THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

OMICRON SYSTEMS, INC., et al.,	:	August Term, 2001
Plaintiffs	:	
	:	No. 669
v.	:	
	:	Commerce Case Program
FRED WEINER,	:	
Defendant	:	Control No. 010320

OPINION

Plaintiffs Omicron Systems, Inc. ("Omicron Systems") and PBR Consulting Group, Inc. ("PBR") have brought an action against Defendant Fred Weiner ("Weiner") arising from Weiner's alleged breach of a restrictive covenant agreement. This Opinion addresses Weiner's preliminary objections ("Objections") to the Plaintiffs' complaint ("Complaint"). For the reasons set forth in this Opinion, the Objections are sustained in part and overruled in part.

BACKGROUND

Omicron Systems is a Pennsylvania corporation that provides computer information technology consulting services. PBR is affiliated with Omicron Systems and is currently known as Omicron Consulting.[1] PBR hired Weiner in 1987 and employed him continuously until his resignation on June 29, 2001. Weiner's most recent position with PBR was Director of Business Development, where he was responsible for client assessment, advising and support, and he had previously served as PBR's Director of the E-Business Group.

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[1] This name change was effected in 1997.

On December 10, 1993, PBR and Weiner entered into two related agreements ("Agreements"). These Agreements were a Confidentiality, Discoveries, Restrictive Covenant and Release Agreement ("Restrictive Covenant Agreement") and a PBR Consulting Group, Inc. Executive Management Plan ("EMP Agreement"). The EMP Agreement awards Weiner the right to "Executive Management Shares," whose value is tied to the value of PBR stock. The Executive Management Shares are payable upon Weiner's departure from PBR and are contingent on Weiner's compliance with the terms of the Restrictive Covenant Agreement.

In consideration for the Executive Management Shares, Weiner agreed to the Restrictive Covenant Agreement, in which he acknowledged that he had access to confidential information and trade secrets of PBR and PBR's clients and agreed not to disclose such information. The Restrictive Covenant Agreement also sets forth the following "Restrictive Covenant" to protect the interest of the "Company":[2]

> (a) During the term of this Agreement and for a period of two (2) years after separation from employment for any reason (the "Period"), Employee shall not, except with the express prior written consent of the Company, in any capacity, directly or indirectly, whether as employee, owner, partner, agent, director, officer, shareholder or in any other capacity in the broadest sense, for his/her own account or for the benefit of any Person in any business providing similar or related services of Company:
>
> (i) Solicit, enter into any business dealing, divert, accept business from or otherwise take away or interfere with any customer, known prospect, supplier, employee, salesman, agent or representative of Company, in connection with any business in competition with Company; or

[2] The Restrictive Covenant Agreement defines "Company" as "PBR Consulting Group, Inc., its divisions, affiliates, subsidiaries, officers or directors or any company successor thereto by merger, consolidation, liquidation, or other reorganization, as well as any subsidiary fifty-one percent (51%) or more the outstanding common stock of which is owned by" PBR. Compl. Ex. A ¶ 2(a).

> (ii) Establish, engage, own, manage, operate, join or control, participate or be connected with the establishment, ownership, management, operation, or control of, or be an employee, salesman, owner, partner, agent, director, office, shareholder or representative of, or be a consultant to, or be connected in any manner with, for his/her own account or for the benefit of any Person, any business in competition with Company throughout the entire world.

Compl. Ex. A. ¶ 5. In the same paragraph, Weiner acknowledged that the Restrictive Covenant was reasonable and necessary to protect the Company's legitimate business interests and that any violation would result in irreparable injury. Id. ¶ 5(b). The Restrictive Covenant also provides that in the event of a violation of the Restrictive Covenant, the Company may, in addition to other rights available to it, seek relief from a court of competent jurisdiction and that such relief may include a preliminary or permanent injunction and an equitable accounting.

Weiner submitted his resignation from PBR on June 15, 2001. At that time, Weiner advised PBR that he was going to work doing post-sale implementation management for Proscape Technologies ("Proscape"), which he described as an independent software vendor. At the time of his departure from PBR, Weiner signed a letter recognizing his obligations under the Restrictive Covenant Agreement.

The Plaintiffs assert that, contrary to Weiner's representations, Proscape is in the business of providing software and computer information technology consulting services and includes operations that compete with PBR and Omicron Consulting. In addition, Weiner's job title at Proscape is "Vice President of Consulting Services," and his responsibilities allegedly are much broader than he portrayed to the Plaintiffs. According to the Plaintiffs, this breach is compounded by the fact that Weiner solicited Eric Nelson, a former PBR employee, to leave PBR and to accept employment with Proscape.

Based on these allegations, the Plaintiffs have brought claims against Weiner for declaratory relief,[3] injunctive relief to enforce the Restrictive Covenant and an accounting and disgorgement of Weiner's earnings and other benefits. In response, Weiner has raised preliminary objections ("Objections") asserting legal insufficiency, application of an arbitration provision, and lack of capacity to sue.[4]

DISCUSSION

Weiner correctly points out that the Plaintiffs have failed to allege that they satisfied all conditions precedent to bringing suit based on the Restrictive Covenant Agreement, and the Objections are sustained on this point. The remaining Objections are without merit and are overruled.

I. The Plaintiffs' Claims are Legally Sufficient

Pennsylvania law sets forth the following guidelines for reviewing preliminary objections asserting legal insufficiency:

> When reviewing a decision granting preliminary objection in the nature of a demurrer, any doubt should be resolved in favor of overruling the demurrer. Preliminary objections should be sustained only in cases that are clear and free from doubt. The trial court must consider as true all well pleaded facts set forth in the complaint and all reasonable inferences drawn

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[3] The Plaintiffs request a declaration that Weiner has breached the Restrictive Covenant.

[4] Weiner also contends that the Plaintiffs' failure to attach the portion of Proscape's webpage that describes its activities violates Pennsylvania Rule of Civil Procedure 1019(i) and renders its claims incomplete. See Pa. R. Civ. P. 1019(i) ("When any claim or defense is based upon a writing, the pleader shall attach copy of the writing. . . ."). However, the Plaintiffs need not attach the excerpt of Proscape's webpage because it is referenced solely as evidence of Proscape's activities and does not form the basis for the Plaintiffs' claims. Cf. DeGenova v. Ansel, 382 Pa. Super. 213, 220, 555 A.2d 147, 150 (1988) (holding that where plaintiff's claims were brought in tort, he had no obligation to attach a copy of his insurance agreement to his complaint); Commonwealth, Dept. of Transp. v. Bethlehem Steel Corp., 33 Pa. Commw. 1, 15, 380 A.2d 1308, 1315 (1977) (Pennsylvania Rules of Civil Procedure "only require a document to be attached when it forms the basis for the claim.").

> therefrom. If the facts pleaded state a claim for which relief may be granted under any theory of law, then there is sufficient doubt to require rejection of the demurrer.

Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., 759 A.2d 926, 929 (2000) (citing Gaston v. Diocese of Allentown, 712 A.2d 757, 758 (Pa. Super. 1998). See also Stair v. Turtzo, Spry, Sbrocchi, Faul & Labarre, 564 Pa. 305, 309, 768 A.2d 299, 301 (2001) (A Pennsylvania court may sustain preliminary objections asserting legal insufficiency "only in cases in which it is clear and free from doubt that the facts pleaded by the plaintiff are legally insufficient to establish a right to relief.").

A. The Complaint Alleges That the Plaintiffs Are Acting to Protect a Legitimate Business Interest

Weiner first asserts that the Plaintiffs are not entitled to relief based on the Restrictive Covenant because they are not acting to protect a legitimate business interest. This argument is without merit.

Pennsylvania courts generally will enforce restrictive covenants if (1) they are incident or ancillary to an employment relationship between the parties, (2) the restrictions imposed by the covenant are reasonably necessary for the protection of the employer, and (3) the restrictions imposed are reasonably limited in duration and geographic extent. Thermo-Guard, Inc. v. Cochran, 408 Pa. Super. 54, 64-65, 596 A.2d 188, 193 (1991) (citing Sidco Paper Co. v. Aaron, 465 Pa. 586, 591, 351 A.2d 250, 252 (1976)).[5] Pennsylvania courts have instructed that restrictive covenants are to be

[5] It is unclear if Pennsylvania considers a confidentiality provision such as the one in the Restrictive Covenant a type of covenant subject to the three-prong test outlined supra. As an example, the Superior Court in Bell Fuel Corp. v. Cattolico, 375 Pa. Super. 238, 544 A.2d 450 (1988), held that "the restrictive covenant [portion of an employment agreement] . . . merely prohibited [the defendant] from soliciting or contacting [the plaintiff's] 'customers,'" even though the agreement included a confidentiality provision. 375 Pa. Super. at 253, 544 A.2d at 458. In contrast, the same court has commented on "non-disclosure . . . restrictive covenants." Insulation Corp. of Amer. v. Brobston, 446 Pa. Super. 520, 524, 667 A.2d 729, 730 (1995).

narrowly construed. All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa. Super. Ct. 1997). See also Hess v. Gebhard & Co., 769 A.2d 1186, 1191 (Pa. Super. Ct. 2001) ("Given that restrictive covenants have been held to impose a restraint on an employee's right to earn a livelihood, they should be construed narrowly."). However, in determining the underlying validity of a restrictive covenant, "the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful." John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 12, 369 A.2d 1164, 1169 (1977). Weiner argues that the second prong of this test is not satisfied because the Restrictive Covenant is not reasonably necessary for PBR's protection.

The legitimate interests Pennsylvania courts have recognized are the employer's trade secrets, customer goodwill acquired through the efforts of an employee and specialized training, protection of a business opportunity or market advantage and skills acquired from the employer. Sidco Paper Co., 465 Pa. at 591, 351 A.2d at 252-53; West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299

It appears that Pennsylvania common law on trade secret misappropriation, which applies to a current or former employee's disclosure of certain confidential information, operates independently of any contract between the disputing parties, a holding that cuts both ways. On the one hand, an employee may not use or disclose trade secrets misappropriated from an employer, regardless of whether or not the employee has executed a confidentiality agreement. Christopher M's Hand Poured Fudge, Inc. v. Hennon, 699 A.2d 1272, 1276 (Pa. Super. Ct. 1997). Conversely, "the presence of a non-disclosure covenant . . . does not create the right to protection but rather serves as evidence of the confidential nature of the data." Morgan's Home Equip. Corp. v. Martucci, 390 Pa. 618, 625 n.5, 136 A.2d 838, 843 n.5 (1957). Cf. Thermo-Guard, Inc. v. Cochran, 408 Pa. Super. 54, 64, 596 A.2d 188, 193-94 (1991) (An employer's rights under a non-disclosure agreement or restrictive covenant extend only so far as necessary to protect the employer's legitimate business interest in its trade secrets, customer goodwill and specialized training.). Here, the Plaintiffs have not presented a claim for misappropriation of trade secrets. As such, the Court will examine the Restrictive Covenant only with regard to its non-competition and non-solicitation provisions and will refrain from discussing the confidentiality portions of the Restrictive Covenant Agreement.

(Pa. Super. Ct. 1999) (citing Sovereign Bank v. Harper, 449 Pa. Super. 578, 674 A.2d 1085, 1093 (1996)); Thermo-Guard, Inc., 408 Pa. Super. at 64, 596 A.2d at 193-94. In cases addressing an employer's interest in customer goodwill and business opportunities, courts found that an employer's interest extended to preventing a former employee generally from competing with the employer. See John G. Bryant Co., 471 Pa. at 9, 369 A.2d at 1168 (affirming issuance of injunction enforcing restrictive covenant to protect the "relationship which had been established on behalf of appellees' companies through the efforts of the former employee); Santoro v. Morse, 781 A.2d 1220 (Pa. Super. Ct. 2001) (affirming issuance of injunction where former employee transferred business opportunities of former employer to his new company); Robert Clifton Assocs., Inc. v. O'Connor, 338 Pa. Super. 246, 254, 487 A.2d 947, 952 (1985) (affirming issuance of injunction to protect former employer's relationship with clients).[6]

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[6] However, in what may be a conflicting line of cases, where former employee had little to no contact with clients or customers, courts have found there to be no legitimate interest to protect and have refused to enforce restrictive covenants as to those clients with whom a former employee had not had a relationship. See, e.g., Thermo-Guard, Inc., 408 Pa. Super. at 65, 596 A.2d at 194 (Once the employer's interest in relations with current and prospective clients generated by the former employee was protected by an injunction, there was "no remaining legitimate business interest for [the employer] to protect through a general injunction against competition by" former employees, and the broad non-competition covenant could not be enforced.); Fidelity Fund, Inc. v. DiSanto, 347 Pa. Super. 112, 123, 500 A.2d 431, 437 (1985) (Employer had no interest in protecting goodwill built by former employee prior to employment where employer had no prior relationship with client.); Robert Half of Pa., Inc. v. Feight, 48 Pa. D. & C.4th 129, 150-51 (Pa. Ct. Com. Pl. 2000) (discussing why employer's legitimate business interest in customer goodwill is limited to goodwill created by the efforts of that employee). Cf. Boldt Mach. & Tools, Inc. v. Wallace, 469 Pa. 504, 512, 366 A.2d 902, 906 (1976) (focusing on former employee's regular, direct, personal contact with the employer's clients); Morgan's Home Equip. Corp., 390 Pa. at 631-32, 136 A.2d at 846 (discussing hardships a general covenant not to compete imposes on a former employee).

Weiner contends that the Complaint is devoid of allegations that Proscape and PBR are competitors and that the Plaintiffs therefore have no legitimate business interest in enforcing the Restrictive Covenant against him. This is not so. Indeed, Paragraph 29 of the Complaint plainly states that "Proscape is a competitor of Omicron's." Moreover, Proscape's alleged activities can fairly be described as services that are similar or related to those of PBR. By enforcing the Restrictive Covenant, the Plaintiffs are acting to protect both its business opportunities and the customer goodwill acquired through Weiner's efforts. As a result, enforcement of the Restrictive Covenant is necessary to protect the Plaintiffs' legitimate business interests.

B. The Complaint Alleges Immediate and Irreparable Harm

A showing of immediate and irreparable harm is a necessary element for both preliminary and permanent injunctions.[7] To establish immediate and irreparable harm, a plaintiff has the burden of showing that the harm cannot be remedied by damages, Schaeffer v. Frey, 403 Pa. Super. 560, 565, 589 A.2d 752, 755 (1991), Churchill Corp. v. Third Century, Inc., 396 Pa. Super. 314, 328, 578 A.2d 532, 539 (1990), and that damages "can be estimated only by conjecture and not by an accurate pecuniary standard." West Penn Specialty MSO, Inc., 737 A.2d at 299. In determining whether the harm in question can be remedied by damages, courts are to look not at past damage, but rather to "the unbridled threat of the continuation of the violation." Id. More specifically, Pennsylvania has

[7] To be entitled to a preliminary injunction, as governed by Pennsylvania Rule of Civil Procedure 1531, a petitioner must satisfy a four-part test:

1. The petitioner has a clear right to relief;
2. The preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
3. A greater injury will result by refusing to issue the injunction; and
4. The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct.

Valley Forge Hist. Soc'y v. Washington Mem. Chapel, 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981); Greco v. Hazleton City Auth., 721 A.2d 399, 401 (Pa. Commw. Ct. 1998). Similarly, a permanent injunction requires the petitioner to prove two elements: "[t]he petitioners must establish that they have a clear right to relief, and that irreparable harm will occur if relief is not granted." The Roman Catholic Congregation of St. Elizabeth Church v. Wuerl, 22 Pa. D. & C.4th 391, 396 (Pa. Ct. Com. Pl. 1994) (citing Carringer v. Taylor, 402 Pa. Super. 197, 586 A.2d 928 (1990), and State Ethics Commission v. Landauer, 91 Pa. Commw. 70, 496 A.2d 862 (1985)). See also Peugeot Motors of Amer., Inc. v. Stout, 310 Pa. Super. 412, 456 A.2d 1002 (1983) (holding that all elements necessary for a permanent injunction were established where actual and substantial injury had already occurred and was threatened in the future, defendant violated plaintiff's legal rights and the injury threatened was substantial and irreparable).

recognized violations of a covenant not to compete as constituting immediate and irreparable harm to an employer. John G. Bryant Co., 471 Pa. at 7, 369 A.2d at 1167 ("The possible consequences of this unwarranted interference with customer relationships . . . is [sic] unascertainable and not capable of being fully compensated by money damages."). Cf. New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 467, 392 A.2d 1383, 1386 (holding that trial court had improperly presumed irreparable injury from the nature of the employer's business and the breach of the restrictive covenant); Rollins Protective Servs. Co. v. Shaffer, 383 Pa. Super. 598, 557 A.2d 413 (1989) (concluding that plaintiff failed to produce evidence to prove any harm resulting from violation of non-competition clause where former employee did not knowingly solicit plaintiff's customers and did not take plaintiff's customer lists).

The Complaint alleges that the Plaintiffs have suffered irreparable harm due to Weiner's competition and solicitation, an allegation that the Court must accept as fact for the purposes of preliminary objections. See Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000) (For the purposes of reviewing the legal sufficiency of a complaint, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true."). Cf. Harsco Corp. v. Klein, 395 Pa. Super. 212, 576 A.2d 1118 (1990) (affirming trial court's decision to deny injunction after full hearing because no irreparable harm had been shown). In addition, Weiner acknowledged in the Restrictive Covenant Agreement that a violation of the Restrictive Covenant would result in irreparable injury to the Plaintiffs. Compl. Ex. A. ¶ 5(b). Accordingly, the Objections to the Complaint's legal sufficiency are overruled.

C. The Complaint Does Not Allege That the Plaintiffs Satisfied All Conditions Precedent under the Restrictive Covenant Agreement

Pennsylvania allows a claimant to aver generally that all conditions precedent to an opposing party's performance under a contract have been satisfied. Pa. R. Civ. P. 1019(c). However, this does not mean that a claimant is excused from failing to plead the satisfaction of conditions precedent entirely:

> Although the details of the performance of a condition precedent need not be alleged, the Rule does not eliminate the requirement of a general allegation regarding the performance of such a condition. Without such a general allegation, a complaint would be insufficient. Thus, where a complaint contained no allegations of any payments made by a plaintiff, the plaintiff failed to aver generally that all conditions precedent had been performed or had occurred, as required by Rule 1019(c), and therefore a defendant's preliminary objection that the complaint was defective had to be sustained.

2 Goodrich-Amram 2d § 1019(c):2 (2001) (footnotes omitted). See also Anderson v. Nye, (1979) 11 D. & C.3d 734, 739 (Pa. Ct. Com. Pl. 1979) ("It would have been sufficient under Pa.R.C.P. 1019(c) for plaintiffs 'to aver generally that all conditions precedent have been performed or have occurred.' Since this . . . was not done by plaintiffs, we must sustain defendant's preliminary objections as to this point."); Foxlea Enters., Inc. v. Powell, 3 Pa. D. & C.3d 506, 507 (Pa. Ct. Com. Pl. 1977) ("In assumpsit, if there is a condition precedent to a party's duty to perform, there must appear in the complaint at least the general allegation of compliance with that condition."). The Complaint does not allege that the Plaintiffs satisfied all conditions precedent to Weiner's performance under the Restrictive Covenant Agreement and does not set forth sufficient facts for the Court to draw such an inference. Thus, the Objections on this point are sustained, and the Plaintiff must file an amended complaint.

II. The Plaintiffs Are Not Required to Submit this Matter to Arbitration

Pennsylvania cases hold that "[i]f a valid arbitration agreement exists between the parties and [the] claim is within the scope of the agreement, the controversy must be submitted to arbitration." Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997) (quoting Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 600, 641 A.2d 1167, 1170 (1994)). However, "[a]greements to arbitrate are to be strictly construed and should not be extended by implication." PBS Coal, Inc. v. Hardhat Mining, Inc. 429 Pa. Super. 372, 377, 632 A.2d 903, 905 (1993). See also Midomo Co. v. Presbyterian Housing Dev. Co., 739 A.2d 180, 190 (Pa. Super. Ct. 1999) (Arbitration agreements are to be confined to the "clear, express and unequivocal intent of the parties as manifested by the writing itself."); Brown v. D. & P. Willow Inc., 454 Pa Super. 539, 546-47, 686 A.2d 14, 18 (1996) (noting that forcing a party into arbitration without its consent is "violative of common law and statutory principles" and a "curtailment of one's substantive and due process rights").[8]

Weiner concedes that the Plaintiffs' claims for declaratory and injunctive relief may be heard by the Court, but argues that its request for an accounting and monetary damage must be referred to arbitration. The Restrictive Covenant Agreement includes an "Arbitration Provision" that requires the arbitration of disputes "between the parties with respect to matters which are the subject of this Agreement," with such arbitration being "in lieu of any party pursuing other available remedies and as

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[8] In those cases where Pennsylvania courts have deferred to arbitration, the agreement to arbitrate is broad and clearly addresses the dispute in question. See, e.g., Shadduck v. Christopher J. Kaclik, Inc., 713 A.2d 635 (Pa. Super. Ct. 1998); Dickler v. Shearson Lehman Hutton, Inc., 408 Pa. Super. 286, 596 A.2d 860 (1991); Sanitary Sewer Auth. of the Borough of Shickshinny v. Dial Assocs. Constr. Group, Inc., 367 Pa. Super. 207, 532 A.2d 862 (1987); Giant Markets, Inc. v. Sigma Mktg. Sys., Inc., 313 Pa. Super. 115, 459 A.2d 765 (1983).

the sole remedy." Compl. Ex. A ¶ 9. However, this provision is limited by Section 10 of the Restrictive Covenant Agreement, which states that a party may seek injunctive relief restraining a breach or directing specific performance and may litigate the relevant issues in court. Moreover, in Paragraph 5(b) of the Restrictive Covenant Agreement, Weiner recognized the Plaintiffs' right to seek injunctive relief for certain damages:

> The Employee . . . acknowledges that, in the event of his/her violation of any of these restrictions, the Company shall be entitled to obtain from any court of competent jurisdiction preliminary and permanent injunctive relief as well as damages and an equitable accounting of all earnings, profits and other benefits arising from such violation, which rights shall be cumulative and in addition to any rights or remedies to which the Company may be entitled.

Compl. Ex. A ¶ 5(b) (emphasis added).

Pennsylvania adheres to the principle that "if two provisions in a contract are inconsistent, the specific provision will govern as a qualification of the general provision." Wilborn Hosiery Co. v. Grissinger, 22 Pa. D. & C.3d 263, 266 (Pa. Ct. Com. Pl. 1981) (citing Restatement (First) of Contracts § 236(c) (1982)). See also Galiardi Coal & Coke Co., 168 Pa. Super. 254, 257, 77 A.2d 669, 671 (1951) (holding that if two provisions are inconsistent, the specific provision governs as a qualification of the general provision). Thus, while Paragraph Nine generally provides for the arbitration of disputes arising under the Restrictive Covenant Agreement, it is trumped by the Plaintiffs' right to seek, through court action, damages such as those sought here, and the Plaintiffs' claim for an accounting need not be sent to arbitration.[9]

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[9] To the extent that Weiner perceives this as being in conflict with Judge Albert W. Sheppard, Jr.'s ruling in Weiner v. Pritzker, August Term, 2001, No. 2846 (Pa. Ct. Com. Pl., Phila.) that ordered the arbitration of a dispute over Weiner's Executive Management Plan shares, it is worth noting that

III. Both PBR and Omicron Services Are Proper Plaintiffs

Lack of capacity to sue "refers to the personal disability of a plaintiff by virtue of some statute." 2 Goodrich-Amram 2d § 1017(b):34 (2001) (citing Commonwealth ex rel. Sheppard v. Central Penn Nat'l Bank 31 Pa. Commw. 190, 375 A.2d 874 (1977)). Weiner contends that PBR lacks the capacity to sue on the Restrictive Covenant Agreement because it has changed its name to Omicron Consulting Group, Inc. and that Omicron Systems lacks the capacity to sue because it is not a party to the Restrictive Covenant.

Under Pennsylvania law, a corporation has the power "[t]o sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitrative or other proceeding in its corporate name." 15 Pa. C.S. § 1502(a)(2). It is clear that PBR's name change does not eliminate its right to enforce the Restrictive Covenant Agreement against Weiner. See Philadelphia Ear, Nose & Throat Surgical Assocs., P.C. v. Roth, 44 Pa. D. & C.4th 427, 430 n.1 (Pa. Ct. Com. Pl. 2000) (citing 15 Pa. C.S. § 1916(b) to state that "[c]orporate name changes do not affect the existing rights of persons other than shareholders" and to find that corporation could enforce restrictive covenant regardless of name change). The Court is puzzled as to why PBR chose to sue Weiner as "PBR Consulting Group, Inc.," and not under its current name. However, because PBR has fully disclosed both its past and present corporate names, there is no legitimate reason to prohibit PBR's participation in this action on this basis. Cf. Ross v. McMillan, 172 Pa. Super. 298, 300, 93 A.2d 874, 875 (1953) (To dismiss plaintiff's claim based on failure to register a fictitious name prior to instituting

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Paragraph 5(b) applies only to claims brought by PBR.

suit where defendant had knowledge of true identity of persons who comprised entity would require reliance on "a hypertechnicality, which courts never view with favor.").

The Objection to Omicron Systems' participation in this suit is rooted in the fact that Weiner was not an employee of Omicron Systems. Even if this is so, the Restrictive Covenant Agreement defines "Company" to include PBR's "divisions, affiliates, subsidiaries" and "any subsidiary fifty-one percent (51%) or more of the outstanding common stock of which is owned by" PBR. Compl. Ex. A ¶ 2(a). The Complaint alleges that Omicron Systems is an affiliate of PBR. Complaint ¶ 2. At the least, Omicron could be considered a third-party beneficiary under the Restrictive Covenant Agreement[10] and would therefore be entitled to enforce the Agreement's terms against Weiner. As a result, both Omicron Services and PBR are proper parties to this action.

CONCLUSION

The Objections asserting failure to allege the satisfaction of conditions precedent is sustained. The remaining Objections are without merit and are overruled accordingly.

BY THE COURT:

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[10] Under Pennsylvania law:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti v. Weborg 530 Pa. 366, 372-73, 609 A.2d 147, 150-51 (1992). Based on the Complaint's allegations and the language in the Restrictive Covenant Agreement, it is possible to conclude that Omicron Services is a third-party beneficiary.

JOHN W. HERRON, J.

Dated: March 14, 2002

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

OMICRON SYSTEMS, INC., et al.,	:	August Term, 2001
Plaintiffs	:	
	:	No. 669
v.	:	
	:	Commerce Case Program
FRED WEINER,	:	
Defendant	:	Control No. 010320

ORDER

AND NOW, this 14th day of March, 2002, upon consideration of the Preliminary Objections of Defendant Fred Weiner to the Complaint of Plaintiffs Omicron Systems, Inc. and PBR Consulting Group, Inc., and the Plaintiffs's response thereto, and in accordance with the opinion being contemporaneously filed, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections asserting failure to allege the satisfaction of conditions precedent are SUSTAINED.
2. The remaining Preliminary Objections are OVERRULED.
3. The Plaintiffs are directed to file an amended complaint within 20 days of the date of entry of this order.

BY THE COURT:

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JOHN W. HERRON, J.