AN ARGUMENT FOR USE OF STOCK OPTIONS WITH FORFEITURE CLAUSES FOR BREACH OF DUTY OF LOYALTY

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I. INTRODUCTION

An employer's various (and self-serving) policy reasons for requiring employees to enter into a covenant not to compete ("CNC")[1] are considerable: to protect research and development assets; to create a return on the investment in human capital; to enhance market growth; to capture entrepreneurial initiatives for the employer; and to prevent mobility of employees or gravitation toward a competitor.[2] The successful enforcement of CNCs (or at least the perception that such successful enforcement is possible) has caused such agreements to proliferate. The CNC is no longer solely for highly-compensated employees but also for the lowly compensated. For example, one non-compete agreement (which must be signed by all new Jimmy John's employees) states:

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1 Non-competes, designed to restrict an employee's post-employment ability to work for a competitor or to start a competing company, have become a common feature of employment contracts. On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 839 (2013).

2 See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626–27 (1960).

> Employee covenants and agrees that, during his or her employment with the Employer and for a period of two (2) years after . . . he or she will not have any direct or indirect interest in or perform services for . . . any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and which is located with three (3) miles of either [the Jimmy John's location in question] or any such other Jimmy John's Sandwich Shop.[3]

While it may be urban myth, one chef at a popular Charleston, South Carolina, restaurant, upon leaving its employ, was prohibited by his CNC from making a coconut pound cake for one year. According to one law review, nearly 90% of managerial and technical employees have signed CNCs.[4]

The profusion of CNCs has even invaded the world of college sports. The Board of Regents of Oklahoma State University filed suit against a former coach and alleged he breached his contract with Oklahoma State when he left the school's football program to coach at the University of Texas at Austin.[5] The coach was not prohibited from coaching at any National Collegiate Athletic Association member institution where he would be a head coach or have offensive play-calling duties.[6] But the coach had to pay a buyout fee if he left OSU for an offensive coordinator job that did not include offensive play-calling duties, which would be a lateral employment move.[7]

Even with courts wielding a "blue pencil"[8] to revise a CNC (with resulting outcomes dependent upon choice of law provisions, state legislatures' latest enacted whims, or a state's public policies), the agreements have become ubiquitous. This Article posits that a stock option with a forfeiture clause conditioned on loyalty of the employee, combined with a handbook or personnel manual's code of conduct or ethics clause, may be a preferred employer method. Compared to a CNC, this method persuades an employee to remain in the employer's employ and to protect confidential information from being published to competitors. A stock option can act as an incentive to retain an employee while

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3 Christopher Mack, Note, *Postemployment Noncompete Agreements: Why Utah Should Depart from the Majority*, 2015 UTAH L. REV. 1201, 1212 n.87.

4 *Id.* at 1212 n.85.

5 Petition ¶ 17, Bd. of Regents v. Wickline, CJ-2014-430 (Dist. Ct. Okla. Oct. 17, 2014).

6 *Id.*

7 *Id.*

8 Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992) ("[T]he 'blue pencil' approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised.").

helping the employer to manage the risk-taking, such as litigation, encompassed by a CNC.

II. BACKGROUND OF CNCS

According to University of Virginia Law Professor J. H. Verkerke,[9] an employee's duty of loyalty arises as an implied obligation of the agency relationship with an employer.[10] This duty prohibits employees from most competitive activity while still employed. But should the duty of loyalty end once an employee resigns or is terminated from employment? Could the post-employment period be the critical concern for an employer?

The genesis of a CNC can be offer letters, bonus plans, or consulting agreements. CNCs may appear in partnership or limited liability company agreements. Employers use various provisions in CNCs to restrict pre- and post-employment activities of their employees. For example, some CNCs have a non-disclosure of inventions or assignments clause, which acts to prevent divulging confidential information or trade secrets. CNCs can have provisions for non-solicitation of customers or clients. CNCs may also have clauses to prevent the inducement of other employees to leave employment to join other entities. Typically, a CNC may state that an employee agrees not to work for a competing entity within a particular geographic area (or, when appropriate, even nationwide or globally) for a specified period of time. And, CNCs often have a return of property provision (e.g., laptops, notebooks, marketing plans, or any management directives).

Litigation issues about a breach of a CNC often involve whether: (1) there is legally sufficient consideration for the formation of a CNC; (2) a non-compete covenant is enforceable in the case of an involuntary termination without cause; (3) a liquidated damage clause would preclude injunctive relief to enforce a covenant; or (4) a court will "blue-pencil" or reform an overbroad unenforceable provision, but leave certain parts of the CNC intact.

Many CNC lawsuits center upon a choice of law provision. One state may have a strong public policy against CNCs, like California or Georgia, which will influence any enforcement of choice of law provisions; while other states, like South Carolina, have generally honored choice of law clauses.[11] The drafter of the CNC will carefully select a choice of law provision, opting for the forum most favorable to enforcing CNCs with some nexus to the employer's operations.

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9 Collaborative Teaching Materials for Employment Law (Draft Feb. 16, 2012). Section 8.01 of the Restatement (Third) of Agency provides, "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

10 RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

11 Team IA, Inc. v. Lucas, 717 S.E.2d 103, 108 (S.C. Ct. App. 2011).

CNCs are designed to protect legitimate business interests, which usually involve confidential information. A legitimate business interest may include: (1) trade secrets; (2) customer lists; (3) manufacturing processes and methods; (4) business and financial information; (5) computer programs, software, and data compilations; (6) certain employee information; (7) formulas and inventions; (8) strategic information, such as business development plans and marketing plans; (9) contract information; and (10) information that protects customer good will. The question of enforceability generally follows contract law: (1) is there consideration (generally just employment); (2) is there a legitimate business interest; (3) is the restriction not more than what is necessary to protect the business interest of the employer; and (4) is there an undue burden on the ability of the employee to make a living.

Recently, one employer's legitimate business interest for imposing a CNC upon employees has been severely stretched. Making little to no investment in training minimum-wage employees, the employer seeks to preclude employees' migration to a competitor.

A. Jimmy John's

In 2014, Emily Brunner ("Brunner") and Caitlin Turowski ("Turowski") filed a complaint in Illinois against the sandwich company, Jimmy John's, and its franchise affiliates.[12] The complaint was amended to include individual and class violations; it also sought a declaratory judgment and injunctive relief regarding the enforceability of Jimmy John's Confidentiality and Non-Competition Agreements.[13] Jimmy John's required all new employees to sign the non-competition agreement.[14]

The parties touted standing, a common claim raised in "litigation jousting" over a CNC. In dismissing the count relating to declaratory judgment and injunctive relief regarding the enforceability of the Confidentiality and Non-Competition Agreements, the court recounted the standing requirements for seeking declaratory relief from non-compete agreements. The court stated, "First, the Plaintiffs must have a 'reasonable apprehension' that the Defendants are going to file a lawsuit against them for violating the Non–Competition Agreement. Second, the Plaintiffs must allege that they were preparing to engage or had engaged in conduct that would compete with the Defendants."[15] Brunner alleged that she satisfied the first requirement based on her confusion as to the scope of the provision, her apprehension that her ongoing disclosures may

12 Brunner v. Liautaud, No. 14-c-5509, 2015 WL 1598106, at *1–2 (N.D. Ill. Apr. 8, 2015).

13 *Id.* at *2.

14 *Id.*

15 *Id.*

constitute a breach, and her knowledge of past actions to enforce such agreements.[16] The court disagreed and held that her allegations were "far too tenuous and broad to constitute a reasonable apprehension of litigation stemming from [her] alleged violation."[17] Brunner could not satisfy the second requirement because she was still a Jimmy John's employee and did not present evidence of her attempts to find employment with a competitor of Jimmy John's.[18] Turowski's claim suffered from the same deficiencies as Brunner's and was dismissed.[19]

The lawyers for Jimmy John's were perhaps worried about the strength of the legitimate business interest of their client in enforcing a CNC against rank and file employees. Jimmy John's and the franchise defendants submitted affidavits stating they would not enforce the non-competition agreements against the plaintiffs in the future.[20] What was the purport of the strategy? Did the company seek to avoid any order nullifying the CNC in its entirety by eviscerating the controversy? Was the strategy to limit any adverse decision solely to these plaintiffs or convince a busy court to dismiss over a lack of controversy?

B. Oklahoma State Case

The Board of Regents of Oklahoma State University's suit against its former assistant football coach, Gregory Joe Wickline ("Wickline"), highlights an esoteric, but legitimate business interest for a CNC agreement. His contract provided for liquidated damages "equal to one hundred percent (100%) of the sum of Wickline's gross base monthly salary in effect at the date of termination and remaining due."[21] The contract provided that the liquidated damage clause would not be enforced if Wickline left Oklahoma State to accept a head football coach position or a position as an offensive coordinator with play-calling duties.[22] The complaint alleges that upon leaving Oklahoma State, Wickline represented that he would be an offensive coordinator with play-calling duties; but, the complaint alleges that Wickline does not have play-calling duties at the University of Texas at Austin, and he is obligated to pay liquidated damages.[23]

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16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at *10.

20 *Id.* (stating that the affidavits met the stringent standard for voluntary cessation making a case moot, the court noted: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (quoting United States v. Concentrated Phosphate Export Ass'n., 339 U.S. 199, 203 (1968))).

21 Petition ¶ 9, Bd. of Regents v. Wickline, CJ-2014-430 (Dist. Ct. Okla. Oct. 17, 2014).

22 *Id.* ¶ 10.

23 *Id.* ¶¶ 11–12.

The outcome of this case is undetermined, but it remains relevant to this Article as further evidence that CNCs are being widely used with some absurd results. Without grounding CNCs in legitimate business interests, courts will not enforce them.

C. Hammer or Carrot?

Making a sandwich is not a protectable interest for the purposes of a CNC; using a CNC to curtail sandwich makers from working for a competitor is overreaching; and financially penalizing a coach if he works for a competitor in the same capacity as his former position is certainly not an everyday use of a CNC. The proliferation of CNCs such as these will result in the dilution and erosion of the concept. For lower-compensated individuals, use of provisions in an employee personnel manual or a handbook, such as an ethics clause or a duty of loyalty promise, may be better solutions. For the highly-compensated employee, an ethics or code of conduct handbook provision combined with a stock option, though, is a grown-up approach to protecting human capital. Instead of imposing a CNC's variety of penalties in the event that an employee wishes to work for a competitor, a stock option with a forfeiture clause for breach of a duty of loyalty may incentivize an employee to remain with the employer[24] or avoid competing employment.

III. STOCK OPTIONS AS CNCS

An employee stock option is a right given to an employee to buy a certain number of company stock shares at a certain time and price in the future.[25] It is a privilege that gives the buyer the right, but not the obligation to buy (call) or sell (put) a stock at an agreed-upon price within a certain period or on a specific date.[26]

Tatom v. Ameritech Corp.[27] identified the following as a typical forfeiture clause in a stock option agreement:

> Notwithstanding any other provision of the Plan, if a Participant, while otherwise eligible for payment or accrual of a benefit under the Plan:

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[24] While stock options are traditionally associated with the highly compensated class, they are available for mid-level managers. *See* Jodi Kantor & David Streitfeld, *Amazon's Bruising, Thrilling Workplace*, N.Y. TIMES, Aug. 16, 2015, at 20.

[25] *Stock Option*, INVESTOPEDIA, http://www.investopedia.com/terms/s/stockoption.asp (last visited Nov. 12, 2016).

[26] *Id.*

[27] 305 F.3d 737 (7th Cir. 2002).

> (a) has, without the consent of the Company or any subsidiary, become associated with, is employed by, renders services to, or owns a substantial interest in any business that is competitive with the Company or its subsidiaries . . . then, his participation in the Plan shall immediately cease and all undistributed awards and grants previously made to him under the Plan and all rights to payments of any kind under the Plan, exclusive of any amount voluntarily deferred shall be immediately forfeited.[28]

Medtronic, Inc. v. Hedemark[29] discussed a stock option with a forfeiture feature involving a reach-back (or clawback) if an employee exercised his right within six months of terminating his employment to work for a competitor. In *Medtronic*, the forfeiture clause provided:

> **Forfeitures.** In the event an Employee has received or been entitled to payment of cash, delivery of Stock or a combination thereof pursuant to an Award within the period beginning six months prior to the Employee's termination of employment with the Company and its Affiliates . . ., the Company, in its sole discretion, may require the Employee to return or forfeit the cash and/or Stock received with respect to the Award (or its economic value as of (i) the date of the exercise of Options or Stock Appreciation Rights, (ii) the date of, and immediately following, the lapse of restrictions on Restricted Stock or the receipt of Stock without restrictions, or (iii) the date on which the right of the Employee to payment with respect to Performance Shares vests, as the case may be) in the event of any of the following occurrences: performing services for or on behalf of a competitor of, or otherwise competing with the Company or any Affiliate, unauthorized disclosure of material proprietary information of the Company or any Affiliate, a violation of applicable business ethics policies or business policies of the Company or any Affiliate, or any other occurrence specified in the related Agreement. The Company's right to require forfeiture must be exercised not later than 90 days after discovery of such an occurrence but in no event later than 15 months after the Employee's termination of employment with the Company and its Affiliates.[30]

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28 *Id.* at 740 (internal citations omitted).

29 No. A08-0987, 2009 WL 511760 (Minn. Ct. App. Mar. 3, 2009).

30 *Id.* at *1 (alteration in original).

Hedemark, an employee, exercised his stock options on June 6, 2006, netting a profit of nearly $60,000 resulting from a same-day sale.[31] In early July 2006, Hedemark left Medtronic to work for its competitor, St. Jude Medical, Inc.[32] Medtronic sent Hedemark a letter stating that his stock options were forfeited because he exercised his right within six months of terminating employment to work for a competitor.[33] Medtronic demanded Hedemark return all stock he received from the exercise of the options or repay the net proceeds from the sale.[34]

Hedemark argued that the section was unenforceable as an unreasonable non-compete agreement.[35] The court analyzed the Stock Award Plan to determine whether it served a legitimate employer interest.[36] The district court's initial finding was that the Plan "serve[d] legitimate business interests of promoting and rewarding employee loyalty as well as maintaining stable, consistent relationships between sales force and customers," and the appellate court appears to affirm that holding. The district court found that the Plan did serve the legitimate employer interest to "motivate key personnel" and "facilitate recruiting and retaining key personnel of outstanding ability."[37] In other words, the agreement was an incentive. The court further noted that Hedemark was in control of how the section could affect him—had he remained with the company for six months after exercising his option, he could have enjoyed the stock proceeds and employment with St. Jude Medical.[38]

The Supreme Court of Texas, in *Exxon Mobil Corp. v. Drennen*,[39] confronted a similar forfeiture clause.[40] William Drennen ("Drennen"), the Exploration Vice President of the Americas, participated in 1993 and 2003 "Incentive Programs," including bonus awards and awards of restricted stock options.[41] Upon receiving restricted stock, Drennen executed a restricted stock agreement, which included a termination provision enabling ExxonMobil to negate the awards if he engaged in "detrimental activity."[42] Under the 1993

31 *Id.* at *2.

32 *Id.* at *1.

33 *Id.*

34 *Id.*

35 *Id.* at *3.

36 *Id.*

37 *Id.*

38 *Id.* at *4.

39 452 S.W.3d 319 (Tex. 2014).

40 *Id.* at 321 (enforcing New York law pursuant to a choice-of-law provision contained in the restricted stock agreements).

41 *Id.* at 322.

42 *Id.*

program, "detrimental activity" was defined as "activity that is determined in individual cases by the administrative authority to be detrimental to the interest of the Corporation of any affiliate."[43] Under the 2003 program, "detrimental activity" was defined as "acceptance . . . of duties to a third party under circumstances that create a material conflict of interest, where a material conflict of interest includes when a grantee becomes employed . . . by an entity that regulates, deals with, or competes with the Corporation or an affiliate."[44]

Following ExxonMobil's decision to replace Drennen and transfer him to another position, Drennen resigned[45] and accepted a position with Hess Corporation, an energy company competitor of ExxonMobil.[46] At the time Drennen resigned, he had 57,200 shares that remained in the restricted period.[47] Drennen's former supervisor sent him a letter stating that Drennen's current employment with Hess constituted "detrimental activity" under both the 1993 and 2003 Incentive Programs, and the employer declared Drennen's outstanding restricted shares forfeited and cancelled.[48]

Defining covenants not to compete as "[c]ovenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees [which] are restraints on trade and are governed by the [Covenants Not to Compete Act],"[49] the Supreme Court of Texas concluded that "it is clear that the agreement here does not fit the mold."[50] The court distinguished CNCs from a forfeiture provision by noting the difference between "an employer's desire to protect an investment and an employer's desire to reward loyalty."[51] The court explained: "Forfeiture provisions conditioned on loyalty, however, do not restrict or prohibit the employees' future employment opportunities. Instead, they reward employees for continued employment and loyalty."[52]

The Texas court reasoned that the forfeiture provision did not restrict Drennen's right to future employment; rather, it forced Drennen to decide if he would compete with ExxonMobil and forgo his benefits or stay with ExxonMobil and accept those benefits.[53] The court suggested that an employer

43 *Id.* (internal citations and punctuation omitted).

44 *Id.* (internal citations and punctuation omitted).

45 *Id.*

46 *Id.* at 322–23.

47 *Id.* at 323.

48 *Id.*

49 *Id.* at 327 (quoting Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768 (Tex. 2011)).

50 *Id.*

51 *Id.*

52 *Id.* at 328.

53 *Id.* at 329.

must take legal action to enforce a CNC. But with forfeiture provisions, the employer can easily cancel an executive's restricted or unvested shares.[54] The court held that the forfeiture provision was not a CNC, and that the provision was enforceable under New York law.[55]

A. The Benefits of Stock Options with Forfeiture Clauses

As *Medtronic* and *Drennen* illustrate, there are numerous benefits to employers to entice employees to participate in stock options with a duty of loyalty forfeiture clause rather than traditional CNCs. For example, the stock option would not be a target of a court's blue-penciling or reformation. The stock option is likely not subject to any severability provisions in the document, which (if present in a CNC) a court could utilize to shred the CNC. If an employer fails to observe strict compliance on confidential company matters, and the employee would leave employment, the stock option vehicle would simplify the evidence compared to similar CNC situations. What is a confidential matter for the employer and whether it was properly protected are common factual issues in CNC cases and are proper for a trier of fact. A stock option may be a preferable route for an employer rather than arbitrarily inserting a liquidated amount in an agreement for a violation of a CNC. A forfeiture of a stock option would not assess attorneys' fees, which the winner in a CNC case may have to litigate. The assignment of stock options would seamlessly track a stock sale of an employer (or could be a subject of negotiations for an asset sale of an employer). An on-boarding employee with stock options (from a former employer but no CNC) would not likely burden his or her new employer with the litigation normally associated with a CNC. While the on-boarding employee would perhaps pay a price for forfeiture of the stock option or reward, the stock option forfeiture would not involve the new employer.

B. The Detriments of Using Stock Options with Forfeiture Clauses

While stock options with forfeiture clauses are a panacea in many ways, they have limitations. Stock options are limited to public companies, but the United States Securities and Exchange Commission ("SEC") would regulate the option, which may increase costs to the employer in the implementation. However, there are no SEC regulations touching or concerning CNC aspects of a stock option. A stock option for an employee may be subject to a "clawback." These are monies or benefits that are distributed and then taken back as a result of special circumstances. A clawback could include purchasing certain investments with taxable benefits contingent upon holding periods. When these investments are sold before they have reached maturity, the benefits must be

54 *Id.* at 328.

55 *Id.* at 332.

returned. If the financials of the employer are poor, or the market drops due to market conditions, then the stock option concept would fail to entice an employee to remain with that employer. A clawback could occur for an executive when financials are restated or if it is determined later that SEC regulations were ignored.

There is a theory associated with a departing employee that there will be inevitable disclosure of proprietary information despite any protests to the contrary by the employee or on-boarding employer. Breaching a CNC causing a forfeiture of a stock option makes sense: why should an executive receive a benefit when he or she has damaged the employer granting the option by going to work for a competitor?

Like CNC litigation, there are also outlier cases involving stock options. In *International Business Corp. v. Martson*,[56] the court addressed whether the stock options constituted wages under section 190(1) of New York's Labor Law.[57] Martson had served as IBM's Vice President of Procurement in North Carolina.[58] IBM had a program in place, the 1994 Long Term Performance Plan ("the Plan"), designed to retain senior employees by offering stock options when they had a significant effect on the success of the company.[59] According to the Plan, "[a]fter an employee receives a stock option award and acknowledges acceptance of the terms of a stock option agreement, the award becomes exercisable pursuant to a schedule set forth in the agreement."[60] The award was subject to the following forfeiture provision:

> (a) A Participant shall not render services for any organization or engage directly or indirectly in any business which, in the judgment of the chief executive officer of the Company or other senior officer designated by the Committee, is or becomes competitive with the Company, or which organization or business, or the rendering of services to such organization or business, is or becomes otherwise prejudicial to or in conflict with the interests of the Company . . . [.]
> (d) [F]ailure to comply with the provisions of paragraph (a) of this Section 13 prior to, or during the six months after, any exercise, payment or delivery pursuant to an Award shall cause such exercise, payment or delivery to be rescinded. The Company shall notify the Participant in writing of any such

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56 37 F. Supp. 2d 613 (S.D.N.Y. 1999).

57 *Id.* at 617; *see also* Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617 (N.Y. App. Div. 2006) (holding unvested rights to equity-based compensation, such as restricted stock options, does not constitute "wages" under section 190(1) of the Labor Law).

58 *Id.* at 615.

59 *Id.*

60 *Id.*

> recission [sic] within two years after such exercise, payment or delivery. Within ten days after receiving such notice from the Company, the Participant shall pay to the Company the amount of any gain realized or payment received as a result of the rescinded exercise, payment or delivery pursuant to an award . . . [.][61]

Martson was awarded two options and exercised those options during March, April, and June of 1998.[62] Also in June, 1998, Martson informed IBM that he was resigning to work for Compaq Computer Corporation, a competitor of IBM.[63] In response, IBM requested Martson pay it the profits that he gained from the exercise of the options, as demanded by the Plan's forfeiture provision.[64]

Martson argued that the stock options constituted wages, and the provision ran afoul of New York's strong policy against the forfeiture of wages. IBM countered that the options constituted "incentive compensation separate from his earned wages and that the forfeiture clause is enforceable pursuant to New York's 'employee choice doctrine.'"[65] IBM cited a long history of cases holding that stock plans, with the objective to retain executives by offering stock options, are not "wages" under New York law.[66]

The court determined that the cases cited by IBM were distinguishable: Those cases dealt with bonuses or awards that had not yet vested or had not yet been exercised, whereas in *Martson* the option had been exercised but remained subject to forfeiture.[67] But, the court quickly concluded that this was a "distinction without a difference" and held that the stock options in question did not constitute wages for the purposes of New York's prohibition against forfeiture of earned wages.[68]

Martson and *Drennen* indicate that courts will find stock options with forfeiture provisions reasonable. A company's grant of stock options provides an incentive for executives to contribute to the company's long-term success, and the stock option with a forfeiture provision operates to keep the option holder's interests aligned with those of the company.[69]

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61 *Id.*

62 *Id.* at 615–16.

63 *Id.* at 616.

64 *Id.*

65 *Id.* at 617.

66 *Id.* (citing Canet v. Gooch Ware Travelstead, 917 F. Supp. 969, 995 (E.D.N.Y. 1996); Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1370 (S.D.N.Y. 1995); Samuels v. Thomas Crimmins Contracting Co., No. 91 Civ. 6657, 1993 WL 36168, at *7 (S.D.N.Y. Feb. 9, 1993)).

67 *Id.*

68 *Id.* at 617–18.

69 Tatom v. Ameritech Corp., 305 F.3d 737, 745 (7th Cir. 2002).

IV. CONCLUSION

Courts face less of a complicated analysis enforcing a stock option with a forfeiture clause predicated upon a breach of a duty of loyalty than the legal machinations associated with CNCs. For a court, the abstract contract considerations of stock options surely outweigh the messy swearing contests associated with CNCs: did the company take steps to label and protect confidential information as confidential; did the employee take marketing plan information with him or her to the detriment of the former employer; is enforcement of a CNC too oppressive on employee mobility; or does the CNC protect a legitimate business interest. There may be a tussle over choice of law for both a stock option and a CNC, but the stock option case would likely not run afoul of public policy, which is so frequently raised in CNC cases. Coupled with a code of conduct or ethics provision in a personnel manual, a stock option with a forfeiture clause for a breach of a duty of loyalty may well counter any erosion and dilution of CNCs due to employers' increasingly fanciful definition of legitimate business interests.