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VIA FEDERAL EXPRESS

Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 09-0558, *Marsh USA Inc. and Marsh & McLennan Companies, Inc. v. Rex Cook*

To the Honorable Supreme Court of Texas:

Oral argument was held in this case on September 16, 2010. On behalf of Respondent Rex Cook ("Cook"), I write to highlight an important concession made by Petitioners in response to a question by Chief Justice Jefferson and to answer more completely a question asked by Justice Green.

1. Petitioners' Argument is Founded on the Premise that Money Is Valid Consideration for a Covenant Not to Compete.

Petitioners contend that the purchase of publicly-traded stock at a discounted price constitutes valid "ancillary" consideration for a covenant not to compete. Chief Justice Jefferson asked Petitioners' counsel whether the covenant not to compete at issue was a naked restraint of trade prohibited by the Texas Business & Commerce Code.[1] (7:55-8:00) Petitioners' counsel responded that "when you're in the employment context, the restraint is not naked because there is already an underlying relationship that gives the parties the reason to want to have a noncompete." (8:15-:20) Counsel then admitted that under Petitioners' view, even pay raises would be valid consideration for a covenant not to compete, claiming that "if [a pay raise] is [an otherwise enforceable agreement] and even if

[1] A video recording of the argument can be found at http://www.stmarytxlaw.mediasite.com. For convenience, each referenced statement and question is followed by the time-stamp indicated on the video.

it is money, then it would fit the statute and then the question would be whether or not it would be reasonable under the circumstances. . . ." (9:15-:37)

Petitioners' position is contrary to Texas law. First, Petitioners' argument is predicated on the Restatement (8:00-:05), which approves of covenants not to compete based merely on an employment relationship. RESTATEMENT (SECOND) OF CONTRACTS § 187 & cmt. b. The Texas Legislature, however, expressly rejected that portion of the Restatement in favor of "the far narrower concept of 'an otherwise enforceable agreement.'" *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 n.4 (Tex. 1994) (discussing the legislative history of the Covenants Not to Compete Act). More fundamentally, this Court has made clear that Texas law prohibits the payment of money in exchange for a covenant not to compete. *Alex Sheshunoff Management Services, L.P. v. Johnson* 209 S.W.3d 644, 650 (Tex. 2006); *see also* TEX. BUS. & COM. CODE 15.05. As a result, the adoption of Petitioners' position would require a radical transformation of existing Texas non-compete law.

2. The Nature of the Consideration Provided in Exchange for the Covenant Not to Compete Is Not a Technical Dispute.

Justice Green asked Respondent's counsel if the issue in this case -- whether Cook's purchase of publicly-traded stock at a discounted price gave rise to a corporate subsidiary's interest in restraining competition -- is the type of "technical dispute" better resolved in assessing the reasonableness of the restraint. *See Sheshunoff*, 209 S.W.3d at 655-56. For at least two reasons, the answer to Justice Green's question is no. To begin with, *Sheshunoff* does not characterize the analysis of the *nature* of the consideration as a "technical dispute." Rather, the Court reaffirmed that the type of consideration provided must give rise to the employer's interest in restraining competition and that financial incentives like the payment of money fail to do so. *Id.* at 650. Indeed, the Covenants Not to Compete Act requires that, *before* a court can assess the reasonableness of the restraint, it must make the threshold determination that the covenant is ancillary to or part of an otherwise enforceable agreement. TEX. BUS. & COM. CODE ANN. § 15.51(c) ("*If* the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations that . . . are not reasonable . . . .") (emphasis added). This threshold determination necessarily includes a substantive assessment of the nature of the agreement. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 852 (Tex. 2009); *Sheshunoff*, 209

S.W. 3d at 660 (Jefferson, C.J. concurring); RESTATEMENT (SECOND) OF CONTRACTS § 187 & cmt. b.

Moreover, a covenant not to compete can never be invalidated on the basis that it is unreasonable. If a covenant not to compete is found to be unreasonable, the Act mandates that the court "shall" reform the covenant and enforce it as reformed. TEX. BUS. & COM. CODE § 15.51(c). Consequently, if this Court accepts Petitioners' view that any otherwise enforceable agreement should be reviewed only for reasonableness, a court could never invalidate a covenant based on the nature of the contract, even if the consideration were a cash payment (and, hence, a naked restraint of trade). Such a result would represent a dramatic expansion of Texas law, and the exception set forth in TEX. BUS. & COM. CODE § 15.50 would gut the foundational public policy principle codified in § 15.05.

3. This Is An Anomalous Case.

Finally, Petitioners' counsel rightly conceded during argument that "this is not a confidential information case." (1:58) The fact that the "otherwise enforceable agreement" at issue is a stock purchase agreement distinguishes this case from traditional non-compete cases involving employment contracts where confidential information or specialized training serves as appropriate consideration for the otherwise enforceable agreement. Texas employers can (and do) draft facially valid and enforceable covenants not to compete to protect their customer relationships. The agreement at issue simply is not one of them.

I appreciate the Court's time and attention to this matter.

Sincerely,

/s/

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c: Thomas L. Case, Beverly A. Whitley, and John R.W. Fugitt