

13
STATE OF MINNESOTA

AUG 10 2010

DISTRICT COURT

COUNTY OF RAMSEY

By j f Deputy

SECOND JUDICIAL DISTRICT
CIVIL DIVISION - MONAHAN, J.

ST. JUDE MEDICAL, INC.,

COURT FILE NO: 62-CV-10-7436

PLAINTIFF,

v.

JOSEPH H. McCULLOUGH,

DEFENDANT.

ORDER

This matter was heard on 29 July 2010 by the Honorable M. Michael Monahan, District Court Judge, on Plaintiff's motion pursuant to Minn.R.Civ.P. 26 and 65 for: (a) a temporary restraining order; and (b) expedited discovery. Court Docket 6.

Edward F. Fox, Stanford P. Hill, and Laurel J. Pugh of Bassford Remele, P.A., appeared for Plaintiff ("St. Jude"). Mr. Fox argued.

William Z. Pentelovitch, Richard G. Wilson, and Wayne S. Moskowitz of Maslon, Edelman, Borman & Brand, LLP, appeared for Defendant. Mr. Pentelovitch argued.

Based on the entire record in this matter:

IT IS ORDERED that:

1. St. Jude's motion for a temporary restraining order is **GRANTED in part** as set forth in the following memorandum. Counsel shall submit an agreed upon form of temporary order, or, in the absence of agreement, each shall submit a suggested form of order, not later than 17 August 2010.
2. St. Jude's motion for expedited discovery is **GRANTED**.
3. This matter is continued to such later time as counsel may agree and the court approve for an evidentiary hearing on Plaintiff's request for a temporary injunction.

4. The following memorandum is a part of this order and constitutes the court's findings of fact and conclusions of law to the extent required by Minn.R.Civ.P. 52.01.

Dated: 10 August 2010.

A handwritten signature in black ink, appearing to read "M. M. Monahan", is written over a horizontal line.

M. Michael Monahan
District Court Judge

MEMORANDUM

FACTS

1. This is a breach of employment contract (the "Agreement") case, involving an attempt to enforce its non-competition and confidentiality provisions.

Parties & Others

2. St. Jude develops, manufactures, and sells sophisticated medical devices and related products worldwide. Among its competitors in the worldwide market for sophisticated medical devices and related products is Medtronic, Inc. ("Medtronic"). With respect to the worldwide market for "cardiovascular medical devices", Medtronic and St. Jude rank first and second respectively. In addition to their global commercial competitive relationship, Medtronic and St. Jude are well known to the global legal community for their energetic mutual litigation.

3. Prior to 10 May 2010, Defendant had been employed by St. Jude for 16 years. It is undisputed that he had reached the highest levels of St. Jude's management. He was one of two Group Presidents. Court Docket 7 at Ex. A. While the public announcement of his appointment as Group President indicates an effective date of January 2008, there is evidence suggesting that Defendant actually took up his new duties as early as October 2007. Court Docket 11 at ¶ 8. In any event, it is undisputed that, as one of two Group Presidents, Defendant reported directly to St. Jude's Chairman-President-CEO, Mr. Starks. Defendant's total direct compensation for the years 2007 and 2008 approximated \$1.87 million and \$2.36 million respectively. Court Docket 1 at Ex. B, p. 31. While there is a dispute about its current value and usefulness, it is undisputed that, as a Group President, Defendant had access to a significant quantity of high quality St. Jude confidential information. Court Docket 3 at p. 4; Court Docket 11 at ¶ 43.

The Agreement

4. The Agreement can be found at Court Docket 1, Ex. A.

5. At some point in the fall of 2007, Defendant executed the Agreement. Court Docket 11 at ¶ 16. Although Defendant had been an employee for approximately 14 years and was a Section 16 officer for some of those years, this was the first time that St. Jude had required Defendant to execute a contract containing a non-competition clause. Court Docket 11 at ¶ 9. The copy of the Agreement attached to the complaint has a typed and handwritten date of 2 October 2007. Nevertheless, Defendant alleges that he did not execute the Agreement until sometime after he had taken up his duties as Group President. Court Docket 11 at ¶ 11. Regardless of when he actually executed the Agreement, Defendant alleges that he executed the Agreement as a result of a misrepresentation of fact made to him at the time. Court Docket 11 at 9-12.

6. As this is a contract case, it may be helpful to set out the provisions of the Agreement which appear to me to be specifically relevant to this motion. They are:

1. Non-Competing. During the Restricted Period (as defined below), Employee shall not, directly or indirectly, either personally or through an agent, servant, employee, partner, representative, affiliate or other entity, without the prior written consent of [St. Jude],

a. **seek or accept employment with or render services to, or hold any ownership interest in, any other person or entity that competes in any sense in the design, development, manufacture, marketing or sale of any products, services or process for which Employee oversaw or participated in the design, development, manufacture, marketing or sale, or about which Employee acquires Confidential Information (as defined below) during Employee's employment with [St. Jude].**

b. render services to any person or entity where rendering services could be expected to require or involve Employee using or disclosing Confidential Information belonging to [St. Jude],

....

For the purposes of this Agreement, "Restricted Period" means the period beginning on the date of this Agreement and continuing through the one (1) year anniversary of Employee's termination of employment for any reason whether voluntary or involuntary.

....

5. Nondisclosure of Confidential Information. "Confidential Information" means any information or compilation of information which derives independent economic value 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. Examples of Confidential Information not to be disclosed or used except as permitted by [St. Jude] include, but are not limited to, information concerning [St. Jude]'s actual or potential management, financial condition, financial operations, purchasing activities, sales activities (including, without limitation, pricing practices and information), marketing activities or plans, plant construction and layout, lists or names of

vendors and other vendor information, costs of manufacturing and materials, legal matters, and strategic business plans.

Court Docket 1 at Ex. A (emphasis added). By quoting only these provisions, I do not intend to indicate that they are the only provisions relevant to this dispute. I recognize that others may become significant as the Agreement is subjected to the inevitable close reading. Based on the arguments made, I merely conclude that the highlighted clause is central to the resolution of this motion.

Promotion & Responsibilities

7. Sometime between 1 October 2007 and 1 January 2008, Defendant became one of two Group Presidents. St. Jude alleges that Defendant's duties involved "senior level responsibility for [St. Jude's] International Division in addition to new senior level responsibility for [its] U.S. Division . . . and for its Corporate Brand and Marketing functions". Court Docket 3 at p. 4. This description of Defendant's responsibilities does not come with a supporting cite to its evidentiary source. I have located a possible source. Court Docket 7, Ex. A. It is an e-mail from "Starks, Dan (Chairman & CEO)" sent to "#SJM_Global" on Sunday 7 October 2007 at 5:00 p.m. It states, in part:

Effective January 1, 2008, we are creating two new senior executive positions called Group Presidents. Each Group President will take over a portion of my current responsibilities for working with our division presidents to maximize the value of being 'all one company' without losing the value of the decentralized operating style that helps drive our success.

Joe McCullough and Mike Rousseau are among our most talented and experienced senior leaders. They both have outstanding records of leadership, success, and accountability and know the business of St. Jude Medical inside and out.

The Presidents of our U.S. Division and International Division, together with our new Vice President of Corporate Brand and Marketing, will report to Joe McCullough. This organizational structure will help align and strengthen the impact and cost effectiveness of our global customer programs. . . . Mike and Joe will work closely together and with the entire organization to deliver the best possible value to our customers in an environment characterized by the highest level of quality, ethics, innovation, teamwork, continuous improvement, and appropriate treatment of people.

8. Defendant does not dispute the description of the scope of his responsibilities as Group President. More tellingly, he does not suggest that his actual responsibilities were more limited.

9. I conclude that from October 2007 until October 2009, Defendant's professional life was spent at the heart of St. Jude's worldwide activities, second in importance and access only to Mr. Starks.

Defendant Retires

10. Apparently, Mr. Starks was not satisfied with the "value" St. Jude was obtaining from the new organizational structure group because on 26 October 2009, he announced:

Group President Joe McCullough, a member of the senior leadership team and an important part of St. Jude Medical's success over the past 15 years, has announced his retirement from the Company. As a result of Joe's retirement, we will restructure our division reporting structure effective November 1, 2009.

Court Docket 7 at Ex. D. The other Group President, Rousseau, was assigned the reporting relationship for the U. S. Division and for Corporate Brand and Marketing which had previously reported to Defendant. Mr. Starks re-established his direct reporting relationship with the balance of St. Jude's Division Presidents.

11. Defendant asserts that he was "terminated" by Mr. Starks. Court Docket 11 at ¶ 13. St. Jude does not seriously dispute this characterization, although it suggests that Defendant and Mr. Starks "agreed that it would be appropriate for [Defendant] to resign...". Court Docket 3 at p. 7. Evidently in modern corporate parlance, "terminate", "resign", and "retire" are synonyms, leaving the casual onlooker at a loss to know what actually occurred.

12. In the event, St. Jude and Defendant entered into a letter agreement, dated 5 January 2010, covering the terms of Defendant's "retirement" (the "Severance Agreement"). Court Docket 1 at Ex. C. The Severance Agreement, *inter alia*: (a) establishes Defendant's "retirement" date as 24 December 2010; (b) provides that he will remain an employee, but not an officer, until that date, unless earlier terminated; (c) provides for a salary at the retroactively reduced rate of \$500,000 per year through the "retirement" date; (d) states that Defendant's

duties will be assigned, from time to time, by Mr. Starks; and (e) permits Defendant to terminate his "employment" at any time without loss of salary. There are various other provisions relating to fringe benefits, bonus, and stock options that are not relevant to this motion.

13. St. Jude argues that Defendant reaffirmed the non-competition clause of the Agreement in the Severance Agreement. Court Docket 3 at p. 2. The only provision of the Severance Agreement that I have found that refers to the Agreement reads, in its entirety, as follows:

2. Non-Competition Agreement. Subject to the earlier termination of your employment with the Company, the effective date of your retirement will be December 24, 2010 for purposes of the Non-Competition Agreement with the Company dated October 2, 2007, *unless your employment is terminated earlier, in which case the non-competition agreement period commences on the date of actual termination of employment.*

Court Docket 1 at Ex. C. The italicized lines are handwritten. While it is difficult to say with certainty, the handwriting appears to be Defendant's rather than that of Ms. Krop, St. Jude's Vice-President and General Counsel, who is the other signatory. Given this language, I will not address St. Jude's re-affirm argument further.

Early Termination

14. On 10 May 2010, Defendant gave written notice that he was terminating his "relationship" with St. Jude. Court Docket 11 at ¶ 16. St. Jude alleges that Defendant also exercised various stock options resulting in a pre-tax gain of \$2.1 million and that Defendant received the balance of his \$500,000 "salary" as provided in the Severance Agreement. Neither party advances an explanation for Defendant's apparently abrupt decision to terminate the relationship, some 228 days before the expiration of the Agreement's non-competition clause.

Above at ¶ 13.

Return to Workforce

15. Without indicating when he did so, or indeed why, Defendant states that he "engaged an experienced employment lawyer, whom [he] selected and paid [himself] to advise [him] with respects to [his] rights to seek and accept employment, and [his] obligations to [St. Jude], under

[his] agreements with [St. Jude] and under Minnesota law". Court Docket 11 at ¶ 22. The "experienced employment lawyer" is not identified.

16. On 23 June 2010, 44 days after Defendant terminated his relationship with St. Jude, Medtronic made a written offer of employment to Defendant. Court Docket 9 at Ex. A. It proposed employing Defendant as its "Vice-President and General Manager, Cardiovascular Commercial Operations, Developed Markets". Court Dockets 9 at Ex. A and 11 at ¶ 23. Prior to receiving that offer, Defendant, his attorney, and Medtronic's representatives, "invested substantial time to ensure that [Defendant], and Medtronic, complied with all of [their] respective obligations, including any legally enforceable obligations that [Defendant] had to [St. Jude]". Court Docket 11 at ¶ 24. Again, who was involved and when these efforts took place is not disclosed.

17. Defendant accepted Medtronic's offer on 1 July 2010, 52 days after he terminated his relationship with St. Jude. Court Docket 9 at Ex. A. That same day Defendant executed: (a) an Employment Agreement; (b) an addendum to the Employment Agreement; and (c) something called an "Ethical Wall; Detailed Restrictions". Court Docket 9. These documents evidence an attention to linguistic detail more commonly encountered in tax legislation or SEC filings rather than in employment contracts. They are at the apex of the drafters' art. More to the point, the documents are evidence that both Defendant and Medtronic recognized that they were embarking upon a relationship that was laden with serious legal and ethical problems. Thankfully, I am not required to deal with the ethical.

18. On 8 July 2010, 59 days after Defendant terminated his relationship with St. Jude, Medtronic notified St. Jude that it had hired Defendant as "International General Manager, Cardiovascular Commercial Operations, Developed Markets". Court Docket 1 at ¶ 35 & Ex. D.

19. This action followed on 23 July 2010. Court Docket 1-5a.

The Motion

20. The motion seeks an order preventing Defendant from: (a) beginning his employment with Medtronic before 10 May 2011; (b) influencing, or attempting to influence, any of St. Jude's customers to do business with Medtronic; (c) soliciting any of St. Jude's employees to terminate their employment with St. Jude; and (d) disclosing any of St. Jude's confidential information. In addition, St. Jude seeks expedited responses to the discovery it served with the complaint. Court Docket 6. The main focus of St. Jude's supporting submissions and arguments is Defendant's employment by Medtronic. Accordingly, I limit myself to that issue.

21. I do not mean to belittle St. Jude's arguments by summarizing them briefly. They are set out in full at Court Docket 3. Essentially, St. Jude argues that: (a) Medtronic is its most significant worldwide competitor; (b) by reason of Defendant's position at the top of St. Jude's management "team", he had access to most, if not all, of its most sensitive confidential information; (c) under such circumstances, the only practical and reasonable way to protect its confidential information is to prohibit Defendant's employment by Medtronic for a reasonable period; and (d) one year from the termination of Defendant's relationship with St. Jude is reasonable.

22. In response, Defendant makes five points. They are: (a) there was no consideration for the Agreement; (b) the Agreement is void for lack of a geographic, product, or customer limitation; (c) because it is void for the lack of a required limitation, the "blue pencil" doctrine cannot save the Agreement; (d) anyway, the totality of Medtronic's Employment Agreement with Defendant is sufficient to satisfy all of St. Jude's legitimate concerns; and (e) the Agreement was obtained by fraud. Court Docket 8. As with St. Jude, I am not belittling these arguments by being brief.

LAW

TRO

23. In order to obtain a temporary restraining order in a civil action, the moving party must "clearly" demonstrate that it will suffer "immediate and irreparable" harm. Minn.R.Civ.P. 65. A

court must apply the same factors in deciding a motion for a temporary restraining order as it applies in deciding whether to issue a temporary injunction. See *M.G.M. Liquor Warehouse International, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn.App.1985). The five factors are: (a) the nature of the relationship between the parties; (b) the comparative harm to the parties if the restraining order is granted or denied; (c) the likelihood of success on the merits; (d) the public interest; and (e) the administrative burdens of enforcing the order. *Dahlberg Brothers, Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). Of these factors, the most important is a party's likelihood of prevailing on the merits at trial. *Id.* at 275, 137 N.W.2d at 322.

Non-Competition

24. Because non-competition agreements restrict trade, they are disfavored and closely scrutinized. *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 294 (Minn.App.1995). To be enforceable, a non-competition agreement must be reasonable and supported by consideration. *Id.* The test of reasonableness is:

whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.

Bennett v. Storz Broadcasting Co., 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965). When evaluating non-competition agreements, courts determine whether the agreements "serve a legitimate employer interest and are not broader than necessary to protect this interest." *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn.1998).

25. The absence of a territorial limitation has been a recurring concern in many cases. See, *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn.App.1993) (observing that a non-competition agreement "lacking a territorial limit will often be held to be unreasonable"). But, the absence of such a limitation does not render a non-competition agreement *per se* unenforceable

because "[t]here may very well be instances in which a restrictive covenant unlimited as to territory is reasonably necessary to protect the employer's interests, for example, in employment with multinational corporations." *Id.*

26. Contracts generally are valid only if they include consideration. *Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976). Employment agreements are contracts. *Kvidera v. Rotation Eng'g & Mfg. Co.*, 705 N.W.2d 416, 420-21 (Minn.App.2005). If a non-compete agreement is made independent of the initial employment contract, it must be supported by separate consideration. *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn.1983). "The adequacy of consideration for [non-competition agreements] signed during an ongoing employment relationship will depend upon the facts of each case." *Id.* Where the consideration issue centers on a promotion, the key inquiry is when the promotion provides the employee with "real advantages." See, *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130-31 (Minn.1980)(upholding a non-competition agreement because the employee "derived substantial economic and professional benefits ... after signing the [agreement]"); *Overholt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 703 (Minn.App.1989)(economic and professional benefits are sufficient consideration to support subsequent non-competition agreements).

DISCUSSION

27. That employers have a legitimate interest in protecting their confidential information from disclosure by former employees is a legal commonplace. The Agreement here recognizes this commonplace by providing for equitable relief in the event of a dispute between the parties. Disclosure of confidential business information, especially to an actual competitor, is irreparable harm. Accordingly, as required, I turn to a consideration of the *Dahlberg* factors.

Factor One - Relationship

28. During most of his 16-year employment by St. Jude, Defendant appears to have been an at-will employee. It was not until he was made a Group President that St. Jude required a written contract, but that contract did not change the at-will nature of the employment

relationship. Defendant rose to the highest management levels. On reaching that level, he executed the Agreement with its non-competition clause. On termination, he negotiated and executed the Severance Agreement and accepted its benefits for some five months. This action is an effort by St. Jude to enforce the two agreements. That having been said, this is not a run-of-the-mill employment dispute. Defendant's position as Group President with responsibilities for both foreign and domestic operations makes the relationship between the parties a good deal more sensitive than the relationships that commonly come before the courts. I conclude that the nature of the relationship between the parties weighs in favor of granting the motion.

Factor Two - Relative Harm

29. As I noted above, the protection of confidential information is a legitimate concern. Given the identity of Defendant's new employer, St. Jude would suffer serious harm if Defendant were permitted to take up employment with Medtronic. I recognize the facial attractiveness of Defendant's argument that: (a) whatever confidential information he has is now stale; (b) he will not be working with competitive products in competitive markets; and (c) in any event, his new employment agreement adequately protects St. Jude. While attractive, these arguments do not meet St. Jude's obvious and serious concerns. The staleness of the information is a function of the mere passage of time. The Agreement's obvious purpose is to insure that sufficient time passes before St. Jude's confidential information is put at risk. Thus, the staleness argument concedes that, given Defendant's position while at St. Jude's, some temporal buffer before he works for a competitor is appropriate.

30. Defendant's contract with Medtronic provides that he will be paid even if his employment is enjoined. Court Docket 10 at Ex. C at par. A11.01. This provision goes a long way towards shielding Defendant from serious harm, but it is not a complete shield. Granting injunctive relief against Defendant under the circumstances here, given the employment levels involved, poses a real danger of reputational harm to Defendant as well as extending his retirement for a period longer than one year from the time he rendered services to St. Jude. As I discuss below, this de

facto extension of the restrictive period is a matter of serious concern which I treat during my consideration of the reasonableness of the non-competition clause as implemented.

31. This factor weighs in favor of granting temporary relief.

Factor Three - Success on Merits

32. As I noted above, this is the most important of the *Dahlberg* factors and the one most in dispute here. The central question is whether the language highlighted in paragraph 6 above is reasonable given the facts of this case. A secondary question is whether, if it is not reasonable as written, it can be rendered reasonable by judicial editing. Defendant has other objections to the validity, or enforceability, or both, of the Agreement. I will deal with those other objections first.

No Consideration

33. Defendant argues that there was no consideration for the non-competition clause and, by extension, the confidentiality clause, because he had taken up his new position before he signed the Agreement. It is accepted law that a promotion accompanied by economic benefit is sufficient consideration to support a non-competition clause executed during an ongoing employment relationship. The evidence Defendant points to as supporting his lack of consideration argument is not convincing. The Agreement is dated October 2nd. Defendant suggests that the Agreement was backdated without citing supporting evidence. His testimony regarding when he took up the duties of Group President is less than precise. He does suggest that he did not receive economic benefit from his promotion to Group President. On the evidence to date, I conclude that St. Jude is likely to prevail on this issue.

Irreparable Harm

34. Defendant argues that St. Jude cannot demonstrate irreparable harm because of the extensive protective provisions contained in Defendant's Employment Agreement with Medtronic. I accept that the provisions are extensive. The question is whether they meet St. Jude's legitimate concerns. As I see it, the problem is that St. Jude is concerned about an

undifferentiated mass of corporate information Defendant acquired over a two-year period, perhaps over a longer period, that includes a tactical aspect, *i.e.*, of relatively short-term value, and a strategic aspect, *i.e.*, of longer term value. In my judgment, Defendant has not yet demonstrated that St. Jude's concern is met by the product-by-product, or country-by-country, approach that is incorporated in the Medtronic Employment Agreement when Defendant had worldwide responsibilities for all St. Jude products, present and future. Additionally, Defendant does not suggest, and I cannot imagine, how Medtronic's third-party beneficiary approach to protecting St. Jude's confidential information can work in the real world. On the present evidence, I conclude that St. Jude will prevail on this issue.

Fraud

35. Defendant alleges that the Agreement was obtained by fraud. The precise fraudulent statement is not spelled out. Essentially, Defendant alleges that he was told that all Section 16 employees were "required" to sign an agreement containing the non-competition clause at issue here. As an aside, Defendant also alleges that he had been a Section 16 employee for some years and had not been required to sign such a contract, raising the question of the reasonableness of his reliance on the alleged fraudulent representation. More to the point, the statement was that all Section 16 employees were "required" to sign, not that all Section 16 employees "had" signed. There seems to me to be a significant difference between these possible formulations, one is ambiguous while the other states a present fact. On the present evidence, I conclude that St. Jude is likely to prevail on this issue.

Reasonableness

36. I return to the paramount issue, *i.e.*, reasonableness. Traditionally, the question of the reasonableness of a restriction has focused on the duration and geographic reach involved given the nature of the employee's job. Defendant's axis of attack on this point is that the Agreement has no geographic or product limitation. That is unquestionably the case. Thus, Mr.

Pentelovitch argues, the Agreement seeks to unlawfully prevent Defendant from working for a competitor rather than from competing with the former employer.

37. As I noted at paragraph 23, restrictive non-competition clauses are disfavored. In determining the reasonableness of such disfavored contracts, I am required to keep in mind: (a) the nature and character of the employment; (b) the duration of the restriction; and (c) a territorial extent of the restriction.

a. Defendant was employed at the highest management levels. His responsibilities encompassed St. Jude's foreign and domestic operations. They involved all of St. Jude's products and all of its markets. It is unclear what level of management Defendant will occupy at Medtronic. It is clear that the Medtronic group he would be joining is directly competitive with St. Jude. There is a dispute regarding the extent to which there is product overlap, but it is clear that there is some overlap.

b. The restriction period is one year. A one-year period is a common feature of non-competition contracts. Indeed, it could be said that one year is a conservative durational restriction given the current state of the law. I note in passing that Defendant's contract with Medtronic has two durational restrictions, one of which is for two years. Defendant does not seriously challenge the reasonableness of a one-year restrictive period on this motion.

c. The restriction at issue here has no territorial limitation. It is worldwide as to a "competitor". As I noted above, this lack of a "territorial restriction" is co-extensive with the scope of Defendant's responsibilities while employed by St. Jude as Group President.

38. I am also required to consider, in light of the foregoing, necessity.

a. The cases almost universally recognize the necessity of some sort of restriction on former employees in order to protect the business interests of their former employers. In this case, St. Jude has an obvious interest in protecting its confidential business information. Accordingly, restricting a former employee's right to work for a direct, actual competitor is a necessary restriction. Confirming my conclusion in this regard, Defendant's Employment

Agreement with Medtronic contains a very similar restriction. I conclude that a restriction on employment by a direct competitor is necessary.

b. I conclude that the restriction against employment with a competitor for one year is no more onerous than necessary to protect St. Jude's legitimate business interest. The cases commonly hold that one year is a reasonable duration even for relatively low level employees. It has become almost the safe harbor restrictive duration. Given Defendant's management level and the nature of his responsibilities, the Agreement's one-year restriction is reasonable, in my view, more than reasonable.

c. But, it does not follow from that conclusion that 10 May 2011 is a reasonable restriction end date. The evidence to date is that Defendant last provided services to St. Jude in October 2009 and that he has had no access to St. Jude's confidential information since that date. Under these circumstances, the May 2010 trigger date established by the terms of the Severance Agreement is unreasonable and unnecessary to protect St. Jude's confidential business information. Mr. Starks elected not to utilize Defendant's services after October 2009. Thus, Defendant was not exposed to any of St. Jude's non-public, confidential information after his termination by Mr. Starks sometime in October 2009. Accordingly, the obvious reasonable trigger date for a reasonable one-year restrictive period to protect confidential information under the specific facts here is 31 October 2010, and not months after Defendant last had access to such information.

d. I do not accept the proposition that the Agreement's restrictive period provision, as triggered by the Severance Agreement, is not subject to "the blue pencil" doctrine. To edit that specific provision is not to "make an agreement where none exist", as Mr. Pentelovich suggests. Rather, it merely renders the implementation of a reasonable restrictive period reasonable. The Severance Agreement is hereby edited to provide that Defendant shall not commence employment with a competitor before 1 November 2010.

e. Given the fact that Defendant's responsibilities while at St. Jude were worldwide, the lack of a territorial limit on the restriction does not render it unreasonable. Defendant's responsibilities with St. Jude were worldwide; his future responsibilities with Medtronic are almost worldwide, Japan excepted. I am not in a position to determine whether the term "developed markets" reduces the territorial scope of Defendant's Medtronic responsibilities, but I conclude that, for the purposes of this motion for a temporary restraining order, it is not an immediately significant question. In other words, it needs, and can await evidentiary clarification.

39. Thus, I conclude that St. Jude is likely to prevail on the issue of the reasonableness of the restriction as modified by this decision, and, therefore, that this factor weighs in favor of granting temporary relief.

Factor Four- Public Policy

40. There are two public policies at issue here. The first is the prevention of unreasonable restrictions on trade, including restrictions on the right of individuals to practice their professions and to peruse their trades. The second is the right of employers to safeguard their legitimate business interests. In this situation, these policies will be kept in equilibrium by a properly drafted temporary restraining order. This factor weighs in favor of granting temporary relief.

Factor Five – Judicial Burden

41. There is no particular judicial burden stemming from granting this motion in part. This factor is neutral.

M.M.M.