DIXON A.C.&R. CORPORATION,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 03-01,557
	:	
ROBERT M. KIBBE and TROJAN TUBE AND FABRICATION COMPANY,	:	
	:	
Defendants	:	PRELIMINARY INJUNCTION

Date: February 18, 2004

OPINION and ORDER

Before the Court is Plaintiff Dixon A.C.&R. Corporation's Motion for a Preliminary Injunction filed September 25, 2003.

Findings of Fact

1. Plaintiff Dixon A.C.&R. Corporation (hereinafter "Dixon") is a Pennsylvania corporation having its principal place of business at 3983 West Fourth Street, Williamsport, Lycoming County, Pennsylvania.

2. Defendant Robert M. Kibbe (hereinafter "Kibbe") is a former employee of Dixon.

3. Defendant Trojan Tube and Fabrication Company (hereinafter "Trojan") is a company with its principal place of business located at 161 West Water Street, Muncy, Lycoming County, Pennsylvania.

4. Dixon and Trojan are competing businesses in the area of commercial boiler installation and service.

5. Dixon is a corporation that was formed in 1946. Gerald Lee Miller, Sr. became its President in 1975. He and his wife, Shirley Miller, acquired Dixon's full ownership in 1976. He was the chief operating officer of Dixon until 1996.

6. Prior to 1988, Dixon had engaged mostly in a refrigeration business in the Commonwealth of Pennsylvania. Until that time, it did not have a commercial boiler business.

7. In 1988 Dixon was operated by Gerald Lee Miller, Sr., its President, who was Kibbe's uncle. Gerald Lee Miller, Sr., on behalf of Dixon, specifically hired Kibbe to start and be in charge of Dixon's commercial boiler business. Kibbe reported directly to Mr. Miller, Sr.

8. Prior to Kibbe beginning his employment with Dixon, he had been employed at Kibbe Boiler Company, which was owned and operated by his father. Kibbe has been working in the commercial boiler business for all his adult life, at least thirty years, and is knowledgeable and technically skilled in all areas of the commercial boiler business.

9. It was Kibbe's job at Dixon to "go out and get" customers and "set up" the commercial boiler shop. Dixon's initial start-up expenses approximated $30,000.

10. After Kibbe's hiring and its start-up of the commercial boiler division, Dixon hired at least six additional employees and made major investments in tools, equipment and other items, such as government seals and certifications for its employees, related specifically to that work. Dixon rapidly expanded its customer base. This was largely attributable to the presence and efforts of Kibbe.

11. Commercial boiler customers will follow a person such as Kibbe, who has contacts with and enjoys a good reputation among these owning commercial boilers, from one employer to another.

12. When Kibbe was hired by Dixon, many customers of his former employer became Dixon customers because of their relationship with and trust in Kibbe, as well as, his good reputation in the commercial boiler industry.

13. Kibbe obtained the Unites States Military Academy (West Point) as a customer for Dixon within three months of starting to work at Dixon. He had obtained other major customers within 1-1/2 months of starting with Dixon.

14. With Kibbe at the helm, Dixon's commercial boiler division developed a statewide business, particularly in the central and eastern portions of Pennsylvania. It has had at least one significant customer in New York, New Jersey, Maryland and Ohio. Dixon on occasion, has also done work for other customers in these adjoining states and in some more distant states. It has not done work in Maine, Massachusetts, New Hampshire, Vermont, Rhode Island nor Connecticut.

15. In 1989, Kibbe was being paid $450 per week salary by Dixon.

16. On May 18, 1990, Dixon and Kibbe entered into a Restrictive Covenant Agreement. The Restrictive Covenant Agreement (hereinafter "Agreement") states the following:

> RESTRICTIVE COVENANT
>
> THE EMPLOYEE, ROBERT M KIBBE SHALL NOT, DIRECTLY OR INDIRECTLY WITHOUT THE PRIOR EXPRESS WRITTEN CONSENT OF THE EMPLOYER DIXON A C & R CORPORATION WHILE HE IS EMPLOYED BY THE

> EMPLOYER AND FOR A PERIOD OF THREE YEARS THEREAFTER, WITHIN THE BOUNDARIES OF NORTH EASTERN UNITED STATES, RENDER SERVICE FOR OR IN ANY OTHER WAY BE INVOLVED WITH A BUSINESS WHICH IS COMPETITIVE WITH THE EMPLOYER'S BUSINESS AND WHETHER AS PRINCIPAL, AGENT OR EMPLOYEE. MAKING PASSIVE AND PERSONAL INVESTMENTS IN THE CONDUCT OF PRIVATE BUSINESS AFFAIRS SHALL NOT BE PROHIBITED HEREUNDER. THE PARTIES ACKNOWLEDGE THAT A BREACH OF THIS RESTRICTIVE COVENANT MAY NOT BE COMPENSABLE BY MONEY DAMAGES AND THEREFORE IT IS AGREED THAT IN THE EVENT OF ITS BREACH, THE EMPLOYER SHALL BE ENTITLED TO INJUNCTIVE RELIEF AS WELL AS SUCH OTHER REMEDIES AS MAY BE AVAILABLE AT LAW OR IN EQUITY.

(Plaintiff's Exhibit #1)

17. Gerald Lee Miller, Sr. negotiated the signing of this Restrictive Covenant with Kibbe. Kibbe had a great respect for and a good relationship with Gerald Lee Miller, Sr. as his boss, to whom he solely and directly reported. G. Lee Miller, Jr. was also present and participated in presenting the Agreement to Kibbe. Dixon's legal counsel had prepared the Agreement. When the Agreement was offered to Kibbe, he was told he would receive a raise including commissions and become a vice president.

18. In 1990, when the Agreement was signed, Gerald Lee Miller, Sr. was still President of Dixon. Mr. Miller, Sr. and his wife, Shirley, owned all of Dixon's stock. In 1996 Mr. Miller, Sr. and his wife transferred all of their Dixon stock to their son, G. Lee Miller, Jr. Thereafter, Mr. Miller, Sr. no longer was involved in the operation of Dixon. The Millers Senior retained no beneficial interest in Dixon. G. Lee Miller, Jr. became Dixon's new President and its chief operating officer. Dixon's assets were all owned in corporate form. Mr. Miller, Sr. and his wife still owned the real estate on which Dixon's office and shop buildings

were located. Upon transferring their stock in Dixon to Mr. Miller, Jr., Mr. and Mrs. Miller, Sr. leased the property to Dixon.

19. Upon the Agreement being signed, Kibbe received the following: a $5,200 annual increase in his salary, from $450 a week to the amount of $550 a week (a 22% increase); authorization to include in Dixon's bids an allowance on specific jobs, of up to 2% of the gross bid, which would be his commission; and, the title of Vice-President of Dixon's boiler division.

20. Kibbe's job duties did not change to any significant extent after the Agreement was signed. Kibbe was solely responsible for the operation of the boiler division. Kibbe was able to work a commission allowance into various bids and did receive commissions on at least 10% of Dixon's work.

21. At about the same time Kibbe's raise became effective, twelve of the other regular employees of Dixon, who had also been employed in 1989, received raises in their weekly pay as follows:

a. 2 from $460 - $470, a 2% raise,

b. 1 from $420 - $430, a 2% raise,

c. 3 from $380 - $400, a 5% raise,

d. 2 from $340 - $360, a 6% raise,

e. 2 from $330 - $360, a 9% raise,

f. 1 from $320 - $360, a 12% raise,

g. 1 from $280 - $320, a 14% raise.

(Plaintiff's Exhibits #5 and #6)

22. These twelve raises averaged $25 per week. Prior to these raises, Kibbe had been paid $10 per week less than the highest paid non-officer. After the raises, Kibbe was being paid at least $80 more per week than the highest paid non-officer.

23. Other officer employees of Dixon received weekly salary raises from 1988-89, as follows:

a. Controller -- $420 to $425;

b. G. Lee Miller, Jr., Vice President and son of the owner -- $500 to $650;

c. Shirley Miller, Secretary (and owner) -- $175 to $250; and

d. Gerald Lee Miller, Sr., President (and owner) -- $962 to $1,200.

(Plaintiff's Exhibits #5 and #6)

24. None of the other employees who received raises were requested to sign Restrictive Covenant Agreements in exchange for their raises.

25. Kibbe's annual compensation with Dixon has been as follows:

a. 1989 -- $36,402

b. 1990 -- $41,839

c. 1991 -- $43,657

d. 1992 -- $53,898

e. 1993 -- $51,958

f. 1994 -- $57,145

g. 1995 -- $50,937

h. 1996 -- $54,291

i. 1997 -- $58,032

j. 1998 -- $70,100

k. 1999 -- $88,440

l. 2000 -- $49,996

m. 2001 -- $49,328

(Defendants' Exhibit #11)

26. From 1997 to 2003, Dixon's commercial boiler business declined. In 1997, Dixon lost a 5-year, $1.3 million dollar contract to service West Point in New York State. Dixon had been doing this work for West Point since 1988. The bid had originally been prepared by Kibbe, but G. Lee Miller, Jr., as President, insisted the overtime charges be increased slightly. This added $42,000 to the bid price. The bid was lost by $8,000.

27. G. Lee Miller, Jr., as President of Dixon, had instructed Kibbe to bid labor costs at three times actual in preparing bids, apparently beginning sometime in 2002. Prior thereto, following the usual practice at Dixon, Kibbe prepared the bidding by doubling the actual labor rate. This increased labor rate billing in bids made it difficult for Kibbe to include his personal commission and to obtain bid work on behalf of Dixon.

28. Also contributing to Dixon's lack of commercial boiler work was the 2002-03 downturn in the economy in the area it serviced.

29. Dixon's Commercial Boiler Sales and Gross Profit and Net Profit have been as follows from 1998 to 2002:

	1998	1999	2000	2001	2002
Sales	$692,188	$1,007,714	$702,068	$867,731	$706,422

Gross Profit	$343,499	$ 608,219	$307,213	$447,866	$348,367
Net Profit	$ 34,608	$ 151,157	$ 70,200	$ 58,423	$ 24,522

(Defendants' Exhibit #7)

30. Kibbe estimates there will be a $54,769 loss in 2003 for Dixon's commercial boiler division. There was very little work for the commercial boiler division employees of Dixon from February 2003 to July 2003. Many of the commercial boiler division employees have been laid off between February 2003 and July 2003 due to the lack of work. They were laid off at Kibbe's discretion..

31. In April 2003, Kibbe expressed to Dixon his desire to leave Dixon's employment.

32. Kibbe represented to G. Lee Miller, Jr. that his desire to leave Dixon was to enable him to do boiler work of a magnitude that Dixon did not handle.

33. Trojan contacted Kibbe concerning the possibility of hiring him in April 2003. Trojan had started a commercial boiler division in 1998. Prior to that, it had been in the business of fabricating tubes for use in building commercial boilers.

34. In a May 7, 2003 letter (Defendant's Exhibit #12), Kibbe stated to G. Lee Miller, Jr. he was going to accept an offer to work for an unnamed company, which was subsequently learned to be Trojan. Kibbe stated he wanted to make this change because he would have an opportunity to gain an ownership interest after two or three years when the owner retired. After stating he was not unhappy at Dixon, Kibbe stated his other reasons for leaving were due to changes in Dixon's commercial boiler operations including the following:

a. The boiler personnel were fifteen years older than when the division was started, were working slower, required more man-hours to complete the work and made Dixon non-competitive.

b. Many of its customers were out of business or had no big projects requiring Dixon's service.

c. Certain big customers – West Point, Kavonta, and Polly-O – would not rehire Dixon because Dixon had to sue them to obtain payments rightfully due Dixon.

Kibbe concluded this letter stating he had always been treated fairly by Dixon.

35. Over several weeks, Mr. Miller, Jr., on behalf of Dixon, and Kibbe negotiated how Dixon could retain Kibbe or allow him to take over Dixon's boiler division. The nature of Kibbe's future work, if he left Dixon's boiler division, was also included in their discussions.

36. Mr. Miller, Jr. expressed to Kibbe he would not object to Kibbe working for another boiler company as long as Kibbe would not be performing work in competition with Dixon.

37. Mr. Decker, Trojan's President, learned from Kibbe of the existence of the Agreement Kibbe had with Dixon when he first met with Kibbe to discuss employment in April 2003. Mr. Decker read the Agreement a week or so later. He did not think it was enforceable. Mr. Decker so advised Kibbe.

38. Prior to finalizing its hiring of Kibbe, Trojan had the agreement reviewed by its legal counsel. The counsel believed that the Agreement might not be enforceable. Kibbe

was aware of this. Trojan and Kibbe also believed there would be no problem with Dixon as long as Kibbe did not initiate contact with any of Dixon's customers.

39. Kibbe acknowledges that while he was employed by Dixon Trojan was a competitor. (*See, inter alia,* re-direct examination of Defendant Kibbe 12/12/03). Jack Decker, C.E.O. of Trojan, acknowledges Trojan competed with Dixon in their commercial boiler work.

40. In late June or early July 2003, Kibbe invited most of the other employees of Dixon's Boiler Division to a meeting at his home. Kibbe indicated that Dixon could no longer be competitive. He discussed with them his and their options, including: taking over Dixon's boiler division as a new and separate company; forming a new company; staying at Dixon; or, going to work at Trojan. Kibbe indicated to them that they could work for him regardless as to his ultimate decision. Michael Fink, Pat Fink, Tom Eck and Larry Kibler were among the Dixon employees at this meeting.

41. Kibbe had expressed to Mike Fink a special reason Kibbe wanted him to attend the Dixon employees' meeting at Kibbe's home, which was so that Fink could tell the others that Jack Decker (Trojan's President) was a good person to work for.

42. Subsequently, Kibbe told Pat Fink that he could not discuss Finks' quitting Dixon because of the agreement he had with G. Lee Miller, Jr., but that if Fink got mad (and quit) Kibbe would hire him.

43. Kibbe submitted his resignation letter dated June 30, 2003 to Dixon, voluntarily quitting as of July 11, 2003. (Plaintiff's Exhibit #8)

44. When Kibbe quit his employment with Dixon and started work with Trojan, G. Lee Miller, Jr. believed he had an understanding with Kibbe that Kibbe would be performing more complex or work of a magnitude that Dixon did not desire to do.

45. Larry Kibler and Tom Eck, who had been laid off 5-1/2 months from Dixon, went to work at Trojan under Kibbe. They performed the same work at Trojan as they had done at Dixon. Michael Fink also left his employment at Dixon and joined Kibbe at Trojan. Michael Fink returned to Dixon after working at Trojan for three weeks.

46. Kibbe knows and is aware of Dixon's costs and overhead and bid calculation procedures.

47. Kibbe had at least an informal legal opinion that the Restrictive Covenant Agreement was not enforceable before he actually quit Dixon.

48. It is recognized in the commercial boiler business that a customer may not need repeat work done after an installation or service call for up to three years.

49. A lot of competition exists in central Pennsylvania among at least five commercial boiler companies. As much as 95% of a company's work is negotiated; 5 to 10% is bid work. At times, potential customers will solicit several commercial boiler companies to get prices for specific work. Repeat customers constitute about 80% of a company's work.

50. The personal reputation of the skill of those doing work on commercial boilers, as well as their personal contacts, and familiarity with customers' needs and equipment are very important in obtaining commercial boiler work.

51. In the five years before Kibbe began work for Trojan, Trojan had not done work at the Dallas State Correctional Institution (S.C.I.), Bloomsburg School District,

Montgomery School District, Bucknell University nor the Milton School District. All of these had been Dixon customers in that timeframe. Trojan and Dixon had competed for work at Bloomsburg University during that time and also at other facilities.

52. Ronald Badman is in charge of the boilers at Bucknell University; he has known Kibbe for thirty years and he has confidence in Kibbe.

53. Dixon often did work for Bucknell before 2003. After July 2003, Badman contacted Dixon to do work and learned Kibbe did not work there any longer. Badman then had Dixon do some repair work on a boiler leak at Bucknell. When he was not satisfied with Dixon's work he contacted Kibbe to arrange for Kibbe to do the work through his new employer, Trojan. The work at Bucknell was actually done by repairmen/welder, Tom Eck, a former employee of Dixon, now employed by Trojan.

54. In June 2003, the Dallas S.C.I. requested Dixon to submit a bid of necessary work to fix a leak in a boiler. A Dixon employee, Pat Fink, evaluated the boiler at SCI Dallas and provided the information about the proposed service work to Kibbe. Based on that information, Kibbe, while still employed by Dixon, prepared Dixon's bid to replace twelve tubes on a boiler and associated boiler work. After Kibbe left Dixon, Trojan got the bid for the work at Dallas S.C.I. Michael Fink, formerly an employee of Kibbe at Dixon, did the work at Dallas S.C.I. for Trojan, under Kibbe's supervision. Kibbe stated to Michael Fink that he, Kibbe, should not bid the Dallas job because of his agreement with Dixon.

55. On or about June 25, 2003, while still employed at Dixon, Kibbe instructed Duane Batschlett, a Dixon employee who was then Kibbe's top assistant, to introduce a Trojan employee to Mr. Joe Hassel, the individual in charge of the boiler work at

Bloomsburg Area School District. The Trojan employee was ostensibly there in order to assess the necessary work and help Dixon prepare a bid. After Kibbe left Dixon, Trojan got the bid for the work at the Bloomsburg Area School District.

56. In June 2003, Bloomsburg University requested Dixon to prepare a bid detailing the necessary boiler work. A Dixon Employee evaluated the boiler condition at Bloomsburg University and proposed a course of necessary service. The Dixon employee submitted the proposed boiler work to Kibbe to be presented to Bloomsburg University as a bid. After Kibbe left Dixon, Trojan got the same work at Bloomsburg University.

57. In June 2003, Dixon submitted a bid for work to be done at Shippensburg University. It had not previously done work for Shippensburg. A bid was also submitted on behalf of Trojan for the work at Shippensburg University. Trojan had previously done work at Shippensburg. Trojan received the work at Shippensburg University. Kibbe had told Michael Fink that he had bid the Shippensburg University job on behalf of Trojan.

58. In August 2003, Kibbe told Duane Batschlett, who had been Kibbe's assistant at Dixon and was now his successor that if Batschlett got tired of work at Dixon Kibbe would hire him to work for Trojan.

Discussion

The matter before the Court involves the enforceability of an employment restrictive covenant. The Agreement as entered into by Kibbe and Dixon prohibits Kibbe from competing with Dixon during and after his employment. It does not specifically prohibit non-disclosure of information learned by Kibbe while employed with Dixon. The Agreement is

restricted in time to a period of three years after termination of employment, within the geographic area of the northeast United States.

The specific issue before the Court at this time is whether or not to grant Dixon's request for a preliminary injunction. The granting of a preliminary injunction in a restrictive covenant case has often been recognized by our Courts. *See, e.g.*, ***Chmura v. Deegan***, 581 A.2d 592 (Pa. Super. 1990). As is the case with other preliminary injunctions, when one seeks to obtain this extraordinary relief the moving party must establish the following:

1. Relief is necessary to prevent immediate and irreparable harm.

2. Greater injury will occur from refusing the injunction than from granting it.

3. Injunction will restore the parties to a status quo that existed prior to the alleged wrongful conduct.

4. The alleged wrongful conduct is actionable and the injunction is reasonably suited to abate that conduct.

5. The right to relief is clear.

Valley Forge Historical Society v. Washington Memorial Chapel, 426 A.2d 1123 (Pa. 1981).

In the case *sub judice*, the major focus is upon the last two prongs. The Court must determine if the alleged conduct by Kibbe is actionable and the injunction is reasonably suited to abate this conduct. The Court must also determine if Dixon's right to relief is clear.

The Court is satisfied that Dixon has established the first three prongs.

There has been a showing by Dixon that relief is necessary to prevent immediate and irreparable harm. Several of its key employees in the commercial boiler division have left its employ and are doing work for Kibbe at Trojan. Many of Dixon's former customers have

been contacted by Kibbe and Trojan or in turn have contacted Kibbe at Trojan. As a result, work that Dixon could have expected to do is now being done by Trojan. It is apparent in many instances the most significant, if not the sole reason that Trojan is doing this work is the relationship that Kibbe has with the former customers of Dixon. Absent injunctive relief Dixon will loose work that cannot be made up. The amount of actual and potential work loss may be immeasurable. The amount of monetary loss to Dixon is immeasurable.

Dixon has also established that a greater injury will occur from refusing the injunction than in granting it. Dixon's ability to competitively bid against Trojan is hampered because Kibbe has taken with him knowledge of Dixon's bidding practices and cost and expense information. Obviously, Kibbe would be able to use this information in preparing competing bids for Trojan. In addition, much of the potential boiler work will not be offered to Dixon because Kibbe is no longer present, but is now working for a competitor who is in essentially the same geographic location.

The harm is that Dixon may not be able to do any significant volume of commercial boiler business. This would obviously drive up their overhead costs and make them less competitive. It would also make it very difficult to retain a staff of skilled employees. The harm to Kibbe is that he is prohibited from working for one who is in direct competition with Dixon. Kibbe's personal inability to work for Trojan is not as great as the potential adverse impact on the entire boiler division of Dixon and its many employees. Kibbe will be able to pursue employment in the commercial boiler industry that does not involve competition with Dixon, in accordance with his original representations to Dixon and Dixon's understanding that Kibbe would seek to do work of a magnitude that Dixon was not able to do.

The harm to Trojan is that they will not be able to continue their employment of Kibbe. This means that Trojan will have to compete with Dixon as they did prior to their hiring of Kibbe away from Dixon. Essentially, this means no harm to Trojan and returns it to the status it had before it hired Kibbe. Realistically, Trojan might be better off with the injunction imposed because Dixon is now without Kibbe and is thus a significantly weakened competitor.

The public will not be harmed by the injunction since the injunction will make Dixon and Trojan more competitive, thus benefiting the consumer. In addition, there are many other qualified companies who can provide services to commercial boiler customers of Dixon and Trojan.

An exact status quo cannot be effected by an injunction as Dixon cannot compel Kibbe to work for it and probably has no wish to rehire Kibbe. The closest status quo obtainable is to allow Dixon to compete in the commercial boiler industry with Kibbe in the status of being as if he had chosen to retire. Returning Trojan to status quo (as discussed above) would be effected by the injunction because it and Dixon's other competitors would not have the advantage of Kibbe being their employee and giving them the benefit of his reputation, contacts and abilities within the commercial boiler field.

The issues as to the actionability and the reasonableness of the preliminary injunction and Dixon's clear right to relief raise many significant legal issues, which need to be addressed by the Court in resolving whether or not to grant the preliminary injunction request. In order for Dixon's right for relief to be clear, it is not necessary that Dixon prove the merits of their underlying claim of showing that the Agreement is absolutely enforceable and that a permanent injunction is absolutely appropriate. Rather, Dixon need only show that there is

before the Court an actionable matter and that there are substantial legal questions to be resolved in order to determine the rights of these parties. *See* ***Chmura,*** *supra,* at 593*; see also* ***Fischer v. Department of Public Welfare***, 439 A.2d 1172 (Pa. 1982).

The enforceability of employment restrictive covenants has most recently and thoroughly been addressed by our Pennsylvania Supreme Court in the matter of ***Hess v. Gephart***, 808 A.2d 912 (Pa. 2002). ***Hess***, *supra*, notes in this regard the following:

> In Pennsylvania, restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent (internal citations omitted). Our law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer (citation omitted). However, restrictive covenants are not favored in Pennsylvania and have been historically reviewed as a trade restraint that prevents a former employee from earning a living.

Hess, *supra* at 917. ***Hess*** also makes it clear that in determining whether or not to enforce a non-competition restrictive covenant the court is required to balance the employer's technical business interest against the oppressive effect on an employee's ability to earn a living in his chosen trade. ***Id.,*** at 922.

For a restrictive covenant to be considered incident to the employment relationship when it was entered into after the commencement of employment, the restrictive covenant "must be supported by new consideration, which can be in the form of a corresponding benefit or a beneficial change in employment status." ***Insulation Corp. of America v. Brabston***, 667 A.2d 729 (Pa. Super. 1995). Dixon has produced evidence that the Agreement was incident to the employment relationship between it and Kibbe.

The Agreement entered into by Kibbe and Dixon on May 18, 1990 was supported by new consideration. Kibbe was given a $5,000 increase in his annual salary (from $450/week to $550/week), the ability to build in a 2% commission on bids he submitted and the title of Vice President of Dixon's boiler division. Kibbe immediately received a set compensation substantially more than any non-officer of Dixon. Within two years his annual compensation increased 48% ($17,498) over what he had been paid the year before the Agreement. The title of vice-president no doubt confirmed and enhanced Kibbe's status to those within and outside of Dixon with whom Kibbe had business relations. The increased monetary benefits and his prestigious title provided the new consideration for the Agreement. As such, the Agreement is incident to the employment relationship between Dixon and Kibbe.

Dixon has introduced evidence indicating the geographic areas in which it has done its work as well as the length of time in which a cycle of servicing its customers normally operates. The geographic area that Dixon services and has serviced through its commercial boiler operations has been primarily within Pennsylvania, with occasional significant work being done in New York, New Jersey and Maryland. It is clear that no work has been done in any states that lie in the north or east of the State of New York. Hence, restricting work in the northeast geographic area as fashioned by the covenant is not appropriate.

The Court has the ability to modify the geographic area over which a restrictive covenant can be enforced if the geographic area stated in the covenant does not appear to be appropriate. ***Hess,*** *supra* at 919. In taking into consideration the requirement that restrictive covenants be construed narrowly and with the least intrusion that is possible upon an employee's right to earn a livelihood, this Court believes that Dixon has only demonstrated that

the reasonableness of geographic limits on the restrictive covenant would be within the Commonwealth of Pennsylvania. The Court is also satisfied that this limited geographic restraint will not unduly impact Kibbe from obtaining and earning a living. He has shown an interest and ability to do work outside of the Commonwealth in this field. Certainly a lot of opportunity to do this work outside of Pennsylvania exists. It is also clear to the Court, when taking the public interest into account, that enforcing the covenant will not create any monopoly for Dixon or adversely affect competition in the geographic area of Pennsylvania due to the significant number of commercial boiler businesses that are readily available to the purchasing public interested in this type of product.

This is not to say that at a trial upon the merits a greater or lesser geographic area than Pennsylvania may be justified; however, at this time in granting relief by maintaining the balance between the greater injury versus the lesser injury, restoring the status quo and granting relief that is reasonably suited to abate the inappropriate conduct, this Court is satisfied that the enforceability area should extend only throughout the Commonwealth of Pennsylvania.

There seems to be little dispute that up to three years may pass before Dixon would have an opportunity to repeat work for a customer who had been serviced while Kibbe was at the helm of its commercial boiler operations. At least one such business cycle is reasonable for such a covenant, as it would create a timeframe in which Dixon could demonstrate to its customers that it could still do the work in an appropriate and acceptable manner and for an appropriate cost, even in Kibbe's absence. Therefore, the three-year length of time appears reasonable.

The final consideration in determining whether or not Dixon's claims are actionable and right to relief clear centers on the issue of the assignability of the Agreement and whether in fact an assignment of it had occurred when Dixon had a change in ownership. The assignability of this particular restrictive covenant and whether an assignment did occur with the change in the Dixon stock ownership determine the remaining issues as to the enforceability of the covenant and Dixon's right to a preliminary injunction. Given the exhaustive evidentiary record presented to us and what this Court perceives as being the introduction of all the evidence concerning this issue and the impact upon the ultimate decision in this case, this Court believes it is appropriate to fully analyze and decide whether or not the Agreement was assignable and if an assignment did occur.

The Dixon Corporation stock was unquestionably owned by Gerald Lee Miller, Sr., its president and chief operating officer at the time Kibbe was hired to start the commercial boiler division for Dixon and at the time the Agreement was entered. Although G. Lee Miller, Jr. took part in presenting the Agreement to Kibbe there is little question that Kibbe's willingness to consider as well as his interest in working for and with Dixon in the commercial boiler industry was based upon his personal relationship with Gerald Lee Miller, Sr. At that time G. Lee Miller, Jr. was involved in the refrigeration and/or electronic control segment of Dixon's business. In accepting the Agreement and the elevation to the position of Vice President, Kibbe became the essential equivalent of G. Lee Miller, Jr. Gerald Lee Miller, Sr. owned all the corporate stock of Dixon and had final authority in all business matters. He also had daily contact with, and daily supervision of, the business operations. Thereafter, in carrying out his work for Dixon, Kibbe was essentially working for Gerald Lee Miller, Sr.

Six years after the Agreement had been entered Gerald Lee Miller, Sr. relinquished full control of Dixon to G. Lee Miller, Jr. G. Lee Miller, Jr. then became the chief operating officer of Dixon and the person to whom Kibbe would thereafter report. The corporate form and structure of Dixon did not change, but rather its corporate stock was transferred between father and son.

The Pennsylvania Supreme Court in ***Hess*** focused upon the issue of assignability of restrictive covenants and held that restrictive covenants absent an explicit assignability provision are not assignable. ***Hess,*** *supra* at 922. ***Hess*** appropriately notes that the employer who drafts an employment agreement, which is executed by both parties for the benefit and protection of the employer, could very easily insert an assignment clause into the agreement at the time it is drafted to cover future contingencies deemed appropriate. ***Id.,*** at 924. As an example in this case, the Agreement could say it was enforceable by the successors and assigns of Dixon. Or it could specifically state that the Agreement would apply so long as Gerald Lee Miller, Sr. and/or G. Lee Miller, Jr. and/or any members of their family retain controlling interest in Dixon. When the Agreement was drafted there was no statement specifically allowing it to be assigned. Therefore, it is clear the Agreement is not assignable. Accordingly, Kibbe, relying upon ***Hess,*** argues the Agreement is not enforceable because the stock transfer from Gerald Lee Miller, Sr. to G. Lee Miller, Jr. constitutes an assignment.

Dixon counters by arguing that the factual situation before the Court is distinguished from ***Hess*** and other cases that discuss the assignability of restrictive covenants. Dixon asserts that those cases involve the sale of assets when one business is purchased by another. Dixon contends that the transfer between the Millers (father & son) being a transfer of

stock is a continuation of the business entity, under new ownership, not a purchase of a business entity by a succeeding business entity. Dixon relies upon the continuation of the same corporate structure to assert that the ownership and enforceability rights of the Agreement were in Dixon and Dixon alone, both before and after the stock transfer and that just as with any fixed asset, such as trucks and equipment, the ownership being vested in the corporation no rights or duties are affected by the stock transfer.

All-Pak v. Johnston, 694 A.2d 347 (Pa. Super. 1997) and ***Hess,*** *supra*, in recognizing that a restrictive covenant could, if properly worded, be assigned both involved a corporate entity that benefited from the restrictive covenant selling its assets to the successor business and did not involve a stock transfer to the successor.

However, in support of its holding that restrictive covenants are not assignable, ***Hess*** specifically states the following:

> We are persuaded that the better rule in deciding whether restrictive covenants are assignable is that the employment contract, of which the covenant is a part, is personal to the performance of both the employer and employee, the touch stone of which is the trust each has in the other. The fact that an individual may have confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to original undertaking.

Id., at 922. ***Hess*** further noted that the personal characteristics of the employment contract require that a restrictive covenant should be confined to the employer with whom the agreement was made because they "permeate the entire transaction." Applying the rationale expressed by ***Hess*** holding that a restrictive covenant cannot be assigned to the facts of this

case, it makes little difference that Dixon was an entity which existed in corporate form as opposed to a sole proprietorship of Gerald Lee Miller, Sr.

There is no question that Gerald Lee Miller, Sr. appropriately carried on business through Dixon as a corporation. There is also no question that the personal relationship and trust between he and Kibbe formed the basis for Kibbe being hired, for Kibbe being given complete charge of the boiler operation, and eventually for Kibbe being willing to enter into the Agreement. Upon signing the Agreement, Kibbe was given the right to pursue a personal commission on his bids and the distinction and enhanced status of being named a vice-president. The Court finds that these beneficial employment additions were extended not only because of Kibbe's past performance – for which a weekly raise may have sufficed – but also in furthering and solidifying the relationship Mr. Miller, Sr. had with Kibbe, both as a favorite nephew as well as a valued and trusted employee. Likewise, Kibbe trusted Mr. Miller, Sr. as his employer, valuing how Mr. Miller ran Dixon and treated his employees. He also trusted Mr. Miller as his uncle and confidant. The mutual personal fondness was often expressed by their testimony. This mutual trust and fondness in both their business and personal relationship led to the negotiating and signing of the Agreement.

The Court finds the stock transfer from Mr. Miller, Sr. to his son effected an assignment of the Agreement. This finding is justified by the equities of the situation where the trust that formed the basis of the Agreement was with the former owner and a change in operation of the business did occur with the change in ownership. It is also justified by the mandate expressed in ***Hess*** that restrictive covenants are to be narrowly construed against the employer. ***Hess***, *supra* at 922; *see, also,* ***All-Pak,*** *supra.* In ***Tratenberg,*** the employee signed

a restrictive covenant with a business operated by a sole proprietor who subsequently incorporated without changing management or personnel of the business. The court in ***Tratenberg*** recognized the significance of the personal nature of such agreements and reasoned that although there was a change in the form of business ownership, which technically constituted an "assignment," equitable principles required the assignment not be recognized as there was no change in management or personnel, and the performance of the contract was not impeded nor did it in any way operate to the prejudice or disadvantage of the employee. ***Tratenberg***, *supra* at 12, 13.

All-Pak, *supra*, was the first Pennsylvania appellate court case to rule on the issue of whether a restrictive covenant in an employment contract can be assigned by the employer. ***All-Pak***, *supra* at 351. Recognizing such agreements are to be construed narrowly ***All-Pak*** stated that absent an explicit provision permitting assignability courts should not permit such assignment but instead employers could negotiate a specific assignability provision for inclusion or new employers could negotiate new employment contracts.

This Court has not found and did not have cited to it any case, which dealt with the assignability of a restrictive covenant where the stock of a closely held corporation was entirely transferred to a new owner. Our courts, however, have not regarded the form of an entity as being controlling when considering whether to enforce employment restrictive covenants.

The Pennsylvania Supreme Court in ***Seligman & Lantz of Pittsburgh, Inc. v. Vernillo,*** 114 A.2d 672, (Pa. 1955) seemingly held a non-compete restrictive covenant entered into with a partnership employer was still enforceable after the partnership was incorporated,

without pleading and proving the assignment of the contract by the partnership to the corporation. In so holding, the Court in ***Seligman*** relied on the principle that, "The incorporation of the employer's business without other change does not abrogate the contract of employment, or alter the liability of the parties one to another." ***Id.*** at 673, 674 (emphasis added). ***Seligman*** does not prevent us from reaching the conclusion that the sale of all of the corporate stock to a new owner was such a change of the underlying trust upon which the Dixon-Kibbe agreement was based that the rights and expectations of the parties, particularly Kibbe, were altered substantially. A similar result was reached in ***Jack Tratenberg, Inc. v. Komoroff***, 87 D.&C. 1, (C.P. Phila. 1951).

Equitable principles require the Court to disregard the nature of the transfer of Dixon's ownership and to look at its effect upon the personal obligations of the Agreement. In doing so, it is clear an assignment of the Agreement occurred when G. Lee Miller, Jr. acquired the corporate stock from his father.

There is no question that when an owner of an incorporated small business sells out to a new owner by transferring the assets of the corporation, as opposed to selling the stock, an assignment of the employment agreement would take place. The rights and expectations of an employee who is subject to a restrictive covenant employment agreement are not and should not be altered if the employer for tax or business reasons effects business sellout through a transfer of the corporate stock. Under the facts presented the Court here, the stock transfer effectively assigned Kibbe's Agreement from Mr. Miller, Sr. to Mr. Miller, Jr.

In ***All-Pak,*** *supra*, the Superior Court upheld the denial of a preliminary injunction, which had been sought to enforce an assigned restrictive covenant contract, because

there was no showing the employee had consented to the assignment. Therefore, this Court's conclusion that the transfer of Dixon's ownership effected an assignment of the Agreement leads us to the inquiry of whether or not Kibbe has consented to the assignment. Kibbe correctly asserts that he never expressly consented to the assignment, neither in the original language of the agreement nor by any subsequent assent.

All-Pak clearly recognizes a restrictive covenant employment contract not assignable by its terms would be enforceable if the employee consents to the assignment and that other courts have held consent may be signified by continuing to work for the new owner. ***All-Pak,*** *supra* at 351, *citing* ***Tratenberg*** *supra,* and ***Greens Dairy, Inc. v. Chilcoat,*** 89 Pa. D.& C. 351 (York Co. 1953).

Hess also refers to the ratification of assignment by continued employment in footnote #3 referencing ***Custer Ins. Adjusters v. Nardi,*** 2000 Conn Super. LEXIS 1003, *see, also,* ***Peters v. Davidson***, 359 N.E. 2d 556 (C.T. App. Indiana 1977). Although recognizing this principle, the ***Custer Insurance*** and ***Peters*** cases upon close reading do indicate that the non-compete agreements in those cases did contain assignability clauses. ***Custer*** relied upon ***Willitson*** on Contracts, Third Edition Section 423 at pp. 141-142, for the proposition that contract rights which would ordinarily not be assignable because of the personal character and duties envisioned in their performance nevertheless could become assignable upon the consent of the other party. Therefore, the question arises in this case whether or not Kibbe has consented to the assignment of the restrictive covenant to G. Lee Miller as the new owner of Dixon. This Court finds that he did so consent.

There is not a significant body of case law on the subject area of when and how an employee may consent to an assignment of the restrictive covenant by continued employment. The "paucity" of case law in the subject area was noted in ***Greens Dairy, Inc. v. Chilcoat***, 89 Pa. D.&C. 351 (C.P. York Co. 1953). ***Greens Dairy*** recognized the principle of ratification of the assignment by the employee could be established by allegations the employee continued in the employment of the succeeding employer for a period of approximately two months following the sale of the business and transfer of the restrictive covenant to the new employer. The decision primarily relied on 4 Am.Jur. 238 §11. In ***Tratenberg,*** *supra,* the employee signed a restrictive covenant with a business operated by a sole proprietor who subsequently incorporated without changing management or personnel of the business. The employee, with knowledge of the change, effected by the corporation continued to work over two years for the incorporated business, without protesting the new arrangement, rendering the same services and receiving the same commissions. The court found the employee implicitly consented to the assignment of the restrictive covenant from the proprietor to the corporation by continuing to accept work under the new employer. ***Tratenberg****, supra* at 10,11, (relying on Restatement of Contracts, §162).

It is quite clear that Kibbe cannot question the fact that he consented to the assignment through his continuing to remain employed at Dixon and reaping the benefits of that continued employment. In 1996, when the stock transfer took place between Gerald Lee Miller, Sr. and G. Lee Miller, Jr., Kibbe was compensated at the annual rate of $54,291. That increased by approximately $4,000 in 1997 and increased to $68,000 in 1998 and $72,600 in 1999. This, no doubt, was due in large part to Kibbe's successful adding of commissions onto

his bid contracts. Although Kibbe's income shows a reduction to approximately $50,000 in 2000 and a further reduction to $49,300 in 2001, he cannot at this late date assert that he has not consented to the assignment after so many years of accepting the benefits of his assignment through his continued and appropriate compensation under the bonus plan, which was given to him when he entered into the restrictive covenant. Kibbe has ratified the assignment and consented to the assignment by his actions as well as the remuneration benefits he had received in exchange for the Agreement.

Kibbe asserted only one area of discontent with the assignment of his employment from Mr. Miller, Sr. to Mr. Miller, Jr. prior to 2003. Within approximately one year of G. Lee Miller, Jr. taking over the operation of the business, Dixon lost the lucrative West Point commercial boiler service work by a mere $8,000. This was upsetting and frustrating to Kibbe, as he believed the adding of extra overhead on the bid by his new boss, Mr. Miller, Jr. cost Dixon the job. It was apparent at that time that Kibbe was aware of the changed nature of the operation at Dixon and the way it conducted business in comparison between Mr. Miller, the son, as to the way Mr. Miller, the father, operated. Mr. Miller, Sr. had relied solely upon Kibbe to determine what amount of overhead and other charges to include in making bid proposals. Nevertheless, Kibbe remained in the employ of Dixon without expressing any indication of leaving for nearly seven years, with his first indication of leaving occurring in May of 2003.

Kibbe's letter of May 7, 2003 indicating he wished to leave Dixon caught G. Lee Miller, Jr. off-guard. Certainly there was a lack of business in Dixon's commercial boiler operation for the first five months of 2003. Kibbe asserts this was due to G. Lee Miller, Jr.'s

unreasonable approach to bidding and pricing the commercial boiler work. Kibbe asserts that this prevents Dixon/G. Lee Miller, Jr. from obtaining equitable relief because of their unfair actions or lack of clean hands. While this issue needs to be addressed in a final determination on the merits, its existence does not affect Dixon's right to preliminary injunction relief. This is because Kibbe has introduced evidence into the record suggesting that other than Dixon's own bidding formula, a general fall-off in the economy and the quality of some of the employees of Dixon are responsible for Dixon not being competitive in the commercial boiler industry.

Kibbe also asserts the lack of competitiveness and the desirability of Kibbe to provide work for his fellow employees that are equities which do not favor granting Dixon injunctive relief. Those contentions of Kibbe may have an impact in the long run on the Court's final decision on the merits. Even though an extensive evidentiary record was made in relation to the preliminary injunction hearings, it is still obvious that the pleadings in the case are not closed and that there is significant discovery that each side wishes to pursue.[1] Nevertheless, the evidence introduced thus far is such as to warrant a conclusion that without the enforcement of the restrictive covenant Kibbe will draw customers anyway and Dixon would lose most, if not all, of its commercial boiler business. Kibbe could pass on his skills and information about Dixon to Trojan. Both of these harms are immediate and irreparable and cannot be compensated by damages, which are for the most part immeasurable. That is a sufficient showing of a reasonable necessity for enforcing the restriction for Dixon's benefit.

[1] Preliminary Objections to the Complaint have been filed, argued, and the Court rendered a decision by an Order dated February 5, 2004.

See, ***Alabama Binder and Chemical Corp. v. Pa. Indust. Chem. Corp.***, 189 A.2d 180 at 184 (Pa. 1963).

The Court is also satisfied it has the authority to impose an injunction against Trojan and that the imposition of injunctive relief is reasonable. The intentional interference of a contractual relationship is actionable and is subject to being enjoined. *See,* ***Jacobson and Co., Inc. v. Int'l Environment Corp.***, 235 A.2d 612, 621 (Pa. 1967) (*citing* ***Caskie v. Philadelphia Rapid Transit Co.***, 187 A. 17 (Pa. 1936); 2 Callmann, Unfair Competition and Trademarks, §33.4(d)(2nd ed. 1950); Prosser, Torts, §106 (2nd ed. 1955)). The interfering employer in ***Jacobson*** offered employment and ultimately hired the other defendants with knowledge that they had signed restrictive agreements, and that they would be acting inconsistently with the covenants through the course of their employment. The court held the new employer liable for interfering with the contractual restrictive covenant. ***Jacobson***, *supra* at 621.

Trojan clearly knew of the existence and terms of the restrictive covenant at the time that it offered employment and actually did effect the hiring of Kibbe. Trojan is an acknowledged competitor of Dixon. It is clear that Trojan has interfered in that restrictive covenant contractual relationship even though assertedly doing so under the belief that the agreement would not be enforceable. Trojan did not seek to pursue a declaratory judgment or other legal action to ascertain whether the agreement could in fact be enforced, but instead decided to take its chances and hire Kibbe, thereby obtaining the benefit of his services. This benefit was also known to include not only Kibbe's technical skills, but also the fact that the group of customers Kibbe had previously serviced at Dixon would likely follow him to Trojan.

The injury imposed on Trojan of denying the benefit of Kibbe's employment is minimal as he certainly is so new to them so as not to be indispensable. By comparison, the harm to Dixon if no injunction is granted against Trojan is great in that not only does Trojan now know how Dixon bids and operates it has already made inroads with Dixon's customers solely because of Kibbe's presence at Trojan. To restore the status quo, Trojan must be enjoined from doing work for Dixon customers it otherwise would not have. *See,* ***Alabama Binder & Chem. Corp.,*** *supra* at 184, 185.

In fashioning an appropriate preliminary injunction there is no question that Trojan would have been a competitor of Dixon even had it not hired Kibbe, yet there is also no question that Trojan, as did Dixon before it, will benefit greatly from the following of commercial boiler customers that Kibbe enjoys solely because of his personal relationship to and relationship with certain commercial boiler customers. It is not feasible to attempt to ascertain what contracts that Dixon would lose to Trojan because of Trojan's continuing employment of Kibbe and/or for any information and contacts that Trojan has already made because of Kibbe working with Trojan since July of 2003.

Accordingly, a preliminary injunction to restore all parties to an appropriate status quo, as it existed prior to Trojan hiring Kibbe, is reasonably suited to abate the effects of that wrongful conduct will be entered.

DIXON A.C.&R. CORPORATION,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 03-01,557
	:	
ROBERT M. KIBBE and Trojan TUBE AND FABRICATION COMPANY,	:	
	:	
Defendants	:	PRELIMINARY INJUNCTION

Date: February 18, 2004

O R D E R

Plaintiff Dixon A.C.&R. Corporation's (hereinafter "Dixon") Motion for a Preliminary Injunction is granted.

Defendant Robert M. Kibbe (hereinafter "Kibbe") and Defendant Trojan Tube and Fabrication Company (hereinafter "Trojan") and their agents, servants, employees, and all persons acting in concert with them are enjoined from:

1. soliciting, contacting or communicating with any current or prospective clients of Dixon within the Commonwealth of Pennsylvania by any means regardless of whether the solicitation, contact and/or communication was initiated by Kibbe, Trojan or the current or prospective client of Dixon;

2. competing in any way whatsoever with Dixon's commercial boiler business within the Commonwealth of Pennsylvania;

3. using to Kibbe and/or Trojan's benefit any document, record, book, drawing or specifications belonging to Dixon but misappropriated by Kibbe and/or Trojan, whether such articles were prepared by Kibbe or others;

4. exploiting the right, title, and interests in any and all customs or practices of Dixon that Kibbe and/or Trojan has made, conceived, or instituted with the use of Dixon's time, material, or facilities;

5. Kibbe continuing employment with Trojan or with any competitor of Dixon within Pennsylvania or doing business in Pennsylvania;

6. interfering with Dixon's existing and prospective business relations;

7. slandering Dixon in its business by making false and malicious statements about Dixon.

After July 1, 2004 the provisions above set forth in numbers 1, 2 and 6 shall not apply to any customer or potential customer for whom Trojan in the calendar years 1999, 2000, 2001, 2002 and in 2003 prior to March 31, 2003 performed commercial boiler work of a nature similar to and in competition with Dixon, regardless as to whether Dixon has previously done work for such customer.

After July 1, 2004 the provisions above set forth under numbers 1, 2 and 6 shall not prohibit Trojan from soliciting and obtaining work that is advertised for public bidding.

Provision number 5, above, shall be in effect for a period of three years following the entry and notice of this Order.

Provision numbers 1, 2 and 6 set forth above shall be in effect as to Kibbe for three years from the date of entry and notice of this Order and as to Trojan until July 1, 2005.

This injunction is conditioned upon Dixon posting a bond, in cash, or by a duly licensed surety company authorized to do business in the Commonwealth of Pennsylvania in the amount of $150,000 as to Kibbe and in the amount of an additional $500,000 as to Trojan. Said bonds shall be in the form of and conditioned as set forth in Pa. R.C.P. 1531(b).

BY THE COURT:

William S. Kieser, Judge

cc: Thomas C. Marshall, Esquire/Ryan Tira, Esquire
Joseph F. Orso, III, Esquire/Michael J. Casale, Jr.
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)