

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ORGANO GOLD INT'L, INC.,

Plaintiff,

v.

LUIS VENTURA, et al.,

Defendants.

CASE NO. C16-487RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiff Organo Gold Int'l, Inc.'s ("Organo") Motion for Temporary Restraining Order ("TRO") and for a Preliminary Injunction. Dkt. # 10. Defendant L&A Ventura Management, Inc. ("L&A Ventura") has filed an Opposition.¹ Dkt. # 15. The Court heard oral argument on April 27, 2016. For the reasons set forth below, the Court **GRANTS** Organo's Motion.

¹ According to the Opposition, Defendants Luis Ventura and Luz Angela Ventura have not yet been served. *See* Dkt. # 15 at 2 n.1. This Court's Local Rules require that moving parties "serve all moving papers on the opposing party before or contemporaneously with the filing of the motion and include a certificate of service with the motion." Local Rules W.D. Wash. LCR 65(b)(1). The certificate of service accompanying Plaintiff's Motion does not provide much detail as to whether Mr. and Mrs. Ventura have been properly served. Still, it is clear that Mr. Ventura has notice of the Motion and suit. *See* Dkt. # 2 (Ventura Decl.). However, since the Venturas have since divorced, it is not clear that Mrs. Ventura has been served. *See id.* ¶ 3. As a result, the Court will not impose a TRO on Mrs. Ventura until Organo can show that she has received adequate notice of this Motion.

1 **II. BACKGROUND**

2 Organo is a multi-level marketing (“MLM”) company that distributes ganoderma-
3 based coffee products² with operations in the United States, Mexico, and more than 30
4 other countries. *See* Dkt. # 1-2 (“Compl.”) ¶¶ 1, 8; Dkt. # 11 Ex. 8 (Perrett Decl.) ¶ 5.
5 Defendants Luis Ventura and Luz Angela Ventura are husband and wife and reside in
6 Texas. *Id.* ¶ 2. They are also the sole shareholders of L&A Ventura. *Id.* ¶ 3. Mr.
7 Ventura joined Organo in July 2009 after having previously worked in the MLM
8 industry. *See* Dkt. # 16 (Ventura Decl.) ¶¶ 2-4. He apparently was solicited by another
9 Organo distributor, John Sachtouras. *See id.* ¶¶ 4-5. Mr. Ventura remained an
10 independent contractor throughout his tenure with Organo. *Id.* ¶ 9. Eventually, the
11 Defendants reached the rank of “Crown Diamond” – the second highest qualification
12 rank within Organo’s compensation plan. *See id.* ¶ 16.

13 Roughly four years into his tenure at Organo, Mr. and Mrs. Ventura signed an
14 “Independent Distributor Application” with Organo on February 24, 2013.³ *See* Dkt. #
15 11 (Bulthuis Decl.) Ex. 1; Dkt. # 16 (Ventura Decl.) ¶ 8. The terms and conditions of the
16 application included a clause stating:

17 15. [The applicants] shall not, while participating as an Organo Gold
18 Distributor, or for 12 months after [their] termination, cancellation, or other
19 separation from the Organo Gold program, participate in any other
20 opportunity that directly competes with Organo Gold in offering
21 ganoderma-based products.”

22 *Id.* at 6.

23 Those terms and conditions also included a provision stating that the applicants
24 agreed to “abide by the Organo Gold Code of Conduct as detailed in the Organo Gold
25

26 _____
27 ² As best as this Court can tell, ganoderma (which is a mushroom of some sort) based products
28 are of particular importance to Organo’s business and to the non-compete clauses at issue. *See*
Compl. ¶ 6; Dkt. # 11 Ex. 1 at 6, Ex. 9 (Zelaya Decl.) Ex. C at 89.

³ All Parties appear to agree that Washington law applies to this case. Both the Distributor
Application and the Policies and Procedures are governed by Washington law. *See* Dkt. # 11
(Bulthuis Decl.) Ex. 1 at 6; Dkt. # 11 (Zelaya Decl.) Ex. C at 91.

1 Policies and Procedures.” *Id.* The Policies and Procedures also include a non-compete
2 clause. That provision states:

3 **X. Non Competition Agreement**

4 Any Distributor that is terminated and/or cancels his or her Distributor
5 Status, shall not compete with the Company or any of its affiliates by
6 soliciting existing customers of the Company to any ganoderma or healthy
7 beverage business similar to the Company in a multi level marketing setting
8 or its equivalent, for a period of twelve (12) months.

9 Dkt. # 11 (Zelaya Decl.) Ex. C at 89.

10 The Policies and Procedures also prohibit distributors from engaging “in
11 deceptive, unlawful, or unethical business or recruiting practices (including cross
12 sponsoring or recruiting)”. *Id.* at 70. No party seriously disputes that “cross sponsoring”
13 or “raiding” includes the practices of recruiting or attempting to recruit a representative
14 from another distributor’s “downline”⁴ or trying to do the same to a representative from
15 one’s own “downline.” *See* Compl. ¶ 21.

16 The Distributor Application and the Policies and Procedures also have alternative
17 dispute resolution provisions. Specifically, the Distributor Application provides that

18 In the event of a dispute between an Independent Distributor and Organo
19 Gold arising from or relating to the Agreement, or the rights and
20 obligations of either party, the parties shall attempt in good faith to resolve
21 the dispute through nonbinding mediation as more fully described in the
22 Policies and Procedures.

23 Dkt. # 11 (Bulhuis Decl.) Ex. 1 at 6.

24 Oddly, the Policies and Procedures do not actually specify any nonbinding
25 mediation process. Nevertheless, they do set forth a binding arbitration procedure. *See*
26 Dkt. # 11 (Zelaya Decl.) Ex. C at 91. Notably, the arbitration procedure does not
27 “prevent [Organo] from applying to and obtaining from any court having jurisdiction, a
28 writ of attachment, an injunction, or other relief available to safeguard and protect [its]
interest prior to, during, or following the filing of any arbitration.” *Id.*

⁴ A distributor’s “downline” is defined as “[t]he organization of a Distributor, including those who are directly or indirectly sponsored by the Distributor and continuing down the lines of sponsorship through infinite levels and legs.” Dkt. # 11 (Zelaya Decl.) Ex. C at 71.

1 Ultimately, Mr. Ventura was terminated as an Organo Distributor on February 19,
2 2016. *See* Dkt. # 11 (Zelaya Decl.) ¶ 6; Dkt. # 16 (Ventura Decl.) ¶¶ 17-18, 20. At that
3 time, Organo held its Project 50K event in Las Vegas, Nevada, a training event held
4 exclusively for the benefit of Organo’s distributors. *See* Dkt. # 11 (Perrett Decl.) ¶ 7.

5 Mr. Ventura associated with another company, Total Life Changes, LLC (“TLC”),
6 in February 2016.⁵ *See* Dkt. # 16 (Ventura Decl.) ¶ 22. TLC is another MLM company.
7 *Id.* TLC sells a range of products, such as teas, oils, cleansing products, and weight loss
8 products. *Id.* It also sells coffee infused with ganoderma. *See* Dkt. # 11 (Perrett Decl.) ¶
9 9; Dkt. # 16 (Ventura Decl.) ¶ 22; Dkt. # 17 (Licari Decl.) ¶ 2 (5.7% of TLC’s total sales
10 attributable to ganoderma-infused coffee). Mr. Ventura was indisputably in Las Vegas at
11 the time of the Project 50K event and indisputably discussed TLC with other Organo
12 distributors. *See* Dkt. # 16 (Ventura Decl.) ¶ 21 (“I responded that I might join another
13 MLM company *or specifically identified TLC*”) (emphasis added).⁶

14 In February 2016, Organo received reports from its distributors that Mr. Ventura
15 had approached them and attempted to recruit them to join TLC. *See* Dkt. # 11 (Zelaya
16 Decl.) ¶ 8; Dkt. # 11 (Sachtouras Decl.) ¶ 5.⁷ Indeed, Organo presents evidence that Mr.

17 ⁵ The Parties disagree as to whether Mr. Ventura associated with TLC prior to his termination or
18 immediately after his termination.

19 ⁶ No party addresses the provision, but the Policies and Procedures prohibit former distributors
20 “from promoting another company’s business, during [Organo]-related or sponsored activities or
any activity promoted as such.” Dkt. # 11 (Zelaya Decl.) Ex. C at 89.

21 ⁷ Although L&A Ventura objects to this evidence, the fact that Organo’s distributors have
22 approached Organo’s employees regarding solicitation is not hearsay. First, the statements are
23 not necessarily being offered to show Mr. Ventura actually solicited these individual distributors.
Second, Mr. Ventura’s statements to the distributors are, of course, not hearsay when offered
against him. *See* Fed. R. Evid. 801(d)(2).

24 Even if inadmissible, the Court may consider inadmissible evidence in ruling on a preliminary
25 injunction. “Due to the urgency of obtaining a preliminary injunction at a point when there has
26 been limited factual development, the rules of evidence do not apply strictly to preliminary
27 injunction proceedings.” *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239,
1250 n.5 (9th Cir. 2013) (citing *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th
28 Cir. 1988)). Here, many of the individuals complaining of Mr. Ventura’s solicitation could
easily present testimony regarding Mr. Ventura’s statements, disarming most of L&A Ventura’s
objections.

1 Ventura invited other Organo distributors to hear him present a new opportunity on
2 February 19, 2016. *See* Dkt. # 11 (Sachtouras Decl.) ¶ 4, Ex. A; Dkt. # 20 (Herrera
3 Decl.) ¶ 5. Indeed, Mr. Ventura directly approached Mr. Herrera and indicated that he
4 was considering leaving Organo for TLC. Dkt. # 20 (Herrera Decl.) ¶ 4.

5 **III. LEGAL STANDARD**

6 The standard for a TRO is essentially the same as that for a preliminary injunction.
7 *See Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7
8 (9th Cir. 2001). In order to obtain preliminary relief, a party “must establish that [it] is
9 likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence
10 of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction
11 is in the public interest.” *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d
12 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Resources Defense Council, Inc.*,
13 555 U.S. 7, 20 (2008)). “In addition, a ‘preliminary injunction is appropriate when a
14 plaintiff demonstrates that serious questions going to the merits were raised and the
15 balance of hardships tips sharply in the plaintiff’s favor,’ provided the plaintiff also
16 demonstrates that irreparable harm is likely and that the injunction is in the public
17 interest.” *Andrews v. Countrywide Bank, NA*, 95 F. Supp. 3d 1298, 1300 (W.D. Wash.
18 2015) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th
19 Cir. 2011)).

20 **IV. DISCUSSION**

21 Organo pleads several causes of action against the Defendants, but the only ones
22 particularly pertinent to the instant Motion are those for breach of contract and for
23 tortious interference because they form the basis for Organo’s request for injunctive
24 relief. *See* Compl. ¶¶ 42-56.

25 a. Likelihood of Success on the Merits for Breach of Contract Claims

26 Organo argues that they are likely to succeed on their claim that Defendants
27 breached the non-compete clauses in the Distributor Agreement and the P&Ps. *See* Dkt.

1 # 10 at 10-12. A breach of contract claim in Washington requires “proof of four
2 elements: duty, breach, causation, and damages.” *BP W. Coast Prods. LLC v. SKR Inc.*,
3 989 F. Supp. 2d 1109, 1121 (W.D. Wash. 2013) (citing *Baldwin v. Silver*, 269 P.3d 284,
4 289 (Wash. Ct. App. 2011)).

5 The Parties do not seriously dispute most of these elements. Instead, the Parties
6 focus their arguments on whether the non-compete provisions are enforceable. L&A
7 Ventura argues that Organo’s breach of contract claim necessarily fails because Organo
8 failed to engage in pre-dispute mediation, the non-compete clauses are unenforceable for
9 lack of consideration, and the non-compete clauses are unreasonable under Washington
10 law. *See* Dkt. # 15 at 9-14.

11 *i. Whether Mediation is a Condition Precedent to Litigation*

12 L&A Ventura argues that the Action should be dismissed because Organo has not
13 yet engaged in nonbinding mediation prior to engaging in litigation. *See* Dkt. # 15 at 9.

14 The alternative dispute resolution provisions of the Distributor Application and
15 Policies and Procedures provide for mandatory pre-litigation mediation. *See* Dkt. # 11
16 (Bulthuis Decl.) Ex. 1 at 6 (“In the event of a dispute between an Independent Distributor
17 and Organo Gold . . . the parties shall attempt in good faith to resolve the dispute through
18 nonbinding mediation”). However, the alternative dispute resolution provisions are also
19 further detailed in the Policies and Procedures, which clarify that “[n]othing in this
20 Agreement shall prevent [Organo] from applying to and obtaining from any court having
21 jurisdiction, . . . an injunction, or other relief available to safeguard and protect [its]
22 interest prior to, during, or following the filing of any arbitration or other proceeding.”
23 *See* Dkt. # 11 (Zelaya Decl.) Ex. C at 91.

24 There is little doubt that the instant dispute arises out of the Parties’ contractual
25 agreements – and there is little question that the plain language of the agreements permits
26 Organo to seek injunctive relief prior to initiating arbitration proceedings. Organo’s
27 request therefore is not subject to the nonbinding mediation condition precedent.

1 L&A Ventura’s cited cases do not compel a different result. In *Delameter v.*
2 *Anytime Fitness, Inc.*, the parties entered into a franchise agreement which contained a
3 non-compete clause. *See* 722 F. Supp. 2d 1168, 1171-72 (E.D. Cal. 2010). The franchise
4 agreements also included a mandatory pre-litigation or arbitration mediation provision,
5 except where *the defendant* believed it necessary to seek equitable relief. *See id.* at 1172.
6 In contrast to the instant Action, however, it was *the plaintiff* who sued, seeking a
7 declaratory judgment. *Id.* at 1173. As a result, the court held that the mediation
8 condition applied. *See id.* at 1180-81. That simply is not the case here, where the plain
9 terms of the Policies and Procedures permits Organo to seek injunctive relief aside and
10 apart from the binding alternative dispute resolution provisions.

11 *ii. Whether the Non-Compete Clauses Fail for Lack of Consideration*

12 Next, L&A Ventura argues that Organo did not provide independent consideration
13 for the non-compete clauses in the Distributor Application and Policies and Procedures
14 entered into in 2013. *See* Dkt. # 15 at 10. The Court disagrees.

15 In Washington, “[i]f a prospective employee agrees to a noncompete restriction
16 when he or she is first hired, employment by itself may be sufficient consideration.”
17 *McKasson v. Johnson*, 315 P.3d 1138, 1141 (Wash. Ct. App. 2013) (citing *Labriola v.*
18 *Pollard Grp., Inc.*, 100 P.3d 791, 794 (Wash. 2004)).⁸ However, “when an existing at-
19 will employee agrees to a noncompete restriction some time *after* he or she was hired, the
20 restriction is enforceable only if the employer gives the employee *independent*
21 *consideration* at the time of their agreement.” *Id.* Such consideration must be something
22 “other than continuing employment.” *Id.* at 1142.

23
24
25 ⁸ The applicability of this principle is an open question. The contracts at issue do not provide for
26 employment – they merely grant distributors the right to sell Organo products, to enroll others as
27 Organo distributors, and to earn commissions for a fixed term. *See* Dkt. # 11 (Balthuis Decl.)
28 Ex. 1 at 6. Nothing in either the Distributor Application or the Policies and Procedures obligates
Organo to renew an applicant’s distributor status, meaning that each term would be supported by
independent consideration.

1 The plain terms of the Distributor Application and the Policies and Procedures
2 provides for a one year term subject only to cancellation under the terms of the Policies
3 and Procedures. *See* Dkt. # 11 (Balthuis Decl.) Ex. 1 at 6 (“The term of this agreement is
4 one year”); Dkt. # 11 (Zelaya Decl.) Ex. C at 74 (“The term of the Distributor Status is
5 one year from the date an Application is accepted by [Organo]”). Moreover, the
6 agreements must be renewed every year (and Organo must accept them). The Court sees
7 little distinction between this and the week-by-week non-compete clauses explicitly
8 approved in *Labriola*. *See* 100 P.3d at 794-95 (citing *Racine v. Bender*, 252 P. 115
9 (Wash. 1927)).

10 In short, even if treated as a non-compete clause entered into subsequent to at-will
11 employment, the Distributor Application is likely supported by independent
12 consideration. “[A] fixed term of employment” serves as adequate independent
13 consideration. *Id.* at 794 (citing *Schneller v. Hayes*, 28 P.2d 273, 274 (Wash. 1934)).
14 And as discussed above, the agreements expressly provide for a fixed one-year
15 distributorship term, thereby providing sufficient independent consideration. Even
16 beyond this, pursuant to the Distributor Application, Organo recognized and permitted
17 Mr. Ventura to add L&A Ventura to his distributorship, even if it was not necessarily
18 required to do so. *See* Dkt. # 11 (Balthuis Decl.) Ex. 1 at 7-8; Dkt. # 11 (Zelaya Decl.)
19 Ex. C at 74. That also likely serves as independent consideration. *See Labriola*, 100
20 P.3d at 794 (holding that “independent consideration involves new promises or
21 obligations previously not required of the parties”). The Court finds that the Distributor
22 Application was sufficiently supported by independent consideration.

23 *iii. Reasonableness of Non-Compete Clauses*

24 That brings the Court to the question of whether the non-compete clauses at issue
25 are reasonable. Unsurprisingly, the Parties disagree.

26 “Generally, restrictive covenants in employment contracts are enforceable so long
27 as the restrictions therein are ‘not greater than are reasonably necessary to protect the

1 business or good will of the employer, even though they restrain the employee of his
2 liberty to engage in a certain occupation or business, and deprive the public of the
3 services, or restrain trade.” *Seabury & Smith, Inc. v. Payne Fin. Grp., Inc.*, 393 F. Supp.
4 2d 1057, 1062 (E.D. Wash. 2005) (quoting *Alexander & Alexander v. Wohlman*, 578 P.2d
5 530, 539 (Wash. Ct. App. 1978)); *Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F. Supp.
6 2d 1205, 1216 (E.D. Wash. 2003) (citing *Perry v. Moran*, 748 P.2d 224, 228-29 (Wash.
7 1987)). Washington courts have applied a three part test to determine whether a non-
8 compete clause is reasonable: “1) the restraint is necessary for the protection of the
9 business or good will of the employer; 2) the restraint on the employee is greater than is
10 reasonably necessary; and 3) the degree of injury to the public from the loss of the service
11 and skill of the employee is great enough to warrant nonenforcement of the covenant.”
12 *Seabury*, 393 F. Supp. 2d at 1062 (citing *Alexander*, 578 P.2d at 539). “If a court finds a
13 restraint unreasonable, it can modify the agreement by enforcing it only ‘to the extent
14 reasonably possible to accomplish the contract's purpose.’” *Amazon.com, Inc. v. Powers*,
15 No. C12-1911RAJ, 2012 WL 6726538, at *8 (W.D. Wash. Dec. 27, 2012) (quoting
16 *Emerick v. Cardiac Study Ctr., Inc.* (“*Emerick I*”), 286 P.3d 689, 692 (Wash. Ct. App.
17 2012)).

18 “Washington courts have typically looked favorably on restrictions against
19 working with an employee’s former clients or customers.” *Id.* In contrast, “Washington
20 courts have been more circumspect when considering restrictions that would prevent an
21 employee from taking on any competitive employment.” *Id.* at *9. To justify a general
22 restriction on competition not tied to specific customers, the employer must point “to
23 specific information about the nature of its business and the nature of the employee’s
24 work” to justify the restriction. *See id.*

25 The first issue is whether the non-compete clauses are necessary to protect
26 Organo’s business or goodwill. *See Emerick v. Cardiac Study Ctr., Inc., P.S.* (“*Emerick*
27

1 *II*”), 357 P.3d 696, 701-02 (Wash. Ct. App. 2015). The Court finds that the non-compete
2 provisions are necessary.

3 The non-compete clause in the Policies and Procedures prohibits distributors from
4 “soliciting existing customers of the Company to any ganoderma or healthy beverage
5 business similar to the Company in a multi level marketing setting or its equivalent, for a
6 period of twelve (12) months.” Dkt. # 11 (Zelaya Decl.) Ex. C at 89. This clause makes
7 sense, as “[a]mong Organo’s most valuable assets is its sales organization – the network
8 of Distributors and customers that market and sell Organo’s products and services – as
9 well as the contact information and the customer data within the sales organization.”
10 Dkt. # 11 (Perrett Decl.) ¶ 6. That interest is squarely recognized under Washington law.
11 *See Pac. Aerospace*, 295 F. Supp. 2d at 1216 (recognizing an employer’s “legitimate
12 interest in protecting its customer base from depletion by a former employee”). There is
13 little doubt that this clause is necessary to protect Organo’s business.

14 The non-compete clause in the Distributor Application is somewhat broader,
15 providing that a distributor shall not “participate in any other opportunity that directly
16 competes with Organo Gold in offering ganoderma-based products.” Dkt. # 11 (Bulhuis
17 Decl.) Ex. 1 at 6.⁹ Whether this clause is reasonably necessary is a closer question – it
18 essentially prohibits terminated distributors from joining any business selling ganoderma-
19 based products. However, in this Court’s view, the clause serves to protect Organo’s
20 business model – a network of distributors and customers selling Organo’s ganoderma-
21 based products would be invaluable to any other such business, even if ganoderma-based
22 products make up only a portion of their overall business. In fact, this provision serves to

23 ⁹ L&A Ventura argues that the non-compete clauses conflict and therefore only the narrower
24 clause prohibiting customer solicitation should be enforced. *See* Dkt. # 15 at 14-16. The Court
25 disagrees – the two clauses may easily be read in harmony. The clause in the Policies and
26 Procedures prohibits soliciting only Organo’s customers to another MLM setting and only for
27 ganoderma or healthy beverage businesses. The clause in the Distributor Application, in
28 contrast, prevents distributors from participating in any business directly competing with Organo
in selling ganoderma-based products. That likely encompasses participating in such business
where distributors’ “downlines” or other network marketing information derived from affiliating
with Organo would be invaluable.

1 protect one of the very legitimate business interests L&A Ventura recognized at oral
2 argument: protecting businesses from departing employees unfairly leveraging personal
3 contacts or confidential information acquired during their tenure. As applied here, Mr.
4 Ventura may very well leverage his intimate knowledge of Organo’s distributor policies,
5 procedures, or practices to entice distributors to join TLC. Whether the identity of those
6 distributors is public or not, Mr. Ventura’s insight into their employer’s guidelines may
7 unfairly advantage him in recruiting for a competing MLM firm.

8 Next, the Court considers the scope of the restriction. *See Emerick II*, 357 P.3d at
9 703. Courts typically analyze this prong by considering the geographic and temporal
10 limitations. *Id.* (citing *Wood v. May*, 438 P.2d 587, 590 (Wash. 1968)). Although both
11 non-compete clauses here are reasonable as to time – a one year non-compete is relatively
12 short and reasonable (*see Seabury*, 393 F. Supp. 2d at 1063) – they do not contain a
13 geographical limitation. Organo argues that this is necessary because of the nature of the
14 MLM business. *See* Dkt. # 10 at 12. Indeed, Organo distributors are not limited to
15 selling in any particular geographic area. *See* Dkt. # 11 (Perrett Decl.) ¶ 5. Washington
16 courts have recognized that an “employer is entitled to a restrictive covenant that is as
17 broad in scope as the business which the covenant seeks to protect.” *ISC-Bunker Ramo*
18 *Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1336 (N.D. Ill. 1990) (citing *Cent. Credit*
19 *Collection Control Corp. v. Grayson*, 499 P.2d 57, 59 (Wash. Ct. App. 1972)). And other
20 courts have found nationwide non-compete provisions to be reasonable in the MLM
21 context. *See e.g., PartyLite Gifts, Inc. v. MacMillan*, 895 F. Supp. 2d 1213, 1226 (M.D.
22 Fla. 2012) (finding nationwide non-compete provision to be reasonable); *YTB Travel*
23 *Network of Illinois, Inc. v. McLaughlin*, No. 09-CV-369-JPG, 2009 WL 1609020, at *4
24 (S.D. Ill. June 9, 2009) (finding that lack of a geographic limitation was irrelevant in
25 network marketing involving online business).

26 Still, L&A Ventura argues that the Distributor Application’s non-compete clause
27 is still unreasonably broad because it prohibits Defendants from engaging in any directly

1 competing opportunity. Dkt. # 15 at 12-13. If the clause categorically prohibited
2 distributors from joining any of Organo’s potential competitors, then the Court would
3 likely find the clause impermissibly broad. Indeed, the cases L&A Ventura cites provide
4 some support for the proposition that non-compete provisions prohibiting working for
5 *any* competitor may be unreasonable. *See Labriola*, 100 P.3d at 800 (Madsen, J.,
6 concurring); *Sheppard v. Blackstock Lumber Co., Inc.*, 540 P.2d 1373, 1376 (Wash.
7 1975) (finding non-compete provision prohibiting “any competitive activity anywhere or
8 anytime, with the determination of what constituted ‘competitive activity’ to be made by
9 respondent’s board of directors” to be unreasonable). However, the provision here does
10 no such thing – it only prohibits joining a very specific type of competitive venture: those
11 selling competitive ganoderma-based products. That does not amount to an outright
12 prohibition on Defendants’ ability to make a living – rather, it simply prevents them from
13 plying their trade in the ganoderma-based products industry.¹⁰

14 L&A Ventura also argues that the Policies and Procedures’ restriction on
15 Defendants’ solicitation of Organo’s existing customers is overly broad because it
16 encompasses both the ganoderma and “healthy beverage” businesses. *See* Dkt. # 15 at
17 13. L&A Ventura also argues that the term “soliciting” is overly broad. *See id.* The
18 Court disagrees with both contentions. First, Courts have routinely held that non-
19 compete clauses are reasonably limited in scope when they apply only to “clients and
20 prospective clients who were solicited or serviced during [an] employee’s term of
21 service.” *Seabury*, 393 F. Supp. 2d at 1063. Second, Washington courts have routinely
22 rejected the same argument that the term “solicit” is ambiguous. *See id.* at 1062-63
23 (citing *Racine*, 252 P. at 116). The term has “a commonsense and ordinarily applied

24
25 ¹⁰ L&A Ventura’s contentions that TLC is not a “direct” competitor because of its small offering
26 of ganoderma-based products or marketing stance are misplaced. Even if TLC only offers a few
27 ganoderma-based products, distributors recruited from Organo inevitably will have substantial
28 experience with selling such products, suggesting a quick increase in sales of those products.
Whether TLC and Organo market themselves in different ways is irrelevant – what matters is
whether they directly compete in the ganoderma-based product market.

1 meaning,” particularly in the instant context. *See id.* at 1063 (citing *Pac. Aerospace*, 295
2 F. Supp. 2d at 1218).

3 Finally, the Court must “balance possible harm to the public by not enforcing the
4 covenant against the employer’s right to protect its business.” *Emerick II*, 357 P.3d at
5 705 (citing *Wood*, 438 P.2d at 589). Neither party seriously argues this point, nor could
6 they do so. L&A Ventura itself acknowledges that the public would not be deprived of
7 ganoderma-based products if the non-compete provisions were enforced. *See* Dkt. # 18
8 (Steinberg Decl.) ¶ 4.

9 Given this analysis, the Court finds that the non-compete provisions are reasonable
10 and enforceable.

11 *iv. Whether Defendants Have Breached the Contracts*

12 All this brings us to whether Organo has shown that the Defendants have breached
13 the non-compete provisions. L&A Ventura appears to argue that Defendants have not
14 breached the clauses for three reasons: (1) soliciting distributors is not expressly
15 prohibited by the non-compete provisions, (2) Organo has not presented any evidence
16 that Defendants have solicited Organo’s customers, and (3) because TLC is not a “direct
17 competitor” of Organo. *See* Dkt. # 15 at 15-16. The Court agrees that Organo has not
18 presented any evidence that Defendants have solicited Organo’s customers – they appear
19 to admit as much – but the issue is largely irrelevant.¹¹ *See* Dkt. # 20 at 2.

20 Whatever the case, the Court disagrees with L&A Ventura on its other two points.
21 First, the language of the Distributor Application likely prohibits soliciting distributors
22 (though it may certainly have been better drafted). Defendants are prohibited from
23 “participat[ing] in any other opportunity that directly competes with Organo Gold in
24 offering ganoderma-based products.” Dkt. # 11 (Balthuis Decl.) Ex. 1 at 6. Clearly
25 soliciting distributors to sell ganoderma-based products – particularly in a similar MLM
26

27 ¹¹ Perhaps the difficulty here is that Organo relies heavily upon its independent distributors to
drive its sales.

1 setting – would be such an opportunity. And Organo has presented substantial evidence
2 supporting that fact. *See* Dkt. # 11 (Sachtouras Decl.) ¶ 4, Ex. A; Dkt. # 20 (Herrera
3 Decl.) ¶¶ 3-5, 8, Ex. A; *see also* Dkt. # 11 (Zelaya Decl.) ¶ 11, Ex. A. Second, the fact
4 that only a small fraction of TLC’s total sales were derived from ganoderma-infused
5 coffee is immaterial. The fact is that TLC offers ganoderma-based products for sale in
6 direct competition to Organo. *See* Dkt. # 16 (Ventura Decl.) ¶ 22; Dkt. # 17 (Licari
7 Decl.) ¶ 2. In fact, as Organo rightly contends, it is reasonable to believe that the
8 proportion of TLC’s sales attributable to ganoderma-based products is likely to increase,
9 given the influx of distributors more experienced in selling such products. Defendants’
10 participation in that “opportunity” constitutes breach.

11 Accordingly, the Court finds that Organo has shown a likelihood of success on the
12 merits for its breach of contract claims.

13 b. Likelihood of Success on the Merits for Tortious Interference Claims

14 Next, the Court considers whether Organo has shown likelihood of success on the
15 merits for its tortious interference claims.

16 Under Washington law, the elements for tortious interference are: “(1) the
17 existence of a valid contractual relationship or business expectancy; (2) that defendants
18 had knowledge of that relationship; (3) an intentional interference inducing or causing a
19 breach or termination of the relationship or expectancy; (4) that defendants interfered for
20 an improper purpose or used improper means; and (5) resultant damage.” *T-Mobile USA,*
21 *Inc. v. Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1194 (W.D. Wash. 2015)
22 (quoting *Leingang v. Pierce Cty. Med. Bureau*, 930 P.2d 288, 300 (Wash. 1997)).

23 For reasons unknown to the Court, L&A Ventura does not respond to this portion
24 of Organo’s brief (though it did address this issue at oral argument). Whatever the case,
25 Organo has presented some evidence to support its claim. Specifically, Organo has
26 presented evidence that Mr. Ventura actively sought out Organo distributors – individuals
27 apparently under contract with Organo – to promote a new “opportunity.” *See* Dkt. # 11

1 (Sachtouras Decl.) ¶ 4, Ex. A; Dkt. # 20 (Herrera Decl.) ¶¶ 3-5, 8, Ex. A; *see also* Dkt. #
2 11 (Zelaya Decl.) ¶ 11, Ex. A. As a result of this, many of Organo’s distributors –
3 including high ranking distributors – apparently have defected to TLC after terminating
4 their relationship with Organo. *See* Dkt. # 11 (Perrett Decl.) ¶¶ 14-19;¹² Dkt. # 20
5 (Zelaya Decl.) ¶ 7. As a result, Organo plainly has suffered substantial damage – by
6 Organo’s admission, unless it can stem the tide of defecting distributors, Organo will no
7 longer be a viable as a going concern within a few months. *See* Dkt. 11 (Perrett Decl.) ¶
8 28.

9 The question, however, is whether Defendants’ interference as wrongful.
10 “Interference is wrongful if it is done for an improper purpose or by improper means.”
11 *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 139 (Wash. Ct. App. 2015) (citing
12 *Pleas v. City of Seattle*, 774 P.2d 1158, 1163-64 (Wash. 1989)). However, “[e]xercising
13 in good faith one’s legal interests is not improper interference.” *Experience Hendrix,*
14 *L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1147 (W.D. Wash. 2011)
15 (quoting *Leingang*, 930 P.2d at 300). In fact, “[t]o be improper, interference must be
16 wrongful by some measure beyond the fact of the interference itself, such as a statute,
17 regulation, recognized rule of common law, or an established standard of trade or
18 profession.” *Moore v. Commercial Aircraft Interiors, LLC*, 278 P.3d 197, 200 (Wash. Ct.
19 App. 2012) (citing *Pleas*, 774 P.2d at 1163).

20 It is not clear what the improper purpose or motive is here – Defendants’ apparent
21 purpose in soliciting Organo distributors was simply to seek additional compensation.
22 *See* Dkt. # 16 (Ventura Decl.) ¶ 15; Dkt. # 20 (Herrera Decl.) ¶ 4. Organo does not point
23 to any other basis for showing that the alleged interference was wrongful and does not
24 show that Defendants were motivated by an improper purpose, such as malice or ill will.

25
26 ¹² The Court overrules L&A Ventura’s objection that there is no basis for this evidence. *See* Dkt.
27 15 at 25. Mr. Perrett is a senior vice president of Organo and could easily verify the number of
28 distributors leaving Organo’s organization by accessing its business records. *See* Dkt. # 11
(Perrett Decl.) ¶¶ 2-3.

1 Accordingly, the Court finds that Organo has not shown a likelihood of success on
2 the merits for its tortious interference claim.

3 c. Whether Organo Will Suffer Irreparable Harm

4 Next, Organo must show that it is “likely to suffer irreparable harm in the absence
5 of preliminary relief.” *Winter*, 555 U.S. at 20. This element is considered the most
6 important prerequisite for the issuance of a preliminary injunction. *See Dex Media W.,*
7 *Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1288 (W.D. Wash. 2011) (quoting *Kotok v.*
8 *Homecomings Fin., LLC*, No. C09–662RSM, 2009 WL 1652151, at *2 (W.D. Wash.
9 June 12, 2009)). Irreparable injury cannot be established where harm is measurable in
10 damages. *See id.* (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

11 Beyond its arguments regarding the validity or applicability of the non-compete
12 clauses, L&A Ventura argues that Organo cannot show irreparable harm because it
13 delayed in seeking an injunction, that only a small number of Organo’s distributors have
14 actually left, and that Organo has only suffered monetary damages. *See* Dkt. # 15 at 19-
15 20. The Court disagrees with these points.

16 To be sure, a long delay before seeking injunctive relief may undermine a party’s
17 claim of irreparable harm. *See Citizens of Ebey’s Reserve for Healthy, Safe & Peaceful*
18 *Env’t v. U.S. Dep’t of the Navy*, 122 F. Supp. 3d 1068, 1083-84 (W.D. Wash. 2015)
19 (quoting *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984)). But
20 the delay here was a mere six weeks, not the severe delay sufficient to deny injunctive
21 relief found in other cases. *See id.* (sixteen months); *see also Oakland Tribune, Inc. v.*
22 *Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (exclusivity provisions sought
23 to be enjoined had “been in effect for a number of years”). In fact other courts have
24 found longer delays to be permissible. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145
25 n.12 (9th Cir. 2013) (roughly three month delay “was not particularly belated”); *see*
26 *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (finding that several month
27

1 delay was not unreasonable); *Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 961 F.
2 Supp. 1402, 1417 (D. Haw. 1997) (nine months held to be permissible).

3 Moreover, Organo is not faced with only monetary injury. Organo has presented
4 substantial evidence that its very business model relies upon forming robust sales
5 networks of distributors. *See* Dkt. # 11 (Perrett Decl.) ¶¶ 6, 26. Given Organo’s heavy
6 reliance on this form of distribution, it seems clear “that the nature of its business makes
7 it vulnerable to losing customers after its relationship” with a distributor ends. *See*
8 *MetroPCS Pennsylvania, LLC v. Arak*, No. C15-0769JLR, 2015 WL 3893155, at *3
9 (W.D. Wash. June 24, 2015). Indeed, Washington courts have held that “[i]rreparable
10 harm is a likely consequence of permitting an employee to pursue his former customers
11 in violation of a valid restriction.” *Amazon.com*, 2012 WL 6726538 at *12. That logic
12 appears equally applicable to a company’s distributors in the MLM sphere. *See Neways*
13 *Inc. v. Mower*, 543 F. Supp. 2d 1277, 1289 (D. Utah 2008) (holding that irreparable
14 injury was likely where former MLM distributors attempted to recruit plaintiff’s current
15 distributors).

16 Finally, the Court finds that L&A Ventura has not raised any serious doubts about
17 the robustness of Organo’s distributor numbers by merely citing various (likely hearsay)
18 statements. *See* Dkt. # 16 (Ventura Decl.) ¶ 21; Dkt. # 18 (Steinberg Decl.) ¶ 5, Ex. 8.
19 Neither Mr. Ventura’s “understanding that Organo had over 1,000,000 active distributors
20 worldwide” nor an unverified third party research report shed any light as to Organo’s
21 internal difficulties. Organo’s business records, on the other hand, suggest serious
22 attrition of both low and high level distributors immediately following February 2016.
23 *See* Dkt. # 11 (Perrett Decl.) ¶¶ 14-19. That stands in stark contrast to the relatively low
24 level of attrition occurring in the six months immediately prior. *Id.* ¶ 21.

25 The Court is convinced that Organo has shown irreparable harm is likely to occur
26 in the absence of an injunction. Indeed, continued loss of distributors may cripple
27 Organo’s viability as a going concern. *Id.* ¶ 28. That concern further justifies a finding

1 of irreparable harm. *See Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 418
2 (E.D.N.C. 2006) (citing *Fed. Leasing v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th
3 Cir.1981); *Turnage v. United States*, 639 F.Supp. 228, 232 (E.D.N.C.1986)) (“Generally,
4 it is in cases where a defendant's conduct threatens to cripple or substantially alter a going
5 concern that irreparable harm will be found”).

6 d. The Balance of the Equities

7 Next, the Court finds that the balance of the equities tips in favor of Organo.
8 Organo argues that without an injunction, it will soon lose its viability as a going
9 concern. *See* Dkt. # 11 (Perrett Decl.) ¶ 28. L&A Ventura counters by arguing that
10 imposing an injunction will prevent Mr. Ventura from supporting his family and working
11 in his chosen field. *See* Dkt. # 15 at 23.

12 The requested restrictions here do not seriously impinge upon Mr. Ventura’s
13 chosen field. For one, they are narrowly tailored as they only prevent Defendants from
14 soliciting Organo’s distributors and customers and preventing him from participating in
15 opportunities that involve the sale of ganoderma-based products. Indeed, Defendants are
16 still permitted to work *in the MLM space* so long as the opportunity does not involve
17 ganoderma-based products. *See* Dkt. # 11 (Balthuis Decl.) Ex. 1 at 6. In fact, Mr.
18 Ventura admits that he has had substantial success throughout the MLM industry, not just
19 in selling ganoderma-based products. *See* Dkt. # 16 (Ventura Decl.) ¶ 2. He has
20 participated in companies selling “a wide range of products” including “gasoline
21 additives to nutritional products to hygiene products.” *Id.* Indeed, Mr. Ventura has
22 apparently had substantial success selling non-ganoderma products in his current position
23 at TLC – although he has only sold \$45.62 worth of products at TLC (*id.* ¶ 23), he has
24 generated over \$44,000 in income (*see* Dkt. # 2 (Ventura Decl.) ¶ 7). Moreover, the
25 requested injunction is for a relatively short period of time – just one year. In short, Mr.
26 Ventura likely could successfully ply his trade in the MLM industry regardless of
27 whether he associates with a company selling ganoderma-based products or not.

1 e. Whether an Injunction is in the Public Interest

2 Finally, the Court addresses whether the requested injunction serves the public
3 interest. *Winter*, 555 U.S. at 20. Organo argues simply that “the public interest benefits
4 from the enforcement of business contracts, including reasonably necessary non-compete
5 and non-solicitation agreements.” *See MetroPCS*, 2015 WL 3893155 at *3 (citing *MWI*
6 *Veterinary Supply Co. v. Wotton*, 896 F. Supp. 2d 905, 914 (D. Idaho 2012); *Perry*, 748
7 P.2d at 229). L&A Ventura, on the other hand, argues that the public interest is best
8 served by unrestrained competition and to preserve the public’s access to services. *See*
9 *Dkt. # 15* at 23. It argues, essentially, that enjoining Defendants would deprive the public
10 of options and services. *See id.*

11 The Court finds that an injunction is plainly in the public interest here – the public
12 interest being the enforcement of reasonable and necessary non-compete agreements.
13 The non-compete clauses at issue here are aimed solely at preserving Organo’s goodwill
14 and customers in the ganoderma-based product (and healthy beverage) industry. Those
15 concerns are legitimate and serve the public interest.

16 In contrast, Defendants’ proffered public interest arguments are easily undermined
17 by the fact that the public may still easily purchase ganoderma-based products with or
18 without his involvement in the industry. *See Dkt. # 18* (Steinberg Decl.) ¶ 4 (internet
19 research showed that at least nine additional companies manufacture ganoderma-infused
20 coffee and tea and ten MLM companies are involved in the healthy coffee industry,
21 including five that sell ganoderma-infused coffee). Moreover, L&A Ventura does not
22 argue that the public would be deprived of the option of choosing TLC – either to serve
23 as distributors or as customers. They would not.

24 Accordingly, the Court finds that an injunction would be in the public interest.

25 f. Whether Organo Must Post a Bond

26 Having determined that Organo is entitled to a TRO, the Court must determine
27 whether Organo must post a bond. *See Fed. R. Civ. P. 65(c)* (“The court may issue a

1 preliminary injunction or a temporary restraining order only if the movant gives security
2 in an amount that the court considers proper to pay the costs and damages sustained by
3 any party found to have been wrongfully enjoined or restrained.”). The Court has
4 substantial discretion to determine the amount of the security, if any, required. *See Diaz*
5 *v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (quoting *Johnson v. Couturier*, 572 F.3d
6 1067, 1086 (9th Cir. 2009)).

7 Organo argues that no security is required. *See* Dkt. # 10 at 15. L&A Ventura
8 contends that any security should be significant – in the realm of \$1,000,000.

9 The Court believes that Organo should be required to post security in this case
10 because the Court has some doubts as to its substantive merits. First, Organo has not
11 conclusively established likelihood of success on the merits with respect to its tortious
12 interference claim. Second, the terms of the non-compete clauses are imprecise as to
13 whether solicitation of distributors is permissible or not. Although this Court has
14 concluded that such solicitation (at least to directly competing associations offering
15 ganoderma-based products) is improper, that is not a foregone conclusion. Finally, there
16 are questions as to whether social media posts visible to the public may serve as
17 impermissible solicitations. *See Pre-Paid Legal Servs., Inc. v. Cahill*, 924 F. Supp. 2d
18 1281, 1291-94 (E.D. Okla. 2013) (collecting cases and finding that Facebook posts were
19 not solicitation). Organo has presented evidence that at least some of its distributors were
20 directly solicited, justifying the injunction. *See e.g.*, Dkt. # 20 (Herrera Decl.) ¶¶ 3-5, 8.
21 But whether Defendants may continue to wax poetic about their current MLM
22 opportunity (as long as it does not involve ganoderma-based products) is a more open
23 question. Additionally, the Court believes Defendants may suffer financial harm as a
24 result of the injunction, even if it is of short duration. *See* Dkt. # 2 (Ventura Decl.) ¶ 6
25 (outlining income from MLM activities in the past few years). Indeed, Mr. Ventura
26 attests that he would suffer “losses far in excess of \$75,000” if he was not able to work
27 for a year. *Id.* ¶ 8.

1 In light of the above, the Court believes that Organo should be required to post a
2 bond in the amount of \$100,000.

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court **GRANTS** Organo's Motion. Dkt. # 10.
5 Accordingly, the Court will enter a TRO as more fully set forth below.

6 **VI. TEMPORARY RESTRAINING ORDER**

7 Effective upon posting \$100,000 bond or equivalent security with this Court, and
8 upon service of this Order, Defendants L&A Ventura Management, Inc. and Luis
9 Ventura¹³ are hereby enjoined from taking the following actions:

- 10 1. Violating the express terms of the Distributor Application with Organo and
11 Organo's Policies and Procedures, including by competing with Organo by
12 participating in an opportunity that directly competes with Organo by offering
13 ganoderma-based products or by soliciting Organo's existing customers to any
14 ganoderma or healthy beverage MLM business;
- 15 2. Soliciting, recruiting, or raiding Organo's distributors or customers;
- 16 3. The temporary restraining order will become effective upon formal service of
17 this Order and will remain in effect pending further order of this Court;
- 18 4. Defendants L&A Ventura Management, Inc. and Luis Ventura are **ORDERED**
19 **to show cause** on or before **May 12, 2016** why the Court should not convert
20 this temporary restraining order into a preliminary injunction.

21 DATED this 3rd day of May, 2016.

22 

23 The Honorable Richard A. Jones
24 United States District Court

25
26 ¹³ As noted, *supra*, Organo has not satisfactorily shown that Mrs. Ventura has adequately been
27 served, given her divorce from Mr. Ventura. See Dkt. # 2 (Ventura Decl.) ¶ 3. Accordingly, the
28 Court will not impose an injunction on her without notice until she has been served and provided
an adequate opportunity to respond.