IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ALL SEASONS SERVICES, INC.	: OCTOBER TERM, 2002
Plaintiff	:
	: No. 2173
v.	:
	:
JOHN J. NEWNAM	: (Commerce Program)
	:
and	:
	:
RDS & V, INC.	:
	:
and	:
	:
RALEY DOWNES SERVICES	:
Defendants	:

O R D E R

AND NOW, this 20th day of July 2006, upon consideration of evidence presented at a bench trial, the respective proposed findings of fact and conclusions of law, all matters of record, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that:

1. Judgment is entered in favor of plaintiff, All Seasons Services, Inc. ("All Seasons"), and against defendant, John J. Newnam ("Newnam") on plaintiff's claim of breach of contract claim (Count 1) in the amount of $77,380.00. This amount includes lost profits and $4,380.00 in pre-judgment interest.

2. Judgment is entered in favor of defendants and against plaintiff with respect to plaintiff's claims for interference with contractual relations (Count II) and

tortious interference with a contract (Count IV).

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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FINDINGS OF FACT, DISCUSSION
AND CONCLUSIONS OF LAW
SUR BENCH TRIAL

Albert W. Sheppard, Jr., J. ……. July 20, 2006

This case involves an employer, its former employee and a Non-Competition and Separation Agreement. The court conducted a two day bench trial. All Seasons Services, Inc. ("plaintiff") and John Newnam, RDS & V, Inc. and Raley Downs Services ("defendants") have submitted Proposed Findings of Fact and Conclusions of Law.

After a review of all pertinent materials, the court finds in favor of plaintiff on the breach of contract claim against John Newnam ("Newnam"). The court finds in favor of defendants on the claims for interference with contractual relations claim and tortious interference with a contract.

FINDINGS OF FACT

I. The Parties

1. Plaintiff All Seasons Services, Inc. ("All Seasons") provides dining, vending and office refreshment services to businesses, governmental agencies, educational institutions and other organizations. Plaintiff's FF,¶ 1.

2. Defendant John J. Newnam ("Newnam") was All Season's District Manager from August 2001 until March 2002. N.T. 3/14/2006 at 11-12. Newnam had also been employed by the corporate predecessors of All Seasons, including Vend-Rite, for several years. *Id*. at 18-19.

3. Defendant Raley Downes Services ("RDS"), a trading name for defendant RDS & V, Inc., is also in the business of providing food services to businesses, agencies and institutions. *Id.* at 10-11.

4. Alan Simons, the President of RDS, hired Newnam after the latter had terminated his employment with All Seasons. N.T. 3/14/2006 at 20, 152-155; Plaintiff's FF, ¶ 14.

II. Factual Background

5. Newnam, upon his employment with All Seasons, signed a Non-Disclosure and Non-Competition and Separation Agreement (the "Non-Competition Agreement"). Exh. P-1; Plaintiff's FF, ¶ 8.

6. The Non-Competition Agreement provided that: (1) Newnam would not "directly or indirectly" compete with All Seasons for a period of three . . . months after the termination of his employment, (2) for a period of one year, Newnam would not "in any capacity, either separately or in association with others, directly or indirectly, solicit

any of the Company's . . . customers . . . to terminate or otherwise modify [their relationship] with the Company" and (3) Newnam would not use "any notes, memoranda, drawings, data or other materials of any nature relating to any matter within the scope of the business of the Company or concerning any or its dealings" other than "for the benefit of the Company" and he would return any such materials to All Seasons "immediately upon termination of [his] employment." *Id.* at ¶¶ 1, 2, 4.

7. Newnam testified that, prior to signing the Non-Competition Agreement, he was told by two national sales managers, Michael Lynch ("Lynch") and Bill Batchelor ("Batchelor"), that the Agreement was not valid in Pennsylvania. N.T. 3/14/2006 at 138-139.

8. On or about March 2002, Newnam tendered his resignation to All Seasons. *Id.* at 12.

9. On the last day of his employment with All Seasons, July 18, 2002, Newnam signed a Separation Agreement in which he reaffirmed his agreement to abide by the provisions of the Non-Disclosure and Non-Competition Agreements. Exh. P-2, Defendants' FF, ¶ 20; N.T. 3/14/2006 at 13.

10. Both the Non-Competition Agreement and the Separation Agreement are to be "governed by and construed in accordance with the law of the Commonwealth of Massachusetts." Exhs. P-1, P-2.

11. Newnam testified that he accepted a job with RDS at some point over the summer of 2002 and that he commenced work at RDS on September 9, 2002. *Id.* at 20, 21.

12. Newnam was hired by and reported to Alan Simons, the President of RDS, who provided Newnam with business cards that identified him as RDS' "Director of Sales and Marketing". N.T. 3/14/2006 at 21, 152-155; Plaintiff's FF, ¶ 14.

13. On October 18, 2002, All Seasons filed suit, alleging the following claims: (1) breach of contract against Newnam, (2) interference with contractual relations against Newnam and RDS, (3) unfair competition against Newnam and RDS and (4) tortious interference with a contract against RDS. This court granted partial summary judgment in defendants' favor on the claim of unfair competition (Count III).

III. Newnam's Alleged Solicitation of All Season's Customers

14. Plaintiff claims that because Newnam violated the Non-Compete Agreement, the following businesses migrated from All Seasons to RDS: (1) Allegheny Valley School ("AVS"), (2) Superpac, (3) National Performance Center ("NPC"), (4) Phelps School, (5) Smurfit Stone and (6) Discover Financial ("Discover").

AVS

15. AVS was a customer of All Seasons and All Seasons' predecessors. Exh. P-23; Plaintiff's FF, ¶ 36.

16. Bella Schachter ("Schachter") is an individual Newnam referred to as a "friend", and in fact is the person responsible for arranging vending services for AVS. Plaintiff's FF, ¶ 36.

17. Schachter testified at her deposition that she had on-going problems with All Season's service. Schacter Dep. at 30-33.

18. As the result of these unresolved issues, Schacter testified that she began looking for an alternative vending service.

19. She further testified that sometime in September, John Newnam dropped off an RDS business card at AVS. *Id.* at 32-36. The message to Schachter from Newnam was that "he is working right now for that company and if I have an interest to call him." *Id*. at 36. On October 15, 2002, AVS entered into an agreement with RDS. *Id.* at 60.

Superpac

20. Richard Sheridan ("Sheridan"), a representative of Superpac, a customer of All Seasons, was initially contacted by an RDS saleswoman in September 2002. Sheridan Dep. at 23-24.

21. In late 2002, Sheridan told a representative of All Seasons that he was seriously thinking about switching vending services. *Id.* at 44.

22. Newnam first met with Sheridan in early November 2002. *Id.* at 24-25

23. At that meeting, Newnam told Sheridan that he was employed by RDS and that "he understood [Superpac] was going to change vending companies." *Id.* at 26.

24. A second meeting took place between Newnam and Sheridan on November 19, 2002. *Id.* At this meeting, Newnam made his presentation of the types of machines RDS would install. *Id.* at 28.

25. The result of this meeting was a letter of intent signed by Newnam and Sheridan. *Id.* at 25.

NPC

26. NPC was also a customer of All Seasons and its predecessors. Sue Ellen DeShields' Dep. at 19-20.

27. In April 2001, NPC entered into a three-year contract with All Seasons. Exh. P-23.

28. Sue Ellen DeShields ("DeShields") was the representative of NPC in charge of the provision of vending services. DeShields Dep. at 15.

29. Due to problems with All Seasons, DeShields made up her mind to find another vending service "quite a few months" before she met with Newnam. *Id.* at 38.

30. DeShields testified that Newnam "stopped into the office" unannounced in October 2002. *Id.* at 23-24.

31. According to DeShields, Newnam told her that he was now with RDS. DeShields testified that she told Newnam "we were looking for another company anyway, and we were going to have people come in and he asked if he could give me a proposal." *Id.* at 25.

32. Newnam provided DeShields with a proposal. *Id.* DeShields signed a letter of intent with RDS on October 16, 2002. *Id.* at 27-29.

Phelps School

33. Joseph Munley ("Munley") operated the Phelps' school store. Phelps is a private all boys boarding and day school. Munley Dep. at 14.

34. Vend-Rite and then All Seasons provided vending services to the Phelps school since Munley began his employment at the school in 2000. *Id*. at 14, 21.

35. While Vend-Rite, followed by All Seasons, was providing vending

services for Phelps, Munley's contact was Aaron Wolf, not Newnam *Id.* at 21, 35.

36. Munley had grown frustrated with Vend-Rite and then All Seasons. He testified that he felt that he had "turned into a number." *Id.* at 18.

37. In the summer of 2002, Munley was looking for a new vending service. He was told that the institution located next to Phelps used RDS. He called RDS and left a message with Alan Simons. *Id.* at 12.

38. In November 2002, Munley spoke with someone at All Seasons, asking that they remove their machines. *Id.* at 23.

39. RDS installed their vending machines at Phelps in early January 2003. *Id.* at 16.

40. Initially, Munley's contact at RDS was Alan Simons. Subsequently it became Newnam. *Id.*

41. Munley testified that met Newnam through RDS. *Id.* at 35.

42. Munley testified that he first had contact with Newnam just prior to, or after the RDS machines were placed in early January. This took place a few weeks after a document that laid out the terms of the deal between Phelps and RDS was signed. *Id.* at 44.

Smurfit

43. Bernard Loveland was the Human Resources Manager of Smurfit Stone ("Smurfit"). Smurfit had been a customer of All Seasons. Loveland Dep. at 45.

44. Loveland testified that he had become increasingly unhappy with All Seasons' services. *Id.* at 35.

45. He testified that he began to shop around for another vending company. *Id.* at 36.

46. Loveland spoke with Coin Caterer and Havco Services about their vending services. *Id.* at 38, 40.

47. Carol Braunstein, a representative of RDS initially contacted Smurfit. *Id.* at 39.

48. Loveland believed that first contact was a cold call. *Id.* Ms. Braunstein met with Loveland to discuss RDS' services. *Id.* at 40. Loveland learned through the representative of another vending company that Newnam had left All Seasons and was with RDS. *Id.* at 44.

49. In October 2002, Loveland first contacted Newnam. *Id*. at 44-46. Newnam had been the contact person for Loveland for some years during the time that All Seasons' predecessor Vend-Rite serviced Smurfit. *Id.* at 45.

50. Loveland testified that he asked Newnam to come in and submit a quote. *Id*. at 47.

51. Sometime after Newnam submitted a quote to Loveland, Newnam conducted a food promotion at Smurfit, bringing in food and then surveying the Smurfit employees about their likes and dislikes. *Id.* at 49.

52. Next, Newnam took Loveland on a tour of food preparation location at RDS. *Id.* at 52.

53. After the tour, Smurfit and RDS entered into an agreement. *Id.* at 41.

Discover

54. Victoria Davis provides food services and oversees and arranges vending services for Discover. Davis Dep. at 19.

55. Discover had signed a three-year contract with US Refresh, All Seasons' predecessor, on January 1, 2001. Exh. P-37.

56. Newnam testified that he had known Victoria Davis for approximately five years. N.T. 3/14/2006 at 36.

57. Davis testified that she had been receiving complaints regarding All Seasons' machines and their product. *Id.* at 44-45.

58. She testified that she made several calls to All Seasons and, for the most part, these calls were not responded to. *Id*. at 50.

59. Davis testified at her deposition that Newnam called her and told her what RDS had to offer. *Id*. at 101. Then he dropped off an information packet and a proposal. *Id.* at 103.

60. Ms. Davis testified that at some point after the proposal information packet was dropped off at Discover, Newnam contacted her and asked if he could meet with her. *Id*. at 105-107.

61. Davis testified that Alan Simons and Newnam "pitch[ed] the company" at that meeting. *Id.* at 109.

62. At some point, Davis met with Perry Frank, Newnam's successor at All Seasons, and told him that she was considering moving her business to Canteen or RDS. *Id.* at 85.

63. Davis terminated her contract with All Seasons and switched her business to RDS. *Id*. at 93, 98.

Newnam's Solicitation Generally

64. At trial, when asked if he knew which customers felt that they were receiving inadequate service from All Seasons, Newnam responded: "I had heard a lot of the customers were getting a lot of pain after I left." N.T. 3/14/2006 at 70.

65. When asked if while he was employed by Raley Downes, he targeted customers who might be unhappy with All Seasons, Newnam testified:

> . . . The ones that had the biggest toothache is [sic] where I went first because if I didn't go there first, somebody else was and they were going to get it.

Id.

66. However, Newnam testified that he exercised restraint in his solicitation of All Seasons' customers. He testified:

> If I wanted to get even with them, we would be taking about 77 or 100 customers, not 6, 7 or 5 or whatever it's going to come down to.

N.T. 3/15/2006 at 130-131.

67. Newnam was asked whether he decided to "[hold] back" after he determined to target All Seasons' business. He responded: "I certainly did." *Id*.

68. Conversely, defendants argue that Newnam did not solicit any of All Seasons' employees, customers, suppliers, consultants or advisors to end or modify their relationship with All Seasons. Defendants' CL, ¶ 19.

69. In fact, defendants argue that every customer that left All Seasons and went to RDS was unhappy with All Seasons' services and these customers made the decision to replace All Seasons prior to any contact with Newnam. *Id*. ¶ 20.

DISCUSSION

I. Breach of Contract

As a preliminary matter, the Non-Competition Agreement between All Seasons and Newnam contained a choice of forum clause which states that the Agreements shall be governed by and construed in accordance with the law of the Commonwealth of Massachusetts. Exh. P-1, ¶ 11. To succeed on a breach of contract claim under Massachusetts law, "a claimant must demonstrate that the parties reached a valid and binding agreement, (2) that one party breached the terms of the agreement, and (3) that the other party suffered damages from the breach." *Yellin & Hyman, P.C. v. James N. Ellix & Associates, P.C.*, 2001 Mass. Super. LEXIS 232, * 11-15.

The Contract

Newnam signed the Non-Competition Agreement when his employment commenced with All Seasons. Plaintiff's FF, ¶ 5. The Non-Competition Agreement provided that Newnam would not "directly or indirectly" compete with All Seasons for a period of three months after the termination of his employment. Exh. P-1, ¶ 1. Additionally, Newnam agreed that he would not for a period of one year "in any capacity, either separately or in association with others, directly or indirectly," solicit any of All Seasons' customers to terminate or otherwise modify their relationship with All Seasons. *Id.* at ¶ 2. On his last day of employment with All Seasons, Newnam also signed a Separation Agreement that reiterated the promises contained in the Non-Competition Agreement. Exh. P-2.

Enforceability and Validity

The essential elements of an enforceable contract under Massachusetts law are legal capacity, offer, acceptance, consideration and delivery. *Massachusetts Municipal Wholesale Electric Company v. Town of Danvers*, 411 Mass. 39, 577 N.E.2d 283, 289 (1991). This court finds that offer, acceptance and consideration are present in the Agreements. *See* Exhs. P-1, P-2. Newnam testified that he was paid the severance pay he was promised. N.T. 3/14/06 at 14.[1] Therefore, the element of delivery was proved. There was no argument as to the legal capacity of Newnam. Moreover, the scope and duration of the pertinent restrictions are reasonable. Thus, this court finds that the Agreements at issue are enforceable under Massachusetts' law. *See e.g. All Stainless v. Colby*, 364 Mass. 773, 308 N.E. 2d 481 (1974) (enforcing two-year covenant, but only with respect to former employee's sales territory).

The Breach

As to whether Newnam breached the restrictive covenants, what follows is an overview of Newnam's contacts with the companies at issue.[2]

Newnam admitted that he had known Victoria Davis ("Davis"), the individual responsible for Discover Financial's ("Discover") vending needs, for approximately five years while he was employed by All Seasons. FF, ¶ 56. Although Alan Simons

[1] Newnam testified that he believed the pay was not related to his signing the Non-Compete. He testified that he was paid the money because he aided All Seasons in stopping a union drive. N.T. 3/14/06 at 13. However, the Non-Competition Agreement and the Separation Agreement make no mention of a union drive. Exh. P-2.

[2] Originally, plaintiff's list included Pillsbury, Penn State University, Pierce College and J.C. Penny. However, in their Conclusions of Law, plaintiff withdrew these entities from its claim. Plaintiff's CL at ¶¶ 96-98.

("Simons"), the president of RDS[3], made the initial contact with Davis, Newnam along with Simons "pitch[ed] the company" at a November 2002 meeting. *Id.* at ¶ 61.

Newnam went to even greater lengths in his solicitation of Smurfit. Bernard Loveland ("Loveland), at all pertinent times was Smurfit's human resource manager. *Id.* at ¶ 43. Newnam had been Loveland's contact while Smurfit was using All Seasons. *Id.* at ¶ 49. Once again, RDS initially contacted Smurfit through a representative other than Newnam. *Id.* at ¶ 47. However, upon learning that Newnam had moved to RDS, Loveland contacted him in October 2002, asking that he bring him a quote for RDS' services. *Id.* at ¶ 50. Approximately one month after Newnam submitted a proposal on behalf of RDS, Newnam conducted a food promotion at Smurfit, bringing in food and then surveying the Smurfit employees about their likes and dislikes. *Id.* at ¶ 51. Newnam then took Loveland on a tour of RDS' food preparation facility. *Id.* at ¶ 52. In early 2003, Smurfit and RDS entered into an Agreement. *Id.* at ¶ 53.

National Performance Center ("NPC") was a company which had been a long-standing customer of All Seasons and its predecessors. Sue Ellen DeShields ("DeShields"), a representative of NPC, testified at her deposition that Newnam "stopped into the office" unannounced in October 2002. *Id.* at ¶ 30. Newnam provided DeShields with a proposal and DeShields executed a letter of intent with RDS on October 16, 2002. *Id.* at ¶ 32.

Richard Sheridan ("Sheridan"), a representative of Superpac and a customer of All Seasons and its corporate predecessors since 1985, was initially contacted by an RDS saleswoman. *Id.* at ¶ 20. However, after this initial contact took place, Newnam advanced the interests of RDS by meeting with Sheridan twice in November, 2002. *Id.* at

[3] *Id.* at ¶ 4.

¶ 23-24. During the first meeting, Newnam told Sheridan that he was employed by RDS and that "he understood [Superpac] was going to change vending companies." *Id.* at ¶ At the second meeting, which took place on November 19, 2002, Newnam made a presentation of the types of machines RDS would install, the cost of the product and the frequency of the deliveries. *Id.* at ¶ 29. This meeting resulted in a letter of intent signed by Newnam and Sheridan. *Id.* at ¶ 25.

Allegheny Valley School ("AVS") was also a long time customer of All Seasons and All Seasons' predecessors. *Id.* at ¶ 15. Bella Schachter ("Schachter"), an individual Newnam referred to as a "friend", was at all relevant times responsible for arranging vending service for AVS. *Id.* at ¶ 16. Schachter testified that sometime in September, John Newnam dropped off an RDS business card at AVS. *Id.* at ¶ 19. The message to Schachter from Newnam was that "he is working right now for [RDS] and if [she had] an interest to call him." *Id.* On October 15, 2002, AVS entered into an Agreement with RDS. *Id.*

Joseph Munley ("Munley") operated the Phelps' School store. *Id.* at ¶ 33. Phelps is a private all boys boarding school and day school. *Id.* Vend-Rite and then All Seasons provided vending services to Phelps since Munley began his employment there in 2000. *Id.* at 34. While All Seasons and its corporate predecessors were providing vending services for Phelps, Munley's contact was Aaron Wolf, not Newnam. *Id.* at ¶ 35. Munley became unhappy with All Seasons' service and he began looking for a new vending service. *Id.* at ¶¶ 36-37. He was told that the institution located next to Phelps used RDS. He called RDS and left a message with Alan Simons. *Id.* at ¶ 37. Munley and RDS reached an agreement and in early January 2003. RDS installed their vending

machines. *Id.* at ¶ 39. Initially, Munley's contact at RDS was Alan Simons. *Id.* at ¶ 40. Subsequently it became Newnam, whom he had not met until he switched his business to RDS. *Id.* at ¶¶ 40, 45.

Based on the foregoing, the court finds that Newnam violated the terms of his Non-Competition Agreement with regard to AVS, NPC, Smurfit, Superpac and Discover, as he was involved in the active solicitation of these parties in violation of the Agreements . However, the court finds that Newnam did not violate the Non-Competition Agreement with respect to the Phelps School.

Damages

The likelihood of Superpac, AVS, NPC, Discover and Smurfit continuing with All Seasons is at the heart of whether All Seasons suffered damages. Therefore, the issue of whether these clients had already made up their minds that they were going to switch to another vending company prior to Newnam's solicitation is pivotal.

Schachter of AVS testified that they had problems with All Seasons' service. *Id.* at ¶ 17. She testified that she began looking for an alternative vending company. *Id.* at ¶ 18. Subsequently, after hearing from Newnam, AVS entered into an agreement with RDS. *Id.* at ¶ 19.

With regard to Smurfit, Loveland complained that Smurfit was not satisfied with All Seasons' services. *Id.* at ¶ 44. In early 2002, he began looking for another vending service to replace All Seasons. *Id.* at ¶ 45. Prior to contracting with RDS, Loveland spoke to three vending companies, Havco Services, Coin Caterers and RDS. *Id.* at ¶¶ 46, 47.

Davis of Discover testified that she was receiving complaints regarding All Seasons' vending machines and their products. *Id.* at ¶ 57. Davis received a proposal from RDS through Alan Simons in September 2002. *Id.* at ¶ 57. After Davis received the proposal, Newnam contacted Davis and subsequently he and Simons met with Davis. *Id.* at ¶ 61. The following month, Davis met with Perry Frank ("Frank"), Newnam's successor at All Seasons. *Id.* at ¶ 62. According to Davis, she told Frank that she was considering switching to RDS or Canteen (another vending service). *Id.* In January 2003, Davis decided to terminate her contract with All Seasons and switch her business to RDS. *Id.* at ¶ 63.

NPC had also been a customer of All Seasons and its corporate predecessors for many years. *Id.* at ¶ 26. In April 2001, NPC entered into a three-year contract with All Seasons. *Id.* at ¶ 27. DeShields, NPC's representative, testified that Newnam came to her office unannounced in October 2002. *Id.* at ¶ 28. Newnam told DeShields that he was now with RDS. *Id.* at ¶ 31. DeShields testified that she told Newnam that she was looking for another vending service and he asked if he could drop off a proposal. *Id.* at ¶ 32. Newnam provided DeShields with a proposal and on October 16, 2002 DeShields signed a letter of intent with RDS. *Id.*

Superpac had been a customer of All Seasons and its corporate predecessors since 1985. Exh. P-23. Newnam met with Sheridan when Sheridan was contemplating switching vendors. *Id.* at ¶ 22. After Newnam pitched RDS at the second meeting, a letter of intent was executed by Sheridan and Newnam. *Id.* at ¶ 24. Sheridan's deposition testimony indicates that Sheridan had not reached out to any of RDS' competitors.

NPC, AVS and Smurfit, through their representatives, had reached out to vending companies other than RDS. The court has no reason to doubt defendants when they state: "[t]he vending business is an incredibly competitive, cutthroat, even ruthless, [sic] business, with competitors constantly seeking to undermine and out-do another." Defendants' FF., ¶ 117. The court submits that Newnam's solicitation of these companies did not result in damages to All Seasons. However, the court finds that plaintiff has proven damages with respect to Superpac and Discover as these businesses had not definitely decided to change vending services before the actions of Newnam.

As to the amount of damages, plaintiff demands $376,000.00 which represents lost profits for all of the business discussed for a period of four years. Plaintiff's CL, ¶ 109. In that the court finds that plaintiff lost Discover and Smurfit's business due to Newnam's breach, the court awards plaintiff six months lost profits for Discover (Discover went out of business after that period of time) and three years profits for Smurfit. Accordingly, the court awards plaintiff lost profits in the amount of $73,000.00[4]

In addition, the court awards pre-judgment interest in the amount of $4,380.00. This is equal to simple six percent annual pre-judgment interest for a period of 3 years[5] lost profits related to Smurfit and 6 months lost profits for Discover. Thus, the total court award is $77,380.00 on the breach of contract claim.

Plaintiff also demands "the costs of its reasonable efforts to mitigate the damages caused by Newnam's breach." Plaintiff's CL, ¶ 110. This includes upgrade costs and

[4] The court credits the testimony of Perry Frank related to lost profits. Therefore, this amount includes $6,000.00 for Discover and Smurfit's profits for three years equaling $67,000.00. Exh. P-64

[5] The court arrives at this three year time period based upon Superpac's nearly 20-year relationship with All Seasons in all its incarnations. Exh. P-23. Additionally, All Season's customer list that includes certain contract terms, including approximately seventy 3-year contracts.

renegotiated rates that All Seasons effected so that customers which were contacted by Newnam did not move their business to RDS. Exh. P-64. The court finds that due to the competitive nature of the vending business, it is likely that All Season's customers would have been solicited by other vending companies and All Seasons would have been forced to offer these business better rates and upgrades. Therefore, the court finds that plaintiff is not due mitigation damages.

II. **Interference with Contractual Relations (Counts II and IV)**

Plaintiff also brings claims for interference with contractual relations against Newnam and RDS.[6] Plaintiff alleges that Newnam and RDS intentionally interfered with both the existing contracts between All Seasons and certain of its customers, as well as future contracts with these same customers. FF, ¶ 15.

The choice of law clause written into the Non-Competition Agreement provides that the governance and construction of such shall be decided under Massachusetts law. However, under Pennsylvania law, if there is no material difference between the laws of competing jurisdictions, there is a 'false conflict' and the court need not decide the choice of law issue." 2002 Phila. Ct. Com. Pl. LEXIS 26, *16 *citing In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3rd Cir. 1984) *see also Ratti v. Wheeling Pittsburgh Steel Corp.*, 2000 Pa. Super. 239, 758 A.2d 695, 702 (Pa. Super. 2000). The court find this to be the case at bar.

Both Massachusetts and Pennsylvania have adopted the Restatement of Torts' definition of the claim of intentional interference with contract. *United Truck Leasing*

[6] Count II purports to state a claim for "interference with contractual relations" against Newnam and RDS. Count IV is a claim against RDS for "tortious interference with contract." Based on the allegations of the Complaint and the evidence presented at trial, the court finds the Counts to be duplicative and will consider them together for the purpose of this analysis.

Corporation v. Geltman, 406 Mass. 811, 551 N.E.2d 20, 23 (1990); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1181-1182.

The Restatement (Second) of Torts, § 766 provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id. As in Massachusetts, in Pennsylvania the elements of tortious interference with a contract are: "(1) an existing or prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." *Kelly-Springfield Tire Company v. D'Ambro*, 408 Pa. Super. 301, 596 A.2d 867, 871 (1991).[7]

Clearly, the first element, the existence of a contract between plaintiff and a third party, has been met. The evidence is clear that two of the clients, Discover and NPC had written contracts with All Seasons that extended beyond the time they moved their business to RDS. *Id.* at ¶¶ 34, 57. The remaining three clients - Phelps, AVS, Superpac and Smurfit - were all serviced by All Seasons and its predecessor(s) for a number of years. *Id.* at ¶¶¶ 26, 29, 40.

[7] Under Massachusetts' law, a plaintiff asserting a claim of tortious interference with contractual relations must establish the following elements: "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *The Clapper Co. v. Samuel M. Clapper*, 2001 Mass. Super. LEXIS 396, * 6-7 (2001)(emphasis added).

In order to satisfy the second essential element, plaintiff must prove that defendant harbored a specific intent to harm plaintiff. According to the Restatement (Second) Torts § 766 (1979), titled *Intentional Interference with Performance of Contract by Third Person*, comment "j":

> . . . If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware the he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.

Id. [8]

Based on the evidence presented at trial, this court finds that the plaintiff did not sufficiently prove this essential element. The evidence clearly shows that both Newnam and RDS were acting to further their own pecuniary interest and not with specific intent to cause harm to plaintiff. While the court acknowledges testimony indicating some discord between Frank and Newnam, this ill-will appeared to result from business competition within the vending industry, not personal animus. As such, the court finds in favor of defendants and against plaintiff as to Counts II and IV.

CONCLUSIONS OF LAW

1. Newnam violated the terms of his Non-Competition Agreement with regard to AVS, NPC, Smurfit, Superpac and Discover.

[8] In *Ayash v. Dana-Farber Cancer Inst.*, the Massachusetts' Supreme Court focused on the requirement of intentional interference that is "improper in motive or means." 443 Mass 367, 822 N.E.2d 667,690 (2005). The court defined improper as being "malevolently, i.e., for a spiteful malignant purpose unrelated to the legitimate corporate interest." *Id.* quoting *Sereni v. Star Sportswear Mfg. Corp.*, 24 Mass. App. Ct. 428, 432-433, 509 N.E. 2d 1203 (1987). Furthermore, when focusing on the requirement that the intentional interference be "improper in motive or means", Massachusetts' courts have held that "the propriety of an actor's motives, or conduct, in a particular setting necessarily depends on the attending circumstances, and must be evaluated on a case-by-case basis." *G.S. Enterprises v. Falmouth Marine, Inc.*, 410 Mass. 262, 571 N.E.2d 1363, 1379 (1991).

2. Newnam did not violate the Non-Competition Agreement with respect to the Phelps School.

3. Plaintiff is entitled to $77,380.00, which amount represents lost profits related to Discover Financial and Superpac and pre-judgment interest.

4. Plaintiff did not sufficiently prove that Newnam or RDS acted with the intent to harm plaintiff. Accordingly, the court finds in favor of defendants and against plaintiffs as to Counts II and IV.

The court will enter an Order consistent with these Findings and Conclusions.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.