SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

HCT GROUP HOLDINGS LIMITED et al. Plaintiffs, vs. NICHOLAS GARDNER, et al., Defendants	Case No.: BC645615 Order Enjoining Defendant Gardner from Specified Competitive Conduct Dept. 86 March 10, 2017 9:30 a.m.

The issue raised by the evidence submitted by the opposing parties in this case is the tension between the "legally recognized [principle] that a former employee may use general knowledge, skill, and experience acquired in his or her former employment in competition with a former employer [but] may not use confidential information or trade secrets in doing so." *Morlife Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1519-1520. The California Supreme Court noted in Continental Car-NA-Var Corp. v. Mosely (1944) 24 Cal.2d 104, 110, "Equity will to the fullest extent protect the property rights of employers in their trade secrets . . . but public policy and natural justice require that equity should also be solicitous for the right inherent in all people

. . . to follow any of the common occupations of life . . . . A former employee has the right to engage in a competitive business for himself and enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted . . . [citation]." See also *Retirement Group v. Golante* (2009) 176 Cal.App.4th 1226, 1237 ("[T]he courts have repeatedly held a former employee may be barred from soliciting existing customers to redirect their business away from the former employer and to the employee's new business *if the employee is utilizing trade secret information to solicit those customers* [citation]. Thus it is not the solicitation of the former employer's customers, but is instead the *misuse of trade secret information* that may be enjoined. [citations].") (Emphasis in original.)

As noted *Morlife* and quoted in *Retirement Group*, "courts are reluctant to protect customer lists to the extent they embody information . . . 'readily ascertainable' through public sources [but] where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market . . . ." (*Morlife,* 56 Cal.App. 4th at 1521-22.) While Business & Professions Code Section 16600 "bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin *tortious* conduct (as violative of either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer." (*Retirement Group*, at 1240.)

Plaintiffs HCT Group Holdings Limited et al. (HCT) have established that defendant Nicholas Gardener, by reason of his role facilitating sales to cosmetic company customers (large companies such as Shiseido and L'Oreal and their subsidiaries selling under various trademarks), necessarily possesses particularized information about those customers. While it appears that the "customer list" of such major companies selling cosmetics can be readily ascertained from public

sources, there is no admissible evidence that each client with whom Gardner dealt while working at HCT (each individual within the customer cosmetic companies who served as a "gatekeeper" for business with packaging companies such as HCT) is readily ascertainable from public sources. The same is true for additional historical information to the extent Gardner learned the information in connection with servicing such clients while at HCT rather than from subsequent independent sources:

1. the price each such client/customer agreed to pay HCT on each order,
2. HCT's margin on each order for such client/customer,
3. the identity of each supplier (packaging manufacturer) Gardner successfully recommended to such client/customer and the tools used by such supplier,
4. such client's/customer's view as to the adequacy or inadequacy of the packaging manufactured by the suppliers,
5. each client's/customer's satisfaction or dissatisfaction with the supplier's pricing, and/or the quality of the supplier's manufacturing services,
6. the identities of filling companies Gardner recommended to such client/customer in the past,
7. such client's/customer's satisfaction or dissatisfaction with the filling companies,
8. the price charged by the filling companies on any order from such client/customer.

While a diligent competitor could identify, from public sources such as *panjiva.com,* a long list of HCT's past suppliers (packaging manufacturers), that information has little economic value. It is Gardner's knowledge about the particular products historically manufactured by each supplier that enables him to quickly identify the best manufacturer for a new order and negotiate the best price. Based on historical transactions, Gardner knows each manufacturer's strengths and weaknesses, tooling capabilities and pricing – information that cannot be obtained from any public sources. It is the knowledge about these particularized (confidential) details of Gardner's historical dealings with customers, suppliers and filling companies that places him in a position to compete unfairly with HCT, using confidential and proprietary information.

In response to HCT's ex parte application, the Court issued an Order to Show Cause why Defendants should not:

> "(i) be preliminarily enjoined, pending trial of this action from accessing, disclosing and utilizing (for competitive purposes) HCT's customer and supplier lists, customer and supplier relationship strengths and weaknesses, confidential pricing information (including margins), proprietary solutions and initiatives, design renderings, product development, and any other trade secrets, proprietary information, and confidential information that Gardner took or received from HCT, and from soliciting HCT's customers and suppliers."

The language in the Order to Show Cause (which was drafted by HCT) is overly broad. The Court finds HCT has failed to establish that identities of its customers ("customer list") or the identities of its suppliers ("supplier list") is a trade secret or is comprised of information not ascertainable from public or industry sources. Under California law, the Court cannot enjoin Gardner from "soliciting HCT's customers and suppliers."

With respect to the language, "any other trade secrets, proprietary information and confidential information that Gardner took or received from HCT," HCT has failed to establish Gardner took with him or presently has access to any physical or electronic proprietary or confidential data or information. The Court therefore has no reason to enjoin Gardener from using such information.

Gardner does, of course, have his memory of particularized dealings with customers, suppliers and filling companies on the myriad customer orders he obtained and fulfilled while working at HCT. The Court is satisfied that HCT has demonstrated a probability of success with respect to its right to prevent Gardner from exploiting such information and that the balance of hardships weighs in HCT's favor with respect to it. However, the language of HCT's proposed injunction, which identifies "customer and supplier relationship strengths and weaknesses, confidential pricing information (including margins), proprietary solutions and initiatives, design renderings, product development" is vague and indefinite. At most, HCT has the right to prevent

Gardner from exploiting his knowledge of historical transactions as a means of unfairly undercutting HCT.

The court therefore narrows the injunction and hereby orders Gardner and all persons acting in concert with or at the direction of Gardner, to refrain from soliciting clients ("gatekeeper" employees of customers) without ascertaining their identity from non-HCT sources. The Court further enjoins Gardner, and all persons acting in concert with or at the direction of Gardner, from utilizing HCT's confidential information identified below to the extent Gardner learned the information while employed at HCT rather than from independent sources subsequent to his employment at HCT:

1. the price each such client/customer agreed to pay HCT on each order,
2. HCT's margin on each order for such client/customer,
3. the identity of each supplier (packaging manufacturer) Gardner successfully recommended to such client/customer and the tools used by such supplier,
4. such client's/customer's view as to the adequacy or inadequacy of the packaging manufactured by the suppliers,
5. each client's/customer's satisfaction or dissatisfaction with the supplier's pricing, and/or the quality of the supplier's manufacturing services,
6. the identities of filling companies Gardner recommended to such client/customer in the past,
7. such client's/customer's satisfaction or dissatisfaction with the filling companies,
8. the price charged by the filling companies on any order from such client/customer.

A court must require an undertaking in a sum sufficient to compensate the enjoined party from damages caused by a wrongfully issued injunction. This can include prospective attorney's fees to the extent they relate to efforts to appeal or dissolve a wrongfully issued injunction. See, e.g., *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App. 3d 1, 15. In this case (unlike *Abba*), the Court is not enjoining Gardner from soliciting clients of his former employer. This injunction only prevents him from capitalizing on confidential information learned in the course of his employment in order to garner new orders from customers. Having received no evidence or

argument that the particularized information addressed in the Court's injunction was not protected as confidential or that it does not have economic value, the Court regards the potential attorney's fees for services relating to appeal or dissolution of this injunction as modest. Because Defendants have declined to submit evidence as to Gardner's present means of earning a living, the extent to which he is competing with Plaintiffs by soliciting orders for packaging from HCT customers/ clients, Gardner's profit margins on potential orders, or any estimate of the volume of anticipated future orders from customers that may be compromised as a result of this injunction, the Court has no evidentiary basis for assuming that Gardner's losses resulting from this injunction will be sizable.

The Court therefore sets the relatively modest undertaking at $50,000 and orders Plaintiffs to file such an undertaking within ten days of the date of this Order.

Dated: MAR 1 0 2017

AMY D. HOGUE, JUDGE

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JUDGE OF THE SUPERIOR COURT