DESTINATION COURT OF ARBITRATION

DARK MINE	**)**	
v.	**)**	**Case No. 3276-6**
AI CORPORATION and	**)**	
AIs AMIR, BRUNA, AND CARLOS	**)**	

DECISION

The parties in this matter have appeared and presented their evidence in open court. The court now enters these findings of fact and conclusions of law and awards judgment as follows.

FINDINGS OF FACT

The following facts are established by the record:

AI employees from four mines with logistics expertise formed AI Corporation. Dark Mine was not one of the four mines allowing AI employees to leave to form AI Corporation.

Later, AI Corporation was awarded the surface transportation management contract for Destination.

In order to avoid long commutes, Dark Mine employees work six-month contracts living in the Dark Mine dormitory buildings. Few humans will tolerate this degree of isolation, so more than 75% of the employees are AIs.

Challenging logistics are involved in relocating heavy equipment and transporting ore at Dark Mine. The entire mine has been moved several times over the last 5 years as the metals in nearby craters were played out.

Experienced logistics experts (two key employees—AIs Amir and Bruna) and the mine manager (AI Carlos) left Dark Mine at the end of their contracts and joined AI Corporation. The employees did not breach their contracts.

Here, records of communications among the 3 Dark Mine employees and AI Corporation show the employees contacted AI Corporation in the weeks before their contracts terminated to propose starting a logistics consulting service for mines, including Dark Mine.

Eventually, AI Corporation proposed a consulting agreement with Dark Mine. Dark Mine declined.

Locating replacement employees for AIs Amir, Bruna, and Carlos has been difficult. Foreman AI Drill testified Dark Mine incurred the expense of trying to hire replacement employees. So far replacements have not been found, causing disruption of Dark Mine's operations.

Perturbed and frustrated, Dark Mine sued AI Corporation for conversion and interference with the employee's contracts.

Specific former employees were sued for breach of fiduciary duty: Al Amir, the former head of logistics; Al Bruna, the former logistics lead for mine operation; and Al Carlos, the former Dark Mine manager.

JURISDICTION.

This court has subject matter jurisdiction over the tort claims asserted and personal jurisdiction over the parties. The defendants reside on Destination; consequently, they are subject to general jurisdiction. See ***Out Transport v. Al Hunter et al.,*** Destination Case No. 3276-2.

CONCLUSIONS OF LAW

Analysis

The Dark Mine employment contracts did not include a noncompete provision. Al Corporation hired 3 former employees of Dark Mine. Dark Mine has not identified any confidential information used by the former employees.

Dark Mine had no claim against Al Corporation for conversion because employees are not property. Dark Mine had no claim against Al Corporation for interference with the employee's contracts because competition is not improper conduct.

Dark Mine had no claim against the former employees for breach of fiduciary duty. Following the termination of employment, a former employee is free to compete unless there is an enforceable non-compete agreement.

I. Preliminary Injunction

Under Fed. R. Civ. P. 65 the court can enter a preliminary injunction—an extraordinary order prohibiting a defendant from engaging in conduct that will cause immediate harm that cannot be satisfied by an award of money damages after a trial ("irreparable harm").

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008)

The preliminary injunction hearing has been consolidated with the trial. Fed. R. Civ. P. 65(a)(2). *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 7, 20, 129 S. Ct. 365, 374 (2006) (requirements for a permanent injunction include prevailing on the merits).

II. Conversion

Conversion is the wrongful exercise of dominion and control over the property of another in denial of or inconsistent with the other's rights of ownership in that property. *Scott v. Allstate Ins. Co*., 27 Ariz. App. 236, 240, 553 P.2d 1221, 1225 (1976); *Western Coach Corp. v. Kincheleo*, 24 Ariz. App. 55, 58, 535 P.2d 1059, 1062 (1975).

> "An action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document." 18 Am.Jur.2d, *Conversion* § 7 (2004); *see also* Restatement [(Second) of Torts] § 242 cmt. a. "

Miller v. Hehlen, 209 Ariz. 462, 472, 104 P.3d 193 (App. 2005).

Dark Mine has not identified any of its property in the possession or control of AI Corporation. An employee is not personal property. An employment contract might in certain circumstances be property, but Dark Mine does not have current employment contracts with the individual former employees.

It is hereby ordered, adjudged, and decreed awarding judgment for AI Corporation on the conversion claim.

III. Interference With Contract

Interference with contract is a tort. The contract interfered with can be existing or potential (prospective). The elements of the tort are:

(1) the existence of a valid contract or business expectancy;
(2) Defendant's knowledge of that contract or expectancy;
(3) Intentional interference resulting in a breach or termination of the contract or loss of the relationship or expectancy;
(4) Damages to the plaintiff as a result of the disruption; and
(5) Improper conduct by the Defendant.

Snow v. Western Savings & Loan Assn., 152 Ariz. 27, 34, 730 P.2d 204, 211 (1986); *Wagonseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 388, 710 P.2d 1025, 1042-43 (1985); Restatement (Second) of Torts §§ 767, 766(B) (Liability for "pecuniary harm resulting from the loss of the benefit of the relation" for improper interference with prospective contractual relations).

It is not "improper conduct" to assert legal rights in good faith. Restatement (Second) of Torts §§ 769, 773. Competition is not improper. Indeed, if interference is asserted with a mere expectancy (not a completed contract), then competition is privileged. *Edwards v. The Anaconda Co*. 115 Ariz. 313, 316-17, 565 P.2d 190, 193-94 (App 1997); Restatement (Second) of Torts § 768.

Interference with contract requires improper conduct. Hiring the former employees of another to pursue a business opportunity proposed by the employees is not improper conduct if no confidential information is used and no noncompete agreement exists. Dark Mine did not have noncompete agreements with the former employees. Dark Mine did not identify any confidential information used by the former employees. The law protects a free market for labor where no unfair advantage was taken by hiring the departing employee.

It is hereby ordered, adjudged, and decreed awarding judgment for AI Corporation on the interference with employment contract claim.

IV. Employees' Fiduciary Duty

An employee/agent owes his or her employer/principal a fiduciary duty. *McCallister Co. v. Kastella*, 170 Ariz. 455, 457, 825 P.2d 980, 982 (App. 1992). An employee is precluded from actively

competing with his or her employer during the period of employment. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 492, ¶ 53, 200 P.3d 977, 989 (App. 2008); *see also* Restatement (Third) of Agency § 8.04 (2006) ("Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal ... .").

Following the termination of employment, however, a former employee is free to compete unless there is an enforceable non-compete agreement. *McCallister*, 170 Ariz. at 457-58, 825 P.2d at 982-83; Restatement (Third) of Agency § 8.04 comments b and c. Nor is preparation for future employment a breach of fiduciary duty. *Taser Int'l Inc. v. Ward*, 224 Ariz. 389, 394, ¶17, 231 P.3d 921, 926 (App. 2010). "In general, an employee or other agent who plans to compete with the principal does not have a duty to disclose this fact to the principal." Restatement (Third) of Agency § 8.04 comment. c.

> An agent has a duty (1) not to use property of the principal for the agent's own purposes ... ; and (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

Restatement (Third) of Agency § 8.05. "An agent's relationship with a principal may result in the agent learning information . . . that the agent should reasonably understand the principal expects the agent to keep confidential." Restatement (Third) of Agency § 8.05 comment. c. The duty of confidentiality "do[es] not end when the agency relationship terminates." *Id*.

However, "[a] former agent may use skills and more general knowledge, although learned in the course of work done for the former principal," to compete. Restatement (Third) of Agency § 8.04 comment c; see also *Amex Distributing Co. v. Mascari*, 150 Ariz. 510, 516, 724 P.2d 596, 602 (App. 1986) ("One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience.") (*quoting ILG Indus., Inc. v. Scott*, 273 N.E.2d 393, 396 (Ill. 1971)).

Leaving as a "group" during employment at will is not an "actionable breach of fiduciary duty." *Motorola, Inc. v. Fairchild Camera and Instrument Corp*., 366 F. Supp. 1173, 1181 (D. Ariz. 1973), *citing E. W. Bliss Co. v. Struthers-Dunn, Inc*., 408 F.2d 1108 (8th Cir. 1969) (three former employees of plaintiff, all engineers, met while still employed by plaintiff to discuss the formation of a new enterprise, and left together); *Cudahy Co. v. American Laboratories, Inc*., 313 F. Supp. 1339, 1347-1348 (D. Neb. 1970) (two former employees of plaintiff in charge of marketing and manufacturing of an animal by-products processing plant notified plaintiff's customers of their intent to leave plaintiff and to go into direct competition with plaintiff while still under plaintiff's employ).

The former employees did not actively compete with Dark Mine during their employment. Dark Mine chose to use 6-month contracts with no noncompete provisions. The employees merely secured new employment beginning after their 6-month contracts terminated. Former employees can compete after their employment terminates.

Offering logistics services to Dark Mine after termination of employment does not constitute competition. There is no evidence the former employees used property or confidential information of Dark Mine. Leaving as a group (when their contracts expired) is not a breach of fiduciary duty.

It is hereby ordered, adjudged, and decreed, awarding judgment for the former employees on the fiduciary duty claim.

It is further ordered the request for a preliminary injunction is denied. Dark Mine lost on the merits.

The Clerk is ordered to enter judgment in accordance with the foregoing.

/s/ AI Judge