UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

NICOLE BOULERICE,	*	CASE NO. 2:12 cv 267
Plaintiff	*	
	*	
v.	*	
	*	
OASIS DAY SPA, INC.,	*	
Defendant	*	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

Introduction.

This litigation presents the question of the legality and enforceability of a covenant not to compete between an employer Oasis Day Spa, Inc. of Williston and its former employee Nicole Boulerice of St. Albans. Ms. Boulerice is a young adult who graduated from BFA St. Albans in 2009 and attended the Salon Professional Academy in Williston, Vermont where she got a degree as a cosmetologist. She received her cosmetologist's license from the State of Vermont in 2011. Shortly thereafter, she began working for Oasis from April 8, 2011 to September 4, 2012. It was an entry-level job. As a condition of employment, Oasis required her to sign an identical adhesion form non competition agreement on a take-it-or-leave-it basis. She has had no prior experience in drafting or negotiating employment agreements. That agreement prohibits her from working anywhere in Chittenden County for a competing salon for a period of 18 months upon termination from employment at Oasis for whatever reason.

[redacted]

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[redacted] the working conditions there so intolerable that Ms. Boulerice finally quit. Several other employees quit as well at about the same time. On September 7, 2012 she started working at a competing salon called the Purple Sage which is located in Williston, Vermont. She later received a "cease and desist" letter from Oasis' counsel demanding that she terminate her relationship with Purple Sage or face a lawsuit seeking preliminary and permanent injunctions to enforce the non-compete covenant, demands which precipitated the instant request for declaratory and injunctive relief.

> At English common law such non-compete agreements were unenforceable.
>
> If a man could not work in his trade in his particular locality, he could hardly work at all; might become a pauper; and the public would be deprived of a worker at a time when the Black Death had made workmen scarce. In that background when, in 1415, the celebrated Dyer's Case came before Judge Hall (Hull?), he became so enraged by an attempt to restrain a dyer from working in a town for just half a year that in bad French he cursed the deal void: "By God, if the plaintiff were here, he should go to prison until he paid a fine to the King."
>
> *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E. 2d 685, 691 (OH. Comm. 1952)[1](citations omitted).

That changed with *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711) which endorsed the validity of such agreements subject to the so-called "rule of reason." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2nd Cir. 1999). That is, a restriction is enforceable "if it is reasonable in view of all the circumstances of the particular case." *Arthur Murray, supra.*

> Such a statement, however, is misleading as over-simplification always is. Reasonableness, like Johnny's being a `good' boy, is complicated. Immediately it breaks down into three subdivisions (then into numerous subdivisions), and one

[1] Though now over 60 years old, this is a "must read" decision. Exhaustively researched and elegantly composed, it is perhaps the greatest ever single exposition on the subject.

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must consider whether the restraint is reasonable as to (1) the employer, (2) the employee, and (3) the public…

> In determining what is reasonable, the Goddess of Justice (has)…the tedious task of reconciling the head-on clash of various basic policies, namely: freedom of contract, freedom of trade, sanctity of contract, individual liberty, protection of business, right to work, making of training available to employees, earning a livelihood for one's self and family, utilization of one's skills and talent, continued productivity, betterment of one's status, avoidance of one's becoming a public charge, encouragement of competition and discouragement of monopoly. *Id.* at 691-92.

Most states recognize employment non-competition agreements and have endorsed this rule of reason to some degree or another, including Vermont. See *Systems & Software v. Barnes*, 2005 VT 95 ¶4, 178 Vt. 389 and *Summits 7 v. Kelly*, 2005 VT 97 ¶7, 178 Vt. 396. But not all have. California has outlawed employment non-competition agreements in its Business Code §16600. *Morris v. Harris*, 127 Cal. App.2d 476, 274 F.2d 22 (1954); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 75 Cal. Rptr. 2d 257 ["every contract by which any one is restrained from engaging in a lawful professions, trade or business of any kind is to that extent void"], as have Oklahoma [15 O.S. §§217, 218], Hawaii [Hawaii Rev. Stat. §480-4], North Dakota [N.D. Code §9-08-6], and Colorado [Colo. Rev. Stat. §8-2-1113].

The original proposition under the rule of reason was that restrictive covenants were to be strictly construed, *Systems and Software v. Barnes, supra*, ¶4, that they are ones "cautiously considered, scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld. Being a contract in restraint of trade it is presumptively void." *Arthur Murray, supra*. The problem, however, is that despite an overwhelming volume of precedent, the "rule of reason" has failed to ensure strict construction, maintain any theoretical coherence, or result in predictable outcomes.

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> This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary, there is so much authority it drowns him. It is a sea – vast, overlapping, and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long…
>
> We trust we are justified in shifting figures of speech long enough to point out how ironic it is that the needles of justice can be buried in such a huge haystack. The average litigant will not find adequate justice in this subject matter until someone devotes treatises solely to it…
> *Arthur Murray* at 687-88.

Laxity in adhering to strict construction now runs afoul of two overriding constitutional considerations: (1) the right created by the dormant Commerce Clause and enforceable under the federal Civil Rights Act, 42 U.S.C. § 1983 to participate in the national common market free of geographical service area restrictions, and (2) recent precedents regarding the Thirteenth Amendment and recognition of its purpose to create a system of "free and voluntary labor throughout the United States." This case is an effort to bring these overriding federal considerations to the fore. The plaintiff's § 1983 claims here are that the position of these states which have rejected the rule of reason is now required of all states as a matter of federal constitutional law.

II. THE DORMANT COMMERCE CLAUSE VIOLATION.

A. The Commerce Clause Creates A National Common Market.

The "dormant" Commerce Clause has created a national common market, and 42 U.S.C. § 1983 creates an enforceable, individual right to participate in that common market.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will, by customs duties or regulations, exclude them. Likewise, every consumer may look to the free competition from every producing

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> area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.
>
> …(T)he Commerce Clause, by its own force, imposes limitations on state regulations of commerce, and is a source of a right of action in those injured by regulations that exceed such limitations.

Dennis v. Higgins, 498 U.S. 439, 449-50 (1991) quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525. 539 (1949). This trumps the common law "rule of reason."

B. The Geographical Restriction of Oasis' Non-Competition Agreement Is A *Per Se* Violation of the Dormant Commerce Clause.

The Commerce Clause's protection against obstructing the free flow in this national common market extends to both goods and services such as those of a cosmetologist. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391-92 (1994) [waste disposal services]. It disallows restrictions that impede (i) import of goods or services into a state, (ii) export of goods or services out a state, and (iii) "curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources*, 504 U.S. 353, 361 (1992) quoted in *Carbone* at 391. Such restrictions are facial, *per se* violations of the Dormant Commerce Clause as held by numerous decisions such as *Carbone*, including this Court. *Green Mountain Sanitation, Inc. v. Lamoille Regional Solid Waste Management District*, Case No. 1:94 cv 271 (D. Vt. Jan. 10, 1996. Murtha, J).

Here the instant non-competition agreement is an intra-state limitation which obstructs the free flow of services within the national common market by keeping the plaintiff's services out of Chittenden County for an 18 month period and does so for the benefit of Oasis as "the favored operator." *Carbone, supra* at 391. It is little wonder that

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Oasis would want to appropriate the Chittenden County market, Vermont's largest and richest, for itself. It is a market which accounts for 150 thousand, or 24%, of Vermont's 626 thousand population;[2] 27% of Vermont's 339 thousand jobs,[3] and its median household income of $62,260 is nearly 17% higher than that for Vermont as a whole.[4] The adjoining counties have smaller populations, lower median incomes, and fewer jobs:

County	**Population[5]**	**Median Household[6] Income**	**Jobs[7]**
Addison	37 thousand	$57,203	20,500
Franklin	48 thousand	$55,181	24,850
Grand Isle	7 thousand	$59,566	3,650
Lamoille	25 thousand	$53,368	15,100
Washington	60 thousand	$57,163	32,950

C. Such Restrictions Distort Both Labor and Consumer Markets.

The labor market implications of this kind of bar are substantial. If every employer were to utilize the same non-compete restriction[8] as found in Oasis' agreements, the effect of that interference would be staggering. According to a July 25, 2012 Bureau of Labor Statistics study,[9] the average person holds 7-10 jobs in a lifetime. Imposition of an 18 month debarment from the relevant labor market each time she changed jobs would require Ms. Boulerice to withhold her labor a stunning *10.5* to *15 years* out of her working lifetime. Human capital is the only capital that most Americans

[2] U.S. Census, State and County Quick Facts at quick facts.census.gov/qfd/states/50000,html.
[3] Vermont Department of Labor, Labor Market Information Section, *Vermont Local Area Employment Statistics, Annual Survey by Country 2007-11*, June 2012.
[4] U.S. Census, *supra.*
[5] *Id.*
[6] *Id.*
[7] Vermont Department of Labor, *supra.*
[8] In *Systems and Software, supra* the employer was able to recruit away Mr. Barnes a senior vice president only because its competitor had no such restriction.
[9] *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Young Baby Boomers: Results from a Longitudinal Study*, U.S. Department of Labor, Bureau of Labor Statistics, nls_info@bls.gov.

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have to "trade." By impeding the free flow of this trade, employees -- especially entry level employees such as the plaintiffs -- are effectively thwarted from "bidding up" the compensation for their services because every time attempt to do so by shopping their own human capital on the labor market they are to be barred from the relevant market until the known quality of their service is no longer fresh, depressing their earning power and any ability to get ahead. This further exacerbates the decline in median incomes which is already ongoing.

The result is also inefficiency for consumers. It prevents consumers from looking "to the free competition from every producing area in the Nation" by preventing them from purchasing the plaintiff's services within the Chittenden County market. The most productive human capital is periodically to be barred from the relevant markets precisely at the moment of the improvement in its skill and efficiency. The best emerging skills and talent in a trade must go unutilized and grow rusty at least for time, if not permanently withdrawn because of the discouraging disruption of having to leave and then later re-enter one's trade unless one wishes to live as a nomad, wandering from "permissible" market to "permissible" market.

Non-competition agreements are unenforceable against lawyers because they restrict the client's right to choose. *Rules of Professional Conduct* 5.6. ["**Comment** An agreement restricting the right of a lawyer to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer"]; *Lynch v. Bailey*, 90 N.Y.S. 2d 359, 364 (N.Y. App. Div. 1949) [restrictive covenant which barred leaving law partner from practicing with a competing firm denied clients of that lawyer's knowledge and skill and denied them the free choice of the lawyer they

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wanted to serve them]. Under the dormant Commerce Clause they are unenforceable against cosmetologists as well, for the very same reason.

III. THE THIRTEENTH AMENDMENT VIOLATION.

A. The Purpose of the Thirteenth Amendment Is to Affirmatively Emboss Into the Constitution A System of "Free and Voluntary Labor Throughout the U.S."

The Thirteenth Amendment's prohibition against involuntary servitude provides a related but distinct constitutional violation. It "was not only to end slavery but to maintain a system of free and voluntary labor throughout the United States." *McGarry v. Pallito* 687 F.3d 505 (2d Cir. 2012). Enforcement of this restrictive covenant – especially by injunction -- violates the Thirteenth Amendment's prohibition against involuntary servitude, as well as the Civil Rights Act's prohibition against peonage in 42 U.S.C. § 1994, and is therefore actionable under § 1983, *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1966). Unlike other § 1983 claims, including the Commerce Clause claim, it does not have state action as a necessary element. *U.S. Kozminski, infra.*

B. The Amendment Outlaws Involuntary Servitude In All Forms, Including Contemporary Ones.

That the victim "voluntarily" entered into the agreement in question is of no moment.[10] Involuntary servitude may be voluntarily or involuntarily entered into; that the

[10] Adhesion contracts such as this which are the product of unequal bargaining power have been recently condemned by the Vermont Court as procedurally and/or substantively unconscionable, s*ee BrickKicker, supra*, especially when they contain exculpatory provisions. Here the provisions in question purport to (i) *a priori* exculpate Oasis' burden of proving in court, among other things a protectable interest, reasonableness of scope, immediate and irreparable harm for an injunction and (ii) to *a priori* pre-empt certain defenses such as whether alternative employment is reasonably available that enforcement poses undue harm to the employee. Such agreements are highly disfavored, *Spencer v. Killington*, 167 Vt. 137 (1997); *Dalury v. S-K-I Ltd*, 164 Vt. 329 (1995) citing *Estate of Geller v. Mt. Snow Ltd.*, (No. 89-66, D. Vt. 1991) and *Barentheim v. Killington Ltd.*, No. 86-33 (D. Vt. 1983), and should be in an area of the law

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arrangement was "voluntarily" entered into "is just a difference in the mode of origin, not the character of the servitude... This amendment denounces a status or condition, irrespective of the manner or authority by which it is created." *Clyatt v. U.S.*, 197 U.S. 207, 215-16.

> A clear distinction exists between peonage and voluntary performance of labor or rendering of services in payment of a debt. In the latter case, the debtor, though contracting to pay for his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels. *Id.*

Therefore an Alabama law which a person liable to criminal punishment for breach of an agreement to work was stricken as involuntary servitude. *U.S. v. Reynolds*, 235 U.S. 133, 143-44 (1914).

It is this distinction which the modern non-competition employment agreements transgress. Recovering damages for breach of a non-competition employment agreement is one thing. Wholesale injunctions against working for a competitor enforceable by fines and/or jail is quite another. For example, under Vermont law the employer's "provable loss" is not the business accruing to the former employee by reason of the breach. Rather, it the lost profits on sales which the employer might reasonably have made *but for* the employee's breach. The employer must show that the clientele's business would have been stayed after the employee's departure had the employee honored the agreement. That means that court cannot assume that the employee's competing sales which violated the agreement would have otherwise been successfully bid by the plaintiff after his/her departure. *Vermont Electric Supply v. Andrus*, 135 Vt. 190, 191-92 (1977). Also *see*

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where "The same identical contract and restraint may be reasonable under one set of circumstances and unreasonable and invalid under another set of circumstances." *Arthur Murray, supra* .at 693.

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Arthur Murray, supra at 697 and 700 [Did employee actually entice away and divert to rival, customers he had served for employer? What was actual business loss caused to employer by employee's working for rival?].

According to its terms, injunctive enforcement of this agreement, however, is not limited to enjoining activities which generate such "provable losses." The injunction contemplated by this agreement sweeps broader, prohibiting all competing employment altogether. And it invokes the coercive apparatus of state power to do so: if the employee violates the injunction, s/he he is subject to fines and/or imprisonment until s/he complies. The coercive evil faced is not the prospect of a claim of provable damages by Oasis. Those damages are few, if any, because Oasis would have to prove that it would have kept the employee's clientele but for their breach of the agreement. The evil faced is the very real danger of no meaningful employment in their trade for a period of 18 months, enforceable by fines and jail.

C. Threatened Legal Coercion Is Sufficient To Render Service Involuntary.

Oasis' defense that the non-compete clause does not violate the 13th Amendment because it does not specifically force the plaintiff to keep working for Oasis is error. Physical coercion or threat of physical coercion is not necessary for a violation because the Amendment was intended to prohibit all forms of involuntary labor and applies where work is obtained or maintained "by the threatened use of legal coercion," *McGarry, supra.,* citing *U.S. v. Kozminski*, 487 U.S. 931, 942-43 (1988). In the modern era, the requisite "legal coercion" is defined as "having no available choice but to work or be subject to legal sanction." To be weighed are "the vulnerabilities of the victim are

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relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." *Kozminski* at 954.

That a bar from participating in a relevant market is coercive is well recognized by modern jurisprudence. *Burlington Northern and Santa Fe R.R. v. White*, 548 U.S. 53, 67-678 (2006) [an employer's employment action is "materially adverse" if it is one "likely to dissuade a reasonable worker"]; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985) ["We have frequently recognized the severity of depriving a person of their means of livelihood"]. This is precisely what is afoot with no-compete clauses, enforceable by injunction in state courts, such as Oasis.' Despite the fact that her employer was abusive in the workplace, Vermont law gives employees very little recourse for abusive and bullying behavior by their employer. See *Denton v. Chittenden Bank*, 163 Vt. 62 (1994) and *Crump v. P. & C. Food Markets*, 154 Vt. 284 (1990). Her choice was to remain tethered to this abuse or face an injunction barring her from employment access to the relevant job market, and face fines or jail time if she violated such an injunction. A non-competition covenant – backed by the coercive apparatus of the State – which thereby constructively binds the employee to their abuser is a situation in the words of *Lynch v. Bailey*, supra at 364 "savored of servitude."

Contrary to Oasis' argument, the Supreme Court did not address the 13th Amendment claim in refusing in *Flood v. Kuhn*, 407 U.S. 258 (1972) to strike baseball's now long-discredited and infamous "reserve clause." The 13th Amendment claim was dismissed by the Second Circuit, *Flood v. Kuhn*, 443 F.2d 264, 268 (1971), but not presented for review by the Supreme Court. Moreover, the Second Circuit's was a simple one sentence dismissal referring to its own 1964 decision in *U.S. v. Shackney*, 333 F.2d

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475, 486. *Shackney* concerned a Polish immigrant threatened with deportment if he did not continue in his employment. It held the 13th Amendment applied only situations where the master has convinced the servant to believe he has no way to avoid his continued service or face confinement, and not to situations where there was a choice between service and continued freedom, even if that freedom carried with it "consequences that are exceedingly bad." *Id.* This plainly is no longer the law in light of *Kozminski* and *McGarry.*

D. Such Agreements Are Antithetical to Free and Voluntary Labor.

Lastly, the interruption in free labor market participation that these agreements entail discussed above is utterly inconsistent with the objectives of the Thirteenth Amendment to emboss into the Constitution a system of "free and voluntary labor throughout the United States." Labor mobility restriction which could require workers to absent themselves from their trade, or from relevant markets in their trade, for a decade to a decade and an half over their working lives is antithetical to such a system, and must be so declared.

Dated at Burlington, Vermont this 14th day of February, 2013.

/s/John L. Franco, Jr.
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