UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OCEAN BEAUTY SEAFOODS LLC, *et al.*, Plaintiffs, v. PACIFIC SEAFOOD GROUP ACQUISITION COMPANY INC., *et al.*, Defendants.	CASE NO. C14-1072RSM ORDER DENYING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION, GRANTING MOTION TO INTERVENE, AND DENYING MOTION TO SUPPLEMENT THE RECORD

I. INTRODUCTION

This matter comes before the Court on Defendant's Motion for Preliminary Injunction (Dkt. #13), Dulcich, Inc. d/b/a Pacific Seafood Group's Motion to Intervene (Dkt. #17), and Defendant's Motion for Leave to Supplement the Record (Dkt. #34). Having considered the parties' pleadings and documents in support thereof, as well as oral argument presented on October 28, 2014, the Court resolves these motions as follows.

II. BACKGROUND

This matter arises from Plaintiff Michael Coulston's former employment with Defendant Pacific Seafood Group Acquisition Company Inc. ("Pacific Seafood") and his new employment with Ocean Beauty Seafoods LLC ("Ocean Beauty"). Dkt. #1. Mr. Coulston was formerly employed in various levels of management with Defendant. Dkt. #15 at ¶ ¶ 3-4. As

part of his acceptance of employment with Defendant, he signed an employment contract which contained an agreement that, should he leave employment with Defendant, he would not directly or indirectly engage in business with any competitor company in a certain territory for a period of 12 months. Dkt. #1 at ¶ ¶ 3.12-3.13.

On July 2, 2014, Mr. Coulston began working for Plaintiff Ocean Beauty, a direct competitor of Defendant in the territory covered by Mr. Coulston's employment contract. Dkt. #1 at ¶ ¶ 3.2, 3.3, 3.22, 3.23 and 3.29. Upon accepting the offer, Mr. Coulston apparently informed another employee of Defendant's that Ocean Beauty informed him it had found a way around the non-compete agreement he had signed. Dkt. #16.

After learning that Mr. Coulston had accepted employment with Ocean Beauty, Defendant sent a letter to Ocean Beauty's lawyer, informing him that Mr. Coulston's employment agreement precluded him from working at Ocean Beauty for one year. Dkt. #1 at ¶ 3.30 and Exhibit C. In response, Ocean Beauty filed the instant Declaratory action, seeking an Order declaring that Mr. Coulston's employment contract is unenforceable, and therefore he is not in violation of it by working for Ocean Beauty. Dkt. #1. Defendant has asserted several Counterclaims against Ocean Beauty and Mr. Coulston, including breach of contract, tortious interference with a business contract, tortious interference with a business expectancy, and breach of Washington's Uniform Trade Secrets Act ("UTSA"). Dkt. #12 at Counterclaim ¶ ¶ 4.2-4.31. Defendant now seeks a preliminary injunction to enjoin Ocean Beauty and Mr. Coulston from using any confidential and/or proprietary information it may have received from Mr. Coulston to date, and to enjoin Mr. Coulston from working for Ocean Beauty, while the matter proceeds on the merits. Dkt. #13.

III. DISCUSSION

A. Preliminary Injunctions

In determining whether to grant a preliminary injunction, this Court considers: (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to that party if an injunction is not issued; (3) the extent to which the balance of hardships favors the moving party; and (4) whether the public interest will be advanced by the injunction. *See Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). The Ninth Circuit has often compressed this analysis into a single continuum where the required showing of merit varies inversely with the showing of irreparable harm. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). Thus, Pacific Seafood will be entitled to preliminary relief if it is able to show either: (1) probable success on the merits and the possibility of irreparable harm; or (2) the existence of serious questions going to the merits and a fair chance of success thereon, with the balance of hardships tipping sharply in favor of an injunction. *Miller*, 19 F.3d at 456.

1. Likelihood of Success on the Merits

The Court first turns to Defendant's likelihood of success on the merits of this matter. Defendant argues that it is likely to succeed on the merits of its breach of contract counterclaim (and defense to Plaintiffs' allegation that Mr. Coulston's employment agreement is unenforceable) and its claims for breach of Washington's UTSA. The Court is not convinced.

a. Plaintiff's Alleged Breach and Enforceability of Non-Compete Agreement

Defendant's claim for breach of contract based on the non-compete portion of the employment agreement with Mr. Coulston is governed by Oregon law. Dkt. #15, Ex. 1 at ¶ ¶ 7

and 11. To be enforceable under Oregon law, a covenant not to compete must meet both the requirements of ORS 653.295 and Oregon's common law governing restraints on trade. *See Nike, Inc. v. McCarthy*, 379 F.3d 576, 580-84 (9th Cir. 2004).

With respect to ORS 653.295, after January 1, 2008, any non-competition agreement entered into between an employer and an employee is voidable and may not be enforced unless four requirements are met. ORS 653.295(1). First, the employer must inform the employee in a "written employment offer received by the employee at least two weeks before the first day of the employee's employment that a noncompetition agreement is required as a condition of employment" or "the agreement is entered into upon a subsequent bona fide advancement of the employee by the employer." ORS 653.295(1)(a). Second, the employee must be employed as an exempt administrative, executive, or professional employee. ORS 653.295(1)(b) and ORS 653.020(3). Third, the employee must have access to trade secrets, or competitively sensitive confidential business or professional information. ORS 653.295(1)(c). Fourth, the employee's total annual gross salary and commissions at the time of the employee's termination must exceed the current median family income for a four-person family as determined by the U.S. Census Bureau. ORS 653.295(1)(d). There appears to be no dispute that the second and fourth requirements are met. Thus, the Court examines only the first and third requirements.

With respect to whether Mr. Coulston received adequate notice of the non-compete agreement, Mr. Coulston agrees with Pacific Seafood that he received the employment agreement with a letter offering him employment on January 12, 2011. Dkts. #14, Ex. 1 and #24 at ¶ 7. He asserts that he verbally accepted the job offer at some time prior to that date, earlier in January 2011. Dkt. #24 at ¶ 7. He further acknowledges that his first day on the

premises was January 31, 2011, the day Pacific Seafood asserts was his first day of employment. Dkts. #14 at ¶ 4 and #24 at ¶ 11. Mr. Coulston also signed his form I-9 Employment Eligibility Verification on February 2, 2011, certifying that he was completing the form within three days of his first day of employment. Dkt. #14, Ex. 2. However, Mr. Coulston asserts that he had expected to start on January 24, 2011, was surprised to learn that he had a two-week waiting period, and was in fact compensated for the week of January 24, 2011, while he waited to start on the premises. Dkt. #24 at ¶ ¶ 7-10. Thus, Mr. Coulston argues, his first day of employment was prior to January 31, 2011, less than two weeks from the date he received notice that a noncompetition agreement was required as a condition of employment, and therefore the agreement is void and unenforceable.

Based on the evidence before the Court at this stage of the proceedings, it appears that Defendant provided Mr. Coulston with notice of the noncompetition agreement at least two weeks prior to the start of his employment. Cases interpreting the pre-2008 version of ORS 653.295 are instructive. In *Olsten Corporation v. Sommers*, 534 F. Supp. 395, 398 (D. Or. 1982), the District Court for the District of Oregon found that "'initial employment' in ORS 653.295 means when the employee starts work." In determining what the term "initial employment" meant, the court looked at whether the term referred to the date the employee accepts a job offer, the date he or she signs an employment contract, or the date he or she begins to work, and concluded that it meant when the employee starts work. *Olsten*, 534 F. Supp. at 397. With that guidance, it appears that Mr. Coulston's first day of work was January 31, 2014, and he received the agreement at least two weeks prior to that date. Accordingly, the first element is met.

The Court now turns to whether Mr. Coulston had access to trade secrets, or competitively sensitive confidential business or professional information. Plaintiff asserts that Mr. Coulston had access to proprietary customer information, product launch plans and marketing plans, all of which were confidential. Dkt. #15 at ¶ ¶ 8-11. Mr. Coulston responds that he did not have access to information that was not already known to the public, or that was secret. Rather, Mr. Coulston maintains that he had access to and utilized commonly known industry pricing and sales models based on the seafood market and industry-wide standards and practices. Dkt. #24 at ¶ ¶ 18, 20, 49, 51, 53, 58 and 60.

At oral argument, the Court explored this issue with the parties. Pacific Seafood's counsel indicated that Mr. Coulston had access to protected information, such as product allocation information. Mr. Coulston's counsel responded that any such information would become almost immediately obsolete, particularly given that this industry is a commodity industry. Mr. Coulston's counsel further noted that seafood prices are market driven, and prices change quickly with supply and demand. She also noted that both parties are aware of each other's customers and regularly compete for them; therefore, the customer lists of which Mr. Coulston has knowledge is not proprietary.

The Court agrees that Mr. Coulston's skills in sales and product development, as well as industry knowledge that he gained while working at Pacific Seafoods is not a protectable interest. *See McCarthy*, 379 F.3d at 585. "'Nonetheless, an employer has a protectable [sic] interest in 'information pertaining especially to the employee's business.'" *Id.* On the evidence provided to the Court at this time, the Court finds that Pacific Seafood has shown Mr. Coulston is likely to have acquired information pertaining especially to its business during the

course of his employment with Pacific Seafood, particularly with respect to certain marketing plans and product allocation. Accordingly, the third element is met.

However, even if Pacific Seafood were able to meet the elements under ORS 653.295, the Court finds that it has not demonstrated a likelihood of success under Oregon common law governing restraints on trade. Under Oregon common law, a non-compete agreement is enforceable if it is: 1) partial or restricted in its operation in respect to either time or place; 2) it comes on good consideration, and 3) it must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large as to interfere with the interests of the public. *Volt Servs. Grp., Div. of Volt Mgmt. Corp. v. Adecco Empl't Servs., Inc.*, 178 Or. App. 121, 126, 35 P.3d 329 (2001), *rev. den.*, 333 Or. 567 (2002); *Nike, Inc. v. McCarthy*, 379 F.3d 576, 584 (9th Cir. 2004). The parties dispute whether the agreement is reasonable. *See* Dkts. #13 at 13-15 and #23 at 18-20.

The agreement at issue purports to restrict Mr. Coulston in the following manner:

> Employee agrees that during the term of Employee's employment with the Company and for twelve (12) months after the termination of Employee's employment, Employee will not directly or indirectly engage in any business (including but not limited to any business that involved seafood distribution, or any so-called "broadline" or "broadliner" distribution business) which in any manner, (including directly or indirectly or wholly partially) competes, or prepares to compete, with the Company in any geographic area in which the Company does business, or becomes a director, officer, partner, limited partner, employee, agent, representative, stockholder, creditor or consultant to or for any such business. Specifically and without limiting the foregoing:
>
> (a) You will not, directly or indirectly, within the Territory described in the Information Section and within a two hundred and fifty-mile (250) mile radius of any of our offices for which you performed services during the term of this Agreement, enter into or engage generally in competition with us whether as an individual on your own or as a partner or joint venture with someone else, or as an employee or agent for some other person, firm or corporation, or as an officer, director or shareholder of a corporation;

> (b) You will not, on your own or in connection with anyone else, solicit, interfere with or attempt to entice away from us any person who is currently an employee of ours;
>
> (c) You will not, on your own or in connection with anyone else, solicit, interfere with or attempt to entice away from us any person, form or corporation which is at the time or was, at any time during the term of this Agreement, a customer of ours[.]

Dkt. #15, Ex. 1 at ¶ 7.

To satisfy the reasonableness requirement, the employer must show as a predicate "that [it] has a 'legitimate interest' entitled to protection.'" *McCarthy*, 379 F.3d at 584-85 (quoting *North Pac. Lumber Co. v. Moore*, 275 Ore. 359, 551 P.2d 431, 434 (Or. 1976)). "That interest need not be in the form of a trade secret or a secret formula; it may consist of nothing more than valuable 'customer contacts.'" *North Pacific Lumber Co. v. Moore*, 275 Ore. 359, 364, 551 P.2d 431, 434 (1976). Defendants argue that Pacific Seafood has failed to show such a legitimate interest.

First, Defendants argue that the geographic area is unreasonably broad, covering areas of the country in which Mr. Coulston never worked. While Pacific Seafood asserts that the geographic area is narrowly tailored only to address the geographic areas in which Mr. Coulston worked (Dkt. #13 at 14), the language of the agreement itself belies that interpretation. Indeed, as noted above, the agreement restricts Mr. Coulston from competing with Pacific Seafood "in any geographic area in which the Company does business" and "[s]pecifically, and without limiting" that limitation, "within a two hundred and fifty-mile (250) mile radius of any of our offices for which you performed services during the term of this Agreement." Dkt. #15, Ex. 1 at ¶ 7 (emphasis added). The term "geographic area" is not defined. Thus, based on the evidence at this stage in the litigation, it is not unreasonable to

interpret that language as effectively limiting Mr. Coulston from competing with Pacific Seafood in any state on the continental West Coast, including Alaska. That geographic areas is much broader than that in which Mr. Coulston actually worked, which appears to be primarily the Clackamas County area of Oregon State, and potentially the Puget Sound area of Washington.

Additionally, in deciding whether a non-compete agreement is reasonable, an important consideration is whether it merely restricts the former employee from luring away specific accounts (*i.e.*, those he serviced while employed) or whether it restricts the employee from competing at all. *Konecranes, Inc. v. Sinclair*, 340 F. Supp.2d 1126, 1131 (D. Or. 2004). In the former instance, the employee might gain an unfair advantage, such as goodwill and inside information, derived from his prior contacts with the client. *Id.* Indeed, in *North Pacific Lumber*, the court stated:

> It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him . . . to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business . . . .

551 P.2d at 434 (citation omitted). Thus, the court recognized that an employee's mere ability to take advantage of the employer's confidential information and thereby gain an unfair advantage may be sufficient for equity to restrain the employee from engaging in a competing business. *See id.*; *see also Farmers Ins. Exch. v. Fraley*, 80 Ore. App. 117, 720 P.2d 770, 771 (Or. Ct. App. 1986) (concluding that plaintiffs had a protectable interest where the employees "had access to confidential information which could be used to plaintiffs' detriment); *Volt*

Servs. Group v. Adecco Employment Servs., Inc., *supra* (explaining that an employee's knowledge of confidential information is sufficient to justify enforcement of the non-compete if there is a "substantial risk" that the employee will be able to divert all or part of the employer's business given his knowledge).

Given the nature of the information that Mr. Coulston acquired at Pacific Seafood, as discussed above, and his new position with Ocean Beauty, the Court cannot find at this time that there is a substantial risk Ocean Beauty would be able to divert a significant part of Pacific Seafood's business given Mr. Coulston's knowledge. Significant to this Court is the fact that the parties are involved in a commodity-based business. This distinguishes the instant matter from that in *McCarthy*, *supra*, at 586 (finding a non-compete enforceable because the employee had the highest access to confidential information concerning Nike's product allocation, product development and sales strategies, which would allow him to divert a substantial part of Nike's footwear sales to Reebok without explicitly disclosing this information to any of Reebok's employees). Pacific Seafood has provided no evidence to the Court suggesting that Mr. Coulston has actually diverted any business to Ocean Beauty based on his knowledge of Pacific Seafood's business practices, and, more significantly, has provided no evidence to the Court supporting the contention that he is likely to divert business to Ocean Beauty based on any such knowledge.

Finally, the Court is not convinced that Pacific Seafood will be able to demonstrate an enforceable agreement due to the many drafting problems with the non-compete document itself, and with other with related documents. At oral argument, Ocean Beauty highlighted problematic language contained in the document regarding the alleged geographic area encompassed in the non-compete, as recognized by the Court above. In addition, counsel

pointed to problems in the drafting of Mr. Coulston's job offer letter in January of 2014, which fails to note that his new position was subject to the existing non-compete agreement. *See* Dkt. #15, Ex. 3. Moreover, while Pacific Seafood attempts to remedy that problem by referencing the "standard terms and conditions" language contained in the letter, that language provides no assistance. When read in context of the letter, that language clearly references the standard terms and conditions contained in the Team Member Handbook, which does not contain the non-compete agreement at issue in this matter. *Id.*

Accordingly, at this time, the Court concludes that Pacific Seafood has not demonstrated a likelihood of success as to the enforceability of its non-compete agreement with Mr. Coulston.

b. Washington's UTSA

The Court finds that Defendant has failed to demonstrate a likelihood of success on the merits of its UTSA claim at this stage of the litigation. Defendant presents limited argument regarding Mr. Coulston's alleged misappropriation of trade secrets based on nothing more than speculation. Dkt. #13 at 15-16. Indeed, Defendant simply notes that Mr. Coulston knew or should have known that he had a duty to maintain the secrecy of Pacific Seafood's customers, product launch plans and marketing plans, and that such information is in his memory and cannot be erased. Dkt. #13 at 16. Defendant then states without legal or factual citation, "It is inconceivable that he could put aside in his mind the knowledge he has about product launch and marketing plans." *Id.* Further, Mr. Coulston has asserted that he did not take any Pacific Seafood documents or property with him when he left, and has not used any information of Pacific Seafood's to solicit new customers. Dkt. #24 at ¶ ¶ 32-34, 36-39 and 60. Without more, Defendant cannot demonstrate a likelihood of success on the merits at this time.