SUPREME COURT OF NOVA SCOTIA
Citation: *Unisys Canada Inc. v. Pineau-Pandya*, 2021 NSSC 346

Date: 20210312
Docket: *Hfx.* No. 47312
Registry: Halifax

Between:

Unisys Canada Inc.

Plaintiff

v.

Andrea Pineau-Pandya, Matthew Watts, Karen Caldwell, Shiliang Lu, Fang Gao, Quishi Li, Natasha Squires and Meraki It Consulting Incorporated

Defendants

PRODUCTION MOTION OF PLAINTIFF

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 19, 2020, in Halifax, Nova Scotia
Decision:	March 12, 2021
Subject:	Production, disclosure, requests for discovery undertakings to be completed. (Rule 14.18)
Summary:	This is a motion for production by the Plaintiff, Unisys Canada Inc., seeking completion of undertakings given at discovery. The main action involves a claim of unfair competition, with allegations of conspiracy, wrongful solicitation of employees and clients, breach of fiduciary obligations, and breach of proprietary agreements made between the Plaintiff and individual Defendants. The Defendants, including the corporate Defendant, Meraki IT Consulting Incorporated, and the individual Defendants,

deny any wrongdoing. They counterclaim alleging, *inter alia*, defamation and unlawful interference with economic relations.

Issues: What discovery undertakings should be produced?

Result: Limited production ordered. The Court ordered the following production be made by the Defendant within 30 calendar days:

1. Meraki's annual financial statements for 2017 and 2018.

2. Personal tax returns of Ms. Pineau-Pandya and Mr. Lu for 2017 and 2018

3.Meraki's shareholder register, directors' register, and certificate of incorporation.

Caselaw Considered: ***Laushway v. Messervey***, 2014 NSCA 7; ***Saturley v. CIBC World Markets Inc.***, 2012 NSSC 57; ***Barghouti v. Alborno***, 2017 NSSC 255; ***Survival Systems Training Ltd. v. Survival Systems Ltd.***, 2012 NSSC 202; ***GasTOPS Ltd. v. Forsyth***, 2009 CarswellOnt 5773 (Ont. S.C.J.); ***Sure-Grip Fasteners Ltd. v. All-grade Bolt & Chain Inc.***, [1993] O.J. No. 193; ***Intact Insurance Company v. Malloy***, *2020 NSCA 18;* ***Physique Health Club Ltd. v. Carlsen***, *1996 ABCA 358;* ***KOS Oilfield Transportation Ltd. v. Mitchell***, *2010 ABCA 270*.

SUPREME COURT OF NOVA SCOTIA
Citation: *Unisys Canada Inc. v. Pineau-Pandya,*, 2021 NSSC 346

Date: 20210312
Docket: Hfx. No. 473125
Registry: Halifax

Between:

Unisys Canada Inc.

Plaintiff

v.

Andrea Pineau-Pandya, Matthew Watts, Karen Caldwell, Shiliang Lu, Fang Gao,Quishi Li, Natasha Squires and Meraki It Consulting Incorporated

Defendants

PRODUCTION MOTION OF PLAINTIFF

Judge: The Honourable Justice Patrick J. Murray

Heard: November 16, 2020, in Halifax, Nova Scotia

Written Decision: March 12, 2021

Counsel: Mark Tector and Andrew Hill for the Plaintiff
Colin Bryson, Q.C.,and Bhreagh MacDonald for the Defendants

By the Court:

Introduction

[1] This is a motion for production by the Plaintiff, Unisys Canada Inc., seeking completion of undertakings given at discovery. The main action involves a claim of unfair competition, with allegations of conspiracy, wrongful solicitation of employees and clients, breach of fiduciary obligations, and breach of proprietary agreements made between the Plaintiff and individual Defendants.

[2] The Defendants, including the corporate Defendant, Meraki IT Consulting Incorporated, and the individual Defendants, deny any wrongdoing. They counterclaim alleging, *inter alia*, defamation and unlawful interference with economic relations.

Background

[3] This motion is to compel responses to refused discovery undertakings in relation to setting up of the defendant company, Meraki, its alleged provision of services competitive to those of Unisys, and the resulting revenues. Unisys submits that the undertakings are relevant to issues of liability and damages.

[4] Amanda Software is a specialized software used for issuing and managing compliance information for governments. Unisys says this software is owned by its partner and client CSDC. Whether CSDC is a client of Unisys is an important issue in the litigation. It is alleged that that each of the individual defendants gained Amanda experience and training through Unisys.

[5] The defendant Andrea Pineau-Pandya held what the plaintiff says was the key management position of service delivery manager, entrusted with access to confidential and propriety information about Unisys's systems, operations, clients, and employees. Unisys also says Ms. Pineau-Pandya was a fiduciary. She oversaw a team of 30-35 Unisys employees. Unisys says she had, for a reasonable period of time after her termination, a duty not to unfairly compete with Unisys, and a duty not to solicit Unisys employees, and alleges that she breached those duties. Unisys relies on non-competition/ non-solicitation/ confidential information agreements signed by Unisys employees, known as EPIAs.

[6] Meraki was set up by Ms. Pineau-Pandya and initially staffed by her, Shiliang Lu, Matthew Watts, Karen Hildebrand, Fang Gao, and Shiliang Li, all former Unisys employees and members of its Amanda team. Ms. Pineau-Pandya admitted on discovery that all of the services that Meraki provides have been Amanda-related. Unisys alleges that on October 17, 2017, Meraki agreed with CSDC that Meraki would provide services to CSDC, for whom individual defendants had provided services while working at Unisys. Unisys alleges the timing of the set up of Meraki and the individual defendants' departures from Unisys is significant, in relation to the allegations which include: 1) unlawful solicitation; 2) conspiracy; and 3) an intention to compete unfairly with Unisys.

[7] Unisys says the individual defendants (other than Ms. Pineau-Pandya) breached the non-competition provisions of their EPIA's and are liable for the fiduciary breaches of Pineau-Pandya/Meraki. It also alleges that the individual defendants breached the confidentiality/proprietary information clauses of their respective EPIAs, and similar common law duties.

[8] The Defendants deny the Plaintiff's allegations. They agree that all individual Defendants, except Ms. Pineau-Pandya, were subject to EPIAs. The non-solicitation/ non-competition provisions in these agreements applied for the 12 months following the end of their respective employment with Unisys, and restricted the employee from working with Unisys' customers that they had worked for in their last 18 months of employment with Unisys. Ms. Pineau-Pandya was subject to a confidential information agreement only. (Exhibit "H", Paul Oliver 1st affidavit)

[9] They counterclaim for defamation, and unlawful and intentional interference with Meraki's economic relations, abuse of process, and other claims.

[10] Discoveries were held on December 2-11, 2019. Unisys says many of the undertakings requested were refused. In addition, it says, the Defendants have failed to preserve relevant documents in accordance with obligations at common law and under the *Civil Procedure Rules*. For example the Unisys says Ms. Pineau-Pandya has not produced any written communications with CSDC or in relation to the defendants Watts, Hildebrand, and Lu.

[11] The responses of the Defendants to the requests made at their discoveries are set out in the letters of Colin Bryson to Plaintiff's counsel, Andrew Hill, dated July 17, 23 and 24, 2020, and are attached as Exhibits XX, YY and ZZ of Mr. Oliver's affidavit filed for this motion.

Issue

[12] The only issue on this motion is whether the Court should order the defendants to produce the disputed discovery undertakings.

Civil Procedure Rules

[13] Civil Procedure Rule 18.18 states a party may require a witness at discovery to produce documents following discovery, with certain exceptions:

> 18.18(1) A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other thing referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:
>
> (a) the document, information, or thing is not in the control of the witness;
>
> (b) it is not relevant and is not likely to lead to relevant evidence;
>
> (c) it is privileged.
>
> (2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.
>
> (3) A party who requires production or access before the party completes examination of a witness at discovery may adjourn the discovery.
>
> (4) A judge may relieve a party or a non-party witness from a requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 - Disclosure and Discovery in General.

[14] Rule 14.08 provides describes the presumption of full disclosure:

> 14.08 Presumption for full disclosure
> (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

> (2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.
>
> (3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
>
> > (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
> >
> > (b) the importance of the issues in the proceeding to the parties.
>
> (4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.
>
> (5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12, Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.
>
> (6) In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.

[15] Unisys submits that the undertakings sought on this motion were refused on the ground of relevance. The Nova Scotia Court of Appeal stated in *Laushway v. Messervey*, 2014 NSCA 7, quoting *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 that the court in these circumstances should take "a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value" (*Laushway* at para. 49).

[16] In *Barghouti v. Alborno*, 2017 NSSC 255, Smith J. held that a "determination of relevance must be made with reference to the material allegations in the pleadings" (para. 21). The document therefore, must provide or render probable the existence of a fact or non existence of a fact, be it past, present or future. The fact must also relate to an allegation in the pleadings, and the fact must also be necessary or material to the claim or defence.

Breach of Fiduciary Duty

[17] Unisys alleges Ms. Pineau-Pandya breached common law fiduciary obligations owed to it and that the other defendants participated and benefited from that breach. In *Survival Systems Training Ltd. v. Survival Systems Ltd.*, 2012 NSSC 202, the Court held that "key employees" can attract fiduciary duties, citing *GasTOPS Ltd. v. Forsyth*, 2009 CarswellOnt 5773 (Ont. S.C.J.), where the court cited *Employment Obligations in Canada*, looseleaf (Aurora Ont.; Canada Law Book 2006), defining "fiduciary" generally as "one who is empowered to act on behalf of and for the benefit of another with the ability to affect that other's interest through the use of discretion" (para. 39). The court in *Survival Systems* also held that fiduciary obligations may also attach to non-fiduciary employees who depart with the fiduciary employees to establish a business in competition with their former employer. This is a question for the trial judge (para. 49).

[18] Unisys alleges that the defendants are subject to fiduciary duties. As a key employee, Unisys says, Ms. Pineau-Pandya was subject to fiduciary obligations. She was a senior manager, with direct contact with Unisys clients, including CSDC, they maintain. She was the person responsible for "Amanda work" in the office. She had access to and knowledge of customers, bidding and pricing practices, and employment and compensation agreements. Unisys claims all of this information was confidential and could make Unisys vulnerable if disclosed.

[19] Unisys says Ms. Pineau-Pandya had an obligation not to compete unfairly with it, and that the defendants who departed from Unisys to join her are subject to the same fiduciary obligations, as articulated in *Survival Systems*. The following breaches of the fiduciary duty are alleged by Unisys:

a) Set up of Meraki (Andrea Pineau-Pandya and Mr. Lu) to seize Unisys corporate opportunities and to compete with Unisys unfairly.

b) Mr. Lu worked for Service NB, became owner of Meraki, in November, 2017, and procured a contract with SNB in May 7, 2018, providing Amanda services.

c) Ms. Pineau-Pandya leveraged her relationship with CSDC to obtain work, thereby seizing a business opportunity from Unisys.

d) Between August and October, 2017, Ms. Pineau-Pandya, Mr. Lu, Mr. Watts, and Ms. Hildebrand were in communication. While there is no

documentation, the timeline makes it evident Watts and Hildebrand were solicited.

e) Once Ms. Pineau-Pandya secured the work from CSDC (Province of Newfoundland) she reached out to these employees. It was following that, that they resigned from Unisys.

f) Andrea Pineau-Pandya knew the importance of hiring them, as she needed people to perform the contract, the start date was tight at 3 - 4 weeks.

[20] Unisys says credibility will be a key issue at trial. It says this alleged solicitation was in breach of Ms. Pineau-Pandya's fiduciary duties to Unisys regarding Mr. Watts and Ms.Hildebrand. In addition, Unisys says, Lu solicited Li to leave Unisys and join Meraki. Therefore, Unisys submits which clients Lu and Li worked for at Meraki are also relevant.

[21] Unisys says there is an evidentiary basis for Unisys to seek undertakings related to further breaches of fiduciary duties by the defendants. It claims the individual Defendants participated in and benefitted from the alleged breaches.

The Undertakings Given at Discovery

[22] The plaintiff seeks production of 52 undertaking requests, which it has broken into eight groups. In many cases, the plaintiff seeks the same or similar undertakings from multiple witnesses.

A. Undertaking to produce Individual Defendants' timesheets/invoices with Meraki.

[23] This undertaking was requested of Pineau-Pandya (UT24 (Dec. 3, 2019)), Watts (UT16 and UT22), Hildebrand (UT 24, Lu (UT 17 and UT18, Gao (UT 10 and UT 12), Li (UT 3 and 7), and Squires (UT 10).

[24] The Plaintiff submits that the formation of Meraki by a group of former Unisys employees shortly after their departure from Unisys, and the provision of AMANDA-related services by the defendants to Unisys clients and other clients in Unisys's market, represents a breach of the defendants' fiduciary duties to Unisys.

[25] According to the Plaintiff, the individual defendants' timesheets/invoices with Meraki will show which clients they serviced, and what work was done. This

information it says will show the extent of the breaches by the defendants, and the profits earned from those breaches. The information is relevant to both liability and damages with respect to the plaintiff's claim for breach of fiduciary duty.

[26] The Defendants say these have already been produced, but were redacted to maintain the privacy of non Unysis' clients. Unisys seeks unredacted versions.

[27] Unisys says the law is clear that there is an obligation not to solicit customers of an ex-employer. Meraki says it was entitled to seek work from non-Unisys customers, and should not be required to disclose this information. Ms. Pineau-Pandya states in her affidavit that the first work done for a non-Unisys customer was in April 2018, 18 months after her termination and well beyond the timeframe of any restriction from her alleged fiduciary duty.

B. Undertaking to produce list of clients Meraki/Individual Defendants have worked for.

[28] This undertaking was requested of Pineau-Pandya (UT25 (Dec. 3, 2019)), Watts (UT27), Gao (UT16), Li (UT8) and Squires (UT9).

[29] For the same reasons set out in respect of the Group A undertakings, the Plaintiff submits that information regarding clients Meraki has worked for relates to both liability and damages with respect to the plaintiff's claim for breach of fiduciary duty. The Defendants argue that Unisys is not entitled to know who Meraki customers are, other than former Unisys customers. Meraki says this request relates to non-Unisys customers for whom Meraki has worked. Meraki says it is entitled to seek work from non-Unisys customers.

[30] This category highlights the "major divide" on this motion.

C. Undertaking to produce documentation of payments from Meraki to Individual Defendants or their companies.

[31] This undertaking was requested of Pineau-Pandya (UT21 (Dec. 2, 2019) and UT31 (Dec. 3, 2019)), Watts (UT17 and UT19), Hildebrand (UT 24 and UT28), Lu (UT6), Gao (UT15), Li (UT6) and Squires (UT11).

[32] The Defendants state Meraki has complied with the March 25th, 2019 Order to provide Meraki billings to the specific companies or government bodies listed in the Order (i.e. the gross income), as well as the relevant project costs (i.e. the hourly

rates paid to the individuals who did the work). Meraki disputes any obligation to provide information beyond this.

[33] The Plaintiff submits that the test for whether the documents sought are producible is whether they are relevant, not whether they are covered by Justice Smith's Order. Unisys states Justice Smith did not limit the ambit of production in this matter to the documents in her Order, and it is open to the plaintiff to seek production of relevant documents outside the scope of that Order.

[34] The plaintiff seeks disgorgement of profits from each of the defendants, therefore they say the payments made to each of the defendants are relevant. Disclosure of payment information will show not just what the defendants billed, but what they received.

[35] Unisys submits these undertakings are also relevant to the issue of damages claimed by the Defendants in the Counterclaim. The Defendants claim they suffered loss of income. Therefore, their income earned from Meraki is relevant.

[36] The Defendants state that this request is made without regard to any timeframe. They also say it should be denied because it involves disclosing the private banking information of individual defendants. In addition the defendants say that payments made are for combined work done for Unisys and non-Unisys clients and cannot be separated into payments done for each.

D. Undertaking to provide Meraki financial information.

[37] This undertaking was requested of Pineau-Pandya (UT21 (Dec. 2, 2019), UT28, UT29, UT30 (December 3, 2019)).

[38] The Plaintiff submits that these undertakings are relevant for the same reasons as the Group C undertakings above. Meraki's financial statements and information are relevant to the issue of disgorgement of profits and to the Defendants' claims for loss of income in the Counterclaim.

[39] The Defendants say the financial statements include the combined income of Unisys and non-Unisys clients, and they cannot be separated. They say financial information regarding non-Unisys clients is not relevant, and that Unisys already has the necessary financial information to calculate Meraki's profits for work done for Unisys customers. Also, they say, this request goes beyond the temporal limitation

of one year (*Sure-Grip Fasteners Ltd. v. All-grade Bolt & Chain Inc.*, [1993] O.J. No. 193).

E. Undertaking to produce tax returns/forms of Meraki/Individual Defendants

[40] This undertaking was requested of Pineau-Pandya (UT27 (Dec. 3, 2019)), Watts (UT18), Hildebrand (UT25), Lu (UT3), Gao (UT13 and 14), Li (UT4 and 5) and Squires (UT12).

[41] The Plaintiff submits that these undertakings are relevant to its damages claim. The Plaintiff seeks disgorgement of profits from each of the Defendants, and says therefore the profits (income) earned by each of the defendants from Meraki is relevant. Disclosure of tax returns will show what each of the Defendants earned from the Meraki business.

[42] The Plaintiff further submits that this undertaking is relevant to the Defendants' Counterclaim. The Defendants claim loss of income as a result of alleged breaches by Unisys. To assess this claim, Unisys says, it requires disclosure of the Defendants' income for the relevant time periods. The defendants' tax returns will provide evidence of their income.

[43] The Defendants state that knowing what they earned in no way relates to the work they lost, or the income lost from Unisys's alleged unlawful interference. Otherwise, they say, Unisys has the information to calculate Meraki's profits earned from Unisys customers. The Defendants say there is no relationship between the work the individual defendants did and the work they lost due to Unisys's interference with Meraki's economic relations.

F. Undertaking to provide documentation related to Meraki's financing.

[44] This undertaking was requested of Pineau-Pandya (UT4, UT5, UT6 (Dec. 3, 2019)).

[45] Unisys argues that documents related to Meraki's financing will provide evidence of when Meraki was set up, and whether it was set up while the Defendants owed contractual or fiduciary duties not to compete with the Plaintiff. Those questions are relevant to the issue of liability. The Plaintiff says documents that show when Meraki was set up are especially important due to the lack of documentation

from the defendants, including a lack of written agreements between Meraki and the individual defendants.

[46] The Defendants submit that Meraki's financing is irrelevant, stating the law is clear that Meraki was free to compete with Unisys for non-Unisys clients, and thus the Defendants were free to set up a company to do so. As such, they say, setting up Meraki did not breach a fiduciary duty.

G. Undertaking to provide documentation related to Meraki's share ownership, including Meraki's shareholders agreement and documentation related to its formation

[47] This undertaking was requested of Pineau-Pandya (UT17 and UT18 (Dec. 2, 2019)) and Lu (UT13 and UT16).

[48] The Plaintiff submits that the shareholders' agreement will speak to the ownership of Meraki and the entitlement to its profits. Unisys claims for disgorgement of Meraki's profits, and says the shareholders' agreement is therefore relevant to the issue of damages.

[49] The Plaintiff says this undertaking is also relevant for the same reasons as the Group F undertakings set out above: it will address the timing of setting up Meraki, and whether it was set up during any relevant non-competition period. Ms. Pineau-Pandya's evidence was that she thought the shareholders' agreement was entered into in October 2017, around the time Meraki was being set up and starting to do client work. This is consistent with para. 29 of Meraki's Amended Statement of Defence, which states that Lu became a part owner of Meraki "in or around October of 2017."

[50] The Defendants maintain that incorporating Meraki was not a breach of fiduciary duty, and that how profits are divided is not relevant to a disgorgement claim.

Analysis and Discussion

[51] The principles governing discovery requests, include the following:

a) The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance

in evidence law generally. The Rule does not permit a watered-down version.

b) Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.

c) The Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.

d) The interpretation of the Rule "should be seen in the context of this important historical and procedural shift" from the previous more liberal disclosure to disclosure based on relevance, and the cost-benefit analysis of doing so.

[52] The Plaintiff submits the timeline provided in its brief is significant in that Meraki's incorporation, the hiring of its former employees, and interaction/contact with former customers, all support Unisys's allegation that Meraki was formed to compete unfairly and to seize business opportunities from Unisys.

[53] The Court has further considered the Plaintiff's submissions on how the breaches alleged were committed by the Defendants.

[54] Ms.Pineau-Pandya states she was entitled to incorporate Meraki and to compete. The employees named as Defendants each had their own reasons for leaving Unisys and sought out opportunities with her company. Similarly, Ms. Pineau-Pandya says former Unisys customers contacted her, but that in any event, such contact was past the timeline for any residual obligations she had to Unisys, which she was aware of and respected.

[55] In terms of whether Ms Pineau-Pandya was a key employee, Mr. Oliver was questioned at some length in cross-examination in regard to paragraph 25 of his February 15, 2019, affidavit.

[56] The Defendants' position for the refusal of the requests is bases on relevancy, with the underlying argument that only information respecting Unisys's clients is relevant and the normal time period for a non-compete clause is one year, subject to the facts of each case. The Defendants say the focus should be to recognize the disclosure already made since the termination of Andrea Pineau-Pandya. Justice Smith's order refers specifically to Unisys' clients and prospective clients.

Disclosure required under the order was to include, but was not limited to those clients listed in Schedule "A". The Defendants say the Smith Order has been fully complied with, which the Plaintiff denies. Mr. Oliver's affidavit, sworn October 29, 2020, sets out what Unisys says has yet to be disclosed. (see paragraph 65 of Oliver affidavit).

[57] This provides some context for my ruling on this production motion.

[58] The client lists and the time line for obligations to continue are major issues on this motion and in this case. Also in dispute is whether CSDC is in fact a client of Unisys, or a partner. Obviously whether Ms. Pineau-Pandya was a fiduciary employee is key.

[59] As stated in *Individual Employment Law*, at page 82:

> A fiduciary cannot compete with a former employer for a reasonable period of time after the employment has ceased. This restriction encompasses not enticing the employer's customers to shift their loyalty to the fiduciary's new firm and also not enticing fellow employees to resign and come to work with the fiduciary. [Emphasis added.]

[60] The Defendants submit that all that Unisys has demonstrated is that, at most, there was a potential fiduciary duty that would have restricted Ms. Pineau-Pandya from soliciting Unisys Customers for one year or less after her termination on October 24, 2016. The Defendants argue that all of Unisys's requests for production in this motion should be viewed from this perspective, and that anything beyond this is not relevant and is not required to be produced.

[61] The Defendants say they have complied with the Order by producing all contracts entered into by Meraki with Unisys Customers to June 2020 (three years and eight months after Ms. Pineau-Pandya's termination from Unisys); all Meraki billings under those contracts; all billings of the independent contractor defendants to Meraki for work done on those contracts; and the timesheets of Meraki's one employee for work under those contracts.

[62] The pleadings provide context for production rulings. However, in *Intact Insurance Company v. Malloy*, 2020 NSCA 18, Farrar, J.A., stated:.

> 35. … Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a

> production application. This is particularly true here, where there was a dearth of evidence before the motions judge.

[63] For liability to attach there must be a misuse of fiduciary power, for example, taking a confidential customer list and using trade secrets of the former employer in a competing business. (See *Physique Health Club Ltd. v. Carlsen*, 1996 ABCA 358.)

[64] In determining a reasonable time frame for an employee's residual duties to continue, Courts must balance the respective interests of the fiduciary in "moving on", and the vulnerable spot the employer is in. (*Individual Employment Law*, 2nd ed. (Toronto Irwin Law, 2008).)

[65] The definition of "relevant" and "relevancy" is contained in Rule 14.01. This rule impacts on the extent of the disclosure in an application and whether information is relevant at the trial or hearing of a proceeding. We are reminded in the caselaw not to slip back into the earlier rule which provided for "semblance of relevance."

[66] On the one hand, Ms. Pineau-Pandya, held the position of service manager, responsible for 30 to 35 employees, and issues were escalated to her pertaining to the Amanda software, for example. She was responsible for the delivery of services in the Halifax Office of Unisys, and was promoted to this position during her 16 years of service. If an employee is key, or even important, it can still be difficult to determine that that employee is a fiduciary. Such duties are among most onerous in law. Accordingly they are imposed in limited circumstances as they create significant restrictions.

[67] Mr. Oliver was asked detailed questions as to Ms. Pineau-Pandya's authority in cross-examination. He agreed that in many cases she made recommendations for hires and salaries, but not decisions. She could recommend a promotion, but someone else decided. She signed employment contracts but did not have the power to approve, as multiple approvals were required. In fairness he emphasized that she was part of a team that contributed to many of these types of decisions. Having the discretion to make decisions which place an employer in a vulnerable position is key to whether a fiduciary duty exists. A further example is with respect to "pricing". It was similar in that Mr. Oliver stated that she made the recommendation, but it was multiple-level decision. Mr. Oliver testified that he was "not Ms. Pineau-Pandya's boss" but she had one, Mr. Feicht. In fact he indicated, he was "not aware of what she did or did not do". To his knowledge she had no authority to make public statements or authorize travel. Delivery of work was her primary role, he said. She

was part of a team to help Unisys develop and implement software for clients and prospective clients.

[68] Once again for liability to attach there must be a misuse of fiduciary power. Competition, of itself, does not constitute a breach of fiduciary duty. The underlying notion relates to "misappropriation of an opportunity that rightfully belongs to the employer" (see *KOS Oilfield Transportation Ltd. v. Mitchell*, 2010 ABCA 270).

[69] Whether an employee's function is essential is a factor. Common themes in determining fiduciary obligations are the employee's discretion and access to confidential information in circumstances that make the employer vulnerable. In addition, interaction with customers and suppliers, and dealing with pricing are additional factors to be considered.

[70] A good indicator of a company's profit is a financial statement, as it is a written record of business activities and financial performance. For this reason, it is commonly used in tax, financing, and investment matters.

[71] Whether a breach occurred is not a decision to be made at this time. It is alleged in the pleadings and previously cited herein. Disgorgement of profits is a remedy being claimed, but of course, any breach must be proven at trial.

Decision

[72] I have reviewed and considered the third affidavit of Mr. Oliver, sworn October 29, 2020, filed in support of the motion, as well as the two affidavits sworn February 4, 2019, and February 15, 2019.

[73] I have also reviewed the affidavit of Ms. Pineau-Pandya filed in response on November 6, 2020, as well as her affidavit filed February 12, 2019, and her affidavit filed October 30, 2020, in support of the corresponding motion of the Defendants seeking production.

[74] Unisys alleges that the defendants took advantage of and profited from their previous employment with Unisys, thus justifying for example, disclosure of tax returns, to determine how much was profited from the relationship.

[75] In addition, the allegation of seizing corporate opportunity is arguably broad enough to include more than Unisys clients in terms of the use and licensing of Amanda software to those clients.

[76] Full disclosure of all items requested in this motion would be "everything there is to know", about Meraki, certainly, and also the individual Defendants. In my respectful view, the undertakings sought are extensive, having regard to confidentiality, probative value, and cost of production. I have not been persuaded that the requests should go beyond Unisys's clients or prospective clients**.** The scope of what is requested is excessive in view of the law of relevance and the scope and duration of any duties that might be found to exist.

[77] In the circumstances, the reasonable period for the employees' obligations to the former employer could be a year, or it may be longer. Ms. Pineau-Pandya was a 16-year employee, and all of the Defendants are former employees. The evidence at trial will obviously determine this, as the caselaw indicates.

[78] I find there is overlap in the categories of requests even though the breakdown of the undertakings was prudent and most helpful to the Court. The overlap is particularly so in relation to financial matters in Groups ACDEF.

[79] The way to identify Meraki profits earned from Unisys clients is to deduct the company's expenses in earning that income. None of the time sheets, invoices, payments, financial statements (for all clients), or tax returns would provide the breakdown needed to establish this. However "financial statements" as required by clause (d) of Justice Smith's order could provide a breakdown of income and expenses related to Unisys clients, including "aged accounts receivable listings". This would provide information on which invoices were paid or unpaid as sought by Unisys in the Group C undertakings.

[80] The objection to providing financial statements by the Defendants is that it would disclose earnings and expenses for all clients, which are confidential and also irrelevant. Confidentiality alone is not a reason to deny production. Nor is the submission that income cannot be separated. Respectfully I am of the view that financial statements of Meraki for a limited period should still be disclosed.

[81] In the result, I am prepared to order the production of Meraki's annual financial statements for years 2017 and 2018. I further order the personal tax returns of Andrea Pineau-Pandya and Shiliang Lu for 2017 and 2018, in relation to disgorgement of profits issue. I understand the limitations that were pointed out by Defendants' counsel.

[82] A shareholders' agreement is a confidential document. I fail to see its relevancy in the present context. However information related to "formation" of the company may, in fact, be relevant or lead to relevant evidence, as the whole premise of the Plaintiff's claim is that Meraki was set up to solicit and compete with Unisys for employees and customers.

[83] Share ownership of Meraki is relevant to these issues. The Court will therefore order that a copy be provided of the: 1) shareholders' register; 2) directors' register; and 3) certificate of incorporation. I have considered ordering the articles of incorporation, but there is no issue that Meraki is a competing business.

[84] The remaining undertakings/requests for production are refused for the reasons given. Based on pleadings and evidence I am not satisfied that the requests are sufficiently relevant to warrant the disclosure sought by Unisys at this time.

Conclusion

[85] In conclusion, the Court has ordered that the following production be made by the Defendants, within 30 calendar days of March 12, 2021:

1. Meraki's annual financial statements for 2017 and 2018. (para 81)

2. Personal tax returns of Ms. Pineau-Pandya and Mr. Lu for 2017 and 2018 (para 81)

3. Meraki's shareholder register, directors' register, and certificate of incorporation. (para 83)

[86] My decision on costs is reserved at this time.

Murray, J.