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November 8, 2010

VIA FEDEX

Texas Supreme Court
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, TX 78701

Re: *Marsh USA Inc. and Marsh & McLennan Companies, Inc. v. Rex Cook*, Cause No.09-0558, in the Supreme Court of Texas.

TO THE HONORABLE SUPREME COURT OF TEXAS:

This post-argument letter brief responds to the argument and authorities submitted by Respondent Rex Cook via post-argument letter brief dated October 27, 2010.

In his first point, Cook mischaracterizes Marsh's position by implying that Marsh is asking the Court to adopt the position that money can serve as consideration for a non-compete. When Justice Jefferson asked if a pay raise could serve as consideration, Marsh prefaced its response by specifically stating that "the giving of a raise" would "be a little bit different" than the stock transfer that occurred in this case. (9:09-9:10). Thus, there is no basis for Cook's initial claim that "Petitioners' argument is *founded* on the premise that money is valid consideration . . . ." (Emphasis added.) The Court does not need to decide the validity of cash consideration in this case because Marsh transferred stock to Cook, not cash standing alone, in consideration for his return promises.

Cook also attacks Marsh's reliance on the *Restatement*, which embraces the rule that an underlying *relationship or transaction* may "give rise" to an interest worthy of protection. RESTATEMENT (SECOND) of CONTRACTS § 187 cmt.b (1979). This Court embraced the same concept in *DeSantis v. Wackenhut*, 793 S.W.2d 670, 681 (Tex. 1990). Section 15.50(a) does not reject the principle; rather, Section 15.50(a) simply requires that the covenant be ancillary to or part of an otherwise enforceable agreement. The requirement of an otherwise enforceable agreement merely ensures that the employee receive independent consideration for the covenant not to compete. Section 15.50(a) does not require that the consideration itself "give rise" to an

interest worthy of protection. That proposition was entirely new when it was announced in *Light v. Centel Cellular Co.*, 883 S.W.2d 642, 647 (Tex. 1994).

Cook's argument requires that the Court focus on the consideration in a vacuum. By isolating the consideration from the rest of the transaction, Cook can claim that the financial aspect of the stock transfer, standing alone, has nothing to do with the growth of customer goodwill. But by isolating the consideration in this way, Cook ignores the purpose of the overall transaction — to grow goodwill and to link key employee interests with the long term interests of Marsh shareholders. The ultimate transfer of stock completed the incentive and made the non-compete into an enforceable agreement. The now enforceable non-compete also enabled Marsh to protect the goodwill grown by the stock incentive.

The requirement of independent consideration should not shift the "worthy interest" focus away from the overall transaction. To do so would prevent employers from entering contracts designed to protect valuable interests unless the consideration itself created the protectable interest. While isolating the consideration in this way works well in the analysis of covenants designed to protect confidential information provided to the employee by the employer, it does not work with other transactions that nevertheless give rise to protectable interests, including covenants designed to protect confidential information developed by the employee for the employer, and of particular importance in this case, covenants designed to protect goodwill developed by the employee for the employer.

Regardless, Cook oversimplifies the "money as consideration" *dicta* from *Alex Sheshunoff Management Servs., L.P. v. Johnson*, 209 S.W.3d 644, 650 (Tex. 2006) (analyzing a promise to give two weeks' notice, not a promise to pay money). Texas has always recognized the validity of having money serve as consideration for a non-compete. For example, in the case of a sale of a business, the seller is paid money and gives a non-compete in return. The mere payment of money without the sale of the business would create a naked restraint. In the context of a sale of a business, the non-compete given in exchange for money is enforceable, despite the fact that the money itself does not create a goodwill interest, because the purpose of the transaction is to protect the goodwill purchased. *See, e.g., La Rocca v. Howard-Reed Oil Co.*, 277 S.W.2d 769, 772 (Tex. Civ. App. — Beaumont 1955, no writ) ("Restrictive covenants of this type are obviously entered into for the purpose of protecting the purchaser of the business in the enjoyment of good will of such business previously enjoyed by the seller."); *see also Daniel v. Goesl*, 341 S.W.2d 892, 895-96 (Tex. 1960) (discussing rule).

Cook is wrong to say this case is anomalous. This case contains the same facts as *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), as both cases involved transactions designed to protect goodwill in the form of customer relationships, not confidential information.

The legislature passed the Act specifically to correct the result in *Hill*, which, like the trial court and the court of appeals in this case, invalidated a non-compete designed to protect such goodwill. The interests at stake in this case are the precise interests the legislature intended to protect when it passed the Act to overrule *Hill*.

Thank you for your consideration of the above.

Sincerely,

/s/ Beverly A. Whitley

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