UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THOMAS A. RUSSOMANO,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	Civil Action No. 20-cv-10077-ADB
NOVO NORDISK INC.,	*	
	*	
Defendant.	*	
	*	
	*	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

BURROUGHS, D.J.

Plaintiff Thomas Russomano resigned from his position with Defendant Novo Nordisk, Inc. ("Novo") on January 6, 2020, and accepted a position with third-party Defendant, BioMarin Pharmaceutical, Inc. ("BioMarin"). [ECF No. 2-1 ¶ 5 ("Compl.")]. Russomano then filed this complaint for declaratory judgment in Suffolk County Superior Court on January 9, 2020, to resolve the parties' disagreement as to whether a confidentiality and noncompete agreement precludes Russomano from working for BioMarin. See [id.]. Novo filed a notice of removal on January 15, 2020, [ECF No. 2], and this motion for a preliminary injunction and temporary restraining order on January 21, 2020, [ECF No. 9]. After a hearing on the motion on January 27–28, 2020, [ECF Nos. 27, 33], and for the reasons set forth more fully below, Novo's motion for a preliminary injunction and temporary restraining order, [ECF No. 9], is DENIED.

I. BACKGROUND

Hemophilia is a rare blood disorder that prevents individuals from forming a sufficient amount of (or any) blood clotting proteins, called factors. [Compl. ¶ 13]. Untreated, the disorder

can be life-threatening. [Id.]. Novo markets several products designed to treat different types of hemophilia, including Novoeight, which is a factor VIII replacement treatment for patients with hemophilia A. [Id. ¶¶ 14, 17]. BioMarin does not currently have a factor VIII replacement drug. [Id. ¶ 17]. The company has, however, applied for FDA approval of its gene therapy treatment for hemophilia A, Valoctocogene Roxaparvovec, or ValRox. [Id. ¶¶ 1, 18, 21]. The earliest anticipated date of approval for that treatment is sometime in August 2020. [1/28/20 Hrg. Tr. at 44:11–15 (testimony from John Cones regarding estimated date of a decision from FDA)]. If approved, BioMarin's gene therapy could eliminate or reduce the need for factor VIII infusions for at least three years (according to clinical trial data), and possibly forever. [Id. at 42:15–19 (testifying that clinical trial data is limited to three years, but the goal is for gene therapy to be administered only once); Compl. ¶¶ 23, 25].[1]

Prior to his work with Novo, Russomano was actively engaged in the hemophilia patient community. [ECF No. 19 ¶ 4 ("Russomano Decl.")]. Russomano was born with hemophilia and as a child he participated in summer camps for children with blood disorders. [Id. ¶¶ 2, 4]. He has served as a board member for the Hemophilia Federation of America and the Hemophilia Association of New Jersey. [Id. ¶ 7]. Since his employment with Novo, he has volunteered with the New England Hemophilia Association's Family Camp and the North American Camping Conference of Hemophilia Organizations. [Id. ¶¶ 5–6].

Russomano first began working for Novo as a Hemophilia Community Specialist ("HCS") for the New England region on January 25, 2016. [Russomano Decl. ¶ 9]. He

[1] At the January 28, 2020, hearing, John Cones, Executive Director of Field Operations for BioMarin, testified that patients would not necessarily stop taking factor VIII replacement therapy when using BioMarin's ValRox treatment. [1/28/20 Hrg. Tr. at 40:11–25]. The two may be used concomitantly. [Id.].

relocated from New Jersey to Boston with his family at Novo's request. See [id.]. As a condition of his employment, Russomano signed a confidentiality and noncompete agreement ("NCA") on December 14, 2015. [ECF No. 11-3 ¶ 6 ("Middleton Decl."); Russomano Decl. ¶ 10]. On November 18, 2016, Russomano was terminated from Novo after the company eliminated his position. [Russomano Decl. ¶ 13; Middleton Decl. ¶ 8]. In December 2016, Novo re-hired Russomano as a Hemophilia Therapy Manager ("HTM") for the New York, Pennsylvania, and West Virginia region. [Russomano Decl. ¶¶ 14, 16]. Upon being hired for this position, he signed another NCA, dated December 7, 2016. [Middleton Decl. ¶ 8]. In June 2017, Russomano's territory as an HTM was changed to New England. [Russomano Decl. ¶ 17].

On June 20, 2018, Novo sent Russomano another letter, again telling him that his position had been eliminated. [Russomano Decl. ¶ 19; Pl. Ex. 14 (copy of termination letter)]. This letter stated, "your position will be eliminated and your employment will end effective August 3, 2018 . . . ." [Pl. Ex. 14]. The letter encouraged Russomano to apply for open positions at Novo, which he did. [Id.; Russomano Decl. ¶ 20]. On July 6, 2018, Russomano was offered a new position at Novo as a Senior Hemophilia Community Liaison ("HCL") for the New York region. [Russomano Decl. ¶ 20; Pl. Ex. 16 (copy of offer letter)]. His offer letter stated that his new position would begin on August 6, 2018, his salary would be $101,400 (the same as when he was an HTM), and he would be eligible for a $30,000 target annual performance incentive. [Pl. Ex. 16]. He was not asked to and did not sign a new NCA in connection with this new position. See [id.; Russomano Decl. ¶ 22].

In January 2019, Novo added New Jersey to Russomano's territory. [Russomano Decl. ¶ 26]. Russomano's territory then consisted of New York and New Jersey, though he still lived in Boston. [Russomano Decl. ¶¶ 9, 30]. In April 2019, Novo made Russomano an Area Field

Trainer ("AFL"), which added to his existing responsibilities as an HCL but did not add compensation. [Id. ¶ 28]; see [ECF No. 11-2 ¶ 15 ("Shelor-Blain Decl.")]. In this role, Russomano helped train new HCLs in Novo's East and Central regions, requiring two to three days of travel per month in addition to his own work as an HCL. [Shelor-Blain Decl. ¶ 15; 1/28/20 Hrg. Tr. at 91:19–24 (Russomano testimony regarding time commitment of AFL role)].

On January 6, 2020, Russomano gave his supervisor at Novo, Scott Coleman, his letter of resignation, which stated that his last day with Novo would be January 20, 2020. [Def. Ex. 24]. He told Novo that he had been hired as a Senior Account Manager for BioMarin. [Id.]. Russomano referenced his 2015 NCA but did not reference the 2016 NCA. [Id.]. In addition, he noted that his position had changed several times while at Novo and asked Novo to confirm in writing that the 2015 NCA would not impact his new employment with BioMarin. [Id.]. Russomano also spoke with Coleman by phone on January 6, 2020, to inform Coleman of his resignation. [1/28/20 Hrg. Tr. at 95:23–96:11 (Russomano testimony)]. Russomano testified that Coleman expressed his opinion that Novo would not enforce a noncompete against Russomano and that it would be Coleman's recommendation to the company not to enforce any existing NCA. [Id. at 96:3–7]. Several days later, Coleman reiterated this message to Russomano. [Id. at 96:8–11]. Novo did not contact Russomano regarding his letter until January 15, 2020. [Russomano Decl. ¶ 37; Pl. Ex. 22 (e-mail communication from Novo's "askHR" email account)]. When Novo did not address Russomano's question regarding whether it would seek to enforce any noncompete obligations against him, he filed this action seeking declaratory judgment. [Compl. ¶ 5].

II. DISCUSSION

A. Legal Standard

"In evaluating a motion for a temporary restraining order, the Court considers the same four factors that apply to a motion for preliminary injunction, that is: the likelihood the movant will succeed on the merits, whether the movant is likely to suffer irreparable harm in the absence [of] preliminary relief, the balance of equities, and whether an injunction is in the public interest." Kilmowicz v. Deutsche Bank Nat'l Tr. Co., 192 F. Supp. 3d 251, 253 (D. Mass. 2016) (citing Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011)). While the Court must consider all four factors, a movant's failure to demonstrate a likelihood of success on the merits is fatal to a request for either form of relief. Id. (citations omitted). Therefore "[i]f the moving party cannot demonstrate that [it] is likely to succeed in [its] quest, the remaining factors become matters of idle curiosity." Id. (quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)).

Preliminary injunctions function to "preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). As a result, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." Id. (citing Indus. Bank of Wash. v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968)). The granting of a preliminary injunction is "an 'extraordinary and drastic remedy' . . . 'that is never awarded as of right.'" Voice of the Arab World, 645 F.3d at 32 (quoting Munaf v. Geren, 553 U.S. 674, 689–90 (2008)).

B. Likelihood of Success on the Merits

At the outset, the parties disagree as to whether the 2016 NCA's noncompete provisions are still binding on Russomano.[2] Novo's position is that the 2016 NCA is still in effect because the June 2018 termination letter only mentioned a "*potential* termination" of his employment and he subsequently accepted a new position within the company. [ECF No. 29 at 13–14]. Russomano's position is that, per the terms of the June 2018 letter, he was terminated on August 3, 2018, and started a new position with Novo on August 6, 2018. [ECF No. 25 at 6, 10]. He argues that he was not asked to sign a new NCA in connection with his rehire and, therefore, he is no longer bound to the noncompete obligations set forth in the 2016 NCA. [ECF No. 18 at 8–9].

Paragraph 3 of the 2016 NCA that Novo required Russomano to sign in December 2016, after terminating his position as an HCS and re-hiring him as an HTM, provided that Russomano's noncompete obligations ran "during [Russomano's] employment and for a period of twelve months following the termination of [his] employment for any reason, voluntary or

[2] Although the parties disagree as to whether New Jersey or Massachusetts law applies, Novo concedes that "the laws of New Jersey and Massachusetts are substantially similar" with respect to their motion. [ECF No. 11 at 16]. In order to determine whether Russomano's August 2018 termination impacted his obligations under the 2016 NCA, the Court refers to cases from both New Jersey and Massachusetts.

Russomano cites NPS LLC v. Ambac Assurance Corp., 706 F. Supp. 2d 162 (D. Mass. 2010), for the proposition that the 2016 NCA's choice of law provision does not apply to the validity of the contract's formation. [ECF No. 18 at 6]. As clarified by Judge Woodlock in a subsequent opinion, the NPS decision and the First Circuit opinion it referenced were focused on claims regarding fraudulent inducement. Foodmark, Inc. v. Alasko Frozen Foods, Inc., No. 12-cv-10837, 2013 U.S. Dist. LEXIS 42625, at *23–24 (D. Mass. Mar. 26, 2013). Neither party has alleged that the 2016 NCA is invalid as a result of actions that occurred at the time Russomano signed the NCA; the parties focus instead on whether the contract is enforceable given Russomano's termination in August 2018 and the multiple changes in his position, responsibilities, and territory. See id. at *24 ("Neither party to this action alleges fraud in the inducement, and neither has denied the validity of contract formation.").

involuntary . . . ." [Middleton Decl. ¶ 8; Def. Ex. 6]. Novo did not require Russomano to sign a new NCA in August 2018, when his position as an HTM was terminated and he was re-hired as an HCL. [Russomano Decl. ¶ 22; Pl. Ex. 16 (offer letter setting out terms of employment as an HCL)]. If his employment was, as he argues, terminated in August 2018, then by the terms of the 2016 NCA, his noncompete obligations would have expired twelve months later, on August 3, 2019, and he would no longer be bound by those obligations. See [Def. Ex. 6].

Both Massachusetts and New Jersey require that an employee sign a new noncompete agreement after being rehired. In Intepros, Inc. v. Athy, an employer sought to enforce a noncompete provision against an employee who had been fired and rehired twice. Intepros, Inc. v. Athy, No. MICV2013-00214, 2013 Mass. Super. LEXIS 48, at *9 (Mass. Super. Ct. May 5, 2013). After being rehired the first time, the employer asked the employee to sign a new noncompete agreement. Id. After being rehired the second time, however, the employer failed to ask the employee to sign a new agreement. Id. The Superior Court found the noncompete agreement unenforceable, stating that "for [the employer] to have an enforceable non-competition restriction against [the employee], she needed to sign a new non-competition agreement upon her return to [the employer] . . . just as [the employer] had required on two previous occasions." Id. at *10; see also Truong, LLC v. Tran, No. A-5752-11T1, 2013 N.J. Super. Unpub. LEXIS 64, at *18 (N.J. Super. Ct. Jan. 9, 2013) ("The restrictive covenant did not spring back to life because of [the employee's] return after her alleged breach. In order to revive its rights under the agreement, [the employer] had to reach a new agreement.")

By the terms of Novo's June 2018 termination letter, Russomano's employment with Novo was terminated on August 3, 2018. [Pl. Ex. 14]. By the terms of Novo's July 2018 offer letter, Russomano's employment in his new position began on August 6, 2018, three days after

he was terminated. [Pl. Ex. 16]. Just as in Intepros and Truong, Novo did not ask Russomano to sign a new NCA before beginning his job as an HCL in August 2018. See Intepros, 2013 Mass. Super. LEXIS 48, at *10; Truong, 2013 N.J. Super. Unpub. LEXIS 64, at *18. For Russomano to continue to be bound not to compete, upon his rehire in 2018, Novo would have needed a new NCA or to ensure that there was no break in employment or any other circumstance that necessitated a new agreement. Although Novo's July 2018 letter refers to Russomano's new position as a "transfer," his termination letter made clear that his employment with the company would end on August 3, 2018. [Pl. Ex. 14 ("[Y]our position will be eliminated and your employment will end effective August 3, 2018 . . . .")]. Novo attempts to cast this letter as referring to a "potential termination," but the Court finds that the letter was unambiguous as to Novo's lack of an ongoing obligation to employ Russomano beyond the date of termination provided in the letter. See [Pl. Ex. 14].[3]

The Court thus finds that Novo terminated Russomano on August 3, 2018, and that his noncompete obligations under the 2016 NCA therefore expired on August 3, 2019. [Pl. Ex. 14 (termination letter); Def. Ex. 6 (defining NCA period)].[4] "[P]roving likelihood of success on the merits is the 'sine qua non' of a preliminary injunction." Arborjet, Inc. v. Rainbow Treecare Sci.

[3] The letter references the possibility of applying for and accepting a new position at Novo "prior to the Separation Date," but this is in the context of the employee's access to severance benefits, not an extension of any existing NCA. [Pl. Ex. 14].

[4] The Court notes that, even though it has found that the noncompete provisions of the 2016 NCA are no longer in effect, the 2016 NCA's confidentiality provisions extend indefinitely:

> I will not, during the term of my employment or at any time thereafter, use for my own benefit, or communicate or disclose to, or use directly or indirectly for the benefit [of] any person . . . or entity, any Confidential Information, except in the loyal performance of my duties for the Company.

[Def. Ex. 6].

Advancements, Inc., 794 F.3d 168, 173 (1st Cir. 2015) (quoting New Comm Wireless Servs., 287 F.3d at 9). The Court will therefore not enter into an analysis of the remaining factors.[5]

A preliminary injunction is "an 'extraordinary and drastic remedy,'" Voice of the Arab World, 645 F.3d at 32 (quoting Munaf, 553 U.S. at 689–90), which "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). Novo has failed to make the requisite "clear showing" at this stage. The Court notes, however, that "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." Camenisch, 451 U.S. at 395 (citations omitted). The Court's findings at this stage are limited to its review of the evidence presented by both parties at the evidentiary hearing on January 27–28, 2020, and the parties' briefings.

[5] Without reaching a decision on these issues at this preliminary stage, the Court observes that Russomano has raised additional grounds in support of his argument that he is not bound by a noncompete obligation to Novo:

1. It is not clear that Novo and BioMarin are competitors given the different types of treatment each offers to hemophilia patients and the fact that use of the therapies is not mutually exclusive. See [ECF No. 18 at 12–16; 1/28/20 Hrg. Tr. at 40:11–25 (testimony from Cones stating that patients might need to use both products concomitantly)].
2. Russomano's employment at Novo was consistently unstable as his position was eliminated in both 2016 and 2018, and his territory shifted repeatedly. [ECF No. 18 at 7–9; Russomano Decl. ¶¶ 13–14, 16–17, 19–20, 26].
3. Russomano's supervisor at Novo provided him with conflicting advice about whether noncompete obligations would be enforceable against him. [1/28/20 Hrg. Tr. at 95:23–96:11 (Russomano testimony regarding conversation with supervisor Coleman)].
4. The June 20, 2018, termination letter Novo sent to Russomano does not mention the 2016 NCA or Russomano's noncompete obligations despite mentioning the nondisclosure and confidentiality provisions and observing, "[w]e understand that one of your first priorities during the Transition Period will be finding new employment . . . ." [Pl. Ex. 14].

III. CONCLUSION

Accordingly, Novo's motion for a preliminary injunction and temporary restraining order, [ECF No. 9], is DENIED.

SO ORDERED.

February 5, 2020

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE