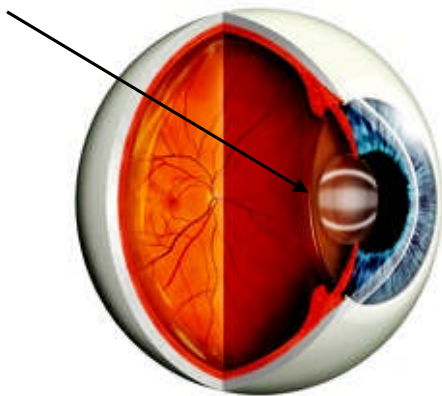


Pause Before Sending Using Unenforceable Non-Competes can be Very Costly *by Mark S. Adams*

Had STAAR Surgical Company (Nasdaq: STAA) (“STAAR”) obtained sound legal advice before it sent three letters to its competitors, STAAR might have saved itself \$11.4 million. In separate, two-month long jury trials, our trial team including myself, Eudeen Chang and Monica Vu of Jeffer Mangels, and Isaac Zfaty of Davis Zfaty APC, prevailed in Orange County Superior Court against STAAR on behalf of clients Parallax Medical Systems and Scott C. Moody, Inc. for tortiously interfering with their prospective economic relationships.

STAAR manufactures and sells specialized lenses for surgical vision correction, such as replacement lenses for the eye’s natural crystalline lenses in cataract surgery, called Intraocular Lenses, or IOLs.

Intraocular Lens (“IOL”)



Parallax Medical Systems (“Parallax”) was a former authorized independent sales company for STAAR and supplied the sales force for STAAR in the Southeast United States Region. Scott C. Moody, Inc. (“SMI”) was also a former authorized independent sales company for STAAR and supplied the sales force for STAAR in the Southwest United States Region.

own independent sales subcontractors and their own customer lists, Parallax in the Southeast, and SMI in the Southwest, generated sales of over \$160 million for STAAR. Parallax and SMI were paid on a commission basis. Parallax and SMI had contracted with STAAR for over 15 years. When the two companies and STAAR were unsuccessful in negotiating a new contract, STAAR launched a campaign designed to prevent Parallax and SMI from working with any of STAAR’s competitors.

Both juries took less than a day in deliberations.

STAAR tortiously interfered with Parallax and SMI’s opportunity to sell Bausch & Lomb lenses by sending letters to competitors stating that Parallax and SMI had a contract with STAAR that included a restrictive covenant prohibiting both companies from selling any competing products for a year. Additionally, STAAR sent an email to Parallax’s and SMI’s sales force at 12:02 a.m.—two minutes after STAAR’s contract with Parallax and SMI expired—seeking to lure their sales force away to work directly for STAAR. STAAR’s letters torpedoed Parallax’s and SMI’s pending deal to sell Bausch & Lomb lenses. As a result, Parallax and SMI separately sued STAAR for intentional and negligent interference with prospective economic advantage.

The Parallax case was tried to a jury over the course of two months, the Honorable Andrew Banks presiding, and concluded in March of 2009. The jury took less than a day in deliberations to find in favor of Parallax and against STAAR for \$4.9 million in damages, including \$2.7 million in punitive damages. The SMI case was also presented to a jury, the Honorable Glenda Sanders presiding, in a two-month trial, *Continued on Page 2*

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Pause Before Sending continued from page 1

resulting in a verdict on December 1, 2009 in favor of SMI. Again, the jury took less than a day in deliberations, and awarded SMI \$6.5 million in damages, including \$2.5 million in punitive damages. STAAR's defense team for the Parallax case was led by Mark Borenstein (now a Los Angeles Superior Court Judge), and STAAR's defense team for the SMI case was led by Daniel Callahan. The jury in the SMI case was not informed about the verdict in the prior Parallax case.

To prove a tortious interference with prospective economic advantage claim, the plaintiff must show that: there was a prospective economic relationship with a third party; the defendant knew about the prospective relationship; the defendant (negligently or intentionally) interfered with it; the defendant engaged in wrongful conduct, separate and apart from the interference itself; and, the relationship was disrupted causing the plaintiff damages. (*Youst v. Longo* (1987) 43 Cal.3d 64; *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764.)

In its letters to its competitors, STAAR wrote that Parallax and SMI had agreements with STAAR, which contained "restrictive covenants that broadly prohibit them and persons/entities affiliated with them from selling any products that compete with STAAR's products or competing with STAAR in any way, both during the terms of those agreements (which expire July 31, 2007) and for the period of one year thereafter (through July 31, 2008)," and that these covenants would encompass the competitors' products that Parallax and SMI intended to sell. Although technically STAAR's letters were partially true (Parallax and SMI did have non-competes in their contracts with STAAR), the letters implied that the non-competes were enforceable.

The jury viewed STAAR's conduct as an attempt to indirectly enforce a non-compete that was unenforceable pursuant to, and violative of, California Business and Professions Code section 16600, which in turn constitutes an "unlawful, unfair fraudulent business practice"

under California's unfair competition law, Business and Professions Code section 17200.

While a company would understandably want to limit the number of its competitors in the marketplace, these jury verdicts show that doing so by the use of an unlawful non-compete can be very costly. Consulting with seasoned counsel *before* hitting the "send" button or dropping letters in the mail slot could save a lot of money. ■

Mark S. Adams, a partner in the Litigation Department of JMBM's Orange County office, focuses his practice on domestic and international business litigation including, contracts, products liability, corporate and partnership disputes, and employment litigation. He has tried numerous cases in state courts, federal courts, and in domestic and international arbitrations under the auspices of the International Chamber of Commerce. Contact him at MarkAdams@JMBM.com or 714.429.3064.

Just the Right Fit, Just in Time: Utilizing Outside Counsel to Save Legal Expenses

by Eudeen Y. Chang

Many companies and their General Counsels have been forced to reduce overhead by cutting their in-house legal staff by more than 35 percent while the amount of legal work they face, particularly in litigation and restructuring, has dramatically increased. Indeed, some companies are tying their General Counsel's bonuses to the reduction in legal expenses. As an overall cost saving strategy, more and more of these overburdened legal departments are looking to outside attorneys to handle matters that would have previously been handled in-house. By using outside counsel, companies are finding that they are now perfectly matching their legal needs with the expense of them. The goal is to eliminate excess capacity and overhead.

developed in other areas of business, has continued to spread as companies try to become more competitive and find innovative ways to cut costs. The *Just In Time* approach began in manufacturing to ensure that supplies would arrive at the exact moment they were needed. This approach then expanded to inventory control to ensure that inventory would arrive or be completed at the exact moment of sale.

The goal is to eliminate excess capacity and overhead.

Now, *Just In Time* is being applied to

legal needs. The objective is to ensure that a company's need for legal expertise and the cost associated with it are met *Just In Time*. For example, one of our clients is a real estate investment company that operates throughout California. Once staffed with a robust legal department of its own, due to the downturn in the economy, this client now looks to us on an as needed, when needed basis for all of its legal needs, no matter how large or small. Other than its Vice President of Legal Affairs and General Counsel, the company no longer has any fixed overhead in its legal department.

We assist this client in every aspect of its business, including: advising on employment issues, such as reviewing and revising employee handbooks or termination procedures; conducting internal

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