STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0318

Atronix, Inc.

v.

Kenneth Morris
Scott Electronics, Inc.

BRIEF FOR APPELLANT ATRONIX, INC.

November 21, 2017

ATRONIX, INC.

By its Attorneys

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QUESTIONS PRESENTED

1. Whether the superior court (Wageling, J.) erred in holding that a non-compete agreement between Defendant Kenneth Morris and Plaintiff's[1] predecessor, Atronix, Inc., was not among the assets Plaintiff acquired under an asset purchase agreement ("APA") that conveyed the Atronix business "as a going concern," to include "all contracts, licenses, sublicenses, agreements, leases, [and] commitments," and "all the assets, properties, goodwill, and business of every kind and description." Add. at 5-10, App. at 511-516.[2]

2. Whether the superior court, in evaluating whether Morris' non-compete agreement was an asset conveyed to Plaintiff under the APA, erred by conflating the issue of whether the agreement was an asset acquired by Plaintiff, with the separate and distinct issue of whether Morris consented to the assignment of that agreement, where the issue of Morris' consent was not before the court. Add. at 15-16, App. at 540-42.

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[1] Plaintiff/Appellant is Atronix, Inc. For clarity, use of the term "Atronix" shall refer to Atronix, Inc. prior to the July 2014 APA. "Plaintiff" shall refer to the post-APA Atronix.

[2] "Add." refers to the numbered pages following the brief, which contain the superior court's two written Orders being appealed.
"App." refers to the numbered pages of the Appendix.

STATEMENT OF THE CASE

On November 9, 2016, Plaintiff brought a complaint alleging that Defendant Kenneth Morris breached the non-compete agreement he executed with Plaintiff's predecessor, Atronix, Inc., by terminating his employment with Plaintiff and going to work for Plaintiff's direct competitor, Defendant Scott Electronics. App. at 1-14.

In December 2016, Defendants each moved to dismiss Plaintiff's complaint. App. at 125-150. Defendants argued that Plaintiff did not have standing to enforce the non-compete agreement because, they alleged, the agreement was classified as an "Excluded Liability" under a July 2014 asset purchase agreement ("APA"). App. at 493. Under the APA, Plaintiff purchased Atronix's business as a going concern and acquired "all the assets, properties, goodwill, and business of every kind and description" including "all contracts, licenses, sublicenses, agreements, leases, [and] commitments." App. at 210-11. Defendants' motions to dismiss did not raise the separate issues of whether the non-compete agreement, if not treated as an "Excluded Liability," was an asset conveyed under the APA. App. at 125-151.

On March 10, 2017, the superior court granted Defendants' motions to dismiss ("Dismissal Order"), but not for the reasons argued by Defendants. Add. at 2. Specifically, the superior court did not decide whether the non-compete agreement was an "Excluded Liability" under the APA. Add. at 7-8. Instead, the court held that because the APA did not expressly include the non-compete agreement among the acquired assets, the agreement was not assigned to Plaintiff. Add. at 9. The court did not consider whether Morris consented to the assignment of the non-compete agreement, or whether Morris' consent to the assignment was required. Id. Plaintiff moved for reconsideration, and the superior court denied that motion. Add. at 20. ("Reconsideration Order").

STATEMENT OF FACTS

Atronix, Inc. ("Atronix") was formed in 1980 by Peter Schofield. App. at 179, ¶ 2. Atronix's business, both before and after its acquisition by Plaintiff, focused on manufacturing customized cable assemblies and wire harnesses used to relay data and power within equipment manufactured by Atronix's customers. App. at 48-49, ¶¶4-5, 7. The contract wire harness and cable assembly industry is highly competitive, with narrow profit margins. App. at 50, ¶12. A company's success depends on its ability to cultivate strong relationships with long-term clients that will provide repeat business. Id.

Kenneth Morris was hired by Atronix in 1982. App. at 50, ¶13. He remained with the company as an at-will employee until September 2016. Id. From 1989 forward, Morris served as a Program Manager in the Atronix sales department. App. at 50-51, ¶14. In this position, Morris served as the primary contact between Atronix and its most important clients. App. at 51, ¶¶15-18. He was responsible for all aspects of the client relationship, ranging from project management, material purchases, and ongoing customer support. Id. He also received access to confidential, highly sensitive information concerning Atronix's clients, the assembly services that the company supplied to those clients, and the company's pricing structures, costs, and profit margins. App. at 52, ¶¶21-22.

In January 1997, Morris was asked to sign, and he did sign, non-compete and non-disclosure agreements.[3] App. at 53, ¶¶23-24, App. at 58-59. The non-compete agreement prohibits Morris, for three years after the termination of his employment, from engaging "in the business of developing, producing, marketing or selling products of the kind or type developed or

[3] Morris signed the non-compete and non-disclosure agreements with a related corporation, Atronix Sales, Inc. ("ASI"). In June 2011, ASI and Atronix merged, and Atronix remained as the surviving entity. Id. at ¶ 3.

being developed, produced, marketed or sold by the Company while the Employee was employed by the Company," or from soliciting clients, customers, or accounts that Morris "contacted, solicited or served … in any capacity" while employed by Atronix. App. at 58-59.

On July 2, 2014, Atronix entered into an APA pursuant to which the company was acquired as a going concern by Plaintiff's predecessor, Cable Assembly Acquisition Corp. ("CAAC"). App. at 179, ¶5; App. at 194-467. Under the APA, the assets purchased by CAAC included "all the assets, properties, goodwill and business of every kind and description" of Atronix, including "all contracts, licenses, sublicenses, agreements, leases, [and] commitments," and its "[b]usiness as a going concern." App. at 210-211. CAAC also acquired the name "Atronix, Inc.," and it now conducts business under this name. App. at 180, ¶11, App. at 473.

Since the APA, Atronix's business has continued largely unchanged. There has been no change to the company's products, customer base, or territory. App. at 180, ¶13. Plaintiff has operated the business as a separate and independent company that is wholly distinct from the other companies owned by its parent, a holding company. Id.

Morris continued his employment with Plaintiff for over two years following the APA. App. at 181, ¶¶ 17-18. He remained a Program Manager, and he remained responsible for many of Plaintiff's largest and most important accounts. Id., App. at 54, ¶30. In 2016, for example, Morris managed approximately 25 percent of Plaintiff's most active accounts, which accounted for 49 percent of Plaintiff's revenues. App. at 51, ¶18.

On September 16, 2016, Morris abruptly announced he was resigning from Plaintiff, effective September 30, 2016. App. at 54, ¶27, App. at 104-05.[4] Immediately after leaving

[4] As early as May 2016, months before announcing his resignation from Plaintiff, Morris began planning to leave the company to work for a competitor. App. at 54, ¶ 29, App. at. 109. During the intervening four-month period, Morris continued to receive, and have access to, Plaintiff's confidential information, and he also had close contact with Plaintiff's most important clients. App. at 54, ¶30.

Plaintiff, Morris began working as a General Manager for Scott Electronics, App. at 54, ¶31, which is a direct competitor of Plaintiff. Like Plaintiff, Scott Electronics is a contract services manufacturer that provides cable assemblies, wire harnesses, and electro-mechanical assemblies. App. at 54, ¶33; App. at 111. Scott Electronics and Plaintiff target the same universe of clients. App. at 54, ¶34, App. at 113. Thus, Morris is now engaged in the business of producing and selling precisely the same wire harnesses and assemblies that Plaintiff produced and sold while Morris was employed by Atronix. Morris is in a position to use, for the benefit of Scott Electronics, the confidential and highly sensitive information that he obtained during his lengthy employment with Atronix. App. at 55, ¶36.

SUMMARY OF ARGUMENT

The superior court ruled that Plaintiff lacked legal standing to enforce Morris' non-compete agreement because, the court found, the agreement was not assigned to Plaintiff under the APA. Add. at 9. The court's ruling conflicts with the plain terms of the APA, which conveyed "all the assets, properties, goodwill, and business of every kind and description" including "all contracts, licenses, sublicenses, agreements, leases, [and] commitments." App. at 210-211. (emphasis added). The court's ruling also conflicts with the well-established rule that when a business is sold as a going concern under an asset purchase, restrictive covenants are assigned to the buyer along with goodwill and other assets necessary to the continued operation of that business. In attempting to distinguish cases that apply this rule, the superior court conflated the issue of whether the non-compete agreement was assigned under the APA, with the wholly separate issue of whether Morris consented to the assignment. Add. at 15-16. In any case, Morris' consent was not required; the assignment of restrictive covenants, which do not impose any affirmative obligation on an employee to act, is not subject to the general prohibition on the assignment of personal services contracts.

ARGUMENT

I. STANDARD OF REVIEW

The superior court's rulings turned on the legal question of whether the terms of the APA transferred the right to enforce the non-compete agreement to Plaintiff. Add. at 3. Those rulings are subject to *de novo* review by the Supreme Court. See Berthiaume v. McCormack, 153 N.H. 239, 244 (2006). The Supreme Court also reviews *de novo* the superior court's determination of whether a plaintiff has standing to sue. See In Matter of P.B., 167 N.H. 627, 629 (2015).

II. THE SUPERIOR COURT ERRED IN CONCLUDING THAT THE NON-COMPETE AGREEMENT WAS NOT ASSIGNED UNDER THE APA

Defendants moved to dismiss on the narrow ground that Plaintiff allegedly lacked standing to enforce Morris' non-compete agreement. App. at 125, 149. Defendants argued that Plaintiff "rejected" the assignment of the non-compete agreement by treating the agreement as an "Excluded Liability" under Section 2.03(b)(vii) of the APA, which states that certain liabilities were not assigned unless they are set forth on the Closing Statement of Working Capital (which, in turn, lists "Assumed Liabilities"). App. at 492. Defendants argued that the non-compete agreement constituted an on-going liability, since it called for payment of $15 per month to Morris but was not listed in the Closing Statement of Working Capital. Id. In response to this argument, Plaintiff demonstrated that the non-compete agreement was not an "Excluded Liability," and that the $15/month payment obligation was an accrued employee obligation that fell within the category of "Assumed Liabilities" in the Closing Statement of Working Capital. App. at 484-88.

In ruling on Defendants' motions to dismiss, the superior court acknowledged, but did not resolve, the parties' competing positions on whether the APA treated the non-compete agreement as an "Excluded Liability." Add. at 8. Instead, the superior court based its decision on its conclusion that the APA did not include "employment contracts" with Morris or other employees

as among the acquired assets.[5] Id. The court held: "The purchasing of Atronix's assets, absent an explicit transfer of Morris' [non-compete and non-disclosure] Agreements, does not make Plaintiff a contracting party with Morris." Add. at 9.

The superior court erred in concluding the non-compete agreement was not assigned under the APA. As demonstrated below, the non-compete agreement was assigned with Atronix's goodwill and other assets necessary to operate the business as a going concern, which expressly included "all contracts" and "agreements." App. at 210-11.

A. Massachusetts Law Allows For the Assignment of Restrictive Covenants

As a threshold matter, Massachusetts law, which applies to this case, Add. at 3 n.4, does not prohibit the assignment of restrictive covenants.

In Massachusetts, it "is axiomatic that a contractual right can be assigned unless assignment is expressly forbidden by the terms of the contract." American Employers' Ins. Co. v. City of Medford, 38 Mass. App. Ct. 18, 22 (1995). Non-compete agreements generally are assignable. See Adamowicz v. Iwanicki, 286 Mass. 453, 456 (1934). Although the Massachusetts Supreme Judicial Court ("SJC") has not addressed this rule in the employment context, no principle of Massachusetts law prevents non-compete covenants from being assigned to, and enforced by, an employee's assignee, as the federal District Court in New Hampshire held earlier this year. See HCC Specialty Underwriters, Inc. v. Woodbury, No. 16-CV-501-LM, 2017 WL 2389522 (D.N.H. June 1, 2017).

Woodbury concerned facts similar to those presented here. An employee, Woodbury, entered into an employment agreement with American Specialty Underwriters. Id. at *1. The agreement was governed by Massachusetts law. Id. at *2n.2. Woodbury worked for American Specialty and later its successor, HCC Specialty Underwriters, and he then resigned to join a

[5] The court overlooked that Morris was an at-will employee; he did not have an employment contract that could be cited in the APA or assigned to Plaintiff. App. at 3, 75.

competitor, PPI. Id. at *1. HCC filed suit against Woodbury and PPI, alleging breach of non-compete and confidentiality provisions in Woodbury's employment agreement. Id. at *2. The defendants moved to dismiss on the ground that HCC was American Specialty's assignee, and as such could not enforce the restrictive covenants in Woodbury's employment agreement. Id. The District Court denied the motion.

The District Court in Woodbury held that even if HCC was American Specialty's assignee (and not a successor through a merger), this did not render the restrictive covenants unenforceable. Id. The Court noted that the SJC "has not addressed the question of whether non-competition obligations in employment contracts may be assigned to and enforced by a subsequent employer." Id. at *3. However, the District Court rejected the defendants' argument that decisions by Massachusetts lower courts established that "non-competition obligations in employment contracts are unassignable." Id. Instead, the Court held emphatically that "[n]o such principal [sic] exists under Massachusetts law." Id.

Here, the superior court did not hold that Massachusetts law prohibited the assignment of Morris' non-compete agreement to Plaintiff. Rather, the superior court concluded that there was no assignment because the APA did not specifically identify the non-compete agreement as an acquired asset. Add. at 9. This ruling was in error.

B. Morris' Non-Compete Agreement Was Assigned By Express Terms of the APA

The superior court's conclusion that the APA did not specifically identify the non-compete agreement as an acquired asset directly conflicts with Section 2.02(a)(xii) of the APA, which defines the purchased assets broadly to include "all the assets, properties, goodwill and business of every kind and description ... belonging to or used or intended to be used in the Business," including "all contracts, licenses, sublicenses, agreements, leases, [and] commitments." App. at 210-211 (emphasis added). Morris' non-compete agreement with Atronix is clearly a "contract"

or "agreement" belonging to Atronix. Accordingly, by the clear terms of the APA, Morris' non-compete agreement was conveyed to Plaintiff.

C. Morris' Non-Compete Agreement Was Assigned As Part of the Goodwill and Other Business Assets Conveyed Under the APA

In addition, it is well-established that when a company is sold as a going concern under an asset purchase, restrictive covenants between the seller and its employees are assigned as part of goodwill and other assets necessary for the continued operation of the seller's business. Moreover, the assignment occurs whether or not the restrictive covenants are mentioned in the asset purchase agreement.

For example, in Beta Lasermike, Inc. v. Swinchatt, No. 18059, 2000 WL 262628 (Ohio App. Ct. March 10, 2000), the Ohio Court of Appeals applied Massachusetts law to hold that the defendant's non-compete agreement with his employer was assigned to the plaintiff when it purchased the employer's assets, even though the purchase agreement did not specifically identify the non-compete agreement as one of the assets purchased. 2000 WL 262628 at *2. In Beta Lasermike, the employee (Swinchatt) signed a non-compete agreement when he was hired by Beta. Id. The plaintiff acquired Beta's business and filed suit to enforce Swinchatt's non-compete agreement. The superior court held the agreement was not assigned to the plaintiff, and the Court of Appeals reversed. Id. at *3. The Court rejected Swinchatt's argument that because the non-compete agreement was not listed in the APA as a purchased asset, it was not assigned. Id. at *4. The Court held the agreement was assigned under a general provision in the APA which stated that all of the "contracts, leases and agreements used in the conduct of Beta's business" were transferred to the plaintiff. Id.

Similarly, in Hexacomb Corp. v. GTW Enterprises, Inc., 875 F. Supp. 457 (E.D. Ill. 1996), the District Court held that restrictive covenants are assigned "as an incident of the business sold," even without express assignment language in an asset purchase agreement. Id. at 464. In

Hexacomb, the defendant signed a confidentiality agreement with his employer. Id. at 460. The employer's successor, Hexcel, later entered into an asset purchase agreement with Hexacomb, pursuant to which Hexacomb acquired all of Hexcel's assets, including goodwill. Id. at 464. Although the APA did not specifically reference the defendant's confidentiality agreement, the Hexacomb Court reasoned that because the agreement was made "for the benefit of [Hexcel's] business," it was transferred as part of that business under APA provisions assigning Hexcel's goodwill and other business assets. Id. at 464-65.

Many other courts similarly hold that in an asset purchase, restrictive covenants are assigned as "an incident of the business sold." See Campbell v. Millenium Ventures, LLC, 55 P.3d 429, 436 (N. Mex. Ct. App. 2002) (non-solicitation covenant was assigned under APA provisions stating that the purchase included "substantially all of [the agency's] assets," including its goodwill; without the assignment the agency's employees would be free to solicit its customers, and the goodwill "would be rendered worthless."); Safelite Glass Corp. v. Fuller, 807 P.2d 677, 681 (Kan. Ct. App. 1991) (noting "general rule" that non-compete covenants "are assignable and enforceable by a subsequent purchaser of a business as an incident of the business, whether or not there is an express assignment by the seller"); Torrington Creamery, Inc. v. Davenport, 126 Conn. 515, 521, 12 A.2d 780, 783 (1940) (non-compete covenant was "a valuable asset" of corporation's business; when corporation sold its entire business, including goodwill, it was "deemed to have assigned as much of the benefit of [the employment] contract as is severable and necessary" to protect the business, even though the sales agreement contained "no specific assignment" of the employment contract).

Despite this authority, the superior court rejected the argument that Morris' non-compete agreement was part of the assets and goodwill sold to Plaintiff. Add. at 18 n.3. The court characterized this argument as "assum[ing] that Morris' relationship with customers is an asset

that can be sold." Id. The court then suggested that this assumption conflicted with the principle that "the objective of a reasonable noncompetition clause is to protect the employer's good will, not to appropriate the good will of the employee.'" Id. The superior court misapprehended Plaintiff's argument. The asset at issue is not "Morris' relationship with customers," but the goodwill that Atronix engendered with its customers.

Non-compete agreements serve the legitimate purpose of protecting goodwill between an employer and its customers. When a business is sold as a going concern, non-compete agreements are assigned as part of goodwill and other assets necessary to continue the business. Here, Morris' non-compete agreement was critical to the business purchased by Plaintiff through the APA. Accordingly, the non-compete agreement should be deemed to have been conveyed as part of goodwill and other assets required for Plaintiff to continue Atronix's operations.

The superior court's reasoning relates to the entirely separate issue of whether Morris' non-compete agreement is reasonable in scope – i.e., whether it was tailored to protect Atronix's goodwill with customers as opposed to Morris' goodwill – and thus enforceable. That issue, however, was not before the superior court.

D. Morris' Consent Was Not Required For the Assignment

The superior court concluded that Beta Lasermike and other cases cited above are inapposite because they all concerned non-compete agreements that "contained express language permitting assignment to successors and assigns." Add. at 15. This conclusion is misplaced.

The existence of a "successors and assigns" provision in a restrictive covenant demonstrates that an employee consented to the assignment of the covenant.[6] See, e.g., Chiswick,

[6] "Successors and assigns" language is just one of several factors that can demonstrate an employee's consent to an assignment. Indeed, Massachusetts courts have held that consent to an assignment can be inferred from an employee's conduct. See, e.g., New England Cabinet Works v. Morris, 226 Mass. 246, 253 (1917) (defendant's consent to assignment could be inferred from his failure to "protest or express surprise" when told of the assignment); Modis, Inc. v. Revolution

Inc. v. Constas, No. 200400311, 2004 WL 1895044, at *2 (Mass. Super. June 17, 2004). This is a separate issue from whether the restrictive covenant was, in fact, assigned in the first place. An employee's consent to an assignment does not resolve whether a restrictive covenant was (or was not) conveyed in an asset purchase; likewise, the conveyance of a restrictive covenant does not resolve whether the employee did (or did not) consent to the assignment, or whether the employee's consent was required. These issues must be analyzed separately, as illustrated in Campbell. There, to determine if a successor corporation could enforce a non-compete covenant as the assignee of the plaintiff's employer, the Campbell Court first evaluated if the plaintiff consented to the assignment (he did). 55 P.3d at 433. Next, the Court separately addressed whether the covenant was conveyed under the asset purchase agreement with the employer (it was). Id. at 435.

In several cases that Plaintiff cited to the superior court, restrictive covenants were assigned even though the agreements containing the covenants were silent on the issue of assignability. For example, in J.H. Rendarde, Inc. v. Sims, 711 A.2d 410 (N.J. Super. Ch. Div. 1998), the court noted that "the contract is silent as to either party's ability to assign its rights or obligations." Id. at 412. The court then explained that "[a]s a general matter, contract rights and obligations may be freely assigned in the absence of some express contractual prohibition. . . . Thus, contrary to defendant's position, the mere silence of the writing in question does not bar plaintiff's claim." Id. at 412-13; see also Menasha Packaging Co. v. Pratt Indus., Inc., No. 1-0075, 2017 WL 639634 *5 (D.N.J. 2017) ("where an employment contract is silent on assignability

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Grp., Ltd., No. 991104, 1999 WL 1441918 (Mass. Super. Dec. 29, 1999). In its order denying Plaintiff's motion for a preliminary injunction, the superior court noted that the parties disputed whether consent was required to assign the non-compete. App. at 506. The superior court held: "Because the issue of whether consent is required by an employee in order to effectuate a valid assignment of a restrictive covenant is an unsettled question in Massachusetts, the Court declines to decide the issue at this juncture." Id. Similarly, the issue of consent was not before the superior court when deciding the motion to dismiss.

courts generally find that an acquiring corporation can enforce the acquired company's restrictive covenants") (citation omitted).

The weight of authority holds that restrictive covenants are freely assignable even where the agreement containing the covenant is silent on the point and there is no contemporaneous consent. For example, in Symphony Diagnostic Services No. 1 Inc. v. Greenbaum, 828 F.3d 643 (8th Cir. 2016), the Eighth Circuit held that non-compete agreements were assignable as part of an asset purchase even without an employee's consent. There, two employees signed non-compete and confidentiality agreements with Ozark. Id. at 644-45. After Ozark was acquired by Mobilex through an asset purchase, the employees went to work for a Mobilex competitor. Id. at 645. The district court held that the restrictive covenants were not assignable to Mobilex because the employees did not consent to the assignment. Id. The Greenbaum Court reversed, applying what it deemed to be the "majority rule" that non-compete covenants can be assigned to a successor under an asset purchase, even if the employee did not consent to the assignment. Id. at 646 (citing 6 Williston on Contracts § 13:13 (4th ed. 1990)).

The Greenbaum Court observed that in the case of a corporate merger, employment agreements are assigned to a successor. Id. at 647. The Court then concluded that when the assignment of restrictive covenants is at issue, the precise manner in which the successor company gains control of the predecessor company – whether through a merger, stock purchase, or asset purchase – should not determine whether covenants are assigned to the successor. Id. The Court held: "We see no reason why the non-compete and confidentiality agreements here should be unenforceable simply because Mobilex's acquisition of Ozark was effected through an asset purchase rather than a transfer of stock." Id. (citing 9 John E. Murray, Jr., Corbin on Contracts § 49.5, at 204-05 (rev. ed 2007) ("The underlying issue of whether an employee should be subject to a noncompetition covenant should not depend on matters of form.")).

Similarly, in Managed Health Care Associates, Inc. v. Kethan, 209 F.3d 923 (6th Cir. 2000), the Sixth Circuit held that a former employee's non-compete agreement was assignable to a successor company through an asset purchase without the employee's consent to the assignment. Id. at 930. The Kethan Court noted that the majority of courts permit a successor to enforce an employee's restrictive covenant as an assignee of the original employer. Id. at 929. In addition, as in Greenbaum, the Kethan Court held that the assignment should not turn on whether the acquisition occurred through a merger, stock purchase, or asset purchase. Id. The Court concluded: "Allowing Kethan to avoid his obligations under the circumstances of this case simply because MHA decided to structure the transaction as a purchase of assets rather than stock would exalt form over substance." Id.

Further, in AutoMed Technologies, Inc. v. Eller, 160 F. Supp. 2d 915 (N.D. Ill. 2001), the defendants, employees, argued that the plaintiff could not enforce restrictive covenants with the defendants' former employer because the contracts containing the restrictive covenants were not assignable to the plaintiff. Id. at 923. The AutoMed court noted that the defendants' employment agreements were silent on whether the agreements could be assigned. Id. The court further noted that "[a]s a general rule, parties may freely assign rights and duties under a contract" and that "where the employment contract is silent, courts generally permit assignment of restrictive covenants to a corporate acquirer." Id. at 923-24. The court concluded that this was the "better-reasoned default rule" because "[a]ny vestiges of personality are further mitigated when the business is acquired in its entirety, as a going concern. For all practical purposes the employees still work for the same business and their duties vary little, if at all, following the assignment." Id. at 924 (citing Hexacomb, 875 F .Supp. at 464).

E. Restrictions On the Assignment of Employment Contracts Do Not Apply to Non-Compete Agreements

In holding that Morris' non-compete agreement was not assigned, the superior court cited

the policy against allowing the assignment of employment contracts. Add. at 18-20. The superior court overlooked that justifications for restricting the assignment of employment contracts do not apply to the assignment of restrictive covenants.

For example, in Greenbaum, supra, the Court distinguished covenants not to compete with non-assignable personal services contracts, explaining that non-compete agreements were "free-standing" and did not form part of a larger employment agreement that required the employees to provide personal services. 828 F.3d at 646. The employees had argued that the non-compete agreements were personal services contracts because they were entered into in consideration for continued at-will employment. Id. at 647. The Court rejected this argument, holding that it "misapprehends the crucial difference between a personal services contract and a non-compete agreement: the former requires affirmative action by the employee, whereas the latter requires only that they refrain from certain actions." Id. (emphasis in original). The Court held that "a contract that imposes on a party affirmative obligations to act raises concerns that are not implicated by a contract that simply forbids certain actions." Id.

Likewise, in Kethan, supra, the Court distinguished personal service contracts from restrictive covenants, reasoning that the former requires one party to render personal services, and thus is not assignable, while the latter requires only that one party abstain from certain activities, and thus is assignable. 209 F.3d at 929-30. The Kethan Court held: "Here, Kethan was an at-will employee who was free to resign at any time. Consequently, the noncompetition clause does not require any affirmative action on the part of Kethan, and is thus assignable." Id. at 930.

The same is true with respect to Morris' non-compete agreement. See also Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990) (holding that while "an employee's duty to perform under an employment agreement generally is not delegable . . .the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business");

Reynolds and Reynolds Co. v. Tart, 955 F. Supp. 547, 557 (W.D.N.C. 1997) ("regardless of whether [defendant employees'] employment contracts were in fact assigned or assignable, the restrictive covenants plainly were"; reasoning that "[c]ovenants not to compete facilitate and protect capital investment," and thus are assignable "in conjunction with a sale of business," citing cases); Norman Ellis Corp. v. Lippus, 176 N.Y.S.2d 5, 6 (1955) (rules restricting assignment of personal services contracts did not apply to assignment of a non-competition agreement; non-compete agreement "was just as assignable as any asset of the business"); Northwest Mobile Servs, LLC. v. Schryver Medical, No. C06-5227-RBL, 2006 WL 1799620, *3 (W.D. Wash. June 28, 2006) (non-competition agreements were assigned as part of seller's assets and goodwill in an asset purchase, even though no employment agreements were assigned); Chemetall GMBH v. Zr. Energy, Inc., No. 99-C-4334, 2000 WL 1808568 *2 (N.D.Ill. Dec. 6, 2000), aff'd 320 F.3d 714 (7th Cir. 2003) (successor corporation in an asset purchase can enforce restrictive covenants between an employee and predecessor corporation; rule applied even though APA stated that none of seller's employees would be employed by buyer).

Accordingly, because restrictive covenants are assignable (and enforceable) when employment agreements are not, the absence of a specific reference to an employment agreement with Morris in the APA does not support a conclusion that Morris' non-compete agreement was not assigned to Plaintiff. In fact, the APA could not have referenced an employment agreement with Morris for the simple reason that Morris was an at-will employee and therefore had no employment agreement.

The superior court relied on Hedgeye Risk Mgmt., LLC v. Heldman, 196 F. Supp. 3d 40, 49 (D.C.C. 2016), which held that an employment agreement was not transferred where it was not expressly referenced in an APA. Add. at 8, 18-19. For the reasons set forth above, this case does not support a departure from the general rule recognizing the assignment of restrictive covenants

even where a purchase agreement does not separately list the covenants among the acquired assets. Moreover, the ruling in Heldman is inapposite here for another reason. Morris was an at-will employee – there was no employment agreement to transfer.

In Heldman, the district court applied District of Columbia law to conclude the plaintiff, a successor corporation, did not acquire an employee's employment contract when it purchased the assets of the employee's employer. 196 F. Supp. 3d at 51. As a result, the plaintiff could not enforce restrictive covenants in the employment contract. Id. Notably, the plaintiff did not argue that the restrictive covenants were assigned separate from the employment contract. Instead, the plaintiff argued that by purchasing the employer's assets "it acquired [defendant's] contract," and that the acquisition of defendant's services "was crucial to the asset sale." Id. at 43-44. As a result, Hedgeye did not invoke, and the Heldman court did not address, the substantial legal authority (set forth above) which establishes that restrictive covenants are assignable separate from an employment contract as part of a business's goodwill and other assets.

Here, there was no Morris employment agreement to convey to Plaintiff, and the restrictive covenants with Morris were separately assigned. The covenants were created to benefit the business sold to Plaintiff. To interpret the APA as excluding the covenants would undermine the parties' clear intent – expressed in Section 2.02 of the APA – for Plaintiff to acquire all of Atronix's goodwill, agreements, and other assets necessary to convey Atronix's business "as a going concern." App. at 210-211. That goodwill "would be rendered worthless" if employees like Morris were permitted to solicit Atronix's customer accounts. Campbell, 55 P.3d at 431.

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that this Court reverse the Superior Court's dismissal.

REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument. Attorney Christopher Carter will argue on Plaintiff's behalf.

Respectfully submitted,

ATRONIX, INC.

By its attorneys

Dated: November 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to all counsel of record.

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#57234535

ADDENDUM TO APPELLANT ATRONIX, INC.'S BRIEF

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Atronix, Inc. v Kenneth Morris, et al**
Case Number: **218-2016-CV-01197**

Enclosed please find a copy of the court's order of March 10, 2017 relative to:

Motion to Dismiss

March 13, 2017

Maureen F. O'Neil
Clerk of Court

(595)

C: Christopher H.M. Carter, ESQ; Jonathan M. Shirley, ESQ; Lisa Snow Wade, ESQ; Juliaana Aili DiGesu, ESQ; Brian W. Leahey, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

ATRONIX, INC.

v.

KENNETH MORRIS & SCOTT ELECTRONICS, INC.

Docket No. 218-2016-CV-01197

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff, Atronix, Inc., commenced the instant action against Defendants, Kenneth Morris ("Morris") and Scott Electronics, Inc. ("Scott"), alleging, inter alia, breach of contract by Morris and tortious inference with contractual relations by Scott. Scott moves to dismiss, to which Morris joins.[1] Plaintiff objects. For the following reasons, Defendants' motion is **GRANTED**.

Background

The instant action centers on the creation, assignment, and applicability of certain restrictive covenants originally entered into by Morris and Atronix Sales, Inc. ("Atronix Sales").[2] Morris is a former employee of Plaintiff, and began working for Atronix Sales in 1982. Compl. ¶ 10. Over his 34 years of employment, Morris was promoted several times, and eventually became a Program Manager in the sales department. Id. ¶¶ 10–11. Given that Morris "was responsible for the majority of the Company's largest and most important accounts," in 1997 he signed Atronix Sales'

[1] Morris has not filed a separate motion to dismiss, but instead "joins in Scott's Motion to Dismiss" and "adopts all the same arguments advanced by Scott." Morris Mot. Dismiss ¶¶ 2–3. For the purposes of this order, the Court will refer to both Morris and Scott as "Defendants" when discussing the arguments in favor of dismissal.

[2] For a detailed factual background regarding the underlying claims in the case, see Order on Plaintiff's Request for Injunctive Relief, 218-2016-CV-01197 (Feb. 1, 2017).

standard non-competition, non-solicitation, and non-disclosure agreement (collectively "Agreements"). Id. ¶¶ 15–17, 20.

In 2011, Atronix Sales merged with Atronix, Inc., and operated under the tradename Atronix, Inc. Compl. ¶ 17 n.1.[3] In 2014, Atronix entered into an Asset Purchase Agreement ("APA") with Consolidated Cable Assembly Holdings, Inc. ("CCAH"), by which a CCAH subsidiary, Cable Assembly Acquisition Corp. ("CAAC"), "acquired all of" Plaintiff's assets including the tradename Atronix, Inc. Second Laird Aff. ¶¶ 5, 7, 11. The surviving company continues to do business under the name Atronix, Inc. Id. ¶ 11. On October 6, 2016, shortly after Morris left his job with Plaintiff, Morris accepted a position as General Manager with Scott. Id. ¶¶ 32, 48.

Analysis

The gravamen of Defendants' argument supporting dismissal is that Plaintiff lacks standing to sue because: (1) it has failed to plead facts sufficient to show any connection to Atronix; and (2) the APA did not assign Morris' Agreements. Typically, in ruling on a motion to dismiss, the Court would assume the facts alleged in Plaintiff's complaint as true, and draw all reasonable inferences in its favor. Plaisted v. LaBrie, 165 N.H. 194, 195 (2013).[4] The Court would also consider "documents attached to the plaintiff's pleadings . . . or documents the authenticity of which are not disputed by the parties . . . or . . . documents sufficiently referred to in the complaint . . . ." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010) (quotations and citations omitted). Here, however, because Defendants challenge Plaintiff's legal right to sue,

[3] The Court will refer to the pre-APA entity as Atronix.

[4] Both parties' agree that Massachusetts law governs the interpretation of the Agreements. Thus, the Court applies the substantive law of Massachusetts in interpreting the Agreements and New Hampshire law for the standards governing Defendants' motion to dismiss. See Allied Adjustment Serv. V. Heney, 125 N.H. 698, 700 (1984).

the Court looks "beyond the allegations [in order to] determine, based upon the facts, whether [Plaintiff] ha[s] sufficiently demonstrated a right to claim relief." In the Matter of P.B., 167 N.H. 627, 629 (2015).

To start, Defendants argue that Plaintiff's complaint is devoid of allegations supporting Plaintiff's standing to sue. Specifically, Defendants argue that "Plaintiff's Complaint lacks a single allegation about the Asset Purchase Agreement ("APA"), assignments of non-compete and non-disclosure agreements, or the assent by Mr. Morris to the assignment of the non-compete agreement, which is a prerequisite to enforcement." Def.'s Reply Supp. Mot. Dismiss 2. This argument, however, misapplies the very standard Defendants seek to impose on Plaintiff. In ruling on a motion to dismiss, where a defendant challenges a plaintiff's legal right to sue, the Court must look "beyond the allegations" in order to determine whether a Plaintiff "ha[s] sufficiently demonstrated a right to claim relief." In the Matter of P.B., 167 N.H. at 629. This includes considering facts verified by affidavit or "apparent from the record." Ossipee Auto Parts, Inc. v. Ossipee Planning Bd., 134 N.H. 401, 404 (1991) (emphasis added) (holding "it was necessary that either an affidavit or a copy of the agreement and assignment referred to by the plaintiffs in their objection be filed . . . in order for the matters raised in the plaintiffs' objection to be considered by the trial court."). Accordingly, the Court will consider all facts apparent in the record, including the APA and supporting affidavits.

Defendants posit that Plaintiff does not have standing to enforce the Agreements because it was not assigned this right under the APA. Whether the terms of the APA transferred the right to enforce the Agreements is a question of law for the Court.

Lexington Ins. Co. v. All Regions Chemical Labs, Inc., 647 N.E.2d 399, 400 (Mass. 1995). The Court interprets the document as a whole, Siebe, Inc. v. Louis M. Gerson Co., Inc., 908 N.E.2d 819, 825 (Mass. App. Ct. 2009), and construes "[w]ords that are plain and free from ambiguity . . . in their usual and ordinary sense," Boland v. George S. May Int'l. Co., 959 N.E.2d 166, 174 (Mass. App. Ct. 2012) (quotation omitted). "The unyielding rule of law in such cases is to give effect to the intention of the parties." Id. "Only when an agreement is reasonably and clearly susceptible to more than one interpretation is it deemed to be ambiguous." Siebe, Inc., 908 N.E.2d at 825 (quotation omitted). "Contract language is usually considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and obligations undertaken." Fashion House, Inc. v. K mart Corp., 892 F.2d 1076, 1083 (1st. Cir. 1989). "Once a contractual ambiguity emerges, the meaning of the uncertain provision becomes a question of fact," and the "fact finder may then consult extrinsic evidence including the circumstances of the formation of the agreement and the intentions and objectives of the parties." Browning-Ferris Indust., Inc. v. Casella Waste Mgmt of Mass., Inc., 945 N.E.2d 964, 971 (Mass. App. Ct. 2011). Where, however, "a contract is clear and unambiguous, the parol evidence rule bars admission of extrinsic evidence that would purport to contradict or modify the express terms of the written contract." Siebe, Inc., 908 N.E.2d at 825 (quotation omitted).

According to Plaintiff, "[u]nder the terms of the APA, the business of Atronix, Inc. was sold as a going concern, and the Agreements, along with good will and all other

aspects of the business" were assigned to Plaintiff. Pl.'s Obj. Mot. Dismiss 1. Under the APA, Plaintiff acquired:

> [A]ll the assets, properties, goodwill and business of every kind and description and wherever located, whether tangible or intangible, real, personal or mixed, directly or indirectly owned by the Company or to which it is directly or indirectly entitled and, in any case, belonging to or used or intended to be used in the Business, other than the Excluded Assets . . . .

APA, Purchase and Sale of Assets § 2.02.[5] In relation to Atronix's employees, the APA states that:

> Except as set forth on Schedule 3.24(b) of the Disclosure Schedule, all directors, officers, management employees and technical and professional Business Employees are under a written obligation to the Company or its Subsidiaries to maintain in confidence all confidential or proprietary information acquired by them in the course of their employment.

Id. at Employees § 3.24(b). Schedule 3.24(b) specifies that: "There are no written agreements with management employees . . . and Business Employees to maintain in confidence confidential or proprietary information acquired by them in the course of their employment." Id. at Schedule 3.24(b).

Defendant argues that this exclusionary provision specifically indicates that Morris was under no confidentiality obligation. Plaintiff counters that the exclusionary provision is inaccurate and "demonstrably incorrect." Pl.'s Obj. Mot. Dismiss 4. Specifically, Plaintiff argues that the non-disclosure agreement[6] and employee handbook demonstrate that Morris was under a duty not to disclose confidential information. It is obvious that this internal inconsistency supports a "reasonable difference of opinion as to the meaning of the words employed and obligations

[5] For purposes of clarity, the Court will refer to sections of the APA by the section heading and corresponding section number if applicable.

[6] Plaintiff has only produced an unsigned non-disclosure agreement. It has not produced an employee handbook.

undertaken." Fashion House, Inc., 892 F.2d at 108; see Suffolk Const. Co., Inc. v. Lanco Scaffolding Co., Inc., 716 N.E.2d 130, 133 (Mass. App. Ct. 1999). See also, Bank v. Thermo Elemental Inc., 888 N.E.2d 897, 907 (Mass. 2008). When read together, these two provisions squarely contradict each other. For example, the language could mean that there were, in fact, no such confidentiality agreements, or the language could indicated that the agreements, if any, were not transferred under the APA.[7] It is unclear to the Court which interpretation the contracting parties intended. Because there is ambiguity in the APA's language, "the meaning of the . . . provision becomes a question of fact," which will include the introduction of extrinsic evidence to aid in determining the intention of the contracting parties' at the time of the contract's formation. Browning-Ferris Indust., Inc., 945 N.E.2d at 971.

The above determination does not end the inquiry, and the Court must next determine whether the Agreements were, in fact, otherwise assigned to Plaintiff. Defendants argue that Plaintiff lacks standing to sue because the APA did not assign Morris' Agreements. Defendants rely on Section 2.03(a)(viii) to support their assertion that the Agreements were specifically excluded under the APA. The exclusionary provision provides that Plaintiff would not assume:

> any Liabilities of the Company to any present or former employees, officers, directors, retirees, independent contractors or consultants of the Company, including, without limitation, and Liabilities associated with any claims for wages, bonuses, accrued vacation, workers' compensation, severance, retention, termination or other payment, except as set forth on the Closing Statement of Working Capital . . . .

APA Assumption and Exclusion of Liabilities § 2.03(a)(viii). Liabilities is defined under the APA as, "any and all debts, liabilities, and obligations, whether accrued or fixed,

[7] These examples are only to provide a brief illustration of the ambiguity in the APA. They are not exhaustive, nor do they reconcile the clear contradiction in the APA.

absolute or contingent, . . . including those arising under any Law, . . . and those arising under any contract, agreement, arrangement, commitment or undertaking." Id. Definitions § 1.01. This, according to Defendants, means that "Plaintiff rejected the assignment of Mr. Morris' non-compete agreement under the APA" because the Agreements "contained continuing bilateral obligations between the contracting parties[.]" Defs.' Reply Supp. Mot. Dismiss 4 (emphasis in original). In Defendants' view, "because the non-compete contained a payment obligation owed by the Company to an employee, it met the APA's definition of 'Excluded Liabilities' under Section 2.03(b)(viii)." Id. & n.3. In response, Plaintiff submitted a redacted version of the "Closing Statement of Working Capital," which outlines the then assets and liabilities of Atronix, Inc. See Pl.'s Obj. Mot. Dismiss Ex. A. This, according to Plaintiff, proves that Morris' salary was included the asset transfer.

But the information provided by Plaintiff proves nothing as it relates to Morris' individual employment agreement. Indeed, nothing in the APA "includes any reference to [any] employment contracts," let alone Morris'. See Hedgeye Risk Mgmt., LLC v. Heldman, 196 F. Supp. 3d 40, 49 (D.D.C. 2016). As in Heldman, the "text and structure of the APA . . . belie any claim that [Atronix's] employment contracts were among the 'assets' conveyed in the APA." Id. Nothing in the APA's language "or the corresponding schedules . . . include[] any reference to employment contracts . . . ." Id. at 50. The "Closing Statement of Working Capital" provided by Plaintiff makes no reference to any employment contract. Moreover, the reference to employees within the APA makes clear that Plaintiff would "offer employment to each of the then-current employees of the Company upon the same terms and conditions as immediately prior to

the Closing . . . ." APA Offer of Employment § 5.06; cf. Heldman, 196 F. Supp. 3d at 50 ("The fact that the APA explicitly provides that Hedgeye could offer employment to PRG employees, and that those employees might then either accept or reject such an 'offer,' is squarely at odds with Hedgeye's contention that PRG's existing employment contracts conveyed to Hedgeye as 'assets' of PRG.") (emphasis in original). Thus, the APA contemplated that Plaintiff would offer employment to Morris on the same terms, but says nothing about "conveying [his] existing employment contract[] to" Plaintiff as an asset of the business. See Heldman, 196 F. Supp. 3d at 50.

To be clear, Morris was subject to Agreements during his employment with Atronix. The Agreements, however, were strictly between Morris and the Atronix— not Plaintiff. See Pl.'s Mot. Prelim. Inj. Ex. A ("Agreement made as of 21st day of January, 1997 between Atronix Sales, Incorporated, a Massachusetts corporation . . . and Kenneth Morris . . . ."); id. Ex. B ("In consideration of my employment or the continuance of my employment by Atronix Sales, Incorporated or any of its subsidiaries . . . . .") (capitalization omitted). Indeed, the Agreements support the APA's directive that Plaintiff would offer Morris a new contract of employment under the same terms of his employment with Atronix, Inc. See APA Offer of Employment § 5.06. No contract has been presented to the Court. Furthermore, Plaintiff is not the original Atronix. Plaintiff and Atronix did not merge, but instead Plaintiff purchased certain assets from Atronix including its tradename. See Heldman, 196 F. Supp. 3d at 51. The purchasing of Atronix's assets, absent an explicit transfer of Morris' Agreements, does not make Plaintiff a contracting party with Morris. Thus Plaintiff has no legal standing to enforce the Agreements.

Conclusion

Accordingly, Defendants' motion to dismiss is **GRANTED**.

So Ordered.

March 10, 2017
Date

Marguerite L. Wageling
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Atronix, Inc. v Kenneth Morris, et al**
Case Number: **218-2016-CV-01197**

Enclosed please find a copy of the court's order of May 11, 2017 relative to:

Plaintiff's Motion to Reconsider.

May 15, 2017

Maureen F. O'Neil
Clerk of Court

(218340)

C: Christopher H.M. Carter, ESQ; Jonathan M. Shirley, ESQ; Lisa Snow Wade, ESQ; Juliaana Aili DiGesu, ESQ; Brian W. Leahey, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

ATRONIX, INC.

v.

KENNETH MORRIS & SCOTT ELECTRONICS, INC.

Docket No. 218-2016-CV-01197

ORDER ON PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff, Atronix, Inc., commenced the instant action against Defendants, Kenneth Morris ("Morris") and Scott Electronics, Inc. ("Scott"), alleging, inter alia, breach of contract by Morris and tortious inference with contractual relations by Scott. On March 10, 2017, the Court granted Defendants' motion to dismiss. See Doc. # 32.[1] Plaintiff requests that the Court reconsider its March 10 order. For the following reasons, Plaintiff's request is **DENIED**.

A brief factual background is warranted. Morris is Plaintiff's former employee. See Doc. # 32, at 1. Morris began working with Atronix Sales in 1982. Id. Given his position with Atronix Sales, Morris was required to sign multiple Agreements, which included a non-compete, non-solicitation, and non-disclosure. Id. at 1–2. In 2011, Atronix Sales merged with Atronix, Inc. Id. at 2. In 2014, Atronix, Inc. entered into an Asset Purchase Agreement ("APA") with Plaintiff, wherein Plaintiff acquired all of Atronix, Inc.'s assets, including its tradename. Id. In 2016, Morris left his job with Plaintiff and accepted a position with Scott, Plaintiff's competitor. Id. After Plaintiff filed

[1] The Court incorporates its March 10 order, and will refer to the order by its index number in the court file. The Court likewise incorporates the factual findings from its February 1, 2017 order denying Plaintiff's request for injunctive relief. See Order on Plaintiff's Request for Injunctive Relief (Feb. 1, 2017) (Doc. # 30).

suit seeking to enforce the Agreements, Defendants moved to dismiss. The principal issue before the Court was whether Plaintiff had standing to sue on the Agreements. Specifically, the Court was charged with determining whether the Agreements were acquired by Plaintiff under the APA. The Court concluded that Plaintiff did not have standing.

Plaintiff moves for reconsideration pursuant to Superior Court Rule 12(e), which provides that a party seeking reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended . . . ." Super. Ct. R. 12(e). According to Plaintiff, the Court misapprehended and overlooked the majority rule, which establishes that "in an asset purchase, restrictive covenants like the Agreements are assigned independent of employment contracts." Pl.'s Mot. Reconsider 1. Further, Plaintiff argues that the Court overlooked the Massachusetts legal doctrine known as a de facto merger. The Court disagrees.

According to Plainitff, a "majority of courts permit [an employer's successor] to enforce the employee's restrictive covenant as an assignee . . . ." Id. (quoting 6 R. Lord, Williston on Contracts § 13:13, at 586–94 (4th ed. 1995)). This truncated quotation, however, is not illustrative of this section's synopsis. Indeed, the treatise explains that "[t]he authorities are . . . in conflict with respect to the important issue of whether an employee's restrictive covenant may be enforced against him by an assignee of or other successor in interest to his employer's rights." Lord, supra § 13:13, at 586–92. It further explains that a "majority of courts permit the successor to enforce the employee's restrictive covenant as an assignee of the original covenantee . . . ." Id. at 592–94. But, "the bases for enforcement vary, with some courts indicating that the

covenant is enforceable in favor of a successor only when the transaction between the successor and the original employer is merely in the form of business (e.g., from sole proprietorship to corporation, or a similar change in structure)," or "if the covenant by its terms permits the assignment." Id. at 594–95. The rule is not, as characterized by Plaintiff, as bright-lined as it seems. As the Court originally noted, the Agreements were only between Morris and the original Atronix and contained no language permitting assignment. See Doc. # 32, at 8. Thus, the only way Morris' Agreements would have been assigned was via the APA.

Plaintiff argues that the APA constituted a de facto merger under Massachusetts law, and thus the Agreements were properly assigned. To start, Plaintiff did not raise this issue in any of its prior pleadings. This is true even though the crux of Defendants' argument supporting dismissal rested on the proposition that Plaintiff lacked standing to sue because "Plaintiff is the Atronix, Inc. from Delaware, not PSJL Corporation, and Plaintiff has failed to adduce evidence that there is any other basis—such as an assignment—that plausibly justified the continuation of its claims." Scott's Mot. Dismiss ¶ 10. Thus, the Court did not consider the de facto merger argument because it was never raised. It was, in essence, waived by Plaintiff. See State v. Davis, 149 N.H. 698, 703 (2003) (holding an argument not briefed or argued is waived).

Nevertheless, the Court will address the issue. State v. Shepard, 144 N.H. 262, 265 (1999) (noting the trial court's discretion to decline to consider issue first raised in motion for reconsideration). "[A] de facto merger may be defined as a transaction that, although called and treated by the parties as a sale of assets, is, for all practical purposes, a merger in fact." 20 Am. Jur. 2d Proof of Facts § 1 (2017). "The

significance of the distinction between an assets transaction and a merger is that a merger gives rise to certain rights and obligations not present with a mere sale of assets." Id. "The doctrine developed as a judicial reply to situations in which an assets transaction resulted in the transferor corporation being financially incapable of satisfying the claims of its creditors or the victims of its torts," and later "expanded to cover the question of the appraisal rights of dissenting shareholders with respect to an assets transaction." Id. (footnotes omitted). "The public policy underlying the imposition of successor liability is the fair remuneration of innocent corporate creditors." Milliken & Co. v. Duro Textiles, LLC, 887 N.E.2d 244, 255 (Mass. 2008).

Plaintiff relies on a number of cases, from jurisdictions other than Massachusetts, to support its argument that restrictive covenants are assigned in an asset purchase even without language in the purchasing agreements effectuating the assignments. This argument naturally dovetails with Plaintiff's argument that asset purchases are commonly considered de facto mergers. This reliance, however, is misplaced. The non-compete agreements at issue in the cases cited all contained express language permitting assignment to successors and assigns. See Campbell v. Millennium Ventures, LLC, 55 P.3d 429, 431 (N.M. 2002) ("Agreement shall inure to the benefit of and shall be binding upon the parties, their successors, assigns, or personal representatives . . . "); Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 461 (N.D. Ill. 1993) (explaining that the non-compete reaffirmation signed by the defendant applied to the successors and assigns and was "was signed by [the defendant] with knowledge that he was going to be working for [the plaintiff]."); Safelight Glass Corp. v. Fuller, 807 P.2d 677, 679 (Kan. Ct. App. 1991) ("This Agreement shall be binding upon

and inure to the benefit of the parties and their respective successors and assigns." (emphasis in original)); Torrington Creamery v. Davenport, 12 A.2d 780, 782 (Conn. 1940) (quoting the restrictive covenant language, which states that the employee will not compete "in the same business as that of the Party of the First Part, or [its] successor . . . ."). As the Court has already found, the Agreements, here, contained no such language of assignability.[2]

Furthermore, as Defendants correctly point out, the de facto merger doctrine is inapplicable in this instance. See Morris's Obj. Mot. Reconsider 3; Scott's Obj. Mot. Reconsider ¶ 6. Plaintiff has cited no Massachusetts case law that would permit it to use the doctrine in the manner it wishes. The doctrine is the creature of the judiciary's desire, 20 Am. Jur. 2d, supra § 1, to ensure the "fair remuneration of innocent corporate creditors," Milliken & Co., 887 N.E.2d at 255. Thus, the Court rejects the doctrine's application in Hexacomb because the court there provided no guidance as to the reason it was expanding the doctrine. In essence, the court noted that "[a]n asset purchase is considered a de facto merger," and applied the doctrine without explanation. See Hexacomb, 875 F. Supp. at 864. Given that this doctrine is a "judge-made device," the Court finds it inappropriate to expand it under Massachusetts law. 20 Am. Jur. 2d, supra § 1. Additionally, the Court finds that even if faced with the decision to expand the doctrine, Massachusetts courts would decline to do so. Cf. Guzman v. MRM/Elgin,

[2] Plaintiff relies on Menasha Packaging Co. v. Pratt Indus., Inc., No. 17-0075, 2017 WL 639634 (D.N.J. Feb. 15, 2017), to supports its proposition that "where an employment contract is silent on [assignability] . . . courts generally find that an acquiring corporation can enforce the acquired company's restrictive covenants." Id. *5 (quotation omitted) (alteration in original). This interpretation of non-compete agreements is in stark contrast with Massachusetts law. In Massachusetts, "[p]ostemployment restraints . . . must be scrutinized carefully to see that they go no further than necessary to protect an employer's legitimate interests . . . ." Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 28 (Mass. App. Ct. 1986); see Sentry Ins. v. Fimstein, 442 N.E.2d 46, 47 (Mass. App. Ct. 1982). Thus, it is clear Massachusetts would not construe the Agreements as liberally as Plaintiff desires.

567 N.E.2d 929, 931–33 (Mass. 1991) (declining to extend the doctrine to products liability cases because it concerned issues "of broad public policy involving balancing the interests of future plaintiffs and defendants, which the Legislature is better equipped to resolve.").

Contrary to Plaintiff's contention, Beta LaserMike, Inc. v. Swinchatt, No. 18059, 2000 WL 262628 (Ohio Ct. App. Mar. 10, 2000), does not support the proposition that the Agreements, here, were assigned under the APA. To start, it is an unpublished Ohio case purportedly applying Massachusetts law. Moreover, the underlying reasoning in Beta LaserMike rests on the faulty, and unexplained, rationale that the asset purchase was a merger. Id. at *5. This flies in the face of the common understanding that "a merger is distinguishable from an assets transaction since a merger usually contemplates the continuance of the enterprise involved and of the shareholder's investment in it, although in altered form, while an assets transaction usually contemplates liquidation of the enterprise." 20 Am. Jur. 2d, supra § 1. Thus, the Ohio court, without supporting its reasoning under Massachusetts law, assumed that the transaction was a merger.

Furthermore, the Ohio court erroneously relied on Adamowicz v. Iwanicki, 190 N.E.2d 711, 712 (1934), to support its conclusion that "[n]oncompete agreements are one of the many contractual rights that are assignable." Beta LaserMike, 2000 WL 262628, *5. Adamowicz concerned a restrictive covenant that was entered into in conjunction with the sale of a business. See Adamowicz, 190 N.E. at 711 ("[T]he defendant . . . conveyed by a bill of sale . . . certain property in connection with a meat and grocery store situated at 65 Sixth Street in Cambridge to Charles Urbon."). The

business and its assets were thereafter transferred to the plaintiff. Id. at 711–12. Relying on the Restatement of Contracts, the Supreme Judicial Court held that, in that context, the restrictive covenants "were assignable by the purchaser with the business . . . ." Id. 712; see Restatement (First) of Contracts § 151, illus. a(4) (1932) ("B sells his business to A, contracting that he will not enter into competition with A. A sells the business to C who receives from A as part of the bargain an assignment of A's right to have B refrain from competition. The assignment is effective . . . ."). This outcome is in harmony with the general notion in Massachusetts "that noncompetition covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of an employer-employee relationship." Alexander, 488 N.E.2d at 28. Accordingly, the Court finds Beta LaserMike unpersuasive, and against the weight of authority in Massachusetts.[3]

Nor is the Court persuaded that it misinterpreted the federal court's decision in Hedgeye Risk Mgmt., LLC v. Heldman, 196 F. Supp. 3d 40 (D.D.C. 2016). Plaintiff attempts to distinguish Heldman by arguing that the court in "Heldman did not consider whether the restrictive covenants were assignable separate from an employment agreement, since Hedgeye did not raise this issue." Pl.'s Mot. Reconsider ¶ 16. Plaintiff further argues that the APA provisions in Heldman contemplating offer of employment were discretionary, whereas here, the APA's language was mandatory. Compare Heldman, 196 F. Supp. 3d at 50 ("Section 9.1(a) states that Hedgeye shall, in

[3] The Court equally rejects Plaintiff's argument that the Agreements were a part of the "good will" sold to Plaintiff. This argument assumes that Morris' relationship with customers is an asset that can be sold. But "[t]he objective of a reasonable noncompetition clause is to protect the employer's good will, not to appropriate the good will of the employee." Sentry, 442 N.E.2d at 47. Indeed, "[n]ot all good will properly belongs to the employer just because it was created by the employee during the term of employment." 6A Corbin, Corbin on Contracts § 1391B, at 45 (2001 Supp.).

[its] sole and absolute discretion, offer employment . . . to all employees of [PRG]." (quotation omitted) (alteration in original), with APA Offer of Employment § 5.06 ("As of closing, Acquisition Sub shall offer employment to each of the then-current employees of the Company upon the same terms and conditions . . . ."). But Plaintiff's arguments misconstrue the Court's application of Heldman. As Defendants correctly point out, "[t]he Heldman Court found that contemplating such offers was 'squarely at odds' with the buyer's contention that it assigned the seller's employment contracts." Scott's Obj. Mot. Reconsider ¶ 13 (quoting Heldman, 196 F. Supp. 3d at 50). Indeed, this Court recognized that the APA's language "contemplated that Plaintiff would offer employment to Morris," but was devoid of any language conveying the existing Agreements. See Doc. # 32, at 8. Thus, the Court's application of Heldman focused on whether the APA intended to transfer the Agreements as assets, or whether it contemplated that new agreements would be entered in to. The Court concluded that the Agreements could not have been transferred as an asset if the APA contemplated that an offer of employment would be forthcoming after the sale.[4]

Furthermore, Plaintiff's argument that Heldman did not deal with the majority rule that restrictive covenants are separately assignable operates under Plaintiff's overbroad interpretation of the majority rule. Indeed, the majority of courts only permit assignment when there is a change in corporate structure or language in the restrictive covenant permitting assignment. Lord, supra § 13:13, at 586–92. As discussed above, Massachusetts has never recognized the use of the de facto merger doctrine by an

[4] Plaintiff's argument that the issue advanced by Defendants in their motion to dismiss was that the APA excluded Morris' Agreements, but that the Court "concluded the APA did not include reference to Atronix employment contracts," is unpersuasive. Pl.'s Mot. Reconsider 1 (emphasis in original). This is a distinction without a difference. Whether or not the APA failed to include or specifically excluded the Agreements is irrelevant because in either instance the Agreements were not transferred to Plaintiff.

employer to enforce restrictive covenants. In addition, the Agreements did not include language permitting assignment. Given that Massachusetts strictly construes non-compete agreements in the employment context, Alexander, 488 N.E.2d at 28, it is clear that the Massachusetts courts would find that the absence of language permitting assignment indicated "that the non-compete agreement was limited to the two parties to the contract and therefore not assignable," Fitness Experience, Inc. v. TFC Fitness Equipment, Inc., 355 F. Supp. 2d 877, 889 (N.D. Ohio 2004). Any other outcome would be squarely at odds with Massachusetts law. See Sentry Ins., 442 N.E.2d at 47 ("[Such contracts] are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood." (quotation omitted) (alteration in original)).[5]

Accordingly, Plaintiff's motion is **DENIED**.

So Ordered.

May 11, 2017
Date

Marguerite L. Wageling
Presiding Justice

[5] The Court need not address whether Morris consented to the assignment because Morris could not consent to the transfer of an Agreement that was not, in fact, transferred to Plaintiff.