IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JOSEPH MARK NEITZEY,	*	
Plaintiff,	*	
v.	*	Case No. 427728 V
GEORGE W. ALLEN, LLC	*	
and	*	
IMPACT OFFICE, LLC,	*	
Defendants.	*	

OPINION AND ORDER

This matter comes before the Court on the Plaintiff's Motion for Summary Judgment, the Defendants' opposition thereto, and the Plaintiff's reply. Following argument before the Court on July 6, 2017, the Court took this matter under advisement to consider the pleadings and arguments of counsel. For reasons set forth herein below, the Court shall grant the Plaintiff's motion.[1]

The central issue presented by the Plaintiff's Motion for Summary Judgment is whether the validity of the covenant not to solicit or accept business, and the covenant not to compete found in the Plaintiff's employment agreement with the Defendant is determined by the wording of the agreement or by the way in which the employer seeks to enforce it. Stated another way, is a covenant not to compete and/or not to solicit clients that is overbroad on its

[1] On August 3, 2017, the parties appeared and argued the Defendant's motion for summary judgment, which is largely a mirror image of the Plaintiff's motion. Necessarily, the decision in this case will dispose of Defendant's motion.

face partially enforceable if the employer voluntarily commits to limit its right of enforcement to only those remedies necessary to protect the employer's legitimate business interest?

FACTS

The Plaintiff, Joseph Neitzey ("Neitzey"), is a former employee of the Defendant, George W. Allen, LLC ("Allen"), who resigned his position on December 5, 2016. Following his resignation, he went to work for the W.B. Mason Company ("Mason"), one of Allen's competitors. Co-Defendant Impact Office, LLC ("Impact") is an affiliate of Allen.

Neitzey worked for Allen for approximately twelve years before resigning in December 2016. It was not until June of 2016 that Allen asked Neitzey to sign the Employment and Retention Agreement (the Agreement) at issue in this case. Neitzey agreed and in consideration received approximately $250 plus additional client accounts formerly serviced by a recently departed Allen salesperson.

The Agreement contains a non-solicitation covenant and a non-competition covenant. As drafted, the non-solicitation covenant applies to any customer of Allen or its affiliates regardless of whether Neitzey had contact with them. It prohibits not only soliciting but also accepting business from any such customer for a period of twelve months. "Customer" is not defined with reference to any point in time. Specifically, it is not limited to customers as of Neitzey's resignation. Further, there is no geographical limit on the area covered by the covenant. The non-competition covenant prohibits Neitzey from competing for a period of twelve months within a 90-mile radius of any location where Neitzey was employed by Allen.

In 2015, Allen and its affiliates had gross sales of approximately $60 Million. Neitzey accounted for approximately $1.1 Million of those sales.

ARGUMENT

The Plaintiff asks the Court to declare both covenants invalid because they are overbroad on their face. He argues neither covenant can be saved by excising or amending the offending portions of the Agreement or by the Defendant's commitment to limit their enforcement rights thereunder. In Plaintiff's view, the only form of "blue penciling" available in Maryland is the traditional form which permits the Court to excise offending terms or phrases but not amend them or otherwise modify the Agreement. To salvage the Agreement as the Defendants propose requires the Court to adopt a more liberal form of "blue penciling" and amend the agreement. This the Court may not do.

In support, Plaintiff cites to *Holloway v. Faw, Casson & Co.*, 78 Md. App. 205 (1989) ("*Holloway I*"); *Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990) ("*Holloway II*"); and *Fowler v. Printers II, Inc.*, 89 Md. App. 448 (1991) ("*Fowler*") and numerous federal cases that have purported to apply Maryland law in resolving similar issues. They include two federal district court cases holding that agreements involving Impact containing almost identical language to that now before the Court are overbroad and unenforceable.

The Defendants oppose the motion. In an effort to preempt the Plaintiff's argument, they offer the following factual and legal stipulations. The Defendants will not seek to enforce or recover damages from Neitzey for any alleged violation of Paragraph 2(c) of the Agreement, the non-compete covenant. The Defendants will not seek injunctive relief against Neitzey for any claimed breach of Paragraph 2(b), the non-solicitation covenant. The sole right of enforcement the Defendants seek to retain for any violation of Paragraph 2(b) is to recover damages from Neitzey for soliciting or accepting business from customers. They further agree to restrict the meaning of customers to those with whom he had "personal

contact" while employed by Allen. The stipulation limiting the available remedies does not extend to third parties, including Neitzey's current employer.

In light of these stipulations, the Defendants submit that the sole issue before the Court is whether the covenant not to solicit or accept business as limited by the stipulations is overbroad and unenforceable.[2] They frame the issue as "whether a business may recover damages caused by a former employee's violation of a contract prohibiting soliciting or accepting business from business customers with whom the former employee had personal contact while employed by the business, when the restrictive covenant facially extends to customers with whom the ex-employee did not have personal contact." (Opp. at 3). They argue that in light of the stipulations the covenant can be partially enforced and they are entitled to damages. In support, as do the Plaintiffs, the Defendants cite principally to *Holloway I*, *Holloway II* and *Fowler,* and the cases cited therein.

The Defendants maintain the Plaintiff's argument which they describe as a "facial invalidity argument" is directly contrary to Maryland law. (Opp. at 4). According to them, this issue was decided in *Holloway II.* They point out the covenant in *Holloway II* on its face included all clients of the former employer. After noting that some courts in other states have invalidated such covenants, the Court of Appeals ruled the issue was not before it. This was because at trial Holloway acknowledged he had served all of the clients involved before leaving his former employer, Faw, Casson & Co. ("FC"). According to the Defendants, this means the Court of Appeals determined the analysis of a covenant must be based on how it is being enforced and not how it was drafted.

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[2] By stipulation the Defendants seek only to pursue remedies under the prohibition on soliciting and accepting business. They forego any right to pursue a remedy under the non-competition clause. Under their view, only one covenant remains for the Court's consideration.

The Defendants submit *Fowler* stands for the same proposition. From their reading of that case, the Court of Special Appeals ruled the issue of whether a covenant is overbroad is determined based on the facts of the case, specifically whether, based on the remedies sought, the restrictions are reasonable.

The Defendants further argue, citing *Holloway II*, the non-solicitation covenant is internally "divisible in terms." The Defendants suggest "the Court of Appeals held this type of covenant was 'severable on a client by client basis.'" (Opp. at 6) Therefore, in light of the Defendants' stipulation, this Court does not reach the question of whether the covenant would be overbroad if applied to customers other than those with whom Neitzey had "personal contact" while at Allen.

They suggest Plaintiff misreads *Holloway II*. Further, Plaintiff cannot distinguish the present case from *Fowler*. Defendants dismiss the federal authorities cited by Plaintiff, suggesting those courts simply misunderstand Maryland law and their decisions are not controlling. Finally, they argue because facts are critical to the analysis of whether the covenant is enforceable, the Court should decline to rule on the motion for summary judgment without permitting the Defendant to take additional fact discovery.

The Plaintiff replies that neither *Holloway II* nor *Fowler* support the propositions advanced by the Defendants. Further, any effort by the Defendants to amend the Agreement by inserting a "personal contact" limitation is impermissible both under the language of the Agreement and Maryland law on restrictive covenants. A similar effort was rejected in the two federal district court cases involving the agreements with Impact. The Plaintiff explains at length how and why he believes the Defendants have misinterpreted *Holloway II* and *Fowler*. He argues that even with the "personal contact" limitation on customers offered by

the Defendants the covenant not to solicit remains overbroad. "Personal contact" is undefined and could encompass something as simple as an exchange of greetings. Extending the non-solicitation restriction to such persons does not serve the Defendants' legitimate business interest. Finally, he argues no further factual inquiry is necessary. The motion is ripe for ruling.

ANALYSIS

Both sides cite to the same trilogy of Maryland cases in support of their competing version of how the Court must analyze the covenants at issue, *Holloway I, Holloway II and Fowler*. In order to understand which party's interpretation of these cases is the most accurate, it is necessary to discuss each at length. The Court shall discuss them in the order in which they were decided.

In *Holloway v. Faw, Casson & Co.*, 78 Md. App. 205 (1989), FC, an accounting firm, brought suit against a former partner, Robert Holloway (Holloway), for breach of the non-compete clause in the partnership agreement (Agreement). FC sought declaratory relief and damages against Holloway. By way of counterclaim, Holloway sought a declaration that the non-compete clause was unenforceable and damages for FC wrongfully withholding his continued income participation (CIP) payments which he was entitled to receive following his departure. On motion for summary judgment, the trial court found the covenant was overbroad and unreasonable as written. However, instead of granting judgment for Holloway, the court amended the agreement and, as modified, held the agreement was enforceable. At trial, a jury awarded FC damages in the amount of $75,655.90, plus pre-judgment interest and found against Holloway on his counterclaim.

The facts presented at trial showed Holloway began work for FC as an accountant in 1968. In 1979, he became a partner and signed the Agreement. The Agreement included a non-competition clause, paragraph XXI. The relevant portions of the paragraph provided as follows:

> [A]ny partner withdrawing from the partnership voluntarily or involuntarily hereby covenants and agrees that he or she will not engage in the general practice of public accountancy or any of its allied branches, either individually or with any other person, firm or corporation, either directly or indirectly, at any place within a *40 mile radius of any* of our offices for *a period of 5 years* from the date of such withdrawal. If, within these limits, the partner engages in the general practice of public accountancy or any of its allied branches, or individually or with any other person, firm or corporation, he or she agrees to pay (FC) or its successor, *100 percent of the prior year's fee for any clients that were (FC)'s who engage the services of the withdrawing partner during the 5 year period.* Any amounts due such partner under item XVII shall be forfeited by such partner. However, such forfeited vested amounts will be used to offset payments above. If there is a balance due (FC) after offsetting of vested amounts, the partner's individual capital account will be used to offset the balance. Any remaining balance will be secured by a note to (FC) from the partner payable over a three year period.

Holloway, 78 Md. App. at 210–11. Paragraph XVII of the Agreement provided for CIP payments to a departing partner for ten years following the date of termination. The value of Holloway's CIP interest was undisputed.

In June of 1983, FC's Executive Committee decided to adjust compensation for partners in the Salisbury office, where Holloway worked. As adjusted, the salary of those partners would be reduced if profits for that office in the current fiscal year fell below profits from the preceding year. Holloway protested the decision but his protest was rejected.

Following the rejection, Holloway resigned. In violation of the Agreement, he almost immediately began work for a competing accounting firm. In the three years following his

resignation, leading up to the trial, Holloway served 165 former FC clients. Those clients had generated $160,193 in fees for FC in the year preceding their migration to Holloway. In light of Holloway's breach of the Agreement, FC withheld Holloway's CIP payments. However, they gave him credit for his CIP interest, against the damages they were awarded following trial. The damages equaled 100 percent of the fees the 165 clients paid FC in the year preceding their departure, which amount exceeded Holloway's total CIP interest. Both parties noted an appeal.

The Court of Special Appeals identified eight issues presented for their consideration. The first three dealt with the trial court's judgment concerning the validity of the covenant not to compete and its authority to modify the agreement. The trial court had determined that although FC had a protectable business interest justifying a restrictive covenant, five years was more time than necessary to protect that interest. Also, the definitions of "clients" and "our offices" used in the covenant were overly broad. The trial court found the terms had to be limited to clients and offices that were extant as of Holloway's departure. As well, the duration had to be limited to three years. They amended the Agreement accordingly.

The Court of Special Appeals agreed that FC had a legally protectable business interest. Citing two earlier Maryland cases, they opined "the general rule in Maryland, as in most jurisdictions, is that restrictive covenants in a contract of employment by which an employee as a part of his employment contract agrees not to engage in a competing business or vocation with that of his employer on leaving the employment will be sustained if (the employer can prove that) the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of *the business of the employer*

and do not impose undue hardship on *the employee* or disregard the *interest of the public*." *Holloway*, 78 Md. App. at 213–14 (internal citations omitted).

Applying that test, the Court of Special Appeals affirmed the trial court's declaratory judgment stating the Agreement was unenforceable beyond a duration of three years. The Court reasoned that if a former client left FC to join Holloway more than three years after his departure, it was unlikely because of any personal relationship the client had forged with Holloway during his time at FC.

The trial court had also found it reasonable to apply the modified covenant to all former clients of FC. The Court of Special Appeals found otherwise. The restriction had to be limited to former clients of FC who dealt with Holloway. While some earlier Maryland cases seemed to support the trial court's decision, the Court of Special Appeals found such covenants had been upheld ". . . only where necessary for the employer's protection under the particular facts of each case." *Id.* at 222. Those cases typically involved situations where the only means of protecting the employer from the employee having benefit of information about the client's gained through his employment was to exclude the employee entirely from a designated area. Such was not the case in *Holloway*.

In arriving at its decision, the Court, quoting *Millward v. Gerstung International Sport*, 268 Md. 483, 488 (1973), went on to state "a determination of the enforceability (of covenants against competition) should be made based on the scope of each particular covenant itself, and, if that, on its face, is not too broad, the *fact and circumstances of each case must be examined.*" *Holloway*, 78 Md. App. at 225. The Court continued ". . . in the case *sub judice*, we do not hold that a covenant identical to the one now before the Court could never be upheld on its face. We merely hold that, under the facts of this particular case,

the severity of the restriction against servicing *any* of the employer's former clients was unjustified for the purpose of protecting the employer." *Id.*

There is no suggestion from the Court's reference to consider the facts of a particular case that those facts would include a stipulation or agreement by the employer not to seek relief to which it was entitled under the Agreement. In fact, such a suggestion seems to conflict with another pronouncement by the Court. Turning to the 40-mile radius covered by the covenant, particularly given the availability of injunctive relief, Holloway argued the Agreement was overbroad and unreasonable. FC had not requested injunctive relief and the Agreement itself was silent on its availability. In response to Holloway's argument, the Court of Special Appeals stated "[FC] does not dispute, nor could they properly do so, Holloway's contention that it is sufficient that unreasonable restraints are available in an agreement and the employer need not actually seek unreasonable relief in order for the courts to strike down the potentially unreasonable part of a restrictive covenant." *Id.* at 227.

However, FC's position was that the agreement contained a liquidated damages clause and that was the only relief available. Injunctive relief was not an option. Because injunctive relief was not available, FC insisted the 40-mile restriction was actually a limit on their entitlement to relief, not Holloway's ability to compete. They were entitled to claim the fee equivalent damages only for clients Holloway served within that radius. If the client was beyond that boundary, FC could make no claim for fees.

The Court of Special Appeals agreed with FC's position that only liquidated damages were available, not injunctive relief. Therefore, the 40-mile radius was actually a limit on FC's ability to claim damages for former clients served by Holloway. Accordingly, the Court found the 40-mile limit a reasonable restraint.

The Court of Special Appeals next discussed the trial court's use of the flexible "blue pencil" approach to modify the agreement. The Court rejected the employer's argument that *existing* Maryland law permitted such amendments. Previous Maryland cases recognized only the "traditional 'blue pencil' approach and the Court's (ability to interpret) vague language in a contract." *Id.* at 232. Under this approach, the Court could excise offending language but could not amend or add language to make an otherwise overbroad covenant enforceable.

The Court proceeded to consider whether Maryland should adopt the more flexible "blue pencil" approach. After reviewing cases from other states and treatises on the subject, the Court concluded Maryland should do so. The Court described this approach as requiring a two-part inquiry: "(1) Does the restrictive covenant as a whole evidence a deliberate intent by the employer to place unreasonable and oppressive restraints on the employee/covenantee? If so, then the entire covenant is invalidated whether severable or not. (2) If the Agreement, although unreasonable, satisfies the test of part 1, then the Court should modify the express terms so as to align the reasonable expectations of the parties to the reasonable expectations of law, so long as it is fair to do so." *Id.* at 238.

Resolving the first issue in favor of the employer, the Court found the trial court did not err in limiting the duration of the covenant from five years to three, resulting in a covenant of a reasonable duration. While the Court of Special Appeals decided a number of other issues on the appeal, they are not relevant to the matter before this court. Chief Judge Gilbert dissented, stating it was unacceptable that ". . . courts should rewrite agreements to save the parties from themselves." *Id.* at 251. Both parties filed petitions for certiorari.

Holloway v. Faw, Casson & Co., 319 Md. 324 (1990) ("*Holloway II*") is the second of the three Maryland authorities cited by both parties in support of their arguments. This opinion is almost as important for the decisions not reached as for the ultimate holding of the Court. The Court of Appeals affirmed in part and reversed in part the decision of the Court of Special Appeals. The Court of Appeals found the remedy for a breach of the covenant requiring the former employee to pay 100 percent of the fees paid by any clients to FC in the preceding year to be a liquidated damages clause, not a penalty. The Court referred to this remedy as the "fee equivalent" obligation. *Holloway*, 319 Md. at 339. In part as a result of that finding, as discussed in more detail below, the Court of Appeals found it unnecessary to reach many issues decided by the Court of Special Appeals, including whether Maryland should adopt the flexible blue pencil approach.

The Court framed the issue before it much more narrowly than the Court of Special Appeals: "The controversy focuses on the withdrawing partner's promise to pay to the firm, in the event a client of the firm engages the services of the former partner in that person's new practice of public accountancy, an amount equal to the firm's billing to that client for the 12 months preceding that engagement. The former partner principally contends that the provision is an illegal restraint of trade which is totally void." *Id.* at 326. The Court of Special Appeals and the trial court both found the covenant could be amended under the flexible blue pencil approach and enforced. The Court of Appeals held it was unnecessary for them to decide if Maryland would recognize the "flexible blue pencil" approach allowing such amendments because the covenant in *Holloway* ". . . is severable on a client-by-client basis." *Id.*

They cited to the fact FC only sought money damages. FC conceded injunctive relief was unavailable in light of the liquidated damages provision in the Agreement. The Court further noted the remedies for a violation of the covenant were related but separate. First, in the event Holloway served any client of FC in violation of the agreement as drafted, he forfeited his CIP. Second, if he served a client of FC's during the term of the covenant within 40 miles of one of FC's offices, he faced the "fee equivalent" obligation. In the event FC pursued the fee equivalent remedy, Holloway was entitled to a credit for his CIP interest against any fees awarded. The only damages FC sought at trial were those under the fee equivalent remedy.

It was undisputed that in the three years following his departure leading up to trial, 171 of FC's former clients followed Holloway to his new firm.[3] All of these were clients Holloway had previously dealt with at FC. With these facts in mind, the Court turned to a discussion of the issues before it. The Court's opinion is divided into ten sections: I.A.–I.H., II and III.

At the outset, the Court recognized FC had a legitimate business interest entitled to protection in the relationships Holloway formed with clients while employed by FC. The Court held it was unnecessary to decide whether the section of the covenant providing for enforcement by forfeiture of the CIP was invalid as an illegal restraint of trade. Under the "fee equivalent" remedy sought by FC, Holloway was given full credit for his CIP interest. These fees exceeded Holloway's total CIP interest. Therefore, it was immaterial whether the CIP forfeiture was invalid. If it was invalid, he would still owe the same amount in fee equivalent damages to FC. Further, the Court held because his total CIP entitlement was less

[3] It is unclear why the Court of Appeals references 171 clients and the Court of Special Appeals references 167 clients. However, this inconsistency does not affect the analysis of these two cases.

than the amount owed under the fee equivalent measure of damages, "... declaratory judgment on the validity of the CIP forfeiture can have no future application between the parties . . . the issue is moot." *Id.* at 341.

The Court then turned to a consideration of the validity of the non-compete enforced only by the fee equivalent remedy. They opined that a covenant not to compete enforceable only by a fee equivalent obligation was far different than a non-compete enforceable by some other penalty or injunctive relief. In their view, such agreements were not so much agreements not to compete but rather agreements "to purchase the account from the former employer" if the employee chooses to serve the former client. *Id.* at 342. Citing to the case of *Perry v. Moran*, 748 P.2d 224 (Wash. 1987), the Court held that the adverse effects of restrictive covenants are "... avoided or lessened if instead of granting injunctive relief, the court requires the former employee or partner to pay for the clients 'taken.' By providing the purchase price and terms in the agreement, the court's task is made easier and the likelihood of enforcement is enhanced. Thus, the legitimate interest of the employer is protected without imposing undue hardship on the employee or being overly injurious to the public." *Id.* at 342) (internal citations omitted).

Inasmuch as all the clients at issue were served by Holloway in the three years following his resignation from FC leading up to the trial, the Court held the question of whether the agreement was overbroad because the prohibition extended beyond the three years was not before it. Therefore, the Court did not need to reach that issue. Also, since only the fee equivalent remedy was pursued, the 40-mile limitation in the covenant acted as a limit on FC's right to damages rather than on Holloway's ability to solicit clients. Therefore, the Court found no need to consider whether the 40-mile limitation as drafted was overbroad.

In his petition for certiorari, Holloway asked the Court of Appeals to reverse the trial court's declaratory judgment that the agreement as modified was reasonable—a decision affirmed by the Court of Special Appeals. Once again, the Court of Appeals found it unnecessary to decide the issue. The money judgment FC had obtained barred FC from seeking any additional relief from Holloway for any violation occurring within the first three years of the agreement under the doctrine of *res judicata*. Since FC was foreclosed from seeking additional relief covering the three years (the period found reasonable as modified) the issue of whether it was still enforceable was moot. No further enforcement was available.

In their cross-petition for certiorari, FC asked the Court of Appeals to reverse the decision of the Court of Special Appeals affirming the trial court's judgment that extending the duration of the covenant to the fourth and fifth years would render the covenant overbroad. The issue is addressed in parts I.G. and I.H. of the Court's opinion. In part I.G., the Court addresses the duration reasonably necessary to protect FC's legitimate business interest. The Court approached the issue by considering "After what period of time will the customer cease to be influenced by the personal relationship the employee was able to establish while in the employ of his employer?" *Id.* at 350 (internal citation omitted). In determining the reasonableness of the duration, citing *Perry*, the Court held three years was sufficient to protect FC's legitimate business interest.

In section I.H., the Court turned to the question of whether the trial court properly invalidated the fourth and fifth years of the covenant. Although at trial no damages had been sought by FC for any violations in the fourth and fifth year and FC had conceded injunctive relief was not available, Holloway argued in determining the validity of the covenant the Court should look at ". . . the extravagances of enforcement that could hypothetically fall

within the language of the covenant." *Id.* at 351. The Court noted that the Court of Special Appeals had acknowledged this was the general "... mode of analysis in noncompete covenant cases." *Id.* The Court acknowledged that approach had merit, particularly if injunctive relief "... coterminous with the scope of the covenant" was being sought. *Id.* at 352. However, they observed in such an instance the petitioner seeks to invoke the equitable powers of the court. In determining whether to exercise its equitable powers, a court could decline to exercise those powers at the outer limits of the covenant if they felt to do so would be unjust. In other words, without striking down the covenant, a court exercising its equitable powers could partially enforce it. They acknowledged, however, this was not the approach taken by the Court of Special Appeals in affirming the trial court.

After observing the Court of Special Appeals could have taken the above approach, the Court declined to decide whether "flexible blue penciling" was appropriate. They held "a court does not reach the question of partial enforcement, in the sense in which the panel majority used and applied it, if the invalidity is severable. In the case at hand the covenant is severable on a client by client basis." *Id.* at 353.

As noted earlier, the only claims FC pressed at trial were those involving former clients served by Holloway within three years of his departure. The Court found each client Holloway served represented a separate breach with its own individual measure of damages. "... This is not a case in which Holloway committed a single breach of covenant for which the damages would mount depending upon the number of former FC clients who engaged Holloway. Rather, the first of a series of breaches occurred when Holloway accepted the first former FC client as his own and the damages for that breach are measured by the fees which that client paid to FC in the preceding 12 months." *Id.* at 353. If FC pressed a claim against

Holloway for a client he never served, and if the Court of Special Appeals found that extending the definition of client to persons he never served was unreasonable, the Court could deny that claim without affecting the validity of the claim for clients Holloway served while at FC. The same logic applies to clients not served until years four and five. Therefore, the Court of Appeals deemed it unnecessary to decide the question of "flexible blue penciling," a practice which the Court described, citing to Judge Gilbert's dissent, as raising "provocative questions concerning judicial power . . . ." *Id.*

This is the key to understanding the Court of Appeals' opinion in *Holloway II.* They were able to avoid the necessity of deciding many of the issues addressed by the Court of Special Appeals because only the fee equivalent remedy was pursued and under that remedy each client served in the case represented a separate breach. Each breach resulted in damages unique to that client. There was no single breach but a series of breaches. Therefore, the two covenants were not only severable from each other but also the relevant terms of the covenant not to solicit standing alone were themselves severable.

The third case relied upon by the parties is a post-*Holloway II* case, *Fowler v. Printers II, Inc.*, 89 Md. App. 448 (1991). In *Fowler*, the Court of Special Appeals largely affirmed the trial court's award of damages to the Plaintiff, Printers II, Inc. (Printers), against the Defendants, Marie Ann Fowler (Fowler), a former employee, and Holladay-Tyler Printing Corporation (HTP), her new employer. Printers brought suit against Fowler for breach of contract and against HTP for tortious interference with that contract. Following a nine-day bench trial, the trial court entered judgment against both defendants in the amount of $410,976. The award included $50,000 for damages to Printers' reputation and goodwill.

While Printers sought and was granted ex parte and interlocutory injunctions, they both expired before trial and final injunctive relief was not sought.

Printers was a commercial print shop doing business in the Washington metropolitan area. They had annual sales in excess of $20 Million. Fowler was one of their top sales people and accounted for almost $4 Million in sales in fiscal year 1988. That year, Printers decided to have its important sales personnel enter employment contracts. In September of 1988, Fowler signed such an agreement for which she received a $15,000 raise. Pursuant to the contract, Fowler agreed that for one year following her employment with Printers, she would not disclose information concerning Printers' business. In addition, during that period she would not solicit or divert any business from Printers and would not service any customers of Printers. The definition of "customers" was limited to those that had contact with Printers in the twelve months preceding Fowler's departure.

Approximately seven months after signing the agreement, Fowler resigned her job. Within hours of resigning, she began employment with HTP, a competitor of Printers. Once there, she immediately began contacting Printers' customers in violation of the agreement.

The trial court held Printers had a protectable business interest and the restrictive covenants met the test of reasonableness. Further, Fowler breached the agreement and HTP tortiously interfered with it. As a result, the court awarded Printers $410,976 in damages. Both parties appealed.

On appeal, Fowler argued Printers had no legitimate business interest to protect and, in any event, the covenant was overbroad. The Court of Special Appeals quickly disposed of the first argument. They found Printers had a legitimate business interest to protect. Part of

Fowler's duties included the creation of goodwill with customers, which made it likely the customers would follow her if she left.

The Court devoted most of its opinion to a discussion of whether the covenant was overbroad because of the expansive definition of "customer." The definition included clients of Printers in the year preceding Fowler's departure without regard to whether Fowler had any contact with them. As well, the definition included persons to whom Printers had submitted a bid for work even if the bid was not accepted. Both parties in an effort to persuade the Court of Special Appeals to their side of the argument cited *Holloway II.* They devoted much of their argument on appeal to a discussion of whether, as in *Holloway*, the covenant was severable. The *Fowler* Court expressed bewilderment about the parties having devoted so much time to that issue, stating "severability on a 'client by client' basis was discussed in *Holloway* only in determining the validity of the declaratory relief granted there; no issue of the validity of declaratory or injunctive relief is raised here. All that Printers requested at trial and all that the circuit court granted was a money judgment. Thus, the *Holloway* discussion as to severability on a 'client by client' basis is irrelevant here." 89 Md. App. at 463.

The *Fowler* Court went on to observe that the Court of Appeals in *Holloway* recognized some courts have found covenants to be overbroad because the term "clients" could include persons who stopped doing business with the employer before the employee left, came to the employer only after the employee's departure, or included clients with whom the employee never had contact. However, the Court of Appeals in *Holloway* ultimately determined that issue was not presented by the facts before them.

The *Fowler* Court found the same was true in the case before it. The only customers involved at trial were clients served by Fowler while she was employed at Printers. Citing

that finding by the Court of Appeals in *Holloway,* the *Fowler* Court held that the question of whether the definition of customer rendered the covenant overbroad was not presented by the facts of the case.

The Court of Special Appeals affirmed the decision of the trial court awarding damages to the employer except for the award of $50,000 for damage to the employer's goodwill. The Court reversed that portion of the damages award, finding that there was no evidence upon which the trial court could have found that the employer's goodwill had been damaged to that extent. The Court also remanded the case for the trial court to make certain findings on post-trial motions on issues unrelated to those before them.

The Court in *Fowler* provides no explanation for the legal reasoning behind their statement that the question of whether the covenant is overbroad because of the definition of "customer" is not before them. They simply point to the similarity of the facts in *Fowler* to those in *Holloway* and say with reference to the decision in *Holloway*

> . . . the same reasoning is applicable here. That is, Fowler acknowledged that each client 'as to whom a claim for damages was made' – eight specific clients – was a client of Printers whom Fowler herself 'served' when she worked at Printers. Accordingly, as in *Holloway*, because Printers sought, and the lower court awarded, only money damages related to clients actually served by the employee, here Fowler, questions as to the breadth of the contract beyond this breach are 'not presented here.'

Id. at 463–64.

Fowler not only fails to discuss the reasoning of the Court of Appeals in *Holloway* in arriving at that decision but, in this Court's respectful opinion, incorrectly suggests the Court's reasoning in *Holloway II* was not based on the issue of severability. In the Court of Special Appeals' view, severability was only relevant to the discussion of the validity of the

covenants under the claims for declaratory or equitable relief. The Court of Special Appeals devotes only two paragraphs of their opinion to this discussion and provides no other explanation for how the Court of Appeals arrived at its holding on the damages issue. As discussed in more detail hereafter, their observation is not accurate.

In part I.E. of its opinion, the Court of Appeals addresses the money judgment in favor of the employer under the fee equivalent obligation for a violation of the non-solicitation covenant. As previously discussed, the Court found the validity of the non-compete enforced only by that remedy was "transformed." *Holloway*, 319 Md. at 342). Once stripped of the CIP forfeiture, the non-compete really operated as an agreement by Holloway to purchase accounts from his former firm. These types of agreements are generally met with approval by the courts because they protect the employer's legitimate business interest but at the same time reduce the adverse effects of any restraint on the former employee and the public.

Continuing in that section with their discussion of the money judgment, the Court referring to the issues of the covenant's 5-year duration and definition of "client" and the cases cited by the parties regarding these issues, states:

> From the standpoint of the **money judgment** against Holloway, the questions raised by these cases are not presented here. Holloway acknowledged in his testimony that each person as to whom a claim for damages was made against him was a client of FC whom Holloway served while at FC.
>
> Nor does the **money judgment** in this case rest on any facts which would generate an illegality issue involving the length of time of the covenant's operation.

Id. at 345 (emphases added). However, in part I.E. the Court does not provide the legal reasoning and explanation for this holding other than the general statement found in section

I.D. that "enforceability of a covenant not to compete depends on the facts of the given case." *Id.* at 335.

A more detailed explanation, however, can be found in section I.H. This section along with I.G. addressed FC's appeal from the trial court's declaratory judgment that the fourth and fifth years of the covenant were invalid. In section I.G., the Court first affirms the trial court's finding that the reasonable length of time necessary to protect FC's legitimate business interest was three years. In section I.H., the Court then considers the impact of that finding on the validity of the covenant. As discussed earlier, they note a request for injunctive relief invokes the equitable powers of a court. In exercising its equitable powers, a court could simply choose not to exercise them at the outer limits of the reach of the covenant and do so without voiding the covenant itself. However, that is not what the Court of Special Appeals did in *Holloway*.

Instead, the Court of Special Appeals partially enforced the covenant by using a liberal blue penciling approach and modifying the agreement. The Court of Appeals concluded they need not reach the issue of whether Maryland should accept this more flexible blue pencil approach:

> A court does not reach the issue of partial enforcement, in the sense in which the panel majority used it, if the validity is severable. In the case at hand, the covenant is severable on a client by client basis.

Id. at 353.

Contrary to the *Fowler* Court's observation, the Court of Appeals in *Holloway* does not limit this reasoning to their discussion of declaratory relief granted by the trial court. They explicitly state this is the same reasoning they employed in upholding the damages award in section I.E.:

> Thus, we did not avoid the thrust of Holloway's argument in part I.E., *supra,* when we pointed out that this case did not present claims for fee equivalence for clients whom Holloway had never served at FC. If FC had claimed a breach of the covenant because Holloway in his new practice served a former FC client whom Holloway had never served at FC, and if the Court of Special Appeals is correct that application of the covenant in that instance would be an illegal restraint of trade, then that claim could be denied for invalidity without affecting the application of the covenant to claims for legally enforceable breaches.

Id. at 353–54. Thus, the issue of severability is key to whether a covenant can be partially enforced irrespective of whether damages or equitable relief is sought.

Turning then to the covenants at issue here, while the covenant not to compete here is severable from the covenant not to solicit or accept business, the latter is not internally severable. It is not severable on a client-by-client basis. This distinction is fatal to the Defendant's argument. The non-solicitation covenant as drafted applies to any customer of Allen or its affiliates. It is not limited to their customers as of the time of Neitzey's departure, and it is without geographical limit.

The Defendants make no effort to suggest that the terms of the covenant as drafted are reasonable. Instead they seek to modify or limit those terms which would render the Agreement overbroad by seeking damages only for clients with whom Neitzey had personal contact. They also agree not to seek any injunctive relief. However, the terms of the covenant not to solicit cannot be severed on the basis of which clients are covered. Unlike *Holloway,* there is no liquidated damages provision to establish separate damages for each client. This is not a case involving a separate breach for each client.

To the contrary, this case is more like the one contrasted with *Holloway* described by the Court of Appeals as involving: ". . . a single breach of covenant for which the damages

would mount depending on the number of former FC clients who engaged Holloway." *Id.* at 353. As was discussed in *Fowler*, the measure of damages for a breach of these types of covenants ". . . are the profits that would have been realized had no breach occurred." *Fowler*, 89 Md. App. at 473. Such profits are determined by determining the gross revenues derived from any sales to such clients less any variable costs that would have been incurred as a result of the sale. Fixed costs need not be deducted.

In the instant case, it would be impossible to determine lost profits on a client-by-client basis. It is a generally understood and well-recognized principle of economics that a seller's variable costs will not increase at a fixed rate with each new client served.

Absent a liquidated damages clause such as that in *Holloway*, in the event of a breach of a covenant not to solicit or accept business, there is almost certainly no way to determine damages on a client-by-client basis. In all other instances, a plaintiff would have to establish the total revenues generated by sales to any such clients and the reasonable costs, other than fixed costs, that would be incurred, to determine lost profits. In such an instance, like the one before the Court, the clients are not severable on a client-by-client basis.

In addition, the Agreement here requires the breaching party to pay the other party's reasonable attorneys' fees. It is unreasonable to believe that the attorneys' fees attributable to this litigation will vary significantly on the number of clients the Defendant solicits or accepts business from. Those damages certainly are not severable on a client-by-client basis.

Both covenants in this case—not to compete and not to solicit or accept business from clients—are overbroad. The two covenants are severable one from the other. Accordingly, if only one was overbroad, that would not render the other unenforceable. However, in this case, neither covenant is limited to that which is reasonably necessary to protect the

Defendants' legitimate business interests, whether viewed individually or collectively. Unlike *Holloway*, the covenant not to solicit or accept business from clients, which is the only covenant Defendants seek to enforce, is not internally severable. Contrary to Defendants' argument, the Court finds that no additional facts are needed to resolve this issue. The Court shall declare and adjudge that neither covenant is enforceable in whole or in part.

Wherefore, the Plaintiff's Motion for Summary Judgment is granted and the Defendants' Cross-Motion for Summary Judgment is denied for the same reasons.

MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD

DATE: August 31, 2017