

Navigating Non-Compete Agreements – A Board Primer

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Company VP of Sales comes to CEO, stating that they may have lost to Competitor a customer that had previously given a verbal agreement to proceed with a lucrative contract. VP of Sales has been told by Customer that Competitor can do the job cheaper and is run by former Company employees.

Company has never heard of Competitor, but its research reveals that it is a start-up in Colorado. Competitor has a website that suggests the Competitor is competing in the same space as the Company, although it lists no management team, office locations, clients or other information about the scope of the operation. Competitor's publicly-available incorporation documents are minimal, but state that it was formed as a Colorado company in 2012, by one of the three founders of the Company, Peter.

Peter and the other two founders were each paid \$5 million in connection with the purchase of the Company in 2011, and signed noncompetition and non-solicitation provisions in the purchase agreement that last until 2016. The purchase agreement says that Delaware law applies, and any lawsuit must be filed in Delaware. The purchase agreement includes a "loser pays" provision.

Peter remained an executive and Board member of the Company during the first year following the sale, but resigned from employment in 2012. However, he retained his Board seat thereafter, and remains on the Board today.

Corporate documents for Competitor also show that in June 2014, Peter sold Competitor to his relative, Allan, who is also a former employee of the Company. Allan was a senior engineer, but not an executive or founder and did not sign the purchase agreement or receive any of its proceeds. He did have a non-compete and non-solicitation agreement with Company, which lasted for one year after his departure. His agreement states that Colorado law applies, and any lawsuit must be filed in Colorado. It does not include a "loser pays" provision. He left the Company in April 2013, so his non-compete/non-solicit obligations expired in April 2014.

What Should the Board Do?