



## Drafting Contracts with Enforcement in Mind

# Non-Compete and Non-Solicitation Provisions

# The Basics

- **Companies should use great caution when dealing with restrictive covenants**
- **Non-compete provisions are more likely to be enforced if they include a geographical limit on the zone of non-competition**
  - **Reasonable geographical limit would be one prohibiting an affected party from doing business with a company's competitor in areas in which the company actively does business – the company has a legitimate business interest in those locations**
- **Reasonable time frame is also advisable**
  - **Reasonable time frame for an individual normally runs between six months and two years, depending on what the line of business the restricting company is in, and its business interest for imposing this time constraint**
- **The “Janitor Rule”**
  - **Legitimacy of business interest depends on what job employee had and new job employee takes**

# The Basics

- **If a covenant not to compete is executed at the inception of employment, consideration supporting covenant is the job itself;**
- **However, when an employee enters into noncompetition agreement subsequent to commencement of employment, restrictive covenant must be supported by new consideration to be enforceable.**

# Dispute Resolution Provisions

# Sample Provision

- **Dispute Resolution.** Seller and Buyer shall negotiate in good faith to resolve any dispute relating hereto. If, despite good faith efforts, the parties are unable to resolve a dispute or claim arising out of or relating to this Agreement or its breach, termination, enforcement, interpretation or validity, the parties will first seek to agree on a forum for mediation to be held in a mutually agreeable site. If the parties are unable to resolve the dispute through mediation, then any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Pittsburgh, Pennsylvania before three arbitrators who are lawyers experienced in the discipline that is the subject of the dispute and shall be jointly selected by Seller and Buyer. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The Arbitrators shall issue a reasoned decision of a majority of the arbitrators, which shall be the decision of the panel. Judgment may be entered upon the arbitrators' decision in any court of competent jurisdiction. The substantially prevailing party as determined by the arbitrators shall be reimbursed by the other party for all costs, expenses and charges, including without limitation reasonable attorneys' fees, incurred by the prevailing party in connection with the arbitration.

# Pre-Arbitration Resolution Mechanisms

- Seller and Buyer <sup>1</sup>**shall negotiate in good faith** to resolve any dispute relating hereto. If, despite good faith efforts, the parties are unable to resolve a <sup>2</sup>**dispute or claim arising out of or relating to this Agreement or its breach, termination, enforcement, interpretation or validity**, the parties will <sup>3</sup>**first seek to agree on a forum for mediation to be held in a mutually agreeable site.**

# Arbitration Procedure

- If the parties are unable to resolve the dispute through mediation, then any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, **1including the determination of the scope or applicability of this agreement to arbitrate,** shall be determined by **2arbitration in Pittsburgh, Pennsylvania** before **3three arbitrators who are lawyers experienced in the discipline that is the subject of the dispute and shall be jointly selected by Seller and Buyer.** The arbitration shall be **4administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures.** The Arbitrators shall issue **5a reasoned decision of a majority of the arbitrators, which shall be the decision of the panel.** **6Judgment may be entered upon the arbitrators' decision in any court of competent jurisdiction.** The **7substantially prevailing party as determined by the arbitrators shall be reimbursed by the other party for all costs, expenses and charges, including without limitation reasonable attorneys' fees,** incurred by the prevailing party in connection with the arbitration.



# Unconscionability

- Arbitration provisions must comport with the Federal Arbitration Act (“FAA”)
  - Core principle: Arbitration agreements involving interstate commerce or foreign commerce must be considered **valid, irrevocable, and enforceable** (except on legal or equitable grounds for the revocation of the contract)
  - FAA Chapter 1: Arbitration agreements must be in writing and relating to a maritime transaction or a transaction involving interstate or foreign commerce
  - FAA Chapter 2: incorporates NY Convention into US law
- Arbitration provisions are generally enforceable under Federal law, unless such provisions result in unconscionable circumstances from either procedural or objective unfairness
  - **Unconscionability**: overwhelmingly one-sided, in favor of the party with the superior bargaining power
- Cases involving the issue of **unconscionability** in arbitration agreements
  - *Chavarria v. Ralphs Grocery Co.* (9<sup>th</sup> Cir. 2013) 733 F.3d 916
    - Held to be unconscionable
  - *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740
    - Valid despite forcing individuals to arbitrate individually rather than on a class-action basis

# Boilerplate Provisions

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## Types of Boilerplate Provisions

- Expenses
- Attorneys' Fees
- Further Assurances
- Public Announcements
- Notices
- Interpretation
- Headings
- Severability
- Entire Agreement
- Amendment and Modification
- Waiver
- Cumulative Remedies
- Equitable Remedies
- Assignment
- Successors and Assigns
- No Third-Party Beneficiaries
- Governing Law
- Submission to Jurisdiction
- Waiver of Jury Trial
- Counterparts
- Force Majeure
- Joint and Several Obligations
- Several Obligations
- Relationship of the Parties
- Business Days
- Time is of the Essence

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# Force Majeure

No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the affected party's reasonable control, including, without limitation: (a) acts of God; (b) flood, fire, earthquake, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest; (d) government order or law; (e) actions, embargoes, or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; [and] (g) national or regional emergency; [and] [(h) strikes, labor stoppages or slowdowns, or other industrial disturbances[; and]] [(i) shortage of adequate power or transportation facilities]. The party suffering a Force Majeure Event shall give notice [within [NUMBER] days of the Force Majeure Event] to the other party, stating the period of time the occurrence is expected to continue and shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized.

# Governing Law

[This Agreement/All matters arising out of or relating to this Agreement] shall be governed by and construed in accordance with the internal laws of the State of [RELEVANT STATE] without giving effect to any choice or conflict of law provision or rule (whether of the State of [RELEVANT STATE] or any other jurisdiction).

# Submission to Jurisdiction

Any legal suit, action, or proceeding arising out of or [based upon/relating to] this Agreement[, the other Transaction Documents] or the transactions contemplated hereby or [or thereby] [shall/may] be instituted in the federal courts of the United States of America or the courts of the State of [RELEVANT STATE] in each case located in the City of [RELEVANT CITY] and County of [RELEVANT COUNTY], and each party irrevocably submits to the [non-]exclusive jurisdiction of such courts in any such suit, action, or proceeding. [Service of process, summons, notice, or other document by [certified] mail [in accordance with Section [NUMBER]/to such party's address set forth herein] shall be effective service of process for any suit, action, or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to venue of any suit, action, or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.]

# Waiver of Jury Trial

EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT [OR THE OTHER TRANSACTION DOCUMENTS] IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT[, THE OTHER TRANSACTION DOCUMENTS] OR THE TRANSACTIONS CONTEMPLATED HEREBY [OR THEREBY]. [EACH PARTY TO THIS AGREEMENT CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) SUCH PARTY HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) SUCH PARTY MAKES THIS WAIVER VOLUNTARILY, AND (D) SUCH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION [NUMBER].]



# Entire Agreement

This Agreement[, together with [the [NAME OF OTHER DOCUMENTS]/any other documents incorporated herein by reference] and all related exhibits and schedules,] constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein [and therein], and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. [In the event of any inconsistency between the statements in the body of this Agreement, [NAME OF OTHER DOCUMENTS] and the related exhibits and schedules (other than an exception expressly set forth as such in the schedules), the statements in the body of this Agreement shall control.]

# Amendment and Modification

This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each party hereto.

# Severability

If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. [Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.]

# Interpretation

For purposes of this Agreement, (a) the words "include," "includes," and "including" are deemed to be followed by the words "without limitation;" (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to sections, schedules, and exhibits mean the sections of, and schedules and exhibits attached to, this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The schedules and exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

# Headings

The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

# Expenses

All costs and expenses incurred in connection with this Agreement [and each other agreement, document, and instrument contemplated by this Agreement/and each Transaction Document] and the transactions contemplated hereby [and thereby] shall be paid by the party incurring such costs and expenses[, whether or not the Closing shall have occurred].

# Attorneys' Fees

In the event that any party institutes any legal suit, action, or proceeding[, including arbitration,] against the other party [to enforce the covenants contained in this Agreement (or obtain any other remedy in respect of any breach of this Agreement)/arising out of [or relating to] this Agreement], the prevailing party in the suit, action or proceeding shall be entitled to receive, in addition to all other damages to which it may be entitled, the costs incurred by such party in conducting the suit, action, or proceeding, including [reasonable/actual] attorneys' fees and expenses and court costs.