**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| DELAWARE ELEVATOR, INC., DELAWARE ELEVATOR SERVICE, INC., and DELAWARE ELEVATOR MANUFACTURING CORPORATION, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 5596-VCL |
| JOHN J. WILLIAMS and JJW ELEVATOR, INC., | ) | |
| Defendants. | ) | |

**MEMORANDUM OPINION**

Date Submitted: February 25, 2011
Date Decided: March 16, 2011

Thaddeus J. Weaver, Esquire, DILWORTH PAXSON LLP, Wilmington, Delaware; *Attorney for Plaintiffs.*

John J. Williams, Levittown, Pennsylvania; *Pro Se Defendant.*

**LASTER, Vice Chancellor.**

Plaintiffs Delaware Elevator, Inc., Delaware Elevator Service, Inc., and Delaware Elevator Manufacturing Corporation (collectively, "Delaware Elevator") seek to enforce a non-compete agreement dated October 29, 2004 (the "Non-Compete Agreement"), against their former employee, defendant John J. Williams, Jr. If enforced literally, the Non-Compete Agreement would bar Williams for three years post-employment from (i) working in a competing business within a 100-mile radius of any Delaware Elevator office and (ii) soliciting anyone who was an actual or potential customer of Delaware Elevator during the last six months of his employment. Maryland law governs the Non-Compete Agreement.

The Non-Compete Agreement as drafted is overly broad and unreasonable. Maryland law instructs a court to re-write an invalid restrictive covenant and enforce it to a reasonable extent. I therefore will enforce Williams's obligation not to compete with Delaware Elevator within a 30-mile radius of the Newark, Delaware office where he worked. The ban will last until January 17, 2012, two years after the end of Williams's employment. Otherwise, Williams is not restricted from soliciting or working for actual or potential customers of Delaware Elevator, so long as the work takes place outside the no-work zone. In soliciting customers, however, Williams may not use Delaware Elevator's confidential customer list. Because it is undisputed that Williams has been competing with Delaware Elevator inside the no-work zone and using the customer list, further proceedings are necessary to quantify the resulting damages and address the parties' other claims.

## I. PROCEDURAL HISTORY

This case has stumbled towards resolution. On June 24, 2010, Delaware Elevator filed a straightforward action to enforce the Non-Compete Agreement. Williams retained counsel, answered the complaint, and asserted counterclaims to which Delaware Elevator responded. In October, Williams's counsel moved to withdraw due to disagreements over how to handle the representation. I granted the motion and directed Williams to retain successor counsel within thirty days.

Rather than retaining successor counsel, Williams advised me, by letter dated October 29, 2010, that he would represent both himself and his co-defendant, JJW Elevator, Inc., a corporation that he owns and controls. *See* Ans. ¶ 6. By letter dated November 5, 2010, I advised Williams that he could represent himself *pro se*, but his entity required counsel. *See* Dkt. 23 (citing *Robbins v. P'ship for Bank Capital, L.P.*, 2010 WL 2901819, at *1 (Del. Ch. July 23, 2010), and *Harris v. RHH P'rs, LP*, 2009 WL 891810, at *2 (Del. Ch. Apr. 3, 2009)). Williams wrote back saying that he would retain counsel "should this [case] go to court." Dkt. 24.

Concerned that Williams did not appreciate that his case already had gone to court, I held a status conference on November 10, 2010. I encouraged Williams to retain counsel, but he represented that he could not afford a lawyer. Dkt. 36. I therefore stayed the claims against JJW Elevator. Dkt. 32. This step avoided a default judgment against the entity and recognized that the relief Delaware Elevator sought, if granted, would extend to actions taken by Williams individually and through his corporation. I instructed the parties to move forward diligently towards a one-day trial on June 2, 2011.

Williams did not cooperate in moving the case forward. He claimed that Delaware Elevator's lawsuit and efforts to conduct discovery violated his "right to be left alone," invaded his privacy, constituted intentional infliction of emotional distress, and defamed him. Dkt. 40. Delaware Elevator was forced to move to compel responses to its discovery requests. During a hearing on December 16, 2010, I ordered Williams to respond to certain discovery requests, but ruled that other requests were overbroad. Because Williams admitted in his answer that he was competing against Delaware Elevator, I stayed Williams's obligation to respond to certain discovery requests until the damages phase of the case. Dkt. 42 at 14.

Colloquy during the hearings made clear that the case pivoted on the reasonableness of the Non-Compete Agreement. I therefore directed the parties to present that issue for decision on motion for summary judgment.

## II. FACTUAL BACKGROUND

The facts for purposes of the motion for summary judgment are largely undisputed. Williams admitted the key elements of the case in his answer. To provide additional factual context, Delaware Elevator has submitted six affidavits and supporting documentary exhibits. Williams responded with three informal submissions and supporting documents. In light of Williams's *pro se* status, I have treated the assertions in his submissions as if presented by affidavit.

### A. The Parties

Delaware Elevator is a group of three privately held Maryland entities operating under common ownership. The group manufactures physical components for elevators,

sells the components, and installs and services elevators. Charles E. Meeks is the President of each entity. Meeks's father founded the predecessor to Delaware Elevator in 1946. Today, Delaware Elevator has approximately 175 employees and conducts business in Maryland, Virginia, Delaware, New Jersey, and Pennsylvania. It handles jobs ranging from in-home installations to multi-million dollar projects for government and private industry.

Williams is currently attempting to run a small, one-man contracting business that installs, repairs, and services elevators. Williams received his undergraduate degree in accounting from LaSalle University in 1982. In 2002, he received his MBA from Indiana Wesleyan University. From 1977 to 1982, while studying at LaSalle, Williams worked as an internal auditor for the Pennsylvania Liquor Control Board. He then worked for twelve years as an accountant in the insurance industry. From 1988 to 1994, he held the position of Assistant Manager, U.S. Branch, for CIGNA International Reinsurance Co.

In 1994, Williams became Chief Financial Officer for Mid-America Elevator Co., Inc., a family business run by his brother-in-law in Indianapolis, Indiana. Williams managed the accounting and bookkeeping functions and became "[f]luent in contract writing and business law." Dkt. 1 Ex. 5 at 4. While with Mid-America Elevator, Williams learned the elevator trade. In 2002, after his brother-in-law and sister divorced, Williams returned to the east coast and took a position as General Manager for the Philadelphia office of Otis Elevator Company. In early 2004, he moved to Schindler Elevator Corporation as Field Supervisor for their Allentown office.

### B. Delaware Elevator Hires Williams.

In 2004, Delaware Elevator decided to establish a permanent physical presence in Delaware. The company approached Williams, and, in October 2004, Delaware Elevator hired him as its "Branch Sales Manager/Wilmington DE." Ans. ¶ 13. In conjunction with hiring Williams, Delaware Elevator established an office at 630 Churchman's Road, Newark, Delaware. Ans. ¶ 14.

The terms of Williams's employment were set forth in a letter agreement titled "Final Offer of Employment," signed by Williams and Meeks, and dated October 18, 2004. Dkt. 1 Ex. 3 (the "Letter Agreement"). According to this document, Williams's responsibilities were:

- To develop branch office in Wilmington DE and surrounding area.
- Project management for new construction / modernization as needed.
- Initial emphasis on sales to build our presence and revenue base in the area.
- Sales will include; [sic] new construction, modernization, maintenance, service and repair of commercial and residential equipment.

*Id.* at 1. Delaware Elevator agreed to pay Williams base compensation of $50,000 per year, increasing to $52,000 after six months, and $55,000 after a year of acceptable performance. Delaware Elevator agreed to loan Williams an additional $1,000 per month during the first year, to be repaid later out of commissions. Williams would receive commissions ranging from 1-3% of sales, depending on the product or service. His benefits package included a car allowance of $450 per month, a phone for business use, and other typical health and retirement benefits. *Id.* at 2.

One term of employment was that Williams "[a]gree to sign employee contract / non-compete agreement." *Id.* Delaware Elevator contends that on October 29, 2004, Williams signed the Non-Compete Agreement. That agreement placed two principal restrictions on Williams for a period of three years after the termination of his employment. First, it provided that Williams "shall not, within a radius of one hundred (100) miles of any Delaware Elevator, Inc.'s [sic] office, directly or indirectly, enter into or carry on as owner, employee or otherwise a business or businesses that compete with the Corporations or in any manner engage in competition with Employer." Non-Compete Agreement at 1 (the "Non-Competition Clause"). Second, it provided that Williams

> shall not . . . solicit, directly or indirectly, for his own account or for the account of others, orders for services of a kind and nature like or similar to services performed by the Employer during the Employee's employment with Employer from any party which they were a client or customer of the Employer or which the Employer was actively soliciting to be a customer or client during the six (6) month period preceding the date upon which Employee shall leave the employ of the Employer . . . .

*Id.* (the "Non-Solicitation Clause").

In this litigation, Williams contends that his signature on the Non-Compete Agreement is a forgery. Yet in an email sent two days after he resigned, Williams did not mention the forgery theory and offered a different objection to the Non-Compete Agreement. By email dated January 19, 2010, Delaware Elevator's CFO asked Williams, "Do you need a copy of your non-compete or do you still have yours." Webster Aff. Ex. 5. Williams responded: "The non-compete was for the first year and was not good. My lawyer stated that because it was not witnessed or notarized. If you want to play games

with my life, you are in for a great surprise." *Id.* Leaving aside that the Non-Compete Agreement was witnessed and notarized, one might well expect Williams to have objected vehemently when the Non-Compete Agreement was first raised if he truly never signed it.

After Delaware Elevator filed this litigation, Williams changed his story. He now contends that he declined to sign the Non-Compete Agreement on the advice of an unidentified attorney who said it invalid and that a normal period for a post-employment restrictive covenant was one year. *See* Dkt. 65 at 5.

In his opposition to the motion for summary judgment, Williams offered a new account. He now says that before he was hired, he met Meeks for lunch at Zia's Italian Restaurant. *See* Dkt. 52 Ex. 11 at 1. According to Williams, the following occurred during the lunch meeting:

> I told Pete Meeks that I do elevator work on the side. He did not care.
>
> At this lunch meeting, I also told Pete Meeks that I would not sign a non-compete.
>
> He stated that he would not do that to me, and that I could cross it off the paperwork.
>
> He said that he did this for office show and nothing more.

*Id.* In other words, Meeks ostensibly told Williams, whom he was hiring to develop a new office for Delaware Elevator, that he "did not care" if Williams competed with Delaware Elevator from day one.

In support of his latest account, Williams has produced a copy of the Letter Agreement on which he struck out "[a]gree to sign employment contract/non-compete

agreement" and wrote in the margin, "Pete Meeks agreed at lunch at Zia's Restaurant." Dkt. 52 Ex. 3 at 7. Williams's version bears the signatures of both Meeks and Williams, but only Williams initialed the deletion and note. Delaware Elevator has produced two competing versions of the same letter from its files. *See* Dkt. 1 Ex. 3; Webster Aff. Ex. 1. Both versions bear the signatures of Meeks and Williams. Both of Delaware Elevator's versions lack Williams's deletion, annotation, and initials. The first bears no annotations and appears to be the final version. *See* Dkt. 1 Ex. 3. The second bears Meeks's handwritten annotations on a number of deal points, but does not strike out the phrase "[a]gree to sign employment contract/non-compete agreement." Webster Aff. Ex. 1. If Meeks and Williams agreed that Williams would not sign a non-compete agreement, then Meeks's annotations should have reflected the same agreement, Meeks should have initialed Williams's strikeout to confirm the edit, or the clean and final version should have dropped that language. One at least would expect some indication *from Delaware Elevator* that the head of its new office would not be bound by a non-compete as contemplated by the Letter Agreement.

To my untrained eye, Williams's signature on the Non-Compete Agreement looks identical to other examples of his signature in the record. Delaware Elevator has submitted a report from a handwriting expert who reviewed 190 examples of Williams's signature and opined that the signature that appears on the Non-Compete Agreement belongs to Williams. Weaver Aff. Ex. 6. Williams has not offered any explanation as to how his signature ended up on the document.

Meeks submitted an affidavit averring that Williams came to Delaware Elevator's main office in Salisbury, Maryland on October 29, 2004, and signed the Non-Compete Agreement. Elie Webb, the Manager of Human Resources for Delaware Elevator, witnessed both Williams's and Meeks's signatures. Webb submitted an affidavit averring that Williams signed the Non-Compete Agreement. Denise C. Cordrey, one of Meeks's two personal assistants, notarized the Non-Compete Agreement. Cordrey submitted an affidavit confirming that she was the notary.

Meeks, Webb, and Cordrey each averred that they specifically remember Williams signing the Non-Compete Agreement. Meeks and Webb explained that not all Delaware Elevator employees sign Non-Compete Agreements. Only members of the sales force, the CFO, and the Vice President of Operations have executed Non-Compete Agreements – currently 17 employees. Meeks explained that the Non-Compete Agreement was particularly critical for Williams, because he would be operating largely on his own in a small, newly established, satellite office.

Further evidencing Williams's presence in the Salisbury office on October 29, 2004, is a document entitled "Acknowledgment of Receipt and Understanding/New Hire Handbook/Please Read and Sign." This document bears Williams's signature and is dated October 29, 2004. Webb averred that all new Delaware Elevator employees sign this document as part of their routine paperwork.

**C. Williams Works For Delaware Elevator.**

After joining Delaware Elevator in October 2004, Williams began working out of the new Newark office. Delaware Elevator contends that he was responsible for a

geographic area encompassing northern and central Delaware, southern Pennsylvania, southern New Jersey, and northern Maryland.

Williams contends that at the time he began working, Delaware Elevator did not provide him with any sort of client list or sales leads. He instead began making cold calls and networking using his existing relationships. As he generated contacts, developed prospects, and made sales, Williams would send Delaware Elevator weekly updates detailing his activities and accounts. Williams compiled a spreadsheet containing this information (the "Customer List").

Williams contends that he successfully built up the Newark office for Delaware Elevator. He reports that from 2004 through 2009, he received total compensation of $490,257, consisting of $308,222 in salary and $182,035 in commissions. This equates to average compensation of just over $80,000 per year. He claims to have earned total commissions of $203,592. *See* Dkt. 65 at 2. At a commission rate of 1-3%, these figures suggest that Williams produced from $6 million to $20 million in revenue for Delaware Elevator over the six-year period.

Williams's tenure with Delaware Elevator appears marred by personality clashes and disagreements with other personnel. Williams says he threatened to quit on multiple occasions. He resigned by email dated January 17, 2010.

### D. Williams Starts A Competing Business.

After resigning, Williams began openly operating a competing elevator business through his entity, JJW Elevator, doing business as Krewstown Elevator Company. Ans. ¶¶ 6-7. He set up an office at 234 Philadelphia Pike, Suite 7, Wilmington, Delaware.

Ans. ¶ 6. He established a website that describes Krewstown as "Your single source for: Elevator Maintenance, Repair, Modernization[,] Commercial and Residential New Construction, Consulting, Design Build, Specification Writing and Survey, Joint Venture, Broker Services." Compl. Ex. 7; *see* Ans. ¶ 30.

After Williams resigned, Delaware Elevator came to believe that in 2009, before his departure, Williams began competing with Delaware Elevator by taking jobs for himself under the Krewstown name. Williams has admitted this, but he contends that Meeks orally agreed during the meeting at Zia's Italian Restaurant that Williams could conduct elevator business on the side. *See* Ans. ¶ 29.

By letter dated February 5, 2010, Delaware Elevator formally put Williams on notice that he was violating the Non-Compete Agreement and that Delaware Elevator would take legal action to enforce it against him. Delaware Elevator filed this lawsuit on June 24, 2010. Its verified complaint asserted a claim against Williams for breach of the Non-Compete Agreement. It also asserted claims against Williams and JJW Elevator for unfair competition, misappropriation of trade secrets, and tortious interference with business relationships, and it added a claim against Williams for breach of fiduciary duty.

On July 27, 2010, Williams answered the complaint and asserted two counterclaims. The first alleged that Delaware Elevator owed Williams his final paycheck of $1,211.20 and outstanding commissions of $7,157, and that the company violated the Delaware Wage Payment and Collection Law, 19 *Del. C.* § 1101. The second counterclaim alleged that Williams secured a job for $308,000 from the University of Delaware, but that after Delaware Elevator sent the University a copy of the

Non-Compete Agreement, the University cancelled the job. Williams contended that Delaware Elevator tortiously interfered with his contract with the University, causing him damages equal to lost profits of $55,455.

In his answer, Williams denied that he signed the Non-Compete Agreement. *See* Ans. ¶ 20 ("Williams did not sign it."); *accord id.* ¶ 19. Williams admitted the following:

- "Following his resignation, [Williams] has continued to do business in the State of Delaware." *Id.* ¶ 5.
- "JJW [Elevator] is in the business of the sale and repair of personal conveyance systems, including elevators, and competes with [Delaware Elevator]." *Id.* ¶ 6.
- "JJW, by and through Krewstown, is in direct competition with [Delaware Elevator]." *Id.* ¶ 33.

Further establishing the existence of competition, Williams asserted that "[Delaware Elevator], as of 1-1-2011, has taken three (3) elevators from me in Dover." Dkt. 52 Ex. 11 at 2. He also contended that "[Delaware Elevator] is sending letters to my accounts stating that they will inspect/annual test the elevators for approximately $400.00 per elevator. Several of my accounts called me about this." *Id.*

Although he admits that he competes with Delaware Elevator, Williams asserts that he can do so legitimately because he never signed the Non-Compete Agreement and because the restrictive covenants are invalid. He also asserts that he has solicited and obtained work from his "following," essentially the set of contacts he has developed throughout his career. Williams also bids on public jobs and procures work through the "Blue Book," an industry publication that lists elevator jobs that are open for bid.

## III. LEGAL ANALYSIS

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). A fact is material if it might affect the outcome of the suit, but "'it is not enough that the nonmoving party put forward a mere scintilla of evidence.'" *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553, at *7 (Del. Ch. Nov. 23, 2010) (quoting *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009)). "'[T]here must be enough evidence that a rational finder of fact could find some material fact that would favor the nonmoving party in a determinative way drawing all inferences in favor of the nonmoving party.'" *Id.* If the conflicting evidence is insufficient to give rise to a material dispute of fact, then the court may grant summary judgment as a matter of law. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990). Courts applying Maryland law have adjudicated the reasonableness of non-compete agreements on motions for summary judgment. *See, e.g.*, *Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748, 750, 754 (D. Md. 2003); *MacIntosh v. Brunswick Corp.*, 215 A.2d 222, 223 (Md. 1965); *Ecology Servs., Inc. v. Clym Envtl. Servs., LLC*, 952 A.2d 999, 1013 (Md. Ct. Spec. App. 2008).

### A. Whether The Non-Compete Agreement Is A Forgery

As a threshold matter, Williams disputes that he signed the Non-Compete Agreement. His bare and unsupported assertion, even when afforded the dignity of a sworn affidavit, is insufficient to create a genuine issue of fact. Overwhelming evidence establishes the authenticity of Williams's signature. Moreover, under at least one of the

accounts that Williams offered, he signed the Non-Compete Agreement but did not believe it would bind him. In January 2010, Williams claimed that the Non-Compete Agreement was not binding because it was not witnessed or notarized (which it was). He did not assert that his signature was a forgery. Williams later asserted that Meeks told him that Delaware Elevator would not enforce the Non-Compete Agreement, but wanted it for show.

Even drawing all inferences in Williams's favor, there is no possibility that a rational fact finder could conclude the Non-Compete Agreement was a forgery. Far too much contemporaneous documentary evidence establishes the validity of the Non-Compete Agreement. For his part, Williams has offered too many conflicting accounts. There is not a triable issue of fact as to the validity of the Non-Compete Agreement.

**B. The Scope Of The Non-Compete Agreement**

Maryland law governs the Non-Compete Agreement. *See* Non-Compete Agreement at 4; *Wilm. Trust Co. v. Wilm. Trust Co.*, 24 A.2d 309, 313 (Del. 1942) (recognizing right of contracting parties to select law to govern agreement).

> The general rule in Maryland is that restrictive covenants in a contract of employment, by which an employee as a part of his agreement undertakes not to engage in a competing business or vocation with that of his employer on leaving the employment, will be sustained "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public."

*MacIntosh*, 215 A.2d at 225 (quoting *Silver v. Goldberger*, 188 A.2d 155, 158 (Md. 1963)). In considering whether a non-compete should be enforced, a court applying Maryland law should consider

> whether the person sought to be enjoined is an unskilled worker whose services are not unique; whether the covenant is necessary to prevent the solicitation of customers or the use of trade secrets, assigned routes, or private customer lists; whether there is any exploitation of personal contacts between the employee and customer; and, whether enforcement of the clause would impose an undue hardship on the employee or disregard the interests of the public.

*Budget Rent A Car of Wash., Inc. v. Raab*, 302 A.2d 11, 13 (Md. 1973). "While such restrictions may be enforced under some circumstances, there is no sure measuring device designed to calculate when they are. Rather, a determination must be made based on the scope of each particular covenant itself; and, if that is not too broad on its face, the facts and circumstances of each case must be examined." *Becker v. Bailey*, 299 A.2d 835, 838 (Md. 1973); *accord Ruhl v. F.A. Bartlett Tree Expert Co.*, 225 A.2d 288, 291 (Md. 1967) ("There is no arbitrary yardstick as to what protection of the business of the employer is reasonably necessary, no categorical measurement of what constitutes undue hardship on the employee, no precise scales to weigh the interest of the public. [Previous decisions] are helpful, but, as in so many other fields of the law, the determination must be made on the particular circumstances.").

When evaluating the reasonableness of a restrictive covenant, a court must consider how the temporal and geographic restrictions operate together. The two dimensions necessarily interact. To be barred for five years from working in a single

county leaves open opportunities for the former employee in surrounding areas. To be barred from an entire state for a shorter period, such as a year or less, leaves open the possibility that the former employee could live off savings, take a long vacation, or enjoy some garden leave. All else equal, a longer restrictive covenant will be more reasonable if geographically tempered, and a restrictive covenant covering a broader area will be more reasonable if temporally tailored. A restrictive covenant that is maximally broad across both dimensions requires exceptional justification. To examine each dimension individually overlooks the interaction and enables employers to justify restrictions that are unreasonably onerous in combination.

A court also should consider the combined effect of multiple provisions. Here, the Non-Compete Agreement contains both the Non-Competition Clause, which bars Williams from working in the elevator business for three years anywhere within 100 miles of a Delaware Elevator office, *and* the Non-Solicitation Clause, which bars Williams from soliciting business from any actual or potential Delaware Elevator customer for the same three-year period. Because the Non-Compete Clause already excludes Williams for three years from doing business within a 100-mile radius of any Delaware Elevator office, the Non-Solicitation Clause necessarily operates beyond this range. The combination expands the scope of the restrictive covenant to apply wherever Williams might encounter and solicit a Delaware Elevator customer, regardless of whether Delaware Elevator actually does business in the area, and irrespective of whether Williams had any prior contact with the customer or knew about any relationship with Delaware Elevator.

On the facts of this case, this combination of provisions is facially overbroad. Delaware Elevator conceded as much in its complaint by seeking only to enforce its provisions in a 100-mile radius around the Newark, Delaware office where Williams worked. In its opening brief in support of its motion for summary judgment, Delaware Elevator acknowledged that there is no authority for a 100-mile radius. Pls.' Opening Br. 13. Delaware Elevator then asked for an injunction covering the amorphous and ill-defined "geographic territory of [Williams's] actual sales territory while within Delaware Elevator, for a period of three years." *Id.* at 18.

The 100-mile radius that Delaware Elevator sought to enforce in its complaint would block Williams from working in the elevator industry throughout approximately 31,000 square miles in the heart of the Northeast Corridor. The ban would begin just south of New York City and end just south of Washington, D.C. It would cover all of Delaware and virtually all of New Jersey. In Pennsylvania, it would encompass Philadelphia, Allentown, Bethlehem, Harrisburg, York, Lancaster, and Norristown. In Maryland, it would capture Baltimore, all but a sliver of the Eastern Shore, and extend west just shy of Hagerstown.

Within this zone, the Non-Competition Clause would bar Williams for three years from the industry in which he has worked for almost two decades. Three years is a long time: 36 months; 156 weeks; 1,095 days. During that interval, a helpless and fragile newborn grows into a walking, talking toddler. A full-time student completes law school. A soldier in the U.S. Army completes a standard stateside tour of duty. The President of the United States finishes three-quarters of his term, and the country begins the next

election cycle. Meanwhile, in Congress, the entire House of Representatives has stood for re-election, along with one third of the Senate.

A restrictive covenant with this expansive temporal and geographic scope would have devastating effects on the typical American family. In 2009, median household income in the United States was around $50,000. Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, at 5 (2010), *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf. Estimates vary as to how much Americans save, with the figure dipping below 1% as recently as 2005. U.S. Dep't of Commerce: Bureau of Econ. Analysis, *Personal Saving Rate*, http://research.stlouisfed.org/fred2/data/PSAVERT.txt (last visited Mar. 14, 2011) (listing national monthly personal saving rate from 1959 to January 1, 2011). A bullish estimate is 6%, which for the median household translates into roughly $2,400 a year post-tax. *See* Stan Reybern, *How Much do Americans Save?*, Billshrink, Sept. 21, 2010, http://www.billshrink.com/blog/10053/how-much-do-american-save/. A typical middle class family will not have the savings to ride out a three-year restrictive covenant like the one found in Delaware Elevator's Non-Compete Agreement. Williams was earning approximately $80,000 – above the median, but well short of an income that could generate a substantial cash cushion. And Williams has health issues that increase his expenses relative to the median family.

Faced with a three-year, 100-mile restriction, Williams would have no choice but to relocate or seek a new line of work. It is one thing to force a relatively young, mobile, single person to relocate or change jobs. Their ties are few and switching costs are low.

A person who holds an entry-level job faces little opportunity cost if forced to take an entry-level job in a different field. Williams has been in the workforce since 1977, some thirty-four years. He has spent nearly two decades in the elevator repair industry, rising to a position that paid him an above-median wage. He has a wife, a home, and longstanding personal ties to the tri-state area. He cannot readily relocate. Nor can he reasonably be expected suddenly to find an equivalent job in a different field. If subjected to Delaware Elevator's proposed restrictions, Williams and his family would suffer substantial and irreparable hardship. Delaware Elevator's lawyers might well consider how they would fare if forced to restart in a far-off jurisdiction, to reinvent themselves as practitioners in a completely different subject-matter area, or to leave the law entirely and find employment in another industry.

Furthermore, enforcing a three-year, 100-mile-radius no-work zone would unfairly penalize Williams by failing to recognize that he developed contacts and relationships throughout the core of the proposed no-work zone prior to and independent of Delaware Elevator. From 2002 until 2004, Williams worked for two major elevator companies in Philadelphia and Allentown. The 100-mile-radius would prevent Williams from utilizing those contacts and relationships.

The reduced and ill-defined area in which Delaware Elevator currently seeks to enforce the restrictive covenant is only marginally better. According to Delaware Elevator, Williams was responsible for northern and central Delaware, southern Pennsylvania, southern New Jersey, and northern Maryland. The ambiguity of this zone more than outweighs the slight reduction in covered area. At what exit does southern

New Jersey end and central or northern New Jersey begin? The boundaries would be in the eye of the beholder, giving Delaware Elevator the power to threaten Williams with litigation and chill his ability to compete.

In my view, a court should not allow an employer to back away from an overly broad covenant by proposing to enforce it to a lesser extent than written. More importantly, a court should not save a facially invalid provision by rewriting it and enforcing only what the court deems reasonable. Doing so puts the employer in a no-lose position. If an employer knows that the court will enforce a reasonable covenant as a fallback, the employer has every reason to start with an overbroad provision.[1]

An employer gains significant advantages from an overly broad restrictive covenant. Such a provision chills employees from leaving: "an employee may pass up a competing job offer (or the rival employer might not make the offer in the first place) if the existence of the clause suggests that there is risk of a lawsuit." Sullivan, *supra*, at 1138-39 (internal footnotes omitted); *accord* Pivateau, *supra*, at 690 (discussing *in*

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[1] *See Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748, 754 n.3 (D. Md. 2003) ("In my view to permit blue penciling encourages an employer to impose an overly broad restrictive covenant, knowing that if the covenant is challenged by an employee the only consequence suffered by the employer will be to have a court write a narrower restriction for it. This appears to me to be extremely unfair and contrary to sound public policy."); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 Ohio St. L.J. 1127, 1151 (2009) ("[I]t seems likely that many, perhaps most, [overbroad non-compete agreements] reflect the incentives the law has created for employers: ask for as much as possible, with the expectation that you will get at least what you're entitled to should the matter go to court."); Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672, 690 (2008) ("The employer . . . receives what amounts to a free ride on a contractual provision that the employer is well aware would never be enforced.").

*terrorem* effect of provisions). Employees who do leave may not compete with their former employers to the extent the law would allow, thereby harming consumers and interfering with the proper functioning of labor and product markets. If an employee chooses to litigate, uncertainty about the provision's invalidity, together with the costs of litigation, help the employer achieve a more favorable settlement.

It is trite and naïve to suggest that low to mid-level employees freely agree to restrictive covenants. Disparities in resources, bargaining power, and access to information undercut that overly simplistic notion – except for senior managers and top-dog executives where the shoe is on the other foot and different agency concerns arise. The employer is a repeat player with strong incentives to invest in legal services, to devise an advantageous non-compete, and to insist that employees sign. For the employer, the marginal costs of imposing a non-compete are low. *See* Sullivan*, supra,* at 1140-46. For a low- to mid-level employee, the calculus is different. When presented with a non-compete, the employee must hire a lawyer to review the document, then attempt to negotiate its terms. In a competitive environment, the employer may simply look elsewhere. Or in the optimistic days of an initial employment courtship, the employee may simply sign. Later on, if a dispute arises, the employer will be better able to fund the costs of enforcement, including litigation, and can benefit from economies of scale. The departing employee faces not only the costs of litigation, but the difficulties the non-compete creates for a new employer who could be brought into the dispute.

The law recognizes these concerns by requiring a careful analysis of reasonableness before enforcing a non-compete. These same concerns lead me to

conclude that when a restrictive covenant is unreasonable, the court should strike the provision in its entirety. *See Deutsche Post*, 292 F. Supp. 2d at 754 n.3; Sullivan, *supra*, at 1176-77; Pivateau, *supra*, at 673-74. The threat of losing all protection gives employers an incentive to restrict themselves to reasonable clauses. Taking away the employer's no-lose proposition helps equalize bargaining power up front such that a court can be more confident in the arm's-length nature of the terms.

Maryland law, however, does not authorize a policy-based refusal to enforce an unreasonable non-compete agreement. Maryland law instead calls on the court to carve back overly broad restrictive covenants by wielding the judicial "blue pencil." There appears to be some debate under Maryland law as to whether, in wielding its mighty pen, the Court is strictly limited to deleting the offending text or may substitute reasonable terms in its place.[2] The Maryland Court of Appeals spoke implicitly to the issue in

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[2] *Compare Holloway v. Faw, Casson & Co.*, 552 A.2d 1311, 1326-28 (Md. Ct. Spec. App. 1989) (adopting "flexible approach" that permits courts to write in reasonable terms), *aff'd in part on other grounds*, 572 A.2d 510 (Md. 1990) (leaving "provocative questions concerning judicial power" as to whether Maryland courts may substitute reasonable terms to "be resolved another day in some other case"), *with Fowler v. Printers II, Inc.* 598 A.2d 794, 802 (Md. Ct. Spec. App. 1991) ("'[B]lue pencil' excision of offending contractual language without supplementation or rearrangement of any language is entirely in accord with Maryland law."), *and United Rentals, Inc. v. Davison*, 2002 WL 31994250, at *3, *5 (Md. Cir. Ct. July 23, 2002) ("[I]t seems likely that Maryland incorporates a 'blue penciling' technique that utilizes a strict divisibility approach."; excising unreasonable two-year restriction and declining to enforce non-solicitation agreement, rather than impose one-year restriction court implied was "reasonable"); *see also Deutsche Post*, 292 F. Supp. 2d at 757-58 (holding, under Maryland law, that "blue penciling must be limited to the removal of offending language and cannot include the addition of words or phrases in an effort to make the restrictive covenant reasonable").

*Holloway* by refusing to overturn the lower court's enforcement of only three years of a five-year non-solicitation provision and endorsing the idea that a court could "refuse to craft an injunction which reaches beyond restraints which the court considers to be reasonable." 572 A.2d at 523-24. The Delaware Supreme Court has interpreted Maryland law as "approv[ing] of the rule of partial enforcement" that calls for restrictive covenants to "be given effect in such area and for such period of time as appears reasonable." *John Roane, Inc. v. Tweed*, 89 A.2d 548, 556 (Del. 1958) (quoting *Am. Weekly, Inc. v. Patterson*, 16 A.2d 912, 915 (Md. 1940) ("Where the covenant as originally drawn has been found too broad, courts have had no difficulty in restricting it to its proper sphere and enforcing it only to that extent."). Maryland law thus compels me to carve back the restrictive covenant and enforce it to a judicially determined degree.

Delaware Elevator hired Williams to start a northern Delaware office. Its business goal was to establish a physical presence in northern Delaware. Williams also pursued business outside of Delaware, but the Letter Agreement recognizes that his primary focus was on the Wilmington, Delaware area. Given the nature of the position for which Williams was hired and his prior contacts in the Philadelphia and Allentown areas, it is unreasonable to ban Williams from engaging in the elevator business for a lengthy period throughout a zone that would stretch far beyond New Castle County and encompass other population centers where Williams worked previously. A 30-mile radius amply protects Delaware Elevator's interests by covering all of New Castle County and portions of southeastern Pennsylvania, northeastern Maryland, and southern New Jersey. It stops just south of Philadelphia and just north of Baltimore.

In conjunction with this reduced no-work zone, a two-year restriction is reasonable. Maryland courts routinely enforce two-year restrictions. In *Ruhl*, a case somewhat similar to the matter at hand, the court upheld a two-year restriction on the area manager of a tree service company. *Ruhl*, 225 A.2d at 293. The *Ruhl* court relied on the fact that tree care firms typically render services to customers once or twice a year, making a two-year restriction reasonable to allow the employer to maintain its relationships. *Id.* at 294. Delaware Elevator strives to inspect its clients' elevators annually. *See* Webster Aff. ¶ 7. Two years for the reduced no-work zone is therefore reasonable and consistent with Maryland law. *See also Millward v. Gerstung Int'l Sport Educ., Inc.,* 302 A.2d 14, 15, 17 (Md. 1973) (enforcing a two-year non-compete agreement against a counselor at a camp for elementary students); *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 246 A.2d 588, 590 (Md. 1968) (holding that two-year non-compete agreement signed by insurance broker "was a valid and enforceable contract").

The three-year Non-Solicitation Clause suffers equally from the problem of temporal overbreadth and is geographically unlimited. Enforcing it would unreasonably limit Williams's ability to support his family and bar Williams from working for clients and prospective clients with whom he never had contact. Maryland courts have declined to enforce restrictive covenants that apply to all of a business's clients when the restriction would extend to a large number of counterparties with whom the employee had no contact. *See, e.g.*, *Deutsche Post*, 292 F. Supp. 2d at 755; *PADCO Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600, 608 (D. Md. 2002); *Holloway v. Faw, Casson & Co.*, 552 A.2d 1311, 1319-21 (Md. Ct. Spec. App. 1989), *aff'd in relevant part*, 572 A.2d 510

(Md. 1990). The reduced Non-Competition Clause adequately protects Delaware Elevator's business interest. I therefore will not enforce the Non-Solicitation Clause.

**C. Williams Cannot Use The Customer List.**

The Non-Compete Agreement contains another overly broad provision that purports to protect Delaware Elevator's trade secrets. As drafted, the provision is not limited to trade secrets, but rather provides that "Employee shall not at any time or in any manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any form [sic] concerning any matters affecting or relating to the business of Employer." Non-Compete Agreement at 2. A related provision extends the restriction for three years post-employment and further provides that "during such three (3) year period, employee shall not make or permit the making of any public announcement or statement of any kind that he was formally [sic] employed by or connected with Employer." *Id.* at 3. Apparently, Delaware Elevator wants former employees to insist that prospective employers sign confidentiality agreements before receiving copies of their résumés. I will enforce the Non-Compete Agreement's restriction on the use of Delaware Elevator's confidential information in one limited respect: for two years following the date of his resignation, Williams may not use the Customer List.

Maryland recognizes "two types of trade secrets: 'technological developments and internal operating information.'" *LeJeune v. Coin Acceptors, Inc.*, 849 A.2d 451, 462 (Md. 2004) (quoting *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 585 (Md. Ct. Spec. App. 1991)). To qualify as a trade secret, the information must have "independent

economic value" derived from its confidentiality, and the owner must have made reasonable efforts to maintain secrecy. Md. Code Ann., Commercial Law, § 11-1201(e).

The Customer List identifies the jobs Williams procured for Delaware Elevator during his employment. For each job, it lists the customer name, type of elevator, price, anticipated commission, and contact information for the customer and associated contractors. This information is not readily ascertainable by Delaware Elevator's competitors. The pricing information gives the holder an advantage in bidding against Delaware Elevator. The contact information provides a valuable source of sales leads. Delaware Elevator has made reasonable efforts to keep this information confidential by having its sales personnel and senior management employees enter into the Non-Compete Agreement. *See* Dkt. 61. The Customer List thus qualifies as a trade secret under Maryland law.

I will enjoin Williams from using the Customer List. To protect Delaware Elevator's interest in the information, Williams must destroy all copies of the Customer List within ten days of the entry of the order implementing this decision.

This restriction does not mean that Williams cannot contact customers who happen to appear on the list to solicit jobs that fall outside of the 30-mile-radius no-work zone, provided he does so based on his own knowledge. Williams often used his contacts and knowledge of the industry to generate business for Delaware Elevator, and it would be unfair to let Delaware Elevator capture all of the benefit that can be derived from Williams's connections. As mentioned above, the two-year/30-mile-radius restriction sufficiently protects Delaware Elevator's interests.

### D. Williams's Defenses

Williams has raised several defenses against enforcement of the Non-Compete Agreement. Dkt. 69 at 3. None has merit.

Williams first contends that he has a constitutional "right to be let alone," which he believes means he cannot be sued for breach of the Non-Compete Agreement. There is no constitutional "right to be let alone," at least in the way that Williams seems to understand it. Although Williams certainly had the right to resign from Delaware Elevator, he remained bound by his contractual commitments, and Delaware Elevator could sue to enforce them.

Next, Williams claims Delaware Elevator has committed several intentional torts by suing him. As a preliminary matter, Williams has not sufficiently pled the elements for intentional infliction of emotional distress, defamation, or libel. Even if he had, these torts are not defenses that would excuse performance of his contractual obligations. Regardless, the claims largely appear to turn on Delaware Elevator's filing and serving this lawsuit. Delaware Elevator's actions were reasonable and justified. Although the Non-Compete Agreement was overbroad, Delaware Elevator had a colorable claim, and its enforcement efforts do not give rise to tort liability.

Williams finally claims that Delaware Elevator has invaded his privacy. Dkt. 69 at 4. Using the judicial system to enforce a legitimate claim does not invade a defendant's privacy in a tortiously actionable manner. It is rather the mechanism that a civilized society uses in lieu of violence to resolve disputes. Nothing in the pleadings or the record suggests an actionable invasion of privacy.

Finally, Williams cannot assert a claim against Delaware Elevator for seeking to retain its clients, including those formerly serviced out of the Newark office. Delaware Elevator has the right to inform its clients that Williams is no longer in their employ, as it has done (a fact that further exposes the ridiculous overbreadth of the purported three-year ban on Williams telling anyone he previously worked for Delaware Elevator). Competition is a two-way street. Just as Williams is entitled to compete with Delaware Elevator outside of the 30-mile-radius zone, Delaware Elevator can defend its current clients and compete with Williams. Summary judgment is therefore entered against Williams and in favor of Delaware Elevator on Williams' counterclaim relating to the elevator job for the University of Delaware.

**E. The Remedy**

Delaware Elevator requests a permanent injunction enforcing the Non-Compete Agreement. In absence of enforcement, Delaware Elevator would continue to suffer harm to its business interests. Thus, an injunction is the logical remedy. To qualify for a permanent injunction, the plaintiff must show: (i) actual success on the merits; (ii) irreparable harm; and (iii) that the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction. *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *13 (Del. Ch. Apr. 15, 2004).

This decision has satisfied the requirement of actual success on the merits. The Non-Compete Agreement stipulates that a breach results in irreparable harm. *See* Non-Compete Agreement at 1 ("As a violation by the Employee of the provisions of this

Section could cause irreparable injury to the Corporation and there is no adequate remedy at law for such violation Employer shall have the right . . . to enjoin the Employee in a court of equity for violating such provisions."). Although Maryland courts have not yet addressed such a provision, they have recognized the ability of contracting parties to specify remedies for breach. *See Mass. Indem. & Life Ins. Co. v. Dresser*, 306 A.2d 213, 217 (Md. 1973); *Armstrong v. Stiffler*, 56 A.2d 808, 810 (Md. 1948). A venerable Maryland case upheld a contractual limitation on equitable remedies. *See Hahn v. Concordia Soc'y of Balt. City*, 42 Md. 460, 465-66 (Md. 1875). In Delaware, a contractual stipulation to irreparable harm does not force the Court's hand but is sufficient to support injunctive relief. *See True N. Commc'ns. Inc. v. Publicis S.A.*, 711 A.2d 34, 44 (Del. Ch. 1997). I therefore treat the contractual stipulation to irreparable harm as binding on Williams and sufficient for injunctive relief.

The balance of hardships favors an injunction enforcing the reduced two-year/30-mile radius non-compete and barring use of the Customer List. The reduced restrictions permit Williams to earn a living outside of the zone and, after two years, to compete freely with Delaware Elevator. Meanwhile, enforcement allows Delaware Elevator to protect its interests and build goodwill with the clients whom Williams formerly serviced.

## IV. CONCLUSION

For the foregoing reasons, partial summary judgment is entered in favor of Delaware Elevator. Williams is enjoined from (i) competing with Delaware Elevator within a 30-mile radius surrounding 630 Churchman's Road, Suite 007, Newark, Delaware, until January 17, 2012, and (ii) using the Customer List. Williams shall

destroy all copies of the Customer List that exist in electronic or paper form. An implementing order has been entered contemporaneously and certified pursuant to Rule 54(b).

Because Williams admits that he has been competing with Delaware Elevator within the reduced zone, further proceedings are necessary to quantify damages and to address the parties' other claims. The parties will meet and confer regarding an appropriate schedule. The trial currently set for June 2, 2011, is removed from the calendar.