Hose Co. v. Smith, 2025 NCBC Order 20.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24 CVS 50767
THE HOSE COMPANY LLC, Plaintiff, v. ROBERT M. SMITH, Defendant.	**ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** **[PUBLIC]**[1]

1. **THIS MATTER** is before the Court on Plaintiff's Motion for a Preliminary Injunction filed pursuant to Rule 65 of the North Carolina Rules of Civil Procedure (Motion), (ECF No. 9).

2. Plaintiff, The Hose Company, LLC (THC), moves for an order prohibiting Defendant Robert M. Smith (Smith) from violating a Noncompetition Agreement (Agreement) that he signed while employed by THC in July 2022.

3. Having considered the Motion, the exhibits submitted in support of and in opposition to the Motion, the related briefing, the Verified Complaint, the arguments of counsel at a hearing on the Motion held on 27 February 2025, and other relevant

[1] The Court's Order was provisionally filed under seal on 25 March 2025 to permit counsel for the parties and for Triosim to confer and advise the Court whether they contend any matters referenced herein should be sealed. There being no proposed sealing, the Court now files its Order on the public record.

matters of record, the Court **FINDS** and **CONCLUDES**, for purposes of the Motion,[2] as follows:

I. FINDINGS OF FACT[3]

4. THC is a Wyoming corporation with operations in Union County, North Carolina. (Ver. Compl. ¶ 1, ECF No. 3.) It has operated in the hose industry for about ten years selling hydraulic, pressure washing, and industrial hose. In addition to hose, it also sells hose fittings, adapters, accessories, and bundles of complete, ready-to-install custom hose setups throughout the United States and Canada. (Ver. Compl. ¶ 3.)

5. THC's hydraulic hose is sold under the brand name Hydrauli-Flex. Its general-purpose water and chemical hose is called Soft Jet, and its pressure-washing hose is known as Fierce Jet. (Ver. Compl. ¶¶ 5–7.)

6. Defendant Smith worked at THC from approximately September 2016 to January 2024, first as Operations Manager and then as General Manager. (Ver. Compl. ¶ 8; Pl.'s Br. in Supp. of the Hose Company's Mot. for Prelim. Inj. Exhibit 1, Deposition of Robert M. Smith [Smith Dep.] 13:10–18, ECF No. 37.2.) He became a

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[2] "It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits." *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (citing *Huggins v. Wake Cnty. Bd. of Educ.*, 272 N.C. 33, 40–41 (1967)).

[3] To the extent any finding of fact is more appropriately characterized as a conclusion of law or vice-versa, it should be reclassified. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88 (2008) ("[C]lassification of an item with [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

shareholder in THC beginning in May 2021 and continuing until his resignation. (Ver. Compl. ¶ 9.)

7. Smith testified that as General Manager for THC he "ran the business. [He] did everything literally but the [profit and loss statements] and corporate accounting," including sourcing suppliers, purchasing, sales, inventory, marketing and IT. (Smith Dep. 13:19–14:17.) His duties included "managing the day-to-day operations," as well as "[s]etting and driving teams to achieve operational goals." (Aff. of Robert M. Smith [Smith Aff.] ¶ 6(a)–(b), ECF No. 44.2.)

8. Pollyanna Cunningham (Cunningham), THC's Vice President, agreed that Smith was "an integral part of THC's business and was involved in all aspects of the business." (Aff. of Pollyanna Cunningham [Cunningham Aff.] ¶ 3, ECF No. 49.1.) Smith's duties included, but were not limited to, developing and maintaining relationships with suppliers and customers; overseeing sales operations; business development, including identifying areas of growth for the company; and managing Epicor and later Tulinx, IT systems used to manage customer and vendor relationships, inventory, and sales. (Cunningham Aff. ¶ 3.) Additionally, according to Cunningham, Smith's duties encompassed "[a]ll other aspects involved in management of a multi-million-dollar company." (Cunningham Aff. ¶ 3(f).)

9. It is undisputed that Smith had access to Plaintiff's confidential information including vendor contacts, personnel data, pricing, customer lists, business plans, and plans for expanding and growing the business. (Smith Dep. 19:13–24; Ver. Compl. ¶ 10.)

10. On 20 July 2022, Smith signed the Agreement in exchange for an increase in compensation. (Ver. Compl. ¶ 11.) The Agreement contained a noncompetition provision, which provided:

> 1. Noncompetition.
>
> (a) [Smith] agrees that, during the Restricted Period, [Smith] shall not accept employment to design, manufacture, assembly [sic], and sale [sic] of hydraulic and industrial hose, or to perform any other services which are the same as or similar to services [Smith] has performed or will perform for [THC], within the Restricted Territory.

(Ver. Compl. Exhibit 1, Noncompetition Agreement [Agreement] § 1(a).)

11. The Restricted Territory and Restricted Period were defined in the Agreement as follows:

> (b) As used herein, the following terms shall have the following meanings:
>
> "Restricted Territory" means the following: (i) the geographic area within a 100-mile radius of [THC's] facility at 301 Warehouse Drive, Matthews, North Carolina; (ii) Mecklenburg County, North Carolina; (iii) counties contiguous to Mecklenburg County, North Carolina; (iv) the State of North Carolina; (v) states contiguous to the State of North Carolina; (vi) the State of South Carolina; (vii) the State of Georgia; (viii) the State of Virginia; (ix) the State of Tennessee; (x) the State of Florida; (xi) the State of Texas; (xii) the contiguous United States; (xiii) the United States; (xiv) or in any geographic area within a 5-mile radius of [THC] locations or [THC] customer locations in which [Smith] exercised responsibility or serviced customers of [THC].
>
> "Restricted Period" means a period that is two years after the termination of [Smith's] employment with [THC], whether voluntary termination by [Smith] or termination for cause by [THC.]

(Agreement § 1(b).)[4]

12. On 2 January 2024, Defendant submitted a resignation letter stating that he had accepted employment with Triosim Corporation (Triosim), which he described as a paper and pulp manufacturing and servicing company based in Appleton, Wisconsin. (Ver. Compl. ¶ 19.) In the letter, Smith promised that "in accordance with my non-competition agreement, my new role at Triosim will not involve direct engagement or contact with any of [Plaintiff's] customers, vendors, or employees." (Ver. Compl., Exhibit 2, Resignation Letter.) However, as discussed below, following Smith's departure from THC, Plaintiff became aware of Smith's involvement in the hose business on behalf of Triosim and its affiliates.

A. Smith's work with Triosim

13. After his departure, THC sent Smith a letter reminding him of his contractual obligations. (Ver. Compl. ¶ 53.) On 9 May 2024, Triosim confirmed that it was aware of THC's Noncompetition Agreement and that it was ensuring that Smith complied. (Ver. Compl. ¶ 55.) On 7 August 2024, however, an email inadvertently sent to Smith's old THC email address revealed that Smith was engaged in the industrial hose industry in some capacity for a company called Albany Rubber & Gasket (Albany). (Ver. Compl. ¶ 23; Ver. Compl., Exhibit 3.) THC investigated and determined that Smith was working for Trident Services, LLC

[4] The Agreement also included a Confidential Information provision; however, Plaintiff specifies that it bases its Motion on its claim for breach of contract, a claim that does not mention this provision. (*See* Pl.'s Br. in Supp. of the Hose Company's Mot. for Prelim. Inj [Pl.'s Br.] at 16, ECF No. 43 (stating that the Motion is premised on its breach of contract claim alone).)

(Trident), a division of Triosim. (Ver. Compl. ¶¶ 24–25.) Albany, which sells industrial and hydraulic hose, is a subsidiary of Trident located in Georgia. (Ver. Compl. ¶ 26; Smith Aff. ¶ 11.)

14. Trident's other subsidiaries include Montgomery Rubber & Gasket, located in Alabama, and MS Rubber, located in Mississippi, both of which sell industrial and hydraulic hoses as well as fittings; and Pensacola Rubber & Gasket, located in Florida, which sells a variety of hose products including industrial and hydraulic. (Ver. Compl. ¶¶ 27, 29–33; Smith Dep. 99:22–100:1; Pl.'s Br., Exhibit 13 Video Deposition of James Hickman [Hickman Dep.] 14:9–21, ECF No. 37.14; Smith Aff. ¶ 11.)

15. It is undisputed that Trident, through its subsidiaries, sells industrial hose and that some of its products compete with products sold by THC. (Smith Dep. 11:1–25; Hickman Dep. 44:14–23.) It is also undisputed that Trident and THC's sales territories overlap, at least in the states in which Trident's subsidiaries are located. (Smith Dep. 12:17–21; Cunningham Aff. ¶ 6.) Smith contends, however, that his employment with Trident does not violate the Agreement because he is not performing the same services that he performed for THC. (Smith Dep. 26:13–19.)

16. Plaintiff has presented evidence that, while working for Trident, Smith has been involved in discussions about pricing for air and pressure washing hose and fittings. (Exhibit 11; Pl.'s Br., Exhibits 17–19, ECF Nos. 37.18–37.20.) He attended a trade show in April 2024 that was specific to the hose industry. (Smith Dep. 42:1–

13.) In addition, Smith has written at least one blog post for Albany regarding hydraulic hose. (Pl.'s Br., Exhibit 14, ECF No. 37.15.)

17. Smith is also one of several Triosim / Trident employees planning an upcoming trip to China to meet with hose and fitting suppliers. (Pl.'s Br., Exhibit 20, ECF No. 37.21.) Cunningham testified that, while employed by THC, Smith developed and maintained relationships with suppliers in the United States and China. (Cunningham Aff. ¶ 3(a).)

B. Christopher Inks and Manatee

18. Christopher Inks (Inks), Smith's longtime friend, began working for THC on or about 29 April 2020. Inks was not required to sign a noncompetition agreement because Smith vouched for his character. (Ver. Compl. ¶¶ 35–36.)

19. In November 2023, while both were employed by THC, Smith and Inks traveled to California with individuals from Manatee Pressure Washer Supply and Repair (Manatee) to identify warehouse space for a potential joint venture between THC and Manatee. The idea did not progress after the trip. (Ver. Compl. ¶¶ 46–47.)

20. Approximately three months later, American Pressure Equipment, LLC (APE), a company affiliated with Manatee, was incorporated in Florida. (Ver. Compl. ¶¶ 38, 40.) APE sells its own line of pressure washing hose under the brand name Rampage, which competes with THC's Fierce Jet. (Ver. Compl. ¶ 44.)

21. At some point in 2024, and while he was still employed by THC, Inks began working for APE. (Ver. Compl. ¶¶ 39, 49.) When THC discovered the conflict of interest, it terminated Inks' employment on 24 April 2024. (Ver. Compl. ¶ 51.)

22. Smith claims he was unaware of Inks' plan to form APE until after Inks was terminated from THC. (Smith Dep. 136:1–12.) However, between 16 February 2024 and 26 March 2024, Smith and Inks participated in several Microsoft Teams meetings, one of which had the title "APE." (Pl.'s Br., Exhibits 4–9, ECF Nos. 37.5–37.9.) Smith now states that he does not recall the content of any of those meetings. (Smith Dep. 140:9–144:2.)

23. Smith and Inks have also exchanged text messages regarding APE and the hose business in general. In one such text, Smith bragged about deterring an individual from considering an investment in THC by stating "he'd be better off buying a 7-11." In another, Smith recounted that he had given suppliers Polyhose, Texcel, and Kanaflex the ultimatum, "you either work with me or them." (Pl.'s Br., Exhibit 23, ECF No. 37.24.) An email from Inks at APE to Smith at Trident sent 16 September 2024, conveys APE's pricing to supply pressure washing hose as compared to the prices Trident has been paying. (Pl.'s Br., Exhibit 11, ECF No. 37.12.)

24. In other communications between Smith and Inks, Smith offers business advice. For example, Smith suggested that Inks "get Aaron on board with APE[.]" (Pl.'s Br., Exhibit 10, ECF No. 37.11.) Aaron is a pressure washing equipment dealer with whom Smith had communicated regarding partnering with THC on a potential West Coast expansion. (Smith Dep. 153:4–154:17.) Smith also advised Inks not to attend Minexpo, a conference for mining equipment dealers, because he did not think it would benefit Inks' work for APE in the pressure washing hose business. (Pl.'s Br., Exhibit 23, RobertSmith 006743.)

25. Plaintiff's Complaint, filed 30 October 2024, alleges claims against Smith for (1) breach of contract; (2) fraud regarding his work with Triosim and its affiliates; (3) fraud regarding his consultations with Inks, Manatee, and APE; (4) misappropriation of trade secrets; (5) violation of the North Carolina Unfair and Deceptive Trade Practices Act; and (6) civil conspiracy. (*See generally* Ver. Compl.)

26. On 13 November 2024, Plaintiff filed this Motion, as well as a Motion for Expedited Discovery, (Mot. Exp. Disc., ECF No. 10). The latter motion was granted on 20 November 2024. (Order, ECF No. 14.)

27. On 6 December 2024, this case was designated to the North Carolina Business Court and assigned to the undersigned. (Design. Order, ECF No. 1; Ass'n Order, ECF No. 2.)

28. Following full briefing, the Court held a hearing on the Motion at which both parties were present. The Motion is now ripe for decision.

II. CONCLUSIONS OF LAW

29. A preliminary injunction is an "extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs. Inc. v. Berry*, 293 N.C. 688, 701 (1977). The plaintiff bears the burden to show: (1) a likelihood of success on the merits, and (2) that it is likely to sustain irreparable loss unless the injunction is issued or, "if, in the opinion of the Court, issuance is necessary for the protection of plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983); *see* N.C.G.S. § 1-485; *Pruitt v. Williams*, 288 N.C. 368, 372 (1975) ("The burden is on the plaintiffs to establish their right to a

preliminary injunction."); *VisionAir, Inc. v. James*, 167 N.C. App. 504, 508 (2004) (a preliminary injunction will issue only upon the movant's showing of these two factors).

30. "Likelihood of success means a 'reasonable likelihood.' " *Am. Air Filter Co. v. Price*, 2017 NCBC LEXIS 9, at *11 (N.C. Super. Ct. Feb. 3, 2017) (quoting *A.E.P. Indus., Inc.*, 308 N.C. at 404); *see also Elec. South, Inc. v. Lewis*, 96 N.C. App. 160, 165 (1989) (To show a reasonable likelihood of success, the moving party must make a *prima facie* showing of the prerequisites of their claim).

31. Irreparable harm is not necessarily injury that is "beyond the possibility of repair or possible compensation in damages, but . . . one to which the complainant should not be required to submit or the other party permitted to inflict [] and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P. Indus., Inc.*, 308 N.C. at 407 (emphasis omitted).

32. Still, an injunction is proper only "when irreparable injury is real and immediate." *Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586 (2002). To succeed on the Motion, Plaintiff "must do more than merely allege that irreparable injury will occur." *United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236 (1975). It must "set out with particularity facts supporting statements so the court can decide for itself if irreparable injury will occur." *Id.*

33. In addition, when deciding whether to afford preliminary injunctive relief, the Court must balance the potential harm the plaintiff will suffer if no injunction is entered against the potential harm to the defendant if an injunction is entered.

Addison Whitney, LLC v. Cashion, 2017 NCBC LEXIS 23, at **12–13 (N.C. Super. Ct. Mar. 15, 2017) (citing *Williams v. Greene*, 36 N.C. App. 80, 86 (1978)); *see Travenol Labs., Inc v. Turner*, 30 N.C. App. 686, 694 (1976) ("A court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction.").

34. Ultimately, the decision to grant or deny a preliminary injunction rests in the discretion of the court. *Lambe v. Smith*, 11 N.C. App. 580, 583 (1971).

A. Likelihood of Success on the Merits

35. Plaintiff specifies that it is pursuing preliminary injunctive relief on its breach of contract claim alone, and it is significant that Plaintiff's breach of contract claim pertains only to the noncompetition provision in the Agreement. Therefore, the Court limits its decision with respect to this Motion to whether Plaintiff is reasonably likely to succeed on this narrow claim.

36. For a noncompetition provision to be enforceable, it must be "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business interest of the employer." *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122–23 (1990) (citation omitted).

37. It is well recognized that "[a] legitimate business interest exists: (1) if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or (2) if the nature of the employment will enable the employee to acquire valuable information as to the nature and character of the business." *Digital Realty Trust, Inc. v. Sprygada*, 2022 NCBC LEXIS 71, at

**37 (N.C. Super. Ct. July 1, 2022) (citing *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 650 (1988)).

38. Tailoring a noncompetition provision so that it is no broader than is necessary to protect the employer's legitimate business interest is central to determining its enforceability. If the employer overreaches and the covenant is too broad, it will not be enforced. *See e.g., Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528 (1989).

39. "The reasonableness of a restraining covenant is a matter of law for the court to decide." *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 663 (1968). The party seeking enforcement of a restrictive covenant has the burden to establish that the covenant is enforceable. *Hartman v. W.H. Odell & Assocs., Inc.*, 117 N.C. App. 307, 311 (1994). Because they are considered restraints on trade, restrictive covenants are strictly construed and "given effect and enforced as written." *McVicker v. Bogue Sound Yacht Club, Inc.*, 257 N.C. App. 69, 76 (2017) (quoting *Callaham v. Arenson*, 239 N.C. 619, 625 (1954)). Any ambiguity is construed "against the drafter – the party responsible for choosing the questionable language." *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476 (2000).

40. Time and territory restrictions are considered "in tandem—the two requirements are not independent and unrelated." *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280 (2000). "A longer period of time is acceptable where the geographic restriction is relatively small, and vice versa." *Id.* (emphasis omitted).

41. As a general proposition, and depending on the size of the territory, a non-competition agreement of two years is within the range that the courts of this State have deemed reasonable. *Lockhart v. Home-Grown Indus. of Ga., Inc.*, 2007 U.S. Dist. LEXIS 67256, at *20 (W.D.N.C. Sept. 10, 2007). On the other hand, five-year restrictions are generally disfavored unless the territory is very tightly defined. *See Hartman*, 117 N.C. App. at 315 (cautioning that only in "extreme conditions" would a five-year covenant be enforceable); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 256 (1961) (determining that a five-year restriction limited to one city was reasonable).

1. Time

42. Smith argues that the duration of this restriction is unreasonable because the language limiting his ability to perform services that are the "same as or similar to services [Smith] has performed . . . for THC" requires the Court to trace Smith's job duties for THC back to the beginning of his employment in September 2016. (Def.'s Memo. in Opp. to Pl.'s Mot. for Prelim. Inj. [Def.'s Memo.] at 9, ECF No. 44.) According to Defendant this look-back period makes the restriction an untenable nine-and-a-half years. (Def.'s Memo. at 9.)

43. Plaintiff responds that the look-back rule does not apply in these circumstances because it has only been used when the restriction is tied to an employee's contacts with customers, not his job duties. (Pl.'s Reply Br. in Supp. of the Hose Company's Mot. for Prelim. Inj. [Pl.'s Reply] at 6, ECF No. 49.) The Court

disagrees that the look-back rule is inapplicable to job duties but agrees that, given the undisputed facts of this particular case, it is not determinative.

44. The rule, first announced in *Farr Associates, Inc. v. Baskin*, requires the Court to add the time it must look backwards to define the restriction to the duration of the restriction post-employment. In this case, that means the Court must look back over the more than seven years Smith was employed to determine what services Smith performed for THC. It must then add two years to this number to determine the total temporal restriction. *See Farr Assocs., Inc.*, 138 N.C. App. at 280 (explaining that the look-back period must be added to the restricted period to determine the total time restriction). Doing so here means that the temporal restriction for this noncompetition provision would exceed nine years. Even limiting the restriction to its narrowest geographic territory, a nine-year noncompetition provision in the employment context would generally be considered overbroad and therefore unenforceable.[5]

45. The logic of the look-back rule is that an employer overreaches when it attempts to protect information that may have been important to the employer years ago but is now past its useful life. The same is true when the employer attempts to

[5] Plaintiff argues that longer covenants have been enforced in the sale of business context and points out that Smith was required to sell his shares when his employment ended. Plaintiff is correct that sale-of-business covenants can be longer. *See Jewel Box Stores Corp.*, 272 N.C. at 663–64 (collecting cases and observing that the duration of noncompetition agreements in the sale-of-business context can sometimes exceed "ten, fifteen, and twenty years, as well as limitations of the life of one of the parties"). The noncompetition provision at issue, however, was not included as a term in the sale of a business. Rather, the consideration for this provision was a pay raise in the ordinary course of employment. (Compl. ¶ 11.) Accordingly, the sale-of-business cases are inapposite.

protect relationships with former customers. In both cases, the scope of the restriction is too broad because it encompasses information and relationships that no longer warrant this type of protection.

46. It is possible that, in some instances, the same logic could apply when the language of the restrictive covenant requires a look-back at an employee's former job duties. The farther back in time one must go to determine what is now restricted, the less likely it is that the restriction is crafted to protect a current business interest. Indeed, this Court has applied the look-back rule when the noncompetition provision was based on job duties, although it ultimately found the noncompetition provision enforceable. *See Elior, Inc. v. Thomas*, 2024 NCBC LEXIS 61, at **26 (N.C. Super. Ct. Apr. 22, 2024) (applying a twelve-month look-back period when the language of the noncompete stated the prohibited competitive activity included "engaging, or assisting others to engage in the same work, or substantially similar work, that [Thomas] performed on behalf of [Elior] or an Affiliate during the twelve (12) months' prior to [Thomas's] Separation Date").

47. This Court has also applied the look-back rule to a provision limiting the solicitation of employees. *Truist Fin. Corp. v. Rocco*, 2024 NCBC LEXIS 62, at **21 (N.C. Super. Ct. Apr. 25, 2024) (concluding that the look-back rule applies to employee non-solicitation provisions to the same extent it applies to customer non-solicitation provisions, "at least to the extent the provisions are intended to protect the employer's relationship with customers or clients."). As was true in *Truist,* however, rote application of the look-back rule is not always determinative – even

when it results in a lengthy temporal restriction. Again, the look-back rule is merely a tool used to determine whether a restriction is broader than is necessary to protect the employer's legitimate business interests. In some cases, those interests do not grow stale as time passes.

48. Such is the case here. Smith testified, candidly, that as its General Manager, he did essentially everything for the Hose Company, with the exception of some accounting functions. Vice President Cunningham confirmed that this was the case. Logically, then, if Smith was responsible for the entire business at the time he left, the fact that his responsibility grew over time does not make his earlier service to the company inconsequential. Instead, it adds detail important to defining the parameters of the restriction. *See, e.g., Investors Trust Co. v. Whitlock*, 2015 NCBC LEXIS 46, at **20 (N.C. Super. Ct. May 1, 2015) (holding that "the more controlling question is not whether the covenant 'looks back' to the entire period of employment but rather whether the covenant's extension . . . becomes unreasonable because it extends beyond the scope necessary to protect [the employer's] legitimate business interest."); *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 521 (1979) ("A major consideration in determining the reasonableness of restrictions as to time and territory relates to the type of position occupied by the employee, and the skills and/or knowledge obtained by the employee, such that the employee's managerial position is a significant factor weighing in favor of the reasonableness of restrictions." (cleaned up)).

49. In short, applying the look-back rule in this case does not render the noncompetition provision unenforceable because the passage of time did not lessen the relevance of the information at issue to a determination of the restriction's reasonableness. Smith's testimony that, as General Manager, he was responsible for everything (except for some accounting functions) necessarily means that, while his duties to THC may have expanded throughout his employment, he never stopped doing them.

2. Territory

50. But while the noncompetition provision survives the Court's scrutiny with respect to time, it does not fare as well with respect to territory. Smith contends that the noncompetition provision is unenforceable because THC has not carried its burden to show that it needs a nationwide restriction. (Def.'s Memo. at 9.) THC responds that it has presented evidence sufficient to support such a restriction, but if not, the Court should choose the appropriate territory from among the alternatives written. (Pl.'s Br. at 17, n. 3.) Based on the record before it, the Court agrees with Smith.

51. The reasonableness of a territorial restriction is evaluated based on six factors: "(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation." *Hartman*, 117 N.C. App. at 312. Ultimately, the territorial restriction

"can be no greater than is reasonably necessary to protect the legitimate business interests of the employer." *Sandhills Home Care, L.L.C. v. Companion Home Care-Unimed, Inc.*, 2016 NCBC LEXIS 61, at **14 (N.C. Super. Ct. Aug. 1, 2016) (citing *Manpower of Guilford Cnty., Inc.*, 42 N.C. App. at 521).

52. Sweeping allegations that a company does business "nationwide" do not give the Court enough information to evaluate the reasonableness of the restriction. *See, e.g., Prometheus Grp. Enters., LLC v. Gibson*, 2023 NCBC LEXIS 42, at **18 (N.C. Super. Ct. Mar. 21, 2023) (finding unenforceable a worldwide restriction that was not sufficiently supported by the evidence presented). Instead, THC is required to present evidence that it operated in a particular area, as well as evidence of the nature of its business there. *See, e.g., Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 89 (2007) (To show reasonableness of a geographic restriction intended to protect customer relationships, an employer must first show "where [its] customers are located, and if the scope is necessary to maintain its existing customer relationships."); *cf., Beverage Sys. of the Carolinas, LLC v. Assoc. Bev. Repair, LLC*, 368 N.C. 693, 699 (2016) (finding covenant in sale-of-business context unenforceable because businesses "had no customers to protect in large swaths of the area covered by the Agreement.").

53. The Court observes that THC pled that it does business "throughout the United States and Canada." (Compl. ¶ 3.) Cunningham testified that THC considers Trident's affiliates in Georgia, Alabama, Mississippi, and Florida to be competitors because they "sell products that compete with THC's products in locations where THC

already does business or actively seeks to do business." (Cunningham Aff. ¶ 6.) Smith admits that the areas in which THC and Trident do business "overlap." (Smith Dep. 12:12–21.) However, it is unclear on this record exactly *where* THC does business and *what* the overlap is.

54. While the Restricted Territory in this covenant is drafted in the alternative and THC encourages the Court to apply the blue pencil rule (discussed below) and choose among those alternatives, *see Welcome Wagon Int'l Inc.*, 255 N.C. at 248, the problem in this case is that the Court lacks sufficient information about THC's business to make a reasoned choice.[6] Consequently, on this record, given the level of scrutiny the Court is required to exercise, the Motion must be **DENIED**. *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 323 (2008) ("Covenants not to compete restrain trade and are scrutinized strictly."); *ChemiMetals Processing, Inc. v. McEneny*, 124 N.C. App. 194, 197 (1996) ("Our Courts have a long history of carefully scrutinizing . . . covenants that prevent an employee from competing with his former employer.").

3. Scope

55. Moreover, even if the noncompetition provision survived a review with respect to time and territory, the Court concludes that it is unenforceable as a matter

[6] Additionally, application of the blue pencil rule is discretionary. *See Tech. Ptnrs., Inc. v. Hart*, 298 Fed. Appx. 238, 243 (4th Cir. 2008) (citing *Hartman*, 117 N.C. App. at 317). A factor to consider when determining whether to exercise that discretion is whether it was necessary for this employer to define the Restricted Territory in *fourteen* alternative ways, or whether that approach was intended to cause the employee to navigate the dilemma of either complying with the broadest restriction or engaging in costly litigation.

of law because the clause limiting the services Smith can provide is not restricted to a particular industry or business.

56. Again, the language at issue is that Smith "shall not accept employment to design, manufacture, assembly [sic], and sale [sic] of hydraulic and industrial hose, or to perform any other services which are the same as or similar to services [Smith] has performed or will perform for [THC] within the Restricted Territory." (Agreement § 1(a).) The first clause adequately defines what Smith cannot do (design, manufacture, assemble and sell), as well as the industry involved (hydraulic and industrial hose).

57. It is the second clause that creates the stumbling block. There, THC purports to prohibit Smith from performing "any other services which are the same as or similar to services [Smith] has performed . . . for [THC]." The problem is that the word "services" is not defined to limit the prohibited activity to the hydraulic and industrial hose industry or, indeed, to any industry. Smith performed a variety of services for THC during his tenure. As written, the language could be interpreted to mean that Smith would not be able to take a position performing any of those same services for a fast-food restaurant chain. THC cannot reasonably argue that such a broad restriction on Smith's ability to earn a livelihood is necessary to protect its business interests. *Cf. Okuma*, 181 N.C. App. at 91–92 (employer's covenant not to compete protected legitimate business interest where provision did not bar employee from "any or all employment in the field of either customer service or machine tool

technology" but, rather, employment with direct competitor in area of competition with former employer).

58. At best, use of the word "other" to define "services" creates an ambiguity regarding whether the drafter intended to reference the hydraulic and industrial hose industry. However, it is not for this Court to divine the intent of the parties when an ambiguity exists. In this area of the law where the words of the restraint must be strictly construed, it is the drafter—THC—that bears the risk created by ambiguity.

59. Moreover, North Carolina's blue pencil rule cannot be used to salvage this noncompetition provision. The rule is one of excision, not modification. "A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant." *Hartman*, 117 N.C. App. at 317; *see also NFH, Inc. v. Troutman*, 2019 NCBC LEXIS 66, at *33 (N.C. Super. Ct. Oct. 29, 2019) (North Carolina's strict blue pencil doctrine allows the court to "avoid scrapping an entire covenant" by "enforc[ing] the divisible parts of [the] covenant that are reasonable."); *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it.").

60. "To be a 'distinctly separable' provision, other restrictions in the covenant must not be dependent on the portion to be excised." *Elior*, 2024 NCBC LEXIS 61, at **35–36. Ultimately, whether to apply the "blue pencil" rule is within the discretion of the Court. *McGriff Ins. Servs., Inc. v. Ryan Hudson & Digital Ins., LLC*, 2023 NCBC LEXIS 4, at **32 (N.C. Super. Ct. Jan. 17, 2023).

61. In this case, Plaintiff points to use of the word "or" and argues that it divides the first clause of the restriction ("[Smith] agrees that, during the Restricted Period, [Smith] shall not accept employment to design, manufacture, assembly [sic] and sale [sic] of hydraulic and industrial hose") from the second clause of the restriction ("OR to perform any other services which are the same as or similar to services [Smith] has performed or will perform for [THC] within the Restricted Territory"). Plaintiff asks the Court to strike the second clause and enforce only the first.

62. Defendant responds that the blue pencil rule cannot be used as Plaintiff requests because the two clauses are not divisible, despite use of the word "or." Defendant points out that the word "or" must be read in context because it can be used either disjunctively (as Plaintiff argues) or conjunctively (as Defendant contends).

63. On this point, the Court agrees with Defendant. North Carolina courts have recognized that "or" can be used either in its conjunctive sense or its disjunctive sense. *Compare Elior*, 2024 NCBC LEXIS 61, at **36 (holding that "or" was used in its disjunctive sense when each clause was also separated into lettered subparts), *with Elec. South, Inc.*, 96 N.C. App. at 167 (determining that use of "or" was ambiguous and holding that it should be construed against the drafter in its conjunctive sense).

64. Here "or" is used in its conjunctive sense. This conclusion is bolstered by the fact that, as stated above, the two clauses are not otherwise distinctly separable. Unlike the language at issue in *Elior*, the words here appear on the page as a single

restriction, not divided into subparts. In addition, the second clause depends on the existence of the first clause because to understand what is meant by "performance of any *other* services," one must necessarily read the first clause, which identifies services that include the design, manufacture, assembly and sale of hydraulic and industrial hose.

65. In short, because the clauses must be read together and are not distinctly separable, the blue pencil rule cannot be applied. The overbreadth created by the second clause cannot be cured.

66. Accordingly, the Court concludes that Plaintiff is not able to show that it is reasonably likely to succeed on the merits of its breach of contract claim because this noncompetition provision is unenforceable as a matter of law.[7] Given the Court's conclusion, it does not address the parties' remaining arguments.

67. **WHEREFORE**, based upon the foregoing **FINDINGS** and **CONCLUSIONS**, the Court, in its discretion, hereby **DENIES** Plaintiff's Motion for Preliminary Injunction.

IT IS SO ORDERED, this the 27th day of March 2025.

/s/ Julianna Theall Earp
Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases

[7] While the Court's determination with respect to the Restricted Territory is based on a lack of evidence in the existing record, its determination with respect to the scope of the noncompetition provision is based on the language of the provision itself.