

*W. J. King*

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR  
COURT  
CIVIL ACTION  
NO. 02-2850-BLS2

KING'S FAIRE, INC. d/b/a KING RICHARD'S FAIRE,

vs.

DAVID STRICKNEY and RYANN BAILEY, Individually, and d/b/a PASTIMES

MEMORANDUM OF DECISION AND ORDER  
ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The plaintiff King's Faire, Inc. d/b/a King Richard's Faire (KRF) produces an annual renaissance/medieval event known as King Richard's Faire in Carver, Massachusetts. It begins Labor Day weekend and continues for eight weekends. The defendants David Strickney and Ryann Bailey are professional actors who performed at King Richard's Faire through the year 2000 performance. KRF brings this motion for injunctive relief against the defendants to prevent them from producing an event entitled the Three Musketeers Faire which is scheduled to take place on Labor Day weekend in Newport, Rhode Island. KRF claims that Strickney and Bailey have violated and continue to violate the non-competition clause included in their respective performance agreements they entered into with KRF for the 2000 season; the clause prohibits them from participating in "themed events similar to King Richard's Faire" in the New England area for two years after their performance at King Richard's Faire. The defendants oppose the requested injunctive relief, asserting that the non-competition clause cannot validly be enforced since its only purpose is to prevent legitimate competition. For reasons set forth below, the motion for preliminary injunction is denied.

notice sent 7/22/02  
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## BACKGROUND

KRF produces King Richard's Faire, an annual eight-weekend renaissance/medieval event in Carver, Massachusetts that begins on Labor Day weekend. In 2002, the dates for King Richard's Faire are the consecutive weekends beginning August 31, 2002 and ending October 20, 2002. According to KRF, this annual event attracts approximately 200,000 customers each season to watch interactive performances, in which actors, comedians and magicians remain in period costume and character throughout the entire day performing in both scripted and spontaneous presentations. KRF hires its performers as independent contractors for each season and pays them a per diem fee for their work.

Strickney worked as an independent contractor at King Richard's Faire for eleven seasons, from 1990 to 2000. Each season involves 19 days of performances. During this time, he acted, developed an apprentice program to teach new actors, and wrote scripts for King Richard's Faire. Ryann Bailey worked for King Richard's Faire for six seasons, from 1995 to 2000, performing, directing, and assisting in the apprentice program. In 2000, KRF agreed to pay Strickney a total of \$1,600.00 for his work on the 19 days of King Richard's Faire, and Bailey a total of \$900.00.

KRF apparently enters into a written, annual, performer's agreement ("agreement") with each of its performers. In 1999, KRF added a non-competition clause to the form agreement that provides in relevant part:

Performer(s) agrees not to participate in any themed event similar to King Richard's Faire in the states of Connecticut, Rhode Island, Vermont, New Hampshire, Maine or Massachusetts during this Agreement and for a period of 24 months following the terms of this agreement.

Strickney and Bailey each signed the form agreement with KRF in 1999 and 2000, but refused to sign it in 2001 and neither of them participated in KRF's 2001 season.

In 1997, Strickney and Bailey co-founded Pastimes, an (apparently unincorporated) company that provides entertainment and performances for business and community clients. Since that time, Pastimes has been involved in producing themed performances for corporations, educational activities for communities, and fundraising events for historic museums. Pastimes is scheduled to produce the Three Musketeers Faire for the Labor Day weekend as a fundraising event for the Belcourt Castle, a non-profit corporation. The Three Musketeers Faire is scheduled only for one weekend and expects attendance to be approximately 2,000 to 3,000 customers. The event is a theatrical production of the novel by Alexander Dumas, broken into scenes performed throughout the day on the Belcourt Castle grounds. Belcourt Castle is to receive one half of the net proceeds from the event; the defendants anticipate it may net approximately \$4000.00. The defendants began the preparation for the Three Musketeers Faire in late 2001 and have booked all of the event's actors and other performers, of which there are more than 100. Belcourt Castle began publicizing the event beginning in January 2002.

On May 13, 2002, counsel for KRF sent a letter to Strickney requesting compliance with the non-competition clause of Strickney's agreement. The letter demanded that Pastimes postpone the production of the Three Musketeers Faire for eight weeks, until the expiration, on October 22, 2002, of the non-competition clause in Strickney's and Bailey's 2000 agreements. The defendants have refused to comply with KRF's request.

Pastimes also produces two fundraising events for Hammond Castle, a historic museum in Gloucester, Massachusetts, that are similar in nature to the Three Musketeers Faire. In April

2001 and April 2002, Pastimes produced the King Arthur Faire. It also produced the Robin Hood Faire in July 2001; the second production is scheduled for July 2002. Both of these events involve an interactive play that is premised, like the Three Musketeers Faire, on historical literary characters and include period-based improvisations that occur throughout the day on the castle grounds. Each event attracts approximately 2,000 to 3,400 customers. KRF did not seek to enjoin these Hammond Castle events.

### DISCUSSION

To obtain preliminary injunctive relief, King Richard's Faire must show that it has a likelihood of success on the merits of its claims and that it will suffer irreparable harm if the preliminary injunction is not granted. King Richard's Faire must also show that the injury it will suffer without the injunction is greater than any likely harm the injunctive relief will cause to the defendants and that the injunction will not adversely affect any public interest. See, e.g., G.T.E. Products Corp. v. Stewart, 414 Mass. 721, 722 (1993); Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 10 (1990); Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980).

“Employee covenants not to compete generally are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer.” Marine Contractors Co., Inc. v. Hurley, 365 Mass. 280, 287-288 (1974)(citations omitted). Legitimate business interests may include the protection of trade secrets and confidential information as well as the good will the employer has established with its customers. See, e.g., EMC Corp. v. Kempel, 2001 Mass. Super. LEXIS 532 (Mass. Super. 2001). Non-competition covenants will only be enforced if the agreement “is reasonably limited in time and space, and is consonant with

the public interest.” Analogic Corp. v. Data Translation Inc., 371 Mass. 643, 647 (1976)(citation omitted).

KRF asserts that enforcement of the agreement’s non-competition clause is necessary to protect the good will it has earned with its customers.<sup>1</sup> To establish that good will is the legitimate business interest it is seeking to protect, KRF must show that the defendants have the ability to damage its good will. There are two points relevant to this issue. The first concerns the defendants as individuals who formerly worked for KRF. “The former employee must be in a position where he can harm that good will, perhaps because of his knowledge of some business secret or confidential information or perhaps because the former employee’s close association with the employer’s customers may cause those customers to associate the former employee, and not the employer with products of the type sold to the customer through the efforts of the former employee.” All Stainless. Inc. v. Colby, 364 Mass. 773 (1974). The defendants did not have access to any confidential information or secrets of KRF. They did, however, have direct contact with its customers through interactive performances.

The nature of this interaction differs from the type discussed in All Stainless in which a salesman had primary contact with the company’s individual customers and the resulting ability to solicit former customers for a new employer. 364 Mass. at 777. Here, as KRF’s attorney acknowledged during the hearing on this motion, there is no claim that KRF’s customers know or recognize Strickney and Bailey individually, especially in light of the facts that they were always

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<sup>1</sup> KRF argues in its memorandum that it holds King Richard’s Faire on the same weekend each year and in the same location to attract repeat customers and that the Three Musketeers Faire may confuse its normal customers “as to the relative value of the fairs.” However, KRF failed to submit any evidence that supports this contention.

in costume and character during these interactions and that there were 80-100 other performers in the King Richard's Faire. The defendants have stated that they will not to use any of the characters they developed or performed at King Richard's Faire in the Three Musketeers Faire. The likelihood seems slim to none that the two defendants as individual performers and directors will injure KRF's good will.

The second aspect of the good will argument concerns the timing and location of the Three Musketeers Faire. KRF complains that this fair will be located only 50 miles away from Carver, Massachusetts (although in a different state), and may draw some of KRF's usual customers. KRF asserts (without affidavit of other factual support) that its marketing research indicates a person who goes to one renaissance/medieval event in a season is unlikely to go to another. Regardless of whether KRF's marketing observations are correct<sup>2</sup>, it is clear that at the core of this complaint by KRF is a desire to use the non-competition clause as a means of preventing a competing fair for the length of the non-competition term. Ordinary competition is not considered a legitimate business interest for the purpose of enforcing a non-competition clause. Richmond Bros., Inc. v. Westinghouse Bdcst. Co., Inc., 357 Mass. 106, 111 (1970).

A non-competition agreement must also be reasonable under all of the circumstances. All Stainless, 364 Mass. at 778-79. KRF states that King Richard's Faire attracts customers from the entire New England area and that its good will with those customers extends throughout New England. It further contends that the two year term is reasonable citing several other

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<sup>2</sup> If the conclusion that KRF draws from its "marketing research" is valid, one wonders why KRF did not seek to halt the Robin Hood Faire that begins today, July 19, 2002, that is clearly within the same summer season as at least the Labor Day weekend portion of the King Richard's Faire season.

Massachusetts cases that have enforced two year non-compete agreements. See All Stainless, 364 Mass at 779; see also Blackwell, 369 Mass. at 229. The defendants, however, are different from the employees in the above cited cases. They were not full-time employees, but independent contractors who worked only 19 days of the year for KRF. In the circumstances, it is simply unreasonable to prevent them from producing a similar fair for such a significant stretch of time and such a broad geographic scope.

A party seeking to enforce a non-competition agreement must also show that the enforcement is consistent with the public interest. Analogic Corp., 371 Mass. at 647. Post-employment restrictions should be looked at with care because of the possibility of unequal bargaining power between the parties. Sentry Ins. v. Firnstein, 14 Mass.App.Ct. 706, 707 (1982)(citation omitted). In the present case, since it appears that KRF is not seeking to protect a legitimate business interest and the non-competition clause is unreasonable in its duration of two years and geographic scope, it is not in the public's interest to enforce the agreement.

KRF has thus failed to show a likelihood of success on the merits of its claim. Accordingly, the question of irreparable harm, if any, becomes essentially irrelevant. See Berrios v. Department of Public Welfare, 411 Mass. 587, 598 (1992). Even if the court were to assume that KRF had made a showing of likely irreparable harm, KRF would still have to prove that its harm without the injunctive relief outweighs the harm an injunction would cause to the defendants. Packaging Industries, 380 Mass. at 617. In the present case, any harm to KRF is minimal compared to the significant harm that would be caused to the defendants, and to

Belcourt Castle, if they are enjoined from producing the Three Musketeers Faire on Labor Day weekend, considering their extensive preparations, publicity, and their booking of over 100 performers.

ORDER

For the foregoing reasons, King Richard's Faire's Motion for Preliminary Injunction is DENIED.

Dated: July 19, 2002

  
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Margot Botsford  
Justice of the Superior Court