

<b>National Tax &amp; Fin. Servs., Inc. v Ciocia</b>
2021 NY Slip Op 30708(U)
March 8, 2021
Supreme Court, New York County
Docket Number: 656999/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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NATIONAL TAX AND FINANCIAL SERVICES, INC.,

INDEX NO. 656999/2020

Plaintiff,

MOTION DATE 12/15/2020

- v -

MOTION SEQ. NO. 001

JAMES C. CIOCIA Sr., JAMES P. CIOCIA Jr., ROY  
NIGGEBRUGGE, ANDREA NIGGEBRUGGE, CURTIS  
RAVEN, DYLAN FAYER, CETERA FINANCIAL GROUP,  
INC., and ABC CETERA ENTITIES,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 53, 57, 58, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 89, 90, 91, 92, 93, 94, 95, 108, 113, 114, 115, 116, 117, 118, 119, 120, 130, 131<sup>1</sup>

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In motion sequence number 001, plaintiff National Tax and Financial Services Inc. (NTFS) seeks to (1) restrain defendants James P. Ciocia Jr. (Ciocia Jr.), Roy Niggebrugge, Andrea Niggebrugge, Curtis Raven, and Dylan Fayer from performing any

<sup>1</sup> The court notes that NYSCEF Doc. No. 130, a post-argument submission provided by Ciocia Group, is Justice Joel M. Cohen’s decision in another NTFS case, *National Tax and Financial Services Inc. v Gopen, et al.*, Index No. 650536/2021. On January 25, 2021, over a month after this action was filed, NTFS filed that newer action as an unrelated matter, and it was assigned to Justice Cohen. Though identical agreements are allegedly at issue (see NYSCEF 130), none of the defendants are the same and a different NTFS office was allegedly raided. NYSCEF Doc. No. 131 is NTFS’s response, asserting that “Justice Cohen specifically stated on the record that the decision about likelihood of success on the merits in the *Gopen* matter did not relate to the case in this Court.” (NYSCEF 131, NTFS Post-Argument Letter.) However, the February 23, 2021 transcript, where Justice Cohen presumably rendered his decision, has yet to be filed in NYSCEF.

activities or services for, or accepting other employment from, defendant Cetera Financial Group or its related entities until there is compliance with the procedures set forth in employment agreements entered into by these individual defendants; (2) restrain defendants James C. Ciocia (Ciocia Sr.), Ciocia Jr., R. Niggebrugge, A. Niggebrugge, Raven, and Fayer (collectively, the Ciocia Group) or defendants Cetera Financial Group (CFG) and ABC Cetera Entities (collectively, Cetera), “during their notice period and for a period of 24 months after each of their notice obligations ends,” directly or indirectly through other former NTFS employees, from working for, serving, or soliciting any clients to which a Ciocia Group employee provided tax or accounting services<sup>2</sup> to, excluding any person or entity introduced to NTFS by the individual defendants at the time that those individual defendants were hired; and (3) restrain the Ciocia Group and Cetera, while the Ciocia Group are still employed at NTFS, and for a period of 24 months after their notice period ends, from directly or indirectly employing, obtaining services from, or soliciting to employ or otherwise obtain services from any NTFS employee who worked in the Tampa Bay office or who was associated with NTFS and with whom the Ciocia Group interacted in the past 12 months at NTFS. (NYSCEF Doc. No. [NYSCEF] 53, Order to Show Cause.) In addition to the preliminary injunction, plaintiff seeks expedited discovery. (*Id.*)

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<sup>2</sup> The Ciocia Group allegedly transferred its business to defendant CFG, which is in the securities business not the accounting business. (NYSCEF 2, Complaint.) NTFS asserts claims against CFG and ABC Cetera Entities for unfair competition (Fourth Cause of Action) and aiding and abetting a breach of the duty of loyalty (Fifth Cause of Action.) (*Id.*) As NTFS’s requested relief concerns accounting and tax clients, and not financial clients, this motion does not pertain to the Cetera defendants.

For the reasons stated on the record on February 4, 2021, NTFS's motion is granted to a limited extent: accounting and tax work only. This decision supplements the February 4, 2021 decision.

## Background

NTFS initiated this action on December 14, 2020 against the Ciocia Group for breaches of their employment agreements, breach of their duties of loyalty and fidelity (faithless servant), including the fiduciary obligations of Ciocia Sr., as a director and officer of NTFS, and for a declaration concerning the rights of NTFS and the Ciocia Group under their employment agreements. (NYSCEF 2, Complaint.)

On December 16, 2020, the court issued a TRO prohibiting the Ciocia Group from

“soliciting or providing tax or accounting services, or communicating regarding tax or accounting services, to any active client that they serviced prior to December 3, 2020 during the term of their relationship with the Plaintiff. This shall not preclude the Individual Defendants from communicating with any client concerning securities related matters and ...soliciting, employing, attempting to employ, or otherwise obtaining services from any individual who provided services to the Company at its Tampa Bay, Florida office in the 2020 calendar year.” (NYSCEF 53, Order to Show Cause.)

Since this TRO was vacated on February 4, 2021, NTFS has effectively had more than 10 days' notice of the December 3, 2020 resignations of Ciocia Jr., R. Niggebrugge, Fayer, Raven, and A. Niggebrugge. Accordingly, the court will not address NTFS's request to enjoin Ciocia Jr., R. Niggebrugge, Fayer, Raven, and A. Niggebrugge for an additional 10 days because they failed to give NTFS 10 days' notice. (See NYSCEF 2, Complaint ¶¶ 33, 47, 48.) Moreover, the court questions NTFS's argument of irreparable harm from the absence of 10 days' notice when it filed this action twelve days after those defendants resigned.

The following allegations are relevant to this decision. In 2013, NTFS's parent, National Holdings Corporation (NHC), acquired Gilman Ciocia, Inc. (GCI) via merger, as a subsidiary. (*Id.* ¶19.) Whether NTFS obtained goodwill and other rights in clients of GCI is a disputed issue. In 2018, GCI was renamed NTFS. (*Id.* ¶20.) After the acquisition, Ciocia Sr. joined the boards of directors of NHC and NTFS. (*Id.* ¶21.) He was President of NTFS. (*Id.*) On January 22, 2014, Ciocia Sr. entered into an employment agreement with NTFS concerning Ciocia's work as an accountant, tax preparer and financial planner. (*Id.* ¶22; NYSCEF 15, Agreement.) "This agreement contained a prohibition on the circumvention of employee and client relationships, a written notice obligation, the right to obtain injunctive relief and an attorney's fees provision." (NYSCEF 2, Complaint ¶22.)

On November 8, 2018, the other Ciocia Group defendants also entered into employment agreements concerning their work as accountants and tax preparers with NTFS which contained a prohibition on the circumvention of employee and client relationships, a 10-day written notice obligation, the right to obtain injunctive relief, and an attorney's fees provision. (NYSCEF 2, Complaint, ¶23 [Ciocia, Jr], ¶24 [R. Niggebrugge] ¶25 [Raven], ¶26 [Fayer], ¶27 [A. Niggebrugge]; NYSCEF 17, Ciocia Jr.'s Agreement; NYSCEF 19, Raven's Agreement; NYSCEF 20, Fayer's Agreement; NYSCEF 18 A. Niggebrugge's Agreement.)

NTFS alleges that between 2018 and November 24, 2020, Ciocia Sr., R. Niggebrugge, and NHC engaged in negotiations "concerning Ciocia Sr.'s desire to purchase clients he serviced from [NTFS] and its affiliated entities and become an

‘independent’ office who remained affiliated with [NHC] and [NTFS]” indicating defendants’ knowledge of the valuable goodwill belonging to plaintiff. (*Id.* ¶¶51, 52.)

In a December 9, 2020 email, Ciocia Sr. announced to clients the Ciocia Group’s move to Cetera. (*Id.* ¶46.) Other defendants issued other similar communications to clients.

NTFS alleges that the Ciocia Group violated their employment agreements by soliciting accounting clients and accepting their accounting business. (*Id.* ¶¶42, 43, 44, 45.) NTFS alleges that, prior to their departure from NTFS, the Ciocia Group participated in Zoom calls with Cetera during business hours. (*Id.* ¶¶54-57.) NTFS asserts that, in their final days working at NTFS, the Ciocia Group printed out hundreds of tax returns, which NTFS believes were taken by the Ciocia Group because NTFS cannot find them. (*Id.* ¶60.)

The Ciocia Group claim that they are primarily financial advisors who provide brokerage services to clients. (See e.g. NYSCEF 34, A. Niggebrugge Aff. ¶20.) They assert that NTFS knows of its affiliate National Securities Corporation’s (National Securities) membership in the Protocol for Broker Recruiting (Protocol), and that pursuant to that membership, National Securities agreed that the Ciocia Group are free to solicit the business of their brokerage clients when they join a new brokerage firm. (*Id.* ¶6.) Thus, due to this litigation abatement agreement among 2000 firms in the securities industry, the Ciocia Group are not restrained by the non-solicitation provisions of the agreements they signed with NTFS as they are superseded by the Protocol. The Ciocia Group assert that, in accordance with the Protocol, they developed Protocol Lists, which are a compilation of certain client information identifying the clients that the

representative may take with them to a new firm, and NTFS were provided with those Lists (NYSCEF 32, Ciocia Jr. aff ¶¶8, 9; NYSCEF 33, R. Niggebrugge aff ¶11; NYSCEF 34, A. Niggebrugge aff ¶8; NYSCEF 35, Raven aff ¶8; NYSCEF 36, Fayer aff ¶8; NYSCEF 90, Ciocia Sr. aff ¶13.)

The Ciocia Group also argue that they are paid commissions, not by the hour, and thus they could not have impermissibly used NTFS's time, facilities, or propriety secrets. Likewise, they argue that any meetings with Cetera during business hours would not have a negative impact on NTFS. Indeed, the Ciocia Group note that NTFS fails to allege that the Ciocia Group's performance or productivity declined as a result.

### Discussion

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].) Where a former employer seeks to enforce employment contracts, the issue of whether the covenants are enforceable rests on their reasonableness. (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388 [1999].) "A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (*Id.* at 388-89 [citations omitted].)

### *Accounting and Tax Clients*

NTFS argues that courts have enforced covenants, like those at issue here, to preserve and protect NTFS's goodwill interest in its clients. At argument, NTFS's

counsel put forth a distinction between a merger versus a purchase of assets, asserting that a merger agreement by its nature would continue the goodwill of the merged entities. This distinction was rejected for the reasons stated on the February 4, 2021 record.

Noncompete covenants that are executed in connection with merger transactions, where goodwill is an element of the value conveyed, have been held to be enforceable if reasonable. (*See Kaplan v BST Advisory Network, LLC*, 2009 NY Misc. LEXIS 6475, 2009 NY Slip Op 33086[u] [Sup Ct, NY County 2009].) Two things are missing here: (1) there is no mention of goodwill in the merger agreement and (2) the noncompete covenants are contained in employment agreements that were not incident to the merger agreement. (*Id.* at \*12.) Here, the Ciocia Group entered into employment agreements separate from the merger agreement years later, while Ciocia Sr. did not sign the employment agreement until January 22, 2014, seven months after the merger agreement was executed (NYSCEF 15, Ciocia Sr. Employment Agreement; NYSCEF 73, Merger Agreement.) Thus, NTFS cannot establish likelihood of success by relying on goodwill in the absence of any mention of goodwill in the merger agreement or by asserting that it was protecting its goodwill interest when the employment agreements were signed after the fact. However, this does not preclude NTFS's argument that it created goodwill thereafter using its assets to initiate and grow client relationships for accounting and tax preparation services.

Nevertheless, NTFS has established likelihood of success on its breach of contract claim against the Ciocia Group. This is evidenced by Ciocia Sr.'s December 9, 2020 email to clients wherein he offers to continue to serve the clients' needs, as well

as the affidavits of the other Ciocia Group defendants, admitting that they solicited clients on their Protocol Lists after leaving NTFS, some of whom were both tax and brokerage services clients. (NYSCEF 75, 12/9/20 Email; NYSCEF 32, Ciocia Jr. aff ¶¶8, 9; NYSCEF 33, R. Niggebrugge aff ¶11; NYSCEF 34, A. Niggebrugge aff ¶8; NYSCEF 35, Raven aff ¶8; NYSCEF 36, Fayer aff ¶8.) Further, defendants sent 60 emails after December 3, 2020, requesting clients to provide tax returns which could be used to provide financial services, as defendants suggest, or for the purpose of providing tax and accounting services as plaintiff opines. (NYSCEF 71, Worman Aff ¶¶6-8; NYSCEF 74, Kleinmann Aff ¶¶6-7.)<sup>3</sup> Either way, the communications were not limited to financial services. The court notes that NTFS limits its challenge to accounting and tax work. NTFS has not objected to the Ciocia Group servicing their clients' financial needs and the Protocol would clearly prohibit such a challenge. However, defendants fail to provide any authority for the proposition that the Protocol supplants the agreements. Moreover, the Protocol does not apply to 27 clients to whom only tax and accounting services were provided. (See NYSCEF 71, Worman Aff, Jan. 17, 2021.)

The Ciocia Group admit that they printed tax returns and mailed some to clients; they deny they are in possession of the remaining printed tax returns. (See NYSCEF 39, Chris Ciocia aff ¶¶ 10, 11; NYSCEF 40, Roberts aff ¶¶ 9, 10.) Such documents do not constitute employer trade secrets or customer lists which are protectable employer

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<sup>3</sup> The parties' failure to follow the rules and use NYSCEF numbers instead of their own exhibit numbers slows the work of this court. Again, the court implores the parties to use NYSCEF numbers and OCR all documents. Further, parties shall describe their documents filed in NYSCEF; describing eleven simultaneously filed affidavits as "Affidavit in Opposition to OSC" is useless.

interests. (See *BDO Seidman v Hirshberg*, 93 NY2d 382, 399 [1999].) NTFS implies that the tax returns impermissibly connected to defendants' departure, but the court cannot rely on such conjecture to find likelihood of success on the breach of contract claim.

NTFS has also established irreparable harm as to clients who came to NTFS for tax preparation and accounting services after January 22, 2014, the date of Ciocia Sr.'s agreement, and November 8, 2018 for the other Ciocia Group defendants,<sup>4</sup> and who may never return to NTFS due to the Ciocia Group's departure. (*FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 AD3d 145 [1st Dept 2004].) NTFS asserts that its assets were used to develop those tax and accounting client relationships which are likely gone forever. The court rejects defendants' challenge, without any support demonstrating their own efforts, that plaintiff has failed to show that plaintiff generated tax and accounting business after defendants executed the agreements. (NYSCEF 114, Ciocia Group's February 12, 2021 post argument letter.) Defendants' argument is contradicted by their other assertion that they are "primarily financial advisors," and thus, not generating tax and accounting business or that such services are incidental to their primary brokerage services.

The court rejects defendants' argument that the agreements are not enforceable because they may contain some unenforceable provisions. The Court of Appeals rejected this "now-discredited doctrine that invalidation of an entire restrictive covenant

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<sup>4</sup> While the court discussed at argument using December 2014 as a bright line test, the court agrees with defendants that it is unfair to apply Ciocia Sr.'s agreement date to defendants whose employment began thereafter. The preliminary injunction is modified accordingly.

is required.” (*BDO Seidman v Hirshberg*, 93 NY2d 382, 395 [1999].) While the liquidated damage calculation in the agreement may be an unenforceable penalty,<sup>5</sup> NTFS may nonetheless be entitled to damages beyond disgorgement of the fees collected from the tax and accounting clients this year. Likewise, defendants’ argument that the liquidated damage provision precludes an injunction was rejected long ago. (*Karpinski v Ingrasci*, 28 NY2d 45, 52 [1971].)

Defendants’ assertion that a preliminary injunction here creates chaos and confusion among clients, does not defeat the equities that favor NTFS with regard to accounting and tax clients. (NYSCEF 114, Taaffe Feb. 12, 2021 letter.) At argument the court also questioned whether clients are unfairly impacted by NTFS’s employment agreements. The exchange of a list of clients for whom defendants prepared tax returns prior to 2014 for Ciocia Sr. and prior to 2018 for the other defendants will ensure an orderly process. If not, the parties may engage a mediator to resolve disputes over individual client relationships; this court does not have such resources at this time. Until the New York legislature enacts legislation otherwise, an employer may enforce its noncompete agreements to the extent that they are reasonable.<sup>6</sup>

#### *NTFS Employees*

NTFS seeks to also enjoin the Ciocia Group from soliciting NTFS’s employees.

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<sup>5</sup>See *Gilman & Ciocia Inc. v Byrne*, Index No 50580/2017 (Sup Ct, Dutchess County 4/1/19)(In a 1.5-page decision, summary judgment denied finding issue of fact on reasonableness.) Since the case is not available on NYSCEF, the court cannot confirm defendants’ assertion that the agreements are similar.

<sup>6</sup> New York City Bar Association, Trade Secrets Committee, Legislating Fairness: Regulating the Use of Noncompetes for Lower-Salary Employees, Feb. 21, 2021. [nycbar.org/files/2020827RegulatingNonCompetesforLowerSalaryEmployees.pdf](https://nycbar.org/files/2020827RegulatingNonCompetesforLowerSalaryEmployees.pdf).

According to the complaint, the NTFS's Tampa Bay office consisted of fifteen people; however, that number dwindled when the Ciocia Group resigned, and an additional four support staff resigned as well.<sup>7</sup> (NYSCEF 2, Complaint ¶135.)

A covenant prohibiting the recruitment of employees "is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (*BDO Seidman v Hirshberg*, 93 NY2d at 388– 389.)

The "legitimate interest of the employer must protect against unfair competition, not simply to avoid competition in a general sense." (*Lazer Inc. v Kesselring*, 13 Misc 3d 427, 432-433 [Sup Ct, Monroe County 2005].) Accordingly, New York has "limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." (*BDO Seidman*, 93 NY2d at 389 [citation omitted].) Under this standard, preventing "potential harm to a company's operations arising from the coordinated en masse resignation of several employees" is not a legally cognizable interest for the purposes of restrictive covenant. (*In re Document Techs. Litig.*, 275 F Supp 3d 454, 466-467 [SDNY 2017].) Thus, NTFS fails to satisfy the first prong of this test.

Furthermore, NTFS's request fails the third prong of the test because the resulting injunction would be injurious to the public. "In addressing whether a restrictive covenant is injurious to the public, the Court must 'take account of any diminution in

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<sup>7</sup> Many of the employees and the Ciocia Group are related.  
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Motion No. 001

competition likely to result from slowing down the dissemination of ideas and of any impairment of the function of the market in shifting manpower to areas of greatest productivity.” (*Id.* at 468, quoting Restatement [Second] of Contracts § 188 [1981].)

NTFS’s proposed injunction not only prevents any “solicitation” of its employees, which prevents the employees from learning of viable employment opportunities, but also prohibits the Ciocia Group from hiring any of NTFS’s employees under any circumstances. “It is under these circumstances that the public interest most strongly supports the free flow of information concerning alternative employment, however, since this effectuates the efficient redistribution of labor[.]” (*Id.*) The court cannot find likelihood of success on plaintiff’s objection to the solicitation of employees. Therefore, the preliminary injunction is denied as to the solicitation of NTFS employees.

Accordingly, it is

ORDERED the TRO is vacated; and it is further

ORDERED that the undertaking is set at \$25,000; and it is further

ORDERED that the preliminary injunction is granted to the extent that Ciocia Sr. may not solicit or perform services for tax or accounting clients who had no pre-existing relationship with Ciocia Sr. prior to January 22, 2014 and initiated their tax business with plaintiff after January 22, 2014; and it is further

ORDERED that the preliminary injunction is granted to the extent that all other Ciocia Group defendants may not solicit or provide services for tax or accounting clients who had no pre-existing relationship with the other Ciocia Group defendants prior to November 8, 2018 and initiated their tax business with plaintiff after November 8, 2018; and it is further

ORDERED that pending the earlier of: December 3, 2022; the resolution of this action; or a further Order of this Court, defendants James C. Ciocia, James P. Ciocia, Roy Niggebrugge, Andrea Niggebrugge, Curtis Raven, and Dylan Fayer, and those working in concert with them, are preliminarily enjoined and restrained from the following:

1. Directly or indirectly, through others acting on their behalf or working in concert with them, soliciting or providing tax and accounting services, or communicating regarding tax and accounting services, to any client they formerly serviced while working at plaintiff, except that the foregoing shall not apply to:

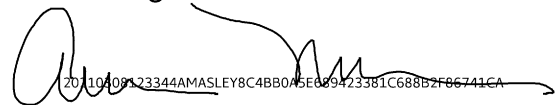
a. Any active tax or accounting client of the Ciocia Group to whom they provided tax and accounting services before January 22, 2014 for Ciocia Sr. and November 8, 2018 for all other Ciocia Group defendants;

b. Any active tax or accounting client of a Ciocia Group defendant with whom they have a pre-existing relationship prior to January 22, 2014 for Ciocia Sr. and November 8, 2018 for all other Ciocia Group defendants;

c. Any communications between the Ciocia Group and any client concerning securities-related business, and not tax or accounting-related matters; and it is further

ORDERED that within three days of this Order, plaintiff shall provide the Ciocia Group with a list of the active clients to whom they provided tax and accounting services prior to January 22, 2014 for Ciocia Sr. and November 8, 2018 for all other Ciocia Group defendants; and it is further

ORDERED that if any disputes arise as to whether defendants have a pre-existing relationship with clients, the parties are encouraged to engage a mediator to assist them expeditiously. Otherwise, the parties have the right to file a motion.

  
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3/8/2021  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE