IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| IN RE: | ) | Chapter 11 |
| | ) | |
| LASON, INC., et al., | ) | Case No. 01-11488 (MFW) |
| | ) | |
| Debtors. | ) | (Jointly Administered) |
| | ) | |
| RAJU VENKATRAMAN, | ) | |
| | ) | |
| Plaintiff, | ) | Adversary No. 02-2962 (MFW) |
| | ) | |
| v. | ) | |
| | ) | |
| LASON SERVICES, INC. | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |
| LASON SERVICES, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Adversary No. 02-2174 (MFW) |
| v. | ) | |
| | ) | |
| RAJU VENKATRAMAN, YOGI PARIKH, GLENN AMURGIS and MEENEKSHI KARUPPIAH, | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM OPINION**[1]

This matter is before the Court on the Motion of Raju Venkatraman ("Venkatraman") for Summary Judgment in the Complaint filed by him against Lason Services, Inc. ("the Debtor") and for Partial Summary Judgment on the Complaint filed against him by the Debtor. Both Motions seek a determination that the Debtor

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

cannot enforce certain non-compete provisions in various agreements between the parties. The Debtor has opposed both Motions. For the reasons stated below, we grant the Motions.

## I. FACTUAL BACKGROUND

On December 17, 1998, pursuant to an Agreement and Plan of Merger ("the Merger Agreement"), the Debtor acquired Vetri Systems, Inc., a company in which Venkatraman was the President, Chief Executive Officer and majority shareholder. Under the Merger Agreement, Venkatraman was required to execute an Employment Agreement for a term of three years, which he did. In addition, the Merger Agreement provided that Venkatraman was entitled to certain payments in the future based on the earnings of Vetri Systems, Inc. after the merger ("the Earnout Payments").

In August 2000, the Debtor failed to pay the Earnout Payments due to Venkatraman under the Merger Agreement for the period ended January 31, 2000. On July 18, 2001, Venkatraman sued the Debtor in Michigan state court and on October 8, 2001, obtained a judgment against the Debtor for those payments in the amount of $3,040,000.

In the interim, after the Debtor's default but before judgment was entered against it, the Debtor and Venkatraman entered into a Retention Agreement (effective as of January 1, 2001) whereby the Debtor agreed to pay Venkatraman $100,000 if he

remained employed by it until December 31, 2001. (Retention Agreement at § 1(b).)

On December 5, 2001, the Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code. Venkatraman continued to be employed by the Debtor post-petition through at least the end of the term of the Employment and Retention Agreements; he left the Debtor's employ when the parties could not agree on a new employment agreement.

Subsequently, on March 13, 2002, the Debtor filed a Complaint against Venkatraman for a declaratory judgment (and injunction) declaring that he is bound by the non-compete provisions of the Employment Agreement and seeking turnover of property of the estate that it asserts he took ("the Debtor's Adversary").[2] The Complaint was subsequently amended to seek a declaratory judgment (and injunction) enforcing the non-compete provisions of the Retention Agreement.[3] However, no temporary restraining order or preliminary injunction was sought.

As a result, on April 17, 2002, Venkatraman filed a Complaint against the Debtor ("Venkatraman's Adversary") seeking a declaratory judgment interpreting the scope and force of the non-compete provisions in the agreements between the parties and

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[2] The Complaint also seeks money damages and asserts a cause under RICO.

[3] The Amended Complaint added additional defendants and seeks similar relief against them.

seeking an injunction preventing the Debtor from enforcing those provisions until the Debtor cures its breaches of those agreements. A hearing was held on May 1, 2002 on Venkatraman's Motion for a Temporary Restraining Order. At that hearing the issue presented was the scope of the non-compete provision contained in the Retention Agreement. After hearing testimony, we denied the Motion concluding that the non-compete provision precluded Venkatraman from competing in any business of the Debtor as of the date he left its employ, but restricting the geographical scope to the states in this country and the province in India where the Debtor was operating.

Venkatraman subsequently filed a Motion for Partial Summary Judgment in the Debtor's Adversary and a Motion for Summary Judgment in the Venkatraman Adversary. The Debtor opposed both Motions. A hearing on the Motions was held on June 12, 2002, at which time we reserved ruling on the issue of whether the three agreements were integrated and allowed counsel to file briefs on this issue. Briefs were filed and a further hearing was held on July 22, 2002, at which time Venkatraman raised an additional issue: that the subsequent confirmation of the Debtor's Plan of Reorganization prevented the Debtor from enforcing the non-compete provisions because the agreements between the parties had been rejected under the Plan. We permitted the parties to brief this additional issue which they did on July 29, 2002.

## II. JURISDICTION

This Court has jurisdiction over the Motions in these Adversaries, which are core proceedings pursuant to 28 U.S.C. § 1334 and § 157(b)(1), (b)(2)(A), (E), and (O).

## III. DISCUSSION

The issue before the Court is whether the three agreements are one integrated contract, such that Venkatraman's performance of the non-compete is premised on the Debtor making the payments due to him under all three agreements (including the $3 million judgment entered by the Michigan court). Further, we must determine whether the Debtor assumed or rejected the agreements under the Plan and the effect of that decision on the Debtor's ability to enforce the non-compete provisions.

### A. Integration

The Debtor argues that the three agreements are separate agreements and that it may assume the Retention Agreement and, by paying the sums due under it to Venkatraman, enforce the non-compete provisions in it. To support its position, the Debtor notes that the Retention Agreement states that "Employee agrees that the covenants, agreements, duties, rights and remedies of the parties set forth in Paragraph 4 of the Employment Agreement [the non-compete provisions] are incorporated herein by reference

except that Employee agrees that the sole consideration therefor are the retention and severance provisions of this Agreement." (Retention Agreement at § 2.) Thus, the Debtor argues that the parties agreed that the non-compete provisions would be enforceable if the Debtor paid the retention amount due under the Retention Agreement ($100,000). (Retention Agreement at § 1(b).)

Venkatraman asserts, however, that the Retention Agreement is part and parcel of his overall agreement with the Debtor and must be considered integrated into the Merger Agreement and the Employment Agreement. Therefore, he asserts that the Debtor cannot assume the Retention Agreement without assuming the Employment Agreement and Merger Agreement and curing the defaults under them (i.e., pay the $3 million judgment and other defaults that occurred since then).

To determine whether the three agreements are one integrated contract, we must review the three agreements in the context of Michigan law. (See Merger Agreement at § 11.13; Employment Agreement at § 9; Retention Agreement at § 5(a).) Michigan law provides that where one writing refers to another the writings are to be construed together to determine the parties' intention. See, e.g., Jenkins v. U.S.A. Foods, 912 F. Supp. 969, 970 (E.D. Mich. 1996); Whittlesey v. Hebrand Co., 187 N.W. 279, 280 (Mich. 1922); Culver v. Castro, 338 N.W.2d 232, 234 (Mich. Ct. App. 1983). "Where a contract has reference to another paper for its

terms, the effect is the same as if the words of the paper referred to were inserted in the contract." Whittlesey, 187 N.W. at 280. "Where there are several agreements relating to the same subject-matter the intention of the parties must be gleaned from all the agreements." Culver, 338 N.W.2d at 234.

In support of his argument that the three agreements are integrated and must be considered as one, Venkatraman notes that the Merger Agreement and the Employment Agreement are expressly dependent on each other: the Merger Agreement expressly refers to (and conditions itself upon) the Employment Agreement executed by Venkatraman. (Merger Agreement at §§ 6.12, 8.1(I).) In addition, the Merger Agreement expressly states that the non-compete provisions of the Employment Agreement with Venkatraman are part of the inducement to the Debtor to enter into the Merger Agreement and that Venkatraman's entitlement to the Earnout Payments under the Merger Agreement is consideration for the non-compete provisions in the Employment Agreement. (Merger Agreement at § 9.1.) This incorporation of the provisions of the Employment Agreement into the Merger Agreement and vice versa, Venkatraman argues, makes those contracts integrated under Michigan law.

The language of the Employment and Merger Agreements support Venkatraman's argument. The Employment Agreement (and in particular the covenant not to compete) was expressly

incorporated into the Merger Agreement and the consideration due to Venkatraman under the Merger Agreement was part of the consideration he was to receive for the non-compete provisions contained in the Employment Agreement.

The Merger Agreement expressly states:

> Venkatraman . . . hereby acknowledge[s] that the Employment Agreements contemplated in Section 6.5 hereof are executed by them as a part of the inducement to Lason to enter into the Agreement and to consummate the transactions contemplated herein. In connection therewith, each Future Employee agrees to refrain from competition and to maintain confidential information concerning Vetri, Lason and its affiliates during the term of the Employment Agreements and for a 3-year period thereafter, all as set forth in the Employment Agreement for each such Future Employee, the terms and conditions of which are incorporated herein by reference. Each Future Employee further acknowledges that the right to receive his Pro Rata Share of the Total Merger Consideration is part of the consideration for his entering into said Employment Agreement and that he is receiving full and adequate consideration for the covenants and agreements provided therein.

(Merger Agreement at § 9.1 (emphasis added).)

Similarly, the Employment Agreement expressly provides that the consideration for its non-compete provision includes the payments due to Venkatraman under both the Merger Agreement and the Employment Agreement. The Employment Agreement states:

> In consideration of the compensation described in this Agreement, the economic benefits accruing to Employee under the [Merger] Agreement and as an inducement to the company to consummate the transactions

> contemplated under the [Merger] Agreement, Employee agrees that for a period of time coextensive with the Term and for the three (3) years following Employee's termination of employment with the Company, for whatever reason and whether or not pursuant to the terms of this Agreement (the "Non-Compete Period"), Employee shall not, either directly or indirectly (and whether or not for compensation), work for, be employed by, own, manage, operate, control, finance, participate or engage in, or have any interest in, any person, firm, entity . . . which engages in any activity substantially the same as or competitive with the Business.

(Employment Agreement at § 4(a).)

Thus, we conclude that the Merger Agreement and the Employment Agreement were integrated. The Debtor argues, however, that the same cannot be said for the Retention Agreement. It asserts that there is no similar express integration language in it. Venkatraman argues nonetheless that the parties' intended the Retention Agreement to be merely a part of the overall transaction and, thus, it must be considered as part of the other two agreements.

We agree with Venkatraman. The Retention Agreement expressly contains language referring to and incorporating by reference the Employment Agreement. In fact, this incorporation relates specifically to the non-compete provisions which are at issue in this case. In the paragraph on which the Debtor relies, the Retention Agreement states:

> Employee agrees that the covenants, agreements, duties, rights and remedies of

> the parties set forth in Paragraph 4 of the Employment Agreement are incorporated herein by reference.

(Retention Agreement at § 2.) This provision alone supports the argument that the Retention Agreement is integrated into, and has to be interpreted together with, the Employment Agreement.

Even without that language, however, we would conclude that the Retention Agreement and the Employment Agreement are one integrated contract. The Retention Agreement expressly states that "This Agreement is intended to supplement, not replace, that certain Employment Agreement dated December 17, 1998, between the Company and Employee." (Retention Agreement at Preamble.) In fact, the term of the Retention Agreement (from January 1, 2001, to December 31, 2001) is virtually co-terminus with the last year of the Employment Agreement (which ran from December 17, 1998, to December 17, 2001). Further, the Retention Agreement states that the retention bonus to be paid under it is "[i]n addition to the compensation payable to Employee under the Employment Agreement" and "[t]he retention bonus will not by payable if Employee terminates for 'Good Reason' as defined in the Employment Agreement." (Retention Agreement at § 1(b).) Finally, the non-compete provisions of the Retention Agreement, which the Debtor seeks to enforce in its Adversary, are the same non-compete provisions contained in the Employment Agreement, which are incorporated into the Retention Agreement. (Id. at § 2.)

When we view the Retention Agreement in the context of the parties' transaction, it is clear that it is simply a modification or addition to their agreement, not a separate agreement. In fact, the Retention Agreement cannot be interpreted without reference to the other agreements. The Retention Agreement is premised on Venkatraman's continued employment. However, the Retention Agreement does not contain any of the terms of employment; instead, it relies on the Employment Agreement to define them. Further, with respect to the non-compete provisions, the Retention Agreement does not state what they are, it merely incorporates the provisions from the Employment Agreement.

Thus, we conclude that the Retention Agreement was clearly not intended to be a separate agreement, but was merely a modification or supplement to the Employment Agreement. In this regard, we find it more analogous to an amendment to a lease (which is part of the underlying lease and not a separate contract) rather than a separate lease of separate premises (which is typically not integrated into other leases). Therefore, under Michigan law, the Retention Agreement must be considered part of the Employment and Merger Agreements such that all three are one integrated contract.

B. Assumption or Rejection

The effect of our conclusion that the three agreements between the parties are one integrated agreement is that the Debtor cannot assume part of that agreement without assuming all of it. See, e.g., Stewart Title Guarantee Company v. Old Republic National Title Insurance, 83 F.3d 735, 741 (5th Cir. 1996)(an unexpired lease must be assumed or rejected in its entirety). Nor can the Debtor seek to enforce one provision (the non-compete) without assuming all its obligations under the integrated contract. See, e.g., In re University Medical Center, 973 F.2d 1065, 1075 (3d Cir. 1992)(assumption of an executory contract requires debtor to accept its burdens as well as its benefits).

Venkatraman asserts that the Debtor has already rejected the Employment Agreement because according to the Debtor's confirmed Plan all employment agreements were rejected except those listed by the Debtor before the Effective Date (July 1, 2002). (Plan of Reorganization at § 7.5(b).) The list filed by the Debtor did not include Venkatraman's Employment Agreement.

Alternatively, Venkatraman argues that the Agreements in question must be deemed assumed because the Plan also provided that all contracts which had not previously been rejected (by motion or in the Plan) were assumed. (Id. at § 7.1.) Consequently, Venkatraman argues that he is entitled to a cure of

all sums due under those agreements (including the $3 million judgment entered by the Michigan Court).

The Debtor responds that, since we concluded that the Employment Agreement and Merger Agreement are one integrated contract, the Plan is inconsistent in how the agreements are treated (rejected pursuant to section 7.5(b) or assumed under section 7.1). Therefore, the Debtor argues that Court must conclude that the Plan is silent as the assumption or rejection of the integrated contract. In the absence of assumption of an executory contract by motion or in a plan of reorganization, the contract is deemed rejected by operation of law. 11 U.S.C. § 365(a) & (d)(2). See also University Medical Center, 973 F.2d at 1077 (formal court approval is a prerequisite to assumption, it cannot be implied).

The Debtor also argues that the Merger Agreement and Employment Agreement were not assumed, because they were not executory contracts. The Employment Agreement expired by its own terms on December 17, 2001 (shortly after the petition was filed on December 5, 2001). As of the petition date, the only obligation left to be performed under the Merger Agreement was the payment of money by the Debtor.

We conclude that the agreements must be deemed rejected by the Debtor because they were not assumed by the Plan or by motion of the Debtor before the Plan was confirmed. Since the Retention

Agreement is integrated into the Employment Agreement and the Merger Agreement, the Retention Agreement must also be deemed rejected by the Debtor. Rejection constitutes a breach by the Debtor immediately before the petition was filed, and, therefore, the Debtor is not entitled to enforce the non-compete provisions of those agreements. 11 U.S.C. § 365(g)(1). Consequently, Venkatraman's Motions for Summary Judgment must be granted.

## IV. CONCLUSION

For the foregoing reasons, we grant the Motions for Summary Judgment filed by Venkatraman in both of the above-captioned adversary proceedings.

An appropriate order is attached.

BY THE COURT:

Dated: August 9, 2002

Mary F. Walrath
United States Bankruptcy Judge

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| | ) | |
| Defendants. | ) | |

**O R D E R**

AND NOW, this **9TH** day of **AUGUST, 2002**, upon consideration of the Motion of Venkatraman for Summary Judgment filed in Adversary No. 02-2962, and the Motion of Venkatraman for Partial Summary Judgment filed in Adversary No. 02-2174, and the Response of the Debtor thereto, and for the reasons set forth in the accompanying Memorandum Opinion; it is hereby

**ORDERED** that the Motions are **GRANTED**; and it is further

**ORDERED** that the Debtor is precluded from enforcing the non-compete provisions in the Merger Agreement, the Employment Agreement or the Retention Agreement with Venkatraman since those agreements are deemed rejected by the Debtor pursuant to section 365 of the Bankruptcy Code.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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