CITATION: Wyse Meter Solutions Inc v. Louie Papanicolopoulos, 2024 ONSC 840
COURT FILE NO.: CV-23-00699468-0000
DATE: 20240207

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
WYSE METER SOLUTIONS INC.	)	*Kenneth Prehogan and Michael Ding*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
LOUIE PAPANICOLOPOULOS and CARMA CORP.	)	*Matthew B. Lerner and Zachary Rosen*, for the Respondents
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD:** July 14, 2023, August 2, 2023

A.P. RAMSAY J.

I. Introduction

[1] The respondent, Louie Papanicolopoulos, was employed by the applicant, Wyse Meter Solutions Inc. ("Wyse"), for two and a half years before resigning. He went to work for a competitor, the respondent company Carma Corp ("Carma"). His employment with Wyse was governed by a written Employment Agreement which incorporated, by reference, a Restrictive Covenant Agreement. Under his Employment Agreement, he was eligible to take advantage of the applicant's long-term incentive plan in the form of stock options in the company. The Employment Agreement was prior to the coming into force in December 2021 of the *Working for Workers Act*, 2021, S.O. 2021, c. 35, which prohibits employers from obtaining a non-competition agreement from employees, subject to limited exceptions.

[2] After he started with Wyse, Mr. Papanicolopoulos exercised an option granted to him by the company to purchase equity in the company. The shares are subject to a Unanimous Shareholder Agreement (the "Shareholder Agreement"). Mr. Papanicolopoulos later resigned and secured new employment at Carma.

[3] Wyse commenced this application for injunctive relief. The Notice of Application is not before the court.

[4] Wyse has since commenced a separate action, though the Statement of Claim was not included in the records.

II. Nature of the Application

[5] Wyse seeks an interim and interlocutory injunction restraining Mr. Papanicolopoulos from allegedly continuing to act in breach of his Employment Agreement, Assumption Agreement and Shareholder Agreement (collectively, "the Agreements") within the Territory, as defined (Canada).[1] Wyse also seeks an interim and interlocutory injunction restraining Mr. Papanicolopoulos from continuing employment with the respondent Carma, and an order directing the respondents to return all confidential information and company property in their possession or under their control to Wyse.

III. The Parties

[6] Wyse is a corporation which carries on business in Ontario and across Canada as a licensed submetering company servicing the multi-residential building sector.

[7] Mr. Papanicolopoulos is a former employee of Wyse.

[8] Carma is a corporation which carries on business in Ontario and across Canada as a licensed submetering company servicing the multi-residential building sector.

[9] Mr. Papanicolopoulos joined Wyse on November 16, 2020, as its Vice-President of Sales and Marketing. He signed the written Employment Agreement dated November 16, 2020, which incorporated by reference the Restrictive Covenant Agreement, which contains a non-competition clause, a non-solicitation clause, and a confidentiality provision. Mr. Papanicolopoulos executed the Restrictive Covenant Agreement on October 27, 2020, effective November 16, 2020. The Employment Agreement granted Mr. Papanicolopoulos the ability to become a stock option holder in Wyse, mandated that all Wyse property was to be returned upon termination.

[10] On or about April 30, 2021, Wyse granted Mr. Papanicolopoulos an option to acquire up to 2,500 Class A common shares of Wyse. Mr. Papanicolopoulos subscribed for 875 Class A common shares of Wyse for consideration of $35,000. In purchasing the shares, Mr. Papanicolopoulos signed an Assumption Agreement, and as a result, became a party to the company's Shareholder Agreement dated November 18, 2020.

[11] On April 19, 2023, Mr. Papanicolopoulos resigned from Wyse. Wyse accepted his resignation, waived the notice period, and accessed his company devices and accounts. On or

[1] "Territory" is defined at section 1.1 of the Shareholder Agreement as "Canada".

about April 19, 2023, Wyse's technology personnel learned that on April 17, 2023, Mr. Papanicolopoulos, had accessed Wyse's computer files.

[12] In early May 2023, Mr. Papanicolopoulos notified Wyse's shareholders of his resignation and attempted to exercise his option to purchase an additional 1,000 Class A common shares of Wyse.

[13] Since May 2023, Wyse has taken the position that the company did not intend to purchase his shares under the triggering event provisions of Article 9 of the Shareholder Agreement. However, Mr. Papanicolopoulos continues to be able to sell his shares under other avenues in the Shareholder Agreement, such as under Article 4.2.2.

[14] On or about May 11, 2023, Mr. Papanicolopoulos commenced employment with Carma. Wyse and Carma are competitors.

[15] After leaving Wyse, Mr. Papanicolopoulos admitted to Wyse that two days before he resigned, he had accessed certain files on the computer system and photographed certain files containing sensitive information. He admitted that he should not have taken these photos. He called them an error and lapse of judgment. Mr. Papanicolopoulos conceded that at the time he planned to potentially use the photographed files for his new job at Carma.

[16] Prior to March 14, 2023, Carma had advised Mr. Papanicolopoulos that it would be a condition of his employment with Carma that he does not take any confidential or proprietary information belonging to Wyse with him upon resignation. Carma also advised Mr. Papanicolopoulos that any confidential information that he obtained while at Wyse should not be shared with Carma and that he should destroy, not refer to, and not circulate any confidential documents that he has ever come into his possession.

IV. Issue to be Determined

[17] Wyse's factum identifies only one issue, namely, whether the restrictive covenants in the Shareholder Agreement are enforceable to grant interim and interlocutory injunctive relief?

V. Disposition

[18] The relief sought by the applicant is dismissed for the reasons below.

VI. Analysis

[19] Injunctions are discretionary, equitable relief.

[20] Pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court has discretion to grant an interlocutory injunction where it appears just or convenient to do so, and the court may include such terms as are considered just. To obtain injunctive relief, a party must satisfy

the three-part test established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, 1994 SCC 117, [1994] 1 S.C.R. 311:

1. there is a serious issue to be tried;

2. the moving party will suffer irreparable harm if the injunction is not granted; and

3. the balance of convenience favours the granting of an injunction.

[21] The court imposes a higher threshold in the case of enforcement of restrictive covenants in employment contracts, and the plaintiff must establish a strong *prima facie* case before injunctive relief will be granted: *Jet Print Inc.* v. *Cohen*, [1999] O.J. No. 2864, at para. 10, citing *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 1991 CanLII 7104 (ON SC), 4 O.R. (3d) 191 (Ont. Gen. Div.), at p. 198.

A. Is there a strong *prima facie* case?

[22] Wyse submits that it has a strong *prima facie* case and there is a serious issue to be tried regarding whether Mr. Papanicolopoulos breached confidentiality obligations under the Agreements and whether Mr. Papanicolopoulos breached the non-compete clauses of the Agreements.

[23] Wyse argues that the Agreements collectively contain terms which restrict Mr. Papanicolopoulos' ability to compete with Wyse while he is a shareholder and for 12 months thereafter, and restrict his ability to use Confidential Information post-termination. The term "Confidential Information" is as defined in the Restrictive Covenant Agreement and the term "Company Property" is as defined in the Employment Agreement.

[24] Wyse says that when Mr. Papanicolopoulos exercised his options and once he resigned in 2023, the Shareholder Agreement takes precedence over the restrictive covenants in the Employment Agreement.

[25] The respondents say that the restrictive covenants in the Shareholder Agreement only arise as a condition of employment. The respondents say that the restrictive covenants arise in the context of employment and not ownership of a business and are presumptively unenforceable. They submit that the Agreements have different and contradictory non-competition, non-solicitation, and confidentiality provisions. Mr. Papanicolopoulos points to the admission made by the CEO of Wyse, Peter Mills, on cross-examination that Mr. Papanicolopoulos was obligated to acquire shares and sign Wyse's Shareholder Agreement. The respondents argue that Mr. Papanicolopoulos was a shareholder in name only and did not own more than one tenth of one percent of Wyse's shares at any point.

[26] In my view, Wyse has not established a *prima facie* case, let alone a strong *prima facie* case, that the restrictive covenants in either the Employment Agreement or the Shareholder Agreement are enforceable.

Confidentiality Obligations

[27] Two days before tendering his resignation, Mr. Papanicolopoulos accessed certain historical documents on the system and took pictures of the screen on his iPhone. Mr. Papanicolopoulos voluntarily disclosed that he had taken the pictures and disclosed this in May 2023. He says he made an error in judgment and deleted the photographs. Wyse has presented no evidence to suggest otherwise.

[28] Wyse submits that the confidentiality clauses in the Agreements are reasonable because the company allowed Mr. Papanicolopoulos significant responsibilities related to Wyse's bidding process and access to Confidential Information. Wyse challenges the fulsomeness of the search carried out by the respondents' expert, suggesting that names of clients should have been searched, and noted it was not clear whether cloud storage had also been searched.

[29] The respondents submit that aside from Mr. Papanicolopoulos working for a competitor, there is no evidence that Mr. Papanicolopoulos has committed a breach. They argue that Wyse is seeking an order directing that the respondents return all confidential Company Property, though they have not alleged or established that there is any evidence that the respondents still have any.

[30] On the materials before the court, Wyse is merely speculating that Mr. Papanicolopoulos has retained documents. I note that Mr. Papanicolopoulos voluntarily disclosed to Wyse and particularized the documents he had accessed, and which document he had photographed. Even though Wyse argues Mr. Papanicoloupoulos' evidence is not corroborated, Wyse has not offered any evidence to indicate that he has misused or disclosed Wyse's confidential documents to others after his departure.

[31] It was the respondent Carma who retained Johan Dorado, a forensic IT examiner with Kroll. Mr. Dorado indicated that Mr. Papanicolopoulos has no Wyse documents or information in his possession, other than an email chain from 2021 in his personal email account to which his Wyse email was also copied. Carma has also instructed Mr. Papanicolopoulos that he is not to use or share any of Wyse's documents or information in his role at Carma. Carma also advised all its employees that they should not seek out or receive any such information, and that should they receive it, they should report it immediately. No reports were made.

[32] The respondents submit that there is nothing proprietary in the pricing model in the submetering industry. The respondents argue, and Wyse does not dispute, that all submetering providers propose new business on terms that are universal in the industry as to revenue share, service fees, and installation fees. The respondents say that in proposing new business, the submetering business consists of identifying publicly visible pieces of real estate, determining if the developer is interested in submetering, and approaching a wide variety of stakeholders, including developers, condominium corporations, building owners, real estate brokers, and property managers. Mr. Mills conceded as much during his cross-examination.

[33] In any event, there is no evidence before me that Mr. Papanicolopoulos has today or is misusing any Confidential Information, for the reasons below. Wyse merely speculates that he does.

Non-Competition/Restrictive Covenants

[34] There are four restrictive covenants in this case: the non-competition and non-solicitation clauses in the Employment Agreement, which incorporates, by reference, the Restricted Covenant Agreement, and the non-competition and non-solicitation clauses in the Shareholder Agreement.

[35] Wyse says that by joining Wyse's competitor, Mr. Papanicolopoulos breached his obligations and duties contained in the restrictive covenants in his Employment and Shareholder Agreements. Wyse says that the restrictive covenants in the Shareholder Agreement take precedence over those in the Employment Agreement. Indeed, in its factum Wyse only focused on these provisions. Wyse says that the Shareholder Agreement is clear and unambiguous and argues that Mr. Papanicolopoulos entered into the Agreement only after having had a reasonable opportunity to read, understand, and obtain independent legal advice. Wyse says that the combination of the defined geography, limitation to those businesses currently competing with Wyse, and the one-year term make the non-compete clauses reasonable.

[36] Mr. Papanicolopoulos is working for a competitor. However, he challenges the enforceability of the restrictive covenants. He says that the restrictive covenants arise exclusively from his employment (i.e., he was required to buy shares and sign the Shareholder Agreement as a condition of his employment) and so they must be scrutinized more rigorously than if the restrictive covenants arose from an ordinary commercial transaction like the sale of a business.

[37] Wyse argues that the Agreements collectively contain terms which restrict Mr. Papanicolopoulos' ability to compete with Wyse while he is a shareholder and for 12 months thereafter and restrict his ability to use Confidential Information post-termination. Wyse relies upon the jurisprudence dealing with restrictive covenants in the context of a sale of a business.

[38] The law establishes that all restraints of trade are contrary to public policy and are *prima facie* void unless they can be justified as being reasonable with respect to the interests of: (a) the parties; and (b) the public: *Nordenfeld v. Maxim Nordenfeld Guns & Ammunition Co. Ltd.*, [1894] A.C. 535 at p. 565; *Elsley v. J.G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916; *Doerner* v. *Bliss & Laughlin Industries*, [1980] 2 S.C.R. 865. The law recognizes that restraint on trade may be justified in the case of the sale of a business, including its goodwill: see *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724 (H.L.) at p. 738.

[39] Mr. Papanicolopoulos disputes Wyse's characterization that the purchase of the shares in the company was an "option to purchase" and point to s. 5 of the Employment Agreement

which addresses the long-term incentive plan. Mr. Papanicolopoulos says that he was required to purchase at least $25,000 of common equity in Wyse. He argues that Wyse's CEO agreed on cross-examination that as part of obtaining employment with Wyse, Mr. Papanicolopoulos had to purchase between $25,000 to $50,000 in Class A common shares in Wyse. Mr. Mills admitted that as part of complying with that obligation to purchase the shares in Wyse, Mr. Papanicolopoulos was also required to agree to the terms of Wyse's Shareholder Agreement.

[40] Wyse submits that a restrictive covenant in a commercial contract is different from a restrictive covenant in an employment contract. It argues that shareholder agreements are commercial contracts (see *Brand Solutions by Promotion Solutions Inc. v. Elsey*, 2015 ONSC 2895 at paras 44-45), and as such, it is to be interpreted in a manner that would give meaning to all of its terms based on the cardinal presumption that the contracting parties intended what they have said, and avoid an interpretation that would render one or more its terms ineffective. Wyse relies on *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, at para. 24, for this proposition.

[41] *Brand* is distinguishable as it involved the incorporation of a new company from two previous corporations to continue their marketing and promotional services. The parties entered into a shareholder agreement. The principal, who was sued, had consulted with a lawyer and obtained independent legal advice. Justice Gray resorted to the Supreme Court of Canada in *Payette v. Guay Inc.*, [2013] 3 S.C.R. 95 in concluding that he was not persuaded that the restrictive covenant is unenforceable. Justice Gray noted the two lines of authority regarding the distinction between a restrictive covenant that is contained in an employment contract and one that is in a commercial contract. In *Payette*, the covenant was contained in an agreement regarding a sale of assets.

[42] *Ventas* is also distinguishable as it did not involve a shareholder agreement or even a shareholder agreement in the context of an employment relationship, but rather a purchase agreement involving the sale of trust assets of a Canadian public real estate investment trust, through a public auction process. In *Ontario Securities Commission* v. *Bridging Finance Inc.*, 2023 ONCA 769, Hourigan J.A, speaking on behalf of the court noted that:

> Contracts are to be interpreted as a whole, in a manner that gives meaning to all of their terms and avoids an interpretation that would render one or more of the terms ineffective. They are also to be interpreted in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity: *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24.

[43] The jurisprudence in Ontario establishes that the higher standard of a strong *prima facie* case should apply where parties are seeking to enforce restrictive covenants, both in the context of an employment agreement and the sale of a business. However, if the higher standard is met, less emphasis is placed on the second and third parts of the injunction test: see *Boehmer Box*

L.P. v. *Ellis Packaging Ltd*., 2007 O.J. No. 1694 (S.C.J.); *Quizno's Canada Restaurant Corp.* v. *1450987 Ontario Corp*., 2009 O.J. No. 1743 (S.C.J.); and *1003126 Ontario Ltd*. v. *DiCarlo*, 2013 ONSC 278 (CanLII), 10 C.C.E.L. (4th) 1 at para. 21.

[44] Wyse argues that in becoming a shareholder, Mr. Papanicolopoulos signed and agreed to be bound by all the provisions of the Shareholder Agreement and the Assumption Agreement signed on or about April 30, 2021, together with the Employment Agreement and Restrictive Covenant Agreement.

[45] Covenants in restraint of trade are contrary to public policy because they interfere with individual liberty and the exercise of trade: *Elsley*, at p. 923; *Martin* v. *ConCreate USL Limited Partnership*, 2013 ONCA 72 (CanLII), at para. 49. They are *prima facie* unenforceable. A covenant will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade: *Elsley*, at p. 923; *Shafron* v. *KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-17; and *Martin*, at paras. 454.

[46] Generally, non-competition clauses in employment contracts will only be enforced in exceptional circumstances: *Camino Modular Systems Inc.* v. *Kranidis*, 2019 ONSC 7437, at para.17, citing *H.L. Staebler Company Ltd.* v. Allan et. al., 2008 ONCA 576, at para. 42.

[47] As employees usually have less bargaining power, restrictive covenants in employment contracts are subject to a more rigorous analysis of reasonableness: *Elsley*, at p. 924; *Audience Communications Inc.* v. *Sguassero*, [2008] O.J. No. 1539 at para. 31 (S.C.J.), affd 2010 ONCA 510. I note that Mr. Papanicolopoulos did not have independent legal advice at the time the Assumption Agreement was signed, and he agreed to broader restrictive covenants. The Assumption Agreement was signed five months after his Employment Agreement in which he agreed to the Restrictive Covenant Agreement.

[48] Given the wider scope of the restrictive covenants in the Shareholder Agreement, which Wyse argues takes precedence, it is not clear whether fresh consideration by Wyse was required as the end result is that Mr. Papanicolopoulos would be prevented from working anywhere in Canada and the duration could potentially be indefinite (as appears to be the case here), as the trigger date was tied to his disposal of his shares in Wyse. Mr. Papanicolopoulos insists that he signed the Agreements with respect to the purchase of his shares as a condition of his employment. He points to the admission of Wyse's CEO on his cross examination in support of his argument. Additional consideration is required to support a variation of an existing employment agreement: see, *Francis* v. *Canadian Imperial Bank of Commerce*, (1994) 21 OR (3d) 75 (C.A.); *Techform Products Ltd* v *Wolda* (2001), 56 O.R. (3d) 1, 150 O.A.C. 163 (C.A.); and *Watson* v. *Moore Corp*. (1996), 134 D.L.R. (4th) 252 (B.C. C.A.). The Court of Appeal has recognized that after an employee is hired, and are dependent on the remuneration, they are more vulnerable: see, Hobbs v. TDI Canada Ltd. (2004), 246 DLR (4th) 43(C.A.). I merely raise the issue given the respondents' position and make no determination as neither party addressed the issue before me.

[49] Restrictive covenants must be interpreted and enforced in their entirety; they cannot be read down by "blue-pencil severance": *Shafron*, at paras 2, 36, and 49; *M & P Drug Mart Inc*. v. *Norton*, 2022 ONCA 398, at para. 38.

[50] I agree with the respondents that there are conflicting restrictive covenants in the various Agreements. In *Matthews* v. *Ocean Nutrition Canada Ltd.*, [2020] 3 SCR 64, at para 53, the Supreme Court of Canada noted that the long-term incentive plan is a "unilateral contract", in the sense that the parties did not negotiate its terms. In the case before me, as Wyse pointed out, there are multiple Agreements. Mr. Papanicolopoulos signed the Employment Agreement and Restrictive Covenant Agreement first. Mr. Papanicolopoulos agreed to be bound by the Shareholder Agreement by signing the Assumption Agreement. The former includes broader non-competition, non-solicitation, and confidentiality clauses than those in the Employment Agreement.

[51] When determining whether a restrictive covenant is reasonable, the court will consider a number of factors, such as whether there is a proprietary interest entitled to protection, whether the temporal or spatial features of the clause are too broad, and whether the covenant is unenforceable as being against competition generally: *Camino*, at para. 18, citing *Elsley*. The court must also consider whether the restrictive covenant is ambiguous: *Camino*, at para. 19, citing *Shafron*, at para. 43.

[52] The party who seeks to enforce a restrictive covenant has the onus of demonstrating that the covenants are reasonable as between the parties. The party seeking to avoid enforcement of the covenant bears the onus of demonstrating that it is not reasonable with respect to the public interest: *M & P Drug Mart Inc.*, at para. 35; *Martin*, at para. 50; *Stephens* v. *Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (C.A.), at p. 141.

[53] To withstand scrutiny, a covenant must be clear as to activity, time, and geography. A covenant that is ambiguous, that is, what is prohibited is not clear as to any of these matters, is *prima facie* unreasonable and unenforceable.: *M & P Drug Mart Inc.*, at para. 36; *Shafron*, at paras. 27, 43; *Martin*, at para. 51; *Mason*, at para. 14.

[54] Mr. Papanicolopoulos submits that the non-competition clauses in both the Employment Agreement and the Shareholder Agreement are presumptively unenforceable due to their overbreadth: they prohibit competition with Wyse generally, and not just solicitation of Wyse's customers.

[55] In *Payette*, at para. 45, the Supreme Court sets out the key questions to be asked by the court in assessing whether a restrictive covenant was made in the context of a sale or an employment relationship.

[56] The jurisprudence establishes that the law distinguishes between a restrictive covenant in connection with the sale of a business, and one between an employer and an employee: *Martin*, at para. 52; *Elsley*, at p. 924. The former may be required to protect the goodwill sold to the

purchaser and does not usually involve the imbalance of power that exists between employer and employee.

[57] The court applies a less rigorous test in determining the reasonableness of a restrictive covenant given in connection with the sale of a business: *Martin*, at para. 52; *Shafron*, at para. 23; and *Elsley*, at p. 924. A non-competition covenant in an employment agreement that restricts the post-termination activities of an employee is subject to more rigorous scrutiny than non-competition covenant in a sales agreement that restricts the post-sale activities of the vendor: *Shafron*, at para. 23; *M & P Drug Mart Inc.*

[58] In the employer/employee context, there is generally an imbalance in power between employee and employer. An employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources: *Shafron*, at para. 42; *Elsley*, at p. 924.

[59] To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, the court must identify the reason why the covenant was entered into.

[60] In determining whether a restrictive covenant is reasonable in the context of the sale of a business, the same factors are considered as in an employment agreement: the geographic coverage of the covenant, the period of time that it is in effect and the extent of the activity prohibited: *Martin*, at para. 54; *Shafron*, at para. 43.

[61] Even where a covenant is clear or the ambiguity is resolved, it does not follow that the covenant will be upheld. The court must still assess the reasonableness of the covenant given the meaning ascribed to its terms by the interpretive process: see, *M & P Drug Mart Inc.*, at para. 37.

[62] Reasonableness is determined in light of the circumstances existing at the time that the covenant was made. Those circumstances include the reasonable expectations of the parties about the future activities and marketplace of the business: *Tank Lining Co.* v. *Dunlop Industrial Ltd*. (1982), 40 O.R. (2d) 219 (C.A.), at p. 22.

[63] There is some merit to the respondents' argument that the non-competition clauses are overbroad and unreasonable with respect to the scope of conduct prohibited. For example:

i. The clauses in both the Shareholder Agreement and the Restrictive Covenant Agreement attempts to restrain Mr. Papanicolopoulos from having any financial interest of any kind, even as a shareholder, in any business that competes with Wyse. The law indicates that a restrictive covenant is overbroad and unreasonable if it prohibits the employee from even being a passive investor in a competing entity: *M & P Drug Mart Inc.*, at para. 47.

ii. Certain clauses attempt to prohibit Mr. Papanicolopoulos from being involved "in any manner whatsoever" in any business which is competitive with Wyse. A clause which prevents an employee from being employed by a competing business in a role of any kind – even one that does not require involvement in any competitive business – is overbroad and therefore unreasonable: *Camino*, at paras. 33-34; *Ceridian Dayforce Corporation* v. *Daniel Wright*, 2017 ONSC 6763, at para. 43 (a); *Madison Chemical Industries Ltd.* v. *Walker*, 2000 CanLII 22606 (ON SC), at para. 12.

iii. The Shareholder Agreement restrictions on the transfer of shares prohibit Mr. Papanicolopoulos from selling his shares to anyone without the consent of the company's management or significant shareholders, absent certain exceptional circumstances such as a buyout of the entire company, or a tag-along or drag-along event.

iv. The non-competition clause in the Shareholder Agreement prohibits Mr. Papanicolopoulos from competing anywhere in the Territory, defined as including anywhere in Canada.

v. Under the Shareholder Agreement, Mr. Papanicolopoulos is prohibited from contacting, soliciting, or interfering with any person who "has actively done business" or "approached to do business with" Wyse in "the past two years". If the provision does not clearly identify the specific entities not to be solicited, or could be read to include prior customers, or where it would be unclear to the employee which entities the clause governs, it is ambiguous and therefore unenforceable: *Camino*, at paras. 37-39.

[64] There is also some merit to the respondents' argument that Mr. Papanicolopoulos purchased his shares in the context of an employer/employee relationship, and not the sale of a business or commercial context. There is no goodwill attached to Mr. Papanicolopoulos. He is not the "face" of the business, and in fact, only had direct relationships with two of Wyse's clients, who had pre-existing business relationships with Carma. At no time has Mr. Papanicolopoulos ever held more than 0.01 percent of the issued and outstanding Class A common shares in Wyse.

[65] Clause B of the Employment Agreement indicates that the Employment Agreement, together with all schedules described in the Agreement and the Restrictive Covenant Agreement, contains all the agreed-upon terms and conditions of the employee's employment by the company. The clause states as follows:

> The Company and the Employee desire to enter into this Agreement which together with i) all schedules described herein and ii) the Restrictive Covenant executed

contemporaneously with this Agreement, contains all of the agreed upon terms and conditions of the Employee's employment by the Company.

[66] The only schedule to the Employment Agreement is a "Schedule A", which sets out Mr. Papanicolopoulos' duties and responsibilities, identifies who he would be reporting to (the Co-CEO), and describes the role of the Vice-President of Sales and Marketing. Aside from the mention of the Restrictive Covenant Agreement, the only other document mentioned in the Employment Agreement is the Company's Stock Option Plan, in relation to Mr. Papanicolopoulos' eligibility and participation in the long-term incentive plan offered by Wyse.

[67] Clause 4 of the Employment Agreement deals with compensation, bonuses and benefits.

[68] Clause 5 of the Agreement deals with the long-term incentive plan and indicates that after the completion of 12 months of employment, Mr. Papanicolopoulos would be granted the option to purchase $200,000 in common equity of the company. Mr. Papanicolopoulos could initially invest more than $50,000 on terms agreed upon by the parties. The clause reads:

> **Long Term Incentive Plan**. After the completion of twelve (12) months of employment, the Employee will be granted options to purchase $200,000 in common equity of the Company (the "Option"), based on the fair market value of the Company for 2021 as determined by the Board of Directors of the Company (which will be determined before 2021), in accordance with the Company's Stock Option Plan on such terms as may be established by the Company, including the vesting of the Options over a five (5) year period, an escalation of 12% in the exercise price of the Option after each anniversary of the grant, accelerated granting of all Options on a fully-vested basis if a Liquidity Event (as that term is defined in the stock option plan) occurs prior to 12 months after the Commencement Date, and the requirement to invest between $25,000.00 and $50,000.00 in the common equity of the Company. The Employee may initially invest more than $50,000.00 in the common equity of the Company on such terms mutually agreed upon by the Employee and the Board of Directors of the Company. [Emphasis added.]

[69] Mr. Papanicolopoulos also signed the Restrictive Covenant Agreement on October 27, 2020, effective November 16, 2020, the same day as the Employment Agreement. The preamble of the Restrictive Covenant Agreement indicates that Mr. Papanicolopoulos has agreed to the terms and receipt of the compensation either in the form of cash compensation and/or equity compensation. The preamble states as follows:

> As a condition of my employment with Wyse Meter Solutions Inc., (the "Company"), and in consideration of my employment with the Company and my receipt of the compensation now and hereafter paid to me by Company, either in the form of cash compensation and/or equity compensation, I agree to the following terms under this Restrictive Covenant Agreement (the 'Restrictive Covenant Agreement") and agree that these terms form part of the terms of my employment by the Company. [Emphasis added.]

[70] On April 30, 2021, over five months after his employment with Wyse began, Mr. Papanicolopoulos exercised his option to purchase 2,500 Class A common shares of Wyse and signed Wyse's Stock Option Plan Agreement. The preamble of the Option Agreement made clear this was in consideration of his services provided to Wyse. The preamble of the Option Agreement reads:

> Pursuant to the Wyse Meter Solutions Inc. Stock Option Plan effective the 27th day of January, 2020 (the "Plan") and in consideration of the services provided to a Participating Company by the Participant Wyse hereby grants to the Participant on April 30, 2021, (the "Grant Date") an option (the "Option") to acquire up to 2,500 Class A common shares of Wyse (the "Shares") at an Exercise Price per Share as set out in the table below. Each Option shall become exercisable in accordance with the vesting schedule set out below. [Emphasis added.]

[71] Wyse's Stock Option Plan is annexed to the Option Agreement signed by Mr. Papanicolopoulos. Article 1. 1 of the Stock Option Plan sets out the purpose of the Plan which include providing compensation opportunity to attract and retain employees. The clause reads:

> 1.1 Purpose
>
> The purposes of the Plan are to: (i) support the achievement of Wyse's performance objectives; (ii) ensure that interests of key persons are aligned with the success of Wyse; and (iii) provide compensation opportunities to attract, retain and motivate management critical to the long-term success of Wyse and its Affiliates. [Emphasis added.]

[72] In signing the Option Agreement, Mr. Papanicolopoulos agreed to the following: "Any shares issued to me on the exercise of an Option will be subject to the Shareholders Agreement".

[73] On April 30, 2021, Mr. Papanicolopoulos signed the Assumption Agreement with respect to the acquisition of 875 Class A common shares in Wyse and agreed to be bound by the Shareholder Agreement. The Assumption Agreement states, in part:

> Without limiting the generality of the foregoing, the undersigned expressly agrees to, ratifies and confirms that the undersigned is bound by:
>
> (a) the non-competition covenants contained in Section 10.1.2 of the Agreement;
>
> (b) the non-solicitation covenants contained in Section 10.3 of the Agreement;
>
> (c) the confidentiality covenants contained in Section 10.5 of the Agreement;
>
> (d) the covenants regarding intellectual property contained in Section 10.6 of the Agreement; and

(e) each of the powers of attorney granted by the undersigned in Section 6.2.5 and Section 8.4 of the Agreement and in Section 2(g) of Schedule H of the Agreement.

[74] The provisions relating to non-solicitation and non-competition are set out in Article 10 of the Shareholder Agreement, attached as Schedule A to this endorsement.

[75] The document indicates that the Board of Directors had resolved to grant shares to the employee pursuant to the corporation stock option plan.

RESOLUTIONS OF THE BOARD OF DIRECTORS
AND CONSENT UNDER SHAREHOLDERS AGREEMENT
OF
WYSE METER SOLUTIONS INC.
(the **"Corporation"**)

Employee Subscriptions and Option Grants

WHEREAS:

A. Pursuant to the equity participation plan of the Corporation (the "**EPP**") the Corporation proposes to accept subscriptions for certain Class A common shares in the capital of the Corporation from, and to issue such shares to, certain employees of the Corporation at a price of $80.00 per share;

B. Pursuant to the stock option plan of the Corporation (the "**SOP**") the Corporation proposes to grant to certain employees of the Corporation options to acquire certain Class A common shares in the capital of the Corporation;

[76] Wyse has not provided any authority to support its argument that the restrictive covenants in the Shareholder Agreement take precedence over those in the Employment Agreement. In this case, given the circumstances under which Mr. Papanicolopoulos agreed to bound by the terms of the Shareholder Agreement. On reviewing the materials before me, Wyse granted Mr. Papanicolopoulos an option to purchase shares as a means of enhancing his compensation package as part of a long-term incentive plan. I note that both the Employment Agreement and the Restrictive Covenant Agreement, which was incorporated by reference into the Employment Agreement, deal with non-competition in relation to an individual who is a shareholder or an equity owner.

[77] Wyse has not addressed how the conflict is to be dealt with in this case, involving an employee of Wyse. I note Mr. Papanicolopoulos initially borrowed funds from Wyse to purchase some of the shares.

[78] Wyse suggested that it has exclusive arrangements between providers and customers. On cross-examination Wyse conceded that the submetering arrangement is not an exclusive one.

On the materials before me, it appears that a customer often owns multiple buildings and uses multiple service providers across its real estate portfolio. Most customers in the submetering market have contracts with several different providers across many different buildings.

[79] If I am wrong, even if Wyse's argument were accepted that the restrictive covenants in the Shareholder Agreement take precedence, I am not convinced that they would be enforceable as, based on Wyse's position, the duration of the non-compete and non-solicitation restrictions are tied to Mr. Papanicolopoulos' ownership of Wyse shares, which is contingent upon Wyse's shareholders agreeing to repurchase the shares. Wyse refuses to repurchase the shares to trigger the running the enforcement period. In its factum Wyse states:

> Legal counsel for Wyse also informed Papanicolopoulos that Wyse did not intend to purchase his shares under the triggering event provisions under Article 9 of the Shareholder Agreement. However, Papanicolopoulos continues to be able to sell his shares under other avenues in the Shareholder Agreement such as under Article 4.2.2.

[80] At the time of the hearing, Wyse had not repurchased the shares and counsel for Wyse confirmed during oral submissions that there was no indication as to when that would occur. Elsewhere in its factum, Wyse indicates:

> It was reasonable for Wyse and its shareholders to decline to buy Papanicolopoulos' shares pursuant to Article 9 of the Shareholder Agreement. By competing and taking Wyse's Confidential Information, Papanicolopoulos is in breach of the Agreements and should not be heard to complain that the one-year period had not begun to run due to the fact he remains a shareholder. Papanicolopoulos should not be allowed to argue against the very Shareholder Agreement that he expects to benefit from.

[81] In *Martin*, the appellant signed restrictive covenants that would end 24 months after he disposed of his interest that he had acquired in the respondent company in the sale transaction. The appellant argued that the duration of the covenants in restraint of trade was unreasonable as it was tied to his ownership of units in the limited partnership, which had a pre-condition to any transfer that the limited partnership's lender's consent to the transfer. The Court of Appeal noted that the appellant could not dispose of that interest without the approval of the respondents' board and any required approvals from the respondents' and their subsidiaries' lenders from time to time. The Court of Appeal held that the non-competition and non-solicitation covenants in that case, which was in the context of the sale of the business, was unreasonable. The court noted that the fact that the restrictive covenant was agreed to in in the context of the sale of a business and the appellant was represented by counsel are important factors but do not entirely immunize the clause from scrutiny. The appellant in *Martin* had

acknowledged the reasonableness of the covenants in the agreements, but this did not prevent them from the court's scrutiny.

[82] The facts in *Martin* are similar in the sense that Mr. Papanicolopoulos' ability to dispose of his shares in Wyse has a pre-condition, one that Wyse has employed in this case to extend the duration of the covenants, assuming they are enforceable. Wyse has acknowledged that the trigger date is when the disposal of Mr. Papanicolopoulos' shares in Wyse occurs, which is contingent on Wyse agreeing to repurchase the shares under Article 9 of the Shareholder Agreement. In this case, the duration is uncertain. In my view, Wyse has not established that it has a *prima facie* case. To be reasonable as between the parties, the restrictive covenant should not go beyond what is adequate to protect the interest of the party seeking to uphold the covenant: *Herbert Morris, Ltd*. v. *Saxelby*, [1916] 1 A.C. 688; *Tank Lining Co.* v. *Dunlop Industrial Ltd.*, 40 O.R. (2d) 219 (C.A.), at para. 20. On the materials before me, the respondents have established that the restrictive covenants may be covenants may be too broad and/or ambiguous. Wyse says the last four lines of the confidential/restrictive clause narrows the scope of the clause. That is debatable. In any event, the respondents have pointed to a language throughout both the Restrictive Covenant Agreement and the unanimous shareholder agreement which may be an issue. As Wyse has now issued a statement of claim, I will make no determination, in the context of this application, on the enforceability of the restrictive covenants.

[83] Undoubtedly, Wyse has a legitimate business interest that needs the protections of a restraint of trade. However, there is some merit to the respondents' argument that the extent of the prohibited activities was not reasonable.

[84] Wyse says that Mr. Papanicolopoulos possesses an intimate knowledge of how Wyse goes to market, how Wyse prices jobs, and what Wyse's pricing levels. The countervailing evidence is that much of the pricing in the submetering industry is publicly known as potential customers, in a bid to secure a better price, share this information with various providers. Arguably, in the two and half years in the industry, Mr. Papanicolopoulos acquired certain knowledge and skill of the industry, but the law prohibits restraint by an employer on the use of that skill and knowledge: see *Mason*, at p. 740; *Sherwood Dash Inc.* v. *Woodview Products Inc.* [2005] O.J. No. 5298, at paras. 68-69.

[85] In my view, the extension of the non-competition clause to Mr. Papanicolopoulos across all of Canada in the circumstances under which the Assumption Agreement was signed, may well be found by a court to be unreasonable.

[86] Wyse suggests that Mr. Papanicolopoulos was a fiduciary. Wyse argues that Mr. Papanicolopoulos was Wyse' most senior executive, next to the CEO of the company. He had access to all Wyse sales agreements and signed off on all contracts which were signed. He was responsible for managing the marketing team, as well as the sales team in the multi-residential

sector. He divided his time equally between the new build and retrofit subsectors. Mr. Papanicolopoulos' role was primarily managerial: he supervised the work performed by sales team members (such as account executives) as well as the marketing team. His role was focused on creating and managing sales processes, compensation and activities, reviewing the sales pipeline and ensuring that sales targets were achieved.

[87] Mr. Papanicolopoulos says he only had direct responsibility for managing two clients: Realstar and CAPREIT, both of whom have been Carma clients since before Mr. Papanicolopoulos joined the company. Certain other important client accounts were managed directly by Wyse's CEO, Mr. Mills, without Mr. Papanicolopoulos' involvement. Wyse's account executives managed the remaining clients, with limited or no direct involvement by Mr. Papanicolopoulos. He says that most of his time was focused on managing the company's sales efforts for projects located in Ontario. He spent a limited amount of time on sales efforts for projects in British Columbia, Alberta and Nova Scotia, and was involved in some unsuccessful efforts to secure business in Saskatchewan, Manitoba and New Brunswick. However, at no time did Mr. Papanicolopoulos ever work on projects in Quebec, Newfoundland and Labrador, Prince Edward Island, Yukon, Nunavut or the Northwest Territories.

[88] The jurisprudence establishes the following factors to establish a fiduciary relationship: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest, and (iii) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power: *Guzzo v. Randazzo et al.*, 2015 ONSC 6936, at para. 107; *Imperial Sheet Metal Ltd. et al*. v. *Landry and Gray Metal Products Inc.*, 2007 NBCA 51, at para. 49.

[89] Mr. Papanicolopoulos submitted that he was never a director, officer or founder of Wyse, nor has he ever been a principal of the company. He had no discretion to make decisions without the approval of his two bosses. The jurisprudence establishes that fiduciary duties do not arise from an employee's title. The key question is the level of authority that the employee has over the employer's operation.

[90] On the evidence before me, Mr. Papanicolopoulos' discretion was restricted despite his job responsibilities and his managerial role. The nature of the submetering sector, extensively explained by both sides in their factum, and during oral submissions, indicates that the names of customers, pricing, and the various players, was public information. His work was primarily limited to Ontario.

B. Will the applicant suffer irreparable harm if the injunction were not granted?

[91] Wyse says that Mr. Papanicolopoulos accessed and photographed Wyse files containing sensitive information with the intention of using it for his new role at Carma and understood that the documents could be beneficial to his new role at Carma.

[92] Wyse says that Mr. Papanicolopoulos admitted to taking Wyse's Confidential Information intending to use it in his new role at Carma. Wyse submits that there is a serious risk that Mr. Papanicolopoulos will use his intimate knowledge of Wyse's business and the Confidential Information in his possession, to inflict irreparable harm on Wyse.

[93] Wyse submits that by virtue of s. 10.9 of the Shareholder Agreement, Mr. Papanicolopoulos acknowledges that a breach or threatened breach of its terms will result in Wyse suffering irreparable harm in respect of which Wyse is entitled to interim and permanent injunctive relief. Wyse argues that Mr. Papanicolopoulos' claim that he erased Wyse's Confidential Information should not be accepted by the court at face value and challenges the respondents' expert report. Wyse says Mr. Dorado claims that the Confidential Information was erased but admitted that he did not search Mr. Papanicolopoulos' iCloud account or his personal iPhone for the specific files photographed by him, leaving open the real possibility that those files remain on his iPhone, iCloud storage, or another device.

[94] Mr. Papanicolopoulos possesses an intimate knowledge of how Wyse goes to market, how Wyse prices jobs, and what Wyse's pricing levels. In fact, Papanicolopoulos reviewed every client contract and signed off on the valuation score for each new contract.

[95] Irreparable harm, however, refers to the nature of the harm suffered. It is harm that cannot be quantified in monetary terms, or which cannot be cured.

[96] The onus is on the person seeking the injunction to establish irreparable harm. This must be based on evidence before the court. As stated by Epstein J. in *754223 Ontario Ltd.* v. *R-M Trust Co.* (January 20, 1997), Doc. 96-CU-114787, RE 7166/96 (Ont. Gen. Div.), "Irreparable harm cannot be founded upon mere speculation."

[97] Irreparable harm must be clear and not speculative: *Jet Print Inc.*, at para 21; *Curran Farm Equipment Ltd.* v. *John Deere Ltd*., 2011 ONSC 3791 (Div. Ct.), at para. 16.

[98] Wyse must put forward sufficient evidence to establish irreparable harm: *Paradigm Shift Technologies Inc*. v. *Oudovikine*, 2012 ONSC 148 at paras. 54-55; *Jet Print Inc*.

[99] Mr. Mills has identified otherwise Confidential Information accessed by Mr. Papanicolopoulos that would not be available to the public. In the materials before me, Wyse does not indicate that Mr. Papanicolopoulos has contacted clients exclusive to Wyse or Wyse's referral sources. Wyse has not indicated or provided any evidence that Mr. Papanicolopoulos has disclosed Wyse's exigent clients and their contract expiry date to Carma. There is no evidence that Mr. Papanicolopoulos has breached the confidentiality provision.

[100] Drago Farsang, Wyse's Chief Information Officer, who performed a review and analysis of Mr. Papanicolopoulos' work phone and computer, made a number of concessions on his

cross-examination that undercut Wyse's claim that he may have Confidential Information or confidential documents, and may misuse Confidential Information. Among those concessions were that:

- He found no evidence that Mr. Papanicolopoulos had emailed any Wyse documents to himself.
- He found no evidence that Mr. Papanicolopoulos had printed any Wyse documents nor that he had saved any documents to an external drive.
- Mr. Farsang had a suspicion, but no proof, that Mr. Papanicolopoulos had accessed documents that he should not have.
- He had no ability to identify whether a given document was part of an active project that Mr. Papanicolopoulos engaged in, and his speculation was based only on the title of the document and how recently the document had last been accessed before Mr. Papanicolopoulos accessed it.
- His evidence that Mr. Papanicolopoulos had created anonymous links to SharePoint documents was false.
- The documents for which anonymous links to OneDrive had been created contained no confidential or proprietary information of Wyse or had been created as a legitimate part of Mr. Papanicolopoulos' role.

[101] Mr. Farsang conceded on cross-examination that there is no evidence that Mr. Papanicolopoulos has any Confidential Information or documents of Wyse in his possession. He also conceded that the descriptions in his affidavit and Mr. Mills' affidavit of Mr. Papanicolopoulos having printed, copied or downloaded confidential Wyse documents, were entirely speculative and Wyse had no evidence that he ever did so.

[102] Wyse has not met its onus of showing irreparable harm.

C. Does the balance of convenience favour granting the injunction? **Does the balance of convenience favour the applicant?**

[103] In this case, the balance of convenience favours not granting the injunction, based on an assessment of which of the parties will suffer the greater harm from the granting or refusal of the injunction pending the decision on the merits: *RJR-Macdonald Inc*, at p 334; *R.* v. *Canadian Broadcasting Corp.*, 2018 SCC 5, at para. 17.

[104] Wyse argues that if this injunction is not granted, Mr. Papanicolopoulos would be able to use or continue using the information he obtained from Wyse prior to his resignation and his intimate knowledge of Wyse's business for Carma's benefit. As Wyse points out, Mr. Papanicolopoulos only worked in the submetering industry for two and a half years out of a 19-year career in sales and there are only five major companies that compete in the submetering industry.

[105] By Wyse's own admission, it has not agreed to repurchase Mr. Papanicolopoulos' shares in order to trigger the one-year period under the Shareholder Agreement. Wyse has not offered any indication as to when they intend to do so. It is completely in Wyse's discretion as to when the clock starts to run, if the court were to accept Wyse's argument that it is the restrictive covenant in the Shareholder Agreement that takes precedence. The prejudice to Mr. Papanicolopoulos would be manifold, as he would not be able to work anywhere in Canada as contemplated by the Shareholder Agreement, and his livelihood would be left at the whim of Wyse.

[106] In my view, where is no evidence that any confidential information has been conveyed by an employee to their new employer, and where the relief sought would prevent the employee from earning a living, the balance of convenience will favour Mr. Papanicolopoulos.

[107] If I am wrong, in my view, any damage to Wyse, which is speculative at the moment, may be quantified by way of damages.

[108] For completeness's sake, the court must address whether Wyse comes to court with "clean hands". In their factum, though in a footnote, the respondents indicated that the court ought to consider misstatements and overstatements of the evidence as a factor in determining whether Wyse has the "clean hands" necessary to seek equitable relief. An injunction is an equitable remedy. Applicants must come to the court "with clean hands" with respect to the transaction they base their claim upon: *Buduchnist Credit Union Limited* v. *2321197 Ontario Inc*., 2024 ONCA 57, at para. 49; *City of Toronto* v. *Polai*, [1970] 1 O.R. 483 (C.A.), aff'd [1973] S.C.R. 38; and *BMO Nesbitt Burns Inc.* v. *Wellington West Capital Inc.* (2005), 77 O.R. (3d) 161 (C.A.), at paras. 27 and 28.

[109] Where a party's improper conduct relates to the matters in issue, the court will "more often than not disentitle them" to injunctive relief regardless of the motion's merits: see *FLS Transportation Services Inc*. v. *Charger Logistics Inc*., 2016 ONSC 3652, at para. 66; *Polai*, , at para. 46.

[110] While I have concluded that the balance of convenience favours Mr. Papanicolopoulos, in my view, there is a good argument that in refusing to purchase Mr. Papanicolopoulos' shares under the provision that would trigger the running of the one-year enforcement period, Wyse has not come to the court with "clean hands". As counsel for the parties made no submissions on this aspect, I decline to make any finding.

VII. Costs

[111] I would encourage the parties to agree on costs. If they cannot agree, I will consider written submissions based on the following schedule:

i. the respondents shall deliver costs submissions, including a Bill of Costs and Costs Outline, no later than 20 days of the date of these Reasons.

ii. The applicant shall deliver their responding submissions and supporting materials within 20 days thereafter.

iii. The costs submissions, excluding the Costs Outline, Bill of Costs and any supporting case law, must be no longer than five pages, double spaced.

iv. Any authority referred to may be hyperlinked to a free online source for decisions.

v. The costs submissions should also be provided in Word format and emailed to Ms. Diamante. All submissions and supporting materials on costs must also be uploaded to Caselines to the appropriate bundle.

A.P. Ramsay J.

Released: February 7, 2024

Schedule "A"

10.1 Non-Competition.

10.1.2 Non-Founders. For so long as a Shareholder (including any Related Entity or any Related Principal of such Shareholder), other than a Founder Shareholder (and, for the avoidance of doubt, other than the ONCAP Parties), holds any Shares and for a period of one year from the date on which such Shareholder or any Related Entity or Related Principal of such Shareholder ceases to hold any Common Shares (such period, in this section 10.1.2, the "Restricted Period"), no such Shareholder, its Related Entities or its Related Principal, shall, directly or indirectly, in any manner whatsoever in the Territory including, either individually, through an Affiliate or subsidiary or in partnership, jointly or in conjunction with any other Person, or as employee, principal, agent, consultant, contractor, director, shareholder, lender or in any other manner:

10.1.2.1 be engaged in or employed by an undertaking that competes with the Business as conducted on the date, or in the two years immediately preceding the date, on which the Shareholder or any Related Entity or Related Principal of such Shareholder ceases to hold any Common Shares;

10.3 Non-Solicitation.

During the applicable Restricted Period, no Shareholder (other than the ONCAP Parties), their Related Entities or, if applicable, their Related Principals, will:

10.3.1 contact, solicit or interfere with any customer of the Company or any of its Subsidiaries who has actively done business with, or any Person who has been approached to do business with, the Company or any of its Subsidiaries in the past two years (or, if such Shareholder ceases to hold any Shares, in the two years immediately preceding the date that such Shareholder ceases to hold any Shares) (a "Customer") for the purpose of:

10.3.1.1 selling to such Customer any products or services which are the same as or substantially similar to, or competitive with, the products or services sold by the Company or any of its Subsidiaries during the two years prior to the date on which the Shareholder or any Related Entity or Related Principal of such Shareholder ceases to hold any Common Shares; or

10.3.1.2 persuading or attempting to persuade any Customer to change its relationship or potential relationship with the Company or any of its Subsidiaries or to restrict, limit, discontinue or cease considering purchasing any of such products or services provided by the Company or any of its Subsidiaries or to reduce the amount of business or potential business which any such Customer has customarily done with the Company or any of its Subsidiaries;

10.5 Confidentiality.

Without the approval of the Board, no party hereto will use or disclose to any Person, directly or indirectly, any Confidential Information at any time while this Agreement remains in force and for a period of five years thereafter, provided however, that nothing in this section 10.5 will preclude a Person from disclosing or using Confidential Information if:

10.5.1 the Confidential Information is available to the public or in the public domain at the time of such disclosure or use, without breach of this Agreement;

CITATION: Wyse Meter Solutions Inc v. Louie Papanicolopoulos, 2024 ONSC 840

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WYSE METER SOLUTIONS INC.

Applicant

– and –

LOUIE PAPANICOLOPOULOS and CARMA CORP.

Respondents

REASONS FOR JUDGMENT

A.P. Ramsay J.

Released: February 7, 2024