SC92291

IN THE SUPREME COURT OF MISSOURI

WHELAN SECURITY COMPANY,

Appellant,

vs.

CHARLES KENNEBREW, Sr., *et alia*,

Respondents.

On Appeal from the Circuit Court of St. Louis County
Honorable Maura B. McShane, Circuit Judge
Case No. 10SL-CC00006

SUBSTITUTE BRIEF OF RESPONDENT CHARLES KENNEBREW

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Preliminary Statement

Whelan Security Company is a private security contractor headquartered in St. Louis that does business across America in 38 branches in 23 states. In 2007, Whelan hired Charles Kennebrew as its branch manager in Dallas, Texas.

Whelan required Mr. Kennebrew sign non-compete covenants restricting against: (1) soliciting any of Whelan's existing or prospective customers; (2) "interfering with" any of Whelan's employees; and (3) working for any competing business within a 50 mile radius "of any location where [he] has provided or arranged for [Whelan] to provide services." The covenants were to last for two years and gave no specific geographic scope. Still, Whelan assured Mr. Kennebrew they only applied to activities in Dallas.

In 2009, Mr. Kennebrew resigned from Whelan to run his own private security contractor business he had started in Houston before he came to Whelan in Dallas. Not wanting to lose him just yet, Whelan agreed to allow him both to work as its Dallas branch manager for four more months while simultaneously running his firm in Houston. Once Elite became successful in Houston, however, even taking on a former Houston customer of Whelan's, Whelan sued Mr. Kennebrew for breach of the covenants.

After a three-day hearing on Whelan's request for a preliminary injunction, the trial court held the covenants were void and unenforceable as facially overbroad. They were "extremely broad and practically unlimited geographically," and Whelan's proposed application of them meant Mr. Kennebrew would have to know and track "the prospective business of every [Whelan] office in every city …." The court later granted summary judgment to Mr. Kennebrew, incorporating its earlier holding.

Whelan appeals. First, it argues the covenants are enforceable. Then, it argues *it* should have summary judgment because Mr. Kennebrew violated the covenants. Finally, it argues the trial court should have rewritten the covenants to make them reasonable.

Whelan's arguments are without merit. Existing caselaw is plain that these limitless covenants are facially overbroad and, thus, void. Regardless, the denial of summary judgment is not appealable, and even viewing the facts in a light most favorable to Whelan, Mr. Kennebrew is entitled to judgment as a matter of law. As well, the trial court's decision to hold Whelan was soundly within its discretion as a matter of equity.

The Court should affirm the trial court's judgment.

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Jurisdictional Statement

This is an appeal from a summary judgment holding particular employment non-compete covenants to be facially unreasonable and void.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. Appellants timely appealed to the Missouri Court of Appeals, Eastern District. This case arose in St. Louis County. Under § 477.050, R.S.Mo., venue lay within that district of the Court of Appeals.

On November 29, 2011, the Court of Appeals issued an opinion reversing the trial court's judgment. Respondent Charles Kennebrew filed a timely Application for Transfer in the Court of Appeals, which was denied. Mr. Kennebrew then filed a timely Application for Transfer in this Court pursuant to Rule 83.04. On March 6, 2012, the Court sustained that application and transferred this case.

Therefore, pursuant to Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. Background

This case stems from an employment agreement between Respondent Charles Kennebrew and Appellant Whelan Security Company (Legal File 530-36). Since October 2007, Mr. Kennebrew has owned 60 percent of Elite Protective Services, LLC ("Elite"), a Texas limited liability company llocated in Houston (Transcript Volume III 18; L.F. 551, 558).

Mr. Kennebrew has worked in the private security industry since his discharge from the United States Navy in 1998 (Tr. III 19-20). He worked for two major companies in Houston, Barton Security and its successor, Allied Barton (Tr. III 214-22). He signed a non-compete agreement with Allied Barton that prohibited him from working in the industry in Houston for six months after his employment ended (Tr. I 33).

Whelan Security is a Missouri corporation principally located in St. Louis that operates throughout the United States (Tr. I 10-11, 13). In October 2007, Whelan began negotiating with Mr. Kennebrew, who still lived in Houston, to bring him on board (L.F. 603, 615). On October 31, 2007, Prentice Robertson, Whelan's Executive Vice President, offered Mr. Kennebrew a position at Whelan's Dallas branch in a "Quality Control/Continuous Improvement" role earning around $115,000 per year (L.F. 603, 615). Mr. Robertson offered to make a mutual decision as to whether Mr. Kennebrew would stay in Dallas or move back to Houston at the pending end of his six-month non-compete period from Allied Barton (L.F. 603, 615). Mr. Robertson offered that, either way, Mr. Kennebrew would assume control of "either" of those two branches at the end

of that period, and would report to Todd McCullough, Whelan's Vice President of Operations for the Southern Region (L.F. 603).

On November 2, 2007, Mr. Robertson sent Mr. Kennebrew an offer letter formally inviting Mr. Kennebrew to join Whelan (L.F. 601; Appendix A17). The offer superseded all previous communications and offers (L.F. 601; Appx. A17). Effective November 26, 2007, he offered Mr. Kennebrew the position of Quality Assurance Manager for Whelan's Dallas branch, to be followed by a branch leadership role in one of Whelan's major Texas markets (L.F. 601; Appx. A17). Mr. Kennebrew would be second-in-command in Dallas, given a goal to reorganize that branch's structure so a new Dallas manager could "step into a finely tuned operation with happy customers" (L.F. 601; Appx. A17). "Should [Mr. Kennebrew] opt to remain in Dallas permanently, [he would] assume the branch leadership role in that branch" (L.F. 601; Appx. A17). Mr. Kennebrew accepted the offer and moved to Dallas (L.F. 356-57).

B. Non-Compete Covenants

On November 26, 2007, Mr. Kennebrew met with Mr. McCullough, who presented Mr. Kennebrew with an agreement to sign titled "Employee Confidential Information and Non-Solicitation/Non-Competition Agreement" ("Agreement") (L.F. 356-57, 487, 530-36; Appx. A10-16).

Section 3 of the Agreement, titled "Restrictive Covenants," contained its "Non-Solicitation/Non-Competition" portion:

> During the term of this Agreement, and for a period of two (2) years thereafter, whether the termination of this Agreement is initiated by

EMPLOYER OR EMPLOYEE, EMPLOYEE shall not, without the prior consent of EMPLOYER, in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee:

(a) Solicit, take away or attempt to take away any customers of EMPLOYER or the business or patronage of any such customers or prospective customer(s) whose business was being sought during the past twelve (12) months of EMPLOYEE'S employment; or

(b) Solicit, interfere with, employ, or endeavor to employ any employees or agents of EMPLOYER.

(c) Work for a competing business within a fifty (50) mile radius of any location where EMPLOYEE has provided or arranged for EMPLOYER to provide services.

(d) Work for a customer of EMPLOYER or prospective customer(s) whose business was being sought during the last twelve (12) months of EMPLOYEE'S employment, if the work would include providing, or arranging for, services the same as, or similar to, those provided by EMPLOYER.

"Competing business" means any business engaged in providing guard and/or security services the same as, or similar to, those offered by

EMPLOYER.

(L.F. 531-32; Appx. A11-12).

Mr. McCullough explained to Mr. Kennebrew that these non-compete proviisons covered work only in the Dallas area, also including Fort Worth, and only would be in force in that market (Supp. L.F. 22, 55, 122, 137, 140-41). The operations of Whelan's Dallas branch also included Fort Worth. (Supp. L.F. 55). Mr. McCullough stated that, when discussing the terms of the contract with Mr. Kennebrew on November 26, 2007, he never suggested Mr. Kennebrew would be responsible for working in Houston (Supp. L.F. 55). Indeed, Mr. McCullough noted Mr. Kennebrew worked exclusively in Whelan's Dallas branch throughout Mr. McCullough's term as Vice President, covering October 2007 to late March 2009. (Supp. L.F. 62).

According to Mr. McCullough, he personally explained to Mr. Kennebrew that the non-compete portion of the Agreement meant that Mr. Kennebrew could not do business in a 50 mile radius of where he was stationed – Dallas – and could not assist anyone else in taking Whelan's customers in that area, either (Supp. L.F. 26, 138). That is, since Mr. Kennebrew oversaw Whelan's Dallas-Fort Worth operations, the non-compete covenants covered a 50-mile radius of that area for two years after his employment with Whelan ended (Supp. L.F. 30, 142).

Mr. McCullough assured Mr. Kennebrew that the covenants did not extend to any potential assistance Mr. Kennebrew may have to give to Whelan in securing business in Houston (Supp. L.F. 26, 138). He understood the covenants did not prevent Mr. Kennebrew from opening his own security business in Houston (Supp. L.F. 32-33).

Mr. Kennebrew testified that, based on this discussion with Mr. McCullough, he understood the non-compete covenantsonly applied to Dallas-Fort Worth, the territory he oversaw (Tr. III 71). He explained he understood this was because his original offer from Whelan gave him the option to remain in Dallas, which he exercised, and Dallas was his only territory for Whelan (Tr. III 71-73). Mr. Kennebrew and Mr. McCullough each signed the agreement (L.F. 536).

Meanwhile, in St. Louis, Whelan's CEO, Greg Twardowski, believed that this language did not contain any geographic limitation at all (Tr. I 73-74). Instead, he believed it contained a "customer restriction" (Tr. I 74). That is, it he said it protects all Whelan's actual and potential customers nationwide from former employees (Tr. I 74).

After signing the Agreement, Mr. Kennebrew immediately became Whelan's Dallas branch manager, as the previous manager abruptly had left (Tr. III 27). Thereafter, he never considered the option to leave Dallas once his Allied Barton non-compete obligation ended because he became so heavily involved in Whelan's Dallas marketplace (L.F. 42, 288)

Mr. Twardowski stated that, once Mr. Kennebrew's Allied Barton non-compete period in Houston ended, Whelan intended to involve Mr. Kennebrew in its Houston operation (Tr. I 44). Mr. Twardowski acknowledged Mr. Robertson's formal November 2006 offer gave Mr. Kennebrew the option to remain in Dallas permanently, but opined that sentence was "misleading" (Tr. I 40-41) Regardless, Mr. Twardowski believed Whelan followed the terms of the offer (Tr. I 38, 41). He said it is uncommon in his business practice to let an employee dictate when and where they would move (Tr. I 35).

C. Mr. Kennebrew's Customer Contacts

According to Mr. Twardowski, most of Whelan's contracts, if not all, are based on the customer's personal relationship with Whelan's management, either local, regional, or at its corporate headquarters (Tr. I 11-12). He stated this important relationship is established by the manager who is handling the customer's contract (Tr. I 12). He said it creates a primary point of reference – a primary manager – personally overseeing the contractual relationship with the customer (Tr. I 12).

In its brief, Whelan states Mr. "Kennebrew had numerous customer contacts in Texas and, in particular, in Houston and dealt with more than ten clients in Houston on behalf of Whelan and had a good rapport with each" (Appellant's Brief 36). It alleges Mr. "Kennebrew's customer contacts and the opportunity to influence Whelan's customers … warrant enforcement of a non-competition covenant that by its terms is reasonable" (Aplt. Br. 36). To reach this conclusion, however, Whelan misapplies the facts.

Mr. Twardowski did indeed say Mr. Kennebrew was well-respected in the Houston marketplace and had a great client following, but he plainly was referring to the portfolio Mr. Kennebrew developed while working for Allied Barton, not Whelan (Tr. I 17). Rather, only *one time*, a "sales blitz" in April 2008, Mr. Robertson requested Mr. Kennebrew give Whelan's Houston salespeople some Houston connections or contacts from his days at Barton and Allied Barton to help bring them over to Whelan (Tr. III 14, 18-19, 31).

Mr. Kennebrew explained that, as a result of that one event alone, he only had

contact with five or ten Houston customers during his 18 months at Whelan (Tr. III 34). Moreover, *all* these customers were contacts with whom he previously had been acquainted before his employment with Whelan (Tr. III 34). Indeed, though Whelan may speculate otherwise, it presented no evidence that Mr. Kennebrew served, managed, or handled any of its clients in Houston. Whelan could not provide evidence that Mr. Kennebrew provided any services for clients outside the Dallas area, but rather only that he once helped Whelan by giving his superiors some of his old Houston contacts (L.F. 91).

Mr. McCullough, too, confirmed that Whelan sought to leverage contacts Mr. Kennebrew previously acquired while working for Barton or Allied Barton (Supp. L.F. 21-22, 111-12). He stated he asked Mr. Kennebrew to assist on an account in Houston in this manner within Mr. Kennebrew's first four months at Whelan. (Supp. L.F. 23, 113). Mr. McCullough explained that was not part of the non-compete provision in the Agreement, but rather that giving leads and things of that nature was just assisting Whelan – while still working exclusively in the Dallas area – to drum up business in Houston (Supp. L.F. 27, 139).

For, it was Mr. McCullough, not Mr. Kennebrew, who oversaw Whelan's operations in the entire Southern United States, including both Dallas and Houston (Supp. L.F. 29, 141). Simply put, while Mr. McCullough was Vice President, Mr. Kennebrew had no staff or operational oversight in Houston; those functions belonged to Doug Blake, Jeff Rosandich, and David Beltran, successive branch managers in Houston (Supp. L.F. 33-34, 145-46).

Mr. Kennebrew testified he only ever had access to Whelan's financials and price information in Dallas and, even then was unable to copy or print it except merely to put it into a spreadsheet and, still then only on Mr. Robertson's approval (Tr. I 37-39). He managed clients and customers in Dallas, both internal and external, managed the Dallas branch's finances (except budgeting), and was responsible for human resources in Dallas (Tr. III 65). He had no access to any operational information about the Houston branch, such as financial or compensation data (Tr. III 66).

D. Park Square

Much of Whelan's claim against Mr. Kennebrew concerns the Park Square Condominiums in Houston and its Property Manager, Jan VerVoort (Aplt. Br. 9-15, 40-46, 48-51).

Mr. McCullough, Whelan's Senior Vice President and Chief Security Officer Mark Porterfield, and indeed even Mr. Twardowski all stated Mr. Kennebrew had a relationship with Park Square and Ms. VerVoort prior to his employment with Whelan (Tr. I 49, 90). Mr. Twardowski testified Park Square was Allied Barton's customer before Mr. Kennebrew began working at Whelan (Tr. I 49). He acknowledged Mr. Kennebrew was not the Houston branch manager; he knew of no instance in which Mr. Kennebrew worked on Park Square's account for Whelan (Tr. I 51).

Rather, it was Mr. McCullough who brought Park Square to Whelan (Tr. III 73). Mr. Kennebrew only contacted Ms. VerVoort on two occasions during his time at Whelan: once during Hurricane Ike when some of Whelan's Dallas employees were brought to Houston to assist in securing buildings, and again in May 2009 when he sent a

gift basket to Ms. VerVoort at Mr. Porterfield's request (Tr. III 34-35, 45).

Mr. Kennebrew also testified that, after he left Whelan, he twice received calls from Ms. VerVoort in which she stated she was about to terminate Whelan's services, first in August 2009 and then again in November 2009 (Tr. III 61). Mr. Kennebrew's response each time was to let Mr. Porterfield know (Tr. III 61). He told Ms. VerVoort in response to the first call that he had left Whelan "a week ago" and she responded she had not heard from anyone at Whelan since Mr. McCullough resigned months earlier (Tr. III 61). In the second call, Ms. VerVoort asked Mr. Kennebrew if he would be interested in bidding on a contract with Park Square (Tr. III 62). He declined and had no further contact with Ms. VerVoort until December 2009, after she terminated Whelan, when she asked Mr. Kennebrew to come meet with Park Square's board (Tr. III 63).

Ms. VerVoort, too, confirmed Mr. Kennebrew did not solicit Park Square's business for Elite; instead, it was she who called Mr. Kennebrew (Supp. L.F. 46, 120-21). She said she used Mr. Kennebrew's Whelan business card to call him initially, as she did not yet know he had his own company (L.F. 77, 198). Rather, she, too, explained Mr. Kennebrew told her he would contact someone with Whelan about her concerns, but let her know he was no longer with Whelan (L.F. 77, 198). She said he did not tell her for whom he was working (i.e. himself) (L.F. 77, 198)

Instead, it was not until Ms. VerVoort inquired further that she discovered Mr. Kennebrew had his own security business in Houston (L.F. 177). This was at the same time she was looking for a new security provider for Park Square (L.F. 177). She acknowledged she invited Mr. Kennebrew to meet with Park Square's board in December

2009 (L.F. 33, 37, 174, 178).

Mr. Twardowski, however, believed Mr. Kennebrew solicited Park Square for Elite, because he said that, in 20 years of business, he had yet to receive a contract without engaging in some form of solicitation (Tr. I 61-62). He said he believed he lost Park Square's contract because of Mr. Kennebrew's conduct, based solely on the fact that Park Square hired Elite after firing Whelan (Tr. I 3-11, 64-69). He acknowledged, though, that he knew Mr. Kennebrew's meeting with Park Square's board and Elite's eventual contract with Park Square occurred *after* Park Square already had terminated Whelan (Tr. I 71-72). Mr. Porterfield admitted he had no personal knowledge that Mr. Kennebrew had solicited Park Square's business for Elite (Tr. I 106).

Ms. VerVoort explained the real reason she fired Whelan was that Whelan's quality of service "had gotten pretty bad," and Elite's was much better (L.F. 172). After comparing Elite to other companies, she felt that, because Elite was new, it would give more attention to Park Square than other, more established companies (L.F. 37, 179).

Some former Whelan security officers remained at Park Square when Elite took over the account (Supp. L.F. 46). Ms. VerVoort, though, explained that those officers had been there for ten years or more and chose to stay working at the Park Square property regardless of which security company handled the property (Supp. L.F. 45-46, 123, 126). Although whether to switch companies is up to the employees, Ms. VerVoort wanted them to stay and managed to broker a deal in which all the officers who were interested in doing so would stay (Supp. L.F. 45-46, 124, 127). To her knowledge, none of the officers were contacted by anyone from Elite (Supp. L.F. 45, 127). Mr. Porterfield

acknowledged that, in the security industry, employees often remain at the same site when a new company takes over, simply changing uniforms (Tr. I 110).

For example, John Loving, the site security supervisor at Park Square for five years, testified that he worked there first for Barton Security (when he was supervised by Mr. Kennebrew), then through Barton's merger with Allied to create Allied Barton, and then for Whelan when it took over security services at Park Square (Tr. II 58-59, 70, 72). Mr. Loving said it was the industry standard that when a new company takes over, employees stay if they want to (Tr. II 73). He said the employee's relationship with the site is very important (Tr. II 74). In his case, for example, when Park Square terminated Whelan's contract, Ms. VerVoort asked him to stay (Tr. II 75).

E. Whelan's Knowledge of Elite

Mr. Twardowski acknowledged he had discussed with Mr. Kennebrew and Mr. McCullough that Mr. Kennebrew could run his own business in Houston while continuing to work for Whelan in Dallas (Tr. I 25). As Mr. Twardowski recounted, Mr. Kennebrew's company "initially" would pursue government contracts and minority subcontracting opportunities with other prime contractors (Tr. I 25). He said he also discussed this with Mr. Robertson and Mr. Porterfield, understanding Mr. Kennebrew was going to pursue government contracts and minority business (Tr. I 55, 57). Mr. Twardowski did not know exactly what Mr. Porterfield, Mr. Robinson, and Mr. Kennebrew had discussed together (Tr. I 57-58). Mr. Twardowski did not feel it necessary to remind Mr. Kennebrew of his non-compete obligations (Tr. I 58).

Mr. Porterfield gave two different versions of his conversation with Mr.

Kennebrew concerning Mr. Kennebrew's desire to run his own business. In the first account, he stated Whelan wanted to help Mr. Kennebrew because Whelan does not "particularly pursue government business, and that was gonna be his core focus, so [Whelan] certainly would be interested in assisting and supporting him" (Supp. L.F. 41, 131). He said, "My agreement with [Mr. Kennebrew] was: That's where we wanted a partnership arrangement, was specifically on government contracts" (Supp. L.F. 41, 131).

Later, however, Mr. Porterfield testified he did not know Mr. Kennebrew was forming his own company until Mr. Kennebrew's letter of resignation stated Mr. Kennebrew was going to start a minority-oriented company in Houston specifically focused on government business (Tr. I 86). But Mr. Kennebrew's resignation *did not* state he was forming a new company that would focus on government business (L.F. 529). Rather, the letter stated Mr. Kennebrew wanted to live his dream, in parentheses typing "Minority Company," meaning he was an African-American and his dream was to run a company owned by African-Americans (L.F. 529).

Indeed, the letter does not even refer to *starting* a company at all (L.F. 529). This is because Elite had been in existence for nearly two years: it was registered at its present address in Houston on October 29, 2007 (L.F. 551, 554, 558).

Mr. Porterfield's first round of testimony, however, mirrors Mr. Kennebrew's account. Mr. Kennebrew recounted that he repeatedly approached Whelan about a joint business venture regarding government contracts: he had approached Mr. Porterfield in December 2008, explaining he had a minority contractor opportunity with the City of Houston and wanted to partner with Whelan to do it (Tr. III. 46). He let Mr. Porterfield

know he already had a minority-owned company and would seek government contracts, but he never told Mr. Porterfield it would be his company's main focus (Tr. III 70).

On March 30, 2009, Mr. Kennebrew submitted the letter of resignation to Whelan in which he stated he wanted "to at least try and live [his] dream (Minority Company)" (L.F. 529). Despite this, Whelan wanted him to stay on longer and entered into a verbal agreement with him in which Mr. Kennebrew remained employed with Whelan Security in Dallas while simultaneously running Elite in Houston (Tr. I 3-6; Tr. III 109). Mr. Twardowski admitted Mr. Kennebrew remained with Whelan under this arrangement until August of 2009; he said Whelan agreed to this both because Mr. Kennebrew was a valuable asset and Whelan wanted to be supportive of Mr. Kennebrew's business (Tr. I 77). During this period, from April 2009 until August 2009, Whelan continued to pay Mr. Kennebrew (Supp. L.F. 33; Tr. I 53).

On August 7, 2009, however, Mr. Kennebrew's employment with Whelan terminated, and the two-year non-compete covenant began to run, eventually terminating on August 7, 2011 (Tr. I 78).

F. Proceedings Below

On January 4, 2010, Whelan filed an action against Mr. Kennebrew and another former Whelan employee, Landon Morgan, in the Circuit Court of St. Louis County seeking injunctive relief and damages (L.F. 26, 30).[1] Whelan stated claims for breach of

[1] The case was filed and heard in Missouri, rather than Texas, due to forum selection and choice-of-law provisions in the Agreement (L.F. 535).

contract, unjust enrichment, and civil conspiracy (L.F. 18-50). As Mr. Twardowski explained, Whelan contended Mr. Kennebrew violated the Agreement's non-compete section, principally the language in subparagraph (c) of § 3 restricting work with a competitor within a 50 mile radius of where Kennebrew provided services (Tr. I 31).

The court issued three successive temporary restraining orders enforcing the non-compete provisions of the Agreement against Mr. Kennebrew (L.F. 57-60, 67-68, 94-95). Mr. Kennebrew filed successive motions to dismiss, contending in part that the Agreements were facially unreasonable and void, but the trial court overruled them (L.F. 97, 102, 119).

Whelan then requested a preliminary injunction against both Mr. Kennebrew and Mr. Morgan, and the trial court heard the issue over three days in June, July, and September 2010 (L.F. 636; Tr. I 1; Tr. II 1; Tr. III 1; Appx. A4). As the court put it, the question before it was

> whether or not to preliminarily enjoin [the defendants] from 1) performing work for a customer of Whelan Security co. including but not limited to Park Square Condominiums; 2) soliciting customers of Whelan, including but not limited to Park Square Condominiums; 3) soliciting or interfering with employees of Whelan; 4) using Whelan's confidential information; and 5) working for a business that provides security service similar to those provided by Whelan.

(L.F. 636-37; Appx. A4-5).

On October 8, 2010, the court denied a preliminary injunction as to either defendant (L.F. 636-41; Appx. A4-9). Noting that "because covenants not to compete are considered to be restraint on trade, they are presumptively void and are enforceable only to the extent that they are demonstratively reasonably [*sic*]," the court observed:

> "Noncompetition agreements are not favored in the law, and the party attempting to enforce a noncompetition agreement has the burden of demonstrating both the necessity to protect the claimant's legitimate interest and that the agreement is reasonable as to time and space." "The question of reasonableness of a restraint is to be determined according to the facts of the particular case and hence requires a thorough consideration of all surrounding circumstances, including the subject matter of the contract, the purpose to be served, the situation of the parties, the extent of the restraint, and the specialization of the business."

(L.F. 638-639; Appx. A6-7) (citations omitted).

The court found Mr. "Kennebrew's Agreement is extremely broad and practically unlimited geographically" (L.F. 639; Appx. A7). As to the Agreement's provision that Mr. Kennebrew could not "solicit, take away or attempt to take away any customers … or prospective customers whose business was being sought during the past twelve months,"

> Whelan operates in 23 states with branch offices in 38 cities. Taken literally, [Mr.] Kennebrew cannot solicit customers that any Whelan office sought but did not acquire in the last year. That would require [Mr.] Kennebrew to know the prospective business of every office in every city

> and to keep track of when they were solicited so as to avoid conflict with the Agreement.

(L.F. 639; Appx. A7).

The provision that Mr. Kennebrew cannot "'interfere with … any employees … of Employer' for two years after employment terminates" suffered from the same debilitation (L.F. 639; Appx. A7). It "would require [Mr.] Kennebrew to know all of Whelan's employees and to avoid 'interfering' with them" (L.F. 639; Appx. A7).

The provision that Mr. Kennebrew could not "work for a customer of Employer or prospective customer whose business was being sought during the last twelve … months of Employee's employment, if the work would include providing … services the same as, or similar to" Whelan's facially overbroad in the same manner (L.F. 639; Appx. A7). It meant that Mr. "Kennebrew cannot work for any customer of any of Whelan's locations. He must also know of Whelan's prospective customers and avoid all of them in every location throughout the country" (L.F. 639-40; Appx. A7-8).

As a result of these findings, the trial court held,

> Obviously, the geographic stretch of these Agreements severely restricts [Mr. Kennebrew's] ability to support [himself] and [his] famil[y]. The breadth of extending the restriction to potential customers is not feasible. Since Missouri courts require a covenant not to compete to be reasonable as to time and space, these Agreements are not valid.

(L.F. 640; Appx. A8).

Then, pointing out that the parties did not ask it to modify the Agreement so as to make it enforceable, the court held that, had they done so, it was "not require to re-write their Agreement" (L.F. 640-41; Appx. A8-9). It held the "Agreements, as written, are not reasonable as to time and space. Whelan as not met its burden to prove them so." (L.F. 641; Appx. A9). Whelan later moved the court to reconsider this holding, but the court refused (L.F. 642-48, 1638-39; Appx. A2-3).

Thereafter, the parties filed dueling motions for summary judgment (L.F. 642-48, 652-800; Appx. A1-2). On January 7, 2011, the trial court denied Whelan's request for summary judgment and granted summary judgment to Mr. Kennebrew and Mr. Morgan on all claims (L.F. 1637-39; Appx. A1-3). It "rule[d] and determine[d]" that, "in light of its" earlier order denying Whelan a preliminary injunction, "the employment agreements at issue in this case, as written, are overbroad, not reasonable as to time and space and are therefore not valid" (L.F. 1638-39; Appx. A2-3). It dismissed Whelan's case with prejudice (L.F. 1639; Appx. A3).

Whelan timely appealed to the Missouri Court of Appeals, Eastern District. On November 29, 2011, the Court of Appeals issued an opinion reversing the trial court's judgment. On March 6, 2012, this Court sustained Mr. Kennebrew's application for transfer and transferred this case.

Response to Appellant's Points Relied On

I. The trial court did not err in granting Mr. Kennebrew summary judgment *because* non-compete covenants are presumptively void and Whelan did not meet its burden to prove that covenants it sought to enforce against Mr. Kennebrew were both necessary and reasonable *in that*, on their face, Whelan's non-compete covenants were unnecessary, overbroad, and unreasonable as to time and space.

(Response to Appellant's Point Relied On I)

Payroll Advance, Inc. v. Yates, 270 S.W.3d 428 (Mo. App. 2008)

State ex rel. Eagleton v. Cameron, 384 S.W.2d 627 (Mo. 1964)

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. banc 2006)

Osage Glass, Inc. v. Donovan, 693 S.W.2d 71 (Mo. banc 1985)

§ 416.031, R.S.Mo.

§ 431.202, R.S.Mo.

Rule 92.02

II. The trial court did not err in refusing to modify the terms of Whelan's non-compete covenants so as to make them reasonable *because* trial courts have equitable discretion to refuse to modify a contract under review *in that* the trial court's decision to hold Whelan to the terms of the covenants it wrote was not so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.

(Response to Appellant's Point Relied On V)

Payroll Advance, Inc. v. Yates, 270 S.W.3d 428 (Mo. App. 2008)

Krepps v. Krepps, 234 S.W.3d 605 (Mo. App. 2007)

AEE-EMF, Inc. v. Passmore, 906 S.W.2d 714 (Mo. App. 1995)

State ex rel. Wyeth v. Grady, 262 S.W.3d 216 (Mo. banc 2008)

III. The trial court did not err in granting Mr. Kennebrew summary judgment *because* the denial of summary judgment is not appealable, and even viewing the facts in a light most favorable to Whelan, Mr. Kennebrew was entitled to judgment as a matter of law *in that* Whelan's request for summary judgment cannot be heard on appeal, and Mr. Kennebrew's running a business in Houston, contracting with Park Square in Houston, and employing former employees of Whelan at Park Square in Houston cannot have violated Whelan's non-compete covenants, which was void for overbreadth and, even if not, did not prohibit these activities.

(Response to Appellant's Points Relied On II, III, and IV)

Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454 (Mo. banc 2006)

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. banc 2006)

Osage Glass, Inc. v. Donovan, 693 S.W.3d 71 (Mo. banc 1985)

Schmersahl, Treolar & Co. v. McHugh, 28 S.W.3d 345 (Mo. App. 2000)

§ 431.202, R.S.Mo.

Argument

I. The trial court did not err in granting Mr. Kennebrew summary judgment *because* non-compete covenants are presumptively void and Whelan did not meet its burden to prove that covenants it sought to enforce against Mr. Kennebrew were both necessary and reasonable *in that*, on their face, Whelan's non-compete covenants were unnecessary, overbroad, and unreasonable as to time and space.

(Response to Appellant's Point Relied On I)

Standard of Review

This is an appeal from a grant of summary judgment. This Court "reviews the grant of summary judgment *de novo*." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452 (Mo. banc 2011). It "applies the same criteria as the trial court in determining whether summary judgment was proper" and will affirm if "there is no genuine issue as to the material facts and … the movant is entitled to judgment as a matter of law." *Id.* at 453.

"An order of summary judgment will not be set aside on review if supportable on any theory." *City of Washington v. Warren Cnty.*, 899 S.W.2d 863, 868 (Mo. banc 1995). "Summary judgment is particularly appropriate when construction of a contract is at issue and the contract is unambiguous on its face." *Grubbs v. Std. Ins. Co.*, 328 S.W.3d 458, 461 (Mo. App. 2010).

* * *

The law of Missouri is that non-compete covenants are presumptively void. A party seeking to enforce first must prove both its necessity and reasonableness as a matter

of law. In this case, Appellant Whelan sought to apply non-compete covenants against Mr. Kennebrew that were unlimited geographically and would require him to know Whelan's actual and prospective business in all Whelan's 38 branch offices in 23 states. The trial court held this was facially overbroad and unreasonable. Was this error?

In its first Point Relied On, Whelan argues its non-compete covenants with Respondent Charles Kennebrew were not facially overbroad and unreasonable and the trial court erred in holding otherwise (Appellant's Brief 21). Whelan argues the covenant is "narrowly drafted and reasonable," and suggests its "research has not disclosed a single reported case" suggesting otherwise (Aplt. Br. 22).

If that is true, then Whelan's research is faulty. For more than 40 years, the law of Missouri has been plain that *all* non-compete covenants are *presumptively* void. As such, Whelan bore the burden to prove its covenant was reasonable as to time and space. It did not.

For, the plain, unambiguous language of the covenants as written was such that, as a matter of law, Whelan simply could not meet this burden. As Whelan seeks to apply it, the covenant would require Mr. Kennebrew to refrain from working in any capacity for any security business in most any major market in America, let alone his home in Houston. Whelan would require Mr. Kennebrew to know all of its business across America, including actual and prospective employees and customers for both 12 months before and two years after he terminated his employment. This is patently, facially unreasonable.

This Court should affirm the trial court's judgment.

A. All the non-compete covenants are overbroad as written and, thus, void as a matter of law, because they have no practical geographic limitation.

In Missouri, "Every contract, combination or conspiracy in restraint of trade or commerce … is unlawful." § 416.031, R.S.Mo. Despite this statutory mandate, Missouri's courts long have recognized that *some degree* of an action that otherwise may restrain trade or commerce occasionally can serve a legitimate purpose. *Schmersahl Treloar & Co. v. McHugh*, 28 S.W.3d 345, 348 (Mo. App. 2000).

"[C]ovenants not to compete are considered to be restraints on trade …." *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 434 (Mo. App. 2008) (quoting *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 453 (Mo. App. 1998)). As a result of § 416.031, "they are presumptively void and are enforceable only to the extent that they are demonstratively reasonable." *Id.* Thus, as restraints on trade or commerce, "[n]oncompetition agreements are not favored in the law, and the party attempting to enforce a noncompetition agreement has the burden of demonstrating both the necessity to protect the claimant's legitimate interests and that the agreement is reasonable as to time and space." *Id.* (citing *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 609-10 (Mo. banc 2006)).

As this Court has explained, "There are at least four valid and conflicting concerns at issue in the law of non-compete agreements[:]"

> First, the employer needs to be able to engage a highly trained workforce to be competitive and profitable, without fear that the employee will use the employer's business secrets against it or steal the employer's customers

> after leaving employment. Second, the employee must be mobile in order to provide for his or her family and to advance his or her career in an ever-changing marketplace. This mobility is dependent upon the ability of the employee to take his or her increasing skills and put them to work from one employer to the next. Third, the law favors the freedom of parties to value their respective interests in negotiated contracts. And, fourth, contracts in restraint of trade are unlawful.

Healthcare Servs., 198 S.W.3d at 609-10.

Thus, as an employment non-compete covenant favors the employer, it is presumptively invalid, but it can be valid and enforceable only "to the extent [it] can be narrowly tailored geographically and temporally" and is "no more restrictive than is necessary to protect the legitimate interests of the employer …." *Id.* at 610 (citing *Am. Pamcor, Inc., v. Klote*, 438 S.W.2d 287, 290 (Mo. App. 1969)); *see also Sys. Bus. Servs., Inc. v. Bratten*, 162 S.W.3d 41 (Mo. App. 2005). Similarly, "such restrictions are not enforceable to protect an employer from mere competition by a former employee, but only to the extent that the restrictions protect the employer's trade secrets or customer contacts." *Id.* (citing, *inter alia*, *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 73-75 (Mo. banc 1985)); *see also Easy Returns*, 964 S.W.2d at 453.

In this case, Whelan argues the non-compete covenants it seeks to enforce against Mr. Kennebrew are narrowly drafted and reasonable as a matter of law (Aplt. Br. 21-22). It takes umbrage with the trial court's having held otherwise. But Whelan ignores that, in Missouri,

> The question of reasonableness of a restraint is to be determined according to the facts of the particular case and hence requires a thorough consideration of all surrounding circumstances, including subject matter of the contract, the purpose to be served, the situation of the parties, the extent of the restraint, and the specialization of the business.

Payroll Advance, 270 S.W.3d at 434.

i. The trial court properly relied on the preliminary injunction proceedings in granting Mr. Kennebrew summary judgment.

Whelan's argument in its first point rests on a notion that the trial court's use of summary judgment was improper, because it did not hear the facts and circumstances of the case. But this is untrue: the trial court heard the facts and surrounding circumstances of this case during the three days of hearings over Whelan's request for a preliminary injunction, as it noted in its eventual order denying the same (Legal File 638-39; Appendix A6-7). Much of both parties' summary judgment materials consisted of preliminary injunction depositions and excerpts from the preliminary injunction proceedings (L.F. 652-800). Then, in its final judgment, the trial court expressly incorporated the preliminary injunction order (L.F. 1638; Appx. AA2).

This was entirely proper. This Court long has held when a preliminary injunction hearing shows "that for some reason as a matter of law plaintiff would in no event be entitled to a permanent injunction, the matter could then be finally disposed of, but it should be done pursuant to a motion for summary judgment or other appropriate proceeding." *State ex rel. Eagleton v. Cameron*, 384 S.W.2d 627, 631 (Mo. 1964); *see*

also Rule 92.02(c)(3). Indeed, this principle can work the other way, too, allowing a permanent injunction at a preliminary injunction hearing. *State ex rel. Mo. Bd. for Architects v. Henigman*, 937 S.W.2d 757, 759 (Mo. App. 1997).

The trial court properly heard the facts and circumstances of this case in the preliminary injunction proceedings and held Whelan could not possibly prevail on the merits as a matter of law. For, as written, the covenants were overbroad. It was equally proper for Mr. Kennebrew to move for summary judgment based on this holding. Consequently, this dispute was amenable to summary judgment. Indeed, Whelan obviously thought so, too, and moved for summary judgment in *its* favor (L.F. 737-800).

ii. Whelan's authorities are inapposite and distinguishable.

Beyond this untenable attack on the trial court's procedure, Whelan insists no "single reported case" in Missouri has held void "restrictive covenants of the temporal and geographical scope that are the same as, or even substantially similar to those in the Agreements here" (Aplt. Br. 23). Instead, Whelan asserts Missouri courts in some cases have found 50-mile or two-year restrictions to be reasonable. But the cases Whelan cites are inapposite. Whelan's argument is without merit.

Whelan's non-compete covenant purports to enjoin Mr. Kennebrew from engaging in any "(c) Work for a competing business within a fifty (50) mile radius of any location where EMPLOYEE has provided or arranged for EMPLOYER to provide services" (L.F. 532-33; Appx. A12-13). This language fails to state a specific location; as a result, it has lent itself to disparate interpretation by the parties.

Whelan's offer to Mr. Kennebrew stipulated the location where he would work for Whelan was in Dallas (L.F. 601; Appx. A17). As a result, Mr. Kennebrew understood that the location where he provided services – and would be enjoined from working for a competing business within fifty miles for two years after leaving Whelan – was Dallas. Todd McCullough, Whelan's agent who signed that offer, agreed with Mr. Kennebrew's understanding; he testified he explained to Mr. Kennebrew at the outset that the covenants only would cover the Dallas-Fort Worth area (Supplemental Legal File 137, 140-41).

Whelan, however, states its "intent" was to move Mr. Kennebrew to Houston at the conclusion of his then-pending six-month non-compete period with his former employer that prevented him from working in Houston (Tr. I 33). Of course, it did not, and Mr. Kennebrew never worked for Whelan in Houston (Tr. I 37-39; Tr. III 65-66). But Whelan argued below and now that the language of the covenants is not exclusive to the area Mr. Kennebrew's job description designated, but rather to wherever Whelan thought it someday might send him (Tr. I 44). In the end, Whelan's argument is that the covenants are not limited to Dallas and the 50 miles surrounding it, but also encompasses Houston, 250 miles away, *simply because it has a branch there*, just as it does in 38 other cities across America.

To support its notion that this reading somehow is a reasonable geographic limitation necessary to its legitimate business interests, Whelan primarily relies on *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893 (8th Cir. 2010), *Alltype Fire Prot. Co. v. Mayfield*, 88 S.W.3d 120, 123 (Mo. App. 2002), and this Court's decision in *Osage*

Glass, 693 S.W.2d at 71 (Aplt. Br. 23-24). But these cases – and the application of the covenants in them – bear no resemblance to the covenants Whelan seeks to enforce against Mr. Kennebrew.

In *Osage*, a specialist automotive glass installer signed a non-compete covenant with his employer in Kansas City preventing him from engaging in any competing business anywhere in Missouri for a period of three years after his employment. *Id.* at 72. When the installer left the employer and began working for a competitor in Kansas City, the employer sought to enforce the covenant against him. *Id.* Unlike this case, in response, the installer made "no direct challenge to the time limitation of three years and the space limitation of the state of Missouri." *Id.* at 74. Instead, he argued no non-compete covenant could apply to him because he held no trade secrets. *Id.* at 73. The Court expressly refrained from reviewing the reasonableness of the geographic or temporal scope of the covenant, which conversely is the first issue in this case. *Id.*

Similarly, in *Mayer Hoffman*, the Eighth Circuit *did not* actually determine that an unrestricted geographical scope in a covenant was reasonable and, thus, enforceable. 614 F.3d at 908. Instead, it held that a two-year restriction on soliciting the employer's own customers was valid because "a customer restriction may substitute for an explicit geographical restriction." *Id.* As well, in *Alltype Fire*, a trial court granted an employer a one-year injunction enforcing a two-year non-compete covenant, but the employee did not appeal. 88 S.W.3d at 123. Rather, the employer appealed and geographic scope was not at issue; the court merely extended the one-year injunction to two years. *Id*.

Then, Whelan includes a long string-cite of cases it insists found to be "reasonable" "non-competition covenants that are the same or even much longer in time and geographic scope than the covenants at issue here" (Aplt. Br. 24-25). These cases, too, are inapposite.

Whelan parenthetically summarizes *Nail Boutique, Inc. v. Church*, 758 S.W.2d 206 (Mo. App. 1988), as "upholding two-year non-competition agreement and fifty-mile radius" (Aplt. Br. 24). But the covenant in *Nail Boutique* was *specific* to Springfield, Missouri, and within 50 miles of the Greene County Courthouse. *Id* at 207. Mr. Kennebrew has no qualm with the reasonableness of such a specific covenant. Moreover, the temporal and geographic scope of the covenant was not at issue: the challenge on appeal was to the adequacy of consideration and the employer's "protectable interest" involved. *Id.*

For *Mid-States Paint & Chem. Co. v. Herr*, 746 S.W.2d 613 (Mo. App. 1988), Whelan states "three year covenant and a 350-mile radius held reasonable" (Aplt. Br. 24). Again, however, the covenant was geographically specific: in that case, to Crescent, Missouri. *Id.* at 616. The employer contended "that the geographic scope and time restrictions of the covenant as written are reasonable." *Id* at 616-17. Moreover, the trial court *reduced* the time restriction to two years and the geographic restriction to 125 miles, and the Court of Appeals affirmed. *Id.* Since the employee had been responsible for some 250 of the employer's customers within 100 miles of Crescent, under the circumstances of that case 125 miles was reasonable. *Id.*

Whelan summarizes *Orchard Container Corp. v. Orchard,* 601 S.W.2d 299 (Mo. App. 1980), as "three year non-competition period and 200-mile radius deemed reasonable" (Aplt. Br. 24). This is misleading. The Court of Appeals *did not* hold this; instead, it held that the 200-mile limit was *unreasonable*. *Id.* at 303-04. Instead, given the scope of the employee's business for the employer – he was the employer's former president and moved to a competitor – 125 miles from St. Louis in Missouri and Illinois was appropriate. *Id.*

For *Long v. Huffman*, 557 S.W.2d 911 (Mo. App. 1977), Whelan says "upholding five year non-competition and a sixty-mile radius for physicians" (Aplt. Br. 24). As in all the other cases, however, the focus location was specific: Butler, Missouri. *Id.* at 913. Moreover, the employee did "not dispute that he violated the noncompetition covenant." *Id.* As well, the restriction was reasonable because patients came to the physician's former employer clinic "patients came from as far as sixty miles away." *Id.* at 915.

Whelan summarizes *Willman v. Beheler*, 499 S.W.2d 770 (Mo. 1973), as "five-year non-competition agreement between physicians upheld" (Aplt. Br. 24). *Willman*, however, did not involve a challenge to the covenant's geographic scope, which was "within a radius of 20 miles from the corporate limits of St. Joseph, Missouri." *Id.* at 774. Had the covenant in this case been limited to "20 miles from Dallas, Texas," it plainly would have been reasonable.

The specific, limited geographic scopes of the covenants at issue in these cases bear no resemblance to the wholly unlimited scope of the covenant Whelan seeks to enforce against Mr. Kennebrew – and certainly not the even more unbridled application

Whelan seeks to give it. Whelan's covenant against working for a competing business (§ 3(c) of the Agreement) says it applies to a 50-mile radius of wherever Mr. Kennebrew has provided or arranged for Whelan to provide services. This plainly means Dallas, but Whelan says it means anywhere in the country (L.F. 532; Appx. A12). In any case, no specific place is mentioned. Whelan cites no cases allowing for the enforcement of such an amorphous, roving scope. This is because none exist.

Moreover, both the non-solicitation provision (§ 3(a)) and the restriction on working for customer of Whelan (§ 3(d)) – both of which Whelan also seek to apply against Mr. Kennebrew – contain *no geographic limitation at all* (L.F. 532; Appx. A12).

iii. *Payroll Advance v. Yates* applies to this case.

The near-mirror facts and circumstances of *Payroll Advance, supra,* apply equally in this case. Just as in this case, *Payroll Advance* concerned a covenant not to compete that set a 50-mile limitation without a focus location:

> [Employee] agrees not to compete with [Employer] as owner, manager, partner, stockholder, or employee in any business that is in competition with [Employer] and within a 50 mile radius of [Employer's] business for a period of two (2) years after termination of employment or [Employee] quits or [Employee] leaves employment of [Employer].

270 S.W.3d at 431.

Also, just as here, the employer was a business with numerous branches throughout Missouri and elsewhere. *Id.* The employee was a branch manager with direct customer contact, developing a rapport and relationship with each client. *Id.* at 432. Part

of her daily job was to keep a client list for her branch. *Id.* The employer alleged a decline in business once the employee left the company, suggesting the employee had taken the client list. *Id.*

As *Payroll Advance* points out, regardless of cases where *some* 50-mile or more geographic restriction was held to be reasonable, such restrictions must be viewed under the specific circumstances of each case. *Id.* at 435. Unlike those other cases (but just as here), the 50-mile restriction in *Payroll Advance* had *no specific focus location*. Instead, as here, it prohibited employment with any business in competition with the employer within 50 miles of any of its branches. *Id.*

The Court of Appeals held the language of the covenant was overbroad *on its face*:

> Here, the covenant not to compete grandly declares that Respondent cannot "compete with [Appellant] as owner, manager, partner, stockholder, or employee *in any business* that is in competition with [Appellant] and within a 50 mile radius of [Appellant's] business...." (Emphasis added.) … Appellant has seventeen branch offices in Missouri and still other locations in Arkansas. *If this Court interprets the plain meaning of the covenant not to compete as written,* [it] would prevent Respondent not only from working at a competing business within 50 miles of the branch office in Kennett, Missouri, but Respondent would also be barred from working in a competing business within 50 miles of any of Appellant's branch offices. Under this interpretation, Respondent would be greatly limited in the geographic area she could work.

> Additionally, the covenant not to compete bars Respondent from working at "any business that is in competition with [Appellant]." Yet, it fails to set out with precision what is to be considered a competing business and certainly does not specify that it only applies to other payday loan businesses. In that Appellant is in the business of making loans, it could be inferred that in addition to barring Respondent's employment at a different payday loan establishment the covenant not to compete also bars her from being employed anywhere loans are made including banks, credit unions, savings and loan organizations, title-loan companies, pawn shops, and other financial organizations. Such a restraint on the geographic scope of Respondent's employment and upon her type of employment is unduly burdensome and unreasonable.

Id. at 436 (emphasis added).

Whelan attempts to distinguish these basic facts, arguing this case is different because Mr. Kennebrew started his own company, the employee in Yates was a lower-level employee than Mr. Kennebrew, and *Payroll Advance* was an appeal from a bench trial. These are distinctions without a difference.

It is irrelevant whether Mr. Kennebrew started his own business or worked for an established company, as Whelan's covenant treats both circumstances the same (L.F. 531-32; Appx. 11-12). Moreover, both Whelan's CEO and its Chief of Security admitted they knew Mr. Kennebrew had started his own business and had *agreed* to let him do so between April and August 2009 (Tr. I 3-6, 53, 77; Tr. III 109; Supp. L.F. 33).

The employee in *Payroll Advance* and Mr. Kennebrew had the same position: manager of a branch. Moreover, the employee's title is immaterial; the language of the covenant is virtually identical, and the language was deemed overbroad as a matter of law, focusing on its plain language. 270 S.W.3d at 436. As a result, that *Payroll Advance* was decided after a bench trial and this case was decided by summary judgment is equally immaterial. As in *Payroll Advance*, the question here is one of law, not fact.

After three days of preliminary injunction hearing, well apprised of all the facts, the trial court denied Whelan's request for preliminary injunction (L.F. 638-41; Appx. A6-9). Mr. Kennebrew moved for summary judgment on the basis of the court's order denying the preliminary injunction, and the ultimate summary judgment plainly incorporated that order (L.F. 1638-39; Appx. A2-3).

In the order, the trial court plainly saw how this case was analogous with *Payroll Advance*, quoting the decision liberally (L.F. 637-38, 641; Appx. A6-7, A9). Then, paraphrasing *Payroll Advance*, it ruled Whelan's agreement is "extremely broad and practically unlimited geographically" (L.F. 639; Appx. A7). Whelan does business in 23 states with branch offices in 38 cities (L.F. 639; Appx. A7). So, just as the Court of Appeals did in *Payroll Advance*, taking the language of the covenant literally, in order to avoid violating it:

(1) Mr. Kennebrew could not solicit any customer anywhere that any of Whelan's 38 branches sought but did not acquire in the last year;

(2) Mr. Kennebrew would have to know the prospective business of every one of Whelan's 38 branches and keep track of when someone was solicited;

(3) Mr. Kennebrew would be required to know the identity of all of Whelan's employees nationwide so as to avoid "interfering" with them;

(4) Mr. Kennebrew could not work for any customer of any of Whelan's 38 locations; and

(5) Mr. Kennebrew must also know all of Whelan's prospective customers and avoid all of them in every location throughout America.

(L.F. 639; Appx. A7).

Thus, just as in *Payroll Advance*, on the face of their plain language, injunctive relief was unjust and inappropriate: "[t]he Agreements, as written are not reasonable as to time and space. Whelan as not met its burden to prove them so" (L.F. 641; Appx. A9). As a matter of law, such overbroad language cannot under any circumstances overcome Whelan's burden to prove the necessity and reasonableness of the covenant (L.F. 637-38, 641; Appx. A6-7, A9).

The covenants are void as a matter of law. The Court should affirm the trial court's judgment.

B. The customer non-solicitation covenant, as written, is overbroad and unreasonable.

In *Healthcare*, *supra*, this Court defined customer contacts as "the influence an employee acquires over his employer's customers through personal contact" and "the quality, frequency and duration of an employee's exposure to the employer's customer are crucial in determining the covenant's reasonableness. *Healthcare*, 198 S.W.3d at 611 (citation omitted).

The covenant in this case states Mr. Kennebrew cannot:

> Solicit, take away or attempt to take away any customers of employer or the business or patronage of any such customers or prospective customer(s) whose business was being sought during the past twelve (12) months of employee's employment, if the work would include providing or arranging for services that same as, or similar to those provided by employer.

(L.F. 38-39).

As written, this clause contains no limit whatsoever to the scope of its prohibition on customers with whom Mr. Kennebrew may have contact. It encompasses every single client of Whelan nationwide, in 38 cities in 23 states, as well as every prospective customer Whelan pursued or was pursuing during the last twelve months of Mr. Kennebrew's employment, regardless of whether Mr. Kennebrew knows or does not know that they were being pursued.

Whelan argues that a selective misquotation from *Nat'l Starch & Chem. Corp. v. Newman,* 577 S.W.2d 99, 105 (Mo. App. 1978), supports the enforceability of such an incredibly broad clause (Aplt. Br. 26). But *Nat'l Starch* did not uphold a covenant restricting against "soliciting all clients of the former employer," as Whelan suggests. Rather, the court held a covenant prohibiting the employee from soliciting *his own* clients who *he* served while *he* had worked for the employer: this was not overbroad because "[d]etermination of the National customers serviced by Mr. Newman while employed by National should be readily available from sales records in possession of either or both

parties." *Id.* This language comes immediately after Whelan's misquote, but Whelan selectively omits it.

Thus, unlike this case, the covenant in *Nat'l Starch* limited the application of its non-solicitation clause to the employer's current stock of customers that the employee had handled while in their employ. *Id.* Moreover, the covenant did not include other non-compete clauses. *Id.* In this case, the covenant goes far beyond that limited scope. It has no limitation.

Whelan's reliance on *Prop. Tax Representative v. Chatman*, 891 S.W.2d 153 (Mo. App. 1995) is equally misplaced (Aplt. Br. 26-7). Of course an "employee's relationship with the client he owes to the employer, and he holds it in a kind of fiduciary capacity for the employer," and "[i]t is perfectly fair…to prohibit" [the employee] using that relationship for his own benefit, and for the benefit of a competitor of the employee, to the employer's detriment." *Id.* at 158. Whelan ignores, however, what the covenant in *Chatman* – as hinted in these quotes – actually said.

For, just like *Nat'l Starch*, *Chatman* involved a covenant not to solicit the individual clients the employee himself managed while with the former employer. *Id.* In this case, the covenant does not limit itself merely to clients with whom Mr. Kennebrew dealt while employed as Whelan's Dallas branch manager. Rather, as the trial court readily recognized, it seeks to cover all existing, former, and prospective customers anywhere in the United States, including those, like Park Square, that Mr. Kennebrew did not manage.

The courts in *Nat'l Starch* and *Chatman* restricted the customer contacts and goodwill a non-solicitation covenant could cover to the relationships the employee personally developed and maintained while employed with the employer. The covenant in this case has no analogous limitation.

Whelan's suggestion that the non-solicitation covenant in *Silver, Asher, Sher & McLaren v. Batchum*, 16 S.W.3d 340 (Mo. App. 2000), is "nearly identical" to Whelan's is without merit (Aplt. Br. 27). The language in Silver specifically limited the application of that covenant to the "Employer's office located at 500 Keene St., Columbia, Missouri 65201" and "any patient of Employer who was a patient of Employer on the date of the termination of physicians Employment with Employer." *Id.* at 343. Again, the covenant Whelan seeks to enforce against Mr. Kennebrew includes *any* customers of Whelan *anywhere*, also including prospective customers regardless of whether Whelan actually did business with them.

Schott v. Beussink, 950 S.W.2d 621 (Mo. App. 1997), is similarly inapposite. There, employees at a small accounting firm with one office were "prohibited from soliciting [the] employer's clients for whom employer had done business with [*sic*] during the fifteen-month period preceding the[ir] termination." *Id.* at 626. Here, however, the customer non-solicitation clause not only restricts competition, it also restricts employment with any customers *or prospective, un-contracted customer* of Whelan – a large, nationwide company (L.F. 512-32).

The unlimited, uncontrollable customer non-solicitation covenant is facially unreasonable and void. The Court should affirm the trial court's judgment.

C. The employee non-solicitation covenant, as written, is overbroad and unreasonable.

Section 431.202.1(4), R.S.Mo., provides, "A reasonable covenant in writing promising not to solicit, recruit, hire or otherwise interfere with the employment of one or more employees shall be enforceable and not a restraint of trade" if it is "Between an employer and one or more employees … *so long as such covenant* ***does not continue for more than one year*** *following the employee's employment*." (Emphasis added).

The covenant Whelan seeks to enforce purports to direct Mr. Kennebrew "for a period of two (2) years" after his employment not to "[s]olicit, interfere with, employ, or endeavor to employ any employees or agents of" Whelan (L.F. 532; Appx. 12). Plainly, the covenant runs afoul of § 431.202.1(4). The statute allows for one year. Whelan seeks leave to break the statute and extend the period to two.

In its brief, however, Whelan brazenly contends the statute "makes plain that a two-year employee non-solicitation covenant such as that in Mr. Kennebrew's Agreement is not on its face invalid" (Aplt. Br. 31). It takes a lawyer to say "no" means "yes." Indeed, the statute itself does not specifically permit anything; it just says what is not *de facto* unenforceable at the outset. For, still, "Whether a covenant covered by this section is reasonable shall be determined based upon the facts and circumstances pertaining to such covenant." § 431.202.2.

In this case, Whelan's covenant does not specify any class of employees. Section 431.202.1(3) sets forth two classes of employees not limited to one year: those who have: "(a) Confidential or trade secret business information; or (b) Customer or supplier

relationships, goodwill or loyalty, which shall be deemed to be among the protectable interests of the employer." Otherwise, § 431.202.1(4) limits the period to one year. Moreover, both classed employees under subsection (3) and un-classed employees under subsection (4) must be limited to one year in order to be presumed reasonable. § 431.202.2.

The employment non-solicitation language in this case encompasses both "solicitation" and a more amorphous "interference" concerning *all* of Whelan's employees anywhere across 23 states, regardless of whether Mr. Kennebrew knows or does not know of their existence or when they were employed by Whelan. On its face, it simply contains no limitation on its scope. Moreover, Whelan's agreement obviously exceeds the one year called for under § 431.202.

Having taken up the mandate of § 431.202.2 and looked at "all surrounding circumstances, including the subject matter of the contract, the purpose to be served, the situation of the parties, the extent of the restraint, and the specialization of the business," the trial court held the employee non-solicitation/non-interference clause was facially overbroad (L.F. 639; Appx. A7). As the provision impossibly "require[d Mr.] Kennebrew to know all of Whelan's employees and to avoid 'interfering' with them," it was unenforceable (L.F. 639; Appx. A7).

Section 431.202.2 does not undo the facial overbreadth of Whelan's employee non-solicitation/non-interference clause. If anything, the statute amplifies how patently unreasonable the provision is.

The Court should affirm the trial court's judgment.

II. The trial court did not err in refusing to modify the terms of Whelan's non-compete covenants so as to make them reasonable *because* trial courts have equitable discretion to refuse to modify a contract under review *in that* the trial court's decision to hold Whelan to the terms of the covenants it wrote was not so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.

(Response to Appellant's Point Relied On V)

Standard of Review

Whether or not to modify the terms of an unreasonable non-compete agreement is within a trial court's sound discretion as a matter of equity. *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 437 (Mo. App. 2008). An abuse of discretion occurs only when a trial court's "ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010). "[I]f reasonable persons may differ as to the propriety of an action taken by the trial court, then it cannot be held that the trial court has abused its discretion." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008).

* * *

Trial courts have discretion in their exercise of equity not to modify the terms of a non-compete covenant that is unreasonable and unenforceable. In this case, Whelan requested the trial court to modify its unreasonable non-compete covenants so as to make

them reasonable. The court refused, deciding instead to hold Whelan to the language it had used. Was this so arbitrary and unreasonable as to shock the sense of justice?

In its fifth point relied on, Whelan argues "that, even if the Circuit Court had been correct in finding that the Agreements were overbroad on their face with respect to space and time, … the appropriate action of the Circuit Court would have been to modify the Agreements" to make them reasonable (Aplt. Br. 49). Whelan asserts the trial court abused its discretion in failing to do otherwise (Aplt. Br. 49-50).

Whelan's argument is without merit. It misunderstands the nature of discretionary, equitable power. That is, when a trial court has discretion to take an action, it has discretion equally not to do so. In such a situation, caselaw upholding a trial court's exercise of that discretionary power has no bearing on whether a trial court in a different case abused its discretion in declining to do so. *Krepps v. Krepps*, 234 S.W.3d 605, 611 (Mo. App. 2007).

Mr. Kennebrew takes no issue with the plain fact that if, after weighing the equities, the trial court had believed that modifying Whelan's unreasonable covenants would have served the interests of justice best, it did indeed have power to modify the terms of the covenants so as to make them reasonable.[2] All the cases Whelan cites evince as much (Aplt. Br. 49-50).

[2] Of course, *truly* making them reasonable merely would have meant limiting their geographic scope to Dallas, in which case Mr. Kennebrew's allegedly violative actions in Houston would not have violated the covenants.

But Whelan cites no case in which a trial court that *refused* to modify such a covenant was found to have *abused* its discretion. This is because no such decision exists. And for good reason – such a holding would make little sense in the context of discretionary equitable powers. The only case ever to have reviewed such a claim was *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 437 (Mo. App. 2008). There, the court firmly rejected an argument akin to Whelan's.

In *Payroll Advance*, the Court of Appeals noted that the "issuance of an injunction rest largely in the sound discretion of the trial court, which is vested with a broad discretionary power to shape and fashion the relief it grants to fit particular facts, circumstances and equities of the case before it." *Id.* As such, while a trial court *may* modify the terms of an unreasonable non-compete covenant, it *is not required to* do so. *Id.* The court affirmed the lack of modification of an unreasonable non-compete covenant. *Id.*

Moreover, in this case, there was good reason for the trial court to decline Whelan's request. The general principles behind enforcing non-compete covenants are to protect the former employer from unfair competition without unreasonably restraining the former employee. *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714, 719-20 (Mo. App. 1995). In this case, Whelan requested the trial court to expand the covenants' coverage to Houston, an area not covered under covenants, which, though silent as to area, only were intended to be restricted to Dallas. *Infra* 50-53.

Thus, Whelan was not requesting the court to modify the covenants so as no longer to be overbroad. Rather, it wanted the court to expand them to cover territory and

customers not previously covered. Obviously seeing the unreasonableness and injustice of this, the trial court refused, expressly stating it was "not required to re-write [*sic*] [the] Agreement" (Legal File 640-41; Appendix 8-9).

It cannot be said that this was so arbitrary and unreasonable as to shock the conscience and indicate a lack of careful consideration. The Court should affirm the trial court's judgment.

III. The trial court did not err in granting Mr. Kennebrew summary judgment *because* the denial of summary judgment is not appealable, and even viewing the facts in a light most favorable to Whelan, Mr. Kennebrew was entitled to judgment as a matter of law *in that* Whelan's request for summary judgment cannot be heard on appeal, and Mr. Kennebrew's running a business in Houston, contracting with Park Square in Houston, and employing former employees of Whelan at Park Square in Houston cannot have violated Whelan's non-compete covenants, which was void for overbreadth and, even if not, did not prohibit these activities.

(Response to Appellant's Points Relied On II, III, and IV)

Standard of Review

This is an appeal from a grant of summary judgment. This Court "reviews the grant of summary judgment *de novo*." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452 (Mo. banc 2011). It "applies the same criteria as the trial court in determining whether summary judgment was proper" and will affirm if "there is no genuine issue as to the material facts and … the movant is entitled to judgment as a matter of law." *Id.* at 453. "An order of summary judgment will not be set aside on review if supportable on any theory." *City of Washington v. Warren Cnty.*, 899 S.W.2d 863, 868 (Mo. banc 1995).

"This Court will review the record in the light most favorable to the party against whom judgment was entered and accords the non-movant the benefit of all reasonable inferences from the record." *Arbor Inv. Co. v. City of Hermann*, 341 S.W.3d 673, 678 (Mo. banc 2011).

* * *

Summary judgment is appropriate when, viewing the facts in a light most favorable to the non-movant, the movant still is entitled to judgment as a matter of law. The denial of a motion for summary judgment is not appealable. Viewing the facts most favorably to Whelan, Mr. Kennebrew started a business in Houston with Whelan's full consent and did business in Houston with a former customer and some former employees of Whelan's. Whelan's non-compete covenants, however, were void for overbreadth and, even ignoring that, and cannot reasonably be read to prohibit these activities. Did the trial court err in granting Mr. Kennebrew summary judgment?

In its second, third, and fourth Points Relied On, Whelan argues *it* was entitled to summary judgment because Mr. Kennebrew violated its non-compete covenants by: (1) starting a business in Houston; (2) contracting with a former Whelan customer in Houston; and (3) employing former Whelan employees in Houston. It also argues that, as a result, the trial court could not have granted Mr. Kennebrew summary judgment.

These arguments are without merit. First, to the extent Whelan's claim of error is its summary judgment motion was denied, its argument is untenable. In Missouri, the denial of summary judgment is unappealable. Even if the trial court had erred in granting Mr. Kennebrew summary judgment, the most Whelan could receive is remand for a trial.

Second, summary judgment was proper. Viewing the facts most favorably to Whelan, Mr. Kennebrew is entitled judgment as a matter of law. The covenants were void for overbreadth. Even still, their plain terms did not apply to his activities.

The Court should affirm the trial court's judgment.

A. To the extent Whelan argues it is entitled to summary judgment, its claim is not appealable.

In its second, third, and fourth points relied on, Whelan argues Mr. Kennebrew "was violating" its covenants (Appellant's Brief 16-18, 32, 40, 46). As relief for this, it rqeuests this Court to "remand this case to the Circuit Court with instructions … that [Mr. Kennebrew] violated their agreements" (Aplt. Br. 52).

That is, Whelan asks the Court to "instruct the Circuit Court to find that Mr. Kennebrew violated his Agreement by competing with Appellant within fifty miles of Appellant's Houston, Texas office, working for and soliciting Appellant's customer Park Square, and by soliciting and employing Appellant's employees" (Aplt. Br. 52). It also asks the Court to instruct the trial court to order injunctive relief against Mr. Kennebrew (Aplt. Br. 52). In short, Whelan complains that *it* was entitled to summary judgment and seeks a remand for automatic judgment in its favor.

It is well established, however, that "denial of a motion for summary judgment is an interlocutory order and is not a proper point on appeal," and thus when raised as an issue on appeal "need not be addressed." *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001) (citing *Wilson v. Hungate*, 434 S.W.2d 580, 583 (Mo. 1968)). The sole exception is when the merits of a denied summary judgment motion "are completely intertwined with a grant of summary judgment in favor of an opposing party." *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 n.1 (Mo. banc 2006).

But this only ever has occurred when (1) a plaintiff receives summary judgment without having rebutted each of a defendant's affirmative defenses, *see Transatlantic Ltd.*

v. Salva, 71 S.W.3d 670, 675-76 (Mo. App. 2002); or (2) there were dueling summary judgment motions with stipulated facts and concerning a pure issue of law. *See Levinson v. City of Kansas City*, 43 S.W.3d 312, 323 (Mo. App. 2001); *Dalton Inv., Inc. v. Nooney Co.*, 10 S.W.3d 590, 594 (Mo. App. 2000). Plainly, neither exception applies here.

Rather, even if Whelan somehow were correct that the trial court erred in granting Mr. Kennebrew summary judgment, the only relief on appeal to which it would be entitled would be remand for a trial. *Intermed Ins. Co. v. Hill*, ___ S.W.3d ___, 2012 WL 806905 at *1 n.1 (Mo. App. Mar. 12, 2012) (where trial court erred in granting movant summary judgment, case could not be remanded for summary judgment in favor of non-movant: reviewing denial of summary judgment for non-movant would not "be proper here. As a result, Appellant's request that we also direct the trial court to enter a summary judgment in her favor … is denied").

The Court should reject Whelan's attempt in its second, third, and fourth points to prove Mr. Kennebrew "was violating" its covenants and Whelan's resulting contention that it is entitled on remand to summary judgment. Whelan cannot appeal the trial court's denial of its own motion for summary judgment. In the unlikely event the Court agrees with Whelan that summary judgment in Mr. Kennebrew's favor was error, the most it could do under the circumstances of this case is remand for a trial on the merits.

B. Even viewing the facts in a light most favorable to Whelan, Mr. Kennebrew was entitled to judgment as a matter of law.

Viewed in a light most favorable to Whelan in the context of the whole record, the facts are that Mr. Kennebrew (1) started his own security business in Houston with

Whelan's full knowledge and consent; (2) entered into a contract with a former Whelan customer in Houston; and (3) employed former Whelan employees in Houston. Under these facts, Mr. Kennebrew was entitled to judgment as a matter of law that he did not violate Whelan's non-compete covenants.

At the outset, as explained in Point I, above, the covenants were facially void for overbreadth, and thus Whelan's arguments fail. But even if they somehow were not facially overbroad, however, these facts did not violate the plain language of the covenants. The covenants plainly only applied to Dallas, where Mr. Kennebrew worked for Whelan, not Houston, where he did not work for Whelan. As well, his contracting with a former Whelan customer, Park Square, and hiring former Whelan employees at Park Square plainly did not violate the covenants.

i. The covenants only applied to Mr. Kennebrew's prospective activites in Dallas, where he worked for Whelan, not Houston.

The understanding both Whelan and Mr. Kennebrew always had was that Mr. Kennebrew was a Whelan employee in Dallas, where he managed its Dallas branch, and thus his non-compete covenants only ever applied to activities in Dallas, not Houston, where Whelan had a separate branch for which Mr. Kennebrew never worked. Moreover, Whelan knew Mr. Kennebrew ran a security business in Houston during his last four months at Whelan in Dallas and expressly allowed him to do so.

Mr. Kennebrew's first contact with Whelan was with Prentice Robertson, Whelan's Executive Vice President, who undertook to negotiate a position for Mr. Kennebrew with Whelan in Dallas (Legal File 603). Mr. Robertson formally offered Mr.

Kennebrew the initial position of Quality Assurance Manager for Whelan's Dallas branch (L.F. 601; Appendix A17). The letter stated, "Should [Mr. Kennebrew] *opt* to remain in Dallas permanently, [he would] assume the branch leadership role in that branch" (L.F. 601; Appx. A17) (emphasis added). Upon agreeing to Mr. Robertson's offer, Mr. Kennebrew moved to Dallas, where he immediately became Whelan's Dallas branch manager and opted to remain (L.F. 356-57; Transcript Volume III 27).

The non-compete covenants to which Whelan seeks to hold Mr. Kennebrew are silent as to location (LF. 531-32; Appx. A11-12). Whelan's offer letter was clear, however, that Mr. Kennebrew position was in Dallas unless *he* opted otherwise (L.F. 601; Appx. A17). Todd McCullough, Whelan's Vice President of Operations, confirmed this when he met with Mr. Kennebrew on November 26, 2007, to sign the agreement containing the covenants (Tr. III 71-73; Supplemental Legal File 22, 55, 122, 137, 140-41). Mr. McCullough explained that the covenants only applied in Dallas (Tr. III 71-73; Supp. L.F. 22, 55, 122, 137, 140-41).

Whelan fails to provide any evidence to dispute its own express offer stipulating that Mr. Kennebrew's place of employment would be Dallas. Instead, it argues his providing Whelan with a list of potential customers from his earlier days in Houston transmogrified him into an employee in Houston (Aplt. Br. 35-36). But Mr. Kennebrew never made contact with Whelan clients in Houston. Rather, on the request of his superiors in Dallas, he provided Mr. McCullough and Mr. Robertson with a list of his own, *prior* customer contacts so that Whelan representatives responsible for the Houston area could solicit their business (L.F. 91; Supp. L.F. 21-23, 111-12; Tr. III 14, 18-19, 31).

Mr. McCullough confirmed he merely contacted Mr. Kennebrew for leads and referrals in the Houston area (Supp. L.F. 21-23, 111-12).

Houston already had a branch manager; the same position Mr. Kennebrew occupied for Whelan *in Dallas*. Standing alone, Mr. Kennebrew's having given his prior Houston contacts to his boss simply could not constitute working in Houston, a different location than his. Whelan's Senior Vice President and Chief Security Officer Mark Porterfield testified Mr. Kennebrew was based out of Dallas performing the Director of Quality Assurance Role but could be called upon by Whelan's Houston branch, as any other Whelan branch, to support sales or services (Tr. I 83-84). But Mr. Porterfield acknowledged this happened only "on occasion" (Tr. I 83-84).

Whelan never showed who the Houston customers were that Mr. Kennebrew helped support "on occasion." Nonetheless, it argues "an employer may enforce a covenant not to compete against an employee that has substantial customer contacts," and thus Mr. Kennebrew became a Houston employee even though he had opted not to (Aplt. Br. 35).

This contention is without merit. The law of Missouri is that, for non-compete covenants, customer contacts are the "influence an employee acquires over his employer's customers through personal contact" which is determined by "quality, frequency, and duration of an employee's exposure to an employer's customer." *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 611 (Mo. banc 2006). Whelan had the burden to prove the application it sought to give its covenants is both necessary and reasonable. But Whelan fails to show any customers in Houston with

whom Mr. Kennebrew had dealings while at Whelan. Whelan simply cannot show that Mr. Kennebrew acquired *any* influence over any Whelan customers in Houston during his time at Whelan of any quality, frequency, or duration.

Whelan's re-invocation of *Osage Glass, Inc. v. Donovan*, 693 S.W.3d 71 (Mo. banc 1985) fails for the same reason. In *Osage Glass*, this Court made plain that, in order for an employee to be restricted on the basis of customer contacts, there must be a finding that he did have substantial customer contacts. *Id.* at 75. While *Osage Glass* did not address geographical disparities in customer contacts, that principle plainly applies here to bely Whelan's contention that Mr. Kennebrew somehow transformed into a Houston employee.

Whelan insists Mr. Kennebrew had numerous customer contacts throughout Texas and, in particular, in Houston (Aplt. Br. 36). Mr. Kennebrew does not deny that he worked for Whelan in Dallas or that he had contact with numerous Dallas customers. Plainly, the covenants apply in Dallas. But Whelan does not demonstrate even a single supposed Houston contact. As a result, Whelan has not met its burden.

Plainly, the terms of Whelan's covenants only applied to activities in Dallas, not Houston. Mr. Kennebrew's activities in Houston therefore could not have violated them.

ii. Whelan had full knowledge of Mr. Kennebrew's Houston business and expressly allowed him to run it during his term of employment.

Contrary to Whelan's misrepresentations, Mr. Kennebrew founded his own private security company, Elite Protection, on October 29, 2007, *before* he ever worked for Whelan (L.F. 551, 558). Elite always was based in Houston (L.F. 551, 558). Moreover,

Whelan entirely ignores the voluminous testimony of its own representatives admitting that they both knew about this and agreed Mr. Kennebrew could maintain Elite in Houston while at Whelan in Dallas. Only when Mr. Kennebrew became successful did they retroactively change their minds. But in expressly *allowing* Mr. Kennebrew to do otherwise, they waived any claims against Mr. Kennebrew relating to Elite.

Whelan's CEO, Greg Twardowski, acknowledged under oath he had discussed with Mr. Kennebrew and Mr. McCullough that Mr. Kennebrew could start his own business in Houston while continuing to work for Whelan in Dallas (Tr. I 25). As Mr. Twardowski recounted, Mr. Kennebrew's company "initially" would pursue government contracts and minority subcontracting opportunities with other prime contractors (Tr. I 25). He said he also discussed this with Mr. Robertson and Mr. Porterfield (Tr. I 55, 57). When agreeing to this, Mr. Twardowski did not feel it necessary to remind Mr. Kennebrew of his non-compete obligations (Tr. I 58).

Mr. Porterfield also acknowledged he had agreed Mr. Kennebrew could run Elite while remaining with Whelan: he stated Whelan did not "particularly pursue government business, and that was gonna be [Mr. Kennebrew's] core focus, so [Whelan] certainly would be interested in assisting and supporting him" (Supp. L.F. 41, 131). He said, "My agreement with [Mr. Kennebrew] was: That's where we wanted a partnership arrangement, was specifically on government contracts" (Supp. L.F. 41, 131).

Mr. Kennebrew recounted the same. He repeatedly approached Whelan about a joint business venture regarding government contracts: he had approached Mr. Porterfield in December 2008, explaining he had a minority contractor opportunity with the City of

Houston and wanted to partner with Whelan to do it (Tr. III. 46). He let Mr. Porterfield know he already had a minority-owned company and would seek government contracts, but he never told Mr. Porterfield it would be his company's only focus (Tr. III 70).

On March 30, 2009, Mr. Kennebrew submitted a letter of resignation in which he stated he wanted "to at least try and live [his] dream (Minority Company)" (L.F. 529). Despite this, wanting him to stay on longer, Whelan entered into a verbal agreement in which he remained employed as Whelan's Dallas branch manager while simultaneously running Elite in Houston (Tr. I 3-6; Tr. III 109). Mr. Twardowski admitted Mr. Kennebrew remained with Whelan under this arrangement until August of 2009; he said Whelan agreed to this both because Mr. Kennebrew was a valuable asset and Whelan wanted to be supportive of Mr. Kennebrew's new business in Houston (Tr. I 77). Whelan continued to pay Mr. Kennebrew during this period (Supp. L.F. 33; Tr. I 53).

It is well established that a party's conduct can waive a non-compete covenant. See, e.g., *Caulfield v. George K. Baum & Co., Inc.*, 649 S.W.2d 456, 459 (Mo. App. 1983). Whelan's open admissions that it knew Mr. Kennebrew was running Elite and that it allowed him to do so bely its argument that this conduct violated its covenants.

iii. Mr. Kennebrew's dealings at Elite with Park Square could not have violated the covenants.

Whelan argues Mr. Kennebrew violated the non-compete covenants by Elite doing business with the Park Square Condominiums in Houston because Park Square was a Houston client of Whelan's while Mr. Kennebrew was Whelan's Dallas branch manager (Aplt. Br. 43). Whelan contends an employer's customer contact, "even when the contact

was brought to the employer from an employee's previous relationship" in a different market is a protectable interest of the employer (Aplt. Br. 43).

Again, however, even viewing the facts in a light most favorable to Whelan, Whelan misrepresents the facts. Mr. Kennebrew did not bring Park Square to Whelan, Mr. McCullough did (Tr. III 73). Mr. Kennebrew had no relationship with Park Square while working for Whelan. He did not pursue or develop a customer relationship with Park Square at Whelan's expense. He did not increase Whelan's relationship with Park Square. Beside assisting Whelan's beleaguered Houston branch during Hurricane Ike and sending Park Square's owner a fruit basket at the request of Whelan's senior vice president, Whelan cannot show that Mr. Kennebrew had any involvement with Park Square while employed with Whelan in Dallas (Tr. III 34-35, 45).

Whelan refers to Mr. Kennebrew as having a "manager" relationship with Park Square's account. But the "manager" position to which it refers was when Mr. Kennebrew was employed with Barton and Allied Barton, not Whelan. Mr. Twardowski testified Park Square was a former customer of Allied Barton prior to when Mr. Kennebrew came to work for Whelan (Tr. I 49).

Still, Whelan argues Mr. Kennebrew's relationship with Park Square's manager, Jan VerVoort, was what ultimately facilitated Park Square's contract with Elite, rather than Whelan (Aplt. Br. 37). But this relationship was not cultivated at Whelan; it was from before Mr. Kennebrew came to Whelan. Whelan's witness, John Loving, confirmed Mr. Kennebrew managed Park Square's account while he worked for Barton Security because Loving worked for Mr. Kennebrew at that time (Tr. II 58-59, 70, 72).

The mere fact Mr. Kennebrew worked for Whelan could not mean that Whelan has a protectable interest in Mr. Kennebrew's relationship with Park Square, especially when Kennebrew did not handle Park Square's account while employed with Whelan.

The cases Whelan cites to support its argument bear this out. They bear no resemblance to this case, but instead turn on the fact that the employee *did* have relationships with certain relevant customers while employed. *See Osage Glass*, 693 S.W.3d at 74 (employee contacted employer's relevant customers regularly during employment); *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714, 720 (Mo. App. 1995) (founder and stockholder of company was the single employee with the most substantial contacts and goodwill with all customers); *Naegele v. Biomedical Sys. Corp*. 272 S.W.3d 385, 389 (Mo. App. 2008) (covenant enforced against salesman whose customer relationships were pursued and developed at employer's expense).

The circumstances of those cases are not true for Mr. Kennebrew and any Whelan customer outside Dallas. Whelan has nothing more than innuendo to support its theory otherwise. It seeks to assume rights, authority and control over any all relationships Mr. Kennebrew developed *prior to* working for Whelan and regardless whether Mr. Kennebrew acted on those relationships as a Whelan employee. The mere fact Mr. Kennebrew knew Ms. VerVoort prior to working for Whelan cannot mean his relationship with her automatically transferred to Whelan once he came on board. Whelan cannot show any quality, frequency or duration of Mr. Kennebrew's contact with Park Square while employed at Whelan.

Moreover, the non-solicitation clause in Whelan's non-compete covenant cannot,

on its face, apply to the circumstances of Elite taking on Park Square, as Whelan argues. There is no evidence that Elite solicited Park Square. Whelan's suggestions otherwise are just speculation. Rather, as Ms. VerVoort testified, *she* contacted Mr. Kennebrew because she was terminating Whelan's services *on her own* (L.F. 77, 198; Supp. L.F. 46, 120-21). When she actually approached Mr. Kennebrew about Elite taking on Park Square's account, it was in December 2009, *after* she already had terminated Whelan, as even Mr. Twardowski acknowledged (L.F. 33, 37, 174, 177-78; Tr. I 66-69, 71-72).

Whelan refers to an email from Mr. Kennebrew listing Park Square as a focal point (L.F. 1028). But the email aligns with both Mr. Kennebrew's and Ms. VerVoort's statements explaining how she called him to tell him she was cancelling Whelan (Tr. III 62). After that call, Mr. Kennebrew had no further contact with Ms. VerVoort until she invited him to meet with Park Square's board in December 2009, after she already had terminated Whelan (Tr. III 63).

Even viewing the facts in a light most favorable to Whelan, it simply cannot meet its burden to show that the non-compete covenants necessarily and reasonably applied to Mr. Kennebrew's eventual contract for Elite with Park Square. There is no evidence Mr. Kennebrew formed any relationship with Park Square (or any other non-Dallas business) during his time at Whelan, and certainly not at Whelan's expense. Furthermore, there is no evidence Elite solicited Park Square. The trial court correctly held Mr. Kennebrew was entitled to judgment as a matter of law.

iv. Elite's hiring former Whelan employees at Park Square could not have violated the covenants.

Finally, Whelan argues Mr. Kennebrew violated its covenant against non-solicitation of its employees by hiring former Whelan employees who worked at Park Square (Aplt. Br. 46-48). Whelan cites no authority except § 431.202(1)(4), R.S.Mo., which, as explained above, only goes to show the unreasonableness of that covenant's scope. *Infra* 40-41. As the employee non-solicitation clause is in excess of one year, unless Whelan can provide evidence showing that the allegedly solicited employees have access to confidential or trade secret information or some sort of customer relationship or goodwill, this statute simply cannot apply. *Infra* 40-41.

The employees at issue are at-will field employees who plainly have no access to trade secrets or customer relationships. Whelan's own evidence confirms this. Its witness, John Loving, a Whelan employee who worked at the Park Square site for five years (first for Barton Security and Allied Barton under Mr. Kennebrew and then when Whelan took over the contract) testified that if an employee were asked to stay with a new company they usually would stay and that the client – Park Square – played a role in that (Tr. II 70-74). If they did not want to, they did not have to (Tr. II 70-74).

Here, after Ms. VerVoort terminated Whelan's contract, she wanted Mr. Loving and the other former Whelan employees to stay (Tr. II 75). Eventually, she "brokered a deal" that included retention of all of the former Whelan officers who were interested in staying (Supp. L.F. 45-46, 124, 127). Under her deal, if the security officers wanted to stay at Park Square, they would become Elite employees (Supp. L.F. 45, 127). Once

again, Whelan has no evidence otherwise, but rather mere innuendo and supposition.

In *Schmersahl, Treolar & Co. v. McHugh*, the Court of Appeals held it was an unreasonable restraint of trade for an employee non-solicitation clause to prohibit soliciting an employer's at will employees. 28 S.W.3d 345, 351 (Mo. App. 2000). Because "soliciting another's at-will employees does not constitute unfair competition," an "[e]mployer's interest in protecting the stability of its at-will workforce is not one of the interests which may be protected by a restrictive covenant in Missouri." *Id.*

As such, even if Whelan somehow did solicit Whelan's security officers at Park Square, they are at-will employees and thus cannot be the subject of a non-solicitation clause in Missouri. Indeed, Mr. Twardowski's testimony bolsters this: he explained Whelan's uniformed security guards do not sign employment agreements (Tr. I 14-15). Whelan's "primary reason for employment agreements was to protect those relationships and [those employees'] confidential information for a reasonable amount of time after the employee separates" (Tr. I 15). Thus, by Whelan's own admission, the security guards were at-will employees. Whelan advances no evidence to show otherwise.

The security guards at Park Square were at-will employees unqualified under § 431.202(1)(3). Even viewing the facts most favorably to Whelan, Mr. Kennebrew cannot have violated the employee non-solicitation clause.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 16,420 words.

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Certificate of Service

I hereby certify that, on April 16, 2012, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Respondent and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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