

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

GARY WALTON, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 99-47-B  
 )  
 NALCO CHEMICAL COMPANY, )  
 )  
 Defendant )

***RECOMMENDED DECISION ON DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT***

Before the Court is Defendant's Motion for Partial Summary Judgment on its asserted counterclaim. Defendant asserts that Plaintiff violated a non-competition covenant in an agreement he signed with Defendant's wholly owned subsidiary, Diversey, in 1996. For reasons stated below, I recommend that the Court GRANT Defendant's Motion.

**Summary Judgment**

Summary judgment is appropriate only 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." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the

nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1<sup>st</sup> Cir. 1993). “A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is ‘sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.’” *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1<sup>st</sup> Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995)).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1<sup>st</sup> Cir. 1993)).

## **Facts**

From 1977 to 1997 Nutmeg employed Plaintiff as a district sales manager in Maine. As district sales manager, Plaintiff managed sales of chemicals tailored to treat water in boiler systems in eleven counties. In October 1996, it was announced that Nalco was purchasing Nutmeg and would operate it under

Diversey, a fully owned subsidiary of Nalco. On December 26, 1996 Plaintiff signed an Associate Agreement and an Employee Retention Bonus Agreement with Diversey. Later, on January 20, 1997, Plaintiff signed an Addendum to the Associate Agreement that identified eleven counties in Maine as his sales territory.

For our purposes, the relevant portions of the agreement reads:

NOW, THEREFORE, In consideration of Associate's employment and payment of compensation by Diversey, and in view of Associate's trusted position with Diversey, it is agreed as follows:

5. Associate will not, directly or indirectly, during her/his employment and for a period of eighteen (18) months immediately after termination of her/his employment:
  - (a) engage or assist in the same or any similar line of business competing with the line of business now or hereafter conducted or operated by Diversey during the term of Associate's employment by Diversey, whether as consultant, associate, officer, director, or representative of such competing business within the United States of America; provided, however, that in the event that the Associate's position with Diversey immediately prior to termination is that of field representative, then the geographic area of her/his non-competition covenant shall be limited to that geographic area within the United States of America for which Associate was responsible at any time during the eighteen-month period immediately preceding termination, and,
  - (b) alone or in concert with others, employ or attempt to employ, induce or solicit for employment in the

same or any similar line of business now or hereafter conducted or operated by Diversey during the term of Associate's employment by Diversey, other employees of Diversey;

17. This Agreement shall inure to the benefit of the successors and assigns of Diversey. Insofar as the same may be applied thereto the terms and provisions hereof shall apply to and bind Associate's heirs, legal representative and assigns.

The agreement was signed by the Plaintiff and a representative from Diversey.

On August 20, 1997 Plaintiff met with representatives of Nalco, Mr. Yankowski and Carney, who told him that his accounts were going to be transferred to Troy Malbon, an employee half his age. At the meeting Yankowski and Carney asked Plaintiff what it would take for him to accept early retirement, even though Plaintiff previously had stated his intent to stay with the company until he was 65.

Concerned about his treatment, Plaintiff retained counsel who, in a letter dated October 3, 1997, offered to settle Plaintiff's age discrimination claim and accept early retirement for a stated sum. In November 1997 Plaintiff received his first ever job performance evaluation. The evaluation form used was created exclusively for Plaintiff and was never used for any other employee.

In February 1998, Nalco took over all material functions of Diversey. As a

condition for continued employment, Nalco sent an Associate's Agreement to former Diversey employees including Plaintiff. The agreement contained a non-competition covenant. Plaintiff advised his superiors that he would not sign the new agreement until Nalco addressed his age discrimination claim. Nalco advised Plaintiff that his failure to sign the agreement would result in his resignation. Plaintiff refused to sign the agreement and Nalco terminated his employment in February 1998.

The next month, March 1998, one of Nalco's competitors, Jamestown Chemical, hired Plaintiff to work in its sales division. Within sixty days of his employment, Plaintiff began selling products for a competitor of Nalco, Jamestown Chemical. In his position at Jamestown Chemical, Plaintiff solicited business from some of his previous customers at Nalco. As a result, Defendant claims that it lost a number of former customers to Jamestown Chemical because Plaintiff solicited their business on behalf of Jamestown Chemical.

### **Discussion**

Defendant argues that Plaintiff violated the plain terms of the non-competition covenant in his Associate's Agreement and therefore the Court should grant Defendant's Motion. It is undisputed that Plaintiff signed an agreement that provides that upon his termination, he will not be employed in any similar line of

business for eighteen months. Further, it is undisputed that the geographical area, namely the eleven counties Plaintiff serviced while employed by Diversey, were listed in the Addendum to the Associate Agreement signed in January 1997.

Plaintiff raises a number of legal reasons why, in his opinion, the Court should deny Defendant's Motion. However upon careful examination of those arguments, each prove to be unavailing for Plaintiff. We address each argument below.

### **1. Assignment**

Plaintiff first argues that he signed an agreement with Diversey, not Nalco, and absent a valid assignment from Diversey to Nalco, the non-competition provision in the Associate Agreement cannot be enforced by Nalco. Plaintiff points out that Nalco has failed to present any evidence that Diversey intended to transfer its rights under the Associate Agreement. *Herzog v. Irace*, 594 A.2d 1106, 1108 (Me. 1991).

The Court finds Plaintiff argument unpersuasive. The agreement explicitly reads that, "this Agreement shall inure to the benefit of the successors and assigns of Diversey." In the context of corporate law, a "successor" has been described as one who acquires the rights and burdens of another corporation. *See Explosives Corp. of Am. v. Garlan Enter. Corp.*, 817 F.2d 894, 906 (1<sup>st</sup> Cir. 1987); *See also*

*Black's Law Dictionary* 1431 (6<sup>th</sup> ed. 1990) (“generally means another corporation which through, amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of [the] first corporation.”). Here, Defendant became the successor to Diversey, its wholly owned subsidiary, when it assumed the assets, including Diversey’s sales-related assets, and liabilities of its subsidiary. Therefore Defendant became a successor as contemplated under paragraph 17 of the Associate Agreement and has the right to enforce the non-competition covenant in the agreement.

## **2. The Associate Agreement**

Plaintiff next contends that the Associate Agreement is unenforceable because Nalco’s purchase of Diversey and attempt to have Plaintiff sign a new Associate’s Agreement, coupled with actions taken by Diversey against Plaintiff in 1997 changed the employer-employee relationship thereby making the terms of the agreement unenforceable. Plaintiff concedes that no Maine case supports his argument. Therefore he points the Court to a case in another jurisdiction.

Plaintiff cites an unreported case in Massachusetts to support the proposition that a change in the employee-employer relationship “coupled with an employer’s repeated efforts to have the employee sign a new non-competition agreement” voids the previously signed non-competition agreement. *AFC Cable*

*Sys., Inc. v. Clisham*, No. 97-CV-12070-RGS 1999 WL 652257 (D. Mass. May 19, 1999).

Regardless of whether the facts of this case are analogous to those in *Clisham*, the Court remains unconvinced that it should adopt the proposition set forth in *Clisham*. In coming to the conclusion it did, the Court in *Clisham* relied entirely upon a Massachusetts case that delineated the law in Massachusetts. *See Bartlett Tree Expert Tree Co. v. Barrington*, 353 Mass. 585 (1968). At no time since the thirty odd years *Bartlett Tree* was decided has it even been cited in Maine courts, or for that matter in any other court, to support the proposition as espoused in *Clisham*. In light of the fact that, as explained in this decision, Maine courts recognize non-competitive covenants as valid subject to certain restrictions, none of which mirror the restriction delineated in *Clisham*, the Court refuses to adopt the proposition set forth in *Clisham* here.

### **3. Consideration**

Plaintiff next contends that the Associate Agreement is unenforceable because it was not supported by consideration. In Maine, “employment itself has been held to be consideration for a non-competition covenant in an employment contract.” *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995). Plaintiff’s attempt to argue that the non-competition covenant in this matter is a separate and discrete

contractual agreement and not part of an overall employment contract is unpersuasive. The agreement specifically states that the employee signs among other provisions, the non-competition covenant, in consideration for the former Nutmeg employee to continue his employment with Diversey. Further, as Defendant properly points out, the Employment Retention Bonus Agreement that Plaintiff signed at the same time as the Associate's Agreement identifies the Associate's Agreement as a separate-at-will agreement and incorporates the terms of the agreement into the Bonus agreement. The Bonus agreement also states that to encourage the employee to enter into the Associate Agreement it offered a bonus to the employee if he remained with Diversey after September 30, 1997.<sup>1</sup> The Court is satisfied that based on the facts above, the non-competition covenant in the Associate's Agreement was supported by adequate consideration.<sup>2</sup>

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<sup>1</sup> The Court disagrees with the Plaintiff's characterization that this clause "makes it clear that the bonus was tied exclusively to Walton's length of employment." The Court is satisfied that the length of employment clause was a condition, along with signing the Associate's Agreement, to receiving the bonus.

<sup>2</sup> Plaintiff cites *IKON Office Solutions, Inc. v. Belanger* CV 99-30047-MAP, 1999 WL 508689 (D. Mass. April 9, 1999), to support his argument that the Associate Agreement lacked consideration. In *Belanger*, the plaintiff signed a non-compete covenant with IKON nearly nine months after he began his employment with the company. Citing Massachusetts law, the court held that continued employment in itself is not sufficient consideration to support the covenant.

Here, even assuming that the proposition set forth in *Belanger* carries some weight in Maine, the facts are distinguishable from this case. Here, Plaintiff signed the agreement before beginning his employment with Diversey, not after he started his employment at Diversey. Further, as stated above, Plaintiff received more than employment for signing the Associate's Agreement. Signing the Associate's Agreement was a condition to his receiving a future bonus

#### **4. Reasonableness and Public Policy considerations**

Plaintiff last argues that even if there was adequate consideration to support the agreement it is unenforceable because: 1) it unreasonably restricts Plaintiff's ability to support himself in his field and 2) it is against the principles of sound public policy to permit Defendant to enforce the terms of the covenant while Plaintiff's age discrimination is pending. The Court addresses each argument in turn.

In Maine, the "reasonableness of a noncompetition covenant is a question of law that must be determined by the facts developed in each case as to its duration, geographic area, and the interests sought to be protected." *Brignull*, 666 A.2d at 84. Plaintiff challenges the duration of the covenant, eighteen months, and the area it covers, eleven counties in Maine, as unreasonable. Based on the facts presented in this case, the Court disagrees. *Chapman & Drake v. Harrington*, 545 A.2d 645, 647 (Me. 1988) (reasonableness of specific covenant determined by the specific facts presented in each case).

Plaintiff contends that the time period in the covenant, eighteen months, is unreasonable in duration. Eighteen months is certainly not *per se* unreasonable. *See Chapman & Drake*, 545 A.2d at 648 (upholding five year period to be

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under the Employment Retention Bonus Agreement.

reasonable). Therefore the Court must determine whether the facts presented in this matter requires it to conclude that the eighteen month time period is excessive. The Court is satisfied that in light of the geographical area and number of customers solicited by Plaintiff during his employment, an eighteen month period permitting Defendant to introduce a new sales person to their existing customers and to maintain the good will between the company and the customers in the eleven county area is reasonable.

Next, the Court must determine whether the geographic area, eleven counties in Maine, is reasonable in scope. The Court recognizes “that protecting the employer simply from business competition is not a legitimate business interest to be advanced by such an agreement.” *Chapman & Drake*, 545 A.2d at 647. However, a covenant may be reasonable “when the employee during his term of employment has had substantial contact with his employer’s customers and is thereby in a position to take for his own benefit the good will his employer paid him to develop for the employer’s business.” *Id.* The Court should also consider the employee’s access to customer lists maintained by the employer. *Id.*

It is undisputed that Plaintiff had substantial contact with customers in eleven counties covered by the agreement. The very reason why the company included the non-competition covenant in the Associate Agreement was to protect

the good will established by the company with its customers should a sales associate leave his or her position. *Brignull*, 666 A.2d at 84. The Court is satisfied that protecting the area serviced by Plaintiff, namely the eleven county area, is reasonable in scope.

Plaintiff next argues that in light of Plaintiff's outstanding age discrimination claim against Nalco, the Court for equitable reasons should deny Defendant's Motion. The Court disagrees and is satisfied that the merits of Plaintiff's claim has no bearing on whether this Court may act on Defendant's counterclaim.<sup>3</sup>

The Court is satisfied that in spite of the non-competition covenant agreement signed by Plaintiff, he in fact did solicit Nalco customers for Jamestown Chemical, one of Nalco, competitors, a month after he ceased employment with Nalco. Plaintiff clearly breached the terms of the agreement and therefore I recommend that the Court GRANT Defendant's Motion with the understanding that the amount of damages due Defendant will be determined at trial.

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<sup>3</sup> In support of his equitable argument, Plaintiff asks this Court to make a number of assumptions. First, he asks the Court to assume that the only job he could have obtained was with a competitor of Nalco. Second, he asks the Court to assume that the only possible way he could maintain gainful employment was to solicit his prior customers at Nalco. The Court finds it hard to accept that Plaintiff, who had 20 years of sales experience, could not find gainful employment without violating the non-competition covenant with Nalco.

## Conclusion

For reasons stated above, I recommend that the Court GRANT Defendant's Motion for Partial Summary Judgment on its counterclaim.

## NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on: October 25, 1999