

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Metro Nursing Services LLC

*

Plaintiff

*

v.

*

Case No. CAL06-18884

Helpmate Nursing Services Inc. *et al.*

*

Defendants

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* * * * *

MEMORANDUM OF LAW AND PROPOSED FINDINGS OF FACT

Plaintiff Metro Nursing Services LLC, by and through its attorneys, Angela E. Currie, Esq. and the Business & Technology Law Group, hereby submits this Memorandum of Law and Proposed Findings of Fact outlining the law in regarding to breach of duty of loyalty and misappropriation of trade secrets pursuant to this Court's oral request on September 27, 2007.

FINDINGS OF FACT

A. Count I - Breach of Duty of Loyalty:

1. Randall was a management employee and vice president of Metro Nursing.
 - a. Exhibit 7
 - b. Exhibit 8
 - c. Exhibit 9
 - d. Transcript H-109-110
2. As an employee, especially a management employee, Randall had a duty of care and loyalty to Metro in that he was to act solely for the benefit of his employer in all matters within the scope of his employment.

3. Randall formed a competitive company while still employed by Metro.
 - a. Exhibit 2
 - b. Exhibit 3
 - c. Exhibit 5
 - d. Transcript H-24
4. Randall conducted business which was in competition with Metro during the time he was employed by Metro.
 - a. Exhibit 5
 - b. Exhibit 11
 - c. Exhibit 12
 - d. Exhibit 13
 - e. Exhibit 14
 - f. Transcript H-24
 - g. Transcript H-62
 - h. Transcript H-96
5. Randall breached his duty of loyalty and care to Metro.
6. Metro was damaged by Randall's breach of duty.
 - a. Transcript H- 137-138
7. During the period of time Randall worked for Metro he should not have conducted business related to a nurse staffing agency through Helpmate.
8. Helpmate made \$40,283 in 2005
 - a. Exhibit 4

9. Helpmate made \$284,576 in 2006, with \$246,588.74 being made prior to Randall's termination of employment with Metro.
 - a. Exhibit 4
 - b. Exhibit 11
 - c. Exhibit 12
 - d. Exhibit 13
 - e. Exhibit 14
10. All profits made by Helpmate during the time that Randall was employed by Metro should have been profit made by Metro.
11. Metro's profit margin is approximately 28%, therefore, damages are calculated at a total of \$80,324.09 for money received by Helpmate prior to Randall's termination.
 - a. Transcript H-140
12. Subsequent to Randall's termination from Metro he profited on business that he sought during the time he was employed by Metro. This business should have been contracted through Metro. Helpmate made a total of \$156,005.21 from clients that Metro should have been provided with the business opportunity.
 - a. Exhibit 11
 - b. Exhibit 12
 - c. Exhibit 13
 - d. Exhibit 14

13. Metro's profit margin is approximately 28% therefore, damages are calculated at a total of \$43,681.46 for money received by Helpmate from Metro's clients subsequent to Randall's termination.

B. Count II - Conversion

1. Randall had access to and possession of a laptop, nurse scheduling software and billing software ("Property") belonging to Metro immediately prior to his termination from Metro.
 - a. Transcript H-35
 - b. Transcript H-116-119
 - c. Transcript H-122
2. Randall failed to return Metro's Property upon his termination and after subsequent demand from Metro for the return of the Property.
 - a. Transcript H-119
3. Randall retained and continued to use Metro's Property, without permission or justification for the benefit of Helpmate.
4. Metro was damaged in the amount of \$2,129, which was the cost of the unreturned laptop.
 - a. Exhibit 17
5. Metro was damaged in the amount of \$2,863.80, which constitutes the cost of one license for the Nurse Scheduling Software.
 - a. Exhibit 18
6. Metro was damaged in the amount of \$3,077.00, which constitutes the cost of one license for the Vision Point 10 billing software.
 - a. Exhibit 19

C. Count III - Misappropriation of Trade Secrets:

1. Metro's customer and nurse lists are trade secret information belonging to Metro.
 - a. They have independent economic value.
 - i. Transcript H-127-128
 - b. Metro expended substantial effort in developing the lists over the years.
 - i. Transcript H-127-130, H-134-137
 - c. The lists were not known to those employees at Metro who did not need to have the information.
 - i. Transcript H-109-112
2. Randall acquired these lists through his employment with Metro and, without right to do so, improperly used and disclosed the lists for his own benefit and for the benefit of Helpmate.
 - a. Transcript H-109-112
 - b. Transcript H-35
 - c. Transcript H-22-23
3. Defendants' use of said trade secrets has caused Metro to suffer damages in the amount of at least \$100,000.
 - a. Transcript H-128

C. Count IV - Concealment

1. Randall was a manager and vice president of Metro beginning in 2003.
 - a. Exhibit 7
 - b. Exhibit 8
 - c. Exhibit 9

d. Transcript H-109-110

2. Randall had a duty to disclose his formation of, and his conducting business through, Helpmate during the time he was employed with Metro.

3. Randall failed to disclose his affiliation with Helpmate, and such information was a material fact that should have been disclosed to Metro.

a. H-119

4. Randall knew Metro would have terminated his employment, or at least restricted the information that Randall had access to, had Randall disclosed his relationship and employment with Helpmate.

5. Metro acted justifiably.

6. Metro was damaged as a result of Randall's failure to disclose the existence of, and his relationship with, Helpmate.

7. During the period of time Randall worked for Metro he should not have conducted business related to a nurse staffing agency through Helpmate.

8. Helpmate made \$40,283 in 2005

a. Exhibit 4

9. Helpmate made \$284,576 in 2006, with \$246,588.74 being made prior to Randall's termination of employment with Metro.

a. Exhibit 4

b. Exhibit 11

c. Exhibit 12

d. Exhibit 13

e. Exhibit 14

10. All profits made by Helpmate during the time that Randall was employed by Metro should have been profit made by Metro.

11. Metro's profit margin is approximately 28%, therefore, damages are calculated at a total of \$80,324.09 for money received by Helpmate prior to Randall's termination.

a. Transcript H-140

12. Subsequent to Randall's termination from Metro he profited on business that he sought during the time he was employed by Metro. This business should have been contracted through Metro. Helpmate made a total of \$156,005.21 from clients that Metro should have been provided with the business opportunity.

a. Exhibit 11

b. Exhibit 12

c. Exhibit 13

d. Exhibit 14

13. Metro's profit margin is approximately 28% therefore, damages are calculated at a total of \$43,681.46 for money received by Helpmate from Metro's clients subsequent to Randall's termination.

Memorandum of Law

Breach of Duty of Loyalty

"It is well established that in every employment relationship there is 'an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment, avoiding all conflicts between his duty to the employer and his own self-interest.'" *Dworkin v. Blumenthal*, 77 Md. App. 774, 779 (1989) (quoting, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 38 (1978)). However that may be, "absent

an enforceable covenant restricting competition, an employee may make arrangements to compete with his former employer before termination of his services, but he may not solicit customers or directly compete while still employed.” *Becker v. Bailey*, 268 Md. 93, 99 (1973). “An employee may not, however, actively solicit business in competition with his employer.” *Quality Systems Inc. v. Warman*, 132 F.Supp.2d 349, (D. Md. 2001); *see also Ritterpusch v. Lithographic Plate Service*, 208 Md. 592 (1956).

Under Maryland law, “every contract of employment [incorporates] an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment, avoiding all conflicts between his duty to the employer and his own self-interest.” *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 38 (1978); *see also King v. Bankerd*, 303 Md. 98 (1985). “[P]rior to his termination, an employee may not solicit for himself business which his position requires him to obtain for his employer. He must refrain from actively and directly competing with his employer for customers and employees, and must continue to exert his best efforts on behalf of his employer.” *Maryland Metals, Inc.*, 282 Md. at 38, 382 A.2d 564. Conduct “may rise to the level of a breach of an employee's fiduciary duty of loyalty ... where the employee has committed some fraudulent, unfair, or wrongful act in the course of preparing to compete in the future.” *Id.* at 40, 382 A.2d 564. “Solicitation of [the] employer's customers prior to cessation of employment ... [and] usurpation of [the] employer's business opportunity” are examples of such misconduct. *Id.* “[C]ourts have not hesitated to condemn as a breach of fidelity the act of an employee who seeks to take advantage of his knowledge of future business opportunities of his employer....” *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 369 (1962).

Randall's admitted actions while an employee of Metro are clearly in violation of his duties as set forth by the Maryland courts. During the trial there was a dispute as to whether Randall was a vice president of Metro or whether he was merely a management employee. Randall alleges he was no more than an employee, even though he executed numerous documents as a manager and vice president, and had business cards stating he was a vice president. Charles Randall stated during his testimony that he never personally signed any document that said he was a manager and vice president.

Transcript p. H-13. When confronted with letters executed by Randall as a manager and/or vice president he admitted he had executed those documents. *Transcript p. H-17.* He then went on to try to make this court believe he never really was the manager or vice president, but that he merely made the titles up himself sometime in 2005, and that there was no actual authority behind the titles. *Transcript p. H-17.*

As evidenced by Exhibit 1 and testified to by Randall, Randall was convicted of Bank Fraud in December of 1997. *Transcript H-14, Exhibit 1.* Such conviction evidences his propensity to be untruthful. This conviction, along with numerous other "untruthful" statements by Randall, gives rise to questioning whose testimony is accurate regarding the allegations in this case.

The determination of whether Randall was the vice president of Metro, makes no difference as to the duty Randall owes to Metro. As Maryland courts have held on numerous occasions, Randall had a duty to his employer, and was prohibited from using his contacts and knowledge gained through Metro to compete with Metro at a time that he was still employed by Metro.

In October of 2004, Randall formed Helpmate Nursing Services, Inc. for the purpose of staffing nursing homes and private homes. *Exhibit 3.* In October 2005,

Helpmate was issued a Nursing Staffing Agency License. *Transcript H-24, Exhibit 2.* At one point during his testimony, Randall admitted the work to be performed by Helpmate under the Nursing Staffing License was in direct conflict with the work performed by Metro. *Transcript H-24.* In May of 2005, Helpmate opened a business checking account. *Exhibit 5.* In 2004, Helpmate placed an advertisement in the phone book under nursing staffing. *Transcript H- 62, 66.*

Kathleen Lewis testified to the fact that she was sent on private duty cases for Helpmate through Randall while he was still employed by Metro, and while she was still providing services to Metro. *Transcript H-96.*

Randall wants this Court to believe that Helpmate's business was not competitive with the services provided by Metro by claiming that Helpmate provided only residential care and that his was a service that Metro did not provide. Randall's credibility is highly questionable. This Court heard the testimony of two witnesses who contradicted Randall's testimony.

Sedgesman Haye, owner of Metro, testified to the fact that Metro placed nurses in private residential settings on a regular basis, equating to almost half of Metro's overall business. *Transcript H-101.* Kathleen Lewis also testified to the fact that she had worked on private duty cases in residential homes on behalf of Metro. *Transcript H-95, 98.*

Randall also wants this Court to believe that under Maryland law he was not prohibited from working for Helpmate from the time he left Metro's offices for the day until he returned to work the next day. Randall alleges he worked for Metro from 9AM to 5PM, and that any time after that was his own time, and that is when he would begin working for Helpmate. *Transcript H-33, H-58.* Randall, on behalf of Helpmate, executed

at least one contract with a client of Metro during the time Randall was still employed by Metro. *Exhibit 11-A, Contract with Washington Home*. Randall used his contacts and information gained while working for Metro to begin staffing other clients of Metro through Helpmate, both prior to and after his termination from Metro. The use of this information and the solicitation of Metro's customers prior to his cessation of employment amounts to the type of misconduct that Maryland courts have held are a violation of an employee's duty to his employer.

The facts set forth herein, along with other exhibits and testimony provided during the trial, evidence that Randall breached his duty of loyalty to Metro at a time when he was a manager and vice president of Metro, and that he caused damage to Metro at the same time Randall was profiting from his own misdeeds.

Misappropriation of Trade Secrets

Maryland's Uniform Trade Secrets Act defines trade secret as 'Trade Secret' meaning information, including a formula, pattern, compilation, program, device, method, technique or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Md.Com. Law Code Ann. § 11-1201(e)(1) & (2) (1990).

Whether there is a trade secret is a conclusion of law based upon the applicable facts. *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 556 (1966). "Although we are well aware that a customer list may constitute a trade secret, there are several factors which must be weighed in making that determination. Those factors are:

(1) the extent to which the information is known outside of [the employer's] business; (2) the extent to which it is known by employees and others involved in [the employer's] business; (3) the extent of measures taken by [the employer] to guard the secrecy of the information; (4) the value of the information to [the employer] and to his competitors; (5) the amount of effort or money expended by [the employer] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Space Aero Products Co.*, 238 Md. 105, 110 (1965).

Former employees may not disclose trade secret information, even if there is no duty specifically imposed on the employee by contract or restrictive covenant. *Tabs Associates Inc. v. Brohawn*, 59 Md. App. 330 (1984). There is a common law fiduciary duty not to misappropriate the trade secrets of another. *Space Aero Products Co.*, 238 Md. 105, 110 (1965).

Metro’s nurse and client lists are valuable trade secrets of the Plaintiff. Sedgeman Haye testified to the fact that Metro expended significant effort and resources to create the lists and that the lists cannot be easily reproduced. *Transcript H-129, H-134-137*. Metro spent approximately \$100,000 in time and effort over a period of 9 years to create the lists. *Transcript H-127-130, H-134-137*. Randall had access to all lists owned by Metro during the time he was a vice president and manager of Metro. *Transcript H-150*. Randall admits he gained and used a lot of information he learned from Metro to start and build Helpmate. *Transcript H-47*.

Randall misappropriated Metro’s nurse lists to create a list for use by Helpmate. A comparison of the two lists will show that Helpmate’s nurse list is substantially similar to Metro’s nurse list, which took Metro years to develop. *Exhibits 15-16*. Helpmate also

used the information it received from Metro related to Metro's customers to create relationships with, and get work from, Metro's clients. *Exhibits 11-14, Transcript H-47.*

The facts set forth herein, along with other exhibits and testimony provided during the trial, evidence that Randall misappropriated trade secret information belonging to Metro and used such information to create and run a competitive company, Helpmate.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2007, a copy of the Plaintiff's Memorandum of Law and Proposed Findings of Fact was sent by first-class mail, postage prepaid, along with a copy of this notice, to:

Leslie Silverman, Esq.
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