STATE OF IDAHO)
County of KOOTENAI)ss

FILED 12-16-2020

AT 1826 O'Clock M
CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SNAP! MOBILE, INC., a Delaware corporation,
Plaintiff,
vs.
VERTICAL RAISE, LLC,an Idaho limited liability company, and PAUL LANDERS, individually,
Defendants.

Case No. **CV28-19-8796**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a Motion for Preliminary Injunction filed on November 25, 2020, by plaintiff SNAP! Mobile (Snap) against defendants Vertical Raise, LLC (Vertical Rise) and Paul Landers (Landers).

Snap and Vertical Raise are both in the business of online fundraising. First Am. Compl. 2. This dispute is over Snap's claims that Vertical Raise and Landers intentionally interfered with Snap's contractual relationship with Snap's sales representatives named Clay, Sanford, Hack and others, by encouraging them to breach their Sales Representative Agreement with Snap. First Am. Compl. 18. Snap claims that, "Vertical Raise and Landers intentionally targeted Clay, Sanford, Hack, and other Snap Sales Representatives for the express purpose of inducing Snap's clients to cancel campaigns with Snap and start campaigns with Vertical Raise, in violation of non-solicitation, non-competition, and confidentiality agreements to which Snap's former employees were

subject as part of their Sales Representative Agreements". *Id.* at 19.

Snap filed its Complaint and Demand for Jury and Request for Injunctive Relief on December 10, 2019. Vertical Raise filed an Answer on January 13, 2020. Snap filed a First Amended Complaint and Demand for Jury Trial and request for Injunctive Relief on September 23, 2020. Vertical Raise and Paul Landers filed an Answer to First Amended Complaint and Counterclaim and Demand for Jury Trial on October 21, 2020, and again on October 22, 2020.

On November 25, 2020, Snap filed Plaintiff's Motion for Preliminary Injunction, a Memorandum in Support of Motion for Preliminary Injunction, a Declaration of Jeff Bone in Support of Motion for Preliminary Injunction, and a Declaration of Trevor Downs in Support of Motion for Preliminary Injunction. On December 2, 2020, Vertical Raise filed a Response to Motion for Preliminary Injunction, a Declaration of counsel in Support of Opposition to Plaintiff's Motion for Preliminary Injunction, and Declaration of Paul Landers in Support of Opposition to Plaintiff's Motion for Preliminary Injunction. Also on December 2, 2020, Vertical Raise and Landers filed a Motion to Strike and Motion to Shorten Time pursuant to I.R.C.P. 7(b)(3)(H) and a Memorandum in Support of Defendants' Motion to Strike Portions of the Declarations of Trevor Downs and Jeff Bone. On December 7, 2020, Snap filed a Reply Memorandum in Support of Motion for Preliminary Injunction, Declaration of Trevor Downs in Support of Motion for Preliminary Injunction, and a Declaration of Jeff Bone in Support of Motion for Preliminary Injunction. Also on December 7, 2020, Snap filed an Objection to Defendants' Motion to Strike Portions of the Declarations of Trevor Downs and Jeff Bone and Non-Opposition to the Motion to Shorten Time.

Oral argument on Snap's Motion for Preliminary Injunction was held on December 15, 2020. At that hearing, counsel for Vertical Raise and Landers withdrew its Motion to

Strike. At the conclusion of the December 15, 2020, hearing, this Court took Snap's Motion for Preliminary Injunction under advisement.

II. STANDARD OF REVIEW.

The grant of an injunction is within the sound discretion of the Court. *White v. Coeur d'Alene Big Creek Mining Co.,* 56 Idaho 282, 55 P.2d 720 (1936); *Harris v. Cassia County,* 106 Idaho 513, 517, 681 P.2d 988, 992 (1984).

A preliminary injunction may be granted upon the following grounds:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

I.R.C.P. 65(e). Subsection 4, 5 and 6 are not applicable to this case.

The Idaho Supreme Court has evaluated the proper standard for a trial court to consider in *Harris v. Cassia County,* holding that the party seeking the injunction has a burden of proving a right thereto. *Harris,* 106 Idaho 513, 681 P.2d 988 (1984). Idaho Rule of Civil Procedure 65(d) requires that every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise. I.R.C.P. 65(d).

III. ANALYSIS.

In its motion for preliminary injunction, Snap moves this Court pursuant to I.R.C.P. 65(e):

> ...for an order enjoining Vertical Raise and anyone acting in concert or on behalf of Vertical Raise from the following:
>
> (1) directly or indirectly soliciting any Snap! customer or Business Partner, i.e., schools and independent organizations, who were served by a Vertical Raise sales representative formerly employed by Snap! and where such individual was employed by Snap! for any product or service similar to or competitive with one offered by Vertical Raise in the same geographic area in which former Snap! employees performed services for Snap!.
>
> (2) Transacting business with any Snap! customer, Business Partner, or organization who was served by a Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! and that individual was employed by Vertical Raise in the same geographic area in which that former Snap! employee performed services for Snap!.
>
> (3) Soliciting or accepting business from any Snap! customer, Business Partner, or organization in the same geographic area in which any Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! performed services for Snap! who were served by that former Snap! employee while he/she was employed by Snap!.
>
> (4) Paying any sales representative formerly employed by Snap! any form of compensation for transacting business with a current or former Snap! customer, Business partner, or organization who was served by that sales representative while he/she was employed, engaged, or contracted with by Snap! in the geographic area in which that sales representative performed services for Snap!.
>
> (5) Aiding or abetting any current or former Snap! employee's breach of that individual 's Sales Representative Agreement with Snap!. This prohibition includes the use of Vertical Raise's email systems, website, platform or other systems in a manner that assists or facilitates a breach of any Snap! Sales Representative Agreement.
>
> (6) Facilitating or participating in the solicitation and/or recruitment of a Snap! Sales Representative by any person who signed a contract to not solicit or recruit Snap! Sales Representatives. This prohibition includes, but is not limited to, paying any compensation to an 'area representative' or other designated person involved in recruitment.
>
> (7) Obtaining or using Snap! 's confidential, trade secret information including, without limitation, customer lists, compilations of customer information and/or pricing information.

Pl.'s Mot. for Prelim. Inj. 1-3.

First, Snap argues that "Snap! has a clear, legal right to enforce its non-

solicitation and nonacceptance of business covenants against its employees." Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. 13. Snap goes on to argue that:

> The non-solicitation and nonacceptance of business covenants signed by the previously-named sales representatives are enforceable. In Washington, reasonable non-solicitation and nonacceptance of business covenants have been enforced by the courts for over 108 years (citations omitted)... The same Washington law applies to all of the Snap! sales representatives given their employment contracts, regardless of where they reside. These same restrictive covenants were at issue in the litigation against Mr. Clay and Mr. Sanford—where the Washington court, interpreting Washington law, issued preliminary injunctions preventing future violations of those agreements.

Id. at 13.

Vertical Raise argues that:

> Snap's tortious interference claim hinges first on showing that its Sales Representative Agreements are enforceable, which it asserts they are under Washington law. Only after that threshold showing can it move on to argue that Vertical Raise tortiously interfered with those contracts under Idaho law.

Resp. to Pl's. Mot for Prelim. Inj. 13. Vertical Raise goes on to argue that:

> Here, Snap alleges the sales representatives sold its services prior to signing the noncompete agreements Snap wants to enforce in this case. Then, in mid-2017, Snap required the sales representatives to sign new contracts that included entirely new non-compete agreements and also contained integration clauses that made the sales representatives' prior non-compete agreements obsolete. Fatally, Snap <u>failed to provide any independent consideration whatsoever</u> when forcing the sales reps to sign the new agreements. Snap had any number of options it could have taken to provide independent consideration and make the Sales Representative Agreements enforceable. For example, it could have provided signing bonuses, larger commissions, specialized sales training, or any number of other things. Rather than provide independent consideration, however, it presented new agreements with exactly the same job descriptions on a take or leave it basis, and that by Snap's own admission would result in the sales reps making less money, and threatened to stop paying anyone who did not sign. That is a textbook example of a failure to provide independent consideration, and thus the restrictive covenants are not enforceable.
>
> Even with consideration, factual issues concerning (1) the extent to which customers had preexisting relationships with sales reps; (2) the extent to which customers left or discontinued business with Snap for reasons independent of the sales reps; (3) the general enforceability of

the noncompete and restrictive covenant due to the competing interests of Snap and the sales reps; (4) applicability of the affirmative defense of privilege, and (5) Snap's practice of reducing territories to appropriate customers away from its own sales reps, warrant discovery before Snap can demonstrate a likelihood of success on the merits. Indeed, Snap has waited nearly a year in both this lawsuit, and has yet to move in the Washington lawsuit, for a preliminary injunction. No depositions occurred to date, but they will occur in the near term.

Id. at 15-16 (underlining in original).

Snap argues in their Reply brief that:

> Even if all of the employees that Vertical Raise recruited from Snap! had signed independent contractor agreements before later signing employment agreements (as noted above, that is not the case), Vertical Raise's "no consideration" argument fails as a matter of law. Under Washington law, "[c]onsideration is any act, forbearance, creation, modification, or destruction of a legal relationship, or return promise given in exchange. " Labriola v. Pollard Group, 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Mr. Tiner signed his Employment Agreement as a condition of becoming a Snap! employee. The creation of a new relationship—employer and employee—is consideration. E.E.O.C. v. Allstate Ins., 778 F.3d 444, 41 (3rd Cir. 2015) (employer's offer to terminated employees to convert to independent contractor status was sufficient consideration for a release). After all, employees receive various safety net protections (such as worker's compensation and unemployment coverage) not available to independent contractors. Consideration exists when a party makes "new promises" or accepts "obligations previously not required." Labriola, 125 Wn.2d at 834.
>
> Here, Snap! made new promises in exchange for new obligations when offering employment. For example, Snap! provided the converted employees with medical, dental, and vision benefits, various insurance policies, and Snap! paid the employers' share of federal employment tax. This is a fatal flaw in Vertical Raise's overall objection to the Motion for Preliminary Injunction. While the declaration from Travis Tiner indicates that he could, in theory, make less money pursuant to the employment agreement than he would have made as an independent contractor, Courts do not inquire into the adequacy of consideration. Browning v. Johnson, 70 Wn.2d 145, 147 (1967). Accordingly, the restrictive covenants were valid and enforceable as there was independent consideration at the time the contracts were executed.
>
> Importantly, in the process of granting a preliminary injunction against Bradly Clay (a former Snap employee who went to Vertical Raise and immediately began trying to steal Snap! customers) in the King County Superior Court rejected this exact same argument, and expressly found sufficient consideration. See, Declaration of Jeff Bone in Support of Snap! 's Reply *Memorandum* ¶¶ 2-4, Exh. A.

Reply 5-6 (underlining in original). Snap goes on to argue in their Reply brief that:

> As noted above, most of the Snap! employees who were recruited to Vertical Raise never signed independent contractor agreements because they did not begin working for Snap! until after June 2017, when Snap! classified sales representatives as employees. See, *Declaration of Trevor Downs in Support of the Reply Memorandum* 2-4. As a result, they all signed employment agreements containing the valid restrictive covenants contemporaneous with their hiring date. *See, e.g., Declaration of Trevor Downs in Support of the Motion for Preliminary Injunction*, Exhs. D, E. Accordingly, Vertical Raise's meritless "no consideration" argument does not even apply to most of the former Snap! employees Vertical Raise has since recruited or poached.

Id. at 6.

In the present case, this Court finds that Snap does have a clear legal right to enforce its non-solicitation and nonacceptance of business covenants against its employees and former employees. As a preliminary matter, this Court finds that all Snap employees that were hired after July 2017 that have not previously signed an independent contractor agreement are clearly bound by the non-solicitation and nonacceptance of business covenants found in the post July 2017 Sales Representative Agreements. Decl. of Trevor Downs in Supp. of Pl's Reply Mem. in Supp. of Pl's Mot for Preliminary Injunction. 3. This issue is not disputed by Vertical Raise.

As evidenced by Trevor Downs' Declaration in Support of the Reply Memorandum, the majority of the employees had been hired after July 2017, and only nine of the 29 listed employees signed the previously applicable Independent Contractor Agreement. *Id.* The remaining question for this Court to answer is whether the nine employees that previously signed an Independent Contractor Agreement are bound to the subsequent Sales Representative Agreement they later signed. This Court finds that these nine employees are bound to this later signed agreement.

In *Labriola v. Pollard Grp., Inc.*,152 Wash. 2d 828, 100 P.3d 791 (Wash. 2004), the Washington Supreme Court delineated when noncompete agreements will be enforced:

> A noncompete agreement entered into after employment will be enforced if it is supported by independent consideration. *Rosellini v. Banchero,* 83 Wash.2d 268, 273, 517 P.2d 955 (1974); *Schneller v. Hayes,* 176 Wash. 115, 118, 28 P.2d 273 (1934). Independent, additional, consideration is required for the valid formation of a modification or subsequent agreement. There is no consideration when "one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract." *Banchero,* 83 Wash.2d at 273, 517 P.2d 955 (citing 15 Walter H.E. Jaeger, *Williston on Contracts* § 1826 at 487 (3d ed.1972)). Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information. *Schneller,* 176 Wash. at 118–19, 28 P.2d 273. Independent consideration involves new promises or obligations previously not required of the parties.

152 Wash. 2d at 834, 100 P.3d at 794. Additionally, the court in *Labriola* found that "Courts generally do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test. *Browning v. Johnson,* 70 Wash.2d 145, 147, 422 P.2d 314, (1967). Legal sufficiency 'is concerned not with comparative value but with that which will support a promise.'" 152 Wash. 2d at 834, 100 P.3d at 793–94.

A copy of Travis Tiner's and Joseph Sanford's Sales Representative Agreement is found attached as Exhibit C and D in the Declaration of Trevor Downs in Support of Plaintiff's Motion for Preliminary Injunction, and the Sales Representative agreement for all sales representatives located in California is attached in Exhibit E. *Id.* at Ex. E. This Court Agrees with Snap that the Sales Representative Agreements contained valid consideration because they include new offerings of "medical, dental, and vision benefits, various insurance policies, and Snap paid the employers' share of federal

employment tax." Reply 5-6. As found in *Labriola v. Pollard Grp., Inc.*, "Independent consideration involves new promises or obligations previously not required of the parties." 152 Wash. 2d at 834, 100 P.3d at 794. The new offerings provided in the Sales Representative agreements clearly represent "new promises or obligation previously not required by the parties." *Id.* This court also agrees with Snap that the fact that employees may make less money under the agreement does not render the Sales Representative Agreements to be without consideration. Reply 5-6. As described in *Labriola*, legal sufficiency of consideration "is concerned not with comparative value but with that which will support a promise." 152 Wash. 2d at 834, 100 P.3d at 794. "Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to restricted information." *Id.* It appears all these apply to the Sales Representative Agreements at issue. This Court finds the Sales Representative Agreements provided adequate independent consideration that would support a promise, and therefore, this Court finds that Snap does have a clear legal right to enforce its non-solicitation and nonacceptance of business covenants against its employees.

Next, Snap argues that, "Snap! is likely to prevail on its claim of tortious interference against Vertical Raise and Landers." Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj. 14. Snap continues:

> Here, Snap! and its former Sales Representatives that were recruited by and/or associated with Vertical Raise executed valid and binding employment contracts.. Those contracts had nonsolicitation and non-compete agreements in which Snap! had a valid expectancy in the continued contractual relationship and compliance with the provisions of those contracts for eighteen (81) [sic] months following termination of employment. Snap! thereafter was damaged when Vertical Raise induced Snap! employees to breach those contracts and to solicit Snap! employees for Vertical Raise. Further, upon poaching of these employees, Vertical Raise expressly instructed the former Snap! sales representatives to initiate conversations with schools known to use Snap!

> as their fundraiser provider in an effort to take business from Snap! in violation of the sales representatives ' employment contracts. Accordingly, Snap! has suffered actual and substantial injury attributable to Vertical Raise's solicitations, including the loss of future referrals.

Id. at 14-15. This Court notes that the "noncompetition" clause, the "non-acceptance of business" clause, the "non-solicitation" clause as to business partners, and non-solicitation of "other employees" clause, all run for a period of eighteen (18) months, not 81 months. Decl. of Trevor Downs in Supp. of Pl.'s Mot. for Prelim. Inj. Ex. D "Sales Representative Agreement (At Will Employment)" 3-4, ¶¶ 4.3-4.6. Under the older "Independent Contractor Agreement", those obligations rand for two years. *Id.* at Ex. C, #2, ¶¶ 10, 13-14.

Vertical Raise argues that:

> As addressed above, there is a bona fide question as to whether the sales reps' agreements with Snap are enforceable under Washington law. That is enough to preclude a preliminary injunction, which is only proper where the movant establishes that its "right is very clear and it appears that irreparable injury will flow from its refusal." *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997).
>
> Further, Snap's tortious interference claim is based on Idaho law. Therefore, the question as to whether or not that is the case here given the absence of consideration; the harshness and onerous scope of the noncompetes — particularly against persons who Snap fails to allege were key employees; and the public policy considerations surrounding customers who are public school sport programs, for which there is a compelling public interest to treat equitably in spite of the self-serving protectionist goals of private companies.
>
> To the extent the contracts are enforceable, Snap must then establish it can show intentional interference. Under *AMX Int'l, Inc. v. Battelle Energy Alliance*, LLC, 744 F. Supp. 2d 1087, 2010 U.S. Dist. LEXIS 108056) and the authority cited therein, this is unlikely, particularly under the broad scope argued by Snap.

Resp. Pl.'s Mot. for Prelim. Inj. 16-17.

Snap! argues in their reply brief that:

> Vertical Raise relies on its "no consideration" argument as the sole basis for asserting that Snap! will not prevail on the merits of its tortious interference with contract claim. It does not even attempt to justify or

otherwise address the wrongful conduct detailed in Snap! 'a motion. For the reasons discussed above, the restrictive covenants are valid as consideration was given therefor. Accordingly, there is no "bona fide question as to whether the sales reps' agreements with Snap are enforceable under Washington law." Indeed, Washington courts have upheld the validity of these exact same agreements on multiple prior occasions. Because the restrictive covenants in Snap! 's employment agreements are valid and enforceable, Vertical Raise's undisputed encouragement of their violation thereof is irreparably harming Snap!.

Reply 7. Snap continues:

> As discussed further above, the non-solicitation and nonacceptance of business covenants signed by the sales representatives are enforceable. Accordingly, Snap! had a valid expectancy in the continued contractual relationship and compliance with the provisions of those contracts. Vertical Raise does not dispute that it induced Snap! employees to breach those contracts and to solicit Snap! employees for Vertical Raise. Further, upon poaching these employees, Vertical Raise expressly instructed the former Snap! sales representatives to breach their restrictive covenants by soliciting and accepting business from Snap! 's customers. (See, *Declaration of Paul Landers*, noting "Vertical Raise hired a data miner in the Philippines off of UpWork.com. Every week he would go through Snap's public pages and add in the information from the public page into an excel sheet and email it to us. " *See also, Declaration of Jeff Bone*, Exh. D, "Snap Raise List for your area—you can filter this list down to the cities in your area and target these programs." *Id.* Accordingly, Snap! has suffered actual and substantial injury attributable to Vertical Raise's solicitations, including the loss of future referrals from now former customers.

Reply 10.

In the present case, this Court grants all of Snap's requests for preliminary injunction, because this Court finds that from the complaint as well as the declarations of Trevor Downs and Jeff Bone, "that the commission or continuance of the act during the litigation would produce waste, or great or irreparable injury to the plaintiff." A preliminary injunction may be granted upon the following grounds:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

I.R.C.P. 65(e) (subparts 4 and 6 are not applicable to this case).

The Idaho Supreme Court has evaluated the proper standard for a trial court to consider in *Harris v. Cassia County,* holding that the party seeking the injunction has a burden of proving a right thereto. *Harris,* 106 Idaho 513, 681 P.2d 988 (1984). Idaho Rule of Civil Procedure 65(d) requires that every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise.

This Court issues this preliminary injunction because evidence provided shows that Vertical Raise has made a concerted effort to solicit and employ Snap employees, knowingly conflicting with those employees' valid contracts with Snap. Decl. of Trevor Downs in Supp. of Mot. for Preliminary Injunction ¶11; Decl. of Jeff Bone ¶¶ 5-11. This was done for the purpose of transacting business with Snap's customers in which the former Snap employees had built relationships. *Id.*

As set forth above, Snap has motioned:

> this Court for a Preliminary Injunction pursuant to Rule 65(e) of the Idaho Rules of Civil Procedure for an order enjoining Vertical Raise and anyone acting in concert or on behalf of Vertical Raise from the following:

(1) directly or indirectly soliciting any Snap! customer or Business Partner, i.e., schools and independent organizations, who were served by a Vertical Raise sales representative formerly employed by Snap! and where such individual was employed by Snap! for any product or service similar to or competitive with one offered by Vertical Raise in the same geographic area in which former Snap! employees performed services for Snap!.

(2) Transacting business with any Snap! customer, Business Partner, or organization who was served by a Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! and that individual was employed by Vertical Raise in the same geographic area in which that former Snap! employee performed services for Snap!.

(3) Soliciting or accepting business from any Snap! customer, Business Partner, or organization in the same geographic area in which any Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! performed services for Snap! who were served by that former Snap! employee while he/she was employed by Snap!.

(4) Paying any sales representative formerly employed by Snap! any form of compensation for transacting business with a current or former Snap! customer, Business partner, or organization who was served by that sales representative while he/she was employed, engaged, or contracted with by Snap! in the geographic area in which that sales representative performed services for Snap!.

(5) Aiding or abetting any current or former Snap! employee's breach of that individual 's Sales Representative Agreement with Snap!. This prohibition includes the use of Vertical Raise's email systems, website, platform or other systems in a manner that assists or facilitates a breach of any Snap! Sales Representative Agreement.

(6) Facilitating or participating in the solicitation and/or recruitment of a Snap! Sales Representative by any person who signed a contract to not solicit or recruit Snap! Sales Representatives. This prohibition includes, but is not limited to, paying any compensation to an 'area representative' or other designated person involved in recruitment.

(7) Obtaining or using Snap! 's confidential, trade secret information including, without limitation, customer lists, compilations of customer information and/or pricing information.

Pl.'s Mot. for Prelim. Inj. 1-3.

As evidenced above, this injunction complies with I.R.C.P. 65(d), because it is specific in terms, it describes in reasonable detail the act sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise.

Vertical Raise argues that:

> To the extent the contracts are enforceable, Snap must then establish it can show intentional interference. Under *AMX Int'l, Inc. v. Battelle Energy Alliance*, LLC, 744 F. Supp. 2d 1087, 2010 U.S. Dist. LEXIS 108056) [sic] and the authority cited therein, this is unlikely, particularly under the broad scope argued by Snap.

Resp. to Pl.'s. Mot. for Prelim. Inj. 17 (citation omitted).

This Court does not find *AMX Int'l, Inc. v. Battelle Energy Alliance, LLC* to be applicable to the Case at hand. The Court *in AMXInt'l, Inc. v. Battelle Energy Alliance, LLC* found that the non-compete clause in the contract in question was overly broad because:

> ...the clause is not limited to clients with whom the AMX employees actually interacted.
>
> The Court shares the concern that the noncompete agreements are more restrictive than necessary according to the standards set forth in *Freiburger, supra.* In *Freiburger,* a civil engineer employed by J–U–B signed a covenant not to compete that prohibited him from providing any services to J–U–B's clients without regard to whether he had any contact with these clients.

AMX Int'l, Inc. v. Battelle Energy Alliance, LLC., 744 F. Supp. 2d 1087, 1094 (D. Idaho 2010).

This Court finds that Snap has shown intentional interference, and Snap's injunction seeks to enjoin Vertical Raise from pursuing business with customers that have been served by former Snap employees in the same geographic area in which former Snap employees performed services for Snap. Mot. for Preliminary Injunction 1-3. This is the exact opposite of the situation in *AMX Int'l, Inc. v. Battelle Energy Alliance, LLC.*

Next, Snap argues that Snap is likely to prevail on its claim of misappropriation of trade secrets. Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. 15. Snap goes on to argue that:

> Here, the primary information at issue is customer lists and associated campaign data, as well as general knowledge of how Snap! ran and runs its campaigns. Customer lists and campaign data have previously been recognized as trade secrets in Idaho. Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010). Vertical Raise continues to use Snap! 's customer lists and campaign data and encourages former Snap! sales representatives to use those customer lists and campaign data to Vertical Raise's benefit. That Snap!'s proprietary lists are valuable resources for Vertical Raise is evident from the numerous emails from Paul Landers instructing former Snap! representatives to "go after" Snap! 's existing clients. As such, Snap! is suffering on going harm from Vertical Raise's use of Snap! 's trade secret and proprietary information and the conduct will continue until and unless this Court imposes a preliminary injunction enjoining such ongoing behavior.

Id. at 15-16. Snap makes a similar argument in Snap's reply memorandum. Reply 10-11. In its briefing, Vertical Raise and Landers did not really address Snap's claim of misappropriation of trade secrets.

Next, Snap argues that, "Snap! has suffered or will suffer irreparable harm if an injunction is not issued." *Id.* at 16. Snap goes on to argue that:

> Here, because Vertical Raise consistently and continuously encourages Snap! 's former sales representatives to violate the restrictive covenants in their employment agreements with Snap! , Snap! is not required to show that it will suffer irreparable harm to be granted injunctive relief to enforce the restrictive covenants. From the amounts shown on the list of Snap! customers served by those former sales representatives, it is plain that Vertical Raise's encouragement of and benefit from the former Snap! sales representatives' violation of the covenants places a significant amount of Snap! business at risk. Accordingly, Snap! has suffered actual and substantial injury attributable to Vertical Raise's current conduct, including the loss of future referrals of business.

Id. at 17. Snap makes a similar argument in Snap's reply memorandum. Reply 11-12. In its briefing, Vertical Raise and Landers do not address Snap's claim of irreparable harm. Instead, Vertical Raise and Landers make an oblique claim that Snap's "preliminary injunction would cause irreparable harm to Vertical Raise." Resp. to Pl.'s Mot. for Prelim. Inj. 4. No legal or factual argument is given by Vertical Raise to support that singular claim.

For the reasons described above, this Court finds that Snap's motion for preliminary injunction must be granted on the merits. A couple of other issues have been raised by Vertical Raise which should be discussed.

Vertical Raise argues that:

> Further, Snap has waited almost a year since filing its complaint in this matter — and more than a year since Vertical Raise was dismissed from the lawsuit in Washington — to seek this preliminary injunction. Delay, while not dispositive to a motion for injunctive relief, merits consideration for the simple reason that irreparable harm is not logically cured by delay. Snap cannot rely on the discovery dispute to excuse its delay given that Vertical Raise has not denied awareness of the sales representatives' agreements with Snap, and Snap obtained the discovery from Sanford long ago that it now asserts is sufficient to support its interference claims and which it uses to support its motion. Snap delayed this motion only to file it over the Thanksgiving holiday with two other substantive motions. Vertical Raise requires several weeks to conduct depositions to properly respond, which it intends to do shortly given the upcoming dispositive motion cutoff.

Resp. Pl.'s Mot. for Prelim. Inj. 17.

Snap argues in their Reply brief that:

> Vertical Raise asserts that the Motion for Preliminary Injunction should be denied as Snap! has "waited almost a year since filing its complaint in this matter—and more than a year since Vertical Raise was dismissed from the lawsuit in Washington." As this Court is aware, there have been extenuating circumstances regarding the delays caused by Vertical Raise's discovery tactics (see, e.g., Snap! 's Motion to Compel and Motion for Sanctions), as well as extenuating circumstances regarding litigation in 2020. These same dilatory tactics and refusal to comply with discovery obligations have occurred in the current litigation pending in Washington. (See, *Declaration of Jeff Bone in Support of the Reply Memorandum*, ¶¶ 5,6 Exh. B)
>
> For example, Snap! has sought two motions to continue the trial in the current Washington matter pursuant to Vertical Raise's independent contractors failing to produce any discovery responses or documents, wherein Snap! was forced to file a motion to compel which was granted on October 16, 2020. *Id.* Further, despite intervention by the Court, discovery remains undeveloped in the Washington matter, similar to the undeveloped nature of discovery in the instant litigation. *Id.* For example, not one of the Washington defendants (who are current Vertical Raise sales reps) have produced a single text message in response to Snap! 's discovery requests.
>
> Accordingly, Vertical Raise incorrectly asserts that "Snap cannot

> rely on the discovery dispute to excuse delay given that Vertical Raise has not denied awareness of the sales representative agreements with Snap... " This ignores a crucial point, however. In granting a motion for a preliminary injunction, this Court must find that there is a likelihood that the moving party will prevail on the merits of the claim. Harris v. Cassia County, 106 Idaho 513, 681 P.2d 993 (1984). Such likelihood can only be proven by documents in support of such theories; the documents necessary to show this Court that Snap! would be likely to prevail on the merits of its intentional interference with contract and intentional interference with economic advantage claims were not produced by Vertical Raise until the Court compelled such responses to be produced.

Reply 7-8.

This Court is not convinced by Vertical Raise's argument that "irreparable harm is not logically cured by delay." As described by this Court above, Snap has shown irreparable harm exists and continues to exist, even at this stage of the litigation. Simply put, Vertical Raise continues to purposely employ former employees of Snap, against the terms of their contracts, for the purpose of utilizing the knowledge and client base of these former employees.

This Court has already found that Vertical Raise has impermissibly delayed production of discovery documents. December 12, 2020, Order Granting Plaintiff's Motion for Sanctions, 1-3. This Court finds that if anyone is at fault for slowing down the process of this litigation, it is Vertical Raise.

Vertical Raise has stated that "Snap! delayed this motion only to file it over the Thanksgiving holiday with two other substantive motions. Vertical Raise requires several weeks to conduct depositions to properly respond, which it intends to do shortly given the upcoming dispositive motion cutoff." Resp. to Mot. for Prelim. Inj. 17-18. The hearing for Snap's Motion for Preliminary Injunction was supposed to take place on December 9, 2020, following the hearing on Snap's Motion for Sanctions, but due to lack of time after the hearing on the Motion for Sanctions, this Court continued the hearing on the Motion for Preliminary Injunction until December 15, 2020. Despite the

allowance of this continuance, no additional filings of depositions or briefing have been filed by Vertical Raise during that time, nor has it filed a motion to compel discovery.

Vertical Raise appears to be arguing that Snap's motion for preliminary injunction is invalid because irreparable harm no longer exists due to the delay by Snap in filing their motion for preliminary injunction. At the same time, Vertical Raise also appears to be arguing that any delay by Vertical Raise in providing discovery documents does not cure Snap's supposed lack of irreparable harm. What really matters, as described by this Court above, is that Snap has shown that irreparable harm exists and continues to exist, even at this stage of the litigation.

Next, Vertical Raise argues that:

> Further, as a practical matter, Snap should seek a preliminary injunction first in the Washington action so that a Washington judge, applying Washington law, can resolve the threshold issue of whether its contracts are enforceable. The individual sales representatives in that lawsuit possess facts and affirmative defenses beyond Vertical Raise to properly resolve this threshold issue.

Resp. to Pl's. Mot. for Prelim. Inj. 16-18.

Snap argues in their reply brief that:

> Vertical Raise also asserts that Snap! should seek a preliminary injunction "first in the Washington action so that a Washington judge, applying Washington law, can resolve the threshold issue of whether its contracts are enforceable." As Vertical Raise likely already knows, but failed to inform the Court, Snap! has sought and obtained multiple preliminary injunctions in Washington courts. For example, in the Washington matter against Bradly Clay, the Motion was granted, and the Court found the following:
>
> > When Mr. Clay executed the employment agreement, he received a change in his employment status that included mental, dental and vision benefits as well as other insurance policies. Mr. Clay argues that he made less money under the employment contract than when he was an independent contractor and suggests that the new benefits were not adequate consideration for the restrictive covenants. Courts, however, generally do not inquire into the adequacy of consideration. Browning v. Johnson, 70 Wn.2d 145, 147 (1967). While this issue may be more thoroughly addressed

> at trial, Snap! has made a sufficient showing that there was likely independent consideration at the time the contract was executed.

See, *Declaration of Jeff Bone in Support of the Reply Memorandum in Support of the Motion for Preliminary Injunction*, 3, Exh. A. In granting the Motion for Preliminary Injunction, the Washington court ordered:

> Neither Mr. Clay, nor anyone acting in concert with or on behalf of Mr. Clay, will directly or indirectly:
> a. Solicit any Snap! customer who was served by Mr. Clay while he was employed by Snap! for any product or service similar to or competitive with one offered by Snap! in the same geographic area I which Mr. Clay performed services for Snap! ;
> b. Transact business with any Snap! customer who was served by Mr. Clay while he was employed by Snap! in the geographic area in which Mr. Clay performed services for Snap! ; or
> c. Accept business from any Snap! customer in the geographic area in which Mr. Clay performed services for Snap! who were served by Mr. Clay while he was employed by Snap!

Id. at pp. 6-7. Snap! sought, and obtained, a similar injunction against Joseph Sanford in that same litigation. Vertical Raise's leadership thereafter worked with Snap! 's prior sales representatives to help them evade provisions of that injunction. *See, e.g., Declaration of Jeff Bone in Support of the Motion for Preliminary Injunction* 8, Exh. G, Exh. G attached thereto. Vertical Raise has continued its wrongful behavior despite the issuance of those two prior injunctions. Accordingly, as a practical matter, Snap! has already sought and obtained a preliminary injunction from the Washington judge, applying Washington law, resolving the threshold issue of finding that the contracts are enforceable. Vertical Raise has already indicated by its past behavior, including its behavior in this action, that it will not stop its wrongful conduct unless directly ordered to by this Court.

Reply 8-9.

This Court has not been pointed to any valid legal reason, nor can this Court discern one on its own, as to why Snap should be required to seek a finding by a Washington court regarding the enforceability of its contracts. Even if there were a legitimate reason to require Snap to seek a finding by a Washington court, this Court finds that Snap has already done so, and the Washington court ruled that Snap's contracts are enforceable.

This Court grants Snap's Motion "enjoining Vertical Raise and anyone acting in concert or on behalf of Vertical Raise from... [o]btaining or using Snap's confidential, trade secret information including, without limitation, customer lists, compilations of customer information and/or pricing information." As evidenced above, this injunction complies with I.R.C.P. 65(e)(2) because it appears that Vertical Raise continuing to obtain or use Snap's trade secret information during the litigation would produce waste, or great or irreparable injury to the plaintiff. Decl. of Trevor Downs in Supp. of Mot. for Preliminary Injunction ¶¶19-21; Decl. of Jeff Bone ¶¶ 5-11.

Additionally, this Court finds that the injunction sought by Snap in regards to trade secrets is sufficient in regards to I.R.C.P. 65(d), because it is specific in terms, it describes in reasonable detail the act sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise.

IV. CONCLUSION AND ORDER.

For the reasons discussed above, all seven (7) specified requests enjoining Vertical Raise and Landers, and anyone acting in concert or on behalf of Vertical Raise and Landers are granted.

IT IS HEREBY ORDERED Snap's Motion for Preliminary Injunction is **GRANTED.**

IT IS FURTHER ORDERED that a preliminary injunction pursuant to Idaho Rule of Civil Procedure 65(e) is issued and is now in effect, enjoining Vertical Raise and Landers and anyone acting in concert or on behalf of Vertical Raise and Landers from the following:

(1) directly or indirectly soliciting any Snap! customer or Business Partner, i.e., schools and independent organizations, who were served by a Vertical Raise sales representative formerly employed by Snap! and where such individual was employed by Snap! for any product or service similar to or competitive with one offered by Vertical Raise in the same geographic area in which former Snap! employees performed services for Snap!.

(2) Transacting business with any Snap! customer, Business Partner, or organization who was served by a Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! and that individual was employed by Vertical Raise in the same geographic area in which that former Snap! employee performed services for Snap!.

(3) Soliciting or accepting business from any Snap! customer, Business Partner, or organization in the same geographic area in which any Vertical Raise sales representative formerly employed, engaged, or contracted with by Snap! performed services for Snap! who were served by that former Snap! employee while he/she was employed by Snap!.

(4) Paying any sales representative formerly employed by Snap! any form of compensation for transacting business with a current or former Snap! customer, Business partner, or organization who was served by that sales representative while he/she was employed, engaged, or contracted with by Snap! in the geographic area in which that sales representative performed services for Snap!.

(5) Aiding or abetting any current or former Snap! employee's breach of that individual 's Sales Representative Agreement with Snap!. This prohibition includes the use of Vertical Raise's email systems, website, platform or other systems in a manner that assists or facilitates a breach of any Snap! Sales Representative Agreement.

(6) Facilitating or participating in the solicitation and/or recruitment of a Snap! Sales Representative by any person who signed a contract to not solicit or recruit Snap! Sales Representatives. This prohibition includes, but is not limited to, paying any compensation to an 'area representative' or other designated person involved in recruitment.

(7) Obtaining or using Snap! 's confidential, trade secret information including, without limitation, customer lists, compilations of customer information and/or pricing information.

Entered this 16th day of December, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 16 day of December, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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