

**FILED**

JUL 14 2011

**LAURA ROY**

CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

---

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

---

No. ED 96394

02231

---

WHELAN SECURITY CO.

**FILED**

Plaintiff/Appellant,

MAR 14 2012

v.

CLERK, SUPREME COURT

CHARLES KENNEBREW, SR. and W. LANDON MORGAN

Defendants/Respondents.

---

Appeal from the Circuit Court  
of St. Louis County  
Honorable Maura B. McShane, Judge

**SCANNED**

---

BRIEF OF APPELLANT,  
WHELAN SECURITY CO.

---

Mark W. Weisman, # 26635  
Marc D. Goldstein, # 62910  
Gallop, Johnson & Neuman, L.C.  
101 South Hanley, Suite 1700  
St. Louis, Missouri  
(314) 615-6000  
(314) 615-6001

Attorneys for Appellant

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** .....vi

**JURISDICTIONAL STATEMENT** ..... 1

**STATEMENT OF FACTS**.....2

    I. The Parties and the Agreements .....2

    II. The Security Guard Business and Respondents’ Work for Whelan .....5

    III. Elite Protective Services, LLC, and Respondents’ Post-Employment  
        Conduct with Whelan’s Longtime Customer Park Square Condominiums..9

**POINTS RELIED ON**..... 15

    Point I.....15

        I. THE CIRCUIT COURT ERRED IN RULING THAT THE  
            EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE, AS  
            WRITTEN, ARE OVERLY BROAD, NOT REASONABLE AS TO TIME  
            AND SPACE, THEREFORE NOT VALID AND IN GRANTING  
            SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THAT  
            BASIS, BECAUSE THE AGREEMENTS, SPECIFICALLY THE NON-  
            COMPETITION AND NON-SOLICITATION COVENANTS SET  
            FORTH THEREIN, ARE NOT OVERLY BROAD AND ARE  
            REASONABLY LIMITED AS TO TIME AND GEOGRAPHIC SCOPE,  
            IN THAT THE COVENANTS’ TEMPORAL AND GEOGRAPHIC  
            RESTRICTIONS, AS WRITTEN, ARE PERMITTED UNDER  
            MISSOURI LAW..... 15

    Point II.....16

        II. THE CIRCUIT COURT ERRED IN RULING THAT THE  
            EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE  
            OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE,  
            THEREFORE NOT VALID AND IN GRANTING SUMMARY  
            JUDGMENT TO RESPONDENT KENNEBREW WITH RESPECT TO  
            HIS NON-COMPETITION COVENANT, BECAUSE MR.  
            KENNEBREW IS VIOLATING A REASONABLE COVENANT NOT  
            TO COMPETE WITH APPELLANT, IN THAT HE IS OPERATING A  
            COMPETING SECURITY COMPANY WITHIN 50 MILES OF WHERE

HE WORKED FOR APPELLANT IN HOUSTON, TEXAS AND WITHIN TWO YEARS OF HIS RESIGNATION FROM APPELLANT 16

Point III ..... 17

III. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT’S CUSTOMERS, IN THAT RESPONDENTS SOLICITED AT LEAST ONE CUSTOMER OF APPELLANT IN HOUSTON, TEXAS WITHIN TWO YEARS OF THEIR RESIGNATIONS FROM APPELLANT ..... 17

Point IV ..... 18

IV. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT’S EMPLOYEES, IN THAT RESPONDENTS SOLICITED AND EMPLOYED APPELLANT’S EMPLOYEES..... 18

Point V ..... 19

V. THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION TO MODIFY RESPONDENTS’ AGREEMENTS TO RESTRICT RESPONDENTS FROM DEALING WITH APPELLANT’S CUSTOMERS IN HOUSTON, TEXAS INCLUDING, BUT NOT LIMITED TO, PARK SQUARE, AND TO RESTRICT RESPONDENT KENNEBREW FROM COMPETING WITH APPELLANT WITHIN A FIFTY-MILE RADIUS OF HOUSTON, TEXAS, BECAUSE THE CIRCUIT COURT ABUSED ITS DISCRETION, IN THAT THE EVIDENCE ESTABLISHED THAT RESPONDENTS SOLICITED, WORKED AND PERFORMED SERVICES FOR A CUSTOMER OF APPELLANT WITHIN A FIFTY MILE RADIUS OF WHERE RESPONDENT KENNEBREW HAD WORKED FOR APPELLANT.... 19

**ARGUMENT**..... 20

- I. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE, AS WRITTEN, ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THAT BASIS, BECAUSE THE RESTRICTIVE COVENANTS IN THE AGREEMENTS ARE NOT OVERLY BROAD AND ARE REASONABLY LIMITED AS TO TIME AND GEOGRAPHIC SCOPE AS WRITTEN, IN THAT THE AGREEMENTS' TEMPORAL AND GEOGRAPHIC RESTRICTIONS PROHIBITING COMPETITION AND THE SOLICITATION OF APPELLANT'S CUSTOMERS AND EMPLOYEES ARE RESTRICTIONS OF THE TYPE PERMITTED UNDER MISSOURI LAW .....20
- A. **Standard of Review: The Circuit Court's January 7, 2011 Order is to be reviewed *de novo* and is entitled to no deference.....20**
- B. **The non-competition covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law. ....21**
- C. **The non-solicitation of customers covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law. ....26**
- D. **The non-solicitation of employee covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law. ....29**
- II. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENT KENNEBREW WITH RESPECT TO HIS NON-COMPETITION COVENANT, BECAUSE MR. KENNEBREW IS VIOLATING A REASONABLE COVENANT NOT TO COMPETE WITH APPELLANT, IN THAT HE IS OPERATING A COMPETING SECURITY COMPANY WITHIN 50 MILES OF WHERE HE WORKED FOR APPELLANT IN HOUSTON, TEXAS AND WITHIN TWO YEARS OF HIS RESIGNATION FROM APPELLANT 32
- A. **Standard of Review: The Circuit Court's January 7, 2011 Order is to be reviewed *de novo* with respect to legal issues,**

and is entitled to no deference. In addition, the record is to be reviewed in the light most favorable to Whelan and Whelan is to receive the benefit of all reasonable inferences. ....32

B. Mr. Kennebrew breached the non-competition covenant in his Agreement and is not entitled to summary judgment.....33

C. The Circuit Court erred in relying on *Payroll Advance v. Yates*, because it is inapposite. ....37

III. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT’S CUSTOMERS, IN THAT RESPONDENTS SOLICITED AT LEAST ONE CUSTOMER OF APPELLANT IN HOUSTON, TEXAS WITHIN TWO YEARS OF THEIR RESIGNATIONS FROM APPELLANT .....40

A. Standard of Review.....40

B. Respondents breached the non-solicitation of customers covenants in their Agreements and are not entitled to summary judgment.....40

IV. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT’S EMPLOYEES, IN THAT RESPONDENTS SOLICITED AND EMPLOYED APPELLANT’S EMPLOYEES.....46

A. Standard of Review.....46

B. Respondents breached the non-solicitation of employees covenants in their Agreements and are not entitled to summary judgment.....46

V. THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION TO MODIFY RESPONDENTS’ AGREEMENTS TO

RESTRICT RESPONDENTS FROM DEALING WITH APPELLANT’S CUSTOMERS IN HOUSTON, TEXAS, INCLUDING, BUT NOT LIMITED TO, PARK SQUARE, AND TO RESTRICT RESPONDENT KENNEBREW FROM COMPETING WITH APPELLANT WITHIN A FIFTY-MILE RADIUS OF HOUSTON, TEXAS, BECAUSE THE CIRCUIT COURT ABUSED ITS DISCRETION, IN THAT THE EVIDENCE ESTABLISHED THAT RESPONDENTS SOLICITED, WORKED AND PERFORMED SERVICES FOR A CUSTOMER OF APPELLANT WITHIN A FIFTY MILE RADIUS OF WHERE RESPONDENT KENNEBREW HAD WORKED FOR APPELLANT ....48

- A. Standard of Review.....48**
- B. The Circuit Court abused its discretion because Missouri case law is replete with cases modifying restrictive covenants to render them reasonable .....49**

**CONCLUSION AND RELIEF SOUGHT .....51**

## TABLE OF AUTHORITIES

### Cases

<i>Adrian N. Baker &amp; Co v. DeMartino</i> , 733 S.W.2d 14 (Mo.App.E.D. 1987).....	41
<i>AEE-EMF, Inc. v. Passmore</i> , 906 S.W.2d 714 (Mo.App.W.D. 1995).15, 17, 41, 50	
<i>All Type Fire Protection Co. v. Mayfield</i> , 88 S.W.3d 120 (Mo.App.E.D. 2002)...	24
<i>Ballesteros v. Johnson</i> , 812 S.W.2d 217 (Mo.App.E.D. 1991).....	45
<i>Emerson Electric Co. v. Rogers</i> , 418 F.3d 841 (8th Cir. 2005) .....	42
<i>Fedynich v. Massood</i> , 2011 Mo.App.LEXIS 875 (Mo.App.W.D. June 21, 2011) 21	
<i>Forms Mfg., Inc. v. Edwards</i> , 705 S.W.2d 67 (Mo.App.E.D. 1985).....	46
<i>Furniture Mfg. Corp. v. Joseph</i> , 900 S.W.2d 642 (Mo.App.W.D. 1995) .....	52
<i>Grebing v. First Nat’l Bank of Cape Girardeau</i> , 613 S.W.2d 872 (Mo.App.E.D. 1981) .....	44
<i>Huegel v. Kimber</i> , 228 S.W.2d 833 (Mo.App.K.C. 1950) .....	25
<i>In the Interest of A.L.M.</i> , 2011 Mo.App.LEXIS 721, *16 (Mo.App.S.D. May 25, 2011) .....	48
<i>Intertel v. Sedgwick Claims Mgmt.</i> , 204 S.W.3d 183 (Mo.App.E.D. 2006) .....	48
<i>ITT Commercial Fin. v. Mid-Am. Marine</i> , 854 S.W.2d 371 (Mo.banc 1993).21, 33, 40, 46	
<i>Long v. Huffman</i> , 557 S.W.2d 911 (Mo.App.K.C. 1977) .....	24, 45
<i>Mayer Hoffman McCann P.C. v. Barton</i> , 2009 U.S.Dist.LEXIS 27559 (W.D.Mo. Apr. 1, 2009) .....	23
<i>Mayer Hoffmann McCann v. Barton</i> , 614 F.3d 893 (8th Cir. 2010).....	23, 24
<i>Mid-States Paint &amp; Chemical Co., v. Herr</i> , 746 S.W.2d 613 (Mo.App.E.D. 1988) .....	15, 19, 24, 49
<i>Naegele v. Biomedical Sys. Corp.</i> , 272 S.W.3d 385 (Mo.App.E.D. 2008) 17, 42, 43	
<i>Nail Boutique Inc. v. Church</i> , 758 S.W.2d 206 (Mo.App.S.D. 1988)..15, 16, 24, 34	

<i>Nat'l Starch &amp; Chemical Corp. v. Newman</i> , 577 S.W.2d 99 (Mo.App.K.C. 1978)	26
<i>Orchard Container Corp. v. Orchard</i> , 601 S.W.2d 299 (Mo.App.E.D. 1980)	24, 50
<i>Osage Glass, Inc. v. Donovan</i> , 693 S.W.2d 71 (Mo.banc 1985)	15, 16, 18, 22, 24, 34, 36, 43, 52
<i>Payroll Advance, Inc. v. Yates</i> , 270 S.W.3d 428 (Mo.App.S.D. 2008)	22, 37, 38, 39
<i>Property Tax Representatives v. Chatam</i> , 891 S.W.2d 153 (Mo.App.W.D. 1995)	17, 26, 27
<i>R.E. Harrington, Inc. v. Frick</i> , 428 S.W.2d 945 (Mo.App.St.L. 1968)	19, 50
<i>S.R. v. K.M.</i> , 115 S.W.3d 862 (Mo.App.E.D.2003)	48
<i>Schott v. Beussink</i> , 950 S.W.2d 621 (Mo.App.E.D. 1997)	28
<i>Sigma Chemical Co. v. Harris</i> , 794 F.2d 371 (8th Cir. 1986)	51
<i>Silver, Asher, Sher &amp; McLaren, M.D.'s Neurology, P.C. v. Batchu</i> , 16 S.W.3d 340 (Mo.App.W.D. 2000)	27, 28
<i>Superior Gearbox Co. v. Edwards</i> , 869 S.W.2d 239 (Mo.App.S.D. 1993)	19, 25, 50
<i>Urologic Surgs., Inc. v. Bullock</i> , 117 S.W.3d 722, 725 (Mo.App.E.D. 2003)	21
<i>Watlow Elec. Mfg. Co. v. Wrob</i> , 899 S.W.2d 585 (Mo.App.E.D. 1995)	25
<i>Whelan Sec. Co., Inc. v. Allen</i> , 26 S.W.3d 592 (Mo.App.E.D. 2000)	3, 25
<i>Williams v. Kimes</i> , 996 S.W.2d 43 (Mo.banc 1999)	21, 33, 40, 46
<i>Willman v. Beheler</i> , 499 S.W.2d 770 (Mo. 1973)	24, 45
<b>Statutes</b>	
Mo. Rev. Stat. § 431.202	18, 29, 30
Mo. Rev. Stat. § 431.202(1)(4)	30, 47
Mo. Rev. Stat. § 431.202(2)	30
<b>Other Authorities</b>	

*Comment, Covenants Not to Compete - Enforceability Under Missouri Law, 41*  
Mo.L.Rev. 37, 43 (1976) .....26

## JURISDICTIONAL STATEMENT

This appeal arises out of a Judgment and Order (“Order”) entered by the Honorable Maura B. McShane, Circuit Court of St. Louis County, on January 7, 2011<sup>1</sup> granting a Motion for Summary Judgment filed by Respondents Charles Kennebrew, Sr. and W. Landon Morgan, and denying Appellant Whelan Security Company’s Motion to Modify.

In its petition, Whelan Security Co. (“Appellant” or “Whelan”) sought injunctive relief against Respondents Charles Kennebrew Sr. and W. Landon Morgan (“Mr. Kennebrew” and “Mr. Morgan”, collectively “Respondents”) for breach of written agreements they made with Appellant. Count I alleged breach of contract. Count II alleged unjust enrichment by the Respondents. Count III alleged a civil conspiracy by the Respondents. As more fully set forth below, Mr. Kennebrew and Mr. Morgan, in their Agreements, covenanted that they would not work for a customer or a competing business within a fifty mile radius of any location where Respondents provided or arranged for Appellant to provide services; that they would not solicit, take away or attempt to take away the business or patronage of any of Appellant’s customers, or solicit the services of, interfere with the employment of, employ or endeavor to employ any employee of

---

<sup>1</sup> The Circuit Court incorrectly file stamped its Order of January 7, 2011 as January 7, 2010. (Legal File, hereinafter referred to as “LF”, p. 1637.) Note that Judge McShane correctly dated the Order with her signature. (LF p. 1639.)

the Appellant. On January 7, 2011, the Circuit Court entered its Order granting Respondents' Motion for Summary Judgment, denying Appellant's Motion for Summary Judgment, and denying Appellant's Motion to Modify the Agreements.

This Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Constitution of the State of Missouri which provides "The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court."

### **STATEMENT OF FACTS**

#### **I. The Parties and the Agreements.**

Whelan is a Missouri corporation with its principal place of business at 1750 South Hanley Road in St. Louis County, Missouri, which provides security guard services to businesses and other entities in various areas of the country, including in Houston, Texas. (Trial Transcript, Volume I, hereinafter referred to as "Tr. Vol. I", pp. 10:21-25, 11:1-5, 13:15-19.) As more fully explained below, one of Whelan's customers in Houston was Park Square Condominiums ("Park Square").

Mr. Kennebrew and Mr. Morgan worked for Whelan. (LF pp. 351:12-13, 488:24-489:1, 490:9-14.) At the commencement and as a condition of employment, each signed agreements with Whelan. (LF pp. 356:20-25; 357:1-2, 13-23; 487:2.) Mr. Kennebrew's agreement is titled "EMPLOYEE CONFIDENTIAL INFORMATION AND NON-SOLICITATION/NON-COMPETITION AGREEMENT"; Mr. Morgan's Agreement is titled

“CONFIDENTIALITY, NON-SOLICITATION AND NON-COMPETITION AGREEMENT” (“Agreements”). The Agreements were similar and include various restrictive covenants. Mr. Kennebrew’s Agreement<sup>2</sup> states:

3. Restrictive Covenants. 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

---

<sup>2</sup> Mr. Kennebrew’s Agreement is identical to the Employee Confidential Information and Non-Solicitation/Non-Competition Agreement that was before this Court in *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592 (Mo.App.E.D. 2000).

provided by EMPLOYER.

(LF pp. 38-39, ¶ 3.)

Mr. Morgan's Agreement reads:

4. ***Non-Solicitation of Customers.*** During the period of Employee's employment, and for a period of two (2) years subsequent to the termination of that employment, whether said termination is initiated by Employer or Employee, Employee shall not, without the prior written consent of Employer, in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, member, agent, principal, broker, advisor, consultant, manager, shareholder, director or officer, or in any other capacity on Employee's behalf or on behalf of any person, firm, partnership, entity or corporation, or by any agent or employee, solicit, take away, or attempt to take away the trade or patronage of any customer, or perform service for any customer, of Employer or any potential customer whose trade or patronage was being sought by Employer during the last twelve (12) months of Employee's employment.

5. ***Non-Solicitation of Employees.*** During the period of Employee's employment, and for a period of one (1) year subsequent to the termination of that employment, whether said termination is initiated by Employer or Employee, Employee shall not, without the prior written consent of Employer, in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, member, agent, principal, broker, advisor, consultant, manager, shareholder, director or officer, or in any other capacity on Employee's behalf or on behalf of any person, firm, partnership, entity or corporation, or by any agent or employee, solicit the services of, interfere with the employment or business relationship of, employ or endeavor to employ any employee or agents of Employer.

(LF p. 47, ¶¶ 4-5.)

Mr. Kennebrew and Mr. Morgan each acknowledged through his Agreement that the restrictions were reasonable and necessary to protect Whelan's legitimate business interests, and that enforcement would not prevent him from

earning a living. (LF p. 40, ¶ 4; LF pp. 48-49, ¶ 7; Trial Transcript, Volume III, hereinafter referred to as “Tr. Vol. III”, pp. 85:8-23; 95:4-15.)

## **II. The Security Guard Business and Respondents’ Work for Whelan.**

The security guard business is very competitive. (LF p. 354:9-14; Tr. Vol. I, p. 11:16-18.) As Gregory Twardowski, Whelan’s President and CEO, explained, many contracts are won or lost on nickels and dimes per hour of service, and are very dependent on personal relationships with customer management. (Tr. Vol. I, p. 11:16-12:1.) Whelan is one of many competitors in Texas. (LF p. 41:15-17; Tr. Vol I, p. 11:18-21.)

To protect its business interests, Whelan requires its higher ranking employees to sign non-solicitation and non-competition agreements like those at issue here. (Tr. Vol. I, pp. 13:20-25; 14:25; 15:1-6.) Most of its employees, including its rank-and-file security guards, do not sign such agreements. (Tr. Vol I, p. 14:1-3, 17-19.) In fact, only two percent of Whelan’s employees are signatory to such agreements. (Tr. Vol I, p. 14:20-22.)

Whelan hired Mr. Kennebrew because of his reputation in the security guard business as a person with important contacts and the ability to obtain and retain business, particularly in the Houston area. (Tr. Vol I, p. 17:13-21.) Mr. Kennebrew stated that he is a person of considerable standing and influence in the security guard business in Houston. (LF pp. 353:17-23; Tr. Vol I, p. 85:18-22.) Whelan wanted to capitalize on his reputation in this area. (LF p. 363:1-8; Tr. Vol I, p. 17:13-21.) Mr. Kennebrew began his employment with Whelan on

November 26, 2007 as the Director of Quality Assurance. (LF p. 351:14-15.) Mr. Kennebrew's duties included, "managing all operations, clients, customers ... internal and external." (LF p. 351:16-21.) He was "responsible for [Human Resources]," and had access to employee files, employee compensation, and training methods. (LF pp. 387:2-18; 388:9-21, 25; 389:1-19.) He also had access to "financials", and "saw [Whelan's profit margin] for the whole company." (LF pp. 351:16-21; 389:10-17.)

Mr. Kennebrew had a non-competition agreement with his prior employer AlliedBarton, and in order to ensure compliance with the obligations under that agreement, Whelan assigned Mr. Kennebrew to Dallas. After the AlliedBarton non-competition agreement expired, Whelan intended to involve Mr. Kennebrew heavily in the Houston market. (Tr. Vol. I, p. 19:10-21.) Ultimately, Mr. Kennebrew's work for Whelan included contacting Whelan's customers and directing its employees in various parts of Texas, including Houston and Dallas. (LF pp. 358:6-21; 359:1-3, 17-21; 360:4-22; Tr. Vol I, p. 20:5-7.) Mr. Kennebrew remained with Whelan until he voluntarily left in August 2009. (LF p. 384:16-19.)

Mr. Kennebrew's responsibilities were extensive in both Houston and Dallas. Mr. Twardowski explained:

Charles fulfilled all of the Branch management responsibilities for us in the Dallas office, which would mean he was – he was ultimately responsible for the growth and profitability of that Branch, which would cover a lot of different subcategories: Customer service, contract relations, employee development, employee training, employee screening, et cetera, and

was also actively involved in the management of the Houston office, Houston contractual relationships.

(LF p. 1086: 9-16; Tr. Vol. I, p. 10:9-16.)

Mr. Kennebrew was heavily involved in work for Whelan in the Houston area. He admitted that he had more than ten clients in Houston for Whelan with whom he had a very good rapport. (Tr. Vol. III, pp. 33:19-25; 34:3-4.) Mr. Kennebrew also was used on a “sales blitz” in Houston because of his contacts there, and he understood that Whelan wanted him to obtain business in Houston. In fact, he did whatever Whelan told him to do in Houston. (Tr. Vol III, p. 31:10-17.) Mr. Kennebrew’s ability to relate to customers was critical. Mark Porterfield, Whelan’s Senior Vice President and Chief Security Officer, who was someone very familiar with Mr. Kennebrew’s work, explained that Mr. Kennebrew was very good with customers, and in fact was one of the best. (Tr. Vol I, p. 85:18-22.)

Mr. Kennebrew voluntarily submitted his resignation to Whelan dated March 30, 2009. Whelan did not terminate him. (LF p. 383:8-10.) There is no dispute that Whelan fulfilled all of its contractual obligations to Mr. Kennebrew. In his resignation letter, Mr. Kennebrew thanked Whelan for “the opportunity to work for this outstanding company, and noted that he had “learned so much.” (LF p. 884.) He continued to work for Whelan until August 2009. (LF p. 383:11-15.) Shortly after receiving Mr. Kennebrew’s resignation letter, Mr. Porterfield spoke with Mr. Kennebrew. (Tr. Vol I, pp. 84:7-85:8.) They discussed Mr. Kennebrew’s

Agreement, including his post-employment covenants; they specifically discussed that Whelan customers would be off-limits to him. (Tr. Vol I, pp. 86:11-14; 87:10-20.) Mr. Kennebrew assured Mr. Porterfield that he intended to operate a start-up company in the security guard business for governmental contracts and/or minority subcontract/set-aside work, a portion of the security guard market of no interest to Whelan in Houston. (Tr. Vol I, p. 86:15-25.)

In August 2009, Mr. Twardowski went to Texas and met with Mr. Kennebrew. (Tr. Vol I, p. 21:18-22:9.) He emphasized to Mr. Kennebrew that he must adhere to the terms of his Agreement, and in particular, that Mr. Kennebrew must not deal with Whelan's customers. (LF p. 1084:6-14.) Mr. Twardowski told Mr. Kennebrew that he had no objection to Mr. Kennebrew operating his security guard business in Houston as long as he focused on that portion of the market not sought by Whelan (*i.e.* certain government contracting and minority contracting opportunities), and left Whelan's clients alone. (Tr. Vol I, pp. 22:21-23:11; 23:25-24:2, 16-25; 25:1-12.) Mr. Kennebrew assured Mr. Twardowski that he would honor his commitments and that he would not work for or service Whelan's customers. (Tr. Vol I, p. 24:1-2, 16-18.) Having received these assurances, Mr. Twardowski wished Mr. Kennebrew well in his new venture. (Tr. Vol III, p. 24:16-22.)

Mr. Morgan worked for Whelan as its Branch Manager in Nashville, Tennessee. (LF p. 490:9-14.) He was responsible for Whelan's Tennessee area, and was officed in Nashville. (Tr. Vol I, p. 20:15-18.) Mr. Morgan oversaw

“operations, sales, [and] marketing.” (LF p. 491:1-6.) He met with customers. (LF p. 492:6-9.) Mr. Morgan used Whelan’s electronic template to bill customers and he understood the template to be confidential. (LF pp. 492:10-16; 493:3-16; 494:25-495:1; 495:21-25; 496:1.) Mr. Morgan further had access to customer contracts, proposals and employee files. (LF pp. 496:10-19; 497:10-20; 504:17-22; 505:20-25; 506:11-507:12.) Mr. Morgan worked for Whelan through December 19, 2008. (LF pp. 23, ¶ 20; 122, ¶ 20.) Like Mr. Kennebrew, he too resigned his position at Whelan voluntarily, and was not forced to leave. (LF p. 1009:14-18.) Mr. Morgan went to work in South Carolina, then for Mr. Kennebrew in Texas, and later in Tennessee. (LF pp. 1010:7-24; 1016:2-8.)

### **III. Elite Protective Services, LLC, and Respondents’ Post-Employment Conduct with Whelan’s Longtime Customer Park Square Condominiums.**

Mr. Kennebrew is the majority owner, founder and manager of Elite Protective Services, LLC (“Elite”), a limited liability company. (LF pp. 1117-1125; Tr. Vol. III, p. 18:8-19.) On November 19, 2009, in his capacity as Elite’s top official, Mr. Kennebrew sent the following e-mail:

To: [michael@the-harrislawfirm.com](mailto:michael@the-harrislawfirm.com); ‘ToddMcCullough’;  
[moody@eliteprotectivellc.com](mailto:moody@eliteprotectivellc.com)  
Subject: Follow up Items

All,  
With the growth and the great things that God is blessing me with in my personal and professional life, I feel like Jabez [sic]. God is enlarging Elite’s territory and we will all reap the benefits of this growth.

Listed below are follow-up items that we need to focus on.

- Texas Workforce in Beaumont (T-Mac)
- 8a Certification (The Michael Harris)
- Park Square Condos (CK) ...

(LF pp. 1025-1028.)(emphasis added)

As reflected by this e-mail, Mr. Kennebrew made it his personal goal to “focus on” Whelan’s longtime customer Park Square. (LF p. 1028.)

In late November 2009, John McClelland, the branch manager of Whelan’s Houston, Texas office, went to Park Square to address a complaint. (Trial Transcript, Volume II, hereinafter referred to as “Tr. Vol. II”, pp. 5:14-17, 7:10-13; 7:22-25; 9:9-11, 18:8-12.) There, Mr. McClelland spoke to Janice VerVoort, Park Square’s manager for all services and the “ultimate contact” at the location. (Tr. Vol. II, pp. 9:21-10:7.) While there, Mr. McClelland saw a business card on Ms. VerVoort’s desk from Mr. Kennebrew on behalf of his company, Elite. (Tr. Vol. II, pp. 11:18-24; 12:14-21; 48:12-18.)

Mr. Kennebrew had been to Park Square prior to Mr. McClelland’s visit. (Tr. Vol. II, p. 13:10-24.) Indeed, Mr. Kennebrew had gone to Park Square to see Ms. VerVoort. (Tr. Vol. II, pp. 60:17-23; 62:25-63:9; 63:22-24.) Mr. Kennebrew’s visit was one facet of his effort to take over the Park Square account. During the month of December 2009 Mr. Kennebrew made a sales pitch to the board of directors of Park Square. (LF p. 985:14-19.) He did so at the request of Ms. VerVoort, with whom he has had a close business relationship. (LF p. 983:3-23.) Mr. Kennebrew is someone who enjoyed Ms. VerVoort’s goodwill. (LF pp.

1089: 25-1090:6; 1090:15-21; 1091:9-11.) Ms. VerVoort called Mr. Kennebrew in August 2009 to address purported concerns she had with Whelan. (LF pp. 983:3-8, 19-23; 1089:5-7, 17-20.) Indeed, Ms. VerVoort asked no one other than Mr. Kennebrew to appear before Park Square's board as a possible replacement for Whelan, and Park Square considered only his company to replace Whelan. (LF pp. 1096:2-12, 20-22; 1097:18-20; 1098:18-23; 1100:7-11.) On December 16, 2009, Mr. Kennebrew sent an email to Ms. VerVoort, regarding a tenant issue and a security incident that he handled as a personal favor to Ms. VerVoort. (LF pp. 986:13-15; 987:3-988:2; 988:14-17, 21; 989: 6-9; 1105:4-1106:17; 1419.) Mr. Kennebrew also submitted a proposal for Elite to provide security services for Park Square to Ms. VerVoort. (LF pp. 1055-1073;1075-1080; 1107:9-1108:2.) On December 17, 2009, Mr. Kennebrew's efforts to obtain Park Square as a customer bore fruit when Jack Rawitscher, President of the Park Square Condominium Association, and Mr. Kennebrew signed a Service Agreement for Elite to become the security service provider. (LF pp. 989:15-990:8; 990:20-21; 991:1-13; 1075-1080; 1110:14-1112:10.)

On December 18, 2009, Mr. Morgan met with Whelan's employees at Park Square on behalf of Elite. (Tr. Vol. II, pp. 64:10-65:1.) Mr. Morgan passed out applications, and told them about Elite's take-over. (LF pp. 1018:10-16; 1019:8-18; 1020:4-9; 1021:11-13.) Mr. Morgan provided employment packages to all of the Whelan employees. (Tr. Vol. II, p. 64:14-24.) He conducted the meeting on behalf of Elite at Park Square's library. (Tr. Vol. II, pp. 64:25; 65:1.) Prior to

Elite's actual January 2010 takeover, Mr. Morgan undertook to cement Elite's relationship with Park Square. He sent Ms. VerVoort his plans for Park Square's security. His emails to Ms. VerVoort are dated December 15, 20, 22, 23, 31, 2009 and January 2, 2010, and show him acting as general manager for Elite at Park Square. (LF pp. 1030-1039; 1109:8-25.) Mr. Morgan also sent an email to Ms. VerVoort on December 31, 2009, copying Mr. Kennebrew, regarding security-related matters for Park Square. (LF pp. 1041; 1104:15-25; 1105:1-20.) After Elite's take-over, Mr. Morgan regularly, almost daily, was on site at Park Square as Elite's general manager. (LF p. 1099:7-10.)

Within only weeks of Mr. Kennebrew's November 19, 2009 email in which he said he would personally focus on Park Square, this Whelan customer terminated Whelan and replaced it with Mr. Kennebrew's company as of January 2010. (Tr. Vol. II, p. 66:1-3; LF pp. 984:2-5; 1043; 1093:6-9, 22-25; 1094:1, 8-10, 1100:1-1101:1.) Despite Mr. Kennebrew's actions, Whelan sought to retain Park Square's business with Mr. McClelland making a personal plea to Ms. VerVoort. (Tr. Vol. II, pp. 13:25-14:8; LF p. 1115:2-16.) Mr. McClelland's efforts were not successful. Elite started providing security services there, and hired many Whelan employees, who had been working at Park Square and who remained there through the pendency of much of this litigation. (LF p. 1100:12-16.)

Elite has provided the same security services to Park Square as Whelan. (Tr. Vol. II, p. 66:7-10.) Mr. Morgan was regularly on site at Park Square acting as Elite's general manager. (LF p. 1099:7-10.) Without interruption since January

2010, Elite has exclusively provided security guard services to Park Square. (LF pp. 962:1-3; 1094:1-10; 1095:2-4; 1100:4-10.)

On January 4, 2010, Whelan filed a Verified Petition for Injunctive Relief and Damages against Respondents. Whelan's Petition includes claims for breach of contract, unjust enrichment, and for civil conspiracy. Whelan also sought injunctive relief. (LF pp. 18-50.) Temporary restraining orders enforcing the Agreements, specifically the restrictive covenants therein, were entered on January 13, 2010, February 2, 2010, and March 15, 2010. (LF pp. 57-60, 67-68, 94-95.) The Court denied Respondents' Motions to Dismiss on March 16, 2010 and May 26, 2010 in which, *inter alia*, the Respondents alleged that their Agreements were unreasonable. (LF pp. 97, 102, 119.)

The Circuit Court heard the preliminary injunction over three days, on June 25, July 30 and September 10, 2010. On October 8, 2010, the Circuit Court issued its Order/Judgment ("Preliminary Injunction Order") denying Whelan's request for preliminary injunction against Mr. Kennebrew and Mr. Morgan. (LF pp. 636-641.) Whelan subsequently filed a Motion to Modify (LF pp. 642-648), and the parties thereafter filed cross Motions for Summary Judgment. (LF pp. 652-800.) The court issued its Order on January 7, 2011 ruling that the employment agreements, as written, are overbroad, not reasonable as to time and space and are therefore not valid. (LF pp. 1637-1639.) The Circuit Court granted Mr. Kennebrew's and Mr. Morgan's Motion for Summary Judgment, denied Whelan's

Motion for Summary Judgment and denied Whelan's Motion to Modify the Agreements. This appeal followed.

## POINTS RELIED ON

### **Point I**

THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE, AS WRITTEN, ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THAT BASIS, BECAUSE THE AGREEMENTS, SPECIFICALLY THE NON-COMPETITION AND NON-SOLICITATION COVENANTS SET FORTH THEREIN, ARE NOT OVERLY BROAD AND ARE REASONABLY LIMITED AS TO TIME AND GEOGRAPHIC SCOPE, IN THAT THE COVENANTS' TEMPORAL AND GEOGRAPHIC RESTRICTIONS, AS WRITTEN, ARE PERMITTED UNDER MISSOURI LAW.

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

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

*Nail Boutique Inc. v. Church*, 758 S.W.2d 206 (Mo.App.S.D. 1988)

*Mid-States Paint & Chemical Co. v. Herr*, 746 S.W.2d 613 (Mo.App.E.D. 1988)

## Point II

THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENT KENNEBREW WITH RESPECT TO HIS NON-COMPETITION COVENANT, BECAUSE MR. KENNEBREW IS VIOLATING A REASONABLE COVENANT NOT TO COMPETE WITH APPELLANT, IN THAT HE IS OPERATING A COMPETING SECURITY COMPANY WITHIN 50 MILES OF WHERE HE WORKED FOR APPELLANT IN HOUSTON, TEXAS AND WITHIN TWO YEARS OF HIS RESIGNATION FROM APPELLANT.

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

*Nail Boutique Inc. v. Church*, 758 S.W.2d 206 (Mo.App.S.D. 1988)

### Point III

THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT'S CUSTOMERS, IN THAT RESPONDENTS SOLICITED AT LEAST ONE CUSTOMER OF APPELLANT IN HOUSTON, TEXAS WITHIN TWO YEARS OF THEIR RESIGNATIONS FROM APPELLANT.

*Property Tax Representatives v. Chatam*, 891 S.W.2d 153 (Mo.App.W.D. 1995)

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

*Naegele v. Biomedical Sys. Corp.*, 272 S.W.3d 385 (Mo.App.E.D. 2008)

**Point IV**

THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT'S EMPLOYEES, IN THAT RESPONDENTS SOLICITED AND EMPLOYED APPELLANT'S EMPLOYEES.

Mo. Rev. Stat. § 431.202

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

## Point V

THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO MODIFY RESPONDENTS' AGREEMENTS TO RESTRICT RESPONDENTS FROM DEALING WITH APPELLANT'S CUSTOMERS IN HOUSTON, TEXAS INCLUDING, BUT NOT LIMITED TO, PARK SQUARE, AND TO RESTRICT RESPONDENT KENNEBREW FROM COMPETING WITH APPELLANT WITHIN A FIFTY-MILE RADIUS OF HOUSTON, TEXAS, BECAUSE THE CIRCUIT COURT ABUSED ITS DISCRETION, IN THAT THE EVIDENCE ESTABLISHED THAT RESPONDENTS SOLICITED, WORKED AND PERFORMED SERVICES FOR A CUSTOMER OF APPELLANT WITHIN A FIFTY MILE RADIUS OF WHERE RESPONDENT KENNEBREW HAD WORKED FOR APPELLANT.

*Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239 (Mo.App.S.D. 1993)

*R.E. Harrington, Inc. v. Frick*, 428 S.W.2d 945 (Mo.App.St.L. 1968)

*Mid-States Paint & Chemical Co. v. Herr*, 746 S.W.2d 613 (Mo.App.E.D. 1988)

## ARGUMENT

**I. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE, AS WRITTEN, ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THAT BASIS, BECAUSE THE AGREEMENTS, SPECIFICALLY THE NON-COMPETITION AND NON-SOLICITATION COVENANTS SET FORTH THEREIN, ARE NOT OVERLY BROAD AND ARE REASONABLY LIMITED AS TO TIME AND GEOGRAPHIC SCOPE, IN THAT THE COVENANTS' TEMPORAL AND GEOGRAPHIC RESTRICTIONS, AS WRITTEN, ARE PERMITTED UNDER MISSOURI LAW.**

**A. Standard of Review: The Circuit Court's January 7, 2011 Order is to be reviewed *de novo* and is entitled to no deference.**

In granting summary judgment, the Circuit Court ruled that as a matter of law the Agreements, as written, were invalid. The Circuit Court's decision is premised solely on the four corners of the Agreements, and is not based on any other facts or circumstances. The Order below states:

The Court, being now fully advised, and in light of its October 8, 2010 Order/Judgment, rules and determines that the employment agreements at issue in this case, as written, are overbroad, not reasonable as to time and space and are therefore not valid. Accordingly, the Court hereby Grants Respondents Charles Kennebrew, Sr. and W. Landon Morgan's Motion for Summary Judgment, DENIES Appellant's Motion for Summary Judgment, and DENIES Appellant's Motion to Modify.

(LF pp. 1637-1639.)(emphasis added)

Because the Circuit Court in issuing its Order invalidated the Agreements on their face, "as written," this Court's standard of review of this first point is *de*

*novo*, and the Circuit Court's decision is entitled to no deference.<sup>3</sup> *Urologic Surgs., Inc. v. Bullock*, 117 S.W.3d 722, 725 (Mo.App.E.D. 2003) ("The standard of review of a summary judgment is essentially *de novo*.) See also *Fedynich v. Massood*, 2011 Mo.App.LEXIS 875, \*3-4 (Mo.App.W.D. June 21, 2011) (Contract interpretation is an issue of law that is reviewed *de novo*.)

In view of the Circuit Court's ruling that the Agreements as written are invalid, the only issue properly before this Court is the facial validity of the Agreements under Missouri law. This issue is addressed in Point I. There was no trial, but a grant of summary judgment.

**B. The non-competition covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law.**

---

<sup>3</sup> Insofar as any other facts or circumstances are considered, therefore, Whelan, the non-movant for purposes of Respondents' summary judgment motion, is entitled to have the record viewed in the light most favorable to it and to receive the benefit of all reasonable inferences from the record. *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993) (Internal citations omitted.); see also *Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. banc 1999). Facts and circumstances related to the restrictive covenants are not pertinent to Point I, but are discussed under Points II, III, and IV in this Brief.

The non-competition covenants, as written, are neither overly broad nor unreasonable. In fact, Appellant's research has not disclosed a single reported case in which a Missouri court has ruled invalid *on their face* restrictive covenants of the temporal and geographic scope that are the same as, or even substantially similar to, those in the Agreements here.<sup>4</sup> To the contrary, the covenants are on their face narrowly drafted and reasonable based upon well established Missouri law. As specified in the Agreements themselves, they are directed at protecting Whelan's legitimate business interests. (LF pp. 40, 48.) In discussing the interest of an employer protecting its legitimate business interests, the Missouri Supreme Court more than two decades ago explained:

The purpose of the restriction [not to compete] is to keep the covenanting employee out of a situation in which he might be able to make use of contacts with customers to his former employer's disadvantage. If the covenant is lawful and the opportunity for influencing customers exists, enforcement [of a noncompetition clause] is reasonable.

*Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 75 (Mo.banc 1985) emphasis added).

---

<sup>4</sup> The primary case on which Respondents rely in their briefing to the Circuit Court is *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428 (Mo.App.S.D. 2008). As noted in Section II(C) of this Brief, the court in *Payroll Advance, Inc.* did not evaluate the facial validity of the restrictive covenants, but instead conducted a bench trial at which it considered all facts and circumstances.

The prohibitions in Respondents' Agreements against working for a competing business within a fifty mile radius of any location where they provided or arranged for Whelan to provide services for a two-year period are not overly broad or unreasonable.<sup>5</sup> To the contrary, the restrictive covenants limiting Respondents from competing with Whelan, on their face, comport with numerous decisions upholding such covenants, and are well within the bounds of restrictive covenants that Missouri courts have found to be reasonable. *See Mayer Hoffman McCann P.C. v. Barton*, 2009 U.S. Dist. LEXIS 27559, \*50 (W.D. Mo. Apr. 1, 2009) ("The overwhelming weight of case authority in Missouri supports the enforceability of a two-year restriction in a covenant not to compete."), *aff'd*, 614 F.3d 893 (8th Cir. 2010). In reversing a circuit court decision to limit a two year non-competition covenant, which included a geographic restriction of 100 miles, to one year, and remanding with directions to grant relief for the entire two year

---

<sup>5</sup> Appellant submits that the non-competition covenant in Mr. Morgan's Agreement is also reasonable, as written. However, Morgan's non-competition covenant is not at issue, and the petition does not allege that Mr. Morgan violated this covenant. Having worked for Whelan in Nashville, Tennessee, he was free to work in Houston, or anywhere in Texas because any location in Texas would have been more than fifty miles from Nashville, so long as he adhered to his non-solicitation covenants.

period specified in the employment agreement, this Court stated in *All Type Fire Protection Co. v. Mayfield*, 88 S.W.3d 120, 123 (Mo.App.E.D. 2002): “The term of two years, furthermore is supported by the overwhelming weight of case authority.” Eight years later, in *Mayer Hoffmann McCann v. Barton*, 614 F.3d 893, 908 (8th Cir. 2010), the Eighth Circuit, citing *All Type Fire*, reaffirmed that the law in Missouri remained as follows: “A duration of two years in a noncompete covenant in an employment contract has been found reasonable under the overwhelming weight of authority in Missouri.”

Indeed, Missouri courts have repeatedly ruled that, non-competition covenants that are the same or even much longer in time and geographic scope than the covenants at issue here are reasonable. *Osage Glass, Inc.*, 693 S.W.2d at 75 (upholding three year covenant throughout the entire State of Missouri); *Nail Boutique, Inc. v. Church*, 758 S.W.2d 206 (Mo.App.S.D. 1988)(upholding two-year non-competition agreement and fifty-mile radius); *Mid-States Paint & Chemical Co., v. Herr*, 746 S.W.2d 613 (Mo.App.E.D. 1988) (three year covenant and a 350-mile radius held reasonable); *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299 (Mo.App.E.D. 1980)(three year non-competition period and 200-mile radius deemed reasonable); *Long v. Huffman*, 557 S.W.2d 911 (Mo.App.K.C. 1977) (upholding five year non-competition and a sixty-mile radius for physicians). *See also Willman v. Beheler*, 499 S.W.2d 770 (Mo. 1973)(five-year non-competition agreement between physicians upheld). At the time of the Court’s decision in *Willman*, the five-year period had expired, but the Court

directed the lower court to assess a monetary amount to compensate plaintiff for the five-year period. In *Superior Gearbox v. Edwards*, 869 S.W.2d 239 (S.D.Mo.App 1993), the court reduced a ten-year non-competition covenant to five years. This Court reached a similar outcome in *Watlow Elec. Mfg. Co. v. Wrob*, 899 S.W.2d 585 (Mo.App.E.D. 1995)(five-year covenant upheld). In *Huegel v. Kimber*, 228 S.W.2d 833 (Mo.App.K.C. 1950), a case in which the appellate court set aside a criminal contempt finding, the court nonetheless noted that a five-year noncompete was permissible.<sup>6</sup>

In the present case, the Agreements, as written, contain time and space restrictions that fall squarely within the parameters expressly and repeatedly permitted by Missouri courts. The foregoing cases make clear that on their face the Agreements are not, and cannot be, overly broad and unreasonable under Missouri law. To the contrary, Missouri courts have repeatedly found similar time and space restrictions to be reasonable and enforced. The Circuit Court's Order

---

<sup>6</sup> As previously noted in footnote 2, an agreement identical to the one signed by Mr. Kennebrew was before this Court in *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592 (Mo.App.E.D. 2000). In that case, this Court enforced a forum selection provision in Defendant Allen's agreement. The defendant did not claim, and this Court did not conclude, that the restrictive covenants, as written, were overly broad or unreasonable, or that the restrictive covenants were not valid and enforceable.

was, therefore, entirely contrary to Missouri law and incorrect in its conclusion that the non-competition covenants in the agreements, as written, were invalid.

**C. The non-solicitation of customers covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law.**

In Missouri, employers may also contractually restrict employees from soliciting customers after the termination of their employment. Indeed, such covenants have been held *per se* reasonable. *Nat'l Starch & Chemical Corp. v. Newman*, 577 S.W.2d 99, 105 (Mo.App.K.C. 1978) (“A covenant restricting former employees from soliciting clients of their former employer is reasonable *per se*, because the goodwill of an employer clearly extends to his current stock of customers, and the employee is not forbidden from opening a competing business, even at plaintiff's doorstep.”)(quoting *Comment, Covenants Not to Compete - Enforceability Under Missouri Law*, 41 Mo.L.Rev. 37, 43 (1976)). The holding of *Nat'l Starch* makes clear that a customer non-solicitation covenant cannot be facially invalid.

Cases after *Nat'l Starch* have reaffirmed this case's holding. “The employee's relationship with the client he owes to the employer, and he holds it in a kind of fiduciary capacity for the employer.” *Property Tax Representatives v. Chatam*, 891 S.W.2d 153, 158 (Mo.App.W.D. 1995). In *Chatam*, the court upheld a non-solicitation covenant that prohibited a former employee from using the employer's customer contacts, goodwill and knowledge of the clients' business. *Id.* at 158. The non-solicitation provision barred the former employee from

soliciting customers from his former employer for two years. *Id.* “It is perfectly fair,” the court stated, “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.* Again, Missouri law clearly states that customer contacts are legitimate, protectable interests of employers, and that it is entirely proper to safeguard that interest with a customer non-solicitation covenant.

The court in *Silver, Asher, Sher & McLaren, M.D.'s Neurology, P.C. v. Batchu*, 16 S.W.3d 340, 345 (Mo.App.W.D. 2000) applied similar reasoning in construing a customer non-solicitation provision. The court stated that, “[a]n accepted method of limiting a post-employment restraint so as to be reasonable is to draft a covenant restricting the former employee from soliciting the former employer’s clients.” *Id.* The customer restriction in the agreement in *Silver* case is nearly identical to the customer restriction in Respondents’ Agreements. In *Silver*, the physician-employee agreed to not “solicit, service, refer to handle any medical business or engage in the practice of neurology for any patient of Employer who was a patient of Employer on the date of the termination of physician’s Employment with Employer.” *Id.* at 343. The agreement limited the physician-employee from treating individuals who were patients of the employer-clinic at the time of his termination for a period of two years. The court found the agreement to be reasonable because it “protected the legitimate interest and concern” of the employer in retaining its patient base. *Id.* Here, Whelan also sought to protect its legitimate interest in retaining its customers. So similar are

the non-solicitation of customers covenants contained in Respondents' Agreements to those in *Silver* that it is clear that Respondents' Agreements are on their face reasonable.

In an earlier case, *Schott v. Beussink*, 950 S.W.2d 621, 627 (Mo.App.E.D. 1997), this Court concluded that a two-year restriction on certified public accountants soliciting their former employer's customers, or doing any accounting work for them, was enforceable, without a geographical restriction, because "the covenant does not prevent employees from practicing in any particular geographical area, it merely prohibits them from soliciting employer's clients." Like the covenant in *Silver*, The covenant in *Schott* was virtually the same as that in Respondents' Agreements. It read:

The Employee covenants and agrees that for a period of two (2) years after the termination of this Agreement that he as an individual or in conjunction with associates or as an employee of another corporation, accountant or firm or company of accountants, will not come directly or indirectly, solicit or do any tax, auditing, accounting, system, or related types of work of or for any of the clients of the Employer for whom the Employer has done business during the fifteen (15) month period preceding the termination of this Agreement, or with whom they were at that date in negotiation to do business.

*Schott*, 950 S.W.2d at 623.

Because Missouri courts have repeatedly held that a customer non-solicitation covenant is a proper method of protecting an employer's legitimate interest in its customer base, the customer non-solicitation portions of

Respondents' Agreements cannot on their face be deemed overly broad or unreasonable. The Circuit Court's Order is erroneous as a matter of law. Its grant of summary judgment must be reversed.

**D. The non-solicitation of employee covenants, as written, are not overly broad or unreasonable. They are reasonable on their face based on well established Missouri law.**

An employer's right to prohibit employees from soliciting other employees is confirmed by statute. Mo. Rev. Stat. § 431.202 (2001) states, in part:

1. 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...

(3) Between an employer and one or more employees seeking on the part of the employer to protect:

(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; or

(4) Between an employer and one or more employees, notwithstanding the absence of the protectable interests described in subdivision (3) of this subsection, so long as such covenant does not continue for more than one year following the employee's employment...

4. Nothing in this section shall preclude a covenant described in subsection 1 of this section from being enforceable in circumstances other than those described in subdivisions (1) to (4) of subsection 1 of this section, where such covenant is reasonably necessary to protect a party's legally permissible business interests.

It is immediately clear that Morgan’s covenant not to solicit, employ or endeavor to employ Whelan’s employees, as set out in his Agreement, is valid and enforceable, because it specifically conforms to subsection 1(4) of the statute, which allows an employer to prohibit a former employee from soliciting, recruiting, or hiring its employees for up to one year, even in the absence of any evidence that the employee obtained trade secrets or had customer contacts. Mo. Rev. Stat. § 431.202(1)(4). Mr. Morgan’s covenant not to solicit or employ Whelan’s employees lasts for only one year. (LF p. 47, ¶ 5.) Thus, the express language of the employee non-solicitation covenant satisfies subsection 1(4) of the statute, and it is therefore as written reasonable, valid and enforceable. Additionally, Mr. Morgan acknowledged in the Agreement that this restriction was reasonable and necessary to protect Whelan’s legitimate business interests. (LF p. 48, ¶ 7.)

Mr. Kennebrew’s covenant not to solicit Whelan’s employees contained in his Agreement is also reasonable, as written. (LF pp. 38-39, ¶ 3.) Mo. Rev. Stat. § 431.202 *et seq.* makes plain that a two-year employee non-solicitation covenant such as that in Mr. Kennebrew’s Agreement is not on its face invalid. Rather, Mo. Rev. Stat. § 431.202(2) specifies that the legality of covenants in excess of one year “shall be determined based upon the facts and circumstances pertaining to such covenant.” Mo. Rev. Stat. § 431.202(2). In the present case, the Circuit Court’s Order is not predicated on “the facts and circumstances pertaining” to Mr.

Kennebrew's two-year employee non-solicitation.<sup>7</sup> Accordingly, because this covenant in Mr. Kennebrew's Agreement cannot be invalid on its face as a matter of law, and because the Circuit Court expressly based its decision on the Agreement as written rather than on any facts or circumstances, the Circuit Court's Order is erroneous and must be reversed.

---

<sup>7</sup> In the Agreement itself, Mr. Kennebrew expressly acknowledged that this employee non-solicitation restriction as well as the other restrictions were "reasonable and necessary in order to protect the Employer's legitimate business interests." (LF p. 40.) Given these acknowledgements as well as Whelan's right to the benefit of all reasonable inferences and to have the record viewed in its favor, Mr. Kennebrew's employee non-solicitation covenant cannot be rendered invalid and unenforceable merely on the basis of a reading of the Agreement.

**II. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENT KENNEBREW WITH RESPECT TO HIS NON-COMPETITION COVENANT, BECAUSE MR. KENNEBREW IS VIOLATING A REASONABLE COVENANT NOT TO COMPETE WITH APPELLANT, IN THAT HE IS OPERATING A COMPETING SECURITY COMPANY WITHIN 50 MILES OF WHERE HE WORKED FOR APPELLANT IN HOUSTON, TEXAS AND WITHIN TWO YEARS OF HIS RESIGNATION FROM APPELLANT.**

**A. Standard of Review: The Circuit Court’s January 7, 2011 Order is to be reviewed *de novo* with respect to legal issues, and is entitled to no deference. In addition, the record is to be reviewed in the light most favorable to Whelan and Whelan is to receive the benefit of all reasonable inferences.<sup>8</sup>**

Because Whelan, the non-movant, is appealing a summary judgment in favor of Respondents it is entitled to have the record viewed in the light most favorable to it and to receive the benefit of all reasonable inferences from the record. The Missouri Supreme Court has stated:

---

<sup>8</sup> Because the Circuit Court’s Order invalidated the Agreements by misapplying Missouri law with respect to the temporal and geographic scope of the restrictive covenants in the Agreements as written, reversal of the Order is warranted. There is no need for this Court to examine the facts and circumstances because the covenants are on their face reasonable. Nevertheless, when the facts and circumstances are considered in the light most favorable to Whelan and when Whelan is given the benefit of all reasonable inferences, it is plain that Respondents were not entitled to summary judgment.

When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. ... We accord the non-movant the benefit of all reasonable inferences from the record.

Our review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment.

*ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993)

(internal citations omitted)(emphasis added); *see also Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo.banc 1999).

**B. Mr. Kennebrew breached the non-competition covenant in his Agreement and is not entitled to summary judgment.**

Mr. Kennebrew's post-employment activities with respect to Park Square, construing the record most favorably to Whelan, demonstrate that he breached the non-competition covenant set forth in his Agreement with Whelan in that he is operating a competing security company within fifty miles of Whelan's Houston, Texas location and within two years of his resignation from Whelan. As the record demonstrates, Mr. Kennebrew is the majority owner, founder, manager and president of Elite. With Elite, Mr. Kennebrew operated a security company that competed with Whelan in Houston, Texas and he did so within the two year period proscribed by the non-competition covenant. (LF pp. 1025-1028; 1094:1, 8-10;

1095:2-4; 1100:4-10; 1117-1125.) Upon departing from Whelan in August, 2009, Mr. Kennebrew founded and began operations with Elite. (LF pp. 1117-1125.) Through Elite, Mr. Kennebrew became interested in developing business in Houston. (LF pp. 1025-1028.) Despite his contractual commitments and affirmations to Mr. Twardowski that he would only provide security services to a market in Houston that Whelan does not regularly serve (*i.e.*, governmental contracts and/or minority subcontract/set-aside work), Mr. Kennebrew nevertheless became interested in providing security services to businesses in Whelan's market, including to Whelan's customer, Park Square. (LF pp. 985:14-19; 1025-1028.) The record shows that commencing in January, 2010, Mr. Kennebrew provided security services to Park Square. (LF pp. 1094:1, 8-10; 1095:2-4; 1100:4-10.) In doing so, Mr. Kennebrew breached his covenant not to compete with Whelan within fifty miles of the locations at which he worked for Whelan.

In Missouri, an employer may enforce a covenant not to compete against an employee that has substantial customer contacts. "The purpose of the restriction is to keep the covenanting employee out of a situation in which he might be able to make use of contacts with customers to his former employer's disadvantage. If the covenant is lawful and the opportunity for influencing customers exists, enforcement is appropriate." *Osage Glass*, 693 S.W.2d at 75; *see also Nail Boutique*, 758 S.W.2d at 211.

Here, the record demonstrates that Mr. Kennebrew had numerous customer contacts in Texas and, in particular, in Houston. He dealt with more than ten clients in Houston on behalf of Whelan, and had a good rapport with each. (Tr. Vol. III, pp. 33:19-25; 34:3-4.) His ability to promote business and deal with customers was the very reason Whelan hired him. (Tr. Vol. I, p. 85:18-22.) The record certainly warrants the conclusion, particularly for purposes of the summary judgment entered against Whelan, that Mr. Kennebrew had sufficient customer contacts and the opportunity to influence Whelan's customers to warrant enforcement of a non-competition covenant that by its terms is reasonable.

The restrictions of Mr. Kennebrew's Agreement are certainly reasonable under the circumstances of this case. Mr. Twardowski made it clear to Mr. Kennebrew when they met in August 2009 that the latter was free to pursue that portion of the market not sought by Whelan – governmental contracts and/or minority subcontract/set-aside work – whether or not it was within fifty miles of a location where Mr. Kennebrew had worked for Whelan. (Tr. Vol. I, pp. 22:21-23:11; 23:25-24:2, 16-25; 25:1-12.) In this meeting, Kennebrew did not protest that the covenants, of which Mr. Twardowski reminded him, were unfair, unreasonable, or unduly burdensome. In fact, Mr. Kennebrew's promises at the very moment he was leaving Whelan's employment, that he would not pursue Whelan's customers and that he would limit his work in Houston to the portion of the security service market not sought by Whelan (Tr. Vol I, p. 24:1-2, 16-18), demonstrate his own belief that his livelihood was not in jeopardy and that the

restrictions were fair to him as well as Whelan. Mr. Kennebrew's reaffirmation of the commitments that he made in his Agreement shows that in his mind those commitments were reasonable and appropriate.

Park Square warrants particular consideration. Mr. Kennebrew had a relationship with Park Square, in particular its manager, which facilitated the transfer of the work from Whelan to Mr. Kennebrew and his company, Elite. (LF p. 983:3-23.) In discussing the interest of an employer such as Whelan in protecting its customer contacts, the Missouri Supreme Court has explained that the purpose of the noncompetition covenant is to prevent the employee from "mak[ing] use of contacts with customers to his former employer's disadvantage." *Osage Glass, Inc.*, 693 S.W.2d at 75.

In such a highly competitive industry as the security service industry, in which contracts may be won or lost over nickels and dimes per hour, the importance of protecting customer contacts cannot be gainsaid. (Tr. Vol. I, p. 11:16-12:1.) The competitiveness of the industry makes clear the reasonableness of the limited, restrictive covenant that Whelan negotiated with him.

Mr. Kennebrew's covenant only restricts his ability to compete with Whelan within fifty miles of the locations where he worked, Houston and Dallas (not every location from which Whelan operates) for a period of two years. Both of these limitations are far less than those upheld by Missouri courts. *See* cases cited in Section I(B), above. When the record is considered in the light most favorable to Whelan, and when Whelan is given the benefit of all reasonable

inferences, it is clear that the non-competition covenant is reasonable, and that Mr. Kennebrew breached that covenant.

**C. The Circuit Court erred in relying on *Payroll Advance v. Yates*, because it is inapposite.**

*Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428 (Mo.App.S.D. 2008), the case upon which Respondents primarily relied in their briefing to the Circuit Court is inapposite for numerous reasons. First, the agreement in *Payroll Advance, Inc.* restricted the former employee, Ms. Yates, from competing within fifty miles of any branch office of Payroll Advance, not just those where she worked. *Id.* at 436. Here, the non-competition covenants extend only for a radius of fifty miles from where Mr. Kennebrew provided services for Whelan. Mr. Kennebrew was free to compete with Whelan anywhere outside this fifty-mile radius. Mr. Kennebrew could have worked in much of Texas without violating his Agreement.

Second, the nature of Ms. Yates's employment was far different than that of Mr. Kennebrew. Working as the sole employee in a branch office, she arranged for payday loans for individuals who came into the office. Ms. Yates neither developed nor sought to develop close personal relationships with applicants, and did nothing to build customer loyalty other than to engage in small talk during the processing of loans. *Id.* at 433. Ms. Yates was little more than a cashier, who dealt with applicants if and when they came into the store where she worked to apply for a payday loan. Her job was akin to a bank teller or check-out clerk. She was not dealing with corporate clients or even courting such business. Unlike Mr.

Kennebrew, she had not formed a business entity to pursue customers, and never solicited customers in competition with her former employer. She was not involved in managing the affairs of Payroll Advance in any way that is meaningfully comparable to the role Mr. Kennebrew played for Whelan. Further, Whelan carefully limits the number of its employees who are asked to sign non-competition or non-solicitation agreements. Whelan does not require its lower ranking employees to sign such agreements; it only asks its higher ranking employees – less than two percent of its workforce – do so. (Tr. Vol. I, p. 14:20-22.)

A third difference between this case and *Payroll Advance, Inc.* is that Payroll Advance terminated Ms. Yates. *Id.* at 431. Here, Mr. Kennebrew (as well as Mr. Morgan) voluntarily resigned. (LF pp. 23, ¶ 20; 122, ¶ 20; 977:16-19.) It is one thing for an employer to deprive an individual of his livelihood by terminating his employment. It is another thing, however, for an employee to voluntarily leave. Ms. Yates's former employer forced her to find a new way to support herself and her family. Whelan did not place either Respondent in this difficult position. Mr. Kennebrew could have continued working for Whelan and receiving the salary and benefits of a high level management position. Unlike Ms. Yates, he decided to strike out on his own, and was not dismissed by his employer. Mr. Kennebrew accepted employment, compensation, and other benefits from Whelan knowing that he would be expected to abide by the terms of his Agreement. He expressly agreed to comply with the post-employment covenants

that Whelan requested. He said in resigning that he appreciated what he had gained from his employment with Whelan, and thanked Whelan for “the opportunity to work for this outstanding company” and concluded by noting that he had “learned so much.” (LF p. 884.)

Fourth, in *Payroll Advance, Inc.*, Ms. Yates testified that the hardship the non-competition agreement would have on her would be severe. *Payroll Advance, Inc.*, 270 S.W. at 433. Notwithstanding any belated assertions to the contrary, Mr. Kennebrew acknowledged that the non-competition agreement with Whelan would not significantly impact his ability to make a living. (LF pp. 39, ¶ 4C; 48, ¶ 7A(3); Tr. Vol. III, pp. 85:19-23, 95:8-15.) In short, the facts in *Payroll Advance, Inc.* are so different from those in the present scenario that it provides no support for the Circuit Court’s determination.

Finally, it is to be noted that the decision in *Payroll Advance* rested on a record developed after a complete bench trial. Neither the circuit court nor the appellate court, which reviewed this case, concluded that the non-competition agreement at issue was on its face unreasonable. In commenting upon the validity of a 50 mile restriction, the appellate court was careful to note that the validity of such a restriction “must be viewed under the specific circumstances of each case.” *Payroll Advance, Inc.*, 270 S.W. at 435. Here, the Circuit Court failed to perform any analysis of the circumstances.

**III. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT'S CUSTOMERS, IN THAT RESPONDENTS SOLICITED AT LEAST ONE CUSTOMER OF APPELLANT IN HOUSTON, TEXAS WITHIN TWO YEARS OF THEIR RESIGNATIONS FROM APPELLANT.**

**A. Standard of Review.**

For the reasons specified in Section II(A) of this Brief, the standard of review is de novo. *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993); *see also Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo.banc 1999).

**B. Respondents breached the non-solicitation of customers covenants in their Agreements and are not entitled to summary judgmentt.**

In contravention of their Agreements, Mr. Kennebrew and Mr. Morgan solicited, took away and did work for Park Square. Shortly after resigning from Whelan, Mr. Kennebrew sent a November, 2009 email highlighting Elite's plan to focus on Park Square. (LF p. 1028.) Within weeks of this email, Park Square terminated Whelan. (LF p. 1043.) To further his goals of "focusing on" Whelan's client, Park Square, Mr. Kennebrew made a sales pitch to the board of directors of Park Square. (LF p. 985:14-19.) Elite also submitted a "Proposal for Security Guard Services" to Park Square for security services. (LF pp. 1055-1073; 1107:9-25; 1108:1-2.) On December 17, 2009, Mr. Kennebrew, on behalf of Elite,

entered into a “Service Agreement” with Park Square for Elite to provide security services to Park Square. (LF pp. 989:10-12, 15-22; 990:4-8, 20-21; 991:1-2, 8-13; 1075-1080; 1110: 14-1112:10.) Mr. Kennebrew was at Park Square in late 2009 to see Ms. VerVoort. (Tr. Vol. II, pp. 62:25; 63:1-4, 22-24.) He left a business card on Ms. VerVoort’s desk.

Mr. Morgan, on behalf of Elite, periodically communicated with Ms. VerVoort by email regarding various day-to-day services Elite would be providing to Park Square, prior to Elite’s take-over of the account. (LF pp. 1103:15-25; 1104:1-4.) In mid-December, 2009, Mr. Morgan visited Park Square to give all of the Whelan employees at Park Square an orientation, and to offer each of them employment opportunities to work for Elite at Park Square. (Tr. Vol. II, pp. 64:10-65:1.)

Given the standard under which the record must be reviewed, there can be no doubt that Respondents were soliciting Park Square for its security guard business. *See Adrian N. Baker & Co v. DeMartino*, 733 S.W.2d 14, 16 (Mo.App.E.D. 1987)(Soliciting means to ask for or to request some thing or action in language which convinces that the asking or requesting is being done in earnest and that the solicitor wants results.)

It is no defense that Mr. Kennebrew may have had a relationship with Ms. VerVoort before joining Whelan. *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714, 720 (Mo.App.W.D. 1995)(rejecting claim that an employer had no protectable interest in customer contacts that predated employee’s employment). Recently,

this Court wrote:

Thus, customer relationships are pursued and developed at the employer's expense, and add value to the employer's business. This is true regardless of whether the customer contact originated with the employer or the employee.

Therefore, an employer may protect customer relationships even if the employee had contact with some of the same customers before joining the employer. See *Emerson Electric Co. v. Rogers*, 418 F.3d 841, 844 – 45 (8th Cir. 2005) (holding that employer had an interest in protecting its relationships with customers to whom employee sold products prior to his relationship with employer). The fact that Biomedical did not purchase the customer contacts at issue as part of an equity investment in a business venture is immaterial. As Naegele's employer, Biomedical had the right to require Naegele to develop strong relationships with any and all customers that she could. ... Biomedical had a legitimate business interest in restraining Naegele from pursuing those customers with whom she developed or strengthened a relationship while working for Biomedical, regardless of whether those customer contacts originated with Naegele while she was working at Matria [former employer].

*Naegele v. Biomedical Sys. Corp.*, 272 S.W.3d 385, 389 (Mo.App.E.D. 2008) (emphasis added).

As the above discussion makes clear, Missouri courts protect employers' customer contacts, even when the contact was brought to the employer from an employee's previous relationship. Indeed, Mr. Kennebrew's prior rapport with Ms. VerVoort and quick takeover of the Park Square account show why it is necessary to enforce such a covenant. Whelan is entitled to protect the goodwill that Mr. Kennebrew had with Ms. VerVoort and Park Square while he was an

employee of Whelan, even though Mr. Kennebrew had contact with Ms. VerVoort before joining Whelan. *Naegele*, 272 S.W.3d at 389.

The crux of the problem, according to the Supreme Court in *Osage Glass*, is that “customers of the plaintiff well might seek [the former employee] out at his new location, without any effort on his part.” *Osage Glass, Inc.*, 693 S.W.2d at 75. Both Respondents have asserted this is what happened here. This is a meritless defense and precisely the situation that an employer may properly seek to prevent under *Osage Glass* and *Naegele*.

This is not merely a situation, however, in which Mr. Kennebrew “might have been able to make use of his customer contacts;” rather, the record demonstrates that he did actively make use of his contacts with Park Square and Ms. VerVoort to his own advantage and to Whelan’s disadvantage. Whether Park Square would have continued to do business with Whelan – had Mr. Kennebrew and Mr. Morgan not presented themselves as a viable alternative to Whelan, had they not expressed readiness to take over the account, or had they not attempted to curry favor with Ms. VerVoort – cannot now be known. Whether Park Square would have chosen to do business with a security guard provider with which it had never worked, in the absence of Respondents’ conduct is now unanswerable. What cannot be disputed on the record facts, is that Mr. Kennebrew’s relationship with Ms. VerVoort and Park Square (*i.e.* his customer contact) aided the transfer of the security guard business to him. Mr. Morgan assisted Mr. Kennebrew and did so in violation of his own Agreement.

When assessing the propriety of restrictive covenants in employment agreements, in addition to considering the temporal and geographic scope of a covenant, courts in Missouri look to other factors, including, “(1) the employer’s need to protect legitimate business interests, such as trade secrets or customer lists, (2) the employee’s need to earn a living, and (3) the public’s need to secure the employee’s presence in the labor pool.” *Grebing v. First Nat’l Bank of Cape Girardeau*, 613 S.W.2d 872, 874 (Mo.App.E.D. 1981).

All of these factors clearly militate in favor of the covenants’ reasonableness. First, the covenants were reasonable and necessary to protect Whelan’s legitimate business interests, as acknowledged by Respondents. (LF pp. 40, ¶ 4C; 48, ¶ 7A(3); Tr. Vol. III, pp. 85:19-23; 95:8-15.) These acknowledgments should not have been ignored, as they were by the Circuit Court, in granting summary judgment to Respondents.

Second, neither Mr. Kennebrew’s non-competition nor his customer non-solicitation covenant infringes on his ability to make a living, because he is free to compete in that portion of the market not sought by Whelan, and the portion that Mr. Kennebrew assured Mr. Twardowski would be his sole aim in the industry — governmental contracts and/or minority subcontract/set-aside work. (Tr. Vol. II, pp. 22:21-25; 23:1-11, 25; 24:1-2, 16-25; 25:1-12.) Additionally, Mr. Morgan, by his own account, has been employed since he left Whelan — first in South Carolina, then for Elite in Texas, and later in Tennessee, so he clearly does not have any issue in supporting himself or his family. (LF pp. 1010:7-24; 1016:2-8.) Finally,

each Respondent expressly acknowledged in his respective Agreement that enforcement of the covenants would not prevent him from earning a living.

Third, the interest of Park Square and that of the broader public in choosing Respondents as a security guard provider is outweighed by the facts that Respondents' covenants are of limited duration and scope and there are many security guard companies in Houston from which to choose. In upholding post-employment restrictive covenants against contentions that the public's choice may thereby be limited, Missouri courts have observed that while there is a public policy that recognizes the public's interest in the right to choose the persons with whom they contract, it is counterbalanced by the need to enforce contractual rights and obligations. Inasmuch as Missouri courts enforce non-competition agreements against physicians and surgeons, it cannot be said that the public interest overrides enforcement of the non-competition covenants at issue here. See *Long v. Huffman*, 557 S.W.2d 911 (Mo.App.K.C. 1977) and *Silver*, 16 S.W.3d at 345 (citing *Willman v. Beheler*, 499 S.W.2d 770, 777 (Mo. 1993)). Further, neither Respondent has such unique skills that their temporary and spatially limited access to the labor pool would be unduly detrimental to the public.

Having received the benefits of employment with Whelan, it is appropriate that Respondents be held to their bargain. *Ballesteros v. Johnson*, 812 S.W.2d 217, 222 (Mo.App.E.D. 1991). The rule in Missouri has long been the following, as stated in *Long v. Huffman*, 557 S.W. 911, 915- 916 (Mo.App.K.C. 1977):

A person who accepts benefits may be estopped to

question the existence, validity, and effect of the contract from which they derive. That person will not be allowed to assume the inconsistent positions which affirm a contract in part by acceptance of its benefits and disaffirm it in part by avoidance of its obligations.

*See also Forms Mfg., Inc. v. Edwards*, 705 S.W.2d 67, 69 (Mo.App.E.D. 1985)

(“An employee cannot repudiate the unfavorable terms of the modified contract when he has claimed the benefits of continued employment under it.”).

**IV. THE CIRCUIT COURT ERRED IN RULING THAT THE EMPLOYMENT AGREEMENTS AT ISSUE IN THIS CASE ARE OVERLY BROAD, NOT REASONABLE AS TO TIME AND SPACE, THEREFORE NOT VALID AND IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE RESPONDENTS ARE VIOLATING A REASONABLE COVENANT NOT TO SOLICIT APPELLANT’S EMPLOYEES, IN THAT RESPONDENTS SOLICITED AND EMPLOYED APPELLANT’S EMPLOYEES.**

**A. Standard of Review.**

Again, for the reasons specified in Section II(A) of this Brief, the standard of review is de novo. *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993); *see also Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo.banc 1999).

**B. Respondents breached the non-solicitation of employees covenants in their Agreements and are not entitled to summary judgment.**

As previously stated, the Missouri legislature codified an employer’s right to obtain from employees an agreement against soliciting other employees. The statute states, in relevant part:

A reasonable covenant in writing promising not to solicit, recruit, hire ... one or more employees shall be

enforceable and not a restraint of trade ... if ...  
Between an employer and one or more employees,  
notwithstanding the absence of the protectable  
interests described in subdivision (3) of this  
subsection, so long as such covenant does not continue  
for more than one year following the employee's  
employment...

Mo. Rev. Stat. § 431.202(1)(4).

The record demonstrates that shortly after Mr. Kennebrew made his sales pitch to Ms. VerVoort, Mr. Morgan went to Park Square and on behalf of Elite, handed out applications to Whelan's employees and told them of Elite's impending takeover. (LF pp. 1018:10-16; 1019:8-18; 1020:4-9; 1021:11-13.) Since Elite has taken over the account, Elite hired many of the Whelan employees, who had worked at Park Square and who continued to work there during the pendency of this litigation. (LF p. 1100:12-16.) This is in direct contravention of Mr. Kennebrew's and Mr. Morgan's agreements not to solicit or employ Whelan's employees. Clearly, Kennebrew and Morgan were acting in concert and conspiring to breach their Agreements.

It is to be noted that Whelan's employees knew the Park Square facility, and their retention facilitated the transition from Whelan to Mr. Kennebrew's company.<sup>9</sup> What cannot be known is whether the switch from Whelan to Elite would have taken place at all if Mr. Kennebrew and Mr. Morgan had been forced

---

<sup>9</sup> The retention of so many of Whelan's former employees also belies any notion that poor performance accounted for Park Square's termination of Whelan.

to find an entirely new work force. It is readily apparent that the prohibition in Respondents' Agreements against soliciting and employing Whelan's employees served Whelan's legitimate interest in protecting its customer relationship with Park Square.

**V. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION TO MODIFY RESPONDENTS' AGREEMENTS TO RESTRICT RESPONDENTS FROM DEALING WITH APPELLANT'S CUSTOMERS IN HOUSTON, TEXAS, INCLUDING, BUT NOT LIMITED TO, PARK SQUARE, AND TO RESTRICT RESPONDENT KENNEBREW FROM COMPETING WITH APPELLANT WITHIN A FIFTY-MILE RADIUS OF HOUSTON, TEXAS, BECAUSE THE CIRCUIT COURT ABUSED ITS DISCRETION, IN THAT THE EVIDENCE ESTABLISHED THAT RESPONDENTS SOLICITED, WORKED AND PERFORMED SERVICES FOR A CUSTOMER OF APPELLANT WITHIN A FIFTY MILE RADIUS OF WHERE RESPONDENT KENNEBREW HAD WORKED FOR APPELLANT.**

**A. Standard of Review.**

The Circuit Court also erred in denying Appellant's alternative request that the Circuit Court exercise its equitable authority to modify the Agreements and then granting Summary Judgment again Whelan. (LF pp. 642-648.) In Missouri, "[a]n abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the trial court, and is so arbitrary and unreasonable as to shock the sense of justice and indicate lack of careful consideration." *Intertel v. Sedgwick Claims Mgmt.*, 204 S.W.3d 183, 193 (Mo.App.E.D. 2006); *citing S.R. v. K.M.*, 115 S.W.3d 862, 865 (Mo.App.E.D. 2003); *see also In the Interest of A.L.M.*, 2011 Mo.App.LEXIS 721, \*16 (Mo.App.S.D. May 25, 2011) ("The trial court's discretion is abused when it is so

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.”).

In refusing to modify the Agreements as Whelan requested, and granting Summary Judgment against Whelan, the Circuit Court clearly acted against the logic of the circumstances before it, and as such abused its discretion.

**B. The Circuit Court abused its discretion because Missouri case law is replete with cases modifying restrictive covenants to render them reasonable.**

As noted in prior sections of the brief, Whelan submits that the Circuit Court’s Order is erroneous based on its application of Missouri law to the Agreements, as written, and based on the facts and circumstances as they are to be construed in light of the procedural posture of this case. However, even if the Circuit Court had been correct in finding that the Agreements were overly broad on their face with respect to space and time, which it was not, the appropriate action of the Circuit Court would have been to modify the Agreements. Missouri courts have long recognized a right to modify restrictive covenants so as to render them reasonable. *See Mid-States Paint & Chemical Co. v. Herr*, 746 S.W.2d 613, 616 (Mo.App.E.D. 1988). “If, after considering the restrictions imposed by a covenant (as agreed to by the parties or as enforced by a trial court), [the court] determine[s] that they are unreasonably broad, [the court] will modify those restrictions accordingly.” *Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239,

247 (Mo.App.S.D. 1993). Unlike many other jurisdictions, Missouri courts do not follow the “blue-pencil” doctrine. Instead:

The courts of this state, and the better reasoned authorities in other states have never allowed the usages and meaning of equity to be drowned in a murky pool of meaningless form, but have decreed enforcement as against a defendant whose breach occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint...

*Id.*, citing *R.E. Harrington, Inc.*, 428 S.W.2d at 951.

The general principles behind enforcing non-competition agreements 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.W.D. 1995).

In practice, Missouri courts have widely exercised this right to modify restrictive covenants. For example, the appellate courts of Missouri have modified non-competition covenants with geographical restrictions as large as 200 miles to 125 miles, and have reduced the period of time that the restriction is to run from 10 years to 3 years. *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 304 (Mo.App.E.D. 1980); see also *Passmore*, 906 S.W.2d at 724. The Eighth Circuit, in applying Missouri law, modified a covenant not to compete and nondisclosure agreement by imposing geographical and temporal restrictions in a scenario where the restrictions were unlimited as to both time and space. *Sigma Chemical Co. v.*

*Harris*, 794 F.2d 371 (8th Cir. 1986). It is evident that Missouri law recognizes a right to seek modification of a restrictive covenant in lieu of enforcing it.

In the context of this case, it is reasonable and appropriate that the Agreements be construed to prohibit Respondents' solicitation of and work for Appellant's clients in the Houston, Texas area, including, but not limited to Park Square. It is uncontroverted that Park Square was a Whelan client and continued to be a Whelan client even after Respondents ceased working for Appellant. It is undisputed that Respondents then solicited and then took over the Park Square account and continue to work for Park Square. It was therefore plainly reasonable to modify the Agreements to prevent Respondents from dealing with Whelan's customers in the Houston, Texas security services market, including, but not limited to, Park Square. It is also reasonable and appropriate that Mr. Kennebrew be restricted from competing with Whelan within a fifty mile radius of Houston, Texas.

### **CONCLUSION AND RELIEF SOUGHT**

Appellant respectfully requests that this Court reverse the Circuit Court's Order entering of summary judgment in favor of Respondents and against Appellant. As demonstrated under Point I, as a matter of law, the Circuit Court erred in its ruling that, as written, the Agreements are overly broad, not reasonable as to time and space and therefore invalid. Reversal of the Order is also warranted under Points II, III, and IV because when the record is considered in the light most favorable to Whelan and when Whelan is given the benefit of all reasonable

inferences, the record establishes that Respondents violated the restrictive covenants in their respective Agreements.

Appellant further requests that this Court remand this case to the Circuit Court with instructions that the Agreements, as written, are not overly broad and are reasonable, and that the Respondents violated their Agreements. Specifically, this Court should 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. This Court should also instruct the Circuit Court to find that Mr. Morgan violated his Agreement by working for and soliciting Appellant's customer Park Square, and by soliciting Appellant's employees.

This Court should instruct the Circuit Court to enter an injunction enjoining Respondents from violating their Agreements. The injunction should begin from the date of the denial of the preliminary injunction, which was October 8, 2010, pursuant to *Osage Glass v. Donovan*, 693 S.W.2d 71, 75 (Mo.banc. 1985) (injunctive relief appropriate in enforcing a non-competition covenant). In conjunction with this instruction, the Circuit Court should be directed to enforce the Agreements from the date it enters its final judgment, pursuant to *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 649 (Mo.App.W.D. 1995) (“[E]nforcement of the applicable period from the date of the decree would not be inequitable.”), and for a two year period thereof.

In the alternative, Appellant requests that this Court remand the case to the Circuit Court with instructions to modify the Agreements to prohibit Respondents' solicitation of and work for Appellant's clients in the Houston, Texas area, including, but not limited to Park Square, and further that Mr. Kennebrew be restricted from competing with Whelan within a fifty mile radius of Houston, Texas.

This Court should also grant such other and further relief as it deems appropriate.

Respectfully submitted,

GALLOP, JOHNSON & NEUMAN, L.C.

By: Mark W. Weisman  
Mark W. Weisman, Esq., #26635  
Marc D. Goldstein, Esq., #62910  
101 South Hanley Road, Suite 1700  
St. Louis, MO 63105  
Telephone: (314) 615-6000  
Fax: (314) 615-6001  
E-mail: mark.weisman@galloplaw.com  
marc.goldstein@galloplaw.com

*Attorneys for Plaintiff*

**APPENDIX INDEX**

“Judgment And Order” entered January 7, 2011..... A1

Mo. Rev. Stat. § 431.202 ..... A4

STATE OF MISSOURI  
MISSOURI CIRCUIT COURT  
TWENTY-FIRST JUDICIAL CIRCUIT  
(St. Louis County)

FILED

JAN 07 2010

JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

WHELAN SECURITY CO.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 10SL-CC00006
	)	
CHARLES KENNEBREW, SR.,	)	Division No. 2
	)	
and	)	
	)	
W. LANDON MORGAN,	)	
	)	
Defendants.	)	

**JUDGMENT AND ORDER**

This matter is before the Court on Plaintiff Whelan Security Co.'s Motion for Summary Judgment, Defendants Charles Kennebrew, Sr.'s and W. Landon Morgan's Motion for Summary Judgment and Whelan Security Co.'s Motion to Modify.

The Court has considered the following:

- a) Plaintiff's Motion for Summary Judgment and Memorandum in Support,
- b) Plaintiff's Statement of Facts in Support of its Motion for Summary Judgment,
- c) Defendant Kennebrew's Response in Opposition to Plaintiff's Motion for Summary Judgment,
- d) Defendant Kennebrew's Response in Opposition to Plaintiff's Statement of Facts,
- e) Defendant Kennebrew's Motion for Summary Judgment,

- f) Defendant Kennebrew's Statement of Facts,
- g) Defendant Morgan's Motion for Summary Judgment,
- h) Defendant Morgan's Statement of Facts,
- i) Plaintiff's Response in Opposition to Defendant Kennebrew's Motion for Summary Judgment,
- j) Plaintiff's Response in Opposition to Defendant Kennebrew's Statement of Facts,
- k) Plaintiff's Response in Opposition to Defendant Morgan's Motion for Summary Judgment,
- l) Plaintiff's Response in Opposition to Defendant Morgan's Statement of Facts,
- m) Defendant Kennebrew's Reply to Plaintiff's Response to Kennebrew's Motion for Summary Judgment,
- n) Defendant Kennebrew's Reply to Plaintiff's Response to Kennebrew's Statement of Facts,
- o) Plaintiff's Motion to Modify,
- p) Defendant Kennebrew's Response to Plaintiff's Motion to Modify,
- q) Defendant Morgan's Response to Plaintiff's Motion to Modify, and
- r) Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Modify.

The Court, being now fully advised, and in light of its October 8, 2010 Order/Judgment, rules and determines that the employment agreements at issue in this case, as written, are overbroad, not reasonable as to time and space and are therefore not

valid. Accordingly, the Court hereby GRANTS Defendants Charles Kennebrew, Sr. and W. Landon Morgan's Motion for Summary Judgment, DENIES Plaintiff's Motion for Summary Judgment, and DENIES Plaintiff's Motion to Modify. The case is hereby dismissed with prejudice. *Court costs assessed against Plaintiff*

1/7/11  
Date

Maura B. McShane  
Maura B. McShane, Judge

# Missouri Revised Statutes

## Chapter 431 General Provisions as to Contracts Section 431.202

August 28, 2010

---

### **Employment covenants enforceable, when--reasonability presumption.**

431.202. 1. 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 pursuant to subsection 1 of section 416.031 if:

(1) Between two or more corporations or other business entities seeking to preserve workforce stability (which shall be deemed to be among the protectable interests of each corporation or business entity) during, and for a reasonable period following, negotiations between such corporations or entities for the acquisition of all or a part of one or more of such corporations or entities;

(2) Between two or more corporations or business entities engaged in a joint venture or other legally permissible business arrangement where such covenant seeks to protect against possible misuse of confidential or trade secret business information shared or to be shared between or among such corporations or entities;

(3) Between an employer and one or more employees seeking on the part of the employer to protect:

(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; or

(4) Between an employer and one or more employees, notwithstanding the absence of the protectable interests described in subdivision (3) of this subsection, so long as such covenant does not continue for more than one year following the employee's employment; provided, however, that this subdivision shall not apply to covenants signed by employees who provide only secretarial or clerical services.

2. Whether a covenant covered by this section is reasonable shall be determined based upon the facts and circumstances pertaining to such covenant, but a covenant covered exclusively by subdivision (3) or (4) of subsection 1 of this section shall be conclusively presumed to be reasonable if its postemployment duration is no more than one year.

3. Nothing in \* subdivision (3) or (4) of subsection 1 of this section is intended to create, or to affect the validity or enforceability of, employer-employee covenants not to compete.

4. Nothing in this section shall preclude a covenant described in subsection 1 of this section from being enforceable in circumstances other than those described in subdivisions (1) to (4) of subsection 1 of this section, where such covenant is reasonably necessary to protect a party's legally permissible business interests.

5. Nothing in this section shall be construed to limit an employee's ability to seek or accept employment with another employer immediately upon, or at any time subsequent to, termination of employment, whether said termination was voluntary or nonvoluntary.

6. This section shall have retrospective as well as prospective effect.

(L. 2001 S.B. 288)

Effective 7-01-01

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

WHELAN SECURITY CO.,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Appeal No. ED 96394
	)	
CHARLES KENNEBREW, SR. and	)	
W. LANDON MORGAN,	)	
	)	
Defendants/Respondents.	)	

CERTIFICATE OF SERVICE

I, MARK W. WEISMAN, being duly sworn upon my oath, do hereby state that on the 14<sup>th</sup> day of July 2011, a copy of the foregoing Appellant's Brief was served via regular mail (postage prepaid) to:

J. Mark Brewer, Esq.  
Brewer & Pritchard, P.C.  
Three Riverway, Suite 1800  
Houston, Texas 77056  
*Attorneys for Defendant/Respondent Charles Kennebrew, Sr.*

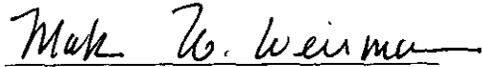
W. Landon Morgan  
(Defendant/Respondent *Pro se*)  
101 Gray Fox Court  
Burns, Tennessee 37029

Mark W. Weisman



**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Appellant's Brief, at 11,434 words, complies with the limitations contained in Supreme Court Rule 84.06(b) and Local Rule 360. The undersigned is relying on Microsoft Word 2003, which was used to produce this Brief. The undersigned further certifies that the floppy disk containing the Appellant's Brief, which has been filed with the Court and served upon counsel for Charles Kenneberw, Sr., and *Pro se* Defendant/Respondent W. Landon Morgan, has been scanned for viruses by Trend Office Scan, which indicates that the disk is virus-free.



Mark W. Weisman, #26635  
Marc D. Goldstein, #62910  
Gallop, Johnson & Neuman, L.C.  
101 South Hanley Road, Suite 1700  
St. Louis, Missouri 63105  
Telephone: (314) 615-6000  
Fax: (314) 615-6001  
E-mail: mark.weisman@galloplaw.com  
marc.goldstein@galloplaw.com

*Attorneys for Appellant*