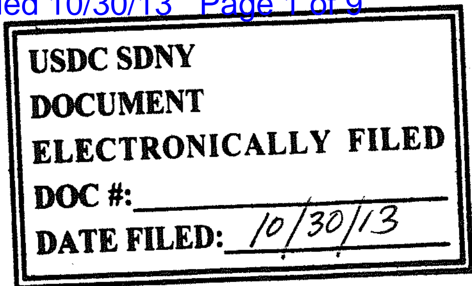

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANTIC, LLC,

Plaintiff,

-v.-

YANIV KONFINO, OPHIR PINHASI, EDWARD ILYAICH and EKO TECHS LLC, a/k/a EKOTECHS LLC,

Defendants.

13 Civ. 4516 (AT)

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

Defendant, Yaniv Konfino, ("Konfino") moves for an order: reducing the duration of the non-compete agreement (the "Agreement") between Plaintiff, Frantic, LLC ("Frantic") and Konfino, or, in the alternative, declaring the Agreement unenforceable. Because there exist unresolved material issues of fact with respect to the enforceability of the Agreement, the motion is DENIED.

BACKGROUND

Frantic is a "full range IT Consulting, VoIP systems and services, ISP company [providing] help desk and computer network maintenance services to customers" across the country. Compl. ¶ 8. Frantic employed Konfino as a help desk manager, from April 2005 until his resignation on February 17, 2013. Konfino Decl. ¶¶ 1-2; Aroch TRO Decl. ¶ 4. The Agreement, executed on April 4, 2005, limits Konfino's right to compete with Frantic and solicit its employees and customers after leaving the company. Konfino Decl. Ex. A. Section 1.2 of the Agreement prohibits Konfino from competing with Frantic or otherwise engaging in technical and computer support and networking services for 18 months after leaving Frantic (the "non-compete clause"). Section 1.3 prohibits Konfino from soliciting or hiring Frantic employees for 18 months (the "employee non-solicitation clause"). *Id.* Section 1.3 prohibits Konfino from

soliciting Frantic affiliates, customers or clients for two years (the "customer non-solicitation clause"). *Id.* While employed at Frantic, Konfino took calls from customers who had trouble with their computer systems. Konfino Decl. ¶ 2. After leaving Frantic, Konfino joined Eko Techs, LLC ("Eko Techs"), a company that competes with Frantic. Aroch TRO Decl. ¶ 12.

The parties dispute whether Konfino possesses trade secrets. Asaf Ben Aroch ("Aroch"), Frantic's President and CEO, maintains that Konfino has access to unique computer code pertaining to the operation of telephone equipment that Frantic provides to its customers, as well as other programs that it developed. Aroch TRO Decl. ¶¶ 20, 35; Aroch TRO Reply Decl. ¶¶ 16, 18.[1] Aroch also believes that Konfino possesses its "customer lists, contact information for key customer contacts, as well as information about [its] pricing and profit margins" (none of which are publicly available). Aroch TRO Decl. at ¶¶ 28, 29. Lastly, Aroch asserts that Konfino knows "information concerning clients' technical needs and currently used systems" that would facilitate Defendants' transfer of client accounts to Eko Techs. *Id.* at ¶ 48. In the Agreement, Konfino acknowledges that he may gain access to confidential information and products proprietary to Frantic. Konfino Decl. Ex. A. Nevertheless, Konfino now contends that "there are no trade secrets in [Frantic's industry] as the business is simply maintaining clients' computer networks." Konfino TRO Decl. ¶¶ 3, 11. Konfino denies possessing client lists or pricing information. *Id.* at ¶ 11.

[1] Defendant argues that his unrebutted factual declarations must be taken as true. Although Plaintiff does not rebut Defendant's factual assertions in the motion before the Court, Plaintiff has rebutted Defendant's assertions in other portions of the record. The Court may examine the entire record in deciding this motion. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691, 2013 WL 1975439, at *2 (S.D.N.Y. 2013) ("As a court in deciding a motion for summary judgment may consider record materials not called to its attention by the parties, which may result in a definitive and final determination of the lawsuit, it necessarily follows that it may do so in deciding a discovery motion like this one.").

The parties also dispute what took place regarding Konfino's alleged entry into Frantic's computers after he left Frantic. Konfino denies having accessed Frantic's computers without permission, denies having downloaded anything from them, and asserts that the servers and passwords belong to Frantic's clients, not Frantic. *Id.* Konfino admits that he may have inadvertently logged into Frantic's computer system sometime in March 2013, but that he immediately logged out and did not download any information on that occasion. *Id.* Aroch claims that on February 16, 2013, the day after Konfino's last day at work and the day before he gave Frantic notice of his resignation, Konfino logged into Frantic's server and continuously downloaded information from 5:48 p.m. to 11:59 p.m. Aroch TRO Reply Decl. ¶ 13. Aroch also asserts that the security access log shows that on March 10, 2013, a user from the IP address "mail.konfino.com" – an e-mail server set up by Konfino at his home – opened a number of files on the server that contained Frantic's unique computer programs. Aroch TRO Reply Decl. ¶¶ 15, 16, 18.

DISCUSSION

In New York, the prevailing standard of reasonableness for employee non-compete agreements applies a three-pronged test. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 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). "Courts assessing the reasonableness of the scope of a restrictive covenant are to 'focus[] on the particular facts and circumstances'" surrounding the agreement. *Estee Lauder v. Batra*, 430 F. Supp. 2d 158, 179 (S.D.N.Y. 2006) (citation omitted). Courts have the power to "blue pencil" – shorten or amend –

restrictive covenants to make them enforceable. *See Earthweb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).

I. Protection of Legitimate Interests of the Employer

Two legitimate interests are at issue here: Frantic's interest in protecting its client relationships and its alleged trade secrets. The Court finds that Konfino does not possess unique skills that would qualify as a legitimate employer-protected interest.[2]

A. Client Relationships

It is well-settled under New York law that employers have a legitimate interest in protecting client relationships developed by an employee at the employer's expense. *See USI Ins. Services LLC v. Miner*, 801 F. Supp. 2d 175, 187 (S.D.N.Y. 2011); *Johnson Controls, Inc. v. APT Critical Systems, Inc.*, 323 F. Supp. 2d 525, 534 (S.D.N.Y. 2004); *BDO Seidman*, 93 N.Y.2d at 392. Indeed, the employer can prevent "former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." *BDO Seidman*, 93 N.Y.2d at 392 (citations omitted). In *BDO*, the defendant, an accountant, agreed that if, within 18 months following the termination of his employment, he served any former clients of BDO's Buffalo office, he would compensate BDO for loss and damages suffered in an amount equal to one and a half times the fees BDO charged the client over the past fiscal year of the client's patronage. *Id.* at 387. The court enforced the agreement to the extent it restricted the defendant from servicing clients with whom he had personally worked at BDO. *Id.* at 393. However, the court held that it was unreasonable to require the defendant to compensate BDO for servicing former BDO clients with whom he never personally worked. *Id.* Because the defendant had not

[2] Frantic does not dispute this point in its papers.

acquired the goodwill of those clients through the expenditure of BDO's resources, the firm had no legitimate interest in preventing the defendant from competing for their patronage. *Id.*

In *Johnson Controls* and *USI*, the courts, respectively, upheld restrictive agreements that limited the rights of former employees to service the plaintiffs' clients. In *Johnson Controls*, the court found that the defendants developed significant relationships with the plaintiff's clients while employed by plaintiff and enjoined the defendants for a period of one year from directly or indirectly servicing them. *Johnson Controls*, 323 F. Supp. 2d at 542. In *USI*, the defendant agreed not to solicit former or active prospective USI clients or USI employees for two years after leaving USI. *USI Ins. Services*, 801 F. Supp. 2d at 186. The court, citing the legitimate employer interest of preventing former employees from exploiting customer goodwill, found the non-solicitation agreement reasonable. *Id.* at 187-88.

Here, the non-compete clause[3] prohibits Konfino from competing with Frantic or otherwise engaging in technical and computer support and networking services for 18 months. Konfino admits that he developed good relationships with Frantic's clients, who held him in high regard as a talented computer maintenance technician. Frantic has a legitimate interest in seeing that Konfino does not exploit those relationships by siphoning clients to Eko Techs. However, weighing the non-compete clause against the legitimate interest Frantic possesses in protecting its client relationships and goodwill, the clause is overbroad. It prohibits Konfino from servicing *any* potential customers that require computer troubleshooting services, not just former clients of

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[3] The Court's analysis will focus on the non-compete clause, as it is the clause that may ultimately be revised by the Court. (Indeed, even Frantic's attorney admits that the non-complete clause may be overbroad and may need to be restricted somewhat by the Court.) *See* TRO Hr'g Tr. 6:10-16, July 8, 2013, ECF No. 35. Although the Court makes no formal ruling on either, the employee non-solicitation clause and the customer non-solicitation clause appear to be reasonable. *See USI Ins. Services*, 801 F. Supp. 2d at 186-88 (upholding two year employee and client non-solicitation agreements).

Frantic. In *BDO*, the court found the employer's interest in protecting client relationships did not extend to restricting the defendant from servicing BDO clients with whom he did not personally work, let alone customers who had never patronized BDO. *BDO Seidman*, 93 N.Y.2d at 393. Although the court in *USI* found the employer's interest to be slightly more expansive – finding reasonable the restriction of servicing USI's clients and any "active prospective" client – the agreement did not restrict the defendant from servicing any and all customers who may have engaged USI's services. Thus, at its maximum, Frantic's interest in preserving client relationships can extend only to customers of Frantic, or potential clients of Frantic who are actively pursuing Frantic as a possible hire. That interest cannot restrain Konfino from competing in the entire computer troubleshooting industry. Although the Court would blue pencil the Agreement if preserving client relationships were the only interest involved, there exist material issues of fact regarding Frantic's interest in protecting its alleged trade secrets, discussed below, which constrain the Court from amending the Agreement at this time.

B. Trade Secrets

Trade secrets and confidential information also count among employer interests courts recognize as legitimate. *USI Ins. Services*, 801 F. Supp. 2d at 187; *Johnson Controls*, 323 F. Supp. 2d at 536. Under New York law, a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it." *Softel, Inc. v. Dragon Med. & Scientific Communications, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997) (citation omitted). In determining whether information constitutes a trade secret, New York courts consider the following factors:

> (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by the employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the businesses and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

North Atlantic Instruments v. Haber, 188 F.3d 38, 44 (2d Cir. 1999) (citations omitted). Under certain circumstances, specific marketing plans and price information, customer lists and the identity of client contacts, as well as customer preferences and needs, may be accorded trade secret protection. *See Johnson Controls*, 323 F. Supp. 2d at 537.

Under New York law, the durational reasonableness of a non-compete agreement is judged by the length of time for which the employer's trade secrets or confidential information will be competitively valuable. *See Earthweb*, 71 F. Supp. 2d at 313; *DoubleClick, Inc. v. Henderson*, Index No. 116914/2007, 1997 WL 731413 (N.Y. Cty. 1997). *See also Estee Lauder*, 430 F. Supp. 2d at 180. In both *Earthweb* and *DoubleClick*, the courts found that due to the dynamic nature of the internet advertising industry, defendants' knowledge of their former employers' operations would likely lose value to such a degree as to make the purpose of the preliminary injunctions obsolete. *See Earthweb*, 71 F. Supp. 2d at 313; *DoubleClick*, 1997 WL 731413, at *8.

On the record before the Court, there are issues of material fact regarding (1) whether Frantic maintains trade secrets; (2) whether Konfino possesses Frantic's alleged trade secrets; and (3) how long Frantic's alleged trade secrets will remain competitively valuable.

Konfino alleges there are no trade secrets in Frantic's industry. Konfino's assertion is dubious as customer lists, pricing information, client contact information, and customer needs

and preferences may exist in any industry. And indeed, Frantic asserts that it maintains customer lists, contact information for key customer contacts, information about pricing and profit margins – none of which are publicly available. Frantic also claims that it has developed a unique computer code, which it has endeavored to keep confidential. Although the Court does not hold that Frantic's lists, contacts, or codes are trade secrets as a matter of law at this time, there are clearly material issues of fact regarding whether Frantic possesses trade secrets.

There are also issues of fact regarding whether Konfino had access to Frantic's alleged trade secrets. Konfino argues that he does not possess any trade secrets and his entry into Frantic's servers after leaving Frantic was inadvertent. Meanwhile, Frantic contends that Konfino spent over six hours downloading information from Frantic the day before he resigned and that during Konfino's "inadvertent" log-in, he opened multiple files that contained Frantic's unique programs. Konfino also acknowledged that he may gain access to confidential information and products proprietary to Frantic when he signed the Agreement.

Lastly, the Court has no indication how long any of Frantic's alleged trade secrets will remain competitively valuable to Frantic. The alleged computer code could be obsolete within months, like the data in *Earthweb* and *Doubleclick*, or it could have a shelf-life of several years. This information, which must be gleaned at trial, bears significantly on the extent, if any, the non-compete clause requires modification.

II. Whether the Agreement Imposes an Undue Hardship

The parties do not fully develop arguments regarding undue hardship in their papers. Konfino asserts that Eko Techs will be put out of business if the Agreement remains in force. Konfino TRO Decl. ¶ 15. He also states the Agreement is affecting his ability to earn a living. Konfino Decl. ¶ 6. Although the Court acknowledges Konfino's concerns, Konfino has not

demonstrated *undue* hardship. Eko Techs has other employees who are not subject to the Agreement. And if needed, Eko Techs may hire additional employees to fill Konfino's position. There are also issues of fact as to whether Konfino could pursue his vocation in other areas of information technology that do not compete with Frantic.

III. Public Policy

Finally, the parties barely touched upon the public policy implications of enforcing the Agreement. Although courts generally disfavor broad restraints on competition, there is no indication the Agreement will cause significant dislocation in the market or create a monopoly in the computer troubleshooting industry. *See BDO Seidman*, 93 N.Y.2d at 393. The Court holds, therefore, that the Agreement is not injurious to the public.

CONCLUSION

For the reasons stated above, Defendant's motion for an order reducing the duration of the Agreement, or, in the alternative, declaring the Agreement unenforceable is DENIED.

SO ORDERED.

Dated: October 30, 2013
New York, NY

ANALISA TORRES
United States District Judge