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IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA
CASE NO.: 2004-CA-4680

THE MAZER CORPORATION,
Plaintiff,
vs.
ELEMENT, LLC, et al.,
Defendants.

_____/
HEARING BEFORE THE HONORABLE
RENEE ROCHE, JUDGE PRESIDING
Date: December 16, 2004
Time: 1:30 p.m.
Location: Orange County Courthouse
425 North Orange Avenue
Courtroom 18-C
Orlando, Florida
Reported by: Karen S. Rhine
Court Reporter

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1 A P P E A R A N C E S :

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3 HAL K. LITCHFORD, ESQUIRE

STEVEN FENDER, ESQUIRE

4 Litchford & Christopher

390 North Orange Avenue

5 Suite 2200

Orlando, Florida 32801

6 (407) 422-6600

7 On behalf of the Plaintiff

8

9 PETER C. VILMOS, ESQUIRE

EURIBIADES CERRUD, ESQUIRE

10 Killgore, Pearlman, Stamp,

Ornstein & Squires, P.A.

11 Two South Orange Avenue, 5th Floor

Orlando, Florida 32801

12 (407) 425-1020

13 On behalf of the Defendants

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1 WHEREUPON,

2 the following proceedings were had:

3 THE COURT: Good afternoon. I know it isn't
4 perhaps expected, particularly in the absence of your
5 clients being here, but I do want to commend both of
6 you for the fine work that you've done on this case.

7 MR. VILMOS: Thank you.

8 THE COURT: The level of preparation and
9 professionalism has just been extraordinary and I
10 appreciate that very much. I don't know what it's been
11 like outside of here, but certainly in the presence of
12 the Court you have conducted yourselves in a way that
13 represents all of us very well. I do thank you for
14 that.

15 This case has caused me to spend quite a lot of
16 time thinking through the presentation of the evidence
17 and reviewing the case law, which is perhaps not as
18 helpful as it is in other circumstances and to some
19 extent the Court has been left on its own to fashion
20 some kind of an analysis that's applicable.

21 And really cutting to the chase, let me say that
22 with respect first to Mr. McLeod, the Court finds that
23 the evidence was that Mr. McLeod did breach his
24 non-solicitation contract, that section of his
25 separation agreement with The Mazer Corporation.

1 In particular what I would rely on is the e-mail,
2 I believe that's Exhibit 5 or 16, I can't remember
3 which one --

4 MR. FENDER: 16.

5 THE COURT: -- to Ms. Waters. Frankly, his
6 explanation for that the Court did not find to be
7 credible. The evidence in addition to that, that being
8 the only real direct piece of evidence of solicitation,
9 but the supporting circumstantial evidence, if you
10 will, being the business plan which laid out pretty
11 specifically and clearly what the intentions were which
12 miraculously seemed to come to pass and the simple fact
13 that all or virtually all of the Element employees who
14 currently work there are former Mazer employees; all of
15 those things led the Court to conclude that the burden
16 of proof has been carried with respect to that aspect
17 of the separation agreement.

18 Notwithstanding Mr. Fender's eloquent and cogent
19 presentation on the non-compete aspect of that
20 separation agreement, however, the Court finds that
21 there was insufficient evidence. To the extent that
22 that is hair splitting I'm not sure, but if you want to
23 break down the separation agreement into those two
24 levels of prohibition, the Court would find that there
25 was not sufficient evidence.

1 In that regard, the preparation of the business
2 plan, which really was about all directly that could be
3 pinned on Mr. McLeod, at this point that would not be
4 sufficient.

5 Matt Reynolds is another matter all together. Not
6 having a contractual prohibition, the Court must rely
7 on the directives in the case law and there is not a
8 lot of that. But the evidence before the Court
9 demonstrated I thought pretty clearly that Mr. Reynolds
10 solicited employees while employed by The Mazer
11 Corporation. Notwithstanding all of his protestations
12 that he was really a team player and a good guy, I
13 think the evidence was pretty clear that he was doing
14 something else under the table.

15 For that I relied on the Waters e-mail and for the
16 other reasons already discussed with respect to Mr.
17 McLeod, that being the business plan, the simple fact
18 of the commonality of the Mazer employees and the
19 Element employees.

20 I may as well say this at this point. A
21 significant part of my finding with respect to Mr.
22 Reynolds frankly is based upon the Court's clear
23 impression that Mr. Reynolds simply was not a credible
24 witness. He did not come across to the Court, having
25 the opportunity to listen and observe him very

1 carefully, as someone who frankly was telling the
2 truth.

3 It also appears and the Court would find that the
4 evidence -- that the burden of proof has been sustained
5 on the solicitation of Mazer's business while Mr.
6 Reynolds was employed there.

7 MR. VILMOS: I'm sorry. I didn't hear that, Your
8 Honor. The burden was --

9 THE COURT: Sustained. Was carried with respect
10 to solicitation of business of Mazer's clients by Mr.
11 Reynolds for his new company while employed by The
12 Mazer Corporation. The most telling, of course, being
13 the surreptitious and very suspicious Steinberg memo,
14 the explanation for that being completely not
15 believable frankly and the surprise and I don't
16 remember what that was about, that equally with the
17 Waters memo really defies belief.

18 In addition to that, the missing planner which
19 suggests that this whole operation was really in
20 movement months before it actually occurred, the
21 existence of the business plan and their prophetic
22 nature, the erased hard drive.

23 In total the Court would conclude that all of
24 those things, the solicitation of the employees, the
25 solicitation of the business constitute a breach of the

1 common law duty of loyalty that an employee owes while
2 employed to his or her employer. And I would say that
3 in this case in particular where that employee was
4 hired specifically to head this office for Mazer was a
5 person with significant duties and responsibilities
6 imposed in him and accepted by him for The Mazer
7 Corporation, that that duty is somewhat heightened.

8 I'm not unmindful that and I guess maybe it's
9 irony that there's such a duty under Florida Law
10 apparently imposed on employees. It's certainly not
11 retroactive employers have no duty the other way, which
12 has never been discussed in the case law certainly, but
13 I guess that's a public policy issue. It is perhaps
14 distressing, might be distressing to some.
15 Nonetheless, that's not for the Court really to say.

16 And let me say that the significant portion of the
17 Court's conclusion in that regard reflect the Court's
18 incredulousness really on some of the testimony offered
19 by the defense witnesses; Ms. Waters, Ms. Steinberg and
20 Mr. Reynolds.

21 Now, what remedy? That's really the tough part of
22 this frankly. With respect to the duty of loyalty,
23 cases do not discuss the appropriate remedy with any
24 real clear direction to the Trial Court. And most of
25 those cases arise in the context of multiple causes of

1 action and really the discussion of breach of duty of
2 loyalty, some were lost in dicta and is not terribly
3 instructive for this case.

4 But I think what that leaves the Court with is
5 questioning whether the elements that have been pled
6 and moved upon of an injunction have been satisfied.
7 With respect to those elements, the Court is persuaded
8 that indeed they have been.

9 And that in spite of Mr. Vilmos' very persuasive
10 and articulate argument to the contrary, that given the
11 the state of the economy at the time and over the
12 course of time when all of this occurred, the type of
13 market that these entities are present working in, the
14 level of reliance of The Mazer Corporation on these key
15 clients, in particular, the ebb and flow of the
16 business as a reflection of the market, it would be
17 impossible for the parties to put a price tag on the
18 damage that was done here and part of that is the
19 damage to The Mazer Corporation's reputation.

20 And for all of those reasons also in the analysis
21 of these factors is often blurred together, the Court
22 would conclude that The Mazer Corporation has been
23 irreparably harmed.

24 The Court has had an opportunity to review the
25 evidence to see some portion of the testimony that

1 ultimately may be presented in a trial. And having
2 reviewed this evidence and having seen the documents
3 that have been introduced so far, the Court further
4 concludes that the movement has demonstrated a
5 likelihood of success on the merits.

6 The impact on the public, frankly, I wonder in a
7 case like this when you're not talking about the
8 allocation of resources or services that are critical
9 to the public health, safety and welfare, whether
10 that's really an element that is in play, but
11 nonetheless, the Court concludes that that element is
12 not such that injunctive relief should be denied. And,
13 therefore, the Court would grant The Mazer
14 Corporation's Motion For Temporary Injunction.

15 And so what is to be enjoined here? Mr. McLeod's
16 contract, that portion that the Court has found has
17 been breached, goes to non-solicitation. And a portion
18 of Mr. Reynolds' conduct that the Court has found
19 tortuous is also non-solicitation of employees, the
20 other being the solicitation of business.

21 And let me just say when I speak about these two
22 individuals, I think necessarily that also brings into
23 play Element because of the -- and perhaps I should
24 have said this earlier -- Mr. McLeod's investment, I
25 think it's pretty clear that Mr. McLeod is an owner of

1 Element and not simply an investor. So there's agency
2 issues that are kind of woven into this, but
3 nonetheless, I think by finding and enjoining these two
4 individuals that necessarily means that Element would
5 also be enjoined having been the vehicle, if you will,
6 for the conduct that we're talking about.

7 And again, going back to the case law, the case
8 law does not offer much direction and it is really for
9 the Court I think to fashion some kind of an equitable
10 remedy here. And the injunction that the Court has
11 considered is that suggested by Mr. Fender, that being
12 for a six-month period of time that Element will not be
13 permitted to work on Harcourt matters.

14 Now, Mr. Fender also asked that the injunction
15 prohibit any work being done on any other clients of
16 The Mazer Corporation, but I hesitate to grant the
17 injunction to that extent because -- well, for one
18 thing I think we're working in the dark a little bit
19 insofar as the remedy is concerned.

20 But there has been no proof that Element or Mr.
21 McLeod or Mr. Reynolds solicited anyone other than the
22 Harcourt account. I hesitate to go any further than
23 that, that being the specific breach that has been
24 proven.

25 Now, this is only on a preliminary basis. I

1 suppose as discovery continues it's conceivable that
2 that may continue and that additional information may
3 be brought to the Court's attention or ultimately
4 proven in trial and that may be the subject of further
5 motions.

6 That would be the extent of the Court's order at
7 this point in time, which brings us to the necessity of
8 discussion of a bond. And I do not know if the parties
9 have discussed this in anticipation that the Court's
10 ruling was a possibility or reached any kind of an
11 agreement.

12 MR. VILMOS: We have not reached an agreement. We
13 have exchanged some e-mails regarding the possibility.

14 THE COURT: Let me hear from you, Mr. Vilmos.
15 What are you thinking? What were your thoughts in that
16 regard?

17 MR. VILMOS: With all due respect, Your Honor, I
18 think Braswell versus Braswell, 881 --

19 THE COURT: Mr. Vilmos, let me caution you about
20 arguing -- you're not going to argue the merits of the
21 Court's decision, right?

22 MR. VILMOS: Correct.

23 THE COURT: Okay. Good.

24 MR. VILMOS: 881, So.2nd, 1193 deals with
25 injunction bonds.

1 THE COURT: Okay.

2 MR. VILMOS: It's a Third District case from
3 September of 2004. It states pretty clearly on page
4 1202 that an evidentiary hearing is required in order
5 to set a bond. I'm sure the Court doesn't need the
6 law.

7 THE COURT: Okay.

8 MR. VILMOS: I think it will be a somewhat lengthy
9 hearing, clearly not the length of the injunction, but
10 I think it will take a while. We're going to have to
11 show, as I understand it, what the price of a death
12 sentence is to my client.

13 I think there are a number of elements that can
14 come into that calculation and I think it's a
15 relatively complicated presentation and will take some
16 time.

17 THE COURT: How about that, Mr. Fender?

18 MR. FENDER: I understand that they're entitled to
19 have an evidentiary hearing, although there was
20 evidence introduced during the trial about their
21 initial investments.

22 They weren't even sure whether Element was
23 profitable or not. I think the case is taking quite a
24 bit of time to be resolved already at this point.
25 Because of irreparable harm, we would suggest some kind

1 of preliminary bond be issued now, a bond amount be
2 ordered not subject to a subsequent hearing.

3 We did have evidentiary testimony of \$190,000
4 apiece investment, which would go up to around
5 \$400,000, maybe another \$100,000 for attorney's fees.
6 Perhaps a preliminary bond could be set today in the
7 amount of \$500,000 and we can resolve if that amount is
8 changed subsequently after an evidentiary hearing.

9 THE COURT: You believe it's appropriate to tie
10 the bond to the amount of the investment only? You
11 really think that that's appropriate?

12 MR. FENDER: That's the only evidence we have so
13 far.

14 THE COURT: Yes, that's the only evidence we have
15 so far.

16 MR. FENDER: And he did admit he didn't even know
17 if the company was profitable, Reynolds did.

18 THE COURT: I have to tell you in fairness, that's
19 not really what I was -- I don't recall that testimony.

20 MR. FENDER: Which testimony?

21 THE COURT: With respect to I don't know if the
22 company is profitable. I'll tell you, one thing I have
23 learned from reading the Appellate cases and watching
24 the Appellate Court is that, you know, these kind of
25 oh, let's just do this sort of the easy way out; they

1 just don't have any patience for that. You've just got
2 to slog through the presentation of evidence and the
3 Court has to make a determination.

4 In fairness, I really think Mr. Vilmos' client has
5 a right to be heard at a bond hearing, fully heard. I
6 don't know that the Court can circumvent that and say
7 for the time being where you're talking about something
8 that is really so serious to his clients. We're
9 talking about twenty-two people who could -- that's
10 just not something to be taken lightly.

11 MR. VILMOS: Can I seek a clarification of the
12 Judge's ruling?

13 THE COURT: I don't know. You can ask me a
14 question, yes, sir.

15 MR. VILMOS: The six-month injunction, I presume
16 they would be -- I guess I'm asking. I'm not going to
17 presume. Would this allow Element to finish the work
18 in progress and take no new work for six months?

19 Because if it means ceasing work, I don't know
20 that damages Element so much as that damages Harcourt.
21 If the argument is The Mazer Corporations' reputation
22 is irreparably harmed, I don't see how --

23 THE COURT: You know what, I hear what you're
24 saying and really those things came across my mind as
25 well, Mr. Vilmos. Before you go into where I think

1 you're going, let me say it's the Court's intention
2 once a bond is in place to issue the injunction that
3 Element will cease at that point in time any work on
4 Harcourt projects.

5 I understand that what you're saying is that word
6 may filter back to Harcourt and that may damage Mazer's
7 reputation, everybody's reputation. There might not be
8 anybody left on this battlefield after this is all
9 over. That's really not the Court's concern -- the
10 Court really is -- unless you're trying to make the
11 argument that that's a public policy consideration.

12 MR. VILMOS: I think it's more than a public
13 policy consideration. I think to the extent that The
14 Mazer Corporation is going to be liable for the damage
15 on irreparable harm, the damage would increase as a
16 result of the Court's ruling rather than as a result of
17 Element's activity.

18 In theory you're ruling that the damage was done,
19 the Plaintiff has put in the evidence and that's the
20 damage. I would hate to see my client's damage dollar
21 increase because of an injunction when it can be so
22 easily avoided by --

23 THE COURT: I think that's a strong reason for you
24 to argue at the bond hearing that your bond needs to be
25 significantly more than that.

1 MR. VILMOS: I'm confident that will come out,
2 Your Honor.

3 THE COURT: I'm confident it will too. I don't
4 know when we're going to have a -- I'm in a real jam on
5 this in terms of hearing time. This is probably going
6 to take, given the history of this thing, it's going
7 to take another day.

8 Do you think another judge could hear the bond
9 part of this, set a bond in this? No?

10 MR. VILMOS: I wouldn't want one to, Your Honor,
11 with all due respect.

12 THE COURT: I would like for you to look on your
13 calendars at January the 28th and get back to me as to
14 whether you can be in here in all day on the 28th.

15 MR. LITCHFORD: May I speak out of turn since you
16 recognized Mr. Fender?

17 THE COURT: Yes.

18 MR. LITCHFORD: I do have one point of
19 clarification. I think I understand the Court's ruling
20 on the scope of the injunction. The Court conflated
21 both the solicitation of employees and the solicitation
22 of work and came up with a single remedy?

23 THE COURT: Yes, sir.

24 MR. LITCHFORD: Thank you. That's how I read it,
25 but I wasn't completely sure.

1 THE COURT: Yes, sir.

2 MR. VILMOS: While we're at it, Your Honor, Mr.
3 McLeod has the right to compete?

4 THE COURT: I don't know. I'm not offering
5 advisory opinion about that. All I'm really doing is
6 looking back at what the evidence was. What the Court
7 found was that with respect to the non-competition
8 portion of his separation agreement, that there hadn't
9 been sufficient evidence that he had actively competed
10 during that six-month time frame.

11 But the Court found that the evidence was
12 sufficient that within the twelve-month
13 non-solicitation period that he had solicited. To the
14 extent that that's hair splitting, it was really
15 treated separately by the two of you in argument and
16 that's why I addressed it separately.

17 MR. VILMOS: I'm just trying to advise my clients
18 as to what they can and cannot do. I'm a little
19 confused with the ruling divided as it is.

20 THE COURT: I'm sure you're a fine lawyer and
21 you'll be able to figure it out.

22 MR. LITCHFORD: As to the order, would it be
23 acceptable to the Court for an order that refers to the
24 reasons stated on the record and just --

25 THE COURT: I would actually prefer that. If you

1 try to come up -- first of all articulating a ruling
2 from the bench doesn't translate well into writing and
3 I would spend hours editing it and I don't want to do
4 that and that's the way I intend to rule.

5 MR. LITCHFORD: Do you want help from the lawyers
6 in that regard?

7 THE COURT: I would like a presentation of a
8 simple order referring to the record and for the
9 reasons stated therein. Please call my office and let
10 me know about the 28th and I'll tell my -- my judicial
11 assistant is out for a time on personal business this
12 afternoon.

13 If you want to leave a message with her, I would
14 appreciate actually -- well, I was going to say if you
15 all could coordinate and just one of you call, but do
16 it however you need to is fine. Just call her and
17 leave a message.

18 If you cannot make it on the 28th, then I expect I
19 will see you sometime next week Monday, Tuesday or
20 Wednesday at exparte to talk about when else you can
21 come in. Court is in recess.

22 MR. VILMOS: Thank you, Your Honor.
23 (Proceedings concluded at 2:05 p.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA
COUNTY OF ORANGE

I, KAREN S. RHINE, being a Notary Public, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing transcript, pages 1 through 19, is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or counsel to any party nor to the attorneys of said action, nor in any way interested in the outcome thereof.

DATED this 16th day of December, 2004.

Karen S. Rhine
Professional Court Reporter