

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OVERSEAS STRATEGIC CONSULTING, LTD	:	CIVIL ACTION
	:	
v.	:	
	:	
CARL LARKINS	:	No. 01-4115

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October \_\_, 2001

Plaintiff Overseas Strategic Consulting, LTD ("OSC") filed this diversity action for breach of contract against Carl Larkins ("Larkins") on August 20, 2001. OSC requests that the court issue a preliminary injunction enforcing the terms of Larkins' agreement not to compete with OSC that he signed on March 24, 1999.<sup>1</sup> Larkins not only opposes the preliminary injunction on its merits, but has moved for summary judgment.

The court held a hearing addressing both parties' motions on September 20th and 21<sup>st</sup>, 2001. At that hearing, the court **denied** defendant's motion for summary judgment and **granted in part** plaintiff's request for a preliminary injunction. This opinion and final order pursuant to Fed. R. Civ. P. 56 and 65(d) follows.

I. **Facts:**<sup>2</sup>

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<sup>1</sup>Plaintiff withdrew its request for a Temporary Restraining Order and agreed that the court would hear this motion instead. Order, August 28, 2001.

<sup>2</sup>Because the court is deciding defendant's motion for summary judgment and plaintiff's motion for a preliminary injunction, it will not make those specific findings of fact that

Larkins is a public information officer: he educates citizens of foreign countries on economic issues in accordance with the foreign policy of the United States government. Tr. Sept. 20, 2001, at 133-36. His experience in this field is extensive: he has worked on domestic political and lobbying campaigns, P. Ex. 1, at ¶¶ 7, 8; for the AFL-CIO in Washington, id. at 17; and for the National Democratic Institute ("NDI") in South Africa and Cambodia, id. at ¶¶ 9-16.

OSC is a consulting firm which employs individuals to fulfill contracts that it has been awarded by government and quasi-governmental organizations. OSC receives most of its funding from the United States Agency for International Development ("USAID"). USAID is a United States Government agency that contracts with for-profit and non-for-profit agencies to encourage stability, democracy, and free markets abroad. Tr. Sept. 20, 2001, at 22

In February, 1999, OSC decided to employ Larkins as "chief of party" for a government funded project in Bosnia. Neither plaintiff nor defendant disagrees that this decision was communicated orally to Larkins, and that Larkins knew that the job offer was expressly conditioned on USAID's approval of his employment. Tr. Sept. 20, 2001, at 23-24; Tr. Sept. 20, 2001, at 170. Had USAID not agreed to Larkins' employment, neither party would have considered themselves bound by an employment contract.

Larkins' salary was paid by OSC acting as a pass-through entity for USAID: Larkins was paid on a daily US Government wage scale.

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usually accompany a preliminary injunction order. Instead, the court will emphasize those issues of fact that are undisputed in this section; when appropriate it will note where the parties conflict on issues that are material to the motions before the court.

OSC made Larkins' employment contingent on his signing a non-competition and confidentiality agreement. Tr. Sept. 20, 2001, at 24. Larkins denied ever hearing about this condition in late-February or early March, 1999. Tr. Sept. 20, 2001, at 173. Robert Arsenault ("Arsenault"), vice-president of OSC, testified that he could not remember specifics of Larkins' pre-employment negotiations. Tr. Sept. 20, 2001, at 48. He did recall writing a letter to Larkins on March 9, 1999, P. Ex. 17, to offer him a position with OSC subject to USAID approval. This letter also made Larkins' employment contingent on a dental and physical exam, and execution of "standard 'Confidentiality', 'Non-Competition' and 'Arbitration' Agreements ...". Id. Larkins denies ever receiving this letter: there is no evidence of record that OSC sent it to him. Tr. Sept. 20, 2001, at 48-49; Tr. Sept. 20, 2001, at 55.

There is no dispute that Larkins left his job at the AFL-CIO on March 10, 1999. Tr. Sept. 20, 2001, at 174. In the third week of March, 1999, Larkins arrived at OSC's offices in Philadelphia to begin his orientation. Id. OSC presented him with a "standard" Non-Competition and Confidentiality Agreement (the "Agreement"), which Larkins took on a short vacation to California. Tr. Sept. 20, 2001, at 91. Larkins edited this Agreement and reduced the scope of the non-competition clause from two years to one year. Tr. Sept. 20, 2001 at 89; Tr. Sept. 20, 2001, at 79-80. The final agreement read, in relevant part:

During the term of this Agreement, and for a period of one years [sic] after termination of this Agreement for any reason whatever, Employee, without prior written consent of the Company, agrees that Employee will not engage directly or indirectly, including, but not limited to, acting as agent, representative, employee, consultant, advisor, owner (except in the case of passive ownership of less than five percent of any publically traded corporation) or participant, whether or not compensation [sic], in any business, firm, partnership, proprietorship, association, corporation or other entity, including eleemosynary

institutions and nonprofit organizations, which in any way provides public information, public relations, public education or similar products or services, including research and development of such products or services, in CEE ("Central and Eastern Europe") or the NIS ("Newly Independent States") geographic area in which Employer provides such products or services.

P. Ex. 2. According to Stewart Cades, an OSC officer who spoke with Larkins during these negotiations, Larkins was not concerned with the CEE or the NIS geographic limitations, because he said he did not "expect to go back there again." Tr. Sept. 20, 2001, at 80.

Larkins' position in Bosnia as "chief of party" made him the leader of a team of 40-60 expatriate and local personnel. Tr. Sept. 20, 2001, at 158-61. OSC's project in Bosnia aimed to educate the populace on the merits of privatizing large, state-owned agricultural concerns. Larkins contends that his work in Bosnia required relatively little knowledge of the content of his educational efforts. Tr. Sept 20, 2001, at 139. OSC responds that individuals of Larkins' status gain special knowledge of the region where they work as well as the information they disseminate. Tr. Sept. 20, 2001, at 29-32.

Larkins worked in Bosnia as a chief of party until April, 2000. From May to November, 2000, Larkins continued to work in Tblisi, Georgia, as an OSC Senior Advisor, organizing media workshops on economic restructuring and capital markets. P. Ex. 1 ¶ 34.

Between November, 2000, and April, 2001, Larkins developed potential projects for OSC in Washington, D.C. From mid-February through April, 2001, he investigated a proposed privatization project in Croatia. He traveled to Croatia during the last week of March and contacted several individuals there in person and by telephone. One such individual, Brenda Pearson, was the chief of party of the pension reform project of a competing consulting

firm known as CARANA - the project Larkins later joined. Tr. Sept. 20, 2001, at 103; P. Ex. 28, at 2. Larkins sent back several reports to OSC's central office regarding the prospects for a public education project in Croatia. Tr. Sept. 20, 2001, at 100-04. On March 28, 2001, OSC submitted a bid as a subcontractor on a proposed Deloitte and Touche privatization project in Croatia. Arsenault Aff. ¶ 30.

Larkins was dissatisfied with business development work. Tr. Sept. 20, 2001, at 182. OSC offered him other work to retain a valuable employee. Tr. Sept. 20, 2001, at 42-43. Larkins rejected these OSC offers, Tr. Sept. 20, 2001, at 114, and resigned his employment effective April 30, 2001. Arsenault Aff. ¶ 33. After Larkins left OSC, Deloitte and Touche was forced to withdraw Larkins' name from its general bid. Arsenault Aff. ¶ 34. Deloitte and Touche did not win the general bid from USAID; OSC did not win the subcontract. Id.

Larkins began negotiating for a position with CARANA, a consulting firm, as chief of party with its pension reform project in Croatia. CARANA, like OSC, derives most of its revenue from USAID. Tr. Sept. 21, 2001, at 5. Unlike OSC, CARANA does not focus on public education. Tr. Sept. 21, 2001, at 14.

CARANA received its Croatian public education contract from USAID in December of 2000, after USAID approached it in a no-bid, single party, process. Tr. Sept. 21, 2001, at 12. Larkins began his employment with CARANA in Croatia on May 15, 2001. P. Ex. 8. Larkins was employed by CARANA as a contract employee, for 140 working days from May 15, 2001 (to the end of the term of the USAID contract). Tr. Sept. 21, 2001, at 8; P. Ex. 8. Eduardo Tugendhat ("Tugendhat"), CARANA's president, expects the contract to expire on January 15, 2002. Tr. Sept. 21, 2001, at 22. CARANA hopes to expand its Croatia contract significantly in the

future, and move from public education to CARANA's primary focus: economic restructuring. Tr. Sept. 21, 2001, at 12. Larkins has already begun to help CARANA to expand and extend its current Croatia contract with USAID. Tr. Sept. 21, 2001, at 42-45; P. Ex. 14; Tr. Sept. 21, 2001, at 46-48. Tugendhat does not consider this help - Larkins' responses to USAID's inquiries about expanding or extending the term of the current contract - to be business development. Tr. Sept. 21, 2001, at 46-47. Tugendhat admits that "business development" by employees currently working under a USAID contract would be prohibited by government regulation. Tr. Sept. 21, 2001, at 22.

When Larkins first began negotiating with CARANA to work for it, OSC demanded that CARANA "buy-out" Larkins' agreement not to compete. Negotiations failed, and OSC filed this action.

## **II. Discussion:**<sup>3</sup>

### **A. Jurisdiction**

The court has diversity jurisdiction over the subject matter under 28 U.S.C. § 1332. OSC is a citizen of Pennsylvania; Larkins is a citizen of Washington, D.C. Larkins earns over \$100,000 a year: the amount in controversy exceeds \$75,000. Neither party contests the court's personal jurisdiction. Venue lies in this district under 28 U.S.C. § 1391(a): the signing of the Agreement took place in Philadelphia.

### **B. Larkins' Motion for Summary Judgment**

#### **1. Standard for Decision**

Summary judgment is appropriate only if there are no genuine issues of material fact and the evidence establishes that the

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<sup>3</sup>Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-34. The non-movant must present evidence to support each element of its case for which it bears the burden of proof at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

Larkins, moving for summary judgment, argues that: (1) the covenant not to compete is unenforceable under Pennsylvania law; and (2) he has not violated its terms.

2. The Enforceability of the Non-Competition Clause of the Agreement

To be enforceable in Pennsylvania, a covenant not to non-compete must be: (1) ancillary to the taking of employment; (2) supported by adequate consideration; (3) reasonably limited in time and geographic scope; and (4) reasonably designed to safeguard a legitimate interest of the former employer. See National Business Services v. Wright, 2 F. Supp. 2d. 701, 707 (E.D.Pa. 1998). Larkins argues that no reasonable jury could find that the non-competition clause passes the first, second, and fourth prongs of this test.

- a. Was the Non-Competition Clause ancillary to the Larkins' employment contract?

Larkins argues that he and OSC entered into an oral employment contract in late February, contingent only on USAID's approval: OSC's later requirement he sign the Agreement was an "after-thought to impose additional restrictions on the unsuspecting employee." Beneficial Finance Co. of Lebanon v. Becker, 22 A.2d 873 (Pa. 1966).

In Pennsylvania, it is possible for the parties to bind themselves orally even when contemplating a later written contract. See George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 315 (Pa. 1975). However, the parties must manifest mutual intent to do so, and there must be agreement on all aspects of the employment relationship. See id. at 315-16. Here, Larkins has not put forward sufficient evidence to satisfy his initial burden on a summary judgment motion.

Had USAID not approved Larkins' placement, OSC would have had no obligation to employ him. This fact, by itself, does not mean that the parties did not form an oral contract in late February. Rather, USAID's approval was an express condition precedent to both parties' obligations. See Farnsworth on Contracts § 8.2, 520-22 (Third Ed. 1998).

But there is a material issue of fact regarding the Agreement: whether OSC orally agreed to employ Larkins absent any agreement by Larkins not to compete with it on termination. Larkins recalls no discussion of a covenant not to compete in his conversations with Arsenault in late February. Tugendhat, the president of CARANA, testified that such covenants are unknown in the industry. Arsenault testified that he could not personally remember whether he informed Larkins in February or early March that signing of a covenant not to compete was an express condition of the contract.

However, Arsenault's March 9, 2001, letter provides strong contemporaneous evidence of what OSC believed it was agreeing to

in its negotiations with Larkins. That letter states: "Your ultimate employment is contingent upon ... the execution of our standard 'Confidentiality', 'Non-Competition' and 'Arbitration' Agreements ...." P. Ex. 17. There is no evidence that Larkins received this letter, but its existence creates a material issue of fact: a reasonable jury could find that OSC made even its late February oral offer of employment contingent on Larkins' execution of the Agreement.

Even had the parties formed an oral agreement in late February absent any condition to sign the Agreement, Larkins would still not prevail on his motion for summary judgment. In Pennsylvania, agreements not to compete are ancillary to the employment contract if signed within a reasonable time of the commencement of work. See National Business Services, 2 F. Supp. 2d. at 707 (ten days); Beneficial Fin., 222 A.2d at 876 (two days); Nagaraj v. Arcilla, 20 Pa. D. & C.3d. 574, 582-83 (Pa.Com.Pl. 1981) (two weeks). Here, there may have been an oral agreement in late February that Larkins would start work in the third week of March. On arrival, he was immediately presented with the Agreement. He signed it within three days.

As defendant points out, the relevant test of reasonableness is whether an agreement was an "afterthought to impose additional restrictions on an unsuspecting employee." Beneficial Fin. Co., 222 A.2d at 876. Larkins considered the Agreement for three days, reduced its term from three years to one year, and made several changes to the confidentiality clause that showed high intelligence and/or legal advice.<sup>4</sup> A reasonable jury could find,

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<sup>4</sup>A sentence in the agreement as modified reads "Employee will not ... divulge [any confidential information] unless compelled to disclose by judicial or administrative process or by other requirements of law ...." (underlined words added by Larkins through a handwritten comment in the margin of an earlier draft). P. Ex 2; P. Ex. 25.

and indeed likely would find, that Larkins' execution of the non-competition agreement was ancillary to his employment.

- b. Is the non-competition clause supported by adequate consideration?

If Larkins' agreement not to compete was ancillary to OSC's agreement to employ him, then he received adequate consideration - i.e., his employment, salary and signing bonus. See National Business Services, 2 F. Supp. 2d. at 707-08.

- c. Is the non-competition clause of the Agreement reasonably limited in time and geographic scope?

The non-competition clause of the Agreement restricts Larkins from working in parts of central Europe and western Asia for one year from the date of his termination for any reason. Larkins does not contend that the clause, if enforceable, is not reasonably limited in time and geographic scope. OSC's primary business activity is in CEE and the NIS: the geographic and temporal scope of the clause is reasonably limited. See Vector Sec., Inc. v. Stewart, 88 F. Supp. 2d. 395, 401 (E.D.Pa. 2000) (upholding five year restriction prohibiting solicitation of customers of former employer); Kramer v. Robec, Inc., 824 F. Supp. 508, 512 (E.D.Pa. 1992) (upholding nationwide restriction).

- d. Does the agreement safeguard a "legitimate business interest?"

In Pennsylvania, an agreement not to compete must not only be restricted in time and space, but must safeguard an independent, legitimate business interest. See Admiral Services, Inc. v. Drebit, 1995 WL 134812 (E.D.Pa. March 28, 1995) (applying Pennsylvania law). "[T]rade secrets of an employer, customer goodwill and specialized training and skills acquired from the employer are all legitimate business interests protectible

through a general restrictive covenant." Thermo-Guard, Inc. v. Cochran, 592 A.2d 188, 193-94 (Pa.Super.Ct. 1991) (citing Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838 (Pa. 1957)). Pennsylvania courts "disfavor restrictive covenants," National Business Services, 2 F. Supp. 2d. at 707, so a court will not enforce a contract in equity when an employer's sole motivation is to punish an employee for leaving.

Larkins argues that he must prevail as a matter of law because: (1) the non-competition clause of the Agreement is unenforceable for OSC's lack of a business purpose in Croatia; or, (2) the non-competition clause of the Agreement is unenforceable for lack of a business purpose anywhere in the world.

Larkins contends that there can not be, as a matter of law, a legitimate business purpose for a contract barring his employment in Croatia, as OSC has never done any business there. There is a material issue of fact whether OSC has been or is engaged "in business" in Croatia. It performs contracts in neighboring countries. With Larkins' help, it has solicited business there. A reasonable jury might find that OSC actually does or reasonably intends to do business in Croatia.

Even so, the issue is besides the point. If a company can protect "customer goodwill," then presumably the goodwill resides with the customer, not where a contract with the customer is performed. See Thermo-Guard, 596 A.2d at 195 (restrictive covenant may protect prospective customers). USAID, the relevant customer, is based in Washington. It is not unreasonable for OSC to wish to preserve those business relationships Larkins developed with USAID and others while employed at OSC. It is not punitive to prevent him from exploiting those relationships - in USAID's regional and homeland offices - for the term of the agreement. See Wainwright's Travel Service Inc. v. Schmolk, 500

A.2d 476, 479 (“[t]he contacts and goodwill built up by Schmolk are certainly a protectable interest”); Bettinger v. Carl Burke Ass’n, Inc. 314 A.2d 296, 298 (Pa. 1967) (reasonable to protect against competition from former employee whose job it was to keep in close contact with customers). Larkins’ trip to Croatia while in OSC’s employ strengthens OSC’s position: it paid for him to contact the very individuals at USAID whom he now contacts for CARANA.

A reasonable jury could find that plaintiff has a legitimate business interest in enforcing the covenant not to compete. There was evidence Larkins has developed considerable contacts with local USAID officials in Croatia and Bosnia and also gained valuable regional experience with OSC. The parties dispute how much this experience is valued by USAID, but it might be an important component of Larkins’ current market position. Whether Larkins’ employment with CARANA hurts OSC’s customer goodwill, and whether he acquired regionally important skills that OSC may seek to protect, are material issues of fact for a jury.<sup>5</sup>

Larkins also contends that the covenant is unenforceable anywhere because he can not possibly damage OSC’s customer goodwill or any other legitimate interest.

He argues that the USAID officials who choose between bids may have no contact with an offeror after the bid has been submitted, but there is evidence that Larkins enhanced OSC’s corporate opportunities through his regional experience and multiple contacts with USAID’s officers. Having Larkins’ resume as part of a bid package might have helped OSC obtain bids from USAID, even if Larkins himself could not personally contact the

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<sup>5</sup>The conclusion that there exist material issues of fact about the business interest protected by the covenant suggests the non-competition agreement may be narrowed to serve the legitimate purpose.

USAID officers with whom he has relationships. It is legitimate, under Pennsylvania law, to prevent a former employee from soliciting customers he had developed while with the former employer.

### 3. Non-violation of the Agreement

Larkins' second argument supporting his motion for summary judgment is that he has not violated the Agreement. He argues that: (1) the non-competition clause only applies to those areas where OSC currently provides products or services; and, (2) the Agreement does not restrict competition in Croatia because it is not a state in CEE or in the NIS.

Whether the agreement applies only to those areas where OSC currently provides products or services is a classic question of fact that can not be resolved in Larkins' favor on this record. The relevant part of the clause reads:

[Larkins will not work for any organization which] in any way provides public information, public relations, public education or similar products or services, including research and development of such products or services, in CEE ("Central and Eastern Europe") or the NIS ("Newly Independent States") geographic area in which Employer provides such products or services.

It may be that "provides such products or services" means that Larkins is prohibited from working in those areas of CEE or the NIS where OSC currently provides services. On the other hand, "products and services" when first mentioned expressly includes "research and development" and the subsequent references to "such products and services" that OSC provides may also include research and development. Larkins has offered no evidence allowing the court to determine, as a matter of law, that the Agreement was meant only to protect OSC's interests in existing contracts.

Larkins' second argument that Croatia is not in CEE or the NIS also cannot be decided in his favor as a matter of law. Larkins submitted several webpages that purport to locate Croatia in Southeastern Europe with his brief in support of his motion for summary judgment. Tugendhat, Larkins' current employer, testified that he considers Croatia to be within Central and Eastern Europe. Tr. Sept. 21, 2001, at 51. A reasonable jury could find that Croatia is where it appears to be on a map: in the south of central Europe. A reasonable jury could find that the parties intended Croatia to be a part of Central and Eastern Europe within the scope of the non-competition clause of the Agreement.

The Court cannot conclude Larkins must prevail as a matter of law, so his motion for summary judgment will be denied.

**C. OSC's motion for a preliminary injunction.**

OSC moves that this court enforce the restrictive covenant by a preliminary injunction enjoining Larkins from working in Central and Eastern Europe (including Croatia), as well as the Newly Independent States, for any competitor of OSC, for one year from the date of judgment. It argues that it continues to suffer immediate and irreparable harm because of Larkins' employment with CARANA.

1. Standard and Application

This court grants a preliminary injunction only if: 1) the movant has shown a reasonable probability of success on the merits; 2) the movant will be irreparably injured by denial of relief; 3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and 4) granting the preliminary relief will be in the public interest. See Allegheny

Energy, Inc. v. DOE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

a. Probability of Success on the Merits

Larkins' arguments against the preliminary injunction track those he makes in support of summary judgment: even if there exist material facts about the enforceability of the covenant, and its scope, OSC is not likely to prevail on the merits.

The court has already determined there are material issues of fact. Now that the burden is on OSC, the court must examine whether OSC is reasonably likely to prevail on the merits by establishing: (1) that a legitimate business purpose makes the Agreement enforceable; and, (2) that the Agreement applies to his present position in Croatia.

- (1) OSC will more likely than not establish that the non-competition clause is enforceable.<sup>6</sup>

Larkins argues that there is a presumption in Pennsylvania law that employees who have not acquired "specialized skills" while working for their employer may not be restrained through a non-competition agreement. See Fonda Group, Inc. v. Erving Indus., Inc., 897 F. Supp. 230, 233 (E.D.Pa. 1995) (where parties had only general management and selling skills, no injunction would issue); Morgan's Home Equipment, 136 A.2d at 846 (listing knowledge of specialized training, trade secrets, and business methods as three potential legitimate purposes). The cases that Larkins cites are distinguishable.

In Fonda Group, the court considered whether a restrictive

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<sup>6</sup>The discussion in section II.B(2) is incorporated by reference. OSC is more likely than not to establish that the non-competition clause was ancillary to his employment and supported by adequate consideration; OSC is more likely than not to establish that the clause was reasonably limited in time and geographic scope.

covenant was assignable to another employer. 897 F. Supp at 231. It noted the new employer had not established irreparable harm because the employees whom it wished to enjoin possessed no technical data or specialized knowledge that would make the harm unquantifiable. Id. at 233. The court did not address the issue of legitimate business purpose, nor the possible loss of customer goodwill.

Morgan's Home Equipment also fails to support defendant's argument. Even if its list of permissible purposes was originally meant to be exhaustive, this forty-four year old opinion has clearly been extended by later Pennsylvania cases. See SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1258 (3d Cir. 1985); Sidco Paper Co. v. Aaron, 351 A.2d 250, 252-53 (Pa. 1976) ("An employer's right to protect, by a covenant not to compete, interest in customer goodwill acquired through the efforts of an employee is well-established in Pennsylvania."). Protecting a the goodwill of a customer base is now a legitimate business purpose in Pennsylvania. See Thermo-Guard, 592 A.2d at 193-94.

OSC seeks to protect the "market cachet" that Larkins' skills brought it. Protecting "market cachet" is synonymous with protecting customer goodwill: OSC wishes to prevent other companies from using the experience and contacts Larkins gained at OSC to win contracts OSC would otherwise have obtained. USAID is the main customer of both OSC and CARANA . OSC may legitimately seek to prevent CARANA (or any other company) from using Larkins to gain new business from USAID for the term of the Agreement.

- (2) OSC will more likely than not establish that Larkins has breached the non-competition Agreement.

OSC is more likely than not to establish at trial that

Larkins has breached his agreement not to compete with it. Larkins contends: (1) that Croatia is not a state covered by the non-competition clause of the Agreement; and (2) that because OSC does no current business in Croatia, it can not enforce the Agreement against him there. Larkins, relying on the general presumption in Pennsylvania against restrictive covenants, argues that they must always be "construed narrowly." All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa.Super.Ct. 1997).

Tugendhat's admission that he considers Croatia in CEE disposes of Larkins' first argument. OSC is reasonably likely to be able to establish that both parties considered Croatia a part of CEE.

Larkins' second argument has more merit. The non-competition clause is not as clear as it might be. Of course, "the paramount goal of contract interpretation is to ascertain and give effect to the parties' intent." Tuthill v. Tuthill, 763 A.2d 417, 419 (Pa.Super.Ct. 2000). To determine intent one looks first to the contract. See id. "Each and every part of the contract must be taken into consideration and given effect, if possible, and the intention of the parties must be ascertained from the entire instrument. Id.

Here, the hard issue is to determine to what "provides such products or services" in the Section 2's last line refers. Larkins' argument is that whatever the general terms of the paragraph may say about "products or service", OSC can only bar Larkins from working in those specific areas where it currently provides them. OSC responds that the agreement focuses on a "geographic area[,]" not any particular state.

It is undisputed that OSC currently provides businesses and services in Bosnia, which is in CEE. Larkins also admits that his understanding of the non-competition agreement is not based on any statements made to him by anyone at OSC. Tr. Sept. 20,

2001, at 93. A reasonable jury could find that the entire clause beginning with "in CEE..." refers back to a definition of products or services that included research and development. Therefore, the court finds it is more likely than not that OSC will establish that Larkins is in breach of his agreement not to compete with it.

b. Irreparable Harm

A plaintiff establishing an actual breach of a non-competition clause satisfies the irreparable harm requirement for a preliminary injunction. See Vector Security, Inc. v. Stewart, 88 F. Supp. 2d. 395, 401 (E.D.Pa. 2000). OSC can also point to the Agreement's clause expressly providing for injunctive relief in case of breach. See United Artists Theatre Circuit, Inc. v Monarch, Inc., 1996 U.S. Dist LEXIS 18180, at \*45 (E.D.Pa. Dec. 6, 1996) (contract term factor in equity jurisdiction). However, here the legitimate irreparable harm is not co-extensive with the scope of the Agreement

The irreparable harm OSC will suffer is the destruction of that which the non-competition clause seeks to preserve: its customer goodwill and customer relationships. If Larkins is allowed to help another company solicit business from USAID (or another customer), OSC will be irreparably harmed because it could never fully ascertain what it had lost. See John G. Bryant Co. v. Sling Testing & Repair, Inc., 369 A.2d 1164, 1167 (Pa. 1977) (unwarranted interference with customer relationships is unascertainable and not capable of being fully compensated by money damages).

However, this interest (and potential harm) is narrower than the scope of the restrictive covenant OSC seeks to enforce. The CARANA contract Larkins currently helps fulfill did not arise out of Larkins' business contacts: CARANA gained it through a no-bid

process before Larkins became a CARANA employee. Tugendhat testified that it would be illegal for Larkins to solicit more business with USAID, or anyone else, while employed on an existing government contract. Although there is some evidence that Tugendhat's definition of business development is non-standard,<sup>7</sup> a narrowly crafted injunction commensurate with the potential harm will ensure that Larkins does not hurt OSC's goodwill while employed with CARANA only on this existing contract.

The court has the power to modify the restrictive covenant to accommodate the employer's interests and the employee's legitimate right to earn a living in his chosen profession. See Thermo-Guard, 596 A.2d at 194. The court will do so here by preventing Larkins from using his OSC contacts, experiences or resume to help CARANA (or any other company) gain new business, or develop new business contacts, for a period of one year from the termination of Larkins' employment with OSC.<sup>8</sup>

Larkins will be able to continue his employment on the contract CARANA entered into before it employed Larkins, provided that Larkins does not: (1) work for CARANA beyond his present 140 day contract before May 1, 2002; (2) seek to extend that contract; (3) allow his name to be used in a proposed extension;

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<sup>7</sup>Tugendhat testified that when a customer approaches CARANA with a proposal to increase the size of an existing contract, the response is not business development. Tr. Sept. 21, 2001, at 47-48. This is contrary to common business understanding and practice.

<sup>8</sup>The parties suggest different beginning periods for the injunctive relief. Plaintiff contends that the injunction should run from the date of judgment. Defendant argues that any injunction should only issue from the date Larkins ceased developing his regional skills and experience (when he left Tblisi to join OSC's Washington staff in October, 2000). These creative arguments lack support in the case law.

(4) help CARANA in any way to extend this contract; (5) or help CARANA gain any new business before May 1, 2002.

c. Harm to Defendant

The injunction the court will issue prevents Larkins from working for an OSC competitor in CEE or the NIS for about four months. Larkins is a highly qualified individual who has worked on four continents. His skills are portable. Moreover, he knew that the non-competition clause might be enforced through an injunction before he signed the Agreement, and had the opportunity to edit the clause accordingly. See National Business Services, 2 F. Supp. 2d. at 709, n. 5 (employee's notice a factor in balance of harms analysis). Larkins will not be denied the right to earn a livelihood. See id. at 709.

d. The Public Interest

Larkins argues that both generally and specifically, it would hurt the public interest to enforce this covenant against him. At the general level, allowing USAID contracts to be performed without court intervention supports the public interest of the United States. See P. Ex. 49, at 56 (incorporating 48 C.F.R. 752.7013: "this contract is an important part of the United States Foreign Assistance Program"). Both parties believe that Larkins is a valuable employee who brings experience and knowledge to his public education work. However, it does not follow that a four month injunction prohibiting Larkins' employment will harm our government's foreign policy or ability to convince citizens of CEE and the NIS that they should embrace capitalism and democracy. There is no evidence that the United States considers Larkins an indispensable component of its foreign policy.

Larkins also argues that it is part of United States policy

to encourage the free-flow of information gained through USAID contracts.<sup>9</sup> However, the court will not presume that a federal agency has impeded the constitutionally protected freedom of contract absent more explicit evidence.

## 2. Bond

Fed. R. Civ. P. 65(c) requires that a party obtaining an injunction post a bond, in a sum that the court deems proper, for the payment of damages; the bond must "provide a fund to use to compensate incorrectly enjoined defendants." Hoxsworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 210 (3d Cir. 1990). The court's injunction effectively prohibits Larkins from working in Central and Eastern Europe, as well as the Newly Independent States, from January 2002 until April 30, 2002, a period of four months. Larkins is currently employed at a rate of \$450.00 per day. The court's injunction will prevent Larkins from seeking certain types of employment in CEE or the NIS for approximately ninety working days. Ninety times four hundred and fifty is approximately forty thousand dollars. Larkins might also be entitled to an award compensating him for the inability to search for employment in CEE and the NIS, as well as the costs of appealing the court's order. Therefore, the court will set a bond in the amount of \$50,000.00.

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<sup>9</sup>The omnibus contract incorporates by reference Chapter 7, Appendix I, of the C.F.R: USAID's academic publishing policy. In section 2, the policy states: "USAID favors and encourages the publication of scholarly research as well as the maximum availability, distribution, and use of knowledge developed in its program." The policy then goes on to detail the procedure by which individuals may publish information they have learned through USAID grants or contracts. Defendant, in oral argument, failed to make clear that this policy concerned academic publishing, and left out words from the policy that would have put the court on notice of this fact. Tr. Sept. 21, 2001, at 112.

### III. Conclusions of Law:

1. The court has diversity jurisdiction over this matter under 28 U.S.C. 1332; the parties are diverse and the amount in controversy exceeds \$75,000. Personal jurisdiction is not contested. Venue lies in this district under 28 U.S.C. 1391(a).
2. There are material issues of fact precluding summary judgment: e.g., the geographic scope of the agreement, the nature of OSC's business in Croatia, and the timing of Larkins' job offer with OSC.
3. OSC is more likely than not to succeed on the merits of its claim.
4. Larkins' solicitation of business while employed by a competitor will irreparably harm OSC's ability to obtain contracts, and his contact with customers like USAID will hurt OSC's competitive position.
5. Larkins will not be harmed more than OSC will be by partial enforcement of the restrictive covenant.
6. Enjoining Larkins from working will not be against the public interest or impede the ability of the government to encourage capitalism and democracy abroad.
7. A preliminary injunction is the appropriate remedy to the extent the injunction is supported by a legitimate business purpose. OSC's legitimate business purpose of

protecting its business against competitors using Larkins' experience and resume will be protected; a desire to punish Larkins for leaving its firm will not be. Larkins will be preliminarily enjoined, for the term of the Agreement, from soliciting business or allowing his name to be used in the solicitation of business, for CARANA or any other competitor of OSC.

8. The appropriate term of this non-competition period is one year from the day Larkins left OSC's employ: April 30, 2001. Until May 1, 2002, Larkins will be prohibited from soliciting any business for any competitor of OSC, or allowing his name or resume to be used in any such competition. Larkins will be able to comply with his current contract with CARANA (140 days from his May 9, 2001 hire), but may not help CARANA to gain new business or expand its existing Croatia contract. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OVERSEAS STRATEGIC CONSULTING, LTD :	CIVIL ACTION
:	
v. :	
:	
CARL LARKINS :	No. 01-4115

**ORDER OF PRELIMINARY INJUNCTION**

AND NOW, this \_\_\_\_ day of October, 2001, upon consideration of the verified complaint, motion for preliminary injunction and supporting memoranda of law of plaintiff, Overseas Strategic Consulting, Ltd. ("OSC"), and all responses thereto, and after a hearing on September 20 and 21, 2001,

It is hereby **ORDERED** that:

1. OSC's motion for preliminary injunction is **GRANTED IN PART** and **DENIED IN PART**.

2. Prior to May 1, 2002, defendant Carl Larkins ("Larkins") is preliminary enjoined and restrained from:

(a) Working as an employee, consultant, contractor or agent for a competitor of OSC including, but not limited to, CARANA Corporation ("CARANA"), on a grant, cooperative agreement, program, contract and/or project in Central and Eastern Europe and/or the Newly Independent States, provided that nothing in this Order shall prohibit Larkins from completing his 140-day

employment with CARANA (as specified in P. Ex. 8, CARANA's letter of employment to Larkins dated May 9, 2001) as a part of CARANA's current contract and/or task order with the United States Agency for International Development ("USAID") related to pension reform in the Republic of Croatia (the "CARANA/USAID Croatia Contract") and/or from communicating with USAID in the normal course of performing that work;

(b) Working as an employee, consultant, contractor or agent for CARANA with respect to any extension of Larkins' current 140-day period of employment with CARANA and/or CARANA's current contract and/or task order for the CARANA/USAID Croatia Project;

(c) Participating in any way, directly or indirectly, in the development, solicitation, procurement and/or bid proposal for an extension of the CARANA/USAID Croatia Contract including, but not limited to, communicating in any manner with representatives of CARANA and/or USAID about an extension of the CARANA/USAID Croatia Contract, and/or permitting the use of his name and/or resume as a proposed member of CARANA's project team or staff in any bid proposal for an extension of the CARANA/USAID Croatia Contract;

(d) Participating in any way, directly or indirectly, in the solicitation, procurement and/or development of business, grants, cooperative agreements, projects, programs and/or contracts in Central and Eastern Europe and/or the Newly Independent States for any competitor of OSC including, but not limited to, CARANA;

(e) For purposes of ensuring compliance with this

Order, Larkins shall provide his attorneys with copies of any timesheets he submits to USAID and/or CARANA in conjunction with his work on behalf of CARANA on the CARANA/USAID Croatia Contract which shall be available for review by the Court upon request.

3. OSC shall post a bond in the amount of \$50,000.

4. This Order for Preliminary Injunction shall remain in effect pending a final hearing on this matter or upon further order of the Court.

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Norma L. Shapiro, S.J.