Hypothetical Two: Non-Competition Agreement in the Sale of a Business

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Table 4 vs. Table 5

Bud Miller started a brewery in Manchester in 2000 called the Queen City Brewery. Miller experimented with unusual beers like guits, braggots, and purls. The popularity of Queen City beer exploded and by 2010 it was the largest brewery in New Hampshire, distributing to stores and restaurants throughout the state. A group of investors formed Zythophilia, LLC to buy Queen City Brewery and distribute the beer nationally. Miller agreed to sell all of his assets to Zythophilia including the recipes, brewing equipment, supplier and customer lists, and the good will for $1,000,000. He also signed an employment agreement in which he agreed to continue to be the brewmeister for Queen City Brewery. If Miller left Queen City Brewery for any reason, he agreed not to compete directly or indirectly with Queen City Brewery anywhere in North America so long as the business continued to make and distribute beer. More specifically, the non-compete stated in relevant part that Miller shall not "directly or indirectly, for his own account or as agent, servant, employee or consultant (whether or not paid), or as a shareholder of any corporation, partner in a partnership, member of any firm, or otherwise, engage or attempt to engage in any business that solicits or promotes services that are competitive with Queen City Brewery." Miller was paid a salary of $150,000; well above the state-wide income for brewers.

The cost of brewing Miller's suds on a national scale proved to be exorbitant so Zythophilia urged Miller to begin using rice and grain in his brews. Miller refused and quit. Within six months, Miller lent money from the sale of Queen City Brewery to his brother to start a brewpub in Nashua called Gate City Brewery. Miller was neither a shareholder nor officer of the Gate City Brewery. Gate City Brewery brewed uncommon style beers such as gose, faro, and sahti. Zythophilia brought an action to enjoin Gate City from brewing beer based on Miller's non-competition agreement.

What are the top six arguments Zythophilia would make in favor of the injunction?

1. The Agreement prohibits **indirect competition**.
2. Miller was **paid a premium** for the non-compete.
3. Creates **customer confusion** because new business is too similar.
4. **Miller quit**/left voluntarily to invest in a competitive brewery.
5. **Liberal construction:** Non-competes in the sale of a business are liberally construed.
6. The **court can narrow** the scope.