

## **A Clash of the Titans**

By Martin J. Greenberg and Sean McCarthy

### **I. Introduction**

IMG, formally known as International Management Group, is considered to be a global leader in “sports, fashion and media” with offices in over twenty-five countries.<sup>1</sup> IMG’s clients include those involved in the college, golf, and tennis businesses.<sup>2</sup> Creative Artists Agency (CAA) markets itself as the “world’s leading entertainment and sports agency.”<sup>3</sup> CAA, through its Sports Division, represents over 1,000 of the world’s top athletes in a variety of sports.<sup>4</sup> CAA also touts its ability to offer unique off-the-field commercial opportunities to its clients.<sup>5</sup>

IMG is considered by many to be the firm “credited with inventing the sports business,” while CAA is a recent entrant to the sports agent industry.<sup>6</sup> CAA’s president, Richard Lovett, was a friend of IMG’s founder Mark McCormack.<sup>7</sup> However, there was, and still is, a history of CAA raiding IMG’s top talent agents in an effort to become a more viable competitor in the sports industry.<sup>8</sup> The departures of Casey Close and Tom Condon from IMG to CAA led to the formation of CAA Sports in early 2006.<sup>9</sup> These departures also resulted in high-end clients such

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<sup>1</sup> *About Us*, IMG, <http://www.img.com/about-us.aspx> (law visited Feb. 5, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *CAA Sports*, CAA, <http://sports.caa.com/> (last visited Feb. 5, 2015).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Liz Mullen, *Lawsuits May Affect Big-Name Sports Agencies*, SPORTS BUSINESS DAILY (May 17, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/05/20100517/This-Weeks-News/Lawsuits-May-Affect-Big-Name-Sports-Agencies.aspx?hl=Matthew%20Baldwin&sc=0>.

<sup>7</sup> *Id.*

<sup>8</sup> Matthew Futterman, *Talent Agencies Cry Foul Lawsuits Fly*, WALL ST J. (May 7, 2010), <http://www.wsj.com/articles/SB10001424052748703686304575228314238507620>.

<sup>9</sup> Mullen, *supra* note 6.

as Derek Jeter, Tony Gonzalez, and LaDainian Tomlinson following their agents to CAA from IMG.<sup>10</sup>

In early 2010, Matthew Baldwin<sup>11</sup> found himself at the center of a legal dispute that had the potential to leave a major impact on the sports agent industry.<sup>12</sup> Baldwin worked as a junior agent in the sports division of IMG's Minneapolis office for five years under Gary O'Hagan.<sup>13</sup> Among Baldwin's clients were high profile coaches such as Mike Shanahan, Jay Wright, and Mike Leach.<sup>14</sup> On April 2, 2010, Baldwin announced that he was leaving IMG effective immediately to join CAA, one of IMG's top competitors.<sup>15</sup> Baldwin made his decision to leave only days after receiving an annual bonus and informing his supervisors he intended to stay at IMG.<sup>16</sup> The lawsuits between the two parties wound up being withdrawn, and the parties settled their dispute out of court. However, Baldwin's actions, and IMG's responses, still have left a mark on the sports agent industry.

## **II. Baldwin's Contract and the Nature of the Dispute**

In the course of his employment with IMG, Baldwin signed, and executed, an employment agreement ("Employment Agreement") that was effective August 20,

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<sup>10</sup> Futterman, *supra* note 8.

<sup>11</sup> Baldwin is a lawyer who received his Bachelor's Degree from Rice University and his Juris Doctor in 2004 from the University of Toledo. He is now legal counsel and senior associate for Professional Sports Representation, Inc., a sports agency that specializes in representing coaches and sports executives in the NFL and NCAA. Before joining PSR, Inc. in 2010, Baldwin was Head of Business Affairs for VICTORPrime, Co-Director of the Coaches Division of CAA Sports, and a Senior Associate in the Coaches Division of IMG.

<sup>12</sup> Mullen, *supra* note 6.

<sup>13</sup> Eriq Gardner, *Agent Defection Creates Nasty Litigation*, HOLLYWOOD REPORTER (May 17, 2010), <http://reporter.blogs.com/thresq/2010/05/agent-defection-poaching-lawsuit.html>; Matthew Futterman, *Talent Agencies Cry Foul Lawsuits Fly*, WALL ST J. (May 7, 2010), <http://www.wsj.com/articles/SB10001424052748703686304575228314238507620>.

<sup>14</sup> Gardner, *supra* note 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

2004.<sup>17</sup> Although Baldwin was employed and working in the State of Minnesota, his Employment Agreement was subject to interpretation and enforcement under and pursuant to the laws of the State of Ohio.<sup>18</sup> The Employment Agreement contained a confidentiality provision that stated:

Employee will not, without the consent of the President or a Senior Vice President or Corporate Vice President of IMG, divulge any information of a confidential, proprietary or trade secret nature relating to IMG or to any of its clients, properties, or customers, to anyone other than authorized personnel of IMG, either during Employee's employment with IMG or at any time thereafter.<sup>19</sup>

Further, the Employment Agreement also contained a restrictive covenant, which stated:

During Employee's employment with IMG, Employee will not solicit nor represent any client, property or customer on behalf of anyone other than IMG, including on Employee's own behalf. For the period of two years following the end of Employee's employment with IMG, Employee will not directly or indirectly solicit or represent as a client, on Employee's own behalf or on behalf of another, or be employed by, any person or organization which: (i) was a client of IMG within the eighteen months next preceding the end of Employee's employment with IMG and, further, was a client with whom Employee had dealings while Employee was associated with IMG or was a client with whom employees reporting to Employee had dealings while Employee was associated with IMG; or (ii) was a prospective client of IMG who was actively solicited as such within the twelve months next preceding the end of Employee's employment with IMG and, further, Employee, or IMG employees reporting to Employee, participated in such solicitation.<sup>20</sup>

Lastly, the Employment Agreement contained an arbitration clause in which the "parties agree to submit to arbitration any dispute related to the employment

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<sup>17</sup> Matthew Baldwin Employment Agreement. [hereinafter Employment Agreement] The entirety of Baldwin's employment agreement is attached at the end of this article.

<sup>18</sup> Employment Agreement Paragraph 11.

<sup>19</sup> Employment Agreement Paragraph 4.

<sup>20</sup> Employment Agreement Paragraph 6.

relationship and . . . the arbitration process shall be exclusive, final and binding. . .”<sup>21</sup>

However, IMG retained the right to pursue injunctive relief from court of competent jurisdiction:

[S]hall not prevent IMG from obtaining injunctive relief from a court of competent jurisdiction to enforce the obligations of [the Agreement's confidentiality and non-solicitation provisions] for which IMG may obtain provisional relief pending a decision on the merits by the arbitrator. Employee consents to the jurisdiction of Ohio courts for such purpose.<sup>22</sup>

IMG exercised its right to pursue injunctive relief through the lawsuit it filed in Ohio, while claiming that Baldwin waived his right to arbitration by filing his suit in California.<sup>23</sup> Baldwin, in his complaint to the California court, argued that the arbitration provision was unconscionable, and thus unenforceable against him.<sup>24</sup>

In the days before his departure from IMG, Baldwin had received a bonus from IMG and had assured his superiors of his intent to remain at IMG.<sup>25</sup> However, Baldwin had grown dissatisfied with his employment, and its conditions, at IMG.<sup>26</sup> As a result, Baldwin announced his resignation from IMG effective April 2, 2010, along with his intent to join CAA.<sup>27</sup> On March 29, 2010, prior to his decision to resign, Baldwin had signed a lease for an apartment in Los Angeles, California.<sup>28</sup> Baldwin contended that by signing the lease he was a legal resident of California,

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<sup>21</sup> IMG Worldwide Inc. v. Baldwin, No. 10-CV-794, 2010 WL 3211686, at footnote 1 (N.D. Oh. 2010).

<sup>22</sup> Employment Agreement Paragraph 9.

<sup>23</sup> IMG Worldwide Inc. v. Baldwin, No. 10-CV-794, 2010 WL 3211686, at footnote 1 (N.D. Oh. 2010).

<sup>24</sup> Complaint for Declaratory Relief at ¶¶ 49-52, Baldwin v. IMG Worldwide, Inc., No. CV10-02408-GW (C.D. Cal. 2010).

<sup>25</sup> Gardner, *supra* note 12.

<sup>26</sup> Complaint for Declaratory Relief at ¶ 3, Baldwin v. IMG Worldwide, Inc., No. CV10-02408-GW (C.D. Cal. 2010).

<sup>27</sup> Gardner, *supra* note 12.

<sup>28</sup> *Id.*

and subject to California's statutory provisions for employees.<sup>29</sup> Further, Baldwin indicated his intention to remain in Los Angeles for the foreseeable future.<sup>30</sup> On the same day that he resigned (i.e. April 2, 2010), Baldwin filed a lawsuit against IMG in California—the home of CAA's operations.<sup>31</sup>

IMG responded by filing a countersuit in Ohio on April 15, 2010.<sup>32</sup> After a hearing before the Northern District Court of Ohio on April 16, Baldwin agreed to enter into a standstill agreement that prevented him from representing any IMG clients, and he agreed to return all business related materials to IMG.<sup>33</sup>

Baldwin's complaint in California District Court contended in relevant part that:

4. Now that Baldwin lives and works in California, any injunction enforcing any restrictive covenants against Baldwin would entail enforcement of such covenants in the state of California. The restrictive covenants, therefore, are enforceable only to the extent California law would permit such enforcement.

5. The post-employment restrictions contained in Baldwin's employment agreement are void under California law. Hence, the restrictive covenants are unenforceable.

6. Under California law, Baldwin is free to compete with IMG, and to service any of his former clients who may choose to hire him. Baldwin is entitled to a declaration declaring that his restrictive covenants are void and unenforceable.

7. As set forth below, this case is virtually identical to another case decided in this district, *Danzi v. IMG*, in which this Court confirmed an arbitral award under the Federal Arbitration Act, [9 U.S.C. § 1 et seq.](#) In that arbitral award, the arbitrator ruled that, in an

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<sup>29</sup> *Id.*

<sup>28</sup> *IMG Worldwide Inc. v. Baldwin*, No. 10-CV-794, 2010 WL 3211686, at \*5 (N.D. Oh. 2010).

<sup>31</sup> Mullen, *supra* note 6.

<sup>32</sup> *See IMG Worldwide Inc. v. Baldwin*, No. 10-CV-794, 2010 WL 3211686 (N.D. Oh. 2010).

<sup>33</sup> Liz Mullen, *IMG Files Amended Complaint Against Agent Matthew Baldwin*, SPORTS BUSINESS DAILY (May 14, 2010), <http://m.sportsbusinessdaily.com/Daily/Issues/2010/05/Issue-169/Sports-Industrialists/IMG-Files-Amended-Complaint-Against-Agent-Matthew-Baldwin.aspx>.

employment contract virtually identical to Baldwin's contract with IMG at issue here, the Ohio choice-of-law clause in the parties' employment agreement was unenforceable, and that the restrictive covenants were enforceable only to the extent California law would permit enforcement of them. Because California law does not allow enforcement of such anti-competitive covenants, IMG agreed to entry of a consent award, and a consent judgment confirming the award, freeing Danzi of any of his post-employment restrictions.

8. The same result should be reached here. Baldwin, like Danzi, moved to California after terminating his employment contract with IMG and, also like Danzi, Baldwin commenced employment with a competitor of IMG's based in Los Angeles. Just as in *Danzi*, now that Baldwin lives and works in California, his post-employment anti-competitive restrictions with IMG must be interpreted under California law. And, because the post-employment anti-competitive restrictions in Baldwin's employment contract with IMG are void under California law, Baldwin is entitled to a declaratory judgment declaring that such restrictions are null, void and unenforceable as a matter of law.<sup>34</sup>

The thrust of Baldwin's argument was that IMG's restrictive covenants were void in California, his new place of residence, and that Baldwin was free to compete with IMG, including taking his clients that he cultivated at IMG with him to CAA.

Ohio Circuit Court Judge Kathleen O'Malley best summarized IMG's position in her circuit court opinion:

IMG alleges that, while Baldwin was still employed by IMG, he "secretly laid the groundwork to recruit IMG clients away from IMG" and "conspired to interfere with IMG's business" in the process. (Doc. 30 at 1-2.) IMG further alleges that Baldwin took his IMG-owned laptop with him when he resigned, along with "hundreds of confidential and sensitive files regarding the contracts IMG clients and prospective clients, as well as other proprietary information and work product of IMG. . . .

Subsequently, on April 15, 2010, IMG filed this lawsuit against Baldwin, asserting breach of contract, misappropriation of trade secrets, and breach of the duty of good faith and duty of loyalty Baldwin owed IMG under the Employment Agreement. (Doc.

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<sup>34</sup> Complaint for Declaratory Relief, at ¶ 4-8, *Baldwin v. IMG Worldwide, Inc.*, No. CV10-02408-GW (C.D. Cal. 2010).

1.) Like the claims asserted in the California Action, these claims all arise from Baldwin's Employment Agreement. Contemporaneously, IMG filed a Motion for Temporary Restraining Order (Doc. 4) seeking to prevent Baldwin from violating the terms of the Employment Agreement and from using or otherwise disclosing IMG's trade secrets in violation of that Agreement.<sup>35</sup>

IMG alleged that Baldwin took with him approximately 7,400 confidential documents from his laptop.<sup>36</sup> Among the documents allegedly taken, were the contracts and personal information of coaches represented by IMG, and commissions.<sup>37</sup> Additionally, IMG claimed that Baldwin took with him a “document detailing IMG’s strategies, plans, strengths, and weaknesses . . . that would be extremely valuable in the hands of a competitor like CAA.”<sup>38</sup> IMG contended that Baldwin had downloaded the confidential documents from his laptop to a USB drive and uploaded the documents to other computers.<sup>39</sup>

Critical to both parties case was the “first to file” rule in determining whether the case should be heard in California or Ohio.<sup>40</sup> Under the first to file rule, if actions that involve nearly identical parties and issues and are filed in two different district courts, the court in which the first suit to be filed generally proceeds towards judgment.<sup>41</sup> Judge O’Malley, for District Court of Ohio, determined that both suits involved “substantially the same issues.”<sup>42</sup> IMG’s claims for misappropriation of trade secrets were not present in Baldwin’s California claim, but they, like the

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<sup>35</sup> IMG Worldwide Inc. v. Baldwin, No. 10-CV-794, 2010 WL 3211686, at \*3 (N.D. Oh. 2010).

<sup>36</sup> *Talent Agency Claims Trade Secrets of Representing Celebrities Stolen*, TRADE SECRETS BLOG (May 7, 2010), <http://wombletradesecrets.blogspot.com/2010/05/talent-agency-claims-trade-secrets-of.html>.

<sup>37</sup> *Id.*

<sup>38</sup> IMG Worldwide, Inc.’s Response to Defendant’s Motion to Dismiss or Transfer at 13-16, IMG Worldwide, Inc. v. Baldwin, No. 1:10-cv-794 (N.D. Ohio 2010).

<sup>39</sup> *Talent Agency Claims Trade Secrets of Representing Celebrities Stolen*, *supra* note 36.

<sup>40</sup> IMG Worldwide Inc. v. Baldwin, No. 10-CV-794, 2010 WL 3211686, at \*6 (N.D. Oh. 2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 7.

restrictive covenant claims, arose from the obligations of Baldwin's employment agreement.<sup>43</sup> Baldwin, by filing on the day of his resignation, had filed his suit in California, so the Ohio court decided not to remove it from the first to file rule's reach.<sup>44</sup> IMG argued that Baldwin's suit amounted to an "anticipatory strike" that constituted an exception to the first to file rule.<sup>45</sup> Judge O'Malley withheld judgment on the anticipatory strike argument, deferring to the California courts to decide because it would be inappropriate for the Ohio court, as the "second-filed court", to evaluate whether the circumstances of the case justified an exception to the first to file rule.<sup>46</sup>

In the wake of these lawsuits being filed, CAA eventually dismissed Baldwin as one of its agents.<sup>47</sup> Baldwin lasted at CAA from April 2010 to May 2010, and was listed as Co-Director of the Coaches Division. At the time, CAA declined to provide a reason for Baldwin's dismissal, but apparently continued to pay for Baldwin's legal fees related to his suit against IMG.<sup>48</sup> After leaving CAA, Baldwin served as Legal Counsel and Senior Associate for Professional Sports Representation, Inc., where he represented the professional and personal business interests of coaches and sports executives in the NFL and NCAA.<sup>49</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 8.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Futterman, *supra* note 8.

<sup>48</sup> *Id.*

<sup>49</sup> *Matt Baldwin*, LINKEDIN, <https://www.linkedin.com/pub/matt-baldwin/26/805/746> (last visited October 6, 2015).



At the time of this writing, Baldwin currently serves as the Chair of the Sports and Entertainment Law Group at Silverman, Thompson, Slutkin, and White, representing coaches and sports executives within the NCAA and the four major sports leagues.<sup>50</sup>

### **III. The Importance of Jurisdiction to Baldwin's Case**

As evidenced by IMG's preference to enforce Baldwin's Employment Agreement in Ohio, the laws governing employment contracts vary from state to state. In Baldwin's case, the laws in California and Ohio took two very different approaches to restrictive covenants. Under California law, a former employee has the right to "engage in competitive business for himself and to enter into competition with his former employer."<sup>51</sup> This law is found under section 16600 of the California Business and Professions Code, which states: "every contract by which anyone is restrained from engaging in lawful profession, trade, or business of any kind is to that extent void."<sup>52</sup> However, as IMG was well aware, Ohio law recognized restrictive covenants against a former employee as valid. Therefore, it is easy to understand why Baldwin wanted to have his case heard in California, so that he would be able to work and compete against IMG immediately.

Where an employee has already established legal residency in California, it becomes likely that an employee will be subject to California law, regardless of the provisions of his employment contract.<sup>53</sup> In order to establish California residency, Baldwin, or any other agent, would have to establish they are: "1) present in

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<sup>50</sup> *Id.*

<sup>51</sup> Christopher W.W. Harrington, *It's Not Personal. It's Strictly Business: How California Non-Competition and Trade Secret Law Demonstrate the Harsh Realities Facing Talent Agencies in the Sports and Entertainment Industries*, 10 U. DENV. SPORTS & ENT. L. J., 41, 48 (2011).

<sup>52</sup> CAL. BUS. & PROF. CODE § 16600 (2010).

<sup>53</sup> Harrington, *supra* note 51, at 56.

California for other than a temporary or transitory purpose; or 2) domiciled in California, but outside California for a temporary or transitory purpose.”<sup>54</sup> Thus, by entering into a lease for an apartment in Los Angeles on March 29, four days before leaving IMG, Baldwin could make his argument that he was domiciled in California for a purpose that was not temporary. Baldwin would be working for CAA, based out of California, with every intention of remaining there for the foreseeable future.

Baldwin’s argument relied heavily on a previous decision involving a former IMG attorney, Joseph Danzi, and his departure to Wasserman Media Group (“WMG”). Danzi, like Baldwin, signed an employment agreement with IMG that was verbatim to the agreement signed by Baldwin.<sup>55</sup> In his complaint filed in California Baldwin laid out the parallels between his case and Danzi’s:

40. In April of 2007, Danzi resigned from IMG and joined Wasserman Media Group (“WMG”), one of IMG's competitors. IMG sent letters to Danzi threatening litigation and asserting, among other things, that the non-competition clause was enforceable against him and WMG.

41. Danzi and WMG brought an action against IMG Worldwide, Inc. (the same defendant in this action) and one of its affiliates, seeking a declaration that, among other things, the non-competition clause in Danzi's contract with IMG was unenforceable against Danzi as a California resident under California law, notwithstanding the fact that the contract specified the choice of Ohio law -- the same issue that is presented in this case.

42. Danzi and IMG stipulated to arbitrate the dispute in New York and were afforded a full and fair opportunity to litigate -- and did actually litigate - the choice of law issue. After extensive briefing by the parties, the arbitrator sided with Danzi, holding that California law, not Ohio law, applied to the restrictive covenants in Danzi's

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<sup>54</sup> *Id.*

<sup>55</sup> See Complaint for Declaratory Relief, at ¶ 39, Baldwin v. IMG Worldwide, Inc., No. CV10-02408-GW (C.D. Cal. 2010).

contract, thus eviscerating IMG's position regarding the enforceability of such covenants against a California resident.

43. Thereafter, Danzi and IMG entered into a Consent Award in favor of Danzi, dated June 26, 2008, which incorporated by reference the April 30, 2008 order. Pursuant to the Award, IMG agreed that the non-competition provisions "may not be enforced against Danzi in any way and IMG covenants not to sue Danzi for any alleged violation of or activity inconsistent with those provisions." (*See* Exhibit F, June 26, 2008 award at page 2).

44. Danzi and WMG petitioned this Court to confirm the Consent Award in the form of a judgment. By order dated July 30, 2008, this Court granted such relief and confirmed the Award as a final judgment. (*See* Exhibit E, July 30, 2008 order at pages 1-3).

45. IMG is thus bound by this Court's final judgment that California law applies to the non-competition clause set forth in IMG's contract with Danzi, and under well-settled principles of collateral estoppel, is precluded from relitigating this same issue with respect to IMG's contract with Baldwin.<sup>56</sup>

As a result of the court's enforcement, Danzi was able to take his former clients at IMG with him to join WMG.<sup>57</sup>

Additionally, California law would have likely provided a favorable outcome for Baldwin regarding IMG's trade secret claims. California law defines a trade secret as information that derives independent economic value because it is not generally known to the public. Further, information can be classified as a trade secret so long as it "has not actually been ascertained by others in the industry."<sup>58</sup> Client lists, such as those allegedly taken by Baldwin, have generally not been classified as protected trade secrets.<sup>59</sup> Information regarding client representation

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<sup>56</sup> Complaint for Declaratory Relief, at ¶ 40-45, Baldwin v. IMG Worldwide, Inc., No. CV10-02408-GW (C.D. Cal. 2010)

<sup>57</sup> Mullen, *supra* note 6.

<sup>58</sup> CAL. CIV. CODE § 3426 (2010).

<sup>59</sup> Harrington *supra* note 51, at 61.

is generally readily accessible to any agent involved in the industry, along with the general public. Therefore, such a list would have very little economic value.

These principles of section 16600 have been used to decide another similar case arising out of an agent-agency dispute in California. In 2003, NFL agent David Dunn left the powerful agency of Steinberg, Moorad, and Dunn, Inc. (SMD), and started his own competing firm.<sup>60</sup> SMD was “decimated” after Dunn’s departure, and the approximately fifty clients he took with him.<sup>61</sup> The U.S. Court of Appeals for the Ninth Circuit reversed a district court judgment in favor of SMD for \$44 million on the grounds that Dunn’s non-competition clause in his SMD employment contract was invalid under section 16600.<sup>62</sup> Additionally, the court reasoned that Dunn was not “unique or irreplaceable” as an employee to SMD.<sup>63</sup>

Baldwin provided a potential strategy for future agents in departing from their agency to California.<sup>64</sup> California statutes will only enforce a restrictive covenant not to compete in a case where the employee is so valuable to the company that his departure would essentially cripple the former employer’s ability to effectively compete.<sup>65</sup> For a great majority of agents, their departure would not create this type of impact on their former agency; therefore allowing an agent to effectively leave his current agency and begin work with a new agency in California immediately, regardless of any existing restrictive covenant in his employment contract.

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<sup>60</sup> *Id.* at 49.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 50.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 57.

<sup>65</sup> *Id.* at 50.

#### IV. Practical Advice to Coaches

Even though Baldwin was not a big name, the case drew interest around the industry because it pitted IMG against CAA, two industry giants.<sup>66</sup> Baldwin's attorney, Adam Kaiser, claimed early on that "IMG was pursuing the case not for information about the files but 'to scare the bejesus out of any of its employees who are considering moving to California talent agencies.'"<sup>67</sup> In the end, however, the talk of a potential landscape altering case was all for naught as Baldwin and IMG settled their suits out of court.<sup>68</sup> Representatives from both sides claimed success from the settlements.<sup>69</sup> An IMG spokesperson claimed that the agency had reached its goals, because under the settlement Baldwin agreed to abide by the terms of his contract, preventing him from soliciting IMG clients for another year.<sup>70</sup> Meanwhile, Baldwin's attorney stated that IMG had misrepresented the terms of the agreement and held that Baldwin had settled under favorable terms.<sup>71</sup>

Former Chairman of SFX Sports Group David Falk addressed the issue of agents changing agencies by saying "the question is not that it's being done. The question is, is it being done ethically?"<sup>72</sup> Talent agencies such as IMG generally bring legal actions against former employers to prevent direct competition, but

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<sup>66</sup> Mullen, *supra* note 6.

<sup>67</sup> Matthew Futterman, *CAA Dismisses Talent Agent Hired From Rival Firm*, WALL ST J. (May 28, 2010), <http://www.wsj.com/articles/SB10001424052748703630304575270912343901640>.

<sup>68</sup> Liz Mullen, *IMG, Matthew Baldwin Both Claim Victory in Lawsuit Settlement*, SPORTS BUSINESS DAILY (Sep. 16, 2010), <http://www.sportsbusinessdaily.com/Daily/Issues/2010/09/Issue-4/Sports-Industrialists/IMG-Matthew-Baldwin-Both-Claim-Victory-In-Lawsuit-Settlement.aspx?hl=IMG%2C%20Matthew%20Baldwin%20settle&sc=0>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Mullen, *supra* note 6.

additionally to prevent the employee from taking clients.<sup>73</sup> Some of the most high profile agents, such as Drew Rosenhaus, in the business have been accused of “poaching” clients.<sup>74</sup> The practice of defecting agents taking their clients along with them in their move has become a commonplace, generally accepted practice.<sup>75</sup> While this has become common, agents and their agencies have become frustrated with the practice and its resulting loss on their bottom lines.<sup>76</sup> The use of non-solicitation provisions in the agents’ contract, like Baldwin’s, can be enforced to prevent poaching if it is specifically written as to whom the agent cannot solicit.<sup>77</sup> Clients, coaches, or players have the ability to choose who represents them and decide to follow an agent to a different agency. Agencies such as IMG or CAA have no authority to prevent a client from willingly following an agent to another agency.<sup>78</sup>

The key issue becomes whether the agent has violated the duty of loyalty to his agency. The duty of loyalty states: “throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf . . . the principal’s competitors.”<sup>79</sup> Under this duty, an agent cannot actively solicit clients away from the firm in preparation for future

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<sup>73</sup> Harrington, *supra* note 51, at 58.

<sup>74</sup> Adam Fusfeld, *Is Drew Rosenhaus Poaching Clients From Other NFL Agents?*, BUSINESS INSIDER (Dec. 28, 2010), <http://www.businessinsider.com/drew-rosenhaus-angers-nfl-agents-by-poaching-clients-2010-12>; *Sports Agency Sued For Poaching NBA Player With ‘Hedonistic Parties’*, BREITBART.COM (Oct. 30, 2010), <http://www.breitbart.com/sports/2013/10/30/nba-agent-sued-for-poaching-player-with-hedonistic-parties/>.

<sup>75</sup> Harrington, *supra* note 51, at 43.

<sup>76</sup> Fusfeld, *supra* note 74.

<sup>77</sup> Harrington, *supra* note 51, at 78.

<sup>78</sup> *Id.*

<sup>79</sup> RESTATEMENT (THIRD) OF AGENCY § 8.04 (2007).

competition.<sup>80</sup> However, the agent is permitted to engage in other preparatory behavior for future competition against the firm.<sup>81</sup> For the client, coach or player, they are free to follow the agent, so long as the agent did not request the client to follow him before his departure from his current agency.

When an agent leaves an agency, the former employer generally seeks to retain the commissions the agent earned from existing marketing/endorsement deals for clients of the agency. This opportunity exists because the agency remains the “agent” as it is defined in the endorsement agreement.<sup>82</sup> The agency is generally able to retain these commissions from endorsement deals until they expire.<sup>83</sup> The agency may be stung by the loss of the client if he chooses to follow his agent, but has a greater concern with the commissions due to them from these existing agreements.

## **V. Conclusion**

While the dispute between Baldwin and IMG did not create the type of industry changing result some had expected, it highlighted fundamental issues within the industry. Chief among them is the potential avenue to get around restrictive covenants enforced against an agent by his agency that Baldwin used to his advantage. California’s employee friendly restrictive law, and the requisite establishment of residency, presents an opportunity for agents looking to leave their current agency to retain their ability to work in the industry without lost time. Additionally, there is the duty on agents not to actively solicit clients in advance of

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<sup>80</sup> Harrington, *supra* note 51, at 77.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 88.

<sup>83</sup> *Id.*

their decision to leave their current agency. Lastly, for most agencies the imposition of these restrictive covenants is done to protect their revenue streams and client lists. Thus it becomes important for clients to recognize that they may follow their agent wherever, but fees owed from current deals will be collected by the agency at the time the contract was signed.

### **Addendum**

Attached below is the Employment Agreement Baldwin had signed with IMG at the beginning of his employment, and was later the center of his legal controversy.

Matthew Baldwin

#### Employment Agreement

THIS AGREEMENT sets forth certain conditions of your employment with IMG Worldwide, Inc., an Ohio corporation. IMG Worldwide, Inc. employs the employees of the International Management Group of companies in the United States. These companies include, without limitation, IMG Worldwide, Inc.; International Merchandising Corporation; Trans World International, Inc.; IMG Motorsports-Cleveland, Inc.; and IMG Motorsports-Detroit, Inc. The following paragraphs constitute the agreement between (hereinafter referred to as "Employee") and IMG Worldwide, Inc., on behalf of the companies of the Mark McCormack Group of Companies (hereinafter referred to as "IMG").

Employee and IMG agree as follows.

1. Term. The term of employment shall be until terminated by either party. Employee agrees to conform to the rules and regulations of IMG. Employee understands that the term of employment and compensation can be terminated, with or without cause, at any time by IMG or by Employee. Employee acknowledges that no representative of IMG other than its Chief Financial Officer has the authority to make any oral or written agreement for employment for a specified period. Employee acknowledges that any agreement for employment for a specified period must be in writing and signed by IMG's Chief Financial Officer.
2. Salary. Employee's starting salary shall be as agreed payable semi monthly in arrears.



3. Benefit Programs. Employee shall be entitled to participate in the group benefit programs of IMG in effect for IMG employees, according to provisions of such programs.

4. Confidentiality. Employee will not, without consent of the President or a Senior Vice President or Corporate Vice President of IMG, divulge any information of a confidential, proprietary or trade secret nature relating to IMG or to any of its clients, properties, or customers, to anyone other than authorized personnel of IMG, either during Employee's employment with IMG or at any time thereafter. During Employee's employment with IMG, Employee will not use any confidential information relating to IMG, its clients, properties or customers, except in the course of Employee's duties. Following termination of Employee's employment with IMG, Employee will not make any use of any confidential or proprietary information relating to IMG, its clients, customers or properties. Disclosures of IMG confidential, proprietary or trade secret information could subject Employee to civil actions or criminal penalties.

5. Files/Ownership of Creations. (a) Employee acknowledges that files, documents and records of any kind relating to IMG and IMG's business, including materials created by Employee, are the property of IMG. They shall not be removed from IMG's offices except as required in the conduct of IMG's business, and shall be returned to IMG at the termination of Employee's employment. IMG's files, documents and records include files maintained in IMG's file rooms, files maintained on IMG's computer systems and on personal computers used for IMG's business, files maintained by company profit centers, files maintained by company executives, such as chronological files and suspense files, rolodex address files on 3 x 5 card files, files maintained by the Legal Department, information recorded on computer diskettes or other computer information storage media, computer printouts.

(b) Employee agrees that all creative materials, research, drafts, documents, surveys, source codes, programs, other deliverables and materials prepared by Employee for IMG (collectively the "Materials"), will be owned by IMG, and that Employee will cooperate with IMG to evidence and perfect its rights therein. Employee acknowledges that all such materials are works made for hire for IMG. If for any reason any or all of the Material are deemed not to be on a work-for-hire basis, by signing this agreement, Employee irrevocably assigns to IMG all right, title and interest to any materials created by employee for IMG. Any and all rights relating to the Materials, including all forms and derivatives thereof in all languages and all materials used in preparing the Materials, belong exclusively to IMG, throughout the world and in perpetuity. IMG, in its sole discretion, is entitled to dispose of any or all of those rights as it sees fit and is entitled to all proceeds from the disposition of those rights. Upon request of IMG and its

expense, Employee agrees to execute and deliver any and all documents or take any other action that IMG deems necessary to obtain, perfect, enforce or defend any and all copyright, patent, trademark or other intellectual property rights or protections in and to Materials, or otherwise vest in IMG ownership of Materials and intellectual property rights thereto throughout the world.

6. Representation of Existing and Prospective Clients, Properties, and Customers. During Employee's employment with IMG, Employee will not solicit nor represent any client, property or customer on behalf of anyone other than IMG, including on Employee's own behalf. For the period of two years following the end of Employee's employment with IMG, Employee will not directly or indirectly solicit or represent as a client, on Employee's own behalf or on behalf of another, or be employed by, any person or organization which: (i) was a client of IMG within the eighteen months next preceding the end of Employee's employment with IMG and, further, was a client with whom Employee had dealings while Employee was associated with IMG or was a client with whom employees reporting to Employee had dealings while Employee was associated with IMG; or (ii) was a prospective client of IMG who was actively solicited as such within the twelve months next preceding the end of Employee's employment with IMG and, further, Employee, or IMG employees reporting to Employee, participated in such solicitation.

7. IMG Personnel. During Employee's employment with IMG and for the twelve months following the end of Employee's employment with IMG, Employee will not, directly or indirectly, on Employee's own behalf or behalf of another, be involved with the hiring of, nor be hired by or associated with, any person who was an IMG employee or who provided substantial services to IMG at any time during the six (6) months next preceding the end of Employee's employment with IMG.

8. Restrictions re Certain Companies. For the twelve month period next following the end of your association with IMG (regardless of the reason for the end of that association and regardless of whether it was your choice or that of IMG) you will not, directly or indirectly, perform services in the nature of the services you performed for IMG on behalf of: SFX Entertainment or its affiliates, the Interpublic Group of companies or any successors or affiliated company of such entities

9. Arbitration. Unless the resolution of a particular dispute is barred by law, the parties agree to submit to arbitration any dispute related to the employment relationship and agree that the arbitration process shall be exclusive, final and binding means for resolving disputes which the parties cannot themselves resolve. Any arbitration hereunder shall be conducted under the Employment Dispute Resolution Rules of the American Arbitration

Association (“AAA”) as modified herein. Arbitration proceedings shall take place in Cleveland, Ohio, before a single neutral arbitrator who shall be a lawyer. All arbitration proceedings shall be confidential. Neither party shall disclose any information about the evidence produced by the other party in the arbitration proceeding, except in the course of judicial, regulatory, or arbitration proceeding, or as may be demanded by government authority. Before making any disclosure permitted by the preceding sentence, a party shall give the other party reasonable advance written notice of the intended disclosure and an opportunity to prevent disclosure. Each party shall have the right to take the deposition of one individual and any expert witness designated by the other party. Additional discovery may be had only where the arbitrator so orders, upon a showing of substantial need. Only evidence that is directly relevant to the issues may be obtained in discovery. Each party bears the burden of persuasion of any claim or counterclaim raised by the party. The arbitration provisions of this agreement shall not prevent IMG from obtaining injunctive relief from a court of competent jurisdiction to enforce the obligations of Paragraphs 4, 5, 6, 7 and 8 for which IMG may obtain provisional relief pending a decision on the merits by the arbitrator. Employee consents to the jurisdiction of Ohio courts for such purpose. The arbitrator shall have authority to award any remedy or relief that a court of the State of Ohio or federal court located in the State of Ohio could grant in conformity to applicable law on the basis of claims actually made in the arbitration. The arbitrator may allow reasonable attorney’s fees as a part of the award where the discretion to allow such fees is provided under applicable Ohio or federal law. Any arbitration award shall be accompanied by a written statement containing a summary of the issues in controversy, a description of the award, and an explanation of the reasons for the award. The arbitrator’s award shall be final and judgment may be entered upon such an award by any court. Employee’s share of the administration and arbitrator’s fees for the arbitration will be Two Hundred Fifty Dollars (\$250.00). The remainder of the administration and arbitrator’s fees will be paid by IMG. Any reference in this clause to IMG also refers to all subsidiary and affiliated entities, all benefit plans, sponsors and trustees of benefit plans, fiduciaries, administrators, officers and directors.

This arbitration procedure will be governed by the Federal Arbitration Act as will any actions to compel, enforce, vacate or conform proceedings, awards, orders of the Arbitrator or settlement under this procedure.

10. Miscellaneous. (a) Employee acknowledges and agrees that Employee is free of employment restrictions from former employers and that Employee is not a party to any agreement, the terms of which are inconsistent with the terms of this Agreement, or which would be breached by Employee’s services to IMG.

(b) Employee agrees to promptly furnish any new employer with a copy of this Agreement prior to the commencement of employment with any third party which is less than two years after the termination of Employee's employment with the Company.

(c) If any provision of this Agreement is found to be unenforceable by reason of being unduly broad or restrictive, then such provision shall be interpreted and enforced to such lesser extent as is not unduly broad or restrictive.

(d) The provisions of this Agreement shall be deemed to be severable, and the invalidity or unenforceability of any provision shall not affect the validity or unenforceability of any other provision. The breach by the Company of any obligation or duty to Employee shall entitle Employee to his or her appropriate remedy at law but shall not, of itself, relieve Employee of any other obligation set forth in the Agreement

(e) Employee agrees that any breach of this Agreement could cause irreparable harm to IMG and that in the event of such breach, IMG shall have, in addition to any and all remedies of law, the right to an injunction, specific performance or other equitable relief to prevent any violation of Employee's obligations hereunder

11. Choice of Law. The Agreement, except as provided in Paragraph 9, shall be interpreted and enforced in accordance with the substantive laws of the State of Ohio

12. Employee's Right to Consult with Administrative Agencies. Nothing in this Agreement is meant to foreclose the Employee's right to consult with or cooperate with any governmental agency but Paragraph 9 is meant to provide an arbitral forum to finally resolve any work-related claim the Employee may wish to pursue.

IN WITNESS WHEREOF, IMG and Employee have executed this Agreement as of the date and year set forth below.

Employee

IMG Worldwide, Inc

Matthew Baldwin

Susan D. Austin

SIGNED at Cleveland, Ohio, this 20 day of Aug. 2004.

Sean McCarthy is a third-year law student at Marquette University. He is a candidate for the NSLI Sports Law Certificate upon his graduation in May 2016. Sean is a graduate of Iowa State University, with B.A. in Political Science. Sean currently serves as the Articles & Survey Editor of the *Marquette Sports Law Review*.