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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

DISTRIBUTOR MARKETING MANAGMENT, INC.  
Plaintiff

Case No: CV-17-879804

Judge: SHANNON M GALLAGHER

JOSEPH J. VISHEY, ET AL  
Defendant

**JOURNAL ENTRY**

89 DIS. W/PREJ - FINAL

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED 6/13/2018, IS GRANTED. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW. PLAINTIFFS' CLAIMS ARE DISMISSED WITH PREJUDICE. O.S.J. COURT COST ASSESSED TO THE PLAINTIFF(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

*Shannon M Gallagher* 9/10/18  
\_\_\_\_\_  
Judge Signature Date

2018 SEP 12 A 11:01  
CLERK OF COURTS  
CUYAHOGA COUNTY

**FILED**

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY

DISTRIBUTOR MARKETING )  
MANAGEMENT, INC., et al. )  
Plaintiffs, )  
vs. )  
JOSEPH J. VISHEY, et al. )  
Defendants, )

CASE NO. CV-17-879804

JUDGE SHANNON M. GALLAGHER

**JUDGMENT ENTRY AND OPINION**

***Shannon M. Gallagher, J.:***

This matter involves a dispute over a non-compete agreement entered into between Plaintiff Distributor Marketing Management, Inc. (DMM) and Defendant Joseph Vishey. Plaintiffs allege Mr. Vishey violated the non-compete agreement by establishing a competing company while still employed with DMM. DMM also alleges that Mr. Vishey stole information from DMM prior to leaving his employment, in violation of the Ohio Trade Secrets Act.

Defendants filed a motion for summary judgment on June 13, 2018, the motion has been fully briefed, and all evidence and legal arguments are before the court.<sup>1</sup>

For the reasons that follow, Defendants' motion for summary judgment is granted and Defendants are entitled to judgment as a matter of law as to Plaintiffs' claims for (1) Violations of Trade Secrets Statute, R.C. 1333.61, et seq.; (2) Unfair and illegal competition; (3) Conversion; (4) Intentional interference with contractual and business relationships; (5) Punitive

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<sup>1</sup> Defendants' initial motion for summary judgment did not address Plaintiffs' claim for spoliation of evidence. The court ordered additional briefing on this claim. On 8/30/2018, Plaintiffs filed a brief regarding spoliation of evidence. On 9/5/2017, Defendants filed a supplemental brief re: spoliation of evidence.

damages; (6) Permanent injunction to not compete with plaintiff, based upon non-compete agreement; and (7) Spoliation of Evidence.

### **I. Background Facts**

Defendant Joseph Vishey began working for Plaintiff Distributor Marketing Management, Inc. ("DMM") in May 1998 as a salesman. DMM's business focuses on direct mail marketing and incentive promotions for distributors/suppliers of plumbing, electrical, HVAC, and building materials. DMM is owned and operated by Plaintiff Loren George. In July 1998, Loren George presented Mr. Vishey with a Covenant Not to Compete, which Mr. Vishey signed.

In early January 2017, Mr. Vishey gave Mr. George notice that he would be leaving DMM. On Mr. George's request, Mr. Vishey sent an email to DMM customers, former customers, and friends advising of his departure. Mr. Vishey's last day at DMM was February 3, 2017.

Plaintiffs allege that while still employed with DMM, Mr. Vishey copied Plaintiff's proprietary information and established a new company, Defendant Supply Chain Direct, LLC, to directly compete with DMM. Plaintiffs had a program installed on all of DMM's computers called ACTIVTRAK. ACTIVTRAK takes a screenshot every 15 seconds. Through these photos, plaintiffs observed Mr. Vishey ordering business cards for Supply Chain Direct, filing for an EIN number with the IRS, researching how to start a new business, and copying DMM's files onto external drives. Plaintiffs allege that Mr. Vishey copied DMM's entire computer server prior to leaving DMM, in violation of Ohio's Trade Secrets Statute.

Plaintiffs state claims for (1) Violations of Trade Secrets Statute, R.C. 1333.61, et seq.; (2) Unfair and illegal competition; (3) Conversion; (4) Intentional interference with contractual

and business relationships; (5) Punitive damages; (6) Permanent injunction to not compete with plaintiff, based upon noncompete agreement; and (7) Spoliation of evidence. Defendants filed for summary judgment. That motion is fully briefed and the parties have submitted all evidence to the court.

## **II. Law and Analysis**

To prevail on a motion for summary judgment, the moving party must demonstrate that there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ. R. 56(C).

When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ. R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984).

### **a. Ohio Uniform Trade Secrets Act Preemption**

Plaintiff's claims for unfair and illegal competition, conversion, and intentional interference with contractual and business relationships are preempted by the Ohio Uniform Trade Secrets Act. Pursuant to R.C. 1333.67(A), the Trade Secrets Act displaces conflicting tort, restitutionary, and other laws of Ohio providing civil remedies for misappropriation of trade secrets.

Plaintiffs alleging theft or misuse of their ideas, data, or other commercially valuable information are confined to the single cause of action provided by the Ohio Uniform Trade Secrets Act. *Rogers Industrial Products, Inc. v. HF Rubber Machinery, Inc.*, 188 Ohio App. 3d 570, 2010-Ohio-3388, P29 (9<sup>th</sup> Dist.). Plaintiffs' tort claims are based on the same fact pattern

supporting Plaintiffs' claim for violation of the Trade Secrets Act. Accordingly, Plaintiffs' claims for unfair and illegal competition, conversion, and intentional interference with contractual and business relationships are dismissed pursuant to Ohio Uniform Trade Secrets Act preemption.

**b. Defendants are entitled to summary judgment on Plaintiffs' claim for misappropriation of trade secrets.**

To prove a claim for misappropriation of trade secrets pursuant to R.C. 1333.61, Plaintiffs must prove three elements: 1) the existence of a trade secret; 2) the acquisition of a trade secret as a result of a confidential relationship; and 3) the unauthorized use of a trade secret. Plaintiffs failed to show that there remain genuine issues of fact regarding the existence of a trade secret and the unauthorized use of a trade secret.

**i. Existence of trade secrets**

Defendants argue that any information that Mr. Vishey allegedly copied from DMM's servers does not constitute trade secrets.

Trade Secret is defined by R.C. 1333.61(D) as information that satisfies both of the following:

1. It derives 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.
2. It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Supreme Court of Ohio adopted six factors to consider in analyzing a trade secret claim:

1. the extent to which the information is known outside the business;
2. the extent to which it is known to those inside the business, i.e., by the employees;
3. the precautions taken by the holder of the trade secret to guard the secrecy of the information;

4. the savings effected and the value to the holder in having the information as against competitors;
5. the amount of effort or money expended in obtaining and developing the information; and
6. the amount of time and expense it would take for others to acquire and duplicate the information.

*State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St. 3d 513, 524-25, 1997-Ohio-75, 687 N.E.2d 661, citing *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588 (1983). No single factor of this test is dispositive.

### **1. DMM did not make reasonable efforts to maintain secrecy**

The possessor of a trade secret must take active steps to maintain the secrecy of the information. *Water Management v. Stayanchi*, 15 Ohio St.3d 83 (1984), paragraph one of the syllabus. For information stored on computer servers, Ohio Courts have found that reasonable efforts require, at a minimum, that computers be password-protected, that employee access to trade secret information be limited, and that the passwords remain safe-guarded. See *J. J. Orr & Assocs. v. Weinschenk*, 9<sup>th</sup> Dist. Wayne No. 04CA0041, 2004-Ohio-7188. *Chornyak & Assoc. v. Nadler*, 10<sup>th</sup> Dist. Franklin No. 08AP-380; 2008-Ohio-6681, P33; *Columbus Bookkeeping & Bus. Servs. v. Ohio State Bookkeeping, LLC*, 10<sup>th</sup> Dist. Franklin No. 11AP-227, 2011 Ohio App. LEXIS 5655 (Dec. 30, 2011).

It is undisputed that DMM's servers were not password protected. George Depo p. 19. Therefore, DMM did not take reasonable efforts to maintain the secrecy of the files kept within its servers. Any information that Mr. Vishey allegedly took from DMM's servers is not protected as a trade secret under the statute.

### **2. The information at issue was generally known and shared with the public and/or had no independent economic value.**

Plaintiffs allege that its logos, pictures, and artwork constitute trade secrets. However, it is undisputed that DMM representatives visiting customers would share artwork, product

information, and direct mailer examples with those customers. DMM poster artwork created for customers would be hung up at the customer's business location and seen by contractors and the public. George Depo p. 68. DMM work product made for or shared with DMM customers was never made the subject of a confidentiality agreement. Further, items that become a customer's property cannot be protected as trade secrets. See *Water Management v. Stayanchi*, 15 Ohio St.3d 83, 84 (1984).

Mr. Vishey avers in his affidavit that DMM's purchase orders have no economic value to him because his small company cannot obtain the same pricing as DMM, which has over 100 customers. Vishey Depo p. 74.

Plaintiffs argued that certain information was not generally known or shared, such as customer emails and pricing information on DMM purchase orders from its vendors. Even assuming that customer emails and pricing information was not generally known to the public, Plaintiffs failed to show that they used reasonable efforts to maintain secrecy of this information. The evidence shows that the information was readily available to all of DMM's employees. What's more, there is no evidence that Mr. Vishey used any of this information.

#### **ii. Use of Trade Secrets**

Plaintiffs have presented no evidence to show that there remains a genuine issue of material fact as to whether Mr. Vishey actually used any of the information that he allegedly had in his possession upon leaving his employment with DMM.

Mr. George testified at deposition that he had no evidence of Defendants' use of DMM purchase orders, promotional orders, customer information from the website We Invest Together, demographic information from a fee-based website Info USA, forms, pricing, formats, logos, pictures, customer email addresses, or customer lists. George Depo p. 70; 72; 79; 101.

Mr. George did testify that he thought defendants used DMM's format to design a flyer for Johnson Air Products. However, Mr. George admitted that the format for the flyer was not kept secret, but had been distributed to hundreds of Johnson Air Products' customers. George Depo p. 45-46. Therefore, this format is not protected by the trade secret statute, as discussed above.

Mr. Vishey did testify that he learned about the existence of certain companies – Johnson Air Products, Porter Pipe, Maumee Supply – from working at DMM, and used this knowledge to contact these companies. Vishey Depo p. 49-50. However, such information, like customer names and contact numbers, is readily accessible by other means and is therefore not protected by trade secret. See R.C. 1333.61(D)(1); *Cary Corp. v. Linder*, 8<sup>th</sup> Dist. No. 80589, 2002-Ohio-6483, P25-26. Mr. George testified that customers could be found through an internet search, George Depo p. 79. Customer websites are available through a membership with a trade organization or buying group. Vishey Affidavit P72-73. Moreover, Mr. Vishey testified that he knew most of DMM's customers from memory and had their contact information stored on his cell phone. Vishey Depo p. 77-78.

Plaintiffs infer that because Mr. Vishey had DMM's information, that he must have used it. George Depo p. 114. However, "conclusory statements as to trade secret factors without supporting factual evidence are insufficient to meet the burden of establishing trade secret status." *Block Communications, Inc. vs. Pounds*, 6th Dist. Lucas No. L-13-1224, 2015-Ohio-2679, P49, citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, 404, 2000-Ohio-207, 732 N.E.2d 373 (2000).

Plaintiffs emphasize in their briefing how Mr. Vishey established his new company on DMM's computer, while still employed with DMM, and during work hours. The sole fact that

Vishey may have acted inappropriately while still employed with DMM does not give rise to a cause of action for misappropriation of trade secrets. See *Orthofix, Inc. v. Hunter*, 55 F. Sup. 3d 1005 (N.D. Ohio 2014).

iii. **Damages**

Plaintiffs cannot prove damages proximately caused by Mr. Vishey's alleged misappropriation of trade secrets. Supply Chain Direct contracted with several companies after Mr. Vishey left DMM. Plaintiffs have failed to show that there is a genuine issue of fact remaining as to whether any of these companies would have contracted with DMM but for the actions of the Defendants.

First, Defendants contracted with Johnson Air Products. The president of Johnson Air averred in his affidavit that he chose not to do business with DMM due to a dispute over billing with Mr. George, and not because Mr. Vishey convinced him to do business with Supply Chain Direct instead.

Second, Defendants contracted with Central Supply Company. Central Supply's president averred in his affidavit that he would not have done business with Plaintiffs because DMM was working with a competitor of Central Supply.

Third, Defendants contracted with Maumee Supply. The transaction was limited to Supply Chain Direct purchasing steaks and reselling those steaks to Maumee. It is undisputed that DMM does not engage in this type of reselling business.

Finally, Plaintiffs allege that they suffered damages in the amount of \$1,206,037.50 arising from the theft of 160,805 active high resolution images. DMM values these images as \$35.00 each or \$7.50 each in bulk. DMM does not provide an explanation of the amount allegedly suffered in damages, nor does DMM present evidence that Defendants used any of these images in a way that caused DMM to lose business profits. As discussed above, these

images are not trade secrets because Plaintiffs failed to take reasonable steps to maintain the secrecy of these images.

Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claim for misappropriation of trade secrets in violation of R.C. 1333.61, et seq.

**c. The covenant not to compete is unreasonable and therefore unenforceable.**

Plaintiffs seek a permanent injunction prohibiting Defendants from competing with Plaintiffs; based upon the enforcement of a non-compete agreement. However, the Covenant not to Compete is unenforceable as it imposes unreasonable restrictions on Mr. Vishey.

In reviewing a covenant not to compete courts apply a rule of reasonableness. *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 25 (1975).

Among the factors properly to be considered are:

1. The absence or presence of limitations as to time and space;
2. Whether the employee represents the sole contact with the customer;
3. Whether the employee is possessed with confidential information or trade secrets;
4. Whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition;
5. Whether the covenant seeks to stifle the inherent skill and experience of the employee;
6. Whether the benefit to the employer is disproportional to the detriment to the employee;
7. Whether the covenant operates as a bar to the employee's sole means of support;
8. Whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and
9. Whether the forbidden employment is merely incidental to the main employment.

*Id.*, quoting *Extine v. Williamson Midwest, Inc.*, 176 Ohio St. 403, 200 N.E.2d 297 (1964), internal quotations omitted.

A covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it 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. Courts are empowered to modify or amend employment agreements to achieve such results. *Id.* at 25-26.

The Covenant not to Compete at issue here states:

In consideration of one dollar (\$1.00) and other valuable consideration, the receipt of which is hereby acknowledges (sic), Joe Vishey (herein after referred to as "employee"), shall not during the term of his employment with Distributor Marketing Management, Inc. (herein after referred to as "the Company"), and for a 2 year period immediately following the termination of his employment, regardless of who initiated the termination of employment, for himself or in behalf of any other person, firm, partnership, or corporation, engage in the business of advertising and promotions or engage in the designing or sale of advertising and promotions; nor will he directly or indirectly, for himself, or in behalf of, or in conjunction with, any other person, firm, or corporation, or partnership for purposes of selling advertising and promotions or other products similar to those manufactured or designed by the company or perform such other incidental business and service as the company then engages in; nor will the employee disclose to any person any of the secrets, methods, or systems used by company in and about its business.

In applying the above factors from *Raimonde*, DMM's Covenant not to Compete is not reasonable. The covenant contains no limitations as to space, and is a total ban on any employment in the field of advertising and promotion anywhere in the world, whether or not that employment competes with DMM. The covenant is written so broadly that it seeks to eliminate ordinary competition, rather than merely competition that would be unfair to DMM. The covenant would stifle Mr. Vishey's skill and experience and bar him from utilizing his sole means of support. Any benefit conferred to DMM through the covenant would be disproportional to the detriment to Mr. Vishey because he would be restricted from working in his field for two years after leaving DMM for any reason.

Although this court has authority to alter the Covenant, under the facts and circumstances of this case, altering the covenant is not warranted. During the pendency of this litigation, Defendants agreed to not do business with several companies that had allegedly done business

with DMM in the past.<sup>2</sup> Mr. Vishey averred in his affidavit that he has not engaged in the business of advertising and promotions since entering into this agreement, and instead has been supporting himself through bartending. Mr. Vishey should not be further prohibited from utilizing his sole means of support.

Accordingly, the Covenant not to Compete is unenforceable and Defendants are entitled to judgment as a matter of law as to Plaintiffs' claim for permanent injunction and any breach of contract claim that is being pursued.

**d. Spoliation of Evidence**

To recover on a claim for spoliation of evidence, a plaintiff must prove all of the following elements: "(1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts." *O'Brien v. City of Olmsted Falls*, 8<sup>th</sup> Dist. Cuyahoga App. Nos. 89966 and 90336, 2008-Ohio-2658, P17.

Plaintiffs advised in their brief regarding spoliation of evidence, filed 8/30/2018, that plaintiffs are not pursuing a separate cause of action for spoliation of evidence because DMM was able to reconstruct any data allegedly destroyed by Mr. Vishey. In order to pursue a claim for spoliation of evidence, the destroyed evidence must make it impossible for plaintiff to pursue a separate civil action. *Roesch v. Warren Distrib./Fleet Eng. Research*, 146 Ohio App. 3d 648, 2000-Ohio-2694, P8 (8<sup>th</sup> Dist.). Accordingly, defendants are entitled to judgment as a matter of law as to plaintiffs' claim for spoliation of evidence.

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<sup>2</sup> As discussed above, there is no evidence that any company has foregone business deals with DMM in order to contract with Supply Chain Direct.

**e. Punitive Damages**

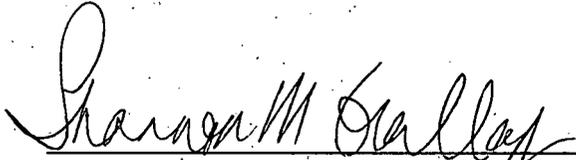
A party is entitled to punitive damages if actual damages have been proven and the actions of the defendant involve malice. *Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 2008-Ohio-2023, P21, 889 N.E.2d 181 (10<sup>th</sup> Dist.). As Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims, Plaintiffs are not entitled to punitive damages and this claim fails as a matter of law.

**III. Conclusion**

Defendants' motion for summary judgment, filed 6/13/2018, is granted. Defendants are entitled to judgment as a matter of law as to Plaintiffs' claims for (1) Violations of Trade Secrets Statute, R.C. 1333.61, et seq.; (2) Unfair and illegal competition; (3) Conversion; (4) Intentional interference with contractual and business relationships; (5) Punitive damages; (6) Permanent injunction to not compete with plaintiff, based upon non-compete agreement; and (7) Spoliation of Evidence.

**IT IS SO ORDERED.**

**Date: September 11, 2018**

  
SHANNON M. GALLAGHER, JUDGE