STATE OF NORTH CAROLINA WAKE COUNTY MERZ PHARMACEUTICALS, LLC, Plaintiff, v. ANDREW THOMAS, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 32848 **ORDER AND OPINION ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

THIS MATTER is before the Court on Defendant Andrew Thomas' Motion for Partial Summary Judgment ("Motion," ECF No. 63).

THE COURT, having considered the Motion, the briefs of the parties, the arguments of counsel, and all appropriate matters of record, **CONCLUDES** that the Motion should be **DENIED** for the reasons set out below.

McGuireWoods LLP, by Heidi E. Siegmund, Dana L. Rust, and Zachary L. McCamey, for Plaintiff Merz Pharmaceuticals, LLC.

Spengler & Agans, PLLC, by Eric Spengler, for Defendant Andrew Thomas.

Davis, Judge.

INTRODUCTION

1. This Court has on several prior occasions addressed legal issues involving the scenario in which an employee's restrictive covenants have been assigned from his original employer to a new employer in conjunction with an asset purchase agreement between the two entities. We have held that when such a restrictive covenant provides that it will only exist for a specified time period, the

clock begins to run immediately upon the termination of his employment with the original employer.

2. The question raised by the present Motion is whether the same rule automatically applies when the employee's change in employer occurs by virtue of an asset transfer agreement between affiliated entities. The Court concludes that it does not.

FACTUAL AND PROCEDURAL BACKGROUND

3. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *McGuire v. Lord Corp.*, 2021 NCBC LEXIS 4, at **1–2 (N.C. Super. Ct. Jan. 19, 2021) (cleaned up).

4. Plaintiff Merz Pharmaceuticals, LLC ("Merz Pharmaceuticals") is a North Carolina limited liability company registered to do business in North Carolina.[1] (Def.'s Br. Supp. Mot. Ex. 3, ECF No. 64.3.) In its Verified Complaint, ("V.C.," ECF No. 3), Merz Pharmaceuticals is described as "a leading pharmaceutical company," which "markets and sells its products to healthcare providers for therapeutic purposes." (V.C. ¶¶ 8, 11.) At all relevant times, Merz, Inc. was the sole member of Merz Pharmaceuticals. (Cleef Aff. ¶ 4, ECF No. 74.2.)

[1] At the time of organization, Merz Pharmaceuticals was known by a different name, "Merz Pharmaceuticals/Consumer Products, LLC." However, it was changed to "Merz Pharmaceuticals, LLC" on 1 December 1998. (Def.'s Br. Supp. Mot. Ex. 3; Def.'s Br. Supp. Mot. Ex 4, ECF No. 64.4.)

5. In October 2018, Defendant Andrew Thomas began working at Merz North America, Inc. ("Merz NA") as its Director of Government and Federal Accounts. (V.C. ¶¶ 1, 4.; Thomas Aff. I ¶ 18, ECF No. 19.1.)

6. Merz NA is a related entity of Merz Pharmaceuticals.[2] As with Merz Pharmaceuticals, Merz NA's sole shareholder at all relevant times was Merz, Inc. (Cleef Aff. ¶ 4.) Moreover, Merz Pharmaceuticals, Merz NA, and Merz, Inc., are "all indirect wholly-owned subsidiaries of Merz Pharmaceuticals GmbH, a German corporation." (Cleef Aff. ¶ 4.) Despite this shared ownership, there is no overlap between the managers of Merz Pharmaceuticals and the officers of Merz NA. (*See* Def.'s Br. Supp. Mot. Ex. 5, ECF No. 64.5; Def.'s Br. Supp. Mot. Ex. 6, ECF No. 64.6.)

7. As a condition of his employment with Merz NA, Thomas was required to sign a Confidentiality, Nonsolicitation, and Proprietary Rights Agreement (the "Agreement"), which contained certain restrictive covenants with respect to Merz NA's confidential information and trade secrets, as well as a non-solicitation covenant regarding the customers of Merz NA. (V.C., at Ex. A, ECF No. 3.)

8. Although in this litigation Thomas has stated in an affidavit that he does not recall signing (electronically or otherwise) the Agreement upon beginning his employment with Merz NA (Thomas Aff. I ¶ 6.), for purposes of this Motion he does not challenge Merz' evidence showing that he did, in fact, sign it.

---

[2] The predecessor company of Merz NA was Merz Aesthetics, Inc., which was incorporated on 12 July 1999 under the laws of Delaware. (Def.'s Br. Supp. Mot. Ex. 1, ECF No. 64.1.) On 1 July 2013, Merz Aesthetics, Inc. was converted via merger to a North Carolina corporation, with Merz NA as the surviving company. (Def.'s Br. Supp. Mot. Ex. 2, ECF No. 64.2.)

9. The non-solicitation covenant in the Agreement states in pertinent part as follows:

> While employed at Merz and *for a period of one (1) year after termination of your employment* for any reason (whether voluntary or involuntary) you will not, alone or with others, directly or indirectly, solicit or attempt to solicit, entice or attempt to entice, induce or attempt to induce any Customer or Supplier (as defined below) of Merz or its Affiliates to cease doing business with Merz or its Affiliates, or to interfere with any relationship Merz or its Affiliates may have with a Customer or Supplier or to become a Customer or Supplier of a Merz competitor.

(Agrmt. § 2(b) (emphasis added).)

10. One of the primary drugs manufactured by Merz is Xeomin, which is "a federally regulated botulinum toxin injection[,]" that can be used for both therapeutic and aesthetic purposes. (V.C. ¶¶ 9–10.)

11. Thomas' duties while employed by Merz NA included working to increase Xeomin's market share in the governmental sector. (V.C. ¶ 9.)

12. For the first few years of his employment with Merz NA, "Merz [Pharmaceuticals] existed, but had no employees[,]" and did not sell Xeomin. (Cleef Aff. ¶ 3.)

13. Merz NA first obtained Food and Drug Administration approval for certain therapeutic uses of Xeomin in 2010 and for aesthetic uses in 2011. (Cleef Aff. ¶ 3.) However, Merz Pharmaceuticals did not become the entity responsible for the sale of Xeomin for therapeutic purposes until 1 January 2021. (Cleef Aff. ¶ 3.)

14. This change occurred because "[i]n 2020, Merz [Pharmaceuticals] and [Merz NA] decided to separate [Merz NA]'s therapeutics business division from its aesthetics business division." (Cleef Aff. ¶ 5.) After this separation of business

divisions was effectuated, Merz NA continued to handle the sale of Xeomin for aesthetic uses while Merz Pharmaceuticals was responsible for the sale of Xeomin for therapeutic purposes. (Cleef Aff. ¶¶ 3–5.)

15. On 30 November 2020, Thomas received a letter (the "30 November Letter") stating that "Merz Therapeutics . . . is transferring operations from Merz North America, Inc. to Merz Pharmaceuticals, LLC, another Merz US affiliate, on January 1, 2021" and that his "employment will similarly transfer and . . . you will become an employee with Merz Pharmaceuticals, LLC." (Thomas Aff. II, at Ex. C, ECF No. 64.7.)

16. On 1 January 2021, Merz NA and Merz Pharmaceuticals entered into an Asset Transfer Agreement ("ATA"), in which Merz NA "transferred substantially all of its assets and liabilities related to its therapeutics division to Merz [Pharmaceuticals]. This transfer included all employees working in [Merz NA]'s therapeutics division, including Thomas[.]" (Cleef Aff. ¶ 5.) Additionally, with respect to the transferred employees, "the ATA transferred all restrictive covenant, non-solicitation, and confidentiality agreements pertaining to the therapeutics business from [Merz NA] to Merz [Pharmaceuticals]." (Cleef Aff. ¶ 6.)

17. Thomas accepted the transfer of his employment. (*See* Thomas Aff. II, at Ex. C.) Accordingly, from 1 January 2021 onward, Thomas was no longer an employee of Merz NA and instead became an employee of Merz Pharmaceuticals. (Thomas Aff. III ¶ 11, ECF No. 70.1.) However, his "job duties and title remained unchanged." (Cleef Aff. ¶ 10.)

18. The Agreement was assigned from Merz NA to Merz Pharmaceuticals per the terms of the ATA.[3]

19. For reasons unrelated to the present Motion, Merz Pharmaceuticals terminated Thomas' employment on 31 July 2023. (V.C. ¶ 35; Thomas Aff. I ¶ 25.)

20. On 3 August 2023, just a few days after his firing, Thomas began communicating with a representative from a company called Revance Therapeutics, Inc. ("Revance") about the possibility of him obtaining a job at Revance. (V.C. ¶ 42.) "Revance, like Merz, markets and sells injectables to healthcare professionals for aesthetic and therapeutic purposes[,]" and is a "direct competitor of Merz in the pharmaceutical industry." (V.C. ¶¶ 17–18.)

21. Thomas ultimately accepted a position with Revance on or about 21 August 2023 as its "National Account Director, Market Access." (Thomas Aff. I ¶ 38–40; *see also* Thomas Aff. I, at Ex. 4.)

22. On 8 September 2023, Merz Pharmaceuticals learned that Thomas had begun working for Revance and proceeded to send both Thomas and Revance cease-and-desist letters "raising concerns about [Thomas's] misappropriation of Merz [Pharmaceuticals'] trade secrets and potential communications with Merz [Pharmaceuticals'] customers." (V.C. ¶¶ 51, 55.)

23. Merz Pharmaceuticals initiated this lawsuit by filing a Verified Complaint in Wake County Superior Court on 16 November 2023 in which Merz asserted claims against Thomas for (1) breach of contract; (2) misappropriation of

[3] Although Thomas initially disputed that a valid assignment of the Agreement between Merz NA and Merz Pharmaceuticals actually occurred, he has now conceded this fact.

trade secrets under the North Carolina Trade Secrets Protection Act ("NCTSPA"); (3) conversion; (4) breach of fiduciary duty; and (5) violation of the North Carolina Unfair and Deceptive Trade Practices Act. (V.C. ¶¶ 64–101.)

24. This case was designated as a complex business case and assigned to the undersigned on 17 November 2023. (ECF Nos. 1, 2.)

25. On 29 March 2024, Thomas filed the present Motion in which he seeks summary judgment on Merz Pharmaceuticals' claim for breach of contract based on his alleged violation of the non-solicitation covenant of the Agreement. Specifically, he contends that Merz Pharmaceuticals' deadline for seeking to enforce the covenant expired one year after his employer switched from Merz NA to Merz Pharmaceuticals. (Mot., at 1.)

26. A hearing was held on 6 May 2024 at which all parties were represented by counsel, and the Motion is now ripe for resolution.

LEGAL STANDARD

27. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and

means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (cleaned up).

28. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

29. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, . . . or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

ANALYSIS

30. Although Thomas has forecast his belief that the non-solicitation covenant is unenforceable for other reasons as well, the only ground he has asserted

in the present Motion is the alleged expiration of the applicable one-year period during which the covenant remained in effect. Therefore, this Opinion does not address any additional issues relating to the enforceability of the non-solicitation covenant.

31. To prevail on a breach of contract claim, a claimant must show: "(1) existence of a valid contract; and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000) (cleaned up).

32. Relying on a line of prior cases from this Court, Thomas argues that the one-year period contained in the non-solicitation covenant began to run as soon as the ATA became effective. He contends that it is "well-established under North Carolina law that when a non-solicitation covenant is assigned—for example, through an asset purchase agreement—the period of the restrictive covenant begins to run at the time of the assignment because *the employment relationship* has been terminated." (Def.'s Br. Supp. Mot., at 8–9 (emphasis in original).)

33. In response, Merz Pharmaceuticals contends that "the change in Thomas' employer was one of form, not substance" and that "[b]ecause Merz's business and its employment relationship with Thomas continued unchanged after the transfer, his restrictive covenants did not begin to run until July 31, 2023, when Merz [Pharmaceuticals] fired him[.]" (Pl.'s Br. Opp. Mot., at 2, ECF No. 74.) It argues "that a purely administrative change in an employer's form should not impact or limit the successor employer's rights to enforce a restrictive covenant." (Pls.' Br. Opp. Mot., at 14.) Accordingly, Merz Pharmaceuticals asserts, the restrictions contained in the

non-solicitation covenant would not expire until 31 July 2024—a year after Thomas' termination from Merz Pharmaceuticals. (Pl.'s Br. Opp. Mot., at 2.)

34. Before addressing the extent to which Thomas' job did (or did not) change following the ATA, the Court deems it appropriate to discuss in some detail the prior cases that form the basis for Thomas' argument.

35. The line of cases from this Court relied upon by Thomas consists of *Better Bus. Forms & Prods., Inc. v. Craver* ("*Craver*"), 2007 NCBC LEXIS 34 (N.C. Super. Ct. Nov. 1, 2007); *Covenant Equip. Corp. v. Forklift Pro, Inc.* ("*Covenant*"), 2008 NCBC LEXIS 12 (N.C. Super. Ct. May 1, 2008); *Artistic S. Inc. v. Lund* ("*Lund*"), 2015 NCBC LEXIS 113 (N.C. Super. Ct. Dec. 9, 2015); and *MarketPlace 4 Insurance, LLC v. Vaughn* ("*Vaughn*"), 2023 NCBC LEXIS 31 (N.C. Super. Ct. Feb. 24, 2023).

36. This issue was first addressed in *Craver*. In that case, the defendant was originally an employee of a company called BBF. The defendant's employment agreement with BBF contained a non-competition covenant prohibiting the defendant from competing with BBF for a period of one year after the termination of his employment. *Craver*, 2007 NCBC LEXIS 34 at **3.

37. Approximately five years later, another company, GDX "acquired substantially all of BBF's assets in an asset purchase transaction[,]" and "[a]s a part of the transaction BBF assigned its contract rights between BBF and its employees to GDX." *Id.* at **4. On the same day as the asset purchase transaction, the defendant's employment with BBF was terminated. *Id.* He accepted employment

with GDX and continued working in the same job that he had with BBF. *Id.* at **5. The defendant did not sign a new employment agreement with GDX. *Id.*

38. A few years later, as a result of GDX's filing of a voluntary bankruptcy petition, the plaintiff purchased all of the assets of GDX, including contractual rights between GDX and its employees. *Id.* On the same day that the purchase of GDX's assets by the plaintiff was approved by court order, the defendant accepted employment with another company, where he performed the same job functions as he had at GDX and BBF. *Id.* at **5–6.

39. The plaintiff subsequently brought suit against the defendant for breach of the non-competition covenant contained in his original employment agreement with BBF, arguing that the covenant remained valid and enforceable because it survived both the first assignment to GDX and the subsequent assignment to the plaintiff as a result of the asset sale in connection with GDX's bankruptcy proceedings. *Id.* at **6, 8–9. In response, the defendant argued that the restrictive covenant was no longer enforceable by the time the plaintiff purchased GDX's assets because the "rights regarding the restrictive covenant, which GDX acquired from BBF in the asset purchase transaction, expired one year" after the defendant's employment with BBF terminated and his employment with GDX began. *Id.* at **9.

40. This Court noted that although the original restrictive covenant at issue was initially valid and enforceable at the time it was agreed upon, "[n]ew issues of assignability . . . arose when the restrictive covenant was transferred, first to GDX,

and then to Plaintiff[,]" and that resolution of those issues was "ultimately a question of public policy[.]" *Id.* at **10.

41. We concluded that although the original restrictive covenant was enforceable by GDX, it was not enforceable by the plaintiff. *Id.* at **11. In so holding, the Court explained its rationale as follows:

> In the current case, the covenant might become a more restrictive covenant with, for example, a wider area and/or different market than initially agreed upon, because the employment agreement is transferred to a different employer--first to GDX then to Plaintiff--without being renegotiated. This transfer might put the employee in the situation of being under a restrictive covenant he did not agree to, one that may impose restrictions he in fact never would have agreed to in his initial employment agreement. To impose wider or different restrictions is unfair to the employee. To protect the employee, the restrictive covenant should have been renegotiated. The argument that the covenant is assignable because it protects the employer's capital investment in its employee . . . is not a valid argument after the first assignment, when the business itself did not undertake to renegotiate the covenant. To let the restrictive covenant be transferable and enforceable in the first place protects the initial employer's capital interest in its employee. Presumably, BBF was paid for its investment in the employee, and the new employer received the benefit of being able to enforce the covenant. When GDX hired Defendant Craver it should have renegotiated the restrictive covenant. The employee would have been able to negotiate the terms of employment, including the restrictive covenant, instead of just having the old covenant transferred to a new employer. The termination of employment and failure to renegotiate the terms of the new employment, including the restrictive covenant, triggered the one-year restrictive term and made the restrictive covenant unenforceable a year into Craver's employment with GDX. GDX would have had to enter into a new restrictive covenant with Defendant Craver if it wanted to extend the one-year restriction after Defendant Craver's employment with GDX began. There are no allegations in the pleadings that this was done. Thus, there was no valid restrictive covenant left which could be assigned to Plaintiff. Had GDX purchased BBF the entity instead of the entity's assets, GDX could have enforced the agreement.
>
> . . .

> Under Plaintiff's theory, there would be no limit to the number or nature of the subsequent purchasers of the covenant. Employees would be left with no bargaining power in accepting new employment. Permitting repeated reassignments of restrictive covenants, especially where they are purchased in a bankruptcy auction, requires an employee to either accept employment with a new employer without any negotiation of the terms and conditions of employment or be forced to change jobs.

Id. at **15–18.

42. We revisited this issue in *Covenant*. In that case, the defendant and his original employer entered into an employment agreement that contained a noncompetition covenant with a duration of two years following the termination of the defendant's employment with that employer. *Covenant*, 2008 NCBC LEXIS 12 at **3. Subsequently, the defendant's employer and the plaintiff entered into an asset purchase agreement. *Id*. at **2. As a result of this agreement (and as of the date of its execution), the defendant ceased to work for his original employer and instead became an employee of the plaintiff. *Id*. at **21.

43. The defendant's employment with the plaintiff ended in July 2007, and the defendant began working for a competitor of the plaintiff shortly thereafter. *Id*. The plaintiff brought a claim against the defendant for breach of the noncompetition covenant. *Id*. at **5. In response, the defendant contended that the restrictive covenants contained in his employment agreement had expired because the covenants began to run at the time his employment with his original employer ended—that is, at the time the original employer and the plaintiff entered into the asset purchase agreement. *Id*. at **20–21.

44. This Court ruled that the covenants at issue had expired because the defendant's alleged breach took place more than two years after the end of his

employment with his former employer. *Id.* at **25. Relying on *Craver*, we stated the following:

> This Court has recently found that a noncompetition agreement that has been sold as part of an asset sale, as opposed to the sale of a business, gives the buyer the right to enforce the noncompetition agreement as of the date of the sale but not to enforce the noncompetition agreement as if it had been entered into originally by the buyer. *Better Bus. Forms & Prods., Inc. v. Craver*, 2007 NCBC 34 P 33 (N.C. Super. Ct. Nov. 1, 2007) [(URL omitted)]. In other words, the buyer of a noncompetition agreement does not step fully into the shoes of the original employer because the buyer is a new employer. Instead, the buyer can either enforce the noncompetition agreement or enter into a new noncompetition agreement.
>
> In this case, Plaintiff entered into an Asset Purchase Agreement with [his] original employer, Wholesale Fork Lifts, Inc. Nowhere in the pleadings is it asserted that Plaintiff renegotiated the Employment Agreement between Wholesale Fork Lifts, Inc. and [the defendant] or entered into a new noncompetition agreement with [the defendant] when he began his employment with Plaintiff. Plaintiff has the right to enforce the Employment Agreement, including the Covenants Against Competition covenant, from the point of the asset sale on June 3, 2004. [The defendant] left the employment of Plaintiff on or about July 6, 2007, and began his employment with [the plaintiff's competitor] immediately or shortly afterwards. The Covenants Against Competition covenant of [the defendant]'s Employment Agreement expired two years after his employment with Wholesale Fork Lifts, Inc. was terminated--June 3, 2006. Regardless of whether the Covenants Against Competition covenant was enforceable, it has since expired.
>
> This holding, as the holding in the *Craver* case, provides buyers who choose to purchase assets rather than stock with the ability to enforce covenants against employees of the selling company. It also requires the buyer, if it chooses to do so, to negotiate a new restrictive covenant with the employee, the consideration for which would be the new employment. This policy is fair because the buyer may have a business which substantially changes the nature and scope of the restriction originally agreed to by the employee.

Covenant, 2008 NCBC LEXIS 12, at **23–26.

45. In *Lund*—the third case relied upon by Thomas—the defendant employee executed an employment agreement with SSNC on 10 October 2001 and began working for SSNC as an outside sales representative on 29 October 2001. *Lund*, 2015 NCBC LEXIS at **4–5. The employment agreement contained various restrictive covenants remaining in effect for either one or two years after the defendant's employment ended. *Id*. at **13. At the time the defendant and SSNC executed the employment agreement, SSNC was a wholly owned subsidiary of SSI. *Id*. at **4.

46. In June 2009, SSI sold all, or substantially all, of its assets to the plaintiff. *Id*. at **5. In connection with this sale, the defendant's employment agreement with SSNC was assigned to the plaintiff. *Id*. at **6. No new employment agreement was executed. *Id*. at **6.

47. Lund ultimately resigned from his employment with the plaintiff in April 2012, so that he could begin working for a competing company, which he helped create. *Id*. at **6–8. After the defendant's departure, the plaintiff sued the defendant for breach of the restrictive covenants in the employment agreement. *Id*. at **11–13.

48. The defendant argued "that the one- and two-year post-employment restrictions expired in June 2010 and June 2011, respectively[,]" because "under North Carolina law, his employment under the Employment Agreement was terminated on the date of the asset sale, i.e., in June 2009." *Id*. at **13. In addressing this argument, this Court held as follows:

> The North Carolina courts have held that the acquisition of another company through an asset purchase — as opposed to a purchase of

> ownership interests—terminates the seller's existing employment relationships.
>
> . . .
>
> This Court has therefore held that "when an employer sells its assets, including its right to enforce a restrictive covenant in an employment contract, the period of the restrictive covenant begins to run because the employment relationship has been terminated." . . . Thus, "a noncompetition agreement that has been sold as part of an asset sale . . . gives the buyer the right to enforce the noncompetition agreement as of the date of the sale but not to enforce the noncompetition agreement as if it had been entered into originally by the buyer." . . .
>
> The facts pleaded here establish that Plaintiff purchased substantially all of SSNC's assets in June 2009. As a result, [defendant]'s employment under the Employment Agreement was terminated at that time as a matter of North Carolina law, and the time periods for the post-employment restrictions in the Employment Agreement began to run. As *Craver* and *Covenant* make clear, Plaintiff had the option of either enforcing the restrictions as of the date of the asset sale or entering into a new agreement with [defendant]. Although Plaintiff attempted to negotiate an agreement with [defendant] containing new post-employment restrictions, [defendant] never agreed to any such restrictions. Plaintiff therefore was left with the right to enforce the post-employment restrictions contained in [defendant]'s Employment Agreement with SSNC.
>
> Based on [defendant]'s June 2009 termination, the one-year prohibition on [defendant]'s solicitation of customers, prospects, and employees expired in June 2010. Because Plaintiff alleges that [defendant]'s purported breach of these restrictions did not occur, at the earliest, until April 2011, Plaintiff's claims for alleged breach of these restrictions should therefore be dismissed.

Id. at **13–17.

49. Finally, in *Vaughn*, a company called MarketPlace 4 Insurance ("MarketPlace") entered into an asset purchase agreement with a separate entity—the Gilliam Agency—on 13 November 2020. *Vaughn*, 2023 NCBC LEXIS 31 at **2–3. As a result of the transaction, MarketPlace acquired the Gilliam Agency's assets,

including the noncompetition covenants in effect between the Gilliam Agency and its current and former employees. *Id*. As a result, certain employees previously employed by the Gilliam Agency became employees of MarketPlace, including the defendant. *Id*. at **3. The defendant had a pre-existing noncompetition covenant with the Gilliam Agency, which was to last for one year. *Id*.

50. After the asset purchase agreement took effect, the defendant continued working for MarketPlace until he resigned on or around 30 June 2021. *Id*. at **5. Approximately two months later, the defendant began working for another insurance agency. *Id*. MarketPlace then brought a claim for breach of the noncompetition covenant against the defendant. *Id*. at **12.

51. Based on the cases discussed above, this Court stated that "when an asset purchase agreement is executed that purports to transfer a former employer's rights under a restrictive covenant to a new employer, the prescribed period contained within the covenant begins to run from the date of the execution of the agreement." *Id*. at **15. Applying this rule, we concluded that "any time-based covenants contained in [the defendant]'s Agreement with the Gilliam Agency began to run when the [asset purchase agreement] was executed on 13 November 2020." *Id*. at **17. As a result, we ruled that "any actionable breach of those covenants alleged to have been committed by Vaughn must have occurred prior to 13 November 2021—that is, one year from the date the APA was executed." *Id*.

52. Here, Thomas asserts that *Craver*, *Covenant*, *Lund*, and *Vaughn* stand for the proposition that as long as there is a change in employers from one legal entity

to another—without the need for consideration of any other factors—the result reached by this Court in those cases must logically follow such that the time period contained in the restrictive covenant at issue begins to run as soon as the employee stops working for the original employer.

53. The Court is unable to agree. The rule applied in *Craver* and its progeny is clearly applicable when the original employer of an employee subject to a restrictive covenant sells its assets to an unrelated entity who becomes the employee's new employer. However, neither the parties' briefs nor the Court's own research has disclosed any North Carolina cases in which this rule has been applied where the switch in employers is more akin to an administrative transfer of an employee between two affiliated entities.

54. Merz Pharmaceuticals argues that this distinction is critical to the result here, contending that the reasoning of our Court of Appeals in *TSG Finishing LLC v. Bollinger* ("*Bollinger*"), 238 N.C. App. 586 (2014), is instructive. Although *Bollinger* concerned the issue of whether a restrictive covenant had been validly assigned by an original employer to a subsequent employer (rather than the question of whether the covenant at issue had expired), we nonetheless agree with Merz Pharmaceuticals that the logic underlying the decision in that case is fully applicable here.

55. In *Bollinger*, the defendant was a former employee of TSG, Inc. Approximately fifteen years into his employment with that company, the defendant entered into a non-disclosure and non-competition agreement with TSG, Inc. in

exchange for a bonus and an increase in pay. *Bollinger*, 238 N.C. App at 589. Two years later, TSG, Inc. filed for bankruptcy and, as a result, transferred its interests to plaintiff TSG Finishing, LLC ("TSG Finishing"), "a wholly owned operating subsidiary of TSG, Inc., which remained in operation." *Id*. Despite the transfer of interests, "[a]ccording to defendant, every aspect of his day-to-day job remained the same after bankruptcy reorganization." *Id*.

56. A few years after the bankruptcy reorganization, the defendant left TSG Finishing to work for a direct competitor. Following his departure, TSG Finishing filed suit against the defendant for, among other things, breach of contract and sought a preliminary injunction to prevent him "from breaching the non-compete and misappropriating TSG [Finishing]'s trade secrets." *Id*. at 589. The trial court denied the preliminary injunction motion and held that the noncompetition agreement was unenforceable because it did not contain an express assignability covenant. *Id*.

57. The Court of Appeals reversed the trial court's order, holding that the noncompetition agreement had, in fact, been validly assigned to TSG Finishing as a result of the bankruptcy reorganization. *Id*.

> The situation in this case is not one where plaintiff was a "stranger to the original undertaking." Unlike the sale of assets between two companies at arms' length, . . . the assignment in this case took place in the context of a bankruptcy reorganization, where the same company policies and management were retained. Plaintiff is a wholly owned subsidiary of TSG, Inc., with whom defendant entered into the non-compete. As Rosenstein testified at the hearing, "[i]t's not a new entity . . . it's basically the same company it was." According to defendant, every aspect of his job remained unchanged after the assignment. Therefore, the facts here are more analogous to those cases where . . . courts have declined to make assignability covenants a requirement, such as with a stock sale or merger, because the contract rights are not

> given to a completely new entity. . . . Accordingly, we reject the trial court's conclusion that the non-compete is unenforceable because it did not contain a specific assignability covenant.

Id. at 596–97.

58. The above-quoted portion of *Bollinger* aptly contrasts, on the one hand, the type of arm's length transactions that existed in *Craver* and its progeny with, on the other hand, the sort of transfer of assets between affiliated companies existing within the same corporate umbrella that occurred here.[4]

59. Although not by itself dispositive, we note that the ATA between Merz NA and Merz Pharmaceuticals was termed an Asset *Transfer* Agreement rather than an Asset *Purchase* Agreement—thereby suggesting that this transaction was akin to an administrative transfer between affiliates. Such a characterization is further supported by the fact that no money changed hands between the two entities as a result of the ATA. (Cleef Aff. ¶ 8.)

60. Moreover, the record reveals the significant extent to which the nature of Thomas' job remained the same after the ATA was executed. The Human Resources Business Partner of Merz Pharmaceuticals, Hannah Cleef, testified on this issue as follows:

> After the ATA, Thomas' job duties and title remained unchanged. Thomas continued to oversee and develop Merz [Pharmaceuticals'] federal strategies, and he was still responsible for calling on the same federal agencies, including top federal customers the Department of Veterans' Affairs ("VA") and the Department of Defense ("DoD"). Thomas did not have any new obligations or responsibilities as a result of the transfer.

---

[4] Although the Court of Appeals in *Bollinger* was applying Pennsylvania law, there is nothing about its discussion of this issue that is in any way inconsistent with North Carolina law.

> After the transfer, all Merz [Pharmaceuticals] employees (including Thomas) continued to receive many of their benefits through [Merz NA]. For example, Merz [Pharmaceuticals] employees remained enrolled in [Merz NA] insurance plans until summer 2023. To this day, Merz [Pharmaceuticals] and [Merz NA] employees still share a 401(k) plan. In addition, Merz [Pharmaceuticals] employees continued to receive other [Merz NA] employee perks, such as discounts on [Merz NA] skincare product Neocutis. Merz [Pharmaceuticals] also adopted all [Merz NA] employment policies, so the same policies continued in effect after the transfer.
>
> Merz [Pharmaceuticals] also gave Thomas and other transferred employees "credit" for their years of service with [Merz NA] when evaluating seniority and accrual of paid time off.
>
> "Thomas (like other employees that transferred to Merz [Pharmaceuticals]) did not have to apply for employment with Merz [Pharmaceuticals] or undergo any background checks to become a Merz [Pharmaceuticals] employee. There was no transition period during which the transferred [Merz NA] employees were not working. The transferred employees simply began receiving paychecks from Merz [Pharmaceuticals], instead of [Merz NA]; as a practical matter, nothing changed."

(Cleef Aff. ¶¶ 10–13.)

61. Indeed, the 30 November Letter informing Thomas that his employment would transfer from Merz NA to Merz Pharmaceuticals stated that his "position will continue to be Director, Government and Federal Accounts, reporting to Kari Escobar, Vice President, US Sales[,]" and that "[a]ll elements of [his] compensation and benefits package remain unchanged." (Thomas Aff. II, at Ex. C.) The 30 November Letter also provided that Merz Pharmaceuticals was "adopting all documented policies of Merz [NA]." (Thomas Aff. II, at Ex. C.)

62. To be sure, as Thomas notes, *some* aspects of his job changed. His place of work changed to a different office (albeit one across the street from his prior office),[5] and Thomas received a new employee handbook issued by Merz Pharmaceuticals. (Thomas Aff. II ¶¶ 14, 16.) In addition, Thomas "no longer reported to the CEO of [Merz NA] and [he] began to report to the CEO of Merz Therapeutics located in Germany." (Thomas Aff. II ¶ 17.)

63. But the Court does not believe that these very limited changes alter the conclusion that Thomas' switch in employers between different Merz entities fails to invoke the rule first articulated in *Craver*. To the contrary, a holding that Thomas' non-solicitation covenant expired within one year after he ceased to be an employee of Merz NA can be reached only by a rote application of the *Craver* rule that is wholly divorced from the above-described public policy considerations that gave rise to that rule in the first place.

64. In short, a holding that the non-solicitation covenant continued to apply to Thomas as if it had originally been agreed to between him and Merz Pharmaceuticals simply does not result in the type of unfairness that this Court was concerned about in *Craver*, *Covenant*, *Lund*, and *Vaughn*.

65. Accordingly, the Court holds that the applicable one-year period began to run not at the time Thomas ceased to be an employee of Merz NA but rather as of the date of the termination of Thomas' employment at Merz Pharmaceuticals on 31

[5] The fact that his office moved is largely irrelevant considering that "[b]oth before and after the transfer to Merz [Pharmaceuticals], Thomas worked remotely full-time from his home in South Carolina, and only occasionally visited Merz's offices[.]" (Cleef Aff. ¶ 16.)

July 2023. For this reason, the non-solicitation covenant will not expire until 31 July 2024.

CONCLUSION

For the reasons set out above, Thomas' Motion is **DENIED**.

SO ORDERED, this the 22nd day of May, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases