[Cite as *Hinsch v. Root Learning, Inc.*, 2013-Ohio-3371.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

William Hinsch	Court of Appeals No. L-12-1192
Appellant	Trial Court No. CI0201006568
v.	
Root Learning, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: August 2, 2013

* * * * *

John D. Franklin, for appellant.

Thomas P. Dillon and Nicholas T. Stack, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted summary judgment to appellee, Root Learning, Inc. ("Root"), and dismissed a complaint filed by appellant, William Hinsch. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Hinsch is an artist who worked for Root from 1992 until mid-2007. Before working for Root, Hinsch was an illustrator for the Toledo Blade newspaper. Root is a company that offers strategic consulting services to businesses. Part of appellee's services are comprised of visual learning materials known by the company as "Learning Maps," "Learnegy Maps," and "RootMaps" which, according to Root, employ visual graphics, metaphors, and other learning materials to simplify complex organizational matters. During his employment at Root, Hinsch helped to create many of the illustrations that were used in Root's products.

The Confidentiality Agreement

{¶ 3} On August 30, 2000, during Hinsch's term of employment, appellant and Root executed a "Confidentiality/Invention Agreement for Root Employees" ("Confidentiality Agreement"). Section 3 of the Confidentiality Agreement defined "confidential information" as:

> a) All information, in whatever form recorded or transmitted;
>
> b) Related to or coming within the past, present or future business affairs of Root or other parties whose information Root has in its possession under obligations of confidentiality, including, without limitation, all business plans, customer lists or information, data, designs, developments, discoveries, employee compensation and benefits, expressions (in any medium), financial information, ideas, improvements, innovations, inventions, marketing materials, methods, operations, personnel records

and information, processes, product development processes, programs, promotional materials and methods, research, systems, techniques, trademarks, or trade secrets;

c) Having commercial or proprietary value; and

* * *

e) Any and all visual graphics and metaphors, strategic dialogue questions, peripheral cards, guide booklets and other learning materials, whether delivered in a physical, tangible format and/or an electronic format, that are collectively referred to as Root Learning Map Products, Root Learnegy Map Products, and/or RootMap Products.

{¶ 4} Exempted from the definition of "confidential information" was any information that:

a. Is or becomes publicly known through no wrongful act of Employee;

b. Is received from a third party free to disclose it to Employee and not under conditions of confidentiality;

c. Is independently developed by Employee outside of his or her Root employment; is unrelated to Root's business, products, research and development, or services; and is not developed using Root's trade secrets or other proprietary information * * *.

{¶ 5} Section 5 of the Confidentiality Agreement, which governs nondisclosure and noncompetition, states in relevant part that:

> a. During and after Employee's employment with Root or its affiliates, Employee shall not use for Employee's own benefit or the benefit of others * * *, or disclose in any manner, any Confidential Information it receives from Root or a third party to any person or entity except authorized recipients of Root known to Employee who have a need to know and who have entered into a confidentiality agreement with Root. Employee shall use a high degree of care to avoid disclosure of Confidential Information * * *.
>
> * * *
>
> c. During Employee's employment and for a period of two (2) years after Employee ceases to be employed by Root, Employee agrees not to engage in any activity, either as an individual, employee or independent contractor with any person or entity who or that offers like-kind or similar products or services competitive with Root's products or services. * * *.

{¶ 6} Section 7 of the Confidentiality Agreement stated that:

> Employee agrees that all tangible property in whole or part used, complied, or created by Employee, or made available to Employee, during Employee's employment by Root and relating to his or her employment by Root, including, but not limited to, disks, documents of all kinds,

equipment, software, and supplies, shall be returned promptly to Root if Employee ceases to be employed by Root for any reason, or at any other time at the request of Root.

{¶ 7} Pursuant to Section 8, in the event of any breach, or threatened breach, of the terms of the Confidentiality Agreement, Root was entitled to seek all possible legal and equitable remedies including, but not limited to, damages, lost profits, compensatory and punitive damages, restraining orders and injunctions.

The Stock Plan

{¶ 8} Effective September 1, 2000, Root established a "Stock Incentive Plan," ("the Stock Plan"), under which certain employees, including Hinsch, were awarded stock options as a reward for excellent individual performance. Hinsch received two option awards under the Stock Plan. The first option price was $1.33 per share, and the second was $2.79 per share. The terms of the Stock Plan were negotiated on behalf of appellant and the other employees by an attorney who was compensated by Root.

{¶ 9} Article Seven of the Stock Plan governed purchase and sale rights, as well as Stock Plan participants' distribution rights. The amount to be paid from a participant's Termination Distribution Account ("TDA"), set forth in Article 7.4 of the Stock Plan, was to be calculated using a formula that took into account the fair market value of the shares at the time of distribution.

{¶ 10} In addition to governing the terms under which stock option awards were to be paid and limitations on their transfer, Article 8 of the Stock Plan document, titled "Breach of Restrictive Covenants," stated that:

> [N]otwithstanding any other provision of this Plan to the contrary, if the participant breaches the competition, non-solicitation or nondisclosure provisions of the Award Agreement, whether during or after termination of Service, the participant will forfeit:
>
> * * *
>
> (c) any and all rights to receive any remaining installment payments due to the Participant from his or her Distribution Account or Termination Distribution Account, pursuant to Section 7.4 [which governs form and amount of distributions to participants].

{¶ 11} A "TDA" is defined in Article Two of the Stock Plan as:

> [A] bookkeeping account maintained by the Company that holds and distributes the Redemption Value of a Participant's vested Options or Owned Shares that are converted to such account following the Participant's Service termination, pursuant to Article 7.

The Option Award

{¶ 12} Effective April 1, 2002, Root and Hinsch executed a "Stock Option Award Agreement Under Root Learning, Inc. 2000 Stock Incentive Plan" ("Option Award") which gave Hinsch the option to purchase "all or any part of an aggregate of 32,000 of

the Company's Common Shares." Pursuant to Section 8 of the Option Award, TDA distributions "will commence to a Participant whose Service terminated:

* * *

(b) for a reason other than Disability, death or Retirement * * * beginning no earlier than 60 days after the latest of: (i) the Settlement Date, (ii) the date the Company has fully retired the Redemption Debt of 2000, or (iii) the fifth anniversary of the Plan's Effective Date.

{¶ 13} Section 11 of the Option Award stated, in relevant part, that:

(a) Nondisclosure and Nonuse of Confidential Information. The Participant shall not disclose or use at any time, either during the Participant's Service or thereafter, any Confidential Information (as defined below) of which the Participant is or becomes aware, whether or not such information is developed by the Participant, except to the text that such disclosure or use is directly related to and required by the Participant's performance of duties assigned to the Participant by any of the Company Parties. The Participant shall take all appropriate steps to safeguard Confidential Information and to protect it against disclosure, misuse, espionage, loss and theft. For purposes of this Agreement, the term "Confidential Information" is defined to include the following: (i) all information, in whatever form recorded or transmitted, related to or coming within the past, present or future business affairs of the Company Parties,

> * * * including, without limitation, all business plans, customer lists or information, data, designs, developments, discoveries, expressions (in any medium), ideas,* * * promotional materials and methods, trademarks, or trade secrets, * * *; and (ii) any and all visual graphics and metaphors, * * * whether delivered in a physical, tangible format and/or an electronic format, that are collectively referred to as Root *Learning Map* Products, Root *Learnegy Map* Products, and/or Root*Map* Products. Confidential Information shall not include any information that is: (i) or becomes publicly known through no wrongful act of the Participant * * * [and] (iii) independently developed by the participant outside of his or her Service with the Company * * *.

{¶ 14} Under Section 11(b), Hinsch agreed that, for a "period beginning on the Grant Date and ending on the later of (x) the second anniversary of the date of the termination of the Participant's Service or (y) the date the Company has fully retired the Redemption Debt of 2000" he would not "directly or indirectly * * * participate in any business or enterprise that provides or proposes to provide organizational learning and business strategy services of the type any of the Company Parties provides. * * *" Under Section 11(c), Hinsch agreed that he would not "induce or attempt to induce" any of Root's employees or customers to leave Root, and that he would not, in any way, interfere in the relationships between Root, its employees, and its customers.

{¶ 15} Section 11(e) provides as follows:

> Remedy for Breach. The Participant agrees that in the event of a breach or threatened breach of any of the covenants contained in this Section 11, * * * the participant shall forfeit:
>
> (i) any and all Options granted or transferred to him or her under the Plan and this Agreement, including vested Options;
>
> * * *
>
> (iii) any and all rights to receive any remaining payments due to the participant from his or her distribution Account or Termination Distribution Account * * *.

The Severance Agreement

{¶ 16} Hinsch's employment with Root was terminated on July 31, 2007. On August 14, 2007, Hinsch and Root executed a Severance Agreement, under which Root agreed to make monthly payments to Hinsch for one year. In addition, Section Two (D) of the Severance Agreement valued the shares in appellant's TDA at $4.71 per share, and stated that "[n]othing in this agreement shall be interpreted as altering any provision of the Stock Incentive Plan." Pursuant to Section Six of the Severance Agreement, Hinsch agreed to "preserve the confidentiality of all trade secrets and any other confidential or proprietary information of the Company and to refrain from disparaging, damaging, impairing or interfering with the Company's business or reputation or from performing any act, [sic] which is adverse to the interests of the Company."

{¶ 17} At the time of his termination, Hinsch owned 184,375 B (non-voting) shares of Root stock. Those shares were placed into Hinsch's TDA, and were valued at more than $850,000. On July 22, 2009, before any payments were made from Hinsch's TDA, Hinsch received a certified letter from Root's attorney stating that he was in violation of the non-compete provisions of the Option Award and, therefore, forfeited his right to payments from the TDA.

{¶ 18} On September 20, 2010, Hinsch filed a complaint in the Lucas County Court of Common Pleas, in which he alleged that Root's refusal to make TDA payments constitutes a breach of contract because it violates the terms of the Stock Plan. Hinsch further alleged that Root's actions resulted in unjust enrichment to Root in the amount of $850,000, and unlawful conversion of Hinsch's property. As part of discovery, Hinsch and Robin Wooddall Klein were deposed.

Hinsch's Deposition Testimony

{¶ 19} Over the course of several days in October 2011, Hinsch gave deposition testimony, the relevant portions of which are as follows. Hinsch testified that he worked at Root from 1992 until August 2007 as an artist, and that his work involved designing "infographics," graphics for reports, marketing materials and Root Learning Maps. On cross-examination, Hinsch testified that, after working for Root, he performed the following services for companies other than Root:

1. Visual Perspective (2008-2010): an organization of five people, including Hinsch, who formed a business to do website marketing that did not involve learning

maps and never "came to fruition." Visual Perspective had a website which Hinsch helped to design.

2. Alchemy (2008-2010): a graphics recording business owned by four women that recorded meetings using pictures. Hinsch stated that he worked as a "visual practitioner," doing illustrations as needed.

3. Change Champions (late 2007-present): a consulting firm in Eltville, Germany, at which Hinsch worked as a "visual practitioner" on projects that included former Root customer Deustche Bank.

4. Bill Hinsch Ink: an art illustration company that Hinsch attempted to form before he left Root that, according to Hinsch, never made any money;

5. Learning Visuals (2007- present): a company of which Hinsch is sole owner. Hinsch stated that Learning Visuals' customers include ContXt Corp, Barefoot Wealth Management, SigmaTech, Assured, Alchemy, Crystal Mapping, Accelerant and Change Champions. Hinsch testified that he has hired several former Root employees for technical assistance at Learning Visuals. He further testified that work for these companies included website illustrations, illustrations directed at sales people, marketing materials, "process visualizations and illustrations," and illustrations about how products are manufactured.

{¶ 20} Hinsch testified that, since leaving Root, he keeps copies of his work on a computer, which is purged on a regular basis. Hinsch stated that, although he may refer to past work for ideas, he does not "archive" his work. However, he admitted to

providing Change Champions with images "like illustrations that I had done" while employed by Root. He stated that all those images were "neutered" before they were given to Change Champions.

{¶ 21} In addition to the above business ventures, Hinsch stated that he attempted to design a product that he named a "MetaMap," a concept that he stated was "my intellectual property and my trade secret." Hinsch described a MetaMap as an illustration that has "a technical aspect to it that would allow it to be connected with a computer database."

{¶ 22} Hinsch stated that, over the four years since he left Root, he has deleted all Root-related projects and e-mails. However, Exhibit D to Hinsch's deposition was comprised of printouts made from CD's that Hinsch kept after leaving Root. When asked why he kept copies of his work for Root, Hinsch stated that "each of those jobs I did with Root are like, you know, sons and daughters, you know, [I] had a lot of attachment to them. You know, it's a product of my work career." Hinsch stated that he did not tell anyone at Root that he kept copies of his work for 15 years, and that he was never told he could not keep the copies.

{¶ 23} Hinsch testified that the description of Learning Maps on the Change Champions website "roughly captures what a Learning Map is," however, he told the company's owner that he was not permitted to compete with Root. Hinsch admitted that he provided some of the illustrations on the Change Champions site in 2007 but said that they were not Root's Learning Maps. Hinsch also admitted that he gave the owner of

Change Champions samples of work that he did for Root "so that he could see illustrations that he and I would work on, which is – our eventual piece of work was an example of that." He denied knowing how those samples were used by Change Champions. For example, Hinsch stated that he prepared an illustration for Root customer "Britvic" in 2007 that could be used to teach others in the marketing group, and that he sent that illustration to Change Champions as an example of his work. In addition, Hinsch stated that he did a 3D illustration that depicts a concept of passive investing for Dick Whalen of Whalen and Assoc. in 2007 on his Root computer, before his signed the severance agreement. He further stated that he did not tell Root about the project because Whalen was not the type of customer Root would be interested in , and the illustration was an "infographic," not a learning map.

{¶ 24} Hinsch testified that, while Change Champions is trying to sell Learning Maps, the company is not in competition with Root because no sale was made as far as he knows. He further acknowledged his participation in creating a Learning Map for Lufthanza as part of a team with other Root employees that was given to Change Champions without Root's knowledge or authorization. When he was asked to review the list of services advertised by Change Champions and compare them to Root's services, Hinsch identified strategy, corporate culture, e-learning, market research, innovation and corporate communication as possible or definite areas of competition between the two companies. Hinsch testified that his picture and biography on Change Champions' website, which describes Hinsch as a "visual concepts architect," was put

there without his knowledge or permission, and that the description of his duties at Change Champions is false.

{¶ 25} Hinsch also testified that the website for his own company, Learning Visuals, inaccurately describes itself as "a strategic consultancy based in Ohio with clients worldwide." Hinsch stated that an accurate description of himself would be "I'm in Ohio. I'm a founding artist of Root Learning. I'm an art editor at major newspapers." He denied engaging in mind mapping or strategy mapping since leaving Root, but agreed that many of the services listed on the Learning Visuals website, including "corporate strategies visually" and "process visualization," were services also offered by Root.

{¶ 26} Hinsch stated that he did not launch Learning Visuals "in a formal way" until 2007 or 2008, and he has not been involved in "using visual metaphors to explain corporate strategy since leaving Root." Hinsch disagreed with Root's stance that keeping copies of his Root projects and giving "neutered" samples of his Root work to Change Champions violated either the non-disclosure and non-competition clauses of the Option Award or his Severance Agreement. He admitted keeping CD's that he possessed before leaving Root, as well as "hundreds" of sketches that were in a box in his basement.

{¶ 27} Hinsch testified that the articles of incorporation for Learning Visuals were filed in October 22, 2007, and that the company's website, which was completed in early 2009, was designed to let "the reader know what Learning Visuals is about." He stated that a "visualization" could also be called an "illustration" once it is reduced to a tangible form, and that Root Learning Maps may, or may not, be visualizations. He listed the

businesses that Learning Visuals worked with as Assured, EFTSource, Findley Davies, NWC, Lichtraum (Germany)-lighting architect, BritVic, Berliner Bank, Inland Revenue, E-Centre, New Zealand Post, the Laminex Group, and Roche, several of which were Learning Visuals' clients in 2007 and 2008. Hinsch stated that, for most of these companies, he did "illustrations." He denied knowing the type of business they engaged in, and stated that he did not retain copies of the work done for those companies. Hinsch said that he wrote the description of Learning Visuals that appears on the website, and which states that the concept of Learning Visuals is to "take illustration and information and co-combine it." In addition, Hinsch stated that his website biography, which says that "Bill is the linchpin behind the Learning Visuals machine that makes our process and product an ideal vehicle for capturing and displaying rich strategic content in corporate and customer environments," was written to "market" the company, and is not necessarily accurate. In fact, the phrase was "inaccurate when he wrote it."

{¶ 28} Hinsch testified that his concept for a "MetaMap" is different from Root Learning Maps, because Root Learning Maps live in the "physical world," while a MetaMap's purpose "was to somehow create an illustration that could be technologically connected to a computer." When questioned specifically as to other work he performed in 2008 and 2009, Hinsch denied competing with Root, and further stated that he did not keep copies of any of his post-Root projects, and he deletes e-mails on a regular basis when his mailbox is full.

Klein's Deposition Testimony

{¶ 29} Robin Wooddall Klein, vice president of human resources for Root, testified in a deposition that she became aware of "numerous examples" of Hinsch's violation of the Option Award and Termination Agreement after reviewing Hinsch's deposition testimony. As one example, Klein cited to the Root projects that Hinsch gave to Change Champions as "samples" of his work. Klein also testified that the term "Learning Maps" belongs to Root, and that the "samples" of Hinsch's work that appeared on the Change Champions website are Root Learning Maps, regardless of their size and whether or not they appear in color. Klein stated that Change Champions is a competitor of Root, and that many phrases used by Root appear on the Change Champions website, for example, terms such as "synthesizing, complex information, aligning, * * *," and phrases such as "Change Champions can help you utilize and synthesize all of the available intelligence to simply articulate a strategic plan in line with market trends along with your market niche and capabilities." Klein also cited other quotes on the Change Champions website as similar to language used by Root, such as:

> [T]he marketplace and your industry are constantly changing, sometimes in very big ways. You know your organization needs to change, but very few change initiatives succeed. Why? Because rarely are these initiatives thought through holistically with thorough planning. Change Champions can develop a plan for you with considerations for cultural

attributes, systems, behaviors, structures, accountabilities and incentives at minimum.

{¶ 30} Klein stated that she did not know how the company obtained those terms, and also testified that she has no direct information that Hinsch supplied peer dialogue to any company that competes with Root. Klein further stated that she is unaware of whether Root actually lost business to Change Champions, however, she stated that Change Champions has Learning Maps on their website. She could not say whether or not Change Champions ever sold any Learning Maps.

{¶ 31} Klein stated that, at the time Root's employees bought out Randy Root's interest in the company, Hinsch was one of the largest shareholders. She also stated that the employees had to agree either to buy out Randy or to sell the company to an outside buyer. Klein stated she did not know if the sale would have worked without Hinsch because of his length of time with the company. Klein further testified that, because economy was "tough," the company was not growing as hoped after the purchase, so the employees were offered a conversion opportunity for "options that weren't in the money and allowed people to convert those into actual shares so that their stake would go from an option to a real share of stock ."

{¶ 32} Klein testified that Hinsch did not receive payments from his TDA account due to "concern about Section 11" of the Option Award, under which Hinsch had agreed not to disclose confidential information. She stated that Hinsch no longer had a TDA because "[h]e forfeited it" when "he took actions that violated the provisions of the

agreements he'd made." Klein further stated that, when the company officers became concerned about Hinsch's actions they consulted lawyers, who wrote the forfeiture letter.

{¶ 33} Klein testified that Section 11(a) of the Option Award states that Root's Learning Map Products include "any and all visual graphics, metaphors, strategic dialogue questions, peripheral cards, guide booklets and other learning materials, whether delivered in a physical, tangible format and/or electronic format that are collectively referred to as Root Learning Map Products." She stated that the term "Learning Maps" is "a trademark that [Root] got for a visual process that synthesizes complex information into a page of meaning that's experienced by people to make sense of complex issues." She further stated that "confidential information" is defined in the document as "all information, whatever form recorded or transmitted related to or coming within the past, present or future business affairs of the company parties." Klein stated that the identities of Root's clients is also confidential information, and that some names cannot be used for marketing purposes. Klein stated that, in her opinion, Hinsch violated Section 11(a) of the Option Award. However, she could not say what evidence of a violation existed in July 2009, except that Hinsch had a Learning Visuals website. She stated that, "[b]y having a website, Bill initiated a new competitor for Root * * * and used his knowledge and expertise that he learned at Root to create the language and the visuals and the description of services that he put on that website; therefore, if someone was looking for the products and services that we offer, they would likely also find Bill's company."

{¶ 34} Klein testified that Hinsch routinely competes with Root by underpricing his work to get business; however, she does not know the amount of business that he has taken from Root. She also testified that Hinsch has done work for ContXt Corporation, which competes with Root by selling "Learning Map-like services using Bill's visuals." She stated that, in her opinion, Hinsch took his "immense talent" and is "charging it out like by the hour at such low fees." Klein stated that Root decided that Hinsch was engaging in competition and cancelled Hinsch's TDA in 2009, after becoming aware of the Learning Visuals website, which stated that Hinsch "offers * * * strategy visuals for learning, making the complex simple."

{¶ 35} Klein testified that Root paid Hinsch a "stepped up salary" from which the taxes were paid for his TDA. She further testified that TDA payments to employees began in 2010, but Hinsch did not receive payments because his account was cancelled in 2009. Klein stated that the Root debt was retired in January 2009, and that the first scheduled payout was in July 2010. She clarified that TDA payouts are based on Root's corporate income, and the company did not fear paying Hinsch his TDA. Klein stated that, in 2004, Randy Root wrote an e-mail to Root executive Jim Haudan, in which he said that "the worst-case real world [scenario would be a] payout to a relatively small number of currently employed R.L. original such as Bill Hinsch." However, she stated that Haudan wanted the employees to buy out Randy Root because Haudan felt that Randy's interest was too big and could be damaging to "participants like Bill and Don."

{¶ 36} Klein also testified as to an e-mail string sent by Haudan to all Root employees on February 23, 2005, in which Haudan stated that a new competitor "Marketing Minds," had begun selling Learning Maps. In that e-mail, Haudan asked Hinsch if he helped Marketing Minds develop their logo, which was similar to work produced by Hinsch in the past. Hinsch replied by denying that the logo was similar to his other designs. The e-mail also noted that Marketing Minds was created by three former Root employees, and that Root's response would be to "continue our focus on executing our strategic engagement strategy and differentiating R with our key accounts."

{¶ 37} Klein testified that, over the years, Hinsch demonstrated that he was not always a team player, and that he had been accused of photocopying Root projects and possibly stealing from Root while he was still employed by the company. She also noted that Hinsch often spoke negatively of the company to other workers and, at one point, the company responded by removing Hinsch's e-mail and voice mail accounts

{¶ 38} Klein testified that negotiations with Hinsch regarding his severance were long, partly because Hinsch wanted "greater clarification on what we [Root] would find competitive." She noted that Root executive Rich Berens expressed concern during the negotiations that Hinsch would attempt to "hurt" Root in the marketplace. Klein also testified that individuals such as Hinsch, who have internal knowledge of what Root does, had a huge advantage in the competitive marketplace over someone starting up a company from nothing. She stated that, in her opinion, Root was the first to coin the term "Learning Maps."

{¶ 39} Klein testified that she received an e-mail from Berens, dated March 12, 2008, informing her that "Thomas Falk is in the learning map business in Germany and that when [Berens] and Lori looked at the site, they felt there was a 90 percent chance that there was visual work done by Bill Hinsch on it." Klein stated that Thomas Falk was a former Root employee. She also referred to several e-mails sent in 2009 by other Root employees who noticed Hinsch's Learning Visuals website and believed that Hinsch was competing with Root's Learning Maps business. Specifically, Klein stated that she received an e-mail from Berens dated June 23, 2009, stating that, after doing some "digging" it was apparent that "Bill is now full fledged in the learning map business." She also testified that Hinsch has a social network profile that references both Visual Perspective and Learning Visuals.

{¶ 40} Klein stated that, after receiving Berens' e-mail, she asked to draw up a letter to Hinsch stating that he violated the TDA. However, she also stated that "it was never a goal [of Root] to not pay Bill his TDA." "Bill violated the terms of his agreements with us and, therefore, he is not owed his TDA."

{¶ 41} On November 14, 2011, Root filed a motion for summary judgment and a memorandum in support, in which it argued that the company was justified in refusing to pay Hinsch from his TDA because he violated Section 11 of the Option Award. Specifically, Root argued that Hinsch admitted in his deposition testimony to providing Change Champions with copies of Learning Maps, and described work he performed for Root's known competitors. Root also argued that Hinsch violated Section 11(a) by

retaining copies of his Root work product and not returning those copies to the company upon his termination. Accordingly, Root argued that, pursuant to Section 11(e) of the Option Award, Hinsch's conduct mandated forfeiture of his TDA, entitling Root to summary judgment on Hinsch's breach of contract claim as a matter of law. Root further argued that Hinsch's additional claims must fail as a matter of law because it is not disputed that the parties had a valid contract, and the complaint did not set forth any claims in addition to breach of contract that would justify either unjust enrichment or conversion.

{¶ 42} In support, Root relied the deposition testimony of Hinsch and Klein, as well as attached copies of Klein's affidavit, the Stock Incentive Plan, an example of Root Learning Maps, and printouts taken from various websites that were referred to in Klein's and Hinsch's deposition testimony.

{¶ 43} On December 20, 2011, Hinsch filed a memorandum in opposition to summary judgment, in which he argued that genuine issues of material fact exist that preclude summary judgment in favor of Root. Specifically, Hinsch asserted that none of his actions constituted a breach of the non-competition and/or non-disclosure clauses of the Option Award. Hinsch further argued that Root based its entire defense on "its mistaken understanding of Hinsch's relationship with a company called Change Champions." Hinsch further argued that the CD's he kept contained his own work that was completed while he worked at Root, they "were at all times located in his home office," and he was never told to return the CD's after his employment at Root was

terminated. Hinsch stated that his involvement with Change Champions consisted of providing "neutered" examples of his Root work, and that he told the CEO of Change Champions that he had a non-compete agreement with Root and therefore was not responsible for Change Champions' use of those examples on its website, or that company's misrepresentation of Hinsch in an online biographical description.

{¶ 44} Hinsch argued that Learning Visuals did not have an online presence until 2009, and that the idea of "MetaMaps" never came to fruition, since the technology to implement the concept did not exist at that time. Finally, Hinsch argued that Root's allegation that he improperly associated with its competitors in violation of Section 11 of the Option Award was based on untrue "assumptions and fabricated theories" since his relationship with the companies listed by Root as "competitors" was merely an "association" that does not violate his agreements with Root. Attached to Hinsch's memorandum was his own affidavit, in which Hinsch denied competing with Root subsequent to the termination of his employment.

{¶ 45} Root filed a reply in support of summary judgment on January 13, 2012, in which the company reiterated its claims that Hinsch violated the terms of the Option Award, the Stock Incentive Plan and Termination Agreement by disclosing confidential information, working for Root's competitors, and forming his own company, Learning Visuals, to directly compete with Root in the marketplace. In addition, Root argued that, contrary to Hinsch's claims, it is not relevant that only some of the companies with which he associated were ultimately successful in taking business from Root, since it is

undisputed that several of those companies, including Change Champions and Learning Visuals "proposed to provide competitive goods and services" in competition with Root.

{¶ 46} Hinsch filed a sur-reply, with leave of court, on January 19, 2012, in which he argued for the first time that Root never intended to make payments from his TDA account. In support, Hinsch asserted that, Root's intent in denying him the proceeds of the TDA account is a matter that can only be resolved by a jury and is, therefore, not appropriate for summary judgment.

{¶ 47} A hearing was held on Root's summary judgment motion on May 15, 2012, at which both parties were represented by counsel. On June 20, 2012, the trial court issued an opinion and judgment entry in which it found, after reviewing the arguments of counsel, both parties' arguments as to summary judgment, and the depositions of Hinsch and Klein, that: (1) "Mr. Hinsch retained copies of Root's confidential materials after he left Root and provided copies of at least portions of several of Root's copyrighted learning maps to Root's competitor"; and (2) Mr. Hinsch participated in several companies after he left Root, including Learning Visuals, Change Champions, Accelerant, and ContXt Corp., that competed or tried to compete with Root."

{¶ 48} After stating the standard for summary judgment, the trial court further found that Hinsch undisputedly "used or disclosed Root's confidential information and participated in businesses that competed with or attempted to compete with Root during the applicable time period." Specifically, the trial court noted that Hinsch stated in his deposition that he gave Learning Maps to Change Champions without Root's knowledge

or authorization, in violation of Section 11(a) of the Option Award. The trial court further noted that Hinsch started Learning Visuals, and worked with several other competitors of Root, in violation of Section 11(b) of the Option Award. Accordingly, the trial court found that Root was entitled to summary judgment on Count 1 of the complaint as a matter of law.

{¶ 49} As to Hinsch's remaining claims, the trial court found that Hinsch was not entitled to damages due to unjust enrichment as a matter of law because the parties had a valid contract that controlled their rights and obligations. Similarly, the trial court dismissed Count 3 of the complaint after finding that Hinsch's conversion claim could not survive because it "does not allege any separate and independent duty owned by Root apart from the contract." A timely notice of appeal from the trial court's judgment was filed on June 26, 2012.

{¶ 50} On appeal, Hinsch sets forth the following as his sole assignment of error:

> The trial court committed prejudicial and reversible error when it granted Appellee's Motion for Summary Judgment on Count One given there are genuine issues of factual dispute in the record and the Appellees are not entitled to judgment as a matter of law.

{¶ 51} In support of his assignment of error, Hinsch makes several arguments. First, Hinsch argues that genuine issues of material fact remain as to whether or not Root breached the parties' contract by refusing to pay Hinsch from his TDA account, and whether or not any alleged competition actually occurred during the "forfeiture period" as

set forth in Section 11(b) of the Option Award. Second, Hinsch argues that the trial court abused its discretion by finding that Hinsch both disclosed confidential information and/or attempted to compete with Root "during the applicable time period" without defining the parameters of the "forfeiture period." Finally, Hinsch argues that the trial court abused its discretion by finding that Hinsch's "participation" in Learning Visuals, Change Champions, Accelerant and ContXt Corp. amounted to competition in violation of the terms of the Option Award.

{¶ 52} We note initially that appellate review of a trial court's grant of summary judgment is de novo. *Transition Healthcare Assoc., Inc. v. New London Healthcare*, 6th Dist. Huron No. H-10-023, 2012-Ohio-3411, ¶ 11, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 53} Initially, the burden of demonstrating that no genuine issue of material fact exists falls on the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 295, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the "adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit

or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 54} A contract is a promise, or a set of promises, actionable upon breach. *Cleveland Builders Supply Co. v. Farmers Ins. Group of Cos.*, 102 Ohio App.3d 708, 712, 657 N.E.2d 851 (8th Dist. 1995). The essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Jackson Tube Svc., Inc. v. Camaco LLC*, 2d Dist. Miami Nos. 2012 CA 19, 2012 CA 25, 2013-Ohio-2344, ¶ 10, quoting *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 28.

{¶ 55} In order to prevail on a breach-of-contract claim, a plaintiff must demonstrate by a preponderance of the evidence that: "(1) the parties reached a valid and binding agreement; (2) that the defendant breached the terms of that agreement; and (3) that the nonbreaching party suffered damages as a result of the breach of contract." *Lavarre v. Fifth Third Secs., Inc.*, 1st Dist. Hamilton No. C-110302, 2012-Ohio-4016, ¶ 30. "Summary judgment is appropriate in breach-of-contract cases because the court may interpret the meaning of the contract as a matter of law." *Id.* (Other citation omitted.)

{¶ 56} It is undisputed in this case that a contract existed between Hinsch and Root which provided for payments to be made to Hinsch from his TDA account. It is

further undisputed that, pursuant to Section 11(b) of the Option Award, Hinsch agreed to forfeit all payments from his TDA if he competed with Root from the time he ceased being a Root employee until the later occurrence of: (1) the two-year anniversary of the termination of his employment, or (2) the date that Root fully retired the Redemption Debt of 2000.

{¶ 57} As to the duration of Hinsch's non-compete agreement, in his appellate brief, Hinsch asserts that the Redemption Debt was retired in January 2008, while Klein testified in her deposition that the debt was retired in January 2009. Both parties agree, however, that the two-year anniversary of Hinsch's termination occurred later, on July 31, 2009. Accordingly, no matter which date is used for retirement of the Redemption Debt, for purposes of summary judgment, the "applicable time period" for determining whether Hinsch violated the non-compete provisions of the Confidentiality Agreement, the Stock Plan, the Option Award and the Severance Agreement is from July 31, 2007 until July 31, 2009. However, regardless of the date on which the non-compete period ended, pursuant to Section 11(a) of the Option Award, Hinsch agreed not to disclose Root's confidential information or trade secrets for an indefinite period of time, beginning on July 31, 2007, the date his employment with Root was terminated.

{¶ 58} As set forth above, Hinsch stated in his deposition that he supplied "neutered samples" of his work, which Klein testified were recognizable as Root Learning Maps, to Change Champions at some point after his employment with Root ended. Hinsch also testified in his deposition that he kept copies of much of the work he

produced while at Root. Hinsch likened those designs and illustrations to his "sons and daughters" and he denied being told that he was required to return them. Hinsch also testified that his own company, Learning Visuals, was not active until after 2009.

{¶ 59} On appeal, Hinsch asserts that Root had no justification to terminate his TDA because Root never lost business to any of the other companies with which he was associated, and because the trial court never made Root prove that Hinsch gave away "copyrighted information" to its competitors. Finally, Hinsch states that it is his word against Klein's that any of the companies that he worked for after leaving Root were actually in competition with Root, and Root simply used his attempts to earn a living as an excuse to avoid paying out his TDA. Hinsch also argues in his appellate brief that Root could not terminate his TDA because it was not aware of his affiliation with Change Champions until Hinsch gave his deposition in 2011. We disagree, for the following reasons.

{¶ 60} It is undisputed that the "neutered samples" that Hinsch gave to Change Champions eventually appeared on Change Champions' website, along with a biography that calls Hinsch the original "Learning Map artist." Hinsch does not state, and the record does not show, exactly when the "neutered samples" were provided, and Hinsch did not testify as to the meaning of the term "neutered." In addition, the Confidentiality Agreement broadly prohibits Hinsch from disclosing "confidential information" without requiring that such information be "copyrighted," and it places on Hinsch a duty to "use a high degree of care to avoid disclosure of Confidential Information." For example, Klein

testified in her deposition that Learning Maps such as the ones Hinsch gave to Change Champions initially were developed and marketed by Root, and that Hinsch was responsible for illustrating those Learning Maps while he was a Root employee. The record contains copies of Root's Learning Maps, which bear an unmistakable resemblance to the "neutered samples" that were attached to Root's summary judgment motion, and which appeared on the Change Champions website.

{¶ 61} In addition to the above, in spite of his claim of innocence, Hinsch signed the Confidentiality Agreement, which requires him to return all visual graphics and illustrations relating to the production of Root learning materials such as Learning Maps upon termination of his employment. Also, Hinsch testified in his deposition that Learning Visuals was initially formed in 2007 to produce "process visualizations and illustrations," and he admitted to hiring several former Root employees to provide technical assistance to Learning Visuals.

{¶ 62} Finally, Hinsch asserts on appeal that even Root did not believe Section 11 of the Option Award was clear and unambiguous, as evidenced by the "Judicial Modification" provision set forth in Section 11(d). Hinsch suggests that, pursuant to that section, the language of Section 11(a)(iii) should be modified to allow "Hinsch and others to provide illustrations to companies without Root simply alleging any illustration is somehow related to its business or product." This argument is misplaced, because Section 11(d) states that judicial modification of the terms of the Option Award is proper only if a court first declares "any term or provision of this Section 11 is invalid or

unenforceable * * *." It is the application of Section 11, not its validity or its enforceability, that is at issue in this case. Accordingly, Hinsch's request for modification by this court is entirely without merit.

{¶ 63} This court has reviewed the entire record that was before the trial court, including the depositions and affidavits of Hinsch and Klein, the terms of the Option Award, the Confidentiality Agreement, the Stock Incentive Plan, and the Severance Agreement, and the exhibits attached to the parties' filings in the trial court and on appeal. On consideration thereof, we find that Root presented to the trial court sufficient competent, credible evidence to show that Hinsch disclosed confidential information in violation of the terms of the Confidentiality Agreement and Section 11(a) of the Option Award, and that Hinsch also violated Section 11(b) of the Option Award within the applicable time period established by the parties' agreement. We further find that, beyond his own self-serving testimony and interpretation of the terms of the parties' agreement, Hinsch has presented no admissible evidence pursuant to Civ.R. 56(E) to demonstrate that a genuine issue of material fact exists that preclude summary judgment. Accordingly, Root did not breach the terms of the Option Award by terminating Hinsch's TDA and refusing to make payments to Hinsch. Appellant's sole assignment of error is found not well-taken.

{¶ 64} Upon consideration whereof, we further find that, after construing the evidence on Root's motion for summary judgment most strongly in favor of the non-moving party, that Root is entitled to judgment as a matter of law. The judgment of the

Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, court costs of these proceedings are assessed to appellant, Hinsch.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE