SESSION 804

Anatomy of a Non-Compete

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Daniel R. Kelly, Felhaber Larson

Table of Contents

I. INTRODUCTION

As relevant for this presentation, a non-compete covenant is an agreement between an employer and its employee by which the employee agrees not to enter into direct or indirect competition with the employer following the cessation of the employment relationship. Sometimes an agreement will include related provisions, such as:

- a non-solicitation covenant (prohibits a former employee form soliciting the employer's current and prospective customers);
- a trade secret/confidentiality provision, (prohibits a former employee from using or disclosing the employer's confidential or proprietary information);
- an anti-raiding provision (prohibits a former employee from hiring away the employer's other employees); or
- a shop rights provision (gives the employer ownership rights to any inventions created by the employee during the employment relationship)

This presentation will discuss various provisions that might be included within a non-compete agreement under Minnesota law. An exemplar non-compete agreement is included in the addendum. While all the actual provisions might not find their way into every executed non-compete agreement, they are still issues that should be considered when drafting every non-compete agreement.

II. BASIC NON-COMPETE PROVISIONS

This subsection covers basic non-compete considerations that must be made for every non-compete. A failure to do so could result in an unenforceable (in whole or in part) non-compete covenant.

Generally speaking, non-compete agreements are looked upon with disfavor as partial restraints on trade. *See Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 630 (Minn. 1983); *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898 (1965)). As a result, they are strictly construed and not extended beyond the true intent of the parties. *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 296 (Minn. App. 1995). That being said, non-compete agreements are enforceable if properly considered, drafted, and implemented. To be enforceable, a non-compete covenant must: (A) be supported by independent consideration; (B) protect a legitimate employer interest; and (C) be reasonable in scope, duration, and geographic territory.

A non-compete without adequate consideration is unenforceable. A non-compete with unreasonable scope, duration, or geographic territory may be modified by a court under the "blue pencil" rule. Under this rule, a court may take an overly broad restriction and only enforce it to the extent it is reasonable. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 n.1 (Minn. 1980) (adopting the rule for employment contracts).

That being said, a court is not required to modify an unreasonable non-compete. *See Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88-89 (Minn. App. 1985) (no abuse of discretion where trial court failed to "blue pencil" the contract). Further, such "blue-penciling"

must occur at the district court level—an appellate court may not engage in such a modification. *See Yonak v. Hawker Well Works, Inc.*, A14-1221, 2015 Minn. App. Unpub. LEXIS 304, at *7 (Minn. App. Apr. 6, 2015).

A. Independent Consideration

Relevant Language: "In consideration of [Company's employment of Employee/salary increase/other consideration], the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows . . . ."

Explanation: As discussed above, a non-compete covenant must be supported by independent consideration to be enforceable. Independent consideration is a benefit to the employee that must be bargained for and must provide a "real advantage" to the employee. *See Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983). Examples of ordinarily adequate consideration might include: (a) employment (if non-compete signed at the inception of the employment relationship); (b) increased compensation or benefits; (c) a bonus for signing non-compete agreement; (d) a stock offer; and (e) a promotion or increase in authority and responsibility.

If the non-compete is offered and signed mid-employment, the continued employment, by itself, is generally NOT sufficient consideration; the agreement must be supported by independent consideration. As with non-competes signed ancillary to the initial employment contract, the mid-employment non-compete must be bargained for and provide a "real advantage" to the employee. *Compare Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (finding that non-compete signed mid-employment was not supported by adequate consideration because pay increase was given to all employees, not just those who signed the non-compete) *with Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980) (finding that non-compete signed mid-employment was supported by adequate consideration because employee continued employment for 10 years and advanced to a position within the agency which would not have been open to him if he had not signed agreement). In other words, promotions and salary increases or other economic and professional benefits must be "attributable to" to the execution of the mid-employment non-compete. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993).

For instance, where only some employees sign a non-compete, "if both signers and nonsigners of a non-compete agreement receive the same benefits under an associated compensation plan, a court cannot find that an employee's signing of the non-compete agreement was a condition of receiving the compensation plan. In such situations, therefore, there is no bargaining and no consideration." *Nott Co. v. Eberhardt*, A13-1061, A13-1390, 2014 Minn. App. Unpub. LEXIS 528, at *10 (Minn. App. June 2, 2014) (internal citation omitted). As another example, the Minnesota Court of Appeals very recently affirmed a district court's denial of a motion for a temporary injunction on the ground that a new restricted stock unit program (which did not guarantee any award of RSUs) did not constitute "the negotiated, independent consideration required under Minnesota law." *Valspar Corp. v. Mueller*, A16-1113, 2017 Minn. App. Unpubl. LEXIS 278, *7 (Minn. App. Apr. 3, 2017).

Finally, while an expression of the consideration may not necessarily be required (although it is always a good practice), non-compete agreements subject to the statute of frauds may be deemed unenforceable if the expression is not stated. *See JAB, Inc. v. Naegle*, 867 N.W.2d 254, 256-57 (Minn. App. 2015) (refusing to enforce a non-compete covenant because it covered a 24-month period (thus not performable within a year) and because the written agreement did not express the "consideration or any benefit to be conferred on employees who signed it").

B. Reasonable Scope

Relevant Language: "The Parties acknowledge that the limitations contained herein as to time, geographical scope, and scope of activity to be restrained . . . do not impose a greater restraint than is necessary to protect the goodwill, Confidential Information, and other legitimate business interests of Company, including, but not limited to, avoiding unfair competition."

Explanation: To be enforceable, the non-compete must protect a "legitimate business interest" of the employer. *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898 (Minn. 1965). Considerations include: (a) the employer's goodwill, customer relationships, trade secrets, or confidential information; (b) the amount of contact between the employee and customers; (c) evidence of direct competition; and (d) whether the employer has enforced non-competes against other employees.

This factor asks whether the non-compete is broader than necessary to protect a legitimate employer interest. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998). For instance, while a non-compete may prevent a former employee from appropriating the employer's relationships with customers, the Minnesota Court of Appeals has found as overbroad a restriction on an employee taking his preexisting customers with him after he left. *Sysdyne Corp. v. Rousslang*, A13-0898, 2014 Minn. App. Unpub. LEXIS 189, at *11 (Minn. App. Mar. 10, 2014) (This example would likely be different in the context of a business sale, where a company purchased another company (and thereby its client relationships)). As a further example, where an employee's contact with clients were merely a "cold calls," did not involve an ongoing relationship, and the employee had no access to confidential information, there was no "legitimate business interest" in protecting the employer's goodwill. *Alpine Glass v. Adams*, C4-02-804, 2002 Minn. App LEXIS 1392, at *6 (Minn. App. Dec. 17, 2002).

While most courts will not treat as dispositive that the employee agreed, as in the provision above, that the scope of the restriction is reasonable and necessary to protect the legitimate business interest of the company, it can be relevant. *Compare Rash v. Toccoa Clinic Medical Assocs.*, 320 S.E.2d 170 (Ga. 1984) ("[I]t should be noted in the case at bar that the appellant, in executing the covenant in question, expressly agreed that the covenant was 'reasonable' and that breach of the covenant 'would work harm' to the partnership."), *with Alw Mktg. Corp. v. Hill*, 422 S.E.2d 9, 13 (Ga. Ct. App. 1992) ("Hill's agreement that the covenant are reasonable does not salvage what is inherently unreasonable, uncertain and unenforceable, as a matter of law to be reasonably determined by courts.").

C. Reasonable Duration

Relevant Language: " 'Restricted Period' shall mean the period of time during Employee's employment with Company and for [X months/years] after the termination of Employee's employment with Company.

* * *

During the Restricted Period, Employee shall not, directly or indirectly, work within the Territory for any Competitor"

Explanation: Under Minnesota law, a non-compete agreement will only be enforced for a length of time that is "necessary for the protection of the business or good will of the employer." *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 899 (Minn. 1965). Courts tend to look at two different standards to determine whether the duration of the non-compete is reasonable: (i) the length of time necessary so that the employer's customers no longer identify the former employee as working for the employer; or (ii) the length of time necessary for the employer to hire a replacement employee and for that employee to learn the fundamentals of the employer's business. *See Klick v. Crosstown State Bank, Inc.*, 372 N.W.2d 85, 88 (Minn. App. 1985). Courts may also consider whether the employer is particularly vulnerable to competition due to its size or age. *See Yonak v. Hawker Well Works, Inc.*, A14-1221, 2015 Minn. App. Unpub. LEXIS 304, at *9-10 (Minn. App. Apr. 6, 2015).

There is no bright-line rule as to whether a certain duration of time is reasonable. Two years is an amount of time typically found to be reasonable.

D. Reasonable Geographic Territory

Relevant Language: " 'Territory' shall mean the entire geographical area [where Employee works for Company at the time of the termination of Employee's employment with Company, and any territory where Employee worked for Company at any time during the twenty four (24) calendar months prior to the termination of Employee's employment with Company, and where Company continues to do business] [OR] [of state/country/within XXX miles of [city]].

* * *

During the Restricted Period, Employee shall not, directly or indirectly, work within the Territory for any Competitor."

Explanation: The reasonableness of the geographic restriction is fact specific and depends on the employer's business and the position of the employee. The best practice is to limit the geographic restriction to areas where the employee actually worked for the employer. *See BMC Software, Inc. v. Mahoney*, No. 15-cv-2583, 2015 U.S. Dist. LEXIS 74318, at *20 (D. Minn. June 9, 2015). However, given the realities of modern commerce, it is possible that this could mean that a geographic restriction could reasonably encompass a global scope. *See Yonak v. Hawker Well Works, Inc.*, A14-1221, 2015 Minn. App. Unpub. LEXIS 304, at *8 (Minn. App. Apr. 6, 2015).

While the absence of a geographic limitation is not necessarily fatal, many courts will consider such a scope to be unreasonable. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) ("A restrictive covenant lacking a territorial limit perhaps will often be held to be unreasonable. Nonetheless, we are reluctant to enunciate a per se rule barring enforceability of all restrictive covenants lacking such a limit."). Courts are more likely to allow an unrestricted geographic territory if it is substituted or complemented by a customer restriction, as discussed below. That being said, it is always the best practice to have a reasonable geographic limitation.

E. Anti-Solicitation Provision in Addition to or in Lieu of Geographic Limitation

Relevant Language: "During the Restricted Period, Employee agrees not to, directly or indirectly, solicit or perform services for Customers for any Competitor.

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'Customer' or 'Customers' shall mean those customers or prospective customers of Company with whom Employee or any other Company employee working under Employee's supervision or at Employee's direction have had direct business-related contact in the twenty four (24) months prior to the termination of Employee's employment with Company."

Explanation: As referenced above, court is most likely to allow for an unrestricted geographic limitation if the non-compete is limited in scope to a restriction on the solicitation of the employer's customers, accounts, and lead sources. For example, the Minnesota Court of Appeals granted an injunction on a non-compete agreement where, although there was no geographic limitation in the agreement, the agreement was limited to 12 customers and three leads. *Hart Forms & Sys. v. Goettsch*, No. C3-90-1791, 1990 Minn. App. LEXIS 1212, at *-7-8 (Minn. App. Dec. 11, 1990).

Additionally, to be enforceable, the restriction with respect to customers must be with customers with whom the employee had direct business-related contacts. The Minnesota Court of Appeals has indicated that a non-compete covenant should be restricted only to an employee's former customers, not all of a business' customers, unless the employee had access to information about those other customers which would aid him in soliciting their business. *Webb Pub. Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. App. 1987). Thus, as with many of these provisions, the exact scope of the restriction should be tailored to the particular employee.

III. ADDITIONAL SUBSTANTIVE PROVISIONS

In addition to the above provisions, employers may wish to include provisions relating to the employment status of the employee, the employee's past employment relationships, and the employee's future employment relationships.

A. Employment at Will

Relevant Language: "Employee specifically recognizes that nothing in this Agreement alters the fact that his or her employment with the Company is on an at-will basis. The Company

reserves the discretion to terminate Employee's employment at any time, with or without cause or notice, and Employee has the right to separate from employment at any time, with or without cause."

Explanation: This provision is only necessary to the extent the employer wishes for an employee to be at-will. If a non-compete is part of an employment contract containing a term of employment for the employee, this provision is not necessary.

The purpose of this provision is to clarify that nothing in the non-compete agreement changes the employee's at-will status. The issue arises from *Pine River State Bank v. Mettille*, where the Minnesota Supreme Court held that an employee handbook containing various policies constituted a unilateral contract that altered the conditions of employment for an at-will employee. 333 N.W.2d 622, 626-27 (Minn. 1983). Creative employees have tried to apply these principles to non-compete agreements. *See Stedillie v. Am. Colloid Co.*, 767 F. Supp. 1502, 1506 (D. S.D. 1991) (Plaintiff argued (unsuccessfully) that a non-compete agreement altered his status as an at-will employee). Thus, out of an abundance of caution, this provision operates to preclude such an argument.

B. Notice to Prospective Employers/Notice to Company

Relevant Language: "During the Restricted Period, Employee agrees to provide a copy of this Agreement to any prospective new employer of Employee that is a Competitor and to notify such prospective new employer of the covenants and obligations set forth herein.

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During the Restricted Period, Employee agrees that if Employee has contact regarding employment or potential employment with any Competitor, the Employee will immediately notify Company of the contact in writing by providing said notice to his/her immediate supervisor"

Explanation: The purpose of this provision is to both prevent a competitor from poaching current employees, and to assist with pursuing a claim against the competitor for tortious interference with the non-compete agreement.

In order to succeed on a tortious interference of a contractual relationship, the employer must prove: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998). This provision obviously relates to the second element: the competitor's knowledge of the contract. While it does not guarantee that the competitor will become aware of the non-compete agreement, it will mean that either: (1) the employee complies with disclosure requirement and informs the competitor that a non-compete agreement exists, meaning the employer has a basis to claim tortious interference; or (2) the employee fails to make the disclosure to the competitor, meaning the employer has an additional breach of contract claim against the former employee.

C. No Conflicts Provision

Relevant Language: "The Employee represents and warrants to the Company that entering into this Agreement and performing her obligations will not conflict with or constitute a breach under any other agreement or contract to which the Employee is a party or any other obligation by which the Employee is bound."

Explanation: This provision serves as a counterpart to the new employer disclosure in that it attempts to preclude tortious interference claims against the employer. By having a new employee agree that he or she is not subject to a prior non-compete agreement, at least not one under which the new employment would constitute a breach, the employer is in a better position to argue that it was not aware of any non-compete agreement, or that it did not procure the breach thereof. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998).

D. Confidentiality Provision

Relevant Language: "Employee acknowledges that Employee will occupy a position of trust and confidence with Company, and that Employee will have access to confidential and proprietary information and trade secrets of Company, all of which are the unique and valuable property of Company. Employee acknowledges and agrees that, among other things, Company's [business methods, advertising programs, referral sources, marketing strategies, software, other relevant business information] (the "Confidential and Proprietary Information") that have been developed through the expenditure of substantial time, effort and money which Company wishes to maintain in confidence and withhold from disclosure to other persons. Accordingly, as a material inducement for Company to enter into this Agreement, Employee acknowledges and agrees that Employee will become intimately involved and/or knowledgeable in regard to the Company's business and will be entrusted with the Company's Confidential and Proprietary Information, and both during employment and after any termination thereof, Employee will use such information solely for the Company's benefit and maintain as secret and will not disclose any of the Confidential and Proprietary Information to any [third party (except as Employee's duties may require)]/[any Competitor] without Company's prior express written authorization.

Employee acknowledges and agrees that all tangible property, documents, files, electronic records or data, or records or materials of any sort pertaining to the Employer's business, including anything containing Confidential and Proprietary Information, whether prepared by Employee or otherwise coming into Employee's possession or control, are the sole and exclusive property of Employer and that Employee has no right to keep or use such documents or things following termination of employment. Employee agrees that, upon termination of employment, Employee shall not retain any such documents or things in any form whatsoever and will immediately return them to Company, and destroy any copies in a personal hard drive, email, or other digital storage format maintained by Employee."

Explanation: One of the legitimate employer interests that may be protected by a non-compete agreement is a company's confidential and proprietary information. The scope of protection of confidential and proprietary information will vary from business to business.

Confidentiality provisions are subject to the same "independent consideration" limitation as non-compete provisions generally. *See C.H. Robinson Worldwide, Inc. v. XPO Logistics, Inc.*, A13-1797, 2014 Minn. App. Unpub. LEXIS 562, at *8-10 (Minn. App. June 9, 2014).

Additionally, something we see more and more frequently is an employee not only divulging confidential and proprietary information to a new employer, but actually taking property (often electronic records and data) containing such information. By containing a provision requiring the employee to return and/or destroy such electronic records and data, an employer has another ground to enforce the non-compete and obtain a temporary restraining order/preliminary injunction.

E. DTSA Disclosure

Relevant Language: "The disclosure of Confidential Information may result in claims against Employee by Company for violations of the Defend Trade Secrets Act which may include an award of exemplary damages and attorneys' fees. Consistent with the terms of the Defend Trade Secrets Act, the following notice is provided: An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law. An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual files any document containing the trade secret under seal; and does not disclose the trade secret, except pursuant to court order."

Explanation: Related to the preceding section, the protection of confidential and proprietary information via a non-compete agreement may implicate an employer's trade secrets. The Defend Trade Secrets Act (DTSA) is a federal law allowing the owner of a trade secret to sue a person or entity (such as a former employee) that steals a trade secret. 18 U.S.C. §§ 1831-1839. Most states have their own version, called the Uniform Trade Secrets Act. *See, e.g.,* Minn. Stat. ch. 325C. In order to be eligible to recover exemplary damages and attorneys' fees under the DTSA, an employer must provide notice of certain exceptions protected by the DTSA, as detailed above. *See* 18 U.S.C. § 1833(b)(3)(c).

IV. REMEDIES PROVISIONS

A. Attorneys' Fees

Relevant Language: "Employee shall be liable to the Company for any and all costs incurred by the Company, including reasonable attorneys' fees, in investigating and enforcing the provisions of this Agreement, regardless of whether the Company is required to initiate litigation to enforce the terms of this Agreement."

Explanation: Not surprisingly, Minnesota courts enforce the American rule in non-compete agreement disputes, which prevents a party from shifting its attorney fees to its adversary without a specific contract or statutory authorization. *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998); *see also Minn. Best Maid Cookie Co. v. Flour Pot Cookie Co.*, 412 N.W.2d 380, 386 (Minn. App. 1987) (denying request for attorneys' fees when non-compete agreement made no provision for attorney fees awards). To be clear, the Minnesota Supreme Court has recognized an exception—that is, when an attorneys' fee provision is not necessary—when a third-party (a competitor) causes the employer to enter into litigation against the employee to protect its rights under the noncompete agreement. *Kallok*, 573 N.W.2d at 363. That being said, the most sensible solution is to include an attorneys' fees provision within the noncompete agreement.

B. Injunctive Relief Provisions

Relevant Language: "Employee understands that if he or she fails to fulfill his or her obligations under this Agreement, the Company will be irreparably and immeasurably injured and the damages to the Company will be very difficult to determine. Therefore, in addition to any other rights or remedies available to the Company at law, in equity, or by statute, Employee hereby consents to the specific enforcement of this Agreement by the Company through an injunction or restraining order issued by an appropriate court, without the need of filing a bond or other security therefore. Employee acknowledges that, in the event Employee's employment with Company terminates for any reason, Employee will be able to earn a satisfactory livelihood without violating this Agreement."

Explanation: Often employers will seek injunctive relief in order to prevent a former employee from working with a competitor, or at the very least (depending when the employer discovers the breach) will prevent the employee from working further with the competitor. While there is no magic clause that will automatically entitle an employer to a TRO/preliminary injunction, certain clauses may at least provide some assistance.

Minnesota state courts consider five factors in deciding whether to grant a temporary restraining order/preliminary injunction:

1) *The relationship between the parties before the dispute*

   It is well-established that a TRO may be issued to prevent a former employee from breaching a non-compete. *See Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 451 (Minn. App. 2001) (describing the factor as "straightforward" when applied to a non-compete).

2) *The harm the plaintiff will suffer if relief is denied compared with the harm inflicted on the defendant if the injunction is issued.*

   Irreparable harm often takes the form of a threatened loss of goodwill, reputation, and business relationships. *Benfield, Inc. v. Moline*, 351 F.

Supp. 2d 911 (D. Minn. 2004). The failure to show irreparable harm is, by itself, sufficient grounds to deny a TRO. *Midwest Sys. v. Faulkner*, 1998 Minn. App. LEXIS 545, at *6 (Minn. App. May 19, 1998). A temporary restraint/injunction may be justified if the harm is still a threat; however, if the harm has already been inflicted, money damages may be sufficient to compensate the employer. *Wells Fargo Ins. Servs. USA v. King*, Civ. No. 15-CV-4378 PJS/JJK, 2016 U.S. Dist. LEXIS 8279 (D. Minn. Jan. 25, 2016).

For the employer, irreparable harm may be inferred from the breach of a non-compete. *Overholt Crop. Ins. Serv. Co. v. Bredeson*, 437 N.W.2d 698, 701 (Minn. App. 1989). This inference may be rebutted by evidence that the former employee has no hold on the goodwill of the business or its clientele. *Webb Pub. Co. v. Fosshage*, 426 N.W.2d 445, 448 (Minn. App. 1987).

"Substantial" harm to the former employee may prevent the issuance of a TRO. The Minnesota Court of Appeals has found the loss of the former employee's new job to be such "substantial" harm to justify denial of a motion for a TRO. *Midwest Sys.*, 1998 Minn. App. LEXIS 545 at *10 (also finding no irreparable harm to the employer); *see also Wells Fargo Ins. Servs. USA v. King*, Civ. No. 15-cv-4378, 2016 U.S. Dist. LEXIS 8279, at *27-28 (D. Minn. Jan. 25, 2016)

3) *The likelihood that one party or the other will prevail on the merits.*

This factor essentially requires a showing that the non-compete is enforceable. See Vital Images, Inc. v. Martel, Civ. No. 07-4195 DWF/AJB, 2007 U.S. Dist. LEXIS 77869, at *9 (D. Minn. Oct. 19, 2007) (issuing a TRO where "the non-compete provision is enforceable as modified"). This factor is the "primary factor" in determining whether to issue a temporary restraint. *Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. App. 1994); *see also Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 661 Minn. App. 2009) (describing it as the "most important" factor). If the non-compete is not supported by adequate consideration, denial of the motion for the TRO is appropriate. *See Free Spirit*, 1996 Minn. App. LEXIS 788 at *4.

4) *The public interest involved.*

It is not often that the public interest weighs heavily in favor of one party or the other. The District of Minnesota has noted that "this factor does not weigh for or against granting [injunctive relief] because the public interest favors both enforcing contracts and promoting competition." *Benfield, Inc v. Moline*, 351 F. Supp. 2d 911, 919 (D. Minn. 2004).

However, when a non-compete is reasonably structured, courts may favor the public interest in "the protection of legitimate business interests and the discouragement of unfair competition." *McNeilus Fin., Inc. v. Dininni*, Civ No. 02-4245, 2002 U.S. Dist. LEXIS 22822, at *13 (D. Minn. Nov. 21, 2002); see also Workers' Comp. Recovery v. Marvin, A03-1549, 2004 Minn. App. LEXIS 635, at *20 (Minn. App. 2004) ("The public interest is not served if a former employee is allowed to derive benefit from violating his employer's confidence and confidentiality after enjoying a relationship that provided her with considerable training and experience over the years.").

5) *The administrative burdens involved in enforcing the relief requested.*

In a typical case involving a single employee, it is unlikely that this factor would weigh against the issuance of a TRO. *See Inspecta-Homes of Am. v. Lilley*, C3-95-1597, 1995 Minn. App. LEXIS 1595, at *6 (Minn. App. Dec. 26, 1995); *D.L. Ricci Corp. v. Forsman*, C8-97-1597, C8-97-1969, 1998 Minn. App. LEXIS 461, at *13 (Minn. App. Apr. 28, 1998).

In the case of both a temporary restraining order and a preliminary injunction, the court must require the moving party to provide a bond for the payment of costs and damages that might be incurred or suffered by the party restrained or enjoined. Minn. R. Civ. P. 65.03; Fed. R. Civ. P. 65(c).

Given the various requirements for a TRO/preliminary injunction, it can therefore be useful to have the employee agree/acknowledge that the company will suffer irreparable harm in case of a breach, and that the employee will be able to earn a satisfactory livelihood without violating the noncompete agreement. That being said, courts are not necessarily bound by such an agreement. *See Bison Advisor LLC v. Kessler*, Civ. No. 14-3121, 2014 U.S. Dist. LEXIS 154805, at *9 (D. Minn. Oct. 30, 2014) ("While parties may agree contractually on the matter of irreparable harm, these agreements are not conclusive.").

It can also be useful, although certainly not dispositive, for the employer to consent to waiver of the bond ordinarily required to be filed upon the granting of a TRO. State courts appear more likely to at least entertain such a waiver. *Compare Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 297 (Minn. App. 1995) ("In the exercise of its discretion, a trial court may waive the security requirement."), *with Novus Franchising, Inc. v. Oksendahl*, 2007 U.S. Dist. LEXIS 52016, at *17 (D. Minn. July 17, 2007) ("Federal Rule of Civil Procedure 65(c) does not allow the parties to waive the bond-posting requirement."). At a minimum, regardless of the presence of a bond-waiver provision, given the mandatory language of Rules 65 the employer should be prepared to post a bond.

C. Waiver of Jury Trial

Relevant Language: "EMPLOYEE ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED AND THAT THE

TIME AND EXPENSE REQUIRED FOR TRIAL BY A JURY MAY EXCEED THE TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT A JURY. EMPLOYEE, AFTER OPPORTUNITY TO CONSULT WITH COUNSEL OF EMPLOYEE'S CHOICE, KNOWINGLY AND VOLUNTARILY WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF ANY COURT ACTION OR PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT."

Explanation: Generally speaking under Minnesota law, "the constitutional right to a jury trial may be waived by the parties' agreement." *Ottman v. Fadden*, 575 N.W.2d 593 (Minn. App. 1998); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 373 F.2d 136, 142 (8th Cir. 1967). An employer would likely (although not necessarily) prefer a bench trial over a jury trial when enforcing a noncompete agreement, given the optics of an employer suing an individual to prevent him or her from working at a particular job.

It does not appear that the enforceability of a jury trial waiver in the context of a noncompete agreement has been litigated in Minnesota, so there is a risk that such a provision could be challenged.

V. CONTINUITY PROVISIONS

A. Continuing Obligations

Relevant Language: "The Parties expressly acknowledge and agree that the provisions of this Agreement, which by their express or implied terms extend beyond the termination of the Employee's employment relationship with Company, shall continue in full force and effect, notwithstanding the termination of Employee's employment relationship with Company."

Explanation: This provision is a reflection of the general rule in Minnesota that "termination of an employment contract does not preclude the enforcement of a restrictive covenant." *Webb Pub. Co. v. Fosshage*, 426 N.W.2d 445, 449 (Minn. App. 1988). However, notwithstanding the general rule and the inclusion of the provision, it is possible that a noncompete agreement could be unenforceable if the employer has taken "undue advantage" of the right to terminate or otherwise engaged in "unconscionable" conduct "by reason of bad motive." *Id.*

B. Survival Provision

Relevant Language: "The obligations of this Agreement shall survive the expiration or termination of this Agreement."

Explanation: Minnesota courts have held that, where there is "no language in the noncompete provision that indicates that the provision survives the expiration of the underlying contract . . . "the noncompete agreement was not enforceable after the underlying contract expired." *Burke v. Fine*, 608 N.W.2d 909, 912 (Minn. App. 2000). To be clear, the exemplar noncompete in the addendum does not have a date upon which the agreement will expire or terminate, so this provision is out of an abundance of caution. To the extent the employer seeks to have the

noncompete agreement as part of an employment agreement for a set period of time, a survival clause is absolutely necessary.

C. Successors and Assigns Provision

Relevant Language: "This Agreement is binding on and inures to the benefit of the Company's parent, subsidiaries, affiliates, successors and assigns, all of which are included in the term the 'Company' as it is used in this Agreement. This Agreement shall not be assignable by the Employee. This Agreement may be assigned by the Employer to any successor of the Employer. For the purposes of this Agreement, the term "successor" of the Employer shall mean any person, firm, corporation, or other business entity which, at any time, whether by merger, purchase, or otherwise, shall acquire all or any of the assets or business of the Employer."

Explanation: Businesses can frequently change hands via mergers or acquisitions or asset sales, and sometimes a significant value of a company is its employees, and thereby the company's ability to retain particular employees, or at least prevent the employees from directly competing. As a result, it is in the interest of the employer to have the ability to assign a non-compete agreement to a successor.

Under Minnesota law, a noncompete agreement is assignable ancillary to the sale of a business to protect the goodwill of that business. *Saliterman v. Finney*, 361 N.W.2d 175, 178 (Minn. App. 1985). However, courts are split as to whether the employee has to consent to the assignment. *See Wells Fargo Ins. Servs. USA v. King*, Case No. 15-cv-4378, 2016 U.S. Dist. LEXIS 8279, at *9 (D. Minn. Jan. 25, 2016). *Compare Metro Networks Commc'ns Ltd. P'ship v. Zavodnick*, No. 03-6198, 2003 U.S. Dist. LEXIS 22685 (D. Minn. Dec. 12, 2003) (holding that *Saliterman*'s analysis of consent was dicta and that consent is not required) *with Great Am. Leasing Co. v. Dolan*, No. 10-4631, 2011 U.S. Dist. LEXIS 9301 (D. Minn. Jan. 31, 2012) (predicting that the Minnesota Supreme Court would find an assignment of a noncompete agreement void unless the agreement expressly permitted assignment) *and Inter-Tel, Inc. v. CA Commc'ns, Inc.*, No. 02-1864, 2003 U.S. Dist. LEXIS 23467 (D. Minn. Dec. 29, 2003) (under *Saliterman*, unless the contract expressly provides for assignment, it is likely not assignable). To avoid this issue, a non-compete agreement should contain consent by the employee to future assignments by the employer.

D. Tolling Provision

Relevant Language: "The temporal duration of the covenants in this Agreement shall not expire, and shall be tolled, during any period in which the Employee is in violation of any of the covenants set forth in this Agreement, and all restrictions shall automatically be extended by the period of the Employee's violation of any such restrictions."

Explanation: This provision is designed to extend the temporal reach of a non-compete if a former employee breaches it, providing protection to an employer who does not quickly learn of a former employee's breach. In the absence of such a provision, Minnesota courts will not read in a tolling provision and the employer will not be entitled to further protection beyond the

original time frame, despite the employee's breach. *See U.S. Water Servs. v. Watertech of Am., Inc.*, Case No. 13-cv-1258, 2013 U.S. Dist. LEXIS 143024, at *5-6 (D. Minn. Oct. 3, 2013) ("[T]he Court doubts very much that any Minnesota court would give an employer a 'fresh set of downs' every time a former employee violates a covenant not to compete.").

VI. FORUM AND CHOICE OF LAW

It is usually in the best interests of the employer to promote predictability of the law that will govern a particular noncompete agreement, as well as the forum in which any disputes about the noncompete agreement will be heard.

A. Forum

Relevant Language: "The Parties agree that any dispute, claim, action, lawsuit, or proceeding arising out of or related to this Agreement shall be exclusively heard and determined by the United States District Court for the [District of X], or the state court sitting in [County], [State]. Employee waives any defense of inconvenient forum as to any such court, and agrees not to bring any dispute, claim, lawsuit, action, or proceeding arising out of or related to this Agreement in any other court."

Explanation: This provision is designed to provide predictability in the forum in which an employee might challenge a noncompete agreement by preselecting an appropriate forum. It is even possible that such a provision may be binding on a third-party (such as a competitor) if the third-party is "sufficiently closely related to the dispute"; such as, for example, the third-party solicited the employees with knowledge that they had employment contracts with the employer. *C.H. Robinson Worldwide, Inc. v. FLS Transp.*, 772 N.W.2d 528, 535 (Minn. App. 2009); *see also Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp. 2d 1054, 1056 (D. Minn. 2008).

Despite the inclusion of this provision, a court may refuse to honor the forum-selection clause if it is unfair or unreasonable; that is, if: (1) the chosen forum is a seriously inconvenient location for trial; (2) the clause appears in a contract of adhesion; or (3) the agreement is otherwise unreasonable. *C.H. Robinson Worldwide, Inc. v. FLS Transp.*, 772 N.W.2d 528, 534 (Minn. App. 2009). That being said, the Minnesota Court of Appeals has rejected a challenge to a forum-selection clause where the employees received adequate consideration at the time of contracting for the alleged inconvenience of the forum. *Id.*

B. Choice of Law

Relevant Language: "The Parties agree that this Agreement shall be subject to and governed by the laws of the [State] without giving effect to any of [State's] conflict-of-laws principles."

Explanation: Non-compete laws vary wildly law from state to state, even on some of the most fundamental aspects of a non-compete agreement, such as what constitutes adequate consideration. As a result, the employer should select a relevant state's laws, familiarize itself with the laws, adjust the non-compete agreement as necessary, and select that state's laws as the applicable law. Minnesota courts generally honor choice of law clauses in noncompete agreements. *See St. Jude Med., S.C., Inc. v. Biosense Webster, Inc.*, 994 F. Supp. 2d 1033 (D.

Minn. 2014); *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 666 (Minn. App. 2009). Companies seeking to enforce noncompete agreements in other states should analyze the relevant choice-of-law jurisprudence to determine whether the court will uphold the choice-of-law provision in a noncompete agreement.

In the absence of a choice-of-law provision, Minnesota courts court analyze: (1) whether there is actually a conflict between the laws of the two states; (2) whether it is constitutionally permissible to apply either state's law; and (3) the "choice-influencing considerations" test. *Nodak Mut. Ins. Co v. American Family Mut. Ins. Co.*, 590 N.W.2d 43, 46-47 (Minn. Ct. App. 1999). The first factor requires a court to determine if choosing one state's law over the other is outcome determinative. The second factor requires a court to determine if there are sufficient contacts with the state so that application of the law will not be arbitrary or fundamentally unfair. This final factor includes an analysis of five considerations: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law. *Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 833 (Minn. 1979). In order to avoid this academic task, it is much easier to just include a choice-of-law provision in the noncompete agreement.

VII. THE TERMS OF THE AGREEMENT

As with any breach of contract situation, a party might try to have the contract construed in their favor, or might attempt to have the written agreement modified by an alleged oral agreement or the alleged actions of the parties. These provisions are designed to safeguard against such attacks.

A. Modification and Non-Waiver Provisions

Relevant Language: "No alteration or modification to any of the provisions of this Agreement shall be valid unless made in writing and signed by both parties. Failure to insist upon strict compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition, nor shall any waiver or relinquishment of any right or power under this Agreement at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time.

***

No provision of this Agreement may be waived except in a writing duly signed by the party waiving such provision. Consequently, the failure to insist upon strict compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition, nor shall any waiver or relinquishment of any right or power under this Agreement at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time"

Explanation: The purpose of these provisions is to help prevent an employee from arguing that alleged subsequent conduct or oral conversations modified the noncompete agreement or result in waiver of some material provision thereof.

With respect to the prohibition on oral modification, the provision may unfortunately be ignored by Minnesota courts. *Larson v. Hill's Heating & Refrigeration, Inc.*, 400 N.W.2d 777, 781 (Minn. App. 1987) ("The general common law rule is that a written contract can be varied or rescinded by oral agreement of the parties, even if the contract provides that it shall not be orally varied or rescinded."); *Connelly v. ValueVision Media, Inc.*, 393 F. Supp. 2d 767, 774 (D. Minn. 2005) ("Even though the parties' 1999 Agreement was written and contained a provision barring oral modification, that agreement could still be varied or rescinded by oral agreement."). There is a similar issue with the ability to waive a non-waiver clause. *Green v. Minn. Famers' Mut. Ins. Co.*, 190 Minn. 109, 112, 251 N.W. 14 (1933) ("[T]he authorities are that the existence of a nonwaiver clause does not prevent a waiver.").

Despite this, it is still in the best interests of an employer to include such a provision, as it at the very least encourages modifications and waivers to be accomplished in writing, which is the best practice, considering how much easier it is to prove a written modification/waiver over an oral one.

B. Entire Agreement

Relevant Language: "This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all previous correspondence, promises, representations, and agreements, if any, either written or oral as to such subject matter. Neither party shall be bound by any terms, covenants, conditions, representations or warranties not expressly contained herein."

Explanation: The purpose of this provision is to prevent an employee from introducing alleged previous understandings that conflict with the terms of the non-compete agreement. Where such a merger clause exists, "integration is presumed," meaning that earlier writings are precluded. *GreatAmerica Leasing Corp. v. Dolan*, Civ. No. 10-4631, 2011 U.S. Dist. LEXIS 9301, at *10 (D. Minn. Jan. 31, 2011). Of course, this can cut both ways, so the employer should ensure that the entire agreement is indeed within the non-compete agreement.

C. No Construction Against Drafter

Relevant Language: "The Company and Employee agree that this Agreement has been thoroughly negotiated in good faith and that if any ambiguity shall arise hereunder, there shall be no presumption that either party drafted this Agreement."

Explanation: Under Minnesota law, a court may construe an ambiguous contract (meaning that the language is reasonably susceptible to more than one interpretation on its face) against the party that drafted the contract. *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 295 (Minn. App. 1995). Not surprisingly, this principle applies equally to non-compete provisions. *Id.*; *see also Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 149 (Minn. 2002); *Cherne Indus. v. Grounds &*

Assocs., 278 N.W.2d 81, 89 (Minn. 1979). Thus, to prevent a court from applying this rule, the non-compete provision may provide that the parties agree for the presumption not to apply.

D. Blue-Line Provision

Relevant Language: "If one or more of the provisions (including, but not limited to, the time, geographical scope, or scope of any activity restrained) of this Agreement in whole or in part shall for any reason be held by a final determination of a court to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions (or portions thereof) of this Agreement, and the invalid, illegal, or unenforceable provision shall be replaced by a provision that is valid, legal, and enforceable to the maximum extent possible not exceeding the express terms herein."

Explanation: As explained previously, Minnesota law permits a court to modify a noncompete agreement's scope in order to make it reasonable, and this provision is a reflection of that. While a district court cannot be forced to blue-line a noncompete agreement if it is so unreasonable the court would "need to rewrite the agreement wholesale," *see Klick v. Crosstown State Bank, Inc.*, 372 N.W.2d 85, 88-89 (Minn. App. 1985); *Gavaras v. Greenspring Media, LLC*, 994 F. Supp. 2d 1006 (D. Minn. 2014); this provision encourages the court to do so to the extent it can.

ADDENDUM
EXEMPLAR NON-COMPETE AGREEMENT

This Non-Compete Agreement ("Agreement") is made and entered into effective as of [Date] ("Effective Date"), by and between [Employer] ("Company") and [Employee] ("Employee"). The parties are collectively hereinafter referred to as the "Parties," and each a "Party."

In consideration of [Company's employment of Employee/salary increase/other consideration], the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Definitions**. In construing this Agreement, the following defined terms shall have the meaning given them below. Any other capitalized term, which is defined in any other provision of this Agreement shall have the meaning given it in that other provision for all purposes of this Agreement, even if the term is not defined in connection with its first use in this Agreement.

    1.1 "Agreement" shall mean this instrument, including all amendments hereto or restatements hereof.

    1.2 "Competitor" or "Competitors" shall mean any person, company, firm, partnership, corporation, association, or any other entity (including departments or divisions thereof), which [sells products/provides services] reasonably substitutable for or otherwise similar to Company's current or prospective [products/services].

    1.3 "Confidential and Proprietary Information" shall mean any information that is not generally known in the industry or general public that relates to the Company's existing or reasonably foreseeable business, which is not readily disclosed by the Company, and has been expressly or implicitly protected by the Company from unrestricted use by persons not associated with the Company. Examples of Confidential Information include, but are not limited to, the Company's client and prospect lists, product pricing information, procedures, manuals, billing records, computer data, as well as other information specific to the Employer's services.

    1.4 "Customer" or "Customers" shall mean those customers or prospective customers of Company.

    1.5 "Restricted Period" shall mean the period of time during Employee's employment with Company and for [X months/years] after the termination of Employee's employment with Company.

    1.6 "Territory" shall mean the entire geographical area [where Employee works for Company at the time of the termination of Employee's employment with Company, and any territory where Employee worked for Company at any time during the twenty four (24) calendar months prior to the termination of Employee's employment with

Company, and where Company continues to do business] [OR] [of state/country/within XXX miles of [city]].

2. **Employment with Competitors**. During the Restricted Period, Employee shall not, directly or indirectly, work within the Territory for any Competitor.

3. **Solicitation of Customers**. During the Restricted Period, Employee agrees not to, directly or indirectly, solicit or perform services for Customers for any Competitor.

4. **Confidential and Proprietary Information**.

4.1 Prohibition on Use of Confidential and Proprietary Information. Employee acknowledges that Employee will occupy a position of trust and confidence with Employer, and that Employee will have access to confidential and proprietary information and trade secrets of Employer, all of which are the unique and valuable property of Employer. Employee acknowledges and agrees that, among other things, Employer's business methods, leads, loan programs, advertising programs, referral sources, marketing strategies, software, investor lists, and Employer's documentation (the "Confidential and Proprietary Information") have been developed through the expenditure of substantial time, effort and money which Employer wishes to maintain in confidence and withhold from disclosure to other persons. Accordingly, as a material inducement for Employer to enter into this Agreement, Employee acknowledges and agrees that Employee will become intimately involved and/or knowledgeable in regard to the Employer's business and will be entrusted with the Employer's Confidential and Proprietary Information, and both during employment and after any termination thereof, Employee will use such information solely for the Employer's benefit and maintain as secret and will not disclose any of the Confidential and Proprietary Information to any third party (except as Employee's duties may require) without Employer's prior express written authorization.

4.2 Return of Company's Property, Including Confidential and Proprietary Information. Employee acknowledges and agrees that all tangible property, documents, files, electronic records or data, or records or materials of any sort pertaining to the Employer's business, including anything containing Confidential and Proprietary Information, whether prepared by Employee or otherwise coming into Employee's possession or control, are the sole and exclusive property of Employer and that Employee has no right to keep or use such documents or things following termination of employment. Employee agrees that, upon termination of employment, Employee shall not retain any such documents or things in any form whatsoever and will immediately return them to Employer.

4.3 DTSA Disclosure: The disclosure of Confidential and Proprietary Information may result in claims against Employee by Company for violations of the Defend Trade Secrets Act which may include an award of exemplary damages and attorneys' fees. Consistent with the terms of the Defend Trade Secrets Act, the following notice is provided: An individual shall not be held criminally or civilly liable under any federal

or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law. An individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual files any document containing the trade secret under seal; and does not disclose the trade secret, except pursuant to court order.

5. **Reasonableness of Restrictive Covenants**. The Parties acknowledge that the limitations contained herein as to time, geographical scope, and scope of activity to be restrained are reasonable, necessary, and do not impose a greater restraint than is necessary to protect the goodwill, Confidential Information, and other legitimate business interests of Company, including, but not limited to, avoiding unfair competition. Employee acknowledges that, in the event Employee's employment with Company terminates for any reason, Employee will be able to earn a satisfactory livelihood without violating the foregoing restrictions.

6. **Notice to Prospective Employers**. During the Restricted Period, Employee agrees to provide a copy of this Agreement to any prospective new employer of Employee that is a Competitor and to notify such prospective new employer of the covenants and obligations set forth herein.

7. **Notice to Company**. During the Restricted Period, Employee agrees that if Employee has contact regarding employment or potential employment with any Competitor, the Employee will immediately notify Company of the contact in writing by providing said notice to his/her immediate supervisor.

8. **No Conflicts**. The Employee represents and warrants to the Company that entering into this Agreement and performing her obligations will not conflict with or constitute a breach under any other agreement or contract to which the Employee is a party or any other obligation by which the Employee is bound

9. **Injunctive Relief**. Employee understands that if he or she fails to fulfill his or her obligations under this Agreement, the Company will be irreparably and immeasurably injured and the damages to the Company will be very difficult to determine. Therefore, in addition to any other rights or remedies available to the Company at law, in equity, or by statute, Employee hereby consents to the specific enforcement of this Agreement by the Company through an injunction or restraining order issued by an appropriate court, without the need of filing a bond or other security therefore. Employee acknowledges that, in the event Employee's employment with Company terminates for any reason, Employee will be able to earn a satisfactory livelihood without violating this Agreement

10. **Attorneys' Fees and Costs**. Employee shall be liable to the Company for any and all costs incurred by the Company, including reasonable attorneys' fees, in investigating and enforcing the provisions of this Agreement, regardless of whether the Company is required to initiate litigation to enforce the terms of this Agreement

11. **Tolling**. The temporal duration of the covenants in this Agreement shall not expire, and shall be tolled, during any period in which the Employee is in violation of any of the covenants set forth in this Agreement, and all restrictions shall automatically be extended by the period of the Employee's violation of any such restrictions.

12. **Modification by Court (Blue-Pencil Doctrine)**. If one or more of the provisions (including, but not limited to, the time, geographical scope, or scope of any activity restrained) of this Agreement in whole or in part shall for any reason be held by a final determination of a court to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions (or portions thereof) of this Agreement, and the invalid, illegal, or unenforceable provision shall be replaced by a provision that is valid, legal, and enforceable to the maximum extent possible not exceeding the express terms herein.

13. **Amendment or Modification by Parties**. No alteration or modification to any of the provisions of this Agreement shall be valid unless made in writing and signed by both parties. Failure to insist upon strict compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition, nor shall any waiver or relinquishment of any right or power under this Agreement at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time.

14. **Waiver**. No provision of this Agreement may be waived except in a writing duly signed by the party waiving such provision. Consequently, the failure to insist upon strict compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition, nor shall any waiver or relinquishment of any right or power under this Agreement at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time.

15. **Waiver of Jury Trial**. EMPLOYEE ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED AND THAT THE TIME AND EXPENSE REQUIRED FOR TRIAL BY A JURY MAY EXCEED THE TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT A JURY. EMPLOYEE, AFTER OPPORTUNITY TO CONSULT WITH COUNSEL OF EMPLOYEE'S CHOICE, KNOWINGLY AND VOLUNTARILY WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF ANY COURT ACTION OR PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT.

16. **Continuing Obligations**. The Parties expressly acknowledge and agree that the provisions of this Agreement, which by their express or implied terms extend beyond the termination of the Employee's employment relationship with Company, shall continue in full force and

effect, notwithstanding the termination of Employee's employment relationship with Company.

17. **Assignability**. The Parties agree that Company may in its sole discretion freely assign this Agreement in whole or in part to any affiliated entity, or an unaffiliated entity which succeeds to some or all of the business of Company through merger, consolidation, a sale of some or all of the assets of the Company, or any similar transaction. Employee acknowledges that the Services to be rendered by Employee to Company are unique and personal. Accordingly, Employee may not assign any of his/her rights or obligations under this Agreement.

18. **Survival**. The obligations of this Agreement shall survive the expiration or termination of this Agreement.

19. **Successors and Assigns**. This Agreement is binding on and inures to the benefit of the Company's parent, subsidiaries, affiliates, successors and assigns, all of which are included in the term the "Company" as it is used in this Agreement. This Agreement shall not be assignable by the Employee. This Agreement may be assigned by the Employer to any successor of the Employer. For the purposes of this Agreement, the term "successor" of the Employer shall mean any person, firm, corporation, or other business entity which, at any time, whether by merger, purchase, or otherwise, shall acquire all or any of the assets or business of the Employer

20. **Governing Law/Forum Selection Clause**.

    20.1 Choice-of-Law. The Parties agree that this Agreement shall be subject to and governed by the laws of the [State] without giving effect to any of [State's] conflict-of-laws principles.

    20.2 Forum. The Parties agree that any dispute, claim, action, lawsuit, or proceeding arising out of or related to this Agreement shall be exclusively heard and determined by the United States District Court for the [District of X], or the state court sitting in [County], [State]. Employee waives any defense of inconvenient forum as to any such court, and agrees not to bring any dispute, claim, lawsuit, action, or proceeding arising out of or related to this Agreement in any other court.

21. **Entire Agreement**. This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all previous correspondence, promises, representations, and agreements, if any, either written or oral as to such subject matter. Neither party shall be bound by any terms, covenants, conditions, representations or warranties not expressly contained herein..

22. **At-Will Employment**. Employee specifically recognizes that nothing in this Agreement alters the fact that his or her employment with the Company is on an at-will basis. The Company reserves the discretion to terminate Employee's employment at any time, with or

without cause or notice, and Employee has the right to separate from employment at any time, with or without cause.

23. **No Construction Against Drafter**. The Company and Employee agree that this Agreement has been thoroughly negotiated in good faith and that if any ambiguity shall arise hereunder, there shall be no presumption that either party drafted this Agreement

24. **Counterparts**. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

25. **Knowing and Voluntary**. Both Parties represent and warrant that they have each had ample opportunity to review this Agreement before signing it, and that they respectively understand the terms of this Agreement and are voluntarily entering into this Agreement intending to be bound by its terms. Employee has read this Agreement carefully and understands each of its terms and conditions.

26. **Severability**. In the event that any provision or any portion of any provision of this Agreement shall be held to be void or unenforceable, and a Court refuses to modify the same, the remaining provisions of this Agreement (and the remaining, enforceable portion of any provision held to be void or unenforceable in part only) shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

[COMPANY] [EMPLOYEE]

_____ _____

By: _____

Its: _____