No. 09-0558

In the
SUPREME COURT OF TEXAS

Marsh USA Inc. and Marsh & McLennan Companies, Inc.,

Petitioners,

v.

Rex Cook,

Respondent.

Petition from the Court of Appeals,
Fifth District of Texas, Dallas, Texas

REX COOK'S RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	Marsh USA Inc. ("Marsh") and Marsh & McLennan Companies, Inc. ("MMC")* (collectively, "Petitioners") sued Rex Cook and his employer, asserting a claim for breach of contract (a covenant not to compete) and other common-law claims.
Trial Court:	Honorable Martin Hoffman, 68th District Court, Dallas County, Texas
Trial Court's Disposition:	The trial court granted Cook's motion for partial summary judgment on Marsh and MMC's claim for breach of contract, and found that the covenant not to compete on which the claim was based was unenforceable as a matter of law. Marsh and MMC subsequently non-suited their common law claims, rendering the trial court's summary judgment order a final judgment.
Court of Appeals:	Fifth Court of Appeals in Dallas, Texas. Opinion by Justice Carolyn Wright, joined by Justices Moseley and Francis. *Marsh USA Inc. v. Cook*, 287 S.W.3d 378, 381-82 (Tex. App. -- Dallas 2009, pet. filed).
Court of Appeals' Disposition:	Affirmed. The court of appeals held that the covenant not to compete is not enforceable because MMC's consideration for the covenant -- a sale of MMC stock to Cook -- did not "give rise to an interest in restraining competition," as required to support a valid covenant not to compete under Texas law.

* Although Petitioners and the Court of Appeals refer to Marsh USA Inc. and Marsh & McLennan Companies, Inc. collectively as "Marsh" or "MMC," the two are distinct corporate entities. (R 94-95)

RESPONSE TO STATEMENT OF JURISDICTION

Absence of Conflict. The issue in this case is not whether an employer has a right to protect its goodwill through a covenant not to compete, as Petitioners contend, but rather whether a discount on the purchase of publicly-traded stock is consideration of the kind that gives rise to an interest in restraining competition, as required to support a valid covenant not to compete under Texas law. Thus, Petitioners' assertion that a conflict exists because the ruling below prevents an employer from protecting goodwill mischaracterizes the holding of the Court of Appeals, and no conflict exists.

Lack of Importance and Absence of a Genuine Issue of Statutory Construction. The petition for review presents no issues of importance to the state's jurisprudence and, to the extent the petition presents a question of statutory construction, it is one that is well-settled under multiple decisions of this Court. This Court considered the proper interpretation of TEX. BUS. & COM. CODE § 15.50(a) in *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642 (Tex. 1994) and established the test for determining whether a covenant not to compete is "ancillary to or a part of an otherwise enforceable agreement" within the meaning of the statute. *Id.* at 647. That test, which this Court confirmed in *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006) and again in *Mann Frankfort Stein & Lipp Advisors, Inc v. Fielding*, 289 S.W.3d 844 (Tex. 2009), requires a valid covenant not to compete to be supported by consideration that gives rise to an interest in restraining competition. The decision of the Court of Appeals presents a straightforward application of that principle because there is no causal connection between the consideration given and the interest MMC claims.

ISSUE PRESENTED

Did the Court of Appeals err on a matter of law that is important to the jurisprudence of this state when:

a. This Court has repeatedly recognized that a valid covenant not to compete must be supported by consideration that gives rise to the employer's interest in restraining competition;

b. The consideration provided by MMC to Cook in exchange for his covenant not to compete was a discount on the purchase of 3,000 shares of publicly-traded stock; and

c. The Court of Appeals applied well-established legal principles in determining that MMC's interest in protecting its goodwill did not arise as a result of Cook's purchase of MMC's stock?

STATEMENT OF FACTS

MMC is a publicly-traded company listed on the New York, Chicago, and London Stock Exchanges. (R 53-54, 57)[2] As of April 2008, MMC had over 500 million shares of stock outstanding and a market capitalization of over $12 billion. (R 53-54, 59) Cook was an employee of Marsh, an MMC affiliate, until 2007. (R 94-95, 97)

In 1996, MMC granted Cook 500 stock options. (R 124, 127-28) The options vested in 25% increments each year, becoming fully vested and exercisable after four years. (R 127-28) Pursuant to the terms and conditions of the option grant, Cook was required to sign a Non-Solicitation Agreement only if he decided to exercise his option to purchase MMC stock at the option price, but not otherwise. (R 129-41) Cook decided to exercise his stock options in February 2005. (R 125) To do so, he tendered to MMC $63,895.02, an amount that represented the sum of the option price for 3,000 shares of stock and $16,363.77 for tax withholding, along with the signed Non-Solicitation Agreement. (R 124-25, 177-83) In return, MMC transferred to Cook 3,000 shares of MMC's publicly-traded common stock, which had a market value of $97,650 on the date of exercise. (*See id.*) Cook obtained about a 0.0006% (6 ten-thousandths of one percent) stake in the company and realized a net financial gain of $33,754.98 from the transaction.[3] *Id.*

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[2] "R" refers to the Clerk's Record filed with the Court of Appeals; "Br." refers to Appellant's Brief filed with the Court of Appeals; "Pet." refers to the Petition for Review.

[3] Petitioners suggest for the first time in a footnote to their Statement of Facts that the Non-Solicitation Agreement is supported by the additional consideration of an implied promise to provide confidential information. (Pet. at 4 n.2) But Petitioners did not raise this as an issue for

SUMMARY OF THE ARGUMENT: REVIEW IS NOT WARRANTED

The Court of Appeals' decision represents a straightforward application of a principle to which this Court has adhered since its first decision addressing the Covenants Not to Compete Act -- that a covenant not to compete must be supported by consideration that gives rise to an interest in restraining competition. Petitioners incorrectly cast this dispute as one about whether a company may protect its "valuable business goodwill" through a covenant not to compete. Neither Cook nor the Court of Appeals has suggested that goodwill is not worthy of protection. But a company's desire to protect its goodwill alone does not render a covenant not to compete enforceable. Texas law has long recognized that a company seeking to protect its goodwill or other protectable interest through a covenant not to compete must meet specific requirements in order to overcome Texas's prohibition on restraints of trade.

Among those requirements is that the company's consideration for the covenant not to compete must give rise to an interest in restraining competition. Texas courts, including this Court, have routinely recognized that financial benefits do not satisfy this requirement. Unlike agreements to provide trade secrets or confidential information, which do give rise to an interest in restraining competition, there was nothing about Cook's purchase of publicly-traded stock, at a discount or otherwise, that, in and of itself, generated a need to restrain competition. Consistent with this well-established body of law, the Court of Appeals' decision stands for the unremarkable proposition that a sale to

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this Court's review, nor did they raise it in the trial court or the Court of Appeals. Indeed, they disavowed in their brief below that confidential information was in issue. (Br. at 13 n.10)

Cook of publicly-traded stock, like other financial benefits, does not give rise to an interest in restraining competition.

Petitioners also incorrectly characterize the Court of Appeals' decision as creating a new "timing requirement" inconsistent with this Court's recent rejection of *Light*'s footnote 6. But the issues are unrelated. *Light*'s footnote 6 and *Sheshunoff* address the issue of when the employer must provide its consideration. This case involves the separate issue of whether the consideration gives rise to an interest in restraining competition. Like the Court of Appeals below, this Court in *Mann* recognized the obvious fact that the phrase "gives rise to an interest in restraining competition" requires some causal connection between the consideration and the interest for which protection is sought. The consideration itself must be what "generates" or "gives rise to" that interest. Manifestly, the employer's consideration must exist before the employer's interest in restraining competition arises, or the consideration could not have "given rise" to the interest. MMC's asserted interest in protecting goodwill arose, according to MMC, from Cook's employment at Marsh and his relationship with Marsh customers, not from his decision to purchase MMC stock. The Court of Appeals therefore reached the logical (and correct) conclusion that the sale of stock could not have "given rise to" MMC's separate, pre-existing interest in protecting goodwill.

Finally, Petitioners exaggerate the supposed economic impact of the Court of Appeals' decision, claiming it will wreak havoc on the Texas economy and cause job losses and an exodus of employers to neighboring states. But the Court of Appeals only reaffirmed what Texas law already required -- that in order to restrain trade, a company

must provide consideration that creates an interest in restraining competition. MMC failed to do so, and its covenant not to compete was therefore a naked restraint of trade. The Court of Appeals' opinion does not alter the existing legal landscape, and the Court should reject Petitioners' imagined parade of horribles.

ARGUMENT AND AUTHORITIES

I. Non-Competition Agreements Are Unenforceable in Texas Unless They Satisfy Stringent Requirements That Are Clearly Established by Statute and This Court's Decisions.

The general rule in Texas is that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful." TEX. BUS. & COM. CODE § 15.05(a) (Vernon 2007). The Covenants Not to Compete Act provides an exception to this rule:

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Id. § 15.50(a). Thus, the exception requires that the covenant not to compete: (1) be ancillary to or part of an otherwise enforceable agreement; and (2) be reasonable in scope. *Id.* The first prong of this test is the only prong at issue in this appeal. (*See* Br. at 18 n.11, 39; R 36-39)

A. A Covenant Not to Compete Must Be "Ancillary" to an Otherwise Enforceable Agreement.

It is well-established Texas law that, for a covenant not to compete to be ancillary to or part of an otherwise enforceable agreement, there must be an "otherwise enforceable agreement" that meets two conditions:

(1) the consideration given by the employer in the otherwise enforceable agreement must *give rise to the employer's interest in restraining the employee from competing*; and

(2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.

Mann Frankfort Stein & Lipp Advisors, Inc v. Fielding, 289 S.W.3d 844, 849 (Tex. 2009); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 648-49 (Tex. 2006); *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 647 (Tex. 1994) (emphasis added).[4] "Unless both elements of the test are satisfied, the covenant is a naked restraint of trade and unenforceable." *Mann*, 289 S.W.3d at 849 (quoting *Light*, 883 S.W.2d at 647); *see also Sheshunoff*, 209 S.W.3d at 648-49 (quoting and applying *Light*'s two-part test). Although Petitioners contend to the contrary, this Court's recent decisions in *Sheshunoff* and *Mann* have "followed and confirmed" this test. *Mann*, 289 S.W.3d at 849 (citing *Sheshunoff*, 209 S.W.3d at 650-51).

B. The Employer's Consideration Must Give Rise to an Interest in Restraining Competition.

Texas law is also clear that only certain types of consideration "give rise to an interest in restraining competition." Texas cases since *Light*, including *Sheshunoff* and *Mann*, consistently hold that, when an employer agrees to provide trade secrets or confidential information to an employee, it has provided consideration of the kind that

[4] Because Texas covenant-not-to-compete case law usually involves employers and employees, the relevant case law often uses those terms, and for simplicity's sake, Cook's response does as well, in place of the more general "offeror," though MMC was not Cook's employer.

"generate[s]" or "give[s] rise" to an interest in restraining competition.[5] *Mann*, 289 S.W.3d at 852; *Sheshunoff*, 209 S.W.3d at 649; *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 118 (Tex. App. -- Houston [14th Dist.] 1999, no pet.); *Ireland v. Franklin*, 950 S.W.2d 155, 158 (Tex. App. -- San Antonio 1997, no writ).

Other Texas cases identify types of consideration that do not meet this test. For instance, "financial benefits do not give rise to an 'interest worthy of protection' by the covenant not to compete." *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App. -- Austin 2004, pet. denied). Nor does an employer's promise to compensate an employee in the event of economic hardship, *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App. -- Dallas 2003, pet. dism'd w.o.j.), or a deferred compensation agreement. *Valley Diagnostic Clinic v. Dougherty*, 287 S.W.3d 151, 157 (Tex. App. -- Corpus Christi 2009, no pet.) ("a compensation provision made only in exchange for a non-compete promise is precisely the sort of restraint that Texas law prohibits"). Similarly, an agreement for employment for a term does not justify a covenant not to compete. *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 590 (Tex. App. -- Dallas 2003, no pet.). Federal courts also have held that stock options do not give rise to an interest in restraining competition under Texas law. *See Olander v. Compass Bank*, 172 F. Supp. 2d 846, 855 (S.D. Tex. 2001), *aff'd*, 44 F.App'x. 651 (5th Cir. 2002) (holding that employer failed to establish how an award of stock options "g[a]ve rise" to

[5] As Petitioners note, the "ancillary to or part of" requirement was enacted in 1993, and interpreted by *Light* and its progeny. (Pet. 8-9) Petitioners, however, rely heavily on cases pre-dating the "gives rise to" requirement first articulated in *Light*.

its interest in restraining competition); *Oxford Global Resources, Inc. v. Weekley-Cessnun*, No. Civ. A. 3:04-CV-0330, 2005 WL 350580, *4 n.8 (N.D. Tex. Feb. 8, 2005) ("[S]tock options do not give rise to an employer's interest in restraining competition or solicitation.")[6]

Most significantly, in *Sheshunoff*, this Court characterized the payment of money as a prototypical example of the type of consideration that *does not* give rise to an interest in restraining competition. The Court reasoned:

> Under *Light*, 'the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing,' and if this particular consideration is never provided by the employer, the covenant not to compete cannot be enforced. Absent such consideration, the covenant is not 'ancillary to or part of the otherwise enforceable agreement' under the Act as interpreted by *Light*. *To hold otherwise would mean that an employer could enforce a covenant merely by promising to pay a sum of money to the employee in the agreement, a result inconsistent with Light's requirements that the covenant must give rise to the employer's interest in restraining the employee from competing and the covenant must be designed to enforce the employee's consideration or return promise.*

209 S.W.3d at 650 (citations omitted) (emphasis added).

The purpose underlying the requirement that the consideration "give rise to an interest in restraining competition" can easily be distilled from the above-cited cases. The key difference between the categories of consideration that do give rise to this interest (such as certain types of confidential information) and those that do not (such as a

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[6] As the Court of Appeals recognized, the only contrary Texas case is an unpublished opinion that relied entirely on inapposite out-of-state case law to conclude that a trial court, in ruling on an application for temporary injunction, did not abuse its discretion in implicitly finding that a covenant not to compete was ancillary to a stock option award. *Totino v. Alexander & Assocs., Inc.*, No. 01-97-01204-CV, 1998 WL 552818, *7 (Tex. App. -- Houston [1st Dist.] Aug. 20, 1998, no pet.) (not designated for publication).

term of employment and various types of financial benefits) is the impact they have on the employer. Committing to share confidential information and trade secrets places an employer in a heightened position of competitive vulnerability and the employee in a position of competitive advantage that overcomes strong Texas public policy prohibiting restraints of trade. Thus, the relevant inquiry is not merely whether the asserted interest is worthy of protection -- a question not in dispute here -- but also whether the asserted interest arises as a result of the type of consideration provided.

II. The Court of Appeals Correctly Determined that Cook's Non-Solicitation Agreement Is Not Ancillary to His Agreement with MMC to Purchase Stock.

A. Petitioners' Consideration for Cook's Covenant Not to Compete Was a Discount on the Purchase of Publicly-Traded Stock, Not Goodwill.

A recurring theme throughout the Petition is the proposition that goodwill is an interest worthy of protection by a covenant not to compete. (Pet. at 6-8, 10, 13) Petitioners' emphasis on this undisputed principle misses the point. As noted above, in assessing the enforceability of a covenant not to compete, courts also must consider whether the interest in seeking the restraint arises from the consideration the employer provides. The sole consideration for the covenant not to compete in this case was the sale of 3,000 shares of MMC common stock to Cook at the option price. (*See* R 19-20, 67, 71, 74-79, 81; Br. at 24; Pet. at 14). Therefore, the issue before the Court of Appeals and this Court is simply whether that consideration gave rise to an interest in restraining competition -- an issue to which Petitioners dedicate only about a page-and-a-half of their Petition. (*See* Pet. at 14-15)

B. MMC's Consideration to Cook Did Not Give Rise to an Interest in Restraining Competition.

The Court of Appeals' conclusion that MMC's consideration did not give rise to an interest in restraining competition was not only consistent with, but was mandated by, Texas case law -- including the decisions of this Court. Unlike a commitment to provide trade secrets or other confidential information to an employee, a discounted sale of stock is analogous to the other incentives and financial benefits that Texas courts have repeatedly held do not give rise to an interest in restraining competition. *See Sheshunoff*, 209 S.W.3d at 650; *Trilogy*, 143 S.W.3d at 463; *Strickland*, 97 S.W.3d at 839; *C.S.C.S.*, 129 S.W.3d at 590; *Olander*, 172 F. Supp. 2d at 855; *Oxford*, 2005 WL 350580 at *4 n.8. Here, given that MMC's stock was publicly traded, Cook could have purchased the same shares on the open market where no covenant not to compete was required. In fact, the effect of the transaction was equivalent to MMC paying Cook a cash bonus equal to the difference between the exercise price and the stock's market value at the time of exercise. Petitioners have conceded that the transfer of stock to Cook resulted in a "net financial gain," (Br. at 6), and MMC's own Confirmation of Exercise calculated specific dollar values representing Cook's gain and tax liability. (R 183)

Instead, Petitioners wrongly focus on the purpose of their offer rather than how Cook's purchase of publicly-traded stock, in and of itself, caused or "gave rise to" a need to restrain competition. Petitioners claim that "Marsh offered stock to Cook to encourage him to grow the customer relationships which comprise Marsh's goodwill," and thus the "stock gave rise to a worthy interest because, absent a non-compete, Cook could walk out

the door and take the relationships he was incentivized to create to a competitor." (Pet. at 14) Petitioners' argument would allow an employer to impose on an employee a covenant not to compete in exchange for any benefit the employer provides to incentivize the employee to work hard and build the company. Any consideration that would incentivize an employee to work hard would suffice under Petitioners' theory -- year-end performance bonuses, retention bonuses, or a company car. As discussed above in Section I.B, however, Texas courts have repeatedly held that such consideration does not justify a covenant not to compete under Texas law. Moreover, as the Court of Appeals aptly noted, this view would eviscerate the "give rise to" requirement. *See Marsh USA Inc. v. Cook*, 287 S.W.3d 378, 381-82 (Tex. App. -- Dallas 2009, pet. filed).

As a last-ditch effort, Petitioners complain that the Court of Appeals erred in applying an "overly technical" analysis by focusing on the "ancillary to or part of" test rather than on the reasonableness of the restraint. (Pet. 13) Petitioners mischaracterize *Sheshunoff*, which states that concerns about the amount of confidential information received by the employee, its true degree of confidentiality, and the time period over which it is received are "better addressed" in assessing the reasonableness of the restraint. 209 S.W.3d at 655. But the Court reaffirmed and applied the threshold requirement that the *nature* of the consideration provided in return for a covenant not to compete must give rise to the interest in restraining competition for which protection is sought. *Id.* at 649, 655. Here, because MMC's consideration for Cook's Non-Solicitation Agreement did not give rise to an interest in restraining competition, the Court of Appeals correctly

determined that the Non-Solicitation Agreement is unenforceable. *See Sheshunoff*, 209 S.W.3d at 650; *Strickland*, 97 S.W.3d at 839; *Trilogy*, 143 S.W.3d at 463.

C. The Court of Appeals Did Not Impose a New "Timing Requirement" Inconsistent with This Court's Decisions.

Petitioners seize on the last paragraph of the Court of Appeals' opinion and urge that the appellate court adopted a new timing requirement. This argument is premised on further mischaracterization of the decision of the Court of Appeals and those of this Court. To begin with, the so-called "timing requirement" that *Sheshunoff* rejects was not even at issue in the Court of Appeals' decision. *Sheshunoff* addresses when an employer must provide its consideration, concluding that a unilateral agreement that becomes enforceable at a later date constitutes an "otherwise enforceable agreement." 209 S.W.3d at 648-56. The Court of Appeals here did not question the timing, formation, or existence of an otherwise enforceable agreement, but rather based its decision on the separate requirement that the consideration provided in exchange for a covenant not to compete must give rise to an interest in restraining competition.

In any event, the Court of Appeals imposed no new "timing requirement." It simply applied the test articulated by this Court in *Light* and reaffirmed in *Sheshunoff* and *Mann*. The Court of Appeals' statement that the employer's consideration "give[s] rise" to an interest in restraining competition only if it creates that interest is precisely consistent with *Mann*'s conclusion that the employer's consideration (there, confidential information) "gave rise" to an interest in restraining competition because it "generated" an interest in protecting that information. *Compare Cook*, 287 S.W.3d at 382, *with*

Mann, 289 S.W.3d at 852. Moreover, the Court of Appeals' observation that the creation of an interest in restraining competition "will occur only where the interest in restraining competition did not exist before the consideration was given" is tautological and uncontroversial. *Cook*, 287 S.W.3d at 382. Indeed, something cannot arise or be created or generated if it already exists. Far from creating a new requirement, the Court of Appeals applied the "gives rise to" test in a straightforward manner.

Petitioners further confuse the issue by suggesting that *Sheshunoff* and *Mann* stand for the proposition that an interest in restraining competition can exist before the consideration is provided. (Pet. 11-12) Petitioners' argument is premised on their assertion that both cases enforce covenants not to compete where the employees had received confidential information before executing their covenants not to compete. But both *Mann* and *Sheshunoff* discuss past confidential information in portions of the analysis unrelated to the "gives rise to" analysis. In *Sheshunoff*, the Court was asked whether the covenant not to compete was unreasonable -- the second prong of the analysis -- given that the employee had received the same type of information before executing the covenant not to compete. 209 S.W.3d at 657. The Court concluded that the employer did not waive the right to request a covenant not to compete merely because it had previously provided the employee with the same information without a covenant not to compete. *Id.*

In *Mann*, the Court considered whether the employer had made an implied promise to provide confidential information. The Court determined that such a promise could be implied. Among other things, the Court observed that the employee had been

previously employed by the employer and had received confidential information in connection with that position. Accordingly, when he was rehired at a more senior position, "it was clear that by the nature of his duties . . . [he] would be required to have and use information confidential to the firm." 289 S.W.3d at 851.

Consequently, neither *Sheshunoff* nor *Mann* stands for the proposition that the interest in restraining competition need not arise from the consideration actually provided in return for the covenant not to compete; both cases instead reaffirm that requirement. 209 S.W.3d at 650; 289 S.W.3d at 852. Indeed, the fact that an employer may have had an interest in restraining competition in the past would not preclude an interest from arising in the future, particularly given that, as Petitioners admit, confidential information is never static and has a short shelf life. (Pet. 14-15) In any event, this case does not even involve a claim that MMC provided the same consideration in the past.

MMC's sale of stock to Cook had no impact on goodwill and thus could not have given rise to an interest in restraining competition. Whether Cook was a valuable employee in a position to "walk out the door and take relationships," the Court of Appeals correctly observed that he was the same employee the day after he exercised his stock options as he was the day before, except that he had experienced a net financial gain of approximately $34,000. He likewise could have called his stock broker and purchased MMC stock that day at the public trading price, as could any other member of the public. Neither circumstance "gave rise" to any interest in restraining competition.

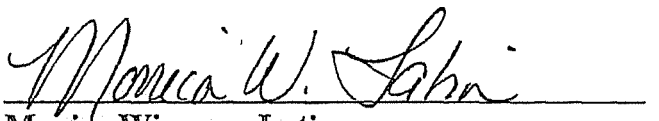
D. The Court of Appeals' Decision Does Not "Create an Environment Hostile to Economic Development."

Petitioners' apocalyptic prediction that the Court of Appeals' decision will result in job losses and an exodus of employers out of the state is a desperate attempt to manufacture a reason why this case -- which follows well-established precedent -- is conceivably important to the jurisprudence of the state. But, again, Petitioners miss the point by complaining that the Court of Appeals' decision threatens the right of employers to protect their goodwill. The Court of Appeals did not address in any way whether goodwill is an interest worthy of protection through a covenant not to compete. It simply reaffirmed that employers seeking to do so must meet certain requirements. Proper application of those requirements led the Court of Appeals to agree with Cook that his Non-Solicitation Agreement is unenforceable, not because the Court of Appeals had some aversion to protecting goodwill, but because MMC's consideration did not give rise to the interest in restraining competition that MMC sought to protect. A rule allowing companies to restrain trade by dangling financial incentives in front of Texas employees surely *would* threaten economic development. Requiring those companies to show sufficient justification for restraints on trade can hardly be characterized as hostile to business.

PRAYER

Because the decision of the Court of Appeals represents a straightforward application of a principle to which this Court has adhered in all of its decisions relating to the Covenants Not to Compete Act, Respondent Rex Cook prays that the Court deny the Petition for Review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 1, 2009, a copy of this Response to Petition for Review was served by Federal Express on the following counsel for Petitioners:

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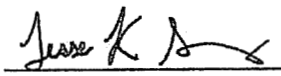

Jesse K. Shumway

TAB A

Marsh & McLennan Companies, Inc.

Non-Solicitation Agreement For Exercise Of Employee Stock Options

In order to receive the benefits afforded by the Marsh & McLennan Companies 1988 Incentive and Stock Award Plan, the Marsh & McLennan Companies 1992 Incentive and Stock Award Plan, or any successor plan thereto (collectively, the "Plan"), as each may be amended from time to time, I, the undersigned, agree that if my employment with Marsh & McLennan Companies, Inc. or one of its subsidiaries (the "Company") terminates for any reason other than death or total disability within three (3) years after exercising the option granted to me on (dates of grant(s) involved):
1) 3-21-96 2) _____ 3) _____
under the Plan, I will not, for a period of two (2) years from date of termination, directly or indirectly, as a sole proprietor, member of a partnership, or stockholder, investor, officer or director of a corporation, or as an employee, agent, associate or consultant of any person, firm or corporation except for the benefit of the Company.

(a) solicit or accept business of the type offered by the Company during my term of employment with the Company, or perform or supervise the performance of any services related to such type of business, from or for (i) clients or prospects or the Company or its affiliates who were solicited or serviced directly by me or where I supervised, directly, indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (ii) any former client of the Company or its affiliates who was such within two)2) years prior to my termination of employment and who was solicited or serviced directly by me or where I supervised directly or indirectly, in whole or in part, the solicitation or servicing activities related so such former clients; or
(b) solicit any employee of the Company who reported to me directly or indirectly to terminate his employment with the Company for the purpose of competing with the Company.

I recognize and acknowledge that the Company's trade secrets and confidential or proprietary information including such trade secrets or information as may exist from time to time, are valuable, special and unique assets of the Company's business, access to and knowledge of which were essential to the performance of my duties while in the employ of the Company. I will not, during or after the term hereof, in whole or in part, disclose such secrets or confidential or proprietary information to any person, firm, corporation, association or other entity for any reason or purpose whatsoever, nor shall I make use of any such property for my own purposes or for the benefit of any person, firm, corporation or other entity (except the Company) under any circumstances, during or after the term hereof, provided that after the term hereof, these restrictions shall not apply to such secrets of information which are then in the public domain (provided that I was not responsible, directly or indirectly, for such secrets or information entering the public domain without the Company's consent).

Without limiting any other remedies which may be available to it under applicable law, the Company shall be entitled to monetary damages under this agreement, which may include, but not be limited to, the gain on exercise of the option computed as the difference between the option price and the market price on the date of exercise multiplied by the number of shares exercised.

I understand that the agreement applies only to this particular option grant and does not take precedence over or affect other non-solicitation agreements that I may have with the Company.

This agreement shall be construed in accordance with the laws of the State of New York.

Name (Print): Rex Cook

Signature: _____ Date: 2-3-05

IMPORTANT NOTE:
To ensure proper and complete processing of your transaction this form MUST be signed and returned promptly by mail to the following address:
Morgan Stanley 1345 Ave. Of The Americas 29th Fl. New York, NY 10105 Attn: 100

EXHIBIT
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