2012 IL App (5th) 110020-U

NO. 5-11-0020

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PETTER PACKAGING, LLC, Plaintiff-Appellant and Cross-Appellee, v. CHARLES HUTCHCRAFT, Defendant-Appellee and Cross-Appellant, and PENNY HUTCHCRAFT, Defendant.	)	Appeal from the Circuit Court of St. Clair County. No. 10-MR-286 Honorable Stephen P. McGlynn, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Donovan and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly applied Kentucky law in finding that the plaintiff has a right to enforce a covenant not to compete in an employment contract. The circuit court did not abuse its discretion in issuing a preliminary injunction. The circuit court improperly limited the scope of the covenant not to compete.

¶ 2 The plaintiff, Petter Packaging, LLC (Petter Packaging), brought an action against the defendant, Charles Hutchcraft, alleging that he breached a covenant not to compete contained in his employment contract and violated fiduciary duties.[1] The complaint alleges that

[1]Petter Packaging's complaint also included allegations against codefendant, Penny Hutchcraft. However, this appeal concerns only the claims against Charles Hutchcraft.

Hutchcraft began competing directly with Petter Packaging in the sale of packaging supplies in violation of the covenant not to compete and in violation of fiduciary duties he owed to Petter Packaging as its president. The circuit court granted Petter Packaging's request for a preliminary injunction in part and denied it in part. Both parties appeal from the circuit court's preliminary injunction. For the following reasons, we affirm in part, reverse in part, and remand with directions.

¶ 3 BACKGROUND

¶ 4 Petter Packaging is an Illinois limited liability company in the business of marketing and selling products for packaging and labeling. It is a wholesaler of packaging products, including labels, ribbons, stretch film, tape, bubble wrap, steel binding, and other types of packing products. Petter Packaging does not manufacture the packaging products, but obtains them from various manufacturers to sell to its customers. Petter Packaging works with its customers to identify their packaging needs and, in turn, works with the manufacturers to meet the customer's specifications. Petter Packaging's customers include a wide variety of manufacturing and wholesale businesses located throughout the southeast, including North Carolina, Georgia, Alabama, Illinois, Missouri, Kentucky, Tennessee, Indiana, Louisiana, and Texas.

¶ 5 On November 13, 2002, Petter Packaging entered into an agreement to purchase the assets of Apex Packaging, Inc. (Apex Packaging), a corporation that was also in the business of selling products for packaging. Apex Packaging was owned and operated by Hutchcraft, and he received consideration with a value in excess of $700,000 in return for the sale of Apex Packaging's assets. The asset purchase agreement provided that a covenant not to compete was part of the consideration and inducement to Petter Packaging to purchase Apex Packaging's assets. Apex Packaging was one of Petter Packaging's primary sources of packaging products, and Petter Packaging developed a close relationship with Hutchcraft in

its dealings with Apex Packaging over the years.

¶ 6 In addition to purchasing Apex Packaging's assets, Petter Packaging also hired Hutchcraft to serve as its president. Petter Packaging and Hutchcraft entered into an employment agreement dated November 27, 2002. The employment agreement provided that it began on December 1, 2002, and continued through November 30, 2007. The agreement also stated that "[t]he parties presently anticipate that the employment relationship may continue beyond the original term."

¶ 7 When the parties entered into the employment contract, Hutchcraft also signed a covenant not to compete. The covenant not to compete provided as follows:

> "Hutchcraft shall [not] directly or indirectly own, manage, operate, control, invest or acquire an interest in, provide assistance to or otherwise engage or participate in (whether as proprietor, partner, stockholder, director, officer, employee, joint venturer, investor, sales representative or other participant in) any products packaging business or any business similar to or in competition, directly or indirectly, with Petter [Packaging], within Petter [Packaging]'s market, without regard to (i) whether the competitive business has its office or other business facilities within Petter [Packaging]'s market, or (ii) whether any activity of Hutchcraft occurs or is performed within Petter [Packaging]'s market, or (iii) whether Hutchcraft resides or reports to an office within Petter [Packaging]'s market. For purposes of this Agreement, Petter [Packaging]'s market shall mean within the states of Kentucky, Illinois, Missouri, Indiana and Tennessee."

¶ 8 The agreement further provided that Hutchcraft shall not "directly or indirectly solicit, induce or influence any customer, supplier, lender, lessor or any other person which has a business relationship with Petter [Packaging] to discontinue or to reduce the extent of such relationship with Petter [Packaging]."

¶ 9 With respect to the term in which the covenant not to compete was enforceable, the agreement provided as follows:

> "It is agreed that the Restricted Period will begin on the date of this Agreement and continue for (i) three years after the Employment Agreement between Hutchcraft and Petter [Packaging] has terminated, if such termination is 'for cause,' or (ii) two years after the Employment Agreement is terminated, if termination is for any other reason."

¶ 10 The employment contract and the covenant not to compete both state that they are to be governed by and construed in accordance with the laws of the State of Kentucky. Although the asset purchase agreement and the employment agreement both state that the execution of the covenant not to compete was part of the consideration for those agreements, Petter Packaging also paid Hutchcraft $5,000 as additional consideration for the covenant not to compete.

¶ 11 Hutchcraft began serving as the president of Petter Packaging on December 1, 2002. According to Petter Packaging's vice-president, John Sircy, Hutchcraft has a tremendous level of expertise in the packaging product industry and was involved in all aspects of Petter Packaging's business operations. The only person that was higher in the company's hierarchy was the company's chief executive officer, Robert Petter.

¶ 12 Although the term of the employment agreement ended on November 30, 2007, Hutchcraft continued to serve as the president of Petter Packaging after that date without the parties entering into any additional employment contracts or covenants not to compete or otherwise expressly extending the contracts. According to Sircy, after November 30, 2007, all of the terms and conditions of the employment agreement were followed and adhered to with respect to Hutchcraft's employment. Hutchcraft's compensation and commission schedule set forth in the contract remained the same.

¶ 13 Petter Packaging terminated Hutchcraft's employment on November 12, 2010. On that same day, it filed its complaint alleging that Hutchcraft breached his obligations as a fiduciary and under the terms of the covenant not to compete by directly competing against Petter Packaging in the business of selling packaging products. The complaint also alleged that Hutchcraft usurped one or more business opportunities by diverting customers away from Petter Packaging.

¶ 14 The circuit court initially entered an order granting Petter Packaging a temporary restraining order, and the parties appeared in court on November 29, 2010, for an evidentiary hearing on Petter Packaging's request for a preliminary injunction.

¶ 15 At the hearing, Sircy testified that he first became aware that Hutchcraft was competing with Petter Packaging in October 2010. Sircy explained that Adhere Label Products (Adhere Label) is one of Petter Packaging's vendors. Adhere Label furnishes Petter Packaging with packaging labels and high heat ribbons. Adhere Label had been one of Petter Packaging's vendors since 2002, with whom they had done over $1.4 million in business during the seven years between 2002 and 2009. Sircy testified that he obtained a copy of an October 8, 2010, invoice from Adhere Label to a company called Kalison Warehousing, Inc. (Kalison Warehousing), showing an order for white polyester labels. Kalison Warehousing was a company that was owned and operated by Hutchcraft. The October 8, 2010, invoice indicated that Kalison Warehousing purchased an order of white polyester labels from Adhere Label to be shipped to Braddock, Pennsylvania, where there is a U.S. Steel facility. U.S. Steel was not a customer of Petter Packaging, but according to Sircy, Petter Packaging would like to have it as one of its customers.

¶ 16 Sircy also testified about an August 5, 2010, invoice from Kalison Warehousing to FG Quality Supply for white polyester labels. Petter Packaging had previously sold labels and ribbon to FG Quality Supply in February and March of 2006. The August 5, 2010,

invoice indicates that the labels were shipped to U.S. Steel Fairfield Works, in Fairfield, Alabama. Sircy had also obtained a December 17, 2009, invoice from Kalison Warehousing to FG Quality Supply dated December 17, 2009, for additional white polyester labels.

¶ 17 Sircy testified that the invoices reflected the type of business in which Petter Packaging was involved. He testified that when he became aware that Hutchcraft was competing with Petter Packaging, he conducted a search of Petter Packaging's e-mails, looking for "references to FG Quality Supply and Adhere and U.S. Steel and transactions that were not taking place on the books of Petter Packaging." He testified that his investigation revealed "considerable evidence that correspondence was taking place between Adhere and–and Mr. Hutchcraft between FG Quality Supply and Mr. Hutchcraft related to product." The transactions did not involve Petter Packaging, were in excess of $270,000, and occurred while Hutchcraft was the president of Petter Packaging. Prior to his investigation, Sircy was not aware that Hutchcraft was involved in this activity, and Petter Packaging did not approve the activity. Sircy testified that Hutchcraft was terminated because of what his investigation revealed.

¶ 18 Sircy believed that the transactions he had discovered should have taken place as Petter Packaging's transactions rather than Kalison Warehousing's. Because of Hutchcraft's long-standing relationships, expertise, knowledge, and skills, Sircy believed that Hutchcraft would continue to compete with Petter Packaging unless Hutchcraft was enjoined from doing so. He testified that Hutchcraft's competition could erode Petter Packaging's market share, inhibit its ability to grow, hurt its profitability, and affect Petter Packaging's relationship with its vendors and customers.

¶ 19 Hutchcraft testified that when he continued working for Petter Packaging after November 30, 2007, it was not conditioned upon his agreeing to an extension of the covenant not to compete. He testified that he was never told that if he continued working after

November 30, 2007, that he would be extending the covenant not to compete each additional day he worked. He believed that after November 30, 2007, he was an employee without a contract and that the covenant not to compete expired under its terms on November 30, 2009.

¶ 20 Hutchcraft admitted that he was the sole shareholder of Kalison Warehousing. He testified that the only product that Kalison Warehousing provides is the white polyester label to FG Quality Supply. FG Quality Supply was Kalison Warehousing's only customer. Hutchcraft believed that the white polyester labels were not technically a packaging product. Instead, the labels were used in identification, not packaging. He also testified that the labels were "not remotely close to anything" that Petter Packaging ever sold. According to Hutchcraft, the difference is the "scope of the product."

¶ 21 Hutchcraft testified that he initially contacted FG Quality Supply for purposes of gaining a customer for Petter Packaging, but after he met with FG Quality Supply, he determined that what it needed was beyond what Petter Packaging provided. Although Petter Packaging sold "a stock 4x6 label," Hutchcraft testified that the label he sold to FG Quality Supply was not a stock item but was a custom item that took two to three years of research and development to create. He believed that the time and expenses for development of the label were "way too great" for Petter Packaging. He stated that Petter Packaging had not taken any business similar to FG Quality Supply's custom label business prior to or subsequent to his initial meeting with FG Quality Supply.

¶ 22 Hutchcraft turned down FG Quality Supply's business on behalf of Petter Packaging but accepted it on behalf of Kalison Warehousing. He did not speak with the CEO of Petter Packaging, Robert Petter, before or after he made this decision, and he did not feel that he had an obligation to tell Petter Packaging about the FG Quality Supply transactions. He testified that the white polyester labels that he sold to FG Quality Supply were proprietary and that Petter Packaging never sold them. However, he admitted that Petter Packaging

could have acquired and sold the labels if it had been given the opportunity.

¶ 23 Hutchcraft further explained that Petter Packaging's payment terms were "net 30 days" and that it did not have any customers that went six months or more without a payment. When Hutchcraft contacted FG Quality Supply concerning the white polyester labels, its representatives told him that it could only pay when it was paid from its customers, which was usually more than 90 days. According to Hutchcraft, Petter Packaging would not have accepted payment under those terms. He testified that he initially entered into the transactions with FG Quality Supply because he did not believe that the payment terms would have been acceptable to Petter Packaging because, at that time, it was not making money and was very strict with its payment terms. He testified, "Initially when we started, I would have thought we weren't in competition because *** Petter Packaging would not have done business with that company forever." Because of the payment terms as well as the research and development expenses involved, he did not feel that the opportunity was something that Petter Packaging would undertake.

¶ 24 Hutchcraft testified that he had been in the packaging materials business for 25 years and that a preliminary injunction that prevented him from dealing with the sale of packaging materials would be devastating to his family. On cross-examination, he agreed that because of his title and position as the president of Petter Packaging, he owed the company an obligation and a responsibility of undivided loyalty.

¶ 25 Although Hutchcraft testified on direct examination that he did not believe that he was competing with Petter Packaging, during his cross-examination, the following colloquy occurred:

> "Q. If the Court does not grant the preliminary injunction that's been requested, you fully intend to compete with your former employer, Petter Packaging; do you not?

A. Probably.

Q. And you'll compete with regard to issues concerning vendors, correct?

A. There's only so many, yes.

Q. Customers, correct?

A. Yes.

Q. Within the geographical area that's defined or specified in the covenant not to compete, correct?

A. Correct.

Q. And you understand that if you're successful in competing with Petter Packaging in that regard, that you take business from [Petter Packaging]; correct?

A. That's typically what competitors do, yes.

Q. And *** you understand that *** results in financial harm or injury to [Petter Packaging], correct?

A. I think it's *** a course of doing business, yes.

Q. *** [I]t results in a financial detriment to [Petter Packaging], correct? Your benefit; [Petter Packaging's] detriment?

A. I guess any two competitors, that statement could be made, yeah."

¶ 26 On December 6, 2010, the circuit court entered an order granting Petter Packaging's request for a preliminary injunction in part and denying the request in part. The court noted that neither the employment agreement nor the covenant not to compete had an automatic renewal clause or a holdover clause and that Hutchcraft continued as Petter Packaging's president after those contracts expired without entering into new contracts. However, the court also noted that "Hutchcraft was paid after 11-30-2007 in a manner consistent with the terms of the initial employment contract and neither party offered any evidence suggesting that the terms and conditions of Hutchcraft's employment after 11-30-2007 were any

different than as explicitly set out in the 2002 employment agreement."

¶ 27 The circuit court looked to Kentucky law and concluded that Kentucky courts do not seem averse "toward extending noncompete covenants beyond the lapse of the express term of the employment contract when the employment continued unbroken, unabated [and] unchanged for a substantial period after the original expiration date." The court, therefore, concluded that under Kentucky law, Petter Packaging is "likely to succeed on the merits on the proposition that at the time [Hutchcraft] was terminated, the parties were operating under the terms of the written contract originally entered into between the parties and that the noncompete covenant survived the 11-30-2007 date and is enforceable as between the parties."

¶ 28 The circuit court then held that the language of the covenant not to compete "does not comfortably fit the realities of the business model these parties set up." The court also concluded that the language in the covenant not to compete was "too expansive, too vague and would create such uncertainty as to make it difficult to enforce and would require constant monitoring by this court." The court stated in its order: "The court has not been sufficiently advised as to the product lines of Petter [Packaging] and its customer base to afford this court confidence that it could fairly umpire disputes between the parties as to what business activities of [Hutchcraft] would fall inside or outside the noncompete strike zone."

¶ 29 The court ordered Petter Packaging as follows:

> "[Petter Packaging] is to provide the court a list of vendors, located within Illinois, Kentucky, Missouri, Indiana [and] Tennessee, with which Petter [Packaging] has had a substantial business relationship at any time in the previous three years. As to those vendors, Petter [Packaging] is to identify with specificity the packaging product lines Petter [Packaging] sold to them."

¶ 30 The court concluded in its order that it anticipated "that a preliminary injunction will

be fashioned identifying specific vendors located within the Petter market territory as well as specific product lines the respondent may not compete against Petter [Packaging] for business."

¶ 31 On December 9, 2010, Petter Packaging submitted a list of its customers that had transacted over $10,000 in sales business over the past three years. The list included a description of the primary products sold to each customer. Hutchcraft filed a motion to reconsider the preliminary injunction.

¶ 32 On December 15, 2010, the circuit court entered a preliminary injunction that restrained Hutchcraft from "competing with Petter Packaging LLC in the territory defined in the contract with those entities identified on the customer list filed by Petter." The court ordered this preliminary injunction to remain in effect until it could conduct a hearing on "any objections, responses to pending motions, or other pleadings."

¶ 33 On December 28, 2010, Hutchcraft filed an affidavit alleging that Petter Packaging assigned a salesperson to call only on customers who generated over $55,000 in revenues per year. Therefore, he did not consider customers that generated less than $55,000 per year to be "substantial" customers. He maintained that Petter Packaging's list of customers included customers that generated an insignificant amount of profit.

¶ 34 Hutchcraft also identified six companies that were included on Petter Packaging's list of customers who had offices outside of the five restricted states: Continental Tire, Decoma Modular Systems, Footlocker, Hisco San Antonio, McElroy Metal, and Wise Alloys. On January 6, 2011, the parties appeared in court for a hearing on Hutchcraft's motion to reconsider and his objection to Petter Packaging's list of substantial customers. Hutchcraft testified that the purchasing decisions for the six companies specified in his affidavit occurred outside the five restricted states. On January 14, 2011, the circuit court entered an order that modified the preliminary injunction to provide that Hutchcraft was not barred from

soliciting or transacting business with these six entities.

¶ 35 The court also modified the preliminary injunction by identifying 37 entities that Hutchcraft was prohibited from soliciting or transacting business with in Missouri, Illinois, Kentucky, Indiana, and Tennessee. The record does not disclose how the circuit court selected these 37 entities from Petter Packaging's list of customers. The circuit court's modified preliminary injunction further provided as follows:

> "For purposes of determining whether or not a business is located within the noncompete territory, the location of the business facility where purchasing and/or contract decisions are made will control. The location of a corporation's main headquarters will also be controlling.
>
> It is contemplated by the court that some contract decisions may be made by a customer outside the non-compete territory that may have the effect of goods being sold to or transferred to entities located within the noncompete territory. Such would not necessarily establish a violation of this court's order."

¶ 36 The circuit court's order does not mention the remaining entities identified by Petter Packaging as substantial customers. The court also found "that there was not sufficient credible evidence to justify injunctive relief based upon the claim of breach of fiduciary duty by [Hutchcraft]."

¶ 37 Petter Packaging appealed the circuit court's modified preliminary injunction, and Hutchcraft cross-appealed.

¶ 38 DISCUSSION

¶ 39 I.

¶ 40 Choice of Law

¶ 41 Each of the agreements in the present case state that they are to be governed by and construed in accordance with the laws of Kentucky. In Illinois courts, the laws of the state

chosen by contracting parties will apply unless (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (2) its application would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. *Old Republic Insurance Co. v. Ace Property & Casualty Insurance Co.*, 389 Ill. App. 3d 356, 363, 906 N.E.2d 630, 636 (2009). In the present case, the parties do not dispute that the contracts should be construed and governed by Kentucky law. We agree that Kentucky law controls the issue of whether Petter Packaging has an enforceable right under the terms of the covenant not to compete. *Emigrant Mortgage Co. v. Chicago Financial Services, Inc.*, 386 Ill. App. 3d 21, 26, 898 N.E.2d 1069, 1074 (2007). Kentucky is part of Petter Packaging's market area and, therefore, has a sufficient relationship to the transactions at issue. In addition, the application of Kentucky law is not contrary to any fundamental policy of Illinois or any state with a greater interest in the issues.

¶ 42 Although Kentucky law governs the issue of whether Petter Packaging has an enforceable contract right, we believe that Illinois law governs whether Petter Packaging is entitled to the remedy of injunctive relief and governs the evidentiary and procedural issues concerning injunctive relief. For example, in *American Food Management, Inc. v. Henson*, 105 Ill. App. 3d 141, 143, 434 N.E.2d 59, 61 (1982), the court addressed the enforcement of a noncompete agreement that stated that the laws of Missouri would apply with respect to enforcement of the contract. The appellate court applied Missouri law to analyze the parties' substantive rights but applied Illinois law to determine whether the plaintiff established that it would suffer irreparable harm without injunctive relief. *American Food Management, Inc.*, 105 Ill. App. 3d at 147, 434 N.E.2d at 64 (citing Restatement (Second) of Conflict of Laws § 135 (1971)). See also *Hughes Associates, Inc. v. Printed Circuit Corp.*, 631 F. Supp. 851, 855 (N.D. Ala. 1986) (although the laws of Massachusetts control the validity and

construction of the contract where the parties have manifested their intent that Massachusetts law should govern, the law of the *forum* operates with respect to the remedy available to enforcement of the contract).

¶ 43 II.

¶ 44 Standard of Review

¶ 45 In Illinois, a party seeking a preliminary injunction must show: (1) that it possesses a clear right or interest needing protection, (2) that it has no adequate remedy at law, (3) that irreparable harm will result if the preliminary injunction is not granted, and (4) that there is reasonable likelihood of success on the merits.[2] *People ex rel. White v. Travnick,* 346 Ill. App. 3d 1053, 1060, 806 N.E.2d 270, 276 (2004). On appeal, "the reviewing court is to decide whether the plaintiff has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed, that the circumstances lead to a reasonable belief that the plaintiff probably will be entitled to the relief sought, and that the matters should be kept in the status quo until the case can be decided on the merits." *Id.*

¶ 46 Illinois courts have held that, generally, "the standard of review regarding the propriety of a preliminary injunction is whether the trial court abused its discretion in determining that the plaintiff provided *prima facie* evidence to support his or her claim." *Travnick*, 346 Ill. App. 3d at 1060, 806 N.E.2d at 276. In *The Agency, Inc. v. Grove*, however, the court stated that "the enforceability of a restrictive covenant is best viewed as presenting separate questions of law and fact." *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 215, 839 N.E.2d 606, 614 (2005). With respect to a preliminary injunction to enforce a restrictive covenant, the court stated as follows:

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[2]We note that the standard for issuing a temporary injunction under Kentucky law is substantially similar to the preliminary injunction standard under Illinois law. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009).

> "[W]here the issue on review is whether a preliminary injunction should issue to enforce a restrictive covenant whose validity is in question, the reviewing court may find itself applying three different standards. The manifest-weight and *de novo* standards will apply to the question of enforceability, and whether a covenant is enforceable or not will become a factor in the ultimate analysis of whether a preliminary injunction should issue, such analysis being reviewable for abuse of discretion." *Id*. at 215-16, 839 N.E.2d at 615.

In *Mohanty v. St. John Heart Clinic, S.C.*, the supreme court cited *The Agency, Inc.* with approval and stated that "whether injunctive relief should issue to enforce a restrictive covenant not to compete in an employment contract depends upon the validity of the covenant, the determination of which is a question of law" that is reviewed *de novo*. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63, 866 N.E.2d 85, 91 (2006) (citing *The Agency, Inc.*, 362 Ill. App. 3d at 215, 839 N.E.2d at 614).

¶ 47 In the present case, the circuit court considered testimony and other evidence at the preliminary injunction hearing on the issue of the enforceability of the covenant not to compete. However, our review of the record indicates that the parties did not dispute the evidence that each party presented at the hearing relevant to the issue of the enforceability of the covenant not to compete. Instead, the parties' dispute centered around the legal conclusions to be drawn from that evidence. Accordingly, we will review the circuit court's decision with respect to the enforceability of the covenant not to compete *de novo*. As noted above, this issue is governed by the laws of Kentucky.

¶ 48 Our analysis of the enforceability of the covenant not to compete is not a resolution of the ultimate merits of the issue because "[t]he purpose of a preliminary injunction is not to determine controverted rights or to decide controverted facts of the merits of the case." *Schweickart v. Powers*, 245 Ill. App. 3d 281, 290, 613 N.E.2d 403, 410 (1993). Instead, our

task is only to decide whether Petter Packaging raised a "fair question" concerning whether it has an enforceable right under Kentucky law. *Id*. ("[p]laintiffs only need show they raised a 'fair question' about the existence of their right").

¶ 49 Once we determine whether Petter Packaging established a "fair question" concerning its right to enforce the covenant not to compete, we then review the circuit court's ultimate decision to issue a preliminary injunction under the abuse of discretion standard. *The Agency, Inc.*, 362 Ill. App. 3d at 216, 839 N.E.2d at 615 ("whether a covenant is enforceable or not will become a factor in the ultimate analysis of whether a preliminary injunction should issue, such analysis being reviewable for abuse of discretion"). Our analysis of the circuit court's discretion in issuing the preliminary injunction is governed by Illinois law.

¶ 50 III.

¶ 51 Whether Petter Packaging Raised a Fair Question Concerning Its Right to Enforce the Covenant Not to Compete Under Kentucky Law

¶ 52 The evidence at the preliminary injunction hearing established that on November 13, 2002, the parties entered into an asset purchase agreement in which Hutchcraft agreed to sell the assets of his corporation, Apex Packaging, to Petter Packaging in exchange for compensation with a value in excess of $700,000. The agreement stated that part of the consideration for the transaction was Hutchcraft's agreement to enter into a covenant not to compete.

¶ 53 On November 27, 2002, the parties entered into an employment agreement in which Hutchcraft agreed to serve as Petter Packaging's president, and Petter Packaging agreed to pay him a six-figure salary plus commissions and performance bonuses that were defined in the employment agreement. The employment agreement stated that its term began on December 1, 2002, and continued through November 30, 2007.

¶ 54 On the same day that Hutchcraft signed the employment agreement, he executed a covenant not to compete. The covenant not to compete stated that it was in further

consideration and as an inducement to Petter Packaging to enter into the asset purchase agreement and the employment agreement. In addition, Hutchcraft was paid $5,000 as additional consideration for signing the covenant not to compete. Section 2 of the covenant not to compete provides the term of the agreement as follows:

> "2. **Commencement of Noncompetition Term**. It is agreed that the Restricted Period will begin on the date of this Agreement and continue for (i) three years after the Employment Agreement between Hutchcraft and Petter [Packaging] has terminated, if such termination is 'for cause,' or (ii) two years afer the Employment Agreement is terminated, if termination is for any other reason."

¶ 55 Hutchcraft began working as the president of Petter Packaging on December 1, 2002, and continued working as its president after November 30, 2007, until he was terminated on November 12, 2010. However, the parties did not enter into a new employment agreement or covenant not to compete after November 30, 2007. Hutchcraft, therefore, maintains that under the express terms of section 2(ii) of the covenant not to compete, the "Restricted Period" expired on November 30, 2009, *i.e.*, "two years after the Employment Agreement [was] terminated." Hutchcraft concludes that, because the restrictive covenant expired under its express terms on November 30, 2009, Petter Packaging no longer has an enforceable right under the agreement after that date. We disagree.

¶ 56 Kentucky courts have held as follows: "[I]t is the well-settled rule in other jurisdictions that where one enters the service of another for a definite period, and continues in the employment after the expiration of that period without a new contract, it is presumed that the old contract continues; and this presumption must prevail, unless overcome by a new agreement or facts sufficient to show that a different hiring was intended by the parties." *Stewart Dry Goods Co. v. Hutchison*, 198 S.W. 17, 17 (Ky. 1917).

¶ 57 The evidence in the present case established that the original term of the employment

contract was from December 1, 2002, through November 30, 2007. The undisputed testimony at the hearing established that Hutchcraft's employment as the president of Petter Packaging continued after November 30, 2007, and he received the same compensation, commissions, and bonuses that are defined in the written employment agreement. The employment agreement states that "[t]he parties presently anticipate that the employment relationship may continue beyond the original term," and Petter Packaging's vice-president, Sircy, testified that after November 30, 2007, all of the terms and conditions of the employment contract were followed and adhered to with respect to Hutchcraft's employment. The terms and conditions of Hutchcraft's employment contract included the covenant not to compete.

¶ 58 Under these facts, Petter Packaging presented the circuit court with a fair question concerning its right to enforce the covenant not to compete. Under Kentucky law, Hutchcraft's continued employment as the president of Petter Packaging after November 30, 2007, created a presumption that his continued employment was pursuant to the old contract terms, including the covenant not to compete. Under Kentucky law, this presumption must prevail unless it is overcome by a new agreement or facts sufficient to show that a different hiring was intended by the parties. The evidence presented at the hearing did not include evidence that there was a new agreement or that the parties intended for Hutchcraft's employment to be a new hiring under new employment terms. Therefore, the circuit court properly presumed that Hutchcraft's continued employment was subject to the terms of the covenant not to compete for purposes of its preliminary injunction analysis.

¶ 59 Hutchcraft argues that there was no new consideration for a covenant not to compete after November 30, 2007. In support of this argument, he cites *Higdon Food Service, Inc. v. Walker*, 641 S.W.2d 750 (Ky. 1982); *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681 (Ky. Ct. App. 1981); and *Orion Broadcasting, Inc. v.*

Forsythe, 477 F. Supp. 198 (W.D. Ky. 1979). Hutchcraft's argument is not persuasive.

¶ 60 The circuit court found that *Higdon Food Service, Inc.* supported Petter Packaging's position, and we agree. In that case, the employee worked as a salesperson for the employer for one year with no written contract. The employer subsequently prepared written contracts for all of its sales and supervisory employees. The written contract contained a covenant not to compete and was a condition of continued employment with the company. After signing the employment contract, the employee subsequently quit and began working for a competitor. When the employer sought to enforce the restrictive covenant, the employee argued that the written contract lacked consideration because it provided protections to the employer but did not provide the employee with anything that he did not already have. The court held that the written contract was a new employment, and neither party was obligated to continue or renew the employment at the time. The court held that the hiring or rehiring was sufficient consideration for the written contract. *Higdon Food Service, Inc.*, 641 S.W.2d at 751.

¶ 61 Likewise, in the present case, under Kentucky law, Hutchcraft's continued employment under the same terms as the employment agreement for several years after November 30, 2007, was sufficient consideration for the continued employment to be subject to the original terms of employment, including the covenant not to compete.

¶ 62 *Central Adjustment Bureau, Inc.* concerned covenants not to compete signed by three employees after they had already been working for the employer for a period of time. The employees argued that the covenants not to compete lacked consideration. The court stated that the issue "boils down to whether a covenant not to compete signed by an employee after the date of his employment is enforceable." *Central Adjustment Bureau, Inc.*, 622 S.W.2d at 685. The court held that such a covenant is enforceable "provided the employer continues to employ the employee for an appreciable length of time after he signs the covenant, and the

employee severs his relationship with his employer by voluntarily resigning." *Id.* The employer's implied promise to continue the employee's employment is sufficient consideration to support enforcement of the employee's promise not to compete. *Id.* The court offered no opinion concerning the result if the employer had terminated the employees' employment. *Id.*

¶ 63 *Orion Broadcasting, Inc.* also involved the enforcement of a covenant not to compete that was signed subsequent to the date of employment, but the employer in that case terminated the employee. The court held that the restrictive covenant was not enforceable; it lacked mutuality because there was no reciprocal obligation on the part of the employer to continue to employ the employee. *Orion Broadcasting, Inc.*, 477 F. Supp. at 200-01. The court found it significant that the employer terminated the employment, rather than the employee voluntarily resigning. *Id.* at 201. The court stated, "[Ha]d [the employee] voluntarily severed her relationship with plaintiff, the Court has no doubt that the non-competition covenant would have been enforceable against her." *Id.*

¶ 64 In the present case, Hutchcraft argues that the restrictive covenant cannot be enforced against him because he did not voluntarily sever his employment, but was unilaterally terminated. The present case, however, is distinguishable from *Central Adjustment Bureau, Inc.* and *Orion Broadcasting, Inc.* because Hutchcraft was not asked to sign a restrictive covenant after the date of his employment. Instead, the covenant not to compete was negotiated and signed as part of an asset purchase agreement and as part of an employment contract that was negotiated and signed before Hutchcraft ever began his employment with Petter Packaging. In addition, the employment agreement sets out reciprocal obligations on the part of Petter Packaging and, therefore, is not lacking in mutuality as was the case in *Orion Broadcasting, Inc.*

¶ 65 Under Kentucky law, a noncompete agreement is viewed as "a valuable business

tool." *Hammons v. Big Sandy Claims Service, Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978). The Kentucky Supreme Court has stated that the policy of Kentucky is to enforce covenants not to compete unless very serious inequities would result. *Lareau v. O'Nan*, 355 S.W.2d 679, 681 (Ky. 1962). In the present case, Hutchcraft did not present any inequities that would result from enforcing the covenant not to compete. Instead, it was a condition of his employment to which he agreed before he was hired. There is nothing inequitable in requiring Hutchcraft to abide by the terms of the covenant not to compete which was a negotiated condition of his employment.

¶ 66 The circuit court surveyed Kentucky law and correctly concluded that Kentucky courts did not seem to have an "aversion toward extending noncompete covenants beyond the lapse of the express term of the employment contract when the employment continued unbroken, unabated[, and] unchanged for a substantial period after the original expiration date." The court further found that "it was not [and] is not inequitable to require [Hutchcraft] to honor his promise not to compete after the termination of his employment with Petter Packaging, LLC." We believe that the circuit court properly concluded that Petter Packaging raised a fair question with respect to these issues for purposes of granting a preliminary injunction.

¶ 67 Hutchcraft also argues that Petter Packaging does not have an enforceable right under the covenant not to compete because it violated the terms of the employment agreement by failing to give him written notice of termination. The employment agreement provides that Petter Packaging may terminate Hutchcraft's employment at any time "for cause with immediate effect" upon delivering written notice. The agreement also provides that Petter Packaging can "effect a termination other than for cause at any time upon giving 30 days prior written notice" to Hutchcraft of such termination.

¶ 68 In the present case, Petter Packaging maintains that it terminated Hutchcraft for cause

when it found out that he had violated the terms of the covenant not to compete. Hutchcraft, however, did not present evidence at the hearing to establish that Petter Packaging materially breached any terms of the employment contract.

¶ 69 IV.

¶ 70 Whether the Circuit Court Abused Its Discretion in Granting Petter Packaging a Preliminary Injunction

¶ 71 Having determined that Petter Packaging raised a fair question concerning its right to enforce the covenant not to compete under Kentucky law, we next turn to the remedy granted by the circuit court. As noted above, we believe that the standard for issuing a preliminary injunction is controlled by Illinois law. Our review of the circuit court's decision to issue a preliminary injunction is reviewed under the abuse of discretion standard. *Travnick*, 346 Ill. App. 3d at 1060, 806 N.E.2d at 276. To be entitled to a preliminary injunction, Petter Packaging had the burden to show: (1) that it possesses a clear right or interest needing protection, (2) that it has no adequate remedy at law, (3) that irreparable harm will result if the preliminary injunction is not granted, and (4) that there is reasonable likelihood of success on the merits. *Id*.

¶ 72 In the present case, the circuit court did not abuse its discretion in issuing a preliminary injunction. Hutchcraft testified at the hearing that if the circuit court did not enter a preliminary injunction, he intended to compete with Petter Packaging, and he admitted that his competition could result in financial harm or injury to Petter Packaging. Hutchcraft was the president of Petter Packaging, has intimate knowledge of its customer base and its operations, and appears to be the type of employee for whom covenants not to compete are designed. In addition, as the circuit court found in its December 6, 2010, order, "it was not [and] is not inequitable to require [Hutchcraft] to honor his promise not to compete after the termination of his employment with Petter Packaging, LLC."

¶ 73 We believe that the circuit court did not abuse its discretion in finding that Petter

Packaging established a *prima facie* case that there is a fair question as to the existence of its rights under the covenant not to compete, that the circumstances lead to a reasonable belief that it is probably entitled to injunctive relief, and that the matters should be kept in the status quo until the case can be decided on the merits. *Travnick*, 346 Ill. App. 3d at 1060, 806 N.E.2d at 276. "Where restrictive covenants are ancillary to valid contracts supported by adequate consideration and are reasonable in their terms as to time and territory, such covenants will be enforced by the courts and relief by injunction is customary and proper." *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 268-69, 880 N.E.2d 188, 196 (2007).

¶ 74 Although we hold that the circuit court did not abuse its discretion in issuing a preliminary injunction, we offer no opinion on whether Petter Packaging will be entitled to injunctive relief after there is a full evidentiary hearing on the claims.

¶ 75 V.

¶ 76 Whether the Covenant Not to Compete Is Enforceable as Written

¶ 77 Petter Packaging argues that the circuit court erred in finding that the covenant not to compete was ambiguous and could not be enforced as it is written. This issue concerns the construction of the covenant not to compete. Therefore, for the reasons stated above, we will apply Kentucky law in construing the scope of the restrictive covenant.

¶ 78 Under Kentucky law, covenants not to compete are enforceable if the terms are reasonable in light of the surrounding circumstances. *Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994). " '[I]n Kentucky, ... an agreement in restraint of trade is reasonable if, on consideration of the subject, nature of the business, situation of the parties and circumstances of the particular case, the restriction is such only as to afford fair protection to the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted.' " *Id.* (quoting *Hammons*, 567 S.W.2d at 315). "The factors applied by Kentucky courts for determining whether a covenant is reasonable are very broad, allowing

a good deal of discretion to the district court in making its analysis." *Id.* The Kentucky Supreme Court has also stated that "the policy of [Kentucky] is to enforce [covenants not to compete] unless very serious inequities would result." *Lareau*, 355 S.W.2d at 681. In addition, Kentucky courts have adopted a "blue pencil" rule that allows the court to reform or amend restrictions in a noncompete clause if the initial restrictions are overly broad or burdensome. *Hammons*, 567 S.W.2d at 315.

¶ 79 In the present case, the circuit court found that the language of the restrictive covenant was too vague and ordered Petter Packaging to furnish a list of all vendors located within Illinois, Kentucky, Missouri, Indiana, and Tennessee that it had a substantial business relationship with at any time within the previous three years. Petter Packaging submitted a list of 103 customers that had transacted over $10,000 in sales business over the past three years. Hutchcraft, in turn, filed an affidavit in which he stated that he did not believe that any customer generating less than $55,000 in sales business was a "substantial" customer and listed six customers on Petter Packaging's list that made purchasing decisions outside of the five-state market area.

¶ 80 The circuit court's preliminary injunction prohibited Hutchcraft from soliciting or transacting business with only 37 specifically identified entities in the five restricted states. The record is unclear what criteria the circuit court used to select the specific companies from the list of customers.

¶ 81 On appeal, Petter Packaging argues that the circuit court was overzealous with its "blue pencil" and should have enforced the covenant not to compete as it is written. We agree with Petter Packaging that based on the evidence that was presented at the hearing, the circuit court's preliminary injunction should enforce the covenant not to compete as it is written. There was no evidence presented at the hearing that established that the covenant not to compete was unreasonable in light of the surrounding circumstances. We believe that

the circuit court's preliminary injunction should prohibit Hutchcraft from engaging in the activities as defined by the language of the covenant not to compete and not be limited to only a few selected Petter Packaging customers. See *Louisville Cycle & Supply Co. v. Baach*, 535 S.W.2d 230, 234 (Ky. 1976), (respondent was "temporarily enjoined from engaging in the business of buying and selling or otherwise dealing in advertising specialties, business gifts, novelties, incentive programs or any similar activity in competition with the movant").

¶ 82 Our decision concerning the scope of the covenant not to compete is limited only to the issue of a preliminary injunction and is based only on the evidence that was presented at the hearing. We offer no opinion on whether the terms of the restrictive covenant will be deemed to be reasonable or should be modified after the court conducts a full evidentiary hearing on the nature of Petter Packaging's and Hutchcraft's respective businesses, the situation of the parties, and all of the circumstances of this particular case.

¶ 83 VI.

¶ 84 Breach of Fiduciary Duty

¶ 85 Petter Packaging also argues that the circuit court's finding that it failed to prove Hutchcraft's breach of his fiduciary duty was against the manifest weight of the evidence. However, at this stage of the proceeding, the only issue before us is the issuance of a preliminary injunction, the purpose of which is to maintain the status quo pending a full hearing on the merits of Petter Packaging's claims. A preliminary injunction that enforces the language of the covenant not to compete provides Petter Packaging sufficient protection against any unlawful competition on the part of Hutchcraft until such time as the court can conduct a full hearing on the merits. Accordingly, we need not review the circuit court's finding with respect to the alleged breach of fiduciary duties.

¶ 86 VII.

¶ 87 Petter Packaging's Motion to Strike Hutchcraft's Brief

¶ 88 Petter Packaging has filed a motion to strike Hutchcraft's brief, and we ordered the motion to be taken with the case. The arguments that Hutchcraft raised in his brief are relevant to the circuit court's January 14, 2011, order, from which he cross-appealed. Therefore, Petter Packaging's motion to strike Hutchcraft's brief is denied.

¶ 89 CONCLUSION

¶ 90 For the foregoing reasons, we affirm the circuit court's preliminary injunction, in part, reverse in part, and remand to the circuit court for the issuance of a preliminary injunction consistent with the language of the covenant not to compete pending a full hearing on the merits of the case. Petter Packaging's motion to strike Hutchcraft's brief is hereby denied.

¶ 91 Affirmed in part and reversed in part; cause remanded with directions; motion denied.