



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELOITTE & TOUCHE USA LLP,	)	
and DELOITTE TAX LLP,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1542-VCP
	)	
JOSE S. LAMELA, JR.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

Submitted: January 9, 2007

Decided: April 6, 2007

Teresa A. Cheek, Esquire, Margaret DiBianca, Esquire, YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, Delaware; Nathaniel H. Akerman, Esquire, Sumiko Soekawa, Esquire, DORSEY & WHITNEY, New York, New York, *Attorneys for Plaintiffs*

Joseph Grey, Esquire, STEVENS & LEE, PC, Wilmington, Delaware; Peter L. Altieri, Esquire, Robert D. Goldstein, Esquire, EPSTEIN BECKER & GREEN, P.C., New York, New York, *Attorneys for Defendant*

**PARSONS, Vice Chancellor.**

Presently before the Court are cross-motions for summary judgment. Deloitte & Touche USA LLP and Deloitte Tax LLP (collectively “Plaintiffs” or “Deloitte”) have moved for summary judgment seeking liquidated damages and a permanent injunction to enforce the terms of a covenant not to compete against a former partner at Deloitte Tax, Defendant Jose Lamela, Jr. Deloitte further seeks to have a post-termination covenant not to compete extended for two years to prevent Lamela from soliciting or servicing several Deloitte clients.

Lamela has cross-moved for summary judgment arguing that, pursuant to Florida law, Deloitte does not have a legitimate business interest that needs to be protected by the noncompete and that Deloitte is not entitled to liquidated damages.

The Court heard argument on these motions on January 9, 2007. For the reasons set forth in this opinion, the Court denies Deloitte’s motion for summary judgment, except to hold, pursuant to Court of Chancery Rule 56(d), that Deloitte has demonstrated in the case of its clients AutoNation, Burger King and Ryder Systems, that it has a legitimate business interest that justifies the two year restriction on competition provided for in its agreement with Lamela. Lamela’s motion for summary judgment is granted with respect to five of the clients still at issue because Deloitte has not shown a legitimate business interest sufficient to justify further enforcement of the covenant not to compete. In all other respects, however, the Court denies Lamela’s summary judgment motion.

## I. BACKGROUND AND FACTS

### A. Facts

Deloitte & Touche USA LLP is a Delaware limited liability partnership that does business in south Florida and throughout the United States. Deloitte Tax LLP is a Delaware limited liability partnership and is a subsidiary of Deloitte & Touche that is in the business of providing, among other things, multistate tax services.

Jose Lamela, Jr. is an accountant who primarily works as a financial consultant advising businesses on state and local tax (“SALT”) issues, particularly in the multistate context. Lamela advises clients with multi-state businesses on the varied and complex network of state sales, income, use and other local tax laws and the impact of those laws on the client’s tax liability.<sup>1</sup>

Before becoming a partner at Deloitte, Lamela was a partner at Arthur Andersen. In May 2002, in the wake of the Enron scandal and the collapse of Arthur Andersen, Deloitte hired approximately 200 partners, principals and directors and 2,000 employees of Arthur Andersen, all of whom were subject to post-employment restrictive covenants relating to Arthur Andersen’s personnel and clients.<sup>2</sup> Lamela was among the partners hired. Deloitte paid Arthur Andersen tens of millions of dollars to enable Lamela and the

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<sup>1</sup> Affidavit of Phillip M. Brunson, Deloitte’s South East Region Tax Managing Partner, (“Brunson Aff.”) ¶ 31. Citations to affidavits and depositions include the last name of the affiant or deponent and the relevant paragraph or page number. For example, “Lamela Dep. at \_\_\_\_.”

<sup>2</sup> Wood Aff. ¶ 4, Ex. A. Chet Wood is Chairman and Chief Executive Officer of Deloitte Tax.

other former Arthur Andersen employees to join Deloitte free of the restrictions imposed by the restrictive covenants.<sup>3</sup> So that Deloitte could avoid claims of successor liability, the agreement that released the former Arthur Andersen employees explicitly did not include the purchase of any relationships, goodwill or book of business.<sup>4</sup> Approximately 80% of the clients served by the former Arthur Andersen tax partners followed those partners to Deloitte.<sup>5</sup> Lamela avers that he had a “substantial relationship” with at least 16 Arthur Andersen clients that followed him to Deloitte.<sup>6</sup>

### **1. The Agreement and post-resignation covenants**

Upon joining Deloitte, Lamela executed a partnership agreement (the “Agreement”) that contained post-resignation confidentiality and noncompete covenants. The Agreement was amended in subsequent years, but the relevant post-resignation covenants remained relatively unchanged. Section 9.04 of the Agreement contains the following restrictions:

Confidentiality of Information; Trade Secrets - Each Party shall keep secret and confidential and shall not disclose to others, except to Active Parties, professional staff and other employees (in each case who need to know), except to others in the proper conduct of the business of the Partnership and

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<sup>3</sup> Wood Dep. at 8-11.

<sup>4</sup> *Id.* at 15-16, 32.

<sup>5</sup> Clavero Dep. at 25-26. Cesar Clavero was Deloitte’s South Florida Tax Managing Partner.

<sup>6</sup> Lamela Aff. 8/26/05 ¶ 14. During the course of this litigation, Lamela has been deposed several times and has submitted several separate affidavits. These are referred to specifically by the date on which the deposition was taken or the affidavit was given.

except as required by law, the names of any clients of the Partnership or a Connected Entity, information regarding the services rendered to any such clients or the financial, business or other affairs of such clients, financial or other information relating to the past, present or projected operations of the Partnership or a Connected Entity, information relating to the past, present or future plans of the Partnership or a Connected Entity, trade secrets and information relating to technical and non-technical systems, methodologies, services, products, client development information, programs, procedures, policies and practices utilized by the Partnership or a Connected Entity; provided that the foregoing shall not restrict the use of information which is in the public domain other than as a result of a breach of this or any similar confidentiality covenant for the benefit of the Partnership or a Connected Entity. Each Party acknowledges and agrees that all manuals, training materials, technical materials, product and service information and other technical materials prepared by or for the Partnership or a Connected Entity and all directories, client files and records used in connection with the management and operation of the Partnership or a Connected Entity, in whatever form, are the proprietary property of the Partnership or a Connected Entity....<sup>7</sup>

Section 9.061a of the Agreement states:

A Party not eligible to receive payments under Article 6 (including any person, firm, corporation or other entity with which such Party is associated) shall not, prior to or for a period of two years following severance of such Party's association with the Partnership, directly or indirectly solicit, assist others in obtaining as a client or accept an engagement to perform or perform any professional services (as defined in 9.061c),<sup>8</sup> other than on behalf of the Partnership or a Continuing Connected Entity, for any person, firm,

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<sup>7</sup> Pls.' Main Br. in Support of Their Mot. for Summ. J. ("POB") Ex. D.

<sup>8</sup> The Agreement defines "professional services" as services which "include public accountancy, auditing, tax, management consulting or advisory, systems, expert testimony, litigation support, budget, actuarial and other services performed by the Partnership or a Connected Entity." POB Ex. C § 9.061c.

corporation or other entity (a) for whom such Party (in any capacity on behalf of the Partnership or a Connected Entity) or any office of the Partnership or a Connected Entity located within seventy-five miles of any office with which such Party has been associated (including such associated office) has performed any professional services or maintained a client relationship on behalf of the Partnership or a Connected Entity during the three years prior to such severance of association or (b) with whom any such office, to the knowledge of such Party, is negotiating or proposing for the provision of any professional service at the time of such severance of association.<sup>9</sup>

In Section 9.07 of the Agreement, Lamela acknowledged that as a result of “the uncertainty and difficulty in ascertaining damages resulting to the Partnership from any breach or violation” of the post-employment restrictive covenants, the restrictive covenants can be specifically enforced by injunction or other similar remedies.<sup>10</sup> The Agreement further provides that it is governed by the laws of Florida, which is the location of the Deloitte office where Lamela worked,<sup>11</sup> and contains a forum selection clause which specifies that Delaware courts will hear any disputes arising out of the Agreement.<sup>12</sup>

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<sup>9</sup> *Id.* § 9.061a.

<sup>10</sup> *Id.* § 9.071.

<sup>11</sup> Brunson Aff. § 14.02.

<sup>12</sup> *Id.* § 14.04.

## 2. Lamela resigns from Deloitte

After working at Deloitte for three years, Lamela resigned on June 17, 2005.<sup>13</sup> Lamela left Deloitte and accepted a position as a partner at Alvarez and Marsal, Tax Advisory Services, LLC (“A&M”). He then began to solicit various Deloitte clients. For example, in late June, Lamela called Jeff Pfaeffli of AutoNation, one of the clients at issue in this litigation, to solicit AutoNation to become an A&M client.<sup>14</sup> Thereafter, Lamela attended a lunch meeting with representatives of AutoNation to discuss various tax issues AutoNation faced and the services offered by A&M. Lamela introduced Bob Lowe, a principal at A&M, to officials at AutoNation, and with Lowe’s approval, sent AutoNation an email soliciting their business.<sup>15</sup> Following these solicitations, AutoNation decided for the first time to include A&M as one of the four tax services firms (including Deloitte) authorized to bid on AutoNation’s 2007 tax compliance work.

As of August 29, 2005, Lamela had contacted 13 additional companies that Deloitte asserts are its clients or companies to which it has made proposals.<sup>16</sup> Lamela admits that after joining A&M he performed professional tax services for Ryder Systems, Burger King and Andrx Corporation, all of which are Deloitte clients and at issue in this

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<sup>13</sup> Lamela Aff. 8/10/05 ¶ 3.

<sup>14</sup> Lamela Dep. 8/19/05 at 68-69.

<sup>15</sup> Lamela Dep. 9/20/06 at 414-20.

<sup>16</sup> Because Deloitte contends the identities of those 13 companies are part of its confidential information, they are listed in Confidential Appendix A to the Court’s memorandum opinion on Deloitte’s application for a preliminary injunction. *Deloitte & Touche USA LLP v. Lamela*, 2005 Del. Ch. LEXIS 164 (Oct. 21, 2005) (the “Memorandum Opinion” or “Mem. Op.”).

litigation.<sup>17</sup> Lamela claims that he can contact these and other Deloitte clients without violating his post-employment restrictive covenants and has asserted several defenses to Deloitte's enforcement actions. These defenses include unclean hands on the part of Deloitte, that the post-employment restraints are overbroad, that Lamela can serve companies for which Deloitte performs audit services because the Sarbanes-Oxley Act ("Sarbanes-Oxley") bars Deloitte from providing both audit and nonaudit tax services for those clients, that the Agreement's liquidated damages provision is an unenforceable penalty and that Deloitte has failed to plead and prove, as required by Florida law, that it has a legitimate business interest in most of the companies still at issue in this litigation.

### **B. Procedural History**

On August 9, 2005 the Court entered a temporary restraining order that closely tracked the language in the Lamela/Deloitte partnership agreement. On August 12, 2005, I granted in part and denied in part Lamela's motion to vacate the TRO. I vacated the TRO with respect to Lamela's contacting Deloitte employees, but denied the motion in all other respects.

The Court heard argument on Deloitte's motion for a preliminary injunction on August 30, 2005. At argument, Lamela contended that no preliminary injunction was necessary and that, in any event, the TRO was overly broad. For its part, Deloitte tacitly acknowledged the need to identify more specifically the clients and prospective clients it sought to enjoin Lamela from soliciting or servicing. Because the exact contours of the

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<sup>17</sup> Lamela Dep. 8/19/05 at 149-50.

Deloitte client list remained in flux, the Court requested further submissions from both sides on the appropriate scope of any injunction that might be ordered. Thereafter, the parties filed a number of supplemental submissions, and the final, consolidated client list for which Deloitte sought protection included 78 businesses.<sup>18</sup>

On October 21, 2005, the Court granted in part and denied in part Deloitte's application for a preliminary injunction. I found that Deloitte had not demonstrated a likelihood of success on the merits in showing that it has a legitimate business interest in nine clients whom Lamela argued put their services out for competitive "open bidding," based on price.<sup>19</sup> For a similar reason, the Court declined to grant a preliminary injunction with respect to clients to whom Lamela did not provide SALT services while at Deloitte.<sup>20</sup> As to the remaining clients, the Court issued a preliminary injunction prohibiting Lamela from soliciting or servicing those businesses.

After the Court issued the preliminary injunction, the parties engaged in extensive motion practice, including a motion to reargue and motions to compel discovery.<sup>21</sup> During the summer of 2006, the parties mutually suspended discovery and briefing while they conducted settlement negotiations. On August 1, 2006, the parties notified the Court

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<sup>18</sup> Sept. 13, 2005 Letter to Ct. from Teresa A. Cheek, Ex. A.

<sup>19</sup> *See* Mem. Op. at \*30-35.

<sup>20</sup> *Id.* at \*41-43.

<sup>21</sup> For the Court's opinion on Deloitte's motion to reargue, *see Deloitte & Touche USA LLP v. Lamela*, 2006 Del. Ch. LEXIS 27 (Feb. 7, 2006).

that those negotiations had broken down, and requested a revised scheduling order.<sup>22</sup> The Court granted the parties' request and postponed the scheduled five day trial from December 2006 to April 2007.

Thereafter, the parties filed cross-motions for summary judgment. In its motion, Deloitte seeks a permanent injunction with the same terms as the preliminary injunction for the remainder of the two years contemplated by Section 9.061a of the Agreement. Deloitte also seeks at least \$72,378.50 in liquidated damages for Lamela's alleged breach of that provision.<sup>23</sup> Deloitte further argues that it has been denied the benefit of its bargain with respect to AutoNation, Burger King, Ryder and Tyco because Lamela solicited or provided services to those clients after leaving Deloitte.<sup>24</sup> Therefore, Deloitte seeks to have the terms of Section 9.061a equitably extended for an additional two years for those four clients. Lamela has opposed Deloitte's motion by asserting the previously mentioned defenses and has cross moved for summary judgment. Lamela argues that the Court should not enter a permanent injunction, that an equitable extension of the noncompete covenants is unwarranted and that Deloitte's claim for liquidated damages is unenforceable because it is a penalty not designed to reasonably estimate Deloitte's

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<sup>22</sup> Aug. 1, 2006 Letter to Ct. from Teresa A. Cheek and Joseph Grey.

<sup>23</sup> POB at 22-23.

<sup>24</sup> Those four clients were not included in the preliminary injunction order. Deloitte initially sought to have the terms of Lamela's noncompete extended for five clients, but subsequently dropped Andrx from this request. *Compare* POB at 44 *with* Tr. of Summ. J. Argument held on Jan. 7, 2007 ("Tr.") at 4.

actual damages.<sup>25</sup> A four day trial is scheduled to begin on April 9, 2007. On March 23, 2007, the Court rendered a preliminary oral ruling on the parties' cross motions for summary judgment. This opinion contains the Court's final ruling on the cross motions for summary judgment and encompasses its previous, preliminary ruling.

## II. ANALYSIS

### A. Standard

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.<sup>26</sup> When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.<sup>27</sup>

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<sup>25</sup> After briefing and argument on the parties' motions for summary judgment, it became clear that Deloitte was not pursuing its claim that Lamela improperly solicited, or attempted to solicit, Deloitte employees to leave Deloitte and join Lamela at A&M. Deloitte also stopped pursuing its claim that Lamela's use of his "Outlook Contact List" constituted a misappropriation of Deloitte trade secrets. Accordingly, on January 16, 2007, the Court granted Lamela's motion for summary judgment on those two claims.

<sup>26</sup> Ct. Ch. R. 56(c).

<sup>27</sup> *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977). Where the parties to an action have cross moved for summary judgment, Ct. Ch. R. 56(h) authorizes the court to decide the case on the record submitted, provided that neither party presents argument that there is an issue of fact material to the disposition of either motion. In this case, Lamela contends that even if he does not prevail on his motion for summary judgment, there are disputed issues of material fact that preclude entry of summary judgment for Deloitte. Thus, under Rule 56(h), the

Florida has adopted a statutory approach to the validity and enforceability of covenants not to compete. Florida Statute §§ 542.335(1)(b) and (c) provide that:

(b) The person seeking enforcement of a restrictive covenant shall *plead and prove* the existence of one or more legitimate business interests justifying the restrictive covenant. The term “legitimate business interest” includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient, or client goodwill associated with:
  - a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”;
  - b. A specific geographic location; or
  - c. A specific marketing or trade area.
5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall *plead and prove* that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to

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Court may not treat this action as having been submitted for decision on the existing record.

protect the established legitimate business interest or interests.<sup>28</sup>

Among the Deloitte clients still in dispute, four (AutoNation, Burger King, Ryder and Tyco) were excluded from the original preliminary injunction because Deloitte failed to effectively counter Lamela's argument that those companies use competitive bidding as the basis for awarding tax work. Thus, with regard to these four clients, Lamela has had the ability to solicit and service them since the Court issued the preliminary injunction on October 21, 2005. Deloitte now seeks a permanent injunction prohibiting Lamela from servicing those four clients for two years from the date such injunction issues. In other words, because Deloitte has not had the benefit of an injunction to prevent Lamela from soliciting or serving these clients for most of the two-year period specified in the Agreement, Deloitte urges the Court to extend the terms of the covenant not to compete for two more years with respect to them.

Since the enactment of § 542.335 in 1996, only a few cases have addressed the issue of equitably extending a covenant not to compete.<sup>29</sup> A review of these and older cases indicates that courts have extended a covenant not to compete beyond the contractually specified time period only when the party seeking the extension has a legitimate business interest in accordance with § 542.335 and that party effectively has

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<sup>28</sup> Fla. Stat. § 542.335 (2007) (emphasis added).

<sup>29</sup> *See, e.g., Michele Pommier Models, Inc. v. Diel*, 886 So.2d 993 (Fla. Dist. Ct. App. 2004); *Vela v. Kendall*, 905 So. 2d 1033 (Fla. Ct. App. 2005).

been deprived of the benefit of its noncompete covenant.<sup>30</sup> Some factors courts look to when deciding whether to grant an equitable extension of a noncompete are: whether the plaintiff initially sought a preliminary injunction, whether a preliminary injunction actually had been issued against the defendant, if a preliminary injunction was issued, has it expired, and whether the defendant engaged in the prohibited activities before the issuance of a preliminary injunction.<sup>31</sup>

## **B. Clients in Whom Deloitte Has Not Shown a Legitimate Business Interest**

With respect to Citrix and four other companies, the Court grants Lamela's motion for summary judgment because Deloitte has failed to plead and prove that it has a legitimate business interest in preventing Lamela from competing for the business of these companies. In general, Deloitte argues that it has three interests that qualify as legitimate business interests under Florida Statute 542.335. These interests are: (1) confidential client pricing information; (2) nonpublic client information; and (3) substantial client relationships. I address each of these interests in the analysis of Citrix.

### **1. Citrix**

In the case of Citrix, Deloitte has not shown that it has a legitimate business interest that needs protection by a covenant not to compete. In an influential 1996 article on § 542.335, written by the statute's principal Senate sponsor and the Florida Bar's

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<sup>30</sup> See *supra* note 29. See also *Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So.2d 532 (Fla. 1966); *Kverne v. Rollins Protective Serv. Co.*, 515 So.2d 1320 (Fla. Ct. App. 1987); *PADCO Advisors v. Omdahl*, 185 F. Supp.2d 575 (D. Md. 2002) (applying Maryland law).

<sup>31</sup> See *supra* note 30.

principal drafter, the authors provide persuasive guidance on what qualifies as “legitimate business interests” under the statute:

[A] “legitimate business interest” is an identifiable business asset that constitutes or represents an investment by the proponent of the restriction such that, if that asset were misappropriated by a competitor (i.e., taken without compensation), its use in competition against its former owner would be “unfair competition.” Put another way, a “legitimate business interest” is a business asset that, if misappropriated, would give its new owner an unfair competitive advantage over its former owner.

[T]he proponent of a restrictive covenant should be entitled to enforcement if it can demonstrate that the defendant has misappropriated (or threatens to misappropriate) identifiable assets of the proponent’s business.<sup>32</sup>

Specifically, the Grant and Steele article points out that the Florida legislature’s use of “legitimate business interest” in the statute expressly rejects the “‘contract approach’ to the enforcement of contractual restrictions on competition.”<sup>33</sup> Instead, in analyzing these restrictions, courts must determine whether they are “‘reasonably

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<sup>32</sup> John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original ‘Unfair Competition’ Approach for the 21st Century*, 70 FLA. B.J. 53, 54 (Nov. 1996) (emphasis added). Several reported decisions of the Florida appellate courts have cited to the Grant and Steele article as persuasive authority in interpreting the statute. *See Henao v. Prof’l Shoe Repair, Inc.*, 929 So.2d 723, 726-27 (Fla. Dist. Ct. App. 2006); *Univ. of Fla. v. Sanal*, 837 So.2d 512, 516 (Fla. Dist. Ct. App. 2003). *See also Austin v. Mid State Fire Equip. of Cent. Fla., Inc.*, 727 So.2d 1097, 1098 (Fla. Dist. Ct. App. 1999); *Am. Residential Servs., Inc. v. Event Technical Servs., Inc.*, 715 So.2d 1048, 1049 (Fla. Dist. Ct. App. 1998).

<sup>33</sup> Grant & Steele, *supra*, at 54.

necessary’ to protect one or more ‘legitimate business interests’ of the party seeking enforcement.”<sup>34</sup>

With regard to both confidential pricing information and confidential business information, the present case is distinguishable from the cases relied upon by Deloitte. In *AutoNation, Inc. v. O’Brien*,<sup>35</sup> the plaintiff-employer successfully enjoined one of its former managers from working for a competing auto dealership. The court found that the defendant-employee had been exposed to valuable confidential business information, proprietary information and specialized training associated with his position with the plaintiff, all of which are legitimate business interests under Section 542.335(1)(b) of the Florida statute.<sup>36</sup> For example, the court found that O’Brien had access to confidential information such as AutoNation’s Best Practices guide, its Peer Performance Results, information disclosed at Monthly Operating Review Meetings and information on AutoNation’s proprietary and confidential Dealer Central Website.<sup>37</sup> The plaintiff also persuasively argued that its confidential and proprietary research was an important part of its business success.<sup>38</sup>

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<sup>34</sup> *Id.*; *Henao*, 929 So.2d at 726.

<sup>35</sup> 347 F. Supp. 2d 1299 (S.D. Fla. 2004).

<sup>36</sup> *Id.* at 1304-05.

<sup>37</sup> *Id.* at 1305.

<sup>38</sup> For further discussion of many of these same confidential and proprietary assets, *see also AutoNation, Inc. v. Hankins*, 2003 WL 22852206, at \*9 (Fla. Cir. Ct. Nov. 24, 2003).

Likewise, in *AutoNation, Inc. v. Maki*,<sup>39</sup> an earlier case with facts similar to *O'Brien*, the court upheld the noncompete for many of the same reasons. Maki's position as manager gave him access to much of the same confidential and proprietary information discussed in *O'Brien*.<sup>40</sup> Maki's access to that information would have allowed him "to compete in a way that would be irreparably detrimental to AutoNation's business interests."<sup>41</sup> In particular, his knowledge regarding his employer's specific "policies, practices, business methods and operations" would have given him an unfair advantage over a normal competitor.<sup>42</sup> The court also noted that the analysis on this point is objective; the employee's "ability to use this information and training in his employment with a competitor" is the "key factor in assessing the existence of a legitimate business interest."<sup>43</sup>

Unlike in *O'Brien* and *Maki*, Deloitte has not shown that Lamela was exposed to any confidential pricing information regarding Deloitte's pricing of its services to Citrix. Lamela was not a billing partner on Citrix's account.<sup>44</sup> Deloitte has not presented any evidence suggesting that it had a special pricing arrangement with Citrix, nor has Deloitte alleged with any specificity that Lamela had access to nonpublic client pricing

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<sup>39</sup> 2004 WL 1925479 (Fla. Cir. Ct. Aug. 25, 2004).

<sup>40</sup> *Id.* at \*3.

<sup>41</sup> *Id.* at \*4.

<sup>42</sup> *Id.* at \*5.

<sup>43</sup> *Id.*

<sup>44</sup> POB Ex. X at 11.

information or strategies of Deloitte that would give him an unfair competitive advantage in dealing with Citrix. Similarly, Deloitte has made no showing that Lamela knows, or was ever exposed to, any confidential client information such as detailed research on Citrix's corporate structure or other information which might plausibly be deemed confidential, proprietary or otherwise protected by Section 542.335.

Nor has Deloitte pled and proved that it has a substantial relationship with Citrix such that it would be "unfair competition" for Lamela to compete for Citrix's multi-state tax business. One aspect of having a substantial client relationship that will support a covenant not to compete under § 542.335 is the degree to which the person against whom enforcement is sought was involved in the development, maintenance or prospective enhancement of the relationship with that particular client.<sup>45</sup>

Deloitte has not shown that Lamela's competition for the work of Citrix threatens a substantial client relationship. While he worked at Deloitte, Lamela did not perform any billable work for Citrix, and he only recorded approximately six hours of unbilled

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<sup>45</sup> Cf. *N. Am. Prod. Corp. v. Moore*, 196 F. Supp.2d 1217, 1228 (M.D. Fla. 2002) ("There is little question under Florida law that an employer has a legitimate business interest in prohibiting solicitation of its customers with whom *the employee* has a substantial relationship. Where an employee, as here, gains substantial knowledge of his former employer's customers, their purchasing history, and their needs and specifications it follows that the employer has a legitimate business interest under the statute.") (emphasis added; internal citations omitted); *Bradley v. Health Coalition, Inc.*, 687 So.2d 329, 334-35 (Fla. Ct. App. 1997) (in the context of interpreting a previous version of the Florida statute, the court said "the purpose of the statutory provision is to prevent an employee from taking advantage of a customer relationship which was developed during the term of the employee's employment") (quoted in *Anich Indus., Inc. v. Raney*, 751 So.2d 767, 771 (Fla. Ct. App. 2000)).

promotional time on Citrix's account during the 2004-2005 time period.<sup>46</sup> Given the lack of any billed work, the small amount of unbilled work Lamela performed for this client, and the lack of evidence of any other substantial nexus between Lamela and Citrix or Deloitte's internal efforts relating to Citrix, Deloitte has failed to plead and prove that it has a substantial relationship with Citrix that needs to be protected by a covenant not to compete applicable to Lamela. For these reasons, the Court grants Lamela's motion for summary judgment with regard to Citrix.

## **2. DHL, JM Family, PharMed and Southern Wine & Spirits**

For similar reasons, the Court also grants Lamela's motion for summary judgment as to the following four clients: DHL, JM Family, PharMed and Southern Wine & Spirits. Lamela was not the billing partner for any of these clients.<sup>47</sup> Lamela did no billable work for these clients, and recorded only nominal amounts of unbilled promotional work. Deloitte has failed to demonstrate that Lamela was exposed to confidential pricing or client information relating to these clients or that it had a substantial relationship with any of them in which Lamela was involved. Because Deloitte has failed to plead and prove that it has a legitimate business interest in these clients, Lamela is entitled to summary judgment as to each of them.

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<sup>46</sup> POB Ex. X at 11.

<sup>47</sup> POB Ex. X.

### **C. Clients in Whom Deloitte Has Demonstrated a Legitimate Business Interest**

The Court finds that Deloitte has pled and proved that it has a legitimate business interest in AutoNation, Burger King and Ryder. The Court also finds that the two-year limitation period contained in Section 9.061a is reasonable with respect to these three clients. To that extent, therefore, the Court grants in part Deloitte's motion for summary judgment as to AutoNation, Burger King and Ryder. The factual and legal record is not sufficiently developed, however, to enable the Court to determine on summary judgment the appropriate remedy for Lamela's apparent breach of Section 9.061 as to these clients. Accordingly, the Court denies that aspect of Deloitte's summary judgment motion, and will leave those issues for trial.

#### **1. AutoNation**

Deloitte has shown that it has a legitimate business interest in AutoNation and that two years is a reasonable period to prohibit Lamela's post-employment competition. During the period 2002-2005, Deloitte received between \$2.5 and \$8.5 million per year in revenue from AutoNation.<sup>48</sup> Lamela billed over 200 hours per year to AutoNation during this period, and recorded a total of approximately 86 hours of unbilled promotional time.<sup>49</sup> While at Deloitte, Lamela was also one of the billing partners on the AutoNation

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<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.*

account.<sup>50</sup> Based on this evidence and the lack of any significant evidence to the contrary, I find that Deloitte has a substantial relationship with AutoNation, and that while he was at Deloitte, Lamela was an important part of this relationship. Further, Deloitte's substantial client relationship with AutoNation would be threatened by Lamela's solicitation of, competition for, and participation in AutoNation's multi-state tax advisory business. Thus, Deloitte is entitled to enforce its noncompetition agreement against Lamela as it relates to AutoNation.

The evidence also suggests that Lamela breached the noncompete agreement in terms of AutoNation in the summer of 2005. As discussed above, Lamela admits to soliciting for AutoNation's multi-state tax business after he left Deloitte. Moreover, the evidence suggests that Lamela used his knowledge of Deloitte's pricing policies in soliciting AutoNation's business. Although Lamela and A&M did not succeed in obtaining AutoNation's business on that occasion, I find that Lamela's efforts, more likely than not, contributed to A&M's now being included with Deloitte in a group of four accounting firms permitted to bid for AutoNation's tax business.

Because AutoNation was not included in the preliminary injunction order, this Court recognized in its preliminary injunction opinion that Deloitte might be entitled to appropriate relief if Deloitte were found to have a protectible interest in that client.<sup>51</sup>

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<sup>50</sup> Lamela Dep. 9/20/06 at 132-34. In a later affidavit, Lamela noted that he was not the billing partner for AutoNation's tax compliance work. *See* Lamela Aff. 12/15/06 at 11.

<sup>51</sup> Mem. Op. at \*35 n.65.

Deloitte seeks an injunction that effectively would extend the terms of Lamela's noncompete with respect to AutoNation for two years from the date of this Court's decision on the merits of this action. Lamela opposes such an extension because, among other things, he claims to have voluntarily abstained from working for AutoNation once the Court issued its preliminary injunction, even though the injunction did not apply to AutoNation.<sup>52</sup> Nevertheless, I am cognizant that Lamela's June 2005 solicitations of AutoNation arguably helped A&M to establish a "beachhead" at AutoNation. Under these circumstances, it is unclear whether an extension of Lamela's noncompete, or liquidated damages, or both are necessary and appropriate to provide Deloitte the benefit of its bargain. For these reasons, I grant Deloitte's motion for summary judgment in that it has shown beyond substantial controversy that it has a legitimate business interest in AutoNation, and that the two-year limitation period contained in the Agreement is reasonable. I decline to grant Deloitte summary judgment on the remedies it seeks, however, because there are issues of fact and law in that regard that require further development at trial.<sup>53</sup>

## **2. Burger King**

Deloitte has shown that it has a legitimate business interest in Burger King and that the covenant not to compete is reasonably necessary to protect that interest. It also

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<sup>52</sup> Lamela Dep. 9/20/06 at 147-48.

<sup>53</sup> For cases denying summary judgment because of the need for more factual and legal development, see *Tunnell v. Stokley*, 2006 Del. Ch. LEXIS 37, at \*5 (Feb. 15, 2006); *Cooke v. Oolie*, 2000 Del. Ch. LEXIS 89, at \*37-38 (May 24, 2000).

has shown that two years is a reasonable period of time to restrict Lamela's post-employment competition. In 2003 Deloitte received \$12,049 in revenue from Burger King; this figure jumped to \$179,793 in 2004 and \$843,208 in 2005; and in 2006, it dropped to \$4,229.<sup>54</sup> While at Deloitte, Lamela was a billing partner for the Burger King account. In addition, he personally billed approximately 131 total hours to Burger King from 2002 to 2005, and recorded a total of 13 hours of unbilled promotional time during that same period.<sup>55</sup>

The evidence confirms that Lamela played an important part in Deloitte's relationship with Burger King. He brought Burger King into Arthur Andersen as a tax client, and Burger King continued to use Lamela after he moved to Deloitte.<sup>56</sup> After Lamela left Deloitte, Burger King followed him to A&M, and Deloitte's revenue from Burger King effectively evaporated. Indeed, Lamela helped build Deloitte Tax's revenue from Burger King from \$12,049 in 2003 to \$843,208 in 2005. In 2006, however, it precipitously dropped to \$4,229. Robert Tache, also a Deloitte partner, testified that Deloitte is not currently generating revenue from Burger King; that as of September 2006 Deloitte had not generated any revenue from Burger King in almost one year (*i.e.*, since Lamela left Deloitte) and that neither he nor anyone else at Deloitte has been personally

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<sup>54</sup> POB Ex. X at 10.

<sup>55</sup> *Id.*

<sup>56</sup> Lamela Dep. 9/20/06 at 166-67; Lamela Aff. 12/15/06 at 12.

soliciting Burger King's business.<sup>57</sup> Under these circumstances, I find that Deloitte has pled and proved that it has a substantial client relationship with Burger King that supports enforcement of the covenant not to compete. As with AutoNation, however, the appropriate remedy, if any, is an issue best left for trial.

### 3. Ryder Systems

For reasons similar to those discussed in connection with AutoNation and Burger King, the Court finds that Deloitte has a legitimate business interest in Ryder. Deloitte has shown that during the period 2003-2006, Deloitte Tax received between \$106,156 and \$716,421 in annual revenue from Ryder.<sup>58</sup> Lamela billed Ryder for 165 hours of his own work from 2004 to 2005, and recorded approximately 97 hours of unbilled promotional time during the 2002 to 2005 period.<sup>59</sup> Lamela was also one of Deloitte's billing partners on the Ryder account.<sup>60</sup> Therefore, I find that Deloitte has a substantial relationship with Ryder and that, while he was at Deloitte, Lamela was an important part of this relationship. Indeed, Lamela contends that because of his relationship, Ryder followed him from Arthur Andersen to Deloitte so that Lamela could continue to provide SALT advisory services.<sup>61</sup>

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<sup>57</sup> Tache Dep. at 31, 38, 45.

<sup>58</sup> POB Ex. X at 35.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*; Lamela Dep. 10/6/06 at 278.

<sup>61</sup> Lamela Aff. 12/15/06 at 14.

I further find that Deloitte's substantial client relationship with Ryder would be threatened by Lamela's solicitation of, and competition for, this client and that the two-year limitation period contained in the Agreement is reasonable. Thus, the court grants in part Deloitte's motion for summary judgment to the extent that it has shown that it has a legitimate business interest in Ryder and that the two-year limitation period contained in the Agreement is reasonable. For reasons similar to those discussed with respect to AutoNation and Burger King, however, the Court declines to grant summary judgment on the question of an appropriate remedy for any breach as to Ryder.

**D. Neither Party is Entitled to Summary Judgment Regarding the Clients that Remain in Dispute**

The Court will not grant either Deloitte's or Lamela's motion for summary judgment on any of the other clients at issue in this litigation. To discuss one example, consider the client Andrx.<sup>62</sup> On this summary judgment record, Deloitte has not shown conclusively that it has a legitimate business interest in Andrx that needs to be protected by a covenant not to compete. Lamela, on the other hand, has failed to show that Deloitte does not have a legitimate business interest in Andrx. Deloitte received revenues from Andrx of approximately \$439,531 in 2003, \$299,528 in 2004, \$232,216 in 2005 and \$326,274 in 2006.<sup>63</sup> The Court reasonably could infer from this evidence that Deloitte

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<sup>62</sup> In my preliminary ruling, I expressed an inclination to grant Lamela summary judgment on Andrx. For the reasons discussed in the text, however, I have concluded that there are genuine issues of material fact that preclude the Court from granting either party summary judgment on this client.

<sup>63</sup> POB Ex. X at 3.

has a substantial relationship with this client. Other than these bare numbers, however, Deloitte has not presented any specific evidence of such a relationship.

Similarly, although Lamela was a billing partner on Andrx's account and Deloitte has alleged that it discounted Andrx's bills in an effort to develop it as a client, Deloitte has not presented any evidence suggesting that it had a special pricing arrangement with Andrx, or that Lamela knew of such an arrangement.<sup>64</sup> In addition, Lamela only billed approximately 37 hours of time to Andrx between 2002 and 2005,<sup>65</sup> an average of little more than 10 hours per year. In terms of unbilled promotional time, Lamela only recorded approximately eight hours on Andrx's account during the 2002-2003 time period.<sup>66</sup> Based on this evidence and the requirement to draw all reasonable inferences in the nonmoving party's favor, I find that there are genuine issues of material fact that preclude the Court from granting either Deloitte's or Lamela's motion for summary judgment with regard to Andrx.

The parties presented extensive evidence for their respective positions on the other clients still in dispute. As to most of those companies, Deloitte seeks only nonmonetary relief. In particular, Deloitte requests a continuation of the restrictions of the preliminary injunction now in place through June 17, 2007, the expiration date of Lamela's covenant not to compete. Having carefully considered the parties' submissions regarding those

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

additional clients in the context of the limited relief sought, I have concluded that there are genuine issues of material fact that require denial of both Deloitte's and Lamela's motions for summary judgment based on the present record.

### **III. CONCLUSION**

For the reasons set forth above, Lamela's motion for summary judgment is granted with respect to Citrix, DHL, JM Family, PharMed and Southern Wine & Spirits and all claims as to those clients are dismissed with prejudice.

Deloitte is granted partial summary judgment with respect to AutoNation, Burger King and Ryder. Deloitte has shown that it has a legitimate business interest in these clients and that the two-year limitation period contained in the Agreement is reasonable. Thus, for purposes of further proceedings in this case, those propositions shall be taken as established. The appropriate remedy for any breach by Lamela of his post-termination covenants, however, presents legal and factual issues that preclude me from granting that aspect of Deloitte's summary judgment motion.

In all other respects, the parties' cross motions for summary judgment are denied. Each party shall bear its own costs on these motions.

**IT IS SO ORDERED.**