No. 316A-14 TWENTY-TWO A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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NEW BRIEF OF PLAINTIFF-APPELLEE

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No. 316A14 TWENTY-TWO A DISTRICT

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

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NEW BRIEF OF PLAINTIFF

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INTRODUCTORY STATEMENT

This matter, in part, arises out of a covenant not to compete that was executed ancillary to an asset purchase agreement between Plaintiff and Defendant Loudine Dotoli with respect to Plaintiff's purchase of Mr. Dotoli's interest in a business called Elegant Beverage Products, LLC. This matter does not involve a covenant not to compete that was executed in an employee-employer arrangement, and as such, an opinion affirming the Court of Appeals will have little precedential value with respect to the strict judicial construction of employee-employer covenants not to compete, as argued by the Amicus Curiae and Defendants. Thus,

Plaintiff respectfully requests that this Court affirm the opinion of the Court of Appeals based on the facts and argument provided herein.

RESTATEMENT OF THE OPERATIVE AND PERTINENT FACTS

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

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

of the Businesses as he was often the person with whom the customers dealt. (R p 189).

In order to protect the legitimate business interests that were purchased, specifically, customer relationships and goodwill, Beverage Systems requested, as a material term of the Asset Purchase Agreement, the Dotolis execute a covenant not to compete (the "Non-Compete"). (R p 190). Without the Non-Compete, the interests and assets purchased and acquired by Beverage Systems would have been substantially less valuable as the Dotolis would have been able to reenter the same markets and compete against Beverage Systems. (R p 190). By agreeing to the Non-Compete the Dotolis commanded a higher purchase price by selling the goodwill of the Businesses.

Section 1 of the Non-Compete provided that:

> Subject to the provisions of Section 6 hereof, Seller and Shareholder shall not, from the effective date of the Asset Agreement in the states of North Carolina or South Carolina until the earlier of (i) October 1, 2014 (the "Non-Competition Period"), or (ii) such other period of time as may be the maximum permissible period of enforceability of this covenant (the "Termination Date"), without the prior written, consent of Purchaser, directly or indirectly, for himself or on behalf of or in conjunction with any person, partnership, corporation or other entity, compete, own, operate, control, or participate or engage in the ownership, management, operation or control of, or be connected with as an officer, employee, partner, director, shareholder, representative, consultant, independent contractor, guarantor, advisor or in any other manner or otherwise, directly or indirectly, have a financial interest in, a proprietorship, partnership, joint venture, association, firm, corporation or

> other business organization or enterprise that is engaged in the business of the Purchaser or any of its respective affiliates or subsidiaries on behalf of clients (the "Business").

(R p 15). The Non-Compete further stated:

> If, at the time of enforcement of any provisions of Sections 1, 3 or 4 hereof, a court holds that the restrictions stated herein are unreasonable under circumstances then existing, the parties hereto agree that the maximum period, scope or geographical area that are reasonable under such circumstances shall be substituted for the stated period, scope or area, and that the court shall be allowed to revise the restrictions contained in Sections 1, 3 and 4 hereof to cover the maximum period, scope and area permitted by law.

(hereinafter the "Revision Provision"). (R p 18). During the negotiation and subsequent execution of the Asset Purchase Agreement and the Non-Compete, all parties were represented by legal counsel regarding the terms of the contracts. (R p 22). As compensation and consideration for signing the Non-Compete, and to offset any burden imposed by the Non-Compete, the Dotolis were collectively paid $10,000.00. (R pp 141, 158-159). The Dotolis also received an increased price for the Businesses as the Non-Compete allowed them to sell the goodwill of the Businesses.[1] Had the Dotolis not signed the Non-Compete, they would not have received compensation for the goodwill of the Businesses, thus, making their transaction less valuable.

[1] Loudine, Thomas and Kathleen received $100,000.00 in additional compensation under the Asset Purchase Agreement for the goodwill of the Businesses (R pp 141, 158-159).

The Businesses, just as Beverage Systems, were in the 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 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 the northern portions of South Carolina. (R pp 212-213). Accordingly, the Non-Compete restricted the Dotolis' ability to reenter the market and compete with Beverage Systems in the areas in which they formerly operated, to wit: 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 for a job it was working on was in fact shipped to Thomas under a new business, Associated Beverage Repair, LLC ("Associated") instead of Beverage Systems. (R p 8). Associated was organized on or about 7 April 2011, by Cheryl Dotoli ("Cheryl"), who is the wife of Loudine. (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 Loudine 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 through which Loudine fostered a close and intimate relationship. (R p 190).

In a separate legal matter involving many of the same parties, Loudine was deposed, and stated under oath that he believed the Non-Compete was valid when he executed the Non-Compete and accepted compensation for signing the same. (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, Loudine 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

When the Supreme Court reviews a decision of the Court of Appeals based on a dissent, the Court is to determine whether there is error of law in the decision of the Court of Appeals. N.C. R. App. P. 16(a). Such a review is limited in scope to only those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the parties' new briefs. N.C. R. App. P. 16(b).

II. THE COURT OF APPEALS CORRECTLY REVERSED THE ORDER GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM AGAINST LOUDINE DOTOLI FOR BREACH OF THE COVENANT NOT TO COMPETE AS THE EXPRESS LANGUAGE OF THE NON-COMPETE GIVES THE TRIAL COURT AUTHORITY TO REVISE THE GEOGRAPHIC TERRITORY OF THE NON-COMPETE SUCH THAT IT IS REASONABLE.

The first claim in Plaintiff's complaint is for damages that resulted from Loudine's breach of the Non-Compete. The majority opinion reversed the order of the trial court and remanded the case to Iredell County Superior Court for the trial court to revise the geographic area covered by the Non-Compete to include only those areas reasonably necessary to protect Plaintiff's legitimate business interests. Bev. Sys. of the Carolinas, LLC v. Associated Bev. Repair, LLC, __ N.C. App. ___, 762 S.E.2d 316 (2014). For the reasons shown herein, Plaintiff respectfully requests that this court affirm the opinion of the North Carolina Court of Appeals.

a. The parties freely and openly negotiated and executed the Non-Compete, specifically including the Revision Provision.

The freedom to enter into contracts and engage in lawful business activity is a right that is guaranteed by both the United States Constitution and the North Carolina Constitution. Alford v. Textile Ins. Co., 248 N.C. 224, 227, 103 S.E.2d 8, 11 (1958). Parties to a contract "may bind themselves as they see fit" unless the contract would violate the law or is contrary to public policy. Hall v. Sinclair Refining Co., 242 N.C. 707, 709-710, 89 S.E.2d 396, 397-98 (1955); Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (describing freedom of contract generally).

When dealing with a covenant not to compete, considerations in recognizing its validity are whether, at the time of executing the covenant not to compete, both parties regard the restrictions as reasonable and desirable, and whether 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. Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co., 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) (quoting Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)).

In the instant action, Loudine freely entered into and executed the Asset Purchase Agreement and the Non-Compete. (R p 195). He has admitted that he intended to be bound by the Non-Compete. (R p 195). The parties freely bargained for and included the Revision Provision in the Non-Compete so that the Non-Compete was no longer an "all or nothing at all" agreement. This provision benefitted both parties. Plaintiff, as the purchasing party, was assured that the Non-Compete would be enforceable in at least some territory. Loudine, as a selling party, received maximum compensation for his interests in the Businesses by his execution of the Non-Compete.

Loudine argues that the Revision Provision is contrary to public policy, and thus unenforceable, alleging it requires the court to rewrite the Non-Compete, which he contends is strictly forbidden by North Carolina's interpretation of the "blue pencil" doctrine. Defendants' argument, however, is flawed in that the Revision Provision does not give the trial court the authority to rewrite the contract. In fact, the opposite is true. The Revision Provision is already included in the Non-Compete as a part of the geographic territory thereof. It does not grant a trial court the authority to rewrite the contract. Instead, the Revision Provision grants the trial court the option to make findings with respect to the territory that should be restricted in order to protect the covenantee's legitimate business interests and to only enforce the covenant in that territory. The Revision Provision

provides an alternative set of terms in lieu of the original terms such that the Non-Compete does not automatically fail if the original terms are deemed to be overly broad.

A North Carolina appellate opinion suggests that the Revision Provision is not contrary to public policy. The North Carolina Court of Appeals has previously indicated a willingness to engage in judicial reformation of an overly broad covenant not to compete such that judicial reformation is not against public policy. Redlee/Scs, Inc. v. Pieper, 153 N.C. App. 421, 571 S.E.2d 8 (2002). In that case, the Court of Appeals affirmed the trial court's use of Texas law to judicially reform the territory restriction of an overly broad covenant to include only Mecklenburg County, North Carolina. Redlee/Scs, Inc., 153 N.C. App at 426, 571 S.E.2d at 13. If judicial reformation is against public policy, as Defendants alleged, the Court of Appeals would have refused to judicially reform the covenant as North Carolina courts routinely refuse to apply the law of another jurisdiction when such an application is contrary to public policy. Cable Tel. Servs., Inc. v. Overland Contr'g, Inc., 154 N.C. App. 639, 643, 574 S.E.2d 31, 33-34 (2002). Since the Court of Appeals affirmed the trial court's judicial reformation, it follows that in appropriate situations, such as when the trial court has express authority to do so; judicial reformation is not against public policy.

The Revision Provision actually furthers the public policy of North Carolina as it ensures that the parties' freedom of contract is not unreasonably abridged. Further the parties' intentions are respected while also ensuring that Loudine is not unreasonably restrained from engaging in his trade or profession. Sonontone Corp. v. Baldwin, 227 N.C. 387, 390, 42 S.E.2d 352, 354-355 (1947) ("Freedom to contract imports risks as well as rights . . . While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones.") Striking the Non-Compete as invalid will cause an extremely inequitable result as it will deprive Beverage Systems of the benefit for which it bargained and compensated Loudine. Further, Loudine would receive a windfall if the Non-Compete is rendered unenforceable as he will have received additional compensation for the Businesses' goodwill and for signing the Non-Compete. Finally, he would also be able to compete against Plaintiff in violation of the Non-Compete.

Therefore, the constitutionally guaranteed freedom and right to freely enter into contracts supports the North Carolina Court of Appeal's opinion that the Revision Provision gives the trial court the ability to revise the terms of the Non-Compete such that they are reasonable and enforceable, rather than render the Non-Compete a complete nullity.

b. North Carolina courts grant substantial deference to covenants not to compete that are executed as part of a sale of a business.

This Court has routinely stated that non-competition agreements executed as a part of the sale of business should be granted much more deference and leeway than covenants ancillary to employment contracts. 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); Beam v. Rutledge, 217 N.C. 670, 673-674, 9 S.E.2d 476, 478 (1940); Jewel Box Stores Corp., 272 N.C. 659, 663-64, 158 S.E.2d 840, 843-44 (1968). This 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., 322 N.C. at 655, 370 S.E.2d at 383. Covenants executed as part of a the sale of a business enable the seller to sell the business' goodwill and receive an overall higher purchase price, thereby actually promoting, rather than stifling, trade and commerce. Seabord Indus., Inc. v. Blair, 10 N.C. App. 323, 333, 178 S.E.2d 781, 787 (1971).

In this matter, the Non-Compete was executed as part of the Asset Purchase Agreement in order to protect the legitimate business interests of Plaintiff, as the purchaser, and in order to allow Loudine, Thomas and Kathleen, as sellers, to

obtain an optimum price for the Businesses and their goodwill. Accordingly, the provisions of the Non-Compete, including the Revision Provision, should be given more deference because the threat such a covenant poses to the public interest is not as great as if it had been executed in an employment context. See Mar-Hof Co., supra. Given that the parties to the Non-Compete had previously contemplated and bargained for the inclusion of the Revision Provision, the Court should grant the parties' agreement deference and find that the Non-Compete is enforceable based, in part, upon the Revision Provision.

c. The Revision Provision does not give the trial court the authority to draft a new contract, but rather, allows the trial court to assist the parties in revising and defining a set of terms already contemplated by the parties.

Defendants argue that the Non-Compete is void because the geographic restraint is unreasonably broad and that the Revision Provision is unenforceable due to North Carolina's strict use of the "blue pencil" doctrine. The basis of the dissenting opinion from the North Carolina Court of Appeals is that the Revision Provision did not save the Non-Compete for the following reasons: (a) the Revision provision by its very terms makes the "blue pencil" doctrine applicable, or (b) the provision is unenforceable as it violates the "blue pencil" doctrine on its face. As shown below, the arguments posed by Defendants and the dissenting opinion are without merit.

i. The Revision Provision does not make the "blue pencil" doctrine applicable by its own terms.

The Defendants, and the dissenting opinion, argue that the express terms of the Revision Provision make the "blue pencil" doctrine applicable because the Revision Provision states "the court shall be allowed to revise the restrictions contained in Sections 1, 3 and 4 hereof to cover the maximum period, scope and area permitted by law." (Emphasis added). This argument is premised upon the notion that the express terms of the Revision Provision only allow the terms to be revised to the extent permitted by law, and as North Carolina's strict application of the "blue pencil" doctrine does not allow a court to revise the terms of a non-compete sua sponte, the Revision Provision cannot be used at all in North Carolina.

To interpret the meaning of the Revision Provision, the intent of the parties must be ascertained by looking to the provision itself, and if the plain language is clear, a court must enforce the provision as written as that is presumed to be the parties' intent. Gaston Cty. Dyeing Mach. Co., 351 N.C. at 300, 524 S.E.2d at 563.

The plain language of the Revision Provision states that the trial court shall be allowed to revise the Non-Compete such that the time, scope and territory cover the maximum amount permitted by law, i.e., the maximum amount that is reasonably necessary to protect the legitimate business interests of Plaintiff. (R p

18). The "permitted by law" limitation is not directed at the trial court's ability to revise the Non-Compete, but rather, it serves to limit the degree to which the revision should take place such that the trial court must ensure that the time, scope and territory of the covenant is no greater than is reasonably necessary to protect the legitimate business interests of the covenantee.

Therefore, the plain language of the Revision Provision does not make the "blue pencil" doctrine applicable and render the Revision Provision a nullity. As such, the Court of Appeals correctly reversed the trial court's Order granting Summary Judgment in favor of Defendants.

ii. Alternatively, even if applicable, the Revision Provision does not violate the "blue pencil" doctrine.

The Revision Provision does not trigger the "blue pencil" doctrine, but should it be held that the "blue pencil" doctrine is in question; the Revision Provision does not violate North Carolina's interpretation of the "blue pencil" doctrine.

Traditionally, North Carolina only allows a strict use of the "blue pencil" doctrine that serves, in part, to prevent a court from "**draft[ing]** a new contract for the parties." Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 337, 178 S.E.2d 781, 790 (1971) (Emphasis added); See also dissenting opinion of Bobbitt, Justice, in Welcome Wagon International, Inc. v. Pender, 255 N.C. 244, 250, 120 S.E.2d 739,

743 (1961) ("We agree that a court **may not exercise its own initiative** in such a manner, for to do so would be to **draft a new contract** for the parties.") (Emphasis added).

In this matter, the Revision Provision is already part of the express language of the Non-Compete. It was expressly contemplated and bargained for by the parties to the Non-Compete. By including the Revision Provision, the parties clearly intended that the trial court be allowed to assist them in establishing the terms of the Non-Complete if the original terms were found unreasonable. In doing so, the parties intended that the public interest be furthered by ensuring that the purchaser's legitimate business interests are protected to the fullest extent of the law, while also ensuring that the covenant is no broader than is reasonably necessary to protect the purchaser's legitimate business interests.

In exercising its authority under the Revision Provision, the court is not "exercising its own initiative" because it was expressly given the authority to act. The Court will only be applying and ensuring that the original intent of the parties is enforced. The court is not drafting a new contract; it is merely assisting the parties in arriving at a territory restraint that is reasonable under the law. Further, as set forth hereinabove, the North Carolina Court of Appeals has already allowed a trial court to revise and reform an overly broad covenant when it was given

express authority within the covenant to so act. See, e.g. Redlee/Scs, Inc. v. Pieper, 153 N.C. App. 421, 571 S.E.2d 8 (2002)

Thus, the "blue pencil" doctrine is not applicable in this action as the court is not acting on its own initiative nor is it creating a new contract for the parties.

d. The general trend among jurisdictions is to allow courts to "reasonably modify" overly broad terms of a covenant not to compete.

While the Court of Appeals did not base their opinion on the "reasonable modification" rule, it is important to note that the growing trend and majority position of jurisdictions across the United States is that courts should be allowed to reasonably modify overly broad terms of covenants not to compete such that the inequities often caused by the "all or nothing at all" rule are reduced. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 36 (Tenn. 1984) ("The recent trend, however, has been away from the all or nothing at all rule in favor of some form of judicial modification. Several courts have explicitly overruled their own prior case law and adopted judicial modification. Our research indicates some form of judicial modification has now been adopted by the majority of jurisdictions. We think that under appropriate circumstances, some form of judicial modification should be permitted, especially when, as in the case before us, the covenant specifically provides for modification.") (Internal citations omitted).

In addition to Tennessee, several other states have affirmatively chosen to abandon the "all or nothing at all" approach in favor of a more reasonable and flexible approach that allows for some degree of modification and reformation based on the facts of each specific case. For example, the Idaho Supreme Court adopted the "reasonable modification rule" in Insurance Center, Inc. v. Taylor, 499 P.2d 1252, 1255-56 (Idaho 1972) so that courts could avoid the harsh results of the "all or nothing rule," and instead, use a variety of other alternatives, such as reasonable modification, that suit the particular facts presented. This same flexible approach has been employed by the appellate courts of the majority of jurisdictions in the United States. King v. Head Start Family Hair Salons, Inc., 886 So. 2d 769 (Ala. 2004) (Alabama); Data Management v. Greene, 757 P.2d 62 (Alaska 1988) (Alaska); Gulick v. A. Robert Strawn & Associates, Inc., 477 P.2d 489 (Colo. 1970) (Colorado); John A. Roane, Inc. v. Tweed, 89 A.2d 548 (Del.1952) (Delaware); Health Care Fin. Enters. v. Levy, 715 So. 2d 341 (Fla. Dist. Ct. App. 1998) (Florida); Weitekamp v. Lane, 620 N.E.2d 454 (Ill. App. Ct. 1993) (Illinois); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971) (Iowa); Puritan-Bennett Corp. v. Richter, 657 P.2d 589 (Kan. Ct. App. 1983) (Kansas); Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951) (Kentucky); Wrentham Co. v. Cann, 189 N.E.2d 559 (Mass. 1963) (Massachusetts); St. Clair Med., P.C. v. Borgiel, 715 N.W.2d 914 (Mich. Ct. App. 2006) (Michigan); Bess v. Bothman, 257 N.W.2d 791

(Minn. 1977) (Minnesota); Redd Pest Control Co. v. Heatherly, 157 So. 2d 133 (Miss. 1963) (Mississippi); R. E. Harrington, Inc. v. Frick, 428 S.W.2d 945 (Mo. Ct. App. 1968) (Missouri); Dumont v. Tucker, 822 P.2d 96 (Mont. 1991) (Montana); Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310 (N.H. 1979) (New Hampshire); Solari Industries, Inc. v. Malady, 264 A.2d 53 (N.J. 1970) (New Jersey); BDO Seidman v. Hirshberg, 712 N.E.2d 1220 (N.Y. 1999) (New York); Igoe v. Atlas Ready, 134 N.W.2d 511 (N.D.1965) (North Dakota); Raimonde v. Van Vlerah, 325 N.E.2d 544 (Ohio 1975) (Ohio); Kelite Products, Inc. v. Brandt, 294 P.2d 320 (Or. 1956) (Oregon); Sidco Paper Co. v. Aaron, 351 A.2d 250 (Pa. 1976) (Pennsylvania); Durapin, Inc. v. American Prods., 559 A.2d 1051 (R.I. 1989) (Rhode Island); Evan's World Travel v. Adams, 978 S.W.2d 225 (Tx. Ct. App. 1998) (Texas); Wood v. May, 438 P.2d 587 (Wash. 1968) (Washington); and Hopper v. All Pet Animal Clinic, 861 P.2d 531 (Wyo. 1993) (Wyoming).

As indicated in many of the cases cited above, legal scholars, such as Professor Williston and Professor Corbin, have commented on judicial reformation of overly broad covenants and agree that the most just and equitable approach is to protect the intentions of the parties by enforcing the covenant insofar as reasonably necessary. Wood v. May, supra; 6A Corbin, Contracts § 1394 (1962); 5 Williston, Contracts § 1660 (rev. ed. 1937).

In this matter, the parties intended to enter into the Non-Compete and clearly intended to include the Revision Provision as a part thereof. As such, the Court need not go so far as to adopt the "reasonable modification" rule as the majority of state appellate courts have. The parties in this action have already contemplated and bargained for the court's ability to reform the terms of the Non-Compete to the extent that is reasonably necessary to protect the legitimate business interests of Plaintiff. Thus, the Court should enforce the parties' agreement as written.

Accordingly, for the reasons listed hereinabove, the North Carolina Court of Appeals correctly reversed the trial court's order and remanded the case back to the trial court to revise the geographic area covered by the non-compete to include only those areas reasonably necessary to protect Plaintiff's legitimate business interests. As such, Plaintiff respectfully asks the Court to affirm the decision of the North Carolina Court of Appeals.

III. THE COURT OF APPEALS CORRECTLY REVERSED THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM FOR TORTIOUS INTERFERENCE WITH A CONTRACT AS IMPLIED-IN-FACT CONTRACTS EXIST BETWEEN PLAINTIFF AND THE CUSTOMERS.

Plaintiff's second cause of action against Defendants is based upon the Defendants' wrongful and malicious interference with the implied-in-fact contracts between Plaintiff and the Customers, giving rise to Plaintiff's claim for tortious

interference with a contract. The elements of tortious interference with contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the 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 the plaintiff.

United Laboratories, Inc., 322 N.C. at 661, 370 S.E.2d at 387. An implied in fact contract only means that the parties' contract is evidenced by their conduct rather than an express set of terms, and there is no difference in the legal effect between an express contract and a contract implied-in-fact. Snyder v. Freeman, 300 N.C. 204, 217, 266 SE 2d 593, 602 (1980). When dealing with an implied-in-fact contract, the issues of mutual assent and contractual intent are questions for the trier of fact. Id. In order to prove the existence of an implied contract, "one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance." Id.

The North Carolina Court of Appeals correctly held that while no express contracts existed, Plaintiff established a genuine issue of material fact regarding the existence of implied contracts between itself and the Customers, many of whom were former customers of the Businesses. The Court of Appeals based its holding on the fact that Loudine described the former relationship between the Businesses and the Customers as "so long as Imperial provided its services

competently and at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its accounts and successfully promoted and sold the coffee and tea products provided to Elegant by its vendors, Elegant continued representing its suppliers." (R p 75). The affidavit of Mark Gandino, owner of Plaintiff, states that Plaintiff's relationship with the Customers dates back to 2007, and the Customers did business under the same relationship with Imperial and Elegant before those accounts were sold to Plaintiff. (R pp 190-191).

Defendants argue that this forecast of evidence falls short of establishing a genuine issue of material fact regarding whether implied contracts existed between Plaintiff and the Customers. However, Defendants' argument is without merit as the relationship and actions between Plaintiff and the Customers, as admitted by Loudine, evidences that there was an implied offer and implied acceptance so long as the services were done competently and the rates were reasonable. Questions of mutual assent and contractual intent are to be decided by the trier of fact, and Plaintiff has met its burden by setting forth some evidence by which the trier of fact can find the existence of a contract implied-in-fact. Snyder, supra.

There is sufficient evidence to show the existence of a genuine issue of material fact regarding the existence of implied contracts between Plaintiff and the Customers, which were wrongfully interfered with by Defendants. Therefore, the Court of Appeals correctly reversed the trial court's order granting summary

judgment in favor of Defendants, and as such, Plaintiff respectfully asks the Court to affirm the decision of the North Carolina Court of Appeals.

IV. THE COURT OF APPEALS CORRECTLY REVERSED THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM FOR TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE AS PLAINTIFF SET FORTH SUFFICIENT EVIDENCE SHOWING THAT PLAINTIFF HAD A PROSPECTIVE ECONOMIC ADVANTAGE THAT IT DID NOT RECEIVE AS A DIRECT RESULT OF DEFENDANTS' WRONGFUL INTERFERENCE THEREWITH.

Plaintiff has also alleged that Defendants wrongfully, and without justification, interfered with its prospective economic advantages and business expectancies, giving rise to its claim for tortious interference with a prospective economic advantage. This Court has held that "interfere[nce] 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). As a part of this cause of action, the plaintiff must prove that the prospective economic advantage would have ensued but for defendant's interference. Id.

The evidence set forth in the record discloses that Plaintiff had an expectation to receive an economic advantage as a result of its business relationship with the Customers. Loudine even admits that the relationship

between the Businesses and the Customers before those accounts were sold to Plaintiff was very constant and consistent such that the customers kept calling as long as competent service and reasonable rates were given to the Customers. (R pp 75-76). Plaintiff was justified in its expectation of the Customer's business because they had routinely continued their business with Plaintiff after the Asset Purchase Agreement until Defendants, specifically Loudine, began to solicit and call upon them in violation of the Non-Compete. (R pp 206-207). Had Loudine and Defendants not wrongfully interjected themselves into the relationship between Plaintiff and the Customers, Plaintiff would have continued to do business as usual with the Customers, deriving income therefrom. (R p 191).

There is sufficient evidence to show the existence of a genuine issue of material fact regarding Plaintiff's claim that its prospective economic advantages with the Customers were lost as a direct and proximate result of Defendants' wrongful and unjustified interference. As such, the Court of Appeals correctly reversed the trial court's order granting summary judgment in favor of Defendants, and therefore, Plaintiff respectfully asks the Court to affirm the decision of the North Carolina Court of Appeals.

V. THE COURT OF APPEALS CORRECTLY REVERSED THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES AS PLAINTIFF HAS FORECASTED EVIDENCE OF SUFFICIENT AGGRAVATING FACTORS AND EGREGIOUS CONDUCT, AND IT HAS ESTABLISHED GENUINE ISSUES OF MATERIAL FACT ON ITS CLAIMS FOR BREACH OF THE NON-COMPETE, TORTIOUS INTERFERENCE WITH A CONTRACT AND TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE.

Plaintiff further alleges that Defendants committed unfair or deceptive acts that violate N.C. Gen. Stat. §75-1.1, which 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). A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). As such, to withstand summary judgment, the plaintiff must set forth sufficient evidence tending to show that the defendant committed the acts on which the plaintiff bases his Chapter 75 claim.

This Court has previously held that a valid claim for tortious interference with a contract by a competitor also states a valid claim for unfair or deceptive

trade practices under N.C. Gen. Stat. §75-1.1. United Labs, 322 N.C. at 664, 370 S.E.2d at 389. Moreover, while it is true that an ordinary breach of contract claim does not support a claim under Chapter 75, a claim under Chapter 75 may be had by the plaintiff when there is evidence showing that the breach was accompanied by "[s]ome type of egregious or aggravating circumstances" Dalton v. Camp, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001).

In the instant action, Loudine, after selling his interests in the Businesses to Plaintiff, signing the Non-Compete, and accepting compensation from Plaintiff, formed Defendant Associated with his wife, Cheryl. (R p 10). He then began to actively solicit and interfere with the business relationships and accounts that Plaintiff gained when it purchased the Businesses from Loudine. (R pp 191, 194-209). Loudine has admitted that he acted intentionally to take customers from Beverage Systems. (R pp 191, 194-209). Further, Loudine has willfully 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.

Since this Court has previously held that claims for tortious interference with contracts and tortious interference with prospective economic advantages also support a claim under N.C. Gen. Stat. §75-1.1, and because Plaintiff has set forth sufficient facts establishing the existence of genuine issues of fact with respect to

those underlying claims against Defendants, Plaintiff has set forth sufficient evidence establishing genuine issues of fact with respect to its claim under N.C. Gen. Stat. §75-1.1. Plaintiff has also set forth sufficient evidence showing that Defendants' actions were unfair and deceptive, and that Loudine's breach of the Non-Compete was accompanied by sufficient aggravating factors and egregious conduct to give rise to a claim under N.C. Gen. Stat. §75-1.1. As such, the Court of Appeals correctly reversed the trial court's order granting summary judgment in favor of Defendants on Plaintiff's claims under N.C. Gen. Stat. §75-1.1, and thus, Plaintiff respectfully asks the Court to affirm the decision of the North Carolina Court of Appeals.

VI. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF.

In its complaint, Plaintiff requested injunctive relief to prevent Defendants from continuing the actions that were causing continuing and irreparable harm to Plaintiff's business. In order to be entitled to injunctive relief, a plaintiff must show that: (1) there is a "likelihood of success on the merits of his case;" and (2) the movant will likely suffer "irreparable loss unless the injunction is issued[.]" Ridge Cmty. Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

When the trial court granted summary judgment in favor of Defendants, Plaintiff's request for injunctive relief was summarily dismissed. In reversing the trial court, the Court of Appeals stated that since the case was being remanded, the trial court must now determine whether there is a likelihood of success on the merits for Plaintiff's breach of contract claim based on the revised Non-Compete. Bev. Sys. of the Carolinas, LLC, __ N.C. App. at ___, 762 S.E.2d at 326. As shown hereinabove, the Court of Appeals correctly reversed the trial court's order granting summary judgment in favor of the Defendants in its entirety. Plaintiff's claim for injunctive relief should now be decided by the trial court to determine whether Plaintiff has set forth sufficient evidence to show that it has a likelihood of success on the merits of its claims. Thus, Plaintiff respectfully asks the Court to affirm the decision of the North Carolina Court of Appeals.

CONCLUSION

For the reasons stated hereinabove, and at any oral argument in this matter, Plaintiff, Beverage Systems of the Carolinas, LLC, respectfully requests that this Court affirm the decision of the North Carolina Court of Appeals.

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

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CERTIFICATE OF SERVICE OF PLAINTIFF-APPELLEE'S NEW BRIEF

I hereby certify that I electronically filed a copy of the foregoing **NEW BRIEF OF PLAINTIFF-APPELLEE** with the Clerk of the North Carolina Supreme Court, and served a copy of the foregoing on counsel for Defendants-Appellants and for the Amicus Curiae, North Carolina Advocates for Justice, 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 November, 2014, addressed as follows:

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