

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

TRISTAN TOUZOT,

Plaintiff,

v.

ROM DEVELOPMENT CORPORATION
AND JOHN AND JANE DOES NOS. 1
THROUGH 10,

Defendants.

ROM DEVELOPMENT CORPORATION
d/b/a CORE COMPOSITES,

Plaintiff,

v.

TRISTAN TOUZOT and
TRANSFORMADERA, S.A.,

Defendants.

Civil Action No.: 15-6289 (JLL)

OPINION

LINARES, District Judge.

This matter comes before the Court by way of an application for a preliminary injunction by ROM Development Corporation (“ROM” or “Core Composites”) to enforce a non-competition agreement against its former employee Defendant Tristan Touzot (“Touzot”) and to enjoin Defendants Touzot and Transformadera, S.A. (“Transformadera”) from soliciting ROM’s customers. Oral argument was heard in this matter on April 4, 2016. After considering the parties’ submissions and the arguments at the April 4 hearing, ROM’s application for a preliminary injunction is denied, and Touzot’s cross-motion for dissolution of the Temporary Restraining

Order, entered on October 9, 2015 by the District of Rhode Island Court, is granted.

I. PROCEDURAL HISTORY

Touzot commenced this action on July 15, 2015 by filing a Complaint in the Superior Court of New Jersey, Chancery Division, Bergen County. *See* ECF No. 1. On August 19, 2015, ROM removed the action to this Court pursuant to 28 U.S.C. § 1441. *Id.* On September 9, 2015, ROM filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2). ECF No. 4-1. On October 15, 2015, this Court denied ROM's motion to dismiss with respect to Plaintiff's contract claims, but granted ROM's motion to dismiss with respect to Plaintiff's tort claim (Count Three). ECF Nos. 14, 15.

On October 1, 2015, during briefing on its motion to dismiss before this Court, ROM filed an action against Touzot and Transformadera in the District of Rhode Island for violation of the non-compete agreement, for misappropriating trade secrets, and for tortious interference, and sought a Temporary Restraining Order ("TRO") against them related to these alleged actions. Docket No. 15-8746, ECF No. 2. The Rhode Island court granted ROM a TRO against Touzot. *See id.*, ECF No. 10 (Order, dated Oct. 9, 2015). However, because the parties disputed which court should hear this matter, the Rhode Island court stayed the Rhode Island action and delayed a full hearing on the injunction application pending a decision on jurisdiction by this Court. On Dec. 18, 2015, ROM's Rhode Island action was transferred to this Court and consolidated with Touzot's action. *See id.*, ECF No. 16. At that point, ROM sought and was granted expedited discovery prior to a hearing on its preliminary injunction application before this Court, which was ultimately held on April 4, 2016. ECF No. 34, 54.

II. BACKGROUND

Parties

ROM is a Rhode Island corporation with its principal place of business in Rhode Island. ECF No. 1 (Touzot Compl.), ¶ 7. ROM has three employees and distributes various composite materials, including balsa wood for the model wood industry. Hr’g Tr. (Apr. 4, 2016) at 7:11-23, 8:3-9:2 (Richard O’Meara¹). Model wood represented approximately 25% of ROM’s sales and profit in the period 2011 to 2014. *Id.* at 19:11-15. Model wood is wood used in the construction of such things as model airplanes and boats, and it is typically required to be of a higher quality than some other balsa wood products. *Id.* at 17:11-15, 200:12-16. For this reason, sourcing such wood is challenging and, for ROM, whose model wood sales represent about 75% of the model wood industry, demand exceeds supply. *Id.* at 25:4-19, 98:11-23. ROM also sells epoxy resins and adhesives. *Id.* at 7:23.

Touzot is an individual who is a resident of New Jersey. ECF No. 1 (Touzot Compl.). Prior to working for ROM, Touzot had experience in the model wood industry, but he had no prior sales experience. *See* Touzot Cert. (dated Feb. 17, 2016) ¶ 3; *see* also Hr’g Tr. at 177:6-8. However, when his prior employer, Baltek, Inc., announced that “it would be closing its New Jersey facility in 2011 and relocating to North Carolina,” Touzot began exploring other employment options as he “had no intention of relocating [his] family out-of-state.” Touzot Cert. ¶ 6.

Transformadera is an Ecuadorian company formed in 2010 to manufacture wood, primarily balsa wood. Cert. of Emmanuel Solari Bouriaud² in Opp’n to Mot. for Prelim. Inj. (“Bouriaud

¹ O’Meara is ROM’s founder, owner, President and CEO. Hr’g Tr. at 7:24-25, 8:1-2, 8-12.

² Mr. Bouriaud is “a principal/owner of Transformadera, S.A.” Bouriaud Cert. ¶ 1.

Cert.”) ¶¶ 7, 9. Transformadera supplies industrial and model grade balsa wood. *Id.* It does not distribute model balsa wood in the United States, and is not a direct competitor to ROM. Hr’g Tr. at 145:6-8, 146:3-5. Touzot knew Transformadera’s founder, Mr. Bouriaud’s father, from his prior employment with Baltek. *See* Bouriaud Cert. ¶¶ 10-11. Touzot developed Transformadera as a source for model wood for ROM, and Transformadera became a valued supplier of model wood to ROM over the course of Touzot’s ROM employment. *See id.* at 49:15-50:5.

ROM/Touzot Pre-Employment Negotiations

After initial discussions regarding employment with ROM between O’Meara and Touzot, on May 30, 2011, O’Meara send Touzot an “employment proposal.” Hr’g Ex., Pl. 2. The proposal specified that Touzot’s job description included “[s]elling the full line of Core Composites materials with special emphasis to start on balsa core for the wind turbine and model wood market.” *Id.*, Attachment at 1. The proposal identifies some of ROM’s model wood customers and prospective customers including Balsa USA, National Balsa, Trillium, and Midwest. *Id.* The proposal further states that ROM makes “an average margin of 25%” on model wood and that sales were \$520,000 in 2008 but had fallen to less than \$100,000 in 2011. *Id.* at 4. The proposal lists other employment terms including “a three year convenient [sic] not to compete in the accounts and for products that you have been representing for Core Composites or that Core Composites sells to that account should you decide to leave the company.” *Id.* at 5. Touzot did not agree to the proposal and a revised proposal was sent on June 6, 2011. *See id.*, Pl. 3A & 3B. Touzot also did not agree to this proposal. The primary term being negotiated in these versions of the employment proposal were related to Touzot’s car allowance. *See* Hr’g Tr. at 32:21-33:3.

On June 28, 2011, O’Meara sent Touzot an “Employment Letter of Agreement.” Hr’g Ex., Pl. 4 & 5. This proposed agreement continued to indicate that Touzot would be “[s]elling the full

line of Core Composites materials with special emphasis to start on balsa core for the wind turbine and model wood market.” *Id.*, Pl. 5, at 1. It also stated that ROM would ask Touzot “to sign a three year convenient [sic] not to compete in the accounts and for products that you have been representing for Core Composites or that Core Composites sells to that account should you decide to leave the company.” *Id.* at 5. Touzot responded on June 30, 2011 stating: “I reviewed the offer carefully and I am in agreement with all the different points. Thank you again for this great opportunity with Core Composites and I look forward to joining the team beginning of August.” *Id.*, Pl. 4.

Before Touzot joined ROM in August 2011 (Touzot Cert. ¶ 2), O’Meara was responsible for sourcing balsa model wood for ROM and for servicing ROM’s model wood customers. *See* Hr’g Tr. at 19:16-21. At the time of Touzot’s hire, ROM had several sources for model wood, but the sources were not sufficient to meet the demand from ROM’s customers. *Id.* at 24:24-25:19. Additionally, ROM’s model wood business had dropped, and O’Meara was looking for Touzot to help bring it back up. *Id.* at 25:11-15. Transformadera was not one of ROM’s suppliers at this time.

Non-Compete Agreement

Subsequent to commencing employment with ROM, ROM and Touzot executed an “Employee Non-Compete Agreement.”³ Hr’g Ex., Pl. 6. The Agreement was dated August 8, 2011, but not actually executed until approximately December 2011. Hr’g Tr. at 37:13-24.

³ Although ROM only seeks to enforce the non-solicitation portions of the agreement, *see infra* at 12, because of the agreement title, and for simplicity, the Court refers to the agreement herein as the “Non-Compete Agreement” or “Agreement.”

The following paragraphs of the Agreement are relevant to the present dispute:

1. COVENANT NOT TO COMPETE

For good consideration and as an inducement for Company to employ Employee, if such employment is terminated for any cause, for a period of two (2) years after leaving the employment, Employment shall neither engage directly or indirectly, either personally or as an employee, associate partner, partner, manager, agent or otherwise, or by any means of any corporate or other device with exact or like products sold by Company, nor shall employee for such period an in such localities solicit orders, directly or indirectly, from any customers of Company or from any customers of its successor, for such products as are sold by Company or its successor, either for himself or as an employee of any person, firm or corporation.

2. DEFINITION OF TERMS

The term "not compete" as used herein shall mean that the Employee shall not own, manage, operate, consult or to be employed in a business substantially similar to, or competitive with, the present business of the Company or such other business activity in which the Company may substantially engage during the term of employment.

Competition means owning or working for a business of the following type: Agency sale or distribution of structural core materials, prepreg composites, carbon fiber or glass reinforcements used in the construction of composite parts to customers of ROM Development Corporation.

3. TRADE SECRETS

The Employee acknowledges that the company shall or may in reliance of this Agreement provide Employee access to trade secrets, customers, and other confidential data and good will. Employee agrees to retain said information as confidential and not to use said information on his own behalf or disclose same to any third party.

The employee will take necessary actions to keep the company's business secrets, including but not limited to customer, supplier, logistical, financial, research and development information, confidential and not to disclose the company's business secrets to any third party during and after the term of the Employee's employment.

4. SPECIFIC ACCOUNT NON-COMPETITION CLAUSE

On the termination of the Employee's employment with the Company for any reason, the Employee will not solicit any customer of the Company that was a customer of the Company during the course of the Employee's employment with the Company, whether or not still a customer of the Company and whether or not

knowledge of the customer is considered confidential information or in any way aid and assist any other person to solicit any such customer for a period of two years from the date of termination of the Employee's employment.

Hr'g Ex., Pl. 6. The Agreement further generally provides that it "shall extend only to the Americas and shall be in full force and effect for two years, commencing the date of employment termination." *Id.*⁴ The Non-Compete Agreement was drafted by O'Meara using the internet; he did not have an attorney review the document. Hr'g Tr. at 39:8-12. Likewise, Touzot did not have an attorney review the Agreement prior to signing it. *See id.* at 211:21-212:2.

Before Touzot signed the Agreement, O'Meara admits that he "was teaching [Touzot] about what [ROM's] customer's model wood's specifications were," and admits that he was sharing ROM's confidential information with Touzot. *Id.* at 79:2-20, 94:10-95:1.

Touzot Termination

On March 27, 2015, ROM terminated Touzot.⁵ *See id.* at 55:2-4. Despite the termination, O'Meara and Touzot engaged in discussions regarding a new contract or arrangement between ROM and Touzot wherein Touzot would start his own company and act as an agent "to source and sell model grade balsa to [Core Composites]." Hr'g Ex., Def. 8; Hr'g Tr. at 55:18-56:3, 202:13-15. O'Meara expressed his expectation that "Core Composites [would] handle all of the sales for model wood." Hr'g Ex., Def. 8. To this end, he stated:

In order for CC to agree to this arrangement we would want the current non-compete agreement to continue for model grade products for an additional five years for the model grade lumber business that we are doing together after the three

⁴ Although some of the correspondence in this matter references the originally proposed three-year period for the Agreement, O'Meara admits that the executed Agreement is for a period of two years. *See* Hr'g Tr. at 61:9-15.

⁵ The documents submitted indicate that Touzot was terminated as of a different date, but O'Meara testified (and Touzot does not appear to contest) that despite the emails, his official termination date was in March. *See* Hr'g Tr. at 74:2-25; Hr'g Ex., Def. 8 (Email from O'Meara to Touzot, dated May 6, 2015) ("You are officially terminated as of May 6, 2015.").

year non-compete agreement ends in April 2018. . . . In regard to you and/or your start-up entity representing other supply companies into accounts that you had been representing Core Composite products in or other accounts that our company handles we would like to help you succeed if the products do not compete with our current offering.

Id. The discussions regarding any new arrangement between ROM and Touzot broke down over the “additional” non-compete request and threatened enforcement of the existing Agreement. Hr’g Tr. at 114:24-115:12, 217:16-25.

Not long after the discussions broke down, O’Meara believed that Touzot was violating the Non-Compete Agreement. *See* Hr’g Ex., Def. 11 (Letter from ROM’s counsel to Touzot, dated June 16, 2015). O’Meara referred the matter to his attorney who remind Touzot that he had “agreed that for a period of three years after leaving your employment with ROM you would not engage in competition with the company or solicit the company’s customers.” *Id.* On June 9, 2015, O’Meara informed Transformadera of his belief that Touzot was violating the Non-Compete Agreement with ROM. *See* Hr’g Ex., Pl. 7 (Email from O’Meara to Transformadera, June 9, 2015, subject “model wood purchases”) (“Last night Tristan and I had a real falling out over this point as he feels that it is within his rights to sell to customers not currently buying from him such as Mid West Products. This is a direct violation of our current three year non-compete agreement that Tristan agreed to in writing when he started with Core Composites. I have been left no option but to defend our customer base.”).⁶

At the time of Touzot’s termination, ROM had 75% of sales in the model wood market, and Touzot was ROM’s sales representative for all of its model wood customers. *See* Hr’g Tr. at 98:11-19, 116:8-117:16. Furthermore, at the time of his termination, Touzot acknowledged that

⁶ Midwest was a ROM model wood customer during Touzot’s employment with ROM, but was not a customer at the time of Touzot’s termination. Hr’g Tr. at 130:18-23, 131:11-13.

ROM was not having any issues with their supplies of model wood; he agreed that “they were able to get it.” *Id.* at 189:6-14.

Alleged Improper Behavior of Touzot and Transformadera Post Touzot’s Termination

ROM alleges that after Touzot’s termination, Touzot and Transformadera colluded to deprive ROM of its model wood supply, thereby allowing Touzot to target and steal ROM’s model wood customers. *Id.* at 137:2-3. ROM bases these allegations on the following facts.

In June 2015, shortly after discussions with Touzot broke down, Transformadera informed ROM that it would be raising the prices on model wood to ROM by 25 to 50%, and would require a 30% deposit before ROM could place orders (with 70% due before the product left the factory). *Id.* at 59:2-60:8, 154:7-14. Transformadera’s stated reasons for the increase were due to expected weather issues and increased demand from China. *See Bouriaud Cert.* ¶¶ 38-39; Hr’g Ex., Pl. 7. However, O’Meara testified that the new prices quoted by Transformadera for model wood were suspiciously similar to the prices that ROM charged its model wood customers. *See Hr’g Tr.* at 59:2-9 (“The prices went up 25 to 50 percent depending on the product, and they very much reflected the sell prices to our customers. . . . [T]he price increases by item were so close to what we had been selling it to the customers for, that it looked very much like what we would be selling to them”), 167:22-168:2 (“That pricing that they sent back to us was almost a duplicate, even the way it was organized of the [Excel] spreadsheets that Tristan was using to put orders together and to speak, so it was -- what they answered in that and where the price increases came from were the specific products we were asking for in the purchase orders.”). From this, O’Meara surmises that Touzot shared ROM’s pricing with Transformadera, and that both Touzot and Transformadera knew that ROM would be unable to agree to this price because it would eat up all of ROM’s profits. *See id.* at 59:7-11, 167:3-8. O’Meara further found the price increases by Transformadera

suspicious “[b]ecause the price of balsa hasn’t moved up like that from any supplier at any time in history nor this year at those rates.” *Id.* at 160:9-16; *see also id.* 63:10-19 (O’Meara testifying that prices have never been raised that much “in the 40 years [he has] been doing this.”). Additionally, none of ROM’s other model wood suppliers had raised their prices; the prices actually got better over the period at issue. *See id.* at 162:22-163:2. Because ROM no longer could buy model wood from Transformadera, it was unable to meet the demand of customers. *See id.* at 133:7-8, 164:2-22. O’Meara testified that, prior to Touzot’s termination, there was not an issue with the prices or supply of model wood. *Id.* at 148:22-24. Touzot agreed that “in the period 2011 to 2015, when [he was] assisting with supplying model wood for ROM, [he never saw] a price increase from Transformadera in the range of 25 to 50 percent.” *Id.* at 192:7-11.

After ROM’s supply of model wood was diminished, ROM then alleges that Touzot and/or Transformadera began contacting or otherwise talking to ROM’s model wood customers to supply model wood. *See, e.g., id.* at 129:3-10. In fact, the sales report from Touzot’s new company (TComposites LLC) indicates that, post his termination from ROM, he has sold model wood to Guillow, Balsa USA, National Balsa, and Midwest Products. *See Hr’g Ex., Pl. 8; see also Hr’g Tr.* at 179:1-187:13. Touzot admits that these were all “customers [he] dealt with during [his] term at ROM.” *Hr’g Tr.* at 179:1-7. He further admits that he met the contacts for these customers “in the course of [his] employment with ROM,” and they he did not know them before he worked at ROM. *Id.* at 179:1-184:12. He further admits that all of the model wood that he sold to these customers was supplied to TComposites by Transformadera, and that the prices that he paid for the model wood from Transformadera was about the same as what Transformadera previously charged to ROM (without any 25-50% increase as quoted to ROM). *See id.* at 187:3-14; *see also* 172:20-173:16; *Hr’g Ex., Pl. 9* (Transformadera invoices showing prices charged to TComposites).

In fact, Transformadera is (and has been) Touzot's only supplier of model wood, and 50-60% of his current customer base are customers he served at ROM. *See* Hr'g Tr. at 187:4-8, 201:7-13, 208:22-209:9, 210:23-211:20.

The ROM model wood customers who are currently purchasing from Touzot have allegedly expressed to O'Meara a continued willingness to do business with ROM, but ROM is unable to fill their orders because of insufficient access to a supply of model wood. *See id.* at 133:3-8, 134:6-9, 164:2-22, 201:4-6. ROM is able to obtain some model wood from Baltek and Blasasud, but the quantities are insufficient to meet demand. *See id.* at 27:14-6, 163:22-164:22.

Touzot admitted that "[n]othing about the TRO prevents [him] from selling that to customers that are not customers of ROM," and that "[t]here are many other customers [he] could go and market" to, but that most were outside the Northeast region. *Id.* at 219:9-16. He further acknowledged that he "could work in a lab in the industry like [he previously] did at Baltek," and that "[t]here are other jobs [he] could have in the industry, other than selling model wood or epoxy." *Id.* at 220:8-18. He also admitted that he discussed the Non-Compete Agreement with Transformadera, and that he told them that it did not cover model wood. *See id.* at 192:14-21; *see also* Bouriaud Cert. ¶¶ 29-30. However, he denies that he and Transformadera are partners. *See* Hr'g Tr. at 212:14-18.

O'Meara admitted that ROM has no exclusivity with Transformadera and that Transformadera could "do business with whoever they like." *Id.* at 144:18-145:1. He further acknowledged that Transformadera was not barred from selling directly to ROM's customers, and that they had the right to raise prices to ROM. *See id.* at 57:8-13, 148:1-8, 161:10-16. O'Meara, however, disagrees that Transformadera and Touzot may collude to interfere with ROM's customers in violation of Touzot's obligations under the Agreement.