IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LUMENATE, LP	)	**CASE NO. CV 13 815919**
	)	
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiff,	)	
	)	**JUDGMENT ENTRY GRANTING THE PLAINTIFF'S MOTIONS TO SHOW CAUSE AND FINDING DEFENDANTS D. WILLIAM CURRIER AND KEITH SCHIFANO IN CONTEMPT OF COURT**
vs.	)	
	)	
D. WILLIAM CURRIER, *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

This is a lawsuit by Lumenate, LP against two of its former employees, defendants D. William Currier and Keith L. Schifano, and their new employer, defendant MCPc, Inc., alleging violations of non-compete and non-solicitation agreements, misappropriation of trade secrets and tortious interference with contractual and business relations.

Currier and Schifano were veteran employees of Data Processing Sciences Corporation. Lumenate bought the assets of DPS in mid-2013. Those assets included written non-compete and non-solicitation agreements by Currier and Schifano. Currier and Schifano each worked for Lumenate for a short time after the asset sale, but soon went to work for a competitor of Lumenate, defendant MCPc, Inc., giving rise to this lawsuit.

The complaint was filed on October 22, 2013, and a settlement was reached a few weeks later on November 12. The terms of the settlement remained confidential, but the fact of settlement was journalized through a consent judgment entry filed on November 15, 2013.

The consent judgment and the motions to show cause

The consent judgment entry required two things of the defendants. First, it prohibited Currier and Schifano from communicating with certain of the plaintiff's customers, identified in an exhibit to the settlement agreement, until after the end of February 2014. Second, it ordered them to immediately return to Lumenate all documents and other information relating "in any way to the work performed by" them for Lumenate. The information the defendants had to return specifically encompassed any documents and electronic files that refer to "customers, contracts or other business" of Lumenate. The consent entry ends by noting that "Currier and Schifano shall retain no copies" of such information.

On February 4, 2014, Lumenate filed a motion for Currier to show cause why he should not be held in contempt for violating the terms of the consent judgment, and then on February 7 the plaintiff filed a similar motion alleging Schifano had also violated the prohibition against communicating with the customers on the no-contact list. After the motions were fully briefed an evidentiary hearing was held on June 3, 2014, and this entry follows.

The violations alleged prior to the hearing

Among the former customers named on the no-contact list are Cisco Systems, Inc., Cliffs Natural Resources, and Windstream Communications. In the first motion to show cause, Lumenate claimed that on January 29, 2014, an email came to it sent to Currier's former DPS email address from Cisco Systems. The email noted that a quote submitted to Cisco by Currier on behalf of Cliffs was approved on January 26 and was good until July 26. The email was also sent to Currier's new email address at MCPc. According to Lumenate, the kind of quote approval given in Cisco's email would only be sent in response to an outside inquiry. In other words, the quote was sent as a follow up to a communication by Currier to Cisco.

For the second motion, on February 5, 2014, Lumenate got an email from Windstream sent to Schifano at his old DPS address. The email referred to the rescheduling of a weekly meeting to discuss the remaining work on the RSA Integration project. RSA Integration is a project that Schifano worked on at DPS and the email led Lumenate to conclude that he was still working on it at MCPc.

The defendants opposed the motions to show cause on the basis that they did not do anything to trigger the emails from third parties and that the emails themselves do not demonstrate violations of the consent judgment.

The hearing evidence

Schifano and Currier testified at the hearing. Both of them admitted that, in connection with the settlement, they signed on November 12 affidavits of compliance that acknowledged the following:

> I have returned to Lumenate any and all documents, electronic files and/or other information, including copies thereof, which relate in any way to the work performed by me for DPS and/or Lumenate, including but not limited to those documents, electronic files or other information which contain, include, refer or relate to the customers, contracts or other business of DPS and/or Lumenate and I have neither retained any copies of the same nor disseminated any copies of the same to any person or entity.[1]

Despite these affidavits, both defendants admitted to having retained much of Lumenate's information.

Schifano testified that his retention of any Lumenate data was inadvertent. The information he kept included a "personal" contact list that had all of his business contacts, passwords from vendor sites, and a folder labeled "last day." That folder was, as its name suggests, created on his last day at Lumenate and contained email addresses of business contacts and a separate file called "customer stuff." He then put the folder on to his own computer.

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[1] Hearing exhibits 3 and 10, defendants' affidavits of compliance.

Schifano also kept "customer configuration" files on portable thumb drives, but never turned over for inspection a thumb drive he claims was used only by his wife.

Currier agreed that he too retained information in violation of the settlement and consent judgment. Like Schifano, he professed to not realizing he still had the information, including all his email contacts from Lumenate, and he also claimed that a Mac laptop was his wife's. He conceded that he had a folder called "work stuff" on his personal computer.

Both defendants also had contact with customers on the prohibited list. In January 2014 Schifano went to MCPc's national "kickoff" meeting. That meeting included a "customer facing event" where he saw representatives of some of the customers on the prohibited list, but he said the only communication he had with them was to advise of his noncompete restrictions. He acknowledged that he went to the meeting despite knowing of the likelihood that he would see some prohibited customers.

Currier admitted to communicating with Cisco representatives before the end of February 2014 but says that he did so only to arrange personal meetings for lunch. He also communicated with a representative of Eaton, another prohibited customer, concerning the fact that he could not do business with Eaton until March 1, 2014. Finally, he acknowledged that he has done business with, among others, Cliffs and Eaton since the end of February.

Robert Lance Fogarty is a licensed computer forensic examiner hired by Lumenate to look over and catalog the contents of desktop computers and their internal hard drives, a notebook computer and its hard drive, external hard drives, a digital video disc, and several thumb drives belonging to Schifano and Currier. His inspection consisted of a key word search limited to the dates between November 12, 2013 (the date of the settlement) and February 28, 2014 (the expiration of the no-contact agreement).

Fogarty found not only that the defendants still had copious amounts of Lumenate information, but they both tried to "cover their tracks" by deleting the data before Fogarty's forensic examination.

In particular, Schifano's desktop computer was produced for examination on March 10, 2014. Less than a week earlier, Schifano removed an existing 500 gigabyte drive and replaced it with a one terabyte drive. Moreover, just before the forensic examination, Schifano reformatted a hard drive that was previously used as an external backup for use as an internal backup drive. The effect of that process was to destroy evidence of the contents of that drive just prior to the reformatting.

The inspection of Schifano's thumb drives and his DVD made clear that he still possessed a significant amount of Lumenate information and had accessed much of the information after the settlement.

The same is true for Currier's devices. Currier maintained a complete copy of his DPS/Lumenate email contacts and emails on his Apple laptop and accessed those emails and attachments after leaving Lumenate up to mid-February 2014. He moved his "work stuff" folder to another device before he put it in his desktop's trash folder, and he then accessed it as late as February 11, 2014, after which he deleted it. He texted with contacts from at least three prohibited clients. Worse than that, on March 9, 2014 – the day before turning over his electronic devices for forensic examination – Currier wrote over an external Western Digital hard drive, thus making it impossible to view the data previously on the hard drive.

Contempt of court finding

Contempt is defined in general terms as disobedience of a court order. *State ex rel. Corn v. Russo*, 90 Ohio St. 3d 551, 554 (2001). To show contempt, it is necessary to establish a valid

court order, knowledge of the order, and a violation of it. *State ex rel. Petro v. Pure Tech Sys.*, 8th Dist. No. 101447, 2015-Ohio-1638, ¶68.

Based on all of the hearing evidence, the plaintiff has demonstrated beyond a reasonable doubt that Schifano and Currier both violated the consent judgment entry by keeping information they promised to return, having contacts with Lumenate's customers during the time the judgment prohibited those interactions, and destroying evidence that would have proved the extent of the defendants' violations of the consent judgment.

These acts constitute contempt even if the retention of the information was inadvertent, because intent to violate a court order is not an essential element of a contempt. *Windham Bank v. Tomaszczyk*, 27 Ohio St. 2d 55 (1971), syllabus 3. One of the purposes of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice. *Id.*, syllabus 2. The defendants' intentions are therefore important to deciding the gravity of the affront to the dignity of the court, and I find the violations were intentional because 1) both defendants accessed some of the prohibited information between the consent entry and the forensic examination and 2) Currier's contacts with customers were indisputably aimed at maintaining relationships for the purpose of starting actual sales efforts as soon as the "no-contact" period came to an end.

A court may wield its civil contempt powers for two separate and independent purposes: (1) to coerce the defendant into compliance with the court's order; and (2) to compensate the complainant for losses sustained. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. Alaska 2016). The explicit violations by Currier and Schifano amount, at a minimum, to a civil contempt of court, and since the injunction expired well before the hearing and while the plaintiff undertook discovery to support the motions to show cause, coercing Currier and

Schifano into complying with the order is not an achievable remedy, leaving Lumenate's request for compensatory damages as the only available civil sanction for the defendants' contempt.

But the effect of the defendants' conduct in disobeying the order goes beyond any damages Lumenate may have incurred. Even if Lumenate suffered no losses because of what the defendants did, some form of punishment is warranted because they 1) signed the affidavits of compliance knowing they weren't true at the time, 2) freely accessed prohibited information during and after the no-contact period, 3) flouted the order publicly and privately by meeting and conversing with prohibited contacts, and 4) brazenly spoliated evidence before turning over their electronic devices for forensic examination. In summary, Currier and Schifano afforded no respect to the court's order, treated it as trivial, and then gambled that Lumenate wouldn't be dogged enough to uncover their efforts to destroy the evidence of their contempt. For that the defendants deserve to be punished.

Sanctions

Civil contempt

There is not sufficient record evidence to ascertain the compensation due to Lumenate from Currier and Schifano for their failure to obey the consent judgment. The likely components of those damages are the value to Lumenate of any business it lost because of the defendants' violations and the plaintiff's expense, including attorneys' fees, in uncovering and prosecuting the contempt. An attorney status conference has been set by a separate entry to discuss the timing of additional discovery and scheduling an evidentiary hearing on Lumenate's damages.

Criminal contempt

Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *United States v. United Mine Workers*, 330

U.S. 258, 302 (1947). The flagrancy of the defendants' actions necessitates a punitive sanction, and each defendant is ordered to serve three consecutive days in the Cuyahoga County jail. The dates of those sentences will also be decided at the upcoming attorney conference.

IT IS SO ORDERED:

Judge John P O'Donnell

May 29, 2016
Date

SERVICE

A copy of this journal entry was sent by email on May 29, 2016, to the following:

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Judge John P. O'Donnell