SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - March 26, 2010

EVENT DATE: 04/09/2010 EVENT TIME: 02:00:00 PM DEPT.: C-62

JUDICIAL OFFICER:Ronald L. Styn

CASE NO.: 37-2008-00090684-CU-BT-CTL

CASE TITLE: SAN DIEGOCOUNTY SCHOOLS FRINGE BENEFITS CONSORTIUM VS. ALLRED

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Summary Judgment / Summary Adjudication (Civil)
CAUSAL DOCUMENT/DATE FILED: Notice of Motion and Supporting Declarations, 12/07/2009

The court first addresses the evidentiary issues. Plaintiff San Diego County Schools Fringe Benefits Consortium's evidentiary objections 11, 12, 13, 15 are sustained; 2-10, 14, 23, 26, 54, 58, 59, 63, 66, 71, 72 are overruled; objections 1, 18-22, 24, 25, 27-53, 55-57, 60-62, 64, 65, 67-70, 73-84 are overruled because the objected to testimony is not specified. *Fibreboard Paper Products Corporation v.* East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO*, et al.* (1964) 227 Cal.App.2d 675, 712. Defendants Barry Allred, Christopher Dougherty, Cristinha Furtado, Lori Lin, Mary Seki and Michael Zeiger's evidentiary objection 15 is sustained; objections 7, 9, 20 are overruled; objections 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18 and 19 are overruled because the objected to testimony is not specified. *Fibreboard,* 227 Cal.App.2d at 712.

The court then rules as follows. Defendants Barry Allred, Christopher Dougherty, Cristinha Furtado, Lori Lin, Mary Seki and Michael Zeiger's motion for summary judgment is denied. Defendants' alternate motion for summary adjudication is granted in part and denied in part.

Breach of Contract

Defendants' motion for summary adjudication is **granted**. The complaint alleges Defendants breached their written contracts with the Consortium by misappropriating trade secrets and using this information to inappropriately solicit exclusive Consortium members in competition with the Consortium. [FAC ¶ 69]

As to allegations Defendants improperly solicited Consortium members, the Consortium relies on The "Independent Contractor Agreement to Serve as Office of Supervisory Jurisdiction" signed by Allred and the "Registered Representative Agreement" signed by Dougherty, Lin, Seki and Michael Zeiger. These agreements contain identical "non-solicitation" covenants.

A. Non-Disclosure of Trade Secrets, Customer Lists, and Other Proprietary Information:

The OSJ/Registered Representative agrees not to use, disclose or communicate in any manner, proprietary information about FBC, its operations, clientele, or any other proprietary information, that relates to FBC or its operations. OSJ/Registered Representative will regard and retain as confidential

and will not divulge, make available or disclose (directly or indirectly) to any third parties, or use of any unauthorized purposes, either during or after the term of this Agreement with FBC, any proprietary or confidential information, OSJ/Registered Representative will receive or have received during or in consequence of service of OSJ/Registered Representative for FBC, without the written consent of an authorized representative of FBC.

"Confidential Information" shall include, but is not limited to, trade secrets, business plans, customer lists, customer proprietary information, FBC member lists, partners, finances, any other data received under circumstances reasonably interpreted as imposing an obligation of confidentiality and related to the business or affairs of FBC. Confidential information will include any and all information in written, or, or magnetic media form or conveyed by any other method of communication. OSJ/Registered Representative agrees not to translate, modify, reproduce, copy, disassemble, or decompile any confidential information without the express prior written consent of FBC.

D. Non-Solicitation Covenant

OSJ/Registered Representative agrees that for a period of one (1) year following termination of this Agreement, for any reason whatsoever, OSJ/Registered Representative will not solicit customers or clients of FBC, including, but not limited to, all FBC PEA members that were serviced by OSJ/Registered Representative during the term of this Agreement. By agreeing to this covenant, OSJ/Registered Representative acknowledges that OSJ/Registered Representative contribution to FBC are unique to FBC's success and OSJ/Registered Representative had significant access to FBC's customers lists, which are trade secrets, and other confidential proprietary information regarding FBC's PEA members.

[SSUMF 74]

Pursuant to Business & Professions Code § 16600 [Unauthorized contracts]: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Section 16600 expresses California's strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice. (*Advanced Bionics Corp. v. Medtronic, Inc*. (2002) 29 Cal.4th 697, 706 [128 Cal. Rptr. 2d 172, 59 P.3d 231]; *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 659 [60 Cal. Rptr. 2d 677] ["section 16600 was adopted for a public reason"].) California courts "have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 946 [81 Cal. Rptr. 3d 282, 189 P.3d 285] (*Edwards*).) "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." (*Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 255 [67 Cal. Rptr. 19]; see *D'Sa v. Playhut, Inc*. (2000) 85 Cal.App.4th 927, 933 [102 Cal. Rptr. 2d 495] (*D'Sa*).)

Dowell v. Pacesetter, Inc. (2009) 179 Cal.App.4th 564, 574.

The court finds the "Non-Solicitation Covenant" similar to the non-solicitation clause language found invalid in *Dowell* and *Edwards*.

[T]he broadly worded nonsolicitation clause prevents the employees for a period of 18 months

postemployment from soliciting any business from, selling to, or rendering any service directly or indirectly to any of the accounts, customers or clients with whom they had contact during their last 12 months of employment. Ultimately, these provisions restrain the employee from practicing their chosen profession. Indeed, these clauses are similar to those found to be void under section 16600. (See, e.g., *D'Sa, supra*, 85 Cal.App.4th at p. 931; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407 [75 Cal. Rptr. 2d 257]; *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 860 [27 Cal. Rptr. 2d 573] (*Metro Traffic*).)

Dowell, 179 Cal.App.4th at 574.

The second challenged clause prohibited Edwards, for a year after termination, from 'soliciting,' defined by the agreement as providing professional services to any client of Andersen's Los Angeles office." The agreement restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession. (See *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429 [7 Cal. Rptr. 3d 427] [distinguishing "trade-route" and solicitation cases that protect trade secrets or confidential proprietary information].) The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession. (See *Muggill, supra*, 62 Cal.2d at pp. 242–243.)

Edwards, 44 Cal.4th at 937.

The broadly worded "Non-Solicitation Covenant" prohibits Defendants for a period of one year following termination from soliciting "for any reason whatsoever" "customers or clients of FBC, including, but not limited to, all FBC PEA members that were serviced by OSJ/Registered Representative during the term of this Agreement." Defendants submit evidence their main client base is public school employees. [SSUMF 60] It is undisputed that Defendants serviced FBC customers for "ancillary" business. [SSUMF 72-73] By prohibiting Defendants from contacting all "customers or clients of FBC" the non-solicitation covenant restrains Defendants from their ability to practice their profession. Therefore, under the authorities cited above, the non-solicitation clause is invalid.

As to allegations Defendants breached their contracts by "misappropriating trade secrets and confidential information" under *The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, such alleged breach is remedied, not via this breach of contract cause of action, but via the Consortium's misappropriation of trade secrets cause of action.

[S]ection 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 (Civ. Code, § 3426 et seq.) 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. Viewed in this light, therefore, the conduct is enjoinable *not* because it falls within a judicially created "exception" to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of any contractual undertaking.

Galante, 176 Cal.App.4th at 1238.

In light of this ruling the court does not reach the issues of mutual assent and whether the Advisors were excused from compliance with the written contracts.

Breach of Implied Contract (against Furtado)

Defendants' motion for summary adjudication is **granted**. The complaint alleges that Advisor Furtado is bound by the terms of the written Registered Representative Agreement. [FAC ¶ 74] However, Defendants submit evidence that Furtado refused to sign the written contract, despite being asked on several occasions by representatives of the Consortium to do so. [SSUMF 358] "It is fundamental that every contract requires mutual assent or consent. (Civ. Code, § 1550; 1 Witkin, Summary of Cal. Law (1960) p. 39.) The determination whether it is present is made by the use of an objective test, the manifestations or expressions of assent being controlling. (*King* v. *Stanley*, 32 Cal.2d 584, 591 [197 P.2d 321].) (2) "Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." (1 Witkin, Summary of Cal. Law (1960) p. 39.)" *Russell v. Union Oil Company* (1970) 7 Cal.App.3d 110, 114. The case relied upon by the Consortium, *Southern California Acoustics Company, Inc. v. C.V. Holder, Inc.* (1969) 71 Cal.2d 719, is distinguishable. In contrast to the issue of whether silence is sufficient acceptance of an offer, Furtado specifically refused to sign the written contract, despite being asked to on several occasions. In light of evidence Furtado refused to sign the written contract, the terms, including the non-solicitation covenant, cannot be enforced against Furtado. Even if the Consortium could establish the written contract as enforceable against Furtado, for the reasons stated above, the Consortium's breach of contract cause of action still fails.

Misappropriation of Trade Secret

Defendants' motion for summary adjudication is **denied.**

California's version of the UTSA defines "trade secret" as "information, including a ... compilation ... that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) Whether information is a trade secret is ordinarily a question of fact. (*In re Providian* Credit Card Cases (2002) 96 Cal.App.4th 292, 300 [116 Cal. Rptr. 2d 833]; *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1430 [7 Cal. Rptr. 3d 427]; *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521 [66 Cal. Rptr. 2d 731].)

San Jose Construction, Inc. v. S.V.C.C., Inc. (2007) 155 Cal.App.4th 1528, 1537.

- *Trade Secret*

In its trade secret designation and in discovery, the Consortium identifies its trade secret as follows: "FBC contends that FBC's proprietary client and member list were maintained in any form and correlated information on members containing the name, social security number, school district employer, date of hire, home and work telephone number, mailing address, name and social security number of primary beneficiary and secondary beneficiary and relationship to member, the member's deferred compensation plan preferences, salary information, asset allocation, and total amount of assets in the

program are trade secrets." [Consortium's response to SSUMF 164] The trade secret is, essentially, a "customer list."

With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is "readily ascertainable" through public sources, such as business directories. (*American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1326 [228 Cal. Rptr. 713].) On the other hand, 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. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. (See *Klamath-Orleans Lumber, Inc. v. Miller*, *supra*, 87 Cal. App. 3d at p. 461; *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 19-20 [286 Cal. Rptr. 518].) As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret. (*Courtesy Temporary* Service, Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1287 [272 Cal. Rptr. 352].)

Morlife, Inc. v. Perry (1997) 56 Cal.App.4th 1514, 1520-1522.

The Consortium submits evidence establishing anyone with this compilation of information would have a competitive advantage. [Consortium's response to SSUMF 164; Consortium's SS 4] The Consortium also submits evidence its trade secret information is contained in various databases and the various sources by which the Consortium gathers the information contained within the databases. [Consortium's response to SSUMF 164] The court finds triable issues of fact as to whether the information sought to be protected is a "trade secret" under CC § 3426.1.

The court is not persuaded by evidence showing some of the information sought to be protected is available as a matter of public record [SSUMF 165]. While certain of the information may be publically available, it is the compilation of all information regarding each member, including "particular needs or characteristics" that is the key feature of the customer list. See, *American Credit Indemnity Company v. Sacks* (1989) 213 Cal.App.3d 622, 630-631. Also, the non-public information is significant – home address, home telephone number, personal email address and salary information.

The court is not persuaded by Defendants' argument they are required to retain certain of the protected information. Defendants fail to set forth facts establishing such a requirement on the Defendants in their capacity as Registered Representatives. Evidence Defendants used only their own ACT! database and the AIG/SagePoint database to identify clients to send the August 2008 letters [SSUMF 163] is not dispositive because the Consortium submits evidence the ACT! database was compiled based on information provided to the Consortium by DCP members for purposes of enrollment in the DCP program (i.e., confidential trade secret information). [Consortium's Separate Statement 52, 60, 82] Similarly, the Consortium submits evidence the AIG/SagePoint database contains information only on those DCP participants with "ancillary" business. [Consortium's response to SSUMF 164] Thus, Defendants use of this database does not demonstrate the information is readily available.

Defendants fail to provide authority allowing for summary adjudication for failure to describe its trade secrets with the required specificity. Both of the cases cited [*Whyte v. Schlage Lock Company* (2002) 101 Cal.App.4th 1443 and *Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 1453] involve a demurrer, not a motion for summary judgment/adjudication.

- *Efforts to Protect Information*

The court finds triable issues of fact as to whether the Consortium undertook sufficient efforts to protect its trade secret information.

A person or entity claiming a trade secret is also required to make "efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d)(2).) A leading treatise has collected the cases of successful and unsuccessful claims of secrecy protection; among the factors repeatedly noted are restricting access and physical segregation of the information, confidentiality agreements with employees, and marking documents with warnings or reminders of confidentiality. (Trade Secrets Practice in Cal. (Cont.Ed.Bar 2d ed. 1999) §§ 4.9-4.10, pp. 79-86.)

In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 304.

Defendants separate statement states the Consortium's third-party administrator National Benefit Services, LLC manages an independent database containing information from every individual enrolled in the DCP program and that neither the Consortium nor NBS required its employees to sign a confidentiality agreement. [SSUMF 166] However, the evidence cited does not establish this fact. Defendants submit evidence neither Puplava nor his clerical assistant were required to sign agreements as a condition of their employment. [SSUMF 119] However, such evidence does not establish the Consortium failed to take steps to protect its trade secret information. The Consortium submits evidence its trade secret information is kept confidential, in password protected databases and that the Consortium required each of the Defendants to sign an agreement with a confidentiality provision. [Consortium's SS 11, 18, 23-25, 28, 30, 32, 33, 37-42, 52, 60, 86, 92, 95-97, 107,] The Consortium also submits evidence that, after the change to Nationwide, the Consortium took steps to prohibit Defendants access to the database [Consortium's SS 100-101]. Evidence Advisor Furtado was allowed access to confidential information, even though she did not sign the written contract, is not dispositive because the Consortium submits evidence that it verbally advised all Defendant Advisors, including Furtado, on several occasions that the information was confidential and proprietary. [Consortium's SS 96, 98]

Drawing all reasonable inferences in the light most favorable to non-moving party, [*Aguilar v. Atlantic* Richfield Co. (2001) 25 Cal.4th 826, 843] the court finds the evidence presented sufficient to create triable issues of material fact as to whether the information sought to be protected is a trade secret and whether the Consortium took sufficient efforts to protect its trade secret information.

Statutory Libel

Defendants' motion for summary adjudication is **denied**. The general rule set forth in *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 535 is "the right of free speech prevents the government from suing for defamation, i.e., criticism of the government is absolutely privileged." *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 535. *City of Long Beach*, a malicious prosecution case, relies on *City of Albany v.* Meyer (1929) 99 Cal.App.651, a defamation case. *City of Albany*, quoting from the court in *Chicago v. Tribune Co.* (1923) 307 Ill. 595, discussed the rationale behind this rule

". . . every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well

as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."

City of Albany, 99 Cal.App. at 654. In *City of Albany* the city filed a libel action against a publisher based on the publication of an article referring to the dire financial status of the city. The financial status of a municipality is clearly a matter of public concern and subject to the general rule. In this case, the only evidence Defendants submit specific to the libel cause of action is evidence Defendants sent two letters to DCP program participants. [SSUMF 221] Such evidence is insufficient to establish these letters as involving a matter of public concern so as to be subject to the general rule barring a libel cause of action against a public entity.

Defendants' Points & Authorities fails to cite to their separate statement and their separate statement fails to cite to any evidence establishing the contents of the August 2008 letters as fact or opinion. As such, there is no evidence allowing the court to examine the "totality of the circumstances" to determine if the if the letters are "actionable fact or nonactionable opinion" as required under *Baker v. Los Angeles* Herald Examiner (1986) 42 Cal.3d 254, 260. Similarly, Defendants fail to cite to any evidence establishing the contents of the August 2008 letters as true. Absent such evidence, there is no basis to summarily adjudicate this cause of action.

Intentional Interference with Prospective Economic Advantage
Intentional Interference with Contract

Defendants' motion for summary adjudication is **denied**.

To the extent Defendants' motion as to this cause of action is premised on summary adjudication of the Consortium's cause of action for libel, for the reasons set forth above, Defendants fail to establish the Consortium is barred from pursuing a libel claim and that the August 2008 letters are privileged as opinion or as true. To the extent Defendants' motion as to this cause of action is premised on summary adjudication of the Consortium's cause of action for misappropriation of trade secrets, for the reasons stated above, the court finds there are triable issues of material fact as to whether the database information is a trade secret and whether Defendants misappropriated the trade secret.

Misappropriation of Name

Defendants' motion for summary adjudication is **denied**. In their Points & Authorities, Defendants state they have discontinued use of the FBC name. However, Defendants fail to cite to and/or provide evidence to support this statement. Defendants rely on the absence of evidence of damages as a result of Defendants' use of the "FBC" name. As evidence, Defendants rely on the Consortium's response to a series of interrogatories requesting identification of "each time the Advisors diverted clients or moved qualified funds out of FBC's DCP, both before and after August 5, 2008 and each time a plan participant moved funds out of the Program as a result of the Advisors' alleged conduct." [SSUMF 359] None of these interrogatories address the issue of whether the Consortium sustained damages as a result of Defendants' alleged misappropriation of the FBC name. As such, Defendants fail to meet their burden on summary judgment; the burden does not shift to the Consortium to come forth with evidence of damages. See, *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573; *Andrews v. Foster Wheeler,* LLC (2006) 138 Cal.App.4th 96, 106-107.