UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GENEX COOPERATIVE, INC., Plaintiff, v. JORGE T. CONTRERAS, et al., Defendants.	NO. 2:13-cv-03008-SAB **ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT**

On December 12, 2012, Defendants Jorge T. Contreras, Daniel R. Senn, Erasmo J. Verduzco, and Robert H. VanderWeerd, inseminated cows at several dairy farms on behalf of their employer, Genex Cooperative, Inc. ("Genex"). The very next day, Defendants inseminated cows at the same dairy farms—but this time on behalf of CRV USA ("CRV"), a Genex rival. Jilted by its former employees and spurned by its customers, Genex filed suit in this Court to enforce non-competition agreements against three of the defendants, employee non-solicitation covenants against two of the defendants, and charged all defendants with tortious interference of contractual relations. Defendants counterclaimed alleging several violations of Washington State wage and hour laws. Presently, this Court addresses Plaintiff's Motion for Partial Summary Judgment, ECF Nos. 61, 108; Defendant Contreras' Motion for Partial Summary Judgment, ECF No. 62; Defendant Senn's Motion for Partial Summary Judgment, ECF No. 64; Defendant Verduzco's Motion for Summary Judgment, ECF No. 66; and

1 Defendant VanderWeerd's Motion for Summary Judgment. ECF No. 68. The case
2 is before this Court on diversity jurisdiction grounds. 28 U.S.C. § 1332. The
3 motions were heard without oral argument.

4 ***FACTS***

5 Dairy cows provide increased milk production for a period of time after
6 giving birth or calving. Because of this increased production, farmers seek to
7 maximize and control the number of gestating cows at any given time. A dairy
8 cow is in heat or estrus for a short period of time—typically under a day—
9 resulting in a narrow window of optimal time to impregnate the cow. Due to the
10 limitations of bovine estrus, many farms implement an artificial insemination
11 ("A.I.") program. Whether done in-house or through an A.I. provider, the A.I.
12 program consists of daily monitoring of herds to determine which cows are in
13 estrus, selecting strains of bull semen, providing "arm service" (physically
14 inseminating the cow), and occasionally providing injections to prompt estrus.
15 Nationwide, approximately thirty-five percent of dairy farms use an A.I. provider.

16 In the Sunnyside, Washington area, approximately eighty percent of dairy
17 farms utilize A.I. providers, making it a "technician-dominant" area. Wisconsin-
18 based Genex is among one of the six largest bovine A.I. providers in the country.
19 Genex entered the Sunnyside market in the early 1990's and began using a team of
20 Breeding Program Specialists ("BPSs") to service its accounts. The Sunnyside
21 area was serviced by a team of BPSs that operated as a unit. Each month, the BPS
22 team internally coordinated schedules to determine when a dairy appointment
23 would require multiple BPSs and to coordinate relief work (when a team-member
24 would service another BPS's accounts to provide the BPS with a day off).

25 A Genex BPS team is paid as a unit with each member receiving a
26 percentage of the team's pool of commissionable dollars based on their
27 contributions. The pool of commissionable dollars is made up of sales
28 commissions and service commissions. Prior to 2011, the sales commission was

1 calculated by taking total sales income, subtracting the "base price" for the semen
2 sold and multiplying by twenty-percent. The "base price" is monies Genex keeps
3 from semen sales for its costs but do not necessarily correlate with actual costs.
4 The sales commissionable dollars are added to service commissionable dollars,
5 which, prior to 2011, were calculated at eighty-percent of service income. From
6 the total commissionable dollars pool, expenses for total team mileage are
7 deducted and the remainder is split among members of the team in relation to his
8 number of cows serviced and sales earned. Lastly, each member is individually
9 reimbursed his portion of mileage expenses that were previously deducted. In
10 October 2011, Genex announced that it was altering the compensation system for
11 BPSs. The commission from services dropped from eighty-percent of income to
12 thirty-seven percent, and the commission from sales rose from twenty-percent to
13 thirty-seven percent. The change in commission rates was allegedly to incentivize
14 the BPSs to sell higher grade semen and to better align the interests of Genex and
15 BPSs. After receiving negative feedback from the BPSs, Genex decided to
16 transition the Sunnyside team's commission rates—beginning 2012 at forty-six
17 percent, finishing the year at forty-four percent, and was set for forty-two percent
18 for 2013. The compensation changes were made by Genex unilaterally.

19 Daniel Senn joined Genex's Sunnyside BPS team in 1999. Two years later,
20 Robert VanderWeerd joined the team. Jorge Contreras was added to the
21 Sunnyside team in 2006. Erasmo Verduzco had been a team-member from 2008
22 until February 2011, and rejoined the team in December 2011. As a condition of
23 their employment with Genex, Senn, Contreras, and Verduzco each signed
24 differing agreements containing non-competition covenants. Contreras and
25 Verduzco also signed employee non-solicitation covenants. VanderWeerd
26 reportedly refused to sign any restrictive covenants.

27 By late 2012, all four defendants were unhappy with Genex. Defendants
28 allege their pay fluctuated, unexplained deductions were taken from their pay, they

1 did not have any, or enough, days off, and that they were dissatisfied with the new
2 commission rates. According to the defendants, their work-load had increased in
3 the fall of 2012 when two additional team members left Genex for other A.I. firms.
4 Defendants report working seven-day weeks nearly every week and it upset the
5 team that Genex did not promptly hire replacements for the departed team-
6 members. Sometime in mid-to-late 2012, Senn and VanderWeerd met with
7 representatives from CRV, another A.I. company. The CRV representatives were
8 former members of Genex's management team and had previously worked with
9 the defendants. By early December 2012, talks between VanderWeerd, Senn and
10 CRV had advanced. Melissa Leatherman, a CRV employee and former account
11 manager for Genex, and Senn began approaching current Genex customers about
12 switching to CRV. Senn stated that Alan McNaughton, then a regional sales
13 manager at Genex, was also present at some of these meetings.

14 In the days preceding December 12, 2012, Senn and VanderWeerd informed
15 Contreras and Verduzco of the opportunity with CRV. The parties dispute whether
16 CRV would have hired only part of the Genex Sunnyside BPS team, or if it
17 required the full team. On December 12, Defendants met with CRV
18 representatives, including Jim Bayne (another former Genex manager) and
19 Leatherman, at a hotel in Sunnyside. Defendants agreed on employment terms
20 with CRV, signed employment paperwork, and signed identical resignation letters
21 that were submitted by mail to Genex. The next day, Defendants serviced the same
22 farms they had previously been serving for Genex but with CRV semen. Nearly all
23 of Genex's Sunnyside area customers switched to CRV with the defendants, none
24 remained with Genex. Since December 2012, Genex has had no BPS and has only
25 made nominal retail sales of bovine semen in the area.
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MOTION STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the burden of showing the absence of a genuine issue of fact for trial. *Celotex* 477 U.S. at 325.

In addition to showing that there are no questions of material fact, the moving party must show that it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law if the non-moving party has failed to make a sufficient showing on an essential element of a claim on which the non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

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ANALYSIS

GENEX'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Genex moves for summary judgment on three issues: (1) the enforceability of the restrictive covenants, including the non-compete and employee non-solicitation obligations of Contreras, Senn, and Verduzco; (2) breach of the non-compete agreements by Contreras, Senn and Verduzco; and (3) dismissal of Defendants' affirmative defenses and counterclaims.

1. Enforceability of Restrictive Covenants

Genex moves for summary judgment declaring the defendants' restrictive covenants are enforceable. Employment restrictive covenants are valid only if they are reasonably necessary to protect an employer's business or goodwill. Restatement (Second) of Contracts § 188 (1981). The test to determine the validity of restrictive covenants in employment contracts is one of reasonableness, considering "(1) whether restraint is necessary for the protection of the business or goodwill of the employer, (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant nonenforcement of the covenant." *Perry v. Moran*, 109 Wash.2d 691, 698 (1987) (quoting *Knight, Vale & Gregory v. McDaniel*, 37 Wash.App. 366, 369 (1984)) *modified on reconsideration*, 111 Wash.2d 885 (1989). Except as to disputed facts, the reasonableness of a restrictive covenant is a question of law. *Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wash.App. 248, 254 (2012) (citing *Alexander & Alexander, Inc. v. Wohlman*, 19 Wash.App. 670, 684 (1978). The burden is on the employer to demonstrate the reasonableness of a restrictive covenant. *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wash.2d 929, 933 (1975); *Techworks, LLC v. Willie*, 318 Wis.2d 488, 498 (Ct.App. 2009).

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1 **a. Verduzco's Restrictive Covenants**

2 Verduzco's employment agreement with Genex explicitly provides that the
3 agreement is governed by Wisconsin law. Genex, the drafter of the agreement,
4 however, urges the application of Washington law. A district court must apply the
5 choice-of-law rules of the state in which it sits when hearing a case based on
6 diversity jurisdiction. *Abogados v. AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir.
7 2000). Washington has adopted the Restatement (Second) Conflict of Laws §§
8 187-88 (1971). In relevant part, the Restatement provides an explicit choice of law
9 provision will govern unless "application of the law of the chosen state would be
10 contrary to a fundamental policy of a state which has a materially greater interest
11 than the chosen state in the determination of the particular issue . . . " *Id.* at §
12 187(2)(b).

13 Genex argues that Washington has a fundamental public policy contrary to
14 Wisconsin law—namely, that Washington courts may reform unreasonable
15 restrictive covenants whereas Wisconsin adopts an "all-or-nothing" rule. Genex,
16 however, does not point to any statute or explicit policy statement that declares
17 Washington has a fundamental policy necessitating the reformation of
18 unreasonable covenants. Instead, Genex recites an explanation of the test
19 Washington courts apply to determine the reasonability of restrictive covenants.
20 *Wood v. May*, 73 Wash.2d 307, 310 (1968) (en banc). Washington courts have
21 exercised their equitable powers to reform some otherwise unenforceable
22 covenants but this is more akin to a "general rule of contract law" than to a
23 fundamental public policy. *See* Restatement (Second) Conflict of Laws § 187, cmt.
24 g. Genex's suggestion that fairness and efficiency dictate that Verduzco's
25 agreements be governed by Washington law is uncompelling and affords no
26 justification allowing it to ignore its own explicit choice of law provision. Because
27 application of Wisconsin law would not be contrary to a fundamental policy of
28 Washington, Wisconsin law applies to Verduzco's agreement.

Verduzco's agreement contains two separate restrictive covenants: a non-compete covenant, and an employee non-solicitation covenant. In relevant part the covenants state:

> 1.1 Employee . . . shall not, during the term of his/her employment . . . for a period of 18 months thereafter, directly or indirectly . . . (b) induce or attempt to induce any employee of the Company to terminate his/her employment relationship with the Company . . . or induce or attempt to induce any employee of the Company to breach any agreement with the Company . . .
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> 3. Restricted Competition During the term of Employee's employment . . . and for 18 months following the date of termination . . . Employee will not attempt to divert any Company business by soliciting, contacting or communicating with "Employee Customers." This provision shall apply regardless of the reason for termination . . . "Employee Customer" shall mean any customer having had a "discussion" with Employee concerning the possibility of doing new or more business with the Company during the eighteen (18) months preceding Employee's termination of employment. "Discussion" shall refer to contact between Employee and a customer by either (a) direct contact with Employee in telephone conversations, in correspondence or e-mail correspondence, or face-to-face meetings.

Verduzco's non-compete covenant prohibits him from soliciting or contacting any dairy farm which he had sought either new or increased business from in the last eighteen months. These "employee customers" would include any farms which Verduzco may have sought business from but which refused to do business with Genex for any reason. Such a non-compete agreement is unenforceable under Wisconsin law. Prohibiting an employee from soliciting any customer the employee has tried but failed to do business with for the former-employer is a violation of Wis. Stat. § 103.465. *JT Packard & Assocs., Inc. v. Smith*, 429 F.Supp.2d 1052, 1056 (W.D.Wis. 2005). Therefore, Verduzco's non-competition covenant is unenforceable as a matter of law.

Verduzco's employee non-solicitation agreement prohibits him from "induc[ing] or attempt[ing] to induce any employee of the Company to terminate his/her employment relationship with the Company . . . or induc[ing] or attempt[ing] to induce any employee of the Company to breach any agreement

with the Company." Genex does not present any developed arguments as to the validity of the employee non-solicitation agreement under either Wisconsin or Washington law.

In *Heyde Cos., Inc., v. Dove Healthcare, LLC*, the Supreme Court of Wisconsin found a "no-hire" provision between two companies invalid under Wis. Stat. § 103.465 as a "harsh and oppressive" restriction on the rights of an employee. 258 Wis.2d 28, 41 (2002). That Court stated that "[a]n employer cannot indirectly [through no-hire agreements with other employers] restrict employees in a way that it cannot do directly under § 103.465." *Id.* Although one federal district court hearing a motion to dismiss did not recognize that *Heyde* applied to an employee's employee non-solicit clause, it is clear from its language that the Court presumed such a restriction was invalid. *Compare id., with Share Corp. v. Momar Inc.*, 2011 WL 284273 *5 (E.D.Wis. 2011). Accordingly, Verduzco's employee non-solicitation clause is unenforceable as a matter of law.

As written, Verduzco's non-compete covenant and his employee non-solicit covenant are invalid under Wisconsin law. Because Wis. Stat. § 103.465 provides for an "all-or-nothing" reading of restrictive covenants, neither of Verduzco's restraints can be enforced in any manner.

b. Senn's Restrictive Covenant

Senn's Technician Agreement contains a choice of law provision selecting New York law as governing the agreement. The parties, however, agree there is no conflict between Washington and New York law and agree that Washington law applies to Senn's agreement.

Paragraph four of Senn's agreement states in relevant part:

> [T]hat, while he/she is so employed and for a period of 18 months after termination of his/her employment for any reason whatsoever, he/she will not, directly or indirectly, either as an employee of an organization, corporate or otherwise, or of any individual or as an independent contractor, divulge trade secrets, engage in either the artificial insemination of cattle or the sale of semen in the area in which he/she has been employed and rendered service.