UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and OPTUM SERVICES, INC., *Plaintiffs*, v. DAVID WILLIAM SMITH, *Defendant*.	Civil Action No.: 19-cv-10101

OPTUM, INC. AND OPTUM SERVICES, INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

In accordance with the Court's order of January 22, 2019 (Dkt. # 20), Plaintiffs Optum, Inc. and Optum Services, Inc. (together, "Optum") hereby submit this reply in support of their Motion for a Temporary Restraining Order (Dkt. # 3).

INTRODUCTION

Smith asks the Court to ignore reality and believe that ABC is just a non-profit startup with the sole goal of improving health outcomes for the employees of its founding companies. Setting aside the fact that the health care market itself sees ABC quite differently (Wolin Aff., ¶ 7), Smith's own supporting company affidavit (the Affidavit of John C. Stoddard, Dkt. # 23-2) fails to answer any of the questions that could possibly give Optum (or the Court) comfort that ABC's goals are so modest. If ABC has no profit motive, then why was it created as an LLC? Will ABC only serve the 1.2 million employees of its founding companies, or, as it has suggested publicly before, will it expand to offer those products and services to others in the marketplace? Will its asserted "non-profit" goals remain, or will its founding companies convert it into a profit center? Will it remain separate, or will it be combined with other assets of the founding companies? Since some of the most formidable players in the health care market are

non-profit entities, why does the fact that it has no asserted profit motive mean that it will not compete vigorously in that market? Will it soon begin to compete with Optum, both as to its founding companies (two of whom are Optum customers) and more broadly? ABC's affidavit filed by Smith answers *none* of these questions.

Either ABC knows the answers to those questions, or it does not. In either case, a TRO is warranted here. If ABC knows those answers but refuses to reveal them, then the Court should enter a TRO and let Optum conduct expedited discovery to ascertain them. If ABC does not know those answers, then that strongly suggests that ABC will use *Smith's* knowledge of Optum's trade secrets to help *answer* those questions to Optum's competitive detriment. Smith's noncompete agreement and governing trade secrets law both bar Smith from using Optum's confidential information to help steer ABC's direction.

Smith also tries to downplay the significance of his role at Optum, but nothing could be further from the truth. Smith was not some "junior" employee with mundane responsibilities at Optum. *See* Smith Aff., ¶ 3. He was an executive who received valuable stock, was a member of Optum's corporate strategy team, and had access to some of Optum's most important trade secrets (Wolin Aff., ¶¶ 14-20), which would be incredibly valuable for a disruptor like ABC entering the health care services market in which Optum competes. To name only a few examples:

- Smith is familiar with the profitability of Optum's broad product portfolio, which would be helpful in developing competing product and pricing strategies;
- Smith is aware of Optum's enterprise product development strategy, which would be helpful in selecting which products to design and develop; and
- Smith is aware of Optum's enterprise corporate strategy for the next 3-5 years, which would be helpful in analyzing the ways in which companies entering the market can add value to the health care system and improve health outcomes for large employers like ABC's founding companies.

Wolin Aff., ¶¶ 10-12, 15-18.

Smith asserts that, despite this knowledge, he will not act in his new role as Director of "Strategy and Research" for ABC to harm Optum's interests. That assertion is pure makeweight. And the fact that Optum does not (and cannot yet) know the precise extent to which ABC is developing those products and services does not remotely change that outcome. Smith's intimate knowledge of Optum's most valuable trade secrets will unquestionably give ABC a significant leg up in its efforts to develop those products and services, and then to offer them both to the employees of ABC's founders and more broadly in the marketplace. That unfair competitive advantage harms Optum *today* and warrants a brief TRO.

ARGUMENT

1. Smith Misstates Current State and Federal Trade Secret Law. The effective date of the Massachusetts Uniform Trade Secrets Act ("MUTSA") was October 1, 2018. All of the cases Smith cites in support of his argument that "Optum's Trade Secret Misappropriation Claims Will Fail" (Opposition, Dkt. # 23, pp. 11-13) *predate* the MUTSA. That is significant, as the MUTSA now provides for injunctive relief when there is actual *or threatened* misappropriation (as there is here), as follows:

> (a) Actual or threatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use, upon a showing that information qualifying as a trade secret has been or is threatened to be misappropriated. . . .

Mass. Gen. Laws Ann. ch. 93, § 42A (West). By contrast, the prior version of the statute required actual use of the misappropriated trade secret before an injunction could be granted on a misappropriation claim. *See* Mass. Gen. Laws Ann. ch. 93, § 42A (2017) (effective until October 1, 2018) (stating that "employer shall, upon petition, be granted a preliminary injunction if it is shown that said employee is working in a directly competitive capacity. . . [and] employee has used such trade secret in such competition.").

Accordingly, Smith misses the mark in asserting that, under *Manganaro Northeast, LLC v. De La Cruz*, 2018 WL 5077180 (D. Mass. Aug. 22, 2018)[1] and *U.S. Elec. Services, Inc. v. Schmidt*, 2012 WL 2317358 (D. Mass. June 19, 2012), the threat of inevitable disclosure of trade secrets is insufficient to show a likelihood of success on the merits. That assertion serves only to misdirect this Court's analysis of Optum's claim for misappropriation of trade secrets under the MUTSA.

Indeed, Massachusetts courts already recognize the inevitable disclosure doctrine for purposes of evaluating irreparable harm, and Smith's acceptance of a position so dependent on his intimate knowledge of Optum's trade secrets establishes a very real threat that he will inevitably rely and draw upon that knowledge in service to ABC. *See Marcam Corp. v. Orchard*, 885 F. Supp. 294, 297 (D. Mass. 1995). Specifically, Smith is in possession of Optum's trade secrets and, as such, can "us[e] his inside . . . knowledge to outmaneuver the [Optum]" in the marketplace. *See Engility Corp. v. Daniels*, 2016 WL 7034976, at *11 (D. Colo. Dec. 2, 2016). This Court's decision in *Aspect Software, Inc. v. Barnett*, is particularly instructive, and the reasoning applies equally here:

> [G]iven the extent of [Smith's] experience at [Optum] and the similarity between his positions . . . it is difficult to conceive how all of the information stored in [Smith]'s memory can be set aside as he applies himself to a competitor's business and its products. On the contrary, what [Smith] knows about [Optum] is bound to influence what he does for [ABC], and to the extent it does, [Optum] will be disadvantaged. Other courts in this district, faced with similar circumstances, have concluded that even sincere, scrupulous efforts by an employee and his or her new employer to protect a prior employer's trade secrets are insufficient to remove the threat of irreparable harm via disclosure of trade secrets. . . . Accordingly, . . . [Optum] has carried its burden of establishing a significant risk of irreparable harm absent preliminary injunctive relief.

[1] Smith's reliance on *Manganaro Northeast, LLC*, to address Optum's likelihood of success on its misappropriation claim is particularly without basis since, in that case, the plaintiff limited its "argument to its breach of contract claim" and the Court "therefore [did] not address whether Manganaro is likely to succeed on its claims for . . . misappropriation of trade secrets. . . ." 2018 WL 5077180, at *2.

Aspect Software, Inc. v. Barnett, 787 F. Supp. 2d 118, 130 (D. Mass. 2011) (quoting *Marcam Corp*, 885 F. Supp. at 297).

Similarly, Smith's argument that the Motion should be denied based on the absence of "evidence of actual use or disclosure" ignores developments in state and federal law since the cases cited by Smith in support of his argument were decided. Opposition, p. 13. The effective date of the DTSA was May 11, 2016, and – like the MUTSA – it provides that "a court may grant an injunction to prevent any actual or *threatened misappropriation* . . . on such terms as the court deems reasonable. . . ."[2] 18 U.S.C.A. § 1836(b)(3)(A)(i) (West) (emphasis added). Nevertheless, Smith relies upon two cases that were decided before the enactment of both the DTSA and MUTSA: *Comark Commc'ns, LLC v. Anywave*, LLC, 2014 WL 2095379 (D. Mass. May 19, 2014) and *Compass Bank v. Lovell*, 2016 WL 8738244 (D. Ariz. Apr. 8, 2016). Opposition, p. 13. Since the authority cited by Smith does not address Optum's request for relief based upon actual *or threatened* misappropriation – as provided by *current* state and federal law – this Court should disregard Smith's misappropriation arguments altogether.

2. Optum Has Adequately Described Its Relevant Trade Secrets. Contrary to Smith's argument that Optum has not identified "the specific trade secrets that Smith allegedly misappropriated" (Opposition, pp. 11-12), Optum has more than satisfied its obligation in this regard: Optum provides an overview of categories of relevant trade secrets (Wolin Aff, ¶ 10), describes specific trade secrets that Smith worked on (*id.*, ¶¶ 16-18), and provides detailed examples of trade secrets that Smith accessed and printed (without legitimate basis) prior to his departure (*id.*, ¶ 36). Indeed, redacted copies of the documents Smith printed have been filed

[2] While the DTSA permits an injunction in these circumstances, an order under the DTSA cannot "prevent a person from entering into an employment relationship," but it can place conditions on such employment, so long as such conditions are "based on evidence of threatened misappropriation and not merely on the information the person knows." 18 U.S.C.A. § 1836(b)(3)(A)(i)(I) (West). The MUTSA does not contain a similar limitation on the scope of an injunction in these circumstances.

with this Court (*id.*, Exhibits 6 & 7), and can be shown to the Court *in camera* if there is any question about whether such documents contain trade secret information. Accordingly, Optum has described its trade secret information with adequate specificity. *See Iconics, Inc. v. Massaro*, 266 F. Supp. 3d 449, 456 (D. Mass. 2017) (alleged trade secret described with enough particularity through narrative containing "technical specificity and . . . clarity that can be understood by a lay person.") (internal citation omitted).

3. Smith Misstates Optum's Position Concerning The Scope Of Its Noncompete Agreement. Smith's primary argument against the enforceability of the Agreements is that "it is Optum's position that Smith is banned from working in 'every dimension of the health system' across the United States." Opposition, p. 14. In fact, Optum has taken no such position, and Smith's arguments that flow from his mischaracterization of Optum's position are similarly misdirected. Smith's noncompete covenant is relatively narrow, as its restriction is limited to competitive activity concerning any "activity, product or service that [Smith] engaged in, participated in, or had Confidential Information about during [Smith's] last 36 months of employment with [Optum]." This is a far cry from the blanket restriction that Smith claims Optum is advocating.

Additionally, Optum's noncompete bears no resemblance to the overly broad noncompete agreement that was rejected by *Tasktop Technologies US Inc. v. McGowan*, 2018 WL 4938570, at *7 (D. Del. Oct. 11, 2018) (cited in Opposition, pp. 14, 15, 19). The defendant in that action – unlike Smith – was a low-level employee who had no "'in-depth knowledge' of Tasktop's business operations," nor was he "'intimately familiar' with Tasktop's proprietary information." 2018 WL 4938570, at *7, quoting *Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, at *2 (D. Del. Apr. 14, 2016). Indeed, in *Tasktop Technologies US Inc.*, the Delaware

court describes a case very much like this one where injunctive relief for violation of a noncompete was deemed appropriate:

> In *Sensus*, the court concluded that the non-compete provision [protected legitimate economic interests] because defendant was a "key employee" in a "critical position" who had "in-depth information regarding the proprietary technology," "worked on all large deals," "possessed a level of knowledge with the technology not many other sales staff possessed," "had knowledge regarding how [plaintiff] prices and negotiates contracts, [plaintiff's] business strategy," and had "worked on some of [plaintiff's] largest accounts."

Tasktop Techs. US Inc., 2018 WL 4938570, at *6, quoting *Sensus*, 2016 WL 1466488, at *7.

Accordingly, this Court, like the court in *Sensus*, should grant Optum's request for injunctive relief and enter a temporary restraining order preventing Smith from working for ABC. 2016 WL 1466488, at *9.

4. Smith's Assurances That ABC Is Not Optum's Competitor Are Vague And Insufficient. While Smith is able to provide a detailed description of Optum's business, including specific examples of Optum's products and services ("Optum's products and services include . . . selling access to and claims processing for specialty clinical networks (e.g., behavioral health, transplant, etc.)") (Opposition, pp. 6-7; Stoddard Aff., ¶¶ 6-8), by contrast, his description of ABC's business is vague, and provides only a high-level overview of what ABC is doing, or is planning to do ("ABC is currently using data, analytics, and expertise to combine products from third-party vendors . . . to come up with new ways of unlocking value for the Founders and their employees.") (Opposition, p. 7; Stoddard Aff., ¶¶ 9-14). From there, Smith makes a conclusory assertion that ABC and Optum are not competitors and argues that, as a result, his work for ABC cannot violate his noncompete agreement. Opposition, pp. 15-17.

Although Optum acknowledges that, to this point, it has had to rely on scant publicly-available information to conclude that Smith's employment at ABC represents a competitive

threat, ABC, for its part, has supplied this court with barely any more details than the information contained in its earlier press releases and third-party reporting. *See* Complaint, ¶¶ 18-21. Rather than sharing more details about ABC's plans and operations, Smith would have this Court accept, at face value, ABC's assertion that "ABC has no activities, products, or services that compete with any Optum activities, products, or services."[3] Stoddard Aff., ¶ 14. However, noticeably absent from ABC's limited narrative about its operations in the Affidavit of John C. Stoddard (Dkt. # 23-2) are representations that, *inter alia*, Smith will not use his knowledge of Optum's corporate strategy to create health care solutions for the employees of ABC's founding partner companies, ABC will not be competing with Optum in the very near future, ABC's products and services will be limited to the employees of ABC's founding partner companies, or that ABC plans to remain "not profit-seeking" (Stoddard Aff. ¶ 13). Without specific representations along these lines, ABC leaves itself a great deal of latitude to have Smith "participate in . . . activity that competes, directly or indirectly" with Optum activities, products or services that Smith "engaged in, participated in, or had Confidential Information about during [his] last 36 months of employment with [Optum]" in violation of his noncompete agreement with Optum. NQ Awards, ¶ 4(c); RSU Awards ¶ 8(c).

For this reason, ABC's response supports Optum's request for an order prohibiting Smith from working for, or soliciting on behalf of, ABC so Optum may conduct expedited discovery. Optum's view is that ABC's hiring of Smith is likely part of a larger plan to lift Optum's model or, at the very least, to duplicate or develop similar products and services (Wolin Aff. ¶ 47), but

[3] In Mr. Stoddard's affidavit (¶ 11), he states "ABC is currently using data, analytics, and expertise to combine products from third-party vendors—which could potentially include Optum—to come up with new ways of unlocking value for the Founders and their employees." Similarly, in Mr. Wolin's affidavit for Optum, Mr. Wolin describes Optum's "core competencies, in data analytics . . ." (¶ 3) and explains that "data and advanced analytics" are part of Optum's trade secrets portfolio (¶ 10). Without more, it cannot be ruled out that the data and analytics cited by both companies are overlapping and are evidence of competition between the entities. The limited expedited discovery Optum seeks in this matter will shed more light on this issue.

in the absence of more information about ABC, neither Optum nor this Court has the ability to evaluate the full extent of the competitive threat posed by Smith's hiring by ABC in violation of his noncompete agreement. Optum's expectation is that its requested expedited discovery will generate the type of information that ABC has, so far, been unwilling to volunteer to this Court about its operation, and that such information will assist the Court in deciding Optum's anticipated preliminary injunction motion.

CONCLUSION

In light of the foregoing, Optum respectfully reiterates its request that this Court issue a TRO that, *inter alia*, bars Smith from working for Optum's competitor ABC in violation of his ongoing contractual and statutory obligations to Optum, in the form of the previously-filed Proposed Order (Dkt. # 3-1).

Respectfully submitted,

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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document has been filed through the CM/ECF system on January 25, 2019, and will be served electronically to the registered participants as identified on the Notice of Electronic Filing through the Court's transmission facilities, and that non-registered participants have been served this day by mail.

/s/ Russell Beck