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ATTORNEYS FOR APPELLANTS:

CRAIG R. PATTERSON
MARK E. BLOOM
Beckman Lawson, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY W. GUEVARA
STEPHANIE S. PENNINGER
Bose McKinney & Evans LLP
Indianapolis, Indiana

LINDA A. POLLEY
Hunt Suedhoff Kalamaros LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

DAVID SEES and ROBERT ABLES,

Appellants-Defendants,

vs.

KOORSEN FIRE & SECURITY, INC.,

Appellee-Plaintiff.

No. 02A03-0711-CV-535

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0702-PL-25

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

David Sees and Robert Ables (collectively, "Appellants") bring this interlocutory appeal of the trial court's preliminary injunction in the action brought against them by Koorsen Fire & Security, Inc. ("Koorsen").

We affirm in part, reverse in part and remand.

ISSUES

1. Whether the trial court erred by entering an order that enjoined Ables from competing against Koorsen for a period of three years from the date of the order.

2. Whether the trial court improperly found that the Ables non-competition agreement's restriction of competitive activities within a 100-mile radius of Fort Wayne was geographically reasonable.

3. Whether the trial court improperly found that Koorsen did not materially breach the terms of its non-competition agreement with Ables.

4. Whether the trial court erred in finding that the competitive activity restriction in Sees' non-competition agreement was reasonable.

FACTS

Indianapolis-based Koorsen operates a "fire and security business." (Tr. 1[1] at 22). In addition to the sale and service of fire extinguishers, Koorsen sells, installs and services systems for fire suppression, fire safety, sound, structured cabling and security, primarily for commercial applications. The latter (non-fire extinguisher) sales are commonly referred to as "system sales," and are typically sold through a bid process;

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[1] Indiana Appellate Rule 28(A)(2) provides that "pages of the Transcript shall be numbered consecutively regardless of the number of volumes the Transcript requires." Appellants' transcript is not in accord with the Rule, as each volume begins with page "1." Hence, we refer to testimony from either "Tr. 1" or "Tr. 2."

frequently, such bids are through an electrical contractor for submission as part of the contractor's bid on the overall project.

Koorsen has sixteen branch offices in six states, with eight branches in Indiana. On March 16, 1989, Sees began employment as a salesman in the Fort Wayne branch office of Koorsen. On that date, Sees signed an agreement with Koorsen ("Sees Agreement") entitled "Covenant Not to Compete," which included the following:

> If my employment with [Koorsen] is terminated for any cause, I, the employee, shall not for a period of two years after leaving the employment, engage directly or indirectly either personally or as an employee, associate partner, partner, manager, agent, or otherwise or by means of any corporate or other device, in the fire extinguisher and equipment or any other business which is in competition with [Koorsen], within a 50 mile radius of the city or town in which the main or branch office from which I work or have worked in the last two years is located.

Ex. P. The agreement further provided that "[i]n the event of termination of his employment for any reason," Sees would not "solicit any customers of [Koorsen]." *Id.* During his employment at Koorsen, Sees considered his efforts cultivating relationships with contractors and building customer loyalty an important part of his job.

In the early 2000's, Sees developed an informal partnership relationship for pursuing system sales on behalf of Koorsen with Ables, who was the co-owner of TSI Technologies, Inc. ("TSI"). At that time, Koorsen did not sell sound and communications products in the Fort Wayne branch office, and TSI was providing outsourced labor and direct product sales in the system sales area, with the greater focus on sound and communications products – including structured cabling, nurse call, intercom and card access systems. Thus, Koorsen (through Sees) and TSI (through

Ables) worked together to submit cooperative bids for systems sales to electrical contractors.

Based on his experience with Ables, Sees recommended to various Koorsen managers, as well as to Randy Koorsen ("Mr. Koorsen"), president and owner of Koorsen, that Koorsen consider purchasing TSI. In early 2005, Mr. Koorsen began communication with Ables regarding such a purchase. Mr. Koorsen and Ables exchanged letters and emails detailing the negotiations for the purchase of TSI by Koorsen. During the negotiations, Koorsen was not represented by counsel, but TSI engaged counsel to review Koorsen's proposed asset purchase agreement. Counsel for TSI proposed a series of changes, and Koorsen made these changes.

An asset purchase agreement, executed by Mr. Koorsen and Ables, effected the purchase by Koorsen of the assets of TSI, effective October 6, 2005. The asset purchase agreement included non-competition restrictions applicable to Ables. Initially, in the fourth recital, the parties stipulated that "as part of the purchase of [TSI's business], [Koorsen] desire[d] that Seller [TSI] and Shareholders [Ables and the co-owner] agree not to compete with the operations of [Koorsen], as provided for herein." (Ex. L). Paragraph 1 of the asset purchase agreement specified assets being purchased by Koorsen, including "all customer lists and related information," "all goodwill associated with the business," and a non-competition agreement by TSI and Ables *Id.* Paragraph 3 stated the purchase price, one component of which was $100,000 for the customer list, goodwill contracts, and related information. Paragraph 7 enumerated "additional . . .

obligations" by TSI and Ables "to [Koorsen] after" October 6, 2005. *Id.* One obligation is found at 7(d), which states as follows:

> Non-Competition Agreement. Seller and Shareholder Robert Ables shall not, during the period of three (3) years after [October 6, 2005], (which period shall be extended by any amount of time this covenant is violated), engage directly or indirectly in the business or activity which involves the sales or service of Fire Alarm, Sound, Communication and Security Products; within a 100 mile radius of Fort Wayne, Indiana. Seller and Shareholder Robert Ables acknowledges that this Non-Competition Agreement constitutes material consideration for [Koorsen]'s agreement to purchase the Sale Assets in accordance with this Agreement. Seller and Shareholder Robert Ables acknowledges and agrees that [Koorsen] will be irreparably harmed by a violation of Seller's restrictive covenant set forth in this Section 7(d), and that [Koorsen] shall be entitled in the event of such a violation to obtain an injunction in a court of competent jurisdiction restraining any such violation, without prejudice to other remedies available to [Koorsen] at law or in equity and without the necessity of posting a bond, and shall be entitled to reimbursement of reasonable attorneys' fees and related costs and expenses in enforcing its rights in this Subsection.

("Ables Agreement"). *Id.*

The negotiations between Mr. Koorsen and Ables also included discussions about employment by Koorsen of Ables and some TSI employees. In correspondence separate from that containing the proposed asset purchase terms, Mr. Koorsen extended a written offer of employment to Ables. Ables accepted the offer. Ables' wife and 5 other TSI employees also accepted employment with Koorsen.[2]

Within a month or so of signing the asset purchase agreement, Ables began work at Koorsen. Ables and Sees worked together, and as a team, they successfully bid many systems sales projects throughout northeastern Indiana.

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[2] The co-owner of TSI and one technician declined offers of employment by Koorsen.

In October of 2006, Sees began talking with Chuck Fairchild, president and owner of Fairchild Communications, Inc. ("Fairchild"), about the possibility of his working for Fairchild – to help establish a Fort Wayne branch office. At that time, Fairchild had no sales representatives in that office, and Mr. Fairchild wanted to hire Sees to sell fire and security systems as he was doing for Koorsen. Sees informed Fairchild that he had a non-competition agreement with Koorsen.

During Sees' discussions with Mr. Fairchild, he recommended that Fairchild also hire Ables. In December of 2006, Mr. Fairchild met with Ables. Ables informed Fairchild that he had signed a non-competition agreement as part of the transaction whereby TSI was sold to Koorsen; however, Ables "told him that it was poorly written and [Fairchild] didn't need to worry about it." (Tr. 2 at 51).

On January 4, 2007, Koorsen announced its 2007 compensation plan, which restructured the bonus and commission terms for Sees' and Ables' compensation. Both believed the new terms would reduce their annual earnings.

Also on January 4, 2007, Fairchild made written offers of employment to Sees and Ables. Both were offered base salaries of $80,000.00 and positions "responsible for profitable project sales," with Sees to be responsible for fire and security system sales, and Ables responsible for sound and telecommunication sales. (Ex. N, Q). Sees and Ables accepted the offers in late January of 2007, and announced their intention to resign from Koorsen.

Mr. Koorsen traveled to the Fort Wayne branch office to meet with them. Sees and Ables expressed their dissatisfaction with the 2007 restructured compensation plan,

and their belief that they would suffer greatly reduced compensation. Mr. Koorsen offered to restore the terms of the 2006 compensation plan in all respects except that instead of each receiving a three percent bonus for exceeding their sales goals, each would receive a 2½ percent bonus. Mr. Koorsen also offered to further increase Ables' salary "to make it the same as Mr. Sees."[3] (Tr. 2 at 55).

Both Sees and Ables left their Koorsen employment on Friday, February 2, 2007, and began employment with Fairchild on Monday, February 5, 2007. Immediately, both began competing directly with Koorsen -- seeking system sales for Fairchild.

Mr. Koorsen contacted Mr. Fairchild regarding the non-competition restrictions to which Sees and Ables had agreed. Mr. Fairchild "indicated that they told him that they had no-competes but they had talked to an attorney who said, '[D]on't worry about them.'" (Tr. 1 at 52). Counsel for Koorsen then sent letters to both Sees and Ables, reminding both of their agreed upon restrictions and demanding each cease conduct in violation thereof. Sees and Ables ignored the letters and continued to seek system sales on behalf of Fairchild, directly competing with Koorsen.

On February 23, 2007, Koorsen filed a complaint for a temporary restraining order, preliminary and permanent injunctive relief, and monetary damages. Koorsen alleged that Sees and Ables had breached their respective non-competition agreements, and had misappropriated trade secrets.

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[3] The 2005 employment offer from Koorsen to Ables was for a $57,000.00 base salary, with bonus potential based on sales. Mr. Koorsen testified that at some point during 2006, Ables' salary was increased to "about fifty-nine or something like that," and that in the January 2007 meeting, he had offered to increase Ables' salary "another four or five thousand." (Tr. 1 at 113).

On September 5 and 6, 2007, the trial court conducted an evidentiary hearing on Koorsen's request for injunctive relief. The parties submitted a number of joint exhibits, stipulating to their contents. One exhibit depicts the area in which Sees sold products for Koorsen. Another depicts the area in which TSI had sold its services, and one depicts the area where Ables subsequently sold Koorsen's services. The exhibits also reflect contractors and end-users to whom both Koorsen and Fairchild had submitted system sales bids after Sees and Ables began employment at Fairchild, and that Fairchild had won many of those bids against Koorsen. Further, the parties stipulated at the hearing that in the six months since beginning employment at Fairchild on February 5, 20007, Sees and Ables were engaged in direct competitive sales activities with respect to Koorsen.

Mr. Koorsen testified that Koorsen sales employees build relationships with customers, and establish a "comfort level" with customers and a reputation for "reliability" and "responsive[ness]," such that "the good will and the relations that" Koorsen had with its customers "ma[de] [Koorsen's] business successful." (Tr. 1 at 26, 25). Mr. Koorsen further testified that Koorsen required employees to sign a covenant not to compete "to protect [its] good will and customer relationships." (Tr. 1 at 28.)

Mr. Koorsen also testified that Koorsen's proposal to purchase TSI specifically included the sale of TSI's goodwill, which included a list of "customers that [Ables] had been doing business with" because Ables "had a good reputation of taking care of his customers. Good relations with them, and we were hoping that the goodwill and reputation would come along with" the purchase." (Tr. 1 at 38, 39). Mr. Koorsen further

testified that he never would have purchased TSI without a non-compete agreement because without "an agreement, [Koorsen] could pay [Ables] one day and he could leave the next and go after those same customers," taking "[t]he goodwill that [Koorsen] had just bought." (Tr. 1 at 43).

Sees testified that at the time he left Koorsen's employment, his work was "a hundred percent" in system sales. (Tr. 2 at 8). Sees admitted that the majority of the contractors to whom he had submitted bids on behalf of Fairchild he "had done work for and established relationship[s]" with while employed at Koorsen. (Tr. 2 at 11). Sees further admitted that when he left Koorsen, he understood that the Sees Agreement barred his "engag[ing] in competitive activity with Koorsen," but that he "was going to do that" anyway "for [his] new employer." (Tr. 2 at 25, 26). Sees testified that when he received the letter from counsel for Koorsen advising him that he was in violation of the Sees Agreement, he "just ignored it." (Tr. 2 at 26).

Ables admitted he had read the non-competition provision in the asset purchase agreement, and that the agreement reflected his signed acknowledgement "that the non-competition agreement constitute[d] material consideration for [Koorsen]'s agreement to purchase [Ables'] business," meaning that Koorsen had given him "value in exchange for [his] promise not to compete." (Tr. 2 at 44). Ables testified that he was "willing" to "receive . . value from Koorsen even though [he] believed the non-compete was unenforceable" because it "was poorly written." (Tr. 2 at 46). Ables testified further that he was "doing the same type of sales for Fairchild [he had] been doing for Koorsen," and dealing "with many of the same contractors as [he] did while" employed by Koorsen.

(Tr. 2 at 53). Ables testified that when he left Koorsen, he did not intend to comply with the non-compete provisions of the asset purchase agreement "because [he] didn't feel that [he] had to," that he "felt that [he] didn't have" any restrictions once Koorsen announced "changes in [his] pay." (Tr. 2 at 56, 57). Ables testified that he "believed" that after Koorsen "changed [his] pay without [his] approving it," his agreement not to compete was "voided." (Tr. 2 at 57). However, Ables also testified that he understood that his employment at Koorsen could have been terminated at any time, and that during his employment at Koorsen, he had received exactly what was indicated in the Koorsen offer of employment.

Ables admitted recruiting some former TSI employees who subsequently had been employed by Koorsen to work for Fairchild. Sees admitted that he "solicited and encouraged" three former TSI employees to work for Fairchild. (Tr. 2 at 27). These employees had accepted work at Fairchild.

On October 16, 2007, the trial court issued its findings of fact, conclusions of law, and preliminary injunctive order. It made extensive findings of fact, consistent with the foregoing. Its final factual finding is as follows:

> As a result of Mr. Sees' and Mr. Ables' admitted competitive activity, [Koorsen]'s relationships with the electrical contractors that Mr. Sees cultivated during his 18-year tenure with Koorsen, and the goodwill associated with many of those same contractors and other customer relationships that Mr. Ables sold to Koorsen in October 2005, are being irreparably undermined. Koorsen has lost bids to Fairchild as a direct result of Mr. Sees' and Mr. Ables' competitive activities, thus resulting in a loss of revenues in [Koorsen]'s Fort Wayne branch office. The recruiting away of key technicians and office support staff has also hurt Koorsen's competitive position in the marketplace. It is difficult to quantify the harm to Koorsen as a result of Mr. Sees' and Mr. Ables' competitive activities

> because of the damage to long-standing customer relationships and Koorsen's reputation in the industry, as well as the direct economic harm caused by the loss of sales and competitive bids by the defendants.

(Order at 10).

In its conclusions of law, the trial court noted that the Appellants did not dispute Koorsen's "legitimate, protectable business interest in its customer relationships and its corporate goodwill." (Order at 12). It further noted that the Appellants had "acknowledged that they [were] not challenging the time element of" the Sees Agreement "for a two-year period following termination of employment" and the Ables Agreement "for a three-year period following the sale of TSI," and found both restrictions reasonable. *Id.* The trial court noted the Appellants' argument that their "covenants [were] overly broad" in restricting Sees' competitive activities in a 50-mile radius of Fort Wayne and Ables' restriction of competitive activities within a 100-mile radius of Fort Wayne. The order discussed the applicable law and concluded that the geographic restrictions were "not overly broad and [were] reasonable as a matter of law." (Order at 13). The trial court noted Sees' argument that his covenant was overly broad "because it prohibited him working in any capacity for a competitor of Koorsen," and concluded that the covenant simply prohibited Sees from engaging in "activities that are" in competition with Koorsen. (Order at 18). The trial court concluded that the Ables Agreement restriction of Ables' activities was narrowly tailored and reasonable.

As to Ables' argument that Koorsen could not enforce the non-competition provision of the asset purchase agreement because Koorsen "first breached" the agreement when it "announced the new commission structure in January 2007," the trial

court enumerated four bases for rejecting Ables' argument. (Order at 19). The trial court noted that the Appellants had "not challenge[d]" the existence of irreparable harm for which Koorsen had no remedy at law, and it concluded that the balance of equities "strongly favor[ed] Koorsen." (Order at 21, 22).

The trial court then temporarily enjoined Sees from violating the Sees Agreement by engaging in sales of "business in competition with Koorsen" within a 50-mile radius of Fort Wayne for a two-year period. (Order at 24). It temporarily enjoined Ables from violating the Ables Agreement by engaging in business activity competitive to that of Koorsen within a 100-mile radius of Fort Wayne "for a three-year period commencing on the date of" the order. *Id.*

DECISION

When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and conclusions of law. *Aberdeen Apts. v. Cary Campbell Realty, Alliance, Inc.*, 820 N.E.2d 158, 163 (Ind. Ct. App. 2005), *trans. denied*; *see also* Indiana Trial Rule 52(A). In our review, we determine whether the trial court's findings support the judgment. *Id.* We will reverse the judgment only when it is clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences to support them. *Id.* We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. *Id.*

The decision to grant a preliminary injunction lies within the discretion of the trial court, and the scope of appellate review "is limited to whether there was a clear abuse of

that discretion." *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003). To obtain a preliminary injunction,

> the moving party has the burden of showing by a preponderance of the evidence that: (1) the movant's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) threatened injury to the movant outweighs the potential harm to the nonmoving party resulting from the granting of an injunction; and (4) the public interest would not be disserved.

Id.

1. Enjoining Ables' Competitive Activity for Three-Year Term

Appellants first argue that the trial court abused its discretion by enjoining Ables from competing against Koorsen for a period of three years beginning on the date of its order, October 16, 2007. Their argument begins by citing the Ables Agreement, stating that he could not compete for "three (3) years after the [October 6, 2005] Closing Date." (Ex. L). Appellants note that a significant portion of the three-year restricted period of time had elapsed from the closing date until he began employment with Fairchild. Appellants then acknowledge that the Ables Agreement "provided that the restricted time period would be extended by any amount of time the covenant was violated." Appellants' Br. at 10. Therefore, Appellants argue, the Ables Agreement only provides for enjoining his competitive activity for the balance of the three-year restricted period – reduced by the portion during which there was no violation.

We must agree. The starting date for an injunctive time period must reflect the express terms of the non-competition agreement that underlies the order of injunctive

relief. *See Oxford Financial Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1146 (Ind. Ct. App. 2003) (citing *Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1092-93 (Ind. Ct. App. 1987) (non-competition agreement "will never be extended beyond the express terms of the agreement.")).

The starting date of the Ables Agreement was October 6, 2005. Sixteen months after this date, on February 5, 2007, Ables began employment at Fairchild. At that point, the balance of his restricted period was twenty months. From February 5, 2007, until the date of the trial court's order (October 16, 2007), however, Ables was in violation of his agreement. Pursuant to the Ables Agreement, this period of more than eight months must now be reflected in the future restriction of his competitive activity. Therefore, we reverse the trial court's order in that regard and direct the trial court to adjust the term of the injunctive order as to Ables accordingly.

2. <u>Area of Ables' Restriction</u>

Appellants next contend that the trial court abused its discretion when it concluded that the 100-mile radius area of the Ables Agreement was a reasonable geographic restriction. Appellants reminds us that "'[c]ovenants not to compete are not favored in the law.'" Appellants' Br. at 11, citing *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005). Appellants then argue that because Koorsen did not have a TSI customer list at the time of the asset purchase agreement, the 100-mile radius area could not have reflected the location of TSI's customers, and the area is "unreasonably overbroad" when compared to TSI's actual customer list. Appellants' Br. at 14.

The Ables Agreement was a covenant not to compete "ancillary to the sale of a business." *Dicen*, 839 N.E.2d at 687. As our Supreme Court has explained, such a covenant is "enforced more liberally" than a covenant arising out of an employer-employee relationship. *Id.* This policy of liberal enforcement derives from the context of the covenant's origin: the relatively equal bargaining power of the seller of the business and the buyer; the "seller is usually paid a premium for agreeing not to compete with the buyer," and "a broad noncompetition agreement may be necessary to assure that the buyer receives that which he purchased." *Id.* Hence, the covenant ancillary to the sale of a business is "reviewed under a reasonableness standard," and "reasonableness" is "measured in terms of time, space, and prohibited activity." *Id.* at 687, 688. "The more liberal enforcement of sale of a business covenants means that they will be deemed reasonable when they are limited to the area of business involved." *Id.* at 688 (internal citation omitted).

The Ables Agreement was ancillary to the sale of a business. The asset purchase agreement expressly stated that one asset being purchased was Ables' agreement not to compete with Koorsen, and it included the Ables Agreement specifying the 100-mile radius restriction applicable to Ables. TSI engaged counsel to review the proposed asset purchase agreement before Ables executed the Ables Agreement. Further, stipulated evidence before the trial court reflects that TSI had made systems sales on at least two projects located more than 100 miles from Fort Wayne. It is true that TSI's sales did not extend in every direction to completely match the area within the 100-mile radius. On the other hand, the 100-mile radius appears to be the geographic area in which Koorsen

believed TSI had goodwill; Koorsen offered to pay TSI $100,000 for that goodwill <u>and</u> Ables' agreement to not compete in that area; Ables had advice of counsel before signing the agreement; and Ables did not express any objection to the restriction or indicate to Koorsen that TSI's goodwill was limited to a much smaller geographic area. The trial court did not abuse its discretion by finding that the geographic restriction of the Ables Agreement was reasonable.

3. <u>Material Breach by Koorsen</u>

Appellants argue that the trial court erred by enjoining Ables because "Koorsen first materially breached the parties' agreement by unilaterally reducing Ables' consideration." Appellants' Br. at 19. Because "Ables' employment with Koorsen and related compensation package was a material part of Ables' agreement to sell TSI's assets to Koorsen," Appellants argue, Koorsen's "change of the commission structure in January of 2007 constituted a material breach" of the "overall agreement" between Koorsen and Ables and precludes this action by Koorsen. *Id.* at 22. We cannot agree.

The trial court found this claim to fail, *inter alia*, because Ables was an at-will employee. In his testimony before the trial court, Ables admitted that the asset purchase agreement did not require Koorsen to hire him or to pay him a particular compensation as a Koorsen employee. Ables further admitted that he understood he could resign his employment with Koorsen at any time, and that Koorsen could terminate his employment at any time. Lacking any evidence whatsoever of "an employment contract for a definite or ascertainable term," and based on Ables' own testimony, Ables' employment by Koorsen was "employment at-will" – with "no definite or ascertainable term of

employment," and "terminable at any time, with or without cause." *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 717 (Ind. 1997).

In at-will employment, when the employer unilaterally changes the agreed-upon compensation, the at-will employee may either accept the compensation changes and continue employment under the new compensation terms <u>or</u> reject changes and quit work. *Wheeler v. Balemaster, Div. of E. Chicago Machine Tool Corp.*, 601 N.E.2d 447, 448 (Ind. Ct. App. 1993). Ables chose the option of terminating his employment. The same at-will doctrine that makes this his option also provides Koorsen, his employer, with the ability to change the basis for computing Ables' future compensation at any time. Therefore, when Koorsen announced its intention to restructure the basis for Ables' future compensation, it did not lose its ability to enforce the Ables Agreement.

Appellants argue in their reply that the Koorsen offer of employment, and Ables' acceptance of employment, established "a deal that so long as Ables was employed by Koorsen, he was to be paid $57,000 with the potential of earning a bonus equal to 15 percent of his salary." Reply at 12. It is this "deal" that Appellants contend was breached by Koorsen's choice "to pay him less than what it promised." *Id.* We are not persuaded. We note Mr. Koorsen's testimony that at some point during 2006, Ables' salary was increased to "about fifty-nine or something like that." (Tr. 1 at 115). Clearly, Ables did not consider that salary increase to be a material breach of the TSI sale transaction. Further, in the January 2007 meeting, Mr. Koorsen offered to increase Ables' salary "another four or five thousand." (Tr. 1 at 113). It is true that the method for computing bonus compensation based on systems sales would be adjusted in some

fashion for 2007. However, the record does not reflect that under either the announced 2007 compensation plan or Mr. Koorsen's proposal at the January meeting, Ables would not be "paid $57,000 with the potential of earning a bonus equal to 15 percent of" his $57,000 salary in 2007. *Id.* In other words, there is no evidence that his 2007 compensation could not reach $65,550. Therefore, this argument also fails.

4. Scope of Sees' Restricted Activity

An employee covenant not to compete is "reviewed under a reasonableness standard." *Dicen*, 839 N.E.2d at 687. The courts "will not enforce an unreasonable restriction" in an employment non-competition covenant. *Central Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 729 (Ind. 2008). The facts of the case determine the reasonableness of a covenant's restriction. *Id.* at 730. In determining the reasonableness of the covenant not to compete, we examine whether the employer has asserted a legitimate interest that may be protected by a covenant. *Cohoon v. Financial Plans & Strategies, Inc.*, 760 N.E.2d 190, 194 (Ind. Ct. App. 2001). If the employer has asserted a legitimate, protectable interest, then we determine whether the scope of the agreement is reasonable in terms of time, geography and types of activity prohibited. *Id.* The covenant not to compete must be sufficiently specific in scope to coincide with only the legitimate interests of the employer and to allow the employee a clear understanding of what conduct is prohibited. *Id.* at 195.

Appellants do not challenge that Koorsen had a legitimate interest in protecting the corporate goodwill and customer relationships of its fire equipment and system sales business, or the 50-mile radius restriction of the Sees Agreement. Appellants' challenge

to the trial court's injunction as to Sees is that the Sees Agreement is overbroad as a matter of law. They cite *MacGill v. Reid*, 850 N.E.2d 926 (Ind. Ct. App. 2006), *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103 (Ind. Ct. App. 2003), and *Burke v. Heritage Food Service Equip. Serv., Inc.*, 737 N.E.2d 803 (Ind. Ct. App. 2000), as holding that non-competition agreements which prohibit any activity on behalf of a competitor are unreasonable and will not be upheld.

As noted above, the Sees Agreement provides as follows:

> If my employment with [Koorsen] is terminated for any cause, I, the employee, shall not for a period of two years after leaving the employment, engage directly or indirectly either personally or as an employee, associate partner, partner, manager, agent, or otherwise or by means of any corporate or other device, in the fire extinguisher and equipment or any other business which is in competition with [Koorsen], within a 50 mile radius of the city or town in which the main or branch office from which I work or have worked in the last two years is located.

(Ex. P). Appellants assert that this precludes him from working for a Koorsen competitor in any capacity, not just competitive capacities. We disagree.

The agreement is a personal commitment by Sees. Thus, it is Sees to whom the limitation refers, and it is Sees who "shall not . . . engage directly or indirectly . . . ." Ex. P. The capacities in which he may not so engage are then listed in the disjunctive: not as an "employee"; not as an "associate partner"; not as a "partner"; not as a "manager"; not as an "agent"; not "otherwise"; and not "by means of any corporate device." *Id.* The activity in which <u>Sees</u> may not engage, in any of the stated capacities, is "the fire extinguisher and equipment business or any other business which is in competition with" Koorsen within the specified 50-mile radius area. *Id.* Thus, Sees "shall not . . . engage

directly . . . as an employee . . . in the fire extinguisher and equipment or any other business which is in competition with Koorsen." *Id.*

The Sees Agreement prohibited Sees from engaging, as an employee, in business activity competing with Koorsen. As the trial court noted, "Sees himself testified that it was his understanding that he was prohibited by the agreement from engaging in any work in competition with Koorsen during the terms of his non-compete." (Order at 18). The Sees Agreement specified the scope of the activity prohibited in terms that allowed the employee a clear understanding of what conduct was prohibited. *Cohoon*, 760 N.E.2d at 195. Therefore, the trial court did not abuse its discretion when it found that the activity restriction of Sees' agreement not to compete was reasonable.

Affirmed in part, reversed in part and remanded with instructions.

NAJAM, J., and BROWN, J., concur.