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Former Dell exec now at HP sued over stock options

Premium content from Austin Business Journal by Christopher Calnan, Staff Writer

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Dell Inc. is suing a former high-level sales executive to recover more than \$780,000 in company stock options he received before going to work for arch rival Hewlett-Packard Co.

The lawsuit involving Round Rock-based Dell and [James Merritt](#) highlights the competitive nature of the technology industry while underscoring the intricacies of noncompete agreements required by a growing number of employers.

The suit, which was filed in the Superior Court of the state of Delaware in January, alleges that Merritt, senior vice president and general manager of HP's enterprise servers and storage and networking sales in Asia Pacific and Japan, engaged in conduct detrimental to Dell.

The complaint filed by Dell (Nasdaq: DELL) cites three stock option award agreements that indicate HP is a "direct competitor of Dell," suggesting that his similar work at HP (NYSE: HPQ) hurt Dell's business in the region.

Merritt worked at Dell for 13 years and was president of Dell Japan before he moved to HP. He resigned his Dell position on Dec. 28, 2011, according to court documents.

On Jan. 26, the company requested he return \$362,000 generated from the nonstatutory stock option agreement, nearly \$349,000 from a restricted stock unit agreement and nearly \$70,000 from a performance based stock unit agreement.

In mid September, the court denied Merritt's attorneys request to depose CEO Michael Dell "to discover facts related to a meeting with [Michael] Dell that occurred in Merritt's home in February 2006," according to a court filing.

Dell attorney [Jason Boulette](#), a partner with Austin-based Boulette & Golden LLP, couldn't be reached for comment. But Dell spokesman [David Frink](#), who declined to comment on Merritt's noncompete agreement, said it's not unusual for large companies to exercise so-called clawbacks.

"The expectation that an executive departing to go to work for a competitor will return proceeds from the company's equity incentive awards to the company's shareholders is common across industry," he said. "It was clear in his equity award agreements that Mr. Merritt would be required to return the equity if he went to a competitor, and Dell expects it to be returned."

Dell generates about 20 percent of its revenue from the Asia Pacific-Japan market, Frink said.

It's unclear how much of HP's business is from Asia Pacific-Japan. Last year, the company generated about two-thirds — or \$83.1 billion — of its revenue from non-U.S. markets, according to a filing with the U.S. Securities and Exchange Commission.

Noncompete clauses, agreements that temporarily prohibit an employee from working directly against a company after separating, are usually required of higher level executives at major technology companies. But the terms of such agreements vary, and the typical term length is for two years in Texas, Austin-based lawyer and employment law specialist [Emily Frost](#) said.

Dell's lawsuit suggests that it's likely Merritt's noncompete agreement did not include a liquidated damages clause like that in his stock option agreement, providing for automatic damages if he breached the agreement. That would leave the company with the option of seeking injunctive relief and actual damages, which can be more difficult to obtain, Frost said.

HP officials didn't respond to requests for Merritt's contact information and company spokesman [Michael Thacker](#) said in an email, "We have no comment, as HP is not a party in the lawsuit."

Dell, which employs an estimated 12,000 workers in Central Texas, is the No. 3 computer maker in the world. HP is No. 1. Both companies are going through a measure of turmoil as the tech industry takes a downturn during a global recession.

Notably, in 2009, Dell prompted a lawsuit when it recruited 27-year IBM Corp. (NYSE: IBM) veteran and acquisition specialist [Dave Johnson](#). IBM filed the suit against Johnson alleging breach of contract, but a judge subsequently sided with Johnson.

In April, IBM's former vice president of federal health care business, [Thomas Romeo](#), was required to return \$165,000 in retention bonuses after he joined Accenture Plc (NYSE: ACN).

The use of noncompete agreements has surged in the last 30 years as workers became more mobile and intellectual property became just as valuable as physical property. And their use has become most prevalent in the technology sector, said [Matthew Marx](#), an assistant professor of technological innovation, entrepreneurship and strategic management at the Massachusetts Institute of Technology.

And though the number of noncompete lawsuits has surged, the effect of such agreements is much more far reaching. Marx said workers are intimidated by noncompete clauses, resulting in lower earnings for workers forced to change sectors to avoid violating the agreements.

"Lawsuits are only the tip of the iceberg," he said. "The real thing is [workers] were threatened. ...

It's the chilling effect."

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