No. 09-0558

In The Supreme Court of Texas

MARSH USA INC. and MARSH & McLENNAN COMPANIES, INC.,

PETITIONERS,

v.

REX COOK,

RESPONDENT.

REPLY TO COOK'S RESPONSE TO PETITION FOR REVIEW

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ATTORNEYS FOR PETITIONERS

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TO THE HONORABLE SUPREME COURT:

Petitioners **MARSH USA INC** and **MARSH & McLENNAN COMPANIES, INC.** (collectively, "Marsh") hereby reply to Rex Cook's Response to Petition For Review filed on October 1, 2009 (the "Response").

REPLY ARGUMENT AND AUTHORITIES

I. COOK'S "FINANCIAL BENEFITS" ARGUMENT UNDERMINES WELL-RECOGNIZED INTERESTS UNDER THE ACT.

In his Response, Cook characterizes Marsh's stock award as a mere financial benefit and claims Texas courts have held that financial benefits do not give rise to an interest in restraining competition. *See* Response at 9. Under Cook's argument, because stock is an asset that has a monetary value, it is just like cash and cannot support a non-compete. *See id.* This argument ignores the undeniable fact that consideration of any value necessarily involves a corresponding financial benefit. Indeed, confidential

information, customer lists, and specialized training all have a value that would, under Cook's theory, provide a financial benefit to an employee. Yet even Cook would admit that these types of benefits can support a non-compete under Texas law. *See Alex Sheshunoff Management Servs., L.P. v. Johnson,* 209 S.W.3d 644, 655 (Tex. 2006). Although a *mere promise* to pay "a sum of money" cannot support a non-compete,[1] extending this argument to invalidate any consideration that bestows a "financial benefit" would mean that only the transfer of something worthless would satisfy Cook's criteria. Since worthless consideration cannot support a contract, Cook's theory takes the "financial benefits" argument too far.

II. COOK'S COMPARISON OF MARSH STOCK TO A BONUS OR CAR IGNORES THE LINK BETWEEN STOCK AND GOODWILL.

Cook also claims that the award of company stock to a key employee is no different than a bonus or company car. *See* Response at 10. Cook claims that "[a]ny consideration that would incentivize an employee to work hard would suffice under Petitioner's theory." *See id.* This argument ignores both the nature of a stock award and the key link between Marsh's goodwill and the stock incentive. Unlike a bonus or company car, the award of Marsh stock to Cook gave him a direct interest in the continued, long term success of Marsh. Unlike a bonus or company car, Cook's equity interest was tied to the growth and success of Marsh – the greater the success of Marsh, the higher the stock price.

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[1] *See Sheshunoff*, 209 S.W.3d at 650 ("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 . . . .") (Internal citations omitted). (Emphasis added.)).

By using a stock award with an ultimate value dependent on the success of the company, Marsh incentivized Cook to grow and create the very customer goodwill that determines Marsh's economic success. A company car, by contrast, creates no long term value for the employee or Marsh; it declines in value over time regardless of the employee's efforts to build value for Marsh. A bonus likewise rewards past behavior and creates no future incentive, whereas the stock award directly aligned Cook's future interests with the growth of Marsh's goodwill. The stock incentive gave rise to Marsh's interest in protecting goodwill because, absent the non-compete, Cook could take the customer relationships grown as a result of the stock incentive and use them to compete with Marsh.

III. THE COURT OF APPEALS IMPOSED A NEW TIMING REQUIREMENT THAT RESTRICTS ENFORCEABILITY OF NON-COMPETES.

Cook claims the Court of Appeals did not create a new requirement under the Act by finding that consideration can only "give rise" to a protectable interest if that interest *did not exist* beforehand. *See* Response at 12. While the Court of Appeals specifically recognized that "a company's goodwill benefits when an employee accepts the offered incentive," it nevertheless invalidated Cook's non-compete merely because Cook was already a valuable employee who had created goodwill beforehand. (App. B at 3.) The Court of Appeals reached this conclusion by mandating that an employer can meet the "ancillary to or part of" test:

> [O]nly if the consideration given by the company creates the interest in restraining competition. This, in turn, will occur *only* where the interest in restraining competition *did not exist* before the consideration was given.

Id. (emphasis added). The requirement that the interest in restraining competition not exist before the consideration for the non-compete has no basis in prior precedent of this Court.

Cook describes the new timing requirement as "uncontroversial." *See* Response at 12. But in practice, the requirement will prevent employers from protecting their goodwill, confidential information, and indeed any other legitimate interest merely because some form of that same interest, no matter how minute or different in nature, existed prior to execution of the non-compete.

An employer's interest in protecting confidential information or goodwill begins the moment an employer begins business and changes over time. Employers must constantly develop new and more valuable confidential information to replace the old. Employers must also constantly develop and grow their goodwill by improving existing customer relationships, gaining customer loyalty (which can only arise over time), and developing new clients. Thus, an employer's need to protect its goodwill or confidential information through a non-compete often increases later in the life of the business, well after the interests first came into existence. The mere fact that a protectable business interest already exists in some form beginning the moment the employer opens its doors should not prevent an employer from protecting that interest as it grows and changes over time. There is no basis under the Act for restricting enforceability of non-competes to the few instances when the origin of the interest and the transfer of consideration occur simultaneously.

The new test created by the Court of Appeals will severely impact enforceability of non-competes designed to protect goodwill. Its opinion conflicts with the Court's rejection of interpretations of an Act intended to *expand* enforceability of non-competes in a manner that *restricts* their enforceability. *See Sheshunoff,* 209 S.W.3d at 650-51 & 655. The new test created by the Court of Appeals to invalidate Cook's non-compete defeats the purpose of the Act and creates the same overly-technical arguments and arbitrary timing obstacles this Court has already rejected. *See id.*

PRAYER FOR RELIEF

WHEREFORE, Marsh USA Inc. and Marsh & McLennan Companies, Inc. pray that the Court grant this petition for review, reverse the judgment of the court of appeals, and grant such other and further relief which the Court deems appropriate.

Respectfully submitted,

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By: _____

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ATTORNEYS FOR PETITIONERS MARSH USA INC. and MARSH & McLENNAN COMPANIES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served upon the persons listed below in the manner indicated on the date indicated.

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DATED this the 16th day of October, 2009.

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Thomas L. Case

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