No. 21-35314

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILLENNIUM HEALTH, LLC,

Plaintiff–Appellee,

v.

DAVID BARBA and JUSTIN MONAHAN,

Defendants–Appellants,

and

NEPENTHE LABORATORY SERVICES LLC and DOES 1–5,

Defendants.

On Appeal from the United States District Court
for the District of Oregon
No. 3:20-cv-02035-HZ

BRIEF FOR APPELLANTS

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INTRODUCTION

In this litigation, Millennium Health, LLC ("Millennium") seeks to enforce non-competition agreements against its former employees, appellants David Barba and Justin Monahan. The district court correctly determined that those agreements are "voidable and may not be enforced by a court of this state" under ORS 653.295(1) because Millennium failed to provide statutorily prescribed notice of the agreements before Barba and Monahan began employment with Millennium or in connection with bona fide advancement thereafter. *See* 1-ER-14–15. Barba and Monahan notified Millennium on the first business day after their employment ended that they were voiding their non-competition agreements, which purported to prevent only post-employment competition. *See* 1-ER-10.

The district court nonetheless concluded that the non-competition agreements "were not timely voided." 1-ER-17. According to the district court, Millennium "forestalled" Barba's and Monahan's attempts to void the non-competition agreements by sending letters to them—one day after they gave two-week notices of their resignation, and well before they began employment elsewhere—"warning … that Millennium would take legal action to enforce" the non-competition agreements if Barba or

Monahan violated them after leaving Millennium. 1-ER-16. The district court therefore granted Millennium's motion for a preliminary injunction enforcing the agreements and precluding Barba and Monahan from providing services to their current employer, Nepenthe Laboratory Services, LLC ("Nepenthe").

The district court's decision construes Oregon law to allow the broad-scale enforcement of non-competition agreements that Oregon law expressly prohibits, and excuses—at the stroke of an employer's pen—noncompliance with the corresponding employee protections created by Oregon law. Even though no Oregon precedent even suggests that an employer could "forestall" an employee's right to void an illegal non-competition agreement, the district court fashioned a new legal rule that permits employers to do so. Its decision allows employers to preempt employees from voiding illegal post-employment non-competition covenants before the termination of employment—and before the employee takes on allegedly competitive work. *See* 1-ER-15–17. This decision fundamentally undermines an Oregon statute designed to protect employees' rights. And the district court's hollowing out of state law is particularly inappropriate for a federal court sitting in diversity.

Even the district court acknowledged that "ORS 653.295 'does not provide a deadline by which an employee must express his intent to void a non-competition agreement,' and Oregon appellate opinions 'do not expressly state what point is too late for an employee to void an agreement.'" 1-ER-15 (quoting *Brinton Bus. Ventures, Inc.* v. *Searle*, 248 F. Supp. 3d 1029, 1035 (D. Or. 2017)). The only previous case interpreting the circumstances in which an employee's right to void a non-competition agreement might be terminated by an employer—the district court's own decision in *Brinton*—involved an employee who "had been in violation of the non-competition agreement for months" and attempted to void the agreement only after the employer sought to enforce it. 1-ER-16.

In this case, by contrast, Barba and Monahan voided the non-competition agreements on the first business day after leaving their employment at Millennium and one week before they started work for Nepenthe. And they were deemed to have acted too late only because Millennium had threatened them with legal action at a time when they could not have been in violation of these post-employment non-competition agreements. Under this approach, any employer could effectively excuse its own illegal conduct and preemptively terminate its employees' statutory rights

to void non-competition agreements by issuing simple enforcement threats before the employees leave their employment. This Court should reject this novel and incongruous interpretation of a state law designed to protect employees and construe Oregon law to prevent employers from requiring illegal or overreaching covenants except in extraordinary circumstances that do not exist here.

JURISDICTIONAL STATEMENT

Millennium filed suit against Barba, Monahan, and Nepenthe in the District of Oregon on November 23, 2020. *See* 2-ER-196–237. Millennium is a California citizen, *see* 2-ER-200 ¶ 13; Barba, Monahan, and Nepenthe are citizens of Oregon; *see* 2-ER-200 ¶ 14. The district court properly exercised diversity jurisdiction under 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds $75,000, exclusive of interest and costs, and the lawsuit is between citizens of different states. *See* 2-ER-200 ¶ 15.

On April 5, 2021, the district court granted Millennium's motion for a preliminary injunction that, in relevant part, enjoined Barba and Monahan from violating the non-competition agreements. *See* 1-ER-23–24.

Barba and Monahan filed a timely notice of appeal on April 22, 2021. *See* 2-ER-238–62. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court correctly interpreted Oregon law as permitting Millennium to preclude Barba and Monahan from voiding their voidable non-competition agreements.

STATEMENT OF THE CASE

Millennium is a "clinical drug testing and pharmacogenetic testing company based in California." 1-ER-4. Barba and Monahan were employed by Millennium as salespersons before resigning pursuant to contracts that were terminable at will. Barba and Monahan subsequently accepted positions with defendant Nepenthe. *See* 1-ER-7–11; *see generally* 3-ER-338–79, 459–94.

When Barba and Monahan were initially hired by Millennium, they were required to sign non-competition agreements as a condition of employment. *See* 1-ER-14–15. The non-competition agreements purport to prohibit them—for one year after the termination of their employment—from "provid[ing] services that are the same or similar in function or purpose to the services" they provided to Millennium "to any business that is competitive with any aspect of [Millennium's] business as to which

[they] had material business-related involvement." 1-ER-6–7. Further, Barba was required to sign another such agreement in 2018, when he took a voluntary demotion to a position from which he had previously been twice promoted. 1-ER-7. After Barba and Monahan accepted positions at Nepenthe, Millennium brought this lawsuit in the District of Oregon seeking to enforce the non-competition agreements. *See* 1-ER-11.

As the district court determined, the non-competition agreements are "voidable and may not be enforced by a court of this state." ORS 653.295(1). Under Oregon law, a non-competition agreement entered into at the beginning of employment is voidable unless it satisfies several statutory requirements, including that "[t]he employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that a non-competition agreement is required as a condition of employment." ORS 653.295(1)(a)(A). Millennium did not satisfy that requirement "[b]ecause Monahan was not provided with the terms of the [non-competition agreement] two weeks before he began work," and "Barba was not provided with written notice of the Non-Competition Clause two weeks before starting work." 1-ER-14–15. Similarly, a non-competition agreement

entered into during employment is voidable unless it was "entered into upon a subsequent bona fide advancement of the employee by the employer." ORS 653.295(1)(a)(B). Millennium did not satisfy that requirement as to Barba's 2018 agreement because "Barba's transfer from the national position to Territory Manager was not a 'bona fide advancement' under ORS 653.295(1)(a)(B) but instead constituted a voluntary demotion." 1-ER-15.[1]

Barba and Monahan gave Millennium two weeks' notice of their resignation on September 21, 2020. *See* 1-ER-16. They remained employed by Millennium until Friday, October 2, 2020 (although they were sidelined by Millennium from doing any work or accessing Millennium information systems during the two-week notice period). *See* 1-ER-16. On the morning of the first business day immediately following their severance—Monday, October 5, 2020—Barba and Monahan informed Millennium that they were exercising their statutory rights to void the non-

[1] In addition, the district court did not address Barba's and Monahan's argument and uncontested evidence that they were "outside salesmen" while employed by Millennium and thus, under Oregon law, not subject to enforceable non-competition agreements under ORS 653.295(1)(b) and 653.020. *See* 3-ER-357–59. Presumably, the district court did not reach that issue because it found the agreements voidable on other grounds.

competition agreements. *See* 1-ER-16; *see also* 3-ER-295–96, 325–26. On October 7, 2020, Nepenthe extended employment offers to Barba and Monahan, which they accepted. *See* 1-ER-10. Barba and Monahan started work for Nepenthe on October 12, 2020, seven days after issuing voiding notices to Millennium. *See* 3-ER-297–310, 311–24.

On November 23, 2020, Millennium filed suit and moved for a temporary restraining order to enforce the agreements. *See* 2-ER-51–195, 196–237. On December 4, 2020, the district court denied Millennium's motion. *See* 2-ER-49–50. On March 1, 2021, Millennium moved for a preliminary injunction to enforce the non-competition agreements. *See* 3-ER-380–422. On March 4, 2021 and March 17, 2021, the district court heard evidence and oral argument on Millennium's motion, *see* 2-ER-45–46, 47–48, and the court issued its order granting that motion on April 5, 2021, *see* 1-ER-3–24. In relevant part, the court enjoined Barba and Monahan from competing with Millennium in both of their former

Millennium territories. *See* 1-ER-15–18. The preliminary injunction extends for one year from April 5, 2021—the date of the Court's order. *See* 1-ER-23.[2]

On April 22, 2021, Barba and Monahan appealed the district court's preliminary-injunction order to this Court.

SUMMARY OF ARGUMENT

A. The district court correctly determined that the non-competition agreements at issue here were "voidable" under ORS 653.295. Millennium did not provide the statutorily required notice—two weeks—that Barba's and Monahan's positions would require signing non-competition agreements, and instead informed them of that requirement mere days before their employment began. And while Barba was required to sign an additional non-competition agreement as part of a voluntary demotion, that voluntary demotion does not constitute a "bona fide advancement" that could potentially have supported the non-competition agreement.

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[2] Millennium also sought to enforce non-solicitation agreements in the employment contracts, and the district court's order enjoins Barba and Monahan from violating those agreements as well. Non-solicitation agreements are not covered by ORS 653.295(1), and Barba and Monahan are not appealing that portion of the district court's ruling.

B. The sole remaining issue is whether Barba and Monahan somehow lost through delay the ability to terminate the voidable non-competition agreements. If not, they voided those agreements on the first business day following the end of their employment relationship with Millennium; Millennium has no likelihood of success in enforcing the non-competition agreements against Barba and Monahan in this lawsuit; and Millennium's motion for a preliminary injunction on the non-competition agreements should have been rejected as a matter of law.

1. The district court acknowledged that neither ORS 653.295 nor any Oregon case law imposes a deadline by which an individual must terminate a voidable non-competition agreement or forever lose the ability to do so. That alone is sufficient for this Court to reject the decision below: Federal courts sitting in diversity cannot adopt adventurous new interpretations of state law without any basis in the state's existing law and that would confound the statutory protections afforded by state law.

2. Even if the district court could have adopted a new deadline for exercising the right to void a non-competition agreement, Barba and Monahan attempted to terminate their non-competition agreements well before any such deadline. Under the Restatement (Second) of Contracts,

the continuing ability to terminate a voidable agreement depends fundamentally on whether there has been any prejudice to the other party from not doing so earlier. In the context of post-employment non-competition agreements, that might be true where an employee seeks to void a non-competition agreement only after having started to compete in violation of the agreement. But here, Barba and Monahan sought to void the non-competition agreements on the first day that they were effective and before engaging in any conduct that might have constituted prohibited competition.

3. The district court's interpretation of ORS 653.295 should be rejected for the additional reason that it would allow employers to eliminate their employees' statutory rights altogether.

STANDARD OF REVIEW

When deciding whether to issue a preliminary injunction, a district court considers whether the requesting party has shown (1) it is likely to succeed on the merits on his state or federal claims; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) a preliminary injunction is in the public interest. *See Winter* v. *Nat. Res. Defense Council*, 555 U.S. 7, 20 (2008).

"Likelihood of success on the merits is the most important factor; if a movant fails to meet this threshold inquiry, we need not consider the other factors." *Edge* v. *City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019) (citation omitted).

The Ninth Circuit reviews the district court's ultimate decision to grant or deny a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Ibid.* The de novo standard of review extends to the district court's interpretation of state law. *Credit Suisse First Bos. Corp.* v. *Grunwald*, 400 F.3d 1119, 1126 n.7 (9th Cir. 2005) (citing *Feldman* v. *Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003)).

ARGUMENT

The district court's non-competition injunction stands or falls on its determination that Millennium was likely to succeed on its claims that Barba and Monahan violated the non-competition agreements. If not, then the district court "need not [have] consider[ed] the other factors"

bearing on whether to grant injunctive relief. *Edge*, 929 F.3d at 663 (citation omitted).

The district court correctly determined that Millennium had not complied with the requirements of ORS 653.295(1) as to all relevant non-competition agreements. *See* 1-ER-14–15. The sole remaining issue is whether (as the district court concluded) Barba and Monahan lost their right to void the non-competition agreements. *See* 1-ER-15–17. There is no basis in Oregon law or public policy, however, for concluding that their attempt to void those agreements—on the very first day the agreements prohibited competition and before any allegedly violative conduct occurred—was somehow too late.

A. The Non-Competition Agreements Were "Voidable" Under Oregon Law.

The Oregon statute at issue here—ORS 653.295—was "inspired by a sentiment that noncompetition agreements in the employment context are contrary to public policy." *Pac. Veterinary Hosp., P.C.* v. *White*, 72 Or. App. 533, 537 (1985); *see also McGee* v. *Coe Mfg. Co.*, 203 Or. App. 10, 15–16 (2005). To "protect employees from surprise and oppressive tactics," *Pac. Veterinary Hosp.*, 72 Or. App. at 537, the statute adopts a number of procedural and substantive protections for Oregon employees that

must be followed to create an enforceable non-competition agreement. Among the employee protections relevant here are the procedural prohibitions against coercively offering noncompetition agreements without adequate notice, ORS 653.295(1)(a), and the absolute prohibition against application of any non-competition agreements as to certain classes of employees like outside salespersons, ORS 653.295(1)(b). Otherwise, "[a] noncompetition agreement entered into between an employer and employee is voidable and may not be enforced by a court of this state." ORS 653.295(1).

A non-competition agreement "is voidable and may not be enforced" unless, *inter alia*, "[t]he employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that a noncompetition agreement is required as a condition of employment," or "[t]he noncompetition agreement is entered into upon a subsequent bona fide advancement of the employee by the employer." ORS 653.295(1)(a)(A)–(B). As the district court correctly determined below, Millennium violated these requirements. *See* 1-ER-14–15.

First, Monahan began his employment with Millennium on July 11, 2014. *See* 1-ER-14. But Millennium had "informed Monahan, for the first time," on July 8, 2014—three days before he started work—that "his employment was contingent upon his signing" a non-competition agreement. 1-ER-14. "Because Monahan was not provided with the terms of the Agreement two weeks before he began work," the district court concluded that "the Monahan Agreement is voidable under ORS 653.295(1)(a)(A)." 1-ER-14.

Second, Barba began his employment with Millennium on October 24, 2014. *See* 1-ER-14. But "the first time Barba learned that the employment was contingent upon his signing" the non-competition agreement was the previous day, October 24, 2014. 1-ER-14. "As with Monahan," therefore "Barba was not provided with written notice of the Non-Competition Clause two weeks before starting work as required by ORS 653.295(1)(a)(A) and the Court concludes that the 2014 Barba Agreement is voidable." 1-ER-14–15. Several months after Barba was promoted from sales representative to a national executive position and in conjunction with returning to his outside sales role, Millennium required him to sign another non-competition agreement on August 27, 2018. *See* 1-ER-15. As

the district court recognized, "Barba's transfer from the national position to [a sales representative] was not a 'bona fide advancement' under ORS 653.295(1)(a)(B) but instead constituted a voluntary demotion." 1-ER-15.

As to both Barba and Monahan, therefore, the district court concluded that their non-competition agreements violated and thus were voidable under the express terms of ORS 653.295.[3]

B. Barba And Monahan Timely Exercised Their Rights To Void The Non-Competition Agreements.

The district court determined that "Millennium forestalled Barba and Monahan's subsequent efforts to void" the non-competition agreements. 1-ER-16. That decision adopted a novel and far-reaching interpretation of a state law designed to protect employees that would allow employers to easily and unilaterally deprive their employees of statutory rights and excuse their own failure to abide by that law.

[3] As noted above, *see supra* n.2, the district court did not reach the issue of Millennium's violation of ORS 653.295(1)(b) by imposing these non-competition agreements on Barba and Monahan as outside salespersons.

1. Neither ORS 653.295 Nor Oregon Case Law Imposes A Deadline For Voiding A Non-Competition Agreement.

As an initial matter, there is nothing in the text of ORS 653.295 or in Oregon case law interpreting the statute that imposes a deadline by which an employee must terminate a non-competition agreement or lose the ability to do so. Indeed, the district court itself acknowledged that "ORS 653.295 'does not provide a deadline by which an employee must express his intent to void a non-competition agreement,' and Oregon appellate opinions 'do not expressly state what point is too late for an employee to void an agreement.'" 1-ER-15 (quoting *Brinton*, 248 F. Supp. 3d at 1035).

Millennium has asserted that such a deadline was imposed in *Bernard* v. *S.B., Inc.*, 270 Or. App. 710, 719 (2015), which is the sole Oregon decision cited by the district court in support of its decision. But even the district court did not claim that *Bernard* permits an employer to preemptively terminate an employee's ability to void a voidable non-competition agreement. The issue in *Bernard* was whether the plaintiff's former employer had intentionally interfered with her economic relations by threatening to enforce a voidable non-competition agreement that had not, at

the time of the threats, been voided. *Id.* at 712. The Oregon Court of Appeals concluded that the "plaintiff's failure to show that she took any steps to void the non-competition agreement precludes her claim for intentional interference" because the non-competition agreement "had not been voided at the time that defendant sought to invoke the contract" and thus "was valid and in effect." *Id.* at 719. The fact that the plaintiff could not *retroactively* void the non-competition agreement says nothing about whether the employer could deprive her of the ability to do so *in the future*.

Confronted with an issue of state law on which there is scant—if any—guidance, the district court should not have fashioned its own deadline out of whole cloth. As the Supreme Court has emphasized since *Erie Railroad Co.* v. *Tompkins*, state law should develop through "the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court)." 304 U.S. 64, 79 (1938) (citations omitted).

Because the Oregon Supreme Court has not addressed the circumstances under which the right to void a non-competition agreement might be terminated, the district court's role was "to predict how the state high court would resolve it." *Albano* v. *Shea Homes Ltd. P'ship*, 634 F.3d 524,

530 (9th Cir. 2011) (citations omitted). But that does not mean the district court was free to adopt a broad new interpretation of Oregon law that would deprive employees of the right to void post-employment non-competition agreements even on the first business day after their employment relationship ended.

"Although a federal court exercising diversity jurisdiction is 'at liberty to predict the future course of [a state's] law,' plaintiffs choosing 'the federal forum ... [are] not entitled to trailblazing initiatives under [state law].'" *Cervantes* v. *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011) (quoting *Ed Peters Jewelry Co.* v. *C & J Jewelry Co.*, 124 F.3d 252, 262–63 (1st Cir. 1997)) (alterations in original); *see also*, *e.g.*, *Doe* v. *City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004) ("A litigant who wants an adventurous interpretation of state law should sue in state court … rather than ask us to declare such an interpretation to be the law of [the state]."). That is sufficient, without more, for this Court to conclude that the district court erred in its interpretation of Oregon law.

2. Even If State Law Imposed A Deadline For Voiding A Non-Competition Agreement, That Deadline Would Not Have Lapsed Here.

The district court believed that, in *Bernard*, the Oregon Court of Appeals had "'strongly suggest[ed]'" that ORS 653.295 "'require[s] a plaintiff to void a non-competition agreement prior to the defendant's effort to enforce the agreement.'" 1-ER-16 (quoting *Brinton*, 248 F. Supp. 3d at 1035). For the reasons discussed above, this interpretation overreads *Bernard* as imposing a deadline the Oregon Court of Appeals never suggested. But even if *Bernard* could be read as suggesting a deadline for terminating a non-competition agreement, there is no basis for concluding that the deadline would have expired here—where Barba and Monahan attempted to void the non-competition agreements on the first day after their employment with Millennium ended, and before they had engaged in any competition that otherwise might have violated the agreements.

The issue of voidable contracts is addressed in Section 7 of the Restatement (Second) of Contracts and further addressed in Section 381 of the Restatement. *See Bernard*, 270 Or. App. at 718 (relying on Section 7 of the Restatement). Under Section 381, a party loses its right to avoid a

contract if "he does not within a reasonable time manifest to the other party his intention to avoid it." Rest. (Second) of Contracts § 381(1)–(2) (1981). Section 381(3) identifies the following circumstances as relevant to what constitutes a "reasonable time":

> (a) the extent to which the delay enabled or might have enabled the party with the power of avoidance to speculate at the other party's risk;
>
> (b) the extent to which the delay resulted or might have resulted in justifiable reliance by the other party or by third persons;
>
> (c) the extent to which the ground for avoidance was the result of any fault by either party; and
>
> (d) the extent to which the other party's conduct contributed to the delay.

Id. § 381(3). The commentary to Section 381 further clarifies that "what time is reasonable depends on all the circumstances, including the extent to which the delay was or was likely to be prejudicial to the other party or to third persons." *Id.* § 381 cmt. a.

The Restatement's focus on "prejudic[e] to the other party," as well as the related issues of "speculat[ion]" and "justifiable reliance," provide a clear rule here: An individual loses the ability to void a non-competition agreement by violating the agreement before attempting to void it. This rule is consistent with *Bernard*'s recognition that an individual cannot

retroactively attempt to void a non-competition agreement. And it comports with the only previous decision—*Brinton*—to address this issue.

In *Brinton*, the district court concluded that a former employee could not void an illegal non-competition agreement retroactively after he had already begun competing in violation of the terms of the agreement. and after the employer sought to enforce the agreements. 248 F. Supp. 3d at 1035 ("Here, because Mr. Searle expressed his intent to void the non-competition agreement only after Brinton sought to enforce it and once Mr. Searle had already been competing against Brinton for five months, Mr. Searle did not validly void the agreement."). But that conclusion is irrelevant here because Barba and Monahan attempted to void their non-competition agreements immediately upon entering post-employment status and before agreeing to or starting employment that otherwise might have violated those agreements or triggered an enforcement effort. In other words, both stated conditions of the Brinton ruling were literally impossible for Millennium to satisfy at the time that Barba and Monahan voided their agreements.

3. The District Court's Approach Would Impermissibly Allow Employers To Eliminate Their Employees' Statutory Rights.

The district court's determination that Barba and Monahan lost their ability to void the non-competition agreements is not just novel, but directly confounds the protective purpose of the statutory scheme. Barba and Monahan attempted to void the post-employment covenants on the first business day after they left Millennium and before they had accepted employment with Nepenthe. The only basis for concluding that those attempts were ineffective is the unilateral decision by Millennium to preemptively threaten them with legal action for possible future violations of illegal non-competition agreements, which the district court regarded as "an effort to enforce" the agreements that "forestalled" voiding them. 1-ER-16. But Millennium made those threats on the day following Barba's and Monahan's two-week resignation notices—while they were still employed by Millennium and thus could not have been in violation of the post-employment agreements. There was nothing to "enforce" at the time of the employer notice because the agreements go into effect—by their terms—only "following Employee's termination of employment with Employer." 1-ER-6.

Following the logic of the district court's decision, an employer can "forestall" any voiding attempts with a penstroke or keystroke, by sending broad and baseless email threats during employment or as soon as an employee submits a resignation notice or is terminated. This would be true even if the employers were seeking to enforce unenforceable agreements, whether because they were entered inappropriately or because they were required from employees who the Oregon legislature determined by statute cannot be subject to such agreements.[4]

According to Millennium, employees must seek to void non-competition agreements unlawfully required by employers *before* their employment ends. *See* D.E. 11-1, at 13. But there is no policy justification—let alone basis in Oregon law—for this approach.

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[4] Under ORS 653.295(1)(b), a noncompetition agreement is voidable and unenforceable unless the employee is an administrative, executive, or professional employee. The district court's ruling would allow an employer to enforce an illegal noncompetition agreement not only against outside salespersons such as Barba and Monahan, but also against a variety of low level employees whom the legislature clearly intended to protect from noncompetes. Similarly, the district court's opinion would give employers a path for avoiding ORS 653.295(1)(d)'s prohibition on requiring noncompetition agreements from employees who make less than the median family income for a four-person family.

Barba's and Monahan's decision to void the non-competition agreement on the first day after their employment relationship with Millennium ended was no more likely to create "prejudic[e] to the other party," "speculat[ion]," or "justifiable reliance" than if they had done so while still employed and before the note upon which the district court relies as seeking to enforce the agreement.[5] Indeed, the district court cited no prejudice to Millennium by the timing of the voiding notices. *See generally* 1-ER-3–24. After receiving the voiding notices, if Millennium had a legitimate position to claim that the agreements were not voidable, it could have brought an action to determine their enforceability immediately upon receiving the notice and before Barba and Monahan started competitive work. Instead, Millennium waited approximately six weeks to do so.

[5] The uncontested testimony was that, immediately after Appellants provided two-weeks' notices of resignation, Millennium instructed them to stop selling and shut them out of its information systems. *See* 3-ER-332:18–24. As a result, there would have been no possible prejudice to Millennium if they had included with their resignation notice a notice that they were voiding the noncompetition agreements (or, as they did, providing that notice on the first business day after their employment ended).

Moreover, Millennium's proposed approach would risk eliminating employees' rights to void non-competition agreements altogether. Millennium has acknowledged that it would have fired Barba and Monahan if they had attempted to void the non-competition agreements while still employed. *See* 3-ER-289:15–17. ORS 653.295's employee protections would be meaningless if the employee could invoke the right to void a voidable non-competition agreement only at the expense of being fired.

Nor does it matter that other employees in Barba's and Monahan's position could similarly void other voidable non-competition agreements. In advancing this argument previously, Millennium overlooks that the issue of voidability arose only because it violated the law in unlawfully requiring Barba and Monahan to sign the non-competition agreements, despite having a staffed human resources department and in-house counsel that should have known the law. *See* 3-ER-281:14-25. That does not mean that an employee could wait indefinitely even while competing in violation of a voidable non-competition agreement; the right to void does not apply retroactively to excuse previous violations. Barba and Monahan are therefore not attempting to transform illegal non-competition agreements from "voidable" into "void." But Millennium's protest that

Barba's and Monahan's position would give too much power to employees ignores that ORS 653.295 was designed to allow employees to avoid being bound by illegal non-competition agreements. Moreover, the law was not designed to afford employers the ability to cover the tracks of their own malfeasance. Because the district court's approach would allow employers to strip employees of their rights altogether, this Court should reject its approach.

CONCLUSION

For the foregoing reasons, the district court's injunction enforcing the non-competition agreements should be reversed.

Respectfully submitted,

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Dated: May 14, 2021

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5004 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), as incorporated by Federal Rule of Appellate Procedure 32(c)(2), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

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