

02-1654-C

RICHARD W. MACKAY vs. COLLEEN CHICK CUPP

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY,  
Plaintiff : IN EQUITY  
vs. : No. 02-1654-CJ  
COLLEEN CHICK CUPP,  
Defendant : Type of Pleading: Complaint  
and Injunction  
: Filed on behalf of: Richard W. Mackey,  
Plaintiff.  
: Counsel of Record for this party:  
THE HOPKINS LAW FIRM  
: DAVID J. HOPKINS, ESQUIRE  
Attorney at Law  
Supreme Court No. 42519  
: LEA ANN HELTZEL, ESQUIRE  
Attorney at Law  
Supreme Court No. 83998  
: 900 Beaver Drive  
DuBois, Pennsylvania 15801  
: (814) 375-0300

**FILED**

OCT 22 2002

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY,	:	
Plaintiff	:	
	:	
vs.	:	No.
	:	
COLLEEN CHICK CUPP,	:	
Defendant	:	

**NOTICE**

TO: Defendant

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint is served, by entering a written appearance personally or by Attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Office of the Court Administrator  
Clearfield County Courthouse  
1 North Second Street  
Clearfield, PA 16830  
(814) 765-2641 (ext. 5982)

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, :  
Plaintiff :  
: vs. : No.  
: :  
COLLEEN CHICK CUPP, :  
Defendant :  
:

**COMPLAINT AND INJUNCTION**

AND NOW, comes Plaintiff, Richard W. Mackey, by and through his attorneys, The Hopkins Law Firm, and files the within Complaint and Injunction against the said Defendant and in support thereof states as follows:

1. Plaintiff is Richard W. Mackey, an adult individual whose address is R.D. #3, Box 147, DuBois, Pennsylvania 15801.
2. Plaintiff operates a business known as the Animal Hospital located on Shaffer Road near its intersection with Maple Avenue, DuBois, Clearfield County, Pennsylvania.
3. Defendant is Colleen Chick Cupp whose current address is 136 Scribner Avenue, DuBois, PA 15801.
4. Both Plaintiff and Defendant are veterinarians licensed to practice veterinary medicine within the Commonwealth of Pennsylvania.
5. On February 28, 2001, Plaintiff and Defendant entered into an Executive Employment Agreement, a copy of which is attached hereto as Exhibit "A" and incorporated as if set forth at length herein.
6. Paragraph 8 of the Agreement states:

Noncompetition. During the full term of this Agreement and for twenty – four (24) months after its termination for any reason, Cupp shall not compete directly or indirectly with Mackey or any affiliate thereof within fifteen (15) miles of the Animal Hospital principal location (Shaffer Road, DuBois).

7. Paragraph 10 of said Executive Employment Agreement states:

Nondisclosure of Confidential Information Concerning Business. Cupp shall not at any time, whether during or after her employment under this agreement, either directly or indirectly, divulge, disclose, or communicate to any person, firm, or corporation any information relating to the business or affairs of Mackey which is confidential, proprietary, or not in the public domain.

8. Plaintiff has complied with all of the terms of the Executive Employment Agreement including paying Defendant a base gross salary of \$60,000.00 per year.

9. Notwithstanding the terms of the Executive Employment Agreement, on or about the 7th day of September, 2002, Defendant left the employ of Plaintiff and has now opened a veterinary practice in the former DuBois Harley Davidson building located on the Oklahoma Salem Road, DuBois, Pennsylvania. Said location is less than three (3) miles from the Animal Hospital's principal business location (Shaffer Road, DuBois, Pennsylvania).

10. Notwithstanding the Executive Employment Agreement, Defendant has contacted owners of pets Plaintiff routinely treats in an effort to help Defendant's practice grow and diminish Plaintiff's practice.

11. The actions of Defendant constitute breach of the February 28, 2001 Executive Employment Agreement in general and paragraph 8 and paragraph 10 in particular.

12. Both paragraph 8 and paragraph 10 provide that in the event of Defendant's breach, Plaintiff shall be entitled to specific performance and injunctive and other equitable relief in addition to other remedies that may exist at law.

WHEREFORE, Plaintiff, Richard W. Mackey, requests this Honorable Court enter judgment in favor of Plaintiff and against Defendant for:

A. Preliminary injunction and then permanent injunction prohibiting Defendant, Colleen Chick Cupp, from competing directly or indirectly with Plaintiff or any affiliate thereof within fifteen (15) miles of the Animal Hospital's principal business location (Shaffer Road, DuBois, Pennsylvania).

B. Order Defendant Colleen Chick Cupp to close her veterinary practice located at the former DuBois Harley Davidson motorcycle shop, Oklahoma/Salem Road, DuBois, Pennsylvania.

C. Require Defendant Colleen Chick Cupp to cooperate with Plaintiff to advise if each client of Plaintiff that Defendant's business is being closed.

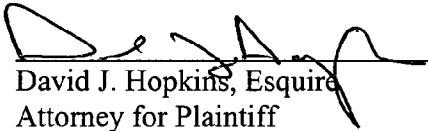
D. Award Plaintiff compensatory damages for lost profits.

E. Award Plaintiff money damages equal to all money Defendant Colleen Chick Cupp has received since the opening of her veterinary practice in violation of the Executive Employment Agreement.

F. Order Defendant Colleen Chick Cupp to advise each client of Plaintiff that she has contacted that Defendant did so in violation of her employment agreement together with a recommendation that client contact Plaintiff for further treatment of their animals.

- G. Order Defendant to pay Plaintiff's legal fees.
- H. Such other and further relief as the Court deems fair, just and equitable.

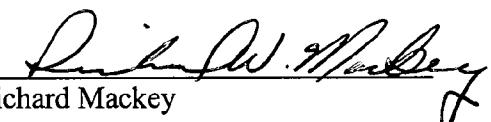
Respectfully submitted,



David J. Hopkins, Esquire  
Attorney for Plaintiff

**VERIFICATION**

I hereby verify that the statements made in this pleading are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to Unsworn Falsification to Authorities.

  
Richard Mackey

## Executive Employment Agreement

THIS AGREEMENT is made this 28 day of February, 2001, by and between Richard W. Mackey whose address is R.D. #3, Box 147, DuBois, Pennsylvania 15801 (hereinafter "Mackey"), and Colleen Chick Cupp, whose address is 500 Montgomery Street, Christiansburg, Virginia 24073 (hereinafter "Cupp").

Mackey, to obtain the benefit of Cupp's experience in veterinarian medicine and to reasonably assure continuity of service and noncompetition with Mackey, wishes to employ, and Cupp is willing to be employed by Mackey, on the terms, covenants, and conditions set forth below.

Now, therefore, in consideration of the mutual covenants contained in this agreement, it is agreed as follows:

1. **Nature of Employment.** Subject to the supervision and pursuant to the orders, advice and directions of Mackey, Cupp will be employed as veterinarian at the Animal Hospital of DuBois and will have such duties as normally apply to such a position and as may be assigned to her from time to time by Mackey. Cupp agrees to devote her full time and attention to such duties. Cupp represents and warrants to the Mackey that she is presently subject to no other employment contract, written or oral.

2. **Base Compensation.** In consideration of the services to be rendered by Cupp, the Mackey will pay to Cupp a base salary in the gross amount of \$60,000 per year, payable in equal weekly installments.

3. **Vacation, Holiday and Sick Days.** Cupp shall be entitled to an aggregate of two (2) weeks annual paid vacation, to be scheduled consistent with business needs.

Cupp shall be entitled to six (6) paid holidays. Cupp is also allotted up to five (5) sick days each year during the continuance of this contract, without deduction of compensation.

4. Continuing Education. Mackey shall pay Cupp's continuing education requirements and Cupp shall be entitled to an aggregate of five (5) days each year to attend said continuing education.

5. Health Insurance. Mackey shall provide health insurance benefits for Cupp equivalent to Blue Cross Select Blue. Cupp may add her family members to said health insurance plan at her expense.

6. Days and Hours of Employment. Cupp shall work Monday, Tuesday, Thursday and Friday for one (1) week and Tuesday, Wednesday, Thursday and Friday on the alternating week and at other times that may be required for the efficient operation of Mackey's business's. Cupp shall be at the business the following hours:

Monday 9:00 a.m. – 6:00 p.m.  
Tuesday 9:00 a.m. – 5:00 p.m.  
Wednesday 9:00 a.m. – 4:00 p.m.  
Thursday 9:00 a.m. – 6:00 p.m.

Friday 9:00 a.m. – 5:00 p.m. and at such other hours as the office may be open.

7. Termination of Position. The Mackey may, at its option and with or without cause, terminate Cupp's position which case the Mackey will give Cupp at least 30 days prior written notice of its intent to terminate her.

8. Noncompetition. During the full term of this Agreement and for twenty-four (24) months after its termination for any reason, Cupp shall not compete directly or indirectly with Mackey or any affiliate thereof within fifteen (15) miles of The Animal Hospital principal business location (Shaffer Road, DuBois). Mackey and Cupp

acknowledge and agree that since a remedy at law for any breach or attempted breach of the provisions of this section shall be inadequate, Mackey shall be entitled to specific performance and injunctive or other equitable relief in case of any such breach or attempted breach, in addition to whatever other remedies may exist at law. Both parties also waive any requirement for the securing or posting of any bond in connection with the attainment of any such injunctive or other equitable relief.

9. Consequences of Death. If Cupp should die during the term of this Agreement, this Agreement shall immediately terminate on the day of her death as if such day were the day fixed for termination.

10. Nondisclosure of Confidential Information Concerning Business. Cupp shall not at any time, whether during or after her employment under this agreement, either directly or indirectly, divulge, disclose, or communicate to any person, firm, or corporation any information relating to the business or affairs of Mackey which is confidential, proprietary, or not in the public domain. In the event of a breach of the provisions of this section, Mackey shall be entitled to an injunction restraining Cupp from such disclosure.

11. Vacation, Holiday and Sick Days. Cupp shall be entitled to an aggregate of two (2) weeks annual paid vacation, to be scheduled consistent with business needs. Cupp is also allotted up to five (5) sick days each year during the continuance of this contract, without deduction of compensation.

12. Contract Terms to Be Exclusive. This written Agreement (a) supersedes any prior understandings or agreements between Cupp and Mackey relating to this subject matter, (b) constitutes the entire understanding between Cupp and Mackey

relating to this subject matter, (c) may be modified only in writing signed by Cupp and an authorized Mackey representative, (d) binds and inures to the benefit of successors and assigns of Mackey, (e) is not assignable by Cupp and (f) is governed by Cupp law. The parties acknowledge that neither of them has made any representation with respect to the subject matter of this Agreement nor any representations including its execution and delivery except such representations as are specifically set forth, and each of the parties hereto acknowledges that he or it has relied on his or its own judgment in entering into the Agreement. The parties further acknowledge that any statements or representations that may have been made to this date by either of them to the other are void and of no effect and that neither of them has relied on them in connection with his or its dealings with the other.

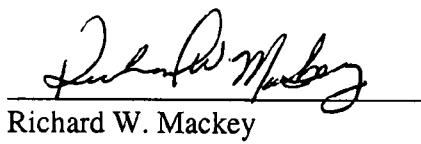
13. Assignment and Attornment. Mackey may assign his rights in this contract to a corporation controlled by him and Cupp agrees that she shall nevertheless be bound by the terms of this agreement notwithstanding Mackey assignment.

14. Severability. If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions nevertheless shall continue in full force and effect.

15. Notices. Any notices required or desired to be given shall be deemed sufficiently given when sent by registered or certified mail to Mackey at R.D. #3, Box 147, DuBois, Pennsylvania, 15801 and to Cupp at 500 Montogomery Street, Christiansburg, Virginia 24073 (or such address or addresses as she hereafter designates in writing to the Mackey).

16. Emergency Services. Mackey shall pay Cupp the standard emergency fee when Cupp attends after hour emergencies plus twenty (20%) percent of service rendered in said emergency cases.

IN WITNESS WHEREOF, the parties have executed this Agreement in several counterparts (each of which shall constitute an original) as of the day and year first above written.



Richard W. Mackey



Colleen Chick Cupp

FILED

08/21/2002 13:47:37

200  
Aug 14th  
1944  
Prob 800

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, : IN EQUITY  
Plaintiff :  
vs. : No. 02-1654-CD  
COLLEEN CHICK CUPP, : Type of Pleading: Petition for Special  
Defendant : Relief in the Nature of an Injunction  
: Pursuant to Rule 1531  
: Filed on behalf of: Richard W. Mackey,  
: Plaintiff.  
: Counsel of Record for this party:  
: THE HOPKINS LAW FIRM  
: DAVID J. HOPKINS, ESQUIRE  
: Attorney at Law  
: Supreme Court No. 42519  
: LEA ANN HELTZEL, ESQUIRE  
: Attorney at Law  
: Supreme Court No. 83998  
: 900 Beaver Drive  
: DuBois, Pennsylvania 15801  
: (814) 375-0300

**FILED**

OCT 22 2002

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, :  
Plaintiff :  
: :  
vs. : No.  
: :  
COLLEEN CHICK CUPP, :  
Defendant :  
:

**PETITION FOR SPECIAL RELIEF IN THE NATURE OF**  
**AN INJUNCTION PURSUANT TO RULE 1531**

AND NOW, comes Plaintiff, Richard W. Mackey, by and through his attorneys, The Hopkins Law Firm, and files the within Petition for Special Relief against the said Defendant and in support thereof states as follows:

1. Plaintiff is Richard W. Mackey, an adult individual whose address is R.D. #3, Box 147, DuBois, Pennsylvania 15801.
2. Plaintiff operates a business known as the Animal Hospital located on Shaffer Road near its intersection with Maple Avenue, DuBois, Clearfield County, Pennsylvania.
3. Defendant is Colleen Chick Cupp whose current address is 136 Scribner Avenue, DuBois, Pennsylvania 15801.
4. Both Plaintiff and Defendant are veterinarians licensed to practice veterinary medicine within the Commonwealth of Pennsylvania.
5. On February 28, 2001, Plaintiff and Defendant entered into an Executive Employment Agreement, a copy of which is attached hereto as Exhibit "A" and incorporated as if set forth at length herein.
6. Paragraph 8 of the Agreement states:

Noncompetition. During the full term of this Agreement and for twenty-four (24) months after its termination for any reason, Cupp shall not compete directly or indirectly with Mackey or any affiliate thereof within fifteen (15) miles of the Animal Hospital principal location (Shaffer Road, DuBois). Mackey and Cupp acknowledge and agree that since a remedy at law for any breach or attempted breach of this section shall be inadequate, Mackey shall be entitled to specific performance and injunctive and other equitable relief in case of such breach or attempted breach in addition to any other remedies that may exist at law. Both parties waive any requirement for the securing or posting of any bond in connection to the attainment of any such injunctive or other relief.

7. Paragraph 10 of said Executive Employment Agreement states:

Nondisclosure of Confidential Information Concerning Business. Cupp shall not at any time, whether during or after her employment under this agreement, either directly or indirectly, divulge, disclose, or communicate to any person, firm, or corporation any information relating to the business or affairs of Mackey which is confidential, proprietary, or not in the public domain. In the event of a breach of the provisions of this section, Mackey shall be entitled to an injunction restraining Cupp from such disclosure

8. Plaintiff has complied with all of the terms of the Executive Employment Agreement including paying Defendant a base gross salary of \$60,000.00 per year.

9. Notwithstanding the terms of the Executive Employment Agreement, on or about the 7<sup>th</sup> day of September, 2002, Defendant left the employ of Plaintiff and has now opened a veterinary practice in the former DuBois Harley Davidson building located on the Oklahoma Salem Road, DuBois, Pennsylvania. Said location is less than three (3) miles from the Animal Hospital's principal business location (Shaffer Road, DuBois, Pennsylvania).

10. Notwithstanding the Executive Employment Agreement, Defendant has contacted owners of pets Plaintiff routinely treats in an effort to help Defendant's practice grow and diminish Plaintiff's practice.

11. The actions of Defendant constitute breach of the February 28, 2001 Executive Employment Agreement in general and paragraph 8 and paragraph 10 in particular.

12. Both paragraph 8 and paragraph 10 provide that in the event of Defendant's breach, Plaintiff shall be entitled to specific performance and injunctive and other equitable relief in addition to other remedies that may exist at law. Paragraph 8 further provides that no bond is required of Plaintiff to bring this action.

13. To be enforceable, a restrictive covenant must meet three requirements: (1) the covenant must relate to the contract for employment; (2) the contract must be supported by adequate consideration; and (3) the covenant must be reasonably limited in both duration of time and geographical extent. Davis v. Warde, Inc. v. Tripodi, 420 Pa. Super. 450, 616 A.2d 1384 (1992), app. denied, 536 Pa. 624, 637 A.2d 284 (1993); see also, Geisinger Clinic v. Di Cuccio, 414 Pa. Super. 85, 606 A.2d 509 (1992), app. denied, 536 Pa. 625, 637 A.2d 285 (1993).

14. The restrictive covenant between Plaintiff and Defendant at issue was ancillary to the employment relationship and supported by valid consideration

15. The restrictive covenant was reasonably limited in both duration of time and geographical extent.

16. Defendant has interfered with Plaintiff's relationships with his patients. The threat of further patient losses to Plaintiff is real and substantial but impossible for accurate pecuniary determination.

17. Enforcement of this restrictive covenant will not impose an undue hardship on Defendant. Nor would the grant of an injunction have an adverse impact on the public interest as there is no dearth of qualified veterinarians in the restricted area.

18. The injury caused by a violation of a covenant not to compete is particularly difficult to quantify for damage purposes. Records Center Inc. v. Comprehensive Management Inc., 363 Pa. Super. 79, 525 A.2d 433 (1987). The Superior Court in Records Center stated:

"The great weight of modern authority is to the effect that one who has been or will be injured [by violation of a covenant not to compete] is ordinarily entitled to the equitable remedy of injunction....' ...The Pennsylvania Supreme Court has also stated that such covenants are *prima facie* enforceable in equity." Id. at 86, 525 A.2d at 436.

WHEREFORE, Plaintiff, Richard W. Mackey, requests this Honorable Court enter judgment in favor of Plaintiff and against Defendant for:

A. Preliminary injunctive and then permanent injunction prohibiting Defendant, Colleen Chick Cupp, from competing directly or indirectly with Plaintiff or any affiliate thereof within fifteen (15) miles of the Animal Hospital's principal business location (Shaffer Road, DuBois, Pennsylvania);

B. Order Defendant Colleen Chick Cupp to close her veterinary practice located at the former DuBois Harley Davidson motorcycle shop, Oklahoma/Salem Road, DuBois, Pennsylvania.

C. Require Defendant Colleen Chick Cupp to cooperate with Plaintiff to advise if each client of Plaintiff that Defendant's business is being closed.

D. Award Plaintiff compensatory damages for lost profits.

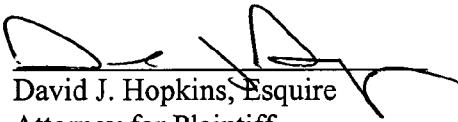
E. Award Plaintiff money damages equal to all money Defendant Colleen Chick Cupp has received since the opening of her veterinary practice in violation of the Executive Employment Agreement.

F. Order Defendant Colleen Chick Cupp to advise each client of Plaintiff that she has contacted that Defendant did so in violation of her employment agreement together with a recommendation that client contact Plaintiff for further treatment of their animals.

G. Pay Plaintiff's legal fees for the institution of this action.

H. Such other and further relief as the Court deems fair, just and equitable.

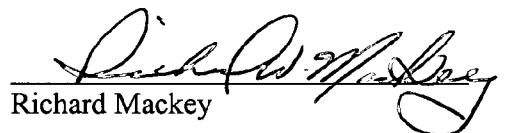
Respectfully submitted,



David J. Hopkins, Esquire  
Attorney for Plaintiff

V E R I F I C A T I O N

I hereby verify that the statements made in this pleading are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to Unsworn Falsification to Authorities.

  
Richard Mackey

## Executive Employment Agreement

THIS AGREEMENT is made this 28 day of February, 2001, by and between Richard W. Mackey whose address is R.D. #3, Box 147, DuBois, Pennsylvania 15801 (hereinafter "Mackey"), and Colleen Chick Cupp, whose address is 500 Montgomery Street, Christiansburg, Virginia 24073 (hereinafter "Cupp").

Mackey, to obtain the benefit of Cupp's experience in veterinarian medicine and to reasonably assure continuity of service and noncompetition with Mackey, wishes to employ, and Cupp is willing to be employed by Mackey, on the terms, covenants, and conditions set forth below.

Now, therefore, in consideration of the mutual covenants contained in this agreement, it is agreed as follows:

1. **Nature of Employment.** Subject to the supervision and pursuant to the orders, advice and directions of Mackey, Cupp will be employed as veterinarian at the Animal Hospital of DuBois and will have such duties as normally apply to such a position and as may be assigned to her from time to time by Mackey. Cupp agrees to devote her full time and attention to such duties. Cupp represents and warrants to the Mackey that she is presently subject to no other employment contract, written or oral.

2. **Base Compensation.** In consideration of the services to be rendered by Cupp, the Mackey will pay to Cupp a base salary in the gross amount of \$60,000 per year, payable in equal weekly installments.

3. **Vacation, Holiday and Sick Days.** Cupp shall be entitled to an aggregate of two (2) weeks annual paid vacation, to be scheduled consistent with business needs.

Cupp shall be entitled to six (6) paid holidays. Cupp is also allotted up to five (5) sick days each year during the continuance of this contract, without deduction of compensation.

4. Continuing Education. Mackey shall pay Cupp's continuing education requirements and Cupp shall be entitled to an aggregate of five (5) days each year to attend said continuing education.

5. Health Insurance. Mackey shall provide health insurance benefits for Cupp equivalent to Blue Cross Select Blue. Cupp may add her family members to said health insurance plan at her expense.

6. Days and Hours of Employment. Cupp shall work Monday, Tuesday, Thursday and Friday for one (1) week and Tuesday, Wednesday, Thursday and Friday on the alternating week and at other times that may be required for the efficient operation of Mackey's business's. Cupp shall be at the business the following hours:

Monday 9:00 a.m. – 6:00 p.m.  
Tuesday 9:00 a.m. – 5:00 p.m.  
Wednesday 9:00 a.m. – 4:00 p.m.  
Thursday 9:00 a.m. – 6:00 p.m.  
Friday 9:00 a.m. – 5:00 p.m. and at such other hours as the office may be open.

7. Termination of Position. The Mackey may, at its option and with or without cause, terminate Cupp's position which case the Mackey will give Cupp at least 30 days prior written notice of its intent to terminate her.

8. Noncompetition. During the full term of this Agreement and for twenty-four (24) months after its termination for any reason, Cupp shall not compete directly or indirectly with Mackey or any affiliate thereof within fifteen (15) miles of The Animal Hospital principal business location (Shaffer Road, DuBois). Mackey and Cupp

acknowledge and agree that since a remedy at law for any breach or attempted breach of the provisions of this section shall be inadequate, Mackey shall be entitled to specific performance and injunctive or other equitable relief in case of any such breach or attempted breach, in addition to whatever other remedies may exist at law. Both parties also waive any requirement for the securing or posting of any bond in connection with the attainment of any such injunctive or other equitable relief.

9. Consequences of Death. If Cupp should die during the term of this Agreement, this Agreement shall immediately terminate on the day of her death as if such day were the day fixed for termination.

10. Nondisclosure of Confidential Information Concerning Business. Cupp shall not at any time, whether during or after her employment under this agreement, either directly or indirectly, divulge, disclose, or communicate to any person, firm, or corporation any information relating to the business or affairs of Mackey which is confidential, proprietary, or not in the public domain. In the event of a breach of the provisions of this section, Mackey shall be entitled to an injunction restraining Cupp from such disclosure.

11. Vacation, Holiday and Sick Days. Cupp shall be entitled to an aggregate of two (2) weeks annual paid vacation, to be scheduled consistent with business needs. Cupp is also allotted up to five (5) sick days each year during the continuance of this contract, without deduction of compensation.

12. Contract Terms to Be Exclusive. This written Agreement (a) supersedes any prior understandings or agreements between Cupp and Mackey relating to this subject matter, (b) constitutes the entire understanding between Cupp and Mackey

relating to this subject matter, (c) may be modified only in writing signed by Cupp and an authorized Mackey representative, (d) binds and inures to the benefit of successors and assigns of Mackey, (e) is not assignable by Cupp and (f) is governed by Cupp law. The parties acknowledge that neither of them has made any representation with respect to the subject matter of this Agreement nor any representations including its execution and delivery except such representations as are specifically set forth, and each of the parties hereto acknowledges that he or it has relied on his or its own judgment in entering into the Agreement. The parties further acknowledge that any statements or representations that may have been made to this date by either of them to the other are void and of no effect and that neither of them has relied on them in connection with his or its dealings with the other.

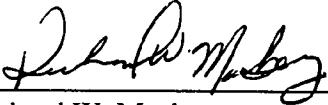
13. Assignment and Attornment. Mackey may assign his rights in this contract to a corporation controlled by him and Cupp agrees that she shall nevertheless be bound by the terms of this agreement notwithstanding Mackey assignment.

14. Severability. If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions nevertheless shall continue in full force and effect.

15. Notices. Any notices required or desired to be given shall be deemed sufficiently given when sent by registered or certified mail to Mackey at R.D. #3, Box 147, DuBois, Pennsylvania, 15801 and to Cupp at 500 Montogomery Street, Christiansburg, Virginia 24073 (or such address or addresses as she hereafter designates in writing to the Mackey).

16. Emergency Services. Mackey shall pay Cupp the standard emergency fee when Cupp attends after hour emergencies plus twenty (20%) percent of service rendered in said emergency cases.

IN WITNESS WHEREOF, the parties have executed this Agreement in several counterparts (each of which shall constitute an original) as of the day and year first above written.

  
Richard W. Mackey

  
Colleen Chick Cupp

FILED

2cc

081149-73H  
Oct 22 2002

Aug Hartzel

William A. Shaw  
Prothonotary

WAS

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

RICHARD W. MACKEY

vs.

COLLEEN CHICK CUPP

:  
:  
:  
: No. 02-1654-CD  
:  
:

**FILED**

OCT 25 2002

William A. Shaw  
Prothonotary

**ORDER**

NOW, this 25 day of October, 2002, upon consideration of Plaintiff's Complaint and Injunction, a Rule is hereby issued upon Defendant to Appear and Show Cause why the Petition should not be granted. Status Conference is scheduled for the 30 day of October, 2002 at 8:30 P.M. in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA. Hearing is scheduled the 12 day of December, 2002, at 1:30 P.M. in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

BY THE COURT

JOHN K. REILLY, JR.  
President Judge

**FILED** 1cc Marcy  
014:08762 2cc Atty Hopkins  
OCT 25 2002

W<sup>MA</sup> William A. Shaw  
Prothonotary  
R

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY,  
Plaintiff

vs.

No. 02-16521-C

COLLEEN CHICK CUPP,  
Defendant

OCT 25 2002

William A. Shaw  
Prothonotary

**TEMPORARY ORDER**

AND NOW, this matter having come before the Court and the Court having considered the Complaint filed by Plaintiff, Richard W. Mackey, and the Petition for Special Relief in the Nature of an Injunction Pursuant to Rule 1531; and the Court having further considered that the Executive Employment Agreement dated February 28, 2001 provides that both parties waived any requirement for the securing or posting of any bond in connection with the attainment of injunctive and equitable relief as requested herein; and it appearing that Defendant Colleen Chick Cupp has contacted customers and clients of Plaintiff Richard W. Mackey and if allowed to continue could permanently and irreparably damage Plaintiff's business; and for good cause shown;

It is this 24 day of October, 2002 ORDERED and ADJUDGED as follows:

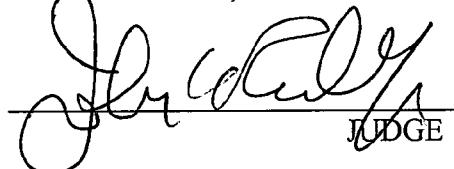
1. Defendant Colleen Chick Cupp, and any individual or entity acting on her behalf is prohibited from contacting in any manner the customers of Plaintiff Richard W. Mackey;

2. A hearing shall be held on the 12 day of December, 2002 to consider Plaintiff's request for a preliminary injunction. Defendant Colleen Chick Cupp is ordered to file a written response on or before the 7th day of November, 2002.

3. Plaintiff Richard W. Mackey need not post a bond.

4. Any party may move at any time to dissolve this injunction.

BY THE COURT,



John Colly  
JUDGE

**FILED** 1 cc Marcy  
01408 2 cc Abby Hopkins  
OCT 25 2002

b7c William A. Shaw  
Pretrial  
9/26

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION

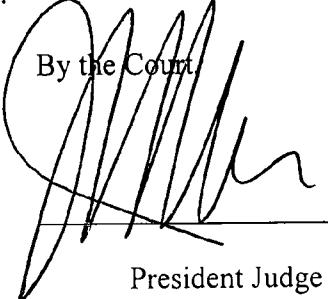
RICHARD W. MACKEY : :

-vs- : No. 02 - 1654 - CD

COLLEEN CHICK CUPP : :

**ORDER**

NOW, this 30<sup>th</sup> day of October, 2002, this being the day and date set for hearing into Plaintiff's Petition for Temporary Injunction, Defendant having failed to appear either in person or by counsel, it is the ORDER of this Court that said Petition be and is hereby granted and Defendant Colleen Chick Cupp and any individual or entity acting on her behalf is prohibited from contacting in any manner the customers of Plaintiff Richard W. Mackey pending hearing on the merits scheduled for December 12, 2002. Further, Defendant shall personally advise all of her employees of the contents of this Order. Plaintiff Richard W. Mackey shall not be required to post bond.

By the Court  
  
President Judge

**FILED**

OCT 30 2002

William A. Shaw  
Prothonotary

**FILED**

cc Atty Hopkins  
O.P. - 2683 H 1cc 2ef-136 Sanjour  
OCT 30 2002 Ave. DuBois

William A. Shaw  
Prothonotary

*ESB*

*ESB*

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNSYLVANIA

RICHARD W. MACKEY,  
Plaintiff

vs.

COLLEEN CHICK CUPP,  
Defendant

CIVIL ACTION - LAW

No. 02-1654-C.D.

Type of pleading:

**ANSWER TO PLAINTIFF'S  
COMPLAINT AND INJUNCTION  
NEW MATTER AND  
COUNTERCLAIM**

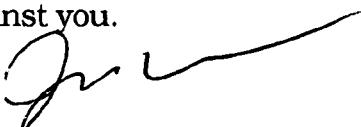
Filed on behalf of:

**DEFENDANT**

Counsel of record for this  
party:

Jeffrey S. DuBois  
Supreme Court No. 62074  
Hanak, Guido and Taladay  
498 Jeffers St., P. O. Box 487  
DuBois, PA 15801

You are hereby notified to plead  
to the within pleading within  
twenty (20) days hereof or a  
default judgment may be entered  
against you.

  
\_\_\_\_\_  
Jeffrey S. DuBois, Esq.  
Attorney for Defendant

**FILED**

NOV 07 2002

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA

RICHARD W. MACKEY,  
Plaintiff

vs.

No. 02-1654-CD

COLLEEN CHICK CUPP,  
Defendant

ANSWER TO PLAINTIFF'S  
COMPLAINT AND INJUNCTION  
NEW MATTER AND COUNTERCLAIM

AND NOW, comes the Defendant, COLLEEN CHICK CUPP, by and through her attorneys, HANAK, GUIDO AND TALADAY, who files this Answer to Plaintiff's Complaint and Injunction, New Matter and Counterclaim and in support thereof avers the following:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. No responsive pleading is required as the same is simply a portion of an entire document which must be read in its entirety and viewed in light of the parties' circumstances, actions and conduct, and their complicity with the same.
7. No responsive pleading is required as the same is simply a portion of an entire document which must be read in its entirety and

8. Denied. It is specifically denied that Plaintiff has complied with all the terms in the Employment Agreement and on the contrary, Plaintiff has breached numerous provisions as set forth herein and in Defendant's New Matter.

9. Denied. It is denied that on or about September 7, 2002, Defendant left the employ of Plaintiff. On the contrary, on or about the same date, Plaintiff terminated not only three employees from his business, but also because of past practices and conduct of Plaintiff, as stated above, made it nearly impossible and impractical for Defendant to continue to work there and consequently Plaintiff effectively terminated Defendant also. It is admitted that Defendant is in the process of opening up a veterinary practice, but Defendant was forced to do the same for the reasons set forth herein and in Defendant's New Matter.

10. It is denied that Defendant has contacted owners of pets Plaintiff has treated in the past, and on the contrary, Plaintiff has only had a very limited contact with any clients which may have seen Plaintiff in the past, and all of said contact was initiated by said clients and not Defendant.

11. Denied. The actions of the Defendant do not constitute a breach of the Employment Agreement, and on the contrary, as set forth herein and in Defendant's New Matter, Plaintiff has breached the Employment Agreement and other agreements between the parties and Defendant, not Plaintiff, is entitled to relief with the Court.

12. Admitted in part and denied in part. It is admitted that Paragraphs 8 and 10 of the Employment Agreement provide for

certain relief, however, it is denied that Plaintiff is entitled to said relief as Plaintiff has breached the agreement and other agreements between the parties. It is Defendant, and not Plaintiff, who is entitled to relief before the Court.

WHEREFORE, Defendant respectfully requests this Honorable Court to dismiss Plaintiff's Complaint in its entirety and award judgment in favor of Defendant as requested herein and against Plaintiff.

**NEW MATTER**

13. Paragraphs 1 through 12 inclusive are incorporated herein by reference.

14. In the summer/fall of 2000, Plaintiff initiated contact with Defendant to have Defendant come work with Plaintiff at his office.

15. At that time, Defendant was practicing in the State of Virginia.

16. The point of Plaintiff contacting Defendant was not only to have Defendant to come and work with Plaintiff, but more importantly to have Defendant eventually purchase Plaintiff's business, specifically within 2 years.

17. Thus, Defendant, in reliance on Plaintiff's assurance to sell his business to Defendant, moved herself and her family from Virginia to Pennsylvania.

18. The parties agreed to the same and on or about February 28, 2001, Defendant came to work for Plaintiff.

19. As set forth in Plaintiff's Petition for Special Relief, the parties entered into an Executive Employment Agreement on or about February 28, 2001.

20. Since the execution of that Agreement and since Defendant came to work for Plaintiff, Plaintiff has failed to abide by the terms of their agreement, failed to allow Defendant to purchase Plaintiff's business, and has breached numerous terms contained in the Employment Agreement.

21. To begin with, on or about January of 2002, Plaintiff and Defendant entered into negotiations for Defendant to purchase Plaintiff's practice.

22. As part of her terms of the Agreement, Defendant applied for and secured financing in the amount of \$290,000.00, obtained approval and acceptance by the Small Business Administration, and obtained all the necessary loans, certifications and other requirements to purchase Plaintiff's business at the agreed upon price.

23. Additionally, as part of Defendant's requirements for securing the financing, she was obligated to put \$3,000.00 as a non-refundable deposit to secure the SBA loan.

24. Despite Defendant complying with all the requirements necessary on her end to purchase Plaintiff's business, Plaintiff failed to complete his requirements with respect to the purchasing of his business.

25. Despite the fact that numerous extensions and additional offers or variations of offers were set forth by Defendant and

Defendant's representatives, Plaintiff could not complete the sale of the business.

26. As a consequence, Plaintiff is in direct violation and failed to comply with the entire essence of why Defendant joined Plaintiff in Plaintiff's business.

27. Therefore, Plaintiff cannot hide behind the Executive Employment Agreement and try to assert its terms when the very reason that Defendant came to work for Plaintiff, the purchase of the business, was rendered futile by Plaintiff's inability to complete said purchase.

28. Further, Plaintiff breached numerous aspects of the Executive Employment Agreement with Defendant.

29. First, Plaintiff failed to have unemployment compensation, as is required by law, on Defendant.

30. Next, during the course of employment and without the knowledge of the Defendant, Plaintiff failed to pay the insurance premiums on Defendant's health insurance.

31. As a consequence, Defendant's health insurance was canceled, her husband and children turned away for health care when applied for, and she was forced to obtain different insurance.

32. Plaintiff's failure to pay the health insurance premiums, while an obvious breach of the agreement, is even more egregious because of the fact he took out approximately \$86.00 from Defendant's paycheck each and every paycheck to pay for the added cost of Defendant's family on the health insurance premiums.

33. Therefore, even though Plaintiff was taking monies out of Defendant's paycheck, each and every week, Plaintiff failed to use these amounts for the health insurance premiums but kept them for himself. Such conduct is not only breach of the agreement, but outrageous and unlawful conduct.

34. Additionally, Plaintiff failed to pay the payroll taxes on Defendant's wages, subjecting Defendant to inquiries from the Internal Revenue Service.

35. Also, Plaintiff failed to pay, as is required under the Agreement, Defendant in a reasonably timely manner payments for her emergency work, as said payments were almost 9 months late, despite repeated requests by Defendant for the same.

36. Thereafter, Defendant was only paid, as set forth above, well after the time said were due and said amounts were only received by Defendant the same week Plaintiff filed this present action.

37. The above facts, along with the other breaches set forth by Plaintiff herein, show Plaintiff's lack of good faith in this action.

38. Further, Plaintiff's failure to keep current with creditors and suppliers, made Defendant's work at Plaintiff's business extremely impracticable and difficult, as Plaintiff could not get many of the standard and much needed medications to be used in the practice for the various animals as Plaintiff was delinquent in his credit with most suppliers and most of the same suppliers refused to provide these much needed medications.

39. Moreover, as is required by the Agreement, Plaintiff failed to pay Defendant or reimburse her for continuing legal education costs she incurred while under his employment.

40. Finally, during the entire course of Defendant's employment with Plaintiff, Defendant, along with other employees at the business, frequently had trouble getting paid as Plaintiff would routinely hold their checks and not submit the checks to them on their regularly scheduled payday and checks were routinely received late by Defendant and other employees, or in the alternative, Plaintiff would often times ask that the aforementioned employees not cash the checks for several days.

41. Additionally, on a number of occasions Plaintiff made the threat to Defendant, as well as other employees, that at some point in time, he was going to fire or get rid of all of them.

42. Finally, on or about September 7, 2002, in light of the above, Plaintiff effectively terminated not only Defendant but a number of the employees of Plaintiff's business, forcing Defendant out of a job without cause.

43. As a consequence, and contrary to Plaintiff's Petition, Plaintiff has not complied with all the terms of the Executive Employment Agreement, while the Defendant has and the Plaintiff should be barred from enforcing any of the terms of said agreement.

44. Additionally, contrary to Plaintiff's petition, Defendant has not contacted owner's of pets Plaintiff routinely treated in an effort to

help her practice, and on the contrary, most of the patients seen by Defendant, were not clients of the Plaintiff.

45. Moreover, any prior clients of Plaintiff which Defendant has seen, have been the result of contact initiated by said clients and not initiated by Defendant.

46. Plaintiff comes before this Honorable Court with unclean hands and cannot avail himself of the alleged agreement between the parties.

47. Contrary to Plaintiff's agreement, because of the fact Defendant detrimentally relied on the promises set forth by Plaintiff and moved herself and her family from Virginia to Pennsylvania to purchase Plaintiff's practice, and because of the fact, through no fault of her own and to the complete fault of the Defendant, could not purchase Plaintiff's practice and thereafter was effectively fired by Plaintiff, great hardship would come on Defendant by enforcing the restrictive covenant in this particular case.

48. Additionally, there would be an adverse impact on the area in the public health interest if the restrictive covenant would be enforced as there is a shortage of qualified veterinarians in the area due to the fact of retirement of local veterinarians as well as the additional fact that a local veterinarian's husband is seriously ill and as a consequence she has cut back her hours and office visits dramatically.

49. Therefore, enforcement of the restrictive covenant would not be in the best interest of the public as the same would cause a

public health hazard as there is a dire need for veterinarian care in the area.

50. This is especially true in light of the fact, Plaintiff, for some inexplicable reason, has shut down his business as of on or about November 1, 2002, and upon information received, will not open up the office until approximately mid-December.

51. In light of the above, and all the breaches and wrongful conduct of the Plaintiff, and because of the detrimental reliance by Defendant on Plaintiff's promises, Plaintiff is estopped from asserting any relief in the agreement.

52. Additionally, because of the statements set forth herein, Defendant is justified in operating her own business.

WHEREFORE, Defendant respectfully requests this Honorable Court to dismiss Plaintiff's Complaint in its entirety and award judgment in favor of Defendant as requested herein and against Plaintiff.

#### **COUNTERCLAIM**

53. Paragraphs through 1 through 52 inclusive are incorporated herein by reference.

54. Defendant, COLLEEN CUPP, is an adult individual with an address of 136 Scribner Avenue, DuBois, Pennsylvania, 15801.

55. Plaintiff, RICHARD W. MACKEY, is an adult individual with a business address of R.D. #3, Box 147, DuBois, Pennsylvania, 15801.

56. Plaintiff is liable to Defendant in an amount in excess of Twenty-five Thousand and 00/100 (\$25,000.00) Dollars for breach of

the agreements between the parties, as well as his outrageous and unlawful conduct with Defendant.

57. Specifically, Plaintiff and Defendant agreed, that in consideration of Defendant moving herself and her family from Virginia to Pennsylvania, that Defendant would purchase Plaintiff's business at an agreed upon price.

58. Defendant, in moving her family to Pennsylvania, relied on these promises by Plaintiff.

59. Once Defendant assumed employment with Plaintiff, and negotiations began for the purchase of the business, an agreed upon price was had between the parties for \$290,000.00.

60. Thereafter, Defendant secured financing in said amount and all necessary approvals, as well as submitting a \$3,000.00 non-refundable deposit to the lender to secure the loan.

61. Despite the fact Defendant complied with all her necessary requirements for the loan, Plaintiff failed to comply with his requirements and failed to allow Defendant to purchase the business.

62. Next, under the parties' agreement, Plaintiff is required to provide health insurance for Defendant and Defendant can further get health insurance for her entire family as long as she pays the difference between costs for herself and the family.

63. Despite the fact Plaintiff took out approximately \$86.00 from Defendant's paycheck each and every paycheck, Plaintiff failed to pay the necessary health premiums for Defendant and her family

causing Defendant's insurance to be canceled and thereby causing Defendant and her family great inconvenience, harm and expense.

64. Plaintiff also failed to pay Defendant's costs and expenses with respect to her continuing legal education as is required under the Employment Agreement.

65. Additionally, Plaintiff failed to pay Defendant her one week's vacation pay after he effectively terminated her on or about September 7, 2002.

66. Plaintiff has caused Defendant and her family extreme harm and detriment, as Defendant detrimentally relied on Plaintiff's promise to purchase the business and in said reliance moved herself and her family from Virginia, where they both were gainfully employed, to Pennsylvania, and after September 7, 2002, as a result of Plaintiff's actions were rendered unemployed.

67. The conduct of the Plaintiff herein is reckless, outrageous, malicious, and unlawful.

WHEREFORE, Defendant respectfully requests that judgment be entered in her favor and against Plaintiff on Defendant's Counterclaim in an amount in excess of Twenty-five Thousand and 00/100 (\$25,000.00) Dollars, together with court costs and attorney's fees, and any other relief this Court deems just and equitable.

Respectfully submitted,



---

Jeffrey S. DuBois  
Attorney for Plaintiff

**VERIFICATION**

I, COLLEEN CHICK CUPP, verify that the statements in the foregoing Answer to Plaintiff's Complaint and Injunction are true and correct to the best of my knowledge, information and belief.

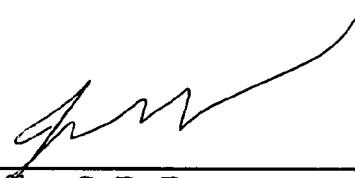
This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn fabrication to authorities, which provides that if I make knowingly false averments, I may be subject to criminal penalties.

  
\_\_\_\_\_  
Colleen Chick Cupp

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of November, 2002, I mailed a true and correct copy of the within Answer to Plaintiff's Complaint and Injunction New Matter and Counterclaim, by first class mail, postage prepaid to the following:

David J. Hopkins, Esq.  
900 Beaver Drive  
DuBois, PA 15801



---

Jeffrey S. DuBois

**FILED**

1cc  
Atty Dubois

10:38 AM  
NOV 07 2002

*WS*  
William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNSYLVANIA

RICHARD W. MACKEY,  
Plaintiff

vs.

COLLEEN CHICK CUPP,  
Defendant

CIVIL ACTION - LAW

No. 02-1654-C.D.

Type of pleading:

**DEFENDANT'S RESPONSE  
TO PLAINTIFF'S PETITION  
FOR SPECIAL RELIEF**

Filed on behalf of:

**DEFENDANT**

Counsel of record for this  
party:

Jeffrey S. DuBois  
Supreme Court No. 62074  
Hanak, Guido and Taladay  
498 Jeffers St., P. O. Box 487  
DuBois, PA 15801

**FILED**

NOV 07 2002

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA

RICHARD W. MACKEY,  
Plaintiff

vs.

No. 02-1654-CD

COLLEEN CHICK CUPP,  
Defendant

**DEFENDANT'S RESPONSE TO**  
**PLAINTIFF'S PETITION FOR SPECIAL RELIEF**

AND NOW, comes the Defendant, COLLEEN CHICK CUPP, by and through her attorneys, HANAK, GUIDO AND TALADAY, who files this Response to Plaintiff's Petition for Special Relief, and in support thereof avers the following:

1. Defendant, COLLEEN CHICK CUPP, is an adult individual with an address of 136 Scribner Avenue, DuBois, Pennsylvania, 15801.
2. Plaintiff, RICHARD W. MACKEY, is an adult individual with a business address of R.D. #3, Box 147, DuBois, Pennsylvania, 15801.
3. Plaintiff has a veterinary practice located on Shaffer Road, known as the Animal Hospital, located in DuBois, Clearfield County, Pennsylvania.
4. Both Plaintiff and Defendant are veterinarians licensed to practice veterinary medicine within the Commonwealth of Pennsylvania.
5. In the summer/fall of 2000, Plaintiff initiated contact with Defendant to have Defendant come work with Plaintiff at his office.

6. At that time, Defendant was practicing in the State of Virginia.

7. The point of Plaintiff contacting Defendant was not only to have Defendant to come and work with Plaintiff, but more importantly to have Defendant eventually purchase Plaintiff's business, specifically within 2 years.

8. Thus, Defendant, in reliance on Plaintiff's assurance to sell his business to Defendant, moved herself and her family from Virginia to Pennsylvania.

9. The parties agreed to the same and on or about February 28, 2001, Defendant came to work for Plaintiff.

10. As set forth in Plaintiff's Petition for Special Relief, the parties entered into an Executive Employment Agreement on or about February 28, 2001.

11. Since the execution of that Agreement and since Defendant came to work for Plaintiff, Plaintiff has failed to abide by the terms of their agreement, failed to allow Defendant to purchase Plaintiff's business, and has breached numerous terms contained in the Employment Agreement.

12. To begin with, on or about January of 2002, Plaintiff and Defendant entered into negotiations for Defendant to purchase of Plaintiff's practice.

13. As part of her terms of the Agreement, Defendant applied for and secured financing in the amount of \$290,000.00, obtained approval and acceptance by the Small Business Administration, and

obtained all the necessary loans, certifications and other requirements to purchase Plaintiff's business at the agreed upon price.

14. Additionally, as part of Defendant's requirements for securing the financing, she was obligated to put \$3,000.00 as non-refundable deposit to secure the SBA loan.

15. Despite Defendant complying with all the requirements necessary on her end to purchase Plaintiff's business, Plaintiff failed to complete his requirements with respect to the purchasing of his business.

16. Despite the fact that numerous extensions and additional offers or variations of offers were set forth by Defendant and Defendant's representatives, Plaintiff could not complete the sale of the business.

17. As a consequence, Plaintiff is in direct violation and failed to comply with the entire essence of why Defendant joined Plaintiff in Plaintiff's business.

18. Therefore, Plaintiff cannot hide behind the Executive Employment Agreement and try to assert its terms when the very reason that Defendant came to work for Plaintiff, the purchase of the business, was rendered futile by Plaintiff's inability to complete said purchase.

19. Further, Plaintiff breached numerous aspects of the Executive Employment Agreement with Defendant.

20. First, Plaintiff failed to have unemployment compensation, as is required by law, on Defendant.

21. Next, during the course of employment, and without the knowledge of the Defendant, Plaintiff failed to pay the insurance premiums on Defendant's health insurance.

22. As a consequence, Defendant's health insurance was canceled, her husband and children turned away for health care when applied for, and she was forced to obtain different insurance.

23. Plaintiff's failure to pay the health insurance premiums, while an obvious breach of the agreement, is even more egregious because of the fact Plaintiff took out approximately \$86.00 from Defendant's paycheck each and every paycheck to pay for the added cost of Defendant's family on the health insurance premiums.

24. Therefore, even though Plaintiff was taking monies out of Defendant's paycheck, each and every week, Plaintiff failed to use these amounts for the health insurance premiums but kept them for himself. Such conduct is not only a breach of the agreement, but outrageous and unlawful conduct.

25. Additionally, Plaintiff failed to pay the payroll taxes on Defendant's wages, subjecting Defendant to inquiries from the Internal Revenue Service.

26. Also, Plaintiff failed to pay, as is required under the Agreement, Defendant in a reasonably timely manner payments for her emergency work, as said payments were almost 9 months late, despite repeated requests by Defendant for the same.

27. Thereafter, Defendant was only paid, as set forth above, well after the time said were due and said amounts were only received by Defendant the same week Plaintiff filed this present action.

28. The above facts, along with the other breaches set forth by Plaintiff herein, show Plaintiff's lack of good faith in this action.

29. Further, Plaintiff's failure to keep current with creditors and suppliers, made Defendant's work at Plaintiff's business extremely impracticable and difficult, as Plaintiff could not get many of the standard and much needed medications to be used in the practice for the various animals as Plaintiff was delinquent in his credit with most suppliers and most of the same suppliers refused to provide these much needed medications.

30. Moreover, as is required by the Agreement, Plaintiff failed to pay Defendant or reimburse her for continuing legal education costs she incurred while under his employment.

31. Finally, during the entire course of Defendant's employment with Plaintiff, Defendant, along with other employees at the business, frequently had trouble getting paid as Plaintiff would routinely hold their checks and not submit the checks to them on their regularly scheduled payday and checks were routinely received late by Defendant and other employees, or in the alternative, Plaintiff would often times ask that the aforementioned employees not cash the checks for several days.

32. Additionally, on a number of occasions Plaintiff made the threat to Defendant as well as other employees, that at some point in time he was going to fire or get rid of all of them.

33. Finally, on or about September 7, 2002, in light of the above, Plaintiff effectively terminated not only Defendant but a number of the employees of Plaintiff's business, forcing Defendant out of a job without cause.

34. As a consequence, and contrary to Plaintiff's Petition, Plaintiff has not complied with all the terms of the Executive Employment Agreement, while the Defendant has and the Plaintiff should be barred from enforcing any of the terms of said agreement.

35. Additionally, contrary to Plaintiff's petition, Defendant has not contacted owner's of pets Plaintiff routinely treated in an effort to help her practice, and on the contrary, most of the patients seen by Defendant, were not clients of the Plaintiff.

37. Moreover, any prior clients of Plaintiff which Defendant has seen, have been the result of contact initiated by said clients and not initiated by Defendant.

38. Plaintiff comes before this Honorable Court with unclean hands and cannot avail himself of the alleged agreement between the parties.

39. Contrary to Plaintiff's agreement, because of the fact Defendant detrimentally relied on the promises set forth by Plaintiff and moved herself and her family from Virginia to Pennsylvania to purchase Plaintiff's practice, and because of the fact, through no fault

of her own and to the complete fault of the Defendant, could not purchase Plaintiff's practice, and thereafter was effectively fired by Plaintiff, great hardship would come on Defendant by enforcing the restrictive covenant in this particular case.

40. Additionally, there would be an adverse impact on the area in the public health interest if the restrictive covenant would be enforced as there is a shortage of qualified veterinarians in the area due to the fact of retirement of local veterinarians as well as the additional fact that a local veterinarian's husband is seriously ill and as a consequence she has cut back her hours and office visits dramatically.

41. Therefore, enforcement of the restrictive covenant would not be in the best interest of the public as the same would cause a public health hazard as there is a dire need for veterinarian care in the area.

42. This is especially true in light of the fact, Plaintiff, for some inexplicable reason, has shut down his business as of on or about November 1, 2002, and upon information received, will not open up the office until approximately mid-December.

WHEREFORE, Defendant respectfully requests this Honorable Court to dismiss Plaintiff's Petition for Special Relief in its entirety and award judgment in favor of Defendant.

Respectfully submitted,



---

Jeffrey S. DuBois  
Attorney for Plaintiff

**VERIFICATION**

I, COLLEEN CHICK CUPP, verify that the statements in the foregoing Response to Plaintiff's Petition for Special Relief are true and correct to the best of my knowledge, information and belief.

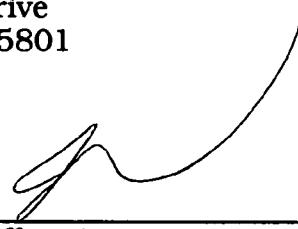
This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn fabrication to authorities, which provides that if I make knowingly false averments, I may be subject to criminal penalties.

  
\_\_\_\_\_  
Colleen Chick Cupp

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of November, 2002, I mailed a true and correct copy of the within Defendant's Response to Plaintiff's Petition for Special Relief, by first class mail, postage prepaid to the following:

David J. Hopkins, Esq.  
900 Beaver Drive  
DuBois, PA 15801



---

Jeffrey S. DuBois

**FILED**

1cc

Nov 39 ~~2002~~  
Nov 07 2002

Ang Dubois

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY,  
Plaintiff : IN EQUITY  
vs. :  
COLLEEN CHICK CUPP,  
Defendant : No. 02-1654 C.D.  
: Type of Pleading: Preliminary Objections  
: to Defendant's Counterclaim  
: Filed on behalf of: Richard W. Mackey,  
: Plaintiff.  
: Counsel of Record for this party:  
: THE HOPKINS LAW FIRM  
: DAVID J. HOPKINS, ESQUIRE  
: Attorney at Law  
: Supreme Court No. 42519  
: LEA ANN HELTZEL, ESQUIRE  
: Attorney at Law  
: Supreme Court No. 83998  
: 900 Beaver Drive  
: DuBois, Pennsylvania 15801  
: (814) 375-0300

RECEIVED  
CIVIL DIVISION  
CLEARFIELD COUNTY PROTHONOTARY

APR 22 2002

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, :  
Plaintiff :  
: vs. : No. 02-1654 C.D.  
: :  
COLLEEN CHICK CUPP, :  
Defendant :  
:

**PRELIMINARY OBJECTIONS TO DEFENDANT'S COUNTERCLAIM**

AND NOW, comes Plaintiff, Richard W. Mackey, by and through his attorneys, The Hopkins Law Firm, and files the within Preliminary Objections to Defendant's Counterclaim and in support thereof avers as follows:

**PRELIMINARY OBJECTION I**

**FAILURE TO COMPLY WITH Pa.R.C.P. §1019**

1. Defendant filed a Counterclaim alleging Plaintiffs' breached the agreements between the parties.

2. Paragraph 56 of the Counterclaim states:

Plaintiff is liable to Defendant in an amount in excess of Twenty-five Thousand and 00/100 (\$25,000.00) for breach of the agreements between the parties, as well as his outrageous and unlawful conduct with Defendant.

3. Paragraph 57 through 66 apparently sets for the alleged breaches by Plaintiff of the parties' contract(s). Nowhere in Defendant's Counterclaim does it identify Defendant's damages.

4. Pa.R.C.P. §1019(f) states:

Averments of time, place and items of special damages must be specifically stated.

5. Pa.R.C.P. §1019(h) states:

When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

6. Pa.R.C.P. §1019(i) states:

When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient to so state, together with the reason, to set forth the substance in writing.

7. Defendant has violated Pa.R.C.P. §1019(f) by failing to specifically set forth the items of special damages.

8. Defendant has violated Pa.R.C.P. §1019(h) by failing to identify whether the contract(s) Plaintiff is alleged to have breached were oral or written.

9. Defendant has violated Pa.R.C.P. §1019(i) by failing to attach a photocopy of any written agreement(s) between Plaintiff and Defendant.

WHEREFORE, Plaintiff's Counterclaim should be dismissed for failure to comply with the Rules of Court.

Respectfully submitted,



David J. Hopkins, Esquire

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, :  
Plaintiff :  
vs. : No. 02-1654 C.D.  
COLLEEN CHICK CUPP, :  
Defendant :  
:

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Plaintiff's Preliminary Objections to Defendant's Counterclaim, filed on behalf of Richard W. Mackey, was forwarding by first class mail, postage prepaid, on the 22nd day of November, 2002, to all counsel of record, addressed as follows:

Jeffrey S. DuBois, Esquire  
Hanak, Guido and Taladay  
498 Jeffers Street  
P.O. Box 487  
DuBois, PA 15801

  
David J. Hopkins, Esquire  
Attorney for Plaintiff

**FILED**  
NOV 10 4 48 PM '02  
CC  
NOV 22 2002  
FAS

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

RICHARD W. MACKEY

:

VS.

: NO. 02-1654-CD

COLLEEN CHICK CUPP

:

O R D E R

NOW, this 2nd day of January, 2003, following testimony in the above-captioned matter on Plaintiff's Petition for Permanent Injunction, it is the ORDER of this Court that counsel for Plaintiff file a brief within twenty (20) days from this date, and Defendant given twenty (20) days thereafter to respond in kind.

BY THE COURT,

President Judge

**FILED**

JAN 03 2003

William A. Shaw  
Prothonotary

**FILED**

2 cc Atty Hopkins

01/10:40 AM 2 cc Atty Dubois

JAN 03 2013

William A. Shaw  
Prothonotary

*WAD*

**In The Court of Common Pleas of Clearfield County, Pennsylvania**

Sheriff Docket # 13264

**MACKEY, RICHARD W.**

**02-1654-CD**

**VS.**

**CUPP, COLLEEN CHICK**

**COMPLAINT AND INJUNTION**

**SHERIFF RETURNS**

---

**NOW NOVEMBER 13, 2002 AT 1:18 PM EST SERVED THE WITHIN COMPLAINT AND  
INJUNCTION ON COLLEEN CHICK CUPP, DEFENDANT AT RESIDENCE,  
136 SCRIBNER AVE., DUBOIS, CLEARFIELD COUNTY, PENNSYLVANIA BY HANDING  
TO EVERETT CUPP, HUSBAND, A TRUE AND ATTESTED COPY OF THE ORIGINAL  
COMPLAINT AND INJUNCTION AND MADE KNOWN TO HIM THE CONTENTS THEREOF.  
SERVED BY: MCCLEARY/NEVLING**

---

**Return Costs**

<b>Cost</b>	<b>Description</b>
30.72	<b>SHFF. HAWKINS PD. BY: ATTY.</b>
10.00	<b>SURCHARGE PAID BY: ATTY.</b>

**Sworn to Before Me This**

23 Day Of January 2003  
C. A. Hawkins

**So Answers,**

  
by Marly A. Hawn  
Chester A. Hawkins  
Sheriff

**FILED**

 JAN 23 2003

**William A. Shaw  
Prothonotary**

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

RICHARD W. MACKEY,  
Plaintiff

vs.

COLLEEN CHICK CUPP,  
Defendant

: No. 02-1654 C.D.

: IN EQUITY

APR 14 2003

William A. Shaw  
Prothonotary

**FILED**

**FINDINGS OF FACT, OPINION AND ORDER**

On October 22, 2002, Plaintiff Richard W. Mackey filed a Complaint and Injunction and Petition for Special Relief in the Nature of an Injunction against Defendant Colleen Chick Cupp. Thereafter, following Defendant's failure to appear for the hearing scheduled on the Petition for Temporary Injunction, this Court entered an Order on October 30, 2002, enjoining Defendant from contacting Plaintiff's customers and scheduled a hearing on the merits for December 12, 2002. Said hearing was rescheduled and took place on January 2, 2003, following which this Court directed the parties to file briefs on Plaintiff's Petition for Permanent Injunction. Said briefs were timely filed, and in connection therewith, the Court makes the following findings of fact:

1. Plaintiff, Richard W. Mackey, and Defendant, Colleen Chick Cupp, are both veterinarians licensed to practice veterinary medicine in the Commonwealth of Pennsylvania.

2. Plaintiff maintains a veterinary practice located at Shaffer Road, DuBois, Pennsylvania known as "The Animal Hospital."

3. During 2000, Plaintiff and Defendant discussed the possibility of Defendant joining Plaintiff's veterinary practice located in DuBois, Pennsylvania, and on February 28, 2001, the parties entered into an Executive Employment Agreement, which provided, *inter alia*, that:

- a. Plaintiff would pay Defendant a base salary of \$60,000 per year;
- b. Plaintiff would pay for Defendant's continuing education requirements;
- c. Plaintiff would provide health insurance benefits to Defendant, and Defendant had the option, at her own cost, to add her family to such coverage;

- d. Plaintiff agreed to be bound by a non-competition clause, which provided that during the term of the Agreement and for 24 months following its termination for any reason, [Defendant] shall not compete directly or indirectly with [Plaintiff] or any affiliate thereof within fifteen (15) miles of the Animal Hospital principal business location (Shaffer Road, DuBois). [Plaintiff] and [Defendant] acknowledge and agree that since a remedy at law for any breach or attempted breach of the provisions of this section shall be inadequate, [Plaintiff] shall be entitled to specific performance and injunctive or other equitable relief in case of any such breach or attempted breach, in addition to whatever remedies may exist at law. Both parties also waive any requirement for the securing or posting of any bond in connection with the attainment of any such injunction or equitable relief.
- e. Plaintiff agreed to be bound by a nondisclosure of confidential information clause prohibiting her from disclosing any confidential or proprietary information relating to the business or affairs of Plaintiff, and agreed that in the event of breach such provision could be enforced by means of an injunction.
- f. The Executive Employment Agreement also contained a "zipper clause," providing that the written agreement superceded

any prior understandings or agreements between Cupp and Mackey . . . constitutes the entire understanding between Cupp and Mackey . . . [and] may be modified only in writing signed by Cupp and an authorized Mackie representative . . . The parties further acknowledge and agree that any statements or representations that may have been made to either of them to the other are void and of no effect and that neither of them has relied on them in connection with his or its dealings with the other.

5. In March 2001, Defendant relocated to DuBois, Pennsylvania from the Commonwealth of Virginia, where she had practiced veterinary medicine.

6. During the discussions that took place regarding Defendant's potential employment with Plaintiff, Defendant indicated to Plaintiff that she was interested in purchasing Plaintiff's business at some point in time. Though Plaintiff apparently indicated to Defendant that he was amenable to selling his practice, the parties made no provision for such purchase in the Executive Employment Agreement and no other document reflecting such intention was executed at the time.

7. After Defendant entered Plaintiff's employ at the Animal Hospital, the parties entered into negotiations for Defendant's purchase of the business, and in fact attempted to negotiate a letter of intent. Defendant did not produce an executed copy of such letter of intent, and the two drafts submitted into evidence indicate two different closing dates: March 20, 2002 and April 5, 2002.

8. The language of such letters of intent also indicates that the letters were contingent upon, *inter alia*, execution of a purchase and sale agreement and the seller conveying the business free of all liens and encumbrances.

9. No purchase and sale or other agreement was executed by the parties relating to the purchase of the business, and various liens existed against the property such that the contingencies set forth in the letter of intent were not satisfied.

10. Plaintiff was late on several occasions in paying health insurance premiums for Defendant. Defendant received a notice of termination of group enrollment coverage, effective as of July 31, 2002. However, Plaintiff testified that Defendant was never without health insurance coverage and in fact, Defendant produced no bills for unpaid medical services.

11. Defendant elected to include her family in her health care plan, and as a result, Plaintiff deducted the sum of \$85.81 from each of Defendant's bimonthly paycheck. Defendant's Exhibit E (submitted during the hearing held on January 2, 2003), a letter from Geisinger Health Plan to Defendant dated August 8, 2002, references "YOUR FAMILY" and indicates that "the above referenced member's *group enrollment* ... has been terminated as of midnight on 7/31/01."

12. Defendant alleged that she attended a three-day continuing education seminar and requested reimbursement from Plaintiff pursuant to the terms of the Executive Employment Agreement, which was not received. However, Plaintiff never received any bills or receipts from Defendant for any such seminar and Defendant offered no such evidence at the hearing.

13. Additionally, Defendant testified that Plaintiff failed to pay Defendant for after-hour emergency services performed on a number of occasions. However, such fees were paid in full prior to the institution of this lawsuit.

14. Prior to the institution of this lawsuit, Plaintiff had paid to Defendant all monies due under the Executive Employment Agreement.

15. In September 2002, Defendant left Plaintiff's employ and opened a veterinary business approximately one and one-half miles from Plaintiff's office contrary to the terms of the restrictive covenant.

### *Opinion*

#### ***I. Injunctive relief is available under Pennsylvania law to enforce the terms of a valid covenant not to compete contained in an employment agreement.***

Under Pennsylvania law, the standards governing the issuance of a preliminary versus permanent injunction are distinct. As stated by the Commonwealth Court, the issuance of "a

preliminary injunction turns on the presence of imminent, irreparable harm, while a permanent injunction is warranted if no adequate remedy at law exists for a legal wrong.” City of Chester v. Chester Redevelopment Auth., 686 A.2d 30, 35 (Pa. Commw. Ct. 1996). In order to obtain a permanent injunction, a petitioner must establish that it has a clear right to relief and that irreparable harm will result if relief is not granted. Carringer v. Taylor, 586 A.2d 928 (Pa. Super. 1990).

The injury caused by a violation of a restrictive covenant is difficult to quantify, and as a result, “[t]he great weight of modern authority is to the effect that one who has been or will be injured [by violation of a covenant not to compete] is ordinarily entitled to the equitable remedy of injunction . . .” Records Center, Inc. v. Comprehensive Mgmt., Inc., 525 A.2d 433, 436 (Pa. Super. 1987). In such a case, the Pennsylvania Superior Court has noted that

“where the plaintiff’s proof of injury, although small in monetary terms, foreshadows the disruption of established business relations which would result in incalculable damage should the competition continue in violation of the covenant’ . . . [t]he effect of such disruption may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are “inherently unascertainable.”

West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa. Super. 1999), quoting John G. Bryant Co. v. Sling Testing & Repair, Inc., 369 A.2d 1164, 1169 (Pa. 1977). Because the remedy sought is equitable in nature, a party seeking such relief must come before the Court with clean hands. Mudd v. Nosker Lumber, Inc., 662 A.2d 660, 663 (Pa. Super. 1995). As such, a party who has engaged in wrongdoing will be denied equitable relief. Id. at 664.

Initially, Defendant contends that Plaintiff comes to this Court of equity with unclean hands and is thus precluded from seeking relief<sup>1</sup>. See Mudd, 662 A.2d at 663 (one guilty of

---

<sup>1</sup> Plaintiff argues that because the language of the restrictive covenant indicates that the restrictions contained therein are triggered by the termination of the contract “*for any reason*,” any issues of Plaintiff’s alleged breaches of contract are irrelevant. This is a contractual argument that is unpersuasive in a court of equity where the theory of “unclean hands” will deny the petitioner access to the Court’s equitable powers. See Mudd, 662 A.2d at 664.

wrongdoing should be denied access to equitable relief). Defendant asserts that Plaintiff breached the Executive Employment Agreement in three respects: 1.) by failing to pay for health insurance benefits; 2.) by failing to reimburse Defendant for her continuing education; and 3.) by failing to pay for emergency services provided by Defendant. The Court notes that at the hearing, Defendant submitted no documentation supporting the last two claims, and acknowledged that by the time of the hearing, all monies owed to Defendant for continuing education and emergency services had been paid in full. As such, the remaining alleged breach of contract relates to the provision of health insurance under the Executive Employment Agreement. Defendant submitted into evidence a letter from Geisinger Health Plan dated August 8, 2002, indicating that her family had been terminated from group enrollment coverage effective July 31, 2002.<sup>2</sup> Plaintiff asserts that at all material times, health insurance coverage was in fact in place and that at one point, Defendant was covered under two different policies. However, no documentary evidence was presented supporting this contention. Based upon the letter noted above, this Court must conclude that Plaintiff had defaulted on his obligation provided for in the Executive Employment Agreement by failing to provide health insurance coverage to Defendant as of August 1, 2002. However, the Court notes this breach occurred some 17 months into the contract, and approximately one-month from the date of the letter notifying Defendant that her insurance had been terminated, Defendant left Plaintiff's employ and began working to open a competing practice within three miles of Plaintiff's business. As set forth above, this Court must look at all facts and circumstances in determining whether to enforce the restrictive covenant, and finds that Plaintiff's default of his obligation to provide

---

<sup>2</sup> While under the Executive Employment Agreement Plaintiff was not obligated to provide health insurance for Defendant's family, Defendant had elected such coverage and had agreed to a monthly payroll deduction to pay for such insurance.

health insurance is an immaterial breach of the Executive Employment Agreement, not adequate, in and of itself to deny Plaintiff access to equitable relief.

Defendant also asserts that Plaintiff is equitably estopped from enforcing the restrictive covenant because Defendant detrimentally relied upon Plaintiff's promise to sell his business by relocating with her family to Pennsylvania. Defendant asserts that based upon these promises, she and her husband left their jobs and relocated to Pennsylvania only to have Plaintiff refuse to go through with such sale based upon business debts that Plaintiff fraudulently concealed from Defendant. First, the Court notes that if this truly was the basis upon which Defendant decided to relocate to Pennsylvania, she did not include this factor within the terms of the Executive Employment Agreement or any other document executed in connection with her relocation. In fact, it is explicitly provided in the Executive Employment Agreement that the Agreement supercedes "any prior understandings or agreements" and "constitutes the entire understanding between Cupp and Mackey." Especially relevant to Defendant's assertions is the following statement contained in the Executive Employment Agreement:

The parties further acknowledge and agree that any statements or representations that may have been made to either of them to the other *are void and of no effect and that neither of them has relied on them in connection with his or its dealings with the other.* (Emphasis added).

The foregoing language indicates that Defendant expressly agreed that the Executive Employment Agreement fully and completely represented the terms on which she entered into Plaintiff's employ. This clear language belies Defendant's current argument of detrimental reliance. Finally, the Court also notes that even if the Letter of Intent had been executed, the terms of both drafts clearly provide that the letter was contingent upon Plaintiff being able to convey the business to Defendant free of all liens and encumbrances. Accordingly, if Plaintiff

could not convey clear title, the letter of intent would be null and void and Plaintiff would have no legal obligation to sell the business to Defendant. Defendant, based upon this writing, had no reason to believe that the business was free and clear of encumbrances. The possibility that business was encumbered by debt is obvious on the face of the letter of intent, and thus was not fraudulently or otherwise concealed. The Court finds that none of the foregoing assertions equitably estop Plaintiff from enforcing the restrictive covenant against Defendant.

## ***II. The Restrictive Covenant***

Under Pennsylvania law, a restrictive covenant must satisfy three requirements in order to be enforceable: (1) the covenant must be incident to a contract of employment, (2) the restriction imposed must be reasonably necessary for the protection of the employer, and (3) the scope of the covenant must be reasonably limited in both duration and geographic territory. Hess v. Gebhard & Co., 808 A.2d 912, 917 (Pa. 2002), *citing Sidco Paper Co. v. Aaron*, 351 A.2d 250 (Pa. 1976); Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838 (Pa. 1957). The defendant bears the burden of proving that the covenant is unreasonable or otherwise unenforceable. John G. Bryant Co., 369 A.2d at 1169. A covenant restricting post-employment competition is subject to a more stringent test of reasonableness than covenants ancillary to the sale of a business, and the determination of whether such covenant is reasonable, is a factual one requiring the Court to consider all facts and circumstances. Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 733-34 (Pa. 1995).

An employee's covenant not to compete may only be equitably enforced where it is "reasonably necessary for the protection of the employer," given that such covenants are not favored under Pennsylvania law. Hess, 808 A.2d at 917, *quoting Sidco*, 351 A.2d at 254. In determining whether to enforce a restrictive covenant, the Pennsylvania Supreme Court has

directed that courts balance “the employer’s protectible business interest against the interest of the employee in earning a living in his or her chosen profession . . and then balanc[e] the result against the interest of the public.” Id. at 920. In the context of a health care practitioner’s employment agreement, this “balancing test” requires consideration of the “impact of the proposed deprivation [which would result from enforcement of the covenant] on the availability of comparable medical care within the restricted area.” West Penn, 737 A.2d at 300, *quoting* New Castle Orthopedic, 392 A.2d at 1387-88 (plurality opinion).

Applying the criteria set forth above, the Court finds that the covenant is incident to and encompassed within Defendant’s employment agreement. *See Barb-Lee Mobile Frame Co. v. Hoot*, 206 A.2d at 59, 61 (Pa 1965); Beneficial Finance Co. of Lebanon v. Becker, 222 A.2d 873, 875 (Pa. 1966). Next, the Court finds that the two-year term of the restrictive covenant is reasonable. Pennsylvania courts have consistently upheld covenants not to compete for terms of between two and three years. *See John G. Bryant Co.*, 471 Pa. 1, 369 A.2d 1164 (three years); Geisinger Clinic v. DiCuccio, 606 A.2d 509 (Pa. Super. 1992)(two year restriction of physician); Hayes v. Altman, 225 A.2d 670 (Pa. 1967)(three year restriction on optometrist).

In determining whether a territorial limitation is reasonable, Pennsylvania courts consider the “linear connection between the reasonableness of a geographic restriction and the employer’s verifiable market.” Medical Wellness Assoc., P.C. v. Heithaus, 51 D. & C.4<sup>th</sup> 1, 25 (Pa. Com. Pl. 2001). In the case at bar, Plaintiff’s practice is situated in DuBois, which is Plaintiff’s market area. However, the Court has no information as to the reach of Plaintiff’s verifiable market. Due to the low-density population of the area, the Court finds that a fifteen-mile restrictive covenant may well be unreasonable, and will consider this as one of the “facts

and circumstances" relevant to the determination of whether the restrictive covenant is enforceable.

Next, this Court finds that the restrictive covenant is reasonably necessary for the protection of Plaintiff's business interests. Plaintiff has presented evidence of a protectible business interest: maintaining the viability and profitability of the veterinary practice that he has built over the years. Additionally, Plaintiff has established that Defendant has opened a new practice within three miles of Plaintiff's primary business location, and contacted the owners of pets cared for by Plaintiff. These actions clearly "foreshadow the disruption of established business relations." West Penn, 737 A.2d at 298.

The next step this Court must take as directed by the Pennsylvania Supreme Court in Hess v. Gebhard & Co., is to balance Plaintiff's stated interest against Defendant's interest in earning a living as a veterinarian and the public's interest in preserving access to veterinary care. Hess, 808 A.2d at 920. Defendant asserts that she relocated from the Commonwealth of Virginia to DuBois, Pennsylvania, to practice veterinary medicine and presents evidence indicating that the enforcement of the restrictive covenant would have a detrimental impact on the availability of comparable veterinary care within the 15-mile radius of the Animal Hospital. While the Court is sympathetic to Defendant's situation, it is also clear that a part of the consideration given by Defendant in exchange for her employment by Plaintiff was her agreement to not compete with Plaintiff for a period of time after her employment terminated. Moreover, the Court also notes that Defendant is not precluded from working in several neighboring communities close enough in proximity to the DuBois area that Defendant would not have to move her family. Also, as will be discussed below, credible testimony indicates that demand for veterinary care apparently outstrips supply in the DuBois market. Such

demand works to Defendant's advantage because due to the proximity of the neighboring communities in which Defendant could practice, Defendant would likely pick-up the overflow business from the DuBois area by establishing an office in any of these areas. Such effort also would not require her to relocate her family. Based upon consideration of all these factors, this Court does not believe that Defendant's ability to practice veterinary medicine outweighs Plaintiff's interest in protecting his practice.

The final item for consideration is the public's interest in access to comparable veterinary care. During the hearing on the permanent injunction, both sides presented testimony on the issue of whether comparable veterinary care is available within the restricted area. Plaintiff himself testified that he has excess capacity for patients, that there is one other veterinarian situated in DuBois who provides full-time services and a third veterinarian who works part-time. No other testimony was provided on Plaintiff's behalf. On Defendant's behalf, Dr. Beth Morgan, a veterinarian situated in Clearfield, provided competent testimony that Plaintiff is presently the only full time veterinarian in the DuBois area, and that in the past, the area was serviced by at least three full-time veterinarians. She noted that in Clearfield, an area that is smaller than the DuBois/Sandy Township area, there are two extremely busy full-time veterinarians who cannot meet current demand. Mr. Harold Wallstrom, a Dog Law Enforcement Officer for the Commonwealth of Pennsylvania, likewise presented credible testimony that in the past, three full-time veterinarians were employed in the DuBois/Sandy Township area, and expressed a concern that the enforcement of the covenant in this case could jeopardize public safety, citing his inability to hold a rabies clinic in the DuBois area due to the lack of availability of local veterinarians. The Court finds that this evidence supports a finding of a strong public interest in the DuBois area maintaining adequate access to veterinary care.

Taken together, this Court's finding that the geographic restriction contained in the restrictive covenant may be unreasonable as well as its finding of a strong public interest in maintaining access to alternate veterinary care dictate that the restrictive covenant contained in the Executive Employment Agreement not be enforced as written. However, neither does this Court believe that these factors warrant voiding the terms of the restrictive covenant. As set forth above, if Defendant were to establish her practice in a community that is within close proximity to DuBois, yet beyond Plaintiff's immediate market area, the community would still have access to comparable veterinary care. The Pennsylvania Supreme Court has recently noted that appellate courts in Pennsylvania have "repeatedly" upheld an equity court's power to "grant enforcement limited to those portions of the restrictions that are reasonably necessary for the protection of the employer." Hess, 808 A.2d at 920; Sidco, 351 A.2d at 254 (court of equity may enforce only portions of restrictions reasonable necessary for protection of employer); All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa. Super. 1997)(when fashioning an injunction to enforce a restrictive covenant, trial court has broad powers to modify restrictions imposed on former employee); Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 456 (Pa. Super. 1988)(trial court has authority to reform restrictive covenant). As such, this Court finds a territorial limitation of 10 miles will satisfy Plaintiff's interest in protecting his customer base. The Court finds that this solution equitably balances Plaintiff's need to protect his practice, with Defendant's interest in maintaining her livelihood and the public's interest in access to veterinary care.

WHEREFORE, the Court enters the following Order:

O R D E R

AND NOW, this 14<sup>th</sup> day of April, 2003, upon consideration of Plaintiff's Petition for Permanent Injunction for enforcement of a restrictive covenant contained in the Executive Employment Agreement by and between Plaintiff and Colleen Chick Cupp, argument thereon held before this Court on January 3, 2003, and briefs of the parties, it is the finding of this Court that Defendant is hereby enjoined from competing with Plaintiff in violation of restrictive covenant contained in Paragraph 8 of the Executive Employment Agreement dated February 28, 2001 by and between Plaintiff and Defendant within a geographic territory of ten (10) miles of the principal location of the Animal Hospital's principal location on Shaffer Road, DuBois, Pennsylvania. The remaining portions of such provision contained in the Executive Employment Agreement shall remain in full force and effect.

BY THE COURT,

John K. Reilly, Jr.  
President Judge

**FILED**

01/24/03 B.A.  
APR 14 2003

1cc att Dabois  
1cc att Mason  
1cc S. Mitchell

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY,	:	IN EQUITY
Plaintiff	:	
	:	
vs.	:	No. 02-1654 C.D.
	:	
COLLEEN CHICK CUPP,	:	
Defendant	:	

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2003, the following Order is entered:

1. Defendant Colleen Chick Cupp is ordered to cease practicing veterinary medicine and offering veterinary patients/animals at her Sandy Township office within five (5) days from the date of this Order.
2. The Defendant, Colleen Chick Cupp, shall not compete directly or indirectly with Richard W. Mackey or any affiliate thereof within a fifteen (15) mile radius from the Animal Hospital's principal location (Shaffer Road, DuBois) for a period of two (2) years from the date of this Order.
3. The Defendant shall not accept employment with any business, firm, person, partnership, corporation, hospital, medical or veterinary office, clinic or other health care provider of animals or any other entity which engages in the practice of veterinary medicine within a fifteen (15) mile radius of the office of the Animal Hospital for a period of two (2) years from the date of this Order.

4. The Defendant shall not practice veterinary medicine within a fifteen (15) mile radius of the Animal Hospital of DuBois, Pennsylvania, for a period of two (2) years from the date of this Order.

5. The Defendant shall not provide within a fifteen (15) mile radius of the Animal Hospital, professional veterinary services to any customer of Richard W. Mackey or the Animal Hospital with whom or with which she was a principal contact at any time during her employment with Richard W. Mackey for a period of two (2) years from the date of this Order.

6. The Defendant shall return to Richard W. Mackey within five (5) business days from this Order, all copies and originals of any documents she has removed from Richard W. Mackey's office and/or the Animal Hospital.

BY THE COURT,

---

JUDGE

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY PENNSYLVANIA  
(CIVIL DIVISION)

RICHARD W. MACKEY, : IN EQUITY  
Plaintiff :  
: vs. : No. 02-1654 C.D.  
: :  
COLLEEN CHICK CUPP, :  
Defendant :  
:

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2003, the  
following Order is entered:

1. Defendant Colleen Chick Cupp is ordered to cease practicing veterinary medicine and offering veterinary patients/animals at her Sandy Township office within five (5) days from the date of this Order.
2. The Defendant, Colleen Chick Cupp, shall not compete directly or indirectly with Richard W. Mackey or any affiliate thereof within a fifteen (15) mile radius from the Animal Hospital's principal location (Shaffer Road, DuBois) for a period of two (2) years from the date of this Order.
3. The Defendant shall not accept employment with any business, firm, person, partnership, corporation, hospital, medical or veterinary office, clinic or other health care provider of animals or any other entity which engages in the practice of veterinary medicine within a fifteen (15) mile radius of the office of the Animal Hospital for a period of two (2) years from the date of this Order.

4. The Defendant shall not practice veterinary medicine within a fifteen (15) mile radius of the Animal Hospital of DuBois, Pennsylvania, for a period of two (2) years from the date of this Order.

5. The Defendant shall not provide within a fifteen (15) mile radius of the Animal Hospital, professional veterinary services to any customer of Richard W. Mackey or the Animal Hospital with whom or with which she was a principal contact at any time during her employment with Richard W. Mackey for a period of two (2) years from the date of this Order.

6. The Defendant shall return to Richard W. Mackey within five (5) business days from this Order, all copies and originals of any documents she has removed from Richard W. Mackey's office and/or the Animal Hospital.

BY THE COURT,

---

JUDGE