IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

., an Illinois corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No.
, an Illinois corporation,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO 735 ILCS 5/2-619.

Now comes the Defendants, (" "), (" ") and (" "), by their attorneys , , and for their Motion to Dismiss Petitioner (" ") complaint pursuant to Section 2-619(a)(9), states as follows:

I. BACKGROUND

filed its complaint on , 200. A copy of the complaint is annexed hereto as Exhibit "A." According to the complaint, is a company that supplies various senior care products such as durable medical equipment, prosthetics, orthotics and supplies. Exhibit "A" at ¶ 28. The complaint further alleges that and are former employees of and that after leaving the employ of started a company called to directly compete against .

In support of their complaint, has attached two employment agreements containing restrictive non-compete/non-solicitation covenants that purportedly bear the signatures of and . A copy of the employment agreements are annexed hereto as Exhibit "B."

As a result, [redacted] alleges in its complaint causes of action for injunctive relief against the defendants seeking to prevent defendants from violating the restrictive non-compete/non-solicitation covenants contained in the employment agreements purportedly signed by the defendants; breach of contract against all three defendants for violating the alleged employment agreements by competing against and soliciting the clients of [redacted]; conversion of property against [redacted] and [redacted]; violation of the Illinois Trade Secrets Act against all defendants; unfair competition against all defendants; interference with prospective economic advantage against all defendants; tortuous interference with contract against all defendants and breach of fiduciary duties against [redacted] and [redacted]

It is undisputed that [redacted] worked for [redacted] from [redacted], 20[redacted] to [redacted], 20[redacted]. See the affidavit of [redacted] annexed hereto as Exhibit "C." In addition, [redacted] worked at [redacted] from [redacted], 20[redacted] to [redacted], 20[redacted]. See the affidavit of [redacted] annexed hereto as Exhibit "D." However, as set forth below, the contracts forming the basis of plaintiff's complaint were never executed and the signatures that appear on these contracts are forgeries. In addition, even if the court were to find the contracts were validly signed, the restrictive non-compete/non-solicitation covenants are against public policy and should not be enforced

II. THE COMPLAINT IN THIS MATTER SHOULD BE DISMISSED BECAUSE AN AFFIRMATIVE MATTER NEGATES THE ENTIRE COMPLAINT

A defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief if the plaintiff's claims against the defendant are barred by other affirmative matter avoiding the legal effect of or defeating the claims. 735 ILCS 5/2-619. The primary purpose of a section 2- 619 motion is to provide a means to dispose of issues of law or easily proved issues of fact. *Dangeles v. Marcus* 57 Ill. App. 3d 662 (1978).

The question for the court under a Section 2-619(a)(9) motion is whether there exists a genuine issue of material fact precluding dismissal or, absent an issue of material fact,

whether dismissal is proper as a matter of law. *Albert Brooks Friedman, Ltd. v. Malevitis*, 304 Ill. App. 3d 979 (Ill. App. Ct. 1st Dist. 1999). The court must accept as true all well-pleaded facts in the complaint and all reasonable inferences that can be drawn from those facts in the light most favorable to the plaintiff. *Id*. at 983.

Further, an "affirmative matter" as used in section 2-619(a)(9) of the Code of Civil Procedure is a type of defense that either negates an alleged cause of action completely or refutes conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *A.F.P Enterprises v. Crescent Pork, Inc*., 243 Ill. App. 3d 905 (Ill. App. Ct. 2nd Dist. 1993); *Fancher v. Central*, Ill. Pub. Serv. Co., 279 Ill. App. 3d 530, 534 (Ill. App. Ct. 5th Dist. 1996) ("Affirmative matter" within the meaning of section 2-619(a)(9) is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint). Moreover, the term "affirmative matter" includes a defense which destroys the cause of action. *Asher v. Farb Sys*., 256 Ill. App. 3d 792 (1 Dist. 1993).

Here, the complaint must be dismissed because the attached affidavits of [redacted] and [redacted] (Exhibits "C" and "D" respectively) establish as a matter of law that the contracts forming the basis of plaintiff's complaint were never executed and the signatures that appear on these contracts are forgeries. In addition, even if the court were to find the contracts were valid, the restrictive non-compete and non-solicitation covenants are against public policy and should not be enforced.

A) <u>The Employment Agreements Which Form The Basis Of Plaintiff's Complaint Were Never Executed And Are Forged</u>

When a party raises the issue of a forgery of the party's signature, it is the party's burden to establish that fact. *Superior Bank FSB v. Golding*, 152 Ill. 2d 480 (Ill 1992). In addition, where a contract is enforced on the basis of a single signature, it must generally be

signed by the party to be charged under the contract and delivered to the nonsigning party who indicates acceptance by performing. *Glabman v. Bouhall*, 81 Ill. App. 3d 966, 969 (Ill. App. Ct. 1st Dist 1980).

According to the affidavit of [redacted], she worked for plaintiff [redacted] from [redacted], 20[redacted] to [redacted], 20[redacted]. Exhibit "C" at [redacted] Although [redacted] handled employment agreements similar to those attached to plaintiff's complaint on many occasions, and handed those agreements to other employees for signing, she never executed an employment agreement with [redacted]. *Id*. at [redacted]. According to her, the signature that appears on the copy of the agreement attached to plaintiff's complaint is not her signature and is a forgery. *Id*. at [redacted].

It should be noted that in August of 2008, [redacted] was contacted by the law firm of [redacted], [redacted] & [redacted] who told her that they had an original copy of the employment agreement she allegedly signed with [redacted]. Exhibit "C" at [redacted] She then requested that they provide her with a copy which they failed to do. *Id*. at [redacted]. In addition, after her termination from [redacted] in May of 2008, [redacted] filed and won a wage loss claim against [redacted]. *Id*. at [redacted]. In addition, she filed a non-payment of overtime claim against [redacted] with [redacted] which resulted in [redacted] are now being audited. *Id*. at [redacted]. According to [redacted], the present action is nothing more than retaliation for seeking money she is rightfully owed from [redacted] as a result of her employment. *Id*. at [redacted].

In her affidavit, [redacted] also states that she has seen employment agreements similar to those attached to plaintiff's complaint but that she never executed an employment agreement with [redacted]. Exhibit "D" at [redacted] According to her, the signature that appears on the copy of the agreement attached to plaintiff's complaint is not her signature and is a forgery. *Id*. at [redacted]

Accordingly, through their sworn affidavits [redacted] and [redacted] have established as a matter of law that the employment agreements that serve as the entire basis of [redacted]'s complaint are forgeries. Without executed employment agreements, there are no restrictive non-compete and non-solicitation covenants that are enforceable against the defendants and the entire complaint must be dismissed. *Zinni v. Royal Lincoln-Mercury, Inc.*, 84 Ill. App. 3d 1093 (Ill. App. Ct. 1st Dist 1980) (absent a signature by the defendant, no contract existed between the parties and complaint should be dismissed); *Baker v. Daniel S. Berger*, 323 Ill. App. 3d 956 (Ill. App. Ct. 1st Dist 2001) (where the evidence established that the contract was not signed, plaintiff's complaint seeking declaratory relief based on non-compete clause in an employment agreement was not "warranted by existing law").

B) <u>Even If The Employment Agreement Is Found To Be Enforceable, The Non-Compete And Non-Solicitation Clause In The Agreement Cannot Be Enforced Because They Are Unreasonable And Against Public Policy.</u>

Whether injunctive relief should issue to enforce a restrictive covenant not to compete in an employment contract depends upon the validity of the covenant, the determination of which is a question of law. *Mohanty v. St. John Heart Clinic*, S.C., 225 Ill. 2d 52 (Ill 2006). Under Illinois law, in determining whether a restrictive covenant is reasonable a court must consider the hardship the covenant imposes upon the individual employee. *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 727-728 (Ill. App. Ct. 3d Dist. 2008). See also *Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Int'l Inc.*, 2009 U.S. Dist. LEXIS 22694, 27 (N.D. Ill. Mar. 19, 2009) ("In Illinois a restrictive covenants reasonableness is measured by its hardship to the employee.")

As a general rule, Illinois courts are reluctant to enforce restrictive covenants. *Del*, 2009 U.S. Dist. LEXIS 22694, 28. Post-employment restrictive covenants operate as partial restrictions on trade and must be carefully scrutinized by the reviewing court. *Id.* In Illinois, restrictive covenants are disfavored in the law and closely scrutinized because they are

repugnant to the public policy encouraging an open and competitive marketplace. *Roberge v. Qualitek Int'l, Inc*., 2002 U.S. Dist. LEXIS 1217, 11 (N.D. Ill. Jan. 25, 2002). This is especially true in the case of covenants not to compete, which Illinois courts have held to be restraints on trade. *Id.* See also *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 599 N.E.2d 1072, 1079, 175 Ill. Dec. 58 (Ill. App. Ct. 1992).

Moreover, Illinois courts have recognized a distinction between those agreements that contain a blanket prohibition on competition and those that limit an employee from engaging in particular types of activities with competitors after they leave the employ of the former employer. *Roberge*, 2002 U.S. Dist. LEXIS 1217, 13. The most prevalent of these "activity restraints" is the soliciting of the former employer's customers. *Id.* at 13.

Here, the covenant to non-compete and non-solicit states in pertinent part:

> 12 (c). During the Employee's employment with the Company for a period of two (2) years immediately following the termination of the Employee's employment with the Company for any reason, the Employee agrees that he shall not, either for himself or on behalf of any other person, firm, corporation or any other entity, directly or indirectly, open, operate, engage in, or become interested in, any other proprietorship, partnership, firm, trust, corporation or other entity . . . which, directly or indirectly, shall, within ***North America***, engage in the sale or distribution of the type of products sold by the Company (***emphasis added***).

A post-employment restrictive covenant is generally held to be enforceable if it is reasonable in geographic and temporal scope and it is necessary to protect a legitimate business interest of the employer. *Abel v. Fox*, 274 Ill. App. 3d 811 (Ill. App. Ct. 4th Dist. 1995) (covenant stating that upon termination of her employment employee would not compete within a 75-mile radius of Busey Bank in Urbana, Illinois was reasonable).

In a case factually similar to the present case, *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396 (Ill. App. Ct. 1st Dist. 2005), the parties entered into an employment agreement with a non-compete provision which stated as follows:

> 5. Restrictive Covenants. Employer sells to customers and is in direct competition with other companies located in the ***United States and Canada*** ('Restricted Area').

> (a) During the term of this Agreement and for a period of one year thereafter EMPLOYEE, shall not, within the Restricted Area, directly or indirectly, either on his or her own account, as an employee, agent or consultant of a firm or otherwise which sells within the Restricted Area; (i) enter into or engage in the business conducted by EMPLOYER, (ii) provide services to, call upon or solicit sales from any account of EMPLOYER which has purchased items from EMPLOYER within a one year period prior to the termination of employment, even if such account was brought into EMPLOYER'S business by EMPLOYEE, or (iii) engage in, accept employment in, advise, sell the products of, represent or aid directly or indirectly any business in competition with the EMPLOYER (***emphasis added***).
>
> The parties also entered into a "Restrictive Shareholders' Agreement" which provided:
>
> For a period of thirty-six (36) months after the termination of their employment neither Smith nor Haas shall be employed by, own, consult to, or be an independent contractor, for any business or venture that sells products competitive to those of Arcor at the time of the termination of such employment."

In finding the non-compete covenant in the employment agreement unenforceable, the lower court noted that the employment covenant was for a one-year period and the geographic limitation was the United States and Canada. *Arcor*, 363 Ill 3d at 404. According to the lower court, the restrictive covenant was an industry-wide ban because it encompassed all of North America and therefore was a blanket prohibition on competition. *Id*. In affirming the lower court, the appellate court noted that a blanket prohibition on competition is defined as prohibiting competition within a particular geographical area. *Id*. at 405. In addition, an activity restraint is defined as a limitation on the types of activities in which the party could engage. *Id*. According to the court, activity restraints can be reasonable, whereas blanket prohibitions were generally unreasonable. *Id*.

Regarding the covenant in the Restrictive Shareholders' Agreement, the appellate court held that this agreement prohibited the defendant from being involved in "any business or venture that sells products competitive to those of Arcor." *Arcor*, 363 Ill 3d at 405. Although the covenant was limited in time to three years, it was unlimited in its geographical scope and therefore was a blanket prohibition on competition. *Id.*

The facts here are analogous. The provision [redacted] seeks to enforce is not limited in geographical scope, but rather acts as a blanket ban on competition throughout all of North America. As such, the provisions in both employment agreements are overbroad and unenforceable, warranting dismissal of [redacted]'s complaint.

WHEREFORE, Defendants, [redacted] ("[redacted]"), [redacted] ("[redacted]") and [redacted] Supplies Incorporated, request this Court grant the following relief:

1) Dismiss [redacted]'s complaint in its entirely;

2) Any further relief this court deems just, proper and equitable.

Dated: [redacted] ___, [redacted]

[redacted]

_____

By: [redacted]
Attorneys for Petitioner
[redacted]