IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MILLENNIUM HEALTH, LLC;

Plaintiff,

v.

DAVID BARBA; JUSTIN MONAHAN; NEPENTH LABORATORY SERVICES, LLC; DOES 1-5,

Defendants.

Civ. No. 3:20-cv-02035-HZ

OPINION & ORDER

HERNANDEZ, Chief Judge

This matter comes before the Court on a Motion for Preliminary Injunction filed by Plaintiff Millennium Health, LLC. ECF No. 53. An evidentiary hearing was held on March 4, 2021 and March 17, 2021, at which the Court heard testimony and argument by the parties. ECF Nos. 54, 65. For the reasons set forth below, Plaintiff's Motion is GRANTED.

LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must show (1) that he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in his or her favor; and (4) an injunction is in the public interest. *Id.* at 20.

In the Ninth Circuit, courts may apply an alternative "serious questions" test, which allows for a preliminary injunction where a plaintiff shows that "serious questions going to the merits" were raised and the balance of hardships tips sharply in plaintiff's favor, assuming the other two elements of the *Winter* test are met. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). This formulation applies a sliding scale approach where a stronger showing of one element may offset a weaker showing in another element. *Id.* at 1131. Nevertheless, the party requesting a preliminary injunction must carry its burden of persuasion by a "clear showing" of the four elements set forth above. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

BACKGROUND

I. Factual Background

A. Millennium Health Services, LLC

Plaintiff Millennium Health, LLC ("Millennium") is a clinical drug testing and pharmacogenetic testing company based in California. Compl. ¶¶ 13, 17. ECF No. 1. Millennium operates a "full-service, complex clinical laboratory," used by "substance-use disorder and pain management providers to obtain objective information about patients' recent use of prescription medications and/or illicit drugs." *Id.* at ¶ 17. Millennium has a national presence and "processes hundreds of thousands of patient specimens each year." *Id.* at ¶ 19.

"Millennium promotes and sells its products and services directly to physician practices and treatment centers through a nationwide network of highly-trained sales professionals." Compl. ¶ 27. "Customer relationships in the clinical drug and pharmocogenetic testing business are long-lasting and are the result of enormous investments of time and capital." Supp. Knee Decl. ¶ 4. ECF No. 27-3. As a result, Millennium's success and competitive position depends "on the strength of the relationships it develops with its customers," and so its salespeople serve as "the

face of Millennium and cultivate the company's valuable business relationships." Compl. ¶ 27. Millennium salespeople are given access to trade secrets and confidential business information "including, but not limited to, customer lists, customer contacts, information concerning profitability of individual client accounts, business methods, techniques, means of operation, strategies, research and development, and business relationships that Millennium dedicated its time and resources toward developing and maintaining, including relationships with existing and potential customers, referral sources and vendors." Knee Decl. ¶ 9. ECF No. 2-6.

Millennium's operations in Oregon are divided between two territories called "Portland North," and "Portland South," which together cover the entirety of Oregon and part of Washington around the city of Vancouver. Knee Decl. ¶ 3. Each territory is overseen by a single Territory Manager, who serves as the "Oregon face of Millennium." *Id.* at ¶ 13. Territory Managers are given "extensive training" about the drug testing industry, and "Millennium's technologies, know-how, products, services, payor strategies and information, research and development efforts, competitive intelligence, target lists and data on prospective customers, and sales." Compl. ¶ 33. Territory Managers also have knowledge of and access to Millennium's trade secrets and other confidential business information including customer lists, finances, methodologies, processes and pricing. *Id.* at ¶ 32.

B. Nepenthe Laboratory Services, LLC

Defendant Nepenthe Laboratory Services, LLC ("Nepenthe") is an Oregon company that provides drug testing laboratory services. Baumgartner Decl. ¶¶ 2, 8. ECF No. 23. As such, Nepenthe is a direct competitor of Millennium. *Id.*; Compl. ¶ 80. Nepenthe operates in Alaska,

Washington, Oregon, California, Nevada, and Idaho. Pl. Mot. Ex. 5, at 5 (Baumgartner Dep.).[1] ECF No. 53-6. Brian Baumgartner is the President of Nepenthe. Baumgartner Decl. ¶ 1.

C. Millennium's Non-Competition and Non-Solicitation Agreements

Clinical drug testing is a "highly regulated" and "fiercely competitive" industry. Compl. ¶ 17. "There are often dozens of companies competing for the same customer accounts." *Id.* at ¶ 30. To protect confidential information and business relationships, Territory Managers enter into Confidentiality, Non-Disclosure, Non-Competition and Intellectual Property Agreements with Millennium. These Agreements contain provisions that persist after the termination of the employee-employer relationship, as relevant to the present case, limit the former employee's ability to solicit Millennium customers (the "Non-Solicitation Clause") and limit the former employee's ability to compete with the Millennium, (the "Non-Competition Clause"). The Non-Solicitation Clause provides:

> Except as provided for below, for a period of one (1) year following Employee's termination of employment with Employer, regardless of which party terminates the employment relationship or the reasons for such termination, Employee will not knowingly, directly or indirectly, solicit, divert, or take away, or attempt to solicit, divert or take away, a customer of the Company that Employee had contact with or did business with (in person or through the direction or supervision of others) in the last two years of the Employee's employment with the Company, nor shall Employee participate in soliciting or inducing such a customer to buy a competitive product or service. This restriction is understood to be inherently reasonable in its geography because it is limited to the places where said customer(s) do business.

Compl. Ex. A, at 6; Ex. C, at 6.[2]

The Non-Competition Clause provides:

> Except as provided for below, for a period of one (1) year following Employee's termination of employment with Employer, regardless of which party terminates the employment relationship or the reasons for such termination, Employee shall not, directly or indirectly, provide services that are the same or similar in function

[1] Page numbers for deposition transcripts are given according to the page of the submitted exhibit, rather than the page of the unredacted transcript.
[2] The Non-Solicitation Clause found in Exhibit B of the Complaint is substantially identical. Compl. Ex. B, at 6.

> or purpose to the services Employee provides to the Employer during the last two years of employment (whether as an owner, shareholder, officer, director, manager, supervisor, employee or agent) to any business that is competitive with any aspect of Employer's business as to which Employee had material business-related involvement or about which Employee received Confidential Information during the last two years of employment in any state, province, or other jurisdiction in which Employee performed services or otherwise assisted the Employer in doing business or preparing to do business during the last two years of employment (the "Restricted Area"). A business shall be considered "competitive" if its products or services would compete with or displace the products and/or services that the Company was engaged in providing or developing at the time Employee's employment with the Company ended. Employee specifically acknowledges and agrees that the foregoing restriction on competition with Employer will not prevent Employee from obtaining gainful employment following the termination of his employment with Employer and is a reasonable restriction to protect the Company's legitimate business interests.

Compl. Ex. A, at 7; Ex. B, at 7-8; Ex. C, at 7.

D. David Barba and Justin Monahan

David Barba was offered a position as a Sales Representative with Millennium on October 23, 2014. Barba Decl. ¶ 3. ECF No. 21. On October 24, 2014, Barba accepted the offer and signed an Agreement Regarding Confidentiality, Non-Disclosure and Intellectual Property Assignment, which contained the Non-Competition Clause and Non-Solicitation Clause described in the previous section (the "2014 Barba Agreement"). Compl. Ex. A. Barba worked in the Portland South territory. Knee Decl. ¶ 5.

In November 2017, Barba was promoted to Senior Director of Managed Markets for Millennium, an executive position with national duties. Barba Decl. ¶ 5. In August 2018, Barba asked to return to a field sales position. *Id.* at ¶ 6. Millennium accommodated this request and Barba was made the Territory Manager for the Portland South territory. *Id.* at ¶ 7. On August 27, 2018, prior to his return to a field sales position and at Millennium's request, Barba signed a second Confidentiality, Non-Disclosure, Non-Competition and Intellectual Property Assignment (the

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