



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CONCORD STEEL, INC., a Delaware  
corporation as a successor in interest  
to CRC Wilmington Acquisition, LLC,  
a Delaware limited liability company,

Plaintiff,

v.

WILMINGTON STEEL PROCESSING  
CO., INC., a Delaware corporation,  
KENNETH NEARY, and  
WILLIAM WOISLAW,

Defendants.

Civil Action No. 3369-VCP

**OPINION**

Submitted: April 17, 2009  
Decided: September 30, 2009

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**PARSONS, Vice Chancellor.**

Concord Steel, Inc. (“Concord”) brought this action against Wilmington Steel Processing Co., Inc. (“WSP”), Kenneth Neary, and William Woislaw (collectively, “Defendants”) alleging that Defendants breached a restrictive covenant in an Asset Purchase Agreement (“APA”) between Concord and WSP. Concord initially sought a preliminary injunction, which was granted April 4, 2008. Concord now seeks a permanent injunction as well as money damages for breach of the covenant. The Court conducted a three-day trial of this matter, after which the parties filed extensive post-trial briefing and presented oral argument. This Opinion reflects my findings of fact and conclusions of law.

For the reasons stated in this Opinion, I conclude that the Non-Competition covenant in the APA was breached by Defendants WSP and Neary, that Concord is entitled to a permanent injunction barring Defendants from breaching the Non-Competition covenant for a period lasting until September 12, 2011, and that WSP and Neary are liable for \$553,512 in damages as well as Concord’s reasonable attorneys’ fees and expenses.

## **I. BACKGROUND**

### **A. The Parties**

Plaintiff Concord is a Delaware corporation headquartered in Warren, Ohio with operations in Ohio, Illinois, and Pennsylvania.<sup>1</sup> Concord is a steel center specializing in

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<sup>1</sup> DX 49, Vesey Dep., Jan. 24, 2008 (“Vesey Dep.”), at 5-9.

cutting steel components and counterweights, including steel frames, for manufacturing companies.<sup>2</sup> Paul Allen Vesey is Concord's president.<sup>3</sup>

Defendant WSP is a plate steel product manufacturing company with its principal place of business in Pennsylvania. WSP was incorporated in 1987 and specializes in processing steel to customer specifications. Defendant Neary is the president and founder of WSP.<sup>4</sup> Defendant Woislaw is WSP's vice president of sales.<sup>5</sup>

## **B. Facts**

### **1. The negotiations between Concord and WSP and the Asset Purchase Agreement**

In June 2006, Concord approached Neary and inquired as to whether he would be interested in selling WSP. Concord wanted to purchase WSP's assets because it was expanding rapidly and needed to increase its production capacity.<sup>6</sup> At this time, WSP was involved primarily in oxyfuel processing and had never owned or used high-definition plasma ("HD plasma") equipment.<sup>7</sup>

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<sup>2</sup> Trial Transcript ("T. Tr.") at 36 (Vesey). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically, as in this instance.

<sup>3</sup> Vesey Dep. at 6.

<sup>4</sup> Neary Dep., Jan. 23, 2008 ("Neary Dep."), at 4-5.

<sup>5</sup> Woislaw Dep. at 1.

<sup>6</sup> T. Tr. at 385-88 (Neary).

<sup>7</sup> *Id.* at 414.

At roughly this same time, WSP was approached by Aker, a shipbuilding company that was WSP's neighbor in the former Philadelphia Naval Shipyard. Aker was looking for a company that could provide it with additional HD plasma capacity. Shortly thereafter, Gamesa, a company involved in the wind power generation business, contacted WSP seeking a company that could cut steel to very close tolerances.<sup>8</sup> As a result of its interactions with Aker and Gamesa, WSP decided to purchase an HD plasma cutting machine.<sup>9</sup> WSP made that decision because HD plasma equipment is far more sophisticated and can achieve much more precise tolerances than oxyfuel. WSP believed it could obtain a premium price for work done with HD plasma and, due to its interactions with Aker and Gamesa, saw certain business areas it could become involved in if it had this equipment.<sup>10</sup>

Negotiations between Concord and WSP over a potential asset sale took place from late June to mid-September 2006.<sup>11</sup> The negotiation process was "long and involved,"<sup>12</sup> featuring "something in the neighborhood of twenty-five or twenty-seven

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<sup>8</sup> *Id.* at 352, 377-78 (Woislaw).

<sup>9</sup> *Id.* at 447-48 (Neary). Neary testified that WSP placed the purchase order for the HD plasma equipment before Concord contacted him about the asset purchase. *Id.*

<sup>10</sup> *Id.* at 394-96. WSP's earliest interactions with Aker were with its predecessor Kvaerner. *Id.* at 394-95.

<sup>11</sup> *Id.* at 386.

<sup>12</sup> Neary Dep. at 16-17.

rewrites.”<sup>13</sup> Both sides were represented by sophisticated counsel in the negotiation and drafting of the APA.<sup>14</sup>

Sometime in either July or August 2006, Concord communicated to WSP that it was not interested in taking over the five years remaining on WSP’s lease at the Naval Shipyard due to environmental concerns.<sup>15</sup> Around this time, WSP offered to include the HD plasma machine it had ordered in the assets being purchased through the APA, but Concord was not interested in purchasing this equipment.<sup>16</sup> WSP then developed a plan to remain in business at its existing facility and focus on HD plasma work.<sup>17</sup> Neary alleges that the APA imposed no restrictions on the work WSP could do using either its HD plasma or laser equipment, but Concord disputes those allegations.

Because it knew WSP was going to remain in the steel cutting business, Concord sought in the negotiation of the APA a restrictive covenant that would ensure it could exploit effectively the assets it was purchasing from WSP. The parties knew that WSP planned on performing HD plasma work and that the defense, shipbuilding, and wind power generation businesses are particularly apt for the use of HD plasma equipment.<sup>18</sup>

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<sup>13</sup> T. Tr. at 389 (Neary).

<sup>14</sup> Neary Dep. at 142-43.

<sup>15</sup> T. Tr. at 390-92 (Neary).

<sup>16</sup> *Id.* at 394-97. Concord also rejected WSP’s offer to include its laser in the assets Concord was purchasing.

<sup>17</sup> *Id.* at 392-97.

<sup>18</sup> *Id.* at 568-69.

Accordingly, Concord agreed to include a carve-out from the restrictive covenant in the APA to allow WSP to work in these three areas.<sup>19</sup> Concord understood that, absent its consent, WSP's HD plasma work was going to be limited to defense, shipbuilding, and wind power generation. At no point during the negotiations over the restrictive covenant did WSP discuss a general carve-out for HD plasma. Rather, the two sides "just discussed the APA and the carved-out business segments they [WSP] were allowed to continue to work in."<sup>20</sup>

The months of negotiation finally culminated on September 19, 2006<sup>21</sup> when CRC Acquisition Co. LLC ("CRC"), which then owned Concord,<sup>22</sup> entered into the APA with WSP. Through the APA, Concord acquired substantially all of WSP's assets for a price of \$4,000,000.<sup>23</sup> Section 7.7(b) of the APA is a Non-Competition covenant which states that "for a period of four (4) years beginning on the Initial Closing Date, [WSP] and

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<sup>19</sup> *Id.* at 46, 56-57 (Vesey).

<sup>20</sup> *Id.* at 171.

<sup>21</sup> This date is the "Effective Date" as per the APA. PX 1, APA, at 1.

<sup>22</sup> CRC sold Concord to Net Perceptions, Inc. in October 2006. Net Perceptions subsequently changed its name to Stamford Industrial Group, Inc. ("SIG"). T. Tr. at 37-39 (Vesey).

<sup>23</sup> APA §§ 2.1-2.3; T. Tr. at 388 (Neary). Substantially all of WSP's assets consisted of WSP's inventory, the entirety of its oxyfuel processing equipment, and some peripheral equipment in WSP's shop. After the APA was executed, the only steel cutting techniques employed by WSP were HD plasma and laser. T. Tr. at 549-51 (Neary). As of the time of trial, Concord had never owned any HD plasma equipment. *Id.* at 90 (Vesey).

[Neary] shall not engage in or have an interest, anywhere in the world . . . in any Competitive Business.”<sup>24</sup> “Competitive Business” is defined in the APA as:

[A]ny business (on a worldwide basis) that is engaged in (i) the design, manufacture and sale of (a) counterweights, elevator weights, stage weights, counterbalances, test weights and crane weights made of any material and (b) steel components for heavy equipment as engaged in or to be engaged in by [Concord], [WSP] or the Acquired Business prior to and after the Effective Time, or (ii) any other business competitive with the type of business engaged in by [Concord], [WSP] and the Acquired Business at any time prior to or after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.<sup>25</sup>

This litigation focuses on the meaning of subpart (ii) of that definition. There is no evidence suggesting that the words “oxyfuel” or “HD plasma” appear anywhere in the fifty-two page, single-spaced APA.<sup>26</sup>

Because Concord elected not to take over WSP’s lease, it needed a place to house temporarily the equipment acquired via the APA. Although Concord was building a new facility in Essington, Pennsylvania, the facility was not ready when the APA became effective. Accordingly, Concord and WSP entered into a Production Services Agreement whereby Concord ran all of its operations out of WSP’s Naval Yard plant from

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<sup>24</sup> APA § 7.7(b).

<sup>25</sup> *Id.* § 1 at 3. As set out in the APA, the Final Effective Time was expected to be around March 1, 2007. *Id.* § 1 at 5, § 6.3.

<sup>26</sup> *See* T. Tr. at 64 (Vesey), 370-71 (Woislaw).

September 2006 until March 2007. Concord's Essington facility was completed in March 2007, at which point Concord vacated WSP's plant.<sup>27</sup>

## 2. The Ryerson job

In November 2006, Ray DeLuca, a fabrication manager at Joseph T. Ryerson & Son, Inc. ("Ryerson"),<sup>28</sup> approached Woislaw looking for someone who could produce "high-definition parts,"<sup>29</sup> namely steel side frames<sup>30</sup> that ultimately would be used by JLG Industries, Inc. ("JLG") in their SkyTrak vehicles.<sup>31</sup> WSP initially declined to quote a price for the job to Ryerson, but after DeLuca again asked for a quote in December, WSP provided one in January 2007.<sup>32</sup> Around this time, Neary and Woislaw inquired as to Concord's interest in the Ryerson job. In mid-December 2006, Woislaw showed a print of the part Ryerson wanted to produce to Concord's operations manager and plant manager and told them, "[t]hese are the parts Ryerson wants us to do for them using high-definition plasma."<sup>33</sup> Both managers said Concord was not interested in the project.

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<sup>27</sup> *Id.* at 42-44 (Vesey).

<sup>28</sup> Ryerson is a full-line steel service center that handles various types of fabrication across a multitude of product lines. *Id.* at 274 (Woislaw).

<sup>29</sup> *Id.* at 280.

<sup>30</sup> According to Vesey, steel side frames are "two pieces of steel that are the sides of a machine, whether it be scissor lifts, truck cranes, fork trucks, or aerial lifts. Just two pieces of the sides." *Id.* at 59.

<sup>31</sup> DX 49 at 47.

<sup>32</sup> T. Tr. at 281 (Woislaw).

<sup>33</sup> *Id.* at 290, 299.

Woislaw also gave a print to Vesey, but received no indication from Vesey that Concord had any interest in the Ryerson work.<sup>34</sup> Vesey testified that Concord lacked the capacity to handle the Ryerson job at that time, but that he still planned to quote the job because he hoped to have the necessary capacity by the time the quote was evaluated and accepted.<sup>35</sup> Ryerson accepted WSP's quote in February 2007.<sup>36</sup>

WSP sent its first invoice to Ryerson on April 10, 2007.<sup>37</sup> After being cut by WSP and readied for shipment to Ryerson, steel parts were bundled and labeled with a tag measuring roughly two and a half by five inches that said "Ryerson" in red lettering.<sup>38</sup> This process of bundling and tagging began in early April 2007.<sup>39</sup> According to both Neary and Woislaw, Concord employees were within twenty feet of "very observable"<sup>40</sup> bundles tagged for Ryerson while in the WSP plant to remove a piece of equipment, and thus knew about WSP's work for Ryerson.<sup>41</sup>

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<sup>34</sup> *Id.* at 291-92.

<sup>35</sup> *Id.* at 54-55 (Vesey).

<sup>36</sup> *Id.* at 281 (Woislaw).

<sup>37</sup> PX 9.

<sup>38</sup> T. Tr. at 294 (Woislaw).

<sup>39</sup> *Id.* at 358-59.

<sup>40</sup> *Id.* at 451 (Neary).

<sup>41</sup> *Id.* at 374-76 (Woislaw), 451 (Neary).

In October 2007, Enrique Benavides, a former Concord employee, came to Vesey to ask for his job back. Benavides, who was then employed by WSP, told Vesey that WSP was cutting the JLG side frames for Ryerson and drew Vesey a picture of one of these frames.<sup>42</sup> Based on this information, Vesey determined that WSP was in breach of the APA's Non-Competition covenant and commenced this litigation.<sup>43</sup>

### **3. Background on the steel cutting industry**

The steel cutting industry is highly specialized and features a number of different techniques for cutting steel, two of which, oxyfuel and HD plasma, are at issue here. Oxyfuel cutting or burning is the most common means of cutting steel plate and involves using a combination of oxygen and fuel gas to cut steel.<sup>44</sup>

HD plasma cutting is an advanced cutting technique that uses plasma as its heat source.<sup>45</sup> HD plasma is very precise and can achieve higher tolerances than other steel cutting techniques, having the capacity to limit deviations from specifications to “a

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<sup>42</sup> *Id.* at 59-61 (Vesey).

<sup>43</sup> Vesey knew the side frames could not be used for Defense Business because JLG's defense unit uses three-inch side frames, while the side frames WSP was cutting were just over one inch thick. *Id.* at 61-62.

<sup>44</sup> Neary Dep. at 50-51.

<sup>45</sup> *Id.* at 52.

couple of millimeters” over 600 to 700 inches.<sup>46</sup> While it cannot hold the tolerances HD plasma can, oxyfuel cutting is much less expensive.<sup>47</sup>

The plate thickness of the steel to be cut for the Ryerson job was 1 and 3/16 inches, which is within the range of thicknesses that could be cut using an oxyfuel process.<sup>48</sup> Concord asserted that it could have done the Ryerson job with its oxyfuel equipment.<sup>49</sup> WSP admits that it was possible for Concord to do the Ryerson job by oxyfuel cutting, but contends Concord could not have done so competitively.<sup>50</sup> Robert McDole, Ryerson’s General Manager in Philadelphia, expressed the belief that cutting steel to the specifications and tolerances JLG required with oxyfuel would be cost-prohibitive and inadequate from a quality standpoint. McDole further testified that when a company tried to use oxyfuel to complete the Ryerson job that WSP had started, the cost to Ryerson almost doubled and there were complaints from JLG about the quality of the steel.<sup>51</sup> For purposes of this opinion, therefore, I find that the Ryerson work at issue here could have been done using an oxyfuel process, but not competitively.

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<sup>46</sup> *Id.* at 72.

<sup>47</sup> T. Tr. at 279 (Woislaw).

<sup>48</sup> *Id.* at 363.

<sup>49</sup> *Id.* at 55 (Vesey).

<sup>50</sup> *Id.* at 362 (Woislaw).

<sup>51</sup> *Id.* at 420-22 (McDole).

### **C. Procedural History**

Concord filed its complaint in this action on November 21, 2007, at which time it moved for a preliminary injunction against WSP, Neary, and Woislaw. After oral argument on Concord's motion on March 17, 2008, I granted a preliminary injunction in favor of Concord on April 4, 2008.<sup>52</sup> Although Defendants promptly applied for certification of an interlocutory appeal and a stay of the preliminary injunction, both this Court and the Delaware Supreme Court denied those applications.

Trial took place from October 20 to 22, 2008. After the parties filed their post-trial briefs, I heard their final oral arguments on April 17, 2009.

### **D. Parties' Contentions**

Concord contends that each Defendant violated the Non-Competition covenant contained in the APA.<sup>53</sup> Concord asserts that this covenant is unambiguous and that

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<sup>52</sup> See *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406 (Del. Ch. Apr. 3, 2008).

<sup>53</sup> Concord also contends that Neary and Woislaw breached their individual Noncompetition and Nondisclosure Agreements. Because the only argument Concord advanced to prove a breach of these individual agreements was a conclusory and incorrect statement in a footnote of its post-trial brief that "Neary and Woislaw signed individual Noncompetition and Nondisclosure Agreements containing identical restrictive covenants as the APA," I consider this contention waived and will not address the individual agreements further. Pl.'s Post-Trial Opening Br. ("POB") at 3.

Concord also presented no evidence indicating that Woislaw bound himself to the provisions of the APA; therefore, the Court has no basis to find Woislaw liable for any potential breach of the APA. Concord did demonstrate, however, that Neary, as Seller Principal, personally bound himself to the APA's Non-Competition covenant, thereby subjecting himself to personal liability if the covenant is breached. APA § 7.7(b) ("Seller [WSP] and Seller Principal [Neary] agree that

Defendants have run afoul of its proscription against engaging in Competitive Business, as defined by the APA, by accepting and performing work on the Ryerson job, among others.<sup>54</sup>

Defendants deny that they breached the Non-Competition covenant, claiming the covenant only restricted them from performing oxyfuel work. Defendants argue that the APA's definition of Competitive Business is ambiguous, thus allowing the admission of extrinsic evidence to resolve the ambiguity. According to Defendants, the extrinsic evidence shows that the parties intended the covenant to refer only to oxyfuel cutting, thereby allowing WSP complete freedom to do any work involving HD plasma processing. Defendants therefore assert that the Non-Competition covenant did not prevent them from performing the disputed HD plasma work for Ryerson and others.

Defendants also raise the equitable defense of laches, claiming that Concord knew of WSP's alleged breach no later than April 2007, yet delayed bringing this suit until November of that year. Defendants aver that Concord's delay prejudiced WSP in the building of its HD plasma business.

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any breach or threatened breach by any of them of any provision of this Section 7.7 shall entitle Purchaser [Concord] to injunctive and other equitable relief to secure the enforcement of these provisions, in addition to any other remedies (including Losses) which may be available to the Purchaser.”). Accordingly, for the remainder of the opinion, “Defendants” will refer only to WSP and Neary.

<sup>54</sup> APA § 7.7(b). Concord also contends that work WSP did for three other companies, Continental Biomass, Power Source & Machine, and Steelway Cellar Doors, violated the Non-Competition covenant.

To remedy the alleged breach of the Non-Competition covenant, Concord seeks a permanent injunction of the same scope as the preliminary injunction presently in effect, as well as money damages in an amount equal to the gross profits WSP earned on the Ryerson job and three other jobs that were performed in violation of the covenant, an amount Concord claims is \$650,277. Concord also seeks an award of its attorneys' fees and expenses in connection with this litigation.

Defendants urge the Court to deny the requested permanent injunction because it would constitute an invalid restraint on competition. Specifically, Defendants assert that an injunction would be extremely harmful to WSP while not advancing any legitimate economic interest of Concord. Defendants further contend that Concord has failed to prove it is entitled to damages, criticizing the testimony of Concord's expert as too speculative to support any damages award. Additionally, Defendants aver that Concord improperly based its damages claim on WSP's gross, rather than its net, profits.

## **II. ANALYSIS**

The primary question regarding liability is whether Defendants WSP and Neary have breached any contractual obligation they owed to Concord. At trial and in the post-trial briefing and argument, the only contractual provision Concord accused Defendants of violating was the Non-Competition clause in the APA, Section 7.7(b). To prove a breach of contract, a plaintiff must show: "the existence of a contract, the breach of an

obligation imposed by that contract, and resulting damages to the plaintiff.”<sup>55</sup> In a post-trial opinion, such as this, “a claimant asserting a breach of contract must prove the elements of its claim by a preponderance of the evidence.”<sup>56</sup>

Defendants’ main defense against Concord’s breach of contract claim is that the sole purpose of the APA was to enable Concord, as the Purchaser, to retain the value of the business it acquired as a “going concern.”<sup>57</sup> According to Defendants, that business consisted solely of WSP’s oxyfuel business and did not encompass any of its HD plasma business or equipment. Extending that line of reasoning, Defendants argue that the APA Non-Competition covenant and the related carve-outs for the “Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses” pertain exclusively to business involving oxyfuel processing, and have no application to any work WSP or Neary might do using HD plasma equipment. Concord, on the other hand, vigorously disagrees with that construction. The APA, according to Concord, precludes Defendants for a period of four years from engaging in any form of steel plate cutting of the type at issue here, whether it is performed by oxyfuel burning, HD plasma, or some other process, unless it is within one of the specified carve-out areas.

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<sup>55</sup> *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at \*2 (Del. Ch. Dec. 7, 2007) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

<sup>56</sup> *Estate of Osborn ex rel. Osborn v. Kemp*, 2009 WL 2586783, at \*4 (Del. Ch. Aug. 20, 2009) (citing *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007)).

<sup>57</sup> DRB at 9-10 (citing APA § 7.7(b)).

I turn first, therefore, to the contract interpretation issues presented by those competing arguments.

**A. Have Defendants Breached the Restrictive Covenant in the APA?**

**1. Contract interpretation standard**

When interpreting a contract, the court’s ultimate goal is to determine the shared intent of the parties.<sup>58</sup> “A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law.”<sup>59</sup> Delaware adheres to the objective theory of contracts.<sup>60</sup> Accordingly, “the court looks to the most objective indicia of that intent: the words found in the written instrument.”<sup>61</sup> “As part of this initial review, the court ascribes to the words their common or ordinary meaning and interprets them as would an objectively reasonable third-party observer.”<sup>62</sup> A disagreement between the parties as to a contract’s construction does not suffice to render it ambiguous. Instead, a contract will be deemed ambiguous only if its language is susceptible to two or more reasonable

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<sup>58</sup> *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

<sup>59</sup> *HIFN, Inc. v. Intel Corp.*, 2007 WL 2801393, at \*9 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936)).

<sup>60</sup> *See United Rentals*, 937 A.2d at 835 (citing *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at \*1 (Del. Ch. Nov. 8, 2007)).

<sup>61</sup> *Sassano*, 948 A.2d at 462. In determining the intent of the parties, the court looks first at the relevant document, read as a whole. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2008 WL 151855, at \*11 (Del. Ch. Jan. 16, 2008) (quoting *Matulich v. Aegis Commc’ns Group, Inc.*, 2007 WL 1662667, at \*12 (Del. Ch. May 31, 2007)).

<sup>62</sup> *Sassano*, 948 A.2d at 462.

interpretations.<sup>63</sup> While extrinsic evidence cannot be used to manufacture an ambiguity where one does not exist on the contract's face,<sup>64</sup> "an understanding of the context and business circumstances under which the language was negotiated" is to be considered,<sup>65</sup> as "seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiating and contracting occurred."<sup>66</sup>

Under the parol evidence rule, where contract language is ambiguous, a court will consider all admissible evidence relating to the objective circumstances surrounding the creation of the contract.<sup>67</sup> "Such extrinsic evidence may include 'overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry.'<sup>68</sup> After examining the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."<sup>69</sup>

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<sup>63</sup> *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

<sup>64</sup> *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

<sup>65</sup> *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at \*10 n.10 (Del. Ch. June 6, 1996).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*10.

<sup>68</sup> *United Rentals*, 937 A.2d at 834-35 (quoting *Supermex Trading Co. v. Strategic Solutions Group, Inc.*, 1998 WL 229530, at \*3 (Del. Ch. May 1, 1998)).

<sup>69</sup> *U.S. West*, 1996 WL 307445, at \*10.

## 2. Are there ambiguities in the restrictive covenant?

Concord bases its claim for breach of the APA on the Non-Competition provision, Section 7.7(b). That section provides that for a period of four years from the Initial Closing Date, the Seller (WSP) and the Seller Principal (Neary) “shall not engage or have an interest . . . in any Competitive Business,” as that term is defined in Section 1 of the APA. Although the definition of Competitive Business has two parts, the parties focused their presentations at trial and at argument on the second part, which provides as follows:<sup>70</sup>

“Competitive Business” shall collectively mean any business (on a worldwide basis) that is engaged in . . . (ii) any other business *competitive* with the *type of business* engaged in by Purchaser (Concord), Seller (WSP) and the Acquired Business at any time prior to and after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.<sup>71</sup>

In arguing that this definition implicitly relates only to aspects of the steel business involving the use of oxyfuel processing, Defendants contend that the emphasized terms “competitive” and “type of business” are both ambiguous. I address those arguments in turn below. Preliminarily, however, I note that there is no reference to oxyfuel burning or

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<sup>70</sup> The first part of the definition of Competitive Business encompasses any business engaged in the design, manufacture, and sale of (a) counterweights and other specified types of steel products and (b) steel components for heavy equipment “as engaged in by Purchaser (Concord), Seller (WSP) or the Acquired Business prior to and after the Effective Time . . . ” APA § 1 at 3. During the trial and post-trial proceedings, none of the parties relied on this portion of the definition in making their arguments regarding the alleged breach.

<sup>71</sup> *Id.* (emphasis added).

HD plasma processing anywhere in the sections of the APA pertaining to the Non-Competition covenant.

**a. Is the term “competitive” ambiguous?**

WSP contends the term “competitive” in the definition of Competitive Business is ambiguous, thus requiring this Court to admit extrinsic evidence to resolve the ambiguity. WSP asserts that there are two plausible definitions of “competitive” in the context of the APA. The first definition refers to a situation where “two or more commercial interests [try] to obtain the same business from third parties.”<sup>72</sup> Under this definition, two businesses would be competitive if they both sought to obtain a specific contract from the same client. The second possible definition of “competitive” posited by WSP is a “rivalry between two or more businesses striving for the same customer or market.”<sup>73</sup> This definition is broader and would include a situation where two businesses vie for a relationship with a particular client, rather than a specific contract.

If I accepted the first definition, then whether Concord and WSP would be competitive would depend on the validity of Defendants’ contention that for any given

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<sup>72</sup> BLACK’S LAW DICTIONARY 302 (8th ed. 2004); *see also* WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 268 (1987) (defining competition as “two or more parties acting independently to secure the business of a third party by offering the most favorable terms.”).

<sup>73</sup> *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (4th ed. 2000).

job only HD plasma or oxyfuel, but not both, would be appropriate.<sup>74</sup> Defendants argue that Concord and WSP could not be competitive under this definition because Concord only does oxyfuel work, while WSP does no oxyfuel work.<sup>75</sup> If the second definition were to be accepted, there could be no question that Concord and WSP would be competitive with each other, as both parties have done work for Ryerson both before and after the APA.<sup>76</sup> Thus, whether the two proposed constructions of the term “competitive” would lead to different results here depends on the validity of Defendants’ contention that for a specific job only HD plasma or oxyfuel would be appropriate, but not both.

The evidence shows that in many instances HD plasma and oxyfuel are not both appropriate for the same job. A primary virtue of HD plasma is its ability to cut steel to close tolerances. In some circumstances, it may be possible to achieve similar tolerances with oxyfuel, but the record indicates that as the specifications become more exacting, the technical and cost effectiveness of an oxyfuel process becomes more questionable. The Ryerson job provides an example. This job required close tolerances, and when a

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<sup>74</sup> More specifically, WSP contends that if a job requires close tolerances, it can only be done using HD plasma because oxyfuel cannot achieve the tolerance. Conversely, if a job can be done with oxyfuel, no one would do that work with HD plasma because of its higher cost. *See* T. Tr. at 279 (Woislaw).

<sup>75</sup> In addition to using HD plasma, WSP also does laser work. *Id.* at 556 (Neary). Laser is “the next level beyond” HD plasma, according to Neary, which suggests it is even more precise and expensive than HD plasma. *See* Neary Dep. at 52. Thus, it is fair to group laser with HD plasma for purposes of comparing the characteristics of those processes to those of oxyfuel.

<sup>76</sup> *See* T. Tr. at 40 (Vesey), 354 (Woislaw).

company tried performing the work with oxyfuel, it failed, producing unsatisfactory steel components at a greater cost. Referring to Concord's ability to do the Ryerson work, Woislaw credibly summarized the situation as follows: "[T]hey could have done it by flame cutting [i.e., oxyfuel burning] and machining. If they could do it competitively is another question."<sup>77</sup> Hence, I find that, at least for the Ryerson work, HD plasma constituted an appropriate processing technique and oxyfuel processing did not represent a cost-effective alternative.

The evidence further indicates that the cost of using HD plasma far exceeds the cost of using oxyfuel for jobs that do not require close tolerances. Thus, Defendants' contention that both HD plasma and oxyfuel cannot be appropriate for a single steel cutting job is plausible, but I am not convinced they are necessarily mutually exclusive techniques. Accordingly, Concord and WSP may not be competitive with each other under WSP's first proffered definition of "competitive." Assuming that proposition for purposes of argument, there would be an ambiguity as to the meaning of "competitive," and extrinsic evidence would be admissible to determine the parties' intent regarding that term, as well as the covenant in general. As explained *infra* Part II.A.4, however, I reach the same ultimate conclusion regardless of whether I consider the proffered extrinsic evidence. Thus, I have assumed, without deciding, that the term "competitive" in the definition of Competitive Business is ambiguous.

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<sup>77</sup> *Id.* at 362.

**b. Is the term “type of business” ambiguous?**

Defendants next contend that the term “type of business” in the definition of Competitive Business is also ambiguous. Defendants argue for a narrow definition of “type of business” under which oxyfuel cutting and HD plasma cutting are considered different types of business. Additionally, Defendants claim that the only “type of business” referred to in the APA is the oxyfuel cutting business. Concord, in turn, argues for a broader definition under which “type of business” refers to steel cutting generally.

The APA defines Competitive Business, in relevant part, as “any business . . . that is engaged in . . . any other business competitive with the type of business engaged in by [Concord], [WSP] and the Acquired Business at any time prior to or after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.”<sup>78</sup>

In determining what “type of business” means, I first note that if the definition Defendants urge is correct, the carve-outs would serve little, if any, purpose. Defense Business, Ship Building and Wind Power Generation are three business areas that require precise tolerances and, thus, are particularly well suited for HD plasma cutting.<sup>79</sup> Also, it

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<sup>78</sup> APA § 1 at 3. As defined in the APA, “Other Permitted Businesses” generally means business involving the “manufacture, design, and sale of steel parts and services” for which WSP has obtained Concord’s “written consent and agreement.” *Id.* § 1 at 10. Woislaw and Neary both admitted that no one at WSP obtained Concord’s consent for any of the disputed work, including the Ryerson job. T. Tr. at 356-57 (Woislaw), 595 (Neary).

<sup>79</sup> T. Tr. at 179 (Vesey).

is largely undisputed that it is difficult to do work in these areas with oxyfuel equipment. Therefore, if “type of business” referred solely to the oxyfuel business, the carve-outs would be virtually meaningless, as they only would carve out work that generally cannot be done economically using oxyfuel.<sup>80</sup> “Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.”<sup>81</sup> Because the carve-out would have no meaningful effect if the “type of business” at issue here meant only the oxyfuel business, I conclude that the parties intended the term “type of business” to refer to the steel cutting business generally.

This conclusion is further supported by the generally broad language used in the definition of Competitive Business to encompass any other business competitive with the type of business engaged in by Concord, WSP, and the Acquired Business “at any time prior to and after the Final Effective Time, except for the [specified carve-outs].”<sup>82</sup>

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<sup>80</sup> *Id.* at 568-69 (Neary). Limiting “type of business” to the oxyfuel business also would strip the carve-outs of any value from the standpoint of the parties to the APA and make them mere surplussage. As of the effective date, WSP had sold all of its oxyfuel equipment and had no intention of using oxyfuel processing in its future business. Thus, even assuming a company could use oxyfuel processing for work in one of the three carve-out areas, Concord had no reason when it entered into the APA to believe that WSP would try to use oxyfuel for those purposes.

<sup>81</sup> *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. July 20, 2007) (citing *Majkowski v. Am. Imaging Mgmt. Serv.*, 913 A.2d 572, 588 (Del. Ch. 2006)).

<sup>82</sup> APA § 1 at 3. Defendants argue that the Non-Competition covenant should be given a narrow construction, but the only case they cite provides more support for Concord’s position than it does for that of Defendants. *See Allied Capital Corp. v.*

Nothing in the language of that definition suggests any limitation of its scope to include only steel processing using oxyfuel or any exclusion of steel processing using HD plasma or any other specific type of processing. In addition, the definition expressly includes business of the type engaged in by WSP “prior to or after the Final Effective Time,” except for the carve-out businesses. WSP’s business included use of oxyfuel and laser processing before that time and HD plasma and laser after it.<sup>83</sup> At all times, however, WSP operated in the steel cutting business and performed a variety of steel cutting jobs. Against this background, I find the term “type of business” in the APA’s definition of Competitive Business to be unambiguous and to refer to the steel cutting business generally. Because the term is unambiguous, there is no need to consider extrinsic evidence to interpret it. Thus, the “type of business” would include WSP’s use of HD plasma processing, but the Non-Competition clause would have no application to WSP’s activities in the carve-out areas of the Defense Business, Ship Building, and Wind Power Generation.

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*GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006). Defendants cite *Allied Capital* for the proposition that if the court were to find that the carve-out applied to HD plasma work, it would be “granting [Concord] a substantive right that it did not extract during negotiation.” *Id.* In fact, the evidence indicates the opposite: WSP is trying to extract a right it did not gain in negotiation given the absence of a carve-out for HD plasma in the Non-Competition covenant. The language used in the covenant implies the parties intended the covenant to apply broadly. I will not undermine this intent by construing the covenant narrowly.

<sup>83</sup> T. Tr. at 556 (Neary).

### 3. Extrinsic evidence

The extrinsic evidence proffered by the parties falls into two categories. First, the testimony of WSP's last-minute expert on the steel industry and, second, fact evidence offered to show the parties' intent when they entered into the APA, in general, and the Non-Competition covenant, in particular. I address the evidence in that order.

#### a. Admissibility of the testimony of WSP's expert witness Douglas Goldstein

During the final pretrial conference on October 10, 2008, I noted that Defendants had failed to submit any expert reports by the discovery deadline. I allowed Defendants until October 13, 2008 to submit an expert report, but noted that if the report was on a topic unrelated to rebutting Concord's damages expert, I most likely would exclude the expert's testimony as untimely. Defendants submitted the expert report of Douglas Goldstein by the deadline, but the report bore no relation to damages. Because Defendants missed the deadlines for filing expert reports and have provided no convincing reason to admit this belated testimony, I hereby grant Concord's motion to exclude Goldstein's report and testimony from evidence.

Defendants contend that their delay in filing Goldstein's expert report stems from Concord's delay in producing Al Weggeman, the president of SIG, for deposition. Goldstein, however, did not read, was not given, did not rely on, and made no reference to Weggeman's deposition in his expert report or during the preparation of that report.<sup>84</sup>

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<sup>84</sup> *Id.* at 540-41 (Goldstein). To the extent Defendants argue that Goldstein waited to issue his report until he could obtain clarification as to the content of Weggeman's

Therefore, I reject Defendants’ argument as unpersuasive and contrary to the record. In the circumstances of this case, the production of such an expert report in a new subject area only a week before trial is unduly prejudicial to Concord and improperly disregards the Court’s scheduling order.

Furthermore, even if I were to find Goldstein’s testimony admissible, it would be only marginally relevant and would not support any change in the outcome reached in this opinion. For purposes of the remaining discussion of the Non-Competition covenant, therefore, I have assumed for purposes of argument only that Goldstein’s major premise – *i.e.*, that “the services offered and performed by WSP for Ryerson were and are NOT the same type of services, nor are they ‘competitive’” – is accurate in a colloquial sense.<sup>85</sup>

**b. Intent of the parties regarding the Non-Competition covenant**

WSP asserts that the parties intended the Non-Competition covenant only to restrict WSP from performing oxyfuel cutting. In support of this position, WSP relies on evidence that it told Concord of its intention to begin focusing on HD plasma work during the negotiations for the APA. I accept that fact as true. WSP also emphasizes that only oxyfuel assets were sold via the APA, which WSP claims shows that the APA was an “oxyfuel transaction,” and, accordingly, that the restrictive covenant can refer only to

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deposition testimony, their argument is equally without merit. Goldstein’s report is dated September 11, 2008, while Weggeman’s deposition was not taken until October 7, 2008. Compare DX 22 to DX 51.

<sup>85</sup> DX 22 at 5. Because Goldstein is not a lawyer, he has no competence to address what the term “competitive” means within the context of the APA. That is the province of the Court.

oxyfuel cutting. In addition, relying largely on Goldstein's testimony, WSP asserts that a company with oxyfuel equipment and one with HD plasma equipment cannot compete for the same contract. Based on this evidence, WSP contends that the language in the APA was "informed and supported" by Concord's knowledge of WSP's intentions and that the parties fully understood that WSP was permitted to do any HD plasma work it desired.<sup>86</sup>

Concord argues that the parties intended the Non-Competition covenant to restrict WSP's performance of all steel cutting work, regardless of the process used, unless the work fell within a carve-out. To support its view, Concord relies primarily on the language of the APA and notes that there is no evidence, other than Neary's uncorroborated testimony, showing that WSP attempted to obtain an express carve-out for work done with HD plasma.

In an effort to rebut the latter point, Defendants rely on the testimony of WSP's president, Neary, and claim that in response to an email from Neary, Concord orally agreed to allow WSP unrestricted use of its HD plasma equipment.<sup>87</sup> In an email to John Pastor of Concord, dated July 24, 2006, Neary wrote:

John, need your input to the following:

1) When and the deal is finalized [sic], how do you intend to distinguish business that WSP can follow and not be in conflict with Concord.

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<sup>86</sup> Defs.' Post-Trial Resp. Br. ("DRB") at 26.

<sup>87</sup> T. Tr. at 405-10 (Neary).

2) WSP is not interested in giving up any purchase price for business presently being carried out with the exception of Aker [a prospective customer in the shipbuilding business]. If you deem that certain business is not in keeping with your core objectives I am willing to become a supplier to Concord for these products so that you can continue to supply these customers.

Our future business plan is to become a fabricator in prime material requiring certification of material, including but not limited to welding and advanced processing requiring equipment and methods not presently employed by WSP.<sup>88</sup>

Nowhere in this email did Neary request a carve-out for HD plasma, or even use the words “HD plasma.” Instead, Neary merely asked about a mechanism for allowing WSP to continue to do some steel cutting work after the deal was completed. Therefore, the email does not controvert Concord’s claim that the parties intended to distinguish the work that WSP could pursue after the APA based on business areas, as seen in the carve-outs, rather than the type of steel cutting process used.

Moreover, Defendants failed to produce the response to the email or any evidence as to the alleged oral agreement other than Neary’s own testimony. Tellingly, Defendants did not adduce any testimony from their negotiator, Bob Williams, in support of Neary’s allegations. Because the alleged oral agreement is not reflected in the APA and is inconsistent with the plain language of that Agreement, I find that no such oral agreement ever existed.<sup>89</sup>

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<sup>88</sup> DX 10.

<sup>89</sup> Having carefully considered Neary’s testimony on that point, I accord it no weight because it is unreliable and inconsistent with the great weight of the evidence.

Vesey denied that HD plasma was ever discussed during negotiations over the covenant. These negotiations focused instead on “the carved-out business segments [WSP was] allowed to continue to work in.”<sup>90</sup> In fact, no evidence was presented that the APA or any of its roughly twenty-five drafts contain the words “oxyfuel” or “HD plasma” anywhere in their fifty-two single-spaced pages.<sup>91</sup> As Concord argues, these facts show the parties did not intend the covenant to refer only to oxyfuel cutting. If they had, the topic of HD plasma would have been addressed in the Non-Competition covenant.

Additionally, the evidence shows that the genesis of the carve-outs was rooted in overtures made to WSP by customers in the shipbuilding and wind power generation businesses looking for an HD plasma processor. A reasonable inference from this evidence is that WSP intended to operate only in the business areas for which it expressly negotiated carve-outs. WSP first developed the idea of purchasing HD plasma equipment after being approached by Aker, a shipbuilding company that had a facility near WSP in the former Philadelphia Naval Shipyard. This idea was then reinforced by interactions WSP had with Gamesa, a wind power generation company.<sup>92</sup> Based on these facts, I find the carve-outs represented concrete and realistic business opportunities for WSP

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<sup>90</sup> T. Tr. at 171 (Vesey).

<sup>91</sup> *Id.* at 604 (Neary); APA.

<sup>92</sup> T. Tr. at 351-53 (Woislaw).

consistent with its expected HD plasma capability, and that the parties intended the covenant to allow WSP to work only within these carve-outs.

Furthermore, WSP was selling all of its oxyfuel assets through the APA and, thus, would have had no capacity to do oxyfuel work going forward. Indeed, Neary testified: “we really had cut the cord and decided that we weren’t going to do any more oxy-fuel cutting.”<sup>93</sup> In those circumstances, a covenant that merely prevented WSP from doing work that it had no capacity or desire to do would have had no value to Concord. This evidence, therefore, further undermines WSP’s contention that the parties intended the covenant only to restrict WSP’s performance of oxyfuel work. “Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.”<sup>94</sup>

#### **4. Resolution of the ambiguity**

Having considered the proffered extrinsic evidence, including, for purposes of argument only, the inadmissible evidence from WSP’s expert Goldstein, I find that the parties intended the Non-Competition covenant to prevent WSP from doing any steel cutting work, HD Plasma, oxyfuel, or otherwise, unless it fell within a carve-out. In reaching this conclusion, the absence of an express HD plasma carve-out in the covenant and the absence of any credible evidence that WSP ever explicitly sought to obtain such a

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<sup>93</sup> *Id.* at 399 (Neary).

<sup>94</sup> *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at \*4 (Del. Ch. May 24, 2006).

carve-out in its negotiations with Concord are important. In an APA that was so intensely negotiated, one would expect a point as critical as the exact scope of the Non-Competition covenant to be dealt with thoroughly. As Neary admitted, however, none of the numerous drafts of the APA makes any reference to a general carve-out for HD plasma work.<sup>95</sup> Nor can WSP point to any evidence that indicates it attempted to expand the scope of the carve-outs to include any and all HD plasma work. The testimony of Neary on this point and the email he relies on are too general to be of much value. Neary subjectively may have believed the APA would give him the freedom of action he now claims in terms of WSP's use of its HD plasma equipment. There is no reliable evidence, however, that Neary or the lawyer that negotiated the APA for WSP ever communicated that view to Concord. Thus, I conclude that the parties did not intend the covenant to refer only to oxyfuel cutting. In rejecting Defendants' argument to the contrary, I adhere to established case law that precludes a party to a contract from obtaining "a substantive right that it did not extract during negotiation."<sup>96</sup>

This conclusion also comports with other provisions of the APA. Section 2.3(m), for example, provides for WSP to retain "any machinery and equipment purchased by [WSP] subsequent to September 1, 2006 which [WSP] intends to use in the Defense

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<sup>95</sup> T. Tr. at 604 (Neary).

<sup>96</sup> See *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006).

Business, Shipbuilding, Wind Power Generation or Other Permitted Businesses.”<sup>97</sup> This provision confirms that WSP was not to do any work outside of the carve-outs as it allows WSP to keep machinery and equipment it purchased *after* the APA was executed only if that equipment was to be used in a carved-out business area. There is no dispute that the parties understood WSP would purchase HD plasma-related equipment after September 1, 2006. Nevertheless, nothing in Section 2.3(m) suggests WSP could use HD plasma equipment outside the Defense, Ship Building, and Wind Power Generation businesses.

Because the parties clearly intended the covenant to restrict WSP from doing all steel cutting outside the scope of the carve-outs, I find that the parties also intended the term “competitive” to have the second of the two potential definitions discussed *supra* Part II.A.2.a, *i.e.*, a “rivalry between two or more businesses striving for the same customer or market.” This definition of “competitive” is the broader of the two options and better matches the broad scope of the Non-Competition covenant. Furthermore, Concord and WSP are competitive under this definition even though they do not own the same type of steel cutting equipment, as they both do work for and, thus, “strive for” the same customers. Therefore, to the extent the term “competitive” in the definition of

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<sup>97</sup> Section 2.3(m) of the APA provides in its entirety: “2.3 Retained Assets: Seller shall retain and not sell and deliver to Purchaser pursuant to Sections 2.1 or 2.2, and Purchaser shall not purchase from Seller, the following assets of Seller even though the following assets may be used in the operation of the Acquired Business: . . . (m): Any machinery and equipment purchased by the Seller subsequent to September 1, 2006 which Seller intends to use in the Defense Business, Shipbuilding, Wind Power Generation or Other Permitted Businesses.”

Competitive Business in the APA is ambiguous, I construe that term to mean a rivalry between two or more businesses striving for the same customer or market.

**5. Has WSP violated the restrictive covenant?**

The restrictive covenant forbids WSP from engaging in any Competitive Business for four years from the Initial Closing Date of the APA. Competitive Business is defined as “any business . . . that is engaged in . . . any other business competitive with the type of business engaged in by [Concord], [WSP] and the Acquired Business prior to or after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.”<sup>98</sup>

Because Concord and WSP were both striving to obtain, for example, the business of Ryerson, albeit not necessarily to obtain the same specific job, Concord and WSP were “competitive” with each other under the definition I have adopted. Both Concord and WSP did work for Ryerson before the APA.<sup>99</sup> WSP’s post-APA HD plasma work for Ryerson involved steel cutting and, thus, was competitive with the “type of business” engaged in by Concord, WSP, and the Acquired Business,<sup>100</sup> namely, the steel cutting

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<sup>98</sup> APA § 1 at 3. The Final Effective Time coincides with the end of the Final Closing Date, as defined in the APA, which evidently was expected to occur on or about March 1, 2007. In contrast, the Initial Closing Date was expected to occur on or about September 15, 2006. *See id.* § 1 at 5, 7, §§ 6.1, 6.3.

<sup>99</sup> T. Tr. at 39-40 (Vesey), 354 (Woislaw).

<sup>100</sup> “Acquired Business” is defined broadly in the APA as “the business of designing, manufacturing and selling counter weights and plate steel products, including without limitation, sub assembly components for the following: man lifts, shipbuilding, military applications and forestry as well as other components made

business. As the disputed Ryerson job did not involve Defense Business, Ship Building, or Wind Power Generation,<sup>101</sup> and did not fit the definition of “Other Permitted Businesses,”<sup>102</sup> none of the carve-outs apply.<sup>103</sup> Accordingly, WSP engaged in Competitive Business as defined by the APA. Because the transactions Concord complains of occurred within four years of the Initial Closing Date, I find that WSP breached the Non-Competition covenant in Section 7.7(b) as to each of those transactions.

### **B. Laches**

Laches is an equitable defense that stems from the maxim “equity aids the vigilant, not those who slumber on their rights.”<sup>104</sup> Although there is no firm rule as to what constitutes laches, it is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting

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from plate steel that a customer might require (but excluding the Defense Business, Shipbuilding, Wind Power Generation and Other Permitted Businesses).” APA §1 at 1.

<sup>101</sup> T. Tr. at 355-56 (Woislaw).

<sup>102</sup> *See supra* note 78.

<sup>103</sup> Defendants also admitted that three other jobs performed by WSP after the execution of the APA do not fall within the carve-outs. T. Tr. at 356-58 (Woislaw). Thus, Defendants WSP and Neary also breached the Non-Competition covenant in connection with those jobs.

<sup>104</sup> *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citing 2 POMEROY’S EQUITY JURISPRUDENCE §§ 418-19 (5th ed. 1941); *accord Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

in material prejudice to the defendant.<sup>105</sup> Therefore, laches generally requires the establishment of three things: (1) knowledge by the plaintiff, (2) unreasonable delay in bringing the claim, and (3) resulting prejudice to the defendant.<sup>106</sup>

Defendants claim Concord knew about WSP's breach of the Non-Competition covenant in April 2007 when WSP began tagging bundles of steel at its plant for shipment to Ryerson. Defendants contend that because Concord worked out of WSP's facility at that time, Concord employees would have seen the bundles saliently labeled with Ryerson tags and, thus, known about the breach of the covenant. The evidence, however, shows that Concord had vacated WSP's plant before the first steel bundles were tagged. WSP did not begin labeling steel with Ryerson tags until April 2007, while Concord's employees vacated WSP's plant in March 2007 when its Essington facility was completed. Defendants, therefore, failed to prove that WSP had bundles of steel conspicuously tagged for Ryerson in its plant when Concord employees worked there.

Defendants further contend that Concord had notice of the breach because its employees were in WSP's plant to remove a piece of equipment when the plant was full of steel bundles with Ryerson tags on them. Even assuming that any Concord employees saw a Ryerson tag, merely seeing one of these tags would not indicate a breach of the covenant. The evidence indicates that some Ryerson work involved the Defense

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<sup>105</sup> *Id.* (citing *U.S. Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996)).

<sup>106</sup> *Id.* at 182-83 (citing *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005)).

Business.<sup>107</sup> Therefore, WSP conceivably could have been doing work for Ryerson under a carve-out. Hence, simply knowing that steel bundles were being shipped to Ryerson would not mean that WSP was breaching the covenant.<sup>108</sup> Concord would have had to know the bundles were to be used for a purpose not within a carve-out before it could be charged with knowledge of the breach. Defendants failed to demonstrate such knowledge.

Accordingly, Defendants failed to prove that Concord knew WSP was in breach of the covenant before October 2007 when Benavides told Vesey about the work WSP was doing for Ryerson. After becoming aware of its claim against Defendants in October 2007, Concord filed suit a month later. Thus, Defendants have not shown that Concord unreasonably delayed in bringing its claim and therefore have failed to establish laches.<sup>109</sup>

### **C. Injunctive Relief**

Concord seeks a permanent injunction that would bar WSP from violating the Non-Competition covenant in Section 7.7(b) of the APA and extend the application of that covenant until April 3, 2012. To merit a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits, (2) irreparable harm, and (3) that the

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<sup>107</sup> T. Tr. at 373 (Woislaw), 630-31 (Neary).

<sup>108</sup> *See Scotton v. Wright*, 117 A. 131, 136-37 (Del. Ch. 1922), *aff'd*, 121 A. 69 (Del. 1923).

<sup>109</sup> Because Defendants failed to show unreasonable delay, there is no need to discuss the prejudice element of laches.

balance of the equities weighs in favor of issuing the injunction.<sup>110</sup> In this case, because Concord seeks specific performance of a covenant not to compete, it also must establish by clear and convincing evidence that the Non-Competition covenant is reasonable in geographic scope and temporal duration and advances Concord's legitimate economic interest.<sup>111</sup>

By proving that Defendants have breached the Non-Competition covenant, Concord has demonstrated actual success on the merits. Concord also has demonstrated irreparable harm because Section 7.7(b) of the APA expressly states, in pertinent part, that: “[WSP] and [Neary] acknowledge that [Concord] would be irreparably harmed and that monetary damages would not provide an adequate remedy to [Concord] in the event the covenants contained in this Section 7.7 were not complied with in accordance with their terms.” Moreover, if an injunction is not granted, the competition Concord would face from WSP would impair the goodwill Concord purchased in the APA. The extent of that harm would be difficult to quantify and, therefore, further shows the existence of irreparable harm. Indeed, “the harms resulting from competition by someone bound by a noncompetition agreement are frequently found to be irreparable.”<sup>112</sup>

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<sup>110</sup> *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at \*25 (Del. Ch. May 18, 2009) (citing *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at \*2 (Del. Ch. Dec. 7, 2007)).

<sup>111</sup> *Hough Assocs. v. Hill*, 2007 WL 148751, at \*47-48 (Del. Ch. Jan. 17, 2007).

<sup>112</sup> *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at \*13 n.147 (Del. Ch. Apr. 15, 2004).

Defendants counter Concord's claim for injunctive relief by arguing that the covenant, as I have interpreted it, constitutes an invalid restraint on competition. To the extent Defendants seek to invalidate the Non-Competition covenant as a matter of law on that basis, I reject their argument as unsupported by the facts or the applicable law. In particular, I note that the covenant accompanied a sale of substantially all of the assets of an on-going business. In such circumstances, noncompetition agreements are commonplace.<sup>113</sup>

Defendants' charge of an invalid restraint on competition is, perhaps, best viewed as an argument that an injunction would not meet the balance of equities test. In balancing the equities, the harm to Concord if Defendants are not enjoined from breaching the covenant must be compared with the harm to Defendants if WSP is forced to cease operating in violation of the covenant.<sup>114</sup> Defendants assert that an injunction would fail the balance of equities test here because enforcement of the covenant "would be fatal to WSP" while not advancing any legitimate economic interest of Concord.<sup>115</sup>

The evidence belies WSP's dire predictions, as it still would be able to do any work that falls within a carve-out or for which it can obtain Concord's written consent.

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<sup>113</sup> Delaware courts more readily enforce noncompetition covenants contained in asset or stock purchase agreements as compared to those in employment contracts. *Id.* at \*10.

<sup>114</sup> *See Singh v. Batta Envtl. Assocs., Inc.*, 2003 WL 21309115, at \*10 (Del. Ch. May 21, 2003).

<sup>115</sup> DRB at 32.

Moreover, an injunction would advance Concord's economic interests, as it would give Concord an opportunity to exploit the assets it purchased from WSP and potentially expand into new areas of the steel cutting business while dealing with competition from WSP only in the carve-out areas. Thus, Defendants have not shown that the harm they would suffer from an injunction would outweigh the harm to Concord if an injunction did not issue. Rather, an injunction merely would put the parties in the position they agreed to be in under the APA.

Concord also has satisfied the prerequisites for specific performance of the Non-Competition covenant. As previously discussed, Concord has shown by clear and convincing evidence that the covenant advances its legitimate economic interests. In addition, because Defendants have made no argument that the covenant was unreasonable in either geographic scope or temporal duration, there is no question as to its reasonableness in that regard. Thus, Concord has established by clear and convincing evidence its right to permanent injunctive relief consisting of the enforcement of the Non-Competition covenant.

A tolling provision in the Non-Competition covenant provides that: "If any party breaches the covenants set forth in this Section 7.7, the running of the four (4) year non-compete period described therein shall be tolled for so long as such breach continues."<sup>116</sup> Concord contends that the permanent injunction should extend until April 3, 2012, four years from the date of the last invoice WSP sent to Ryerson.

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<sup>116</sup> APA § 7.7(b).

Under the tolling provision, however, the covenant is tolled only during the period of a breach. Concord offered no evidence that Defendants breached the covenant before April 10, 2007, the date of WSP's first invoice to Ryerson.<sup>117</sup> Accordingly, I find the breach continued from that date until April 3, 2008, the date of the last WSP invoice to Ryerson,<sup>118</sup> a period one week short of a year. By its terms, the Non-Competition covenant was to expire on September 19, 2010, four years after the APA was signed. Therefore, taking into account the tolling of the covenant for the period that WSP was in breach, I will issue an appropriate injunction through September 12, 2011.

#### **D. Money Damages**

Concord also seeks money damages as compensation for Defendants' breach of the Non-Competition covenant. In particular, Concord seeks the estimated gross profits earned by WSP from the four jobs it performed in breach of its obligations under the APA. The parties dispute whether Concord's damages should be measured as "gross profits" or "net profits."<sup>119</sup> Defendants cite this Court's decisions in *Topps* and *Amstel* to support its view that damages should be limited to net profits.<sup>120</sup> In both of those cases,

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<sup>117</sup> PX 9, Invoice 12861.

<sup>118</sup> PX 9, Invoice 13462.

<sup>119</sup> As the parties have used those terms in this litigation, fixed costs are deducted from revenues in computing "net profits," while no such deduction is made in calculating "gross profits."

<sup>120</sup> *Topps Chewing Gum, Inc. v. Fleer Corp.*, 1985 WL 24928 (Del. Ch. Nov. 25, 1985); *Amstel Assocs., L.L.C. v. Brinsfield-Cavall Assocs.*, 2002 WL 1009457 (Del. Ch. May 9, 2002).

however, the plaintiffs sought restitution, whereas Concord sued for lost profits. “Under Delaware law, fixed costs generally are not deducted from lost profits.”<sup>121</sup> Accordingly, Concord is correct that the proper measure of damages is WSP’s gross profits.

Concord’s damages expert, Andrew C. Verzilli, testified to two alternative measures of gross profits on the Ryerson job. Under both methods, Verzilli devised a variable expense ratio to calculate expenses and then subtracted these expenses from WSP’s gross revenues on the Ryerson job, which the parties stipulated were \$761,933.<sup>122</sup> Under the first method, Verzilli used a WSP Schedule of Operating Expenses for February and March 2008 to calculate a variable cost ratio of 30%, which resulted in a gross profit on the Ryerson job of \$533,353.<sup>123</sup> Under the second method, Verzilli used

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<sup>121</sup> *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at \*28 n.171 (Del. Ch. May 18, 2009) (citing *All Pro Maids v. Layton*, 2004 WL 1878784, at \*11 (Del. Ch. Aug. 9, 2004, revised Aug. 10, 2004)); *see also Vitex Mfr. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (holding that because overhead remains constant, it should not be deducted from lost profits). I see no reason to depart from this norm here. Until the time it was enjoined, WSP would have been making expenditures on overhead and other fixed costs regardless of whether it was doing any work in breach of the covenant. The expenditures WSP incurred for the HD plasma equipment could have been related to work WSP was authorized to do under the carve-outs. Whether WSP, in fact, elected to focus on work not authorized under the Non-Competition covenant reflects its own choice and provides no basis for reducing the measure of damages here.

<sup>122</sup> Joint Pre-Trial Order at 5.

<sup>123</sup> T. Tr. at 202 (Verzilli). With respect to the Ryerson revenues, Verzilli considered WSP’s only variable expenses to be “the labor incurred to perform the cutting services and the cost to operate the high definition plasma cutter.” PX 18 at 3.

WSP's 2007 federal income tax return to calculate a 17.3% variable cost ratio, yielding a gross profit of \$630,119.<sup>124</sup>

Defendants contend that Verzilli failed to establish damages with the requisite degree of certainty. Yet, "[t]he law does not require certainty in the award of damages when a wrong has been proven and injury established. Responsible estimates that lack mathematical certainty are permissible so long as the Court has a basis to make a responsible estimate of damages."<sup>125</sup> Concord has established that it was injured by Defendants' wrongful conduct; thus, it is entitled to any damages it reasonably can prove. I find Verzilli's testimony sufficient to enable the Court to make a "responsible estimate" of damages and, thus, reject Defendants' contention that Concord's damages estimates are too speculative.

Verzilli also calculated WSP's profits on the three other jobs WSP did in violation of the covenant. For these calculations, Verzilli had access to a WSP Customer Sales Analysis Summary from August 2006 which explicitly stated WSP's profit margins for these customers. Verzilli found the profits to be \$6,861 on the Continental Biomass job, \$2,916 on the Power Source & Machine job, and \$10,382 on the Steelway Cellar Doors job.<sup>126</sup>

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<sup>124</sup> T. Tr. at 202-03 (Verzilli); PX 18 at 3-4.

<sup>125</sup> *All Pro Maids*, 2004 WL 1878784, at \*11.

<sup>126</sup> T. Tr. at 206-08 (Verzilli).

I accept Verzilli's estimates of gross profits for the three smaller jobs and adopt the lower estimate of profits for the Ryerson job. On the latter point, I am not convinced that Verzilli's estimate of 17.3% variable costs for the Ryerson work is any more reliable than his 30% estimate. The lower estimate of profits uses a 70% profit margin, which more closely resembles the profit margins listed on the WSP Customer Sales Analysis Summary for Continental Biomass (70%), Power Source & Machine (40%), and Steelway Cellar Doors (77%) than the 83% profit margin Verzilli used to calculate the higher profit estimate for Ryerson.<sup>127</sup> Thus, I find WSP and Neary jointly and severally liable to Concord for damages in a total amount of \$553,512 for the four jobs WSP performed in violation of the covenant.

#### **E. Attorneys' Fees and Costs**

Section 7.7(b) of the APA provides that "[WSP] and [Neary] agree that any breach . . . by any of them of any provision of this Section 7.7 shall entitle [Concord] . . . to any other remedies (including Losses) which may be available to [Concord]." "Losses" are

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<sup>127</sup> To the extent Defendants challenge the accuracy of Verzilli's calculation of gross profits based on his failure to deduct certain allegedly variable costs, I reject that contention because Defendants failed to provide any more accurate estimate of gross profits or to show Verzilli had access through reasonable means to WSP financial information that would have enabled him to provide a better estimate.

I also find unpersuasive Concord's argument that it should receive the higher damages estimate because Neary allegedly destroyed documents which stated the profit margin on the Ryerson job. Concord failed to establish that Neary destroyed any document of this type. Instead, the evidence suggests that WSP occasionally attempted to determine gross profits on a customer-by-customer basis, *e.g.*, in connection with due diligence on a specific transaction, but did not do so in the normal course of its business.

defined in the APA to mean all “costs and expenses of whatever kind or nature (including reasonable attorneys’ fees) . . . .”<sup>128</sup> Based on these contractual provisions and my finding that Defendants breached the Non-Competition covenant in Section 7.7(b), Concord is entitled to an award against WSP and Neary, jointly and severally, of its reasonable attorneys’ fees and other costs and expenses related to this litigation.<sup>129</sup>

### III. CONCLUSION

For the foregoing reasons, I find that Defendants WSP and Neary breached the Non-Competition covenant found in Section 7.7(b) of the APA. As a result of this breach, Concord is entitled to a permanent injunction against WSP and Neary effectively extending the restrictions of that covenant until September 12, 2011. I also find WSP and Neary jointly and severally liable for: (1) damages to Concord in the amount of \$553,512 for their breach of the covenant; and (2) Concord’s reasonable attorneys’ fees and expenses in connection with this litigation. To the extent Concord purported to assert any claims against Woislaw, those claims are dismissed with prejudice. Concord shall supplement the record with appropriate documentation regarding the amount and

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<sup>128</sup> *Id.* § 1 at 8.

<sup>129</sup> Concord discussed the basis of its claim for attorneys’ fees and expenses in its opening post-trial brief. POB at 43-44. Defendants did not respond to that aspect of Concord’s claim in their responsive brief. Therefore, WSP and Neary have waived any objection to Concord’s claims for fees and expenses, except to the extent that they may object in the future to the reasonableness of specific fees and expenses Concord may seek. *Martinez v. Regions Fin. Corp.*, 2009 WL 2413858, at \*4 n.12 (Del. Ch. Aug. 6, 2009) (citing *Emerald Partners v. Berlin*, 2003 WL 21003437, at \*43 (Del. Ch. Apr. 28, 2003) (“It is settled Delaware law that a party waives an argument by not including it in its brief.”)).

reasonableness of their requested attorneys' fees and expenses within ten days of the date of this Opinion. Defendants may file any opposition to Concord's application within ten days after the date of that submission.

Plaintiff's counsel shall promptly submit, on notice, a stipulated or proposed form of judgment in accordance with this Opinion and 10 *Del. C.* § 4734.