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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO
10 UNLIMITED JURISDICTION
11

12 ROGER A. CARTER
13 Plaintiff
14 v.
15 GOLDMAN SACHS & CO,
16 Defendant.
17

Case No.: 320038

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Hearing Date: March 30, 2001
Time: 11:00 a.m.
Dept.: 302
(Hon. A. James Robertson II)

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1 **I. INTRODUCTION**

2 By this action, plaintiff Roger A. Carter seeks to prevent his former employer, Goldman
3 Sachs & Co. (“Goldman”), from attempting to enforce an illegal employment contract that Goldman
4 foisted on Carter and other Goldman brokers. Goldman should not be permitted to file any action
5 outside California seeking to enforce that contract, and Carter should be allowed to begin his new
6 employment in California free of any illegal restraints, for two reasons. First, as shown in the very
7 recent case of Advanced Bionics Corporation v. Medtronic, Inc., 01 C.D.O.S. 2339 (2d Dist., March 22,
8 2001),¹ the contractual provisions upon which Goldman would rely in bringing any action in another
9 state – the non-compete and non-solicitation clauses – are unenforceable under California law and
10 contrary to the fundamental public policy of this State. Second, Mr. Carter has already initiated an
11 arbitration proceeding before the National Association of Securities Dealers, and any action brought by
12 Goldman in the courts of another state would be a blatant attempt to end run this properly commenced
13 arbitration. Goldman thus should not be permitted to force Mr. Carter to defend against a duplicative
14 action that would seek to enforce a contract with provisions that are illegal under California law. For all
15 of these reasons, Mr. Carter’s application for a TRO should be granted.

16 **II. STATEMENT OF FACTS**

17 Roger Carter is a highly successful and productive broker, who has spent his entire career
18 with Goldman Sachs. Mr. Carter began working in the St Louis, Missouri Goldman office in 1980. In
19 1988, he transferred to the San Francisco office. In 1996, at the request of his employer, Mr. Carter
20 moved to Memphis, Tenn. In order to induce him to move from San Francisco to Memphis, Goldman
21 promised Mr. Carter that, in Memphis, his already substantial book of business would be increased
22 through the addition of clients from another broker, Henry Levy, who was planning to retire. Goldman
23 informed Mr. Carter, in writing, that the transfer of clients from Levy would be complete within five
24 years. Declaration of Roger Carter In Support of Application for Temporary Restraining Order (“Mr.
25 Carter Declaration”) ¶¶ 2-3.

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28 ¹ A copy of this case is attached hereto for the Court’s reference.

1 From 1995 through 2000, Mr. Carter attempted to work with Mr. Levy to complete the
2 transfer of clients. These efforts were unsuccessful. Mr. Levy has not retired and the promised
3 transition of clients has not materialized. Id.

4 In February of 1999, while Mr. Carter was attempting to work with Mr. Levy, Goldman
5 approached Mr. Carter and “requested” that he sign an “Employee Agreement Regarding Confidential
6 and Proprietary Information and Materials, Non-Solicitation and Non-Competition (the “Non-Compete
7 Agreement”). A true and correct copy of the Non-Compete Agreement is attached to the Carter
8 Declaration as Exhibit B. The Non-Compete Agreement imposed several new, and, unlawful,
9 requirements on Mr. Carter². Id. ¶ 5, Ex. B. First, the Agreement banned the broker, for a period of 90
10 days after leaving Goldman, from contacting or communicating with any existing or prospective
11 Goldman client. Ex. B ¶ 3(a). Although couched as a prohibition against “solicitation,” this ban on
12 communication was so broad that it applied even if: 1) the client initiated the communication; 2) the
13 broker had not actually communicated with the individual while employed at Goldman but only learned
14 of the individual’s “identity”, or 3) the broker knew the individual prior to joining Goldman. Id.
15 Moreover, under the Agreement, all business developed by the broker (except that with “direct
16 relatives”) was presumed to be the result of Goldman’s “goodwill, reputation, name recognition, and
17 other assets and resources,” regardless of any personal relationship that the broker may have had with
18 the client.

19 The Non-Compete Agreement further provided that, for 90 days following termination of
20 employment, the broker “will not...engage in any business within the geographic area then covered by
21 the office in which you were located at the time of your termination in competition with any business of
22 Goldman Sachs in which you were engaged directly or substantially during any portion of your
23 employment with Goldman Sachs...” Ex. B ¶ 3(c). The agreement went on to define “competition” to
24 include “transmittal of communications” into the geographic area in which the broker worked as well as
25 “associating with a competitive business” located with in that geographic area regardless of where the
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27
28 ² Mr. Carter is informed and believes that numerous other Goldman financial consultants were also
required to sign the Non-Compete Agreement.

1 broker himself was located. Finally, the Non-Compete Agreement stated that a broker may only rescind
2 the agreement by leaving Goldman within thirty days of its execution.³

3 Goldman’s “request” that Mr. Carter sign the Non-Compete Agreement was an offer that
4 he could not turn down. In fact, Goldman threatened Mr. Carter that, if he did not sign the Non-
5 Compete Agreement, the process of transitioning Mr. Levy’s clients to him would be terminated. *Id.* ¶
6 7. In addition, Goldman assured Mr. Carter that, if he signed the Non-Compete Agreement, his
7 compensation would not be materially reduced, and Goldman represented that it had no plans to reduce
8 his compensation. *Id.* ¶ 6. Since Mr. Carter had left San Francisco and spent three years in Memphis
9 working with Mr. Levy to obtain his book of business, Mr. Carter had little choice but to sign the
10 agreement.

11 In December 1999, just seven months after Mr. Carter was forced to sign the Non-
12 Compete Agreement, Goldman imposed a new compensation system on its brokers. Although the new
13 compensation system was complex and operated differently for each individual, the immediate effect on
14 Mr. Carter was clear: his aggregate compensation was reduced by 25%. *Id.* ¶ 8.

15 Faced with this reduction in compensation and the lack of success of his numerous
16 attempts to work with Mr. Levy to complete the promised transition of clients, Mr. Carter determined
17 that he had no choice but to resign from Goldman. Following his resignation, Mr. Carter returned to San
18 Francisco and is now employed by Morgan Stanley Dean Witter (“MSDW”). *Id.*

19 **III. ARGUMENT**

20 In deciding whether to issue injunctive relief, a court must weigh two "interrelated"
21 factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative
22 interim harm to the parties from issuance or nonissuance of the injunction. *Butt v. State of California*, 4
23 Cal.4th 668, 677-678 (1992). As demonstrated below, Mr. Carter is likely to prevail on his claim for
24 unfair competition. California courts view contracts like the Non-Compete Agreement that non-
25 compete and non-solicitation provisions as unenforceable restraints of trade. Such provisions constitute
26 unfair competition and are at odds with this State’s fundamental public policy. In addition, Mr. Carter

27 _____
28 ³ The Agreement also provides that it shall be “governed by and construed and interpreted in accordance with the laws of the

1 will suffer great harm if the injunction is not issued. Without the TRO sought by Mr. Carter, Goldman
2 will be able to seek, and in all likelihood obtain, an ex parte order, without notice, from a New York
3 state court enforcing the Non-Compete Agreement. Not only would such an order deprive Mr. Carter of
4 his livelihood, it would also improperly reward Goldman for manipulating the legal system. The
5 requested TRO should be granted.

6 **A. Mr. Carter Is Entitled to a TRO Because He Is Likely to Prevail on the**
7 **Merits.**

8 The complaint filed by Mr. Carter alleges that the non-compete and non-solicitation
9 provisions in the Non-Compete Agreement constitute unfair competition and are unenforceable under
10 California law. As demonstrated below, Mr. Carter is likely to prevail on this claim. Indeed, the very
11 recent case of Advanced Bionics Corporation v. Medtronic, Inc., 01 C.D.O.S. 2339 (2d Dist., March 22,
12 2001) (“Advanced Bionics”), is dispositive of Mr. Carter’s right to equitable relief.

13 In that case, as here, an employee signed a contract containing a non-compete clause
14 while he was employed in another state. As here, he then moved to California and went to work for a
15 California employer. As here, he filed suit in California challenging the enforceability of the non-
16 compete provision. But the day after he started his new job, his former employer filed suit in the state
17 where the employee formerly worked and obtained a restraining order prohibiting him from working for
18 his new employer. Ultimately, the California trial court issued a restraining order enjoining the
19 employer from taking any further steps in the out-of-state action to enforce the non-compete provision
20 or otherwise to restrain the employee from working for his new employer in California.

21 On appeal, the Second District Court of Appeal upheld the restraining order issued by the
22 California trial court. Relying on Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881
23 (1998), the court held that section 16600 of the Business and Professions Code expressed a
24 “fundamental policy” of the State of California and therefore that California law governed the parties’
25 contractual rights. The court rejected the former employer’s contention that “principles of comity”
26 required the California trial court to defer to the out-of-state court. Instead, it concluded that the

27
28 State of New York”. Ex. B at ¶ 14. As is demonstrated below, this choice of law provision is unenforceable.

1 restraining order issued by the trial court preventing the former employer from pursuing its action in the
2 other state was “necessary and appropriate” to protect the interests of the employee pending final
3 disposition of the California action. So, too, here.

4 **1. California law governs the non-compete and non-solicitation**
5 **provisions**

6 Paragraph 14 of the Non-Compete Agreement provides that it shall be “governed by and
7 construed and interpreted in accordance with the laws of the State of New York...” Despite this choice
8 of law provision, the validity of the non-compete and the non-solicitation provisions in the Non-
9 Compete Agreement is a matter of California law. Application Group, Inc. v. Hunter Group, Inc., 61
10 Cal. App. 4th 881 (1998).

11 In that case, as here, the issue was whether California law governed the enforceability of
12 a non-compete clause in an employment agreement between an out-of-state employer and a non-resident
13 employee who obtained employment in California. Even though the agreement contained a choice-of-
14 law provision designating Maryland law, the court held that public policy required applying California
15 law and therefore voiding the non-compete clause.

16 The court began by noting that a contractual choice-of-law provision will be not be
17 respected if either the chosen state has no substantial relationship to the parties or the application of the
18 law of the chosen state would be contrary to a fundamental policy of the state of California. Id. Under
19 the second exception, a choice-of-law provision will be ignored “to the extent necessary to preserve
20 public policy.” 61 Cal. App. 4th at 869.

21 A case involving a non-compete provision posed just such a situation. Under California
22 law, “every contract by which anyone is restrained from engaging in a lawful profession, trade or
23 business of any kind is to that extent void.” Cal. Bus. & Prof. Code §16600. This statute, the court held,
24 expressed a fundamental policy of the state of California, since it reflected a recognition that “the
25 interests of the employee in his own mobility and betterment are deemed paramount to the competitive
26 business interests of the employers, where neither the employee or his new employer committed any
27 illegal act accompanying the employment change.” Id. at 901 (quoting Diodes, Inc. v. Franzen, 260 Cal.
28

1 App. 2d 244, 225 (1968)). In light of this strong public policy, the court held that California law would
2 be applied to determine the validity of the non-compete provision despite the choice-of-law clause.

3 The analysis used by the court in Application Group applies with equal force here. As
4 demonstrated below, both the non-compete and the non-solicitation provisions in the Non-Compete
5 Agreements improperly limit a broker's employment mobility. Thus, both provisions are contrary to
6 California's strong public policy in favor of protecting an employee's right to change jobs and improve
7 his position. Under Application Group, this public policy interest outweighs any interest that New York
8 may have in protecting the competitive interest of Goldman. California law therefore governs the Non-
9 Compete Agreement. See also Advanced Bionics.

10 **2. The non-compete clause is unenforceable under California**
11 **law.**

12 As discussed above, section 16600 represents a "strong public policy" of the state of
13 California. Robinson v. Jardine Insurance Brokers Int'l, 856 F.Supp. 554, 558 (N.D. Cal. 1994). The
14 purpose of Section 1660 is to "ensure that every citizen shall have the right to pursue any lawful
15 employment and enterprise of their choice." Application Group, Inc., 61 Cal. App. 4th at 890. See also
16 Advanced Bionics.

17 Under Section 16600, "[a] former employee has the right to engage in a competitive
18 business for himself and to enter competition, even for himself and to enter into competition with his
19 employer, even for the business of those who have been the customers of his former employer, provided
20 such competition is fairly and legally conducted." Scott v. Snelling and Snelling, Inc., 732 F. Supp.
21 1034, 1045-1046 (N.D. Cal. 1990). Thus, California courts construe Section 16600 "broadly" and
22 "generally do not enforce covenants not to compete." Bayer Corp. v. Roche Molecular Sys. Inc., 72 F.
23 Supp.2d 111, 119 (N.D. Cal 1999).

24 Under these principles, the non-compete provision in the Non-Compete Agreement is
25 unenforceable under Section 16600. As defined in the Agreement, "competition" includes "transmittal
26 of communications into ...the geographic area [in which the broker worked at the time of termination]
27 and ... associating with a competitive business located [in the area that you worked at the time of
28 termination] regardless of your location at the time you engage in any such activity..." Moreover, the

1 definition of “in competition with any business of Goldman” prohibits Mr. Carter from working in any
2 capacity for another firm that offers brokerage or asset management services even if Mr. Carter’s
3 responsibility at the new employer is different from that he had at Goldman.

4 These provisions, taken together, greatly impair Mr. Carter’s ability to leave Goldman
5 and work for another employer in California. They conflict with California’s stated policy of elevating
6 the employee’s interest in employment mobility above the competitive interest of the employer. They
7 are therefore invalid and unenforceable under California law.

8 **3. The non- solicitation clause is unenforceable under California law.**

9 Under the common law,

10 In the absence of an enforceable contract containing negative covenants to
11 the contrary, equity will not enjoin a former employee from soliciting
12 business from his former employer’s customers, provided that his
13 competition is fairly and legally conducted.

14 Aetna Bldg. Maintenance Co. v. West, 39 Cal. 2d 198, 204 (1952). Moreover, even contractual
15 provisions purporting to prohibit solicitation remain subject to the public policy expressed in section
16 16600. See Robinson v. Jardine Ins. Brokers Intern. Ltd., 856 F.Supp. 554 (N.D.Cal. 1994). An
17 employer thus “will be able to restrain by contract only that conduct of the former employee that would
18 be subject to judicial restraint under the law of unfair competition, absent the contract.” Hollingsworth
19 Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1338 (9th Cir. 1980), cited in Moss, Adams & Co. v.
20 Shilling, 179 Cal. App. 3d 124, 130 (1986). Consistent with these principles, California courts have
21 held that covenants prohibiting a departing employee from soliciting customers serviced at his former
22 employer “are void as unlawful business restraints except where their enforcement is necessary to
23 protect trade secrets.” Moss, Adams, 179 Cal. App.2d at 130.

24 In this case, the non-solicitation provision in the Non-Compete Agreement goes far
25 beyond the scope permitted under California law. The Agreement purports to characterize as
26 Goldman’s “proprietary information” the identity of *all* clients serviced by the broker at Goldman, even
27 those whom the broker “knew or [was] familiar with” prior to joining Goldman. Under California law,
28 however, customer lists enjoy trade-secret protection only where the employer has expended
“substantial time, effort, and expense” in creating the list. Courtesy Temporary Services, Inc. v.

1 California courts recognize that “an employer’s business practices are within the scope of
2 section 17200.” Application Group, 61 Cal. App. 4th at 908. This is true even where the employer
3 whose conduct is determined to be unfair competition is not based in California. Id. In Application
4 Group, the Court of Appeals held that the non-compete provision in the employment agreement of an
5 out-of-state employer was an unenforceable restraint of trade and that therefore the employer’s use of
6 those provisions constituted unfair competition in violation of section 17200. Id. at 908-09.

7 Under these authorities, Mr. Carter is likely to succeed on his claim of unfair
8 competition. As demonstrated above, the non-compete and non-solicitation provisions in the Non-
9 Compete Agreement are unenforceable restraints of trade under Section 16600. Under Application
10 Group, Goldman’s use of these provisions, by itself, constitutes unfair competition and violates section
11 17200.

12 But Goldman did more than merely insert the provisions into an employment agreement.
13 Goldman coupled its “request” that Mr. Carter sign the Non-Compete Agreement with the threat of
14 terminating the process of transitioning Mr. Levy’s clients to him if he did not do so. In addition, it
15 promised Mr. Carter that it would not reduce his compensation and represented that it was not
16 contemplating any such reduction. Both the promise and the representation were false. Clearly,
17 intimidating an employee into signing an agreement qualifies as “wrongful business conduct.” So, too,
18 does inducing an employee to sign an agreement by means of false promises and representations. See,
19 e.g., Lazar v. Superior Court, 12 Cal.4th 631 (1996). Such conduct constitutes an independent ground
20 for a finding of unfair competition.

21 **B. The Harm to Goldman From Denial of a the Temporary Restraining Order**
22 **Outweighs The Harm From Issuance of Such an Order**

23 The request for a temporary restraining order should be also be granted because it is
24 necessary to prevent irreparable harm to Mr. Carter. Given the past practices of Goldman in cases
25 involving former employees, Mr. Carter expects that, just as the employer in Advanced Bionics filed suit
26 in the courts of another state to enforce a non-compete provision that was illegal under California law,
27 Goldman will file an action in New York State court to attempt to enforce the non-solicitation and non-
28 compete provisions in the Non-Compete Agreement. Declaration of Bruce W. Day In Support Of

1 Application for Temporary Restraining Order (“Day Declaration”) ¶¶ 3-4; Declaration of Robert D.
2 Goldstein In Support of Application for Temporary Restraining Order (“Goldstein Declaration”) ¶ 5.
3 Indeed, Goldman’s counsel has stated that, rather than agreeing to allow the N.A.S.D. arbitration panel
4 to decide the issue of unenforceability of the Non-Compete Agreement in the proceeding commenced by
5 Mr. Carter, Goldman insists on preserving its ability to take action in New York state court. Day
6 Declaration ¶ 3

7 Under New York procedure, Goldman will be able to apply for a TRO without providing
8 any notice to Mr. Carter. Indeed, Mr. Carter will not even be aware that a complaint against him has
9 been filed until he is served with the order restraining him from continuing with his livelihood.
10 Moreover, it is often two weeks until the subject of the “no notice” restraining order is given the
11 opportunity to challenge it in court. Goldstein Declaration ¶ 4.

12 Thus, denying the TRO and permitting Goldman to proceed in New York may result in
13 irreparable harm to Mr. Carter who, without the courtesy of a telephone call, may be the subject of an
14 order restraining him from pursuing his profession. In addition, such an order would cause irreparable
15 harm to his clients, whose ability to do business with the broker of their choice should be given as least
16 as much weight as Goldman’s interest in retaining the revenue that business generates. As the court
17 stated in Prudential Securities, Inc. v. Plunkett, 8 F.Supp.2d 514, 519-520 (E. D. Va. 1998,

18 The Court must also be mindful of the interests of Plunkett’s former
19 clients. Rule 412 of the New York Stock Exchange provides that
20 customers’ accounts should be handled in such a way that coordination of
21 activities between brokerage firms on a single account should not cause
22 customers to endure losses as a result of firm competition. [citation
23 omitted] If the Court interpreted “solicitation” as proscribing
24 communication between Plunkett and his former Prudential clients, the
25 clients might be prejudiced. A broker-client relationship, like a lawyer-
26 client or doctor-patient relationship, is a personal relationship dependent
27 on personal trust. Clients should be free to deal with the broker of their
28 choosing and not subjected to the turnover of their accounts to brokers
associated with the firm but unfamiliar to the client, unless the client gives
informed consent to the turnover.

25 Similarly, in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goodson, 820 F. Supp. 1128, 1131 (S. D.
26 Indiana 1993), the court stated that a requested injunction preventing the broker from servicing accounts
27 that “have or might” transfer from his former employer

1 violates a client's right to obtain financial advice from the source of his
2 choice. This public interest outweighs Merrill Lynch's interest in
3 preventing Goodson from obtaining this business. To prohibit a client
4 from transferring his business to Goodson would create a substantial harm.
5 As the testimony and argument presented during the hearing, as well as all
6 financial industry advertising, makes clear: a broker client relationship is
7 one of trust. It is not merely the mechanical process of giving advice and
8 accepting orders, rather it is a personal relationship which allows a client
9 to sleep easy knowing that his financial interests are well shepherded.

10 Moreover, this Court should issue a temporary restraining order to protect Carter's ability
11 to obtain an adjudication of the unenforceability of the Non-Compete Agreement from the N.A.S.D. As
12 discussed above, Mr. Carter has initiated an arbitration proceeding before the N.A.S.D. in order to
13 obtain an order from a securities industry panel freeing him from the illegal restraints on competition
14 and solicitation imposed by the Non-Compete Agreement. Given the pendency of this arbitration, it
15 would be unfair to permit Goldman to proceed in New York state court. Goldman is an N.A.S.D.
16 member organization, and, as such, has agreed to abide by its rules. Those rules permit an expedited
17 hearing in cases in which a brokerage firm claims that a departing employee has engaged in unlawful
18 activity. See N.A.S.D. Code of Arbitration Procedure § 10335.

19 But Goldman is apparently unwilling to live by the N.A.S.D. rules. Instead, it wants to
20 bring an action in New York state court so that it can obtain an order putting Mr. Carter out of business
21 without even giving him a chance to object. Goldman apparently fears that the arbitration panel will see
22 the inherent unfairness of the non-compete and non-solicitation provisions and, consequently, wants to
23 litigate in a forum where it believes those provisions are more likely to receive a favorable reception.

24 See BDO Seidman v. Hirshberg, 93 N.Y. 2d 382, 388 (1999) (New York has adopted a modern
25 "standard of reasonableness" in determining the validity of employee agreements not to compete.)

26 Courts do not favor forum shopping. Nor does the law reward a party who seeks to
27 improve his chances by filing suit in a jurisdiction whose law is more palatable than the law of the state
28 whose law actually governs the dispute. Most importantly, this court should issue a TRO to prevent
Goldman from achieving a result contrary to the fundamental public policy of this State. See Advanced
Bionics.

