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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

[redacted]

Plaintiff,

vs.

[redacted]

Defendants.

_____/

Case No.: [redacted]

Dept. No.: 8

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT

Before the Court is Defendants [redacted] *Motion to Dismiss Plaintiff's Complaint*, filed March 3, 2017. Plaintiff [redacted] opposed the motion on March 20, 2017, and Defendants filed a *Reply*. This matter came before the Court on May 17, 2017 at 1:30 for hearing on the Motion. S. Brett Sutton, Esq. appeared on behalf of Defendants. [redacted] appeared on behalf of Plaintiff and [redacted] was present. Having heard and carefully considered the Motion, all related briefing, the arguments of counsel, and good cause appearing, the Court GRANTS *Defendants' Motion to Dismiss Plaintiff's Complaint* for the reasons set forth below.

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BACKGROUND

This case concerns the alleged breach of the restrictive portions of an "Agreement and Acknowledgement Regarding Confidentiality, Invention Assignment, Non-Competition and At-Will Employment." (Complaint, Ex. 1.) Specifically, in 2012, [redacted] was hired as a Production Manager at [redacted] which sells a variety of chairs and seating specifically designed for casino gaming. As part of his employment, [redacted] entered into the above-named employment agreement with [redacted] which contained confidentiality and non-compete provisions.

In 2016, [redacted] left [redacted] to work at [redacted] as Vice President of Production. [redacted] manufactures and sells various forms of chairs and seating, although not of the type that [redacted] manufactures. After [redacted] began working for [redacted], several employees left employment with [redacted] to go work for [redacted] [redacted] alleges that [redacted] solicited these employees and others to leave [redacted] to work at [redacted]

Subsequently, [redacted] filed a complaint against [redacted] alleging the following causes of action: (1) Injunctive Relief Against Defendants; (2) Breach of Contract Against [redacted]; (3) Breach of the Covenant of Good Faith and Fair Dealing Against [redacted]; and (4) Intentional Interference with Contractual Relations Against [redacted] [redacted] then filed the instant motion to dismiss, arguing that the non-compete agreement is invalid in its entirety under Nevada law.

STANDARD OF REVIEW

NRCP 12(b)(5) mandates the dismissal of a cause of action that fails to state a claim upon which relief can be granted. Nevada is a "notice-pleading" jurisdiction and, therefore, a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has "adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In reviewing motions to dismiss under NRCP 12(b)(5), the district court must construe the pleadings liberally, accept all factual allegations in the complaint as true, and draw every fair inference in favor of the non-moving party. *Blackjack Bonding v.*

City of Las Vegas Mun. Court, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citing *Simpson v. Mars. Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997)).

A claim in any pleading should not be dismissed under NRCP 12(b)(5) unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Id.* However, dismissal under NRCP 12(b)(5) is proper where the allegations are insufficient to establish the elements of a claim for relief. *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (per curiam).

DISCUSSION

[redacted] and [redacted] argue that the non-compete paragraph is clearly invalid as overbroad in that its duration is unreasonably long; has no geographical limitation; contains no limitations on the type of employment [redacted] is prohibited from taking; and contains a prohibition on employing, not merely soliciting, all [redacted] employees.

The employment agreement between [redacted] and [redacted] states, in relevant part:

> Non-Competition. I will not directly or indirectly engage or participate in business activities for the competitor of, or in competition with, the Company during my employment and for a period of two years after the termination of my employment. During the two years following termination of my employment, I will not solicit, contract, contract with or transact business competitive with the Company with any of the persons who were customers or suppliers of the Company at any time during my employment. **During such time, I will not employ or solicit for employment any person who is an employee of the Company at the time of termination of employment.**

(emphasis added). As is evident, the Non-Competition paragraph of the employment agreement includes both a non-compete provision **and** a non-solicitation provision.

The non-compete provision is impermissibly overbroad.

In a recent decision, the Nevada Supreme Court held that "[u]nder Nevada law, '[a] restraint of trade is unreasonable, in the absence of statutory authorization or

dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted.'" *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 155 (2016) (quoting *Hansen v. Edwards*, 83 Nev. 189, 191–92, 426 P.2d 792, 793 (1967)). "Time and territory are important factors to consider when evaluating the reasonableness of a noncompete agreement." *Id.* The Nevada Supreme Court has held that non-compete agreements that do not contain a reasonable geographic limitation or a reasonable limitation on the type of employment that was prohibited were unreasonable as overbroad. *Id.* at 132 Nev. Adv. Op. 49, 376 P.3d at 155-56; *Camco, Inc. v. Baker*, 113 Nev. 512, 520, 936 P.2d 829, 834 (1997) (holding that "[t]o be reasonable, the territorial restriction should be limited to the territory in which appellants [(former employers)] established customer contacts and good will.").

Here, the non-compete provision contains no geographic limitation, nor does it reasonably limit the type of business activities that [redacted] would be prohibited from engaging in. Rather, [redacted] would be prohibited from engaging in *any* business activity for a competitor of [redacted]. Thus, similar to the agreement in *Golden Rd.*, under the language of the non-compete provision [redacted] could, for example, be prohibited from even being a custodian at one of [redacted] competitors. *See* 132 Nev. Adv. Op. 49, 376 P.3d at 155. Such a provision has been justifiably found to be unreasonably overbroad and thus unenforceable. *Id.* This court makes such finding here.

Severance is not available.

[redacted] argues that it is most concerned with arresting violations of its non-solicitation provision, as well as seeking relief for improper use of confidential information. [redacted] argues that the non-compete agreement and the non-solicitation agreement are two distinct provisions that should be separately analyzed.

Non-solicitation covenants are often considered to be separate and distinct from non-compete agreements. *See John Jay Esthetic Salon, Inc. v. Woods*, 377 So. 2d 1363, 1366 (La. Ct. App. 1979) ("An agreement not to engage in competition with the employer is

vastly different from an agreement not to solicit the employer's customers or employees or to engage in a business relationship with the employees or contractors."). This is because, unlike a non-compete agreement, a non-solicitation covenant "does not infringe on an employee's ability to engage in an occupation, but merely infringes on his ability to recruit former co-workers to engage in competitive businesses." *Renaissance Nutrition, Inc. v. Jarrett*, 2012 WL 42171, at *5 (W.D.N.Y. Jan. 9, 2012). For that reason, non-solicitation covenants are inherently less restrictive than non-compete agreements. *Id.*

[redacted] further argues that although the non-solicitation provision is included in a section labeled "Non-competition," it is clearly separate from the non-compete covenant. Thus, a question remaining before the court is whether the non-solicitation provision is severable from the unreasonably overbroad non-compete agreement, or whether both are unenforceable in total because of the offending provision.

In *Golden Rd.*, the Nevada Supreme Court refused to reform or modify an unreasonable non-compete agreement or apply the blue pencil test, a judicial standard for deciding whether to invalidate the whole contract or only the offending words, to the agreement. 132 Nev. Adv. Op. 49, 376 P.3d at 156 n.5, 159. The court held that by including an unreasonable provision in the non-compete agreement, the entire agreement was unenforceable, not just the offending provision.[1] *Id.* at 132 Nev. Adv. Op. 49, 376 P.3d at 158-60.

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[1] The Court's rationale was compelling: "At the outset, the bargaining positions of the employer and employee are generally unequal. When an employment contract is made, the party seeking employment must consent to almost any restrictive covenant if he or she desires employment. Hence, even an employer-drafted contract containing unenforceable provisions will likely be signed by the employee. Under a blue pencil doctrine, the employer then receives what amounts to a free ride on" the provision, perhaps knowing full well that it would never be enforced. Consequently, the practice encourages employers with superior bargaining power to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full. It thereby forces the employee to bear the burden as employers carelessly, or intentionally, overreach. In the words of one commentator, this smacks of having one's employee's case and eating it too." *Golden Rd.*, 376 P.3d at 158-59. (internal citations omitted).

Here, the employment agreement is not drafted in a way that would allow the Court to consider the non-solicitation provision and non-competition provision separately, as the two are within the same paragraph and under the same heading. If the Court did consider them separately, the Court would be modifying the contract, which is prohibited by *Golden Road.* The Court should not "cherry-pick" the sentence concerning non-solicitation out of the paragraph to save it from the otherwise invalid provision. If the last sentence in the non-compete paragraph was truly meant as a separate non-solicitation clause, the contract should have been more carefully drafted. In accordance with *Golden Road,* the court must render the entire agreement invalid, not just the offending provision. Therefore, because the non-compete clause is unenforceable, the following sentence containing the non-solicitation clause is thus unenforceable as well.

The court finds the non-solicitation clause cannot be severed from the non-compete clause, and thus, for that reason alone, is unenforceable. Because the restrictive covenant is unenforceable, [redacted] cannot be found in breach of contract.

The non-solicitation provision is itself overbroad.

Even if the Court were to consider the non-solicitation clause separately, the language of the sentence itself is facially overbroad.[2] The non-solicitation sentence of this paragraph prohibits [redacted] for a period of two years from employing or soliciting for employment any employee of [redacted] that was employed at the time [redacted] ended his employment there. Regardless of duration issues, the non-solicitation sentence is facially overbroad because it prohibits *employing or soliciting* employees of [redacted]. (emphasis added). Thus, the sentence excludes more activities than is reasonably necessary to protect the interest of [redacted] and is not solely a non-solicitation provision. Specifically, it restricts ***the employment of*** [redacted] employees, without any explanation, which unreasonably restricts the employees' right to work as well as [redacted] right to hire.

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[2] It reads, "During such time, I will not employ or solicit for employment any person who is an employee of the Company at the time of termination of employment."

Therefore, even if the Court were to sever the non-solicitation provision from the non-compete provision, it is still overbroad and thus, legally invalid.

CONCLUSION

Because the non-competition clause herein is overbroad and facially deficient, the entire paragraph is unenforceable. Plaintiff could prove no set of facts which would entitle it to relief because the restrictive covenant is unenforceable under Nevada law. Thus, Plaintiff's Second, Third, and Fourth Causes of Action sounding in contract are hereby dismissed.[3]

THEREFORE, and good cause appearing, IT IS HEREBY ORDERED that *Defendants' Motion to Dismiss Plaintiff's Complaint* is GRANTED.

IT IS FURTHER ORDERED that *Plaintiff's Complaint* is DISMISSED WITHOUT PREJUDICE.[4]

IT IS SO ORDERED.

DATED this 22 day of May, 2017.

BARRY L. BRESLOW
District Judge

[3] Plaintiff's First Cause of Action is for "Injunctive Relief Against Defendants." (Complaint at 5:25). Injunctive relief is not a cause of action, it is a remedy available only if Plaintiff were to prevail on his claims. *See e.g., Cole v. CIT Grp./Consumer Fin., Inc.*, 126 Nev. 701, 2010 WL 5134999 *1, n. 1; *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007); *Tillman v. Quality Loan Serv. Corp.*, No. 2:12-CV-346 JCM RJJ, 2012 WL 1279939, at *3 (D. Nev. Apr. 13, 2012) ("injunctive relief is a remedy, not an independent cause of action"); *Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) ("A request for injunctive relief by itself does not state a cause of action.").

[4] Plaintiff may refile to the extent any alleged use of confidential trade secrets sound in tort.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 22 day of May, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

[redacted]

[redacted]

S. BRETT SUTTON, ESQ.

Judicial Assistant