CARLTON FIELDS

# Preparing to Compete is Not a Violation of Non-Compete Agreement

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In *Avisena, Inc. v. Alberto C. Santalo, et al.*, Case No. 3D10-178 (3d DCA May 4, 2011), the Third District Court of Appeal held that the trial court properly denied a former employer's motion for a preliminary injunction against a former employee where the former employer, Avisena, alleged that the former employee, Santalo, violated a non-competition clause in the employment agreement (the "Agreement"). The court held that the motion for preliminary injunction was properly denied because Avisena had not established a substantial likelihood of success on the merits. Santalo was terminated without cause on September 15, 2008. In January of 2009, Santalo incorporated a company. On September 16, 2009, Santalo began to directly compete with Avisena through the new company. Avisena sought a preliminary injunction against Santalo, alleging that Santalo had violated the Agreement. The court first considered whether Santalo had violated the Agreement when he competed with Avisena more than twelve months after he was terminated. The court found that the Agreement clearly and unambiguously provided for a twelve-month restricted period following an employee's termination without cause. Because it was undisputed that Santalo had been terminated without cause, the twelve-month restricted period applied. Accordingly, Santalo's actions more than twelve months after termination did not violate the Agreement. The court then turned to whether Santalo had violated the Agreement during the restricted period. The court found that there was no record evidence that Santalo solicited Avisena's customers or employees during the restricted period. Instead, Santalo had incorporated a company during the restricted period, and the company later competed with Avisena. The court held that this was not a violation of the Agreement because mere preparation to open a competing business is insufficient to demonstrate a violation.

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