

FILED

OCT 30 2013

**STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION**

PREPARED BY THE COURT:

KING TRANSCRIPTION
SERVICES, LLC,

Plaintiff,

vs.

PHOENIX TRANSCRIPTION,
LLC, et als.,

Defendants.

SUPERIOR COURT OF NEW JERSEY,
CHANCERY DIVISION
GENERAL EQUITY PART
MORRIS COUNTY
Docket No. MRS-C-121-13

Civil Action

ORDER

THIS MATTER, having come before the Court by way of plaintiff's application for an Order to Show Cause for Preliminary Injunction; and defendants having submitted opposition thereto; and the Court after conducting a hearing on said application on October 30, 2013 and having considered the matter; and for good cause shown;

IT IS on this 30th day of October, 2013;

ORDERED that the Order to Show Cause filed by plaintiff seeking preliminary injunctive relief be, and hereby is, denied for the reasons set forth on the Court's record; and it is further

ORDERED that a telephonic case management conference is scheduled for November 6, 2013, at 3:30 p.m. The Court directs that counsel communicate with each other to determine who will initiate the conference call to the Court.

The Court has served a copy of the within Order on counsel of record in this action.


STEPHAN C. HANSBURY, P.J., Ch

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: Gen. Equity
MORRIS COUNTY
DOCKET NO.: C-234-13
A.D. # _____

KING TRANSCRIPTION)
SERVICES, LLC)
)
Plaintiff,)
)
vs.) TRANSCRIPT
) OF
) ORDER TO SHOW CAUSE
PHOENIX TRANSCRIPTION,)
LLC, et al.)
)
Defendants.)

Place: Morris County Courthouse
Washington and Court Streets
Morristown, NJ 07963-0910

Date: October 30, 2013

BEFORE:

HONORABLE STEPHAN C. HANSBURY, P.J.Ch.

TRANSCRIPT ORDERED BY:

JOHN FIALCOWITZ, ESQ., (Law Offices of John
Fialcowitz, LLC)

APPEARANCES:

RONALD T. NAGLE, ESQ., (Ronald T. Nagle, Esq., PC)
Attorney for the Plaintiff

MARTIN LIBERMAN, ESQ., (Martin Liberman, Esq., PC)
Attorney for the Defendant Frank Ulrich

JOHN FIALCOWITZ, ESQ., (Law Offices of John
Fialcowitz, LLC)
Attorney for Defendants Phoenix Transcription, et
al.

Transcriber: Patricia Wtulich
PHOENIX TRANSCRIPTION
796 Macopin Road
West Milford, NJ 07480

Audio Recorded
Recording Opr: Not Indicated

1 ORDER TO SHOW CAUSE
2 FOR PRELIMINARY INJUNCTION:

3 Arguments

4 BY: Mr. Nagle 3, 27

5 BY: Mr. Liberman 14

6 BY: Mr. Fialcowitz 23

7 THE COURT:

8 Decision 31

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1 THE COURT: All right, this is the matter,
2 excuse me, of King Transcription Services versus
3 Phoenix, et al., Docket Number C-121-13. And may we
4 have appearances, please?

5 MR. NAGLE: Good morning, Your Honor. Ronald
6 T. Nagel, on behalf of the plaintiff King Transcription
7 Services, LLC.

8 THE COURT: Good morning, sir.

9 MR. LIBERMAN: Good morning, Your Honor.
10 Martin Liberman, on behalf of defendant Frank Ulrich.

11 THE COURT: Sir.

12 MR. LIBERMAN: And third-party plaintiff
13 counterclaim.

14 THE COURT: Okay.

15 MR. FIALCOWITZ: Good morning, Your Honor.
16 John Fialcowitz, I represent Phoenix Transcription,
17 LLC, Teresa Ulrich, John Ulrich, Melissa Ulrich,
18 Patricia Wtulich, and Mark Mazza.

19 THE COURT: Okay. I'm happy to hear whatever
20 you wish.

21 MR. NAGLE: Thank you, Your Honor. This is
22 the plaintiff's application for a Preliminary
23 Injunction. And I'll focus first on Frank Ulrich, and
24 then I'll focus on Phoenix and the other defendants.

25 Frank Ulrich is a member of the LLC that is

1 plaintiff. He is a one-third member, and as part of
2 his membership he signed an operating agreement that
3 contains certain post-employment restrictions. One was
4 a post-employment restriction not to compete. The
5 other was a post-employment restriction not to solicit
6 our suppliers and vendors, and other things like that.
7 And then there's confidentiality provisions in there,
8 as well which are fairly typical.

9 As far as the non-compete, Mr. Ulrich has
10 submitted a certification saying he's not competing.
11 He hasn't addressed what he's actually doing, which is
12 significant, but he's saying he's not competing.

13 We have two certifications from independent
14 third parties. One from Ms. Higgs where she says Mr.
15 Ulrich called her in July, he said he opened his own
16 agency and would she come to work for him at that
17 agency.

18 And then there's another certification from
19 Ms. Powers, where there's an indication that Mr. Ulrich
20 had also made representation to another party, another
21 transcriber that he had opened his own agency and
22 wanted to get transcribers.

23 Now, as far as non-compete, the non-compete
24 seeks to enjoin him from basically operating a business
25 or conducting business in the counties that are listed

1 in the agreement, which is the counties that King does
2 business in.

3 The non-solicitation provision, Your Honor,
4 deals with him contacting our transcribers, our
5 suppliers, our vendors. He admits in his certification
6 that he was contacted and had conversations with our
7 transcribers. He says, significantly that all he did
8 was point them to something that was a public record,
9 which was Phoenix's information on a certified
10 transcriber list. But the same -- that list didn't
11 appear until August of 2013. He was pointing these,
12 according to him, the transcribers before that. And he
13 claims it was a public list, but there was no such
14 public list.

15 All the transcribers that were King's
16 transcribers are now working for Phoenix, and these are
17 key transcribers. These are transcribers that we paid
18 for, for their transcription, we developed them, they
19 have their cards with us. And then interestingly
20 enough they ask all of a sudden, transfer the cards to
21 Trenton, we're going to go out on our own. And the
22 next thing you know they end up at Phoenix.

23 And Your Honor, the analogy that we make as
24 far as our transcribers is that they're basically our
25 sales force. They're the face of the company, they go

1 out, they work for our clients. They create the
2 business, the goodwill of the business for King. So
3 we're careful about who we choose, who we send on a
4 job, because that's basically how we get more business.
5 And we have, again, Frank's admission that he was
6 pointing them in the direction of Phoenix.

7 You know, as far as these restrictions where
8 Frank is concerned, he was paid very well. And he was
9 paid over the years between 250-300 thousand dollars.
10 And he was paid to then have those restrictions
11 enforced against him post-employment. Now he's, you
12 know, obviously, not complied with. So we're trying to
13 enforce that against Mr. Ulrich.

14 He comes in and he says, well, he wasn't
15 terminated properly. I think it's pretty clear he was
16 terminated for cause. In any event, he was at will
17 employee, he could have been terminated for any reason.
18 But we put forth in our papers, that he was using money
19 from the company to pay his cable bill, his car bill,
20 New Jersey Devil tickets. Clearly not business related
21 expenses, they were personal.

22 THE COURT: Really, that's clear?

23 MR. NAGLE: Well his cable bill --

24 THE COURT: This is -- well okay, I'll go
25 along with that. But Devil's tickets, car expenses, I

1 think a lot of businesses charge those off. But you're
2 right, the home cable probably not. Okay.

3 MR. NAGLE: Okay. And we also have the
4 additional fact that he wasn't working.

5 THE COURT: Right.

6 MR. NAGLE: He wasn't performing his job. So
7 he was terminated for cause.

8 As far as the Phoenix defendants, Your Honor,
9 there's a whole bunch of coincidences that add up. And
10 at the end of the day, our position is they don't add
11 up, not the least of which is they form the company
12 using Mark Mazza, not one of the Ulrich's, who
13 ultimately run the business. Mr. Mazza, at the time, I
14 guess was unemployed or a custodian. He had never been
15 in the business before. We believe that was an effort
16 to come in under the radar and not have one of the
17 Ulrich's show up a corporation formation form or some
18 other public record, so they use Mr. Mazza.

19 We have the fact that Phoenix, in and of
20 itself, is not certified until August, yet all of our
21 transcribers are going over to Phoenix, before that.
22 All the people that run Phoenix are related, they're
23 family members.

24 THE COURT: Right.

25 MR. NAGLE: Father, son, daughter, aunt and

1 uncle. Phoenix is operating in the very same counties
2 that we're operating in now. So when you add up all
3 these things -- oh, and you also have Frank's golfing
4 buddy whose the attorney that forms Phoenix. So you
5 add up all of these things, Your Honor, we're saying it
6 can't be a coincidence. This isn't just something that
7 happened or fell out of the sky. These people had an
8 idea; they had a plan. They used Mr. Ulrich, and they
9 created a competing business, which significantly is
10 competing against us within a matter of two months.

11 THE COURT: Mmm-hmm.

12 MR. NAGLE: And according to Mr. Froonjian
13 who's been in the business for a very long time, it
14 would take at least a year for a company like this, the
15 start-up company to come in and be able to effectively
16 compete. Here they did it in two months.

17 So, Your Honor, we're asking for the
18 restraints that are set forth in the Order to Show
19 Cause to be imposed against these defendants.

20 THE COURT: I reviewed the complaint, and I
21 see no allegations in the complaint as to Mark Mazza,
22 John Ulrich, or Pat Wtulich, there's no allegations
23 against them.

24 MR. NAGLE: We filed an amended complaint,
25 Your Honor, against --

1 THE COURT: I read the amended complaint.

2 MR. NAGLE: Right.

3 THE COURT: I don't see any allegations as to
4 them. Did I miss something?

5 MR. NAGLE: Your Honor, the allegations are
6 the same against the defendants.

7 THE COURT: Well they're not named. Mazza's
8 name appears once in paragraph 12. The others, there's
9 no reference at all to them.

10 MR. NAGLE: Well, the claims are made in the
11 verified complaint against all of the defendants and in
12 the amended.

13 THE COURT: Well, what did -- let's take an
14 example, what did Pat Wtulich do?

15 MR. NAGLE: She interfered, tortuously
16 interfered with our business.

17 THE COURT: How?

18 MR. NAGLE: She was contacting, since she was
19 a transcriber of King's, went out and started
20 soliciting King's transcribers.

21 THE COURT: You think it can't be a
22 coincidence is a sufficient basis to issue a
23 Preliminary Restraining Order?

24 MR. NAGLE: We're not asking for restraints
25 against Pat Wtulich or John Ulrich.

1 THE COURT: Well, then clarify, what are you
2 looking for?

3 MR. NAGLE: For restraints against Phoenix
4 and the other individual defendants, and against Frank
5 Ulrich.

6 THE COURT: Right. And you're saying it
7 can't be a coincidence. And your papers kind of make
8 it clear, it can't be a coincidence. Is that a
9 sufficient basis to issue a restraining order against
10 anybody?

11 MR. NAGLE: Your Honor, there are -- yes.

12 THE COURT: Okay.

13 MR. NAGLE: Because there are inferences to
14 be built upon these so-called coincidences. And the
15 inference is, it just couldn't happen.

16 THE COURT: Mmm, I thought it was clear and
17 convincing evidence; I thought that was the standard.

18 MR. NAGLE: Your Honor, oftentimes we don't
19 have the information --

20 THE COURT: Right. I --

21 MR. NAGLE: -- it's in the possession of the
22 defendant.

23 THE COURT: -- I get that, I get that.

24 MR. NAGLE: And we tried to get information
25 through discovery --

1 THE COURT: Okay.

2 MR. NAGLE: -- we didn't get it.

3 THE COURT: How do I enjoin Phoenix; what's
4 the premise; what's the theory that I would enjoin
5 Phoenix?

6 MR. NAGLE: Taking our transcribers with the
7 assistance of Frank Ulrich, competing against us in the
8 very counties that they're competing against us.

9 THE COURT: Okay. What -- what's prohibiting
10 Phoenix from competing, help me understand?

11 MR. NAGLE: Using our confidential
12 information.

13 THE COURT: What confidential information?

14 MR. NAGLE: Contacts at courthouses.

15 THE COURT: You know, you said that. But how
16 is that confidential? You can look in the Lawyers
17 Diary and find out who does court transcriptions. You
18 can call and say, how do I con -- how do I get a
19 transcript and get the name. How --

20 MR. NAGLE: You don't know the key individual
21 to talk to.

22 THE COURT: Why not?

23 MR. NAGLE: I mean there may be three or four
24 people in the office that you could talk to. But you
25 don't know the real person.

1 THE COURT: So you walk into the courthouse
2 and say, who can I talk to?

3 MR. NAGLE: Cold?

4 THE COURT: Yeah.

5 MR. NAGLE: And that's what they're --
6 they're asking us to believe that they just did this
7 cold.

8 THE COURT: Yeah, why not?

9 MR. NAGLE: They started cold calling people,
10 and within two months they're doing all of this
11 business in all of these counties.

12 THE COURT: Why not? Why isn't that
13 feasible?

14 MR. NAGLE: Because it doesn't happen,
15 according to my clients --

16 THE COURT: Well, I --

17 MR. NAGLE: -- who have been in the business
18 for 30 years.

19 THE COURT: All right. You cite two specific
20 certifications, but both of those certifications
21 appeared in the reply papers to which they had no
22 opportunity to respond.

23 MR. NAGLE: Well, their position was that
24 they didn't do what they're doing. So we have an --

25 THE COURT: That's not what I'm saying. You

1 cited two certifications that were not in the initial
2 papers, they were in the reply papers.

3 MR. NAGLE: Right.

4 THE COURT: Well, they didn't have a chance
5 to respond to those.

6 MR. NAGLE: Well, we are replying to
7 something that they said in their opposition.

8 THE COURT: No. The only specific facts
9 you've given me, as I saw it, and as you pointed out
10 this morning, are in the reply papers.

11 MR. NAGLE: And that's permissible, Your
12 Honor. We need to reply to their opposition. If
13 they're coming in and saying --

14 THE COURT: But you're not getting my point.
15 If you didn't have those two certifications, I'm not
16 sure that you'd get anywhere today. Because neither
17 you nor I have seen any facts in the initial filing
18 papers sufficient to support an injunction. If I've
19 missed something, please tell me?

20 And they've had no chance to reply. So the
21 only two specific allegations, which might support an
22 injunction.

23 MR. NAGLE: In the certification of Carl
24 Nielsen, that was submitted originally, we address the
25 issue of Frank calling a court reporter and soliciting

1 her, telling her --

2 THE COURT: That was hearsay, I can't
3 consider it.

4 MR. NAGLE: -- telling her -- well, then they
5 come back and say, we didn't do that.

6 THE COURT: Right.

7 MR. NAGLE: So we came in with a reply
8 saying, yes, you did.

9 THE COURT: Well, we're not communicating.
10 You can't put hearsay in as a basis to issue an
11 injunction. Okay, anyway, I've made my point, and I'm
12 not communicating it clearly. Let's see what they have
13 to say.

14 MR. LIBERMAN: Your Honor, I represent the
15 defendant Frank Ulrich.

16 THE COURT: All right.

17 MR. LIBERMAN: And just so the Court is aware
18 -- and I do thank, Your Honor, for the adjournment
19 request. I was away on business in Texas. And we
20 really had to put things together.

21 Your Honor, just so you know this and a
22 matter of record, the defendant Frank Ulrich has filed
23 an answer, a counterclaim and a third-party action in
24 this matter, as a result of oppression, as a result of
25 the breach of the operating agreement regarding his

1 firing. And I know -- Your Honor, my client
2 absolutely, unequivocally denies that he is involved in
3 the -- this transcription business with Phoenix. We
4 all -- we recognize that it is family that, in fact,
5 has started this business. They have the right to do
6 that.

7 My client was fired in November of 2012,
8 cold-cock, without a hearing, without any -- any
9 notification --

10 THE COURT: All right, I'm aware of that.
11 I've read the facts.

12 MR. LIBERMAN: Yes, yes. And what I can say,
13 Your Honor, is as it relates to Mr. Ulrich, he denies
14 all of these allegations. And part of our complaint,
15 we're asking that we be reinstated. We're asking for
16 reinstatement of our job. My client, if --

17 THE COURT: Well that's not before me today.

18 MR. LIBERMAN: But, no, it's not. But it's
19 in our pleadings. But I'm just -- it's part of a -- it
20 was part of the certification that was filed by Mr.
21 Ulrich in this case. And again, we have not had the
22 opportunity to respond to the recent certification. My
23 client denies this information.

24 If, Your Honor, there were eight transcribers
25 that left this company, and just -- just to go back,

1 and I just want to focus, and I'm not going to spend a
2 lot of time on this. Just to go back and focus on the
3 initial application, and then what the reply was. The
4 initial application was that trade secrets,
5 confidential information, and proprietary information
6 was taken, and that was the reason for the irreparable
7 harm and injury that occurred. That was in the initial
8 papers.

9 We then responded at length. The subsequent
10 papers that came in, in the reply. Now, positions are
11 now changed. Well, guess what, we have new irreparable
12 harm. Our new irreparable harm is that transcribers
13 have now been pirated by the -- by the -- by my client
14 and as well as Phoenix. Judge, there's not one issue
15 of proof before this Court that any of these
16 transcribers left and why? Why did they leave?
17 There's not one shred of evidence as to why these
18 people left other than the pure supposition that -- and
19 speculation that Phoenix people and my client told
20 these people to leave, totally denied, totally denied.
21 And a hearing would have to take place.

22 Why is there only one certification by the
23 plaintiff in this case that came in reply? What about
24 the other seven people? Did they contact those people,
25 and did those people say, you're wrong? We have

1 information Your Honor indicates that Mr. Froonjian has
2 been harboring and he's slandered my client's and
3 calling people, there's a defamation claim in our
4 counterclaim that Mr. Froonjian has been badmouthing
5 and telling people that my client was fired, and he was
6 fired from his job because he stole money. Totally not
7 true.

8 And also, Your Honor, and I know that he
9 brought up the issue about expenses, Devils tickets,
10 let's deal with Devils tickets. Business expense to
11 take customers out. All of this information regarding
12 these alleged expenses that occurred, all of these
13 expenses, Judge, have been going on for years. Mr.
14 Froonjian and Mr. Nielsen totally have fabricated
15 information in their certifications. Neither of these
16 gentlemen have done anything in this business
17 commencing in or about 2003 up until probably this past
18 summer. They've done nothing other than receive monies
19 from distributions of profits that my client has earned
20 for these gentlemen.

21 My client doesn't even get any notice at all
22 of what these improprieties even were. My client has
23 advised that the first time that he seen any such
24 statements or accounts of the reason he was terminated
25 was in the reply papers of Mr. Froonjian.

1 And here's an interesting question, Your
2 Honor.

3 THE COURT: Okay.

4 MR. LIBERMAN: On the initial application
5 papers, why was Mr. Froonjian's certification not part
6 of the initial application? Mister -- because he
7 realized that he had to say something. Mr. Nielsen
8 files a certification saying that he's been in the
9 transcript certification business for 30 years, totally
10 not correct, total fabrication. He had nothing to do
11 with this business.

12 And then Mr. Froonjian also acknowledges that
13 he's done nothing in regard to this company. He's done
14 absolutely nothing from 2003 until 2006, he sold his
15 transcription business. He was under a covenant not to
16 compete, and he did not. He transferred no business to
17 this company from 2003 to 2006.

18 Also the initial operating agree -- the
19 operating agreement says specifically, that Mr. Ulrich,
20 Frank Ulrich was initially hired as, initially as an
21 employee at will. It doesn't say employee at will
22 initially.

23 Your Honor, my client was the manager of this
24 entire office from 2003, the managing member, even
25 though the agreement says that -- that Frank -- that

1 Nielsen will be the managing member. Your Honor, my
2 client was improperly terminated. It's not before Your
3 Honor. It will be another -- another day, that he
4 wants -- he wants back into the company. He's been
5 oppressed, he's received not one piece of paper as a
6 member in this matter at all. Has never received any
7 distribution, has no idea what's going on in the
8 company. And as admitted by Mr. Froonjian, Mr.
9 Froonjian hasn't spoken to him since he was terminated.
10 And the interesting question is, is that why didn't Mr.
11 Froonjian terminate my client? He's the one that
12 claims that all of this information was -- was
13 disseminated to my client.

14 The last issue, and I'm done, Your Honor. If
15 you look at the exhibits that were attached by Mr.
16 Froonjian regarding the expenses that were claimed to
17 have been stolen, these -- that -- these emails that
18 are attached, thank God they attached them, not sent
19 until November 9th. It's alleged that all of these
20 incidents took place in May of 2012. So what happened
21 from May until November. Okay?

22 I'm letting you know, Your Honor, it is our
23 position this was a power play. It was a Coup d'etat,
24 there was an agreement and a conspiracy between Mr.
25 Froonjian and Mr. Nielsen to get rid of Mr. Ulrich. He

1 was improperly fired.

2 What do they do? After he leaves, okay, and
3 they're try -- and in the papers there's a buyout
4 that's attempted. There's a buyout that's attempted.
5 The excuse, no writings, we haven't even done discovery
6 yet, no writings, nothing, oh, we just decided not to
7 pursue this thing because Mr. Ulrich has a Federal Tax
8 Lien against him. So what, that's my client's problem.
9 Okay?

10 So the point it reaches, Your Honor, is that
11 -- and not to get back into a brief or anything like
12 that, there is no -- there are so many facts in dispute
13 in this case, it is incredible.

14 And I know Your Honor is totally familiar
15 with our law, it would be totally improper in any way,
16 shape, or form to restrain my client. In fact, if
17 after what occurs today, we may be coming in on a
18 motion, in fact we may, to request that my client be
19 reinstated. Part of our relief is also that a Fiscal
20 Agent be appointed in this matter, because this case --
21 the -- the transcription business now being run by Mr.
22 Froonjian is completely mismanaged. It's our
23 understanding that the reason why these transcribers
24 have left, is because they can't stand the people that
25 work there. They have -- they're not employees. These

1 people are -- nobody owns these transcribers. They're
2 independent contractors. They can work where they
3 want.

4 Last issue, I know I said that before. It's
5 argued by the plaintiff that they cannot function in
6 this business, because their main transcribers have
7 left. But yet they attach to their original papers 22
8 pages of transcribers, 22 pages. And the Court System,
9 our Court System does not determine who gets what job,
10 excuse me, our Court System does make that
11 determination. It's not the individual agency that
12 says, oh, by the way.

13 There is, just like in -- in an analogy in
14 our Court System in the Surrogate's Court, there's a
15 list of lawyers that are appointed in guardianship
16 cases. Okay? Everybody wants these cases. There is a
17 list and it's sent out in rotation, the same thing with
18 court transcribers.

19 And maybe this -- in the event that there is
20 some appeal of this decision, who gets the transcript?
21 Does King get the transcript, does Phoenix get the
22 transcript? Does Frank Ulrich call, and say, by the
23 way, I would like this transcript, I would like this
24 job. Totally not within the control of any
25 transcribing company. There's majorly deficient facts.

1 There's no irreparable harm. And the issue also is,
2 Judge, let's assume there is a hundred cases that are
3 disseminated for transcribing. Okay? So here's our
4 pie, what percentage of the pie has King lost? Where's
5 their proof? What money have they claimed that they
6 lost? Their pie, we don't even know what's happened.
7 We're going to be getting discovery, their pie could be
8 exactly the same. So what is -- why are we even here?
9 Why are we even here?

10 And my, again, my client wants to be
11 reinstated for his improper firing. Thank you.

12 THE COURT: Thank you. Yes, sir.

13 MR. FIALCOWITZ: Good morning, Your Honor.
14 John Fialcowitz again for the Phoenix Defendants and
15 for Pat Wtulich.

16 Your Honor hit it right on the head in the
17 questioning of plaintiff's counsel. I think the
18 threshold issue in this case is, is the information
19 King is trying to protect by way of Preliminary
20 Injunction legally protectable information? And I
21 think the answer to that question is clearly no.

22 Everybody in this case has cited tens and
23 tens of cases to Your Honor and big briefs. But the
24 one case I would urge Your Honor to base its decision
25 on is the Subcarrier Communications versus Day case.

1 Because I feel that that is a factually analogous case
2 involving cell tower sites, large communication
3 carriers. And the Appellate Division in that case, the
4 Trial Court agreed with the argument like advanced by
5 Trial Counsel here, that despite the fact that all this
6 information is out there. Anyone can see a cell tower
7 site. Since it was on the plaintiff's list, Day was
8 enjoined from using it. It went up on appeal, but the
9 Appellate Division said, absolutely not. Day's made a
10 colorable showing that this information is publicly
11 available. Based on this record, the Trial Court
12 should not have not entered the injunction and vacated
13 it.

14 And I would submit, just as Your Honor
15 appears to recognize right off the bat, the courthouse
16 personnel contact information, it's publicly available.
17 In Teresa's certification that we submitted, exhibit 5,
18 the New Jersey Judiciary website lists, not only the
19 telephone numbers, but the names of the point persons.

20 We went on in exhibit 6, through, I believe,
21 10 of Teresa's certification to do the screen shots of
22 each Vicinage in Bergen, Essex, Hudson, Middlesex,
23 Passaic, Morris, where each, the telephone number is
24 listed. Anyone can walk into the courthouse and
25 eventually find the person who is responsible for

1 registering AD/Ts, Agency Director/Transcribers, for
2 work. On top of that, King's own website lists the
3 telephone numbers. So even King is making this
4 information publicly available.

5 And in our papers, and I beg the Court's
6 indulgence, we did go into a lot of detail regarding
7 what's involved in becoming an Agency
8 Director/Transcriber. But I think it's important for
9 the Court to understand for two big reasons here.
10 One, according to the Standards Booklet that's
11 published by the Office of Reporting Services, on page
12 7, the Office is telling applicants, when you're done,
13 when you're certified, go to the courts. You know,
14 give them your name and solicit work. It's common
15 knowledge in the industry that that's what you do to
16 get transcribing work. And common knowledge in the
17 industry isn't the type of things our courts have
18 previously enjoined people from doing.

19 With regard to the transcribers, there was a
20 lot of talk about transcribers. The list of
21 transcribers, as Mr. Liberman said, is publicly
22 available information. On exhibit 13 in Teresa's
23 certification, we took this from the NJ Judiciary
24 website, it's a 22 page list of AD/Ts who are available
25 to do work. And typically the way the work goes, at

1 least in my experience when I've ordered a transcript,
2 I call the officer at a courthouse. I never have any
3 interaction with the actual person who does the typing.
4 And it's the court person who says, okay, you send the
5 check in. So there's no interaction as King is, you
6 know, claiming to the Court, that like I develop
7 goodwill with Pat Wtulich in North Carolina. I never
8 meet Pat Wtulich, until this case, of course. But, the
9 point being is there's no goodwill built up with the
10 actual typist. You just submit the court, you know, to
11 the court your application for the transcript and you
12 get it back.

13 And -- and again, another lesson from
14 Subcarrier is plainly when certifications conflict over
15 material facts. It is inappropriate to issue the
16 Preliminary Injunction.

17 Pat Wtulich, Jennifer Wtulich, Teresa,
18 Melissa Ulrich all certified that they did not, well
19 depending on which side of the transaction on, there is
20 no solicitation by Phoenix of these transcribers.
21 They're not King's transcribers, typically these people
22 are independent contractors. They didn't encourage
23 them to stop working for King. This is all certified
24 on my side of the aisle here towards them.

25 The last thing I would like to leave the

1 Court with, and there's been no mention to this is --
2 and just one other point I wanted to respond to that
3 counsel mentioned. There's been mention in the reply,
4 we didn't get a chance to respond to this, that somehow
5 Phoenix first became listed and certified in August of
6 2013. I don't think that's correct information, Your
7 Honor.

8 I think what happened was, is that Melissa
9 Ulrich became an AD/T, a certified AD/T back in March
10 of 2013. Unfortunately, between the time I got the
11 reply, I haven't been able to locate a list. I guess
12 the Office of Reporting Services post on the website a
13 list. It's easy for me to get the September list,
14 because that's the most recent list. I'm not sure yet
15 how I would get the list to show that maybe we were
16 listed earlier. I just simply did not have enough time
17 to do that. But I'm not sure if that's a correct
18 statement.

19 Finally the final thought I leave the Court
20 with is, if you were to enter their requested
21 Preliminary Injunction, it would put Phoenix out of
22 business. It would cause immediate and irreparable
23 harm to my client, who I believe is operating lawfully.
24 It does 80 percent of its business based on Bergen,
25 Essex, Hudson, Passaic, and Middlesex. And so if you

1 entered what they want, my client, Phoenix, at least,
2 would be done. Thank you, Your Honor.

3 THE COURT: Can you just give me one second
4 to look at something, then I'll give you all the time
5 you need? But I just want to check something.

6 (Pause in hearing)

7 THE COURT: Okay, I'm happy to hear whatever
8 you wish.

9 MR. NAGLE: Your Honor, as far as the
10 certified list of transcribers, it was attached to the
11 original papers and it was attached as exhibit D to
12 Carl Nielsen's affidavit. And it shows on it that
13 Phoenix appeared for the first on 8/1/13 on a public
14 record as a certified transcriber.

15 THE COURT: You just said April, do you mean
16 April?

17 MR. NAGLE: I said 8-1, I'm sorry.

18 THE COURT: 8-1, I'm sorry, I thought you
19 said April. Okay.

20 MR. NAGLE: I spoke unclearly, Your Honor.

21 THE COURT: No, it's all right, yeah.

22 MR. NAGLE: And you know this concept that
23 Phoenix was formed in March of 2013. They don't get
24 publicly certified until August. In the meantime they
25 line up all of our transcribers to go out and work for

1 them. And then in two months of just plain cold call,
2 no experience. And let's be clear, Your Honor, none of
3 these people have any experience in the business.
4 Melissa, Teresa, John, Mark, neophytes, they have no --
5 no knowledge whatsoever of how to run a business. So
6 two months of cold calling they're out there competing
7 in the very same counties that we're in business for
8 many, many years. And they did this all on their own,
9 with no assistance from Frank, without using our
10 confidential or proprietary information. It's just one
11 of those things, it's strange credibility, Your Honor.

12 You can't simply go to the court. You can
13 make a phone call, but to get the business you have to
14 have some reputation, some background, some experience
15 in that court. And then they did this all in two
16 months. It's not credible, Your Honor.

17 THE COURT: You cited two certifications and
18 I wanted to go back and read the one from Ms. Powers.
19 I can't consider anything she says, that's hearsay.
20 She talks about a phone call that she received from
21 somebody else. I mean, unless I'm missing something.
22 The only one that's not hearsay is the one from Ms.
23 Higgs, I guess it is.

24 MR. NAGLE: Well, Your Honor, you know, in
25 the context of an Order to Show Cause application for a

1 Preliminary Injunction, there's a lot of hearsay. I
2 mean --

3 THE COURT: Yeah. No, there's not. This is
4 a part of an attempt to put hearsay in.

5 MR. NAGLE: Well, I understand, Your Honor,
6 but you know I've been involved in a number of these
7 cases, and --

8 THE COURT: Me too.

9 MR. NAGLE: Okay, okay. And in my experience
10 it is oftentimes, it's not maybe the best evidence
11 because there's no live person testifying.

12 THE COURT: Right.

13 MR. NAGLE: But --

14 THE COURT: Okay, anything else?

15 MR. NAGLE: Well, Your Honor, as far as, you
16 know, the protests from Frank. Again, they're not
17 believable either. The Devil's tickets, if he's buying
18 Devil's tickets and he's using the Devil's tickets to
19 take court personnel, that's illegal, you can't do it.
20 So he's buying the Devil's tickets for himself,
21 lunches, and all the rest of the stuff.

22 THE COURT: You know, I can't decide that
23 today; right?

24 MR. NAGLE: But he was made aware of that
25 back in November. Now he's coming in and he's

1 complaining and he's saying --

2 THE COURT: Yeah, but the issue isn't was he
3 properly -- the issue for today is not was he fired
4 properly or was he not fired properly.

5 MR. NAGLE: I agree. I agree.

6 THE COURT: I mean if you -- some people take
7 the position that a portion of your car is deductible,
8 that can be a legitimate business expense. That's why
9 the circumstances of his firing are not a slam dunk for
10 either side right now. There's unknown information.

11 MR. NAGLE: It calls into question his
12 credibility throughout his entire certification. I
13 mean something that clear, Your Honor, where he has --
14 I mean he's coming in and saying under oath, I didn't
15 use any of King's money for my personal use, yet,
16 they're paying his cable bill.

17 THE COURT: I don't know. Anything else?

18 MR. LIBERMAN: Just one issue on cable that,
19 the reason that he has cable was because that is where
20 his internet is hooked up, that's what he uses to
21 download information. But --

22 THE COURT: So now we even got a possible
23 explanation for that.

24 MR. LIBERMAN: By the way, my cable, I have
25 all of my internet access there. That's what it's used

1 for.

2 THE COURT: I understand. Okay, anything
3 else?

4 MR. NAGLE: No, Your Honor.

5 THE COURT: The strongest power a Court has
6 is, I believe, is to issue an injunction, and it's kind
7 of an awesome power, because I have the authority to
8 stop people from doing something. Well, that's a power
9 that should be used sparingly and appropriately.

10 In Cole versus De Gioia makes it pretty clear
11 that there's four -- there's four standards that have
12 to met. Rule 166 says that I can't consider hearsay.
13 I understand that this is the early stage of
14 litigation, and proofs are wanting. But the standard
15 is also -- I'm sort of rambling here -- it's also
16 necessary that the plaintiff come forward and establish
17 by clear and convincing evidence: One, that there is
18 no adequate remedy of law. Okay, that's possible.
19 Substantial, immediate and irreparable harm. I don't
20 see any substantial, immediate, irreparable harm.
21 Reasonable probability of eventual success, I don't
22 know whether they're going to be successful or not.

23 Is there a reasonable theory, that's why I
24 asked Mr. Nagel, can I enter an order because there are
25 coincidences and inferences to be made. Well, the

1 answer is no. I cannot, I will not, and I have never,
2 and I will never, because I can't. It's not fair to
3 the parties to reach conclusions based upon
4 constructing evidence around them drawing reasonable
5 evidence, and saying, well, this can't be a
6 coincidence, it must be a fact. That's not the way
7 restraining orders operate.

8 And then, of course, there's the balance of
9 the equities. If I issue a restraining order then
10 Phoenix is out of business, which isn't fair either.
11 If I don't issue a restraining order, is King out of
12 business? No, I don't think so. At least there's no
13 evidence for me to believe it.

14 The -- and also the only contract about this
15 -- about which this request is made is the one between
16 King and Ulrich. Phoenix is not contractually
17 obligated to do anything, neither are any of the other
18 parties. And I go back to what I said a few minutes
19 ago, I saw nothing in the complaint at all referencing
20 Mr. Mazza, Mr. Ulrich or Pat Wtulich, whatever her name
21 is. There's a reference in paragraph 12 of the amended
22 complaint to Mark, but it doesn't establish that --
23 there's no specific allegations that they did anything
24 wrong in the first place.

25 So, the plaintiff has failed to establish by

1 clear and convincing evidence that there's no adequate
2 remedy of law -- oh, I'm sorry. That there's no --
3 that is not a substantial or immediate -- Let me
4 backup, I said that wrong.

5 The plaintiff has not established by clear
6 and convincing evidence that there is a substantial,
7 immediate, and irreparable harm to the plaintiff, or
8 that there's a reasonable probability of eventual
9 success.

10 Now, my job is not to say, is it likely that
11 the plaintiff will succeed, if all his coincidences and
12 inferences come true, that's not my job today. This
13 case goes on, that's for sure. And I gather that there
14 will be counterclaims, and I gather we'll have to deal
15 with that.

16 But I simply can't find any evidence to
17 support the injunctive relief sought that's clear and
18 convincing. And I might point out, the only direct
19 statement a bit could even begin to support, that is,
20 the one that Ms. Higgs signed which was filed October
21 25th. Everything else in it is hearsay, inference,
22 coincidence, and even she doesn't really say that much
23 which would be supportive of an injunction against Mr.
24 Ulrich.

25 Now clearly the agreements are valid -- well

1 I shouldn't say that, I won't say that. So, for all
2 those reason the application is denied.

3 Now we need to figure out a discovery
4 schedule, have a Case Management Conference. Are you
5 in a position to do that today, or would you like to
6 set another date?

7 MR. LIBERMAN: If you don't mind, Your Honor,
8 and I apologize, I don't think I can do it today.

9 THE COURT: That's fine. You don't need to
10 apologize, that's why I asked.

11 MR. LIBERMAN: Yes.

12 THE COURT: Is next week time enough?

13 MR. LIBERMAN: Yes.

14 MR. NAGLE: It's fine for me, Your Honor.

15 THE COURT: Okay, let me get you a date. We
16 can do it by phone or you can come in, either way.
17 You're all local, it doesn't matter to me.

18 MR. FIALCOWITZ: We're all local, Your Honor.
19 We might as well come in, if that's all right, Your
20 Honor.

21 THE COURT: Sure.

22 MR. LIBERMAN: That's fine.

23 THE COURT: Let me go get a date.

24 MR. LIBERMAN: We're all in Morristown.

25 (Pause in hearing)

1 THE COURT: We can get Wednesday, November
2 6th, sometime in the afternoon, if that works for you.

3 MR. NAGLE: That's fine, Your Honor.

4 MR. FIALCOWITZ: That would be great, Your
5 Honor.

6 MR. LIBERMAN: That's great.

7 THE COURT: 2:00, 2:30, 3:30, pick your time?

8 MR. FIALCOWITZ: 3:30?

9 MR. NAGLE: 3:30 is good.

10 THE COURT: Okay, all right. You can do it
11 by phone or you can come in, it makes no difference. I
12 don't think I've seen your papers. Have you filed them
13 yet?

14 MR. LIBERMAN: Which papers are that, Your
15 Honor?

16 THE COURT: I don't mean the motion, but
17 there was an answer and a counterclaim you said.

18 MR. LIBERMAN: Yes, I filed it on Monday.

19 THE COURT: Okay.

20 MR. LIBERMAN: I didn't bring -- I have a
21 copy, if you'd like me to give it to you.

22 THE COURT: That's all right. I'm sure it
23 will find it's way down here. I just want to make sure
24 I have them before we meet.

25 MR. LIBERMAN: Your Honor, I have a copy

1 right here. If I can supply it to you right now.

2 THE COURT: And the purpose is to talk about
3 what we need to do by way of discovery.

4 MR. LIBERMAN: Yes.

5 THE COURT: How do we move this case along.

6 MR. LIBERMAN: Yes.

7 THE COURT: So that we can reach as early a
8 disposition as possible, if that is possible. Okay.

9 Thank you.

10 MR. NAGLE: Thank you very much, Your Honor.

11 THE COURT: Okay? Thank you, gentlemen.

12 (Proceeding Concluded)

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CERTIFICATION

I, Patricia Wtulich, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, from index number 11:32:52 to 12:08:56, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/s/ Patricia Wtulich Date: 11-13-13
Patricia Wtulich AD/T #621

Phoenix Transcription, LLC (Date)
796 Macopin Rd.
West Milford, NJ 07480
(862) 248-0670