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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-006300 02/08/2017

HONORABLE JOSHUA D. ROGERS

CLERK OF THE COURT
S. Ortega
Deputy

MATTHEW F PEREZ

DANIEL G DOWD

v.

AMERICAN NATIONAL MEDICAL MANAGEMENT L L C, et al.

TODD FELTUS

D LEWIS CLARK JR.
MATTHEW J KELLY

UNDER ADVISEMENT RULING

This Court held a 2-day evidentiary hearing on December 9 and 16, 2016. Based on the evidence presented at trial, the Court finds that, subject to application of the blue pencil rule, the non-solicitation of employees provisions that Defendants/Counterclaimants American National Medical Management, LLC ("ANMM"), Maldonado Medical, LLC, and Odyssey Biomedical, LLC (collectively, "the Maldonado Companies") seek to impose upon Plaintiffs/Counterdefendants Matthew Perez and Alfred C. Duffy are reasonable and enforceable. The Court finds, however, that the remaining restrictive covenants the Maldonado Companies seek to impose upon Mr. Perez and Mr. Duffy are unreasonable and unenforceable. Accordingly, with the exception of the non-solicitation of employees provisions, Mr. Perez and Mr. Duffy are entitled to judgment in their favor on their respective declaratory judgment claims.

FINDINGS OF FACT

Background

1. Maldonado Medical is in the business of providing orthopedic durable medical equipment directly to patients generally, and specializes in the delivery, setup, and patient education of Hot/Cold Compression and Continuous Passive Motion machines (CPM). [G.

Maldonado, 12/9, 41:5-23, 60:8-10.][1]

2. Brandon Maldonado is the President of Maldonado Medical. [B. Maldonado, 12/9, 186:19-187:3.]

3. Matthew Perez joined Maldonado Medical as a driver in 2005 and worked his way up to office manager. [G. Maldonado, 12/9, 67:8-68:7.]

4. As of June 2013, when Mr. Perez left Maldonado Medical, Maldonado Medical had 20 to 30 customers in Arizona and 10 to 15 in California. [Perez, 12/16, 102:15-20.]

5. Alfred C. Duffy was an independent contractor for Maldonado Medical from August 16, 2013 until March 24, 2014. [Trial Exhibit ("Ex.") 25; G. Maldonado, 12/9, 69:13-70:5, 92:15-19.]

6. ANMM is an out-of-network medical billing company that specializes in billing in four areas: orthopedics, spine, podiatry and pain. [G. Maldonado, 12/9, 61:3-14, 77:13-20.]

7. There are hundreds of potential customers for out-of-network billing services in Maricopa County, and thousands in the States of Arizona and California. [G. Maldonado, 12/9, 111:7-24, 135:8-13.]

8. ANMM considers its process for billing out-of-network claims to be proprietary and a trade secret, and describes its process as follows:

a. Using an Authorization of Representation ("AOR") that permits ANMM to represent the patient;

b. Using a "proactive approach" when submitting claims, which consists of including in the initial claims submission package the AOR and other documents that the insurer is likely to request, such as operative reports, health and physical reports, and medical records;

c. Submitting claims on paper to ensure that the attachments are accepted; and

d. Preparing appeals that are targeted to the reason that the claim was denied or

[1] Citations to the transcripts include the last name of the witness and the date, page and line of the testimony (e.g., Perez, 12/16, 141:15–18).

underpaid.

[G. Maldonado, 12/9, 45:11-19, 48:12-50:5, 55:2-12, 57:15-59:22.][2]

9. Greg Maldonado is the President of ANMM. [G. Maldonado, 12/9, 114:3-11.]

10. Mr. Perez was a 15 percent member of ANMM from its formation through his resignation on March 24, 2014. [G. Maldonado, 12/9, 68:11-14, 92:15-19.]

11. Mr. Duffy joined ANMM as a sales manager in August 2013. [G. Maldonado, 12/9, 70:4-5; Duffy, 12/16, 171:20-172:3; Joint Pretrial Statement filed November 9, 2016 ("JPTS"), ¶ A(2)(45).]

12. ANMM later promoted Mr. Duffy to the position of National Director of Sales. [Duffy, 12/16, 171:20-172:3.]

13. Mr. Duffy resigned from ANMM on March 24, 2014. [G. Maldonado, 12/9, 92:15-19.]

14. ANMM had only 12-15 customers and was not profitable as of March 24, 2014. [G. Maldonado, 12/9, 111:18-112:1, 163:15-21.]

15. ANMM did not compensate Mr. Perez for his 15 percent share of the company upon his resignation. [G. Maldonado, 12/9, 163:15-21.]

16. In the fourth quarter of 2015, ANMM's operations were moved to another entity called Advanced Reimbursement Solutions, LLC. [G. Maldonado, 12/9, 95:8-20.]

17. ANMM has changed its name to Healthcare Reimbursement Solutions, LLC. [*See* Notice of Name Change Relating to Defendant American National Medical Management, LLC, filed February 18, 2016.]

18. Odyssey Biomedical was in the business of distributing medical implants. [G. Maldonado, 12/9, 60:11-17, 187:8-11.]

[2] The Court is not at this time making a ruling with respect to whether the process ANMM describes constitutes a legally protectable trade secret.

19. Brandon Maldonado was the President of Odyssey. [B. Maldonado, 12/9, 187:12-13.]

20. Mr. Duffy was a 30 percent member of Odyssey from October 1, 2013 to March 24, 2014. [Duffy, 12/16, 172:15-173:22; JPTS, ¶ A(2)(61) and (83).]

21. Odyssey was never profitable, and ceased operations seven months after Mr. Duffy's departure. [B. Maldonado, 12/9, 207:20-25, 212:6-12.]

22. Odyssey did not pay Mr. Duffy any salary, commissions or any distributions for his 30 percent ownership share of Odyssey. [B. Maldonado, 12/16, 7:7-10.]

23. After resigning from the Maldonado Companies, Mr. Perez and Mr. Duffy formed AllianceMed, LLC, which processes out-of-network billing claims on behalf of providers and surgery centers. [Perez, 12/16, 98:19-99:2; Duffy, 12/16, 164:17-18.]

24. The Maldonado Companies seek to enforce each of the restrictive covenants at issue for one year. [Maldonado Companies' Opening Statement, 12/9, 21:3-6.]

25. Mr. Perez and Mr. Duffy were not given the opportunity to negotiate any of the provisions of the documents at issue. [Perez, 12/16, 126:18-25; Duffy, 12/16, 186:23-187:22, 188:12-189:11.]

ANNM's Restrictive Covenants

26. ANNM seeks to enforce against Mr. Perez and Mr. Duffy restrictive covenants found in three documents: 1) the ANNM Operating Agreement executed by Mr. Perez and effective January 1, 2011 [Ex. 1; G. Maldonado, 12/9, 127:13-129:13]; 2) an unsigned ANNM Confidentiality, Noncompetition and Nonsolicitation Agreement ("ANNM Confidentiality Agreement") [Ex. 5; G. Maldonado, 12/9, 98:25-100:3]; and 3) the ANNM Non-Disclosure, Nondisparagement and Non-Competition Agreement ("ANNM Non-Disclosure Agreement") executed by Mr. Duffy on August 8, 2013. [Ex. 23; G. Maldonado, 12/9, 136:18-137:25.]

The ANNM Operating Agreement

(Trial Exhibit 1)

27. The ANNM Operating Agreement defines ANNM's "Business" as "to provide but limited to develop any process related to the medical industry, lease sell and commercialist medical devices, supplied and related products and services, directly or indirectly through one or

more subsidiary entities." [Ex. 1, ¶ 1.5; JPTS, ¶ A(1)(21).]

28. The ANMM Operating Agreement's definition of "Business" is broader than the business in which ANMM actually engaged. [G. Maldonado, 12/9, 130:5-131:6.]

29. The term "Time Period" is defined in the ANMM Operating Agreement as 36 months. [Ex. 1, ¶ 11.2(d); G. Maldonado, 12/9, 134:15-23.] The definition also purports to provide for lesser time periods down to 12 months, should a court determine that 36 months is unenforceable. [*Id*.]

30. The term "Area" is defined in the ANMM Operating Agreement as the States of Arizona and California. [Ex. 1, ¶ 11.2(e); G. Maldonado, 12/9, 135:2-4.]

31. ANMM chose Arizona and California as the defined Area in the ANMM Operating Agreement because it has an office in each state. However, the location of ANMM's offices did not necessarily correspond to the location of its customers. [G. Maldonado, 12/9, 80:3-81:1.]

32. The term "Customers" is defined in the ANMM Operating Agreement as "any persons, firms, associations, partnerships, corporations, limited liability companies or other entities (i) to which either the Company or Member has provided services relating to the Business, or (ii) that either the Company or Member has solicited with respect to the provision of services relating to the Business, before or during the time term that the Member was a Member of the Company." [Ex. 1, ¶ 11.2(c); 1 G. Maldonado, 12/9, 132:14-133:2.]

33. The definition of "Customers" encompasses individuals or entities with which ANMM has never had a business relationship. [G. Maldonado, 12/9, 132:6-133:8.] (ANMM considers itself to have solicited an individual or entity if it did as little as sending a single letter to that individual or entity. [G. Maldonado, 12/9, 108:1-15.])

34. The ANMM Operating Agreement seeks to prohibit competition as follows:

> For the Time Period, Members and Terminated Members shall not, directly or indirectly, for any reason:
>
> (a) Provide consulting services to, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operating or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that is engaged or is about to be engaged in, any activity that competes in any manner within the Area with the Business of

> the Company, its successors or assigns; or
>
> (b) Provide consulting services to, be employed by, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that has a practice of referring Business to the Company.

[Ex. 1, ¶ 11.4; G. Maldonado, 12/9, 129:14-132:5.]

35. Individuals or entities that refer business to ANMM do not compete with ANMM. [G. Maldonado, 12/9, 104:8-106:9.]

36. The ANMM Operating Agreement seeks to prohibit the solicitation of Customers as follows:

> For the Time Period, Members and Terminated Members shall not solicit or assist in the solicitation of any Customers for the purpose of providing services similar to the Company's Business or discouraging the obtaining of services from the Company, nor will Members or Terminated Members accept any business from any Customers relating to the Business, except when such solicitation or acceptance is done on behalf of the Company and in the sole and exclusive interest of the Company.

[Ex. 1, ¶ 11.5; G. Maldonado, 12/9, 132:6-13.]

37. As written, in addition to prohibiting the solicitation of current ANMM customers, the non-solicitation provision also seeks to prohibit the solicitation of individuals or entities with which ANMM never had a business relationship and the passive acceptance of business from former ANMM customers, even where no solicitation occurred. [G. Maldonado, 12/9, 124:1-21, 132:6-133:8.]

38. The ANMM Operating Agreement seeks to prohibit the solicitation of ANMM employees as follows:

> For the Time Period, Members and Terminated Members shall not individually or as an agent or employee of or as a consultant for or otherwise on behalf of or in conjunction with any person, firm, association, partnership, corporation, or other entity, directly or indirectly, solicit, or otherwise encourage or entice to leave their employment with the Company, any of the Company's employees who are or

> were employed by the Company at the time of such solicitation, encouragement or enticement.

[Ex. 1, ¶ 11.6.]

39. The ANMM Operating Agreement defines "Confidential Information and Material" as follows:

> "Confidential Information and Material" shall mean without limitation all confidential, proprietary, or unique information belonging to, used by, or in the possession of the Company relating to its Business, whether or not physically marked as such, and whether or not such information and materials are conceived or developed while the Member is employed with the Company, including, without limitation its: business processes, business methods, business plans, business strategy, business tactics, internal reports, sales information, price information, Customer lists, potential Customer lists, applications, operating systems, data bases, and other information pertaining to the Company; the Business; or a past, present or potential Customer of the Company. Confidential Information and Material shall not include any information that the Member can show: (a) was known by the Member on or before disclosure of the information to the Member by the Company; or (b) became known to the public other than as a result of disclosure by the Member, directly or indirectly, or by another entity or individual in violation of its, his or her duties of confidentiality. If Member is unsure as to whether certain information or material is Confidential Information and Material, then Member shall treat that information or material as Confidential Information and Material unless Member has been informed to the contrary by the Company in writing.

[Ex. 1, ¶ 11.2(b); G. Maldonado, 12/9, 133:18-24.]

40. The definition of Confidential Information and Material is broader than ANMM's allegedly trade-secret process. [G. Maldonado, 12/9, 78:19-79:7, 133:22-134:14.]

41. The ANMM Operating Agreement prohibits the disclosure or use of Confidential Information and Material indefinitely, with no geographic limitation. [Ex. 1, ¶ 11.3; G. Maldonado, 12/9, 136:2-11.]

The ANMM Confidentiality Agreement

(Trial Exhibit 5)

42. Although not relevant to the legal issues presently before the Court, the ANMM Confidentiality Agreement as submitted to the Court is not signed by Mr. Perez, or anyone on behalf of ANMM, and does not include Mr. Perez's name. [Ex. 5; G. Maldonado, 12/9, 98:25-99:25.]

43. The ANMM Confidentiality Agreement defines ANMM's Business as "providing Healthcare Provider Claim Reimbursement Process." [Ex. 5, Recitals; G. Maldonado, 12/9, 102:4-12.]

44. The ANMM Confidentiality Agreement's definition of "Business" is broader than the business in which ANMM actually engaged. [G. Maldonado, 12/9, 102:21-103:4.]

45. The term "Time Period" is defined in the ANMM Confidentiality Agreement as 24 months. [Ex. 5, ¶ 1(d); G. Maldonado, 12/9, 110:7-24.] The definition further provides for lesser time periods down to 3 months should a court determine that 24 months is unenforceable. [*Id*.]

46. The term "Area" is defined in the ANMM Confidentiality Agreement as the State of Arizona. [Ex. 5, ¶ 1(e); G. Maldonado, 12/9, 110:25-111:6.] The definition further provides for smaller geographic areas down to Maricopa County should the Court determine that the State of Arizona is unenforceable. [Id.]

47. The term "Customers" is defined in the ANMM Confidentiality Agreement as "any persons, firms, associations, partnerships, corporations, limited liability companies or other entities (i) to which either the Company or Employee has provided services relating to the Business, or (ii) that either the Company or Employee has solicited with respect to the provision of services relating to the Business, before or during the term of Employee's employment with the Company." [Ex. 5, ¶ 1(b); G. Maldonado, 12/9, 107:16-108:1.]

48. The definition of "Customers" encompasses individuals or entities with which ANMM has never had a business relationship. [G. Maldonado, 12/9, 108:2-109:4.] (ANMM considers itself to have solicited an individual or entity if it did as little as sending a single letter to that individual or entity. [G. Maldonado, 12/9, 108:1-15.])

49. The ANMM Confidentiality Agreement seeks to prohibit competition as follows:

> Employee hereby covenants and agrees with the Company that for the Time Period set forth in Paragraph 1(d), Employee shall not, directly or indirectly, for any reason, provide consulting services to, own, manage, operate, join, control, be employed by, participate in, or finance the ownership, management, operating or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that is engaged or is about to become engaged in any activity that competes in any manner within the Area with the Business of the Company, its successors or assigns. Without limiting the foregoing, Employee covenants and agrees with the Company that any person, firm, association, partnership, corporation, or other entity that receives twenty-five percent (25%) of its gross income from Healthcare Provider Claim Reimbursement and/or Health Insurance Reimbursement, is engaged in an activity that competes with the Business of the Company.
>
> Employee also hereby covenants and agrees with the Company that for the Time Period set forth in Paragraph 1(d), Employee shall not, directly or indirectly, for any reason, provide consulting services to, be employed by, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that has a business relationship with the Company or refers patients to Company.

[Ex. 5, ¶ 3; G. Maldonado, 12/9, 100:17-24.]

50. Individuals or entities that refer business to ANMM do not compete with ANMM. [G. Maldonado, 12/9, 104:8-106:9.]

51. The ANMM Confidentiality Agreement seeks to prohibit the solicitation of Customers as follows:

> Employee further covenants and agrees that during the Time Period, Employee will not solicit or assist in the solicitation of any Customers for the purpose of providing services relating to the Company's Business or discouraging the obtaining of such services from the Company, nor will Employee accept any business from any Customers relating to the Business, except when such solicitation or acceptance is done on behalf of the Company and in the sole and exclusive interest of the Company.

[Ex. 5, ¶ 4; G. Maldonado, 12/9, 107:3-8.]

52. In addition to prohibiting the solicitation of current ANMM customers, the non-solicitation provision also prohibits the solicitation of individuals or entities who never had a business relationship with ANMM, and the acceptance of business from former ANMM customers even where no solicitation occurred. [Ex. 5, ¶ 4; G. Maldonado, 12/9, 108:2-109:4.]

53. The ANMM Confidentiality Agreement seeks to prohibit the solicitation of employees as follows:

> Employee further covenants and agrees that during the Time Period, Employees will not individually or as an agent or employee of or as a consultant for or otherwise on behalf of or in conjunction with any person, firm, association, partnership, corporation, or other entity, directly or indirectly, hire, employ, solicit, or otherwise encourage or entice to leave their employment with the Company, any of the Company's employees who are or were employed by the Company at any time during the Time Period.

[Ex. 5, ¶ 5.]

54. This language prohibits the solicitation of even former employees that have no current relationship with ANMM. [G. Maldonado, 12/9, 124:22-125:17.]

55. The ANMM Confidentiality Agreement defines "Confidential Information and Material" as follows:

> "Confidential Information and Material" shall mean without limitation all confidential, proprietary, or unique information belonging to, used by, or in the possession of the Company relating to its Business, whether or not physically marked as such, and whether or not such information and materials are conceived or developed while the Employee is employed with the Company, including, without limitation its: business processes, business methods, business plans, business strategy, business tactics, products under development, internal reports, sales or rental information, price information, Customer lists, potential Customer lists, applications, operating systems, data bases, information pertaining to products or services under development, information pertaining to products or services for which the Company is the sole distributor, information pertaining to Healthcare Provider Claim Reimbursement Processes, inventions, and other information pertaining to the Company; the Business; or a past, present or potential Customer of the Company.

> Confidential Information and Material shall not include any information that the Employee can show: (a) was known by the Employee on or before disclosure of the information to the Employee by the Company; or (b) became known to the public other than as a result of disclosure by the Employee, directly or indirectly, or by another entity or individual in violation of its, his or her duties of confidentiality. If Employee is unsure as to whether certain information or material is Confidential Information and Material, the Employee shall treat the information or material as Confidential Information and Material unless Employee has been informed to the contrary by the Company President in writing.

[Ex. 5, ¶ 1(a); G. Maldonado, 12/9, 112:18-21.]

56. This definition of Confidential Information and Material is broader than ANMM's allegedly trade-secret process. [G. Maldonado, 12/9, 112:22-113:15.]

57. The ANMM Confidentiality Agreement prohibits the disclosure or use of Confidential Information and Material indefinitely, with no geographic limitation. [Ex. 5, ¶ 2.]

The ANMM Non-Disclosure Agreement

(Trial Exhibit 23)

58. The ANMM Non-Disclosure Agreement defines "Confidential Information" as follows:

> "Confidential Information" means all information of ANMM, including, but not be limited to, all proprietary information and materials relating to claims billing services, additional services, products, business practices/plans, processes (including, but not limited to, suggested prescription length; database of billable amounts used for and allowable for services, products, modularities and HCPC and CPT codes, including any increases, changes, and additions to same (with the exception of rate increases according to yearly CPI inflation rates according to the Department of Labor)), strategies, current/prospective client/customer information (including, but not limited to, identities, lists, leads, account revenues, contact information, compensation, financial data, buying and/or selling habits, preferences, special needs, ANMM's relationships with customers, or like information), vendor/supplier/service provider information (including, but not limited to, costs, sales, or services/products provided to ANMM or like information), agent information, performance measurements, marketing

> methods/strategies, marketing data, pricing, forms, payroll, conditions, rates, profitability data, sales figures/reports, internal memoranda, inventions, proprietary software (related source code and programming information whether or not patented or registered for copyright or like protection), works of authorship, research and development information, trade secrets, personnel policies, accounting/financial records (including, but not limited to, balance sheets, profit and loss statements, tax returns, payable and receivable information, bank account information and other financial reporting information) know-how, show-how, terms of employment, and all other information that is known or should be known to be confidential.
>
> The term "Confidential Information" also includes any and all information and materials that might derive actual or potential economic value from not being generally known or readily ascertainable to the public or to ANMM's competitors. Confidential Information also includes any information or materials relating to this Agreement, information used by ANMM related to its out-of-network billing services, including information that ANMM has compiled or developed over time or through its experiences, information that ANMM obtained or obtains from a third party and that ANMM treats as proprietary, designates as Confidential Information or is otherwise obligated to keep confidential, whether or not owned or developed by ANMM. For the avoidance of doubt, Confidential Information shall also include all analyses, compilations, forecasts, data studies, notes, translations, memoranda, or other documents or materials, prepared by or for DUFFY by ANMM its employees, representatives, agents, or contractors containing, based on, generated, or derived from, in whole or in part, ANMM's Confidential Information.

[Ex. 23, ¶ 1(a); G. Maldonado, 12/9, 140:4-10.]

59. Paragraph 1 of the ANMM Non-Disclosure Agreement prohibits the disclosure or use of Confidential Information and Material (as so defined) for a period of 10 years, with no geographic limitation. [Ex. 23, ¶ 1.]

60. Paragraph 1(a) of the ANMM Non-Disclosure Agreement provides that Mr. Duffy "shall not disclose to any third party Confidential Information received from ANMM, and shall not use ANMM's Confidential Information except for purposes directly related to this Agreement and any right to use Confidential Information shall end with the termination or expiration of this Agreement." [Ex. 23, ¶ 1(a).] This provision has no time or geographic limitation. [G. Maldonado, 12/9, 138:19-139:6.]

61. In imposing these restrictions, ANMM sought only to protect its allegedly trade-secret process. [G. Maldonado, 12/9, 85:21-86: 5.] However, the definition of Confidential Information is significantly broader than ANMM's process, and contains no exclusion for public information. [G. Maldonado, 12/9, 140:22-141:8.]

Maldonado Medical's Restrictive Covenants

62. Maldonado Medical seeks to enforce against Mr. Perez the restrictive covenants in a Maldonado Medical Confidentiality, Noncompetition and Nonsolicitation Agreement ("MM Confidentiality Agreement"). [Ex. 4; G. Maldonado, 12/9, 115:6-12.] Maldonado Medical seeks to enforce against Mr. Duffy the confidentiality and non-disclosure provisions found in the Maldonado Medical Independent Contractor Agreement ("MM Independent Contractor Agreement"). [Ex. 25; Maldonado Companies' Opening Statement, 12/9, 23:9-21.]

The MM Confidentiality Agreement

(Trial Exhibit 4)

63. Although not relevant to the legal issues presently before the Court, the MM Confidentiality Agreement as submitted to the Court is not signed by Mr. Perez or anyone on behalf of ANMM and does not include Mr. Perez's name. [Ex. 4; G. Maldonado, 12/9, 115:6-16.]

64. The MM Confidentiality Agreement defines Maldonado Medical's Business as "providing orthopedic, durable medical and rehabilitation equipment." [Ex. 4, Recitals; G. Maldonado, 12/9, 118:6-10.]

65. The MM Confidentiality Agreement's definition of "Business" is broader than the business in which Maldonado Medical is actually engaged. [G. Maldonado, 12/9, 118:6-13.]

66. The term "Time Period" is defined in the MM Confidentiality Agreement as 24 months. [Ex. 4, ¶ 1(d); G. Maldonado, 12/9, 110:7-24.] The definition further provides for lesser time periods down to 3 months should a court determine that 24 months is unenforceable. [*Id.*]

67. The term "Area" is defined in the MM Confidentiality Agreement as the State of Arizona. [Ex. 4, ¶ 1(e).] The definition further provides for smaller geographic areas down to Maricopa County should the Court determine that the State of Arizona is unenforceable. [*Id.*]

68. The term "Customers" is defined in the MM Confidentiality Agreement as "any persons, firms, associations, partnerships, corporations, limited liability companies or other entities (i) to which either the Company or Employee has provided services relating to the Business, or (ii) that either the Company or Employee has solicited with respect to the provision of services relating to the Business, before or during the term of Employee's employment with the Company." [Ex. 4, ¶ 1(b); G. Maldonado, 12/9, 122:13-25.]

69. The definition of "Customers" encompasses individuals or entities with which Maldonado Medical has never had a business relationship. [G. Maldonado, 12/9, 122:13-123:5.] (Maldonado Medical considers itself to have solicited an individual or entity if it did as little as sending a single letter to that individual or entity. [G. Maldonado, 12/9, 123:1-22.])

70. The MM Confidentiality Agreement seeks to prohibit competition as follows:

> Employee hereby covenants and agrees with the Company that for the Time Period set forth in Paragraph 1(d), Employee shall not, directly or indirectly, for any reason, provide consulting services to, own, manage, operate, join, control, be employed by, participate in, or finance the ownership, management, operating or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that is engaged or is about to become engaged in any activity that competes in any manner within the Area with the Business of the Company, its successors or assigns. Without limiting the foregoing, Employee covenants and agrees with the Company that any person, firm, association, partnership, corporation, or other entity that receives twenty-five percent (25%) of its gross income from continuous passive motion devices sales or rentals, and any company that rents or sells ThermoTek products, is engaged in an activity that competes with the Business of the Company.
>
> Employee also hereby covenants and agrees with the Company that for the Time Period set forth in Paragraph 1(d), Employee shall not, directly or indirectly, for any reason, provide consulting services to, be employed by, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that has a business relationship with the Company or refers patients to Company.

[Ex. 4, ¶ 3; G. Maldonado, 12/9, 117:21-122:1.]

71. Individuals or entities that refer business to Maldonado Medical do not compete with Maldonado Medical. [G. Maldonado, 12/9, 120:22-122:1.]

72. The MM Confidentiality Agreement seeks to prohibit the solicitation of Customers as follows:

> Employee further covenants and agrees that during the Time Period, Employee will not solicit or assist in the solicitation of any Customers for the purpose of providing services relating to the Company's Business or discouraging the obtaining of such services from the Company, nor will Employee accept any business from any Customers relating to the Business, except when such solicitation or acceptance is done on behalf of the Company and in the sole and exclusive interest of the Company.

[Ex. 4, ¶ 4; G. Maldonado, 12/9, 122:2-5.]

73. In addition to prohibiting the solicitation of current Maldonado Medical customers, the non-solicitation provision also prohibits the solicitation of individuals or entities that never had a business relationship with Maldonado Medical, and the acceptance of business from former Maldonado Medical customers even where no solicitation occurred. [Ex. 4, ¶ 4; G. Maldonado, 12/9, 122:6-124:21.]

74. The MM Confidentiality Agreement seeks to prohibit the solicitation of employees as follows:

> Employee further covenants and agrees that during the Time Period, Employee will not individually, or as an agent or employee of or as a consultant for or otherwise on behalf of or in conjunction with any person, firm, association, partnership, corporation, or other entity, directly or indirectly, hire, employ, solicit, or otherwise encourage or entice to leave their employment with the Company, any of the Company's employees who are or were employed by the Company at any time during the Time Period.

[Ex. 4, ¶ 5.]

75. This language prohibits the solicitation of even former employees that have no current or ongoing relationship with Maldonado Medical. [G. Maldonado, 12/9, 124:22-125:17.]

76. The MM Confidentiality Agreement defines "Confidential Information and Material" as follows:

> "Confidential Information and Material" shall mean without limitation all confidential, proprietary, or unique information belonging to, used by, or in the

> possession of the Company relating to its Business, whether or not physically marked as such, and whether or not such information and materials are conceived or developed while the Employee is employed with the Company, including, without limitation its: business processes, business methods, business plans, business strategy, business tactics, products under development, internal reports, sales or rental information, price information, Customer lists, potential Customer lists, applications, operating systems, data bases, information pertaining to products or services under development, information pertaining to products or services for which the Company is the sole distributor, information pertaining to Durable Medical Equipment, information pertaining to Continuous Passive Motion Devices, inventions, and other information pertaining to the Company; the Business; or a past, present or potential Customer of the Company.
>
> Confidential Information and Material shall not include any information that the Employee can show: (a) was known by the Employee on or before disclosure of the information to the Employee by the Company; or (b) became known to the public other than as a result of disclosure by the Employee, directly or indirectly, or by another entity or individual in violation of its, his or her duties of confidentiality. If Employee is unsure as to whether certain information or material is Confidential Information and Material, the Employee shall treat that information or material as Confidential Information and Material unless Employee has been informed to the contrary by the Company President in writing.

[Ex. 4, ¶ 1(a); G. Maldonado, 12/9, 125:20-25.]

77. This definition of Confidential Information and Material is broader than ANMM's allegedly trade secret "process" that Maldonado Medical seeks to protect. [G. Maldonado, 12/9, 126:1-10.]

78. The MM Confidentiality Agreement prohibits the disclosure or use of Confidential Information and Material indefinitely, with no geographic limitation. [Ex. 4, ¶ 2.]

The MM Independent Contractor Agreement

(Trial Exhibit 25)

79. The MM Independent Contractor Agreement defines "Confidential Information" as follows:

> "Confidential Information" means all information of MM, including, but not be limited to, all proprietary information and materials relating to claims billing services, additional services, products, business practices/plans, processes (including, but not limited to, suggested prescription length; database of billable amounts used for and allowable for services, products, modularities and HCPC and CPT codes, including any increases, changes, and additions to same (with the exception of rate increases according to yearly CPI inflation rates according to the Department of Labor)), strategies, current/prospective client/customer information (including, but not limited to, identities, lists, leads, account revenues, contact information, compensation, financial data, buying and/or selling habits, preferences, special needs, MM's relationships with customers, or like information), vendor/supplier/service provider information (including, but not limited to, costs, sales, or services/products provided to MM or like information), agent information, performance measurements, marketing methods/strategies, marketing data, pricing, forms, payroll, conditions, rates, profitability data, sales figures/reports, internal memoranda, inventions, proprietary software (related source code and programming information whether or not patented or registered for copyright or like protection), works of authorship, research and development information, trade secrets, personnel policies, accounting/financial records (including, but not limited to, balance sheets, profit and loss statements, tax returns, payable and receivable information, bank account information and other financial reporting information) know-how, show-how, terms of employment, and all other information that is known or should be known to be confidential.
>
> The term "Confidential Information" also includes any and all information and materials that might derive actual or potential economic value from not being generally known or readily ascertainable to the public or to MM's competitors. confidential Information also includes any information or materials relating to this Agreement, information used by MM related to its out-of-network billing services, including information that MM has compiled or developed over time or through its experiences, information that MM obtained or obtains from a third party and that MM treats as proprietary, designates as Confidential Information or is otherwise obligated to keep confidential, whether or not owned or developed by MM. For the avoidance of doubt, Confidential Information shall also include all analyses, compilations, forecasts, data studies, notes, translations, memoranda, or other documents or materials, prepared by or for CLIENT, its employees, representatives, agents, or contractors containing, based on, generated, or derived from, in whole or in part, MM's Confidential Information.

[Ex. 25, ¶ 6(a); 12/16 TR at 16:24-17:11.]

80. Although this definition of Confidential Information includes Maldonado Medical's out-of-network billing services, Maldonado Medical does not provide such services. [B. Maldonado, 12/16, 17:21-18:3.]

81. The definition includes information regarding all of Maldonado Medical's services, products, and relationships with its suppliers, vendors and providers, regardless of whether that information is truly private or confidential. [B. Maldonado, 12/16, 18:4-19:10.]

82. The definition also includes all information that Mr. Duffy learned or acquired while working for Maldonado Medical. [B. Maldonado, 12/16, 19:11-17.]

83. The first paragraph of the non-disclosure provision in the MM Independent Contractor Agreement seeks to prohibit the disclosure or use of Confidential Information for a period of 10 years, with no geographic limitation, as follows:

> Duffy acknowledges that Duffy may receive and will have access to certain confidential information of MM or of certain entities affiliated with MM, MM clients and vendors of MM and that all such information constitutes valuable, special and unique property of MM, its affiliates and its customers and vendors ("Confidential Information"). Duffy acknowledges that this Confidential Information is valuable to MM and, therefore, its protection and maintenance constitutes a legitimate interest to be protected by MM by this non-disclosure covenant. Therefore, Duffy agrees that during the Term and for a period commencing upon the Termination Date and ending ten (10) years after the Termination Date, the Confidential Information will (i) be received and maintained by Duffy in the strictest confidence, (ii) be used by Duffy only for the purposes of the Services contemplated herein, and (iii) not be, directly or indirectly, used by Duffy for his benefit or the benefit of another, or disclosed (except as required by law or legal process) to any person, firm, corporation, association, organization or other entity of any nature for any reason or purpose whatsoever without the express prior written consent of MM. Duffy further agrees that no Confidential Information shall be reproduced in whole or in part without the express prior written consent of MM Upon the written request of MM, all Confidential Information in the Duffy's possession, and all copies thereof, shall be promptly returned to MM. Duffy further acknowledges that Duffy is in a strict confidential relationship with MM with respect to such Confidential Information and that, absent this Agreement, MM would not agree to provide Duffy with access to such Confidential Information nor employ Duffy as provided for herein.

[Ex. 25, ¶ 6; B. Maldonado, 12/16, 20:25-21:17.]

84. The fourth paragraph of the non-disclosure provision in the MM Independent Contactor Agreement provides that Mr. Duffy "shall not disclose to any third party Confidential Information received from MM, and shall not use MM's Confidential Information except for purposes directly related to this Agreement and any right to use Confidential Information shall end with the termination or expiration of this Agreement." [Ex. 25, ¶ 6(a).] This paragraph of the provision has no time or geographic limitation. [B. Maldonado, 12/16, 21:18-22:12.]

Odyssey's Restrictive Covenants

85. Odyssey seeks to enforce against Mr. Duffy the restrictive covenants in the Odyssey Operating Agreement dated October 1, 2013 [Ex. 2], and the First Addendum to the Odyssey Operating Agreement ("Addendum") dated March 18, 2014 [Ex. 3.]

The Odyssey Operating Agreement

(Trial Exhibit 2)

86. The Odyssey Operating Agreement defines Odyssey's "Business" as "to provide but limited to develop any process related to the medical industry, lease sell and commercialize medical products, devices, supplies and services, directly or indirectly through one or more subsidiary entities." [Ex. 2, ¶ 1.5; B. Maldonado, 12/16, 26:2-15.]

87. The Odyssey Operating Agreement's definition of "Business" is broader than the business in which Odyssey actually engaged. [*See* B. Maldonado, 12/16, 26:16-27:21.]

88. The non-competition provision of the Odyssey Operating Agreement states:

> For a period starting one year from the purchase of a terminated members interest Members shall not, directly or indirectly, for any reason:
>
> (a) Provide consulting services to, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that is engaged or is about to be engaged in, any activity that competes in any manner within the Area with the Business of the Company, its successors or assigns; or

> (b) Provide consulting services to, be employed by, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of, or be connected in any manner with any person, firm, association, partnership, corporation, or other entity that has a practice of referring Business to the Company.
>
> (c) No Member shall have ownership in any company or organization that competes in any way with any product or service that the company may provide now or in the future without written permission of the Manager.

[Ex. 2, ¶ 10.4.]

89. The Odyssey Operating Agreement separately defines the terms "Member" and "Terminated Member." [Ex. 2, ¶¶ 1.8(w) and 9.5(a); B. Maldonado, 12/16, 27:25-29:21.]

90. Mr. Duffy became a Terminated Member of Odyssey when he resigned on March 24, 2014. [B. Maldonado, 12/16, 29:22-30:24.]

91. The non-competition provision applies only to Members and not to Terminated Members. [*Id*. *See also* B. Maldonado, 12/16, 32:19-33:2.]

92. The restrictions in the non-competition provision do not begin until one year after the purchase of a terminated member's interest in Odyssey. [Ex. 2, ¶ 10.4; B. Maldonado, 12/16, 31:17-23.]

93. Mr. Duffy's interest in Odyssey was never purchased. [B. Maldonado, 12/16, 31:24-32:1.]

94. Individuals or entities that refer business to Odyssey do not compete with Odyssey. [B. Maldonado, 12/16, 36:23-37:25.]

95. The term "Area" is defined in the Odyssey Operating Agreement as the United States of America. [Ex. 2, ¶ 10.2(e); B. Maldonado, 12/16, 36:4-6.]

96. When Mr. Duffy resigned from Odyssey, Odyssey was not doing business in the entire United States, and had customers only in New York, Georgia, and Texas. [B. Maldonado, 12/9, 200:1-4; B. Maldonado, 12/16, 36:7-15.]

97. The term "Customers" is defined in the Odyssey Operating Agreement as "any persons, firms, associations, partnerships, corporations, limited liability companies or other

entities (i) to which either the Company or Member has provided services relating to the Business, or (ii) that either the Company or Member has solicited with respect to the provision of services relating to the Business, before or during the time term that the Member was a Member of the Company." [Ex. 2, ¶ 10.2(c); B. Maldonado, 12/16, 40:9-14.]

98. The definition of "Customers" encompasses individuals or entities with which Odyssey has never had a business relationship, and with which Mr. Duffy never had contact on behalf of Odyssey. [B. Maldonado, 12/16, 40:17-42:6.]

99. The Odyssey Operating Agreement seeks to prohibit the solicitation of Customers as follows:

> For a period start one year from the purchase of a terminated members interest Members shall not shall not [sic] solicit or assist in the solicitation of any Customers for the purpose of providing services similar to the Company's Business or discouraging the obtaining of services from the Company, nor will Members or Terminated Members accept any business from any Customers relating to the Business, except when such solicitation or acceptance is done on behalf of the Company and in the sole and exclusive interest of the Company.

[Ex. 2, ¶ 10.5; B. Maldonado, 12/16, 38:25-39:20.]

100. The first clause of the non-solicitation provision applies only to Members and not to Terminated Members. [Ex. 2, ¶ 10.5; B. Maldonado, 12/16, 39:11-14.]

101. The restrictions in the non-solicitation provision do not begin until one year after the purchase of a terminated member's interest in Odyssey. [Ex. 2, ¶ 10.5; B. Maldonado, 12/16, 39:5-8.]

102. In addition to prohibiting the solicitation of current Odyssey customers, the non-solicitation provision also prohibits the solicitation of individuals or entities with which Odyssey never had a business relationship, and the acceptance of business from former Odyssey customers even where no solicitation occurred. [B. Maldonado, 12/16, 39:21-40:8, 40:17-42:6.]

103. The Odyssey Operating Agreement seeks to prohibit the solicitation of Odyssey employees as follows:

> For the Time Period, Members and Terminated Members shall not individually or as an agent or employee of or as a consultant for or otherwise on behalf of or in conjunction with any person, firm, association, partnership, corporation, or other

> entity, directly or indirectly, solicit, or otherwise encourage or entice to leave their employment with the Company, any of the Company's employees who are or were employed by the Company at the time of such solicitation, encouragement or enticement.

[Ex. 2, ¶ 10.6.]

104. The only Odyssey employees, other than Mr. Duffy, were Brandon Maldonado, Megan Lineberg and a representative in California. [B. Maldonado, 12/16, 208:4-8.]

105. The Odyssey Operating Agreement defines "Confidential Information and Material" as follows:

> "Confidential Information and Material" shall mean without limitation all confidential, proprietary, or unique information belonging to, used by, or in the possession of the Company relating to its Business, whether or not physically marked as such, and whether or not such information and materials are conceived or developed while the Member is employed with the Company, including, without limitation its: business processes, business methods, business plans, business strategy, business tactics, internal reports, sales information, price information, Customer lists, potential Customer lists, applications, operating systems, data bases, and other information pertaining to the Company; the Business; or a past, present or potential Customer of the Company. Confidential Information and Material shall not include any information that the Member can show: (a) was known by the Member on or before disclosure of the information to the Member by the Company; or (b) became known to the public other than as a result of disclosure by the Member, directly or indirectly, or by another entity or individual in violation of its, his or her duties of confidentiality. If Member is unsure as to whether certain information or material is Confidential Information and Material) then Member shall treat that information or material as Confidential Information and Material unless Member has been informed to the contrary by the Company in writing.

[Ex. 1, ¶ 10.2(b).]

106. The Odyssey Operating Agreement seeks to prohibit the disclosure or use of Confidential Information and Material indefinitely, with no geographic limitation. [Ex. 2, ¶ 10.3; B. Maldonado, 12/16, 42:7-43:13.]

First Addendum to the Odyssey Operating Agreement

(Trial Exhibit 3)

107. Brandon Maldonado was the only Odyssey Member to execute the Addendum. [B. Maldonado, 12/9, 201:14-23.]

108. The Addendum is dated March 18, 2014, but was prepared sometime later. [B. Maldonado, 12/16, 44:5-9.]

109. Mr. Duffy testified that he was not aware of the existence of the Addendum until it was attached to Odyssey's counterclaims in the litigation. [Duffy, 12/16, 190:9-191:6.]

110. The Addendum defines Odyssey's "Business" as follows:

> The business and purpose of the Company is to purchase, sell, rent, lease and develop any process related to the medical industry and to commercialize medical equipment, durable medical equipment, medical products, medical devices, medical supplies and biological or man-made implants (defined as:
>
> DEFINITION OF A BIOLOGICAL IMPLANT
>
> Biological Implant(s) is a tissue-engineered and cell-based medical products.
>
> DEFINITION OF A MAN MADE IMPLANT
>
> > An implant is a medical device manufactured to replace a missing biological structure, support damaged biological structure, or enhance an existing biological structure. Medical implants are man-made devices, in contrast to a transplant, which is a transplanted biomedical tissue. The surface of implants that contact the body might be made of a biomedical material such as titanium, silicone or apatite depending on what is the most functional. In some cases implants contain electronics e.g. artificial pacemaker and cochlear implants. Some implants are bioactive, such as subcutaneous drug delivery devices in the form of implantable pills or drug-eluting stents).
>
> and to provide services, directly or indirectly through one or more subsidiary(s) or affiliated entities such as Maldonado Medical LLC and American National

Medical Management (ANMM) (the "Business").

[Ex. 3, ¶ 1.5; B. Maldonado, 12/16, 49:13-22.]

111. Maldonado Medical and ANMM are not parties to the Odyssey Operating Agreement. [B. Maldonado, 12/16, 50:17-19.]

112. The definition of "Business" in the Addendum is broader than Odyssey's actual business. [B. Maldonado, 12/16, 49:18-50:1.]

113. The Addendum defines "Confidential Information and Material" as follows:

> "Confidential Information and Material" shall mean without limitation all confidential, proprietary, or unique information belonging to, used by, or in the possession of the Company, Maldonado Medical LLC and ANMM, relating to its Business, whether or not physically marked as such, and whether or not such information and materials are conceived or developed while the Member is employed with the Company, including, without limitation its: business processes, business methods, business plans, business strategy, business tactics, internal reports, sales information, price information, Customer lists, potential Customer lists, applications, operating systems, data bases, and other information pertaining to the Company, Maldonado Medical LLC and ANMM or a past, present or potential (potential to be defined has having ongoing discussions (attachment A) Customer of the Company Maldonado Medical LLC and ANMM. Confidential Information and Material shall not include any information that the Member can show: (a) was known by the Member on or before disclosure of the information to the Member by the Company; or (b) became known to the public other than as a result of disclosure by the Member, directly or indirectly, or by another entity or individual in violation of its, his or her duties of confidentiality. If Member is unsure as to whether certain information or material is Confidential Information and Material) then Member shall treat that information or material as Confidential Information and Material unless Member has been informed to the contrary by the Company in writing.

[Ex. 3, ¶ 10.2(b).]

114. The definition also includes a non-competition provision, which reads as follows:

> Duffy agrees that he shall not attempt to provide services, be employed or hold a [sic] ownership interest to any competitor of Company, Maldonado Medical or

> ANMM at any time during the Term of this Agreement and ending 36 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 36-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 24 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 24-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 18 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 18-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 12 months after a Termination Event.

[Ex. 3, ¶ 1.5; B. Maldonado, 12/16, 50:23-51:11.]

115. The non-competition provision in Paragraph 1.5 of the Addendum does not have a geographic limitation. [Ex. 3, ¶ 1.5; B. Maldonado, 12/16, 51:12-14.]

116. Brandon Maldonado did not inform Mr. Duffy that the Addendum included a non-competition provision within the new definition of "Business." [B. Maldonado, 12/16, 51:15-23.]

117. Neither the Odyssey Operating Agreement nor the Addendum defines the term "services." [B. Maldonado, 12/16, 52:1-10.]

118. The Addendum contains a second non-competition provision, which states:

> Duffy as a member of the Company or after his membership share has been terminated or when he withdrawals [sic] from the Company, shall not, directly or indirectly, for any reason during the Time Period: Time Period shall mean the period beginning at of the effective date of this Agreement and ending 24 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 24-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 18 months after a Termination Event; provided, however, that if a Court of competent jurisdiction determines that such 18-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 12 months after a Termination Event. Provide consulting services to, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of or be connected in any manner with any person(s), firm, association, partnership, corporation, or

> other entity engaged or is about to become engaged in any activity that competes in any manner within Maricopa County, Arizona, with the Company, its affiliates Maldonado Medical LLC and ANMM, its successors or assigns, or provide consulting services to, own, manage, operate, join, control, be employed by, participate in or finance the ownership, management, operation or control of or be connected in any manner with any person or persons that are employed by Company, Maldonado Medical LLC or by ANNM as of March 18, 2014.

[Ex. 3, ¶ 10.4(e).]

119. The 36-month Time Period in the non-competition provision contained in Paragraph 1.5 of the Addendum is inconsistent with the 24-month Time Period in the non-competition provision that is Paragraph 10.4(e) of the Addendum. [Ex. 3, ¶¶ 1.5 and 10.4(e); B. Maldonado, 12/16, 55:4-10.]

120. The non-competition provision in Paragraph 1.5 of the Addendum has no limitation by geography, while the non-competition provision in Paragraph 10.4(e) of the Addendum is limited to Maricopa County. [Ex. 3, ¶¶ 1.5 and 10.4(e); B. Maldonado, 12/16, 55:18-56:11.]

121. By seeking to preclude a Member from being "connected in any manner with" anyone employed by any of the Maldonado Companies as of March 18, 2014, the non-competition provision in Paragraph 10.4(e) precludes business activities that do not compete with Odyssey, ANMM or Maldonado Medical. [Ex. 3, ¶10.4(e); B. Maldonado, 12/16, 58:6-59:10.]

122. The Addendum expressly permits Brandon Maldonado to compete with Odyssey, Maldonado Medical or ANMM:

> No Member, except Brandon J. Maxon Maldonado, shall have ownership in any company or organization that competes in any way with any product or service that the company, Maldonado Medical LLC or ANMM may provide now or in the future without written permission of the Manager.

[Ex. 3, ¶ 10.4(e); B. Maldonado, 12/16, 61:12-62:10.]

123. Brandon Maldonado formed Bio Opes, LLC, in February 2014, before Mr. Duffy's departure. [B. Maldonado, 12/16, 7:24-11:14.]

124. The Addendum contains a customer non-solicitation provision, which states:

> For the Time Period: Time Period shall mean the period beginning as of the effective date of this Agreement and ending 24 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 24-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 18 months after a Termination Event; provided, however, that if a court of competent jurisdiction determines that such 18-month period is unenforceable, Time Period shall mean the period beginning as of the effective date of this Agreement and ending 12 months after a Termination Event. Starting one year from purchase of a terminated members interest Members shall not shall not solicit or assist the solicitation of any Customers or potential Customers of Company, Maldonado Medical LLC or ANMM for the purpose of providing services similar to the Company's Business or discouraging the obtaining of services from the Company, Maldonado Medical LLC or ANMM, nor will Members or Terminated Members accept any business from any potential Customers, existing customers of Company Maldonado Medical LLC or ANMM relating to the Business, except when such solicitation or acceptance is done on behalf of the Company and in the sole and exclusive interest of the Company in the Area.

[Ex. 3, ¶ 10.5; B. Maldonado, 12/16, 62:11-15.]

125. The Addendum defines "Customers" as follows:

> "Customers" shall mean any persons, firms, associations, partnerships, corporations, limited liability companies or other entities (i) to which either the Company or Member has provided services relating to the Business, or (ii) that either the Company or Member has solicited with respect to the provision of services relating to the Business, before or during the time term that the Member was a Member of the Company. Customers or potential customers shall also include all potential, existing clients that Duffy contacts on behalf of American National Medical Management (attachment A). These relationships may be established or have been established and maintained through the efforts and resources of the Company and ANMM, and the Company believes these relationships to be proprietary and valuable. The Members therefore each desire to protect the Company's valuable relationship with its Customers (as defined below) in the manner set forth in this section.

[Ex. 3, ¶ 10.2(c).]

126. The term "Area" is defined in the Addendum as Maricopa County, Arizona. [Ex. 3, ¶ 10.2(e).]

127. The first clause of the Addendum's customer non-solicitation provision applies only to Members and not to Terminated Members. [Ex. 3, ¶ 10.5; B. Maldonado, 12/16, 62:20-63:9.]

128. The restrictions in the Addendum's customer non-solicitation provision do not begin until one year after the purchase of a terminated member's interest in Odyssey, an event that has not occurred. [Ex. 3, ¶ 10.5; B. Maldonado, 12/16, 63:2-64:6.]

129. In addition to seeking to prohibit the solicitation of current Odyssey, ANMM and Maldonado Medical customers, the Addendum's customer non-solicitation provision also seeks to prohibit the solicitation of potential Odyssey, ANMM and Maldonado Medical customers, and the acceptance of business from former Odyssey, ANMM and Maldonado Medical customers even where no solicitation occurred. [Ex. 3, ¶ 10.5; *See also* B. Maldonado, 12/16, 39:21-40:8, 40:17-42:6.]

130. The Addendum contains an employee non-solicitation provision that would preclude Mr. Duffy from hiring a former employee of any of the Maldonado Companies, even if the employee had previously severed his or her relationship with the Maldonado Companies. [Ex. 3, ¶ 10.6; B. Maldonado, 12/16, 64:7-65:12.]

131. Each of the documents at issue provides for an award of attorneys' fees to the prevailing party in a dispute regarding any provision of the contract. [Ex. 1, ¶ 13.14; Ex. 2, ¶ 12.14; Ex. 4, ¶ 13; Ex. 5, ¶ 13; Ex. 23, ¶ 8; Ex. 25, ¶ 16.]

CONCLUSIONS OF LAW

1. This Court's task is to determine whether the Maldonado Companies met their burden to prove that the restrictive covenants they seek to enforce against Mr. Perez and Mr. Duffy meet each of the four requirements for enforceability: 1) no broader than necessary for the protection of a legitimate interest; 2) reasonable as to time and geography; 3) not unreasonably restrictive on the employee's rights; and 4) consistent with public policy. *See, e.g., Amex Distrib. Co. v. Mascari*, 150 Ariz. 510, 515, 724 P.2d 596, 601 (App. 1986); *Lessner Dental Labs., Inc. v. Kidney*, 16 Ariz. App. 159, 160–61, 492 P.2d 39, 40–41 (1971).

2. In making that determination, the Court considers the totality of the circumstances. *See Valley Med. Specialists v. Farber*, 194 Ariz. 363, 367, ¶ 11, 982 P.2d 1277, 1281 (1999) ("[R]easonableness is a fact-intensive inquiry that depends on weighing the totality of the circumstances."). The Court is also guided by the following legal principles:

a. Covenants not to compete are both "disfavored" and "strictly construed against the employer." *Amex*, 150 Ariz. at 514, 724 P.2d at 600; *Hilb, Rogal & Hamilton*

Co. of Arizona, Inc. v. McKinney, 190 Ariz. 213, 216, 946 P.2d 464, 467 (App. 1997).

b. The Maldonado Companies bear the burden to prove both the extent of their protectable interest in the restrictive covenants and that the restrictive covenants they seek to enforce are no broader than necessary to protect such interests. *See Amex*, 150 Ariz. at 519, 724 P.2d at 605; *Bryceland v. Northey*, 160 Ariz. 213, 216, 772 P.2d 36, 39 (App. 1989).

c. "An employer may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se*." *Bryceland*, 160 Ariz. at 216, 772 P.2d at 39. "In other words, a covenant not to compete is invalid unless it protects some legitimate interest beyond the employer's desire to protect itself from competition." *Farber*, 194 Ariz. at 367, ¶ 12, 982 P.2d at 1281.

d. To be considered reasonable, restrictions on competition can extend no longer than "the time necessary for the employer to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers." *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 374, ¶ 19, 45 P.3d 1219, 1223 (App. 2002).

e. The geographic scope of restriction on competition must be reasonably tied to the services (both type of services and locations serviced) previously provided by the employee. *See, e.g., Nouveau Riche Corp. v. Tree*, No. CV08-1627-PHX-JAT, 2008 WL 5381513, at *7 (D. Ariz. Dec. 23, 2008) (holding that covenant restricting employee from working in four states was unreasonable where defendant either had no sales contacts in or was not assigned the sales and marketing territory of the states identified). *See also Unisource Worldwide, Inc. v. Swope*, 964 F. Supp. 2d 1050, 1066 (D. Ariz. 2013) (finding non-compete provision unreasonable where it covers entire counties, noting that "Maricopa County alone, where Defendants reside and where they worked for Plaintiff, is 9,224 square miles. … Requiring Defendants to work in another county effectively, and unreasonably, necessitates relocation.") (internal citations omitted).

f. A restrictive covenant cannot be used to preclude a former employee from using the skills developed while working for the employer in a new position. *See, e.g., Bryceland*, 160 Ariz. at 217, 772 P.2d at 40; *Unisource Worldwide*, 964 F. Supp. 2d at 1065 (stating that "[n]either thwarting competition nor hamstringing a former employee's ability to work is a legitimate interest" and holding that non-compete provision that "cripple[d] Defendants' ability to obtain employment

> elsewhere" was unenforceable); *Lessner Dental Labs., Inc. v. Kidney*, 16 Ariz. App. at 162, 492 P.2d at 42 ("An employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment, for it becomes part of the employee's personal equipment….").

3. Based on the totality of circumstances, established by the evidence submitted during the evidentiary hearing on December 9 and 16, 2016, the Court finds as follows with respect to the restrictive covenants the Maldonado Companies seek to enforce:

Whether the Covenants are No Broader than Necessary to Protect a Legitimate Interest

4. The Maldonado Companies' witnesses Greg Maldonado and Brandon Maldonado testified that they sought to impose restrictive covenants against Mr. Perez and Mr. Duffy to protect ANMM's allegedly trade secret "process" for billing out of network healthcare claims.[3] [FOF, ¶ 8. *See also* G. Maldonado, 12/9, 46:9-59:22, 78:19-79:15, 85:21-86:19; B. Maldonado, 12/9, 193:15-194:2.] However, assuming *arguendo* that ANMM's billing process constitutes a trade secret, the restrictive covenants are far broader than actually necessary to protect such an interest.[4]

5. First, each of the non-competition and non-solicitation of customers provisions that the Maldonado Companies seek to enforce is based on definitions of "Business" that are far broader than the actual business in which the Maldonado Companies were engaged. [*See* FOF, ¶¶ 6, 27-28, 43-44, 64-65, 86-87, 110, 112.]

6. Second, the definitions of "Confidential Information" or "Confidential Information and Material" in each document are not limited to information that is actually confidential or proprietary. [*See* FOF, ¶¶ 8, 39-40, 55-56, 58, 61, 76-77, 79-82, 105, 113.] Although some of the documents purport to exclude public information, those that do place the burden on the employee to demonstrate that the information is public, and state that if the employee is unsure whether information is confidential, he must obtain written confirmation from the employer. [*See* FOF, ¶¶ 39, 55, 105, 113.] As a practical matter, these provisions would compel the employee to treat <u>all</u> information as confidential to avoid violating the non-disclosure provision. Two documents, the ANMM Non-Disclosure Agreement and the MM

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[3] The Maldonado Companies did not present evidence that Maldonado Medical or Odyssey possess trade secrets to protect, independent of ANMM's billing process.

[4] As noted above, the issue of whether a trade secret exists is not currently before the Court.

Independent Contractor Agreement, contain no exclusion for public information, and have the same unnecessarily burdensome result. [*See* FOF, ¶¶ 58, 61, 79.]

7. Third, neither ANMM nor Odyssey was profitable as of March 25, 2014, when Mr. Perez and Mr. Duffy ended their employment with the Maldonado Companies. Indeed, Odyssey ceased operations completely only seven months after Mr. Duffy's departure, and ANMM has now transferred its billing operations to a different entity that is not a party to this action. [*See* FOF, ¶¶ 10, 14, 16, 20, 21.]

8. Fourth, the documents include restrictions on the solicitation of the Maldonado Companies' customers. While the protection of existing customers is a legitimate interest, the restrictions here also prohibit the solicitation of non-customers and former customers. [*See* FOF, ¶¶ 32-33, 36-37, 47-48, 51-52, 68-69, 72-73, 97-98, 102, 124, 125, 129.] These restrictions are broader than necessary, because the Maldonado Companies do not have a legitimate interest in precluding Mr. Perez and Mr. Duffy from contacting individuals or entities with which the Maldonado Companies were not doing business as of March 24, 2014. *See Orca Comm'ns Unlimited, LLC v. Noder*, 233 Ariz. 411, 418, ¶ 22, 314 P.3d 89, 96 (App. 2013), depublished in part on other grounds, 337 P.3d 545, 550 (Ariz. 2014) (depublishing ¶¶ 28–31) (holding that employers "have no protectable interest in either potential customers or former customers").

9. Fifth, the non-solicitation of customers provisions prohibit the mere acceptance of business from a Maldonado customer. [FOF, ¶¶ 37, 52, 73, 102, 129.] Mr. Perez and Mr. Duffy cannot be legitimately restricted from doing business with an individual or entity who affirmatively seeks them out. *See Olliver/Pilcher Ins. v. Daniels*, 148 Ariz. 530, 531-32, 715 P.2d 1218, 1219-20 (1986) (holding that restriction that imposed penalty for every customer that transferred to former employee's new company regardless of whether employee solicited that customer was unenforceable).

10. Sixth, the non-solicitation of employees provisions preclude the solicitation of individuals who were employed by the Maldonado Companies at any time during the period that the restrictions are in force. [FOF, ¶¶ 38, 53-54, 74-75, 103.] While maintaining the stability of an existing workforce is a legitimate interest, such provisions would prohibit the hiring of individuals who previously and independently ended their relationships with the Maldonado Companies. As the Maldonado Companies have no legitimate interest in prohibiting the solicitation of their former employees, the employee non-solicitation provisions are unreasonable.

11. Seventh, the non-solicitation of employees provisions in the unsigned ANMM Confidentiality Agreement and the unsigned Maldonado Medical Confidentiality Agreement go beyond mere solicitation and preclude the hiring or employment of individuals who were employed by the Maldonado Companies at any time during the period that the restrictions are in

force. [FOF, ¶¶ 53, 74]. By extending the restriction beyond mere solicitation to hiring and employment in general, these provisions unnecessarily and inappropriately hamper or restrain employees, who are not even a party to these agreements, from seeking other employment. *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 279-80, 219 Cal. Rptr. 836, 844 (1985) ("Equity will not enjoin a former employee from receiving and considering applications from employees of his former employer, even though the circumstances be such that he should be enjoined from soliciting their applications."). Because the Maldonado Companies have no legitimate interest in or basis to hamper or restrain their employees from seeking other employment, especially where they are not even a party to the agreements, the employee non-solicitation provisions are unreasonable.

Whether the Covenants are Reasonable as to Time and Geography

12. The time period for the non-competition and non-solicitation provisions in the ANMM Operating Agreement is three years, while the time period for similar provisions in the ANMM Confidentiality Agreement is two years. [FOF, ¶¶ 29, 44.] ANMM seeks to enforce these provisions for only one year, and did not offer evidence that would support longer durations. [FOF, ¶ 24.] Accordingly, the 2-year and 3-year non-competition and non-solicitation provisions are unreasonable as to time.

13. The geographic scope applicable to the non-competition and non-solicitation of customers[5] provisions in the ANMM Operating Agreement is the State of Arizona and California, while the geographic scope for similar provisions in the ANMM Confidentiality Agreement is the State of Arizona. [FOF, ¶¶ 30, 46.] ANMM had only 12-15 customers as of March 24, 2014, and enforcing the restrictions as written would unnecessarily preclude competition for thousands of potential customers. [FOF, ¶¶ 7, 14.] Accordingly, the geographic scope is overbroad and unreasonable.

14. Due to their breadth, the confidentiality/non-disclosure provisions in the ANMM Operating Agreement, the ANMM Confidentiality Agreement, and the ANMM Non-Disclosure Agreement would preclude Mr. Perez and Mr. Duffy from effectively using any knowledge they gained while working for ANMM. [*See* FOF, ¶¶ 39, 55, 58.] Accordingly, these provisions are construed as covenants not to compete that must be reasonable as to time and geography. *See Orca*, 233 Ariz. at 417, ¶ 18, 314 P.3d at 95. However, there are no geographic limitations in these provisions. [FOF, ¶¶ 41, 57, 59, 60.] In addition, the restrictions in the ANMM Operating Agreement and the ANMM Confidentiality Agreement are perpetual, while the ANMM Non-

[5] Due to the nature and purpose of the non-solicitation of employees provisions, the Court finds that the geographic scope is irrelevant for purposes of determining the reasonableness and enforceability of these provisions.

Disclosure Agreement has a time period of 10 years. [FOF, ¶¶ 41, 57, 59, 60.] The provisions are not reasonably limited in time or geography.

15. The time period for the non-competition and non-solicitation provisions in the Maldonado Medical Confidentiality Agreement is two years. [FOF, ¶ 66.] Maldonado Medical seeks to enforce these provisions for only one year, and offered no evidence that would support longer durations. [FOF, ¶ 24.] Accordingly, the 2-year non-competition and non-solicitation provisions are unreasonable as to time.

16. The geographic scope applicable to the non-competition and non-solicitation of customers[6] provisions in the Maldonado Medical Confidentiality Agreement is the State of Arizona. [FOF, ¶ 67.] Maldonado Medical offered no evidence regarding the location of Maldonado Medical's customers or Maldonado Medical's need for a state-wide prohibition on competition or customer solicitation. Moreover, Maldonado Medical had only 20-30 customers in Arizona as of June 2013. [FOF, ¶ 4.] Accordingly, the geographic scope is overbroad and unreasonable.

17. Due to their breadth, the confidentiality/non-disclosure provisions in the Maldonado Medical Confidentiality Agreement and the Maldonado Medical Independent Contractor Agreement would effectively preclude Mr. Perez and Mr. Duffy from using any knowledge they gained while working for Maldonado Medical. [FOF, ¶¶ 76-77, 79-81.] Accordingly, these provisions are construed as covenants not to compete that must be reasonable as to time and geography. *See Orca*, 233 Ariz. at 417, ¶ 18, 314 P.3d at 95. However, there are no geographic limitations in these provisions. [FOF, ¶¶ 78, 83-84.] In addition, the restrictions in the Maldonado Medical Confidentiality Agreement are perpetual, while the Maldonado Medical Independent Contractor Agreement has a time period of 10 years in one paragraph, and a perpetual restriction in another. [FOF, ¶¶ 78, 83-84.] The provisions are not reasonably limited in time or geography.

18. The non-competition and non-solicitation of customers provisions in the Odyssey Operating Agreement apply only to Members of Odyssey. [*See* FOF, ¶¶ 91, 100.] As Mr. Duffy is no longer a Member, these provisions do not apply to him. [FOF, ¶ 90.] Moreover, even if they did apply to him, these provisions do not begin to run until one year after the purchase of a terminated member's interest. [FOF, ¶¶ 92, 101.] As Mr. Duffy's interest in Odyssey was never purchased, this provision never took effect. [FOF, ¶ 93.]

19. The Addendum has a non-competition provision with a 3-year duration, a second non-competition provision with a 2-year duration, and a non-solicitation of customers provision

[6] As for the non-solicitation of employees provisions, *see* footnote 5, *supra.*

with a 2-year duration. [FOF, ¶¶ 114, 118, 124.] Odyssey seeks to enforce these provisions for only one year, and offered no evidence that would support longer durations. [FOF, ¶ 24.] Accordingly, the 2-year and 3-year non-competition and non-solicitation of customers provisions are unreasonable as to time.

20. The geographic scope applicable to the non-competition and non-solicitation of customers provisions in the Odyssey Operating Agreement is the United States of Arizona. [FOF, ¶ 95.] The Addendum has a non-competition provision with no geographic scope listed, and a second non-competition provision and a customer non-solicitation provision with geographic scopes of Maricopa County. [FOF, ¶¶ 114-15, 118, 120, 124, 126.] As of March 24, 2014 Odyssey had customers only in New York, Georgia, and Texas. [FOF, ¶ 96.] Accordingly, the non-competition and non-solicitation of customers provisions in both the Odyssey Operating Agreement and the Addendum are unreasonable as to geographic scope.

21. In addition, the two non-competition provisions in the Addendum have differing durations (3 years/2 years) and geographic scopes (unlimited/Maricopa County). [FOF, ¶¶ 114-115, 118-120.] The Maldonado Companies presented no evidence that would permit the Court to harmonize these provisions or select one over the other. Accordingly, neither can be enforced.

22. Due to its breadth, the confidentiality/non-disclosure provisions in the Odyssey Operating Agreement and the Addendum would effectively preclude Mr. Duffy from using any knowledge he gained while working for Odyssey. [FOF, ¶¶ 105, 113.] Accordingly, these provisions are construed as covenants not to compete that must be reasonable as to time and geography. *See Orca*, 233 Ariz. at 417, ¶ 18, 314 P.3d at 95. Odyssey's non-disclosure provision is perpetual and extends worldwide. [FOF, ¶ 106.] Accordingly, it is unreasonable in both time and geography.

Whether the Covenants Unreasonably Restrict Mr. Perez and Mr. Duffy's Activities

23. As discussed above, the restrictive covenants as written would i) preclude Mr. Perez and Mr. Duffy from working in industries that are unrelated to the Maldonado Companies' actual business activities; ii) preclude Mr. Perez and Mr. Duffy from contacting individuals and entities that never had a business relationship with the Maldonado Companies; iii) preclude Mr. Perez and Mr. Duffy from accepting business from a former customer of the Maldonado Companies even where Mr. Perez and Mr. Duffy did not solicit that customer; and iv) prohibit Mr. Perez and Mr. Duffy from hiring even former employees of the Maldonado Companies. Moreover, the restrictions as written would impose these restrictions for up to three years, and in some cases would preclude competition anywhere in the United States. If enforced, Mr. Perez and Mr. Duffy would essentially be compelled to find a new industry in which to work, because they could not continue to perform medical billing services, or sell medical products or services,

without running afoul of one or more of the restrictive covenants. Accordingly, the restrictive covenants as written are unduly restrictive on Mr. Perez and Mr. Duffy.

24. The testimony from Greg Maldonado and Brandon Maldonado that they did not intend the restrictions to be so restrictive on Mr. Perez and Mr. Duffy does not change this result. In interpreting a contract, a court may consider extrinsic evidence of intent only where it does not contradict the language of the agreement, and the language is reasonably susceptible to the interpretation proposed. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993) (holding that if the court finds that the contract language is "reasonably susceptible" to the interpretation asserted, extrinsic evidence is admissible to determine the meaning intended by the parties); *Chopin v. Chopin*, 224 Ariz. 425, 427–28, ¶ 7, 232 P.3d 99, 101–02 (App. 2010) ("Extrinsic evidence is inadmissible if it 'would actually vary or contradict the meaning of the written words.'") (*quoting Long v. City of Glendale*, 208 Ariz. 319, 328, ¶ 29, 93 P.3d 519, 528 (App. 2004)).

25. The testimony from the Maldonados regarding their intent directly contradicts the language of the agreements. For example, the ANMM Operating Agreement defines ANMM's Business as including "any process related to the medical industry." [FOF, ¶ 27.] However, Greg Maldonado testified that there were "numerous areas" in the medical industry in which Mr. Perez could work, including medical billing. [G. Maldonado, 12/9, 81:15-82:4.] Mr. Maldonado's testimony, as well as other evidence offered by the Maldonado Companies regarding the intended (but unexpressed) scope of the restrictive covenants, is inadmissible.

Whether the Restrictive Covenants are Consistent with Public Policy

26. Arizona's public policy favors permitting employees to freely change their employment. As the *Lessner* court explained:

> [W]hile an employer, under a proper restrictive agreement, can prevent a former employee from using his trade or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers, he has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood and He cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment. Public policy prohibits such undue restrictions upon an employee's liberty of action in his trade or calling.

Lessner Dental Labs., 16 Ariz. App. at 162, 492 P.2d at 42 (*quoting Roy v. Bolduc*, 34 A.2d 479, 149 A.L.R. 630 (Me. 1943)) (emphasis added).

27. Public policy also condemns restrictive covenants that would negatively impact patients' access to health care or limit their choice of physicians. *See, e.g., Farber*, 194 Ariz. at 368, 982 P.2d at 1282 ("By restricting a physician's practice of medicine, this covenant involves strong public policy implications and must be closely scrutinized."). *See also Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683–84 (Tenn. 2005) ("Public policy considerations such as the right to freedom of choice in physicians, the right to continue an on-going relationship with a physician, and the benefits derived from having an increased number of physicians practicing in any given community all outweigh the business interests of an employer."); *Mercy Health Sys. of Nw. Arkansas, Inc. v. Bicak*, 383 S.W.3d 869, 874 (Ark. App. 2011) ("[I]t is contrary to public policy to unduly restrict the public's right of access to the physicians of their choice."). Greg Maldonado confirmed in his testimony that out-of-network medical billing services benefit both providers and patients by giving providers higher reimbursement, which improves the quality of care patients receive. [G. Maldonado, 12/9, 62:16-64:11.] Competition in such an industry should be encouraged rather than restricted. Accordingly, the restrictive covenants, with the single exception of the non-solicitation of employees provisions discussed below, are contrary to public policy.

28. The non-solicitation of employees provisions do not implicate the same public policy considerations as the other restrictive covenants at issue. The non-solicitation of employees provision has as its purpose the maintenance of a stable work force and enabling the former employer to remain in business. *Loral Corp.*, 174 Cal. App. 3d at 280, 219 Cal. Rptr. at 844; *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 76, 589 N.E.2d 640, 650 (1992) (covenant restricting solicitation of employees was "calculated to protect [the employer's] interest in maintaining a stable work force, … ."); Elizabeth E. Nicholas, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 Ky. L.J. 505, 508 (2007) ("Restrictions on a former employee from recruiting his co-workers after he leaves his employment … , … primarily protects the employer's interests in maintaining a stable workforce."). Such a provision does not prevent former employees from competing but merely requires them to solicit potential employees for their competing business from some source other than the former employer. *See id.* (citing 2 Louis Altman, Callmann on Unfair Competition, Trademarks & Monopolies § 16:44 (4th ed. 2006)) ("Because non-solicitation agreements do not prevent the former employee from competing altogether, but merely require him or her to hire employees in some other manner or from some other source, courts consider non-solicitation agreements less anticompetitive than non-compete covenants."). Thus, it has been observed that while this restriction has the apparent impact of limiting a former employee's business practices in a small way in order to promote the former employer's business, "[t]his non-interference agreement has no overall negative impact on trade or business." *Loral Corp.*, 174 Cal. App. 3d at 280, 219 Cal. Rptr. at 844. Therefore, while the other restrictive covenants are contrary to the aforementioned public policy, the non-solicitation of employees provisions are not.

Whether the Court Can "Blue Pencil" the Covenants to Make Them Reasonable and Enforceable

29. The Maldonado Companies assert that the Court can use the "blue pencil" rule recognized in Arizona to restrict the scope of the covenants and make them reasonable and therefore enforceable. Arizona courts can "blue-pencil" grammatically severable portions of a restrictive covenant if doing so would make it enforceable. *See Olliver/Pilcher*, 148 Ariz. at 533, 715 P.2d at 1221. The Court, however, may not rewrite the agreement. *See Farber*, 194 Ariz. at 372, ¶ 30, 982 P.2d at 1286. This limitation applies even where the parties to the contract have specifically authorized judicial reformation of the contract. *See Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 358, ¶ 15, 45 P.3d 352, 355 (App. 2002). *Varsity Gold* noted that "[b]y simply authorizing a court to rewrite unreasonable restrictions, an employer may relieve itself of crafting a reasonable restriction with the added benefit that departing employees may adhere to an onerous covenant," which was "precisely the result that the *Farber* court sought to avoid." *Id.* at 356, ¶ 17, 45 P3d at 356.

30. Through their representatives Greg and Brandon Maldonado, the Maldonado Companies acknowledged that the restrictive covenants are overbroad at least as to the scope of the prohibited activity, the duration of the non-compete and non-solicitation provisions, and the scope of the definitions of "Confidential Information" in the various documents. They therefore ask the Court to "blue pencil" the documents to narrow these provisions. However, with the exception of the non-solicitation of employees provisions, which will be discussed at more length below, these restrictions cannot be made reasonable by merely striking portions of the documents, and would instead require an impermissible rewriting of the covenants. *See Farber*, 194 Ariz. at 372, ¶ 30, 982 P.2d at 1286.

31. The Maldonado Companies suggest that to make the non-competition provisions enforceable as to the scope of the restriction, the Court should strike the words "the Business of" from the provisions. However, the words "the Business of" are not grammatically severable from any of the non-competition provisions. To use the blue pencil rule to strike these words from the provisions would therefore operate to impermissibly alter the meaning of the provision and rewrite the contract.

32. The Maldonado Companies likewise suggest that to make the confidentiality/non-disclosure provisions enforceable as to the scope of the restriction, the Court should strike from the definition the entire sentence addressing the required protocol for situations in which an employee or Member is "unsure as to whether certain information or material is Confidential Information and Material … ." While a sentence would be grammatically severable, merely eliminating this sentence does not resolve the unreasonableness of the provision because the preceding sentence still inappropriately places the burden on the employee to show that information or material is public and not Confidential Information and Material. Further, in the

absence of the sentence the Maldonado Companies argue can be blue penciled out, the employee is left without a protocol by which the employee can meet his or her burden to show that information or material is not Confidential Information and Material, thereby rendering the purported public information exception vague in its application. In sum, severance of this sentence from the definition would ultimately have the same unreasonable effect on the employee, i.e., the employee would be compelled to treat all information as confidential to avoid violating the non-disclosure provision.

33. The Maldonado Companies further suggest that to make the non-solicitation of customers provisions enforceable as to the scope of the restriction, the Court should strike from the definition of "Customers" subpart (ii) pertaining to anyone from which the Maldonado Companies had merely solicited business. The Maldonado Companies suggest the Court should strike from the non-solicitation of customers provisions themselves the language pertaining to passive "acceptance" of business from the Maldonado Companies' customers. Subpart (ii) of the definition of "Customers" would be grammatically severable, as would the language regarding passive acceptance in the provision itself as this language follows "nor" and "or" conjunctions. Nevertheless, the provision remains unnecessarily broad because it prohibits any solicitation of Customers "for the purpose of providing services similar to the Company's Business". As discussed previously, the definitions of "Business" are far broader than the actual business in which the Maldonado Companies were engaged thereby rendering the provisions unreasonable. Further, although not proposed by the Maldonado Companies, "Business" is not grammatically severable from any of the non-solicitation of customers provisions and to use the blue pencil rule to strike "Business" from the provisions would operate to impermissibly alter the meaning of the provision and rewrite the contract.

34. The Maldonado Companies suggest that to make the non-solicitation of employees provisions enforceable as to the scope of the restriction, the Court should strike the language "or were" from each such that it no longer has any application to former employees. Because it follows the conjunction "or", this is a grammatically severable phrase and would eliminate the single aspect of these provisions which render them unreasonable in scope.

35. The area provisions have stepdowns which make them particularly appropriate for application of the blue pencil rule. *Compass Bank v. Hartley*, 430 F. Supp. 2d 973 (D. Ariz. 2006).

a. The geographic scope applicable to the non-competition and non-solicitation of customers provisions in the ANMM Operating Agreement is the State of Arizona and California. [FOF, ¶ 30.] The Maldonado Companies suggest that the blue pencil rule could be used to restrict the geographic are to Arizona. As stated previously, however, ANMM had only 12-15 customers as of March 24, 2014, and enforcing the restrictions as written would unnecessarily preclude competition for thousands of

potential customers in the State of Arizona. Accordingly, the geographic scope is overbroad and unreasonable even if the blue pencil rule is employed and the geographic scope is limited to Arizona.

b. The geographic scope applicable to the non-competition and non-solicitation of customers provisions in the ANMM Confidentiality Agreement is the State of Arizona. [FOF, ¶ 46.] The stepdowns would allow for the blue pencil rule to reduce the geographic scope to Maricopa County. As stated previously, however, ANMM had only 12-15 customers as of March 24, 2014, and enforcing the restrictions as written would unnecessarily preclude competition for thousands of potential customers in Maricopa County. Accordingly, the geographic scope is overbroad and unreasonable even if the blue pencil rule is employed and the geographic scope is limited to Maricopa County.

c. The geographic scope applicable to the non-competition and non-solicitation of customers provisions in the Maldonado Medical Confidentiality Agreement is the State of Arizona. [FOF, ¶ 67.] The stepdowns would allow for the blue pencil rule to reduce the geographic scope to Maricopa County. Maldonado Medical offered no evidence, however, regarding the location of Maldonado Medical's customers or Maldonado Medical's need for a state-wide prohibition on competition or customer solicitation. Moreover, Maldonado Medical had only 20-30 customers in Arizona as of June 2013. [FOF, ¶ 4.] Accordingly, the geographic scope is overbroad and unreasonable.

d. The geographic scope applicable to the non-competition and non-solicitation of customers provisions in the Odyssey Operating Agreement is the United States of Arizona. [FOF, ¶ 95.] The Addendum has a non-competition provision with no geographic scope listed, and a second non-competition provision and a customer non-solicitation provision with geographic scopes of Maricopa County. [FOF, ¶¶ 114-15, 118, 120, 124, 126.] As of March 24, 2014 Odyssey had customers only in New York, Georgia, and Texas. [FOF, ¶ 96.] Accordingly, the non-competition and non-solicitation of customers provisions in both the Odyssey Operating Agreement and the Addendum are unreasonable as to geographic scope.

e. As the Court has noted previously, due to the nature and purpose of the non-solicitation of employees provisions, the Court finds that the geographic scope is irrelevant for purposes of determining the reasonableness and enforceability of these provisions. *See Loral Corp.*, 174 Cal. App. 3d at 280, 219 Cal. Rptr. at 844 (observing that the non-solicitation of employees provision has as its purpose the maintenance of a stable work force and enabling the former employer to remain in business); Elizabeth E. Nicholas, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 Ky. L.J.

505, 508 (2007) ("Restrictions on a former employee from recruiting his co-workers after he leaves his employment … , … primarily protects the employer's interests in maintaining a stable workforce."). Thus, whether or not the blue pencil rule can be appropriately applied to the area provisions in the various agreements has no impact on the non-solicitation of employees provisions.

36. The time period provisions likewise have stepdowns which make them particularly appropriate for application of the blue pencil rule. *Compass Bank*, 430 F. Supp. 2d 973.

a. The time period applicable to the restrictive covenants in both the ANMM Operating Agreement and the Odyssey Operating Agreement is thirty-six (36) months. The stepdowns would allow for the blue pencil rule to reduce the time period to as low as twelve (12) months, which is the time period that the Maldonado Companies ask this Court to enforce. As applied to the non-competition and non-solicitation of customers provisions, as stated previously, these restrictions can extend no longer than "the time necessary for the employer to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers." *Bed Mart, Inc.*, 202 Ariz. at 374, ¶ 19, 45 P.3d at 1223. In the present case, the Maldonado Companies are not entitled to restrictions that last a year because the Court finds that, based upon the evidence presented at the evidentiary hearing, the new employees can be trained in far less time.[7]

b. The time period applicable to the restrictive covenants in both the ANMM Confidentiality Agreement and the Maldonado Medical Confidentiality Agreement is twenty-four (24) months. The stepdowns would allow for the blue pencil rule to reduce the time period to as low as three (3) months, with twelve (12) months being the time period that the Maldonado Companies ask this Court to enforce. As applied to the non-competition and non-solicitation of customers provisions, the Court reiterates its conclusion that the Maldonado Companies are not entitled to restrictions that last a year because the Court finds that, based upon the evidence presented at the evidentiary hearing, the new employees can be trained in far less time. Nevertheless, this same evidence shows that three (3) months is a reasonable time period. The blue pencil rule

[7] The Maldonado Companies stated in the Joint Pretrial Statement that a new employee could be trained in billing in 30-90 days, and in sales in less than a year. [JPTS, ¶ C(1)(33).] During the hearing, ANMM's Debra Sofia testified that it takes three months for a new ANMM employee to understand the process. [Sofia, 12/9, 179:21-24.] ANMM's Jeff Webb testified that most of ANMM's sales training can be accomplished within a "couple of months." [Webb, 12/16, 72:11-20.]

therefore can be applied to render the time period reasonable for the non-competition and non-solicitation of customers provisions in these two agreements.[8]

c. While the time period restriction is relevant to the non-solicitation of employees provisions in all of the agreements at issue, the analysis of what is reasonable is nevertheless different in relation to these provisions versus the other restrictive covenants. This is due to the nature and purpose of the non-solicitation of employees provisions, discussed previously. Thus, while a twelve (12) month time period restriction is too long in relation to the other restrictive covenants, the Court finds that twelve (12) months is a reasonable time restriction on non-solicitation of employees in light of the Maldonado Companies' interest in maintaining a stable work force and enabling them to remain in business. *See Omni Consulting Grp., Inc. v. Pilgrim's Pride Corp.*, 488 F. App'x 478, 480 (2d Cir. 2012) (upholding as reasonable a one-year restriction on an anti-raiding restriction in a technical services agreement between consulting company and client); Mo. Ann. Stat. § 431.202 (West 2017) (by statute stating that a one-year non-solicitation of employees provision is reasonable and enforceable); *see also* PROTECTION OF INTANGIBLE BUSINESS ASSETS: TRADE SECRETS IN THE AGE OF FEDERAL COMPUTER LEGISLATION, SP003 ALI-ABA 947, 955 (2008) (discussing *Modis, Inc. v. The Revolution Group, Ltd*, 1999 WL 1441918 1, *6-8 (Mass. Super. 1999), in which the court restricted the former employees from soliciting Modis' customers for 180 days but restricted the former employees from soliciting Modis' employees for 2 years). The blue pencil rule therefore can be applied to render the time period reasonable for the non-solicitation of employees provisions in all of the subject agreements.

37. As noted above, with the exception of the non-solicitation of employees provisions, this Court cannot make the restrictive covenants consistent with the Maldonado Companies' actual interests without rewriting them, which is not permissible under Arizona law. *See Farber*, 194 Ariz. at 372, ¶ 30, 982 P.2d at 1286. *See also ReBath, LLC v. All-Brite Sols., LLC*, No. 2:13-CV-02500-JWS, 2014 WL 12567177, at *4 (D. Ariz. Feb. 19, 2014) ("[A] court cannot go further than severing grammatically severable provisions; it cannot rewrite the agreement in an attempt to make it enforceable."). Moreover, making the changes required would encourage employers to impose overly broad restrictions on employers, confident that a Court would narrow them. The *Farber* court expressly condemned this tactic:

[8] The finding on reasonableness for the time period as applied to the non-competition and non-solicitation of customers provisions in these two agreements does not, however, affect the ultimate conclusion that the provisions are unreasonable and unenforceable based upon the other factors discussed previously.

> For every agreement that makes its way to court, many more do not. Thus, the words of the covenant have an *in terrorem* effect on departing employees. Employers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable. Although we will tolerate ignoring severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite provisions.

Farber, 194 Ariz. at 372, ¶ 31, 982 P.2d at 1286.

RULING

For all of the reasons discussed above, with the exception of the non-solicitation of employees provisions, the restrictive covenants in the seven documents addressed herein are unenforceable.

IT IS THEREFORE ORDERED that the non-solicitation of employees provisions in the seven documents addressed herein are held to be reasonable and enforceable, after applying the blue pencil rule to remove the "or were" language which would otherwise include former employees and stepping down the applicable time period to twelve (12) months.

IT IS FURTHER ORDERED that as to the remaining restrictive covenants in the seven documents addressed herein, Mr. Perez and Mr. Duffy are entitled to judgment as a matter of law on their declaratory judgment claims, and on the Maldonado Companies' counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing, to the extent that those counterclaims are based upon violations of the remaining restrictive covenants.