UNITED STATES DISTRICT COURT
THE MIDDLE DISTRICT OF FLORIDA
Jacksonville Division

Case No. 309-CV-176 J 32 MCR

VISTAKON PHARMACEUTICALS, LLC,

Plaintiff,

v.

BAUSCH & LOMB, INC., a New York Corporation,

Defendant.
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MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

MOTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Vistakon Pharmaceuticals, LLC ("Vistakon") moves for a preliminary injunction against Defendant Bausch & Lomb, Inc. ("B&L"). In support of this motion, Plaintiff submits the following memorandum of law.

MEMORANDUM

I. Introduction

This lawsuit involves unfair corporate competition and tortious interference with known contracts and business relationships and seeks injunctive relief to stop the flagrant pirating of Vistakon's sales force by B&L and to prevent B&L from continuing its

intentional and unjustified efforts to induce Vistakon's sales force to violate their employee secrecy, non-competition and non-solicitation agreements (the "Agreements").

As discussed below, Vistakon recently learned of a deliberate effort by B&L to induce a fourth of Vistakon's sales force to breach the Agreements and to begin working for B&L in competition with Vistakon, even in the same sales territories where they currently promote Vistakon's products. Vistakon has brought suit against B&L for tortious interference with contract and advantageous business relationships and violation of Florida's Unfair and Deceptive Trade Practices Act, §§ 501.201 *et seq.*, Fla. Stat. ("FDUTPA"). As discussed below, all the necessary elements are present for the Court to issue the injunctive relief in the attached proposed order.

II. Facts Supporting Injunctive Relief

As alleged in the Complaint and the supporting declarations, Plaintiff proffers the following:

A. Plaintiff's Products and Confidential Information, including Customer Relationships.

Plaintiff Vistakon is a subsidiary of Johnson & Johnson. Vistakon develops and markets pharmaceutical products that treat certain ophthalmic conditions, such as, among others, IQUIX®, an anti-bacterial drug used for the treatment of corneal ulcers and QUIXIN®, another anti-bacterial drug that kills many types of bacteria that may cause pink eye. To market its products, Vistakon relies on a sales force that has significant training and experience promoting these products. Vistakon's sales force also has knowledge of Vistakon's confidential, proprietary and trade secret information

(collectively "Confidential Information"), which, among other things, is used to market and promote Vistakon's products.

As one example, for a sales force to be effective, it must have the right number of salespeople, properly and fully trained, each placed in a strategically defined geographic territory. Presently, Vistakon employs 34 sales representatives strategically placed across the United States and four district managers supervising them. Vistakon has invested considerable resources, including time and money, in developing the optimal strategy for the alignment of its sales force in the United States, and Vistakon's sales force has knowledge of this Confidential Information. Just as important, to a great extent, Vistakon's customer relationships are developed and maintained through its sales representatives, while on Vistakon's payroll, such that the sales representative is perceived by the customer as the equivalent of Vistakon. While working for Vistakon, the sales representatives maintained those customer relationships and those relationships are highly valuable to Vistakon.

Vistakon's sales representatives are also privy to other Confidential Information that would be valuable in the hands of a competitor, including, among other things, pipeline products, marketing and sales plans, customer targeting strategies, and strategic priorities and objectives for the short-term (1 to 2 years), mid-term (3 to 5 years) and long-term (+ 5 years).

B. The Agreements.

To protect the substantial investment in its sales force, Vistakon has entered into the Agreements with each of its sales representatives. There are three significant clauses. First, the Agreements contain a non-compete covenant. The non-compete prohibits employees from working for a competitor for a period of 18 months after employment with Vistakon ends if that work would involve products that compete with Vistakon's products and he or she had access to confidential information regarding Vistakon's products that could be used to enhance the use or marketability of the competitor's products.

Second, the Agreements contain a non-solicitation covenant. For a period of 18 months after employment with Vistakon, sales representatives may not directly or indirectly solicit business from, sell to, or render any services to any of the customers with whom they had contact during the last 12 months of employment with Plaintiff, for any purpose related to the sale of a product or service that could compete with a product or service being sold or developed by Plaintiff.

Third, each Agreement contains a non-solicitation covenant precluding for a period of 12 months sales representatives from hiring any Vistakon employees on their own behalf or on behalf of others.

C. B&L's Conduct

B&L is a direct competitor of Vistakon. In the past few years, B&L has hired several former executives of Johnson & Johnson Vision Care, Inc. ("Vision Care"), which is another J&J subsidiary and the world's leading manufacturer of disposable

contact lenses and other products for vision care health. Vision Care is Vistakon's parent company. These highly placed upper management employees[1] were in positions that developed the overall strategy for Vision Care and Vistakon in the market. All of these former employees themselves had and are aware that Vistakon's sales representatives have employment agreements that contain non-disclosure, non-competition, and non-solicitation covenants.

B&L's raiding campaign is now focused on Vistakon's sales representatives. B&L is preparing to launch in April 2009 a new ophthalmic anti-bacterial product, Optura®, that will compete directly with Vistakon's ocular anti-bacterial products, QUIXIN® and IQUIX®. This new product is B&L's first and only branded ocular anti-bacterial product, which is unlike B&L's other products such as contact lenses and contact lens solutions. Unlike Vistakon, B&L has no pharmaceutically-trained sales force with relevant experience regarding ocular anti-bacterial products. As a result, to compete with Vistakon and promote its new drug, B&L is recruiting 40 sales representatives with relevant experience and knowledge regarding such products in

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[1] The individuals who were employed by J&J or a J&J operating company, include, among others:

(A) Gerald Ostrov, the former J&J Company Group Chairman
(B) Michael Gowen, the former Vice President of Global Operations and Supply Chain for Vision Care;
(C) Clifford Wright, O.D., the former Director of Business Development and Technology Transfer for Vision Care;
(D) Peter Valenti, the former Vice President of Marketing for Vision Care;
(E) David Edwards, the former President of Vision Care for Asia Pacific;
(F) Carol Panzor, the former Executive Director of Knowledge Management for Vision Care;
(G) Seevali Fernando, the former IT Director of Vision Care for Asia Pacific. B&L.

preparation for the April 2009 launch. It intends to commence product training of these new sales representatives in March 2009.

It is apparent that B&L seeks to fill most of these positions with Vistakon's sales representatives who have experience and knowledge marketing and promoting ocular anti-bacterial products. Rather than recruiting its sales force lawfully, in the past month, B&L has solicited at least one-fourth of Vistakon's sales representatives and managers and is attempting to induce them to breach their Agreements with Vistakon in several respects. For example, B&L has targeted these sales representatives to promote a competing product in the same territories and, therefore, to the same customers, that they currently serve for Vistakon, thereby misappropriating Vistakon's customer relationships and good will, which would also be a violation of the non-solicitation covenant in the Agreements.

Further, Vistakon has developed a significant amount of Confidential Information designed toward the marketing and promotion of ocular anti-bacterial products, which Vistakon's sales representatives have intimate knowledge of, including: (1) how a sales force that markets and sells ocular anti-bacterial products should be geographically divided; (2) the areas where Vistakon focuses its marketing and sales force based on the activity level of customers; (3) Vistakon's customers; and (4) which products better match the needs of certain customers. By hiring Vistakon's sales representatives and misappropriating this Confidential Information, B&L could, with little effort, dramatically improve the marketability of B&L's product, Optura®, and unfairly

compete with Vistakon's products. In fact, B&L could create an effective sales force overnight, and use this sales force to promote Optura®.

Besides that Vistakon's sales representatives know which customers to target, they already have the established relationships with those customers. Vistakon expends over $25,000 to recruit and train a single sales representative. It also loses approximately $75,000 to $100,000 in sales by the time a new sales representative re-establishes the customer relationship, if possible, since in some cases the customer relationship is lost. By targeting Vistakon's sales representatives, B&L would save a significant amount of money in training costs and would also hit the ground running in sales by exploiting these established customer relationships. At the same time, Vistakon would incur a significant amount of money in recruiting and training new sales representatives and would lose a significant amount of sales from the down time or may permanently lose market share.

In addition, in executing B&L's corporate initiatives, recruiters from B&L have contacted Vistakon's sales representatives on their non-public email accounts or cellular and home telephone numbers. The fact that those accounts and numbers are not publicly available indicates that B&L has access to a Vistakon private roster. Additionally, B&L appears to be aware of which sales representatives are Vistakon's top performers and which territories they cover, information which is not publicly available. The sales representatives that B&L has solicited are some of Vistakon's best performers.

To make matters worse, the sales representatives would have left Vistakon simultaneously since B&L has been soliciting them during the past two to three weeks for the launch of its new product in April 2009, with training to begin in March 2009. If they

were to leave simultaneously, Vistakon would be without one-fourth of its sales force on a national level since B&L's recruiting efforts cover territories spanning the United States as demonstrated by the chart below:

Vistakon Employee	**Position**
Kevin Ledwith	District Manager of the Northeast
Tracy Scafariello	Sales Representative for Connecticut
Eric Lopez	Sales Representative for Brooklyn, Queens and Manhattan, New York
Barry Carter	Sales Representative for Virginia
Josh Meredith	Sales Representative for North Carolina
Melanie Lupo	Sales Representative for North Georgia
Brian Gardner	Sales Representative for Arizona and part of Nevada
Peter Benitez	Sales Representative in the area from San Francisco through the Silicon Valley peninsula and San Jose

A loss of one quarter of its sales force would be extremely damaging to Vistakon's business. On the other hand, a successful raid will present B&L with a double windfall in that it will obtain a highly successful sales force with knowledge of Vistakon's Confidential Information, including customer relationships, that will allow B&L to hit the ground running while at the same time decimating Vistakon's sales force as B&L attempts to enter this field. B&L would also be spared the time and expense required to develop its own sales force.

III. Analysis

Injunctive relief is an appropriate remedy in cases of common law tortious interference. *See, e.g., Heavener, Ogier Servs, Inc. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074, 1077 (Fla. Dist. Ct. App. 1982) (enjoining tortious interference by competing franchisors by prohibiting contact for the purpose of inducing a breach); *see also* Restatement (Second) of Torts § 766 cmt. u (1979). It is similarly appropriate to enjoin violations under FDUTPA. Fla. Stat. § 501.211 ("anyone aggrieved by a violation of this part [FDUTPA] may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part"). A preliminary injunction is properly entered when the moving party demonstrates:

(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if the injunction is not granted;

(3) that the threatened injury to the plaintiffs outweighs the harm an injunction may cause the defendant; and

(4) that granting the injunction would not disserve the public interest.

Church v. City of Huntsville, 30 F. 3d 1332, 1342 (11th Cir. 1994).

As discussed below, all these elements are easily satisfied, and the requested injunction must be entered to prevent B&L from irreparably injuring Vistakon's business operations.

A. There is a substantial likelihood of success on the merits

1. Tortious Interference

The common law elements of tortious interference with business relationship are (1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant;[2] and (4) damage to the plaintiff as a result of the breach of the relationship. *Ethan Allen, Inc., v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1995); *see also* Restatement (Second) of Torts § 766 (1979); *see also Jenkins v. Region Nine Housing Corp.*, 703 A.2d 664, 667 (N.J. Super. Ct. App. Div. 1997) (stating substantially similar elements of the tort recognized by New Jersey courts). Each of these elements is present here.

a. Business Relationship

In addition to the business relationships between Vistakon and its customers, Vistakon and its employees have entered into valid agreements that choose the New Jersey law of contracts and contain non-competition and non-solicitation provisions, satisfying the first element of tortious interference. Under New Jersey law a post-employment restrictive covenant is enforceable if it is "reasonable under the circumstances." *Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 293-94 (Law Div. 1995). Vistakon's Agreements are reasonable under these circumstances. They protect the employer's legitimate interests, do not cause undue hardship on the employees, and

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[2] Some cases indicate that it is the defendant's burden to prove justification for interference with a contract. *See e.g., Greenberg v. Mount Sinai Med. Center of Greater Miami, Inc.*, 629 So. 2d 252, 256 (Fla. Dist. Ct. App.1993). Nonetheless, in this case, there is clearly no justification for interference with the contracts at issue.

do not impair the public interest. *Id. See also Karlin v. Weinberg*, 77 N.J. 408, 411-12 (1978); *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 32-33 (1971).

Under New Jersey law, an employer has a patently legitimate interest in protecting trade secrets, confidential information and customer relations. *Platinum*, 285 N.J. Super. at 305; *Whitmyer*, 58 N.J. at 32-33 (citation omitted) As to customer relations, an employer has a legitimate interest to protect, through a restrictive covenant, confidential and proprietary information such as customer buying habits, customer pricing, sales projections and product strategies. *Platinum*, 285 N.J. Super. at 305. As noted by one New Jersey Court:

> It is not merely the knowledge of the identity of the customers, but the friendly contact with them, which is important to the solicitors . . . Their personal acquaintance with customers and knowledge of their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers, is sufficient to invoke equitable protection against the subsequent use by a former employee of such information.

Board & Carton Corp. v. Britting, 63 N.J. Super. 517, 531 (Ch. Div.), aff'd, 61 N.J. Super. 340, certif. denied, 33 N.J. 326 (1960) (any Florida cite here)

Further, the agreements impose no undue hardship on the employees. Where an employee breaches a restrictive covenant in an employment agreement out of a desire to end his relationship with his employer, the employee's hardship is not "undue." *Karlin*, 77 N.J. at 423-24 ("personal hardship, without more, will not amount to an 'undue hardship' such as would prevent enforcement of the covenant").

Finally, the agreements are not contrary to public policy. As in Florida, the public law of New Jersey protects trade secrets because such protection "tends to

encourage…substantial expenditures to find or improve ways and means of accomplishing commercial and industrial goals. The protection of such efforts when translated into trade secrets tends to encourage such efforts and the result is beneficial to the employer and presumably to society." *E.I. duPont de Nemours & Co. v. American Potash & Chem. Corp.*, 200 A.2d 428, 437 (Del. Ch. 1964); [New Jersey?] *see also* Fla. Stat. § 542.335(1)(j) ("The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant.")

b. B&L Knowledge

B&L is aware of Vistakon's business relationships. As described above, in the past few years, B&L has hired several former executives of Vision Care, and these highly placed upper management employees were in positions that steered the overall strategy for Vision Care and Vistakon. All of those former employees are aware that Vistakon employees have employment agreements that contain non-disclosure, non-competition, and non-solicitation covenants.

c. Interference

B&L's efforts to raid Vistakon's workforce constitute intentional and unjustified interference with Vistakon's relationships. B&L has not only contacted a substantial portion of Vistakon's sales force[3] in an effort to induce them to breach their Agreements as well as to interfere with Vistakon's relationships with its customers, but it has apparently done so through the use of internal, confidential contact lists and other

[3] Vistakon is aware that B&L has contacted approximately one-fourth of its sales force, but there could be additional contacts that Vistakon is not aware of.

information. B&L has used Vistakon's Confidential Information to encourage its sales representatives to desert their employer but remain in the same sales territories, taking advantage of the Confidential Information and good will they have gained while on Vistakon's payroll. Such interference is not privileged and provides a sufficient basis for a claim of tortious interference. *See Viscito v. Fred S. Carbon Co., Inc.*, 717 So. 2d 586, 587 (Fla. Dist. Ct. App. 1998) (reversing summary judgment on tortious interference claim where the plaintiffs alleged defendant wrongfully solicited plaintiff's customers). Where a defendant has no prior economic interest of his own to safeguard but only a prospective business advantage that is not yet realized, the defendant has no such privilege to interfere with an existing contract. *Heavener, Ogier Servs., Inc.*, 418 So. 2d at 1077.

d. Impending Damage

If B&L is not enjoined from its efforts to raid Vistakon's sales force, the damage to Vistakon will be extreme, as its sales force would immediately be reduced by 25% in key territories and the competition world.

2. FDUTPA

B&L conducts business in Florida. B&L's improper conduct in aggressively soliciting Vistakon's sales representatives in violation of their Agreements constitutes unfair competition practices under Florida law. Under FDUTPA, "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *See* § 501.204, Fla. Stat. An aggrieved competitor may seek injunctive relief to enjoin a party from engaging

in acts of unfair competition. *See* Fla. Stat. § 501.211. "To state a claim for injunctive relief, the plain language of the statute requires a plaintiff to allege that the defendant engaged in a deceptive act or practice in trade or commerce, § 501.204(1), and that the plaintiff be a person 'aggrieved' by the deceptive act or practice, § 501.211(1)." *Klinger v. Weekly World News, Inc.*, 747 F.Supp. 1477, 1480 (S.D. Fla. 1990).

Florida courts have construed FDUTPA broadly to address unfair business practices. *See Day v. Le-Jo Enterprises, Inc.*, 521 So.2d 175, 178 (Fla. Dist. Ct. App. 1988) (reversing the lower court's entry of a directed verdict dismissing plaintiff's FDUTPA unfair competition claim and holding that the concept of "unfair and deceptive," as used in FDUTPA, was "extremely broad" and included practices that offended established public policy and that were immoral, unethical, oppressive, unscrupulous, or substantially injurious to competitors) (citations omitted).

To state a FDUTPA claim, a plaintiff need not establish that the defendant's conduct violated a specific regulation, only that it "offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious." *Citibank (South Dakota) N.A. v. Nat'l Arbitration Council, Inc.*, Nos. 3:04-cv-1076-J-32MCR, 3:04-cv-1205-J-20MCR, 2006 WL 2691528 at *3 (M.D. Fla., Sept. 19, 2006) (Corrigan, J.)(citation omitted). Intentional tortious interference is clearly unethical, oppressive, unscrupulous, or substantially injurious to competitors, and for the reasons stated above, B&L's raid will be injurious to Vistakon if not enjoined. *See Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F.Supp. 2d 1134, 1146-47 (M.D. Fla. 2007) (Fawsett, J.) ("TDW's alleged plan to hire all of Furmanite's employees *en masse* and use them to

misappropriate Furimanite's trade secrets would constitute unlawful and unfair or deceptive acts or practices under the broad reading Florida courts traditionally apply to FDUTPA. TDW's actions would amount to 'inappropriate' and 'unethical' conduct in the marketplace").

Vistakon is clearly likely to prevail on the merits of its tortious interference and FDUTPA claims.

B. There is a substantial threat of irreparable injury if B&L is not enjoined

If the requested injunction is not granted, Vistakon will face a substantial threat of irreparable injury as explained above. However, because the very purpose of B&L's tortious interference is to procure the breach of a restrictive covenant, Vistakon need not prove that it will continue to suffer irreparable harm due to B&L's raid. Rather, under § 542.335, irreparable harm is presumed. *See* Fla. Stat. § 542.335(1)(j) ("The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant."); *I.C. Systems, Inc. v. Oliff*, 824 So. 2d 286, 287 (Fla. Dist. Ct. App. 2002) (violation of restrictive covenants in employment agreement creates presumption of irreparable harm).

A preliminary injunction will stave off this irreparable harm. The purpose of a preliminary injunction is to prevent future harm. *Advantage Digital Sys., Inc. v. Digital Imaging Servs., Inc.*, 870 So. 2d 111, 116 (Fla. Dist. Ct. App. 2004) ("By its nature, an injunction restrains commission of a *future* injury; a court cannot prevent what has already occurred.") It is not necessary for a party seeking a preliminary injunction to wait until harm has occurred; such a delay would defeat the purpose of injunctive relief.

In *Tiffany Sands, Inc. v. Mezhibovsky*, the Third District Court of Appeal reversed the denial of a preliminary injunction where a former employee, while subject to a non-compete agreement, sought employment in violation of the agreement. 463 So. 2d 349, 351 (Fla. Dist. Ct. App. 1985). The appellate court found that where "the employer testified at the [preliminary injunction] hearing that he has suffered damages from appellee's solicitation of employment in direct competition, and that he will continue to suffer future monetary injury as well as injury to the [former employer's] goodwill and business reputation, which is a sufficient showing to support the enforcement of the non-competition agreement," the denial of injunctive relief was error. The Middle District of Florida has noted "the common sense notion that the pursuit of [plaintiff's] business by former … employees, having contacts and relationships developed while employed with [plaintiff], would irreparably harm [plaintiff]." *Jotan, Inc. v. Barnett*, 229 B.R. 218, 222 (M.D. Fla. 1998) (Funk, J.) (enjoining former employees and competitors).

C. Vistakon's threatened injury outweighs the harm an injunction may cause B&L

The requested injunction merely requires B&L to refrain from soliciting or employing a workforce of fewer than 40 people in the United States population because their employment would violate the terms of their Agreements with Vistakon. B&L will have no inappropriate difficulty finding its own sales force through legitimate means, even without consideration of Vistakon's few employees. On the other hand, a raid on Vistakon's sales employees would represent a substantial injury to Vistakon. The recruitment and training of a single sales representative costs over $25,000. Vistakon also loses approximately $75,000 to $100,000 in sales by the time a new sales

representative becomes acclimated in his/her territory. Those losses are in addition to the loss of good will, market share, and other harm Vistakon would suffer due to direct competition with the sales representatives that Vistakon itself trained. And B&L has apparently determined that this improper interference offers its best avenue toward success in the business.

The balance of hardship clearly weighs in favor of injunctive relief.

D. An injunction will not disserve the public interest

Florida, like many other jurisdictions, allows for the enforcement of non-compete and non-solicitation agreements and does not consider such enforcement to be contrary to the public interest. Moreover, the public interest is served by parties being able to rely on their contracts without fear of tortious interference from outsiders. *See North Am. Products Corp. v. Moore*, 196 F. Supp. 2d 1217, 1231 (M.D. Fla. 2002) (Hodges, J.) ("Under Florida law, the public has an interest in the enforcement of restrictive covenants.") Florida law creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant, and "[t]he provisions of this [FDUTPA] shall be construed liberally to promote the following policies…[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." *See* Fla. Stat. § 542.335(1)(j) and § 501.202(2), Fla. Stat. By passing these statutes, the Florida legislature confirmed that the public policy of Florida is to prevent individuals from competing unfairly in the marketplace.

CONCLUSION

For the foregoing reasons, Vistakon requests that the Court enjoin B&L from further solicitation of members of Vistakon's workforce in an effort to induce them to breach the terms of their employment agreements.

Respectfully submitted,

HUNTON & WILLIAMS LLP
Counsel for Vistakon Pharmaceuticals, LLC
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: 305.810.2517
Facsimile: 305.810.1605

By: /s/ Terence G. Connor
Terence G. Connor
Trial Counsel
Florida Bar No. 291153
tconnor@hunton.com

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert Bailey, Vice President and General Counsel for Bausch & Lomb, One Bausch & Lomb Place, Rochester, NY 14604 by Federal Express this 5th day of March.

/s/ Terence G. Connor
For Hunton & Williams LLP