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<tr><td>DISTRICT COURT
CITY & COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202</td><td rowspan="2">DATE FILED: May 9, 2017 5:15 PM
CASE NUMBER: 2017CV31079

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<tr><td>Plaintiffs: DISH NETWORK CORPORATION and DISH NETWORK, L.L.C.
v.
Defendant: TOM SHEBAR</td></tr>
<tr><td></td><td>Case Number: 2017CV31079

Courtroom: 203</td></tr>
<tr><td colspan="2">ENTRY OF PRELIMINARY INJUNCTION</td></tr>
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THIS MATTER comes before the Court following a hearing on the Plaintiffs' request for a preliminary injunction. The Court, having considered the related testimony, evidence, arguments, and briefing, finds and rules as follows:

Background

Plaintiffs DISH Network Corporation and DISH Network, L.L.C. (collectively "DISH") seek to enjoin Defendant Tom Shebar ("Mr. Shebar") from being employed by one of DISH's competitors: Charter Communications ("Charter").

Mr. Shebar is an attorney. He began working for DISH as a Director and Senior Corporate Counsel in August 2009. His initial work involved negotiations of technology licensing, product development transactions, and real estate leases. In March 2014, he became the lead legal counsel for DISH's programming and media sales department. Then, in May 2016, he became the senior media, technology and business development counsel in connection with a new service developed by DISH known as Sling TV.

In March 2011, DISH presented Mr. Shebar with a stock option agreement. Section 5 of the agreement, entitled "Covenant Not to Compete and Protection of Confidential Information," provides that Mr. Shebar agrees not to compete with DISH and its subsidiaries for one year after exercise of the option or the point in time that Mr. Shebar ceased to be employed by DISH. (Exh. 1, § 5(a)). In such regard, Mr. Shebar agreed that, during the year period, he would not provide services to any of the five largest domestic cable companies. (Exh. 1, § 5(b)). Charter is one such company. Mr. Shebar had the ability to accept or reject the terms and conditions presented to him in the stock option agreement, and he electronically accepted them.

Two years later, in April 2013, DISH presented Mr. Shebar with another stock option agreement. The provisions of the related section for the "Covenant Not to Compete; Non-Solicitation; Protection of Confidential Information and Trade Secrets" in this second agreement are more detailed, but they contain an agreement by Mr. Shebar not to be employed by a Competitor of DISH for one year following the date on which Mr. Shebar ceased to be an employee of DISH. (Exh. 2, § 5(a)(i) and (iv)). The definition of a Competitor under the second stock option agreement is much broader, but it still includes the five largest domestic cable companies. (Exh. 2, § 5(a) DBS Business Line). Mr. Shebar, again, electronically accepted the terms and conditions of the second stock option agreement.

There was some argument at the hearing that Charter is not a Competitor under the DBS Business Line description. In such regard, the agreement provides in relevant part:

> The "DBS Business Line" means the Company's line of business that provides from time to time pay television services via satellite to customers on a subscription, transactional and/or other basis.

(Exh. 2, § 5(a) DBS Business Line). The provision then goes on to list enumerated restricted persons and entities "that apply to the DBS Business Line," including "each of the five MSO cable entities with the greatest number of paying U.S. residential subscribers." (Exh. 2, § 5(a) DBS Business Line). Mr. Shebar argues that Charter does not fall under this category because

Charter provides television services via cable, not satellite. The argument misconstrues the language of the agreement. As explained by section 5(a)(i)(A), the term Competitor, as used in the stock option agreement refers to the persons and entities enumerated for each of the listed lines of business for the company. In other words, the description of the DBS Business Line identified one of DISH's lines of business, not the lines of business of the competitors for whom Mr. Shebar agreed not to work. Stated more directly, under the language of the stock option agreement, by working in DISH's satellite business line—which Mr. Shebar did from August 2009 to May 2016—Mr. Shebar agreed not to work for any of the top five cable companies, even though those companies provided pay TV services by cable rather than satellite.

The greater issue in this regard is the fact that Mr. Shebar transferred to DISH's subsidiary[1] Sling TV. Sling TV does not provide pay television services via satellite, but does so via the Internet. More precisely, Sling TV provides a service known as OTT, or Over-The-Top, which involves pay television services delivered via the Internet. The second stock option agreement does define a related business line—the IPTV[2] Business Line—but the competitors thereunder do not include cable companies. Instead, the prohibited competitors include on-line video distributors such as Netflix or Hulu. Despite this, however, section 5(a)(i)(B) of the agreement goes on to further define a Competitor as:

> any other persons or entities … whose primary business is competitive with one or more of the Company Business Lines or future business lines that the Company may enter into at any time and from time to time.

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[1] The agreements in this case are based upon Mr. Shebar ceasing to be employed by DISH or its direct or indirect subsidiaries.

[2] IPTV, which stands for Internet Protocol Television, is now considered to be different from OTT, however, both utilize the Internet to provide pay televisions services to customers. Accordingly, DISH's OTT service Sling TV still falls under the definition of the "IPTV Business Line" in the agreements.

Charter qualifies as a company that is competitive with DISH's DBS Business Line. Further, the evidence presented at the hearing makes it more likely than not that Charter is attempting to develop its own OTT service that would be competitive with Sling TV.

In April 2014, DISH presented Mr. Shebar with two more stock option agreements and a restricted stock unit agreement. Each of these agreements contained the same non-competition and trade secret provisions as the April 2013 stock option agreement. Mr. Shebar also electronically accepted the terms and conditions of each of the April 2014 agreements.

Mr. Shebar testified that he believed that the non-competition provisions of the various stock agreements violated Colo. RPC 5.6 and were, therefore, unenforceable. He also testified that he advised DISH of his belief before accepting the terms and conditions. Mr. Shebar, however, also testified that the basis of his belief was a general understanding from law school. It has been argued by the defense that Mr. Shebar consulted with a law school ethics professor, presumably professor Eli Wald who testified at the temporary restraining order hearing, however, there was no indication that Mr. Shebar did so in 2011, 2013, or 2014 when he accepted the various stock agreements. Candidly, weighing the testimony and credibility of the witnesses, it appears more likely than not that DISH was not told about Mr. Shebar's belief at the time Mr. Shebar accepted the terms of the stock agreements. In fact, based on the same considerations, it seems likely that Mr. Shebar did not reach the opinion that the agreements could be void against public policy for being contrary to Colo. RPC 5.6 until close to the time he made the decision to leave the company.

Mr. Shebar was not forced to agree to the non-competition provision as a condition of his employment. Instead, he had the choice whether to accept the offered stock options knowing that his acceptance was conditioned upon his agreement to the non-competition provision. Although he claims to have realized at the time that the Code of Professional Conduct precluded him from entering into such an agreement, he rationalizes his action with the argument that the non-competition provisions were not only void in violation of public policy but were severable from the rest of the stock option agreements, and therefore, entering into the agreements would not be an ethical violation in his opinion.

Legal Standards

Whether to grant a request for a preliminary injunction rests in the discretion of the trial court. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). Such relief, however, should be exercised sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity. *Id.*

To be entitled to a preliminary injunction, the moving party must demonstrate: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Id.* at 653-54.

Analysis

Application of Colo. RPC 5.6

Colo. RPC 5.6(a) provides that a lawyer shall not participate in offering or making a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship. The most significant issue in these proceedings is whether the non-competition provisions at issue are void and unenforceable by DISH based upon Colo. RPC 5.6. Ultimately, in this regard, Mr. Shebar seeks to impose the restrictions of the Colorado Rules of Professional Conduct on a non-lawyer. Moreover, Mr. Shebar seeks to utilize those Rules in such a way as to work to his benefit and to the detriment of his client.

A contract provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy. *F.D.I.C. v. American Cas. Co. of Reading Pa.*, 843 P.2d 1285, 1290 (Colo. 1992). In upholding that position in *F.D.I.C.*, the Colorado Supreme Court cited to the *Restatement (Second) of Contracts*, § 178. Subpart (3)(b) of that section of the Restatement provides that, in weighing a public policy against enforcement of a term of an agreement, account should be taken of the likelihood that a refusal to enforce the term will further the related policy. Critically in this regard, the Colorado Rules of Professional Conduct define ethical attorney conduct for purposes of professional discipline, and they do not serve as a basis for civil liability. *Accident & Injury Medical Specialists, P.C. v. Mintz*, 2012 CO 50, ¶ 30. The Colorado Rules of Professional Conduct are not designed to alter civil liability. *Olsen and Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995). Along these lines, Colo. RPC Preamble and Scope § 20 specifically warns of the danger that the purpose of the Rules can be subverted when one is invoked by opposing parties as a procedural weapon. The policy behind the adoption of the Colorado Rules of Professional Conduct is to set ethical standards for the practice of attorneys. Applying the consideration presented by the Restatement, preventing DISH, a non-attorney, from enforcing a non-competition provision that it could utilize with any other employee does not further that policy. Worse, in every area in which the Colorado Rules of Professional Conduct address the relationship between an attorney and a client, they restrict the conduct of the attorney. When it comes to the attorney-client relationship, the Colorado Rules of Professional Conduct serve to protect the client from unethical conduct by the attorney, and it is not any part of their purpose is to protect the attorney from his client. Yet in this instance, application of Colo. RPC 5.6 to DISH would serve to allow Mr. Shebar to avoid DISH's efforts to protect its trade secrets while allowing him to keep the benefit of the stock options. In other words, rather than protect the client, application of the Rule in this instance would work to the detriment of the client in order to unfairly benefit the attorney.

Both parties have discussed *Calvert v. Mayberry*, 2016 COA 60, for which certiorari has been granted by the Colorado Supreme Court, in part on the question of whether a contract between an attorney and his client that was formed in violation of Colo. RPC 1.8(a) is void as against public policy. In *Calvert*, the attorney had been disbarred for ethical violations that involved several clients. In connection with its ruling, the hearing board had found that the attorney had violated Colo. RPC 1.8(a) which prevents a lawyer from entering into business relationships with his clients unless certain requirements are met. After being disbarred, the attorney brought a lawsuit to enforce the same agreement that was the basis of his violation of Colo. RPC 1.8(a). In finding the agreement to be unenforceable by the attorney, the Colorado Court of Appeals quoted with approval from a ruling by the trial court that: given the importance of Colo. RPC 1.8(a) in protecting clients, permitting the attorney to reap the benefits of an agreement that he was ethically prohibited from entering into cannot be countenanced, and, therefore, as a general matter, *and especially in light of the facts of this case*, the agreement between the attorney and the former client was unenforceable. *Id*. at ¶9 (emphasis in original).

The facts of the present case are in diametric opposition to the facts in *Calvert* in a central and critical aspect. There the attorney was trying to take advantage of a contract that he was ethically not permitted to make, and permitting him to do so would have brought about the very harm to the client that the related Rule was designed to avoid. Here, on the other hand, the attorney is trying to prevent the client from enforcing an agreement that it was not precluded from making, and permitting him to do so would work to the detriment of the client and would allow the attorney to breach an agreement he knowingly and voluntarily entered. In *Calvert*, an ethical rule was enforced against an attorney to the benefit of the client, whereas here, Mr. Shebar seeks to enforce an ethical rule against a non-attorney client to the detriment of that client.

In *Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, the Colorado Court of Appeals cited favorably to the position in *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 462 (Tex.App.1981), that an ethical rule for the guidance of attorneys should not be readily construed as a license for attorneys to break a promise, go back on their word, or decline to fulfill an obligation, in the name of legal ethics. Although *Norton Frickey* and *Baron* involved Colo. RPC 1.5(d), and its counterpart DR 2-107, the purpose of Colo. RPC 1.5(d), like Colo. RPC 5.6, serves to increase clients' abilities to choose which attorneys represent them.

No Colorado case has found that a contract may be held void for violating public policy based on Colo. RPC 5.6, but some courts in other states have voided contracts that violated their state's version of RPC 5.6 or DR 2-108, and Mr. Shebar cites to several such cases. However, every one of those cases involved an attorney seeking to preclude members of his former law firm from enforcing a restrictive agreement. In other words, the related ethical rules were enforced against attorneys and never non-attorneys. It does not appear that any court in the country has ever used RPC 5.6 or DR 2-108 as a means to preclude a non-attorney from enforcing such an agreement.

Mr. Shebar also cites to a number of ethical opinions. Although some of them involve circumstances similar to those in the present action, none of the opinions supports precluding a non-attorney from enforcing a restrictive covenant against an attorney. In such regard, ABA Formal Opinion 300 provides that it is unethical for *an attorney employing another attorney* to include as part of the employment contract a restrictive covenant. (Emphasis added). The present case involves a non-attorney employing an attorney. ABA Informal Opinion 1072 clarified that the position in ABA Formal Opinion 300 was equally applicable to partnership agreements. The present case does not involve a law partnership. ABA Formal Opinion 94-381 examined the circumstance of a corporation's in-house counsel and an agreement that the counsel could never represent anyone against the corporation in the future. Aside from the fact that that the situation addressed by the opinion involves a permanent prohibition and the present case involves a one year prohibition, the language of the opinion carefully defines the source of the ethical violation in such a way that it does not apply to the facts of the present case. More specifically, the opinion holds that: "*A lawyer* may not ethically ask for nor may *a lawyer* agree to any further restriction unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel." (Emphasis added). The opinion in no way suggests that ethical rules impose any related prohibitions on the conduct of non-lawyers.

New Jersey Ethics Opinion 703 is more on point with the situation in the present case, and it specifically examines a request for in-house counsel to sign a restrictive covenant designed to protect trade secrets and confidential information. The opinion tangentially discusses the enforceability, in other circumstances, of contracts that violate ethical rules for attorneys. In the end, however, nothing in the opinion states that non-attorneys must comply with the rules of ethics, although it twice explicitly states that in-house corporate counsel must abide by those rules. Similarly, Connecticut Ethics Opinion 02-05 also involves a situation tightly paralleling the facts of the present case in that it regards a non-competition agreement that employees had to sign in order to receive stock options. However, the questions addressed by the opinion all involved limitations on attorneys, not on the corporate entity itself. Specifically, the opinion reviewed whether *an attorney* could enter into such an agreement; whether *an attorney* in the company could offer such an agreement to subordinate attorneys; and whether *an attorney* in the company could have stock options withheld from subordinate attorneys who refused to sign such an agreement.

To the extent the non-competition provisions in the stock option agreements in this case are inconsistent with Colo. RPC 5.6(a),[3] it was an ethical violation for Mr. Shebar—not DISH—to participate in the making of those agreements by accepting the non-competition provisions in order to receive the stock options. Mr. Shebar's position that it was acceptable for him to enter into what he believed was an ethically prohibited contract because it would be void for being in violation of public policy involves invalid circular logic. There are multiple ethical rules prohibiting attorneys from entering into certain agreements. If Mr. Shebar's rationale was valid, there could never be a violation of those rules.

The attorney-client relationship is distinctly a fiduciary relationship founded upon a special trust and confidence. *Mintz* at ¶ 25. The Rules of Professional Conduct govern the conduct of attorneys in order to promote that trust and confidence. *Id.* To permit one of those Rules to serve as a mechanism by which an in-house attorney could accept a substantial monetary benefit from his employer then avoid the condition upon which the benefit was offered would subvert the purpose for which the Rules exist in such a way as to enable an abuse of the attorney's fiduciary responsibility to his client. As observed in *Norton Frickey, P.C.*, an ethical

[3] DISH argues that Colo. RPC 5.6(a), which by its terms applies to partnership, shareholders, operating, employment, and similar types of agreements, does not apply to a stock option agreement. There is potential validity in that position. If the Rule was intended to apply to any agreement that restricts the right of a lawyer to practice after termination of a relationship with another lawyer, it could simply provide as such. Nevertheless, the question does not need to be decided in order to determine whether a preliminary injunction should issue.

rule should not serve as a license for an attorney to break a promise, go back on his word, or decline to fulfill an obligation, in the name of ethics. *Id.* at 1270.

Non-competition provision

C.R.S. § 8-2-113(2) generally voids covenants not to compete. However, subsections (b) and (d) of the statute specifically provide that the provision does not apply to contracts for the protection of trade secrets or to executive and management personnel.

In order to fall within the trade secrets exception, the purpose of a covenant not to compete must be the protection of trade secrets, and the covenant must be reasonably limited in scope to the protection of those trade secrets. *Gold Messenger, Inc. v. McGuay,* 937 P.2d 907, 910 (Colo. App. 1997). Factors in determining whether something is a trade secret include: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Porter v. Industries, Inc. v. Higgins*, 680 P.2d 1339, 1341 (Colo. App. 1984).

The technology required to provide an OTT service does not appear to be something that is uniquely known to DISH. Instead, the difficulty in providing a profitable OTT service appears to lie in being able to negotiate and reach particular agreements with content providers. The agreements are complex and appear to require creative solutions to a myriad of problems in order for the Sling TV service to be profitable and functional. Although some other competitors have entered the OTT market, several more, including Charter, appear to be in the process of trying to develop an OTT service. The evidence presented at the hearing indicates that DISH expended substantial money, time, and resources in developing and carrying out the plan and approach to negotiating and reaching the agreements with the service providers. Mr. Shebar was directly involved in the contract negotiation process and the evidence indicates that he is one of a very few individuals who had access to and understanding of the plan and approach. Critically, in this case, DISH likely holds a short-lived advantage by having released an OTT service before its competitors. If a competitor had access to information regarding the contract negotiations and agreements with the various companies who provide the content for the OTT service, it could bypass the delay that DISH experienced while refining their strategies and approach through invention, trial, and error.

The non-competition provision in the first stock option agreement is entitled "Covenant Not to Compete and Protection of Confidential Information." The non-competition provisions in the subsequent agreements are entitled "Covenant Not to Compete; Non-Solicitation; Protection of Confidential Information and Trade Secrets." In addition to the titles that specifically reference confidential information and trade secrets, the terms of the provisions are clearly designed to inhibit the opportunity to expose trade secrets to a direct competitor by becoming employed by such a competitor, who in turn would benefit from the use of secret information to the disadvantage of DISH.

Finally, it is of note that the short, one-year duration of the term of the non-competition provision appears to reflect the fleeting value of the type of information that an employee would have.

Considering the above, the provisions are for the protection of trade secrets, and the provisions are reasonably limited in scope to the protection of those trade secrets.

Even if the covenants were not for the specific protection of trade secrets, Mr. Shebar qualifies as both a management and executive employee. In such regard, he was a director in the company, he managed and supervised a team of attorneys, he had access to information reserved for a select group of upper level executive employees, and he had discretion in making certain executive decisions. *See DISH Network Corp. v. Altomari*, 224 P.3d 362 (Colo. App. 2009).

***Rathke* factors**

In light of the above analysis, the non-competition provisions are enforceable against Mr. Shebar either as a means to protect trade secrets or due to his capacity as an executive and management level employee. Assuming that, as an attorney, Mr. Shebar was prohibited by Colo. RCP 5.6(a) from agreeing to the restrictive covenants in the stock option agreements, Mr. Shebar may not use an ethical rule as a means to avoid an obligation to his client to the detriment of that client. Further, since the Colorado Rules of Professional Conduct serve to govern the actions of attorneys and are not binding upon non-attorneys, they cannot be used as a basis to preclude a client from enforcing an otherwise binding agreement against an attorney. Accordingly, DISH has demonstrated a reasonable probability of success on the merits.

But for the entry of the temporary restraining order, Mr. Shebar would have begun to work for Charter—a company that is likely exploring or developing an OTT service that would compete with DISH's Sling TV service. There is clearly a danger of real and immediate injury. Mr. Shebar's argument that there is no such risk because he is precluded by Colo. RPC 1.6 and his fiduciary obligations from revealing DISH's confidential information to Charter ignores that he entered into an agreement with DISH that he believed was precluded by an ethical rule, and created a justification in his mind for doing so in order to retain the financial benefit given by his client while trying to avoid the commitment he made to the client in return. With regard to whether the injury would be irreparable, it would be a practical impossibility to prove whether Mr. Shebar used specialized information and knowledge while working for Charter that he developed while negotiating agreements for DISH, or to prove what precise damages resulted from the use of such information. Accordingly, DISH has demonstrated a danger of real, immediate, and irreparable injury.

Since C.R.S. § 7-74-103 specifically provides the remedy of an injunctive relief to prevent or restrain an actual or threatened misappropriation of a trade secret, it is not entirely clear that the lack of a plain, speedy, and adequate remedy at law is required. Nevertheless, in light of the practical impossibility of determining actual damages if Mr. Shebar is involved in the negotiation of contracts for Charter in which he might intentionally or inadvertently utilize confidential and secret strategies and knowledge developed by DISH, there would be no plain, speedy, and adequate remedy at law in any event.

With regard to the public interests, the investment of time and resources to produce a new service would evaporate if competitors were able to immediately benefit from developed information without having to make a similar expenditure of time and resources. If businesses cannot take advantage of the trade secrets they develop, they are less likely to commit the resources needed to develop them. As such, it is in the public interest for companies like DISH to be able to protect its trade secrets. That is why statutes such as C.R.S. §§ 7-74-101 *et seq.* and 8-2-113(2)(b) exist.

With regard to the equities, an attorney should not be able to utilize ethical rules designed to protect his clients in such a way as to benefit himself at the expense of a client. Mr. Shebar knowingly entered into the stock agreements, aware that they contained the non-competition provisions, and he realized the benefits of those agreements. It was Mr. Shebar's obligation to conform his actions to the Colorado Rules of Professional Conduct, not DISH's, and if there was a violation of those Rules, it was by Mr. Shebar and not DISH. In the end, the balance of equities favors the injunction.

Finally, the status quo is that Mr. Shebar is not working for Charter. If he were, it would place him in a position that he would almost certainly have to utilize trade secrets of DISH, even if that use was inadvertent. If a preliminary injunction is not imposed, future injunctive relief would be made moot. As such, the preliminary injunction will preserve the status quo pending a trial on the merits.

Ruling

For the reasons discussed above, DISH's request for a preliminary injunction is GRANTED.

Mr. Shebar is enjoined from working for Charter Communications during the pendency of this action, up to March 6, 2018.

SO ORDERED this May day of 9th, 2017

BY THE COURT:

John W. Madden, IV
District Court Judge