IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LITIGATION MANAGEMENT, INC.	)	**CASE NO: CV 08 655349**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs		
	)	
JEAN C. BOURGEOIS, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

The plaintiff's complaint includes: causes of action against eight of the nine remaining individual defendants for breach of separate covenants not to compete; causes of action against all nine individual defendants for breach of separate non-solicitation contracts; and causes of action against all individual defendants for breach of confidentiality agreements. These claims, with additional causes of action for tortious interference with contractual relations (against defendants Bourgeois and Excelas only) and misappropriation of trade secrets (against all defendants), were tried to a jury from April 12 through April 20, 2010.

Whether a covenant not to compete is valid and enforceable is an issue for the court to decide.[1] If it is valid and enforceable, it is for a jury to decide the issues of breach, causation, and damages. Therefore, the question of enforceability was tried to the court at the same time as the jury heard all the evidence. The evidence is closed and this entry follows, but prior to instructions and closing arguments to the jury.

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[1] *UZ Engineered Prod. Co. v. Midwest Motor Supply Co.*, 147 Ohio App.3d, 382, 2001-Ohio-8779, at ¶33.

Each individual defendant, except Bourgeois, worked as a medical analyst for the plaintiff. Bourgeois worked in the management of LMI, serving as chief operating officer before her termination in May, 2003. All defendants signed a "non-competition and non-solicitation agreement." The terms of the agreements varied slightly depending on the date of the contract. The relevant provisions of the earlier agreements are as follows:

NON-COMPETITION AND NON-SOLICITATION AGREEMENT

***

. . ., THE PARTIES agree to the following:

1. Non-Competition

1.1 While in the employ of LMI and for a period of twelve (12) months subsequent to such employment, the Employee shall not, within LMI's market,

a) Directly or indirectly engage in business or compete in LMI's market in any manner whatsoever; or

b) Accept employment, render services to, or accept compensation of any kind from any person, firm or corporation that competes, directly or indirectly, in LMI's market.

2. Non-Solicitation

2.1 During the employment with LMI and for a period of twenty-four (24) months subsequent to such employment, Employee shall not solicit or attempt to solicit, directly or indirectly by any means, on Employee's own behalf or on behalf of others, for the purpose of directly or indirectly competing in LMI's market, the following:

a) Any of LMI's past, present or prospective clients while Employee was employed by LMI; and

b) Any of LMI's employees and/or independent contractors who have access to LMI's trade secrets, which include, but are not limited to, identities of clients, client lists, patient medical records, LMI Medical Summary Manual, LMI teaching tools, LMI software or software design, the prices at which LMI sells or has sold its products and services, bidding

information, staffing information, and any other information concerning the business of LMI.

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5. Definitions

5.1 Throughout this agreement, the following definitions apply.

a) "LMI's market" is defined as those clients who have participated or who will participate as parties in litigation in the various federal and state courts of the United States.

b) "Clients" is defined as purchasers or potential purchasers of the medically-oriented support services and/or other related services and/or goods offered by LMI.

c) "LMI" includes Litigation Management, Inc. and its affiliates.

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This earlier version of the agreement was signed by defendants Bourgeois, Streicher, Golladay, Walcer, McNicholas and Fisher.[2]

The later agreement contains the following relevant provisions:

NON-COMPETITION AND NON-SOLICITATION AGREEMENT

***

. . ., Employee hereby acknowledges and agrees with the Company as follows:

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2. Covenant Against Competition

During the term of Employee's employment with the Company and for a period of 12 months from the voluntary or involuntary termination of Employee's employment with the Company for any reason whatsoever, Employee (a) will not, directly or indirectly, own, manage, operate, control, be employed by, perform services for, consult with, solicit business for, participate in, or be connected with

[2] Trial exhibits 2, 5, 7, 11, 13 and 18.

the ownership, management, operation, or control of any business which performs services materially similar to or competitive with those provided by the Company, in the Greater Cleveland Metropolitan Area. In addition, it is specifically understood that employee will not for a period of 12 months, directly or indirectly, own, manage, operate, control, be employed by, perform services for, consult with, solicit business for, participate in, or be connected with the ownership, management, operation, or control of Medical Research Consultants, Inc., FirmLogic Limited Partnership, The Medical Resource Network, Inc., or LBS Associates, Inc.

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4. Non-solicitation of Employees

During the term of Employee's employment with the Company and for a period of 24 months from the voluntary or involuntary termination of Employee's employment with the Company for any reason whatsoever, Employee shall not, either on her or his own account or for any person, firm, partnership, corporation, or other entity (a) solicit, interfere with, or endeavor to cause any employee or consultant of the Company to leave his or her employment, or (b) induce or attempt to induce any such employee or consultant to breach her or his employment or consulting agreement with the Company.

5. Non-solicitation of Clients, Business Associates, etc.

During the term of Employee's employment with the Company and for a period of 24 months from the voluntary or involuntary termination of Employee's employment with the Company for any reason whatsoever, Employee shall not, either on her or his own account or for any person, firm, partnership, corporation, or other entity take any action or perform any services which are similar to the actions taken or services performed by Employee for the Company during said time which actions or services are designed to, or in fact call upon, compete for, solicit, divert, or take away, or attempt to divert or take away, any of the clients, business associates, endorsers or advertisers of the Corporation.

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This form of the contract was agreed to by defendants Golladay, Maxwell, Brunn and Shifman.[3]

[3] Trial exhibits 9, 16, 22 and 24. Golladay signed a second agreement after returning to LMI. Shifman's contract, exhibit 24, is in slightly different form in that the term "Company" is replaced by the term "LMI."

The Cuyahoga County Court of Appeals has recently summarized the enforceability of covenants not to compete as follows:[4]

> In Ohio, noncompetition and nonsolicitation agreements that are reasonable are enforced, and those that are unreasonable are "enforced to the extent necessary to protect an employer's legitimate interests." *Raimonde*, 42 Ohio St.2d 21, at paragraph one of the syllabus. In *Raimonde*, the Ohio Supreme Court held that "[a] covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." *Id.*, paragraph two of the syllabus.
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> In determining whether restrictive covenants should be enforced, the facts of each case are paramount. *Id.* at 26. The Supreme Court also made it clear that "[c]ourts are empowered to modify or amend employment agreements to achieve" a reasonable covenant between the parties. *Id.* In doing so, courts should consider the following factors:
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> "'[T]he absence or presence of limitations as to time and space, * * * whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment.'" *Id.* at 25, quoting *Extine v. Williamson Midwest* (1964), 176 Ohio St. 403, 406.
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> In *Basicomputer Corp. v. Scott* (N.D.Ohio 1991), 791 F.Supp. 1280, 1281, fn. 1, the court pointed out:
>
> "[T]he public and some courts continue to perceive covenants not to compete as suspicious in the eyes of the law. Nevertheless, an exhaustive review of contemporary case law on this subject reveals that while courts continue to express reservations regarding the validity of non-competition covenants, such reservations have little impact in practice. In fact, perhaps cognizant of this unintentional yet understandable paradox, the Ohio Supreme Court * * * expressed that it is 'entirely proper for a trial court to enjoin an employee who breached a covenant not to compete. * * *' *Rogers v. Runfola & Associates, Inc.*, 57 Ohio St.3d 5, 9, 565 N.E.2d 540 (1991)."

[4] *Century Business Servs., Inc. v. Urban*, 179 Ohio App.3d 111, 2008-Ohio-5744, ¶12-17.

> Moreover, preserving the sanctity of contractual relations and preventing unfair competition have traditionally been in the public interest. *UZ Engineered Prod. Co. v. Midwest Motor Supply Co., Inc.* (2001), 147 Ohio App.3d 382, 397.

These same considerations apply to the enforcement of a non-solicitation agreement.[5]

The essence of the plaintiff's argument in this case is that Excelas competed for LMI's business by taking a cadre of LMI's trained medical analysts and setting up a business almost literally across the street, thereby enabling Excelas to market itself as the functional equal of LMI but with lower prices. That scenario constitutes unfair competition that LMI has a right to protect against. However, the harm only occurs if a critical mass of former LMI analysts accretes at a new company. The likelihood of that happening decreases as the distance a new

Northeast Ohio. Most have family ties here and are middle-aged or older. Several have homes here. Some have other jobs or spouses with jobs. The chance of persuading a critical mass of them to relocate to another part of Ohio or beyond is remote. As a result, LMI's legitimate business interest will be protected, and the defendants who executed the first version of the non-compete will not be unduly restrained, by a geographical limitation on competition similar to that used in section 2 of the second version of the agreement.

As for the non-solicitation agreement, LMI's legitimate business interest is sufficiently protected by requiring employees to refrain from soliciting past and present clients. The limitation of section 2.01(a) of the earlier agreement on soliciting "prospective" clients is more than needed to protect against unfair competition.[6]

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[5] See, *e.g.*, discussion at *Busch v. Premier Integrated Med. Assoc., Ltd.*, 2003-Ohio-4709, 2d District App. No. 19369, at ¶33 *et seq.*, where the court considered the reasonableness of a non-solicitation provision.

[6] LMI seems to have recognized this by changing the restriction in the later version of the non-solicitation provision.

Therefore, having considered the evidence in this case, the court finds that the non-competition and non-solicitation agreements are reasonable, and therefore enforceable, with the exceptions that section 1 of the earlier contract's restriction from competition "in LMI's market" as that term is defined is greater than required for the protection of the plaintiff, and the portion of that same version at section 2.01(a) prohibiting solicitation of "prospective" clients is unreasonably broad.

Those sections are subject to reformation by the court. Section 1 of Exhibits 2, 5, 7, 11, 13 and 18 is amended to adopt the language from section 2 of Exhibits 9, 16, 22 and 24, so that it reads as follows:

> Non-Competition
>
> 1.01 While in the employ of LMI and for a period of twelve (12) months subsequent to such employment, the Employee shall not directly or indirectly, own, manage, operate, control, be employed by, perform services for, consult with, solicit business for, participate in, or be connected with the ownership, management, operation, or control of any business which performs services materially similar to or competitive with those provided by the Company, in the Greater Cleveland Metropolitan Area.

Section 2.01(a) of Exhibits 2, 5, 7, 11, 13 and 18 is amended by the court to strike the word "prospective" and Section 5.01(b) is amended to strike the words "or potential purchasers."

The contracts are enforceable as amended. The jury will be instructed accordingly and will decide the factual issues of breach, causation, and damages.

IT IS SO ORDERED:

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Judge John P. O'Donnell Date

SERVICE

A copy of this Journal Entry was sent by e-mail, this 21st day of April, 2010, to the following:

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Judge John P. O'Donnell