NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *The Metis Group, Inc. v. Stephanie P. Allison, et. al.,* Case No. CL 2019-10757

Dear Counsel,

This matter came before the Court for an evidentiary hearing on the Defendants' Plea-in-Bar challenging the enforceability of a restrictive contract provision. At the conclusion of the hearing it became evident there were no disputed material facts at issue. This plea-in-bar is therefore decided largely as a matter of law and subject to *de novo* review upon appeal. Resolving the issue under the plea-in-bar here is consistent with the principle that the enforceability of a

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covenant that restricts competition is utlimately a question of law. *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249 (2005).

**Background**

The Metis Group, Inc. is a government contractor that was one of several companies that received a Blanket Purchase Agreement ("BPA") from the United States Government for the provision of psychological and related services for the United States Army. Defendant Preting, LLC was apparently also a qualified contractor under the BPA.

The BPA permitted the U.S. Army to offer different task orders to different businesses who then competed to provide services as requested in an amount and duration as the Army determined. Metis was awarded and received several task orders under the BPA.

To service the task orders issued under the BPA, The Metis Group entered into an Independent Contractor Agreement with the Defendants Dr. Stephanie P. Allison and Dr. David A. Kohls.[1] The Agreements contained identical provisions including certain restrictive covenants at issue. Specifically, although captioned as a "non-solicitation" provision, the first provision is essentially a non-compete clause and although captioned as a "non-solicitation of employee" provision, the second provision is a non-solicitation of both employees and independent contractors of The Metis Group.

The non-compete provides as follows:

V. NON-SOLICATION

5.1 Non-Solicitation of Clients. The Parties acknowledge and agree that Metis' existing relationships with its Clients and the relationships made or enhanced during the course of this Agreement were derived at considerable expense and belong exclusively to Metis.[2] Consultant agrees, represents, warrants and

[1] Dr. Kohls filed a Demurrer arguing that he is not a party to the Independent Contractor Agreement and it is only his entity, Ballston Psychology, PLLC that was the defined consultant under the Agreement. For purposes of the Plea-in-Bar, the Court accepts the pleadings as true that Dr. Kohls is a party bound under the Agreement. The determination that the restrictive covenants are unenforceable renders the demurrer moot. The Court notes, however, that although Dr. Kohl signed the Agreement both in his individual capacity as well as representative capacity, the restrictive provisions of the Agreement under §§ 5.1 and 5.2 govern the conduct of only the Consultant – which is defined as Ballston Psychology, PLLC. Dr. Kohls signing individually is logically explained as the acknowledgement that despite the fact the entity was the defined "Consultant", the services rendered had to be personal services by Dr. Kohl. That does not mean Dr. Kohl is personally under the non-compete. The Metis Group may want to correct this part of their form contract as well.

[2] Standard form contracts often suffer from inaccuracies and misrepresentations because they seek to apply general terms to all circumstances instead of addressing the specific parties under the contract. The general statement about Metis' enhanced relationship with the particular client at issue – the U.S. Army and more specifically, the 1st Capabilities Integration Group at Fort Belvoir - was untrue for Dr. Stephanie P. Allison. Dr. Allison had actually served as a Deputy performing the same functions performed under the Metis

covenants that during the terms of this Agreement, Consultant shall not, except with respect to providing the Services, for Consultant or on behalf or in conjunction or association with any other person or other entity directly or indirectly, solicit, attempt to solicit, engage, contact, provide any professional psychological services for Client. To protect Metis' and its Clients' legitimate interests, Consultants represents, warrants, and covenants that it shall comply with the restrictions set forth in this Article V.

The second provision prohibits the solicitation of employees and other independent contractors, despite its title limiting the restriction to employees, provides as follows:

> 5.2 Non-Solicitation of Employees. Consultant further agrees, represents, warrants, and covenants that during the term of this Agreement and the Restrictive Period (as defined in Section 4.2), Consultant shall not, on Consultant's own behalf or on behalf of any other person or entity, directly or indirectly: (i) induce, or attempt to induce, any employee or contractor to terminate any employment or any contractual relationship with Metis and/or any Client; (ii) interfere with or disrupt Metis' and/or any Client's relationship with any other Metis and /or client employee or contractor; (iii) solicit, entice, take away, employ or engage any employee or contractor employed or engaged by Metis and/or any Client with whom Metis and/or Client has a contractual relationship; or (iv) advise or recommend to a third party that it employ, entice, take away, engage, or solicit for employment or independent contractor relationship, any person employed or engaged as an independent contractor by Metis and/or its Clients.

The plain and unambiguous term or duration of the restriction differs as between the "non-compete" under § 5.1 and the "non-solicitation" under § 5.2.

The noncompete is limited to the "term of the Agreement." The term of the Agreement is indefinite. It commences upon the effective date of the Agreement and continues until terminated by either Party upon written notice. That short period nearly saves the covenant except for the indefinite term that exists absent termination.

The "non-solicitation" provision is in force during the term of the Agreement and the "Restrictive Period" under § 4.2. The restrictive period under § 4.2 is defined as twenty-four (24) months following the termination of the Agreement.

In November 2017, both Defendants Dr. Allison and Dr. Kohl worked as independent contractors under Metis' Independent Contractor Agreement. The applicable task orders ran for one year and were not renewed. At the end of the task order, neither Defendants terminated their respective Agreement, and both technically remained restricted from working for the United States Army under the terms of their Agreement.

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contract. She left the full-time position with the Army to spend more time with her family. It is therefore inaccurate and untrue that the relationship between Dr. Allison and the 1st Capabilities Integration Group can only be credited to and belong exclusively to Metis.

In June of 2019, Metis learned that both Dr. Allison and Dr. Kohl were, in fact, providing the services to the U.S. Army under the same BPA but with a competitor – Preting, LLC. Shortly after learning of their services, Metis sent a "cease and desist" letter to all three Defendants, the two doctors and Preting, LLC.

Metis then filed a Complaint alleging breach of contract against the two doctors and tortious interference of contract against Preting. In response, all Defendants filed a plea-in-bar on grounds that the restrictive covenants were unenforceable. Prior to the hearing on the plea-in-bar – both doctors submitted their respective written termination notices.

## Legal Analysis

### A. Standard of Proof

A plea-in-bar is referred to by this Court colloquially as the "so-what" defense. In essence, the Defendants in presenting a plea-in-bar implicitly states that even if they committed the alleged wrong, the Plaintiff is barred from bringing a claim against them. *See, Ferguson Enterprises, Inc. v. F.H. Furr Plumbing,* 297 VA. 539, 549 (2019).

As the Virginia Supreme Court in *Hawthorne v. VanMarter,* 279 Va. 566, 577-578 (2010)(citations omitted) has thoroughly explained:

> A plea in bar asserts a single issue, which if proved creates a bar to a plaintiff's recovery . . .The party asserting a plea in bar bears the burden of proof on the issue presented . . . The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings or developed through the presentation of evidence supporting or opposing the plea .... If the parties present evidence on the plea ore tenus, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support.
>
> If the facts underlying the plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea .... Conversely, if the facts are disputed and no demand for a jury is made, the "whole matter of law and fact' may be decided by the court.

Some confusion exists regarding who bears the burden of proof when the enforceability of a restrictive covenant is challenged pursuant to a plea-in-bar. As stated above, it is generally required that a party who seeks a plea-in-bar bears the burden of proof of having the complaint dismissed with prejudice.

On the other hand, the employer who seeks to enforce a restrictive covenant bears the burden of proving that the restriction is (1) narrowly drawn to protect the employer's legitimate business interest; (2) is not unduly burdensome on the employee's ability to earn a living, and (3)

is not against public policy. *Home Paramount Pest Control Companies, Inc. v. Shaffer,* 282 Va. 412, 415 (2011).

Restraints on trade are disfavored in Virginia, thus are strictly construed; hence, all three factors must be proven before a restraint will be deemed valid and enforceable. *Modern Env'ts, Inc. v. Stinnett,* 263 Va. 491, 493 (2002). In determining whether the employer has met the burden of proving those three factors, the court considers the "function, geographic scope and duration" of the restriction. *Simmons v. Miiller,* 261 Va. 561 581 (2001). Those elements are not considered separately in a three-part test but are considered together and as applied to the three factors above. *Home Paramount Pest Control Companies, Inc.* 282 Va. at 764 *citing Simmons v. Miller,* 261 Va. at 581. As a result, the inquiry undertaken by the Court is whether the function, geographic scope and duration are narrowly drawn to protect the employer's legitimate interest. After that inquiry, the Court moves on the second factor and then the third. At any point, where a factor is not proven, the restrictive covenant is deemed unenforceable.

Requiring an employer to prove that factors needed to validate that a restrictive covenant is lawfully drawn is consistent with Virginia law, requiring that in a contract action the Plaintiff must prove the obligation sought to be enforced is lawful. *Filak v. George,* 267 Va. 612, 614 (2004)(The elements of a breach of contract action are (1) a legally enforceable obligations of a Defendant to a plaintiff; (2) the Defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation).

Despite the burden on the employer to prove the lawfulness of the restraint under the restrictive covenant, the employee or party challenging the enforceability of the provision does not wholly escape the underlying burden of proof incidental to a plea-in-bar. This competing standard can only be harmonized by considering which party is in the better position to produce evidence with respect to the factors considered in deciding whether to uphold or reject a restrictive covenant.

For instance, whether the restraint is no greater than necessary to protect the employer's legitimate business interest requires evidence that rests primarily with the employer. It is unreasonable to require the employee to produce evidence of the employer's business interest.

At the same time, whether the restraint from the standpoint of the employee is unduly harsh or oppressive in obstructing efforts to earn a livelihood, implicate facts that should be known and can be shown by the employee. Therefore, once the employer produces some evidence that supports the restriction as to the second factor of the effects upon the employee, then the employee must come forth with evidence to meet the burden at the plea-in-bar stage for the Court to dismiss the cause of action.

As for the third and final factor, whether a restrictive covenant violates public policy is a matter that should be proven by both parties. It is not only up to the employer to prove a negative proposition and that is, the restrictive covenant does not violate public policy. The party challenging the enforceability of the covenant should present some evidence that sustaining the restriction would violate public policy. It is generally from the line of cases, that the parameters of public policy have appeared.

**B. The restrictive covenants are unenforceable**

**(1) The restrictive covenants are actually facially invalid and there was no credible evidence that The Metis Group needed the restrictions to be as broad as they were drafted.**

The non-compete provision under § 5.1 prevents the Defendant doctors from engaging in any professional services with the United State Army anywhere in the world and for any purpose, whether or not such purposes compete with The Metis Group's business model. The Plaintiff argues that prior case law supports a worldwide ban on providing competing services to a single client. Contrary to the Plaintiff's argument, the expansive restriction worldwide is not equivalent to the upholding the validity of singling out a client as referenced in *Preferred Systems Solutions, Inc. v. GP Consulting, LLC,* 284 Va. 382 (2012).

In *Preferred System,* a duration period of 12-months was deemed reasonable when the restriction was limited to the support of a particular program run under a particular government agency and limited to the same or similar type of information technology support offered by the employer. *Preferred Systems,* 284 Va. at 390. Specifically, in *Preferred Systems* the federal Defense Logistics Agency (DLA) awarded a Blanket Purchase Agreement to ten contractors, with Accenture, a leading global professional service company, as the "team leader", for the development of systems solutions under DLA's Business System Modernization program (BSM). *Id.*

The subcontractor in *Preferred System* agreed that it would not enter into a contract with Accenture (the team leader) or DLA to provide the same or similar support that the contractor – Preferred Systems - was then providing in support of DLA's Business Systems Modernization program. Consequently, the subcontractor was not prohibited from contracting with Accenture or the Defense Logistics Agency to develop systems solutions in any other department or location outside of the work being performed under the BSM program. In other words, the geographic limitation was unnecessary but the restriction was so narrowly drawn to include only the BSM program under the BPA. The subcontractor in *Preferred System* was, as stated, free to offer systems development support to both Accenture and DLA in any other programs.

Here, the restriction under § 5.1 applies to the U.S. Army for whatever programs for which it may need support regardless of the program involved or place of performance. The restrictions include "any professional psychological service" for the "Client" – defined as the United States Army. Consequently, if the Army sought the services of Drs. Allison and Kohl to start up a completely new project overseas with a different unit, they would be prohibited from providing those services without Metis even if The Metis Group had never performed work in that specific area or specific space.

At the same time the non-solicitation provision under § 5.2 prohibited the solicitation of covered employees or contractors even if the reason for causing the employees or contractors to pursue opportunities elsewhere was unwholly unrelated to The Metis Group's business needs.

Consequently, The Metis Group cannot rely upon *Advance Marine Enterprises, Inc. v. PRC, Inc.*, 256 Va. 106, 111 (1998) because the restrictions here do not confine themselves to competing services. *Advance Marine* involved a restrictive covenant that shielded the employer from unfair practices by their competitors. Here, the restrictive covenants seek to hoard the services of the defendants and prevent any disruption of the workplace regardless of whether the disruption comes from a competitor. The fact that the disruption came from a competitor does not render the restriction enforceable.

The Metis Group defined the scope of services to all services that can be professionally provided by the doctors regardless of whether the services fall outside those services generally provided by The Metis Group or their competitors. Instead of narrowly tailoring the prohibited services, The Metis Group expanded the definition of services it provided by embracing all professional services that can be performed as long as it is the individual defendants who are providing those services. In other words, as long as the doctors were acting within their profession with the entire U.S. Army, they were tied to The Metis Group.

**(2) The second factor concerning the impact upon the Defendants' efforts at earning a livelihood was not proven.**

The individual Defendants hold professional degrees and experience in the security field. Being prohibited to work, by working on the particular task orders with the Army, may interfere with their job preference, but there was not enough evidence to find that complying with the agreement would have been overly burdensome to their earning a livelihood.

**(3) The restrictive covenants violate public policy.**

The restrictive covenants violate public policy because they are designed to perpetuate a monopoly although the work itself performed was limited to a particular government project. For example, here the consultants were hired for a specific task order. When the task orders were completed there was no more work to be done. A contract that prohibits a party from seeking employment at a time the employer had no work for the contractor and did not offered to subsidize the contractor's livelihood is almost unconscionable. There was no credible evidence The Metis Group kept in touch with the contractors, or attempt to secure work for them in any areas or else it would have discovered sooner that the contractors were still working.

There was no credible evidence as to why The Metis Group needed to create an impermeable barrier preventing others from soliciting their employees or other independent contractors to perform any other work regardless of the nature of the work or location.

Defendant Preting seeks a classification scheme that treats independent contractors differently from employees. As mentioned above, there are some differences between the two groups that are weighed differently when determining whether a restrictive covenant is reasonable or needed for the employer's business. There is, however, no blanket restriction on requiring an independent contractor from observing a reasonably drafted and narrow restriction.

Defendants' argument is unpersuasive when arguing that the restrictive covenants violate public policy because they deprive the United States Army of unique and specialized expertise. That expertise was always available through The Metis Group. The purpose of the restrictive covenants was to ensure that for so long as the Army thought the services were valuable that The Metis Group was the only contractor able to provide such services.

Ultimate, all businesses would happily enjoy the economic benefit of being a sole source contractor. An interest in having monopolistic control over possible profits is not a factor that supports a restrictive covenant. Therefore, although The Metis Group may require its independent contractors to agree to restrictive covenants, it may not impose such broad and overreaching restrictions.

All three factors have to be proven. While the second factor was proven insofar as the evidence was insufficient, suggesting that it would unduly interfere with the defendant's ability to earn a livelihood, it is more than enough that The Metis Group failed to prove the first and third factors.

**(C) The severability (§ 7.7) and modification (§ 7.3) clauses do not affect the unenforceability of §§ 5.1 and 5.2 or allow The Metis Group to continue its lawsuit.**

The independent contractor agreement contains a severability clause designed to avoid the voiding of the entire contract should a particular provision be deemed unenforceable. The severability clause provides as follows:

> 7.7 **Severability,** The provisions of this Agreement are several, and if any one or more provisions may be determined to be illegal, invalid or otherwise unenforceable, in whole or in part, and not otherwise subject to modification as provided in Section 7.3 above, the remaining provisions, and any partially unenforceable provision to the extent enforceable, shall, nevertheless be binding and enforceable.

Severability clauses are valid – but only to the extent applying the severability clauses do not violate Virginia's prohibition concerning blue-penciling. Consequently, clauses that are unenforceable do not render the entire contract unenforceable, the Court simply strikes out those clauses. *Resitroffer v. Person,* 247 Va. 45, 49-50 (1994). The Court will not rewrite the specific terms. And yet, The Metis Group interesting offers a modification clause to argue that the restrictive covenants can be edited to become valid. The agreements contained the following provision:

> 7.3 **Modification by the Court.** If any provision of this Agreement is deemed overbroad, unreasonable, or creating such a burden that a court would otherwise find such provision unenforceable, the Parties agree that the court shall be authorized to modify such provision to the extent it believes reasonable so as to best carry out the intentions of the Parties to the fullest extent allowed by a court of law or equity.

Granting the Court authority to modify the provisions is an interesting concept but utlimately would not help. For example, if granted the opportunity the Court would modify the restrictions as follows:

(1) The Court would have limited the definition of Client for whom psychological services could not be provided during the term of Agreement to the specific client serviced under the particular task order. In this case, it would have been the 1st Capabilities Integration Group at Fort Belvoir. "Client" would not be defined as the entire U.S. Army.

(2) Pursuant to § 1.1 of the Contract, the term "Services" under the § 5.1 is defined as the work to be performed under the Task Order. However, the restrictive covenant goes further and prohibits the doctors from performing "any psychological services." Under § 5.1, the term "services" is not capitalized and therefore embraces all forms of psychological services even if some differ materially then what is being offered under the Task Order. The Court would have limited prohibited services from the same or similar services provided under the task order. That would enable the defendants from providing services to the U.S. Army within their field.

(3) The Court would have limited the term of the restriction to end upon the termination of the Task Order without the need for further notice. This is essentially what the doctors reasonably believed they could do. With the Task Order ended and having no further task orders in place, it is unreasonable to prevent independent contractors who receive no ongoing benefits from the employer from seeking work from the Client. Employers who keep employees on payroll while searching out other opportunities to place them have a plausible economic reason for not having their employees poached by competitors when in between contracts. Employers who keep talent out of the marketplace for the purpose of hoarding those assets engage directly in purely anti-competitive and monopolistic practices.

Ending the restrictions upon the conclusion of the Task Order further recognizes the effect of termination under § 2.3(B) and (C). Under that section, The Metis Group may terminate a Task Order with ten (10) days' notice. The Consultant, however, can terminate only with thirty (30) days' notice but then all Task Orders are terminated and not the particular Task Order for which the notice of termination had been sent. Consequently, a Consultant who sought to terminate one Task Order would be deprived of the opportunity to work on any other Task Order. Once freed of obligation to the Metis Group, they should be free to offer what services are sought.

(4) As for the non-solicitation of employees or independent contractors, that clause should be limited to soliciting the employees or independent contractors working under the same Task Order to work on behalf of another competitor

under the same task order. Such a limitation would sufficiently discourage a competitor from wooing a co-worker over and having that co-worker persuade others to work for the competitor under the same Task Order.

(5) The Court would have also limited the time to the end of the Task Order. A post separation time can be considered for employees who receive severance pay upon separation from the company, however, in terms of the needs of Metis – the greatest need for protection would appear to be limited to the time of recompete or renewal of the Task Order. Given the absence of evidence as to a dependable cycle, each contract would have to be modified to fit the facts and circumstances of the particular Task Order.

As stated in *Mantech Intl. Corp. v. Analex Corp.,* 75 Va. Cir. 354 (2008)[3], when it comes to co-workers communicating with one another, a former employee may have legitimate reasons to persuade a former co-worker to retire or pursue another career path. Businesses do not have the right to place an impermeable protective barrier around their employees and their independent contractors.

Businesses should instead retain their personnel, by recognizing their value, by ensuring that the compensation and rewards are such that those working for them would be hesitant to leave or have a financial incentive not to work for a competitor. Some businesses are even known for offering incentive payments or finders' fees for employees who seek out additional business opportunities for their company.

Virginia courts do not, however, rewrite contracts for the business world. While Virginia courts will strike down efforts at establishing monopolies and overly broad restraint of trade, the courts are not in the business of writing contracts.

**(D) The tortious interference of contract fails because the tort requires a valid contract or at the very least a valid business expectancy. The law will not aid a party seeking to enforce an unenforceable contractual provision.**

A claim for tortious interference of contract claim requires (1) a valid contract or business expectancy between the Plaintiff and a third party; (2) the Defendant knew of the contract; (3) the

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[3] Notably, *Mantech* was decided prior to the 2013 decision of *Assurance Data, Inc. v. Malyevac,* 286 Va. 137 (2013) in which the Virginia Supreme Court declared that the reasonableness of a restrictive covenant cannot be decided by demurrer because whether it is enforceable or unenforceable cannot be decided in a factual vacuum. The scope and breadth of the restrictions here – extending worldwide to the United States Army and with respect to the non-solicitation of employees without limit as to what choices those employees may want to exercise in terms of remaining employed with Metis – are such that it is inconceivable that any private entity would be entitled to such far reaching restrictions. In keeping consistent with the Virginia rule that an element of a contract claim is that the Plaintiff must allege a lawful agreement and that restrictive covenants are disfavored, part of a plausible cause of action stated under this particular lawsuit should arguably include a justification as to why the restrictive covenants were needed.

Defendant took actions to induce a breach or disruption of the contract; and (4) damages. *Schaecher v. Bouffault,* 290 Va. 83, 106 (2009) *citing Chaves . Johnson,* 230 Va. 112, 120 (1985).

There must be a valid contract or a valid business expectancy. More importantly, the particular contractual relationship being preserved must be valid. Here, due to the severability clause, the contract itself is valid, but this lawsuit is brought on the unsustainable premise that the defendants have interfered with the unenforceable restrictive covenants.

There is no Virginia authority that would allow a Plaintiff to hold a third party accountable when the Plaintiff relies upon an anti-competitive and overbroad restrictive covenant and the facts and circumstances here do not suggest that this case should be a case of first impression allowing such a cause of action to continue.

Understandably there can be an argument that, without providing such protections, the Court would be encouraging the unseemly poaching of government contracts by allowing competitors to take away contracts by enticing away the employees under those contracts.

The answer in the market is for the employer to retain those employees, consultants and independent contractors with offers of greater benefits and stability rather than to restrain trade.

**Conclusion**

For reasons stated herein, the Pleas-in Bar is SUSTAINED and the Complaint is dismissed with prejudice. The Court asks that Dr. Kohl's counsel to take the lead in drafting and circulating an Order that allows for such objections as should be noted and that the Order adopts and incorporates this letter decision without the need for making it a part of the Order.

This cause was set on the Court's next civil motions docket on Friday, January 31, 2020 at 10:00 a.m. If a fully endorsed Order is submitted to the Court before then, the hearing will be removed. If the parties do not agree on the language of the Order, please provide the Court with notice of where the disagreement lies and consider providing competing versions.

The Plaintiff is invited to file a motion for reconsideration to bring to the Court's attention any errors under this letter before the entry of the final Order. Defendants are not required to respond unless expressly requested by the Court to do so.

The Court thanks all counsel for their thorough presentation of the issues.

Sincerely,

[redacted]

John M. Tran
Judge, Fairfax Circuit Court