VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

GERALD WAYNE CORBITT

Plaintiff,

v. Case No: CL09-491

TRANG THIEN THI THAN

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, by counsel, for her Opposition to Plaintiff's Motion for Summary Judgment and respectfully states as follows:

I. PLAINTIFF'S CITED AUTHORITY REQUIRES ITS MOTION BE DENIED

Plaintiff's Motion for Summary Judgment (the "Motion") cites the following authority and the principles contained therein (emphasis added):

a. *"...the trial court must consider inferences from the facts* ***in the light most favorable to the non-moving party.*** Andrews v. Ring, 266 Va. 311, 585 S.E. 2d 780 (Va. 2003)."

b. *"...covenants in restraint of trade are not favored, will be strictly construed, and,* ***in the event of ambiguity, will be construed in favor of the employee.*** Richardson v. Paxton Co., 203 Va. 790, 795..."

c. *"...the* ***employer bears the burden*** *to show that the* ***restraint is no greater than necessary*** *to protect a legitimate business interest,* ***is not unduly harsh or oppressive*** *in curtailing an employee's ability to earn a livelihood,* ***and is reasonable*** *in light of*

sound public policy. Roanoke Engineering Sales Co., Inc. v. Rosenbaum, 223 Va. 548,552..."

d. *"...each case must be determined* ***on its own facts****.* Id."

Rule 3:20 states that Summary Judgment shall not be entered if any material fact is genuinely in dispute. Defendant has asserted in her First Affirmative Defense that the covenant sued upon is *"...overbroad and therefore an unenforceable restrictive covenant..."*. This clearly raises a genuine dispute as to the material facts relating to the scope and enforceability of the covenant.

With respect to disputed material facts, Defendant in her Answer and Grounds of Defense has denied Plaintiff's allegations that she *"opened a Nail Salon within the 10 mile radius"* that her actions *"are in breach of the terms of the contract"* and that *"the Plaintiff suffered an economic loss."* (see Answer ¶¶ 7-8)

Even in the absence of the Defendant's denials of fact and affirmative defense, the principles set forth by the Virginia Supreme Court, in which covenants in restraint of trade are not favored, require that the Plaintiff bear the burden of proving facts to establish that the covenant is enforceable by showing that it is 1) no greater than necessary to protect a legitimate business interest; 2) not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood; and 3) is reasonable in light of sound public policy. *Id.*

The Plaintiff, reaches the conclusion that the covenant is enforceable without any factual support from any of the *"pleadings, admissions in pleadings, [or] admissions made in answers to requests for admissions"* as required by Rule 3:20 and further set forth in *Andrews v. Ring*, 266 Va. at 381. At a minimum, facts would have to be presented either by the parties, witnesses or experts as to the nature of the Plaintiff's business interest, the demographics of the area in

question, the Defendant's ability to earn a livelihood as just a few of the factual issues the Court must consider. Plaintiff concedes that *"Each case must be determined on its own particular facts." Meissel v. Finley,* 198 Va. 577, 579, 95 S.E.2d 186, ___ (1956). As such, the Plaintiff bears the burden of proving these facts at trial and the Defendant is entitled to examine the evidence and witnesses against her and to offer her own evidence in rebuttal of such facts.

Defendant points out that summary judgment is not a substitute for a trial on the issues and is available only where no issue of fact exists. *See e.g., Leslie v. Nitz,* 212 Va. 480 (1971), *Simpson v. Broadway Manhattan Taxicab Corp.,* 203 Va. 892 (1962), *Marshall v. Dean,* 201 Va. 699 (1960).

Summary judgment is a drastic remedy, available only where there are no material facts genuinely in dispute and should not be used to short-circuit litigation by deciding disputed facts without permitting parties to reach a trial on the merits. It is been called a "drastic remedy" because it terminates the litigation, and denies the parties a trial on the issues. s*ee Stockbridge v. Gemini Air Cargo, Inc.,* 269 Va. 609 (2005).

Furthermore, notwithstanding the foregoing, to the extent Plaintiff relies on the inference it draws that the Defendant *"...opened (from time to time) those businesses to the public"* (Motion at p. 4 ¶1) as constituting a breach of the term "open" contained in the covenant, such an inference is not established by any pleadings or admissions and, as previously stated, such an inference upon which the Plaintiff's basis its legal conclusion cannot be drawn because *"the trial court must consider inferences from the facts* ***in the light most favorable to the non-moving party."*** *See Andrews v. Ring*, 266 Va. 311, 585 S.E. 2d 780 (Va. 2003) (emphasis added).

CONCLUSION

Based on the foregoing principles set forth by the Virginia Supreme Court strictly construing covenants in restraint of trade in favor of the restricted party in light of Rule 3:20 and the existence of the genuine disputes as to material facts, the Defendant prays that the Plaintiff's Motion for Summary Judgment be denied.

Respectfully submitted,

TRANG THIEN THI THAN
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of December, 2010 a true and accurate copy of the foregoing was sent via facsimile and email to:

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Richard H. Nguyen

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

GERALD WAYNE CORBITT
Plaintiff,

v. Case No: CL09-491

TRANG THIEN THI THAN
Defendant.

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, by counsel, for her Cross-Motion for Summary Judgment and respectfully states as follows:

I. PLAINTIFF'S FACTUAL ADMISSIONS

Plaintiff has conceded to the following admissions in its pleadings before the Court:

a. *"It is undisputed that the Defendant worked in and was a regular employee of three nail salons within the 10 mile radius within the 3 year limitation."*

b. *"[I]t is also undisputed that the Defendant did not start a new nail salon business within the three years within the geographic area."* (Motion at p. 2 ¶2)

c. *"...the Plaintiff concedes that the Defendant did not start a new business during the limitation..."* (Motion at p.3-4)

d. *"...that [Plaintiff] no longer ha[s] any interests in the business known as "Only Nails" once located at 3940 Plank Road, Suite G, Fredericksburg, Virginia."* (Pl.'s Answer to Req. for Amiss. ¶1)

e. *"that [Plaintiff]conveyed all of [his] interests in the business known as "Only Nails" once located at 3940 Plank Road, Suite G, Fredericksburg, Virginia to an individual,*

individuals, an entity or entities that is/are not a party to this pending action." (Pl.'s Answer to Req. for Amiss. ¶2)

II. SUMMARY JUDGMENT AS TO FIRST AFFIRMATIVE DEFENSE

Defendant has asserted that the covenant in restraint of trade sued upon by Plaintiff is *"overbroad and therefore an unenforceable restrictive covenant on trade."* (Answer at p. 2)

The controlling case on this issue is *Stoneman v. Wilson,* 169 Va. 239, 241, 192 S.E. 816, ___ (1937) in which the Virginia Supreme Court ruled on an ambiguous covenant in restraint of trade that was contained in a business stock sale agreement. The disputed clause in that case provided:

"The party of the second part agrees not to go in the Hardware business for a period of 5 yrs. In Galax, Va. or a radius of five miles."

The Court in *Stoneman* was faced with the question of determining the meaning of the phrase *"go in the hardware business" Id* at 245. Similarly, this Court is faced with the determining the meaning of the phrase *"open any Nail Salon business".*

In *Stoneman* the seller, prior to selling his business, was the *"secretary and treasurer and for a time was its purchasing agent." Id* at 243. In the case at bar, the Defendant, prior to selling her business, was the sole owner and proprietor as evidenced by the Bill of Sale sued upon by Plaintiff.

In *Stoneman* the seller obtained employment as *"a clerk and nothing more"* and *"he had nothing to do with its management"* within the restricted time and area. *Id* at 245. In the case at bar, the Defendant undisputedly obtained employment as a mere employee at nail salons but she had nothing to do with their management as conceded by Plaintiff. Plaintiff has also conceded that the Defendant did not *"start a new business"* during the restricted time and area.

Defendant's employment as a nail salon employee is directly analogous to that of the clerk's position in *Stoneman.*

The Court in *Stoneman* cited the following principles and authorities in reaching its decision:

> "Ordinarily one who secures a position as a mere clerk for a corporation cannot be said to have gone into that business which it is conducting. Plainly a clerk for the Steel Corporation is not in the steel business as that term is ordinarily understood..." *Id* at 246.
>
> "One who is a manager of a business is engaged in its conduct." *Id.*
>
> "In such cases there is a patent distinction, it has been said, between a mere servantship in a business and the managership thereof." *Id* at 247.

Finally, after reviewing the relevant authority on the subject and in light of the facts, the Virginia Supreme Court in *Stoneman* held that:

> "The substance of our conclusion is this: Stoneman should not be permitted to occupy with the Galax Company substantially the position which he held with the Matthews Company. Proof of that fact should be clear, but it has not been forthcoming. Since it is not clear and is not forthcoming, he should not be enjoined." *Id* at 248.

Applied to the instant case at bar, the Defendant should not be permitted to occupy at another nail salon substantially the position which she held at "Only Nails", that position being that of the owner and sole proprietor. Therefore, the "open" as contained in the covenant in question must be construed as establishing an ownership interest in a business, not merely opening its doors to the general public from time to time. Such a broad definition of the term "open" would lead to absurd results in which one could imagine that Defendant to be in breach the covenant merely by opening the doors of a nail salon to the public one day without even being an employee of that nail salon.

It is clear from Plaintiff's admissions and pleadings before the Court that the Defendant's actions have not constituted a breach of the covenant sued upon and that she has not "open[ed]

any nail salon business" within the restricted time and area in that she has no ownership interest or managerial role in any such nail salon.

III. SUMMARY JUDGMENT AS TO SECOND AFFIRMATIVE DEFENSE

Defendant has asserted the defense that *"the Plaintiff lacks standing to bring this suit against Defendant as Plaintiff has no remaining interest in the business known as Only Nails."* (Answer at p. 2)

In support of her Cross-motion for summary judgment, Defendant cites the following request for admission and the Plaintiff's response:

1. Admit or deny that you no longer have any interests in the business known as "Only Nails" once located at 3940 Planck Road, Suite G, Fredericksburg, Virginia.

   RESPONSE:

   Admit.

2. Admit or deny that you conveyed all your interests in the business known as "Only Nails" once located at 3940 Planck Road, Suite G, Fredericksburg, Virginia to an individual...that is/are not a party to this pending action.

   RESPONSE:

   Admit

A copy of the Request for Admissions and Answers are attached hereto as Exhibit 1.

Based on the foregoing admissions, it is clear that the Plaintiff has no remaining interests in the business "Only Nails" that is the subject of the contract sued upon by Plaintiff.

Such interests in the business include the covenant in restraint of trade relating to that business which would include a claim for damages for breach of the contract.

As further set forth below, Plaintiff "no longer ha[s] any interests in the business" and "conveyed all of your interests" it cannot be said that the Plaintiff reserved for himself any right to maintain causes of actions arising from the covenant arising from the business. That right and

standing to bring any such action including this action belongs to the undisclosed buyer of the business who *"is/are not a party to this action."*

To the extent that person has not been joined as a Plaintiff, Defendant could be exposed to multiple inconsistent liabilities and as such Plaintiff's Complaint appears to be in violation of Rule 3:12 which provides:

> Rule 3:12. Joinder of Additional Parties.
>
> (a) *Persons to Be Joined if Feasible.* A person who is subject to service of process may be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or **(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest of the person to be joined.**

Further, Rule 3:12 requires that:

> (d) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) hereof who are not joined, and the reasons why they are not joined.

Defendant points out that she attempted through discovery to obtain documentation that would identify the subsequent buyer of "Only Nails", but Plaintiff objected to the production of said indentifying documentation relating to that subsequent sale on relevance grounds and as such does not know of the identity of the party to be joined, while it is believed that the Plaintiff does.

The controlling case as to the standing issue is *Burchell v. Capitol City Dairy,* 158 Va. 6, 6, 163 S.E. 81, ___ (1932). This was a case involving the enforcement of a covenant in restraint of trade by a plaintiff who had since sold his business that gave rise to the covenant. There it was held that:

> *"there was no person before the court who was then entitled to have the covenant enforced, assuming that it is enforceable." Id* at 10.

The Virginia Supreme Court in *Burchell* set forth the principle that:

> *"The general rule is that to be valid a covenant by a vendor of a business not to engage in trade must be ancillary and incidental to the main purpose of the transfer of the business sold, and made in protection or support of the business transferred; and that it has no vitality or validity apart from the business transferred."* *Id.* (citations omitted)
>
> *"Such a covenant is assignable by the purchaser of the business, even though it does not run to the purchaser and his assigns; and* ***if the purchaser in turn sells the business, including his good will, the covenant passes as an appurtenance of or an incident to the business sold by the purchaser without a specific assignment thereof, or of the contract in which it was made.***" *Id.* (citations omitted, emphasis added)

The *Burchell* Court held concluded that had the plaintiff:

> *"sold its corporate assets and good will prior to the institution of this suit,* ***it would have been necessary to dismiss the bill because neither of the complainants had any interest which he was entitled to have protected.***" *Id* at 11. (emphasis added)

Alternatively, the Court stated that if the sale of plaintiff's business:

> *"took place during the pendency of the suit, and that fact was pleaded and established by the proof,* ***the court in the absence of any request that the new party in interest be substituted for the Capitol City Dairy, Incorporated, should have dismissed the bill for the same reason."*** *Id* at 11. (emphasis added)

The facts of the case at bar are similar in that at some point either prior to the institution of this suit or during the pendency of the suit, the Plaintiff sold all of his interests of the business to a person not a party to this suit. The covenant sued upon "*passe[d] as an appurtenance of or an incident to the business sold by the purchaser without a specific assignment thereof, or of the contract in which it was made*" and thus this Court must dismiss the Plaintiff's suit for lack of standing based on the same reasons as our Supreme Court did in *Burchell.*

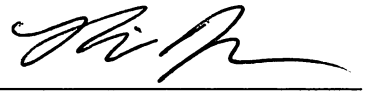
IV. CONCLUSION

WHEREFORE the Defendant, by Counsel, having set forth her grounds for her Cross-Motion for Summary Judgment, prays that this Court enter an Order:

A. Dismissing Plaintiff's Complaint with prejudice; and

B. Granting any other relief this Court deems proper.

Respectfully submitted,
TRANG THIEN THI THAN
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of December, 2010 a true and accurate copy of the foregoing was sent via facsimile and email to:

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EXHIBIT 1

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

GERALD WAYNE CORBITT
Plaintiff,

v. Case No.: CL 09-491

TRANG THIEN THI THAN
Defendant.

DEFENDANT'S FIRST REQUEST FOR ADMISSIONS TO PLAINTIFF

COMES NOW the Defendant, Trang Thien Thi Than, by counsel, pursuant to Rule 4: 11, and serves upon the Plaintiff, Gerald Wayne Corbitt, for the purposes of the pending action only, requests for the admissions of the truth of the following matters and of the genuineness of the documents described below and attached hereto:

1. Admit or deny that you no longer have any interests in the business known as "Only Nails" once located at 3940 Plank Road, Suite G, Fredericksburg, Virginia.

2. Admit or deny that you conveyed all of your interests in the business known as "Only Nails" once located at 3940 Plank Road, Suite G, Fredericksburg, Virginia to an individual, individuals, an entity or entities that is/are not a party to this pending action.

3. Admit or deny the genuineness of the document attached at Exhibit A.

TRANG THIEN THI THAN
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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF SPOTSYLVANIA

GERALD WAYNE CORBITT

Plaintiff

v. Case Number CL09-491

TRANG THIEN THI THAN

Defendant

PLAINTIFF'S ANSWER TO REQUEST FOR ADMISSIONS

COMES NOW the Plaintiff, by counsel, and properly answers the Defendant's first request for the production of documents.

1. Admit

2. Admit

3. The Plaintiff neither admits nor denies as pursuant to the Courts ruling on 21 September 2009 that the Bill of Particulars was not properly Ordered and therefore the Plaintiff's filed Bill or Particulars was not received by the Court.

RESPECTFULLY SUBMITTED

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