No. COA14-185 TWENTY-TWO A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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BEVERAGE SYSTEMS OF THE CAROLINAS, LLC,	)	
Plaintiff-Appellant,	)	FROM IREDELL COUNTY
vs.	)	
ASSOCIATED BEVERAGE REPAIR, LLC, LUDINE DOTOLI, AND CHERYL DOTOLI,	)	
Defendants-Appellees	)	

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PLAINTIFF-APPELLANT'S BRIEF

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TABLE OF CASES AND AUTHORITIES

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ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL ISSUES PURSUANT TO N.C. R. CIV. P. 56?

STATEMENT OF THE CASE

Beverage Systems of the Carolinas, LLC, commenced this action by filing a verified complaint and issuing a summons on 14 June 2012. (R pp 2-24). The Defendants filed a Motion for Summary Judgment on all issues on 11 September 2013. (R pp 64-67). The Honorable A. Robinson Hassell, Guilford County Superior Court Judge, presiding, heard arguments on the motion on 30 September 2013, in Iredell County Superior Court. (R p 69; T pp 1-24). An order granting Defendants' Motion for Summary Judgment on all issues was entered on 3 October 2013. (R p 248). The plaintiff filed and served Notice of Appeal on 28 October 2013. (R pp 249-250). A transcript of the 30 September 2013 hearing was ordered on 6 November 2013 and delivered on 19 December 2013. (R pp 252-255). The record on appeal was settled by stipulation on 7 February 2014, filed in the Court of Appeals on 12 February 2014 and docketed 12 February 2014. (R pp 1, 257).

STATEMENT OF GROUNDS OF APPELLATE REVIEW

The 3 October 2013, Order of Judge A. Robinson Hassell, which granted Defendants' Motion for Summary Judgment on all Issues, is a final judgment. Accordingly, appellate jurisdiction lies with the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. §7A-27(b).

STATEMENT OF THE FACTS

On or about July 20, 2009, Plaintiff-Appellant, Beverage Systems of the Carolinas, LLC, (hereinafter, "Beverage Systems") executed an asset purchase agreement (the "Asset Purchase Agreement") with Imperial Unlimited Services, Inc. ("Imperial"), Elegant Beverage Products, LLC ("Elegant"), Ludine Dotoli ("Lou Dotoli"), Thomas Dotoli and Kathleen Dotoli, pursuant to which Beverage Systems bought the businesses and assets of Elegant and Imperial (hereinafter collectively referred to as the "Businesses") (R p 189). The Agreement provided for the sale of all assets, trade names, customer lists, accounts receivable, current customers and customer contracts and all equipment of the Businesses. (R p 7).

At the time of the execution of the Asset Purchase Agreement, Lou Dotoli, the son of Thomas and Kathleen Dotoli, owned a certain percentage of Elegant and was heavily involved in the day-to-day operations of Imperial. (R p 189). As such, Lou Dotoli developed a close and intimate relationship with all of the customers of the Businesses. (R p 189).

In order to protect the legitimate business interests acquired from the Businesses, specifically, customer relationships and goodwill, Beverage Systems required, as a material term of the Asset Purchase Agreement, Lou Dotoli, Thomas Dotoli and Kathleen Dotoli to execute a covenant not to

compete (the "Non-Compete"). (R p 190). Without the Non-Compete, the interests and assets acquired by Beverage Systems would be substantially less valuable as the Dotolis would be allowed to reenter the same markets and compete against Beverage Systems. (R p 190). As compensation and consideration for signing the Non-Compete, Lou Dotoli, and his parents, Thomas and Kathleen, were collectively paid $10,000.00, and they also received the sum of $100,000.00 as compensation for the Businesses' goodwill. (R p 141).

Elegant, Imperial and Beverage Systems, operated in the same industry of supplying and repairing beverage products and beverage equipment throughout North Carolina and South Carolina. (R pp 211-212). The Businesses operated from a building located in Statesville, North Carolina, but they supplied and serviced customers throughout the entirety of North Carolina and into parts of South Carolina. (R p 212). In North Carolina, the Businesses' operations extended as far west as Burke County and as far east as Wake County, encompassing a substantial portion of North Carolina within the Businesses' geographic footprint. (R p 212). Furthermore, the Businesses' serviced and supplied customers into northern portions of South Carolina. (R pp 212-213). Accordingly, the Non-Compete restricted the Dotoli's ability to reenter the market and compete with Beverage Systems in North Carolina and South Carolina. (R p 189). The Non-

Compete was effective from the date of the execution of the Non-Compete until 14 October 2014. (R p 15).

On or about 11 March 2011, Beverage Systems learned that equipment which was to be shipped to Beverage Systems for a job it was working on was in fact shipped to Thomas Dotoli under a new business, Associated Beverage Repair, LLC ("Associated"). (R p 8). Associated was organized on or about 7 April 2011, by Cheryl Dotoli, who is the wife of Lou Dotoli. (R p 189). This was the first time that Beverage Systems became aware that any of the Dotolis were operating a competing business in North Carolina. (R p 8).

Beverage Systems soon thereafter became aware that Lou Dotoli had approached and/or solicited business on behalf of Associated from the following customers of Beverage Systems: BunnServe/Bunn-O-Matic, PF Chang's, Reiley, U.S. Foods, J.T. Davenport, Silver Service, and Tetley (collectively, the "Customers"). (R p 190). The Customers were previous customers of the Businesses, and Lou Dotoli had previously fostered a close and intimate relationship with these customers. (R p 190).

In a separate legal matter involving many of the same parties, Lou Dotoli was deposed, during which he stated under oath that he believed the Non-Compete was valid when he originally executed the Non-Compete and accepted the

compensation for signing the Non-Compete. (R pp 191, 195). He further stated that since executing the Non-Compete, he engaged in conduct that would be in violation of the Non-Compete. (R p 191). Additionally, Lou Dotoli admitted that he engaged in a course of conduct in which he contacted and/or solicited the former customers of the Businesses in an effort to obtain their business for Associated and to take it away from Plaintiff. (R p 191).

ARGUMENT

I. STANDARD OF REVIEW

This Court applies a de novo standard of review for summary judgment decisions. Moody v. Able Outdoor, Inc., 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). Summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of a trial on a disputed factual issue. Johnson v. Trustees of Durham Tech. Cmty. Coll., 139 N.C. App. 676, 681, 535 S.E.2d 357, 361 (2000). A motion for summary judgment must be denied where the non-moving party shows a dispute as to one or more material issues. Johnson, 139 N.C. App. at 681, 535 S.E.2d at 361. Moreover, all well-plead facts asserted by the non-moving party are to be taken as true and viewed in the light most favorable to the non-moving party's position. Norfolk & W. R. Co. v. Werner Industries, Inc., 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974). As shown herein, Beverage Systems has

presented evidence that, when taken as true, shows the existence of material issues of fact regarding each of its claims against the Defendants and that Defendants are not entitled to judgment as a matter of law. As such, the trial court erred in granting Defendants' Motion for Summary Judgment.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT LUDINE DOTOLI FOR BREACH OF THE COVENANT NOT TO COMPETE

To determine whether a defendant has breached a covenant not to compete, the court must first decide whether the covenant is reasonable and valid as a matter of law. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 663-64, 158 S.E.2d 840, 843-44 (1968). The evidence before the Court in the instant action clearly shows, and Lou Dotoli admits, that his actions would be in violation of the Non-Compete. Defendants' do argue that the Non-Compete is invalid as a matter of law. However, as shown hereinbelow, the Non-Compete is reasonable as to both time and territory, and it does not violate public policy. Therefore, the trial court erred in finding that the Non-Compete was not valid as a matter of law.

A. Covenants not to compete executed during the sale of a business are given more deference

North Carolina courts give more latitude to non-competition agreements executed as a part of the sale of business than covenants ancillary to employment contracts. Jewel Box Stores

Corp., 272 N.C. 659, 663-64, 158 S.E.2d 840, 843-44; Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 331, 97 S.E. 169, 169 (1918) ("Such deals [covenants not to compete executed as part of the sale of a business] between individuals do not, as a rule, tend to unduly harm the public and are ordinarily sustained.) Such deference is the result of the public interest in seeing that valid non-competition agreements are enforced just as much as oppressive ones are rendered unenforceable. United Labs, Inc. v. Kuykendall, 322 N.C. 643, 655, 370 S.E.2d 375, 383 (1988).

This Court has previously stated that covenants not to compete executed as a part of the sale of a business are given more leeway because such covenants enable the seller to sell the business' goodwill and receive an overall higher purchase price. Seabord Indus., Inc. v. Blair, 10 N.C. App. 323, 333, 178 S.E.2d 781, 787 (1971). Moreover, a court should seek to enforce not only the technical terms of a covenant not to compete, but it should also ensure that the parties thereto are abiding by the covenant's spirit as well. Bicycle Transit Authority, Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985).

Since the Non-Compete was executed as part of the sale of the Businesses to Beverage Systems, and it benefited both Beverage Systems and the sellers of the Businesses, the Non-Compete should be granted more deference and leeway as to the reasonableness of its terms pursuant to the precedent cited

hereinabove. Accordingly, for the reasons set forth herein, the trial court erred in granting Defendants' Motion for Summary Judgment on all Issues.

B. The Non-Compete is reasonably necessary to protect a legitimate business interest, is reasonable as to time and territory and does not substantially affect public interest

A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the business' goodwill and enabling him to obtain a better price for the sale of his business. Morehead Sea Food Co. v. Way, 169 N.C. 679, 682, 86 S.E. 603, 605 (1915). When one sells a trade or business and a covenant not to compete is executed as an incident of the sale, the covenant is valid and enforceable if it: (1) is reasonably necessary to protect the legitimate interest of the purchaser; (2) is reasonable with respect to both time and territory; and (3) does not interfere with the interest of the public. Jewel Box Stores Corp., 272 N.C. at 662, 158 S.E.2d at 843. A consideration in recognizing the validity of non-competition covenants is that at the time of executing the covenant not to compete, both parties regard the restrictions as reasonable and desirable, and both parties intended to enter into the covenant. United Labs, Inc. v. Kuykendall, 322 N.C. 643, 649, 370 S.E.2d 375, 383 (1988).

To determine the parties' intent, a court must look to the contract itself, and if the plain language is clear, a court must enforce the contract as written as that is presumed to be the parties' intent. Hodgin v. Brighton, 196 N.C. App. 126, 129, 674 S.E.2d 444, 446 (2009). The Non-Compete and the Asset Purchase Agreement clearly show that Beverage Systems and Lou Dotoli intended to execute both documents, and that both parties found the terms of the Non-Compete to be agreeable and reasonable. Lou Dotoli was compensated not only for signing the Non-Compete, but he also received compensation for the goodwill of the Businesses, which directly relates to his willingness and agreeableness to sign the Non-Compete. Accordingly, it is clear that Lou Dotoli intended to execute the Non-Compete, and he felt that its terms were reasonable and desirable at the time he executed the Non-Compete. (R p 195).

The Non-Compete, executed by Lou Dotoli as a part of the sale of his interest in the Businesses, meets both tests of "reasonableness," and as such, the Court should overrule the trial court's Order granting Defendants' Motion for Summary Judgment.

i. Reasonably necessary to protect legitimate interest of purchaser

A business has a legitimate interest in protecting its relationship with its customers when said customers are long-

standing, regular customers with whom the business has, over many years, developed a close relationship and goodwill. United Labs, 322 N.C. at 651, 370 S.E.2d at 381.

A business' interest in protecting its relationship with its customers through a covenant not to compete increases greatly when its employees are able to engage in close and intimate communications and contact with individual customers. Id., 322 N.C. at 651, 370 S.E.2d at 381-382. When an employee, during the course of his or her employment, develops or improves customer relationships, the employee is establishing business goodwill, which is a valuable asset of the employer. A.E.P. Industries v. McClure, 308 N.C. 393, 408, 302 S.E. 2d 754, 763 (1983). Given that goodwill is a valuable business asset, it follows that protecting goodwill is a legitimate business interest. Id.

In United Labs, the North Carolina Supreme Court found that the plaintiff-employer had a legitimate interest in protecting its customer relationships and goodwill derived therefrom. United Labs, 322 N.C. at 653, 370 S.E.2d at 382. Such finding was because the former employee against whom the covenant was sought to be enforced had developed a close and intimate relationship with plaintiff's customers as a result of his employment with plaintiff. Id., 322 N.C. at 652, 370 S.E.2d at 381. Further, the defendant-employee was only able to learn of

the intimate needs of existing and potential customers because of his employment with plaintiff. United Labs, 322 N.C. at 653, 370 S.E.2d at 382.

In this matter, Lou Dotoli owned part of the Businesses which were sold to Plaintiff. Prior to selling his interest in the Businesses to Beverage Systems, he worked as a manager and salesman for the Businesses, which allowed him to develop and foster substantial and intimate relationships with the Customers. (R p 189). Lou Dotoli, through his employment with the Businesses, developed substantial goodwill on behalf of the Businesses for which he was compensated. (R p 141). Additionally, at the time he executed the Non-Compete and Asset Purchase Agreement, he had no objections to the Non-Compete and he willingly accepted compensation for the Businesses' goodwill. (R p 195). The Non-Compete was reasonably necessary to protect a legitimate business interest for which Lou Dotoli was compensated.

ii. Reasonable in respect to both time and territory

The reasonableness of a restraint, in respect to both time and territory, depends upon the circumstances of the particular case. Shute v. Shute, 176 N.C. 462, 463-464, 97 S.E. 392, 393 (1918). The Court must look at the facts of each case to determine whether a covenant's restrictions as to time and

territory are reasonable in light of the legitimate business interests that the covenant seeks to protect. Id.

a. Time

To prove the validity of a covenant not to compete, the party seeking to enforce the covenant must show that the time restraint is reasonable in light of the business interests it seeks to protect. Id. Where the covenant is part of a contract for the sale of a business, the seller should be allowed to fix the time for the operation of the restriction so as to command the highest market price for his business. Jewel Box Stores Corp., 272 N.C. at 665, 158 S.E.2d at 846; see Beam v. Rutledge, 217 N.C. 670, 673, 9 S.E.2d 476, 478 (1940) ("the right of the parties to . . . enter into a contract containing a covenant not to compete, is not to be lightly abridged. Indeed, it is no small part of the liberty of the citizen. Freedom to contract must not be unreasonably abridged."). A time limitation contained in a covenant not to compete should remain valid and enforceable if its duration can be justified on the ground that it is reasonably necessary to prevent a loss of customers. Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 522, 257 S.E.2d 109, 114 (1979).

In the case sub judice, Lou Dotoli, as a seller of the Businesses to Beverage Systems, should have been able to freely enter into a covenant not to compete with Beverage Systems such

that he could obtain the highest possible price for the Businesses. In fact, Lou Dotoli received compensation for signing the Non-Compete, and he received additional, separate compensation for the "goodwill of his business." (R pp 98 and 141). Given that Lou Dotoli executed the Non-Compete, at the time of execution, Lou Dotoli thought a five (5) year time restraint was reasonable and necessary to receive maximum compensation for the Businesses. (R p 195).

Defendants-Appellees may argue that the time restraint is unreasonable given the broad geographic scope of the covenant, to wit: North Carolina and South Carolina. However, this argument is flawed for two reasons. First, North Carolina courts have found multi-year and multi-state covenants not to compete to be reasonable. Enterprises, Inc. v. Heim, 276 N.C. 475, 173 S.E.2d 316 (1970) (upholding a nationwide two year restriction); Associates, Inc. v. Taylor, 29 N.C. App. 679, 225 S.E.2d 602 (1976) (upholding a multi- state two year restriction). Second, today's economy is much more intertwined, interconnected and mobile thereby enabling companies to compete on a much broader scale than in years past. Harwell Enterprises, Inc. v. Heim, 276 N.C. 475, 481, 173 S.E.2d 316, 320 (1970). Time restraints that may have been previously unreasonable are more likely to be reasonable now given the ease of the ability to compete. See Id.

Accordingly, a five (5) year time restraint is reasonable in this matter in that Lou Dotoli freely negotiated the terms of the Non-Compete in order to obtain an optimum price for his interest in the Businesses. Lou Dotoli posed a significant threat to Beverage Systems as he had kindled close relationships with the customers of the Businesses, and as such, the time restraint is reasonably necessary to protect a legitimate business interest. He also admitted that he believed the Non-Compete to be valid when he signed it and intended to be bound by it. (R p 195).

b. Territory

The test as to reasonableness of the restricted territory is whether the agreed upon territory is broad enough to protect the interest of the purchaser by removing the danger to the purchaser of competition with the seller of the business, and not so large as to interfere with the interest of the public. Beasley v. Banks, 90 N.C. App. 458, 460, 368 S.E.2d 885, 886 (1988). One of the primary purposes of a covenant not to compete is to protect the relationship between a company and its customers. A.E.P. Industries, Inc., 308 N.C. at 408, 302 S.E.2d at 763. To prove that a geographic restriction in a covenant not to compete is reasonable, a covanantee must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer

relationships. Manpower of Guilford County, Inc., 42 N.C. App. at 523, 257 S.E.2d at 115 (1979).

Defendants will likely argue that the territory restriction contained in the Non-Compete is too broad given that it includes all of North Carolina and South Carolina. Defendants' argument is flawed given that the Non-Compete divides the restricted territory into distinct areas, to wit: North Carolina and South Carolina. If the geographic restriction of a covenant not to compete is divided into distinct and separate units, a court will enforce the covenant in as many of those units that may be reasonable to the court. Welcome Wagon International, Inc. v. Pender, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961). This practice, while potentially creating a similar end result as "blue penciling," is not barred by North Carolina's restrictive use of the "blue pencil rule." Id.

In Welcome Wagon, the geographic restriction of the covenant not to compete was as follows,

> (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be, engaged in rendering its said service.

Welcome Wagon, 255 N.C. at 244, 120 S.E.2d at 739. The Supreme Court held that because the parties had already separated the geographical restrictions into distinct and separate units, the court can enforce the covenant in as many of the units as are reasonable and disregard the remainder. Welcome Wagon, 255 N.C. at 248, 120 S.E.2d at 742.

Defendants may attempt to rely on this Court's holding in Hejl v. Hood, Hargett & Associates, 196 N.C. App. 299, 674 S.E.2d 425 (2009), in support of its argument, but that case is distinguishable for two reasons. First, it was an employee-employer covenant, which is more strictly scrutinized. Second, the evidence in this action shows that the Businesses operated in a much broader geographic territory than that of the defendants in Hejl.

In the case sub judice, the pertinent language of the Non-Compete is as follows, "Seller and Shareholder shall not . . . in the states of North Carolina *or* South Carolina." (Emphasis ours). The evidence in the record indicates that Beverage Systems' customer base, and that of the Businesses, covered a large majority of the State of North Carolina, and covered the northern portion of the State of South Carolina (R pp 212-213). Defendants' have admitted that the customers of the Businesses, which were transferred to Beverage Systems, went as far west as Burke County, North Carolina, and as far east as Raleigh, North

Carolina (R pp 212-213). Moreover, given that today's economy enables businesses to compete from fixed locations rather than requiring an expansive physical presence, it is reasonable to conclude that the territory restriction of the Non-Compete was reasonably necessary to protect its legitimate business interests. See Harwell Enterprises, Inc., 276 N.C. at 481, 173 S.E.2d at 320.

Given that the Non-Compete already separates the geographical areas into two distinct and separate units, just as in Welcome Wagon, it is indicative that the parties intended for the geographic restrictions to be distinct and separate. Under the holding of Welcome Wagon, should the Court rule that the Non-Compete is unenforceable as to South Carolina, the Non-Compete is not entirely invalid, as the unenforceable geographic unit can be disregarded, and the Non-Compete can be readily enforced in North Carolina.

iii. Does not interfere with the interest of the public

A covenant not to compete will not be upheld if it substantially interferes with the interest of the public. Jewel Box Stores Corp., 272 N.C. at 665, 158 S.E.2d at 844. A covenant not to compete is not contrary to public policy if it is intended to protect a legitimate interest of the covenantee and is not so broad as to be oppressive to the covenantor or the public. See Beam v. Rutledge, 217 N.C. 670, 673, 9 S.E.2d 476,

478 (1940). Public interest is concerned with both sides of the question: It favors the enforcement of contracts intended to protect legitimate interests and frowns upon unreasonable restrictions. Beam, 217 N.C. at 673, 9 S.E.2d at 478. It is as much a matter of public concern to see that valid contracts are observed as it is to frustrate oppressive ones. Id. If the public interest is merely inconvenienced, the covenant not to compete will be enforced as long as it meets the other requirements of reasonableness. Iredell Digestive Disease Clinic, P.A. v. Petrozza, 92 N.C. App. 21, 28, 373 S.E.2d 449, 453 (1988).

The Supreme Court in Beam held that the covenant did not substantially interfere with the interests of the public because the parties regarded the covenant as reasonable when it was signed as both parties were businessmen who were aware of what they were signing. Id. Moreover, the defendant actually encouraged the execution of the covenant not to compete. Id. Based upon those facts, the Supreme Court held that the covenant in question did not violate public policy or substantially interfere with public interest. Id.

In the instant action, just as in Beam, the parties willingly executed the Non-Compete and they felt that the terms were reasonable and agreeable. (R pp 15, 122-156 and 195). Additionally, Lou Dotoli was compensated for the Businesses'

goodwill and for signing the Non-Compete. (R pp 98 and 141). It follows, then, that Lou Dotoli encouraged the execution of the Non-Compete since he received compensation for his execution thereof. Further, the parties were familiar with what they were signing, made no objections at the time it was signed, and were fully represented by counsel. Beverage Systems and Lou Dotoli are in the beverage supply industry, which does not directly affect the public interest to the same extent as other industries. It is clear that the Non-Compete was the result of an arm's length transaction where neither side had more bargaining power than the other, and all parties thereto felt that the terms of the Non-Compete were reasonable and desirable at the time of execution.

As shown hereinabove, the terms of the Non-Compete are reasonable as to both time and territory, and they do not substantially interfere with any public interest. Therefore, the trial court erred in granting Defendants' Motion for Summary Judgment because the Non-Compete is valid as a matter of law and Beverage Systems has set forth evidence that, when taken as true, shows that Lou Dotoli violated the terms of the Non-Compete.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANTS FOR TORTIOUS INTERFERENCE WITH CONTRACT

To allege a prima facie cause of action for tortious interference with a contract, a plaintiff must show the existence of the following: (1) a valid contract between the plaintiff and a third person; (2) defendant knows of the contract; (3) defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. Williams v. Am. Eagle Airlines, Inc., 208 N.C. App. 250, 258, 702 S.E.2d 541, 547 (2010). Plaintiff has met its burden in proving the existence of material questions of fact for each element of its cause of action.

a. Valid Contract

The first element of a prima facie claim for tortious interference with a contract is the existence of a valid contract between the plaintiff and a third party; however, there is no requirement that the contract be in writing. An implied in fact contract arises where the intentions of the parties are not expressed, but where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. Snyder v. Freeman, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980). An implied contract is valid and enforceable as if it were express

or written, and there are no differences in the legal effect of an express contract and an implied in fact contract. Snyder, 300 N.C. at 217, 266 S.E.2d at 602. To prove the existence of a contract implied in fact, one must look at the actions of the parties showing an implied offer and acceptance. Id.

In this matter, Beverage Systems is a supplier of dispensed beverage products, support and service. It routinely provides the same customers with regularly scheduled products, support and service, and in return, its customers remit payment. While there is no express agreement between the parties, the conduct of the parties indicates the existence of an implied in fact contract in that Beverage Systems offers its products and services to its customers, and its customers accept the products and services by remitting payment for the same. (R p 190). Many of the contractual relationships that Defendants interfered with were with customers that were sold to Beverage Systems as a part of the Asset Purchase Agreement. (R p 7). Further, Defendants admit that the business relationship with the Businesses' customers continued indefinitely as long as competent and reasonable services were rendered. (R pp 213-214). The implied in fact contracts in question between Beverage Systems and the Customers were simple: as long as Beverage Systems provided competent and reasonable services, which it did, the Customers would continue to pay and use its services. (R pp 213-214).

Accordingly, Beverage Systems has set forth sufficient evidence to show the existence of an implied in fact contract.

b. Defendants knew of the valid contracts and intentionally induced the third parties not to perform

The second and third elements of a prima face claim for tortious interference with a contract are that the defendant knew of the valid contract and intentionally induced a third party not to perform pursuant to the contract. Defendants were aware of the implied in fact contracts because Lou Dotoli helped build many of the relationships when he worked for the Businesses. Further, his position with the Businesses allowed him to have intimate knowledge of the contractual relationships between the service provider, whether it be the Businesses or Beverage Systems, and the Customers. There is more than sufficient evidence to show that there is a question of fact regarding whether Lou Dotoli was aware of the contracts in question.

Lou Dotoli has admitted under oath that he purposely and maliciously sought to obtain the business of the current customers of Beverage Systems in an effort to gain business for Associated and take business away from Beverage Systems. (R pp 191, 196-199). He further admits in his response to Beverage Systems' Interrogatory No. 14 that Associated has obtained business from customers of Beverage Systems that were

transferred to Plaintiff from the Businesses. Lou Dotoli admitted that he intentionally violated the terms of the Non-Compete in an effort to take back the customers that were transferred to Beverage Systems as a result of the Asset Purchase Agreement (R pp 193-195). There is sufficient evidence in the record to show the existence of a material question of fact regarding whether Lou Dotoli knew of the contracts and whether he intentionally induced Beverage Systems' customers to stop doing business with it and start doing business with Defendant Associated.

c. Defendants' actions were not justified

The fourth element of a prima facie claim for tortious interference with a contract is that the defendant's actions were not "justified." Generally speaking, interference with a contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors. Peoples Security Life Ins. Co. v. Hooks, 322 N.C. 216, 221-222, 367 S.E.2d 647, 650 (1988). However, the privilege to interfere is conditional and it is lost if exercised for a wrong purpose. Smith v. Ford Motor Co., 289 N.C. 71, 91, 221 S.E. 2d 282, 294 (1976). In general, a wrong purpose exists where the act is done other than as a reasonable and bona fide attempt to protect the interest of the defendant which is involved. Id. If the defendant's actions are

not "reasonably related to the protection of a legitimate business interest," the defendant's actions are not justified. Privette v. University of North Carolina, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989).

In United Labs, 322 N.C. 643, 370 S.E.2d 375 (1988), the Supreme Court found that the defendant's actions were not justified because it had hired plaintiff's employee, placed him in the same sales territory that he had previously serviced for the plaintiff, and induced the former salesman to solicit the same customers he had serviced for the plaintiff. Id. In another similar case, this Court found that the defendant's actions were not justified because it hired plaintiff's former salesmen, had them actively solicit the plaintiff's customers, and actively encouraged its salesmen to interfere with plaintiff's existing accounts. Roane-Barker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 39, 392 S.E.2d 663, 669 (1990).

In the instant action, Beverage Systems alleged in its verified complaint that it purchased the Businesses, in part, from Lou Dotoli, and that as a part of that transaction, Lou Dotoli executed the Non-Compete. (R pp 6-8). Accordingly, Lou Dotoli was not an outsider to the transaction. Moreover, Beverage Systems alleges that after executing the Non-Compete and consummating the Asset Purchase Agreement, Lou Dotoli, and

his wife, Defendant Cheryl Dotoli formed Defendant Associated, and began to directly compete with Beverage Systems in the same geographic region as Beverage Systems (R pp 8-12).

Further, Defendants began to actively solicit the business of the Customers, which was in direct violation of the Non-Compete. (R pp 8-9, 190-191, 181-183 and 195-196). Lou Dotoli admitted in the Deposition that he purposely sought to violate the terms of the Non-Compete in order to take Beverage Systems' customers. (R p 195). The allegations contained in Beverage Systems' verified complaint, which are supported by the evidence in the record, establish that the Defendants' actions in this matter are closely aligned to those of the defendants in United Labs and Roane-Barker, and thus, the Court should find that the Defendants' actions in interfering with the Beverage Systems' contracts were not justified.

d. Defendants' actions damaged Plaintiff

The final element of a valid cause of action for tortious interference with a contract is that the defendant's actions caused the plaintiff to incur actual damages. White v. Cross Sales & Eng'g Co., 177 N.C. App. 765, 768-69, 629 S.E.2d 898, 901 (2006).

In the instant action, Beverage Systems' complaint alleges that it has suffered actual damages in the form of lost profits and income as a result of Defendants' wrongful interference. (R

p 12). Moreover, Beverage Systems' president, Mark Gandino, states in his affidavit that Beverage Systems' gross receipts from the customers solicited by Defendants have drastically declined causing Beverage Systems to lose profit and income. (R p 191).

Accordingly, the trial court erred in granting summary judgment in that Beverage Systems has met its burden by presenting evidence that, when taken as true, establishes material questions of fact regarding each element of its cause of action for wrongful interference with a contract.

IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANTS FOR TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

The North Carolina Supreme Court has held that "interference with a man's business, trade or occupation by maliciously inducing a person not to enter a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues." Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). The word "malicious" used in this context does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at their expense. Walker v. Sloan, 137 N.C. App. 387, 393, 529 S.E.2d 236, 241 (2000).

Beverage Systems is in the business of supplying and repairing beverage products and beverage equipment throughout North Carolina and South Carolina. Accordingly, many of its customers repeatedly order and contract with Beverage Systems on a routine basis. As a result of Defendants' interference and solicitation of these customers, which was specifically forbidden by the Non-Compete, they chose to contract with Associated instead of Beverage Systems. As a result, Beverage Systems filed this action against Defendants, and alleged, among other things, that: (a) Lou Dotoli was aware of the relationship between Beverage Systems and its customers because the customers were transferred to it through the Asset Purchase Agreement (R pp 56, 191); (b) Defendants have admitted that they directly contacted, solicited and interfered with these relationships, in direct violation of the Non-Compete, in an effort to take Beverage Systems' business (R pp 56, 191); (c) these customers would have done business with Beverage Systems but for the Defendants' interference (R pp 56, 191); (d) Defendants were successful in obtaining the business of these customers, which was designed to injure Beverage Systems and benefit Defendants (R pp 56, 191); and (e) that as a direct and proximate result of Defendants' actions, Beverage Systems has suffered actual damages in the form of lost profit. (R pp 56, 191). Additionally, Lou Dotoli's admissions in the Deposition

establish that his conduct was done maliciously to the detriment of Beverage Systems and to the benefit of Defendants. (R pp 194-209).

Accordingly, the trial court erred in granting summary judgment because Beverage Systems has set forth sufficient evidence to show the existence of material questions of fact regarding the Defendants' malicious interference with the prospective contractual relationships between Beverage Systems and its customers.

V. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANTS FOR VIOLATION OF THE NORTH CAROLINA UNFAIR AND/OR DECEPTIVE TRADE PRACTICES ACT, N.C.G.S §75-1.1.

The North Carolina Unfair or Deceptive Trade Practice Act is codified at N.C.G.S. §75-1.1, and it provides, in part, that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. §75-1.1(a). Under N.C.G.S. § 75-1.1, it is a question for the jury to determine whether the defendants committed the alleged acts, and then it is a question of law for the court to determine whether these proven facts constitute an unfair or deceptive trade practice. Hardy v. Toler, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975). Accordingly, to withstand a motion for summary judgment, a plaintiff must establish the existence of material questions of

fact regarding alleged actions by the defendant that would amount to an unfair and/or deceptive trade practice. Id. North Carolina courts have previously held that claims involving breach of a covenant not to compete, tortious interference with contracts and tortious interference with prospective economic advantages also constitute claims for unfair and deceptive trade practices. United Labs, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988); Roane-Baker., 99 N.C. App. 30, 41, 392 S.E.2d 663, 670 (1990).

In United Labs, the Supreme Court specifically held that a valid claim for tortious interference with a restrictive covenant by a competitor also states a valid claim for unfair or deceptive trade practices under N.C.G.S. §75-1.1. Id. In Roane-Baker, this Court held that the defendant committed unfair or deceptive trade practices when it hired plaintiff's former salesmen, had them actively solicit the plaintiff's customers, and actively encouraged its salesmen to interfere with plaintiff's existing accounts. Roane-Baker, 99 N.C. App. at 41, 392 S.E.2d at 670. Accordingly, to carry its burden of proof to withstand summary judgment, a plaintiff alleging these claims as a basis for a cause of action under N.C.G.S. §75-1.1 must establish that there are questions of fact regarding whether the defendant committed such acts. N.C.G.S. §1A-1, Rule 56.

In the instant action, Lou Dotoli, after selling his interests in the Businesses to Beverage Systems and signing the Non-Compete, formed Defendant Associated with his wife, Defendant Cheryl Dotoli. (R p 10). He then began to actively solicit and interfere with the business relationships that Beverage Systems gained when it purchased the Businesses from Lou Dotoli. (R pp 191, 194-209). Lou Dotoli admitted that he acted intentionally to take customers from Beverage Systems. (R pp 191, 194-209). Lou Dotoli wilfully violated the Non-Compete, and the Defendants have intentionally and maliciously interfered with the contracts and prospective contracts that Beverage Systems had with its customers. Accordingly, the trial erred in granting summary judgment since Beverage Systems has set forth sufficient evidence to establish material questions of fact as to each element of its claims for breach of the Non-Compete, tortious interference with a contract, and tortious interference with a prospective economic advantage.

VI. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

Injunctive relief is proper when a plaintiff is able to show the likelihood of success on the merits of his case and when a plaintiff is likely to sustain irreparable loss unless the injunction is issued. A.E.P. Industries, Inc., 308 N.C. at 401, 302 S.E.2d at 759-60. A plaintiff faces irreparable injury when the injury is one to which the complainant should not be

required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. Id.

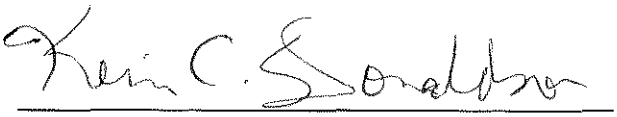
Beverage Systems has established hereinabove that the trial court erred in granting summary judgment on behalf of the Defendant. Therefore, should this Court reverse the Order of the trial court and remand this matter based upon the arguments contained hereinabove, Beverage Systems is entitled to pursue injunctive relief because of the irreparable injury that it suffers and will continue to suffer as a result of the Defendants' actions.

CONCLUSION

The Appellant, Beverage Systems of the Carolinas, LLC, respectfully requests that this Court overrule the 3 October 2013, Order, which granted Summary Judgment in favor of the Defendants-Appellees.

Respectfully submitted, this 14th day of March, 2014.

JONES, CHILDERS, MCLURKIN & DONALDSON, PLLC

By: 
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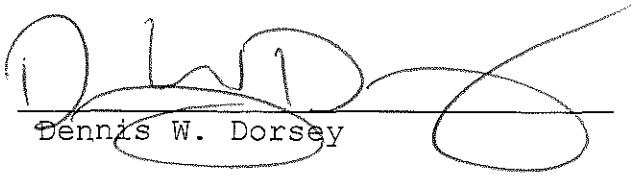
By: 
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CERTIFICATE OF SERVICE OF SETTLED RECORD ON APPEAL

I hereby certify that I filed a copy of the foregoing **BRIEF OF PLAINTIFF-APPELLANT** with the Clerk of the North Carolina Court of Appeals, and served a copy of the foregoing BRIEF OF PLAINTIFF-APPELLANT on counsel for Defendants-Appellees by **DEPOSITING A COPY ENCLOSED IN A FIRST-CLASS POSTAGE PAID PACKAGE INTO A DEPOSITORY UNDER THE EXCLUSIVE CARE AND CUSTODY OF THE UNITED STATES POSTAL SERVICE**, this 14th day of March, 2014, addressed as follows:

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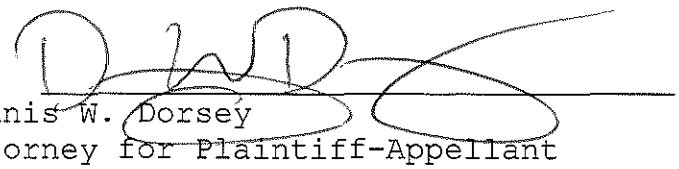
By: 

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