provide Kashless with written certification under penalty of perjury that, apart from
18 copies of hard drives given to his outside counsel, all records of information obtained
19 from Kashless, including, but not limited to, hard copies and electronically or
20 magnetically stored data, have been permanently destroyed and deleted from
21 DeLorenzo's data preservation systems, and describing with specificity the steps taken to
22 achieve that end; and

1 f) Bond is maintained in this action at \$10,000.

2
3 DONE IN OPEN COURT this 4th day of February, 2011.

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5
6 
7 HONORABLE STEVEN C. GONZALEZ

8 Presented by:

9 VANDEBERG JOHNSON & GANDARA, LLP

10
11 By _____
12 James C. Fowler, WSBA #15560
13 Attorneys for Plaintiffs

14 Approved as to form;
15 Notice of presentation waived.

16 STAFFORD FREY COOPER

17
18 By _____
19 A. Richard Dykstra, WSBA #5114
20 Danford D. Grant, WSBA #26042
21 Attorneys for Defendants Andrew Moss and
22 BuyWithMe

23 VALDEZ MALCOLM PLLC

24
25 By _____
26 Sean Bennett Malcolm, WSBA #36245
Attorneys for Defendant Andrew DeLorenzo

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