IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELOITTE & TOUCHE USA LLP, and DELOITTE TAX LLP,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1542-N
JOSE S. LAMELA, JR.,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: August 30, 2005
Decided: October 21, 2005

Teresa A. Cheek, Esquire, YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, Delaware, *Attorneys for Plaintiffs*

Joseph Grey, Esquire, STEVENS & LEE, PC, Wilmington, Delaware, *Attorneys for Defendant*

PARSONS, Vice Chancellor.

Deloitte & Touche USA LLP and Deloitte Tax LLP (collectively "Plaintiffs" or "Deloitte") seek a preliminary injunction against Defendant Jose Lamela, Jr. to prevent him from soliciting any current, former, or prospective clients that he had contact with while employed by Deloitte. On August 9, 2005, I granted with modifications Plaintiffs' proposed temporary restraining order. Subsequently, on August 12, 2005, I denied Lamela's motion to vacate the temporary restraining order as it relates to contacts with clients.[1] Plaintiffs now seek a preliminary injunction enforcing their rights under the noncompetition agreement they entered into with Lamela. The Court heard argument on this motion on August 30, 2005, and received supplemental submissions from both sides thereafter. For the reasons stated below, Plaintiffs' motion for a preliminary injunction is granted in part and denied in part.

I. FACTS

Lamela primarily works as a financial consultant advising clients on multistate tax matters. This highly sophisticated practice serves companies which conduct business in 45 states that impose income, sales, use and other taxes.[2] These laws are extremely complex and vary from state to state. Persons in the multistate tax practice provide advice to clients with multi-jurisdictional businesses concerning the complex network of

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1 I granted Lamela's motion to vacate the TRO to the extent it prohibited contacts with employees of Deloitte. The pending motion for a preliminary injunction relates only to solicitations of current, former or prospective clients of Deloitte, not of employees.

2 Affidavit of Phillip M. Brunson, Deloitte's South East Region Tax Managing Partner, ("Brunson Aff.") ¶ 31.

state tax laws and the impact on their tax liability in the various states of the manner in which they conduct business.[3]

Lamela began his career as a tax consultant at Arthur Andersen. While there, Lamela had contacts with numerous clients who eventually followed him to Deloitte. None of these clients, however, originated with Lamela;[4] instead, they were pre-existing clients of Arthur Anderson.

In May 2002, Deloitte admitted into their partnerships or hired a number of former tax partners, principals, directors and employees of Arthur Andersen, including Lamela. Deloitte hired a total of approximately 200 partners, principals and directors and approximately 2,000 employees of Arthur Andersen, all of whom were subject to post-resignation restrictive covenants relating to Arthur Andersen's personnel and clients.[5]

Around that same time Deloitte paid Arthur Andersen tens of millions of dollars to enable Lamela, among others, to join Deloitte without the restrictions imposed by the restrictive covenants they had with Arthur Andersen.[6] In particular, the Deloitte/Arthur Andersen agreement released the group from their noncompetition agreements and allowed Deloitte to obtain certain licenses for intellectual property.[7] The agreement

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3 *Id*.

4 Lamela Dep. at 89-90. Citations in this form are to the deposition of the witness whose surname is indicated.

5 Affidavit of Chet Wood, Chairman and Chief Executive Officer of Deloitte Tax LLP, ("Wood Aff.") Ex. A; Wood Aff. ¶ 4.

6 Wood Dep. at 8-11.

7 *Id*.

expressly did not include the purchase of any relationships, goodwill or book of business so that Deloitte could avoid any claim of successor liability.[8] Still, Deloitte's actions demonstrate a plan to attract the business of former Arthur Andersen customers by having them follow the former Arthur Andersen employees that Deloitte hired. Consistent with that plan, before Deloitte entered into the agreement with Arthur Andersen, Deloitte personnel conferred with individual Andersen partners about the nature, identity, and anticipated revenue from their clients.[9] Ultimately, approximately 80% of the clients served by the former Arthur Andersen tax partners followed them to Deloitte.[10]

Around the time he joined Deloitte, Lamela signed a partnership agreement with them that contained post-resignation restrictive covenants. In that agreement, Lamela agreed to the following restrictions:

> Each Party shall keep secret and confidential and shall not disclose to others, except to Active Parties, professional staff and other employees (in each case who need to know), except to others in the proper conduct of the business of the Partnership and except as required by law, the names of any clients of the Partnership or a Connected Entity, information regarding the services rendered to any such clients or the financial, business or other affairs of such clients, financial or other information relating to the past, present or projected operations of the Partnership or a Connected Entity, information relating to the past, present or future plans of the

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8 *Id*. at 15-16, 32.

9 *Id*. at 34-35; Brunson Dep. at 83.

10 Clavero Dep. at 25-26. Cesar Clavero was Deloitte's South Florida Tax Managing Partner.

> Partnership or a Connected Entity, trade secrets and information relating to technical and non-technical systems, methodologies, services, products, client development information, programs, procedures, policies and practices utilized by the Partnership or a Connected Entity; provided that the foregoing shall not restrict the use of information which is in the public domain other than as a result of a breach of this or any similar confidentiality covenant for the benefit of the Partnership or a Connected Entity. Each Party acknowledges and agrees that all manuals, training materials, technical materials, product and service information and other technical materials prepared by or for the Partnership or a Connected Entity and all directories, client files and records used in connection with the management and operation of the Partnership or a Connected Entity, in whatever form, are the proprietary property of the Partnership or a Connected Entity. Upon severing association with the Partnership, no Active Party shall retain or remove from the control of the Partnership, without the express written consent of the US Chief Executive Officer or the US Chief Executive Officer's designee, any of such proprietary property or other information described in this 9.04 and such Party shall return promptly to the Partnership any such proprietary property or other information so retained or removed.[11]
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> A Party not eligible to receive payments under Article 6 (including any person, firm, corporation or other entity with which such Party is associated) shall not, prior to or for a period of two years following severance of such Party's association with the Partnership, directly or indirectly solicit, assist others in obtaining as a client or accept an engagement to perform or perform any professional services (as defined in 9.061c),[12] other than on behalf of the Partnership or a Continuing Connected Entity, for any person, firm, corporation or other entity (a) for whom such Party (in any

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[11] Brunson Aff. Ex. A § 9.04.

[12] The agreement defines "professional services" as services which "include public accountancy, auditing, tax, management consulting or advisory, systems, expert testimony, litigation support, budget, actuarial and other services performed by the Partnership or a Connected Entity." *Id.* ¶ 9.061(c).

> capacity on behalf of the Partnership or a Connected Entity) or any office of the Partnership or a Connected Entity located within seventy-five miles of any office with which such Party has been associated (including such associated office) has performed any professional services or maintained a client relationship on behalf of the Partnership or a Connected Entity during the three years prior to such severance of association or (b) with whom any such office, to the knowledge of such Party, is negotiating or proposing for the provision of any professional service at the time of such severance of association.[13]

In addition, Lamela acknowledged that as a result of "the uncertainty and difficulty in ascertaining damages resulting to the Partnership from any breach or violation" of the restrictive covenants, Deloitte could specifically enforce the restrictive covenants by injunction or other similar remedies.[14] The agreement further provides that it is governed by the laws of the jurisdiction of the Deloitte office where Lamela worked, i.e., Florida.[15] It also contains a forum selection clause which specifies that Delaware courts will hear any disputes arising out of the agreement.[16]

After working at Deloitte for three years Lamela resigned on June 17, 2005. When Lamela left Deloitte he took his three-ring binder, which contained all the business cards he had collected since he began his career, with him to Alvarez and Marsal, Tax Advisory Services, LLC ("A&M").[17] Specifically, the binder contains contact

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13 *Id*. § 9.061(a).

14 *Id.* § 9.07.

15 *Id.* § 14.02.

16 *Id.* § 14.04.

17 Lamela Dep. at 54.

information for all clients Lamela served at Deloitte and Arthur Andersen, as well as his personal friends.[18] Lamela used this binder to create a Microsoft Outlook computerized client list at Deloitte (the "Deloitte Contact List").[19] After leaving Deloitte, Lamela used the same binder to create a Microsoft Outlook computerized client contact list at A&M (the "A&M Contact List").[20]

On July 5, 2005, Lamela sent a mass e-mail to the A&M Contact List.[21] The e-mail informed the recipients that Lamela had joined A&M and provided his new contact information. Subsequently, Lamela solicited a number of the email recipients that Deloitte claims are its clients by means of additional emails, phone calls and personal visits. For example, in late June, Lamela called Jeff Pfaeffli of AutoNation, a client of Deloitte, to solicit AutoNation to become an A&M client.[22] Later, at a July 18, 2005 lunch meeting, Lamela and his colleagues discussed with representatives of AutoNation the tax issues it faced and the services offered by A&M. Lamela asked AutoNation's representatives how he and A&M could start providing tax services to them.[23]

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18 *Id*. at 46.

19 *Id*. at 52.

20 *Id*. at 54.

21 *Id*. at 67.

22 *Id.* at 68-69.

23 *Id*. at 69.

Lamela also contacted Bacardi, another Deloitte client.[24] At a dinner with two Bacardi representatives in late June 2005 Lamela explained A&M's business model and discussed Bacardi's tax situation.[25] He also stated that "A&M would like to service Bacardi in the tax area."[26]

As of August 29, 2005, Lamela had contacted 13 additional companies that Deloitte asserts are its clients or companies to which it has made proposals.[27] Furthermore, Lamela admitted that after joining A&M he performed professional tax services for Ryder Systems, Burger King Corporation and Andrx Corporation, all of which are Deloitte clients.[28] Lamela also testified that he believes he can contact at least 23 other purported Deloitte clients without violating his noncompetition agreement.[29] For example, Lamela contends that he can serve companies for which Deloitte performs audit services because the Sarbanes-Oxley Act ("Sarbanes-Oxley") bars Deloitte from

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24 *Id*. at 71.

25 *Id.* at 81-82; Diaz Dep. at 49-50, 64-71; Lowe Dep. at 52. Benjamin Diaz, III, is a former tax consultant in Deloitte's South Florida Multistate Tax Practice and a current employee of A&M. Robert N. Lowe, Jr., is the Chief Executive Officer of A&M.

26 Diaz Dep. at 49-50, 64-71; Lowe Dep. at 52.

27 Because Deloitte contends the identities of those 13 companies are part of its confidential information, they are listed in Confidential Appendix A to this Memorandum Opinion.

28 Lamela Dep. at 149-50.

29 *See* Confidential App. B hereto for a list of such companies.

also providing nonaudit services for those clients.[30] Deloitte disagrees, however, and asserts that it can perform consulting work for all of the clients Lamela served at the time of his resignation.[31] Moreover, at their depositions, neither Lamela, Diaz nor Lowe could identify a single client of Deloitte's multistate tax practice that Deloitte can no longer serve because of an actual conflict under Sarbanes-Oxley. In addition, according to Deloitte even if Sarbanes-Oxley were to prevent it from doing both certain tax and audit work for a particular client, Deloitte and the client involved would have the option of having Deloitte provide either tax or audit services. Deloitte argues that Lamela has no right to usurp that decision.

On August 9, 2005 I entered a temporary restraining order that, using language drawn from the post-resignation restrictive covenants in the Lamela/Deloitte partnership agreement, enjoined Lamela from:

> (a) directly or indirectly, alone or in concert with others, soliciting or inducing any partner, principal, employee or agent of any of the Deloitte U.S. Entities or a Connected Entity to leave the Deloitte U.S. Entities or a Connected Entity; (b) directly or indirectly, alone or in concert with

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30 15 U.S.C. § 7231. In particular, 15 U.S.C. § 78j-1 bars accounting firms that provide audit services to a company from also providing them nonaudit services including "1) bookkeeping or other services related to the accounting records or financial statements of the audit client; 2) financial information systems design and implementation; 3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; 4) actuarial services; 5) internal audit outsourcing services; 6) management functions or human resources; 7) broker or dealer, investment adviser, or investment banking services; 8) legal services and expert services unrelated to the audit; and 9) any other service that the [Public Company Accounting Oversight] Board determines, by regulation, is impermissible."

31 Brunson Dep. at 96.

> others, soliciting, assisting others in obtaining as a client or accepting an engagement to perform or performing any Professional Services for any person, firm, corporation or other entity for whom Lamela (in any capacity on behalf of the Deloitte U.S. Entities or a Connected Entity) or any of the Miami, Fort Lauderdale and Palm Beach, Florida offices of the Deloitte U.S. Entities or a Connected Entity has performed any Professional Services or maintained a client relationship on behalf of the Deloitte U.S. Entities or a Connected Entity from June 17, 2002 through June 17, 2005 and of which person, firm, corporation or entity Lamela has knowledge or reasonably should have knowledge; (c) directly or indirectly, alone or in concert with others, soliciting, assisting others in obtaining as a client or accepting an engagement to perform or performing any Professional Services for any person, firm, corporation or other entity with whom any of the Miami, Fort Lauderdale and West Palm Beach, Florida offices of the Deloitte U.S. Entities or a Connected Entity, to Lamela's knowledge, was negotiating or proposing for the provision of any Professional Service as of June 17, 2005; and (d) alone or in concert with others, using or disclosing to others client information and/or other confidential, proprietary or trade secret-protected information of the Deloitte U.S. Entities or a Connected Entity.

On August 12, 2005, I granted in part and denied in part Lamela's motion to vacate the TRO. Specifically, I vacated the TRO with respect to Lamela's contacting Deloitte employees (subparagraph (a) above), but denied the motion to vacate in all other respects.

At the hearing on Deloitte's motion for a preliminary injunction on August 30, 2005, Lamela argued that no preliminary injunction was necessary and that, in any event, the TRO was too broad. Deloitte tacitly acknowledged the need to identify more specifically the clients and prospective clients it seeks to prohibit Lamela from soliciting or working for in his new position at A&M. Deloitte pointed to three exhibits as encompassing its client list, for which it claimed trade secret protection. Those exhibits

are: (1) a list of the clients Lamela serviced in the capacity of partner in charge while he was at Deloitte;[32] (2) a list of prospective clients that Lamela worked on or made proposals for new or additional business while at Deloitte;[33] and (3) a subset of the list of persons to which Lamela sent "bcc" emails (the "email list") advising them of his new contact information at A&M.[34] As to Lamela's email list, Deloitte conceded that its client list would include, at most, only those that it serviced while it employed Lamela. Because the exact contours of the Deloitte client list remained in flux the Court requested further submissions from both sides on the appropriate scope of any injunction that might be ordered. Thereafter, the parties filed a number of supplemental submissions on that issue. The final, consolidated client list for which Deloitte seeks protection contains 78 entities.[35]

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[32] Brunson Supp. Aff. Ex. A.

[33] Brunson Supp. Aff. Ex. B.

[34] PX 1 at the August 30, 2005 hearing. Deloitte notes that Lamela did not produce the email list until after his deposition of August 17, 2005, and shortly before the preliminary injunction hearing.

[35] *See* September 13, 2005 letter from Teresa A. Cheek to Court, Ex. A ("Final Client List").

II. ANALYSIS

A. Applicable Standard

The standard for determining whether to grant a preliminary injunction is procedural and therefore governed by Delaware law.[36] The party seeking a preliminary injunction has the burden of establishing a right to injunctive relief.[37] When seeking a preliminary injunction, the moving party must satisfy the Court that: (1) it has a reasonable probability of success on the merits at a final hearing, (2) it faces an imminent threat of irreparable injury, and (3) the balance of the equities tips in favor of issuance of the requested relief.[38] A preliminary injunction is an extraordinary remedy; therefore, such relief will not be granted "where the remedy sought is excessive in relation to, or unnecessary to prevent, the injury threatened."[39] This "extraordinary remedy . . . is granted only sparingly and only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently."[40]

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36 *Custom Video v. N.A. Video*, 1987 WL 17676, at *2-3 (Del. Ch. Sept. 25, 1987) (applying Delaware standards for preliminary injunction where New Jersey law governed enforceability of restrictive covenants).

37 *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 551 (Del. Ch. 2000).

38 *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 371 (Del. Ch. 2004).

39 *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 202-03 (Del. Ch. 2002) (internal quotations omitted).

40 *Aquila, Inc.*, 805 A.2d at 203 (internal quotations omitted).

B. Reasonable Probability of Success on the Merits

The parties agree that Florida law governs the enforceability of the restrictive covenants at issue.[41] In 1996, the Florida Legislature enacted § 542.335, which sets forth the governing standards for enforceability of restrictive covenants. Under Florida law, the party seeking to enforce a restrictive covenant must

> plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.[42]

Thus, under § 542.335, courts do not simply enforce restrictive covenants as written. Rather, the proponent must demonstrate that the contractually specified restraint is reasonably necessary to protect a legitimate business interest before a court will enforce it.

The statute provides that a "legitimate business interest" includes but is not limited to:

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41 *USH Ventures v. Global Telesystems Group, Inc.*, 796 A.2d 7, 23-24 (Del. Super. 2000) (applying law parties agreed governed the dispute).

42 Fla. Stat. § 542.335(1)(c).

> (a) trade secrets, (b) valuable confidential business or professional information that otherwise does not qualify as trade secrets, (c) substantial relationships with specific prospective or existing customers or clients, (d) customer or client goodwill associated with (i) an ongoing business or professional practice by way of trade name, trademark, service mark, or trade dress, (ii) a specific geographic location, or (iii) a specific marketing or trade area, or (e) extraordinary or specialized training.[43]

In sum, a "legitimate business interest" as envisioned by the statute is "an identifiable business asset that constitutes or represents an investment by the proponent of the restriction such that, if that asset were misappropriated by a competitor (i.e., taken without compensation), its use in competition against its former owner would be unfair competition."[44] Further, the Florida restrictive covenant statute requires courts to "construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement."[45]

1. Is Deloitte likely to be able to prove that the restrictive covenant is enforceable and has been or is likely to be breached?

Lamela contends that the restrictive covenant Deloitte seeks to enforce against him is not reasonably necessary to support any legitimate business interest.

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43 Fla. Stat. § 542.335(1)(b).

44 John A. Grant & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 Fla. B.J. 53, 54 (Nov. 1996) ("Grant & Steele").

45 Fla. Stat. § 542.335(1)(h).

Lamela agrees, however, that Deloitte may have a legitimate business interest in protecting business relationships with certain clients.[46] In particular, Lamela's supplemental affidavit identifies nine companies in which he admits Deloitte has a protectible, legitimate business interest. Deloitte has not presented any evidence that Lamela is likely to breach the restrictive covenant as to any of these clients. Instead, this dispute centers on the following five categories of clients in which Lamela contends Deloitte has no legitimate business interest: (1) clients Deloitte does not provide state and local tax ("SALT") services to, (2) clients Lamela did not service while at Deloitte, (3) clients subject to Sarbanes-Oxley restrictions, (4) SALT clients that Lamela serviced at Arthur Andersen, and (5) clients who put tax engagements out for competitive bidding.[47] Lamela argues that Deloitte has failed to plead and prove the necessary prerequisite under Florida law for an enforceable restrictive covenant as to clients in these five categories, and therefore has no right to a preliminary injunction.

To evaluate the merits of Lamela's argument that no injunction of any scope is warranted here, I address as an example whether Deloitte has a legitimate business interest in the SALT clients Lamela served at Arthur Andersen.[48]

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46 Lamela Supp. Aff. at 22.

47 Lamela's Proposed Form of Order.

48 In his proposed order Lamela lists 25 companies that he claims fit within this category. Lamela's Proposed Form of Order Ex. D. After negotiations, the parties reduced this number to 21. *See* Final Client List.

Lamela argues that Deloitte does not have a legitimate business interest in his SALT clients from Arthur Andersen because "[t]he purpose of the statutory provision is to prevent an employee from taking advantage of a customer relationship which was developed during the term of the employee's employment."[49] Lamela further argues that because his former Arthur Andersen SALT clients were developed at Arthur Andersen, before Deloitte employed him, the noncompetition agreement cannot restrict him from contacting them.

Courts have recognized that an employer who seeks to enforce a restrictive covenant may not have a legitimate business interest in clients an employee developed before his employment by that employer began. In *BDO Seidman v. Hirshberg*, the Court of Appeals of New York court held that restrictive covenants cannot extend to "personal clients of defendant who came to the firm **solely** to avail themselves of his services and **only** as a result of his own independent recruitment efforts, which" plaintiff "**neither subsidized nor otherwise financially supported** as part of a program of client development."[50] A federal court in Florida, applying Florida law, cited *BDO Seidman* with approval but carefully limited its application to the holding quoted above.[51] Thus,

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49 *Anich Indus., Inc. v. Raney*¸751 So.2d 767, 771 (Fla. Dist. Ct. App. 2000) (quoting *Bradley v. Health Coalition, Inc.*, 687 So.2d 329, 334-35 (Fla. Dist. 1997)).

50 712 N.E.2d 1220, 1225-26 (N.Y. 1999) (emphasis added).

51 *Merrill Lynch, Pierce, Fenner & Smith v. Dunn*, 191 F. Supp.2d 1346, 1353 (M.D. Fla. 2002) (rejecting reliance on *BDO Seidman* in absence of evidence that defendant "obtained any of his clients solely as a result of his own recruitment efforts, which Plaintiff neither subsidized nor otherwise financially supported as part of a program of client development" and, in addition, because "there was no

for Lamela to prevail on this argument he would have to show that Deloitte did not spend any money to develop the former Arthur Andersen clients he seeks to contact and that those clients came to Deloitte only because of his efforts. Lamela has not shown either of these premises.

In particular, Lamela's heavy reliance on *BDO Seidman* for the proposition that a noncompetition agreement cannot extend to pre-existing clients of the employee is misplaced.[52] First, unlike the situation in *BDO Seidman,* Deloitte invested in Lamela's clients from Arthur Andersen. The investment began when Deloitte agreed to pay tens of millions of dollars to Arthur Andersen to release Arthur Andersen's partners, principals, directors and employees from their restrictive covenants and to obtain licenses for certain intellectual property.[53] That agreement enabled Lamela to contact his former clients at Arthur Andersen and avoid losing contact with key individuals at those clients, as he might have if he had been subject to Andersen's 18 month restrictive covenant. In contending that *BDO Seidman* applies here, Lamela emphasizes that Deloitte did not purchase any Arthur Andersen client relationships, goodwill or book of business because it wished to avoid any claim of successor liability. According to Lamela, this fact precludes Deloitte from claiming any interest in his Andersen clients. I disagree. Based on the record developed at this preliminary stage, I find that Deloitte is likely to succeed

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evidence that the defendant in BDO used the Plaintiffs' confidential information.").

52 Def.'s Supp. Mem. In Opposition to the Pls.' Motion for a Prelim. Inj. at 9-11.

53 Wood Aff. ¶ 5.

in proving that it did subsidize or otherwise financially support the development of the Andersen clients. Deloitte supported the development of the former Arthur Andersen clients by investing money to facilitate the ability of the former Arthur Andersen personnel, including Lamela, to service those customers. Deloitte also financially supported that effort by having its highly trained and specialized personnel work for those customers during the three years Lamela was with Deloitte.

Second, Lamela has not presented any facts demonstrating that he obtained the former Arthur Andersen clients through his own independent recruitment efforts. Instead, the record indicates that these clients already used Arthur Andersen for tax services when Lamela joined that company.

Hence, Deloitte is likely to succeed in proving that it has a legitimate business interest under § 542.335 of the Florida Code in protecting as its own clients entities that Lamela worked for while at Arthur Andersen. Based on its efforts to develop those clients between June 2002 and June 2005, Deloitte has demonstrated a reasonable probability of being able to show that it has acquired either trade secrets or "valuable confidential business or professional information that otherwise does not qualify as trade secrets" relating to these clients or has substantial relationships with the former Arthur Andersen clients it seeks to protect in this action. The Florida statute explicitly recognizes each of those factors as reflecting the existence of a legitimate business interest.[54]

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[54] Fla. Stat. § 542.335(1)(b).

The other cases cited by Lamela are readily distinguishable.[55] Accordingly, Deloitte is likely to succeed in showing that it has a legitimate business interest in the clients Lamela served while employed by Arthur Andersen.

Moreover, Deloitte is likely to be able to show that Lamela has breached or threatened to breach the restrictive covenant with respect to several Deloitte clients that he previously served at Arthur Andersen. For example, at Lamela's deposition he testified that he serviced Andrx while employed by Deloitte and earlier by Arthur Andersen. After leaving Deloitte Lamela not only sent Andrx a change of address e-mail, but also called them and had a lunch meeting with two of their representatives for the purpose of continuing his "relationship with them in the hope of generating tax work from them."[56] At his deposition Lamela also listed at least five additional former Arthur Andersen clients that he contacted via telephone at least in part to solicit their business on

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[55] In *Reddy v. Comty. Health Found. of Man*, 298 S.E.2d 906, 916 (W. Va. 1982), the court stated that the employee could show that the asset in question belonged to him, "either because he brought it with him when he entered his employer's service or because he 'paid' for it during the term of his employment." In this case, absent Deloitte's actions Lamela probably could not have serviced the former Arthur Andersen clients for a period of time, and there is no evidence of Lamela's own client development efforts. Similarly, in *Lawley v. A & M Logistix, Inc.*, 1998 WL 34182467, at *4 (E.D. Mich. Feb. 18, 1998) the court held that: "In the case of customers that defendant knew prior to joining plaintiffs company, unless that information is transferred or sold to plaintiff, it is not the proper subject matter for a restrictive covenant." Here, Arthur Andersen effectively sold information relating to its clients to Deloitte by enabling its former partners to contact them. Thus, the *Lawley* case supports Deloitte's position.

[56] Lamela Dep. at 99-100.

behalf of A&M.[57] Therefore, Deloitte has demonstrated that it is likely to succeed in showing that Lamela breached or threatened to breach his restrictive covenant by contacting Deloitte clients that Lamela formerly served at Arthur Andersen. Thus, Deloitte has made a sufficient showing on the merits to justify at least some form of preliminary injunctive relief against Lamela, provided they meet the other requirements for such relief in terms of irreparable harm and a balancing of the hardships involved.

Lamela opposed Deloitte's motion for a preliminary injunction on several other grounds related to the merits of their claims. Those grounds involve the other categories of clients as to which Lamela argues Deloitte has no legitimate business interest. The parties presented the details of these arguments in the context of their dispute over the scope of any preliminary injunction that might issue. Accordingly, I have addressed them in the same light.

2. The appropriate scope of any preliminary injunction

Lamela challenges Deloitte's right to enforce its restrictive covenant as to four additional categories of clients. I will discuss each of these categories in turn.

a. Clients who held out their multistate tax work for competitive bids[58]

Lamela argues that Deloitte does not have a substantial relationship with "specific prospective or existing customers"[59] who put their tax services out for competitive bid.

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57 Confidential App. C.

58 Lamela's Proposed Form of Order Ex. E. Lamela lists ten companies who put their tax engagements out to bid, of those nine are still in dispute.

59 Fla. Stat. § 542.335(1)(b).

Citing *Shields v. Paving Stone Co.*, Lamela argues that because such clients only care about price, the relationship between Deloitte and the potential customer has no bearing on their decision regarding which company should provide them with multistate tax services.[60]

Plaintiffs argue that clients do not come to Deloitte purely based on competitive bidding. Their brief, however, cites no evidence to support this proposition.[61] They assert that multistate tax clients really come to a company because of established relationships developed between the client and Deloitte, which take years to develop.[62] According to Deloitte, companies do not accept the lowest bid; rather, they choose a tax company based upon a mixture of cost and prior experience with that company.

The cases cited by Lamela in support of his claim that the noncompetition agreement at issue does not apply to clients acquired through a competitive bidding process are persuasive. In those cases the court found that the company seeking to

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60 796 So.2d 1267, 1269 (Fla. App. 4th Dist. Oct 17, 2001) (holding a noncompetition agreement unenforceable "because Paving Stone did not have exclusive relationships with any of its customers and information on customers was readily obtainable through the yellow pages and trade subscriptions, the nonsolicitation/nondisclosure agreement was not reasonable to protect Paving Stone's customer base. Moreover, Paving Stone conceded that it had no control over contracts awarded through open bidding."). *See also Anich Indus., Inc.*, 751 So.2d at 770-71.

61 Pls.' Main Br. in Supp. of their Mot. for a Prelim. Inj. ("POB") at 30. Plaintiffs cited no evidence to support their statement that "Deloitte Tax's Multistate Tax Practice clients normally do not request competitive bids for their multistate tax work but base their work on the established relationships developed between them and Deloitte Tax, relationships that takes years to develop."

62 POB at 30.

enforce a restrictive covenant did not have a substantial relationship with the client, because due to the nature of the business the extent of any such relationship would have had no bearing on which company received the winning bid.[63] For example, in *Anich* the court held that:

> "[S]ubstantial relationships" have not been shown. The customers who testified on Anich's behalf all acknowledged that they made their industrial tool and equipment purchases based primarily on cost and the supplier's ability to provide the goods quickly. There was little evidence of any exclusive or other kind of relationship that could be construed as "substantial" within the meaning of the statute. Alternatively, under Raney's interpretation, it is obvious that in less than three months with Anich she did not have the opportunity to develop a "substantial relationship" with any of her customers.[64]

Similarly, in this case Deloitte has not presented any evidence to show that in competitive bidding situations the nine companies identified by Lamela do not base their decision on price alone. Although Lamela worked for Deloitte for three years, which gave him far greater time to establish a relationship with the customers than the defendant in *Anich*, Deloitte has not presented any persuasive evidence that the tax business for the clients in question does not operate in a competitive bidding manner similar to that in *Anich*. To the contrary, the evidence shows that companies listed on Lamela Ex. E put their work out for competitive bidding and supports a reasonable inference at this

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63 The Florida restrictive covenant statute lists as a legitimate business interest "substantial relationships with specific prospective or existing customers, patients, or clients." Fla. Stat. 542.335(1)(b)(3).

64 *Anich Indus. Inc.*, 751 So.2d at 771 (internal quotations omitted).

preliminary stage of the litigation that they base their decisions solely on price. Therefore, Plaintiffs have not demonstrated a likelihood of success in showing that they have a legitimate business interest in the nine identified clients who put their services out for "open bidding." Thus, those clients will not be included in the proscriptive provisions of any preliminary injunction order.[65]

b. Clients Deloitte allegedly could not serve due to the requirements of Sarbanes-Oxley[66]

Lamela argues that because Deloitte provides audit services to certain clients, Sarbanes-Oxley bars it from providing multistate tax services to those clients.[67] According to Lamela an injunction covering those clients would be inappropriate because Florida Statute § 542.335(1)(g) specifically permits a court to consider as a defense the inability of the person seeking to enforce a restrictive covenant to continue in the line of business that is the subject of the enforcement action. At argument on Deloitte's motion for a preliminary injunction, Lamela complained that Deloitte had failed to produce requested documents relating to concerns expressed by clients about using Deloitte for SALT work based on the requirements of Sarbanes-Oxley.[68] Deloitte did not seriously dispute this criticism of its production. Therefore, I will assume for purposes of

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65 This is a preliminary ruling only. If Deloitte ultimately proves that it does have a legitimate business interest as to those clients and Lamela breaches the restrictive covenant as to any of them, Deloitte would be entitled to appropriate relief.

66 Lamela's Proposed Form of Order Ex. C. Lamela lists seven companies that fit within this exception, all of which are still in dispute.

67 *See supra* n.30.

68 Tr. at 61-63.

Deloitte's motion that Lamela's allegations relating to concerns about Sarbanes-Oxley are true and that each of the seven companies Lamela identified has decided not to use Deloitte for both audit work and the tax-related work specified in Exhibit C to Lamela's Proposed Order.

Deloitte asserts that Deloitte Tax LLP ("Deloitte Tax") currently is "able to perform work for all of the clients Lamela served at the time of his resignation from [Deloitte]."[69] The evidence also suggests that the fact that an audit client of Deloitte may be subject to Sarbanes-Oxley does not necessarily mean that Deloitte Tax cannot provide any tax services to that client.[70] Furthermore, even "when Sarbanes-Oxley does prevent Deloitte from doing both certain tax work and the audit work for a particular client, [Deloitte], together with the applicable client, have the option of providing the tax work or the audit work."[71]

There is no dispute that Deloitte's restrictive covenant with Lamela, by its terms, prohibits him from soliciting or performing any professional services on behalf of A&M for any of the seven Deloitte clients alleged to have Sarbanes-Oxley concerns. Therefore, the Court must decide whether Deloitte pled and proved that this contractual restraint is reasonably necessary to protect the legitimate business interests Deloitte relies upon to justify it.

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69 POB at 10; Brunson Dep. at 96.

70 Brunson Dep. at 91-95; *see* Lamela Dep. at 119 ("certain enumerated services" are precluded); Brunson Supp. Aff. ¶ 2.

71 Brunson Supp. Aff. ¶ 4.

As previously discussed, Deloitte has proven that it has a legitimate business interest in the identified Deloitte clients who Lamela worked with while at Arthur Andersen. Four of the seven clients alleged to have Sarbanes-Oxley concerns had been clients of Arthur Andersen. Thus, Deloitte has a legitimate business interest as to those clients. Because the other three clients did not come from Arthur Andersen they presumably originated with Deloitte. Hence, Deloitte is likely to be able to prove that it had a sufficiently substantial relationship with those clients to give it a legitimate business interest in maintaining them.

In arguing that Deloitte has no protectible interest in the clients with Sarbanes-Oxley concerns, Lamela essentially contends that an injunction including those seven clients would be overbroad. Under Florida Statute § 542.335, however, the burden is on Lamela to show that the restriction is overbroad or otherwise not reasonably necessary to protect Deloitte's legitimate business interest. In evaluating whether Lamela has met that burden, the Court is mindful of its finding that Deloitte has a legitimate business interest in the identified clients. In other words, Deloitte has made an investment in developing these clients and its trade secrets or confidential information relating to them such that their misappropriation by Lamela and his use of them in competition with Deloitte would be unfair competition.[72]

The record shows that most likely Deloitte has at least some nonaudit work within the meaning of "professional services" under the restrictive covenant that Deloitte could

[72] Grant & Steele, 70 Fla. B.J. at 54.

perform for a client, even if it also provided audit services for that client.[73] Absent an injunction, however, Lamela and A&M could compete with Deloitte for that work. In addition, as Deloitte has demonstrated, both it and its clients have the continuing flexibility to decide to provide or offer either audit or consulting services in each individual case.[74] Lamela seeks to deprive Deloitte of that flexibility.

I do not consider Florida Statute § 542.335(1)(g), cited by Lamela, applicable on the facts of this case. That statute only applies when the company "no longer continues in business in the area or line of business" that is subject to the restrictive covenant.[75] It has been applied, for example, where a company went out of business.[76] Here, neither party asserts that Deloitte no longer serves clients in the state and local tax area. Therefore, the limitations imposed by Sarbanes-Oxley do not create a situation such as that contemplated by § 542.335(1)(g).

Based on the preliminary record available, I conclude that Lamela has not carried his burden of proving that including clients with Sarbanes-Oxley concerns within the prohibitions of an injunction would be unreasonable. Thus, Deloitte is reasonably likely to succeed on the merits of the Sarbanes-Oxley issue.

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73 *See* Brunson Dep. at 91-95.

74 *Id*.

75 Fla. Stat. § 542.335(1)(g).

76 *See Wolf v. Barrie*, 858 So.2d 1083, 1086 (Fla. Dist. Ct. App. 2003) (holding that § 542.335(1)(g) applied when the former employer no longer operated his business).

c. Clients Lamela did not provide tax services to at Deloitte[77]

Lamela asserts that Deloitte does not have a legitimate business interest in clients he did not serve or provide SALT services to while at Deloitte, because Lamela did not gain any knowledge with respect to those clients with which he could engage in unfair competition. Thus, he argues that as to these clients Deloitte does not have a legitimate business interest that this Court needs to protect, as Lamela is on equal footing, competitively, with individuals who never worked at Deloitte.

Deloitte may have a substantial relationship with companies within these categories. It has not shown, however, a reasonable likelihood of success in proving that Lamela had a relationship with them or knowledge of trade secrets or confidential information about them that would have enabled him to compete unfairly with Deloitte for their business. For example, even though Deloitte submitted 96 pages of timesheets for work done for its client Republic Services, Inc., none of those timesheets show any work done by Lamela.[78] Hence, Deloitte appears unlikely to succeed in showing that it

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[77] *See* Lamela's Proposed Form of Order Exs. A & B. Lamela lists "non-Deloitte SALT clients" and clients Lamela did not service while at Deloitte in separate categories. For purposes of this opinion, however, the analysis for each category is the same; thus, I address both categories together. In Exhibit A Lamela lists 15 non-Deloitte SALT clients of which six are still in dispute. Exhibit B lists 59 clients Lamela allegedly did not service while at Deloitte, of those 22 are still in dispute.

[78] *See* Affidavit of George Sumrow Jr., the Controller for the Southeast Region for Deloitte Tax LLP ("Sumrow Aff.") Ex. D, part 29(a-d).

has a legitimate business interest in clients for whom Lamela did not provide professional services while he was a partner at Deloitte.[79]

C. Irreparable Harm

Under Florida law, the violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant.[80] Lamela has failed to rebut this presumption. After leaving Deloitte, Lamela admittedly served at least three Deloitte clients and personally approached at least 13 more to become A&M clients in the multistate tax area before the entry of the temporary restraining order.[81] Thus, absent a preliminary injunction Lamela probably will actively encourage other Deloitte clients to give their business to A&M. If this occurs, Deloitte is likely to find it difficult to "unscramble the eggs" and reacquire those lost clients.[82]

D. The Balance of the Equities

The Florida statute provides that, in determining the enforceability of a restrictive covenant, a court "shall not consider any individualized economic or other hardship that

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79 *See* Lamela's Proposed Form of Order Ex. A & B. Deloitte has demonstrated, however, that contrary to Lamela's assertions, he did have substantial contacts with Wackenhut. *See* Sumrow Aff. Ex. D, part 37 (Deloitte's timesheets show that Lamela billed 50.5 hours of work to this client). Accordingly, a preliminary injunction encompassing Wackenhut would be appropriate.

80 Fla. Stat. § 542.335(1)(j).

81 Lamela Dep. at 149-50.

82 Lamela also argues that Deloitte has not shown irreparable injury because Deloitte can calculate its damages and therefore has an adequate remedy at law. I did not find Lamela's evidence on this issue convincing and believe Deloitte could have difficulty quantifying its damages. In short, Lamela did not rebut Deloitte's statutory presumption of irreparable injury.

might be caused to the person against whom enforcement is sought."[83] Lamela has stated that, if granted, this preliminary injunction will "have a severe and devastating effect" on him and "cripple him professionally."[84] The Florida statute expressly prohibits consideration of this type of harm. Furthermore, Lamela's employer has stated he will retain him even if this Court grants Plaintiffs' preliminary injunction motion.[85]

For the reasons discussed above, Deloitte would be subject to a significant risk of competitive harm if no preliminary injunction issues. Therefore, the balance of the equities weighs in favor of granting a preliminary injunction to the extent it favors either side.

III. CONCLUSION

Deloitte has demonstrated a reasonable probability of success on the merits, irreparable harm in the absence of an injunction and that its need for protection against possible loss of legitimate business interests outweighs any harm that can reasonably be expected to befall Lamela if a preliminary injunction were granted. The scope of the preliminary injunction sought by Deloitte, however, is too broad in the respects indicated above. Therefore, Deloitte's motion for a preliminary injunction is granted in part and denied in part.

An appropriate Order consistent with this Memorandum Opinion will be entered.

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83 Fla. Stat. § 542.335(1)(g)(1).

84 POB at 27.

85 Lowe Dep. at 13.