IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMERICAN FRIENDS OF LUBAVITCH (CHABAD), *et al.*	
Plaintiffs,	**Case No. 14-0006353**
	Judge Neal E. Kravitz
v.	
YEHUDA STEINER, *et al.*	
Defendants.	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the Court's Request of November 26, 2014, Defendants Rabbi Yehuda Steiner and Rivky (Brikman) Steiner hereby submit their Supplemental Memorandum of Law in Support of Their Opposition to Plaintiffs' Motion for Preliminary Injunction.

As Defendants have already demonstrated, and as Plaintiffs now appear to concede, the non-compete clause in the Contract between Rabbi Steiner and Rabbi Shemtov is against relevant law and public policy, and is thus unenforceable. Defendants' Opposition to Preliminary Injunction Motion, at 9-10; Transcript of Oral Argument at 50:21-51:1, 53:2-4, 57:3-6 (Nov. 26, 2014). Setting aside the issue of its enforceability, however, this clause is relatively straightforward. It is only 32-words in length, and states that upon termination of or resignation from his employment, Rabbi Steiner "will not enter into employment or arrangement – of whatever scope or duration – with any Chabad-Lubavitch entity or any other institution, performing similar work, anywhere in DC, or suburban MD or VA." Exh. 1 to Plaintiffs' Motion for Preliminary Injunction, § G. In other words, the clause simply entails that Rabbi

Steiner must abstain from accepting employment with any religious outreach organization in DC, or suburban Maryland or Virginia, for the rest of his life.

In stark contrast to this simple, 32-word clause, Plaintiffs now request that the Court entirely rewrite the Contract and enforce a 915-word Preliminary Injunction that contains eleven individual sections. *See* Plaintiffs Supplemental Memorandum of Law in Support for Preliminary Injunction. As elaborated below, this request goes far beyond any type of contract modification ever performed in the D.C. courts; indeed, the extent of this rewrite goes far beyond any type of "blue pencil" or other equitable revisions permitted by other jurisdictions. Covenants not to compete implicate "one of the common law's 'oldest and best established' public policy concerns," namely the restraint of trade. *Ellis v. James V. Hurson Associates, Inc.*, 565 A.2d 615, 618 (D.C. 1989) (quoting Restatement (Second) of Contracts, Introductory Note to Topic 2: Restraint of Trade (1981)). The injunctions sought by Plaintiffs in this case are unusually harmful, as they would not only restrain trade, but also restrain Rabbi Steiner from providing religious instruction to individuals who have formed a spiritual bond with him and who have come to rely on his mentorship. These injunctions would force Rabbi Steiner to leave his home, uproot his family, and pull his children out of their school in the middle of the school year. Indeed, the new, two-mile radius proposed by Plaintiffs seems designed to restrict Rabbi Steiner from operating not only at GWU but also at Georgetown University, the campus of which is within the proposed radius.

As Defendants have already demonstrated in their Opposition and at the hearing, Plaintiffs' motion must be denied because they have not "clearly demonstrated" the four preliminary injunction requirements.[1] Plaintiffs' motion should also be denied due to three

[1] *See* Defendants' Opposition to Motion for Preliminary Injunction, at 8-13; *see also* Transcript of Oral Argument at 66:3-9, 68:13-18.

additional factors. First, D.C. law, as well as other relevant laws and authorities, provide that the Court should refrain from rewriting the non-compete clause. Second, no other clause in the Contract requires that Defendants cease religious outreach activities. Third, Plaintiffs have submitted an overly-broad amended request for preliminary injunction, the restrictions in which are not appropriate injunctive relief.

1. D.C. Law and Other Relevant Laws and Authorities Provide that the Court Should Refrain from Rewriting the Non-Compete Clause in the Contract

As explained, the Contract's non-compete clause as written is overbroad and unenforceable. In the United States, there are three general approaches to judicial revision of overbroad non-compete clauses.[2] First, some states take an "all-or-nothing" approach. *See Ellis*, 565 A.2d at 616. Courts in these jurisdictions can neither strike offending terms from a non-compete clause, nor add limiting terms to the clause; non-compete clauses must be upheld in the entirety or not at all. Second, certain states adhere to what is known as the "blue pencil rule." *See id.* at 617. In these jurisdictions, courts may selectively enforce an otherwise unenforceable non-compete clause as long as the part to be enforced is severable on the face of the agreement. In other words, "blue pencil" jurisdictions allow courts to strike offending language but not to supplement contractual language. *See, e.g, id.* at 617; *see also* Fearnow *v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 731 (Ariz. 2006); *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Colo. Ct. App. 1984); *Grayling Assoc., Inc. v. Villota*, 2004 Conn. Super. LEXIS

[2] There is substantial variety among states between these three approaches. Whereas roughly 28 states provide for equitable reformation, around 18 states do not, but rather follow either the "all-or-nothing" or the "blue pencil" rule. The 18 states which do not provide for equitable reformation include Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Indiana, Louisiana, Maryland, Montana, Nebraska, North Carolina, South Carolina, South Dakota, Virginia, Wisconsin, Wyoming, and presumably DC. *See* Covenants Not to Compete: A State-by-State Survey, pp. 1167, 1234, 1295, 1371, 1440, 1544, 1901, 2093, 2740, 2831, 3184, 3324, 3753, 4237, 4613, 4766, 4813 (Brian M. Malsberger ed., 2012); *see also Ellis,* 565 A.2d at 617 (reflecting the D.C. Court of Appeals' "cognizan[ce] of the judicial reluctance to 'rewrite' contracts between parties" because "partial enforcement rewards employers who have everything to gain from writing overbroad covenants," but noting that "these concerns need not be compromised by the rule we adopt today in light of the limitations on its application"); *see also Jacobsen v. Oliver*, 555 F.Supp.2d 72, 80 (D.D.C. 2008) (noting that *Ellis* allows for the severance of unenforceable clauses from an otherwise enforceable contract).

1859, 4 (Conn. Super. Ct. 2004); *Technology Partners, Inc. v. Hart*, 298 Fed. Appx. 238, 243 (4th Cir. 2008) (unpublished). Third, in some states, courts may selectively enforce part of the non-compete clause without regard to its severability (known as "equitable reformation"). *See, e.g., Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239, 248 (Mo. Ct. App. 1993); *see also Ellis*, 565 A.2d at 617. In states which have adopted this third approach, courts may add limiting language to the Contract. All the courts of which Defendants are aware, however, which have added language have done so in limited amounts—typically adding just a few words to the non-compete clause to render it enforceable. *See, e.g., Dean Van Horn Consulting Associates, Inc. v. Wold*, 395 N.W.2d 405, 409 (Minn. Ct. App. 1986); *Misys Intl. Banking Sys. v. TwoFour Systems*, LLC, 800 N.Y.S.2d 350 (N.Y. App. Div. 2004).

D.C. courts have rejected the first, "all-or-nothing" approach to the enforcement of covenants not to compete, and in essence have adopted the second approach, which permits partial enforcement of a covenant where the parts to be enforced are severable on their face. *See Ellis*, 565 A.2d at 617-618. In *Ellis*, considered the seminal D.C. case on non-compete clauses, the court ruled that part of a non-compete clause could be enforced by striking the grammatically severable, unenforceable sections, and upholding the other, enforceable parts of the covenant. *Ellis*, 565 A.2d at 617 (holding that the terms were "severable on their face"). Although the court in *Ellis* did not expressly reject the third approach, which permits equitable reformation of a non-compete clause, the Court in *Ellis* declared its "cognizan[ce] of the judicial reluctance to 'rewrite' contracts between parties," as well as "the argument which suggests that partial enforcement rewards employers who have everything to gain from writing overbroad covenants," and stated that *"these concerns need not be compromised by the rule we adopt today in light of the limitations on its application." Ellis*, 565 A.2d at 617 (emphasis added).

In their Reply to Defendants' Opposition, Plaintiffs expressly rely on Maryland law, noting that D.C. courts view Maryland law as particularly persuasive. Plaintiffs' Reply to Defendants' Opposition § II(A)(3) n. 3 (citing *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983)). Maryland, however, has adopted the "blue pencil rule" that permits partial enforcement of a covenant not to compete only if the offending provisions of that covenant are severable; Maryland does not permit the court to draft new language to add to the covenant. *Fowler v. Printers II*, 598 A.2d 794, 802 (1991) (stating that Maryland only permits "'blue pencil' excision of offending contractual language without supplementation or rearrangement of any language"); *Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F.Supp.2d 748, 758 (D. Md. 2003) (stating that "blue penciling must be limited to the removal of offending language and cannot include the addition of words or phrases in an effort to make the restrictive covenant reasonable"); *SNS One, Inc. v. Hage*, 2011 U.S. Dist. LEXIS 74718, 5 (D. Md. 2011) (stating that "the case-law limits blue-penciling to removing offending language"). Many other states, including Arizona, *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 731 (Ariz. 2006), Colorado, *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Colo. Ct. App. 1984), Connecticut, *Grayling Assoc., Inc. v. Villota*, 2004 Conn. Super. LEXIS 1859, 4 (Conn. Super. Ct. 2004), and North Carolina, *Technology Partners, Inc. v. Hart*, 298 Fed. Appx. 238, 243 (4th Cir. 2008) (unpublished), apply similar blue pencil rules, allowing the courts only to strike offending language.

D.C. courts look to the Restatement (Second) of Contracts for guidance "in the absence of well-developed doctrine in our jurisdiction." *East Capitol View Cmty. Dev. Corp. v. Denean*, 941 A.2d 1036, 1041 n. 8 (D.C. 2008) (citing *Ellis*); *District of Columbia v. Tulin*, 994 A.2d 788, 797 n. 10 (D.C. 2010). The court in *Ellis* confirmed, in fact, that where non-competes are

concerned, "[t]he Restatement sets forth the relevant principles." *Ellis*, 565 A.2d at 617. The Restatement provides that, when a court wishes to selectively enforce an overly broad and unenforceable term, "the court's power in such a case is not a power of reformation, [ ] and it will not, in the course of determining what part of the term to enforce, add to the scope of the term in any way." Restatement (Second) of Contracts § 184 cmt. b (1981). Plaintiffs here seek exactly what the Restatement expressly forbids: reforming the contract by re-writing and adding to the non-compete clause.

Should this Court determine, for the first time in the District of Columbia, that equitable reformation should apply in the non-compete context, the Court should nonetheless refuse to allow the particular requested reformations here. Jurisdictions utilizing the reformation approach share the *Ellis* court's concern about re-writing contracts and have refused to allow wholesale re-writing of the initial covenant when the initial restrictions "clearly extend far beyond those necessary to the protection of any legitimate interest." *Eichmann v. Nat'l Hosp. & Health Care Servs.*, 719 N.E.2d 1141, 1149 (Ill. App. 1999); *see also Bayly, Martin & Fay, Inc. v. Pickard*, 780 P.2d 1168, 1173 (stating that "even those courts allowing modification refuse to supply essential elements in covenants in order to make them reasonable"); *McGough v. Nalco Co.*, 496 F.Supp.2d 729, 755 (N.D. W. Va. 2007) (explaining that "because the covenant is likely unreasonable on its face, I will not 'blue pencil' the covenant to conform it with the rule of reason"). The court in *Eichmann* declined to modify the temporally and geographically unlimited non-compete in that case since the "original restraint was unfair in that its degree of unreasonableness was great and clearly designed to protect [the employer] from competition *per se* on the part of [the employee]." *Eichmann*, 719 N.E.2d at 1149. The court further observed that the non-compete in *Eichmann* had "significant deficiencies" that would require "drastic

modifications, rather than minor ones," which "would be tantamount to fashioning a new agreement," and would discourage "the narrow and precise draftsmanship which should be reflected in written agreements." *Id.*; *see also Bayly*, 780 P.2d at 1173.

Like the employer in *Eichmann*, the Plaintiffs in this case initially sought to enforce a non-compete clause which "extend[s] far beyond" the scope necessary to protect Plaintiffs' legitimate interests, and now seek for the Court to make "drastic modifications" to the non-compete clause to render it enforceable. *Id.* Moreover, here, as in *Eichmann*, the original restraint was "clearly designed to protect [the employer] from competition *per se*[3] on the part of [the employee]." *Id.* George Washington University has the fifth-largest Jewish population of any private university, boasting a Jewish student population of approximately 4,500. Exh. A; Exh. B. Students at other universities are allowed the opportunity to choose between competing Chabad organizations, and it would not be in the public's interest to limit the number of organizations in which GWU students can participate. *See, e.g.*, Exh. C (showing competing Chabad organizations at Rutgers); Exh. D (showing competing Chabad organizations at USF).

The interests at stake in this case are unique, moreover, because they concern the provision of non-profit religious and instructional services.[4] In *Hope Found, Inc. v. Edwards*,

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[3] Notably, unlike the non-compete clause in the instant case, the severable portion of the non-compete clause addressed in *Ellis* was not designed to restrict competition *per se*, but rather stated that the employee should not "attempt to secure the company's [existing] clients or customers . . . for a period of three years after employment." *Ellis,* 565 A.2d at 616, 618 ("[T]he considerably more narrow issue before us is whether there is a substantial likelihood that a covenant not to solicit the company's clients or customs for a period of three years will be found to be valid and binding upon [the employee]."); *see also id.* at 619 ("[A]n even further restriction in the scope of the injunction, *such as to those clients actually served by Ellis while with Hurson* [his employer], may be indicated in applying to this particular situation the limitations [ ] of Restatement section 188.") (emphasis added).

[4] Similarly, several courts have declined to grant preliminary injunctions with respect to mental health counselors or other providers which have special relationships with customers and patients. *Lowe v. Reynolds*, 428 N.Y.S.2d 358, 359 (N.Y. App. Div. 1980); *Columbus Med. Servs., LLC v. David Thomas & Liberty Healthcare Corp.*, 308 S.W.3d 368, 393-394 (Tenn. Ct. App. 2009) (holding that a Plaintiff employer could not enforce a non-compete against Defendant therapists in a mental health care and mental retardation facility). For example, the New York Court of Appeals held that an employer should not have been granted a preliminary injunction against its former employee, a specialized speech and hearing pathologist. *Lowe*, 428 N.Y.S.2d at 359. The court noted that in the mental health context, patients "are not readily transferable to another therapist" and cutting off these relationships "would probably cause confusion and damage to the patient . . . Thus, a substantial question of potential harm to the public exists." *Lowe*, 428 N.Y.S.2d at 359.

the Southern District of Indiana denied a motion for preliminary injunction in a similar context. 2006 U.S. Dist. LEXIS 84244 (S.D. Ind. 2006). Plaintiff Hope Found Inc. was a non-profit corporation aimed at training educators in strategies for improving public schools, offering on-site consultant services "sometimes over a period of several years." *Hope Found Inc.*, 2006 U.S. Dist. LEXIS 84244 at 3. Defendant Edwards was one of these consultants. *Id.* The court denied Hope Found Inc.'s motion for preliminary injunction, holding, among other things, that "the public interest here plays a relatively unusual role, and one that weighs against injunctive relief." *Id.* at 49-51. The court noted that, while non-profits can enforce non-competes, "the court should consider [Hope's] not-for-profit status" when evaluating Hope's protectable interest "and the public interest as it might be affected by a preliminary injunction." *Id.* at 29-30. Specifically, the court found that the services provided by both parties were valuable to public schools and that Edwards's school customers "prefer Dr. Edwards and have confidence in him . . . are in the midst of long-term relationships with him . . . [and] another consultant would have to start over again," which would "disrupt, delay, and add costs to projects that the court must assume are valuable and important efforts to improve public education." *Id.* at 49-51. Thus, the court found that the public interest, "unlike a typical private commercial dispute, weighs in favor of relying on a later damages remedy . . . without interfering with the customers' programs, even though it may be difficult to calculate damages." *Id.*

As explained in greater detail in Section 3 below, and as confirmed by Plaintiffs own counsel, Rabbi Steiner is similarly in the "midst of long-term relationships" with Jewish students, who would like to continue to receive spiritual guidance from him through his non-

profit organization,[5] Jewish GW. *See* Exh. E; Transcript of Oral Argument at 41:25-50:2, 48:9-14, 52:8-16, 51:14-23, 55:21-56:2 (Nov. 26, 2014).

This Court should adopt the approach supported by D.C. and Maryland law and the Restatement, and should decline to modify terms of the non-compete clause which are not severable on their face. As explained, such an approach is particularly warranted due to the drastic nature of the modifications proposed by Plaintiffs, as well as the unique context here of non-profit religious outreach and instruction.

2. No Other Contract Provisions Prevent Defendants From Operating Independently at GWU

In their Motion for Preliminary Injunction, Plaintiffs contend that the following sentence in the fourth paragraph of Section G of the Contract precludes Rabbi Steiner from operating at GWU independently of AFL:

> "Upon completion of their employment . . . [Defendants] agree to conclude their operations at GWU peacefully within 30 days of notification, and without causing any damage or discomfort to [Plaintiffs], or interfering with any arrangement or subsequent decision made by [Plaintiffs] in connection with GWU or any other activities over which [Plaintiffs] ha[ve] authority. . . . Should this be compromised, [Defendants] will forfeit any severance payment which may be due them" Exh. 1 to Plaintiffs' Motion for Preliminary Injunction, § G.

At the hearing, Plaintiffs again suggested that this sentence constitutes a limitation on Rabbi Steiner's ability to conduct religious outreach, and indicated that they would address this issue in their supplemental memorandum. Transcript of Oral Argument at 80:17-24 (Nov. 26, 2014) ("[W]e also have support from the second sentence in that paragraph."). Plaintiffs are incorrect. As elaborated below, the language cited here does not apply to Rabbi Steiner's independent work

[5] Jewish GW is a registered non-profit corporation in the District of Columbia.

at GWU. Rather it applies to operations over which Plaintiffs have authority," namely operations conducted in the name of AFL. Even if the language did apply, moreover, to Rabbi Steiner's independent work at Jewish GW, Rabbi Steiner is excused from performance of this obligation under D.C. law due to Plaintiffs' prior material breaches of the Contract. *Rosenthal v. Sonnenschein Nath & Rosenthal, LLP,* 985 A.2d 443, 452 (D.C. 2009).

The Restatement (Second) of Contracts outlines certain canons of contract interpretation that may be helpful to a D.C. court. *See 1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009) (citing Restatement § 202 for a canon of interpretation). One of these canons states that "a writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement (Second) of Contracts § 202 (1981). A reading of the whole fourth paragraph of Section G reveals that the requirement that Defendants "conclude their operations at GWU" applies only to Rabbi Steiner's operations for AFL, as this clause is grammatically and stylistically distinct from the clause containing the non-compete. Exh. 1 to Plaintiffs' Motion for Preliminary Injunction, § G. Indeed, the "conclude operations" clause expressly limits this requirement to "activities over which [Plaintiffs] ha[ve] authority." *Id.* Moreover, if the word "operations" were broad enough to cover Rabbi Steiner's current independent outreach, this requirement would be duplicative of the requirement earlier in the paragraph that Rabbi Steiner not enter into any arrangement "anywhere in DC, or suburban MD or VA." *Id.*

The "conclude operations" clause also contains several references to Plaintiffs' peace, comfort, and right to make decisions. *Id.* Thus, the word "operations" clearly refers to the relationship between Plaintiffs and Rabbi Steiner, as opposed to future outreach "of whatever scope or duration," a restriction that would in any event be overbroad and unenforceable. The

more natural reading of the second sentence within the paragraph as a whole is to conceptually separate the first and second sentences: the first sentence as a general non-compete, and the second sentence governing the parties' AFL relationship.

As Defendants have shown, Rabbi Steiner has taken affirmative steps to separate himself from Plaintiffs' organization and thus has already concluded operations at GWU. Steiner Affidavit ¶ 18. Most recently, Rabbi Steiner has changed his logo from "Chabad at GW" to "Jewish Colonials (Chabad)." Exh. G. In addition, the GWU community is aware that he is no longer affiliated with AFL, as evidenced by the attached petition, signed electronically by 118 GWU students. Exh. E. The donation form used by Rabbi Steiner, moreover, for his new organization, Jewish GW, now explicitly notes that Jewish GW is not affiliated with AFL. Exh. G.

Even if the "conclude operations" clause applied to Rabbi Steiner's independent operations, and/or Rabbi Steiner was found not in compliance with these requirements, Rabbi Steiner is excused from performance of this clause under D.C. law. As recently held by the D.C. Court of Appeals "in breach of employment contract claims, it is well established that a material breach by one party excuses the other party from further performance under the contract." *Rosenthal,* 985 A.2d at 452. As set forth by Defendants in their Amended Answer and in their Opposition to the Preliminary Injunction, prior to the occurrence of the alleged breach by Rabbi Steiner, Plaintiffs were already in longstanding breach of their payment obligations under the Contract. Amended Answer ¶ 35; Opposition to Motion for Preliminary Injunction, at 5, 12. Given this prior material breach, Rabbi Steiner is "excus[ed] . . . from further performance under the contract," both in relation to the "conclude operations" clause, as well as the non-compete clause. *Rosenthal,* 985 A.2d at 452.

3. Plaintiffs Amended Request for Preliminary Injunction Is Overly Broad and Should Not Be Enforced.

Defendants further note that even if Plaintiffs "clearly demonstrate" a likelihood of success on the merits of the issue of contract modification, Plaintiffs also must "clearly demonstrate" a likelihood of success for their modified preliminary injunction as part of the larger demonstration of success on the merits as a whole. Plaintiffs *also* must "clearly demonstrate" that they are "in danger of suffering *irreparable* harm during the pendency of the action"; that "*more harm* will result to [them] from the denial of the injunction than will result to the defendant[s] from its grant"; and that "the public interest will not be disserved by the issuance of the requested order." *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255-56 (D.C. 2003) (emphasis added); *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

Plaintiff's modified preliminary injunction remains overly broad and unlikely to succeed on the merits. Plaintiffs propose to restrict Defendants from activities that go beyond the scope of Defendants' work for Plaintiffs.[6] Plaintiffs, for example, ask this Court to order Rabbi Steiner to cut all ties to GWU, regardless of whether such contact is in any way related to the religious outreach that Rabbi Steiner conducted while employed by Plaintiffs. Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, ¶10. Indeed, Plaintiffs go so far as to request that the Court forbid Rabbi Steiner from "*any* contact with the President of GWU and his office/support staff. *Id.* at ¶ 10 (emphasis added). Plaintiffs also wish to restrict donations from a broad class of donors that reaches beyond the outreach that Rabbi Steiner conducted while employed by Plaintiffs, and to require Rabbi Steiner to transfer the lease to the

[6] In fact, Plaintiffs also seek to enjoin Rabbi Steiner's wife, Rivky Steiner, even though she was not a signatory to the Contract and therefore had no formal relationship to Plaintiffs.

Chabad Lounge[7] to Plaintiffs. *Id.* at ¶¶ 6, 8. Such restrictions are not found in the post-employment or other provisions of the Contract. *See* Exh. 1 to Plaintiffs' Motion for Preliminary Injunction. Because these requirements extend beyond any reasonable relation to Rabbi Steiner's work for Plaintiffs, the amended non-compete clause remains overly broad and unenforceable.

The sole irreparable harm referenced by the Plaintiffs at the hearing was that they are unable to hire another rabbi for ChabadGW due the existing "dispute" between the Parties. Transcript of Oral Argument at 46:10-15 (Nov. 26, 2014). Plaintiffs have provided no evidence, however, besides their own self-serving statements that this is the case. Rather, the evidence reflects that well-prior to the instant dispute, Plaintiffs had already fired Rabbi Steiner once unlawfully in 2011, as determined by a Jewish Beit Din, and that Plaintiffs are in longstanding violation of their payment obligations to Rabbi Steiner. *See* Steiner Aff. ¶¶ 4, 6-7; Defendants' First Amended Answer and Counterclaims ¶¶ 46-56. To the extent that Plaintiffs are having difficulty finding a replacement rabbi, it is thus likely due to their own prior employment breaches, and not due to concerns about Rabbi Steiner's new organization. Defendants maintain, moreover, as explained at the hearing, that to the extent the Court believes that Rabbi Shemtov's unsubstantiated assertions regarding (unnamed) replacement rabbis constitute a clear demonstration or irreparable of harm, Defendants should be allowed to cross-examine Rabbi Steiner on this issue. *See* Transcript of Oral Argument at 64:25-66:3 (Nov. 26, 2014). In any event, as in *Hope Found Inc.*, any harm suffered by Rabbi Shemtov due to non-enforcement of

[7] With respect to the Chabad lounge, moreover, the lease has always been in the name of Rabbi Steiner personally, rather than in the name of Plaintiffs. Exh. F (in which "RABBI YUDI STEINER" is listed as the tenant). In any event, Rabbi Steiner signed his current lease *after* he ceased working for Plaintiffs; Plaintiffs thus have no claim to that property. Exh. F (signed on September 2, 2014). Because these restrictions further extend beyond religious outreach and beyond the terms of the Contract, Plaintiffs moreover cannot "clearly demonstrate" irreparable harm as to these restrictions as written.

the non-compete could be remedied through "a later damages remedy." 2006 U.S. Dist. LEXIS 84244 at 50.

Plaintiffs also do not "clearly demonstrate" that the balance of harms tilts in their favor. As explained above, the modified requested preliminary injunction would prevent Rabbi Steiner from practicing his religion in the manner that he chooses. *See* Plaintiffs' Supplemental Memorandum, ¶¶ 3-4 (forbidding Rabbi Steiner from, among other things, hosting Shabbos dinners in an area that includes his current residence). If such an injunction was granted, Rabbi Steiner would only be able to freely continue his religious practices by uprooting his family. In addition, Rabbi Steiner's independent outreach is the only means by which he currently supports his wife and four young children. *See* Steiner Aff., ¶¶ 2, 18 (stating that Rabbi Steiner continued his career of religious outreach by working for Plaintiffs, and that since the dispute arose, Steiner has taken steps to continue his outreach independent of Plaintiffs). In contrast, if this Court denies Plaintiffs' amended request for preliminary injunction, Plaintiffs would not suffer the financial and emotional effects of being forced to move to a new residence in order to continue practicing their religion, nor would it deprive Plaintiffs of their sole livelihood.

As noted above, Plaintiffs also are unlikely to "clearly demonstrate" that the grant of this modified injunction is in the public interest. As explained above, other jurisdictions have analyzed the particular public harm that results from preventing non-profit educational outreach, and from preventing continuity in mental health therapy. *See supra* § 1. Here, Plaintiffs seek an injunction in a clearly non-commercial context that involves a highly personal and emotional relationship relating to the mental and spiritual health of young adults. Indeed, at the hearing, Plaintiffs' counsel spoke at length about the "important bond" between a rabbi and his devotees and personal experiences with Chabad while in college. Transcript of Oral Argument at 41:25-

50:2, 48:9-14, 52:8-16, 51:14-23, 55:21-56:2 (Nov. 26, 2014) (and noting that in his experience, a Chabad rabbi at a university would "relate to us [the students]" and was "more than just a rabbi" (*id.* at 54:22-55:2), and conceding that "if [the Court is] asking that there's an interest for those students [at GW] to maintain that bond, sure" (*id.* at 53:8-10)). As the Court has itself recognized, "[a]n injunction would take that [bond] away at least temporarily from students at GW." Transcript of Oral Argument at 53:18-20 (Nov. 26, 2014). The strong bonds between rabbis and the GWU community are apparent by the Petition submitted by Defendants with this Memorandum, which was signed by 118 students affirming that "each of [them] enjoy a personal relationship with Rabbi Yudi Steiner and very much appreciate the role he plays as our Rabbi and as a wise 'big brother' to us while we live away from home," and that "the special rapport that we and other students and alumni enjoy with Rabbi Steiner is not something that can be replaced by a substitute, however competent." Exh. E. Even without a preliminary injunction, there is nothing to stop Rabbi Shemtov from offering his own religious outreach services to the approximately 4,500 Jewish students on campus. Exh. A; Exh. B. In fact, the existence of multiple rabbis on campus would likely result in better outreach, since students would then have greater opportunities to develop bonds with a spiritual advisor. A preliminary injunction would, at this point, only be disruptive of the religious preferences of the current freshmen through senior classes. Rabbi Shemtov has plenty of time to ramp up his outreach program for next fall so that he can offer an additional option for the incoming freshman class, as well as reach those students who may want an alternative to Rabbi Steiner.

Finally, Plaintiffs not only ask the Court to significantly expand the scope of the non-compete clause in the original contract, to require Rabbi Steiner to uproot his family, and to prevent students from practicing their religion with a rabbi of their choice within the confines of

the GWU campus, but *also* ask the Court for measures that do not constitute injunctive relief. The District of Columbia defines an injunction as "an equitable remedy, consisting of a command by the court . . . that the party to whom it is directed do, or refrain from doing, some specified act." *McQueen v. Lustine Realty Co.*, 547 A.2d 172, 176-177 (D.C. 1988). Here, in contrast, Plaintiffs ask the Court, among other things, to grant them the right of inspection to "any and all" of Rabbi Steiner's property. Plaintiffs' Supplemental Memorandum, ¶ 3. Such proposal goes well beyond the scope of equitable injunctive relief, as well as beyond the terms of the Contract, and should be denied. *See* Exh. 1 to Plaintiffs' Motion for Preliminary Injunction, § G.

IV. CONCLUSION

For the reasons described above and in Defendants' Opposition to Motion dated November 12, 2014, this Court should deny Plaintiffs' amended non-compete as contained in Plaintiffs' Supplemental Memorandum in Support of their Motion for Preliminary Injunction.

DATE: December 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December 2014, a copy of the foregoing Supplemental Memorandum of Law in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction was served on Plaintiffs' Counsel via CaseFileXpress:

Chauncey A. Bratt (DC Bar # 1018133)
WHITE & CASE LLP