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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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UAH-MAYAIR MANAGEMENT GROUP LLC and UAH PROPERTY
MANAGEMENT, L.P.,

Plaintiffs,

-against-

Index No.
653590/18

MICHAEL CLARK, LYNNE CLARK, and DISTINGUISHED
AFFORDABLE HOUSING MANAGEMENT CONSULTANTS, LLC,

Defendants.
-----x

60 Centre Street
New York, New York 10007
September 13, 2018

B E F O R E:
HONORABLE JENNIFER SCHECTER, Justice

A P P E A R A N C E S:

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THE COURT: Good morning. We are here for argument on a preliminary injunction. And the plaintiff is the movant.

Counsel, go ahead.

MS. GUERON: Your Honor, just before that, there is also a pro hac vice motion pending from -- Mr. Myers is here from Dallas and Mr. Ross told me he has no objection.

THE COURT: That is fine. Then the motion will be granted in due course and very good. Please be seated. Go ahead.

MR. ROSS: I --

THE COURT: Why should I grant an injunction today?

MR. ROSS: Your Honor, you should grant the injunction today because it's clear from the evidence that we put in front of the Court that Mr. Clark and his company, HMC, and the other defendant, Mrs. Clark, have been using plaintiff's confidential information for its own benefit; has been providing that information to third-parties, including Brownstone which is -- well, it still is currently plaintiff's largest client, just transitioning away.

In particular, last night after we had a chance to review many documents, and this is included as

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Exhibits D and E to the supplemental affirmation -- and I apologize, your Honor, I filed it at 3 a.m. last night and I tried to get it to the Court as early as possible by hand delivery.

Exhibits D and E show that Lynne Clark, who is a principal of DHMC, along with Mr. Clark, sent a Benefits Guide, plaintiff's Benefits Guide along with the Brownstone so that they could use it. Exhibit E --

THE COURT: When did they do that?

MR. ROSS: They did that approximately on August 9th, 2018, which was after this action had been filed and after the initial TRO had been denied by this Court.

So it's particularly brazen that that activity would happen after that hearing and after this lawsuit was filed. And if you look at Exhibit E to Mr. -- to Mr. Salerno's affidavit from September 13th, from this morning, he also sends a copy of the Employee Handbook. And in that exhibit he says, specifically, "it needs to be repaginated and I am sure there are sections that you may want changed." And then he goes on, "yes, it is very boring but worth its weight in gold."

So, essentially, what he is doing, he is working for a client to hasten their departure from the plaintiffs. Working directly. And there is an

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2 agreement in place where he is getting paid
3 approximately \$7,500 a month for hastening his departure
4 --

5 THE COURT: Is he -- so is he getting paid by
6 Brownstone?

7 MR. ROSS: Correct.

8 THE COURT: And what evidence do you have in
9 support of that?

10 MR. ROSS: There is an agreement, attached as
11 Exhibit B to Mr. Salerno's affidavit. And it's only
12 signed by Mr. Clark. It's not countersigned by
13 Brownstone, I will concede that, but from the affidavit
14 that I have submitted here along with the e-mails it
15 appears that Mr. Clark and Mrs. Clark were having weekly
16 calls with Brownstone, and were sending scores of
17 information back and forth in order for them to
18 transition away from plaintiffs. That is the -- the
19 e-mails are set forth in Exhibit A of this exhibit;
20 Exhibit C of Mr. Salerno's affidavit, and those e-mails
21 are from July, August of 2018. Again, after this action
22 was filed.

23 So, your Honor, essentially what is happening
24 with regard to Brownstone, is that defendants are
25 basically using -- and it can't be disputed, they are
26 using plaintiff's confidential information as that term

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2 is defined in the relevant agreements and giving it away
3 to plaintiff's client for the purpose of hastening that
4 client's departure away from the plaintiffs.

5 THE COURT: Who is Leslie Holleman?

6 MR. ROSS: Leslie Holoman is a person --
7 someone that works with Brownstone.

8 THE COURT: Do you know in what capacity?

9 MR. ROSS: Her capacity -- I know what her
10 title is. But her full capacity I am not fully aware of
11 what she does. I believe she is part of decision making
12 on behalf of Brownstone.

13 THE COURT: Okay.

14 MR. ROSS: So there are scores of e-mails
15 between the defendants, all of the defendants including
16 their company, DAHMC, doing a lot of work for Brownstone
17 including sending confidential information, an Employee
18 Handbook, the Benefits Guide. And, importantly, your
19 Honor, in one of the e-mails it says that they are doing
20 that for the purposes of luring plaintiff's employees to
21 go work for Brownstone. And that is in the e-mails.

22 So, again, that is something that can't be
23 disputed. I am just reading what the e-mails
24 specifically said.

25 THE COURT: What is the status of Brownstone
26 right now?

1 Proceedings

2 MR. ROSS: They are still technically a client
3 and in transition.

4 THE COURT: So they are clients?

5 MR. ROSS: Yes, no question they are clients.

6 THE COURT: And when is the agreement over with
7 Brownstone? Or when is the engagement --

8 MR. ROSS: Well, there is a letter sent to
9 plaintiffs regarding a wind-down. And it's a gradual
10 wind-down over a period of eighteen months,
11 approximately eighteen months where they were going to
12 take the management in-house. What they did was, they
13 retained Mr. Clark and his company in order to do that
14 wind-down and take everything in-house. So while
15 Mr. Clark and his company were acting as plaintiff's
16 consultant, it was also hastening the departure of
17 plaintiff's largest client. I don't know if they are
18 getting paid. Maybe they are. I have a drafted
19 agreement that was signed by the defendants in that
20 regard to do that work. There were e-mails and weekly
21 phone calls to do that. They are sending them the
22 confidential information. They are discussing using
23 usurping plaintiff's employees for the purposes of
24 taking the management in-house, and that is some of the
25 e-mails produced to me.

26 Now, I haven't been through all of them but

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2 that is one piece of why the Court should grant the
3 preliminary injunction. And there is a second reason.
4 And this is the second reason for why we renewed our
5 application for a TRO, is that they are misusing a
6 client, plaintiff's second largest client is Alden
7 Torch. Alden Torch. And, again, the e-mails don't
8 really spell it out, but there was contact between
9 Mr. Clark and Alden Torch about working for Good Harbor
10 which, like Brownstone, is -- manages properties that it
11 owns in-house. It's an in-house --

12 THE COURT: Is Good Harbor a competitor of the
13 plaintiff?

14 MR. ROSS: Yes, and I will tell you why they
15 are a competitor of plaintiffs. Good Harbor and Alden
16 Torch -- and, again, Alden Torch is plaintiff's second
17 largest client. There is someone named Jill -- pardon
18 me, your Honor. I didn't get much sleep last night. I
19 apologize. I am sorry.

20 Jill Brooks Garnet, who sent Mr. Clark a
21 contract initially on behalf of Alden Torch to get
22 services back in July, and then Ms. Garnet also sent a
23 subsequent contract which was executed by Mr. Clark's
24 company, DHMC and Good Harbor concerning certain
25 services and Mrs. Brooks Garnet signs that agreement on
26 behalf of Good Harbor. So there's overlapping people

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that make decisions here on both ends.

So the same people that will be making decisions as to whether or not to retain plaintiff's services for management are the same people that decide what properties should be managed by Good Harbor.

THE COURT: So I am confused.

Is your argument that Good Harbor is a client or competitor of plaintiff?

MR. ROSS: It's difficult to tell where the line beings and where it ends with regard to Good Harbor. I believe they are -- technically could be both. I believe they are a competitor and I will explain to you now.

THE COURT: I think that is the better argument. Go ahead.

MR. ROSS: If you look at what Brownstone just did, they -- what they did, using Mr. Clark's expertise, they just transitioned all the properties being managed by plaintiff and took them in-house. That is what they did.

With Mr. Clark now going to work for Good Harbor also as overlapping directors with Alden Torch, which is my client's second largest client, there could be a thought of in Mr. Clark's mind to basically say why don't we take all these properties and bring them

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2 in-house to Good Harbor. That would harm the
3 plaintiffs. And, again, we don't know what will happen.
4 But we do know what happened with Brownstone. And the
5 issue is, they oppose that by stating that, oh, we are
6 only a limited partner in certain agreements, but that
7 is simply not so.

8 Attached to Mr. Salerno's affidavit, as
9 Exhibits G and H are certain agreements that Alden Torch
10 and its affiliates have with plaintiffs which show that
11 the limited partner does have influence and control over
12 who the management company is.

13 The other issue is the reality of the situation
14 is that a limited partner who owns 99.9 percent of an
15 entity could readily influence the general partner to
16 change management companies. And that's the fear we
17 have. That is why they are a competitor.

18 THE COURT: Is that dispositive to whether Good
19 Harbor is a competitor?

20 MR. ROSS: I believe it is dispositive, your
21 Honor. Again, the same decision-makers who are deciding
22 whether or not to keep Mr. -- keep plaintiffs in their
23 employ under these short term thirty day agreements are
24 the same people making decisions for Good Harbor. And
25 that is made plain by the fact that Mrs. Brooks Garnet
26 did not put in an affidavit refuting any of those

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2 points. And the first agreement was signed by Ms.
3 Brooks Garnet. And the second agreement sent by Good
4 Harbor is also signed by Ms. Brooks Garnet.

5 So, again, the people that plaintiffs are
6 dealing with, are the same at Alden Torch and at Good
7 Harbor. Therefore, there is a threat of imminent harm,
8 your Honor. I don't think that could be disputed.

9 There is one other point, and I apologize
10 because we didn't get a chance to review all the
11 affidavits. We uncovered this morning another e-mail
12 from August 10th, so that after the initial TRO is
13 denied, and before we got the -- back here on the 17th
14 to discuss the issue of Alden Torch where Jill Brooks
15 Garnet of Alden Torch asks Mr. Clark if he knows any
16 people that could work on their properties. And
17 Mr. Clark responds, "I will reach out to my former
18 employees for potential staff."

19 That is him speaking with Alden Torch about
20 usurping, again, usurping plaintiff's employees for the
21 use of plaintiff's second largest client. That is not
22 allowed under the solicitation provision under the
23 agreement. Again, I am reading it directly from the
24 e-mail. I can hand it up, and I will hand it to
25 opposing counsel who I am sure is already aware of this
26 e-mail if the Court will be so indulgent.

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THE COURT: So Mr. Ross, before I hear from Ms. Gueron, tie me to the contract here. Give me the path by which you believe you are entitled to a preliminary injunction based upon the agreement.

MR. ROSS: Sure, your Honor. There is different agreements. First there is a separation agreement which incorporates a noncompete provision which is Section 7A, and if you go back to --

THE COURT: Well, 7A deals with the confidentiality and B --

MR. ROSS: Yes, 7A discusses what confidential information is. And it's very broad. It discusses proposed transactions. It discusses pricing policies, sales profit cost, and other financial information.

One thing I forgot to mention, your Honor, also is that Mr. Clark also shared plaintiff's proprietary financial information with Brownstone after this lawsuit was filed. And, again, I believe that is after the initial preliminary injunction was denied. So that would fall under confidential information. So it's clear that confidential information is being passed by defendants to third-parties including Brownstone. That is --

THE COURT: And specifically you are referring to the Employee Handbook?

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MR. ROSS: Employee Handbook, and the Benefits Guide, financial information, and these are things we just found so far. And the other part, your Honor, is that -- well, I will get to that point later. What I mean when I discuss this, you have to understand this is a sale of Goodwill of a company. There was millions of dollars to purchase the name of Goodwill. And the clients that the Goodwill had are all on short term thirty day contracts for the most part. So 7B says prohibit activities, noncompetition.

Well, there are other areas which are in the affidavit which I haven't really discussed, your Honor. For example, Mr. Clark soliciting current clients which are attached to Mr. Salerno's affidavit to do consulting work which we believe is competition again.

THE COURT: Give me the more specifics, Mr. Ross. When you say he is violating the noncompete, specifically how?

MR. ROSS: Okay. He is violating the noncompete, your Honor, because he is directly engaging or assisting in activity which is the same as or competitive for the business of the company. What he is doing, by going to work for Good Harbor who could take all their properties in-house and is indisputably a management company, he is going to work for them and

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2 engage in the same business that plaintiffs do for an
3 affiliate that has overlapping directors for plaintiff's
4 second largest client. That is anti-competitive.

5 THE COURT: What about the argument that it's
6 two to three days worth of work and just auditing the
7 properties.

8 MR. ROSS: Well, again, that is what they say.
9 But I don't believe that to be the case. It appears
10 that even after -- your Honor, even after August 17th
11 hearing that we had, and they were told not to enter
12 into any agreements with Good Harbor, there were still
13 conversations and e-mails attached to Mr. Salerno's
14 affidavit where he sets up a call with Ms.
15 Brooks-Garnett to discuss I don't know what because
16 there is no e-mail that shows that.

17 There is another issue, your Honor, they were
18 required to divulge any agreement they had with Good
19 Harbor pursuant to the August 17th Order. They produced
20 nothing. And there is an agreement dated July 26th
21 between defendants and Good Harbor.

22 THE COURT: Well, we all have that agreement,
23 don't we?

24 MR. ROSS: Yes, we do now.

25 THE COURT: How did we get that agreement?

26 MR. ROSS: It was produced to me just Monday.

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THE COURT: Did that mean we had an earlier version? When we were here last I saw an agreement with Good Harbor and Alden.

MR. ROSS: There was two separate agreements. There was a service agreement entered into on July 26th --

THE COURT: Proposed or entered into?

MR. ROSS: Fully executed agreement.

THE COURT: Okay.

MR. ROSS: And that is attached as Exhibit 5 to Mr. Salerno's affidavit. And that agreement is different than the contemplated agreement that was never executed in this court told the defendants not to execute and which is the subject of the parties' stipulation.

THE COURT: So let me ask you this, meaning if it was a two- to three-day job would that be competitive work?

MR. ROSS: Yes, we believe it -- he is working for a competitor.

THE COURT: So it doesn't matter to you whether the scope was two to three days of work on properties or whether it's more as you believe.

MR. ROSS: It doesn't matter what it is. Competition is competition. When you bargain for and

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2 purchase the good will of the company -- and the other
3 issue too, there are e-mails in Exhibit 8 to Salerno's
4 affidavit where he is disparaging plaintiff's executives
5 to third-parties including Brownstone. So when those
6 things happen, when you combine those with the fact that
7 we believe Good Harbor, which is Alden Torch's
8 affiliate, is a direct competitor, when you combine
9 those together there is a great chance for irreparable
10 harm in the loss of Goodwill and the loss of a client.
11 Just because someone works for Coke and enters into a
12 noncompete agreement and goes to work for Pepsi for two
13 days doesn't make it right. You can't do that
14 especially in the spirit of a Goodwill contract.

15 The defendants also cite to a case of Bessemer
16 where they say it's okay to solicit people as long as
17 it's -- as long as you don't reach out to them first;
18 they reach out to you first. But Bessimer is
19 distinguishable for one major reason; there is no
20 noncompete in Bessimer at all. Here there is a
21 noncompete. And in Bessimer the defendant went to work
22 for a third-party large company. The defendants here in
23 this case are Mr. and Mrs. Clark. That's it. They are
24 not going to work for a large company. Any pitch they
25 will make is being made by Mr. Clark. So, again, there
26 is no way to parse out -- if you go to work for a

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2 competitor for two days, one day, it's competition. If
3 you go and meet with them that violates the
4 nonsolicitation part of the agreement. You cannot do
5 that. They are either a current client, prospective
6 client or a competitor. And that is what millions of
7 dollars were spent for and why there is a three year
8 limitation.

9 Now, they could do that in two years and
10 roughly four months, or, six months. They could do
11 that. They could compete with the company. They could
12 solicit in two years and six months. But they can't do
13 that right now. That was the purpose and scope of this
14 agreement, your Honor.

15 And as far as -- I will just wrap up my points
16 here, your Honor. The other -- well, there are several
17 other issues, but there is also issues of Mr. Clark also
18 contacting and discussing a loan that was made by Mason
19 Joseph to plaintiff's client, the Odessa Housing
20 Authority.

21 Now, this happens -- the last communication
22 between Mr. Clark and plaintiff's client is August 19,
23 2018. That is two days after the stipulation in this
24 case. And, frankly, your Honor, he should not be
25 contacting or discussing anything with plaintiff's
26 current clients. And he certainly should not be

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2 responding to them with regard to a loan that
3 plaintiff's affiliates, MCA, was in the market to try to
4 get and say, oh, that loan looks great. And you should
5 do it with the competitor where Mr. Clark knew that MCA,
6 plaintiff's affiliate, was working on.

7 So, again, that is anticompetitive activity as
8 well. We just scratched the surface of the e-mails.
9 There are certain other issues we have with discovery.
10 For example, there is issues with laptops but I will get
11 to that after defendants have a right to speak. There
12 is also a July 13, 2018, e-mail which we uncovered this
13 morning where it shows that Mr. Clark was sending draft
14 employment agreements along to Brownstone -- Mrs. Clark
15 sent them to Brownstone.

16 And apparently I don't know how Mr. Clark
17 received them because according to his counsel -- or
18 still had them -- he doesn't have any UAH documents, he
19 returned all the confidential information to UAH. But
20 this e-mails dated July 13, 2018, tells a very different
21 story. And Ms. Clark says, and I can hand this e-mail
22 up, "there are several items not included in Mike's
23 copies. That were added per our attorney. I will send
24 them over today." And it also says in an e-mail from
25 Mr. Clark, "Lynne has several" -- meaning draft
26 employment letters that are on a portable hard drive. I

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2 have attached what I have to give you a general idea of
3 how they appear."

4 So it's clear they have retained UAH's
5 confidential information and they have it and
6 distributed it to Brownstone. And that is on July 13,
7 2018. So, again, and I could hand this up to your
8 Honor.

9 THE COURT: Okay. I will take it. Thank you.

10 All right. Ms. Guerin, it doesn't sound good.
11 Tell me why everything here is on the up and up and
12 doesn't violate any of the provisions.

13 MS. GUERON: Your Honor, I would be honored to
14 do so and I also would ask the opportunity for Mr. Clark
15 to speak. Because in many ways there have been very
16 personal accusations against him. And as Mr. Salerno
17 had the opportunity to speak the last time we were
18 before your Honor, Mr. Clark would really like that
19 opportunity as well.

20 With the Court's permission I would like the
21 opportunity for him to say a few words as well. Would
22 that be acceptable?

23 THE COURT: Any objection?

24 MR. ROSS: I don't have an objection, but if he
25 is going to be speaking on the record, and Mr. Salerno
26 was talking off the record, I have no problem with

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Mr. Clark speaking but I believe Mr. Salerno should be given the right to speak on the record as well.

THE COURT: How about if it's necessary?

MR. ROSS: That is fine.

THE COURT: Meaning I have no idea what Mr. Clark feels the need to tell me and I first, of course, want to hear how legally what Mr. Clark has engaged in or you could dispute whether he is engaged in the conduct or any of the evidence that Mr. Ross has raised.

Again, everything that Mr. Salerno said last time, that was not sworn and off the record. I am not considering that today. So I don't know, meaning if he feels the need to talk to me because he's concerned about what Mr. Salerno said, but that is not part of the record here and not going to influence my determination. It's not. The only thing that will make a difference are the submissions of the parties right now and what I hear today. And I have not heard anything from Mr. Salerno today.

My concern is what is going on with Brownstone, and what is going on with Good Harbor.

MS. GUERON: Certainly, your Honor. If I may.

THE COURT: Please.

MS. GUERON: When we have been before your

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2 Honor before, and when we have talked about the legal
3 landscape of this case, everyone has seemed to
4 understand that we stand between a variety of
5 agreements. There are contracts that have
6 noncompetition and nonsolicitation requirements. Those
7 same contracts carve-out the right for Mr. Clark and his
8 company to continue as consultants.

9 THE COURT: So here is the problem, Ms. Guerin.
10 I will jump right in.

11 MS. GUERON: Yes.

12 THE COURT: When we talk about carve-out, I
13 don't see it as broadly as I believe you are
14 interpreting it.

15 MS. GUERON: Okay.

16 THE COURT: Meaning the provision in the
17 employment agreement states that the executive
18 cooperator could otherwise participate in, first of all,
19 noncompetitive property management consulting services
20 provided the same shall not adversely effect or compete
21 with the company or interfere with the executive's
22 performance of his duties as executive of the company.

23 MS. GUERON: Yes, your Honor.

24 THE COURT: The way I could interpret that or
25 the way I think is the reasonable interpretation of that
26 is that he could engage in activities that are not at

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2 all coextensive with the activities that the plaintiff
3 engages in. It would have to be something completely
4 separate and apart. Because if it were the same, it
5 would be a problem. Meaning, it would be a conflict if
6 while he was employed. And this is contemplated for
7 while he is employed. If he is doing the same
8 activities that plaintiff is doing, that would be a
9 problem.

10 The only interpretation I could give what we
11 have been calling the, quote, carve-out is the activity
12 that is distinct from the services that plaintiff
13 provides.

14 MS. GUERON: Your Honor, that is right. And
15 Mr. Clark, one of the things I think he would very much
16 like to tell you himself is that there is no way that
17 his two-person consulting company, a company that is
18 himself and his wife, could be competing with the four
19 hundred person company that he built, and that, frankly,
20 is his legacy and that he has no interest in harming.

21 So, your Honor, the carve-out permits him to
22 participate in noncompetitive property management
23 consulting services. We are not arguing that he may be
24 a property manager. Of course not. That is their
25 business. His business is property management
26 consulting services.

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2 So what does that mean? And that is the
3 question we have been asking. And, frankly, it's the
4 question Mr. Clark asks as he tries to figure out how I
5 earn a living going forward when I am told I could be a
6 consultant in the field I worked in for forty-five
7 years, but every time I seem to do the consulting that I
8 was told and contracted for that I could do, I am told I
9 am competing.

10 And so if I may also speak to the legal
11 standards here, your Honor, you are being asked to show
12 irreparable -- to find that there is irreparable harm.
13 So I ask, what is the irreparable harm that is being
14 described here? Brownstone, it's Doak, D-O-A-K, brown,
15 signed an affidavit in our prior filing, your Honor,
16 that said that on June 10th they let UAH know that they
17 were terminating UAH --

18 THE COURT: But they are still clients now,
19 correct?

20 MS. GUERIN: I don't know how long that period
21 is. But the idea that Mr. Clark is hastening the
22 departure, luring them away, they had given notice, they
23 were leaving. There is no decision that is up in the
24 air or there is no irreparable harm that could stem from
25 any interaction with Brownstone. Their decision has
26 been made. They are leaving UAH.

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Now, so the allegation somehow that there is a hastening of departure, that is pure speculation. In contrast to the affidavit of the Vice President of the company saying we told UAH, we are leaving and no longer want to do business. What they say further, the decision to terminate UAH was the culmination of years of growth of our portfolio. The decision was not made overnight and he says that the decision to terminate its relationship with UAH was not influenced by, encouraged by or solicited by or dependent in any way on Michael --

THE COURT: Okay. Let's forget the termination that is upcoming. But let's focus now on that Brownstone is now a current client of the plaintiff.

Is Mr. or Mrs. Clark doing work for Brownstone now?

MS. GUERON: Well, I think -- there is no signed contract among them.

THE COURT: Okay. Is he doing work?

MS. GUERON: I think -- are you consulting?

MR. CLARK: Yes.

MS. GUERON: So there is consulting work going on.

THE COURT: Okay.

MS. GUERON: From that perspective, that falls within the category of noncompetitive property

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2 management consulting services. So he is not luring
3 them away. He is doing what he thinks lives exactly
4 within that carve-out.

5 THE COURT: So, Ms. Guerin, I will ask you and
6 you could ask Mr. Clark or I will ask him under oath, is
7 part of his consulting work giving them the employee
8 manual and other information that belongs to plaintiff?
9 Is that part of the noncompetitive consulting work? And
10 when I say noncompetitive consulting work, I am using
11 your terminology. I am not necessarily saying that I
12 agree that it's noncompetitive consulting work. But in
13 that context, he gave the information from the plaintiff
14 to Brownstone?

15 MS. GUERON: I think I have to say yes to that.

16 THE COURT: Okay. I guess you do.

17 MS. GUERON: Your Honor, nonetheless, there is
18 no irreparable harm coming from the work because they
19 already stated they were terminated from UAH. His work,
20 his consulting is not changing.

21 As to Alden Torch, your Honor, Mr. Ross says to
22 you he can't tell whether there are -- whether they are
23 a client or competitor. It could be both. Well, what
24 the employees and leadership of Good Harbor say, loud
25 and clear, in their affidavits, Steve Sterquell who is
26 the managing director says, Good Harbor only manages

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property owned by Alden Torch Financial or properties in which Alden Torch Financial has a general --

THE COURT: That is what they say now. But does Good Harbor engage in property management for anybody?

MS. GUERON: Good Harbor --

THE COURT: I would think it's an easy question.

MS. GUERON: Yes, Good Harbor manages property --

THE COURT: So it is a property manager. But it currently is not servicing any of plaintiff's clients.

MS. GUERON: Right.

THE COURT: But it's a property manager.

MS. GUERON: And what the Executive Vice President of Alden Torch says is that she specifically refers to something Mr. Salerno said, that Alden Torch had the authority to remove UAH as the property manager. And she says this in her affidavit, this statement is untrue. And then she says under each of the limited partnership agreements that define the limited partner's rights, the limited partner has no authority or ability to select or designate a property manager. Retaining such a right in the LPA or engaging such conduct could

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2 jeopardize Alden Torch's or its affiliates status as a
3 limited partner.

4 So what could really be only thought of as
5 guesswork on the other side, you have people at Alden
6 Torch and Good Harbor saying we don't compete, that is
7 not the work we do, we do not have the right to flick a
8 switch and swap in property managers. And that is why
9 from Mr. Clark's perspective, doing work with Good
10 Harbor is not competing. It's consulting with a
11 noncompetitor of UAH. Speculation to the contrary could
12 not overcome the witness, sworn witness testimony of
13 folks who have no dog in this fight. They run their own
14 companies and have sworn affidavits to this Court that
15 this is not a competitor.

16 I think Mr. Clark's remarkable good faith in
17 turning over eighteen thousand pages of e-mails
18 immediately upon request after they asked for six and a
19 half pages of e-mails, this is someone who does not have
20 anything to hide. He is trying to live within what
21 appears to be a very narrow band, but it's not a
22 nonexistent band of where he is allowed to consult.

23 And if I might, your Honor, now give Mr. Clark
24 an opportunity to describe his relationship to UAH, his
25 desire to see the company thrive. It would mean a lot
26 to --

1 Proceedings

2 THE COURT: You know what, I will allow him to
3 testify. Let's have him sworn in. And to be clear,
4 once he testifies he could be cross-examined.

5 MS. GUERON: Yes.

6 THE COURT: Okay. Very good. He can remain
7 there.

8 M I C H A E L C L A R K, the Defendant herein, having
9 been first duly sworn, was examined and testified as follows:

10 COURT CLERK: State in a loud clear voice your
11 name and address.

12 THE WITNESS: Michael Clark, 7209 Glendora
13 Avenue, Dallas, Texas.

14 THE COURT: Good morning, Mr. Clark. You may
15 be seated. Go ahead, Ms. Gueron.

16 DIRECT EXAMINATION

17 BY MS. GUERON:

18 Q. Mr. Clark, can you tell us the history of UAH and
19 your relationship to it?

20 A. Yes. It started on March the 1st, 2002, in the
21 bedroom of my house. Started with two properties and two
22 properties under construction. Twelve years later that
23 small little company would be ranked twenty-fifth largest
24 affordable management housing company in the country by the
25 National Affordable Housing Management Association.

26 We were operating in nine states with sixteen

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2 thousand units and over five hundred fifty employees. The
3 growth of the company was based one hundred percent on
4 referrals. I never solicited business. I never made a call
5 or knocked on a door. Mr. Salerno in his affidavit says -- I
6 think borne out his thesaurus finding as many negative
7 adjectives to describe my character. I am not the ogre. I
8 wanted to sell the company. If I -- I do not want to engage
9 in property management. I am seventy-two years old. My
10 partners are older than I. This was an opportunity to sell
11 the company and back off property management.

12 I had an agreement with them for which I could
13 remain as the president. And that was the plan.
14 Unfortunately plans often go astray. So I exercised this --
15 earlier last year my termination, followed up with my
16 termination, and expected to be paid a -- by the way, your
17 Honor, I forfeited 1.2 million dollars by resigning early. I
18 was supposed to be paid \$297,000 on June 4th and to receive
19 severance pay through October of this year. Money was never
20 paid. And the severance pay was suddenly turned --
21 discontinued in July.

22 I have no animosity towards Mayfair or UAH. I do
23 have a tremendous amount of loyalty to all of the clients.
24 And they do come to me. And I try to be responsive without
25 disparaging, demeaning, but I feel an obligation, these
26 people brought their business and trust to me over these

Proceedings

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2 fifteen to sixteen years and I can't simply just dismiss
3 them. But the interest, if any, is -- why would I have
4 interest in hurting or harming UAH when, in fact, they owe me
5 a significant amount of money. I want them to succeed. Many
6 of my old clients are now their clients and I encouraged it.

7 What has not been made clear, and this is a -- this
8 continuing Brownstone thing, I personally secured more
9 revenue on the business for UAH than Brownstone generates.
10 So I, on my own as the consultant at the time, still unpaid
11 by UAH, brought in more revenue than Brownstone's entire
12 portfolio generates. And I just want the Court to understand
13 I am not the ogre. I am not a bad guy. I have no agenda. I
14 simply would like to be paid what I am owed, allowed to
15 operate as a consultant because as I described to anyone that
16 will listen, I am too old to deal with a day-to-day pressure
17 of property management which in all due respects, your Honor,
18 is 24/7. But I am far too young to watch the Shopping
19 Network. I wanted to be able to use my many years of
20 experience and knowledge in the industry to pick and choose,
21 help clients on my schedule, supplementing my income to push
22 back as long as possible what my wife and I set aside for
23 retirement. I am very sorry -- this whole matter is a
24 nightmare. And we may -- we have no hidden or aligned
25 agenda. And plaintiffs tend to pull out pieces of e-mail,
26 string them together, which shows me that they really have no

1 Proceedings

2 good -- they fundamentally don't understand the business.

3 Q. If I may, Mr. Clark, are you engaged in property
4 management?

5 A. No, I am not.

6 Q. Can you explain to the Court, how do you know that
7 to be true?

8 A. Because I don't want it.

9 MR. ROSS: I will object. That calls for a
10 legal conclusion based upon the agreement.

11 THE COURT: I will allow him to say based on
12 his interpretation that he has not engaged in property
13 management, and you could ask him whether he has engaged
14 in or not and I will ultimately make the call.

15 MR. ROSS: Okay. Go.

16 THE COURT: Go ahead.

17 A. No, I am not.

18 Q. And how do you know that?

19 A. Well, I think after forty-some years in the
20 business I would know what property management services are.

21 Q. Perhaps I will ask it differently.

22 A. I don't collect rents. I don't hire people. I
23 don't do -- I don't do any property management work at all.
24 I consult with property managing firms on how to do certain
25 things. I suggest to them certain things. The Brownstone,
26 as you pointed out what that was, what has not been

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2 presented to the Court is that Brownstone takes over these
3 properties. The employees on these properties are -- while
4 they are proceeds of UAH, when the management goes away,
5 they will have no job. So I was endeavoring to assist
6 Brownstone in creating a comparable package, employee
7 benefits package so Brownstone could retain those employees.

8 THE COURT: How do you know, Mr. Clark, that
9 they won't have a job? Meaning, they may not work on
10 that property, but how do you know that they will still
11 have a --

12 THE WITNESS: Well, I don't know. But I do
13 know this; I know where UAH operates. And has no other
14 properties under management in Mississippi, in
15 Louisiana. They just don't have any. So where are
16 these people going to go? Will they move somewhere in
17 Texas? I don't know. But typically, in my experience,
18 your Honor, employees on-site will stay on-site because
19 that is where they live.

20 THE COURT: I understand. I appreciate your
21 worrying about them now while they do have a job with
22 UAH.

23 THE WITNESS: Yes, ma'am. But I was giving
24 Brownstone information so if they -- if and when they
25 meet with these employees they are not going to offer
26 these employees something inferior to what the employees

1 Proceedings

2 are -- what they were currently receiving from UAH.

3 THE COURT: All right. Go ahead, Ms. Gueron.

4 Q. Have you solicited any of --

5 A. Absolutely not.

6 Q. Have clients reached out to you?

7 A. Yes.

8 Q. Has the flow always been in that direction, not you
9 reaching --

10 A. I have not approached any UAH client. Period.

11 Q. Have you reached out to UAH employees to --

12 A. No.

13 Q. -- let me finish the question -- to go work
14 elsewhere?

15 A. No, I have not. My e-mail was referring to former
16 UAH employees.

17 Q. So the e-mail that Mr. Ross was reading aloud in
18 which it quoted you saying "I will reach out to my former
19 employees for potential staff" --

20 A. "Former", that's correct.

21 Q. Can you explain to the Court who you meant?

22 A. I meant former regional managers.

23 THE COURT: Can I get names?

24 THE WITNESS: I haven't reached out to anyone
25 specifically.

26 THE COURT: But you said I will reach out to my

1 Proceedings

2 former employees for potential staff. I could interpret
3 that as my former employees when I was with UAH. "My
4 former employees."

5 THE WITNESS: But later on I could present to
6 the Court an e-mail in which I specifically informed
7 Good Harbor that I would not and could not solicit any
8 current UAH employee for employment with Good Harbor.

9 THE COURT: So what did you mean when you said
10 "I will reach out to my former employees for potential
11 staff?"

12 What were you thinking of?

13 THE WITNESS: Who was I thinking of?

14 THE COURT: Yes.

15 THE WITNESS: Tracy Braken, who is the H.R.
16 manager; Josh McKool, who is the national inspections
17 manager. I was thinking of -- putting me on the spot
18 here. But I haven't reached out to any of them. My
19 thought process was that I would reach out to the former
20 employees, but I don't know at this time -- at this time
21 I don't know what positions they are seeking to fill.

22 Q. I just want to clarify --

23 THE COURT: One moment. And where is Tracy
24 Braken now?

25 THE WITNESS: She was terminated by UAH.

26 THE COURT: When?

1 Proceedings

2 THE WITNESS: I think -- I don't remember the
3 exact date.

4 THE COURT: Give me a ballpark.

5 THE WITNESS: I think in April.

6 THE COURT: Okay. And what about Josh McKool?

7 THE WITNESS: Probably March.

8 THE COURT: Okay.

9 Q. I just want to make this crystal clear. When you
10 wrote, Mr. Clark, "I will reach out to my former employees",
11 were you referring to people who were at the time this was
12 written, namely August 10th, still currently working at UAH?

13 A. Absolutely not. No. No, I was not.

14 MS. GUERON: I think that is it, your Honor.

15 For now. Given the informal nature of this I would ask
16 that you permit some leeway in terms of Redirect.

17 THE COURT: No problem. Go ahead, Mr. Ross.

18 CROSS-EXAMINATION

19 BY MR. ROSS:

20 Q. Good morning, Mr. Clark. You have a company
21 called -- can I just call it DHMC?

22 A. Yes.

23 Q. Did DHMC enter into a consulting agreement with
24 UAH-Mayfair?

25 A. Yes.

26 Q. And that was April of 2018, correct?

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A. Yes.

Q. And was it your understanding that under that agreement you were to act in the best interests of UAH-Mayfair, correct?

A. And I did, yes.

Q. We will get to that.

So when you started speaking to Brownstone about helping them with their transitioning away from plaintiffs, did you tell anybody from plaintiffs?

A. Did I tell plaintiffs?

Q. Yes.

A. I did.

Q. Who did you tell?

A. I told Frank Miletto whose name never appears in here. I warned your client a year before that Brownstone was going to leave, that they wanted to have their own management.

MR. ROSS: I will object and nonresponsive.

Q. Listen to my question specifically.

Did you have any conversations after April of 2018, telephone, e-mail, with any executives that you will be working with Brownstone in order to make their transition away from plaintiffs at any time?

A. No.

Q. Why didn't you -- why didn't you tell them that?

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A. What?

Q. -- that you were working with Brownstone --

A. Why did I?

Q. Why did you not?

A. Why did I not?

THE COURT: Correct. Slow it down.

Why did you not tell plaintiff that you were working with Brownstone?

THE WITNESS: I didn't believe it was necessarily -- I didn't think it was appropriate or necessary.

Q. Why is that, Mr. Clark?

A. Brownstone had already informed UAH of their displeasure and their intent to leave.

Q. Would it be fair to say that Brownstone is plaintiff's largest client?

A. No, it's not.

Q. Who is?

A. Largest is AMCAL-AMTEX. By revenue.

Q. Where would Brownstone fall in the revenue column?

A. Third or fourth.

Q. So it's substantial revenue?

A. Yes, sir, no question.

Q. So I am trying to understand.

When you were working with Brownstone, had you not

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2 worked for Brownstone to work on their transition away from
3 plaintiffs, do you think it would have taken them longer to
4 transition away from plaintiffs?

5 MS. GUERON: Objection. It's pure speculation.

6 MR. ROSS: He speculated before.

7 THE COURT: One moment. Can you repeat the
8 question?

9 Q. Sure. I will rephrase. Do you believe that your
10 work helped Brownstone transition away from plaintiffs
11 quicker than had you not been retained --

12 A. No, sir. The transition, as you acknowledged
13 already, is already in place. I have no -- I had no effect
14 on the timing of the transition whatsoever.

15 Q. And isn't it true that you provided a long list of
16 what Brownstone would need in order --

17 A. Yes, I did.

18 Q. And why did you do that?

19 A. Because I was asked for it.

20 Q. By Brownstone?

21 A. Yes.

22 Q. Did you tell plaintiffs you were doing that?

23 A. No.

24 Q. Why not?

25 A. I didn't feel it was necessary.

26 Q. And why did you do that?

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A. Why did I --

Q. Do that for Brownstone?

A. Because Brownstone had been in long -- a long term good standing client of UAH. They were honest and had been forthright and forthcoming about their intent to move.

Q. And did you provide that to give Brownstone a blueprint as to what they would need to do to transition away from plaintiffs?

A. I also --

Q. Can you answer my question?

A. If I may?

THE COURT: Go ahead, Mr. Clark.

A. I would also like to note to, counsel, it was at my suggestion that they decided, Brownstone decided to transition the management change over a long, long period of time, taking the first step of the properties that were the least profitable and most difficult for UAH, while allowing UAH to retain the portfolio of Brownstone which paid the highest amount of fees all the way until July 2019. That was my suggestion. And in the meantime work diligently on behalf of plaintiffs to make up for the loss of the Brownstone revenues, which, if you look at my June report to Mr. Salerno, it clearly states the number of properties being brought on as a result directly of my efforts.

Q. I don't have any evidence of that.

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2 MS. GUERON: Yes, you do.

3 THE COURT: I don't need to hear anything
4 conclusory.

5 Mr. Ross, do you have a question?

6 MR. ROSS: Yes.

7 THE COURT: Okay.

8 Q. But you didn't tell plaintiffs about this, correct?

9 A. No.

10 Q. Did you tell plaintiffs that at the time you had --
11 at the time you had a consultancy with them that you were
12 also doing consulting services for Brownstone?

13 A. No.

14 Q. Did you at any time ask plaintiffs if you could
15 send their Employee Handbook to Brownstone?

16 A. No.

17 Q. Did you ever ask plaintiffs if you could send their
18 Benefits Guide to Brownstone?

19 A. No.

20 Q. Did Brownstone ask you to send those things to
21 them?

22 A. Yes.

23 Q. Do you understand in one of your agreements what
24 the term confidential information means?

25 A. I believe I do.

26 Q. Did you believe that the Employee Handbook was

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1 confidential information?

2 A. No, I did not.

3 Q. Why not?

4 A. It was very, very dated. It was only sent down as
5 an example so they could create their own -- it was really
6 more of a template.

7 (Brief pause.)

8 Q. If you look at Exhibit E to Mr. Salerno's
9 affidavit, I --

10 MS. GUERON: Your Honor, may I look over his
11 shoulder?

12 (Documents submitted.)

13 THE COURT: I have no problem with that.

14 MS. GUERON: Thank you.

15 Q. If you look at that e-mail, do you recall -- this
16 is from your wife?

17 A. Yes.

18 Q. The top?

19 THE COURT: One moment. Go ahead.

20 Q. Have you ever seen the top e-mail here dated July
21 9, 2018, at 3:24 p.m.?

22 A. No.

23 THE COURT: You never seen it.

24 THE WITNESS: No, ma'am, it wasn't from me.

25 THE COURT: I understand. You were copied on
26

1 Proceedings

2 it. So you still don't --

3 THE WITNESS: I don't recall seeing it.

4 Q. Were you aware that your wife's -- wife was going
5 to send the handbook to --

6 A. I was aware of that.

7 THE COURT: Was that a yes?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Go ahead. Thank you.

10 Q. And it says -- did you have any discussions with
11 your wife about why Brownstone was requesting plaintiff's
12 Employee Handbook?

13 A. Yes, they were endeavoring to create their own
14 handbook because of the creation of a new company. Also in
15 this e-mail my wife sends to them TWC Best Practices for the
16 Employees. That is a public document. It's not
17 confidential.

18 Q. I am not asking about that.

19 THE COURT: Go ahead with a question. Go
20 ahead, Mr. Ross.

21 Q. And in it it says the second paragraph says I am
22 also trying to make sure it's not a replica --

23 A. Yes.

24 Q. Do you know why your wife said that?

25 A. Of course, we knew that we were not -- she realized
26 she should not be sending an exact replica of confidential

1 Proceedings

2 information. We -- we won't do it again. We made a
3 mistake.

4 Q. So you do agree that the information you sent was
5 confidential information?

6 A. I do agree.

7 Q. And was the purpose of getting an Employee
8 Handbook, was one of the reasons that Brownstone wanted the
9 Employee Handbook was that it could potentially take away
10 UAH employees who were managing Brownstone properties?

11 MS. GUERON: Objection.

12 THE COURT: Overruled.

13 A. No.

14 Q. No?

15 A. No.

16 THE COURT: The answer is no.

17 Q. What makes you say that, Mr. Clark?

18 A. With all due respect, asked and answered.

19 THE COURT: Your attorney could make the
20 objections.

21 Q. I am asking what the basis for what that belief is.

22 MS. GUERON: I will renew my objection. It's a
23 question about what Brownstone wants. He can't answer
24 that question.

25 MR. ROSS: I will reask the question.

26 THE COURT: Go ahead.

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2 Q. Did you have any conversations with Brownstone
3 about the desire for a handbook?

4 A. Yes.

5 Q. Did they tell you why they wanted a handbook?

6 A. Yes, they wanted to create an Employee Handbook for
7 their future employers.

8 Q. All right. If you look at Exhibit D, I would ask
9 you to turn to Exhibit D, the last page.

10 (Witness complies.)

11 Q. It's an e-mail from you dated August 18, 2018, at
12 5:04 p.m..

13 You see that e-mail?

14 A. Yes, I do.

15 Q. And in that e-mail it -- who is Doak?

16 A. Doak Brown, he is Vice President of Brownstone
17 residential, LLC..

18 Q. It says "On our conference call today, the idea of
19 providing on-boarding UAH employees to Brownstone
20 Residential with a meeting eligibility for health insurance
21 benefits was discussed as a potential tool to retain these
22 employees."

23 You see that?

24 A. Yes.

25 Q. What were you referring to?

26 A. I was referring to, your Honor, and Mr. Ross, the

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2 typical health benefits provider will require a sixty day
3 probation period before an employee becomes eligible for
4 health insurance benefits. I was suggesting to Mr. -- I was
5 reaffirming to Mr. Brown that in the conversation they
6 discussed getting a waiver so that as Brownstone took over
7 the management of their properties, employees that were --
8 UAH employees employed in a Brownstone property, Brownstone
9 could offer these folks continued health insurance without
10 the normal sixty-day waiting period.

11 Again, it was designed in such a way as to reduce
12 the financial impact on the existing employees.

13 Q. So what you were doing, essentially, you were
14 trying to find a benefit to entice UAH employees to work for
15 Brownstone; is that correct?

16 A. No, sir, that is incorrect.

17 Q. What were you doing?

18 A. We were working to minimize the dislocation,
19 disruption of individual's lives and livelihood as a result
20 of Brownstone's decision to terminate UAH and take-over the
21 management themselves.

22 Q. Weren't you also doing, you were giving UAH
23 employees a better path and benefits to work for Brownstone;
24 is that correct?

25 MS. GUERON: Objection.

26 THE COURT: Overruled.

1 Proceedings

2 A. No, sir. You are misinterpreting the intent. I
3 believe I tried to be as clear as possible.

4 Q. Your intent was to ensure a smooth transition for
5 UAH employees to work for Brownstone with no waiting period
6 for health insurance?

7 A. Among other things, yes.

8 Q. So what you were trying to do was to give an
9 additional benefit to work for UAH employees --

10 A. Not an additional benefit. Just so that existing
11 employees would not suffer financial or any other type of
12 personal disruption of their lives.

13 THE COURT: Mr. Ross, let's move on.

14 MR. ROSS: Sure.

15 Q. In Exhibit B to Mr. Salerno's affidavit there is a
16 draft agreement. You see that?

17 A. Yes.

18 Q. And was that agreement ever fully executed by both
19 your company and Brownstone?

20 A. No, we have consistently testified in this
21 courtroom there is no -- there is no executed agreement.

22 Q. Did you have an oral agreement to perform services
23 for Brownstone?

24 A. Yes.

25 Q. And were you paid money by Brownstone to perform
26 those services?

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A. Yes.

Q. And how much money have you received from Brownstone for --

A. I believe \$15,000.

Q. And are they paying you on a monthly basis, something else?

A. Yes.

Q. How much are they paying you?

A. \$7,500.

Q. And what is -- why are they paying you \$7,500 a month?

A. For consulting -- our consulting work and for being a resource to them regarding a wide range of operational questions, management company issues or questions --

THE COURT: What are the wide range of operational questions that you are assisting them with?

THE WITNESS: Number of hours of operation, staffing questions, policies and procedures questions relative to bad checks, NSF's, a myriad of questions that arise when a company, management company is developing its policies and procedures, your Honor.

THE COURT: So you are helping them with policies and procedures for management?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Is there anything else that

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2 you were doing?

3 THE WITNESS: I was recently asked about a
4 nonsmoking policy. And another one was may we charge
5 higher deposit for smokers?

6 THE COURT: So you are consulting them on
7 management?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Okay.

10 THE WITNESS: Under management policies and
11 procedures.

12 Q. And, Mr. Clark, would it be fair to say that you
13 are being paid roughly \$7,500 a month to help Brownstone
14 transition away from the plaintiffs?

15 A. I disagree with that. I am being paid 7,500 a
16 month to assist Brownstone in transitioning to their
17 management company.

18 Q. Away from plaintiff's --

19 A. That has already been determined, counselor. I had
20 nothing to do with their decision.

21 Q. That is not what I am asking.

22 THE COURT: How is what you are saying
23 different than what Mr. Ross is asking you?

24 THE WITNESS: Because the inference is that
25 somehow by my consulting with Brownstone I am somehow
26 enabling them to hasten this transition from UAH. And I

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2 am -- with all due respect, I disagree with that
3 interpretation.

4 THE COURT: Tell me specifically, you mentioned
5 the nonsmoking policy.

6 What issue came up with that regard?

7 THE WITNESS: Well, this goes to, believe it or
8 not, the Federal government. Under new HUD guidelines a
9 smoke free environment is strongly encouraged beginning
10 with the Section 8 communities. In California, for
11 example, there are already statutes that prohibit
12 smoking in apartment communities. It's coming to Texas.
13 It's already come to Texas. On several properties that
14 UAH now manages in which the properties as they were
15 developed specifically residents moving are told this
16 was a -- this is a nonsmoking community and the
17 community provides smoking areas outside. And that is
18 the only area in which residents may smoke.

19 THE COURT: So what did they ask you?

20 THE WITNESS: They asked me what did I think of
21 the policy, my opinion of the policy.

22 THE COURT: And what did you tell them?

23 THE WITNESS: I said what I just told you, your
24 Honor, it's coming and I would recommend -- my
25 recommendation is in the future, in your future
26 developments you adopt a nonsmoking policy because

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2 ultimately it will be mandated by Federal and/or State
3 regulatory agencies.

4 THE COURT: Go ahead, Mr. Ross.

5 Q. Sure.

6 THE COURT: And let me just ask, do you have a
7 lot more questions?

8 MR. ROSS: No, I think the Court gets the gist
9 of the --

10 THE COURT: Because this is not the trial, to
11 be clear.

12 Q. Would it be fair to say that the services you
13 provided were -- that DHMC also provided human resource
14 services to Brownstone, correct?

15 A. No, we did not.

16 Q. But you provided them with a template for an
17 Employee Handbook; is that correct?

18 A. Yes.

19 Q. You don't consider that human resource services?

20 A. No, sir, not -- no, I don't.

21 Q. And your wife is also a principal of DHMC?

22 A. Yes.

23 Q. And what are they --

24 A. She was the Director for fourteen years.

25 Q. Okay. And as part of your work for Brownstone, has
26 your wife performed or done any human resource services for

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Brownstone?

A. No, Brownstone has hired Tracy Bracken, Lynne's former assistant improperly terminated by UAH --

Q. Okay. Fair enough. Would it be fair to say that one of the services you provided to Brownstone was a copy of plaintiff's employee --

THE COURT: We have really gone through this, Mr. Ross.

MR. ROSS: I am just about done, your Honor.

THE COURT: Very good.

MR. ROSS: Sorry.

Q. I will ask you to turn to Exhibit Q of Mr. Salerno's affidavit. And there is an e-mail from you to Scott Gailbrath.

A. Yes.

Q. Do you see that?

A. Yes.

Q. And who is Scott Gailbrath?

A. Mr. Gailbrath unfortunately is deceased. He died on August 15th. Cardiac arrest in his sleep. And probably one of the nicest people you will ever want to meet.

Q. Was he a principal of one of plaintiff's clients as of April 17, 2018?

A. Yes.

Q. And this e-mail, what was the purpose of you

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sending this e-mail to Mr. Gailbrath?

A. Because he called me and asked me to send the contact information because he wanted to engage me as a consultant on two other properties that he had been developing.

Q. Do you have an e-mails or anything from Mr. Gailbrath asking you to send him information?

A. You could clearly see I send him consulting agreements which he executed.

Q. I understand. I am saying as before April 17th, 2018, are there any other e-mails where Mr. Gailbrath contacts you with regard to --

A. In regard to? I am sure there are. Because, you know, I was -- I was assisting in the management of Hutchins Gateway, or Gateway Hutchins, three hundred twenty-six unit tax property that Mr. Gailbrath was the project manager on behalf of --

Q. And that was plaintiff's client, right?

A. Yes.

Q. And you were doing work on behalf of that client in accordance with your consultancy agreement with plaintiffs; is that correct?

A. I was -- yes, as far as Gateway Hutchins is concerned, yes.

Q. And did you ever tell the plaintiffs that you were

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2 independently contacting Mr. Gailbrath for business through
3 the --

4 MS. GUERON: Objection. I believe that
5 misstates the testimony.

6 THE COURT: You could answer.

7 A. Yes, I did.

8 Q. Who did you tell?

9 A. Carline Leal, and Susanne Kleins.

10 Q. Okay.

11 A. Susan is the president and Carline is the Vice
12 President and senior regional manager of UAH. And the
13 reason I contacted them and informed them of that is that I
14 was working on behalf of UAH to secure the management of two
15 large properties, one in Fort Worth and one in Dallas.

16 Q. And how did you tell them that you were contacting
17 Mr. Gailbrath to do business through DHMC?

18 A. By telephone.

19 Q. And do you remember when that was?

20 A. No, sir, I do not.

21 Q. Was that through your cell phone?

22 A. I don't recall.

23 Q. And with regard to Hutchins, do you recall that
24 there was a time when you were working as a consultant for
25 plaintiffs through DHMC where you independently billed
26 Hutchins for work?

Proceedings

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2 A. Yes, I did.

3 Q. And what were those services that you performed?

4 A. Mr. Gailbrath was oversourced. What that means,
5 your Honor, the developer has more money than he should. So
6 developer then seeks ways to increase his basis. Mr.
7 Gailbrath asked me to coordinate with his general contractor
8 to provide to -- provide covers for the children's
9 playgrounds and install speed bumps which I did.

10 Mr. Gailbrath insisted that I charge a five percent
11 administrative fee which would assist him in getting -- his
12 number to what he needed it to be. UAH had no ability
13 within its management contract to charge that fee.

14 So it was done expressly, after -- at instruction of
15 Gailbrath. In contrary to Mr. Salerno's affidavit, I did not
16 consider it to be double-dipping.

17 THE COURT: Mr. Ross, I just want to point out
18 the time. It's now 12:50. I don't know if you're
19 planning to all come back after lunch or if you are
20 done.

21 MS. GUERON: Let me confer with --

22 THE COURT: Go ahead.

23 (Brief pause.)

24 Q. Have you ever heard of an entity called Marque?

25 THE COURT: One moment.

26 (Brief pause.)

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2 THE COURT: I am sorry. Go ahead.

3 Q. Mr. Clark, are you familiar with a company called
4 Marque Consultants, M-A-R-Q-U-E?

5 A. It's Marque Consultants. And, yes, I am.

6 Q. And are they a current client of plaintiffs?

7 A. Yes, they are.

8 (Brief pause.)

9 THE COURT: Again, Mr. Ross --

10 MR. ROSS: I will zoom right through this.

11 Q. Are you familiar with an entity called Alpha-Barnes
12 real estate?

13 A. Yes.

14 Q. And is Alpha-Barnes a competitor of plaintiff?

15 A. Yes, there are.

16 Q. If you look at Exhibit O to Mr. Salerno's
17 affidavit, I just ask you to turn to that. Exhibit O.

18 (Brief pause.)

19 Q. Before I ask that question, are you aware that
20 plaintiffs were attempting to get a management contract from
21 a Marque -- a new Marque property in Houston?

22 A. Yes, I was.

23 Q. And were you aware of that before August --

24 A. Yes, I was.

25 Q. And how did you become aware of that?

26 A. Ms. Donna Rickenbacker sent me a copy of a

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2 management contract from Carlton Management, another
3 competitor of UAH. And asked me if I could review it, which
4 I did. And I have told her that the contract was awful, and
5 that she should not sign it and then I inquired as to -- I
6 mentioned to her specifically that UAH's compliance was far
7 better than Carlton. She responded to me that, well, she
8 had a proposal from UAH but was very displeased with it and
9 sent it to me. I reviewed the proposal, and I said if you
10 are displeased with this, I would suggest you may want to
11 talk to Alpha-Barnes who is a competitor, but has a huge
12 presence in Houston.

13 In my termination of my consultancy with UAH, the
14 language is very specific as to what I will and will not do
15 in the last paragraph. I could not refer her back to UAH. I
16 was simply accommodating her in giving her a new alternative.

17 Q. If you look at Exhibit P, very quickly, would it be
18 fair to say that Ms. Rickenbacker was asking you to review
19 UAH's proposal?

20 A. Yes.

21 Q. And did you recommend that Ms. Rickenbacker use
22 UAH?

23 A. I did not.

24 Q. Why not?

25 A. Because the proposal was inappropriate, incomplete,
26 and the management fee quoted was more than any of the other

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competitors.

Q. And you told that to Ms. Rickenbacker?

A. She knew. She had it in front of her.

Q. I will ask the question again.

Did you tell that to Ms. Rickenbacker?

A. Did I tell Ms. Rickenbacker -- I told Ms.

Rickenbacker that there was -- she asked me, I am unhappy --

I don't like -- the Carlton contract is unsignable. The

management proposal from UAH is too high and incomplete.

Could you recommend to me any other alternatives and

subsequently I did. And subsequently Alpha-Barnes did send

her a detailed proposal. They have a huge presence in

Houston and apparently she executed the contract with them.

Q. Did you know prior -- had this property been in

UAH's pipeline from the time you were president?

A. I put it in the pipeline.

Q. You put it in the --

A. I did.

Q. And did you think it was -- so it would be fair to

say that you advised a current client not to sign a contract

with UAH, correct?

MS. GUERON: Objection.

A. No, I did not advise the client not to sign it.

Q. What did you do? You told them that UAH contract

was inferior?

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2 A. I did not say that.

3 MS. GUERON: Asked and answered.

4 THE COURT: Overruled. What did you say?

5 THE WITNESS: I listened to Donna's comments,
6 and I read it. I called her and I said there are some
7 holes in it, but as Donna had said to me, the fee is
8 higher than it should be, and Ms. Rickenbacker then said
9 to me, Mike, I need your help. Who else could I look
10 at? And at that point I responded to her to talk to
11 Alpha-Barnes.

12 Q. So is it fair to say that you told Ms.
13 Rickenbacker, a current client of plaintiffs, that UAH's
14 price is too high?

15 A. I did not say that.

16 Q. What did --

17 A. Ms. Rickenbacker said that.

18 Q. Okay. She said that. And what did you say?

19 A. I listened. I didn't respond.

20 Q. Did you agree?

21 A. I didn't --

22 Q. Did you respond?

23 A. I said --

24 THE COURT: How much longer, Mr. Ross?

25 MR. ROSS: This is my last inquiry.

26 THE COURT: The last question. Go ahead.

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2 Q. Do you believe that advising a current client about
3 a UAH proposal was an anticompetitive act?

4 A. Excuse me. But I have no contract with UAH. My
5 consultancy contract had been cancelled, unpaid. I have
6 not been paid by UAH for any of the promised funds. I do
7 not believe I have any obligation to UAH whatsoever, so if a
8 client calls me and says who do you recommend, I may
9 recommend anybody I choose. I don't think I am
10 contractually obligated to recommend UAH.

11 Q. So you don't think you have an obligation to act in
12 a?

13 A. When --

14 Q. -- that would harm plaintiffs?

15 A. I disagree that it's anticompetitive. When
16 somebody asks me for an opinion I will give it to them.

17 THE COURT: All right. Mr. Ross, all the other
18 choice is that you're welcome back after lunch.

19 Ms. Gueron, can you be brief.

20 MS. GUERON: I have one question.

21 REDIRECT EXAMINATION

22 BY MS. GUERON:

23 Q. You mentioned Scott Gailbrath in your testimony.

24 A. Yes.

25 Q. In your first affidavit to the Court, dated July
26 23rd, you made reference to the work you had done for UAH as

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2 a consultant in June of 2018?

3 A. Yes.

4 Q. Is that right?

5 A. Yes.

6 Q. And you attached a two-page document reflecting
7 your consulting services?

8 A. Yes.

9 Q. Mr. Gailbrath is mentioned there, right?

10 A. Yes.

11 Q. How much revenue for UAH did this June spreadsheet
12 represent, the work you had done for UAH as consultant?

13 A. Revenue? Thousands of dollars.

14 Q. Per?

15 A. Oh, I don't recall but I would say at least 25 to
16 \$30,000 a month.

17 MS. GUERON: That is all.

18 THE COURT: Okay. Give me one moment.

19 Mr. Clark, before we close I have a question
20 for you.

21 At this point do you believe that you're
22 currently contractually prohibited from --

23 THE WITNESS: Yes.

24 THE COURT: -- with the plaintiff?

25 THE WITNESS: Yes, ma'am.

26 THE COURT: And do you believe that you are

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2 contractually prohibited currently from soliciting
3 plaintiff's clients?

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Okay. I have heard all of the
6 evidence presented by Mr. Clark and I heard your
7 arguments and on that basis I am going to grant a
8 preliminary injunction as follows:

9 I find -- the injunction will prohibit
10 Mr. Clark from entering into an agreement with Good
11 Harbor based on the nonsolicitation provision. I find
12 that -- there is a likelihood of success in terms of
13 showing that Good Harbor is a competitor of the
14 plaintiff; and, therefore, the employment would be
15 prohibited. And there is a presumption of irreparable
16 harm.

17 There is also a showing that Mr. Clark has
18 engaged in activities violated by the terms of the
19 employment agreement and adopted by the separation
20 agreement and specifically in terms of working with
21 Brownstone, and sharing the confidential information.

22 In that regard, however, I am not convinced
23 that there is irreparable harm at this point sufficient
24 to impose an injunction against Brownstone because
25 Brownstone is already leaving. That is not to say that
26 there would be no entitlement to damages based upon the

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2 conduct, if proven at trial, with respect to Brownstone.

3 The problem here, Ms. Gueron, is that I
4 disagree in terms of the definition of the carve-out and
5 what is allowed and not allowed. In terms of the
6 injunction going forward, in addition to no work for
7 Good Harbor, the scope is, is that Mr. Clark cannot
8 engage in any activity that the plaintiff engages in.
9 It doesn't have to be to the scale of plaintiff; meaning
10 it doesn't have to be a competitor in the market, but he
11 can't engage in competitive activities based upon the
12 contract.

13 So if he plans to do any work that comes within
14 plaintiff's purview within ten days of any execution of
15 a contract, he is to present the contract to plaintiff
16 for review. Plaintiff can either find that it is, in
17 fact, noncompetitive, or you will come to the Court for
18 a specific ruling on a case by case basis as to any
19 contract with the understanding -- or understanding what
20 I just set forth on the record.

21 Now, in terms of the preliminary injunction, so
22 the Good Harbor contract cannot be executed. In
23 addition, perspective, any work that plaintiff does
24 that Mr. Clark would want to do, anything that overlaps,
25 there is the ten day advance notice requirement in
26 coming to the Court to get the clearance. And, finally,

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the language of the injunction should also trap the specific nonsolicitation provision and noncompetition provisions in -- and confidentiality provisions set forth in the Court's Order.

So, Mr. Ross, I will leave it to you to submit a proposed order that is in accordance with what I just laid out on the record, and obviously Ms. -- show it to Ms. Gueron and I will sign the injunction to that effect. I wish you all good luck.

MS. GUERON: Can I ask one question?

THE COURT: The minutes of this proceeding to be e-filed. Sorry. In -- let's discuss an undertaking.

What is your proposal, Mr. Ross, for the undertaking?

MR. ROSS: Well, in the agreements they specifically state to the extent there is injunctive relief that Mr. Clark would agree that no undertaking was necessary. That was agreed to by the parties. There is no need for an undertaking.

THE COURT: In what section?

MR. ROSS: There are several agreements, your Honor. I will look them up. Sorry.

(Brief pause.)

MS. GUERON: Dave, I see it. I don't know sitting here today whether it's enforceable, but I do

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see it.

MR. ROSS: It says in the employment agreement it's on page 13 of the employment agreement. Section F.

THE COURT: One moment.

(Brief pause.)

MR. ROSS: Last sentence. I believe the same section is also repeated in the other agreements, your Honor.

MS. GUERON: Maybe we should just table this?

THE COURT: What section of the separation agreement?

Ms. Gueron, do you want to brief the issue of an undertaking?

MS. GUERON: Don't know sitting here today, your Honor. I see the language. So I guess I want the opportunity to brief it. Whether I will or not, we will discuss on our side.

THE COURT: Okay.

MS. GUERON: So perhaps we should just schedule that?

THE COURT: All right. How about if I were to issue the injunction now without an undertaking, and give a five-day schedule for briefing.

MS. GUERON: Could we make that longer? I am absolutely underwater.

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2 THE COURT: What was that?

3 MS. GUERON: That would be fine, your Honor,
4 except for the five days. Could we make that fifteen
5 days?

6 THE COURT: Can you let me know within five
7 days whether you need additional time?

8 MS. GUERON: Yes, your Honor.

9 THE COURT: Okay. So for now, or -- or you
10 know what, if you consent to the fifteen days without an
11 undertaking, I have no problem with that.

12 MS. GUERON: Yes.

13 THE COURT: Okay. Very good. So I am not
14 going to impose an undertaking. I am going to allow Ms.
15 Gueron fifteen days to decide whether or not she wants
16 to brief -- if defendant wants to brief the issue. If I
17 do not hear anything from the defendant within the
18 fifteen days, then I will take that as a concession that
19 there is no undertaking requirement.

20 Please e-file this record within ten days.

21 MR. ROSS: Your Honor, can I ask one question?

22 THE COURT: Yes.

23 MR. ROSS: There are certain agreements we may
24 not know about that we may have not have seen. Can the
25 Court order that they be sent to us for review?

26 THE COURT: Meaning --

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MR. ROSS: Already entered into.

THE COURT: Yes. If -- but let's have the scope. The same thing, as I said, meaning if there are any agreements for services that plaintiff performs, all right -- again, I appreciate that your position is that that is consulting. I disagree. If the work is work that the plaintiff performs then I want the contracts turned over to the plaintiff.

And what about any discovery -- any additional discovery issues? Do you have a conference set?

MR. ROSS: We do not, your Honor. We could set a conference date.

THE COURT: Okay. Actually, you are having the conference right now. But I am going to close the record and allow you to have the discovery conference and that way all the employees could go to lunch. All right. Thank you.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

Tal R. Hahn,
Senior Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 54

-----X

UAH-MAYFAIR MANAGEMENT GROUP LLC and UAH
PROPERTY MANAGEMENT, L.P.,

Plaintiffs,

- v -

MICHAEL CLARK, LYNNE CLARK, and DISTINGUISHED
AFFORDABLE HOUSING MANAGEMENT CONSULTANTS,
LLC,

Defendants.

-----X

INDEX NO. 653590/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION AND ORDER

HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for

PRELIMINARY INJUNCTION

Upon the foregoing documents and after a hearing on the record at which plaintiffs showed a likelihood of success on the merits, that they would suffer irreparable harm in the absence of an injunction and that the balance of the equities weighs in plaintiffs' favor, it is

ORDERED that defendants Michael Clark, Lynne Clark (collectively, the Clarks), and Distinguished Affordable Housing Management Consultants, LLC are enjoined from using or disclosing any "Confidential Information" as defined by § 7(a) of both the Amended and Restated Executive Employment Agreement (AREA [Exhibit B to the Complaint]) and the Executive Employment Agreement (EEA [Exhibit C to the Complaint]) and, if they have not already done so, within 10 days of entry of this Order, the Clarks must deliver to plaintiffs' counsel, David Ross of Meister Seelig & Fein, LLP, by email to DER@msf-law.com, all Confidential Information in

their possession, custody or control, disclose all parties with whom the Confidential Information was shared, and then destroy all copies of the Confidential Information within their possession, custody or control, except for one copy which shall be maintained by their counsel during the pendency of this action; and it is further

ORDERED that defendants are enjoined until the earlier of resolution of this action, modification of this Order or April 10, 2021, from without the prior written consent of UAH-Mayfair Management Group LLC (UAH), directly or indirectly, engaging in or assisting any activity which is the same as OR competitive with the business of UAH as defined in Exhibit A to both the AREA and EEA, including without limitation, whether such engagement or assistance is as a proprietor, partner, employee, investor (other than a holder of less than 5% of the outstanding capital stock of a publicly traded corporation), or other participant of any limited liability company, partnership, firm, corporation or other business organization in the United States. This includes engaging in or assisting any activity that UAH would perform as part of the property management services that it provides; and it is further

ORDERED that if defendants want to engage in or assist any activity which is the same as OR competitive with the business of UAH as defined in Exhibit A to the AREA and EEA, they must provide plaintiffs' counsel with at least 10-days advance notice, by email, of any proposed contract written or oral including the proposed contract's terms, and plaintiffs' counsel shall respond to defendants' counsel, Brett Myers, by email to Brett.Myers@wickphillips.com, within 10 days. If plaintiffs do not provide written consent authorizing defendants to enter into the proposed agreement, then defendants must apply to the court for a ruling on whether the proposed contract is permissible based on the parties' agreements; and it is further

ORDERED that defendants are enjoined from entering into an agreement to provide services for Good Harbor Management LLC and any of its subsidiaries or affiliates, including but not limited to, Alden Torch Financial, LLC; and it is further

ORDERED that defendants are enjoined until the earlier of resolution of this action, modification of this Order or April 10, 2021, from directly or indirectly on behalf of themselves or any competitor, anywhere in any area or territory where plaintiffs conduct operations of any kind or nature, soliciting or attempting to solicit any business from any of plaintiffs' customers, prospective customers, or vendors with whom defendants had material contact during the last three years of the Clarks' employment with the plaintiffs; and it is further

ORDERED that defendants are enjoined until the earlier of resolution of this action, modification of this Order or April 10, 2021, from directly or indirectly on behalf of themselves or in conjunction with any person or legal entity, recruiting, soliciting or inducing or attempting to recruit, solicit or induce, any customers, prospective customers or vendors to terminate their business or contractor relationship with plaintiffs; and it is further

ORDERED that defendants are enjoined until the earlier of resolution of this action, modification of this Order or April 10, 2021, from directly or indirectly, on behalf of themselves or on behalf of or in conjunction with any person or legal entity, recruiting, soliciting or inducing, or attempting to recruit, solicit or induce, any clerical or non-clerical employee or independent contractor of the plaintiffs to terminate their employment or contractor relationship with plaintiffs; it is further

ORDERED that, within 10 days of entry of this order, defendants must produce to plaintiffs copies of all written contracts and summaries of all oral contracts (including the parties, scope and

consideration) that defendants have entered into that are in any way related to property management, and it is further

ORDERED that plaintiffs must give an undertaking in the amount of \$1,000.

This is the Order of the Court.

10/15/2018
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE