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JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C.A. No. 2013-CP-10-5579
Joshua Fay,	)	
Plaintiff,	)	**ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	)	
Total Quality Logistics, LLC,	)	
Defendant,	)	

This matter came before the Court by the parties' cross-motions for partial summary judgment concerning the enforceability of the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement") which Plaintiff Joshua Fay ("Fay") entered into when he became employed by the Defendant, Total Quality Logistics, LLC ("TQL"). TQL asserted counterclaims for breaches of the Agreement and for a declaratory judgment that the Agreement is enforceable, as a matter of law. Plaintiff moved for partial summary judgment on those counterclaims, as well as TQL's counterclaims for conversion and misappropriation of trade secrets.

The parties submitted initial and supplemental memoranda of law and facts supported by affidavits, and this Court heard oral arguments Friday, January 31, 2014. For the reasons explained below, the Court finds that the Agreement is enforceable and therefore grants the Defendant's motion for partial summary judgment on its counterclaims for a declaratory judgment and for breaches of contract, and denies the Plaintiff's motion for partial summary judgment on those same counterclaims of TQL, as well as Plaintiff's motion for partial summary judgment on TQL's counterclaims for conversion and misappropriation of trade secrets.

I. FINDINGS OF FACT

A. TQL'S offer of employment to Plaintiff.

TQL is an Ohio limited liability company providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. (Answer of Defendant to Amended Complaint and Counterclaims, ¶51; Affidavit of Hillary Kotlarz, ¶3).

TQL offered Plaintiff employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. (Affidavit of Anna Longar Wolf, ¶4). The offer of employment specifically informed the Plaintiff that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." (*Id.* at ¶6).

Thereafter, TQL employed Plaintiff on December 10, 2012. (Answer of Defendant to Amended Complaint and Counterclaims, ¶52; Affidavit of Hillary Kotlarz, ¶4). At the inception of his employment, and as an inducement to TQL's employing him, Plaintiff entered into an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"). (Answer of Defendant to Amended Complaint and Counterclaims, ¶53; Affidavit of Hillary Kotlarz, ¶5). Even the Plaintiff admits he signed the Agreement on his first day of employment. (Affidavit of Thomas Joshua Fay, ¶¶3-5).

B. The Agreement contains reasonable covenants against competition.

1. The Agreement restricts competition and solicitation in Section 9.

In Section 9, the Plaintiff agreed that, for a period of one year after his employment terminated, he would not "become employed by or engaged in a Competing Business ..., in a

capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." (Agreement, ¶9(b), ¶9(b)(ii)). The parties agreed that a "Competing Business" is "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." (Agreement, ¶9(d)). The parties agreed that "the Business" is "providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States." (Agreement, First Recital).

Plaintiff also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL." (Agreement, ¶9(b), ¶9(b)(iii)). He also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer[1] ..., or otherwise take any action to divert Business from TQL." (Agreement, ¶9(b), ¶9(b)(iv)).

2. The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that "All Confidential Information as described herein is

[1] "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason.

proprietary and the sole property of TQL." (Agreement, ¶3). The Agreement prohibits Plaintiff from "us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information." (Agreement, ¶4).

Plaintiff agreed that "engaging in an employment relationship with a Competing Business ... in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL." (Agreement, ¶6).

Plaintiff agreed that "TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder... ." (Agreement, ¶7). The term Confidential Information is defined in the Second Recital of the Agreement.

C. Plaintiff's extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Plaintiff's job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. (Affidavit of Hillary Kotlarz, ¶6). Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. *Id.* His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. *Id.*

Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (Affidavit of Hillary Kotlarz, ¶7). As part of his training and employment, Plaintiff had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. *Id.* The Plaintiff was introduced to the customer of TQL's for which Plaintiff began to work after his termination, The Brandt Companies, ("Brandt"), through his training on Load Manager.

Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (Affidavit of Hillary Kotlarz, ¶8). Before he was hired, Mr. Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.*

Following his termination on June 17, 2013, he began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to Brandt the same services that he had provided to Brandt while employed by TQL.

The Plaintiff initiated this action in part seeking a declaratory judgment that the Agreement is unenforceable. TQL counterclaimed asserting claims for a declaratory judgment

that the Agreement is enforceable, that Plaintiff breached his Agreement by providing services to Brandt, and that Plaintiff had misappropriated trade secrets in this pursuit.

II. LAW/ANALYSIS.

A. Standard for Summary Judgment.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a motion for summary judgment shall be granted "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 a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009).

B. Analysis.

1. The Agreement is valid under Ohio Law and does not offend the public policy of South Carolina.

Terms in a non-compete agreement may be construed according to the law of another state. *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005), citing *Standard Register Co. v. Kerrigan,* 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961). So long as the resulting agreement is valid as a matter of law and comports with public policy in South Carolina, our courts will enforce the agreement. *Id.*

Here, the restrictive covenants in the Agreement are valid under Ohio law, and they comport fully with South Carolina's public policy which generally requires the enforcement of contracts entered into freely. *Oxman v. Profitt*, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Under Ohio law, they are no greater than is required for

the protection of TQL; they do not impose undue hardship on the Plaintiff; and they are not injurious to the public. *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975). Under Ohio law, the Court must examine a non-competition covenant to determine the reasonableness of the restrictions. *Id.* To make that determination, the court should consider the absence or presence of a long list of factors: whether the covenant imposes temporal and spatial limitations, whether the employee had contact with customers, whether the employee possesses confidential information or trade secrets, whether the covenant bars only unfair competition, whether the covenant stifles the employee's inherent skill and experience, whether the benefit to the employer is disproportionate to the employee's detriment, whether the covenant destroys the employee's sole means of support, whether the employee's talent was developed during the employment, and whether the forbidden employment is merely incidental to the main employment. *Id.*

The Agreement imposes time and geographic limits; the restrictive covenants run for one year after Plaintiff's employment terminates and are limited to the Continental United States. (Agreement, ¶9(b), ¶9(d)). Plaintiff's argument that the geographic scope is somehow overbroad ignores the reach of TQL's business and its need for a nationwide noncompete. Moreover, Plaintiff was able to establish contact with TQL's customers and prospects across the United States and Canada. (Supplemental Affidavit of Hillary Kotlarz, ¶4). For example, TQL's records show that Plaintiff contacted customers and prospects located in thirty-one (31) cities in five (5) Canadian provinces, and four hundred forty (440) cities in the Continental United States located in forty-four (44) states, the District of Columbia, Hawaii, and Puerto Rico. *Id.* at ¶5. Clearly, the geographic scope of the Agreement is enforceable. Indeed, it is drawn more narrowly than the actual areas within which Plaintiff was able to establish contacts, which included Hawaii and

Puerto Rico. Obviously, the Plaintiff had contact with many customers—and he admits for example that he had contact with The Brandt Companies ("Brandt"). (Affidavit of Thomas Joshua Fay, ¶¶7-12).

Plaintiff possesses TQL's confidential information and trade secrets. Plaintiff underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (Affidavit of Hillary Kotlarz, ¶7). As part of his training and employment, Mr. Fay had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. *Id.*

TQL's Agreement only bars unfair competition. Before he was employed by TQL, Plaintiff had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (Affidavit of Hillary Kotlarz, ¶8). Before he was hired, Plaintiff did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. *Id.* In fact, at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. *Id.* As a result, there is nothing unfair about preventing Plaintiff from competing in this business, from soliciting TQL's clients, or from diverting business of TQL's clients away from TQL to Plaintiff's competing business, JF Progressions, Incorporated. Finally, by its terms, the restrictions were not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL. (Agreement, ¶4).

Plaintiff's argument that his noncompete prevents him from working in any capacity in the intermodal transportation industry is overstated: his noncompete permits him to hold several positions, including, by way of example, the following jobs: dispatcher for a truck company, driver for a truck company, carrier compliance coordinator, safety compliance officer with a motor carrier, carrier coordinator with a motor carrier, logistics planner for any company other than a freight broker, freight broker for an ocean or air freight company, freight broker for a non-vessel operating common carrier, barge or intermodal freight company, customs broker or international freight broker, produce broker, lumber broker, and an alloy broker.

The covenants do not stifle the Plaintiff's inherent skill and experience, because at the time of his hire Plaintiff had previously worked for his parents' company, T. Mark Fay Consulting which was not in the transportation or logistics industry. The benefit to TQL in enforcing the Agreement is not disproportionate to the Plaintiff's detriment. At oral argument, Plaintiff's counsel represented to the Court that Plaintiff was earning as much as $100,000 annually from his work with Brandt alone. These are substantial damages to TQL.

Plaintiff also argued that under the covenant restricting the disclosure of trade secrets and confidential information, any information that Plaintiff received during his employment with TQL would be considered a proprietary trade secret, even if it were information otherwise in the public domain or had been obtained by TQL from another competitive business. This again overstates the effect of the Agreement. Although the definition of Confidential Information in the Agreement is certainly a robust expression of the information protected, a close reading shows that it genuinely focuses on secret and/or proprietary information concerning TQL and/or its customers:

> **WHEREAS**, TQL develops and maintains confidential proprietary Information (hereinafter referred to as, "Confidential Information"), including but not limited

> to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; Information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with Customers, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures. Confidential Information also includes any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. This Information may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form. Confidential Information may be protected by patents, copyrights, or other means of protection; ...

(Agreement, Second Recital). Thus, as an employee of TQL, Plaintiff learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigerated unit during transit; how to locate flag cars and permits for a

motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain periods of the year (e.g., produce, landscaping, building materials); where products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed– this will help brokers understand when truck costs and availability will "tighten up" because of increased demand and how to obtain backhauls for motor carriers and how to price them.

Courts in Ohio that have considered whether TQL's Agreement should be enforced with a preliminary injunction or temporary restraining order, both drastic remedies, have held that it is enforceable and granted the preliminary relief. *See Jeffrey A. Dangelo vs. Total Quality Logistics, LLC*, Case No. 1:09cv512 (S.D. Ohio 2009); and *Total Quality Logistics, LLC vs. Michael Siano*, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011).

For the foregoing reasons, I find that the Agreement is valid as a matter of Ohio law and comports with public policy in South Carolina.

2. Plaintiff's motion for summary judgment on TQL's claims for breaches of the confidentiality provisions in his Agreement and for conversion and misappropriation of trade secrets are denied.

Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). For the same reason, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991).

Plaintiff's argument that he did not use confidential information to solicit Brandt's business is nothing more than a bald denial and side steps the fact that he was introduced to Brandt and taught how to sell to them by way of his exposure to a range of confidential information that TQL alleges constitutes trade secrets. (Affidavit of Hillary Kotlarz, ¶¶7-9). He was entrusted with such nonpublic information as TQL's pricing, profitability and margin information, as well as non-public information about Brandt and other customers, TQL's proprietary software system, Load Manager, TQL's marketing and business strategies, and how to develop leads and build loads. *Id.*

In light of Plaintiff's complete disregard of his contractual obligations not to solicit customers like Brandt, TQL is entitled to conduct discovery to determine the extent of his misconduct and misuse of confidential information. Particularly appropriate in the face of Plaintiff's premature motion is the explanation Judge Lord provided in *Greenberg v. Croydon Plastics Co.*:

> Plaintiffs in trade secret cases, who must prove by a fair preponderance of the evidence disclosure to third parties and use of the trade secret by the third parties, are confronted with an extraordinarily difficult task. Misappropriation and misuse can rarely be proved by convincing direct evidence. In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what the plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants' witnesses who directly deny everything.

378 F. Supp. 806, 814 (E.D. Pa. 1974) (emphasis added). Finally, TQL included a very explicit list of confidential information and trade secrets it alleges Plaintiff converted. *See* ¶64, Answer of Defendant to Amended Complaint. Those allegations fully inform the Plaintiff of the nature of TQL's claim.

III. CONCLUSION.

For the foregoing reasons, the Plaintiff's partial motion for summary judgment is denied, and TQL's motion for partial summary judgment is granted. The parties are instructed to conduct discovery focused on the damages to TQL that proximately flow from the Plaintiff's breaches of the Agreement to be presented to the trier of fact.

Roger M. Young, Sr.
Judge, Ninth Judicial Circuit Business Court

April 14, 2014.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDUCIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2103-CP-10-5579
THOMAS JOSHUA FAY)	
)	
Plaintiff,)	
)	Order Amending April 14, 2014 Order
vs.)	and Certifying Case for Appeal Under
)	SCRCP 54(b)
TOTAL QUALITY LOGISTICS,)	
LLC)	
)	
Defendant.)	

This case is postured differently from the typical action that involves a non-competition agreement. Normally, these suits are initiated by the former employer against the employee seeking to enjoin the former employee from violating a non-competition agreement. In this case, the former employee is the plaintiff, and the defendant is the former employer. The Plaintiff moved for summary judgment seeking a declaratory judgment that that agreement was unenforceable. Conversely, the defendant sought summary judgment on its counterclaim for a declaratory judgment that the noncompetition agreement is enforceable. The plaintiff also sought summary judgment on the defendant's counterclaims for conversion and misappropriation of trade secrets, which I denied.

I do not change the substantive reasoning of my April 14, 2014 Order Granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment. My purpose in writing today is to clarify two things. First, the April 14th order found the defendant's noncompetition agreement valid and enforceable because Ohio law would have found this agreement to be reasonable, not

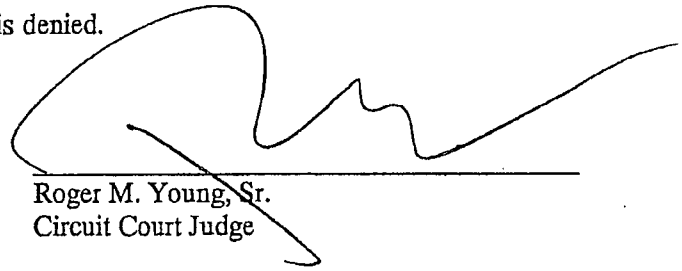
because it could have been have "blue-penciled." As noted on pages 6 through 11 of the April 14, 2015 Order, I believe the agreement was valid under the reasonableness analysis required by Ohio law as set forth in the leading Ohio case of Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975). Since it would be valid under current Ohio law, it is enforceable in South Carolina unless it violates the public policy of South Carolina. South Carolina appellate courts have not previously approved a nationwide geographic limitation, and I believe this case provides a vehicle for South Carolina appellate courts to revisit the much narrower current geographic limitations usually imposed under South Carolina law. South Carolina law must recognize that national and multinational corporations now transact business far beyond the narrow current geographic limitations typically upheld under South Carolina law. National and multinational corporations recruit and train highly technical personnel who often conduct business in multiple states and around the world. This 21st century reality should be a factor that our appellate courts may want to re-examine in light of modern business conditions and practices.

Because this matter is for partial summary judgment, involves important policy considerations that should be examined by the appellate courts, and there is no just reason for delay, I certify this issue pursuant to SCRCP 54(b).

The second thing I wish to clarify is that my April 14th order final paragraph instructed the parties to conduct discovery focused on the damages owed to the defendant proximately flowing from the plaintiff's breach of the agreement. This was incorrect as I made no finding that the plaintiff in fact violated the agreement. My order was limited to the question of whether the agreement's non-competition clause was valid and

enforceable. Whether the plaintiff violated the agreement is highly contested, and therefore the last sentence of the April 14, 2014 order is deleted, and the defendant's motion for summary judgment seeking a finding that the plaintiff breached the agreement and misappropriated trade secrets is denied.

It is so ordered.



August 4, 2014
Charleston, SC

Roger M. Young, Sr.
Circuit Court Judge